

Editor's Introduction

Most military justice practitioners have heard of Colonel William Winthrop's *Military Law and Precedents*. This nineteenth-century treatise is still frequently cited by the military appellate courts,¹ and has been called "a masterpiece of painstaking scholarship, brilliant erudition, and lucid prose."² However, the disappearance of the printed law library in many military legal offices has made it less likely than ever that the attorney in the field could actually inform her efforts by reference to *Military Law and Precedents*.

With this set of circumstances in mind, the military judges of the U.S. Army's Fifth Judicial Circuit set out to bring *Military Law and Precedents* to a new generation of practitioners via the Internet. Their primary goal was to make an abridged edition of this classic work available to military attorneys who were seeking to incorporate a historical perspective in their consideration of contemporary military justice issues. The documents that you are about to examine are the result of 18 months of effort toward that end by military judges, court reporters, and legal specialists.

This electronic abridgement of *Military Law and Precedents* includes only Part I of the second edition, which Colonel Winthrop entitled "Military Law." Those portions of that edition dealing with the "Law of War" and "Civil Functions and Relations of the Military" have been omitted in this abridgement, as they are less likely to be relevant to the contemporary military justice practitioner. The editors have also deleted many footnotes found in the original that they determined were unlikely to be helpful to the attorney in the field, and all footnotes were converted to endnotes to improve the readability of the final

¹ See, e.g., *United States v. Norfleet*, 53 M.J. 262 (2000); *United States v. Quintanilla*, 52 M.J. 839 (Army Ct. Crim. App. 2000); *United States v. Quiroz*, 53 M.J. 600 (N.M. Ct. Crim. App. 2000).

² Honorable Andrew S. Effron, *Military Justice: The Continuing Importance of Historical Perspective*, *Army Law.*, June 2000, at 1, 7 (quoting Wiener quoting Fratcher).

product. While some typographical changes were made to Colonel Winthrop's prose, the substance of the text remains unchanged from the second edition.³

In closing, I would like to say a special word of thanks to those individuals without whom this project could not have succeeded: Colonel Kenneth Clevenger, Lieutenant Colonel Donna Wright, Sergeant First Class Patricia Chumbley, and Sergeant Glenn Richardson. Their tireless effort on this project was in addition to their routine duties within the Fifth Judicial Circuit, and reflects great credit upon themselves and the Judge Advocate General's Corps. I would also like to thank Colonel Peter E. Brownback III, Retired, and Colonel Gary Smith for their forbearance and support in connection with this project.

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³ Please report all errors, typographical or substantive, to the Editor-in-Chief at bartow@cmtymail.26asg.army.mil. Thank you.

MILITARY LAW.

CHAPTER I.

THE SUBJECT DEFINED AND DIVIDED-CONSTITUTIONAL PROVISIONS.

MILITARY LAW, in its ordinary and more restricted sense, is the specific law governing the Army¹ 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 follow:

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 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 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.”

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 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 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 crime⁶ unless on a presentment or indictment of a Grand jury, except in actual service in time of war or public danger."⁷

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

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.

³ U.S. Const. Art. I, § 8.

⁴ U.S. Const. Art. II., § 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.

CHAPTER II.

Part I--MILITARY LAW PROPER.

THE WRITTEN LAW--ARTICLES OF WAR AND OTHER DISCIPLINARY STATUTES

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 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 Carolingian 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. 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." 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.³ 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, 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. Early ordinances of this character are indicated by the authorities as promulgated by Richard I, Richard II, Henry V, Henry VII, and Henry VIII; 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. In some instances, the generals commanding the armies were empowered by the King, by special commission, to make rules and articles of war. Among the last of these was the ordinance issued in 1640 by the Earl of Northumberland as Lord General, 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.⁴

Just before the dates last mentioned, viz. in 1639, there was published in London⁵ the Code of Articles, already referred to, of Gustavus Adolpbus, 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.⁶ 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.

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; 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 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. 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.⁷ Parliament therefore availed itself to the occasion of asserting its exclusive authority to license such punishment by enactment 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. 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.

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.

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, 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 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."⁸ 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,) and, with the Revised Rules, (first promulgated, August 29, 1881,) and a few army regulations,⁹ 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,¹⁰ 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, "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.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"¹² 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."¹³ 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."

Of this code, comprising sixty-nine articles, the original was the existing British code in force in the "ministerial army."¹⁴ 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.¹⁵

The Articles of War thus inaugurated were by a Resolution of the same Congress, of November 7, 1775, amended and added to by sixteen further provisions intended to complete the original draft in certain particulars in which it was imperfect. 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; 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." New articles prepared by this committee were reported on August 7th following, and the same were agreed to by Congress on September 20, 1776. 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. And, further, on August 21st, an article providing for the punishment of spies, whose crime was made capital.

The code of 1776, which was an enlargement, with modification, 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.

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 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. 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 minimum of the general court at five-limitations which have subsisted to the present time.

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, until the inauguration of a new code by the Act of April 10, 1806.

The Articles of 1806, which superseded all other enactment on the same subjects, were adopted by Congress mainly for the reason that the changed form of government rendered desirable a complete revision of the code. 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.

Code and Revision of 1874. The Code of 1874,-that at present 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, being Chapter Five of Title XIV, "THE ARMY."

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 punishment 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 member 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.

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 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 classes 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 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 court-martial in cases of fraudulent enlistment, etc. These various statutes (which will be found in the Appendix) will hereafter be recurred to, and construed or otherwise considered under the appropriate heads.

¹ Among the principal authorities consulted upon the subject of these early military laws are Potters' *Archaeologia Graeca* ; Smith's *Dictionary of Greek and Roman Antiquities*; Adam's *Roman Antiquities*; Vegetius, *De Re Militari*; Ludovici, *Kriegsprozess*; Koppmann,

Militärstrafgesetzbuch ; Von Molitor, Kriegsgerichte und Militärstrafen; Le Faure, Lois Militaires de la France; Foucher, Commentaire sur le Code de la Justice Militaire.

³ 2 Grose, History of the English Army, 58; Pipou & 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 71; Samuel, 65; Clode, M.L., 84. And See Clode, 1 M.F., 442, where, as also in Pipon & Col., 37, extracts are given from this Code. Clode, (M. L., 10,) referring to three similar 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.

⁵ In Ward's Animadversions of Warre, Book Second, pp. 41-54. See the reference to this code in Stevens' Life of Gustavus Adolphus, 129-180.

⁷ "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. 1. 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.

⁸ 42 & 43 Victoria, c. 33. This Act superseded also the Marine Mutiny Act. A similar change-it may be noted-had previously taken place to 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.

⁹ See "The Queen's Regulations and Orders for the Army, 1881," Sec. VI.

¹⁰ 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.

¹¹ "The effect of the recent legislation has been rather to complicate than to simplify 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. Blackenbury, in Preface to Pratt's Military Law.

As the Act and Rules, with their many Forms, take up as 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.

¹² 1 Journals of Congress, 82. The enactment of Congress prior to the adoption of the Constitution were in the form of Resolutions.

¹³ 1 Jour. Cong., 83. Of this committee, Washington was, on June 15th, chosen general of the army, and Shuyler, on June 19th, a major-general. 1 Jour. Cong., 83f, 86.

¹⁴ 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.

¹⁵ 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 of Connecticut and Rhode Island, and the Congress of New Hampshire, (Id., col. 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.

CHAPTER III.

ARMY REGULATIONS AND ORDERS

ARMY REGULATIONS.

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 of 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 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. 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* 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, 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. 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 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.¹ These regulations, 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.²

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.³ 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 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; care of course being 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 authorities.

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,⁴ 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,⁵ to prescribe rules, where requisite, for the due execution of the statutes relating to the military establishment. The *former* description of regulations scarcely differs from some of the Orders that 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. Those of the *latter* species are more strictly “regulations,” being especially within the description of rules “in aid or complement of statutes.”

From these two sources is derived an original and sufficient authority for Army Regulations in general, no authority or sanction of 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, subsequently to the adoption of the Constitution,⁶ may be said to have commenced with the Act of March 3, 1813, c. 52, s. 5, 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.

The next statute 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.*"

In the view of the authority thus given for additions and amendments, there was published a second more extended set of regulations, (embracing 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, however, (1822,) by Act of May 7th, c.88, the section of 1821 was expressly "repealed;" 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, 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, 1847, 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 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 of general army regulations; these enactments indeed being from time to time supplemented by special statutory provisions relating to particular branches of the service.

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, 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.

No determinate action, however, was taken upon these regulations 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 future⁷ - a power expressly given by the Act of 1816 and exercised thereunder till 1866, divested apparently by the legislation of the latter year, 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, the Secretary of War was *"authorized and directed to cause all the regulations of the army and general orders now in force 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.

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) the existing Regulations for the Army upon the subjects embraced.

They have been repeatedly impliedly sanctioned in Acts of Congress since that date."

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 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.

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. It is indeed somewhat loosely said of the army regulations by some of the authorities⁸ that they have "the force of the law," but this expression is well explained by the court in *U.S. v. Webster*,⁹ as follows: -"When it is said that they have the force of law, nothing more is meant than that they have the 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.¹⁰ 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.¹¹ 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*, or the head of the

Department by whom the same were made,¹² 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.¹³ Regulations are also recognized as conclusive upon the courts in cases to which they apply; ¹⁴ 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.

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

III. PRINCIPLES GOVERNING REGULATIONS.

But, to have legal force and effect, the regulations must conform to certain principles, as follows:¹⁵

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.¹⁶ 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.

It is in recognition of this principle that, in statutes authorizing or directing the making of regulations, it is not infrequently 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. But such a provision is of course surplusage, a condition to this effect being always implied.

2. They must not legislate. 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,"¹⁷ is in a just sense a regulation no longer, and can have no legal effect as such. The leading case illustrative of this 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. Similar views have been expressed by the authorities in other cases of a similar nature and it can scarcely be questioned that an army regulation which should assume to impose a condition upon the employment of a statutory right or the exercise of a statutory authority, to vest or divest rights to pay¹⁸ or rank, to restrict or extend the jurisdiction of a court-martial or otherwise administer justice,¹⁹ to dispose of public property, to direct as to what persons should or should not be enlisted in the army, 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." And Chief Justice Marshall, in expressing himself to a similar effect, has added that "the precise boundary of this power," (that of making executive regulations,) "is a subject of delicate and difficult inquiry.

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. 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 indeed surplusage.²⁰ 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 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.²¹ 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 an existing or impending state of war.²²

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 Legare, 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." So the Supreme Court, in an adjudged case, 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."

5. They should be equitable. It need scarcely be added that regulations should be just and equitable-that they should not be arbitrary or oppressive.²³ As already noticed, a regulation cannot deprive a person of a legal right, 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.

OBJECTIONAL 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

infrequently themselves partaking of the character of legislation and thus of doubtful validity; 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 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, 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, 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 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.

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.

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."

A set of regulations for this purpose was published from the Headquarters 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.

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 institution, as amended by that of March 21, 1866, the designated Board of 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."

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 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;²⁴ 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. 70 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.

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 higher 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.

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. Both General 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, acts as the representative and presumably by the direction of the President; the indication--“by the direction of the President,” though not essential, being not infrequently 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.²⁵

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 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. In the Orders in which they act 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 case 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 OF 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. Further, Orders should not conflict with established Regulations. 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.

¹ 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 infrequently 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 § 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.

² "All the law of the United States in 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.

³ "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*.

⁴ That military commanders, in giving legal orders, represent the Command-in-chief, the President, see *Clark v. Dick*, 1 Dillon, 8; *Lockington's Case*, Brightly, 289; *O'Brien*, 30.

⁵ 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*, Daveis, 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.

⁶ 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.

⁷ 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.

⁸ *Gratiot v. U.S.*, 4 Howard, 117; *Exparte 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.

⁹ *Davis*, (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.]

¹⁰ See *U.S. v. Eaton*, 144 U.S., 688.

¹¹ 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.

¹² *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.

¹⁴ *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*.

¹⁵ 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*.

¹⁷ 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."

¹⁸ See *Symonds v. U.S.*, 21 Ct. Cl., 152, 154.

¹⁹ That a regulation alone cannot make an act or omission a criminal offence, but that for this statutory requirement is essential-see *U.S. v. Eaton*, 144 U.S., 688.

²⁰ 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."

²¹ See *The Thomas Gibbons*, 8 Cranch, 428-9; *Lockington v. Smith*, 1 Peters, C.C., 470-473.

²² *Hughes v. Oaks*, 59 Pa. St., 41, 42.

²³ "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.

²⁴ 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.

²⁵ *U.S. v. Page*, 137 U.S., 673.

CHAPTER IV.

THE UNWRITTEN MILITARY LAW.

While the Military Law has derived from the Common Law certain of the principles and doctrines illustrated in its code, 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.¹

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 Regulations of the Army.² 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 judgement of the court upon the FINDING is not infrequently

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 order and military discipline;" in what acts consist of 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 infrequently have occasion to take into consideration the unwritten law or practice of the service.³

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.⁴ (Sec. 1343, Rev. St.) 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.

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 reasonable,⁵ and is not in conflict with existing statute or constitutional provisions. A civil custom cannot set aside or modify the statute law,⁶ or subsist in regard to any matter regulated by such law.⁷ 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 provided for by such law.⁸ A ministerial officer (as it has been observed by a U.S. Court) cannot institute a usage, but the same must be built up out of a series of precedents; so, a custom of the service cannot be created by isolated or occasional instances, or by practice of a particular command or commander, 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 DEFENSE.

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"-it is remarked in a General Order-"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*.⁹

¹ "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 Daveis*, (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.

² Compare *U.S. v. Webster, Daveis*, (2 Ware,) 56; O'Brien, 223.

³ 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.)

⁴ 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."

⁵ 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.

⁶ 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., 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.

⁷ "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.

⁸ "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 to 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 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 circumstances." In 4 Opins., 18, Atty. Gen. Legare, 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."

⁹ 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 defense 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.

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 coexisted with the early history of armies. In those of Rome justice was commonly administered by the *magistri-militum*, and especially by 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 or 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, 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, (*militargerichts*,) 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 remarkable "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. 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 defense, 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. The courts established by the codes and articles, (heretofore specified,) of the sixteenth and seventeenth centuries 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.

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 - Carolingian-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.⁴ 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, 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.

Later history. Upon its decadence, and during the interval preceding the first Mutiny Act, justice was administered, in the military forces from time to time raised, mostly by martial courts or councils held under the ordinances or articles heretofore noticed, or assembled by special commission issued under the royal prerogative, or what was arbitrarily assumed to be such. 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.⁵ It was such arbitrary exercise of military authority which was doubtless had in view by Hale⁶ and Blackstone⁷ 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.

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,⁸ also recognized-in the Vth Amendment-the distinction between civil offences and those cognizable by a military forum.⁹ 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, 1789,¹⁰ continued in existence as previously established. Thus, as already indicated, this court is perceived to be

in fact older than the Constitution, 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 the 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, 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 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*, 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 of an existing military jurisdiction than an original provision initiating such a jurisdiction.¹¹

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 practiced 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."¹²

Not belonging to the judicial branch of the Government, it follows that courts-martial must pertain to the executive department; and they are 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,¹³ 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;¹⁴ nor is it embraced in the provisions of the VIth Amendment to the Constitution.¹⁵ 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 in 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

accomplished,¹⁶ the court-martial, as compared with the civil tribunals, is transient in its duration and summary in its action.¹⁷ It is not, in a legal sense, a "court of record,"¹⁸ 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 judgement 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.¹⁹ 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 judgements 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*,²⁰ 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 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.²¹

In the recent case of *Wales v. Whitney*,²² a proceeding instituted against the Secretary of the Navy for the discharge on habeas corpus of an officer of the 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 tribunal "is authorized to interfere with" a court martial "in the performance of its duty by way of a writ of prohibition or any order of that nature."

This ruling was presently affirmed in the case of *Smith v. Whitney*, where a petition for a writ of *prohibition*²³ 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. In a still more recent instance, (*Johnson v. Sayre*, April, 1895,)²⁴ 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," and a relation, unknown to our law, exists between civil and military tribunals, a power to review the proceeding and sentences of court-martial appears to have been at one time specifically recognized by the Mutiny Act as possessed by the superior courts of common law. 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 up the record with a view to the quashing of conviction or sentence if found illegal. 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, or after the sentence had been executed, or because the sentence was excessive; 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. 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 not 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, 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, 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, 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 the 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.²⁵ But the action must have been absolutely illegal and void in law to induce the federal court to grant relief, for a civil tribunal will not go into the merits of, or try, a military cause.

So, in a case before the Court of Claims, 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. But these *collateral* methods of 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.

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 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.

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."

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.²⁶ So, with us, 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.²⁷ Thus, as the tribunal is an *executive* agency, the appeal therefrom is to a superior *executive* authority.

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. Its sentence, if per se legal, cannot, after it has received the necessary official approval, be revoke or set aside; and it is only by the exercise of the pardoning power that it can-provided it be not as yet executed-be rendered in whole or in part inoperative.

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 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. 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 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."

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.²⁸ 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 accordingly 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," is not without close analogy 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 to a *jury*. Indeed, in its taking of a statutory oath, its being subject 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 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. 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 guilty.

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-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.

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.

¹ Bruce, Insts., 295-300; Adams, roman Ant., 330; De Chenier, Guide des Tribunaux Militaires, Introd.; Von Molitor, Kriegsgerichte und Militarstrafen, 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.

⁴ A corresponding jurisdiction was exercised in naval cases by the Lord High Admiral. Thring, 5; Clode, M.L., 41.

⁵ 1 Black. Com., 414; Hallman, Const. Hist., vol. 1, pp. 325-330, 531; Manual, 7-8, cited in Ch. II, p. 8, note. Col. Woodward's Essay of Mil. & Mar. Lw, United Service Mag., Oct., 1879.

⁶ Hist., Com. Law, c. 2.

⁷ "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.

⁸ 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.

⁹ *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.

¹⁰ Providing that the Army should continue to be governed by the existing articles of war.

¹¹ 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.

¹² *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*.

¹³ 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.

¹⁴ 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.

¹⁵ That is to say, the term-"criminal prosecutions" does not include proceedings before courts-martial.

¹⁶ *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., sec. 470. "These courts are not permanent, but created *pro hac vice*, i.e. for the trial of the particular offender." Clode, M.L., 58.

¹⁷ "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.

¹⁸ *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 marital, is certainly not law as applied to our courts-martial as governed by Art. 86.

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

²⁰ Howard, 81, 82.

²¹ 114 U.S., 564.

²² "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.

²³ A writ of prohibition is a means resorted to prevent the doing of an act not yet performed or completed. *U.S. v. Hoffman*, 4 Wallace, 158.

²⁴ 158 U.S., 109.

²⁵ *In re Grimley*, 137 U.S., 150.

²⁶ "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, (1181,) p. 63.

"The Judge Advocate General and his Deputy for a sort of final court, which has the power of upsetting, or 'quashing,' all court-martial proceedings." Gorham, (1880,) p. 27.

²⁷ 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, 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.]

²⁸ "In military life there is a higher code termed honor which holds its society 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. US.*, 26 Ct. Cl., 563.

CHAPTER VI.

THE CONSTITUTION OF GENERAL COURTS-MARTIAL.

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,) does not expressly designate the President as one of the officials invested with 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 vested 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"¹ such courts; the exception expressed in the second clause being regarded as a recognition 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.² Nor, in the author's opinion, was this power, exercised from an early

period, divested by the Mutiny Act of 1869. 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. 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, the principal of the earlier, and Clode, 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 Kingdom, this branch of the prerogative remained for a long period acquiesced in and acknowledged by the Legislature. 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.

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, in general devolved the authority for this purpose upon the commander-in-chief of the army and the generals commanding in the separate States. To the *latter* this authority was expressly delegated by Congress, by resolution of April 14, 1777, 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."³ Considerably 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.

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

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.⁴

The authority in question, however, does not rest wholly upon executive practice and precedent. The legality of its exercise was affirmed by the Military Committee of the House of Representatives in Lt. Col. Woolley's case in 1832, and had also been asserted by Maltby, Macomb and De Hart, in their treatises. Later writers on military law have adopted the same view, and the same was also declared by distinguished department and army commanders in Orders, during the late war. 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; and this opinion, adopted by the Secretary of War at the time, was subsequently sustained by the Attorney General 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.

More recently, (February, 1893) the power in question has been again maintained by the Court of Claims in Gen. Swain's case, 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 them is expressly granted to military officers, this power is necessarily vested in the President by statute, though it may be inherent in his office. A military officer can not be invested with greater authority by Congress than he 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.⁵

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.

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 designated. Its purpose clearly was to debar a superior from selecting 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.⁶ 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.

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.

Whether a commander who has taken action in the case of any 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.

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 nominally by another for him, 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 prosecution 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.

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.

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. 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.

The exception being taken at the trial, the original charges, 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.

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, commanding 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.

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, 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.

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.

It has been held by the Judge Advocate General in whose opinion the Attorney General has since concurred, 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, 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.

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 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.

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 fail 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, 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 invaded 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.

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 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 the Army of the United States, (and, in practice, such courts are now frequently ordered by such commanding general); 2d, by an 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 Potomac, 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. Such were heretofore the Divisions of the Missouri, of the Atlantic and

of the Pacific; 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. 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 the Division.⁷ To make the court legal, the convening officer must of course be a department, &c., commander at the date of the convening order.⁸

Delegation of 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.⁹

Scope of the authority. It is of course to be understood that the authority, conferred by the article upon division, department and army commanders 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 alone¹⁰ 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, or where he had temporarily left it on official business-would not properly be deemed to affect the legality of the order,¹¹ 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,¹² 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.

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

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. 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 States; and in several cases the proceedings of court convened under it in 1866, subsequently to that date, were declared void in Orders.

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. 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.

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. 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* in the evident sense of the Article, but were embraced in division commands, or were small or mixed commands not properly amounting to or constituting brigades. The latter was peculiarly the case with the commands known 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.

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 dismissing, 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 and of the military post of West Point. The above provision is sufficiently clearly expressed,¹³ 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.

¹ 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.

² See Samuel, 34, 53, 55, 64,65, 134. The extent of this power, as understood at the time, appears from the well-known statute 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 fullness 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)

³ 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 of the commander.

⁴ 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. Ga. 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)

⁵ 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.

⁶ "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.

⁷ 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.

⁸ 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.

⁹ 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.

¹⁰ Compare 16 Opins. At. Gen., 678.

¹¹ See Circ. No. 8, (H.A.,) 1886.

¹² 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."

¹³ 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.

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 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 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.

WHO ARE COMMISSIONED OFFICERS. These are officers who have duly received and accepted commissioned 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. Thus an officer holding a commission of the latter description, is, while it remains in force, as eligible to 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

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

“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, 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 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, 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. 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." In this category, however, is not included the Professor of Law, who is an officer of the army temporarily detailed in this capacity, 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, and this construction, adopted by other authorities,⁸ has been recently finally established in the case of *Mullan v. U.S.*,⁹ where it was held by the Supreme Court, affirming the judgment of the Court of Claims,¹⁰ 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,¹¹ or subject him as such member to challenge. 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 court of equals or superiors in rank for the trial of a general officer of one of the higher grades.¹² Upon courts for the trial of officers of the lower 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. But in view of the comprehensive and general term, "officers and soldiers of *other forces*," the Article has been construed as disqualifying regular officers 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 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 infrequently 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.¹³

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, had occupied an undefined position.¹⁴ The Act of June 30, 1834, however, while assimilating it to the army in respect to organization, discipline and pay, permanently attached it to the naval establishment for administrative and jurisdictional purpose,¹⁵ 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 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;¹⁶ and similarly on several occasions during the recent war, of which the taking of Fort Fisher was the most marked.

In the early case of Lieut. Col. Wharton of the marine corps, 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.

MILITIA.-Authority of 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.

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,¹⁷ 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 occasions of the late war with Great Britain and the war with Mexico respectively, and presently expired by their own limitation. 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 1862.¹⁸ 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 "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. Legare has well described this class as "the body of the people, armed and disciplined in self defense."¹⁹ 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. 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,) 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 but of the United States, convened not under State Law but under 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.

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, and may be required to serve in any part of the United States; and it was specifically held in *Mills v. Martin* 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.

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 members will not be a legal body,²⁰ 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. 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. 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. Thus five are sufficient to be reassembled and to revise the sentence, though when it was originally adjudged, 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.

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.

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.

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. 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; the added member, 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,- in such a case the authorized commander will be fully justified in continuing the courts by the details 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, 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 in 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." 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*. 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, 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.

SUPERNUMERARY MEMBERS. It remains to notice a practice, which at one time prevailed in our service, of detailing, with a court of thirteen, (and sometimes with a court of lesser number,) one or more additional officers as "supernumeraries," whose purpose was to supply the places 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. 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, though in the British it still subsists in a different form.

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 authorizations cited. The French Code de Justice Militaire directs that one *sous-officier*, (non-commissioned officer,) shall sit on courts for the trial of non-commissioned officer 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 their viewing of and reporting upon the proceedings of trials, and because they are not infrequently 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 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.

⁹ 140 U.S., 240.

¹⁰ 23 Ct. Cl., 34.

¹¹ 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.

¹² 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.; Major Gen. Wilkinson, (1814,)-2 maj. gens., 3 brig. gens., 7 cols., 1 lieut. col.; Maj. Gen. Wilkinson, (1814), -2 maj. gens., 3 brig. gens., 7 cols., 1 lieut. col.; Maj. Gen. Gaines, (1816)-1 maj. gen., 3 brig., 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 marshals being at the time available. That by which the Emperor Maximillian 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.

¹³ 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.

¹⁴ 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.

¹⁵ See 10 Opins. At. Gen., 118, 129, 487; 19 *Id.*, 618, *Wilkes V. Dinsman*, 7 Howard, 125, 126; *In re Baily*, 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.

¹⁶ 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.

¹⁷ 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. Nott*, 12 Wheaton, 19. And see *Luther v. Borden*, 7 Howard, 11; *Vanderheyden v. Young*, 11 Johns. 150; *People v. Campbell*, 49 N.Y., 135; *Kneedler v. Lane*, 45 Pa. St., 238.

¹⁸ 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.

¹⁹ 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.

²⁰ Thirteen members were usually detailed on our earlier important general courts-martial-those, for instance, for the trials of Gens. Hull, Wilkinson and Gainer, 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 member 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. Debvbieg, 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.

CHAPTER VIII.

THE JURISDICTION OF GENERAL COURTS-MARTIAL.

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 coextensive 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. 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 an officer or soldier of his command, may take cognizance of the case though the offence or offence 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.

EFFECT OF PRINCIPLE OF EXTRATERRITORIALITY. 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 "extraterritoriality," 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.¹ Such, for example, would be the legal status of our troops when permitted by the government of Mexico to cross the frontier in carrying on hostilities against Indians.

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

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, 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. 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, or while held as a prisoner of war by the enemy.

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 offence committed abroad. With due deference to its source, this construction can but be regarded by the author as a forced one and not warranted 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, 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 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 defense to be taken advantage of by a special plea.

VIEW OF ATTORNEY GENERAL WIRT. It was held at an early date, (1820,) by Mr. Wirt, 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, and for a considerable period was recognized in the War Department as established law. And it was held by the Judge Advocate General, and subsequently by the Attorney General, that an accused could not, by a *plea of guilty* at a trial, any more than by previously requesting, 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, the judgment in that case was, in 1884, reversed on appeal in the U.S. Circuit Court, Second Circuit, where it was in substance held that the limitation of Art. 103 was not a jurisdictional objection but a "matter of defense;" the court here adopting the ruling which had been made at San Francisco in the previous year, in Bogart's and White's Cases, by the Circuit Court for the Ninth Circuit. In these cases, (and subsequently in Zimmerman's Case, 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 defense 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 during which an officer or soldier continues within the jurisdiction of a 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, rebellion, &c., and if any case the war which prevailed at the commission of the offence has ended² 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.³

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. 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.⁴

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 corps of professors and cadets⁵ of the military Academy, and the officers and enlisted men of the retired list.⁶ 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 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, are now held to be "inferior officers, appointed though not commissioned." 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. 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, 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.

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 recruited by conscription.⁷ Owing to the defects in the operation of the existing militia systems of the States,⁸ and to the fact that the material of the militia was limited to citizens, the measure of adding to the military strength of the country by calling out the militia had, notwithstanding the authority to enroll 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," as well as more efficient and comprehensive in its operation, was resorted to almost exclusively in lieu of the former statute.⁹ The Act of 1863 and the system thereby inaugurated have received an especially careful examination in McCall's Case and the leading case of *Kneedler v. Lane*,¹⁰ in which the Act was held 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. As such, they were of course subject to trial by court-martial.

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, 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 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 military 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, 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, &c. or-if a volunteer officer-his discharge or mustering out, &c. In the case of a *soldier*, it begins with his enlistment¹¹ or muster into the service, and ends with his discharge or muster-out.¹² 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, or than it can over any other members of the civil community.

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, 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. 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.

2. Deserters whose enlistment was illegal. It has been ruled in a series of adjudged cases 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*, (1830,) -a case of a seaman in the navy, but the ruling in which is equally applicable to soldiers of the army. Here the court, in adverting to the injurious results that might ensue 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, 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, 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 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. 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. 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 as 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 from liability for such offences as criminal acts or injurious conduct committed during his captivity against other officers or soldiers in the same status.

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 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 of applicable to army, navy and civilians alike.

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. Instances of trials ordered under it have been infrequent in practice. 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 dishonorable 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. Trials of discharged soldiers under confinement have been had from time to time under this provision; the

accused, who are really *civilians*, being designated in the proceedings as “military convict,” or “military prisoner.”

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.

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.

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.

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, and have been abundantly illustrated in subsequent rulings and Orders. That a *double amenability* exists in all cases which 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 military code, is now established law. 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 an 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 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; 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.

The subject of *double amenability* will be recurred to and further illustrate later in the work.

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 the federal service, "in time of war or public danger," 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.¹³

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." 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*, 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.

The ruling in *Houston v. Moore* has been affirmed by subsequent rulings and opinions, 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 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.

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 issues 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 "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.¹⁴

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*¹⁵ 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 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*, 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, 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 thus created is quite other than that first above specified, and which is 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*, where it was held that the matter of the composition of 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.¹⁶

Term of the jurisdiction. It was held in *Martin v. Mott*,¹⁷ 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 say 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 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 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.

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 rules and discipline of war.”* This provision, which, with some slight modifications, 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. 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. 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 *attaches* mentions 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, their breaches of discipline having been in general summarily punished by expulsion from the station or beyond the lines. Of followers of the camp-sutlers, sutlers’ employees, newspaper correspondents, telegraph operators, and some others, were from time to time during the late war brought to trial by court-martial, or otherwise summarily disciplined.¹⁸ The post-traders who succeeded sutlers¹⁹ would, in time of war, have been of the class of camp-followers if their posts had been within the theatre of the war. Camp-followers are generally restricted to the least number, on the eve of an important movement by the army to which they are attached.

"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*. This class, during the late war, was considerable 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 transport and military

railroads and as telegraph operator, &c. Of these persons those who appear from the General Orders to have been most frequently subjected to trial by courts-martial were-Inspectors, Teamsters, and other employees of the Quartermaster's Department; Officials and employees of the Provost Marshal General's Department, Contract surgeons and nurses, Paymasters' clerks, Officials of boards of enrollment, Officers and men employed on steam transports, Military telegraph operators, &c.

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.²⁰ 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, 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 did not appear that at the time of their offences they were '*serving with the army*' in the sense of this Article.

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.²¹ A period of hostilities with Indians is, equally with a period of warfare against a foreign power, a "time of war;" 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 of offences committed pending such service. 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. 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 a 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, that the circumstances were not within the description or application of the Article, and this opinion was concurred in by the Attorney General. 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.

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. In both cases, the ruling was concurred in by the Attorney General.

Term of the jurisdiction. It need only be added that the jurisdiction 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.

ARTS. 45 AND 46.

These provisions of the Code declare that - "*Whosoever 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 word "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.

2nd 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.

3rd 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, 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 the 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, to May, 1777, a case of one John Brown, a civilian, convicted by 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. Subsequently, by Resolution of Oct. 8, 1777, it was declared 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 Champlain," 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 sentence were approved,) of aiding the enemy by "supplying them with the means of war," &c. Of the earlier writers on military law, while Maltby was of opinion that the article under consideration applied only to military persons, O'Brien 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. This view was adopted by the Secretary of War, and announced in Orders of

the War Department and of the military commands; 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.

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 the United States, were amenable to trial under the 65th (now 45th) article, which, he observed, applied to “persons who are not as well as persons who are in the military service.” This is the most recent authoritative ruling upon the question of jurisdiction under consideration.

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*,²² has been more recently most clearly held in

Jones v. Seward,²³ 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.²⁴

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 or war, would properly be exercised during the continuance of the war status.

The jurisdiction not exclusive. It may be added with reference to this jurisdiction that it is not exclusive. The acts denounced in the Articles are mostly acts of treason, and as such cognizable by the U.S Courts.

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 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, and made similarly subject by Sec. 4835, Rev. Sts.

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, 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. 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. Sec. 4835 is a copy of the last, and as authority for trials by court-martial has proved wholly unavailable.

CONSTITUTIONALITY OF THE STATUTES. These laws, however, remain on the statute book, and under Sec. 1361 discharged soldiers have not infrequently been brought to trial, 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 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 their offences shall be punishable as “*cases arising in the land forces.*”²⁵ But does the power to “raise armies” extended 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 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 *volens 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 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 Kentucky²⁶ 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, 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, the concluding clause of Art. 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 as soldiers, by the U. S. Dist Court for the Dist. of Kansas and by the Attorney General. Such opinions, whether or not satisfactory to the military student, are to be deferred to till overruled by subsequent or higher authority. 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*.

1. 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 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. 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 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, 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 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." None of them are felonies and none of them are misdemeanors at military law, but all are simply military crimes. So, among offenders, the Articles recognize no principals, and no accessories either before or after the fact, *as such*. 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.

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 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."

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.

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*.

2. 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 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 which 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.

¹ "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.

² As to what constitutes a legal termination of a state of war, see Chapter XXV, - Fifty-Eighth Article.

³ *In re Martin*, 45 Barb., 142; Wells on Jurisdiction, 577.

⁴ 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.

⁵ That Cadets have always been a part of the Army, see *Morton v. U.S.*, 112 U.S., 4.

⁶ 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.

⁷ 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.

⁸ *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.

⁹ Subsequently to its passage there was but one call for militia, (limited to four States,) – that by proclamation of June 15, 1863.

¹⁰ 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.

¹¹ 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.

¹² The discharge must of course be due and legal, not fraudulent. See 16 Opins. At. Gen., 349; Circ. No. 4, (H. A.,) 1888.

¹³ 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.

¹⁴ See Mustering Regulations in G. O. 108 of 1863.

¹⁵ 5 Wheaton, 1, 25, 64-66.

¹⁶ 1 Opins., 473.

¹⁷ 12 Wheaton, 37.

¹⁸ 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.

¹⁹ 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."

²⁰ 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."

²¹ In 14 Opins., it is remarked by the Atty. Gen. that "that words *in the field* imply military operations with a view to an enemy."

²² Johns., 257, 265. And see *In re Stacy*, 10 Id., 332; *Mills vs. Martin*, 19 Id, 22; *In re Kemp*, 16 Wis., 359.

²³ 40 Barb., 563.

²⁴ 4 Wallace, 121-3.

²⁵ Compare the ruling in *Wildman's Case*, Digest, 327, note; 16 Opins. At. Gen., 294-5.

²⁶ 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.

CHAPTER IX.

THE PROCEDURE OF GENERAL COURTS-MARTIAL.

I. THE ARREST OF THE ACCUSED

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 to 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. 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.

I. ARREST OF OFFICERS.

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 offenses. For these the censure of the commanding officer will, generally, answer the purposes of discipline.” Where, however, the offense 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 offenses*, 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. The context of 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.

The occasion and authority for the arrest of an officer thus is that he shall *be charged with a material military offense*. 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 offense 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,

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 either be verbal or written. 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 offense 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. This official does not ordinarily serve the order by copy, making return upon the original in the manner of a writ, 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,” till further orders. A requirement that he surrender his sword is sometimes added, but is not essential, the Article itself specifically providing for such surrender.

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. 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 cannot, of his own authority, exceed without being guilty of breach of arrest - the offense made punishable by the last clause of the Article. 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. For an undue or unreasonable exercise of the power of arrest and confinement conferred by the Article, a commander will himself become amenable to charges.

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. The sword must of course be surrendered on demand. 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. 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.

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 commander. 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. - 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.” 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 offense 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.

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. The limits once fixed may even 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 offense, &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.”

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 offense need not be placed in arrest until the court-martial for his trial convenes, if the service would be inconvenienced thereby, unless the charge is of a flagrant character.” 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. 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. It is

proper to add that an omission to arrest is an *irregularity* which must in general be prejudicial to discipline and the due administration of justice.

BY WHOM ARREST IS TO BE IMPOSED. Art. 65 indicates the “commanding officer,” as the agent of arrest,”¹ 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; 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.

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. 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 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.

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 noncommissioned 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. There is nothing in this power to excite apprehension; the inferior, in employing 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 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 some gross conduct or criminal incapacity by which military authority and discipline 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 in 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. This ruling has been recognized as law by the later authorities."

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 offense 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."

There are also certain acts which, though not necessarily subjecting an 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:" 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 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." 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. Unless in arrears to the United States, or held as a deserter, 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. 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.

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. 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.

Absence of authority in the court. A court-martial can no more release from arrest than it can arrest an officer.² 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 commander has released him, he cannot refuse to be released. The discharge from arrest is an *order* which, like any other military order emanating 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.

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 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. 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.

LIMITATION OF PERIOD OF ARREST OF OFFICERS, BY ARTS. 70 and 71.

Art. 70, which will be more fully considered in treating of arrests 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.

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 posts or stations,*” (i.e. those on the frontier, or which are distant because of the absence of facilities of communication therewith,) 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, and that he is brought to trial within ten days after his arrest, unless the necessities of the service prevent such trial; and then he shall be brought to trial within thirty days after the expiration of said ten days. If a copy of the charges be not served, or the arrested officer be not brought to trial, as herein required, the arrest shall cease. But officers released from arrest, under the provisions of this article, may be tried, whenever the exigencies of the service shall permit, within twelve months after such release from arrest.*”

This provision, which was originally enacted as s. 11, c. 200, Act of July 17, 1862, 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 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 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.”

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.*”

An enactment thus mandatory and explicit in the conferring of individual rights cannot be disregarded or evaded by a commanding officer. 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*, 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. 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.

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.”*

The offense thus visited with an extreme punishment 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 offenses not within the purview of this, but cognizable only under the general 62d article.

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.) 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. The distance which he may thus go is not material, nor is the period of time during which he may be absent. If he leaves, (except from necessity,) 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 offense, the same is alleged to have variously consisted-in visiting without permission the quarters of the commanding officer, or those of another officer, at the same post; in going to the guard house or visiting the guard; going to the sutler's or post trader's store; attending as a spectator a trial by court-martial; similarly attending a parade of the battalion; riding or walking outside the camp; visiting a place of entertainment near the camp; going outside the post into the neighboring town and appearing in public places; crossing the Navy Yard Bridge from the District of Columbia and entering Maryland; going to a public race-course and remaining two days absent; going from Portland, Me., to Boston, and not returning till the fourth day, &c.

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 offense, whatever the intention or motive. Breach of arrest indeed ordinarily involves, with a disobedience of orders, a deliberate defiance or contempt of authority, and, hence the heinousness usually ascribed to it; 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 authority existed, would, strictly, be guilty of a violation of the Article.

Defences. The nature of the offense 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 offense for which he was arrested and confined and that the arrest was therefore unwarranted. 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; or that the arrest, by reason of the unnecessary placing of a guard over the quarters, or otherwise, was unjustifiably severe; 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, provided that, before the breach assigned, he had not been duly re-arrested and re-confined.

Acts not constituting the specific offense. The character of the offense 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 offense 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 by the officer, constitute the offense, though it may indeed involve a still higher criminality. So, for an arrested officer to quit his company or regiment, when personally with it in the field or on the march, is an offense quite other than a violation of this Article.

Further, the specific offense 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 offense. 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 order or other assumption of official authority. 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 an application by the accused, or may be delayed till the trial has been completed and the judgment finally acted upon. 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 principles applicable to the arrest of officers will apply to the arrest of cadets, these also being officers. 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.

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 offenses, 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 to their offenses 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 offenses is commonly delegated by commanders to 1st sergeants or other non-commissioned officers.

Form of the arrest. "The arrest of a soldier is, properly, confinement." It is indicated by the authorities 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 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. By a recent order, 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., 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. The imposition upon soldiers, while confined in arrest, of disciplinary punishments is, in our service, wholly illegal. In one of the Orders last cited, 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, 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, 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 confinement exists at the station. It must always, however, be an exceptional measure, and should be reserved for extreme cases.³

Neither hard labor nor severe service should be exacted of a soldier while remaining in arrest. 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. If a soldier in arrest be required by some exigency of the service to be employed on anything like continuous military duty, he should first be released from arrest. Placing him on duty would indeed suspend the arrest *per se*.

A soldier, upon and during arrest, is entitled, unless a deserter, to receive his regular pay; 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. 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.*"

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, 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.

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 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. 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, 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 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 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. 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.

ART. 67. This Article provides that: - *“No provost-marshal or officer commanding a guard, shall refuse to receive or keep any prisoner committed to his charge by an officer belonging to the forces of the United States; provided the officer committing shall, at the same time, deliver an account in writing, signed by himself, of the crime charged against the prisoner.”*

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 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 charge of a military offense is presented at the same time with the prisoner, but that, where no such charge is rendered, he is at liberty to refuse to receive the prisoner. 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 faith, or that the prisoner has not been guilty of a military offense. 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.

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 offense in general terms and as designated in common parlance - as "Drunkenness," "Disobedience of Orders," "Larceny," &c. Further, to avoid the embarrassment of executing and filing a separate writing with each commitment, the name of the prisoner, with the offense 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 offense impliedly created by the Article. It may be remarked that, although the Article fails to assign any penalty for the act 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 offense under Art. 62.

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. Further, the report being duly made, the commander becomes the officer responsible for the proper disposition of the cases. 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 offense, how proved. The offense 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.

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 *offenses 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, 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. Nor would the fact that the offense 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. 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 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.

Suffering an escape. This was an offense punishable at common law about which much learning is to be found in the reports and treatises. Two degrees or kinds of the offense were recognized - *voluntary escape* and *negligent escape*; 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.” The former offense 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 of the escape on the part of the keeper would be indictable as felony. A “negligent” escape did not rise above the degree of misdemeanor.

It is quite clear, under the general language of the present Article, (and has been thus held by Hough,) that the offense made punishable therein may 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.

So, much of the principles of the law relating to the criminal offense 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. Nor did the fact of a recapture of the prisoner have such effect, unless he were immediately pursued and retaken before being lost sight of. The death of an escaped prisoner before recapture did not “purge” the escape. The rule, however, as to what acts will constitute negligence is not so strict at the military as at the common law. Thus, where a prisoner has succeeded in

effecting his escape through the insecurity or inadequacy of the guard-house or 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; 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 the prisoner to have private interviews with improper persons by whose aid the escape was facilitated.

As to the proof of the offense, 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, it need not be shown that the prisoner was actually guilty of the offense for which he was arrested, or that the officer had knowledge of his guilt. 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 then rests upon him; and a similar rule may in general be applied to a case of escape suffered by a military officer."

While the offenses of voluntary and negligent escape are distinct, it is yet held that gross negligence may be given in evidence to show a voluntary escape, and further that, under an indictment for a voluntary escape, the defendant may be convicted of a negligent escape, the former offense properly including the latter. 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. A non-commissioned officer, or soldier, (as a sentinel or guard,) permitting an escape, is of course liable, for this offense, 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 offense is *desertion*.

¹ “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, deprived another of his liberty, a regiment would exhibit a scene of disorder, anarchy, and a total absence of all discipline.” Hough, 459.

² So having legally nothing whatever to do with the matter of arrest, a court-martial cannot, with a view to facilitate the defence 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.

³ 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."

CHAPTER X.

THE CHARGE.

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, 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*.

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 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.

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.

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, 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. 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 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 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 logical¹ 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, “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 writes:—“It” (the pleading,) “must be particular or specific, as opposed to undue generality.” This rule, Archbold 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: - "To combine with the requisite certainty and precision the greatest possible brevity is now justly considered as the perfection of pleading.

But this authority 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 - "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, 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, and will properly be observed in framing specifications. Because, however, of the exceptional authority possessed by courts-martial in their findings, 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 surplusage. Stephen, 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,” 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*.

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. 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.

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.

NOR ARGUMENTATIVE. Or, as it is expressed by Stephen - pleadings “must advance their positions of fact in an absolute form, and not leave them to be collected by inference and argument only.”

MATTER OF EVIDENCE NOT TO BE STATED. It is not good pleading, in alleging a fact, to state the circumstances proving or tending to prove its truth. 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 infrequently added in a military Charge.² 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.

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. As it is observed by Gould - “Judges are always presumed to know judicially what the law is; and have therefore no occasion to be informed of it by the pleadings.” As 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 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 circulating medium. “In fine,” adds Greenleaf, “courts will generally 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.

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. It is held by the U.S. Supreme Court, and generally by the courts of the States, 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*. 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, &c. 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. 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 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, or other party material to be mentioned in the pleading. 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 court. 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,³ (or within the territory of a foreign country when, by reason of war or otherwise, the army is authorized to be there.)

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. 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 named; but if these dates are so far apart that the offence intended to be charged cannot reasonably be distinguished, the pleading is defective, and, upon exception taken by the accused, by motion to strike out, or otherwise, should be required by the court to be amended.

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 between) the months of ----," (specifying the particular months or other periods.) 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 testimony in the record. Such an omission, however, would be negligent and hazardous, and is now of rare occurrence.

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. 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.

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, although the utmost exactness is not required. 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 stealing of any article larceny at the common law, it must be proven to be of some value.” In a military charge there is not the same necessity 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. 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. If a writing essential or desirable to be set forth literally has been lost or 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. So, where it 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. When the substance 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. 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. 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; 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 substance may be given,) 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. 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; and it is always *sufficient*, 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.

As all military offences are statutory offences, this rule, (with its qualification,) applies directly to military charges; but the Articles of 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; 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; or, in other words, where criminal acts, which may be imputed in the same count or Chare without duplicity, are stated in the disjunctive in the statute, they should, if pleaded together, be expressed in the conjunctive form. This point will be further illustrated in treating of “double” pleading.

STATEMENT OF INTENT. It is laid down, generally, by Chitty, 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. 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 “willfully,” or “knowingly and willfully,” commit a certain act, he shall be amenable to trial and punishment. So, in Art. 60, the terms “knowing,” “knowingly,” “knowingly and willfully,” “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 “willfully,” “maliciously,” “feloniously,” or the like.

DIFFERENT STATEMENTS OF SAME OFFENCE. It is laid down by Chitty 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 writes - “Every cautious pleader will insert as many counts as will be necessary to provide for 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 infrequent in cases of importance to state the accusation under two or more charges - 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. 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*.

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 compete 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.” 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. 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 offences if the same nature, classified in the enactment as of the same species and made similarly punishable. In a case of the class it was observed by a U.S. court 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.”

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 willfully misappropriate and apply to his own use, property of the United States, &c.

The point under consideration is illustrative of the rule of pleading statutory offence 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 any other 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.

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; while, on the other hand, matter which is material may have such effect though it be defectively pleaded.

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 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."

. . . "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 jointed," as conspiracy and riot. But whenever the offence is, in its nature, *several*, there can be not joinder.

The joining of several persons in one Charge, though not infrequent during the late war, 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. The 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. 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.

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.

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.

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 of war or other statute 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," "Misbehavior before the enemy;" or, referring to the article under which it is brought, it may be expressed as "Violation of the-Article of War," or it may combine the two forms and be phrased as "False Muster, in violation of the 21st Article," &c. 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.

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," "Incompetency," "Habitual Drunkenness," "Unreliability," "General Bad Conduct," and the like inasmuch as they do not designate any specific 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. Where indeed the specifications to such charges merely set forth, (as they generally have done,) former instances of arrests of 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." 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. 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.

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. 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, 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 infrequent 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, 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. It will be further illustrated in the chapter on the Finding.

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.

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.

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 the general - 62d - Article, will be a serious defect, for which the charge will properly be struck out on motion of the accused. 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; *vice versa*. But though no such distinction may exist-the two Articles prescribing or permitting the same punishment, or both making the 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 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 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 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.

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 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 charged. 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 offence 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. 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 formal, which are necessary and proper both to complete itself and to support the charge as laid.

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, without 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. In the British military law, such investigation is enjoined by express statute. 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.

CHARGES NOT TO BE FRIVOLOUS OR MALICIOUS. All charges should be substantial and made in good faith. Where, as the result of imperfect 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 infrequently exposed those preferring them to grave censure and in some cases to severe punishment.

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. Further, where superiors and inferiors have offended together, or superiors have sanctioned offences of subordinates, - whatever proceedings it may be thought proper to take against the latter, charges should certainly be preferred against the former, as primarily responsible and deserving punishment. 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.

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, 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, 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. 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 offence, 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. Where all the charges to which 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.

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. 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.

BY WHOM CHARGES ARE TO BE PREFERRED. 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. 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*. A preferred charge is an official paper, and must be officially subscribed.

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; 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, though peculiar circumstances will sometimes justify

them. 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.

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. 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, 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.

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 to the trial of enlisted men. 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.

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.

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; 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 out, any part of the charges or specifications officially committed to it for trial, except, indeed, in so far as to correct a mere obvious error of form. 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. Such Charges may relate 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.

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. The service is usually made by the judge advocate of the court, the adjutant of the command, or other officer or non-commissioned officer detailed for the purpose. 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.

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, 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 defense 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 as may be deemed material.

TIME OF SERVICE. The law indicates no particular time within which charges would 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," 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.

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 legal objection in bar of trial, or affect the validity of the judgment of the court. 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 defense or plea to the same.

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, and service should be similarly made of “additional” charges, if any are preferred.

¹ “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.

² 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.

³ “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.

CHAPTER XI.

THE FORMAL ORDERING, MEETING, &c., OF THE COURT.

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. 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 California;” “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. That the Order is dated on a Sunday affects in no manner its validity.

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., 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. 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.

3. THE NAME OF THE PARTY PARTIES TO BE TRIED.

The Order then subjoins: “for the trial of”-naming a certain officer or 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, - “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."

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." 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.

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, 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.

5. THE DESIGNATION OF THE JUDGE ADVOCATE.

This usually 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 - "No greater number can be detailed without manifest injury to the service." The early 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, 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.

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 necessary 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.

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.

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, it is added in the

Order that-“The court will sit without regard to hours.” This direction is not infrequently given in a supplemental Order.

8. THE CERTIFICATION 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,” 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; 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 of meeting changed, the hours of session extended, &c. In the record 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 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 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.

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-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,) 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 state 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 closing arguments of the counsel, or till the final clearing for judgment. 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. In general, however, such reporters are freely admitted, 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 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 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, and the Attorney General 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. 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 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 principle preliminary business of the court at this stage will consist - 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 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 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 state, - and such exceptions are comparatively rare, - this time is the 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 courtroom, 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. 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 courtroom under guard, his guard being directed to report to the judge advocate. In the case of a noncommissioned 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. 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.

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 courtroom, - 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 no manner hampered in making his defence. 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 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 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. Hughes 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." 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, but yet a privilege almost invariable acceded and as a matter of course; 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 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, 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 practicing 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 bad character, or who is otherwise clearly exceptionable. Further, the court may exclude a counsel guilty of disrespect or other improper behavior in its presence, or who unreasonably delays the proceedings by repeated technical objections, although such behavior may be of a sort made punishable by Art. 86. 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 address the court by statement, motion, or argument, but being required to express themselves either through the accused or in writing. 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 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 statement, 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. Thus, in practice, 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.

HIS RELATION TO ACCUSED AND COURT.

A properly qualified 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. When this appears, and the court is of opinion that the defense 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 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. Indifference to the interests of the accused, or a lack of deference toward the court, is, as remarked in a recent Order, “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 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.

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, 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.” Clerks, unlike reporters, are not required to be sworn.

INTERPRETERS.

Where any of the proposed witnesses are foreigners 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. Interpreters, in our practice, are summoned and paid as witnesses, and sworn as such. 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; 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.

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 courtroom, &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 serve subpoenas, attachments and notices, take charge of prisoners and witnesses, enforce order in the courtroom, and otherwise execute the mandates of the court and directions of the judge advocate. The attendance, however, of such an auxiliary official, though apparently not infrequent in the British practice has, with us, been more commonly resorted to before State militia courts than before courts-

martial of the United States. At the trial of the Conspirators against the life of the President Lincoln, &c., in 1865, a “special provost-marshal” was assigned to attend the commission. During the late war provost-marshals were frequently appointed or detailed as executive officials, but, though sometimes acting as judges of provost courts, they were rarely employed in connection with general courts-martial.¹

¹ 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.

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 members*, 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.

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. It is immaterial what may be the actual rank of the senior, 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,) 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 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, the witnesses, or the audience, while at the same time seeing that the rights of every one entitled to consideration are respected; 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, 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 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, nor can he act against the will of a majority of the court. On the other hand he cannot trench upon the authority of the Commander-as by excusing a member from attendance, &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. 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. 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. 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, and by him that the court should communicate with that authority. As Jones 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 infrequently been made the medium.

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.

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 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.

THE 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 giving 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, 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 senior. "In no other way," observes Clode, "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.

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 judgement of the court, but who constitute the majority is made know, and the minority may, and often do, express their dissenting views. 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, 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.

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, nor can he, while remaining, *i.e.* without being duly relieved as, a member, act as counsel for the accused. 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. 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 trial where he is to act a judge. In this connection Gilchrist 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, 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. 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 communicating his knowledge to his fellow members in closed court - a proceeding wholly condemned at military law.

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. It is clear that a member cannot declare himself to be ineligible, or on any other ground excuse himself from attending;¹ 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. When prevented from attending by sickness 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. If the 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. A court-martial may in general properly adjourn for a short interval to await the recovery of a member temporarily indisposed. A member absent at the organization but coming in on a subsequent day should see to having himself sworn and to his being made subject to challenge.

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.

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.

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.

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. 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 defense, 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 close, taking part in the findings and sentence of death. On Capt. D. Porter's trial in 1825, 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, 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, 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, wherever members were absent 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, 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; 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.

INTRODUCTION OF A NEW MEMBER PENDING THE TRIAL.

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. 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.

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.

BEHAVIOR 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 Article 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. 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, 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.

THEIR COURSE UPON THE INVESTIGATION.

While the members may, and in practice not infrequently 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.”

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 officers 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."² 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.

¹ 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.

² 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

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 to “judge and give sentence” in certain cases. So, the *Shultheiss* of the early and the *Auditeur* of the later German military law exercised a species of jurisdiction of their own; the latter official names having a vote on the court. 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.

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, s. 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.

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 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:--"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,) “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 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 Article 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.

Maltby cites this Act as in force in 1813. O’Brien and De Hart 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, (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. After this date the provision of 1802 became practically obsolete, the Article 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 appointed Judge Advocate under the Act of 1849, 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, had prevailed to the date of the recent revision in 1874. Meanwhile—it may be added—no deputation of judge advocates for general 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, 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 that whenever a court-martial is appointed a judge advocate shall be appointed for it. And this construction accords with 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 regimental 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 inferior courts under Arts. 81 and 82,. This view was soon after adopted and announced by the Secretary of War, and judge advocates have since been detailed for regimental and garrison equally as for the 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 Article 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. 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 office 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 commander 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.

Nor of course can the *court* appoint a judge advocate, even for a temporary purpose. Thus it was held by the Judge Advocate General, 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, 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.

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, and this proceeding may if necessary be repeated. That the judge advocate cannot relieve *himself* from any part of his duty need hardly be added.

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; 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, 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. 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 authorized the appointment of "a judge advocate," without specifying whether or not he shall be a military person, and that he may legally be a civilian has been uniformly held. In the British service the Judge Advocate General and Deputy Judge Advocate General, who formerly officiated at the principal trials by court-martial within the kingdom, are civilian lawyers. Under the present Rules of Procedure 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.

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, and Maj. Gen. Wilkinson in 1815. Between 1818 and the period of the late war, as also during the continuance of the war, the employment of civilian as judge advocates was of rare occurrence.

In our *naval* service, on the contrary, the judge advocates officiating at trials with the United States were, in general, up to a recent period, counselors at law. 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. 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.

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 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. But the rule under consideration does not preclude the detailing of other officers to assist the judge advocate in an important case, 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." This officer has been styled by McArthur "the *primum mobile*;" by Adye "the mainspring of a court-martial." "If he errs," adds the later writer, "all may go wrong;": or, as it is quaintly expressed by Napier, unless courts-martial have a properly instructed judge advocate, "they must assemble in bodily fear." 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 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. 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 offences 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.

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, 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. 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 conscious 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. 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.

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 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. 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. 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, amount, &c., known to him, from having communicated with the witnesses or otherwise, to be incorrect, 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. 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 communicate the facts and his views to the Commander by whom he has been detailed, and await his instructions.

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 perfected, 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 specification, 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 and those whose names are furnished him by the accused, who is entitled to have summoned for him his material witnesses. If papers in the possession of a witness are required to be used in evidence, the judge advocate will issue to him a subpoena *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 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. Where not satisfied as to the materiality of a proposed witness, or where the testimony of such a witness will be merely cumulative, he may omit or decline to summon him till requested or instructed to do so by the court or the commander. Where the accused desires the attendance of a witness whom the judge advocate does not think it worthwhile 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 subpoenas 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. If he is at a greater distance, a subpoena, or application for his attendance, should generally be forwarded by the judge

advocate "through the regular military channels," 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 subpoena and causing or enabling him to become informed of its contents, or--and preferably--by delivering to him a copy. The individual making the personal service will properly be instructed by the judge advocate to certify the fact, date and place of service on the back of the original 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 charges.² 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 fact alleged in the specification. 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 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 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*, (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.

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, “is essential to the jurisdiction of a court-martial.” O’Brien 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.

It was observed by Kennedy, (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 of the Sovereign before general courts-martial. 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 as unjust to the accused and inexpedient, and in 1860 it was expressly prescribed in one of the Article of war that he “should no longer be the prosecutor.” A provision to the same effect is contained in the present Army Act. In the British practice the prosecutor is now a separate official, quite distinct from the judge advocate. He is appointed by the convening authority, “who, in the trial of a soldier, ordinarily selects the adjutant of the prisoner’s regiment.”

In our law the judge advocate has from the beginning acted as the public prosecutor in military cases. In the articles of 1776,³ it was enacted that the officer officiating as judge advocate should “prosecute in the name of the United 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, and more conspicuously in the French 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 defense; 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; 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 arguments on behalf of the Government.

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 a general rule, be regarded as independent of the court, 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, 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 to 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.

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” of the offences charged. And the only safe rule for him is to put in all the material testimony that is available, and not merely cumulative. 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 his 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,) he can no more withdraw a charge after arraignment than he can drop one before: 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 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.⁴

Duty as a minister of justice. It was remarked by the judge in a late case in the Central Criminal Court of London,⁵ 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,⁶ 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 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," by failing to prosecute "with spirit and resolution," 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 defense or offering such matter of extenuation as may exist in the case.⁷

It is in view of this principle that it has been held by certain courts, both in England and the United States, 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 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 defense. Thus it is held in one case:--"All the facts constituting the *res gestae*, 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 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 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," 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.

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.” In this capacity a two-fold 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 by the court. 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. 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.

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 this is authorized, and it is indeed his duty, respectfully to *caution* the court against the apprehended illegality.

HIS ATTITUDE WHEN THE COURT IS CLOSED.

Up to a recent 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. 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,⁸ and the apparent unfairness of the practice not unfrequently evoked serious criticism. 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 courtroom, (with the accused, &c.,) whenever the court clears for deliberation, either on the finding and sentence, or upon any interlocutory matter such as a challenge, an objection to evidence, &c. And hereafter when a question arises, in closed session, as to which the opinion of the judge advocate is desired, the court must be reopened, 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. 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. The question involved is really one which concerns less the judge 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.

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 DeHart, 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 testimony, 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 this 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, he may be made amenable, under the 62d or other appropriate article, for any marked disrespect or disorderly behavior 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.

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 of trial, summoning witnesses for the defense, &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 the prisoner the answer to which might tend to criminate himself.” This is a most imperfect and ineffective provision; objecting to the 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.⁹ This provision, derived from the Article 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.

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.” This doctrine is applied to the military procedure by Simmons, 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, such assistance as may be compatible with his primary duty of efficiently conducting the prosecution. In addition to aiding him before the trial in collecting his proofs and preparing his defense if he has one,--(and he will especially guard against even suggesting his pleading *guilty* if the case has any merits whatever,)--he will properly assist him in presenting in due form such challenges as he may desire to urge, in offering his plea or pleas general

or special, and in bringing out the full testimony of the defense on the trial, as well as such circumstances of extenuation as may exist in the case; and will further advise him of his right to be furnished with counsel, to take the stand as a witness, and, generally, as to this rights and privileges at all stages of the case. It is in omitting to bring out in evidence existing matters of defense or extenuation, that judge advocates are most liable to fail in furthering complete justice in military cases. Though the defenses 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 pleas of guilty, and, in asserting facts constituting a substantial defenses, 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, and by reviewing officers in General Orders.

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.

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 defense, 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 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.¹⁰

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.

In regard to a corresponding article in the then British code, the view was expressed by Hough that the judge advocate, though forbidden to disclose votes and opinions of members, was "not precluded by the 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, 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, 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.

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.

Being prohibited from divulging the sentence "to any but the proper authority," the judge advocate cannot of course communicate it to the clerk or reporter employed to write up the proceedings, but must himself enter it in the record in his own writing.

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 advocate of a court-martial*¹¹ *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 subject. 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, cannot 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. 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.

Nature of the authority. To authorize a resort to an attachment under this statute, there must have been a formal subpoena duly issued by the judge advocate and duly served upon the witness, and not complied with by him. The authority to issue the compulsory process is co-extensive with the authority to issue the subpoena, 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, and whether he be a military

person or civilian. It was, however, for securing the attendance of *civilian* witnesses that the enactment was originally designed.

Service of the process. As to the mode of executing the process, it was held by the Attorney General 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 issue 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;” and it is added that “the nearest military commander will thereupon furnish the necessary military force for the execution of the process, if force be required.” 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: 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, it follows that a civilian witness, though duly attached and compelled to appear, may, with entire impunity, refuse, if he sees 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 or the court. This is a serious defect in the military law, calling for an amendment either of Art. 86 or of Sec. 1202.

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. 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 on in any 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 is 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, (tell rescinded or modified,) be strictly observed by the judge advocate, especially as its observance may 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, 1892.¹² 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.

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 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 military cases. The

allowances and compensation of witnesses before courts-martial are set forth in Art. LXXVI of the Army Regulations.

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 the 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, 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

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 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, 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 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.

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 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 would 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.

³ No judge advocate was provided for in the original code of 1775.

⁴ G. C. M. O. 14, Dept. of Cal., 1883.

⁵ Regina v. Berens, 4 F. & F., 842.

⁶ Wellar v. People, 30 Mich. 23.

⁷ 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." Coppee, 60. And see the subject of "Absence of bias," *ante*.

⁸ 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.

⁹ 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.

¹⁰ 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.

¹¹ 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.

¹² 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."

CHAPTER XIV.

CHALLENGES

In a previous Chapter we left the Court ready to proceed to be organized for the trial, subject to such objection, 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 members, 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 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. Any objection which the accused may have to the judge advocate must be addressed to the convening authority.

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. 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 disapproved 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.

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.

“OF A COURT-MARTIAL.”

This term includes, with general, also regimental and garrison courts; 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 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; 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 specially 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, *i.e.* challenged preferred without any reasons assigned therefor. Of these a certain number were, in capital cases, allowed to the prisoner, *in favorem vitae*, by the common law, and are now allowed to both parties in civil and criminal cases by the laws of most of the States and of the United States. At military law, however, in England, the same were not formally sanctioned by usage, and are now

precluded by statute: in the American military code only challenges for legal cause have ever been permitted.

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.”

**“THE COURT . . . SHALL NOT RECEIVE A CHALLENGE TO
MORE THAN ONE MEMBER AT A TIME.”**

That is to say, challenges to the *array* shall not be entertained; or, as Simmons expresses it, “a prisoner cannot challenge the court generally,” or “the whole of the members collectively.” 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. And, though the accused may deem all the members to be prejudiced or otherwise personally subject to exception, 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. He may indeed challenge all in succession if he sees fit, 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.

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. 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 such objections, he is held to have *waived* them, and cannot be allowed to interpose them at any subsequent stage.

But valid objections may exist at this time, not known to the accused, (or to his counsel, if he has one,) and of the existence of which he could not by reasonable diligence have been informed. In such event, it is permitted to the accused, (as to the prisoner under similar circumstances at a criminal trial,) 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. 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. In all such cases the military practice, in the interest of justice, follows that of the civil court in allowing the challenge to be interposed. 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 extreme 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. In our 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, 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, as well as one expressed in unnecessarily 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.

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. 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. If, on the contrary, he does not admit the facts alleged, he may, by a statement or explanation, (which he is always at liberty to make,) satisfy the challenging party that he is in error and induce him to withdraw his challenge. Thus it is not 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.

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 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, like any other issue.

This evidence may include not only the testimony of witnesses, as well as such documentary or other written proof as may be relevant, but also the testimony of the member himself brought out upon an examination instituted by the challenging party.

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, is well settled. 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. 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. But, though not sworn as such, he is *examined* as a witness, and the examination is therefore to be governed by the rules which specifically 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 or disreputable acts. The exemption, however, from answering such questions is held, in the case of a juror, to be a *personal privilege* which may be *waived*.

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 Article or other statute. 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. 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, 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.

Where indeed the ground of challenge, 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 deliberations, the challenged members usually and properly withdraws from the court, that is to say, does not remain with it: if however he states, 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 promoting freedom of discussion and may properly be requested by the court. In an early leading case, 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 settled in our law: 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.

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, 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; *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. 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 is less to be regarded than the obligation to administer justice. The majority of military writers certainly lean rather in favor of supporting challenges than rejecting them, and the proceedings of courts-martial have been not

unfrequently disapproved in General Orders for the reason that valid objections to member have failed to be allowed.

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; 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, that the objection is not sustained; and to this effect has also been the practice of the civil courts. Simmons 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. 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, 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 member, as upon any other proposition, is *no vote, i.e.*, is not the indispensable majority, and the objection is not sustained.

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 are present, the decision is announced by the president. If it is that challenges 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. 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 the president to the convening authority. The latter, if he deems it expedient, will issue an order adding to the court a member or members, or detailing a new court altogether. 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.

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 excuse a member; nor, of course, can a member in any case excuse *himself*. Simmons and Kennedy 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, and Hart. 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. 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. 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, 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.

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 crime;) *propter defectum*, (on account of defect, that is to say personal or legal incapacity;) and *propter affectum*, (on account of favor or bias.)

CHALLENGES PROPTER HONORIS RESPECTUM.

This kind of challenge, says Coke, could be taken only to a “peer of the realm or lord of parliament, for these, in respect of honor and nobility, are not to be sworn on juries.” And he adds:--When any of the commons is to have a trial, either at the King’s suit, or between party and party, a peer of the realm shall not be impaneled in any case.” 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.

CHALLENGE 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. Of the crime which is the ground for challenge the juror must have been duly convicted, and the proper proof to sustain the challenge is the *record* of such conviction. 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 interposed.

CHALLENGE PROPER DEFECTUM.

Challenges of this class are of two kinds: 1. Those based upon some physical or mental defect; 2. Those based upon a incapacity created by law.

1. Of 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,” as also sickness, deafness, and intoxication, are specified by the authorities as causes properly exempting a juror from serving, and constituting ground of challenge. So, at military law, Hough 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. 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 professors of the

Military Academy were to be detailed upon a court-martial - 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*.

CHALLENGES PROPTER AFFECTUM.

This is by far the most numerous class of challenges taken to jurors, and so to member 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*,¹ 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 opinion 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 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,²) which, alone or in combination with other incidents, may have so acted on 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; 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.

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 challenged 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; 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; 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, 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.” Such an opinion would ordinarily 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 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. A decided opinion, it may be added, need not be expressed in a public manner: Hough 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*. 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 rejected, it will be impossible at the present day to administer justice in cases sufficiently exciting to inspire a newspaper paragraph.”

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 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.

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 is so far preoccupied as to render him incompetent. In a case in California, 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.

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. 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. Nor, as ruled in a further case, is 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, “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; and the same has been held as to the entertaining of such an opinion in regard to persons in general when charged with crime, or in regard to violence and crime in general.

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. 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; but an opinion that the statute is constitutional and in force has been held not to affect the juror's competence, since it is merely an opinion upon an abstract legal question. 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."

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.

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 his 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. But the authorities are not uniform on

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 - will properly fail to convince the court of his neutrality in the case where it appears that he has recently entertained decided views concerning of the criminality of the accused.

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 this being expressed at all, will affect the juror's competency. In Callender's case, (tried in 1800,) it was held 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." 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. 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. 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 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 thus actually the accuser, a challenge offered to him has been held valid; and, where the court has ruled otherwise their ruling has been disapproved.

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, or that disrespect was shown himself, or that his own property was stolen, &c.,--especially as, in such cases, he is also generally the principal, or a material, witness. 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.

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. 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 ground of challenge. 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.

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.

Prejudice of commanding officer. Simmons, (who is repeated by some of the later authorities,) 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. 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, or those in 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.

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. In small commands, however it is sometimes unavoidable.

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 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, 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.

Among military authorities, Tytler 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.

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 crimes; his having publicly libelled him; his having initiated against him a malicious suit or prosecution, 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, &c. In an adjudged case 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, but, except in a single instance, it is one that is most rarely urged.

Claim to promotions. 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. 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, such sentence is a probably 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 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 dismissal of the accused be merely advanced on “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. 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 law³ and recognized in the modern civil practice - 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 the alleged offence of the accused, 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 jurymen and a party to a legal proceeding, implying friendship, fellowship, dependence, &c. Later, Blackstone designated as causes of "*principal* challenge," that the juror "is the party's master, servant, counselor, 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 indifferent on the trial being determined in each case by the special circumstances in evidence.⁴

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, 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 which would properly constitute adequate cause of objection to the member. Hough cites a case where two members of a court-martial, "who had been the private advisers, counselors, and associates of the prisoner up 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. Where indeed a member of a military court is *in fact*

subject to be biased by an 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 reasons 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 juror 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, 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 previous trial,--as where the case was dismissed by the court without proceeding to verdict. In such a case the juror is not challengeable “for principal cause,” 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.”

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; 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.”

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 or for a similar offence; 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; 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, - 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.

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.

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; 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.

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 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."

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.

Having served on a regimental court from which an appeal is taken. All the authorities, English and American, 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. This on the ground that a witness is likely to be a partisan and either to have a personal prejudice or a decided opinion in the case. 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*: otherwise, however, where he is to be called upon simply to testify as to character, or as to some interlocutory point not material to the main issue, or slight detail. It is not essential, however, that the member should have been formally summoned. 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.

If a member has given material testimony on a previous trial or investigation of the same case, or on a previous trial or investigation of another case or matter of the same or a similar nature, 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, 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. 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. 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.

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; that he has been bribed; that he is characterized by a moral obliquity; that he will not convict on circumstantial evidence; 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; that he has conscientious scruples in regard to the imposition of the death penalty which will affect his verdict; that he does not speak English; that he has not sufficient intelligence.

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 proceeding. In an adjudged case in New York, 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 the case in North Carolina 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. 8, to object waives, or fails to make, 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.

¹ 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.

² “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.

³ “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.

⁴ 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.

CHAPTER XV.

ORGANIZATION--ARRAIGNMENT--CONTINUANCE--NOLLE- PROSEQUI

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.

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,*

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.'"

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. 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.

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 *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, 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.

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 swear, and you, E.F., do affirm &c.” In affirming, the reference to the Deity at the end of the oath should be omitted.

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.

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, 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.

2. To try, etc., “the matter now before” the court. By these words the members engage to pass upon the specific offences alleged against the 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 reorganized, and re-sworn to try all the charges old and new.

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 defense. 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 strict compliance with the actual statutory provisions of the military code, relating to the offence or offences charged. 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 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,) 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 defense 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, 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, as thus the better to secure their independence and promote the ends of justice. 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.

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 some *issue*,--as the issue upon a challenge or a special plea,--voted on in the course of the proceedings.

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.

For a member to disclose his own vote or opinion would, as remarked by Hough, 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 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." 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 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.

Upon 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 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; and he is entitled to remain similarly unrestrained pending the trial. A failure, however, strictly to observe this rule will not affect the legal validity of the proceedings.

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. 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 the 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.

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*—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, 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*,” 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; and to the same effect appears to have been the practice of the earlier British courts-martial. 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. 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.*”

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, refuses to plead,) or answers foreign to the purpose, and it is not clear that he does so from mere willfulness--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 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.

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. 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. 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 disorder disturbing the hearing, the court may be justified in proceeding as for a contempt under Art. 86.

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.

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 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 authorized 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 court in continuing cases from one term or session to another—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. 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 same *at any time pending the trial*. But while sufficient causes for granting such applications may not unfrequently arise at later stages of the proceedings, 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. 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. 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,) 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, the trial, for a reason hereafter to be noticed, was, at the instance of the accused, suspended for nearly two years. This 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 applications 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. 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 appears to be the view of the civil courts.¹ 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 as 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.

GROUND FOR CONTINUANCE.

It was declared by Lord Mansfield in *Rex v. D'Eon*, that—"no crimes 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, Chief Justice Mansfield clearly lays down the rules governing in the granting of a continuance for this case. “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 statement. This regulation is in terms confined to the case of an application by the accused. But on 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 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 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.

But as to the 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. And his 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,² or testimony which is only cumulative or reiterative as to a point already sufficiently exhibited in proof. 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 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.

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 subpoena, specifying the exertions used;" or that the witness has been duly served but refused 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;³ 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, 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. 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. From the 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.⁴ 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.⁵

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 able to secure the presence of the witness at the court. 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.

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.

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.

3. Absence of written or documentary evidence. The reasonableness of this as a ground for continuance is illustrated in an English case, where, in granting a postponement to enable the defendant to procure a copy of a judgement 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 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; the temporary illness of the judge advocate; the death, illness or absence of the counsel for the defense, in an important case, where considerable time is required to enable the accused to supply his place;⁶ 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. 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 yet had a sufficient opportunity to do so. 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 to prepare his plea or defense; 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; or that the case is one presenting grave questions of law or other unusual difficulties requiring extended study and preparation. 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,⁷ (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 affidavit by the statements and affidavits of other persons. 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. 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,) and issue to be duly tried and determined. But where the *accused* applies for a continuance upon a recognized ground, and furnishes a satisfactory statement 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 a *prima facie* true, and, if not disputed by the opposite party, are to be acted upon as substantially true by the court.

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.

Extent of authority to adjourn. And adjournment is not to be resorted to merely for the convenience of the members. 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. 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, or to the quarters of a sick witness for the purpose of taking testimony. In a case of necessity a court-martial may even adjourn to a different location 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, no power to dissolve itself or terminate its own existence.

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 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 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 indicted, 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. The authority to *nol. pros.* must be exercised by the superior who, as the representative of the United States, 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. 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.

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. 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, (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 like.

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.

¹ "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.

² 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.

³ 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.

⁴ "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 subpoenaed by the opposite party. *Moore v. Goelitz*, 27 Ills. 18.

⁵ *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.

⁶ "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.

⁷ 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.

CHAPTER XVI

PLEAS AND MOTIONS

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.”

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. 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 to pass upon the question of its own authority to proceed to try under the convening order.[?] 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.[?]

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.

ITS NATURE AND SCOPE. By means of this convenient and effective motion on the part of the accused,³ 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,⁴ 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,⁵ 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 writers⁶ the attention to which it is entitled, is not infrequently 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.

FORM OF THE MOTION. There is no prescribed form for this motion, which may either be oral or in writing.⁷ It should not, however, be made in general terms, but its precise ground or grounds should be distinctly specified.⁸ Otherwise indeed the court may decline to entertain it.

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,⁹ and a court-martial will properly do the same.

OCCASION AND USE OF THE MOTION. “Whenever,” writes Bishop,¹⁰ “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 offense 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 offense; 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 defense. 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 offense, or any legal offense; this motion being really, in its commonest application, a substitute for the demurrer.¹¹ The motion, however, is not infrequently made on account of the serious indefiniteness of the substance of a specification.¹²

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.¹³ 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. A court-martial will also the more hesitate 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. 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 offense for which sentence could properly be adjudged, or of one the trial of which could be pleaded in bar of a second trial for the same offense.¹⁴ The granting of the motion being discretionary with the court, a refusal to allow it cannot affect the legality of the proceedings.

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,” 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.¹⁵ 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 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. 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 defense.

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 desire 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 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.¹⁶ 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,¹⁷ 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.¹⁸ In either of these cases, whether 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.¹⁹

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 offense; 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 defense only. As such while it may be taken advantage of upon the general issue, it is preferably disposed of at the outset of the proceedings by the special plea now to be considered.²⁰

THE STATUTE. The military statute of limitations consists of the 103d Article of War, which embraces all offenses and dates from the code of 1806, and an amendatory Act, relating to the offense 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 with 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 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.” The effect of the two enactments is that, whenever an accused is brought to trial for an offense 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.²¹

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 that it did so apply, though sustained by the courts,²² not being adopted by the Secretary of War. 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 referred to, the only reasonable interpretation that can be adopted is that the term "any offense" 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 offense. 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, 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,) need not be prosecuted till at the end of nearly seven years. Thus the 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 offense," i.e. is an offense 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 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 offense," 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 offense 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 offense, committed but once, being complete and consummate on the day on which the soldier quits the service with the *animus non revertendi*; the "continuing offense" thereafter committed being *not* the desertion but the simple minor offense of *absence without leave involved in it*,

and which of course continues till the deserter's apprehension or voluntary return.

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 offense as consummated and run from that date a certain term, say two years, in the cases of all offenses except desertion, and a somewhat longer term, say three years, in cases of desertion.

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, quite different in the two statutes which make up our military law of limitation; it being in the Article the date of "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. 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 law²³ is that no person shall be tried for an offense 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 offenses triable by the federal courts, is that the indictment shall be found within a certain number of years after the commission of the offense. 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 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, 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.”²⁴ 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.

As to the signification of the term “manifest impediment”—this, as held by the court in the case of Davison last cited, refers to such conditions as the being held as a prisoner of war in the hands of the enemy, or 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..” 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

offense 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; on the other hand it is estopped from claiming that because not informed on an offense it could not prosecute it.²⁵ 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."

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 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;²⁶ 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.

PLEADING AND PROCEDURE IN VIEW OF THE ARTICLE. As the statutory limitation is, according to the weight of authority, "matter of defense," 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 the operation of the statute. Though it may affirmatively appear from the specification, (in connection with the convening order,) the 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,²⁷) 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 prosecution to rebut it by evidence of such absence or other impediment as shall be sufficient to except the case from the operation of the limitation.

Inasmuch as the objection may also be taken advantage of under the general *issue*, 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.

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. The two Articles, 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, 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.

THE PLEA OF FORMER TRIAL FOR THE SAME OFFENSE.

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 offense.”*

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 same rules, 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 offense, was an ancient maxim of the common law, which derived it from a still earlier period. Whether or not recognizable, as has been supposed, in Magna Carta, it may certainly be traced in the precept of the Roman civil law—*non bis in idem*. Brought over to this country by our ancestors as one of their common law privileges, 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, as follows—*“nor shall any person be subject for the same offense 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 offenses in regard to which this right of defense would be asserted were felonies punishable capitally or by dismemberment. 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, and have held the phrase “put in jeopardy” to mean practically the same as *tried*,²⁸ thus giving to such provision substantially the effect of the declaration expressed in the military statute.

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.²⁹ 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.³⁰ 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.³¹ 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.³²

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 acquitted 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.³³ 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 offense or the person, the trial was a nullity, there was in law no trial, no jeopardy, and the plea cannot be sustained. Thus if, upon a plea of former trial, it appeared that the alleged “trial” was an investigation by a “court of inquiry,” 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 offense, or by a general court of an offense 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. And the test applied to the indictment in such cases is--whether the same was one upon which a valid judgement could have been pronounced, or a judgement or sentence not liable to be reversed on account of defects in such indictment. 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 offense intended to be but not alleged. 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 offense properly pleaded.

3. The proceedings of the former trial must have been without fatal

defect. To make tenable the plea under consideration, the proceedings of the former trial must have been “according to law;” or, as it is expressed by Bishop,³⁴ 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, or for any cause is reduced to less than five members at the finding,³⁵ or its proceedings are invalidated by other fatal defect, 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.³⁶ Thus a jury, in convicting, may find but a part of the matters put in issue in the indictment;³⁷ or may make a special finding omitting to include some essential element of the crime, as malice; or may find the defendant guilty of an offense wholly distinct in law and fact from that charged. 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 guilty of the charge;³⁸ or not guilty of the specific offense charged but guilty of another and distinct specific offense not included in it;³⁹ or not guilty of "conduct to the prejudice of good order and military discipline," but guilty of a specific offense;⁴⁰ 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 offense charged or any offense,⁴¹ 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; or where the trial has been broken off by reason of the death or disability of a juror or the judge, or of the defendant himself; or where by reason of an irreconcilable difference of opinion among the jurors the jury has been discharged-the defendant has not been legally “tried” and cannot plead *autrefois acquit* upon a separate trial for the same offense. So, at military law, neither a mere arraignment, nor an arrest followed by a discharge without trial, nor a service of charges withdrawn or dropped without prosecution, nor a withdrawal of the charges after arraignment or pending the trial, nor a discontinuance of the proceedings, by the order of the convening authority, for any cause before a finding, 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-will amount to an acquittal or a “trial” of the accused.

THE OFFENSE 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 offenses must be the same,” is substantially the form in which the proposition is usually expressed. Strictly, however, the more accurate statement would be, that, to sustain this plea, the offenses 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 OFFENSES. 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*, -“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 offenses 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." The identity need be substantial only: 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 offenses does not indicate that they are not the same, for the same offense may be expressed in different terms in two indictments or charges. In a case of doubt, the usual test of their identity is, the determination of the question whether the same evidence will support both.

INSTANCES OF OFFENSES HELD NOT IDENTICAL BUT DISTINCT. Where, by the application of this test, the offenses are ascertained to be not identical but distinct, a plea of former trial cannot of course be sustained. Offenses 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 offense, 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 consent and against the will of the owner. So, of the two offenses of the larceny of certain articles and of the receiving and concealing of the same articles; these offenses 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. So, the offenses 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. So, a conviction or acquittal of a simple assault and battery has been held to be no bar to a trial for the same assault with intent to commit a

felony. 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.

Further, two or more offenses, 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 defense to a trial for the same act committed against the other. 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, (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 offenses committed at the same time and in and by the same act, -the offense of mutiny, or joining in mutiny, may involve with it a violation of Art. 21; so, the offense of behaving with disrespect to a commanding officer may concur with that of a disobedience of his order; so, the offense of disobedience of orders, or of absence without leave, may concur with the offense of misbehavior before the enemy. Yet a trial for one of these concomitant offenses would not operate as a legal bar to a subsequent prosecution for the other.

Military and civil crimes involved in the same act. A further class of offenses, apparently identical but distinct in law, may here be noticed. These are the offenses which, though involved in the same act, are distinct in this, that, while one is an offense against the ordinary criminal law of a State or of the United States, the other is a breach of military discipline made exclusively

punishable by the Articles of war. Thus a soldier convicted by a general court-martial, under Art. 21 or 22, of an 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 offenses 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 offenses, or rather of the actual single offense, in a civil court, will be a complete bar to a prosecution of the same in a military court, and *vice versa*.

The subject of double amenability for and jurisdiction of military and civil offenses involved in the same acts has been considered in a previous Chapter.

OFFENSES OF WHICH THE ONE IS INCLUDED IN THE OTHER. The cases in which offenses 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 offense which is the subject of the pending trial is included within the offense which was the subject of the former trial, and is one so related to it in law that under an indictment for the major offense there may legally be a conviction of the minor.⁴²

Here a previous conviction or acquittal of the major offense 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 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 a conviction or acquittal of desertion may be pleaded in bar of a trial for the minor offense of the absence-without leave included in it. Nor can one tried for any specific military offense be subsequently tried for the disorder or neglect, to the prejudice of good order and military discipline, which may have been involved therein.⁴³

2. Cases where, under an indictment or charge for the major offense, the accused has actually and legally been convicted of the minor included offense, and is again brought to trial for the major offense.

In such cases the accused has been fully tried for the major offense and convicted of such part of it as he was found to have committed. Such conviction thus operates as a perfect bar. For, as it is expressed in an adjudged case—"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 order and military discipline" under a charge of "conduct unbecoming and officer and gentleman" or under a charge of any specific military offense, is a bar to a subsequent trial for the offense originally charged.

3. Cases, the reverse of those of the 1st class, where, after a trial for a minor offense which is included in a certain major offense, 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 offense is one of which there could be a legal conviction under an indictment or charge for the major. The principle of course is that, as the accused, upon the second trial for the major offense, is legally liable to be convicted of the minor included offense, he is by this trial again put in jeopardy for an offense for which he has already been once tried. 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; a conviction upon an indictment for larceny is similarly held to bar a trial upon a charge of robbery founded upon the same transaction; and a conviction of an assault is held to be a bar to a trial for the battery committed at the same time.⁴⁴

Courts-martial being governed in general by the rules of evidence applicable to criminal cases, 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 offense which the same disorder or neglect was claimed to have amounted to.

THE FORM OF THE PLEA, AND THE EVIDENCE TO SUSTAIN IT-Form of the Plea. “This plea,” to employee the description of Chitty, “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 offense 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-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.;⁴⁵ and that the offense for which he was so tried and acquitted, or convicted, is the same with the offense set forth in the charge to which the plea is made. Or if the offenses are not identical, an averment should be substituted to the effect that the offenses 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 offense, without any of the particulars above indicated, would, strictly, be insufficient, and the court would be justified in declining to entertain it without amendment. 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 bases 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 probably afford the accused reasonable time to amend and compete his plea.

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. 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.⁴⁶ 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 offense. 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.

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. The judge advocate, however, may admit the 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 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. 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 offense, evidence outside the record is admissible. Whether indeed the offenses 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 offenses.⁴⁷ 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.

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 offense, being for the sole benefit of the accused party, may be, expressly or impliedly, *waived* by him. The same principle has been recognized at military law. It was held by Attorney General Wirt, in 1818, that provision of the Articles of war, that “no person shall be tried a second time for the same offense,” 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 thus deemed to be waived.⁴⁸ 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. An accused, who had in fact been previously tried for the same offense, would also waive this right by intelligently pleading guilty or not guilty without interposing the special plea under consideration.

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. 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.⁴⁹ 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.⁵⁰

PLEA OF PARDON.

A pardon is an act of grace and mercy presupposing only the commission of an offense; 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,⁵¹ may legally pardon an offender even in advance of trial.⁵² 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, -we will here 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 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,⁵³ in the form of a proclamation or General Order, to deserters or absentees. Pardons, as it has repeatedly been remarked, may be conditional—based upon conditions precedent or subsequent and these amenities 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 effect till the performance of the condition: where the condition is subsequent, the failure to perform it nullifies the grant.⁵⁴

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 offense, and may be pleaded in bar of a trial subsequently ordered.⁵⁵ 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 offense, will operate as a constructive pardon of such offense, and constitute a valid bar to a trial therefor. 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 law⁵⁶ 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. Nor can the mere fact that charges once preferred have been dropped by a commander be pleaded bar as a constructive pardon of the same, upon their being subsequently revived and brought to trial in connection with charges for offenses since committed.

II. FORM AND PROOF OF PLEA.

FORM. The plea may be oral or in writing. Where the pardon is a 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 offense 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.⁵⁷ 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. In pleading an amnesty offered to deserters, the accused, -if the fact does not appear from the averments of the specification or is not admitted by the prosecution, -must show that his case is embraced within the terms of the offer,⁵⁸ (not being included in any excepted class, if exceptions are made,) 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.⁵⁹ 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 proffer 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.

The prosecution may take issue on the plea;-may reply that the pardon has been obtained by fraud; 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 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 guilty in law. 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 a plea of guilty or not guilty. 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*. Indeed, as it has been remarked by Atty. Gen. Cushing, 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 of the Plea to the Jurisdiction, 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, 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 consideration of justice demand it.⁶⁰

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 offense by his commanding officer, though recognized in the English practice, 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 offense, 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. 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, or that he was enlisted for three years when the law required that all enlistments should be for five, &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, 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.

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; or that owing to the long delay in bringing him to trial he is "unable to disprove the charge or defend himself;" or that he has not been furnished with a copy, or a correct copy, of the charges; or that his accuser is actuated by malice or is a person of bad character, -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.

So, as to all such objections as are properly matters of *defence* under the general issue, -for example, that the accused committed the offense 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 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.

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 offense 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 offense 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 offense of desertion, substituting, if necessary, words describing the offense actually admitted.⁶³ This form of qualifying and excepting, though not essential, since the court may always find the lesser offense if the evidence warrants it, is not infrequent in practice.

Inadmissible forms. An accused may plead guilty of the specification but not guilty of the charge, since such plea raises a legal issue, viz. whether the facts alleged in the specification do constitute the offense charged.⁶⁴ But the converse plea of not guilty of the specification but guilty of the charge, is wholly illegitimate. It neither confesses anything nor contests anything, but consists of two incompatible answers which nullify the issue, and cannot be admitted as pleas by the court. 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.⁶⁵ 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. A substantial defect, however, going to the sufficiency of the charge as a statement of a military offense, is not waived. Nor of course can any such radical defect as an illegality in the constitution of the court, or an absence of jurisdiction of the offense or the person, be done away with or lessened by this plea.⁶⁶

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.

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 offense which these details describe; in other words the particular offense which, it is alleged, the details constitute. 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. Even where every material averment in the charge is admitted to be true, and no defense to the same exists on the merits, 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 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. 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. Nor can such plea confer jurisdiction where not given by law.

RECEPTION OF THIS PLEA—WITHDRAWAL. This plea is one which military courts, in common with civil, should not too readily receive, 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: indeed the *court* will properly advise or suggest such substitution if the same appears to be in the interests of justice.

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. In such cases, while 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 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, and his view was adopted in Orders by the Secretary of War. It 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.

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—it was enjoined, by the General Commanding, upon courts-martial in capital cases, and especially cases of desertion, not to receive the plea of guilty, but, entering for the prisoner the plea of not guilty, to “determine the grade of the offense 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, “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 offense charged is discretionary, * * * and the specifications do not show all the circumstances attending the offense, to receive such testimony as the judge advocate may offer for the purpose of illustrating the actual degree of the offense, 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 offense. 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 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,⁶⁷ 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 regard to relevancy, &c. These views have been adopted and acted upon in repeated cases published in Department, &c., Orders,⁶⁸ 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.

With the plea of Not Guilty or Guilty begins the Trial proper,⁶⁹ which we now proceed to consider.

² See Tytler, 143; 5 Opins. At. Gen., 707.

² Chapter V, ante.

³ 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.

⁴ See 1 Bishop, C.P., § 761.

⁵ Nichols v. State, 2 Halst., 539. And see State v. Wishon, 15 Mo., 503; State v. Dayton, 3 Zab., 49.

⁶ 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; Se 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 uninformative 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 defenses.

⁷ In practice, it is commonly oral. See ante.

⁸ See State v. Maurier, 7 Iowa, 408.

⁹ Nichols v. State, 2 Halst. 539.

¹⁰ 1 C.P. , 758.

¹¹ See State v. Robinson, 9 Foster, 274; Thomasson v. State, 22 Ga., 499; Com. v. Chapman, 11 Cush., 422

¹² 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, 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 offense, whereby, without material advantage accruing to the prosecution, the defense 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.

¹³ Nothing is better settled that 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 justitiae. In an important and doubtful case I would not do it." Hornblower, C.J., in State v. Hageman, 1 Green, 323.

¹⁴ 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."

¹⁵ State v. Dayton, 3 Zab., 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.

¹⁶ 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.

¹⁷ As to the exercise of this power, see "Procedure on Special Plea, in general," post.

¹⁸ 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.

¹⁹ 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 defenses of the other accused are antagonistic to his own, or that the evidence as to them will in some manner prejudice his defense. 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.

²⁰ Statutes of limitation are "available as a defense," only "when they are at the proper time specially pleaded." Gormley v. Bunyan, 138 U.S., 623, 635.

²¹ 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.

²² In Davison's case, in 1880. (In re Davison, 4 Fed., 507,) Choate J. clearly and ably expressed 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 offense of desertion; 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 offense 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 offense, 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 offense. As it is the only article limiting the time of prosecutions the presumption is very strong that it extends to every military offense; 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.

²³ "Except in the case of the offense of mutiny, desertion or fraudulent, enlistment." Army Act, sec. 161.

²⁴ 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.

²⁵ 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 offense 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."

²⁶ 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.

²⁷ 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.

²⁸ U.S. v. Perez, 5 Wheaton, 579; U.S. v. Haskell, 4 Washington, 409, U.S. v. Gilbert, 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 offense." 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 offense." 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.]

²⁹ 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.

³⁰ And this is also the rule of the British military code. Army Act, sec. 157.

³¹ 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.

³² So it is quite immaterial whether an adequate or inadequate punishment may have ensued. DIGEST, 120.

³³ 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.

³⁴ 1 C.L. 1020. There must not have been what is known as a "mis-trial." See DIGEST, 119.

³⁵ 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 judgement, and remanded the cause for another trial." And see 1 Bishop, C.L. 1040.

³⁶ The accused must be *legitimo modo acquietatus*. Vaux's Case, 4 Coke, 45.

³⁷ "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.

³⁸ 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.

³⁹ See this finding similarly disapproved in G.O. 14, 27, Army of the Potomac, 1864; Do. 231, Fifth Mil Dist., 1869.

⁴⁰ See this finding similarly disapproved in G.C.M. O. 78, Dept. of the Mo., 1874; Do. 6, Dept. of the Gulf, 1876.

⁴¹ 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 offense. 1 Bishop, C.L. 1023; Com. v. Loud, 3 Met., 328.

⁴² "A former conviction is a bar to a trial for any offense of which the defendant might have been convicted under the indictment and proof in the first case." State v. Nunnally, 43 Ark., 68.

⁴³ 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 offense 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.

⁴⁴ 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.

⁴⁵ 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 append to the plea. As to the use of the same as evidence, see post.

⁴⁶ Com. v. Daley, 4 Gray, 209; Wharton, CV.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.

⁴⁷ 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 offenses, there can be no question of variance, and no evidence to assimilate the offenses will be admissible. Martha v. State, 26 Ala., 72.

⁴⁸ 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.

⁴⁹ "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.

⁵⁰ *State v. Barnes*, 32 Maine, 530; *Com. v. Olds*, 5 Litt., 140. The defense 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.

⁵¹ "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.

⁵² 1 Opins. At. Gen., 342; 6 Id., 20-1, 405; Id., 283-4; 11 Id., 227. "The power extends to every offense 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.

⁵³ 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.

⁵⁴ *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 offense. The breach of the condition would make the pardon void." 11 Opins. At. Gen., 229.

⁵⁵ 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.

⁵⁶ *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.

⁵⁷ See *U.S. v. Wilson*, 7 Peters, 161. It may be noted here that proof 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.

⁵⁸ 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.

⁵⁹ *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.

⁶⁰ 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 well 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.

⁶¹ See De Hart, 145; Benet, 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 offense committed, or ground for a special plea.

⁶³ 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.

⁶⁴ This plea may sometimes be made by a soldier though 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."

⁶⁵ 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.

⁶⁶ 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 offense 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.

⁶⁷ 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 testimony 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."

⁶⁸ 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 Benet, 95.

⁶⁹ 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.

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 defense; III. The general course of proceeding; IV. The Defense; 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, 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, it is represented as a purpose of the Article, "to guard against 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. As a rule of procedure on the trial, however, the injunction is invariable.¹ 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 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,² are necessarily irregular, and the members of the court are amenable to justice for a disregard of the statutory direction:³ their proceedings and sentences also are liable to be formally disapproved by the reviewing officer, if the objection is deemed sufficiently material. 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. 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. 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.⁴

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. 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. 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.

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,⁵ (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.⁶

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.

II. THE OPENING OF THE PROSECUTION OR DEFENSE.

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 the part of the accused, where the defense promises to be an elaborate one, involving the examination of numerous witnesses or an extended discussion of points of law.⁷

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 courtroom 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 courtroom, 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 with 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 states of the trial, so that any witness or witnesses yet to testify, who may be discovered to have come into the courtroom, 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—

be amenable to 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 bases for 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.⁸

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. The prosecution having closed its examination in chief, the accused then produces similarly the proofs on his side and similarly resets 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 uplifted hand, qualify by taking in open court⁹ 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,¹⁰ 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,¹¹ or 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.

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 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;¹² but it may permit a case once closed on the part of the prosecution or defense, or on both sides, to be reopened for the introduction of testimony previously omitted or discovered since the closing.¹³ 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.¹⁴

Examination by the court. While it is no part of the province of the court to conduct either the prosecution or the defense, it is open to any member to put questions to the witness 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. 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, i.e. take 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.¹⁵

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 period of deliberation after it has been cleared. 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 defense.

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.¹⁶

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*.¹⁷ The court itself cannot refuse to hear witnesses proposed to be offered by either party, provided they are competent and their testimony is material¹⁸ and not unreasonable cumulative;¹⁹ 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 accused, by

escaping from legal custody, after pleading not guilty, and 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.

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: 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,²⁰ may be taken by either party to proposed oral testimony-questions or answers-in the course of the examination of the witnesses, as also the admission of written evidence. Objections may also be raised by members of the court; but, as remarked in a General Order, 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.²¹

All objections should be specific;²² 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,²³ 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 courtroom 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. In the French *conseils de guerre*, the members when desiring to deliberate,²⁴ 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, “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, “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 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, the objection is not sustained, and, on the court being reopened, 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 DEFENSE.

IN GENERAL. It is a principle to be scrupulously observed on a military trial that the accused, whatever his rank, 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 defense. As heretofore indicated, 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, 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 defense. On the trial he should be deprived of no material testimony, reasonably obtainable either by subpoena, order or deposition, whether required to present his original defense, to rebut or reply to the testimony of the prosecution to impeach its witnesses, to exhibit matters of extenuation, 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 defense, in his own way, without restriction by the court.²⁵ Subject to a reasonable limitation as to evidence of character and evidence purely cumulative, the court should hear his entire material

testimony, aiding him where necessary in bringing it fully out, and should protect him from testimony which is legally inadmissible. 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 defense, while of general application, is especially to be regarded in a case where he is an enlisted man without counsel.

SPECIFIC DEFENSES—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 defense. Defenses 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 defense of the former class will consist in exhibiting some state of facts inconsistent with guilt,-as that the occurrences set forth in the specification 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. Defenses of this class vary with the provisions of the Articles under which the charges are laid and with the circumstances of each case, and, except to notice briefly the defense of alibi, need not be considered.

Alibi. This defense, 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. "A perfect alibi must cover the whole time when the presence of the prisoner was required" for the consummation of the offence. 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. This defense 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*.

2. The defenses 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.

IGNORANCE OF FACT. It is generally laid down that ignorance of fact excuses crime. But this must be an honest or innocent ignorance, and not an ignorance which is the result of carelessness or fault.²⁶ The theory 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 defense 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 breach, 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,”²⁷ 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.” 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 defense.

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 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. 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, among other things, he swears that he will observe and obey military orders “according to the rules and articles of war.”²⁸ 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 defense, 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, 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 defense, certainly as a palliation of his misconduct. In several cases published in General Orders, such an omission has induced the court to impose a light sentence or the reviewing authority to mitigate the punishment adjudged.

DRUNKENNESS. The common law, though it does not indict for mere drunkenness, views it as a wrongful act.²⁹ As observes Bishop, “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.³⁰

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. 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 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) degree.³¹ 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 defense.

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. 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 be treated as constituting a legal defense 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 fact³²-the accused may be convicted of an offence under Art. 62, thus incurring some adequate punishment.

It is to be noted that drunkenness, to be admitted in evidence, or to constitute a defense, 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.

The effect, as a defense 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,³³) 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 defense in a criminal case rests of course upon the accused.³⁴ To constitute a defense 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;³⁵ 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.

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,³⁶ or of a monomania.³⁷ A partial insanity is no defense where it relates to persons or things not connected with the crime charged.

Insanity 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.³⁸ 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.³⁹

Insanity of whatever sort must, to constitute a defense, be absolute. No mere caprice or eccentricity, however arbitrary or extravagant, can be accepted as an excuse for crime.

Insanity may be a defense 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.⁴⁰

In military cases, insanity is not a common *defense*, 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 defense is actually set up, it should be duly entertained and allowed to be supported by evidence, however improbably it may apparently be.⁴¹ Where insanity or mental incapacity has been shown or indicated on the defense, 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; in other cases it has found the accused “guilty without criminality” on the expressed ground of his mental condition”⁴² the preferable form is simply to *acquit* on this ground.

If at the arraignment, or pending the trial, the accused, though not alleging it as a defense, manifests insanity or imbecility, the court should suspend proceedings and investigate his condition, reporting the result to the commander; 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 written⁴³--of a military superior, is, in general, a good defense at military law.

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.

Further the order, to constitute a defense, must be a legal one. 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. It is “the lawful orders of the superiors appointed over them” that “all inferiors” are, by par. 1 of the Army 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.⁴⁴ 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 manifestly beyond the legal power or discretion of the commander as to admit of no rational doubt of their unlawfulness.⁴⁵ 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,⁴⁶ 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. Except in such instances of palpable illegality, which must be of rare occurrence, the inferior should presume that the order was lawful and authorized⁴⁷ and obey it accordingly, and in obeying it he can scarcely fail to be held justified by a military court.⁴⁸

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 defense 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 defense, 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 defense 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. 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. It is to be added that even where the compulsion has originally so overpowered the will of the part as to constitute a legal justification, he may yet forfeit his right to have it allowed as defense, by voluntarily remaining and acting with the enemy, &c., notwithstanding opportunity of escape has been offered.⁴⁹

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 defense that his alleged act was justified by the requirements of military discipline. This defense, however, should not be accepted as sufficient by a courts-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.

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 immediate arrest ordered, would have put an end to the insubordination. 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. 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.⁵⁰ Otherwise the defense should not be accepted as sufficient. And in time of peace the superior should be held to a stricter responsibility than in war. The law on this subject has been abundantly illustrated not only in military cases but in a series of civil prosecutions.

V. THE CONCLUDING STATEMENT.

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, the order indicated is that now invariably observed in the practice of our courts-martial, whatever be the nature of the defense, if any, which may have been made.⁵¹ 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, 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. 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.⁵² But within these limitations the court will rarely be 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 nonobservance of which indeed could give no additional force to the address.⁵³

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.⁵⁴ In an extreme case the court may properly report the facts to the reviewing authority for the preferring of charges or other action.⁵⁵ The use of “menacing words,” in the sense 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.⁵⁶

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 defense, and cannot legally be acted upon as evidence either by the court or reviewing authority. Nor can it be a vehicle of evidence, or properly embrace documents or other writings, or even averments of material facts, 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, (accorded by the Act of March 16, 1878,) of testifying in his own behalf, and so become evidence. Such an impression is erroneous; 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. 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.

While the statement proper cannot be regarded as evidence, yet where, - as it is expressed in the Digest - 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—is inherent in all superior courts of record, independently of legislation. But it “does not arise from the mere exercise of judicial functions,” and so is not commonly possessed by inferior courts unless the same are courts of record, or are specially empowered to exercise this authority by express statute. Courts-martial, not being courts of record, 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 judgements, 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.

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 proximity 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.⁵⁷ Thus, such

acts as a refusal or neglect by a witness to appear⁵⁸ 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. 86.⁵⁹

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. 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, 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. 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 at 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.⁶⁰ 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 on inquiry in express terms, cannot properly be held to convey the same by implication.⁶¹

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 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, and such was the action taken by the court in a more recent case, promulgated in General Orders, 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.⁶² In the majority of the cases in our service this course has in fact been pursued.⁶³ Except, 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, and indeed in general the duty of the court,⁶⁴ 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,⁶⁵ 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. In the civil practice generally the punishment for direct contempts is 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 person;⁶⁶ it being evidently deemed to be on 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.⁶⁷ The court, however, would not be precluded from substituting, or adding, some other military punishment, not inappropriate to the occasion nor excessive in quality or quantity.⁶⁸ The extent and character of the penalty will depend mainly upon the particular circumstances which exhibit the offence as aggravated or the reverse,⁶⁹ and upon the intent of the party. 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 either with the regular course of the trial or with the presentation of his defense to the same.

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 cases⁷⁰—would be quite 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.⁷¹ 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,⁷² 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 and, furnishes the court with a guard, or performs any other ministerial function in aid of its proceedings.⁷³

“Any person.” This designation includes certainly any military person who may be before the court, whether in an official capacity or otherwise. It thus embraces the judge advocate⁷⁴ or the accused, a military witness, prosecutor, counsel, clerk, or guard, or any officer or soldier who may be present as a spectator. The rank of the person is immaterial.⁷⁵ 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.

Inclusion of civilians. Whether the term “any person” includes also civilians, is a question upon which the authorities have differed.⁷⁶ In the opinion of the author, a court-martial, while empowered of course to cause a disorderly civilian to be ejected from the courtroom, 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.⁷⁷ The enforcing of the Article in the instance of a 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, “to remove disorderly persons from the courtroom 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 thought 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 proceeded 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:-"The proceedings of this court having been submitted 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.

"Who uses any menacing words, signs, or gestures, in is 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.⁷⁸ 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,⁷⁹ 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;⁸⁰ and words of this nature may either be spoken, or presented in a writing, as, for instance, in the closing address or argument. 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. As to the case of a witness, while the ordinary bullying practiced 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 courtroom, or in its sight or hearing, and also while it is in session. Menacing 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.⁸¹

"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 behavior; 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 Article are—assaults committed upon members, or upon persons connected with the court or properly before it;⁸² altercations between counsel⁸³ or spectators;⁸⁴ drunken⁸⁵ or indecent⁸⁶ conduct; loud and continued conversation;⁸⁷ any noise or confusion which prevents the court from hearing the testimony, &c.,⁸⁸ any shouting cheering, or other expression of applause or disapprobation, especially if repeated after being checked;⁸⁹ 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.

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 existing law,

do so with entire impunity.⁹⁰ 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 will not affect the offence. “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.” Where, however, the court is satisfied that the contempt was quite unintentional, it will certainly impose a less penalty, or it may, in its discretion, refrain from proceeding to punish at all.

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 courtroom itself. Under Sec. 725, Rev. Sts., which authorizes the infliction by U.S. courts of summary punishment for contempts when committed “in the presence of the court or so near that disorderly conduct at or near the entrance of the courtroom, 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; and a similar rule might properly be applied to like disturbances of military trials.

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.

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. Opportunity is properly given the offender to present anything he may have to offer in excuse or explanation of his language or behavior, 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 sometimes been done,) to have a charge and specification preferred or prepared. As there is no formal accusation, so there is no arraignment, plea, prosecution, or defense. As aptly observed by the court in a case already cited,—"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, not 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 judgement 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. But, as is observed by the court in a late case, “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 of his conduct; for this, as held in another case, 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. 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. The contempt, like any other military offence, is a crime against the United States; a fine imposed by way of punishment accrues to the United States; and, as to an imprisonment or other punishment, the same, when once duly adjudged according the 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.

¹ 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.)

² 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 3 p.m." But this course was not taken.

³ 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.

⁴ As to the presumption in favor of the regularity of judicial proceedings, see 1 Greenl. Ev. § 19.

⁵ 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.

⁶ 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."

⁷ 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 defense 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.

⁸ 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.

⁹ 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 illegal proceeding.

¹⁰ 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 1766 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.

¹¹ This was the form observed in the reported case of Regina v. Entrehman, 1 C. & M., 248.

¹² 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.

¹³ 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 defense 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.

¹⁴ 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.

¹⁵ 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;

Coppee, 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. Fremon'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.

¹⁶ 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.

¹⁷ See U.S. v. Corrie, 23 Law Rep., 145. As to the proceeding of *nolle prosequi*, or withdrawal of a charge, see Chapter XVI.

¹⁸ 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 judgement with unreasonable haste and thus prejudicing the interests of justice. And see G.C.M.O. 41, Div. of the Atlantic, 1886.

¹⁹ As to the authority of the court to limit the extent of testimony as to character, see next Chapter.

²⁰ 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.

²¹ 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; De Hart, 156.

²² 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.

²³ 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.

²⁴ Which, however, so far as perceived by the author, in attending personally their military trials, they rarely do except on the final judgment.

²⁵ 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.

²⁶ 1 Bishop, C.L. § 302, 313. Simmons, (§ 593,) in treating of this defense, 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 defense, must be such as could not have been guarded against by a reasonable prudence: if in an appreciable degree the result of heedlessness, the defense fails. Akin to this defense is that sometimes distinguished as the defense 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 misbehavior." And see post, Chapter XXV-Fifth-Eight Article. The first of these statements however must be taken with the qualification above specified.

²⁷ And on a consideration of "the dangerous extent to which the excuse of ignorance might otherwise be carried." 3 Greenl. Ev. § 20, note.

²⁸ 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."

²⁹ "It is a great offence in itself." *Beverly's Case*, 4 Coke, 123, b. And see G.O. 157, Dept. of Va. & No. Cas. 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."

³⁰ "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." *Pardons' Case*, 2 Lewin, 144. And see or the fraud of another, he is not responsible." *Parson's 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 Green. Ev. § 6; *People v. Robinson*, 2 Park., 236.

³¹ *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 Part., 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 Hump., 136; *People v. Belencia*, 21 Cal., 544; *People v. Williams*, 43 Id., 344; 3Greenl. Ev. § 6, 148; 1Bishop, C.L. § 401, 409.

To constitute, however, a defense, 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 defense to the charge of an attempt to commit it. 1 Bishop, C.L. § 413.

³² 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.

³³ 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.

³⁴ 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.

³⁵ 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.

³⁶ "Where the delusion of the part 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.

³⁷ 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. & Stille 185.

³⁸ "It is all one whether the frenzy 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.

³⁹ State v. Spencer, 1 Zab., 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.

⁴⁰ 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 unskillfulness of his physician, or by the contrivance of his enemies, eat or drink such a thing as causeth such a temporary or permanent frenzy as *aconitum* or *nux vomica*, this puts him into the same condition in reference to crimes as any other frenzy and equally excuseth him."

⁴¹ In a peculiar case in G.O. 29, Div. of the Atlantic, 1874, in which the court assumed to refuse to entertain this defense 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 defense "unknown to the administration of justice," as well as at variance with the oath of the members to "determine according to evidence."

⁴² G.O. 13, Nothern 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.

⁴³ 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.

⁴⁴ 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.

⁴⁵ 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., 20a; Despan v. Olney, 1 Curtis, 306; Riggs v. State, 3 Cold., 85. And compare Chapter XXV-TWENTY-FIRST ARTICLE.

⁴⁶ 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.

⁴⁷ 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 the disobedience of orders."

⁴⁸ 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.

⁴⁹ "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 defense to show an actual force, and that he quitted the service as soon as he could." McGrowther's Case, ante. "Those that supplied with the victuals Sir John Oldcastle and his accomplices then in rebellion that supplied with victuals Sir John Oldcastle and his accomplices then in rebellion were acquitted by the judgement 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.

⁵⁰ 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.

⁵¹ DIGEST, 711. Either party, or both parties, may waive the right to make a statement. *Id.*, 458.

⁵² 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. of 1826; Do. 64 of 1827; Do. 16 of 1851; Do. 2 of 1856; Do. 3, Army of the Potomack, 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.

⁵³ As remarked in *Bombay R.*, 16, an indulgence in personalities not only weakens a defense, but has the effect of disposing the pardoning power against lenity toward the accused.

⁵⁴ *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 actions 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.

⁵⁵ 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.

⁵⁶ 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.

⁵⁷ 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.

⁵⁸ 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.

⁵⁹ A larger power is given to naval courts-martial by Art. 42 of the Articles for the Government of the Navy.

⁶⁰ 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.

⁶¹ "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.

⁶² *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; *Griffiths*, 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 Pat. 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.

⁶³ 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.

⁶⁴ 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."

⁶⁵ 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.

⁶⁶ 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 judgement 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 courtroom 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.

⁶⁷ 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."

⁶⁸ 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 resorts 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.

⁶⁹ 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 defense, was, for repeated improper language used in his argument, fined successively 20 pounds, 40 pounds, and again 40 pounds;) 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."

⁷⁰ 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 US. 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."

⁷¹ 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.

⁷² It would appear that the 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.

⁷³ Where courts-martial are attended by provost-marshals, these officials might be sufficient for the execution of some minor punishments under Art. 86.

⁷⁴ 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.

⁷⁵ 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.

⁷⁶ Samuel held the negative; McNaghten and Hough the affirmative. De Hart, 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. Benet expresses a contrary view.

⁷⁷ 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."

⁷⁸ "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 imparts a menace. See *Ex parte Robinson*, 19 Wallace, 511; *In re Cooper*, 32 Vt., 256; Hough, 455.

⁷⁹ 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 courtroom 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.

⁸⁰ 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."

⁸¹ 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.

⁸² "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 courtroom, the accused, for attempting to impeach his testimony. He was not proceeded against under Art. 86, but tried for murder.

⁸³ 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.

⁸⁴ 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 curiae*, consisting in a fight between two individuals just outside of the courtroom.

⁸⁵ 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.

⁸⁶ 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.

⁸⁷ 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."

⁸⁸ 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.

⁸⁹ 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 defense, 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 fined £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.

⁹⁰ 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 Article 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.

CHAPTER XVIII

EVIDENCE

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. Thus, indeed, it is laid down and repeated by the 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 proceeding is summary and vigorous action, and moreover, court-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 the true courts of the United States; 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 tribunals. 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.

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 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*² so called, or the fact that the alleged criminal act was committed – by some one, 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. In the cases of some military offences, as desertion, 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.

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. And if the wrongful intent is present, the wrongful act committed is a completed crime, though it may not be the precise act had in view. Where the intent is shared 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.

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. In cases of the former 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. “When” – as observed by a U.S. Court – “the proof shows that an unlawful act was done, the law presumes the intent, and proof of the act being a violation of the law is proof of the intent.”

Facts negating intent. Under the head of the DEFENSE 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 the 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 offence, 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, “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 merciful inclination to permit the defendant 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.” A court-martial which 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. The rule is equally applicable to military as to the civil prosecutions.

III. WHAT IS TO BE PRESUMED

Presumption in General—Kinds of Presumption. It is observed by Bishop that the whole law of evidence rest upon presumptions, and it has been said, by a distinguished English judge, 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*.

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.” *Conclusive* presumptions are inferences of the law in regard to which, as it is expressed by Greenleaf, “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.” So, according to the earlier authorities, an infant under seven years is “conclusively presumed incapable” of committing a felony. There is also the conclusive presumption, in favor of judicial proceedings, that the records of the courts of justice have been correctly made up. Among *disputable* presumptions, (where the inference, though more or less strong, is not absolute but may be overcome by outer evidence,) are – the presumption in favor of the innocence of every person accused of crime; 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; the presumption of ownership arising from the open possession of property; the presumption as to public officers, that they are legally in office, and that they properly perform their official duties – presumptions especially applicable to the military service.

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.”

Inculpatory and exculpatory presumptions. Of this class are the “inculpatory” presumptions, derived from collateral circumstances and declarations indicating a motive for crime, from preparation 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.) as well as from 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.

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 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.

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 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, the geographical features of the Country; and so of the ordinary meaning of words in our language, &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. 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.

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 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 objection, will, in general, properly not be admitted by the court.³ The testimony, to be admissible, need not indeed *directly* or *immediately* sustain the charge, provided it merely constitutes a link in the chain of proof; 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 subsequent introduced.

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. 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.⁴ 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*.

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. 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. So of the allegations of time, place, quantity, quality, and value – the rule as to relevancy does not require strict proof; 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, 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 *defense*. Whether testimony on the part of the accused is or not relevant must be determined by the nature of the defense in each case. In a military case, not only is such testimony relevant as goes to the gist of the particular defense, but also such as may establish good character or avail to extenuate the punishment in case of conviction.

Where irrelevant or immaterial testimony has been admitted in a case, but such testimony was manifestly such as could not have affected the finding or impaired the rights of the accused, the same should not be regarded as sufficient to induce a disapproval of finding or sentence.

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.” 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 criminal neglect, 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 defense. Asserting this defense, 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 defense as to involve the main issue in a reasonable doubt, the prosecution must dispel this doubt by further evidence, in order to obtain a conviction.

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*. 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 exist 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 a substitute, the substitutional evidence is incompetent and not to be admitted if objected to.

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 evidence may be objected to and, upon objection, will properly be excluded. 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. 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."

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 such witness, the written statement should not be received.

Exceptions. To the general rule, however, there are certain exceptions, 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 and inadmissible. A further exception has been admitted where the charge is to be proved out of voluminous 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, and schedules prepared and verified by him may also be admitted.

Lost or destroyed writing. An occasion for the substitution of secondary evidence is also presented where a material writing has been lost or destroyed. 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 unsuccessfully made for it in the place where it was most likely to be found, if the nature of the case admits of such proof. 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, or he may be allowed to be sworn to the fact in court. 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.

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*. 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 used in evidence. The notice should generally be in writing, and should clearly describe the paper or document called for, so that it cannot be mistaken. It should ordinarily be served, if practicable, before the trial, so that there may be ample opportunity for complying with it: 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.

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.”

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.

II. HEARSAY.

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, “is used with reference to that which is written as well as 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, “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.

HEARSAY DISTINGUISHED FROM ORIGINAL TESTIMONY. It is to be noticed that the statements of a third person are not always hearsay, 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 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.

RES GESTAE. 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 gestae,” as the legal phrase is. By the res gestae 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. Such are threats or 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 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 gestae 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, 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. 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 – 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; though it is not necessary that he should himself state that he speaks under the impression, provided the fact is otherwise shown. 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. 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. But it is no objection to their admissibility that they were brought out in answer to leading questions, or upon urgent solicitations addressed to him by any person or persons; and if, instead of speaking, he answered the questions by intelligible signs, these signs may equally be testified to. 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 consist in a statement of opinion instead of fact, it cannot be received. Nor can it be received unless complete in itself; as where the declaration is left incomplete and uncertain because interrupted by death. If it was put in writing at the time, the writing should be produced. Dying declarations are admissible as well in favor of the accused as against him.

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.

III. CONFESSION.

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. But of course the evidence of such acquiescence must be very clear and positive to assign to it the efficacy of a confession.

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.

In the second 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.⁵ 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. So, the judge advocate may prefer not to discover a certain portion of the confession, on the ground that it is erroneous and unsatisfactory; but this also is not sufficient reason, since he is at liberty to contradict such portion by other evidence. He must, therefore, (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*; and the *onus* to show that it was such is upon the prosecution offering it. 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 other confessing.⁶ And the reason of the rule is that where the confession is not thus voluntary, there is always ground to believe that it may not be true. 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.

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” and not such as to induce a substantial hope of favor or fear of punishment. 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 the means of making him partially intoxicated, or by practicing upon him some deception by which he is entrapped into confessing.

In *military cases*, in view of 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, 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 voluntarily and therefore improperly admitted. 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.

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. 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.

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.

CONFESSIONS TO BE RECEIVED WITH CAUTION. In view of the peculiar conditions of mind and body under which accused persons 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.

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. 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, and records of advisory boards and courts of inquiry. Such papers are esteemed of so *privileged* a character that heads of departments or others in whose legal custody they are, cannot in general be required to furnish the same, (or copies,) to be produced in court, 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. 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*.

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.

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 day declarations and statements, verbal or written, made to a legal advisor. 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. 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.

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. The rule under consideration is laid down by the authorities with reference of course to *civilian* legal advisors. 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 defense.

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. Further, it has not been attached by the common law to communications made either to *clergymen* or *physicians*. 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 State 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 the Witnesses; II. The Competency of Witnesses; III.

The Examination of Witnesses; IV. Testimony of Depositions; 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 subpoena or attachment, to compel the 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 the witnesses before a courts-martial, including the service and return of the summons, as also of the issuing, service and return or process of attachment, belongs properly to the subject of the authority and province of the Judge Advocate, and has accordingly been ordered 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*. 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 resorted to, to see if they are 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, 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 incompetent to be sworn in the usual manner. To render a witness competent, “it is enough,” says Greenleaf, “if he has the religious sense of accountability to the Omniscent 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 Deity; 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, 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. If indeed he “objects to take an oath, or is objected to as incompetent to take an oath,” 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 momentary instruction at the time of the trial is not sufficient. 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 any degree to a witness, may in general be avoided by his making an *affirmation in lieu of an oath* – as all witnesses are authorized to do by our law.

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. 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. 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. 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.

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 – “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.

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.

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. 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.

Intoxication should in general render a person only temporarily incompetent as a witness. "Witnesses put aside when drunk may be examined when sober."

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. The rule excludes as communications, whether oral or in writing. And the application of the principle extends "to all cases in which the interests of the other party are involved." 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.

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*."

Thus, in a military case, a wife would in general properly be held competent to testify against her husband when charged with a violation of the 61st or 62^d Article of war in maltreating her under circumstances rendering his act a military offence.

ACCUSED PERSON 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,⁷ 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, and becomes subject to cross-examination like any other witness. 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; nor, as it has been repeatedly held, 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 naturally and properly enough be exposed to a more searching cross-examination.⁸

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 jurors,” it was said, “can only remain unaffected from this circumstance by excluding all reference to it.”

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 been 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.

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.

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. 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 a previous Chapter, a resort to a *member* as a witness on the merits is especially to be avoided.

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.

1. 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 defense is opened and displayed. It embraces also, however, the examination of witnesses offered in *rebuttal* or direct testimony from the other side, - as where witnesses are introduced to meet new matter brought out in the defense, 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:

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.

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 it enables or assists him to testify as of his own memory or knowledge. If, instead of serving as a refresher or memory, it is relied upon to supply facts not otherwise known to the witness, it is of course not a legitimate means of reference. 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.

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 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.⁹

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 an *opinion*, but of a fact so far within the personal knowledge of the witness as to render it admissible in evidence.

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.

Opinions of experts. The second class is the familiar one of cases 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*. Thus, military officers may give evidence as experts upon issues requiring, for their proper solution, technical military knowledge; 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; 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 evidence, upon a statement of similar facts presented hypothetically by the examining party or counsel.¹⁰ 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.

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 belief." 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; 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 preparatory 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.

LEADING QUESTIONS ARE NOT TO BE ASKED. It is a further general rule governing the *direct* as distinguished from the *cross* examination, 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. 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 suggest to the witness the answer desired;” 2. Those “which, embodying at 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.” 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.

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.

2d. A further exception 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 mention or suggest the particular matter in regard to which an answer is desired. 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.” 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.

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 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.

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 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 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.

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 - 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 allowed in the cross-examination than in the direct;¹¹ leading questions, for example, being freely permitted; 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.

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, and commonly observed in the military practice, of restricting in general the cross-examination to the subject and scope of the direct examination. Such rule tends to simplify and 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."¹² This rule indeed may be allowed to be departed from in the discretion of the court; and it is to be understood that it has reference mainly to facts pertaining to the issue and material to the prosecution or defense, 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, 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. 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. 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. 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 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, and hence the desirableness nor exhausting a witness as far as possible on the original examination.

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 defense, 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, 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.

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.

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 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, that a witness – whether the accused on the stand, or other witness – may refuse and cannot be required to answer a question the answer to which may tend to criminate him; or, as it is expressed by Greenleaf, “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, 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, and 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. Where indeed he positively refuses to answer, such refusal is conclusive and the question cannot be put. In Burr’s Trial 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.

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.

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; or prosecution for the same has been barred by the statute of limitations. Nor can it be claimed on the cross examination where the witness has voluntarily testified without objection as to the subject of the question on the examination-in-chief.

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.

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; nor can it be asserted though the answer, (while not criminating,) will tend directly to degrade or disgrace the witness, unless indeed the question relate to some matter wholly collateral and irrelevant to the issue. If indeed the question, (having the tendency to disgrace the witness,) refer to a fact which can be properly 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*. 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.

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 (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 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 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. This rule has been recognized in military cases.

Where the previous statement of the 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.

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.

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. 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; for, as it is well settled, evidence of particular deceits, falsehoods, false conduct, &c., of the witness is wholly inadmissible. The impeaching witnesses are not called to communicate their personal knowledge in regard to his speaking or not speaking the truth, or their own estimate or opinion of him as a veracious person or the reverse, or knowledge of his general personal character, but his reputation or character *for truth* among his acquaintance or those conversant with him. And this – what his reputation is – they must know of their own knowledge; it is not sufficient for them to state what they have heard others say as to such reputation. 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.

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, and, if he answers in the

affirmative, to ask him further to state what that reputation is. 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 be encouraged by the weight of authority in this country, 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.

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.¹³ 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.

7. TESTIMONY AS TO GOOD CHARACTER.

ADMISSIBILITY OF IN DEFENSE, 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, may be introduced by the accused as part of his defense, 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, or as sustaining the original presumption of innocence, 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, - it is in general admitted if it be 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 defense in a case of larceny, though it might be entirely apposite under an indictment for violent homicide.

Evidence as to character is sometimes referred to as especially significant in *doubtful* cases; but, where otherwise admissible, neither the nature of the offence nor of the proof on the merits can properly affect its competency. It will possess little or no weight, however, when the guilt of the accused is plainly shown by the testimony. Where offered, it must be evidence of *general* character or reputation: particular acts of good conduct are not admissible.

This testimony is admitted, subject, like any other, to cross-examination. 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.

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 - "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 defense, 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.”

In military cases. At military law, evidence of character, which is always admissible, it is comparatively seldom offered strictly or exclusively in defense; 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 may also be 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.

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. 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.

“Residing beyond the limits of the State,” &c. The Article, in providing for the admission of depositions taken under certain specified conditions, must be regarded as excluding them where these conditions do not exist. Thus depositions of persons residing *within* the limits indicated are not admissible, and cannot be read in evidence, *though the parties may consent*. On the other hand, the Article authorizes the admission of the 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, 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 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 be 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 as inadmissible. A deposition taken without notice is indeed no more than an *ex parte* affidavit; and affidavits, or statements of persons not subjected to cross-examination, are of course, as already observed, entirely incompetent as evidence before courts-martial.

The objection, however, to a notice as *not reasonable* would properly come from the adverse party rather than from the court. 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, or 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. 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.

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.

“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 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.

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, unless possibly the court may require the same for its information or the elucidation of the case.

“In cases not capital.” Defining “capital” as *punishable capitally*, 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.

PROCEDURE. In the absence in the military law of any provisions, (such as those in the statutes of the United States and of the several States,) 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, 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 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 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, the parties – the accused and judge advocate – enter into and subscribe a written STIPULATION, 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. 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 subpoena or subpoenas for the witness or witnesses, according to the regulation on the subject prescribed in General Orders.

Where the Interrogatories have been forwarded to the witness directly, he will proceed to make in writing under oath 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.

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.

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*. 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 subpoena, 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,” (authorized by Army Regulations, Art. LXXVI,) as if he had attended personally before the court.

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. 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. It is held, however, that the corroboration must certainly extend to the *identity*, (where that is in question,) of the person of the accused.

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.

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 applied, 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 be 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.

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, "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. Discrepancies as to minor matters rather tend to sustain the credit of witnesses, as indicating the absence of concert. 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. So, the positive testimony of a witness as to particular fact in a case, which was certainly within his knowledge, should not be regarded as necessarily discredited by his failure to recall other facts in the case or by his contradictory or confused statements in regard to the same.

AFFIRMATIVE AND NEGATIVE TESTIMONY. As remarked by the U.S. Supreme Court in an adjudged case:¹⁴ - "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 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 willfully 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.” Such testimony will always be fair material for a rigid cross-examination, and, 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.” How successfully he may endure this test is a circumstance which will be most material in measuring his credibility;

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.

NUMBER OF WITNESSES. The relative number of witnesses for the prosecution and the defense, 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.

MANNER OF THE WITNESS. That the manner of the witness on the stand – his appearance, demeanor, style of expressing himself, &c., – is proper to be considered in connection with his testimony as adding to or detracting from his credibility and relative weight, is a point frequently noticed by the authorities. 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.¹⁵

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.¹⁶

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; 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 of his acquittal or conviction by a civil tribunal having concurrent jurisdiction of the crime; 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. Judgements and judicial proceedings of State courts of general jurisdiction are proved by copies attested by the clerks and certified by the judge, as prescribed in Sec 905, Rev. Sts. 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."

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 forming 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.

1. Legislative acts and acts of State. The public Statutes – Acts and Resolutions – 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, with a very few designated exceptions. If enacted since December 1, 1873, public statutes are proved, either by the single volume designated as the “Supplement to the Revised Statutes,” 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 according 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.

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.

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

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. 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, 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. 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.

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.

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; 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, authenticated under the seals of such Departments, respectively, shall be admitted in evidence equally with the originals thereof.”

As to the *form* of the authentication prescribed by the statute – this, as it is held by the authorities, must be “strictly pursued.” 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. 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 be 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 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. The procedure where such an original is in the possession of the adverse party has already been indicated in this Chapter.

An original paper on file in an executive department or office is proved by the person in whose custody it is, appearing as 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. Such a document is the Army Register, and it has been held by the Supreme Court 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 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 to the issue, the court itself must judicially expound them and not accept the construction of executive officials.

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.

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 "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, books, official reports, communications and papers, kept on file at the 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 trial.

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. 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.

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, - evidence which is 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 that it was received by him or even mailed to his proper station. 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*.

So, an official certificate is evidence only of facts therein stated which the officer was *authorized* to certify. 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.

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, considerations of public policy or justice render it inexpedient that their contents should be made public. 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. 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. 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 preference 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 in 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 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.

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,¹⁷ received, written, published, &c. 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. 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.

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. 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.

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 having been formally witnessed, or the witness being dead or not attainable, the same is properly established either – (1) by the testimony of witnesses having personal knowledge of the handwriting; or (2) by a comparison of writings, made – in a military case – by the court.

1. By witnesses having knowledge. Such knowledge, it is held, must have been acquired in one of two ways. The witness must (1) either have seen the individual write, - 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; 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.

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 the court in an English case, “ought to be the resemblance, not to the formation of the letters in some other specimen or specimens, but the general 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.” 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. 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. The expert, - who need have had no previous knowledge of the person’s handwriting, - may express his opinion upon such points as whether the signature is genuine or simulated, whether the writing of the paper is in a real or feigned hand, whether the signature and the body of the paper were written by the same person, whether the whole of the paper was written by the same individual and at the same time, whether a date or amount has been altered by the substitution of one figure for another, &c.; and he may state in full his reasons for his conclusion.

It appears, however, to be 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.” It is after all only *opinion*, and as such to be received with caution. 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, 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 signature of the person whose handwriting is in question. Similar statutes have been enacted in a considerable number of our States; as in New York, Rhode Island, Maryland, Kentucky, Tennessee, Georgia, Iowa, California, Oregon, Nebraska, Montana. And the law – in the absence of any statutory provision – has been similarly held by the courts in sundry of the other States; – as in Massachusetts, Maine, New Hampshire, Vermont, Connecticut, Ohio, Pennsylvania, Indiana, South Carolina, Mississippi, Minnesota, Kansas, and in Utah.

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, and favored in other of the federal courts. In the leading military case of Cadet Whittaker, 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, 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.” This opinion having been concurred in by the President, the proceedings and sentence were disapproved accordingly, on the ground of this

objection alone, and one of the most extended and laborious investigations 566 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 defense.

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.

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” action, when the course pursued will apparently work no injustice while conducing to a more complete investigation of the truth.

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.

¹ Tytler, 352; Kennedy, xiii; Prendergast, 208; Maltby, 1; Macomb, 80.

² 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.

³ 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 follow:- “The court, on the application of the defense, 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 defense 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.”

⁴ The collateral offence must form “a link in the chain of circumstances or proof relied upon for conviction.”

⁵ “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.

⁶ “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.”

⁷ 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.”

⁸ 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.

⁹ 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 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; D.O. 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.

¹⁰ 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 regards 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 also be 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 state 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 stated in the question. Bomgardner v. Andrews, 55 Iowa, 638.

¹¹ 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.

¹² R. R. Co. v. Stimpson, *ante*. Matters of defense 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. Thorton v. Hook, 36 Cal, 223.

¹³ "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.

¹⁴ Stitt v. Huidekopers, 17 Wallace, 384. And see Au v. R. R. Co., 29 Fed., 73; 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. § 383.

¹⁵ "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.

¹⁶ 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.

¹⁷ A postmark on a letter is presumptive evidence that it has been mailed. *U.S. v. Noelke*, 17 Blatchford, 555.

CHAPTER XIX.

THE FINDING.

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. 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. Commonly, 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.

When discussion is had, it may be informal, but should be free, frank, and open. 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. So, whatever opinions or views are expressed should be expressed to all – laid before the court. As is remarked by Bishop 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 communication to a

juryman “is an indictable offense when such communication touches the subject matter of the trial, or it may be treated as a contempt of court.” So, “it is a misdemeanor in a juryman knowingly to permit such communications.”

RECALLING WITNESSES. It is held by Simmons 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. 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. And where exceptions and substitutions are made, the accused must be acquitted or convicted on every part – every averment and particular – of each specification and charge. “The verdict,” says Bishop, “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 – 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 offense within the description of Art. 62.

THE FINDING MUST BE ACCORDING TO THE EVIDENCE. The votes of the members must be based upon and governed by the *testimony* in the case considered in connection with the *plea*. 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, 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. 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.

While all matter of legal *excuse* will justly affect the findings, it is quite otherwise with matter of *extenuation*. Such matter can legitimately be considered 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.

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 properly

induce a disapproval of the finding. 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. 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.

In capital cases. It has sometimes been supposed that a finding of Guilty of an offense 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 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 modified 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*,) 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. So, neither the 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. 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.

PRESERVING THE VOTE. 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 findings, (or sentence,) should be preserved or some permanent minute of the same retained. 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 improper persons. 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. This will be illustrated in treating presently of the various allowable *forms* of finding.

THE FINDING MUST BE CONSISTENT AND HARMONIOUS. That is to say the finding on the charge must be responsive to that on the specification or specifications, 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” or “Not Guilty” of both the charge and its 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 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.

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.

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 offense 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.

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; 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 . 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 offense 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, being a determination that the accused is not guilty in law. It will therefore be more legally accurate, as well as more military and more just to the accused, to express and record the finding simply as “Not Guilty.”

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. 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.

PARTIAL FINDING. This term implies a much more considerable authority than does the term “partial verdict” in the civil procedure. 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 findings of Guilty such portions as are not proved, and thus declare the *exact measure* of the criminality deemed to be established. Thus, it may find him Guilty of the facts set forth in certain 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. 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 offense alleged, (or a minor offense legally included in it,) or if the effect of the exception has been to cause the specification to describe another and quite distinct offense 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 simple and familiar illustration of an exception detracting from the legal virtue of a specification is the excepting by the court of the word or words which express the *gravamen* of the offense 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. 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 offense 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.” 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 – 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. The latter is not an offense 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 accepting 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 words of description. 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 offenses 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 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 offense charged is one which includes, as a necessary constituent, another offense of lesser gravity, and where the evidence – the accused having pleaded Not Guilty – fall 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 offense charged but Guilty of the minor constituent. 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 offense 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. Similarly, manslaughter may be found under a charge of murder, larceny under robbery, and an attempt to commit an offense under the charge for the offense itself.

Wherever a lesser offense 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.

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 offense than the one charged, nor an offense of a different nature. Murder 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. And this though the evidence clearly shows that the greater or the distinct offense was the one actually committed; for a party cannot be convicted of an offense 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, it is now fully settled by the uniform practice of the service that where the charge is one of the specific designated offences made punishable by the Articles of war other than the general, or 62d, Article, and the evidence fails to fully 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 exceptions, &c., as may be required,) and Not Guilty of the charge but Guilty of Conduct to the prejudice of good order and military discipline.

This finding, of an offense 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. It has since, however, been extended to *all cases of charges of specific offences* made punishable by the code, having been especially applied to such as Disobedience of Orders, Disrespect to a commanding officer, Mutiny, Misbehavior 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 offense 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 offense 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.

Conviction of a specific offense 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* offense 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. Thus a conviction of a violation of Art. 21, (a capital offence,) could not legally be made under a charge of Art. 62.

And so of a finding of one *specific* offense 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 Misbehavior before the enemy, of guilty of a Violation of the 32d Article under a charge of Violation of the 33d or 40th, of guilty of a Violation of the 33d Article under a charge of Violation of the 32d or the 21st, of guilty of a Violation of the 40th Article under a charge of Violation of the 47th, and of guilty of Violation of the 17th Article under a charge of Violation of the 60th - have 585 been properly disapproved as without legal sanction and inoperative. In such cases the accused is convicted of an offense not alleged against him or included in that alleged, - an offense of which he has had no notice and to which he has not been called upon to plead or to make defence.

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 and 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." 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.

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*” acquit. These terms add nothing to the legal effect of the acquittal, but are still occasionally employed, though less so than formerly. “*Honorably*,” according to the authorities, is not in general to be employed except in cases where the alleged offense 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, misbehavior 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.

2. The court, in connection with an acquittal, may also *reflect upon the charges* as malicious, frivolous, vexatious, unfounded, &c.,¹ or upon the *accuser* or *prosecutor*, (or prosecuting witness,) as actuated by personal animosity or other improper motive, or as equally culpable with the accused, or more culpable – recommending that he be himself brought to trial, or as offending against military usage by preferring stale or accumulated charges, &c. 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.

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. 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.

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.

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.

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.

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 be discharged from arrest and returned to duty with his regiment,” this addition was properly disapproved as transcending the authority of a court-martial.

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.

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, which was, by his direction, published in the form of an Army regulation, in General Orders, No. 41, of June 26, 1886. 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,” In the Army Regulations of 1889, this regulation was published as par. 1018.

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 offense 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. 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 offense 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 offense not punishable with reduction, he may, if he shall have been convicted of a military offense 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. Copies of records introduced in evidence may of course be contested by the accused, as to the genuineness or correctness of the record, but should not be rejected for immaterial and presumably clerical errors in the copy.

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; 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.

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. 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.

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 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 entrenched 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 conviction are artificial and confusing, and the convictions themselves are much more 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.

¹ 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*.

CHAPTER XX

SENTENCE AND PUNISHMENT.

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.

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.
- 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. The court may of course take an *adjournment* between finding and sentence if deemed proper and expedient.

The voting may either be 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.

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. 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 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*, 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 sentence 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 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 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 determine 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 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.¹

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 fails in his full duty as an officer and member of the court.

SOME SENTENCE NECESSARY ON CONVICTION. But though the sentence pronounced be inadequate, *some* sentence must always follow a conviction. 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 irregularity.² And so of any mere direction as to the disposition of the accused, or recommendation as to his disposition

addressed to the reviewing authority; 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.

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, 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 forfeited – by the number of the members, and taking the average result as the sentence to be adjudged, is clearly not a proper or military proceeding. Twyford 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 irregularity: it is certainly very rare in practice. To determine upon a punishment by *casting lots* would be still more irregular.

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. And the power to reconsider would extend to the substitution, for the sentence, of a full acquittal, if deemed by the court just and proper.

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.

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, 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 judgement of the law. It has no power to affix a punishment either more or less severe, or other, than that specified: any different or additional punishment is simply a nullity and inoperative. 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. 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. For a long period also no *maximum limit* was prescribed, and – except in Art. 58, where it is declared that the punishment 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 enlisted men*, which was published

in G.O. 21 of February 27th, 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.

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 embarrassing 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. 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 service.

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. *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.³

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 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.

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, it may yet properly exceed that which the latter could legally impose if the facts as proved are deemed to require it.

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; 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 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.

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.

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.

“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 purpose 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. 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, 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. In prohibiting *cruel* punishments, the law doubtless had in view the punishments involving torture or needless agony which were practiced 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.”

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." This usage has sanctioned in practice two classes of punishment, 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, but which is unknown to the usage of our service, would be illegal here. 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. 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.

Par.1019 of the Army Regulations, in specifying certain punishments, (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; others-hereafter to be mentioned-being also regarded as still authorized by custom of the service and usage of war.

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. 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. And so of the form, adopted in one case, upon a conviction, - “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. Nor does the fact that the liability has grown out of a criminal transaction, as a liability for money or property stolen or fraudulently or otherwise illegally obtained by the accused, affect the application of the principle: in neither case can the court, by its sentence, require the accused to refund to the injured party or to reimburse him for his loss.

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, or be expended for the use of sick soldiers, &c., or be allotted for the support of the family of the accused. 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. 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. 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.

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,” or, to a sentence imposing a fine, that the same be enforced in a particular mode or by a particular official.

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;” nor can it direct the assignment or transfer of a convicted soldier to a particular regiment or organization; or that a soldier, sentenced to be dishonorably discharged, be furnished transportation to his place of residence; or that a soldier deemed insane be confined in an insane asylum.

A court-martial, in awarding the *death* penalty, need not and should not designate in its sentence any time or place for its execution; 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: these also are particulars properly to be determined by the reviewing officer.

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. 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.

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. 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.

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, may be wholly *disregarded* by the latter in his action

upon the case. 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 BE 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. Amounts of forfeitures and dues, numbers of files to be lost, and periods – years, months, days, &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.

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 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.

TO BE ENTIRE AND SINGLE. In the absence of any statutory direction 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.

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 violation of the members' oath prescribed by Art. 84.

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.

CUMULATIVE SENTENCES, HOW TO BE FRAMED. Where a person while under sentence or 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. At military law, however, it is not habitual, nor is it necessary, so to specify 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 not 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 or by a remission on the part of the proper superior authority. The second sentence is thus made cumulative simply by operation of law.

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.

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, or that he incur the forfeitures specified in the Army Regulations, or that he be subjected to the loss of civil rights prescribed by the statute law; 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 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 and thus constituting a more severe punishment than the former. The two are now classified as separate punishments in the British Army

Act, but in our law and practice all such distinction has long ceased to exist, cashiering having become identical with dismissal. 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. A dismissed officer is not as such disqualified to hold either military 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 accordingly," since it is not the sentence that dismisses or can

dismiss the officer, but its approval or confirmation by the reviewing authority.

When the dismissal is "for cowardice or fraud,"-as where it is adjudged on conviction of misbehavior before the enemy in violation of Art. 42, or of some offence to the fraud of the United States, as presenting a fraudulent 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 servicing or held in arrest. All military persons are in general bound to take notice of General Orders officially promulgated at their stations; and, in the absence of evidence to the contrary, an officer will be presumed to have been informed of an Order, confirming a sentence dismissing him from the service, on the day on which the same was published or received, at his post or station. 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 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.

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, 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.

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.⁴ In a few

cases, upon conviction of misbehavior 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," and further even that he be drummed out of the service.

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.

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,⁵ and is not included in the list of legal punishments contained in the present Army Act. In the American civil courts disqualification to hold office seems to have been recognized as a common-law punishment for treason, but does not appear to have been employed in other cases except where expressly authorized by statute. In sundry U.S. statutes, 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, (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." As a general proposition, however, this statement of the law is too broad. In a previous General Order of the Navy Department, 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. 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;-the disqualification pronounced being in most cases general, i.e. not confined to the holding of military office merely, but extending to the holding of any office under the United States.

In a case, however, published in a General Order of April, 1870, 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. 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, 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 promulgation 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.

SUSPENSION. This punishment, (no longer authorized by the British code,) is imposable in our service for any offence of an officer 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, it in fact rests for its authority upon usage. It may be imposed for any stated term of months or years; and has in fact been adjudged in one instance for so

short a period as fifteen days, and in another for so long a period as twelve years.

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 resorted to in the Navy than in the military practice. 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. 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.

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. 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 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.

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, (where no new selection of quarters involving him is required at his station,) to purchase fuel, commissary stores, &c., from the proper officer, to draw his pay, (where the same is not expressly forfeited in the sentence according to Art. 101,) to receive his pecuniary or other allowances, &c.

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. It is also evidently a considerably less severe punishment than suspension from rank.

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. 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 and command, as well as amenable to the jurisdiction of a court-martial for any military offence committed during such term. The term being completed, he reverts to his former rank, 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—he may be resorted to by the pardoning power, and his promotion by the appointing power will operate as a pardon and terminate the suspension. 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.

Suspension, also, is not arrest, and does not, per se, authorize a commander to subject the officer to bodily restraint. 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. 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.⁶

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. In the British law, loss of relative rank has been substituted for it. In our present practice, however, suspension remains a not infrequent and apparently a generally approved form of punishment. 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 punishment; 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 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, is, with us, sanctioned by the established usage of the service. 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.

Like suspension, this punishment has, in some General Orders, 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 hold 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. As remarked of suspension, it is sometimes resorted to by way of commutation for a more severe penalty, as dismissal.

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.

REPRIMAND OR ADMONITION, AND APOLOGY. Reprimand is one of the punishments enumerated in the Army Regulations, (par. 1019,) as legal for enlisted men. Inasmuch, however, as it is most rarely adjudged offenders of this class, and is especially appropriate for cases of officers,- 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, and in our law 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, &c.,-and intended as a light penalty, 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, according as it is contemplated that it shall be administered in public before the command 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, 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. This officer should be designated, if any one: for the court indeed to designate any other officer as the person to execute the sentence would be irregular and unauthorized,⁷ and such action would properly be disregarded: the best form is to make no designation.

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. These also are matters which belong to the province of the reviewing officer.

Admonition is but a milder form of reprimand. A sentence “to be admonished” is an indication that the court deems the offence to be one of a comparatively venial character. To sentence an officer, convicted of a serious offence, merely to be reprimanded or admonished, is a mockery of justice.

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. 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 reviewed and commented upon, have been pronounced and promulgated to the army. 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. 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. The British precedents, (which are few in number,) seem to be all cases of officers. In our service the precedents have been nearly all cases in which soldiers have been sentenced, in connection with some other punishment, to tender apologies to, (or ask pardon of,) non-commissioned officers. This punishment, however, like reprimand, is regarded as a more appropriate one for officers than for enlisted men. 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; (2^d.) 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 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.

Our code does not prescribe in any case 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.

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. 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.

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 similar preliminaries, an “executioner,” under the direction of the officer in charge, “performs his office.”

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 property, 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.

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. 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 IMPRISONEMENT. “The ordinary and appropriate commonlaw punishment for misdemeanor is fine and imprisonment, or either of them at the discretion of the court.” In the military code, the 60th Article makes, 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 be, added in the judgment that the party shall be imprisoned till the fine is paid. 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, 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.

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 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 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.

There are five species of this punishment now recognized in military law: Simple confinement; Confinement at hard labor; Confinement in a penitentiary; 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,⁸ imposed for slight offences, or confinement (without hard labor) in a military prison-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 of the sentence is, in general terms, -To be confined at such prison, or military prison, (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. 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 except—as will hereafter be noticed—where necessarily involved in the peculiar species of punishment adjudged, as in the case of confinement in a penitentiary.

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, 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- 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 by convicted would by some statute of the United States, or by some statute of the State, Territory, or District in which such offence 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, 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.

It is here to be noted that by the recent Act of March 2, 1895, c. 180, 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 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.

By the term “penitentiary,” as used in the Article,- is understood any public 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” in the several Territories, or those established by the laws of the different States-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, 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 penitentiary as the reviewing or proper authority may designate.” 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. 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.

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, and even for life, were in some instances

imposed for specially aggravated crimes. To be imprisoned “during the war” was at that period also a not infrequent form. Sentences of confinement “during the remainder of the term of enlistment” of the soldier were then also more common than now. At present-in time of peace-the term of imprisonment fixed for *desertion* is from three months to five years: the latter limit is also rarely exceeded for any *other* offences, except aggravated instances of violent crime taken cognizance of under Art. 62.

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.

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 a 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 the discretion the offence committed.

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.

Execution of the punishment of imprisonment. Confinement *at a military prison*, which was executed at a great variety of fortified posts during the late war, 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-hour law," does not apply to prisoners employed at hard labor under sentence of court-martial.

Confinement *in a penitentiary* is executed by the forwarding of the prisoner under guard to the penitentiary designated by the proper authority, 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, 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.,⁹ 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, affects in no manner the due course of the execution of the punishment. 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, - 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, or during which he may be held in hospital or his quarters under medical treatment. 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. 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, or subsequently by a partial remission,- is also well established. 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,) was, on June 21, 1875, issued from the War Department, by 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.

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- 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; 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.

Different forms of forfeiture. Forfeiture by sentence may be expressed in different forms according to the particular pay or amount of pay intended 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 one-half, or so many dollars-of such pay, 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. 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. 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 allowance for clothing in the case of a soldier. A forfeiture of allowances other than pecuniary-as or rations or clothing as such, would not now be sanctioned by the usage of the service.

The forfeiture to be to, the United States only. We have heretofore noted 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. 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.

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, 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 evident from the sentence itself without any reference to other source of information being required-are points which have already been illustrated under a previous general head. 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.

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 purchases 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, 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 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.

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-whensoever accrued-which may be due and payable to the soldier at the

regular bimonthly or other payment next after the approval of the sentence, or out of such amount so far as it 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.

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 subsequently 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.

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.

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.

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 remitted, he would be entitled at the bimonthly 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, 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. Reducing to an intermediate grade, as from sergeant to corporal, is not known to our law. The punishment, as adjudged in our practice, is absolute, i. e. without limitation as to *term*. 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 imprisonment is entered upon.

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.

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. No Act passed since the war has authorized such punishment. Reduction of officers in grade-as from captain to lieutenant-is also unknown to our law.

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.¹⁰ 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.

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 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. 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. 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. 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.¹¹ 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 same effect as if such word were not omitted; the discharge adjudged by a sentence being a *punishment* and therefore necessarily dishonorable. A Sentence - "to be *dismissed* the service," while a rare and irregular form, inappropriate to a case of a soldier, has, where employed, the same effect as if the word *discharged* had been used. 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.

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.

Discharge with ignominy. A mode of dishonorable discharge, sanctioned by usage for -time of war, is *drumming*, (or bugling,) *out of the service*, with the “Rogue’s March,” in the presence of the command. This ignominious form is sometimes conjoined with circumstances of *special* ignominy. Thus soldiers have been sentenced to be drummed out after having their clothing 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.

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 him personally. The discharge will be worded in the usual form, as “furnished front the Adjutant General’s Office,” 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. 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.

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 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. 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*.

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. In a case in

the Army of the Potomac, 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.’”

SOLITARY CONFINEMENT. The usage of the service, as recognized 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 same *shall not exceed fourteen days at a time or eighty-four days in any one year*. The term, therefore, of this confinement can in no case legally transcend the limit here fixed, nor can it properly transcend for any period the *proportion* indicated. Such term has in some instances indeed been extended, but not lawfully since the adoption of the regulation.

In the early sentences the solitary confinement was sometimes required to be “in the black hole.” Later it has in a few cases been directed to be executed in a “light cell,” - or in a “dark cell.” In one of these cases 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 rare. Where resorted to in the later cases, 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. 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, or the "first week of every three months" of a term of one year, or for "each alternate week" of a confinement "during the continuance of the rebellion."

It has been remarked in a General Order 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 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 indicated 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."

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.

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 misbehavior before the enemy;) Beheading; "To be drawn," (in connection with the death penalty;) To be drowned or buried, bound to the person killed, (a punishment for homicide;) To have the tongue perforated with a red hot iron, (for blasphemy;) Loss of the right hand, or of a hand; Loss of an ear; Running the Gate-lope;¹² To be "beaten through the quarters;" To be ducked in the sea; To perform the duty of scavenger; To forfeit his horse, or his horse and armor."

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.

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.

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.

In the British law, flogging is no longer authorized to be adjudged as a punishment by courts-martial, though it may be employed as a corrective, to the extent of twenty-five lashes, at military prisons. For some *civil* offences—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. 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 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 installment 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.

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, the authority to resort to the same was gradually restricted by the Mutiny Act till, in 1832, the maximum was fixed at 200 lashes. 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. In the *American* service, after the Revolution, comparatively few sentences of flogging were adjudged until after the punishment had been revived for deserters in 1833, when the same was frequently resorted to, 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 General Order of July, 1861: 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.

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, and was authorized by the British Mutiny Act at an early date. Later, that Act also authorized the marking of offenders discharged with ignominy, with the letters " B. C." (Bad Character.)

In our service this punishment has been carried considerably farther, additional forms of it having been sanctioned by usage. Soldiers have been sentenced to be branded, as well as marked, with D, both for desertion and for drunkenness. The mark has commonly been placed on

the hip, but sentences to be branded on the cheek and on the forehead have been adjudged. Other markings imposed by our courts have been H D for Habitual drunkard, M for mutineer, W for worthlessness, C for cowardice, I for insubordination, R for robbery, T for thief. Sometimes also entire words were required to be marked as “Deserter,” “Habitual Drunkard,” “Mutineer,” or “Swindler.” 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 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.

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.”

DISUSED PUNISHMENTS—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 guardhouse, 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.

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,” (in connection with confinement;) To be confined “in double Irons;” “To be sent to his regiment in irons;” “To be sent in chains to the Dry Tortugas.”

Shaving of the head. This has already been noticed as imposed in some instances as a mark of ignominy in connection with Dishonorable Discharge. The sentence has sometimes directed that the head be “half-shaved;” also, that it be “close-shaved” and a “pitch canvas cap” worn upon it.

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;” “A chicken-thief;” “For selling liquor to recruits;” “I forged liquor orders;” “I presented a forged order for liquor and got caught at it;” “I struck a noncommissioned officer;” “I robbed the mail -I am sent to the penitentiary for 5 years;” “The man who took the bribe from deserters and assisted in their escape.”

Standing on a barrel, &c. Soldiers have been not infrequently 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.”

Other punishments. Less usual were such punishments as the following: - Riding the wooden horse, (sometimes with hands tied behind the person, or a musket tied to each foot;) Wearing a wooden jacket; Wearing an iron collar or yoke; Wearing partly-colored clothes, or Marching with coat turned wrong side out; Bucking; Picking; Tarring and feathering; Pillory; Stocks; Gaggling; Fasting; Tying up by the thumbs; Stopping “grog,” or “ration of whiskey.”

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, 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; may recommend that an officer or soldier, (other than the accused,) compromised by the evidence, be brought to trial; 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. So the court may explain an exceptional sentence by a statement of its conclusions from the testimony, or an expression of its estimate of the amount of criminality involved in the case, or otherwise. 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.

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.

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, 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.

Being the act, not of the court, but of the members who take part in it, 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. The judge advocate may properly join in a recommendation.

A recommendation should not omit to state the reasons upon which it is based. 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 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. It should of course not disclose opinions on the question of guilt or innocence. 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.

It seems to be the sentiment of the authorities that recommendations are not much to be encouraged. 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—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, and in the cases mentioned, in two or three unimportant and obsolete Articles of war, our law recognizes no military punishments for the Army, whether administered physically, or by deprivation of pay, 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 approved sentences of military courts. 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, and forbidden in practice by Department commanders. Officers who have resorted, or authorized inferiors to resort, to them have not infrequently been brought to trial and sentenced, sometimes to be dismissed: if acquitted or lightly sentenced, the proceedings have in general been disapproved. or severely commented upon. 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.

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 to selection for the more agreeable duties as may be just and proper. 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. and in *extreme* cases may even be warranted in taking life. Especially in time of war, and when the command is before the enemy, will such forcible and vigorous measures be justified. 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 punitive treatment, much less, by the use of arms, to put him in danger of his life. In violating these rules the superior subjects himself to charges and trial by court-martial, as well as to civil suit or prosecution.¹³

¹ 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.”*

² 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 offence, 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.”.

³ 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.

⁴ 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. Mannning. 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.)

⁵ 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.

⁶ 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 his property and moneys in his hands, to leave the department during the period of his suspension.”

⁷ 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.

⁸ Sometimes expressed in the sentence under the form of – “To be confined under charge of the guard at this station” or “at the post where he is serving,” (for a certain period,) or in terms 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.*

⁹ “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.

¹⁰ Dishonorably discharged soldiers, who have also been confined under their sentences at Fort Leavenworth or Alcatraz Island, are not infrequently re-enlisted where their record for conduct in confinement has been good.

¹¹ In the Navy, besides *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.

¹² See Art. 122 of Gustavus Adolphus. "Running the gauntlet," (the same punishment,) was sometimes practiced in our army in the Revolutionary War.

¹³ 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 Streater, 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 the 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.

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. This superior, sometimes referred to as the Approving, or Confirming Authority, but more commonly known in military parlance as the Reviewing Authority or Officer, 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. It is the function of such officer (or officers) which we now proceed to consider.

THE LAW ON THE SUBJECT. 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 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.

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.

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. In practice, however, no essential difference in meaning is recognized between the two terms, “approved “ and “confirmed,” 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 original commander-the commander of the department for example by whom the court was ordered, (or his successor, if there has been a 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.

APPROVAL AS AN ESSENTIAL. Approval is necessary, not only to vitalize the sentence as such, but to give it substance as material upon which 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*, 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. 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. 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 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 commander or of the President.

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.

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, 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. 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 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, and to be made, he may be an officer upon whom the command has 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 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, 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.

"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.

DISAPPROVAL-Its nature and effect. "Disapproval," in military law, is not a mere expression of disapprobation, 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, 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. 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. 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 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.

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; 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, it will in general be wiser for the Reviewing Officer to defer to, rather than disapprove, its conclusion. 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. Nor will he

ordinarily disapprove where he can have the defeat remedied by a revision by the court, as presently to be indicated.

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,¹ the prosecution, the administration of a command, &c. Such comment has not infrequently 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 infrequently been induced to remark upon the very improper admission or rejection of testimony offered.

Allowance of new trial, upon disapproval. It was held by Att. Gen. Wirt in the early case of Captain Hall, 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, 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 noticed the action to be taken in cases in which the accused is found 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.

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, (and now affirmed in the Army Regulations,) 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, nor can the court,² after it has once duly completed and forwarded to him the record, recall it for modification.

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 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 misstatement 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; 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 unduly 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 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, *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 member 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. 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 reipublicae 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, and this principle, upon a recent reconsideration of the subject, has been emphatically reaffirmed in General Orders, and incorporated in the Army Regulations.

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 endorsement or report.

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 business. 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. 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.

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. 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. If it determine that no error has been committed, it will return the record with an official communication, declining, for reasons stated to make the correction." In such event the Reviewing Officer cannot of course actually compel the court to take the action proposed, 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 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, 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 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.

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. 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. 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.

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.

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. 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* of military sentences by the President, which has been compared to “the judgment of a court of last resort,” 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 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.*”

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-marauders* 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 forwarded.

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, it impliedly authorizes their being executed upon the approval of the proper military commander alone, in time of war-an authority further conferred by Art. 109.

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, (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.

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, (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 observes, "we 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 daily 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. Paige's case one very similar to that of Runkle-the Court of Claims, following, as it supposed, the ruling of the Supreme Court, 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 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 President,

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 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 Paige’s
case, was to be allowed as controlling. On appeal to the Supreme Court, this
decision was reversed. 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. 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 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.

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.

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.

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, and to forward the record for the action of the President, &c., must be not only superfluous but unauthorized.

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 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 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, “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. 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 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. 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 wholly arbitrary and illegal. 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. 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 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. 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. 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 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 the privilege of devolving upon the President the responsibility of the action to be taken upon such sentences.

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, 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. 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. 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.

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 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 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 appeal 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 men under

sentence, but at present, in cases of prisoners confined at Leavenworth or Alcatraz Island, the mere remission in Orders 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, but even these have not been common.

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, and he has repeatedly, by proclamation or general order, offered pardon to deserters who may return to duty within a time specified. 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. 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 incident thereto or to the sentence are removed, and the offender is personally completely rehabilitated in law. But the power given by the Article is a power only to “pardon” a “punishment,” that is to say a power of remission; 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 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; 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 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 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 coextensive with the punishment. 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 resorted to at any stage of the execution of the punishment, and so long as any portion of the same remains unexecuted. 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. 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. The same course was also pursued by army commanders. 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 sentences; except that in cases of convicts- confined at the Military Prison at Leavenworth, or, (after discharge,) in penitentiaries, 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. So a part of a punishment may be remitted at one time and another part at a subsequent time. 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 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. 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 infrequent in military cases. Thus sentences were remitted on the conditions precedent-that the accused re-enlisted, or enlisted "during the war;" that he paid back certain bounty money received by him; that he paid a fine, or part of a fine imposed by his sentence; or gave satisfactory security for its payment; that he turned over the company fund in his hands; that he made good an amount found, to have been embezzled by

him; that he reimbursed the expenses incurred in his apprehension as a deserter; or the value of public property, (as a horse, carbine &c.,) appropriated in deserting, or that he made good the time-lost by his absence; that he allotted certain pay sentenced to be forfeited, or other pay, to the support of his family. 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 behavior, or both.

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; where the sentences of soldiers in confinement were remitted on condition that they faithfully served their full terms of enlistment; 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,³ or that he should engage in no illicit trade, nor aid or have intercourse with the enemy, during the war.

Where the pardon is conditional, the condition must be accepted by the beneficiary:⁴ 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. As remarked by the court in a case in Pennsylvania—"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. But, at present, in time of peace, conditional remissions, under Art. 112 are of most rare occurrence.

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, 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 severe punishment of a different nature-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 implicitly by the party's entering upon without objection, and duly undergoing, the substituted punishment. 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 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, loss of files, or other punishment appropriate to an officer and less severe than an absolute and disgraceful separation from the army. 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.

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. 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, commutation has not infrequently 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. An act of this character operates as an implied, or, as it is usually designated, constructive pardon. 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. 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. 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; 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.

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, 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. Thus an imprisonment or suspension adjudged for a certain term is mitigated by reducing it to one for a less term; a fine or forfeiture of a certain amount, by reducing it to one of a less amount; a loss of a certain number of files, by reducing it to one of a less number. But dishonorable discharge, or forfeiture of pay, cannot, by mitigation, be substituted for confinement, or vice versa. 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.

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. 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.

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.

GROUND OF PARDON OR MITIGATION. The subject may well be illustrated by noting here some of the principal grounds upon which the discretion 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 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 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.

VIII. FORMULATING OF ACTION AND PROMULGATION.

STATEMENT OF APPROVAL, &c. It is directed in the Army Regulations, par. 1041, that the reviewing authority "shall state at the 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. 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 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.

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. 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, 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 critical for acquitting where, in the opinion of

the reviewing officer, the testimony called for a conviction; for imposing sentences regarded by him as inadequate to the offences found; for findings held by him to be unwarranted by the proof; for errors in admitting or rejecting evidence; for ignorance or neglect inducing grave irregularities in the proceedings or form of the record;⁵ for the personal misbehavior of the members,⁶ &c. The conduct not only of the accused⁷ but also of the judge advocate, prosecutor, or officer preferring the charges, has also been reflected upon,⁸ as well as that of superiors of the accused whose acts, deemed illegal or improper, have been regarded as having induced or aggravated the offences committed, or that of other officers implicated with the accused or otherwise culpable. In rare, cases even a subordinate commander who has acted upon the proceedings has been censured.⁹ Observations, suggested by the evidence, upon matters affecting discipline or other interest of the service, have sometimes also been promulgated.

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 for the misconduct imputed, his application cannot in general fairly be denied.

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, 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,) 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.

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, 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 adjudged, the date of the Order of promulgation fixes, as heretofore noticed, 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. 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 infrequently

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.

IX. DISPOSITION OF RECORDS.

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.

¹ 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 offenses here fully established and found, is a reproach to the service, and the proceeding is in marked inconsistency with the duty of protecting and maintaining that high sense of personal honor which has long characterized the reputation of the army.”

² The action taken by the court is usually designated in practice by the term “Revision.”

³ 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.

⁴ “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.

⁵ 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.”

⁶ 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 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.

⁷ 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.

⁸ 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.”

⁹ 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 has been designated as a “separate brigade,” - thus divesting the commander of the power to convene general courts.

CHAPTER XXII.

INFERIOR COURTS-MARTIAL AND MILITARY BOARDS.

INFERIOR COURTS-MARTIAL.

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, 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 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.”

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“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.”*

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 in Art. 81, is the colonel, or other officer in command of the same whatever 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.

“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.

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. 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; 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, 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 this interpretation would preclude from convening a court-martial the commander of a garrison

whose force was wholly made up from a single Corp 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 comprising the body of the command being almost invariably present with it.

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 consists 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 representative only—officer or enlisted man—of some arm or component of the military establishment other than that one of which the command, with this exception, is made up. 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 noncommissioned officer of the quartermaster or subsistence department, chaplain, etc.

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, etc. 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, etc., 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 prosecution 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 detailed with regimental or garrison courts, but the junior member acted as recorder. 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.

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.

COMPOSITION—"Of three officers." By the codes of 1775 and 1776 it was directed that regimental, etc., court should consist of not less than five members where that number could be conveniently assembled, otherwise of three. The present Arts. 81 and 82 provided that such courts shall consist "of three officers." *Officers* is of course identical with *commissioned* officer, and—subject to the provision of Art. 78,—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 Article: that the same is not repeated in

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, 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. They may therefore legally take cognizance of the offences, other than capital, not only of all soldiers, but of all noncommissioned officers belonging to regiments, or to corps in the sense of Art. 81, or forming part of garrisons, etc., as defined in Art. 82. Any Orders or Regulations, which prohibit the trial by inferior courts of any such noncommissioned 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, is not only one expressly required to be visited with the death penalty, but one 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 punishment as a court-martial may direct.” 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: 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 offence. 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 offence 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 called upon to try them if it can be avoided, but the same should be reserved for the action of general courts. 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. 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.

As affected by Arts. 102 and 103. It has been noted in a previous Chapter, 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.

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 declared that inferior courts “*shall not have power * * * to inflict a fine exceeding one month’s pay, or to imprison or put to hard labor any noncommissioned officer or soldier for a longer time than one month.*”

“*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. 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.

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--much be private's pay, was in excess of the monthly pay of that grade.

Should the accused be entitled to any monthly *pecuniary* allowance 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 terms 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.

The imprisonment here authorized is commonly executed by confinement in the guardhouse. "Hard labor," as a distinct penalty, is now rarely adjudged by inferior courts, being mostly reserved for cases of persons sentenced by general court to confinement in a military prison.

The measurement 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.

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.

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 noncommissioned 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 noncommissioned 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, 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, etc., 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. A sentence "to be drummed out of the service,"--an ignominious form of discharges,--if imposed by an inferior court, would be illegal, 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. 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. 84, prescribing the oath to be taken by the members; Art. 86, providing for the punishment of contempt; 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, etc.; the action or judgement of the court is determined by the vote of the majority; 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, and, when completed, is transmitted to the convening authority. 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;”) and in Art. 109--also generally—that “all sentences of a court-martial may be confirmed and carried into execution” by such officer, etc. The proceedings 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.”² 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 actions 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 in command,) is empowered to return the proceedings to the court, (reassembling it if necessary,) for revision and the correction of errors.

Power of pardon and mitigation. Art. 112, in empowering officers authorized to act upon the sentences of general courts to remit, etc., 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, 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 an 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 etc., to the command, in a regimental or post, etc., 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. 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, etc., commanders the exclusive power 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 without delay to the officer having authority to confirm the sentence." A provision of the Act of March 8, 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 burdened 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.

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 Art. 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 noncommissioned 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 the 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.

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, as held by Judge Advocate General Holt, 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. 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, lieutenant 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 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 regiment 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, etc., 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, theretofore defined in this Chapter, of the Regimental Court of three offices 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.

PROCEDURE--No oath required. Neither the 84th,³ 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 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," etc. 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, etc., 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 names,--excluding therefrom, for example, a division or department commander. 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 proceedings of a general court, are rendered nugatory, and no punishment can be enforced. Where the proceedings are approved by such commander, the execution of the

sentence will be 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 commander, or the Field Officer, to pardon or mitigate punishments awarded by the latter.⁴

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 thereafter in time of peace all enlisted men charged with offences 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, * * * 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,--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, 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 summary 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”, therein of the accused, in which 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- 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. 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" 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. But, unless specially requested, a garrison, etc., 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 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.” I 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 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 a delay be protracted, the fact may well be put in evidence as ground for mitigation of punishment.

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.”

In G.O. 47 of 1894, it is directed that—“When charges are preferred against an enlisted man for offence 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 cop of the summary court record specially furnished for the purpose and certified to be a true copy by the post commander or adjutant.” 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. It sets forth in each case the name, etc., 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. The trial officer keeps his own record, but may be assisted by a clerk from the Post Adjutant’s Office when requisite.

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.” But, as it is remarked by the Major General Commanding, in an Order of 1892,--“The increasing number of trials by summary court and the trivial character of many of the offences tried indicated 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 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.

Beside the Boards of government, examination, inspection, investigation, etc., 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. Retiring Boards are bodies constituted and empowered, and whose duties are prescribed, under and by Sections 1246 to 1253 of the Revised Statutes.⁵ 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 boards;—that the President, in approving, shall retire the officer from active service merely, (if found to have been incapacitated 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;—that no officer whose case is inquired into by a retiring board 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. 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,” etc., 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 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, 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.

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,-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 where the proceeding is *in invitum*. 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.

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.

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, 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.

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. These regulations are so specific as to call for but little comment.

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, 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, 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, as thoroughly as its want of power to swear witnesses will permit, 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. 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, etc. If the loss was the fault of no person, but was incurred through the violence of the elements or the operations incident to a state of war, or some contingency of the service," 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, 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. The approving officer will properly endorse upon, or state in connection with, the report, what action he may

himself have taken in the case. 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. 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, 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.

¹ The *naval* courts-martial are but two- the "General" and "Summary."

² 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."

³ The "regimental" court referred to in this article is evidently the old regimental court of three officers, of Article 81; the only one in existence when the original of Art. 84 was enacted.

⁴ 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.

⁵ 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.

CHAPTER XXIII.

THE RECORD.

THE LAW RELATING TO THE SUBJECT.

Though courts-martial are, as we have seen, 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, 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, etc., such "proceedings," - by Sec. 1203, Rev. Sts., which required that he "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," etc.

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," etc., 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," etc. Par. 1039 directs as to the form in which "the record of the proceedings" shall be "endorsed," etc. 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; 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.¹

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, if any, and the action thereupon; the organization for the trial; the appointment of reporter or employment of clerk, if any, and the introduction of counsel; the arraignment and pleas, with special pleas, if any, and disposition of the same; the sworn testimony and written evidence, with the objection to its admission and rulings thereon; the closing arguments or statements; the findings and sentence; together with all motions, adjournments, continuances, proceedings for contempt if any, proceedings upon revision if any, etc.; 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. The only act of the court or members not properly embraced in the minutes are the discussion, votes, etc., 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; 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. This rule is illustrated by par. 888 of the Regulations, which directs that “the 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.

DETAILS OF THE RECORD. Premising with the remark that the record, as indeed directed by the Army Regulations,² should be legibly and neatly written, we proceed to indicate that 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 the members, time and place of assembling, etc., 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, etc.—it has been issued, thus testing at the outset the legality of the whole proceedings.

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. In this class of Orders are included those in the form of telegrams; copies of these, where affecting the *personnel* of the court, etc., 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 the original detail, etc., 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 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.

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; if not known, an entry of - "cause of absence unknown," or words to that effect, should be added. 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, state, 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 assembling of the court on the second and subsequent days of a trial should be headed with the proper place and date, 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, but it is always better to specify the actual members present on each day though they may be always the same. Their rank should 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. Where, however, a member has been so promoted, etc., 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.

The presence of the judge advocate, 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 willfully 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, - is entitled to be present and his presence is essential to the legality of the proceedings and sentence. 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. 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, and if sickness has been the cause a medical certificate will properly be furnished: under similar circumstances, a similar excuse should be offered by the judge advocate, and recorded. Unless the court has been authorized, by the 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.

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. 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 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.” 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 thereupon had as to each member objected to, 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. 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.

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 the 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 the judge advocate are required to be sworn anew for each case tried. If an absent member is admitted, 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.

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. 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.*

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.

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,” etc., 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, 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.

Statement of the testimony. The record must set forth fully and independently the testimony of each witness, specifying by which side - prosecution or defense - 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. 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.³ If the answers as rendered are liable to be misunderstood, the accused should be called upon in further questions to explain the obscure portions. 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.

Another grave irregularity would be to introduce into the record as evidence any oral statement other than the sworn testimony of witnesses present in court - as a statement of, or reference to, anything said or done, by the accused or other person, out of court.

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.⁴ A brief writing, however—as a simple post or field Order, short letter, etc.—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. A clearing of the court for deliberation upon an objection to testimony, with the subsequent reopening, should be specifically noted.

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, 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 defense, or prosecution.

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 defense.

Where no evidence is introduced by the accused, it should appear that he was afforded an opportunity to make a defense 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.

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 defense *at his own request*.

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.

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 advocated 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, etc., 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 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."

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.

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. Care should especially be taken that there be no material variance in the name of the accused between the sentence and the specifications.

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.

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.

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 nay action by the court, can properly be entered upon or attached to the proceedings.

Statement of previous convictions. Where, in the case of an enlisted man, there has been a conviction of an offense “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,” 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, the nature of the objection and particulars of the issue should be fully stated. At the end of this stage, the reclosing 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.* 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. The authentication should,

regularly, be executed in the presence of the court before the final adjournment, and as 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.

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 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.

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 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. 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.

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 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, of an announcement, headed by a designation of the place, (headquarters of the 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, etc., 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, etc., as may be deemed to be called for.

Where the sentence adjudged is one requiring, for its execution, the confirmation of the President, (or other superior authority,) under Art. 106, etc., 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, etc. The record having reached the latter, his action, confirming, disapproving, remitting, commuting, 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.

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.

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. 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 regular in substance and legal in fact. As to any action indeed provided 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, etc., 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, 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 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.⁵

¹ Courts-Martial, (with their judge advocates,) have not unfrequently been censured by Reviewing Commanders, on account of material omissions and other errors appearing in their records. 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.

² 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 several general

orders, and erasures and interlineations occurring in the records are animadverted upon in more than one case. Though the regulation contemplates that the record will be written, there in no *legal* objection to *type-writing* or otherwise *printing* it in whole or in part, except of course the signatures of the president and the judge advocate. Such printing, however, generally necessitates frequent corrections, and has not been found to be a very material improvement upon the written form.

³ But to record at all times barracks phraseology is not expected.

⁴ Failure to attach writings introduced in evidence has been frequently remarked upon in General Orders.

⁵ United States v. Molloy, 31 F. 19 (E.D. Mo. 1887).

CHAPTER XXIV

COURTS OF INQUIRY

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—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.

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."

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 the opinion of the author, legally be extended to the latter. 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 123rd of the Rules of Procedure.

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.”¹ It is thus not a Court but rather a Board, -- a board of investigation with the incidental authority, (when expressly conferred upon it,) of pronouncing a conclusion upon the facts. But, as it is a sworn body, and as the witnesses 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. 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 Andre, 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, [Parson, 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 (Andre) ought to be considered and the punishment that ought to be inflicted." The Court, after considering the evidence, reported a statement of the 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:"

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:

That convened by President Jefferson in 1808, in the case of Brig. Gen. Jas. Wilkinson, to investigate the charge of his having cooperated 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:

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:

That convened by President Van Buren, at Knoxville, Tenn., in September, 1837, "to examine into the transactions of Bvt. Brig. Gen. Wool, and others of his command, in reference to his and their conduct in the Cherokee country:"

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 capitulation 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. 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, etc:"

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:"²

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:"

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:

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:

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 offenses, if any, as may be discovered:”

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:”

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 formed the basis of the subsequent court-martial proceedings published in G.C.M.O. 19 of 1885.

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,³ “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” indicates that the authority to constitute courts of inquiry is not necessarily restricted, as has sometimes been supposed, 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; the power conferred being thus made incident to distinctive command as such. Thus the commander of a district, post, regiment, or independent company or detachment, 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.

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. 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 member or recorder,⁴ adding to or modifying the instructions originally given, or changing the time or place of meeting.

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.⁵ In a few 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 Andre, 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.⁶

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.

ITS FUNCTION

IN WHAT IT CONSISTS. The function of the court of inquiry 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 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;⁷ 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; but, as the party whose conduct is under investigation may be present with counsel, and be heard in his defense, at its sessions, and its proceedings may be and generally are public, the analogy indicated is by no means complete.

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 and the rights or liabilities of individuals. 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.⁸

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. 115.⁹ Though the primary object of the inquiry is vindication, the result may indeed be quite the reverse.

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.

To be confined to cases of person in the army. The term “*officer or soldier*,” employed in the Article, clearly means one who is an officer or soldier of the army at the time the court is ordered.¹⁰ Transactions 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 limitation—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 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. 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, etc., 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.

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 separate opinions

upon several different points involved in the case, and also to give its *reasons* for its opinions. Where ordered to render an opinion upon a specific subject, or to a certain particular effect, it should 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.

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. 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.

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.

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*,"¹¹ the special use and purpose of this latter officer is added as follows: "*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.

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-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 role 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 court of inquiry to pass upon questions of law of a difficult or unfamiliar character.

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, though his presence is not at any stage obligatory or essential. He is sometimes indeed, though rarely, *ordered* to be present, and in such case must 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.¹²

The party accused, or “whose conduct is inquired of,” is entitled to be *present* (with counsel, if desired,), and to examine and cross-examine the witnesses 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, and with his counsel; and a similar privilege is properly extended to an officer whose conduct will be materially *involved* in the inquiry.

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.” In strict justice, however, to the party, and with a view to an impartial inquiry, such privilege is now always extended in our service.

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.

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, Etc.—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 the interests of the accused party in the event of a trial being ordered. It has therefore been held both by English and American writers to 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. Admission to them, in the absence of statutory regulation on the subject, is declared to be, strictly, not of right. But from an early period these courts, even in England, have sometimes been open; and, in our law, Art. 118 provides for the admission of the accused and 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. It is indeed always competent and proper for the

convening authority to direct, in the convening or a supplemental Order, whether the court shall be open or closed. 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. 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, all persons being excluded except those entitled or privileged by law or usage to be present, and the witnesses being admitted separately. 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.

Hours for 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 parties interested.¹³ 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.

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 discretion 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. 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. In the event of a trial of the offender, the members and recorder, or any of them, will properly testify as prosecuting witnesses.

THE INVESTIGATION AND EVIDENCE—Entertaining of charges, reports.

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, etc., or charges—which will properly be specific, but need not be in a technical form, -- 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.

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 directed, 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 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, but founded as

such rules commonly are upon justice as well as logic, it will ordinarily be safest and most equitable to observe them.

Independently of his examination as a witness, the accused—it need hardly be remarked—is not now subject as formerly, 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 defense, such closing statement or argument as he may deem for his advantage. 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.

Making up of report, etc., 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. 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. 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.

The completed record will then be authenticated, in the same form as the record of a court-martial, and as prescribed by Art. 120, and thereupon transmitted to the commanding officer or the President.

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.¹⁴ 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 reassemble 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. 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 to publish, the report, etc., or may publish the result alone—as, for example, that it is determined that no further proceedings are called for in the case.

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; 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 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 offenses, which, by the Articles of war, would be capitally punishable, if found by the court, and, by the latter, cases of alleged offenses 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 offense charged. 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 made a different statement on oath before the court of inquiry.

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.

BEFORE A CIVIL COURT. The question of the admissibility in evidence of the record of a court of inquiry at trial before a civil court was determined in the negative in England by the well-known case of *Home v. Lord Entinck*. 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."

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.

¹ In the British Rules of Procedure, 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 *United States v. Clarke*, 3 F. 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 the finding of a trial court,) could not be pleaded in bar as an acquittal before such a tribunal.

² This court was designated a "Military Commission."

³ 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."

⁴ It is not absolutely necessary that the same members should go through the whole of the inquiry.

⁵ A court of inquiry with but one member is convened by G.O. 36 of 1837.

⁶ The British law simply provides that the court "may consist of any number" of officers, but the number has generally been three or five.

⁷ The ground of complaint may be advanced by *civilians*.

⁸ "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.

⁹ Instances may occur where two officers who have become involved in a controversy may each apply for a court of inquiry in regard to the same transaction. In such cases the court, if convened, will practically . . . "sit as a court of arbitration between the contending parties, the decision of which they have consented to abide by." [Editor's note - citation omitted]

¹⁰ Thus a court of inquiry could not legally be ordered to investigate charges against a contract surgeon. 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.

¹¹ The articles of the late code of 1806 termed this officer "judge advocate," and "judge advocate or recorder."

¹² The case of Andre was of course an exception: at the end of the proceedings the record states that he was "remanded into custody."

¹³ In this connection, Hough observes - "Though Sunday is not a day for sitting, still there may arise cases requiring a court to sit on Sunday."

¹⁴ 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.

CHAPTER XXV

THE ARTICLES OF WAR SEPARATELY CONSIDERED

The history and authority of our Code of Articles of War have been reviewed in a previous Chapter. Certain specified Articles 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.

In general 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 offense, but should set forth in full the particulars—words, acts and circumstances—in which the offense is alleged to have consisted.

It may also here be observed that the discretion as to the punishments of *enlisted men*, given in the Articles making punishable military offenses, is to be viewed as subject to such restrictions with regard to *maximum* penalties 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 commissioned officers; the word soldier shall be understood to include noncommissioned 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,) noncommissioned officers could properly be held to be included.

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.

CHAPTER XXV

THE ARTICLES OF WAR SEPARATELY CONSIDERED

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 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]

Second Article

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.

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.

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,” etc. In practice, it is incorporated in the formal enlistment paper or certificate in use in our service, as prescribed by the Army Regulations, and is subscribed by the party enlisting; and the date of the oath is treated as the date of the actual enlistment. In the case of *In re Grimley*², 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 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.”³ The army regulation of 1881, cited by the court as requiring

the reading only of the 47th and 103rd 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, 19-23, 30-33, 35, 36, 38, 39, 47, 48, 50, (first clause,) 51, 55, 81-83, 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 them.⁴ 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 noncommissioned 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.

THIRD ARTICLE.

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 offense, shall, upon conviction, be dismissed from the service, or suffer such other punishment as a court-martial may direct.

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 enlisting, etc., 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," etc. The term "*muster-in*," though sometimes confounded with *enlistment*, is only properly employed to designate the formal admission, (upon inspection, administration of the oath, etc.,) into the U.S. service, of militia or other State troops, or troops raised under State authority. The term is, strictly, without application to the army proper, into which persons are admitted only by enlistment and separately.

"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 papers, 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 offense, 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 offense 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 offense.” 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, the term “infamous crime,” as here used, may properly be regarded as practically synonymous with *felony*, 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.

In this connection it will be convenient briefly to review the law pertaining to the general subject of enlistments in our army.

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, etc., 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. 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. Enlistment is thus not only a contract, but a contract of a formal and solemn character.

Peculiarity of 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. So, pending the engagement, it may reduce the pay, or curtail any allowance, which formed a part of the original consideration.⁵ 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.⁶

CONSTITUTIONAL PROVISION--POWER OF CONGRESS. The original authority for the enlisting of person in the military service is to be found in the clause of the Constitution by which Congress is empowered “to raise armies.”⁷ The Constitution does not indicate the manner in which the power shall be exerted, but leaves the whole subject without limitation to the discretion of Congress.⁸ 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.⁹ To this branch of the Government it thus belongs in the first instance to determine how the army shall be raised,¹⁰ of what persons and number of persons it shall be composed,¹¹ and what shall be the terms and conditions of the contract or obligation of military service.

1. MODE OF RAISING ARMIES. Congress, as held by the Supreme Court in *Tarble's Case*,¹² “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

enrollment and draft of citizens, etc., between the ages of 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, 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, etc.¹³

Nationality. The legality of the enlistment of aliens is recognized by the common law and the law of nation,¹⁴ and the employment in their armies of foreign mercenaries has been resorted to by all the European powers. 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 aliens or inhabitants who have not been naturalized.¹⁵ 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 performance of certain conditions required in other cases of aliens.

Race – Indians. Although Indians are not, in general, citizens,¹⁶ 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.”¹⁷ Congress indeed did not hesitate to avail itself of their military service during the war of the Revolution; 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 the Shawnees and Delawares, was raised and held in service for three months. In the recent war three regiments, designated as the First, Second and Third Indian Regiments, (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,” etc. Indians were also enlisted into other regiments of State troops, as the 6th, 9th, and 14th regiments of Kansas Volunteers.

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, 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 enlistment 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.

Persons of African descent. No Act of Congress, as observed by Attorney General Bates,¹⁸ 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 and the war of 1812. 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 war, there had been organized and added to the army about one hundred and forty regiments of colored troops.¹⁹ 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.

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., (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; but – it is added – “this limitation as to age shall not apply to soldiers reenlisting.” The power having thus been exercised, no executive order or regulation can avail to exceed or modify the limits established by statute.²⁰

ENLISTMENT OF MINORS. That Congress, in fixing the age of enlistment, may permit the enlistment of minors has been repeatedly adjudged by the courts. “The age,” observed the Supreme Court, “at which an infant shall be competent to do any acts or perform any duties, military or civil, depends wholly upon the legislature;”²¹ and Congress has from an early period authorized, in its legislation, the enlistment of persons under 21 years of age.

It has been further 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. 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. 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.

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 necessities 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 legislation.²² 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 defense and welfare.²³ This 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.²⁴

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, etc., be entitled to have him discharged in the absence of some such express authority as that of Sec. 1118, Rev. Sts.

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, etc., – of persons admitted into the military service. It has heretofore done so by specifying in several of the earlier statutes that such persons shall be “at least five feet, six inches, in height,” and that they shall be “effective and able-bodied men.” The former condition, however, was done away with by the Act of July 5, 1838, since which date there has been no statutory requirement as to height;²⁵ the latter qualification, as to physical efficiency, still subsists as a part of the existing law on the subject.

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.²⁶

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 *United States v. Wyngall*,²⁷ and *United States v. Cottingham*,²⁸ 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, 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. 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*. 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, etc.; or where the soldier had committed a military offense 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; 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 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;²⁹ and more recently it has been held in a U.S. Court than 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 not claim to be discharged on *habeas corpus*.³⁰ In a further case in a State court, 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.”

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.

3. THE TERMS OF THE CONTRACT or engagement of military service,³¹ 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, etc., that are to be furnished him. All these matters have, from time to time, been regulated by the legislation of Congress. 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;³² and it was added – “The executive department has discretionary authority 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, consists of two separate provisions, and will be considered accordingly under the head of – I. Requirements as to discharge in general; II. Discharge before expiration of term of service.

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. 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 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. 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, etc. 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, and the practice of the service. As directed in part. 143 of the Army Regulations, the cause of the discharge must be set forth in the body of the certificate - *viz.* expiration of term of service, order, or sentence.³³

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.³⁴

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, cannot discharge himself. So strictly is this rule applied that a soldier leaving his regiment without a regular discharge, though he immediately reenlist 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 defense, - to be forthwith discharged according to the Article. 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 offense, the former is a mere terminating or rescinding of a contract. 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, - an “honorable” discharge. 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, 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 occasion 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 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.”³⁵

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 discharge is “honorable,” whatever may have been its grounds or the

circumstances under which it was given. Though its subject be a deserter, an offender in arrest or on trial, or a convict under sentence of imprisonment, 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 military jurisdiction and control, 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.³⁶

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.³⁷ But the distinction between a discharge “without honor” and a “dishonorable” discharge is fanciful 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 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 unemancipated 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.³⁸ 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 offense, or under sentence adjudged upon conviction of such offense, 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.

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,) 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 offense,) or under sentence on conviction of such, he cannot legally be discharged even at the suit of the parent.

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 a minor.

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 prescribe, permit any enlisted man to purchase his discharge from the Army.” The rules, etc., several times amended, are, in their last form, published in G.O. 17 of 1893. It is here declared that the discharge, which, it is remarked, “is not an inherent right but a privilege to be granted entirely 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.”

¹ Formerly the officer’s oath 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.

² 137 U.S. 147 (1890).

³ *Id.* at 156.

⁴ 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.

⁵ *Cf.* Wilkes v. Dinsman, 48 U.S. 89 (1849).

⁶ 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 of relieves from the obligations which its existence imposes.” 137 U.S. at 151; *see id.* at 152-54.

⁷ U.S. Const. Art. I, § 8, para. 12.

⁸ “Its control over the subject is plenary and exclusive.” Tarble’s Case, 80 U.S. 397 (1871).

⁹ “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 upon it.” 4 Opins. At. Gen., 537.

¹⁰ Tarble’s Case, 80 U.S. at 408.

¹¹ “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. United States, 23 Ct. Cl. 140.

¹² Tarble’s Case, 80 U.S. 397 (1871). 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.

¹³ Details omitted to be prescribed by Congress may, (where not of the nature of legislation,) be supplied by regulation.

¹⁴ 3 Opins. At. Gen., 671; 6 Opins. At. Gen., 476.

¹⁵ 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 the draft.

¹⁶ “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.

¹⁷ 1 Jour. Cong. 281.

¹⁸ 11 Opins. At. Gen., 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.

¹⁹ Even the Confederate States Government authorized, near the end of the war, the raising of “companies of negro soldiers.” Official communication of the Confederate Secretary of War, to Major Pegram and others, A. & I. G. O., March 15, 1865.

²⁰ The direction of Circ. No. 10 of September 4, 1894, that “in view of 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.

²¹ In re Morrissey, 137 U.S. 157, 159 (1890).

²² 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. But these rulings are opposed by the great mass of authority.

²³ In re Grimley, 137 U.S. 147, 153 (1890).

²⁴ Especially in time of war is the claim of the parent, etc., to the services of the minor to be subordinated to that of the Government. 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 necessities, - part of the consideration being certain rations, clothing, fuel, quarters, medical attendance, etc. But in general it has been preferred to support the contract upon the "*broader ground of public policy*."

²⁵ 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.

²⁶ And see the Third Article of War, and the corresponding law as to the Navy - Sec. 1420, Rev. Sts.

²⁷ 5 Hill, 16.

²⁸ 1 Rob., 631 - a very instructive case.

²⁹ In re Stevens, 24 Law Rep., 205.

³⁰ Ex parte Schmeid, 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*."

³¹ 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.

³² 4 Opins., 537-8. And see 15 Opins., 362.

³³ That the certificate is not the discharge, but only "*evidence*" of it, see 13 Opins. At. Gen., 18.

³⁴ Where the sentence of confinement is to be executed at a post other than that of the company, etc., 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.

³⁵ 2 Opins. At. Gen., 353.

³⁶ United States v. Kelly, 15 Wallace, 36.

³⁷ 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.

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- (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."

³⁸ 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.

CHAPTER XXV

THE ARTICLES OF WAR SEPARATELY CONSIDERED

V. THE FIFTH, SIXTH, AND FOURTEENTH ARTICLES

[False Muster, etc.]

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, 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.

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 offense of “false muster” were made punishable in the old British Article, (particularly in those of Charges 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 mentions the following, which embrace all or nearly all forms of the offense as now understood: -- “the substitution, on the muster-roll, of one man or horse for another; 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 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, etc.; 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.”¹

“Knowingly”—“Knowing.” The guilty knowledge, which is the gist of the offenses specified, may be proved by direct evidence, but, more generally, will be established inferentially from the circumstances indicating that the accused must, in all reasonable probability, have made the muster, or signed, etc., 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 in his office to know, or what he is bound to know in the performance of the particular duty devolved upon him.

Where it appears that the accused had knowledge of the false statement or entry, his motive or object in making the muster, or signing, etc., the roll, is of

no consequence in law. 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: 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 be 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 code as embraced within the general description of Art. 14. Judging from its terms in the earlier forms, it was originally aimed mainly at the offense of causing retainers or officers’ servants to take the place of soldiers and answer as such upon the muster. As at present worded, it is immaterial what sort of persons are thus substituted. The direction—“shall be punished accordingly,” means of course shall suffer the punishment prescribed by the principal (misplaced) Article—the 14th.

SIXTH ARTICLE.

CONSTRUCTION AND EFFECT. This Article makes it an offense 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. Samuel, 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 offense,” 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 offense will be complete.” O’Brien’s comment is -- “The Article is explicit and makes no distinction whether the muster-rolls were true or false.”

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 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.² 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 Article. The offenses 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 offense 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 to discretionary with the court.

As has been remarked in Chapter XX, the disability to hold office, etc., here prescribed, attaches as a legal consequence to the conviction and punishment 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 garrison, shall, in the beginning of every month, transmit through 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.

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, etc.

THE OFFENSE 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

ITS OBJECT. “The object,” observes Hough, “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 the regiments, etc., and therefore a false return may be attended with very serious consequences.” Of the returns of *arms, etc.*, he adds: “The object of such returns is to check the issues and receipts of arms, etc., furnished to the regiments from the magazines, etc., as well as to ascertain the state and condition of the equipments in use.”

THE OFFENSE. 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 62nd, 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; and in a further Order, 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 equipage,”³ the Chief of Ordnance or Quartermaster General.

To constitute therefore the offense, 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, regulation, or usage to require it; 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, 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 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.

¹ The offense 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.

² So Atty. Gen. Legare 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.” 3 Opins. At. Gen., 694-5.

³ Stores “there unto belonging” means of course belonging to, or issued to and held by, the regiment, company, or garrison. The returns contemplated in the Article are returns of the personnel or materiel of the command, and do not include returns of funds.

CHAPTER XXV

THE ARTICLES OF WAR SEPARATELY CONSIDERED

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 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, 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 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 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. 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 criminal offense.ⁱ

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.ⁱⁱ

"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 devolved 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.ⁱⁱⁱ

The Article is directory only. It has, however, as its penal complement, Art. 15, under which an officer who fails willfully 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 offense 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.

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, in construing the concluding clause of the Article, observes that—"by 'unavoidable' is intended what could not 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 offenses 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 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 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 general--62d—Article. Such is indeed the conclusion, in substance, of Samuel, in construing the corresponding British Article. Thus while any neglect, resulting in a loss, etc., 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 willful act also constituted an offense thereby.

“Suffers to be lost, etc.” The willful 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, etc.

“Shall make good the loss of damage.” This provision is regarded as imposing a general pecuniary liability which may be enforced independently of the sentence. 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 statement that the court estimates the value of the stores lost, etc., to be a certain amount specified. The stoppage when ordered would properly concur with this estimate.

SIXTEENTH ARTICLE.

CONSTRUCTION AND EFFECT. The original 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 offense, 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 lost or damaged, in recklessly expending it in firing, giving it away, etc. The “casting away” of ammunition, made punishable by Art. 42, is a distinct offense.

SEVENTEENTH ARTICLE

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, 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.” 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 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 offenses 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; and so of the offense of the gambling away of his clothing by a soldier.

The *neglect* specified may be of any degree—from willful positive neglect to the negligence involved in an omission to take due care of this thing, or a mere carelessness in the use of it.^{iv}

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.

A specification under a charge of a violation of this Article should set forth one of the specific offenses enumerated and not some other similar act of offense or offense expressed in general terms. Thus a specification which alleges that the accused did unlawfully “dispose of” his horse, etc., is defective and insufficient. And so is a specification which avers the commission of two or more offenses in the *alternative*;--as that the accused “did sell, lose or spoil through neglect,” or “did sell, lose through neglect, or otherwise dispose of.”^v

“His horse, arms, clothing,” etc. 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, that the term “*his*,” employed as it is indifferently in regard to all the things specified, is no here intended to convey an idea of *absolute* property or ownership, but rather one, as between him and the United States, of possession only. 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, etc., 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, etc. 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, etc., 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.

“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.

ⁱ 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.

ⁱⁱ 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.

ⁱⁱⁱ Prior to the enactment of July 15, 1870, a special allowance (similar to that made in the British service,) of \$10 per month was made to company commanders "for responsibility of arms and clothing."

^{iv} 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.

^v This form is allowed in British practice.

CHAPTER XXV

THE ARTICLES OF WAR SEPARATELY CONSIDERED

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 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 noncommissioned 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, 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,ⁱ 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, where the form of a furlough is indicated. At the end of the form it is declared that the soldier shall rejoin his regiment, etc., 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* 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.

TWELTH 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, etc., 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, etc.,) is made a specific military offense.

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. 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 offense, that the officer shall *knowingly* sign 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 defense 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 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 payroll or voucher before the day on which the pay becomes due has been held not to constitute a violation of this Article; 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 person, 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 offense of fraudulently duplicating his personal payrolls, by an officer, is, in the opinion of the author, not strictly a violation of this Article and therefore not properly chargeable under it.

ⁱ 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.

CHAPTER XXV

THE ARTICLES OF WAR SEPARATELY CONSIDERED

IX. THE EIGHTEENTH ARTICLE

[Taxing, or being Interested in, the Sale of Provisions, etc.]

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.

ITS OBJECT AND EFFECT. This provision, dating from art. 66 of 1775, 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. 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, 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 defense to a charge, against an officer, of having exacted a sum of money from a citizen as a consideration for a license to sell 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.

Sutlers in our law were done away with by the Act of July 28, 1866, and were succeeded by *Post Traders*, 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, and these have more lately been superseded by the *Post Exchange*. A commanding officer who should become interested in the sale of "victuals," etc., intended for trade of the post exchange, would probably be amenable to a charge under this Article.

CHAPTER XXV

THE ARTICLES OF WAR SEPARATELY CONSIDERED

X. THE NINETEENTH, TWENTIETH, AND TWENTY-FIRST ARTICLES

[Offenses 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

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.¹ This Article was derived from the British code where the offense consisted in the use of “traitorous or disrespectful words against the Sacred Person of his Majesty or any of the Royal Family.” 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. No instance has been found of a trial upon a charge of disrespectful words used against Congress alone or the Vice-President alone, although in some examples the language complained of has included Congress *with* the President. Only one case is known of an arraignment upon a charge of speaking disrespectfully of a Governor of a State,² (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 OFFENSE. The “words,” (which need not, of course, be addressed to the President, etc., 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, etc. Although the mere fact that no disrespect was *intended* will not constitute a defense 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 offense, or what degree, 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.³ 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 offense under consideration. And any disrespect will be aggravated by being manifested before inferiors in rank in the service.

To constitute the offense of speaking, etc., disrespectfully of the President, the official referred to must be the acting President at the time. Maligning a deceased President would not be within the Article. Thus the public exulting over or justifying of the assassination of President Lincoln—an offense which was in several instances, toward the end of the late rebellion, made the subject of trial by court-martial, was properly charged as a violation of Art. 99.

It would not constitute a *defense* to a charge under this Article, to show that the person was spoken of, etc., 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 offense 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 reference 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,” etc., 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; --“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 behavior 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;⁴ by an open declaration 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, etc. Disrespect toward a commander by *acts* may be exhibited in a variety of modes—as by neglecting the customary salute, 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, etc.

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. As indicated under Art. 19, it is no defense 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 offense under the Article. Where, however, it is doubtful whether an act, or language, not necessarily disrespectful *in se*, may properly be treated as amounting to disrespect, the *animus* of the party becomes a material inquiry. 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 more readily inferred. An intentional disrespect is of course much more aggravated than one which is unintentional: a disrespect is also aggravated where it is *publicly* committed; and so of disrespectful language conveying *false* imputations. It is no defense, however, to a charge for using such language, that the same only stated *facts*,⁵ 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. Further it is no defense, 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, 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."⁶

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 behavior was unprovoked, undeserved, false, deliberate, violent, or public—as in the presence of officers or soldiers, than where it was the reverse.⁷

“Toward.” As already indicated, it is not essential to the offense 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 included not only to, but at, against, or in reference to. Disrespectful language used in regard to a commander, in his absence, has been expressly held in Orders 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.

“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 offenses 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 offense. 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. This is not necessarily an officer of the line but may be a staff officer—as an engineer officer in command of an engineer station, or an ordnance officer in command at an arsenal. Or it may be a medical officer in command at a hospital.⁸ The offense 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 charged under some other, as the 62d. And so of the offense 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 offense 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. 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 pretense whatsoever.” These words, while emphasizing the description of the grave offenses made punishable by this Article, do not add to its legal effect, or preclude the possibility of a defense 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 offense indicated, but a mere assault only. If indeed there is an assault offered, (with a weapon,) it is punishable under the next description. Upon the words “strikes” Hough 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 hard blow; the mere striking constitutes the crime.” The striking must however be intentional; an accidental blow or contact would not constitute the offense contemplated.

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-defense 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 offense of the latter in employing force in return.

“Draws or lifts up any weapon against.” Here, however, are intended simple assaults; the offense 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 firearm, (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 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 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 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. A striking or offering of violence by shooting, etc., which has resulted fatally, has sometimes been charged under this Article, and the death sentence been imposed upon conviction.

“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. The Article, as remarked in the Digest, is thus “broader than Art. 20,” which relates to offenses against commanding officers only.

“Officer”—it need hardly be observed—means here, as elsewhere in the code, commissioned officer. An assault or battery upon a noncommissioned 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. 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 offense was committed in the night time, it will depend upon all the circumstances, as they 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, etc., and the fact that he did so will be material evidence, as part of the *res gestae*, upon the trial of the subordinate for an offense under this Article.⁹ 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. 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 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 offense of Disobedience of Orders. Obedience to orders is the vital principle of the military life,¹⁰--the fundamental rule, in peace and war, for all inferiors through all the grades from the general of the army to the newest recruit.¹¹ 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, 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 proceed.¹² 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;¹³ nothing short of a physical impossibility ordinarily excusing a complete performance. 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,¹⁴ 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.¹⁵ Even where the order is 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.¹⁶

The disobedience contemplated by the Article. It is agreed by the authorities that the offense 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 willful 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.¹⁷ 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

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.¹⁸ Thus a failure to comply with the general or standing orders of a department, district, post, etc., or with the Army Regulations, is not an offense under this Article, but under the 62d. And so of a non-performance by a subordinate of any mere routine duty.

As to the *form* of the order, -- this is immaterial, provided that the substance amounts to a positive mandate. 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.¹⁹

The order may be oral or written;²⁰ 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.²¹

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.²²

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. Where not previously informed upon this point, the declaration to him of the emissary that he is the staff officer, aid, etc., 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 liable to a charge under the present Article, if he does not comply.²³

As to the 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, 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, 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. The order must be clearly repugnant to some specific statute, to the law or usage of the military service, or to the general law of the land.²⁵ 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, the *onus* of establishing this fact will, in all cases -- except where the order is palpably illegal upon its face -- devolve upon the defense, and clear and convincing evidence will be required to rebut the presumption.

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. Thus an order for the seizure of citizens' property for the subsistence or transportation of the troops, the construction of defenses, etc., 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.

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. 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. 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 at most invariably justify and protect an accused who has been exposed to prosecution by reason of his unquestioning fidelity to duty, holding the superior alone responsible.

Unjust or objectionable commands. That the order was merely unjust or unreasonable would, it need hardly be added, constitute no defense to a charge of disobedience of orders under this Article. 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 England, where it was held wholly insufficient as a defense. 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 occurring 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 the Army may rank very considerably above 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 offense 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. 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, etc.: it is sufficient if he can be an officer upon whom the command has temporarily devolved.

To constitute the specific offense 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.

¹ Compare the early civil statute, not now in force, of July 14, 1798, s.2, making punishable by fine and imprisonment the offense of “writing, printing, uttering, or publishing, etc., 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,” etc.

² 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.

³ “To seek indeed for ground of offense in such discussions would ordinarily be inquisitorial and beneath the dignity of government.” Judge Advocate General Holt, Digest of Opinions, 26. It would, ordinarily, be still more inquisitorial to look for the same in private conversation.

⁴ In a case in G.C.M.O. 41 of 1889, the offense 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.

⁵ 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. [citation omitted]

⁶ It is also held an aggravation of the offense that the *commander* is an officer of especially high rank and station.

⁷ 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.

⁸ “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 behavior 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.

⁹ 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.”

¹⁰ “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, and without this there can be neither discipline nor efficiency in an army.” McCall v. McDowell, Deady, 244. “To ensure efficiency an army must be, to a certain extent, a despotism. Each officer . . . is invested with an arbitrary power over those beneath him, and the soldier who enlists in the army waives, in some particulars, his rights as a civilian, surrenders his personal liberty during the term of his enlistment, and

consents to come and go at the will of his superior officers. He agrees to become amenable to the military courts, to be disciplined for offenses unknown to the civil law, to relinquish his right of trial by jury, and to receive punishments which, to the civilian, seem out of all proportion to the magnitude of the offense.” *United States v. Clarke*, 3 Fed. 713, (Brown, J.) And see *Trammel 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.

¹¹ “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.

¹² 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 higher authority.”

¹³ 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 Wheat. 30.

¹⁴ 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 victory, Hough observes that, “if he had *failed*, he would have been brought to trial by court-martial.”

¹⁵ “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 subordinate 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 means of resistance.” *Martin v. Mott*, 12 Wheat. 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.

¹⁶ 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.

¹⁷ To be willfully disobeyed, the order must of course be *understood*.

¹⁸ Other persons may be included in the order, provided it contains a distinct and direct mandate upon the individual who afterwards becomes the accused. It has been held an offense 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.

¹⁹ But if an order be actually given, it is no less to be obeyed though expressed in a courteous instead of a peremptory form.

²⁰ 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 be reasonably misunderstood as an order to himself, it will be within contemplation of the Article.

²¹ 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 offense.

²² The omission of an intermediate commander in the course of the transmittal will not affect the force of the order.

²³ The transmission of an order to an officer through a non-commissioned officer does not impair its obligation.

²⁴ That an illegal order emanating from the President or Secretary of War can confer no authority, see *Little v. Barreme*, 2 Cranch 179. "In time of peace at least an officer is not obliged to obey an illegal order." *Id. v. United States*, 25 Ct. Cl. 407.

²⁵ "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." (citation omitted). The code of Gustavus Adolphus makes punishable, as a specific military offense, the giving of an unlawful command.

CHAPTER XXV

THE ARTICLES OF WAR SEPARATELY CONSIDERED

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.

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 noncommissioned officers and soldiers into confinement, who take part in the same, until their proper superior officer is acquainted therewith. And whosoever, being so ordered, refused to obey such officer or

noncommissioned 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 offense 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. Of the acts which it makes punishable, the principal, *Mutiny*, has commonly been characterized as the gravest and most criminal of the offenses known to the military code.¹ It has also an historical significance; the well-known mutiny of Jacobite troops in 1689, 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. 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.

It is this intent which distinguishes it from the other offenses with, to the embarrassment of the student, it has often been confused both in treatises

and General Orders. Thus, disrespect toward a commanding officer, the offense which is the subject of Art. 20, has sometimes been charged as mutiny. More frequently the doing or offering of violence to a superior officer, and disobedience of order, -- offenses specifically made punishable by Art. 21, - have been so charged or considered. Still more frequently has the designation of "mutiny" been erroneously attached to disorders of the class known as "mutinous conduct"—such as defiant behavior or threatening language toward superiors, muttering or murmuring against the restraints of military discipline, combinations of soldiers with a view to acts of violence or lawlessness which however are not committed, 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 enlistment has expired,² etc. 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 offense of mutiny, but are commonly to be treated as "conduct to the prejudice of good order and military discipline" in violation of Art. 62. And the same is to be said of disorderly conduct under the influence of intoxication, which, though accompanied by resistance to a superior, is without the animus peculiar to mutiny in law.

The definition of mutiny at military law is indeed best illustrated by a reference to the adjudged cases treating of that offense 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, that simple violence against the officer, without proof of intent to override his authority, is not sufficient to constitute revolt or mutiny, that mere

disobedience of orders, unaccompanied by such intent, does not amount to mutiny; and that insolent language or disorderly behavior is *per se* insufficient to establish it.

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, from an assumption of the command which belongs to the superior, a rescue or attempt to rescue a prisoner, a stacking of arms and refusal to march or do duty, a taking up arms and assuming a menacing attitude, etc.; or it may be gathered from a variety of circumstances no one of which perhaps would of itself alone have justified the inference. But the fact of *combination*—that the opposition or resistance is the proceeding of a number of individuals acting together apparently with a common purpose, -- is, though not conclusive, the most significant, and most usual evidence of the existence of the intent in question.

INTENT ALONE NOT SUFFICIENT. While the intent indicated is essential to the offense,³ 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. Words alone, unaccompanied by acts, will not suffice.

A VIOLENT ACT NOT NECESSARY. The opposition or resistance need not be active or violent. It thus may consist simply in a persistent refusal or omission, (with the *intent* above specified,) to obey orders or do duty.

THE RESISTANCE, ETC., MUST BE TO LAWFUL AUTHORITY. If the superior when resisted is attempting to execute an illegal order, or to enforce his authority by illegal means, 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.

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. 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.⁴

SEDITION. This offense, which, as designated in the present Article, is by the earliest writers, 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.”⁵ No instance of a trial, under this Article, for sedition, as thus defined, is known to have ever occurred in our military history.

THE SPECIFIC ACTS MADE PUNISHABLE BY THE ARTICLE. – “Who

begins, excites, causes, or joins in, any mutiny,” etc. Samuel distinguishes in general terms the two classes of person 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 offense of the officer or soldier who originates or is instrumental in originating a mutiny, and *join in* as referring especially to the offense 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; 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, etc., actually resorted to. Thus a mutiny may be excited and caused by an inflammatory harangue addressed to soldiers by one having influence of authority over them, as--especially--by an officer or noncommissioned 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, etc.

Joining in a mutiny is the offense of one who takes part in a mutiny at any stage of its progress, whether he engages in actively executing its purposes, or,

being present, stimulates and encourages those who do. 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 offense; 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.

None of the offenses complete unless a mutiny actually occurs. The Article, in designating as offenses the beginning, etc., and joining in, a mutiny, evidently contemplates that a mutiny shall have been consummated. A mutiny complete in law must actually have existed to authorize the bringing to trial of an accused for an offense of this class. Thus an *attempt* to begin or create a mutiny, which has proved abortive, is not chargeable under this Article, 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 offense 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 as constituting the offense, with an allegation of the proper intent. Where, as is usual, the mutiny is a concerted act, the charge is frequently *joint*; all or the principal of the offenders being accused together and tried together accordingly.

The evidence. It need only be added here that, as a foundation for establishing 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.

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 offense 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 conviction. The punishment being left discretionary, the court will naturally and properly adjudge a severer penalty to ringleaders, especially of superior rank, 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 settle a claim for pay overdue or for a legal allowance, 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 offense and reduce the measure of punishment.

That death is not a *legally excessive* punishment for this offense 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 trial. 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.”

TWENTY-THIRD ARTICLE.

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.⁶ As to suppression—the Article makes it a crime to simply “stand by” while a mutiny is being committed. “It is,” Samuel 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 he party shall use “his utmost endeavor,” etc., holds that “every officer is armed” by the Article “with dictatorial and unlimited powers,” and that “if the measures are stronger than necessary he cannot be punished; the law justifies him.” 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 means—in using a deadly weapon and taking life, -- for the suppression of a mutiny, he will not ordinarily thus be warranted in a case of mutiny unaccompanied by violence or where less vehement methods will be entirely effectual. 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 officer, in employing them, might become liable, for abuse of authority, not only to trial by court-martial but to indictment in a civil tribunal.

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.

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.

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.⁷ 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 seeing that a hearing was given them and justice done when aggrieved, and of duly considering their feelings when natural and reasonable.

GIVING INFORMATION. The Article further requires that officers or soldiers “having knowledge of any intended mutiny,” etc., shall, thus, in the words of Samuel, “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 observes that an intended mutiny “is more likely to be known to the noncommissioned 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.

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, or the fact of his coming 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 noncommissioned officers who join in a mutiny in violation of Art. 22, will in general be also chargeable with the offense of not endeavoring to suppress a mutiny, in violation of Art. 23.

TWENTY-FOURTH ARTICLE.

ITS GENERAL EFFECT. This Article, (which dates from the British codes of 1642 and 1688) 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 dueling, 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 those 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, 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 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

alone cannot amount to this offense; to constitute an affray the words must be accompanied by acts. At the same time it is held not absolutely to be necessary to the offense 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. All persons present engaged in aiding and abetting an affray are principals.

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.

APPLICATION OF THE PRINCIPLE IN THE MILITARY SERVICE. An officer of the army is still a citizen and has the same summary power of any citizen forcibly to repress frays – 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.” 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.⁸ 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 last clause – “such officer or noncommissioned officer,” it is clear that not only commissioned officers but sergeants and corporals are vested with the power to part, quell and arrest, without regard to the superiority in rank of the person whom they may thus regulate and restrain. 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 offense 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, etc., 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. Where such arrest, etc., has been ordered by an inferior officer or a noncommissioned 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.

PROOF—DEFENSE. In proving either of the two specific offenses, 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 noncommissioned,) officer of the army. A defense, 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, etc., of the command. It is no sufficient defense 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.

¹ It can however scarcely be regarded as a graver offense than Misbehaviour before the enemy.

² A combination, however, to refuse to perform military service, legally and properly required of the parties, if persisted in after due warning, etc., may certainly be treated as mutiny.

³ Excuses 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 *defense*.

⁴ "The grand feature generally to be found in the crime of mutiny." Samuel, 274.

⁵ 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."

⁶ 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.

⁷ “Having punished guilt and supported authority, it now becomes proper to do justice.”
General Washington, referring to the mutiny in the New Jersey line.

⁸ 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.

CHAPTER XXV

THE ARTICLES OF WAR SEPARATELY CONSIDERED

XII. THE TWENTY-FIFTH, TWENTY-SIXTH, TWENTY-SEVENTH, AND TWENTY-EIGHTH ARTICLES.

[Challenges to Duels, etc.]

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.”

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. 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 restraint. In practice, however, the provision enjoining the *asking of pardon* by soldiers is rarely, if ever, resorted to; the course pursued with regard either to officers or soldiers, who may be culpable as indicated in the first clause, being to place them in arrest and prefer charges with a view to trial – as in any other case of offense.

If indeed the proceeding specified in the Article is pursued, and the offender, having been afforded a *locus paenitentiae* 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 cites the case of Capt. Burdett, in which the accused was acquitted because it “appeared in the course of the evidence” that his offense 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 dueling in the army, by rendering liable to immediate arrest, trial and severe punishment, all military personnel without distinction, who send 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.¹

THE COMMON LAW OF THE SUBJECT OF DUELS AND CHALLENGES. The practice of dueling, “grounded,” as Lord Bacon expresses it, “upon a false conceit of honor,” or, as described by Tytler, “upon mistaken sentiments of honor, and supported by false shame,” is, with the incidental offenses of sending a challenge, acting as second, etc., denounced as criminal, alike by the common law and by statute. By the common law, the taking of life in a duel is murder in the killer, whatever may have been in the occasion or provocation of the fight and notwithstanding the absence of actual homicidal intent.² So is it also murder in the seconds of both parties,³ and others who are present abetting the act; all such persons being treated as principals equally with the one who fires the fatal shot.

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. 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.

CIVIL STATUTE LAW. In this country, the offenses 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. Military offenders will thus in general be amenable both to military charges and to criminal indictment.

OFFENSES MADE PUNISHABLE BY ART. 26. This Article makes punishable the two specific offenses of Sending a challenge and Accepting a challenge.

SENDING A CHALLENGE – What constitutes a challenge. Wharton 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; must contemplate the employment of weapons from the use of which homicide may be expected as a natural and probable consequence; 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. A *challenge* is a written or verbal demand, request, or invitation to another to unite in such a combat. No particular form of words is necessary to constitute a challenge in law. The *intention* of the language employed is the material point. Mere bullying or defiant language does not amount to a challenge; nor do words conveying only a willingness to fight or a readiness to accept a challenge from the other party.⁴ 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.⁵ Written challenges are indeed often phrased in 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. 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. 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. Where, however, ambiguously or obscurely worded, or containing technical terms, they may be explained by a reference to the so-called dueling code, or by the circumstances of the controversy and the acts, conversation, correspondence, &c., of the parties, as exhibited in evidence.⁶

The sending. The early British Article from which ours was derived characterized the offense 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*,” etc., 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 offense 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 offense 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.

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 offense being complete without it. 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.⁷ It is not necessary to show that the challenge was either accepted or declined by the person to whom it was sent. The non-acceptance of the challenge in no manner exonerates the sender; to the completeness of *his* offense it is quite immaterial whether or not an offense 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.

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. 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.

ACCEPTING A CHALLENGE. This offense 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 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, etc., 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 acceded to the

invitation conveyed by the challenge. 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.

DEFENSE – PUNISHMENT. The sending or accepting of a challenge being *prima facie* established, the only defense 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. No provocation, however, great, can constitute a defense. 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, etc., 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 offense 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 of culpability. The several classes indicated, and the nature of their offenses, 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: 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 offense, 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, provided the weapons, etc., he will bring himself within the description of "seconds or promoters of duels," as employed in the Article.

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 acts. The "duelling code" may also be put in proof, to indicate what acts and service pertain to the functions of a second.

Defense. The accused may show in defense 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,”⁸ 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 offense of the carrier, the carrying must be performed *knowingly*, i.e., the accused must know that the message is a challenge to fight a duel.⁹ 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. It is only essential that the carrier should have the knowledge before the carriage be completed.

The offense is consummated by the *delivery* of the challenge. We have seen that the offense 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 paenitentiae*, 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.

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,¹⁰ 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,) they have at the same time a distinct and 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.

As it is not necessary, to complete the offense of the *second* or the *carrier*, that a duel should actually transpire; so, it is not deemed absolutely essential to the offense 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,¹¹ 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 intent¹² - 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 offense 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.

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, and, among the latter, persons of any grade; so that a non-commissioned officer or officer or inferior rank would be chargeable under the Article for suffering a *superior* officer of whatever rank “to go forth,” etc. The commander of the guard must not merely forbid the person to go forth from the post, station, etc., but *stop* him, and by force if necessary: if he neglects to do so, he commits the offense 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.” 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 declamatory 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 evidence 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 apprehension 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 sane

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 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;” 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 adoption of the Article was “posting” as a coward, by means of a written or printed public notice,¹³ – an still made punishable in the statutes especially of the older States. Thus, in the laws of Massachusetts, 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,” etc.

It is quite clear, however, that the upbraiding intended by the Article need not be in writing, but may be *oral* as well.

The offense 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, 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 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, and proved by showing either that it is in the handwriting of the accused, or was written for 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.

¹ It is noticeable that the specific offense 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 62nd Article. But this offense, and those specifically made punishable in Arts. 26-28, are now of rare occurrence, though once not unfrequent in the army.

² 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.” (citations omitted)

³ The criminal liability of the second of the deceased is no less than that of the second of the other party.

⁴ Of this character are such expressions as – “I am responsible for my words,” “You know where to find me,” etc.

⁵ 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. Nor need it refer to the origin of the difficulty between the parties, or the matter of the suppose grievance of the challenger. Nor need it indicate the place where the duel is proposed to be fought. 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.

⁶ 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.

⁷ 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.

⁸ 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.

⁹ “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.”

¹⁰ The term *promoters* “applies to all 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.”

¹¹ In the only precedent which the author has found of promoting, charged specifically as such and independently of seconding, there was an actual duel.

¹² The promoting of a challenging of one’s self by the party addressed would appear to be as much within the general designation of the Article as a promoting of the challenging of another.

¹³ 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.”

CHAPTER XXV

THE ARTICLES OF WAR SEPARATELY CONSIDERED

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 an 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, now of but slight significance, and may be very briefly treated.

“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 resort to a trial by court-martial. Clode expresses the opinion, in regard to the corresponding British Article, that its object is to provide for the “settlement of professional disputes;” and Hough, 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 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* 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, (commonly 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 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, etc., 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 outline 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, etc., 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,) has not been materially modified since 1806, is also a provision of comparatively slight value in the code. It entitles indeed a soldier, “who thinks himself wronged by an 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 must rather be to discourage soldiers from seeking relief under it. It has thus been found inadequate in practice, and is comparatively 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 judgement on the part of the officer in regard to some matter connected with the “internal economy” 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. So, such grievances as the imposition of unreasonable arrest, 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.

But where the act of the officer, as complained of, amounts clearly to a specific military offense, 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 offense, it would be transcending altogether its province.

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; 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. 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 complainant, it is to be gathered from the history, and text of the Article that it was therein contemplated that it would be mainly the acts of the 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.e., must not have resigned, been dismissed, etc., 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 that 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. 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 offense, nor does it acquit, convict, or sentence. It merely, as has already 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.

“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 complainant. 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. 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.

“Either party may appeal.” 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. 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.

“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 in the proceeding

can result in nothing but embarrassment and trouble to the adversary and to the military authorities.¹

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, since to allow this would be to encourage a mutinous or insubordinate feeling, but that separate and individual complaints only should be entertained. 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. 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. The complainant produces his witnesses or other testimony, and the officer, if he sees fit, follows with a defense or explanation and proofs. Either party may be sworn and testify if he desires. Each has the same 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.

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,²) 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, etc. 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 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 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 infrequent in practice.

¹ 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.

² 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.

CHAPTER XXV

THE ARTICLES OF WAR SEPARATELY CONSIDERED

XIV. THE THIRTY-FIRST, THIRTY-SECOND, THIRTY-THIRD,
THIRTY-FOURTH, THIRTY-FIFTH, THIRTY-SIXTH,
THIRTY-SEVENTH AND FORTIETH ARTICLES.

[Unauthorized Absences and other Minor Offenses.]

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 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. 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 offense particularized 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, etc., at which the offender is stationed or quartered. The bad example as well as the hazard attending such an offense, when committed by officers serving with troops in time of war, must be obvious.¹ 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 unsteady effect of such a practice, if permitted to soldiers, need not be enlarged upon. Samuel refers to it as being an offense - "to the injury of the civil neighborhood and the corruption of the morals and discipline of the camp;" and Hough 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, etc. The "leave," to constitute a defense 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.

THIRTY-SECOND ARTICLE.

NATURE OF THE OFFENSE. This Article makes punishable the offense 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. 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 that 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 offense, 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. That the absence was unauthorized should be shown by some witness or witnesses – as the commanding officer, a company officer, a first sergeant, etc.-personally cognizant of the fact. The statement of a witness that the 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 offense.

DEFENSE. It will be a good defense that the party, while absent on pass or furlough, was prevented from returning at the proper time by sickness or other disability, 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 defense; 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 offense, 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 offense

was committed in time of war, when, in the words of Attorney General Legare, “the absence falls, in contemplation of law, little short of desertion.”

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, 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.”²

THIRTY-THIRD ARTICLE.

EFFECT AND CONSTRUCTION. This Article, in its first clause, enjoins 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,” etc., says Hought, “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, the place appointed for gymnasium practice, the riding-hall at the Military Academy. The instances of trials under this Article, though not as numerous as those under Art. 32, are not infrequent in practice.

The offense of “failing to appear at the fixed time,” etc., may consist either in non-attending or attending tardily. The excuse of sickness should, of course, as remarked by Samuel, be made out by the testimony of a medical officer. In

the case of the offense, specified in the second clause of the Article, of “going from” the place of exercise or assembly, “nothing,” Samuel observes, “will serve as a defense but the absolute leave of the commanding officer.”

THIRTY-FOURTH ARTICLE.

PURPOSE AND EFFECT. This Article, says Simmons, “is of very ancient standing, 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 that “a mile is mentioned as a convenient place, probably, for all purposes of exercise and refreshment.” “But,” he adds, “though 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 offense, 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. 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, 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, “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 writers cites, further, from Sutcliffe’s “Combination” the following old order which, in its spirit, is applicable to the army at all times: “All manner of 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.

NATURE OF THE OFFENSES – Hiring to do duty. Of the provision on this subject in the original British Article, Samuel writes, 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 wharves 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.

The offense indicated is a rare one in our service. In an Order of the Department of Missouri 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, 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 offense 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, this Article, which is supplementary to that last considered, was evoked by the existence of a 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, 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.

FORTIETH ARTICLE.

EFFECT AND CONSTRUCTION. The main object of this Article, in the view of Samuel, 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 offense of "quitting his guard" by an officer or soldier. This offense 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 the quitting of his guard without authority by an officer of the guard is commented upon as a grave instance of offense under this Article. In a case in another Order, it is ruled that the description "any officer," etc., 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 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 33rd.

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, guard for prisoners, etc.

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 that 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 offense, 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. 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 also a reprehensible act and a military offense, in the superior who *knowingly* suffers it. 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.

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 offense is then chargeable not under this but under the 62d Article.

“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. 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 offense being complete where, by becoming intoxicated, he has

rendered himself either more or less incompetent for the same.³ And, as a general rule, in proportion as the duty is difficult or important, and especially in time of war, a less degree of intoxication may be held sufficient to constitute the offense. 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.

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, the offense 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*. But, the ruling in an early General Order of the War Department that the Article had “reference solely to duties of detail,” was overruled in a later Order 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, 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, 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. The specification should of course set forth precisely the description of the duty which the accused was on at the time of the offense.

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,⁴ there are yet some instances recognized by the authorities, where officers or soldiers, by reasons 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 commanders*, and *post surgeons*, 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 *depot 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 this office. 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.

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 late war, “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, 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.”⁵

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, etc., 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, etc., he has not commenced to be “on duty” in the sense of the Article. But the opposite – as held in other instances – 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 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, or acting as an Indian agent under Sec. 2062, Rev. Sts.,⁶ would, if disqualifying himself by intoxication for the proper performance of the service devolved upon him, be amenable to charges under the present Article.⁷

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*.” 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. 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.

DEFENSE. 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 defense. He may also show in defense 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, 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 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.

¹ 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.”

² It is added, however, - “an absence without leave of less than one day shall not be noted upon the muster and pay rolls.”

³ In G.C.M.C.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) and the general rule 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.”

⁴ In the Joint Resolution of April 12, 1866, the term “in 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.”

⁵ 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 Opns. 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 62nd or 61st.

⁶ Otherwise perhaps where the officer was so serving under the Act of July 13, 1893, which detaches him from military command and places him “under the orders and direction of the Secretary of the Interior.”

⁷ In the leading case of *Runkle v. United States*, 19 Ct. Cl. 412, it was held that services on a detail in the Freedman’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.”

CHAPTER XXV

THE ARTICLES OF WAR SEPARATELY CONSIDERED

ARTICLE XVI. THIRTY-NINTH ARTICLE

[Offenses of Sentinels]

ART. 39. Any sentinel who is found sleeping upon his post, or who leaves 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 degradation 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 offenses 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*.

SLEEPING ON POST - Proof. As to the proof of this offense, 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 offense occurred, as it usually does, in the night,) 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 until touched, shaken, etc.; 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, etc.

LEAVING HIS POST BEFORE BEING REGULARLY RELIEVED – Proof. After showing the due detail and posting of the accused, this offense 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 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, (expressing a custom of the service,) 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 sentinel may be relieved at the end of a tour. 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, nor can he “regularly” be relieved by another sentinel except in the presence and under the supervision and direction of an officer or noncommissioned officer of the guard. Referring, in a case of the offense under consideration, to the mere relieving of sentinels by each other, Gen. Ordwell says—“This method of conducting guard duty is in direction violation of the Regulations, and sentinels allowing themselves to be thus relieved are liable to trial for a violation of the 39th Article.”

DEFENSE AND EXTENUATION. It has been held no defense to a charge of “sleeping on post” that the accused was on guard the day previous; or that an imperfect discipline had prevailed in the command and similar offenses had been allowed to pass without notice; or that the accused was not duly posted as a sentinel; or that he was ill, since, if really so, he should not have gone on duty at all but duly reported for medical treatment. So, to a charge of “leaving post before being regularly relieved,” it has been held no defense that it was a custom in the command for sentinels to relieve themselves, and that the accused had not followed this custom.

Circumstances, however, which could not constitute a legal *defense*, may be admissible as evidence going to *extenuate* the offense committed and reduce the measure 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; or that he had already been overtasked by excessive guard duty or other continuous service; or that he had temporarily left his post under an extraordinary stress of weather; or that, in irregularly relieving himself or allowing 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.¹

PUNISHMENT. The infliction of the death penalty for the offenses specified in Art. 39 is as old as the history of armies.² In our practice, the extreme punishment is most rarely, if ever, resorted to except in time of war. During the late war of the rebellion, it was adjudged not infrequently for the offense of sleeping on post.³

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 48. Of this series of Articles—which refer to a class of *capital* offenses pertaining mostly to time of *war*—those will be considered together which may be most conveniently associated.

FORTY-FIRST ARTICLE.

ITS OBJECT. Samuel, in commenting upon the corresponding early British Article, 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 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 to disposed to exert themselves . . . when their prompt and immediate services should be demanded.”

THE NATURE OF THE OFFENSE. 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—“Any officer, who, by discharging of firearms, drawing of swords, beating of drums, or by any other

means whatsoever, shall occasion false alarms,” etc. A later British Article, added, (after “beating drums,”) – “making signals, using words, or by any means whatever.” Among “other means,” says Hough, “may be enumerated the sounding of trumpets, bugles, or other wind instruments.” Samuel 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. Thus, before the enemy, in the absence of any warning from the picket line or outposts, it would in general constitute an offense 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 offense but the reverse to arouse and notify the command by the most effectual means.

The intent. The offense as defined in the later British Article 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 offense 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 offense and reduce the measure of the punishment.

Application in practice. “From the nature of the Article,” observes O’Brien, “it will most generally find its application in a season of war, though its letter does not in any way exclude times of tranquility.” Occasions of conviction under it have been rare in our army even in war. In an Order of 1863, 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, 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.

WATCHWORD AND PAROLE DISTINGUISHED. The British commentators 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, noncommissioned 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.”

THE TWO OFFENSES CONSIDERED--1. Making known the watchwords to persons not entitled to receive it. The Article, (which is applicable not merely to time of war, but also to time of peace, upon those rare occasions when a countersign is employed,) includes, in the first of the offenses designated, all impartings, secretly or openly, of the watchwords 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. It would include also cases of the offense committed without specific motive, but through negligence merely or want of appreciation of the purpose or significance of the watchword.

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, noncommissioned officers, and soldiers of the camp or post guard, provost guard, picket-guard and outpost; *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 for any purpose; as well as any other persons military or civil, not connected with the command, who, as visitors or for purposes of business, 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 offense 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.

It is no defense 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 offense by Samuel, 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 replace one which has been lost or communicated to the enemy, is provided for by par.1075 of the Army Regulations of 1881.

It would constitute an extenuating circumstance, though not a defense, that the accused, because of being a foreigner or for other good reason, had not understood the word when given out and so repeatedly it incorrectly. Hough, observes, of the watchword or parole, that it “should be some short word which is familiar to all and easily to be pronounced.” 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.

¹ In cases where the offense of the accused has been in part induced though the neglect or oppressive treatment of a superior, the latter has been not infrequently pronounced more culpable and deserving of punishment than the former.

² “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.

³ 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 offense, viz. – to forfeit

certain pay, to stand on a barrel for a certain period in the center of camp, and to “have a sign hung on his back inscribed ‘Sleepy Head.’”

CHAPTER XXV

THE ARTICLES OF WAR SEPARATELY CONSIDERED

XVIII. THE FORTY-SECOND AND FORTY-THIRD ARTICLES.

[Misbehavior Before the Enemy and Like Offenses.]

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.

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 Arts. numbered 55, 56, 62, 64, 73, 79, 89, 92, 93 and 94. The offense 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, which provided for the punishment of the offenses described only when committed “in time of an engagement;” and, as respects the offense of “leaving post, etc., to plunder and

pillage,” is also more general than the form of 1776, which made this act punishable only “after victory.” Other details in which the present Article differs from its predecessors will be noticed hereafter.

MISBEHAVIOR BEFORE THE ENEMY. This offense may consist in: --1. Such acts by a *commanding officer*, as—needlessly surrendering his command,¹ or abandoning it before the enemy; abandoning, or absenting himself from, his post when expecting an attack; failing to advance against, attack, or resist, the enemy, when ordered or properly called upon to do so; retreating, or withdrawing his command, before the enemy, without sufficient cause; conducting a retreat in a disorderly manner and without the proper precautions; failing to rally his force when in disorder but capable of being rallied; procuring himself unnecessarily to be relieved from the command when about to be engaged; failing to succor, support, or relieve, another command, when ordered, or when circumstances make it a duty; 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.

2. Such acts by *any officer or soldier*, as—refusing or failing to advance with the command when ordered forward to meet the enemy; going to the rear or leaving the command when engaged with the enemy, or expecting to be engaged, or when under fire; hiding or seeking shelter when properly required to be exposed to fire; feigning sickness, or wounds, or making himself drunk, in order to evade taking part in a present or impending engagement or other active service against the enemy; refusing to do duty or to perform some particular service when before the enemy.

Misbehavior not necessarily cowardice. Misbehavior before the enemy is often charged as “Cowardice;” but cowardice is simply one form of the offense, which, though not infrequently 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. An officer or soldier who culpably fails to do his whole duty before the enemy will be equally chargeable with the offense as if he had deliberately proved recreant.

Where the offense may be committed. The offense 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.

The act of misbehavior must be voluntary. The act or acts, in the doing not doing, or allowing of which consists the offense, 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 offense, 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, 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 enemy, or resorted to in view of his movements, the misbehavior committed will be “before the enemy” in the sense of the Article. The “enemy” may be hostile Indians, and the offense be committed in the course of warfare with Indians equally as in a foreign or a civil way.

Defense. Beside negating the facts charged, the accused may show in a defense 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 misbehavior. Brave or efficient conduct in action or before the enemy, subsequently to the offense, (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 defense. Nor will it constitute a defense, or scarcely an extenuation, that the accused did finally perform the service required of him or otherwise duty 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.

RUNNING AWAY. This is merely a form of misbehavior before the enemy, and the words “runs away” might well be omitted from the Article as surplusage. Barker, an old writer cited by Samuel, says of this offense: --“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 blamable; the other is voluntary, and, as it were, a determinate intention to give place unto the enemy—a fault exceeding foul and not excusable.”

SHAMEFULLY ABANDONING A FORT, POST, ETC. Of this specific form of misbehavior 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 defense, 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 offense indicated by the Article. In time of war nothing indeed so fatally compromises the public interests, and nothing is so inevitably made the subject of investigation and trial, as the premature and 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 defense under circumstances of extreme privation and difficulty.²

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.

The term “*post*,” it has been said, “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 practical the advance of the enemy, thus enabling the main body to prepared against his approach, would be a marked instance of the offense 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 offense, no express or specific instruction to defend the post need have been given, but that it is sufficient if an obligation to make a defense 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, and Hough, the conclusion is reached that these words are most properly to be construed as referring not merely to the act of abandoning a post, etc., the designation of which immediately precedes such words in the Article, but also and equally to the general offense of misbehaving before the enemy first therein mentioned and to the specific offense of running away; in other words that “*the 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 arguments, persuasion or threat, language of discouragement or alarm, of 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, 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.

It is held by Samuel that the offense 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, 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 offense, which, from an early period of history, has been viewed as a most serious one, especially in time of war, 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.” The term “*his arms or ammunition*,” like the item “his horse, arms, clothing, or accouterments,” employed in Art. 17, includes not only such arms, etc., if any, as may be personal property, but also such as have been furnished by the government to the soldier for his equipment and use in the service; the latter being those as sometimes among militia or volunteer troops, that the soldier will own his arm, etc., Where—as is thus the general rule—the arm or ammunition discarded belongs not to the offender himself but to the United States, the offense is aggravated; and, in time of war, it is also aggravated by the further fact that the arm, etc., 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 defense to the charge.

QUITTING POST OR COLORS TO PLUNDER OR PILLAGE. This offense, 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. It has been stigmatized as a grave military crime in all the codes of Articles from a very early period. The General Orders, published

during the late war, abound with declarations of commanders, denouncing and prohibiting pillaging and lawless foraging, and holding officers responsible for the conduct of their commands in this particular. 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.

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 of War” of 1866, and in the Franco-Prussian War of 1870. In regard to the latter, a writer of authority 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, 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 property; and whether private property sought to be taken belonged to persons hostile or friendly can in no manner affect the legal character of the offense. 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 offense is no less committed though the quitting of the post, etc., 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 noncommissioned officer. In such a case, the act of the superior being prohibited and lawless, the legal offense 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 offenses 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. Formerly, for the crime of misbehavior before the enemy, this punishment was executed at the will of the commander and without trial; and when this crime was committed conjointly by an considerable number, their decimation, or the summary taking of the life of every tenth man, was authorized by the Roman law. 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 misbehavior in battle, of attempted desertion to the enemy, or of violent or aggravated acts of plunder or pillage, 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, and during the late war of the rebellion

capital sentences were repeatedly adjudged for marked cases of violation of this Article. In cases of officers, dismissal has been almost invariably imposed, and in some instances there has been added disqualification to hold office. In one case, a lieutenant was sentenced to be reduced to the ranks. 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, and placarding with the word “coward,” or branding with the letter “C.”

The matter of the direction in the sentence as to publication in the newspapers of the particulars of the case, upon a conviction for *cowardice*, and the discontinuance thereupon of social relations between other officers and one who has been dismissed for such offense—has heretofore been noticed as enjoined in the 100th Article.

FORTY-THIRD ARTICLE.

NATURE OF THE OFFENSE. This Article, which has undergone no material change since 1775, refers, according to Samuel, to the using of “direct 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, etc. 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 defense, might be as effectual a form of compulsion as if physical constraint were resorted to. Of the offense Samuel further writes: “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, etc., is quite immaterial. It is observed by O’Brien 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 offense made punishable by this Article is known to have occurred in our army.

¹ 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.

² In the late instance of Belfort, (1870-1,) the defense was continued for three months. At Sebastopol it was protracted eleven months.

CHAPTER XXV

THE ARTICLES OF WAR SEPARATELY CONSIDERED

XIX. THE FORTY-FIFTH AND FORTY-SIXTH ARTICLES.

[Relieving, and Communicating with the Enemy, etc.]

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-marital 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 OFFENSES COMPARED WITH TREASON. Treason *as such* is not an offense properly cognizable by a court-martial. The offenses, however, which are the subject of these two Articles are treasonable in their nature and are characterized by Samuel, as “overt acts of treason;” by O’Brien, 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, an adherence to his cause, it can scarcely be regarded as less than an act of treason. 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 offense 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 offense, in the absence of the requisite *animus* implied in the constitutional definition.¹

CONSTRUCTION OF THE TERM “WHOSOEVER.” The subject of the interpretation of this initial word of the two Articles, as indicating of the classes of persons made amenable thereby to trial by court-martial for the offenses therein specified, has already been considered in Chapter VIII on Jurisdiction.

FORTY-FIFTH ARTICLE.

THE OFFENSE 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*. There 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 offense 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, affect the legal quality of the act.

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 offense.

“The enemy.” This term does not necessarily refer to the enemy’s government or army, nor is it required to constitute the offense 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;² 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 citizens or subjects of the other,” both in “civil and international wars.”³ 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, etc. It would include, however, a prisoner of war who has escaped and while he is at large, as also one who, having been made prisoner of war, has been paroled, and is at large upon his parole.

The term under consideration embraces also—as has been specifically held by the Attorney General – 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. “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, 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, as also by similarly

purchasing Confederate bonds. "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." In the reported cases occurring in 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. As to "ammunition," no sufficient grounds are perceived for ascribing to this word a meaning larger or other than that which it bears in common military parlance.⁴

THE OFFENSE OF KNOWINGLY HARBORING OR PROTECTING AN ENEMY.

This offense 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," a person known as, or confidently believed to be, and who is in fact, an enemy. If the party harboring, etc., is in no manner apprised that the other is an enemy, the specific offense 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 offense has commonly been committed by lodging or procuring lodging for officers or soldiers of the enemy's force, or by concealing them, and denying their presence or refusing to furnish any information of their whereabouts.

PROOF. It must of course appear that a *status belli* prevailed at the date of the offense, 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 offense, 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, etc. A state of war being admitted or established, the fact that the party relieved, etc., 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.

DEFENSE. The only justification of an act made punishable by this Article would ordinarily be the order or sanction of a competent military superior, or an authority conferred by an Act of Congress or the President.

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 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.

FORTY-SIXTH ARTICLE.

THE OFFENSES MADE PUNISHABLE. This Article makes capitally punishable by sentence of court-martial the two distinct acts of holding 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 communication 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 offense 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, etc., but makes it an offense 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, 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. 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.

It is further to be observed that the crime is complete in writing or 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 transit, the legal character of the offense will not be affected.

GIVING INTELLIGENCE TO THE ENEMY. This offense will consist in communicating to the enemy, by personal statement, message, letter, signal or otherwise,⁵ 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.⁶

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 defenses of a military post; 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; 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; and the giving of similar information to scouts of the enemy.

It is necessary that the enemy shall have been *actually informed*. If therefore the intelligence fails to reach him, this offense is not completed, though the offense of holding correspondence may be. 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—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 number, organization, position, operations, etc., of the army, by which information might readily be communicated to the enemy; and in several instances the offense thus committed was made the subject of charges under the present Article, or of trial by military commission. 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.

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 proper evidence of the existence of a state of war, etc.,) 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 manner, as indicated in the Chapter on Evidence. 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.

DEFENSE. The general principle laid down as applicable to defenses 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 defense 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 defense 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 defense, 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 defense 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 defense of duress, where his life was not seriously threatened or otherwise put in actual peril.

PUNISHMENT. The penalty to be awarded will properly depend upon the *animus* of the offender, whether treasonable, treacherous, or sympathetic 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, etc. The death penalty has sometimes been adjudged in our practice for a violation of this, as of the previous, Article, but imprisonment has been the more usual punishment. In some cases, the sentence has required that the accused be sent without the lines of the army.

¹ 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 offense under Art. 46.

² 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, 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."

³ *The Venice*, 69 U.S. (2 Wall.) 418 (1864). See also *The Prize Cases*, 67 U.S. (2 Black) 635 (1862); *Mrs. Alexander's Cotton*, 2 Wall. 274; *Gooch v. United States*, 15 Ct. Cl. 281, 287-88 (1879). The term "the enemy" includes not only civilians, soldiers, etc., but also persons who, by the laws of war, are outlaws, -- as guerillas and other freebooters.

⁴ The view expressed by Hough that “ammunition” was synonymous with *munitions*, and included arms and other materiel of war, does not seem to have been favored by other authorities.

⁵ See case in G.O. 26, Dept. of Va. And 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.”

⁶ The intelligence may be of a negative character. Thus in Stone’s Case, the sending to the enemy a paper containing reasons for *not invading* England was held to constitute high treason.

CHAPTER XXV

THE ARTICLES OF WAR SEPARATELY CONSIDERED

XX. THE FORTY-SEVENTH, FORTY-EIGHTH, FORTY-NINTH, FIFTIETH, AND FIFTY-FIRST ARTICLES.

[Desertion and Kindred Offenses.]

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 be 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 noncommissioned officer or soldier shall enlist himself in any other regiment, troop, or company, without a regular discharge from the regiment, troop, or company in which he last served, on a penalty of being reputed a deserter, and suffering accordingly. And in case any officer shall knowingly receive and entertain such noncommissioned 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 advised 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 Article, 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,¹ and therefore not made punishable as a military offense in the earlier military codes—is now, (as with us,) a purely military offense cognizable only by court-martial.

DESERTION DEFINED.² 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 offense of desertion thus consists of the minor offense 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.

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. A soldier may also desert pending a pass or brief leave of absence from his post, etc.; the fact that he is authorized to be thus absent from the particular command not being incompatible with his deserting from the army and the service. 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, but of his own choice,) in the enemy's army – he is a deserter. 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. 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 certain desertion not affecting his capacity to desert again.

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 authorized absence for a period is not, in our law, either conclusive or *prima facie* evidence of the requisite intent. 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:³ an absence,

however, for a few days or even a part of a day, may, under certain circumstances, fully justify such an inference; and, in time of war, 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 offense 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, etc.; procuring a civilian's dress or other disguise; declarations by the accused to comrades, etc., 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, etc.; taking passage on a railway train, steamer, or other conveyance for a distant point; the commission, in leaving, of some other military offense necessary to effectuate the desertion, as a quitting of his post as a sentinel; the fact that he has committed a homicide, larceny, embezzlement, or other crime, for which he would have been liable to severe punishment; the fact that, in leaving, he has escaped from a confinement or close arrest; his writing, during his absence, to comrades, etc., 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; his being pursued and overtaken when in evident flight; his being found, on arrest, dressed wholly or partly in civilian's clothes, or otherwise disguised his resisting arrest; his denying, upon request, his identity, making false or contradictory statements, or failing to explain satisfactorily his absence; his surrendering himself as a deserter, etc.,

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. In what consists an enlistment has been considered under the “Second Article.”

“In time of war.” This term, as employed in Articles of War, has already been construed as including not only foreign or civil war but also a period of hostilities against an Indian tribe.

“A court-martial.” Under this general description, desertion, (committed in time of peace, when it is not a capital offense,) 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 only 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 offense 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 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. Commonly, however, it will be sufficient to identify the accused as one who, having voluntarily served and acted as a soldier, (or an officer,) of the regiment, or corps, etc., named, is estopped to deny his amenability as such.⁴

Proof of the unauthorized absence. This is in general readily made by the commanding officer, first sergeant, or other officer or noncommissioned officer of the command who is cognizant of the fact. If it is alleged that the offense 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. A mere *attempt* by a soldier to absent

himself without leave has also been held not to be sufficient evidence of an unauthorized absence.

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, 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*. It is a matter of common knowledge that soldiers, when thus absent, are not infrequently 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,) 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 *escaped* from a confinement, since he may have liberated himself for some such purpose as the procuring of liquor, tobacco, etc.

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, 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. 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 noncommissioned 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.

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 offense, 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 offense, 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 offense and affix the penalty. Whatever effect, therefore, it may have for other purposes, it cannot legally be availed of as proof of desertion before a military tribunal.

DEFENSE. In defense 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. Or he may prove that his absence was not unauthorized: and it will be a good defense 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 defense that the accused being absent by authority, was prevented from returning, at the expiration of his leave or furlough, by serious disabling illness; but this defense 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 defense 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; or that it was occasioned by his being forced by his comrades to leave the company; or that it was the result of his having been arrested and detained in confinement by the civil authorities. Having been so arrested and held after a desertion had been *consummated* would of course be unavailing as a defense.

It will also be a good defense 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.

It would further be a complete defense, 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. 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.

It may be added that it is no defense 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.

Upon the defense the accused may put in evidence any facts tending to negative the presumption that he absented himself with the *intent* of desertion; -- 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; 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, etc.; that he returned, after a brief absence, voluntarily and not because induced by privations, etc.

EXTENUATING CIRCUMSTANCES. The accused may also exhibit in evidence facts and circumstances which, though not constituting a defense, may avail to extenuate his offense with the court or the reviewing officer. Such as that—he absented himself in good faith, under a claim, honest and not without some foundation, that he was entitled to terminate his service; that he had been subjected to cruel and arbitrary punishment, or other oppressive treatment by his superiors; that he had been urged to his act by the continued hostility of comrades; that he had been advised or incited to desert by an officer of the command; that he had been induced to leave by the prevalence of an epidemic or contagious disease at the post; that his rations had been for a considerable period deficient in quantity or quality; that he had not been furnished with proper quarters, or sufficient clothing or blankets, especially in winter; 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 noncommissioned officer deserting with him; that he had never been made acquainted with the Articles of War and did not comprehend the gravity of the offense; that he surrendered himself as a deserter after but a brief absence.

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. The finding, under a charge of desertion, of attempt to desert, is expressly authorized in the British law, and may, it is considered, properly sanctioned in our service.

PUNISHMENT. 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,) 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, the fact that he surrendered or was apprehended, the fact of previous convictions for the same offense, 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 offense 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 noncommissioned officer; or by any other circumstance illustrating the original criminality, subsequent intentions, etc., of the party, and tending either to dispose the court unfavorably or to render it lenient.

In time of war, when the offense 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; and this penalty has also not infrequently been enforced in cases where the party has enlisted solely with the view of obtaining a bounty and then abandoning the service.

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 offense 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:

Forfeiture of pay and allowances. By pars. 220 and 2458, 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. 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. It is not essential to its taking effect that there have been any conviction of the offender; 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.⁵ It includes, with the pay proper, all the pecuniary emoluments due the deserting soldier or officer, 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.

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 payable only in case the soldier "serves honestly and faithfully to the date of discharge."

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, 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, and continues to be law.

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 consequence of desertion, and could be incurred only upon a *conviction* of the offense 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.

The penalties prescribed by the statute need not of course be specifically included in the *sentence* of the court-martial, and are not so included in practice.

It has been held by the Attorney General 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, 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, 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.*”

Ineligibility for reenlistment. 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 noncommissioned officer. It is declared in the Army Regulations that—"The desertion of a noncommissioned officer vacates his appointment from the date of desertion."

Incapacity to receive a bounty-land warrant.⁶ 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, received 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 and deliver him into the custody of the military authority of the General Government." Up to a recent date the "reward" for arrest, etc., of deserters at large, was fixed by the Army Regulations at *sixty dollars*.⁷ 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 1894,⁸ 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, 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. Such officer must be one having a general power under the laws of the United States, or of the State, etc., 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 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.

Being empowered to arrest summarily, the civil officer will of course not require a warrant, -- 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. In such a case the arrest may sometimes be effected by taking out a warrant against the occupant for the offense 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. 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.

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 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.

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 subject"--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 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. 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, 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.” 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.”⁹ 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.

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.

Further—adopting the same view of the law—it is clear, though once considered otherwise, 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. 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.

The liability dissolved by discharge. Where, however, the deserter is sentenced to be dishonorably discharged, and has been duly discharged accordingly, 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.

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, etc., “to become due,” contained in his sentence. Otherwise, he is to be paid, subsisted, etc., 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.

Deserters, etc., 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 offense, 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 offense must be visited with some penalty other than that involved in this obligation.

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 this 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. 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.

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 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.¹⁰ 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.¹¹

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, etc., i.e., to leave it “without a regular discharge,” and enlist in another, does so at the peril of being treated as a deserter.¹² It is to be construed, however, not as creating an offense distinct from the desertion made punishable by Art. 47, but as indicating a specific form of such offense, 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. 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.

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 offense under Art. 62

PROOF-DEFENSE. The previous voluntary enlistment or service, and the absence of any discharge therefrom, together with the deliberate enlistment in the “other” regiment or company, being shown by the evidence of the proper commanding officer, adjutant, recruiting officer, etc., the act of desertion defined in the Article is proved, and there can be no valid defense. It is not a defense 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.

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 by death in time of war,¹³ 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 offense will be aggravated and the punishment properly made more severe where the party in re-enlisting, uses an assumed name, makes false statements, exhibits a false or forged discharge, etc., with deliberate intent to deceive the military authorities.¹⁴

DUTY AND LIABILITY OF OFFICERS UNDER THE ARTICLE. The object of the second provision of the Article was, according to Samuel,¹⁵ “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 see, to be to deter officers from becoming, through connivance or indifference, practically accessories to desertion, 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, but the admitting of them to the command, or recognizing and treating them, as soldiers in good standing. 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, of requiring the deserter to be immediately confined is to prevent the escape which he would be likely to attempt upon perceiving himself to be the object of suspicion. Such 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.

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 involved, induce, or encourage desertion.

FIFTY-FIRST ARTICLE.

THE OFFENSES CONTEMPLATED. This Article, which dates from the code of 1775,¹⁶ is viewed as making punishable two distinct acts—that of counseling 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 offenses.

ADVISING TO DESERT. The offense is complete with the giving of the advice, by one officer or soldier to another, with serious intent.¹⁷ Whether the act is or is not induced by the advice given, is quite immaterial.

PERSUADING TO DESERT. But to persuade a person to desert is to cause him to do so by the influence employed. The offense 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 offense 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.

In perhaps a majority of the cases, (which however are not numerous,) this offense has been committed by one who himself contemplated desertion, and who did in fact desert, accompanied by the party persuaded.

A peculiarly aggravated form of the offense 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.

To constitute the offense 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 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. So it is not necessary that the persuasion should have been personal: if employed, for instance, by an officer, through a noncommissioned officer or soldier, it will be within the Article.

The desertion persuaded to be committed may be either of the ordinary form or that particularized in Art. 50. The latter was the form charged in the well-known English case of Sergeant Grant.

PUNISHMENT. This being discretionary, a court will ordinarily be inclined to visit the latter form of offense 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 offense 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 offense committed by one of the same military grade or status with the person attempted to be influenced. In any case, the persuader, if of superior rank, will be deserving of a severer punishment than the party persuaded.

¹ Desertion, which was originally a civil offense 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 a *felony* by the 18th Henry VI. By the original Mutiny Act of 1689, desertion was first made punishable by court-martial within the kingdom.

² 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.

³ Bringing to trial for desertion soldiers who have simply been absent without authority for a few days has been not infrequently condemned in the G.O. Mere stragglers on the march are not to be treated as deserters. 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.”

⁴ In some cases the proceedings have been disapproved on account of the absence of any proof whatever of receipt of pay or enlistment.

⁵ It cannot of course be enforced if the accused is acquitted; nor, upon a conviction, if the finding is disapproved by the competent authority.

⁶ 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. The prior rule and practice were changed by the Act of 1890.

⁷ 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, etc., were on several occasions authorized by Congress during the Revolutionary War.

⁸ 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.”

⁹ 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.

¹⁰ See *Barger v. United States*, 6 Ct. Cl. 35 (1870).

¹¹ *Mimmack v. United States*, 10 Ct. Cl. 584 (1874), *aff'd*, 97 U.S. 426 (1878).

¹² It has been noticed by the Judge Advocate General 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.

¹³ The death sentence was on several occasions during the late war adjudged upon a conviction of desertion under this article.

¹⁴ 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.

¹⁵ Hough seems to be of the opinion that *recruiting* officers are mainly intended by the Article. Its terms however are general and equally applicable to all officers.

¹⁶ Neither this code nor that of 1776 made these offenses capitally punishable.

¹⁷ It has been held by the Judge Advocate General 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.”

CHAPTER XXV

THE ARTICLES OF WAR SEPARATELY CONSIDERED

XXI. THE FIFTY-SECOND AND FIFTY-THIRD ARTICLES.

[Attendance and Behavior 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 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 forfeited for such offenses 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 article of a very early date; corresponding provisions being found in the “Lawes and Ordinances of Warre” for the Royal army of 1639, in the Article for the Scottish army, of 1644, and in Art. I of the Code of James II.

THE RECOMMENDATION. The Article, in its first clause, differs from the corresponding British article, from which it was directly derived and which requires attendance at divine worship, in recommending only such attendance; a difference doubtless growing out of the provision in our Constitution, by which Congress is forbidden to make any “law respecting an establishment of religion or prohibiting the free exercise thereof.”¹ 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 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. For the punishment indeed of an offense 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.

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,) was, at an early period of our law, much insisted upon. Thus, in a Resolution of December, 1776, 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 required of them the strict observation of the Articles of war, and particularly that part of the said Articles

which forbids profane swearing,” etc. Again, in February, 1777, “It being,” (to quote from the Journals,) represented to Congress that profaneness in general, and particularly cursing and swearing, shamefully prevail in the army of the United States,” it is “Resolved that General 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, officers of the army are “strictly enjoined” to see, among other things, “that the good and wholesome rules provided for the discountenancing of profaneness . . . 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.

XX. THE FIFTY-FOURTH, FIFTY-FIFTH, FIFTY-SIXTH
AND FIFTY-SEVENTH ARTICLES.

[Protection to Citizens and their Property, etc.,]

“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 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.”

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 civilians² from disorderly and riotous³ 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 General Order presently to be cited of summarily mulcting 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, 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 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.

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 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 to the injured party. This proceedings will be independent of any trial or sentence by court-martial for the criminal offense.”

Under the Article, as illustrated and supplemented by this Order, the procedure is initiated by a “complaint made” by the injured party⁴ to the commander of the regiment, post, etc. 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, etc.; 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. The party cannot be awarded punitive *damages*: if he claims them, he must be 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, etc.

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.

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 offense 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, 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 amount to be assessed. If, upon the trial, a forfeiture of pay be adjudged, such forfeiture, 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, 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, first appeared in our code in the Article of 1776, 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.

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 reminder:” according to Greenleaf, “it includes every act of lasting damage to the 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, 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 offense 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 offense is described, it is not considered necessary, as it was at common law, 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, or toward a person who has the property in temporary possession as tenant or bailee, or evil disposition in general.

The malice may be established by declarations of the accused, made before or after, 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. The existence of malice may be negated 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, or where telegraph wires are severed and thus rendered useless.

Malice being the gist of this second offense made punishable by the Article, the court, where the evidence shows an unjustifiable destruction of property but without malicious intent, will properly find the accused not guilty of the specific offense 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, equally with that of an individual. So, although, 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.

“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 offense 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 defense, or to prevent its falling into the hands of the enemy. 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.

“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, etc., to the commission of “malicious mischief” and like offenses. It thus recognized 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 offense, (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,*” etc., . . . should suffer such punishment as should “*be ordered by a regimental court-martial;*”—such court having, under the code, jurisdiction of the offenses 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 offenses committed “*in foreign parts.*” An offense, 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, etc. The principle upon which a military court, in the absence of statutory authority, is invested with jurisdiction under the circumstances, is that of *extraterritoriality*, or a principle analogous thereto, by which an army, when without the domain of its own government, is held to carry with it its own code of discipline, a principle already considered in Chapter VIII. In this instance, and that of Art. 57, the jurisdiction is conferred by express enactment.⁵

OBJECT OF THE ARTICLE. The main object of the Article, according to Samuel, and Hough, is to conciliate the inhabitants and induce them to bring

provisions into the camp, etc., 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.

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 offense involving a battery. 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 taking, destruction, etc., 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 offense, 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 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 offense of *forcing* one may consist.

THE SAFEGUARD—ITS NATURE, FORM, AND EFFECT. The term “safeguard” has sometimes been treated as synonymous with “safe-conduct,” and the two have been confounded by some writers on military law. Both indeed are *personal* concessions and not transferable.⁶ 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 through the territory of a nation during war, is quite different from a safeguard as that term is now understood in our military law. As used in the present Article, and described in the Army Regulations, the words 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,⁷ or whose premises or property it is though desirable to protect in the interests of military discipline or otherwise,⁸) to corporations, or to hospitals or other public institutes or places. In according this privilege, the commander either causes a guard, (a soldier or soldiers,) to be posted⁹ 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.¹⁰

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, 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 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 cannot 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, etc., 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, etc. Where a guard only is employed, the sentinel, or the officer or noncommissioned officer commanding the detail, should be clearly instructed as to the same particulars.

By whom to be granted. The Army Regulations 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,” 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 by the commander of a separate army, etc., it is, in general, equally to be 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.¹¹

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. 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.

FORCING A SAFEGUARD. The offense of the forcing of a safeguard will consist in a willful disregard and violation of the protection, to the injury of the person, property, etc., to whom, or for which, it has been accorded. In a majority of the cases published in General Orders, the offense consisted in plundering, or in larceny or robbery, committed upon premises which had been duly placed under the protection of a safeguard; the act being sometimes accompanied by violent or threatening conduct toward the inmates. 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 house, property, etc., placed under the protection, would be another marked form of a violation of the Article.

It is of course essential to the specific offense that the accused should have known of the existence and purpose of the safeguard which he is accused of forcing. 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.¹²

¹ 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."

² 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.

³ The expression "any kind of riot," employed in the Article, may be regarded as of more general import than the technical legal term *riot*.

⁴ 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, by a police officer, or an attorney.

⁵ An offense of this kind described but committed within Indian country in a Territory would not be cognizable under this Article.

⁶ Like a passport.

⁷ 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.

⁸ Granting a safeguard to an *improper* person may constitute a military offense.

⁹ The guard is generally posted by the provost marshal.

¹⁰ The writing may be furnished to the guard, or to a person employed as custodian of the property. In some instances, safeguards have been announced in General Orders.

¹¹ As to safeguards, Vattel states that the guards posted to enforce them must be respected also by the *enemy*. However, a safeguard given for an illegal or traitorous purpose is a fraud and not entitled to respect.

¹² In a few instances in our service of convictions under this Article, the sentence—to be shot—has been mitigated by the reviewing authority.

CHAPTER XXV

THE ARTICLES OF WAR SEPARATELY CONSIDERED

XXIII. THE FIFTY-EIGHTH ARTICLE.

[Jurisdiction of Crimes of War, etc.]

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, 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.

ORIGIN AND OBJECT. This provision, which, with but a single material change of language,¹ 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 in war, with a jurisdiction of the violent crimes cognizable by the civil courts, except where the same directly prejudiced “good order and military discipline.”² 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, etc., 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 cannot be exercised with the promptitude and efficiency required by the exigencies of the period and the necessities of military government.³

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. 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, “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 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, etc.—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, etc., commences and when it ends.

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 letter of marque and general reprisal,*” etc. 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 their words: --“*Whereas, by the act of the Republic of Mexico, a state of war exists between that government and the United States,*” etc.—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.⁴ 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 defenses 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. Under such circumstances as 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.

A *civil war* resembles this last form of foreign war in that it 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*,⁵ the court says 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.”⁶ 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, etc. 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 September 25, 1794, was published immediately before marching the militia and volunteers against the insurgents. Later, in the case of the obstruction in the same State of the enforcement of the tax upon dwellings, etc., the status of

insurrection was first announced by proclamation of the President of March 12, 1799. In the further case of the recent Southern rebellion, the Supreme Court of the United States, in the case of *The Protector*,⁷ 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."⁸

The *existing law*, under and by the authority of which, in the event of insurrection, etc., the President would take action, by proclamation, etc., 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 peacemaking 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 announce by executive proclamation.

In the case of a *civil* war, rebellion, etc., 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. In the case, above cited, of *The Protector*,⁹ the Supreme Court held that the war ceased, in all the States except Texas, on April 2nd, 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.¹⁰

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.¹¹

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.

As to *Indian* warfare—which is initiated, not by formal declaration or proclamation, but by the breaking out of active hostilities¹²—this, with us, is prosecuted under such varying situations that the question whether a certain offense 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.

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,” etc., 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.

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 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 time, by courts-martial, where committed in respect to *public* property. Except in this instance the crimes names 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 “*prejudicial to good order and military discipline*” or may constitute “*conduct unbecoming an officer and*

a gentleman” within the meaning of Art. 61. Under Art. 62, courts martial have duly and not infrequently 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*:¹³ —“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.”¹⁴

The military jurisdiction conferred by the Article not exclusive of that of the civil court. 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*,¹⁵ 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 offense named shall not be amenable to punishment by the State courts. It simply declares that the offenses 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 offenses 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 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.”¹⁶

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, etc. 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 offense of the same name.¹⁷

Degrees of crime not known to the law military. In this connection it may also be noted that no such distinctions as degrees of offenses, such as are established by the statutes of some of the States, are recognized by the military law, 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. 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,¹⁸ 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*.

The definition of murder is completed by adding that, to constitute these crimes, 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 a day, the law presumes that the wound or injury was not the occasion of the death—that it proceeded from some other cause.

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 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 “premeditation,” 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 an early writer has expressed it, “a heart regardless of social duty and fatally bent on mischief.” 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, etc.—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 some excessive bodily injury which may naturally result in death; *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, etc., one person, actually hits and kills another; 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 someone; or, in resisting an officer of justice engaged in the execution of his duty, unintentionally kills him, etc. 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.

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

defense 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.

Justifiable and excusable homicide. The definition of Murder is well illustrated by the two defenses apposite to this charge: 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.¹⁹ 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-defense.

Self-defense. “A man may oppose force to force in defense of himself, his family or property.” Only such amount of force, however, may be used as is reasonably proportionate to the danger. Killing in defense 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.²⁰ In defense 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 domicile. As, under a charge of murder, evidence may

be given of the disposition of the accused, so, upon a plea of self-defense, it may be shown that the person killed was of a vindictive or violent nature.²¹

MANSLAUGHTER. This crime is defined as an *unlawful killing without malice aforethought express or implied*. 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. The only *malice* in manslaughter thus is the wrongful intent that is an ingredient in crime in general. Homicide is commonly *manslaughter*, 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 irritating language, the killing will be murder in law. 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. Thus where a military superior, in the act of enforcing law of 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 of involuntary manslaughter. Similarly where a superior, by the imposition of an excessive punishment or measure of discipline causes, presently or eventually, the death of an inferior, such superior is chargeable with involuntary manslaughter. 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 firearms in his command—as in target firing or artillery practice.

MAYHEM. Mayhem, maiming, or main, 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 offense being that the act permanently disables the person “to fight in defense of the king and country, and as a soldier protect himself on the field of battle.”²² 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. Acts indeed of the latter character have, by statute, been made punishable similarly to common-law maims,²³ but such acts would not, by a military court, properly be cognizable as “mayhem” under the present Article, which, as to this term, is to be interpreted by the common law.²⁴

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.

The malice, or criminal purpose, essential to legal mayhem. 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 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.²⁵ As in the case of homicide, the charge may be disproved by evidence showing that the injury caused was committed in self-defense.

RAPE—Definition. Rape is defined as the unlawful carnal knowledge of a woman forcibly and against her will or consent.

The person. 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.

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. So, its subject may be any woman except the legal wife of the accused, even although she be his mistress, or a common harlot.

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. "The essence of the 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."

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 resistance, is the gist of the offense. 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. 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.

Non-consent. Absence of free will, or non-consent,²⁶ 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, resistance must be useless if not perilous; in her yielding though 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;²⁷ in the fact that she is imbecile or otherwise *non compos*, or that she a child under the age of ten—in which case the law presumes that she is incapable of consenting to this act; in the fact that her will has been constrained, or her passive acquiescence obtained, by fraud, surprise, false pretense, or other controlling means or influence.

As to the details of the proof required to establish the offense under the different circumstances of its perpetration, the subject of the testing of the credibility of the prosecutrix, the defenses which may be set up to the charge, etc., the student must be referred to the treatises on criminal law and the authorities therein cited.

ROBBERY—Definition. Robbery, at common law, is a felonious taking of his property from the person, or presence of another, by means of violence, or putting in fear. Its nature is well illustrated by comparing it with larceny. Thus it is called by Blackstone²⁸—“an open and violent larceny from the person;” and Bishop 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 principle aggravating matter being usually, not always, an assault.” And the same author further characterizes robbery as “a mere compound larceny.”

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. 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.

The taking. To constitute the taking in robbery, the property must pass possession but for a very brief period. There may be a taking in law as well as in fact; 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. 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.

The property. This may be personal property of any description or value. It must indeed possess some value, but how much is immaterial. “A penny as well as a pound, forcibly extorted, makes a robbery.” 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, etc. Indeed, in robbery the essential point as to the ownership of the property is, not so much that it should belong to the person robbed as that it should not belong to the taker.

The person or presence. It is characteristic of robbery that it is an offense 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, or, occupied with the assault, may not have perceived the abstraction of the article.

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.

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 offense.²⁹ 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, “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, but it must be physical: fraud, for instance, will not supply the place of actual violence. 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, etc. 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.

ARSON—Definition. Arson, at common law, is the malicious burning of the house of another. “It is,” says Blackstone, “an offense against the right of habitation, which is acquired by the law of nature as well as by the laws of society;” or—as it is expressed by Bishop, —“though the things burned is realty, the offense 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. 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.³⁰

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. 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—as where the design is to burn the house of A, and that of B is actually burned instead, or where the burning has resulted from some other felony or criminal act which alone was originally contemplated.³¹ 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.

The burning. There must be an actual burning; an intent to burn, not carried out, will not be sufficient. But the burning need must 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 fiber 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, a charring is all that is required.

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, "all outhouses 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, though, if at the time of the offense the occupant and his family chance to be temporarily absent, the quality of the offense will not be changed in law. The most approved test for determining, in a case of 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."

The ownership or property. Arson being an offense 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. 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 offense. 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.³²

BURGLARY—Definition. Burglary, at common law, is an unlawful breaking and entering, in the nighttime, into the dwelling house of another, with the intent to commit a felony therein. Like arson, it is an offense, not so much against property as against the peace and security of the habitation, of which Blackstone 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 and exposed them to be assailed or despoiled while defenseless and in terror.

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, intimidation, or conspiracy with an inmate of the dwelling.

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. The term breaking is used in a technical sense; an opening, removing, displacing, etc., of any fastening or customary barrier to entrance, being equivalent to an actual breaking or

severing. 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 the door on the inside,³³ prying open a fastened door or window,³⁴ boring and pushing back an inside bolt, cutting out a panel or making a hole in a door, shutter, etc., cutting through or breaking in a pane of glass, 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.

But gaining access to an interior by means of a barrier left carelessly opened 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 not burglary.³⁵ The breaking, however, to constitute burglary, 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. And since it is not essential that an *outer* door be broken, a servant or other inmate may commit burglary 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.

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 practicing 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. The constructive breaking, etc., thus effected is held equivalent in law to a breaking by direct manual force; for, as says Coke, “that which is done *in fraudem legis*, the law giveth no benefit thereof to the party;” and, as Hawkins observes the law will not endure to have its justice defrauded by such evasions.” Further, a breaking may be constructively effected through a conspiracy with a servant or other inmate of the dwelling, by whom a door, etc., is opened to the assailant, or keys are furnished him.

The entering. This is the accompaniment or complement of the breaking, without which the burglary is not effected; a breaking alone does not complete 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. 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. And so it is said that there is an entering where the foot of the burglar crosses the threshold of the house. 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. 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. What has been said of the breaking of an inner door, etc., as well as *constructive* breaking, applies also to the entering.

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." 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.³⁶ Or, Blackstone 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.

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 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, 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.³⁷

The ownership or occupancy. The place must be the dwelling of another; a man cannot commit burglary of his own dwelling. 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.

The intent. The intent in burglary is to commit a felony, that is to say a particular felony, not merely felony in general. 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 offense: whether it be executed or not is wholly immaterial. 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.³⁸

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*.

The taking. This must be (1) an actual substantial taking of some thing by physical force: an attempt to take, or an intention to take not carried out, will not suffice. 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 exerted being also immaterial.³⁹ (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.⁴⁰ (3) The taking must be from the actual or constructive possession of the owner. 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.⁴¹ (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: he may consent to the transfer of the possession, as to a servant or agent for safekeeping,⁴² without affecting the nature of a conversion by the latter, the possession being still constructively and the property wholly his own.

The property. The subject of larceny must be *personal* property, and property of some recognized value. The articles taken, says Bishop, “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 *ferae naturae*, (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. But the ownership need not be that of the absolute or 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 personality cannot steal the same from each other.

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, etc. 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. 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.

THE OTHER OFFENSES 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 with an intent to commit rape.” The second of these offenses⁴³ 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. 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.

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, properly, the discharging of a loaded gun, pistol or other firearm. 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, if fired very close to a person, may inflict a dangerous wound. 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.

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 offense of “Wounding,” etc.,) 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.⁴⁴ 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. It may be evidenced by such circumstances as a declaration of such intent by the accused, his violent conduct at the time of the offense, 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.

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.

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. 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. 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. 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.

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; 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, etc.; 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.⁴⁵

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,⁴⁶ (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 offense, by the laws of the State, Territory, or District, in which such offense may have been committed.*”

CONSTRUCTION-“Shall not be less than the punishment,” etc. 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,⁴⁷ 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 properly be controlled by a principle analogous to that of the constitutional prohibition of “cruel and unusual” punishments.⁴⁸ 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 appropriate to the case, such as dismissal, discharge, reduction, forfeiture, suspension, etc.⁴⁹

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 offense.” Like means same or similar, and in general the “like” offense in the local statute will readily be distinguished. Where the statute establishes two or more *degrees* of an offense, 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 offense found by it is “like” or corresponds. Where the common-law offense, as charged and found, can not readily be assimilated to either of the degrees of the offense 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 strictly observing the specific injunction last noticed, and considering—generally—the estimate

of the criminality of the offense as indicated by the penalty or scale of penalties assigned to it by the laws of the State, etc., may well also consult, as a guide to assist its judgment, the *United States* statute, where any exists making punishable the particular offense. 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.⁵⁰

¹ 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.

² They were distinguished in this respect from the British courts-martial.

³ In *Coleman v. Tennessee*, 97 U.S. 509 (1879), 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.” *Id.* at 513. It is certainly immaterial upon or against whom the crime was committed, whether another soldier, a citizen, or a prisoner of war.

⁴ 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*.

⁵ 67 U.S. (2 Black) 635 (1862).

⁶ Compare *Alire v. United States*, 1 Ct. Cl. 233 (1865), *rev'd*, 73 U.S. 573 (1868), as to the initiation of *Indian* wars.

⁷ 79 U.S. (12 Wall.) 700 (1871).

⁸ 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. 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 *The Prize Cases*, 67 U.S. (2 Black) 635, 670-71 (1862).

⁹ 79 U.S. (12 Wall.) 700 (1871).

¹⁰ *United States v. Anderson*, 76 U.S. (9 Wall.) 56 (1870); *Grossmeyer v. United States*, 4 Ct. Cl. 1, 28 (1868), *rev'd*, 76 U.S. (9 Wall.) 72 (1870).

¹¹ 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.

¹² *Alire v. United States*, 1 Ct. Cl. 233 (1865), *rev'd*, 73 U.S. 573 (1868).

¹³ 105 U.S. 696 (1881).

¹⁴ *Id.* at 699.

¹⁵ 97 U.S. 509 (1879).

¹⁶ *Id.* at 513-14. But 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 offenses of every grade committed by persons in military service." *Id.* at 515.

¹⁷ 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 *United States v. King*, 34 F. 302, 306 (1888).

¹⁸ 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 Minn. 341 (1868).

¹⁹ Homicide is described by the authorities as of three species: "felonious" homicide (which is either murder or manslaughter), "justifiable" homicide, and "excusable" homicide—the latter two not being crimes at all. The defense that homicide is justifiable or excusable is pertinent to an indictment or charge either for murder or for manslaughter.

²⁰ "The law of self-defense justifies an act done in honest and reasonable belief of immediate danger." *New Orleans & N. R. Co. v. Jopes*, 142 U.S. 18 (1891).

²¹ Or of a "bad temper or a quarrelsome disposition." *Williams v. State*, 74 Ala. 18 (1883). 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-defense, to put in evidence a General Court-Martial Order, of 1872, (twenty-two years before) setting forth charges against the victim, 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, and the acquittal of the accused was disapproved by the President.

²² Neither the weapon nor instrument by which, nor the manner in which, the disabling or injury is effected, is material. It is no less mayhem, though the severed member is restored to its place and grows again.

²³ 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.

²⁴ 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."

²⁵ It is to be noted that, in mayhem under the U.S. statute, no premeditated design is necessary to complete the offense. Thus a soldier, committing mayhem by accident, would be amenable to trial by a federal (or Territorial) court.

²⁶ 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.

²⁷ 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 offense.

²⁸ The taking must be by force or a previous putting in fear, which makes the violation of the person more atrocious than privately stealing. 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." [citation omitted].

²⁹ The force must be employed before or with the taking.

³⁰ 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 offense 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 offense, but it does not constitute it.

³¹ On the familiar principle of law that every man is to be taken to intend the natural and probable consequences of his acts.

³² Such a burning, where resorted to for the purpose of fraudulently securing the insurance, is a statutory arson in some of the States.

³³ 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.

³⁴ 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 (1869).

³⁵ So, entering by a transom left open over a door. *McGrath v. State*, 25 Neb. 780, 41 N.W. 780 (1889). But getting in by an open chimney is held a breaking, because, in the words of East, "it is as much enclosed as the nature of the thing will admit of."

³⁶ In view, however, of the uncertainty of the common-law rule, the period has been expressly defined by statute in Great Britain (as from the period from 9 o'clock p.m. to 6 a.m.) and in some of our States.

³⁷ It may be noted that neither a tent in a military camp nor a mere warehouse at a military post can be the subject of a burglary.

³⁸ In *People v. Shaber*, 32 Cal. 36 (1867), 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.

³⁹ So, the taking may be effected by means of an innocent agent, as a young child employed for the purpose.

⁴⁰ The removal being completed, the immediate *return* of the property to the owner will not render the act any the less a larceny.

⁴¹ See under “Sixtieth Article.”

⁴² Or to a person for a mere temporary use to amounting to a bailment.

⁴³ This attempt is in substance made punishable as a specific offense by the British statute and by similar statutes in several of our States.

⁴⁴ But in *People v. Torres*, 38 Cal. 141 (1869), 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.

⁴⁵ In these findings, the rule of military law that a court, under a charge of a specific offense, 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.

⁴⁶ This irregular finding was made in a few cases during the late war.

⁴⁷ Where the punishment is in fact less severe, it is not only unauthorized but also inoperative. Sentences imposing punishments inferior to those provided by the law of the State, etc., have not infrequently been disapproved, in cases where the court could not well be reconvened for the correction of the sentence.

⁴⁸ See Chapter XX.

⁴⁹ *Ex parte* Mason, 105 U.S. 696 (1881).

⁵⁰ The crime described is indeed not always the common-law offense, and these statutes are not in general to be referred to for *definitions*.

CHAPTER XXV

THE ARTICLES OF WAR SEPARATELY CONSIDERED

XXIV. THE FIFTY-NINTH ARTICLE.

[Surrender to the Civil Authorities of Military Persons
Charged with Civil Offenses.]

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 willfully neglects, except in time of war, to deliver over such accused person to the civil magistrates, or to aid the officers of justice in apprehending him, he shall be dismissed from the service.

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 declared by the Supreme Court in *Ableman v. Booth*,¹ has been applied to the relations between the authorities of States and the U.S. military authorities in the more recent adjudication of the same court in *Tarble's Case*,² and specially also in the leading case in Iowa of *Ex parte McRoberts*.³ 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.⁴

It is in recognition of these principles, and to facilitate the exercise of such jurisdiction, that this Article has been enacted. Though in form an injunction upon commanding officers, etc., its general purpose, as expressed by the court in the case of *McRoberts*, 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.”⁵ 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.

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, etc., for the surrender to the civil authorities of an officer or soldier present with the command, who is accused of a criminal offense. 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. 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.”⁶ In the further case of Private Rosenback, 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 offense 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.”

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 offense 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 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 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 proceeding indicated, however, is not *essential*; the term “accused” is not necessarily to be construed in a technical sense; and a specific charge of an offense 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.

“A capital crime.” These words are considered to be qualified, equally with those which follow, (“any offense,” etc.,) by the words “punishable by the laws of the land.” The capital crime here intended is thus properly a crime made punishable with death by the laws of the State, etc., in which it was committed.

“Any offense 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. Offenses against society or the public, and offenses 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 offense committed against him was one cognizable and adequately punishable at military law.⁷

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 States. The Article is not, of course, intended to apply to cases of offenses 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.”⁸ The term as here employed is thus believed to include, not only such acts of the lawmaking power as State statutes, but also authorized municipal ordinances and by-laws.⁹ Thus it would be the duty of the officers referred to in the Article to surrender, etc., an offender, commorant at the post, etc., whose offense was a violation of a city ordinance, equally as where he had committed an offense made punishable by a statute of the State. In the majority of cases, however, offenses 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.

The fact that the crime against the State may also constitute or involve a military offense punishable by the military law cannot affect the right of the citizen, (or of the public,) to initiate proceedings under the Article.

The right, it may be added, continues until the prosecution for the offense becomes barred by the civil statute of limitations and the offense is thus no longer “punishable.” That the offense 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.

Of course, where the crime or offense 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 offense 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 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—he may require the application to be made more specific, 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, “is the necessary antecedent condition of the right of the civil authorities to act.” So, in the case of *McRoberts*, 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 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, etc., 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,¹² 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.

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.

DUTY AND LIABILITY OF OFFICERS UNDER THE ARTICLE. The duty imposed by the Article upon commanding officers and the officers under them¹³ 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, etc., had been conferred upon military courts, *in time of war*, etc., for the trial of the principal crimes made punishable by the general criminal law.

The requirement that officers shall use their "*utmost endeavors*," etc., is of course to be understood in a reasonable sense and with reference to the circumstances of the particular case.¹⁴ 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, etc., 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 offense, but should properly be remanded to the civil authorities, or held subject to a renewed application by them for his surrender.

As the commander, etc., 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.

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 offense committed by a military person, the court which is the first to take cognizance of the same is entitled to proceed; 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 offense, of a serious character, the military authorities will in general properly wait a reasonable time for the authorities to take action;¹⁵ but if, before the latter have initiated proceedings under the Article, the party is duly brought to trial by court-martial for the military offense 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 judgement of the court has been finally acted upon.

¹ 62 U.S. (21 How.) 506, 516 (1859). 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 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."

² 80 U.S. (13 Wall.) 397 (1871).

³ 16 Iowa 600 (1864).

⁴ Dow v. Johnson, 100 U.S. 158, 169 (1880); 16 Iowa at 601.

⁵ 16 Iowa at 603.

⁶ That is to say, for the purposes of this Article. As to the jurisdiction of a court-martial over an offense committed by an officer or soldier on leave or furlough, see Chapter VIII.

⁷ "In ordinary cases, the party injured, if he be himself of the army, either as officer or soldier, will consider that the rights and 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.

⁸ Kalloch v. Superior Court, 56 Cal. 229 (1880).

⁹ 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*, 9 A. 571 (1887), 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 (1874), is believed to be unsound on this as upon some other points of the case.

¹⁰ "It is not enough to tell him" (the commander) "that some offense has been committed; he must know what the specific offense is in order that he may see whether it is an offense '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 offense 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.

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." 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.

¹² "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 obligation. This Article 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.

¹³ The duty is mainly devolved upon the *commanders*, the province of inferior officers principally being to carry out their orders. It is remarked by Mr. Wirt, in 6 Opins. At. Gen., 422, that the Article is "entirely inapplicable to the *President*, and that no demand can be made upon him under it.

¹⁴ Hough, 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 not using the best endeavors."

¹⁵ It is indicated in *Ex Parte Mason*, 105 U.S. 696, 699 (1881), 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.

CHAPTER XXV

THE ARTICLES OF WAR SEPARATELY CONSIDERED

XXV. THE SIXTIETH ARTICLE.

[Frauds, Embezzlement, etc.]

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

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.

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 material 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 offenses 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 claims against the United States,¹ including the making, presenting,² etc., of any such claims; the entering into corrupt agreements and combinations to defraud the government by the prosecution of such claims; and the making, using, etc., of false writings, the forging, etc., of signatures, and the taking, etc., of false oaths, for the purpose of obtaining the payment or approval of such claims.³ It will be observed that it is not necessary to constitute an offense 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 offense familiarly known as the *duplicating* of pay rolls—have been frequently laid.⁴

Thus, where an officer who has sold his claim for pay for a certain 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 offense set forth in the 1st and 2nd paragraphs, since the claim thus made and presented must, as well as the second set of accounts, necessarily be false and

fraudulent.⁵ 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; these, or other facts, indicating that the personal presentation was made in good faith, may constitute a defense 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,⁶ all such defenses 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 that he knew, or was fully and reasonably assured, that no other presentation had been or would be made, the defense should not be accepted as sufficient.

It may be noted that it is no defense under this Article, (or under the 61st,) that either the first or a subsequent assignment of his pay by the officer 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, 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 offense 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.

Other included claims. Under these three Paragraphs (1, 2 and 4) also are properly laid Charges based upon the knowingly making, etc., 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 in the secret service, for horses lost in battle, for recruiting expenses, for transportation of public stores, for pay of soldiers on falsified muster rolls for fuel for a detachment, etc.; also claims by soldiers for pay upon falsified discharges, final statements, or clothing accounts; claims for the reward for the arrest of deserters who have not in fact been apprehended, etc.

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 offense with which he is charged.⁷ 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.⁸

Guilty knowledge the gravamen of the offense. It is not the object or purpose of the party in transaction, but his *knowledge* that the claim is false or fraudulent⁹ which is made by the Article the gist of the offense. If he knew, or the circumstances of the case were such as properly to charge him with the knowledge,¹⁰ that the claim was a fictitious or dishonest one when made or presented, etc., he is amenable to trial under this part of the Article; otherwise not.¹¹ Where an officer presented his pay account and received his pay thereon without having been notified, he was held by the Judge Advocate General not to be chargeable with the offense of knowingly making a false or fraudulent claim under this Article. So the mere filling out and signing of a pay account before the pay has become due does not constitute such an offense. 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.

PARAGRAPH 3. The offense 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, etc.: 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, etc., 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 States, to their mutual benefit, by means of falsified vouchers indicating the delivery by the latter of supplies not in fact furnished, false accounts for recruiting expenses, or other spurious or fraudulent claims.

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,) may properly be regarded as assimilated to that crime in some of its requisites.¹² 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.¹³ As to the further offense 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.”¹⁴

PARAGRAPH 6. Here the expressions “ forges or counterfeits,” “forging or counterfeiting,” etc., 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 handwriting, while the general term “forging” embraces any form of false writing of the name.

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, etc., 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. The writings or papers mainly had in view in the paragraph are the usual drafts on the Treasury, vouchers, certificates, returns, accounts, rolls, final statements, descriptive lists, etc., 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, etc.

To establish a charge under this paragraph, it should of course appear that the accused made, etc., 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 offense would not be committed.

As has already been observed to be the fact with regard to this class of offenses in general, no fraud upon the United States need actually be consummated in order to complete the offense 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.

In the present instance indeed the using of the forged signature is made a separate specific offense: in the majority of the cases the two offenses—the forging, etc., and the knowingly uttering—have generally both been committed by the accused: the latter offense, however, is complete whether the falsification of the signature was the act of the accused or some other person.

As to the further offenses specified, of *procuring* and *advising* the forging, etc., of the signature, or its use when forged, etc., the remarks will be applicable which have already been made in regard to the similar forms of the offenses 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. While the proceeding may be collusive, the act is ordinarily effected, by deceiving the employee, etc., as to the sum or quantity really due him, and causing him to sign a blank or falsified receipt therefor. The criminal nature of the offense is illustrated by a reference 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 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.

PARAGRAPH 8. This paragraph makes punishable the giving by an officer, etc., of a receipts 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.

PARAGRAPH 9. The forms of offense 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 offense 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*—in peace as well as in war—of larceny of *public property*, "furnished," etc., 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 offense will ordinarily be one directly affecting military discipline. Where the stealing is *not* of public property, it *must*, (in time of peace,) be charged as an offense, under the latter Article.

EMBEZZLEMENT—Definition. This is not a common-law but a statutory offense.¹⁵ 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, etc.—to whom, in such capacity, it has been entrusted by the owner.¹⁶ Embezzlement, though really a species of larceny, differs from larceny at common law, and mainly in the fact that the latter involves, (as heretofore shown,¹⁷) 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 appropriation.

Proof of the offense 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.

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 offense 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, etc., the fact that such was his office or capacity and that he was duly acting therein at the time of the offense, 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, etc., of the accused, by the testimony of the officer or other person by whom the money or property was transferred, delivered, or paid, by the testimony of the public depository, 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 absconding¹⁸ 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 acknowledged, or in which a fictitious balance is made to appear, or which is otherwise falsified or purposely misstated;¹⁹ by a failure altogether to 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;²⁰ 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, 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 by the government; 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; or by any other form of non-performance or mal-performance of the *trust* devolved upon the party.²¹ 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, etc., for which he is shown by his returns or accounts to be responsible. 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.

Defense. Presumptive evidence, such 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 stolen or presumably stolen by a clerk, soldier or other person;²² or that a deficiency of supplies was caused by unavoidable wastage or an over-issue not involving culpability. So, in a case of an alleged conversion of property *other than money*, the greater offense 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. 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, or even that he did actually restore it before charges were preferred.

A defense 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 moneys except as legally authorized; the failing to deposit the same in the Treasury or with a public depository 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.²³ 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, Property taken cognizance of by courts-martial under Art. 60, as being forms of the statutory offense 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, charged with the offense 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.²⁴

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 *animus* of the accused;²⁵ these being left to affect only the measure of the punishment. It is accordingly no defense 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, 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 trial of any indictment against such person for embezzlement, as presumptive evidence*” of the commission of the offense.²⁶ 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 willful, (i. e. intentional,) misappropriation of public property, specified in Paragraph 9, may be defined 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 offense 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. 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, etc.

MISAPPLICATION. This offense 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, etc., of the government—whether or not specially entrusted to his charge—for the purposes of himself or his family.²⁷

WRONGFUL SALE OR DISPOSITION. Under this designation are included sales, etc., such as are made punishable by Arts. 16 and 17, as also any other unauthorized sale,²⁸ or any unauthorized pledge, barter, exchange, loan, or gift, of public property.²⁹ The general and comprehensive term “*wrongful disposition*” includes also any appropriation or application of such property not embraced within the previous descriptions of offenses 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; as, for example, the loaning by an officer or soldier to a civilian, (for his benefit exclusively,) of stores, tools, materials, etc., of the United States, with the understanding that the same were to be returned. 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.

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.

Defense, etc. 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, etc., 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 offense. And the fact that the same is practiced generally in a command, or is sanctioned by the commanding officer, cannot be accepted as a *defense* 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 offense of selling or disposing of similar property. The act indicated is as a *military* offense most rare; as a civil offense, 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, 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 offenses as those described in the 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. Where a dismissal is adjudged, the sentence, in a case of an offense involving fraud, should contain the direction in regard to the publication of the crime, punishment, etc., which is prescribed by Art. 100.

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. That such exceptional authority and jurisdiction, if accepted as legal, are still subject to the general limitation of the 103rd Article, has also been pointed out in a previous Chapter.

¹ In the description of these 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.

² That making and presenting are distinct offenses 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.

³ The offense being specific, the general form of charge sometimes adopted of—"Fraud, in violation of the 60th Art. of war," is loose and faulty.

⁴ The opinion has already been expressed that this offense 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, etc. The offense, however, is sometimes, and properly as it involves a dishonor, charged as a violation of Art. 61; also, less frequently, as conduct prejudicial to discipline under Art. 62. Where a pay account is transferred before the pay is due, the officer is chargeable under the last named Article for violation of par. 1440 of the Army Regulations.

⁵ 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. *United States v. Hull*, 14 F. 324 (D. Neb. 1882).

⁶ 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 pretenses of excuse and defense on the ground of mistake and accident."

⁷ See *United States v. Ingraham*, 49 F. 155 (C.C.D.R.I. 1892), *aff'd* 155 U.S. 434 (1894)

⁸ *United States v. Strobach*, 48 F. 902 (C.C.D. Ala. 1883). In *United States v. Wallace*, 40 F. 144 (D.S.C. 1889), 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." *Id.* at 147.

⁹ 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.

¹⁰ See *United States v. Russell*, 19 F. 591, 594 (D. Tex. 1884).

¹¹ In the recent (1893) case of *United States v. Shapleigh*, 54 F. 126 (8th Cir. 1893), 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 *United States v. Route*, 33 F. 246 (D. Mo. 1887), 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." *United State v. Jones*, 32 F. 482 (D.S.C. 1887).

¹² It may also be assimilated, in like particulars, to the statutory perjury made punishable by Sec. 5392, Rev. Sts.

¹³ 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 as is perjury.

¹⁴ See Fifty-First Article.

¹⁵ *Ex parte Hedley*, 31 Cal. 108, 111 (1866).

¹⁶ *Id.* "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." *Commonwealth v. O'Malley*, 97 Mass. 584, 586 (1867).

¹⁷ Under the Fifty-Eighth Article.

¹⁸ The element of *stealth* is said by the authorities to be peculiarly characteristic of this crime.

¹⁹ As by charging amounts as paid which have not been paid. 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.

²⁰ The selling of ammunition, arms, clothing, etc., made punishable in Arts. 16 and 17 is a form of embezzlement; and so is the retention and conversion of captured property in violation of the injunction of Art. 9.

²¹ 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.C.O. 34 of 1872.

²² Secs. 1059 & 1062, Rev. Sts., invest 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, etc., by “capture or otherwise,” and with authority to grant such relief where the officer was without fault or negligence.

²³ To these be added—the converting of such moneys in any manner to personal use. But this general offense is no more than the ordinary embezzlement already considered.

²⁴ 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.”

²⁵ In G.C.M.C.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 Treasury, 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.”

²⁶ 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.

²⁷ 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. *United States v. Murphy*, 9 F. 26 (C.C.D. Ohio 1881). 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 infrequently 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 offense of this class has been substantially proved and found.

²⁸ 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.

²⁹ Such transactions are declared by Sec. 3748, Rev. Sts., to pass no title, but to render the article sold, etc., subject to seizure on the part of the United States wherever found.

CHAPTER XXV

THE ARTICLES OF WAR SEPARATELY CONSIDERED

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.¹

EFFECT OF THE PRESENT FORM. It is the effect of this omission to extend materially the scope of the Article, and thus indeed to establish 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; 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. 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 be,² viz. a man of honor; that is to say, a man of high sense of justice, of an elevated standard of morals and manners, and of a corresponding general deportment.

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. We have seen³ 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 offense 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, and at the same time must be of such a nature or committed under such circumstances as to bring dishonor or disrepute upon the military profession which he represents.⁴

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. 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, as to have seriously compromised his character and position as an officer of the army and brought scandal or reproach upon the service. 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. And if the act, though ungentlemanlike, be of a trifling character, involving no material prejudice to individual rights, or offense 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.⁵

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 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. The

fitness therefore of the accused to hold a commission in the army, as discovered by the nature of the behavior complained of, or rather his worthiness, morally, to remain in it after and in view of such behavior, is perhaps the most reliable test of his amenability to trial and punishment under this Article.⁶

GENERAL DEFINITION. “Conduct unbecoming an officer and a gentleman” may thus be defined to be: Action or behavior in an official capacity, which, in dishonoring or otherwise disgracing the individual as an officer, seriously, seriously compromises his character and standing as a gentleman; Or action or behavior 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 OFFENSES CHARGED UNDER THE ARTICLE. The definition above given is best illustrated by a reference to the principal offenses which, in practice, as indicated mainly by the General Orders, have been charged and prosecuted under this Article.⁷ These are as follows:

- ~~✍~~ Making false official reports, statements, etc., to commanding or superior officers.
- ~~✍~~ Making false statements or representations to inferior officers intended to affect their official action or liability. Making false representations to such an officer in turning over to him public property.
- ~~✍~~ Making false or calumnious reports or statements in regard to a commanding (or other,) officer.
- ~~✍~~ Writing or publishing false or libelous matter in regard to another officer.
- ~~✍~~ Knowingly preferring false charges or accusations. Attempting by underhand means to undermine the reputation of an officer.⁸

- ~~✍~~ 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.
- ~~✍~~ Opening and reading letters or communications addressed to another officer.
- ~~✍~~ Making a violent assault without due cause upon another officer.
- ~~✍~~ Giving false testimony as a witness before a court-martial or board.
Attempting to suborn testimony to be given before a court-martial.
- ~~✍~~ Breach of trust, official, semi-official, or personal.
- ~~✍~~ Duplication of pay accounts.⁹
- ~~✍~~ Dishonorable neglect to discharge pecuniary obligations.¹⁰
- ~~✍~~ Cruel punishment, or cruel, or unduly violent, treatment of soldiers.
- ~~✍~~ Demeaning of himself by an officer with soldiers or military inferiors.¹¹
- ~~✍~~ Abuse of authority over soldiers by frauds or exactions practiced upon them, or by requiring or influencing them to do illegal acts.
- ~~✍~~ Acts of fraud or gross falsity, cheats, or other corrupt conduct not included under former heads.
- ~~✍~~ Drunkenness of a gross character committed in the presence of military inferiors, or characterized by some peculiarly shameful conduct or disgraceful exhibition of himself by the accused.¹²
- ~~✍~~ Drunkenness, or indulgence in intoxicating liquor, after a formal *pledge* given to a commanding officer to abstain from such indulgence.¹³
- ~~✍~~ 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.
- ~~✍~~ Defiance of, or gross disrespect toward, the civil authorities.
- ~~✍~~ Doing wanton injury to the property of civilians.
- ~~✍~~ Open ill treatment of his wife. Obtaining or attempting to obtain a divorce through fraud, etc.
- ~~✍~~ Offending against good morals, in violation of the local law or of public decency and propriety.

~~Art. 62~~ Commission of felony or crime.

SCOPE OF THE ARTICLE AS DISTINGUISHED FROM ART. 62. It is to be remarked that while Art. 62 is intended to cover only offenses not cognizable under the other Articles, Art. 61 embraces offenses made punishable by *any other Article*, provided such offenses 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 offenses, such as desertion or mutiny, could scarcely properly become chargeable under this Article, there are many other offenses punishable in the code, such as the making of false musters, certificates or returns, together with embezzlement and other offenses 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,” etc., should be omitted.

PROCEDURE-Charge. The offense not being described in the Article except merely by its technical name, the general rule that the constituents of the offense should be fully averred in the specification applies with peculiar force to this charge. An act which perhaps would not fall within the description 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, etc.

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. An officer carelessly making 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.

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 offense 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.¹⁴

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. 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.

Sentence. The Article makes mandatory the sentence of dismissal upon conviction. This injunction 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 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.

The penalty being thus imperative, the court, where an offense 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 statutory sentence, those

members who consider this too severe joining, if desired, in a recommendation for commutation.

¹ The term “scandalous conduct” is preserved in the article of the *naval* code most nearly corresponding to our 61st. The present corresponding provision of the British Law 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.”

² “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 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.

³ Chapter XIX—The Finding.

⁴ It is not absolutely essential that the act or the conduct of the offender should be intrinsically dishonorable. Cases, however, in which conduct properly charged under this Article does not involve some dishonor, are of rare occurrence.

⁵ 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.

⁶ 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 army, and, with this view, to provide for expulsion from the service of any who may be guilty of such disgraceful or scandalous offenses against decency as those set forth in these specifications.” (gross drunken conduct, and association with prostitutes, in public.)

⁷ It is in construing this Article that Hough 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 offenses charged under this Article,) in a great measure as a *court of honor*.”

⁸ 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, etc., as an offense 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.

⁹ This offense has already been referred to as not infrequently charged under Art. 60, when involving the presenting, etc., 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.

¹⁰ In these cases, in general, the debt was contracted under the false representations, or the failure to pay characterized by deceit, evasion, false promises, denial of indebtedness, etc., 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. 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 by also the honor or credit of the military profession—if, in the words of Gen. McDowell, 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 offense within the present Article will in general properly be held to

have been committed. In the recent case of *Fletcher v. United States*, 148 U.S. 84 (1893), where most of the acts charged as offenses under Art. 61 consisted mainly in the continued non-payment, for long periods, of debts promised to be paid at certain times or speedily, 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 the remarks of Nott, J., in the same case at the Court of Claims. 26 Ct. Cl. 541, 563 (1891)(wherein may be found the specifications in full). 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 the 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 offense."

¹¹ In some early cases, 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.

¹² 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 surveyed, nearly all were of a gross character; most of the offenses being committed in places of public resort, as on the street, in hotels, "saloons," theatres, etc., or in the presence of military persons at the officer's post or station, and under circumstances of aggravation.

¹³ 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.

¹⁴ Chapter XIX.

CHAPTER XXV

THE ARTICLES OF WAR SEPARATELY CONSIDERED

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 offense, and punished at the discretion of such court.

GENERAL PURPOSE AND USE. This provision, taken originally from the British military law,¹ was in substance incorporated in our first code of 1775, and has similarly appeared in each subsequent issue of our Articles of war.² 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 offenses 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.³ 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 offense 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.⁴

CONSTRUCTION—“All crimes.” The term “crimes,” in its ordinary sense, imports, in the language of Bishop, “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.⁵ 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 offenses, and authorizes their trial and punishment by military courts. And, in time of *peace*, it is only or mainly⁶ under this Article that such crimes are so cognizable; the jurisdiction conferred by Art. 58 being limited in its exercise to time of *war*, insurrection, etc.

“Not Capital.” The Article, by those 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 death⁷ by the common law, or by a statute of the United States applicable to the case, as, for example, murder, 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,” etc., to have been in fact a murder, the court should refuse to proceed, or, if it assume to do so and to find or sentence, its proceedings should be disapproved as *coram non judice* and void in law.”⁸

“All disorders and neglects.” In this comprehensive term are included all such insubordination; disrespectful or insulting language or behavior 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;⁹ in fine all such sins of commission or omission,” 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 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 offense in violation of this Article, whether committed by an officer or soldier. Samuel 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 offense in the military than in the civil code.” Hough 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, Gen. Crook well observes: “Drunkenness by persons in the military service is an offense against good order and military discipline whenever and wherever 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. 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, etc., may properly be charged as a military offense, 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.

“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.¹⁰ 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,” etc., is to be understood *directly* prejudicial, not *indirectly* or *remotely* merely. An irregular or improper act on the part of a 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.

General application of the term “to the prejudice,” etc.—“Crimes” to the prejudice, etc. It is now the accepted construction that the words, “to the prejudice of good order and military discipline,” are of general application, and qualify not only the term “disorders and neglects” but the designation “crimes” as well.¹¹ 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 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,¹² and manslaughter, assault with intent to kill, mayhem, or battery,¹³ committed upon a military person; inasmuch as they directly affect military relations and prejudice military discipline, may properly be--as they frequently have been--the subject of charges under the present Article. 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.¹⁴

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, wherever the offense can be viewed as affecting, *in any material though inferior degree*, the discipline of the command¹⁵—a question which may in general, in the judgment of the author, properly be left to be decided by Department, etc., 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 offenses not named or included in the Articles preceding; the policy of the provision being, as it is expressed by Samuel, “to provide a general remedy for wrongs not elsewhere provided for.” Or, as Coppee¹⁶ observes, “This Article is intended to be supplementary to all the others, and to provide a general charge under which every possible kind of offense not provided for may be ranged.”

This very general description of the offenses 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 offenses 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.¹⁷

It is to be observed of the term “not mentioned in the foregoing articles” that it embraces not only offenses 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, the

disrespectful behavior 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,” “willfully,” 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 offenses by enlisted men and officers respectively, only.

ILLUSTRATIONS OF NEGLECTS AND DISORDERS CHARGED UNDER THE ARTICLE.

As indicating the species of offenses, other 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.
- ~~✍~~ Neglect to observe, or carelessness in observing, standing post orders.
- ~~✍~~ Neglect of official duty in devolving important work upon an inadequate subordinate.
- ~~✍~~ Insubordinate conduct not properly chargeable under Art. 20 or 21.

- ~~Art.~~ Neglect to attend drills, or other exercises or duties, not chargeable under
- ~~Art.~~ Art. 33.
- ~~Art.~~ Failure by a commanding officer to be present and properly exercise command.
- ~~Art.~~ Failure to maintain discipline in his command by the suppression of disorders.
- ~~Art.~~ Failure to restore and maintain the public peace on an occasion of a riot which he was called upon to suppress.
- ~~Art.~~ Failure to properly supervise and inspect public work in his charge.
- ~~Art.~~ Failure to bring offending inferiors to punishment.
- ~~Art.~~ Allowing illegal or irregular practices within his command.
- ~~Art.~~ Abuse of authority in assaulting or punishing inferiors.
- ~~Art.~~ Arbitrary treatment of camp-followers.
- ~~Art.~~ Allowing a soldier to go on duty when known to be materially under the influence of liquor.
- ~~Art.~~ Employment of soldiers for non-military or other illegal uses.
- ~~Art.~~ Neglect of public animals in his charge.
- ~~Art.~~ Exceeding extended limits of arrest.
- ~~Art.~~ Assuming a rank superior to his own- as a Lieutenant the rank of Captain.
- ~~Art.~~ Inefficiency in service against Indians.
- ~~Art.~~ Rendering himself unfit for duty by excessive use of spirituous liquors.
- ~~Art.~~ Gambling, by an officer not a disbursing officer, with other officers or with enlisted men.
- ~~Art.~~ Altercation with another officer in the presence of an inferior.
- ~~Art.~~ Fighting a duel. Inciting another officer to challenge him to a duel.
- ~~Art.~~ Preferring or making of groundless charges.
- ~~Art.~~ Publicly demeaning himself by receiving chastisement from an inferior, without properly resenting it or taking measures to bring the other to punishment.

- ~~✍~~ Making or causing publications in newspapers, pamphlets, etc., of strictures upon the acts or conduct, official or personal, of other officers, or upon the administration of the army.
- ~~✍~~ Taking part in meetings convened for the purpose of expressing disapprobation of the orders or acts of superiors.
- ~~✍~~ Entering into illegal combinations with other officers or soldiers.
- ~~✍~~ Joining with others in requesting the resignation of a commanding officer.
- ~~✍~~ Tendering his resignation in language disloyal to the government.
- ~~✍~~ Expressing sentiments disloyal to the government and in sympathy with the enemy.
- ~~✍~~ Causing troops to be transported on a steamer known to be unsafe.
- ~~✍~~ Culpable neglect of the sick, or malpractice, by a surgeon.
- ~~✍~~ Inexcusable neglect by a chaplain to perform funeral services.
- ~~✍~~ Drunken conduct in public, in the presence of military inferiors.
- ~~✍~~ 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.
- ~~✍~~ Failure to make proper investigation as member of a board of survey.
- ~~✍~~ Ordering a garrison court to try a capital offense, and putting the members in arrest because the court held that it had no jurisdiction of the same.
- ~~✍~~ As a *member of a court-martial*—improperly disclosing the proceedings had in secret session; refusing to vote a punishment after conviction; appearing drunk before the court, or behaving disrespectfully to the court: As a *witness*—failing to comply with a summons; testifying falsely under oath; using disrespectful language, or behaving disrespectfully or contumaciously to the court: As an *accused*, (or *counsel* for an accused,) transcending the privilege of the defense or “statement” by indulging in unwarrantable strictures upon a superior officer, or gross personalities; attempting to suborn or to intimidate witnesses.
- ~~✍~~ Contempt of court, where not punished summarily under Art. 86.

~~✍~~ Violation of special Paragraphs of the Army Regulations, as of—Par. 57, in failing to report address when on leave of absence; Par. 850, in addressing a communication direct to the Secretary of War instead of through proper military channels; Pars. 993 and 994, in arresting and confining in the guard-house a medical officer for a trivial offense; Par. 504, in showing disrespect to a sentinel by interfering with him, or setting at naught his authority and attempting to disarm him; Par. 731, in taking, as quartermaster, receipts from employees for money not actually paid them; Par. 743, in gambling as a disbursing officer; Par. 744, in being, as a quartermaster, interested with civilians in a sale to the United States of quartermaster stores; also, in receiving presents for the transaction of public business; Par. 746, in contracting for and purchasing, as quartermaster, public stores from persons in the military service; Par. 1440, in transferring a pay account before the pay was due; also Violation of the recruiting regulations, (Art. LXXI, A. R.,) in making improper enlistments.¹⁸

In cases of enlisted men.

~~✍~~ Special neglects or violations of duty on guard, as—Omission to challenge, in time of war; Allowing or suffering prisoners to escape; Bringing whiskey into guard-house; Improperly relieving sentinels, by non-commissioned officer of the guard; Mutilating the guard book.

~~✍~~ Escape while in confinement under arrest, or under sentence.

~~✍~~ Attempt to desert.¹⁹ Making preparations to desert.

~~✍~~ Failing to appear on duty with a proper uniform, or appearing with dirty or torn clothing, etc.; Being offensively unclean in person.

~~✍~~ Failing to appear, or appearing drunk, before a court-martial, as an accused or as a witness; Giving false testimony before a court-martial, or suborning or conniving at false testimony by another; Attempting to suborn a witness; Attempting to intimidate one who was to be a material witness by a threatening letter; Refusing to testify at all as a witness.

- ~~/s/~~ Gambling by non-commissioned officers with enlisted men in the guardhouse, or in barracks, or allowing them to gamble. Gambling by one soldier with another. The conducting, by an enlisted man, of a gambling house or table at or near a military post for soldiers to play at.
- ~~/s/~~ Straggling on the march.
- ~~/s/~~ Malingering, or self-maiming. Maiming of another soldier.
- ~~/s/~~ Cruel or injurious treatment of his horse by a mounted soldier, or of any public animal by any soldier.
- ~~/s/~~ Malicious destruction of property of civilians.
- ~~/s/~~ 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.
- ~~/s/~~ 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.
- ~~/s/~~ Disorderly conduct in a town, etc., inducing arrest by the civil authorities.
- ~~/s/~~ Assaulting persons and damaging property on a railway train near a military post.
- ~~/s/~~ Misconduct at target practice.
- ~~/s/~~ Not giving proper attention to his lessons at the post school.
- ~~/s/~~ Neglect of duty by private of hospital corps in caring for patients.
- ~~/s/~~ Failing by a hospital steward to put up prescriptions correctly.
- ~~/s/~~ Refusing to submit to treatment in hospital necessary to render him fit for duty. Refusing to submit to a necessary and proper operation directed by the Surgeon in charge of hospital.
- ~~/s/~~ Careless or wanton discharge of firearm, so as to endanger man or animal.
- ~~/s/~~ Assuming by a soldier to be a corporal, in the recruiting service, and acting as such in the enlisting of recruits, etc.
- ~~/s/~~ Falsely personating and acting as an officer.
- ~~/s/~~ Writing, and publishing in newspaper, statements grossly defaming and misrepresenting the military service.

- ~~✍~~ Writing an improper complaining letter to the colonel of the regiment without first presenting his grievance to his company commander.
- ~~✍~~ Combining and holding meetings in a spirit of insubordination against superior authority.
- ~~✍~~ Inciting, by a sergeant, the men of a company to insubordination, by incendiary circulars.
- ~~✍~~ Abusing or maltreating his wife, in the presence of other soldiers at a military post. Similarly assaulting any woman.
- ~~✍~~ In uniform and in the presence of other soldiers, disturbing the services at church of the "Salvation Army," and assaulting those who ejected him.
- ~~✍~~ Failing to properly deliver the mail, or opening the mail, by a soldier detailed as mail carrier.
- ~~✍~~ Engaging, by a non-commissioned officer, in a public sparring exhibition at a liquor saloon.
- ~~✍~~ Illegally introducing liquor into the Indian country.
- ~~✍~~ Through carelessness setting fire to the forest in a National Park.
- ~~✍~~ Joining and parading with an association of Fenians, reported to be in armed hostility to a nation at peace with the United States.
- ~~✍~~ 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, etc., by a company clerk, hospital steward, etc.; Falsification of discharge papers and forgery of signatures of officers to same; Forging the name of an officer to a pass or furlough, order on the post trader or check on the post exchange, ration return, etc.; Uttering a forged check; Obtaining a pass on a false pretence; Embezzlement of private property, or of post exchange funds, or other misappropriation or fraud not included in Art. 60; Unauthorized selling of company rations; Corruptly obtaining money from civilians for pretended commissions for post exchange; Making false statements to an officer in regard to matters of duty and the like; Preferring false charges against an officer or soldier;

Dishonorable nonpayment of a debt;²⁰ Borrowing property of another soldier and not returning same; Obtaining money on false pretences from other soldiers; 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.

~~§~~ Any *attempt*, not consummated, to commit a military offense 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, committed in camp, garrison, etc., and not specifically made punishable in some other Article of War.

~~§~~ And, now, fraudulent enlistment, as provided in the Act of July 27, 1892.

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 “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 offense punishable under a specific Article, at the same time clearly directly impairs or injuriously affects good order and military discipline, the whole will constitute a sufficient pleading of a crime, neglect or disorder under Art. 62.

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 offense, the reverse, *viz.* the finding of a specific offense 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 offenses constantly brought to trial under it. The maximum punishments, however, for certain of the offenses 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 offense under the statutes of the United States or the local law. As recognized, however, by the Supreme Court in *Ex parte Mason*,²² 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 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 offense, and made punishable by court-martial under the 62d Article of War.”

Nature of the offense. 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, etc., in which the offense 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 *civilian* and not constitutionally amenable to such trial. 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 offense, because the pay, etc., 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 offense 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, etc.*

Definition of Fraudulent Enlistment. It has been decided under the Act by the Secretary of War that the court-martial before which this offense is brought to trial shall be a *general* court-martial, and it is enjoined that the enactment “be fully explained to every applicant presenting himself for enlistment.” And the offense is officially defined as follows—“A fraudulent enlistment is an enlistment procured by means of a willful misrepresentation in regard to a qualification or disqualification for enlistment, or by an intentional concealment of a disqualification, which has had the effect of causing the enlistment of a man not qualified to be a “soldier, and who, but for such false representation or concealment, would have been rejected.”

Instances of the offense. 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 offense have been as follows: Concealment by the party of the fact of his having been discharged by sentence; Concealment of the fact that he had been discharged with “bad” character or “without a character;” Concealment of the fact that he had been discharged “without honor;” Concealment of the fact of discharge for disability; Concealment of the fact of discharge as a rejected recruit; Concealment of the fact of discharge for previous fraudulent enlistment; Concealment of the fact of discharge by purchase within less than one year prior to the enlistment; Concealment of an existing physical disability; Concealment by the party of the fact that he was a deserter; Concealment of the fact that he had been confined under sentence in the Military Prison; Concealment of the fact that he had been convicted of felony by a civil court and sentenced to the penitentiary; Falsely representing that he was twenty-one years of age; Falsely representing that he was a single man; inducing his acceptance, though a minor, by presenting a false written consent purporting to be signed by his father. The concealment of fact or false representation is not infrequently accompanied by the giving of a *false name*.

Charge. The charge for this offense may be expressed as “Conduct to the prejudice of good order and 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, the offense expressly made punishable by Art. 50. But this offense, as has heretofore been pointed out, is a form of desertion, and is erroneously charged as fraudulent enlistment,” or otherwise than as “desertion.”

PROOF. The alleged false representations, concealments, etc., 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, etc. The receipt of pay, or of an allowance pecuniary or other, being the gravamen of the offense, must be clearly shown by the testimony of the recruiting officer, paymaster, etc. 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. 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.

PUNISHMENT. The maximum punishment for the offense 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.

¹ In the Articles of the Earl of Essex, (1642,) the form is—“*All other faults, disorders and offenses, 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 offense by these Articles and the laws and customs of war.*”

² The only material change has been the mention, in the Article of 1874, of the field officer's court.

³ A corresponding provision is contained in the Naval code in Art. 22.

⁴ Because of its providing a trial and punishment for every possible military offense, 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.”

⁵ The term “crimes” is thus used in a sense similar to that in which it is employed in Art. 59, (see under that Article,) as also in the Constitution. O'Brien writes, “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 thus not declared.”

⁶ 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. Cases of “larceny” or “theft,” similarly pleaded, are frequent in the G.C.M.O. In *Ex parte Mason*, 105 U.S. 696 (1882), the jurisdiction of a court-martial, under this Article, of the crime of shooting with intent to kill, was affirmed by the Supreme Court. See *Barrett v. Hopkins*, 7 F. 312 (C.C.D. Kan. 1881).

⁷ See Chapter XVIII—“Testimony by Deposition.”

⁸ In a few cases indeed where the accused, though charged with murder, has been acquitted, or convicted of manslaughter only, the proceedings, apparently from considerations of justice, have been approved by the reviewing officer. But an accused, thus convicted, would be entitled, if raising the question, to have the entire proceedings declared void and inoperative.

⁹ “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, p. 270.

¹⁰ The term is commonly applied in this sense, and as being practically analogous to *discipline*, in the General Orders.

¹¹ In the corresponding Article of the last code of the 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 etc., may be guilty of to the prejudice of good order and discipline,” etc.

¹² 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.

¹³ And so of criminal *attempts* and *conspiracies* and the offense of *aiding and abetting in crime*.

¹⁴ 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 (1882), the Supreme Court, in holding that the offense 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.”

¹⁵ Thus the jurisdiction has not infrequently been sustained where the offense 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. The fact that the offense was committed publicly in uniform has generally been regarded as a fact going materially to render the act cognizable under this Article.

¹⁶ 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 offenses, and therefore after Arts. 65, 68, and 69.

¹⁷ See the remarks of the Supreme Court in *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 82 (1858), in reference to the corresponding Article of the naval code.

¹⁸ 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.

¹⁹ All attempts to commit military offenses, or attempts to commit civil crimes cognizable at military law, are properly charged under this Article.

²⁰ This act, however, should be such as to affect military discipline. The mere nonpayment of a debt to a citizen is not sufficient.

²¹ An attempt to commit suicide is charged as an offense under this Article in G.C.M.O. 16, Dept. of Columbia, 1892.

²² 105 U.S. 696 (1882).

CHAPTER XXV

THE ARTICLES OF WAR SEPARATELY CONSIDERED

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 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.

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,¹ be dismissed from service except upon and in pursuance of the sentence of 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 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 offense. 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, "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 offenses 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, 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 passed upon the acts of the party and tried him for his offenses, has imposed upon him a minor punishment, but after such a court has *acquitted* him altogether. And so, after a court of inquiry, or an examining board has rendered a favorable report upon his case. And that such exercise of power is entirely legal has been repeatedly affirmed by the authorities.

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 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.”² In this country, the power, having been employed by Congress antecedently to the adoption of the Constitution, 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.

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.³ 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, and for varied causes,⁴ being published in the General Orders,⁵ and upwards of fifteen hundred in the Special Orders, of the War Department.⁶ 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 been rendered inoperative; 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.⁷ 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 other than his right to the office as such. Thus such a dismissal, (except where Congress otherwise specifically enacts,) involves no *legal disability* to reenter 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 *pay*, etc. Thus it has been held by the Judge Advocate General, (applying to the case an opinion of Atty. Gen. Mason,) 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 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. 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 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, etc.

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 Washington, were duly enacted, *viz.* on July 27, August 7, and September 2, 1789, respectively.

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.”⁸ 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.” Mr. Boudinot 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.” 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.”

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.” 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*, 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 own sake but for that of the public. If he misbehaves, the sooner he is removed the better, because the country suffers every moment that he continues in office.”

In 1889, in the case of *Ex parte Hennen*,⁹ 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.”¹⁰ 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 opinion¹¹ relating to a *naval* officer who had been “stricken from the rolls” by the President, it was declared by Atty. Gen. Legare 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*,¹² 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 military and those of civil officers, “much the largest class of whom,” he 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 navy¹³ 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.” 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 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 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 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,¹⁴ 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,¹⁵ 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*;" 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 opinion¹⁶ 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 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 of the army and navy, for cause,¹⁷ 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.”¹⁸

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—“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 in regard to the legislation of 1789, and Kent refers to it in the following terms: “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 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 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,¹⁹ had, prior to the legislation of 1866 (incorporated in Art. 99,) become firmly established by the acceptance 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 *United States v. Guthrie*²⁰—that “nothing but an amendment of the Constitution could take from the President this power”—was founded in good reason.²¹ The political history of

the enactment 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 remembered.²² 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.²³ In 1880, however, in the case of a chaplain of the army,²⁴ 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.”²⁵ Under this ruling, the President, if determining to remove an officer of the army without trial, (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.²⁶

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 of the main portion of s. 17, Act of July 15, 1870, c. 294;²⁷ 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 power²⁸ conferred by Congress for the purpose of relieving the army of a useless member who has himself practically abandoned it,²⁹ 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 Advocate General, followed by a concurrent ruling, (in the same case,) of the Attorney General,³⁰ to the effect that an officer who has been

dropped from the rolls under Sec. 1230 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.”³¹

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 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. It provides for persons removed by executive act from military office 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 acting 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.³² 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 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.³³

Opinions of Attorneys General, etc. Of the rulings referred to, on this subject, some of the principal will be cited—as follows:

Thus, in an opinion given in 1843, in the cases of two naval officers, Lieut. Whitney and Passed Midshipman Moorhead,³⁴ 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 judgement of the court. The effect of the judgement, it is true, may be removed; not, however, in virtue of an 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 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 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.³⁵ 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,³⁶ 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 case³⁷ 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 corps³⁸—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, 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 division 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 CPT Howe’s case.³⁹ “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, 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.”⁴⁰

In a subsequent opinion—in the case of Capt. Downing of the navy—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 be raised on the proceedings of the court, save the purely technical one of nullity of sentence for want of jurisdiction.”⁴¹

More recently, 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 much as if he had never been in it.”⁴² And in a later case 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.”⁴³

As a further reference—Atty. Gen. Evarts⁴⁴ 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.”⁴⁵

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.⁴⁶ In such an instance the law, having in view the 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.⁴⁷ 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*,⁴⁸ 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.⁴⁹

Illegal restorations, etc., 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 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 judgements of courts-martial.

The extent to which this practice had been carried can only be appreciated by consulting the published General Orders 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 “reinstated in” or “restored” or “returned to” his former office and rank; in others he is “honorably discharged” from, or “mustered out” of, the military service; in others his resignation is accepted, (or permitted to be tendered,) as of the date generally of the preceding dismissal. 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 accepted, 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, etc., 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.⁵⁰ Congress has no power, of itself, to restore 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.⁵¹ “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 effect 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.”⁵²

RESTORATION OF OFFICERS DISMISSED BY ORDER, etc. In connection with the specific subject of the Section under consideration- 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 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,⁵³ dismissed by executive order without trial, it was observed by Attorney General Legare, 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 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,⁵⁴ 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,⁵⁵ 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 recent case,⁵⁶ 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*,⁵⁷ 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,⁵⁸ was finally abandoned by the same in McElrath’s case⁵⁹ and the correct doctrine as there held has been reaffirmed in later rulings.⁶⁰

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 public statute expressly requiring such discharge.⁶¹ So, where he is “*dropped*” under Sec. 1229,⁶² or “*wholly retired*” under Sec. 1252,⁶³ of the Revised Statutes, already considered; or where he has vacated his military office, under Sec. 1223, R. S., by the acceptance of a, diplomatic or consular

office.⁶⁴ 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,⁶⁵ 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 one taken effect, is of no legal validity. And so with a permission given to an officer to withdraw a resignation once duly accepted;⁶⁶ 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 resorted to by the executive or legislative department of the government, is in derogation of the Constitution and wholly futile;⁶⁷ 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.

¹ It was held by the Supreme Court in *McElrath v. United States*, 102 U.S. 426 (1880), 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.

² The same author adds, “A military officer cannot by law hold his commission or any military employment, free from his liability to summary dismissal by the Crown.” 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. United States*, 134 U.S. 99 (1890).

³ 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.

⁴ 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 a member of a court-martial, incompetence, inefficiency, being “troublesome,” being “an alarmist,” being in Washington without proper authority, violations of the sovereignty of a friendly State by arresting a deserter in Canada and bringing him away within the United States.

⁵ 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.

⁶ As these orders are very numerous, and not readily accessible to students, it is not worthwhile 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, etc. In some instances, the dismissal took the form of a summary *muster-out*.

⁷ And see, similarly, as to the taking effect of a *sentence* of dismissal, Chapter XX—“Dismissal.”

⁸ In *United States v. Guthrie*, 58 U.S. (17 How.) 284, 307 (1885), 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.”

⁹ 38 U.S. (13 Pet.) 230 (1839).

¹⁰ *Id.* at 258-59.

¹¹ 4 Op. Att’y Gen. 1.

¹² 4 Op. Att’y Gen. 609-13.

¹³ See 8 Op. Att’y Gen. 231.

¹⁴ 7 Op. Att’y Gen. 251.

¹⁵ 8 Op. Att’y Gen. 230-32.

¹⁶ 12 Op. Att’y Gen. 424-26.

¹⁷ The enactment specifies—“for any cause which, in his” (the President’s) “judgment, either renders such officer unsuitable for, or whose dismissal 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.

¹⁸ That this provision of 1862 was “simply declaratory of the long established law,” see 15 Op. Att’y Gen. 421; see also *Blake v. United States*, 103 U.S. 227, 234 (1881). As to *other* declaratory provisions which neither enlarge nor diminish the constitutional power of the President—see 8 Op. Att’y Gen. 233. With the opinions of Attys. Gen., cited in the text, see 2 Op. Att’y Gen. 67 and 12 Op. Att’y Gen. 4, where the general power to dismiss is recognized by Mr. Wirt and Mr. Stanberry. The power was repeatedly affirmed by Judge Advocate General Holt, in his opinions during the war.

¹⁹ 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.

²⁰ 58 U.S. (17 How.) 284 (1885).

²¹ But that Congress may be law limit and restrict the power of removal of the “inferior officers” appointed by heads of departments—see *Perkins v. United States*, 20 Ct. Cl. 438 (1885), *aff’d*, 116 U.S. 483 (1886).

²² 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 Op. Att’y Gen. 445-46, 449.

²³ See *Street v. United States*, 24 Ct. Cl. 230, 247-8 (1889).

²⁴ *Blake v. United States*, 103 U.S. 227, 231 (1881).

²⁵ See also *McElrath v. United States*, 102 U.S. 426 (1880); *Keyes v. United States*, 109 U.S. 336 (1883).

²⁶ See *Keyes v. United States*, 109 U.S. 336 (1883); *United States v. Corson*, 114 U.S. 619 (1885); *Runkle v. United States*, 122 U.S. 543, 558 (1887); *Crenshaw v. United States*, 134 U.S. 99 (1890); *Mullan v. United States*, 140 U.S. 240 (1891).

²⁷ 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.

²⁸ “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. United States*, 18 Ct. Cl. 435, 444 (1883).

²⁹ That the officer leaves the service in a *dishonorable status*, see Circ., No. 4, (H.A.,) 1891.

³⁰ Lieut. Newton’s Case, 17 Op. Att’y Gen. 13. It was held by the Attorney General in this opinion that—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 the 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. See also *Newton v. United States*, 18 Ct. Cl. 435, 444 (1883).

³¹ Officers wholly retired become at once civilians, and, as such, cannot be readmitted to the army except by a new appointment. *Miller v. United States*, 19 Ct. Cl. 338, 339 (1884); *McBlair v. United States*, 19 Ct. Cl. 528 (1884); *Fletcher v. United States*, 26 Ct. Cl. 541 (1891), *rev’d*, 148 U.S. 84 (1893); 19 Op. Att’y Gen. 202.

³² See also *United States v. Corson*, 114 U.S. 621 (1885).

³³ 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 Op. Att’y 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 *id.*; *Collins v. United States*, 14 Ct. Cl. 568 (1878).

³⁴ 4 Op. Att’y Gen. 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.

³⁵ 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 Op. Att’y Gen. 170; 7 *Id.*, 104; 10 *Id.*, 65, 67; 14 *Id.*, 449.

³⁶ 4 Op. Att’y Gen. 306.

³⁷ *Id.* at 318.

³⁸ 6 *Id.*, 370.

³⁹ *Id.* at 514. *See also* 10 *Id.*, 66.

⁴⁰ 6 Op. Att'y Gen. 507.

⁴¹ 7 *Id.*, 99.

⁴² 14 *Id.*, 449.

⁴³ *Id.* at 502.

⁴⁴ 12 Op. Att'y Gen. 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 officer of a *particular person designated by name* was unconstitutional, mainly as assuming to limit and control the appointing power of the President.

⁴⁵ To a similar effect see the recent case of *Vanderslice v. United States*, 19 Ct. Cl. 480 (1884); *Runkle v. United States*, 19 Ct. Cl. 397 (1884).

⁴⁶ 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 Op. Att'y Gen. 170; 5 *Id.*, 384; 6 *Id.*, 507, 514; 10 *Id.*, 65. This fact, however, cannot affect the question of legal power. *See* 11 Op. Att'y Gen. 22. A sentence of dismissal is 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.

⁴⁷ *See also* 12 Op. Att'y Gen. 21.

⁴⁸ 71 U.S. (4 Wall.) 333, 381 (1867). *See also* *Vanderslice v. United States*, 19 Ct. Cl. 480 (1884).

⁴⁹ *See*, further in this connection, Report, 868 of the Judiciary Committee of the Senate, of March 3, 1879, 45 Cong., 3rd Ses.; 17 Op. Att'y Gen. 297; 18 *Id.*, 18; 19 *Id.*, 202, 609; *United States v. Corson*, 114 U.S. 619 (1885).

⁵⁰ *See*, on the subject of this class of legislation, the case of *Wood v. United States*, 15 Ct. Cl. 151 (1879), 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, to properly held by the Attorney General in 19 Op. Att'y Gen. 609.

⁵¹ 14 Op. Att’y Gen. 448. The effect which is given to the Act in the opinion is certainly a remarkable instance of a liberal construction.

⁵² 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”!

⁵³ 4 Op. Att’y Gen. 124. And see the general observations applicable to either form of dismissal, already cited from 14 *Id.*, 502.

⁵⁴ 4 Op. Att’y Gen. 604.

⁵⁵ 8 Op. Att’y Gen. 235.

⁵⁶ 12 *Id.*, 427. It follows that any orders of the War Department, in which valid summary dismissals have been revoked, were, so far, unauthorized and legally inoperative.

⁵⁷ 2 Ct. Cl. 206 (1866). 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.

⁵⁸ *Winters v. United States*, 3 Ct. Cl. 136 (1867); *Barnes v. United States*, 4 Ct. Cl. 216 (1868); *Montgomery v. United States*, 5 Ct. Cl. 93 (1869).

⁵⁹ *McElrath v. United States*, 12 Ct. Cl. 201, 202 (1876), *aff’d*, 102 U. S. 426 (1880).

⁶⁰ *Palen v. United States*, 19 Ct. Cl. 389 (1884); *Montgomery v. United States*, 19 Ct. Cl. 370 (1884); *Miller v. United States*, 19 Ct. Cl. 338 (1884); *Mimmack v. United States*, 97 U. S. 426 (1878); *United States v. Corson*, 114 U.S. 619 (1885).

⁶¹ See 5 Op. Att’y Gen. 101; 8 *Id.*, 223.

⁶² 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 Op. Att’y Gen. 67.

⁶³ See the principle applied to a case of a “wholly retired” officer in *McBlair v. United States*, 19 Ct. Cl. 528 (1884); also in *Miller v. United States*, 19 Ct. Cl. 338 (1884).

⁶⁴ 19 Op. Att’y Gen. 609.

⁶⁵ Capt. Mimmack’s case, 12 Op. Att’y Gen. 555. 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. United States*, 19 Ct. Cl. 379; *Turnley v. United States*, 24 Ct. Cl. 317. See also 14 Op. Att'y Gen. 499. In a subsequent opinion, 18 Op. Att'y Gen. 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.

⁶⁶ 19 Op. Att'y Gen. 350.

⁶⁷ See—generally—the opinions of the Attorney General in Gen. Porter's case, in 17 Op. Att'y Gen. 297; 18 Op. Att'y Gen. 18.

CHAPTER XXV

THE ARTICLES OF WAR SEPARATELY CONSIDERED

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, etc.,
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 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 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, etc., 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. It has already been noticed that the term “different corps” in Art. 82 is held to allow of the same application.¹

“Happen to join or do duty together.” This phrase is evidently 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,” etc. This means the officer who is highest or senior in rank by the commission under which he is at the time serving. 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. Thus a captain may also be a colonel by brevet, but unless he has been specially assigned to duty according to this brevet rank,² 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.

“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 State—as the “Pennsylvania line,” the “New Jersey line,” the “Virginia line,” 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.

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, etc., 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.”³ Among the 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.⁴

THE LINE AND STAFF OFFICERS OF THE PRESENT ESTABLISHMENT, DISTINGUISHED. The line officers proper of the army as 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.⁵ 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,⁶ 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 aides-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 head of the staff corps,) now (January 1, 1865,) consisting of three Major Generals, and six Brigadier Generals.⁷ 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, 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 cooperating 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,⁸ 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.”

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 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.

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 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 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 Sc. 1292, Rev. Sts.⁹

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,¹⁰ 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 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, 1775,¹¹ 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 *levee 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.¹² 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.

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

assimilating them in every respect, while remaining in the Army, to the most favored class of the military,¹³ 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 and the Attorney General, 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, etc., 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.¹⁴

DETERMINATION OF RELATIVE RANK UNDER THE FOREGOING ARTICLES. Questions of relative rank arising under the three preceding Articles can—it may be remarked—be determined by military superiors, courts-martial, courts of inquiry, etc., 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 infrequently 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.

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, 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 to the ordinances of the Tudors and Stuarts.¹⁵ 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—a jurisdiction of which a vestige is perceived in the requirements 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.

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 construction, 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.

It need not affect the substantial application of the Articles that the officer or soldier deceases when temporarily *absent* from his regiment, company, etc. 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, this 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, receive money *voluntarily paid* in satisfaction 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 or a debt due the estate or property withheld therefrom: 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*”¹⁶—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 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.

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 “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 administrator, 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: if he does so, he subjects himself to a personal liability for the pecuniary amount thus diverted.¹⁷ 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 “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.

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, 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 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.

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,¹⁸ 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 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.”

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,”¹⁹ 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. 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, or—in one case—twice a week. Sentences of soldiers tried by court-martial have not infrequently been mitigated for the reason that the accused had not been sufficiently made acquainted with the Articles; and the failure properly to read them on the part of commanders has been denounced as a military offense. 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.

¹ Chapter XXII—"Construction of Art. 82."

² 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."

³ This opinion is cited and adopted as a "satisfactory exposition" of the term line, in *Scott's Military Dictionary*, p. 388. 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." 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.

⁴ 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).

⁵ See Chapter VIII.

⁶ 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."

⁷ By a recent Joint Resolution of Feb. 5, 1895, the grade of Lieutenant General was temporarily revived in the army.

⁸ 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.

⁹ 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."

¹⁰ See Chapter VIII.

¹¹ 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."

¹² 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."

¹³ And see Art. 124, where regular and volunteer officers are assimilated in their relations to *militia* officers.

¹⁴ 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.

¹⁵ 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.

¹⁶ 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.

¹⁷ "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 an administrator nor assimilated to one, and he could not in general therefore make such expenditures except at his own risk.

¹⁸ 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 Caesar 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 witness." 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, I 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.]

¹⁹ 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."

CHAPTER XXV

THE ARTICLES OF WAR SEPARATELY CONSIDERED

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.*" This was the law in force during the Revolutionary war, and at the time of the trials of Major Andre, Lieut. Palmer, and others hereinafter mentioned.

The next specific enactment,¹ 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.*"

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—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 States, 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 offense 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. This restriction, however, was soon done away with, and the jurisdiction made general, i.e., applicable to offenses 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 OFFENSE. 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 obtaining material information and communicating it to the enemy; or one who, being by authority within the lines, attempts secretly to accomplish such purpose. The information is commonly such as relates to the numbers or resources of the enemy, the state of his defenses, the positions of his forces, military, or naval, their proposed movements or operations, and the like. The clandestine character of his proceedings and the deception thus practiced constitute the gist or rather aggravation of the offense of the spy. 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 among the enemy.” The concealment is in general contrived by his disguising himself by a change of dress, by assuming the enemy’s uniform, by coloring

the hair, removing the beard or wearing a false one, assuming a false name, etc.; as also by false representations, by personating another individual, 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 of the enemy's army, who, in penetrating our lines, had abandoned their proper uniform for the dress, of a civilian; 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. This presumption, however, might—it was, ruled—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, etc., on a retreat, had changed his dress merely to facilitate a return to the other side. In such a case, indeed the clearest proof would properly be required before accepting the defense.

But to be charged with the offense 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 offense, legally within their lines. So he may either be an emissary of the enemy or one acting of his own accord.

Beside the coming within the hostile lines without authority, being in disguise,² making false representations, etc., 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,³ or the destruction or attempted destruction by him, upon being detected, of letter, dispatches, or other writings in his possession, containing information for the enemy.⁴ 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. Another suspicious circumstance is an attempt to *bribe* the arresting party to allow him to proceed.⁵

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. 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 offense.

Further, it is not necessary that the spy should be within the lines without authority. 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. Such was the situation in the case of Andre, 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.

MERE OBSERVATION OF THE ENEMY NOT THIS OFFENSE. 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 offense 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.”⁶ Observing the

enemy from a *balloon* is no more criminal than any other form of reconnaissance.

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;⁷ 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 like, is not *as such* a spy.⁸ 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, is *as such* not to be treated as a spy but to be held as a prisoner of war.⁹

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 offense is an exclusively military one, cognizable only by military tribunals. 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.

It has always been legal, however, and would still be so in time of war notwithstanding the statute, to proceed *summarily without trial* against spies; and in some of our earlier cases—that of Andre, for example—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.¹⁰ 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 offense 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 offense.¹¹

2. Further, a spy, to be punished as such, must be brought to trial and convicted during the existence, i.e., before the end of, the war. Thus, in the case of Robert Martin, 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, he was not subject to trial by a military tribunal;¹² and he was accordingly discharged on *habeas corpus* from the custody of the

military authorities. But 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, and by our statute, this penalty is made mandatory upon conviction. Such penalty may be executed either by shooting or hanging. The sentence “to be shot” was in a few instances imposed during the late war; but, in the great majority of cases, the form of death by hanging, as the more ignominious and severe, was adjudged. In some instances, women, (who, by reason of the natural subtlety of their sex, were especially qualified for the role of the spy,) were sentenced to be hung as spies, though in their case this punishment was rarely if ever enforced. In a considerable proportion of the other cases, the capital punishment adjudged was executed, and commonly on the next day or within a brief period after the approval of the proceedings.

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 infrequently resorted to by military commanders, and is sanctioned by the usages of civilized warfare; 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; 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. 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; 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 observes, “*puisque l’on n’ a gueres d’autre moyen de se garantir du mal qu’ils peuvent faire.*”

¹ Meanwhile a Resolution of Feb. 27, 1778, had declared that any "inhabitant of these States," who, by giving intelligence, etc., 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.

² 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."

³ ⁷ Thus Andre carried official returns of the forces and state of the defenses 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.

⁴ 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.

⁵ This was a feature in the case of Andre.

⁶ So Halleck, (p. 406,)-"The term spy is frequently applied to persons sent to reconnoiter an enemy's position, his forces, defenses, etc., but not 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.

⁷ 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, etc., 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.

⁸ In the leading cases of Beall and Kennedy, though the accused were charged and convicted, inter alia, as spies, their offenses 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.

⁹ 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."

¹⁰ As to the form of investigation in Andre's case, see Chapter XXIV, "Courts of Inquiry."

¹¹ But he will be liable upon such recapture to be subjected to a closer surveillance. 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 offense.

¹² 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.