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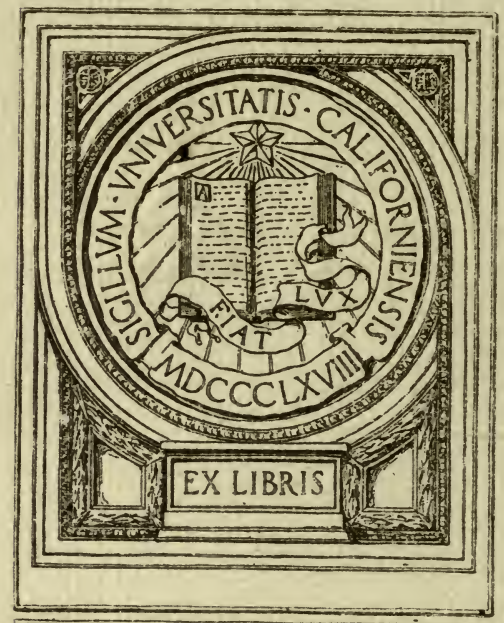

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U.S. War dept.

A MANUAL FOR COURTS-MARTIAL

COURTS OF INQUIRY

AND OF OTHER PROCEDURE UNDER MILITARY LAW

REVISED IN THE JUDGE ADVOCATE GENERAL'S OFFICE
AND PUBLISHED BY AUTHORITY OF THE SECRETARY OF WAR

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The Manual for Courts-Martial, Courts of Inquiry, and of other Procedure under Military Law, prepared by direction of the Secretary of War in the Office of the Judge Advocate General for use in the Army of the United States, is approved, and will be published for the information and guidance of all concerned, including all courts-martial in the National Guard of the several States and Territories and the District of Columbia not in the service of the United States, in so far as applicable, under section 102 of the national-defense act, approved June 3, 1916. The provisions of this Manual will be in force and effect on and after March 1, 1917.

By order of the Secretary of War:

H. L. Scott,
Major General, Chief of Staff.

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INTRODUCTION TO THE FIRST EDITION.

This Manual introduces and interprets to the Military Establishment the revised Articles of War which become effective March 1, 1917. The revision supersedes the existing articles, sometimes designated the Code of 1874, and repeals all other laws and parts of laws inconsistent therewith. It will facilitate an understanding of the scope and effect of the revision to refer to the history and development of the amended Code of 1874, indicate briefly its most serious defects, and summarize the principal changes introduced by the revision.

HISTORY OF UNITED STATES ARTICLES OF WAR PRIOR TO 1916.

Passing over the earlier enactments of the American Colonies of Articles of War for the government of their respective forces, examples of which are found in the articles adopted by the Provisional Congress of Massachusetts Bay, April 5, 1775 (Am. Archives, 4th series, vol. 1, p. 1350), and the similar articles adopted in May and June of that year by the Provincial Assemblies of Connecticut and Rhode Island and the Congress of New Hampshire (idem, vol. 2, pp. 565, 1153, 1180), we come (*a*) to the first American articles enacted by the Second Continental Congress June 30, 1775, and copied largely from the British Code of 1765 and the Massachusetts Code; (*b*) the Code of 1776, an enlargement and modification of the Code of 1775; and (*c*) the supplemental Code of 1786, regulating the composition of courts-martial and generally the administration of military justice. The articles in force on the adoption of the Constitution of the United States were, by act of the First Congress, made to apply to the then existing Army "so far as the same are applicable" and were continued in force by successive enactments until April 10, 1806, when, by act of Congress of that date, revised articles, adapted to the changed form of government, were enacted, superseding all other enactments on the same subject. Thus the Code of 1806 was, in effect, a reenactment of the articles in force during and immediately following the period of the Revolutionary War, with only such modifications as were necessary to adapt them to the Constitution of the United States. It comprised 101 articles, with an additional provision relating to spies. During the War of 1812 four of the articles of this code were amended, during the Seminole wars three articles were amended and one new article added, and during the Civil War seventeen articles were amended and eight

new articles added. All of these new articles and amendments were gathered into the restatement of the articles which appears in the Revised Statutes of 1874, making a code of 128 articles, with the additional provision relating to spies. Between that year and 1912, when this revision was submitted to Congress, the more important amendments have been the summary court and maximum punishment acts of 1890; the repeal of articles 80 and 110 in 1898; the repeal of article 123 and the amendment of articles 122 and 124 in 1910.

DEFECTS OF ARTICLES PRIOR TO 1916 REVISION.

The more serious defects of the Code of 1874 were those incident to its development by compilation from a now obsolete and replaced foreign code, and by piecemeal amendment made during periods of war and under the stress of war conditions. Eighty-seven articles of the Code of 1806 survived in the amended Code of 1874 without change or with only minor changes of style, and most of the remaining articles of that code without substantial change, with the result that the latter code was unscientific in its arrangement and contained many provisions either wholly obsolete or illy adapted to present service conditions. We may cite as examples illustrating its archaic character the following of its provisions:

The fifty-fourth and fifty-fifth articles prohibited any kind of riot to the disquieting of "citizens of the United States," and article 59 made mandatory the turning over to a civil magistrate of officers and soldiers accused of an offense against the person or property of any "citizen of the United States," but only "upon application duly made by or in behalf of the party injured," ignoring the more modern doctrine that all persons residing within the United States are entitled to the equal protection of the laws, and that crimes are now punished, not at the instance of an individual but at the instance of the public. Article 126 regulated administration upon the effects of deceased soldiers and devolved the duties incident thereto upon the commanding officer of the troop, battery, or company to which the deceased soldier belonged, but made no provision for similar cases arising among the large class of soldiers who, under the present-day organization, do not belong to troops, batteries, or companies; and similar instances might be multiplied indefinitely.

IMPORTANT CHANGES IN REVISION.

The limits assignable to this introduction permit only the following brief summary of the more important changes introduced by the revised articles:

1. Certain provisions of the Revised Statutes and of the Statutes at Large in the nature of Articles of War, and proper for this reason to be incorporated in a military code, are reenacted in their proper

places in the revised articles, and certain other statutes relating to the procedure and practice of the criminal courts of the United States are made the basis of new articles. Examples of legislation incorporated and of new articles suggested are found in revised articles 2, 4, 7, 8, 22, 23, 25, 30, 34, 36, 37, 38, 42, 45, 48, 52, 80, 82, 106, 107, 108, 112, 114, 117, 118, and 119.

2. Articles 1, 10, 11, 36, 37, 52, 53, 76, 87, and 101 of the Code of 1874, either wholly obsolete or embracing only matters properly within the field of Army Regulations, have been dropped.

3. Related provisions have been brought together under five separate headings, and where subheads would serve a useful purpose they have been employed to complete the classification.

4. Provisions relating to the same subject-matter have been consolidated into a single article. Examples of such consolidation may be found in revised article 48, which reenacts with modifications the substantial provisions of four articles of the Code of 1874 and one section of the Revised Statutes, all relating to the confirmation of sentences of courts-martial; and in revised article 61, which reenacts in brief form the material provisions of six of the existing articles of that code relating to unauthorized absences.

5. The authority to convene general courts-martial has been extended to include "the commanding officer of any district or of any force or body of troops" when empowered by the President, thus providing for the case of expeditionary forces not the equivalent of a brigade or higher unit, and other emergent services, and permitting general court-martial jurisdictions to be multiplied as the exigencies of the service may require. (Art. 8.)

6. The jurisdiction of the general court-martial is made concurrent with that of the military commission and other war tribunals in the trial of offenses against the laws of war, and further extended to include the capital offenses of murder and rape when committed in time of peace at places outside the geographical limits of the States of the Union and the District of Columbia. (Arts. 12, 15, and 92.)

7. Authority is granted for the detail of one or more assistant trial judge advocates for each general court-martial, with power to act for the judge advocate, thus largely increasing the capacity of these courts in the disposition of cases. (Arts. 11 and 116.)

8. The provision of the Code of 1874 making regular officers incompetent to sit on courts-martial for the trial of officers and soldiers of other forces is abolished, and all distinctions as to eligibility of officers of the several forces for the performance of court-martial duty is removed. (Art. 4.)

9. A disciplinary court, intermediate between the general and summary court, with adequate power to impose disciplinary punishments but without the power to adjudge dishonorable discharge, is provided

for the trial of offenses where the retention of the offender with his command, to be disciplined rather than his dishonorable discharge, is contemplated, leaving the general court-martial with its extended jurisdiction to be resorted to in grave cases calling for discipline, dishonorable discharge, or prolonged detention in confinement with or without dishonorable discharge, and the summary court for the trial of minor offenses calling for light punishments of confinement and forfeiture.

10. The power to prescribe the procedure, including modes of proof, in cases before courts-martial and other military tribunals has been expressly delegated to the President. (Art. 38.)

11. The statute of limitations of the Code of 1874 (art. 103, as amended by act of Apr. 11, 1890) fixed a uniform period of two years of liability to trial and punishment by general court-martial (not expressly excepting any capital offenses), to be reckoned from the date of the commission of the offense to the date of the issuing of the order for trial, except in case of peace desertion, when the period was required to be reckoned from the date of expiration of enlistment from which the soldier deserted to the date of his arraignment. No period of limitation was prescribed in the case of inferior courts. The new military statute of limitations (art. 39) expressly excepts from its operation the capital offenses of desertion committed in time of war, mutiny, and murder, fixes the period of limitation at three years for the graver common law and statutory felonies denounced and punished in revised articles 93 and 94, conforming to the rule governing Federal civil courts with concurrent jurisdiction of these offenses; and the same period for the offense of desertion in time of peace, a study of statistics having shown that few, if any, deserters of this class are arrested after three years from date of desertion. The two-year period of limitation prescribed by the Code of 1874 is retained in the revised articles for all other offenses than those above named, and the uniform rule is established that all these periods shall be reckoned from the date of commission of the offense to the date of arraignment. The new statute covers trials by any court-martial.

12. The right of persons in the military service to remove to a Federal court all suits and prosecutions brought against them in a State court for acts done under the color of military status is secured by article 117 of the revised code.

13. The right of the reviewing or confirming authority to mitigate a finding of guilty by a court-martial to a finding of guilty of any lesser included offense is conferred by articles 47 and 49 of the revised code.

14. The article of the Code of 1874 respecting the taking of depositions (art. 91) has proved in practice unsatisfactory, in that it authorized the use of a deposition when the witness resided just

outside the State in which the court was in session, though perhaps only a few miles from the place of its sessions, but did not permit the use of a deposition when the witness resided in the State, even though his place of residence was remote from the place of meeting; and further unsatisfactory in that it made no provision for the taking of a deposition when a witness was about to go beyond the State, Territory, or District in which the court was sitting, or when, by reason of age, sickness, bodily infirmity, or other reasonable cause, he was unable to appear and testify in person at the place of trial. These deficiencies are supplied in article 25 of the new code, which is drawn so as to conform, in the main, to the provisions of section 863 of the Revised Statutes regulating the taking of depositions for use in civil suits.

15. Under a provision of the Code of 1874 (art. 96) no person might be sentenced to suffer death except by the concurrence of two-thirds of the members of a general court-martial, but it was open to a bare majority of the court to find an accused guilty of an offense for which the death sentence was mandatory; so that the article did not, as a matter of fact, furnish any special protection to an accused in a case of that kind, in view of the obvious duty the court had to impose the sentence required by law upon a legal conviction. In revised article 43 the requirement is imposed that two-thirds of the members of the court shall concur in the conviction of an accused of an offense for which the death penalty is made mandatory by law, as well as in the imposition of the sentence of death.

The foregoing list of important changes introduced by the revised articles is by no means complete, as there has been a general recasting of the articles; but it embraces those to which it is desirable that the special attention of the service be invited. The complete recasting of the articles has not extended to changing language defective in form, but to which settled construction has assigned a definite meaning.

SCOPE OF PRESENT MANUAL.

The term "military law" is frequently used in a wide sense to include, not only the disciplinary, but also the administrative law of the military establishment, as, for instance, the whole range of the Army Regulations. But in distinguishing military from civil law we say that military law is the law relating to, and administered by, military courts. Military law, in this sense, concerns itself with the trial and punishment of persons subject to it. This is the disciplinary aspect of the subject, and while officers, as such, must have a knowledge of military law in the broader definition, the proper functions of a court-martial manual are confined to the law of military discipline.

Earlier manuals have functioned in this field, but they have, in general, purported to be only compilations of pertinent statutes and regulations, thus furnishing officers and courts-martial with the framework of the law which they are required to administer, but leaving them to a search of texts and authorities for the fullness of the principles applicable to even the most familiar and elementary questions. While the present work confines itself to the disciplinary aspect of the subject, and thus makes no profession to be a manual of military law, it *is* intended to cover its appropriate field as fully as is possible under the restrictive definition of a manual, and thus to place in the hands of officers a guide that shall be reasonably sufficient in all the ordinary exigencies of service.

The Manual in its arrangement of subject matter follows, as far as has been found practicable, the arrangement of the new code. In scope it has been extended to include chapters on "Evidence" and "Punitive articles." In the preparation of the former chapter this office has had the assistance of Prof. Wigmore of the Northwestern University, recently commissioned a major and judge advocate in the Officers' Reserve Corps. Prof. Wigmore has given liberally of his time in the preparation of this chapter, has lent the authority of his name to what appears therein, and has performed a work of great value for which appreciation will be general throughout the service. In the chapter on "Punitive articles" an effort has been made to meet what is conceived to be a very urgent need in our service, namely, a statement of the essentials of proof under the more important offenses denounced and punished by the new code, for the guidance of trial judge advocates.

Due to the brief interval between the enactment of the new code and the date when the Manual had to go to the printer in order to be available for troops on foreign station prior to the taking effect of the new code, the preparation of the Manual has necessarily been done with a haste which in a work of such importance it would have been desirable to avoid. It is hoped, however, that no fundamental errors appear therein. In using the Manual it should be borne in mind that over attention to technicalities represents a failure to grasp the spirit of the revision and will lead to requests for interpretation which may usually be avoided by the application of broad principles. It is hoped that by the amplification of chapters of this Manual and the inclusion of new chapters on such subjects as "The law of riot duty," "Martial law," and "Military government" future editions may be made to embrace all that is necessary to the service at large regarding the general subject of military law.

JANUARY 1, 1917.

ABBREVIATIONS.

A. R.	Army Regulations, 1913.
A. W.	Articles of War, Code of 1916.
Bishop	Bishop's New Criminal Law, 8th edition.
Clark	Clark's Criminal Law, 2d edition.
Clark and Marshall	The Law of Crimes, 2d edition.
Cyc.	Cyclopedia of Law and Procedure.
Davis	A Treatise on the Military Law of the United States, 2d edition.
Digest	Digest of Opinions of Judge Advocates General of the Army, 1912.
Dudley	Military Law and Procedure of Courts-Martial, 1910.
Greenleaf	Law of Evidence, 16th edition.
R. S.	Revised Statutes of the United States, 1878.
Thompson	Law of Trials.
Wharton	Criminal Law, 9th edition.
Wigmore	Law of Evidence.
Wigmore, P. C.	Pocket Code of Evidence.
Winthrop	Military Law and Precedents, 2d edition, 1896.

The discipline and reputation of the Army are deeply involved in the manner in which military courts are conducted and justice administered. The duties, therefore, that devolve on officers appointed to sit as members of courts-martial are of the most grave and important character. That these duties may be discharged with justice and propriety it is incumbent on all officers to apply themselves diligently to the acquirement of a competent knowledge of military law, to make themselves perfectly acquainted with all orders and regulations, and with the practice of military courts.—Army Regulations, 1835, Article XXXV, paragraph 1.

CHAPTER I.

MILITARY JURISDICTION.

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Section I.

SOURCE AND KINDS OF MILITARY JURISDICTION.

1. **Source.**—The source of military jurisdiction is the Constitution, the specific provisions relating to it being found in powers granted to Congress, in the authority vested in the President, and in a provision of the fifth amendment.

2. **Kinds.**—Military jurisdiction is of four kinds, viz:

(a) **Military government** (the law of hostile occupation); that is, military power exercised by a belligerent by virture of his occupation of an enemy's territory, over such territory and its inhabitants. This belongs to the law of war and therefore to the law of nations. When a conquered territory is ceded to the conqueror, military government continues until civil government is established by the new sovereign.

(b) **Martial law at home** (or, as a domestic fact); by which is meant military power exercised in time of war, insurrection, or rebellion in parts of the country retaining their allegiance, and over persons and things not ordinarily subjected to it.

(c) **Martial law applied to the Army**; that is, military power extending in time of war, insurrection, or rebellion over persons in the military service, as to obligations arising out of such emergency and not falling within the domain of military law, nor otherwise regulated by law.

The last two divisions (*b*) and (*c*) are applications of the doctrine of necessity to a condition of war. They spring from the right of national self-preservation.

(d) **Military law**; which is the legal system that regulates the government of the military establishment. It is a branch of the municipal law, and in the United States derives its existence from special constitutional grants of power. It is both written and unwritten. The sources of written military law are the Articles of War enacted by Congress August 29, 1916; other statutory enactments relating to the military service; the Army Regulations; and general and special orders and decisions promulgated by the War Department and by department, post, and other commanders. The unwritten military law is the "custom of war," consisting of customs of service, both in peace and war.

This Manual deals primarily with military law.

SECTION II.

EXERCISE OF MILITARY JURISDICTION.

3. Military tribunals.—Military jurisdiction is exercised through the following military tribunals:

(a) **Military commissions and provost courts**, for the trial of offenders against the laws of war and under martial law.

(b) **Courts-martial—general, special, and summary**—for the trial of offenders against military law. (A. W. 3.)

[NOTE 1.—The general court-martial has concurrent jurisdiction with military commissions and provost courts to try offenders against the laws of war. (A. W. 12.)

NOTE 2.—For the authority to appoint courts-martial in the National Guard not in the service of the United States, and the jurisdiction and powers of such courts, see sections 102–108, act of June 3, 1916, 39 Stat., 208, 209; Appendix 2, post.]

(c) **Courts of inquiry**, for the examination of transactions of or accusations or imputations against officers or soldiers. (A. W. 97.)

[NOTE.—The composition, jurisdiction, procedure, etc., of these tribunals are treated in the succeeding chapters of this Manual.]

SECTION III.

PERSONS SUBJECT TO MILITARY LAW.

4. Classes enumerated.—The following persons are subject to the Articles of War (A. W. 2):

[NOTE.—Wherever the following words are used in the Articles of War or this Manual, they are to be construed in the sense indicated below, unless the

context shows that a different sense is intended, viz: (*a*) The word "officer" shall be construed to refer to a commissioned officer; (*b*) the word "soldier" shall be construed as including a noncommissioned officer, a private, or any other enlisted man; (*c*) the word "company" shall be understood as including a troop or battery; and (*d*) the word "battalion" shall be understood as including a squadron. (A. W. 1.)]

(*a*) All officers and soldiers belonging to the Regular Army of the United States; all volunteers, from the dates of their muster or acceptance into the military service of the United States; and all other persons lawfully called, drafted, or ordered into, or to duty, or for training in the said service, from the dates they are required by the terms of the call, draft, or order to obey the same.

[NOTE.—(*a*) *Regular Army.*—The Regular Army of the United States, including the existing organizations, shall consist of sixty-four regiments of Infantry, twenty-five regiments of Cavalry, twenty-one regiments of Field Artillery, a Coast Artillery Corps, the brigade, division, army corps, and army headquarters, with their detachments and troops, a General Staff Corps, an Adjutant General's Department, an Inspector General's Department, a Judge Advocate General's Department, a Quartermaster Corps, a Medical Department, a Corps of Engineers, an Ordnance Department, a Signal Corps, the officers of the Bureau of Insular Affairs, the Militia Bureau, the detached officers, the detached noncommissioned officers, the chaplains, the Regular Army Reserve, all organized as hereinafter provided, and the following as now authorized by law: The officers and enlisted men on the retired list; the additional officers; the professors, the Corps of Cadets, the general army service detachment, and detachments of Cavalry, Field Artillery, and Engineers, and the band of the United States Military Academy; the post noncommissioned staff officers; the recruiting parties, the recruit depot detachments, and unassigned recruits; the service school detachments; the disciplinary guards; the disciplinary organizations; the Indian Scouts; and such other officers and enlisted men as are now or may be hereafter provided for. (Sec. 2, act of June 3, 1916, 39 Stat., 166.)

(*b*) *Volunteers.*—The volunteer forces shall be subject to the laws, orders, and regulations governing the Regular Army in so far as such laws, orders, and regulations are applicable to officers or enlisted men whose permanent retention in the military service, either on the active list or on the retired list, is not contemplated by existing law. (Sec. 4, act of Apr. 25, 1914, 38 Stat., 347.)

(*c*) *National Guard.*—The National Guard, when called as such into the service of the United States, shall, from the time they are required by the terms of the call to respond thereto, be subject to the laws and regulations governing the Regular Army, so far as such laws and regulations are applicable to officers and enlisted men whose permanent retention in the military service, either on the active list or on the retired list, is not contemplated by existing law. (Sec. 101, act of June 3, 1916, 39 Stat., 208.)

[NOTE.—The militia when called into the service of the United States is also subject to military law. (35 Stat., 399.)]

(*d*) *National Guard when drafted into Federal service.*—Members of the National Guard and the National Guard Reserve drafted into the military service of the United States shall, from the date of their draft, stand discharged from the militia, and shall from said date be subject to such laws and regulations for the government of the Army of the United States as may be applicable to members of the Volunteer Army. (Sec. 111, act of June 3, 1916, 39 Stat., 211.)

(*e*) *Officers' Reserve Corps.*—Any officer who, while holding a commission in the Officers' Reserve Corps, shall be ordered to active service by the Secretary of War shall, from the time he shall be required by the terms of his order to obey the same, be subject to the laws and regulations for the government of the Army of the United States, in so far as they are applicable to officers whose permanent retention in the military service is not contemplated. (Sec. 38, act of June 3, 1916, 39 Stat., 190.)

(*f*) *The Enlisted Reserve Corps.*—Any enlisted man of the Enlisted Reserve Corps ordered to active service or for purposes of instruction or training shall, from the time he is required by the terms of the order to obey the same, be subject to the laws and regulations for the government of the Army of the United States. (Sec. 55, act of June 3, 1916, 39 Stat., 195.)]

(*b*) Cadets.

(*c*) Officers and soldiers of the Marine Corps when detached for service with the armies of the United States by order of the President. (A. W. 2.)

(*d*) Officers and enlisted men of the Medical Department of the Navy, serving with a body of marines detached for service with the Army in accordance with the provisions of section sixteen hundred and twenty-one of the Revised Statutes, shall, while so serving, be subject to the rules and articles of war prescribed for the government of the Army in the same manner as the officers and men of the Marine Corps while so serving. (Act of Aug. 29, 1916, 39 Stat., 573.)

[NOTE.—(*a*) Except as provided in (*c*) and (*d*) supra or otherwise specifically provided by law, the Articles of War do not apply to any person under the United States naval jurisdiction. (*b*) An officer or soldier of the Marine Corps detached for service with the Army may be tried by military court-martial for an offense committed against the laws for the government of the naval service prior to his detachment and for an offense committed against the Articles of War he may be tried by a naval court-martial after such detachment ceases. (A. W. 2.)]

(*e*) All retainers to the camp and all persons accompanying or serving with the armies of the United States *without* the territorial jurisdiction of the United States, and *in time of war* all such retainers and persons accompanying or serving with the armies of the United States in the field, *both within and without* the territorial jurisdiction of the United States though not otherwise subject to the Articles of War.

[NOTE.—In addition to the two classes (*a*) "retainers to the camp" and (*b*) "persons serving with the armies of the United States in the field" who were made subject to military jurisdiction by A. W. 60 of the code of 1806 (A. W. 63 of the revision of 1874), A. W. 2 of the code of 1916 includes a third class, viz, (*c*) "persons accompanying the armies of the United States."]

(*f*) All persons under sentence adjudged by courts-martial.

(*g*) Army field clerks.

[NOTE.—Hereafter headquarters clerks shall be known as Army field clerks and shall * * * be subject to the rules and Articles of War. (Sec. 1, act of Aug. 29, 1916, 39 Stat., 625.)]

(*h*) Field clerks, Quartermaster Corps.

[NOTE 1.—Hereafter not to exceed two hundred clerks, Quartermaster Corps, * * * shall be known as field clerks, Quartermaster Corps, * * * and shall be subject to the rules and Articles of War. (Act of Aug. 29, 1916, 39 Stat., 626.)]

[NOTE 2.—Inmates of the Soldiers' Home (R. S. 4824), the National Home for Disabled Volunteer Soldiers (R. S. 4835), all persons admitted to treatment in the General Hospital at Fort Bayard, New Mexico, while patients in said hospital (act of June 12, 1906, 34 Stat., 255), and all persons admitted to treatment in the Army and Navy General Hospital at Hot Springs, Arkansas, while patients in said hospital (act of Mar. 3, 1909, 35 Stat., 748), are by the statutes cited made subject to the rules and articles for the government of the armies of the United States, but court-martial jurisdiction over them has rarely, if ever, been exercised.]

CHAPTER II.

COURTS-MARTIAL—CLASSIFICATION—COMPOSITION.

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Section I.

CLASSIFICATION.

5. Kinds.—Courts-martial shall be of three kinds (A. W. 3), viz:

(*a*) General courts-martial;

(*b*) Special courts-martial; and

(*c*) Summary courts-martial.

[Note.—The classification of courts-martial adopted by the code of 1916 is identical with that made by the act of March 2, 1913 (37 Stat., 721), which abolished garrison and regimental courts-martial and created special courts-martial.]

SECTION II.

COMPOSITION.

6. Who competent to serve.—All officers in the military service of the United States, and officers of the Marine Corps when detached for service with the Army by order of the President, shall be competent to serve on courts-martial for the trial of any persons who may lawfully be brought before such courts for trial. (A. W. 4.)

Exceptions.—(*a*) No officer shall be eligible to sit as a member of a general or special court-martial when he is the accuser or a witness for the prosecution (A. W. 8, 9); but when there is only one officer present with a command he shall be the summary court-martial of that command and shall hear and determine cases brought before him (A. W. 10). [See chapter 8, sec. 1, par. 129.] (*b*) Chaplains, veterinarians, dental surgeons, and second lieutenants in the Quartermaster Corps are not in practice detailed as members of courts-martial.

7. Number of members.—Courts-martial shall be composed of the following number of officers (A. W. 5, 6, 7), viz:

(a) General courts-martial.—Any number from 5 to 13, inclusive.

A general court-martial shall not consist of less than 13 officers when that number can be convened without manifest injury to the service. (A. W. 5.) The Articles of War (A. W. 5, 6) governing the number of members which may sit upon a general or a special court-martial are merely directory to the officer appointing the court, and his decision as to the number which can be convened without manifest injury to the service (within the maximum and minimum limits prescribed by law), being a matter submitted to his sound discretion, must be conclusive. (Martin *v.* Mott, 12 Wheaton, 35; see also Mullan *v.* U. S., 140 U. S., 240.) While a number less than five can not be organized as a *general* court-martial or proceed with a trial, they may perform such acts as are preliminary to the organization and action of the court. Less than five members may adjourn from day to day, and where five are present and one of them is challenged, the remaining four may determine upon the sufficiency of the objection. A court reduced to four members and thereupon adjourning for an indefinite period does not dissolve itself. The appointing authority may at any time complete it by the addition of a new member or members and order it to reassemble for business. (Digest, p. 158, LXXV, B, 3), but if any evidence has been taken before the court is reduced below five, it should be dissolved and a new one ordered.

If for any reason a general court-martial is reduced below five members it will direct the judge advocate to report the facts to the convening authority and wait his orders. The report by the judge advocate will, in all cases, be made through the commanding officer

of the post, command, or station where the court is sitting, who will indorse thereon the names of a sufficient number of available officers whom he recommends be detailed on the court to enable it to proceed. More than enough to make a quorum should be recommended where practicable in order to provide for future contingencies, and so far as can be foreseen the officers recommended should not be liable to challenge in any case to be tried. If there be no such officer or officers available, the commanding officer will so state. This report will be made by wire whenever deemed advisable in order to prevent unnecessary delay in trying cases. Similar action will be taken before trial by the judge advocate and commanding officer whenever the former knows or has good reason to believe that the court will be reduced below a quorum at the time of trial. It is the duty of commanding officers to keep in touch with the business before general courts-martial being held within the limits of their commands and from time to time to take the initiative in making recommendations to the appointing authority as to relieving or adding members, changing the judge advocate, or appointing a new court, and as to other matters relating to such courts, so that they may proceed expeditiously and in cooperation with other official business.

(b) **Special courts-martial.**—Any number of officers from three to five, inclusive.

The remarks under (a) *ante* apply equally to a special court-martial where its membership is reduced below the minimum required by law, except that in the case of special court-martial the report by the judge advocate will be made to the convening authority, who will, without unnecessary delay, *detail a sufficient number of qualified officers to enable it to proceed or appoint a new court.*

(c) **Summary courts-martial.**—A summary court-martial shall consist of one officer. (*C. M. C. M., No. 1.*)

8. "**Officer**" **defined.**—The word "officer" when used in the Articles of War or this Manual means commissioned officer. (A. W. 1.)

9. "**In the military service of the United States.**"—(*a*) An officer suspended from rank should not be detailed to sit as a member of a court-martial during the period of suspension.

(*b*) A retired officer may be assigned with his consent to active duty upon courts-martial in time of peace (act of Apr. 23, 1904, 33 Stat., 264), and if employed on active duty in time of war in the discretion of the President (sec. 24, act of June 3, 1916, 39 Stat., 183), he is eligible for court-martial duty. At other times he is not available for such duty except that when placed in command of a post under the act of August 29, 1916 (39 Stat., 627), or when assigned to recruiting duty he may act as summary court-martial when he is the only officer present. (See pars. 26 and 27.)

(*c*) Volunteers become eligible for duty as members of courts-martial from the dates of their muster or acceptance into the military service of the United States (A. W. 2), members of the Officers' Reserve Corps ordered to active service by the Secretary of War (sec.

38, act of June 3, 1916, 39 Stat., 191), and all other officers lawfully called, drafted, or ordered into, or to duty or for training in, the said service, from the date they are required by the terms of the call, draft, or order to obey the same (A. W. 2).

10. Marine officers.—Marine officers can be detached for duty with the Army only by order of the President (R. S. 1619, 1621), and their eligibility to sit as members of courts-martial to try persons subject to military law continues only during the time they are serving under such order. When any part of the Marine Corps is present with the Army and engaged in a common enterprise with it, without an order of the President detaching it for service with the Army, the case is one of cooperation and not of incorporation, and in such a case no officer of the Marine Corps can exercise command over the Army any more than a naval officer can when some part of the Navy is cooperating with the Army, and the converse is true of Army officers cooperating with the Marine Corps. (28 Op. Atty. Gen., 15.)

11. No distinction between Regulars and other forces.—No distinction now exists in the matter of eligibility for court-martial duty among the various classes of officers in the military service of the United States for the trial of any person subject to military law. (Act of Apr. 25, 1914, 38 Stat., 348; A. W. 4.)

12. Rank of members.—(*a*) The order appointing a general or a special court-martial should name the members in order of rank, and they will sit according to rank.

In no case shall an officer, when it can be avoided, be tried by officers inferior to him in rank. (A. W. 16.) This provision (like that in reference to the number of members of a general or special court-martial considered in paragraph 7, *ante*) is not prohibitory but directory only upon the convening authority. Its effect is to leave to the discretion of that officer, as the *conclusive* authority and judge, the determination of the question of the rank of the members, with only the general instruction that superiors in rank to the accused shall be selected, so far as the exigencies and interests of the service will permit. (Mullan *v.* U. S., 140 U. S., 240.)

(*b*) Rank among officers of the Regular Army, forces drafted or called into the service of the United States, and Volunteers is determined according to the rules laid down in A. W. 119.

13. Who may be tried.—(*a*) For the jurisdiction of general, special, and summary courts-martial as to persons see Chapter IV, Jurisdiction.

(*b*) In addition to the persons subject to military law enumerated in Chapter I, Section III, *ante*, the general court-martial also has jurisdiction over *any other person* who by the law of war is subject to trial by military tribunals. (A. W. 12; see Chap. IV, Jurisdiction.)

CHAPTER III.

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Section I.

GENERAL COURTS-MARTIAL.

14. Authorities enumerated.—General courts-martial may be appointed by the following authorities (A. W. 8), viz:

(*a*) The President of the United States.
(*b*) The commanding officer of a territorial division.
(*c*) The commanding officer of a territorial department.
(*d*) The Superintendent of the Military Academy.
(*e*) The commanding officer of an army.
(*f*) The commanding officer of an army corps.

(*g*) The commanding officer of a (tactical) division.

(*h*) The commanding officer of a separate brigade.

(*i*) The commanding officer of any district or of any force or body of troops, when empowered by the President to do so.

Exceptions.—(1) When any of the foregoing commanders is the accuser or the prosecutor of the person or persons to be tried, the court shall be appointed by superior *competent* authority; (2) the Superintendent of the Military Academy is not empowered to convene a general court-martial for the trial of an officer. (A. W. 12.)

[NOTE.—For the authority to appoint general court-martial in the National Guard not in the service of the United States, see sec. 103 act of June 3, 1916, 39 Stat., 208; Appendix 2, *post.*]

15. Power of the President to appoint.—In addition to the general statutory authority conferred upon the President by A. W. 8 to appoint general courts-martial he is also empowered to do so by virtue of being Commander in Chief of the Army (Swain *v.* U. S., 165 U. S., 563) and in the particular case provided for by R. S. 1230.

[NOTE.—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. (R. S. 1230.) See also A. W. 118.]

16. Superintendent of the Military Academy.—The Superintendent of the Military Academy was authorized by R. S. 1326 to convene general courts-martial for the trial of cadets only; the act of March 2, 1913 (37 Stat., 722), extended this authority to include all persons (except officers) subject to military law under his command. This authority was continued in the Code of 1916. (A. W. 8, 12.)

17. "Accuser" or "prosecutor."—Whether the commander who convened the court is to be regarded as the "accuser or prosecutor" where he has had to do with the preparing and preferring of the charges, is mainly to be determined by his *animus* in the matter. He may, like any other officer, *initiate* an investigation of an officer's conduct and formally prefer, as his individual act, charges against such officer; or by reason of a personal interest adverse to the accused he may adopt practically as his own charges initiated by another; in which cases he is clearly the accuser or prosecutor within the article. On the other hand, it is his duty to determine, when the facts are brought to his knowledge, whether an officer within his command charged with a military offense shall in the interest of discipline and for the good of the service be brought to trial. To this end he may formally refer or revise or cause to be revised and then formally referred, charges preferred against such officer by another;

or when the facts of an alleged offense are communicated to him, he may direct a suitable officer, as a member of his staff, or the proper commander of the accused, to investigate the matter, formulate and prefer such charges as the facts may warrant, and having been submitted to him, he may revise and refer them for trial as in other cases; all this he may do in the proper performance of his official duty without becoming the accuser or prosecutor in the case. Of course, he can not be deemed such accuser or prosecutor where he causes charges to be preferred and proceeds to convene the court by direction of the Secretary of War or a competent military superior. (Digest, p. 154, LXXII, I, 1.) It is not essential that the commander who convenes the court-martial for the trial of an officer should sign the charges to make him the "accuser or prosecutor" within the meaning of this article. Nor is the fact that they have been signed by another conclusive on the question whether the convening commander is the actual accuser or prosecutor. The objection that such commander is such, calls in question the legal constitution of the court, and while such objection, if known or believed to exist, should regularly be interposed at or before the arraignment it may be taken during the trial at any stage of the proceedings. If not admitted by the prosecution to exist, the accused is entitled to prove it like any other issue. (For decisions as to when the convening authority is the accuser or prosecutor, see Digest, p. 155, LXXII, I, 1, a; p. 155, LXXII, I, 2; p. 156, LXXII, I, 3, a; p. 156, LXXII, I, 3 a (1).)

18. Power to appoint an attribute of command.—As the authority to appoint general courts-martial is an attribute of *command*, a commanding officer can not delegate to another officer such as his adjutant or any other staff officer or subordinate the authority to appoint a court, detail an additional member, or relieve a member. If the authority to appoint a general court-martial is vested by law in a commanding officer he retains that authority, wherever he may be, so long as he continues to be such commanding officer. In the absence of orders or legislation, personal presence within the territorial limits of his department is not essential to the validity of commands given by a department commander to be executed within the department. Therefore he may appoint a court-martial while absent from his department *if he continues to exercise command.* But a department commander detached and absent from his command for any considerable period by reason of having received a leave of absence (whether of a formal or informal character), or having been placed upon a distinct and separate duty, is held to be in a status incompatible with a full and legal exercise of such authority and therefore incompetent during such absence to order a general court-martial as department commander, even though no other officer has been

assigned or has succeeded to the command of the department. (Digest, p. 153, LXXII, A.)

19. Rank of appointing authority.—The power of the various commanders enumerated in paragraph 14, *supra*, to appoint general courts-martial is independent of their rank, but no officer other than those enumerated can appoint a general court-martial no matter what his rank may be. An officer who succeeds to any command or duty stands in regard to his duties in the same situation as his predecessor. (A. R. 17.) In the event of the death or disability of the permanent commander of a territorial department, or his temporary absence from the limits of his command, the senior line officer present and on duty therein will exercise the command of the department, unless otherwise ordered, until relieved by proper authority. (A. R. 196.)

20. Power of appointing authority, how limited.—An officer who has power to appoint a court-martial may control its existence, dissolve it, and determine the cases to be referred to it for trial, but he can not control the exercise by the court of powers vested in it by law.

SECTION II.

SPECIAL COURTS-MARTIAL.

21. Authorities enumerated.—Special courts-martial may be appointed by the following authorities (A. W. 9), viz:

(*a*) The commanding officer of a district.

(*b*) The commanding officer of a garrison.

(*c*) The commanding officer of a fort.

(*d*) The commanding officer of a camp.

(*e*) The commanding officer of any place other than (*a*), (*b*), (*c*), and (*d*) where troops are on duty.

(*f*) The commanding officer of a brigade.

(*g*) The commanding officer of a regiment.

(*h*) The commanding officer of a detached battalion.

(*i*) The commanding officer of any other detached command.

Exception.—When any one of the foregoing commanding officers is the accuser or the prosecutor of the person or persons to be tried, the court shall be appointed by superior authority.

When any superior authority deems it desirable, he may appoint a special court-martial for any part of his command.

[NOTE.—For the authority to appoint special courts-martial in the National Guard not in the service of the United States, see sec. 104, act of June 3, 1916, 39 Stat., 208; Appendix 2, *post*.]

22. Commanding officer as "accuser or prosecutor."—The rules laid down in Section I, paragraph 17, *supra*, for determining when a commander is the accuser or prosecutor apply equally to trials by special

courts-martial. When a superior appoints a court because of such disqualification on the part of a subordinate commanding officer, he will specify in the order the names of the person or persons to be tried, and the court will adjourn *sine die* upon the completion of the last case which it is ordered to try.

23. Rank of appointing authority.—As in the case of general courts-martial, the test of the power to appoint a special court-martial is whether the officer is one of the commanders designated in A. W. 9. Such authority is an incident of his power to command, and is independent of his rank.

24. Commanding officer as member.—When but two officers in addition to the commanding officer are available for detail on a special court-martial, the commanding officer will not detail himself as a member of such court. In such a case, if superior authority desires to appoint a special court-martial for such command, the commanding officer, if otherwise eligible, may be appointed as a member thereof.

SECTION III.

SUMMARY COURTS-MARTIAL.

25. Authorities enumerated.—Summary courts-martial may be appointed by the following authorities (A. W. 10), viz:

(*a*) The commanding officer of a garrison.
(*b*) The commanding officer of a fort.
(*c*) The commanding officer of a camp.
(*d*) The commanding officer of any other place not enumerated in (*a*), (*b*), and (*c*) where troops are on duty.
(*e*) The commanding officer of a regiment.
(*f*) The commanding officer of a detached battalion.
(*g*) The commanding officer of a detached company.
(*h*) The commanding officer of any other detachment not enumerated in (*f*) and (*g*).

A summary court-martial may *in any case* be appointed by superior authority when by the latter deemed desirable.

[NOTE.—For the authority to appoint summary courts-martial in the National Guard not in the service of the United States, see sec. 105, act of June 3, 1916, 39 Stat., 208; Appendix 2, *post*.]

26. When more than one officer present.—When more than one officer is present the summary court-martial will be appointed from staff officers or available line officers junior to the commanding officer. The commanding officer will not in such cases designate himself as the summary court-martial. The senior officer on duty at a recruiting station is a "commanding officer" in the sense of the last preceding sentence when there is another officer present at the same station, even though the latter may be serving at an auxiliary or branch station. (Bul. 46, War Dept., Oct. 24, 1914.)

27. When but one officer present.—When but one officer is present with a command he shall be the summary court-martial of that command and shall hear and determine cases brought before him. (A. W. 10.) In such a case, no order appointing the court will be issued but the officer will enter on the record that he is the "only officer present with the command." (As to retired officers, see par. 9, *b*.)

28. "Detachment" defined.—A battalion or other unit is "detached" when isolated or removed from the immediate disciplinary control of a superior of the same branch of the service in such a manner as to make its commander primarily the one to be looked to by superior authority as the officer responsible for the administration of the discipline of the enlisted men composing the same. The term is used in a disciplinary sense, and is not necessarily limited to what constitutes detachment in a physical or tactical sense. The commanding officers of such units as field signal battalions, aero squadrons, field bakeries, and ammunition, engineer, or sanitary trains, if their respective commands are independent, except in so far as they constitute parts of a division, and if their commanders are responsible directly to the division commander for the maintenance of discipline in those commands, are competent to appoint summary courts for the same, subject to the power of the division commander to appoint summary courts for all subordinate organizations and detachments under his command if by him deemed advisable.

So likewise the various service schools, such as the Mounted Service School at Fort Riley, though they may be located within the immediate limits of higher commands, constitute "detachments" within the meaning of A. W. 10, and the commandants thereof have power to appoint summary courts-martial for the trial of enlisted men connected with such schools, subject to the right of the commanding officer of the garrison or fort to appoint such courts when by him deemed desirable. (Bul. 13, War Dept., 1913, p. 7.)

29. Power of brigade commanders.—A brigade commander is responsible for the instruction, tactical efficiency and preparedness for war service of his brigade. (A. R. 194.) If the brigade is serving at one garrison or post he has, by virtue of his power as such garrison or post commander, authority to retain within himself the appointing power of all summary courts within his command, but if he does not exercise the authority which is vested in him by statute he allows the appointing power, including the power of review, to pass to regimental (and detachment) commanders. (Digest, p. 580, XVI, E, 7.) If the brigade is acting as a tactical unit in the field, he may as superior authority, appoint summary courts-martial for his command whenever he deems it desirable, but such authority will ordinarily be exercised by the regimental commanders.

Section IV.

JUDGE ADVOCATE.

30. Power to appoint.—For each general or special court-martial the authority appointing the court shall appoint a judge advocate, and for each general court-martial one or more assistant judge advocates when necessary. (A. W. 11.)

31. Duties of judge advocate and assistant judge advocates.—For discussion of the duties of the judge advocate and his assistants see Chapter VII, Sections II and III.

CHAPTER IV.

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Section I.

JURISDICTION IN GENERAL.

32. Jurisdiction defined.—The jurisdiction of a court-martial is its power to try and determine cases legally referred to it and, in case of a finding of guilty, to award a punishment for the offense within its prescribed limits. Being courts of special and limited jurisdiction their organization, powers, and mode of procedure must conform to all the statutory provisions relating to their jurisdiction. (For the source and kinds of military jurisdiction and persons subject to military law see Chap. I, Secs. I and III.)

33. Courts-martial not part of Federal judicial system.—While courts-martial have no part of the jurisdiction set apart under the article of the Constitution which relates to the judicial power of the United States they have an equally certain constitutional source. They are established under the constitutional power of Congress to make rules for the government and regulation of the land forces of the United States, and are recognized in the provisions of the fifth amendment expressly exempting "cases arising in the land and naval forces" from the requirement as to presentment and indictment by grand jury. They are tribunals appointed by military orders issued under authority of law. The power to appoint them, as well as the power to act upon their proceedings, is vested by law in certain commanding officers. Their jurisdiction is *entirely criminal.* They have no power to adjudge damage for personal injuries or private wrongs, nor to collect private debts. Their judgments upon subjects within their limited jurisdiction, when duly approved or confirmed, are as legal and valid as those of any other tribunals. No appeal can be taken from them, nor can they be set aside, or reviewed by the courts of the United States, nor of any State, but United States courts may, on writ of habeas corpus, inquire into the legality of detention of a person held by military authority, at any time, either before or during trial or while serving sentence, and will order him discharged if it appears to the satisfaction of the court that any of the statutory requirements conferring jurisdiction have not been fulfilled. Their sentences have in themselves no legal effect until they have received the approval or confirmation of the proper commanding officer. With such approval or confirmation, however, their sentences become operative and are as effective as the sentences of civil courts having criminal jurisdiction, and are entitled to the same legal consideration.

34. Conditions necessary to show jurisdiction.—The jurisdiction of every court-martial, and hence the validity of each of its judgments, is conditioned upon these indispensable requisites:

(*a*) That it was convened by an officer empowered by statute to appoint it.

(*b*) That the persons who sat upon the court were legally competent to do so.

(*c*) That the court thus constituted was invested by the acts of Congress with power to try the person and the offense charged.

(*d*) That its sentence was in accordance with law.

"Persons, then, belonging to the Army and the Navy are not subject to illegal or irresponsible courts-martial, when the law for convening them and directing their proceedings of organization and for trial have been disregarded. In such cases, everything which may be done is void—not voidable, but void; and civil courts have never failed, upon a proper suit, to give a party redress, who has been

injured by a void process or void judgment. * * * When we speak of *proceedings* in a cause, or for the organization of the court and for trials, we do not mean mere irregularity in practice on the trial, or any mistaken rulings in respect to evidence or law, but a disregard of the essentials required by the statute under which the court has been convened to try and to punish an offender for an imputed violation of the law." (Dynes *v.* Hoover, 61 U. S., 81; see also Deming *v.* McClaughry, 113 Fed. Rep., 650; McClaughry *v.* Deming, 186 U. S., 63; Mullan *v.* United States, 140 U. S., 240; Ex parte Tucker, 212 Fed. Rep., 569; and A. W. 37.)

35. Procedure when military and civil jurisdiction concurrent.—Courts-martial have exclusive jurisdiction to try persons subject to military law for all purely military crimes and offenses; they have concurrent jurisdiction with the proper civil courts to try such persons for civil crimes and offenses denounced and punished under A. W. 92, 93, 94, and 96. (For limitation as to the crimes of murder and rape, see A. W. 92.) In accordance with a principle of comity as between the civil and military tribunals in cases of concurrent jurisdiction the jurisdiction which first attaches in a particular case is entitled to proceed to its termination. This is, however, not an inflexible rule and need not govern the action of the military authorities in the case of an accused person demanded by the civil authorities to answer for an offense which is primarily one against the civil community.

When any person subject to military law, except (*a*) one who is held by the military authorities to answer, or (*b*) who is awaiting trial, or (*c*) result of trial, or (*d*) who is undergoing sentence for a crime or offense punishable by the Articles of War, is accused of a crime or offense committed within the geographical limits of the States of the Union and the District of Columbia, and punishable by the laws of the land, the commanding officer is required, *except in time of war*, upon application duly made, to use his utmost endeavor to deliver over such accused person to the civil authorities, or to aid the officers of justice in apprehending and securing him, in order that he may be brought to trial. Any commanding officer who upon such application refuses or willfully neglects, except in time of war, to deliver over such accused person to the civil authorities or to aid the officers of justice in apprehending and securing him shall be dismissed from the service or suffer such other punishment as a court-martial may direct.

When, under the provisions of this article, delivery is made to the civil authorities of an offender *undergoing sentence* of a court-martial, such delivery, if followed by conviction, shall be held to interrupt the execution of the sentence of the court-martial, and the offender shall be returned to military custody, after having

answered to the civil authorities for his offense, for the completion of the said court-martial sentence. (A. W. 74.) When offenses against the peace and good order of civil communities are committed by persons subject to military law, the proper military authorities will be prompt in the preferring of charges and the arraignment of offenders, having due regard for arrangements existing for the purpose of securing between the authorities of the two jurisdictions, civil and military, mutual aid and cooperation in the administration of justice. In such cases, if, after charges are preferred, the officer competent to order trial by the proper court-martial deems it inadvisable to bring the case to trial, he will hold the offender and forward the charges, with his views thereon, to The Adjutant General of the Army.

36. Can not be divested by act of accused.—A court-martial having once duly assumed jurisdiction of a case, can not, by any wrongful act of the accused, be ousted of its authority or discharged from its duty to proceed fully to try and determine according to law and its oath. Thus the fact that, after arraignment and during the trial, the accused has escaped from military custody furnishes no ground for not proceeding to a finding, and, in the event of conviction, to a sentence, in the case; and the court may and should find and sentence as in any other case. During such absence it is proper for his counsel to continue to represent him in all respects as though present.

37. Not territorial.—Military jurisdiction is not territorial. It extends as to persons legally subject to it to offenses committed by them in any place whatsoever, whether within or beyond the territorial jurisdiction of the United States.

38. When terminated—Rule stated.—The jurisdiction of courts-martial over officers, cadets, and soldiers ordinarily ends when they become separated from the service. The following are, however, *exceptions to this general rule:*

(*a*) If any person, being guilty of any of the offenses of fraud, embezzlement, etc., against the United States, 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. W. 94.)

(*b*) 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 date of making 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. (R. S. 1230.)

[NOTE.—In time of peace no officer shall be dismissed except in pursuance of the sentence of a court-martial or in mitigation thereof. (A. W. 118.)]

(*c*) All persons under sentence adjudged by courts-martial remain subject to military law, while under such sentence. (A. W. 2.)

(*d*) Where a soldier obtains his discharge by fraud, the discharge may be canceled and the soldier arrested and returned to military control. He may also be required to serve out his enlistment and may be tried for his fraud. (Digest, p. 457, XVI, A. 3.)

(*e*) An honorable discharge releases from the particular contract and term of enlistment to which it relates, and does not therefore relieve the soldier from the consequences of a desertion committed during a prior enlistment. (Digest, p. 462, XXII, A.) A dishonorable discharge does not relate to any particular contract or term of enlistment; it is a discharge from the military service as a punishment—a complete expulsion from the Army—and covers all unexpired enlistments. A soldier thus dishonorably discharged *can not* be made amenable for a desertion or other military offense committed under a prior enlistment except as provided in A. W. 94. Nor would a subsequent enlistment after such dishonorable discharge operate to revive the amenability of the soldier for such offenses. (Digest, p. 462, XXII, B.)

[NOTE.—For an offense committed *prior* to the expiration of his term of enlistment, a soldier may be held in the service and tried *after* the expiration of his term. So, also, a soldier may be tried for offenses committed while making good time lost through desertion, through absence without leave, through disease or injury, the result of his own misconduct, etc., under A. W. 107.]

SECTION II.

JURISDICTION OF GENERAL COURTS-MARTIAL.

39. Persons and offenses—General courts-martial have power (A. W. 12) to try—

(*a*) Any *person* subject to military law, for

(*b*) Any *crime* or *offense* made punishable by the Articles of War.

[NOTE.—No officer shall be brought to trial before a general court-martial appointed by the Superintendent of the Military Academy. (A. W. 12.)]

In addition they have power to try—

(*c*) Any *person other than* (*a*) *above*, who by the law of war is subject to trial by military tribunals, for

(*d*) Any *crime* or *offense* in violation of the law of war.

40. Limits of punishment—Exception.—Punishment upon conviction is discretionary with a general court-martial, except—

(*a*) When mandatory under the law, or

(*b*) When limited by order of the President under A. W. 45; in addition,

(*c*) The death penalty can be imposed only when specifically authorized.

[NOTE.—The death penalty is mandatory in the case of spies (A. W. 82); dismissal is mandatory for conduct unbecoming an officer and gentleman (A. W. 95); either death or imprisonment for life is mandatory for murder and rape (A. W. 92); punishment is mandatory in part and discretionary in part for false muster (A. W. 56), false returns (A. W. 57), officer drunk on duty in time of war (A. W. 85), and personal interest in the sale of provisions (A. W. 87). For limits of punishment fixed by the President under A. W. 45, see Chapter XIII, *post*, Punishments.]

SECTION III.

JURISDICTION OF SPECIAL COURTS-MARTIAL.

41. Persons and offenses.—Special courts-martial shall have power (A. W. 13) to try—

(1) Any *person* subject to military law, *except*—

(*a*) An officer;

(*b*) Any person subject to military law belonging to a class or classes excepted by the President, for

(2) Any *crime or offense* (not capital) made punishable by the Articles of War.

[NOTE.—Cadets and soldiers holding a certificate of eligibility for promotion are excepted from the jurisdiction of Special Courts-martial.]

The following are capital crimes and offenses under the Articles of War, viz:

(1) *At all times.*—(*a*) Assaulting or disobeying a superior officer (A. W. 64); (*b*) mutiny or sedition (A. W. 66); (*c*) failure to suppress mutiny or sedition (A. W. 67).

(2) *War offenses.*—(*a*) Desertion (A. W. 58); (*b*) advising or aiding another to desert (A. W. 59); (*c*) misbehavior before the enemy (A. W. 75); (*d*) subordinates compelling commander to surrender (A. W. 76); (*e*) improper use of countersign (A. W. 77); (*f*) forcing a safeguard (A. W. 78); (*g*) relieving, corresponding with, or aiding the enemy (A. W. 81); (*h*) spies (A. W. 82); (*i*) misbehavior of sentinel (A. W. 86). (*C. M. C. M., No. 1.*)

42. Limits of punishment.—A special court-martial shall not have power to adjudge—

(*a*) Dishonorable discharge, nor

(*b*) Confinement in excess of six months, nor

(*c*) Forfeiture of more than six months' pay.

[NOTE.—(*a*) Reduction to the ranks in the case of noncommissioned officers and (*b*) reduction in classification in the cases of first-class privates are within the limits of the punishing power of special courts-martial. (Act of Mar. 2, 1913, 37 Stat., 722.)]

SECTION IV.

JURISDICTION OF SUMMARY COURTS-MARTIAL.

43. Persons and offenses.—Summary courts-martial shall have power (A. W. 14) to try—

(1) Any *person* subject to military law, *except*—

(*a*) An officer;

(*b*) A cadet;

(*c*) A soldier holding the privilege of a certificate of eligibility to promotion;

(*d*) A noncommissioned officer who objects thereto (without the authority of the officer competent to bring him to trial before a general court-martial);

(*e*) Any person belonging to a class or classes excepted from the jurisdiction of summary courts-martial by the President.

(2) Any *crime or offense* (not capital) made punishable by the Articles of War.

[NOTE.—For list of capital crimes under the Articles of War see Sec. III, par. 41, *supra*.]

44. Limits of punishment.—A summary court-martial shall not have power to adjudge—

(*a*) Dishonorable discharge,

(*b*) Confinement in excess of three months, nor

(*c*) Forfeiture of more than three months' pay.

Exception.—When the summary court officer is also the commanding officer, no sentence of such summary court-martial adjudging confinement at hard labor or forfeiture of pay, or both, for a period in excess of one month shall be carried into execution until the same shall have been approved by superior authority. (A. W. 14.)

[NOTE.—(*a*) Reduction to the ranks in the case of noncommissioned officers and (*b*) reduction in classification in the cases of first-class privates are within the limits of the punishing power of summary courts-martial. (Act of Mar. 2, 1913, 37 Stat., 723.)]

SECTION V.

JURISDICTION OF OTHER MILITARY TRIBUNALS.

45. When concurrent with courts-martial.—The provisions of the Articles of War conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect to offenders or offenses that by the law of war may be lawfully triable by such military commissions, provost courts, or other military tribunals. (A. W. 15.)

CHAPTER V.

COURTS-MARTIAL—PROCEDURE PRIOR TO TRIAL.

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Section I.

ARREST AND CONFINEMENT.

46. Arrest or confinement of accused persons.—(*a*) *An officer* charged with crime or with a serious offense under the articles of war shall be placed in arrest by the commanding officer, and in exceptional cases an officer so charged may be placed in confinement by the same authority.

(*b*) *A soldier* charged with crime or with a serious offense under the articles of war shall be placed in confinement, and when charged with a minor offense he may be placed in arrest.

(*c*) *Any other person* subject to military law charged with crime or with a serious offense under the articles of war shall be placed in confinement or in arrest, as circumstances may require; and when charged with a minor offense such person may be placed in arrest. Any person placed in arrest under the provisions of this article

(A. W. 69) shall thereby be restricted to his barracks, quarters, or tent, unless such limits shall be enlarged by proper authority. Any officer who breaks his arrest or who escapes from confinement before he is set at liberty by proper authority shall be dismissed from the service or suffer such other punishment as a court-martial may direct; and any other person subject to military law who escapes from confinement or who breaks his arrest before he is set at liberty by proper authority shall be punished as a court-martial may direct. (A. W. 69.)

[NOTE.—A failure to place a person subject to military law in arrest or confinement or the disregard of any custom or formality connected therewith does not affect the jurisdiction of a court.]

47. Who may order arrests.—(*a*) Only commanding officers have power to place officers in arrest, except as provided in A. W. 68.

[NOTE.—The "commanding officer" thus authorized is the commander of the regiment, separate company, detachment, post, department, etc., in which the officer is serving. Digest, p. 481, I D. 1.]

(*b*) A judge advocate of a court-martial has no authority to place in arrest an officer or soldier about to be tried by the court, or to compel the attendance of the accused before the court by requiring a noncommissioned officer to bring him, or otherwise. These are duties which devolve upon the convening authority or upon the post commander or other proper officer in whose custody or command the accused is at the time. (Digest, p. 498, IV, B, 5.)

(*c*) A court-martial has no control over the nature of the arrest or other status of restraint of a prisoner except as regards his personal freedom in its presence. It cannot place an accused person in arrest or confinement nor can the court, even with a view to facilitate his defense, interfere to cause a close arrest to be enlarged. The officer in command is alone responsible for the prisoners in his charge. (Davis, p. 62.)

48. Arrest, how executed.—An officer is placed in arrest by his commanding officer in person or through another officer, by a verbal or written order or communication, advising him that he is placed in arrest, or will consider himself in arrest, or words to that effect.

49. Status of officer in arrest.—An officer in arrest can not exercise command of any kind. He will not wear a sword nor visit officially his commanding or other superior officer, unless directed to do so. His applications and requests of every nature will be made in writing. (A. R. 926.)

50. Arrest of officer without preferring charges.—Officers will not be placed in arrest for light offenses. For these the censure of the commanding officer will generally answer the purpose of discipline. Whenever a commanding officer places an officer in arrest without preferring charges, he will make a written report of his action to the brigade or Coast Artillery district commander, stating the cause. The brigade or Coast Artillery district commander, if he thinks the

occasion requires, will call on the officer arrested for any explanation he may desire to make, and take such other action within his authority as he may think necessary, forwarding the papers, with his recommendation, to the department commander, who will, in case a trial is not deemed advisable, forward the papers to The Adjutant General of the Army for file with the officer's record, or for further action. In the case of officers belonging to organizations not attached or belonging to a brigade or Coast Artillery district, the report will be sent directly to the officer exercising general court-martial jurisdiction. (A. R. 924.)

51. Arrest of medical officer.—In ordinary cases where inconvenience to the service would result from it, a medical officer will not be placed in arrest until the court-martial for his trial convenes. (A. R. 925.)

52. Arrest and confinement of soldiers.—Except as provided in A. W. 68, or when restraint is necessary, no soldier will be confined without the order of an officer, who shall previously inquire into his offense (A. R. 930); it is proper, however, for a company commander to delegate to noncommissioned officers of his company the power to place enlisted men in arrest as a means of restraint at the instant when restraint is necessary, but such action must be reported to the company commander at once. (Digest, p. 481, I, E, 1.)

53. Status of noncommissioned officer in arrest.—Noncommissioned officers will not be confined in company with privates if it can be avoided. When placed in arrest, they will not be required to perform any duty in which they may be called upon to exercise authority or control over others, and when placed in confinement, they will not be sent out to work.

54. Abuse of authority to arrest.—The fact that cases of officers put in arrest "at remote military posts or stations" are excepted from the application of A. W. 70 does not authorize an abuse of the power of arrest in these cases. And where, in such a case, an arrest, considering the facilities of communication with the department headquarters and other circumstances, is in fact unreasonably protracted without trial the officer is entitled to be released from arrest upon a proper application submitted for the purpose. (Digest, p. 152, LXXI, C.) Though an officer, in whose case the provisions of A. W. 70 in regard to service of charges and trial have not been complied with, is *entitled* to be released from arrest, he is not authorized to release himself therefrom. If he be not released in accordance with the article he should apply for his discharge from arrest, through the proper channels, to the authority by whose order the arrest was imposed, or other proper superior. (Digest, p. 153, LXXI, D.) When an officer is placed in arrest in the operation of A. W. 69 and subsequently tried he is not entitled to be released from

arrest, as a right, until the proper reviewing authority has acted on the record of his case. (Digest, p. 152, LXV, C.)

55. Refusal to receive and keep prisoners.—No provost marshal or commander of 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 time, deliver an account in writing, signed by himself, of the crime or offense charged against the prisoner. Any officer or soldier so refusing shall be punished as a court-martial may direct. (A. W. 71.)

[NOTE.—A. W. 72 requires every commander of a guard to submit a report in writing to his commanding officer within twenty-four hours after the confinement of a prisoner (or as soon as he is relieved from his guard) showing (*a*) the name of such prisoner, (*b*) the offense charged against him, and (*c*) the name of the officer committing him. Such report is ordinarily contained in the "Guard report" and presented to the commanding officer by the old officer of the day at guard mounting. For duty of commanding officers to surrender prisoners to civil authorities, see par. 35.]

56. Placing prisoners in irons.—Prisoners will not be placed in irons except in the extraordinary case of a prisoner who, in the judgment of the commanding officer, is a desperate or dangerous character, in which case report of action and the circumstances will be immediately made to the department or tactical division commander. When a prisoner is removed from irons a report of that action will be made to the department or tactical division commander. A prisoner may be shackled or handcuffed while being transported from one post to another, or from a post to a penitentiary, when, in the judgment of the officer in charge, the escape of the prisoner can not otherwise be prevented. (A. R. 935.)

57. Releasing prisoner without proper authority.—Any person subject to military law, who, without proper authority, releases any prisoner duly committed to his charge, or who, through neglect or design, suffers any prisoner so committed to escape, shall be punished as a court-martial may direct. (A. W. 73.)

SECTION II.

ARREST OF DESERTERS BY CIVIL AUTHORITIES.

58. Authority for apprehension.—It shall be lawful for any civil officer having authority under the laws of the United States, or of any State, Territory, District, or possession of the United States, to arrest offenders, summarily to arrest a deserter from the military service of the United States and deliver him into the custody of the military authorities of the United States. (A. W. 106.)

59. Authority of citizens other than peace officers to arrest deserters.—The statute conferring authority upon civil officers to apprehend and deliver deserters (A. W. 106) should not be construed as taking away the authority for their apprehension by a citizen under an

order or direction of a military officer, but the legislation should be treated as providing an *additional* means of securing the arrest of deserters by conferring authority upon civil officers to apprehend them without military orders—leaving the former method still legal. The offer of reward for the apprehension and delivery of a deserter, coupled with the act of Congress which provides for the payment of such a reward, is considered sufficient authority for the arrest of the deserter by a citizen. (C–17327–A, July 20, 1909.)

60. Minority of deserter.—The right of the United States to arrest and bring to trial a deserter is paramount to any right of control over him by a parent on the ground of his minority. (See Digest, p. 401, III, G; In re Cosenow, 37 Fed. Rep., 668; In re Kaufman, 41 Fed. Rep., 876; and compare In re Grimley, 137 U. S., 147, and in In re Morrissey, 137 U. S., 157.)

Note - Report on Desertion:
(a) Circumstances of arrest
(b) What accused was doing when arrest was made
(c) Whether employed
(d) Whether in uniform
(e) Whether trying to get away or to conceal identity
(f) What he said at the time
(g) any other evidential information

CHAPTER VI.

COURTS-MARTIAL—PROCEDURE PRIOR TO TRIAL.

[Continued.]

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SECTION I.

PREPARATION OF CHARGES.

61. Definitions.—A charge corresponds to a civil indictment. It consists of two parts—the technical "*charge*," which should designate

the alleged crime or offense as a violation of a particular article of war or other statute, and the "*specification*," which sets forth the facts constituting the same. The requisite of a *charge* is that it shall be laid under the proper article of war *or other statute;* of a *specification*, that it shall set forth in simple and concise language facts sufficient to constitute the particular offense and in such manner as to enable a person of common understanding to know what is intended. The general term "charges," in the sense that the word "charge" is used in the first sentence of this paragraph, includes any number of technical charges and their specifications.

[NOTE.—For forms for changes see Appendix 4.]

62. Who may initiate charges.—Military charges, though commonly originating with military persons, may be initiated by civilians. Indeed, it is but performing a public duty for a civilian who becomes cognizant of a serious offense committed by an officer or a soldier to bring it to the attention of the proper commander. A charge may likewise originate with an enlisted man. But by the usage of the service all military charges should be formally preferred by—that is, authenticated by the signature of—a *commissioned* officer. Charges proceeding from a person outside the Army and based upon testimony not in the possession or knowledge of the military authorities, should, in general, be required to be sustained by affidavits or other reliable evidence, as a condition to their being adopted. (Digest, p. 482, II, B.)

63. Who may prefer charges.—Any officer may prefer charges. An officer is not disqualified from preferring charges by the fact that he is himself under charges or in arrest. (Digest, p. 483, II, C.)

64. Signing charges.—The officer preferring charges will sign his name following the last specification, adding his rank and organization in the Army.

The signing of charges, like orders, with the name of an officer, adding "by order of" his commander, is unusual and not to be recommended. (Digest, p. 487, II, D, 12, a.) The signature of the officer preferring charges forms no part of the charges themselves, but *such signature will nevertheless be copied into the record of trial* by a general or special court-martial, in order that it may affirmatively appear whether the officer preferring the charges (who is *prima facie* the accuser) sat as a member of the court. (See A. W. 8, 9.)

65. Accumulation of charges.—It may sometimes be expedient, where the offenses are slight in themselves and it is deemed desirable to exhibit a continued course of conduct, to wait, before preferring charges, till a series of similar acts have been committed, provided

the period be not unreasonably prolonged; but, in general, charges should be preferred and brought to trial immediately or presently upon the commission of the offenses. Anything like an accumulation or saving up of charges, through a hostile *animus* on the part of the accuser, is discountenanced by the sentiment of the service. (Digest, p. 490, II, F, 2.)

66. Duplication of charges.—The duplication of charges for the same act or omission will be avoided except when, by reason of lack of definite information as to available evidence, it may be necessary to charge the same act or omission as constituting two or more distinct offenses. When the same act or omission in its different aspects is charged as constituting two or more offenses, the court, even though it arrives at a finding of guilty in respect of two or more specifications, should impose punishment only with reference to the act or omission in its most important aspect, and if this rule be not observed by the court the reviewing authority should take the necessary action. Thus a soldier should not be punished for disorderly conduct and for assault, when the disorderly conduct consisted in making the assault. And so, a person subject to military law should not be charged under A. W. 61 for failure to report for a *routine* duty at a time included in a period for which he is charged with absence without leave under the same article; otherwise, when the duty is not a *routine* duty. *Routine* duties are those that are regularly scheduled, such as reveille, retreat, stables, fatigue, schools, drills, and parades, but do not include practice marches or other previously specially appointed and important exercises, of which the accused is chargeable with notice.

67. Consolidation of charges.—Ordinarily all the charges against the accused should be consolidated into one set of charges, and one trial had upon the consolidated set instead of having two or more trials, one upon each set. To avoid taking up unnecessarily the time of a court with minor offenses, where charges are preferred for serious offenses, there should not be joined with them charges for minor derelictions, *unless the latter serve to explain the circumstances surrounding the serious charges.* For instance charges for desertion should not ordinarily be joined with charges for losing through neglect Government property of small value; nor should charges for willful disobedience of the orders of a commissioned officer ordinarily be joined with charges for an absence from a routine duty.

68. Refusal to submit to medical treatment.—An officer or soldier may be charged for refusing to submit to a surgical operation or medical treatment at the hands of the military authorities if it is designed to restore or increase his fitness for service, and is without risk of life.

A soldier who refuses to submit to a surgical operation that the attending surgeon certifies is without risk to his life and is necessary for the removal of a disability that prevents the full performance of any or all military duties that properly can be required of him will, for such refusal, be brought to trial by general court-martial; but if in any such case the attending surgeon is in doubt as to whether the proposed operation involves risk to life, the soldier will not be brought to trial but will be discharged on surgeon's certificate of disability. (G. O. 43, War Dept., 1906.)

69. Joint charges.—Where two or more persons jointly and in pursuance of a common intent commit a crime or offense which can be committed by a combination of persons acting in concert, they may be separately charged and tried for such crime or offense or may be jointly charged and jointly tried. The actual presence of all of the accused persons at the actual commission of the offense is not necessary, for all who take part in the enterprise are equally guilty, though they may be absent from the place of actual commission of the offense with which they are charged. The fact that justice may require that different degrees of punishment be awarded to the different parties constitutes no objection to such a joint prosecution. The mere fact of their committing the same offense together and at the same time, although material as going to show concert, does not necessarily establish it. Thus the fact that several soldiers have absented themselves together without leave will not, in the absence of evidence indicating a concert of action, justify their being arraigned together on a joint charge, for they may merely have been availing themselves of the same convenient opportunity of leaving. Nor is desertion, unless in execution of a conspiracy, chargeable as a joint offense. (Digest, p. 484, II, D, 7.) In joint charges the form of the *charge* does not differ from that in other charges. The form of specification will read as follows:

In that Private ———, Company ———, ——— Infantry; Private ———, Company ———, ——— Infantry; and Private ———, Company ———, ——— Infantry, acting jointly, and in pursuance of a common intent, did [here allege the offense in the language prescribed where the offense is committed by only one person].

The right of challenge may, of course, be exercised by each of the accused. (*C. M. C. M., No. 1.*)

70. Charges not to be preferred upon uncorroborated confession.—Charges should not be preferred for an offense unless there is some evidence other than the confession of the accused that the offense has been committed. This applies particularly in cases of fraudulent

enlistment. The mere confession by the accused that he had prior service, or was under a certain disability at the time he enlisted, and concealed that fact should not be made the basis for charges unless there is something confirming the confession. Charges should not be preferred in such cases until corroborating evidence that the offense was committed has been secured, or that, the existence of such evidence being ascertained, the necessary steps to obtain it have been taken. (See par. 225.)

71. Charges for private indebtedness.—The military authorities will not attempt to discipline officers and soldiers for failure to pay disputed private indebtedness or claims—that is, indebtedness or a claim where, in the opinion of the military authorities, there is a genuine dispute as to the facts or law—nor will the military authorities attempt to decide such disputed indebtedness or claims. If the indebtedness is disputed the creditor should resort to the civil courts to establish the liability. If, in the opinion of the military authorities, the facts and law are undisputed and there appears to the military authorities to be a private indebtedness, and the officer or soldier does not claim to have a legal or equitable set-off or counterclaim to urge against it, an officer may be brought to trial if his failure is considered to be a violation of A. W. 95 or A. W. 96, and a soldier may be tried if his failure is considered to be a violation of A. W. 96, but no action will be taken by the military authorities to enforce payment. If an officer or soldier by his conduct in incurring the indebtedness or by his attitude toward it or his creditor thereafter reflect discredit upon the service to which he belongs, he should be brought to trial for his misconduct. If the facts and law, in the opinion of the military authorities, are undisputed and there appears to the military authorities to be no indebtedness, the department will take no further action. Where a soldier was largely indebted and failed to pay his indebtedness and the commanding officer denied the soldier all pass privileges until the indebtedness was paid, it was held that such action on the part of the commanding officer constituted an attempt to enforce payment of the indebtedness and was contrary to the policy of the War Department and such action should be revoked. (Digest, p. 878, IV.)

72. Numbering charges and specifications.—Where there are several specifications under one article, the usual procedure is to place them all under one charge, rather than to make several charges with one specification under each. Where there are several specifications under one charge they will be consecutively numbered, and where there are several charges, the charges will be consecutively numbered.

73. Additional charges.—New and separate charges which are preferred after others have been preferred are known in military law as "additional charges." 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 they were preferred; or they may, as is more frequent, arise from acts of the accused subsequent to his arrest or confinement on the original charges. Thus, if after charges have been preferred he commits a "breach of arrest," an additional charge will properly be preferred in the case, and should be designated as an "additional" charge. Charges of this character do not require a separate trial, but may and preferably should be tried by the same court that tries the original charges, and at the same time subject to the limitation regarding service of charges contained in A. W. 70. If practicable to consolidate the two sets of charges this should be done, otherwise the second set will be denominated "additional" charges. After the court has been duly sworn to try and determine "the matter now before it" additional charges which the accused has had no notice to defend and regarding which the right to challenge has not been accorded him, can not be introduced or the accused required to plead thereto. Such charges must await a separate trial. (See Winthrop, pp. 225, 226.) (*C. M. C. M., No. 1.*)

74. Rules to be observed in pleading.—(*a*) *Statement of charge.*—The charge should be limited to a statement of the article violated, as "Violation of the 58th article of war," or "Violation of the 85th article of war." Common law and statutory crimes, not specified in the Articles of War, over which courts-martial have jurisdiction should, if not capital, be charged under A. W. 96.

(*b*) *Statement of specification.*—The specification need not possess the technical nicety of an indictment. In general a bald statement of the facts in simple and concise language, and in such a manner as to enable a person of common understanding to know what is intended is sufficient, provided the offense itself be distinctly and accurately described. More specifically, (1) the name, rank, title, and organization of the accused person, if he belongs to the Army of the United States, should be stated, or if he is a civilian he should be so described that it appears he is a person subject to military law, or by statute or the law of war, is subject to trial by military tribunals; (2) the facts that constitute the offense charged will be set out briefly but clearly, together with the place and time of commission. Care should be taken that all the elements of the offense as denounced in the article of war or other statute are set forth. The specification must be appropriate to the charge. (See Winthrop, p. 189, and authorities there cited.)

(*c*) *Alternative pleading.*—A specification should not allege two offenses in the alternative. For example, an offense under A. W. 84 can not be charged by the words, "did sell *or* through neglect lose." If, as the result of an investigation, there is doubt whether the property has been sold or lost, both offenses may be charged under separate specifications. Care will be taken in every case where an article of war includes two or more offenses to see that each specification alleges but a single offense. (See Digest, p. 487, II, D, 11, *d.*)

(*d*) *Evidence not to be pleaded.*—It is not good pleading in alleging an offense to state the circumstances or evidence proving or tending to prove it, such as the acts, occurrences, and matters of description, which should properly form part of the testimony of witnesses; but there is no objection to stating very briefly in the specification the immediate result or effect of the act charged as a circumstance of description illustrating the character and extent of the offense committed. For instance, in charging a striking or doing of violence to a superior officer under A. W. 64, it is allowable, in a case where the assault was fatal, to add in the specification, "thereby causing his death," as indicating the measure of violence employed. (Digest, p. 488, II, D, 14, *a.*)

(*e*) *Specific articles, when used.*—When a crime or offense is specifically provided for in an article of war, the charge will be laid under that article and not under the general article, i. e., under A. W. 96. This rule is particularly to be observed when the crime or offense falls under an article which prescribes a fixed punishment. (See, however, A. W. 37.)

[NOTE.—In charging offenses against cadets for violation of regulations of the Military Academy, the offense, if covered by a specific article applicable to cadets, will be laid under that article (G. O. 64, War Dept., 1906), otherwise it will be laid under the general article.]

(*f*) *Forms for charges.*—The forms for charges and specifications set forth in Appendix 4 cover most of the offenses that are tried by military courts and covered in the maximum-punishment order. These forms may be followed, in the cases to which they apply, but they are not mandatory.

(*g*) *Time and place.*—The allegations of the *time* and *place* of the commission of an offense should be stated as accurately as possible, but where the act or acts charged extend over a considerable period of time it may be necessary to cover such period in the allegation. Thus allegations of "from March to September, 1887," and "from May to October, 1888," have been countenanced in a case in which the accused was charged with the neglect of a duty that required continuous performance. (Digest, p. 486, II, D, 10, *b.*) So, also, it is proper to allege that an offense was committed while "en route" between certain points. (Digest, p. 486, II, D, 9, *b.*) So where the exact time or place of the commission of the offense is not known it

is frequently preferable to allege it as having occurred "on or about" a certain date or time, or "at or near" a certain locality, rather than to aver it as committed on a particular day or between two specified days or at a particular place. There is no defined construction to be placed upon the words "on or about" as used in the allegation of time in a specification. The phrase can not be said to cover any precise number of days or latitude in time. It is ordinarily used in military pleading for the purpose of indicating some period, as nearly as can be ascertained and set forth, at or during which the offenses charged are believed to have been committed—in cases where the exact day can not well be named. And the same is to be said as to the use of the words "at or near" in connection with the averment of place. (Digest, p. 485, II, D, 9, *a*.) If the specification alleges the offense to have been committed "on" a certain date or "at" a certain place, the court in its findings may, by exceptions and substitutions, find another date or place if the evidence supports such amendments, provided the new date or place is sufficiently near the one alleged that an injustice is not done the accused. In preparing several specifications under one charge, the time and place of the alleged offense will be given in each specification.

(*h*) *Christian name.*—The Christian name of an accused should be used in preparing charges, but where there are one or more middle names they may be indicated by the initials only. In the case of a person in the military service the name used in the charges should correspond to that borne by the accused on the muster rolls or the Army register.

(*i*) *Charging under "alias."*—If the accused is known by two names, as where a soldier enlists under a name different from that under which he was known in his prior enlistment, both the heading of the charge and the specification will describe him under his true name and also under his assumed name as an *alias*.

(*j*) *General prisoners.*—In charging a general prisoner with an offense, the form of the charge will not be changed but the specification will read as follows:

In that General Prisoner A——— B——— did [here allege the offense in the language prescribed when it is committed by an officer or soldier].

It is not necessary to allege in the specification that the general prisoner was formerly a soldier, was tried by a general court-martial, and sentenced to dishonorable discharge and a term of confinement, and that he committed the offense while serving such confinement. The words "general prisoner" necessarily import such facts.

[NOTE.—General prisoners are persons sentenced to dismissal or dishonorable discharge and to terms of confinement at military posts or elsewhere.]

(*k*) *Change of rank.*—Where the rank of the accused has changed since the commission of an offense, the specification will read as follows:

In that Private A——— B———, Company ———, ——— Infantry, then sergeant, Company ———, ——— Infantry, did, etc.

(*l*) *Written papers and oral statements.*—A specification in alleging the violation of an order which has been given in writing, or of any written obligation—as an oath of allegiance, parole, etc.—should preferably set forth the writing verbatim, or at least state fully its substance, and then clearly specify the act or acts which constitute its alleged violation. Oral statements should be alleged in as nearly the exact words as possible, but should always be qualified by the words "or words to that effect," or some similar expression, since proof will generally vary as to some word or words, particularly if some time has elapsed since the incident. A similar rule obtains in cases involving insubordinate or disrespectful language.

(*m*) *Scandalous and disgraceful offenses.*—In framing charges it is permissible, under the custom of the service, after alleging the facts in the specification, to add, "This to the scandal and disgrace of the military service." This form of charge is appropriate in cases of particularly disgraceful conduct occurring in the presence of a number of persons, particularly civilians, or in uniform, or otherwise resulting in publicity.

(*n*) *Desertion followed by fraudulent enlistment.*—Enlistment by a soldier in desertion is fraudulent. Such soldier should be charged with desertion under A. W. 58, and with fraudulent enlistment under A. W. 54. (Cir. 28, War Dept., 1908.) A fraudulent enlistment is no defense to a charge of desertion but is proof of such desertion, for a soldier can not be excused from repudiating a pending contract by substituting another in its place. In such a case the *status* of desertion remains, notwithstanding the deserter's presence in the military service under a fraudulent enlistment, until he surrenders *as a deserter* or is apprehended as such. For a single desertion followed by a fraudulent enlistment, *but one specification for desertion will be preferred*, in addition to the specification for fraudulent enlistment.

[NOTE.—A. W. 29 constitutes a rule of evidence and is not a punitive article.]

(*o*) *Larceny and sale of public property.*—In cases of larceny of property (not described in A. W. 94) where the accused has sold the stolen property, the charges should not include specifications alleging the sale except where the same has been made to an innocent party and constitutes such a fraud upon the purchaser as to warrant the preferment of a specification based upon such fraud. Proof of

a subsequent sale of stolen property goes to show intent to steal, and, therefore, evidence of such sale should be introduced to support charges of larceny, wherever available. Larceny and sale of United States property in violation of A. W. 94 should each be charged in separate specifications, since that article denounces both offenses.

(*p*) *Wording of statute to be followed.*—Wherever practicable the exact words of the articles of war will be followed. A person under the influence of intoxicating liquor which incapacitates him mentally or physically for the proper performance of duty is "drunk." Therefore, under A. W. 85 the word "drunk" will be used. So in charging other offenses involving drunkenness no other word or phrase will be used as a substitute for "drunk." Under such charges the court should not in its findings substitute such phrases as "under the influence of intoxicating liquor" and "intoxicated" for "drunk."

SECTION II.

ACTION UPON CHARGES.

75. Submission of charges.—All charges for trial by court-martial will be prepared in triplicate, using the prescribed charge sheet as a first sheet and using such additional sheets of ordinary paper as are required. They will be accompanied—

(*a*) Except when trial is to be had by summary court, by a brief statement of the substance of all material testimony expected from each material witness, both those for the prosecution and those for the defense, together with all available and necessary information as to any other actual or probable testimony or evidence in the case; and

(*b*) In the case of a soldier, by properly authenticated evidence of convictions, if any, of an offense or offenses committed by him during his current enlistment and within one year next preceding the date of the alleged commission by him of any offenses set forth in the charges.

They will be forwarded by the officer preferring them to the officer immediately exercising summary court-martial jurisdiction over the command to which the accused belongs, and will by him and by each superior commander into whose hands they may come either be referred to a court-martial within his jurisdiction for trial, forwarded to the next superior authority exercising court-martial jurisdiction over the command to which the accused belongs or pertains, or otherwise disposed of as circumstances may appear to require.

76. Investigation of charges.—If the officer immediately exercising summary court-martial jurisdiction over the command to which the accused belongs or pertains decides to forward the charges to superior authority he will, before so doing, either carefully investigate them

himself or will cause an officer other than the officer preferring the charges to investigate them carefully and to report to him, orally or otherwise, the result of such investigation. The officer investigating the charges will afford to the accused an opportunity to make any statement, offer any evidence, or present any matter in extenuation that he may desire to have considered in connection with the accusation against him. (See par. 225 (*b*), p. 112.) If the accused desires to submit nothing, the indorsement will so state. In his indorsement forwarding the charges to superior authority the commanding officer will include:

(*a*) The name of the officer who investigated the charges;

(*b*) The opinion of both such officer and himself as to whether the several charges can be sustained;

(*c*) The substance of such material statement, if any, as the accused may have voluntarily made in connection with the case during the investigation thereof;

(*d*) A summary of the extenuating circumstances, if any, connected with the case;

(*e*) His recommendation of action to be taken.

77. Prompt action required.—No person put in arrest shall be continued in confinement more than eight days, or until such time as a court-martial can be assembled. When any person is put in arrest for the purpose of trial, except at remote military posts or stations, the officer by whose order he is arrested shall see that a copy of the charges on which he is to be tried is served upon him within eight days after his arrest, and that he is brought to trial within ten days thereafter, unless the necessities of the service prevent such trial; and then he shall be brought to trial within thirty days after the expiration of said ten days. If a copy of the charges be not served, or the arrested person be not brought to trial, as herein required, the arrest shall cease. But persons released from arrest, under the provisions of A. W. 70, may be tried whenever the exigencies of the service shall permit, within twelve months after such release from arrest. (A. W. 70.)

78. Determination of proper trial court.—When an officer who exercises court-martial jurisdiction receives charges against an enlisted man it is his duty to consider whether they shall be tried by general, special, or summary court-martial. He should not withhold charges from trial by special or summary court solely for the reason that the maximum limit of punishment is beyond the jurisdiction of such courts to impose. On the other hand, he should not refer to a special or summary court-martial offenses which by reason of their inherent gravity or of the circumstances surrounding their commission merit greater formality of trial or more condign punishment than is found in the procedure or jurisdiction of such courts. No fixed rule can be laid down and the matter must be de-

cided by the careful consideration of commanders subject to the limitations that while, in a proper case, desertion may be tried before a special court, felonies and crimes involving moral turpitude should not be, and capital crimes can not be tried by special or summary courts-martial. (A. W. 13, 14. For list of capital crimes and offenses see Chap. IV, Sec. III.)

79. Disposition of copies of charges.—(*a*) When trial is to be had by summary court the charges will be completed as the record of trial, a copy thereof will be completed as a copy of the summary court record for the company or other commander, and the other copy will, with the least practicable delay after action has been taken on the sentence, be completed and transmitted as the required report of trial to the officer exercising general court-martial jurisdiction over the command, there to be filed in the office of the judge advocate for a period of two years, at the end of which time it may be destroyed.

(*b*) When trial is to be had by special or general court-martial the charges and one copy thereof will be referred to the trial judge advocate, the copy to be furnished by him to the accused or his counsel, and the other copy will be used for record purposes in the office of the officer appointing the trial court, the top fold of this copy of the charge sheet, in case of trial by general court-martial, being detached at the proper time and forwarded with the record of trial to the Judge Advocate General of the Army.

80. Service of charges upon accused.—In order that the accused may have sufficient time to prepare for his defense it is provided by A. W. 70 that in time of peace no person shall, against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him.

CHAPTER VII.

COURTS-MARTIAL—ORGANIZATION.

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SECTION I.

THE MEMBERS.

81. Place of meeting—Duties of members.—The authority appointing a general or special court-martial designates the place for holding the court, hour of meeting, the members of the court, and the judge advocate. A general or special court-martial assembles at its first session in accordance with the order convening it; thereafter, according to adjournment. Courts will be assembled at posts or stations where trial will be attended with the least expense. A member stationed at the place where the court sits is liable to duty with his command during adjournment from day to day. Subject to any instructions that may be given by the authority that appoints the court, the court will determine the hours of holding its sessions.

82. Uniform.—For regulations regarding uniform to be worn by members of courts-martial, the judge advocate, the accused, and witnesses see Regulations for the Uniform of the United States Army. In any case of doubt (as where the court consists of members but recently mustered into the service), the president of the court will designate the uniform in the notice sent to members notifying them of the place and hour of meeting of the first session.

83. Seating of court.—When the court is ready to proceed it is called to order by the president. Members will be seated according to rank, alternately to the right and left of the president. The judge advocate, the accused, and his counsel are seated so as to be most easily seen and heard by all the members of the court. The reporter should be seated near the judge advocate.

84. Roll call.—At the beginning of each session the judge advocate verifies the presence or absence of the members of the court by calling each officer's name or by informally noting his presence or absence. This verification is noted in the record. (See Appendices 6, 7 for record of general and special courts-martial.) When the accused and his counsel appear before the court for the first time the judge advocate will announce their names to the court.

[NOTE.—For number necessary to constitute a quorum of a general or special court-martial and the procedure to be taken when the number is reduced below five, see par. 7.]

85. Absence of member.—A member of a court-martial who knows, or has reason to believe, that he will, for a proper reason, be absent from a session of the court, will inform the judge advocate accordingly. When a member of a court-martial is absent from a session thereof, the judge advocate will cause that fact, together with the reason for such absence if known to him, to be shown in the record of proceedings. If the reason for such absence is not known to the judge advocate, he will cause the record to show the member as absent, cause

unknown. In any event, the appointing authority will take such action, if any, relative to such absence as he may deem proper.

86. Decorum to be observed.—Trials before courts-martial will be conducted with the decorum observed in civil courts. The conduct of members should accordingly be dignified and attentive. Reading of newspapers or other evidence of inattention by members of a court-martial during its sessions constitutes a neglect of duty to the prejudice of good order and military discipline. It is the duty of the president of the court to admonish against such inattention, and charges may be preferred against a member who does not heed the admonition. A court-martial has no power to punish its members, but a member is liable to charges and trial for improper conduct as for any other offense against military discipline. Improper words used by a member should be taken down in writing and any disorderly conduct reported to the appointing authority. During the reading of the order appointing the court and the arraignment the judge advocate, the accused, and his counsel will stand; while the court and the judge advocate are being sworn all persons concerned with the trial, including any spectators present, will stand; when the reporter, an interpreter, or a witness is being sworn he and the judge advocate will stand; and when the judge advocate, the accused, or his counsel addresses the court, he will rise. (For punishment for contempts, see Chapter X, Sec. I, par. 173.)

87. Control of court over accused.—A court-martial has no control over the nature of the arrest or other status of restraint of a prisoner except as regards his personal freedom in its presence. For the relation between a court-martial and the accused during trial as regards arrest, see Chapter V, Section I.

88. Accused not to be tried in irons.—The accused should not be brought before the court in irons, unless there are good reasons to believe that he will attempt to escape or to conduct himself in a violent manner, but the fact that a prisoner has been tried in irons can not in any case affect the validity of the proceedings.

89. Duties of the president.—A president of the court will not be announced. The officer senior in rank present will act as such. The president does not by virtue of being such exercise command of any kind. He is in no sense the commanding officer of the court, and can not by virtue of being president give an order to a member. As the organ of the court he gives the directions necessary to the regular and proper conduct of the proceedings; but a failure to comply with a direction given by him, while it may constitute a neglect to the prejudice of good order and military discipline, can not properly be charged as a violation of the sixty-fourth article of war. (Digest, p. 508, VI, G, 3.) Neither the court nor the president is authorized to place the judge advocate in arrest. Only the proper commanding

officer can impose an arrest. It is the duty of the commanding officer to secure the attendance of the accused before the court. (Digest, p. 509, VII, C, 2; *id.*, VII, C, 3.) The president is the presiding officer of the court, and as such is the organ of the court to maintain order and conduct its business. In addition, he has the duties and privileges of other members. He has an equal vote with other members in deciding all questions, including challenges, findings, sentence, acquittal, and adjournments. He speaks and acts for the court in every instance where a rule of action has been prescribed by law, regulations, or its own resolution, and has no authority to open or close the court or make a ruling upon the admissibility of evidence, the competency of witnesses, or method of procedure without the acquiescence of the court or by custom of the service. He administers the oath to the judge advocate and authenticates by his signature all acts, orders, and proceedings of the court requiring it. (See Winthrop, p. 249.) It is his duty to take the proper steps to insure prompt trial and disposition of all charges referred for trial and to keep the court advised thereof.

[NOTE.—For duty of the president to explain to the accused the effect of a plea of guilty, see Chap. IX, Sec. II, "Pleas to the general issue."]

90. Voting.—Members of a general or special court-martial, in giving their votes, shall begin with the junior in rank. (A. W. 31.) In all deliberations, including those on challenges, findings, sentence, acquittal, and adjournments, the law secures the absolute equality of the members, the president having no greater rights in such matters than any other member. A tie vote on the *findings* is a vote of "not guilty"; a tie vote on a proposed sentence or on a challenge or any objection or motion is a vote in the negative. The sentence is not adopted and the challenge, objection, or motion is not sustained. When the offense charged includes a minor offense, voting shall first be had upon the major offense.

All convictions and sentences (other than those involving death), whether by general or special court-martial, may be determined by a majority of the members present. (A. W. 43.) Refusal to vote on any question arising during the proceedings constitutes a neglect to the prejudice of good order and military discipline punishable under A. W. 96. (For voting on findings and sentence, see Chap. XII, Sec. II.)

91. Closed sessions.—Members take an oath not to disclose or discover the vote or opinion of any particular member of the court-martial. (See A. W. 19.) In order to avoid disclosing or discovering such vote or opinion the court is closed while voting upon any question. When the court is closed all persons (including the judge advocate) withdraw. In important cases, where delay would ensue due to the number of spectators present, the court itself may withdraw to another room prepared for the purpose for deliberating in closed session. It is not necessary, however, for the court to go into closed session in every case requiring action, where such

action would be unanimous and business can properly be transacted without disclosing the vote or opinion of any member. Thus, on a request by the judge advocate or the accused for a short recess, it is proper for the president to announce "without objection, the request will be granted," or words to that effect. Similarly, if the accused objects to a member because he preferred the charges and is the accuser and the member admits the fact, he may be excused without going into closed session. Care will be taken in such cases that no votes are taken in open session. If any member believes the matter should be passed upon in closed session, it is proper for him to move that the court be closed, whereupon the president will announce that the court will be cleared.

92. Sitting with closed doors.—A court-martial is authorized, in its discretion, to sit with doors closed to the public. Except, however, when temporarily closed for deliberation, courts-martial in this country are almost invariably open to the public during a trial. But in a particular case where the offenses charged were of a scandalous nature, it was recommended that the court be directed to sit with doors closed to the public. (Digest, p. 516, IX, C.)

93. Change in membership.—Although it is undesirable to change the membership of a court during a trial it is within the discretion of the appointing officer in a proper case, to relieve members or appoint new members. The promotion of a member during the trial of a case does not affect his competency as a member. He should sit according to his changed rank. The rule is that no member who has been absent during the taking of evidence shall thereafter take part in the trial; but the nonobservance of this rule shall not be construed as invalidating the proceedings of courts-martial if no objection is made, and the court permits the member to sit. The rule, however, should be complied with when practicable. Especially should a member who has been absent during an important part of the proceedings not be permitted to resume his seat. Where a member who has been absent is permitted to resume his seat, or a new member is added after the trial of the case has begun, all proceedings and evidence during his absence should be read over to him in open court before the case proceeds further and the record should show this fact; but in proceedings in revision the presence of any member who did not vote on the findings and sentence will invalidate the proceedings in revision.

Section II.

THE JUDGE ADVOCATE.

94. Selection.—The prompt, speedy, and thorough trial of a court-martial case is principally dependent upon the judge advocate. He will, accordingly, be carefully selected. Where it can be avoided, no

officer will be detailed as judge advocate of a general court-martial until he has had experience as a member or as an assistant judge advocate of a court.

95. General duties.—The judge advocate of a general or special court-martial shall prosecute in the name of the United States, and shall, under the direction of the court, prepare the record of its proceedings. (A. W. 17.) Before the court assembles the judge advocate will obtain a suitable room for the court, see that it is in order, procure the requisite stationery, summon necessary witnesses, make a preliminary examination of the latter, and, as far as possible, systematize his plans for conducting the case. During the trial he executes all orders of the court; reads the appointing order and any modifying orders to the accused; swears the members of the court, the reporter, interpreter, and all witnesses; arraigns the accused; examines witnesses; keeps or superintends, under the direction of the court, the keeping of a complete and accurate record of the proceedings; and affixes his signature to each day's proceedings. Whenever the court adjourns to meet at the call of the president, the judge advocate will notify the members of the time designated by the president for reassembling. In conjunction with the president of the court, he authenticates the record by his signature and, at the end of the trial, transmits the same to the reviewing authority. In case the record can not be authenticated by the judge advocate by reason of his death, disability, or absence, it shall be signed by the president and an assistant judge advocate, if any; and if there be no assistant judge advocate, or in case of his death, disability, or absence, then by the president and one other member of the court. (A. W. 33.)

96. Duty toward accused.—Should the accused, for any reason, not be represented by counsel, the judge advocate shall, from time to time throughout the proceedings, advise him of his legal rights. (A. W. 17.) He should—

(*a*) Acquaint the prisoner with the accusations against him;
(*b*) Inform him of his right to have counsel;
(*c*) Inform him of his right to testify in his own behalf; and
(*d*) Inform him of his right to have a copy of the charges.

He may ask a prisoner how he intends to plead, but he should in no case try to induce him to plead guilty, or leave him to infer that if he does so his punishment will be lighter. (Winthrop, p. 293.) When the accused determines to plead guilty the judge advocate should advise him of his right to introduce evidence in explanation of his offense, and should assist him in securing it. During the trial he will see that the accused has full opportunity to interpose such pleas and make such defense as may best bring out the facts, the merits, or the extenuating circumstances of his case. In so far as such action may be taken without prejudice to the rights of the ac-

cused, any advice given him by the judge advocate should be given or repeated in open court and noted upon the record.

97. Examination of charges.—The judge advocate will note and report to the convening authority any irregularity in the order convening the court and see that the charges are technically and correctly drawn. He may ordinarily correct obvious mistakes of form, or slight errors in names, dates, amounts, etc., but he will not, without the authority of the convening officer, make *substantial* amendments in the allegations, or—least of all—reject or withdraw a charge or specification or substitute a new and distinct charge for one transmitted to him for trial by the proper superior. (Digest, p. 496, IV, B, 1.) It is the duty of the president as well as the judge advocate of every court-martial to examine carefully the indorsement on the charges when referred for trial in order that an accused may not be brought to trial before the wrong court.

98. Whole truth to be presented.—Throughout the trial the judge advocate should do his utmost to present the whole truth of the matter in question. He should oppose every attempt to suppress facts or to distort them, to the end that the evidence may so exhibit the case that the court may render impartial justice.

99. Legal adviser of the court.—While the court is in open session the judge advocate should respectfully call the attention of the court to any apparent illegalities in its action, and to any apparent irregularities in its proceedings. He should act as legal adviser of the court so far as to give his opinion upon any point of law arising during the trial, when it is asked for by the court, but not otherwise. (See, however, par. 197, p. 96.) When his legal advice or assistance is required it will be obtained in open court. In case the accused desires to plead guilty the judge advocate will, whenever necessary, invite the attention of the president of the court to the fact that the effect of such plea must be explained to him. (See Chap. IX, Sec. II, "Pleas to the general issue.")

100. Freedom in conducting case.—The judge advocate should be left free by the court to introduce his evidence in such order as he sees fit, and in general to bring cases to trial in such order as he deems expedient. (Winthrop, pp. 281–283.) But while it is not the province of the court to direct or control the judge advocate in his prosecution of the case, it is responsible for the thorough investigation of the case, and need not content itself with the evidence brought out by the prosecution and defense. It is proper for the court as a body or for any member to ask questions of a witness if it is believed the examination already submitted has failed fully to develop the case. Usually such questions are not asked until after the prosecution and defense have fully completed their examination of

the witness. The court may direct that the judge advocate recall a witness, secure the attendance of a particular witness, or that he introduce evidence on a particular point. It is the duty of the court to take such action if it believes that thereby the facts in the case will be more clearly presented.

101. Closed sessions.—Whenever a general or special court-martial shall sit in closed session, the judge advocate and the assistant judge advocate, if any, shall withdraw; and when their legal advice or their assistance in referring to the recorded evidence is required, it shall be obtained in open court and in the presence of the accused and of his counsel if there be any. (A. W. 30.) If through mistake or inadvertence the judge advocate should be present during the whole or a part of a closed session of the court, such irregularity is, subject to the provisions of A. W. 37, ground for a disapproval of the proceedings by the reviewing authority, but it does not deprive the court of jurisdiction and courts of the United States do not interfere in such a case to release a prisoner by writ of *habeas corpus.* (Ex parte Tucker, 212 Fed. Rep., 569; see also A. W. 37.)

102. Accuser or prosecutor.—The judge advocate is not challengeable; but in case of personal interest in the trial or of personal hostility toward the accused he should apply to the convening authority to be relieved.

103. Expediting trials.—Charges to be tried by a general or special court-martial are referred to the judge advocate of the court. It is his duty to bring them to trial promptly. In most cases tried by court-martial the facts are few and simple, and the witnesses are officers or soldiers stationed at the post where the trial is had. Usually the members of the court, judge advocate, and accused and his counsel are stationed at the same post. In such cases the preliminary investigation, reference for trial, and the trial should take place promptly. If the other official duties of the judge advocate and counsel do not leave time to prepare cases properly and to bring them to trial promptly the president will advise the commanding officer with a view to their being relieved from other duties.

104. Weekly reports.—On Saturday of each week each judge advocate of a general court-martial will report, through the president of the court and the commanding officer, to the appointing authority, a list of charges on hand, showing the date of receipt of each; and if any case has been in the hands of the judge advocate for one week or more and the record of trial has not been forwarded to the convening authority, the report will include a statement of the reasons for the delay. No record need be made of this report by the president of the court or the commanding officer.

105. Detail of orderly.—The commanding officer will detail, when necessary, suitable soldiers as clerks or orderlies to assist the judge

advocate of a general or special court-martial or military commission, or the recorder of a court of inquiry.

SECTION III.

ASSISTANT JUDGE ADVOCATE.

106. Appointment.—The authority appointing a *general* court-martial shall appoint one or more assistant judge advocates when necessary. (A. W. 11.) An assistant judge advocate of a general court-martial shall be competent to perform any duty devolved by law, regulation, or the custom of the service upon the judge advocate of the court. (A. W. 116.)

107. Duties.—An assistant judge advocate will perform such duties in connection with the trial as the judge advocate may designate. Ordinarily he will be expected to relieve the judge advocate of minor details, such as arranging for a place of meeting of the court, stationery, and messenger service, stenographers and interpreters, subpœnaing witnesses, and notifying the court of the place and hour of meeting. During trial he will be expected to see that witnesses are on hand when needed, that all details of procedure are observed and the record accurately kept. He may also be intrusted by the judge advocate with the investigation before trial and proof during trial of any special phase of the charges, or he may, where the judge advocate is otherwise engaged, take charge of the complete trial of a case. (See also A. W. 33.) While the judge advocate and assistant judge advocate will ordinarily be present during trial, if their duties require the presence of either of them elsewhere, he may be excused by the court; but the fact of his withdrawal or absence, the reason therefor, and his return to the court will be noted in the record. (See form for record of a general court-martial, Appendix 6.)

Wherever in this Manual the judge advocate of a *general* court-martial is mentioned, the term will be understood to include assistant judge advocates, if any, unless the context shows clearly that a different sense is intended.

SECTION IV.

COUNSEL.

108. Appointment.—The accused shall have the right to be represented before a general or special court-martial by counsel of his own selection, for his defense, if such counsel be reasonably available. (A. W. 17.) Civilian counsel will not be provided at the expense of the Government. (Digest, p. 506, V, G, 5.) Should the accused request the appointment as his counsel of an officer stationed at the station

where the court sits, and such officer be not a member of the court, the commanding officer will appoint such officer as counsel if he is reasonably available. Should the commanding officer decide that the officer desired by the accused is not reasonably available, the accused may appeal to the officer appointing the court, whose decision shall be final. If the counsel desired by the accused is not under the control of the commanding officer where the trial is held, application for counsel will be submitted by the accused in writing to the appointing authority, whose decision as to whether the officer desired is "reasonably available" is final. Officers of the Judge Advocate General's Department are not available for appointment as counsel for the defense in trials by courts-martial.

109. Duty of officer as counsel.—An officer acting as counsel before a general or special court-martial should perform such duties as usually devolve upon the counsel for a defendant before civil courts in criminal cases. He should guard the interests of the accused by all honorable and legitimate means known to the law, but should not obstruct the proceedings with frivolous and manifestly useless objections or discussions.

110. Right to interview the accused.—An accused, even if in close arrest, will be allowed to have such interviews with his counsel, military or civil, as may be required in order to prepare his defense. Counsel will also be permitted to have interviews with any other person who may be a witness for the accused, or whose knowledge of facts may be useful to the accused in preparing for trial.

111. Witnesses, how questioned during trial.—If the judge advocate personally prepares the record the counsel will be required to reduce his questions and arguments to writing; but if the court has a stenographic reporter, the counsel will be allowed to question witnesses and address the court orally.

SECTION V.

REPORTER.

112. Employment.—Under such regulations as the Secretary of War may from time to time prescribe, the president of a court-martial or military commission, or a court of inquiry, shall have power to appoint a reporter, who shall record the proceedings of and testimony taken before such court or commission and may set down the same, in the first instance, in shorthand. (A. W. 115.) Reporters will be employed only when authorized by the appointing authority. They will not be authorized for special courts-martial, except when the appointing authority directs that the testimony be reduced to writing.

[NOTE.—For form of oath for reporter see par. 135.]

113. Compensation—Decisions.—The reporter shall be paid at the following rates of compensation by the Quartermaster Corps on vouchers certified to be correct by the judge advocate or recorder:

(*a*) For each case not to exceed $1 an hour for time actually spent in court during the trial or hearing, except when the court or commission sits less than three hours during the first day, when the allowance for such day shall be $3. Time will be reckoned to the nearest half of an hour.

(*b*) Fifteen cents for each 100 words for transcribing notes and making that portion of the original record which is typewritten; but no allowance shall be made for the first carbon copy of that portion of the record which is typewritten or for original papers which are appended as exhibits.

(*c*) Ten cents for each 100 words for copying papers material to the inquiry, and 2 cents for each 100 words for each carbon copy of the same, when ordered by the court or commission for its use.

(*d*) Two cents for each 100 words for the second and each additional carbon copy of the record when authorized by the convening authority.

(*e*) Except for such part of the journey as may be covered by Government transportation, mileage at the rate authorized for a civilian witness not in Government employ and $3 a day for expenses when the judge advocate or recorder keeps him, at his own expense, away from his usual place of employment for twenty-four hours or more, on public business referred to the court or commission, shall be allowed the reporter for himself, and, when ordered by the court or commission, for each necessary assistant.

(*f*) When a stenographic reporter is authorized for a special court-martial only one copy of the proceedings will be required, and for transcribing notes and making that part of the record of a trial by special court-martial which is typewritten, the reporter, other than an enlisted man, shall receive 13 cents for each 100 words.

[NOTE.—The following decisions regarding compensation of reporters will be observed in preparing vouchers:

(*a*) The payment to a reporter of $3 for each case completed by him is not authorized when more than one case is disposed of in one day, each case requiring less than three hours in which to be completed, but simply guarantees the reporter at least $3 for each day that the court or commission sits when a new case is taken up for that day. (Cir. 81, War Dept., 1908.)

(*b*) In determining the period for which a reporter is entitled to the allowance of $3 a day for expenses when kept away from his usual place of employment time should be counted from the date on which he is required to leave his usual place of business by the terms of his employment to the date of his return thereto, provided there be no unnecessary delay in the travel to and from the place where the court meets. (Par. 1244, Manual Q. M. Corps, 1916.)

(*c*) The fact that a reporter returns each night to his home does not preclude the view that he was kept away from his place of business for 24 hours. He is not, however, entitled to mileage for such journeys unless the sessions of the court are held on nonconsecutive days. (Op. J. A. G., Sept. 7, 1910.)

(*d*) A reporter serving two separate courts-martial on the same day is entitled to have his allowances (except mileage) computed separately for each court. (Op. J. A. G., Oct. 13, 1910.)

(*e*) A reporter duly employed, but who, after arrival at court, performs no service, owing to adjournment, is entitled to mileage, $3 for constructive service, and also to the additional $3 if kept away from place of business for 24 hours. (Op. J. A. G., Feb. 18, 1911; June 4, 1914.)

(*f*) The abbreviations "Q.," standing for the word question, and "A.," standing for the word answer, and all dates as "25th" and "1914" will each be counted as one word. Punctuation marks will not be counted as a word. It is not necessary for the judge advocate to count the actual number of words on every page to justify him in certifying the account of the reporter. He may ascertain the total number of words by counting the words on a sufficient number of pages to enable him to ascertain a fair average of the number of words on a page and then ascertain the total by multiplying this average by the number of pages. (Op. J. A. G., Oct. 22, 1909; Feb. 8, 1915.)]

114. Disposition of vouchers.—The original voucher for payment of the reporter will be properly completed and certified by the judge advocate and will be sent for payment to the nearest disbursing quartermaster. A carbon copy of the voucher will be forwarded with the record for the information of the appointing authority.

[NOTE.—For form of voucher for payment of reporter, see Appendix 18.]

115. Detail of soldier.—A soldier may be detailed to serve as a stenographic reporter for general courts-martial, courts of inquiry, and military commissions, and while so serving shall receive extra pay at the rate of not exceeding five cents for each one hundred words taken in shorthand and transcribed, such extra pay to be met from the annual appropriation for expenses of courts-martial. (Act of Aug. 25, 1912, 37 Stat., 575.) Such detail will be made only when a reporter is authorized by the appointing authority.

116. Time limit for completing record.—The judge advocate or recorder shall require the reporter to furnish the typewritten record of the proceedings of each session of the court or commission (together with one carbon copy of the same) not later than twenty-four hours after the adjournment of that session. The complete record will be finished, indexed, bound, and ready for authentication not later than forty-eight hours after the completion of its action by the court or commission on the merits of the case or hearing.

117. Carbon copies of the record.—Whenever a record of a trial of general court-martial is to be typewritten by a reporter, the judge advocate will inform the accused of his right to demand a copy of the record, and will require of him a statement as to whether or not he desires a copy. If the answer be in the affirmative, the judge advocate will cause the reporter to prepare a carbon copy; this copy will be turned over to the accused. If the answer be in the negative, no carbon copy will be prepared. In either case, notation of the action taken will be made on the index sheet of the record. (See form for record of general court-martial, Appendix 6.) In case of joint trials, the judge advocate will, in case a stenographer is employed,

have one copy of the record made for each of the accused requesting the same. When records of trial by general court-martial are typewritten, the copyable ribbon will be used. (*C. M. U. M., No. 1.*)

118. Extra compensation for clerical duties.—No person in the military or civil service of the Government can lawfully receive extra compensation for clerical duties performed for a military court except as provided in paragraph 115, *supra.* (A. R. 987.)

Section VI.

INTERPRETER.

119. Employment and pay.—Under such regulations as the Secretary of War may from time to time prescribe, the president of a court-martial or military commission, or court of inquiry, or a summary court, may appoint an interpreter, who shall interpret for the court or commission. (A. W. 115.) Interpreters may be employed whenever necessary without application to the appointing authority. They will be allowed the pay and allowances of civilian witnesses, which will be paid by the Quartermaster Corps on vouchers certified by the judge advocate or recorder.

[Note.—For oath of interpreter see par. 136.]

CHAPTER VIII.

COURTS-MARTIAL—ORGANIZATION.

(Continued.)

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Section I.

CHALLENGES.

120. Occasion for.—The composition of the court-martial having been made known to the accused by the reading of the appointing order, together with any orders which have operated to modify the compo-

sition of the court as originally constituted, he is asked by the judge advocate whether he objects to being tried by any member present named in the order and modifying orders. If his reply be in the negative, the court and judge advocate are sworn; if, on the other hand, the accused has objection to a member, he exercises his right in this respect by challenging, in turn, each member to whom he objects. Members of a general or special court-martial may be challenged by the accused, 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. (A. W. 18.) Neither a summary court officer nor the judge advocate of a general or special court-martial is subject to challenge. (Digest, p. 502, IV, N; Davis, p. 85, n, 3.)

[NOTE.—The various classes of challenges recognized at common law have been practically reduced in courts-martial practice to two, viz, (1) *principal* challenges, or those where the member must be excused upon proof of the ground for challenges as alleged; (2) *for favor*, where the court must decide whether the facts proved constitute cause to excuse the member.]

121. Grounds for challenge—(a) Principal challenges.—In the following cases a member will be excused when challenged upon proof of the fact as alleged:

(1) That he sat as a member of a court of inquiry which investigated the charges.

(2) That he has personally investigated the charges and expressed an opinion thereon, or that he has formed a positive and definite opinion as to the guilt or innocence of the accused.

(3) That he is the accuser.

(4) That he will be a witness for the prosecution.

(5) That (upon a rehearing of the case) he sat as a member on the former trial.

(6) That, in the case of the trial of an officer, the member will be promoted by the dismissal of the accused.

(7) That he is related by blood or marriage to the accused.

(8) That he has a declared enmity against the accused.

(b) Challenges for favor.—Where prejudice, hostility, bias, or intimate personal friendship are alleged it is for the court, after hearing the grounds for challenging stated and the reply, if any, of the challenged member, as well as any other evidence presented, to determine whether the grounds stated and proved or admitted are sufficient in fact to disqualify a challenged member.

122. Challenge of new member.—Where new members join or are added to the court after its organization the order detailing such new members should be read to the accused and he should be given full opportunity to challenge. The record will show affirmatively that the right has been accorded the accused to challenge every member of the court.

123. Challenge by judge advocate.—There is no statutory authority for a challenge by the judge advocate, but under the custom of the service after the accused has fully exercised his right of challenge the judge advocate may also challenge for cause in the same manner as the accused. (Digest, p. 502, IV, O.)

124. Member can not challenge.—There is no authority of law or custom of the service for a member of a court-martial to challenge another member, but where one member has knowledge of the fact that another is the accuser in the case or will be a witness for the prosecution he will bring the fact to the attention of the court in order that proper action may be taken. (See par. 129, below.)

125. Procedure upon challenges.—A positive declaration by a member challenged on the ground of prejudice or interest that he is not prejudiced against the accused nor interested in the case is ordinarily satisfactory to the accused, and, in the absence of material evidence in support of the objection, will justify the court in overruling it. If, however, the statement is unsatisfactory, or the member makes no response, the accused may offer testimony in support of his challenge or may subject the challenged member to an examination under oath as to his competency as a member. In such a case the judge advocate administers the oath to the challenged member. The accused and other witnesses may be cross-examined, witnesses may be introduced in rebuttal by the judge advocate and arguments may be made. The whole proceedings, will, in the case of a general court-martial, appear in the record. During the deliberation of the court the challenged member will withdraw. If but four members remain they may pass upon the challenge. (See Chap. II, Sec. II.)

[NOTE.—For form of oath to be administered to a challenged member see par. 137.]

126. Member disqualified but not challenged.—In the absence of a challenge the court of itself can not excuse a member from sitting on the trial of a case, but a member not challenged, who thinks himself disqualified for reasons other than those indicated in paragraph 129, below, may announce in open court his supposed disqualification, in order that he may be challenged; or he may apply to the appointing authority to be relieved.

127. Waiver of objection.—The rule is that challenges should be made before the arraignment, and if an objection to the comptency of a member was known at that time and not made, it will be considered as waived; but if the cause of a member's incompetency was not known at the time of arraignment or did not arise until later, the court will entertain a challenge based on such cause, at any stage of the proceedings.

128. Liberality required.—Courts should be liberal in passing upon challenges, but they will not entertain an objection that is not spe-

cific, and they should be reluctant to sustain one upon the mere assertion of the accused, except where it is admitted by the challenged member.

129. Member as accuser or witness for the prosecution.—No officer shall be eligible to sit as a member of a general or special court-martial when he is the accuser or a witness for the prosecution. (A. W. 8, 9.) After the accused is brought before the court, preferably before the court is sworn, any member thereof who is or believes himself to be the accuser in the case will formally announce that fact to the court, whereupon he will be excused. When the accused, his counsel, the judge advocate, or any member of the court, at any time before the finding, shall have reason to believe that any member thereof is the accuser in the case, or may be called as a witness for the prosecution, such belief shall be communicated to the court, and, if the court, after hearing the facts, find that such member is the accuser or is to be called as a witness for the prosecution, he shall be excused. If at any stage of the proceedings prior to the findings any member of the court be called as a witness for the prosecution, he shall, before qualifying as a witness, be excused from further duty as a member.

130. Member signing charges—When accuser.—Whether or not an officer is the accuser in a particular case is a question of fact. If, notwithstanding his ineligibility, he does sit as a member of a general or special court-martial, the proceedings are necessarily invalid. (A. W. 8, 9; Op. J. A. G., Oct. 11, 1913; id., Nov. 13, 1913, Bull. 38, War Dept., 1913, p. 6.) An officer may be ordered by superior authority to prefer and sign a charge. The action of the officer preferring and signing the charge may be purely ministerial and represent no conviction whatever on his part that an offense has been committed, or that if an offense has been committed it was committed by the person charged. In such a case the accuser is not, in fact, the officer signing the charge, but the officer who directs the preparation and signing of the charge. The former is, therefore, not within the prohibition of the statute. The officer who has signed the charge in a particular case is, however, *prima facie*, the accuser in that case, and therefore ineligible to sit as a member of the trial court. (Op. J. A. G., Feb. 20, 1914, Bull. 8, War Dept., 1914, p. 6.) If in such a case the court should decide that he is eligible, all the evidence upon which the court reached its decision will, in the case of a *general* court-martial, be made of record, and in the case of a *special* court-martial the record will show that evidence touching the eligibility of the officer was heard by the court and the finding arrived at thereon.

131. Member of court as witness.—(*a*) *For the prosecution.*—No officer shall be eligible to sit as a member of a general or a special court-martial who is a witness for the prosecution. (A. W. 8, 9;

Bull. 38, War Dept., 1913, p. 6.) In any case where the proceedings of a court are invalidated by reason of the failure to excuse a member who is the accuser or a witness for the prosecution a new trial may be ordered. (Bull. 8, War Dept., 1914, p. 8.)

(*b*) *For the defense.*—The fact that a member is a witness for the defense will not necessarily disqualify him to sit as a member of the court, and the fact that such a witness sits throughout the trial as a member of the court will not in any way affect the validity of its proceedings.

(*c*) *When called by court.*—Whether a member called as a witness by the court is to be considered as a witness for the prosecution depends on the character of his testimony, which should be carefully considered before a conclusion is reached that he is not. In any case of doubt he should be excused from further participation in the trial as a member. (Op. J. A. G., Nov. 20, 1913.)

(*d*) *When accused pleads guilty.*—When a member is a witness to any charge or specification to which the accused pleads guilty and he is not called as a witness for the prosecution to any other charge or specification, he is not disqualified from sitting as a member. (Op. J. A. G., Nov. 19, 1914, Bull. 52, War Dept., 1914, p. 3.)

SECTION II.

OATHS.

132. Oath of members.—(*a*) The challenges having been disposed of, the judge advocate of a general or special court-martial shall administer to the members of the court, before they proceed upon any trial, the following oath or affirmation (A. W. 19):

You, A. B., do swear (or affirm) that you will well and truly try and determine, according to the evidence, the matter now before you, between the United States of America and the person 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 (or affirm) that you will not divulge the findings or sentence of the court until they shall be published by the proper authority, except to the judge advocate and assistant judge advocate; neither will you disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence thereof as a witness by a court of justice in due course of law. So help you God.

(*b*) In case of affirmation the closing sentence of adjuration will be omitted.

(*c*) When more than one case is tried by the same court, the oath must be administered anew for each case.

(*d*) The oaths or affirmations prescribed in A. W. 19 for the members, the judge advocate, a witness, and others will always be administered, but in addition there may be such additional ceremony or acts as will make the oath or affirmation binding on the conscience of the person taking it.

(*e*) For decorum to be observed during the administration of oaths, see Chapter VII, Section I.

133. Oath of judge advocate.—When the oath or affirmation has been administered to the members of a general or special court-martial, the president of the court shall administer to the judge advocate and to each assistant judge advocate, if any, an oath or affirmation in the following form (A. W. 19):

You, A. B., do swear (or affirm) that you will not divulge the findings or sentence of the court to any but the proper authority until they shall be duly disclosed by the same. So help you God.

134. Oath of witness.—(*a*) All persons who give evidence before a court-martial shall be examined on oath or affirmation in the following form (A. W. 19), administered by the judge advocate:

You swear (or affirm) that the evidence you shall give in the case now in hearing shall be the truth, the whole truth, and nothing but the truth. So help you God.

(*b*) If either the judge advocate or assistant judge advocate is to testify, the oath or affirmation will be administered by the other or by the president.

135. Oath of reporter.—(*a*) Every reporter of the proceedings of a court-martial shall, before entering upon his duties, make oath or affirmation in the following form (A. W. 19), administered by the judge advocate:

You swear (or affirm) that you will faithfully perform the duties of reporter to this court. So help you God.

(*b*) For authority for hiring reporters, and compensation, see Chapter VII, Section V.

136. Oath of interpreter.—Every interpreter in the trial of any case before a court-martial shall, before entering upon his duties, make oath or affirmation in the following form (A. W. 19), administered by the judge advocate:

You swear (or affirm) that you will truly interpret in the case now in hearing. So help you God.

137. Oath to test competency.—When a member of a general or special court-martial is challenged and it is desired to question him regarding his eligibility to sit as a member in the trial of a case, the judge advocate will administer to him the following oath:

You swear that you will true answers make to questions touching your competency as a member of the court in this case. So help you God.

138. Oaths for administrative purposes.—(*a*) Any officer or clerk of any of the departments lawfully detailed to investigate frauds on, or attempts to defraud, the Government, or any irregularity or misconduct of any officer or agent of the United States, and any officer of the Army, Navy, Marine Corps, or Revenue-Cutter Service detailed to conduct an investigation, and the recorder, and if there be none the presiding officer, of any military, naval, or Revenue-Cutter Service board appointed for such purpose, shall have authority to administer an oath to any witness attending to testify or depose in the course of such investigation. (R. S. 183, as amended by the act of Feb. 13, 1911, 36 Stat., 898.)

(*b*) Any judge advocate or acting judge advocate, the president of a general or special court-martial, any summary court-martial, the judge advocate or any assistant judge advocate of a general or special court-martial, the president or the recorder of a court of inquiry or of a military board, any officer designated to take a deposition, any officer detailed to conduct an investigation, and the adjutant of any command shall have power to administer oaths for the purposes of the administration of military justice and for other purposes of military administration; and in foreign places where the Army may be serving shall have the general powers of a notary public or of a consul of the United States in the administration of oaths, the execution and acknowledgment of legal instruments, the attestation of documents, and all other forms of notarial acts to be executed by persons subject to military law. (A. W. 114.)

Section III.

CONTINUANCES.

139. Authority for.—A court-martial may, for reasonable cause, grant a continuance to either party for such time and as often as may appear to be just. (A. W. 20.) If before the first meeting of the court a continuance is deemed necessary by either party, application therefor should be made to the appointing authority, but if made after assembling the application will be made to the court. When application is made to the court for an extended delay which appears to be well founded, it may be referred to the appointing authority in order that he may determine whether the court should grant it or whether he should dissolve the court.

140. Reason for application to be stated.—The party desiring a continuance must state the reasons upon which his application is based. When it is desired because of the absence of a witness he should distinctly show that the witness is material, that he has used due diligence to procure the testimony or attendance of the witness, and that he has reasonable ground to believe that he will be able to procure

such testimony or attendance within a reasonable time, which time shall be stated.

141. Number of continuances.—The number of continuances which may be granted is not limited, but where extended delays will ensue the court will be justified in exacting proof of due diligence on the part of the party requesting the same, and may even require the reasons to be stated under oath if it has reason to suspect that the intention is merely to delay the proceedings.

SECTION IV.

COMPLETION OF ORGANIZATION.

142. When accomplished.—The court having met, the accused and his counsel having been introduced, the reporter sworn, the convening order read, the right of challenge accorded, and the court and judge advocate sworn, the organization of the court is complete for the trial of the case.

CHAPTER IX.

COURTS-MARTIAL—PROCEDURE DURING TRIAL.

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Section I.

ARRAIGNMENT.

143. When made.—On the swearing in of the members and the judge advocate, the organization of the court is complete for the trial of the charges in the case then before the court. In each case tried by the court the appointing order must be read anew, a new opportunity

to challenge must be given, and the members, judge advocate, reporter, and interpreter must be sworn anew. In each case the proceedings must be complete without reference to any other case.

144. Procedure.—The court being organized, and both parties ready to proceed, the judge advocate will read the charges and specifications, separately and in order, to the accused and ask him how he pleads to each. The order pursued, in case of several charges or specifications, will be to arraign on the first, second, etc., specifications to the first charge, then on the first charge, and so on with the rest. The reading of the charges and specifications and the pleas of the accused in answer thereto constitute the arraignment of the accused. In reading the charges the judge advocate will also read the name and rank of the officer preferring them.

[For decorum to be observed during the arraignment see par. 86.]

SECTION II.

PLEAS.

145. Kinds of pleas.—In court-martial procedure the usual pleas are the following: (*a*) Pleas to the jurisdiction; (*b*) pleas in abatement; (*c*) pleas in bar of trial; and (*d*) pleas to the general issue. The first three mentioned are also known as special pleas. These pleas should be made in the order named. (Dudley, p. 93; Bouvier's Law Dictionary, Rawle, 3d Rev., p. 2603.)

146. Plea to the jurisdiction.—A plea to the jurisdiction denies the right of the court to try the case. The following are grounds for a plea to the jurisdiction of a court:

(*a*) That it was appointed by an officer who did not have the legal authority to do so (see Chap. III, Courts-martial—By whom appointed);

(*b*) That it is composed wholly or in part of members not authorized by law to sit upon such court-martial (see Chap. II, Courts-martial—Composition);

(*c*) That the accused is not subject to its jurisdiction (see Chap. I, Persons subject to military law); or

(*d*) That it has not legal power to try the offense charged (see Chap. XVII, Punitive articles).

A plea to the jurisdiction, if well grounded and sustained by the court, bars further prosecution before the court. If well grounded and not sustained by the court, the proceedings may be disapproved by the appointing authority, or, even though approved, may be reviewed on writ of habeas corpus by a United States court, which will cause the proceedings to be set aside as illegal and void. Waiver of objection will never avail to confer jurisdiction upon a court not

legally possessing it, even though the accused fails to submit a plea to the jurisdiction at the proper time.

147. Plea in abatement.—A plea in abatement is based upon some defect in the charge or specification and is one that operates merely to delay the trial, such as an error in the name, rank, or organization of the accused or in the allegation as to time and place in the specification. An accused who submits a plea in abatement must show how the error may be amended. When a plea in abatment is sustained, the judge advocate will correct the charge and specification objected to so as to meet the objection, and the trial will proceed on the corrected charges. To enable him to make the correction a continuance may be granted. Matters which might have been objected to by a plea in abatement will be considered as waived by pleading to the general issue.

148. Plea in bar of trial.—A plea in bar of trial, if sustained, is a substantial and conclusive answer to the charge or specification to which it is addressed. Such a plea may be made on the grounds set forth in pars. 149, 150, and 151.

149. The statute of limitations.—(1) *Definition.*—Statutes of limitation in criminal law are statutes of which the accused may take advantage and deprive the Government of the power to try and punish him after the lapse of a specific period since the offense was committed. They are enacted to secure the prompt punishment of criminal offenses and with a view to obtain the attendance of the witnesses at the trial while the recollection of the event is still fresh in their minds. In court-martial practice prosecutions are limited both as to time and as to number. (A. W. 39, 40.)

(2) *Limitations as to time.*—(*a*) In the following cases there is *no limitation as to time* upon trial by court-martial (A. W. 39) viz:

(1) Desertion committed in time of war;
(2) Mutiny; or
(3) Murder.

(*b*) The period of limitation upon trial and punishment by court-martial shall be *three (3) years* in the following cases (A. W. 39) viz.:

(1) Desertion in time of peace;
(2) Any crime or offense punishable under A. W. 93; or
(3) Any crime or offense punishable under A. W. 94.

(*c*) No person subject to military law shall be liable to be tried or punished by a court-martial for any crime or offense not enumerated in paragraph (*a*) or paragraph (*b*), *supra*, committed more than *two (2) years* before the *arraignment* of such person (A. W. 39).

(*d*) *Computation of the period of limitation.*—The point at and from which the period of limitation is to begin to run is the date of

the commission of the offense. The point at which the period of limitation is to terminate and from which said period is to be reckoned back is the date of arraignment of the accused. There must be excluded in computing this period—

(1) The period of any absence of the accused from the jurisdiction of the United States; and

(2) Any period during which by reason of some manifest impediment the accused shall not have been amenable to military justice.

[NOTES.—"Manifest impediment" means only such impediments as operate to prevent the court-martial from exercising its jurisdiction, and includes such conditions as 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 (In re Davison, 4 Fed. Rep., 510); but any concealment of the evidence of their guilt or other like fraud on their part while they remain within the jurisdiction of the United States, by which the prosecution is delayed until the time the bar has run, did not deprive them of the benefit of the statute. (14 Op. Atty. Gen., 268.)

The thirty-ninth article of war did not have the effect to authorize trial or punishment for any crime or offense barred by the provisions of law existing at the date of its enactment, August 29, 1916.]

(3) *Limitation as to number of trials.*—(*a*) No person shall be *tried* a second time for the same offense. (A. W. 40.)

(*b*) Where a person subject to military law has been once duly convicted or acquitted by a court-martial he has been "tried" in the sense of the article, and can not be tried again, against his will, for the same offense, or for any included offense and it is immaterial whether the conviction or acquittal has been approved or disapproved.

(*c*) A person subject to military law has not been "tried" in the sense of A. W. 40 in any of the following cases:

Where the party, after being arraigned or tried before a court which was illegally constituted or composed, or was without jurisdiction, was again brought to trial before a competent tribunal; where the accused, having been arraigned upon and having pleaded to certain charges, was rearraigned upon a new set of charges substituted for the others which were withdrawn; where one of the several distinct charges upon which the accused had been arraigned was withdrawn pending the trial, and the accused, after a trial and finding by the court upon the other charges, was brought to trial anew upon the charge thus withdrawn; where, after proceedings commenced, but discontinued without a finding, the accused was brought to trial anew upon the same charge; where, after having been acquitted or convicted upon a certain charge which did not in fact state the real offense committed, the accused was brought to trial for the same act, but upon a charge setting forth the true offense; where the court was not sworn; where the first court was dissolved because reduced below five members by the casualties of the service pending the trial; where, for any cause, without fault of the prosecution, there was a

"mistrial," or the trial first entered upon was terminated, or the court dissolved, at any stage of the proceedings before a final acquittal or conviction. (Digest, p. 167, C, II, B.)

(*d*) The same acts constituting a crime against the United States can not, after the acquittal or conviction of the accused in a court of competent jurisdiction, be made the basis of a second trial of the accused for that crime in the same or in another court, civil or military, of the same government.

Although the same act when committed in a State might constitute two distinct offenses, one against the United States and the other against the State, for both of which the accused might be tried, that rule does not apply to acts committed in the Philippine Islands. The government of a State does not derive its powers from the United States, while that of the Philippine Islands does owe its existence wholly to the United States.

A soldier in the Army, having been acquitted of the crime of homicide, alleged to have been committed by him in the Philippine Islands, by a military court-martial of competent jurisdiction proceeding under authority of the United States, can not be subsequently tried for the same offense in a civil court exercising authority in that Territory. (Grafton *v.* U. S., 206 U. S., 333.)

A similar rule applies in Alaska, Hawaii, Porto Rico, The Panama Canal Zone, or any other locality where the civil courts derive their authority from the United States.

(*e*) There can not be a second trial where the offense is really the same though it may be charged under a different description and under a different article of war. Thus, where the Government elects to try a soldier under A. W. 61 for absence without leave, and the testimony introduced develops the fact that the offense was desertion, the accused, after an acquittal or conviction, can not legally be brought a second time to trial for the same absence charged as desertion. (Digest, p. 169, C, II, D.)

(*f*) It is not misrepresentation or concealment by an applicant for enlistment, but the procuring of his enlistment by means of misrepresentation or concealment, together with the receipt of pay or allowances, which constitutes the military offense of fraudulent enlistment under A. W. 54. Therefore, where a soldier was tried for and convicted of fraudulent enlistment in procuring his enlistment by means of a misrepresentation or concealment, to try him again for the same enlistment on account of another misrepresentation or concealment subsequently discovered would be a second trial for the same offense. (Digest, p. 169, C, II, E, 1.)

(*g*) The thirty-ninth article of war does not deprive a court-martial of jurisdiction of an offense after the periods prescribed. The court still has jurisdiction. The article gives the accused a right

of exemption from trial *if the accused claims the exemption and proves it.* In other words, the exemption from trial is a defense that the accused must assert in order to take advantage of it. The defense may be made by entering a plea in bar, or it may be made after a plea of not guilty by introducing evidence showing the facts that entitle him to the exemption.

(*h*) In each case tried by general court-martial in which, upon the face of the record, it appears that the accused might successfully plead the statute of limitations but in which he has not interposed such plea, it shall be made to appear of record that the president of the court advised the accused of his legal rights in the premises.

150. Pardon.—A pardon is an act of the President which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. (See Words and Phrases, vol. 6, p. 5168, and authorities there cited.)

151. Constructive condonation.—Where a deserter has been restored to duty without trial by authority competent to order his trial, this action is regarded as a constructive condonation of the offense and may be pleaded in bar of trial subsequently ordered. (Digest, p. 839, XV, D, 4.)

152. Inadmissible special pleas—(a) Former punishment.—The plea of former punishment, i. e., that he has already been adequately punished for his offense by his commanding officer, is not recognized by our military law, and, when made in our military trials, has been properly overruled; but where 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 protracted arrest, or to reprimand, 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. Except in this form, he can not avail himself of such circumstances upon his trial. (Winthrop, p. 411; 25 Op. Atty. Gen., 623; 28 *idem.*, 622.)

(b) 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 a shorter period than the law required, etc., he was not amenable to trial. But no such form of special plea is recognized in our law. If the accused, by reason of his 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. (Winthrop, p. 411.)

(c) Release from arrest.—Release from arrest upon the charges and restoration to duty before trial—already noticed as not a ground for a plea of pardon or condonation (except in case of a deserter restored

to duty without trial)—is, similarly, no ground for a special plea in bar of trial. (Idem, p. 412.)

(d) **Other forms of inadmissible pleas.**—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 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 defense 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, etc.—these are not within the scope or purpose of special pleas in bar, nor can they properly be raised in an interlocutory form, or otherwise than upon the trial and by the testimony, being, as they are, of the very substance of the defense. (Idem, p. 412.)

153. Action upon special pleas.—(*a*) Each special plea should be stated briefly and clearly. It must also be supported by evidence or legal argument to show that it is well taken. The burden of supporting a special plea by a preponderance of proof rests on the accused. Both sides should be heard and the proceedings and arguments under the plea in trial by general or special court-martial recorded. The accused may make several special pleas to any charge or specification.

(*b*) When a special plea to the jurisdiction or in bar of trial as to *all* the charges and specifications has been sustained by a court, the record of the proceedings as far as had will be forwarded to the reviewing authority with a statement of reasons which, in the opinion of the court, sustain its action. If the reviewing authority is in disagreement with the court in respect of the validity of the plea, the proceedings will be returned by him to the court, with reasons for such disagreement and with instructions to the court to reconvene and reconsider its action. To the extent that such pleas present issues of law, the court properly defers to the views of the reviewing authority. The order returning the procedings for reconsideration should direct the court, upon vacating its prior action, to proceed with the trial of the case. If the reviewing authority approves the action of the court in sustaining such pleas his action will be indorsed on the proceedings and published in the final review of the case.

(*c*) If the charge and specification to which a special plea has been sustained are not capable of amendment and there are *other* charges and specifications in the case, the trial may proceed on the other charges and specifications. (G. O. 28, W. D., 1905.)

(*d*) When all the special pleas to a given charge or specification are overruled, the accused must plead to the general issue as to that charge or specification.

154. Pleas to the general issue.—(*a*) Usually the plea of the accused is "guilty" or "not guilty" to each charge and specification; or, guilty to a specification excepting certain words, and to the excepted words not guilty; or, as when charged with an offense which includes a lesser one of a kindred nature, guilty to the specification except certain words, substituting therefor certain others, to the excepted words "not guilty," to the substituted words "guilty," and to the charge not guilty, but guilty of the lesser included offense.

(*b*) A court-martial is authorized, in any case, in its discretion, to permit an accused to withdraw a plea of not guilty, and substitute one of guilty, and vice versa, or to withdraw either of these general pleas and substitute a special plea. And wherever the accused applies to be allowed to change or modify his plea, the court should, in general, consent, provided the application is made in good faith and not for the purpose of delay.

(*c*) A plea of guilty does not necessarily exclude the taking of evidence, on behalf of either the accused or the prosecution, or at the request of the court. In cases where the punishment is discretionary a full knowledge of the circumstances attending the offense is essential to the court in measuring the punishment, and to the reviewing authority in acting on the sentence. In cases where the punishment is *mandatory*, a full knowledge of the attendant circumstances is necessary to the reviewing authority to enable him to comprehend the entire case and correctly judge whether the sentence should be approved or disapproved or clemency granted. The court should therefore take evidence after a plea of guilty, except when the specification is so descriptive as to disclose all the circumstances of mitigation or aggravation. When evidence is taken after a plea of "guilty", the witnesses may be cross examined, evidence may be produced to rebut their testimony, and the court may be addressed by the prosecution or defense on the merits of the evidence and in extenuation of the offense or in mitigation of punishment. After a plea of guilty the accused will always be given an opportunity to offer evidence in mitigation of the offense charged if he desires to do so.

(*d*) In each case tried by a general court-martial in which the accused enters a plea of guilty in whole or in part as to any charge or specification the president of the court shall explain to him as to that part:

First. The various elements which constitute the offense charged, as set forth in Chapter XVII, defining the punitive articles of war; and

Second. The maximum punishment which may be adjudged by the court for the offense to which he has pleaded guilty.

The accused will then be asked whether he fully understands that by pleading guilty to such a charge or specification he admits having committed all the elements of the crime or offense charged and that he may be punished as stated. If he replies in the affirmative, the plea of guilty will stand; otherwise a plea of not guilty will be entered. The explanation of the president and the reply of the accused thereto shall appear in the record. The same rule will apply in cases tried by special court-martial *when the evidence heard is made of record.*

(*e*) When the accused pleads "guilty," and, without any evidence being introduced, makes a statement inconsistent with his plea, the statement and plea will be considered together, and if guilt is not conclusively admitted the court will direct the entry of a plea of "not guilty" and proceed to try the case on the general issue thus made. The most frequent instances of inconsistency are in cases involving a specific intent, as in desertion, larceny, etc. In such cases, where after a plea of guilty the accused makes a statement, the latter should be carefully scrutinized by the court, and if in the case of desertion in any part there is a statement that the accused had no intention of remaining away, that he expected to return when he had earned some money, or that when arrested he was on his way back to his organization, etc.; or, in the case of larceny, that he intended to return the property alleged to have been stolen, etc., the court should direct the entry of a plea of "not guilty," but the criminality of an intent once formed is not affected by a subsequent change of intent.

(*f*) A plea of "guilty without criminality" is irregular and contradictory. (Winthrop, p. 414.) It is practically equivalent to a plea of "not guilty" and the court and judge advocate should proceed as if that plea were entered. Unless a plea of guilty is unqualified the prosecution must prove all allegations that are not specifically admitted by the accused.

(*g*) Insanity at the time of the commission of the acts charged is a defense which may be properly made under a plea of not guilty. Insanity at the time of arraignment, or at a later stage of the trial, is a proper ground for the arrest of further proceedings on the charges. (See par. 219.)

Section III.

REFUSAL TO PLEAD.

155. Action.—When the accused, arraigned before a 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 he had pleaded not guilty. (A. W. 21.) If the court finds that the failure to plead is the result of insanity, it will proceed as indicated in Section II, paragraph 154 (*g*), supra.

SECTION IV.

MOTIONS.

156. Motion to sever.—A motion to sever is a motion by one of two or more *joint* accused to be tried separately from the other or others. It will regularly be made at the arraignment. 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. 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 coaccused, 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 rarely been presented to the court in our military practice. 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, by order of the convening authority, to withdraw charges as to such one. (See Winthrop, p. 379, and authorities there quoted.)

157. Motion to elect.—The prosecution is at liberty to charge an act under two or more forms, where it is doubtful under which it will more properly be brought by the testimony. In the military practice the accused is not entitled to call upon the prosecution to "elect" under which charge it will proceed in such, or indeed in any, case. (Digest, p. 504, V, F.)

158. Nolle prosequi.—A *nolle prosequi* is a declaration of record on the part of the prosecution that it withdraws a charge or specification from the investigation and will not pursue the same further at the present trial. This authority can only be exercised by the superior who, as the representative of the United States, ordered the court, and in a proper case he may, on his own initiative or on application duly made to him, instruct the judge advocate to enter a *nolle prosequi.* The principal grounds for this proceeding when duly authorized will be—

(*a*) The fact that the charge or specification is discovered to be substantially defective and insufficient in law, or

(*b*) That it is ascertained that the allegations can not be proved, or

(*c*) That the testimony available is not sufficient to sustain them, or

(*d*) That the criminality of one of the accused, where there are several, can not be established, or

(*e*) That it is proposed to use one of the accused as a witness.

The withdrawal of such a charge or specification is not in itself equivalent to an acquittal or to a grant of pardon and can not be so pleaded. It simply removes from the pending case a particular

charge or specification without prejudice to its being subsequently renewed in its original or a revised form. In court-martial practice when authorized by the appointing authority a *nolle prosequi* may be entered either before or after arraignment and plea. If after arraignment it is found that a charge or specification can not be sustained or it is determined for other reasons that the same shall not be pursued, while it would be legal to enter a *nolle prosequi* 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. (See Winthrop, pp. 369–371.)

CHAPTER X.

COURTS-MARTIAL—WITNESSES AND DEPOSITIONS.

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SECTION I.

ATTENDANCE OF WITNESSES.

159. Process to obtain witnesses.—Every judge advocate of a general or special court-martial, and every summary court-martial shall have power to issue the like process to compel witnesses to appear and testify which courts of the United States, having criminal jurisdiction, may lawfully issue; but such process shall run to any part of the United States, its Territories, and possessions. (A. W. 22.) The authority to issue such process is in terms vested solely in the judge advocate of a general or special court-martial and in a summary court-martial, and it is by them alone that the process can be initiated. The judge advocate, however, will sometimes properly consult the court as to the desirability 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. (Winthrop, p. 298.) (*C. M. C. M., No. 1.*)

[NOTE.—1. For power to issue process to secure the attendance and testimony of witnesses before courts-martial in the National Guard, not in the service of the United States, see sec. 108, act of June 3, 1916, 39 Stat., 209, Appendix 2. 2. Wherever in this section reference is made to issue of such process by a judge advocate, a summary court-martial will be understood to be included.]

160. Service of subpœna.—A subpœna for the attendance of a civilian witness is issued in duplicate. It may be legally served by either a person in the military service or a civilian. Usually, service is made by an officer or noncommissioned officer. Service is made by personal delivery of one of the copies to the witness. The *proof of service* is made by indorsing on the remaining copy a sworn statement that service was made. (For service by mail and acceptance of same, see par. 164, below.) After making service a copy of the subpœna will be promptly returned to the judge advocate of the court, with the proof of service. If the witness can not be found, the judge advocate should be promptly so informed. A judge advocate can not subpœna a civilian witness to appear before himself for preliminary examination.

[NOTE.—For form of subpœna and proof of service, see Appendix 13.]

161. Summoning of witnesses.—The judge advocate will summon the necessary witnesses for the trial, but will not summon witnesses at the expense of the Government without the order of the court, unless satisfied that their testimony is material and necessary. In order that the accused may not be denied a full opportunity to make his defense any witness requested by him is usually summoned. But a reasonable discretion should be exercised where the summoning of the num-

ber of witnesses requested by the defense would result in an unreasonable inconvenience or expense to the Government. In such instances the judge advocate should ascertain whether the testimony required of the witness is not merely cumulative, or as to an unimportant point that one witness would be sufficient to render conclusive, or as to which the judge advocate would be willing to admit the facts expected from the witness's testimony.

162. Advance notice to witnesses.—The judge advocate will endeavor to issue subpœnas to civilian witnesses and to make request for the attendance of military witnesses at such time as will give each witness at least 24 hours' notice before starting to attend the meeting of the court.

163. Attendance of military witnesses.—The attendance of persons in the military service stationed at the place of meeting of the court, or so near that no expense of transportation will be involved, will ordinarily be obtained by informal notice served by the judge advocate on the person concerned that his attendance as a witness is desired. If for any reason formal notice is required, the judge advocate will request the proper commanding officer to order him to attend; but, if mileage is involved, the department commander or other proper superior will be requested to issue the necessary order. Fees will not be paid to military witnesses on the active list, and they are entitled only to the mileage allowances due them under their travel orders. The attendance as witnesses of persons on the retired list (not assigned to active duty) should be obtained in the same manner, and they are entitled to the same fees and mileage as civilian witnesses not in the Government employ. No travel order will be issued in such cases.

164. Procedure to secure attendance of civilian witness.—Unless he has reason to believe that a formal service of subpœna will be required, the judge advocate will endeavor to secure the attendance of a civilian witness by correspondence with him, sending him duplicate subpœna properly filled out, with a request to accept service on one by signing the printed statement, "I hereby accept service of the above subpœna," and to return same to the judge advocate, for which purpose a return addressed penalty envelope should be inclosed. Ordinarily there will be no difficulty in securing the voluntary attendance of a civilian witness if he is informed that his fees and mileage will not be reduced by reason of his voluntary attendance, and that a voucher for his fees and mileage going to and returning from the place of the sitting of the court-martial will be delivered to him promptly on being discharged from attendance on the court. If such informal methods are ineffective, formal duplicate subpœna will be issued by the judge advocate with a view to service on the witness. If the witness is at or near the post where

the court is sitting, the service will be by the judge advocate or by some person designated by him. If the witness is not at or near the post where the court is sitting, but is at or near another military post, command, or detachment, the judge advocate will send the duplicate subpœna direct to the commanding officer of such post, command, or detachment, requesting service of the same. Upon receipt of the request the officer receiving it will serve the subpœna or cause it to be served. The service will be made without delay, and the retained copy of the subpœna, with proof of service indorsed on it, will be sent at once direct to the judge advocate. If in any instance travel is necessary to serve the subpœna, a request will promptly be made by the commanding officer of the post, command, or detachment, on the proper authority for travel orders. If the witness does not reside near a post, command, or detachment, the subpœna will be sent direct to the department or other proper commander requesting service of the same.

165. When accused must be confronted with witness.—Depositions can not be introduced by the prosecution in capital cases. (See A. W. 25, Chap. XI, Evidence, and Chap. IV, Sec. III.) In such cases, therefore, as well as in others in which the judge advocate believes that the interests of justice demand that the accused be confronted by a witness against him, or believes that for any reason a witness should testify in the presence of the court, he will take the necessary steps to secure the attendance of such witness or witnesses.

166. Procedure to obtain books, documents, or papers.—If a civilian has in his possession a book, document, or paper desired to be introduced in evidence, a *subpœna duces tecum* will be prepared and issued by the judge advocate, directing the person to appear in court and to bring with him such book, document, or paper, which should be described in sufficient detail to enable it to be readily identified.

[NOTE.—For form, see Appendix 13.]

167. Civilian witness in confinement.—The testimony of a witness who is in confinement in the hands of the civil authorities will ordinarily be obtained by means of a deposition (A. W. 25), but if for any reason it is necessary that such a witness testify in court, an endeavor should be made by the judge advocate to make arrangements with the civil authorities to obtain his appearance.

168. Warrant of attachment.—In view of the provisions of A. W. 23 providing for the punishment on information before a district court of the United States or in a court of original criminal jurisdiction in any of the territorial possessions of the United States of a civilian who willfully neglects or refuses, after he has been duly subpœnaed,

to appear as a witness before any military court, commission, court of inquiry, or board, circumstances requiring the issue of a warrant of attachment will be very rare. (For form, see Appendix 14.) Whenever it becomes necessary to issue a warrant of attachment, the judge advocate or summary court-martial will direct or deliver it for execution to an officer designated by the department commander for the purpose. (12 Op. Atty. Gen., 501.) As the arrest of a person under a warrant of attachment involves depriving him of his liberty, the authority for such action may be inquired into by a writ of *habeas corpus*. For this reason the officer executing the warrant of attachment should be provided with the following papers to enable him to make a full return in case a writ of *habeas corpus* is served upon him:

(*a*) A copy of the charges in the case, sworn to be a full and true copy of the original by the judge advocate of the court (or summary court-martial).

(*b*) A copy of the order appointing the court-martial, sworn to be a full and true copy of the original by the judge advocate of the court (or summary court-martial).

(*c*) The original subpœna, showing proof of service of same.

(*d*) An affidavit of the judge advocate or summary court-martial that the person being attached is a material witness in the case; that he has failed and neglected to appear, although sufficient time has elapsed for that purpose; and that no valid excuse has been offered for such failure to appear.

(*e*) The original warrant of attachment.

In executing such process it is lawful to use only such force as may be necessary to bring the witness before the court. Whenever force is actually required the post commander nearest the residence of the witness will furnish a military detail sufficient to execute the process.

169. Habeas corpus proceedings in connection with attachments.—(*a*) If, in executing a warrant of attachment, the officer detailed for that purpose should be served with a writ of *habeas corpus* from any United States court, or by a United States judge, for the production of the witness, the writ will be promptly obeyed, and the person alleged to be illegally restrained of his liberty will be taken before the court from which the writ has issued, and a return made setting forth the reasons for his restraint. The officer upon whom such a writ is served will at once report, by telegraph, the fact of such service direct to The Adjutant General of the Army and to the commanding general of the department. (See Appendix 15, Form A.)

(*b*) If, however, the writ of *habeas corpus* is issued by any State court (or a State judge) it will be the officer's duty to make respectful return, in writing, informing the court that he holds the person named in the writ by authority of the United States pursuant to a warrant of attachment issued under section 3 of the act of Congress

approved August 29, 1916 (A. W. 22), by a judge advocate of a lawfully convened general or special court-martial (or by a summary court-martial), and that the Supreme Court of the United States has decided that State courts and judges are without jurisdiction in such cases. (See Appendix 15, Form B.) After having made the above return to a writ issued by a State court or judge, it is the duty of the officer to hold the prisoner in custody under his warrant of attachment, and to refuse obedience to the mandate or process of any government except that of the United States. Consequently, it is his duty not to take the prisoner, nor suffer him to be taken, before a State judge or court upon a writ of *habeas corpus* issued under State authority.

170. **Punishment for refusal to appear or testify.**—Although the *attendance* of a witness as above described can be enforced, there is no power in a court-martial itself to compel a witness to testify or to punish him for not testifying. The only procedure is that provided in A. W. 23, as follows:

Every person *not subject to military law*, who being duly subpœnaed to appear as a witness before (*a*) any military court, commission, court of inquiry, or board, or (*b*) any officer, military or civil, designated to take a deposition to be read in evidence before such court, commission, court of inquiry, or board, willfully (*a*) neglects or refuses to appear, or (*b*) refuses to qualify as a witness, or to testify, or (*c*) produce documentary evidence which such person may have been legally subpœnaed to produce, shall be deemed guilty of a misdemeanor, for which such person shall be punished on information in the district court of the United States, or in a court of original criminal jurisdiction in any of the Territorial possessions of the United States, jurisdiction being hereby conferred upon such courts for such purpose; and it shall be the duty of the United States district attorney or the officer prosecuting for the Government in any such court of original criminal jurisdiction, on the certification of the facts to him by the military court, commission, court of inquiry, or board, to file an information against and prosecute the person so offending, and the punishment of such person, on conviction, shall be a fine of not more than $500, or imprisonment not to exceed six months, or both, at the discretion of the court: *Provided*, That the fees of such witness and his mileage, at the rates allowed to witnesses attending the courts of the United States, shall be duly paid or tendered said witness, such amounts to be paid out of the appropriation for the compensation of witnesses. (A. W. 23.)

[NOTE.—If an officer who is charged with serving a subpœna pays the necessary fees and mileage to a witness, taking a receipt therefor, he is entitled to reimbursement. (Dec. Comp. Treas., Sept. 10, 1901, published in Cir. 38, A. G. O., 1901.)]

171. Same in Philippine Islands.—Every person not belonging to the Army of the United States, who, in the Philippine Islands, being duly subpœnaed to appear therein as a witness before a general court-martial of said Army (or naval court), willfully neglects or refuses to appear, or refuses to qualify as a witness, or to testify, or produce documentary evidence, which such person may have been legally subpœnaed to produce, shall be punished by a fine of not more than $500, United States currency, or imprisonment not to exceed six months, or both, at the discretion of the court, and it shall be the duty of the proper fiscal or prosecuting officer, on the certification of the facts to him by the general court-martial, to file in the proper court a complaint against and prosecute the person so offending: *Provided*, That $1.50, United States currency, for each day's attendance, and 5 cents, United States currency, per mile for going from his residence to the place of trial or hearing, and 5 cents per mile for returning, shall be duly tendered to said witness: *Provided further*, That no witness shall be compelled to incriminate himself or to answer any question which may tend to incriminate him. (Acts 1130 and 1243, P. I. Commission.) The provisions of this paragraph do not apply to witnesses before special and summary courts.

[NOTE.—Employees of the civil government of the Philippine Islands, paid from insular funds of the islands, are held not to be in the employ of the United States. (Dec. Comp. Treas., Aug. 20, 1902, published in Cir. 45, A. G. O., 1902.)]

172. Tender of fees preliminary to prosecution.—In case a civilian witness is duly subpœnaed under the authority of A. W. 22 and willfully neglects or refuses to appear or refuses to qualify as a witness, or to testify or produce documentary evidence which he may have been legally subpœnaed to produce, he will at once be tendered or paid by the nearest quartermaster one day's fees and mileage for the journeys to and from the court, and will thereupon be again called upon to comply with the requirements of the law. Upon failing the second time to comply with the requirements of the law a complete report of the case will be made to the officer exercising general court-martial jurisdiction over the command with a view to presenting the facts to the Department of Justice for the punitive action contemplated in A. W. 23.

173. Contempts—(a) Authority to punish.—A court-martial may punish, at discretion, subject to the limitations contained in A. W. 14, any person who uses any menacing words, signs, or gestures in its presence, or who disturbs its proceedings by any riot or disorder. (A. W. 32.) The power to so punish is vested in general, special, and summary courts-martial. Punishments adjudged for contempt, like other punishments adjudged by courts-martial, require the approval of the reviewing authority in order to be effective.

(b) Persons who may be punished for contempt.—The words "any person," as used in A. W. 32, appear to include civilians as well as military persons. In view, however, of the embarrassment liable to attend the execution, through military machinery, of a punishment adjudged against a civilian for a contempt under the article, it would generally be advisable for the court to confine itself to causing the party to be removed as a disorderly person, and, in an aggravated instance, to procure a complaint to be lodged against him for breach of the public peace. (Winthrop, p. 462.)

(c) Direct and constructive contempts.—A direct contempt is one committed in the presence or immediate proximity of a court while it is in session. An indirect or constructive contempt is one not so committed. The conduct described in A. W. 32 constitutes direct contempt. But conduct on the part of a person subject to military law and amounting to a constructive contempt may be punished like any other conduct that is prejudicial to good order and military discipline, by bringing the person to trial before another court on charges under A. W. 96.

(d) Procedure.—Where a contempt within the description of A. W. 32 has been committed and the court deems it proper that the offender shall be punished, the proper course is to suspend the regular business and, after giving the party an opportunity to be heard in explanation, to proceed, if the explanation is insufficient, to impose a punishment, resuming thereupon the original proceedings. The action taken is properly summary, a formal trial not being called for. Close confinement in quarters or in the guardhouse during trial of the pending case or forfeiture of a reasonable amount of pay, has been the more usual punishment. A full record of the proceeding is at once made, not separate from, but in and as a part of the regular record of the case on 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 and the disposition of the offender. (Winthrop, p. 469.) Instead of proceeding against a military person for contempt in the manner contemplated by this article, the alternative course may be pursued of bringing him to trial before a new court on a charge of a disorder under A. W. 96.

SECTION II.

DEPOSITIONS.

174. When admissible.—A duly authenticated deposition taken upon reasonable notice to the opposite party may be read in evidence before any military court or commission in any case not capital, or in any proceeding before a court of inquiry or a military board, if such

deposition be taken when the witness resides, is found, or is about to go beyond the State, Territory, or District in which the court, commission, or board is ordered to sit, or beyond the distance of 100 miles from the place of trial or hearing, or when it appears to the satisfaction of the court, commission, board, or appointing authority that the witness, by reason of age, sickness, bodily infirmity, imprisonment, or other reasonable cause, is unable to appear and testify in person at the place of trial or hearing: *Provided*, That testimony by deposition may be adduced for the defense in capital cases. (A. W. 25.)

[NOTE.—For form for interrogatories and depositions, see Appendix 12.]

175. Before whom taken.—Depositions to be read in evidence before military courts, commissions, courts of inquiry, or military boards, or for other use in military administration, may be taken before and authenticated by any officer, military or civil, authorized by the laws of the United States or by the laws of the place where the deposition is taken to administer oaths. (A. W. 26.)

176. Interrogatories, how submitted.—The procedure for submitting interrogatories for a deposition is as follows:

(*a*) The party desiring the deposition submits to the opposite party the interrogatories which he wishes propounded to the person whose deposition he desires, and the opposite party then submits to him such cross-interrogatories, if any, as he may desire. Such additional direct and cross-interrogatories may be submitted as desired; or

(*b*) The party desiring the deposition submits to the court, military commission, or board the interrogatories which he wishes propounded to the person whose deposition he desires. The opposite party then submits to the court, military commission, or board such cross-interrogatories, if any, as he may desire. The court, military commission, or board then submits such additional interrogatories as they may deem proper and desirable, and such additional direct and cross-interrogatories may be submitted as are desired.

(*c*) Where the court, military commission, or board desires that the deposition of a particular person be obtained, it will cause interrogatories to be prepared accordingly. The prosecution and defense (or other party or parties in interest) then submit such interrogatories as they may desire. Such additional interrogatories may be included as are desired by the court, military commission or board, or by a party in interest.

177. Procedure to obtain deposition.—(*a*) All the interrogatories to be propounded to the person are entered upon the form for interrogatories and deposition, and the trial judge advocate, summary court,

or recorder will take appropriate steps to cause the desired deposition to be taken with the least practicable delay. In an ordinary case he will either send the interrogatories to the commanding officer of the post, recruiting station, or other military command at or nearest which the person whose deposition is desired is stationed, resides, or is understood to be, or will send them to some other responsible person, preferably a person competent to administer oaths, at or near the place at which the person whose deposition is desired is understood to be. In a proper case the interrogatories may be sent to the department or other superior commander or to the witness himself, and in any case they will, when necessary, be accompanied by a proper explanatory letter.

(*b*) When interrogatories are received by a commanding officer he will either take or cause to be taken the deposition thereon. He may send an intelligent enlisted man—preferably a noncommissioned officer, if available—to the necessary place for the purpose of obtaining the deposition, or he may properly arrange by mail or otherwise that the deposition be taken. The deposition will be taken with the least practicable delay, and when taken will be sent at once direct to the judge advocate of the court-martial trying the case or other proper person.

(*c*) If the witness whose deposition is desired is a civilian, the judge advocate or other proper person sending interrogatories as above will inclose with them a prepared voucher for the fees and mileage of the witness, leaving blank such spaces provided therein as it may be necessary to leave blank, accompanied by the required number of copies of the orders appointing the court, military commission, or board. The judge advocate, summary court, or recorder will also send with the interrogatories duplicate subpœna requiring the witness to appear in person at a time and place to be fixed by the officier, military or civil, who is to take the deposition. If the name of this officer is not known, the space provided for it will be left blank. If a military officer takes the deposition, he will complete the witness voucher, certify it, and transmit it to the nearest disbursing quartermaster for payment. When the deposition is to be taken by a civil officer he will be asked to obtain and furnish to the military officer, requested or designated to cause the deposition to be taken, the necessary data for the completion of the witness voucher, and the latter will complete the voucher, certify it, and transmit it to the nearest disbursing quartermaster for payment.

In the case of a military witness subpœna will not accompany the interrogatories, but the officer before whom the deposition is to be taken will take the necessary steps to have the witness appear at the proper time and place.

178. Tracing delayed depositions.—Judge advocates will be prompt in preparing and forwarding interrogatories. If the deposition is not received within a reasonable time, a letter of inquiry will be sent; and, if a prompt explanation of the delay is not received, the department commander or other proper superior will be advised.

179. Designation of deponent by official title.—Where it is desired to take the deposition of some person holding a certain office or position, as, for instance, a troop commander, first sergeant, quartermaster sergeant, cashier of a bank, post exchange officer, etc., and the name of the person is unknown, interrogatories may be prepared in the usual way for submission to the person holding the office or position, without naming him unless it shall appear that the accused will be prejudiced thereby.

180. Deponent's answer to be responsive.—Before a witness gives his answers to the interrogatories they should be read and, if necessary, explained to him, or he should be permitted to read them over in order that his answers may be clear, full, and to the point. The person taking the deposition should not advise the witness how he should answer, but he should endeavor to see that the witness understands the questions, and what is desired to be brought out by them, and that his answers are clear, full, and to the point.

181. Fees for taking depositions.—Civil officers before whom depositions are taken for use before courts-martial will be paid the fees allowed by the law of the place where the depositions are taken.

182. Taking depositions in foreign country.—If the evidence desired from a witness residing in a foreign country is necessary and material and is desired to be read before a court-martial, military commission, court of inquiry, or military board sitting within any of the States of the Union or the District of Columbia, interrogatories (accompanied by the necessary vouchers for fees and mileage) will ordinarily be forwarded through military channels to The Adjutant General of the Army. They will then be transmitted by the Secretary of War to the Secretary of State, with the request that they be sent to the proper consul of the United States and the deposition of the witness be taken. In the case of troops serving along the international boundaries, outside of the United States proper, or in foreign countries, the officer exercising general court-martial jurisdiction may, in his discretion, detail an officer to take the deposition of a civilian witness, or he may send the interrogatories direct to the consul of the United States nearest the place of residence of the witness with the request that the deposition be taken. In the latter case the interrogatories will be accompanied by the proper vouchers for the fees and mileage of the witness.

[NOTE.—For use of depositions as evidence, see Chap. XI, Evidence.]

SECTION III.

FEES, MILEAGE, AND EXPENSES OF WITNESSES.

183. Officers and soldiers, active or retired.—Officers and soldiers on the active list required to attend a court-martial as witnesses are not entitled to receive mileage and fees like civilian witnesses but are entitled to such travel allowances as the law allows to officers and soldiers traveling under orders; but a retired officer, not assigned to active duty, or a retired soldier, is entitled to the per diem and mileage provided for civilian witnesses not in Government employ.

[NOTE.—The fees, mileage, and expenses of persons in the military service or of civilians in the Government employ duly subpœnaed and appearing before civil courts whether State or Federal are payable by the civil authorities.]

184. Civilians in Government employ.—Civilians in the employ of the Government when traveling upon summons as witnesses before military courts are entitled to transportation in kind from their place of residence to the place where the court is in session and return. If no transportation be furnished, they are entitled to reimbursement of the cost of travel actually performed by the shortest usually traveled route, including transfers to and from railway stations, at rates not exceeding 50 cents for each transfer, and the cost of sleeping-car accommodations to which entitled or steamer berth when an extra charge is made therefor. They are also entitled to reimbursement of the actual cost of meals and rooms at a rate *not exceeding* $3 per day for each day actually and unavoidably consumed in travel or in attendance upon the court under the order or summons. No allowance will be made to them when attendance upon court does not require them to leave their stations.

185. Civilians not in Government employ.—A civilian, not in Government employ, duly summoned to appear as a witness before a military court, commission, or board or at a place where his deposition is to be taken for use before such court, commission, or board, will receive $1.50 for each day of his actual attendance before such court, commission, or board or for the purpose of having his deposition taken, and 5 cents a mile for going from his place of residence to the place of trial or of the taking of his deposition, and 5 cents a mile for returning, except as follows:

(*a*) In Porto Rico and Cuba he will receive $1.50 a day while in attendance as above stated and 15 cents for each mile necessarily traveled over stage line or by private conveyance and 10 cents for each mile over any railway or steamship line.

(*b*) In Alaska, east of the one hundred and forty-first degree of west longitude, he will receive $2 a day while in attendance as above stated and 10 cents a mile, and west of said degree $4 a day and 15 cents a mile.

(*c*) In the States of Wyoming, Montana, Washington, Oregon, California, Nevada, Idaho, Colorado, Utah, New Mexico, and Arizona will receive $3 a day for the time of actual attendance as above stated, and for the time necessarily occupied in going to and returning from the same, and 15 cents for each mile necessarily traveled over any stage line or by private conveyance and 5 cents for each mile by any railway or steamship.

[NOTE.—1. Travel must be estimated by the shortest usually traveled route—by established lines of railroad, stage, or steamer—the time occupied to be determined by the official schedules, reasonable allowance being made for unavoidable detention.

2. These rates apply to the Philippine Islands. (See Cir. 45, A. G. O., 1902.)

3. A civilian not in Government employ, when furnished transportation on transport or other Government conveyance, is entitled to 57.142 per cent of 5 cents per mile (equal to 2.857 cents per mile). (Comp. Dec., Aug. 20, 1902, published in Cir. 45, A. G. O., 1902.)]

186. Payment for return journey.—The charges for return journeys of witnesses will be made upon the basis of the actual charges allowed for travel to the place of giving testimony, and the entire account thus completed will be paid upon discharge from attendance, without waiting for completion of return travel.

187. Contents of vouchers.—The items of expenditure authorized for civilian witnesses will be set forth in detail and made a part of each voucher for reimbursement. No other items will be allowed.

The certificate of the judge advocate, or other officer, will be evidence of the fact and period of attendance, and will be made upon the voucher.

When payment is made under the provisions of paragraph 184, the correctness of the items will be attested by the affidavit of the witness, to be made, when practicable, before the officer who certifies the voucher.

188. Witness in several trials on same day.—A civilian attending as a witness in several court-martial trials on the same day is entitled to a separate fee for attendance in each case (Dig. Dec. Comp., 1894 to 1902, p. 476), but will receive mileage in only one case.

189. Voucher to be delivered to witness.—A civilian witness not in Government employ who appears to testify is entitled, upon his discharge from attendance, to receive from the judge advocate, if any (or summary court, recorder of court of inquiry or board, etc.), his witness voucher properly filled out. If not practicable to deliver to the witness his voucher at that time his address will be obtained and his witness voucher will be promptly forwarded to the nearest disbursing quartermaster. To entitle a witness to the payment of fees and mileage it is not essential that he should produce a subpœna.

190. Lost voucher.—Where the voucher of a witness has been lost, a new voucher may be issued by the judge advocate upon a satisfactory

showing of such loss, supported by affidavit. The new voucher should be so noted as to indicate its character and should be forwarded to the Quartermaster General for settlement.

191. Fees for service of subpœnas.—There is no fee or compensation fixed by statute or regulation for the service of subpœnas to secure the attendance of witnesses before military courts. Ordinarily service will be made by an officer or soldier, but if service by a civilian is deemed by the judge advocate or department commander to be preferable, the services of a civilian may be used, and the fees and mileage allowed by law in that locality for similar services may be paid by a quartermaster from the appropriation "for expenses of courts-martial, etc."

192. Employment of experts.—When the employment of an expert is necessary during a trial by court-martial the necessity for such employment should be made to appear by a resolution of the court. This resolution will be forwarded by the judge advocate, in advance of the employment, to the Secretary of War through the authority appointing the court, with a request for authority to employ the expert and for a decision as to the compensation to be paid him. The request should, if practicable, state the compensation that is recommended by the judge advocate. The compensation of the expert, including the compensation for photographs that may be necessary in connection with his testimony, will be paid out of the appropriation "for expenses of courts-martial, etc."

[NOTE.—Where, in advance of trial, the judge advocate knows that the employment of an expert will be necessary, he should, without delay, apply through the appointing authority to the Secretary of War for authority to employ the expert, stating the necessity therefor and probable cost thereof.]

193. Expenses of courts-martial, etc., how payable.—The fees of civilian witnesses, the mileage of both civil and military witnesses, the legal fee of the proper official for certified copy of a marriage certificate, the expense of procuring a transcript of a stenographer's notes of testimony taken before a United States commissioner, the fees of a notary for swearing a witness, and the expenses (including railway fare and hotel bills) of a United States consul stationed in a foreign country in taking depositions, when such items are incurred in connection with a trial before a court-martial or military commission, or investigation before a court of inquiry, are paid by the Quartermaster Corps out of the annual appropriation "for expenses of courts-martial, etc." If no quartermaster be present at the place where the court is sitting the vouchers may be transmitted direct to any quartermaster. Such vouchers are not transferable.

[NOTE.—Blank vouchers may be procured from any disbursing quartermaster.]

CHAPTER XI.

COURTS-MARTIAL—EVIDENCE.

(Revised and approved by Professor Wigmore.)

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Section I.

INTRODUCTORY PROVISIONS.

194. General remarks.—The oath taken by members of general and special courts require them to try and determine "according to evidence" the matter before them. A summary court, although it does not take such an oath, will also determine the matter before it solely on the evidence in the case, and no evidence would be admissible before a summary court that is not admissible before general and special courts. The evidence thus referred to, according to which the court must decide the case, means all the matters of fact which the court permits to be introduced, or of which it takes judicial notice, with a view to prove or disprove the charges. Every item of this evidence must be introduced in open court, and it would be seriously irregular and improper for any member of the court to convey to other members, or to consider himself, any personal information that he possessed as to the merits of the case or the character of the accused, without stating it in open court and, if a witness for the prosecution, retiring as a member of the court, as provided in A. W. 8. But while their knowledge of the facts must come to them from the evidence, the members are expected to utilize their common sense, their knowledge of human nature and the ways of the world in weighing the evidence and arriving at a finding. In the light of all the circumstances of the case they should consider the inherent probability or improbability of the evidence given by the several witnesses, and with this in mind the court may properly believe one witness and disbelieve several whose testimony is in conflict with that of the one.

The methods which are employed by courts of justice to ascertain the facts—that is, the truth—respecting any past transaction closely resemble those resorted to by an individual for a similar purpose. If A desires to ascertain whether a particular act did or did not take place, he addresses himself to those who were in a situation to witness the occurrence itself, and so endeavors to obtain from each person present his version of the occurrence. From the testimony thus obtained he forms his conclusion as to whether or not the act took place. In the course of his investigation, however, he finds that all who were present and witnessed the occurrence as bystanders do not give testimony of equal importance or value. Some having greater powers of observation or better memories than others give in consequence more valuable testimony. Some of the witnesses, being children or persons of weak or unsound mind, are without the requisite mental capacity to observe facts or to appreciate their relations to each other; others, by reason of their bad character, are not regarded as worthy of belief by their fellow citizens; still others were insane or quite under the influence of intoxicating liquor at the time of the occurrence, and so were incapacitated from observing. A, therefore, rejects some of the statements as entirely untrustworthy; to others he attaches weight in proportion to their worthiness of belief, and so endeavors to reach a conclusion as to the truth of the occurrence or event which was the original subject of his inquiry. (Davis, p. 244.)

195. The issues.—It is well to understand, in the beginning of this consideration of the rules of evidence, the purpose for which the evidence is to be introduced in the manner prescribed and laid down by the rules. The purpose is to elucidate and settle the *issues* raised in the case and to confine, under a well devised and developed system of limitations that experience has shown to best conserve the interests of all concerned, the evidence to such issues.

In every criminal case the burden is on the prosecution to prove, by relevant evidence, (*a*) that the offense charged was really committed, (*b*) that the accused committed it, and (*c*) that the accused had the requisite criminal intent at the time. These three facts broadly constitute the issues in the case. Incidental issues will be formed by the necessity for proof of the essentials—that is, the gist—of an offense and as to character. Not only the allegations set out in the charges and specifications, but the component parts of such allegations as well, raise the issues to be decided. For instance, in a case of larceny, where it is charged that the accused "did take, steal, and carry away" certain articles of value, the component parts of the allegation not specifically set out are that such articles were taken (*a*) fraudulently and (*b*) with the felonious intent of depriving the owner of them.

196. Analysis of evidence by judge advocate and counsel.—The ends of justice and saving of time of all concerned imperatively demand careful analysis by both judge advocate and counsel for accused of the evidence requisite for proof of and defense against the offenses charged. As a prerequisite to such analysis the law as to the offenses charged should be studied with a view to determining the essential elements of the offense; that is, the things that must be proved by the judge advocate in order to justify a conviction and those that must be proved by the defense to disprove or place in reasonable doubt the proof offered by the prosecution. In other words, the prosecution and defense should limit the proffer of testimony to that which is relevant to these issues, and these only, and should prepare the case with only that in view. The essentials or gist of the offense (see Chap. XVII) should be so clearly defined in the preparation of the case that both the judge advocate and counsel for accused may be ready, by appropriate objections before the court, to limit the introduction of evidence to relevant matter only, bearing in mind that only the essentials of the offense must be proved and that what may be properly considered surplusage may be disregarded.

Before trial an examination of all the sources of the evidence to be submitted should be made by the judge advocate and counsel for accused and a determination as to the order in which it will be introduced should be reached. The case should be presented in sequence of events as nearly as possible, just as a story would be told by one party who had seen everything to which the different witnesses will testify. When several offenses are charged, especially if unrelated, the evidence should be directed to the development of their proof in the order charged, so that neither the court nor the accused may be in doubt at any time as to the specific offense to which the testimony being given refers. Counsel for accused should adhere to the same principle in presenting evidence for the defense.

197. Duties of court—Opening statements.—If the court will augment the preparation invoked in the preceding paragraph by constantly bearing in mind what the issues are and holding judge advocate and counsel strictly to them, it will tend to the expedition of business, the securing of justice, and the conservation of the interests of all concerned. The court should have before it as a guide, always by reference to this manual in each case, the following essential considerations as to any evidence that may be tendered: (1) That it is relevant to the issue; (2) that it is not within the rule rejecting hearsay evidence; (3) that, if it is a confession or admission, it is legally admissible; (4) that where documents are used the original should be obtained (except when a copy is admissible) and that the genuineness should be verified; (5) that any witnesses called are

legally competent to give evidence; (6) that the examination of witnesses is fairly and properly conducted. (British Manual.)

Further reference will always be had to the paragraph of the manual that sets out the gist of the offenses charged (see Chap. XVII), and this will be read to the court in each case by the judge advocate immediately after the accused has pleaded to the charges and specifications.

It will be appropriate in all cases—and in an important or complicated case it will be required by the court—for the judge advocate, before proceeding with the introduction of evidence, to make a brief statement of "the nature of the issues to be tried and what he expects to prove" (1 Thompson on Trials, 246) to sustain them. Counsel for the accused may also make an opening statement as to his defense, either just following the statement of the judge advocate or just after the judge advocate has rested his case, as counsel deems better, but the latter course is customary. It would be highly reprehensible for either judge advocate or counsel to get before the court in such opening statement, as a probable means of influencing its judgment, matters as to which no evidence is intended to be offered or as to which it is known that the evidence to be offered is clearly inadmissible, just as it would be so reprehensible for either to suggest for the same purpose, by questions propounded to a witness, matters known not to exist or that the rules of evidence clearly make inadmissible.

198. Rules of evidence for courts-martial.—Prior to the act of August 29, 1916 (A. W., 38), courts-martial followed in general the rules of evidence, including the rules as to competency of witnesses to testify, that are applied by Federal courts in criminal cases. These consisted of the rules of the common law as they existed in the several States at the adoption of the Federal Constitution in 1789, as modified from time to time by subsequent acts of Congress. But courts-martial were, however, not required by express *statute* to follow these rules, and have always been allowed to pursue a more liberal course in regard to the admission of testimony than do, habitually, the civil tribunals. Their purpose was to do justice; and if the effect of a technical rule was found to be to exclude material facts or otherwise obstruct a full investigation, it was deemed that the rule may and should be departed from. Proper occasions, however, for such departures were regarded as exceptional and unfrequent. (Winthrop, 473.) It was believed that "courts-martial had much better err on the side of liberality toward a prisoner than, by endeavoring to solve nice and technical refinements of the laws of evidence, assume the risk of injuriously denying him a proper latitude for defense." (G. C. M. O. 32, 1872; see 3 Greenleaf, secs. 469, 476.) And now, by the provisions of the act of August 29, 1916 (38 A. W.):

The President may, by regulations which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals: *Provided*, That nothing contrary to or inconsistent with these articles shall be so prescribed: *Provided further*, That all rules made in pursuance of this article shall be laid before the Congress annually.

The modes of proof, therefore, including the rules of admissibility for witnesses and other evidence, are now by express congressional enactment placed under the authority of Executive regulation; and the rules laid down in this Manual have the force of such regulation. They therefore form the only binding rules, except such rules of evidence as are expressly prescribed (1) in the Articles of War; (2) in the Federal Constitution; and (3) in such Federal statutes as expressly mention courts-martial.

199. Rules, where found.—The common-law rules, with their legislative modifications, will be found in the various textbooks on the subject of evidence. These rules have been the subject of much interpretation by the courts, which will be found in the published decisions of such courts. While resort to textbooks and decisions will sometimes be necessary in the trial of an especially difficult case, it is the purpose of this chapter to state the rules of evidence applicable to trials by courts-martial in sufficient fullness to cover the field in practically all cases. Where the rule herein laid down is clear it should be taken as law (subject to the discretionary relaxation noted in par. 198), unless modified by Federal statute or some decision of the Federal courts made since the date of the publication of the Manual.

Where, in the preparation of a case, the judge advocate or counsel finds that the rules laid down in this chapter are not sufficiently specific clearly to settle a specially important question as to the competency of a witness to testify or as to the admissibility of evidence intended to be introduced or the exclusion of such as the nature of the case or other information indicates will be offered, he should secure in advance of the trial and have with him in court authorities to sustain his contentions for such admission or exclusion.

But it should be kept in mind that the use of such authorities is merely to inform the court of the reason of a rule or the good sense and fairness of a proposed ruling, and not to control the decision of the court with binding effect. This caution rests on the two grounds of principle: First, because the State decisions and statutes, and the writers of treatises, never have had any binding effect on courts-martial, the Federal statutes and decisions being the only ones that are entitled to such effect; and, secondly, because since the Federal statute of August 29, 1916 (A. W., 38), the modes of proof in courts-

martial are governed by regulations issued by presidential order, as explained in par. 198.

200. Rules of evidence to be applied irrespective of rank.—The rules of evidence should be applied by military courts irrespective of the rank of the person to be affected. Thus a witness for the prosecution, whatever be his rank or office, may always be asked on cross-examination whether he has not expressed animosity toward the accused, as well as whether he has not on a previous occasion made a statement contradictory to or materially different from that embraced in his testimony. Such questions are admissible by the established law of evidence and imply no disrespect to the witness, nor can the witness properly decline to answer them on the ground that it is disrespectful to him thus to attempt to discredit him. (Digest, p. 529, XI, A, 3.)

201. Protection of witnesses.—It is the duty of the court to protect every witness from irrelevant, insulting, or improper questions; from harsh or insulting treatment; and from unnecessary inquiry into his private affairs. The court must forbid any question which appears to be intended merely to insult or annoy a witness, or which, though proper in itself, appears to be needlessly offensive in form. (Proposed codification, N. Y. Rules.)

202. Evidence must be material and relevant.—Evidence to be admissible must be not only material but relevant to the issues in the case. Evidence is not material when the fact which it aims to prove is not a part of the issues in the case. Evidence is not relevant when, though the fact which it aims to prove is material, yet the evidence itself is too remote or far-fetched to have any probative value for that purpose. Where evidence is apparently irrelevant it may, however, be admitted provisionally upon a statement of the judge advocate or counsel that other facts to be proved will show its relevancy, but the court should afterwards exclude it, if its relevancy is not shown. Indirect evidence is known as circumstantial evidence, and signifies merely any and all evidence which is not testimonial; i. e., the assertion of a witness or other person. For example, on a charge of larceny of a wallet, the statement of a witness that he saw the accused take the wallet from the owner's overcoat is testimonial evidence; the finding of the wallet hidden in the blanket belonging to the accused is circumstantial evidence. Obviously, a fact constituting circumstantial evidence must itself usually be proved in its turn by testimonial evidence; for example, the finding of the wallet as indicated above would be evidenced by a sergeant's testimony that he searched the accused's blanket and found the wallet.

Testimonial evidence is thus classed by itself, because the weight to be given to testimony is subject to a group of considerations which affect all human assertions alike.

SECTION II.

CIRCUMSTANTIAL EVIDENCE.

203. Circumstantial evidence.—Circumstantial evidence is not resorted to because there is an absence of direct or testimonial evidence. It is introduced even when there is direct evidence; nor is it an inferior substitute for direct evidence. Circumstantial evidence may furnish a safe and satisfactory ground for belief, while on the other hand direct or testimonial evidence may leave the court in doubt. The proper effect of circumstantial as compared with direct evidence has been stated as follows:

When circumstances connect themselves closely with each other, when they form a large and strong body so as to carry conviction to the minds of a jury, it may be proof of a more satisfactory sort than that which is direct. In some lamentable instances it has been known that a short story has been got by heart by two or three witnesses; they have been consistent with themselves, they have been consistent with each other, swearing positively to a fact, which fact has turned out afterwards not to be true. It is almost impossible for a variety of witnesses, speaking to a variety of circumstances, so to concoct a story as to impose upon a jury by a fabrication of that sort, so that where it is cogent, strong, and powerful, where the witnesses do not contradict each other or do not contradict themselves, it may be evidence more satisfactory than even direct evidence, and there are more instances than one where that has been the case. (Wigmore, 26.) In a case depending upon circumstantial evidence the court, in order to convict, must find the circumstances to be satisfactorily proved as *facts*, and must also find that those facts clearly and unequivocally imply the guilt of the accused and can not reasonably be reconciled with any hypothesis of his innocence. (Davis, p. 265.)

204. Illustration of difference between good and bad circumstantial evidence.—The accused is charged with stealing clothes from the locker of a comrade. The following circumstances are not admissible as circumstantial evidence:

(1) The accused is very much disliked by other members of his company.

(2) A number of thefts from comrades have taken place in the company, and the general belief in the company is that he was connected with them.

(3) He was tried once before for larceny of clothes from a comrade and was convicted.

(4) He is suspected of being a deserter from a foreign army.

(5) He belongs to a race or enlisted in a locality that does not entertain very strict notions of right and wrong as to the manner of acquiring possession of property.

But the following series of circumstances should be admitted in evidence:

(1) The clothes were taken while the company was at drill, and there was no one known to have been in the room where the locker was.

(2) The accused was not at drill, but was detailed as kitchen police that day.

(3) He was absent from his duty as kitchen police a short while during the time when the clothes disappeared.

(4) One of the articles stolen was found in the locker of the accused.

(5) The accused was known to be without money the day before the larceny, and that evening left the post with a bundle under his arm and was seen to enter a certain house and the same night had money in his possession.

(6) Upon the house being searched next day most of the missing clothes were found there.

(7) The person found in the house identified the accused as the one from whom he had purchased the missing clothes.

205. Evidence of character of accused and of his services.—In trials by court-martial the good character of the accused, as evidenced by his reputation, may become of importance in four classes of cases: First, when the evidence of guilt is not strong evidence of the good reputation of the accused will strengthen the presumption of innocence; second, when the punishment is discretionary such evidence may be introduced with a view to inducing the court to impose a milder sentence in the case of a plea of guilty or a conviction; third, when the punishment is mandatory such evidence may be introduced with a view to inducing the court to recommend clemency; fourth, in any case such evidence may be introduced with a view to inducing the reviewing authority to extend clemency. An accused may also introduce evidence of his character and services. In any such case, if the accused offers evidence as to character, record, or services, as shown by statement of service or otherwise, the prosecution may rebut such evidence. (See 1, 2, 4, and 5, par. 204, p. 99, for illustrations of what may not be used in rebuttal to evidence bad character.) Evidence as to the bad character of an accused, offered by the prosecution or at the solicitation of the court prior to the introduction by the accused of evidence as to his good character, is inadmissible. Not even the fact that before the introduction of such evidence the accused consented to its introduction will make it any the less irregular. If, however, the accused takes the witness stand his character for veracity as a *witness* may be attacked as in the case of any other witness.

206. Motive, etc.—Motive or lack of motive as impelling the accused toward or against the act charged or that class of acts often throws

a flood of light upon the issue as to guilt or innocence. So important has it been deemed for the ascertainment of truth that it has invoked exceptions to the *character* rule. Thus the doing of another criminal act, not a part of the issue, while not admissible as evidence of the doing of the criminal act charged, or of the bad moral character of the accused, is admissible when offered for the specific purpose of evidencing design, plan, motive, identity, knowledge, or other relevant facts distinct from moral character. (Wigmore's P. C. 64, 65.)

Illustrations.—(1) In a trial for arson of a barn, the defendant's attempt on two former occasions to burn houses in other parts of the town is not admissible, unless for the purpose of evidencing intent or motive.

(2) On a charge of murder by poison, the defendant's murders of other members of the same family by poison, if admissible to show motive or intent, are not excluded because they are criminal acts and might cause undue prejudice. (Wigmore's P. C. 64, 65.)

(3) The declarations, threats—especially his other similar criminal acts—of the accused are admissible.

(4) When the accused is charged with having knowingly committed an offense or having knowledge of the essence of the offense, prior similar acts that would probably have led to some knowledge or warning would be admissible.

Section III.

TESTIMONIAL EVIDENCE.

207. Testimonial evidence.—Testimonial evidence is the statement of some person offered as evidencing the fact asserted by it. For example, a statement that a rifle was discharged at a certain hour and place is testimonial evidence that it was so discharged.

Such statements may be made either in court or out of court. If made in court as a witness, then the witness must be "competent." If made out of court, then even if he is competent, the statement is not admissible, because the hearsay rule forbids.

The competency of the witness is therefore the important thing to determine before admitting testimonial evidence.

208. Competency rule in general.—The modern tendency, as evidenced to a great extent by statutes of different States, and to a limited extent by Federal statutes, is to recognize practically no grounds for incompetency, but to admit the material and relevant testimony of a witness offered by either side and leave his credit to be estimated according to all the circumstances.

Among the few common-law grounds of incompetency (see par. 198) now remaining in some States, but no longer to be recognized in

courts-martial, are (1) conviction of felony and of misdemeanors involving dishonesty ("crimen falsi"), especially perjury; (2) relationship, as wife or husband of the accused. (See pars. 211 and 213.)

209. Competency of witness.—The competency of a witness depends upon several elements, which may be divided thus: (1) His general moral and mental capacity; (2) his special expertness in subjects on which expertness is required; (3) his knowledge of the specific facts on which he testifies.

210. General capacity of witness.—The general capacity of an adult witness is always presumed; i. e., the party disputing it must always prove to the court the specific ground of incapacity or else the witness should be allowed to testify. The admissibility of children as witnesses is not regulated by their age, but by their apparent sense and understanding. Children, therefore, of any age, may be examined, if capable of distinguishing between good and evil, but always under oath.

There are very few grounds of incapacity to-day recognized by the law.

211. Moral incapacity of witness.—Moral incapacity was recognized in the common-law rule that rendered incompetent as a witness any person convicted of treason, felony, or the crimen falsi.

But this incapacity has been abolished in almost all States, except that several retain it with a restriction to convictions for perjury. In courts-martial, conviction of any offense does not disqualify a witness. But it may, of course, be shown to diminish his credit. (See Credibility of witnesses, Sec. VI, *post.*)

212. Mental incapacity of witness.—Mental incapacity is a disqualification, but only to a limited extent, as follows: Insanity or intoxication may disqualify, but only to the extent to which they affect the subject of the testimony. For example, a religious hallucination as to angels saving a man from bullets does not disqualify the person from testifying as to the time of lighting a camp fire or the persons on duty at a certain post. Intoxication would disqualify only if it was so complete as to render the person senseless at the time of the event to be testified to.

213. Interest or bias.—Interest or bias does not disqualify; i. e., the fact that a person owes a party money or has a property interest with or against a party, does not disqualify him from testifying for or against that party. A person who is a relative or an avowed enemy of the accused is not disqualified from testifying for or against the accused. The weight of such testimony when admitted is a different matter. (See Credibility of witnesses, Sec. VI, *post.*)

Marital relationship was a disqualification at common law. Except in certain cases, husband or wife could not testify either for or

against one another. This rule has been abolished in most States. In courts-martial the rule is as follows:

(1) Wife or husband of an accused may testify *on behalf of* the accused without restriction.

(2) Wife or husband of an accused may *not* be called to testify *against* the accused without the consent of both accused and witness, unless on a charge of an offense committed by the accused against the witness.

(3) Wife or husband of any person may not testify to *confidential communications* of the other, unless the other give consent.

The last two rules are rules of privilege, and are more fully stated under "Privilege."

214. Where accused is witness.—It was provided by act of Congress of March 16, 1878 (20 Stat., 30), that in trials by courts-martial and courts of inquiry as well as by United States courts and Territorial courts, the accused "shall at his own request, but not otherwise, be a competent witness," and that "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. The same rules as to the admissibility of evidence, privilege of the witness, impeaching of his credit, etc., will apply to him as to any other witness, and the only noticeable difference between his examination and that of other witnesses will be that he will in general, naturally and properly, be exposed to a more searching cross-examination. (Winthrop, 508.) So far as the latitude of the cross-examination is discretionary with the court, a greater latitude may properly be allowed in his cross-examination than in that of other witnesses (id., 545), but, like them, he may not be cross-examined beyond the field of his direct examination, except to test his credibility as a witness. Where he is charged with a series of offenses and, taking the stand in his own defense, testifies as to a part of them only, he can not be cross-examined as to the others.

215. Procedure where accused fails to testify or make a statement.—In each case tried by a general court-martial in which the accused does not testify or make any statement in his own behalf, it shall appear on record that the president of the court explained to the accused that he may testify in his own behalf if he so desire, or may make an unsworn statement to the court in denial, in explanation, or in extenuation of the offense with which he stands charged. The explanation by the president and the reply of the accused thereto shall appear upon the record of trial. The same rule will apply in cases tried by special court-martial when the evidence heard is made of record.

216. Effect of turning state's evidence.—The fact that an accomplice turns state's evidence does not make him immune from trial, unless immunity has been promised him by the authority competent to order his trial. But, if an accomplice goes on the stand and makes a full and frank statement of the circumstances of the offense, it is customary to pardon his offense, or impose upon him a milder punishment than upon his accomplices.

217. Competency of accused when testifying against an accomplice.—The rule of the common law was that an accused person was incompetent to testify for or against his accomplices. This rule is nullified by the act making the accused a competent witness when testifying at his own request. The rule now is that when an accused chooses to testify he may do so, and that it does not matter whether his testimony is for or against himself or for or against his codefendant. (Wolfson *v.* U. S., 101 Fed. Rep., 436.)

218. Expert capacity.—On most matters, the ordinary experience of any adult qualifies him to observe and testify. Hence, all persons are ordinarily qualified to testify on ordinary matter. But, when the subject is one upon which special experience is required, it will not be presumed that a witness possesses such special experience, for ordinarily he does not. Hence, a witness called upon such a subject must be shown to possess such special experience; he is therefore called an "expert" on that subject. A person may be an expert on one subject, but not on another. Hence, whenever such a topic calls for testimony, the witness' special experience in it must first be shown. Whether a piece of leather has been recently tanned; whether a stain is human blood or animal blood, are instances of topics which might well require experts, if important to the issue.

In applying this rule, pedantry would be out of place. Experts on all subjects are seldom within reach of a court-martial, and liberality of application is a necessity. Good sense and ordinary caution will determine whether an expert is needful for accurate discovery of the truth. For example, an expert in alcohol would hardly be needed to testify to whether the contents of a certain bottle were sufficiently alcoholic to be intoxicating, but in a homicide case, where the cause of death was disputed, obviously a medical man's testimony should be secured.

219. Insanity of accused.—Where the existence of mental disease or derangement on the part of the accused, either at the time of the trial or at the time of the commission of the alleged wrongful act, becomes an issue in the trial of the case, the court will stop its proceedings and immediately report the fact to the convening authority. The convening authority will forthwith order a board of medical officers to take the accused under their personal observation for such length of time as may be sufficient to determine the nature

and extent of the disease or derangement, if any, and to extend their examination, in a case of any doubt, to written inquiries directed to probation officers, physicians, clergymen, school and prison authorities, mayors, postmasters, etc., for the purpose of fully developing, from any trustworthy sources, the question as to any mental, moral, or physical defects of childhood, or later, that may throw light upon the question as to whether the accused at the time of the wrongful act had the necessary criminal mind to commit the wrongful act charged. Where the information from any source indicates the absence of insanity, the accused will be entitled to cross-examine the party giving such information. Such information and its source will be brought to the attention of the judge advocate, who will confer with the counsel for the accused for the purpose of securing the presence of the informant for cross-examination before the court, or his deposition if he is not available to testify.

The medical board will make a written circumstantial report as to the character of their observations, attach thereto such written evidence as may have been considered, and state their opinion as a board, or individually if there is any difference of opinion, as to whether or not the accused had at the time of their report sufficient mental capacity to justify his being brought to trial, or had at the time of the wrongful act the necessary criminal mind to commit the wrongful act charged, and will further state their opinion, if it is found that the accused did not have the necessary criminal mind to commit the wrongful act charged, as to whether the accused would be now a menace to the public safety.

The medical report as a whole will be admissible in evidence, and when admitted the court will have called as a witness for the court at least one of the members of the board to be thoroughly examined, as if on cross-examination, by counsel for the accused, the judge advocate or the court, as to any feature of the report, and on request of the accused the remaining members of the board shall be called for cross-examination.

If insanity is indicated to either judge advocate or counsel for accused prior to the assembling of the court it would be appropriate for the judge advocate, at request of counsel for accused or of his own motion, to report such indications to the reviewing authority with the idea of obviating the necessity for the assembling of the court until a medical board had been convened and reported as outlined above.

In any case where the convening authority accepts the finding of the board on the question as to necessary criminal mind and decides to withdraw the case from consideration of the court-martial it would accord with modern ideas of justice, if any doubt whatsoever existed as to the accused having committed the wrongful act charged

against him, to grant, upon request of counsel or a member of the accused's family, a trial upon the charge with a view to relieving him, though insane, of the stigma attached to the accusation. In such instance the case should be proceeded with, and if the court determines that the accused committed the wrongful act charged but was insane at the time of its commission or at the time of trial the findings will be to that effect. And in any case where a finding by the court of "not guilty" would be based upon lack of criminal mind, the findings should be in accordance with those prescribed by the preceding sentence.

220. Testimonial knowledge.—A prime qualification in a witness is that he should speak only of what he has observed with his senses, or had an opportunity to observe. E. g., a witness on sentry post at night might testify that he heard three shots and saw two persons running in the distance, but should stop with telling what he heard and saw. To proceed further and state that the shots killed a mule and that the accused was one of the persons running may involve beliefs of his that are based on rumors and gossip picked up afterwards, beliefs for which he has no status as a witness. An important feature of correct trial methods is to summon every person who saw or heard anything revelant, but to require every such person to limit his testimony to what he himself saw or heard. In this way the court arrives (if the testimony be credited) at the basic circumstances on which the proof must be built up.

This rule also has, of course, its liberal side, based on practical experience. For example, if the issue be as to a stolen case of soap, and the quartermaster has an invoice showing 400 cases received, and he is asked how many are remaining in stock, it is not necessary that he should personally count every case; it might suffice if he ticked off 39 large bales of 10 cases, each intact, and then found a bale of 9 with 1 missing.

This fundamental principle of requiring personal knowledge (or opportunity to observe) leads up to the hearsay rule, applicable to statements made by persons not in court. The hearsay rule signifies that when a witness testifies not to what he himself saw or heard but to what he heard some one else say, his testimony on that point shall be rejected, and the person who said it shall be produced in the court to testify, the object being to get at the first-hand source of knowledge. Experience shows again and again that when that other person is produced either what he actually said was something very different or else when cross-examined he turns out to have only a scanty trustworthiness. For example, if the sentry in the above instance testifies that he did not identify the person running, but afterwards in barracks Sergt. S said that it was X, the court would exclude what Sertg. S said, would summon S to testify in person, and

then it might appear that all Sergt. S *knows* about it is that X came into barracks half an hour later looking as if he were out of breath, and this might be connected up with an errand on which X had been sent, by testimony of his captain. The hearsay rule, therefore, is a corollary of the principle that a witness must testify from what he has himself seen and heard, and not from what another person has told him or written to him.

221. Hearsay evidence.—The hearsay rule is subject to some well-established exceptions; most of them are based on the general principle that there is an unavoidable necessity for using the hearsay, because the person is deceased or for some other reason can not be secured as a witness. These exceptions are now settled, however, into fixed rules, irrespective of the above principle.

Nevertheless, in courts-martial the liberal principle, now adopted in one or two States, may well be followed in extreme cases, viz, wherever the person, whose statement is desired to be offered (whether written or oral), is deceased at the time of the trial, and was a person having personal knowledge of the facts, his statement may be admitted, in the discretion of the court. The following are familiar instances of hearsay in court-martial cases:

(1) A soldier is being tried for desertion. Pvt. A is able to testify that Pvt. B told Pvt. A that the accused told Pvt. B that he (the accused) intended to desert at the first opportunity. Such testimony from Pvt. A would be hearsay and would be inadmissible.

(2) A soldier is being tried for larceny of clothes from a locker. Pvt. A is able to testify that Pvt. B told Pvt. A that he (Pvt. B) about the time the clothes were stolen saw the accused leave the quarters with a bundle resembling clothes. Such testimony from Pvt. A would be hearsay and would be inadmissible.

(3) A soldier is being tried for selling clothing. Policeman A is able to testify that, while on duty as policeman, he saw the accused with a bundle under his arm go into a shop, that he (the policeman) entered the shop and the accused ran away and the policeman was unable to catch him. The policeman the next day asked the proprietor of the shop what the accused was doing there, and the proprietor replied that the accused sold him some clothes issued by the Government and that he paid the accused $2.50 for them. The testimony of the policeman as to the reply of the proprietor would be hearsay and would be inadmissible. The fact that the policeman was acting in the line of his duty at the time the proprietor made the statement would not render the evidence admissible.

In the foregoing instances the fact that the accused said he intended to desert, that the accused left the quarters with a bundle, and that the accused sold the proprietor the clothes, constitute most important evidence and can be proved in the first two instances by Pvt. B, and

in the third instance by the proprietor, but they can not be proved by hearsay evidence.

If evidence is hearsay it does not become admissible because it was made to an officer in the course of an official investigation. For instance, in illustration (1), if Pvt. B had made his statement to Capt. C in the course of an official investigation by Capt. C, the statement would still be hearsay and inadmissible.

Official statements and opinions as to either guilt or innocence expressed by an officer, as, for instance, a company, regimental, or department commander, or by a staff officer, in an indorsement, is not admissible in evidence by reason of its official character or the rank or position of the officer making it, as it would be hearsay. Nor is such a statement or opinion evidence because it is among papers referred to the trial judge advocate with the charges. It would be irregular to permit such statements or opinions to come to the attention of the court. If they do become known to the court they should, of course, not be considered in arriving at a finding or sentence.

222. Dying declarations.—On trials 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 produced his condition, and especially as to the person by whom the violence was committed, to be detailed in evidence by one who heard them. The reason for admitting such declarations where the victim believes death is impending is that his belief is equal to the sanctity of an oath in causing him to tell the truth. 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. 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 are generally to be received with great caution. (Winthrop, p. 493.)

223. Res gestæ.—Another exception to the hearsay rule consists of the inculpatory or exculpatory declarations or statements that constitute part of the res gestæ. By the res gestæ is meant the circumstances and occurrences substantially contemporaneous with the facts at issue that explain and elucidate the character and quality of such facts. Such are threats or declarations of the accused in connection with his commission of the crime that indicate his intent or knowledge; declarations or exclamations of a party injured that go to indicate the nature of the violence and the parties responsible; language of accomplices; cries of bystanders; facts, circumstances,

and declarations showing premeditation and preparation for the crime. All such may be established by the testimony of persons who heard the utterances, etc. All such declarations and statements must be made so near in time to the principal transaction as to preclude the idea of deliberate design or afterthought in making them, but it is not essential that they should have been made in the presence or hearing of the accused. Nor does it matter that the party making them would be incompetent to testify in the case. For instance, the statements of a wife under such circumstances would be admissible against her husband. Where the crime committed is the culmination of a series of acts, such as in riots, etc., the res gestæ rule applies to all acts and declarations of the rioters and of bystanders that would tend to indicate purpose, motive, etc.

For instance, the exclamation of a bystander who was witnessing the building of barricades in a street: "My God, they are getting ready to resist the police!" would be admissible as tending to indicate the purpose of that transaction where the killing of certain of the police resulted from a fire directed from such barricades, though the killing did not occur until the next day. The res gestæ is considered as an act connected with or an incident of a main transaction, and not as testimony, and, as soon as it assumes the character of a narration, rather than a spontaneous exclamation that there is no probable ground for belief was inspired by a desire to influence the case, it is inadmissible as falling under the hearsay rule. The application of the rule of res gestæ is not limited strictly to circumstances and occurrences contemporaneous with the principal facts at issue nor with the transactions leading up to the principal facts but would extend to a case of identification, as when, for instance, a party who has seen the commission of a crime and afterwards sees the accused and spontaneously identifies him by some such exclamation as "There's the man that did the killing," although such statement as to identification may have been made days after the principal act was committed. The following examples illustrate what constitute the res gestæ:

Where the accused is charged with sleeping on post, and it appears that the officer of the day or corporal of the guard, in searching for the accused, found him sitting down with his rifle across his knees and his chin on his chest, what they did and said to each other and to the accused, and the accused to them, in what led up to and immediately followed their efforts to ascertain whether or not he was asleep, all constitute parts of the res gestæ.

Where a soldier is charged with murder, manslaughter, or assault, and the party against whom the violence is offered is another soldier, and the wife of the former, while walking with the latter, exclaims, "Run! here comes my jealous husband, and he will kill you!" her

exclamations would be admitted as part of the res gestæ. If the soldier had then fled to his house pursued by her husband, and she had followed to deter him from injuring the other party and later had run from the house shouting, "My husband is killing Jones!" or "has just killed Jones!" her exclamations would be admissible as constituting part of the res gestæ. If a party in the next room had heard a shot and then a voice that he recognized as Pvt. Jones's say, "You shot me for revenge and nothing else," the declaration would be considered as a part of the res gestæ.

A liberal use of this exception may well be made.

224. Evidence of conspirators and accomplices.—In cases where several persons join with a common design in committing an offense all acts and statements of each of them made in furtherance of the offense are admissible against each of the others. Only where the statements of such conspirator fall within the rule laid down for admission of evidence as a part of the res gestæ could such statements be admissible for the defense. The declaration of a conspirator, however, made after the common design is accomplished or abandoned, is not admissible against the others. Such accomplishment or abandonment, however, should be considered as extending to any acts and statements in furtherance of an escape. It is immaterial whether such acts or statements were made in the presence or hearing of the other parties. They are binding upon all parties if they are in furtherance of the common design. Foundation must first be laid by either direct or circumstantial evidence sufficient to establish *prima facie* the fact of conspiracy between the parties, unless the judge advocate states that the conspiracy will later appear from evidence to be adduced. While in Federal courts and courts-martial corroboration of the testimony of a coconspirator, or accomplice, need not be required, yet from the character of the associations formed the uncorroborated testimony of a coconspirator, or accomplice, should be received with great caution.

225. Confessions.—Another exception to the rule excluding hearsay evidence is the rule that admits testimony as to confessions of guilt made by the accused. The most common form of confession is that contained in the plea of guilty made by the accused in open court in answer to a charge. This is not the kind of confession referred to as constituting an exception to the hearsay rule. The confessions referred to are those made out of court, and to be admissible must be offered in their entirety and not merely the parts disadvantageous to the accused. Before a confession of the accused not made in open court can be testified to the following foundations must be laid by the judge advocate:

(*a*) There must be corroborating evidence, either direct or circumstantial, outside of the confession itself, that the crime charged has

been committed. This is what is technically known as the rule requiring proof of the *corpus delicti;* that is, some proof of the fact that the crime charged has probably been committed by some one, so that there will be some corroboration of the confession. It is not requisite that this outside evidence constituting proof of the *corpus delicti* shall be sufficient to convince the court beyond a reasonable doubt of the guilt of the accused, nor need it cover every element contained in the charge. For instance, where desertion is charged proof of absence without leave would be considered as proving the *corpus delicti;* where the charge is that a sentinel had left his post before being regularly relieved it would be sufficient to prove that he was not on his post during his period of duty; where a homicide is charged the proof of the death of the person charged to have been killed amounts to proof of the *corpus delicti;* and in cases of larceny and selling clothing the fact that the property alleged to have been stolen or sold was missing is sufficient proof.

(*b*) It must be affirmatively shown that the confession was entirely voluntary on the part of the accused. 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, etc., or at least believed to be thus competent by the party confessing. 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. (Winthrop, p. 496.) In military cases, in view of the authority and influence of superior rank, confessions made by inferiors, especially when ignorant or inexperienced and held in confinement or close arrest, should be regarded as incompetent unless very clearly shown not to have been unduly influenced. Statements, by way of confession, made by an inferior under charges to a commanding officer, judge advocate, or other superior whom the accused could reasonably believe capable of making good his words upon even a slight assurance of relief or benefit by such superior should not in general be admitted. Thus in a case where a confession was made to his captain by a soldier upon being told by the former that "matters would be easier for him," or "as easy as possible," if he confessed, such confession was held not to have been voluntary and therefore improperly admitted. And it has been similarly ruled in cases of confessions made by soldiers upon assurances being held out or intimidation resorted to by noncommissioned officers. (Winthrop, p. 498.) But confessions made by private soldiers to officers or noncommissioned officers, though not shown to have

been made under the influence of promises or threats, etc., should, yet, in view of the military relations of the parties, be received with caution. Of course, the above principles apply to a written confession as well as to a verbal one. In some cases before courts-martial it appears that the accused has signed a paper confessing his guilt, stating in the paper that he confesses freely without hope of reward or fear of punishment, etc. Such statements are not conclusive that the confession was voluntary. Evidence may be introduced. If the evidence shows the statement was not in fact voluntary, it should not be considered by the court.

Considering, however, the relation that exists between officers and enlisted men and between an investigating officer and a person whose conduct is being investigated, and the obligation devolving upon an investigating officer to warn the person investigated that he need not answer any question that might tend to incriminate him, confessions made by soldiers to officers or by persons under investigation to investigating officers should not be received unless it is shown that the accused was warned that his confession might be used against him or it is shown clearly in some other manner that the confession was entirely voluntary.

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 (Winthrop, p. 499).

Courts should bear in mind that mere silence on the part of an accused when questioned as to his supposed offense is not to be treated as a confession.

Although the confession, because not voluntary, is inadmissible, yet any information given in the confession that leads to the discovery of relevant facts will not render testimony of such facts inadmissible, and it may be further shown, by way of corroboration of such facts, that the discovery was either wholly or partially due to the information thus obtained.

226. Admissions against interest.—Somewhat connected with the subject of confessions is that of declarations or admissions against one's own interest. This constitutes another exception to the rule excluding hearsay. In many instances the accused, after the commission of an offense, makes statements which fall short of a full confession of guilt but do constitute important admissions as to his connection

with the offense. The rule is that such admissions if against his own interest may be admitted in evidence. For instance, in a case of homicide in a dance hall, if the accused when arrested made the statement that he was in the hall when the homicide took place, such a statement is admissible as against his interest.

Admissions against penal interests of parties other than the accused or those connected with him in the commission of the crime charged, are not admissible as evidence. Such persons ought to be summoned as witnesses and examined as to such supposed admissions or confessions.

227. Privileged communications.—A privileged communication is one that relates to matters occurring during a confidential relation, which it is the public policy to protect. A witness can decline to answer a question touching such a communication. The confidential relations that were protected at common law and which are met with in court-martial practice are the following:

State secrets.—Communications made by informants to public officers engaged in the discovery of crime are privileged. The deliberations of courts and of grand and petit juries are privileged, but the results of their deliberations are not privileged. Diplomatic correspondence, and, in general, all oral or written official communications which, in the opinion of the President, would be detrimental to the public interests, and official communications between the heads of the departments of the Government and their subordinate officers are privileged. Were it otherwise it would be impossible for such superiors to administer effectually the public affairs with which they are intrusted.

Husband and wife.—Communications between husband and wife are privileged.

Attorney and client.—The testimony of the attorney, his clerk, interpreter, stenographer, agent, or other employee as to communications between the client and the attorney, made while the relation of attorney and client existed and in connection with the matter for which the attorney was engaged, will not be received by a court, unless such communications clearly contemplate the commission of a crime; i. e., perjury, subornation of perjury, etc. Of course, communications prior to or subsequent to the relation are not privileged. The client, but not the attorney, may waive this privilege.

Police secrets.—The privilege that extends to communications made by informants to public officers engaged in the discovery of crime should be given a common-sense interpretation. The public interests would ordinarily be prejudiced by reason of the disclosure of such communications in a case—and this might very reasonably occur where, for instance, the admission of such communications would

disclose the identity of parties employed for the detection of criminals or would endanger the party who made such communication, or would injuriously affect the chances of securing such agents for the detection of crime in the future. But the material interests of the accused to vindicate his innocence should not be allowed to suffer by reason of the exclusion of such evidence.

The purpose of the privilege, extended to communications between *husband and wife and attorney and client*, which grows out of a recognition of the public advantage that accrues from encouraging free communication in such circumstances, is not disregarded by allowing outside parties who overhear such privileged communications to testify to what they have overheard. It would not be permitted, however, for one of the minor children of the parents, who might reasonably be presumed by the parents not to understand what they were talking about, to testify to communications overheard by such child.

228. Privilege of wife and husband to testify.—At common law the early rule was that neither husband nor wife is competent as a witness against the other, but later admitted an exception in a case of bodily injury inflicted by one of them upon the other.

Certain departures have been made from the common-law rule by Federal statutes and decisions of the courts which, giving consideration to the reasons—i. e., the necessities of justice that demand relaxation of the rule in cases of bodily injury—have extended the field of instances to which the necessities of justice must necessarily apply.

In any prosecution for bigamy, polygamy, or unlawful cohabitation under any statute of the United States, the lawful husband or wife of the accused shall be a competent witness, and may be called, but shall not be compelled to testify in such proceedings, and shall not be compelled to testify * * * without the consent of the husband or wife, as the case may be. (Act of Mar. 3, 1887, 24 Stat., 635.) A married woman is excluded as a witness from motives of public policy. (Lucas *v.* Brooks, 18 Wall., 436, 453.)

Whenever, therefore, the policy or necessity of admitting her as a witness against her husband is sufficiently strong to overbalance the principle of public policy, upon which the general rule of exclusion is based, she ought to be received as a witness. (People *v.* Mercein, 8 Paige (N. Y.), 47.) And so the wife should be permitted to testify against the husband whenever she is the particular individual directly injured by the crime committed by her husband and the facts are peculiarly within her knowledge and impossible or difficult of proof by any witness other than the wife. (State (Mo.) *v.* Bean, 78 S. W., 640.) It would therefore be appropriate in such cases against a husband as bodily injury of any character inflicted by him upon her, bigamy, polygamy, or unlawful cohabitation, abandonment of

wife and children, or failure to support them, for the wife to be permitted to testify against her husband.

The principle enunciated above as to permission of the wife to testify should be extended to a husband in analogous cases.

229. Telegrams not privileged.—Neither private telegrams nor the information regarding them that comes to the knowledge of telegraph operators, either military or civil, are privileged. Telegraph operators, both military and civil, may be subpœnaed to testify before a court-martial as to private telegrams, and private telegrams may be brought before a court-martial by the usual process.

230. Confidential papers.—The reports of special inspections by the Inspector General's Department are confidential documents and the testimony taken is considered a part and parcel of such reports. There is no law or regulation which requires copies of the evidence contained in these confidential reports to be furnished to officers whose conduct has been under investigation. So also the reports of the Judge Advocate General to the Secretary of War have always been regarded as confidential communications and it has not been the practice to furnish copies of them to parties outside the department in the absence of special authority from the Secretary of War. If the prosecution has had access to any such document, fairness requires that the accused should have equal access to it.

231. Communications from officers or soldiers to medical officers not privileged.—It is the duty of medical officers of the Army to attend officers and soldiers when sick, to make the annual physical examination of officers, and examine recruits for enlistment, and they may be specially directed to observe an officer or soldier or specially to examine or attend them; such observations, examination, or attendance would be official and the information acquired would be official. While the ethics of the medical profession forbid them to divulge to unauthorized persons the information thus obtained and the statements thus made to them, such information and statements do not possess the character of privileged communications. If the medical officer, when called as a witness before a court-martial, refuses to testify to such matters, he is subject to charges under A. W. 96.

232. Communications between civilian physicians and patients not privileged.—Neither are the communications between civilian physician and patient privileged, and the refusal of a physician to testify to such communications would subject him to the prosecution provided by A. W. 23.

233. Compulsory self-crimination prohibited.—The fifth amendment to the Constitution of the United States provides that in a criminal case the person shall not be compelled "to be a witness against himself." The principle embodied in this provision applies to trials by courts-martial and is not limited to the person on trial, but ex-

tends to any person who may be called as a witness. A. W. 24, in furtherance of this principle, provides that no witness before a military court, commission, court of inquiry, or board, or before any officer, military or civil, designated to take a deposition to be read in evidence before a military court, commission, court of inquiry, or board, shall be compelled to incriminate himself or to answer any questions which may tend to incriminate or degrade him.

The constitutional guaranty contained in the fifth amendment is predicated upon the "well established and universally accepted maxim of the common law that a witness shall not be compelled to answer any question that tends to criminate him or to expose him to criminal prosecution or to a penalty" (Rice, p. 298), nor to answer any question *not* material to the issue that may tend to degrade him. It must be noted that this rule draws a distinction between questions that *tend to criminate* and those that *tend to degrade*, the protection extending in the first instance against questions whether material or not, while in the second instance it extends only to questions which are *not* material to the issue. And this is not limited to the main issues in the case; for instance, "as the credibility of a witness is always an issue, he must, therefore, answer questions which are no other way material than as affecting his credibility." (Roscoe, p. 149.)

(*a*) *Rule as to questions tending to degrade.*—Where common-law rules have been written into our Constitution and laws they have been given the construction that attach to them under common-law practice, and so the provisions of A. W. 24 must be presumed to have been declaratory of the common-law protection afforded witnesses and, as to questions tending to "degrade," must be accepted with the distinction drawn by the common law—that is, as extending only to questions, *not* material to the issue, that tend to "degrade."

(*b*) *Where privilege as to self-crimination ceases.*—As in the following cases the witness would not be liable to the law's punishment, his privilege as to self-incrimination ceases:

Conviction and the suffering of the punishment; acquittal, or other former jeopardy; abolition of the general crime, subsequent to its commission (provided the rule of criminal law thereby exonerates prior offenders); lapse of time barring prosecution of the particular offense; executive pardon for the particular offense; statutory amnesty, before or after the act, for the particular criminal act or for the offender. (Wigmore, p. 3163.)

234. Privilege against self-crimination is a personal one.—The privilege of a witness to refuse to respond to a question, the answer to which may incriminate him, is a personal one, which the witness may exercise or waive as he may see fit. It is not for the judge advocate or accused to object to the question or to check the witness, or for

the court to exclude the question or direct the witness not to answer. Where it appears that the witness is ignorant of his rights and that the answer to a question might incriminate him, the president of the court will inform him of his right to decline to make any answer which might tend to incriminate him.

235. Procedure where alleged incriminating question is asked.—Where the court overrules an objection made by a witness that the answer to a question will incriminate him the witness should answer the question. If he is a person subject to military law and refuses to answer, charges may be preferred against him under A. W. 96. If he is a civilian witness the facts should be certified to the United States district atttorney by the court with a view to his prosecution as provided in A. W. 23. (See A. W. 23 as to other tribunals and agencies.) In any case of refusal to answer a question after the court has held it to be a proper one, the refusal may be commented on by the judge advocate or counsel in his remarks to the court.

As to civilians, as well as those in the military service, the national-defense act (sec. 108, Act June 3, 1916, 39 Stat., 209) provides that presidents of courts-martial and summary court officers of the National Guard, not in the service of the United States, shall have power "to issue subpœnas and subpœnas *duces tecum* and to enforce by attachment attendance of witnesses and production of books and papers and to sentence for refusal to be sworn or to answer as provided in actions before civil courts." In such cases the punishment would be for contempt of court.

236. Not self-crimination to require accused to submit to physical examination.—"The prohibition of the fifth amendment against compelling a man to give evidence against himself is a prohibition of the use of physical or moral compulsion to extort communications from him and not an exclusion of his body as evidence when it is material." (Holt *v.* U. S., 218 U. S., 245.) In addition to this rule of general application in the Federal courts it has been decided that:

When a person enlists in the military service he waives or surrenders, during the period of his enlistment, some of the rights which he possessed as a citizen. He does this without compulsion, the surrender resulting from his voluntary enlistment in the military service. (U. S. *v.* Grimley, 137 U. S., 147.)

Among other incidents of the military status to which he voluntarily submits himself is that of physical examination by proper military authority such, for example, as is required by regulation when he enlists in the military establishment, at which time his finger and thumb prints are taken, and any marks or scars which appear on any part of his body are made the subject of official record on a card provided for that purpose by The Adjutant General, and the right to impose, and the corresponding duty to submit to, a proper

physical examination, at the discretion and upon the order of a competent military superior, continues to exist so long as he remains in the military service in the operation of his contract of enlistment.

The following are illustrations of what might be required without violating the privilege contained in the fifth amendment:

(*a*) The admission of testimony as to marks and scars found upon the person of a defendant, in a criminal prosecution, during a forcible examination of him with a view to ascertaining his identity for the purpose of arresting him, is not prohibited. (O'Brien *v.* Indiana, L. R. A., Book 9, 1890, p. 323; see also 12 Cyc., 401.)

(*b*) Upon the trial, a question was raised as to the identity of the defendant. One witness testified that he knew the defendant, and knew that he had tattoo marks (a female head and bust) on his right forearm. The court thereupon compelled the defendant, against his objection, to exhibit his arm, in such a manner as to show the marks to the jury. (State *v.* Ah Chuey, alias Sam Good, 14 Nev., 79.)

(*c*) An officer also of the Army was ordered to a place for identification by civilian witnesses in relation to charges which were pending against the officer, and it was held that such an order would not be in violation of the officer's privilege, as it called for no testimonial communication from him.

It follows that it would be appropriate for the court to order the accused to remove his clothing for the purpose of examination by the court or by a surgeon who would later testify as to the results of his examination and, upon refusal to obey the order, might have his clothing removed by force. The accused might likewise be compelled to try on clothing or shoes or place his bare foot in tracks, etc., but where resort to extreme force would be necessary to compel compliance in the presence of the court it would comport more with the dignity of the court to have a surgeon make the examination out of the presence of the court and testify as to the result of the examination, or to advise the accused as to the purpose of the examination and to warn him that his refusal to obey would be considered as an admission on his part of what was sought to be ascertained by the examination. This conclusion would be quite within legal bounds as to presumption of facts.

237. Manner of proving contents of writing.—A writing is the best evidence of its own contents and must be introduced to prove its contents. But if it has been lost or destroyed or it is otherwise satisfactorily shown that the writing can not be produced, then the contents may be proved by a copy or by oral testimony of witnesses who have seen the writing. Under this rule if it is desired to prove the contents of a private letter or other unofficial paper, or an official paper such as a pay voucher, written claim against the Government,

pay roll or muster roll, company morning report, enlistment paper, etc., the strict and formal method of doing so is to prove by proper evidence that the writing is in fact what it purports to be, and then introduce in evidence the original or a properly authenticated copy.

In order to prove that a writing is what it purports to be, in case of a private letter, the person who received the letter should testify that he received it and he should identify it. Then it should be proved that the signature is in the handwriting of the purported writer of the letter. But in proving the genuineness of letters the rule is that the arrival by mail of a reply purporting to be from the addressee of a prior letter duly addressed and mailed, is sufficient evidence of the genuineness of the reply to justify its introduction in evidence. A similar rule prevails as to telegrams purporting to be from the addressee of a prior telegram or telephone message.

If the writing is an official document such as a pay voucher, the person having official custody should produce it in court and testify that he is the custodian of the writing and that it is the pay voucher of the person whose name is signed. The signature to the voucher should be proved to be genuine if that is not admitted. In court-martial practice the opposing party usually admits a public document without requiring such strict proof. The entries in pay vouchers, muster and pay rolls, company morning reports, and other public records used in the Army, are open to inspection by both parties, and contain numerous entries not pertaining to the case being tried. It is the practice, in the absence of an objection, to prove their contents by the oral testimony of a witness, usually the custodian, reading the material matter in court.

When the original consists of numerous writings which can not conveniently be examined by the court, and the fact to be proved is the general result of the whole collection, and that result is capable of being ascertained by calculation, the calculation may be made by some competent person and the result of the calculation testified to by him, as, for instance, if the fact to be proved is the balance shown by account books. In such case the opposite party should have access to the books and papers from which the calculation is made.

It is customary for the party introducing a writing in evidence to read it to the court. But unless the court directs it to be read at once it may be read at any time.

Section IV.

DOCUMENTS.

238. Public records.—An important exception to the rule that the contents of a writing must be proved by the writing itself is in the case of public records required to be preserved on file in a public

office, in which case duly authenticated copies may be admitted in evidence equally with originals without first proving that the originals have been lost, destroyed, or their absence accounted for in some other way. This exception is made necessary by the inconvenience to the public business that would result if such records were removed. The following order covers this exception so far as concerns records and papers in the War Department and its bureaus and in military offices:

Copies of any records or papers in the War Department, in any of its bureaus, or in an office of any of the supply departments; or at the headquarters of an army, field army, division, brigade, or regiment; or of a territorial division, territorial department, or post, if authenticated by the impressed stamp of the bureau, office, or headquarters having custody of the originals (for example, "The Adjutant General's Office, official copy"), may be admitted in evidence equally with the originals thereof before any military court, commission, or board, or in any administrative matter under the War Department. (G. O. 16, W. D., 1912.)

239. Certain official writings are evidence of facts recited therein.—Where the law requires that the evidence of certain facts and events shall be recorded in certain writings, the original writing containing this evidence is competent, i. e., prima facie evidence of the facts and events recorded in it. For instance, the original of an enlistment paper, the physical examination paper, outline figure card and finger-print card, and the original morning report sheet are competent evidence of the facts recited in them. By authority of the War Department order, properly authenticated copies of these papers may be admitted in evidence equally with the original. (See par. 238.) A descriptive and assignment card, however, is not an *original* paper. All the information it contains is compiled from other original sources, and therefore it is not evidence of the facts recited in it.

240. Comparison of handwriting.—The common-law rule of evidence would not permit a comparison of handwriting unless the writing to be used as a standard was properly in the case for other purposes than mere comparison. This rule was changed by act of Congress approved February 26, 1913 (37 Stat., 683), which provides—

That in any proceeding before a court or judicial officer of the United States where the genuineness of the handwriting of any person may be involved, any admitted or proved handwriting of such person shall be competent evidence as a basis for comparison by witnesses, or by the jury, court, or officer conducting such proceeding to prove or disprove such genuineness.

But before admitting such specimens of handwriting, satisfactory evidence should be offered as to the genuineness of the same.

The rule prescribed by Congress will govern in courts-martial procedure.

241. Use of memoranda.—Memoranda may be used to aid the memory or to supply facts once known but now forgotten. Memoranda are therefore of two sorts: First, if the witness does not actually remember the facts but relies on the memorandum exclusively (as in the case of a bookkeeper using an old account book), then the witness must be able to guarantee that the record accurately represented his knowledge and recollection at the time of its making, but it is not necessary that he should himself have made the record if he can state from his present recollection that it was correct when made and the entries must have been made at or near the time, and the recollection at such time must have been fresh as to the facts recorded. Second, if the witness can actually remember the facts and merely needs the memorandum to stimulate or revive his memory, or a part of it, then the above limitations do not strictly apply. But the court should see to it that no attempt is made to use such a paper to impose a false memory on the court under guise of refreshing it.

The memorandum to be used must always, on demand, be shown to the opponent for purposes of inspection and cross-examination, and fairness and justice require that where a memorandum is consulted before trial for refreshing a witness's recollection, statement should be made by the judge advocate or counsel to that effect, and the memorandum should be brought into court by the side whose witness has so consulted it.

242. Memorandum as evidence.—Where a memorandum does not serve to refresh the recollection of the witness, but he can state that it was made when his memory was fresh and can give the guaranty of accuracy and recollection called for by the preceding section, the memorandum itself will be admissible. Where the witness's certainty rests on his usual habit or course of business in making memoranda or records, it is sufficient.

243. Memorandum for refreshing recollection.—Where a witness states that the memorandum to be used refreshes his recollection to the extent of his now remembering the data contained therein, the common rule is to have him testify as to such facts without admitting in evidence the memorandum itself.

244. Books of account.—Entries in books of account, where such books are proven to have been kept in the regular course of business, and the entrant is dead, insane, out of the jurisdiction of the court, or otherwise unavailable to testify, are admissible as evidence. Also the lack of an entry in a series of written entries is admissible as an implied statement that no events occurred of the kind that would have been recorded.

Where the entrant is available to testify in court, books of account will be used, just as memoranda are used for the purpose of refreshing the recollection of the witness, and may be introduced in evidence in connection with his testimony.

Where the entrant only records an oral report or written memorandum made in the regular course of business by another person or persons, such other person or persons, if available, must be called to testify.

The original document of entry must be produced or accounted for. Where a composite entry is used, the extent to which intermediate memoranda must be produced depends on the circumstances of each case. As between ledger and daybook or other kinds, the book required is that which contains the first regular and collected record of the transactions. (Wigmore, sec. 1530.)

245. Maps, photographs, etc.—Maps, photographs, sketches, etc., as to localities, wounds, etc., are admissible as evidence when properly verified by the party that made them or when coming from official sources that are a guaranty of truthfulness and accuracy. This character of evidence is capable of gross misrepresentation of facts and should be carefully scrutinized. Finger prints, upon such verification or guaranty, are admissible.

SECTION V.

EXAMINATION OF WITNESSES.

246. Witnesses examined apart from each other.—Witnesses, after having been first sworn as provided in par. 134, are usually examined apart from each other, no witness being allowed to be present during the examination of another who is called before him. But this rule is not inflexible; it is in practice subject to the discretion of the court, nor is it ever so rigidly observed as to exclude the testimony of a person because he has been present at the examination of other witnesses.

247. Objections to competency; when made.—Any objection to the witness's competency should be made before he is sworn. If his incompetency should later appear, however, a valid objection should be sustained.

248. Number of witnesses required.—Though there are occasional dangers in trusting to a single witness, the testimony of a single qualified witness to the facts in issue would suffice to sustain a conviction, except as to (1) treason, where there must be two witnesses testifying credibly to the same overt act, or (2) perjury, where there must be either (*a*) a second witness to the falsity alleged or (*b*) a corroboration of a single witness by some other form of evidence. The

rule as to perjury does not apply, however, where the falsity can be inferred from a contradictory statement made by the accused. (Wigmore's P. C., 338, 339.) For instance, where a person is charged with a perjury as to facts directly disproved by documentary or written testimony springing from himself, with circumstances showing the corrupt intent; in cases where the perjury charged is contradicted by a public record, proved to have been well known to the defendant when he took the oath; and in cases where the false swearing can be proved by his own letters relating to the fact sworn to, or by other written testimony existing and being found in the possession of a defendant and which has been treated by him as containing the evidence of the fact recited in it. (U. S. *v.* Wood, 14 Pet., 430.)

(See par. 224 as to corroboration of an accomplice and see par. 225 as to corroboration of a confession.)

249. Order of examination of witnesses.—While the proper and usual order and sequence of examination of witnesses contemplates that the witnesses for the prosecution shall be called first and then the witnesses for the accused, and afterwards the witnesses for the prosecution in rebuttal of testimony brought out by the accused, and then the witnesses for the accused in rebuttal of those last introduced by the prosecution, and then witnesses by the court; and that the method of examining each witness shall be direct examination, cross-examination, redirect examination, recross-examination, and examination by the court, the court may, in the interest of truth and justice, call or recall witnesses, or permit their recall at any stage of the proceedings; it may permit material testimony to be introduced by either party quite out of its regular order and place, or permit a case once closed by either or both sides to be reopened for the introduction of testimony previously omitted, if convinced that such testimony is so material that its omission would leave the investigation incomplete. In all such cases both parties must be present, and any testimony thus received would be subject to cross-examination and rebuttal by the party to whom it may be adverse.

250. Direct examination.—The first question to be asked each witness, whether called for the prosecution or defense or by the court, will be, whether he knows the accused and if he does to state who he is. This question is always asked by the judge advocate. The accused having been identified the examination of the witness is continued by the person calling him. All questions and answers are recorded in full, and as far as possible in the exact language of the witness. If an objection is made to a question, the reason for the objection will be stated.

251. Cross-examination.—In general the cross-examination must be limited to matters brought out by the direct examination of the wit-

ness, but in the discretion of the court exceptions may be made to this rule. As it is the purpose of the cross-examination to test the credibility of the witness it is permissible to investigate the situation of the witness with respect to the parties and to the subject of the litigation, his interest, his motives, inclinations, and prejudices, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used those means, his powers of discernment, memory, and description. Leading questions may be freely used on cross-examination. (Davis, p. 285.)

252. Redirect and recross-examination.—Ordinarily the redirect examination will be confined to matters brought out on the cross-examination, and the recross-examination will be confined to matters brought out on the redirect examination. But in these matters the court, in the interest of truth and justice, should be liberal in relaxing the rule.

253. Examination by the court.—The court or a member may ask questions of a witness when it is apparent that the examination of the witness already made has failed to bring out matters material to the issues, and for the same reasons a witness may be recalled or a new witness summoned by the court.

254. Leading questions.—Leading questions, that is, questions which suggest the answer it is desired the witness shall make, or which, embodying a material fact, are susceptible of being answered by a simple yes or no, should not be asked. For example, "Did you not see the accused leave his quarters with a bundle under his arm?" is a leading question. In such case the question should be "Did you see the accused?" If the answer is in the affirmative, add "What was he doing?" Again, for example, the question, "Did you hear the accused say he did not intend to come back?" would be leading. The proper form of the question should be: "Did the accused say anything?" If the answer is in the affirmative, add "State what he said." So, where a knife is introduced in evidence a witness should not be asked whether that is the knife he saw the accused stab Pvt. A with, but he should be asked whether he recognizes the knife, and if he does, where he saw it and what was done with it, etc. The following are the exceptions to the rule that leading questions will not be asked:

(1) Leading questions may be asked on cross-examination.

(2) To abridge the proceedings, the witness may be led at once to points on which he is to testify, and the *admitted facts in the case* may be recapitulated to him. The rule is therefore not applicable to that part of the examination of a witness which is merely introductory. For example, in a desertion case where the accused admits that on a certain day at a certain place he was apprehended as a

deserter by a policeman, the latter when on the stand may have his attention directed at once to the occasion by such a question as whether at a certain time and place he arrested the accused as a deserter. The witness having answered the question in the affirmative, in the next question he might properly be asked to state the details connected with the arrest. So in a case of disobedience of orders where there is no dispute that the alleged disobedience took place at a certain time and place and that it involved certain persons, the witness might properly be asked whether he was present at the place where and time when the accused was placed in arrest by a certain officer for not carrying out a certain order. The witness having answered in the affirmative, he may be asked to state all the circumstances.

(3) When the witness appears to be hostile to the party calling him or is manifestly unwilling to give evidence.

(4) When there is an erroneous statement in the testimony of the witness, evidently caused by want of recollection, which a suggestion may assist, as, for instance, where he misstates a date or an hour.

(5) Where, from the nature of the case, the mind of the witness can not be directed to the subject of the inquiry without a particular specification of it, as where he is called to contradict another witness who has testified that the accused made a certain statement on a certain occasion in the hearing of a number of soldiers, each of them may be asked whether he heard the accused make the statement.

The court, in its discretion, would be justified in allowing liberal departures from the rule.

255. Recalling of witnesses.—Where a witness is recalled to the witness stand he will not be sworn again, but will be reminded that he has been sworn in the case and is still under oath. A failure to so remind him, however, does not affect the validity of the trial and will not be ground for rejecting the testimony.

Section VI.

CREDIBILITY OF WITNESSES.

256. What credibility consists in.—The credibility of a witness is his worthiness of belief, and is determined by his character, by the acuteness of his powers of observation, the accuracy and retentiveness of his memory, by his general manner in giving evidence, his relation to the matter in issue, his appearance and deportment, prejudices, by his general reputation for truth and veracity in the community where he lives, by comparison of his testimony with other statements made by him out of court, by comparison of his testimony with that of others, etc. From all these the court will draw its own conclusions as

to the credibility of the witness, attaching only such weight to his evidence as all the facts seem to warrant. There may even be cases in which the court will reject all the testimony of a witness. This may be for any of the reasons set forth above. No statement will be made by the court of the weight given to any testimony or the amount rejected, except as it may desire to inform the reviewing authority of the reasons which have led to its findings.

257. Proof of character by general reputation.—Where impeachment of a witness for bad character is undertaken it must be limited to proof of his general reputation for truth and veracity in the community in which he lives. For a military man this would mean the reputation that he bore amongst the members of his regiment or company, or amongst those stationed at a post and, if stationed at or near a town, amongst the residents of the town. Personal observation as to his character is not admissible.

258. Conviction of crime.—Evidence of the conviction of any crime, even by a foreign tribunal and whether felony or misdemeanor, is admissible for the purpose of diminishing the credit due to his testimony. (1 Greenleaf, sec. 376.) It is allowable to ask a witness on cross-examination whether he has ever been convicted of a crime, but if he denies it, proof may only be made by copy of the record of his conviction.

259. Self-contradiction.—Proof may be offered of inconsistent statements made by the witness on specific facts, but on collateral facts the inconsistency can not be evidenced by calling other witnesses to testify to his self-contradictory assertion.

Where, on cross-examination, a witness is questioned as to his self-contradictory statements, his attention should be called to the time, place, and surrounding circumstances and to the person to whom he is assumed to have made the contradictory statements.

Where the contradictory statement is contained in a writing, it need not be shown to the witness before questioning him about it.

260. Prejudice, bias, etc.—Prejudice, bias, relationship, etc., may be shown to diminish the credibility of the witness, either by the testimony of other witnesses or by cross-examination of the witness himself. Such matters are never regarded as collateral.

261. Credibility of accused as a witness.—If the accused testifies, his credibility *as a witness* may be attacked on any of the grounds stated in the preceding paragraphs.

262. Proof of contradictory statements out of court.—The strict rule is that, before testimony can be admitted to prove that a witness has made out of court statements that are in conflict with his testimony in court, a foundation therefor must be laid by asking the witness on cross-examination whether he has not made on a certain occasion at a certain time or under certain circumstances the alleged contra-

dictory statement. If the witness admits making such a contradictory statement he will be permitted to explain it. If he denies making it, evidence may be introduced to prove it.

SECTION VII.

DEPOSITIONS AND FORMER TESTIMONY.

263. Depositions admissible.—Depositions taken under the provision of A. W. 25 and 26 "may be read in evidence before any military court or commission in any case *not capital* or in any proceeding before a court of inquiry or a military court."

264. Depositions for defense in capital cases.—Deposition testimony may be adduced for the defense in capital cases. (A. W. 26.) Where the defense calls for such testimony in capital cases the witnesses may be cross-examined as fully as witnesses in a case not capital.

265. Objections as to competency of witness and admissibility of evidence.—The same rules as to competency of witnesses and admissibility of evidence apply in the taking of evidence by deposition that apply in the examination of a witness before the court, except that a wider latitude than usual should be allowed as to leading questions.

If the interrogatories and cross-interrogatories for depositions are prepared for acceptance by the court, in open session, objection to the competency of the deponent, if grounds of objection are known at the time, as well as objections to questions, should be raised at such session, and ordinarily be passed upon by the court at that time. The court should, however, in the interests of justice, entertain such objections when the depositions are offered in evidence, but might in a proper case call upon judge advocate or counsel for explanation as to why they had failed to make the objection at the proper time.

If the interrogatories and cross-interrogatories are agreed upon by both parties in advance of the assembling of the court—and this is the usual practice—objections to questions and to the admissibility of evidence will be made when the depositions are offered in evidence.

266. Examination of deposition by counsel.—Upon receipt of the deposition the judge advocate will advise the accused or his counsel of that fact and will give them an opportunity to examine the deposition before the trial.

267. Reading of depositions.—Ordinarily depositions will be read to the court by the party in whose behalf they are taken, but if the accused is not represented by counsel the judge advocate will read to the court the deposition taken on his behalf, unless the accused requests to read them. After being read to the court a deposition

will be properly marked for identification purposes and attached to the record, and the record will show that it has been introduced and read to the court.

268. Miscellaneous provisions as to depositions.—The party at whose instance a deposition has been taken should not be permitted to introduce only such parts of the deposition as are favorable to him or as he may elect to use; he must offer the deposition in evidence as a whole or not offer it at all. If the party at whose instance a deposition has been taken decides not to put it in, it may be put in evidence by the other party.

269. Affidavits not admissible.—Affidavits taken without notice and not as depositions under the provisions of A. W. 25 and 26 are in no case admissible as evidence unless expressly consented to by the judge advocate and the accused with full knowledge of his rights.

270. Certificate of discharge.—The "certificate of discharge" may be used by the defense, either before or after the findings, for proof of good character.

271. Statement of service.—The statement of service and number of previous convictions of the accused, as found in the upper quarter of the front page of the charge sheet, will not be permitted to be seen or examined by members of the general or special court-martial trying a soldier until after they have reached their findings. In the event of conviction the accused, if a soldier, will be asked whether such statement of service is correct, and such statement will be examined and considered by the court for the purpose of determining proper punishment in view of length of service.

The statement of service may be used by the defense, either before or after the findings, for proof of good character.

272. Former testimony before court of inquiry.—The record of the proceedings of a court of inquiry may be read in evidence before any court-martial or military commission in any case not capital nor extending to the dismissal of an officer, and may also be read in evidence in any proceeding before a court of inquiry or a military board: *Provided*, That such evidence may be adduced by the defense in capital cases or cases extending to the dismissal of an officer. (A. W. 27.)

The ends of justice would require that the reasonable tests for admissibility laid down in par. 275, as to examination and cross-examination on the same issues and as to correctness and completeness of the record where former testimony before civil courts and courts-martial is offered, should be applied as to the admission of the record of a court of inquiry.

273. Evidence of pardon.—When a special plea in bar of trial, based on a pardon, is offered by the defense, the best evidence of such pardon, if in the nature of an individual pardon, will be the document

signed by the President himself, and, if in the nature of a general amnesty, by an official copy of the proclamation or order publishing such amnesty. If such document or order is not sufficiently explicit to determine whether or not the offense for which the accused is on trial is the same as that covered by the pardon, then other evidence must be introduced to fill the gap. Where the pardon is in the nature of a constructive pardon, the evidence will be of such facts and circumstances as it is contended constitute such pardon.

274. Evidence of former trial by court-martial or civil court.—Where a plea in bar of trial, based on a former trial by court-martial for the same offense and conviction or acquittal of the same is offered for the defense the best evidence of such conviction or acquittal will be the order of the reviewing authority publishing the case. Where such order is not sufficiently explicit to determine whether or not the offense for which the accused is on trial is the same as that the conviction or acquittal of which he pleads in bar, then the original court-martial record should be offered in evidence.

Where a plea in bar is on a former trial and conviction or acquittal by a Federal court—the action of a State or any other than a Federal court does not operate as a bar to second trial—the best evidence of such conviction or acquittal will be a duly certified copy of the indictment and findings and conviction or acquittal, given by the public officer whose duty it is to keep the original.

275. Former testimony in civil courts and courts-martial.—Where a witness, who has testified in either a Federal or State court at a former trial on the same issues raised in the case on trial and was fully examined and cross-examined, is dead or is beyond the reach of the process of the court and his personal attendance can not be secured, then the stenographic report of his testimony, if proven to be correct and complete by the person by whom it was reported, will be admissible and may very properly be accorded the same weight as a deposition duly taken on notice. (Chicago, St. P., M. & O. Ry. Co. *v.* Myers, 80 Fed. Rep. 361, 365.) Ordinarily, however, this situation should be met by the judge advocate and counsel for accused procuring in advance of trial a transcript of the stenographer's notes, duly sworn to by him as correct and complete, and submitting it to the opposite party for his inspection. If acknowledged to be correct and complete, then such transcript will be received in evidence.

Where the testimony desired is of a witness who had testified in a former trial by court-martial, all conditions being approximately the same as those cited in the first paragraph of this section, the original court-martial record itself will be admissible, and the stenographic reporter will only be called where a question is raised as to the correctness or completeness of the recorded testimony.

SECTION VIII.

PRESUMPTIONS.

276. Presumptions.—Presumptions constitute a large part of the law of evidence. They are of two kinds—presumptions of law and presumptions of fact.

277. Presumptions of law.—Broadly speaking, a presumption of law is a rule of law that when certain circumstances exist the court *must* presume certain other circumstances. Presumptions of law are divided into conclusive and disputable presumptions. In case of a conclusive presumption of law the presumption can not be contradicted. For example, all residents of a country are conclusively presumed to know its laws. This presumption is in force in the practice of courts-martial so far as concerns offenses that constitute civil crimes. (As to the modification of the rule as regards knowledge of the Articles of War in case of recruits, see par. 282; as to intent, par 281; as to ignorance of law, par. 282.) In case of a disputable presumption of law, the presumption can be contradicted. For example, it is presumed that a sane person intends the natural and probable consequences of his acts; a person is presumed to be innocent until proven guilty; all persons are presumed to be sane; persons acting as public officers are presumed to be legally in office and to properly perform their duties; and malice is presumed from the use of a deadly weapon. Evidence may be introduced to rebut such presumptions.

278. Presumptions of fact.—Presumptions of fact are nothing more than logical inferences, from facts already proved, as to the existence of other facts. This kind of a presumption is not made as a rule of law but as a matter of human reason. All evidence in a case, except that which directly proves the allegations in the specifications, leads at once to presumptions of fact. Such presumptions are the basis of all circumstantial evidence. (See par. 204.) It is in making such presumptions that the members of the court should especially exercise their common sense and their knowledge of human nature and the ways of the world. Facts in evidence showing a motive or absence of motive on the part of the accused, preparations or the absence of preparations for the commission of crime, a failure to account for suspicious circumstances, acts showing a criminal consciousness (as concealment, disguise, or flight), the suppression of evidence, the possession of weapons or instruments that might have been used in the commission of the offense, the possession soon after larceny or embezzlement of the articles stolen or embezzled, are a proper basis for presumptions of fact.

Also where the existence at one time of a certain condition or state of things of a continuing nature is shown, the general presumption arises that such condition or state continues to exist, until the con-

trary is shown, *so long as is usual with conditions or things of that particular nature.* For example, there is a presumption of continuance as to one's residence, until a change is shown, also that one holding an office continues to hold it until the end of the term for which appointed or elected and that personal habits have not changed. There is a presumption of fact from the regular course of business in the Post Office Department that a letter when properly deposited in a post-office box or in the place in which letters for mailing are usually deposited, postage prepaid, is received by the addressee. The presumption with regard to the delivery of letters duly posted has been extended and applied to the delivery of telegrams deposited with a telegraph company for transmission; but delivery of the message to the telegraph company must of course be shown. There is also a presumption of fact that persons of the same name are the same person. The strength of this presumption will of course depend upon how common the name is and other circumstances.

279. Prima facie evidence.—Prima facie evidence is that which suffices for the proof of a particular fact until contradicted and overcome by other evidence. In other words, prima facie evidence justifies the court in finding the facts presumed, but in view of the doctrine of reasonable doubt that always inures to the benefit of the accused from a consideration of all of the evidence presented the court is not required to find the facts presumed. The court may decide, for instance, that the prima facie evidence presented does not outweigh the presumption of innocence.

280. Intent in connection with crimes.—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 offense, as murder, larceny, burglary, desertion, and mutiny; and those in which the act is the principal feature, the existence of the wrongful intent being simply inferable therefrom, as rape, perjury, sleeping on post, 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. (Winthrop, p. 475.)

281. Intent in military cases.—Military offenses being created by statute, the peculiar statutory intent described in the article, if there be one, must be alleged in the specification. The enlistments prohibited in A. W. 54, for example, must have been "knowingly" made in order to constitute an offense under the statute. It is similarly essential to some of the offenses described in A. W. 55, 56, and

57 that they be "knowingly" committed; offenses under A. W. 83 and 84 must have been committed "willfully" or "through neglect"; an officer quitting his post on tender of resignation must do so "with intent to absent himself permanently therefrom" to be triable for the offense described in A. W. 28; and an officer who refuses or "willfully neglects" to deliver an offender to the civil authorities upon application duly made by such authorities subjects himself by such refusal or willful neglect to the penalties set forth in A. W. 74. (Davis, 642.) In some instances, however, as in the offenses described in A. W. 61 and 86, no statutory intent is set forth in the article, and none need be alleged in the specifications. In other cases, while no intent is embodied in the article, a particular intent is necessary to the completeness of the offense, and though not set forth in the specification must be established in evidence. Such is the case with respect to the offense of desertion, the intent being not to return. But whether the intent that is presumed from the commission of an unlawful act or the specific one that must be proved raises a point in issue the accused in his defense may prove there was actually no intent. If the accused can substantiate such a defense, he must be acquitted or the grade of the offense reduced, as, for instance, from assault with intent to kill to assault. The usual defenses of this character in military practice are ignorance of military law, ignorance of fact, drunkenness, and insanity.

282. Ignorance of law.—Every person is usually presumed to know the provisions of Federal, State, and municipal law applicable to the community in which he lives, and a person subject to military law is presumed, in addition thereto, to know the statute law as particularly applicable to the Army, as well as Army regulations, the different manuals, orders, and circulars issued for the information and government of the Army. This really means that on grounds of public policy a person is responsible whether he knows the law or not. His ignorance is immaterial.

An exception may sometimes be made where enlisted men are charged with the knowledge of the Articles of War. This exception would be based primarily upon the fact that A. W. 110 makes it one of the features of enlistments into the military service that certain of the "Articles of War shall be read to every enlisted man at the time of, or within six days after, his enlistment." A. W. 109 enjoins that he shall take an enlistment oath in which, among other things, he swears that he will observe and obey military orders "according to the rules and Articles of War." While in the case of an old or reenlisted 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 should usually at least act 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 offense charged was 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. (Winthrop, p. 438.)

283. 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. The theory, of course, is that where a bona fide ignorance of fact exists there would 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 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 of A. W. 61 unless his ignorance is a result of his own neglect or wrongdoing (Winthrop, p. 436); and if the soldier should disobey an order given to him by an officer in civilian clothing without the officer having first stated to the soldier that he was an officer, where the soldier did not know that he was an officer nor have reason to believe that he was an officer, then his ignorance would be excuse for his act of disobedience which might otherwise have been a very serious offense. Of course, a soldier is presumed—it is his duty—to know the officers of his command where reasonable time and opportunity after joining the command are shown to have existed for this purpose.

[NOTE.—See Insanity of accused, par. 219.]

284. Evidence of desertion.—Absence without leave is usually proved by the evidence of an officer or noncommissioned officer of the company of the accused to the effect that he was absent from his organization without authority for a certain period, but if such witnesses are not available it may be proved by the entries on the muster rolls. In making the latter kind of proof, that portion of the muster roll relating to the accused, or a copy of it certified by the officer having official custody thereof, showing the accused was absent without leave, beginning a certain date, and (if such is the case) was dropped as a deserter, should be attached to the proceedings as an exhibit. But the muster roll, even though it refers to the accused as a "deserter," is not complete evidence of desertion; it is evidence only of

absence without leave, and it is still necessary for the judge advocate to prove an intent to remain permanently absent; that is, to desert.

The condition of absence without leave having once been shown to exist will be presumed to continue in the absence of evidence to the contrary until the accused came again under military control. It is therefore necessary to prove only that the accused went absent without leave a certain date and came under military control a certain date. During the intermediate time it is presumed he was absent without leave.

If the condition of absence without leave is much prolonged, and there is no satisfactory explanation of it, the court may be justified in presuming from that alone an intent to remain permanently absent. The presumption of such intent will be strengthened by such circumstances as that the accused attempted to dispose of his uniform or other property; that substantially all his clothes were missing from his locker when his absence was discovered; that his civilian clothes were missing; that he attempted to board a train that took him away from his station; that he purchased a ticket for a distant point or was arrested or surrendered at a considerable distance from his station; that while absent he was in the neighborhood of military posts and did not surrender to the military authorities; that he was dissatisfied in his company or with the military service; that he had made remarks indicating an intention to desert the service; that he was under charges or had escaped from confinement at the time he absented himself; that just previous to absenting himself he stole or took without authority money, civilian clothes, or other property that would assist him in getting away, etc.

On the other hand, such incidents are not always inconsistent with a guilt of mere absence without leave. They should be carefully weighed by the court. Previous excellent and long service, the fact that none of the property of the accused was missing from his locker, and the fact that he was under the influence of intoxicating liquor or drugs when he absented himself, and that he continued for some time under their influence, etc., are incidents going to show there was not an intent to remain permanently absent.

The fact that a reward has been paid for the apprehension of the accused as a deserter neither proves nor disproves an intent to desert. So also the opinions of witnesses as to whether the accused intended to desert and statements from them that the accused is a "deserter" or "deserted" are not only incompetent, but are valueless for any purpose to prove desertion.

(*a*) *Statutory rules of evidence.*—A. W. 28 provides that it shall be sufficient proof of the offense of desertion by an officer that, having tendered his resignation and prior to due notice of the acceptance of the same, he quits his post or proper duties without leave and with intent to absent himself permanently therefrom. And similarly in

the case of a soldier, A. W. 29 provides that it shall be sufficient proof of desertion in his case when it is proved that, without having first received a regular discharge, he again enlists in the Army or in the militia when in the service of the United States, or in the Navy or Marine Corps of the United States, or in any foreign army; and shall be further proof of fraudulent enlistment where the enlistment is in one of the forces of the United States mentioned above.

285. Drunkenness as showing absence of intent.—It is a general rule of law that voluntary drunkenness is not an *excuse* for crime committed in that condition. 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 kind of offense was actually committed. Thus, there are 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 the 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 offenses 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 drunkenness of the accused at the time of the killing may ordinarily be admitted as indicating a mental excitement, confusion, or unconsciousness incompatible under the circumstances of the case with premeditation or a deliberate intent to take life and as reducing the crime to the grade of manslaughter. 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. (Winthrop, p. 440.)

Where drunkenness is pleaded as an excuse for crime such excuse should be received with caution. Drunkenness is easily simulated. It is sometimes resorted to for the purpose of stimulating the nerves to the point of committing the act. Where premiditation and intent first exist, followed by voluntary drunkenness and the commission of the crime during such state of drunkenness, the necessary intent to commit the crime will be presumed, whatever the state of drunkenness at the time of its commission may have been.

286. Drunkenness in military cases.—In military cases, the fact of the drunkenness of the accused, as indicating his state of mind at the time of the alleged offense, 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 specific intent is necessary to constitute the offense, as in cases of disobedience of orders in violation of A. W. 64, desertion, mutiny, cowardice, or fraud in violation of A. W. 94, 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 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 the accused may be convicted of that offense under A. W. 96. (Winthrop, p. 441.)

287. Proof of drunkenness.—Upon a trial for drunkenness it is not essential to confine the testimony to a description of the conduct and demeanor of the accused, but it is admissible to ask a witness directly if the accused "was drunk," or for a witness to state that the accused "was drunk," on the occasion or under the circumstances charged. Such a statement is not viewed by the authorities as of the class of expressions of opinion which are properly ruled out on objection unless given by experts, but as a mere statement of a matter of observation, palpable to persons in general, and so, proper to be given by any witness as a fact in his knowledge. *It is preferable that all witnesses introduced to prove drunkenness should describe the conduct and demeanor of the accused in addition to giving their opinion as to whether the accused was drunk.*

288. Reasonable doubt and burden of proof.—In order to convict, the court must be satisfied, beyond a reasonable doubt, that the accused is guilty as charged.

By "reasonable doubt" is intended not fanciful or ingenius doubt or conjecture but substantial, honest, conscientious doubt suggested by the material evidence in the case. It is an honest, substantial misgiving, generated by insufficiency of proof. It is not a captious doubt, nor a doubt suggested by the ingenuity of counsel or jury and unwarranted by the testimony; nor is it a doubt born of a merciful inclination to permit the defendant 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 inno-

cent falls as far short of appreciating the proper amount of proof required in a criminal trial as does a court which convicts because the accused is probably guilty. (Winthrop, p. 476.)

In trials before courts-martial the prosecution has upon it the burden of proving the guilt of the accused beyond a reasonable doubt, and, whatever the defense of the accused may be, this burden never changes. After the evidence is all in the court must be convinced beyond a reasonable doubt of every element necessary to constitute the offense in order to justify it in convicting the accused of the offense charged.

In collateral issues arising in the course of the trial as to the competency of witnesses, the admissibility of testimony, and the like, the burden of proof rests upon the party who alleges incompetency or objects to the admission of particular testimony. (Davis, p. 267.)

Section IX.

JUDICIAL NOTICE.

289. Judicial notice.—Courts will recognize the existence and truth of certain matters bearing upon the issue before them of their own motion and without requiring the production of evidence. Such acceptance is known as "taking judicial notice" of them. This is done as to all matters of law and all facts which are so notorious as to need no evidence. To the former class belong the laws which the court applies in the decision of the cases before it, including the Constitution, laws, and treaties of the United States, those of the State in which it sits, the common law, and the law of nations. They also take notice of the great seal of the United States, those of the several States, the seal of courts of record, notaries public, etc. Under the latter head they will take judicial notice of the ordinary divisions of time, of calendar and lunar months, of weeks and days, and of the hours of the day; of astronomical and physical facts; of the laws of nature, including their ordinary operations and consequences; of the Government of the United States and those of the several States and their heads; of war and peace; and of the great facts of history as recorded in the works of writers of standard authority. So in addition all courts-martial will take judicial notice of the organization of the Army, the statutes relating to the Army, the Army Regulations, the contents of the several manuals issued, the existence and situation of military departments, reservations, and posts, and the stations of troops as published to the Army, the fact that an officer belongs to a certain organization, etc. General and special orders, general court-martial orders, and bulletins of the War Department and the headquarters of the several military departments may ordinarily be proved by printed official copies in

the usual form. A court-martial will in general properly take judicial notice of the printed order as genuine and correct. A court-martial, however, should not in general accept in evidence, if objected to, a printed or written order which has not been made public to the Army without some proof of its genuineness and official character. Special and summary courts will take judicial notice of the published orders of the regimental and post commander. Where the price of an article furnished by the Government is published to the Army in orders, bulletins, or price lists, it will not be necessary to prove the price, as the court will take judicial notice of it. It is proper, although not necessary, for the judge advocate to state to the court that the price as set out in the charges is the same as that fixed by the order, bulletin, or price list. If the court is uncertain as to the fact which it is called upon to notice judicially, it may refer to any person or to any document or book of reference to satisfy itself with regard thereto, or it may refuse to take judicial notice of the fact unless and until the party calling upon it to do so shall produce such document or book of reference.

CHAPTER XII.

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SECTION I.

STATEMENTS AND ARGUMENTS.

290. Scope of statement.—After the introduction of evidence has been completed the accused, personally or by counsel, and whether or not he has testified as a witness, may make an unsworn verbal or written statement as to the case. If the statement is in writing it should be signed by the accused, or by counsel in his behalf, and appended to the record. The statement may consist of a brief summary or version of the evidence, with such explanation or allegation of motive, excuse, matter of extenuation, etc., 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. (Winthrop, p. 450.) Such statement is not testimony and, therefore, is not subject to cross-examination, but as a personal defense or argument, however, it may and properly should be taken into consideration by the court. (Digest, p. 506 V, H, 1.)

291. Freedom of expression.—A large freedom of expression in his statement to the court is allowable to an accused, especially in his comments upon the evidence. So, an accused may be permitted to reflect within reasonable limits upon the apparent animus of his accuser or prosecutor, though a superior officer and of high rank. But an attack upon such a superior of a personal character and not apposite to the facts of the case is not legitimate; nor is language of marked disrespect employed toward the court. Matter of this description may indeed be required by the court to be omitted by the accused as a condition to his continuing his address or filing it with the record. (Digest, p. 506, V, H, 3.)

292. Admissions.—While the statement proper can not, as previously stated, be regarded as evidence, and the accused is not in general to be held bound by the argumentative declarations it contains, yet if he clearly and unequivocally admits in his statement certain *facts* material to the prosecution, such may properly be viewed by the court and reviewing authority *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.

[NOTE.—See Chap. IX, par. 154, as to procedure where, after a plea of guilty, the accused makes a statement inconsistent with his plea.]

293. Arguments.—After the accused has made a statement, if any, arguments may be presented to the court by the judge advocate, the accused, and his counsel. The judge advocate has the right to make the opening and closing argument, but the court, in its discretion, may permit the defense to answer any new matter in the closing argument of the judge advocate.

SECTION II.

FINDINGS.

294. Voting.—After the statements and arguments, if any are made, have been concluded the court will proceed to its judgment which consists of the findings and sentence. Members of a general or special court-martial, in giving their votes, shall begin with the junior in rank. (A. W. 31.) The votes of the members must be based upon and governed by the testimony in the case considered in connection with the plea. The charges and specifications are voted upon in the same order that is followed in arraigning the accused, the first specification to the first charge being voted upon, then the second, third, and thereafter in order, followed by a vote upon the charge itself; and so on with the other charges. A tie vote on a finding is a finding of not guilty.

[NOTE.—For refusal to vote a member is chargeable under A. W. 96, see Chap. VII, par. 90.]

295. Majority necessary to convict—Exception.—All convictions whether by general or special court-martial may be determined by a majority of the members present, except that no person shall by general court-martial be convicted of an offense for which the death penalty is made mandatory by law, unless by the concurrence of two-thirds of the members of said court-martial and for an offense in the Articles of War expressly made punishable by death. (A. W. 43.)

296. Reasonable doubt.—Where issues arise during the progress of a trial, as for instance as to the competency of members or witnesses, and evidence is taken, the question at issue is determined by preponderance of evidence; but in order to convict of the charges and specifications or any part of them the court must be satisfied of the guilt of the accused beyond a reasonable doubt.

[NOTE.—For description of reasonable doubt, see Chap. XI, par. 288.]

297. General principles controlling findings.—The finding on the charge should be supported by the finding on the specification (or specifications), and the two findings should be consistent with each

other. A finding of guilty on the charge would be quite inconsistent with a finding of not guilty on the specification. So a finding of guilty on a well-pleaded specification apposite to the charge, followed by a finding of not guilty either of the article charged or of some other proper article, would be an incongruous verdict. No matter how many specifications there may be, it requires a finding of guilty on but one specification (apposite to the charge) to support a similar finding upon the charge. (Digest, p. 536, XII, A. 2) Evidence can not be taken after a finding has been reached.

298. Guilty of a lesser included offense.—If the evidence proves the commission of an offense which is included in that with which the accused is charged the court may except words of the specification, and if necessary substitute others instead, pronounce the innocence and guilt of the excepted and substituted words, respectively, and then find the accused either guilty of the charge or not guilty of the charge, but guilty of a violation of another proper article of war as the finding on the specification may require. Of this form of verdict the most familiar is the finding of guilty of absence without leave under a charge of desertion. In such a case the court should find as follows where the charges are in the usual form:

Of the specification, guilty except the words "desert" and "in desertion" substituting therefor respectively the words "absent himself without leave from" and "without leave," of the excepted words not guilty, of the substituted words guilty.

Of the charge, not guilty but guilty of violation of the sixty-first article of war.

[NOTE.—For a discussion of the incidental power of appointing and confirming authorities to approve and confirm a finding of guilty of a lesser included offense see Chap. XVI, pars. 377 and 379.]

299. Guilty with exceptions and substitutions.—It is a peculiarity of the finding at military law that a court-martial, where of opinion that any portion of the allegations in a specification is not proved, is authorized to find the accused guilty of a part of a specification only, *excepting* the remainder; or, in finding him guilty of the whole (or any part), to *substitute* correct words or allegations in the place of such as are shown by the evidence to be incorrect. And provided the exceptions or substitutions leave the specification still appropriate to the charge and legally sufficient thereunder, the court may then properly find the accused guilty of the charge in the usual manner. Familiar instances of the exercise of the authority to *except* and *substitute* in a finding of guilty occur in cases where, in the specification, the name or rank of the accused or some other person is erroneously designated, or there is an erroneous averment of time or place, or a mistaken date, or an incorrect statement as to amount, quantity,

quality, or other particular, of funds or other property. But the authority to find guilty of a lesser included offense, or otherwise to make exceptions and substitutions in the findings, does not justify the conviction of the accused of an offense entirely separate and distinct in its nature from that charged, thus "selling" and "through neglect losing" property are separate offenses though each is a violation of A. W. 84.

300. Substitution of general for specific article in the charge.—Another legal and now common form of finding is where an accused is charged with an offense, made punishable by an article of war other than the ninety-sixth (as for instance the ninety-fifth article), and the court is of the opinion that, while the material allegations in the specification are proved, they do not fully sustain the charge as laid, but do clearly constitute a violation of the ninety-sixth article of war. In this case the accused may properly be found guilty of the specification and not guilty of the charge, but guilty of "violation of the ninety-sixth article of war." It should be remembered, however, that the court can not in its findings legally substitute the ninety-sixth article of war for any other, unless the proof fails to substantiate the specification under the original charge.

301. Joint charges.—Where joint charges are tried, if one or more of the accused persons is acquitted and one or more is convicted, the findings should by proper exceptions eliminate the words showing that the acquitted person or persons was a joint participant in the offense, and should expressly acquit those persons whom it finds not guilty.

302. Reasons for findings.—A court-martial may spread upon the record of trial a brief statement of reasons upon which its findings are based. In many cases such a statement will aid the reviewing authority in determining the action to be taken by him.

303. Findings where no criminality is involved.—A finding of "guilty without criminality" is not consistent and should not be made. If the accused is found to have committed the act and done the things alleged in the specification, but without the guilty intent or knowledge essential to constitute the offense, the court should, as to the specification, find the accused "not guilty."

304. Findings under charge of drunkenness.—A person "under the influence of intoxicating liquor" or "intoxicated" is "drunk." Therefore, under the eighty-fifth article of war, in charging that the accused was found "drunk" the word "drunk" will be used. So in charging other offenses involving drunkenness no other word or phrase will be used as a substitute for "drunk." Under such charges the court should not in its findings substitute such phrases as "under the influence of intoxicating liquor" and "intoxicated" for "drunk."

305. Recording of finding or sentence by reporter.—A court-martial, member of court, or judge advocate can not, of course, lawfully communicate to a reporter or clerk, by allowing him to record the same or otherwise, the finding or sentence of the court. But the fact that the finding or sentence or both may have been made known to a reporter or clerk can not affect the legality of its proceedings or sentence. (Digest, p. 558, XIV, E, 7, g.)

SECTION III.

PREVIOUS CONVICTIONS.

306. Procedure as to previous convictions.—Courts-martial will, in the case of a soldier, after a finding of guilty, be opened for the purpose of ascertaining whether evidence of previous convictions has been referred to the court by the appointing authority, and if so, of receiving it. The introduction and use of evidence of previous convictions will be limited to that pertaining to convictions by courts-martial of an offense or offenses commtted by the accused during the current enlistment and within one year next preceding the commission of any of the offenses of which he stands convicted before the court. These convictions may be proved only by the records of previous trials and convictions or by duly authenticated copies of such records, or by duly authenticated copies of orders promulgating such trials and convictions. A copy of such a record or order promulgating such a trial and conviction is duly authenticated when certified as an official copy by the commander having custody of the original, or by his adjutant, or by the impressed stamp of his office or headquarters. The proper evidence of a previous conviction by summary court is a copy of the summary court record furnished to the company or other commander or one authenticated as an official copy by the signature of the commanding officer or his adjutant, or by the impressed stamp of the headquarters having custody of the original record and furnished for the purpose. In a trial by general court-martial, when the proof is the copy furnished to the company or other commander it will be returned to him and a certified copy of it attached to the record. The evidence of previous convictions referred to a special or summary court will, after trial, be returned to the appointing authority and will, after action by the latter on the case, be returned to the company or other command to which it pertains. (*C. M. C. M., No. 1.*)

307. Character of previous convictions.—By "previous conviction" is meant a previous conviction by a court-martial where the sentence has been approved by competent authority. A previous conviction by a civil or naval court, an acquittal, or an approved conviction by a court-martial that has been set aside as illegal is not a "previous conviction" as the phrase is used here. Previous convictions are not

limited to those for offenses similar to the one for which the accused is on trial. The object is to see if the accused is an old offender and therefore less entitled to leniency than if on trial for his first offense. This information might not be fully obtained if evidence of previous convictions of similar offenses only were laid before the court. The consideration of previous convictions has no bearing upon the question of guilt of the particular charge on trial, but only upon the amount and kind of punishment to be awarded. They are not considered until after the findings have been reached.

SECTION IV.

SENTENCES.

308. Voting.—After the findings have been determined upon and resulted in a conviction upon the charge or some one at least of the charges when there are several, or in a conviction of a lesser offense included in the one charged, and, in the case of a soldier, the evidence of previous convictions, if any, have been introduced, the court proceeds to adjudge the sentence. In voting, the thirty-first article of war requires that the junior in rank shall vote first, and the votes are therefore taken in the inverse order of rank. Those members desiring to propose a sentence usually write it on a slip of paper and hand it to the president. The president reads the proposed sentences to the court and the members vote on them in order, beginning with the lightest, until a majority present, or, in cases where the death penalty is mandatory, two-thirds of the members of the general court-martial agree upon a sentence. (See A. W. 43.) Even in a case where the punishment is fixed, as, for instance, under the eighty-second article where the punishment for lurking or acting as a spy is death, and under the ninety-fifth article where the punishment is dismissal, the members must by vote impose this punishment. All the members of the court, those who voted for an acquittal equally with those who voted for conviction, should vote for some sentence.

309. Mandatory and discretionary punishments.—Punishment, under the Articles of War, is either mandatory, that is, a certain punishment is prescribed by the terms of the article, or is discretionary, that is, it is left to the discretion of the court-martial. If the punishment is prescribed in the article violated, any other punishment than that prescribed is illegal. For instance the punishment imposed by a court for a violation of the ninety-fifth article of war must be dismissal, it can not be less and it can not be more, though a conviction under other articles at the same trial might authorize the inclusion of other forms of punishment in the sentence. Before pronouncing sentence, the court should, therefore, examine the article

violated to see what punishment may be legally awarded. As to discretionary punishments the President, by virtue of an act of Congress, has by executive order prescribed maximum limits of punishment for certain offenses when committed by soldiers. The latest order is found in Chapter XIII, par. 349. If the punishment is discretionary the court, before proceeding to award a punishment, will ascertain whether a limit is fixed in the order, and if no limit is fixed the court may impose any punishment that is sanctioned by the custom of the service.

[NOTE.—See mandatory and discretionary punishment, Chap. IV, Sec. II, par. 40.]

310. Sentences for officers.—For officers the legal sentences by court-martial, depending on the nature of the offense, include death, dismissal with confinement at hard labor, dismissal, loss of rank, suspension from rank, command, or duty, with or without loss of pay or part of pay, fine or forfeiture of pay, confinement to limits of post or reservation, reprimand, and admonition.

[NOTE.—Immediately upon the promulgation of any sentence of court-martial in the case of a commissioned officer involving suspension from rank and command, confinement, reduction in lineal rank, or any other material change in the officer's status, the commander who has authority to approve such sentence and carry it into execution will advise The Adjutant General of the Army, by telegraph, of the sentence imposed as approved or mitigated and the date of promulgation thereof. (G. O. No. 6, War Dept., 1910.).]

311. Sentences for soldiers.—For soldiers, the legal sentences, depending on the nature of the offense and the jurisdiction of the court, include death, dishonorable discharge, confinement at hard labor, hard labor without confinement, forfeiture of pay, detention of pay, and reprimand; for noncommissioned officers, reduction to the ranks; for privates, first class, reduction to second-class privates and privates; for cooks of the Quartermaster Corps (where sentence is imposed by a general court-martial) reduction to the ranks; and for those holding a certificate of eligibility to promotion, deprivation of all rights and privileges arising from such a certificate.

[NOTE.—1. Confinement without hard labor should never be imposed. 2. For forms for sentences, see Appendix 9.]

312. Dismissal.—Under the article of war which prescribes the sentence of dismissal upon conviction, no punishment in addition to dismissal is authorized. Therefore no punishment in addition to dismissal can legally be imposed upon conviction of an offense under the ninety-fifth article of war alone.

[NOTE.—For statement by whom a sentence of dismissal or dishonorable discharge imposed by National Guard courts-martial, not in the service of the United States, must be approved, see sec. 107, act of June 3, 1916; 39 Stat., 166; Appendix 2, *post.*]

313. Loss of rank.—Loss of rank is accomplished by a sentence directing that an accused be placed at the foot of the list of officers of his

grade and arm, or that he remain at the foot of such list until he shall have lost a certain number of files, or for a certain length of time, or that he lose a certain number of files, or that his name shall appear in the lineal list of officers of his arm next below that of a certain officer named.

314. Suspension from rank.—Suspension from rank includes suspension from command. It deprives an officer of the right to promotion to a vacancy in a higher grade occurring pending the term of suspension and which he would have been entitled to receive by virtue of seniority had he not been suspended. It does not, however, deprive the officer of the right to rise in files in his grade. Suspension from rank also makes an officer ineligible to sit upon a court-martial, court of inquiry, or military board, and deprives him of privileges that depend on rank, such as the selection of quarters.

315. Suspension from command.—This punishment merely deprives the officer of authority to exercise his proper military command and, consequently, of his right to give orders to or exact obedience from his juniors or perform any other duties that go with the exercise of command. It does not affect his right of promotion or any military rights or privileges other than those attaching to command. It is therefore not an appropriate punishment for a staff officer.

316. Suspension from duty.—Suspension from duty is practically equivalent to a sentence of suspension from command. It is appropriate in the case of an officer holding a position involving the performance of administrative duty, as distinguished from actual military command, as in the case of officers of the staff.

317. Fine.—A fine is distinguished from a forfeiture in that it is a punishment which imposes a pecuniary liability in general, not necessarily affecting pay. It is especially recognized as a form of punishment in the ninety-fourth article of war. It is usually accompanied in the sentence by a provision, in order to enforce collection, that the person fined shall be imprisoned until the fine is paid or until a fixed portion of time considered as an equivalent punishment has expired. Fines as well as forfeitures accrue to the United States and can not be imposed or collected for the benefit of any individual.

318. Reprimand.—This sentence is usually awarded to officers only and for minor offenses where a mild penalty is to be inflicted. In general it is not appropriate for enlisted men, but is authorized in the cases of noncommissioned officers. The proper authority to administer the reprimand is the reviewing authority, and he may vary it in severity or mildness, according to his views of the case.

319. Confinement to limits of post or reservation.—This form of punishment is rather a deprivation of a privilege than confinement. Where it is imposed on an officer on duty with troops it is customary

to so qualify it as to enable him to take part in maneuvers, practice marches, and perform other duties connected with his command.

320. Dishonorable discharge.—A dishonorable discharge can be imposed only pursuant to a sentence of a general court-martial. The discharge should be dated as of the day on which the order promulgating such approval is received at the post where the soldier is held. A sentence adjudging a dishonorable discharge to take effect at such period during a term of confinement as may be designated by the reviewing authority is illegal.

321. Suspension of dishonorable discharge.—Members of a court-martial may properly recommend, in a communication made separately but forwarded to the reviewing authority with the record, that sentence of dishonorable discharge be suspended. (See par. 332.)

322. Confinement at hard labor.—In the case of officers this punishment is imposed only in connection with a sentence of dismissal. Where "hard labor" is intended, it should be stated in the sentence, but the omission of these words will not prevent such punishment being required where it is authorized in the maximum-punishment order. (See A. W. 37.)

[NOTE.—Chap. XVI, Sec. I, pars. 396–398, state the rules as to whether a post, the United States Disciplinary Barracks or one of its branches, or a penitentiary shall be designated as the place of confinement.]

323. Hard labor without confinement.—This punishment is regulated by the provisions of the Executive order fixing the maximum limits of punishment, Chapter XIII, Section VI, par. 349.

324. Forfeiture of pay and allowances.—Pay and allowances can not be forfeited in a sentence by implication. If the court intends to forfeit pay or pay and allowances, the penalty of forfeiture should be adjudged in express terms in the sentence. No other punishment imposable by court-martial—not even a sentence of death, dismissal, suspension, dishonorable discharge, or imprisonment—involves of itself a forfeiture or deprivation of any part of the pay or allowances due the party at the time of the approval or taking effect of the sentence. It is not customary to provide in sentences for a forfeiture of allowances unless the sentence also imposes a dishonorable discharge and forfeiture of pay. A sentence of forfeiture of a certain number of days' pay, or two-thirds of a soldier's pay for a certain period does not forfeit extra-duty pay. (Digest, p. 544, XII, B, 3, e (1); Bul. 18, War Dept., 1915, pp. 8, 9.)

325. Courts can not stop pay in favor of Government or an individual.—A court-martial can direct a forfeiture only in favor of the United States, and can not assign the pay of a soldier to any other person; nor can a soldier be required to receipt for money paid without his consent. A sentence can not appropriate, or stop pay for the reimbursement or benefit of the Government or a Government agency,

such as a company fund, post fund, hospital fund, nor of an *individual* civil or military, however justly the same may be due him, either for money borrowed, stolen, or embezzled by the accused or to satisfy any other pecuniary liability of the accused, whether in the nature of debt or damages. The "stoppage" of pay to reimburse the Government or a Government agency on account of losses for which officers and enlisted men are responsible is purely an administrative matter with which courts-martial have nothing to do. Sentences providing that a soldier shall be dishonorably discharged, forfeiting all pay and allowances due or to become due, "except such amounts as may be due the post exchange, Fort ———, and the company fund, Company ———, ——— Infantry," in no way hasten or facilitate the settlement of the debts due the exchange or company fund. Such matters in a sentence are mere surplusage.

326. Forfeiture of deposits.—Deposits of soldiers and interest thereon are forfeited by desertion, but the forfeiture can not be imposed by sentence of a court-martial. They are exempt from liability to meet a sentence of a court-martial imposing forfeiture of pay or allowances. A sentence that a soldier shall deposit a certain part of his pay is illegal. (Digest, p. 547, XII, B, 4, c.)

327. Reduction of noncommissioned officer.—This punishment is regulated by the provisions of the Executive order fixing maximum limits of punishment, Chapter XIII, Section VI, par. 349.

328. Detention of pay.—This punishment was revived by the Executive order of September 5, 1914, fixing the maximum limits of punishment, and is regulated by the provisions of the Executive order contained in Chapter XIII, Section VI, par. 349.

329. When reward for apprehending deserter not to be stopped.—If a soldier be brought to trial under a charge of desertion and acquitted, or convicted of absence without leave only, any amount paid as a reward for his arrest will not be stopped against his pay, and a sentence providing for such a stoppage is not authorized.

330. Sentences of general prisoners.—Courts-martial in imposing sentences upon general prisoners are restricted to imposing additional confinement at hard labor to be served upon the completion or termination of their existing sentences, and will not interfere with the manner of executing such sentences by prescribing loss of good-conduct time, solitary confinement, or confinement on bread-and-water diet, leaving all such punishments to be imposed by the commanding officer as the ordinary means of enforcing discipline.

331. Reasons for sentence.—A court-martial may spread upon the record of trial a brief statement of reasons upon which its sentence is based. In many cases such a statement will aid the reviewing authority in determining the action to be taken by him.

332. Recommendations to clemency.—When a court-martial, or any member thereof, desires to submit a recommendation to clemency, including a recommendation for the suspension of the whole or of any part of the sentence imposed by the court, such recommendation will be signed by each member of the court desiring to participate therein. The communication carrying the recommendation will include a statement in succinct form of the reasons upon which the recommendation is based and will be appended to the record of trial. (See par. 357 (*d*).)

332a. Report to commanding officer of result of trial—When made.—When an enlisted man has been tried by a general court-martial and acquitted, or has been convicted and the sentence does not include dishonorable discharge or confinement, the judge advocate will at once notify the commanding officer in writing, direct, of the fact that the prisoner has not been sentenced to dishonorable discharge or confinement, whereupon the commanding officer will at once release the prisoner from confinement or arrest, provided he is not awaiting trial or result of trial under other charges. (*C. M. C. M., No. 1.*)

CHAPTER XIII.

COURTS-MARTIAL—PUNISHMENTS.

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SECTION I.

DISCIPLINARY POWER OF COMMANDING OFFICER.

333. Authority for.—While courts-martial are the judicial machinery provided by law for the trial of military offenses, the law also recognizes that the legal power of command, when wisely and justly exercised to that end, is a powerful agency for the maintenance of discipline. Courts-martial and the disciplinary powers of commanding officers have their respective fields in which they most effectually function. The tendency, however, is to resort unnecessarily to courts-martial. To invoke court-martial jurisdiction rather than to exercise this power of command in matters to which it is peculiarly applicable and effective, is to choose the wrong instrument, disturb unnecessarily military functions, injure rather than maintain discipline, and fail to exercise an authority the use of which develops and increases the capacity for command.

Legal sanction is now given to the exercise of such disciplinary power by the following article of war:

"ART. 104. Under such regulations as the President may prescribe, and which he may from time to time revoke, alter, or add to, the commanding officer of any detachment, company, or higher command

may, for minor offenses not denied by the accused, impose disciplinary punishments upon persons of his command without the intervention of a court-martial, unless the accused demands trial by court-martial.

The disciplinary punishments authorized by this article may include admonition, reprimand, withholding of privileges, extra fatigue, and restriction to certain specified limits, but shall not include forfeiture of pay or confinement under guard. A person punished under authority of this article who deems his punishment unjust or disproportionate to the offense may, through the proper channel, appeal to the next superior authority, but may in the meantime be required to undergo the punishment adjudged. The commanding officer who imposes the punishment, his successor in command, and superior authority shall have power to mitigate or remit any unexecuted portion of the punishment. The imposition and enforcement of disciplinary punishment under authority of this article for any act or omission shall not be a bar to trial by court-martial for a crime or offense growing out of the same act or omission; but the fact that a disciplinary punishment has been enforced may be shown by the accused upon trial, and when so shown shall be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty."

While commanding officers should always use their utmost influence to prevent breaches of discipline and compose conditions likely to give rise to such breaches, they should also impose and enforce the disciplinary punishment authorized by the above article. This authority, involving the power, judgment, and discretion of the commander, can not be delegated to or in any manner participated in by others, but must be exercised by the commander upon his own judgment and in strict compliance with the article and the regulations prescribed by the President pursuant thereto. Accordingly, the commanding officer of a detachment, company, or higher command will usually dispose of, and may award disciplinary punishment for, any offense committed by any enlisted man of his command which would ordinarily be disposed of by summary court-martial, when the accused does not deny that he committed the offense and does not demand trial by court-martial before the commanding officer has made and announced his decision in the case.

334. Record of punishment.—For each punishment awarded, the commander will cause a brief record to be made showing—

(*a*) Name of accused.

(*b*) Brief statement of offense, including time and place.

(*c*) Statement as to whether or not accused demanded trial by court-martial. To be effective such demand must be made before award of punishment by commanding officer.

(*d*) Disposition of case, with date and punishment awarded, if any.

(*e*) Whether or not appeal was made to higher authority.

(*f*) Decision of higher authority on appeal.

(*g*) Whether or not accused was required to serve punishment pending appeal.

335. **Appeals.**—If an appeal is made to the next superior authority it shall be in writing through the immediate commander awarding the punishment or his successor, who will immediately forward it to the superior with a copy of the record. An appeal shall consist of a brief statement signed by the accused, giving his reasons for regarding the punishment as unjust or disproportionate, and shall be accompanied by a like brief statement by the commander in support of the punishment awarded. The superior will, in passing upon the appeal, hear no witnesses and will consider no statements other than those forwarded with the appeal, but will be limited strictly to the consideration of the punishment awarded. He will be reluctant to disturb the award of punishment, but when justice clearly requires such action he may modify, set aside, or even increase the punishment awarded, but in no case will he award a different kind of punishment. After having considered the appeal he will return the record to the commanding officer from whom received, with a statement of his disposition of the case.

336. **Not limited to soldiers.**—The power is not limited in its application, either in law or principle, to enlisted men, but may with propriety be applied as well to commissioned officers, especially those of junior grades. Obviously in the case of officers the occasion for such action will be less frequent, the variety of punishment available more restricted, and the selection of the most effectual punishment more perplexing, but when the best interests of discipline require such action it shall be taken with firmness and in no wise restrained by an unwarranted regard for the commissioned grade of the offender.

If the accused demands a court-martial, steps will promptly be taken to bring him to trial and notation of the demand will appear upon the charges.

SECTION II.

CONFINEMENT IN A PENITENTIARY.

337. **When authorized.**—The forty-second article of war follows the rules of the Federal Penal Code and practice respecting the imposition of penitentiary confinement in so far as they can be applied to court-martial procedure. Under the Federal Penal Code any offense is a felony which is *punishable* under the code or other statute of the United States by confinement in excess of one year. But

no person may be *confined in a penitentiary* uuless the *punishment actually adjudged* for an offense of which he has been convicted exceeds one year. Under civil procedure it is not permissible to join in a single indictment and trial offenses of a different nature. As a matter of practice, also, confinement is never ordered to be executed in a penitentiary unless among the offenses upon which the sentence is awarded is found a felony; that is to say, an offense of a civil nature, separately punishable by confinement to exceed one year. The practical result is that no person is confined in a penitentiary *unless* both of the following conditions subsist:

(1) The confinement that *could lawfully be awarded* as punishment of some one of the offenses of which he stands convicted (if that conviction stood alone) would exceed one year.

(2) The confinement *actually adjudged* exceeds one year.

The ninety-third and ninety-sixth articles of war now confer upon courts-martial jurisdiction to try all crimes and offenses, not capital, of which persons subject to military law may be guilty. Under the military practice, dissimilar offenses *may* be joined in the same set of charges; convictions may be had on one set of charges joining crimes of a civil nature with purely military offenses, and a single sentence may be adjudged on all the convictions. Also, there are certain purely military offenses which are by statute made punishable by confinement in a penitentiary, regardless of the term of confinement imposed. Notwithstanding these departures from the practice of Federal courts, the jurisdiction granted to courts-martial to punish offenses of a civil nature ought not to be exercised with greater harshness than is practiced under the criminal jurisdiction of United States courts, and the analogies with the penal rules of those courts ought carefully to be maintained. The forty-second article of war and the following rules of practice which result from that article preserve these analogies as far as they can be preserved under court-martial procedure.

338. Classes of sentences to be executed in a penitentiary.—Sentences of the following classes may be executed in a penitentiary:

Class 1: Commutation of death sentence. Any confinement, whether more or less than a year, awarded by way of commutation of a death sentence, may be executed in a penitentiary; and this is true whether the offense for which the sentence of death was awarded was of a military or of a civil nature, and whether the sentence was awarded on conviction of a capital charge alone or on conviction on a capital charge coupled with conviction on other charges not capital.

Class 2: Military offenses. A sentence of confinement awarded upon conviction of one or more of the military offenses enumerated in this class may be executed in a penitentiary, regardless of the

length of the sentence imposed, but, in practice, a penitentiary should not be designated unless the *confinement adjudged* exceeds one year. However, if a conviction is had on several offenses, either military or civil in nature, one of which is included in this class, and the sentence adjudged on all the convictions together exceeds one year, the confinement may be executed in a penitentiary. The military offenses comprised in this class are:

(*a*) Desertion in time of war.

(*b*) Repeated desertion in time of peace.

(*c*) Mutiny.

Class 3: Offenses of a civil nature. A sentence *exceeding one year's confinement*, awarded, either on conviction of any one or more of the several offenses of a civil nature described below, or on conviction of any one or more of the several offenses of a civil nature described below, coupled with a conviction or convictions of one or more military offenses, may be executed in a penitentiary, *if* any one of the several offenses of a civil nature standing alone would be punishable by confinement exceeding one year by the limits of punishment order, or, if not covered by said order, then by the law denouncing the offense, or by any other Federal statute.

The civil offenses contemplated in class 3 are:

(*a*) An act or omission specified and denounced as an offense in the Penal Code of the United States.

(*b*) An act or omission specified and denounced as an offense in any other statute of the United States. This heading has reference particularly to penal provisions not properly separable from the administrative laws of the several branches and departments of government, and not included in the Penal Code. Such offenses will rarely be encountered in court-martial practice.

(*c*) An act or omission committed or omitted in any place over which the United States has exclusive jurisdiction as provided in the third paragraph of section 272, Penal Code of the United States, where such act is recognized as an offense by the law of the State, Territory, or District in which such place is situate, and when such act is not specifically denounced in the laws of Congress, but is adopted by section 289 of said code. Such offenses, known to local law and not specifically provided for by Federal law, will constitute a small class, infrequently encountered.

(*d*) An act or omission recognized as an offense at the common law as the same exists in the District of Columbia, wherever committed or omitted. The offenses under this head that may be encountered in court-martial practice include the offense of sodomy.

339. Authority for penitentiary sentence to be cited.—In each case tried by general court-martial in which a penitentiary is designated as the place of confinement of the person tried, the record of trial, when for-

warded to the Judge Advocate General of the Army, will be accompanied by a signed statement indicating the law or laws authorizing the confinement in a penitentiary of the person sentenced.

In each case tried by general court-martial in which the confinement of the offender in a penitentiary is authorized by law, but in which a place other than a penitentiary is designated as the place of confinement, the record of trial, when forwarded to the Judge Advocate General of the Army, will be accompanied by a signed statement indicating the law authorizing the confinement in a penitentiary of the person sentenced and the reasons, briefly expressed, for designating a place other than a penitentiary, instead of a penitentiary, as the place of confinement in the particular case.

If the law relied upon as authorizing confinement in a penitentiary be a Federal statute an accurate citation will be regarded as sufficient to indicate the law, but if any other law is relied upon as authorizing such confinement, the law will be quoted in full in the required statement.

Section III.

WAR DEPARTMENT POLICY REGARDING PUNISHMENTS.

340. Desertion.—The policy of the War Department respecting punishment for desertion was announced in General Orders, No. 77, War Department, June 10, 1911. Corrective confinement and forfeiture were suggested in cases of inexperienced soldiers who by surrender manifested a disposition to atone for their offenses. The number so punished and saved to the service has so increased each year that this policy has been enforced with fairly satisfactory results. In addition a limited number of this class of offenders has been restored to duty without trial under the provisions of A. R. 131.

Since that order was issued important changes have been introduced in our military penology. Purely military offenders serving sentences in the United States Disciplinary Barracks at Fort Leavenworth and its branches may be restored to an honorable status and complete their enlistment. By the act of August 22, 1912 (37 Stat., 356), reenlistment of this class of offenders is authorized with the approval, in each case, of the Secretary of War. Under the provisions of the act of April 27, 1914 (38 Stat., 354), dishonorable discharge may be suspended with a view to restoration to duty by remission thereof should the conduct of the offender warrant. There are now additional means of saving men to the colors—men whose offenses are thoughtless acts due to youth or inexperience or committed under some special stress, and for these reasons have in them less of the element of culpability. Supplementing these methods is the establish-

ment of disciplinary organizations at the United States Disciplinary Barracks where the offenders of this class who desire reenlistment or restoration may receive an intensive practical training to fit them for efficient service from the moment of rejoining. It is confidently believed that men restored in this way will make better soldiers than those restored by the old methods, viz, without trial under A. R. 131 or with trial and a short period of corrective punishment.

These old methods may be continued in the limited number of cases where there are good grounds for belief that a soldier restored by such methods will creditably complete his enlistment period, but all doubtful cases should be sent before a court competent to adjudge dishonorable discharge and the longer periods of confinement, to the end that advantage may be taken of the more effective methods of reformation and training by hard labor and intensive practical military instruction now provided at the United States Disciplinary Barracks. These periods of confinement are graduated so as to prevent inequalities of punishment for like degrees of culpability and are sufficient, it is believed, to meet the ends of punishment where restoration to duty is not in contemplation. Where restoration is in contemplation, as in case of purely military offenders, including deserters, the period of confinement imposed is, under the new policy, in practical effect the maximum of an indeterminate sentence. In other words, the period for which the offender is held depends entirely upon himself. With good conduct and proper progress toward reform evidencing efficiency in training and fitness to resume service relations the sentence of confinement terminates and the honorable status of duty with the colors is resumed.

While it is the effect of this policy to mitigate the condition of the peace deserter who desires to redeem his record and earn an honorable restoration to duty with the colors, it carries no substantial mitigation as to other classes of deserters. Experience has not thus far demonstrated the wisdom of any change in the policy of severe punishment for this latter class. An engagement for military service has little in common with an ordinary private contract for personal service, and the fact that an individual may abandon such a contract with only minor consequences to himself furnishes no suggestion that a corresponding rule may be properly adopted in the Army. Nor does the fact that the early requirement of the common law that a call to civil office or civil employment under the Government could not be disregarded by the citizen, nor the obligations of such office or employment be laid down at his will, no longer obtains, furnish any such suggestion. An engagement for military service creates a special status, and many obligations flow from that status which are not obligations of the citizen in the civil service of the Government or under a private contract for personal service. Other closely re-

lated considerations inherent in the nature of military service support this view. The Army is an emergent arm of the public service which the Nation holds ready for a time of great peril. Military service is an obligation which every citizen owes the Government. It is settled law that such service may be compelled, if necessary, by draft. Nor is the obligation of the soldier who volunteers for a fixed period different from that of the drafted soldier. By his act of volunteering he consecrates himself to the military service. His engagement, supported by an oath of allegiance, is that the Nation may depend upon him for such service during the fixed period, whatever may be the emergency. When this engagement is breached a high obligation to the Nation is disregarded, a solemn oath of allegiance is violated, and the Government is defrauded in the amount of its outlay incident to inducting the soldier into the military service, training, clothing, and caring for him while he remains in that service, and transporting him to the station from which he deserts. Desertion is thus seen to be, not simply a breach of contract for personal service, but a grave crime against the Government; in time of war perhaps the gravest that a soldier can commit, and at such times punishable with death. These facts furnish ample justification for a continuance of the policy of severe punishment for the offense of desertion in time of peace, subject only to the qualification that it should not be severe to the degree of barring an honorable restoration to duty of the thoughtless, young, or inexperienced offenders who desert and who, on return, manifest a desire to atone for their desertions and qualify themselves in character and training for such restoration by service in the disciplinary battalions and companies now organized at the United States Disciplinary Barracks.

341. Segregation of prisoners.—It is the policy of the War Department to separate, so far as practicable, general prisoners convicted of offenses punishable by penitentiary confinement from general prisoners convicted of purely military offenses or of misdemeanors in connection with purely military offenses. In furtherance of this policy, reviewing authorities will designate a penitentiary as the place of confinement of general prisoners sentenced to be confined for more than one year according to the rules laid down in Section II, *supra*, except in individual cases in which the proved circumstances show that the holding of the prisoners so convicted in barracks associations with misdemeanants and military offenders will not be to the detriment of the latter. Instructions will be issued from time to time by the War Department to commanders having general court-martial jurisdiction regarding the place of confine-

ment for general prisoners sentenced to confinement in penitentiaries. (*C. M. C. M., No. 1.*)

342. Adaptation of punishments.—In cases where the punishment is discretionary the best interests of the service and of society demand thoughtful application of the following principles: That because of the effect of confinement upon the soldier's self-respect confinement is not to be ordered when the interests of the service permit it to be avoided; that a man against whom there is no evidence of previous convictions for the same or similar offenses should be punished less severely than one who has offended repeatedly; that the presence or absence of extenuating or aggravating circumstances should be taken into consideration in determining the measure of punishment in any case; that the maximum limits of punishment authorized are to be applied only in cases in which, from the nature and circumstances of the offense and the general conduct of the offender, severe punishment appears to be necessary to meet the ends of discipline; and that in adjudging punishment the court should take into consideration the individual characteristics of the accused, with a view to determining the nature of the punishment best suited to produce the desired results in the case in question, as the individual factor in one case may be such that punishment of one kind would serve the ends of discipline, while in another case punishment of a different kind would be required. As an instance of the necessity for adapting punishment to the particular case under consideration, it is to be noted that prior experience with detention of pay by sentence of court-martial indicates that this form of punishment, while not generally applicable, was nevertheless found to be an effective means of restraint and discipline for a considerable number of offenders.

343. Relative severity of punishments.—The usual punishments imposed upon soldiers are the following, beginning with the least severe:

(1) Detention of pay,
(2) Forfeiture of pay,
(3) Reduction,
(4) Hard labor without confinement,
(5) Confinement at hard labor, and
(6) Dishonorable discharge.

In the absence of evidence of two or more previous convictions, a minor offense, the nature of which appears to demand punishment by hard labor, should ordinarily be punished by hard labor without confinement, rather than by confinement at hard labor. For offenses properly punishable by detention of pay, forfeiture of pay, reduc-

tion, or hard labor without confinement, those forms of punishment should, as a rule, be resorted to before confinement at hard labor is imposed.

SECTION IV.

PROHIBITED PUNISHMENTS.

344. By statute.—Punishment by flogging, or by branding, marking, or tattooing on the body is prohibited. (A. W. 41.)

345. By custom and regulations.—Many punishments formerly sanctioned have now, under a more enlightened spirit of penology, become so obsolete as to be effectually prohibited by custom without the necessity of regulations; among these, are carrying a loaded knapsack, wearing irons (both handcuffs and leg irons—these are now used only in exceptional cases for the purpose of preventing escape and not as a punishment), shaving the head, placarding, pillory, stocks, and tying up by the thumbs. To impose *military duty in any form as a punishment* must tend to degrade it, to the prejudice of the best interests of the service; such punishments, therefore, as imposing tours of guard duty or requiring a soldier to sound all calls at the post for a certain period, are forbidden. Solitary confinement on a bread and water diet and the placing of a prisoner in irons are regarded as means of enforcing prison discipline. They will not be imposed as a punishment by a court-martial.

SECTION V.

DEATH—COWARDICE—FRAUD.

346. Death penalty.—No person shall, by general court-martial, be convicted of an offense for which the death penalty is made mandatory by law, nor sentenced to suffer death, except by the concurrence of two-thirds of the members of said court-martial and for an offense in these articles expressly made punishable by death. (A. W. 43.) A court-martial, in imposing the sentence of death, should not designate the time and place for its execution, such designation not being within its province, but pertaining to that of the reviewing or confirming authority. If it does so designate, this part of the sentence may be disregarded, and a different time and place be fixed by the reviewing or confirming authority. (Digest, p. 165, XCVI, B.) If the designated day passes without execution, the same authority, or his superior, may name another day. Death by hanging is considered more ignominious than death by shooting and is the usual method of execution designated in the case of spies, of persons guilty of murder in connection with mutiny, or sometimes for desertion in the face of the enemy; but in case of a purely military offense, as sleeping on

post, such sentence when imposed is usually "to be shot to death with musketry." Hanging is the proper method of executing a death sentence when imposed for violation of A. W. 92. For the sake of example and to deter others from committing like offenses the death sentence may, when deemed advisable, be executed in the presence of the troops of the command.

347. Cowardice—Fraud—Accessory penalty.—When an officer is dismissed from the service for cowardice or fraud, the crime, punishment, name, and place of abode of the delinquent shall be published in the newspapers in and about the camp and in the State from which the offender came or where he usually resides; and after such publication it shall be scandalous for an officer to associate with him. (A. W. 44.) The terms "cowardice" and "fraud" as employed in this article refer mainly to the offenses made punishable by A. W. 75 and 94. With these, however, may be regarded as included all offenses in which fraud or cowardice is *necessarily involved*, though the same be not expressed in terms in the charge or specification. (Digest, p. 166, C, A.) The publication throughout the United States in press dispatches of "the crime, punishment, name, and place of abode" of the accused is a sufficient compliance with the article. (See Digest, p. 167, C, B.)

SECTION VI.

MAXIMUM LIMITS.

348. By whom prescribed.—Whenever the punishment for a crime or offense made punishable by these articles is left to the discretion of the court-martial, the punishment shall not, in time of peace, exceed such limit or limits as the President may from time to time prescribe. (A. W. 45.)

349. Executive order.—The following Executive order becomes operative on March 1, 1917, as to offenses committed on and after that date and as to criminal acts, committed prior to that date, whose maximum punishment was not prescribed in the Executive order of September 5, 1914. The Executive order of September 5, 1914, published in General Orders, No. 70, War Department, 1914, prescribing limits of punishment, remains operative as to offenses committed before March 1, 1917, except as to criminal acts whose maximum punishment has been decreased by this order, which will not be followed by severer punishment than is hereinafter prescribed.

EXECUTIVE ORDER.

Under authority of an act of Congress approved September 27, 1890 (26 Stat., 491), as reenacted in article 45 of section 3 of an act of Congress approved August 29, 1916 (39 Stat., 657), the following maximum limits, in time of peace, of punishment of soldiers are prescribed:

ARTICLE I.

Article of war.	Offenses.	Punishments.					
		Dishonorable discharge, forfeiture of all pay and allowances due and to become due.	Confinement at hard labor.			Forfeiture of two-thirds pay per month.	Forfeiture of pay
			Years.	Months.	Days.	Months.	Days.
54	Enlistment, fraudulent:						
	Procured by means of willful misrepresentation or concealment of a fact in regard to a prior enlistment or discharge, or in regard to a conviction of a civil or military offense, or in regard to imprisonment under sentence of a court.	Yes	1				
	Other cases of	Yes		6			
58	Attempting to desert:						
	After not more than six months in service.	Yes		6			
	After more than six months in service	Yes	1				
	In the execution of a conspiracy or in the presence of an unlawful assemblage which the troops may be opposing.	Yes	3				
	Desertion:						
	Terminated by apprehension—						
	Not more than 6 months in service at time of desertion.	Yes	1½				
	More than 6 months in service at time of desertion.	Yes	2½				
	Terminated by surrender—						
	After absence of not more than 30 days.	Yes	1				
	After absence of more than 30 days	Yes	1½				
	In the execution of a conspiracy or in the presence of an unlawful assemblage which the troops may be opposing.	Yes	5				
59	Advising another to desert			6		6	
	Assisting knowingly, or persuading another to desert	Yes	1				
61	Absence without leave:						
	From command, quarters, station, or camp—						
	For not more than 30 days, for each day or fraction of a day of absence.				3		2
	For more than 30 days	Yes		6			
	From guard—						
	For not more than 1 hour						15
	For more than 1 hour			3		3	
	Failing to repair at the fixed time to the properly appointed place of assembly for, or place for:						
	Athletic exercise						
	Drill						
	Fatigue						
	Field exercise						
	Gallery practice						
	Guard mounting						
	Horse exercise						
	Inspection						3
	Instruction						
	Muster						
	Parade						
	Prison guard						
	Review						
	School						
	Stable duty						
	Target practice						
	March			2		2	
	Reveille or retreat roll call						1

ARTICLE I—Continued.

Article of war.	Offenses.	Punishments.					
		Dishonorable discharge, forfeiture of all pay and allowances due and to become due.	Confinement at hard labor.			Forfeiture of two-thirds pay per month.	Forfeiture of pay.
			Years.	Months.	Days.	Months.	Days.
61	Leaving without permission the properly appointed place of assembly for, or place for:						
	Athletic exercise						
	Drill						
	Fatigue						
	Field exercise						
	Gallery practice						
	Guard mounting						
	Horse exercise						
	Inspection						5
	Instruction						
	Muster						
	Parade						
	Prison guard						
	Review						
	School						
	Stable duty						
	Target practice						
	Reveille or retreat roll call						2
62	Using contemptuous or disrespectful words against the President, Vice President, etc.	Yes	1				
63	Behaving with disrespect toward his superior officer.			6		6	
65	Attempting to strike or attempting otherwise to assault a noncommissioned officer in the execution of his office.			6		6	
	Behaving in an insubordinate or disrespectful manner toward a noncommissioned officer in the execution of his office.			2		2	
	Disobedience, willful, of the lawful order of a noncommissioned officer in the execution of his office.			6		6	
	Striking or otherwise assaulting a noncommissioned officer in the execution of his office.	Yes	1				
	Threatening to strike or otherwise assault, or using other threatening language toward a noncommissioned officer in the execution of his office.			4		4	
	Using insulting language toward a noncommissioned officer in the execution of his office.			2		2	
68	Drawing a weapon upon a noncommissioned officer quelling a quarrel, fray, or disorder.	Yes	5				
	Refusing to obey a noncommissioned officer quelling a quarrel, fray, or disorder.	Yes	2				
	Threatening a noncommissioned officer quelling a quarrel, fray, or disorder			6		6	
69	Breach of arrest			1		1	
	Escaping from confinement	Yes	1				
73	Releasing, without proper authority, a prisoner committed to his charge	Yes	1				
	Suffering a prisoner committed to his charge to escape:						
	Through design	Yes	1				
	Through neglect			6		6	
83	Suffering, through neglect, military property to be damaged, lost, spoiled, or wrongfully disposed of:						
	Of a value of $20 or less			3		3	
	Of a value of $50 or less and more than $20.			6		6	
	Of a value of more than $50	Yes	1				

ARTICLE I—Continued.

Article of war.	Offenses.	Punishments.					
		Dishonorable discharge, forfeiture of all pay and allowances due and to become due.	Confinement at hard labor.			Forfeiture of two-thirds pay per month.	Forfeiture of pay.
			Years.	Months.	Days.	Months.	Days.
83	Suffering, willfully, military property to be damaged, lost, spoiled, or wrongfully disposed of:						
	Of a value of $20 or less			6		6	
	Of a value of $50 or less and more than $20.	Yes		6			
	Of a value of more than $50	Yes	2				
84	Injuring or losing, through neglect, horse, arms, ammunition, accouterments, equipment, clothing, or other property issued for use in the military service, or items belonging to two or more of said classes:						
	Of a value of $20 or less			3		3	
	Of a value of $50 or less and more than $20.			6		6	
	Of a value of more than $50	Yes	1				
	Injuring or losing, willfully, horse, arms, ammunition, accouterments, equipment, clothing, or other property issued for use in the military service, or items belonging to two or more of said classes:						
	Of a value of $20 or less			6		6	
	Of a value of $50 or less and more than $20.	Yes		6			
	Of a value of more than $50	Yes	2				
	Selling or otherwise wrongfully disposing of horse, arms, ammunition, accouterments, equipment, clothing, or other property issued for use in the military service, or items belonging to two or more of said classes:						
	Of a value of $20 or less	Yes		6			
	Of a value of $50 or less and more than $20	Yes	1				
	Of a value of more than $50	Yes	5				
85	Found drunk:						
	At formation for or at—						
	Athletic exercise						
	Drill						
	Fatigue						
	Field exercise						
	Gallery practice						
	Guard mounting						
	Horse exercise						
	Inspection						
	Instruction						20
	March						
	Muster						
	Parade						
	Review						
	School						
	Stable duty						
	Target practice						
	Reveille or retreat roll call						5
	On guard			6		6	
	On duty as—						
	Barrack orderly						
	Company clerk						
	Cook						
	Dining room orderly						
	Farrier						
	Horseshoer						
	Kitchen police						
	Mechanic						20
	Mess sergeant						
	Noncommissioned officer in charge of quarters.						
	Saddler						
	Stable sergeant						
	Supply sergeant						
	Wagoner						

ARTICLE I—Continued.

Article of war.	Offenses.	Punishments.					
		Dishonorable discharge, forfeiture of all pay and allowances due and to become due.	Confinement at hard labor.			Forfeiture of two-thirds pay per month.	Forfeiture of pay.
			Years.	Months.	Days.	Months.	Days.
86	Found drunk on post, sentinel	Yes		6			
	Leaving before regularly relieved from or sleeping on post, sentinel.	Yes	1	1			
90	Using a provoking or reproachful speech or gesture to another.			3		3	
93	Arson	Yes	20				
	Assault:						
	With intent to do bodily harm	Yes	5				
	With intent to commit any felony except murder or rape.	Yes	10				
	With intent to commit murder or rape	Yes	20				
	Burglary	Yes	10				
	Embezzlement or larceny:						
	Of property of a value of $20 or less	Yes		6			
	Of property of a value of $50 or less, and more than $20.	Yes	1				
	Of property of a value of more than $50	Yes	5				
	Manslaughter:						
	Involuntary, in the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution or circumspection.	Yes	3				
	Voluntary, upon a sudden quarrel or heat of passion.	Yes	10				
	Perjury	Yes	5				
	Robbery	Yes	10				
94	Forging or counterfeiting a signature, making a false oath, and offenses related to either of these.	Yes	5				
	Other cases:						
	When the amount involved is $50 or less.	Yes	1				
	When the amount involved is more than $50.	Yes	5				
96	Abandoning guard, by member thereof			6		6	
	Abusing a public animal			3		3	
	Allowing a prisoner to receive or obtain intoxicating liquor.			3		3	
	Appearing in civilian clothing without authority.						10
	Appearing in unclean uniform, or not in prescribed uniform, or in uniform worn otherwise than in manner prescribed.			1		1	
	Assault			3		3	
	Assault and battery			6		6	
	Attempting to escape from confinement	Yes		6			
	Attempting to strike or attempting otherwise to assult a sentinel in the execution of his duty.			6		6	
	Behaving in an insubordinate or disrespectful manner toward a sentinel in the execution of his duty.			1		1	
	Breach of restriction (other than quarantine) to command, quarters, station, or camp.			1		1	
	Carrying a concealed weapon			3		3	
	Committing a nuisance			3		3	
	Concealing, destroying, mutilating, obliterating, or removing willfully and unlawfully a public record, or taking and carrying away a public record with intent to conceal, destroy, mutilate, obliterate, remove, or steal the same.	Yes	3				
	Conspiring to escape from confinement	Yes		6			
	Destroying, willfully, public property:						
	Of a value of $20 or less	Yes		6			
	Of a value of $50 or less, and more than $20.	Yes	1				
	Of a value of more than $50	Yes	5				

ARTICLE I—Continued.

Article of war.	Offenses.	Punishments.					
		Dishonorable discharge, forfeiture of all pay and allowances due and to become due.	Confinement at hard labor.			Forfeiture of two-thirds pay per month.	Forfeiture of pay.
			Years.	Months.	Days.	Months.	Days.
96	Discharging, through carelessness, a firearm			3		3	
	Disobedience, willful, of the lawful order of a sentinel in the execution of his duty.	Yes	1				
	Disorderly in command, quarters, station, or camp.			1		1	
	Disorderly under such circumstances as to bring discredit upon the military service.			4		4	
	Drinking liquor with prisoner			2		2	
	Drunk and disorderly in command, quarters, station, or camp.			3		3	
	Drunk and disorderly under such circumstances as to bring discredit upon the military service.			6		6	
	Drunk in command, quarters, station or camp.						15
	Drunk under such circumstances as to bring discredit upon the military service.			3		3	
	Drunk, prisoner found			3		3	
	Failing to obey a lawful order:						
	Of a superior officer	Yes	1				
	Of a noncommissioned officer			6		6	
	Of a sentinel			6		6	
	Failing to pay a just debt under such circumstances as to bring discredit upon the military service.	Yes		6			
	False official report or statement knowingly made:						
	By a noncommissioned officer			3		3	
	By any other soldier			1		1	
	False swearing	Yes	3				
	Forgery	Yes	5				
	Gambling:						
	By a noncommissioned officer with a person of lower military rank or grade.					3	
	In command, quarters, station or camp in violation of orders.			2		2	
	Indecent exposure of person			3		3	
	Introducing a habit-forming narcotic drug into command, quarters, station or camp:						
	For sale	Yes	2				
	All other cases	Yes	1				
	Introducing intoxicating liquor into command, quarters, station or camp:						
	For sale			6		6	
	All other cases			3		3	
	Loaning money, either as principal or agent, at an usurious rate of interest to another in the military service.					3	
	Loitering or sitting down on duty by sentinel.			1		1	
	Obtaining money or other property under false pretenses:						
	When the amount obtained is $20 or less.	Yes		6			
	When the amount obtained is $50 or less and more than $20.	Yes	1				
	When the amount obtained is more than $50.	Yes	5				
	Refusing to submit to medical or dental treatment.	Yes		6			
	Refusing to submit to a surgical operation	Yes	1				
	Sodomy and other unnatural crimes	Yes	5				
	Straggling			3		3	
	Striking or otherwise assaulting a sentinel in the execution of his duty.	Yes	1				
	Subornation of perjury	Yes	5				
	Threatening to strike or otherwise assault or using other threatening language toward a sentinel in the execution of his duty.			4		4	

ARTICLE I—Continued.

Article of war.	Offenses.	Punishments.					
		Dishonorable discharge, forfeiture of all pay and allowances due and to become due.	Confinement at hard labor.			Forfeiture of two-thirds pay per month.	Forfeiture of pay.
			Years.	Months.	Days.	Months.	Days.
96	Unclean accouterment, arm, clothing, equipment, or other military property, found with.	.....	.....	1	.....	1	.....
	Using insulting language toward a sentinel in the execution of his duty.	.....	.....	3	.....	3	.....
	Uttering a forged instrument	Yes	5	.....	.....	.....	.....
	Violation of condition of parole by general prisoner.	.....	.....	3	.....	.....	.....

ARTICLE II.

EQUIVALENTS.

SECTION 1. Subject to the limitations set forth elsewhere in this order, substitutions for punishments specified in Article I thereof are authorized at the discretion of the court, at the rates indicated in the following table of equivalents:

Forfeiture.	Confinement at hard labor.	Detention.	Hard labor without confinement.
1 day's pay...	1 day.....	1½ days' pay...	1½ days.

ARTICLE III.

GENERAL LIMITATIONS.

SECTION 1. A court shall not, by a single sentence which does not include dishonorable discharge, adjudge against a soldier:

(*a*) Forfeiture of pay at a rate greater than two-thirds of his pay per month.

(*b*) Forfeiture of pay in an amount greater than two-thirds of his pay for six months.

(*c*) Confinement at hard labor for a period greater than six months.

SEC. 2. A court shall not, by a single sentence, adjudge against a soldier:

(*a*) Detention of pay at a rate greater than two-thirds of his pay per month.

(*b*) Detention of pay in an amount greater than two-thirds of his pay for three months.

(*c*) Hard labor without confinement for a period greater than three months.

ARTICLE IV.

NONCOMMISSIONED OFFICERS.

SECTION 1. A court shall not, unless they in the same sentence adjudge reduction to the ranks, adjudge against a noncommissioned officer confinement at hard labor, nor hard labor without confinement.

SEC. 2. A court may, upon his conviction of an offense or offenses for which they may adjudge confinement at hard labor for a period of five or more days, authorized substitution considered, adjudge, in addition to the punishments otherwise authorized, reduction against a noncommissioned officer or against a private, first class.

ARTICLE V.

PREVIOUS CONVICTIONS.

SECTION 1. A general or special court shall, upon conviction of a soldier, be opened and shall thereupon ascertain whether there is evidence of a previous conviction or convictions, which has been referred to the court by the convening authority, and, if there be such evidence, shall receive it.

SEC. 2. A court may, under the authority contained in section 1 of this article, receive evidence only of convictions by court-martial of an offense or offenses committed by the accused during his current enlistment and within one year next preceding the commission by him of an offense of which he stands convicted before the court. These convictions may be proved only by the records of the trials in which they were had, or by duly authenticated copies of such records, or by duly authenticated copies of orders promulgating such trials and convictions.

ARTICLE VI.

DISHONORABLE DISCHARGE.

SECTION 1. A court may, upon his conviction of an offense or offenses for none of which dishonorable discharge and forfeiture of all pay and allowances due and to become due is, in Article I of this order or by the custom of the service, authorized, upon proof of five or more previous convictions, adjudge against a soldier, in addition to the confinement at hard labor without substitution authorized in said article or by the custom of the service for the offense or offenses of which he is convicted, dishonorable discharge and forfeiture of all pay and allowances due and to become due, and, in any such case in which such confinement so authorized is less than three months, a court may adjudge, in addition to such discharge and forfeiture, confinement at hard labor for three months.

SEC. 2. A court may, upon his conviction upon one arraignment of two or more offenses for none of which dishonorable discharge, confinement at hard labor and forfeiture of all pay and allowances due and to become due is, in Article I of this order or by the custom of the service, authorized, but the aggregate term of confinement at hard labor for which, as authorized in said article or by the custom of the service, without substitution, equals or exceeds six months, adjudge against a soldier, in addition to the confinement at hard labor, without substitution, authorized in said article or by the custom of the service for the offense or offenses of which he is convicted, dishonorable discharge and forfeiture of all pay and allowances due and to become due.

ARTICLE VII.

EFFECT AND APPLICATION OF THIS ORDER.

SECTION 1. This order prescribes the maximum limit of punishment for each of the offenses therein specified, and thus indicates an appropriate punishment for an offense which is attended by aggravating circumstances, or after conviction of which there is received by the court evidence of several previous con-

victions. In other cases the punishment will be graded down according to the circumstances thereof.

SEC. 2. Offenses not herein provided for remain punishable as authorized by statute or the custom of the service, but, in cases for which maximum punishments are not prescribed, courts will be guided by limits of punishment prescribed for closely related offenses.

ARTICLE VIII.

ADMINISTRATIVE RULES.

SECTION 1. Hard labor without confinement, when imposed as a punishment, shall be performed in addition to other duties which fall to the soldier, and no soldier shall be excused or relieved from any military duty for the purpose of performing hard labor without confinement which has been imposed as a punishment, but a sentence imposing such punishment shall be considered as satisfied when the soldier shall have performed hard labor during available time in addition to performing his military duties.

SEC. 2. Pay detained pursuant to the sentence of a court-martial will be detained by the Government until the soldier is furloughed to the reserve, discharged from the service, or mustered out of active Federal service.

ARTICLE IX.

DATE ON WHICH OPERATIVE.

This order shall become operative on March 1, 1917, as to offenses committed on and after that date and as to criminal acts, committed prior to that date, whose maximum punishment was not prescribed in the Executive order of September 5, 1914. The Executive order of September 5, 1914, published in General Orders, No. 70, War Department, 1914, prescribing limits of punishment, shall remain operative as to offenses committed before March 1, 1917, except as to criminal acts whose maximum punishment has been decreased by this order, which will not be followed by severer punishment than is hereinbefore prescribed.

WOODROW WILSON.

THE WHITE HOUSE,
December 15, 1916.

[NOTE.—Nothing in the foregoing Executive order is applicable to the National Guard not in the service of the United States. Sec. 102, act of June 3, 1916, (39 Stat., 208).]

CHAPTER XIV.

COURTS-MARTIAL—PROCEDURE OF SPECIAL AND SUMMARY COURTS AND PROCEDURE ON REVISION.

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Section I.

SPECIAL COURTS-MARTIAL.

350. Procedure.—The procedure of and before special courts-martial will, so far as practicable, be identical with that prescribed for general courts-martial.

Section II.

SUMMARY COURTS-MARTIAL.

351. Procedure.—(*a*) The summary court will be opened at a stated hour daily, except Sundays, for the trial of such cases as have been properly referred to it for trial. Trials will be had on Sunday only when the exigencies of the service make it necessary.

(*b*) The summary court will at the beginning of each trial, in the order of such trial, give to and enter in the proper place on the charges in the case a serial number.

(*c*) The procedure of and before summary courts-martial will, so far as practicable, be identical with that prescribed for general courts-martial. In the trial of a case the summary court represents both the Government and the accused. He will see to it that the interests of both are fully conserved.

(*d*) When the accused pleads guilty he will—

(1) Explain to him (*a*) the elements constituting the offense to which he has pleaded guilty, and (*b*) the maximum punishment therefor;

(2) Ask him whether he fully understands (*a*) that by pleading guilty thereto he admits all the elements of the crime or offense, and (*b*) that he may be punished as explained to him.

In any such case he will also, in the manner below stated, make such impartial investigation, if any, as the doing of justice may appear to require.

(*e*) In the absence of a plea of guilty he will make a full, thorough, and impartial investigation of both sides of the entire matter before him. On behalf of the Government he will obtain the attendance of, swear, and examine such witnesses, and will obtain such other evidence, documentary and other, as may tend or may appear likely to tend to establish the allegations before him against the accused. On behalf of the accused he will, in the absence of a plea of guilty, obtain the attendance of, swear, and examine such witnesses, and will obtain

such other evidence, documentary and other, as may tend to disprove or negative guilt of such allegations, or explain the acts or omissions charged, or show extenuating circumstances or establish good character. He will permit the accused fully to examine all witnesses that appear, and will, to the fullest extent, aid him in making such examination. He will, in every proper way, encourage and aid the accused in making his defense. In all cases he will extend to the accused full opportunity to testify in his own behalf and to make a statement in denial, in explanation, or in extenuation, and will, before arriving at a finding, assure himself, by inquiry of the accused, that he has no further testimony to offer and no further statement to make.

(*f*) Having done so, he will, as soon as the trial is concluded, arrive at his findings and record them in the proper place on the charges.

(*g*) In the event of the conviction of a soldier he will consider the evidence of previous convictions, if any, referred to him.

(*h*) In any case of conviction he will, as soon as trial is concluded, impose sentence and record it in the proper place upon the charges.

(*i*) In the event of a finding of not guilty of all the charges and specifications he will record an acquittal instead of a sentence.

(*k*) Having recorded his findings and an acquittal or sentence, he will subscribe his name, rank, and organization as summary court, and then without delay transmit the record of trial to the appointing authority.

SECTION III.

PROCEDURE ON REVISION.

352. Of general or special courts-martial.—The procedure of general or special courts-martial when reconvened for the purpose of revising their action or correcting their records will in general be as indicated by the form of record of proceedings on revision. (Appendix 6.) The members of the court who participated in the findings and sentence or acquittal, together with the judge advocate and assistant judge advocate, if any, will assemble and the court will meet. It is not ordinarily necessary or proper that the accused be present, but there may be rare cases in which he should be present. The judge advocate will read to the court the indorsement of the appointing authority returning the record and directing the reconvening, or, if the record of trial by a special court-martial has been returned to him orally for revision, may state briefly to the court the views and desires of the appointing authority as communicated to him. The court is then closed, considers and takes action upon the matter before it, is opened, and adjourns. As the action so to be taken is entirely corrective, a case will not be reopened by the calling or recalling of witnesses or otherwise.

353. Of summary courts-martial.—What has been said in respect to the procedure on revision by general or special courts-martial will, so far as applicable, govern such procedure by summary courts-martial.

CHAPTER XV.

COURTS-MARTIAL—RECORDS OF TRIAL.

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Section I.

GENERAL COURTS-MARTIAL.

354. Record required—how authenticated.—Each general court-martial shall keep a separate record of its proceedings in the trial of each case brought before it, and such record shall be authenticated by the signature of the president and the judge advocate, but in case the record can not be authenticated by the judge advo-

cate, by reason of his death, disability, or absence, it shall be signed by the president and assistant judge advocate, if any; and if there be no assistant judge advocate, or in case of his death, disability, or absence, then by the president and one other member of the court. (A. W. 33.)

355. What the record is and by whom prepared.—The legal record of a court-martial is that record which is finally approved and adopted by the court as a body and authenticated by the signatures of its president and judge advocate. The record is prepared by the judge advocate under the direction of the court, but the court as a whole is responsible for it, and the instrument which it approves as such is its record, however the same may have been made up. It is immaterial to the sufficiency of a record whether the same was kept or written by the judge advocate or by a clerk or a reporter acting under his direction.

356. Separate record.—Where several cases are tried by the same court the record of each case should not only be complete and independent in itself and as much an entirety, both in form and in substance, as if it were the only case tried, but should contain all that is essential to an original and independent official paper, and should be so perfected as to leave no material detail to be supplied from any previous or other record. Where sentence is pronounced the record should contain everything necessary to sustain it in fact and in law.

357. Contents of record.—(*a*) *In general.*—The record of proceedings of a general court-martial will in each case show that all statutory requirements incident to that case have been complied with; will state a complete history of the proceedings, regular and irregular, had in open court in that case; and will set forth the material conclusions arrived at in both open and closed sessions. The only acts of the court or members not properly stated or set forth in the record of trial are the discussions, votes, etc., had while the court was closed for deliberation upon some matter such as a challenge, an objection, findings, sentence, etc. Such discussions, etc., are no part of the formal record, and, as to votes and opinions of particular members, a statement of these is precluded by A. W. 19. It is, in fact, only the *result* of a deliberation in closed session that is to be entered upon the record.

(*b*) *In detail.*—The record of proceedings in each case will show, among other things, each in its proper place:

1. A brief of itself in the prescribed form.
2. An index of itself in the prescribed form.
3. Whether a carbon copy of the record of trial was prepared, and if so, the disposition made thereof.
4. The place and date of each meeting of the court.

5. The fact and hour of each meeting.

6. The number, date, and source of the order appointing the court and of each amendatory order, each stated at the proper place in the record of trial.

7. The fact of the presence and the name, rank, and organization of each member, judge advocate and assistant judge advocate present at the assembling of the court or at any proceedings in revision.

8. The fact of the presence and the name, rank, and organization of each new member, new judge advocate, or assistant judge advocate who begins to participate therein, together with citation of the authority for his so doing.

9. The fact of the absence and the name, rank, and organization of each member and the judge advocate or assistant judge advocate absent at the assembling of the court or at any proceedings in revision, together with a statement of the reason for such absence.

10. That the accused was given opportunity to introduce counsel, and the action thereon.

11. That the accused and his counsel, if any, were present during all the open sessions of the court in his case except during such proceedings in revision as did not so require.

12. The name of each person, if any, who acted as reporter during any part of the trial, and that each such person was sworn.

13. The name, rank, and organization of each member present who, during the trial, announced himself as, or was alleged to be, ineligible to sit as a member, together with the alleged reason for such ineligibility, and the action had thereon.

14. The name of each person, if any, who acted as interpreter during any part of the trial, and that each such person was sworn.

15. That the accused was informed of his right to demand a copy of the record of his trial, and was asked whether or not he desired a copy thereof, together with his answer thereto.

16. That the order appointing the court and each amendatory order was read to the accused in court and that he was given opportunity to challenge each member of the court who sat as such during any part of the trial in his case, and the action, if any, had thereon.

17. That each member of the court who sat as such during any part of the trial of the case and each judge advocate and assistant judge advocate who appeared before the court in the case was sworn.

18. The several charges and specifications upon which the accused was arraigned.

19. The name, rank, and organization of the officer who subscribed the charges.

20. The pleas of the accused to the several specifications and charges upon which he was arraigned.

21. That after a plea of guilty the president—

(*a*) Explained to the accused (1) the elements constituting the offense to which he had pleaded guilty; (2) the maximum punishment for such offense;

(*b*) Asked the accused whether he fully understood (1) that by pleading guilty thereto he admitted all the elements of the crime or offense; (2) that he may be punished as explained to him.

22. The answer of the accused thereto and the action, if any, had thereon.

23. That the several witnesses were sworn.

24. That each witness recalled to testify was cautioned, upon being so recalled, that he was still under oath.

25. That if the accused was sworn as a witness he was so sworn at his own request.

26. The questions propounded and the answers given by each of the several witnesses as nearly as possible in the language used.

27. That the accused was given full opportunity to examine each witness who gave testimony.

28. The fact of the introduction of each deposition and other paper received in evidence by the court, and that it is appended to the record properly marked.

29. The exact and entire text read by the prosecution or defense from any publication to the court, together with the title of the publication, the edition thereof, and the proper page number.

30. In a proper case, that the accused had no testimony, or no further testimony, to offer or no statement to make, or both.

31. That when the accused did not testify or make a statement the president explained to him in court that he might testify in his own behalf if he so desired, or make a statement in denial, in explanation, or in extenuation.

32. Each motion, objection, argument, statement, etc., made in open court and the action, if any, had thereon.

33. The fact of each closing of the court.

34. The fact of each opening of the court and that the accused and his counsel, if any, were present when the court was opened.

35. If a note was made of recess taken, that the members, the judge advocate, assistant judge advocate, the accused and his counsel, if any, and the reporter, if any, were present when the court again proceeded to business.

36. In a joint trial, that each and every one of the several accused was accorded each and every right and privilege he would enjoy if tried separately, and, as to each accused, proper findings and sentence or acquittal. (The end here sought, however, will so far as practicable be attained by the use of appropriate general language without unduly burdening the record with repetitions.)

37. The findings of each of the several specifications and charges not disposed of as a result of a special plea.

38. In case of the conviction of a soldier, that the court was opened for the purpose of receiving evidence of previous convictions, and its action.

39. In case of receipt by the court of evidence of previous convictions, that a copy of each is appended to the record, properly marked.

40. In case of the conviction of a soldier, that the accused was asked whether the evidence of previous convictions, if any, was correct and whether the statement of his service, as shown on the charge sheet, was correct, and his answers thereto.

41. The sentence, acquittal, or other action finally taken.

42. In case of conviction of an offense for which the death penalty is made mandatory by law, that two-thirds of the members of the court concurred in the finding.

43. In case of a sentence to suffer death, that two-thirds of the members of the court concurred in the sentence.

44. The adjournment.

45. That the judge advocate, or, in a proper case, the assistant judge advocate, subscribed each day's proceedings.

46. That the president and the judge advocate, or, in a proper case, the president and an assistant judge advocate, or, in a proper case, the president and one other member, subscribed the record. (In any case in which a person other than the judge advocate subscribes the record in lieu of the judge advocate, the facts which make such action necessary will appear.)

47. In case the judge advocate has recorded the findings and sentence with a typewriter, a certificate that he recorded the findings and sentence of the court.

(*c*) *Record of revision.*—Subject to the modifications indicated by the form for proceedings in revision, the foregoing will, so far as applicable, govern in respect to such proceedings.

(*d*) *Clemency recommendation.*—A recommendation to clemency will not be embodied in the record proper, but will be bound into the record immediately after the exhibits. (See par. 332.)

SECTION II.

SPECIAL COURTS-MARTIAL.

358. Form and substance.—(*a*) Except as otherwise indicated by the form for record of trial by special court, or elsewhere, the requirements in respect of the form and substance of such records are in general the same as for records of trial by general courts-martial.

(*b*) Neither oral testimony received by the court nor statements nor arguments made will be recorded unless herein specifically required or ordered by competent authority. (See par. 154 (*d*).)

(*c*) Documentary evidence received by the court, the originals of which can properly be appended to the record, such as depositions, certain letters, recommendations to clemency, and other similar papers, will be so appended.

(*d*) Neither the originals nor copies of writings, the originals of which can not properly be appended to the record, such as certificates of discharge, recommendations as to character, and similar papers, need be so appended.

(*e*) If a special plea is made, the record will set out in full the proceedings had thereon, including all testimony taken thereon and statements made relative thereto, as well as the disposition thereof made by the court.

(*f*) Evidence of previous convictions, if any, will not be appended to the record, but will be returned by the trial judge advocate with the record of trial to the appointing authority.

(*g*) No certificate that the judge advocate recorded typewritten findings or sentence is required.

(*h*) The record will, at the end, contain sufficient space for the action of the reviewing authority. If necessary for this purpose, an extra sheet will be included.

359. Number of copies.—One copy only of the record will be prepared.

360. Not indexed.—The record will not be indexed.

361. Briefed.—The record will be briefed as prescribed for the record of a general court-martial.

362. Bound.—The record will be securely bound. The method of binding is not prescribed, but it must be such as will securely fasten together all the leaves and parts that comprise the record. Easily removable clips or paper fasteners will not be used for this purpose.

Section III.

SUMMARY COURTS-MARTIAL.

363. Form and substance.—The requirements in respect of the form and substance of records of trial by summary court are indicated in the form for record of trial by summary court. The findings and sentence or acquittal only are required to be recorded and subscribed by the summary court as such. The action of the commanding officer on the record, with date and his signature, completes the record, except when approval by superior authority is required.

Section IV.

CORRECTION OF RECORDS OF TRIAL.

364. Records of general or special courts-martial.—A record of trial by general or special court-martial which by reason of omission, error, or other defect is substantially incomplete or incorrect, or which

in the opinion of the appointing authority shows improper action by the court, may be returned by the appointing authority to the president of the court, directing that the court be reconvened for such action as may be appropriate. In any such case the defective part of the record will be left unchanged and without erasure or interlineation, and the record of proceedings in revision will show specifically, ordinarily by page and line, the part of the original record that is changed and the change made. (See par. 352.)

365. Records of summary courts-martial.—A record of trial by summary court which by reason of omission, error, or other defect, is substantially incomplete or incorrect, or which, in the opinion of the appointing authority, shows improper action by the court, may be returned by the appointing authority to the summary court for such action as may be appropriate. (See par. 353.)

Section V.

DISPOSITION OF RECORDS OF TRIAL.

366. By trial judge advocate.—(*a*) *Original record.*—The judge advocate of a court-martial shall, with such expedition as circumstances may permit, forward to the appointing authority, or to his successor in command, the original record of the proceedings of the court in the trial of each case. The record should be forwarded as an inclosure to an indorsement by the judge advocate, returning to the appointing authority the charges and other papers referred to him, and forwarding at the same time the required copy of the reporter's voucher. The original record of the proceedings of a general court-martial appointed by the President will be sent by the trial judge advocate directly to the Judge Advocate General of the Army.

(*b*) *Carbon copy.*—The judge advocate of a general court-martial shall, if the accused so desires, deliver to the accused, after it has been corrected, completed, and certified as a true copy except as to findings, sentence, and exhibits not copied, the carbon copy, when one is prepared, of the record of his trial.

367. By appointing authority.—(*a*) *Records of trial by general courts-martial.*—After having been acted upon by the officer appointing the court, or by the officer commanding for the time being, the record of each trial by general court-martial, with the decisions and orders of the appointing authority made thereon, accompanied by the statement of service, if there be any, and five copies of the order, if there be any, promulgating the case, will be transmitted directly to the Judge Advocate General of the Army.

(*b*) *Records of trial by special courts-martial.*—After having been acted upon by the officer appointing the court, or by the officer commanding for the time being, the record of each trial by special

court-martial, accompanied by a copy of the order publishing the case, will be forwarded, ordinarily without indorsement or letter of transmittal, to the officer exercising general court-martial jurisdiction over the command, there to be filed in the office of the judge advocate for a period of two years, at the end of which time it may be destroyed.

(*c*) *Records of trial by summary courts-martial.*—The several records of trial by summary courts-martial within a command shall be filed together in the office of the commanding officer and shall constitute the summary-court record of the command.

(*d*) *Reports of trial by summary courts-martial.*—The report of trial by summary court (copy of record of trial) will, with the least practicable delay after action has been taken on the sentence, be completed and transmitted to the officer exercising general court-martial jurisdiction over the command, there to be filed in the office of the judge advocate for a period of two years, at the end of which time it may be destroyed.

SECTION VI.

LOSS OF RECORDS OF TRIAL.

368. Action to be taken.—When, prior to action by the reviewing authority, a record of trial by court-martial is lost or destroyed, a new record of trial in the case will, if practicable, be prepared and will become the record of trial in the case. Such new record will, however, only be prepared when the extant original notes or other sources are such as to enable the preparation of a complete and accurate record of the case. In any case of loss of a record of trial by court-martial the summary court, judge advocate, or other proper person will fully inform the appointing authority as to the facts and as to the action, if any, taken.

CHAPTER XVI.

COURTS-MARTIAL—ACTION BY APPOINTING OR SUPERIOR AUTHORITY.

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SECTION I.

ACTION ON THE PROCEEDINGS.

369. Appointing authority.—The term appointing authority is employed to designate the officer whose province and duty it is to take action upon the proceedings of a court-martial after the same are terminated, and, when the record is transmitted to him for such action, to approve or disapprove the sentence or acquittal. This officer is ordinarily the commander who has convened the court. In his absence, however, or where the command has been otherwise changed, his successor in command, or, in the language of A. W. 46, "the officer commanding for the time being" is invested (by that article) with the same authority to pass upon the proceedings and order the execution of the sentence in a case of conviction. (Digest, p. 554, XIV, A, 1.)

370. Record of action by appointing authority.—Upon the receipt of the proceedings by the appointing authority, he will state at the end thereof in each case his decisions and orders.

371. Sentence not effective until approved.—No sentence of a court-martial shall be carried into execution until the same shall have been approved by the officer appointing the court or by the officer commanding for the time being. (A. W. 46.) The acquittal of the accused does not entitle him to be released at once from confinement as in cases before civil courts. The acquittal is not effective until it has been acted on by the proper reviewing authority. But the announcement of the result of trial in orders is not essential to the validity of the sentence or acquittal. It is not necessary for the reviewing authority to approve the *findings* and *proceedings*.

372. Effect of approval and disapproval.—While approval gives life and operation to a sentence, disapproval, on the other hand, nullifies it. A disapproval of the sentence of a court-martial by the reviewing authority is not a mere expression of disapprobation but is a final determinate act putting an end to the proceedings in the particular case and rendering them entirely nugatory and inoperative; and the legal effect of a disapproval is the same whether or not the officer disapproving is authorized finally to confirm the sentence. But to be thus operative a disapproval should be expressed. The effect of the entire disapproval of a sentence is not merely to annul the same as such but also to prevent the accruing of any disability or forfeiture, which would have been incidental upon an approval. (Digest, p. 563, XIV, E, 9, b, (1).)

373. Manner of approval.—The approval of the sentence should properly be of a *formal* character. The article requires the *sentence* to be approved. A formal approval of the findings only *does* not meet the requirement of the article. The sentence should be ap-

proved by "the officer appointing the court," or the officer commanding for the time being, although—as in a case of a sentence of dismissal in time of peace—he may not be empowered *finally* to confirm and give effect to the sentence. His approval is required as showing that he does not, as he is authorized to do, *disapprove*. (Digest, p. 174, CIV, A, 1, and A, 2.)

374. The officer commanding for the time being.—The "officer commanding for the time being," indicated in A. W. 46, is an officer who has succeeded to the command of the officer who appointed the court; as where the latter has been regularly relieved and another officer assigned to the command; or where the command of the appointing officer has been discontinued, and merged in a larger or other command, at some time before the proceedings of the court are completed and required to be acted upon. Thus where, under these circumstances, a separate brigade has ceased to exist as a distinctive organization and been merged in a division, or a division has been similarly merged in an army or department, the commander of the division in the one case and of the army or department in the other, is "the officer commanding for the time being," in the sense of the article. So where a court was convened by a division commander, but before the reviewing authority had acted upon the sentence the division was discontinued and the organizations composing it were distributed among the divisions of another corps, it was held that the commander of this other corps was the officer "commanding for the time being." So, where, before the proceedings of a special court convened by a post commander were completed, the post command had ceased to exist and the command became distributed in the department, it was held that the department commander, as the legal successor of the post commander, was the proper authority to approve the sentence. (Digest, p. 174, CIV, C, 1; p. 175, CIV, C, 2, and see C, 4.)

375. Action when accused is transferred to another department.—Where an accused who has been tried by general court-martial proceeds with his command, from the department in which he has been tried to another department, before action has been taken on his case by the reviewing authority, the commanding general of the department in which he has been tried is the proper reviewing authority of the case. (Digest, p. 554, XIV, A, 3.)

376. Appointing authority must act in person.—The appointing authority can not delegate to an inferior or other officer his function as reviewing authority as conferred by the forty-sixth article of war; nor can he authorize a staff or other officer to subscribe for him his decision and orders on the proceedings. He will sign in his own hand the action taken by him on the proceedings, his rank and the fact that he is the commanding officer appearing after his signature.

377. Powers incident to power to approve.—The power to approve the sentence of a court-martial shall be held to include:

(*a*) The power to approve or disapprove a finding and to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense when, in the opinion of the authority having power to approve, the evidence of record requires a finding of only the lesser degree of guilt; and

(*b*) The power to approve or disapprove the whole or any part of the sentence. (A. W. 47.)

The authority here conferred to *approve* only so much of a finding of guilty as involves a finding of guilty of a lesser included offense is coextensive with the power of courts-martial to *convict* of lesser included offenses. The more frequent occasions for the exercise of this authority are indicated below.

(1) Affray.
  (*a*) Assault.
  (*b*) Breach of peace (disorder).
(2) Assault with intent to commit murder.
  (*a*) Any of the minor degrees of assault.
(3) Battery.
  (*a*) Assault.
(4) Murder.
  (*a*) Manslaughter.
    Voluntary.
    Involuntary.
  (*b*) Attempt to commit.
  (*c*) Felonious assault.
  (*d*) Assault and battery.
(5) Mayhem.
  (*a*) Assault with intent to commit.
  (*b*) Assault and battery.
(6) Rape.
  (*a*) Assault with intent to commit rape.
  (*b*) Assault and battery.
  (*c*) Assault.
(7) Robbery.
  (*a*) Assault with intent to rob.
  (*b*) Larceny from the person.
  (*c*) Assault and battery.
  (*d*) Assault.
(8) Desertion.
  (*a*) Attempt to desert.
  (*b*) Absence without leave.
(9) Willful disobedience of superior officer.
  (*a*) Failure to obey.

(10) Willful disobedience of noncommissioned officer.
(*a*) Failure to obey.
(11) Refusal to receive and keep prisoners.
(*a*) Failure to receive and keep.
(12) Quitting post to plunder or pillage.
(*a*) Quitting post.
(13) Drunk on duty.
(*a*) Drunk.
(14) Conduct unbecoming an officer and gentleman.
(*a*) Conduct to the prejudice of good order and military discipline.

378. Confirmation of sentences.—In the following cases confirmation by the President is required before the sentence of a court-martial is carried into execution:

(*a*) Any sentence respecting a general officer.

(*b*) Any sentence extending to the dismissal of an officer except that in time of war a sentence extending to the dismissal of an officer below the grade of a brigadier general may be carried into execution upon confirmation by the commanding general of the Army in the field or by the commanding general of the territorial department or division.

(*c*) Any sentence extending to the suspension or dismissal of a cadet, and

(*d*) Any sentence of death, except in the cases of persons convicted in time of war of murder, rape, mutiny, desertion, or as spies, and in such excepted cases a sentence of death may be carried into execution upon confirmation of the commanding general of the Army in the field or by the commanding general of the territorial department or division.

When the authority competent to confirm the sentence has already acted as the approving authority no additional confirmation by him is necessary. (A. W. 48.)

[NOTE.—For statement by whom a sentence of dismissal from service or dishonorable discharge imposed by National Guard courts-martial, not in the service of the United States, must be approved before its execution, see sec. 107, act of June 3, 1916, 39 Stat., 166, Appendix 2, *post*.]

379. Powers incident to power to confirm.—The power to confirm the sentence of a court-martial shall be held to include—

(*a*) The power to confirm or disapprove a finding, and to confirm so much only of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense when, in the opinion of the authority having power to confirm, the evidence of record requires a finding of only the lesser degree of guilt; and

(*b*) The power to confirm or disapprove the whole or any part of the sentence. (A. W. 49.)

The manner of the exercise of the power conferred upon confirming authorities is indicated in the remarks in paragraph 377 relating to the power incident to approve a sentence as provided for under A. W. 47.

380. Mitigation of punishment—Definition.—By mitigating a punishment is meant a reduction in quantity or quality, the general nature of the punishment remaining the same. (Digest, p. 177, CXII, B.)

381. Mitigation or remission of sentences.—The power to order the execution of the sentence adjudged by a court-martial shall be held to include *inter alia* the power to mitigate or remit the whole or any part of the sentence, but no sentence of dismissal of an officer and no sentence of death shall be mitigated or remitted by any authority inferior to the President. Any unexecuted portion of a sentence adjudged by a court-martial may be mitigated or remitted by the military authority competent to appoint, for the command, exclusive of penitentiaries and the United States Disciplinary Barracks, in which the person under sentence is held, a court of the kind that imposed the sentence, and the same power may be exercised by superior military authority; but no sentence extending to the dismissal of an officer or loss of files, no sentence of death, and no sentence approved or confirmed by the President shall be remitted or mitigated by any other authority. The power of remission and mitigation extends to all uncollected forfeitures adjudged by sentence of a court-martial. (A. W. 50.)

382. Mitigation, when permissible.—A sentence providing for dishonorable discharge only can not be mitigated. Subject to the limitations expressed in the Executive order prescribing maximum limits of punishment, forfeiture of pay adjudged by a court-martial may be mitigated to detention of pay for a like period, or less, and confinement at hard labor may be mitigated to hard labor without confinement for a like period or less. A sentence of dishonorable discharge, forfeiture of all pay and allowances due and to become due, and confinement at hard labor for a definite period may be mitigated to confinement at hard labor and a forfeiture of two-thirds of the soldier's pay per month for a period not exceeding that prescribed in the sentence.

383. Effect of remission at time of approval.—The action of a reviewing authority in approving a sentence and simultaneously remitting a portion thereof is legally equivalent to approving only the sentence as reduced. (Bul. 12, p. 5, War Dept., 1912.)

384. Commutation of sentences.—The power to commute sentences imposed by military tribunals, not being vested in military commanders, can be exercised by the President alone. Therefore a department commander can not commute to confinement at hard labor a sentence of dishonorable discharge awarded an enlisted man.

385. Adding to sentences.—Neither the reviewing authority nor any other officer is authorized to add to the punishment imposed by a court-martial. Where post orders classify all soldiers at a post according to their conduct, and provide that soldiers undergoing sentence of a court-martial will be denied pass privileges until the sentence is completed, such a provision adds to the punishment and is unlawful. (Bul. 46, p. 7, War Dept., 1914.)

386. Sentences in excess of legal limit.—Where a sentence in excess of the legal limit is divisible, such part as is legal may be approved and executed. (Digest, p. 564, XIV, E, 9, c.) Thus: When a sentence to confinement, hard labor without confinement, forfeiture, or detention of pay is in excess of the legal limit, the part within the limit is legal and may be executed.

387. Action on sentence may be modified before publication.—Action taken by a reviewing officer upon the proceedings and sentence of a court-martial may be recalled and modified before it has been published and the party to be affected has been duly notified of the same. After such notice the action is beyond recall. An approval can not then be substituted for a disapproval or *vice versa.* (Digest, p. 565, XIV, E, 9 e.)

388. Where conviction of desertion is disapproved—Grounds to be stated.—Where the reviewing authority disapproves a sentence for desertion he should indicate in his review whether his disapproval is based upon his belief that the evidence does not show an intent to desert, or is for some other reason that assumes the accused was guilty as charged. The reason for so indicating the grounds of his disapproval is to enable the Quartermaster Corps to decide whether the pay and allowances due at date of alleged desertion should be forfeited and whether the reward paid for apprehending the deserter, and the expenses incurred by the Government in transporting him from point of apprehension, delivery, or surrender to the station of his company or detachment or to the place of trial, including the cost of transportation of the guard, should be set against the alleged deserter's pay, under A. R. 127, 1913. (12 Comp., 328; 15 *idem.*, 661.)

389. Place of confinement—Change of.—The authority which has designated the place of confinement or higher authority may change the place of confinement of any prisoner under the jurisdiction of such authority; but when a military prison or post has been designated as the place of confinement of a prisoner under sentence, no power is competent to increase the punishment by designating a penitentiary as the place of confinement.

390. Loss of files.—Where a court-martial convened by a department commander for the trial of an officer sentences the accused to the

punishment of a loss of files, the approval of the appointing authority is sufficient to give full effect to the sentence, and no action by superior authority can add anything to its effect or conclusiveness. Confirmation by the President is not essential to the execution of such a sentence; and the fact that the same involves a change in the Army Register does not make requisite or proper a revision of the case by the War Department. The department commander, however, can not restore the files, such action can be taken only by the President. (*See* A. W. 50.)

391. Suspension of sentences until pleasure of President be known.—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. (A. W. 51.)

392. Suspension of sentences not involving dishonorable discharge.—The authority competent to order the execution of a sentence adjudged by a court-martial may, if the sentence involve neither dismissal nor dishonorable discharge, suspend the execution of the sentence in so far as it relates to the forfeiture of pay or to confinement, or to both; and the person under sentence may be restored to duty during the suspension of confinement. At any time within one year after the date of the order of suspension such order may, for sufficient cause, be vacated and the execution of the sentence directed by the military authority competent to order the execution of like sentences in the command, exclusive of penitentiaries and the United States Disciplinary Barracks, to which the person under sentence belongs or in which he may be found; but if the order of suspension be not vacated within one year after the date thereof the suspended sentence shall be held to have been remitted. (A. W. 53.)

393. Suspension of sentences of dishonorable discharge.—The authority competent to order the execution of a sentence including dishonorable discharge may suspend the execution of the dishonorable discharge until the soldier's release from confinement; but the order of suspension may be vacated at any time and the execution of the dishonorable discharge directed by the officer having general court-martial jurisdiction over the command, exclusive of penitentiaries and the United States Disciplinary Barracks in which the soldier is held, or by the Secretary of War. (A. W. 52.) The object in seeking the legislation contained in A. W. 52 was to further the plan of giving soldiers convicted of purely military offenses an opportunity to reclaim themselves and gain restoration to the colors

through service in disciplinary companies. Reviewing authorities will aid in the accomplishment of this object by discriminating action in passing upon sentences.

394. Place of confinement to be designated by reviewing authority.—When the sentence of a general court-martial prescribes dishonorable discharge and confinement, so much of the sentence as relates to confinement will be expressed in substantially the following form:

To be confined at hard labor at such place as the reviewing authority may direct for ——— [leaving to the reviewing authority the designation of the place of confinement.]

395. Forms for action on sentence by reviewing authority.—(See Appendix 10.)

396. When confinement in a penitentiary may be directed.—Except for desertion in time of war, repeated desertion in time of peace, and mutiny, no person shall under the sentence of a court-martial be punished by confinement in a penitentiary unless an act or omission of which he is convicted is recognized as an offense of a civil nature by some statute of the United States, or at the common law as the same exists in the District of Columbia, or by way of commutation of a death sentence, and unless also the period of confinement authorized and adjudged by such court-martial is one year or more: *Provided*, That when a sentence of confinement is adjudged by a court-martial upon conviction of two or more acts or omissions any one of which is punishable under these articles by confinement in a penitentiary, the entire sentence of confinement may be executed in a penitentiary: *Provided further*, That penitentiary confinement hereby authorized may be served in any penitentiary directly or indirectly under the jurisdiction of the United States: *Provided further*, That persons sentenced to dishonorable discharge and to confinement not in a penitentiary shall be confined in the United States Disciplinary Barracks or elsewhere as the Secretary of War or the reviewing authority may direct, but not in a penitentiary. (A. W. 42.)

[NOTE.—For a full statement of the law relating to penitentiary confinement, the War Department policy with reference to the segregation of general prisoners convicted of offenses punishable with penitentiary confinement and requirements placed upon appointing authorities in stating the law applicable where such confinement is directed, see Chap. XIII, Sec. II, pars. 337, 339, and 341.]

397. When confinement in Disciplinary Barracks will be directed.—The United States Disciplinary Barracks at Fort Leavenworth, Kans., or one of its branches will be designated as the place of confinement of all general prisoners other than residents of Porto Rico, the Canal Zone, Hawaiian Islands, or the Philippine Islands who are to be confined for six months or more and who are not to be confined in a penitentiary pursuant to the preceding paragraph. From time to time detailed instructions will be issued as to which of the

barracks shall be designated and as to when the prisoners shall be transferred to them.

398. When confinement in post will be directed.—A military post, station, or camp will be designated as the place of confinement of any general prisoner whose case does not come within the terms of paragraphs 396 and 397 of this section.

399. Cooperation of reviewing authorities.—The successful segregation of general prisoners according to the grade of their offense as prescribed by the three preceding paragraphs must depend to a considerable extent upon the cooperation of officers exercising general court-martial jurisdiction. The demand for prison labor at posts is not deemed a sufficient reason for a departure from the rule of segregation prescribed.

400. Court-martial orders.—Trials by general courts-martial, including so much of the proceedings as will give the charges and specifications, the pleas, findings, and sentence, and the action and remarks of the reviewing authority will be announced in general orders issued from the War Department or in general court-martial orders from the headquarters exercising general court-martial jurisdiction. If the charges contain matter which for any reason is unfit for publication, such matter will be omitted from the order, but a copy thereof will be promptly furnished by the reviewing authority to the commanding officer of the post at which the officer or soldier is confined, to be included with the papers required to be sent to the commanding officer of the post or other places of confinement where the sentence of confinement is to be executed. Trials by special courts-martial will also be published in orders similar in form to general court-martial orders. (For forms, see Appendix 11.)

SECTION II.

ACTION AFTER PROMULGATION OF SENTENCE.

401. Date of beginning of sentence.—The order promulgating the proceedings of a court and the action of the reviewing authority will, when practicable, be of the same date. When this is not practicable, the order will give the date of the action of the reviewing authority, which date will be the beginning of a sentence of confinement, as well where dishonorable discharge is imposed as where it is not. A sentence of confinement is continuous until the term expires, except where the prisoner is absent without authority or under a parole which proper authority revokes or is delivered to the civil authorities under A. W. 74. It is appropriate for the appointing authority to consider, at the time of approval, confinement served by an accused prior thereto, and in a proper case make it the basis of mitigation of the sentence.

When soldiers awaiting the result of trial or undergoing sentence commit offenses for which they are tried, the second sentence will be executed upon the expiration of the first, except that when the first sentence involves hard labor without confinement, and the second sentence hard labor with confinement, the second sentence will take precedence. If a soldier, while awaiting the result of a trial that terminates in a sentence of confinement without dishonorable discharge, or while undergoing a sentence of confinement without dishonorable discharge, is tried for a further offense and sentenced to confinement without dishonorable discharge, the period of confinement imposed by the second sentence will be executed upon the expiration of the period of confinement imposed by the first; but if the second sentence imposes confinement with dishonorable discharge, the period of confinement on the first sentence will terminate upon the date of the approval of the second sentence, leaving to be excuted only the confinement imposed by the second sentence. (*C. M. C. M., No. 1.*)

402. Applications for clemency.—The power to remit or mitigate punishment imposed by a court-martial, vested in the authority who appointed the court or the corresponding authority under whose jurisdiction the sentence is being executed, extends only to unexecuted portions of a sentence. If the punishment be one imposed by a general court-martial, it may be remitted or mitigated only by an officer competent to order a general court-martial and under whose jurisdiction the sentence is being executed. The fact that a soldier has been dishonorably discharged through his sentence does not affect this power. An application for clemency in case of a prisoner sentenced to confinement in a penitentiary or in the United States Disciplinary Barracks or any branch thereof will be forwarded to The Adjutant General of the Army for the action of the Secretary of War and the President. A military prisoner sentenced to confinement in a penitentiary or in the United States Disciplinary Barracks or any branch thereof will, so far as concerns the exercise of clemency, be considered to have passed beyond the jurisdiction of the department or other commander from the date of the approval of his sentence. The power to commute sentences imposed by military tribunals, not being vested in military commanders, can be exercised by the President only.

403. Remission of suspended sentence of dishonorable discharge.—Requests to remit the dishonorable discharge under a suspended sentence of dishonorable discharge are requests for clemency, and will be made to the authority empowered to extend clemency.

404. Clemency applications limited to one in six months.—It appearing that the expenditure of much unnecessary time and labor is involved in the reexamination in the War Department upon further applica-

tions for clemency of cases relating to military prisoners which have received recent and thorough consideration in connection with prior applications, the Secretary of War has directed that where such further application is received at the War Department within six months of such prior consideration the case will not be reexamined unless there be set forth in the application new and material reasons for the granting of clemency, but that the applicant will be advised of the recent consideration and of the action had thereon.

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Section I.

ENLISTMENT—MUSTER—RETURNS.

FIFTY-FOURTH ARTICLE.

405. Any person who shall procure himself to be enlisted in the military service of the United States by means of willful misrepresentation or concealment as to his qualifications for enlistment, and shall receive pay or allowances under such enlistment, shall be punished as a court-martial may direct.

Definitions and Principles.

A *fraudulent enlistment* is an enlistment procured by means of a willful misrepresentation in regard to a qualification or disqualification for enlistment, or by 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.

Willful means intentional, thus excluding cases of mistake or forgetfulness.

Misrepresentation and concealment include any act, statement, or omission, however made, which has the effect of conveying an untruth or concealing the truth concerning the applicant's qualifications or disqualifications for enlistment.

The misrepresentation or concealment may be in matters which are designed to open the door to inquiry concerning the qualifications or disqualifications for enlistment, such as questions as to previous service, previous applications for enlistment, etc.

The qualifications or disqualifications may be prescribed by law, regulations, or orders.

Answers to questions having no bearing on the applicant's qualifications for enlistment, such as questions as to applicant's name, address, or immaterial statements as to age, are not sufficient.

Analysis and Proof.

The article applies only to enlisted men.

The article defines one offense, i. e., fraudulent enlistment.

I. FRAUDULENT ENLISTMENT.

PROOF.

(*a*) The enlistment of the accused in the military service as alleged.

(*b*) That the accused willfully misrepresented a certain fact or facts regarding his qualifications or disqualifications for enlistment, or willfully—that is, intentionally—concealed a disqualification, as alleged.

(*c*) That enlistment was procured by such misrepresentation or concealment.

(*d*) That under such enlistment the accused received either pay or allowances, or both, as alleged.

(*e*) Where a soldier enlists without a discharge (see twenty-ninth article), the proof should include the fact that at the time of the alleged enlistment the accused was a soldier, and that the enlistment was entered into without a regular discharge from the former enlistment.

FIFTY-FIFTH ARTICLE.

406. Any officer who knowlingly enlists or musters into the military service any person whose enlistment or muster in is prohibited by law, regulations, or orders shall be dismissed from the service or suffer such other punishment as a court-martial may direct.

Definitions and Principles.

See the terms of the article.

The prohibited enlistment must be *knowingly* made, i. e., it must be shown that the accused *knew* that the person enlisted or mustered in by him was within the prohibited class.

Knowingly includes not only a certainty of belief but also such a degree of belief as the ordinarily prudent man acts upon.

The enlistment or muster in of the person must be at the time prohibited by law or by regulations or orders that were operative as to the accused.

This excludes cases where the enlistment or muster in was prohibited by regulations or orders of the existence of which the accused was not aware or at the time chargeable with knowledge.

Analysis and Proof.

The article applies only to officers.

The article defines two offenses which may be treated under one heading as follows:

I. UNLAWFUL ENLISTMENT (OR MUSTER IN).

PROOF.

(*a*) The enlistment or muster in by the accused officer of the person named, as alleged.

(*b*) That such person was within the classes whose enlistment or muster in were prohibited at the time of such enlistment or muster in.

(*c*) That the accused knew this at the time of the enlistment or muster in of such person.

FIFTY-SIXTH ARTICLE.

407. * * * Any officer who knowingly makes a false muster of man or animal, or who signs or directs or allows the signing of any muster roll knowing the same to contain a false muster or false statement as to the absence or pay of an officer or soldier, or who wrongfully takes money or other consideration on mustering in a regiment, company, or other organization, or on signing muster rolls, or who knowingly musters as an officer or soldier a person who is not such officer or soldier, shall be dismissed from the service and suffer such other punishment as a court-martial may direct.

Definitions and Principles.

See the terms of the article for requirements as to muster rolls and definition of the offenses.

Muster has been 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. (Winthrop, p. 852.)

Analysis and Proof.

The article applies only to officers.

The article defines a number of offenses which may be treated under the following heads:

I. Making false muster.

II. Signing, directing, or allowing the signing of false muster rolls.

III. Taking money or other consideration on muster or signing muster rolls.

IV. Mustering as an officer or soldier one who is not.

I. MAKING FALSE MUSTER.

PROOF.

(*a*) That the muster of a certain man or animal was made by the accused officer, as alleged.

(*b*) That the muster was false as alleged.

(*c*) That the accused officer knew this at the time of making the muster.

II. SIGNING, DIRECTING, OR ALLOWING THE SIGNING OF FALSE MUSTER ROLLS.

PROOF.

(*a*) That the accused officer signed the muster roll or directed or allowed the signing of the muster roll as alleged.

(*b*) That such muster roll was false in certain particulars as alleged.

(*c*) That the accused officer knew this at the time he signed the roll or directed or allowed it to be signed as alleged.

III. TAKING MONEY OR OTHER CONSIDERATION ON MUSTER OR SIGNING MUSTER ROLLS.

PROOF.

(*a*) That the accused officer made the muster of the organization or signed the muster rolls as alleged.

(*b*) That he accepted money or other consideration as a compensation or reward for making the muster or signing the muster rolls.

(*c*) That the taking of such money or other consideration was wrongful—that is, without legal excuse.

IV. MUSTERING AS AN OFFICER OR SOLDIER ONE WHO IS NOT.

PROOF.

(*a*) That the accused officer mustered as an officer or soldier a certain person, as alleged.

(*b*) That the person so mustered was not such officer or soldier.
(*c*) That the accused knew this when he made the muster.

FIFTY-SEVENTH ARTICLE.

408. Every officer commanding a regiment, an independent troop, battery, or company, or a garrison, shall, in the beginning of every month, transmit through the proper channels, to the Department of War, an exact return of the same, specifying the names of the officers then absent from their posts, with the reasons for and the time of their absence. Every officer whose duty it is to render to the War Department or other superior authority a return of the state of the troops under his command, or of the arms, ammunitions, clothing, funds, or other property thereunto belonging, who knowingly makes a false return thereof shall be dismissed from the service and suffer such other punishment as a court-martial may direct. And any officer who, through neglect or design, omits to render such return shall be punished as a court-martial may direct.

Definitions and Principles.

See the terms of the article, the penal part of which applies broadly to "every officer whose duty it is to render to the War Department or other superior authority a return of the state of the troops under his command, or of the arms, ammunition, clothing, funds, or other property thereunto belonging."

Analysis and Proof.

The article applies to commanding officers only.
The article defines two offenses:
I. Making false returns.
II. Omitting to render returns.

I. MAKING FALSE RETURNS.

As to *knowingly*, see remarks under fifty-fifth article.

PROOF.

(*a*) That the accused officer was a commanding officer, as alleged.
(*b*) That it became his duty as such to render to a certain superior authority a certain return as specified.
(*c*) That he complied with such duty, and that the return so made was false in certain particulars, as alleged.
(*d*) That the accused officer knew that the return was false at the time of making it.

II. OMITTING TO RENDER RETURNS.

The term "neglect" involves the idea of culpability and includes the case of an officer who, knowing the return to be due, fails to render it through remissness or procrastination.

PROOF.

(*a*) That the accused officer was a commanding officer as alleged.

(*b*) That it became his duty as such to render to a certain superior authority a certain return as specified.

(*c*) That he omitted through neglect or design to render such return.

SECTION II.

DESERTION—ABSENCE WITHOUT LEAVE.

FIFTY-EIGHTH ARTICLE.

409. Any person subject to military law who deserts or attempts to desert the service of the United States shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct, and, if the offense be committed at any other time, any punishment, excepting death, that a court-martial may direct.

DEFINITIONS AND PRINCIPLES.

Desertion is absence without leave accompanied by the intention not to return.

Both elements are essential to the offense. The offense becomes complete when the person absents himself without authority from his place of service with intent not to return thereto. A prompt repentance and return are no defense, nor is it a defense that the deserter at the time of departure intended to report for duty elsewhere. Thus, where a soldier leaves his post *intending never to go back unless a certain event happens*, or leaves his post with such intent and reports at another post, he is a deserter; but unless such intent exists at some time the soldier can not be a deserter whether his purpose is to stay away a definite or indefinite length of time. Where a soldier, without having been discharged, again enlists in the Army or in the Militia in the service of the United States, such enlistment is, by the twenty-ninth article, made sufficient evidence of desertion. In such a case, proof of the intent permanently to stay away from his former place of service and of the status of absence without leave therefrom are unnecessary.

ANALYSIS AND PROOF.

The article includes all persons subject to military law. See Article 2.

The article defines two offenses, as follows:

I. Desertion.

II. Attempting to desert.

I. DESERTION.

PROOF.

(*a*) That the accused absented himself, or remained absent without authority, from his place of service, as alleged.

(*b*) That he intended, at the time of absenting himself or at some time during his absence, to remain away permanently from such place.

(*c*) That his absence was of a duration and was terminated as alleged.

(*d*) That his act was done, if so alleged, in the execution of a certain conspiracy, or in the presence of a certain outbreak of Indians, or of a certain unlawful assemblage which his organization was opposing, or in time of war where the court will not take judicial notice of the existence of a status of war.

(*e*) Where the soldier enlisted without a discharge (see twenty-ninth article), that the accused was a soldier in a certain organization of the Army as alleged; and that, without being discharged from such organization, he again enlisted in the Army, Navy, Marine Corps, or some foreign army as alleged. In this case proof of the absence without leave and of the intention not to return become unnecessary.

II. ATTEMPTING TO DESERT.

An attempt to desert is an overt act other than mere preparation toward accomplishing a purpose to desert.

Usually the endeavor of the accused toward getting away will be frustrated by an agency independent of his own will; but once the attempt is made a turning back by the accused of his own accord does not obliterate the offense. An instance of the offense is: A soldier intending to desert hides himself in an empty freight car on the post, intending to effect his escape from the post by being taken out in the car.

PROOF.

(*a*) That the accused made the attempt by doing the overt act or acts alleged.

(*b*) That he intended to desert at the time of doing such act or acts.

(*c*) That his act was done, if so alleged, in the execution of a certain conspiracy, or in the presence of a certain outbreak of Indians, or a certain unlawful assemblage which his organization was opposing, or in time of war where the court will not take judicial notice of the existence of the status specified.

FIFTY-NINTH ARTICLE.

410. Any person subject to military law who advises or persuades or knowingly assists another to desert the service of the United States shall, if the

offense be committed in time of war, suffer death, or such other punishment as a court-martial may direct, and, if the offense be committed at any other time, any punishment, excepting death, that a court-martial may direct.

Definitions and Principles.

See the definition of desertion under the next preceding article.

As to *knowingly*, see remarks under the fifty-fifth article.

The offenses of persuading and assisting desertion are not complete unless the desertion occurs; but the offense of advising is complete when the advice is given, whether the person advised deserts or not.

It is not necessary that the accused act alone in giving the advice or assistance, or in the persuasion; and he may act through other persons in committing the offenses.

Analysis and Proof.

The article applies to all persons subject to military law. See article 2.

The article defines three offenses, as follows:

I. Advising desertion.

II. Persuading desertion.

III. Assisting desertion.

I. ADVISING DESERTION.

PROOF.

(*a*) That the accused advised a person subject to military law to desert the service as alleged.

(*b*) That the act was done, if so alleged, in time of war, where the court will not take judicial notice of the status of war.

II. PERSUADING DESERTION.

PROOF.

(*a*) That the accused used persuasion to induce a person subject to military law to desert the service as alleged.

(*b*) That the person whom he persuaded deserted as alleged, and was induced to do so by such persuasion. See proof of desertion in the next preceding article, items (*a*) and (*b*).

(*c*) That the act was done, if so alleged, in time of war, where the court will not take judicial notice of the status of war.

III. ASSISTING DESERTION.

PROOF.

(*a*) That the accused knowingly assisted a person subject to military law to desert the service as alleged.

(*b*) That the person given such assistance deserted as alleged. See proof of desertion in the next preceding article, items (*a*) and (*b*).

(*c*) That the act was done, if so alleged, in time of war, where the court will not take judicial notice of the status of war.

SIXTIETH ARTICLE.

411. Any officer who, after having discovered that a soldier in his command is a deserter from the military or naval service or from the Marine Corps, retains such deserter in his command without informing superior authority or the commander of the organization to which the deserter belongs shall be punished as a court-martial may direct.

Definitions and Principles.

See definition of desertion under article 58.

Discovered does not imply a certainty on the one hand or a mere suspicion on the other. It implies such a belief as the ordinarily prudent officer would act upon.

Analysis and Proof.

The article applies only to commanding officers.

The article defines one offense:

I. RETAINING A DESERTER.

PROOF.

(*a*) That the accused officer exercised a certain command as alleged.

(*b*) That while so in command he discovered that a certain soldier in his command was a deserter from the military or naval service, or from the Marine Corps, as alleged.

(*c*) That such soldier was in fact such a deserter. See proof of desertion under fifty-eighth article, items (*a*) and (*b*).

(*d*) That he retained such deserter in his command without informing superior authority or the commanding officer of the organization to which the deserter belongs, as alleged.

SIXTY-FIRST ARTICLE.

412. Any person subject to military law who fails to repair at the fixed time to the properly appointed place of duty, or goes from the same without proper leave, or absents himself from his command, guard, quarters, station, or camp without proper leave, shall be punished as a court-martial may direct.

Definitions and Principles.

The article is designed to cover every case not elsewhere provided for where any person subject to military law is through his own fault not at the place where he is required to be at a time when he should be there.

The first part of the article—that relating to properly appointed place of duty—applies whether such place is appointed as a rendezvous for several or for one only. Thus, it would apply in the case of a soldier failing to report as the kitchen police or leaving such duty after reporting.

A soldier turned over to the civil authorities upon application is not punishable under this article for the period he is held by them under such delivery. So, also, where a soldier is absent with leave and is held, tried, and acquitted by the civil authorities, his status does not change to absence without leave. But where the soldier is absent without leave when tried, although acquitted, or being absent with leave is convicted and held beyond the expiration of his pass, or being absent without leave is unable to return through sickness or lack of transportation facilities, or other disabilities, the period of the absence without leave will include the time he is so detained; but, in view of the fact that the absence during such time is enforced, it would be appropriate not to consider the length of such detention for the purpose of administering punishment in the case.

In computing the length in days of a period of absence for the purpose of determining the maximum punishment for an absence without leave under this article periods of 24 hours are considered one day. Thus, a soldier who absents himself from 11.59 p. m. one day to 12.01 a. m. the next is absent only a fraction of a day as far as the maximum punishment order is concerned, although the period of absence cover parts of two calendar days.

Analysis and Proof.

The article applies to any person subject to military law. See Article 2.

The article defines a number of offenses which may be treated under the general term "Absence without leave."

I. ABSENCE WITHOUT LEAVE.

PROOF.

(1) *Where the accused fails to appear at or goes from a place of duty.*

(*a*) That a certain authority appointed a certain time and place for a certain duty by the accused, as alleged.

(*b*) That he failed to report to such place at the proper time, or having so reported went from the same without authority from any one competent to give him leave to do so.

(2) *Where the accused is charged with absenting himself without proper leave.*

(*a*) That the accused absented himself from his command, guard, quarters, station, or camp for a certain period, as alleged.

(*b*) That such absence was without authority from any one competent to give him leave.

SECTION III.

DISRESPECT—INSUBORDINATION—MUTINY.

SIXTY-SECOND ARTICLE.

413. Any officer who uses contemptuous or disrespectful words against the President, Vice President, the Congress of the United States, the Secretary of War, or the governor or legislature of any State, Territory, or other possession of the United States in which he is quartered shall be dismissed from the service or suffer such other punishment as a court-martial may direct. Any other person subject to military law who so offends shall be punished as a court-martial may direct.

DEFINITIONS AND PRINCIPLES.

The contemptuous or disrespectful words, as used in this article, cover language disrespectful and contemptuous in themselves, such as abusive epithets, denunciatory or contumelious expressions, or intemperate or malevolent comments upon official or personal acts, etc., or words disrespectful or contemptuous because of the connection in which and the circumstances under which they are used.

It is essential that a person against whom such words are used be in one of the offices named at the time; but it is immaterial whether the words are spoken against him in his official or private capacity.

The truth or falsity of the statements is, as a rule, immaterial.

Trials for offenses covered by this article have usually been for the use of "contemptuous or disrespectful words against the President," or the Government mainly as represented by the President. The deliberate employment of denunciatory or contumelious language in regard to the President, whether spoken in public or published, or conveyed in a communication designed to be made public, has, in repeated cases, been made the subject of charges and trial under this article. (Digest, p. 120; Winthrop, p. 872.)

The language used must be disrespectful or contemptuous. Adverse criticism of the Executive expressed in emphatic language in the heat of political discussion, but not apparently intended to be personally disrespectful, should not be made the basis of trial under this article. (*Idem.*)

Analysis and Proof.

The article applies to any person subject to military law.

The article defines a number of offenses which may be treated under the general term of "disrespect toward the President, etc."

I. DISRESPECT TOWARD THE PRESIDENT, ETC.

PROOF.

(*a*) That the accused used certain contemptuous or disrespectful words against the President, or other of the authorities mentioned in the article, as alleged.

(*b*) Where such words are not contemptuous or disrespectful in themselves that the words were used under certain circumstances or in a certain connection, or that a certain intended meaning gave them the character of contemptuous or disrespectful words, as alleged.

SIXTY-THIRD ARTICLE.

414. Any person subject to military law who behaves himself with disrespect toward his superior officer shall be punished as a court-martial may direct.

Definitions and Principles.

The disrespectful behavior contemplated by this article is such as detracts from the respect due to the authority and person of a superior officer. It may consist in acts or language, however expressed.

It is not essential that the disrespectful behavior be in the presence of the superior, but in general it is considered objectionable to hold one accountable under this article for what was said or done by him in a purely private conversation.

The officer toward whom the disrespectful behavior was directed must have been the superior of the accused at the time of the acts charged; but by superior is not necessarily meant a superior in rank, as a line officer, though inferior in rank, may be the commanding officer, and thus the superior of a staff officer, such as a surgeon.

Disrespect by words may be conveyed by opprobrious epithets or other contumelious or denunciatory language. (Winthrop, p. 874.)

Disrespect by acts may be exhibited in a variety of modes—as neglecting the customary salute, by a marked disdain, indifference, insolence, impertinence, undue familiarity, or other rudeness in the presence of the superior officer. (Winthrop, p. 875.)

It is not essential that the behavior be intentional, and it is immaterial that only facts were stated; but where the person who did the acts or spoke the words did not know that the person against whom they were directed was his superior officer, such ignorance is a defense.

Analysis and Proof.

The article applies to any person subject to military law. See Article 2.

The article defines one offense, that is, disrespect toward a superior officer.

I. DISRESPECT TOWARD A SUPERIOR OFFICER.

PROOF.

(*a*) That the accused did or omitted to do certain acts or spoke certain words toward a certain officer, as alleged.

(*b*) That the behavior involved in such acts, omissions, or words was that under certain circumstance or in a certain connection or with a certain meaning, as alleged.

(*c*) That the officer toward whom the acts, omissions, or words were directed was the accused's superior officer.

SIXTY-FOURTH ARTICLE.

415. Any person subject to military law who, on any pretense whatsoever, strikes his superior officer or draws or lifts up any weapon or offers any violence against him, being in the execution of his office, or willfully disobeys any lawful command of his superior officer, shall suffer death or such other punishment as a court-martial may direct.

Definitions and Principles.

The phrase "on any pretense whatsoever" is not to be understood as excluding as a defense the fact that the striking was done in legitimate self-defense or in the discharge of some duty, such as is enjoined by the sixty-seventh article.

By "superior officer" is meant not only the commanding officer of the accused, whatever may be the relative rank of the two, but any other commissioned officer of rank superior to that of the accused. That the accused did not know the officer to be his superior is available as a defense.

Analysis and Proof.

The article applies to any person subject to military law. See Article 2.

The article embraces offenses indicated by the following diagram:

- Any person subject to military law who
  - On any pretense whatsoever
    - Strikes / or / Draws / or / Lifts up / or / Offers any violence against / or — Any weapon against — His superior officer being in the execution of his office.
  - Willfully disobeys any lawful command of his superior officer.

These offenses may be treated under the following heads:

I. Assaulting superior officer.

II. Disobeying superior officer.

I. ASSAULTING SUPERIOR OFFICER.

The word "strikes" means an intentional blow with anything by which a blow can be given.

The phrase "draws or lifts up any weapon against" covers any simple assault committed in the manner stated.

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 might, however, 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." (Winthrop, p. 879.)

The phrase "offers any violence against him" comprises any form of battery or of mere assault not embraced in the preceding more specific terms "strikes" and "draws or lifts 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. (Winthrop, pp. 879 and 880.)

An officer is *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." (Winthrop, p. 881.)

PROOF.

(*a*) That the accused struck a certain officer with or without a certain thing or weapon or drew or lifted up a certain weapon against him or offered violence against him, as alleged.

(*b*) That such officer was the accused's superior officer at the time.

(*c*) That such superior officer was in the execution of his office at the time, as alleged.

II. DISOBEYING SUPERIOR OFFICER.

The *willful disobedience* contemplated is such as shows an intentional defiance of authority, as where a soldier is given an order

by an officer to do or cease from doing a particular thing at once and refuses to do what is ordered or simply omits to do it.

Where the order is operative *in futuro* a mere neglect to comply with it "through heedlessness, remissness, or forgetfulness is an offense chargeable not in general under this article, but under the "general article" (Winthrop, p. 884), and the same is true of a mere refusal to obey such an order before the time set for its execution.

The order must relate to military duty and be one which the superior officer is authorized under the circumstances to give the accused. Disobedience of an order which has for its sole object the attainment of some private end or which is given for the sole purpose of increasing the penalty for an offense which it is expected the accused may commit is not punishable under this article.

An accused can not be convicted of a violation of this article if the order was in fact unlawful; but, unless the order is plainly illegal, the disobedience of it is punishable under the general article, i. e., the ninety-sixth article.

To justify from a military point of view a military inferior in disobeying the order of a superior, the order must be one requiring something to be done which is palpably a breach of law and a crime or an injury to a third person, or is of a serious character (not involving unimportant consequences only) and if done would not be susceptible of being righted. An order requiring the performance of a *military* duty or act can not be disobeyed with impunity unless it has one of these characteristics.

That obedience to a command involved a violation of the accused's religious scruples is not a defense.

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 ninety-sixth article; and so of a nonperformance by a subordinate of any mere routine duty.

The form of the order is immaterial as is the method by which it is transmitted to the accused; but the communication must amount to an order and the accused must know that it is from his superior officer; that is, a commissioned officer who is authorized to give the order whether he is superior in rank to the accused or not.

PROOF.

(*a*) That the accused received a certain command from a certain officer as alleged.

(*b*) That such officer was the accused's superior officer.

(*c*) That the accused willfully disobeyed such command.

SIXTY-FIFTH ARTICLE.

416. Any soldier who strikes or assaults, or who attempts or threatens to strike or assault, or willfully disobeys the lawful order of a noncommissioned officer while in the execution of his office, or uses threatening or insulting language, or behaves in an insubordinate or disrespectful manner toward a noncommissioned officer while in the execution of his office, shall be punished as a court-martial may direct.

Definitions and Principles.

This article has the same general objects with respect to noncommissioned officers as the sixty-third and sixty-fourth articles have with respect to commissioned officers, namely, to insure obedience to their lawful orders, and to protect them from violence, insult, or disrespect.

The terms "willful disobedience," "lawful order," and "in the execution of his office" are used in the same sense as in the sixty-fourth article.

Analysis and Proof.

The article applies to enlisted men only.

The article embraces offenses indicated by the following diagram:

- Any soldier who
  - Strikes / or / Assaults / or / Attempts / or / Threatens } to { Strike / or / Assault } — A noncommissioned officer while in the execution of his office.
  - or
  - Willfully disobeys the lawful order of } — A noncommissioned officer while in the execution of his office.
  - or
  - Uses { Threatening language / or / Insulting language } — Toward a noncommissioned officer while in the execution of his office.
  - or
  - Behaves in an { Insubordinate manner / or / Disrespectful manner } — Toward a noncommissioned officer while in the execution of his office.

These offenses may be briefly treated under the following headings:

I. Assaulting a noncommissioned officer.

II. Disobeying a noncommissioned officer.

III. Using threating or insulting language or behaving in an insubordinate or disrespectful manner toward a noncommissioned officer.

I. ASSAULTING A NONCOMISSIONED OFFICER.

For definition of the offense, see ninety-third article, item IX.

The part of the article relating to assaults covers any unlawful violence against a noncommissioned officer in the execution of his office, whether such violence is merely threatened or is advanced in any degree toward actual application.

PROOF.

(*a*) That the accused soldier struck a certain noncommissioned officer with a certain thing, or assaulted, or attempted or threatened to strike or assault him in a certain manner, as alleged.

(*b*) That such noncommissioned officer was at the time in the execution of his office, as alleged.

II. DISOBEYING A NONCOMMISSIONED OFFICER.

PROOF.

(*a*) That the accused soldier received a certain command from a certain noncommissioned officer, as alleged.

(*b*) That the noncommissioned officer was in the execution of his office.

(*c*) That the accused soldier willfully disobeyed such command.

III. USING THREATENING OR INSULTING LANGUAGE OR BEHAVING IN AN INSUBORDINATE OR DISRESPECTFUL MANNER TOWARD A NONCOMMISSIONED OFFICER.

The phrase "while in the execution of his office" limits the application of this part of the article to language and behavior within sight or hearing of the noncommissioned officer toward whom it is used; the word "toward" not being used in the same sense as in the sixty-third article.

PROOF.

(*a*) That the accused used certain language or did or omitted to do certain acts under certain circumstances, or in a certain manner or with a certain intended meaning, as alleged.

(*b*) That such language or behavior was used toward a certain noncommissioned officer.

(*c*) That such noncommissioned officer was at the time in the execution of his office, as alleged.

SIXTY-SIXTH ARTICLE.

417. Any person subject to military law who attempts to create or who begins, excites, causes, or joins in any mutiny or sedition in any company, party, post, camp, detachment, guard, or other command shall suffer death or such other punishment as a court-martial may direct.

Definitions and Principles.

Mutiny imports collective insubordination, and necessarily includes some combination of two or more persons in resisting lawful military authority.

Sedition implies the raising of commotion or disturbance against the State; it is a revolt against legitimate authority and differs from mutiny in that it implies a resistance to lawful civil power.

The concert of insubordination contemplated in mutiny or sedition need not be preconceived nor is it necessary that the act of insubordination be active or violent. It may consist simply in a persistent and concerted refusal or omission to obey orders or to do duty with an insubordinate intent.

Analysis and Proof.

The article applies to any person subject to military law.

The article defines five offenses relating to mutiny and five relating to sedition.

I. Attempting to create a mutiny (or sedition).
II. Beginning a mutiny (or sedition).
III. Joining in a mutiny (or sedition).
IV. Exciting a mutiny (or sedition).
V. Causing a mutiny (or sedition).

I. ATTEMPTING TO CREATE A MUTINY OR SEDITION.

An attempt to commit a crime is an act done with specific intent to commit the particular crime and *proximately* tending to, but falling short of, its consummation. There must be an apparent possibility to commit the crime in the manner specified. Voluntary abandonment of purpose after an act constituting an attempt is not a defense.

The intent which distinguishes mutiny or sedition is the intent to resist lawful authority in combination with others. The intent to create a mutiny or sedition may be declared in words, or, as in all other cases, it may be inferred from acts done or from the surrounding circumstances.

A single individual may harbor an intent to *create a mutiny* and may commit some overt act tending to create a mutiny or sedition and so be guilty of an attempt to *create a mutiny* or sedition, alike whether he was joined by others or not, or whether a mutiny or sedition actually followed or not.

PROOF.

(*a*) An act or acts *of accused* which proximately tended to create a certain intended (or actual) collective insubordination.

(*b*) A specific intent to create a certain intended (or actual) collective insubordination.

(*c*) That the insubordination occurred or was intended to occur in a company, party, post, camp, detachment, guard, or other command.

II–III. BEGINNING OR JOINING IN A MUTINY.

There can be no actual mutiny or sedition until there has been an overt act of insubordination joined in by two or more persons, and so no person can be guilty of beginning or joining in a mutiny unless an overt act of mutiny is proved. A person can not be guilty of *beginning* a mutiny unless he is the first, or among the first, to commit an overt act of mutiny; a person can not *join in* a mutiny without joining in some overt act. Hence presence of the accused at the scene of mutiny is necessary in these two cases.

PROOF.

(*a*) The occurrence of certain collective insubordination in a company, party, post, camp, detachment, or other command.

(*b*) That the accused began or joined in the certain collective insubordination.

IV–V. CAUSING OR EXCITING A MUTINY.

As in II and III, *supra*, no person can be guilty of *causing or exciting* a mutiny unless an overt act of mutiny follows his efforts. But a person may excite or cause a mutiny without taking personal part in or being present at the demonstrations of mutiny which result from his activities.

PROOF.

(*a*) The occurrence of certain collective insubordination in a certain company, party, post, camp, detachment, or guard, or other command.

(*b*) Acts of the accused tending to create or excite the certain collective insubordination.

SIXTY-SEVENTH ARTICLE.

418. Any officer or soldier who, being present at any mutiny or sedition, does not use his utmost endeavor to suppress the same, or knowing or having reason to believe that a mutiny or sedition is to take place, does not without delay give information thereof to his commanding officer shall suffer death or such other punishment as a court-martial may direct.

Definitions and Principles.

See pages 213, 214.

Analysis and Proof.

The article applies only to officers and soldiers. It defines two offenses relating to mutiny and two relating to sedition.

I. Being present at a mutiny (*or* sedition), failing to use the utmost endeavor to suppress it.

II. Having knowledge or reason to believe that a mutiny (*or* sedition) is to take place, failing to give information thereof to his commanding officer without delay.

I. FAILURE TO SUPPRESS MUTINY (OR SEDITION).

Mere presence countenancing such collective insubordinations and disturbances as mutinies, riots, and seditions has been considered criminal for over a century. The article goes a step further and requires of officers and soldiers their utmost endeavors to suppress such disorders.

One is not *present* at a mutiny unless an act or acts of collective insubordination occur in his presence.

Utmost endeavor is a relative term. The rule governing the lawful use of force to suppress crime or arrest wrongdoers is that as much force may be used as is reasonably necessary to accomplish the desired purpose, and no more. This article has been construed as authorizing and requiring the most extreme measures—even to the using of a dangerous weapon and the taking of life—*where such extreme measures are reasonably necessary.* But all the circumstances of necessity are to be considered. Means which in war and before the enemy would be not only justified, but laudable, might, in time of peace, render the person employing them criminally and civilly liable for abuse of authority.

PROOF.

(*a*) The occurrence of an act or acts of collective insubordination in the presence of the accused.

(*b*) Acts or omissions of the accused which constitute a failure to use his utmost endeavor to suppress such acts.

II. FAILURE TO GIVE INFORMATION OF MUTINY (OR SEDITION).

Where circumstances known to the accused are such as would have caused a reasonable man in the same or similar circumstances to believe that a mutiny or sedition was impending, these circumstances will be sufficient to charge the accused with such reason to believe as will render him culpable under the article.

It is not a necessary element of the crime that the impending mutiny or sedition materialize.

"Delay" imports the lapse of an unreasonable time without action.

The expression "commanding officer" here includes in its meaning any officer having a military command over the person who has knowledge or reason to believe that a mutiny or sedition is impending.

PROOF.

(*a*) That the accused knew that a mutiny or sedition was impending or that he knew of circumstances that would have induced, in a reasonable man, a belief that a mutiny or sedition was impending.

(*b*) Acts or omissions of the accused which constitute a failure or unreasonable delay in informing his commanding officer of his knowledge or belief.

SIXTY-EIGHTH ARTICLE.

419. All officers and noncommissioned officers have power to part and quell all quarrels, frays, and disorders among persons subject to military law and to order officers who take part in the same into arrest, and other persons subject to military law who take part in the same into arrest or confinement, as circumstances may require, until their proper superior officer is acquainted therewith. And whosoever, being so ordered, refuses to obey such officer or noncommissioned officer or draws a weapon upon or otherwise threatens or does violence to him shall be punished as a court-martial may direct.

DEFINITIONS AND PRINCIPLES.

A fray is a fight in a public place to the terror of the people, in which acts of violence occur or dangerous weapons are exhibited or threatened to be used. All persons aiding or abetting a fray are principals. The word "frays" is thus seen to be somewhat restrictive, but the words "quarrels" and "disorders" include any disturbance of a contentious character from a mere war of words to a rout or riot.

To quell is to quiet, allay, abate, or put down.

It is immaterial under the article whether the officer or noncommissioned officer who essays to part or quell quarrels, frays, and disorders is on a duty status or not, as it is immaterial whether the

persons engaged in the disorder are superior to him in rank or not.

Analysis and Proof.

The punitive portion of the article applies to all persons subject to military law. It is designed to enforce the authority of officers or noncommissioned officers to part and quell certain disorders and to order the participants into confinement or arrest.

The article defines four crimes:

I. Refusal to obey an order of an officer or noncommissioned officer placing the accused in arrest or confinement.

II. Upon being ordered into arrest or confinement, drawing a weapon on the officer or noncommissioned officer giving the order.

III. Upon being ordered into arrest or confinement, threatening the officer or noncommissioned officer giving the order.

IV. Upon being ordered into arrest or confinement, doing violence to the officer or noncommissioned officer giving the order.

I. DISOBEDIENCE OF ORDERS INTO ARREST OR CONFINEMENT.

It should appear that the power conferred by the article was being exercised for the purpose stated, and therefore the charges and proof should refer to the order given during the disorder. It should be made to appear that the accused heard or understood the order and knew that the person giving it was an officer or noncommissioned officer.

PROOF.

(*a*) That the accused was a participant in a certain quarrel, fray, or disorder occurring among persons subject to military law.

(*b*) That during the disorder a certain officer or noncommissioned officer ordered the accused into arrest (if accused is an officer) or into arrest or confinement (if accused is a person subject to military law other than an officer), with a view to quell or part the disorder.

(c) That the accused refused to obey.

II, III, IV. THREATENING, DRAWING A WEAPON UPON, OR OFFERING VIOLENCE TO, AN OFFICER OR NONCOMMISSIONED OFFICER.

The proof of the second, third, and fourth crimes defined by the article should follow in form and essentials the proof required under the first crime (disobedience of order into arrest or confinement, *supra*), except that instead of proving a refusal to obey (par. 3, *supra*), drawing a weapon, making a threat, or doing violence must be proved as the consummation of the particular offense. The word threat as here used includes any menacing action, either by gesture or by words.

SECTION IV—ARREST; CONFINEMENT.

SIXTY-NINTH ARTICLE.

420. An officer charged with crime or with a serious offense under these articles shall be placed in arrest by the commanding officer, and in exceptional cases an officer so charged may be placed in confinement by the same authority. A soldier charged with crime or with a serious offense under these articles shall be placed in confinement, and when charged with a minor offense he may be placed in arrest. Any other person subject to military law charged with crime or with a serious offense under these articles shall be placed in confinement or in arrest, as circumstances may require; and when charged with a minor offense such person may be placed in arrest. Any person placed in arrest under the provisions of this article shall thereby be restricted to his barracks, quarters, or tent, unless such limits shall be enlarged by proper authority. Any officer who breaks his arrest or who escapes from confinement before he is set at liberty by proper authority shall be dismissed from the service or suffer such other punishment as a court-martial may direct; and any other person subject to military law who escapes from confinement or who breaks his arrest before he is set at liberty by proper authority shall be punished as a court-martial may direct.

DEFINITIONS AND PRINCIPLES.

The arrest of an officer has been compared to an enlargement on bail, the security being the officer's commission. It is for this reason that the punishment may include dismissal. The distinction between arrest and confinement lies in the difference between the kinds of restraint imposed. In arrest the restraint is moral restraint imposed by the orders fixing the limits of arrest, or by the terms of the article. Confinement imports some physical restraint.

ANALYSIS AND PROOF.

The article applies to all persons subject to military law. The article defines two crimes:

I. Breach of arrest.

II. Escape from confinement.

I. BREACH OF ARREST.

The offense is committed when the person restrained infringes the limits set by orders, or by the sixty-ninth article of war, and the intention or motive that actuated him is immaterial to the issue of guilt, though, of course, proof of inadvertence or *bona fide* mistake is admissible to guide the court in assessing punishment. The unlawfulness of the arrest is a valid defense, but innocence of the accusation upon which the arrest is imposed is entirely irrelevant.

PROOF.

(*a*) That the accused was duly placed in arrest.

(*b*) That before he was set at liberty by proper authority he transgressed the limits fixed by the sixty-ninth article of war or by the orders of proper authority.

II. ESCAPE FROM CONFINEMENT.

An escape may be either with or without force or artifice, and either with or without the consent of the custodian. Any completed casting off of the restraint of confinement, before being set at liberty by proper authority, is an escape from confinement, and a lack of effectiveness of the physical restraint imposed is immaterial to the issue of guilt. It seems, however, that an escape is not complete until the prisoner has, momentarily at least, freed himself from the restraint of his confinement, so, if the movement toward escape is opposed, or before it is completed an immediate pursuit ensues, there will be no escape until opposition is overcome, or pursuit is shaken off. In cases where the escape is not completed the offense should be charged as an attempt under the ninety-sixth article of war.

PROOF.

(*a*) That the accused was placed in confinement.

(*b*) That he freed himself from the restraint of his confinement before he had been set at liberty by proper authority.

SEVENTY-FIRST ARTICLE.

421. No provost marshal or commander of 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 time, deliver an account in writing, signed by himself, of the crime or offense charged against the prisoner. Any officer or soldier so refusing shall be punished as a court-martial may direct.

DEFINITIONS AND PRINCIPLES.

The words "commander of a guard" include a commander of any rank or grade, and hence a noncommissioned officer or private. The term "any prisoner" includes civil as well as military prisoners who are committed according to the terms of the article. A provost marshal or commander of a guard *may* receive a prisoner without an account of the charge against him or other due formality of commitment, but he *must* receive the prisoner where the required account in writing accompanies the commitment.

A mere name or description of the offense charged in common parlance when written and signed by the committing officer is a sufficient "account in writing."

Analysis and Proof.

The article applies to officer and soldiers.

The article defines one crime:

I. REFUSING TO RECEIVE OR KEEP A PRISONER COMMITTED WITH A WRITTEN ACCOUNT OF THE OFFENSE CHARGED AGAINST HIM SIGNED BY THE OFFICER COMMITTING THE PRISONER.

PROOF.

(*a*) That the accused was a provost marshal or commander of a guard.

(*b*) That a certain prisoner was committed to his charge by a certain officer belonging to the forces of the United States.

(*c*) That, at the time of commitment, the committing officer delivered to the accused a written account of the crime or offense charged against the prisoner, which account was signed by the committing officer.

(*d*) That the accused refused to receive or keep the prisoner.

SEVENTY-SECOND ARTICLE.

422. Every commander of a guard to whose charge a prisoner is committed shall, within twenty-four hours after such confinement, or as soon as he is relieved from his guard, report in writing to the commanding officer the name of such prisoner, the offense 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.

Definitions and Principles.

The term "commander of a guard" includes commanders of any rank or grade.

The term "prisoner" includes civilian as well as military prisoners.

The term "commanding officer" imports the commander to whom the guard report is properly made.

Analysis and Proof.

The article applies to officers and soldiers. It defines one offense:

I. FAILURE TO RENDER A REPORT AS PRESCRIBED.

PROOF.

(*a*) That the accused was commander of a certain guard.

(*b*) That a prisoner was committed to his charge.

(*c*) That the accused—

1. Failed to make any report at all, or,
2. That the report rendered was not in writing, or,

3. That no report was rendered within 24 hours after confinement, or as soon as accused was relieved from his guard, or,

4. That the report failed to set forth one or more of the particulars prescribed.

SEVENTY-THIRD ARTICLE.

423. Any person subject to military law who, without proper authority, releases any prisoner duly committed to his charge, or who through neglect or design suffers any prisoner so committed to escape, shall be punished as a court-martial may direct.

Definitions and Principles.

The article describes three long-recognized common-law crimes.

It looks to the punishment of any person who is responsible for the unauthorized release or escape of a prisoner duly committed to his charge, and hence any member of a guard, party, escort, and convoy, or any person subject to military law to whose charge a prisoner is committed may be guilty of an offense under this article. Where a prisoner is committed to the commander of a guard, party, escort, or convoy, and is released by, or escapes from, a subordinate or subordinates to whom the commander has duly delegated custody of the prisoner, or to whom that custody duly falls as an incident of duty, all will be responsible under this article, except those who can show that the escape or release occurred under circumstances against which they could not reasonably guard.

The words "any prisoner" import both military and civilian prisoners.

A person may receive a prisoner in his capacity as commander or member of a guard, or he may be burdened with such a responsibility as a personal trust. In the former case, the lowest authority competent to release the prisoner is the chief of the command, of the guard by which the prisoner is held. In the latter case, the authority who has imposed the trust, and who was competent to do so, is the lowest "proper authority" to order a release.

While a commander of the guard must receive a prisoner properly committed by *any officer*, the power of the committing officer ceases as soon as he has committed the prisoner, and he is not a "proper authority" to order a release.

An officer is not responsible under this article unless the prisoner was *duly committed*, but, as was pointed out in the discussion of the seventy-first article, an officer *may* receive a prisoner not committed in strict compliance with the terms of that article or other law, and if, having so received a prisoner, he releases such prisoner, or suffers him to escape, he may be held to answer, under the ninety-sixth article, for any dereliction of duty that may be predicated on his conduct in the case.

Analysis and Proof.

The article applies to any person subject to military law.

The article defines three crimes:

I. Releasing a prisoner without proper authority.

II. Suffering a prisoner to escape through neglect.

III. Suffering a prisoner to escape through design.

I. RELEASING A PRISONER WITHOUT PROPER AUTHORITY.

A *release* imports a removal of restraint from the prisoner in which the custodian is the sole actor, and in which the prisoner takes no initiative.

PROOF.

(*a*) That a certain prisoner was duly committed to the charge of the accused.

(*b*) That the accused released him without proper authority.

II. SUFFERING A PRISONER TO ESCAPE THROUGH NEGLECT.

The word "neglect" is here used in the sense of the word "negligence."

Negligence is a relative term. It is defined in law as the absence of due care. The legal standard of care is that which would have been taken by a reasonably prudent man in the same or similar circumstances. This test looks to the standard required of persons acting in the capacity in which the accused was acting. Thus, if the accused is an officer, the test will be, "How would a reasonably prudent officer have acted?" If the circumstances were such as would have indicated to a reasonably prudent officer that a very high order of care was required to prevent escape, then the accused must be held to a very high order of care. The test is thus elastic, logical, and just.

A prisoner can not be said to have escaped until he has overcome the opposition that restrained him, and shaken off immediate pursuit. Once he has done these things, the fact that he returns, is taken in a fresh pursuit, is killed, or dies, will not relieve the person accused of guilt under this article.

PROOF.

(*a*) That a certain prisoner was duly committed to the charge of the accused.

(*b*) That the prisoner escaped.

(*c*) That the accused did not take such care to prevent escape as a reasonably prudent person, acting in the capacity in which the

accused was acting, would have taken in the same or similar circumstances. (This constitutes neglect.)

(*d*) That the escape was the proximate result of the neglect of the accused.

III. SUFFERING A PRISONER TO ESCAPE THROUGH DESIGN.

In law a wrongful act is designed when it is intended or when it results from conduct so shockingly and grossly devoid of care as to leave room for no inference but that the act was contemplated as an extremely probable result of the course of conduct followed. Thus, on a charge of suffering a prisoner to escape through design, evidence of gross negligence may be received as probative of design.

It sometimes happens that a prisoner has been permitted larger limits than should have been allowed, and an escape is consummated without hindrance. It does not at all follow that such an escape is to be considered as designed. The conduct of the responsible custodian is to be examined in the light of all the circumstances of the case, the heinousness of the crime with which the prisoner is charged, the notoriety of the prisoner's guilt, the probability of his return, and the intention and motives of the custodian.

PROOF.

(*a*) That a certain prisoner was duly committed to the charge of the accused.

(*b*) That the prisoner escaped.

(*c*) 1. Acts of the accused tending to permit escape. 2. Acts of the accused probative of a design to suffer the escape.

(*d*) That as a result of these acts and of this design the prisoner escaped.

SEVENTY-FOURTH ARTICLE.

424. When any person subject to military law, except one who is held by the military authorities to answer, or who is awaiting trial or result of trial, or who is undergoing sentence for a crime or offense punishable under these articles, is accused of a crime or offense committed within the geographical limits of the States of the Union and the District of Columbia, and punishable by the laws of the land, the commanding officer is required, except in time of war, upon application duly made, to use his utmost endeavor to deliver over such accused person to the civil authorities, or to aid the officers of justice in apprehending and securing him, in order that he may be brought to trial. Any commanding officer who upon such application refuses or willfully neglects, except in time of war, to deliver over such accused person to the civil authorities or to aid the officers of justice in apprehending and securing him shall be dismissed from the service or suffer such other punishment as a court-martial may direct.

When, under the provisions of this article, delivery is made to the civil authorities of an offender undergoing sentence of a court-martial, such delivery, if followed by conviction, shall be held to interrupt the execution of the sen-

tence of the court-martial, and the offender shall be returned to military custody, after having answered to the civil authorities for his offense, for the completion of the said court-martial sentence.

Definitions and Principles.

I. REFUSING TO DELIVER ACCUSED PERSONS.

The words "commanding officer," as here used, import the officer who is chief of the complete integral place, body of troops, or detachment, wherein the person accused is serving at the time application is duly made. The words "upon application duly made" prescribe a condition precedent to responsibility. They are inserted to prevent the possibility of false arrests, and to enable the commanding officer to satisfy himself of the true official character of him who makes the application, of the subsistence of an actual accusation against the person sought, and of the locus of the charged crime or offense.

The commanding officer should require that the application show that the crime or offense is alleged to have been committed within the geographical limits of the States of the Union and the District of Columbia. A sufficient form of application will be a written communication setting forth the fact of such an accusation of a crime or offense committed within the prescribed limits as would subject the accused person to arrest by the civil authorities for the purposes of trial, or that a warrant for such arrest has issued, and a request that the commanding officer deliver the person accused to the civil authorities or assist them in apprehending or securing him. When the military jurisdiction has actively attached in any of the ways prescribed in the article, the commanding officer may, but he is *not required* to make the prescribed delivery.

II. REFUSING TO AID IN APPREHENDING ACCUSED PERSONS.

The commanding officer is required not only to deliver the person accused but to aid in apprehending and securing him. The article therefore contemplates cases where, after apprehension by either the military or civil authorities, an application is duly made to a commanding officer for his assistance in *securing* a person subject to military law and accused of crime.

"Utmost endeavor" is to be understood in a reasonable sense with reference to the circumstances of the particular case. Thus, if the accused is not within military control, as where he is absent as a deserter, nothing more can be required of a commander than to furnish civil authority such information of his whereabouts and the prospect of his return as may be available.

While commanding officers are enjoined to use their utmost endeavor in carrying out the provisions of this law, a mere inadvertent neglect to take some necessary step toward delivery, apprehension, or securing of the person accused will not constitute an offense under this article, which contemplates only refusals and *willful* neglects to act.

Analysis and Proof.

The punitive portion of the article applies only to officers, but the obligation to deliver or assist in apprehending and securing rests on all persons subject to military law.

The article defines two offenses:

I. Refusing or willfully neglecting to deliver an accused person.

II. Refusing or willfully neglecting to aid in apprehending and securing an accused person.

The essentials of proof are similar in both cases.

PROOF.

(*a*) That the accused was the commanding officer of a certain integral place, body of troops, or detachment.

(*b*) That a certain person under his command stood accused of a certain crime or offense, committed within the geographical limits of the States of the Union and the District of Columbia.

(*c*) That application was duly made to the accused officer by a person in proper civil authority—

1. To deliver the accused person to the civil authorities; or

2. To aid the officers of justice in apprehending and securing, or either, the accused person.

(*d*) Acts or omissions of the accused officer which constitute a refusal or a willful neglect to deliver the accused person or to aid in apprehending or securing him.

Section V.

WAR OFFENSES.

SEVENTY-FIFTH ARTICLE.

425. Any officer or soldier who misbehaves himself before the enemy, runs away, or shamefully abandons or delivers up any fort, post, camp, guard, or other command which it is his duty 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, or 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.

Definitions and Principles.

Misbehavior is by no means confined to acts of cowardice. It is a general term, and as here used it renders culpable under this article any conduct by an officer or soldier not conformable to the standard of behavior before the enemy set by the history of our arms. Running away is but a particular form of misbehavior specifically made punishable by this article.

"The enemy" imports any hostile body that our forces may be opposing and well includes a rebellious mob, a band of renegades, or a tribe of Indians.

Analysis and Proof.

The article applies only to officers and soldiers. It defines seven offenses:

I. Misbehavior before the enemy.

II. Running away before the enemy.

III. Shamefully abandoning or delivering up any command.

IV. Speaking words inducing others to misbehave, run away, or abandon or deliver up any command.

V. Casting away arms or ammunition.

VI. Quitting post or colors to plunder or pillage.

VII. Occasioning false alarms.

I. MISBEHAVIOR BEFORE THE ENEMY.

Under this clause may be charged any act of treason, cowardice, insubordination, or other unsoldierly conduct committed in the presence of the enemy.

PROOF.

(*a*) That the accused was serving in the presence of an enemy.

(*b*) Acts or omissions of the accused not conformable to the standard of soldierly conduct set by the history of our arms.

II. RUNNING AWAY BEFORE THE ENEMY.

(*a*) That the accused was serving in the presence of an enemy.

(*b*) That he misbehaved himself by running away.

III. SHAMEFULLY ABANDONING OR DELIVERING UP ANY COMMAND.

While the word "abandon" is broad enough to include a case in which a soldier or a subordinate officer leaves a fort, post, guard, or command which it is his duty to defend, it is probable that this clause of the article looks only to offenses by the commanding officers of such commands, and that abandonment by a subordinate should be charged as misbehavior or running away.

The words "deliver up" are synonymous with the word "surrender."

The surrender or abandonment of a command by an officer charged with its defense can only be justified by the utmost necessity and extremity, such as the exhaustion of provisions or water, the absence of hope of relief, and the certainty or extreme probability

that no further effort could prevent the place, with its garrison, their arms, and magazines, from presently falling into the hands of the enemy. Unless such absolute necessity is shown, the conclusion must be that the surrender or abandonment was shameful within the meaning of this article.

An officer's duty to defend may be imposed by orders or by the circumstances in which he finds himself at a particular stage of operations; but an officer will find less justification in abandoning a post that he has been ordered to defend than in abandoning one that he has decided to defend. He will have less justification in delivering up a post than in abandoning it, and in delivering up a post that he has been ordered to defend he will have no justification at all except such as can be found in proof that no further resistance was possible.

PROOF.

(*a*) That the accused was charged by orders or by circumstances with a duty to defend a certain fort, post, camp, guard, or other command.

(*b*) That without justification he abandoned it or surrendered it.

IV. SPEAKING WORDS INDUCING OTHERS TO MISBEHAVE, RUN AWAY, OR TO ABANDON OR DELIVER UP ANY COMMAND.

The words "to do the like" refer to the offenses of misbehavior and running away, as well as to abandoning or delivering up a command.

The inducement contemplated is verbal only, but it may include any argument, persuasion, threat, language of discouragement or alarm, or false or incorrect statement which may avail to bring about an unnecessary surrender, retreat, or any misbehavior before the enemy. The offense will not be complete, however, unless the words spoken do induce some person other than the accused to misbehave, run away, or abandon or surrender a command. It is to be noted, however, that speaking words whose natural tendency is to induce others to do any of these things may in itself constitute misbehavior of the speaker within the meaning of the article, although the words spoken induce no misconduct on the part of others.

PROOF.

(*a*) That some person other than the accused misbehaved in the presence of the enemy or ran away or abandoned or delivered up any command which it was his duty to defend.

(*b*) Words spoken by the accused which induced such action.

V. CASTING AWAY ARMS OR AMMUNITION.

PROOF.

(*a*) That the accused cast away certain arms or ammunition as specified.

VI. QUITTING POST OR COLORS TO PLUNDER OR PILLAGE.

The word "post" includes any place of duty, whether permanently or temporarily fixed. The term "colors" was used to include cases where the offender's organization is moving, but the words "quits his post," as here used, import any unauthorized leaving of that place where the accused should be.

In proving this crime an intent to pillage or plunder must be shown. The words "to pillage or plunder" may be properly paraphrased "to seize and appropriate public or private property." The offense is no less committed, though the quitting is by *quasi* authority, as where soldiers quit the place where they should be to go forth and maraud in company with an officer or noncommissioned officer.

The act is complete when the accused has left his post with the described intent, although he may never have consummated his design.

PROOF.

(*a*) That the accused left his post of duty.

(*b*) That the intention of the accused in leaving was to seize and appropriate private or public property.

VII. OCCASIONING FALSE ALARMS.

The article is intended as well to guard the repose and tranquillity of troops as to avoid the ill effect on morale which must inevitably follow needless excursions and alarms. The article contemplates the spreading of false and disturbing rumors and reports as well as the needless giving of such alarm signals as the beating of drums and the blowing of trumpets.

The intent is immaterial. If the alarm was given, and it appears that there was no material cause or occasion which should reasonably justify a general alarm, the offense is complete.

PROOF.

(*a*) That an alarm was occasioned in a certain camp, garrison, or quarters.

(*b*) Conduct of the accused which occasioned the alarm.

(*c*) That there was no reasonable or sufficient justification in fact for occasioning the alarm.

SEVENTY-SIXTH ARTICLE.

426. If any commander of any garrison, fort, post, camp, guard, or other command is compelled, by the officers or soldiers under his command, to give it 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.

Definitions and Principles.

When the surrender or abandonment of a command is induced by words spoken, the offense should be charged under the seventy-fifth article. Where the surrender or abandonment is compelled by acts rather than words, the charge should be laid under the present article.

The offense here contemplated is very like that of a mutiny which results in the surrender or abandonment of any command, but, unlike mutiny, no concert of action is an essential element of this offense. The offense is not complete until the command is abandoned or given up to the enemy. The compulsion need not consist in the use of actual violence or force. A refusal to obey orders or to do duty or to participate in measures of defense would be as effective compulsion as if forcible restraint were resorted to.

Analysis and Proof.

The article applies to officers and soldiers.

The article defines one crime.

I. SUBORDINATES COMPELLING COMMANDER TO SURRENDER.

PROOF.

(*a*) That a certain commander has abandoned his command or given it up to the enemy.

(*b*) That the accused was under the command of this commander.

(*c*) Acts or omissions of the accused that compelled the commander to abandon his command or give it up to the enemy.

SEVENTY-SEVENTH ARTICLE.

427. Any person subject to military law who makes known the parole or countersign to any person not entitled to receive it according to the rules and discipline of war, or gives a parole or countersign different from that which he received, shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct.

Definitions and Principles.

A countersign is a word given from the principal headquarters of a command to aid guards and sentinels in their scrutiny of persons who apply to pass the lines.

A parole is a word used as a check on the countersign. It is imparted only to those who are entitled to inspect guards and to commanders of guards.

Analysis and Proof.

The article applies to any person subject to military law.

It defines two offenses:

I. Making known the parole or countersign.

II. Giving a parole or countersign different from that received.

I. MAKING KNOWN THE PAROLE OR COUNTERSIGN.

The class of persons entitled to receive the countersign will expand and contract under the varying circumstances of war. Who these persons are will be determined largely, in any particular case, by the general or special orders under which the accused was acting. It is no defense under the terms of this law that the accused *did not know* that the person to whom he communicated the countersign or parole was not entitled to receive it. Before imparting such a word it behooves a person subject to military law to determine at his peril that the person to whom he presumes to make known the word is a person authorized to receive it.

The intent or motive that actuated the accused is immaterial to the issue of guilt, as would also be the circumstance that the imparting was negligent or inadvertent. It is likewise immaterial whether the accused had himself received the password in the regular course of duty or whether he obtained it in some other way.

PROOF.

(*a*) That the accused made known the countersign or parole to a certain person, known or unknown.

(*b*) That the person was not entitled to receive it.

II. GIVING A PAROLE OR COUNTERSIGN DIFFERENT FROM THAT RECEIVED.

The intent or motive that actuated the accused is immaterial to the issue of guilt.

PROOF.

(*a*) That the accused received a certain countersign or parole.

(*b*) That he gave a parole or countersign different from that which he received.

SEVENTY-EIGHTH ARTICLE.

428. Any person subject to military law who, in time of war, forces a safeguard shall suffer death or such other punishment as a court-martial may direct.

Definitions and Principles.

A safeguard is a detachment, guard, or detail posted by a commander for the purpose of protecting some person or persons, place, or property. The term also imports a written order left by a commander with an enemy subject or posted upon enemy property for the protection of the individual or property concerned.

Any trespass on the protection of the safeguard will constitute an offense under the article, provided that the accused was aware of the existence of the safeguard.

Analysis and Proof.

The article applies to all persons subject to military law.

It defines one offense:

I. FORCING A SAFEGUARD.

PROOF.

(*a*) That a safeguard had been issued or posted for the protection of a certain person or persons, place, or property.

(*b*) That, with knowledge of the safeguard, or under circumstances that charged him with notice of the safeguard, the accused trespassed upon its protection.

SEVENTY-NINTH ARTICLE.

429. All public property taken from the enemy is the property of the United States and shall be secured for the service of the United States, and any person subject to military law who neglects to secure such property or is guilty of wrongful appropriation thereof shall be punished as a court-martial may direct.

Definitions and Principles.

Immediately upon its capture from the enemy public property becomes the property of the United States. Neither the individual who takes it nor any other person has any private right in such property. On the contrary, every person subject to military law has an immediate duty to take such steps as are within his powers and functions to secure such property to the service of the United States and to protect it from destruction or loss.

Analysis and Proof.

The article applies to all persons subject to military law. See A. W. 2.

It defines two offenses:

I. Neglecting to secure captured public property.

II. Wrongful appropriation of captured public property.

I. NEGLECTING TO SECURE CAPTURED PUBLIC PROPERTY.

The neglect will consist in a failure to take such steps as a reasonably prudent man acting in the capacity in which accused was acting would have taken in the same or similar circumstances to secure the property in question to the service of the United States.

PROOF.

(*a*) That certain public property was captured from the enemy.

(*b*) That the functions of the accused vested him with a certain power and imposed on him a certain duty to secure such property to the service of the United States.

(*c*) Acts or omissions of the accused which evidence a failure to take such steps to secure the property to the service of the United States as would have been taken by a reasonably prudent person acting in the capacity in which the accused was acting and in the same or similar circumstances.

II. WRONGFUL APPROPRIATION OF CAPTURED PUBLIC PROPERTY.

Any unauthorized and unjustified act in disposition of property which is inconsistent with the true owner's right of complete dominion over it is a wrongful appropriation of it. A wrongful appropriation is distinguished from a neglect in that it presumes some act while a neglect may consist solely in an omission.

PROOF.

(*a*) That certain public property was captured from the enemy.

(*b*) Acts of the accused in disposition of the captured public property, inconsistent with the United States right of complete dominion over that property.

EIGHTIETH ARTICLE.

430. Any person subject to military law who buys, sells, trades, or in any way deals in or disposes of captured or abandoned property, whereby he shall receive or expect any profit, benefit, or advantage to himself or to any other person directly or indirectly connected with himself, or who fails whenever such property comes into his possession or custody or within his control to give notice thereof to the proper authority and to turn over such property to the proper authority without delay, shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial, military commission, or other military tribunal may adjudge, or by any or all of said penalties.

Definitions and Principles.

This article is broader than the preceding one in the following particulars: It protects abandoned as well as captured property and private as well as public property.

Unless the property is private or abandoned property or unless the acts charged fall within the descriptions of this article, the offense should be charged under article 79, *supra*.

Analysis and Proof.

The article applies to all persons subject to military law. See A. W. 2.

It defines a number of offenses which may be treated as follows:

I. Any dealing in or disposition of captured or abandoned property whereby the accused receives or expects to receive an advantage.

II. Failure or delay in reporting the receipt of and in turning over to proper authority captured or abandoned property.

I. DEALING IN CAPTURED OR ABANDONED PROPERTY.

This portion of the article addresses itself to several specific acts of wrongful dealings and looks especially to cases where, instead of appropriating the property to his own use in kind, the accused in any other way deals with it to advantage. The article prohibits receipt as well as disposition of captured or abandoned property by barter, gift, pledge, lease, or loan. It lies against the destruction or abandonment of such property if any of these acts are done in the receipt or expectation of profit, benefit, or advantage to the actor or to any other person directly or indirectly connected with himself. The expectation of profit need not be founded on contract; it is enough if the prohibited act be done for the purpose, or in the hope, of benefit or advantage, pecuniary or otherwise.

PROOF.

(*a*) That the accused has disposed of, dealt in, received, etc., certain public or private or abandoned property.

(*b*) That by so doing the accused received or expected some profit or advantage to himself or to a certain person connected in a certain manner with himself.

II. FAILURE OR DELAY IN REPORTING THE RECEIPT OF CAPTURED OR ABANDONED PROPERTY.

Proper authority is any authority competent to order the disposition of the property in question, and the required report should be direct or through such channels as the customs and rules of the service prescribe.

PROOF.

(*a*) That certain captured or abandoned property came into the possession, custody, or control of the accused.

(*b*) Acts or omissions of the accused which evidence his failure in reporting the receipt of, and in turning over without delay, such property to proper authority.

EIGHTY-FIRST ARTICLE.

431. Whosoever relieves the enemy with arms, ammunition, supplies, money, or other thing, or knowingly harbors or protects or holds correspondence with or gives intelligence to the enemy, either directly or indirectly, shall suffer death, or such other punishment as a court-martial or military commission may direct.

Definitions and Principles.

"Enemy" imports enemy citizens as well as soldiers and does not restrict itself to the enemy government or its army. All the citizens of one belligerent are enemies of the Government and of all the citizens of the other.

Analysis and Proof.

This article describes, in nearly every phrase, an overt act of treason. The word *whosoever*, as it is here used, subjects to the jurisdiction of courts-martial and military commissions all persons, either military or civil, who, in the theater of operations and during the continuance of war traffic with the enemy in any of the ways herein denounced.

The article defines four offenses:

I. Relieving the enemy.
II. Harboring or protecting the enemy.
III. Holding correspondence with the enemy.
IV. Giving intelligence to the enemy.

I. RELIEVING THE ENEMY.

"Relieves," in the sense here used, is substantially equivalent to *furnishes* or *supplies*. It is immaterial whether the articles furnished are needed by the enemy or whether the transaction is a donation or sale. Knowledge or intent is not an essential in proof of this offense.

PROOF.

(*a*) That the accused either directly or indirectly furnished the enemy with a certain article or articles.

II. HARBORING OR PROTECTING THE ENEMY.

An enemy is harbored or protected when he is shielded either physically or by use of any artifice, aid, or representation from any injury or misfortune which in the chance of war mav befall him. It

must appear that the offense is knowingly committed. But, as in all other cases where knowledge must be proved, circumstances sufficient to put a reasonable man on notice will be sufficient to charge the accused with notice.

PROOF.

(*a*) That the accused harbored or protected a certain person.

(*b*) That the person so protected was an enemy, and that the accused had notice or is chargeable with notice of this fact.

III. HOLDING CORRESPONDENCE WITH THE ENEMY.

Correspondence does not necessarily import a mutual exchange of communication. The rule requires absolute nonintercourse, and any communication, no matter what may be its tenor or intent, is here denounced. The prohibition lies against any method of communication whatsoever, from the winking of an eye to the sending of script, and the offense is complete the moment the communication emanates from the accused whether it reaches its destination or not. The words "directly or indirectly" are construed as applying to this offense, and they include within the prohibition communications printed in newspapers and intended for the enemy and to communications conveyed to the enemy through friendly or neutral hands. It is essential to prove that the offense was knowingly committed.

Citizens of neutral powers resident in or visiting invaded or occupied territory can claim no immunity from the customary laws of war which threaten punishment for communication with the enemy. The offense of communicating with the enemy when committed by a resident of occupied territory constitutes war treason and is properly charged under this article.

PROOF.

(*a*) That the accused uttered a certain communication.

(*b*) That the communication was intended for a certain person, and that the accused had notice or is chargeable with notice that this person was an enemy.

IV. GIVING INTELLIGENCE TO THE ENEMY.

This is a particular case of corresponding with the enemy rendered more heinous by the fact that the communication contains intelligence that may be useful to the enemy for any of the multifarious reasons that make information valuable to belligerents. As in the preceding case, knowledge must be proved, and it is immaterial to the issue of guilt whether the intelligence was conveyed by direct or indirect means. The word "intelligence" imports that the information conveyed is true, at least in part.

PROOF.

(*a*) That the accused knowingly conveyed to the enemy certain information.

(*b*) That the information was true, at least in part.

EIGHTY-SECOND ARTICLE.

432. Any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be tried by a general court-martial or by a military commission, and shall, on conviction thereof, suffer death.

DEFINITIONS AND PRINCIPLES.

See below.

ANALYSIS AND PROOF.

The words "any person" bring within the jurisdiction of courts-martial and military commissions all persons of whatever nationality or civil status who may be accused of the offense denounced by the article.

The article defines one crime—being a spy.

I. BEING A SPY.

The principal characteristic of this offense is a clandestine dissimulation of the true object sought, which object is an endeavor to obtain information with the intention of communicating it to the hostile party.

Thus, soldiers not wearing disguise, dispatch riders, whether soldiers or civilians, and persons in aircraft who carry out their missions openly and who have penetrated hostile lines are not to be considered spies, for the reason that, while they may have resorted to concealment, they have practiced no dissimulation.

It is necessary to prove an intent to communicate information to the hostile party. This intent will very readily be presumed on proof of a deceptive insinuation of the accused among our forces, but this presumption may be rebutted by very clear evidence that the person had come within the lines for a comparatively innocent purpose, as to visit his family or that he has assumed a disguise to enable him to reach his own lines.

It is not essential that the accused obtain the information sought or that he communicate it. The offense is complete with the lurking or dissimulation with intent to accomplish these objects.

An act of espionage completed by the escape of the accused to his own lines can not be the subject of trial if the *quondam* spy is later captured.

A person living in occupied territory who, without dissimulation, merely reports what he sees or what he hears through agents to the

enemy may be charged under the preceding article with communicating or giving intelligence to the enemy, but he may not be charged under this article with being a spy.

PROOF.

(*a*) That the accused was found at a certain place within our lines, acting clandestinely, or under false pretenses.

(*b*) That he was obtaining, or endeavoring to obtain, information with intent to communicate the same to the enemy.

SECTION VI.

MISCELLANEOUS CRIMES AND OFFENSES.

EIGHTY-THIRD ARTICLE.

433. Any person subject to military law who willfully, or through neglect, suffers to be lost, spoiled, damaged, or wrongfully disposed of, any military property belonging to the United States shall make good the loss or damage and suffer such punishment as a court-martial may direct.

DEFINITIONS AND PRINCIPLES.

The loss, etc., may be said to be willfully suffered when the accused knowing the loss, etc., to be imminent or actually going on, takes no steps to prevent it, as where a sentinel seeing a small and readily extinguishable fire in a stack of hay on his post allows it to burn up. A suffering through neglect implies an omission to take such measures as were appropriate under the circumstances to prevent a probable loss, damage, 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. (Winthrop, p. 862.)

ANALYSIS AND PROOF.

The article applies to any one subject to military law. See article 2.

The article embraces eight offenses, indicated by the following diagram:

Any person subject to military law who	Willfully or Through neglect	Suffers to be	Lost, Spoiled, Damaged, or Wrongfully disposed of	Any military property belonging to the United States.

These offenses may be briefly treated under the heading "Suffering military property to be lost, etc."

I. SUFFERING MILITARY PROPERTY TO BE LOST, ETC.

PROOF.

(*a*) That certain military property was lost, spoiled, damaged, or wrongfully disposed of in the manner alleged.

(*b*) That such loss, spoiling, damage, or wrongful disposition was suffered by the accused through a certain omission of duty on his part.

(*c*) That such omission was willful, or negligent, as alleged.

(*d*) The value of the property, as alleged.

EIGHTY-FOURTH ARTICLE.

434. Any soldier who sells or wrongfully disposes of or willfully or through neglect injures or loses any horse, arms, ammunition, accouterments, equipment, clothing, or other property issued for use in the military service, shall be punished as a court-martial may direct.

Definitions and Principles.

See definitions under A. W. 80, pages 232, 233.

Accouterments applies in the military sense to those parts of the soldier's equipment which are issued by the Ordnance Department * * * in connection with his arms and ammunition, such, for example, as belts and cartridge pouches. (Digest, p. 1084.)

Clothing includes *all* articles of clothing whether issued under a clothing allowance or otherwise, for example, overcoats and sweaters as now issued are articles of clothing. That the property sold, disposed of, lost, or injured was issued to someone other than the accused is immaterial; the article applies to *any* property issued for use in the military service.

Analysis and Proof.

This article applies to enlisted men only.

The article defines a number of offenses, indicated by the following diagram:

Any soldier who { Sells / or / Wrongfully disposes of / or / Willfully / or / Through neglect } { Injures / or / Loses } Any { Horse, / Arms, / Ammunition, / Accouterments, / Equipment, / Clothing, / or / other property } Issued for use in the military service.

These offenses may be treated under the following heads:

I. Selling or wrongfully disposing of military property.

II. Willfully or through neglect injuring or losing military property.

I. SELLING OR WRONGFULLY DISPOSING OF MILITARY PROPERTY.

See matter under A. W. 80, Item I.

PROOF.

(*a*) That the accused soldier sold or otherwise disposed of certain property in the manner alleged.

(*b*) That such disposition was wrongful.

(*c*) That the property was issued for use in the military service.

(*d*) The value of the property as alleged.

II. WILLFULLY OR THROUGH NEGLECT INJURING OR LOSING MILITARY PROPERTY.

A *willful injury* or *loss* is one that is *intentionally* occasioned. A loss or injury is occasioned through neglect when it is the result of a want of such attention to the nature or probable consequences of an act or omission as was appropriate under the circumstances.

Accouterments applies in the military sense to those parts of the soldier's equipment which are issued by the Ordnance Department in connection with his arms and ammunition, such for example as belts and cartridge pouches. (Digest, p. 1084.)

Clothing includes *all* articles of clothing, whether issued under a clothing allowance or otherwise; for example, overcoats and sweaters as now issued are articles of clothing. That the property sold, disposed of, lost, or injured was issued to some one other than the accused is immaterial; the article applies to *any* property issued for use in the military service.

PROOF.

(*a*) That certain property was injured in a certain way or lost, as alleged.

(*b*) That such property was issued for use in the military service.

(*c*) That such injury or loss was willfully caused by the accused in a certain manner, as alleged; or that such injury or loss was the result of certain neglect on the part of the accused.

(*d*) The value of the property, as alleged.

EIGHTY-FIFTH ARTICLE.

435. Any officer who is found drunk on duty shall, if the offense be committed in time of war, be dismissed from the service and suffer such other punishment as a court-martial may direct; and if the offense be committed in time of peace,

he shall be punished as a court-martial may direct. Any person subject to military law, except an officer, who is found drunk on duty shall be punished as a court-martial may direct.

Definitions and Principles.

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 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 can not 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. (Winthrop, pp. 944, 945.)

Whether the drunkenness was caused by liquor or drugs is immaterial, but where the sole cause was a liquor or drug duly prescribed by a medical officer of the Army or a civil physician and taken in good faith according to the prescription no offense is committed.

The fact that the accused, owing to an unsuspected susceptibility, permanent or temporary, was made drunk by indulging in a very small amount of intoxicant is not a defense.

Any intoxication which is sufficient to sensibly impair the rational and full exercise of the mental and physical faculties is drunkenness within the meaning of the article. (Digest, p. 540.)

Where the accused is charged under this article, a conviction under the general article of *being under the influence* of liquor is wholly inconsistent if he was found in such condition while on duty. The article requires no particular degree of drunkenness, and if the accused was found so far under the influence of liquor as to be punishable at all he was found drunk on duty within the meaning of this article.

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. (Winthrop, p. 949.)

The words "on duty," as used in this article, have also received an authoritative interpretation. As applied to the commanding officer of a post, or of an organization, or detachment in the field, the senior officer present, in the actual exercise of command, is constantly on duty; the term being here used in contradistinction to "on leave." In the case of other officers, or of enlisted men, the term "on duty" has been held to relate to the performance of duties of routine or detail, in garrison or in the field; the words "off duty," in respect to such persons, relating to such periods or occasions when, no duty being required of them by orders or regulations, officers and men are said to occupy that status of leisure known to the service as being "off duty." (Davis, p. 408.)

In time of war and in a region of active hostilities the circumstances are often such that all members of a command may properly be considered as being continuously on duty within the meaning of this article.

A medical officer of a post, where there are constantly sick persons under his charge who may at any moment require his attendance, may, generally speaking, be deemed to be "on duty" in the sense of the article during the whole day and not merely during the hours regularly occupied by sick call, visiting the sick, or attending hospital. If found drunk at any other hour he may in general be charged with an offense under this article. (Digest, p. 127.)

So, also, an officer of the day and members of the guard are on duty during their entire tour within the meaning of this article, but a sentinel found drunk on post is chargeable under the next succeeding article. The article also applies to cases where the duty being performed is merely a preliminary one, such as a reporting for inspection by a soldier designated for guard or a reporting under orders for duty at a post to the commanding officer.

The offense of a person who absents himself from his duty and is found drunk while so absent, or who is relieved from duty at a post and ordered to remain there to await orders, and is found drunk during such status, is not chargeable under this article.

Analysis and Proof.

This article applies to any person subject to military law. See article 2.

The article defines one offense, namely, being found drunk on duty.

I. BEING FOUND DRUNK ON DUTY.

PROOF.

(*a*) That the accused was on a certain duty, as alleged.
(*b*) That he was found drunk while on such duty.

EIGHTY-SIXTH ARTICLE.

436. Any sentinel who is found drunk or sleeping upon his post, or who leaves it before he is regularly relieved, shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct; and if the offense be committed in time of peace, he shall suffer any punishment, except death, that a court-martial may direct.

Definitions and Principles.

As to drunkenness, see matter under eighty-fifth article, page 240.

The term "sentinel" does not include a *watchman.*

A sentinel is on post within the meaning of this article not only when he is walking a duly designated sentinel's post, as is ordinarily the case in garrison, but also "when he may be stationed in observation against the approach of an enemy, or on post to maintain internal discipline, or to guard stores, or to guard prisoners while in confinement or at work." (Digest, p. 128.)

The fact that the sentinel was not posted in the regular way is not a defense.

Analysis and Proof.

The article applies only to sentinels.

The article defines three offenses, namely:

I. Being found drunk on post.

II. Being found sleeping on post.

III. Leaving post before being relieved.

I. BEING FOUND DRUNK ON POST.

As to drunkenness, see matter under eighty-fifth article, page 240.

PROOF.

(*a*) That the accused soldier was posted as a sentinel on a certain post, as alleged.

(*b*) That he was found drunk while on such post.

II. BEING FOUND SLEEPING ON POST.

The fact that the accused had been previously overtaxed by excessive guard duty is not a defense, although evidence to that effect may be received in extenuation of the offense.

PROOF.

(*a*) That the accused soldier was posted as a sentinel on a certain post, as alleged.

(*b*) That he was found sleeping while on such post.

III. LEAVING POST BEFORE BEING RELIEVED.

The offense of leaving post is not committed when a sentinel goes an immaterial distance from the point, path, area, or object which was prescribed as his post.

PROOF.

(*a*) That the accused soldier was posted as a sentinel on a certain post, as alleged.

(*b*) That he left such post without being regularly relieved.

EIGHTY-SEVENTH ARTICLE.

437. Any officer commanding in any garrison, fort, barracks, camp, or other place where troops of the United States may be serving who, for his private advantage, lays any duty or imposition upon or is interested in the sale of any victuals or other necessaries of life brought into such garrison, fort, barracks, camp, or other place for the use of the troops, shall be dismissed from the service and suffer such other punishment as a court-martial may direct.

Definitions and Principles.

See the terms of the article.

Analysis and Proof.

This article applies to commanding officers only.

The article defines offenses which may be treated under two heads, as follows:

I. Laying a duty or imposition upon the bringing in of victuals, etc.

II. Being interested in the sale of victuals, etc.

I. LAYING A DUTY OR IMPOSITION UPON THE BRINGING IN OF VICTUALS, ETC.

A commanding officer who should prohibit the entry into his camp of peddlers of vegetables for the troops, permitting it only if the peddlers pay him for the privilege, would be guilty of this offense whether any money was actually paid or not.

PROOF.

(*a*) That the accused officer was in command of a certain place where troops of the United States were serving, as alleged.

(*b*) That he laid a certain duty or imposition upon the bringing into such command of victuals or other necessaries of life for the use of such troops, as alleged.

(*c*) That such duty or imposition was laid for his own private advantage.

II. BEING INTERESTED IN THE SALE OF VICTUALS, ETC.

The interest 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 understand-

ing 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. (Winthrop, p. 870.)

Thus a commanding officer commits this offense when he agrees with a peddler to exclude others in consideration of some advantage to himself.

A commanding officer might become *interested* in the sale of articles by the post exchange within the meaning of this article.

PROOF.

(*a*) That the accused officer was in command of a certain place where troops of the United States were serving, as alleged.

(*b*) That he became pecuniarily interested in a certain way in the sale of certain victuals or other necessaries of life to such troops, as alleged.

(*c*) That he so became interested for his own private advantage.

EIGHTY-EIGHTH ARTICLE.

438. Any person subject to military law who abuses, intimidates, does violence to, or wrongfully interferes with any person bringing provisions, supplies, or other necessaries to the camp, garrison, or quarters of the forces of the United States shall suffer such punishment as a court-martial may direct.

Definitions and Principles.

See the terms of the article.

This article in no way interferes with the lawful powers of a military commander to exclude persons or supplies inimical to health or good order of his command. The purpose of this article is to prevent the diminishing or cutting off of the supply of necessaries brought in by private persons through any abuse, intimidation, doing violence to, or wrongfully interfering with such persons. The prohibition against interference, etc., therefore, applies not only while such persons are coming to the camp, etc., but also while they remain and during their return therefrom.

The wrongful interference contemplated would include not only any wrongful act not included in the terms "abuse, etc.," which prevents, obstructs, or delays the movements of the person, but any wrongful interference with the supplies themselves, such as stealing or destroying them.

Analysis and Proof.

This article applies to any person subject to military law. The article defines a number of offenses which may be briefly treated under one head, as follows:

I. INTIMIDATING, DOING VIOLENCE TO, OR WRONGFULLY INTERFERING WITH PERSONS BRINGING NECESSARIES.

PROOF.

(*a*) That a certain person named or described was bringing provisions, supplies, or other necessaries to a certain camp, garrison, or quarters of the forces of the United States, as alleged.

(*b*) That the accused abused, intimidated, did violence to, or wrongfully interfered with such person while so engaged and in the manner alleged.

EIGHTY-NINTH ARTICLE.

439. All persons subject to military law are to behave themselves orderly in quarters, garrison, camp, and on the march; and any person subject to military law who commits any waste or spoil, or willfully destroys any property whatsoever (unless by order of his commanding officer), or commits any kind of depredation or riot shall be punished as a court-martial may direct. Any commanding officer who, upon complaint made to him, refuses or omits to see reparation made to the party injured, in so far as the offender's pay shall go toward such reparation, as provided for in article one hundred and five, shall be dismissed from the service, or otherwise punished, as a court-martial may direct.

Definitions and Principles.

See the terms of the article and the definitions under the respective offenses as given below.

Analysis and Proof.

This article divides itself into two parts, one embracing all persons subject to military law, and the other commanding officers only.

The article defines a number of offenses which may be briefly treated under the following headings:

I. Committing any waste or spoil.
II. Willfully destroying property.
III. Committing depredation or riot.
IV. Refusing or omitting to see reparation made.

I. COMMITTING ANY WASTE OR SPOIL.

The terms "waste" or "spoil" as used in this article refer to such acts of voluntary destruction of or permanent damage to real property as burning down buildings, tearing down fences, cutting down shade or fruit trees, and the like.

PROOF.

(*a*) That the accused being with a certain command in quarters, camp, garrison, or on the march, committed waste or spoil on certain property in the manner alleged.

(*b*) That such acts were not ordered by his commanding officer.

II. WILLFULLY DESTROYING PROPERTY.

To be *destroyed* it is not necessary that the property be completely demolished or annihilated. It is sufficient if it is so far injured as to be useless for the purpose for which it was intended.

PROOF.

(*a*) That the accused being with a certain command in quarters, camp, garrison, or on the march, destroyed certain property, as alleged.

(*b*) That such destruction was willful and was not ordered by his commanding officer.

III. COMMITTING DEPREDATION OR RIOT.

The terms "any kind of depredation or riot," include plundering, pillaging, robbing, and any other willful damage to property not included in the preceding specific terms of the article. Injuries to persons are not made punishable by this article.

PROOF.

(*a*) That the accused being with a certain command in quarters, camp, garrison, or on the march, committed certain acts of depredation on certain property, or certain acts of rioting resulting in injury to certain property, as alleged.

IV. REFUSING OR OMITTING TO SEE REPARATION MADE.

Refusing to entertain a proper complaint at all; refusing or omitting to convene a board for the assessment of damage; or to act on such proceedings, or to direct the proper stoppages are instances of this offense.

PROOF.

(*a*) That the accused was the commanding officer of a certain command in quarters, garrison, camp, or on the march, as alleged.

(*b*) That a complaint was duly made to him by a certain person of damage to or loss of certain property occasioned by troops of the accused's command, as alleged.

(*c*) That the accused either refused to see reparation made or omitted in the manner alleged to see reparation made to the party injured in so far as the offender's pay would go toward such reparation.

NINETIETH ARTICLE.

440. No person subject to military law shall use any reproachful or provoking speeches or gestures to another; and any person subject to military law who offends against the provisions of this article shall be punished as a court-martial may direct.

Definitions and Principles.

See the terms of the article.

The article is intended to prevent what frequently are the first steps toward quarrels, fights, or serious offenses.

Reproachful speeches and gestures are such as involve censorious comment on the actions or opinions of another. Provoking speeches and gestures are such as tend to exasperate or to arouse anger and resentment.

Analysis and Proof.

This article applies to any person subject to military law. The article defines offenses which may be treated under one heading, as follows:

I. USING PROVOKING SPEECHES OR GESTURES.

PROOF.

(*a*) That the accused used certain speeches or gestures to a certain person, as alleged.

(*b*) That the speeches or gestures were reproachful or provoking.

(*c*) That the person to whom such speeches or gestures were addressed is in one of the classes of persons subject to military law.

NINETY-FIRST ARTICLE.

441. Any person subject to military law who fights or promotes or is concerned in or connives at fighting a duel, or who having knowledge of a challenge sent or about to be sent fails to report the fact promptly to the proper authority shall, if an officer, be dismissed from the service or suffer such other punishment as a court-martial may direct; and if any other person subject to military law, shall suffer such punishment as a court-martial may direct.

Definitions and Principles.

See the terms of the article.

A duel is a concerted fight between two persons with deadly weapons, the object of which is claimed to be the satisfaction of wounded honor. (Wharton, vol. 2, p. 555.)

[Note.—The offenses made punishable by this article are of such infrequent occurrence that it is considered inadvisable to comment more fully upon them. In a case of doubt, works on military law should be consulted.]

Analysis and Proof.

This article applies to any person subject to military law.

The article embraces a number of offenses which may be briefly treated under the following headings:

I. Fighting or promoting a duel.

II. Being concerned in or conniving at fighting a duel.

III. Failing to report knowledge of a challenge.

I. FIGHTING OR PROMOTING A DUEL.

Fighting or promoting a duel would include such acts as the sending, giving, or accepting a challenge, or the carrying of a challenge or acceptance, the arrangement of the preliminaries, and, in general, any act by which a duel is intentionally furthered, encouraged, or incited, whether the duel takes place or not.

PROOF.

(*a*) That the accused fought a duel with a certain person as alleged, or that he promoted a duel between certain persons in the manner alleged.

II. BEING CONCERNED IN OR CONNIVING AT FIGHTING A DUEL.

Being concerned in or conniving at fighting a duel would include the being present thereat in some capacity other than a principal, as in the case of seconds and doctors.

PROOF.

(*a*) That the accused was concerned in or connived at fighting a certain duel in the manner alleged.

III. FAILING TO REPORT KNOWLEDGE OF A CHALLENGE.

A *challenge* is a written or verbal demand, request, or invitation to another to fight a duel.

To constitute a challenge no particular form is necessary. It is enough if what was sent or about to be sent, considered in connection with the circumstances, amounts to such a demand, request or invitation. However, an effort to provoke a challenge or an announcement of a willingness to accept one is not a challenge.

As to *knowledge*, see matter under fifty-fifth article.

PROOF.

(*a*) That the accused knew that a certain challenge had been sent, or was about to be sent, as alleged.

(*b*) That he either did not report the fact to the proper authority at all, or that he unnecessarily delayed making such report, as alleged.

NINETY-SECOND ARTICLE.

442. Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial may direct; but no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace.

Definitions and Principles.

See the terms of the article and the matter under the treatment of the several offenses defined therein.

Analysis and Proof.

The article applies to any person subject to military law. See article 2.

The article defines two offenses, as follows:

I. Murder.

II. Rape.

I. MURDER.

Murder is the unlawful killing of a human being with malice aforethought. (Federal Penal Code, 1910, sec. 273.)

"Unlawfully" as used in the definition of murder means without legal justification or excuse.

A homicide done in the proper performance of a legal duty is justifiable. Thus, executing a person pursuant to a sentence of death; killing in suppressing a mutiny or in preventing the escape of a prisoner where no other available means are adequate; killing an enemy in battle; and killing to prevent the commission of a felony attempted by force or surprise, such as murder, burglary, or arson, are cases of justifiable homicide.

The right and duty of a sentinel over a prisoner in his charge in case of attempted escape is discussed in the Manual of Interior Guard Duty, 1914.

This right and duty extends to other members of the guard whose duties include the safe-keeping of such prisoner. (Digest, 1912, p. 583.)

The same principles apply to the arrest of a soldier by officers or soldiers authorized to make the particular arrest.

A party of soldiers left their camp at night in time of war without leave contrary to positive orders and proceeded to a neighboring town, where they created a disturbance. Their commanding officer followed them, found them in a saloon, and was about to arrest them, when they broke from him, and knowing who he was disregarded his order to halt and ran away from him. He repeated his order, and not being obeyed and having no other means of detaining them, fired upon them while fleeing with a pistol, and shot and killed one of them. *Held*, that he did not use undue force in endeavoring to maintain discipline and to arrest the offenders whom he was endeavoring to return to their stations, and that he was not guilty of an offense requiring punishment, and that his conduct under the circumstances in which he was placed was justified. (Digest, p. 480.)

The general rule is that "The acts of a subordinate officer or soldier, in compliance with his supposed duty, or of superior orders, are justifiable, and he will be protected against the consequences, unless they are manifestly beyond the scope of his authority, and such that a man of ordinary sense and understanding would know to be illegal, where he acts in good faith and without malice." (Wharton on Homicide, 3d ed., p. 731.)

The foregoing principles should not be construed as conferring immunity on an officer or soldier who willfully or through culpable negligence does acts endangering the lives of innocent third parties in the discharge of his duty to prevent escape or effect an arrest.

But where a guard fired on a prisoner fleeing down a public street which was apparently clear, under circumstances that would have justified the homicide of the prisoner, and thereby accidentally killed a young woman whom he did not see at the time he shot, it was held that the homicide was excusable.

A homicide which is the result of an accident or misadventure in doing a lawful act in a lawful manner, or which is done in self-defense on a sudden affray, is excusable. Thus, where a lawful operation, performed with due care and skill, causes the death of the patient, the homicide is excusable. To excuse a killing on the ground of self-defense upon a sudden affray, the killing must have been necessary to save the person's life or the lives of those whom he is bound to protect, or to prevent great bodily harm to himself or them. The danger must be believed on reasonable grounds to be imminent, and no necessity will exist until the person, if not in his own house, has retreated as far as he safely can. The person doing the killing must not have been the aggressor and intentionally provoked the difficulty; but if he withdraws in good faith and his adversary follows and renews the fight, the latter becomes the aggressor.

The death must take place within a year and a day of the act or omission that caused it, and the offense is committed at the place of such act or omission although the victim may have died elsewhere.

Malice does not necessarily mean hatred or personal ill will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word "aforethought" does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed. (Clark, pp. 187, 188.)

Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused; (*a*) An intention to cause the death of, or grievous bodily harm to, any

person, whether such person is the person actually killed or not (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation); (*b*) knowledge that the act which causes the death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused; (*c*) intent to commit any felony (*d*) an intent to oppose force to an officer or other person lawfully engaged in the duty of arresting, keeping in custody, or imprisoning any person, or the duty of keeping the peace, or dispersing an unlawful assembly, provided the offender has notice that the person killed is such officer or other person so employed. (Clark, p. 187.)

PROOF.

(*a*) That the accused killed a certain person named or described by certain means, as alleged. This involves proof—

(1) That the person alleged to have been killed is dead.

(2) That he died in consequence of an injury received by him.

(3) That such injury was the result of the act of the accused.

(4) That the death took place within a year and a day of such act.

(*b*) That such killing was with malice aforethought; that is, that the accused was in one or more of the states of mind described above.

II. RAPE.

Rape is the having of unlawful carnal knowledge of a woman by force and without her consent.

As the carnal knowledge must be unlawfully had, a husband who has carnal knowledge of his wife *forcibly where she does not consent* is not guilty of this offense; but he is guilty when he assists another man in having such carnal knowledge.

Any penetration, however slight, of the woman's genitals is sufficient carnal knowledge, whether emission occurs or not.

The offense may be committed on a female of any age, on a man's mistress, or on a common harlot.

Force, actual or constructive, and a want of consent are indispensable in rape, but the force involved in the act of penetration is alone sufficient force where there is in fact no consent.

Where there is actual consent to the connection, though such consent be obtained by fraud, there is no rape; thus, where a woman agrees to connection with a physician on his false representation that the act is part of the required treatment, or where a man successfully passes himself off to a woman as her husband and is admitted by her to connection as such, the crime of rape is not committed.

There is no consent where the woman is so idiotic as to be incapable of consenting, and a man having connection with her not believing that he has her consent is guilty of rape. So also where the woman is insensible, unconscious, or asleep, or where her apparent consent was extorted by violence to her person or fear of sudden violence. A child under the age of 10 is presumed incapable of consenting.

Mere verbal protestations and a pretense of resistance do not of course show a want of consent, but the contrary, and where a woman fails to take such measures to frustrate the execution of the man's design as she is able to and are called for by the circumstances the same conclusion may be drawn.

It has been said of this offense that "it is true that rape is a most detestable crime * * *; but it must be remembered that it is an accusation easy to be made, hard to be proved, but harder to be defended by the party accused, though innocent."

PROOF.

(a) That the accused had carnal knowledge of a certain female, as alleged;

(*b*) That the act was done by force and without her consent; or that the female was under the age of 10 years.

NINETY-THIRD ARTICLE.

443. Any person subject to military law who commits manslaughter, mayhem, arson, burglary, robbery, larceny, embezzlement, perjury, assault with intent to commit any felony, or assault with intent to do bodily harm, shall be punished as a court-martial may direct.

DEFINITIONS AND PRINCIPLES.

See matter under several offenses listed in the article.

ANALYSIS AND PROOF.

This article applies to any person subject to military law. The article defines the following offenses, namely:

I. Manslaughter.
II. Mayhem.
III. Arson.
IV. Burglary.
V. Larceny.
VI. Robbery.
VII. Embezzlement.
VIII. Perjury.
IX. Assault with intent to commit any felony.
X. Assault with intent to do bodily harm.

I. MANSLAUGHTER.

Manslaughter is unlawful homicide without malice aforethought and is either voluntary or involuntary.

Voluntary manslaughter is where the act causing the death is committed in the heat of sudden passion caused by provocation.

Involuntary manslaughter is homicide unintentionally caused in the commission of an unlawful act not amounting to a felony, nor likely to endanger life, or by culpable negligence in performing a lawful act, or in performing an act required by law. (Clark, pp. 197, 204.)

In voluntary manslaughter the provocation must be such as the law deems adequate to excite uncontrollable passion in the mind of a reasonable man; the act must be committed under and because of the passion, and the provocation must not be sought or induced as an excuse for killing or doing bodily harm. (Clark, p. 197.)

The killing may be manslaughter only even if intentional, but where sufficient cooling time elapses between the provocation and the blow the killing is murder, even if the passion persists. Instances of adequate provocation are: Assault and battery, inflicting actual bodily harm or a gross insult; an unlawful imprisonment; and the sight by a husband of an act of adultery committed by his wife. If the person so assaulted or imprisoned, or the husband so situated at once kills the offender or offenders in a heat of a sudden passion caused by their acts, manslaughter only has been committed.

Instances of inadequate provocation are: Knowledge by the brother of a female of her seduction; insulting or abusive words or gestures; and injuries to property.

In involuntary manslaughter in the commission of an unlawful act the act must be *malum in se* and not *merely malum prohibitum.* Thus the driving of an automobile in slight excess of the speed limit fixed by ordinance is not the kind of unlawful act contemplated, but voluntarily engaging in an affray is such an act. To use an immoderate amount of force in suppressing a mutiny is an unlawful act, and if death is caused thereby the one using such force is guilty of manslaughter at least.

Instances of culpable negligence in performing a lawful act are: Negligently conducting target practice so that the bullets go in the direction of an inhabited house within range; pointing a pistol in fun at another and pulling the trigger, believing, but without taking reasonable precautions to ascertain, that it would not be discharged; carelessly leaving poisons or dangerous drugs where they may endanger life.

Instances of culpable negligence in performing an act required by law are: Gross negligence or inattention by those in charge of con-

trolling or operating trains in the discharge of their duties; culpable failure on the part of a parent to provide food, shelter, and medical attendance for his helpless child where able to do so.

Where there is no legal duty to act there can, of course, be no neglect. Thus where a stranger makes no effort to save a drowning man, or a person allows a mendicant to freeze or starve to death, no crime is committed.

PROOF.

(*a*) See item (*a*) under "Proof of murder" under ninety-second article.

(*b*) The facts and circumstances of the case, as alleged, indicating that the homicide amounted in law to manslaughter.

II. MAYHEM.

Mayhem at common law is "a hurt of any part of a man's body whereby he is rendered less able, in fighting, either to defend himself or to annoy his adversary." (Bishop, vol. 2, p. 579.)

The offense at common law did not include such injuries which merely disfigure, such as cutting off the nose or ear; but did include such injuries as knocking out a front tooth, or castration, which were supposed to weaken a man's fighting ability.

The injury must be willfully and maliciously done, but need not be premeditated. If the hurt is done under circumstances which would excuse or justify a homicide, no offense is committed.

A person inflicting such a hurt upon himself is guilty of this offense, and if another does it at his request, both are so guilty.

PROOF.

(*a*) That the accused inflicted on a certain person a certain injury in the manner alleged.

(*b*) The facts and circumstances of the act showing such injury to have been inflicted intentionally and maliciously.

III. ARSON.

Arson, at the common law, is the malicious burning of another's house. (Bishop, vol. 2, p. 5.)

The house must be the dwelling house of another, as the offense is against the habitation, not against property as such.

The term "dwelling house" includes outbuildings that form part of the cluster of buildings used as a residence. A mere scorching is not a burning. To constitute a burning some part, however small, of the house must be actually consumed or disintegrated by charring or by a blaze.

A shop or store is not the subject of arson unless occupied as a dwelling. It is not arson to burn a house that has never been occupied or which has been permanently abandoned; but it is arson if the occupant is merely temporarily absent. It is not arson to burn one's own dwelling, whoever owns it, or even the dwelling of another at his request, and this is so even if there is an intent to burn an adjoining house belonging to a third party; but it is arson if such house is actually burned. A house occupied by another than the owner is a subject of arson by the owner.

The burning must be willful and malicious, which excludes a burning arising from negligence or mischance, unless the accused was engaged in the commission of a felony. Where a man, who, in setting fire to his own house to get the insurance, burns his neighbor's, he is guilty of arson in burning the neighbor's house.

PROOF.

(*a*) That the accused burned a certain dwelling house of another, as alleged.

(*b*) Facts and circumstances indicating that the act was willful and malicious.

IV. BURGLARY.

Burglary at common law is the breaking and entering, in the night, of another's dwelling house, with intent to commit a felony therein. (Bishop, vol. 2, p. 56.)

To constitute *burglary* the house *must* be a *dwelling house* of another, *dwelling house* including outhouses within the curtilage or the common inclosure; there must be an actual breaking, or there must be the constructive breaking involved where an entry is effected by fraud or false pretenses, by intimidation, by conspiracy with a servant or other inmate, or by descent of a chimney; there must be an entry; the breaking and entry must both be at night; but not necessarily on the same night, and there must be an intent to commit a felony in the house at the time of the breaking and of the entering, but the felony need not be committed. (Clark and Marshal, pp. 595, 596.)

A store is not a subject of burglary unless part of or used also as a dwelling house as where the occupant uses another part of the same building as his dwelling; or where the store is habitually slept in by his servants or members of his family.

The house must be in the status of being occupied at the time of the breaking and entering. It is not necessary to this status that any one actually be in it; but if the house has never been occupied at all or has been left without any intention of returning to it this

status does not exist. Separate dwellings within the same building as a flat in an apartment house or a room in a hotel are subjects of burglary by other tenants or guests, and in general by the owner of the building himself. At common law a tent is not a subject of burglary.

There must be a breaking, actual or constructive. Merely to enter through a hole left in the wall or roof or through an open window or door, even if left only slightly open and pushed farther open by the person entering, will not constitute an actual breaking; but where there is any removal of any part of the house designed to prevent entry, other than the moving of a partly open door or window, it is sufficient. Thus opening a closed door or window or other similar fixture, or cutting out the glass of a window or the netting of the screen is a sufficient breaking. So also the breaking of an inner door by one who has entered the house without breaking, or by a servant lawfully within the house, but who has no authority to enter the particular room is a sufficient breaking, but unless such a breaking is followed by an entry into the particular room with intent to commit a felony therein, burglary is not committed.

There is a *constructive* breaking when the entry is gained by a trick, such as concealing oneself in a box; or under false pretense, such as personating a gas or telephone inspector; or by intimidating the inmates through violence or threats into opening the door; or through collusion with a confederate, an inmate of the house; or by descending a chimney, even if only a partial descent is made, and no room is entered. An entry must be effected before the offense is complete; but the entry of any part of the body, even a finger, is sufficient; and an insertion into the house of an instrument, except merely to facilitate further entrance, is a sufficient entry.

Both the breaking and entry must be in the nighttime, which at common law was the period between sunset and sunrise when there is not sufficient daylight to discern a man's face, and both must be done with the intent to commit a felony in the house. It is immaterial whether the felony be committed or even attempted, and where a felony is actually intended it is no defense that its commission was impossible. The felony intended may be a statutory felony.

PROOF.

(*a*) That the accused broke and entered a certain dwelling house of a certain other person, as specified.

(*b*) That such breaking and entering was done in the nighttime.

(*c*) The facts and circumstances of the case (for instance, the actual commission of the felony) which indicate that such breaking and entering were done with the intent to commit the alleged felony therein.

V. LARCENY.

Larceny at common law is the taking and removing, by trespass, of personal property which the trespasser knows to belong either generally or specially to another, with the felonious intent to deprive him of his ownership therein. (Bishop, vol. 2, p. 440.)

In larceny there must be a taking and carrying away. When actual physical possession is obtained and the property moved the least distance, the taking and carrying away is complete. Such possession must, however, be complete; thus, enticing a domestic animal a short distance, or seizing property secured by a chain, or causing another to drop property by knocking his hand is not a taking of such property. The taking need not be by the hands of the thief. Thus, where one, having the required intent to steal, entices a horse into his own stable without touching him, or procures an insane person to take the goods, or procures a railroad company to deliver another's trunk by changing the check on it, he is guilty of larceny.

The taking must be by *trespass;* that is, the property must be taken from the actual or constructive possession of the owner without his consent.

One who has a lawful right to the possession of the property of another can not steal it. Thus where an article is borrowed or hired in good faith the bailee does not commit larceny if he subsequently during the bailment decides to and does convert the article to his own use. But if at the time the article is borrowed, etc., the borrower intends to convert it, such a taking is by trespass and his act a larceny. And where the possession of an article is obtained by fraud, although no intent to steal existed at the time, a subsequent forming and carrying out of such intent is a larceny, as the taking and keeping possession in such a case is a continuing trespass. Thus where a horse was hired by one who really intended to go farther than he stated to the owner, but who did not intend to steal the horse, it was held that his subsequent conversion of the animal was a larceny.

These rules apply to any case of *bailment*, but do not apply where the owner intends to part with the *ownership* of the property. Where a carrier of goods in a bale, or a person intrusted with a trunk for safekeeping breaks bulk and appropriates part or all of the contents, he is guilty of larceny regardless of what his intention was when he received the property.

The principle of the rules as to a bailee who accepts the possession of property in good faith, or who intends at the time to steal it, applies to cases of property delivered by mistake. Thus, where an article intended for one is delivered to another by mistake the latter's

acceptance of the possession, knowing of the mistake and with the required intent, is a larceny; but if he accepts it in ignorance of the mistake and in good faith as intended for him, his subsequent appropriating to his own use is not a larceny, as there was no trespass in the taking.

This same rule applies where a person is paid by mistake more money than he is entitled to.

The possession of goods may be in one person although the goods themselves be in the actual manual control of another, who is said to have the custody of them. Thus, where the owner of a coin gives it to a friend to examine on the spot, he still retains the possession, and if the recipient goes away with the coin intending to steal it he is guilty of larceny. So, too, a guest at a hotel or a private house has the bare custody of articles such as those in his room or given him for use at the table and can commit a larceny of such articles.

Where a servant receives goods or coins from his master to use, care for, or employ for a specific purpose in his service, the master retains possession and the servant has the custody only and may commit larceny of them. The fact of the existence of the relationship of master and servant does not prevent the latter from being a bailee of the former's property, in which case the rules as to bailees apply; for instance, a master might lend his servant a horse to use on the latter's own business. Where, however, a servant receives goods or coins from a third person on behalf of his master he has the possession of the goods or coins and can not commit a larceny of them until they have reached the possession of his master, which they do when delivered into his hands or deposited in the receptacle or place provided for the purpose. Thus, if a clerk receive some coins for his master in the course of business and places in the cash drawer or safe belonging to the master he no longer has the possession of the coins and his taking of them with the requisite intent would be larceny; but he does not relinquish possession if, merely for his own convenience, he uses the safe or drawer as a hiding place. His subsequent taking of the coins would not, therefore, be larceny.

This distinction between custody and possession is of the utmost importance, for it is often very difficult to determine whether the crime is larceny or embezzlement, each particular case depending upon the peculiar circumstances. To illustrate the doctrine: Where a third person hands a clerk money to pay a bill which he owes the clerk's employer, and the clerk, instead of putting the money into his employer's safe or other proper place, puts it into his own pocket and appropriates it, or hides it on the premises and afterwards carries it off, he does not commit larceny, for, as the money has not reached its destination, but is merely in transit, the master has not obtained possession, either actual or constructive. If, however, the

clerk puts the moneys in the safe, it is in his employer's constructive possession; and if he takes it out again and converts it, he is guilty of larceny. If it is not the duty of the clerk to put the money in the safe, but he is required to keep it on his person for his master, then, as soon as he received the money, it has reached its ultimate destination, and he will be guilty if he appropriates it, instead of holding it for his master. If a master gives his servant a check to take to the bank and get cashed he has mere custody of the check itself, and commits larceny if he appropriates it; but if he cashes the check and appropriates the money he commits embezzlement only, as the money has never been in the master's possession. (Clark, pp. 285, 286.)

Where the owner of an article delivers it to another, intending at the time an unconditional passing of the *property* as well as the possession, the other can not be guilty of larceny, whatever the inducement employed by him. Thus where property is obtained from a dealer on the false pretense of being sent for it by a regular charge customer, or where property is bought on credit with no intention of paying, or where a bogus check is given in payment of goods or in exchange for money, or where money is borrowed on false pretenses with the understanding that different coins or bills are to be returned there is no larceny.

In the case of property delivered by servants or agents, such delivery can not go beyond the actual or apparent authority of the servant or agent. So where a master sends his servant with a c. o. d. package, and the purchaser induces the servant to give him the package without payment or pays with a worthless check, intending to keep the package, it is larceny.

The reason for the rule above stated as to an intention to pass the property preventing the taking from amounting to larceny is that the consent of the owner precludes the existence of an essential element of larceny, viz, a trespass. But where the taking overlaps the consent given it is *pro tanto* a trespass and where the other elements of larceny are present, he who does the taking is guilty of the offense. Thus where one gets candy from a slot machine by using a counterfeit coin, or where a customer after buying a cigar takes the whole box of matches provided by owner of the store for the use of his customer, the act in each case is a trespass, and the offenders are guilty of larceny if the other elements of that offense are present.

Another application of the rule that the consent must be as broad as the taking is made in cases where the owner's intent is to pass the property in the goods only when a condition is fulfilled. Thus where goods are handed to a purchaser on a cash sale the title is not intended to pass until the price is paid; and if the person re-

ceiving them runs off with the goods without paying for them and with the required intent, he is guilty of larceny.

This rule applies in many analagous cases. For instance it is larceny "for a man to whom money is handed to be changed to run off with it or keep it, *animo furandi*, and refuse to give the change, though the intention may be that he shall keep part of it as payment for goods purchased or as a loan, for there is no consent to part with the money without receiving the change." (Clark and Marshal, p. 467.) In these cases of conditional delivery the recipient has only the bare custody and it is therefore immaterial whether the intent to steal existed at the time of the delivery, or was formed later.

The taking may be from any one having possession of the property; hence, property may be stolen from one who himself has stolen it, and the owner of goods may steal them from a bailee with a special property in them.

One retains the constructive possession of property although it is actually out of his control until some one else takes possession, except in the case of abandoned property. So where a desk was sold and coins were afterwards found by the purchaser in a secret drawer and taken by him, he takes it from the possession of the owner. Where a person finds property he has a right to take it and examine it. If the circumstances give him no clue to the ownership he can rightfully appropriate it and this act or a subsequent refusal to give it up to the owner will not be a larceny, as there was no trespass in the taking. If the circumstances do give him such a clue he can rightfully assume possession for the owner and a subsequent change of intent and an appropriation of the property would not be a larceny, but where he intends to appropriate it at the time he assumes possession he is guilty of larceny, and none the less so if he intends to return it in the event that a reward is given.

In larceny, as in other crimes, the evil intent and the act must coexist; that is, as stated in the definition of larceny, the taking and removing by trespass must be *with* the particular intent described.

But where the *possession* of property is obtained by a trespass the subsequent retention of the property without right is a continuing trespass, and however innocent the original intent of the trespasser, he commits larceny if while wrongfully retaining possession he has the intent to steal. Thus where an animal belonging to one person becomes mingled with the herd of another and is driven off by mistake, without the knowledge of either person, there is a continuing trespass, and if on discovering his mistake the owner of the herd converts the animal to his own use he is guilty of larceny.

The felonious intent in larceny is that entertained by a thief; i. e., a fraudulent intent to deprive the owner permanently of his property in the goods or of their value or a part of their value. Unless

such a purpose exist with the taking and carrying away by trespass there is no larceny.

Thus larceny is not committed where the taking was without any intent at all as regards the property, as in the case of property taken by mistake or accidentally; or where the intent was to take one's own property, as in the case of property taken under a *bona fide* claim of right, however unfounded; or where the intent was to take another's property temporarily from his possession, as in the case of property taken for a temporary use, or in fun, or out of curiosity, or to keep for him, or to deprive him of the power of using it. Thus if one takes a horse merely to enable him to escape with stolen property, or takes property from a drunken friend in order to prevent him from losing it, or taking a cudgel out of the owner's hand to prevent a beating there is no larceny.

Whether the required intent exists where property is taken to pawn or hold for a reward depends upon the circumstances. Some cases of taking property to pledge would come within the above rule as to temporary use, as where the intent is in good faith to redeem and return it; but in the absence of such intent the taking is larceny.

Where the taking is with the design of returning it to the owner, but in the hope of obtaining a reward, it is not larceny; but if the purpose is to keep the property until a reward is offered it is. Taking property with the intent to sell it back to the owner or return it to him for some other consideration is, of course, more indicative of than inconsistent with the existence of the required intent. Thus, stealing a railroad ticket is none the less stealing because it was intended to be returned to the railroad when made use of.

Once the goods are taken and removed with the felonious intent above described the offense is complete and is none the less a larceny because the thief may have had in mind a disposition of the property without benefit or advantage to himself. Thus, an intent to give it to another or to destroy it out of revenge, or to prevent its use as evidence or otherwise against himself or another, does not prevent the felonious taking of another's property from being larceny.

In line with this principle it has been held that a servant who clandestinely took his master's oats for the purpose of feeding them to his master's horse was guilty of larceny.

When a larceny has been committed a prompt repentance by the thief, followed by a return of the property or payment for it, is no defense.

Under the common law personal property only can be stolen. Thus, where trees, fences, crops, or fixtures are cut down or severed by a trespasser and immediately taken away by him, there is no larceny. But should the trespasser, after cutting down some trees, for instance, leave the fallen timber and relinquish his possession,

the possession of the owner attaches to the property in its new character as personal property, and a subsequent taking by the trespasser with intent to steal is larceny.

At common law a piece of paper may be stolen, though its value is less than that of the smallest coin; but if the paper is so written upon as to be evidence of valid and subsisting agreement, it loses its value as a piece of paper and is no longer a subject of larceny. Thus, a promissory note, a bank note or a post-exchange check or other writing evidencing a chose in action is not a subject of larceny at common law. But section 287, United States Penal Code, changes this rule so as to make written instruments subject to theft and to fix their value as the amount of money due thereon. Many of the States by statute have so changed the rule. (*C. M. C. M., No. 1.*)

PROOF.

(*a*) The taking by the accused of the property as alleged.

(*b*) The carrying away by the accused of such property.

(*c*) That such property belonged to a certain other person named or described.

(*d*) That such property was of the value alleged, or of some value.

(*e*) The facts and circumstances of the case indicating that the taking and carrying away were by trespass and with a fraudulent intent to deprive the owner permanently of his property or interest in the goods or of their value or a part of their value.

VI. ROBBERY.

Robbery at common law is the taking, with intent to steal, of the personal property of another, from his person or in his presence, against his will, by violence or intimidation. (Clark, p. 323.)

The felonious and forcible taking from the person of another goods or money to any value by violence or putting him in fear. (Bouvier's Law Dictionary, 15th ed., vol. 2, p. 601.)

Robbery includes larceny and the elements of that offense must always be present. See matter under heading "V" under this article.

Thus it is not robbery to take one's own property, unless the person from whom it is taken has a special property in the goods and the right to possession; nor is it robbery to take property that is honestly believed to be one's own or to take it for a merely temporary use.

It is not necessary that the person from whom the property is taken be the actual owner—it is enough if he have a possession or a custody that is good against the taker.

The property must be taken from the person or in his presence; but to be in the presence it is not necessary that the owner be within any certain distance of his property; it is enough if he be near enough to be in control of his property. Thus where some persons entered a house and forced the owner by threats to disclose the hiding place of valuables in an adjoining room, and then, leaving the owner

tied, went into such room and stole the valuables their offense was held to be robbery.

The taking must be against the owner's will by means of violence or intimidation. The violence or intimidation must precede or accompany the taking. Thus where property is taken by stealth from the person of its owner it is not robbery in case the thief overcomes a forcible effort to retake it; or the owner is deterred by the threats of the thief from making an attempt to retake it.

The violence must be actual violence to the person, but the amount of violence used is immaterial. It is enough where it overcomes the actual resistance of the person robbed, or puts him in such a position that he makes no resistance, or suffices to overcome the resistance offered by a chain or other fastening by which the article is attached to the person. Where an article is merely snatched out of another's hand or a pocket is picked by stealth and no other force is used and the owner is not put in fear, the offense is not robbery. But if in snatching the article resistance is overcome, there is sufficient violence, as where a woman's earring is torn from her ear or a hair ornament entangled in her hair is snatched away. So, also, when a person's attention is diverted by being jostled by a confederate of a pickpocket, who is thus enabled to steal the person's watch, it is a robbery.

Other instances of robbery by violence are where a man is knocked insensible and his pockets rifled, and where an officer steals property from the person of a prisoner in his charge after handcuffing him on the pretext of preventing his escape.

It is equally robbery whether the robber prevents resistance by rendering his victim physically incapable of making any, or by putting him, by threat or menaces, in such fear that he is warranted in making none. The fear must be a reasonably well-founded apprehension of present or future danger, and the goods must be taken while such apprehension exists. The danger apprehended may be, for instance, his own death or some bodily injury to him, or the destruction of his habitation, or a prosecution for sodomy.

In the last case it is immaterial whether the person threatened with the prosecution is innocent or guilty of the offense. A danger of being prosecuted for any other offense is held not to be sufficient. (Clark and Marshall, p. 865.)

PROOF.

(*a*) The larceny of the property. See proof under larceny above.

(*b*) That such larceny was from the person or in the presence of the person alleged to have been robbed.

(*c*) That the taking was by violence or putting in fear, as alleged.

VII. EMBEZZLEMENT.

Embezzlement is a fraudulent appropriation of another's property by a person to whom it has been intrusted or into whose hands it has lawfully come. It differs from larceny in that the original taking of the property was lawful or with the consent of the owner, while in larceny the felonious intent must have existed at the time of the taking. (Cyc., vol. 15, p. 488.)

Embezzlement is not a common law but a statutory offense.

The purpose of embezzlement statutes is to meet the case of a servant, clerk, bailee, or other person to whom the possession of property is intrusted by or for the owner, and who fraudulently misappropriates it to his own use or otherwise, the circumstances being such that the act is not larceny.

The gist of the offense is a breach of trust, and can not be committed unless some fiduciary relationship exists between the owner and the person in possession of the property and unless such possession was taken by virtue of such relationship.

PROOF.

(*a*) That the accused was the clerk or servant of a certain other person or stood in some other fiduciary relationship to that person, as alleged.

(*b*) That in such fiduciary capacity the accused received into his possession certain money or property of such person, as alleged.

(*c*) That he converted or appropriated to his own use such money or property during the existence of such fiduciary relationship.

(*d*) The facts and circumstances indicating that the accused had in so doing the fraudulent intent to deprive the owner permanently of his property in the goods or money, or of their value or a part thereof.

VIII. PERJURY.

Perjury, at common law, is the willful and corrupt giving, upon a lawful oath, or in any form allowed by law to be substituted for an oath, in a judicial proceeding or course of justice, of false testimony material to the issue or matter of inquiry. (Clark, p. 385.)

The false testimony must be willfully and corruptly given; that is, with a deliberate intent to testify falsely.

It is not perjury to testify by mistake to what is believed to be true, however unfounded the belief may be; hence, a witness may contradict under oath testimony formerly given by him without committing perjury, since he may on each occasion have believed his testimony to be true. On the other hand, a witness may commit perjury

by testifying that he knows a thing to be true when in fact he either knows nothing about it at all or is not sure about it, and this is so whether the thing be true or false in fact. So, also, a witness may commit perjury in testifying falsely as to his belief, remembrance, or impression, or as to his judgment or opinion on matters of fact. Thus where a witness swears that he does not remember certain facts when in fact he does he commits perjury, if the other elements of the offense are present. So, also, where a witness testified that in his opinion a certain person was drunk when in fact he entertains the contrary opinion.

The oath must be one required or authorized by law and must be duly administered by one authorized to administer it. If no particular form of oath is prescribed by statute, the form of oath is immaterial, but "there must be in some form, in the presence of an officer authorized to administer it, an unequivocal and present act by which the affiant takes upon himself the obligation of an oath." (Clark and Marshal, p. 863.)

Thus, where a person merely delivers an affidavit signed by him to an officer authorized to administer the oath thereto, and without anything more being said or done the officer signs the jurat, no oath has been administered.

Where a form of oath has been prescribed a literal following of the statute is not essential. It is sufficient if the oath administered conforms in substance to the statutory form.

An oath includes an affirmation where the latter is authorized in lieu of an oath.

It is no defense that the witness voluntarily appeared, or that he was incompetent as a witness, or that his testimony was given in response to questions that he could have declined to answer, even if he was forced to answer it over his claim of privilege.

It is a defense, however, if the tribunal or magistrate had no jurisdiction of the cause in which the false testimony was given.

The false testimony must be material to the issue or matter of inquiry, but the issue or matter of inquiry may be a collateral one.

Thus perjury may be committed by giving material false testimony with respect to the credibility of a material witness, or in an affidavit in support of a request for a continuance, as well as by giving testimony with respect to a fact from which a legitimate inference may be drawn as to the existence or nonexistence of a fact in issue. It is no defense that such testimony would have been excluded if objected to as incompetent, or that it was not believed, or that it did not affect the result in any way, or that subsequent proceedings rendered it immaterial.

PROOF.

(*a*) That a certain judicial proceeding or course of justice was pending.

(*b*) That the accused was sworn in such proceeding.

(*c*) That such oath was administered to the accused in a matter where an oath was required or authorized by law, as alleged.

(*d*) That such oath was administered by a person having authority to do so.

(*e*) That upon such oath he gave the testimony alleged.

(*f*) That such testimony was false, and material to the issue or matter of inquiry.

(*g*) The facts and circumstances indicating that such false testimony was willfully and corruptly given.

IX. ASSAULT WITH INTENT TO COMMIT ANY FELONY.

An assault with intent to commit any felony is an assault made with a specific intent to murder, rape, rob, or to commit manslaughter, sodomy, or other common-law felony.

An assault is an attempt or offer with unlawful force or violence to do a corporal hurt to another. (Clark and Marshall, p. 271.)

Raising a stick over another's head as if to strike him, presenting a firearm ready for use within range of another, striking at another with a cane or fist, assuming a threatening attitude and hurrying toward another are examples of assaults.

Some overt act is necessary in any assault. Mere preparation, such as unfastening the catch on a pistol holster in order that the pistol may be drawn, or picking up a stone at a considerable distance from another without making any attempt or offer to throw it, is not an assault.

The force or violence must be physical; mere words, however threatening, or insulting gestures are not by themselves sufficient to constitute an assault.

Furthermore, in an assault there must be an intent, actual or apparent, to inflict corporal hurt on another.

Where the circumstances known to the person menaced clearly negative such intent there is no assault. Thus, where a person accompanies an apparent attempt to strike another by an unequivocal announcement in some form of his intention not to strike, there is no assault. This principle was applied in a case where the defendant raised his whip and shook it at the presecutor within striking distance saying, "If you weren't an old man, I would knock you down."

Viewed solely as an attempt to commit a battery there must be an actual or constructive intent to do a corporal hurt to another, and an

act of unlawful violence or force begun to be executed with a view to inflicting such hurt. How such purpose is defeated is immaterial.

The following have been held to be assaults: Riding after a person so as to compel him to seek safety in an inclosure to avoid a beating, though the assailant was never near enough to hit him; rushing upon another in a threatening attitude although before quite close enough to strike, the person threatened strikes in self-defense or the attack is frustrated by a third person.

It is also an assault where the person in order to avert the taking effect of the unlawful violence yields to a demand of his assailant. Thus, where A, being within striking distance of B, raises a weapon for the purpose of unlawfully striking him, stating that he will strike unless B does a certain thing, and B does that thing, thereby averting the blow, A commits an assault.

It is not a defense to a charge of assault that for some reason unknown to the assailant his attempt was bound to fail. Thus, where a soldier loads his rifle with what he believes to be a good cartridge and, pointing it at a person, pulls the trigger, he is guilty of assault although the cartridge was so defective that it could not be used. The same principle was applied to a case where a person in a house shoots through the roof at a place where he supposed a policeman was concealed, though the policeman was at another place on the roof.

The intent need not be to injure a particular person, and mere recklessness may supply the place of intent. Thus, where one strikes at A believing him to be B, he is guilty of assaulting A; and where one fires a loaded and capped pistol at another recklessly, and not knowing or seeking to know whether it is loaded or not, he commits an assault.

To constitute an assault, however, it is unnecessary that there be an actual or constructive intent to hurt anyone or a believed ability to inflict such hurt.

If there be to the person set upon an *apparent* present intent to injure, coupled with an *apparent* present ability to do so, it is sufficient.

The better opinion, however, is to the effect that if a person presents a gun at another, or threatens him with a stick or other weapon, and thereby reasonably puts him in fear and causes him to act on the defensive, or to retreat, there is an assault, whether there is any actual intention to injure or not. In a comparatively late Massachusetts case it was held that a man who pointed an unloaded gun at another was guilty of an assault, although he may have known that it was not loaded and may have had no intention to injure. "It is not the secret intent of the assaulting party," said the court, "nor the undisclosed fact of his ability or inability to

commit a battery, that is material, but what his conduct and the attending circumstances denote at the time to the party assaulted. If to him they indicate an attack, he is justified in resorting to defensive action. The same rule applies to the proof necessary to sustain a criminal complaint for an assault. It is the outward demonstration that constitutes the mischief which is punished as a breach of the peace." (Clark and Marshall, pp. 277, 278.)

If there be such a demonstration of violence, coupled with an apparent ability to inflict the injury, so as to cause the person at whom it is directed reasonably to fear the injury unless he retreat to secure his safety, and under such circumstances he is compelled to retreat to avoid an impending danger, the assault is complete, though the assailant may never have been within the actual striking distance of the person assailed. (Clark and Marshall, p. 281, note.)

There must, however, be an apparent present ability. To aim a pistol at a man at such a distance that it clearly could not injure would not be an assault.

A battery is an assault in which force is applied, by material agencies, to the person of another, either mediately or immediately. Thus, it is a battery to spit on another; to push a third person against him; to set a dog at him which bites him; to cut his dress while he is wearing it, though without touching or intending to touch his person; to shoot him; and to cause him to take poison. So it is a battery for a man to fondle against her will a woman not his wife. The force may be applied through conductors more or less close. Thus, to strike the dress of the person assailed, or the horse on which he is riding, or the house in which he resides, may be as much a battery as to strike his face; and sending an explosive machine by express from New York to San Francisco may be as much a battery as taking it to San Francisco in person. It is not, however, a battery to lay hands on another to attract his attention, or in a party falling to seize another for support. Sending a missile into a crowd also is a battery on anyone whom the missile hits; and so is the use, on the part of one who is excused in using force, of more force than is required. (Wharton, vol. 1, pp. 566, 567.)

1. Assault With Intent to Murder.

This is an assault aggravated by the concurrence of a specific intent to murder; in other words, it is an *attempt* to murder.

As in other attempts there must be an overt act, beyond mere preparation or threats, or an attempt to make an attempt.

Thus, it was held not an assault with intent to murder where the defendant drew a pistol from his hip pocket, but because of its becoming caught in the lining of his coat, did not make any actual

attempt to inflict an injury with the pistol on the person alleged to have been assaulted.

To constitute an assault with intent to murder by firearms it is not necessary that the weapon be discharged; and in no case is the actual infliction of injury necessary. Thus, where a man with intent to murder another deliberately assaults him by shooting at him the fact that he misses does not alter the character of the offense.

Where the intent to murder exists, the fact that for some reason unknown the actual consummation of the murder is impossible by the means employed does not prevent the person using them from being guilty of an assault with intent to commit murder where the means are apparently adapted to the end in view. Thus, where a soldier intending to murder another loads his rifle with what he believes to be a good cartridge and aims and discharges his rifle at the other, it is no defense that he, by accident, got hold of a cartridge so defectively loaded that the bullet did not leave the gun.

In order to constitute this offense the specific intent to murder must exist, and the facts must be such that had death been caused by the act the offense would have been murder, but the converse of this latter proposition is not always true, as a man may be guilty of murder without intending to kill. Thus, where a workman recklessly throws a heavy object from the roof of a building into a street where he knows people are likely to be passing and thereby kills a person, he may be guilty of murder; but where the person is merely injured, the offense of assault with intent to commit murder is not committed.

To constitute this offense there must be a specific intent to murder the person assaulted and this intent must exist at the time of the assault.

A general felonious intent of a specific design to commit another felony is not sufficient, and where a person is too drunk to entertain the specific intent the offense is not murder. But where the accused intending to murder A shoots at and wounds B, mistaking him for A, he is guilty of assaulting B with intent to murder him; so also where a man fires into a group with intent to murder some one he is guilty of an assault with intent to murder each member of the group.

2. Assault with Intent to Commit Manslaughter.

This offense differs from assault with intent to murder in the lack of the elements of malice necessary to constitute the latter crime.

It is an attempt to take human life in a sudden heat of passion.

The specific intent to kill is necessary and the act must be done under such circumstances that had death ensued the offense would have been manslaughter.

What has been said under the head of assault with intent to commit murder applies to the offense of assault with intent to commit manslaughter.

3. Assault with Intent to Commit Rape.

This is an attempt to commit rape in which the overt act amounts to an assault upon the woman intended to be ravished. Indecent advances, importunities however earnest; mere threats; and actual attempts to rape wherein the overt act is not an assault do not amount to this offense. Thus, where a man, intending to rape a woman, stealthily concealed himself in her room to await a favorable opportunity to execute his design but was discovered and fled, it was held that he was not guilty of an *assault* with intent to commit rape.

No actual touching is necessary. Thus where a man entered a woman's room and got in the bed where she was and within reach of her person for the purpose of ravishing her he commits the offense, although he did not touch the woman.

This offense may be committed on a woman who is insane or an imbecile, or while she is drugged or intoxicated, or asleep, provided the offense would be rape if the purpose was carried out. But where an attempt to have connection with a woman capable of consenting and whose consent thereto has been obtained by fraud there can be no assault with intent to commit rape.

Thus an attempt to have connection with a woman who has consented thereto in the belief that one personating her husband is her husband can not be an assault with intent to commit rape.

The intent to have carnal knowledge of the woman assaulted by force and without her consent must exist and concur with the assault. In other words, the man must intend to overcome any resistance by force, actual or constructive, and penetrate the woman's person. Any less intent will not suffice. Thus where a man assaults a woman, his purpose being to seduce her, the offense is not committed.

Once an assault with intent to commit rape is made it is no defense that the man voluntarily desisted or that the woman yields her consent to the connection, so that no rape is committed.

4. Assault With Intent to Rob.

This is an attempt to commit robbery wherein the overt act is an assault and the concurrent intent is forcibly to take and carry away property of the person assaulted from his person or in his presence by violence or putting him in fear.

The accused can not set up as a defense that he intended to take only money and that the person he attempted to rob had none.

5. Assault With Intent to Commit Sodomy.

Sodomy consists in sexual connection with any brute animal, or in sexual connection, per anum, by a man with any man or woman. (Wharton, vol. 2, p. 538.)

Penetration of the mouth of the person does not constitute this offense.

Both parties are liable as principals if each is adult and consents; but if either be a boy of tender age the adult alone is liable, and although the boy consent the act is still by force.

Penetration alone is sufficient.

An assault with intent to commit this offense consists of an assault on a human being with intent to penetrate his or her person per anum.

That which has been before stated, with regard to the evidence and manner of proof in cases of rape, ought especially to be observed upon a trial for this heinous offense. When strictly and impartially proved the offense well merits strict and impartial punishment; but it is from its nature so easily charged and the negative so difficult to be proved that the accusation ought clearly to be made out. The evidence should be plain and satisfactory in proportion as the crime is detestable.—4 Bla. Com., 215. (Archbold's Criminal Practice and Pleading, 7th ed., vol. 2, pp. 185, 186, note.)

PROOF.

(1) Assault with intent to murder:

(*a*) That the accused assaulted a certain person, as alleged.

(*b*) The facts and circumstances of the case indicating the existence at the time of the assault of the specific intent of the accused to kill such person, and that the killing would have been murder had death resulted.

[Note.—Both the specific intent and the malice *may* be inferred from the deliberate use of a deadly weapon in a way calculated to cause death, or from other deliberate acts of violence likely to result in death or great bodily harm.]

(2) Assault with intent to commit manslaughter:

(*a*) That the accused assaulted a certain person, as alleged.

(*b*) The facts and circumstances of the case indicating the existence at the time of the assault of the specific intent of the accused to kill such person and that the killing would have been voluntary manslaughter had death resulted.

(3) Assault with intent to commit rape:

(*a*) That the accused assaulted a certain female, as specified.

(*b*) The facts and circumstances of the case indicating the existence at the time of the assault of the intent of the accused to penetrate the person of such female at all events by overcoming any resistance on her part by actual or constructive force; and the facts

and circumstances indicating that the offense of rape would have been committed had the accused succeeded in carrying out his purpose.

(4) Assault with intent to rob:

(*a*) That the accused assaulted a certain person, as alleged.

(*b*) The facts and circumstances of the case indicating the existence at the time of the assault of the intent on the part of the accused forcibly to steal property of such person from his person or in his presence by violence or putting him in fear.

(5) Assault with intent to commit sodomy:

(*a*) That the accused assaulted a certain person, as alleged.

(*b*) The facts and circumstances of the case indicating the concurrent intent to commit the offense on such person.

X. ASSAULT WITH INTENT TO DO BODILY HARM.

This is an assault aggravated by the specific present intent to do bodily harm to the person assaulted by means of the force employed. It is not necessary that any battery actually ensue, or, if bodily harm is actually inflicted, that it be of the kind intended. Where the accused acts in reckless disregard for the safety of others it is not a defense that he did not have in mind the particular person injured.

PROOF.

(*a*) That the accused assaulted a certain person, as alleged.

(*b*) The facts and circumstances of the case indicating the concurrent intent thereby to do bodily harm to such person.

NINETY-FOURTH ARTICLE.

444. Any person subject to military law who makes or causes to be made any claim against the United States, or any officer thereof, knowing such claim to be false or fraudulent; or

[2] Who presents or causes to be presented to any person in the civil or military service thereof, for approval or payment, any claim against the United States, or any officer thereof, knowing such claim to be false or fraudulent; or

[3] Who enters into any agreement or conspiracy to defraud the United States by obtaining, or aiding others to obtain, the allowance or payment of any false or fraudulent claim; or

[4] Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or against any officer thereof, makes or uses, or procures, or advises the making or use of, any writing or other paper, knowing the same to contain any false or fraudulent statements; or

[5] Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, makes, or procures, or advises the making of, any oath to any fact or to any writing or other paper knowing such oath to be false; or

[6] Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, forges or counterfeits, or procures, or advises the forging or counterfeiting of any signature upon any writing or other paper, or uses, or procures, or advises the use of any such signature, knowing the same to be forged or counterfeited; or

[7] Who, having charge, possession, custody, or control of any money or other property of the United States, furnished or intended for the military service thereof, knowingly delivers, or causes to be delivered, to any person having authority to receive the same, any amount thereof less than that for which he receives a certificate or receipt; or

[8] Who, being authorized to make or deliver any paper certifying the receipt of any property of the United States furnished or intended for the military service thereof, makes or delivers to any person such writing, without having full knowledge of the truth of the statements therein contained and with intent to defraud the United States; or

[9] Who steals, embezzles, knowingly and willfully misappropriates, applies to his own use or benefit, or wrongfully or knowingly sells or disposes of any ordnance, arms, equipments, ammunition, clothing, subsistence stores, money, or other property of the United States furnished or intended for the military service thereof; or

[10] Who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, or other person who is a part of or employed in said forces or service, any ordnance, arms, equipment, 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, or by any or all of said penalties. And if any person, being guilty of any of the offenses aforesaid while in the military service of the United States, receives his discharge or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial in the same manner and to the same extent as if he had not received such discharge nor been dismissed.

Definitions and Principles.

See the respective headings under which the defenses defined by this article are treated below.

Analysis and Proof.

The article applies to any person subject to military law. See article 2.

The article embraces a large number of offenses which may be treated under headings, corresponding to the numbered paragraphs of the article, as follows:

I. Making or causing to be made a false or fraululent claim.

II. Presenting or causing to be presented for approval or payment a false or fraudulent claim.

III. Entering into an agreement or conspiracy to defraud the United States through false claims.

IV. Making, using, procuring, or advising the making or use of a false writing or other paper in connection with claims.

V. False oath in connection with claims.

VI. Forgery, etc., of signature in connection with claims.

VII. Delivering less than amount called for by receipt.

VIII. Making or delivering receipt without having knowledge that the same is true.

IX. Embezzlement, misappropriation, sale, etc., of military property.

X. Purchasing or receiving in pledge of military property.

I. MAKING OR CAUSING TO BE MADE A FALSE OR FRAUDULENT CLAIM.

Making a claim is a distinct act from presenting it. A claim may be made in one place and presented in another. This section does not relate to personal claims against an officer of the United States, but to claims against the United States made to such officer or otherwise. It is not necessary that the claim be allowed or paid nor that it be made by the person to be benefited by the allowance or payment. The claim must be made or caused to be made with knowledge of its fictitious or dishonest character. This does not include claims, however groundless they may be, that are honestly believed by the maker to be valid, nor claims that are merely made negligently or without ordinary prudence, but it does include claims made by a person who has the belief of the false character of the claim that the ordinarily prudent man would have entertained under the circumstances. (See also the discussion under "II" of this article.)

An instance of making a false claim would be where an officer having a claim respecting property lost in the military service knowingly includes articles that were not in fact lost and submits such claim to his commanding officer for the action of the board.

PROOF.

(*a*) That the accused made or caused to be made a certain claim against the United States as alleged.

(*b*) That such claim was false or fraudulent in the particulars specified.

(*c*) That when the accused made the claim or caused it to be made he knew that it was false or fraudulent in such particulars.

(*d*) The amount involved, as alleged.

II. PRESENTING OR CAUSING TO BE PRESENTED FOR APPROVAL OR PAYMENT A FALSE OR FRAUDULENT CLAIM.

See second paragraph of the article and matter under heading "I."

The claim must be presented to some person having authority to approve or pay it. False and fraudulent claims include not only those containing some material false statement, but also claims that the person presenting knows to have been paid, or for some other reason knows he is not authorized to present or receive money on.

Where an officer knows that a certain duly assigned pay account of his is outstanding and that the assignee can collect on it if he chooses to do so, it is no defense to a charge against such officer of presenting for payment a second account covering the same period as the assigned account that the second account was presented relying on the assignee's statement that he would not present the first. But where the accused has good grounds to believe and actually does believe when he presents the second account that the assigned account had been canceled or surrendered by the assignee, his presentation of the second claim does not constitute this offense. A cancellation or surrender of the first account *after* the presentation of the second account is, of course, no defense to the charge.

Presenting to a paymaster a false final statement, knowing it to be false, is an example of an offense under this paragraph.

PROOF.

(*a*) That the accused presented or caused to be presented for approval or payment to a certain person in the civil or military service of the United States, a certain claim against the United States, as alleged.

(*b*) That such claim was false or fraudulent in the particulars alleged.

(*c*) That when the accused presented the claim or caused it to be presented he knew it was fictitious or dishonest in such particulars.

(*d*) The amount involved, as alleged.

III. ENTERING INTO AN AGREEMENT OR CONSPIRACY TO DEFRAUD THE UNITED STATES THROUGH FALSE CLAIMS.

See the third paragraph of this article.

A conspiracy is the corrupt agreeing together of two or more persons to do by concerted action something unlawful either as a means or an end. (Bishop, vol. 2, p. 98.)

The mere entry into a corrupt agreement for the purpose of defrauding the United States through any of the means specified constitutes the offense. An example of this offense is an agreement be-

tween a contractor and an officer to defraud the United States by means of a padded voucher to be certified as correct by the officer.

PROOF.

(*a*) That the accused and one or more other persons named or described entered into an agreement.

(*b*) That the object of the agreement was to defraud the United States.

(*c*) That the means by which the fraud was to be effected were to obtain or assist certain other persons to obtain the allowance or payment of a certain false or fraudulent claim, as specified.

(*d*) The amount involved, as alleged.

IV. MAKING, USING, PROCURING, OR ADVISING THE MAKING OR USE OF A FALSE WRITING OR OTHER PAPER IN CONNECTION WITH CLAIMS.

See the fourth paragraph of the article, and matter under headings "I" and "II."

It is not necessary to the offense of making a writing knowing it to contain false or fraudulent statements that such writing be used or attempted to be used, or that the claim in support of which it was made be presented for approval, allowance, or payment. The false or fraudulent statement should, however, be material.

In the offense of procuring the making or use of the writing or other paper, the paper must be made or used; but in the offense of advising such acts the making or use of the paper is not necessary. Examples of offenses under this paragraph are: Willfully inducing another to make to the United States a lease of premises containing a false and fraudulent statement with a view of obtaining the allowance of a false claim for rent against the United States; falsification by a soldier of an entry in the company clothing book for the purpose described in this paragraph of the article; and the making by an officer in his pay account of false and fraudulent statements with a view to securing the payment of such account.

PROOF.

(*a*) That the accused made or used or procured or advised the making or use of a certain writing or other paper, as alleged.

(*b*) That certain statements in such writing or other papers were false or fraudulent, as alleged.

(*c*) That the accused knew this.

(*d*) The facts and circumstances indicating that the act of the accused was for the purpose of obtaining or aiding certain others to obtain the approval, allowance, or payment of a certain claim or claims against the United States, as specified.

(*e*) The amount involved, as alleged.

V. FALSE OATH IN CONNECTION WITH CLAIMS.

See the fifth paragraph of the article and matter under headings "I," "II," and "IV."

PROOF.

(*a*) That the accused made or procured or advised the making of an oath to a certain fact or to a certain writing or other paper, as alleged.

(*b*) That such oath was false, as alleged.

(*c*) That the accused knew it was false.

(*d*) The facts and circumstances of the case indicating that the act was for the purpose of obtaining or aiding certain others to obtain the approval, allowance, or payment of a certain claim or claims against the United States, as alleged.

VI. FORGERY, ETC., OF SIGNATURE IN CONNECTION WITH CLAIMS.

See the sixth paragraph of the article and matter under headings "I" and "II" above.

The term "forges or counterfeits" includes any fraudulent making of another's signature, whether an attempt is made to imitate the handwriting or not.

PROOF.

(*a*) That the accused forged or counterfeited the signature of a certain person on a certain writing or other paper or that he procured or advised the act as specified; or that he used the forged or counterfeited signature of a certain person or procured or advised its use, knowing such signature to be forged or counterfeited, as alleged.

(*b*) The facts and circumstances of the case indicating that his act was for the purpose of obtaining or aiding certain others to obtain the approval, allowance, or payment of a certain claim or claims against the United States as alleged.

VII. DELIVERING LESS THAN AMOUNT CALLED FOR BY RECEIPT.

See the seventh paragraph of the article.

It is immaterial in this offense by what means, whether by deceit, collusion, or otherwise, the accused effected the transaction, or what his purpose was in so doing.

Instances of this offense are:

A contractor gave a receipt for a greater amount than was due him from the United States. Thereupon the disbursing officer gave him the full amount called for by the receipt, but received back from the contractor the excess over the amount actually due.

A disbursing officer, having delivered to a creditor of the United States less money than was actually due, received a receipt signed in blank by the creditor, which he afterwards completed by writing the true amount due.

PROOF.

(*a*) That the accused had charge, possession, custody, or control of certain money or property of the United States furnished or intended for the military service thereof, as alleged.

(*b*) That he obtained a receipt for a certain amount or quantity of such money or property, as alleged.

(*c*) That for such receipt he knowingly delivered, or caused to be delivered, to a certain person having authority to receive it an amount or quantity of such money or property less than the amount or quantity thereof specified in such receipt.

(*d*) The value of the undelivered money or property, as alleged.

VIII. MAKING OR DELIVERING RECEIPT WITHOUT HAVING KNOWLEDGE THAT THE SAME IS TRUE.

See the eighth paragraph of the article.

The following is an instance of an offense under this paragraph: An officer, being in collusion with a contractor, knowingly received from him an amount of supplies intended for the military service less than the amount shown on the receipt for the supplies, which receipt was certified to by the officer and delivered to the contractor with the intent to defraud the United States.

PROOF.

(*a*) That the accused was authorized to make or deliver a certificate of the receipt from a certain person of certain property of the United States furnished or intended for the military service thereof. as alleged.

(*b*) That he made or delivered to such person such certificate, as alleged.

(*c*) That such certificate was made or delivered without the accused having full knowledge of the truth of a certain material statement or statements therein.

(*d*) The facts and circumstances indicating that his act was done with intent to defraud the United States.

(*e*) The amount involved, as alleged.

IX. EMBEZZLEMENT, MISAPPROPRIATION, SALE, ETC., OF MILITARY PROPERTY.

For definitions and principles respecting *larceny* and *embezzlement*, see headings "V" and "VII" under the ninety-third article.

Misappropriating is devoting to any unauthorized purpose. The misapplication meant is where such purpose is for the party's own use or benefit.

For the definition of "disposes of," see heading "I" under the eightieth article.

The *larceny*, *embezzlement*, etc., must be of the particular kind of property mentioned in the article. Post exchange and company funds and money appropriated for other than the military service do not come within the description "money of the United States furnished or intended for the military service thereof." The term "embezzlement" as used in this article does not include acts or omissions not within the definition of embezzlement, but which are expressly declared by statute to be embezzlements. Such statutory embezzlements are chargeable, however, under the ninety-sixth article.

The misappropriation of the property or money need not be for the benefit of the accused; the words "to his own use and benefit" qualifies the words "applies only."

Instances of misappropriation are:

An officer of the Quartermaster's Department used teams, tools, and other public property in his possession as such officer in erecting buildings, etc., for the benefit of an association composed mainly of civilians, of which he was a member.

An officer of the Quartermaster's Department loaned public property (corn) to a contractor for the purpose of enabling him to fill a contract made with the United States through another officer.

An instance of misapplication is the temporary use by a quartermaster of Government horses in his charge to draw his private carriage on nonpublic business.

PROOF.

In larceny and embezzlement:

(*a*) See proof under headings "V" and "VII" under the ninety-third article.

(*b*) That the property belonged to the United States and that it was furnished or intended for the military service thereof.

In misappropriation and misapplication:

(*a*) That the accused misappropriated or applied to his own use certain property in the manner alleged.

(*b*) That such property belonged to the United States and that it was furnished or intended for the military service thereof.

(*c*) The facts and circumstances of the case indicating that the act of the accused was willfully and knowingly done.

(*d*) The value of the property, as specified.

In wrongful sale or disposition:

(*a*) That the accused sold or in a certain manner disposed of certain property, as specified.

(*b*) That such property belonged to the United States and that it was furnished or intended for the military service thereof.

(*c*) The facts and circumstances indicating that the act was knowingly or wrongfully done.

(*d*) The value of the property, as specified.

X. PURCHASING OR RECEIVING IN PLEDGE OF MILITARY PROPERTY.

See the tenth paragraph of the article and matter under fifty-fifth article.

To constitute this offense the accused must know not only that the person selling or pawning the property was in one of the specified classes but that the property was the property of the United States. As to "knowingly" see "Definitions and principles" under fifty-fifth article.

PROOF.

(*a*) That the accused purchased, or received in pledge, for a certain obligation or indebtedness certain military property of the United States, as alleged, knowing it to be such property.

(*b*) That such property was purchased or so received in pledge from a certain soldier, officer, or other person who was a part of or employed in the military service of the United States, as alleged, and that the accused knew the person selling or pledging the property to be such soldier, officer, or other person.

(*c*) That such soldier, officer, or other person had not the lawful right to sell or pledge such property.

(*d*) The value of the property, as alleged.

NINETY-FIFTH ARTICLE.

445. Any officer or cadet who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service.

Definitions and Principles.

The conduct contemplated is action or behavior in an official capacity which, in dishonoring or disgracing the individual as an officer, 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. (Winthrop, p. 1106.)

There are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of dis-

honesty or unfair dealing; of indecency or indecorum; of lawlessness, injustice, or cruelty.

Not every one is or can be expected to meet ideal standards or to possess the attributes in the exact degree demanded by the standards of his own time; but there is a limit of tolerance below which the individual standards in these respects of an officer or cadet can not fall without his being morally unfit to be an officer or cadet or to be considered a gentleman.

This article contemplates such conduct by an officer or cadet which, taking all the circumstances into consideration, satisfactorily shows such moral unfitness.

This article includes acts made punishable by any other article of war, provided such acts amount to conduct unbecoming an officer and a gentleman; thus, an officer who embezzles military property violates both this and the preceding article.

Instances of violation of this article are:

Knowingly making a false official statement; dishonorable neglect to pay debts; opening and reading another's letters; giving a check on a bank where there were no funds to meet it, and without intending that there should be; using insulting or defamatory language to another officer in his presence, or about him to other military persons; being grossly drunk and conspicuously disorderly in a public place; public association with notorious prostitutes; cruel treatment of soldiers; committing or attempting to commit a crime involving moral turpitude; failing without a good cause to support his family.

For other instances, see Digest, pages 140–143, and Winthrop, pages 1107–1115.

Analysis and Proof.

This article applies to officers and cadets only.

The article defines one offense, viz:

I. CONDUCT UNBECOMING AN OFFICER AND A GENTLEMAN.

PROOF.

(*a*) That the accused did or omitted to do the acts as alleged.

(*b*) The circumstances, intent, motive, etc., as specified.

NINETY-SIXTH ARTICLE.

446. Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital,

of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court.

Definitions and Principles.

See matter under the respective headings under which the offenses are treated.

Analysis and Proof.

The article applies to any person subject to military law. See article 2. The article embraces offenses falling within the classes described therein, and not mentioned in the other punitive articles. The offenses may be treated under the following headings:

I. Disorders and neglects to the prejudice of good order and military discipline.

II. Conduct of a nature to bring discredit upon the military service.

III. Crimes or offenses not capital.

I. DISORDERS AND NEGLECTS TO THE PREJUDICE OF GOOD ORDER AND MILITARY DISCIPLINE.

The disorders and neglects include all acts or omissions to the prejudice of good order and military discipline not made punishable by any of the preceding articles.

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 an officer or soldier can scarcely be conceived which may not be regarded as in some indirect or remote sense 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.* (Winthrop, p. 1123.)

Instances of such disorders and neglects in the case of officers are: Disobedience of standing orders, or of the orders of an officer when the offense is not chargeable under a specific article; allowing a soldier to go on duty knowing him to be drunk; rendering himself unfit for duty by excessive use of intoxicants; drunkenness.

Instances of such disorders and neglects in the cases of enlisted men are: Failing to appear on duty with a proper uniform; appearing with dirty clothing; malingering; abusing public animals; refusing to submit to treatment necessary to render him fit for duty; refusing to submit to a necessary and proper operation not endangering life (see G. O. 43, W. D., 1906); careless discharge of firearms; personating an officer; making false statements to an officer in regard to matters of duty.

PROOF.

(*a*) That the accused did or failed to do the acts alleged.
(*b*) The circumstances, intent, etc., as specified.

II. CONDUCT OF A NATURE TO BRING DISCREDIT UPON THE MILITARY SERVICE.

"Discredit," as here used, means to injure the reputation of.

The principal object of including this phrase in the general article was to make military offenses those acts or omissions of retired soldiers which were not elsewhere made punishable by the Articles of War but which are of a nature to bring discredit on the service, such as a failure to pay debts.

There is, however, a limited field for the application of this part of the general article to soldiers on the active list in cases where their discreditable conduct is not made punishable by any specific article or by the other parts of the general article.

PROOF.

(*a*) That the accused did or failed to do the acts alleged.
(*b*) The circumstances, intent, etc., as specified.

III. CRIMES OR OFFENSES NOT CAPITAL.

The crimes referred to in A. W. 96 manifestly embrace those not capital committed in violation of public law as enforced by the civil power. (U. S. *v.* Grafton, 206 U. S., 348.)

All crimes or offenses wherever committed that are not made punishable by death are included, except such as are specifically included in some other article and (in view of the ninety-second article) except murder or rape committed in time of peace within the geographical limits of the States of the Union and the District of Columbia.

Within this description would be a noncapital crime which, although designated by the laws of the jurisdiction where committed with one of the names used, for instance, in the ninety-third article, is not within the common-law definition of the offense.

Thus section 90 of the Federal Penal Code of 1910 provides that a failure by an officer to render accounts for public money received by him unless authorized to retain it as salary, pay, or emolument is an embezzlement of such funds. Such an embezzlement not being within the definition of embezzlement as the term is used in the ninety-third and ninety-fourth articles would be chargeable under the general article.

The elements of some of the more common crimes that are chargeable under this article will now be discussed.

(1) *Assault.*

(2) *Assault and battery.*—See matter under heading "IX" under ninety-third article.

A battery is any unlawful touching or injury, however slight, to the person of another directly or indirectly done in an angry, revengeful, rude or insolent manner. Throwing water or spitting in a person's face is a battery. So, merely taking hold of another's clothing, or pushing another against him, or striking a horse on which he is riding causing him to be thrown; striking his cane while in his hand, is a battery when done unlawfully and in the manner described.

If the injury is accidentally inflicted in doing a lawful act without culpable negligence the offense is not committed; but where personal injury results from the reckless doing of an act likely to result in such injury, the offense is committed.

It is no defense that the injury took place on a person for which it was not intended, or that the injury was not the immediate result of the defendant's acts. Thus, if a person throws a firecracker in a crowd where it is tossed from hand to hand and finally explodes and puts out a man's eye, the offense is committed.

(3.) *Assault with a dangerous weapon, instrument, or other thing.*—See matter under heading "IX," under Ninety-third article.

Weapons, etc., are dangerous when they are used in such manner that they are likely to produce death or great bodily harm. Mere capability of being so used is not enough.

Boiling water may be so used as to be a dangerous thing, and a pistol may be so used as not to be a dangerous weapon.

(4.) *Forgery.*—At common law "forgery is the fraudulent making of a false writing which, if genuine, would be apparently of some legal efficacy." (Bishop, vol. 2, p. 301.)

Some of the instruments that are subjects of forgery are checks, indorsements, orders for the delivery of money or goods, railroad tickets, and receipts.

A false writing includes a false instrument that is in part or entirely printed, engraved, written with a pencil, or made by photography or other device.

A false writing may be made by materially altering an existing writing, by filling in a paper signed in blank, or by signing an instrument already written.

The writing must be false—must purport to be what it is not.

Thus, signing another's name to a check with intent to defraud is forgery, as the instrument purports on its face to be what it is not. But where, after the false signature of such person is added the word *by* and the signature of the person making the check, thus indicat-

ing an authority to sign, the offense is not forgery even if no such authority exists, as the check on its face is what it purports to be.

Forgery may be committed by signing one's own name to an instrument. Thus, where a check payable to the order of a certain person comes into the hands of another of the same name, he commits forgery, when, knowing the check to be another's, he indorses it with his own name, intending to defraud.

Forgery may also be committed by signing a fictitious name, as where a person signs a check payable to himself with a fictitious name; but when he passes a check signed by him with a fictitious name, credit being extended to *him* without regard to his name, forgery is not committed.

To constitute a forgery the instrument must have apparent legal efficacy. The fraudulent making of an instrument affirmatively invalid on its face is not a forgery. But this requirement does not ordinarily prevent the fraudulent making of a signature on a check, for instance, from being a forgery even if there be no resemblance to the genuine signature and the name is misspelled.

The false writing must be made with intent to defraud. A person who signs another's name to an instrument believing that he has authority to do so does not commit a forgery.

It is immaterial, however, that anyone be actually defrauded or that no further step be made toward carrying out the intent to defraud than the making of the false writing.

(5) *Sodomy.*—See assault with intent to commit sodomy under heading "IX," under ninety-third article.

PROOF.

Crimes in general:

(*a*) That the accused did or failed to do the acts alleged.

(*b*) The circumstances, intent, etc., as specified.

(1) Assault:

(*a*) That the accused did the overt act alleged.

(*b*) The facts and circumstances of the case indicating either that such an act was an actual attempt with force and violence to do a corporal hurt to a certain person or that such act was apparently such an attempt and conveyed to the mind of the person set upon a well-grounded apprehension of such injury.

(2) Assault and battery:

(*a*) That the accused assaulted a certain person, as alleged.

(*b*) That an injury resulted to such person, as specified.

(3) Assault with a dangerous weapon, instrument, or other thing:

(*a*) That the accused assaulted a certain person with a certain weapon, instrument, or thing.

(*b*) That facts and circumstances of the case indicating that such weapon, instrument, or thing was used in a manner likely to produce death or great bodily harm.

(4) Forgery:

(*a*) That a certain instrument was made. (The instrument itself should be produced, if available.)

(*b*) That such instrument is a forgery.

(*c*) That the accused forged it.

(*d*) The facts and circumstances of the case indicating the intent of the accused thereby to defraud a certain person.

(5) Sodomy:

See proof under heading "IX," under ninety-third article.

CHAPTER XVIII.

COURTS OF INQUIRY.

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SECTION I.

CONSTITUTION.

447. When and by whom ordered.—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 a court of inquiry shall not be ordered by any commanding officer except upon the request of the officer or soldier whose conduct is to be inquired into. (A. W. 97.)

448. Limitation upon power to convene.—There is no statutory restriction to the meaning of the term "commanding officer," consequently any commander of the officer or soldier who makes the request would have authority to convene the court, but if the charge to be inquired into is beyond the jurisdiction of a court-martial which such commander can appoint, he would not, by analogies of the service in the administration of military justice, be the proper convening authority in such case. (Op. J. A. G., approved by Secretary of War, Sept. 19, 1874.)

449. Discretion as to ordering court.—Neither the President nor a commanding officer is obliged to order a court of inquiry on demand of an officer or soldier. Where the facts are thoroughly understood by the authority who is requested to order a court of inquiry or can be satisfactorily ascertained by an investigating officer, the commanding officer may, in his discretion, refuse the application; but in the event of such refusal the party, if not satisfied, may appeal to higher authority. (Winthrop, p. 805.)

Section II.

JURISDICTION.

450. As to persons.—A court of inquiry may examine into the conduct of officers or soldiers only (A. W. 97), and the inquiry is confined to those actually in the service. (Digest, p. 586, XVIII, B.)

451. As to time.—The statute of limitations (A. W. 39) does not apply to courts of inquiry. There is no legal objection therefore to investigating transactions that are remote in time.

452. As to subject matter.—The inquiry is limited to transactions of or accusations or imputations against officers or soldiers. (A. W. 97.) The principal uses which courts of inquiry are expected to serve are: (*a*) For determining whether there should be a trial by court-martial in a particular instance; (*b*) for informing and advising superior authority in cases which appear not to call for trial by court-martial, but for some other military or administrative action; and (*c*) for the vindication of character or conduct. (Winthrop, p. 805.)

Section III.

COMPOSITION.

453. Members.—A court of inquiry shall consist of three or more officers. (A. W. 98.) The Secretary of War may assign retired officers, with their consent, upon courts of inquiry. (Act of Apr.

23, 1904.) In time of war retired officers may be employed on active duty in the discretion of the President. (Act of June 3, 1916.)

454. Recorder.—For each court of inquiry the authority appointing the court shall appoint a recorder. (A. W. 98.) The recorder is not an adviser of the court nor a prosecutor before it, but will assist the court, if it so desires, in all matters leading to correct conclusions of fact and law.

455. Convening order.—The form of the convening order is similar to that for a court-martial. It details the members and recorder by name, fixes the time and place of meeting, specifies the subject matter of inquiry, and directs a report of the facts only, or of the facts with an opinion on the merits of the case.

456. Rank of members.—There is no statute prescribing the rank of members, but when it can be avoided they should not be inferior in rank to the officer whose conduct is being inquired into. The decision of the appointing authority, as indicated by the order convening the court, is conclusive as to whether or not it can be avoided.

457. Reporter and interpreter.—The president of a court of inquiry has the same power to appoint reporters and interpreters as is delegated to the president of a court-martial. (A. W. 115.) They are usually paid at the rates fixed by Army regulations for those of courts-martial. (A. R. 986–988.) An enlisted man may be detailed to serve as stenographic reporter and will receive extra pay as provided in A. R. 986.

Section IV.

POWERS.

458. To summon and examine witnesses.—A court of inquiry and the recorder thereof shall have the same power to summon and examine witnesses as is given to a court-martial and the judge advocate thereof. (A. W. 101.)

459. Refusal to appear or testify.—Any person not subject to military law who, being duly subpœnaed to appear as a witness before a court of inquiry or before any officer, military or civil, designated to take a deposition to be read in evidence before such court, willfully neglects or refuses to appear, or refuses to qualify as a witness, or to testify, or to produce documentary evidence which such person may have been legally subpœnaed to produce, shall be deemed guilty of a misdemeanor and punished as in like offenses with respect to courts-martial. (A. W. 23.)

460. Contempt.—A court of inquiry has no authority to punish for contempt, but any conduct before it to the prejudice of good order and military discipline by persons subject to military law may be made the subject of charges against the offender.

SECTION V.

PROCEDURE.

461. General principles.—A court of inquiry is governed by the general principles of military law, applying the analogies of a court-martial where they are applicable, and recurring to adjudged cases, precedents, rules, authoritative legal opinions, and approved books of legal exposition where there is no pertinent paramount stated rule. (28 Op. Atty. Gen., 364.) A court of inquiry is not really a court in the legal sense of the term, for no criminal issue is formed before it, it arraigns no accused, receives no plea, makes no findings of guilt or innocence, awards no punishment, and expresses no opinion unless specially ordered to do so.

462. Presence of party whose conduct is being investigated.—The presence of the party whose conduct is being investigated is not essential and his absence does not affect the authority of the court to proceed with the hearing.

463. Counsel.—The party whose conduct is being inquired into shall have the right to be represented before the court by counsel of his own selection, if such counsel be reasonably available. (A. W. 99.) So also the accuser, where there is one, should usually be allowed to be present with counsel, and a similar privilege may properly be extended to any officer who will be materially involved in the inquiry. (Winthrop, p. 812.)

464. Challenge.—Members of a court of inquiry may be challenged by the party whose conduct is being inquired into, but only for cause stated to the court. The court shall determine the relevancy and validity of any challenge, and shall not receive a challenge to more than one member at a time. (A. W. 99.)

465. Reduced numbers.—Where the number of members is reduced by casualty or challenge, the court may proceed with the reduced number, if not below the minimum, but the appointing authority should be notified in order that he may detail new members if he desires to do so. If any testimony has been taken before a new member is added, it should be read to him in the presence of the other members. In the absence of the recorder the junior member can not act as recorder. The proper procedure is to notify the convening authority and adjourn to await the appointment of another recorder.

466. Oaths.—The recorder of a court of inquiry shall administer to the members the following oath:

> You, A. B., do swear (or affirm) that you will 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 (or affirm) 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.

In case of affirmation the closing sentence of adjuration will be omitted. (A. W. 100.)

Witnesses shall take the same oath or affirmation that is taken by witnesses before courts-martial, and a reporter or interpreter shall, before entering upon his duties, take the oath or affirmation required of a reporter or an interpreter for a court-martial. (A. W. 101.)

467. Examination of witnesses.—The examination of witnesses may be by the court, by a member thereof, or by the recorder, in the discretion of the court. The party whose conduct is being inquired into or his counsel, if any, shall be permitted to examine and cross-examine witnesses so as fully to investigate the circumstances in question. (A. W. 101.) A witness may not be compelled to answer any question which would tend to incriminate or degrade him. (A. W. 24.)

468. Depositions.—Depositions to be read in evidence before courts of inquiry are taken and admitted in evidence under the same rules governing their taking and admissibility in evidence before courts-martial. (A. W. 25, 26.)

469. Conclusions.—The court must, as a finding, give its conclusions as to the facts, and, when ordered, must also give an opinion on the merits of the case. The conclusions or opinion may not be unanimous, in which case a dissenting conclusion or opinion is authorized.

470. Obligation of secrecy.—The oath of members of a court of inquiry, unlike that of members of a court-martial, does not enjoin upon them secrecy as to the votes and opinions of members, but under the custom of the service it would be conduct prejudicial to discipline to divulge the recommendation or opinion of the court until announced by the appointing authority, or to disclose the vote or opinion of a member unless legally required to do so.

471. Revision by court.—If not satisfied with the investigation, or with the report or opinion, the reviewing authority may reassemble the court, in the same manner as a court-martial, and return the proceedings with direction 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 reexamine witnesses or to take entirely new testi-

mony, or it may do so of its own motion without orders in connection with the revision. (Winthrop, p. 819.)

472. Publication of proceedings.—The reviewing authority, having taken final action upon the report or opinion, may publish in orders, 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 the publication, or omit altogether the publication of, 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.

Section VI.

RECORD.

473. How authenticated.—Each court of inquiry shall keep a record of its proceedings, which shall be authenticated by the signature of the president and the recorder thereof. In case the record can not be authenticated by the recorder, by reason of his death, disability, or absence, it shall be signed by the president and by one other member of the court. (A. W. 103.)

474. Disposition of.—The record shall be forwarded to the reviewing authority. (A. W. 103.) Should the court be appointed by the President the proceedings will be sent direct to the Judge Advocate General of the Army. To his office will be forwarded the original proceedings of all courts of inquiry with the decisions and orders of the reviewing authority made thereon, accompanied by five copies of the order publishing the case, if there be any, also a copy of every subsequent order affecting the case. When more than one case is embraced in a single order, a sufficient number of copies will be forwarded to enable one to be filed with each record. (A. R. 917.)

475. Admissible in evidence.—The record of the proceedings of a court of inquiry may be read in evidence before any court-martial or military commission in any case not capital nor extending to the dismissal of an officer, and may also be read in evidence in any proceeding before a court of inquiry or a military board: *Provided*, That such evidence may be adduced by the defense in capital cases or cases extending to the dismissal of an officer. (A. W. 27. See par. 272.)

CHAPTER XIX.

HABEAS CORPUS.

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Section I.

PURPOSE OF WRIT.

476. To determine legality of restraint.—The purpose of the writ of habeas corpus is to bring the person seeking the benefit of it before the court or judge to determine whether or not he is illegally restrained of his liberty. It is a summary remedy for unlawful restraint of liberty and it can not be made use of to perform the function of a writ of error or an appeal. Where it is decided that the restraint is unlawful he is ordered released, but if the restraint is lawful the writ is dismissed. If the restraint be by virtue of legal process, the validity and present force of such process are the only subjects of investigation.

Section II.

WHERE RESTRAINT IS BY THE UNITED STATES.

477. State court without authority.—A State court is without authority to inquire into the legality of the restraint where it appears that the custody is by virtue "of the authority of the United States," the principle being that no State can authorize one of its judges or courts to exercise judicial power, by habeas corpus, within the jurisdiction of another and independent government. No State judge or court, after they are judicially informed that the party is held under the authority of the United States, has any right to interfere with him or to require him to be brought before them. (Robb *v.* Connolly, 111 U. S., 624, 632; Ableman *v.* Booth, 21 How., 506, 514; Tarble's case,

13 Wall., 397, 409.) If a party thus held be illegally imprisoned, it is for the courts or judicial officers of the United States, and those courts or officers alone, to grant him release. (Tarble's case, 13 Wall., 397, 411.)

SECTION III.

RETURN TO WRIT ISSUED BY STATE COURT.

478. To show authority for restraint.—The return should be sufficient in its detail of facts to show distinctly that the imprisonment is under the authority, or claim and color of the authority, of the United States and to exclude the suspicion of imposition or oppression on the part of the officer making the return. The process or orders under which the petitioner is held should be produced with the return and submitted to inspection in order that the court or the judge issuing the writ may see that the officer is acting in good faith, under the authority or claim and color of authority of the United States, and not under the mere pretense of having such authority. (Tarble's case, 13 Wall., 397, 409; Covell *v.* Heyman, 111 U. S., 176, 183.)

(a) **Witness held under warrant of attachment.**—Where the petitioner is a civilian who has been apprehended under a warrant of attachment to be taken before a court-martial to testify as a witness, the officer making the return to the writ issued by a State court or judge will not produce the body, but will, by his return, set forth fully the authority by which he holds the person and allege that the State court, or judge, issuing the writ is without jurisdiction to issue the same and ask to have it dismissed. He will exhibit to the court or judge issuing the writ of habeas corpus the warrant of attachment and the subpœna (and the proof of service of the subpœna) on which the warrant of attachment was based, and also a certified copy of the order convening the court-martial before which the witness was subpœnaed to testify, together with a copy of the charges and specifications in the case in which he was subpœnaed to testify, and an affidavit showing that the witness has failed to appear in response to such subpœna.

[NOTE.—See A. R. 997. For form of return, see Form B, Appendix 15.]

(b) **Enlisted man or general prisoner.**—The return to a writ of habeas corpus issued by a State court or judge to produce an enlisted man or a general prisoner and show cause for his detention will show in writing that the subject of the writ is a duly enlisted soldier of the United States or a general prisoner, as the case may be, and set forth fully the cause of his detention, but the officer making the return will decline to produce in court the body of the prisoner named in the

writ, giving as a reason for such refusal the fact that the Supreme Court of the United States has decided that a State court or judge has no jurisdiction in such a case.

[NOTE.—See A. R. 998. For form of return, see Form D, Appendix 15. A deserter apprehended by a civil officer authorized by a statute of the United States to apprehend deserters is in the custody of the United States. See U. S. *v.* Reaves, 126 Fed. Rep., 127.]

SECTION IV.

RETURN TO WRIT ISSUED BY A UNITED STATES COURT.

479. Contents.—A writ of habeas corpus issued by a United States court or judge will be promptly obeyed. The person alleged to be illegally restrained of his liberty will be taken before the court from which the writ has issued and a return made, setting forth the reasons for his restraint. The officer upon whom such writ is served will at once report the fact of such service by telegraph direct to The Adjutant General of the Army and the commanding general of the department, stating briefly the grounds on which the release of the party is sought.

[NOTE.—See A. R. 999. For form where a civilian witness is held under warrant of attachment, see Form A, Appendix 15. For form where an enlisted man or general prisoner is held, see Form C, Appendix 15. For brief of authorities when writ is applied for on grounds of age, see Appendix 15.]

SECTION V.

WRIT ISSUED IN THE PHILIPPINE ISLANDS.

480. When return conclusive.—It shall be a conclusive answer to a writ of *habeas corpus* against a military officer or soldier and a sufficient excuse for not producing the prisoner if the commanding general or any general officer in command of the department or district shall certify that the prisoner is held by him either—

(*a*) As a prisoner of war; or

(*b*) As a member of the Army, civilian employee thereof, or a camp follower and subject to its discipline; or

(*c*) As a prisoner guilty of violation of the laws of war committed in any unpacified province or territory and who has escaped into provinces officially declared to be under civil control and has been there captured by military authorities and is held for trial for such violations of the laws of war.

[NOTE.—Sec. 1, Act. No. 272, Philippine Commission, Oct. 21, 1901, and sec. 4, Act. No. 421, id., June 23, 1902. Respectful return in writing will be made in the case of prisoners who may be exempted from jurisdiction by the provisions of these acts stating the facts of the case, but the body of the prisoner will not be produced. In all other cases the return will be made and the body produced before the proper tribunal.]

CHAPTER XX.

MISCELLANEOUS AND TRANSITORY PROVISIONS.

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Section I.

MISCELLANEOUS PROVISIONS.

481. Injuries to persons or property—Redress.—Article 105 imposes upon a commanding officer, upon receipt of a complaint that damage has been done to the property of any person, or that his property has been wrongfully taken, by any person subject to military law, the duty to convene a board of officers consisting of any number from one to three to investigate the complaint. The article provides the administrative machinery by which money reparation for acts of waste, spoil, destruction, or depredation, denounced in A. W. 89 as offenses, shall be made effective. The complaint will more properly be made in writing by the injured party or his representative, and 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. It is competent, however, for a commanding officer, apprised by the report of any person in the military service, or by the oral complaint of the party injured, of any such damage, to proceed with the investigation as here outlined in case of written complaint submitted by or in behalf of the party injured and supported by affidavits or written statement. The board will be convened with the least practicable delay, is empowered to summon witnesses, examine them under oath or affirmation, receive depositions or other documentary evidence, and assess the damages against the person or persons determined to be responsible for the

damage or wrongful taking. The board's assessment of damages is subject to the approval of the commanding officer and an assessment thus approved will be stopped against the pay of the offender. The order of the commanding officer directing stoppages authorized by the article is conclusive on any disbursing officer for the payment by him to the injured party of the stoppages.

The occasions for resorting to the procedure under this article are more frequent in a period pending or immediately succeeding a time of war, or during field operations and maneuvers. As the absolute identity of the guilty parties can not always be determined, the article further provides that in such a case, and when the organization or detachment to which they belong is known, stoppages to the amount of damages inflicted may be made and assessed in such proportion as may be deemed just upon the individual members thereof who are shown to have been present with such organization or detachment at the time the damages complained of were inflicted, as determined by the approved findings of the board.

The guilty parties may be tried and punished for the military offense involved in his and their act under A. W. 89, quite irrespectively of any proceeding for the reparation of the parties injured had under this article. A trial, however, will preferably be first ordered, since, if 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 persuasive but not necessarily conclusive ground for not favorably entertaining the complaint or for reducing the amount to be assessed.

482. Effects of deceased persons—Disposition.—In case of the death of any person subject to military law, the commanding officer of the place or command will permit the legal representative or widow of the deceased, if present, to take possession of all his effects then in camp or quarters, and if no legal representative or widow be present the commanding officer shall direct a summary court to secure all such effects; and said summary court shall have authority to convert such effects into cash, by public or private sale, not earlier than 30 days after the death of the deceased, and to collect and receive any debts due decedent's estate by local debtors; and as soon as practicable after converting such effects into cash said summary court shall deposit with the proper officer, to be designated in regulations, any cash belonging to decedent's estate, and shall transmit a receipt for such deposit, accompanied by any will or other papers of value belonging to the deceased, an inventory of the effects secured by said summary court, and a full account of his transactions to the War Department for action as authorized by law in the settlement of the accounts of deceased officers or enlisted men of the Army; but

if in the meantime the legal representative, or widow, shall present himself or herself to take possession of decedent's estate, the said summary court shall turn over to him or her all effects not sold and cash belonging to said estate, together with an inventory and account, and make to the War Department a full report of his transactions.

The provisions of this article shall be applicable to inmates of the United States Soldiers' Home who die in any United States military hospital outside of the District of Columbia where sent from the home for treatment. (A. W. 112.)

483. Inquests.—Article 113 imposes upon the summary court-martial the principal duties of the office of coroner at common law, viz, to investigate the cause of sudden, violent, and unnatural deaths. When a person is found dead at a place described in the article, and there is reasonable belief that his death has occurred from violence or other unlawful means, the commanding officer will immediately designate and direct a summary court-martial to investigate the circumstances of the death, to the end that the cause thereof may be determined and the persons criminally responsible therefor may be brought to justice. The summary court-martial will with the least practicable delay view the body of the deceased and summon and examine, under oath or affirmation, such witnesses as may have knowledge of the cause and circumstances of the death. The summary court-martial should warn every person testifying at the inquest who is accused or suspected that he is not required to give evidence incriminating himself, and that any statement or evidence he gives may be used against him in the event of any further proceedings being instituted. If expert medical testimony is necessary, the commanding officer will, at the request of the summary court-martial, direct a medical officer to make such examination of the body of the deceased as may be necessary and to appear as a witness at the inquest. The testimony of each witness will be reduced to writing, and will, except when stenographically reported, be subscribed by him, and will be appended to the report of the inquest.

If the body of the deceased shows wounds or bruises such as to indicate or create suspicion that he came to his death by violent means, it shall be the duty of the summary court-martial to ascertain with as much exactness as possible the precise nature of the wounds or blows and the character of the instrument by which the wounds were inflicted; the person or persons by whom the fatal blow or blows were dealt; if there were any aiders or abettors; and such other particulars as may afford the means of drawing up, with the precision required by law, the necessary charges and specifications against the person or persons accused of the homicide.

The summary court officer will render a written report of his investigation to the commanding officer, which report will state his

finding as to the cause of the death and the names of the persons criminally responsible therefor, if in his opinion there be any such. Such persons, though not subject to military law, may, if found at any post over which the United States has exclusive jurisdiction, be confined by the commanding officer for such time as may be necessary for their delivery to the civil authorities. If such persons are subject to military law and appear to be guilty of an offense not triable by court-martial, they will be confined by the commanding officer, who will immediately furnish the proper United States district attorney with a copy of the findings of the summary court officer.

If the person over whose body the inquest is held is not identified as an officer or soldier, the report of the summary court-martial shall give a description of the deceased, which shall specify the name, if known, the apparent age, the sex, the color of the eyes and hair, and all marks or other particulars which may assist in the identification of the person.

[NOTE.—For form of report of inquest see Appendix 19.]

484. Removal of civil suits.—When any civil suit or criminal prosecution is commenced in any court of a State against any officer, soldier, or other person in the military service of the United States on account of any act done under color of his office or status, or in respect to which he claims any right, title, or authority under any law of the United States respecting the military forces thereof, or under the law of war, such suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court of the United States in the district where the same is pending in the manner prescribed in section 33 of the act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March 3, 1911 (36 Stat., 1097), and the cause shall thereupon be entered on the docket of said district court and shall proceed therein as if the cause had been originally commenced in said district court and the same proceedings had been taken in such suit or prosecution in said district court as shall have been had therein in said State court prior to its removal, and said district court shall have full power to hear and determine said cause. (A. W. 117.)

485. Complaints of wrongs.—Any officer or soldier who believes himself wronged by his commanding officer, and, upon due application to such commander, is refused redress, may complain to the general commanding in the locality where the officer against whom the complaint is made 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. (A. W. 121.)

486. Articles of War—When effective.—Section 3 of the Act of Congress entitled "An Act making appropriations for the support of the Army for the fiscal year ending June 30, 1917, and for other purposes," approved August 29, 1916 (39 Stat., 650–670), amends section 1342, Revised Statutes of the United States, and contains the Articles of War. It is provided by section 4 of the act cited that the Articles of War will be in force and effect on and after March 1, 1917, except that articles 4, 13, 14, 15, 29, 47, 49, and 92 became effective upon the approval of the act, August 29, 1916.

Section II.

TRANSITORY PROVISION.

487. Prior offenses subject to previous laws.—It is provided by section 5 of the act of Congress entitled "An Act making appropriations for the support of the Army for the fiscal year ending June 30, 1917, and for other purposes," approved August 29, 1916 (39 Stat., 670), that all offenses committed and all penalties, forfeitures, fines, or liabilities incurred prior to the taking effect of that act under any law embraced in or modified, changed, or repealed by that act may be prosecuted, punished, and enforced in the same manner and with the same effect as if that act had not been passed.

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OLD AND NEW CODES.

Old number.	New number.	Old number.	New number.	Old number.	New number.	Old number.	New number.
1	.....	32	61	63	2	96	43
2	109, 110	33	61	64	2	97	42
3	55	34	61	65	69	98	41
4	108	35	61	66	69	99	118
5	56	36	.....	67	71	100	44
6	56	37	.....	68	72	101	.....
7	57	38	41, 85	69	73	102	40
8	57	39	86	70	70	103	39
9	79	40	61	71	70	104	46
10	.....	41	75	[1] 72	8	105	48
11	.....	42	75	[1] 73	8	106	48
12	56	43	76	74	11	107	48
13	56	44	77	[1] 75	5	108	48
14	56	45	81	76	.....	109	46
15	83	46	81	77	4	111	51
16	84	47	58	78	4	112	50
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20	63	51	59	[1] 83	13, 14	116	98
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22	66	53	.....	85	19	118	101
23	67	54	89, 105	86	32	119	102
24	68	55	89, 105	87	.....	120	103
25	90	56	88	88	18	121	27
26	91	57	78	89	21	122	120
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[1] Old articles 72, 73, 75, 81, 82, and 83 were replaced by the act of Mar. 2, 1913 (37 Stat., 723), effective July 1, 1913.

[NOTE.—Except as otherwise specified herein this code becomes effective on March 1, 1917.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

* * * * * * *

SEC. 3. That section thirteen hundred and forty-two of the Revised Statutes of the United States be, and the same is hereby, amended to read as follows:

"SEC. 1342. The articles included in this section shall be known as the Articles of War and shall at all times and in all places govern the armies of the United States.

"I. PRELIMINARY PROVISIONS.

"ARTICLE 1. DEFINITIONS.—The following words when used in these articles shall be construed in the sense indicated in this Article, unless the context shows that a different sense is intended, namely:

"(a) The word 'officer' shall be construed to refer to a commissioned officer;

"(b) The word 'soldier' shall be construed as including a noncommissioned officer, a private, or any other enlisted man;

"(c) The word 'company' shall be understood as including a troop or battery; and

"(d) The word 'battalion' shall be understood as including a squadron.

"ART. 2. PERSONS SUBJECT TO MILITARY LAW.—The following persons are subject to these articles and shall be understood as included in the term 'any person subject to military law,' or 'persons subject to military law,' whenever used in these articles: *Provided*, That nothing contained in this Act, except as specifi-

cally provided in Article two, subparagraph (c), shall be construed to apply to any person under the United States naval jurisdiction, unless otherwise specifically provided by law.

"(a) All officers and soldiers belonging to the Regular Army of the United States; all volunteers, from the dates of their muster or acceptance into the military service of the United States; and all other persons lawfully called, drafted or ordered into, or to duty or for training in, the said service, from the dates they are required by the terms of the call, draft or order to obey the same;

"(b) Cadets;

"(c) Officers and soldiers of the Marine Corps when detached for service with the armies of the United States by order of the President: *Provided*, That an officer or soldier of the Marine Corps when so detached may be tried by military court-martial for an offense committed against the laws for the government of the naval service prior to his detachment, and for an offense committed against these articles he may be tried by a naval court-martial after such detachment ceases;

"(d) All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles;

"(e) All persons under sentence adjudged by courts-martial;

"(f) All persons admitted into the Regular Army Soldiers' Home at Washington, District of Columbia.

"II. COURTS-MARTIAL.

"ART. 3. COURTS-MARTIAL CLASSIFIED.—Courts-martial shall be of three kinds, namely:

"First, general courts-martial;

"Second, special courts-martial; and

"Third, summary courts-martial.

"A. COMPOSITION.

"ART. 4. WHO MAY SERVE ON COURTS-MARTIAL.—All officers in the military service of the United States, and officers of the Marine Corps when detached for service with the Army by order of the President, shall be competent to serve on courts-martial for the trial of any persons who may lawfully be brought before such courts for trial.

[NOTE.—This article became effective on August 29, 1916.]

"ART. 5. GENERAL COURTS-MARTIAL.—General courts-martial may consist of any number of officers from five to thirteen, inclusive; but they shall not consist of less than thirteen, when that number can be convened without manifest injury to the service.

"ART. 6. SPECIAL COURTS-MARTIAL.—Special courts-martial may consist of any number of officers from three to five, inclusive.

"ART. 7. SUMMARY COURTS-MARTIAL.—A summary court-martial shall consist of one officer.

"B. BY WHOM APPOINTED.

"ART. 8. GENERAL COURTS-MARTIAL.—The President of the United States, the commanding officer of a territorial division or department, the Superintendent of the Military Academy, the commanding officer of an army, an army corps, a

division, or a separate brigade, and, when empowered by the President, the commanding officer of any district or of any force or body of troops may appoint general courts-martial; but when any such commander is the accuser or the prosecutor of the person or persons to be tried, the court shall be appointed by superior competent authority, and no officer shall be eligible to sit as a member of such court when he is the accuser or a witness for the prosecution.

"ART. 9. SPECIAL COURTS-MARTIAL.—The commanding officer of a district, garrison, fort, camp, or other place where troops are on duty, and the commanding officer of a brigade, regiment, detached battalion, or other detached command may appoint special courts-martial; but when any such commanding officer is the accuser or the prosecutor of the person or persons to be tried, the court shall be appointed by superior authority, and may in any case be appointed by superior authority when by the latter deemed desirable; and no officer shall be eligible to sit as a member of such court when he is the accuser or a witness for the prosecution.

"ART. 10. SUMMARY COURTS-MARTIAL.—The commanding officer of a garrison, fort, camp, or other place where troops are on duty, and the commanding officer of a regiment, detached battalion, detached company, or other detachment may appoint summary courts-martial; but such summary courts-martial may in any case be appointed by superior authority when by the latter deemed desirable: *Provided*, That when but one officer is present with a command he shall be the summary court-martial of that command and shall hear and determine cases brought before him.

"ART. 11. APPOINTMENT OF JUDGE ADVOCATES.—For each general or special court-martial the authority appointing the court shall appoint a judge advocate, and for each general court-martial one or more assistant judge advocates when necessary.

"C. JURISDICTION.

"ART. 12. GENERAL COURTS-MARTIAL.—General courts-martial shall have power to try any person subject to military law for any crime or offense made punishable by these articles and any other person who by the law of war is subject to trial by military tribunals: *Provided*, That no officer shall be brought to trial before a general court-martial appointed by the Superintendent of the Military Academy.

"ART. 13. SPECIAL COURTS-MARTIAL.—Special courts-martial shall have power to try any person subject to military law, except an officer, for any crime or offense not capital made punishable by these articles: *Provided*, That the President may, by regulations, which he may modify from time to time, except from the jurisdiction of special courts-martial any class or classes of persons subject to military law.

"Special courts-martial shall not have power to adjudge dishonorable discharge, nor confinement in excess of six months, nor to adjudge forfeiture of more than six months' pay.

[NOTE.—This article became effective on August 29, 1916.]

"ART. 14. SUMMARY COURTS-MARTIAL.—Summary courts-martial shall have power to try any person subject to military law, except an officer, a cadet, or a soldier holding the privileges of a certificate of eligibility to promotion, for any crime or offense not capital made punishable by these articles: *Provided*, That noncommissioned officers shall not, if they object thereto, be brought to trial before a summary court-martial without the authority of the officer competent to bring them to trial before a general court-martial: *Provided further*, That the President may, by regulations, which he may modify from time to time, ex-

cept from the jurisdiction of summary courts-martial any class or classes of persons subject to military law.

"Summary courts-martial shall not have power to adjudge confinement in excess of three months, nor to adjudge the forfeiture of more than three months' pay: *Provided*, That when the summary court officer is also the commanding officer no sentence of such summary court-martial adjudging confinement at hard labor or forfeiture of pay, or both, for a period in excess of one month shall be carried into execution until the same shall have been approved by superior authority.

[NOTE.—This article became effective on August 29, 1916.]

"ART. 15. NOT EXCLUSIVE.—The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by the law of war may be lawfully triable by such military commissions, provost courts, or other military tribunals.

[NOTE.—This article became effective on August 29, 1916.]

"ART. 16. OFFICERS; HOW TRIABLE.—Officers shall be triable only by general courts-martial, and in no case shall an officer, when it can be avoided, be tried by officers inferior to him in rank.

"D. PROCEDURE.

"ART. 17. JUDGE ADVOCATE TO PROSECUTE.—The judge advocate of a general or special court-martial shall prosecute in the name of the United States, and shall, under the direction of the court, prepare the record of its proceedings. The accused shall have the right to be represented before the court by counsel of his own selection for his defense, if such counsel be reasonably available, but should he, for any reason, be unrepresented by counsel, the judge advocate shall from time to time throughout the proceedings advise the accused of his legal rights.

"ART. 18. CHALLENGES.—Members of a general or special court-martial may be challenged by the accused, but only for cause stated to the court. The court shall determine the relevancy and validity thereof, and shall not receive a challenge to more than one member at a time.

"ART. 19. OATHS.—The judge advocate of a general or special court-martial shall administer to the members of the court, before they proceed upon any trial, the following oath or affirmation: 'You, A. B., do swear (or affirm) that you will well and truly try and determine, according to the evidence, the matter now before you, between the United States of America and the person 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 (or affirm) that you will not divulge the findings or sentence of the court until they shall be published by the proper authority, except to the judge advocate and assistant judge advocate; neither will you disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence thereof as a witness by a court of justice in due course of law. So help you God.'

"When the oath or affirmation has been administered to the members of a general or special court-martial, the president of the court shall administer to the judge advocate and to each assistant judge advocate, if any, an oath or affirmation in the following form: 'You, A. B., do swear (or affirm) that you

will not divulge the findings or sentence of the court to any but the proper authority until they shall be duly disclosed by the same. So help you God.'

"All persons who give evidence before a court-martial shall be examined on oath or affirmation in the following form: 'You swear (or affirm) that the evidence you shall give in the case now in hearing shall be the truth, the whole truth, and nothing but the truth. So help you God.'

"Every reporter of the proceedings of a court-martial shall, before entering upon his duties, make oath or affirmation in the following form: 'You swear (or affirm) that you will faithfully perform the duties of reporter to this court. So help you God.'

"Every interpreter in the trial of any case before a court-martial shall, before entering upon his duties, make oath or affirmation in the following form: 'You swear (or affirm) that you will truly interpret in the case now in hearing. So help you God.'

"In case of affirmation the closing sentence of adjuration will be omitted.

"ART. 20. CONTINUANCES.—A court-martial may, for reasonable cause, grant a continuance to either party for such time and as often as may appear to be just.

"ART. 21. REFUSAL TO PLEAD.—When the accused, arraigned before a 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 he had pleaded not guilty.

"ART. 22. PROCESS TO OBTAIN WITNESSES.—Every judge advocate of a general or special court-martial and every summary court-martial shall have power to issue the like process to compel witnesses to appear and testify which courts of the United States, having criminal jurisdiction, may lawfully issue; but such process shall run to any part of the United States, its Territories, and possessions.

"ART. 23. REFUSAL TO APPEAR OR TESTIFY.—Every person not subject to military law who, being duly subpœnaed to appear as a witness before any military court, commission, court of inquiry, or board, or before any officer, military or civil, designated to take a deposition to be read in evidence before such court, commission, court of inquiry, or board, willfully neglects or refuses to appear, or refuses to qualify as a witness, or to testify, or produce documentary evidence which such person may have been legally subpœnaed to produce, shall be deemed guilty of a misdemeanor, for which such person shall be punished on information in the district court of the United States or in a court of original criminal jurisdiction in any of the territorial possessions of the United States, jurisdiction being hereby conferred upon such courts for such purpose; and it shall be the duty of the United States district attorney or the officer prosecuting for the Government in any such court of original criminal jurisdicton, on the certification of the facts to him by the military court, commission, court of inquiry, or board, to file an information against and prosecute the person so offending, and the punishment of such person, on conviction, shall be a fine of not more than $500 or imprisonment not to exceed six months, or both, at the discretion of the court: *Provided*, That the fees of such witness and his mileage, at the rates allowed to witnesses attending the courts of the United States, shall be duly paid or tendered said witness, such amounts to be paid out of the appropriation for the compensation of witnesses.

"ART. 24. COMPULSORY SELF-INCRIMINATION PROHIBITED.—No witness before a military court, commission, court of inquiry, or board, or before any officer, military or civil, designated to take a deposition to be read in evidence before a military court, commission, court of inquiry, or board, shall be compelled to

incriminate himself or to answer any questions which may tend to incriminate or degrade him.

"ART. 25.—DEPOSITIONS—WHEN ADMISSIBLE.—A duly authenticated deposition taken upon reasonable notice to the opposite party may be read in evidence before any military court or commission in any case not capital, or in any proceeding before a court of inquiry or a military board, if such deposition be taken when the witness resides, is found, or is about to go beyond the State, Territory, or District in which the court, commission, or board is ordered to sit, or beyond the distance of one hundred miles from the place of trial or hearing, or when it appears to the satisfaction of the court, commission, board, or appointing authority that the witness, by reason of age, sickness, bodily infirmity, imprisonment, or other reasonable cause, is unable to appear and testify in person at the place of trial or hearing: *Provided*, That testimony by deposition may be adduced for the defense in capital cases.

"ART. 26. DEPOSITIONS—BEFORE WHOM TAKEN.—Depositions to be read in evidence before military courts, commissions, courts of inquiry, or military boards, or for other use in military administration, may be taken before and authenticated by any officer, military or civil, authorized by the laws of the United States or by the laws of the place where the deposition is taken to administer oaths.

"ART. 27. COURTS OF INQUIRY—RECORDS OF, WHEN ADMISSIBLE.—The record of the proceedings of a court of inquiry may be read in evidence before any court-martial or military commission in any case not capital nor extending to the dismissal of an officer, and may also be read in evidence in any proceeding before a court of inquiry or a military board: *Provided*, That such evidence may be adduced by the defense in capital cases or cases extending to the dismissal of an officer.

"ART. 28. RESIGNATION WITHOUT ACCEPTANCE DOES NOT RELEASE OFFICER.—Any officer who, having tendered his resignation and prior to due notice of the acceptance of the same, quits his post or proper duties without leave and with intent to absent himself permanently therefrom shall be deemed a deserter.

"ART. 29. ENLISTMENT WITHOUT DISCHARGE.—Any soldier who, without having first received a regular discharge, again enlists in the Army, or in the militia when in the service of the United States, or in the Navy or Marine Corps of the United States, or in any foreign army, shall be deemed to have deserted the service of the United States; and, where the enlistment is in one of the forces of the United States mentioned above, to have fraudulently enlisted therein.

[NOTE.—This article became effective on August 29, 1916.]

"ART. 30. CLOSED SESSIONS.—Whenever a general or special court-martial shall sit in closed session, the judge advocate and the assistant judge advocate, if any, shall withdraw; and when their legal advice or their assistance in referring to the recorded evidence is required, it shall be obtained in open court and in the presence of the accused and of his counsel if there be any.

"ART. 31. ORDER OF VOTING.—Members of a general or special court-martial, in giving their votes, shall begin with the junior in rank.

"ART. 32. CONTEMPTS.—A court-martial may punish at discretion, subject to the limitations contained in Article fourteen, any person who uses any menacing words, signs, or gestures in its presence, or who disturbs its proceedings by any riot or disorder.

"ART. 33. RECORDS—GENERAL COURTS-MARTIAL.—Each general court-martial shall keep a separate record of its proceedings in the trial of each case brought before it, and such record shall be authenticated by the signature of the president and the judge advocate; but in case the record can not be authenticated

by the judge advocate, by reason of his death, disability, or absence, it shall be signed by the president and an assistant judge advocate, if any; and if there be no assistant judge advocate, or in case of his death, disability, or absence, then by the president and one other member of the court.

"ART. 34. RECORDS—SPECIAL AND SUMMARY COURTS-MARTIAL.—Each special court-martial and each summary court-martial shall keep a record of its proceedings, separate for each case, which record shall contain such matter and be authenticated in such manner as may be required by regulations which the President may from time to time prescribe.

"ART. 35. DISPOSITION OF RECORDS—GENERAL COURTS-MARTIAL.—The judge advocate of each general court-martial shall, with such expedition as circumstances may permit, forward to the appointing authority or to his successor in command the original record of the proceedings of such court in the trial of each case. All records of such proceedings shall, after having been finally acted upon, be transmitted to the Judge Advocate General of the Army.

"ART. 36. DISPOSITION OF RECORDS—SPECIAL AND SUMMARY COURTS-MARTIAL.—After having been acted upon by the officer appointing the court, or by the officer commanding for the time being, the record of each trial by special court-martial and a report of each trial by summary court-martial shall be transmitted to such general readquarters as the President may designate in regulations, there to be filed in the office of the judge advocate. When no longer of use, records of special and summary courts-martial may be destroyed.

"ART. 37. IRREGULARITIES—EFFECT OF.—The proceedings of a court-martial shall not be held invalid, nor the findings or sentence disapproved, in any case on the ground of improper admission or rejection of evidence or for any error as to any matter of pleading or procedure unless in the opinion of the reviewing or confirming authority, after an examination of the entire proceedings, it shall appear that the error complained of has injuriously affected the substantial rights of an accused: *Provided*, That the act or omission upon which the accused has been tried constitutes an offense denounced and made punishable by one or more of these articles: *Provided further*, That the omission of the words 'hard labor' in any sentence of a court-martial adjudging imprisonment or confinement shall not be construed as depriving the authorities executing such sentence of imprisonment or confinement of the power to require hard labor as a part of the punishment in any case where it is authorized by the Executive order prescribing maximum punishments.

"ART. 38. PRESIDENT MAY PRESCRIBE RULES.—The President may by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals: *Provided*, That nothing contrary to or inconsistent with these articles shall be so prescribed: *Provided further*, That all rules made in pursuance of this article shall be laid before the Congress annually.

"E. LIMITATIONS UPON PROSECUTIONS.

"ART. 39. AS TO TIME.—Except for desertion committed in time of war, or for mutiny or murder, no person subject to military law shall be liable to be tried or punished by a court-martial for any crime or offense committed more than two years before the arraignment of such person: *Provided*, That for desertion in time of peace or for any crime or offense punishable under articles ninety-three and ninety-four of this code the period of limitations upon trial and punishment by court-martial shall be three years: *Provided further*, That the period of any absence of the accused from the jurisdiction of the United States,

and also any period during which by reason of some manifest impediment the accused shall not have been amenable to military justice, shall be excluded in computing the aforesaid periods of limitation: *And provided further*, That this article shall not have the effect to authorize the trial or punishment for any crime or offense barred by the provisions of existing law.

"ART. 40. AS TO NUMBER.—No person shall be tried a second time for the same offense.

"F. PUNISHMENTS.

"ART. 41. CERTAIN KINDS PROHIBITED.—Punishment by flogging, or by branding, marking, or tattooing on the body is prohibited.

"ART. 42. PLACES OF CONFINEMENT—WHEN LAWFUL.—Except for desertion in time of war, repeated desertion in time of peace, and mutiny, no person shall under the sentence of a court-martial be punished by confinement in a penitentiary unless an act or omission of which he is convicted is recognized as an offense of a civil nature by some statute of the United States, or at the common law as the same exists in the District of Columbia, or by way of commutation of a death sentence, and unless, also, the period of confinement authorized and adjudged by such court-martial is one year or more: *Provided*, That when a sentence of confinement is adjudged by a court-martial upon conviction of two or more acts or omissions any one of which is punishable under these articles by confinement in a penitentiary, the entire sentence of confinement may be executed in a penitentiary: *Provided further*, That penitentiary confinement hereby authorized may be served in any penitentiary directly or indirectly under the jurisdiction of the United States: *Provided further*, That persons sentenced to dishonorable discharge and to confinement not in a penitentiary shall be confined in the United States Disciplinary Barracks or elsewhere as the Secretary of War or the reviewing authority may direct, but not in a penitentiary.

"ART. 43. DEATH SENTENCE—WHEN LAWFUL.—No person shall, by general court-martial, be convicted of an offense for which the death penalty is made mandatory by law, nor sentenced to suffer death, except by the concurrence of two-thirds of the members of said court-martial and for an offense in these articles expressly made punishable by death. All other convictions and sentences, whether by general or special court-martial, may be determined by a majority of the members present.

"ART. 44. COWARDICE; FRAUD—ACCESSORY PENALTY.—When an officer is dismissed from the servce for cowardice or fraud, the crime, punishment, name, and place of abode of the delinquent shall be published in the newspapers in and about the camp and in the State from which the offender came or where he usually resides; and after such publication it shall be scandalous for an officer to associate with him.

"ART. 45. MAXIMUM LIMITS.—Whenever the punishment for a crime or offense made punishable by these articles is left to the discretion of the court-martial, the punishment shall not, in time of peace, exceed such limit or limits as the President may from time to time prescribe.

"G. ACTION BY APPOINTING OR SUPERIOR AUTHORITY.

"ART. 46. APPROVAL AND EXECUTION OF SENTENCE.—No sentence of a court-martial shall be carried into execution until the same shall have been approved by the officer appointing the court or by the officer commanding for the time being.

"ART. 47. POWERS INCIDENT TO POWER TO APPROVE.—The power to approve the sentence of a court-martial shall be held to include:

"(a) The power to approve or disapprove a finding and to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense when, in the opinion of the authority having power to approve, the evidence of record requires a finding of only the lesser degree of guilt; and

"(b) The power to approve or disapprove the whole or any part of the sentence.

[NOTE.—This article became effective on August 29, 1916.]

"ART. 48. CONFIRMATION—WHEN REQUIRED.—In addition to the approval required by article forty-six, confirmation by the President is required in the following cases before the sentence of a court-martial is carried into execution, namely:

"(a) Any sentence respecting a general officer;

"(b) Any sentence extending to the dismissal of an officer, except that in time of war a sentence extending to the dismissal of an officer below the grade of brigadier general may be carried into execution upon confirmation by the commanding general of the Army in the field or by the commanding general of the territorial department or division;

"(c) Any sentence extending to the suspension or dismissal of a cadet; and

"(d) Any sentence of death, except in the cases of persons convicted in time of war of murder, rape, mutiny, desertion, or as spies; and in such excepted cases a sentence of death may be carried into execution upon confirmation by the commanding general of the Army in the field or by the commanding general of the territorial department or division.

"When the authority competent to confirm the sentence has already acted as the approving authority no additional confirmation by him is necessary.

"ART. 49. POWERS INCIDENT TO POWER TO CONFIRM.—The power to confirm the sentence of a court-martial shall be held to include:

"(a) The power to confirm or disapprove a finding, and to confirm so much only of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense when, in the opinion of the authority having power to confirm, the evidence of record requires a finding of only the lesser degree of guilt; and

"(b) The power to confirm or disapprove the whole or any part of the sentence.

[NOTE.—This article became effective on August 29, 1916.]

"ART. 50. MITIGATION OR REMISSION OF SENTENCES.—The power to order the execution of the sentence adjudged by a court-martial shall be held to include, *inter alia*, the power to mitigate or remit the whole or any part of the sentence, but no sentence of dismissal of an officer and no sentence of death shall be mitigated or remitted by any authority inferior to the President.

"Any unexecuted portion of a sentence adjudged by a court-martial may be mitigated or remitted by the military authority competent to appoint, for the command, exclusive of penitentiaries and the United States Disciplinary Barracks, in which the person under sentence is held, a court of the kind that imposed the sentence, and the same power may be exercised by superior military authority; but no sentence extending to the dismissal of an officer or loss of files, no sentence of death, and no sentence approved or confirmed by the President shall be remitted or mitigated by any other authority.

"The power of remission and mitigation shall extend to all uncollected forfeitures adjudged by sentence of a court-martial.

"ART. 51. SUSPENSION OF SENTENCES OF DISMISSAL OR DEATH.—The authority competent to order the execution of a sentence of dismissal of an officer or a sentence of death may suspend such sentence until the pleasure of the President be known, and in case of such suspension a copy of the order of suspension, together with a copy of the record of trial, shall immediately be transmitted to the President.

"ART. 52. SUSPENSION OF SENTENCE OF DISHONORABLE DISCHARGE.—The authority competent to order the execution of a sentence, including dishonorable discharge, may suspend the execution of the dishonorable discharge until the soldier's release from confinement; but the order of suspension may be vacated at any time and the execution of the dishonorable discharge directed by the officer having general court-martial jurisdiction over the command, exclusive of penitentiaries and the United States Disciplinary Barracks, in which the soldier is held or by the Secretary of War.

"ART. 53. SUSPENSION OF SENTENCES OF FORFEITURE OR CONFINEMENT.—The authority competent to order the execution of a sentence adjudged by a court-martial may, if the sentence involve neither dismissal nor dishonorable discharge, suspend the execution of the sentence in so far as it relates to the forfeiture of pay or to confinement, or to both; and the person under sentence may be restored to duty during the suspension of confinement. At any time within one year after the date of the order of suspension such order may, for sufficient cause, be vacated and the execution of the sentence directed by the military authority competent to order the execution of like sentences in the command, exclusive of penitentiaries and the United States Disciplinary Barracks, to which the person under sentence belongs or in which he may be found; but if the order of suspension be not vacated within one year after the date thereof the suspended sentence shall be held to have been remitted.

"III. PUNITIVE ARTICLES.

"A. ENLISTMENT; MUSTER; RETURNS.

"ART. 54. FRAUDULENT ENLISTMENT.—Any person who shall procure himself to be enlisted in the military service of the United States by means of willful misrepresentation or concealment as to his qualifications for enlistment, and shall receive pay or allowances under such enlistment, shall be punished as a court-martial may direct.

"ART. 55. OFFICER MAKING UNLAWFUL ENLISTMENT.—Any officer who knowingly enlists or musters into the military service any person whose enlistment or muster in is prohibited by law, regulations, or orders shall be dismissed from the service or suffer such other punishment as a court-martial may direct.

"ART. 56. MUSTER ROLLS—FALSE MUSTER.—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. Any officer who knowingly makes a false muster of man or animal, or who signs or directs or allows the signing

of any muster roll knowing the same to contain a false muster or false statement as to the absence or pay of an officer or soldier, or who wrongfully takes money or other consideration on mustering in a regiment, company, or other organization, or on signing muster rolls, or who knowingly musters as an officer or soldier a person who is not such officer or soldier, shall be dismissed from the service and suffer such other punishment as a court-martial may direct.

"ART. 57. FALSE RETURNS—OMISSION TO RENDER RETURNS.—Every officer commanding a regiment, an independent troop, battery, or company, or a garrison, shall, in the beginning of every month, transmit through the proper channels, to the Department of War, an exact return of the same, specifying the names of the officers then absent from their posts, with the reasons for and the time of their absence. Every officer whose duty it is to render to the War Department or other superior authority a return of the state of the troops under his command, or of the arms, ammunitions, clothing, funds, or other property thereunto belonging, who knowingly makes a false return thereof shall be dismissed from the service and suffer such other punishment as a court-martial may direct. And any officer who, through neglect or design, omits to render such return shall be punished as a court-martial may direct.

"B. DESERTION; ABSENCE WITHOUT LEAVE.

"ART. 58. DESERTION.—Any person subject to military law who deserts or attempts to desert the service of the United States shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct, and, if the offense be committed at any other time, any punishment, excepting death, that a court-martial may direct.

"ART. 59. ADVISING OR AIDING ANOTHER TO DESERT.—Any person subject to military law who advises or persuades or knowingly assists another to desert the service of the United States shall, if the offense be committed in time of war, suffer death, or such other punishment as a court-martial may direct, and, if the offense be committed at any other time, any punishment, excepting death, that a court-martial may direct.

"ART. 60. ENTERTAINING A DESERTER.—Any officer who, after having discovered that a soldier in his command is a deserter from the military or naval service or from the Marine Corps, retains such deserter in his command without informing superior authority or the commander of the organization to which the deserter belongs, shall be punished as a court-martial may direct.

"ART. 61. ABSENCE WITHOUT LEAVE.—Any person subject to military law who fails to repair at the fixed time to the properly appointed place of duty, or goes from the same without proper leave, or absents himself from his command, guard, quarters, station, or camp without proper leave, shall be punished as a court-martial may direct.

"C. DISRESPECT; INSUBORDINATION; MUTINY.

"ART. 62. DISRESPECT TOWARD THE PRESIDENT, VICE PRESIDENT, CONGRESS, SECRETARY OF WAR, GOVERNORS, LEGISLATURES.—Any officer who uses contemptuous or disrespectful words against the President, Vice President, the Congress of the United States, the Secretary of War, or the governor or legislature of any State, Territory, or other possession of the United States in which he is quartered shall be dismissed from the service or suffer such other punishment as a court-martial may direct. Any other person subject to military law who so offends shall be punished as a court-martial may direct.

"ART. 63. DISRESPECT TOWARD SUPERIOR OFFICER.—Any person subject to military law who behaves himself with disrespect toward his superior officer shall be punished as a court-martial may direct.

"ART. 64. ASSAULTING OR WILLFULLY DISOBEYING SUPERIOR OFFICER.—Any person subject to military law who, on any pretense whatsover, 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 willfully disobeys any lawful command of his superior officer, shall suffer death or such other punishment as a court-martial may direct.

"ART. 65. INSUBORDINATE CONDUCT TOWARD NONCOMMISSIONED OFFICER.—Any soldier who strikes or assaults, or who attempts or threatens to strike or assault, or willfully disobeys the lawful order of a noncommissioned officer while in the execution of his office, or uses threatening or insulting language, or behaves in an insubordinate or disrespectful manner toward a noncommissioned officer while in the execution of his office, shall be punished as a court-martial may direct.

"ART. 66. MUTINY OR SEDITION.—Any person subject to military law who attempts to create or who begins, excites, causes, or joins in any mutiny or sedition in any company, party, post, camp, detachment, guard, or other command shall suffer death or such other punishment as a court-martial may direct.

"ART. 67. FAILURE TO SUPPRESS MUTINY OR SEDITION.—Any officer or soldier who, being present at any mutiny or sedition, does not use his utmost endeavor to suppress the same, or knowing or having reason to believe that a mutiny or sedition is to take place, 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. 68. QUARRELS; FRAYS; DISORDERS.—All officers and noncommissioned officers have power to part and quell all quarrels, frays, and disorders among persons subject to military law and to order officers who take part in the same into arrest, and other persons subject to military law who take part in the same into arrest or confinement, as circumstances may require, until their proper superior officer is acquainted therewith. And whosoever, being so ordered, refuses to obey such officer or noncommissioned officer or draws a weapon upon or otherwise threatens or does violence to him shall be punished as a court-martial may direct.

"D. ARREST; CONFINEMENT.

"ART. 69. ARREST OR CONFINEMENT OF ACCUSED PERSONS.—An officer charged with crime or with a serious offense under these articles shall be placed in arrest by the commanding officer, and in exceptional cases an officer so charged may be placed in confinement by the same authority. A soldier charged with crime or with a serious offense under these articles shall be placed in confinement, and when charged with a minor offense he may be placed in arrest. Any other person subject to military law charged with crime or with a serious offense under these articles shall be placed in confinement or in arrest, as circumstances may require; and when charged with a minor offense such person may be placed in arrest. Any person placed in arrest under the provisions of this article shall thereby be restricted to his barracks, quarters, or tent, unless such limits shall be enlarged by proper authority. Any officer who breaks his arrest or who escapes from confinement before he is set at liberty by proper authority shall be dismissed from the service or suffer such other punishment as a court-martial may direct; and any other person subject to military law who escapes from confinement or who breaks his arrest before

he is set at liberty by proper authority shall be punished as a court-martial may direct.

"ART. 70. IVESTIGATION OF AND ACTION UPON CHARGES.—No person put in arrest shall be continued in confinement more than eight days, or until such time as a court-martial can be assembled. When any person is put in arrest for the purpose of trial, except at remote military posts or stations, the officer by whose order he is arrested shall see that a copy of the charges on which he is to be tried is served upon him within eight days after his arrest, and that he is brought to trial within ten days thereafter, unless the necessities of the service prevent such trial; and then he shall be brought to trial within thirty days after the expiration of said ten days. If a copy of the charges be not served, or the arrested person be not brought to trial, as herein required, the arrest shall cease. But persons 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: *Provided*, That in time of peace no person shall, against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him.

"ART. 71. REFUSAL TO RECEIVE AND KEEP PRISONERS.—No provost marshal or commander of 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 time, deliver an account in writing, signed by himself, of the crime or offense charged against the prisoner. Any officer or soldier so refusing shall be punished as a court-martial may direct.

"ART. 72. REPORT OF PRISONERS RECEIVED.—Every commander of a guard to whose charge a prisoner is committed shall, within twenty-four hours after such confinement, or as soon as he is relieved from his guard, report in writing to the commanding officer the name of such prisoner, the offense charged against him, and the name of the officer committing him; and if he fails to make such report he shall be punished as a court-martial may direct.

"ART. 73. RELEASING PRISONER WITHOUT PROPER AUTHORITY.—Any person subject to military law who, without proper authority, releases any prisoner duly committed to his charge, or who through neglect or design suffers any prisoner so committed to escape, shall be punished as a court-martial may direct.

"ART. 74. DELIVERY OF OFFENDERS TO CIVIL AUTHORITIES.—When any person subject to military law, except one who is held by the military authorities to answer, or who is awaiting trial or result of trial, or who is undergoing sentence for a crime or offense punishable under these articles, is accused of a crime or offense committed within the geographical limits of the States of the Union and the District of Columbia, and punishable by the laws of the land, the commanding officer is required, except in time of war, upon application duly made, to use his utmost endeavor to deliver over such accused person to the civil authorities, or to aid the officers of justice in apprehending and securing him, in order that he may be brought to trial. Any commanding officer who upon such application refuses or willfully neglects, except in time of war, to deliver over such accused person to the civil authorities or to aid the officers of justice in apprehending and securing him shall be dismissed from the service or suffer such other punishment as a court-martial may direct.

"When, under the provisions of this article, delivery is made to the civil authorities of an offender undergoing sentence of a court-martial, such delivery, if followed by conviction, shall be held to interrupt the execution of the sentence of the court-martial, and the offender shall be returned to military custody, after having answered to the civil authorities for his offense, for the completion of the said court-martial sentence.

"E. WAR OFFENSES.

"ART. 75.—MISBEHAVIOR BEFORE THE ENEMY.—Any officer or soldier who misbehaves himself before the enemy, runs away, or shamefully abandons or delivers up any fort, post, camp, guard, or other command which it is his duty 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, or 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. 76. SUBORDINATES COMPELLING COMMANDER TO SURRENDER.—If any commander of any garrison, fort, post, camp, guard, or other command is compelled, by the officers or soldiers under his command, to give it up to the enemy or to abandon it, the officers or soldiers so offending shall suffer death or such other punishment as a court-martial may direct.

"ART. 77. IMPROPER USE OF COUNTERSIGN.—Any person subject to military law who makes known the parole or countersign to any person not entitled to receive it according to the rules and discipline of war, or gives a parole or countersign different from that which he received, shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct.

"ART. 78. FORCING A SAFEGUARD.—Any person subject to military law who, in time of war, forces a safeguard shall suffer death or such other punishment as a court-martial may direct.

"ART. 79. CAPTURED PROPERTY TO BE SECURED FOR PUBLIC SERVICE.—All public property taken from the enemy is the property of the United States and shall be secured for the service of the United States, and any person subject to military law who neglects to secure such property or is guilty of wrongful appropriation thereof shall be punished as a court-martial may direct.

"ART. 80. DEALING IN CAPTURED OR ABANDONED PROPERTY.—Any person subject to military law who buys, sells, trades, or in any way deals in or disposes of captured or abandoned property, whereby he shall receive or expect any profit, benefit, or advantage to himself or to any other person directly or indirectly connected with himself, or who fails whenever such property comes into his possession or custody or within his control to give notice thereof to the proper authority and to turn over such property to the proper authority without delay, shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial, military commission, or other military tribunal may adjudge, or by any or all of said penalties.

"ART. 81. RELIEVING, CORRESPONDING WITH, OR AIDING THE ENEMY.—Whosoever relieves the enemy with arms, ammunition, supplies, money, or other thing, or knowingly harbors or protects or holds correspondence with or gives intelligence to the enemy, either directly or indirectly, shall suffer death, or such other punishment as a court-martial or military commission may direct.

"ART. 82. SPIES.—Any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be tried by a general court-martial or by a military commission, and shall, on conviction thereof, suffer death.

"F. MISCELLANEOUS CRIMES AND OFFENSES.

"ART. 83. MILITARY PROPERTY—WILLFUL OR NEGLIGENT LOSS, DAMAGE, OR WRONGFUL DISPOSITION.—Any person subject to military law who willfully, or through neglect, suffers to be lost, spoiled, damaged, or wrongfully disposed of,

any military property belonging to the United States shall make good the loss or damage and suffer such punishment as a court-martial may direct.

"ART 84. WASTE OR UNLAWFUL DISPOSITION OF MILITARY PROPERTY ISSUED TO SOLDIERS.—Any soldier who sells or wrongfully disposes of or willfully or through neglect injures or loses any horse, arms, ammunition, accouterments, equipment, clothing, or other property issued for use in the military service, shall be punished as a court-martial may direct.

"ART. 85. DRUNK ON DUTY.—Any officer who is found drunk on duty shall, if the offense be committed in time of war, be dismissed from the service and suffer such other punishment as a court-martial may direct; and if the offense be committed in time of peace, he shall be punished as a court-martial may direct. Any person subject to military law, except an officer, who is found drunk on duty shall be punished as a court-martial may direct.

"ART. 86. MISBEHAVIOR OF SENTINEL.—Any sentinel who is found drunk or sleeping upon his post, or who leaves it before he is regularly relieved, shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct; and if the offense be committed in time of peace, he shall suffer any punishment, except death, that a court-martial may direct.

"ART. 87. PERSONAL INTEREST IN SALE OF PROVISIONS.—Any officer commanding in any garrison, fort, barracks, camp, or other place where troops of the United States may be serving who, for his private advantage, lays any duty or imposition upon or is interested in the sale of any victuals or other necessaries of life brought into such garrison, fort, barracks, camp, or other place for the use of the troops, shall be dismissed from the service and suffer such other punishment as a court-martial may direct.

"ART. 88. INTIMIDATION OF PERSONS BRINGING PROVISIONS.—Any person subject to military law who abuses, intimidates, does violence to, or wrongfully interferes with any person bringing provisions, supplies, or other necessaries to the camp, garrison, or quarters of the forces of the United States shall suffer such punishment as a court-martial may direct.

"ART. 89. GOOD ORDER TO BE MAINTAINED AND WRONGS REDRESSED.—All persons subject to military law are to behave themselves orderly in quarters, garrison, camp, and on the march; and any person subject to military law who commits any waste or spoil, or willfully destroys any property whatsoever (unless by order of his commanding officer), or commits any kind of depredation or riot, shall be punished as a court-martial may direct. Any commanding officer who, upon complaint made to him, refuses or omits to see reparation made to the party injured, in so far as the offender's pay shall go toward such reparation, as provided for in article one hundred and five, shall be dismissed from the service, or otherwise punished, as a court-martial may direct.

"ART. 90. PROVOKING SPEECHES OR GESTURES.—No person subject to military law shall use any reproachful or provoking speeches or gestures to another; and any person subject to military law who offends against the provisions of this article shall be punished as a court-martial may direct.

"ART. 91. DUELING.—Any person subject to military law who fights or promotes or is concerned in or connives at fighting a duel, or who having knowledge of a challenge sent or about to be sent fails to report the fact promptly to the proper authority shall, if an officer, be dismissed from the service or suffer such other punishment as a court-martial may direct; and if any other person subject to military law, shall suffer such punishment as a court-martial may direct.

"ART. 92. MURDER—RAPE.—Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial

may direct; but no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace.

[Note.—This article became effective on August 29, 1916.]

"ART. 93. VARIOUS CRIMES.—Any person subject to military law who commits manslaughter, mayhem, arson, burglary, robbery, larceny, embezzlement, perjury, assault with intent to commit any felony, or assault with intent to do bodily harm, shall be punished as a court-martial may direct.

"ART. 94. FRAUDS AGAINST THE GOVERNMENT.—Any person subject to military law who makes or causes to be made any claim against the United States or any officer thereof, knowing such claim to be false or fraudulent; or

"Who presents or causes to be presented to any person in the civil or military service thereof, for approval or payment, any claim against the United States, or any officer thereof, knowing such claim to be false or fraudulent; or

"Who enters into any agreement or conspiracy to defraud the United States by obtaining, or aiding others to obtain, the allowance or payment of any false or fraudulent claim; or

"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 statements; 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, equipment, 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, or by any or all of said penalties. And if any person, being guilty of any of the offenses aforesaid while in the military service of the United States, receives his discharge or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial in the same manner and to the same extent as if he had not received such discharge nor been dismissed.

"ART. 95. CONDUCT UNBECOMING AN OFFICER AND GENTLEMAN.—Any officer or cadet who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service.

"ART. 96. GENERAL ARTICLE.—Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court.

"IV. COURTS OF INQUIRY.

"ART. 97. WHEN AND BY WHOM ORDERED.—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 a court of inquiry shall not be ordered by any commanding officer except upon the request of the officer or soldier whose conduct is to be inquired into.

"ART. 98. COMPOSITION.—A court of inquiry shall consist of three or more officers. For each court of inquiry the authority appointing the court shall appoint a recorder.

"ART. 99. CHALLENGES.—Members of a court of inquiry may be challenged by the party whose conduct is to be inquired into, but only for cause stated to the court. The court shall determine the relevancy and validity of any challenge, and shall not receive a challenge to more than one member at a time. The party whose conduct is being inquired into shall have the right to be represented before the court by counsel of his own selection, if such counsel be reasonably available.

"ART. 100. OATH OF MEMBERS AND RECORDERS.—The recorder of a court of inquiry shall administer to the members the following oath: 'You, A. B., do swear (or affirm) that you will 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 (or affirm) 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.'

"In case of affirmation the closing sentence of adjuration will be omitted.

"ART. 101. POWERS; PROCEDURE.—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 advocate thereof. Such witnesses shall take the same oath or affirmation that is taken by witnesses before courts-martial. A reporter or an interpreter for a court of inquiry shall, before entering upon his duties, take the oath or affirmation required of a reporter or an interpreter for a court-martial. The party whose conduct is being inquired into or his counsel, if any, shall be permitted to examine and cross-examine witnesses so as fully to investigate the circumstances in question.

"ART. 102. OPINION ON MERITS OF CASE.—A court of inquiry shall not give an opinion on the merits of the case inquired into unless specially ordered to do so.

"ART. 103. RECORD OF PROCEEDINGS—HOW AUTHENTICATED.—Each court of inquiry shall keep a record of its proceedings, which shall be authenticated by the signature of the president and the recorder thereof, and be forwarded to the convening authority. In case the record can not be authenticated by the recorder, by reason of his death, disability, or absence, it shall be signed by the president and by one other member of the court.

"V. MISCELLANEOUS PROVISIONS.

"ART. 104. DISCIPLINARY POWERS OF COMMANDING OFFICERS.—Under such regulations as the President may prescribe, and which he may from time to time revoke, alter, or add to, the commanding officer of any detachment, company, or higher command may, for minor offenses not denied by the accused, impose disciplinary punishments upon persons of his command without the intervention of a court-martial, unless the accused demands trial by court-martial.

"The disciplinary punishments authorized by this article may include admonition, reprimand, withholding of privileges, extra fatigue, and restriction to certain specified limits, but shall not include forfeiture of pay or confinement under guard. A person punished under authority of this article, who deems his punishment unjust or disproportionate to the offense may, through the proper channel, appeal to the next superior authority, but may in the meantime be required to undergo the punishment adjudged. The commanding officer who imposes the punishment, his successor in command, and superior authority shall have power to mitigate or remit any unexecuted portion of the punishment. The imposition and enforcement of disciplinary punishment under authority of this article for any act or omission shall not be a bar to trial by court-martial for a crime or offense growing out of the same act or omission; but the fact that a disciplinary punishment has been enforced may be shown by the accused upon trial, and when so shown shall be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty.

"ART. 105. INJURIES TO PERSON OF PROPERTY—REDRESS OF.—Whenever complaint is made to any commanding officer that damage has been done to the property of any person or that his property has been wrongfully taken by persons subject to military law, such complaint shall be investigated by a board consisting of any number of officers from one to three, which board shall be convened by the commanding officer and shall have, for the purpose of such investigation, power to summon witnesses and examine them upon oath or affirmation, to receive depositions or other documentary evidence, and to assess the damages sustained against the responsible parties. The assessment of damages made by such board shall be subject to the approval of the commanding officer, and in the amount approved by him shall be stopped against the pay of the offenders. And the order of such commanding officer directing stoppages herein authorized shall be conclusive on any disbursing officer for the payment by him to the injured parties of the stoppages so ordered.

"Where the offenders can not be ascertained, but the organization or detachment to which they belong is known, stoppages to the amount of damages inflicted may be made and assessed in such proportion as may be deemed just upon the individual members thereof who are shown to have been present with such organization or detachment at the time the damages complained of were inflicted as determined by the approved findings of the board.

"ART. 106. ARREST OF DESERTERS BY CIVIL OFFICIALS.—It shall be lawful for any civil officer having authority under the laws of the United States, or of any State, Territory, District, or possession of the United States, to arrest offenders, summarily to arrest a deserter from the military service of the United States and deliver him into the custody of the military authorities of the United States.

"ART. 107. SOLDIERS TO MAKE GOOD TIME LOST.—Every soldier who in an existing or subsequent enlistment deserts the service of the United States or without proper authority absents himself from his organization, station, or duty for more than one day, or who is confined for more than one day under sentence, or while awaiting trial and disposition of his case, if the trial results in conviction, or through the intemperate use of drugs or alcoholic liquor, or through disease or injury the result of his own misconduct, renders himself unable for more than one day to perform duty, shall be liable to serve, after his return to a full-duty status, for such period as shall, with the time he may have served prior to such desertion, unauthorized absence, confinement, or inability to perform duty, amount to the full term of that part of his enlistment period which he is required to serve with his organization before being furloughed to the Army reserve.

"ART. 108. SOLDIERS—SEPARATION FROM THE SERVICE.—No enlisted man, lawfully inducted into the military service of the United States, shall be discharged from said service without a certificate of discharge, signed by a field officer of the regiment or other organization to which the enlisted man belongs or by the commanding officer when no such field officer is present; and no enlisted man shall be discharged from said service before his term of service has expired, except by order of the President, the Secretary of War, the commanding officer of a department, or by sentence of a general court-martial.

"ART. 109. OATH OF ENLISTMENT.—At the time of his enlistment every soldier shall take the following oath or affirmation: 'I, ———, 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 or affirmation may be taken before any officer.

"ART. 110. CERTAIN ARTICLES TO BE READ AND EXPLAINED.—Articles one, two, and twenty-nine, fifty-four to ninety-six, inclusive, and one hundred and four to one hundred and nine, inclusive, shall be read and explained to every soldier at the time of his enlistment or muster in, or within six days thereafter, and shall be read and explained once every six months to the soldiers of every garrison, regiment, or company in the service of the United States.

"ART. 111. COPY OF RECORD OF TRIAL.—Every person tried by a general court-martial shall, on demand therefor, made by himself or by any person in his behalf, be entitled to a copy of the record of the trial.

"ART. 112. EFFECTS OF DECEASED PERSONS—DISPOSITION OF.—In case of the death of any person subject to military law, the commanding officer of the place or command will permit the legal representative or widow of the deceased, if present, to take possession of all his effects then in camp or quarters, and if no legal representative or widow be present, the commanding officer shall direct a summary court to secure all such effects; and said summary court shall have authority to convert such effects into cash, by public or private sale, not earlier than thirty days after the death of the deceased, and to collect and receive any debts due decedent's estate by local debtors; and as soon as practicable after converting such effects into cash said summary court shall deposit

with the proper officer, to be designated in regulations, any cash belonging to decedent's estate, and shall transmit a receipt for such deposit, accompanied by any will or other papers of value belonging to the deceased, an inventory of the effects secured by said summary court, and a full account of his transactions to the War Department for transmission to the Auditor for the War Department for action as authorized by law in the settlement of the accounts of deceased officers or enlisted men of the Army; but if in the meantime the legal representative, or widow, shall present himself or herself to take possession of decedent's estate, the said summary court shall turn over to him or her all effects not sold and cash belonging to said estate, together with an inventory and account, and make to the War Department a full report of his transactions.

"The provisions of this article shall be applicable to inmates of the United States Soldiers' Home who die in any United States military hospital outside of the District of Columbia where sent from the home for treatment.

"ART. 113. INQUESTS.—When at any post, fort, camp, or other place garrisoned by the military forces of the United States and under the exclusive jurisdiction of the United States, any person shall have been found dead under circumstances which appear to require investigation, the commanding officer will designate and direct a summary court-martial to investigate the circumstances attending the death; and, for this purpose, such summary court-martial shall have power to summon witnesses and examine them upon oath or affirmation. He shall promptly transmit to the post or other commander a report of his investigation and of his findings as to the cause of the death.

"ART. 114. AUTHORITY TO ADMINISTER OATHS.—Any judge advocate or acting judge advocate, the president of a general or special court-martial, any summary court-martial, the judge advocate or any assistant judge advocate of a general or special court-martial, the president or the recorder of a court of inquiry or of a military board, any officer designated to take a deposition, any officer detailed to conduct an investigation, and the adjutant of any command shall have power to administer oaths for the purposes of the administration of military justice and for other purposes of military administration; and in foreign places where the Army may be serving shall have the general powers of a notary public or of a consul of the United States in the administration of oaths, the execution and acknowledgment of legal instruments, the attestation of documents, and all other forms of notarial acts to be executed by persons subject to military law.

"ART. 115. APPOINTMENT OF REPORTERS AND INTERPRETERS.—Under such regulations as the Secretary of War may from time to time prescribe, the president of a court-martial or military commission, or a court of inquiry shall have power to appoint a reporter, who shall record the proceedings of and testimony taken before such court or commission and may set down the same, in the first instance, in shorthand. Under like regulations the president of a court-martial or military commission, or court of inquiry, or a summary court, may appoint an interpreter, who shall interpret for the court or commission.

"ART. 116. POWERS OF ASSISTANT JUDGE ADVOCATES.—An assistant judge advocate of a general court-martial shall be competent to perform any duty devolved by law, regulation, or the custom of the service upon the judge advocate of the court.

"ART. 117. REMOVAL OF CIVIL SUITS.—When any civil or criminal prosecution is commenced in any court of a State against any officer, soldier, or other person in the military service of the United States on account of any act done under color of his office or status, or in respect to which he claims any right, title, or authority under any law of the United States respecting the military

forces thereof, or under the law of war, such suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court of the United States in the district where the same is pending in the manner prescribed in section thirty-three of the Act entitled 'An Act to codify, revise, and amend the laws relating to the judiciary,' approved March three, nineteen hundred and eleven, and the cause shall thereupon be entered on the docket of said district court and shall proceed therein as if the cause had been originally commenced in said district court and the same proceedings had been taken in such suit or prosecution in said district court as shall have been had therein in said State court prior to its removal, and said district court shall have full power to hear and determine said cause.

"ART. 118. OFFICERS, SEPARATION FROM SERVICE.—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; but the President may at any time drop from the rolls of the Army any officer who has been absent from duty three months without leave or who has been absent in confinement in a prison or penitentiary for three months after final conviction by a court of competent jurisdiction.

"ART. 119. RANK AND PRECEDENCE AMONG REGULARS, MILITIA, AND VOLUNTEERS.—That in time of war or public danger, when two or more officers of the same grade are on duty in the same field, department, or command, or of organizations thereof, the President may assign the command of the forces of such field, department, or command, or of any organization thereof, without regard to seniority of rank in the same grade. In the absence of such assignment by the President, officers of the same grade shall rank and have precedence in the following order, without regard to date of rank or commission as between officers of different classes, namely: First, officers of the Regular Army and officers of the Marine Corps detached for service with the Army by order of the President; second, officers of forces drafted or called into the service of the United States; and, third, officers of the volunteer forces: *Provided*, That officers of the Regular Army holding commissions in forces drafted or called into the service of the United States or in the volunteer forces shall rank and have precedence under said commissions as if they were commissions in the Regular Army; the rank of officers of the Regular Army under commissions in the National Guard as such shall not, for the purposes of this article, be held to antedate the acceptance of such officers into the service of the United States under said commissions.

"ART. 120. COMMAND WHEN DIFFERENT CORPS OR COMMANDS HAPPEN TO JOIN.—When different corps or commands of the military forces of the United States happen to joint or do duty together the officer highest in rank of the line of the Regular Army, Marine Corps, forces drafted or called into the service of the United States, or Volunteers, there on duty, shall, subject to the provisions of the last preceding article, command the whole and give orders for what is needful in the service, unless otherwise directed by the President.

"ART. 121. COMPLAINTS OF WRONGS.—Any officer or soldier who believes himself wronged by his commanding officer, and, upon due application to such commander, is refused redress, may complain to the general commanding in the locality where the officer against whom the complaint is made 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."

SEC. 4. The provisions of section three of this Act shall take effect and be in force on and after the first day of March, nineteen hundred and seventeen: *Provided*, That articles four, thirteen, fourteen, fifteen, twenty-nine, forty-seven, forty-nine, and ninety-two shall take effect immediately upon the approval of this Act.

SEC. 5. That all offenses committed and all penalties, forfeitures, fines, or liabilities incurred prior to the taking effect of this Act, under any law embraced in or modified, changed, or repealed by this Act, may be prosecuted, punished, and enforced in the same manner and with the same effect as if this Act had not been passed.

SEC. 6. All laws and parts of laws in so far as they are inconsistent with this Act are hereby repealed.

Act of August 29, 1916 (39 Stat., 650–670).

APPENDIX 2.

SYSTEM OF COURTS-MARTIAL FOR NATIONAL GUARD NOT IN THE SERVICE OF THE UNITED STATES.

SEC. 102. Except in organizations in the service of the United States, courts-martial in the National Guard shall be of three kinds, namely, general courts-martial, special courts-martial, and summary courts-martial. They shall be constituted like, and have cognizance of the same subjects, and possess like powers, except as to punishments, as similar courts provided for by the laws and regulations governing the Army of the United States, and the proceedings of courts-martial of the National Guard shall follow the forms and modes of procedure prescribed for said similar courts.

SEC. 103. General courts-martial of the National Guard not in the service of the United States may be convened by orders of the President, or of the governors of the respective States and Territories, or by the commanding general of the National Guard of the District of Columbia, and such courts shall have the power to impose fines not exceeding $200; to sentence to forfeiture of pay and allowances; to a reprimand; to dismissal or dishonorable discharge from the service; to reduction of noncommissioned officers to the ranks; or any two or more of such punishments may be combined in the sentences imposed by such courts.

SEC. 104. In the National Guard, not in the service of the United States, the commanding officer of each garrison, fort, post, camp, or other place, brigade, regiment, detached battalion, or other detached command, may appoint special courts-martial for his command; but such special courts-martial may in any case be appointed by superior authority when by the latter deemed desirable. Special courts-martial shall have power to try any person subject to military law, except a commissioned officer, for any crime or offense made punishable by the military laws of the United States, and such special courts-martial shall have the same powers of punishment as do general courts-martial, except that fines imposed by such courts shall not exceed $100.

SEC. 105. In the National Guard, not in the service of the United States, the commanding officer of each garrison, fort, post, or other place, regiment or corps, detached battalion, company, or other detachment of the National Guard may appoint for such place or command a summary court to consist of one officer, who shall have power to administer oaths and to try the enlisted men of such place or command for breaches of discipline and violations of laws governing such organizations; and said court, when satisfied of the guilt of such soldier, may impose fines not exceeding $25 for any single offense; may sentence noncommissioned officers to reduction to the ranks; may sentence to forfeiture of pay and allowances. The proceedings of such court shall be informal, and the minutes thereof shall be the same as prescribed for summary courts of the Army of the United States.

SEC. 106. All courts-martial of the National Guard, not in the service of the United States, including summary courts, shall have power to sentence to con-

finement in lieu of fines authorized to be imposed: *Provided*, That such sentences of confinement shall not exceed one day for each dollar of fine authorized.

SEC. 107. No sentence of dismissal from the service or dishonorable discharge, imposed by a National Guard court-martial, not in the service of the United States, shall be executed until approved by the governor of the State or Territory concerned, or by the commanding general of the National Guard of the District of Columbia.

SEC. 108. In the National Guard, not in the service of the United States, presidents of courts-martial and summary court officers shall have power to issue warrants to arrest accused persons and to bring them before the court for trial whenever such persons shall have disobeyed an order in writing from the convening authority to appear before such court, a copy of the charge or charges having been delivered to the accused with such order, and to issue subpœnas and subpœnas duces tecum and to enforce by attachment attendance of witnesses and the production of books and papers, and to sentence for a refusal to be sworn or to answer as provided in actions before civil courts.

All processes and sentences of said courts shall be executed by such civil officers as may be prescribed by the laws of the several States and Territories, and in any State where no provision shall have been made for such action, and in the Territories and the District of Columbia, such processes and sentences shall be executed by a United States marshal or his duly appointed deputy, and it shall be the duty of any United States marshal to execute all such processes and sentences and make return thereof to the officer issuing or imposing the same. (Act of June 3, 1916, 39 Stat., 208, 209.)

APPENDIX 3.

[FRONT.]

Charge sheet. No. in summary court record ———.

(Place.) (Date.)

(Surname.) (Christian name.) (Rank and organization.)

Date current enlistment, ———. Rate of pay, ———.

Previous service, ———

(Give dates, with character given on each discharge.)

Date of { Arrest: ———. Confinement: ———. } No. of previous convictions, ———.

Witnesses:

——— ———.

——— ———.

CHARGE —: Violation of the ——— article of war.

Specification —: In that, etc.

Form No. 594, A. G. O.

[BACK.]

Pleas: ———.

Findings: ———.

Sentence: ———.

Days in { Arrest: ———. Confinement: ———. }

Maximum punishment: ———.

NOTE.—The above spaces are intended only for use for record purposes at the headquarters of the officer appointing the special or general court-martial, and it is not intended that they shall be filled in by summary courts, trial judge advocates, etc.

INSTRUCTIONS.

(M. C. M., pars. 75, 76, 79, 306.)

1. Submission of charges.—All charges for trial by court-martial will be prepared in triplicate, using the prescribed charge sheet as a first sheet and using such additional sheets of ordinary paper as are required. They will be accompanied—

(*a*) Except when trial is to be had by summary court, by a brief statement of the substance of all material testimony expected from each material witness, both those for the prosecution and those for the defense, together with all available and necessary information as to any other actual or probable testimony or evidence in the case; and

(*b*) In the case of a soldier, by properly authenticated evidence of convictions, if any, of an offense or offenses committed by him during his current enlistment and within one year next preceding the date of the alleged commission by him of any offense set forth in the charges.

They will be forwarded by the officer preferring them to the officer immediately exercising summary court-martial jurisdiction over the command to

which the accused belongs, and will by him and by each superior commander into whose hands they may come either be referred to a court-martial within his jurisdiction for trial, forwarded to the next superior authority exercising court-martial jurisdiction over the command to which the accused belongs or pertains, or otherwise disposed of as circumstances may appear to require.

2. Investigation of charges.—If the officer immediately exercising summary court-martial jurisdiction over the command to which the accused belongs or pertains decides to forward the charges to superior authority, he will, before so doing, either carefully investigate them himself or will cause an officer other than the officer preferring the charges carefully to investigate them and to report to him, orally or otherwise, the result of such investigation. The officer investigating the charges will afford to the accused an opportunity to make any statement, offer any evidence, or present any matter in extenuation that he may desire to have considered in connection with the accusations against him. If the accused desires to submit nothing, the indorsement will so state. In his indorsement forwarding the charges to superior authority he will include:

(*a*) The name of the officer who investigated the charges;

(*b*) The opinion of both such officer and himself as to whether the several charges can be sustained;

(*c*) The substance of such material statement, if any, as the accused may have voluntarily made in connection with the case during the investigation thereof;

(*d*) A summary of the extenuating circumstances, if any, connected with the case; and

(*e*) His recommendation of action to be taken.

3. Disposition of copies of charges.—(*a*) When trial is had by summary court the charges will be completed as the record of trial, a copy thereof will be completed as a copy of the summary court record for the company or other commander, and the other copy will, with the least practicable delay after action has been taken on the sentence, be completed and transmitted as the required report of trial to the officer exercising general court-martial jurisdiction over the command, there to be filed in the office of the judge advocate for a period of two years, at the end of which time it may be destroyed; and

(*b*) When trial is to be had by special or general court-martial the charges and one copy thereof will be referred to the trial judge advocate, the copy to be furnished by him to the accused or his counsel, and the other copy will be used for record purposes in the office of the officer appointing the trial court, the top fold of the copy of the charge sheet, in case of trial by general court-martial, being detached at the proper time and forwarded with the record of trial to the Judge Advocate General of the Army.

4. Disposition of evidence of previous convictions.—(*a*) The evidence of a previous conviction referred to a summary court or to the judge advocate of a special court will, after trial, be returned by him to the appointing authority and will, after action by the latter on the case, be returned to the company or detachment to which it pertains;

(*b*) The evidence of a previous conviction referred to the judge advocate of a general court-martial will, if a company record, after trial be returned by him direct to the company or detachment to which it pertains, and a certified copy thereof will be attached to the record of trial.

NOTE.—This form supersedes the blank form for record of trial by summary court (Form No. 99, A. G. O.), the blank form for report of trial by summary court (Form No. 59, A. G. O.), and the blank form for statement of service (Form No. 15, A. G. O.).

APPENDIX 4.

FORMS FOR CHARGES AND SPECIFICATIONS.

INSTRUCTIONS.

The forms for charges and specifications set forth below constitute a general guide for use in the drafting of charges and specifications under the several articles of war, not only for offenses specifically provided for in the forms but also for like offenses not specifically mentioned therein. In preparing charges the following general rules should be observed:

(*a*) When there is more than one charge the charges will be numbered, using the Roman numerals, viz, I, II, etc.

(*b*) When there is more than one specification under a charge the specifications under that charge will be numbered, using the Arabic numerals, viz, 1, 2, etc.

(*c*) The form provided for the charge will not in any case be abbreviated, added to, or deviated from.

(*d*) The several forms provided for specifications will be added to or deviated from when circumstances require such addition or deviation, and in charging minor offenses with a view to trial by summary court they may in proper cases be abbreviated.

(*e*) The words inclosed in parentheses or brackets, or both, in the forms for specifications may or may not be used, as circumstances require.

(*f*) The blanks inclosed in parentheses in the forms for specifications indicate that a proper substitute may be used.

(*g*) The name of the accused as entered in the specification should, except in a case in which the jurisdiction of the court over the person is not dependent upon his being a person subject to military law (e. g. see A. W., 81 and 82), be accompanied by such descriptive language as will show that he is a person subject to military law and therefore subject to the jurisdiction of the court, as "Pvt. John Doe, Company ———, ——— Infantry"; "Pvt. John Doe, ——— ——— United States Marine Corps, detached for service with the Army, by order of the President"; "John Doe, a retainer to the camp"; "John Doe, a person accompanying the Army of the United States without the territorial jurisdiction of the United States"; "John Doe, a person serving with the Army of the United States in the field"; "John Doe, a general prisoner"; "John Doe, a person under a sentence adjudged by a court-martial."

(*h*) The place and date of the commission of the alleged offense will ordinarily be stated in the body of the specification and not in a separate line at the end thereof.

(*i*) The words "officer preferring charge," or words of similar import, will not be used in connection with the signature of the officer who subscribes the charges.

SPECIMEN CHARGES.

[To be placed on charge sheet, Appendix 3.]

CHARGE I: Violation of the 54th Article of War.

Specification: In that Pvt. Richard Roe, Company A, Second Infantry, alias Pvt. John Doe, Company F, Twenty-ninth Infantry, did, without a discharge from said Company A, Second Infantry, procure himself to be enlisted in the

military service of the United States at Fort Jay, N. Y., on the 24th day of July, 1917, under the name of John Doe, by willfully concealing from Capt. William White, Medical Corps, a recruiting officer, the fact of his prior enlistment in said Company A, Second Infantry, and has at Fort Jay, N. Y., since said date, received allowances under said enlistment.

CHARGE II: Violation of the 58th Article of War.

Specification: In that Pvt. Richard Roe, Company A, Second Infantry, alias Pvt. John Doe, Company F, Twenty-ninth Infantry, did, at Fort Jay, N. Y., on or about the 6th day of March, 1917, desert the service of the United States, and did remain absent in desertion until he was apprehended at Fort Jay, N. Y., on or about July 24, 1917.

CHARGE III: Violation of the 96th Article of War.

Specification 1: In that Pvt. Richard Roe, Company A, Second Infantry, alias Pvt. John Doe, Company F, Twenty-ninth Infantry, did, at Fort Jay, N. Y., on or about March 6, 1917, strike in the face with his fist Pvt. John W. Davis, Third Company, Fort Hamilton, then a sentinel in the execution of his duty.

Specification 2: In that Pvt. Richard Roe, Company A, Second Infantry, alias Pvt. John Doe, Company F, Twenty-ninth Infantry, having at Fort Jay, N. Y., on or about the 6th day of March, 1917, received a lawful order to halt from Pvt. John W. Davis, Third Company, Fort Hamilton, then a sentinel in the execution of his duty, did willfully disobey the same.

JOHN JONES,
Captain, C. A. C.

FORMS.

[See instructions on p. 335.]

CHARGE: Violation of the 54th Article of War.

1. *Specification:* In that Pvt. ———, Company ———, ——— Infantry, *alias* Pvt. ———, Company ———, ——— Infantry, did, without a discharge from said ——— Infantry, procure himself to be enlisted in the military service of the United States, at ———, on the ——— day of ———, 19—, under the name of ———, (by willfully and falsely representing to ———, a recruiting officer, that he had never been enlisted in the service of the United States and) by willfully concealing from (———, a) (said) recruiting officer (,) the fact of his prior enlistment in said ——— Infantry; and has, at ——— and since said date, received (pay) (allowances) (pay and allowances) under said enlistment.

2. *Specification:* In that ——— did procure himself to be enlisted in the military service of the United States, at ———, on the ——— day of ———, 19—, (by willfully and falsely representing to ———, a recruiting officer, that he had never been discharged from the service of the United States and) by willfully concealing from (———, a) (said) recruiting officer the fact that (, under the name of ———,) he had been discharged [(dishonorably from ———, on ———, pursuant to sentence of court-martial) (from ———, on ———, by reason of ———)] [convicted of a felony, to wit, ———] [———]; and has, at ——— and since said enlistment, received (pay) (allowances) (pay and allowances) thereunder.

3. *Specification:* In that ——— did procure himself to be enlisted in the military service of the United States, at ———, on the ——— day of ———, 19—, [by willfully and falsely representing to ———, a recruiting officer, that he had never been imprisoned in any (jail) (reformatory) (penitentiary) and] by willfully concealing from (———, a) (said) recruiting officer (,) the fact that (, under the name of ———,) he had been imprisoned in a (reformatory) (jail) (penitentiary) under a sentence of a civil court; and has, at

———and since said enlistment, received (pay) (allowances) (pay and allowances) thereunder.

4. *Specification:* In that ——— did procure himself to be enlisted in the military service of the United States, at ———, on the ——— day of ———, 19—, (by willfully and falsely representing to ———, a recruiting officer, that he was ——— years of age and) by willfully concealing from (———, a) (said) recruiting officer (,) the fact that he was then (under the age of eighteen years) (a married man) (———) ; and has, at ——— and since said enlistment, received (pay) (allowances) (pay and allowances) thereunder.

CHARGE: Violation of the 55th Article of War.

5. *Specification:* In that ——— did at ———, on ———, unlawfully (enlist) (muster) into the military service of the United States one ———, who, as he, the said ———, then well knew, was (a) (an) (insane) (intoxicated) (———) person (who had been convicted of a felony) (under the age of 16 years) (———).

CHARGE: Violation of the 56th Article of War.

6. *Specification:* In that ——— did, at ———, on the ——— day of ———, 19—, (sign) (allow ——— to sign) (direct ——— to sign) the muster roll of ———, for the period ——— to ———, 19—, he, the said ———, then well knowing that the said muster roll contained the name of ——— as soldier and a member of said company and as present for duty therewith, and that the said ——— was (not a soldier) (not a member of said company) (not present for duty) but (a civilian) (a member of company ———) (wholly absent from military duty).

7. *Specification:* In that ——— did, at ———, on the ——— day of ———, 19—, (sign) (allow ——— to sign) (direct ——— to sign) the muster roll of ———, for the period ——— to ———, 19—, he, the said ———, then well knowing that said muster roll contained a statement that ———, a private of said ———, was present and mustered, and that said statement was false in that said ——— was then absent without leave.

8. *Specification:* In that ——— did, at ———, on the ——— day of ———, 19—, falsely muster as (present) (———) ———, when he well knew that said ——— was not (present) (———), but (absent with leave) (———).

9. *Specification:* In that ——— did, at ———, on the ——— day of ———, 19—, falsely muster as a ——— of Company ———, ———th Infantry, one ———, who, as he, the said ———, then well knew, was not a soldier, but (a civilian) (———).

10. *Specification:* In that ——— did, at ———, on the ——— day of ———, 19—, sign the muster roll of ———, for the period ——— to ———, 19—, knowing at the time that said muster roll contained a statement that ——— was (present) (———), and knowing at the time that said ——— was not (present) (———), but (absent with leave) (———).

11. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, wrongfully take from ——— (the sum of $———) (———), as a consideration to him ———, for knowingly permitting the muster-in roll of ——— ——— on the mustering in of that ——— to falsely show as (mustered in) (———), ———, who, as he, the said ———, then well knew, was (were) not (mustered in) (———).

12. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, wrongfully take from ——— the sum of $———, as a consideration to him ———, for allowing the muster roll of ———, for the period of ——— to ———, 19—, to show ——— as (present and mustered) (———), when, as he, the said ———, then well knew, he (they) was (were) not present and mustered as shown on said muster roll.

CHARGE: Violation of the 57th Article of War.

13. *Specification:* In that ———, being in command of ———, and it being his duty to render to the ——— a return of the state of (the troops under his command) (the ——— thereto belonging) for the period ——— to ———, did, at ———, on the ——— day of ———, 19—, make a return of ——— for said period, which he then knew to be false in that it showed ——— as (absent with leave) (———), whereas the said ——— was, as he, the said ———, then well knew, (absent without leave) (———).

14. *Specification:* In that ———, being in command of ———, and it being his duty to render to the ——— a return of the state of (the troops under his command) (the ——— thereto belonging) for the period ——— to ———, did (on and after the ——— day of ———, 19—) (from ——— until ———), through (neglect) (design), omit to render such return.

CHARGE: Violation of the 58th Article of War.

15. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, attempt to desert the service of the United States by (seeking passage to ——— on the steamship ———) (———).

16. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, in the (execution of a conspiracy to desert the service of the United States previously entered into with ——— and ———) (presence of ———, which the forces of which he was a member were then opposing) attempt to desert the service of the United States by (seeking passage to ——— on the steamship ———) (———). (*C. M. C. M. No. —, Apr. —, 1917.*)

17. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, desert the service of the United States, and did remain absent in desertion until he (was apprehended) (surrendered himself) at ——— on or about the ——— day of ———, 19—.

18. *Specification:* In that ——— did, at ——— on or about the ——— day of ———, 19—, in the (execution of a conspiracy to desert the service of the United States previously entered into with ——— and ———) (presence of ———, which the forces of which the accused was a member were then opposing), desert the service of the United States and did remain absent in desertion until he (was apprehended) (surrendered himself) at ——— on or about the ——— day of ———, 19—.

19. *Specification:* In that ——— and ——— did, at ———, on or about the ——— day of ———, 19—, acting jointly, in pursuance of a common intent and in the execution of a conspiracy to desert the service of the United States previously entered into by them (and in the presence of ———, which the forces of which they were members were then opposing), desert the service of the United States and did remain absent in desertion until they (were apprehended) (surrendered themselves) at ——— on or about the ——— day of ———, 19—.

CHARGE: Violation of the 59th Article of War.

20. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, (advise) (persuade) ——— to desert the service of the United States by (saying to him ——— ——— ——— ——— ———, or words to that effect) (offering him a position as ——— at ———).

21. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, knowingly assist ——— to desert the service of the United States (by supplying him with a railroad ticket from ——— to ———) (———), he, the said ———, then well knowing that the said ——— intended to use the (railroad ticket) (———) so supplied him in furtherance of his plans to desert.

CHARGE: Violation of the 60th Article of War.

22. *Specification:* In that ———, having discovered that ———, a soldier in his command, was a deserter from the (military service) (naval service) (Marine Corps) did, at ———, from about the ——— day of ———, to about the ——— day of ———, 19—, retain said deserter in his command without informing superior authority or the commander of the organization to which the deserter belonged of the presence of said deserter in his command.

CHARGE: Violation of the 61st Article of War.

23. *Specification:* In that ———, did, at ———, without proper leave, absent himself from his ——— from about ———, 19—, to about ———, 19—.

24. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, fail to repair at the fixed time to the properly appointed place (of assembly) for ———.

25. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, without proper leave, go from the properly appointed place (of assembly) for ———, after having repaired thereto for the performance of said duty.

CHARGE: Violation of the 62d Article of War.

26. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, use (orally and publicly) (———) the following (contemptuous) (disrespectful) (contemptuous and disrespectful) words against the ——— of the (United States) (——— in which he was then quartered), to wit: ——— ——— ——— ———, or words to that effect.

CHARGE: Violation of the 63d Article of War.

27. *Specification:* in that ——— did, at ———, on or about the ——— day of ———, 19—, behave himself with disrespect toward ———, his superior officer, by (saying to him ——————————, or words to that effect) (contemptuously turning from and leaving him while he was talking to him the said ———) (———).

CHARGE: Violation of the 64th Article of War.

28. *Specification:* In that ———, having received a lawful command from ———, his superior officer, to ———, did at ———, on or about the ——— day of ———, 19—, willfully disobey the same.

29. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, willfully (draw) (lift up) a ——— against ———, his superior officer, who was then in the execution of his office.

30. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, willfully strike ———, his superior officer, who was then in the execution of his office, (in) (on) the ———, with (a) (his) ———.

[NOTE.—For assaults upon officers amounting to felonies see A. W. 93.]

CHARGE: Violation of the 65th Article of War.

31. *Specification:* In that ———, having received a lawful order from ———, who was then in the execution of his office, to ———, did at ———, on or about the ——— day of ———, 19—, willfully disobey the same.

32. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, (attempt) (threaten) to (strike) (———) ——— [(in) (on) the ———] with (a) (his) ———, while said ——— was in the execution of his office.

33. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, behave in an (insubordinate) (disrespectful) (insubordinate and disrespectful) manner toward ———, who was then in the execution of his office, by (saying to him ———, or words to that effect) (———).

34. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, willfully (strike) (assault) ———, who was then in the execution of his office, by ——— him (in) (on) the ——— with (a) (his) ———.

[NOTE.—For assaults upon noncommissioned officers amounting to felonies see A. W. 93.]

CHARGE: Violation of the 66th Article of War.

35. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, attempt to create a mutiny in ——— by urging the members of said ——— to refuse to obey the order of ———, their (commanding) (superior) officer, to ———.

36. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, cause a mutiny in ——— by unlawfully assuming control over about ——— soldiers of said command, and in the execution of such control causing said soldiers to disregard and defy the lawful orders of ———, their (commanding) (superior) officer, to (assemble for drill) (———).

37. *Specification:* In that ——— did, at ———, or on about the ——— day of ———, 19—, voluntarily join in a mutiny which had been begun in ——— against the authority of ———, the commanding officer thereof, and did, in combination with sundry other members of said ——— assembled on the (parade ground) (———), refuse to (disperse) (do any further duty) (assemble for drill) (———).

CHARGE: Violation of the 67th Article of War.

38. *Specification:* In that ———, being at ——— and knowing on the ——— day of ———, 19—, that certain members of ——— proposed and intended to begin and join in a mutiny against the commanding officer of that ———, at ——— o'clock (a.) (p.) m. on the following day, did fail (wholly) to give information of said intended mutiny to his commanding officer (until the hour of ——— on the ——— day of ———, 19—).

39. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, join with other members of the ——— and sundry citizens in an attempt to break into a jail and release a prisoner, did assault and beat the police officers and other civil authorities, and did commit other disorders until overpowered and restrained by a detachment of ——— sent from the post of ——— and compelled to return to his quarters.

40. *Specification:* In that ———, being present at a mutiny among the soldiers of ——— against the authority of ———, the commanding officer thereof, did fail to use his utmost endeavor to suppress the same, in that, having commanded the men of his own company to return to their quarters, he took no means to compel their obedience or reduce them to discipline upon their refusal to obey said command.

CHARGE: Violation of the 68th Article of War.

41. *Specification:* In that ———, being engaged in a (quarrel) (fray) (disorder) and having been ordered into (arrest) (confinement) by ———, did, at ———, on or about the ——— day of ———, 19—, [(refuse to obey) (draw a ——— upon) the said ———] [threaten the said ——— by (saying to him ———————————, or words to that effect) (———)].

CHARGE: Violation of the 69th Article of War.

42. *Specification:* In that ———, having been placed in (arrest) (confinement) by his (commanding officer) (———) on account of being charged with a (crime) (offense), did at ———, on or about the ——— day of ———, 19—, (break his arrest) (escape from said confinement) before he was set at liberty by proper authority.

CHARGE: Violation of the 71st Article of War.

43. *Specification:* In that ———, being on duty as ——— at ——— on or about the ——— day of ———, 19—, did refuse to (receive) (keep) one ———, a prisoner duly committed to his charge by ———, who, at the time of committing said prisoner, delivered to the said ——— an account in writing, signed by himself, of the (crime) (offense) charged against said prisoner.

CHARGE: Violation of the 72d Article of War.

44. *Specification:* In that ———, (having been) (being) on duty as commander of the guard at ———, did, on or about the ——— day of ———, 19—, fail to report in writing to the commanding officer of that ——— (as soon as relieved from his guard) (within 24 hours after the confinement of said prisoner) the name of ———, a prisoner committed to his charge, the offense charged against him, and the name of the officer committing him.

CHARGE: Violation of the 73d Article of War.

45. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, [without proper authority release] [through (design) (neglect) (suffer)] ———, a prisoner duly committed to his charge to escape.

CHARGE: Violation of the 74th Article of War.

46. *Specification:* In that ———, being at the time the commanding officer at ———, and an application having been duly made to him by the ——— of ——— for the (delivery) (apprehension and securing) of ———, a (soldier) (officer) under his command, who was accused of a (crime) (offense) committed against the laws of ———, did, at ———, on the ——— day of ———, 19—, refuse to (deliver said ——— to said ——— of ———) (aid the said ——— of ——— in apprehending and securing the said ———).

CHARGE: Violation of the 75th Article of War.

47. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, in disregard of his duty and shamefully (abandon) (deliver up to the enemy) ——— ,which (it was his duty) (he had been ordered by ———, his proper superior officer), to defend.

48. *Specification:* In that ———, while on duty before the enemy, did at ———, on the ——— day of ———, 19—, cast away his (rifle) (ammunition) (———).

49. *Specification:* In that ———, being (present with) (in command of) his ——— while it was engaged with the enemy, did at ———, on or about the ——— day of ———, 19—, abandon the said ——— and (seek safety in the rear) (———), and did fail to rejoin it until (the engagement was concluded) (———).

50. *Specification:* In that ——— did, while on duty before the enemy, cause a false alarm in the (camp) (garrison) (quarters) (———) at ———, on or about the ——— day of ———, 19—, by needlessly and without authority causing the call to arms to be sounded.

51. *Specification:* In that ——— did, while on duty before the enemy, quit his (company) (post) (———), at ———, on the ——— day of ———, 19—, for the purpose of (pillaging) (plundering) (pillaging and plundering), and did commit plunder and pillage on the property of one ———, a citizen, by forcibly entering the house of said ———, against his will, and taking therefrom and appropriating money and effects of the said ——— of the value of $———.

52. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, run away from his (company) (———), which was then en-

gaged with the enemy, and did not return thereto until (after the engagement had been concluded) (———).

53. *Specification:* In that ———, being an (officer) (soldier) of a force charged with the duty of defending ——— against an enemy then before it, did at ———, on or about the ——— day of ———, 19—, (induce) (seek to induce) (soldiers) (soldiers and officers) of that force to shamefully (abandon) (deliver up) to the enemy that ———, which it was their duty to defend, by saying to said (soldiers) (soldiers and officers) ———, or words to that effect.

54. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, say to ———, who was then, with his company, engaged with the enemy, ———, or words to that effect, thereby (inducing) (seeking to induce) said ——— to [(run away from) (shamefully abandon) his (post)] (———).

55. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, say to ———, who was then on outpost duty before the enemy, ———, or words to that effect, thereby (inducing) (seeking to induce) the said ——— to [run away from) (abandon) his (post)] (———).

CHARGE: Violation of the 76th Article of War.

56. *Specification:* In that ———, being an (officer) (soldier) under the command of ———, commanding the (fort) (post) (camp) (guard) (———) of ———, which was then threatened by the enemy, did, at ———, on or about the ——— day of ———, 19—, in combination with other (officers) (soldiers) (officers and soldiers) of said command, by ——— compel said ——— to (surrender) (abandon) said (fort) (post) (camp) (guard) (———) of ——— to the enemy.

57. *Specification:* In that ———, ———, and ———, being (officers) (soldiers) (officers and soldiers) under the command of ———, who was then commanding the (fort) (post) (camp) (guard) (———) of ———, which was then threatened by the enemy, did, at ———, on or about the ——— day of ———, 19—, acting jointly and in concert, refuse to perform further duty in defense of said (fort) (post) (camp) (guard) (———) of ———, and thereby compel the said ——— to (abandon it) (give it up) to the enemy.

CHARGE: Violation of the 77th Article of War.

58. *Specification:* In that ———, having received as the proper (countersign) (parole) the word ———, did at ———, on or about the ——— day of ———, 19—, give to ———, a person to whom he knew it was his duty to give the proper (countersign) (parole), the different word —— as the proper (countersign) (parole).

59. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, make known the (countersign) (parole), to wit, ———, to ———, known by him, ———, to be a person not entitled to receive it.

CHARGE: Violation of the 78th Article of War.

60. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, violate a safeguard, known by him to have been placed over the premises occupied by ———, at ———, by (overwhelming the guard posted for the protection of the same and violently entering said premises and committing waste and plunder therein) (———).

CHARGE: Violation of the 79th Article of War.

61. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, wrongfully appropriate to (his own use) (———) the following

public property taken from the enemy, viz: ——— of the value of about $——— and ——— of the value of about $———, and all of the total value of about $———.

62. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, neglect to secure for the service of the United States the following property which had been taken from the enemy, viz: ——— of the value of about $——— and ——— of the value of about $———, and all of the total value of about $———.

CHARGE: Violation of the 80th Article of War.

63. *Specification:* In that ——— did, at ———, or about the ——— day of ———, 19—, unlawfully (buy) (sell) (———) the following articles of (captured) (abandoned) property, namely: ——— of the value of about $——— and ——— of the value of about $———, and all of the total value of about $———, thereby [(accepting) (receiving) (accepting and receiving)] [(profit) (benefit) (advantage) (profit, benefit and advantage)] to (himself) [———, his (brother) (———)].

64. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, fail to give notice to proper authority that the following (captured) (abandoned) property had come into his (possession) (custody) (control), namely: ——— of the value of about $——— and ——— of the value of about $———, and all of the total value of about $———.

65. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, fail to turn over to the proper authority without delay the following (captured) (abandoned) property which had come into his (possession) (custody) (control), namely: ——— of the value of about $——— and ——— of the value of about $———, and all of the total value of about $———.

CHARGE: Violation of the 81st Article of War.

66. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, inform a patrol of the enemy's forces of the whereabouts of a military patrol of the United States forces.

67. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, knowingly (harbor) (protect) (harbor and protect) ———, a person whom he, the said ———, then knew to be a member of the enemy's forces, and who was then being sought by a patrol of the United States forces, by (concealing the said member of the enemy's forces in his house) (———).

68. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, directly (hold correspondence with) (give intelligence to) (hold correspondence with and give intelligence to) the enemy by writing and transmitting secretly through the lines to one ———, whom he, the said ———, then knew to be an (officer) (———) of the enemy's army, a communication (in words and figures as follows) (substantially as follows), to wit.

69. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, furnish and deliver to certain members of the enemy's army ———, of the value of about $———, and ———, of the value of about $———, all of the total value of $———, he then well knowing that the persons to whom said goods were furnished and delivered were enemies of the United States.

CHARGE: Violation of the 82d Article of War.

70. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, (lurk) (act) (lurk and act) as a spy in and about ———, the (fortification) (post) (quarters) (encampment) of the Army of the United States there situated, and did there (collect) (attempt to collect) material information in regard to the (numbers) (resources) (operations) (———) of the

military forces of the United States, with intent to impart the same to the enemy.

CHARGE: Violation of the 83d Article of War.

71. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19— (through neglect) (willfully) suffer ———, of the value of $———, military property belonging to the United States, to be (lost) (spoiled by ———) (damaged by ———) [wrongfully disposed of by (sale to ———) (———)].

CHARGE: Violation of the 84th Article of War.

72. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19— [(through neglect) (willfully) injure by ———] (lose) ———, of the value of $———, issued for use in the military service of the United States.

73. *Specification:* In that ——— did at ———, on or about the ——— day of ———, 19—, (unlawfully sell to ———) (wrongfully dispose of by ———) ——— of the value of $———, issued for use in the military service of the United States.

CHARGE: Violation of the 85th Article of War.

74. *Specification:* In that ——— was, (in time of war), found drunk while on duty as ———, at ———, on or about the ——— day of ———, 19—.

CHARGE: Violation of the 86th Article of War.

75. *Specification:* In that ———, being on guard and posted as a sentinel (in time of war), at ———, on or about the ——— day of ———, 19—, was found sleeping on his post.

76. *Specification:* In that ———, being on guard and posted as a sentinel (in time of war), at ———, on or about the ——— day of ———, 19—, left his post before he was regularly relieved.

CHARGE: Violation of the 87th Article of War.

77. *Specification:* In that ———, who was then commanding ———, did on or about the ——— day of ———, 19—, become financially interested in the sale of ———, brought into said ——— for the use of the troops thereat by ———, by (receiving) (entering into an agreement to receive) from the said ——— (— per cent of the profits on said sales) (the sum of $—) as a consideration for the privilege (of ———) extended by him to said ———.

78. *Specification:* In that ———, who was then commanding ———, did, on or about the ——— day of ———, 19—, lay a (duty) (imposition) (duty and imposition) of (— per cent) (———) on the proceeds of all sales of ——— brought into said ———, and did appropriate the moneys collected on account of said (duty) (imposition) (duty and imposition) to (his own use and benefit) (———).

CHARGE: Violation of the 88th Article of War.

79. *Specification:* In that ——— did, on or about the ——— day of ———, 19—, do violence to ———, an inhabitant of the country, who was bringing (supplies) (provisions) (———) to the (camp) (garrison) (quarters) of the forces of the United States there situated, by striking and beating the said ———.

80. *Specification:* In that ———, and ———, acting jointly and in concert, did, on or about the ——— day of ———, 19—, interfere with ———, an inhabitant of the country, who was bringing (provisions) (supplies) (———) to the (camp) (garrison) (quarters) of the forces of the United States there situated by (preventing the said ——— from passing over a road leading into said ———, (———).

81. *Specification:* In that ———, did on or about the ——— day of ———, 19—, intimidate ———, an inhabitant of the country, who was bringing (provisions) (supplies) (———) into the (camp) (garrison) (quarters) of the forces of the United States there situated, by [threatening to kill the said ——— if he continued to bring (provisions) (supplies) (———) into said (camp) (garrison) (quarters)] (———).

CHARGE: Violation of the 89th Article of War.

82. *Specification:* In that ——— did at ———, on or about the ——— day of ———, 19—, commit a depredation upon (an) (a) (orchard) (———) belonging to ——— and situated near the said ———, by [entering the same against the will of the said ——— and (removing growing fruit from trees, the property of ———) (———)].

83. *Specification:* In that ——— and ——— did at ———, on or about the ——— day of ———, 19—, commit a riot in the public streets of said ——— by (resisting and fighting against the peace officers of that ———) (———).

84. *Specification:* In that ——— did at ———, on or about the ——— day of ———, 19—, wilfully destroy a growing crop of oats in a field belonging to ——— by (permitting the horses of his troop to graze in said field) (———).

85. *Specification:* In that ——— did at ———, on or about the ——— day of ———, 19—, without the authority of his commanding officer (destroy a building belonging to ———) (———).

86. *Specification:* In that ———, who was then commanding ———, at ———, did, on the ——— day of ———, 19—, complaint being made to him that ———, a ——— of his command, had (damaged) (destroyed) (damaged and destroyed) (———) ———, the property of ———, refuse to see reparation made to the said ——— so far as said ———'s pay would go toward such reparation and as provided for in the 105th Article of War.

CHARGE: Violation of the 90th Article of War.

87. *Specification:* In that ——— did at ———, on or about the ——— day of ———, 19—, use a (reproachful) (provoking) (reproachful and provoking) speech against ———, to wit: ———, or words to that effect, and did accompany said speech with a provoking gesture, to wit (shaking his closed fist in the face of the said ———) (———).

CHARGE: Violation of the 91st Article of War.

88. *Specification:* In that ———, being officer of the day at ——— and having knowledge that ——— and ——— intended and were about to engage in a duel near that ———, did on or about the ——— day of ———, 19—, connive at the fighting of said duel by knowingly permitting ———, one of the parties to said proposed duel, to leave the post and go toward the place appointed for said duel and at the time and at the hour which he, ———, then knew had been appointed therefor.

89. *Specification:* In that ———, being officer of the day at ———, and having knowledge on or about the ——— day of ———, 19—, that a challenge to fight a duel had been sent by ——— to ———, did fail to report the fact promptly to the proper authority.

90. *Specification:* In that ——— and ——— did at ———, on or about the ——— day of ———, 19—, fight a duel, using, as weapons therefor, (swords) (pistols) (———).

91. *Specification:* In that ——— did at ———, on or about the ——— day of ———, 19—, promote a duel between ——— and ——— by knowingly acting as a messenger for ——— and knowingly carrying from said ——— to said ——— a challenge to fight a duel.

CHARGE: Violation of the 92d Article of War.

92. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one ———, a human being by (shooting him with a rifle) (———).

93. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, forcibly and feloniously against her will, have carnal knowledge of ———.

CHARGE: Violation of the 93d Article of War.

94. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, willfully, maliciously, and feloniously burn the (dwelling house) (———) of ———.

95. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, with intent to (do him bodily harm), (commit a felony, viz, ———) feloniously (strike) (———) (in) (on) the ——— with a ———.

96. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, in the nighttime break into and enter the (dwelling house) (———) of ———, with intent to commit a felony, viz, ———.

97. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, fraudulently convert to his own use and benefit ———, value about $———, the property of ———, intrusted to him (by the said ———) (for ——— by ———).

98. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, feloniously take, steal, and carry away ———, value about $———, the property of ———.

99. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, willfully, feloniously, and unlawfully kill ———, by ——— him (in) (on) the ——— with a ———.

100. *Specification:* In that ———, did, at ———, on or about the ——— day of ———, 19—, unlawfully, willfully, and feloniously cut off the (hand) (arm) (———) of ———. (For the offense of maiming, see Specification No. 173.)

101. *Specification:* In that ——— (having) (did, on the — day of ———, 19—) in a (trial by court-martial of ———) (deposition for use in a trial by court-martial of ———) (———) (taken) (take) an oath, before a competent (tribunal) (officer) (person) that [he would (testify) (declare) (depose) (certify) truly] [a (declaration) (deposition) (certificate) (———) subscribed by him was true] [did at ——— on or about the ——— day of ———, 19—, willfully and contrary to such oath, (state) (subscribe a statement) in substance that ———] which (statement) (declaration) (deposition) (certificate) was a material matter and which statement he did not then believe to be true.

102. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, by (force and violence) (putting him in fear) feloniously take from the (person) (presence) of ———, ———, value about $———.

CHARGE: Violation of the 94th Article of War.

103. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, (make) (cause to be made by ———) a claim against the (United States) (Quartermaster at ———) (———) in the amount of $———, for (private property alleged to have been (lost) (destroyed) in the military service) (———), which claim was (false) (fraudulent) (false and fraudulent) in that ——— and was then known by the said ——— to be (false) (fraudulent) (false and fraudulent).

104. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, (present) (cause to be presented by ———) for (approval) (payment) (approval and payment) a claim against the (United States) (Quartermaster at ———) (———) in the amount of $———, for (services alleged to have been rendered to the United States by ———) (———), which claim was (false) (fraudulent) (false and fraudulent) in that ——— and was then known by the said ——— to be (false) (fraudulent) (false and fraudulent).

105. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, enter into an (agreement) (conspiracy) (agreement and conspiracy) with ———, to defraud the United States by (obtaining) (aiding ——— to obtain) the (allowance) (payment) (allowance and payment) of a (false) (fraudulent) (false and fraudulent) claim against the United States in the amount of $———, for (supplies) (———) alleged to have been furnished to the United States by ———, which claim was (false) (fraudulent) (false and frudulent) in that ——— and was the known by the said ——— to be (false) (fraudulent) (false and fraudulent).

106. *Specification:* In that ———, for the purpose of (obtaining) (aiding others to obtain) the (approval) (allowance) (payment) (approval, allowance, and payment) of a claim against the (United States) (Quartermaster at ———) (———), did, at ———, on or about the ——— day of ———, 19—, (make) (use) (make and use) a ———, which said ———, as he, ———, then knew contained a statement that ———, which statement was (false) (fraudulent) (false and fraudulent) in that ——— and was then known by the said ——— to be (false) (fraudulent) (false and fraudulent).

107. *Specification:* In that ———, for the purpose of (obtaining) (aiding others to obtain) the (approval) (allowance) (payment) (approval, allowance, and payment) of a claim against the (United States) (Quartermaster at ———) (———), did, at ———, on or about the ——— day of ———, 19—, (advise) (procure) (advise and procure) the (making) (use) (making and use) of a ——— by ———, which said ———, as he then knew, contained a statement that ———, which statement was (false) (fraudulent) (false and fraudulent) in that ———, and was then known by the said ——— to be (false) (fraudulent) (false and fraudulent).

108. *Specification:* In that ———, for the purpose of (obtaining) (aiding others to obtain) the (approval) (allowance) (payment) (approval, allowance, and payment) of a claim against the (United States) (Quartermaster at ———) (———), did, at ———, on or about the ——— day of ———, 19—, (make) (procure the making of) (advise the making of) (advise and procure the making of) an oath by ——— that ———, which said oath was false in that ———, and was then known by the said ——— to be false.

109. *Specification:* In that ———, for the purpose of (obtaining) (aiding others to obtain) the (approval) (allowance) (payment) (approval, allowance, and payment) of a claim against the (United States) (Quartermaster at ———) (———), did, at ———, on or about the ——— day of ———, 19—, (forge) (counterfeit) (forge and counterfeit) (the signature of ——— upon a ———) (a ———) in words and figures as follows: ———.

110. *Specification:* In that ———, for the purpose of (obtaining) (aiding ——— to obtain) the (approval) (allowance) (payment) (approval, allowance, and payment) of a claim against the (United States) (Quartermaster at ———) (———), did, at ———, on or about the ——— day of ———, 19—, (advise) (procure) (advise and procure) the (forging) (counterfeiting) (forging and counterfeiting) by ——— of (the signature of ——— upon a ———) (a ———) in words and figures as follows: ———.

111. *Specification:* In that ———, for the purpose of (obtaining) (aiding others to obtain) the (approval) (allowance) (payment) (approval, allowance, and payment) of a claim against the (United States) (quartermaster at ———) (———), did, at ———, on or about the ——— day of ———, 19—, (use) (advise the use of) (procure the use of) a ——— in words and figures as follows: ——— (the same) (the signature thereon) being (forged) (counterfeited) (forged and counterfeited), and then known by the said ——— to be (forged) (counterfeited) (forged and counterfeited).

112. *Specification:* In that ———, having (charge) (possession) (custody) (control) of (money) (———) of the United States, (furnished) (intended) (furnished and intended) for the military service thereof, did, at ———, on or about the ——— day of ——— 19—, knowingly (deliver) (cause to be deliverel) to ———, the said ———, having authority to receive the same, (an) (a) (amount) (number) (quantity) which, as he, ———, then knew was (——— dollars ——— cents) (———) less than the (amount) (number) (quantity) for which he received a (certificate) (receipt), from the said ———.

113. *Specification:* In that ———, being authorized to (make) (deliver) (make and deliver) a paper certifying the receipt of property of the United States (furnished) (intended) (furnished and intended) for the military service thereof, did, at ———, on or about the —— day of ———, 19—, (make) (deliver) (make and deliver) to ——— a writing in words and figures as follows: ———, without having full knowledge of the truth of the statements therein contained and with the intent to defraud the United States.

114. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19— (feloniously take, steal, and carry away) (embezzle) (knowingly and wilfully misappropriate) (apply to his own use) (apply to his own benefit) (apply to his own use and benefit) (wrongfully sell) (knowingly and without proper authority sell) (wrongfully and knowingly sell), ——— ——— of the value of about $———, property of the United States (furnished) (intended) (furnished and intended) for the military service thereof.

115. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, knowingly (purchase) (receive in pledge) from ——— ———, (in) (employed in) the military service of the United States for an (obligation) (indebtedness) ———, of the value of about $———, property of the United States, the said ——— not having the lawful right to (sell) (pledge) the same.

CHARGE: Violation of the 95th Article of War.

116. *Specification:* In that ———, being indebted to various creditors in the sum of about $——— and being without either means or probable means with which to liquidate within a reasonable time said indebtedness, did, at ———, on or about the ——— day of ———, 19—, unnecessarily contract with ——— a further indebtedness of about $———.

117. *Specification:* In that ——— was, at ———, on or about the —— day of ———, 19—, so (drunk) (disorderly) (drunk and disorderly) while in uniform, in the presence and hearing of several persons, as to disgrace the military service.

118. *Specification:* In that ———, having assigned to ——— his claim (against the United States) for pay in full for the month of ———, 19—, did, at ———, on or about the ——— day of ———, 19—, assign to ——— a second claim against the United States for pay in full for the said month of ———, 19—, which second claim was by him known to be false and fraudulent.

119. *Specification:* In that ———, being indebted to ——— in the sum of $——— for ———, which amount became due and payable (on) (about) (on or about) ———, did, at ———, on or about the ——— day of ———, 19—,

without due cause fail and neglect to pay said debt, notwithstanding the fact that he had been repeatedly requested by the said ——— to pay the amount thereof, thereby bringing discredit upon the military service.

120. *Specification:* In that ———, having on or about the ——— day of 19— become indebted to ——— in the sum of about $——— for ———, and having failed without due cause to liquidate said indebtedness, and having on or about the ——— day of ———, 19—, promised in writing to said ——— that he would on or about the ——— day of ———, 19—, (settle such indebtedness in full) (pay on such indebtedness the sum of $———), did, without due cause, at ———, on or about the ——— day of 19—, to the disgrace of the military service, fail to keep said promise.

121. *Specification:* In that ———, having made and executed in due form his voucher for pay as ——— for the month of ———, 19—, and having duly assigned the said voucher to ———, did at ——— on or about the ——— day of ———, 19—, while the said voucher and the assignment thereof remained in force and effect, falsely certify with his official signature to the correctness of another voucher for pay for the said month of ———, 19—, duly made, executed, and assigned to ———, which said certificate was in words as follows: ———.

122. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, with intent to deceive ———, officially (report) (state) to the said ———, that ———, which (report) (statement) was (known by the said ——— to be untrue) (believed by the said ——— to be untrue) (made by the said ——— with disregard of a knowledge of the facts) (made by the said ——— as true when he did not know it to be true) in that ———.

123. *Specification:* In that ———, with intent to defraud ———, did, at ———, on or about the ——— day of ———, 19—, unlawfully pretend to ——— that ———, well knowing that said pretenses were false, and by means thereof did fraudulently obtain from the said ——— (the sum of $———) (merchandise of the value of $———) (———).

124. *Specification:* In that ———, having at ———, on or about the ——— day of ———, 19—, voluntarily given his pledge in words and figures as follows: ———, which pledge was accepted by his commanding officer ———, did, at ———, on or about the ——— day of ———, 19—, in disregard of his honor violate said pledge by ———.

CHARGE: Violation of the 96th Article of War.

125. *Specification:* In that ———, being on guard as a ———, did, at ———, on or about the ——— day of ———, 19—, abandon his guard.

[NOTE.—This form will be used only in case where absence from guard is coupled with an intent not to return during the tour of duty. Ordinary absence from guard duty will be charged under A. W. 61.)

126. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, [kick a public (horse) (———) in the belly] (———).

127. *Specification:* In that ———, a (sentinel) (overseer) (———), being in charge of prisoners, did, at ———, on or about the ——— day of ———, 19—, allow ———, a prisoner under his charge, to (go to) (enter) (go to and enter) an unauthorized place, to wit: ———.

128. *Specification:* In that ———, a (sentinel) (overseer) (———), being in charge of prisoners, did, at ———, on or about the ——— day of ———, 19—, allow ———, a prisoner under his charge, to (hold unauthorized conversation with ———) (loiter) (neglect his task by ———) (obtain ———) (———).

129. *Specification:* In that ———, a (sentinel) (overseer) (———), being in charge of prisoners and having received a lawful order from ———, to

require a prisoner under his charge to ———, did, at ———, on or about the ——— day of ———, 19—, fail to obey the same.

130. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, without authority, appear in civilian clothing.

131. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, appear (at) (on) ——— (without his ———) (with his ——— not buttoned) (in an unclean ———) (———).

132. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, attempt to (strike) (———) ——— (in) (on) the ——— with ———.

[NOTE.—For assaults upon officers and noncommissioned officers amounting to felonies see A. W. 93.]

133. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, (strike) (———) ——— (in) (on) the ——— with ———.

[NOTE.—See note under Specification 132.]

134. *Specification:* In that ——— did, at ——— (on or about the ——— day of ———, 19—), (between ——— and ———), with the intention of evading his (duty) (———) as a (soldier) (———), feign (illness), (disability), (insanity), (———).

135. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19— (attempt to), (threaten to) (strike) (———) ———, a sentinel in the execution of his duty, [(in) (on) the ———] with ———.

136. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, strike (———) ———, a sentinel in the execution of his duty, (in) (on) the ——— with ———.

137. *Specification:* In that ———, a prisoner in confinement serving sentence in the post guardhouse, (———), did, at ———, on or about the ——— day of ———, 19—, (escape) (attempt to escape) from such confinement.

138. *Specification:* In that ———, a prisoner, did, at ———, on or about the ——— day of ———, 19—, use the following disrespectful language to ———, a sentinel in the execution of his duty: "———," or words to that effect.

139. *Specification:* In that ———, having been restricted to the limits of ———, did, at ———, on or about the ——— day of ———, 19—, break the same by going to ———.

140. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, unlawfully carry a concealed weapon, viz, a ———.

141. *Specification:* In that ———, did, at ———, on or about the ——— day of ———, 19—, (urinate) (defecate) (———) (on the floor of the squad room) (———).

142. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, willfully and unlawfully [(conceal) (remove) mutilate) (obliterate) (destroy)] [attempt to (conceal) (remove) (mutilate) (obliterate) (destroy)] [take and carry away with intent to (conceal) (remove) (mutilate) (obliterate) (destroy) (steal)] a public record, to wit: (the descriptive list of ———) (———).

143. *Specification:* In that ———, a prisoner in confinement in the post guard house, (———), did, at ———, on or about the ——— day of ———, 19—, conspire with ——— and ——— to escape from such confinement. (For joint charge see par. 69.)

144. *Specification:* In that ——— did, at ———, on or about the ——— day, of ———, 19—, willfully destroy ———, value about $———, property of the United States.

145. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, through carelessness, discharge a (service rifle) (———) in his (squad room) (in his tent) (———).

146. *Specification:* In that ———, having received a lawful order from ———, a sentinel in the execution of his duty, to ———, did, at ———, on or about the ——— day of ———, 19—, (fail to obey) (willfully disobey) the same.

147. *Specification:* In that ——— was, at ———, on or about the ——— day of ———, 19—, (drunk) (disorderly) (drunk and disorderly) in (camp) (post) (quarters) (———).

148. *Specification:* In that ——— was, at ———, on or about the ——— day of ———, 19—, (drunk) (disorderly) (drunk and disorderly) in uniform and did thereby bring discredit upon the military service.

149. *Specification:* In that ———, a sentinel (———) in charge of prisoners, did, at ———, on or about the ——— day of ———, 19—, drink intoxicating liquor with ———, a prisoner under his charge.

150. *Specification:* In that ———, a prisoner, was, at ———, on or about the ——— day of ———, 19—, found drunk.

151. *Specification*: In that ———, having received a lawful order from ——— to ———, the said ——— being in the execution of his office, did, at ———, on or about the ——— day of ———, 19—, fail to obey the same.

152. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, violate (standing orders) (regulations) of ——— by ———.

153. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, wrongfully use ———, a narcotic drug.

154. *Specification:* In that ———, being indebted to ——— in the sum of $———, which amount became due and payable (on) (about) ———, did, at ———, on or about the ——— day of ———, 19—, without due cause, fail and neglect to pay said debt, notwithstanding the fact that he had been repeatedly requested by the said ——— to pay the amount thereof, thereby bringing discredit upon the military service.

155. *Specification:* In that ———, having been directed to report for prophylactic treatment at (the post hospital) (———) did, at ———, on or about the ——— day of ———, 19—, fail to report as directed.

156. *Specification:* In that ——— did, at ———, on or about the ——— day of———, 19—, with intent to deceive ———, officially (report) (state) to the said ———, that ———, which (report) (statement) was (known by the said ——— to be untrue) (believed by the said ——— to be untrue) (made by the said ——— with disregard of a knowledge of the facts) (made by the said ——— as true when he did not know it to be true) in that ———.

157. *Specification:* In that ———, (having) (did on the ——— day of ———, 19—,) in a (trial by court-martial of ———) (deposition for use in a trial by court-martial of ———) (———) (taken) (take) an oath, before a competent (tribunal) (officer) (person) that [(he would testify) (declare) (depose) (certify) (truly)] [a (declaration) (deposition) (certificate) (———) subscribed by him was true] did, at ———, on or about the ——— day of ———, 19—, willfully and contrary to such oath, (state) (subscribe a statement) in substance that ———, which (statement) (declaration) (deposition) (certificate) (———) he did not then believe to be true.

[Note.—For charging perjury see Specification No. 101.]

158. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, with intent to defraud, feloniously forge (in its entirety) [by (altering ———) (erasing ———) (adding ———)] a certain (check) (———) in the following words and figures ———.

159. *Specification:* In that (Sergeant) (Corporal) ——— did, at ———, on or about the ——— day of ———, 19—, gamble with Privates ——— and ———.

160. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, gamble in quarters, in violation of orders.

161. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, while (at a barrack window) (———) indecently expose to public view his (———).

162. *Specification:* In that ——— (for and in behalf of one ———) did, at ———, on or about the ——— day of ———, 19—, loan to ——— $———, under an agreement whereby he, the said ———, was to receive for the use of said money for ——— (months) (days) (interest at the rate of ——— per cent per (annum) (month) (the sum of $———), thereby (demanding) (receiving) (demanding and receiving) an usurious rate of interest for said loan.

163. *Specification:* In that ———, while posted as a sentinel, did, at ———, on or about the ——— day of ———, 19—, loiter on his post.

164. *Specification:* In that ———, with intent to defraud, did, at ———, on or about the ——— day of ———, 19—, unlawfully pretend to ——— that ———, well knowing that said pretenses were false and by means thereof did fraudulently obtain from the said ——— (the sum of $———) (merchandise of the value of $———) (———).

165. *Specification:* In that ———, while suffering (with) (from) ———, did, at ———, on or about the ——— day of ———, 19—, refuse to submit to the (dental *or* medical treatment) (surgical operation) prescribed by ———, the attending (dental) surgeon for the (disease) (injury), the said (treatment) (operation) consisting in ———, being necessary and being without appreciable risk to his life.

166. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, willfully maim himself in the ——— by (shooting himself with ———) (———), thereby unfitting himself for the full performance of military service.

167. *Specification:* In that ———, while posted as a sentinel, did, at ———, on or about the ——— day of ———, 19—, sit down on his post.

168. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, commit sodomy upon the person of one ———.

[NOTE.—If the acts alleged do not amount to sodomy as defined in par. 443, the acts committed will be accurately described in the specification.]

169. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, while accompanying his organization on (a practice march) (maneuvers) straggle.

170. *Specification:* In that ———, knowing that ——— would corruptly and willfully (give false testimony) (make a false declaration, etc.), did, at ———, on or about the ——— day of ———, 19—, procure the said ——— to commit perjury, by inducing him, the said ———, to take an oath before a competent (tribunal) (officer) (person) in a (trial by court-martial of ———) that [he, the said ———, would (testify) (declare) (depose) (certify) truly] [a (declaration) (deposition) (certificate) subscribed by him was true] and, willfully, corruptly and contrary to such oath, to (testify) (declare) (depose) (certify) as follows: ——— ———, which (testimony) (declaration, deposition, etc.) was false, was (material) (a material matter) and was known by the said ——— and the said ——— to be false. (*C. M. C. M., No. 1.*)

171. *Specification:* In that ——— did, at ———, on ———, with intent to defraud, feloniously utter to ——— as true a certain (written instrument) (———), in the following words and figures, "———," the said ——— well knowing that the said (instrument) (———) was forged.

172. *Specification:* In that ———, a prisoner on parole, did, at ———, on or about the ——— day of ———, 19—, break his parole by ———.

173. *Specification:* In that ——— did, at ———, on or about the ——— day of ———, 19—, with intent to (maim) (disfigure) ———, willfully and feloniously [(cut) (bite) (———) the (nose) (ear) (———) of] [(throw) (pour) corrosive acid (———) upon] the said ———. (For mayhem, see Specification No. 100.)

APPENDIX 5.

SUGGESTIONS FOR TRIAL JUDGE ADVOCATES.

The judge advocate of a general or special court-martial shall prosecute in the name of the United States, and shall, under the direction of the court, prepare the record of its proceedings. (A. W. 17.)

The following notes, indicating more or less in proper sequence certain action usually proper to be taken by a trial judge advocate, may be found useful:

1. UPON RECEIPT BY AN OFFICER OF AN ORDER APPOINTING HIM JUDGE ADVOCATE OF A COURT-MARTIAL.

(*a*) Examine the order carefully and take appropriate action to cause the correction of any substantial irregularity therein.

(*b*) Examine and study such portions of the Manual for Courts-Martial, Digest of Opinions of the Judge Advocates General, Army Regulations, and War Department or other orders affecting courts-martial as may appear desirable. He should, in this connection, give particular attention to the duties of trial judge advocates, to the procedure of courts-martial, and to the matter of evidence.

2. UPON RECEIPT OF CHARGES IN A CASE.

(*a*) Prepare an envelope to contain the papers pertaining thereto.

(*b*) Examine the charges and all papers received to see that none appear to be missing, that the charges appear to be correctly drawn, that the evidence of previous convictions is complete and correct, especially as to dates, authentication, proper signatures, etc.

(*c*) Make authorized necessary changes in charges and take proper action in connection with defects, if any, found in evidence of previous convictions.

(*d*) Report to the appointing authority necessary or desirable changes which the judge advocate is not authorized to make.

(*e*) Furnish the accused, if he so desires, a copy of the charges; and, if he desires to state, ascertain from him how he intends to plead.

(*f*) Ascertain whether accused desires counsel; and if so, ascertain whether he wishes a particular person; and if so, whom.

(*g*) Arrange for counsel, if desired to do so.

(*h*) Prepare case for trial, investigating it thoroughly, and determining upon plan of prosecution.

(*i*) Arrange with president date and time of meeting of court.

(*j*) Arrange for court-martial room, see that it is in order, provided with necessary tables, chairs, stationery, and room to be heated, if necessary.

(*k*) Notify all members of date and time of meeting and arrange for presence of other necessary persons, including the accused and his counsel, reporter, interpreter, if required, and witnesses.

(*l*) Arrange to have at trial such books, etc., as may be required. The following are frequently found necessary or useful:

Manual for Courts-Martial.
Digest of Opinions, Judge Advocates General.
Standard Text on Military Law.
Ordnance Price List.
Clothing Price List.

(*m*) Determine maximum punishment, if any, imposable upon conviction of each of the several offenses charged, and note same on slip for use of court in the event of a conviction.

3. UPON THE ASSEMBLING OF THE COURT.

(*a*) Note officers present and absent.

(*b*) When court appears to be ready to proceed, announce the readiness of the prosecution to proceed with trial of ———, who desires to introduce ——— as counsel, or does not desire to introduce counsel.

(*c*) Swear reporter, if any.

(*d*) If a general court-martial, ask accused if he desires a copy of the record of his trial. If he does not, do not have copy made; if he wishes copy, direct reporter to prepare one.

(*e*) Read aloud to accused the order appointing the court and each modifying order.

(*f*) Ask accused if he objects to being tried by any member present named in the order or orders.

(*g*) After action on challenge, if any made, has been had, again ask the accused whether he objects as above. Continue this until accused has no further objection.

(*h*) Swear members of court.

(*i*) Be sworn by president.

(*j*) Read charges and specifications aloud slowly to the accused, and, having done so, ask him how he pleads to the first specification, first charge—if necessary rereading to him the specification; then how he pleads to the second specification, first charge, etc.; then to the first charge, etc.

(*k*) If there be a plea of guilty, the president makes to accused the required explanations and asks him the required questions.

(*l*) Read to court from chapter on punitive articles the gist of each of the several offenses charged.

(*m*) Introduce and swear witnesses for the prosecution. In some cases it may be desirable to acquaint the court with the particular specification with which the testimony of a particular witness is connected.

(*n*) In all cases attempt to establish by evidence each of the several specifications, except such elements as may be the subjects of judicial notice or as are admitted.

(*o*) Examine each witness, having careful regard for the rules of evidence.

(*p*) Offer opportunity to cross-examine.

(*q*) Reexamine, if desirable.

(*r*) Ask court if there are any questions by the court.

(*s*) If any witness is recalled, remind him that he is still under oath.

(*t*) When the prosecution has nothing further to offer for the time, announce that the prosecution rests.

(*u*) Swear witnesses for defense, in succession, and cross-examine so far as desirable.

(*v*) After defense rests, swear and examine witnesses, if any, in rebuttal for prosecution.

(*w*) If the accused neither testifies nor makes a statement, the president makes to him the required explanation and asks him the required questions.

(*x*) Offer accused opportunity to make a statement.

(*y*) Make closing statement, if any.

4. ADJOURNMENT DURING TRIAL.

(*a*) Note time of adjournment.

(*b*) Arrange, if practicable, to have completed record of proceedings to date ready before next assembling of court.

(*c*) Subscribe the record of proceedings for the day.

5. FINDINGS.

(*a*) After both prosecution and defense have concluded, the court closes for findings, and in the case of a person not a soldier to award sentence upon conviction.

(*b*) Upon conviction of a soldier, the court opens for the purpose of receiving evidence of previous convictions, if there be any.

(1) Read aloud duly authenticated evidence of previous convictions referred to the court by the appointing authority.

(2) Invite attention of court to any apparent irregularity in the evidence of previous convictions.

(3) Ask the accused whether the evidence of the several previous convictions and the statement of service as shown on the charge sheet are correct.

(4) Invite the attention of the court to any apparent irregularity in the findings.

6. SENTENCE.

(*a*) The court will then close to determine upon and award the sentence.

(*b*) After awarding sentence the court notifies the judge advocate of the same.

(*c*) Invite the attention of the court to any apparent irregularity in the sentence.

7. ADJOURNMENT AT CLOSE OF TRIAL.

(*a*) After sentence has been awarded the court either proceeds to other business or adjourns.

(*b*) Note time of proceeding to other business or of adjournment.

8. AFTER TRIAL.

(*a*) Complete vouchers for civilian witnesses and deliver same, if practicable, before the witness leaves.

(*b*) Take proper measures to insure the security of the findings and sentence, if recorded, and that they are not disclosed to any but the proper authority.

(*c*) When record is received back from reporter:

(1) Examine carefully to see that it is in proper form, complete, and correct as to both form and substance.

(2) Make proper notation on index sheet as to copy of record.

(3) See that copies of evidence of previous convictions are correct, certify same, and return originals to organizations.

(4) If not so attached, attach index sheet and all exhibits.

(5) See that record is *securely bound.*

(*d*) Enter findings and sentence.

(*e*) If findings and sentence are typewritten, add proper certificate.

(*f*) Authenticate record.

(*g*) Have president authenticate record.

(*h*) Certify original voucher and send it to reporter or to a near disbursing quartermaster, and inclose copy with record.

(*i*) Verify completeness and correctness of record by seeing that, so far as necessary in the particular case, each requirement stated in Chapter XV, Section I, paragraph 357 (*b*) has been complied with.

(*j*) Indorse and forward charges, accompanied by record of trial and all other papers received with the case, to the appointing authority.

9. WEEKLY REPORT.

Each Saturday report through the president of the court and the commanding officer all charges which have not been returned to the appointing authority, showing date of receipt of each and reasons for delay in trial.

10. RECORD WHICH MAY BE KEPT.

It is suggested that when deemed desirable at least the following record be kept by the trial judge advocate in each case. This record may be conveniently kept on an envelope to be used as a container for the charges and various papers:

Date of receipt by him of charges or other papers.

Date of preliminary consultation by him with the accused.

How accused intends to plead, if stated by him.

Counsel:

Desired?

If so, name.

If so, date on which commanding officer so informed.

Date on which judge advocate informed of appointment of counsel.

Result of examination in preparing for trial, and dates and other necessary facts pertaining to each other incident connected with the case, such as mailing interrogatories, subpœnaing witnesses, etc.

Date of trial.

Date and hour record received back from reporter.

Date and hour record forwarded to appointing authority.

Date of return to commanding officer of evidence of previous convictions, if any, to be so returned.

APPENDIX 6.

FORM FOR RECORD OF TRIAL BY GENERAL COURT-MARTIAL AND REVISION PROCEEDINGS.

RECORD OF TRIAL BY GENERAL COURT-MARTIAL[1] OF

.....

INDEX.

Page.

Arraignment.....
Pleas.....
Statement by accused.....
Address by counsel.....
Reply by judge advocate.....
Findings.....
Previous convictions submitted.....
Sentence (or acquittal).....
Proceedings in revision.....

Testimony.

Name of witness.	Direct.	Cross.	Redirect.	Examination by court.	Recalled.
	Page.	*Page*	*Page.*	*Page.*	*Page.*
.....	.....	.....	.....	.....	.....
.....	.....	.....	.....	.....	.....
.....	.....	.....	.....	.....	.....

Exhibits.

	Number.	Page where introduced.
Deposition of Capt. ——	.....	.....
Deposition of Pvt. ——	.....	.....
Letter of ——	.....	.....

Carbon copy of the record { not desired by accused.[2] / furnished the accused.

[1] See "Courts-martial, Records of trial, Chap. XV." The record will be clear and legible and, if practicable, without erasure or interlineation.

Erasures or interlineations will be authenticated by the initials of the judge advocate or of the president, or, in a proper case, of the assistant judge advocate.

The pages of the record will be numbered at the bottom, and margins of 1 inch will be left at the top, bottom, and left side of each page.

[2] Line out inappropriate words.

Proceedings of a general court-martial which convened at ———, ———, pursuant to the following order:

(*Here insert a literal copy of the order appointing the court and, following it, copies of any orders modifying the detail.*)

FORT ———, ———,
——— ———, 19—.

The court met pursuant to the foregoing order at ——— o'clock —. m.

PRESENT.[1]

Maj. ———, 5th Cavalry.
Capt. ———, Medical Corps.
First Lieut. ———, 10th Infantry.
First Lieut. ———, 5th Cavalry.
Second Lieut. ———, Coast Artillery Corps.
First Lieut. ———, 5th Cavalry, judge advocate.
Second Lieut. ———, 29th Infantry, assistant judge advocate.

ABSENT.[2]

Capt. ———, Coast Artillery Corps (detached service).
Second Lieut. ———, 10th Infantry (leave of absence).

The court proceeded to the trial of Private ———, Company ———, ——— Infantry, who, on appearing before the court, stated that he did not desire counsel *or* introduced ——— as counsel.

——— was sworn as reporter.

Capt. ——— announced that he was the accuser and was excused and withdrew.

(*If an interpreter is to be used he should be sworn when his services are required.*)[3]

---

[1] In the record of the proceedings of a court-martial at its organization for the trial of a case the officers detailed as members, judge advocate, and assistant judge advocate will be noted by name as present or absent. In the record of the proceedings of subsequent sessions in the same case (except in proceedings in revision) the following form of words will be used, subject to such modification as the facts may require: "Present, all the members of the court, the judge advocate, and the assistant judge advocate." When the absence of an officer who has not qualified or who has been relieved or excused as a member has been accounted for, no further note will be made of it.

[2] A member of a court-martial who knows, or has reason to believe, that he will, for proper reason, be absent from a session of the court, will inform the judge advocate accordingly. When a member of a court-martial is absent from a session thereof, the judge advocate will cause that fact, together with the reason for such absence, if known to him, to be shown in the record of the proceedings. If the reason for such absence is not known to the judge advocate, he will cause the record to show the member as absent, cause unknown.

[3] Words in italics will not be copied into the record.

The order appointing the court (and the order or orders modifying the detail, *if any*) was (*or* were) read to the accused, and he was asked if he objected to being tried by any member present named therein; to which he replied in the negative; *or*

Defense: (*Insert statement.*)

Captain ———:

(*Insert the statement of the challenged member, who ordinarily should respond to the challenge by briefly admitting or denying the grounds of the challenge. Should the accused, after the statement, desire to call upon the member to testify as to his competency, the record should continue:*)

The accused having requested that the challenged member be sworn as to his competency to act as a member of the court, ——— was sworn by the judge advocate and testified as follows:

The court was closed, and on being opened the president announced in the presence of the accused and his counsel that the challenge was not sustained *or* that the challenge was sustained.

If the challenge is sustained: ——— then withdrew.

The accused was asked if he objected to any other member present, to which he replied in the negative *or*

Defense:

(*Insert objection in full, record, and continue as before until accused replies in the negative.*)

The members of the court, the judge advocate, and the assistant judge advocate were then sworn.

(*If delay is desired, request should now be made and the proceedings recorded. If no continuance is requested, the record should continue:*)

The accused was then arraigned upon the following charges and specifications:[1]

CHARGE I: Violation of the ——— article of war.

Specification: In that, etc.

CHARGE II: Violation of the ——— article of war.

Specification 1: In that, etc.

Specification 2: In that, etc.

——— ———, Capt. ——— Infantry.

To which the accused pleaded:[2]

To the specification, Charge I: Guilty *or* Not guilty.

To Charge I: Guilty *or* Not guilty.

To Specification 1, Charge II: Guilty *or* Not guilty.

To Specification 2, Charge II: Guilty *or* Not guilty.

To Charge II: Guilty *or* Not guilty.

The paragraphs of the Manual for Courts-Martial that set out the gist of each of the several offenses were read to the court by the judge advocate.

---

[1] All words that precede the charge proper are not parts of the charges *and will not be copied into the record*, but the name, rank, and organization of the officer subscribing the charges will be copied into the record after the charges and specifications.

[2] In case the accused pleads guilty in whole or in part to any charge or specification, the record will show the explanation of the president and the reply of the accused required by par. 154 (*d*).

Sergt. John Jones, Company ———, ——— Infantry, a witness for the prosecution, was sworn and testified as follows:

Questions by prosecution:

Q. Do you know the accused? If so, state who he is.

A. I do; Pvt. ———, Company ———, ——— Infantry.

(*The succeeding questions of the prosecution and their answers should follow in order.*)[1]

Questions by defense:

Q. ———?

A. ———.

(*If the defense declines to cross-examine the witness, the record should state:*)

The defense declined to cross-examine the witness.

Questions by prosecution:

Q. ———?

A. ———.

Questions by defense:

Q. ———?

A. ———.

Questions by court:

Q. ———?

A. ———.

Prosecution: (*Insert objection.*)

Member: (*Insert reply, etc.*)

(*If the accused or another member object, the record would proceed in a corresponding way.*)

The court was closed, and on being opened the president announced in the presence of the accused and his counsel that the objection was sustained *or* was not sustained.

(*In the latter case the record should continue:*)

The question was then repeated:

A. ———.

(*If the court considers it necessary to hear the testimony of the witness read or the witness desires to have any part of his testimony read for correction, the record will show the fact and the corrections, if any.*)

(*After the proper foundation for the introduction of a writing has been laid the record will continue.*)

Prosecution: "I offer in evidence the" (*Describe the writing or other proposed exhibit*).

Defense: (*Insert his reply. If there is no objection the record will continue.*)

---

[1] The record should set forth fully all the testimony introduced upon the trial, the oral portion as nearly as practicable in the precise words of the witness. If the court should decide to strike out any part, it will not be literally stricken out or omitted from the record, but will not be thereafter considered as part of the evidence.

The paper (*or other proposed exhibit*) was then received in evidence and is appended marked —[1] (*insert the number of the exhibit*).

(*If there is objection the record will continue by stating any further remarks of the prosecution.*)

The court was closed, and on being opened the president announced in the presence of the accused and his counsel that the objection was sustained (*or* was not sustained).

(*If the objection is not sustained the record will continue as in the case where there is no objection. If the objection is sustained there will be no further entry.*)

(*If it is the defense that seeks to introduce the writing, the record would proceed in a corresponding manner.*)

(*At the close of the prosecution the record should continue.*)

Prosecution: The prosecution rests.

(*If the court adjourns to meet another day the record should continue.*)

The court then, at —— o'clock —. m., adjourned to meet at —— o'clock —. m. on ———.

——— ———,
First Lieutenant 5th Cavalry, Judge Advocate.

FORT ———, ——— ———, *19*—.

The court met, pursuant to adjournment, at ——— o'clock —. m.

Present:

All the members of the court, the judge advocate, and the assistant judge advocate.[2]

The accused, his counsel, and the reporter were also present.

(*If the proceedings of the previous day are required to be read, the fact will be recorded in the following form:*

The proceedings of ——— were read and approved, *or* corrected, as follows:

(*In the latter case enumerate corrections, giving page and line on which they occur.*)

Corpl. John Smith, Company ———, ——— Infantry, a witness for the defense, was sworn and testified as follows:

Questions by prosecution:

(*When considered desirable, the first question may be as to the identity of the witness.*)

Q. Do you know the accused? If so, state who he is.

A. ———.

Questions by defense:

Q. ———?

A. ———.

(*Should the accused testify in his own behalf, the record will continue.*)

---

[1] All documents and papers made part of the proceedings, or copies of them, will be securely fastened (*but not pasted*) to the record, in the order of their introduction, after the space left for the remarks of the reviewing authority, and marked "1," "2," "3," etc., so as to afford easy reference. Documents or other writings, or matter excluded by the court will not ordinarily be appended to the record, but the record should simply specify the character of the writings and the grounds upon which they were ruled out.

[2] If any member is absent, if not already accounted for, add "Except—" (*giving cause of absence, if known*).

The accused, at his own request, was sworn and testified as follows:

Questions by defense:

Q. ———?

A. ———.

(*If the defense offers no other witness, the record should continue.*)

The defense had no further testimony to offer and no statement to make, *or*, having no further testimony to offer, made the following verbal statement.

Or, having no further testimony to offer, submitted a written statement, which was read to the court, and is hereto appended and marked —.[1]

Or, requested until ——— o'clock —. m. to prepare his defense.

(*If the court takes a recess during the time asked for, the record will continue.*)

The court then took a recess until ——— o'clock —. m., at which hour the members of the court, the judge advocate, the assistant judge advocate, the accused, his counsel, and the reporter, resumed their seats.

(*Or, if the court has other business before it, the record may continue.*)

The court then proceeded to other business, and at ——— o'clock —. m. resumed the trial of this case, at which hour, etc.

Defense: (*Insert statement*).

Or, The defense read to the court a statement, which is hereto appended and marked —.[1]

The prosecution: (*Insert statement*).

Or, The prosecution read to the court a statement, which is hereto appended and marked —.

The court was closed, and finds the accused:

Of the specification, Charge I: Guilty *or*, Not guilty.

Of Charge I: Guilty *or* Not guilty.

Of Specification 1, Charge II: Guilty, except the words "———," substituting therefor the words "———"; of the excepted words, "Not guilty" and of the substituted words "Guilty."

Of Specification 2, Charge II: Guilty *or* Not guilty.

Of Charge II: Guilty *or* Not guilty, *or* Not guilty, but guilty of ———.

(*If a soldier is found guilty, the record should continue.*)

The court was opened and the judge advocate stated, in the presence of the accused and his counsel, that he had no evidence of previous convictions to submit.

Or, read the evidence of ——— previous convictions,[2] copies of which are hereto appended and marked "4," "5," etc.

(*If the defense has any statement to make in regard to the previous convictions or statement of service, it will be recorded.*)

The court was closed, and sentences the accused to ———.

(*No previous convictions, or accused acquitted.*)

The court sentences the accused, Private ——— ———, ——— Infantry, to ———, etc., *or* acquits the accused.

---

[1] The statement of the accused, or argument in his defense, and all pleas to the jurisdiction in bar of trial or in abatement, when in writing, should be signed by the accused himself, referred to in proceedings as having been submitted by him, and appended to the record.

[2] When the proof produced is the copy furnished to the company or other commander it will be returned to him and a copy of it attached to the record, if the trial be by general court-martial. The copy should be bound with the record as an exhibit.

The court, at — m., was opened and proceeded to other business.
Or, adjourned until — m., the ——— instant.
Or, adjourned to meet at the call of the president.

——— ———,
Major, 5th Cavalry, President.

——— ———,
First Lieutenant, 5th Cavalry, Judge Advocate. ———.[1]

(*At least two blank sheets will be inserted after the adjournment and before the exhibits for the decision and orders of the reviewing authority.*)

BINDING AND BRIEF.

(*The papers forming the complete record will be securely bound together at the top (easily removed clips or paper fasteners will not be used) and the record folded in four folds and briefed on the first fold, as follows:*

——— ———,
Private, Company ———, ——— *Infantry.*
Trial by general court-martial.

FORM FOR REVISION OF RECORD.[2]

Fort ——— ———.
——— ———, 19—.

The court reconvened at ——— o'clock —. m., pursuant to the following indorsement:
(*Insert copy of indorsement.*)

PRESENT.[3]

Maj. ———, 5th Cavalry.
Capt. ———, Medical Corps.
First Lieut. ———, 10th Infantry.
First Lieut. ———, 5th Cavalry.
Second Lieut. ———, Coast Artillery Corps.
First Lieut. ———, 5th Cavalry, judge advocate.
Second Lieut. ———, 29th Infantry, assistant judge advocate.

ABSENT.

(*Insert names of absentees and state cause of absence, if known.*)
The judge advocate read to the court the foregoing indorsement of the convening authority.[4]

---

[1] In case of the death, disability, or absence of the judge advocate, see A. W. 33. When the judge advocate records the findings and sentence by the use of a typewriting medium he will certify immediately after the authentication of the record as follows: "I certify that I recorded the findings and sentence of the court." When the record is completed the judge advocate will forward it without delay to the appointing authority as an inclosure to the indorsement of the judge advocate, returning the original charges.

[2] See "Record of revision," par. 357, *ante*. The court is usually reconvened by indorsement on the charges returning them to the president of the court with the directions of the appointing authority.

[3] The record should show the name of each member of the court present during the proceedings in revision.

[4] The judge advocate will also read any other indorsements that may be connected with the proceedings in revision.

The court was closed and revokes its former findings and sentence, and finds the accused, etc.

Or, revokes its former sentence and sentences the accused, etc.

Or, respectfully adheres to its former findings and sentence.

Or, amends the record by, etc.[1]

The judge advocate was then recalled and the court at ——— —. m., etc.

———,

Major, 5th Cavalry, President.

———,

First Lieutenant, 5th Cavalry, Judge Advocate.

(*The record of revision will be appended to the original proceedings, following them immediately, before the exhibits, and will be forwarded by indorsement on the charges to the appointing authority.*)

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[1] See par. 364.

APPENDIX 7.

FORM FOR RECORD OF TRIAL BY A SPECIAL COURT-MARTIAL.

FORT ———,
———— ————, 19—.

The special court-martial appointed by paragraph ———, Special Orders, No. ———, Headquarters ———, ———, 19—[1] as modified by paragraph ———, Special Orders, No. ———, Headquarters ———, met at ———, — m.

PRESENT.

ABSENT.[2]

The court proceeded to the trial of Private ———, Company ———, ——— Infantry, who, on appearing before the court[3] (stated that he did not desire counsel) (introduced ——— as counsel).

(——— was sworn as reporter.)[4]

(Capt. ———, because ineligible, was excused and withdrew.)

(First Lieuts. ——— and ——— were, upon challenge, excused and withdrew.)

The accused stated that he had no objection to trial by any member (remaining) present.

The members of the court and the judge advocate were sworn.

The accused was arraigned upon the following charges and specifications:

CHARGE I: Violation of the ——— article of war.

Specification: In that, etc.

CHARGE II: Violation of the ——— article of war.

Specification 1: In that, etc.

Specification 2: In that, etc.

———— ————,
Captain, ——— *Infantry.*

PLEAS.[5]

To all specifications and charges: ———.[6]

To the Specification, Charge I: ———.[7]

To Charge I: ———.

To Specification 1, Charge II: ———.

To Specification 2, Charge II: ———.

To Charge II: ———.

---

[1] The number, source, and date of the order appointing the court and of each order modifying the detail will be stated.

[2] Statement of neither reason nor authority for the absence is required.

[3] Words inclosed in parentheses will in a proper case be omitted.

[4] A judge advocate of a special court may, when authorized by the appointing authority, employ a stenographic reporter, to be paid at the rates fixed in paragraph ———.

[5] If a special plea is made, the record will set out in full the proceedings had thereon, including all testimony taken thereon and statements made relative thereto, as well as the disposition thereof made by the court.

[6] This or similar language will be used when the pleas to all the specifications and charges are the same.

[7] For action when the accused pleads guilty in whole or in part and evidence is recorded, see par. 154 (*d*).

The following-named persons were sworn and testified:
Sergt. ———, ——— Infantry.
Corpl. ———, ——— Infantry.
Pvt. ———, ——— Infantry.
The defense was given full opportunity to examine each witness.
(The depositions of the following-named persons were received in evidence and are hereto appended marked —, —, —.)
The accused (at his own request was sworn and testified) (made a statement to the court).
The accused stated that he had nothing further to offer.
The court was closed and finds the accused:
Of all specifications and charges: ———.[1]
Of the Specification, Charge I: ———.
Of Charge I: ———.
Of Specification 1, Charge II: ———.
Of Specification 2, Charge II: ———.
Of Charge II: ———.
(The court therefore acquits him.)
The court was opened and the judge advocate, in the presence of the accused (and his counsel) (stated that he had no evidence of previous convictions to submit) (read the evidence of ——— previous convictions.)
(The court was closed and sentences the accused to ———.)
The court was opened and (proceeded to other business) (adjourned.)[2]

——— ———,
Major, ——— Infantry, President.

——— ———,
First Licutenant, ——— Infantry, Judge Advocate.
Approved, ———, 191—

——— ———,
Colonel, ——— Infantry, Commanding.

---

[1] This or similar language will be used when the findings of the court on all the specifications and charges are the same.
[2] One copy only of the record will be made. It will not be indexed, will be briefed as is a general court-martial record, and will be securely bound.

APPENDIX 8.

FORM FOR RECORD OF TRIAL BY SUMMARY COURT.

CHARGE SHEET. No. IN SUMMARY COURT RECORD ———.

———————————
(Place.) (Date.)

———————————————————
(Surname.) (Christian name.) (Rank and organization.)

Date current enlistment: ————————————. Rate of pay: ———.

Previous service: ————————————————————
(Give dates, with character given on each discharge.)

Date of { Arrest: ————————. No. of previous convictions: ———.
Confinement: ————————

Witnesses:

First Sergt. ———, Company ———, ——— Infantry.

Private ———, Company ———, ——— Infantry.

CHARGE I: Violation of the ——— article of war.

Specification: In that, etc.

CHARGE II: Violation of the ——— article of war.

Specification 1: In that, etc.

Specification 2: In that, etc.

[1st Ind.]

Headquarters ———, ———, 19—. To Capt. ———, ——— Infantry, Summary Court, for trial.

By order of Col. ———.

———— ————,
Captain, ——— Infantry, Adjutant.

Findings: (*If the findings as to all the specifications and charges are the same, a single proper entry, such as "Guilty," or "Not guilty," will be made. If necessary, however, in order to show the facts, detailed entries will be made.*)

Sentence: ———.

———— ————,
Captain, ——— Infantry, Summary Court.

Approved ———, 19—.

———— ————,
Colonel, ——— Infantry, Commanding.

APPENDIX 9.

FORMS FOR SENTENCES.

(For forms for action by reviewing authority on sentences by courts-martial, see Appendix 10.)

A sentence adjudged by a court-martial will, in a proper case, be expressed substantially in one or another of the forms following. When desirable, in a proper case, two or more of the forms may be combined.

1. To have his pay for ——— days detained.
2. To have two-thirds (*or other fraction*) of his pay per month for ——— months detained.
3. To forfeit ——— days' pay.
4. To forfeit two-thirds (*or other fraction*) of his pay per month for ——— months.
5. To perform hard labor for ——— days (*or* months).
6. To be confined at hard labor for ——— days (*or* months).
7. To be confined at hard labor, at such place as the reviewing authority may direct, for ——— days (*or* months *or* years).
8. To be confined at hard labor, at such place as the reviewing authority may direct, for ——— months and to forfeit two-thirds (*or other fraction*) of his pay per month for a like period.
9. To be dishonorably discharged the service and to forfeit all pay and allowances due or to become due.
10. To be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for ——— days (*or* months *or* years). (*C. M. C. M., No. 1.*)
11. To be reduced to the ranks.
12. To vacate all rights and privileges arising from his certificate of eligibility.
13. To be admonished.
14. To be reprimanded.
15. To be restricted to the limits of his post (*or other place*) for ——— months.
16. To be suspended from duty for ——— months.
17. To be suspended from command for ——— months.
18. To be suspended from rank for ——— months.
19. To be reduced in rank ——— files.
20. To be reduced in rank so that his name shall appear in the lineal list of officers of his arm next below that of ———.
21. To be dismissed the service.
22. To pay to the United States a fine of ——— dollars and to be confined at hard labor, at such place as the reviewing authority may direct, until said fine is so paid, but for not more than ——— months (*or* years).

23. To pay to the United States a fine of ——— dollars, to be confined at hard labor, at such place as the reviewing authority may direct, for ——— months (*or* years), and to be further confined at hard labor until said fine is so paid, but for not more than ——— months (*or* years), in addition to the ——— months (*or* years) hereinbefore adjudged.

24. To be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life.

25. To be shot to death with musketry.

26. To be hanged by the neck until dead.

APPENDIX 10.

FORMS FOR ACTION BY REVIEWING AUTHORITY.

(For forms for sentences see Appendix 9.)

The following forms will serve as a general guide for reviewing authorities in recording, in cases in which such forms are appropriate, their action on sentences imposed by courts-martial. In a proper case the substance of two or more of the forms may be combined. Likewise, the action as recorded may contain proper matter additional to that set out in any of the several forms.

A. FORMS FOR ORIGINAL ACTION.

1 Approved (*or* disapproved) ———, 191—.

———— ————,
Colonel, ——— *Infantry, Commanding.*

2 Headquarters ———, ———, 191—.
Approved (*or* disapproved).

———— ————,
Colonel, ——— *Infantry, Commanding.*

3 Approved and suspended ———, 191—.

———— ————,
Colonel, ——— *Infantry, Commanding.*

4 Approved, and forfeiture (*or* confinement) suspended, ———, 191—.

———— ————,
Colonel, ——— *Infantry, Commanding.*

5 Headquarters ———, ———, 191—.
In the foregoing case of ———, the sentence is approved and will be duly executed (*or* is disapproved).

———— ————,
Colonel, ——— *Infantry, Commanding.*

6 Headquarters ———, ———, 191—.
In the foregoing case of ——— the sentence is approved, but owing to the length of time the accused has been in confinement ——— days (*or* months) of the confinement imposed are remitted. As thus modified the sentence will be duly executed.

———— ————,
Colonel, ——— *Infantry, Commanding.*

7 Headquarters ———, ———, 191—.
In the foregoing case of ——— the findings of Specifications 1 and 2, Charge II, are disapproved. The sentence is approved and will be duly executed.

———— ————,
Colonel, ——— *Infantry, Commanding.*

8 Headquarters ———, ———, 191—.

In the foregoing case of ——— only so much of the findings of guilty of the specification of Charge I and of Charge I as involves a finding of guilty of absence without leave from ——— to ———, terminated by apprehension (*or* surrender) is approved. Only so much of the sentence as provides for ——— is approved and will be duly executed.

———, ———,
Colonel, ——— *Infantry, Commanding.*

9 Headquarters ———, ———, 191—.

In the foregoing case of ——— the sentence is approved, but the execution thereof is suspended.

———, ———,
Colonel, ——— *Infantry, Commanding.*

10 Headquarters ———, ———, 191—.

In the foregoing case of ——— the sentence is approved but the execution thereof, in so far as it relates to forfeiture of pay (*or* to confinement) is suspended.

———, ———,
Colonel, ——— *Infantry, Commanding.*

11 Headquarters ———, ———, 191—.

In the foregoing case of ——— the sentence is approved and will be duly executed but the execution of that portion thereof adjudging dishonorable discharge is suspended until the soldier's release from confinement. ——— is designated as the place of confinement.

———, ———,
Colonel, ——— *Infantry, Commanding.*

12 Headquarters ———, ———, 191—.

In the foregoing case of ——— the sentence is approved and will be duly executed. ——— is designated as the place of confinement.

———, ———,
Colonel, ——— *Infantry, Commanding.*

13 Headquarters ———, ———, 191—.

In the foregoing case of ——— it appears from the record of trial that the officer who had subscribed the charges participated as a member of the court in the findings and sentence. As such officer is *prima facie* the accuser in the case, and as the record of trial contains nothing to indicate that the court upon investigation arrived at a finding that he was not in fact such accuser, the proceedings are, in view of the provisions of the ——— article of war, invalid.

———, ———,
Colonel, ——— *Infantry, Commanding.*

14 Headquarters ———, ———, 191—.

In the foregoing case of ——— it appears from the record of trial that an officer who testified as a witness for the prosecution participated as a member of the court in the findings and sentence. In view of the provisions of the ——— article of war the proceedings are invalid.

———, ———,
Colonel, ——— *Infantry, Commanding.*

15 Headquarters ———, ———, 191—. To ——— ———.
In the foregoing case of ——— the sentence is approved and the record of trial is forwarded for action under the forty-eighth article of war.

——— ———,
Colonel, ——— Infantry, Commanding.

16 Headquarters ———, ———, 191—. To the Judge Advocate General of the Army.
In the foregoing case of ——— the sentence is approved, but the execution thereof is suspended until the pleasure of the President be known, and the record of trial is forwarded for action under the fifty-first article of war.

——— ———,
Colonel, ——— Infantry, Commanding.

17 Headquarters ———, ———, 191—.
In the foregoing case of ——— the sentence is approved and will be duly executed at ——— on ———, 191—, under the direction of the commanding ———.

——— ———,
Colonel, ——— Infantry, Commanding.

18 Headquarters ———, ———, 191—.
In the foregoing case ——— the sentence is confirmed and will be duly executed at ——— on ———, 191—, under the direction of the commanding ———.

——— ———,
Colonel, ——— Infantry, Commanding.

B. FORMS FOR ORDERS VACATING SUSPENSIONS.

Headquarters ———, ———, 191—.
1 So much of the order published in ——— Court-Martial Order No. —, ———, 191—, these headquarters, ——— —, 191— (*or* found in a record of trial by summary court approved ———, 191—), as suspends execution of sentence in the case of ——— is vacated and said sentence will be carried into execution.

By order of Col. ———.
———, *Adjutant.*

Headquarters ———, ———, 191—.
2 So much of the order published in ——— Court-Martial Order No. —, ———, 191—, these headquarters, ——— —, 191— (*or* found in a record of trial by summary court approved ———; 191—), as suspends execution of sentence to confinement (*or* forfeiture of pay) in the case of ——— is vacated and that part of said sentence will be carried into execution.

By order of Col. ———.
———, *Adjutant.*

Headquarters ———, ———, 191—.
3 So much of the order published in General Court-Martial Order No. —, ———, 191—, these headquarters, as suspends execution of sentence to dishonorable discharge in the case of ——— is vacated and that part of said sentence will be carried into execution.

By order of Col. ———.
———, *Adjutant.*

APPENDIX 11.

COURT-MARTIAL ORDERS.

A. FORM FOR GENERAL COURT-MARTIAL ORDER.

GENERAL COURT-MARTIAL
ORDER No. 447.

HEADQUARTERS EASTERN DEPARTMENT,
Governors Island, N. Y., July 27, 1919.

Before a general court-martial which convened at Fort Hamilton, N. Y., pursuant to paragraph 6, Special Orders, No. 93, Headquarters Eastern Department, April 24, 1919,[1] as modified by paragraph 7, Special Orders, No. 101, Headquarters Eastern Department, May 26, 1919, was arraigned and tried:

Private John Doe, Company F, 29th Infantry.

CHARGE I: Violation of the 58th Article of War.

Specification: In that Private John Doe, Company F, 29th Infantry, did at Fort Jay, N. Y., on or about March 27, 1917, desert the service of the United States and did remain absent in desertion until he was apprehended at Brooklyn, N. Y., on or about June 30, 1919.

CHARGE II: Violation of the 84th Article of War.

Specification: In that Private John Doe, Company F, 29th Infantry, did at Fort Jay, N. Y., on or about March 27, 1917, through neglect, lose one overcoat, olive drab, value $14.84, and one blanket, light weight, value $3.79, issued for use in the military service.

PLEAS.

To the specification, Charge I: "Not guilty."
To Charge I: "Not guilty."
To the specification, Charge II: "Not guilty."
To Charge II: "Not guilty."
Or
To all the specifications and charges: "Not guilty."[2]

FINDINGS.

Of the specification, Charge I: "Guilty."[3]
Of Charge I: "Guilty."
Of the specification, Charge II: "Guilty."

---

[1] The orders appointing the court and all orders modifying the convening order will be cited.

[2] Where the accused pleads guilty or not guilty to all the specifications, or is found guilty or not guilty of all, the form may be abbreviated as indicated.

[3] If a special plea has been made *and sustained by the court*, the wording will be: "Plea in ——— (———) sustained by the court."

Of Charge II: "Guilty."

Or

Of all the specifications and charges: "Guilty."[1]

SENTENCE.

To be dishonorably discharged the service; to forfeit all pay and allowances due, or to become due; and to be confined at hard labor at such place as the reviewing authority may direct for two years. (Four previous convictions considered.)

The sentence is approved and will be duly executed. The United States Disciplinary Barracks is designated as the place of confinement.

By command of ——— ———.

———,
Colonel, General Staff, Chief of Staff.

Official:

———,
Adjutant General, Adjutant.

(*C. M. C. M., No. 1.*)

B. FORM FOR SPECIAL COURT-MARTIAL ORDER.

SPECIAL COURT-MARTIAL
ORDER No. 43.

HEADQUARTERS FORT JAY, N. Y., *July 27, 1919.*

Before a special court-martial which convened at Fort Jay, N. Y., pursuant to paragraph 6, Special Orders, No. 93, these headquarters, April 24, 1919, as modified by paragraph 7, Special Orders, No. 101, these headquarters, May 26, 1919, was arraigned and tried:

Private John Doe, Company F, 29th Infantry.

CHARGE I: Violation of the 58th Article of War.

Specification: In that Private John Doe, Company F, 29th Infantry, did at Fort Jay, N. Y., on or about March 27, 1917, desert the service of the United States and did remain absent in desertion until he was apprehended at Brooklyn, N. Y., on or about June 30, 1919.

CHARGE II: Violation of the 84th Article of War.

Specification: In that Private John Doe, Company F, 29th Infantry, did at Fort Jay, N. Y., on or about March 27, 1917, through neglect, lose one overcoat, olive drab, value $14.84, and one blanket, light weight, value $3.29, issued for use in the military service.

PLEAS.

To the specification, Charge I: "Not guilty."

To Charge I: "Not guilty."

To the specification, Charge II: "Not guilty."

To Charge II: "Not guilty."

Or

To all the specifications and charges: "Not guilty."[2]

---

[1] Where the accused pleads guilty or not guilty to all the specifications or is found guilty or not guilty of all, the form may be abbreviated as indicated.

[2] If a special plea has been made *and sustained by the court*, the wording will be: "Plea in ——— (———) sustained by the court."

FINDINGS.

Of the specification, Charge I: "Guilty."[1]
Of Charge I: "Guilty."
Of the specification, Charge II: "Guilty."
Of Charge II: "Guilty."
Or
Of all the specifications and charges: "Guilty."[2]

SENTENCE.

To be confined at hard labor for six months and to forfeit two-thirds of his pay per month for a like period. (Two previous convictions considered.)

The sentence is approved.

By order of ———.

Official:

——— ———,
Adjutant.

——— ———,
Adjutant.

---

[1] If a special plea has been made *and sustained by the court*, the wording will be: "Plea in ——— (———) sustained by the court."

[2] Where the accused pleads guilty or not guilty to all the specifications or is found guilty or not guilty of all, the form may be abbreviated as indicated.

APPENDIX 12.

INTERROGATORIES AND DEPOSITION.

To be read in evidence before a[1] ———, United States Army, appointed to meet at ———, by paragraph —, Special Orders, No. —, Headquarters ———, ——— —, 191—, in the case of (in the matter of)[2] ———.

——— —, 191—. To ———:

Please cause to be taken on the interrogatories herein contained the deposition of ———, to be found at ———.

——— ———.[3]

HEADQUARTERS ———, *191—*. To ———, who will take OR cause to be taken[4] the deposition of the person named above on the interrogatories herein contained.[5]

By ——— of ———:

——— ———, *Adjutant.*

First interrogatory: Are you in the military service of the United States? If so, what is your full name, rank, organization and station? If not, what is your full name, occupation and residence?

Answer:[6] ———.

Second interrogatory: ———.

Answer: ———.

First cross-interrogatory: ———.

Answer: ———.

First interrogatory by the ———:

Answer: ———.

(Witness sign here) ——— ———.

I certify that the above deposition was duly taken by me, and that the above-named witness, having been first duly sworn by me, gave the foregoing answers

---

[1] General (*or* special *or* summary) court-martial, *or* military commission, *or* court of inquiry, *or* military board.

[2] Name, rank, and organization of the accused, or other proper words identifying the particular matter in which the deposition is desired to be used.

[3] To be subscribed by the trial judge advocate or other proper person with his name, rank, organization, and official title, as "judge advocate," "summary court," "recorder," etc.

[4] Strike out word or words not used.

[5] If it is desired to give special instructions, or if a travel order is necessary, the remaining space will be used for the purpose.

[6] If the spaces for answers are not sufficient, extra sheets may be inserted by the officer taking the deposition. In such case he will rewrite the interrogatories, writing the answers immediately below the respective interrogatories.

to the several interrogatories, and that he subscribed the foregoing deposition in my presence at ———, this ——— day of ———, 191—.

(Name) ——— ———,

(Rank and organization) ——— ———.

(Official character, as "summary court," "officer designated to take the deposition," "notary public," etc.)

——— ———.

[BACK.]

Instructions.

1. Interrogatories, how submitted.—(*a*) The party desiring the deposition submits to the opposite party the interrogatories which he wishes propounded to the person whose deposition he desires, and the opposite party then submits to him such cross-interrogatories, if any, as he may desire. Such additional direct and cross interrogatories may be submitted as desired; or

(*b*) The party desiring the deposition submits to the court, military commission, or board the interrogatories which he wishes propounded to the person whose deposition he desires. The opposite party then submits to the court, military commission, or board such cross-interrogatories, if any, as he may desire. The court, military commission, or board then submits such additional interrogatories as they may deem proper and desirable, and such additional direct and cross interrogatories may be submitted as are desired; or

(*c*) Where the court, military commission, or board desires that the deposition of a particular person be obtained it will cause interrogatories to be prepared accordingly. The prosecution and defense (or other party or parties in interest) then submit such interrogatories as they may desire. Such additional interrogatories may be included as are desired by the court, military commission, or board, or by a party in interest. (M. C. M. par. 176.)

2. Procedure to obtain deposition.—(*a*) All the interrogatories to be propounded to the person are entered upon the form for interrogatories and deposition, and the trial judge advocate, summary court, or recorder will take appropriate steps to cause the desired deposition to be taken with the least practicable delay. In the ordinary case he will either send the interrogatories to the commanding officer of the post, recruiting station, or other military command at or nearest which the person whose deposition is desired is stationed, resides, or is understood to be, or will send them to some other responsible person, preferably a person competent to administer oaths, at or near the place at which the person whose deposition is desired is understood to be. In a proper case the interrogatories may be sent to the department or other superior commander, or to the witness himself, and in any case they will, when necessary, be accompanied by a proper explanatory letter.

(*b*) When interrogatories are received by a commanding officer he will either take or cause to be taken the deposition thereon. He may send an intelligent enlisted man—preferably a noncommissioned officer, if available—to the necessary place for the purpose of obtaining the deposition, or he may properly arrange by mail or otherwise that the deposition be taken. The deposition will be taken with the least practicable delay, and when taken will be sent at once direct to the judge advocate of the court-martial trying the case, or other proper person.

(*c*) If the witness whose deposition is desired is a civilian, the judge advocate, or other proper person sending interrogatories as above, will inclose with

them a prepared voucher for the fees and mileage of the witness, leaving blank such spaces provided therein as it may be necessary to leave blank, accompanied by the required number of copies of the orders appointing the court, military commission, or board. The judge advocate, summary court, or recorder will also send with the interrogatories duplicate subpœna requiring the witness to appear in person at a time and place to be fixed by the officer, military or civil, who is to take the deposition. If the name of this officer is not known, the space provided for it will be left blank. If a military officer takes the deposition, he will complete the witness voucher, certify it, and transmit it to the nearest disbursing quartermaster for payment. When the deposition is to be taken by a civil officer, he will be asked to obtain and furnish to the military officer requested or designated to cause the deposition to be taken the necessary data for the completion of the witness voucher, and the latter will complete the voucher, certify it, and transmit it to the nearest disbursing quartermaster for payment. In the case of a military witness, a subpœna will not accompany the interrogatories, but the officer before whom the deposition is to be taken will take the necessary steps to have the witness appear at the proper time and place. (M. C. M., par. 177.)

3. Payment of civilian witnesses, etc.—(*a*) A civilian, not in Government employ, duly summoned to appear as a witness before a military court, commission or board, or at a place where his deposition is to be taken for use before such military court, commission or board, will receive $1.50 for each day of his actual attendance before such military court, commission or board, or for the purpose of having his deposition taken, and 5 cents a mile for going from his place of residence to the place of trial or of the taking of his deposition, and 5 cents a mile for returning, except as follows:

(1) In Porto Rico and Cuba he will receive $1.50 a day while in attendance as above stated, and 15 cents for each mile necessarily traveled over stage line or by private conveyance, and 10 cents for each mile over any railway or steamship line.

(2) In Alaska, east of the one hundred and forty-first degree of west longitude, he will receive $2 a day while in attendance as above stated, and 10 cents a mile; and west of said degree $4 a day and 15 cents a mile.

(3) In the States of Wyoming, Montana, Washington, Oregon, California, Nevada, Idaho, Colorado, Utah, New Mexico, and Arizona he will receive $3 a day for the time of actual attendance as above stated, and for the time necessarily occupied in going to and returning from the same, and 15 cents for each mile necessarily traveled over any stage line or by private conveyance, and 5 cents for each mile by any railway or steamship. (M. C. M., par. 185.)

(*b*) Civil officers before whom depositions are taken for use in the military service will be paid the fees allowed by the law of the place where the depositions are taken. (M. C. M., par. 181.)

4. Articles of War.

ART. 26. DEPOSITIONS—BEFORE WHOM TAKEN.—Depositions to be read in evidence before military courts, commissions, courts of inquiry, or military boards, or for other use in military administration, may be taken before and authenticated by any officer, military or civil, authorized by the laws of the United States or by the laws of the place where the deposition is taken to administer oaths.

ART. 114. AUTHORITY TO ADMINISTER OATHS.—Any judge advocate or acting judge advocate, the president of a general or special court-martial, any summary court-martial, the judge advocate or any assistant judge advocate of a general or special court-martial, the president or the recorder of a court of inquiry or

of a military board, any officer designated to take a deposition, any officer detailed to conduct an investigation, and the adjutant of any command shall have power to administer oaths for the purposes of the administration of military justice and for other purposes of military administration; and in foreign places where the Army may be serving shall have the general powers of a notary public or of a consul of the United States in the administration of oaths, the execution and acknowledgment of legal instruments, the attestation of documents, and all other forms of notarial acts to be executed by persons subject to military law.

5. Taking depositions in foreign country.—If the evidence desired from a witness residing in a foreign country is necessary and material and is desired to be read before a court-martial, military commission, court of inquiry, or military board sitting within any of the States of the Union or the District of Columbia, interrogatories (accompanied by the necessary vouchers for fees and mileage) will ordinarily be forwarded through military channels to The Adjutant General of the Army. They will then be transmitted by the Secretary of War to the Secretary of State with the request that they be sent to the proper consul of the United States and the deposition of the witness taken. In the case of troops serving along the international boundaries outside of the United States proper, or in foreign countries, the officer exercising general court-martial jurisdiction may, in his discretion, detail an officer to take the deposition of a civilian witness or he may send the interrogatories direct to the consul of the United States nearest the place of residence of the witness with the request that the deposition be taken. In the latter case the interrogatories will be accompanied by the proper vouchers for the fees and mileage of the witness. (M. C. M., par. 182.)

APPENDIX 13.

SUBPŒNA FOR CIVILIAN WITNESS.

THE PRESIDENT OF THE UNITED STATES to ——— ———, greeting:

You are hereby summoned and required to be and appear in person on the ——— day of ———, 191—, at ——— o'clock — m.,[1] before ———,[2] a ———,[3] designated to take your deposition to be read in evidence before a [4]——— of the United States, at ———, appointed to meet by paragraph ———, Special Orders, No. ———, Headquarters ———, dated ———, 191—, then and there to testify and give evidence as a witness for the ——— in the case of [5] ———, [6]and you are hereby required to bring with you, to be used in evidence in said case, the following described documents, to wit: ———.

And have you then and there this precept.

Dated at ——— this ——— day of ———, 191—.

——— ———.

(To be subscribed by judge advocate, recorder, etc.)

The witness is requested to subscribe on one copy of the subpœna the following and to return to the person serving the subpœna the copy thereof so subscribed.

——— ———,

———, 191—.

I hereby accept service of the above subpœna.

——— ———.

Form No. 76, A. G. O. (Signature of witness.)

[BACK.]

Personally appeared before me the undersigned authority, ———, who, being first duly sworn according to law, deposes and says that at ——— on ———, 191—, he personally delivered to ——— in person a duplicate of the within subpœna.

——— ———.

Subscribed and sworn to before me at ——— this ——— day of ———, 191—.

——— ———.

(Rank, organization, and official character.)

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[1] Line out when inappropriate "before ———, a ——— designated to take your deposition to be read in evidence."

[2] When used, enter name, rank, and organization, if any.

[3] When used, enter official character, if any, such as judge advocate, summary court, notary public, etc.

[4] General (*or* special, *or* summary) court-martial, etc.

[5] Enter name, etc., of accused or other subject of investigation.

[6] Line out when inappropriate "and you are hereby required to bring with you, to be read in evidence in said case, the following described documents, to wit."

INSTRUCTIONS.

1. Articles of war.—(*a*) *Process to obtain witnesses.*—Every judge advocate of a general or special court-martial and every summary court-martial shall have power to issue the like process to compel witnesses to appear and testify which courts of the United States, having criminal jurisdiction, may lawfully issue; but such process shall run to any part of the United States, its Territories, and possessions. (A. W. 22.)

(*b*) *Refusal to appear or testify.*—Every person not subject to military law who, being duly subpœnaed to appear as a witness before any military court, commission, court of inquiry, or board, or before any officer, military or civil, designated to take a deposition to be read in evidence before such court, commission, court of inquiry, or board, willfully neglects or refuses to appear, or refuses to qualify as a witness, or to testify, or produce documentary evidence which such person may have been legally subpœnaed to produce, shall be deemed guilty of a misdemeanor, for which such person shall be punished on information in the district court of the United States or in a court of original criminal jurisdiction in any of the territorial possessions of the United States, jurisdiction being hereby conferred upon such courts for such purpose; and it shall be the duty of the United States district attorney or the officer prosecuting for the Government in any such court of original criminal jurisdiction, on the certification of the facts to him by the military court, commission, court of inquiry, or board, to file an information against and prosecute the person so offending, and the punishment of such person, on conviction, shall be a fine of not more than $500 or imprisonment not to exceed six months, or both, at the discretion of the court: *Provided*, That the fees of such witness and his mileage, at the rates allowed to witnesses attending the courts of the United States, shall be duly paid or tendered said witness, such amounts to be paid out of the appropriation for the compensation of witnesses. (A. W. 23.)

2. Tender of fees preliminary to prosecution.—In case a civilian witness is duly subpœnaed under the authority of A. W. 22 and willfully neglects or refuses to appear or refuses to qualify as a witness, or to testify or produce documentary evidence, which he may have been legally subpœnaed to produce, he will at once be tendered or paid by the nearest quartermaster one day's fees and mileage for the journeys to and from the court, and will thereupon be again called upon to comply with the requirements of the law. Upon failing the second time to comply with the requirements of the law, a complete report of the case will be made to the officer exercising general court-martial jurisdiction over the command with a view to presenting the facts to the Department of Justice for the punitive action contemplated in A. W. 23. (M. C. M. 172.)

3. Civilians not in Government employ.—A civilian not in Government employ, duly summoned to appear as a witness before a military court, commission, or board, or at a place where his deposition is to be taken for use before such court, commission, or board, will receive $1.50 for each day of his actual attendance before such court, commission, or board, or for the purpose of having his deposition taken, and 5 cents a mile for going from his place of residence to the place of trial or of the taking of his deposition, and 5 cents a mile for returning, except as follows:

(*a*) In Porto Rico and Cuba he will receive $1.50 a day while in attendance, as above stated, and 15 cents for each mile necessarily traveled over stage line or by private conveyance, and 10 cents for each mile over any railway or steamship line.

(*b*) In Alaska east of the one hundred and forty-first degree of west longitude he will receive $2 a day while in attendance as above stated and 10 cents a mile, and west of said degree $4 a day and 15 cents a mile.

(*c*) In the States of Wyoming, Montana, Washington, Oregon, California, Nevada, Idaho, Colorado, Utah, New Mexico, and Arizona, will receive $3 a day for the time of actual attendance as above stated and for the time necessarily occupied in going to and returning from the same, and 15 cents for each mile necessarily traveled over any stage line or by private conveyance, and 5 cents for each mile by any railway or steamship. (M. C. M., par. 185.)

[NOTE.—1. Travel must be estimated by the shortest usually traveled route—by established lines of railroad, stage, or steamer—the time occupied to be determined by the official schedules, reasonable allowance being made for unavoidable detention.

2. These rates apply to the Philippine Islands. (See Cir. 45, A. G. O., 1902.)

3. A civilian not in Government employ, when furnished transportation on transport or other Government conveyance, is entitled to 57.142 per cent of 5 cents per mile (equal to 2.857 cents per mile). (Comp. Dec., Aug. 20, 1902, published in Cir. 45, A. G. O., 1902.)]

4. Civilians in Government employ.—Civilians in the employ of the Government when traveling upon summons as witnesses before military courts are entitled to transportation in kind from their place of residence to the place where the court is in session and return. If no transportation be furnished, they are entitled to reimbursement of the cost of travel actually performed by the shortest usually traveled route, including transfers to and from railway stations at rates not exceeding 50 cents for each transfer, and the cost of sleeping-car accommodations to which entitled or steamer berth when an extra charge is made therefor. They are also entitled to reimbursement of the actual cost of meals and rooms at a rate *not exceeding* $3 per day for each day actually and unavoidably consumed in travel or in attendance upon the court under the order or summons. No allowance will be made to them when attendance upon court does not require them to leave their stations. (M. C. M., par. 184.)

APPENDIX 14.

WARRANT OF ATTACHMENT.

UNITED STATES
vs.
——— ———.

THE PRESIDENT OF THE UNITED STATES to ——— ———, greeting:

WHEREAS ———, of ———, was on the ——— day of ——— 191—, at ———, duly subpœnaed to appear and attend at ———, on the ——— day of ———, 191—, at ——— o'clock — m., before a ——— court-martial duly appointed by paragraph —, Special Orders, No. —, dated Headquarters ———, ———, 191—, to testify on the part of the ——— in the above-entitled case; and whereas he has failed to appear and attend before said ——— court-martial to testify, as by said subpœna required, and whereas he is a necessary and material witness in behalf of the ——— in the above-entitled case:

NOW, THEREFORE, by virtue of the power vested in me, the undersigned, as judge advocate of[1] said ——— court-martial, by article 22 of section 1342 of the Revised Statutes of the United States (39 Stat., 650), you are hereby commanded and empowered to apprehend and attach the said ——— wherever he may be found within the United States, its Territories, or possessions and forthwith bring him before the said ——— court-martial at ——— to testify as required by said subpœna.

——— ———,
Judge Advocate of said ——— Court-Martial.[2]

Dated ——— ———,
———, 191—.

Form No. 272, A. G. O.

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[1] If a summary court-martial, line out the words "judge advocate of."
[2] If a summary court-martial, line out and substitute the necessary words.

APPENDIX 15.

FORM A.

HABEAS CORPUS BY UNITED STATES COURT (WHERE A WITNESS IS HELD UNDER A WARRANT OF ATTACHMENT).

RETURN TO WRIT.

In re ——— ——— (name of party held).

(*Writ of habeas corpus—Return of respondent.*)

To the ——— ——— (court or judge):

The respondent, Maj. ——— ———, United States Infantry, upon whom has been served a writ of habeas corpus for the production of ——— ———, respectfully makes return and states that he holds the said ——— ——— by authority of the United States, pursuant to a warrant of attachment issued under section 3, act of August 29, 1916, twenty-second Article of War, by a judge advocate of a lawfully convened general (*or* "special") court-martial (*or* "by a summary court-martial") and duly directed to him, the said respondent, for execution; that he is diligently and in good faith engaged in executing said warrant of attachment, and that he respectfully submits the same for the inspection of the court, together with the original subpœna and proof of service of the same, a copy[1] of the order appointing the court-martial, sworn to as such, before which the said ——— ——— has been subpœnaed to testify, a copy of the charges and specifications in the case, sworn to as such, in which said ——— ——— is a witness, and an affidavit of ——— ——— showing that said ——— ——— is a material witness in the case; that he has failed to appear and has offered no valid excuse for such failure.

[1] The copy of the order appointing the court and of the charges will be sworn to by the judge advocate (or summary court-martial) before an officer authorized to administer oaths.

In obedience, however, to the said writ of *habeas corpus* the respondent herewith produces before the court the body of the said ——— ———, and for the reasons set forth in this return prays this honorable court to dismiss the said writ.

———— ————,
Major, ——— *United States Infantry.*

Dated ———, ———,
———— ————, 191—.

FORM B.

HABEAS CORPUS BY STATE COURT (WHERE WITNESS IS HELD UNDER A WARRANT OF ATTACHMENT).

RETURN TO WRIT.

(*Make return as in case of writ by a United States court, except as to last paragraph, for which substitute as follows:*)

And said respondent further makes return that he has not produced the body of the said ——— ———, because he holds him by authority of the United States as above set forth, and that this court (*or* "your honor," *as the case may be*) is without jurisdiction in the premises, and he respectfully refers to the decisions of the Supreme Court of the United States in Ableman *v.* Booth, 21 Howard, 506, and Tarble's case, 13 Wallace, 397, as authority for his action, and prays this court (*or* "your honor") to dismiss the writ.

———— ————,
Major, ——— *United States Infantry.*

Dated ———, ———,
———— ————, 191—.

FORM C.

HABEAS CORPUS BY UNITED STATES COURT (WHERE PRISONER IS HELD FOR TRIAL OR UNDER SENTENCE).

RETURN TO WRIT.

In re ——— ——— (name of party held).

(*Writ of habeas corpus—Return of respondent.*)

To the ——— ——— (court or judge):

The respondent, Maj. ——— ———, United States Infantry, upon whom has been served a writ of *habeas corpus* for the production of ——— ———, respectfully makes return and states that he holds the said ——— ——— by authority of the United States as a soldier in the United States Army (*or* "as a general prisoner under sentence of general court-martial") under the following circumstances:

That the said ——— ——— was duly enlisted as a soldier in the service of the United States at ———, ———, on ——— ———, 191—, for a term of ——— years. (*If the offense is fraudulent enlistment, this recital should be omitted.*)

(*Here state the offense. If it is fraudulent enlistment by representing himself to be of the required age, it may be stated as follows:*)

That on the ——— day of ———, 191—, at ——— ——— the said ———, being under 18 years of age, did fradulently enlist in the military service of the United States for the term of ——— years, by falsely representing himself to be over 18 years of age, to wit, ——— years and ——— months; and has, since said enlistment, received pay and allowances (*or either*) thereunder.

(*If the offense is desertion, it may be stated substantially as follows:*)

That the said ——— ——— deserted said service at ———, ———, on ——— ———, 191—, and remained absent in desertion until he was apprehended at ———, ———, on ——— ———, 191—, by ——— ———, and was thereupon committed to the custody of the respondent as commanding officer of the post of ———.

The said ——— ——— has been placed in confinement (*or* "arrest," *as the case may be*), and formal charges have been preferred against him for said offense, a copy of which, duly certified and verified,[1] is hereto annexed; and that he will be brought to trial thereon as soon as practicable before a court-martial, to be convened by the commanding general of the ——— Department (*or* "convened by Special Orders, No. —, dated Headquarters ——— Department, 191—, a copy of which, duly certified and verified,[1] is herein annexed").

(*If the party held is a general prisoner, the following paragraph should be substituted for the preceding paragraph:*)

That the said ——— ——— was duly arraigned for said offense before a general court-martial, convened by Special Orders, No. ———, dated Headquarters ——— Department, 191—, was convicted thereof by said court, and was sentenced to be ———, which sentence was duly approved on the ——— day of ———, 191—, by the officer ordering the court (*or* "by the officer commanding said ——— Department for the time being") as required by the ——— article of war. A copy of the order promulgating said sentence, duly certified and vertified,[1] is hereto attached.

In obedience, however, to the said writ of *habeas corpus* the respondent herewith produces before the court the body of the said ——— ———, respectfully refers to the decisions cited in the annexed brief (*if the case does not involve a minor under the required age the words* "respectfully refers to the decisions cited in the annexed brief" *will be omitted*), and for the reasons set forth in this return prays this honorable court to dismiss the said writ.

——— ———,
Major, ——— *United States Infantry.*

Dated ———, ———,
——— ———, 191—.

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[1] The copy of the charges will be certified by the adjutant and sworn to before an officer authorized to administer oaths for military administration, in the following form:

I hereby certify that the foregoing is a full and true copy of the original charges preferred against ——— ———, and that the same are in the usual form of military charges and conform to the rules regulating military procedure.

——— ———, *Adjutant.*

Sworn to and subscribed before me this ——— day of ———, 191—.

——— ———,
Judge Advocate of Court-Martial
(*Or* "Summary Court-Martial").

The copy of the order convening the court or publishing the sentence will be certified and verified in a similar manner.

FORM D.

HABEAS CORPUS BY STATE COURT (WHERE PRISONER IS HELD FOR TRIAL OR UNDER SENTENCE).

RETURN TO WRIT.

(*Make return as in case a writ by a United States court, except as to last paragraph, for which substitute the paragraph set out in Form B, Appendix 15.*)

INSTRUCTIONS AS TO RETURNS TO WRITS OF HABEAS CORPUS.

The following instructions in regard to returns under A. R. 998 and 999, in the cases of soldiers who have committed military offenses and are held for trial or punishment therefor, and of general prisoners, are for the information and guidance of all concerned:

1. The return under A. R. 999 will be made in accordance with Form C (Appendix 15), and *if the person whose release is sought has committed the offense of fraudulent enlistment by representing himself to be of the required age*, will refer, as in last paragraph of that form, to the brief of authorities which follows these instructions, and a copy of that brief will be annexed to the return. Should the court order the discharge of the party, the officer making the return, or counsel, should note an appeal pending instructions from the War Department, and he will report to The Adjutant General of the Army the action taken by the court and forward a copy of the opinion of the court as soon as it can be obtained.

2. The return under A. R. 998 will be made in accordance with Form D (Appendix 15), *but a copy of the brief of authorities is not intended to be attached to the returns to writs of habeas corpus issuing from a State court.*

BRIEF TO BE FILED WITH A RETURN TO A WRIT OF HABEAS CORPUS ISSUED BY A UNITED STATES COURT IN THE CASE OF A SOLDIER WHOSE DISCHARGE IS SOUGHT ON THE GROUND OF MINORITY.

The right to avoid the contract of enlistment of a soldier on the ground of minority will be considered under the following heads: I. Under the common law; II. Under the statutes; III. Where the minor is held for punishment.

I.

UNDER THE COMMON LAW.

The enlistment of a minor is not avoidable by the minor nor by his parent or guardian at common law, but is only avoidable where the right to avoid it is conferred by statute.

This proposition is clearly established by the decision of the Supreme Court (*In re Morrissey*, 137 U. S., 157, 159), where the court said:

> An enlistment is not a contract only, but effects a change of status. (*Grimley's case*, 137 U. S., 147.) It is not, therefore, like an ordinary contract, voidable by the infant. At common law an enlistment was not voidable either by the infant or by his parents or guardians.

The court cites, in support of these statements, *Rex* v. *Rotherfield Greys* (1 Barn. & Cress., 345, 350; 8 Eng. C. L., 149); *Rex* v. *Lytchet Matraverse* (7 Barn. & Cress., 226, 231; 14 Eng. C. L., 107); *Commonwealth* v. *Gamble* (11 Serg. & Rawle (Pa. R.), 93); *U. S.* v. *Blakeney* (3 Grattan, 387, 405).

In *Rex* v. *Rotherfield Greys*, *supra*, it was said by Best, J.:

> By the general policy of the law of England the parental authority continues until the child attains the age of twenty-one years; but the same policy also requires that a minor shall be at liberty to contract an engagement to serve the State. When such an engagement is contracted it becomes inconsistent with the duty which he owes to the public that the parental authority should continue. The parental authority, however, is suspended, but not destroyed. When the reason for its suspension ceases the parental authority returns.

In *Rex* v. *Lytchet Matraverse*, *supra*, Bayley, J., after quoting these views of Best, J., says:

> Lawrence, J., in *Rex* v. *Roach* (6 T. R., 254), seems to take the same view of the subject and to consider the authority of the State paramount to that of the parent so long as the minor continues in the public service, but as soon as he leaves it then the parental authority is restored.

It is clear from these authorities and others which could be cited that at common law the enlistment of a minor *of sufficient capacity to bear arms* was valid regardless of age. The right of the State to the services of such minors is forcefully laid down in *Lanahan* v. *Birge* (30 Conn., 438). See also *Cooley's Constitutional Law*, page 99, where on the authority of *Ex parte Brown* (5 Cranch, C. C., 554), and *United States* v. *Bainbridge* (1 Mason, 71), it is said:

> Minors may be enlisted without the consent of their parents or guardians *when the law fails to require such consent.*

II.

UNDER THE STATUTES.

The pertinent statutes are the following:

> SEC. 1116, R. S. Recruits enlisting in the Army must be effective and able-bodied men, and between the ages of sixteen and thirty-five years at the time of their enlistment. This limitation as to age shall not apply to soldiers reenlisted.

This section was modified by the act of March 2, 1899 (30 Stat., 978), which provides:

> That the limits of age for original enlistments in the Army shall be eighteen and thirty-five years.
>
> SEC. 1117, R. S. No person under the age of twenty-one years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians: *Provided*, That such minor has such parents or guardians entitled to his custody and control.

This section is replaced by the provision of section 27, National-Defense Act of June 3, 1916 (39 Stat. 186), which reenacts it in the same words, substituting the age of 18 years for the age of 21.

> SEC. 1118, R. S. No minor under the age of sixteen years, no insane or intoxicated person, no deserter from the military service of the United States, and no person who has been convicted of a felony shall be enlisted or mustered into the military service.

1. *The statutes confer no right upon the minor to avoid his enlistment, certainly not if he be 16 years of age or over. No case has been found directly in point holding that a minor under 16 years of age, if of sufficient capacity to bear arms, may avoid his enlistment.*

Section 1116, R. S., as amended, prescribing the age limits of original enlistment, was made for the benefit of the Government and not the minor. (*In re Morrissey*, 137 U. S., 157; *In re Grimley*, 137 U. S., 147; *In re Wall*, 8 Fed. Rep., 85; *In re Davison*, 21 Fed. Rep., 618; *In re Zimmerman*, 30 Fed. Rep., 176; *In re Spencer*, 40 Fed. Rep., 149; *In re Lawler*, 40 Fed. Rep., 233; *Solomon* v. *Davenport*, 87 Fed. Rep., 318; *Wagner* v. *Gibbon*, 24 Fed. Rep., 135.)

Section 1117, R. S., as amended, while recognizing the right of the parent to the services of the minor, confers no right in the minor to avoid his enlistment. See the cases cited above.

In the *Morrissey case* the Supreme Court of the United States said that the provision of section 1116, R. S.,

> is for the benefit of the parent or guardian * * * but it gives no privilege to the minor * * * an enlistment is not a contract only, but effects a change of status. It is not, therefore, like an ordinary contract, voidable by the infant * * *. The contract of enlistment was good, so far as the petitioner is concerned. He was not only *de facto* but *de jure* a soldier—amenable to military jurisdiction.

Whether the designation of the age limit of 16 years in section 1118, R. S., is such as to make the enlistment of the minor under 16 years of age void or voidable by the minor has not been decided. On principle, the minor, if of sufficient capacity to render military service, should not be permitted to avoid his enlistment obtained through his fraudulent statements as to his age. However this may be, if the minor continued to serve and receive pay after passing that age he—

> acquires the status of a soldier like one who was enlisted when over 16 years without the consent of his parents, and a court-martial has jurisdiction to try and sentence him to punishment for desertion, from which sentence he can not be discharged on habeas corpus on petition of himself or his parents. (*Ex parte Hubbard*, 182 Fed. Rep., 76.)

2. *The statutes requiring the consent of the parent or guardian of a minor to his enlistment (section 1117, R. S., amended by section 27, act of June 3, 1916) impliedly confer upon the parent or guardian the right to avoid an enlistment entered into by a minor under the prescribed age without the required consent, where the minor is not held for trial or punishment for a military offense.*

In support of this proposition see the cases cited under II, proposition 1.

3. *A parent or guardian with knowledge of the enlistment of a minor under the prescribed age and acquiescing therein for a considerable period, may be held to be estopped from asserting the right to avoid the enlistment.*

In support of this proposition see *Ex parte Dunakin* (202 Fed. Rep., 290), where it was held, quoting from the syllabi:

> Where a minor enlisted without the consent of his parent or guardian, and his mother, who was his surviving parent, on learning of his enlistment shortly thereafter, did nothing to repudiate the same or to secure his release, and testified that she would have been reconciled to it, had he remained in the Army and not deserted, but that after his desertion she wanted to keep him out of the Army, her acts constituted an implied consent to his enlistment.

4. *A minor fraudulently enlisting and remaining in the service after attaining the legal age of enlistment, or the age beyond which parental consent is not required, thereby validates his enlistment.*

In support of this proposition see the case of *Ex parte Hubbard* (182 Fed. Rep., 76), where the court held, quoting the syllabus:

> A minor enlisted in the Army when under the age of 16, who has continued to serve and receive pay after passing that age, acquires the status of a soldier like one who was enlisted when over 16 without the consent of his parents, and a court-martial has jurisdiction to try and sentence him to punishment for desertion from which sentence he can not be discharged on habeas corpus on petition of himself or his parents.

III.

WHERE THE MINOR IS HELD FOR PUNISHMENT.

Neither the minor nor his parent nor guardian may avoid the enlistment where the soldier is held for trial or under sentence for a military offense.

In support of this proposition see the cases cited above under II, proposition 1, and also the following: *In re Kaufman* (41 Fed. Rep., 876); *In re Dohrendorf* (40 Fed. Rep., 148); *In re Cosenow* (37 Fed. Rep., 668); *In re Dowd* (90 Fed. Rep., 718); *In re Miller* (114 Fed. Rep., 838); *United States* v. *Reaves* (126 Fed. Rep., 127); *In re Lessard* (134 Fed. Rep., 305); *Ex parte Anderson* (16 Iowa, 595); *McConologue's Case* (107 Mass., 154, 170); *In re Carver* (142 Fed. Rep., 623); *In re Scott* (144 Fed. Rep., 79); *Dillingham* v. *Booker* (163 Fed. Rep., 696); *Ex parte Rock* (171 Fed. Rep., 240); *Ex parte Hubbard* (182 Fed. Rep., 76); *Ex parte Lewkowitz* (163 Fed. Rep., 646); *United States* v. *Williford* (220 Fed. Rep., 291).

The reasons given for these decisions are that the enlistment of a minor in the Army without the consent of his parent or guardian required by section 1117, R. S., "is not void, but voidable only"; that the soldier being not only *de facto* but *de jure* a soldier, he is subject to the Articles of War and may commit a military offense; and that if held for trial or punishment for a military offense, the interests of the public in the administration of justice are paramount to the right of the parent or guardian, and require that the soldier abide the consequences of his offense before the question of his discharge will be considered by the court. In the *Miller Case* (114 Fed. Rep.,

842), the court supported its holding by the analogy of a minor held for punishment for a civil offense, saying:

> The common law, unaided by statute, fully recognizes the parents' right to the custody and services of their minor child; but it has never been held that they could, by the writ of habeas corpus or otherwise, obtain his custody and his immunity when he was held by an officer of a civil court of competent jurisdiction to answer a charge of crime. His enlistment having made the prisoner a soldier notwithstanding his minority, he is amenable to the *military law just as the citizen who is a minor is amenable to the civil law. The parents can not prevent the law's enforcement in either case* * * *.

The views here cited were approved in the *Reaves case* (126 Fed. Rep., 127), where upon full consideration of the authorities the Circuit Court of Appeals remanded Reaves, a minor, who had deserted from the Navy, to custody of the naval authorities as represented by the chief of police who had apprehended him. In the *Carver case* (142 Fed. Rep., 623), the syllabus is as follows:

> A minor under the age of 18 years who unlawfully enlisted in the Army without the consent of his father can not be discharged from the service on a writ of habeas corpus sued out by his father so long as he is under arrest for desertion nor until he has been discharged from such custody or has served the sentence imposed on him by the military tribunal.

In the *Lewkowitz case* (163 Fed. Rep., 646), the syllabus reads:

> A minor who by misrepresenting his age has fraudulently enlisted in the Army without the consent of his parents and thereby subjected himself to punishment under military law will not be relieved from such punishment by the civil courts by discharging him on a writ of habeas corpus on the application of his parents, *even though the military prosecution is not instituted until after the writ was issued.*

This was followed by the unanimous opinion in the Circuit Court of Appeals in the *Love case* (United States *v.* Williford, 220 Fed. Rep., 291), in which the court expressly approved the views stated in the *Lewkowitz case*, quoting section 761, R. S., relating to procedure under writs of habeas corpus, which reads as follows:

> The court, or justice, or judge shall proceed in a summary way to determine the facts of the case by hearing the testimony and arguments and thereupon to dispose of the party as law and justice require.

The court added:

> Law and justice do not, in our opinion, require Love to be withdrawn from the military authorities and relieved of liability for his offense in favor of his mother's right to his custody.

By act of July 27, 1892 (27 Stat., 278), "fraudulent enlistment and the receipt of pay or allowance thereunder" was made a military offense, punishable under the sixty-second article of war. The offense is now defined in article 54, revised Articles of War, approved August 29, 1916 (39 Stat., 659), which provides that the offense "shall be punished as a court-martial may direct." A minor who procures his enlistment by wilful misrepresentation or concealment as to his qualifications for enlistment commits this offense, and the statute authorizes his punishment therefor. In general, it may be stated that where a minor has committed a military offense the interests of the public in the administration of justice are paramount to the right of the parent and require that the soldier shall abide the consequences of his offense before the right to his discharge be passed upon. The soldier should not be allowed to escape punishment for his offense, even though his parents assert their right to his services. A minor in civil life is liable to punishment for a crime or misdemeanor, even though his confinement may interfere with the rights of his parents; and the above authorities clearly apply the same rule to a minor held for trial or punishment for a military offense.

APPENDIX 16.

[Sheet 1.]

WAR DEPARTMENT
Form No. 338.
Approved by the Comptroller of the Treasury April 29, 1914

WAR DEPARTMENT
QUARTERMASTER CORPS

Voucher No......
General Account.....
Detail Account.....

PUBLIC VOUCHER

COMPENSATION, CIVILIAN WITNESS

APPROPRIATION: PAY, ETC., OF THE ARMY, 191 *Symbol*.....

THE UNITED STATES TO....., DR.

ADDRESS: .....

OBJECT SYMBOL		AMOUNT		U. S. NOTATIONS
	For mileage as a witness from.....to.....and return, being.....miles, at.....cents per mile.....			
	For allowance as a witness while in attendance—			
	On a court-martial at.....			
	Giving deposition at.....for use before a court-martial from..... 191 , to....., 191 , as per certificate hereon, ...days, at $.....per day.....			
	TOTAL.....			

I CERTIFY that, as stated above, I attended as a witness for the period named, and as such the travel between the places named was required.

(PAYEE).....
(Do not sign in duplicate)

EXAMINED BY

(Account to be completely filled in before certification, and no alteration or erasure to be made thereafter)

I CERTIFY that....., a civilian not in Government employ, has been in attendance from....., 191 , to....., 191 , inclusive, {as a material witness before a....court-martial duly convened at this place, / giving deposition for use of a court-martial convened under attached orders,} and that he was duly summoned thereto from....., and was not furnished transportation by the Government for any portion of the journey.

PLACE, ...

DATE, ..., 191

.....
.....
(Title)

Paid by check No. ...., dated ....., 191 , of ..... on ....., in favor of payee named above for $.....

OR

Received....., 191 , of ....., IN CASH, the sum of..... dollars and ..... cents, in full payment of the above account.

$.....

.....

.....

(This form to be used only for payment of civilian witnesses not in Government employ)

FORM No. 338.

Public Voucher No. _____

WAR DEPARTMENT

QUARTERMASTER CORPS

Appropriation: Pay, etc., of the Army, 191

Amount, $_____

IN FAVOR OF

(Name of payee)

For Compensation, Civilian Witness

ACCOUNTS OF

(Name of disbursing officer)

(Official designation)

(Place where located)

(Period for which voucher is rendered)

[Sheet 2.]

WAR DEPARTMENT
Form No. 338.
Approved by the Comptroller of the Treasury April 29, 1914

WAR DEPARTMENT

QUARTERMASTER CORPS

Voucher No. .....

General Account .....

Detail Account .....

PUBLIC VOUCHER

COMPENSATION, CIVILIAN WITNESS

APPROPRIATION: PAY, ETC., OF THE ARMY, 191

Symbol .....

THE UNITED STATES TO ....., DR.

ADDRESS: .....

Object Symbol		Amount		U. S. Notations
	For mileage as a witness from ..... to ..... and return, being ..... miles, at ..... cents per mile			
	For allowance as a witness while in attendance—			
	On a court-martial at			
	Giving deposition at ..... for use before a court-martial from ....., 191 , to ....., 191 , as per			
	certificate hereon, ... days, at $..... per day			
	Total.....			
				EXAMINED BY

MEMORANDUM VOUCHER

(To be filled in and retained by paying officer)

Voucher certified by .....

Voucher approved by .....

Paid by check No. ...., dated ....., 191 , of ..... on .....,
in favor of payee named above for $.....

OR

Paid in cash ..... by .....
(Date)
..... dollars and .....cents.
Funds derived from check No. .... on .....
.....
$.....
.....

(This form to be used only for payment of civilian witnesses not in Government employ)

FORM No. 338.
MEMORANDUM
Public Voucher No. _____

WAR DEPARTMENT
QUARTERMASTER CORPS
Appropriation: Pay, etc., of the Army, 191

Amount, $_____
IN FAVOR OF
(Name of payee)

For Compensation, Civilian Witness

ACCOUNTS OF
(Name of disbursing officer)
(Official designation)
(Place where located)
(Period for which voucher is rendered)

APPENDIX 17.

WAR DEPARTMENT
Form No 350 a.
Approved by the Comptroller of the Treasury April 29, 1914.

[Sheet 1.]

WAR DEPARTMENT

.....
(Bureau or Office.)

Voucher No.....
General Account.....
Detail Account.....

PUBLIC VOUCHER

REIMBURSEMENT OF TRAVELING EXPENSES

Appropriation..... *Symbol*..... $.....
Appropriation..... *Symbol*..... $.....
Appropriation..... *Symbol*..... $.....

THE UNITED STATES, TO....., DR.

Address: .....

FOR REIMBURSEMENT OF TRAVELING EXPENSES incurred in the discharge of official duty from....., 191 , to....., 191 , under written authorization from the.....:....., dated....., 191 , a copy of which is.....as per itemized schedule below.....			U. S. notations
Amount claimed, $			

Object symbol	Date 191		Schedule of expenditures	Sub-voucher No.	Amount		U. S. notations

MEMORANDUM OF TRAVEL PERFORMED UPON TRANSPORTATION REQUESTS							Examined by .....
Date of travel	No. of transportation request	From—	To—	Via R. R.	Amount		U. S. notations

I DO SOLEMNLY *..... that the above account and schedule are correct in all respects; that the distances as charged have been actually and necessarily traveled by me on the dates therein specified; that the amounts as charged have been actually paid by me for traveling expenses; that no part of the account has been paid by the United States, but the full amount is due; that all expenditures included in said

account other than my own personal traveling expenses were made under urgent and unforseen public necessity; and that it was not, for the reasons stated herein, feasible to have such expenditures paid directly by a disbursing officer.

Payee: .....
(Do not sign in duplicate)

.....

Subscribed and †..... to before me at....., this.....day of....., A. D. 191

.....

.....

*Swear or affirm. † Sworn to or affirmed.

I CERTIFY that the above account is correct, that the travel was performed, and that it was necessary for the public service.

.....

APPROVED FOR $..... *Title:* .....

Date: ....

Title: .....

Paid by check No...., dated....., 191 , of.....on....., in favor of payee named above, for $.....

OR

Received.....of.....in CASH, the sum of.....dollars and.....
(Date)
cents in full payment of the above account.

.....

.....

$

FORM No. 350 a.

PUBLIC VOUCHER No. -----

WAR DEPARTMENT

(Bureau or Office)

APPROPRIATION:

(State full title of appropriation)

AMOUNT, $-----

IN FAVOR OF

(Name of payee)

FOR REIMBURSEMENT OF TRAVELING EXPENSES

ACCOUNTS OF

(Name of disbursing officer)

(Official designation)

(Place where located)

(Period for which voucher is rendered)

[Sheet 2.]

WAR DEPARTMENT
Form No. 350 a.
Approved by the Comptroller of the Treasury April 29, 1914.

WAR DEPARTMENT
.....
(Bureau or Office.)

Voucher No. .....
General Account .....
Detail Account .....

PUBLIC VOUCHER.

REIMBURSEMENT OF TRAVELING EXPENSES

Appropriation ..... *Symbol* ..... $.....
Appropriation ..... *Symbol* ..... $.....
Appropriation ..... *Symbol* ..... $.....

THE UNITED STATES, To ....., DR.
Address: .....

FOR REIMBURSEMENT OF TRAVELING EXPENSES incurred in the discharge of official duty from ....., 191 , to ....., 191 , under written authorization from the ....., dated ....., 191 , a copy of which is ..... as per itemized schedule below..... Amount claimed, $			U. S. notations

Object symbol	Date 191		Schedule of expenditures	Sub-voucher No.	Amount		U. S. notations

MEMORANDUM OF TRAVEL PERFORMED UPON TRANSPORTATION REQUESTS	Examined by .....

Date of travel	No. of transportation request	From—	To—	Via R. R.	Amount.		U. S. notations

MEMORANDUM VOUCHER.

(To be filled in and retained by paying officer)

Voucher certified by .....
Voucher approved by .....

Paid by check No. ...., dated ....., 191 , of ..... on ....., in favor of payee named above, for $.....

OR

Paid in cash ..... by ....., ... dollars and ..... cents.
(Date)
Funds derived from check No. .... on .....

$

FORM No. 350 a.

MEMORANDUM

PUBLIC VOUCHER No. _____

WAR DEPARTMENT

_____

(Bureau or Office)

APPROPRIATION:

_____

(State full title of appropriation)

AMOUNT, $_____

IN FAVOR OF

_____

(Name of payee)

FOR REIMBURSEMENT OF TRAVELING EXPENSES

ACCOUNTS OF

_____

(Name of disbursing officer)

_____

(Official designation)

_____

(Place where located)

_____

(Period for which voucher is rendered)

APPENDIX 18.

[Sheet 1.]

WAR DEPARTMENT
Form No. 339.
Approved by the Comptroller of the Treasury April 29, 1914

WAR DEPARTMENT
QUARTERMASTER CORPS

Voucher No. .....
General Account.....
Detail Account.....

PUBLIC VOUCHER

PERSONAL SERVICES—REPORTER

APPROPRIATION: PAY, ETC., OF THE ARMY, 191 *Symbol*.....

THE UNITED STATES TO....., DR.

ADDRESS: .....

OBJECT SYMBOL	DATE 191		AMOUNT		U. S. NOTATIONS
		For services as a reporter before a.....convened at....., pursuant to Special Orders No. ....., Department....., 191 :			
	.....	Cases of.....			
	.....	..... hours before the....., at $1 per hour.. (Court, board, or commission.)	.....	....	
	.....	..... words, at 15 cents per 100 words.....	.....	....	
	.....	..... words, at 10 cents per 100 words.....	.....	....	
	.....	..... words, carbon copies, at 2 cents per 100 words..	.....	....	
	.....	..... days in going to, in attendance on, and returning from said....., at $3 per day.. (Court, board, or commission.)	.....	....	
	.....	To mileage for travel between.....and..... in going to and returning from the court, being .... miles, at ..... cents a mile.....	.....	....	
		TOTAL.....	.....	....	

I CERTIFY that as above stated I rendered the services named, and the travel between the places named was required.

(PAYEE).....
(Do not sign in duplicate)

EXAMINED BY

(Account to be completely filled in before certification, and no alteration or erasure to be made thereafter.)

I CERTIFY that.....was employed by me as a reporter for a .....under the annexed authority, and that the account for his services as stated above is correct.

.....
(TITLE).....

Paid by check No. ...., dated ....., 191 , of ..... on ....., in favor of payee named above, for $.....

OR

Received ....., 191 , of ....., IN CASH, the sum of ..... dollars and ..... cents, in full payment of the above account.

.....

$..... .....

FORM No. 339.

Public Voucher No. _____

WAR DEPARTMENT
QUARTERMASTER CORPS

Appropriation: Pay, etc., of the Army, 191

Amount, $_____

IN FAVOR OF

(Name of payee)

For Personal Services—Reporter

ACCOUNTS OF

(Name of disbursing officer)

(Official designation)

(Place where located)

(Period for which voucher is rendered)

WAR DEPARTMENT
Form No. 339.
Approved by the Comptroller of the Treasury April 29, 1914

[Sheet 2]

WAR DEPARTMENT

QUARTERMASTER CORPS

Voucher No.....
General Account.....
Detail Account.....

PUBLIC VOUCHER

PERSONAL SERVICES—REPORTER

Symbol.....

APPROPRIATION: PAY, ETC., OF THE ARMY, 191

THE UNITED STATES TO ....., Dr.

ADDRESS: .....

OBJECT SYMBOL	DATE 191		AMOUNT		U. S. NOTATIONS
		For services as a reporter before a ..... convened at ....., pursuant to Special Orders No. ....., Department ....., 191 :			
	.....	Cases of			
	.....	..... hours before the ....., at $1 per hour.. (Court, board, or commission.)			
	.....	..... words, at 15 cents per 100 words.....	.....	....	
	.....	..... words, at 10 cents per 100 words.....	.....	....	
	.....	..... words, carbon copies, at 2 cents per 100 words..	.....	....	
	.....	..... days in going to, in attendance on, and returning from said ....., at $3 per day..... (Court, board, or commission.)	.....	....	
	.....	To mileage for travel between ..... and..... in going to and returning from the court, being..... miles, at ..... cents a mile	.....	....	
		Total.....	.....	....	

EXAMINED BY

MEMORANDUM VOUCHER
(To be filled in and retained by paying officer.)

Voucher certified by.....

Voucher approved by.....

Paid by check No. ...., dated ...., 191 , of ..... on ....., in favor of payee named above, for $.....

OR

Paid in cash ..... by ....., ... dollars and ..... cents.
(Date)
Funds derived from check No. .... on .....

$..... .....

FORM No. 339.

MEMORANDUM

Public Voucher No. _____

WAR DEPARTMENT

QUARTERMASTER CORPS

Appropriation: Pay, etc., of the Army, 191

Amount, $_____

IN FAVOR OF

(Name of payee)

For Personal Services—Reporter

ACCOUNTS OF

(Name of disbursing officer)

(Official designation)

(Place where located)

(Period for which voucher is rendered)

APPENDIX 19.

REPORT OF INQUEST.

———— ————,
————, 191—.

From: ———— ———— summary court-martial.
To: Commanding officer.
Subject: Report of inquest over body of ————, deceased.

1. Pursuant to your letter (*or*, your oral instructions) of ————, I viewed on the ———— day of ————, the body of ————, found dead at this post, and have examined the following witnesses, whose testimony is appended to this report:

———— ————.
———— ————.

2. From a view of the body and from the evidence before me I find that at or about ———— m., on the ———— day of ———— (*or*, on or about the ———— day of ————), ————, a ———— of ————, ———— Regiment of ———— (*or*, a civilian), died a natural death (*or*, committed suicide; *or*, was accidentally killed in manner and circumstances as follows; *or*, was killed by ———— or by some person or persons unknown, in manner and circumstances as follows: (*or* otherwise, as the case may be).

———— ————.
———— ————.

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