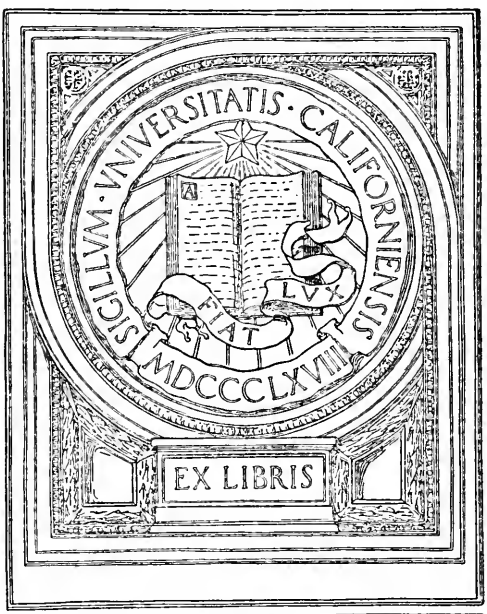

WAR DEPARTMENT
OFFICE OF THE JUDGE ADVOCATE GENERAL

A DIGEST OF OPINIONS

OF THE

JUDGE ADVOCATES GENERAL OF THE ARMY

1912

WASHINGTON
GOVERNMENT PRINTING OFFICE
1917

War Department,
Document No. 412.
Office of the Judge Advocate General.

War Department,
Office of the Chief of Staff,
Washington, February 17, 1912.

The following Digest of Opinions of the Judge Advocates General of the Army, prepared under the direction of the Judge Advocate General, United States Army, by Capt. Charles Roscoe Howland, Twenty-first Infantry, Assistant to the Judge Advocate General, is published for the information of the Army and Organized Militia of the United States.

By order of the Secretary of War:

Leonard Wood,
Major General, Chief of Staff.

JUDGE ADVOCATES GENERAL OF THE ARMY.

Name.	From—	To—
Holt, Joseph [1]	Sept. 3, 1862	Dec. 1, 1875
Dunn, Wm. M	Dec. 1, 1875	Jan. 22, 1881
Swaim, David G	Feb. 18, 1881	Jan. 3, 1895
Lieber, G. Norman [2]	Jan. 3, 1895	May 21, 1901
Davis, Geo. B	May 24, 1901	Feb. 14, 1911
Crowder, Enoch H	Feb. 15, 1911	

[1] Capt. J. F. Lee was appointed "Judge Advocate of the Army" under section 4 of the act of March 2, 1849, and served as such until September 3, 1862.

[2] Gen. Lieber was "Acting Judge Advocate General" from July 25, 1884, to January 3, 1895.

PREFACE.

This Digest includes the opinions of the Judge Advocates General of the Army from September 3, 1862, to January 31, 1912, inclusive.

Practically all opinions of general interest are presented. Those are omitted whose enunciated principles have been incorporated into the Regulations or into the Statute law.

No opinion is presented which is known or believed to have been disapproved by the Secretary of War.

The SUBJECTS in the Digest are arranged alphabetically.

The arrangement of the opinions on a SUBJECT is set forth in a synopsis which precedes those opinions.

As shown by the synopsis, the divisions of a SUBJECT are indicated by Roman Numerals and the subdivisions by other characters in the following order:

SUBJECT.

ROMAN NUMERALS ..... thus: I
CAPITAL LETTERS ..... thus: A
Arabic Numerals ..... thus: 1
Small Bold-Faced Letters ..... thus: a
Arabic Numerals in Parentheses ..... thus: (1)
Small Italic Letters in Parentheses ..... thus: (*a*)
Arabic Numerals in Brackets ..... thus: [1]
Small Italic Letters in Brackets ..... thus: [*a*]
CAPITAL LETTERS IN BRACKETS, thus: [A]

Each paragraph of the text is preceded by the characters, arranged in order, which synoptically indicate the division and each subdivision of the SUBJECT which includes the opinion printed in the paragraph.

The opinions of the Judge Advocate General's Office are cited as follows:

C. for Cards.
P. for Letter Press Books.
R. for Record Books.

Many of the SUBJECTS consist of cross references only. In the cross references where there is under a heading more than one reference to a SUBJECT, there is as little repetition as possible of the characters which synoptically indicate the location of the desired opinion.

WASHINGTON, D. C., *February 16, 1912*

JUDGE ADVOCATES GENERAL OF THE ARMY.

Name.	From—	To—
Holt, Joseph [1]	Sept. 3, 1862	Dec. 1, 1875
Dunn, Wm. M	Dec. 1, 1875	Jan. 22, 1881
Swaim, David G	Feb. 18, 1881	Jan. 3, 1895
Lieber, G. Norman [2]	Jan. 3, 1895	May 21, 1901
Davis, Geo. B	May 24, 1901	Feb. 14, 1911
Crowder, Enoch H	Feb. 15, 1911	

[1] Capt. J. F. Lee was appointed "Judge Advocate of the Army" under section 4 of the act of March 2, 1849, and served as such until September 3, 1862.

[2] Gen. Lieber was "Acting Judge Advocate General" from July 25, 1884, to January 3, 1895.

PREFACE.

This Digest includes the opinions of the Judge Advocates General of the Army from September 3, 1862, to January 31, 1912, inclusive.

Practically all opinions of general interest are presented. Those are omitted whose enunciated principles have been incorporated into the Regulations or into the Statute law.

No opinion is presented which is known or believed to have been disapproved by the Secretary of War.

The SUBJECTS in the Digest are arranged alphabetically.

The arrangement of the opinions on a SUBJECT is set forth in a synopsis which precedes those opinions.

As shown by the synopsis, the divisions of a SUBJECT are indicated by Roman Numerals and the subdivisions by other characters in the following order:

SUBJECT.

ROMAN NUMERALS.....thus: I
CAPITAL LETTERS.....thus: A
Arabic Numerals.....thus: 1
Small Bold-Faced Letters.....thus: **a**
Arabic Numerals in Parentheses.....thus: (1)
Small Italic Letters in Parentheses.....thus: (*a*)
Arabic Numerals in Brackets.....thus: [1]
Small Italic Letters in Brackets.....thus: [*a*]
CAPITAL LETTERS IN BRACKETS, thus: [A]

Each paragraph of the text is preceded by the characters, arranged in order, which synoptically indicate the division and each subdivision of the SUBJECT which includes the opinion printed in the paragraph.

The opinions of the Judge Advocate General's Office are cited as follows:

C. for Cards.
P. for Letter Press Books.
R. for Record Books.

Many of the SUBJECTS consist of cross references only. In the cross references where there is under a heading more than one reference to a SUBJECT, there is as little repetition as possible of the characters which synoptically indicate the location of the desired opinion.

WASHINGTON, D. C., *February 16, 1912*

DIGEST.

ABANDONING CONTRACT.

See CONTRACTS XIV H; XXII to XXIII.

ABROGATION.

Of lease.

See CLAIMS VII C 3.

ABOLISHMENT OF OFFICE.

See OFFICE II A 1; V A 7 e.

ABSENCE FROM QUARTERS.

See ABSENCE II B 2.
See A. W. XXXII A; LXII D.

ABSENCE.

I. WITH LEAVE.

A. NOT DUTY STATUS..... *Page 7*

B. OFFICERS.

1. Ordinary leaves.

a. Indulgence not a right.

b. Leave and duty status incompatible..... *Page 8*

(1) Disability on leave not in line of duty.

c. Authority to grant.

(1) May extend.

(2) May not give *nunc pro tunc*.

(3) Chief of Engineers may not grant as department commander.

d. Granted in terms of months and days.

e. Leave order does not relieve from duty..... *Page 9*

f. Staff officers must apply to War Department for one month or more.

g. Extra leaves.

(1) Professors at United States Military Academy.

(2) Instructors at service schools.

(*a*) Student officers..... *Page 10*

(3) Officers on duty with civil government in Philippine Islands.

h. Fail to sail on scheduled transport.

i. Date of arrival in United States.

k. Graduation leave interrupted by temporary duty.

l. Relinquishment, express and implied.

m. Rule for computing leave allowance..... *Page 11*

(1) Suspension is not leave.

n. Commutation of quarters on leave.

2. Hunting leaves.

I. WITH LEAVE—Continued.
C. Enlisted Men.
1. Ordinary pass.
a. Can not be used to cover desertion..... *Page 12*
(1) Attempt to board departing ship while on pass.
b. Overstaying pass while on shore leave.
c. Duty status. See Absence I C 4 b.
2. Hunting pass.
3. Fishing pass.
4. Furlough.
a. Commander's discretion not subject to revision..... *Page 13*
b. A pass for several days is a furlough. Pass and furlough distinguished.
c. Uniform not required.
d. Employment.
(1) By Quartermaster's Department.
(2) In civil life.
e. Soldier returns after furlough has expired.
(1) Commutation paid if delay excused.
(2) Not paid if soldier has been discharged..... *Page 14*
f. Service for retirement.
(1) Furlough not counted.
(2) In service beyond the seas furlough does count double.
g. Not given to enable soldier to accept commission as scout officer.
h. Return transportation on commercial liner charged against soldier.
D. Nurse Corps.
1. Leave not cumulative.
II. WITHOUT LEAVE.
A. Officers.
1. Restrained by civil authority.
2. Overstay absence with leave.
B. Enlisted Men.
1. Obligation to remain and to return to organization..... *Page 15*
2. Thirty-second article of war refers to absence from post.
3. From civil hospital.
4. Restrained by force *majeur*.
a. By civil authority.
(1) Turned over to civil by military authorities.
b. By disability.
5. Soldier requests transportation back to post.
6. What is proper station.
7. Restored to duty..... *Page 16*
8. No service no pay.
a. Less than one day not counted.
b. Acquittal of desertion does not prevent forfeiture of pay.
9. Time lost made good.
a. In hands of civil authorities.
10. *Nunc pro tunc* order does not change status.

I A. *Held,* that an officer on leave of absence for more than 24 hours or a soldier on furlough is on a status of absence with leave and so can not be regarded as occupying a *status of duty.* *C. 26949, Jan. 23, 1910.*

I B 1 a. A leave of absence is an indulgence which is or may be granted to an officer at the pleasure and in the discretion of a proper

military superior. *Held,* that as it is not a privilege created by law it can not for that reason ever be demanded as a matter of legal right.[1] *C. 13346, Dec. 8, 1903.*

I B 1 b. The status of leave of absence and that of duty are incompatible, and both can not exist at the same time in respect to the same person; nor is there an intermediate status, or connection, lying between them which partakes of some of the incidents of both. If one exists, the other necessarily ceases to exist. In a case in which an officer had been granted leave to visit the United States by a proper commanding general in the Philippine Islands, and, subsequently was placed on a status of duty by the Secretary of War the superior of such commander, *held,* that as both conditions could not exist together, one must survive and one must be destroyed. As between the two, it seems to admit of no doubt that the status created by the commanding general in the Philippine Islands must yield to that created by the Secretary of War. *C. 20917, Jan. 12, 1906; 23666, Sept. 21, 1908.*

I B 1 b (1). An officer was disabled while on leave. *Held* that his status was not one of duty, as disability, to be pensionable, must have been incurred in line of duty. *C. 25634, Oct. 1, 1909; 19323, Feb. 24, 1906.*

I B 1 c (1). A post commander granted 10 days' leave of absence to an officer under his command which was in fact, though not in form, an extension of a leave already granted by a higher commander; *held,* that the authority of a commanding officer of a post in the matter of leaves of absence to officers is fully set forth in (paragraph 49) the Army Regulations (1910) and does not extend to the granting of a leave in continuation of one previously granted by superior authority; such power being restricted by regulation to the officer by whom the original leave was granted or, when the indulgence asked for is beyond his power to grant, to the next higher commander. *C. 17491, Feb. 3, 1905; 17440, Jan. 24, 1905.*

I B 1 c (2). The Army Regulations vest in certain military commanders the power to grant leaves of absence; *held,* that the authority so vested in the several classes of military commanders is one which, from its nature, is operative *in futuro,* and leaves which they are authorized to grant are to have prospective operation. None of the regulations above referred to confer power to act retrospectively, or to grant a leave as of a prior date, or to cause a leave to become operative as to time already passed. Such an undertaking, of which that described in the foregoing statement of facts is an example, involves a resort to *nunc pro tunc* procedure, which has no application in the execution of regulations respecting leaves of absence; which, from the nature of the case, can only operate in the future. *C. 17440, Jan. 24, 1905; 21294, Mar. 13, 1907.*

I B 1 c (3). *Held,* that the Chief of Engineers was not a "department commander" and was therefore without authority to grant leaves of absence to officers stationed at Willets Point, N. Y. *C. 15, July 10, 1894.*

I B 1 d. Paragraph (58) Army Regulations (1910) provides that "leaves of absence will be granted in terms of months and days." *Held,* where a leave for a certain number of days less than a month

[1] Leave accrued to a volunteer officer can not be used by him if appointed to the Regular Army. VIII Comp. Dec. 192; Sept. 25, 1901.

is granted, and is subsequently extended for a specific number of days, that there is no authority for converting the same into months, the operation of the leave being measured in terms of days. *C. 19284, May 31, 1906.*

I B 1 e. An order granting leave of absence to an officer stationed at a military post does not operate *proprio vigore* to relieve the officer from duty at the post, which is a matter falling within the jurisdiction of the post commander, whose duty it is to see that a successor is appointed to take over the money and property accountability of the officer, if he has any, and, where special duties are imposed in orders of the post or department commanders, that an officer has been designated to relieve him. *C. 18756, Nov. 8, 1905.*

I B 1 f. Paragraph (51) Army Regulations (1910) requires that applications for leaves of absence for staff officers for more than one month shall be forwarded for the action of the War Department. The administrative principle which underlies the regulation is this: If a staff officer is to be granted leave for more than one month it may be necessary to replace him, either permanently or temporarily, by another, and this fact gives rise to a number of considerations, as to which the head of the staff department to which the officer belongs should be consulted; another officer may not be available at the moment; the tour of the officer who desires leave may be approaching its close; he may be engaged in the execution of most important duties, and there may be difficulty in finding a competent line officer to replace him; if he is a bonded officer it may be difficult, and in some cases impossible, to replace him by an officer who is not bonded. These are some of the matters in respect to which the opinion of the head of the staff department has to be ascertained before it can be determined whether the indulgence can be granted without detriment to the public interest. This view has regulated the practice of the department for nearly 70 years. *C. 17037, Oct. 21, 1904.*

I B 1 g (1). Under section 1330, R. S., professors, assistant professors, instructors, and other officers of the Military Academy may be granted leaves of absence by the superintendent under regulations prescribed by the Secretary of War for the entire period of the suspension of the ordinary academic studies. *Held,* that such leave, if not taken during the suspension of the ordinary academic studies, at the time of the summer encampment, may be taken by such officers at such other time during the academic year as their services may be spared for that purpose. *Held,* further, that it must be taken during the leave year in which it accrues, as such leave is not cumulative. *C. 27492, Nov. 14, 1910.*

I B 1 g (2). The act of March 23, 1910 (36 Stat. 244), granting leaves of absence to instructors in the several service schools during remission of academic duties is conceived in the same sense as section 1330 of the Revised Statutes, which grants similar leave, without deduction of pay or allowances, to the corresponding class of officers at the Military Academy. *Held* that the operation of the act extends to the officers composing the "academic staff" as distinguished from the "military staff" of the several educational institutions established by statute or regulation for the instruction of commissioned officers or enlisted men (*C. 17388, May 9, 1910*), but does not include student officers nor officers on duty with organizations composing the garrisons doing post duty only. *C. 17388, May 3 and Dec. 20, 1910; 18085, June 27, 1911.*

Held also that veterinarians on duty as instructors at the service schools are entitled to the benefit of the act. *C. 17388, May 26, 1910.*

I B 1 g (2) (a). *Held,* in view of the peremptory requirements of section 1265 of the Revised Statutes, that student officers relieved from duty at the War College and the several service schools can not be placed on an extra-leave status with full pay from the date of their graduation until the 31st of August following, unless the order relieving such officers contains the requirement that the delays in reporting for duty, therein authorized, are for the convenience of the Government.[1] *C. 18286, July 12, 1905.*

I B 1 g (3). An officer of the Army on detached service with the civil government in the Philippine Islands was granted a vacation by that Government. *Held,* that as the officer was serving by authority of law with the Philippine Government, he was not subject to Army control during his incumbency of that position, and his status in respect to duty is not determined by the Army authorities, by whom he should be regarded as occupying a status of duty during the entire period of his detachment as an inspector of Philippine Constabulary.

The mere fact that he was permitted to be absent from his post of duty in the Army by the proper authority did not, in the opinion of this office, create a status of leave of absence of which the department should take official cognizance. *C. 22400, Nov. 21, 1907; 24236, Dec. 21 and Dec. 23, 1908.*

I B 1 h. Where an officer on leave of absence is unable to reach a port of sailing before the departure of a particular transport and is assigned to a transport sailing at a subsequent date, his leave status may be extended, or he may be placed on temporary duty, or upon a status of awaiting orders for the convenience of the Government, but the status last named is not demandable as of right, as its creation rests in the discretion of the Secretary of War, upon a showing of facts sufficient to warrant its establishment in a particular case. *C. 23030, Sept. 30, 1906; 27346, Oct. 12, 1910.*

I B 1 i. The date of arrival in the United States, within the meaning of the act of March 2, 1901 (31 Stat. 902), is the date when the transport has reached the terminus of its voyage; that is, when it has reached the dock where the passengers and cargo can be discharged. *C. 18286, July 12, 1905; 25592, Sept. 20, 1909.*

I B 1 k. The act of December 20, 1886 (24 Stat. 351), authorizes a graduation leave in favor of those cadets who graduate from the Military Academy and who are commissioned second lieutenants in the Army. By uniform practice such leaves have begun immediately after graduation and continued three months. *Held,* in accordance with the rule which is applied in like cases to other officers when on regular leaves of absence, that if an officer while on graduation leave should be ordered to temporary duty, the order should recite that the officer's leave is temporarily suspended and that on its completion he will revert to a leave status. *C. 18286, July 12, 1905; 13346, Apr. 17, 1908.*

I B 1 l. The relinquishment of a leave of absence may be express or implied. *Held* that it is express when made in the form of a written instrument, to the completion of which an acceptance of such relinquishment by proper superior authority is necessary, and implied when the officer reports at his proper post for duty or at any other

[1] See Cir. No. 35, W. D., July 26, 1905.

post designated for that purpose by proper superior authority on a date previous to the expiration of his leave. *C. 27346, Oct. 12, 1910.*

I B 1 m. *Held* that when an officer is granted a leave of absence under the act of July 29, 1876 (19 Stat. 102), it shall be charged to the year or years in which it first accrued in order of priority of date, and any balance of accrued leave remaining shall stand to his credit for future leaves; provided no credit shall stand longer than four years from date of accruing.[1] *P. 44, 271, Dec.* 18, *1890.*

I B 1 m (1). *Held,* in estimating the period of the leave of absence to which a certain officer would be entitled under the provisions of section 1265, R. S., and the act of July 29, 1876, without incurring a deduction from his pay, that a period during which he was permitted to be absent from his post, while under a sentence of suspension from rank, was not properly to be taken into account; such absence not being an absence of an "officer on duty" in the sense of the act of 1876, but an absence pending the execution of a sentence which, during its term, separated the officer from all duty. *R. 42, 306, May, 1879.*

I B 1 n. The provision of the act of July 29, 1876, to the effect that officers shall enjoy the leaves of absence accorded by the act, "without deduction of pay or allowance," *held* to entitle such officers as are drawing commutation of quarters while on duty at a station to receive their allowance for *quarters,* as well as their full pay for and during the period of absence. The word "allowance" must mean something—must mean some emolument distinct from pay. *R. 43, 277, Apr.* 7, *1880; C. 13863, Dec. 24, 1902, and Jan. 21, 1903.*

I B 2. The Army Regulations[2] provide that under certain conditions "permission to hunt will not be considered as a leave of absence." Circular No. 35, War Department, July 26, 1905, published a decision of the Secretary of War to the effect that all authorized absence from duty except on account of sickness or wounds counts as absence with leave unless shown to be for the convenience of the Government. *Held* that although hunting leaves have not been looked upon as ordinary leaves, but rather expeditions for the special improvement of the officer and for the acquisition of topographical information for the Government, they must, since the publishing of the above circular, be considered as ordinary leaves unless it is shown in each specific permission that the leave to hunt is for the convenience of the Government. *C. 18487, Aug. 29, 1905.*

I C 1. By custom a soldier is permitted, when not required for specific duties, to be absent for a brief period of time by authority of his commanding officer. Such a pass generally recites that it authorizes the man to go to a particular place, and also that he may be absent until a certain specified hour, but whether it recites this or not it is always given for a lawful purpose only and does not per se remove the soldier from a duty status. (*C. 23666–D, Sept. 21, 1909; 24393, May 7 and June 1, 1910; 26949, June 23, 1910.*) *Held* that it answers a double purpose—first, it is authority in the post or camp for a temporary absence of a member of the garrison; second, it operates to protect the man against molestation while outside the limits of his post so long as he does not violate the express or implied conditions imposed by the authority who granted the pass. No vested rights

[1] See General Orders, No. 77, War Department, series 1886.
[2] Par. 65, Ed. 1910, Army Regulations.

pass in the operation of such an instrument. It can be revoked by the authority which granted it. It also ceases to run as a protection against molestation or apprehension so soon as the soldier violates the conditions of the pass. *C. 1397, Aug. 5, 1908*[1]*; 23666, Dec. 8, 1909, and Feb. 3, 1911. Held,* further, that a soldier who is absent on pass which authorizes his absence until a certain hour can not afterwards rely on his pass as authority for being absent at a later hour. *Held* also that a soldier so absent on a pass which authorizes him to be absent until a certain hour, which limit of time permits of a visit to a near-by town, viz, A, can not rely on his pass as a protection at any time before that fixed for its termination, should he be apprehended at a point more distant, viz, B, from his station than A, and while speeding away as rapidly as possible, as the pass does not cover his absence under those conditions. *C. 1397, Aug. 5, 1908; 2658, Oct. 15, 1896; 29211, Oct. 31, 1911.*

I C 1 a. A soldier is on pass. The evidence is conclusive that he is using the pass for the purpose of separating himself from the service with the intention of not returning thereto. *Held* that the pass does not protect him from apprehension as a deserter, as the pass was not granted for an unlawful use and can not be so used. *C. 1397, Aug. 5, 1908.*

I C 1 a (1). Should a soldier obtain a pass good until 4 o'clock p. m., and at 12 o'clock noon board and take passage on a steamer which is scheduled to sail at 1 o'clock p. m. for a foreign and distant point, *held* that he can not rely on his pass for protection should he be arrested as a deserter just before the steamer sails. *C. 1397, Aug. 5, 1908.*

I C 1 b. An enlisted man en route by transport from Manila to San Francisco overstayed his pass at Nagasaki, Japan, and arrived at the dock after the transport had sailed. He immediately reported to the depot quartermaster at that station, by whom he was quartered and subsisted until he was placed on board the next United States transport bound for San Francisco. *Held* that at the expiration of his authorized time on pass his status became that of absence without leave, and that his absence without leave terminated when he reported to the depot quartermaster at the place from which he had gone on pass and was given a status by him awaiting transportation. *C. 20006, July 9, 1906; 29211, Oct. 31, 1911.*

I C 2. The "hunting pass" authorizes an absence of more than 24 hours from the post, and is given upon the assumption that the soldier while on this pass is actually engaged in hunting game, thereby acquiring skill in the use of firearms. *Held* that such a pass does not permit a soldier to go to a point at a considerable distance from his post, and that while on such a pass he is not removed from a status of duty. *C. 23666–I, Feb. 3, 1911.*

I C 3. Enlisted men of the Coast Artillery, because of their duties in connection with mine planting, are required to understand the handling of steam launches and other small boats. *Held,* that a "fishing pass" may be given to a Coast Artillery man which will permit him to be absent for more than 24 hours on a duty status, but will not permit him to go to a considerable distance from his post. *C. 23666–I, Feb. 3, 1911.*

---

[1] See Circular 66, War Department, 1908, which publishes this opinion.

I C 4 a. The eleventh article of war does not apply to a large number of cases in which the applicant is not under the immediate command and control of the regimental commander; these are provided for in paragraphs 105 to 112, inclusive Army Regulations of 1908 (106 to 113, A. R., 1910 ed.); where, however, the issue of the furlough falls, under law and regulation, within the exclusive jurisdiction of the regimental commander, his exercise of discretion in respect thereto is not subject to revision by higher authority. But where an application is, for any reason, brought within the jurisdiction of a higher commander, on account of the length of the furlough asked for, or because the applicant desires to leave the department in which he is stationed, or otherwise, the application should go to the higher commander to whom it is addressed with such expression of opinion on the part of the regimental commander as is required by paragraph 791 of the Army Regulations (799, A. R., 1910 ed.). *C. 15841, Jan. 30, 1904.*

I C 4 b. The terms "furlough" and "pass" are not synonymous. It is an essential incident in the operation of a pass that the beneficiary of the permit is not removed from the list of men "present for duty," his permission to be absent for a short time being of such a character as not to interfere with the performance of the more important duties for which he is expected to hold himself in constant readiness. In determining what limits of time and place shall be regarded as falling within the operation of a pass, the foregoing conditions should be borne in mind. The soldier should be carried on the rolls and returns as present for duty, the operation of the pass or other form of permission to be absent should be restricted to the vicinity of the post, and its duration should not extend over a period of 24 hours. The character of the instrument in the operation of which the soldier absents himself should, therefore, be determined by the duration of the absence and the status created, rather than by its name. If, for example, an instrument be called a "pass" which authorizes a soldier to be absent for several days and to visit a point at a considerable distance from the station of his company, it should be regarded as a "furlough," although it may be in form a "pass." *C. 24293, Oct. 4, 1910; 23666, Sept. 8, 1910; 15841, Jan. 29, 1904.*

I C 4 c. There is no regulation requiring an enlisted man to wear his uniform while on furlough. *C. 5408, Nov. 30, 1898.*

I C 4 d (1). *Held,* that there is no statute which precludes a soldier on furlough from being employed by the Quartermaster's Department. *C. 2607, Sept. 16, 1896, and May 6, 1908.*

I C 4 d (2). *Held,* that an enlisted man on furlough may accept employment in civil life. *C. 5005, Sept. 20, 1898; 5408, Nov. 30, 1898.*

I C 4 e (1). A soldier on furlough applied for transportation in sufficient time so that he could report at his station on or before the last day of his furlough. Due to the delay of the Government, transportation was not furnished promptly. He did not report until after his furlough had expired. *Held,* that the period of time between the last day of his furlough and the date of his actual reporting for duty at the station of his company should be excused by proper authority. *Held* further, that if his delay should be excused he would not forfeit

the commutation of rations due.[1] *C. 3988, May 13, 1898; 4758, Aug. 10, 1898; 7211, Oct. 26, 1899; 20203, Aug. 11, 1906.*

I C 4 e (2). *Held* that a delay in reporting at the expiration of a soldier's furlough may not be excused after the soldier has been discharged. *C. 7020, Sept. 13, 1899.*

I C 4 f (1). *Held* that the time spent by an enlisted man on furlough should not be deducted in computing the 30 years' service necessary for retirement. *C. 8696, Aug. 4, 1900.*

I C 4 f (2). *Held* that a soldier serving an enlistment in the possessions beyond the seas can not count absence on furlough double for the purpose of retirement. *C. 26995, July 29, 1910.*

I C 4 g. *Held* that furloughs for an indefinitely long period of time may not be granted to enlisted men in order that they may, during such furloughed period, accept commissions as officers of Philippine Scouts and serve as such. *C. 10843, July 12, 1901.*

I C 4 h. An enlisted man on furlough in the United States from one of the possessions lying beyond the seas reported at a post and requested return transportation to his station. He was given an order for transportation on a commercial liner. *Held* that such transportation would be a proper charge against the soldier's pay, and that the post commander's order would not properly carry with it transportation at the expense of the Government in such a case. *C. 27100, Aug. 1, 1910.*

I D. Section 19 of the act of February 2, 1901, provides *inter alia* that nurses "may be granted leaves of absence for thirty days, with pay, for each calendar year." (31 Stat. 751.) *Held* that nurses appointed under the above act are a component part of the United States Army and are not civilian employees under contract (*C. 10160, Apr. 5, 1901*); and that they may not be granted cumulative leaves. *C. 10160, May 31, 1902.*

II A 1. An officer of the Army in the hands of the civil authorities was convicted by the civil courts. *Held* that he was absent without leave.[2] *Held* further, in the event of an appeal, that the disposition of the case should be awaited before it could be determined whether his absence was excused [3] or unavoidable.[4] *C. 17667, June 19, 1905.*

II A 2. In view of the requirement of section 1265 of the Revised Statutes, that an officer absent without leave shall "forfeit all pay and allowances unless the absence be excused as unavoidable"; *held* that the power to decide whether the absence of an officer, in excess of a leave previously granted, is, or is not, to be excused as unavoidable, vests, by reasonable implication, in the officer who is empowered by regulations to grant the leave which, for some reasons, has been overstayed, as an incident of his authority to grant leaves of absence to officers under his command. From this it reasonably follows that, if the absence be in excess of a particular commander's power in the premises, the power to excuse passes to the next higher commander, and the discretion created by the statute must be exercised by him, and his conclusions as to its character, as avoidable or unavoidable, are final and,

[1] See V. Comp. Dec., 941, for case of soldier granted furlough in United States until his regiment should arrive from the Philippines.

[2] See Dodge *v.* U. S., 33 Ct. Cls., 28.

[3] An officer's absence without leave may be excused. (See Smith *v.* U. S., 23 Ct. Cls., 452, Nov. 5, 1888.)

[4] See XI Comp. Dec., 659, Apr. 29, 1905, and 755, June 14, 1905.

unless appealed from, are not subject to review by higher authority.[1] *C. 20764, Dec. 14, 1906.*

II B 1. The articles of war which prescribe the duties of the soldier require him not only to remain habitually with the organization of which he is a member but, when absent therefrom without authority, for any cause, to endeavor constantly to return to his duty, for, in the absence of such endeavor, the mere lapse of time operates to establish that *animus non revertendi* which, coupled with unauthorized absence, causes it to ripen into the offense of desertion. *C. 12524, Apr. 30, 1902; 1397, June 20, 1908; 3694, Jan. 4, 1910.*

II B 2. An unauthorized absence from the quarters only, as from 11 p. m. inspection, held not properly chargeable under the 32d Article. This article contemplates an absence from the soldier's "troop, battery, company, or detachment"—an absence from the post or command.[2] *P. 47, 133, May, 1891; 49, 100, and 171, Sept., 1891.*

II B 3. A soldier undergoing treatment in hospital absented himself without leave and, instead of reporting for duty with his company at Jacksonville, Fla., went to Jonesville, Va., where he was under the care of a local physician. *Held* that the status of absence without leave, thus established, was not terminated or interrupted by his sickness at Jonesville, Va., but that the status of absence without leave continued until the soldier's muster out of the Volunteer service. *C. 9786, Feb. 8, 1901; 12464, June 8, 1902; 15942, Mar. 17, 1904.*

II B 4 a. Where a soldier absent with leave is arrested by the civil authorities, tried, and convicted and, due to the restraint so imposed, fails to report at the expiration of his furlough, or pass, he passes to the status of absence without leave from the date of such expiration. *C. 18764, June 21, 1910; 3694, Jan. 4, 1910; 12524, Apr. 30, 1902.* Where a soldier is held by the civil authorities, the holding should be regarded, if he be not convicted of an offense, as duress; if convicted of such offense the duress is held to have been due to the fault of the soldier. *C. 16966, Mar. 31, 1909.*

II B 4 a (1). When a soldier is turned over to the civil authorities on service of the proper process, *held* that prosecution will not lie for absence without leave during the time that he is away being tried or serving sentence. *C. 18041, Sept. 7, 1905.*

II B 4 b. An officer or soldier while absent without leave incurs a disability which prevents his return to duty. *Held* that his status of absence without leave is not changed. *C. 20974, Nov. 2, 1908.*

II B 5. A soldier absent without leave who reports to a quartermaster for transportation back to his post does not by such report change his status as an absentee without leave. *C. 11778, Dec. 19, 1901; 12967, July 21, 1902.*

II B 6. Where expense is incurred in transporting a soldier absent without authority to his proper station, *held* that the proper station of a soldier is that at which his company or detachment is serving. The station of a soldier so returned may be changed by the War Department, in which case the new station so assigned is the proper station of the soldier within the meaning of the regulations. *C. 17775, Apr. 4, 1905.*

---

[1] Cir. No. 5, War Dept., 1905.

[2] Capture by the enemy while absent without leave gives a soldier a duty status. Vol. III, Digest 2d Comp. Dec., p. 9, Jan. 26, 1888.

II B 7. Where an officer[1] or soldier on his return from an unauthorized absence is, in consequence of his report of the facts and circumstances of such absence, not proceeded against by his proper commander for the military offense involved, but is by the latter placed upon full duty, such action, under the general custom of the service, may be pleaded as a good defense, if the officer or soldier be subsequently brought to trial for the unauthorized absence. *R. 2, 376, and 391, May, 1863.*

II B 8 a. An enlisted man forfeits his pay and allowances during the period of an absence without leave, as provided in Army Regulations. During such absence he renders no service, and therefore earns neither pay nor allowances. *C. 12168, Mar. 10, 1902; 3694, July 9, 1910.* The forfeiture is thus by operation of law, and accrues independently of the result of a trial for the military offense involved in the unauthorized absence. One of the purposes of the muster and pay rolls is to show what service the soldier renders, and if they show that he has rendered none during a particular period by reason of an absence without leave, he is not entitled to pay and allowances during such period.[2] *P. 36, 303, Nov., 1889; 57, 240, Jan., 1893; C. 1494, June, 1895.* For an absence without leave of less than a day the soldier may, of course, be tried by court-martial and sentenced to suffer a forfeiture, but such absence should not be noted on the muster and pay rolls. *P. 47, 399, June, 1891; C. 12577, June 17, 1902.* The pay so forfeited should cover the entire period of his absence without leave. *C. 12967, July 15, 1902; 13808, Dec. 16, 1902; 17492, Feb. 3, 1905; 17768, Apr. 1, 1905; 18934, Dec. 28, 1905.*

II B 8 b. A soldier who had been absent without leave from March 7 to August 5, 1892, was tried for desertion and acquitted, and was not convicted of absence without leave. *Held,* that so far as any military offense is concerned his record is, as to this matter, absolutely clean; but his record shows that he was guilty of a breach of contract in failing to furnish the services he had contracted to furnish, and this failure was caused by his being absent without authority. That was a fact, and the rolls, the object of which is to give the facts with reference to this contract, would be false if they did not show his failure to earn his pay, by reason of breach of contract by absence without authority. This indicates his status in this respect. *C. 1494, June 28, 1895.*

II B 9. Under the act of May 11, 1908 (35 Stat. 109), an enlisted man who has absented himself without leave in an enlistment entered into subsequent to the approval of that act will be required to make good time so lost. *Held,* however, that for an enlistment prior to date of approval of that act he can not be required to make good such absence except as provided in the forty-eighth article of war,[3] but the period of absence will not be regarded in the computation of continuous service in the operation of the act of May 11, 1908 (35 Stat. 110). *C. 18438, June 24, 1908.*

II B 9 a. A soldier was arrested, tried, convicted, and held to serve sentence of civil authorities. *Held,* that he was absent without leave, but could not be held to make the time good. *C. 16966, Oct. 3, 1904; 16423, Aug. 3, 1905.*

II B 10. An officer overstayed a leave of absence. A *nunc pro tunc* order was issued purporting to grant him a leave of absence for

[1] An absence without leave by an officer is laid under the sixty-second article of war.
[2] U. S. *v.* Landers, 92 U. S., 77, 79; also 12 Comp. Dec., 328.
[3] 10 Comp. Dec., 333, Oct. 9, 1903.

the period overstayed. *Held*, that such order did not change his status. *C. 17440, Jan. 25, 1905; 19077, June 20, 1906; 20764, Dec. 12, 1906; 17440, Aug. 28, 1907.*

ABSENCE WITH LEAVE.

See ABSENCE I to II.
Arrest of officer or soldier.....See ARTICLES OF WAR LIX I 2.
Civilian emptoyecs.....See CIVILIAN EMPLOYEES I to II.
Female nurses.....See ARMY I G 3 d (6) (a) [2].
Graduation leave.....See ARMY I D 6.
Medical attendance during.....See CLAIMS VIII.
Officer, muster-out of.....See VOLUNTEER ARMY IV D 1 a (2) (*a*).
Quarters and heat and light.....See PAY AND ALLOWANCES II A 1 c (6).
Medical Reserve Corps officer.....See ARMY I G 3 d (3) (*c*) [2].
Muster-out during.....See VOLUNTEER ARMY IV D 1 a (3) to (5).

ABSENCE WITHOUT LEAVE.

See ABSENCE II to III.
See ARTICLES OF WAR XXXII A to C.
Civil authorities in hands of.....See ENLISTMENT I B 2 b.
Deserter convicted of.....See DESERTION V B 4.
Evidence of.....See DISCIPLINE XI A 17 a (2) (*a*) [1] [*e*] [A].
Medical attendance on.....See CLAIMS VIII.
Muster-out during.....See VOLUNTEER ARMY IV D 1 a (4) (*b*).
Pay and allowances while on.....See DESERTION XIV A 1.
PAY AND ALLOWANCES I C 2; II A 3 a (2); III C 2 b.
Relation to desertion.....See DESERTION I A to E.
Status after muster-out of organization United States Volunteers......See VOLUNTEER ARMY IV C 1 b.
Stoppage of pay on account of.....See DESERTION V D 1 b.

ACCEPTANCE.

Appointment, original.....See OFFICE III A 6 to 7; B 3 a (1).
Appointment, by volunteer.....See OFFICE V A 2.
Appointment, how affects pay.....See PAY AND ALLOWANCES I B 1.
Bid.....See CONTRACTS VI F 2; XI A; XI D 3; H; XVI B.
Bond.....See BONDS I M 1; III B; IV K; N.
Claim, settlement of.....See CLAIMS I.
Deed.....See PUBLIC PROPERTY II A 3.
Flag.....See FLAG V.
Gift to United States.....See APPROPRIATIONS VII.
Nunc pro tunc of resignation.....See CIVILIAN EMPLOYEES XI A 1.
Pardon.....See PARDON II.
Promotion.....See OFFICE III A 7 to 8; B 5 to 6.
Rent from assignee.....See PUBLIC PROPERTY VII B 1 a.
Resignation.....See OFFICE IV D 1; 5 to 6.
Resignation for good of service.....See OFFICE IV D 6.
Right of way.....See PUBLIC PROPERTY VI B 3.
Service as soldier.....See VOLUNTEER ARMY II B 1 b.
Surety.....See BONDS V A.
Vacates office.....See OFFICE IV A to B; V A 7 a.

ACCOMPLICE.

Evidence by.....See DISCIPLINE XV F 4.

ACCOUNTABILITY.

For public property.....See PUBLIC PROPERTY I F to G.
Governor, for public property.....See MILITIA IX D.

ACCRETIONS TO LAND.

See PUBLIC PROPERTY I D 1.

ACCUSED.

See DISCIPLINE V A to I 1; II D 3 to 9.
Arraignment of.....See DISCIPLINE IX E 1 to 5 b.
Charges, copy of to.....See DISCIPLINE II E.
Copy of record.....See ARTICLES OF WAR CXIX A.
Counsel, right to.....See COMMAND V A 5; DISCIPLINE XV B.
Court of inquiry.....See ARTICLES OF WAR CXIX A to B; CXX A to B; CXXI A.
Criminates himself.....See DISCIPLINE V B; B 1.
Escape of during trial.....See DISCIPLINE VIII H 2; XVII A 4 c.
Evidence by.....See DISCIPLINE XI A 14 a; b; b (1).
Insanity, evidence of.....See DISCIPLINE XI A 11 a.
Jurisdiction over by general court-martial...See DISCIPLINE VIII G 1 a; b; c (1).
Revision of record.....See DISCIPLINE IX N 4.
Statement by.....See DISCIPLINE IV C 2 a (1); L; V H 1 to 5; IX I 1 to 2, XV F 6.
Statement, inconsistent with plea.....See DISCIPLINE IX E 5 a (2).
Wife as witness.....See DISCIPLINE X B 1; 1 a.
Witnesses, right to.....See DISCIPLINE X D; D 1.
Witnesses, right to be confronted with.....See ARTICLES OF WAR XCI H.

ACCUSER.

As summary court officer.....See DISCIPLINE XVI E 5.
As trial judge advocate.....See DISCIPLINE III C 2 c (1) to (3).
Commanding officer as.....See DISCIPLINE XVI C.
How determined.....See ARTICLES OF WAR LXXII I 1 to 4.

ACQUITTAL.

Deserter.....See DESERTION V E 1; 2; XI; XIV A 6.
Discharge without honor after, not authorized......See DISCHARGE III B 4.
Drunkenness.....See DISCIPLINE XII A 9 a.
Effect of.....See DISCIPLINE XII I 1; XVIII B 1 g.
Forfeitures after.....See PAY AND ALLOWANCES I C 2; III C 2 b.
Post exchange officer charged with embezzlement of fund......See GOVERNMENT AGENCIES II B 5.
Release after.....See DISCIPLINE XIV E 9 n (1).
Responsibility for public property.....See DESERTION XIX A.

ACTION BY GENERAL COURT-MARTIAL.

See DISCIPLINE XII A to F.

ACT OF GOD.

See CONTRACTS X C.

ACTIVE DUTY.

See RETIREMENT I K to L.

ACTIVE LIST.

Retired officer not on.....See RETIREMENT I K 4 d.

ACTIVE SERVICE.

See RETIREMENT I K 1.
In Marine Corps by enlisted man counts for retirement. See RETIREMENT II A 2.

ADDITIONAL CHARGE.

See ARTICLES OF WAR LXXXIV B.

ADDITIONAL PAYMENTS.

See CONTRACTS XLI.

ADDITIONAL TIME.

See CONTRACTS VII J 2.

ADJOURNMENT.

Of general court martial.....See DISCIPLINE IX L 1; 2.

ADJUTANT GENERAL'S DEPARTMENT.

Duty in case of disapproval of deserter's conviction.....See DESERTION XIV A 5.
Eligibility of officers to command.....See COMMAND I A 1.
The Adjutant General is a Chief of Corps..See INSIGNIA OF MERIT II H 1.
The Adjutant General's office, duties of.....See ARMY I G 3 a (2).

ADJUTANTS GENERAL OF STATES.

See MILITIA III G.
Payment of.....See MILITIA XI A.
Penalty envelopes, use of.....See COMMUNICATIONS II A 4.

ADMINISTRATIVE STAFF.

See ARMY I G 3 a to b.

ADMIRALTY LIEN.

See CLAIMS VI F.

ADMONITION.

By commanding officer.....See DISCIPLINE XVII A 2.

ADVERTISEMENT.

By Quartermaster's Department.....See LAWS I B 5.
Contracts by.....See CONTRACTS III to VI; VI A; E; 1; L.
Exception to rule requiring.....See CONTRACTS VII to VIII.

ADVISING DESERTION.

See ARTICLES OF WAR LI A.

AFFIRMATION.

By member of General Court Martial.....See ARTICLES OF WAR LXXXIV A.

AGE.

Candidate for commission.....See OFFICE III A 1 b (2); c (3).
Limit for enlistment.....See ENLISTMENT I B 1 to 2; D 2 to 3.
Minor, how shown.....See DISCHARGE XII B 1; 2.

AGENT.

Acts of, bind surety.....See BONDS V D.
Service of process on.....See BONDS V G.

ALASKA.

See TERRITORIES III to IV.
Cadets from.....See ARMY I D 1 a (2) (*c*).
Discharge without honor in.....See ARMY I G 3 b (2) (*a*) [3] [*a*].
Reenlistment in.....See ENLISTMENT I B 2 c.
Use of Army in.....See ARMY II B.

ALASKAN ROAD COMMISSION.

Authority of.....See TERRITORIES III F to G.
Sale of property.....See PUBLIC PROPERTY IX A 3 a.

ALIEN.

I. MAY DISPLAY FLAG OF COUNTRY.
II. MINOR MAY DECLARE INTENTION TO BECOME CITIZEN.
III. APPLICATION FOR CITIZENSHIP MADE BEFORE COURTS IN UNITED STATES.
IV. IN ALASKA, CITIZENSHIP HOW SECURED. (See TERRITORIES.)
V. ENLISTMENT OF. (See ENLISTMENT.)
VI. DISCHARGE OF, FROM ARMY. (See DISCHARGE.)
VII. MAY WORK ON GOVERNMENT WORKS.

I. *Held* that there is no law precluding an alien residing in the United States, the subject of a foreign Government with which we are at peace, from displaying the flag of his country on his dwelling. *P. 15, 176, Mar., 1887.*

II. Under section 4 of the act of June 29, 1906 (34 Stat. L., 596), an alien minor, independently of his family, may make declaration of his intention to become a citizen at any time after he reaches the age of 18. *C. 10040, Nov. 28, 1910.*

III. As none of the courts established in the Philippine Islands come under the terms of description used in section 2165, Revised Statutes; *held*, that a soldier applying for naturalization should appear before a court in the United States having jurisdiction to naturalize. *C. 12293, Mar. 29, 1902.* The same is true in Cuba. *C. 10915, July 23, 1901.*

VII. There is no law prohibiting contractors on Government work employing persons on such work who are not citizens of the United States. *C. 724, Dec. 6, 1894.*

CROSS REFERENCES.

Appointment to office.....See OFFICE III A 1 b (1).
Armory can not be used for drill by.....See MILITIA VIII B.
Candidate for West Point.....See ARMY I D 1 a (2) (*a*) [2] [a] [B].
Contracts with.....See CONTRACTS XXIII to XXIV.
Desertion of.....See DESERTION IX L; M.
Discharge of.....See DISCHARGE XXVI A.
Enlistment of.....See ENLISTMENT I B 1 b (1); (2); C to D.
Naturalization of.....See MILITIA XIX to XX.
Nonintercourse in war.....See WAR I C 2 b.

ALIMONY.

Judgment against an officer.....See Army I C 2.
Proceedings for, against retired officer.....See Retirement I G 2 d.

ALLOTMENTS.

Of pay.....See Pay and allowances I C 8 a.

ALLOWANCES.

See Pay and allowances II to IV.
Chief and assistant chief of Philippine constabulary.....See Territories IV B 2 a (1).
Militia during joint encampment.....See Militia VI B 2 h.
Not pay.....See Pay ans allowances II A 3 a (1).
Officers at Soldiers' Home.....See Soldiers' Home I C.
Post exchange officer.....See Government agencies II B 1.
Sea travel.....See Command V B 1.

ALTERNATE.

Beneficiary for gratuity.....See Gratuity I B 4 b.
Candidate for West Point.....See Army I D 1 a (2) (*b*) [1].

AMENDMENT.

Bids.....See Contracts VI M.
Charges.....See Discipline II D 8 a; H 1; 2; IV B 1; XIV E 7 b; c.
Muster roll, unauthorized.....See Pay and allowances III E 1.
Records, official, not permitted.....See Volunteer Army IV H 1.

AMERICAN NATIONAL RED CROSS.

See Red Cross II to III.

AMMUNITION.

Issue of.....See Militia XII B.

ANNULMENT.

Of contract.....See Contracts VII J 1; XXI to XXII.

APPEAL.

See Absence II A 2.
From regimental court-martial.....See Articles of War XXX A.
From general court-martial.....See Discipline XIV E 9 f (1); XV I 1.

APPOINTMENT.

Board of review.....See Army I G 3 d (2) (*b*).
Bureau chief.....See Rank I B 1 d to e.
Cadetship.....See Army I D 1 a to c.
Constructive pardon.....See Pardon XV C 3.
Date of.....See Office III B 3 to 4.
Eligibility of dismissed officer for.....See Office IV E 1 c; 2 f.
Medical Department.....See Rank I B 1 c to d.
Noncommissioned officers.....See Rank I D to E.
Office in Army.....See Office II to IV.
Office in Volunteers.....See Office V A to B.
Pay before.....See Pay and allowances I A 1 a.
Porto Rico Regiment.....See Army I G 2 a (1) (*a*); (*b*).
Successor: vacates office.....See Office IV C; D 5 c (2).

APPREHENSION.

Of deserter.....See Desertion III A to H.

APPROPRIATIONS.[1]

I. GENERAL RULE AS TO EXPENDITURES COVERED BY APPROPRIATION ACTS.

A. Appropriation for "Construction" of Telegraph Line Includes all Expenditures Necessary to Carry out the Provisions of the Act..... *Page 25*

B. An Appropriation Does Not Cover an Article Named in the Estimates Unless it Names that Article or Designates a Class that would Include that Object.... *Page 26*

C. Appropriations Made in Conformity to Estimates Imply an Authority to Purchase the Article Named in the Estimate.

II. WORDS NECESSARY TO CONSTITUTE AN APPROPRIATION. APPROPRIATION BY IMPLICATION..... *Page 27*

III. SECTION 3736, R. S. LANDS SHALL NOT BE PURCHASED EXCEPT UNDER A LAW AUTHORIZING SUCH PURCHASE.

IV. SECTION 3678, R. S. SUMS APPROPRIATED SHALL BE APPLIED TO THE OBJECT FOR WHICH APPROPRIATED..... *Page 28*

V. SECTION 3690, R. S. ANNUAL AND PERMANENT APPROPRIATIONS. PERIOD FOR WHICH APPROPRIATIONS ARE AVAILABLE.

A. Section 3690, R. S., in General.

B. Permanent Appropriation Usually Available Regardless of Lapse of Time..... *Page 29*

C. Necessary Expenses Required in Preparation of a Contract that is Payable From an Annual Appropriation May be Paid, Although Incurred Before Beginning of Fiscal Year..... *Page 31*

D. An Annual Appropriation is Available for Two Years After the Expiration of the Fiscal Year.

VI. PROPERTY CAN NOT BE TRANSFERRED FROM ONE BUREAU TO ANOTHER EXCEPT WHERE PROPERTY IS NOT NEEDED FOR PURPOSE FOR WHICH PURCHASED..... *Page 32*

VII. MONEY DONATED TO THE UNITED STATES CAN NOT BE EXPENDED UNTIL APPROPRIATED..... *Page 33*

VIII. EXPENSES PRELIMINARY TO PURCHASES FOR WHICH AN APPROPRIATION IS MADE ARE CHARGEABLE TO THE APPROPRIATION.

IX. WHERE AN APPROPRIATION IS MADE FOR A CERTAIN OBJECT THE ENTIRE APPROPRIATION CAN NOT BE EXPENDED FOR PARTIAL PERFORMANCE ONLY..... *Page 34*

X. SPECIFIC APPROPRIATION CAN NOT BE SUPPLEMENTED BY A GENERAL APPROPRIATION. INSTANCES..... *Page 35*

XI. RULE THAT GENERAL WORDS FOLLOWING THE ENUMERATION OF SPECIAL ARTICLES OR CLASSES OF ARTICLES ARE TO BE CONSTRUED AS LIMITED TO ARTICLES OF A LIKE KIND WITH THOSE SPECIFIED..... *Page 37*

XII. APPROPRIATIONS THAT COVER THE PAYMENT OF A REWARD FOR THE DETECTION OF CRIME..... *Page 38*

XIII. USE OF APPROPRIATION TO REIMBURSE PERSONS WHO HAVE EXPENDED MONEY FOR PURPOSES COVERED BY THE APPROPRIATION.

---

[1] Prepared by Maj. H. M. Morrow, judge advocate; assistant to Judge Advocate General.

XIV. APPROPRIATIONS FOR "IMPROVEMENT" OF RIVERS AND HARBORS AND OTHER CIVIL WORKS.

XV. APPROPRIATION FROM WHICH PROPERTY HAS BEEN ACQUIRED SHOULD BE CHARGED WITH THE EXPENSE OF AN ABSTRACT OF TITLE AND OTHER EXPENSES CONNECTED WITH TRANSFER OF LAND, AS EXPENSE OF RECORDING DEEDS, PAYMENT OF TAXES, ETC ..... *Page 39*

XVI. APPROPRIATIONS FOR THE RELIEF OF SUFFERERS FROM STORMS, ETC ..... *Page 40*

XVII. APPROPRIATIONS FOR "CONSTRUCTION" OF LAUNDRIES DO NOT AUTHORIZE THE PURCHASE OF A BUILDING ALREADY CONSTRUCTED ..... *Page 41*

XVIII. EXPENDITURE OF PUBLIC MONEY ON LAND SUBJECT TO A PUBLIC EASEMENT, OR ON LAND TO WHICH THE UNITED STATES DOES NOT HAVE TITLE.

XIX. APPROPRIATIONS FOR MILEAGE ..... *Page 42*

XX. APPROPRIATIONS FOR TRANSPORTATION ..... *Page 43*

XXI. APPROPRIATIONS FOR INCIDENTAL EXPENSES OF QUARTERMASTER'S DEPARTMENT ..... *Page 45*

XXII. APPROPRIATIONS FOR SUPPORT OF THE ARMY AVAILABLE FOR STRICTLY ARMY PURPOSES AT MILITARY ACADEMY, GENERAL HOSPITALS, WAR COLLEGE, ETC.

XXIII. APPROPRIATIONS FOR CONTINGENT EXPENSES OF WAR DEPARTMENT ..... *Page 46*

XXIV. CONTINGENCIES OF THE ARMY ..... *Page 47*

XXV. APPROPRIATIONS FOR EXPENSES OF COURTS-MARTIAL, COURTS OF INQUIRY, ETC ..... *Page 50*

XXVI. APPROPRIATIONS FOR TELEGRAMS AND TELEPHONE MESSAGES ON "OFFICIAL BUSINESS" ..... *Page 51*

XXVII. APPROPRIATIONS FOR THE MILITIA. (See MILITIA AND "APPROPRIATIONS" XXX.)

XXVIII. APPROPRIATIONS FOR BARRACKS AND QUARTERS .... *Page 52*

XXIX. APPROPRIATIONS FOR POST EXCHANGES ..... *Page 53*

XXX. APPROPRIATIONS RELATING TO FORTIFICATIONS AND SEACOAST DEFENSES ..... *Page 54*

XXXI. APPROPRIATIONS FOR REGULAR SUPPLIES ..... *Page 55*

XXXII. ACT OF MARCH 3, 1899, CREATING AN EMERGENCY FUND.

XXXIII. MONEY PAYABLE FROM A SPECIFIC APPROPRIATION CAN NOT BE TRANSFERRED TO THE CREDIT OF ANOTHER APPROPRIATION.

XXXIV. PROCEDURE WHERE ACCOUNTS ARE PAYABLE FROM AN EXHAUSTED APPROPRIATION ..... *Page 56*

XXXV. ACT OF JUNE 16, 1890, AS TO MONEY FOR DISCHARGE BY PURCHASE BEING DEPOSITED TO CREDIT OF AN ARMY APPROPRIATION.

XXXVI WHERE AN ARTICLE IS TO BE USED FOR A PURPOSE COVERED BY TWO SEPARATE APPROPRIATIONS, COST MAY BE APPORTIONED BETWEEN THE TWO APPROPRIATIONS.

A. WOOD-WORKING MACHINERY AT MILITARY PRISON.

B. MACHINERY FOR LAUNDERING CLOTHES OF PRISONERS AT MILITARY PRISON.

C. PRINTING OF BLANK FORMS FOR SPECIAL INSPECTION.

D. PRINTING OF CERTAIN SPECIALLY RULED SHEETS RELATING TO FORTIFICATIONS AND THE MILITIA ..... *Page 57*

XXXVII. PLANT INSTALLED AT ARTILLERY SCHOOL WHETHER CHARGEABLE AGAINST APPROPRIATION FOR FORTIFICATIONS OR FOR SUPPORT OF SCHOOL.

XXXVIII. RIVER AND HARBOR ACT OF MARCH 3, 1899, WHETHER EXPENSE OF REMOVING FALLEN RAILROAD BRIDGE OVER CANAL SHOULD BE PAID FROM APPROPRIATION FOR REMOVING WRECKS OR FOR CARING FOR CANALS.

XXXIX. APPROPRIATION FROM WHICH CUSTOMS DUTIES AND INTERNAL-REVENUE TAXES ON GOVERNMENT PROPERTY ARE PAYABLE.

XL. FUEL AND LIGHT FOR COMMISSARY STOREHOUSE WHETHER CHARGEABLE AGAINST QUARTERMASTER'S OR SUBSISTENCE DEPARTMENT.

XLI. ELECTRIC INSTALLATION AND OPERATION OF FANS FOR HOSPITALS WHETHER CHARGEABLE AGAINST APPROPRIATION FOR QUARTERMASTER'S DEPARTMENT OR MEDICAL AND HOSPITAL DEPARTMENT..... *Page 58*

XLII. EXPENSE OF REMOVAL OF BUILDINGS FOR CONSTRUCTION OF HOSPITAL CHARGEABLE AGAINST APPROPRIATION FOR CONSTRUCTION OF HOSPITAL, REGARDLESS OF THE FACT THAT ANOTHER DEPARTMENT CONTROLLED THE BUILDINGS TO BE REMOVED.

XLIII. TELEPHONE MESSAGES FROM A HOSPITAL WHETHER CHARGEABLE AGAINST HOSPITAL FUNDS OR APPROPRIATIONS FOR QUARTERMASTER'S DEPARTMENT.

XLIV. ACT OF MARCH 2, 1901, AS TO PURCHASE OF MEDICAL AND HOSPITAL SUPPLIES, MAY BE USED TO EQUIP ROOMS IN ARMY MEDICAL SCHOOL FOR INSTRUCTION PURPOSES.

XLV. ACT OF MAY 11, 1908, AS TO APPROPRIATION FOR MEDICAL CARE OF CIVILIAN EMPLOYEES.

XLVI. "ELECTRIC FIXTURES" PROVIDED FOR IN APPROPRIATION ACT INCLUDES WATT METERS FOR MEASURING ELECTRICITY..... *Page 59*

XLVII. ACT OF FEBRUARY 27, 1893, APPROPRIATING FOR FUEL AND LIGHTS FOR ENLISTED MEN, INCLUDES GAS.

XLVIII. EXPENSE OF OBTAINING SERVICES OF EXPERTS IN CONNECTION WITH TEST OF COAL CHARGEABLE AGAINST APPROPRIATIONS FOR FUEL AND HEATING APPARATUS.

XLIX. UNEXPENDED BALANCE AFTER COMPLETION OF MONUMENT ERECTED BY MONEY JOINTLY CONTRIBUTED BY UNITED STATES AND STATE TO BE DIVIDED PRO RATA BETWEEN UNITED STATES AND STATE.

L. COST OF DISTILLED WATER CHARGEABLE AGAINST APPROPRIATION FOR PROCURING WATER AND INTRODUCING THE SAME TO BUILDINGS.

LI. APPROPRIATION FOR ERECTION OF BUILDING DOES NOT INCLUDE FURNITURE..... *Page 60*

LII. APPROPRIATION FOR CONSTRUCTING ROADS AND WHARVES INCLUDES REPAIRING A CRIB DOCK AND APPROACH THERETO.

LIII. THE COST OF MAINS AND HYDRANTS SITUATED IN A STREET PURCHASED BY THE UNITED STATES IS CHARGEABLE AGAINST THE APPROPRIATION FOR THE PURCHASE OF THE STREET.

LIV. ACT OF MARCH 2, 1907, MAKING APPROPRIATION FOR LIBRARY OF SURGEON GENERAL'S OFFICE, INCLUDES THE HIRE OF LABORERS TO HANDLE AND CARRY THE BOOKS.

LV. ACT OF JULY 1, 1898, MAKING AN APPROPRIATION TO COVER THE ENTIRE COST OF LIGHTING AND MAINTAINING CERTAIN ELECTRIC LIGHTS, INCLUDES NECESSARY EXCAVATIONS AND EXTENSION OF UNDERGROUND CONDUITS.

LVI. ACT OF MARCH 23, 1910, APPROPRIATING FOR MAINTENANCE AND REPAIR OF TELEGRAPH LINES INCLUDES TRAVEL EXPENSES OF CIVILIAN EMPLOYEE.

LVII. ACT OF MARCH 9, 1906, FOR PROPER FENCING OF BURIAL GROUNDS IN CONNECTION WITH MARKING GRAVES OF CONFEDERATE DEAD, INCLUDES THE SERVICES OF AN ARCHITECT TO DESIGN THE FENCING AND INCLUDES GRADING.

LVIII. COST OF PRIVATE TREES CUT DOWN IN COURSE OF TACTICAL INSTRUCTION AT A SERVICE SCHOOL CHARGEABLE AGAINST THE APPROPRIATION FOR THE SCHOOL ..... *Page 61*

LIX. ACT OF FEBRUARY 14, 1902, FOR THE ESTABLISHMENT OF FORT WILLIAM McKINLEY, HELD NOT TO AUTHORIZE CONSTRUCTION OF ROADS.

LX. NO APPROPRIATION AVAILABLE FOR FURNISHING MUSIC FOR "VOLUNTEER BANDS."

LXI. EXPENSE OF CONFINING NATIVE OF PORTO RICO IN PENITENTIARY FOR CIVIL CRIME FOR WHICH TRIED BY MILITARY COMMISSION NOT PAYABLE FROM APPROPRIATIONS FOR THE ARMY.

LXII. ACT OF JUNE 28, 1910, APPROPRIATING FOR "REPAIR" OF MONUMENTS ON BATTLE FIELD.

LXIII. ACT OF JULY 8, 1898, RELATIVE TO TRANSPORTING TO THEIR HOMES THE REMAINS OF DECEASED OFFICERS AND SOLDIERS.

LXIV. REMARKS OF QUARTERMASTER GENERAL BEFORE CONGRESSIONAL COMMITTEE NOT TO PREVAIL OVER LANGUAGE OF APPROPRIATION ..... *Page 62*

LXV. ACT OF MARCH 3, 1909, AS TO USING ONE APPROPRIATION TO MAKE UP DEFICIENCY IN ANOTHER, NOT LIMITED TO APPROPRIATIONS PERTAINING TO SAME FISCAL YEAR.

LXVI. FORFEITURE OF PAY OF CIVILIAN EMPLOYEE BY SENTENCE OF COURT-MARTIAL.

LXVII. APPROPRIATION FOR MAINTAINING AND IMPROVING NATIONAL CEMETERIES SUFFICIENT TO COVER A SIDEWALK IN FRONT OF A NATIONAL CEMETERY.

I A. The act of February 17, 1887 (24 Stat. 405), appropriated[1] "for the construction of a military telegraph line on the eastern coast of the State of Florida from * * * and for the establishment of a station for the taking of meteorological observations and the display of storm signals at Point Jupiter," *held* that it is the imperative rule that expenditures are payable out of the appropriation under which they are specifically provided for, and that applying this rule to the above act, it follows that all expenses legitimately incurred in

[1] In an appropriation act general legislation beginning with the word "hereafter" takes effect at the date of the act and not at the beginning of the ensuing fiscal year for which the appropriation is made. Chance *v.* U. S., 38 Ct. Cls. 75.

the construction of the telegraph line in question and in establishing the station for the purposes intended are legally payable out of the appropriation in question, and include the mileage of the officer to supervise the work, the transportation of the enlisted men engaged therein, the materials to be used, the hire of labor, etc., the erection of the necessary shelter, the purchase of instruments, and every other expenditure necessary to carry out the provisions of the act to construct the line and to establish the station.[1] *51 R. 666, Mar. 12, 1887.*

I B. The act of March 3, 1891 (26 Stat. 978), appropriated $200,000 "to enable the Secretary of War to complete the establishment of the Chickamauga and Chattanooga National Park, according to the terms of an act entitled 'An act to establish a national military park at the battlefield of Chickamauga,' approved August 19, 1890." The estimates for this appropriation included sundry items to the amount of double the sum actually appropriated, that is, $400,000, and it was claimed that one of these items in the estimates, that of $35,000 for "seven wrought-iron observation towers," was included in the act, notwithstanding that the act cut down the total of the estimate by one-half, made no mention of the particular item of observation towers, and specified no class of objects within which it could be included, but made an appropriation in the most general terms to carry out the purposes of a previous act, which also did not include observation towers. *Held* that the appropriation did not include the erection of observation towers, and that although estimates are a legitimate means of construction of appropriation acts based on them,[2] yet an appropriation act can not be construed as appropriating for a certain article specified in the estimates unless such appropriation act either names that article or designates a class of objects within which it may be fairly and reasonably embraced.[3] If a certain article is fairly and reasonably embraced within a class of objects designated in the appropriation act, it may be presumed that Congress had in view that particular article and intended to make provision for it. *54 P. 112, June 14, 1892.*

I C. It is a familiar general principle adopted and acted upon in the executive departments that appropriations made in conformity with *estimates*, and based upon them, imply an authority to expend the appropriated funds for the articles designated in the estimates and imply a legislative sanction of the objects for which the appropriations were asked.[4] *51 R. 666, Mar. 12, 1887; 41 P. 105, May 29, 1890; C. 584, July 28, 1911.*

---

[1] In VII Comp. Dec., 31, it was said: "It is true that the question whether a particular expense is necessary or appropriate to the object for which an appropriation is made is one which is in general within the discretion of the head of the department having control of the disbursement of the moneys appropriated. This is particularly true of any question of the necessity for an expenditure, or of the character or quality or reasonable cost of any article purchased under a particular appropriation; and, except as to unconscionable transactions, which are not to be presumed, the exercise of such discretion in relation to these particular questions, within the authority of the law, is conclusive upon the accounting officers and the courts. (United States *v.* Speed, 8 Wall., 77, 83; Earnshaw *v.* United States, 146 U. S., 60, 68.) But the discretion so conferred is not an unlimited discretion; it is a legal discretion, subject to the terms of the particular appropriation and to restrictions imposed by other laws. (V Comp. Dec., 152.)" See also VIII Comp. Dec., 327.

[2] See Ohio *v.* Thomas, 173 U. S. 276, 282.

[3] See VI Comp. Dec., 912.

[4] See Dig. Second Comptroller of 1869, pars. 76 and 77.

II. A Senate resolution of May 2, 1900, provided "That the Secretary of War be directed to communicate to the Senate the number, amount, and character of all claims which have come to his knowledge against the United States for damages to private property used or destroyed by troops in the military service within the limits of the United States during the War with Spain, and to ascertain the loss or injury, if any, that may have been sustained by such claimants, and report to the Senate what amounts he finds to be equitably due from the United States to such claimants." *Held* that the above resolution did not constitute a law making an appropriation for the expenses of the investigation provided for, and therefore the Secretary of War would not be authorized to involve the United States in any expense in making such investigation.[1] *C. 8199, May 5, 1900.* The river and harbor act of June 3, 1896 (29 Stat. 213), provided for an investigation of San Pedro Harbor, Cal., by a board, and upon the report of the board expressly authorized the Secretary of War to let the contract for the improvement of the harbor, and appropriated $50,000 "for the expenses of the board and payment of the civil engineers for their services." It clearly appeared from the wording of the act that it assumed that the money to pay for the improvement was appropriated by the act; but in fact the act did not appropriate for the improvement. *Held*, that as the act expressly authorized the Secretary to let the contract he could let it on credit if he wished, but he could not proceed with the work itself, as the use of the money for the work itself would violate the provisions of sections 3678, 3679, 3732, and 3733, R. S. *C. 3721, Nov. 18, 1897.*

III. Section 3736, R. S., provides that "no land shall be purchased on account of the United States except under a law authorizing such purchase." *Held*, that in view of the above provision of the Revised Statutes, the provision in the act of February 14, 1902 (32 Stat. 12), providing "for the establishment in the vicinity of Manila, P. I., of a military post, including the construction of barracks, quarters for officers, hospital, storehouses, and other buildings, as well as water supply, lighting, sewerage, and drainage, necessary for the accommodation of a garrison of two full regiments of infantry, two squadrons of cavalry, and two batteries of artillery, to be available until expended, five hundred thousand dollars," was not sufficient to justify the purchase of land.[2] *C. 12154, Mar. 4, 1902.* The act of May 26, 1900 (31 Stat. 206), made an appropriation "for the

[1] The act of February 27, 1899 (30 Stat. 894), directed the Secretary of War to "appoint and detail" an officer of the Army to investigate claims for services of members of the Fourth Arkansas Mounted Infantry, but the act made no appropriation to meet the expenses of the appropriation. It was therefore held that as there was no other appropriation out of which the expenses could be legally paid the act was inoperative, and subsequently an appropriation of $2,000 was made for that purpose by the urgent deficiency act of February 9, 1900. See 4 Comp. Dec., 325; 6 id. 514; 7 id. 411; 13 id. 729; Fisher's case, 15 Ct. Cls. 323, for a review of forms of acts held to constitute an appropriation. See also 6 Ct. Cls. 84. Section 9 of the act of June 30, 1906 (34 Stat. 764), provides: "No act of Congress hereafter passed shall be construed to make an appropriation out of the Treasury of the United States, or to authorize the execution of a contract involving the payment of money in excess of appropriations made by law, unless such act shall in specific terms declare an appropriation to be made or that a contract may be executed." As to the meaning of the words "in specific terms" see 13 Comp. Dec., 219, 700, 729.

[2] In this case supplemental legislation (32 Stat. 465) authorized the use of a portion of the appropriation for the purchase of land. See also 7 Comp. Dec., 524; 11 id. 132; 14 id. 784; 11 Op. Atty. Gen. 201; 19 id. 80; 22 id. 665; 24 id. 603.

purpose of connecting headquarters, Department of Alaska, at St. Michael, by military telegraph and cable lines with other military stations in Alaska." *Held*, that in view of the requirements of section 3736, R. S., the above act would not authorize the acceptance by the military authorities of the donation of a lot in Alaska as a site for a telegraph office and quarters for a signal corps detachment. *C. 21874, Feb. 18, 1908.* So where the act of June 25, 1910 (36 Stat. 725), made an appropriation as follows: "Mount Rainier National Park: For additional work upon the wagon road into said park from the west, heretofore surveyed and commenced under the direction of the Secretary of War, to be immediately available," *held*, that in view of the requirements of section 3736, R. S., the appropriation did not authorize its application to the acquisition of a right of way for the roadway. *C. 16898, Nov. 26, 1910.*

IV. In view of the requirements of section 3678, R. S., that "All sums appropriated for the various branches of expenditure in the public service shall be applied solely to the object for which they are respectively made, and for no other," *held* that the expense of fencing a tract of land the property of the United States, intended for fortification purposes, would not be a legal charge against an appropriation for river and harbor improvements. *C. 726, Jan. 8, 1895.* Nor where an appropriation was made for "shelling or otherwise improving to completion" a certain designated road between two places named could the appropriation be expended on the construction of an entirely different road from that designated. *C. 3635, Nov. 9, 1897.* Nor could an appropriation for the support of the Army or for the construction and maintenance of works of river and harbor improvement be expended for insuring public property against fire or employees against accident. *C. 23069, Mar. 16, 1909.* Where an appropriation is made expressly for a "Cavalry post" and a bill to make the appropriation available for the construction of a post for "mobile troops" had passed only one House of Congress, *held* that in view of section 3678, R. S., the appropriation could not be expended for the construction of a post for mobile troops other than Cavalry, notwithstanding that the amending bill had passed one House of Congress. *C. 28948, Sept. 7, 1911.*

V A. Section 3690, R. S., provides that "all balances of appropriations contained in the annual appropriation bills and made specifically for the service of a fiscal year, and remaining unexpended at the expiration of such fiscal year, shall only be applied to the payment of expenses properly incurred during that year, or to the fulfillment of contracts properly made within that year; and balances not needed for such purposes shall be carried to the surplus fund.[1] This section, however, shall not apply to appropriations known as permanent or indefinite appropriations."[2] *Held* with respect to this section: (1) Where supplies are both ordered and delivered within the fiscal year or a contract is made providing for

[1] "Congress intends that each annual appropriation should bear the burdens of the particular year for which it is granted, and that it should be for the proper use of that year, and no other." 6 Comp. Dec., 815, 819. "It must be remembered that an annual appropriation can only be used for the needs and uses of the particular fiscal year for which it is made, or in payment of contracts properly made for such needs and uses." 11 Comp. Dec., 455. 13 Op. Atty. Gen., 288.

[2] Permanent appropriations are those made for an unlimited period; indefinite appropriations are those in which no amount is named. 13 Op. Atty. Gen., 288.

their delivery within the year, the appropriations for that year are chargeable therefor, unless it clearly appears that the amount was manifestly and largely in excess of the needs of the year, including in such needs the keeping of a reasonable stock on hand. As, for instance, where forage was both purchased and delivered in a certain fiscal year, but the voucher showed it was intended for use during July, August, and September, of the next fiscal year, it should be paid for from funds for the former fiscal year if there was a shortage in the "reasonable stock on hand" at the time, otherwise it must be paid for from the funds of the next fiscal year.[1] (2) Where a contract is made within the fiscal year providing for deliveries within the year, the appropriation for that year would be chargeable therewith, even if the actual deliveries were not made until after its close, subject to the limitation stated in (1).[2] (3) Where a contract is made within a fiscal year, providing for delivery of supplies to begin in that year, and the deliveries are completed after its expiration, the appropriation for that year would be properly chargeable if it appears that the supplies delivered after the expiration of the year were required to replace inroads made during the year on the "reasonable stock on hand." In such a case the supplies could be considered as "*for the service of that year.*" (4) If a *nonperishable* article is needed for a given fiscal year, either for actual use or to keep a "reasonable stock on hand," its purchase during that year should be charged to the appropriation for that year, even though its use may be continued for several years. (5) Where a contract for a building is made and construction begun within a fiscal year, the appropriation for that year would seem to be properly chargeable therewith, even though the construction is not completed until some time after its expiration.[3] *C. 8525, June 27, 1900, and July 16, 1910; 22225, Oct. 18, 1907.*

V B. The expenditure of an unexpended balance of an appropriation not "made specifically for the service of any fiscal year" within the meaning of section 3690 R. S., is not rendered illegal by the lapse of time, as, for instance, 10 years since the date of the appropriation. *C. 4066, Apr. 27, 1898.* So where the act of March 3, 1901 (31 Stat. 1168), made an appropriation "Toward the enlargement of Governors Island, two hundred thousand dollars; and for the erection of storehouses and other necessary buildings, in accordance with the plan

---

[1] 4 Comp. Dec., 555; 6 id., 898.

[2] Bids were invited about the close of the fiscal year 1910 for supplying the Government with draft and pack mules during that fiscal year, and the lowest bid was properly accompanied by a guaranty to make good any loss to the United States resulting from the bidder's failure to enter into the contract or deliver the mules. The bidder failed to enter into a written contract, as required by section 3744, R. S., but was ready to deliver the mules, and the fiscal year ended before any mules were accepted. It was proposed that mules be accepted after the close of the fiscal year 1910, but paid for out of the appropriation for the fiscal year 1910. *Held* that in view of the existence of the guaranty, assuming that notwithstanding the provisions of section 3744 as to contracts under the War Department, the decision of the Comptroller in 2 Comp. Dec., 248, was applicable to cases arising under the War Department, mules accepted and delivered after the close of the fiscal year 1910 could be paid for from the appropriation for the fiscal year 1910. *C. 26994, July 11, 1910.* See, also, 9 Comp. Dec., 10.

[3] See 11 Comp. Dec., 454, that repairs made to a building will ordinarily be presumed to be for the needs and uses of the particular fiscal year in which they were ordered, although this presumption is not conclusive, but may be rebutted by the facts in each case. See, also, 11 Comp. Dec., 186, 227.

reported by a board composed," etc., *held* that as it appeared the buildings were to be of a permanent character and were intended for the storage of the clothing, armament, equipage, etc., of an army of considerable size and were not merely for the current needs of the service at Governors Island, the appropriation should be considered as permanent in character and would remain available until expended. *C. 14502, Apr. 20, 1903.* So, also, where the act of June 8, 1898 (30 Stat. 437), made an appropriation "For contingent expenses of the Army, incident to the expedition to the Philippine Islands, to be expended under the direction of the commanding officer of the United States military forces at the Philippine Islands, in his discretion, for such purposes as he may deem best in the execution of his duties under the orders of the President, and for such objects as are not now appropriated for, to be available until expended." *Held* that an unexpended balance of the above appropriation was still available in the year 1909, and *held*, further, that if no military map was prepared at the time of the occupation of the Philippine Islands by the United States forces, and if the necessity of such a map continues to exist, the cost of its preparation in the year 1909 is a proper charge against the above appropriation. *C. 25291, July 16, 1909.* So where the deficiency appropriation act of March 3, 1899 (30 Stat. 1223), contained this provision "for emergency fund to meet unforeseen contingencies constantly arising, to be expended in the discretion of the President, three million dollars," *held* that the appropriation was still available in 1905 for expenditure for certain national defenses in the West Indies.[1] *C. 17353, Jan. 7, 1905.* But even though the appropriation is a permanent one, it will, upon the accomplishment of the object for which made, be covered into the Treasury.[2] Thus where the act of December 18, 1897 (30 Stat. 226), made an appropriation for the relief of destitute persons who had gone into the newly discovered Klondike mining region of Alaska, and the emergency calling for the appropriation had long since passed, *held* that an unexpended balance of such appropriation was not available for expenditure in the year 1907. *C. 20718, Jan. 21, 1907.*

Section 3690 R. S., in providing that balances of appropriations for any fiscal year remaining unexpended at the end of such year shall not be applied to the "fulfillment" of any contracts except those "properly incurred during that year," [3] expressly excepts "permanent or indefinite appropriations." The existing law (sec. 1661 R. S.) makes a permanent appropriation [4] of a certain sum annually "for the purpose of providing arms and equipments for the militia." *Held* that a balance of this appropriation, remaining unexpended on the last day (June 30) of a certain fiscal year, could legally be used for the payment of a contractor in December following, under a contract entered into in November with the Ordnance Department for the manufac-

[1] In XV Comp. Dec., 576, this appropriation was held not to be a "permanent specific" appropriation within the meaning of section 10 of the act of Mar. 4, 1909 (35 Stat. 1027).

[2] I Comp. Dec., 487. But see XV Comp. Dec., 626, that an additional appropriation for a stated purpose is tantamount to a reappropriation of unexpended balances for the same purpose.

[3] See 6 Comp. Dec., 815; id., 898.

[4] This opinion is based on the opinion of the Second Comptroller of the Treasury dated Nov. 3, 1870, which is the basis for section 26, vol. 2, Digest of Decisions of the Second Comptroller.

ture of an arm intended to be issued to the militia. *31 R., 85, Dec. 3, 1870.*

V C. Where there are necessary expenses connected with the preparation of and entering into a contract payable from an annual appropriation they may be paid from such appropriation when it becomes available, notwithstanding that they were actually incurred prior to the beginning of the fiscal year for which the appropriation was made. Thus where an appropriation for the purchase of land was available on July 1, 1911, and during the month of June, 1911, the United States attorney incurred certain expenses in preparing the abstracts of title to the property, *held* that such expenses should be paid from the appropriation.[1] *C. 29072, Oct. 6, 1911.*

V D. An appropriation made for a particular fiscal year is available for the payment of proper charges against it incurred during that fiscal year[2] for a period of two years after the expiration of the fiscal year. It then lapses and is no longer available. *63 P., 337, Jan. 31, 1894.* Thus, where the annual Army appropriation act, making appropriations for the fiscal year ending June 30, 1891, appropriated as usual a certain sum for "barracks, quarters, and other buildings," *held* that, to have the benefit of this appropriation for the repair and reconstruction of the public buildings at Jefferson Barracks, Mo., it would be necessary that such work should be contracted for within that fiscal year, and that the funds appropriated should be availed of and expended within two years from the date of expiration of the fiscal year.[3] *49 P., 320, Oct. 3, 1891.*

VI. In general the Secretary of War is not authorized, without the authority of Congress to turn over property of his department in his charge to another department for its use.[4] So the Secretary of War could not authorize the Surgeon General of the Army to transfer to the Secretary of Agriculture certain instruments purchased from the appropriation for "Medical and Hospital Supplies." *51 P., 414, Jan. 25, 1892.* So a transit belonging to the United States Military Prison at Fort Leavenworth, which is under the Department of Justice could not be transferred to the United States Infantry and Cavalry School at Fort Leavenworth, which is under the War Department. *C. 1623, Aug. 7, 1895.* But where the property desired to be transferred is no longer needed for the purpose for which appropriated, it may be transferred to another department without the consent of Congress. Such a transfer would not be a sale[5] as the Government would not part with its title, and it would not, therefore, be open to the objection that public property can not be disposed of without the authority of Congress. Sec. 3678, R. S., provides that "all sums appropriated for the various branches of expenditures

[1] See I Comp. Dec., 472; 5 id., 486; 6 id., 898; 7 id., 595; 11 id., 189. See "Appropriations" VIII.

[2] See I Comp. Dec., 170; 2 id., 547, 615; 3 id., 41, 623; 4 id., 553; 5 id., 318; 6 id., 815, 898. For instances of annual appropriations, see 9 Comp. Dec., 7 58; 11 id., 529; 14 id., 807.

[3] See secs. 3679, 3690, 3691, Rev. Stat., and sec. 5, act of June 20, 1874 (18 Stat. 110); Digest Dec. 2d Comp., vol. 3, p. 31; Comp. Dec., 82 (1893–94). For a review of the laws and decisions relating to the covering into the Treasury of balances of appropriations not used, see III Comp. Dec., 623.

[4] Par. 682, A. R., 1910, provides that "supplies" may be furnished by one bureau to another.

[5] Par. 630, A. R., 1910, provides that the transfer of public property from one bureau or department to another is not regarded as a sale, and provides for the disposition of the vouchers for such property. See also 3d Comp., 602; 9 id., 625.

in the public service shall be applied solely to the objects for which they are respectively made, and for no others." While this statute prohibits the expenditure of an appropriation for purposes other than those for which appropriated, yet if it be regarded as intended also to forbid the application of property purchased from an appropriation for a particular purpose to a different purpose, it should not be construed to forbid such a transfer where the property is no longer needed for the purpose for which appropriated. Therefore the property being no longer needed for the purpose for which appropriated, *held* that two vessels belonging to the Navy Department might be transferred for a definite or an indefinite time to the War Department for use as Army transports (*C. 7840, Mar. 14, 1900*); that certain cooking utensils, tableware, and soap purchased from a river and harbor appropriation to be used in connection with the improvement of rivers and harbors in Florida could be turned over to an officer for use in connection with a river improvement in Georgia [1] (*C. 10300, Apr. 25, 1901*); that five mules purchased in connection with certain harbor improvement in Alabama could be transferred to the Quartermaster's Department of the Army (*C. 3679, Nov. 26, 1897*); that a sailboat in possession of the United States engineering officer at San Juan could be transferred to the Lighthouse Board (*C. 10315, Apr. 29, 1901*); that a Remington typewriter in possession of the Chickamauga and Chattanooga National Park Commission could be exchanged for a Smith Premier in the office of a certain quartermaster (*C. 10741, June 25, 1901*); that certain cable laid between Narragansett Pier and Block Island could be transferred to the Weather Bureau in the Department of Agriculture on the condition that the bureau keep the cable in repair, and in case of war or other military necessity restore it to the War Department (*C. 12883, June 30, 1902*); that certain property belonging to the Medical Department of the Army which had been condemned and ordered to be destroyed could be turned over to the Forest Service of the Department of Agriculture (*C. 21850, July 26, 1907*).

It was proposed to transfer certain machinery purchased from an appropriation for the District of Columbia to an appropriation for a work of river and harbor improvement and in partial satisfaction of such machinery to transfer from the river and harbor appropriation to the District of Columbia a certain steamer. The act of June 13, 1902 (32 Stat., 373) authorizes the disposition of property acquired for river and harbor improvements when no longer needed either by sale or transfer to other projects of improvement, the proceeds in case of sale to be credited to the appropriation for the work for which it was purchased or acquired, and in case of transfer the property to be valued and credited to the project in which it was formerly used and charged to the project for which it should be transferred. *Held* that as to the proposed exchange the above act constitutes clear statutory authority as respects the river and harbor improvement and the river and harbor appropriation should be charged only with the difference between the value of the machinery and the value of the steamer. As respects the District of Columbia

[1] The act of June 13, 1902 (32 Stat., 373), now authorizes the sale of property acquired for the improvement of rivers and harbors when it is "no longer needed, or is no longer serviceable."

there is no statutory authority. The proposed exchange, however, would not be a sale, as the Government would not part with its title, and it would not therefore be open to the objection that public property can not be disposed of without the authority of Congress, and there is no legal objection to the sale. As there is no statute authorizing the amount allowed for the machinery to be credited upon the project upon which it had been used, as in the case of the river and harbor improvement, the amount allowed should be treated as "Miscellaneous receipts," as required by the statute for all moneys received for the use of the United States and should be deposited in the Treasury. Inasmuch as the machinery was originally purchased from an appropriation, one-half of which was charged to the revenues of the District of Columbia, one-half of the deposit should be to the credit of the District of Columbia. *C. 27202, Aug. 30, 1910.*

VII. A certain work of river improvement required for its completion the expenditure of $10,000 more than had been appropriated by Congress for the work. A power company proposed "to furnish and turn over to the United States to be expended on this work" the sum of $10,000. *Held* that the Secretary of War could not let a contract or employ labor, or purchase materials in excess of the appropriation, and that if the sum of $10,000 should be furnished and turned over as proposed, this sum could not be expended on the work until it had been appropriated for the work by Congress. *Suggested,* however, that an arrangement could be made by which the power company could legally purchase and pay for material, or pay laborers of its own, and the officers in charge of the works could legally use this material and the laborers. *C. 1662, Aug. 23, 1895.* So, where the Daughters of the American Revolution offered to donate a sum of money to be expended in the construction of a building at a military post to promote the physical, mental, and moral well-being of enlisted men, *held* that the Secretary of War was without authority to permit such a construction, and that the consent of Congress should be obtained for the acceptance and expenditure of the proposed donation. *C. 12344, Apr. 2, 1902.*

Congress appropriated for a monument to the prison ship martyrs, the appropriation to become available when certain sums had been appropriated by the State of New York, and the city of New York, and when a certain sum had been subscribed by the Prison Ship Martyrs Monument Association. The sum appropriated by the State of New York was transferred to the Secretary of War, who deposited it in the subtreasury in New York, *held* that in view of sections 3621, 3639, 5488, 5490, and 5497 R. S. the money so deposited should be considered as quasi public money of the United States, and should remain on deposit in the subtreasury until disbursed in conformity to the act of Congress. *C. 13999, Feb. 24, 1906.*

VIII. Where it became necessary to make certain preliminary surveys, plans, etc., in connection with the completion of the plan for the enlargement of the Military Academy, *held* that the expenses incident to such preliminary work would be chargeable to the appropriation for the erection of the buildings. *C. 14553, Apr. 29, 1902.* So, *held,* where services were rendered consisting in obtaining information and data as to the extent of work done by the French Canal Co. on the Isthmus of Panama preliminary to the acquisition of the

canal by the United States, the services being rendered prior to the act of appropriation.[1] *C. 16479, June 18, 1904.*

IX. When a special appropriation is made for a certain object, it is an expression by Congress as to the amount of public money which can legally be expended for that object and the entire appropriation can not be expended for the partial accomplishment only of that object, thereby making an additional appropriation necessary to carry out the original purpose.[2] Thus where a specific sum was appropriated for a defined specific purpose—the "construction complete of a sewerage system" at Fort Monroe—and, upon proposals being invited for the work, the lowest bid was in excess of the amount appropriated, *held* that the statute evidently contemplated the completion of the system within the appropriation made, the intention of Congress clearly being to limit the cost of the work to that amount, and that the appropriation could not therefore legally be availed of for the construction of a system the completion of which would require an additional appropriation. *55 P. 364, Sept.* 14, *1892.* So, *held,* where the act of June 4, 1897 (30 Stat. 50), appropriated $10,000, or so much thereof as might be necessary "for the construction of the military road from Fort Washakie, Wyo., at the most practicable route near the Wind River and the mouth of the Buffalo Fork and Snake River, and near Jackson's Lake in Uinta County, Wyo," and it appeared that the road could not be constructed within the limit of the appropriation. *C. 3453, Aug. 24, 1897.* But it appearing that a portion of the above road was in fairly good condition, and that the $10,000 expended on other portions of the road would place the entire road in fairly good condition, *held* that the appropriation might be so expended. *C. 3453, Feb. 15, 1898.* So, where the act of July 19, 1897 (30 Stat. 121), appropriated "for repair of damages caused by recent floods to the roadway leading from the Mound City National Cemetery to Mound City and Mounds, Ill., and to widen the road and elevate the grade, $3,500," and it appeared that all of such improvements could not be made within the limit of the appropriation, *held* that it would clearly be illegal to expend the appropriation for a part only of the work. *C. 5544, Sept. 25, 1897.* So, also, where an appropriation was made for removal of the rock in the North River of New York Harbor to a depth of 40 feet, and, it appearing that it was impossible to remove the rock to such a depth within the limit of the appropriation, it was proposed to remove the rock to a depth of from 35 to 38 feet only.[3] *C. 14378, Mar. 30, 1903.* So, where the act of June 30, 1906 (34 Stat. 744), made an appropriation "for the partial reconstruction of the Alexander Bridge over the Chickamauga River on the eastern boundary of the Chickamauga Park," and it appeared that the estimates on which the appropriation was based contemplated that a complete structure should be built for the amount appropriated, and that the bridge could not be completed within the limit of the appropriation, and it was proposed to contract for the metal superstructure only,

[1] I Comp. Dec., 34. As to a corresponding practice in relation to preliminary expenses, surveys, etc., in connection with river and harbor improvements, see "Appropriations" V C.

[2] See Hooe *v.* U. S., 218 U. S., 322; I Comp. Dec., 291; 6 id., 194; 7 id., 665; 8 id., 27, 326; 9 id., 638, 560.

[3] See opinion of Comptroller in 7 Ms., 159, referred to on p. 63, Digest of Decisions of the Comptroller, 1894 to 1902.

held, that as it is a well-established rule of accounting that appropriations based on estimates are to be construed with reference thereto, the contract could not be let for completing a part only of the bridge. *C. 21096, Feb. 16, 1907.* So, where an act appropriated $20,000 for continuing work under a certain existing river and harbor project, the act providing that the Secretary of War might enter into contracts for its completion, to be paid for as future appropriations were made, but limiting him in the matter of making the contracts to the amount of $660,000, and it was ascertained that it would cost over $1,000,000 to do the necessary work, *held*, that in view of sections 3679, 3732, and 3733 R. S., the Secretary of War had no authority without further legislation to contract for all the work covered under the existing project if it could not be done within the limit of the appropriation; and *held*, further, that the Secretary had no authority to abandon a substantial part of the work and contract for the remainder without further legislation. *C. 2915, Feb. 4, 1897.* So, *held*, where a sum of money was appropriated for the purchase of 924 acres of land as an addition to a target range, and it was found that the amount appropriated was not sufficient to buy the number of designated acres, and it was proposed to expend the appropriation in purchasing a smaller area, it being reported that the smaller area would give substantially as good a range as the one originally projected. *C. 24464, Feb. 8, 1909.* So, *held*, also, where the act of June 25, 1910 (36 Stat. 788), appropriated a sum of money for the purchase of 182.73 acres of land adjacent to the Shiloh National Military Park, and it was proposed to expend most of the money in purchasing some 51 acres of the proposed addition, it being extremely improbable that the additional acreage could be purchased within the balance of the appropriation. *C. 27363, Oct. 15, 1910.*

So, where the act of June 3, 1896 (29 Stat. 225), appropriated $22,250 and provided that this sum "or so much thereof as may be necessary shall be used at the discretion of the Secretary of War in the construction of three ice piers" at certain designated places, *held*, that the entire sum could not lawfully be expended on the construction of one ice pier at one of the designated places. *C. 10842, July 18, 1901.* But where an appropriation was made for the purchase of an entire tract of land and it was proposed that a part of the tract be purchased with a part of the appropriation, the circumstances indicating that the balance of the appropriation would be sufficient to purchase the balance of the tract, *held*, that the expenditure of a portion of the appropriation for the purchase of a part of the tract under the circumstances would be legal. *C. 13580, Nov. 4, 1902; 8125, Jan. 14, 1909.*

X. It is well established that where an appropriation is made for a specific object it is the only one applicable to that object, although but for such specific appropriation another one more general in terms might have been applicable.[1] Under the above rule, where the act

[1] See "Appropriations" XXIV and XXXVIII. That a specific appropriation is exclusive of the general appropriation, and that the latter can not be used to supplement the former unless authorized by Congress, see I Comp. Dec., 10, 57, 126, 236, 317, 417, 559, 560; III id., 70, 373; IV id., 24; VI id., 124, 743; IX id., 259; XII id., 61; XIII id., 420; XIV id., 689. Such authority is given as to the Interior Department. IV id., 5. Where it is doubtful whether a particular item is properly payable from the appropriation for a particular object or from a general appropriation, the matter is within the discretion of the head of the department having control of the appropriations. V id., 855. And where in such a case the head of a department has exercised his discretion

of June 30, 1902 (32 Stat. 507), provided, "United States Service Schools: To provide means for the theoretical and practical instruction at the artillery school at Fort Monroe, Va.; the school of submarine defense at Willetts Point, N. Y.; the general service and staff college at Fort Leavenworth, Kans., and the cavalry and field artillery school at Fort Riley, Kans., by the purchase of textbooks, books of reference, scientific and professional papers, the purchase of modern instruments and material for theoretical and practical instruction, and for all other absolutely necessary expenses, to be allotted in such proportions as may, in the opinion of the Secretary of War, be for the best interest of the military service, twenty-five thousand dollars," *held*, that the appropriation for the general support of the Army was more specific than the above appropriation as to articles that could be furnished by the several staff departments, such as quartermaster's supplies, stationery, etc. *C. 13100, Aug. 15, 1902, Dec. 11, 1906.* So, also, where an appropriation for military post exchanges provided for the "construction, equipment, and maintenance of suitable buildings at military posts and stations for the conduct of the post exchange, school, library, reading, lunch, amusement rooms, and gymnasium," *held*, that the appropriation under the above provision was more specific than the appropriation for incidental expenses in the quartermaster's department as to the construction of a fence, grand stand, seats, etc., for an athletic field at Fort Leavenworth. *C. 14970, May 13, 1907.* So, also, where an appropriation was made for clerical services at division and department headquarters, including clerical service necessary in the bureau of military information, and another appropriation was made for clerical service in the quartermaster's department, *held*, that the appropriation for clerical services at division and department headquarters was more specific than the other appropriation as to a clerk on duty in the military information division, Philippines Division, and that the salary of such clerk could not be paid from funds appropriated for the service of the quartermaster's department. *C. 20443, Sept. 29, 1904.* So, also, where the act of June 12, 1906 (34 Stat. 240), made an appropriation for the Army War College "for expenses of the Army War College, being for the temporary hire of office rooms, purchase of the necessary stationery, office, toilet and desk furniture, textbooks, books of reference, scientific and professional papers and periodicals, binding, maps, police utensils, and for all other absolutely necessary expenses, fifteen thousand dollars," *held*, that a general appropriation for the construction of the War College building was more specific than the above appropriation as to electric-light fixtures, which would become part of the building, and that the above appropriation could not be used to supplement the appropriation for the construction of the building for the purchase of such fixtures. *C. 20719, Nov. 24, 1906.* So, also, where the act of May 11, 1908 (35 Stat. 106), made an appropriation for the Army War College substantially similar to the appropriation quoted above of June 12, 1906, *held*, that as to an electric delivery wagon for the use of the War College the appropriation for the general support of the Army was a specific act, and the appropriation for the War College should be considered a more general appropriation, and

in determining which should be so regarded, a subsequent change of this determination is not authorized. XII id., 199. And where two appropriations are applicable to the same object, neither specific so as to exclude the other, they are cumulative, and either or both may be used in the discretion of the head of the department. IV id., 121.

that the expense of the delivery wagon should be paid from the appropriation for the transportation of the Army. *C. 23560, July 9, 1908.* So, where the act of August 5, 1909 (36 Stat. 122), made an appropriation for the Brownsville court of inquiry as follows: "For expenses of the court of inquiry provided for in chapter two hundred and sixty-five of the act approved March third, nineteen hundred and nine (35 Stat. 836), for services of clerks and reporters, witness fees, messenger and janitor service, and such other employees as may be required, and for all other absolutely necessary expenses; to be expended by the Pay Department of the Army under the direction of the Secretary of War, to remain available during the fiscal year nineteen hundred and ten, fifteen thousand dollars," *held*, that the above appropriation was a specific one for the expenses of the court of inquiry, and that the appropriation for the general support of the Army could not be used to pay any obligations incurred by the court of inquiry after the appropriation above quoted should be exhausted. *C. 20754, Mar. 7, 1910.*

XI. It is a rule of construction that general words following the enumeration of special articles or classes of articles are to receive a restrictive construction limited to the articles or classes of articles of a like kind with those specified.[1] In view of this rule, where the act of March 2, 1905 (33 Stat. 827), appropriating for the School of Application of Cavalry and Field Artillery, enumerated certain specific classes of articles as covered by the appropriation, followed by the words "and for all other absolutely necessary expenses," *held* that the above-quoted language was broad enough to cover articles similar to those enumerated—that is, articles peculiar to the needs of the school—and, therefore, would cover certain special equipments not kept in stock or issued to the Army, but required for use in the course in equitation at the school. *C. 18490, Sept. 7, 1905; 13100, Sept. 22, 1903.* Also, where the act of August 5, 1909 (36 Stat. 122), providing for the expenses of the Brownsville court of inquiry, appropriated "for services of clerks and reporters, witness fees, messenger and janitor service, and such other employees as may be required, and for all other absolutely necessary expenses," *held* that the words "all other absolutely necessary expenses" would include the cost of telegrams sent by the court in the conduct of the inquiry. *C. 20754, Feb. 3, 1910.* Also, where the act of June 12, 1906 (34 Stat. 240), made an appropriation "for expenses of the War College, being for the temporary hire of office room, purchase of the necessary stationery, office and desk furniture, textbooks, books of reference, scientific and professional papers and periodicals, binding, maps, police utensils, and for all other absolutely necessary expenses," *held* that, although the words "for all other absolutely necessary expenses" would include drop-lights and other necessary attachments as being a part of office or desk furniture, it was doubtful whether they would include an electric-light fixture intended to become a part of the building. *C. 20719, Nov. 24, 1906. Held*, further, that the words "for all other absolutely necessary expenses" in the above appropriation for the War College would not cover an electric delivery wagon for use at the War College. *C. 23560, July 9, 1908.*

---

[1] See also Appropriations XII, XXXVIII.
See Public Money I P.
VI Comp. Dec., 617; VII id., 189; VIII id., 298.

XII. Where acts of vandalism had been committed against property belonging to the Vicksburg National Military Park, and the act of March 4, 1909, (35 Stat. 1006), making an appropriation for the park, after specifying certain purposes for which the appropriation could be expended, added "and other necessary expenses," *held* that these words of the appropriation were sufficiently broad to include the payment of a reward for the discovery of the perpetrator of the vandalism.[1] *C. 26665, May 5, 1910.* So, *held*, also, where acts of vandalism had been committed in a national cemetery and the appropriation was "for maintaining and improving national cemeteries," but recommended that the reward be only for future acts of vandalism, as it might be doubtful whether a reward offered for past acts could be considered as an expenditure for the future maintenance of the cemetery. *C. 26665, Aug. 10, 1911.*

XIII. The act of December 18, 1897 (30 Stat. 226), appropriated a sum of money "to be expended in the discretion and under the direction of the Secretary of War for the purchase of subsistence stores, supplies, and materials for the relief of people who are in the Yukon River country or other mining regions of Alaska, and to purchase transportation and provide means for the distribution of such stores and supplies * * * that the said subsistence stores, supplies, and materials may be sold in said country at such prices as shall be fixed by the Secretary of War, or donated where he finds people in need and unable to pay for the same." *Held* that the above act did not authorize the use of the appropriation to reimburse private parties for relief furnished by them to the class of persons for whose benefit the act was passed.[2] *C. 6078, Mar. 24, 1899; 7344, Nov. 27, 1899; 7483, Jan. 9, 1900; 11077, Aug. 22, 1901.* And where a commissary sergeant on duty at a camp hired quarters at his own expense, although if application had been properly made the Quartermaster's Department could legally have hired quarters for him, *held* that the appropriation for barracks and quarters could not be used to reimburse him for the sums expended by him in the hire of quarters, *C. 7383, Dec. 7, 1899.*

Where an appropriation was made "for repairing monument of George H. Thomas Post Numbered Two, Grand Army of the Republic, in the San Francisco, California, National Cemetery, three hundred dollars" (34 Stat. 1347), and the repairs had been voluntarily made by George H. Thomas Post, *held* that as there was no restriction on the expenditure of the money and the appropriation was intended as a contribution on the part of the United States to the cost of repairing the monument, there was no legal objection to reimbursing the post for the repairs. *C. 22305, Nov. 1, 1907.*

XIV. Money appropriated for the improvement of rivers and harbors is not available for the payment of damages[3] suffered by individual citizens on account of injury to their property caused by the negligence of the employees of the Government or the defective construction of a public work (*54 P., 390, July 26, 1892*), nor for the

[1] See V Comp. Dec., 119. See Appropriations XI for construction of the words "and for other absolutely necessary expenses."

[2] See V Comp. Dec., 257; VIII id., 43, 584; IX id., 688; XI id., 486; IV id., 314, 409; XII id., 48, 308; XIII id., 783, for decisions relating to reimbursement.

[3] The act of June 25, 1910 (36 Stat., 676), now authorizes the Chief of Engineers, subject to the approval of the Secretary of War, to adjust and settle all claims for damages to the amount of $500 arising from a collision between a vessel engaged on river and harbor work colliding with and damaging another vessel, pier, or other legal structure, and provides that a report on the matter shall be made to Congress for its consideration.

employment by the month or otherwise of a civilian physician to treat civilian employees of the Government engaged on such works of improvement, nor for the payment of damages for personal injuries received while on such work [1] (*C. 1696, Aug. 31, 1895; 23069, Apr. 14, 1908*); nor is an appropriation for the improvement of rivers and harbors in the "district" of a certain Engineer officer available for paying the expenses of that officer in attending a congress of engineers in Paris, the officer having been detailed for that purpose as a representative of the Corps of Engineers (*55 P., 134, Aug. 20, 1892*); nor is an appropriation for the improvement of the Ohio River available for the removal of an ice gorge closing a part of the river opposite Cincinnati and threatening the destruction of floating property (*57 P., 293, Jan. 13, 1893*); nor is an appropriation for "improving East River and Hellgate; removing obstructions" available for the payment of a claim interposed by certain tug owners for personal services in assisting to put out a fire on a dredge used by the Government in the improvement (*63 P., 386, Feb. 5, 1894*); nor is an appropriation for "improving" a certain river available for the reimbursement of United States employees for losses of personal effects caused by the sinking, without their fault, of a vessel employed in the improvement (*44 P., 87, Nov. 25, 1890*). But under an appropriation for the "improvement of the Yellowstone National Park," *held* that the Secretary of War would be authorized to purchase a bridge, the private property of a person who, before the park was reserved, had constructed the same over the Yellowstone River on one of the principal thoroughfares and where a bridge was indispensable, such bridge being in good condition and clearly an "improvement." *62 P., 15, Oct. 10, 1893.*

Held that, while Engineer officers engaged upon civil works were entitled, like other officers on duty, to the allowances of fuel, forage, and quarters authorized by sections 8 and 9 of the Army appropriation act of June 18, 1878 (20 Stat. 150), no part of the appropriations specially made for such works by Congress could, in the absence of express statutory authority for the purpose, be devoted to the purchase of fuel for such officers or to the payment to them of the commutation allowance for quarters.[2] *41 R., 346, July 29, 1878.*

XV. Where an appropriation was made for "a permanent military camp of instruction and concentration" at Pine Plains, N. Y., and the owners of the property gave an option to the Government agreeing to give "a good and sufficient full covenant deed" to their premises, free and clear from all rights of dower and from all incumbrances, but without specific reference to furnishing an abstract of title to the premises, *held* that the owners of the property were under no legal obligations to furnish an abstract of title, and that the expense of procuring abstracts, certificates, and evidence of title and of recording the deeds is properly chargeable to the appropriation for the purchase

[1] See to the same effect I Comp. Dec., 62, 181; II id., 347; V id., 943 and 944; VI id., 955; VII id., 407; VIII id., 296; also Cir. 39, A. G. O., Oct. 25, 1900, publishing an opinion of Oct. 4, 1900, of the comptroller.

[2] Statutory authority now exists for paying commutation of quarters, see act Feb. 27, 1911 (36 Stat. 957), which provides "That officers of the Corps of Engineers, when on duty under the Chief of Engineers, connected solely with the work of river and harbor improvements may, while so employed, be paid their pay and commutation of quarters from the appropriations for the work or works upon which they are employed."

of the land[1] (*C. 25446, Aug. 26, 1909; 15698, Oct. 5, 1910; 29072, Oct. 6, 1911*); *held*, also, that if, under the facts recited above, it was necessary to have a survey made of the several tracts of land, the expense could be paid out of the appropriation for the purchase of the land. *C. 25446, Nov. 11, 1909.* So, *held*, as to the expense of recording patents, deeds, etc., respecting land through which a right of way was being acquired by purchase. *C. 15698, Oct. 5, 1910.* So where a claim was made against the United States for real estate taxes alleged to be due at the time the United States purchased the land and it was necessary to institute a tax search, *held* that the expense of the tax search should be paid from the appropriation from which the land was purchased. *C. 10027, Feb. 26, 1902.* So where certain taxes were a lien against land at the time it was acquired by the United States. *Held* that the taxes could be paid from the appropriation from which the land was purchased or from a subsequent appropriation for the same purpose. *C. 23913, Dec. 27, 1910. Held*, also, that an expenditure for abstracts of title from the appropriation for the purchase of the property would be valid, notwithstanding the fact that after the abstracts had been prepared certain defects in the titles were discovered which made it necessary to resort to condemnation proceedings. *C. 25446, Feb. 16, 1910.* But *held* that expenses connected with proceedings to condemn land for public purposes are ordinarily payable from the appropriations made for the Department of Justice.[2] *C. 15110, Mar. 19, 1907.*

XVI. The public resolutions No. 17, 20, and 21 of April 30 and May 11, 1908, providing for the relief of persons made destitute by storms,[3] authorized the Secretary of War to "use such means as he has at hand or that may be furnished to him in the way of tents, provisions, and supplies, to relieve the distress occasioned by such storm or cyclone," and further authorized the Secretary to "procure in open market or otherwise subsistence and quartermasters' supplies, medicines, and medicinal aid belonging to the military establishment and available," and to issue the same to destitute persons, *held* that under the above resolutions the Secretary could use the funds appropriated to replace stores belonging to the military establishment which had been issued to the beneficiaries of the resolutions, and as the appropriation was a continuing one purchases to replace the stores so issued might be made without regard to the fiscal year. *C. 23289, May 22, 1908.* And where under the above resolution an officer was ordered from his station to Cleveland, Tenn., to carry on relief work with directions that when the work was accomplished he should report that fact with a view to his being ordered to return to his proper station, *held* that the journey of the officer from his station to Cleveland and return constituted ordinary travel in the public service, the cost of which would properly be reimbursed by the pay-

[1] See III Comp. Dec., 216; VIII id., 212; IX id., 569. But the cost of an abstract of title to lands *owned by the United States* is a lawful charge against the contingent fund of the department acquiring the property, V Comp. Dec., 62. See VI Comp. Dec., 133, as to payment for services of attorney in preparing abstract of title.

[2] See I Comp. Dec., 317; II id., 201; III id., 216; IX id., 569, 793; X id., 538. See also XVI Comp. Dec., 593, holding that when land has been condemned and the court in rendering judgment includes in the judgment or award certain costs, such judgment, including costs, will be a legal charge against the appropriation to acquire the site when the payment of the judgment was made a condition precedent to vesting title in the Government.

[3] See "Appropriations" XXXVI.

ment of mileage; but that the cost of travel and subsistence while engaged in administering relief in the district under his charge, not being in the nature of travel from one place to another in the operation of military orders, but rather an incident of the relief work itself, would constitute a charge against the appropriations made by the above resolutions.[1] *C. 23289, May 27, 1908. Held* further, that the unexpended balance of the funds so appropriated could not be used for the relief of sufferers from a flood occurring nearly a year later and in a different locality. *C. 23289, Sept. 27, 1909.*

The act of May 13, 1902 (32 Stat. 198), made appropriation "to enable the President of the United States to procure and distribute among the suffering and destitute people of the islands of the French West Indies such provisions, clothing, medicines, and other necessary articles and to take such other steps as he shall deem advisable for the purpose of rescuing and succoring the people who are in peril and threatened with starvation." *Held* that the above act did not authorize the extending of relief to destitute persons in the *Danish* West Indies, and *held*, further, that it did not authorize the relief of destitute persons by the payment of money to such persons (*C. 13008, July 24, 1902*); and further *held* that the purpose of the act was to extend immediate relief and that aid requested almost two years after the passage of the act should be refused. *C. 16184, Apr. 19, 1904.*

XVII. The act of March 3, 1911 (36 Stat. 1047), provided "For the construction, operation, and maintenance of laundries in Army posts in the United States and in its island possessions." *Held*, in accordance with the decisions of the comptroller,[2] that the above appropriation would not be available for the purchase of a post-exchange laundry building with its machinery and fixtures belonging to a post exchange as the appropriation specifically provided for the construction of buildings and would not be available for the purchase of buildings already constructed. *C. 15026, Jan. 22, 1912.*

XVIII. There is no legal objection to the expenditure of public money in works of improvement on lands to which title has not been acquired in the absence of a statute forbidding the same, provided the Government will be assured that the benefit of the expenditure will be received. So, *held*, that an appropriation for the transportation of the Army could be expended on a public highway where neither the title nor an easement was in the United States[3] (*C. 15264, Sept. 12, 1906; 22355, Nov. 16, 1907; 23041, Apr. 17, 1908*); also, *held*, that an appropriation for "Roads, walks, wharves, and drainage" could be so expended on a highway (*C. 5843, Mar. 29, 1909*), or on a sidewalk (*C. 22191, Nov. 2, 1910*). So, where the act of March 3, 1899 (30 Stat. 1225), appropriated a sum of money for the erection of a monument to Sergt. Floyd, there being no words in the act providing for the acquisition by the United States of the title to the site on which the monument was to be located, *held* that the monument could be erected without acquiring title to the site. *C. 7842, Mar. 20,*

[1] See "Appropriations" XIX; see also IV Comp. Dec., 86.

[2] See decisions of the comptroller of Nov. 24, 1911, and Dec. 9, 1911. See the construction of similar language in connection with post exchanges. "Appropriations" XXIX.

[3] The provision in the sundry civil act making appropriation for repairing roadways to national cemeteries, has for a number of years provided "That no part of this sum shall be used for repairing any roadway not owned by the United States within the corporate limits of any city, town, or village."

1900. So, where it was desired to extend a levee over certain private lands, *held* that it was not necessary for the United States to obtain the title before constructing the levee, but that an easement in the land would be sufficient. *C. 5089, Oct. 7, 1898, and Nov. 4, 1898.* So, *held*, also, where land was required for laying a pipe line. *C. 14719, Jan. 31, 1908.*

Where the United States owned and had exclusive jurisdiction over a military reservation subject to a right of way through the same of a public highway, *held* that although the duty of repairing public highways for the general benefit of the public rests on the proper highway authorities and not on the owner of the soil over which the highways run, and although the owner is under a passive obligation to permit the public to exercise the right to repair and use the land within the limits of the highway for highway purposes and not to obstruct the exercise of such rights, yet if the repair of such a road would be useful for military purposes, the expense of such repairing would be a legal charge against the funds pertaining to the general appropriation for army transportation of the quartermaster's department. *C. 3683, Nov. 27, 1897.* So, *held*, that such a highway running through a national cemetery could be repaired at Government expense. *C. 20373, Apr. 28, 1910.*

In order to discharge the sewage from the military reservation near Jeffersonville, Ind., it was necessary to construct a sewer outside the reservation. The city offered to construct the sewer for the sum of $9,658 and to give the Government the perpetual right to connect with the city sewer. *Held* there was no legal objection to the proposed expenditure. *C. 19415, Mar. 27, 1906; C. 6831, June 24, 1902.* So where it was necessary to construct a sluice gate outside a military reservation in order to properly drain the reservation and to prevent it from being flooded at high tide, *held* there was no legal objection to purchasing for the sum of $1,000 from the company owning the gate the right to drain the water of the military reservation through the gate in question and the appropriation for "roads, walks, wharves and drainage" could be used for such purchase. *C. 29127, Oct. 17, 1911.*

XIX. Where certain officers of the Army were defendants in a cause in which the United States was interested, and their defense, before the United States court, had been undertaken by the Department of Justice, *held* that, while not entitled to mileage from any appropriation for the support of the Army, their necessary expenses in going to, attending, and returning from the court constituted a legitimate charge against the appropriation "for defraying the expenses * * * of suits in which the United States is interested."[1] *51 R., 590, Mar. 2, 1887.*

[1] The payment of the traveling expenses of these officers was subsequently authorized from the appropriation for contingencies of the Army. In XII Comp. Dec., 649, it was held that the actual expenses of officers of the Army in attending, by authority of the Secretary of War, upon a State court as witnesses for the United States, in a case in which the United States is a party, may be paid from the appropriation for contingent expenses of the *War Department*, and that the appropriation "Transportation of the Army" is not properly chargeable. (But see X Comp. Dec., 648.) Circular 3, A. G. O., Apr. 23, 1887, contains a synopsis of an opinion of the Attorney General, as follows:

"To avoid any doubt about the method of payment of the expenses of these officers it is better in all cases that when they are the nominal defendants in suits brought against them in the official discharge of their duties they should be subpœnaed on the part of the Government, who is the party in interest, to appear as witnesses."

See, also par. 75, A. R., 1910.

Held, that the appropriation for the recruiting service—"for expenses of recruiting and transportation of recruits"—was not available for the payment of *mileage* of officers for travel while on recruiting service, but that the same was chargeable to the general appropriation for the mileage and cost of transportation of officers.[1] *P. 41, 105, May 29, 1890.* But where a specific appropriation is made for a work of improvement and traveling expenses are incurred in the supervision or execution of such work, the assumption would be that Congress intended the appropriation for the improvement to be exclusive and that it could not be supplemented from other appropriations. So, *held*, where an appropriation was made for increasing the water supply at West Point and it was necessary for the engineer officer in charge to travel in connection with the inspection of water pipe and the examination of land records, etc.[2] *C. 16459, June 16, 1904.* So the expense of travel required in connection with the manufacture and inspection of torpedoes would not constitute a charge against the mileage appropriation of the Army, but would be a charge against the appropriation for the "Purchase of submarine mines and necessary appliances to operate them." *C. 13728, Dec. 1, 1902.*

The joint resolution of February 24, 1911 (30 Stat. 1457), provided for an investigation by a commission of Army officers as to the availability of certain grounds for maneuver purposes, and added "that the said board or commission shall serve without compensation, but shall be paid actual necessary expenses." *Held* that the "actual necessary expenses" are chargeable against the proper Army appropriations, and that the effect is to suspend, as to that particular case, the operation of the laws under which mileage allowances are paid, and to substitute for such allowances "actual necessary expenses." *C. 28005, Mar. 22, 1911.*

XX. *Held* that the transportation expenses of officers and enlisted men and of their mounts to enable them to attend an international horse show in London, England, might be paid from Army appropriations. *C. 28017, Mar. 24, 1911.*[3]

---

[1] See opinions of 2d Comptroller Gilkeson in Digest of Decisions of 2d Comp., Vol. V, sec. 813, holding that mileage due a recruiting officer for travel performed is payable from the appropriation "Pay, etc., of the Army." "Payment from the appropriation 'Expenses of recruiting' is improper under the well-established rule that where Congress has made a specific appropriation for any purpose the use of any other appropriation is thereby precluded."

[2] See par. 1529, A. R., 1910, as to the mileage of engineer officers on service connected with fortifications or works of public improvement. See "Appropriation," XVI.

[3] See par. 14, S. O. 254, War Dept., Nov. 10, 1910, ordering certain officers and enlisted men to duty pertaining to an international horse show in New York. Where certain officers and enlisted men were ordered to Pimlico, Md., in connection with a race known as the "Army officers service cup race," the transportation involved was approved by the Comptroller in an unpublished opinion under date of Dec. 19, 1910, as follows: "The questioning the availability of the appropriation is solely because of the purpose for which the shipment was made and goes to the discretion of the department in ordering the shipment as public business. I personally may not countenance attending or participating in a horse race and may not perceive what in connection with the Army may be there achieved, but I apprehend races are run at military posts and that under other Governments the military participate in races. It is for the Secretary of War to determine the policy of the War Department in this respect. Whether the purpose in the present case was one tending to the efficiency of the Army was none the less the exercise of a legal discretion because of the place where the race was to be run. The commanding officer reported it as a matter of special military interest and of regimental and Army importance generally, and the approval of the Secretary of War, reported by the Adjutant General, was a determination that it tended to the efficiency of the Army enough to justify shipping the horses

Where a considerable force of troops, constituting an organized command, under the command of a major general, was being transported from New York to Manila via the Suez Canal, and at several ports where the transport touched certain official calls were made, necessitating the employment of carriages, *held* that the carriage hire was a proper charge against the appropriations for the Quartermaster's Department. *C. 25821, Nov. 22, 1909.*

The appropriation for the transportation of the Army should bear expenses incurred under the following circumstances: The cost of transportation of baggage of an officer ordered to report for duty pertaining to the mounting of a gun to be exhibited at the Pan American Exposition at Buffalo, the duty being considered as military (*C. 10587, June 4, 1901*); the expense incident to the movement of a company of Coast Artillery to another station in connection with the Pan American Exposition at Buffalo, the movement being treated as military in its nature (*C. 10825, July 16, 1901*); the cost of transportation of the battalion of cadets of the Military Academy to the Pan American Exposition at Buffalo (*C. 10863, July 16, 1901*); the cost of transportation of an insane general prisoner from his place of confinement to the Government Hospital for the Insane at Washington (*C. 20052, July 13, 1906*); the cost of dredging to enable troops and supplies to be landed at a Coast Artillery post (*C. 24002, Oct. 23, 1908*); a claim for salvage as general average against Government property being transported in a private vessel (*C. 17725, Mar. 31, 1905; 26396, Mar 24, 1910*). But where a soldier was arrested by the civil authorities at a military post and transported to a distant point and there, after examination by the civil authorities, discharged, *held* that the expense of returning him to his proper station was not a charge against the appropriation for Army transportation. *C. 2529, Mar. 20, 1911.* Also where an appropriation was made for the construction of a particular set of quarters in Alaska, and the Government purchased the material on Puget Sound, and the question arose as to what appropriation should bear the expense of transportation to Alaska, *held* that the cost of transportation should not be paid from the appropriation for the transportation of the Army, but from the appropriation for the construction of the quarters. *C. 18314, July 21, 1905.* So where in inviting bids for the construction of a building in Alaska, it was agreed to transport the building material of the contractor free of charge from Seattle, *held* that the cost of transportation of such material should be paid from the appropriation for the construction of the building. *C. 25056, June 5, 1909.*

The decision as to whether the cost of providing and maintaining means of transportation between individual batteries at seacoast forts, or between the posts and the several batteries at those posts, or between a wharf and the batteries, should be charged against the appropriation for fortifications or against the appropriation for transportation of the Army, should as a general rule be controlled by this consideration—that where the means of transportation is planned as an integral and inseparable part of the project, and for such reasons appropriate to be placed under the exclusive control of the

there at Government expense. Under that authorization I view the shipment as public business, for the payment of which the appropriation 'Transportation of the Army and its supplies' is available. To say otherwise would be an arbitrary conclusion unsupported by any definite facts. So much as to the availability of the appropriation."

combatant force, the cost of construction and maintenance is properly chargeable to appropriations for fortification purposes; but where these considerations do not predominate and the work is done primarily as a means of transportation, the necessary funds should be drawn from the appropriation for Army transportation.[1] *C. 13998, Feb. 17, 1903.*

Held that the expense of mining coal at a Government coal mine, carrying it to tide water, and transporting it to the place where it would be used, should be charged against the appropriation for "Transportation of the Army." *C. 21659, Oct. 12 and Nov. 10, 1908.*

XXI. The Army appropriation act, under the head of "Incidental expenses of the Quartermaster's Department,"[2] appropriates for certain specified objects and for "such additional expenditures as are necessary and authorized by law in the movements and operation of the Army and at military posts." *Held* that the phrase "authorized by law" refers to statutory authority[3] and that therefore the rental of a piece of ground for light artillery practice, not having been authorized by law, can not be paid from the appropriation for incidental expenses, but that the expense would be a legitimate charge against the appropriation for contingent expenses of the Army, as the latter appropriation covers expenses "not provided for by other estimates." *62 P., 208, Nov. 2, 1893.* So where it was desired to cut down trees on private property adjoining a fort, the trees masking a portion of the field of fire of the fort guns at approaching maneuvers, *held* that as the expenditure was clearly necessary and as it had to do with the instruction of the garrison in the use of armament provided by law, it should be regarded as "authorized by law" within the meaning of the clause providing for incidental expenses. *C. 18108, June 6, 1905.*

XXII. The appropriations for the support of the Army and those for the support of the Military Academy are distinct and separate, and funds appropriated for the former can not be used to defray the expenses of the latter; but as West Point is at one and the same time a military post and a military academy, appropriations for the support of the Army can be expended for strictly Army purposes at the Military Academy.[4] Therefore, an appropriation for the support of the Army for "barracks and quarters" is available for the hire of extra-duty labor for repairs to post buildings at West Point. *C. 11106, Aug. 27, 1901.* Also the general appropriations for the support of the Army for "water and sewers, military posts," from which apparatus for extinguishing fires at military posts is usually purchased, is available for the purchase of fire extinguishers to be used at West Point. *C. 28776, July 29, 1911.* Also an appropriation for the support of the Army for "construction and repair of hospitals of military posts already established and occupied" is available for the installation of a sanitary closet and bath fixtures at the "soldiers' hospital" at West Point. *C. 13471, Oct. 16, 1902.* But the appropriation for the support of the Army would not be available to pay for the services of an architect to prepare plans for a building at West Point. *C. 10689, June 17, 1901.* Nor to supplement the appropriation for the master of the sword, the pay of that officer being provided for by the appropriation for the Military Academy, and that appro-

[1] See XIII Comp. Dec., 559.
[2] See "Appropriations," XXXIX.
[3] XV Comp. Dec., 740.
[4] V Comp. Dec., 812.

priation being through error insufficient to pay the full amount authorized by law. *C. 18009, May 18, 1905.*

Fort Bayard, N. Mex., although designated in orders as a general hospital, continues to be a military post, and the appropriation in the act of March 2, 1903 (32 Stat., 937), "for construction of quarters for hospital stewards at military posts established and occupied" is available for the construction of quarters for hospital stewards on duty at Fort Bayard. *C. 14894, July 1, 1903.*

Where the appropriation for the construction of the War College had become exhausted and it was still necessary to do certain grading about the grounds, remove rubbish, and police the grounds, and make certain underground electrical connections, *held* that as the War College was located at Washington Barracks, a military post, and was intended for the instruction of officers of the Army, the expense of the above work could be paid for out of the general appropriations for the support of the Army. *C. 20719, Jan. 30, 1907.* So, also, where it was necessary to replace the electric light main leading to the War College with one having heavier insulation, and it appeared that the entire cable was outside the War College building and was a part of the post lighting system, *held* that for the reasons given above, the expense could properly be charged against the general appropriations for the Army. *C. 20719, July 9, 1907.*

XXIII. Section 214 R. S. provides that "There shall be at the seat of Government an executive department to be known as the Department of War, and a Secretary of War, who shall be the head thereof." In a general way it may be said that the Department of War comprises within its administrative forces a number of offices called the bureaus of the War Department. These bureaus represent the civil side of the military administration, and their clerks and certain of their supplies are appropriated for by Congress in the appropriation for the "Legislative, executive, and judicial" expenses of the Government. Such are the offices of The Adjutant General, Quartermaster General, Commissary General, etc. While these bureaus, so far as their clerical forces and all nonmilitary persons connected therewith are concerned, are supported by an appropriation in a civil bill, the officers of the Army attached to these bureaus are paid under the appropriation for the support of the Army. *C. 21587, Mar. 10, 1911.* As the contingent expenses of the Board of Ordnance and Fortification are provided for in the fortification bill this board should not be considered as an integral part of the War Department and telephone service for the board would not be a charge against the appropriation for "Contingent expenses of the War Department," but should be made against the appropriation for fortifications. *C. 14377, Mar. 28, 1903.*

XXIV. The appropriation for "Contingencies of the Army"[1] is restricted in its operation to cases arising in the administration of the

[1] For many years prior to the act of April 23, 1904 (33 Stat. 259), making appropriation for the support of the Army for the year 1905, the wording of the act of appropriation for the contingent expenses of the Army was "for all contingent expenses of the Army not provided for by other estimates, and embracing all branches of the military service, to be expended under the immediate orders of the Secretary of War." Since that date the wording has been as follows: "For all contingent expenses of the Army not otherwise provided for, and embracing all branches of the military service, including the office of the Chief of Staff, to be expended under the immediate orders of the Secretary of War." Under sec. 3683 R. S. the expenditure from contingent funds must be authorized by the head of the department prior to incurring the expenses. I Comp. Dec., 566; II id. 1. This appropriation is also available for paying the compensation of reporters before examining boards.

Army proper as distinguished from other establishments, such as the Military Academy, the needs of which are made the subject of a separate act of appropriation. To warrant expenditures from the appropriation for the "Contingencies of the Army" the object of expenditure, first, must be one that is necessary, useful, or appropriate to the Army proper; second, must have the character of an incidental, casual, unforeseen, or emergency expense; and third, must not come within the scope of any other appropriation for the support of the military establishment.[1] *C. 7030, Sept. 18, 1899; 27415, Oct. 27, 1910.* Under the foregoing rules, *held*, that the expenditure could properly be made from the appropriation "Contingencies of the Army" in the following cases: For carriage hire in connection with the funeral of a President, in view of the fact that he was the constitutional Commander in Chief of the military forces (*C. 11438, Oct. 23, 1901*); for the expense of engraving and lettering two Spanish cannon captured at Santiago, which had been presented to the city of San Francisco (*C. 10443, June 1, 1901*); for the traveling and other expenses of the Assistant Secretary of War in connection with awarding the national trophy, medals, and other prizes contested for annually and provided for in the act of March 2, 1903 (32 Stat. 941) (*C. 14668, May 11, 1903*); for the expense connected with the erection of certain appliances for field sports for the use of troops assembled at St. Louis to participate in the ceremonies incident to the dedication of the World's Fair (*C. 14991, July 24, 1903*); for the payment of a bill presented by a justice of the peace who on request furnished a post commander with a statement of the offenses, results of trial, etc., in the cases of three soldiers tried before him (*C. 14856, June 26, 1903*); for the employment of a secretary or clerk to the Panama Fortification Board appointed by order of the War Department (*C. 26071, Jan. 15, 1910*); for witness fees and mileage of a witness appearing before an Army officer who had been detailed to collect certain information concerning the violation of the neutrality laws (*C. 28241, June 20, 1911*); also for the expenses of a witness appearing before an Army officer detailed to investigate an alleged theft by a soldier from a civilian (*C. 28033, Mar. 28, 1911*); for the expense connected with the service of a summons upon a distant witness who was required to appear before an Army officer detailed to investigate an alleged theft by a soldier from a civilian (*C. 28033, Mar. 28, 1911*); for supplies furnished troops while fighting a forest fire under orders, the issue of such supplies having been considered necessary under the circumstances (*C. 27395, Oct. 22 and Dec. 8, 1910*); for the salary and expenses of a member of the Secret Service of the Treasury Department detailed to assist the military authorities to discover certain frauds committed in connection with the military establishment (*C. 18866, Nov. 24, 1905, May 23, 1906, and Aug. 20, 1909*); for the expenses incident to the journeys of a civilian lecturer for the Artillery School, Fort Monroe[2] (*C. 14278, Mar. 21, 1903*); for the expenses, including attorney's fees, of a civil

[1] IV Comp. Dec., 287; V id., 151.

[2] See XII Comp. Dec., 519, holding that "The appropriation for the United States service schools is applicable for the payment of the travel expenses of a civilian incurred in the delivery of a series of lectures before the Infantry and Cavalry School and Staff College at Fort Leavenworth, Kans., *the notes of which are to remain as a textbook for the instruction of subsequent classes.*" See also XVI Comp. Dec., 845.

employee incurred by him in connection with his arrest for an act in the line of his duty[1] (*C. 8972, June 18, 1909*); for the expense to an Army officer of providing a bond where he was sued for damages for an injury to a person run over by a Government automobile in which he was traveling on official business (*C. 28517, July 10, 1911*); for the removal of the bodies in an Indian cemetery, the removal being made necessary by the erection of buildings as a part of a military post (*C. 22657, Jan. 22, 1908*); for the services and expenses of a civilian who returned to his proper station an insane soldier, supposed to be a deserter, found wandering about at a distance from his post (*C. 1407, June 3, 1895, and Oct. 28, 1910; 13776, Dec. 9, 1902*); for the services and expenses incurred by a civil officer pursuant to request of the military authorities in apprehending a soldier supposed to be a deserter but who in fact was not such and was not held out as such by the military authorities, and no reward for his apprehension as a deserter therefore could legally be paid (*C. 17327, Apr. 29, 1907, Mar. 25 and Apr. 8, 1908, and Jan. 8, 1909, Nov. 23 and Dec. 10, 1910*); for the payment of a reward promised or expenses incurred on request, in addition to the reward for desertion where the soldier was not only charged with desertion but with embezzlement or other crimes[2] (*C. 16578, July 18, 1904; 17327, Aug. 25, 1909*); for the payment of a reward to ascertain the origin of certain suspicious fires that had occurred at a military post (*C. 28784, July 31, 1911*); for the purchase of a map to be used in connection with a progressive military map of the United States, a dispute having arisen between the officer obtaining it and the owner as to whether it was donated or not (*C. 29303, Dec. 13, 1911*); for the repayment to a contractor of the insurance prepaid by him upon an Armstrong gun transported to the United States (*53 P., 80, Apr. 7, 1892*); for payment for the services of an expert bookkeeper in making an examination of the books of an officer charged with a criminal offense before a court-martial in order to qualify the expert to testify before the court-martial as a witness (*C. 4960, Sept. 23, 1898; 5718, Jan. 30, 1899*); for the board and lodging of a deserter who had been turned over to the police of the city by an Army officer for safekeeping until the arrival of a military guard (*C. 8585, July 13, 1900; 8742, Aug. 10, 1900*); for payment of a reasonable compensation to a person who carried a message to the regular and insurgent forces of Mexico operating close to the American border, the message being sent from the commanding officer of the American troops who were guarding the border to prevent violations of neutrality (*C. 22132, May 3, 1911*); for payment for services rendered and expenses incurred as secret agent for a military attaché of the United States during the Spanish War (*C. 5130, Oct. 15, 1898*); for the payment of a reasonable compensation to a civilian official or private civilian for the purpose of serving a summons or subpœna in connection with the trial of a case by court-martial (the fees or expenses of such service would not be a charge against the appropriation for expenses of courts-martial, courts of inquiry, etc.), in a case where the service could not have been otherwise so effectually and economically made (*R. 43, 284, Apr. 10, 1880; 53, 399,*

[1] XV Comp. Dec., 621.

[2] XI Comp. Dec., 124; XVI id., 132.

Apr. 29, 1887; 32 P., 365, May 20, 1889; 51, 407, Jan. 23, 1892; C. 5549, Dec. 20, 1898; 13418, Oct. 9, 1902); for payment of the expenses of maintenance (including the payment of $5 and the furnishing of a suit of civilian clothing on discharge) of an officer serving a court-martial sentence in a State penitentiary[1] (*C. 16023, Apr. 2, 1904; 16238, Feb. 3, 1905*).

Held that an appropriation "for shelter, shooting galleries, ranges, repairs, and expenses incident thereto" was intended for target practice with small arms, and would not cover the rental of a piece of ground for artillery practice, but that such rental, being of small amount (i. e., for the occupation of the ground for a few days only), might properly be considered a legitimate charge against the appropriation for the contingencies of the Army. *62 P. 209, Nov. 2, 1893.*

As the appropriation for contingencies of the Army is to meet necessary and appropriate expenses in connection with the Army "not otherwise provided for," this appropriation is not available any more than is any other general appropriation, to supplement a specific appropriation for furnishing certain supplies or rendering certain services.[2] *C. 12521, July 24, 1902; 14113, Oct. 22, 1903.* So, where a sum was appropriated for repairs to the old Ford Theater building and this amount was found to be insufficient, *held* that the appropriation for Army contingencies could not be used to supply the deficiency. *62 P. 74, Oct. 19, 1893.* The Army appropriation act, approved August 6, 1894 (28 Stat., 236), provided for the employment of clerks and messengers in several designated offices and provided for "not exceeding" 125 clerks at various indicated salaries and 45 messengers at a certain salary and provided that all were to be employed and apportioned to the several headquarters and stations by the Secretary of War. Two clerks in excess of the authorized number were employed for a short time. *Held,* that the act appropriating salaries for the 125 clerks amounted to a provision of law that no more than that number should be employed on the work specified in the act, and hence prohibited the employment or payment of the two extra clerks from such appropriation,[3] and *held* further, the two extra clerks could not be paid from the contingent fund as such fund is for expenses of the Army "not otherwise provided for," while the employment of clerks not in excess of a certain number is expressly "provided for" in the specific appropriation. *C. 295, Sept. 15, 1894.*

In the following instances the expenditure was held not to be chargeable against the appropriation for contingencies of the Army: For medical treatment of a civil employee injured on work being carried on for the benefit of the District of Columbia, the reason being that the appropriation for contingencies of the Army is for "all branches of the military service," while the work that the employee was engaged in was not of a military character, and the person for whom the medical treatment would be furnished would not be an officer, soldier, or military employee, but would be a civilian laborer

[1] In this case, as the confinement was for only one year, it could not be executed in the United States Penitentiary at Fort Leavenworth.

[2] See "Appropriations" X.

[3] See I Comp. Dec., 291; VIII id. 27.

(*44 P. 358, Dec. 23, 1890*); for the burial expenses of a civilian employee[1] (*C. 7030, Sept. 18, 1899; 16757, Aug. 16, 1904; 17563, Feb. 15, 1905;* for damages to private property caused by ice falling from the roof of a public building under the control of the War Department (*52 P. 48, Feb. 6, 1892*); for expenses incurred in transporting Canadian half-breed Indians from Montana to Canada (*C. 5816, Feb. 4, 1899*). As the United States is not legally responsible for the torts of its officers or agents the Secretary of War could not authorize from the appropriation for "all contingent expenses of the Army not otherwise provided for," the payment of damages as compensation for personal injury to a native Filipino accidently shot on a rifle range.[2] *C. 27214, Aug. 27, 1910.*

The payment of copyists employed in the bureaus of the War Department out of the appropriation for Army contingencies would be an expenditure for clerical compensation and is therefore prohibited by sec. 3682 R. S. *C. 1154, Mar. 25, 1895.*

It is questionable whether the expense of selling a portion of a military reservation under an act of Congress can be regarded as an expense pertaining to the Army within the meaning of the appropriation "for all contingent expenses of the Army." *C. 22572, May 15, 1911.*

XXV. The Army appropriation act, provided "for expenses of courts-martial[3] and courts of inquiry and compensation of witnesses," *held* that the expenses of a witness belonging to the Navy or Marine Corps incurred in attending an Army court-martial was a proper charge against the above appropriation. *C. 17465, Jan. 31, 1905.* So, *held*, that the cost of railroad tickets for an indigent witness to enable him to attend a court-martial, might be paid from the above appropriation, the amount paid to be noted on the witness vouchers with a view to its deduction in final settlement of their accounts. *C. 22915, Mar. 30, 1908.* So, *held*, also, as to the legal fee of the proper official for a certified copy of a marriage certificate, necessary to be used in evidence in a case of trial before a court-martial. *P. 19, 423, Oct. 8, 1887; C. 17929, May 2, 1905.* So, *held*, also, as to the expense of procuring a transcript of a stenographer's notes of testimony taken before a U. S. Commissioner in a matter necessary to the prosecution of a soldier before a general court-martial. *C. 17929, Jan. 21, 1911.* And so, *held*, as to the expense of employing

[1] The act of June 7, 1897 (30 Stat. 86), provides that: "Hereafter the heads of departments shall not authorize any expenditure in connection with transportation of remains of deceased employees except when otherwise specifically provided by law." See, also, pars. 501 and 502, A. R., 1910; also, VI Comp. Dec., 447, where it is held, quoting from the syllabus: "The appropriation for incidental expenses of the Quartermaster's Department is applicable to the expense of burying the remains of a deceased civilian employee of that department, where such burial is necessary for the prevention of unsanitary conditions, but not otherwise." See also, the opinion of the comptroller of Oct. 4, 1900, published in Cir. 39, A. G. O., Oct. 25, 1900.

[2] Although such claims have been repeatedly brought to the attention of Congress, that body has failed to appropriate for their payment. (See "Claims.")

[3] As sec. 1248, R. S., confers upon retiring boards certain powers of a court-martial and a court of inquiry, it is the practice to charge against the annual appropriation for expenses of courts-martial, etc., the payments for reporters employed on retiring boards.

The compensation of reporters for examining boards who have been employed by proper authority is a charge against the appropriation for contingencies of the Army.

a reporter for a court of inquiry convened at the Military Academy to inquire into the hazing of cadets, as cadets are a part of the Army. *C. 6971, Sept. 2, 1890.* So, *held*, also, as to the fees of a notary for swearing a witness in the taking of a deposition. *C. 13418, Mar. 29, 1911.* But where an officer who served a subpœna made affidavit of the service before a notary, the affidavit being wholly unnecessary, *held*, the expense should be charged against the officer. *C. 13418, Feb. 11, 1908.* But *held* that the above appropriation referred to compensation of *civilian* witnesses only, and did not apply to retired officers of the Army ordered to appear as witnesses before courts-martial. *P. 28, 291, Nov. 24, 1888. Held*, further, that although a summons or subpœna may legally be served either by a military or a civil person,[1] but will in general preferably be served by an officer or noncommissioned officer of the Army, yet as there is no express authority for the employment by a judge advocate of a United States marshal or other civil official or civilian for the purpose of serving a summons or subpœna, the fees or expenses of such a person in connection with the service would not be a proper charge against the above appropriation, but advised that in a case where the service could not have been otherwise so effectually and economically made a reasonable compensation might be paid from the appropriation for contingencies of the Army. *R. 43, 284, Apr. 10, 1880; 53, 399, Apr. 29, 1887; P. 32, 365, May 20, 1889; 51, 407, Jan. 23, 1892; C. 5549, Dec. 20, 1898; 13418, Oct. 9, 1902.* The expense of a witness belonging to the Army incurred in attending a naval court-martial is not a charge against any appropriation for the Army. *C. 17465, Sept. 3, 1909.*

XXVI. Telegrams containing applications for leaves of absence, for extension of same and inquiries as to whether they have been granted, independently of par. 1209, A. R. (1203 of 1910), are not "telegrams on official business" within the meaning of the act making an appropriation for payment of "cost of telegrams on official business," and can not therefore be paid for from that appropriation.[2] *C. 6935, Sept. 6, 1899.* But where two soldiers, one absent on sick furlough and the other on account of reenlistment furlough, applied to the post commander for an extension of their furloughs, and that officer not having the authority to act, wired the department commander for such authority, *held* that the telegram was sent on official business.[3]

---

[1] See G. O. 93, Headquarters of the Army, Nov. 9, 1868.

[2] Referring to this case the Comptroller in VI Comp. Dec., 422, said: "It requires no argument to show that leaves are granted for the benefit of the persons and that any cost relating thereto should not be borne by the United States. I have to advise * * * that said telegrams should not be paid for by the United States."

Where a brigade surgeon, U. S. V., in charge of a hospital at Philadelphia, Pa., sent certain telegrams with a view to obtaining leaves of absence for officers in said hospital who were convalescent to enable them to go to their homes and thus relieve the hospital of their care and enable it to retain accommodations for others of the sick who might be sent there for treatment, the Secretary of War, under date of Nov. 17, 1899, said: "The sending of such telegrams under the circumstances is viewed as not only an official act performed in pursuance of duty, but as also in the interests of the military service, and is not regarded as subject to the provisions of par. 1209 A. R. (1203 of 1910), which are held as applying to applications for personal leaves and therefore does not come within the scope of the opinion of the Comptroller of the Treasury and the Judge Advocate General of the Army."

[3] See XIV Comp. Dec., 940, approving this opinion.

C. 23362, June 4, 1908. And, also, *held*, that par. 1196 A. R. (1203 of 1910) does not apply to a telegram requesting extension of a *sick* leave, and that such a telegram is on official business. *C. 23362, Apr. 16, 1910.*

A post surgeon wired to his official superiors requesting that an assistant surgeon at the post, who was under orders to change station, be retained on duty at the post on account of illness in the families of certain officers; *held* that the telegram was on official business. *C. 17871, Apr. 21, 1905.*

Held, that telegrams sent and received by the governor and adjutant general of New Mexico and by the commissioned officers in the United States Volunteer Army, and which relate to recruiting organizations of the Volunteer Army of the United States raised in New Mexico are "official" and may be paid for as telegrams sent and received in carrying on official business of the Government, out of the appropriation in the Quartermaster's Department made for that purpose, and at the rates fixed for other official telegrams. *C. 4670, July 26, 1898.*

The cost of telegraphic messages over the lines of commercial companies on post exchange business is not a proper charge against the appropriations for the payment of telegrams on official business. *C. 19479, Mar. 26, 1900.*

XXVIII. The act of April 28, 1904 (33 Stat. 496), appropriated money "for the purchase of suitable building sites for said barracks and quarters"[1] for artillery at seacoast defenses; *held* that the term "barracks and quarters" as used above should not be so restricted in its application as to relate exclusively to the company barracks and officers' quarters, and to withhold authority for the purchase of land upon which to erect the other buildings, such as the guardhouse, hospital, headquarters' structures, post exchange, blacksmith and carpenter shops, etc., which are necessary to the administration of a military post. Such appropriation can therefore be used to purchase a site for a pump house separated from the main post.[2] *C. 14719, July 14, 1904.* But the language "barracks and quarters" does not cover the construction of a chapel at a military post. *C. 21783, July 12, 1907.*

The act of June 30, 1902 (32 Stat. 516), under the head of "Barracks and quarters, Philippine Islands," appropriated "for the proper shelter and protection of officers and enlisted men of the Army of the United States lawfully on duty in the Philippine Islands, including the acquisition of title to building sites where necessary, to be expended in the discretion of the President." *Held* that the words "proper shelter and protection" included something more than the mere quarters for officers and barracks for enlisted men. It would include also hospitals, guardhouses and storehouses, as all these buildings, although incidental to the purpose of the appropriation, are as necessary to the proper shelter and protection of the troops as are the structures erected for the mere living accommodations of the officers and enlisted men. *C. 13065, Aug. 4, 1902; 14955, July 17, 1903.*

---

[1] See "Appropriations" XIII, XX, XXII, and XXX.

[2] But see V Comp. Dec., 706, where the phrase "barracks and quarters" was held not to include separate buildings for hospitals, storehouses, shops, stables, etc., nor sewers, water supply, roads or walks.

The act of May 11, 1908 (35 Stat. 121), appropriating for "Barracks and quarters, Philippine Islands," provided for the proper shelter and protection of officers and enlisted men "and all other buildings necessary for post administration purposes"; *held* that the quoted language would cover the erection of a building for a post office at Fort William McKinley. *C. 24671, Mar. 24, 1909.*

Sec. 1136 R. S. provides that "permanent barracks or quarters and buildings and structures of a permanent nature shall not be constructed unless detailed estimates shall have been previously submitted to Congress, and approved by a special appropriation for the same, except when constructed by the troops; and no such structures, the cost of which shall exceed twenty thousand dollars, shall be erected unless by special authority of Congress." In practice this section has been construed to permit of the construction out of the annual appropriation for "barracks and quarters" of permanent buildings, at a cost not to exceed $20,000, although no detailed estimates "have been previously submitted to Congress, and approved by a special appropriation for the same," and also to permit of the construction of more than one permanent building at a particular post for the same purpose, even though their aggregate cost should exceed $20,000. In view of the apparently contradictory provisions of the section, *advised* that the construction which it has received in practice be adhered to.[1] *C. 6985, Sept. 8, 1899.*

Where a building had been erected at the sole cost of a post exchange, there being no contribution toward its construction, either in money or material by the Quartermaster's Department, *held* that the appropriation "Barracks and quarters" could legally be expended for the purchase of the building. *C. 27238, Sept. 9, 1910.*

The act of June 22, 1874 (18 Stat., 144), provided that "hereafter no contract shall be made for the rent of any building or part of any building in Washington not now in use by the Government to be used for the purposes of the Government until an appropriation therefor shall have been made in terms by Congress." *Held* that the appropriation for the support of the Army for "barracks and quarters" can be used for providing in the city of Washington rooms for the use of the dental board of examiners, as the above legislation was not intended to limit or restrict the President in his control of the military establishment.[2] *C. 10561, May 29, 1901.*

XXIX. The appropriation for post exchanges, which provides for the "construction, equipment, and maintenance of suitable buildings at military posts and stations for the conduct of the post exchange, school, library, reading, lunch, amusement room and gymnasium," and which is expended "in the *discretion* and under the direction of the Secretary of War," being intended to serve a very broad purpose, should be liberally construed, and is, therefore, *held* to cover the construction of fences, grand stand, seats, etc., for an athletic field

[1] The U. S. Sup. Ct. will accept the department's uniform construction of a doubtful or obscure statute, but where the departmental construction has not been uniform the court will determine for itself the true interpretation. U. S. *v.* Healey, 160 U. S. 136.

[2] From time to time accommodations have been rented in the city of Washington for the purpose of carrying on the recruiting of the Army, for the use of courts-martial and boards for the subsistence depot and for stables for the quartermaster's depot, etc., notwithstanding the absence of any appropriation by Congress "in terms" for these purposes.

(*C. 14970, May 13, 1907*); the laying out of golf links at a post (*C. 14970, Dec. 8, 1908*); the purchase of apparatus for outdoor as well as indoor athletics (*C. 14970, Jan. 30, 1909*); the expense of constructing a fence for a deer park (*C. 22337, Nov. 7, 1907*), and could legally be expended for the purchase from a post exchange of a building erected by it for post exchange purposes[1] (*C. 13365, Sept. 29, 1902; 15026, July 29, 1903; 26607, Apr. 29, 1910*). But as the appropriation is for *buildings, held* that it would not cover an expenditure for a tent in which to quarter temporarily the post exchange during Army maneuvers (*C. 25057, June 5, 1909*), nor would it cover the purchase of polo balls and mallets (*C. 25575, Sept. 17, 1909*), and, as the post exchange is intended to be a local institution belonging to a post, and not to move about with troops, *held* that the appropriation would not cover an expenditure for a tent that was intended to be a part of the movable equipment of the regiment. *C. 27950, Mar. 6, 1911.* And, *held*, also, that although the Government appropriates for the construction of the post exchange building, still as the exchange itself is an instrumentality of the Government composed of military units, for which Congress makes no appropriation whatever, such items as a safe and a cash register which are not part of the equipment of a building, but are rather the equipment of a commercial enterprise conducted in the building, should be furnished by the post exchange itself, and are not a proper charge against the appropriation. *C. 20299, Aug. 29, 1906.* As a post exchange is an agency of the War Department, maintained for the benefit of enlisted men, and as the profits derived from its operation are exclusively applied to the company funds, the appropriation for the support of post exchanges should be expended for the exclusive benefit of enlisted men. *C. 14970, May 4, 1910.* Therefore, this appropriation should not be expended for the laying out of golf links unless for the exclusive use of enlisted men. *C. 14970, Dec. 8, 1908.* So; also, it could not be expended for furniture for an officer's mess. *C. 15674, Dec. 18, 1903.*

Par. 1467, A. R. 1904 (1461 of 1910), provided that "General hospitals will be under the exclusive control of the Surgeon General and will be governed by such regulations as the Secretary of War may prescribe. The senior surgeon will command the same and will not be subject to the orders of local commanders other than those of territorial divisions and departments to whom specific delegation of authority may have been made." *Held* that in view of the above paragraph the general hospital at the Presidio of San Francisco constituted a separate post in all matters relating to administrative discipline and military control, and the construction of a post exchange at such hospital would be a proper charge against the appropriation for that purpose in the act of March 2, 1905 (33 Stat. 836). *C. 18827, Nov. 9, 1905.*

XXX. The act of May 25, 1900 (31 Stat. 183), made an appropriation for fortifications and other works of defense and "for the protection, preservation, and repair of fortifications for which there may be no special appropriation available;" *held* that the above appropriation was sufficient to cover the repair of a sailboat that would be

[1] But see "Appropriations," XVII, construing similar language in reference to laundries.

useful for transporting materials or making inspections connected with the fortifications[1] on Porto Rico. *C. 9676, Jan. 23, 1901.*

Certain land at Corregidor Island, P. I., which it was desired to purchase, was not the land on which the fortifications in the course of construction were actually being erected, but was essential in connection with the construction, use, and maintenance of the batteries and other works of defense and had no connection with the shelter of officers and enlisted men; *held* that the purchase could not be made from the appropriation "barracks and quarters, Philippine Islands," which provided "for the proper shelter and protection of officers and enlisted men," but should be made from the appropriation for fortifications. *C. 22798, Feb. 24, 1908.*

The act of March 2, 1905 (33 Stat. 845), made an appropriation "for the purchase and installation of searchlights for the defense of our most important harbors," the searchlights being of a movable character, mounted on trucks, and moved about by horsepower; *held*, that storehouses for the safe-keeping and shelter of such searchlights should not be considered a part of the "installation," but should be charged against the appropriations for the Quartermaster's Department. *C. 18474, Sept. 5, 1905.*

XXXI. Where it was proposed to develop the coal fields on the island of Batan, P. I., by prospecting and testing by drilling operations, *held* that such an expense was chargeable against the appropriation for "regular supplies," as that appropriation was charged with providing fuel for the Army. *C. 21659, June 11, 1907.*

XXXII. The deficiency appropriation act of March 3, 1899 (30 Stat. 1223), contained this provision: "For emergency fund to meet unforeseen contingencies constantly arising, to be expended in the discretion of the President, three million dollars;" *held*, that this fund was available for expenditure toward the relief of the sufferers from the recent cyclone in Porto Rico.[2] *C. 6953, Aug. 30, 1899. Held*, also, that where soldiers of the Philippine Scouts on duty at the St. Louis Exposition intrusted to their company commander, a white man, certain sums of money for safe-keeping, which sums were embezzled by the company commander, it was doubtful whether the scouts could be legally reimbursed out of the above appropriation.[3] *C. 17191, Nov. 23, 1904. Held*, also, that the above fund was not available to reimburse a quartermaster who had paid out money for transportation of sick and destitute civilians in Alaska. *C. 11919, Jan. 24, 1902.*

XXXIII. A sum legally payable out of a specific appropriation can not be transferred to the credit of another appropriation. So *held* where a soldier of the Signal Corps made a deposit with a paymaster, sections 1305 and 1308, R. S., providing that such a deposit should pass to the credit of and be payable out of the appropriation for "Pay of the Army," and it was sought to transfer this deposit to the credit of the appropriation for the "Signal Service." *P. 36, 265, Nov. 4, 1889.* But this rule does not effect the proper *disbursement* of the

---

[1] See "Appropriations," XX, XXIII, and XXXVII.

[2] See VI Comp. Dec., 177, concurring in above opinion; see also "Appropriations," XVI.

[3] In this case the fund was not used to pay the scouts. Subsequently an unsuccessful attempt was made to obtain relief from Congress.

sum appropriated. Thus, where in a Military Academy appropriation act a certain amount was appropriated for the manufacture or purchase of models of guns and carriages, *held* that the Secretary of War was authorized to transfer this amount for disbursement to the disbursing officer at Watervliet Arsenal, where the models were to be manufactured, instead of leaving the disbursement to the disbursing officer at West Point. *P. 60, 498, July 31, 1893.*

XXXIV. Where legitimate accounts were presented to the War Department which would properly be payable out of an appropriation which had been fully expended, *held* that the same should be transmitted to the Treasury Department as "claims to be certified to be due by the accounting officers under appropriations the balances of which have been exhausted or carried to the surplus fund, * * * and certified to Congress." They could then be appropriated for in a deficiency act, and thus paid. *P. 62, 389, Nov. 24, 1893.*

XXXV. Section 4 of the act of June 16, 1890 (26 Stat. 158), provides that moneys paid upon purchase of discharges shall be "deposited in the Treasury to the credit of one or more of the current appropriations for the support of the Army, to be indicated by the Secretary of War." *Held,* that under this section the Secretary could change his designation of appropriations from time to time, as to purchase money thereafter accruing, if, in his judgment, such change would be for the interests of the service. *P. 59, 60, Apr. 11, 1893; C. 11264, Sept. 27, 1901.*

XXXVI A. Where it was desired to install certain woodworking machinery at the United States Military Prison at Fort Leavenworth, and it appeared that there was a special fund appropriated for gradually reconstructing the prison, and it also appeared that the cost of supporting the prisoners and maintaining the prison as a reformatory agency constituted a charge against the appropriations for the support of the Army, *held* that if the proposed machinery was to be used in part in construction work and in part with a view to instruct the prisoners to work at a trade by which they could support themselves after they were discharged, the cost thereof might be apportioned between the two appropriations as the Secretary of War might deem just and equitable. *C. 24994, May 19, 1909.*

XXXVI B. Machinery for laundering the clothes of prisoners at the United States Military Prison does not relate to the prison itself, but to the prisoners, and the cost of such machinery would be a proper charge against appropriations for the support of the Army, just as the cost of the food, clothing, and medical attendance of such prisoners is a charge against such appropriation. Either the appropriation for "Camp and garrison equipage," which is for "altering and fitting clothing and washing and cleaning when necessary," or for "incidental expenses," would be available for such expenditure. *C. 19379, Mar. 28, 1906.*

XXXVI C. Where a special form was printed for the use of the Inspector General in the conduct of an inspection of the quartermaster's and subsistence departments in the Philippine Islands, which was ordered by the Secretary of War, *held* that the cost of the same could be charged against the appropriation for printing in either the Quartermaster's or the Subsistence Department. *C. 15022, July 28, 1903.*

XXXVI D. Where a requisition was made for certain specially ruled sheets necessary to carry into effect the appropriations for the armament of fortifications and for the arming and equipping of the Organized Militia, *held* that the purchase of such sheets would constitute a charge against the appropriation for "Stationery for the War Department," or against the appropriation for "Armament of fortifications," or against the appropriation for "Arming the militia," and that if any one of the above-mentioned appropriations had been unduly depleted, the cost could be charged against either of the others. *C. 21225, Mar. 14, 1907.*

XXXVII. Where it was desired to install a plant for instruction purposes at Fort Monroe, where the Artillery School is located, *held* that if the plant was to constitute a part of the armament of the fortifications at Fort Monroe the purchase should be made from the fortification appropriation, but if needed solely or chiefly for purposes of instruction, and not as a necessary part of the defensive equipment of the fort, the purchase should be from the appropriation for the support of the school. *C. 13823, Dec. 20, 1902.*

XXXVIII. Sections 19 and 20 of the river and harbor act of March 3, 1899 (30 Stat. 1154), provide that "whenever the navigation of any * * * canals * * * shall be obstructed or endangered by any sunken vessel, boat, water craft, raft, or other similar obstruction" the same may be removed by the Secretary of War. In view of the general purpose of the act, which was to keep the navigable waters clear of obstructions, the act should receive an extensive rather than a restrictive construction, and, therefore, the general words "other similar obstructions" should not be closely restricted to obstructions of the nature of those specifically mentioned, but if in any way similar they should be regarded as coming within the purview of the act. Therefore, where a draw span of a railroad bridge across the Portage Lake Canal had been thrown from its piers by a collision with a steamer and was lying in the canal, completely blocking navigation, *held* that the span could be removed under the above act; and *held,* further, that the above act should be considered as making an appropriation for the specific purpose of removing wrecks, and therefore that act, rather than an indefinite appropriation which was made for operating and caring for canals and other works of navigation under which the Portage Lake Canals were operated, was the proper appropriation against which to charge the expense. *C. 17866, Apr. 20, 1905.*

XXXIX. The appropriation that is chargeable with the purchase price of Government property imported into the Philippine Islands from the United States is also chargeable with the payment of customs duties and internal-revenue taxes legally assessed against the United States under the appropriation act of August 5, 1905 (36 Stat. 11 and 130).[1] *C. 27447, Mar. 14, 1911.*

XL. It was desired to supply the commissary storehouse, the rent of which was paid by the Quartermaster's Department, with gas for the purpose of testing and sampling subsistence stores. *Held,* that the cost of fuel, and for heating the storehouse, if the storehouse was heated by artificial means such as steam or electricity, and for the lighting of the storehouse whether by candles, oil, gas, or electricity,

[1] See XVII Comp. Dec., 701, to the same effect; see also XVI Comp. Dec., 146.

constitute a charge against the appropriation for the Quartermaster's Department; but if gas is needed not for heating or lighting, but for testing and sampling stores, the expenditure for the gas would not be one connected with the heating or lighting of the storehouse, but would be connected with the "purchase, care," etc., of subsistence supplies, and should, therefore, be a charge against the appropriation for the Subsistence Department. *C. 21074, Feb. 9, 1907.*

XLI. As the expense connected with the installation and operation of electric fans for a military hospital is not an expense incident to lighting a military post, it should not be charged against the appropriation for the Quartermaster's Department, but against the appropriation for the "Medical and Hospital Department." *C. 18847, Nov. 21. 1905.*

XLII. In order to prepare a site for the erection of a hospital it was necessary to remove certain buildings under the control of the Ordnance Department. *Held,* that the expense of the removal of the buildings should be charged against the appropriation for the construction of the hospital and that the fact that the Ordnance Department had control of the buildings was not a material consideration in the case. *C. 2398, June 27, 1896.*

XLIII. Where a hospital was required to pay for telephone messages, *held,* that each message should be charged against that fund out of which the article to which the message referred was purchased. For instance, messages having to do exclusively with the sick and the detachment of the Hospital Corps, and which related to expenditures properly made out of hospital funds, as for food, milk, and articles for the use or benefit of the sick, etc., should be paid out of hospital funds; but messages connected with the administration of the hospital, such as those relating to the purchase of medicines, hospital property, etc., should be paid for by the Quartermaster's Department. *C. 27273, Sept. 21, 1910.*

XLIV. The act of March 2, 1901 (31 Stat. 895), making appropriations for the support of the Army provided for "the purchase of medical and hospital supplies, including disinfectants for military posts, * * * for the proper care and treatment of epidemic and contagious diseases in the Army, or at military posts or stations, including measures to prevent the spread thereof, and all other necessary miscellaneous expenses of the Medical Department." *Held,* that as the Army Medical School is an agency of the War Department for the instruction of newly appointed medical officers in matters pertaining to their specialty, just as officers of the line are drilled and instructed in technical schools in duties pertaining to their respective arms of service, the above appropriation could be expended in fitting up two rooms in the Army Medical School for necessary instruction. *C. 11258, Sept. 16, 1901.*

XLV. The act of May 11, 1908 (35 Stat. 122), making appropriations for the support of the Medical Department, provided "for medical care and treatment not otherwise provided for, including care and subsistence in private hospitals of * * * civilian employees of the Army * * * when entitled thereto by law, regulation, or contract." Where a civilan seaman on an Army transport was taken sick while the vessel was in port undergoing repairs and the ship's hospital was not in condition to be used, and the seaman was placed in a hospital ashore by order of the ship's surgeon, *held,* that the trans-

port regulations charged the Government with the duty of furnishing the medical attendance to members of the ship's company and this duty continued to exist when the vessel was in port undergoing repairs, and that the hospital charges in the above case were chargeable against the above appropriation.[1] *C. 24389, Jan. 22 and Feb. 15, 1909.* So, also, where four seamen on an Army transport were affected with contagious diseases and were removed to a hospital ashore, *held,* that the cost of transporting them to the hospital was chargeable against the above appropriation. *C. 24389, July 27, 1909.*

XLVI. Wattmeters for measuring electricity are included in the language "electric fixtures" used in the appropriation act in connection with certain construction work at a military post. *C. 25456, Aug. 24, 1909.*

XLVII. The appropriation in the Army appropriation act of February 27, 1893 (27 Stat. 482), "for the regular supplies of the Quartermaster's Department, consisting of * * * fuel and lights for enlisted men, guards, hospitals, storehouses and offices, and for sale to officers"—*held,* so far as concerns lights and officers, to include any such lights or material for lighting as may be saleable to officers, and therefore to be applicable for the production and furnishing of *gas,* to be paid for by officers at a cost covering expenses. This appropriation for "fuel and lights" is first found in the Army appropriation act of 1881, and, originating thus recently, may be deemed to contemplate gas as a material for lighting equally with the more primitive methods. *P. 64, 470, May 1, 1894.*

XLVIII. Where it was desired to initiate certain tests with a view to determining whether there was an economical use of coal at military posts, *held,* that the expense of obtaining the services of experts in connection with such tests would be a proper charge against the appropriations out of which the cost of fuel and heating apparatus is defrayed. *C. 23576, Sept. 13, 1909.*

XLIX. Congress appropriated for a monument to the prison ship martyrs, the appropriation to become available when certain sums had been appropriated by the State of New York and the city of New York and when a certain sum had been subscribed by the Prison Ship Martyrs Monument Association. After completing the monument a balance was left over. The act of appropriation was completely lacking in words indicating directly or indirectly what disposition should be made of this balance. *Held,* that the unexpended balance could not be turned over for the care and maintenance of the monument.[2] *Held,* further, that the unexpended balance should be divided *pro rata* among those by whom the funds were provided, whether by appropriation or subscription, and that the portion belonging to the United States be deposited to the credit of "Miscellaneous receipts." *C. 13999, Mar. 11, 1910.*

L. A provision in an appropriation for the Quartermaster's Department "for procuring water and introducing the same to buildings at such places as from their situation require it to be brought from a distance" is sufficient to cover the purchase of distilled water at a division headquarters for the use of clerks where the ordinary water procured by the Quartermaster's Department is not fit for drinking purposes. *C. 17317, Jan. 4, 1905.*

---

[1] I Comp. Dec., 62; II id., 347; V id., 913; VI id., 955; VII id., 407; VIII id., 296.
[2] See III Comp. Dec., 520.

LI. No part of an appropriation which has been made for the erection of a public building can legally be used in the purchase of furniture therefor, except such in the nature of fixtures as may be considered a part of the building itself and necessary to complete it for the purposes stated in the appropriation act.[1] *C. 3944, Mar. 18, 1899.*

LII. In the Army appropriation act of February 27, 1893 (27 Stat. 483), under the head "Army transportation," money was expressly appropriated "for constructing roads and wharves." *Held,* that the expense of repairing a crib dock and approach thereto belonging to the Government on the Fort Wayne Military Reservation, and used for military purposes, would be a proper charge against the said appropriation. *C. 70, July 19, 1894.*

LIII. Where the Government required for military purposes a street in which were situated water mains and hydrants, *held,* that the money appropriated for the purchase of the land could be expended for purchase of the mains and hydrants. *C. 15110, Jan. 30, 1909.*

LIV. The act of March 2, 1907 (34 Stat. 1158), made an appropriation "for the library of the Surgeon General's office, including the purchase of necessary books of reference and periodicals. *Held,* that the above appropriation is broad enough to cover the hire of the laborers necessary in handling and carrying books in connection with the reclassification of the library. *C. 22214, Oct. 15, 1907.*

LV. The sundry civil act of July 1, 1898 (30 Stat. 628), appropriated a specified amount for lighting 20 arc lights in the Executive Mansion Grounds and Monument Park 365 nights at not exceeding 25 cents per light per night, "which shall cover the entire cost to the United States of lighting and maintaining in good order each electric light in said grounds and park." *Held,* that the cost of necessary excavations and extension of underground conduits to carry the current for the new lights would be a proper charge against this appropriation. *C. 4641, July 30, 1898.*

LVI. The act of March 23, 1910 (36 Stat. 245), in making an appropriation for the expenses of the Signal Service of the Army, appropriated for the "maintenance and repair of military telegraph lines and cables, including salaries of civilian employees, supplies, and general repairs." *Held,* that the appropriation for the above purpose was sufficient to include the travel expenses of a civilian employee of the Signal Corps who was on temporary duty in Alaska as wireless inspector in connection with the installation of new equipment and overhauling apparatus already installed at wireless stations in Alaska. *C. 19479, Dec. 22, 1910.*

LVII. The act of March 9, 1906 (34 Stat. 56), for the marking, etc., of the graves of the Confederate dead who died in northern prisons, etc., covers "proper fencing for the preservation of said burial grounds." *Held,* that as the Secretary of War is not restricted as to the means for carrying out the provision for fencing, he may authorize such means as may in his judgment be necessary to carry out the object of the appropriation, and he may therefore employ an architect to design the fencing and attend to its construction and may pay him the usual compensation for such services. *C. 19834, July 23, 1907.*

[1] See III Comp. Dec., 134, holding that an appropriation "to alter certain rooms" in the courthouse of the District of Columbia did not cover the purchase of furniture or other articles that did not become fixtures.

Held, also, that under the same statute he may expend the appropriation for such grading as is necessary to the proper construction of a fence. *C. 25539, Oct. 18, 1909.*

LVIII. Where certain trees on private land were cut down for use in the construction of a pontoon bridge in the course of tactical instruction under direction of the authorities of a service school, *held,* that the trees should be considered as articles purchased for the use of the military establishment and the owner be paid the value of the same out of the funds set apart for the use of the particular service school in connection with which the pontoon construction was being carried on. *C. 24968, May 17, 1909.*

LIX. The act of February 14, 1902 (32 Stat. 12), provided "for the establishment in the vicinity of Manila, Philippine Islands, of a military post, including the construction of barracks, quarters for officers, hospital, storehouses, and other buildings, as well as water supply, lighting, sewerage, and drainage, necessary for the accommodation of a garrison of two full regiments of Infantry, two squadrons of Cavalry, and two batteries of Artillery, to be available until expended, five hundred thousand dollars." *Held,* that as the above statute did not specifically authorize the construction of "roads," it could not be used for such a purpose. *C. 12154, Apr. 23, 1904.*

LX. There is no authority to expend public money in furnishing music to so-called "volunteer bands," as such bands are not authorized by law as a part of the military establishment. *C. 23870, Dec. 11, 1908.*

LXI. While the Government of Porto Rico was being carried on under military authority a native of the island killed a United States soldier, the crime being of a character neither political nor in violation of the laws of war, and was tried by military commission and sentenced to a term of imprisonment. The confinement was served in a state penitentiary. *Held,* that the crime was one over which the courts of Porto Rico had jurisdiction,and the fact that justice was administered by a military commission did not make the crime any less a violation of the laws of Porto Rico, and that therefore the bills connected with the keeping of this prisoner in a State penitentiary were not payable from any appropriation for the Army.[1] *C. 15759, Jan. 15, 1904.*

LXII. The act of June 25, 1910 (36 Stat. 723), made an appropriation "for repair and preservation of monuments, tablets * * * made and constructed by the United States upon public land within the limits of Antietam battle field." A tablet on the battle field bore an inscription which was inaccurate and incomplete, and the only practicable method of making a correction in the inscription was to cause a new tablet bearing an amended inscription to be cast, the old tablet to be broken up. Authority for such action was requested. *Held,* that under the above appropriation the new tablet might be made as requested. *C. 28328, May 12, 1911.*

LXIII. By act of July 8, 1898 (30 Stat. 730), $200,000 was appropriated "to enable the Secretary of War, in his discretion, to cause to be transported to their homes the remains of officers and soldiers who die at military camps or who are killed in action or who die in the

[1] In this case the Attorney General held that after military authority in the island had ceased the power to remit the unexecuted sentence was in the governor of Porto Rico.

field at places outside of the limits of the United States." *Held*, that the appropriation could be used for providing metallic caskets and other expenses incident to disinterring the remains and preparing them for shipment as well as for transportation proper, as such expenses are necessary and proper to their transportation. But further *held*, that the act did not apply where the deceased officer or soldier died within the limits of the United States. *C. 4808, Aug. 18, 1898.*

LXIV. An estimate for providing a water supply for the Presidio of San Francisco was made in the following language: "For the purchase of land and acquirement of water rights on Lobos Creek, California, to protect the water supply of the Presidio of San Francisco, and to provide an independent water supply for military purposes in San Francisco Harbor, California." At a hearing before the committee of Congress the Quartermaster General stated that the estimate was to cover the purchase of all of one side of the creek, the Government already owning the other side. A sum of money was appropriated for the purpose stated in the estimate, the language of the appropriation being identical with that of the estimate. *Held*, that as neither the estimate nor the appropriation specified the amount of land and water rights which were to be acquired, the remarks of the Quartermaster General to the congressional committee should not be regarded as limiting the legal discretion in the Secretary of War to purchase such land and water rights as were necessary, and that if a purchase of a part only of one side of the creek was sufficient the entire appropriation could be used for this purpose. *C. 584, June 28, 1911.*

LXV. *Held*, that the act of Congress approved March 3, 1909 (35 Stat. 747), authorizing a disbursing officer of the Quartermaster's Department, having to his credit insufficient balance under the proper appropriation to make payment from the total available balance to his official credit, provided sufficient funds under the proper appropriations have been apportioned by the Quartermaster General for the expenditure, was not limited to appropriations pertaining to the same fiscal year; that there was nothing in the language of the appropriation which would justify such a limitation. *C. 17327, Aug. 5, 1910.*

LXVI. A civilian employee was sentenced by a court-martial to a forfeiture of pay. *Held* that the forfeiture should not be actually paid, but should remain in the appropriation from which the civilian was paid, the forfeiture being in effect a reduction of his authorized pay to that extent. *C. 9326, Nov. 23, 1900.*

LXVII. Where the United States owned to the middle of a street adjoining a national cemetery, *held* that an appropriation "for maintaining and improving national cemeteries" would cover the cost of construction of a sidewalk along the street if the sidewalk is considered as required for the convenience of access to the cemetery. *C. 26106, Jan. 22, 1910.*

CROSS REFERENCES.

Act, rule of construction.....See LAWS I B 1 b.
Execution of, for River and Harbor work...See NAVIGABLE WATERS X A to B.
Expenditures in excess of.....See CONTRACTS XIII to XIV.
Under 1661 R. S., available until expended..See MILITIA X A 1.

ARCHITECT.

Payment of.....See APPROPRIATIONS LVII.

ARMORY.

See MILITIA VIII.

ARMS.

I. ARMS DEFINED.
II. STATE QUESTION.

I. The Constitution of the United States provides that a well-regulated militia "being necessary to the security of a free state, the right of the people to bear *arms* shall not be infringed." [1] Held that the word "arms" refers to the arms of the militia or soldier and does not authorize the carrying of weapons not adapted to use for military purposes. *C. 1169, May 27, 1910.*

II. Held that the question of carrying weapons is one that is regulated by the States, and is a matter over which the Government of the United States has neither jurisdiction nor control. *C. 1169, Feb. 27, 1908.*

CROSS REFERENCES.

Borrowing from allies.....See WAR I C 6 d (1).
Furnished by allies.....See CLAIMS VII B 6.
Furnishing to colleges.....See MILITARY INSTRUCTION II B 1 c; 2.
Sale of and seizure of.....See PUBLIC PROPERTY IX B 1.
State can not forbid soldier to carry.....See GOVERNMENT AGENCIES V.

ARMY.

I. PERSONNEL.
- A. COMMANDER IN CHIEF.
  - 1. Appointing power. (See Office.)
  - 2. Convening and reviewing authority. (See Discipline.)
  - 3. Pardoning power. (See Pardon.)
  - 4. Can not issue regulations in conflict with statutes. (See Laws.)
  - 5. May drop officers as deserters. (See Deserter.)
  - 6. Turning prisoner over to civil authorities ..... *Page 69*
  - 7. Can not exchange old property for new.
  - 8. Can suspend a cadet without pay. (See Army I D 2.)
- B. SECRETARY OF WAR.
  - 1. Acts of.
    - a. Are acts of President.
      - (1) As to orders.
      - (2) As to transfers of property ..... *Page 70*
    - b. Can not be reopened by successor.
  - 2. Authority of.
    - a. Over personnel of the Army.
      - (1) Assignment of line officers to staff duty ..... *Page 71*
      - (2) Will not collect debts against officers.
        - (*a*) But can apply a disciplinary remedy ..... *Page 72*
      - (3) May detail a squadron sergeant major on extra duty.
      - (4) Can not restore a general prisoner to duty.

[1] Art. II, Amendments.

I. PERSONNEL—Continued.
B. SECRETARY OF WAR—Continued.
2. Authority of—Continued.
b. Over property.
(1) As to bonds of disbursing officers.
(a) Can not relieve commissary of bond while on general staff.
(2) As to funds.
(a) Can order inspection of Signal Corps funds.
(b) Can not divert forfeitures from treasury to any particular fund..... *Page 73*
(3) As to lands.
(a) Can not accept conditional conveyances.
(4) Can fix selling price of repaired property.
(5) Can not loan Government property.
c. Over records.
(1) May refuse to furnish to Court of Claims.
(2) Rule as to furnishing to other departments.
d. To grant franchises.
(1) Legislation required in case of navigable waters.... *Page 74*
e. Delegation of authority.
(1) To Chief of Engineers in river and harbor work.
f. Can not restrict a general's right to aids-de-camp.
g. Can order officers' travel without reporting to Congress.
h. Authority to have documents printed.
(1) Under act of July 7, 1884.
(2) Under act of January 12, 1895..... *Page 75*
3. Acting Secretary in absence of Secretary.
4. Hearings before.
a. Qualifications of lawyers who appear.
5. Requests on other departments.
a. Department of Justice to defend officer or enlisted man in civil courts ..... *Page 76*
b. To prosecute soldier who presented fraudulent final statements ..... *Page 77*
6. Request on Congress for relief of officers.
a. When subjected to judgment due to execution of duty.
b. Reimbursement of stoppage, loss of public money not involving neglect.
7. Can order issues.
a. Of clothing to general prisoners.
8. May order hospital attendant to attend a discharged soldier to soldier's home..... *Page 78*
9. Can not authorize dredging for gold in navigable waters.
10. Responsible for construction of fortifications and seacoast defenses.
11. Rule of comity as to relations with civil authorities.
C. OFFICERS. (See Line, Staff, under Army; also Office, Rank, Command, Pay, Retirement, Discipline, etc.)
1. May not hire soldier as servant.
2. Can not be deprived of pay by civil process.
3. Can not accept remuneration from a foreign power..... *Page 79*
4. Can not accept present from soldiers.

I. PERSONNEL—Continued.

D. Cadets.

1. Appointment.

a. Applicant must be actual resident of district.

(1) Rule if State has been redistricted.

(2) Residence may be changed after appointment.

(*a*) Minor.

[1] If emancipated may acquire residence. *Page 80*

[2] Not emancipated.

[*a*] Residence same as father's.

[A] Father on duty in district, but not resident therein.

[B] Alien attending school in United States.

(*b*) Alternate.

[1] Can not succeed to principalship except by appointment.

(*c*) Appointment from Alaska ..... *Page 81*

b. Age.

(1) Limitation applies at beginning of academic year.

c. Unmarried.

(1) May be a divorced man.

d. Reappointment.

(1) In case of resignation.

(2) In case of discharge because of deficiency.

(3) In case of dismissal by sentence of court-martial.

2. Cadets found deficient.

a. May be given furlough without pay ..... *Page 82*

b. Reappointment of.

3. Punishment.

a. Trial by court-martial.

b. Summary.

(1) Punishment by order is unauthorized.

(2) For hazing.

(*a*) Dismissal authorized.

4. Change of name by cadet..... *Page 83*

5. Not entitled to mileage.

6. Graduation leave.

E. Enlisted Men.

1. Noncommissioned officers.

a. Warrants are private property.

b. Reduction of.

2. Post noncommissioned staff officers.

a. Service as commissioned officer does not count toward appointment as commissary sergeant..... *Page 84*

b. Selection of post quartermaster sergeants not restricted to sergeants.

c. May be placed on extra duty if authority is obtained in advance.

3. Military status of enlisted men.

a. Not ineligible to hold civil office.

(1) May act as postmaster.

I. PERSONNEL—Continued.
E. Enlisted Men—Continued.
3. Military status of enlisted men—Continued.
b. Positions the holding of which is incompatible with military status..... *Page 85*
(1) Office in civil service in Philippine Islands.
c. Details not inconsistent with military status.
(1) To alter grade emplacements for Coast Artillery guns.
4. Chief musician, status of.
5. May be in contempt of civil courts.
F. General Prisoners. (See Discipline.)
G. Regular Army.
1. Standing Army in peace and war.
2. Line.
a. Mobile Army.
(1) Porto Rican Regiment ..... *Page 86*
(*a*) Natives may be officers.
(*b*) Natives may be chaplains.
(2) Philippine Scouts.
(*a*) Belong to the Regular Army.
b. Coast Artillery Corps.
(1) Office of Chief not bureau of War Department.
(2) Unassigned list of officers.
(3) Targets towed over "lobster pots" ..... *Page 87*
3. Staff.
a. Administrative staff.
(1) General Staff.
(*a*) Can not command without presidential assignment.
(2) The Adjutant General's Department.
(3) Inspector General's Department..... *Page 88*
(*a*) Reports of, are confidential documents.
(4) Judge Advocate General's Department.
(*a*) Judge Advocate General.
[1] Duties of.
[2] Reports of, are confidential..... *Page 89*
[3] No administrative jurisdiction over claims of court reporters.
[4] Does not express opinions on questions which affect only one or more of the States. (*Also see "Militia"*) ..... *Page 90*
b. Supply staff.
(1) Detailed officers must furnish bonds.
(2) Quartermaster's Department.
(*a*) Transportation.
[1] Street car tickets.
[2] Through foreign territory.
[*a*] Troops.
[*b*] Supplies.
[3] By sea.
[*a*] Of man discharged without honor.
[*b*] Pensionable status of ship's officers.
[*c*] Transport quartermaster summoned before United States commissioner ..... *Page 91*

I. PERSONNEL—Continued.
G. Regular Army—Continued.
3. Staff—Continued.
b. Supply staff—Continued.
(2) Quartermaster's Department—Continued.
(a) Transportation—Continued.
[3] By sea—Continued.
[d] Disposition of property found.
[e] Of military supplies in American vessels.
[f] Of members of family and servants.
[g] Principle of exterritoriality.
[h] Mess bill.
[i] In American or foreign bottoms. *Page 92*
[4] Transportation over automobile line.
(b) Purchase of horse from officer requires approval of Secretary of War.
(c) Can sell forage to retired officers..... *Page 93*
(3) Subsistence Department.
(a) Post commissary.
[1] Can hold each member of an officers' mess liable for his share of supplies furnished.
[2] Can not issue more than is authorized.
[3] Issue to civilian employees in Alaska.
[4] Issue of rations in kind in Alaska.
(4) Ordnance Department.
(a) Authority of chief under sec. 1167 R. S.
(b) Chief of Ordnance can not make rules for inspection of ordnance property.
(c) Examination of officers for detail in Ordnance Department.
(d) Ordnance sergeant..... *Page 94*
c. Engineer Department.
(1) Duties. (See also Public property, rivers and harbors, navigable streams, etc.)
d. Medical Department.
(1) Practice of surgeons.
(2) Board of review on examination for promotion.
(a) Jurisdiction.
(b) Action by War Department..... *Page 95*
(3) Medical Reserve Corps.
(a) "Emergency" in act of April 23, 1908, defined.
(b) Officers of Medical Reserve Corps are commissioned.
(c) Status..... *Page 96*
[1] As to privileges.
[2] Before assignment to duty.
[3] How discontinued.
[4] When mounted, entitled to transportation for private mounts.
(4) Contract surgeon.
(a) Use of, not forbidden..... *Page 97*
(b) Oath of office not administered to.
(c) Status and duties.
(d) Contract dental surgeon..... *Page 98*

I. PERSONNEL—Continued.
G. REGULAR ARMY—Continued.
3. Staff—Continued.
d. Medical Department—Continued.
(5) Hospital Corps.
(a) May be increased by Secretary of War.
(b) Sergeants; first class, detailed as mess sergeants.
(6) Nurses.
(a) Nurse Corps (female).
[1] An integral part of the Army.
[2] Leave of absence not cumulative.
(7) General hospitals.
(a) Hot Springs, Ark.
[1] Civil employees eligible for treatment as patients.
[2] Discharged enlisted men of Navy not eligible for treatment as patients.
(8) Post hospitals.
(a) Officers' servants are entitled to treatment as patients.
(b) Procedure in case of escheat of estate of deceased patient to United States.
[1] Case of soldier.
[2] Case of discharged soldier. (See Public property.)
(c) Special diet.
[1] Ginger ale, etc..... *Page 99*
(d) Funds obtained from sale of supplies.
H. VOLUNTEER ARMY. (See Volunteer Army.)
1. Office in. (See Office.)
I. MILITIA CALLED FORTH. (See Militia.)

II. EMPLOYMENT OF ARMY TO AID CIVIL AUTHORITY.
A. TO PROTECT STATE FROM INVASION OR DOMESTIC VIOLENCE.
1. When legislature can not be convened.
2. Rule of comity between Army and State officers.
B. MAY BE USED IN ALASKA.
C. MAY BE USED IN INDIAN COUNTRY..... *Page 100*
1. Use of officers to instruct Indians.
D. DUTIES OF COMMANDING OFFICER DURING DISORDER BEFORE RECEIPT OF ORDERS..... *Page 101*
E. FORCE SO EMPLOYED CAN NOT BE PLACED UNDER CONTROL OF GOVERNOR.
F. CAN NOT BE USED FOR POSSE COMITATUS.
1. May be used to serve process.
G. IN PHILIPPINES.
1. Scout companies.
a. Under command of chief or assistant chief of Constabulary. *Page 102*
2. Regular troops and scouts.
a. Under ordinary circumstances are not responsible for good order of the community..... *Page 103*
(1) May become so when called out.
H. CAN NOT BE USED TO POLICE FOREST RESERVES..... *Page 104*
I. RIOTS, ETC.
1. Proclamation will precede use of Federal troops.
2. Troops will not be placed under State control.
3. The President is judge.
a. Of size of force to use.
b. Of extent of territory to occupy.

II. EMPLOYMENT OF ARMY TO AID CIVIL AUTHORITY—Continued.
I. Riots, etc.—Continued.
4. Republican form of State government can not be overthrown.
5. Trespassers can be ejected from Indian country..... *Page 105*
6. Used to guard post road.
K. Use of Army to Enforce Neutrality.
1. By preventing hostile expeditions, etc., leaving country.
a. Military expedition defined.
b. How much force may be used.
c. Department commander should turn information of hostile expeditions over to civil authorities..... *Page 106*
d. Armed forces can not pursue a hostile expedition into foreign territory.
e. Seizing contraband supplies.
(1) Should be turned over to Federal civil authorities.
(2) Not to be turned over to State authorities.
f. By preventing violation of our peace due to firing from across the border line into our territory by participants in a foreign civil war.
(1) Our commanding general should promptly inform both foreign commanding generals and request them to desist.
(2) May defend against such fire..... *Page 107*
g. Commanding general.
(1) Should maintain friendly relations with the State in which he is serving.
(2) Can not support State authorities in execution of State laws.
h. Interned prisoners.
(1) Finger prints of, may not be taken.
III. EMPLOYMENT OF ARMY TO MAKE WAR. (See War.)
IV. MATERIAL. (See Public Property, Supplies, Pay, etc.)
V. USE OF ARMY TO ENFORCE TREATY RIGHTS IN CHINA.

I A 6. Whether the Executive shall turn over a miliatry prisoner undergoing sentence of court martial to a governor of a State, upon his formal request, in order that he may be tried and punished by a court of the State, or in order to enable such governor to surrender him to the governor of another State in compliance with a requisition made by the latter for the party as a criminal under the laws of the latter State—is a question to be decided by considerations of policy and expediency suggested by the facts of the particular case. The U. S. Government is under no obligation to surrender its prisoner, and whether it will, in comity, do so, should in general depend mainly upon the nature of the crime charged. Unless the party be charged with a peculiarly heinous offense, of which, for the purposes of public example and punishment, a prompt investigation by a civil tribunal is called for, the Executive will in general properly decline to turn over the party to the civil authorities till his military punishment has been fully executed. *R. 37, 47, Oct., 1875; C. 5955 and 6055, Mar., 1899.*

I A 7. *Held* that the commander in chief has no authority to exchange old property for new property. *C. 2127, Mar. 14, 1896.*

I B 1 a (1). It is a fundamental general principle of our public law that all acts done by and directions emanating from the heads of the executive departments in the course of their administrative duties, are in law the acts and directions of the President, in whom is reposed by the Constitution the entire executive power of the Government,

and whom the heads of departments (except where specially invested by Congress with distinctive authority of their own [1]) simply act for and represent.[2] Thus all orders made and issued by the Secretary of War in connection with the government and regulation of the military establishment—such as orders convening general courts martial, or approving and directing the execution of the sentences or otherwise acting upon the proceedings of such courts, or mitigating or wholly or partially remitting punishments imposed thereby; or orders summarily dismissing officers, or dropping for desertion, retiring or accepting the resignation of, officers; or orders establishing military reservations, or promulgating army regulations, &c.—are to be regarded as the orders and acts of the President, whom the Secretary of War represents in the administration of his department; the same being presumed to be made and issued with the knowledge and by the direction of the President, whether or not he be referred to therein as having directed or commanded the same; and being equally as valid and operative as if signed by the hand of the President himself.[3] *R. 5, 319, Nov., 1863; 9, 44, May, 1864; 23, 654, Aug., 1867; 37, 650, June, 1876; 38, 107, 243, June and Aug., 1876; 39, 296, Nov., 1877; 41, 25, 611, Sept., 1877, and July, 1879; 42, 209, Mar., 1879; 43, 106, Dec., 1879; P. 41, 360, June 30, 1890.*

I B 1 a (2). Where, by an act of Congress, the President was "authorized to dispose of" certain reserved lands of the United States, but was not in terms required to execute the transfer, *held* that the execution of the deeds was a ministerial act and that the same might legally be executed by the Secretary of War. *P. 48, 420, Aug., 1891.*

I B 1 b. It is an established rule of our administrative law that a decision upon a claim once arrived at, upon whatever grounds, by the head of a department of the Government, is a finality so far that, in the absence of new evidence, error of calculation, or fraud, it can not (without the authority of Congress) be reopened by a successor.[4] *R. 51, 136, Nov., 1886; P. 53, 443, May, 1892; C. 687, Dec., 1894. Held* that "new evidence," to be available to change a determination upon a claim arrived at by a previous Secretary of War, must be

[1] That a Secretary may have special powers devolved upon him, independently of the President, by an act of Congress, see United States *v.* Kendall, 5 Cranch, Ct. Cls., 163 (Fed. Cas., 15517).

[2] Lockington *v.* Smith, Peters Ct. Cls., 472; United States *v.* Benner, 1 Baldwin, 238; Wilcox *v.* Jackson, 13 Peters, 498, 513; United States *v.* Eliason, 16 id., 302; The Confiscation cases, 20 Wallace, 109; U. S. *v.* Farden, 99 U. S., 10, 19; Wolsey *v.* Chapman, 101 id., 655, 769; Runkle *v.* U. S., 122 id., 543, 557; United States *v.* Webster, Daveis, 38, 59 (Fed. Cas., 16658); United States *v.* Freeman, 1 Wood. & Minot, 45; Lockington's case, Brightly, 288; United States *v.* Cutter, 2 Curtis, 617; Hickey *v.* Huse, 56 Maine, 495; McCall's case, 5 Philad., 289; In matter of Spangler, 11 Mich., 322; 1 Op. Atty. Gen., 380; 6 id., 326, 587, 682; 7 id., 453, 725; 9 id., 463, 465; 10 id., 527; 11 id., 398; 13 id., 5; 14 id., 453.

[3] See Wilcox *v.* Jackson, 13 Peters, 498; U. S. *v.* Eliason, 16 id., 302; U. S. *v.* Farden, 99 U. S., 10, 19; Wolsey *v.* Chapman, 101 id., 755, 769; Hickey *v.* Huse, 56 Maine, 495; 2 Op. Atty. Gen., 67; 13 id., 5; 14 id., 453; 15 id., 290, 463; G. O. 35, W. D., 1850.

[4] U. S. *v.* Bk. of Metropolis, 15 Peters, 378; Rollins and Presbrey *v.* U. S., 23 Ct. Cls., 106, and cases cited; *Waddell's Case*, 25 id., 323; 9 Op. Atty. Gen., 32; 12 id., 355; 14 id., 275; 15 id., 192; 16 id., 452; I Comp. Dec., 193; 2 id., 264, 401; 4 id., 303; 6 id., 236, 245. In Rollins and Presbrey *v.* U. S., *supra*, it was held, quoting from syllabus, that "any public officer in an executive department may correct his own errors and open, reconsider, or reverse any case decided by himself." In delivering the opinion of the court, Chief Justice Richardson said: "It has long been held in the executive departments that when a claim or controversy between the United States and indi-

evidence as to its merits. A mere reargument, upon a subsequent application, with citation of authorities or precedents, is not such "new evidence," or evidence at all, and can not avail to reverse the original decision. *P. 58, 110, Feb., 1893.* Where an order, fixing the status of an officer on the retired list, was issued by the Secretary of War in the execution of a statute which it was his duty to execute, *held* that such order was *res judicata*, and could not be reopened or set aside by a succeeding Secretary, in the absence of fraud or manifest error on the face of the proceedings. *P. 41, 358, June, 1890; 42, 438, Sept. 1890; C. 4954, Sept. 13, 1898; 11741, Jan. 11, 1902; 13244, Sept. 2, 1902; 14043, Feb. 24, 1903; 16202, Apr. 20, 1904; 16416, May 27, 1904, Jan. 9, 1905, and Dec. 6, 1906; 16913, Sept. 20, 1904; 20446, Sept. 27, 1906; 29327, Jan. 13, 1912.*

I B 2 a (1). Under the requirements of section 26 of the act of February 2, 1901 (31 Stat. 755), that "officers so detailed shall serve for periods of four years, at the expiration of which they shall return to duty with the line," *held*, that the foregoing requirement is mandatory, and makes it necessary that such details shall terminate at the expiration of the statutory period; *held*, also, however, that it is within the authority of the Secretary of War to assign an officer so relieved to any duty that he may regard as conducive to the public interest; that if he assigns him to duty in connection with the construction of buildings, his bond, if he has given one as detailed captain in the Quartermaster's Department, would not be applicable to the duty performed under his new assignment; and that it is in the discretion of the Secretary of War to require a new bond to cover the duties with which he is charged in such new assignment. *C. 15844, Apr. 16, 1910.*

I A 2 a (2). It is not within the province of the War Department to afford to officers of the Army protection against suits instituted by civilians claiming to be their creditors. *P. 64, 63, Feb., 1894.* Nor can the Government properly act as collector of private indebtedness due from officers or enlisted men of the Army. In such cases resort should be had to the civil courts. Where, however, the question becomes one of conduct unbecoming an officer and a gentleman on

---

viduals therein pending has once been fully considered, and final action and determination had thereon by any executive officer having jurisdiction of the same, it can not be reopened, set aside, and a different result ordered by any successor of such officer, except for fraud, manifest error on the face of the proceedings, such as a mathematical miscalculation or newly discovered evidence, presented within a reasonable time and under such circumstances as would be sufficient cause for granting a new trial in a court of law. This ruling and practice of the departments has been approved elsewhere and has been sustained by the courts. (9 Op. Atty. Gen., 34; 12 id., 172, 358; 14 id., 387, 456; 14 id., 275; 15 Pet., 401; *Lavalette's Case*, 1 Ct. Cls., 147; *Jackson's Case*, 19 id., 504; *State of Illinois Case*, 20 id., 342; *McKee's Case*, 12 id., 560; *Day's Case*, 21 id., 264, and the opinion of the Judiciary Committee of the Senate, reported by Senator and Judge David Davis, quoted in Jackson's case above referred to.) But it has never been doubted that any public officer in the departments may correct his own errors, and open, reconsider, and reverse in whole or in part any case decided by himself." As to reopening final settlements, which have been followed by receipt and acceptance by the claimant of the amount awarded, 5 Op. Atty. Gen., 122; 10 id., 259; 12 id., 386; IV Comp. Dec., 328; VI id., 858.

The act of July 31, 1894 (28 Stat. 208), provides that "any person accepting payment under a settlement by an auditor shall be thereby precluded from obtaining a revision of such settlement as to any items upon which payment is accepted." In view of this statute the accounting officers have no jurisdiction to reopen a settlement, upon newly discovered evidence, as to any item upon which payment of the amount allowed by an auditor has been accepted. VII Comp. Dec., 537.

the part of an officer or of conduct to the prejudice of good order and military discipline on the part of either an officer or enlisted man, action may be taken by the War Department on these questions only.[1] *C. 5482, Dec., 1898; 5931, Mar., 1899.*

I B 2 a (2) (*a*). The Secretary of War is without authority to appropriate or stop an officer's pay for the use of his family, or to satisfy a judgment or decree of a civil court growing out of an obligation of a private character. But he may of course cause such officer to be brought to trial by court martial for dishonorable conduct in the treatment of his family or with respect to the obligation referred to. *C. 3500, Sept., 1897; 3819, Jan., 1898; 5482, Dec., 1898; 6882, Aug., 1899.* Nor in the case of a retired officer, alleged to be irresponsible, has the Secretary of War authority to designate a person to receive and distribute such officer's pay. In such case, the appointment of a guardian by the proper court should be secured by the parties interested. *C. 4636, July, 1898; 13097, Aug. 12, 1902; 13439, Oct. 14, 1902; 15770, Jan. 16, 1904; 17915, May 4, 1905; 21852, Oct. 15, 1907.*

I B 2 a (3). *Held* that the Secretary of War may detail a squadron sergeant major on extra duty and that such detail can not be made without his authority. *C. 14664, May 18, 1903.*

I B 2 a (4). Section 6 of the act of March 3, 1873, provided, with regard to general prisoners confined in the United States military prison, that "the Secretary of War is authorized and directed to remit, in part, the sentence of such convicts and to give them an honorable restoration to duty in case the same is merited." *Held* that it has not been possible for the Secretary to exercise this power since the enactment of the act of August 1, 1894, as that act prohibits the reenlistment of men whose preceding term of enlistment has not been honest and faithful. *C. 22577, Nov. 17, 1911.*

I B 2 b (1) (*a*). A permanent officer of the Subsistence Department detailed in the General Staff can not be relieved from his bond by the Secretary of War. But no obligation accrues under the bond while so serving as an officer of the General Staff; it is, therefore, suggested that the bonding company be advised, with a view to remit the annual premiums during his incumbency of office in the General Staff. *C. 4396, Feb. 19, 1900.*

I B 2 b (2) (*a*). *Held* that the Secretary of War has authority to cause funds in possession of officers of the Signal Corps who are charged with their disbursement in connection with the Alaskan telegraph and cable lines, including funds in course of telegraphic transmission,

[1] The Secretary of War does not undertake the collection of debts due private persons from officers and soldiers, nor to require a preference for any particular creditor in payment in such cases. His aim is to protect the character and standing of the Army, and to eliminate from it those guilty of dishonorable conduct. Where charges of such conduct are made they will be promptly investigated, and where statements of nonpayment of debts are made against officers, they will be investigated with this end in view. *Ruling, Secretary of War, Nov. 18, 1897.*

Complaints of nonpayment of debts due from officers on the active list and under the control of department commanders are in practice referred for the "necessary action" to the proper department headquarters and the complainants notified of the above ruling of the Secretary of War. The complaints need not be accompanied by or be in the form of formal charges—a statement of the acts and conduct complained of is sufficient as a basis for investigation. Formal charges can be prepared when as a result of the investigation such action is required.

to be inspected by officers of the Inspector General's Department. *C. 6363, Jan. 21, 1909.*

I B 2 b (2) (*b*). In executing a sentence of forfeiture of pay, the pay forfeited in the absence of specific statutory authority for the purpose can not be diverted from the General Treasury to any particular fund. Thus where a soldier convicted of the embezzlement of certain subsistence stores was sentenced to a forfeiture of pay, *held* that the Secretary of War would not be authorized to cause the pay forfeited to be added to the appropriation for the Subsistence Department so as to make good to the same the amount lost by the embezzlement. *R. 43, 85, Nov., 1879.*

I B 2 b (3) (*a*). The act of Congress of August 19, 1890, vested in the Secretary of War a simple authority to purchase land for the purposes of the Chickamauga and Chattanooga National Park, without direction or indication as to the terms of such purchase. Deeds were offered by its owners containing two conditions—(1) a condition subsequent to the effect that unless certain improvements should be made the grant should become null and void; (2) a proviso that in case the United States should at any future time condemn other land of the grantor, he should then be paid for the same an amount to be measured by the value, determined by appraisement, of the lands conveyed by the present deed—an arrangement which would be equivalent to giving him a claim on the United States for an unliquidated amount. *Held* that such conditional conveyances could not legally be accepted by the Secretary of War, no authority being given him by the statute to bind the Government by conditions or stipulations in regard to the title or purchase. *P. 56, 263, Nov., 1892.*

I B 2 b (4). The Secretary of War has power to sell public property that has been used. *Held*, therefore, that he can fix the sale price of property which has been in use and repaired. *C. 26372, Mar. 17, 1910.*

I B 2 b (5). *Held* that there is no legal authority for the loan, by the Secretary of War, of Government property to other executive departments or to parties not in the Government service. *C. 19282, Mar. 2, 1906.*

I B 2 c (1). Under section 1076, R. S., the Secretary of War (or other head of a department) may refuse or omit to comply with a call of the Court of Claims for information or papers when he considers that it would be prejudicial to the public interests to furnish them: The statute makes him the sole judge on the subject. So *advised* here that a certain affidavit, thus called for, be, on account of the peculiar nature of its contents (as well as its apparent immateriality) withheld. *P. 26, 497, Sept., 1888.*

I B 2 c (2). The calls upon the War Department by subordinate officers and employees of other executive departments for extended copies of military records have become so numerous and compliance with them has become so burdensome and expensive as to call for serious consideration in the interests of economy and the dispatch of public business. As a rule, these records are desired for the purpose of ascertaining some fact relating to military status or services which it is primarily the duty of the War Department to determine. *Held* that where such a fact is to be determined judicially it is the practice of the department to produce either the original records or duly authenticated copies in court. *Held*, however, that when such a fact

is to be ascertained for executive purposes it can only lead to confusion, conflict, and waste of public time to have numerous different members of the executive branch examining the same records for the purpose of determining the same questions, and that it is wholly unnecessary. *Held*, therefore, that when such a fact is to be ascertained for the purpose of executive action, and no statute requires a different course, the War Department will answer proper inquiry as to the fact, ascertaining it from the examination of its own records, but advised that the department will not hereafter (Nov. 2, 1901) furnish copies of records or statements to enable officers or employees of other executive departments to review decisions made by the War Department upon purely military questions or to make independent decisions with regard to such questions.[1] *C. 10306, July 8, 1910.*

I B 2 d (1). The Secretary of War is without authority, unaided by legislation, to grant franchises in navigable waters or elsewhere. *C. 9323, Nov. 23, 1900.*

I B 2 e (1). *Held* that in view of the general language of the law [2] the Secretary of War could legally delegate to the Chief of Engineers his authority to direct a temporary transfer of property purchased from one appropriation for a particular project and not for the time required therefor for use in another improvement upon such equitable adjustment of charges and credits as may be agreed upon by the district officers under direction of the Chief of Engineers. *C. 16202, Apr. 20, 1904; 16899, Sept. 16, 1904.*

I B 2 f. A question having arisen as to the power of the Secretary of War to limit the number of aids allowed to general officers in the operation of sections 1097 and 1098 R. S., *held* that such restrictive action would be unlawful, as the power of general officers to appoint the number of aids to which they are entitled being granted by statute can not be abridged by an executive regulation. *C. 14819, June 17, 1903.*

I B 2 g. Section 4 of the act of May 22, 1908 (35 Stats. 244), requires the head of each executive department and other Government establishment at Washington to submit at the beginning of each regular session a statement to Congress showing what officers or employees have traveled on official business from Washington to points outside of the District of Columbia. *Held* that the Secretary of War is not required, under this law, to make a report of travel by officers of the Army in pursuance of competent military orders, which travel is covered by Army appropriations. *C. 23876, Dec. 3, 1908.*

I B 2 h (1). *Advised* that, under the prohibitory provisions of the act of July 7, 1884 (23 Stat. 227), a work entitled the "Manual of Calisthenics" can not legally be authorized or caused, by the Secretary of War, to be printed by the Public Printer, unless the same be, in the words of the act, "necessary to administer the public business." The term "necessary" has been construed, in similar connections, as meaning—not absolutely necessary, but reasonably necessary or clearly conducive, to the object expressed. (See the *Legal Tender Cases*, 12 Wallace, 457, 539.) The Secretary of War should be assured that the proposed publication would clearly and materially conduce to the due administration of the public business before causing

[1] See War Department circular of Nov. 2, 1901.
[2] See sec. 5, act of June 13, 1902 (32 Stat. 373).

the printing to be done by the Public Printer. *P. 50, 442, Dec., 1891.* Similarly *advised* in regard to a translation, by an Artillery officer, from the Russian, of lectures on the subject of the "Resistance of guns and interior ballistics," a precedent being cited of a work by a surgeon of the Army, entitled "Notes on Military Hygiene," held by the Secretary of War (Apr., 1890) to be valuable though not *necessary* in the sense of the statute. *P. 50, 444, Dec., 1891; C. 18579, Sept. 13, 1905.*

I B 2 h (2). *Held* that the Secretary of War "is authorized by law" (see public printing and binding act of January 12, 1895) to have the Commissary's Handbook, or any other similar work needed in the business of the War Department, printed at the Government Printing Office and paid for from the War Department's allotment of the appropriation for "public printing and binding." *C. 1679, Aug., 1895; 18579, Sept. 13, 1905.*

I B 3. *Held* that during the illness of the Secretary of War or during his temporary absence from the seat of government the Assistant Secretary of War must, if present, serve as Acting Secretary of War, unless the President shall direct otherwise; but that by direction of the President the duties of the Secretary may, whether the Assistant Secretary be present or absent, be devolved upon (*a*) the head of any other executive department; (*b*) any other officer in any of the executive departments whose appointment is vested in the President by and with the advice and consent of the Senate; (*c*) the commanding general of the Army, if there be one; or (*d*) the chief of any military bureau of the War Department; and that the officers comprised in classes (*b*) and (*d*) include, among others, the Chief of Staff, The Adjutant General, the Inspector General, the Judge Advocate General, the Quartermaster General, the Commissary General, the Surgeon General, the Paymaster General, the Chief of Ordnance, the Chief of Engineers, the Chief Signal Officer, and the Chief of the Bureau of Insular Affairs. *C. 18175, Sept. 7, 1911.*

I B 4 a. The War Department has no special regulations covering the matter of the qualifications of attorneys appearing before it. In practice any attorney who has legal authority to represent a client in a particular matter will be heard by the department in that matter. *C. 2931, Feb., 1897, to Mar., 1900.*

I B 5 a. By the act of June 22, 1870 (16 Stat. 162), the whole matter of the employment of counsel in cases of a public nature, and the settlement of their compensation, has been taken from the chiefs of the other executive departments and transferred to the Attorney General. Section 189, R. S. (derived from sec. 17 of said act), provides generally that "No head of a department shall employ attorneys or counsel at the expense of the United States; but when in need of counsel or advice shall call upon the Department of Justice, the officers of which shall attend to the same." The subject is regulated in detail by sections 356 to 367, R.S.; and when an officer or soldier gives notice of a suit or prosecution commenced against him for an act done in the due performance of a military duty and applies to be defended at the expense of the United States, the Secretary of War, if he deems the case to be one in which such action will be just and expedient, will refer the papers to the Attorney General for the proper action. *R. 37, 99, June, 1876; P. 50, 363,*

Nov., 1891; 62, 32, Oct., 1893; C. 11458, Nov. 8, 1901; 12208, Mar. 15, 1902; 14570, Apr. 29, 1903; 21164, Feb. 19 to Sept. 3, 1907.

In the following instances the officer sued or prosecuted was considered to have acted in the performance of his military duty, and the Attorney General was requested to designate the proper assistant United States attorney to appear on the officer's behalf: Where a constructing quartermaster was sued by a contractor for alleged arbitrary action in making the contractor "replace certain shutters on the windows of a building he was constructing" (*C. 12208, Mar. 15, 1902*); where an officer, in obedience to the orders of his commanding officer, undertook to drive off the military reservation a number of trespassing horses, and it was alleged that he had exceeded the necessities of the case and used undue severity in removing them, and suit had been brought against him as a private individual to recover damages (*C. 22007, Aug. 30, 1902*); where an officer on duty at Sea Girt was sued for a statutory penalty prescribed by State laws for not stabling the horses of his battery (*C. 27740, Aug. 19, 1908*); where an officer traveling on duty in a Government conveyance in which he was merely a passenger was sued for damages resulting from an injury caused by the alleged negligence of the driver (*C. 21739, July 1, 1907*); so also where an officer was traveling on duty as a passenger in a Government automobile in New York City and the machine ran over a pedestrian[1] (*C. 28517, June 12, 1911*); where a civilian attempted to sell fruit on a reservation in violation of the orders of the commanding officer, who had the civilian confined in the guardhouse for a short period of time pending an investigation by him, and the civilian sued the commanding officer as a private individual in the civil courts for damages for the alleged illegal confinement, the commanding officer urging that his action was strictly in the line of duty (*C. 28517, Oct. 7, 1911*); where a fireman on a transport was discharged for refusing to do his duty and thereupon sued the transport quartermaster in the civil courts as a private individual (*C. 28517, Oct. 19, 1911*); where a post exchange officer contemplated bringing an action against a corporation for the price of certain articles sold to the exchange (*C. 19268, Mar. 1, 1906*); and so where a so-called company exchange was carried on at a post by the consent of the commanding officer, although such exchange was not authorized by law or regulations, and an action was brought against the individual officers in charge of the exchange for the debts of the concern, *held* that owing to the fact that the exchange had existed by the authority of the commanding officer and owing to other peculiar circumstances of the case, it would be proper for the officers sued to request to be provided by the Government with counsel (*C. 20279, Apr. 20, 1907*); where a former officer of the volunteers was sued by a former soldier of his regiment for alleged false imprisonment growing out of circumstances connected with the former military service of all parties (*C. 10150, Apr. 4, 1901*); but where a suit was brought by the parents of a deceased soldier against a railroad company for damages for alleged negligence in causing the death of the soldier, *held* that as the United States was not a party to the suit and had no

[1] In this instance the case was removed to the United States circuit court for trial, and the expense of the removal bond was paid from the appropriation for contingencies of the Army.

legal interest in it there was no obligation to represent the parents in their litigation (*C. 16478, June 16, 1904*); so where an officer was sued for damages for the removal of trespassing animals from a military reservation with alleged undue and unlawful severity, and under instructions of the trial court the only question at issue was as to the manner in which the officer had exercised his authority, and a judgment had been rendered against the officer and this judgment had been affirmed by the court of last resort, *held* that the Government would not be warranted in furnishing counsel or taking other affirmative action to resist the execution of the judgment.[1] *C. 22007, Apr. 13, 1911.*

I B 5 b. Where a discharged volunteer soldier made out fraudulent final statements and presented the same to a paymaster for payment, *advised* that the matter be referred to the Department of Justice, that the man might be proceeded against under section 5438, R. S. *C. 7284, Nov., 1899.*

I B 6 a. In a case in which, in 1873, a judgment was obtained in a Territorial court against two officers for an act performed in good faith and in the zealous and conscientious discharge of what was believed to be a public duty devolved upon them by an order of the department commander, and this judgment was subsequently (in 1877) affirmed by the Supreme Court of the United States[2]—the officers having been defended by counsel assigned to defend them by the Department of Justice—*advised* that, notwithstanding the fact that their act had been thus determined to have been illegal, an application made by them to Congress for an appropriation to defray the amount of the judgment, would properly be favored by the Secretary of War.[3] *R. 41, 433, Oct., 1878.*

I B 6 b. *Held* that a proper case had arisen for congressional relief when, due to no fault of the disbursing officer, his consignment of public money arrived short of the proper amount, and recommended that such relief be requested. *C. 25605, Feb. 4, 1910.*

I B 7 a. The Army appropriation act for the year ending June 30, 1896, made the usual appropriation "for cloth, woolen material, and for the manufacture of clothing for the Army; for issue and sale at

---

[1] So where a soldier was arrested and prosecuted in the United States court for killing another soldier and was without funds and unable to employ counsel, and it was believed that he would not obtain justice unless properly defended, the Department of Justice declined to undertake the defense, holding that as the United States attorney was prosecuting, it would not be proper for a representative of the Attorney General also to defend the case, but suggested that the Attorney General could call for a report and direct a *nolle pros* if there was not sufficient reason for a trial. *See C. 5684, J. A. G. O.*

[2] Bates *v.* Clark, 5 Otto, 205.

[3] By the acts of Mar. 3, 1863, c. 81, s. 4; May 11, 1866, c. 80, s. 1; and Mar. 2, 1867, c. 155, the order or authority of the President is made a defense in any court of the United States or of the States, to any prosecution or suit instituted against an officer or soldier of the Army, for an arrest, trespass, or other act made or done by such authority, during the War of the Rebellion. Under these Statutes it would appear that an officer or soldier could not be made liable to punishment or damages for any legitimate act performed during the war in the line of his duty or under the orders of a proper superior; otherwise, however, as to injuries or wrongs done in the absence of legal orders, or on the personal responsibility of the individual. See, as illustrating this subject the decision of the Supreme Court in Beard *v.* Burts, 5 Otto, 434.

In the case of *In re* Murphy, Woolworth, 141, it was held by Justice Miller that the act of 1867 was *ex post facto* and unconstitutional, in so far as it assumed to validate *punishments* imposed by military courts which would otherwise be invalid.

cost price according to the Army Regulations." Army Regulations prescribe that commanding officers may order necessary issues of clothing to military prisoners who have no clothing allowance from deserters' or other damaged clothing or from clothing specially provided for the purpose. Damaged clothing and clothing specially provided would be unissued clothing purchased from the appropriation for clothing, camp and garrison equipage. This paragraph of the regulations should be accepted as an authoritative construction of that part of the appropriation act relating to clothing, etc., to the effect that the word "Army," as used therein, includes general prisoners. *Held*, therefore, that the Secretary of War could legally authorize issues of overcoats, arctic overshoes, woolen mittens, and flannel shirts to general prisoners,[1] as a charge against the appropriation for clothing of the Army. *C. 2057, Mar.., 1896.*

I B 8. There is no law expressly relating to the subject, but the Secretary of War in the exercise of his general power over the movements of members of the Army, may order a hospital attendant, an enlisted man, to accompany an invalid discharged soldier to the Soldiers' Home. *C. 2592, Sept., 1896.*

I B 9. The Secretary of War has authority to authorize dredging operations, in so far as the interests of navigation are concerned, but is without jurisdiction to give permission to dredge for gold in the navigable waters of the United States.[2] *C. 7487, Jan. 6, 1900; 7982, Apr. 9, 1900; 8072, Apr. 23, 1900; 8408, June 13, July 9, 1900 and June 8, 1910; 12918, June 26, 1902; 22845, Mar. 5, 1908.*

I B 10. *Held*, that the Secretary of War and not the Secretary of the Navy is responsible for the construction of fortifications and seacoast defenses. *C. 12389, Apr. 9, 1902.*

I B 11. While comity enjoins that the authorities of the United States should in general, and in any proper manner, facilitate the legal operations of State officials, yet no such obligation can be deemed to exist where the rendering of the desired facilities would materially interfere with, or embarrass, the due prosecution of a public function under an act of Congress. *Held*, therefore, that the Secretary of War may decline to order a commanding officer to furnish a list of names of employees under his charge to a civil official for tax collection purposes. *C. 1300, Apr. 27, 1895.*

I C 1. On the question of whether a soldier on furlough might be employed as a servant by an officer, *held*, that under the wording of section 1232, R. S., "no officer shall use an enlisted man as a servant in any case whatever," there would be no authority in law for excepting furloughed soldiers from the operation of the statute. *C. 1867, Nov. 23, 1895.*

I C 2. An officer or soldier can not be deprived of his pay by means of any civil process of attachment or levy on execution. So where a wife, in an action of divorce against her husband, a captain in the United States service, obtained an interlocutory judgment for an allowance *pendente lite*, *held*, that there was no precedent or legal ground for requiring him to satisfy the amount of such judgment out of his pay. *R. 8, 493, May, 1864; C. 13097, Aug. 8, 1902; 13439, Oct. 14, 1902.*

---

[1] See Circular 5, A. G. O., 1896, authorizing such issues to be made when in the judgment of the department commander necessary to prevent suffering.

[2] See sec. 26, act of June 26, 1900 (31 Stat. 321).

I C 3. In the absence of express authority from Congress, an officer of the Army can not accept remuneration from a foreign power in return for military or other public service rendered, without a violation of Art. I, sec. 9, par. 8, of the Constitution. Nor can such an officer (in the absence of such authority) properly be granted a leave of absence for the purpose of rendering foreign service, even without compensation, since such a proceeding would be contrary to the spirit and intent of the laws relating to the Army, which clearly contemplate that the services of its officers shall be rendered to the United States.[1] *R. 37, 448, Apr., 1876; C. 20396, Apr. 15, 1910.*

I C 4. *Held,* that the acceptance by an officer of a present from enlisted men recently under his command is incompatible with the proper relation between officers and enlisted men. *C. 10102, Mar. 29, 1901.*

I D 1 a. Under the law the power of appointing cadets is in the President, and with the exception of the cadets appointed at large, the appointments are required to be made from "actual residents of the congressional or Territorial districts or of the District of Columbia, respectively, from which they purport to be appointed." The privilege of selecting those appointed from congressional districts, which has been accorded to Members of Congress, is one which rests on regulation and long practice, and this privilege is limited to the nomination of such persons as meet the requirements of law. In making the appointments it is the duty of the President to appoint only such persons as comply with the provisions of the statute, and the decision of the Representative in the matter does not relieve him from this duty. *R. 42, 601, Apr., 1880; C. 6615, June, 1899; 16602, July 19 and 26, 1904; 23425, June 13, 1908.*

I D 1 a (1). A State having been redistricted by an act of its legislature, *held,* (1) That the cadets now at the Military Academy appointed from congressional districts of that State should, where the numbers of their districts had been changed, be credited to the new districts, so as to appear on the list as representing the districts now actually including the towns, etc., which were their places of residence when appointed; (2) That existing conditional appointments made under section 1317, R. S., providing that such appointments shall be made one year in advance of admission to the academy, and which accordingly had been made prior to the redistricting, were valid and should stand, the appointees being deemed *entitled* to admission at the designated time, subject to the prescribed conditions; (3) That future appointments should be made according to the districts as newly established and numbered; any increased delay that might thus be caused in the filling of vacancies for appointments for particular districts being but a necessary result of the new legislation. *R. 39, 575, June, 1878.*

I D 1 a (2). Section 1317, R. S., prescribes that cadets shall be appointed one year in advance of the time of their admission to the academy, etc. It is to the date of appointment and not to date of admission that the qualification as to residence (sec. 1315, R. S.)

[1] Note in this connection the opinion of the Attorney General, in 15 Op., 187, to the effect that the Centennial Commissioners appointed by the President under the act of Mar. 3, 1871, were officers of the United States, holding offices of *trust* (though, in the absence of salary, not of *profit*), and that therefore, in view of the prohibition of Art. I, sec. 9, par. 8, of the Constitution, they could not, without the authority of Congress, legally accept presents from a foreign Government.

refers. Thus *held*, that a change of residence by a father would not affect the appointment of his minor son, legally made prior to the change of residence.[1] *P. 45, 288 and 303, Feb., 1891.*

I D 1 a (2) (*a*) [1]. Assuming that an emancipated minor is so far *sui juris* that he can acquire and change domicil like a person of full age, the same rule of *intention* applies to determine the question of domicil in his case as in any other—there must be an *animus manendi*. So where an alleged emancipated minor took up a so-called residence in a congressional district other than that of his father's habitation, which residence was intended to be merely temporary and was resorted to for the sole purpose of securing an appointment as cadet from that district, *held*, that such supposed emancipation and pretended change of domicil could have no legal effect in qualifying the party for such an appointment under section 1315, R. S. *R. 56, 473, Aug., 1888.*

I D 1 a (2) (*a*) [2] [*a*]. An unemancipated minor can acquire no residence distinct from that of his father or parent;[2] otherwise in the case of an emancipated minor. *C. 6615, June, 1899.* So *held* that unemancipated minors whose fathers resided in certain States and congressional districts could not, by removing to and abiding in other States or districts, acquire such an "actual residence" therein as to render them eligible for appointment as cadets under section 1315, R. S.,[3] R. *29, 83, July, 1869; 30, 528, July 23, 1870; 31, 313, Apr., 1871.*

I D 1 a (2) (*a*) [2] [*a*] [A]. *Held* that the mere fact that an officer of the Army was on duty under military orders in a certain Territory did not make his minor son eligible for appointment as a cadet from such Territory, the fact of the father's being thus on duty not being sufficient evidence of his being a legal resident therein. *R. 30, 528, July, 1870.* So where an Army officer was temporarily on duty as military instructor at a college in a congressional district which was not his actual residence, *held* that his unemancipated minor son commorant there was not eligible for appointment as a cadet from such district. *C. 1220, Apr., 1895.*

I D 1 a (2) (*a*) [2] [*a*] [B]. *Held* that a minor whose father was a foreigner domiciled in Cuba, and who was himself commorant in the United States only for the purpose of being educated, was not eligible for appointment as a cadet from a congressional district. *R. 35, 446, June, 1874.*

I D 1 a (2) (*b*) [1]. A party was duly nominated and appointed as a cadet for a certain congressional district one year in advance agreeably to sections 1315 and 1317, R. S. Later another party was by the same Member of Congress nominated for a *provisional* appointment—i. e., an appointment in the event of the regular nominee being found disqualified or failing to pass the examination—and was appointed accordingly. Subsequently, the regular nominee having resigned his appointment, a third person was nominated in his stead by the same Member and (under sec. 1317, R. S.) appointed to fill the vacancy. *Held*, that this appointment was a valid one, and that

[1] See 13 Op. Atty. Gen., 130.

[2] See Crawford *v.* Wilson, 4 Barb. 505; Brown *v.* Lynch, 2 Bradf., 214; Wheeler *v.*, Burrow, 18 Ind., 14; Hiestand *v.* Kuns, 8 Blackf., 345; Allen *v.* Thomasen, 11 Humph., 536; Hardy *v.* De Leon, 5 Texas, 211; Story, Conflict of Laws, sec. 46.

[3] This opinion was concurred in by the Attorney General, in 13 Op., 130.

the provisional appointee had no legal claim to have received the same. The statute law does not recognize such "provisional" appointments, the same being resorted to in the practice of the War Department, as a matter of convenience, in order that there may be a person at hand to take the place of a regular nominee who may fail at the last moment, and the embarrassment of a vacancy occurring at that time be thus as far as possible avoided. The provisional appointee, or "alternate," was not *entitled* to be substituted for the regular appointee on his resignation, and not having been so substituted, but another person having been selected, he remained with precisely the claim which he had originally, *viz*, to present himself for examination and appointment in case the regular nominee was not accepted, the only difference being that the regular nominee had meanwhile been changed. *R. 42, 162, Feb., 1879.*

I D 1 a (2) (*c*). As Alaska is an organized Territory within the meaning of section 1315, R. S., as amended by section 4 of the act of June 6, 1900 (31 Stat. 656), *held* that a cadet may lawfully be appointed to the Military Academy from that Territory. *C. 19179, Feb. 10, 1906.*

I D 1 b (1). Section 1318, R. S., prescribes that appointees to the Military Academy shall be admitted only between the ages of 17 and 22 years. The academic year begins on September 1. Therefore *held* that an appointee who would not be 17 until the preceding August could, without a violation of the statute cited, be permitted to take the June examination and, if found qualified, to remain at the academy at his own expense until of lawful age to be admitted. *C. 3886, Feb., 1898.* A cadet over 22 years of age who has been separated from the Military Academy is not eligible for reappointment or reinstatement. *C. 3852, Feb. 8, 1898.*

I D 1 c (1). If a person whose nomination as cadet is proposed has obtained a divorce from a bond of matrimony (*a vinculo matrimonii*), he would seem to be an unmarried man within the meaning of paragraph 24, Regulations for the United States Military Academy, and as such would be *prima facie* eligible for appointment as a cadet at the Military Academy upon the presentation of a duly authenticated copy of the decree of absolute divorce granted by the State court having jurisdiction of the case and of the parties. *C. 27225, Sept. 7, 1910.*

I D 1 d (1). Where a regular appointee as cadet, having resigned, was again nominated to fill his own vacancy, the same not having meanwhile been filled by the appointment of another, *held* that the President was empowered under section 1317, R. S., to reappoint him. *R 37, 195, Feb., 1871.*

I D 1 d (2). In view of the provisions of section 1325, R. S., *held* that the President would not be empowered to reappoint a cadet discharged as deficient in either conduct or studies except upon the recommendation of the academic board. *R. 43, 372, July, 1880; C. 3796, Jan., 1898; 16602, July 19, 1904.*

I D 1 d (3). Section 1325, R. S., provides that no cadet shall be reappointed to West Point found to be deficient in conduct and discipline under the rules of the institution. *Held* that this prohibition applies to the case of a cadet dismissed by sentence of general court-martial. *C. 29329, Dec. 26, 1911.*

I D 2 a. A cadet found deficient and recommended for discharge was granted a furlough without pay by the Secretary of War; as no service was rendered by the cadet during the period of his furlough, *held* to be a legitimate exercise of authority by the Secretary of War. *C. 15709, Jan. 16, 1904.*

I D 2 b. *Held* by the Secretary of War in July, 1884, in view of the requirements of section 1325, R. S., that a cadet who is reported as deficient in either conduct or studies and recommended to be discharged from the academy shall not, unless upon recommendation of the academic board, be reappointed to the academy, etc., and that the duty of the Secretary of War in executing the findings and recommendation of the board was ministerial in character. *C. 3796, July 23, 1884.*

I D 3 a. Cadets are amenable to trial by court-martial for violations of the regulations of the academy, as "conduct to the prejudice of good order and military discipline."[1] *R. 36, 129, Dec., 1874; 61, P. 370, Sept., 1893.* The records of trials of cadets by general courts-martial appointed by the superintendent pass directly to the Secretary of War for review and not to the commanding general, Department of the East. *C. 15821, Jan. 20, 1904.*

I D 3 b (1). The superintendent of the Military Academy can have no power, by virtue of a regulation of the academy, to try and punish a cadet for a military offense for which, under the Articles of War, he is amenable to trial by court-martial. A regulation assuming to confer upon him such power would be in contravention of law and inoperative. Otherwise of a regulation which merely authorized a measure of school discipline. So, where a cadet, on arraignment for a military offense, pleaded in bar that he had already, for the same offense, been punished by reduction from cadet officer to cadet private, under par. 107, Academy Regulations, *held* that, regarding such reduction as a form of school discipline only, the plea was properly overruled by the court. *P. 61, 373, Sept., 1893; C. 9704, Jan. 6, 1910; 19330, Mar. 10, 1906.* It is within the authority of the President to suspend a cadet without pay in the operation of the Military Academy Regulations. *C. 10513, May 20, 1901; 15709, Jan. 16, 1904.*

I D 3 b (2) (*a*). The word "summarily," in its ordinary sense, strongly implies that the established course of *legal* procedure, namely, trial by court-martial, is to be disregarded. Having regard to this fact, to the absence of statutory provision expressly requiring resort to courts-martial as in case of naval cadets, to the existence of regulations at the time of the enactment authorizing investigation by boards of officers, and considering also the opinions expressed in the debate, I am of the opinion that the act of March 2, 1901 (31 Stat. 911), is properly construed as establishing the policy of administrative dismissal by the Secretary of War for the offense of hazing upon the ascertainment of guilt by investigation of the superintendent of the Military Academy, assisted by boards of officers or such other agencies as may be authorized by regulation.

---

[1] In this connection may be noted the opinion of the Solicitor General (15 Op. Atty. Gen., 634) that, except for the offense of hazing, specially made punishable by the act of June 23, 1874 (18 Stat. 203), cadets of the *Naval* Academy are *not subject to trial by court-martial.* That cadets of the Military Academy are a part of the Army, see sec. 1094, R. S.

The act of March 2, 1901 (31 Stat. 911), does not, however, operate to bar trial by court-martial where the act charged involves the perpetrator in the commission of crime. Where the criminal aspect of the act charged predominates, that is, where something more than hazing is involved, trial by court-martial may be resorted to and is the preferable course to pursue.

The procedure in respect to cadets charged with hazing is now regulated by the act of April 19, 1910 (36 Stat. 312). *C. 9704, Jan. 6, 1910; 29329, Dec. 27, 1911.*

I D 4. A cadet applied to have his name changed on the Register of the Military Academy. *Held* that the Secretary of War would not be empowered to change the name as such, though he might make a new contract with the cadet in the new name. But *advised*, as the preferable mode of proceeding, that the cadet first procure the name to be changed in the mode prescribed by the statutes of his own State, after which the register would of course be made to correspond. *P. 25, 126, June, 1888.*

I D 5. Where two cadets were ordered from West Point to Washington for a special duty, on completion of which they returned to West Point, *held*, that not being commissioned officers they were not entitled to mileage. *C. 24762, Apr. 12, 1909.*

I D 6. The act of December 20, 1886 (24 Stat. 351) granting leaves of absence to graduates from the Military Academy, from date of graduation, and after graduation "when in accordance with uniform practice," is sufficiently broad to warrant leave with pay from date of graduation, June 12, the approximate date of graduation, to September 30 following, but the regulation should be amended to correspond to existing practice. *C. 13346, Dec. 8, 1903. Held* also, that said leaves are not cumulative. *C. 13346, Dec. 8, 1903. Held* further, that where an officer is ordered back to duty at the academy during graduating leave, time so spent should be deducted from said leave and may be taken advantage of after September 30. *C. 13346, Apr. 17, 1908.*

I E 1 a. The warrant or certificate given to a noncommissioned officer is as much the personal property of the individual as is the commission given to a commissioned officer. In the absence of any statute or regulation requiring that a sergeant or corporal shall surrender his warrant on being reduced to the ranks (or dishonorably discharged), he may retain it with the same right as that by which an officer retains his formal commission on being dismissed. *R. 41, 310, July, 1878.*

I E 1 b. It being the purpose of par. 271, Army Regulations, 1908 (276 of 1910), to secure the continuance of their status as such to noncommissioned officers who are absent sick, due to disability or wounds incurred in line of duty; *held*, that a first-class private, while absent undergoing treatment at Fort Bayard, N. Mex., was entitled to hold his rating as first-class private. *C. 25760, Nov. 6, 1909. Held otherwise*, however, as to first sergeants and company quartermaster and stable sergeants. *C. 25760, Oct. 4, 1910.*

Paragraph 271, Army Regulations, 1908 (276 of 1910), forbids the reduction of a noncommissioned officer while absent on account of wounds or disability incurred in the line of duty; par. 268, Army Regulations, 1908 (273 of 1910), vests the selection of first sergeants

and company quartermaster and stable sergeants in the company commander; *held*, that these regulations should be read together; as the sergeants last named are *detailed* by the company commander, they may be relieved by other sergeants with the same authority; such relief from detail not constituting "reduction" within the meaning of par. 271 (276 of 1910); a process which involves degradation in rank, which is not the case where noncommissioned officers are relieved from duty as first sergeants, company quartermaster, and stable sergeants by other noncommissioned officers of the same grade, but continue to hold the rank of sergeant equally after as before their relief. *C. 25760, Oct. 4, 1910.*

Held, that where the reduction of a noncommissioned officer was primarily based upon his inefficiency in, or incapacity for, performing the duties of his office, his reduction to the ranks, though accomplished while he was absent due to sickness, was not within the prohibition of the paragraph. *C. 25760, Jan. 20, 1911.*

Held, also, that the detail of a sergeant as first sergeant of his company, by the company commander, the first sergeant being absent sick due to causes arising in line of duty, did not fall within the prohibition of the paragraph. *C. 25760, Oct. 4, 1910.*

I E 2 a. Section 1142, R. S., authorized the appointment of commissary sergeants from "sergeants of the line of the Army who shall have faithfully served therein five years, three years of which in the grade of noncommissioned officers." Where an applicant for appointment had served five years, about two and a half years of which as noncommissioned officer, and six months as commissioned officer of United States Volunteers, it was held, independently of the question whether the service in the volunteers could be counted in any event, that service as a commissioned officer could not be computed as service in the grade of noncommissioned officer expressly required by the statute. *C. 6793, Aug., 1899.*

I E 2 b. The act of July 5, 1884 (23 Stat. 109), in authorizing the Secretary of War to appoint post quartermaster sergeants, provides that they shall be selected by examination from the most competent enlisted men in the Army who have served at least four years and whose character and education shall fit them to take charge of public property and to act as clerks and assistants to post and other quartermasters. *Held*, that the Secretary of War may under this statute appoint as post quartermaster sergeant any enlisted man of the Army who may be found to possess the qualifications specified. *P. 47, 169, May, 1891.*

I E 2 c. The requirement of Army Regulations that enlisted men of the several staff departments, etc., shall not be placed on extra duty without authority of the War Department contemplates that such authority shall be obtained prior to placing the soldier on duty; this to give the Secretary of War an opportunity to pass on the case before the detail is made and to make it unnecessary for him to take *nunc pro tunc* action therein, with a view to avoid imposing hardship upon the soldier, where he is not satisfied that the public interest requires such detail to be made. *C. 17173, Nov. 17, 1904.*

I E 3 a (1). On question as to whether an enlisted man could serve as a postmaster, *held*, that the law does not forbid it since section 1222, R. S., does not in terms apply to enlisted men. *C. 15297, Nov. 27, 1909.*

On question as to whether an enlisted man serving as mail carrier from a post office to a military post might take the "oath of post-office employees," *held*, that there was no legal objection to his so doing. *C. 15297, Mar. 1, 1907.*

I E 3 b. Section 1222, R. S., does not apply to enlisted men. But except perhaps in a rare case—as, for example, the case of an ordnance sergeant, or other member of the noncommissioned staff, established at a permanent station—it must in general be quite incompatible with the status and obligation of an enlisted man to hold any civil office or employment, even one held for the mere purpose of qualifying the party to administer oaths, as that of a notary public. *R. 37, 616, June, 1877.*

I E 3 b (1). In a case where the permanent detail of a master signal electrician in its bureau of navigation was requested by the Philippine government, *held*, that although the statute (sec. 1222, R. S.) which provides that an officer who holds civil office by election or appointment vacates his office by such acceptance and exercise of the functions of civil office, is not in terms applicable to enlisted men, the analogy prevails and should equally prevent enlisted men from holding or exercising the functions of civil office. Furthermore, Congress in providing a force of electrician sergeants in the Signal Corps, had it in mind that they should be exclusively employed in the work of that branch of the War Department, and did not contemplate that any of the noncommissioned staff officers so maintained should be permanently employed by the Philippine government. *C. 26897, June 16, 1910.*

I E 3 c (1). Where enlisted men were detailed to assist an ordnance mechanic in altering the concrete emplacements for guns of the seacoast artillery, *held*, that such duty was that which a soldier is expected to perform under his contract of enlistment. *C. 14591, May 4, 1905.*

I E 4. A chief musician is an enlisted man, but not a noncommissioned officer. He is enlisted not to perform the duties of a soldier, but expressly as an instructor of music. *Held*, that he can not legally be reduced to the ranks either by sentence or by order. *R. 33, 33, May, 1872.*[1] *Held* also that he may be tried by regimental or garrison court, as well as by a general court. *R. 31, 212, Mar., 1871. Held*, that after the term he may engage in his profession in civil life. *C. 24179, Dec. 7, 1908.*

I E 5. Where an enlisted man who had been served at his post (which was not under the exclusive jurisdiction of the United States) with a subpœna requiring his attendance as a witness before a civil court of the State, neglected to comply, *held*, that he was guilty of *contempt*, and, if fined by the court, had no remedy; and this though the service was personal and not made through the commanding officer. *P. 35, 284, Sept., 1889.*

I G 1. The terms "Regular Army" and "Volunteer Army" are not significant of the methods by which these two branches of the Army are brought into the service. The term "Regular Army" simply means the "Standing Army"—the military organization of the Government, which it is the intention ordinarily to maintain and

[1] See act of Mar. 3, 1869 (15 Stat., 318), and act of Mar. 2, 1899 (30 Stat., 978), and secs. 1099, 1102, and 1106 R. S.

continue in existence indefinitely and without regard to whether the country is at peace or at war; and this Army is made up of persons who engage voluntarily and directly with the United States to serve. *C. 1301, Mar., 1895; 21406, Apr. 19, 1907.*

I G 2 a (1). The act of May 27, 1908 (35 Stat. 392), provides "That on and after the thirtieth day of June, nineteen hundred and eight, the Porto Rico Provisional Regiment of Infantry shall be designated the Porto Rico Regiment of Infantry of the United States Army." *Held*, that although this regiment consists of two battalions, its legal status is that of a regiment of Infantry in the line of the Army,[1] and, as such, it would seem to be entitled to the staff officers pertaining to regiments in the Infantry arm. It is true that regiments of Cavalry and Infantry have three squadrons or battalions, but in the case of a regiment of Field Artillery, as in that of the Porto Rico Regiment of Infantry, the regimental organization consists of but two battalions, and it is to the organization which is officially designated by Congress as a regiment that regimental staff officers authorized by law may be appointed. *C. 23668, Feb. 8, 1909.*

I G 2 a (1) (*a*). Section 4, act of May 27, 1908 (35 Stat. 392), which regulates the appointments to the grade of second lieutenant in the Porto Rico Regiment of Infantry, and which reads in part as follows: "Vacancies in the grade of second lieutenant may be filled by the President in his discretion by the appointment of citizens of Porto Rico whose qualifications for commissions shall be established by examination," *held*, not to *restrict* such appointments to citizens of Porto Rico but to be regarded as a legislative suggestion to the President in exercising the appointing power in the Porto Rico Regiment of Infantry to give especial recognition to the citizens of Porto Rico whether they be civilians or enlisted men of the Porto Rico Regiment. *C. 23668, Apr. 28, 1909.*

I G 2 a (1) (*b*). *Held*, also, that the Porto Rico Regiment of Infantry in entitled to a chaplain, and that as citizenship in the United States is not required by statute as a condition precedent to the appointment of a regimental chaplain, a "citizen of Porto Rico" can lawfully be appointed chaplain of the Porto Rico Regiment of Infantry. *C. 23668, Dec. 23, 1908.*

I G 2 a (2) (*a*). *Held*, that the Philippine Scouts are a part of the Regular Army of the United States. *C. 19272, Mar. 14, 1906.*

I G 2 b (1). On the question of whether, in view of section 4, act of August 5, 1882 (22 Stat., 255), a master gunner could be detailed for duty in the office of the Chief of Artillery, *held*, that that office was not a bureau of the War Department and did not therefore come within the inhibition of the statute. *C. 22133, Sept. 24, 1907.*

I G 2 b (2). Section 6 of the act of February 2, 1901 (31 Stat., 741), contains the requirement that: "The captains and lieutenants provided for in this section not required for duty with batteries or companies shall be available for duty as staff officers of the various Artillery garrisons and such other details as may be authorized by law and regulations." *Held*, that the clause of legislation above cited refers not to captains and lieutenants *in excess* of the complements authorized for companies and batteries of Coast and Field Artillery, but to

[1] The 3 battalions and band of the Corps of Engineers constitute a part of the line of the Army. See sec. 22 of the act of Feb. 2, 1901 (31 Stat., 754).

officers of those grades "not required for duty with batteries or companies." The quoted portion of said section 6 is to be construed as a legislative recognition of the fact that in the Artillery Corps, as reorganized, the number of officers of the grades mentioned required for duty with their organizations was considerably reduced by the abolition of regimental organization and instruction, and that there would be greater necessity than in the other arms for detaching such officers for staff duty and other details in connection with the new administration of the Artillery Arm necessary to be established under said act; and as authorizing the War Department to adopt the necessary and appropriate means for carrying the provision into effect; that therefore if the Secretary of War is convinced that the end contemplated can be best accomplished by carrying captains and lieutenants needed for such staff duty and other details upon an "unassigned list" such means are, under the language quoted, legislatively sanctioned. *C. 19797, May 26, 1906.*

I G 2 b (3). *Held,* that targets for subcaliber practice can be towed over areas within which are "lobster pots" without subjecting the Government to a claim for damages. *C. 22112, Sept. 21 and 30, 1907.*

I G 3. The staff of the Army, consisting of the General Staff and the chiefs of the Staff Corps and inferior officers of the same, constitute the staff of the Commander in Chief of the Army—the President.[1] As such, these officers are properly under the immediate direction of the Secretary of War, who acts for the President in the administration of the military department. *R. 38, 253, Aug., 1876; 40, 17, Apr., 1877.*

I G 3 a (1) (*a*). A vacancy having occurred in the command of a territorial department, a question arose as to the succession to the command, in the operation of par. 193, Army Regulations 1908 (195 of 1910), *held,* that a colonel of the General Staff, serving as chief of staff of the department, was inhibited from succeeding to such command in the operation of the regulations, as the order of the President detailing an officer for duty in the General Staff places in temporary abeyance the office held by such officer in the arm of service or department of staff in which he holds a permanent commission, and during the period of his incumbency of office in the General Staff he becomes as fully an officer of the staff as if he held a permanent appointment therein. During such incumbency he is as powerless to exercise command in the line or in the Army generally as would be the case if he were a permanent officer of the Staff Corps. *C. 23317, May 25, 1908.*

I G 3 a (2). It is an essential incident of departmental administration that there should be some office in which the action of the Secretary of War, in respect to the duty to which officers of the Army are assigned, shall be made a matter of official record; and that office should also be charged with the preparation and submission to the Secretary of War of orders changing the station of officers or appointing them to particular duties. The Adjutant General, from the nature of his office, constitutes the channel of communication between the heads of departments and the Secretary of War in such cases, and in

[1] Stocqueler, Military Dictionary, title "General staff," defines this term: "The body of officers entrusted with the general duties of the Army in aid of a commander in chief." See G. O. 11 and 28, A. G. O., 1869; also two letters of Secretary of War to Lieut. Gen. Sheridan (5603, A. G. O. 1885) dated, respectively, Dec. 9, 1884, and Jan. 17, 1885.

his office the record of the action of the Secretary thereon is made a matter of permanent record.

The necessity of such a central agency as that above described is apparent when the enormous volume of administrative work with which the War Department is charged is considered. As a result of such an orderly disposition of the business of the department, as is contemplated in the General Regulations of the Army, it is possible for the Secretary of War to know at all times the exact stations of all officers of the Army and the nature of the duty upon which they are employed. He is also able to call for the entire record of a particular officer from the date of his original appointment to the Army, and in the operation of the existing system of efficiency reports, which are matters of record in The Adjutant General's Office, he is enabled to call for the record showing not only the nature of the duty with which a particular officer is charged, but the manner in which that duty has been performed, together with an authoritative estimate of the capacity and adaptability of the officer along several lines of professional activity.

It should also be borne in mind that several important enactments of Congress require that the methods of administration above indicated should be adhered to and that a central bureau of record in respect to the stations, duties, and movements of commissioned officers of the Army should be constantly maintained. Such are the acts of July 29, 1876 (19 Stat. 102), and March 2, 1901 (31 Stat. 902), regulating the pay status of officers on cumulative leave; the act of March 2, 1901 (31 Stat. 903), allowing additional pay for foreign service; sections 1243 and 1244, R. S., and the acts of June 30, 1882 (22 Stat. 117), March 3, 1883 (22 Stat. 457), February 16, 1891 (26 Stat. 763), etc., governing compulsory retirement, retirement for age, and the retirement of officers at fixed ages or after specific periods of service. *C. 25730, Oct. 30, 1909.*

I G 3 a (3). *Held* that the reports of special inspections by the Inspector General's Department are confidential documents and that the testimony taken is taken as 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. *C. 23106, Apr. 22, 1908.*

I G 3 a (4) (*a*) [1]. The work done in the office of the Judge Advocate General[1] and for which the Judge Advocate General is responsible consists mainly of the following particulars: Review-

[1] The Judge Advocate General's Department now consists of the Judge Advocate General and 11 judge advocates (2 of the rank of colonel, 3 of the rank of lieutenant colonel, and 6 of the rank of major), and of as many acting judge advocates (temporarily detailed with the rank of captain) as may be necessary to supplement the regular officers so that "each geographical department or tactical division of troops" may be supplied with a judge advocate. See sec. 15 of the act "to increase the efficiency of the permanent military establishment," approved Feb. 2, 1901, published in G. O. 9, A. G. O., 1901.

The Secretary of War (Stanton), under date of Nov. 13, 1862, defined the duties of a judge advocate of the corps of judge advocates appointed under section 6 of the act of July 17, 1862 (12 Stats. 598), as follows:

"Your duties will be—

"1. Those pertaining to the office of judge advocate under the general military law as defined in the standard works of military jurisprudence.

"2. To advise and direct all provost marshals or other ministerial officers, civil or military, in the police or other duties that may be directed by the orders of the War

ing and making reports upon the proceedings of trials by court-martial of officers, enlisted men and cadets, and the proceedings of courts of inquiry; making reports upon applications for pardon or mitigation of sentence; preparing and revising charges and specifications prior to trial, and instructing judge advocates in regard to the conduct of prosecutions; drafting of contracts, bonds, etc., as also—for execution by the Secretary of War—of deeds, leases, licenses grants of rights of way, approvals of location of rights of way, approvals of plans of bridges and other structures, notices to alter bridges as obstructions to navigation, etc.; framing of bills, forms of procedure, etc.; preparing of opinions upon questions relating to the appointment, promotion, rank, pay, allowances, etc., of officers, enlisted men, etc., and to their amenability to military jurisdiction and discipline; upon the civil rights, liabilities and relations of military persons and the exercise of the civil jurisdiction over them; upon the employment of the Army in execution of the laws; upon the discharge of minors, deserters, etc., on *habeas corpus;* upon the administration of military commands, the care and government of military reservations, and the extent of the United States and State jurisdictions over such reservations or other lands of the United States; upon the proper construction of appropriation acts and other statutes; upon the interpretation and effect of public contracts between the United States and individuals or corporations; upon the validity and disposition of the varied claims against the United States presented to the War Department; upon the execution of public works under appropriations by Congress; upon obstructions to navigation as caused by bridges, dams, locks, piers, etc.; upon the riparian rights of the United States and of States and individuals on navigable waters, etc.; and the furnishing to other departments of the Government of statements and information apposite to claims therein pending, and to individuals of copies of the records of their trials under the one hundred and fourteenth article of war. *P. 37, 14, Nov., 1889.*

I G 3 a (4) (*a*) [2]. 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. *P. 42, 452, Sept., 1890. C. 663, Dec., 1894; 4013, July, 1898, and Mar., 1899; 12660, May 26, 1902.*

I G 3 a (4) (*a*) [3]. The Judge Advocate General has no administrative jurisdiction over claims of parties employed to report the proceedings of court-martials. *C. 6191, Apr., 1899.*

Department, or commanding general, or by the Judge Advocate General from time to time.

"3. Such other special duties in regard to State prisoners and measures relating to the national safety as may be assigned you by the department, by the commanding officer, or by the Judge Advocate General.

"4. To advise the War Department, through the Judge Advocate General, upon all matters within your military district whenever you may deem the action of the department important to the national safety and the enforcement of the laws and Constitution.

"5. To apply for special instructions to the commanding general upon such matters as may need special instruction to guide your action.

"6. To report to the commanding general all disloyal practices in your district, and when prompt action is required, take such measures [as may be necessary] through the provost marshal, military commandant, or other authority to suppress them."

I G 3 a (4) (*a*) [4]. It is contrary to the practice of the Judge Advocate General's Office to give, upon request of the military officers or the officials of a State, opinions on questions arising in the military administration of the State. *C. 685, Nov., 1894; 1287, Apr., 1895.* Similarly *held* with respect to requests made directly to the Judge Advocate General for opinions upon questions relating to any other internal affairs of a State. *C. 578, Oct., 1894.* (*Also see militia.*)

I G 3 b (1). A line officer serving by detail under the act of February 2, 1901, in a supply department, the officers of which are required to be bonded, is not exempt from a bond simply because his office in such department vested in the operation of a detail. *C. 22292, Oct. 30, 1907; 10328, Apr. 3, 1901; 10479, May 16, 1901, and Oct. 30, 1907; 12318, Mar. 27, 1902.*

I G 3 b (2) (*a*) [1]. The cost of street-car tickets necessary in the delivery of commercial messages from Alaska telegraph and cable lines should be paid, in the case of commercial messages, out of the appropriation for the operation of lines; if for purely military messages, tickets should be furnished by the Quartermaster's Department. *C. 17047, Oct. 22, 1904.*

I G 3 b (2) (*a*) [2] [*a*]. Where a contract was made for the transportation in time of peace of troops and supplies over a route, a part of which was in foreign territory *held*, that the contractor should obtain written consent of the foreign government to the passage of troops, and in the event of its being impossible to obtain such consent suggested that a stipulation be inserted requiring the contractor in such a case to carry the troops by another route without additional cost to the United States. *C. 14552, Dec. 18, 1903.*

A similar stipulation should be inserted protecting the United States against customs charges on goods so transported through foreign territory. *C. 14552, Dec. 18, 1903, and Jan. 18, 1906.*

I G 3 b (2) (*a*) [2] [*b*]. The rule of international law applicable to troops, that a State must obtain express permission before its troops can pass through the territory of another State, does not apply in time of peace to the transportation of Government supplies through foreign territory in the ordinary course of foreign commerce, and duties are not, as a rule, levied on such goods while in course of transportation. *C. 14552, Dec., 1908, and Jan., 1906.* Where it was proposed to ship the guns and horses of a battery of Field Artillery through Canadian territory, the guns and horses being in charge of the necessary number of soldiers in uniform, but otherwise unarmed, *held*, that while such a shipment does not involve the passage of a fully equipped body of troops through the territory of another nation, it sufficiently approaches it to render it of doubtful propriety to attempt such shipment in advance of obtaining the consent of the foreign nation through the territory of which the shipment is to be made. *C. 19990, July, 1906.*

I G 3 b (2) (*a*) [3] [*a*]. Where a soldier is discharged without honor in Alaska, or other territorial possession of the United States, and is not entitled to travel allowances, *held*, that he is not entitled to transportation in kind at the cost of the United States, but may be conveyed to the United States on a Government or chartered transport. *C. 14937, July 15, 1903.*

I G 3 b (2) (*a*) [3] [*b*]. *Held*, that under the act of May 28, 1896 (29 Stat. 189), masters, mates, pilots, and engineers on vessels that

are being used as transports by contract, if killed or wounded while performing such duties, have the same pensionable status as soldiers and sailors serving in the Army and Navy of the United States. *C. 4331, Jan. 11, 1898.*

I G 3 b (2) (*a*) [3] [*c*]. On the question whether quartermasters on board United States transports can be summoned before a United States commissioner, on claims for pay made by seamen, *remarked*, that when an officer of the Army is served with a summons from a United States court it is his duty to respond to the same; that this is recognized by the Army Regulations and has become the practice. *Recommended*, therefore, that this course be pursued in all cases instituted in the United States courts for seaman's wages, but the officer whose duty it becomes to make response to the summons should forthwith notify the proper United States district attorney of the institution of the suit and request him to defend the same, and at the same time report action to the War Department, by telegraph, if necessary, to the end that the Attorney General may be requested to give the district attorney any required instructions in the matter. *C. 5647, Jan., 1899.*

I G 3 b (2) (*a*) [3] [*d*]. An officer of the Army, by direction of the commanding officer of a transport, raided a crap game that was being conducted on board the transport. The men who had participated in the game disappeared and he was not able to identify any of the participants. He found $15.65 exposed. He took possession of it, and on the question as to the proper disposition of the money, *held* that this officer acquired title to this money as the finder, which was valid against all the world except the true owner. He could retain the money subject to claim by the true owner or he could turn it over to the transport quartermaster. The latter, upon the receipt of such money, should take it up as "found on U. S. Army transport," and turn it into the Treasury as miscellaneous receipts. *C. 13965, Jan. 14, 1903.*

I G 3 b (2) (*a*) [3] [*e*]. The act of April 28, 1904 (33 Stat. 518), which provides for the transportation "by sea" of supplies for the Army and Navy in American vessels applies to the transportation of military supplies by sea in the Philippine Islands. *C. 16367, Sept. 1, 1904.*

I G 3 b (2) (*a*) [3] [*f*]. *Held* under the act of June 12, 1906 (34 Stat. 240), which provides for the transportation by sea of the families and employees of officers and men of the Army, Navy, and Marine Corps, on Army transports, that a person who has not yet acquired the above status is not entitled to transportation. *C. 20304, Aug. 29, 1906.*

I G 3 b (2) (*a*) [3] [*g*]. The principle of exterritoriality is one which is applied to vessels of war in the territorial waters of a foreign power. It is by no means well established that *public vessels* as distinguished from *public armed vessels* are entitled to the privilege, and the rule itself does not control in the relations between a consul general of the United States (or a consul) in a foreign port and the master of an Army transport in the employ of the Quartermaster General. *C. 19051, Jan. 12, 1905.*

I G 3 b (2) (*a*) [3] [*h*]. *Held* that section 1765 R. S., forbidding any officer in the public service or any other person whose salary, pay, or emoluments are fixed by law or regulations, to receive any additional pay, extra allowances, or compensation in any form whatever unless

the same is authorized by law, has no application to an increase in the money allowance on a transport due to the excessive cost of beef in Alaska, and does not require the cost of subsistence of passengers on a transport to be raised, due to the high cost of supplies in Alaska. *C. 17859, Apr. 19, 1905.*

I G 3 b (2) (*a*) [3] [*i*]. The act of April 28, 1904, provides that "Vessels of the United States, or belonging to the United States, and no others, shall be employed in the transportation by sea of coal, provisions, fodder, or supplies of any description, purchased pursuant to law, for the use of the Army or Navy unless the President shall find that the rates of freight charges by said vessels are excessive and unreasonable, in which case contracts shall be made under the law as it now exists: *Provided*, That no greater charges be made by such vessels for transportation of articles for the use of the said Army and Navy than are made by such vessels for transportation of like goods for private parties or companies." (33 Stat. 518.) *Held* that this enactment applies to a case where there are ships of American register which are engaged in carrying trade. If there are none, there is nothing to which the provisions of the statute can apply, and the transportation services would then be procured in the method prescribed by existing law. *Held* further that the same case would exist at a port where there are vessels of American register, but their owners decline to allow them to engage in the carrying trade. Where there are vessels of American register, therefore, it would seem to be necessary, in order to give operation to the statute, to give them an opportunity to engage in the carrying trade by advertisement for bids. If bids are received, it can easily be ascertained whether they are "excessive and unreasonable or not," and their character in that regard should be reported to the department, with a view to the submission of the case to the President for an exercise of the discretion vested in him by the act of April 28, 1904. *C. 20928, Jan. 15, 1907. Held* further that if no bids were received from owners of American ships, recourse could be had to foreign ships. In the same way if a ship having an American register bids for one trip in six months, and the Government is obliged to ship monthly, or more frequently, then the American bid, if reasonable, would be accepted as to the one trip, and foreign bids would be received as to the other shipments, as the bid for one trip amounts, in fact, to notice that no vessels of American register are offered for the balance of the service. *C. 20928, Jan. 19, 1907, Aug. 6, 1907.*

I G 3 b (2) (*a*) [4]. *Held* that when an officer in the Philippine Islands is ordered to travel in the military service, and the only transportation along a portion of the journey is by automobile, a transportation request may be furnished by the Quartermaster's Department, good on the automobile line.[1] *C. 25747, Mar. 16, 1911.*

I G 3 b (2) (*b*). On a question as to whether a quartermaster could buy a horse for the Government from an officer of the Army, *held* that unless such purchase received the approval of the Secretary of War it would not be valid.[2] *C. 15996, Mar. 7, 1904.*

---

[1] See Mms. Dec. of the Comptroller of the Treasury, dated Apr. 13, 1911, approving this opinion.

[2] See G. O. No. 54, 1910, War Department, p. 18.

I G 3 b (2) (*c*). The sale of stores to officers on the retired list is now authorized by Executive regulation in some cases—notably that of subsistence stores. As such stores, with the exception of fuel, are sold at the cost price, and as such sales are authorized to be made to "officers of the Army" and are not restricted, by statute, to officers on the active list, there is no legal objection to the sale of forage to retired officers at cost price, under such restrictions, as to amount and conditions, as may be imposed by the Secretary of War. For that reason it is unnecessary to ask legislative sanction for the sale of forage to retired officers, a transaction which stands on precisely the same footing, in respect to legality, as the sale of subsistence to the same class of officers.[1] *C. 19126, Apr. 12, 1906.*

I G 3 b (3) (*a*) [1]. Where subsistence stores were sold by a post commissary of subsistence to a mess of three officers of the post, and charged to the mess as such, *held*, that such mess was not in the nature of a commercial partnership in which each member was bound for the joint indebtedness, but was simply an association, for purposes of convenience and economy, of three individuals, each of whom was bound to the United States only for his proportion—one-third—of the account. And *held* that a member who had paid his proportion to one of the other members who acted as caterer but who had deceased without paying over this amount to the commissary, remained liable for such proportion to the United States. R. 41, 155, *Mar., 1878.*

I G 3 b (3) (*a*) [2]. The issue of stores for food beyond amounts fixed in established rations, *held* not lawful. *C. 6728, July 21, 1899.*

I G 3 b (3) (*a*) [3]. Where employees of the Alaskan telegraph lines, receiving over $60 per month, were issued rations because no other method of subsistence was practicable, such issue being incorporated in their contracts of employment, *held* to be a waiver of the requirements of par. 1219, Army Regulations, 1904 ed. (1224 ed. 1910), which it was lawful for the Secretary of War to make. *C. 19366, Mar. 13, 1906* and *June 22, 1907.*

I G 3 b (3) (*a*) [4]. Where other subsistence can not be obtained at places in Alaska, *held* that female nurses, and enlisted patients in hospital may be issued rations in kind. *C. 20184, Aug. 6, 1906.*

I G 3 b (4) (*a*). *Held* that section 1167, R. S., does not direct or authorize the Chief of Ordnance, subject to the approval of the Secretary of War, to draw up and enforce in his department a system of rules and regulations for the *inspection* of ordnance property with a view to its condemnation and sale or destruction. *C. 63, July, 1894.*

I G 3 b (4) (*b*). A line officer, detailed for service in the Ordnance Department, under the act of June 25, 1906 (34 Stat. 455), is required to take the examination for promotion in the line which is provided for in section 3 of the act of October 1, 1890 (26 Stat. 562). In the application the principle of equivalency, as embodied in General Order 220, War Department, of October 31, 1907, *held* that he may lawfully be excused from examination in those branches in which he has passed a successful examination for detail in the Ordnance Department. *C. 22432, Dec. 2, 1907.*

I G 3 b (4) (*c*). The verification of capacity and fitness for a second detail in the Ordnance Department is, in the act of June 25, 1906,

[1] See G. O. 141, War Department, 1906.

made to depend upon the recommendation of a board of ordnance officers, but whatever may be the scope and character of that inquiry, it is not an "examination" in the sense in which that term is used in the acts regulating the advancement of officers in the military establishment. *Held*, that the operation of General Order 220, War Department, 1907, is not such as to exempt an ordnance officer from the operation of existing orders regulating the examination for promotion of officers in his branch of the line of the Army. *C. 22432, Dec. 2, 1907.*

I G 3 b (4) (*d*). *Held* that section 1765, R. S., does not prohibit the payment of compensation to an ordnance sergeant for work as "time keeper" under the United States Engineer Department, such employment having no affinity or connection with the line of his official duty[1] as ordnance sergeant and not interfering in any way with the same. *C. 2570, Sept., 1896.*

I G 3 c (1). The duties of the Engineer Department in respect to the construction, maintenance, and operation of canals and works of river and harbor improvement, together with their work in connection with fortifications and seacoast defenses, are carried on under the direction of the Secretary of War and the Chief of Engineers, whose authority in respect thereto is measured by the enactments of Congress which prescribe their duties and responsibilities in that regard. It is only when the station of an officer is changed, or a leave of absence granted, or a question of retirement is presented, that The Adjutant General becomes charged with the performance of certain duties respecting the record sides of the several acts noted.[2] *C. 25730, Oct. 30, 1909.*

I G 3 d (1). Medical practice by officers of the Medical Corps of the Army, outside of military posts, should conform to the laws of the State, but this is subject to the qualification that medical treatment of members of the Army on the active list, being an instrumentality of the United States Government, can not be controlled by State legislation, and may be furnished wherever the soldier may be stationed. Enlisted men on the retired list are allowed medical attendance at the stations of medical officers only. Medical officers on duty are required to attend officers and enlisted men and when *practicable* their families. Medical officers in their attendance upon the families of officers and enlisted men, outside of military posts, would have to comply with the State laws; otherwise such attendance would not be "practicable." So in the treatment of civilians not living on military reservations, the laws of the State would have to be complied with. *C. 3270, June, 1899; 20395, Sept. 18, 1906.*

I G 3 d (2) (*a*). *Held*, in respect to the jurisdiction vested in the board of review by the act of April 23, 1908 (35 Stat. 66), that as the law expressly provides that "a second examination shall not be allowed," it would seem that this language would negative the idea that a board of review could conduct an independent inquiry into any views or aspects of the fitness of the officer for advancement. Its jurisdiction would seem to be restricted by the statute to the record of the original examining board, including all the

[1] See Converse *v.* U. S., 21 Howard, 463; U. S. *v.* Brindle, 110 U. S., 688; Meigs *v* U. S., 19 Ct. Cls., 497.

[2] Under the act of Feb. 2, 1901 (31 Stat. 754), the enlisted force of the Corps of Engineers, and the Engineer officers on duty with them belong to the line of the Army.

testimony, documentary and otherwise, which was submitted to that board for consideration in connection with the fitness of the officer for advancement. Any taking of new testimony would, in the opinion of the office, be in the nature of a second examination and, as such, would be prohibited by the clause of legislation above cited. *C. 23135 June 12, 1908.*

I G 3 d (2) (*b*). The act of April 23, 1908 (35 Stat. 66), makes specific provision for the review of the proceedings of boards charged with the original examination of officers of the Medical Corps for promotion. The Secretary of War is charged with the duty of appointing the board, but is not required, either expressly or by necessary implication, to approve or disapprove its findings, which become operative from the date of publication.

The action of the department upon the findings of the board of review is ministerial in character, and consists in executing the discharge of the officer and in the advancement of such officers of inferior rank as become entitled to promotion in consequence of the findings, and in announcing the result of the action to the Army in the usual manner. *C. 23135, June 24, 1908.*

I G 3 d (3) (*a*). The act reorganizing the Medical Corps provides that "In emergencies the Secretary of War may order officers of the Medical Reserve Corps to active duty" (Sec. 8, act of Apr. 23, 1908—35 Stat., 68).

Held, that the term "emergency" is nowhere made the subject of rigorous and exact definition. Webster defines the term as: "An unforeseen occasion or combination of circumstances which calls for immediate action or remedy; pressing necessity; exigency." The term is defined in the Century Dictionary as: "A sudden or unexpected happening; an unforeseen occurrence or condition." In some acts of legislation affecting the executive departments and the military establishment the term "extraordinary emergency" is used, without adding to the force of the term or extending its legal meaning. Where a contract surgeon is the only medical officer at a post or station and a vacancy is caused, due to his death, resignation or discharge from the further operation of his contract of employment, it would seem that an emergency has arisen, within the meaning of the clause above cited, of such a character as to warrant an exercise of the discretionary judgment which is provided for in the statute; and this would be equally true if the vacancy were caused by the discharge of the contract surgeon serving at a place where the vacancy occurred, and where it is proposed to order an officer of the Medical Reserve Corps into active service. Such a view would also be properly taken as to the operation of the statute in a case where the services of a contract surgeon at a post or hospital are necessary, even if there be other medical officers at such post or hospital; although such an emergency would be one which should be distinguished in some of its aspects from that first above described. In any event, the law charges the Surgeon General with the duty of determining whether an emergency exists, and his conclusion in that regard, when approved by the Secretary of War, will be decisive in the operation of the statute.[1] *C. 23135, June 26, 1908.*

[1] Sheean *v.* City of New York (75 N. Y. Supp., 802–803); People *v.* Lee Wuh (71 Cal., 80–89 Pac. Rep., 851).

I G 3 d (3) (*b*). *Held*, in the operation of section 7 of the act of April 23, 1908 (35 Stat., 66), that commissions should issue to appointees in the Medical Reserve Corps, they being so drawn as to evidence an exercise of the appointing power and, as the Medical Reserve Corps is a part of the military establishment, the commission should, as far as possible, be similar in form to those issued to officers of the Medical Corps, subject, of course, to such changes as are required to give effect to that clause of the statute which restricts the operation of the commission to the period during which the officer may be employed in the active service of the United States. At all other times these commissions are dormant and vest no authority in and impose no duties upon the persons who hold them. *C. 23135, May 8, 1908.*

I G 3 d (3) (*c*) [1]. The object of the creation of the Medical Reserve Corps is stated to be "for the purpose of securing a reserve corps of medical officers available for military service." Under this statement of the intent of the law it would seem clear that the idea is to secure the cooperation and general assistance, moral if not actual, of proper graduates in medicine. It would seem proper, therefore, to take the view that all privileges, not involving what I may call official rights, should be extended to officers of the Medical Reserve Corps if the Government is to be consistent in the matter, regardless of whether they are actually in active service or not. *C. 23135, Aug. 1, 1908.* As a matter of law, clearly only those in active service are entitled to the privilege of officers of the Army, but under the general principle involved, the entire Medical Reserve Corps should receive all consideration and privileges which their interest in the service warrants, so long as those privileges are not in conflict with existing law. *C. 23135, Aug. 1, 1908.*

I G 3 d (3) (*c*) [2]. The mere acceptance of office in the Medical Reserve Corps, not coupled with an assignment to duty, creates no rights in respect to pay or allowances or the indulgence of leave of absence. Should an officer be assigned to duty under his appointment, he would be placed in the same position in respect to leaves of absence as other commissioned officers of the Army, and the statutes regulating the pay status of officers on cumulative leave would apply to him in the same way that they apply to other commissioned officers of the Army. *C. 23135, June 29, 1908.*

I G 3 d (3) (*c*) [3]. *Held* that the President can relieve an officer of the Medical Reserve Corps from duty under an assignment when his services are no longer necessary, and thus render his appointment dormant. He may also honorably discharge an officer of the Medical Reserve Corps when his services are no longer needed. Officers of this corps are subject to the Articles of War and the laws, regulations, and orders for the government of the Regular Army during the period of their service; and when an officer of the Medical Reserve Corps commits a criminal offense he is subject to the same disciplinary control that is applied to other officers of the Army. *C. 23135, Dec. 19, 1908.*

I G 3 d (3) (*c*) [4]. Section 7 of the act of April 23, 1908 (35 Stat. 68), provides for the securing of a reserve corps of medical officers to be known as the Medical Reserve Corps, the members of which shall be commissioned, and when called into active duty, shall have all the authority, rights, and privileges of commissioned officers of like

grade in the Medical Corps of the United States Army, except promotion, during the period of such active service. *Held* that officers of the Medical Reserve Corps while on active service are entitled to transportation, etc., of private horses when their duty requires them to be mounted, in accordance with the law and regulations which govern the furnishing of transportation under such circumstances to officers of the permanent establishment. *C. 23135, Dec. 16, 1911.*

I G 3 d (4) (*a*). The clause of section 18 of the act of February 2, 1901 (31 Stat. 753), which authorizes the employment of contract surgeons, is not repealed, either expressly or by necessary implication, in the act of April 23, 1908 (35 Stat. 67), which, save that it confers eligibility for their appointment to the Medical Reserve Corps, is silent in respect to the status or employment of contract surgeons. They formed no part of the Medical Department in the act of February 2, 1901, and they form no part of the same department as reconstituted in the act of April 23, 1908. *C. 23135, May 21, 1908; 10566, Nov. 5, 1909.*

I G 3 d (4) (*b*). As the services of acting assistant or contract surgeons are obtained by contract and not in the operation of the appointing power, *held*, that in view of the contractual character of their employment, an oath of office is not required as a condition precedent to the receipt of compensation under their contractual undertaking with the United States. *C. 23135, Dec. 17, 1908.*

I G 3 d (4) (*c*). A "contract" or "acting assistant" surgeon is not a military officer and has no military rank.[1] *C. 10566, Nov. 5, 1909.* He is amenable to the military jurisdiction when employed with the Army in the field in time of war under the sixty-third article of war, but is in fact no part of the military establishment, being merely a civilian under employment by the United States by contract for his personal services as a medical attendant to the troops. *R. 9, 678, Oct., 1864; 26, 18, Sept., 1867; 28, 239, Nov., 1868; 34, 207, Apr., 1873; 49, 246.* Not an officer within the meaning of the act of May 3, 1885 (23 Stat., 350); *July, 1885; 52, 304, June, 1887; P. 52, 404, Mar., 1892; 53, 167, Apr., 1892; 65, 226, June, 1894; C. 11128, Mar., 1895.* *Held* that he should take the oath prescribed in section 1757 R.S. *C. 23135, Dec. 17, 1908.* *Held* that he has the privilege of buying fuel and forage from the quartermaster's department, as provided by the Army Regulations, as this privilege is not an allowance or an emolument. *C. 4988, Sept. 18, 1898; 12965, June 2, 1902.* *Held* that he may purchase necessary articles of equipment for field service. *C. 20861, Jan. 3, 1907.* *Held* that he may sign surgeons' certificates of disability (*C. 15308, Sept. 26, 1903*) and may prepare and sign final statements (*C. 11720, Dec. 17, 1901*). A contract surgeon may act as post treasurer. *C. 8974, Sept. 19, 1900.* *Held* that a contract surgeon has the power to effectually supervise his subordinates in a field hospital, as well as in a post hospital. *C. 16600, July 13, 1904.* *Held* that he is not entitled to admission to the Government Hospital for the Insane. *C. 17217, Sept. 19, 1906.* *Held* that he is not eligible for retirement.[2] *C. 16672, June 28, 1909.* *Held* that a contract surgeon can not legally

[1] 26 Ct. Cls., 302, 306; Dig. Dec. Comp., Vol. III, secs. 929, 932; IV, idem, 629, 631; 27 Op. Atty. Gen., 468.
[2] 27 Op. Atty. Gen., 468.

be compelled to remain in the service against his consent after the expiration of the term of his contract. *C. 8618, July, 1900.*

I G 3 d (4) (*d*). Section 18 of the general reorganization act of February 2, 1901 (31 Stat. 753), authorizes the employment of contract dental surgeons. *Held* that they are not commissioned officers and are not a part of the Army. They are civilians and their services are obtained in the operation of contracts of employment. *C. 10566, Nov. 5, 1909.*

I G 3 d (5) (*a*). The strength of the Hospital Corps was not increased in the operation of the act of May 11, 1908 (35 Stat. 111), and its strength can only be increased by an act of affirmative discretion on the part of the Secretary of War under the authority to that end which is vested in him by the act of March 1, 1887 (24 Stat. 435). *C. 23288, Apr. 15, 1909.*

I G 3 d (5) (*b*). Sergeants of the first class of the Hospital Corps can only be detailed as mess sergeants under the special authority of the Surgeon General. *C. 23695, Oct. 12, 1909.*

I G 3 d (6) (*a*) [1]. *Held*, that the Nurse Corps (female) is an integral part of the United States Army, notwithstanding the fact that the members thereof are neither commissioned as officers nor enlisted for a term of years. *Held*, therefore, for the purposes of civil-service administration that the Army Nurse Corps is in the military service, as distinguished from the executive civil service, and consequently is not subject to the civil-service acts and rules or required to be classified thereunder. *C. 10566, Oct. 13, 1909.*

I G 3 d (6) (*a*) [2]. The 30 days' leave of absence to female nurses, provided for in section 19, act of February 2, 1901 (31 Stat. 753), *held*, to be not cumulative. *C. 10160, May 29, 1902.*

I G 3 d (7) (*a*) [1]. Under the present regulations for the government of the Army and Navy General Hospital at Hot Springs, Ark., civil employees of the Government are not eligible to admission. *P. 58, 452, Mar., 1893.*

I G 3 d (7) (*a*) [2]. *Held*, that under the regulations for the government of the General Hospital at Hot Springs, Ark., (G. O. 60, A. G. O., 1892, as amended by G. O. 40, A. G. O., 1893), discharged enlisted men of the Navy are not entitled during the three months within which they may reenlist under the act of February 8, 1889 (25 Stat. 657), to admission to the hospital. *C. 2069, Feb., 1896.*

I G 3 d (8) (*a*). *Held* that officers' servants, being a part of the officer's household, were entitled equitably to admission to post hospitals, and should not be regarded as a class subject to par. 1630 Army Regulations of 1889, relating to the admission to such hospitals of "civilians not in public service." They should be treated with the same liberality in this respect as is shown in the furnishing of subsistence supplies, which an officer is entitled to purchase not only for his own use but for that of his household.[1] *P. 37, 460, Jan., 1890.*

I G 3 d (8) (*b*). In the case of the death of a soldier at a post hospital who leaves an estate without heirs and makes no disposition of the estate by will, *held* that the estate escheats to the United States. *Held* further that the post surgeon should proceed as indicated in the Army Regulations and deposit the money (as that was the estate in

[1] A stricter view is expressed in Circ. No. 1, A. G. O., 1890.

this case) with the paymaster to the credit of the United States, taking receipts in duplicate, etc. *C. 20272, Aug. 24, 1906.*

I G 3 d (8) (*c*) [1]. The act of March 2, 1901 (31 Stat. 895, 905), appropriated money for a special diet for enlisted patients in Army hospitals who were too sick to be subsisted on the Army rations. *Held* that a reasonable interpretation of this act would permit the purchase for the use of the sick as articles of special diet, ginger ale and a charged water (Tansan). *C. 12094, Feb. 27, 1902.*

I G 3 d (8) (*d*). The act of June 12, 1906 (34 Stat. 256), provides that "hereafter all moneys arising from dispositions of serviceable medical and hospital supplies authorized by law and regulation shall constitute one fund on the books of the Treasury Department, which shall be available to replace medical and hospital supplies throughout the fiscal year in which the dispositions were effected and throughout the following fiscal year." *Held* that funds paid to the Medical Department to reimburse it for the cost of a safe are available to replace medical and hospital supplies in the manner described in the above cited act. *C. 20993, Jan. 26, 1907.*

II A. Under Article IV, section 4, of the Constitution, the Army may be employed to protect a State from "invasion" or "domestic violence," only by the order of the President, made "on application of the legislature, or of the executive when the legislature can not be convened."[1] A military commander, of whatever rank or command, can have no authority, except by the order thus made of the President to furnish troops to a governor or other functionary of a State, to aid him in making arrests or establishing law and order. *R. 30, 125, Mar., 1870; 41, 206, Apr., 1878; C. 2063, Feb. 11, 1896; 3119 (Alaska) Apr. 21, May 18, 1909, Aug. 19 and Sept. 7, 1910; 8200, May 10, 1900; 8570, Sept. 10, 1902; 17164, Nov. 15, 1904; 19341, Mar. 10, 1906; 20104, July 20, 1906; 22360, Nov. 14, 1907.*

II A 1. The proviso of the Constitution—"when the legislature can not be convened," may be said to mean when it is not in session, or can not, by the State law, be assembled forthwith or in time to provide for the emergency. *R. 30, 172, Mar., 1870; C. 5557, Dec. 20, 1898; 8383, May 26, 1900; 22474, Dec. 10, 1907.*

II B. Under act of May 17, 1884 (23 Stat. 24), a civil government, consisting of an executive and a judicial branch, was established for Alaska, and the general laws of Oregon were made the laws of the Territory. On the question whether the Army could be used to enforce the law in that Territory, *held*, that if the United States marshal should ask for military assistance to enable him to execute a process which he is unlawfully prevented from executing, it could legally be given him by the President. The act of June 18, 1878 (20 Stat. 152), does not preclude such action, because, as held by the United States Supreme Court, the President has by virtue of his constitutional powers to take care that the laws are faithfully executed and as commander in chief of the Army the power to use force when necessary in the execution of the laws of the United States.[2] *C. 3119, Apr., 1897.* The use of troops in Alaska continues to be lawful in the sup-

[1] For a full discussion of this subject and citation of authorities, see "The Use of the Army in Aid of the Civil Power," by G. N. Lieber, Judge Advocate General, U. S. Army, War Dept. Doc. No. 63.

[2] See *In re* Neagle, 135 U. S., 1, and authorities cited.

port of civil order, as the Territory is expressly exempted from the operation of the act of June 18, 1878 (20 Stat. 152), by a requirement of the act of March 3, 1899 (30 Stat. 1324). *C. 3388, July 26, 1897; 3119, Apr. 21, May 18, 1909, Aug. 19 and Sept. 10, 1910.*

II C. There is not in the treaties with the Indians of the Indian Territory, or sections 2147, 2150, 2152, R. S., any express authority vested in the President to use the Army in such Territory for the apprehension of local robbers or thieves, etc., or for the protection of corporations or individuals from such robbers or other outlaws, except in so far as such offenders may be persons who are in, or are attempting to enter the Indian country "contrary to law," or are Indians charged with crime. (Sec. 2152, R. S.) In these cases they could be apprehended by the military forces, but only by virtue of and conformably to the statutes cited, and not (unless they be Indians) because they are train robbers or other offenders against the local peace or laws. *C. 542, Oct., 1894; 5354, Nov., 1898.*

Held, that in the execution of process of arrest under the act of March 3, 1885 (23 Stat. 362), (rendering Indians amenable to the criminal laws of the Territories), the military may, by direction of the President, legally be employed to aid the civil officials in such arrests, such employment being expressly authorized by section 2152, R. S. *R. 53, 272, Apr., 1887.*

Notwithstanding the legislation of June 18, 1878 (20 Stat. 152), the President was authorized to employ the military to arrest and prevent persons engaging in introducing liquor into the Indian country contrary to law, as also to arrest persons being otherwise in the Indian country in violation of law,[1] or to make the arrest therein of Indians charged with the commission of crime; such employment being *expressly authorized* by sections 2150 and 2152, R. S. *R. 53, 112, Dec., 1879.*

That the President was authorized by section 2150, R. S., to remove by military force, after a reasonable notice to quit, certain persons commorant upon an Indian reservation contrary to the terms of a treaty between the United States and the tribe occupying the reservation, and who therefore were there "in violation of law" in the sense of that section.[2] *R. 37, 266, Jan., 1876.*

II C 1. *Held* to be at least doubtful whether the authority of the President as Commander in Chief could legally be extended to the ordering of an officer of the Army upon the purely civil duty of instructing Indian youth, unless indeed such instruction was to be given by him as a professor of a college, &c., under section 1225, R S. Special duties of an exclusively civil character, where intended to be anything more than merely temporary, have in general been devolved upon military officers only by the authority of express legislation—as, for example, in the cases provided for by sections 1225,

[1] But note that, in view of the provisions of section 2151, R. S., an officer of the Army who detains a person arrested under section 2150 longer than five days before "conveying him to the civil authority," or subjects him when in arrest to unreasonably harsh treatment, renders himself liable to an action in damages for false imprisonment. *In re* Carr, 3 Sawyer, 316; Waters *v.* Campbell, 5 id., 17.

[2] See 14 Op. Atty. Gen., 451; 20 id., 245; and note the proclamation of the President published in G. O. 16, Headquarters of Army, 1880, relating to the intrusion of unauthorized persons upon the "Indian Territory" and declaring that the Army would be employed to effectuate their removal if necessary.

2062, 2190, and 4687, R. S., in which authority has been given by Congress for the employment of officers of the Army as professors, &c., of colleges, Indian agents, and assistants in taking the census [1] and on the coast survey. So, *advised*, that, if thought expedient to devolve upon military officers the function of the instruction of Indian youth, specific authority be obtained from Congress for the purpose.[2] *R. 41, 545, April, 1879; C. 16134, Apr. 11, 1904; 20251, Apr. 21, 1906.*

The Industrial Training School for the Chilocco Indians not being established "at a vacant military post or barracks set aside for its use by the Secretary of War," *held* that the Secretary would not be authorized to detail an officer of the Army for duty there "in connection with Indian education," under the act of July 31, 1882 (22 Stat. 181). *R. 49, 320, Sept., 1885.*

II D. In all cases of civil disorders or domestic violence it is the duty of the Army to preserve an attitude of inaction till ordered to act by the President, by the authority of the Constitution or of section 2150, 5297, or 5298, R. S., or other public statute. An officer or soldier may indeed interfere to arrest a person in the act of committing a crime or to prevent a breach of the peace in his presence, but this he does as a citizen and not in his military capacity. (See twenty-fourth article of war.) Any combined effort by the military, as such, to make arrests or otherwise prevent breaches of the peace or violations of law in civil cases, except by the order of the President, must necessarily be illegal. In a case of civil disturbance in violation of the laws of a State, a military commander can not *volunteer* to intervene with his command without incurring a personal responsibility for his acts. In the absence of the requisite orders he may not even march or array his command for the purpose of exerting a moral effect or an effect *in terrorem;* such a demonstration indeed could only compromise the authority of the United States, while insulting the sovereignty of the State. *R. 30, 125, Mar., 1870; 32, 241, Jan., 1872; 36, 450, May, 1875; 41, 206, Apr., 1878.*

II E. A military force employed according to Article IV, section 4, of the Constitution, is to remain under the direction and orders of the President as Commander in Chief and his military subordinates: It can not be placed under the direct orders or exclusive disposition of the governor of the State. *R. 30, 172, March 1870; C. 5354, Nov. 19, 1898; 8383, May, 1900; 20570, Oct. 19, 1906.*

II F. Though *dicta* are to be met with in the authorities looking to such a service as legal, it is clear that the military forces of the United States can not as such be permitted in any event to serve upon the *posse comitatus* of a *sheriff*, or other executive official whose function it is to execute the local laws of a State or Territory. *R. 36, 450, May, 1875; 39, 458, 577, Mar. and June, 1878; C. 11928, Jan. 21, 1902; 16165, Apr. 8, 1904; 17508, Feb. 15, 1905; 20104, July 20, 1906; 20570, Oct. 30, 1906; 22360, Nov. 14, 1907.*

II F 1. It is provided in section 15 of the act of June 18, 1878 (20 Stat. 152), that—"from and after the passage of this act it

[1] See G. O. 39, Headquarters of Army, 1880.

[2] Congress was accordingly resorted to for authority in this instance, and by the act of June 23, 1879 (21 Stat. 35), the Secretary of War was specially empowered "to detail an officer of the Army not above the rank of captain for special duty with reference to Indian education." A detail was made accordingly—by S. O. 194, Headquarters of Army, Aug. 23, 1879.

shall not be lawful to employ any part of the Army of the United States as a *posse comitatus*, or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress." [1] In view of this legislation, *held* as follows:

That whenever a marshal or deputy marshal was prevented from making due service of judicial process, for the arrest of persons or otherwise, by the forcible resistance or opposition of an unlawful combination or assemblage or persons, the President was *expressly authorized* by section 5298, R. S.,[2] to employ such part of the Army as he might deem necessary to secure the due service of such process and execute the laws. *R. 39, 665, Sept., 1878; 43, 80, Nov., 1879 and 324, May, 1880.*

II G 1 a. The Philippine Scouts are a part of the Military Establishment. (Sec. 36, act of Feb. 2, 1901; 31 Stat. 751.)

Prior to the legislation in aid of the constabulary laws, the Philippine Scouts were on precisely the same footing, in respect to abstinence from interference in civil affairs, as other organizations of the Regular Army which were stationed in the Philippine Islands. If a situation arose indicating a necessity for the employment of military force in the suppression of disorder a request to that end was made by the civil governor upon the military commander, under the President's instructions to the Philippine Commission of April 7, 1900, which were ratified and confirmed by the act of July 1, 1902 (32 Stat. 691), and the troops were employed, under the direction of their military superiors, in the restoration of order. The extent of such use being determined as a result of conference between the chief civil and military authorities in the islands.

The operation of the act of January 30, 1903, has been to vest in certain officers of the Philippine Constabulary the same power of military command over companies of the Philippine Scouts, which

---

[1] As to what provisions of the Constitution and acts of Congress are excepted, see paragraphs 486–491, A. R. of 1895 (493–498 of 1910).

As United States marshals are not *expressly authorized* by any act of Congress to *summon* the military to serve on a *posse comitatus* (this being authorized only indirectly and impliedly by the provision of the act of Sept. 24, 1789, incorporated in sec. 787 of the Revised Statutes, 6 Op. Atty. Gen., 466, 471; letter of Atty. Gen. Evarts to the U. S. marshal for the northern district of Florida, Atty. Gen.'s office, Aug. 20, 1868; general instructions to U. S. marshals from Atty. Gen. Taft, published in G. O. 96, Headquarters of Army, 1876), the Army can not, under the existing law, legally act on the *posse comitatus* of a marshal or deputy marshal of the United States. See 16 Op. Atty. Gen., 162 (Oct. 10, 1878); 17 id., 242, 333; 19 id., 293; 21 id., 72.

While the object of the serving of United States troops on the *posse* of a United States marshal (where legally authorized so to serve) is simply to assist and cooperate with him in the enforcement of the process committed to him for execution, and the commander of the detachment is to consider himself as acting in subordination to the civil officer (see Atty. Gen. Evarts's letter of instructions cited, *supra*), the troops employed are to be regarded as under the command of their military superiors, and directly responsible to the latter as on other occasions of the performance of military duty and service. See G. O. 96, A. G. O., 1876; also par. 490, A. R. of 1895 (497 of 1910).

[2] See sec. 5300, R. S., as to proclamations by the President whenever in his judgment it becomes necessary to use the military forces under secs. 5297, 5298, and 5299 or other sections of Title LXIX, R. S. As instances of such proclamations see proclamation of Oct. 7, 1878, 20 Stat., 806; do. of July 8 and 9, 1894, 28 Stat., 1249, 1250. See also the President's (Cleveland) reply to Gov. Altgeld, July 5, 1894—published in "The Use of the Army in Aid of the Civil Power" (Lieber), War Dept. Doc. No. 63.

are ordered to assist the constabulary in the maintenance of order, as is habitually exercised by the officers of the line of the Army over the commands to which they have been assigned by the President, or by military superiors deriving their authority from the President. The control of the chief of the Philippine Constabulary over his subordinates in the service is derived from the legislation of the Philippine Commission and from the orders of the civil governor, conveyed to such chief either directly or through the secretary of commerce and police; and his authority over such companies of Philippine Scouts as are employed, in support of the constabulary, in the maintenance of order, is a strictly military command, and is derived from the act of January 30, 1903, which obviously has application to cases in which the disturbance is so limited and localized that order can be restored by the employment of the civil agencies provided for that purpose with the assistance of a detachment of Philippine Scouts; in other words, the extent and amount of the disorder is known to the civil governor, who has ground for the belief that the constabulary force, with the assistance of one or more companies of scouts, can restore order or secure the execution of the laws in the disturbed locality without formally calling upon the military commander for the employment of troops in the method prescribed in the President's proclamation of July 3, 1902. *C. 17508, Feb. 15, 1905.*

II G 2 a. The officers and men of the Regular Army have, under ordinary circumstances, no responsibilities in connection with the maintenance of civil order in the Philippine Islands, or elsewhere, and no duties in respect to the general execution of the laws, and they become charged with such responsibility only when insurrection exists against the authority of the United States or when resistance is encountered in the execution of its laws; in which case the law vests in the President the power to use military force in the repression of such insurrection or in the execution of certain statutes, in which event they act, not on their own motion but in pursuance of instructions from the President as the Commander in Chief of the military forces of the United States. *C. 17508, Feb. 15, 1905.*

II G 2 a (1). The duty of the President to maintain order in the Philippine Islands is precisely the same in respect to its source, character, and extent as his duty to maintain order in the District of Columbia or in the Territory of New Mexico. It is exercised in the Philippine Islands by the civil governor, who acts in behalf of the President, and who is provided with adequate civil agencies to assist him in the performance of his duties in that regard. In the particular case of disorder which is contemplated in the act of January 30, 1903, a portion of the military forces of the United States is placed at his disposal, which is to be employed under his general direction in the restoration of order, but is to act under officers of the Army who are clothed with military rank and, having such rank, are not only competent to exercise military command but are designated in the statute by title of office and are therein expressly vested with the power to exercise the particular command which is described in the statute. If the theater of a particular disturbance should extend over and include a considerable territorial area and should it be participated in by a large number of the native inhabitants of the island, becoming so formidable that the constabulary with the assistance of

the Philippine Scouts could not deal with it, a case would arise for the general employment of military force, and the operations would be conducted by the proper military commander under the general direction of the President. *C. 17508, Feb. 15, 1905.*

II H. The Chief Forester of the United States requested that Federal troops be placed on duty within certain forest reserves of the United States, with instructions to kill wild horses or other noxious animals on such reserves. *Held,* That even though everyone in the neighborhood of the wild-horse range appeared to be willing to take the risk of damage to private property, troops should not be placed upon that duty, and that if so placed it would entail endless complications on the part of stockmen, who might allege that their stock were damaged. *C. 23846, Sept. 15, 1908.*

II I 1. In a State of the Union the common law, or the law of the State, requires the principal peace officer, the sheriff in the county, before using his posse to read the riot act. In analogy to this procedure, section 5300, R. S., charges the President with the performance of a corresponding duty by the issue of a proclamation. Until such proclamation is issued troops of the United States will not be used with a view to preserve order in any one of the States of the Union. *C. 22474, Dec. 10, 1907.*

II I 2. When a State has exhausted her own coercive resources to maintain order within her borders and has requested the Federal Government, under constitutional authority, to protect her from the violence of her own members, *held,* that the Federal Government must direct its own forces, as it can not transfer its own functions to a State. This is true whether the President commands the troops in person, as did President Washington during the Pennsylvania Rebellion of 1794, or devolves this duty on a subordinate. The Federal authorities will direct the operations. *C. 8383, May 26, 1900.*

II I 3 **a.** When the President is required, in the execution of his duty, to send troops within one of the States of the Union to protect it from the violence of its own members, or to guarantee the execution of Federal statutes, he will be the judge of the size of the force to send, which may be possibly a few hundred men or many thousand troops. *C. 8383, May 26, 1900.*

II I 3 **b.** When Federal troops are required within the limits of one of the States of the Union, to protect it from the violence of its own members, or to guarantee the execution of Federal statutes, *held* that the district occupied may vary from one or two points to extensive portions of the State's territory. The measures of administration and control necessary to adopt in every instance will depend upon its own circumstances. The President or officer to whom he confides the direction of affairs will decide upon this, and if martial law be a necessary and proper measure he will institute it, as both the duty and the responsibility are his. *C. 8383, May 26, 1900.*

II I 4. When, in compliance with a request from one of the States for assistance, or when, in execution of his duty as President of the United States, the Commander in Chief sends Federal troops within a State to protect the State from the violence of its own members, or to guarantee the execution of Federal statutes, a limitation is placed upon the operations of the Federal troops, namely, that they must do nothing which will nullify the guarantee in the Federal Constitu-

tion of a republican form of government to the State. *C. 8383, May 26, 1900.*

II I 5. *Held* that troops may be used to assist in ejecting trespassers from Indian lands. *C. 542, Sept. 11, 1907.*

II I 6. A railroad company requested a department commander to guard a high bridge which the company believed was in danger of being destroyed during war just across the boundary. *Held* that his action in furnishing the guard was proper under section 5298–5299 R. S. in securing to the Government the use of that "post route, and military road." *Held*, further, that it was within the constitutional power of the President to guard the bridge against the invasion of United States territory by lawless bands from across the boundary. *C. 27995, Mar. 21, 1911.*

II K 1. While it is true that the status of neutrality is one that only comes into existence at times of public war, *held* that the neutrality laws of the United States are happily drawn so as not to depend upon the existence of a state of war for their enforcement, as the several acts which are therein made criminal and punishable acquire the character of crimes and misdemeanors when committed against a foreign State with which the United States is at peace. *C. 22132, July 6, 1908.*

II K 1 a. The question was raised under the neutrality laws of the United States, as found in the Revised Statutes (sec. 5281 to 5291), and the act of March 4, 1909 (35 Stat. 1090), as to what constitutes a military expedition or enterprise within the meaning of sections 13 and 14 of the act of March 4, 1909. *Held* that any combination of men organized and provided with means within the territory or jurisdiction of the United States to go to a foreign country, with the Government of which the United States is at peace, for the purpose of making war on that Government, is a military expedition or enterprise within the meaning of the statute. The number of men in the combination is not necessarily decisive. Three or four would be sufficient, other necessary conditions being present. The organization need not be efficient or complete. It is sufficient that there is submission by common consent to the will and direction of one or more leaders. The means of making war, with which the combination is provided, need not be adequate or in the personal possession of the men, as it is sufficient if such means are adapted to the purpose of making war and have been provided for the use of the men when occasion may require.[1] *C. 22132, Apr. 22, 1911.*

II K 1 b. On a question as to how much force can be used by the commanding general of American troops in the enforcement of the neutrality of the United States, *held* that in carrying out the provisions of section 14 of the act of March 4, 1909 (35 Stat. 1152), a military detachment may resort to all the force that under the circumstances of the case appear to be necessary, even though in doing so it be necessary to use deadly weapons, with which the detachment may be armed. The actual use of saber, bayonet, or firearm will generally be preceded by due warning to the parties sought to be arrested, and will be resorted to after such warning only when no lesser measure of force may reasonably be expected to accomplish the lawful end in view. *C. 22132, Apr. 22, 1911.*

---

[1] See U. S. *v.* Yebanez, 53 Fed. Rep. 538; U. S. *v.* Hart, 74 Fed. Rep. 727; U. S. *v.* Hart, 78 Fed. Rep. 874; U. S. *v.* Murphy, 84 Fed. Rep. 613.

II K 1 c. *Held* that when information is in the possession of the commanding general of a department which is adjacent to the boundary line of the United States and a friendly country, that bands of armed men are planning to cross the border and make war upon such friendly country, he should furnish such information at once to the nearest United States marshal or United States attorney with a view to his taking the proper steps to bring the offending parties to justice.[1] *C. 22132, Sept. 26, 1907.*

II K 1 d. When the armed forces of the United States are used to enforce the neutrality laws of the United States, *held* that there is no authority for such forces to cross the boundary line into the territory of a friendly country even to pursue armed forces that have crossed from the territory of the United States into such territory or friendly country with a view to making war on that friendly country. *C. 23132, July 6, 1908.*

II K 1 e (1). *Held* that when arms, ammunition, animals, or other contraband are seized by American troops near the border between the United States and a friendly foreign State which is being subjected to the experience of civil war or insurrection, the commanding general of the American troops should as soon as possible turn such seized property over to the Federal civil authorities. *C. 22132, Nov. 21, 1911.*

II K 1 e (2). In a case when a neighboring State was passing through the experience of civil war and instructions had been sent to the commanding general of United States troops nearest to the border line between the United States and the neighboring State to preserve the neutrality of the United States, and pursuant to his instructions arms and ammunition had been captured by American troops from a band which fled at the approach of the American troops, *held* that the commanding officer of the troops should retain captured property in his possession, and that if a writ of replevin should issue out of a State court he should resist it and give notice to the State court that the property was held by him under the authority of the United States, at the same time advising the United States attorney of his action. *Held* further that if a writ of replevin should issue out of a Federal court he will, under advice of said attorney, make proper return thereto. *C. 22132, Apr. 25, 1911.*

II K 1 f (1). During the progress of an engagement between opposing forces in a time of civil war in a neighboring State, fire was directed across the border line and into the territory of the United States. *Held* that the employment by the commanding general of the American troops in that vicinity of a civilian to carry a message to the commanding officers of the two opposing forces, in which message he notified them of the fact that shots were being fired across the border line into the United States and requested them to desist, was a proper action, and that such messenger could be paid for his services from the appropriation "Contingencies of the Army."[2] *C. 22132, May 3, 1911.*

---

[1] See section 5287, R. S., which authorizes the President, or such person as he shall empower for the purpose, to prevent the carrying out of any such expedition or enterprise.

[2] See XVI Comp. Dec., 132.

II K 1 f (2). On a question as to what could be done by the commanding general of American troops on duty near the border line between the United States and a friendly foreign State in a contingency when insurgents within that foreign State disguised as regular troops should deliberately and wantonly, and without being provoked, fire across the border line upon American troops, *held* that the commanding general of the American troops may in such a contingency defend against such an attack and aggressively to the extent necessary to protect his troops. *C. 22132, May 4, 1911.*

II K 1 g (1). *Held* that when the neutrality laws of the United States are being violated or its territory is menaced with invasion, the cost of executing such neutrality laws would constitute primarily a charge against the United States rather than against the State, and that, when in an unusual emergency the peace of one of the States of the Union equally with that of the United States is disturbed or threatened, or its territorial integrity is menaced with invasion, the commanding general of United States troops in that vicintiy should maintain the most cordial relations with the State authorities, but that he should constantly bear in mind that under ordinary circumstances cooperation of the State authorities which involves unusual time or considerable demands upon the State treasury should be sedulously avoided. *C. 22132, Aug. 27, 1908.*

II K 1 g (2). *Held* that the commanding general of Federal troops along the border of the United States and a friendly foreign State, which is being subjected to the experience of civil war, is not authorized to support the authorities of one of the States of the Union in the execution of the State laws. *C. 22132, Nov. 21, 1911.*

II K 1 h (1). The practice is fast becoming general for civil authorities to take finger prints of persons held by them charged with crime. *Held,* however, that when troops cross the boundary from a friendly country which is being subjected to the experience of civil war, and are interned within the United States, there is no occasion under which the finger prints of such persons should be taken. *C. 22132, June 26, 1911.*

V A. Under Article IX of the peace protocol signed September 7, 1901, between China and the Powers, the Chinese Government conceded the right to the Powers in the protocol annexed to the letter of the 16th of January, 1901, to occupy certain points, to be determined by an agreement between them, for the maintenance of open communication between the capital and the sea. *Held* that the object of the military occupation of certain points between Peking and the sea is to enable the foreign legations at the capital to have free passage to the sea, to make it possible for the Powers to send troops to the capital, in case the disturbed condition of China makes it necessary for the Powers to act, and to protect foreign officials and merchants. *Held* therefore that United States forces when charged with the protection of a certain portion of this line from Peking to the sea are not only authorized under the protocol, but are bound by their implied obligations to the other signatory Powers to prevent, by force if necessary, any act committed by the Imperial Government or by any revolutionary party which would result in the interruption of this communication. This maintenance of free communication should be the sole criterion by which the command-

ing officer of the American forces detailed for duty on this line, by which he is to be guided in arriving at a decision as to the legality or advisability of any measure he may propose to take in the section assigned to the American troops. *Held* further that any act committed that tends to interfere with free communication along the section assigned us is a violation of our treaty rights and should be prevented. *C. 29383, Jan. 15, 1912.*

ARMY BANDS.[1]

I. COMPETITION WITH CIVIL BANDS.
A. What Constitutes.
1. The same form of music must be furnished and
2. There may be competition when there is but one band in the locality.
3. Quality of local music not a factor.
4. Price charged for musical services not a factor..... *Page 109*
5. Union affiliations of civil musicians not a factor.
6. Inhibition of statute applies to both bands and the individual members thereof.
B. Who Shall Determine if Competition Exists.
1. Post commander, but
Post commander not allowed discretion as to merits of civilian band, and it is
Duty of those desiring band to show lack of competition.
C. Competition Does Not Exist.
1. Where music by military band is furnished free.
2. Where Army band plays for civilians under competent orders.
3. Where member of Army band serves as instructor to civil band.
4. In the case of Army bandsmen on the retired list.
D. Volunteer Bands.
1. Public money can not be used to buy music..... *Page 110*
2. Instruments, how secured.
3. Competition with civil bands.

I A 1. While the terms of the prohibition in respect to Army bands competing with local musicians are quite sweeping, there must be competition in respect to the particular form of musicial service which is called for by the employer. Where, therefore, a brass band was desired and there was no civil brass band in the locality, *held*, that it would be lawful for an Army band to render the service desired. *C. 14639, May 14, 1910.*

I A 2. There may be competition in a locality where there is a single organized civil band which is capable of rendering service similar to that furnished by an Army band. The service so rendered may be less acceptable than that which the Army band is capable of rendering; indeed it may be entirely unacceptable, but as long as there is a single band of local musicians which desires to compete the Army band is incapacitated and can not accept a proffered engagement. *C. 14639, June 10 and Oct. 14, 1908.*

I A 3. The quality of the local music is not a factor in determining the question of competition; if there are civilian musicians who desire to furnish music, the military band can not receive compensation for

[1] Prepared by Lieut. Col. John Biddle Porter, judge advocate, assistant to Judge Advocate General.

playing. C. *14639, Feb. 19, Mar. 5, Mar. 24 and Aug. 18, 1909 and May 6, 1911.*

I A 4. The determination of whether there is or is not competition between a military and a civil band does not depend on the price charged by either for services. *C. 14639, Feb. 19, Mar. 24, and Aug. 18, 1909 and Feb. 28, 1911.*

I A 5. *Held,* that the competition which is prohibited to Army bands is that in connection with local musicians, independently of their union affiliations. *C. 14639, June 8, Sept. 25, and Oct. 14, 1908.*

I A 6. The act of May 11, 1908 (35 Stat. 110), is equally applicable to bands and to individual members thereof. *C. 14639, Sept. 25, 1908.*

I B 1. The duty of determining whether the acceptance of an engagement by an Army band will come within the operation of the act of May 11, 1908 (35 Stat. 110), is one with which the post commander is charged, and in the performance of which he is to determine whether the acceptance of a particular engagement will place an Army band in competition with a similar local organization. The law vests no discretion in the post commander to pass upon the relative merits of civilian bands or to say that a particular band is or is not of sufficient musical standing to compete. Those who desire the services of the Army band should be able to make such representations to the commanding officer as will establish to his satisfaction the fact that there are no similar civil organizations which desire to compete, in order to permit the employment of the Army band. *C. 14639, June 10, Aug. 22, Sept. 17, Oct. 14, 1908, and Feb. 19, 1909.*

I C 1. In a case where an Army band furnished music outside the limits of a military post, but without remuneration, *held,* that there had been no violation of the act of May 11, 1908 (35 Stat. 110), which forbids the furnishing of music for remuneration by military bands outside the limits of a military post in competition with local civil musicians. *C. 14639, Sept. 17, 1908, Mar. 12, 1909, and Nov. 11, 1911.* So for a military band to give free concerts in a city in which, or near which, it is stationed is not a contravention of the law. *C. 14639, Oct. 31, 1911.* The law does not forbid the playing of musicians outside the limits of a military post, but forbids their receiving compensation for playing when in competition with local civil musicians. *C. 14639, July 7, Oct. 14, 1908, and May 6 and 25, 1911.*

The act of May 11, 1908 (35 Stat. 110), does not contemplate that military bands may not voluntarily play for civilians, if by voluntarily is meant without remuneration. *C. 14639, Sept. 17, 1908.*

I C 2. Where an Army band was placed by the Secretary of War at the disposal of the executive committee of an irrigation congress, *held,* that the placing of the band on this duty was in the operation of lawful orders from competent military authority and that there was no infraction of the act of May 11, 1908 (35 Stat. 110). *C. 14639, July 30, 1909.*

I C 3. Where a musician of a military band was employed as instructor in music by a local civilian band, *held,* that he was not engaged in furnishing musical services within the prohibition of the act of May 11, 1908 (35 Stat. 110). *C. 14639, Sept. 10, 1909.*

I C 4. The inhibition contained in the act of May 11, 1908 (35 Stat. 110), is against Army bands or members thereof receiving remuneration for furnishing music outside the limits of military posts in com-

petition with local civilian musicians, *held*, therefore, that a musician on the retired list of the Army, not being a band or a member thereof, did not come within the inhibition. *C. 24179, Dec. 9, 1908.*

I D 1. Where it was proposed to expend public money in furnishing music to bands which are not authorized by law as a part of the military establishment, *held*, that such an expenditure would not be authorized by law, as the Executive is without authority, unaided by legislation, to establish bands in the military service. *C. 23870, Dec. 11, 1908.*

I D 2. Volunteer bands at military posts are not organizations established by law as a part of the Army; *held*, therefore, that in so far as the purchase of new instruments and material are concerned the Secretary of War is restricted in the procurement of such articles to the reasonable needs of the bands which are authorized by existing law; where, however, a stock of instruments has accumulated in excess of the legitimate demand, it is equally within the authority of the Secretary of War to permit their use in a case where the welfare, comfort, and contentment of the enlisted men of the Army would be promoted by such use. *C. 23870, Sept. 21, 1908.*

I D 3. *Semble*, that volunteer bands composed of enlisted men, maintained at military posts, are bands within the inhibition of the act of May 11, 1908 (35 Stat. 110), forbidding military bands competing with civilian local musicians for remuneration. *C. 14639, May 21, 1908; Sept. 16, 1910; Aug. 22, 1911.*

CROSS REFERENCE.

Refusal to play.....See ARTICLES OF WAR XXI C 2 c.
Retirement of member of.....See RETIREMENT II E 2 a.
Money paid to fund.....See PUBLIC MONEY I A.

ARMY OF CUBAN PACIFICATION.

Army.....See ARTICLES OF WAR LXXII F 1.
Discharge without honor from.....See DISCHARGE III B 1.

ARMY REGULATIONS.

See LAWS II A to B.

ARRAIGNMENT.

Of accused.....See DISCIPLINE IX E 1 to 5 b.
Record of.....See DISCIPLINE XIII D.

ARREST.

Absentee.....See ARTICLES OF WAR LIX I 2.
Affrayer by bystander.....See ARTICLES OF WAR XXIV A.
Attaches jurisdiction.....See DISCIPLINE VIII D 1 to 4.
Breach of.....See ARTICLES OF WAR LXII C 17; 18; LXV A to C.
By Judge Advocate.....See DISCIPLINE IV B 5.
Civilian by military.....See COMMAND V A 3 c; V A 3 c (1); V A 3 d (1).
See CLAIMS XII E.
Civilians in Indian country.....See ARMY II C.
Deserters.....See DESERTION III A to H.
Dismissed officer or discharged soldier.....See COMMAND V A 6 b (1) (b).

Evidence of protracted.....See Discipline XI A 14 a; XIV E 9 d (1) (a).
Flag of truce.....See War I C 10.
Force that may be used.....See Command V A 3 c.
Illegal of civilian.....See Army II D.
Jurisdiction does not depend on.....See Discipline VIII G 1 a; b.
Member of general court-martial.....See Discipline VI E.
Military.....See Discipline I A to E 3; II C.
Military by civil.....See Articles of War LIX A.
National cemetery.....See Public Property IV A 3 b.
Payment during.....See Pay and Allowances I A 1 b; c.
Photographing fortifications.....See War I C 6 g (1).
Release from.....See Articles of War LXXI C; D.
Violation of navigation laws.....See Navigable Waters IX B.
Witness.....See Discipline X L 1.

ARTICLES OF WAR.[1]

Article.
III. A. "Infamous Criminal Offense" Defined ..... *Page 120*
VIII. A. Does Not Refer to Funds.
XVII. A. "His Clothing" Defined. (See Clothing Allowance.)
B. Other Wrongful Dispositions, How Charged.
C. Pecuniary Responsibility, How Settled.
XIX. A. Adverse Criticism Not Offense.
XXI. A. "Superior Officer" Defined ..... *Page 121*
B. "Willful Refusal or Neglect."
1. To pay debt to company tailor.
a. To act as cook.
C. Acts that are Not Violations of this Article.
1. Officers.
a. Refuses to sign certificate.
2. Enlisted men.
a. Refuses to act as officer's servant ..... *Page 122*
b. Refuses to contract marriage.
c. Refuses to play as musician in town.
d. Refuses prophylactic treatment because of religious belief.
D. Rule: Obey Order First, Question Legality Afterwards.
E. Homicide of Superior Officer.
1. Soldier may be tried by court-martial.
2. May be punished capitally.
XXII. A. Mutiny Defined ..... *Page 123*
B. Refusal in Combination to Obey Unlawful Order Not Mutiny.
XXIV. A. Any Bystander Should Arrest an Affrayer.
XXV. A. Confers no Jurisdiction..... *Page 124*
XXVI. A. Deliberate Invitation Necessary.
XXIX. A. Limited to Regimental Commander..... *Page 125*
B. Statements in Efficiency Reports.

[1] As shown by the synopsis above, an opinion has not been written on each of the Articles of War. The 128 articles, briefly stated, are as follows:

Article.
1. Officers shall subscribe these articles.
2. Articles to be read to recruits.
3. Officers making unlawful enlistments.
4. Discharges.
5. Mustering persons not soldiers.
6. Taking money on mustering.

Article.
7. Returns of regiments, etc.
8. False returns.
9. Captured stores secured for public service.
10. Accountability for arms, etc.
11. Furloughs.
12. Musters.

Article.
XXX. A. Does Not Authorize Trial of Officers.
B. One Hundred and Third Article of War Does Not Apply.
C. Only Regimental Commanders Can Summon Court.
D. Limitations on Province of Court.
E. Right to Complain..... *Page 126*
XXXII. A. Means Absence from Post.
B. Absence to Evade Duty.
C. Absence that Includes Failure "to Repair" ..... *Page 127*
XXXVIII. A. Drunkenness by Liquor or Drug.
B. Officers.
1. Post commander always on duty.
2. Medical officer always on duty.
3. Officer drunk when reporting for duty.
a. Not permitted to enter upon duty.
C. Soldiers.
1. Drunk before entrance on duty.
D. Right Can Not be Prejudiced by Regulations.
XXXIX. A. "On Post" Defined ..... *Page 128*
XL. A. Unauthorized Absence from Place of Guard.
XLII. A. Misbehavior.
B. "On Duty" Defined.
XLV. A. "Whosoever" Defined.
B. "Enemy" Defined..... *Page 129*
C. Relieving May be Done by Exchange.
1. Exchange of money for commodities distinguished from trading.
XLVI. A. Mailing of Letter.
B. Material Information Communicated.
XLVIII. A. Restored to Duty Without Trial—Time to be Made Good.
B. United States May Waive its Exercise of Soldier's Liability ..... *Page 130*
C. Convicted.
1. Sentence does not include discharge—time to be good.
2. Need not be mentioned in sentence.
3. Liability remains after expiration of term of enlistment.
4. Conviction disapproved.
D. Acquitted.
E. Time Made Good Must be Military Service.
F. Liability Continues After One Hundred and Third Article of War Has Run.
L. A. Does Not Create Special Offense..... *Page 131*
LI. A. "Advising" and "Persuading" Defined.
LII. A. Attendance at Church Not Military Formation.
B. Attendance at Church is a Duty.

Article.
13. False certificates.
14. False muster.
15. Allowing military stores to be damaged.
16. Wasting ammunition.
17. Losing or spoiling horses, accouterments, etc.
18. Commanders not to be interested in sale of victuals, etc.

Article.
19. Disrespectful words against the President, etc.
20. Disrespect toward commanding officer.
21. Striking a superior officer.
22. Mutiny.
23. Failing to resist mutiny.
24. Quarrels and frays.
25. Reproachful or provoking speeches.

Article.
LIV. A. Includes Damage to Person or Property.
B. Action is Mandatory..... *Page 132*
C. Assessment of Whole Command.
1. Those not present excepted.
D. In Addition to Punishment.
1. By civil authorities.
2. By military authorities.
E. General Court-Martial Can Not be Used Instead of Board.
F. Procedure.
1. Men in the Regular Army.
2. Men in the militia..... *Page 133*
G. Enforceable in Cuba and the Philippine Islands.
H. Can Not be Enforced.
1. In favor of military persons.
2. In case of embezzlement.
LVIII. A. Jurisdiction of Military Court Concurrent with Civil.
B. Sentence to be Equal to or Greater than Provided by State Law.
C. Local Laws of Foreign Country Do Not Apply..... *Page 134*
D. Situation in Philippines During Military Occupation.
LIX. A. Recognizes Subordination of Military to Civil.
B. Requirement as to Application.
C. "Laws of Land" Defined..... *Page 135*
D. Jurisdiction Which First Attaches Should Try Case.
E. Soldier Should Await Formal Application..... *Page 136*
F. "Any of the United States" Defined.
G. State May Make Demand.
1. Then undertakes expense of man's transportation.
a. To place of trial.
b. And return to station.
(1) Commanding officer should impose second condition when possible..... *Page 137*
H. Limited to Officers and Soldiers.
I. Does Not Apply.
1. To time of war.
2. To absent officer or soldier.
3. To offense of perjury.
K. Soldier Returned After Surrender Under Fifty-Ninth Article of War Before Conclusion of Case.
L. Homicide by Soldier.
1. At post in United States.
2. At post in Philippines..... *Page 138*

Article.
26. Challenges to fight duels.
27. Allowing persons to go out and fight; seconds and promoters.
28. Upbraiding another for refusing challenge.
29. Wrongs to officers, redress of.
30. Wrongs to soldiers, redress of.
31. Lying out of quarters.

Article.
32. Soldiers absent without leave.
33. Absent from parade without leave.
34. One mile from camp without leave.
35. Failing to retire at retreat.
36. Hiring duty.
37. Conniving at hiring duty.
38. Drunk on duty.
39. Sentinel sleeping on post.

Article.
LX. A. Offenses by Officers.
1. Duplication of pay accounts.
2. Collusion with contractor.
3. Using Government property for private purposes.
a. Even temporary use of Government horses.
4. Failure to turn over public money.
5. Inducing civilian to make fraudulent lease..... *Page 139*
B. Offenses by Soldiers.
1. Forging a final statement.
2. Falsifying entry in clothing book.
C. "Stealing" Defined.
D. Misappropriation Need Not Be For Private Profit.
E. Liability to Trial After Separation from Service.
1. If under military jurisdiction.
2. Of Volunteers or militiamen in service of United States.
3. Provision not yet held unconstitutional..... *Page 140*
4. Does not put man on pay basis.
F. Article Not Affected by Act of March 3, 1875.
LXI. A. Conduct Must be Manifestly Unbefitting Officer and Gentleman.
1. Sufficient if morally wrong.
B. Instances of Conduct Unbecoming.
1. False official statement.
2. Preferring false accusation..... *Page 141*
3. Corruptly influencing vote of officer.
4. Appropriating Government property to personal use.
5. Violation of pledge by officer.
6. Officer drunk in public.
7. Disorderly fighting in public.
8. Gambling in public with enlisted men by officer.
9. Continued dishonorable nonpayment of debt.
a. After assurance of payment.
b. Which brings discredit upon the service..... *Page 142*
c. Money borrowed from soldier.
10. Check against no funds in bank.
11. Officer charging interest on loan to soldier.
12. Committing bigamy.
13. Abusing wife..... *Page 143*
14. Manufacture of false testimony.
15. Duplication of pay accounts.

Article.
40. Quitting guard, etc., without leave.
41. False alarms.
42. Misbehavior before the enemy, cowardice, etc.
43. Compelling a surrender.
44. Disclosing watchword.
45. Relieving the enemy.
46. Corresponding with the enemy.
47. Desertion.
48. Deserter shall serve full term.
49. Desertion by resignation.

Article.
50. Enlisting in other regiment without discharge.
51. Advising to desert.
52. Misconduct at divine service.
53. Profane oaths.
54. Officers to keep good order in their commands.
55. Waste or spoil and destruction of property without orders.
56. Violence to persons bringing provisions,

Article.
LXII. A. "Crimes" Defined.
B. "To the Prejudice" Qualifies Crime.
C. Offenses Under Sixty-second Article of War.
1. Improper publication of criticism of officer..... *Page 144*
2. Unauthorized withdrawal of public funds.
3. Failure to account for public money received ..... *Page 146*
4. Unauthorized payment of public money.
5. Offenses against civilians.
a. If on duty—in uniform, etc.
6. Offenses against nature..... *Page 147*
7. Burglary.
8. Larceny. (*See* Larceny.)
9. False swearing.
10. Improper disposition of property.
11. Disrespectful language in regard to officer by soldier.. *Page 148*
12. Disobedience of noncommissioned officer's order.
13. Drunkenness at hour for duty.
14. Drunkenness while absent without leave.
15. Loaning money at usurious rates.
16. Disturbance upon private premises.
17. Delays return when permitted to leave confinement.
18. Failure to obey order.
D. Instances of Disorders or Neglect..... *Page 149*
E. Acts Which are Not Offenses Under Sixty-second Article of War ..... *Page 150*
F. Manslaughter..... *Page 151*
LXIII. A. Punishment of Retainers to the Camp.
1. Officers' servants, etc., punished by discharge.
B. Jurisdiction Does Not Extend to Time of Peace.
1. Even if offense committed in war.
C. Trials Restricted to Imperative Necessities.
D. Violation of Sixty-third Article of War Subjects to Trial by General Court-Martial..... *Page 152*
E. Forfeiture Reverts to Proper Appropriation.
LXV. A. The Leaving Should be Deliberately Insubordinate.
B. Regimental Commander is Commanding Officer.
C. Accused Not Entitled to Release Until Case Acted on.
LXVI. A. Crimes Defined.
LXXI. A. "Ten Days" Means After Arrest.
B. List of Witnesses May be Omitted.
C. "Except at Remote Stations" Explained.
D. Officer Can Not Release Himself..... *Page 153*

Article.
57. Forcing a safeguard.
58. Certain crimes during rebellion.
59. Offenders to be delivered up to civil magistrates.
60. Certain kinds of frauds against the United States.
61. Conduct unbecoming an officer and gentleman.
62. Crimes and disorders to prejudice of military discipline.

Article.
63. Retainers of camp.
64. All troops subject to Articles of War.
65. Arrest of officers accused of crimes.
66. Soldiers accused of crimes.
67. Receiving prisoners.
68. Report of prisoners.
69. Releasing prisoner without authority; escapes.
70. Duration of confinement.
71. Copy of charges and time of trial.

Article.

LXXII. A. Authority to Order Court-Martial is Attribute of Command.
B. Convening Authority's Decision is Final.
C. Division Commander.
1. When acting as department commander.
D. Corps Commander.
1. When corps is a separate Army.
E. Staff Officer.
1. Can not add or relieve members..... *Page 154*
F. Army.
1. Of Cuban passification.
G. Officers Not Qualified to Order Court.
1. Lieutenant colonel.
2. Or to add or relieve members.
H. Troops Temporarily in Department.
I. Accuser.
1. Determined mainly by "animus."
a. Inspector reports against trial..... *Page 155*
2. When denials may be proved.
3. Does not become accuser.
a. By preparing charges by order..... *Page 156*
(1) And orders department judge advocate to do so.

LXXIII. A. Separate Brigade Defined.
1. Should be designated.
2. Provost marshal's command, Manila, P. I..... *Page 157*
B. No Authority to Convene Court.
1. When separate brigade reduced to one regiment.
2. Military governor of a district.
3. Force on transport merely..... *Page 158*

LXXV. A. Convening Authority.
1. Decides on number of members.
B. Less than Five.
1. Can not organize court.
2. Or proceed if already organized.
3. Can not dissolve itself.

LXXVII. A. Regular Officer.
1. May be member to try Philippine scout.
2. May be judge advocate to try volunteers.
3. May not be member to try volunteers.

LXXVIII. A. Marine Officer Accused, Some Members of Court Should be Marines ..... *Page 159*

Article.
72. Who may appoint general courts-martial.
73. Commanders of divisions and separate brigades may appoint in time of war.
74. Judge advocate.
75. Members of general courts-martial.
76. When requisite number not at a post.
77. Regular officers, on what courts may sit.

Article.
78. Marine and Regular Army officers associated on courts.
79. Officers triable by general courts-martial.
80. Field officers' courts.
81. Regimental courts.
82. Garrison courts.
83. Jurisdiction of inferior courts.
84. Oath of members of courts-martial.
85. Oath of judge advocate.

Article.
LXXXII. A. Officer Commanding.
1. Not limited as to rank..... *Page 159*
2. Can not detail himself.
B. "Other Place" Defined.
C. "Different Corps."
1. One man does not make corps.
2. Commanding Officer, Army and Navy General Hospital, Hot Springs, Ark.
LXXXIII. A. Graver Offenses Not Tried by Inferior Court..... *Page 160*
B. Capital Offenses.
1. Charge under twenty-first article of war can not be tried.
C. Limitations Refer to Single Sentence.
1. Forfeitures.
a. Limited to one month's pay.
2. Reduction to ranks.
LXXXIV. A. Oath, How Administered..... *Page 161*
B. "The Matter Before Them" Defined.
C. "Not Divulge the Sentence."
1. Object of this provision.
2. Not even in the record.
3. Reopening of court for previous convictions..... *Page 162*
4. Not even to the clerk.
LXXXVI. A. Court Exercises Authority Over Acts in Its Presence Only.
1. May exclude a spectator.
B. Contempt.
1. May be punished under this article.
a. Procedure.
b. A civilian's refusal to testify is not contempt.... *Page 163*
LXXXVIII. A. Grounds for Challenge.
B. Insufficient Grounds for Challenge.
C. Challenge Should be Made at Proper Stage of Procedure.
D. Court as a Whole Not Subject to Challenge.
XCI. A. Evidence of High Public Officers.
1. Should be taken by deposition.
B. Deposition Must be Submitted as a Whole..... *Page 164*
C. If Not Tendered, Other Party May Use It.
D. Depositions Taken Abroad.
E. Court Can Not Exclude Deposition.
F. Reasons for Not Receiving Deposition.
G. Authority of Court Over Deposition.
H. Not a Violation of Sixth Amendment to Constitution.
I. Can Not be Read in Capital Cases..... *Page 165*
K. Witness Resides Within the State.

Article.	Article.
86. Contempts of court.	94. Hours of sitting.
87. Behavior of members.	95. Order of voting.
88. Challenges by prisoner.	96. Sentence of death.
89. Prisoner standing mute.	97. Penitentiaries.
90. Judge advocate, prosecutor, and counsel for prisoner.	98. Flogging.
91. Depositions.	99. Discharge and dismissal of officers.
92. Oath of witness.	100. Publication of officers cashiered for cowardice or fraud.
93. Continuances.	101. Suspension of officers' pay.

Article.
XCIII. A. Good Grounds for Continuance.
1. To procure counsel.
2. Copy of charges differs materially from original.
XCVI. A. Sentence of Death is Supported by Finding on One Capital Charge.
B. Court Can Not Designate Time or Place.
XCVII. A. Prohibits Confinement in Penitentiary for Military Offenses.
B. Authorizes Penitentiary Sentence..... *Page 166*
C. "Penitentiary" Defined.
D. In Fixing Sentence Court Should Consult Statute.
E. Case of Conviction of Several Offenses.
C. A. "Cowardice" and "Fraud" Defined.
B. What Constitutes Publication..... *Page 167*
CII. A. "Jeopardy" Means Conviction or Acquittal.
1. Without regard to action of reviewing authority.
B. Cases of "No Second Trial."
C. One Act, but Two Offenses..... *Page 168*
1. Murder and a military offense.
a. Case of officer..... *Page 169*
b. Case of soldier.
2. Manslaughter and mutiny.
D. Same Offense Charged under New Article.
E. Fraudulent Enlistment.
1. Can not try separately for two misrepresentations.
F. Reconsideration not a Second Trial..... *Page 170*
G. Trial by Court of Inquiry not a Former Trial.
H. Sentinel Commits Homicide.
1. On escaping prisoner.
2. On innocent bystander..... *Page 171*
I. Soldier Assaults a Civilian.
CIII. A. "Order for Trial" Defined.
B. Impediment.
1. Mere concealment is not.
2. Allegation of.
C. Limits Forty-eighth and Sixtieth Articles of War..... *Page 172*
D. Limitation is Matter of Defense.
E. "Absence" Defined as "Fleeing from Justice."
F. Desertion.
1. Begins to run at end of term.
2. Does not run in time of war..... *Page 173*
a. Desertion in Boxer uprising was in time of war.
3. Second desertion before expiration of term of enlistment add two years to unexpired portion of term.

Article.
102. No person tried twice for same offence.
103. Limitation of time of prosecution.
104. Approval of sentence by officer ordering court.
105. Confirmation of death sentence.
106. Confirmation of dismissals in time of peace.
Article.
107. Dismissal by division or brigade courts.
108. General officers, sentences respecting.
109. Confirmation by officer ordering court.
110. Confirmation of field officers' sentences.

Article.

CIII. F. Desertion—Continued.

4. Second desertion after expiration of term of enlistment add two years to portion of term yet unserved under the forty-eighth article of war.
5. In time of peace even if there is an enemy, statute runs unless the desertion is in face of the enemy.
6. A deserter working on a transport in the Philippine Islands was not absent from the United States.

G. Article Applies to Escape..... *Page 174*

H. In Fraudulent Enlistment Except Without Discharge Limitation Runs from Date of Last Receipt of Pay or Allowances.

CIV. A. Approval.

1. Should be recorded even though President's action is necessary.
2. Should be formal in character.

B. Accused Transferred Out of Department; Former Department Commander Acts on Case.

C. Officer Commanding for the Time Being.

1. Successor to the command.
   a. Should so indicate on record..... *Page 175*
   b. Not limited to rank.
2. Corps commander when division is discontinued.
3. Division commander when separate brigade is merged with division.
4. Department commander when post discontinued.
5. Senior line officer present and for duty.
   a. When department commander is ill.

CVI. A. Department Commander in Time of War May Confirm.

CVII. A. When Division or Brigade not in Separate Army, President is Confirming Authority.

CXI. A. Procedure..... *Page 176*

CXII. A. Authority to Pardon.

1. Can not be delegated.
   a. Does not include authority to commute.
      (1) Even in time of war.
   b. Or to substitute.
   c. Continues after approval..... *Page 177*
      (1) Except as to dishonorably discharged soldiers sentenced to confinement in military prison or penitentiary.

B. "Mitigation" Defined.

C. Illegal Sentence can not be Mitigated.

D. Dishonorable Discharge can not be Mitigated.

E. Power of Mitigation of Sentence of Inferior Court is in Actual Commanding Officer.

CXIV. A. Copy, How Obtained..... *Page 178*

Article.

111. Suspension of sentence of death or dismissal.
112. Pardon and mitigation of sentences.
113. Proceedings forwarded to Judge Advocate General.
114. Party entitled to a copy.
115. Courts of inquiry, how ordered.
116. Members of court of inquiry.

Article.

117. Oaths of members and recorder of court of inquiry.
118. Witnesses before courts of inquiry.
119. Opinion, when given by.
120. Authentication of proceedings of court of inquiry.
121. Proceedings of court of inquiry used as evidence.

Article.
CXV. A. Court of inquiry is not a Demandable Right.
B. Court of Inquiry is a Board and not a Court.
CXIX. A. Opinion Confined to Special Question.
B. Minority Report Permitted ..... *Page 179*
CXXI. A. Proceedings May be Used to Impeach Witness.
CXXII. A. Marine Corps Officers Require President's Order to Assume Command in the Army.
B. At Joint Maneuvers Militia Officers can not Assume Command of Regular Officers.
CXXVI. A. Company Commander May Convert Effects of Deceased Soldier into Cash ..... *Page 180*
CXXVII. A. Upon Accounting to Representative, Responsibility Ends.
B. Legal Representative Defined.

III A. *Held*, that the words "infamous criminal offense" used in the third article of war mean an offense punishable by imprisonment in a penitentiary or by death. *C. 9490, Dec. 9, 1911.*

VIII A. This article does not refer to funds.[1] *R. 30, 598, Aug., 1870; 32, 575, May, 1872; 33, 188, July, 1872; 38, 526, Mar., 1877.*

XVII A. The description, "*his* clothing," refers to articles thereof which are regularly issued to the soldier for his use in the service and with the safe-keeping of which he is charged. His property in them is qualified by the trust that he can not dispose of them while he is in the military service, and can only use them for military purposes.[2] *P. 59, 196, Apr., 1893; C. 16107, Apr. 2, 1904.*

XVII B. Only three offences are made punishable by this article—selling, through neglect losing, and through neglect spoiling, the property named therein. Any other form of wrongful disposition should be made the subject of a charge under article 60 or article 62. *P. 26, 238, Aug., 1888; C. 17442, Jan. 23, 1905.*

XVII C. This article is quite independent of the Army Regulations, relating to surveys of property. The surveying officer passes upon questions of *pecuniary responsibility* for the loss, &c., of public property. The court-martial, under this article, simply imposes *punishment*.[3] *R. 37, 352, Feb. 28, 1876; P. 59, 196, Apr. 28, 1893.*

XIX A. When a trial of an officer or soldier has been resorted to under this article, it has usually been on account of the use of "con-

Article.
122. Command when different corps happen to join.
123. Regular and volunteer officers on same footing as to rank, etc.
124. Rank of militia officers on duty with officer of regular or volunteer forces.
125. Deceased officers' effects.
126. Deceased soldiers' effects.
127. Effects of deceased officers and soldiers to be accounted for.
128. Articles of War to be published once in six months to every regiment, etc.

[1] See, as sustaining the text, G. C. M. O. 12, 19, War Department, 1872, and 36, of 1877.

[2] See ruling of reviewing officer in G. O. 35, Dept. of the East, 1869; and see also do. 31, Dept. of the South, 1877; G. C. M. O. 15, Dept. of Texas, 1880; all sustain the text. Clothing issued in kind does not become private property. (See Clothing allowance under Pay and allowances.)

[3] Where a *trial* is had, the proceedings of a board of survey, already ordered in the same case, will not be competent evidence to prove the fact of the loss, &c., charged. G. C. M. O. 45, Dept. of the Missouri, 1877; do. 15, Dept. of Texas, 1877.

temptuous or disrespectful words against the President," or the Government mainly as represented by the President. The deliberate employment of denunciatory or contumelious language in regard to the President, whether spoken in public, or published, or conveyed in a communication designed to be made public, has, in repeated cases, been made the subject of charges and trial under this article;[1] and, where taking the form of a hostile arraignment, by an officer, of the President or his administration, for the measures adopted in carrying on the Civil War—a juncture when a peculiar obedience and deference were due, on the part of the subordinate, to the President as executive and commander in chief—was in general punished by a sentence of dismissal. *R. 5, 491, Dec., 1863; 20, 516, Apr., 1866.* On the other hand, it was *held* that adverse criticisms of the acts of the President, occurring in *political discussions,* and which, though characterized by intemperate language, were not apparently intended to be disrespectful to the President personally or to his office, or to excite animosity against him, were not in general to be regarded as properly exposing officers or soldiers to trial under this article. To seek indeed for ground of offence in such discussions would ordinarily be inquisitorial and beneath the dignity of the Government. *R. 5, 491, Dec., 1863.*

XXI A. The "superior officer" in the sense of this article, need not necessarily have been the *commanding* officer of the accused at the time of the offence. The article is thus broader than article 20, which relates only to an offence against a "commanding officer." *R. 19, 248, Dec., 1865.*

XXI B. The offence of disobedience of orders contemplated by this article, consists in a willful refusal or neglect to comply with a specific order to do or not to do a particular thing. A mere failure to perform a routine duty is properly charged under article 62.[2] *R. 33, 280, Aug., 1872.* Where an officer neglected fully to perform his duty under general instructions given him in regard to the conduct of an expedition against Indians; *held* that his offence was properly chargeable not under the twenty-first but under the sixty-second article. *R. 38, 454, Feb., 1877; C. 16150, Apr. 6, 1904; 20968, Jan. 18, 1907; 2885, Nov. 11, 1909.*

XXI B 1. *Held* that the refusal by a soldier to pay a debt legally contracted with the company tailor, soldier, or civilian is a violation of the twenty-first article of war.[3] *P. 33, 22, June 10, 1889.*

XXI B 2. *Held,* that the refusal of a soldier, when properly detailed for that duty, to cook for a mess of civilian teamsters who were regular employees of the military establishment and a constituent part of the command, was a violation of the twenty-first article of war. *P. 28, 342, Dec. 3, 1888.*

XXI C 1 a. *Held,* that the refusal of a commissioned officer to sign a certificate, as the facts set forth in such certificate were not within

[1] See cases in G. C. M. O. 43, War Dept., 1863; G. O. 171, Army of the Potomac, 1862; do. 23, id., 1863; do. 52, Middle Dept., 1863; do. 119, Dept. of the Ohio, 1863; do. 33, Dept. of the Gulf, 1863; do. 68, Dept. of Washington, 1864; do. 86, Northern Dept., 1864; do. 1, id., 1865; do. 29, Dept. of N. C., 1865.

[2] See G. C. M. O. 26, War Dept., 1872; do. 7, Dept. of Texas, 1874; G. O. 24, 35, Fifth Mil. Dist., 1868.

[3] See sec. 1220, R. S., and act of Mar. 2, 1889 (25 Stat., 831). See also Circular 8, A. G. O., 1896, which by construction extends the regulation to include civilian tailors.

his knowledge, was not a violation of the twenty-first article of war. *R. 49, 224, July 18, 1885.*

XXI C 2 a. *Held,* that the refusal of a soldier to comply with an order to act as an officer's servant is not a violation of the twenty-first article of war.[1] *R. 44, 80, July 21, 1880; C. 22404, Nov. 25, 1907.*

XXI C 2 b. *Held,* that the refusal of a soldier to contract marriage when ordered to do so was not a violation of the twenty-first article of war. *R. 38, 47, Apr. 13, 1876.*

XXI C 2 c. *Held,* that the refusal by a member of a post band to obey an order of a post commander to play in a neighboring town for the pleasure of the inhabitants was not a violation of the twenty-first article of war. *R. 27, 520, Feb. 6, 1869.*

XXI C 2 d. A soldier refused to submit to the prophylactic treatment required by War Department orders [2] as a preventative against typhoid fever, declaring that he is in a healthy condition physically and that it is his religious belief that the body under such conditions should not be tampered with. *Held,* that cases of this character are peculiar in that they affect the person of the soldier and are somewhat out of the line of regular military service in which unquestioning obedience is essential, and the infliction of punishment in such cases would be regarded differently than if it were inflicted for a violation of orders directly pertaining to the military service. *Suggested* that the soldier's request to be permitted to purchase his discharge rather than submit to the prophylactic treatment be approved. *C. 11753, Jan. 26, 1912.* In the meantime the soldier had been tried, convicted, and sentenced to dishonorable discharge, forfeiture, and confinement for six months. The soldier upon being informed that his application for purchase of discharge would be approved declined to make such application. Under the new conditions presented it was *recommended* that the soldier be discharged without honor. *C. 11753, Feb. 9, 1912.*

XXI D. When a soldier receives an order of doubtful legality, it is his duty to obey it and seek redress afterwards. *Held,* that if he elects in such a case to disobey the order in the first instance his action is an offense under the sixty-second article of war. Thus, in a particular case where an illiterate soldier who was unable to sign his name was furnished with a written exhibit of his name and ordered to continue to copy the same until he could reproduce it, and he refused, his refusal was an offense under the sixty-second article of war. *P. 27, 484, Nov., 1888; C. 9709, June 26, 1901.*

XXI E 1. Where a soldier kills his superior officer on a military reservation over which jurisdiction has been ceded to the United States, *held* that he may be tried for murder in the proper Federal criminal court, or for manslaughter under the sixty-second article of war, and for shooting his superior officer in violation of the twenty-first article of war. *C. 25267, July 13, 1909.*

XXI E 2. *Held* that the fact that capital sentences have been imposed and executed in time of war for a violation of the twenty-

[1] See section 1232, R. S., which forbids officers to use an enlisted man as a servant in any case whatever. See G. C. M. O. 130, Department of Dakota, 1879, which publishes the proceedings of a trial in which a soldier was convicted of disobedience of orders in refusing to assist in building a private stable for an officer, and the finding was disapproved on the ground that such an order was not lawful.

[2] See G. O. No. 134, War Department, 1911.

first article does not operate to deprive a court-martial of power to impose an adequate punishment in a case in which an offense committed in violation of the article in time of peace is sufficiently aggravated in character to warrant the imposition of a capital sentence, and that in the case in reference (the willful killing of a superior officer by a noncommissioned officer) the circumstances attending the offense were such as to warrant the imposition of a capital sentence and the recommendation that the sentence imposed be confirmed and carried into execution.[1] *C. 21568, May 1, 1907.*

XXII A. Mutiny at military law may be defined to be an unlawful opposing or resisting of lawful military authority, with intent to subvert the same, or to nullify or neutralize it for the time.[2] It is this *intent* which distinguishes mutiny from other offenses, and especially from those, with which, to the embarrassment of the student, it has frequently been confused, viz, those punishable by the twenty-first article, as also those which, under the name of "mutinous conduct," are merely forms of violation of article 62. The offenses made punishable by article 22 are not necessarily "aggregate" or joint offenses.[3] *P. 26, 284, Sept., 1887.* Among them is the *beginning* or *causing* of a mutiny—which may be committed by a single person. In general, however, the offense here charged will be a concerted proceeding; the concert itself going far to establish the intent necessary to the legal crime. To charge as a capital offense under this article a mere act of insubordination or disorderly conduct on the part of an individual soldier or officer, unaccompanied by the intent above indicated, is irregular and improper.[4] Such an act should in general be charged under articles 20, 21, or 62. *R. 29, 571, Jan., 1870; 38, 199, July, 1876.*

XXII B. Soldiers can not properly be charged with the offense of joining in a mutiny under this article, where their act consists in refusing, in combination, to comply with an *unlawful* order. Thus where a detachment of volunteer soldiers, who, under and by virtue of acts of Congress specially authorizing the enlistment of volunteers for the purpose of the suppression of the rebellion, and with the full understanding on their part, and that of the officers by whom they were mustered into the service, that they were to be employed solely for this purpose, entered into enlistments expressed in terms to be *for the war*, and after doing faithful service during the war, and just before the legal end of the war, but when it was practically terminated, and when the volunteer organizations were being mustered out as no longer required for the prosecution of the war, were ordered to march to the plains and to a region far distant from the theater of the late war and engage in fighting Indians, wholly unconnected

[1] The soldier was executed July 27, 1907.

[2] Compare the definition and description of mutiny or revolt at maritime law, in the United States *v.* Smith, 1 Mason, 147; United States *v.* Haines, 5 id., 272, 276; United States *v.* Kelly, 4 Wash., 528; United States *v.* Thompson, 1 Sumner, 168, 171; United States *v.* Borden, 1 Sprague, 374, 376.

[3] Samuel, 254, 257; G. O. 77, War Dept., 1837; do. 10, Dept. of the Missouri, 1863.

[4] See G. O. 7, War Dept., 1848; do. 115, Dept. of Washington, 1865; G. C. M. O. 73, Dept. of the Missouri, 1873. And compare United States *v.* Smith, 1 Mason, 147; United States *v.* Kelly, 4 Wash., 528; United States *v.* Thompson, 1 Sumner, 168, 171.

as allies or otherwise with the recent enemy, and thereupon refused, together, to comply with such orders, *held* that they were not chargeable with mutiny. While by the strict letter of their contracts they were subject to be employed upon any military service up to the last day of their terms of enlistment, the public acts and history of the time made it perfectly clear that this enlistment was entered into for the particular purpose and in contemplation of the particular service above indicated, and to treat the parties as bound to another and distinct service, and liable to capital punishment if they refused to perform it, was technical, unjust, and in substance illegal. *R. 42, 524, Mar., 1880.*

XXIV A. See footnote.[1]

XXV A. Article 25 confers no jurisdiction or power to punish on courts-martial, but merely authorizes the taking of certain measures of *prevention and restraint* by commanding officers; i. e., measures preventive of serious disorders such as are indicated in the two following articles relating to duels. *R. 28, 650, June, 1869.*

XXVI A. To establish that a challenge was sent, there must appear to have been communicated by one party to the other a deliberate invitation in terms or in substance to engage in a personal combat with deadly weapons, with a view of obtaining satisfaction for wounded honor.[2] The expression merely of a willingness to fight, or the use simply of language of hostility or defiance, will not amount to a challenge. On the other hand, though the language employed be couched in ambiguous terms, with a view to the evasion of the legal consequences, yet if the intention to invite to a duel is reasonably to be implied—and, ordinarily, notwithstanding the stilted and obscure verbiage employed this intent is quite transparent—a challenge will be deemed to have been given. And the intention of the message where doubtful upon its face, may be illustrated in evidence by proof of the circumstances under which it was sent, and especially of the previous relations of the parties, the contents of other communications between them on the same subject, etc.[3] And technical words

[1] It is a principle of the common law that any bystander may and should arrest an affrayer. 1 Hawkins, P. C., c. 63, s. 11; Timothy *v.* Simpson, 1 C. M. & R., 762, 765; Phillips *v.* Trull, 11 Johns, 486,487. And that an officer or soldier, by entering the military service, does not cease to be a citizen, and as a citizen is authorized and bound to put a stop to a breach of the peace committed in his presence, has been specifically held by the authorities. Burdette *v.* Abbott, 4 Taunt., 449; Bowyer, Com. on Const. L. of Eng., 449; Simmons secs. 1096–1100. This article is thus an application of an established common law doctrine to the relations of the military service. See its application illustrated in the following General Orders: G. O. 4, War Dept., 1843; do. 63, Dept. of the Tennessee, 1863; do. 104, Dept. of the Missouri, 1863; do. 52, Dept. of the South, 1871; do. 92, id., 1872.

[2] Compare the definition in 2 Wharton, Cr. L. secs. 2674–2679.

[3] On the general subject of challenges, and the question what constitutes a challenge, see the principal cases of the sending of challenges in our service, as published in G. O. 64, A. G. O., 1827; do, 39, 41, *id.*, 1835; do. 2, War Dept., 1858; do. 330, *id.*, 1863; do. 11, Army of the Potomac, 1861; do. 46, Dept. of the Gulf, 1863; do. 223, Dept. of the Missouri, 1864; do. 130, *id.*, 1872; do, 33, Dept. & Army of the Tennessee, 1864. And compare Commonwealth *v.* Levy, 2 Wheeler, Cr. C. 245; do. *v.* Tibbs, 1 Dana, 524; do. *v.* Hart, 6 J. J. Marsh, 119; State *v.* Taylor, 1 S. C., 108; do. *v.* Strickland, 2 Nott & McCord, 181; Ivey *v.* State, 12 Ala., 277; Aulger *v.* People, 34 Ills., 486; 2 Bishop, Cr. L., sec. 314; Samuel, 384–387.

in an alleged challenge may be explained by a reference to the so-called dueling code.[1] *R. 39, 247, Oct., 1877.*

XXIX A. The twenty-ninth article of war is expressly limited in its terms to wrongs alleged to have been committed by regimental commanders, and does not apply to other commanding officers. *R. 55, 365, Mar. 22, 1888; C. 18317, July 19, 1905; 18387, Aug. 4, 1905; 18415, Aug. 11, 1905; 23840, Sept. 10, 1908; 24632, Apr. 21, 1909.*

XXIX B. *Held* that when, in the course of his duty, a regimental commander reports facts on an officer's efficiency report, the officer is not wronged in the sense of the twenty-ninth article of war, unless it is clearly shown that the report by the regimental commander was malicious and was not dictated by a true sense of duty. *C. 23840, Sept. 16 and 26, 1908, and Oct. 6, 1909.*

XXX A. This article is not inconsistent with article 83, which prohibits regimental courts from trying commissioned officers. It does not contemplate or provide for a *trial* of an officer as an *accused*, but simply an investigation and adjustment of some matter in dispute—as, for example, a question of accountability for public property, of right to pay, or to an allowance, of relief from a stoppage, etc. The regimental court does not really act as a court but as a board, and the "appeal" authorized is practically from one board to another.[2] But though the regimental court has no power to find "guilty" or "not guilty," or to sentence, it should come to some definite opinion or conclusion—one sufficiently specific to allow of its being intelligently reviewed by the general court if desired. *R. 23, 631, July, 1867; 28, 113, Aug., 1868; 29, 227, Aug., 1869; 30, 81, Feb., 1870; 32, 588, May, 1872; C. 25975, Dec. 27, 1909; 24632, Mar. 16, 1909.*

XXX B. The proceeding under this article, not being a *trial*, is not affected by the limitation of the one hundred and third article. Due diligence, however, should be exercised in presenting the complaint, and a delay in a certain case to do so for three years (not satisfactorily explained), *held* unreasonable and properly treated by the court as seriously prejudicing the complaint. *R. 31, 452, June, 1871.*

XXX C. The authority to summon a regimental court under this article is vested in terms in the regimental commander. A department or other superior commander can not properly exercise such authority, nor will his order add to the validity or effect of the proceeding. *R. 29, 227, Aug., 1869.*

XXX D. There are two manifest and unqualified limitations to the province of the regimental court under this article, viz: (1) It can not usurp the place of a court of inquiry; (2) It can take no cognizance of matters which it would be beyond the power of the regimental commander to redress. When the matter is beyond the reach of this commander, it is beyond the jurisdiction of this court. If it involve a question of irregular details, excessive work or duty,

---

[1] State *v.* Gibbons, 1 South., 51. It may be noted that our Articles of War, unlike the British, fail to make punishable, as a specific military offence, *the engaging in a duel.* Such an act, therefore, would, as such, be in general chargeable only under Art. 62.

[2] See Macomb, secs. 193, 194; G. O. 13, War Dept., 1843; 1 Op. Atty. Gen., 167; McNaughton's Annotations of the Mutiny Act, p. 86; O'Brien, pp. 123–129.

wrongful stoppages of pay, or the like, a regimental court under this article may be resorted to for the correction of the wrong. Otherwise when the case is one of a wrong such as can be righted only by the *punishment* of the officer.[1] *P. 43, 37, 479, Sept. and Nov., 1890; 47, 214, May, 1891; C. 855, Jan., 1895.*

XXX E. The right to complain which is vested in enlisted men in the operation of the thirty-eighth article of war is a right conferred by statute, and its exercise can not be prejudiced by requirements of regulations. *C. 24632, Mar. 15, 1909.*

XXXII A. An unauthorized absence from the quarters only, as from 11 p. m. inspection, *held* not properly chargeable under the thirty-second article. This article contemplates an absence from the soldier's "troop, battery, company, or detachment"—an absence from the post or command. *P. 47, 133, May, 1891; 49, 100, 171, Sept., 1891.*

Violations of the thirty-third article of war only should not be charged as absence without leave under the thirty-second article. *C. 2838, Dec., 1896; 18508, Sept. 6, 1905.*

XXXII B. A soldier who, while absent without leave, fails to repair to the place of parade, etc., may be charged with an offense under both the thirty-second and thirty-third articles of war. *C. 18508, Sept. 6, 1905; 3694, June 11, 1910.*

---

[1] The "regimental court-martial," under the thirtieth article of war, can not be used as a substitute for a general court-martial or court of inquiry, for it can not try an officer nor make an investigation for the purpose of determining whether he shall be brought to trial. When, if the soldier's complaint should be sustained, the only redress would be a reprimand to the officer, the matter would not be within the jurisdiction of this court. It can only investigate such matters as are susceptible of redress by the doing of justice to the complainant; that is, when in some way he can be set right by putting a stop to the wrongful condition which the officer has caused to exist. Erroneous stoppages of pay, irregularity of detail, the apparent requirement of more labor than from other soldiers, and the like, might in this way be investigated and the wrongful condition put an end to. The court will in such cases record the evidence and its conclusions of fact, and recommend the action to be taken. The members of the court (and the judge advocate) will be sworn faithfully to perform their duties as members (and judge advocate) of the court, and the proceedings will be recorded, as nearly as practicable, in the same manner as the proceedings of ordinary courts-martial. Manual for Courts-Martial (1908), page 108, note.

An early instance of an appeal under this article is published in Orders No. 5, A. G. O., January 20, 1827, as follows:

" I: Under the 35th [now 30th] Article of War, the commanding officer at Fortress Monroe, on the 17th of November, 1826, assembled a regimental court-martial to examine into a complaint made by Musician R——— B——— against Lieutenant M———, of the 2d Artillery, and to do justice to the complainant." The court pronounced the following opinion:

"The court having heard and deliberately weighed the evidence in the case before them, and also Lieutenant M———'s statement, are of the opinion that the accusation is *not fully sustained.* * * * In expressing this opinion the court do not find the occasion warranted the language made use of by Lieutenant M——— to the accuser, and the band in general."

Considering himself aggrieved by this "opinion," Lieutenant M——— "appealed to a general court-martial."

The court of which Lieutenant Colonel E——— was president, having been instructed to take cognizance of the case, made the following "decision:"

"The court having reexamined all the witnesses who appeared before the regimental court-martial, and having examined such other additional witnesses as were produced by the parties, * * * *confirm* the opinion expressed by the regimental court-martial with the exception of the closing words, to wit, 'and the band in general.'"

This decision was "confirmed" by the Major General Commanding the Army.

XXXII C. Where a soldier absents himself without leave for a definite period, with the apparent purpose of evading an announced six days' practice march, *held* that he may be charged with a violation of article 32, and, in addition, with a violation of the sixty-second article of war for his attempt to evade the practice march. *C. 3694, Apr. 24, 1908.*

XXXVIII A. It is immaterial whether the drunkenness be voluntarily induced by spirituous liquor or by opium or other intoxicating drug; in either case the offense may be equally complete.[1] *R. 38, 409, Jan., 1877.*

XXXVIII B 1. A post commander, while present and exercising command as such, is deemed to be at all times on duty in the sense of this article, and thus liable to a charge under the same if found drunk at post.[2] *R. 26, 486, Mar., 1868; 38, 306, Sept., 1876; C. 10600, June 1, 1901.*

XXXVIII B 2. 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. *R. 37, 116, Nov., 1875.*

XXXVIII B 3. An officer reporting in person drunk, upon his arrival at a post, to the commander of which he had been ordered to report, *held* chargeable under this article. And so *held* of an officer reporting, when drunk, to the post commander for orders, as officer of the day, after having been duly detailed as such.[3] *R. 37, 152, Nov., 1875.*

XXXVIII B 3 a. When an officer or soldier is found drunk at the time when he is required to enter upon a duty, *held* that he is not "drunk on duty" unless he shall be permitted to enter the duty. *C. 15376, Apr. 23, 1910.*

XXXVIII C 1. *Held* that a soldier found drunk when on duty was properly convicted under this article, though his drunkenness actually commenced before he went on the duty; his condition not being perceived till some time after he had entered upon the same. While it is in itself an offense knowingly to allow a soldier to go on duty when under the influence of intoxicating liquor, yet if a soldier is placed on duty while partially under this influence but without the fact being detected, and his drunkenness continues and is discovered while he remains upon the duty, he is strictly amenable under this article, which prescribes not that the party shall *become*

---

[1] Simmons, sec. 157. And see Hough (Precedents), 208; James's Precedents, 60.

[2] That the article is not limited in its application to mere duties of detail, but embraces all descriptions and occasions of duty, see the interpretation of the same as declared in G. O. 7, War Dept., 1856, and affirmed in G. O. 5, id., 1857. The case in the latter order, indeed, was a case of drunkenness while on duty as a post commander. See another case of the same character in G. C. M. O. 21, Dept. of the Missouri, 1870, and the remarks of Maj. Gen. Schofield thereon, and compare G. C. M. O. 9, War Dept., 1875.

[3] See G. O. 104, Headquarters of the Army, 1877.

drunk, but that he shall be *"found drunk"* on duty.[1] *R. 31, 324, Apr., 1871; C. 15376, Oct. 13, 1903; 25940, Jan. 15, 1910.*

XXXIX A. *Held* that a sentinel is on post within the meaning of the thirty-ninth article of war when he is walking a duly designated sentinel's post, as is ordinarily the case in garrison, but that he is also on post 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. *C. 20325, Sept. 7, 1906.*

XL A. Any unauthorized absence from the place of a guard by a member of the guard may properly be tried under the fortieth article of war. *C. 15991, Mar. 2, 1904; 21530, May 4, 1907.*

XLII A. Misbehavior before the enemy may be exhibited in the form of cowardice, or it may consist of a willful violation of orders, gross negligence or inefficiency, an act of treason or treachery, etc.[2] It need not be committed in the actual sight of the enemy, but the enemy must be in the neighborhood, and the act of offense have relation to some movement or service directed against the enemy, or growing out of a movement or operation on his part. It may be committed in an Indian war equally as in a foreign or civil war.[3] *R. 6, 79, Apr., 1864; 11, 274, Dec., 1864; 42, 546, Mar. 1880.*

XLII B. The term "his arms or ammunition" does not refer to arms, etc., which are the personal property of a soldier, but means such as have been furnished to him by the proper officer for use in the service.[4] The term is to be construed in connection with the further similar expression, "his post or colors." *R. 6, 79, Apr., 1864.*

XLV A. In view of the general term of description in this and the succeeding article—"Whosoever," it was *held,* during the war of the rebellion, by the Judge Advocate General and by the Secretary of War,[5] and has been held later by the Attorney General,[6] that civilians, equally with military persons, were amenable to trial and punishment by court-martial under either article.[7] *R. 2, 498, June, 1863; 5, 291, Nov., 1863; 11, 215, 454, Dec., 1864,* and *Feb., 1865.*

---

[1] See cases in G. O. 11, Dept. of Louisiana, 1869; G. C. M. O., 113, Dept. of the Missouri, 1873.

[2] The phases which this offense may assume are well illustrated in cases published in the following General Orders: G. O. 5, War Dept., 1857; do. 183 id., 1862; do. 18, 134, 146, 189, 204, 229, 282, 317, id., 1863; do. 27, 64, id., 1864; G. C. M. O. 90, 114, 272, 279, id., 1864; do. 53, 91, 107, 124, 126, 134, 191, 421, id., 1865.

[3] See case in G. O. 5, War Dept., 1857, in which a soldier was sentenced to be hung upon conviction of misbehavior before the enemy on the occasion of a fight with Indians.

[4] See Samuel, 592; Hough (Practice), 336.

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

[6] 13 Op. Atty. Gen., 470, 472.

[7] Admitting this construction to be warranted so far as relates to acts committed on the theater of war or within a district under martial law, it is to be noted that it is the effect of the leading adjudged cases to preclude the exercise of the military jurisdiction over this class of offenses, when committed by civilians in places not under military government or martial law. (See, especially, *Ex parte* Milligan, 4 Wallace, 2, 121–123; Jones *v.* Seward, 40 Barb., 563; also other cases cited in note.)

But the sounder construction is believed to be that, as the Articles of War are a code enacted for the government of the military establishment, they relate only to persons belonging to that establishment, unless a different intent should be expressed or other-

XLV B. During the War of the Rebellion all inhabitants of insurrectionary States were *prima facie* enemies in the sense of this and the succeeding article.[1] *R. 14, 266, Mar., 1865.* A citizen of an insurgent State who entered the United States military service became of course no longer an enemy. So *held* of a lieutenant of the First East Tennessee Cavalry. *R. 29, 206, Aug. 1869.*

XLV C. It is no less a *relieving* an enemy under this article that the money, etc., furnished is *exchanged* for some commodity, as cotton, valuable to the other party. *R. 12, 385, Mar., 1865; 14, 266, Mar., 1865; 16, 446, Aug., 1865.*

XLV C 1. The act of "relieving the enemy" contemplated by this article is distinguished from that of trading with the enemy in violation of the laws of war; the former being restricted to certain particular forms of relief, while the latter includes every kind of commercial intercourse not expressly authorized by the Government. *R. 14, 266, Mar., 1865.* (See War.)

XLVI A. *Held* that the offense of *holding correspondence* with the enemy was completed by writing and putting in progress a letter to an inhabitant of an insurrectionary State during the War of the Rebellion; it not being deemed essential to this offense that the letter should reach its destination.[2] *R. 4, 370; 5, 274 and 291, Nov., 1863; 10, 567, Nov., 1864.*

XLVI B. It is essential, however, to the offense of *giving intelligence* to the enemy that material information should actually be communicated to him; the communication may be verbal, in writing, or by signals. *R. 14, 273, Mar., 1865.*

XLVIII A. *Held* that when a deserter is returned to duty without trial there is an implied admission on his part of the desertion. This admission establishes the desertion and entails the requirement in the forty-eighth article of war that he shall make good the time lost in desertion.[3] *R. 53, 276, Apr., 1887, P. 26, 487, Sept., 1888; C. 16306, Apr. 11, 1908; 16814, Sept. 3, 1904 and Nov. 13, 1906; 20690, Nov. 28, 1906; 21117, Feb. 15, 1907.*

---

wise made manifest. No such intent is so expressed or made manifest. Persons not belonging to the military establishment may be proceeded against for the acts mentioned in the article, but it is by virtue of the power of another jurisdiction, namely, martial law; and martial law does not owe its existence to legislation but to necessity. The scope of these articles under the legislation of 1776, apparently extending their application to civilians, seems to have become modified on the adoption of the Constitution.

Possibly the sixty-third article of war should be construed as making "retainers to the camp," etc., part of the military forces for the time being. But see the case of B. G. Harris, M. C., tried by court-martial in 1865. (H. Ex. Doc. 14, 39th Cong., 1st sess.)

[1] See the opinion of the United States Supreme Court (frequently since reiterated, in substance), as given by Grier, J., in the "Prize Cases," 2 Black, 635, 666 (1862); and by Chase, C. J., in the cases of Mrs. Alexander's Cotton, and The Venice, 2 Wallace, 258, 274, 418 (1864). In the latter case the Chief Justice observes: "The rule which declares that war makes all the citizens or subjects of one belligerent enemies of the Government and of all the citizens or subjects of the other, applies equally to civil and to international wars." That an insurrectionary State was no less "enemy's country," though in the military occupation of the United States, with a military governor appointed by the President. (See Opinion by Field, J., in Coleman *v.* Tennessee, 7 Otto, 509, 516, 517.)

[2] O'Brien, 147; Hensey's Case, 1 Burrow, 642; Stone's Case, 6 Term, 527; Samuel, 580.

[3] 26 Op. Atty. Gen., 239.

XLVIII B. The United States may *waive* the liability imposed by the first clause of the article. It is in fact waived where the deserter, without being required to perform the service, is *discharged* by one of the officials authorized by article 4 to discharge soldiers. So it is waived where the soldier is adjudged to be dishonorably discharged by sentence of court-martial, and this punishment is duly approved and thereupon executed. *R. 29, 507, Dec., 1869; 30, 506, July, 1870; 37, 416, Mar., 1876.* Nor does a deserter who has been duly discharged from the service remain amenable to trial under the last clause of this article. *R. 31, 48, Nov., 1870.*

XLVIII C 1. *Held* that following a conviction by court-martial for desertion, where the sentence does not include discharge, the requirement to make good time lost becomes operative by its own force. *C. 16814, Nov. 13, and Dec. 4, 1906.*

XLVIII C 2. The liability to make good to the United States the time lost by desertion, enjoined by the first clause of this article, is independent of any *punishment* which may be imposed by a court-martial, on conviction of the offense. It need not, therefore, be adjudged or mentioned in terms in a *sentence.*[1] *R. 50, 413, June, 1886.* If the sentence is *disapproved,* the legal status of the accused is the same as if he had been acquitted, and the obligation of additional service is not incurred. *R. 26, 568, June, 1868.*

XLVIII C 3. The enforcement of the liability is postponed till after the execution of the punishment (if any) imposed upon the deserter by his sentence. A deserter may still be required to make good the time included in his unauthorized absence from the service, although his term of enlistment has expired. *R. 32, 40, Oct., 1871; C. 18492, Aug. 31, 1905.*

XLVIII C 4. As the disapproval of a conviction operates as an acquittal, *held* that a soldier whose conviction of desertion has been disapproved by the reviewing authority can not be required to make good time lost in desertion under the forty-eighth article of war.[2] *C. 16814, Apr. 11, 1907; 18438, June 26, 1908, and Aug. 3, 1910.*

XLVIII D. The weight of authorities is in support of the view that the provision in the forty-eighth article of war to the effect that a deserter must make good time lost in desertion is penal in character. *Held* that if the soldier is acquitted of desertion the liability to make good the time lost is wiped out. *C. 16814, Dec. 4, 1906.*

XLVIII E. *Held* that the requirement in the forty-eighth article of war that a deserter shall be liable to serve such period as shall with the time he may have served previous to his desertion amount to the full time of his enlistment, requires *military service,* and excludes from the computation time spent while awaiting trial or serving sentence. The deserter, therefore, does not begin to serve the unexecuted portion of his enlistment until he has completed his sentence. *R. 30, 506, July 15, 1870; 31, 275, 374, Mar. 31, and May 10, 1871. 1F 93 F, Nov. 23, 1905; 16306, Apr. 10, 1898; 16423, June 4, 1904; 17937, May 4, 1905; 21037, Feb. 21, 1907; 21536, May 9, 1907.*

XLVIII F. *Held* that the liability to trial and punishment imposed by the second clause of the forty-eighth article of war is subject to

[1] See G. O. 21, Dept. of the Lakes, 1873; do. 94, Dept. of the Missouri, 1867; G. C. M. O. 74, Dept. of the East, 1873. The old ruling *contra* (see G. O. 26, 45, Hdqrs. of Army, 1843) may be regarded as abandoned in our law and practice.

[2] 26 Op. Atty. Gen., 239.

the limitation of prosecutions prescribed in the one hundred and third article of war. *R. 31, 384, May, 1871; C. 15257, Sept. 18, 1903; and May 3, 1910. Held* further that the liability to make good time lost in desertion continues even though the statute of limitation has taken effect or has been successfully pleaded in bar as to the desertion. *R. 37, 416, Mar., 1876; P. 48 and 69, Mar., 1890.*

L A. This article, in its first clause, does not create a specific offense, or a particular kind of desertion, or an offense distinct from the desertion made punishable in the forty-seventh article, but declares in effect that a soldier who abandons his regiment, etc., shall be deemed none the less a deserter, although he may forthwith reenlist in a new regiment. It does not render the act of reenlistment a desertion, but simply makes the reenlistment, under the circumstances indicated, *prima facie* evidence of a desertion from the previous enlistment from which the soldier has not been discharged, or, more accurately, evidence of an intent not to return to the same.[1] The object of the provision, as it originally appears in the British Code, apparently was to preclude the notion that might otherwise have been entertained that a soldier would be excused from repudiating or departing from his original contract of enlistment, provided he presently renewed his obligation in a different portion of the military force.[2] *R. 42, 642, May, 1880; P. 7, 298, Sept., 1885; 10, 4, May, 1886; 49, 442, Oct., 1891; C. 355, Sept., 1894; 902, Feb., 1895; 1571, July, 1895; 1624, Aug. 12, 1895; 2827, Dec. 31, 1899; 18801, Nov. 4, 1905; 21422, Apr. 23, 1907; 23644, Jan. 23, 1909; 24722, Apr. 5, 1909.*

LI A. A declaration made by one soldier to another of a willingness to desert with him in case he should decide to desert, *held* not properly an *advising* to desert, in the sense of this article. To constitute the offense of *advising to desert*, it is not essential that there should have been an actual desertion by the party advised. But otherwise as to the offense of *persuading to desert;* to complete this offense the persuasion should have induced the act.[3] *R. 39, 407, Jan., 1878; C. 23215, May 8, 1908.*

LII A. *Held* that a post commander has no authority, under the fifty-second article of war, to require soldiers to march to church and participate in divine worship as a part of a military formation. *C. 20968, Jan. 19, 1907.*

LII B. The fifty-second article of war contains the statement that it is "earnestly recommended to all officers and soldiers diligently to attend divine service." *Held* that an officer or soldier so engaged, and while on his way to such service, or while returning, is on duty within the meaning of the clause in the act of April 23, 1904 (33 Stat., 272), which provides "for medical care and treatment of officers and enlisted men of the Army on duty." *C. 17045, Oct. 25, 1904.*

LIV A. *Held* that it would not be sound construction to extend the specific measure of redress contained in the fifty-fourth article of war to other than the specified cases. Its strict construction therefore would limit the specific redress to acts of violence against

[1] See the similar view expressed in G. C. M. O. 129, Dept. of the Missouri, 1872; do. 77, id., 1874.

[2] See Samuel, 330, 331.

[3] Compare Hough (Practice), 172, and cases in G. O. 23, Dept. of the Missouri, 1862; G. C. M. O. 11, 152, Id., 1868.

a person, but the weight of American authority further extends it to acts of violence against property. *R. 7, 263, Feb., 1864; P. 37, 293, Dec., 1889; C. 5347, Nov., 1898; 8043, Apr. 17, 1900; 15180, Sept. 11, 1903; 20543, Oct. 19, 1906; 22357, Nov. 15, 1907.*

LIV B. This article is mandatory in its terms. The action required of the commanding officer is both harsh and summary, but it must be applied to all cases falling within its scope. In a case when a proper complaint was presented and the requirements of existing orders and regulations were complied with by the post commander, in his efforts to identify the offenders, but it was found to be impossible to ascertain their names, and as it appeared that substantially the entire enlisted membership of the command was present and participated in the damage, the stoppage was made *pro rata* against them; *held* to be action within the scope of the article. *C. 13106, Aug. 22, 1902.*

LIV C. Where complaint was duly made, under the fifty-fourth article of war, of injury done by persons of a command, but the active perpetrators could not upon investigation be found, it appearing, however, that the entire command was present and implicated, *held* that stoppages might legally be made against all individuals present. *R. 8, 671, July, 1864; 12, 673, Sept., 1865; 50, 9, Jan., 1886; C. 1861, Nov., 1895; 6839, Aug., 1899; 13106, Aug. 9, 1902; 24491, Feb. 10, 1909; 26836, June 4, 1910.*

LIV C 1. Where, in a proper case, an entire command was assessed in the operation of the article; *held,* that from such assessment there should be excepted those men whose duties were such as to preclude the belief that they were present at the commission of the act for which damages are to be assessed. Members of the guard, the sick in hospital, men in confinement or absent from the post on duty, etc., would therefore be withdrawn from the operation of the order of assessment. *C. 19196, Feb. 13, 1906.*

LIV D 1. It does not affect the question of reparation under the article that the offender or offenders may be criminally liable for the injury committed, or may have been punished therefor by the civil authorities. *R. 34, 335, June, 1873; C. 22357, Nov. 15, 1907.*

LIV D 2. The stoppage contemplated is quite distinct from a *punishment* by *fine,* and it can not affect the question of the summary reparation authorized by the article that the offender or offenders may have already been tried for the offense and sentenced to forfeiture of pay. In such a case, indeed, the forfeiture, as to its execution, would properly take precedence of the stoppage. On the other hand, where the stoppage is first duly ordered under the article, it has precedence over a forfeiture subsequently adjudged for the offense. *R. 21, 447, June, 1866; C. 8043, Apr. 17, 1900; 21157, Mar. 2, 1907.*

LIV E 1. *Held* that, as an agency for assessing the amount of the damage, a court martial could not properly be substituted for the board, directed by General Order 35, Headquarters of Army, 1868, to be convened for such purpose. *R. 37, 52, Oct., 1875; C. 21157, Mar. 2, 1907.*

LIV F 1. The procedure under this article, and pursuant to General Order 35 of 1868, is as follows: The citizen aggrieved tenders a "complaint" under oath, charging the injury against a particular soldier or soldiers, described by name (if known), regiment, etc., and

accompanied by evidence of the injury, and of the instrumentality of the person or persons accused. If such evidence be satisfactory, the commanding officer has the damages assessed by a board, and makes order for such stoppage of pay as will be sufficient for the "reparation" enjoined by the article. The commander must have a proper case presented to him; he can not legally proceed *sua sponte*. *R. 45, 14, Aug., 1881; C. 1861, Nov. 22, 1895; 4768, Aug. 16, 1898; 5347, Nov. 21, 1898; 5586, Jan. 9, 1899; 6839, Aug. 4, 1899; 9766, Jan. 28, 1901; 13106, Aug. 22, 1902; 14971, July 23, Aug. 28, 1903, Jan. 29, 1904, and July 22, 1907; 19196, Feb. 13, 1902; 21157, Mar. 2, 1907; 23148, May 20, 1908.*

LIV F 2. Where the requirements of this article were violated by enlisted men of a regiment of Organized Militia taking part in a joint encampment of Regular and Militia forces, *suggested* that the case be referred to the regimental commander with a view to its submission to the governor of the State for such redress as is authorized by the law of the State to which the militia forces belonged. *C. 14971, July 23, 1903.*

LIV G. *Held* that the fifty-fourth article of war is enforceable in Cuba and in the Philippine Islands (at date of opinion). *C. 9677, Jan. 28, 1901.*

LIV H 1. *Held* that the remedial provision of the fifty-fourth article of war can not be enforced in favor of military persons (*R. 26, 352, Jan., 1868; 27, 453, Jan., 1869; 32, 152, Dec., 1891; C. 8043, Apr. 17, 1900; 23148, Apr. 27 and May 20, 1908*), or in favor of the United States. *R. 26, 37, Sept., 1867; C. 20273, Aug. 21, 1906; 21148, Feb. 28, 1907.*

LIV H 2. *Held* that the remedial provision of the fifty-fourth article of war can not be invoked to indemnify persons for property stolen or embezzled. *R. 35, 139, Jan., 1874; P. 37, 293, Dec., 1889; C. 8043, Apr. 17, 1900; 15180, Sept. 11, 1903; 22357, Nov. 15, 1907.*

LVIII A. The jurisdiction conferred by this article upon military courts has been held by the highest judicial authority to be not exclusive, but concurrent merely with that of the civil tribunals.[1] The word "shall," in the term "shall be punishable," is construed as equivalent to *may*.[2] *C. 4916, Sept., 1898.*

LVIII B. Where a sentence, adjudged by a court convened by the authority of this article, imposed a punishment of less severity than that provided for the same offense by the law of the State in which the offense was committed (as imprisonment where the law of the State required the death penalty); *held* that such a sentence was unauthorized and inoperative. *R. 21, 6; Nov., 1865; 24, 42, Dec., 1866; C. 12646, May 19, 1902.* But though the punishment must not be "less," it may legally be of greater severity than that provided by the local statute. *R. 2, 564, June, 1863; 21, 77, Nov., 1865. Held* that the court, in imposing punishment, should be governed by the local law (so far as required by the article), although the offense was

[1] Coleman *v.* Tennessee, 7 Otto, 509, 513. And see People *v.* Gardiner, 6 Parker, 143; G. O. 29, Dept. of the Northwest, 1864; do. 32, Dept. of Louisiana, 1866.

The United States District Court for the District of Hawaii has jurisdiction of an assault committed upon a military reservation in the Territory of Hawaii. (See U. S. *v.* Kauchi Matohara, U. S. Dist. Ct. for the Territory of Hawaii, Oct., 1911, term, cases 773–784.)

[2] People *v.* Gardiner, *supra.*

committed in a State whose ordinary relations to the General Government had been suspended by a state of war or insurrection.[1] *R. 7, 205, Feb., 1864; C. 7304, Nov. and Dec., 1899; 10584, Dec. 18, 1901; 11322, Oct. 3, 1901; 11658, Nov. 26, 1901; 11757, Dec. 14, 1901; 12177, Mar. 11, 1902; 12219, Mar. 17, 1904; 12234, Apr. 28, 1902; 12286, Mar. 24, 1902; 12456, Apr. 19, 1902; 12646, May 20, 1902; 12689, May 14, 1902.*

LVIII C. The local laws of a foreign country in the military occupation of the United States in time of war are not "laws of any State, Territory, or District of the United States" within the meaning of this article. At such a time and in such a place the punishment to be adjudged for the offenses named in the article would be discretionary with the court-martial. *C. 5267, Nov. 1898; 5848 Feb., 1899.*

LVIII D. *Held* that the officers and enlisted men of the Army serving in the Philippine Islands during the period of military occupation were not amendable to the jurisdiction of civil courts for any of the offenses enumerated in the fifty-eighth article of war.[2] *C. 13770, Feb. 18, 1903.*

LIX A. This article is a recognition of the general principle of the subordination of the military to the civil power,[3] and its main purpose evidently is to facilitate, in cases of offenders against the local civil statutes, who happen to be connected with the Army, the execution of those statutes, where, as citizens, such persons remain legally amenable to arrest and trial thereunder. Protection of military persons from civil arrest, except in certain cases, is not the object of this article. *P. 54, 33, June, 1892; 63, 406, Feb., 1894; C. 638. Nov. 16, 1894; 5635, Aug. 29, and Sept. 26, 1910; 17640, Mar. 11, 1905; 17824, Apr. 13, 1905, and Apr. 12, 1907; 18339, July 27, 1906; 25219, July 20, 1910.* Surrenders under this article are exempted from its operation in time of war. *Held* that the exemption clause did not forbid such surrender, in a proper case, in time of war. *C. 11916, Jan. 16, 1902.*

LIX B. The commanding officer, before surrending the party, is entitled to require that the "application" shall be sufficiently specific to identify the accused and to show that he is charged with a particular crime or offense which is within the class described in the article. It has been further held that without a compliance with these requirements the commanding officer can not properly surrender nor the civil authorities arrest, within a military command, an accused officer or soldier. Where it is doubtful whether the application is made in good faith and in the interests of law and justice, the commander may demand that the application be especially explicit and be sworn to; and in general the preferable and indeed only satisfactory course will be to require the production, if practicable, of a due and formal warrant or writ for the arrest of the party.[4] *R. 21, 567, July, 1866; 23, 490, May, 1867; 35, 357, May, 1874; 53, 442, May, 1887; C. 10107, July 25, 1901; 18518, Nov. 1, 1907; 24097, Nov. 16, 1908; 25219, July 1, 1909.* The application required by the article should

[1] That the Southern States during the civil war were "at no time out of the pale of the Union," see White *v.* Hart, 13 Wallace, 646.

[2] See 24 Op. Atty. Gen. 570.

[3] See the declaration of this principle in Dow *v.* Johnson, 10 Otto, 169.

[4] 2 Op. Atty. Gen., 10; 6 id., 413, 421; *Ex parte* McRoberts, 16 Iowa, 600. 603–605.

be made in a case where the crime was committed by the party *before* he entered the military service equally as where it was committed by him while in the service.[1] In the former case a more exact identification may perhaps reasonably be required. *R. 12, 145, Dec. 1864; C. 17640, Mar. 8, 1905.*

LIX C. The provisions of the article are applicable only when the officer or soldier is accused of a crime or offense "which is punishable by the laws of the land," i. e., by the laws of the particular State or Territory, or of the United States, or by the common law as recognized in the State or Territory. *R. 35, 357, May, 1874.* The by-laws or ordinances of a town or city are a part of the "laws of the land" within the meaning of this article.[2] *C. 638, Nov., 1894.*

LIX D. It is a principle of comity, as between the civil and military tribunals, that the jurisdiction which first attaches should carry the

---

[1] See G. O. 29, Dept. of the Northwest, 1864, where it is remarked that there is an *especial* obligation to surrender the soldier, where the crime was committed by him before entering the military service.

[2] As to the meaning of the term "laws of the land," especially as contrasted with municipal ordinances, see Vanzant *v.* Waddell, 2 Yerger, 270; State Bk. *v.* Cooper, id., 605; Horn *v.* People, 26 Mich., 221. But the question as applicable to the fifty-ninth article was specifically decided by Attorney General Olney under date of Nov. 26, 1894 (21 Op., 88), as follows:

"1. Does the expression 'laws of the land' as used in the fifty-ninth article of war include city ordinances and by-laws?

"2. May a soldier be arrested, tried, and punished by a civil authority for the violation of a city ordinance?

"3. If he escapes to a military reservation, can a demand be made by the civil on the military authorities for his surrender, and if so, will it be the duty of the commanding officer to surrender him?

"If the first question is answered affirmatively, I see no escape from the conclusions that a soldier may be arrested, tried, and punished by the proper civil authorities for the violation of a city ordinance, and that, if he escape to a military reservation, his surrender may be demanded by the proper civil authorities and should be made by the military officer in command.

"The real inquiry then being whether a municipal ordinance is comprehended by the phrase 'laws of the land' as used in the fifty-ninth article of war, I have no hesitation in saying that in my judgment it is so comprehended.

"The general reasoning on the subject by the learned Acting Judge Advocate General, as contained in his elaborate memorandum of January 25, 1875, can not, I think, be successfully controverted and need not be here repeated. But it may not be amiss to make special reference to a class of adjudications which clearly define the nature of municipal ordinances and apparently render the result reached by Mr. Lieber inevitable. They are illustrated by a recent case in Vermont in which the facts were that a village charter granted to the village certain powers in the matter of licensing eating houses which were repugnant to a general statute already in force. The village made a by-law or ordinance pursuant to its charter and the question arose which prevailed—the ordinance or the general law? Did the general law nullify the ordinance or did the ordinance nullify the general law *pro tanto* and as regards that particular village? The decision was that the ordinance, conforming as it did to the charter, repealed for that village the preexisting general law. It was held to do so because though in form an ordinance, yet being authorized by the village charter, it was in reality a special statute of the State of Vermont. The same principle is affirmed in numerous well-considered adjudications of the highest authority. But if valid municipal ordinances are in substance and effect special statutes of the State chartering the cities or towns making the ordinances, they are certainly to be regarded as among the 'laws of the land' unless that phrase is to be construed as covering the general legislation of the State only and is exclusive of its special legislation. But no distinction of that sort, it is believed, has ever been attempted or has any foundation in reason or precedent. The result is, as already stated, that the by-laws or ordinances of a town or city are to be taken as part of the 'laws of the land' within the meaning of that phrase as used in the fifty-ninth article of war." (Published in Circ. 15, A. G. O. 1894.)

case to a termination. For such jurisdiction to attach, the prisoner should be in custody and charges should have been served upon him with a view to a trial by court-martial. When these conditions have been fulfilled the military authorities may decline to surrender the offender until the claims of the United States shall have been satisfied.

Such retention of jurisdiction, however, is discretionary, and may be waived by the proper military authority, especially if the charge is a grave one, such as felonious homicide.[1] *C. 10048, Mar. 25, 1901; 11589, Nov. 13, 1901; 14042, Dec. 5, 1904; 17767, Mar. 18 and June 2, 1905; 19466, Oct. 13, 1906; 21964, June 18, 1907; 22264, May 20, 1908; 4644, July 20, 1908; 21694, Aug. 13, 1908; 23264, May 8 and 27 and Aug. 9, 1909, and Nov. 28, 1910; 25219, July 1, 1909; 26233, Feb. 18, 1910; 26237, May 12, 1910; 5635, Sept. 27, 1910.*

LIX E. An officer or soldier accused as indicated by the article, though he may be willing and may desire to surrender himself to the civil authorities, or to appear before the civil court, should not in general be permitted to do so, but should be required to await the formal application. *R. 31, 622, Sept., 1871.*

LIX F. The term "any of the United States," employed in this article, *held* properly to include any and all the political members of our governmental system, and to embrace an organized Territory equally with a State. *P. 63, 406, Feb., 1894.*

LIX G. The article is directory not jurisdictional. It does not limit the action to be taken by the military authorities to cases where the application is made *by* the injured party or *in his behalf*. It does not place a soldier who has committed a crime and been indicted therefor beyond the reach of the civil power if the person injured does not apply for his surrender. In a case—one of murder, for example—where there can be no personal application, the State properly takes the place of the individual. And so in all other cases where an indictment has been found, or a warrant of arrest has been issued, the *State* (using the term in its general sense) with which resides the jurisdiction and the power to prosecute, may make the demand, and upon its demand it is the duty of the commanding officer to surrender the party charged. *P. 54, 33, June, 1892.*

LIX G 1 a. *Held* that there is no provision of law for the transportation at the expense of the United States to the place where he is wanted by the civil authorities of a surrendered soldier under the fifty-ninth article of war (*C. 1872, Nov. 23, 1895; 7609, Jan. 25, 1900; 13354, Sept. 26, 1902; 13389, Oct. 6 and Nov. 11, 1902; 17824, Apr. 13, 1905; 18339, July 25, 1905; 18518, Sept. 8, 1905*), even though he is surrendered on a legal warrant for a crime committed before enlistment. *C. 1872, Nov. 23, 1895; 4780, Aug. 12, 1898; 16475, June 21, 1904; 17640, Mar. 10, 1905.*

LIX G 1 b. A case of surrender under the fifty-ninth article of war has some of the aspects of extradition to a foreign State. When a State asks for the surrender of a soldier, in the operation of the fifty-ninth article of war, it is a request made by a State on the Government of the United States for the surrender of an offender, and it would seem to be a reasonable condition in respect to such surrender that the State in whose behalf the request is made should charge itself with the burden of returning the surrendered soldier in the event of

[1] See G. O. 7, Dept. of the South, 1871.

an acquittal, or of any other disposal of the case than a conviction, upon which a sentence to imprisonment was based. *C. 25219, June 30, 1909; 17824, Apr. 13, 1905, and July 8, 1909; 26233, Feb. 18, 1910. Held* that no reimbursement can be made to the soldier for expense of returning to his station out of any appropriation under control of the Army. *P. 57, 277, Jan., 1893.*

LIX G 1 **b** (1). As enlisted men surrendered under this article are released by the civil authorities at a distance from their posts, without the means of returning thereto, and as the return journey is not one that is properly chargeable to the United States; *recommended*, that where the surrender of enlisted men is asked for, it be attempted to impose a condition that, if the soldier is acquitted, or the case is disposed of in any other way than by conviction, the soldier be returned to his post of duty at the cost of the authority to whom he was originally surrendered. *C. 25219, June 30, 1909.*

LIX H. The article contemplates only cases in which an "officer or soldier is accused," etc. So, *held* that it did not apply to a case of a civilian (Chinese) laundryman employed and residing at a military post, accused of a civil crime. The arrest in this case having been made without the knowledge of the commanding officer, *remarked*, that while it is desirable that arrests by the civil authorities of civilians residing upon military reservations should, in general, be made upon application or notice to the proper commanding officer, such a course is a matter of *comity* only and can not be required. *P. 42, 134, July, 1890.*

LIX I 1. This article does not apply to a time of war. *Held*, however, that it does not forbid the delivery of officers and soldiers accused of capital crime in time of war, but leaves the matter to the discretion of the proper authorities. *C. 4916, Sept. 6, 1898; 5613, Jan. 5, 1899; 13499, Oct. 27, 1902; 19855, Jan. 5, 1906. Held*, therefore, in a particular case where an officer of Volunteers was charged with forgery that on presentation of a proper warrant he could, by direction of the Secretary of War, be surrendered to the civil authorities. *C. 4644, July 23, 1898; 4831, Aug. 23, 1898; 5613, Jan. 5, 1899.*

LIX I 2. *Held* that an officer absent on leave or a soldier on furlough may be arrested in the same manner as any civilian, as they are not under the immediate control of the military authorities. *C. 5613, Jan. 5, 1899.*

LIX I 3. Perjury is not an offense against the person or property of a citizen within the meaning of the fifty-ninth article of war. *C. 26337, Mar. 18, 1910.*

LIX K. When a soldier after surrender under the fifty-ninth article of war is released by the civil authorities under bail and returned to duty, or when by escape from the civil authorities he has returned himself to the custody of the military authorities, *held* that the department commander should instruct the commanding officer of such soldier to cause him to appear for trial by the civil authorities at the proper time. *R. 21, 457, June 16, 1866.*

LIX L 1. Where a soldier doing guard duty shot and killed a soldier on the Fort Caswell Military Reservation, N. C., over which jurisdiction had been ceded to the United States, *held* that the commanding officer took proper action in declining to surrender the soldier to the civil authorities of the State, as jurisdiction is vested

in the Criminal Court of the United States for the Eastern District of North Carolina and in a legally constituted court-martial, and that if the proper United States court takes jurisdiction of the case as a matter of comity, the military jurisdiction should be waived. *C. 17735, Mar. 25, 1905.*

LIX L 2. Where a Philippine scout killed another scout under circumstances which, in the opinion of his department commander, warranted the belief that the homicide amounted to murder, and charges had been prepared as required by Army Regulations (970 of 1910), *held* that it was within the discretion of the department commander to turn him over to the civil authorities without bringing him to trial before a general court-martial, and that such action would not be in contravention of the requirements of the regulations. *C. 21694, July 9, 1908.*

LX A 1. The offense known as the duplicating of pay accounts, where it involves, as it generally does, a presenting or a causing to be presented of a false or fraudulent claim against the United States, is properly chargeable under this article. *R. 37, 356, Feb., 1876; 42, 569, Mar., 1880; C. 14619, Aug. 14, 1903; 16131, Apr. 5, 1904.*

LX A 2. Where an officer, by collusion with a contractor, who had contracted for the delivery of military supplies, received for a pecuniary consideration from the latter a less amount of supplies than the United States was entitled to under the contract, while at the same time giving him a voucher certifying on its face the delivery of the whole amount, *held* that such officer was chargeable with an offense of the class defined in the 8th paragraph of this article. *R. 35, 206, Feb., 1876.*

LX A 3. Where an officer of the Quartermaster Department used teams, tools, and other public property, in his possession as such officer, in erecting buildings, etc., for the benefit of an association, composed mainly of civilians, of which he was a member, *held* that he was properly chargeable with a misappropriation of property of the United States. *R. 10, 664, Dec., 1864.* And similarly *held* of a loaning by such an officer of public property (corn) to a contractor, for the purpose of enabling him to fill a contract made with the United States through another officer.[1] *R. 29, 26, June, 1869.* The fact that a practice exists in a post or other command of making a use (not authorized by regulation or order) of Government property for private purposes, or of loaning it in the prospect of a prompt return, can constitute no defense to a charge for such act as an offense under this article. Such practice, however, if sanctioned, though improperly, by superior authority, may be shown in evidence in mitigation of sentence. *R. 29, 189, Aug., 1869.*

LX A 3 a. Where a quartermaster used temporarily with his private carriage a pair of Government horses in his charge, *held* that he was not properly chargeable with embezzlement, but with the offense (now under this article) of knowingly applying to his own use and benefit property of the United States, furnished for the military service. *R. 4, 421, Dec., 1863.*

LX A 4. Section 5495, R. S., provides that the refusal of any person charged with the disbursement of public moneys promptly to transfer or disburse the funds in his hands "upon the legal requirement of an

[1] Compare case in G. C. M. O. 46, Hdqrs. of Army, 1869.

authorized officer, shall be deemed, upon the trial of any indictment against such person for embezzlement, as *prima facie* evidence of such embezzlement." Applying this rule to a military case, it is clear that, in the event of such a refusal by a disbursing officer of the Army, the burden of proof would be upon him to show that his proceeding was justified, and that it would not be for the prosecution to show what had become of the funds. So, where an acting commissary of subsistence, on being relieved, failed to turn over the public moneys in his hands to his successor, or to his post commander when ordered to do so, or to produce such moneys, exhibit vouchers for the same, or otherwise account for their use, when so required by his department commander; *held* that he was properly charged with and convicted of embezzlement (the embezzlement now prohibited by this article). *R. 22, 548, January, 1867.*

LX A 5. Where an officer, for the purpose of obtaining the allowance of a fraudulent claim against the United States, willfully induced another to make to the United States a lease of premises for public use, containing a false and fraudulent statement, *held* that he was chargeable with an offense of the class specified in the fourth paragraph of this article. *P. 42, 189, July, 1890.*

LX B 1. Where a soldier, in order to procure his discharge from the service and the payment thereupon of a considerable amount not in fact due him, forged the name of his commanding officer on a discharge paper and a "final statement" paper, and presented the same to a paymaster; *held* that he was chargeable with offenses defined in the second, fourth, and sixth paragraphs of this article. *R. 28, 668, June, 1869.*

LX B 2. *Held* that a soldier who falsifies the entry in a company clothing book commits an offense under the sixtieth article of war. *C. 17555, Feb. 16, 1905.*

LX C. The offense of stealing, indicated in the ninth paragraph of this article, consists in a larceny of "property of the United States furnished or intended for the military service." Except in time of war (see Fifty-eighth article), larceny of *other* property can be charged as a military offense only when cognizable under article 62, as prejudicing good order and military discipline. (See Sixty-second article.)

LX D. The *misappropriation* specified in the article need not be an appropriation for the personal profit of the accused. The words "to his own use or benefit," qualify only the term "applies." *R. 23, 77, June, 1866.*

LX E 1. *Held,* That under the concluding provision of this article, a soldier might be brought to trial for an offense of the class specified therein, while held imprisoned, after dishonorable discharge, under a sentence imposed for another offense, provided of course the two years' limitation of article 103 had not expired. *R. 31, 34, Nov., 1870, P. 1, 673, July, 1883; 2327, May 25, 1896; 7264, Nov. 10, 1899; 17901, Apr. 27, 1905; 25939, Dec. 16, 1909.*

LX E 2. In view of the words, "in the same manner," employed in the last paragraph of this article, considered in connection with the seventy-seventh article and section 1658, R. S., *held,* that a volunteer or militia officer or soldier could be tried after his discharge from the service for a breach of this article committed while in the service only by a court composed in the one case of other than regular officers and

in the other of militia officers. *R. 19, 670, July, 1866; 26, 166, Nov., 1867; C. 17901, Apr. 24, 1905; 25609, Nov. 13, 1909.*

LX E 3. As a question has been raised as to the constitutionality[1] of that portion of the sixtieth article of war which provides that officers and enlisted men may be tried for violation of that article after dismissal or discharge, *held*, that that provision of the article can not be considered unconstitutional until it shall have been so judicially declared. *C. 2327, May 27, 1896; 5835, Feb. 7, 1899; 7264, Nov. 10, 1899; 10740, June 26, 1901; 10751, Nov. 14, 1901; 14619, Aug. 16, 1903; C. 25939, Dec. 16, 1909.*

LX E 4. Two discharged soldiers were brought to trial under the last clause of article 60, and one was acquitted, and the other was convicted but his sentence was disapproved. They applied for pay for the period spent in confinement awaiting trial and final action. *Held* that there was no law authorizing their being paid for such period. *P. 63, 178, and 179, Jan., 1894.*

LX F. The application or operation of this article is in no manner affected by the enactment of March 3, 1875 (18 Stat., 479), constituting embezzlement of public property a felony and making it triable by a United States court, such act being a purely civil statute. *R. 46, 101, July, 1882.*

LXI A. To constitute an offense under this article, the conduct need not be "scandalous and infamous." These words, contained in the original article of 1775, were dropped in the form adopted in 1806. Nor is it *essential* that the act should compromise the *honor* of the officer.[2] It is only necessary that the conduct should be such as is at once disgraceful or disreputable and *manifestly unbefitting* both an officer of the Army and a gentleman.[3] An act, however, which is only slightly discreditable is not, in practice, made the subject of a charge under this article. The article, in making the punishment of dismissal imperative in all cases, evidently contemplates that the conduct, while unfitting the party for the society of men of a scrupulous sense of decency and honor, shall exhibit him as unworthy to hold a commission in the Army. *R. 2, 52, Mar., 1863; C. 17667, Mar. 18, 1900.*[4]

LXI A 1. To justify a charge under this article, it is not necessary that the act or conduct of the officer should be immediately connected with or should *directly* affect the military service. It is sufficient that it is morally wrong and of such a nature that, while dishonoring or disgracing him as a gentleman, it compromises his character and position as an officer of the Army. *R. 5, 148, Oct., 1863; 24, 555, May, 1867; 28, 649, June, 1869.*

LXI B 1. Knowingly making to a superior a false official report *held* chargeable under this article. *R. 1, 365, Oct., 1862; 27, 123,*

---

[1] See G. C. M. O. 20, Hdqrs. Phil. Div., Manila, Nov. 6, 1911, which publishes the record of a case, in which case it was pleaded that this part of the sixtieth article is unconstitutional, and that the court had no jurisdiction. The court held that it had jurisdiction, tried, convicted, and sentenced the accused.

[2] G. O. 25, Dept. of the Missouri, 1867.

[3] "An officer of the Army is bound by the law to be a gentleman." Atty. Gen. Cushing, 6 Ops. 413, 417. See definitions or partial definitions of the class of offenses contemplated by this article, in G. O. 45, Army of the Potomac, 1864; do. 29, Dept. of California, 1865; do. 7, Dept. of the Lakes, 1872; G. C. M. O. 69, Dept. of the East, 1870; do. 41, Hdqrs. of Army, 1879. See also G. O. 12, Dept. of the East, 1895.

[4] See Carrington *v.* U. S. (208 U. S., 1).

Aug., 1868. So of a deliberately false official certificate as to the truth or correctness of an official voucher, roll, return, etc. *R. 27, 290, Oct., 1868.* So of any deliberately false official statement, written or verbal, of a material character. *R. 27, 123, supra.* So, where an officer caused the sergeant of the guard to enter in the guard book a false official report that he (the officer) had duly visited the guard at certain hours as officer of the day (when he had in fact not done so), and thereupon himself signed such report and submitted it to his post commander; *held* that his conduct was chargeable as an offense under this article. *R. 42, 585, Apr., 1880; C. 23277, July 20, 1908, and July 13, 1910.*

LXI B 2. The following acts, committed in a particular case, *held* to be offenses within this article: Preferring false accusations against an officer; attempting to induce an officer to join in a fraud upon the United States; attempt at subornation of perjury. *R. 27, 435, Dec., 1868.*

LXI B 3. An attempt, by corrupt means, to induce an officer to give a vote, as a member of a post council of administration, in favor of a particular candidate for the tradership of the post, *held* properly charged under this article. *R. 38, 671, July, 1877.*

LXI B 4. *Held* that a surgeon who appropriated to his own personal use, and to that of his private mess, food furnished by the Government for hospital patients, was guilty of an offense under this article. *R. 2, 33, Feb., 1863.*

LXI B 5. The violation by an officer of a promise or pledge on honor, given by him to a superior—in consideration of the withdrawal by the latter of charges preferred for drunkenness—that he would abstain for the future or for a certain period from the use of intoxicating drink; *held* chargeable under this article. *R. 27, 297, Oct., 1868; 29, 151, Aug., 1869; C. 22394, Jan. 14, 1908.*

LXI B 6. Where an officer appeared in uniform at a theater drunk and conducted himself in such a disorderly manner as to attract the attention of officers and soldiers who were present, as well as the audience generally; *held* that he was properly convicted of a violation of this article. *R. 25, 479, Apr., 1868; 38, 140, July, 1876.*

LXI B 7. Engaging, when intoxicated, in a fight with another officer, in the billiard room at a post trader's establishment, in the presence of other officers and of civilians, *held* in the particular case, an offense within this article. *R. 42, 478, Jan., 1880.* So *held* of an engaging in a disorderly and violent altercation and fight with another officer in a public place at a military post in sight of officers and soldiers. *R. 27, 635, Apr., 1869.*

LXI B 8. Gambling with enlisted men (in a public place in this case); *held* an offense within this article.[1] *R. 37, 127, Mar., 1873.* And so of visiting in uniform a disreputable gambling house and gambling with gamesters. *R. 42, 633, May, 1880.*

LXI B 9 a. Though a mere neglect on the part of an officer to satisfy his private pecuniary obligations will not ordinarily furnish sufficient ground for charges against him (*R. 26, 551, May, 1868*), yet where the debt has been dishonorably incurred—as where money has been borrowed under false promises or representations as to pay-

[1] To the same effect, as an early precedent, see G. O. 1, War Dept., 1847.

ment or security, or where the nonpayment has been accompanied by such circumstances of fraud, deceit, evasion, denial of indebtedness, etc., as to amount to dishonorable conduct—the continued nonpayment, in connection with the facts or circumstances rendering it dishonorable, may properly be deemed to constitute an offense chargeable under this article.[1] *R. 13, 425, Feb., 1865; 23, 564, July, 1867; 27, 430, Dec., 1868; 28, 328, Jan., 1869; 29, 208, Aug., 1869; 34, 307, June, 1873; C. 5482, Dec., 1898; 5931, Mar., 1899; 20063, May 4, 1910.*

LXI B 9 **b.** An indifference on the part of an officer to his pecuniary obligations, of so marked and inexcusable a character as to induce repeated just complaints to his military commander or the Secretary of War by his creditors, and to bring discredit and scandal upon the military service, *held* to constitute an offense within the purview of this article.[2] *R. 23, 566, July, 1867.*

LXI B 9 **c.** *Held* that continued neglect, without suitable excuse, to pay honest debts after specific assurances have been given of speedy payment, is a dishonorable act, constituting an offense under the sixty-first article of war, especially when the refusals are so often repeated as to furnish reasonable ground for believing that the officer designs to indefinitely defer settlement. Such an offense is peculiarly aggravated when the debts are in the form of money borrowed from enlisted men or held in trust for them. *R. 21, 635, Sept., 1866; 42, 54, Nov., 1873; P. 59, 261, May, 1893.*[3] *Held* further that embezzlement by an officer of a soldier's pay which was turned over to the officer at the pay table for delivery to the soldier is an offense under the sixty-first article of war. *C. 15177, June 15, 1905; 20063, July 16, 1906.*

LXI B 10. Where an officer, in payment of a debt, gave his check upon a bank, representing at the same time that he had funds there, when in fact, as he was well aware, he had none; *held* that he was amenable to a charge under this article. *R. 13, 207, Jan., 1865.*

LXI B 11. Where certain officers of a colored regiment made a practice of loaning to men of the regiment small amounts of money, for which they charged and received in payment at the rate of two dollars for one at the next pay day; *held* that they were properly convicted of a violation of this article. *R. 23, 260, Oct., 1866; 24, 72, Dec., 1866.*

LXI B 12. Where an officer stationed in Utah was married there by a Mormon official to a female with whom he lived as his wife, although having at the same time a legal wife residing in the States; *held* that he might properly be brought to trial by general court-martial for a violation of this article. *R. 23, 164, Aug. 1866.* So

---

[1] Cases of officers made amenable to trial by court-martial, under this article, for the nonfulfillment of pecuniary obligations to other officers, enlisted men, post traders, and civilians are found in the following General Orders of the War Department and Headquarters of Army: No. 87, of 1866; Nos. 3, 55, 64, of 1869; No. 15, of 1870; No. 17, of 1871; Nos. 22, 46, of 1872; No. 10, of 1873; Nos. 25, 50, 68, 82, of 1874; No. 25, of 1875; No. 100, of 1876; No. 46, of 1877; Nos. 39, 124, of 1885; No. 31, of 1887; No. 54, of 1888; No. 20, of 1890; Nos. 3, 85, of 1891; Nos. 45, 65, 106, of 1893; No. 53, of 1894; No. 20, of 1895; No. 38, of 1896; and No. 5, of 1897. For English precedents, see James Courts-Martial (Collection, charges, etc.), pp. 303, 395, 510, 618, 622, 696, 797, 802.

[2] See, on the subject of these complaints, the circular, issued originally from the War Department (A. G. O.), on Feb. 8, 1872, in which the Secretary of War "declares his intention to bring to trial by court-martial," under the sixty-first article of war, "any officer who, after due notice, shall fail to quiet such claims against him."

[3] See Fletcher *v.* United States, 148 U. S., 84, 91, 92; also 26 Ct. Cls., 541.

held of an officer who committed bigamy by publicly contracting marriage in the United States, while having a legal wife living in Scotland whom he had abandoned. *R. 42, 98, Jan., 1879.*

LXI B 13. Abusing, assaulting, and beating his wife by an officer *held* chargeable as an offense under this article. *R. 31, 400, May, 1871.* Similarly *held* with respect to failure on the part of an officer to support his wife and children without adequate cause. P. 59, *348, May 11, 1893.*

LXI B 14. The institution by an officer of fraudulent proceedings against his wife for divorce, and the manufacture of false testimony to be used against her in the suit, in connection with an abandonment of her and neglect to provide for her support, *held* to constitute "conduct unbecoming an officer and a gentleman" in the sense of this Article. *R. 43, 21, Oct., 1879; 50, 392, and 431, June, 1886; P. 59, 348, May, 1893.*

LXI B 15. The duplication of a "pay account," or claim for monthly pay, is always an offense under this article. It is no defense that the transfer was made before the pay was actually due and payable, i. e., before the end of the month. While such a transfer may be inoperative in view of par. 1440, A. R. (1300 of 1895),[1] in so far as that the Government may refuse to recognize it, it is valid as between the officer and the party, and to allow the former to shelter himself behind the regulation would be to permit him to take advantage of his own wrongful and fraudulent act. *P. 50, 43, Oct., 1891, and 219, Nov. 1891; 51, 370, Jan., 1892; C. 25078, June 9, 1909.*

LXII A. The word "crimes" in this article, distinguished as it is from "neglects" and "disorders," means military offenses of a more serious character than these, including such as are also civil crimes—as homicide, robbery, arson, larceny, etc. "Capital" crimes (i. e., crimes capitally punishable), including murder, or any grade of murder made capital by statute, can not be taken cognizance of by courts-martial under this article. *R. 1, 473, Dec., 1862; 7, 429, 465, Mar. and Apr., 1864; 11, 176, Nov., 1864; 29, 257, Sept., 1869; 32, 478, and 522, Apr., 1872; 34, 350, 447, July and Sept., 1873; 35, 385, Sept., 1874; 36, 364, Apr., 1875; 41, 50, Nov., 1877.* A crime which is in fact murder, and capital by statute of the United States or of the State in which committed, can not be brought within the jurisdiction of a court-martial under this article by *charging* it as "manslaughter, to the prejudice," etc., or simply as "conduct to the prejudice," etc.[2] If the specification or the proof shows that the crime was murder and a capital offense, the court should refuse to take jurisdiction or to find or sentence. If it assume to do so, the proceedings should be disapproved as unauthorized and void. *R. 33, 155, July, 1872; 34, 250, May, 1873; 42, 451, Dec., 1879; C. 17462, Jan. 28, 1905.*

LXII B. The term "to the prejudice of good order and military discipline," qualifies, according to the accepted interpretation, the word "crimes" as well as the words "disorders and neglects." Thus, the crime of *larceny* (sometimes charged as "theft" or "stealing") is

[1] See par. 1281 A. R. 1910 Ed.

[2] See this opinion as given in an important case, adopted by the Secretary of War in his action on the same published in G. C. M. O. 3, War Dept., 1871; also the similar rulings in G. C. M. O. 28, Dept. of Texas, 1875; G. O. 14, Dept. of Dakota, 1868; do. 104, Army of the Potomac, 1862. As to the jurisdiction of courts-martial in cases of murder, &c., *in time of war*, see Fifty-eighth article.

held chargeable under this article when it clearly affects the order and discipline of the military service. Stealing, for example, from a fellow soldier or from an officer (or stealing of public money or other public property, where the offense is not more properly a violation of art. 60) is generally so chargeable. *R. 24, 441, Apr., 1867; 26, 23, 439, 487, Sept., 1867, to Mar., 1868; 36, 214, Jan., 1875; 39, 47, Dec., 1876.* And so of any other crime (not capital), the commission of which has prejudiced military discipline. As for example, manslaughter (or homicide not amounting to murder) of a soldier (*R. 25, 592, June, 1868; 31, 87, Dec., 1870; 278, Apr., 1871; 33, 155, July, 1872; 36, 667, Sept., 1875; 37, 380, Mar., 1876; 41, 188, Apr., 1878*); assault with intent to kill a fellow soldier (*R. 27, 587, 654, Mar. and May, 1869*); forgery of the name of a disbursing or other military officer to a Government check or draft (*R. 29, 369, Oct., 1869*); or forgery of an officer's name to a check on a bank (*R. 32, 623, May, 1872*) whether or not anything was in fact lost by the Government or the bank or officer; forgery in signing the name of a fellow soldier to a certificate of indebtedness to a sutler (*R. 9, 328, July, 1864*); or to an order on a paymaster (*R. 42, 562, Mar., 1880*); embezzlement or misappropriation of the property of an officer or soldier (*R. 39, 201, Oct., 1877*); misappropriation of ration money, the act being a fraud and not a breach of trust. *C. 18764, Feb. 5, 1906.*

LXII C 1. *Held* that for an officer to print and publish to the Army a criticism upon an official report, made by another officer in the course of his duty to a common superior, charging that such report was erroneous and made with an improper and interested motive, was gravely unmilitary conduct to the prejudice of good order and military discipline. An officer who deems himself wronged by an official act of another officer should prefer charges against the latter or appeal for redress to the proper superior authority. He is not permitted to resort to any form of *publication* of his strictures or grievances. *R. 39, 431, Feb., 1878.* So *held* that for an officer to publish or allow to be published in a newspaper of general circulation charges and insinuations against a brother officer by which his character for courage and honesty is aspersed and he is held up to odium and ridicule before the Army and the community was a highly unmilitary proceeding and one calling for a serious punishment upon a conviction under this article, and this whether or not the charges as published were true. *R. 42, 284, May, 1879.*

LXII C 2. The withdrawing by a disbursing officer of the Army from an authorized depository of public funds for a purpose not prescribed or authorized by law—as for personal use, or to pay claims not due from the United States or payable by such officer—being a form of embezzlement defined by section 5488 R. S., is properly charged as embezzlement under this article. *R. 25, 588, May, 1868; 27, 414, Dec., 1868; 33, 291, 495, Sept. and Nov., 1872; 38, 96, May, 1876.* Though the offense may in terms be laid as a violation of the act of 1866 (5488 R. S.), it is, indeed, only a form of a charge of violation of the ninety-ninth (now sixty-second) article of war,[1] the act of Congress merely

[1] An examination of the opinions in the cases upon which the text is based discloses the fact that the distinction between the character of the general offence of embezzlement and the particular embezzlement defined in the act of June 14, 1866, now sec. 5488, R. S., is clearly set out and defined, the difference being so marked that it would be an error to charge the acts set out in the latter statute as a violation of the sixtieth

furnishing a definition of the offense. The act, it may be added, furnishes also a measure of punishment which may properly aid, though it need not necessarily govern, the discretion of a court-martial in imposing sentence. *R. 33, 495, Nov., 1872.* But *held*, that to constitute such embezzlement it is not necessary that there should have been a personal conversion of the funds or an intent to defraud. The object of the law is to provide a safeguard against the misuse and diverting from their appointed purpose of public moneys, and the intent of the offender, whether fraudulent or not, enters in no respect

---

article of war. These opinions were rendered with reference to the trials of officers, which trials were published in the following general court-martial orders of the War Department: 43, 86, of 1868; 27, 34, of 1872; and 7, of 1873.

In all of these cases, except the last one, the officers were tried, among other offences, for illegally withdrawing from the authorized depositories or applying to a purpose not authorized by law, money intrusted to them, and in each of these cases the money so withdrawn or misapplied was furnished or intended for the military service, but the offences were charged under the act of June 14, 1866, now sec. 5488, R. S., and *not* under what is now subdivision 9 of the sixtieth article of war.

The officer named in the last order was tried under the act of March 2, 1863, now the sixtieth article of war, for embezzlement, and not for any acts legitimately chargeable under the act of June 14, 1866.

In remarking upon the general offence of embezzlement as then set out in the thirty-ninth article of war of the articles of 1806, and upon the embezzlement defined in the act of June 14, 1866, Judge Advocate General Holt, in his opinion upon the case in G. C. M. O., 34 *supra*, says: "* * * The court may well be supposed to have construed the thirty-ninth article as contemplating an embezzlement or misapplication with fraudulent intent, and to have acquitted on the ground that there was upon the testimony a reasonable doubt as to the existence of such intent. But if this conclusion be accepted, the fact remains that no such construction could properly govern in connection with the other charge (embezzlement under the act of June 14, 1866). The statute of 1866, in view of which it was preferred, is the expression of extreme vigilance in regard to the proper use and disposition of the public moneys, found by the experience of the Government to have become imperatively necessary to be observed. It provides an additional safeguard of the Public Treasury by enacting that any disbursing officer who shall withdraw, transfer, or apply any of the public funds intrusted to him for any purpose not authorized by law shall be deemed guilty of a felonious embezzlement and be punished accordingly. The intent of the officer, whether innocent or fraudulent, enters in no manner into the statutory offence. If his act of withdrawal, application, etc., of the funds is simply one not authorized by existing law, he is guilty of the crime here defined by Congress. His intent, if innocent, may perhaps be considered in mitigation of punishment, but can not be relied upon as a legal bar against conviction. The offence created by this act belongs to the class known as *mala prohibita*, but it is upon the repression of this class of offences that the safety of the Public Treasury largely depends."

In the publication to the Army of this case, the Secretary of War, approving the views of Judge Advocate General Holt, said: "In the opinion of the Secretary of War, they might well have convicted the accused of at least a portion of the charged violations of the act of June 14, 1866 (now sec. 5488, R. S.), a statute enacted for the more complete protection of the Treasury, * * * and which without regard to the *intent* of the offender denounces all withdrawals from a public depository or dispositions of public moneys not authorized by express law."

As a rule, therefore, acts defined in sec. 5488, R. S., have been brought to trial as embezzlement under this section in violation of the sixty-second article of war, and *not* under the sixtieth article of war.

See in this connection in addition to the cases already cited those published in the following general court-martial orders (War Department): 5, of 1869; 21, 58, 81, of 1874; 52, of 1877; 5, of 1881; 30, of 1883.

See also S. O. 172, A. G. O., of 1899 (order publishing case of Capt. O. M. Carter, Corps of Engineers). See further, O. M. Carter *v.* McClaughry (105 Fed. Reporter, p. 614). In the latter case the court, *inter alia*, said: "It is also contended that under the sixty-second article of war no charge can be preferred that is embraced in any other article, and that as the charge is that of embezzlement it is covered by either the first, fourth, or ninth paragraph of the sixtieth article of war. Assuming, but not

into the statutory crime.[1] If the withdrawal or application of the funds is simply one not prescribed or authorized by law, the offense is complete.[2] *R. 25, 588, May, 1868; 27, 116, July, 1868; 33, 494, Nov., 1872; 38, 96, May, 1876.* An absence, however, of criminal motive in the illegal act may be shown in mitigation of sentence in a military case. *R. 33, 494, supra.* So *held*, that it constituted no *defense* to a charge of an embezzlement of this class (though it might be shown in mitigation of punishment) that the officer had restored to the public depository the funds illegally withdrawn by him before a formal demand was made for the same. *R. 25, 588, supra.*

LXII C 3. In view of the injunction and definition of sections 3622 and 5491, R. S., an officer who, in his official capacity, receives public money (not pay or an allowance) which he fails duly to account for to the United States, is guilty of embezzlement. The statute makes no distinction as to the sources from which the money is derived or the circumstances of its receipt. Nor is it material whether or not the officer actually converted it to his own use or what was the motive of his disposition of it. So *held* that an officer who, having claimed and exacted certain moneys of the United States from Government contractors, failed to pay the same into the Treasury, or to duly account therefor, was guilty of embezzlement under this article. *P. 52, 138, Feb., 1892.*

LXII C 4. Where an officer allowed to an enlisted man and paid to him, out of certain public funds consisting of the proceeds of a public sale of condemned quartermaster stores, an amount of 10 per centum on the total of such proceeds, as a compensation for the services of such man as auctioneer at the sale, *held* that such payment was illegal and unauthorized [3] and constituted an embezzlement of public money chargeable under this article. *P. 59, 201, Apr., 1893.*

LXII C 5 **a.** Whether acts committed against *civilians* are offenses within this article is a question to be determined by the circumstances of each case, and in regard to which no general rule can be laid down. If the offense be committed on a military reservation, or other premises occupied by the Army, or in its neighborhood so as to be—so to speak—in the constructive presence of the Army; or if committed by

---

deciding, that no charge can be laid under the sixty-second article of war if it is mentioned in any preceding article, still it is apparent that the embezzlement defined in sec. 5488, R. S., is not the offence denounced in either the first or fourth paragraph referred to, and I am also of the opinion that it is a species of embezzlement different from that defined in the ninth paragraph of the sixtieth article of war, since the money which is the subject of embezzlement under the latter article is money 'furnished for military service,' whereas under sec. 5488, the term 'money' comprehends any public money, whether appropriated for the military service or for other purposes. The offence denounced in sec. 5488 is much broader and more comprehensive than the other, the former being the application by a disbursing officer of money to any unauthorized purpose, whilst under the ninth paragraph mentioned the money which is the subject of the embezzlement is money appropriated specifically for the military service, and it is quite probable from the context of the entire paragraph that the term 'embezzlement,' as there employed, means such an offence as is generally understood where one having the money of another in his custody appropriates it to his own use with felonious intent, intending to deprive the true owner thereof."

[1] See remarks of the Secretary of War in G. C. M. O., 34, War Department, 1872, quoted in preceding note.

[2] Compare 14 Op. Atty. Gen., 473.

[3] See opinion of the Second Comptroller of the Treasury published in Circ. No. 3, A. G. O., 1894.

an officer or soldier while on duty, particularly if the injury is done to a member of the community whom the offender is specially required to protect; or if committed in the presence of other soldiers, or while the offender is in uniform; or if the offender use his military position or that of another for the purpose of intimidation or other unlawful influence or object—the offense will in general properly be regarded as an act prejudicial to good order and military discipline and cognizable by a court-martial under this article. The judgment on the subject of a court of military officers, experts as to such cases, confirmed by the proper reviewing commander, should be reluctantly disturbed. *R. 49, 268, Aug., 1885; P. 28, 207, Nov., 1888; 34, 381, Aug., 1889; 36, 151, Oct., 1889.*

LXII C 6. It has been held by the War Department where it has been sought to cause the discharge without honor, without previous trial, of soldiers guilty of bestial offenses, that when possible men should not be discharged under the circumstances without a hearing, and that the best form of granting such a hearing was that of a trial by general court-martial; where, therefore, soldiers are charged with sodomy and the proof is sufficient to warrant a trial, they should be brought to trial and not summarily discharged.

Where, on the other hand, it would appear that sufficient evidence to convict is not obtainable, or that a case is barred by the statute of limitations, the discharge of a man without honor, for the reason that he has become disqualified for service as a result of his bad habits, has been authorized. *C. 20615, Aug. 13, 1907.* See also Discharge, III B to C; F.

LXII C 7. Burglary at common law is the breaking and entering of a dwelling in the nighttime with intent to commit a felony. Where a soldier was brought to trial upon a charge of "Burglary," with a specification setting forth that he forcibly entered the quarters of an officer in the night, with intent to steal, and it appearing that he entered through an *open* window, *held* that, although the offense shown was not a burglary in law—the essential element of a breaking being wanting—the charge and specification, taken together, omitting this element, made out a sufficient pleading of a disorder to the prejudice of good order and military discipline, under the sixty-second article of war.[1] *R. 38, 391, Dec., 1876.* And similarly *held* of an offense charged as "conduct to the prejudice, etc.," and described in the specification as "burglariously" breaking and entering a post trader's store in the daytime. *R. 38, 548, Aug., 1870; C. 12177, Mar. 11 and May 15, 1902; 12224, Apr. 1, 1902; 12689, May 14, 1902; 22606, Jan. 9, 1908.*

LXII C 9. "False swearing," under the sixty-second article of war, as the term is used in the order prescribing maximum punishments, means, (1) taking a false oath in a military judicial proceeding as to a matter not material to the issue; (2) taking a false oath otherwise than in a judicial proceeding, before a person legally authorized to administer the oath and under circumstances affecting the interests of the military service, *P. 46, 211, Mar., 1891,* and is an offense under the sixty-second article of war. *P. 36, 359, Nov. 9, 1889.*

LXII C 10. Improper disposition of property in the charge and use of soldiers, other than the dispositions indicated in article 17, will

[1] See G. C. M. O. 205, Hdqrs. of the Army, 1876.

in general properly be charged under article 62.[1] Likewise the selling, through neglect losing, etc., by soldiers, of property issued to them, but not mentioned in article 17, should be charged under article 62. Thus *held* that a selling or losing of the following articles was not punishable under article 17, but under article 62, viz, sheets, pillows, pillowcases, mattress covers, shelter tent, barrack bag, great-coat strap, tin cup, spoon, knife, fork, meat ration can, cartridges. *P. 17, 119, May, 1887; 21, 151, Dec., 1887; 52, 245½, Feb., 1892; C. 12796, July 25, 1902.*

LXII C 11. *Held* that disrespectful language used in regard to his captain by a soldier, when detached from his company and serving at a hospital, to the surgeon in charge of which he had been ordered to report for duty, was an offense cognizable by court-martial under article 62. *R. 6, 53, Mar., 1864.*

LXII C 12. A noncompliance by a soldier with an order emanating from a noncommissioned officer, or offering violence to the latter, is not an offense under article 21, but one to be charged, in general, under the sixty-second. *R. 9, 90, May, 1864; 11, 491, Mar., 1865.*

LXII C 13. A charge of drunkenness on duty (drill), *held* not sustained where the party was found drunk, not at or during the drill, but at the hour appointed for the drill, which, however, by reason of his drunkenness, he did not enter upon or attend. The charge should properly have been laid under article 62. *R. 39, 226, Oct., 1877; C. 15376, Apr. 22, 1910.*

LXII C 14. Where an officer, after being specially ordered to remain with his company, absented himself from it and from his duty, and, while thus absent, became and was found drunk, *held* that he was not strictly chargeable with drunkenness on duty under article 38, but was properly chargeable with drunkenness in violation of the sixty-second article, disobedience of orders, and unauthorized absence. *R. 38, 425, Jan., 1877.*

LXII C 15. *Held* that it is competent for the President as Commander in Chief to prescribe a maximum punishment for the offense of loaning money at usurious rates of interest, and that if such order be issued it would be proper to make the punishment of noncommissioned officers for that offense more severe that that of privates. *C. 28023, Mar. 27, 1911.*

LXII C 16. *Held* that soldiers who commit a disturbance upon private premises while in uniform violate the sixty-second article of war, as their conduct is to the prejudice of good order and military discipline. *C. 16603, July 8, 1904.*

LXII C 17. *Held*, in the case of an officer who had been permitted by his commanding officer to leave his confinement in close arrest temporarily, and who delayed his return for a brief period beyond that fixed, that such delay did not properly constitute an offense under the sixty-fifth article of war but, if sufficiently serious, should be charged under the sixty-second article. *R. 30, 562, Aug., 1870.*

LXII C 18. *Held* that a failure to obey an order to proceed and report in arrest to a certain commander was chargeable as an offense under the sixty-second article of war and not under the sixty-fifth

[1] As the pawning of a revolver. G. C. M. O. 77, Dept. of the Missouri, 1874. So, the gambling away of clothing. G. C. M. O. 41, Dept. of Texas, 1873. So, the spoiling by a bugler of his bugle. G. C. M. O. 36, War Dept., 1876.

article of war. *R. 31, 606, Aug. 21, 1871.* Similarly *held* with regard to a breach of arrest, which arrest was not accompanied by confinement to quarters. *R. 5, 122, Oct. 10, 1863; 11, 127, Nov. 4, 1864; C. 26140, Jan. 29, 1910.*

LXII D. The following offenses have been held properly charged or chargeable under this article, as *disorders or neglects* "to the prejudice of good order and military discipline": Drunkenness or drunken and disorderly conduct, at a post or in public, committed by a soldier or officer when not "on duty," and when the act (in the case of an officer) does not more properly fall within the description of article 61. *R. 1, 463, Dec., 1862; 8, 366, May, 1864; 24, 79, Dec., 1866; 28, 575, May 1869.* Escape from military confinement or custody (where not amounting to desertion). *R. 10, 574, Nov., 1864.* Breach of arrest (where not properly chargeable under article 65). *R. 29, 175, Aug., 1869.* Disclosing a finding or sentence of a court-martial in contravention of the oath prescribed in article 84 or 85. *R. 21, 628, Sept., 1866.* Refusal by an officer or soldier to testify, when duly required to attend and give evidence as a witness before a court-martial. *R. 42, 596, Apr., 1880.* Joining with other inferior officers of a regiment in a letter to the colonel, asking him to resign. *R. 41, 226, May, 1878.* Neglecting, by a senior officer "present for duty" with his regiment, to assume the command of the same when properly devolved upon him, and allowing such command to be exercised by a junior. *R. 11, 172, Nov., 1864.* Culpable malpractice by a medical officer in the course of his regular military duty. *R. 2, 378, May, 1863.* Colluding with bounty brokers in procuring fraudulent enlistments to be made and bounties to be paid thereon. *R. 14, 326, May, 1865.* Violations, by an officer, of Army Regulations,[1] in bidding in and purchasing, through another party, public property sold at auction by himself as quartermaster; also in purchasing subsistence stores, ostensibly for domestic use, but really for purposes of traffic. *R. 39, 283, Nov., 1877.* Causing (by a quartermaster) troops to be transported upon a steamer known by him to be unsafe. *R. 15, 301, June, 1865.* Paying money due under a contract (for military supplies) to a party to whom, with the knowledge of the accused, the contract had been transferred in contravention of section 3737, R. S. *R. 42, 44, Nov., 1878.* Inciting (by an officer) another officer to challenge him to fight a duel. *R. 28, 650, June, 1869.* Assuming (by a soldier) to be a corporal in the recruiting service, and as such enlisting recruits and obtaining board and lodging for himself and recruits without paying for same. *R. 39, 229, Oct., 1877.* Procuring (by a soldier) whisky from the post trader by forging an order for the same in the name of a laundress. *R. 37, 270, Jan., 1876.* Breach of faith (by a soldier) in refusing to pay the post trader for articles obtained on credit, upon orders on him which had been guaranteed or approved by the company commander upon the condition that the amounts should be paid on the next pay day. *R. 27, 282, Sept., 1868; 563, Mar., 1869; 28, 298, Jan., 1869; 29, 574, Jan., 1870.* Gambling by officers or soldiers under such circumstances as to impair military discipline (where the conduct, in the case of an officer, does not rather constitute an offense under

[1] Violations of Army Regulations in general are properly chargeable as neglects (or disorders) to the prejudice of good order and military discipline.

art. 61). *R. 16, 381, July, 1865; 31, 404, May, 1871; 40, 32, Oct., 1877. C. 15538, Nov. 24, 1903.* Striking a soldier, or using any unnecessary violence against a soldier (by an officer). *P. 39, 25, Feb., 1890.* Neglect on the part of an officer of engineers to oversee the execution of a contract for a public work placed under his charge, the due fulfillment of such charge being a military duty.[1] *P. 31, 357, Apr., 1889.* A public criticism in a newspaper (by an officer) of a case which had been investigated by a court-martial and was awaiting the action of the President. *R. 50, 86, Mar., 1886.* Assuming (by an officer) to copyright as owner, and thus asserting the exclusive right to publish, in an abridged form, the Infantry Drill Regulations, property of the United States, and the formal official publication of which had already been announced in orders by the Secretary of War. *P. 50, 373, Dec., 1891; 62, 156, Oct., 1893.* Selling condemned military stores (by an officer) without due notice, and not suspending the sale when better prices could have been obtained by deferring it, in violation of Army Regulations. *P. 50, 446, Dec., 1891.* Misconduct by a soldier at target practice, consisting of breaches of the published instructions, false statements, or markings with a view fraudulently to increase a score, etc. *P. 20, 357, Nov., 1887; 21, 256, Dec., 1887.* Violation (by a soldier) of a pledge given to his commanding officer to abstain from intoxicating liquors, on the faith of which a previous offense was condoned. *P. 44, 11, Nov., 1890; C. 22246, Oct. 22, 1907.* Bigamy (by a soldier) committed at a military post. *P. 21, 430, Jan., 1888.* Disobedience of orders by a general prisoner. *C. 16220, Apr. 26, 1904.* Absence from quarters between an unannounced inspection and reveille. *C. 3694, Mar. 11, 1909.* Attempt to commit rape, or assault and battery with intent to commit rape. *C. 23910, Nov., 23, 1908.* Failure to pay a debt due to post exchange or post laundry. *C. 11776, Dec. 17, 1901.* Failure to pay debt when such conduct is to the prejudice, etc. *C. 5482, Dec., 1898; 5931, Mar., 1899.*

LXII E. The following acts have been held *not* to be cognizable as offenses under this article: A mere breach of the peace committed by a soldier (while absent alone and at a distance from his post [2]) in a street of a city, and in violation of a municipal ordinance. *R. 33, 277, Aug., 1872.* Pecuniary transactions between enlisted men of a culpable character, but in their private capacity and not directly affecting the service or impairing military discipline. *R. 11, 490, Feb., 1865; 18, 380, Nov., 1865; 36, 480, May, 1875.* Speculating and gambling in stocks by a disbursing officer, the proper performance of whose military duty was not affected. (But *recommended* that he be relieved from the duty of disbursing public money.) *R. 17, 22, July, 1865.* Reenlisting by the procurement of the recruiting officer, after having been discharged for a disability still continuing; the act being in good faith, and the alleged offense being committed before the party could be said to have fully come into the service. *R. 6, 203, June, 1864.* A resort to civil proceedings by suit against a superior officer on account of acts done in the performance of military duty. But *held* that, if the verdict should be for the defendant,

[1] See Runkle *v.* U. S., 19 Ct. Cls., 396, 411, 412.

[2] See S. O. 206, Dept. Mo., 1895; do. 5, id., 1896, and the order prescribing maximum punishments. Court-Martial Manual (1908, p. 53).

and it should appear that the suit was without probable cause and malicious, a charge under this article might perhaps be sustainable. *P. 48, 3, Jan., 1891.* The mere loaning of money at usurious or excessive rates of interest by a noncommissioned officer to privates, unless it should clearly be made to appear that such conduct promoted desertions or other results prejudicial to the discipline of the command; but as the practice in this case had been long continued and was clearly demoralizing, *advised* that the noncommissioned officer be summarily discharged. *P. 53, 173, Apr., 1892.* The becoming infected, by a soldier, with a disease unfitting him for service, as the result of vicious conduct. *P. 61, 396, Sept., 1893; C. 23429, Apr. 5, 1909.*

LXII F. *Held* that the sixty-second article of war is broad enough to include the offense of manslaughter to the prejudice of good order and military discipline. *R. 11, 592, Mar., 1865; 25, 592, June, 1868; 38, 579, Apr., 1877.*

LXIII A. This article has been applied principally to civilians serving in a quasi-military capacity in connection with troops in time of war and in the theater of war (*R. 7, 453, Sept., 1863, and 511, Apr., 1864*); such as teamsters, watchmen, Quartermaster's Department employees, and employees of the subsistence, engineer, and ordnance departments, provost marshal general, etc., ambulance drivers, telegraph operators, interpreters, guides, contract surgeons, employees on railroad trains and on transports. *R. 7, 116, Feb., 1864; 9, 111, 146, May, 1864; 11, 493, Mar., 1865; 12, 376, Mar., 1865; 13, 459, Mar., 1865.* Thus the forces employed in the "Ram Fleet" on western waters during the Civil War, including pilots, engineers, etc., were amenable to trial under this article (*R. 2, 570, June, 1863*); and civil employees, including guides for the Army, during warfare with Indians. *R. 32, 386, Mar., 1872; 36, 435, May, 1875.*

LXIII A 1. *Held* that retainers to the camp, such as officers' servants and the like, as well as camp followers generally, have rarely been subjected to trial by court-martial in our service, but they have generally been dismissed from employment for breaches of discipline committed by them. *R. 23, 331, Nov. 1866; C. 10603, June 13, 1901, and Jan. 13, 1903; 11341, Nov. 8, 1901; 25609, Nov. 12, 1909.*

LXIII B. The jurisdiction authorized by this article can not be extended to civilians employed in connection with the Army *in time of peace*,[1] nor to civilians employed in such connection during the period of an Indian war, but not on the theater of such war. *R. 38, 557, Apr., 1877.* In view of the limited theater of Indian wars, this exceptional jurisdiction is to be extended to civilians, on account of offenses committed during such wars, with even greater caution than in a general war. *R. 38, 641, June, 1877; C. 10603, Dec. 4, 1903; 25609, Nov. 8, 1909.*

LXIII B 1. Civilians can not legally be subjected to military jurisdiction by the authority of this article *after* the war (whether general or against Indians), pending which their offenses were committed, has terminated. The jurisdiction, to be lawfully exercised, must be exercised *during* the *status belli*. *R. 38, 641, supra.*

LXIII C. *Held* that trials of civilians under this article of war should be restricted to cases of imperative necessity, leaving ordinary

[1] See 16 Op. Atty. Gen., 13 and 48.

infractions of rule by civilian employees to be dealt with under the regulations governing the civil service, and that the promulgating order of the proceedings of such trials by courts-martial should set forth the circumstances which render a military trial necessary. *C. 10782, June 29, 1901.*

LXIII D. The accepted interpretation of the sixty-third article of war is that it subjects in time of war the classes of persons specified not only to military discipline and government in general, but also to the jurisdiction of courts-martial. *R. 23, 331, Nov. 1, 1866.*

LXIII E. The forfeitures adjudged against the pay of civilian employees by courts-martial when sentenced under the sixty-third article of war should be withheld from their pay and allowed to remain in the appropriation to which pay pertains. *C. 9326, Nov., 1900; 10782, June 29, 1901.*

LXV A. Though any unauthorized leaving of his confinement by an officer in close arrest is, strictly, a violation of the article, it would seem, in view of the severe mandatory punishment prescribed, that an officer should not in general be brought to trial under the same unless his act was of a reckless or deliberately insubordinate character.[1] *R. 5, 122, Oct., 1863; 27, 136, Aug., 1868.*

LXV B. *Held* that a regimental commander is a "commanding officer" within the meaning of the sixty-fifth article of war, although his regiment is a part of a higher command; for instance, part of a brigade or of a brigade post, and this is true even if a part of his regiment is detached from the brigade or post of which it forms a part. *C. 26140, Jan. 29, 1910.*

LXV C. When an officer is placed in arrest in the operation of the sixty-fifth article of war and subsequently tried, *held* that 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. *C. 19854, June 24, 1908.*

LXVI A. The word "crimes" as used in article 66 is construed to mean serious military offenses. So that a soldier should not ordinarily be "confined" when not charged with one of the more serious of the military offenses—in other words, when charged only with an offense of a minor character. *P. 36, 78, Oct., 1889; 50, 141, Nov., 1891.*

LXXI A. The term "within ten days thereafter," *held* to mean after his *arrest. R. 9, 572, Sept., 1864; C. 15659, Dec. 19, 1903.*

LXXI B. *Held* a sufficient compliance with the requirement as to the service of charges, to have served a true copy of the existing charges and specifications, though the list of witnesses appended to the original charges was omitted, and though the charges themselves were not in sufficient legal form, and were intended to be amended and redrawn. *R. 25, 350, Feb., 1868.*

LXXI C. The fact that cases of officers put in arrest "at remote military posts or stations" are excepted from the application of the article does not authorize an abuse of the power of arrest in these cases. And where, in such a case, an arrest, considering the facilities of communication with the department headquarters and other circumstances, was in fact unreasonably protracted without trial,

[1] It is no defense to a charge of breach of arrest in violation of this article that the accused is innocent of the offense for which he was arrested. Hough (Practice), 494; id. (Precedents), 19.

held that the officer was entitled to be released from arrest upon a proper application submitted for the purpose. *R. 32, 195, 484, Jan. and Apr., 1872.*

LXXI D. Though an officer, in whose case the provisions of this article in regard to service of charges and trial have not been complied with, is *entitled* to be released from arrest, he is not authorized to release himself therefrom. If he be not released in accordance with the article, he should apply for his discharge from arrest, through the proper channels, to the authority by whose order the arrest was imposed, or other proper superior. *R. 7, 163, Feb., 1864; 8, 61, Mar., 1864; 9, 467, 550, Aug., 1864; 18, 161, Sept., 1865; 24, 387, 580, Mar. and May, 1867; C. 16131, Feb. 16, 1905.*

LXXII A. The authority to order a court under this article is an attribute of *command*. Thus a department commander, detached and absent from his command for any considerable period by reason of having received a leave of absence (whether of a formal or informal character), or having been placed upon a distinct and separate duty (as that of a member of a court or board convened outside his department, for example), is held to be 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,[1] even though no other officer has been assigned or has succeeded to the command of the department.[2] *R. 44, 63, July, 1880.* (See One hundred and fourth article.) Nor can a department commander thus absent *delegate* such authority to a staff officer or other subordinate, to be exercised by him. *R. 43, 264, 279, Mar. and Apr., 1880; C. 1499, July, 1895.* Nor, where a general court-martial duly convened by a department commander has, at a time when the commander is thus absent from his command been reduced, by an incident of the service, below five members, can another member legally be detailed upon the court by the assistant adjutant general or other subordinate officer remaining in charge of the headquarters; since such a detail would be an exercise of a portion of the authority vested by this article in the commander, and which can in no part be delegated. *R. 43, 332, June, 1880; C. 16710, Feb. 27, 1906; 22162, Oct. 10, 1910.* (See seventy-fifth article.)

LXXII B. Where a commander empowered by this article to convene a general court-martial, declines, in the exercise of his discretion, to approve charges submitted to him by an inferior and to order a court thereon, his decision should, in general, be regarded as final. *R. 32, 323, Feb., 1872.*

LXXII C 1. A general court martial, convened by the division commander (a major general), duly acting as department commander in the absence of the regular department commander, is legally convened by a general officer commanding a department in the sense of this article. *P. 26, 418, Sept., 1888.*

LXXII D 1. A corps commander is held by the Secretary of War to be a commander of an army in the field, and may convene a court-

[1] In absence of legislation or of orders from competent authority forbidding it, personal presence within the territorial limits of his command is not essential to the validity of an order given by a department commander appointing a court-martial within such limits. (16 Op. Atty. Gen., 678.)

[2] See G. C. M. O. 9, Dept. of Columbia, 1880; and par. 195, A. R., as amended by G. O. 20, A. G. O., 1901.

martial under the authority of this article.[1] A corps commander may also convene such court where the division or separate brigade commander is the accuser or prosecutor, by authority of the act of December 24, 1861 (12 Stat., 330), *R. 7, 237, Feb., 1864.* But sound principles of public policy require that only the highest military authority in any army should be vested with the final power of the confirmation and execution of sentences of death and dismissal, and the act of December 24, 1861, has never been construed as conferring this power upon a corps commander when his command is not a separate and distinct army, but only, as in the case of corps of the Army of the Potomac, a constituent part of a larger body.[2] *R. 11, 543, Mar., 1865; C. 4277, June 7, 1898; 4710, July, 1898; 5121, Oct. 8, 1898; 8197, May 3, 1901; 16710, July 23, 1908.*

LXXII E 1. An assistant adjutant general, or other staff officer of a department commander, is not empowered, of his *own* authority, in the absence of the commander, to *relieve* an officer duly detailed upon a court-martial by such commander, any more than he is so empowered to *detail* a new officer as a member of such a court. *R. 43, 332, June, 1880.*

LXXII F 1. The "Army of Cuban Pacification" was "an army" within the meaning of the seventy-second article of war, and not a territorial division or department. *C. 16710, Feb. 23, 1908.*

LXXII G 1. A lieutenant colonel in temporary command of a territorial division, department, or army, is without authority to appoint a general court-martial. *C. 17335, Jan. 7, 1905; 17212, Feb. 13, 1905; 16710, Jan. 20, 1908; 18764, Jan. 4, 1908.*

LXXII G 2. *Held* that an officer who is not qualified under the seventy-second article of war to convene a court-martial can not issue orders detailing members to a court already appointed, even though he succeed to the command held by the convening officer. *C. 16710, Aug. 25, 1904.*

LXXII H. When troops in the prosecution of a practice march or while engaged in a joint encampment or maneuver pass within the territorial limits of a department, they pass, for court-martial purposes, from the jurisdiction of the department in which they are permanently stationed into that of the commander of the department in which they are temporarily operating because of the duty mentioned above. *C. 20052, May 9, 1907.*

LXXII I 1. Whether the commander who convened the court is to be regarded as the "accuser or prosecutor" in the sense of the article in question, 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

[1] This refers to the old sixty-fifth, now the seventy-second, article, but both contain the expression "a general officer commanding an army."

[2] Under date of Aug. 5, 1898, the Secretary of War decided (circ. 30, A. G. O., 1898) that "under the one hundred and seventh article of war a corps commander is held to be a commander of an army in the field when his corps is not a constituent part of a larger body and he may * * * confirm sentences of dismissal of officers. A corps commander may also convene such court where the division or separate brigade commander is the accuser or prosecutor."

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.[1] 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. *R. 7, 5, Jan., 1864; 14, 285, Mar., 1865; 30, 170, Mar., 1870; 32, 78, Oct., 1871, and 278, July, 1872; 34, 104, Feb., 1873; 37, 189, Dec., 1875; 42, 626, May, 1880; 55, 220, Dec., 1887, and 369, Mar., 1888; C. 2240, May, 1896; 3913, Mar., 1898; 17212, Feb. 17, 1905; 17335, Jan. 7, 1905; 18804, Nov. 3, 1905; 19070, Jan. 17, 1906; 19854, June 29, 1906; 24986, June 8, 1909; 25832, Jan. 27, 1910.*

LXXII I 1 a. But where the officer who made an investigation recommended that charges be not preferred and the department commander nevertheless directed that charges be prepared and brought the accused officer to trial thereon, *held*, that such action, taken in connection with the further fact that official reports previously made by the department commander and the nature of the offenses alleged manifestly disclosed on his part an interest and animus adverse to the accused, rendered him the accuser in the case. *C. 2240, May, 1896.*

LXXII I 2. It is not essential that the commander who convenes the court-martial for the trial of an officer should sign the charges to

---

[1] "In a certain sense the commanding general is the prosecutor in nearly every case that comes before a military court within the limits of his command; for in almost every case charges are submitted to his examination, approval, and, if necessary, amendment, and there is always an informal preliminary adjudication by him to determine that the case is one which is proper for trial by a court-martial before he orders the court-martial, and the accused to appear before it. It is quite apparent that in such case he is not an accuser or prosecutor in the sense of the article of war. * * * He does not alter his position as commanding officer and become accuser or prosecutor in the sense of the * * * article * * * , because he himself sees that the charges are in proper and definite legal form, and to that extent superintends teir preparation. In the present case, the charges were not actually signed by General ——. He had no personal relation to, or knowledge of, the matter out of which the charges grew, so as to have created in him any personal feeling or interest in the conviction of the prisoner. In considering alike the question of the propriety of a court-martial and the preferment of charges, he dealt with the matter, as a commanding officer must deal in a large number of instances, upon the statements and allegations of others, and decided the matter in his own mind no further than to pronounce that upon the information before him the alleged offender should be brought before a court-martial." *Opinion of Attorney General Devens, Aug. 1, 1878, vol. 16, p. 109.* It is also held in this opinion that where the record of the trial fails to indicate that the convening officer was the "accuser or prosecutor" of the accused, the latter, in applying to the Secretary of War to have the proceedings pronounced invalid on this ground, may establish the fact by the production of *affidavits* setting forth the circumstances of the case and the action of the commander.

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.[1] If not admitted by the prosecution to exist, the accused is entitled to prove it like any other issue. *R. 1, 430, Nov., 1862; 8, 38, Mar., 1864.*

LXXII I 3 **a.** When superior authority directs the commanding general of a department to bring a certain officer to trial for certain indicated offenses and leaves the details only of the preparation of the charges and specifications to the discretion of the department commander, *held*, that the department commander by thus preparing the charges does not become the accuser within the meaning of the seventy-second article of war. *C. 17212, Feb. 17, 1905; 17335, Jan. 7, 1905; 18804, Nov. 3, 1905.*

LXXII I 3 **a** (1). *Held*, that when, in the execution of his duties, the department commander is called upon to order the department judge advocate to formulate and sign charges made by another, the department commander who is the convening authority does not thereby become the accuser. *C. 3913, Mar. 17, 1898.*

LXXIII A. According to the general definition given in the act of March 3, 1799 (sec. 1114, R. S.), a division is an organized command consisting of at least two brigades, and a brigade an organized command consisting of at least two regiments of infantry or cavalry. A brigade, however, to be a "*separate brigade*" in the sense of this article, must not exist as a component part of a division: to authorize its commander to convene a general court-martial it must be detached from or disconnected with any division and be operating as a distinct command. Thus, where it appeared from the record of a trial that the court was convened by a colonel commanding the "2d Brigade, 3d Division, 14th Army Corps," *held*, that it was quite clear that such colonel did not command a "*separate* brigade," and was therefore not authorized to order a general court-martial. *R. 3, 546, Aug., 1863; 6, 250, Aug., 1864; 10, 53 and 106, July and Aug., 1864; 13, 29, Dec., 1864; C. 4387, June 16, 1898; 7777, Mar. 6, 1900; 7778, Mar. 6, 1900; 8531, Dec. 29, 1900; 17564, Mar. 2, 1905.*

LXXIII A 1. On August 31, 1864, was issued from the War Department a general order—No. 251 of that year—which directed as follows: "Where a post or district command is composed of mixed troops, equivalent to a brigade, the commanding officer of the department or army will designate it in orders as '*a separate brigade*,' and a copy of such order will accompany the proceedings of any general court martial convened by such brigade commander. Without such authority commanders of posts and districts having no brigade organization will not convene general courts martial." Under this order, which was applied mainly to the commands designated in the war of the

[1] Or it may be taken to the reviewing officer with a view to his disapproving the sentence, or may be made to the President after the approval and execution of the sentence with a view to having the same declared invalid or to the obtaining of other appropriate relief.

rebellion as "districts," it was held by the Judge Advocate General as follows: That the fact that a district command was composed not of regiments but of detachments merely (which, however, in the number of the troops, were equal to or exceeded two regiments) did not preclude its being designated as a "separate brigade," and that when so designated its commander had the same authority to convene general courts martial as he would have if the command had the regular statutory brigade organization (*R. 11, 110, Nov., 1864*); that though a district command embraced a force considerably greater than that of a brigade as commonly constituted, yet if not designated by the proper authority as a "separate brigade" its commander would be without authority to convene general courts martial unless, indeed, his command constituted a separate "army" in the sense of the sixty-fifth (now seventy-second) article (*R. 13, 340, Feb., 1865*); that it was not absolutely necessary, to give validity to the proceedings or sentence of a general court martial convened by the commander of a separate brigade, that the command should be described as a separate brigade in the caption or superscription of the order convening the court and prefixed to the record, or even that a copy of the order designating the command as a separate brigade should accompany the proceedings. As to the latter feature the order of 1864 is viewed as directory merely; and though not to accompany the record with a copy of the order thus constituting the command would be a serious irregularity, as would be also—though a less serious one—the omission of the proper formal description of the command from the convening order, yet if the command had actually been duly designated, and *in fact* was, a separate brigade, and this fact existed of record and could be verified from the official records of the department or army, the omission of either of these particulars, though a culpable and embarrassing neglect on the part of the court or judge advocate, would not, *per se*, invalidate the proceedings or sentence. *R. 19, 280, Dec., 1865, and 681, Sept., 1866.*

LXXIII A 2. *Held* that the force under the provost marshal of the city of Manila, P. I., in April and May, 1901, was a separate brigade within the meaning of the seventy-third and one hundred and seventh articles of war. *Held,* therefore, that all persons subject to military law who were stationed or temporarily sojourning in the city of Manila were, for the purpose of court-martial jurisdiction, a part of his command, as this was in time of war. (*C. 10910, Aug. 17, 1901.*)

LXXIII B 1. The different organizations which composed a division had been taken out from under the command of the division commander one by one until one regiment remained under the command of the division commander at a date when he convened a general court-martial. *Held,* that he was not in actual command of a separate brigade and therefore had no authority to convene a court-martial, as his previous authority was based upon his command of a separate brigade. *C. 5819, Feb. 4, 1899.*

LXXIII B 2. *Held,* that "a military governor of a district" has no authority as such to convene a court-martial. The record of a court-martial appointed by such officer under this article should show that the court was convened and the sentence approved by him in his capacity as a division or separate brigade commander. *C. 7776, 7777, 7778, Mar., 1900.*

LXXIII B 3. Where the caption of the orders appointing two general courts-martial were respectively, "Headquarters 2d Detachment, Philippine Expedition, Steamer *China* at sea," and "Headquarters Philippine Island Expeditionary Forces, 4th Expedition (2d Section), Steamer *Rio de Janeiro* at sea," and there being nothing with the records to show that the detachment or section had been designated or was in fact a "separate brigade," *held* that the sentences were void. *C. 4847, Aug., 1898; 5086, Sept., 1898.*

LXXV A 1. It is for the convening authority under this article to determine what number of officers can be convened without manifest injury to the service, and his decision in the matter is conclusive.[1] *R. 3, 82, June, 1863.*

LXXV B 1. While a number of members less than five can not be organized as a court or proceed with a trial, they may perform such acts as are preliminary to the organization and action of the court. Less than five members may adjourn from day to day, and where five are present and one of them is challenged, the remaining four may determine upon the sufficiency of the objection. *R. 5, 319, Nov., 1863.*

LXXV B 2. Where, in the course of a trial, the number of the members of a general court-martial is reduced by reason of absence, challenge, or the relieving of members, the court may legally proceed with its business so long as *five* members—the *minimum* quorum—remain; otherwise where the number is thus reduced below five. *R. 16, 549, Sept., 1865; C. 22163, Sept. 30, 1907.*

LXXV B 3. A court reduced to four members and thereupon adjourning for an indefinite period does not dissolve itself. In adjourning it should report the facts to the convening authority and wait his orders. He may at any time complete it by the addition of a new member or members and order it to reassemble for business. *R. 5, 319, supra; 39, 328, Nov., 1877.*

LXXVII A 1. *Held* that the Philippine Scouts, being a part of the Regular Army of the United States, are not other forces within the meaning of the seventy-seventh article of war. *C. 19272, Mar. 14, 1906; 26772, Mar. 2, 1911.*

LXXVII A 2. *Held* that a regular officer may be detailed to act as judge advocate of a court which tries a volunteer officer or soldier as the restriction contained in the seventy-seventh article of war applies only to members who vote on the question of guilt or innocence. *C. 13710, Nov. 25, 1902.*

LXXVII A 3. Officers and soldiers of volunteers, not being militia, are as much a part of the Army as are regular officers and soldiers, but in view of the terms of the seventy-seventh article of war an officer of the Regular Army is not eligible for detail as a member of a court-martial convened for the trial of volunteer officers or soldiers, nor can he legally act as such [2] even though he holds a volunteer commission.[3] *R. 19, 670, July, 1866; C. 9875, Apr. 26, 1909; 12682,*

[1] It was thus held from an early period by the U. S. Supreme Court. See Martin *v.* Mott, 12 Wheaton, 19, 34—37 (1827); Mullan *v.* U. S., 140 U. S., 240; Swaim *v.* U. S., 165 U. S., 553, 559.

[2] See McClaughry *v.* Deming, 186 U. S., 49.

[3] See U. S. *v.* Brown, 206 U. S., 240.

May 27, 1902; 15511, Nov. 20, 1903; 19272, Mar. 14, 1906; 25249, Aug. 17, 1906; 25945, Mar. 31, 1910.

LXXVIII A. Seventy-eighth article of war.[1]

LXXXII A 1. It is not essential that the "officer commanding" should be of the rank of field officer. A commanding officer, though a captain or lieutenant, may convene a court-martial under this article, provided he has the required command. *R. 8, 483, May, 1864.*

LXXXII A 2. A commanding officer is not authorized to detail *himself,* with two other officers, as a court under this (or the preceding) article. *R. 24, 263, Jan., 1867.* An "acting assistant surgeon," not being an officer of the Army, can not be detailed on such court. *R. 30, 109, Feb., 1870.*

LXXXII B. The general term "other place" is deemed to be intended to cover and include any situation or locality whatever—post, station, camp, halting place, etc., at which there may remain or be, however temporarily, a separate command or detachment in which different corps of the Army are represented, as indicated in the next paragraph. If such command, so situated, contains enough officers, other than the commander, available for service on court-martial, the commander will be competent to exercise the authority conferred by this article. *R. 44, 32, June, 1880; C. 856, Jan. 8, 1895, and Sept. 2, 1908.*

LXXXII C 1. *Held,* in view of the early orders[2] relating to the subject and of the practice thereunder, that the presence on duty with a garrison, detachment, or other separate command, at a fort, arsenal, or other post or place, and as a part of such command, of a single representative, officer or soldier, of a corps, arm, or branch of the service other than that of which the bulk of the command is composed—as an officer of the Quartermaster, Subsistence, or Medical department, a chaplain, an ordnance sergeant, or hospital steward, an officer or soldier of artillery where the command consists of infantry or cavalry, or *vice versa,* etc.—might be deemed sufficient to fix upon the command the character of one "where the troops consist of different corps," in the sense of this article, and to empower the commanding officer to order a court-martial under the same. *R. 7, 174, Feb., 1864; 14, 48, Feb., 1865; 21, 118, Dec., 1865; 26, 254, Dec., 1867.* The presence, however, with the command, of a *civil* employee of the Army (as an "acting assistant surgeon") could have no such effect. *R. 8, 483, May, 1864.*

LXXXII C 2. *Held* that the commanding officer of the Army and Navy General Hospital at Hot Springs, Ark., is authorized, under the eighty-second article of war, to appoint a garrison court-martial at that station when the patients at the hospital consist of members of different arms of the service. *C. 856, Sept. 1, 1901.*

---

[1] Attorney General Rush, Sept. 11, 1817, decided that when a marine officer was to be tried while the marines were associated with the Regular Army, officers of the Marine Corps should be associated with officers of the Army in the membership of the court. President Monroe approved this decision by indorsement Sept. 19, 1817. (See also 2 Op. Atty. Gen., 311.)

[2] The original order is G. O. 5, Hdqrs. of Army, 1843. And see the law as announced later in G. O. 13, Fourth Mil. Dist., 1867.

LXXXIII A. While inferior courts[1] have, equally with general courts, *jurisdiction* of all military offenses not capital, committed by enlisted men, yet, in view of the limitations upon their authority to sentence, it is in general inexpedient to resort to them for the trial of the graver offenses, such as larcencies, aggravated acts of drunkenness, protracted absences without leave, etc., a proper and adequate punishment for which would be beyond the power of such tribunals. The more serious offenses should, where practicable, be referred for trial to *general* courts, which alone are vested with a full discretion to impose punishment in proportion to the gravity of the offense. *R. 7, 36, 207, Jan. and Feb., 1864; 11, 210, Dec., 1864; 16, 315, June, 1865; 26, 487, 533, Mar. and Apr., 1868; 42, 33, Nov., 1878.* An inferior court can not, however, legally decline to try or sentence an offender on the ground that it is not empowered under this article to impose a punishment adequate to his actual offense. *R. 28, 57, Aug., 1868; C. 11360, Oct. 10, 1901; 11861, Jan. 7, 1902; 13734, Nov. 23, 1902; 17352, Jan. 11, 1905; 18036, May 20, 1905.*

LXXXIII B 1. Capital offenses (i. e., offenses capitally punishable), not being within the jurisdiction of inferior courts, such courts can not take cognizance of acts specifically made punishable by article 21, however slight be the offenses actually committed.[2] *R. 2, 189, Apr., 1863; 11, 210, Dec., 1864; 24, 195, Jan., 1867; 26, 533, Apr., 1868; 28, 53, Aug., 1868; 32, 334, Feb., 1872; C. 3445, Aug. 17, 1897; 10946, July 30, 1901; 14761, June 5, 1903.*

LXXXIII C. The limitations imposed by the article have reference of course to single sentences. For distinct offenses made the subject of different trials resulting in separate sentences, a soldier may be placed at one and the same time under several penalties of forfeiture and imprisonment, or of either, exceeding together the limit affixed by the article for a single sentence.[3] *R. 31, 3, Feb., 1870.*

LXXXIII C 1 a. A sentence forfeiting pecuniary allowances in addition to pay, where the entire forfeiture amounted to a sum greater than one month's pay, *held* not authorized under this article. *R. 29, 401, Nov., 1869.*

LXXXIII C 2. The limitation of the authority of inferior courts in regard to sentences of imprisonment and fine, *held* not to preclude the imposition by them of other punishments sanctioned by the usage of the service; such, for example, as reduction to the ranks, either alone or in connection with those or one of those expressly men-

[1] Regimental and garrison courts-martial and summary courts detailed under existing laws to try enlisted men shall not have power to try capital cases or commissioned officers, but shall have power to award punishment not to exceed confinement at hard labor for three months or forfeiture of three months' pay, or both, and in addition thereto, in the case of noncommissioned officers reduction to the ranks and in the case of first-class privates reduction to second-class privates: *Provided*, That a summary court shall not adjudge confinement and forfeiture in excess of a period of one month, unless the accused shall before trial consent in writing to trial by said court, but in any case of refusal to so consent the trialmay be had either by general, regimental, or garrison court-martial, or by said summary court, but in case of trial by said summary court without consent as aforesaid, the court shall not adjudge confinement or forfeiture of pay for more than one month. *Act of Mar. 2, 1901 (31 Stat., 951).*

[2] G. O. 21, Hdqrs. of Army, 1858. And see G. O 18, War Dept., 1859; do. 9, Dept. of Utah, 1858, where the proceedings of garrison courts in cases of capital offenses are pronounced void.

[3] See G. O. 18, War Department, 1859.

tioned.[1] *R. 30, 667, Oct., 1870; 44, 659, Jan., 1882; C. 1397, Sept., 1895.*

LXXXIV A. This article makes the administering to the court of the form of oath thereby prescribed an essential preliminary to its entering upon a trial. Until the oath is taken as specified, the court is not qualified "to try and determine." *R. 38, 196, July, 1876.* The arraignment of a prisoner and reception of his plea—which is the commencement of the trial—before the court is sworn, is without legal effect. *R. 9, 293, June, 1864; 11, 323, Dec., 1864.* The article requires that the oath shall be taken not by the court as a whole, but by "each member." Where, therefore, all the members are sworn at the same time, the judge advocate will preferably address each member by name, thus, "You, A. B., C. D., E. F., etc., do swear," etc. *R. 13, 483, Mar., 1865.* A member added to the court, after the members originally detailed have been duly sworn, shoud be separately sworn by the judge advocate in the full form prescribed by the article; otherwise he is not qualified to act as a member of the court. *R. 10, 563, Nov., 1864; 14, 350, Apr., 1865.* A member who prefers it may be affirmed instead of sworn.[2] *R. 2, 562, June, 1863.*

LXXXIV B. The members are sworn to try and determine *the matter before them* at the time of the administering of the oath. In a case, therefore, where, after the court had been sworn and the accused had been arraigned and had pleaded, an additional charge, setting forth a new and distinct offense was introduced into the case, and the accused was tried and convicted upon the same; *held* that, as to this charge, the proceedings were fatally defective, the court not having been sworn to try and determine such charge.[3] *R. 24, 513, May, 1867.*

LXXXIV C 1. The object of the secrecy[4] in regard to the vote of a member is to place him, when voting, beyond the reach of influences which might induce him to act contrary to his judgment on the merits of the case. *P. 63, 263, Jan., 1894.*

LXXXIV C 2. Where the vote of each member of the court upon one of several specifications upon which the accused was tried, was stated in the record of trial, *held* that such statement was a clear violation of the oath of the court, though it did not affect the validity of the proceedings or sentence. *R. 2, 59, Mar., 1863.* A statement in the record of trial to the effect that all the members concurred in the finding or in the sentence, while it does not vitiate the proceedings or sentence, is a direct violation of the oath prescribed by this article. *R. 2, 76, Mar., 1863; 7, 3, Jan., 1864; C. 13366, Sept. 29, 1902.*

---

[1] See Manual for Courts-Martial (1908), p. 81, par. 13. The summary court act approved June 18, 1898, specifically recognizes and authorizes reduction to the ranks as a punishment by such court. See also, amended eighty-third article, note 1, *ante.*

[2] See sec. 1, Revised Statutes.

[3] See G. C. M. O. 39, War Dept., 1867; G. O. 13, Northern Dept., 1864.

[4] The words "a court of justice" are deemed to mean a civil or criminal court of the United States, or of a State, etc., and not to include a court-martial. A case can hardly be supposed in which it would become proper or desirable for a court-martial to inquire into the votes or opinions given in closed court by the members of another similar tribunal. The only case which has been met with in which the members of a court-martial have been required to disclose their votes by the process of a civil court is that of *In re* Mackenzie (1 Pa. Law J. R. 356), in which the members of a naval court-martial were compelled, against their objections, to state their votes as given upon the findings at a particular trial.

LXXXIV C 3. *Held* that the reopening of the court, after a conviction, to receive evidence of previous convictions, was not a violation of the eighty-fourth article of war. The procedure is in accordance with the spirit of the legislation which excludes judge advocates from closed sessions—to place prosecution and defense on a more equal footing, by allowing the accused to be present when evidence of previous convictions is submitted and to scrutinize and test the legality of the same. *P. 63, 49, Dec., 1893; C. 3097, Apr., 1897.*

LXXXIV C 4. The disclosing of the finding and sentence to a clerk by permitting him to remain with the court at the final deliberation and enter the judgment in the record, is a violation of the oath and a grave irregularity, though one which does not affect the validity of the proceedings or sentence. *R. 28, 146, Oct., 1868.*

LXXXVI A. The power of a court-martial to punish, under this article, being confined practically to acts done in its immediate presence,[1] such a court can have no authority to punish, as for a contempt, a neglect by an officer or soldier to attend as a witness in compliance with a summons.[2] *R. 5, 172, Oct., 1863.*

LXXXVI A 1. A court martial is authorized to exclude from its session any person who, it has good reason to believe, will endeavor to intimidate or interrupt the witnesses, or otherwise conduct himself in a disorderly manner. *R. 29, 237, Aug., 1869.*

LXXXVI B 1. A court martial has none of the common-law power to punish for contempt vested in the ordinary courts of justice, but only such authority as is given it by this article. Thus *held* that a court-martial was not authorized to punish, as for a contempt, under this article (or otherwise), a civilian witness duly summoned and appearing before it, but, when put on the stand, declining (without disorder) to testify.[3] *R. 9, 208, and 278, June, 1864; 21, 215, Feb., 1866; 42, 595, Apr., 1880; 49, 306, Aug., 1885.*

LXXXVI B 1 a. Where a contempt within the description of this article has been committed, and the court deems it proper that the offender shall be punished, the proper course is to suspend the regular business, and after giving the party an opportunity to be heard, explain, etc.,[4] 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 the trial of the pending case, or forfeiture of a reasonable amount of pay, has been the more usual punishment.[5] *R. 30, 361, 570, May and Aug., 1870.*

---

[1] It was held by the Secretary of War in the case of Lieut. Col. Backenstos—G. O. 14, War Dept., 1850—that a court-martial had, under this article, no power to punish its own members.

[2] As to the power of *courts of inquiry* to punish for contempt, see note to one hundred and eighteenth article.

[3] By sec. 1 of the act of Mar. 2, 1901, "to prevent the failure of military justice," etc., provision is made for the punishment by civil authority of civilians refusing to appear or testify before general courts-martial.

[4] See G. C. M. O. 37, Fourth Mil. Dist., 1868.

[5] Instead of proceeding against a military person for a contempt in the mode contemplated by this article, the alternative course may be pursued of bringing him to trial before a new court on a charge for a disorder under art. 62. Compare Samuel, 634; Simmons, sec. 434. The latter course has not unfrequently been adopted in our practice.

LXXXVI B 1 **b.** The authority of the judge advocate (under sec. 1202, R. S.) to issue "like process to compel witnesses to appear and testify which courts of criminal jurisdiction within the State, Territory, or district where such military courts may be ordered to sit, may lawfully issue," does not vest the court-martial with power to punish a civilian witness for contempt who refuses to testify. *R. 49, 306, Aug., 1885.*

LXXXVIII A. *Held* that the following are sufficient grounds of challenge to a member of a court-martial: That the member is the author of the charges and a material witness in the case. *R. 2, 584, June, 1863; 20, 18, Oct., 1865; 31, 210, Mar., 1871; 37, 43, Sept., 1875; 315, Feb., 1876; 39, 240, Oct., 1877.* Or that he is the prosecutor in the case. *R. 33, 204, July, 1872; 33, 257, Aug., 1872; 36, 257, Feb. 1875; 37, 315, Feb., 1876.* Or that he had expressed an opinion based upon the knowledge of the facts that the accused would be convicted whichever way he might plead. *R. 37, 491, Apr., 1876.* Or that a member was present at a mutiny, as a result of which the accused was before the court on a charge involving homicide. *R. 55, 529, Apr., 1888.* Or on a charge of conduct unbecoming an officer and a gentleman that the member when challenged said that he would not associate with the accused, and that he had so stated. *R. 24, 584, Mar., 1867.* Or that the member had previously investigated the case as a member of a board of survey. *R. 36, 599, July, 1875.* Or as a member of a court of inquiry. *R. 23, 406, Apr., 1867.* Or as a member of a previous court-martial. *R. 28, 181, Oct., 1868.*

LXXXVIII B. *Held* that a member of a court should not be excused on challenge for the following reasons: The mere fact that he is to be a witness (*R. 2, 584, June, 1863; 33, 137, July, 1872; C. 10973, Feb. 28, 1902*); or that he ministerially or by order of a superior preferred the charges (*R. 9, 258, June, 1864*); or that he was in command of the accused (*R. 7, 534, June, 1864; 22, 631, Mar., 1867*); or that he is junior to the accused, unless he will gain his promotion by the dismissal of the accused (*R. 33, 137, July, 1872; 37, 189, Dec., 1875; 38, 366, 376, Oct. and Nov., 1876; 55, 220, Dec., 1887*); or that the member entertained an opinion as to the impropriety of acts such as those charged against the accused unaccompanied by any opinion as to his guilt (*P. 64, Mar., 1894*); or that the member had had a disagreement with the accused and the accused thought that the member "might be prejudiced," although the member declared that he was not conscious of any prejudice to the interests of the accused. *R. 53, 225, Apr., 1887.*

LXXXVIII C. Where before arraignment, the accused (an officer), without having personal knowledge of the existence of a ground of challenge to a member, had credible information of its existence, *held* that he should properly have raised the objection before the members were sworn, and that the court was not in error in refusing to allow him to take it at a subsequent stage of the trial. *R. 41, 414, Sept., 1878.*

LXXXVIII D. The court, as a whole, is not subject to challenge, yet all the members may be challenged provided they are challenged separately. *R. 28, 632, May 26, 1869; 30, 361, May 23, 1870; 38, 53, Jan. 31, 1876; 53, 225, Apr. 1, 1887.*

XCI A 1. Where the evidence of high officers or public officials—as a department commander, or chief of a bureau of the War Depart-

ment—is required before a court-martial, the same, especially if the court is assembled at a distant point, should be taken by deposition, if authorized under this article. Such officers should not be required to leave their public duties to attend as witnesses, except where their depositions will not be admissible, and where the case is one of special importance and their testimony as essential. *R. 7, 5, Jan., 1864.* The Secretary of War should not be required to attend as a witness, or to give his deposition in a military case, where the chief of a staff corps or other officer, in whose bureau the evidence sought is matter of record, or who is personally acquainted with the facts desired to be proved, can attend or depose in his stead. *R. 35, 505, July, 1874.*

XCI B. 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. *R. 36, 236, Feb., 1875.*

XCI C. If the party at whose instance a deposition has been taken decides not to put it in, it may be read in evidence by the other party. One party can not withhold a deposition (duly taken and admissible under this article) without the consent of the other. *R. 37, 9, Feb., 1875.*

XCI D. When it is necessary to take a deposition in a foreign country, the papers should be forwarded to The Adjutant General for submission to the Department of State, with a request that a proper official of the diplomatic or consular service be designated to cause the deposition to be taken at the residence of the deponent or at the nearest point to such residence as is convenient for the purpose. *R. 42, 114, Jan., 1879; C., 13046, Nov. 24, 1903, July 6, 1906, Sept. 14, 1906, Nov. 18, 1911; 17953, May 5, 1905; 21294, Jan. 3, 1907; 22294, June 3, 1909.*

XCI E. *Held* that under the ninety-first article of war a court may not decide that a legal and material deposition shall not be taken.[1] *P. 48, 59, June, 1891; C. 6739, July, 1899; 18566, Apr. 27, 1906; 26990, July 28, 1910.*

XCI F. A deposition, introduced by either party, which is not "duly authenticated," should not be admitted in evidence by the court, although the other party may not object. *P. 34, 75, July, 1889.* A deposition *held* irregular and inadmissible where it failed to show that the officer by whom it was taken was authorized to take it, or that he was qualified to administer the oath to the witness. *P. 14, 285, Jan., 1887; 34, 75, July, 1889; 57, 61, Dec., 1892; C. 11942, Jan. 21, 1902; 12021, Feb. 1, 1902; 12035, Feb. 6, 1902; 12036, Feb. 7, 1902; 18566, Apr. 27, 1906.*

XCI G. A court-martial has no power to qualify or authorize a commanding officer, or any other officer or person, to take a deposition or administer an oath. *R. 55, 486, Mar., 1888.*

XCI H. Article VI of the amendments to the Constitution declares that the accused shall be entitled "to be confronted with the witnesses against him." *Held* that this applies only to cases before the United States courts and not to accused persons before courts-martial, as courts-martial are not a part of the judiciary of the United States, but simply instrumentalities of the executive power. *Held* further,

[1] It may require oral testimony before the court.

therefore, that where the offense is not capital a deposition may be introduced before a court-martial. *R. 19, 35, Oct., 1865; 38, 141, July, 1876; 52, 148, Mar., 1887; 55, 486, Mar. 1888; P. 44, 351, Dec., 1890; 52, 204, Feb., 1892; 55, 493, Oct., 1892; C 13883, Dec. 29, 1902; 17212, Feb. 24, 1905; 23941, Mar. 1, 1909.*

XCI I. A deposition can not be read in evidence in a capital case, that is, in a case where the offense may be punished capitally. *R. 3, 485, Apr. 7, 1854; 9, 646, Sept. 27, 1864; 32, 6. June 11, 1871; 42, 177, 361, Feb. 28 and July 18, 1879; C. 5202, Oct. 24, 1898; 5240, Nov. 1, 1898; 5702, Oct. 24, 1898; 5708, Jan. 24, 1899.*

XCI K. The deposition of a witness who resides in a State, etc., within which the court is held, is not admissible except by consent of the parties.[1] *R. 42, 361, July 18, 1879; C. 1829, Nov. 8, 1895; 5202, Nov. 9, 1906; 20772, June 14, 1907; 23481, June 24, 1908.*

XCIII A 1. It is in general good ground for a reasonable continuance, that the accused needs time to procure the assistance of counsel,[2] if it is made to appear that such counsel can probably be obtained within the time asked, and that the accused is not chargeable with remissness in not having already provided himself with counsel. *R. 13, 400, Feb., 1865.*

XCIII A 2. That the charges and specifications upon which an accused is arraigned differ in a material particular from those contained in the copy served upon him before arraignment, may well constitute a sufficient ground for granting him additional time for the preparation of his defense. *R. 24, 514, May, 1867.*

XCVI A. A sentence of death imposed by a court martial, upon a conviction of several distinct offenses, will be authorized and legal if any *one* of such offenses is made capitally punishable by the Articles of War, although the other offenses may not be so punishable. *R. 3, 253, 276 and 480, July and Aug., 1863.*

XCVI B. A court martial, in imposing a death sentence, should not designate a time or place for its execution, such a designation not being within its province but pertaining to that of the reviewing authority. If it does so designate, this part of the sentence may be disregarded, and a different time or place fixed by the commanding general.[3] *R. 3, 650, Sept., 1863. 5, 22, Sept., 1863.*

XCVII A. This article, by necessary implication, prohibits the imposition of confinement in a penitentiary as a punishment for offenses of a purely or exclusively military character—such as desertion for example.[4] *R. 5, 500, Dec., 1863; 7, 538, Apr., 1864; 23, 415,*

[1] See G. C. M. O. 102, Dept. of the East, 1871; do. 1, Division of South, 1875.

[2] G. C. M. O. 25, War Dept., 1875.

[3] It was held by the Supreme Court in Coleman *v.* Tennessee (7 Otto, 509, 519, 520), that a soldier who had been convicted of murder and sentenced to death by a general court martial in May, 1865, but the execution of whose sentence had been meanwhile deferred, by reason of his escape and the pendency of civil proceedings in his case, might at the date of the ruling (October term, 1878) "be delivered up to the military authorities of the United States, to be dealt with as required by law."

More recently (May ,1879, 16 Op., 349), it has been held in this case by the Attorney General that the death sentence might legally be executed notwithstanding the fact that the soldier had meanwhile been discharged from the service; such discharge, while formally separating the party from the Army, being viewed as not affecting his legal *status* as a military convict. But, in view of all the circumstances of the case, it was recommended that the sentence be commuted to imprisonment for life or a term of years.

[4] See G. O. 4, War Dept., 1867; also the action taken in cases in the following General Orders: G. O. 21 Dept. of the Platte, 1866; do. 21, id., 1871; do. 44, Eighth Army Corps, 1862; G. C. M. O. 34, 35, 43, 46, 72, 73, Dept. of the Missouri, 1870.

Apr., 1867; 28, 126, Sept., 1868; 29, 250, Sept., 1869; 31, 296, Apr., 1871; 32, 255, Jan., 1872; 33, 175, July, 1872; C. 14495, Apr. 17, 1903; 14624, May 7, 1903; 15623, Dec. 12, 1903; 16023, Apr., 1904; 17464, Feb. 3, 1905; 17200, May 10, 1905; 25481, Sept. 1, 1909.

Or for lifting up a weapon against the commanding officer and discharging it at him with intent to kill, in violation of the twenty-first article of war. *P. 25, 141, September, 1889; 64, 385, April, 1894.* Or for joining in a mutiny in violation of the twenty-second article of war. *P. 26, 284, September 1888.*

XCVII B. An offense duly charged as "Conduct to the prejudice of good order and military discipline," or as a violation of the sixtieth article of war, which, however, is *in fact* a larceny,[1] embezzlement, violent crime, or other offense made punishable with penitentiary confinement by the law of the State, etc., may legally be visited with this punishment. *R. 9, 281, Jan., 1864; P. 28, 302, Nov., 1888; C. 14624, Apr. 22, 1903.*

XCVII C. The term "penitentiary," as employed in this article, has reference to civil prisons only—as the penitentiary of the United States or District of Columbia at Washington, the public prisons or penitentiaries of the different States, and the penitentiaries "erected by the United States" (see sec. 1892, R. S.) in most of the Territories.[2] The term *State* or *State's prison* in a sentence is equivalent to *penitentiary. R. 9, 70, May, 1864.*

XCVII D. A court-martial, in imposing by its sentence the punishment of confinement in a penitentiary, is not required to follow the statute of the United States or of the State, etc., as to the *term* of the confinement. It may adjudge, at its discretion, except as provided in the fifty-eighth article of war, a less or a greater term than that affixed by such statute to the particular offense. At the same time the court will often do well to consult the statute, as indicating a reasonable measure of punishment for the offense. *R. 28, 247, Nov., 1868; P. 26, 497, Sept., 1888; 31, 117, Mar., 1889.*

XCVII E. Where a soldier is convicted of manslaughter in violation of the sixty-second article of war, and shooting his superior officer in violation of the twenty-first article of war, and sentenced to imprisonment for life, *held* that as the maximum sentence for manslaughter in the State where the offense was committed is imprisonment in the penitentiary for eight years, the life imprisonment must be regarded as having been imposed under the twenty-first article of war, which defines a strictly military offense, so that under the ninety-seventh article of war the United States military prison, and not the United States Penitentiary, must be designated as the place of confinement. *C. 25576, Sept. 16, 1909.*

C A. The terms "*cowardice*" and "*fraud*," employed in this article, may be considered as referring mainly to the offenses made punishable by articles 42 and 60. With these, however, may be regarded as included all offenses in which fraud or cowardice is *necessarily involved*, though the same be not expressed in terms in the charge or specification. *R. 11, 671, Apr., 1865.*

---

[1] In a case of *larceny*, the court should inform itself as to whether the *value* of the property stolen be not too small to permit of penitentiary confinement for the offense under the local law. See G. O. 44, Eighth Army Corps, 1862; G. C. M. O. 63, Dept. of the Platte, 1872.

[2] See pars. 940 and 941, A. R. (981 and 982, 1910).

C B. The publication throughout the United States, in the Associated Press dispatches, of the "crime, punishment, name, and place of abode" of the accused, *held* to be a sufficient compliance with the requirements of the one hundredth article of war. *C. 10831, Aug. 3, 1901.*

CII A. The Constitution (Art. V of the amendments) declares that "no person shall be subjected, for the same offence, to be twice put in jeopardy of life or limb." The United States courts, in treating the term "put in jeopardy" as meaning practically *tried*, hold that the "jeopardy" indicated "can be interpreted to mean nothing short of the acquittal or conviction of the prisoner and the judgment of the court thereon."[1] So, *held* that the term "tried," employed in this article, meant *duly prosecuted, before a court-martial, to a final conviction or acquittal;* and, therefore, that an officer or soldier, after having been duly convicted or acquitted by such a court, could not be subjected to a second military trial for the same offense, except by and upon his own waiver and consent. That the accused may *waive* objection to a second trial was held by Attorney General Wirt in 1818,[2] and has since been regarded as settled law. *R. 5, 172, Oct., 1863; 6 and 8, 62 and 37, Mar., 1864; C. 5766, Jan., 1899; 5654, July 24, 1899; 24518, Mar. 25, 1909.*

CII A 1. Where the accused has been once duly convicted or acquitted, he has been "tried" in the sense of the article, and can not be tried again, against his will, though no action whatever be taken upon the proceedings by the reviewing authority (*R. 31, 300, Apr., 1871);* or, though th proceedings, findings (and sentence, if any) be wholly disapproved by him.[3] *R. 9, 611, Sept., 1864; 27, 348, Nov., 1868, and 605, Apr., 1869; 38, 38, Apr., 1876; P. 60, 177, June, 1893; C. 16814, Apr. 29, 1907.* It is immaterial whether the former conviction or acquittal was approved or disapproved. *P. 36, 259, Nov., 1889.*

CII B. *Held* that there was no "second" trial, in the sense of the article, in the following cases, viz: Where the party, after being arraigned or tried before a court which was illegally constituted or composed, or was without jurisdiction, was again brought to trial before a competent tribunal. *R. 9, 261, June, 1864; 18, 214, Sept., 1865; 28, 68, Aug., 1868; C. 1645, Sept., 1895; 4036, Apr., 1898; 16710, Aug. 9, 1904.* 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. *R. 19, 212, Oct., 1865.* Where one of several distinct charges upon which the accused had been arraigned was withdrawn pending the trial, and the accused, after a trial and finding by the court upon the other charges, was brought to trial anew upon the charge thus withdrawn. *R. 5, 213, Oct., 1863.* Where, after proceedings commenced, but discontinued without a finding, the accused was brought to trial anew upon the same charge. *R. 5, 192, Oct., 1863.* Where, after having been acquitted or convicted upon a certain charge which did not in

[1] United States *v.* Haskell, 4 Wash. C. C., 402, 409. And see United States *v.* Shoemaker, 2 McLean, 114; United States *v.* Gilbert, 2 Sumner, 19; United States *v.* Perez, 9 Wheaton, 579; 1 Op. Atty. Gen., 294.

[2] 1 Op. Atty. Gen., 233. And see also 6 id., 200, 205.

[3] Compare Macomb, sec. 159; O'Brien, 277; Rules for Bombay Army, 45; McNaughton, 132, 133.

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. *R. 25, 675, June, 1868; 27, 604, Apr., 1869.* Where the accused was brought to trial after having had his case fully investigated by a different court, which, however, failed to agree in a finding and was consequently dissolved.[1] *R. 25, 73, Sept., 1867.* Where the court was not sworn. *C. 9472, Dec. 24, 1900.* Where the first court was dissolved because reduced below five members by the casualties of the service pending the trial. *R. 6, 62, Mar., 1864.* 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. *R. 5, 192, Oct., 1863; P. 32, 29, Apr., 1889; 14761, June 5, 1903; 16710, Aug. 25, 1904; 17773, Apr. 3, 1905.*

CII C. It is no objection to the assuming by a court-martial of jurisdiction of a military offense committed by an officer or soldier, that he may be amenable to trial, or may actually have been tried and convicted, by a criminal court of the State, etc., for a criminal offense involved in his act. Thus, a soldier may be tried for a violation of article 21, in striking or doing other violence to a superior officer, after having been convicted by a State court for the criminal assault and battery. So, an officer or soldier may be brought to trial under a charge of "Conduct to the prejudice of good order and military discipline" for the military offense (if any) involved (see sixty-second article) in a homicide or a larceny of which, as a civil offense, he has been acquitted or convicted by a State court.[2] And the reverse is also law, viz, that the State court may legally take cognizance of the criminal offense involved, without regard to the fact that the party has been subjected to a trial and conviction by court-martial for his breach of military law or discipline. In such instances the act committed is an offense against the two jurisdictions and may legally subject the offender to be tried and punished under both.[3]

---

[1] See United States *v.* Perez, 9 Wheat., 579.

[2] Grafton *v.* U. S. 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. (206 U. S., 334.)

[3] That an officer may be amenable to the civil and the military jurisdiction at the same time for the same act, see cases of Asst. Surg. Steiner and Capt. Howe, 6 Op. Atty. Gen., 413, 506. In the former case it is held that the "conviction or acquittal of an officer by the civil authorities of the offense against the general law does not discharge him from responsibility for the military offense involved in the same facts." In the latter case it is observed: "An officer may be tried by court-martial for the military relation of an act after having been tried by the civil authorities for the civil relations of the same act." And see 3 Op. Atty. Gen., 749, and 6 Op. Atty. Gen., 413, 506. In a case published in G. C. M. O. 20, Hdqrs. of Army, 1869, an officer was charged with and convicted of "Conduct to the prejudice of good order and military discipline," for the killing of a soldier, for which, as "manslaughter," he had previously been acquitted by a civil court. And see cases in G. O. 78, Dept. of the East, 1869; G. C. M. O. 50, Dept. of the Missouri, 1871. See Grafton *v.* U. S. (206 U. S., 333).

In cases of double amenability, while—in view of the subordination of the military to the civil power—the civil jurisdiction is entitled to the preference, yet, in general, that jurisdiction which is *first fully attached* is ordinarily properly allowed to have the precedence in its exercise over the other. (See *Ex parte* McRoberts, 16 Iowa, 606; 6 Op. Atty. Gen., 423; G. O. 25, Hdqrs. of Army, 1840.)

R. 5, 140, Oct., 14, 1863; 41, 187, Apr. 5, 1878; 43, 210, Feb. 17, 1880; 49, 657, Jan. 18, 1886; P. 65, 268 and 269, June 30, 1894; C. 6862, Aug. 7, 1899; 14851, July 19, 1903; 17017, Oct. 17, 1904.

CII C 1 a. Where an officer who had killed a superior officer in an altercation at a military post was brought to trial before a civil court on a charge of murder and acquitted, and was subsequently arraigned before a court-martial for an offense against military discipline involved in his criminal act, *held* that a plea of former trial interposed by him was properly overruled by the court. *P. 65, 268, and 269, June, 1894; C. 14851, July 13, 1903; 17017, Oct. 17, 1904.*

CII C 1 b. *Held* that the trial and acquittal of a soldier for murder by the civil authorities was not a bar to his subsequent trial and conviction by a general court-martial for assault with a rifle and the infliction of a mortal wound on a fellow soldier.[1] *C. 17402, May 14, 1906.*

CII C 2. A soldier was convicted of "manslaughter," but the findings and sentence were disapproved. He was then brought to trial on a charge of mutiny, as committed on the occasion of the homicide, the latter being alluded to in the specification as an incidental circumstance of aggravation, and was found guilty and sentenced. *Held* that the accused was not, in the sense of this article, "tried a second time for the same offense," the mutiny not consisting in the act of homicide but constituting a distinct offense. *P. 26, 284, Sept., 1888.*

CII D. There can not, in view of this article, be a second trial where the offense is really the same though it may be charged under a different description and under a different article of war. Thus, where the Government elects to try a soldier under the thirty-second article for "absence without leave," or under the forty-second for "lying out of quarters," 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 a desertion. *P. 34, 401, Aug., 1889; C. 11025, Sept. 4, 1901; 19740, Mar. 6, 1907.*

CII E 1. 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 allowance, which constitutes the military offense of fraudulent enlistment under the act of Congress approved July 27, 1892. (27 Stat., 278). *Held,* therefore, where a soldier was tried for and convicted of fraudulent enlistment in procuring his enlistment by means of a misrepresentation or concealment, that to again try him for the

[1] *In re* Stubbs, 133 Fed. Rep., 1012, in which the court said, quoting from the syllabi: "Where a United States soldier killed a fellow soldier during a military encampment, and on being surrendered to the civil authorities of the State was prosecuted for murder and acquitted, such acquittal, though a final determination of his innocence of murder and of each lesser offense necessarily included therein, was no bar to his subsequent military arrest and trial by a general court-martial for 'conduct to the prejudice of good order and military discipline,' in violation of the sixty-second article of war (U. S. Comp. St. 1901, p. 957), though based on the same act.

"A charge of assault with a rifle and the infliction of a mortal wound by accused upon a fellow soldier, with particulars of the time and place clearly stated, sufficiently alleged an offense within the sixty-second article of war (U. S. Comp. St. 1901, p. 957), providing for trial and punishment of all crimes not capital, and all disorders and neglects which officers and soldiers may be guilty of to the prejudice of good order and military discipline."

same enlistment on account of another misrepresentation or concealment subsequently discovered would be a second trial for the same offense within the meaning of this article. *C. 2768, Nov., 1896 and Jan., 1897; 7668, Feb. 9, 1900; 11988, Feb. 6, 1902; 25703, Oct. 25, 1909; 23644, July 8, 1910.*

CII F. The reconsideration by a court-martial of a finding, whether of guilty or not guilty, when duly reconvened for that purpose, is not a second trial within the meaning of this article. The original and revised proceedings are merely parts of one and the same trial.[1] *C. 5654, July, 1899; 12177, Mar. 11, 1902.*

CII G. An opinion given by a court of inquiry is not in the nature of a sentence or adjudication pronounced upon a *trial.* The accused, upon a subsequent trial, by court-martial, of charges investigated by a court of inquiry, can not plead the proceedings or opinion of the latter as a former trial, acquittal, or conviction. *R. 16, 389, July, 1865; 29, 98, July, 1869.*

CII H 1. Where a soldier on duty as sentinel at a military reservation commits homicide to prevent prisoners from escaping or in self-defense in the discharge of his duty, *held* that it is to the advantage of both the military service and the soldier that he first be tried by a military court, to attain which it is necessary that a military jurisdiction vest before the civil courts have assumed jurisdiction,[2] and that whenever a soldier commits an offense which is liable to cause a civil court to take action and the offense is one which may be excused as one involved in the performance of a military duty, charges be immediately formulated and lodged with the proper authority with a view to vesting military jurisdiction, subject to such later action as may be necessary.[3] *C. 21694, June 18, 1907.*

---

[1] See 6 Op. Atty. Gen., 200, 204; 7 id., 338; 18 id., 113; Swaim *v.* U. S., 165 U.S., 553.

[2] Grafton *v.* U. S., 206 U. S., 333, in which the court said, quoting from the syllabus: "The prohibition of double jeopardy is applicable to all criminal prosecutions in the Philippine Islands.

"A person is not put in second jeopardy unless his prior acquittal or conviction was by a court having jurisdiction to try him for the offense charged.

"The judgment of a court-martial having jurisdiction to try an officer or soldier for a crime is entitled to the same finality and conclusiveness as to the issues involved as the judgment of a civil court in cases within its jurisdiction is entitled to.

"General courts-martial may take cognizance, under the sixty-second article of war, of all crimes, not capital, committed against public law by an officer or soldier of the Army within the limits of the territory within which he is serving; and, while this jurisdiction is not exclusive, but only concurrent with that of the civil courts, if a court-martial first acquires jurisdiction its judgment can not be disregarded by the civil courts for mere error, or for any reason not affecting the jurisdiction of the court rendering it.

"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."

[3] Army Regulation 970, of 1910.

CII H 2. Where a sentinel has committed homicide in the execution of his duty by firing upon an escaping prisoner and accidentally killing a third person, for which he was subsequently acquitted by a general court-martial, in which jurisdiction had vested, *held* that it is within the power of the civil authorities of the State to assume jurisdiction, and surrender of custody should be made on demand of such authority, and the right of the State authorities to hold the soldier should be raised on writ of habeas corpus [1] in a United States court. *C. 2194, Aug. 14, 1907.*

CII I. Where a soldier of the Philippine Scouts made an assault upon a Chino, for which he was tried, convicted, and punished by a summary court, and subsequently a formal demand was made upon his commanding officer for his surrender to the civil authorities, *held* that the fifty-ninth article of war was applicable to the case, and that the question as to whether or not the soldier was subject to the jurisdiction of the civil court, from which the warrant of arrest issued, was a judicial one which could not be decided by the post commander, and that he should have surrendered the offender instead of returning the warrant with the information that he had been tried by a regularly constitued military tribunal having jurisdiction of the offender described in the warrant, leaving the question of double jeopardy to be raised before the proper civil tribunal. *C. 21694, Aug. 14, 1908.*

CIII A. The "order for such trial," within the meaning of this article, is the reference of the charges to the court for trial, and not the order appointing the court. *C. 1646, Aug., 1895.*

CIII B 1. The mere fact that the offense was concealed by the accused and remained unknown to the military authorities for more than two years constitutes no "impediment" in the sense of the article.[2] *R. 21, 635, Sept., 1866; 50, 633, Aug., 1886; C. 18605, Sept. 22, 1905; 23644, July 8, 1910.*

CIII B 2. A mere allegation in a specification, to the effect that the whereabouts of the offender was unknown to the military authorities

---

[1] See U. S. *v.* Lipsett, *ex parte* Gillette, 156 Fed. Rep., 65, in which the court said, quoting from the syllabi: "Under R. S. secs. 752, 753, 761 (U. S. Comp. St. 1901, pp. 592, 594), a court or judge of the United States has power to issue a writ of habeas corpus on petition of the United States for the purpose of an inquiry into the cause of detention of a prisoner held by a State to answer to a criminal charge, where it is alleged by the petitioner that the act charged as a crime was committed by the prisoner in the performance of his duty as a soldier of the United States; and it has authority to determine summarily as a fact whether or not such allegation is true, and, if found to be true, to discharge the prisoner on the ground that the State is without jurisdiction to try him for such act."

"A soldier in the service of the United States was placed on guard over prisoners and furnished with a gun and ammunition. By the manual of guard duty, with which he was familiar, it was made his duty if a prisoner attempted to escape to command him to halt, and if he failed to do so, and there was no other possible means to prevent his escape, to fire upon him. One of the prisoners started to run away down a public street, and the guard pursued, calling on him to halt, to which no attention was paid. The guard, being lame, was unable to overtake the prisoner, and after reaching a place where the street was apparently clear fired upon him, but the bullet went over his head and struck and killed a young woman who was walking with others in the street upon higher ground and was not seen by the guard. He fired again at the prisoner, but the latter escaped temporarily. There was no claim that the killing was intentional, or that the guard acted maliciously or wantonly, or otherwise than in good faith. *Held*, that under such facts the guard in shooting was acting in the supposed performance of his duty as a soldier, and was not subject to arrest and trial for manslaughter by the State."

[2] 14 Op. Atty. Gen., 52, 266–268.

during the interval of more than two years which had elapsed since the offense is not a good averment of a "manifest impediment" in the sense of the article. *R. 35, 640, Oct., 1874.*

CIII C. The liability to trial after discharge, imposed by the last clause of article 60, *held* subject to the limitation prescribed in article 103.[1] *R. 12, 481, 536, July and Aug., 1865; 15, 133, Apr., 1865; 21, 4, Nov., 1865; 26, 670, July, 1868.* And so held as to the liability to trial after the expiration of the term of enlistment, under article 48.[2] *R. 31, 384, May, 1871.*

CIII D. The limitation is properly a matter of *defense* to be specially pleaded and proved.[3] *P. 21, 156, Dec., 1887; 40, 476, May, 1908; 59, 278, May, 1893; 65, 346, June, 1894; C. 17950, Oct. 22, 1906.* By a plea of guilty the accused is assumed to waive the right to plead the limitation by a special plea in bar. *R. 56, 75, Apr., 1888.* But under a plea of not guilty the limitation may be taken advantage of by *evidence* showing that it has taken effect. *P. 21, 156, supra; 55, 266, Sept., 1892;*[4] *C. 16172, Apr. 12, 1904; 16122, Apr. 13, 1904; 16254, May 8, 1904; 16859, Sept. 7, 1904; 17034, Oct. 21, 1904; 15607, Nov. 18, 1905; 17950, Oct. 22, 1906; 22784, Sept. 13, 1909.*

CIII E. By the absence referred to in the original article, in the term—"unless by reason of having absented himself"—is intended, not necessarily an absence from the United States, but an absence by reason of a "fleeing from justice," analogous to that specified in section 1045, R. S., which has been held to mean leaving one's home, residence or known abode within the district, or concealing one's self therein, with intent to avoid detection or punishment for the offense against the United States.[5] Thus *held* that, in a case other than desertion, it was not essential for the prosecution to be prepared to prove that the accused had been beyond the territorial jurisdiction of the United States in order to save the case from the operation of the limitation. *P. 58, 268, Mar., 1893; 64, 137, and 151, Mar., 1894; C. 15607, Dec. 11, 1903; 16064, Mar. 22, 1904; 16122, Mar. 23, 1904; 16172, Apr. 12, 1904; 16254, May 3 and 26, 1904; 17034, Oct. 21, 1904, and May 12, 1905; 18023, May 19, 1905; 18137, June 9, 1905; 18605, Sept. 22, 1905; 18812, Nov. 7, 1905; 19374, May 16, 1906; 21367, Apr. 12, 1907; 21760, July 9, 1907; 21829, July 22, 1907; 12563, Sept. 30, 1907, and July 30, 1909; 22874, Feb. 27, 1908; 15257, Mar. 10, 1908, and May 4, 1910; 23034, Apr. 3, 1908; 22784, July 10, 1909; 8287, Nov. 23, 1909; 20754, Apr. 29, 1910.*

CIII F 1. Prior to the amendment of the One hundred and third article of war by the act of April 11, 1890 (26 Stat., 54), it was held that the statute of limitation began to run in a case of a desertion only upon the return of the deserter to military control. It is now held that the act of April 11, 1890, cited above, operates to cause the statute of limitation to begin to run at the end of the term for which the soldier

---

[1] 14 Op. Atty. Gen., 52.

[2] See, to a similar effect, 13 Op. Atty. Gen., 462; 15 id., 152; 16 id., 170; also, *In re* Bird, 2 Sawyer, 33.

[3] *In re* Bogart, 2 Sawyer, 396, 397; *In re* White, 17 Fed. Rep., 723; *In re* Davison, 21 Fed. Rep., 618; *In re* Zimmerman, 30 Fed. Rep., 176; G. O. 22 of 1893. And compare U. S. *v.* Cooke, 17 Wallace, 168.

[4] See XII Comp. Dec., 276.

[5] U. S. *v.* O'Brien, 3 Dillon, 381; U. S. *v.* White, 5 Cranch C. C., 38, 73 (**Fed. Cas., 16675**); Gould & Tucker, Notes on Revised Statutes, 349.

was enlisted or mustered into the service. *C. 4130, May 17, 1898; 12563, May 6, 1902 and Sept. 30, 1907; 28321, May 8, 1911.*

CIII F 2. *Held* that the statute of limitations does not run in the case of desertion in time of war. *C. 11850, Jan. 6, 1902; 13532, Oct. 23, 1902; 16064, Mar. 22, 1904; 16254, May 3, 1904; 16859, Sept. 7, 1904; 17034, Oct. 21, 1904; 17439, Jan. 6, 1905; 17609, Mar. 1, 1905; 18023, May 20, 1905; 23070, Apr. 10, 1908.*

CIII F 2 a. A soldier deserted November 17, 1900, from the Ninth United States Infantry, which was then a part of the force with which the United States was making war in Chinese territory. The active operations against the enemy began June 20, 1900, when the admirals of certain powers issued a proclamation announcing that they intended to use force against the Boxers, and the hostile operations ended May 12, 1901, when the commanding general, China Relief Expedition, issued an order relieving the American forces from further service in China. *Held* that although war was not declared nor a treaty of peace ratified, nevertheless a condition of war existed, and that as this soldier was a deserter in time of war he was not entitled to the benefit of the statute of limitation provided in the one hundred and third article of war. *C. 17609, Mar. 22, 1905.*

CIII F 3. A soldier deserted, was convicted, and given a sentence less than dishonorable discharge. At a date previous to the expiration of his term of enlistment he again deserted. *Held* that the statute of limitations began to run, as to the second desertion, two years after the offense had been committed plus the length of time from the date of the second desertion to the end of his term of enlistment. *C. 15257, May 4, and Oct. 20, 1910.*

CIII F 4. A soldier deserted, was convicted, and given a sentence less than dishonorable discharge. After he had been returned to duty, and at a date subsequent to the expiration of his term of enlistment, and while making good the time lost in the first desertion, he again deserted. At his trial for the second desertion it was claimed that the statute of limitations had run. *Held* that the statute of limitations did not begin to run as to the second desertion until the soldier had made good under the forty-eighth article of war the time lost in desertion.[1] *C. 15257, Jan. 28, 1909.*

CIII F 5. The one hundred and third article of war, which is the statute of limitations, contains the provision that: "No person shall be tried or punished by a court-martial for desertion in time of peace and not in the face of an enemy." *Held* that the words "in time of peace and not in the face of an enemy" refer to a situation in which the United States, although not at war, is confronted with warlike conditions and has an enemy, and that, therefore, the statute of limitations will run at that time in the case of a desertion which was not in the presence of such enemy. *C. 17034, Oct. 20, 1904.*

Similarly *held* that that phrase applies to conditions which exist when the country at large is at peace, but when portions of its armed forces are confronting strikers, rioters, or are engaged in active operations as the result of an Indian outbreak. *C. 17294, Dec. 24, 1904.*

CIII F 6. A soldier deserted and was for a considerable time thereafter continuously employed on an Army transport. The question

[1] See XII Comp. Dec. 592, Apr. 7, 1906. If arrested after expiration of term, time in confinement or while serving sentence is not military service and can not be counted to make good time lost under the forty-eighth article of war.

was raised as to whether or not he had absented himself from the United States as those words are used in the one hundred and third article of war. *Held* that absence from the United States under the one hundred and third article of war means absence from the jurisdiction of the United States, and that absence from the geographical limits of the United States on a Government vessel would not be such absence from the United States as is contemplated by the statute, particularly where the deserter passed under the same name as that which he bore when he enlisted and deserted, as in this case. *C. 21760, July 9, 1907; 28321, May 11, 1911.*

CIII G. *Held* that the one hundred and third article of war applies to escape, as escape is not a continuing offense. *C. 22784, Mar. 11, 1908.*

CIII H. *Held* that in cases of fraudulent enlistment, except those of enlistment without a discharge from a previous enlistment, the limitation provided in the one hundred and third article of war begins to run from the date of receipt of last pay or allowances. *C. 13322, July 6, 1911.*

CIV A 1. The approval of the sentence indicated by this article should properly be of a *formal* character. An indorsement, signed by the commander, of the single word "approved"—a form not unfrequently employed during the Civil War—though, strictly, sufficient in law (*R. 26, 511, Apr., 1868*), is irregular and objectionable. So, *held* that a mere statement, written in or upon the proceedings, in transmitting them to the President, that the record was "forwarded" for the action of superior authority, was insufficient as not implying the requisite approval according to the article. *R. 2, 99, Mar., 1863; 7, 476, Apr., 1864.* And similarly *held* of a mere recommendation that the proceedings be approved by such authority. *R. 9, 50 and 54, May, 1864; C. 2844, Jan., 1897.* The article requires the sentence to be "approved." *Held*, therefore, where a sentence had been duly adjudged, that a formal approval of the "findings" *only* did not meet the requirement of the article. *C. 5095, Oct., 1898.*

CIV A 2. This article is properly to be complied with by an approval of the sentence (where the same is approved in fact) by "the officer ordering the court," etc., although—as in a case of a sentence of dismissal in time of peace—he may not be empowered *finally* to confirm and give effect to the sentence. His approval is required as showing that he does not, as he is authorized to do, *disapprove. R. 9, 15, May, 1864.*

CIV B. Where the men who had been tried by a general court-martial had passed with their command from the department in which they had been tried before action had been taken on their cases by the reviewing authority, *held* that the commanding general of the department in which they had been tried was the proper reviewing authority for the cases. *C. 4942, Sept. 9, 1898; 7166, Oct. 13, 1899.*

CIV C 1. The "officer commanding for the time being," indicated in this article, is an officer who has succeeded to the command of the officer who convened the court; as where the latter has been regularly relieved and another officer assigned to the command; or where the command of the convening officer has been discontinued, and merged in a larger or other command, at some time before the proceedings of the court are completed and require to be acted upon. 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. *R. 8, 633, July, 1864; 9, 621, Sept., 1864; 13, 298, Jan., 1865; 20, 153 and 194, Nov., 1865; C. 5231, Oct., 1898; 5274 and 5294, Nov., 1898; 5471, Dec., 1898; 10849, July 17, 1901; 12210, Mar. 14, 1902; 16710, Jan. 20 and July 29, 1908; 25832, Mar. 4, 1910.*

CIV C 1 a. When the officer who convened a court-martial and referred a case to trial before it was succeeded by another officer, *held* that the latter when acting as reviewing authority should indicate on the proceedings that he had succeeded to the command of the officer who convened the court. *C. 5078, Sept. 29, 1898; 5079, Sept. 29, 1898; 5080, Sept. 29, 1898; 10849, July 16, 1901; 16710, Aug. 9, 1904.*

CIV C 1 b. *Held* that it is not necessary that the "officer commanding for the time being" should be of the rank required of a convening officer. All that is required in order that he may lawfully act upon a record of trial is that he succeeds lawfully to the command. *C. 10849, July 16, 1901; 11796, Dec. 19, 1901; 16710, Aug. 9, 1904, Feb. 8 and Mar. 2, 1908.*

CIV C 2. A court was convened by 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. *Held* that the commander of this other corps was the officer "commanding for the time being," and therefore the proper reviewing officer. *C. 5231, Oct. 31, 1898; 5274, Nov. 9, 1898; 5294, Nov. 8, 1898; 5471, Dec. 7, 1898; 5473, Dec. 8, 1898; 16710, Mar. 20, 1906.*

CIV C 3. Where a separate brigade was merged in a division, *advised* that a court convened by the commander of the separate brigade need not be dissolved on account of the merger, but may legally try all the cases which have been referred to it, the division commander becoming the reviewing authority. *C. 5151, Oct., 1898.*

CIV C 4. Where, before the proceedings of a garrison court convened by a post commander were completed, the post command had ceased to exist and the command become distributed in the department, *held* that the department commander, as the legal successor of the post commander, was the proper authority to approve the sentence under this article. *R. 42, 48, Nov., 1878; C. 16800, Aug. 25, 1904.*

CIV C 5 a. *Held* that the illness of a department commander is a "disability" under which the senior line officer present and on duty in the department is the "officer commanding for the time being" within the meaning of the one hundred and fourth article of war. *C. 10849, July 16, 1901.*

CVI A. *Held* that a department commander can confirm a sentence of dismissal of an officer and order its execution while a state of war continues.[1] *C. 5860, Feb. 11, 1899; 6240, Apr. 12, 1899; 8197, May 3, 1900; 10002, Mar. 18, 1901; 12184, Mar. 12, 1902; 15754, Dec. 23, 1903.*

CVII A. *Held* that when a division or separate brigade does not belong to a separate army in the field, the President of the United

[1] As to general officers, see article 108.

States is the proper confirming authority within the meaning of the one hundred and seventh article of war. *C. 4980, Sept., 1898; 10910, Aug. 17, 1901.*

CXI A. Under this article a reviewing authority should first formally approve the sentence, as forwarding the record for the action of the President without such approval would be incomplete and irregular. *R. 4, 337, Nov., 1863; 9, 15, May, 1864. Held,* however, that when a record reached the President without any action of the reviewing authority being recorded thereon he very properly regarded it as having reached him under the one hundred and eleventh article of war. *C. 12251, Mar. 19, 1902. Held* that the President may, when a record reaches him under the operation of this article approve or disapprove the sentence in whole or in part and may exercise the usual power of remission or mitigation. *R. 3, 492, Aug., 1863; 7, 594, Apr., 1864.*

CXII A 1. A military commander vested with the power of pardon or mitigation under this article is not authorized to delegate the same to an inferior. Thus *held* that a department commander could not legally authorize a post commander to remit in part, upon good behavior, the punishment of a soldier under sentence at the post of the latter, who had been convicted by a general court, convened, and whose proceedings had been acted upon, by the former. *R. 33, 119, June, 1872; C. 11028, Aug. 16, 1901.*

CXII A 1 **a.** *Held* that a reviewing officer other than the President was not empowered by this article to *commute* a punishment; that the "pardon" here specified was *remission*, which, unlike the pardoning power vested in the President, did not include commutation or conditional pardon. So, held that a reviewing commander was not authorized to commute the punishment of dishonorable discharge, and that, as such punishment was not susceptible of mitigation, it could not legally be reduced under this article. *R. 48, 666, Jan., 1885; 57, 89, Oct., 1888; P. 32, 401, May, 1889; 34, 237, Aug., 1889; C. 5887, Feb., 1899; 21390, Apr. 16, 1907.*

CXII A 1 **a** (1). The power to remit or commute sentences of death (and dismissal in case of an officer) remains with the President. A military commander can not exercise such power even where, in time of war, he is authorized to approve and execute the sentence. *Held,* therefore, that the action of a department commander in directing the commutation of a sentence of death was a nullity, but that such action might be regarded as a recommendation to be considered by the President.[1] *R. 2, 67, Mar., 1863; C. 12213, Mar. 13, 1902.*

CXII A 1 **b.** The order prescribing maximum punishments was not intended to and does not affect the established principle that the reviewing authority, in the exercise of his power of mitigation, can not change the kind of punishment. The power of substitution which may be exercised by the court under the order has no relation to the power of the reviewing officer. Thus *held* that the substitution by the reviewing officer of confinement for forfeiture, though the period of confinement proposed were less than the court could have substituted, would not be legal mitigation. *C. 2381, June 20, 1896; 2751, Nov. 18, 1896; 3487, Sept., 1897; 3850, Feb. 7, 1898; 5887, Feb. 18, 1899.*

---

[1] See 6 Op. Atty. Gen. 123.

CXII A 1 c. The pardoning power under the one hundred and twelfth article of war is not limited in its exercise to the moment of the approving of the sentence, but may be employed as long as there remains any material for its exercise.[1] *R. 5, 71, Sept. 30, 1863; 6, 35, Mar. 21, 1864; 8, 582, June 20, 1864; 21, 49, Nov. 21, 1865; 26, 463, Feb. 20, 1868; 27, 243, Sept. 21, 1868; C. 10393, June 10, 1901; 14678, May 18, 1903; 16552, July 6, 1904; 16710, July 27, 1908; 18467, Aug. 23, 1905; 21705, Aug. 20, 1907.*

CXII A 1 c (1). A military prisoner sentenced to confinement in a penitentiary or in the United States military prison or any branch thereof will, so far as concerns the exercise of clemency, be considered to have passed beyond the jurisdiction of a division or department commander from the date of the approval of his sentence without regard to the fact of his being temporarily retained within the command of such division or department commander pending transfer to penitentiary or to the United States military prison or any branch thereof. *C. 21705, June 19, 1907; 16710, July 29, 1908.* All punishments of confinement in a penitentiary, where legal, may, however, at the time of action on the case by the reviewing authority, be mitigated to confinement in a military prison or at a military post. *P. 29, 209, Jan., 1889.*

CXII B. The reviewing authority, in approving the punishment adjudged by the court and ordering its enforcement, is authorized, if he deems it too severe, to graduate it to the proper measure by reducing it in quantity or quality, without changing its species: this is *mitigation. R. 37, 22, June, 1875; 41, 518, Mar., 1879.* Imprisonment, fine, forfeiture of pay, and suspension, are punishments capable of mitigation. As an instance of a mitigation both in quantity and quality, *held* that a sentence of imprisonment for three years in a penitentiary was mitigable to an imprisonment for two years in a military prison. *R. 41, 518, supra; C. 21390, Apr. 16, 1907.*

CXII C. A punishment in itself illegal is not capable of *mitigation.* Thus where a sentence of imprisonment in a penitentiary is not legally authorized, it can not be made valid by mitigating this imprisonment to confinement in a military prison. In such case the latter will be equally invalid and inoperative with the original punishment.[2] *P. 29, 209, Jan., 1889; 43, 151, Oct., 1890; 53, 181, Apr., 1892.*

CXII D. *Held* that a sentence of dishonorable discharge by a court-martial can not be commuted or mitigated to confinement or forfeiture by the reviewing authority except the President. *C. 2751, Nov. 18, 1896; 5887, Feb. 20, 1899.*

CXII E. Where the station of a soldier who is undergoing sentence imposed by an inferior court is changed, *held* that the power to mitigate the sentence passes to the new post commander. *C. 10393, June 10, 1901.*

---

[1] See G. O. 167 A. G. O., Dec. 31, 1901.

See par. 958, A. R., Ed. 1910, which requires that an application for clemency in case of a prisoner sentenced to confinement in a penitentiary or in the United States military prison 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.

See also 19 Op. Atty. Gen., 106, Feb. 27, 1888.

[2] But see A. R. 981 of 1910, which provides that when a penitentiary has been erroneously designated in the sentence the reviewing authority may disapprove that portion of the sentence and designate a proper place.

CXIV A. Under the one hundred and fourteenth article of war and the practice of the War Department, every person tried by a general court-martial or by a military commission is entitled to *one* copy of the record of proceedings in his case upon demand therefor made by him or by any person in his behalf (*C. 6606, June 15, 1899*) before his decease. *R. 56, 17, Mar., 1888; P. 25, 188, June, 1888.* The application should, in the first instance, be addressed to the Judge Advocate General, and if not made by the accused himself, should exhibit satisfactory evidence that the applicant represents the accused, as a person other than the accused, applying on his own account, is not entitled to a copy. *R. 3, 348 and 409, Aug., 1863; 19, 318, Jan., and 459, Mar., 1866; 21, 12 and 583, Nov., 1865, and Aug., 1866; 31, 499, July, 1871; 37, 106, Nov., 1875; C. 26559, Apr. 20, 1910. Held* that otherwise than as above a copy of a court-martial record can be secured only by order of the Secretary of War. *R. 19, 635, May, 1866; 31, 449, July, 1871; 37, 106, Nov., 1875.* The report of the Judge Advocate General will not be furnished under the one hundred and fourteenth article of war. *R. 19, 657, June, 1866; 32, 54, Oct., 1871.*

CXV A. *Held*, that neither the President nor a commanding officer is obliged to order a court of inquiry on the application of an officer. *C. 18772, Oct. 26, 1905; 23059, May 12, 1908; 20754, Mar. 12, 1909; 27472, Nov. 9, 1910.* And in a case where an officer requested a court of inquiry, and it was apparent that the real purpose of the request was to secure an opinion by the court of inquiry on a question of infringement of patent, *held* that it was not a proper subject for a court of inquiry. *C. 25188, Jan. 20, 1912.*

CXV B. The court of inquiry authorized by the one hundred and fifteenth article of war can examine into the nature of transactions of officers or enlisted men only.[1] *R. 1, 395, 402, Nov., 1862; 19, 71, Oct., 1865; 27, 601, Apr., 1869; 38, 210, Aug., 1876; 39, 619, Aug., 1878; 51, 263, June, 1878.* The accused appears and examines witnesses before such a court as freely as before a court-martial. The proceedings of a court of inquiry may be open at the discretion of the court.[2] *R. 28, 586, May, 1869.*

CXIX A. Where, as in the majority of cases, the inquiry is instituted with a view of assisting the determination by the President, or a military commander, of the question whether the party should be brought to *trial*, the opinion of the court will properly be as to whether further proceedings before a court-martial are called for in the case, with the reasons for the conclusions reached. Where no such view enters into the inquiry, but the court is convened to investigate a question of military right, responsibility, conduct, etc., the opinion will properly confine itself to the special question proposed and its legitimate military relations. A court of inquiry, composed as it is of military men,

[1] A court of inquiry is not a court in the legal sense of the term, but rather a board. It takes no pleadings, and its proceedings are not a trial of the guilt or innocence of the accused, nor does it come to a verdict or pass sentence. (1 Winthrop's Mil. Law, chap. 24.)

[2] Although the challenge of members of a court of inquiry is not specifically provided for, yet in the interest of justice it is generally allowed. (See Macomb, sec. 204; O'Brien, 292; 1 Hart, 278.) See S. Doc. no. 701, 61st Cong., 3d sess., which publishes the proceedings and conclusions of the Brownsville Court of Inquiry. That Court of Inquiry had jurisdiction by the act of Mar. 3, 1909 (35 Stat. 836), to make eligible for reenlistment men who had been discharged without honor.

will rarely find itself called upon to express an opinion upon questions of a purely legal character.[1] *R. 16, 389, July, 1865; C. 23277, Oct. 27, 1908.*

CXIX B. While it is of course desirable that the members of a court of inquiry, directed to express an opinion, should concur in their conclusions, they are not *required* to do so by law or regulation.[2] The majority does not govern the minority as in the case of a finding or sentence by court-martial. If a member or a minority of members can not conscientiously and without a weak yielding of independent convictions agree with the majority, it is better that such member or members should formally disagree and present a separate report (or reports) accordingly. The very disagreement indeed of intelligent minds is a material and important fact in the case, and one of which the reviewing authority is entitled to have the advantage in his consideration of and action upon the same. *R. 41, 207, Apr., 1878.*

CXXI A. While the proceedings of a court of inquiry can not be admitted as *evidence on the merits* upon a trial before a court-martial of an offense for which the sentence of dismissal will be mandatory upon conviction,[3] yet *held* that upon the trial of such offense, as upon any other, such proceedings, properly authenticated, would be admissible in evidence for the purpose of impeaching the statements of a witness upon the trial who, it was proposed to show, had made quite different statements upon the hearing before the court of inquiry.[4] *R. 43, 339, June, 1880.*

CXXII A. Officers of the Marine Corps traveling without troops on Army transports can not exercise command of the troops on board in the operation of this article or exercise command in the Army at any time unless duly assigned thereto by the President.[5] *C. 20461, Oct. 3, 1906; 22905, Mar. 17, 1908; 24712, Apr. 2, 1909; 25586, Oct. 9, 1909.*

CXXII B. The command at joint encampments of the Regular Army and Organized Militia remains with the regular post commander

---

[1] In an exceptional case, that of the special court of inquiry authorized by Congress in the joint resolution of Feb. 13, 1874, the court was required to express an opinion not only upon the "moral," but upon the "technical and legal responsibility" of the officer for the "offenses" charged. It is not irregular, but authorized, for a court of inquiry, in a proper case, to reflect, in connection with its opinion, upon any improper language or conduct of the accused, prosecuting witness, or other person, appearing before it during the investigation. Thus, the court of inquiry on the conduct of the Seminole War, adverted, in its opinion, unfavorably upon certain offensive and reprehensible language employed against each other by the two general officers concerned, the one in his statement to the court, and the other in his official communications which were put in evidence. (See G. O. 13, Hdqrs. of Army, 1837.)

[2] In the case of the court of inquiry (composed of seven general officers), on the Cintra convention, in 1808, the members who dissented from the majority were required by the convening authority to put on record their opinions, and three dissenting opinions were accordingly given. A further instance, in which two of the five members of the court gave each a separate dissenting opinion, is cited by Hough (Precedents), 642. Mainly upon the authority of the former case, both Hough (Precedents), 642, and Simmons, sec. 339, hold that members nonconcurring with the majority are entitled to have their opinions reported in the record. In the Brownsville case see S. Doc. no. 701, 61st Cong., 3d sess., the court was unanimous as to some of its conclusions, but as to others, the record states that certain members did not concur.

[3] Compare G. O. 33, Dept. of Arizona, 1871.

[4] See this ruling published, as adopted by the President, in G. C. M. O. 40, Hdqrs. of Army, 1880. See also G. C. M. O. 88, Navy Dept., 1895.

[5] See 28 Op. Atty. Gen., 15.

without regard to rank of senior officer of the Organized Militia. *C. 14148, May 14, 1910; 25586, Feb. 3, 1910.*

CXXVI A. *Held* that it is within the discretion of a company commander under the one hundred and twenty-sixth and one hundred and twenty-seventh articles of war to convert into cash the effects left by a deceased soldier. He is then required to pay over to the personal representatives of the deceased the proceeds of the sale, and if expense is incurred by the sale it must be defrayed out of the sum realized. After such expense is deducted, the result will be the "net proceeds," which is the term referred to in the Army Regulations. *C. 18500, Sept. 5, 1905.*

CXXVII A. This article, in connection with the two preceding articles, provides for the securing of the effects of deceased officers and soldiers, making inventory of the same, and accounting for them to the proper legal representative, etc. These articles have special reference to cases of deaths of military persons while in active service in the field or at remote military posts, and their provisions apply only to such effects as are left by the deceased "in camp or quarters." An attempt by the commander, etc., to secure effects left elsewhere would not be within the authority here given, and might subject the officer to the liability of an administrator; such a proceeding would not therefore be advisable. Upon accounting to the duly qualified legal representative, as directed in the article, the responsibility of the officer is discharged, and it remains for the representative to dispose of the property according to the law applicable to the case. *R. 43, 266, Mar., 1880.*

CXXVII B. *Held* that the term "legal representatives," as employed in the one hundred and twenty-seventh article of war, is to be construed as equivalent to duly appointed legal personal representative, i. e., the duly appointed executor or administrator of the estate of the deceased. *C. 29333, Dec. 27, 1911.*

CROSS REFERENCE.

Construction of Articles of War.....See LAWS I B 7 a.

ASSAULT AND BATTERY.

See ARTICLES OF WAR LXII D.

ASSAULT WITH INTENT TO KILL.

See ARTICLES OF WAR LXII B.

ASSIGNEE.

Execution of contract by.....See CONTRACTS I B 2.

ASSIGNMENT.

Bonds.....See BONDS III C.
Contracts.....See CONTRACTS XIV to XV.
Franchise.....See NAVIGABLE WATERS III C to D.
Lease.....See PUBLIC PROPERTY VII A 1.
License.....See PUBLIC PROPERTY VIII A 2 to 3.
Patent right.....See PATENT III; III A.
Pay account.....See PAY AND ALLOWANCES I B 4.
Secretary of War.....See ARMY I B 2 a (1).
To duty according to brevet rank.....See RANK IV B to C.

ASYLUM.

Admission to.....See Insanity I B 2.

ATHLETICS.

Line of duty status.....See Gratuity I A 5 a.
See Claims VIII.

ATTORNEY.

Claim for service as counsel.....See Claims XII C.
Officer as.....See Claims X.

ATTORNEY GENERAL.

Allowing completion of work.....See Bonds V H.
Requests on.....See Desertion III A.
Discipline IV B 4 a
Army I B 5 a b; G 3 b (2) (*a*) [3] [*c*]
Claims XII M.

AUCTIONEER.

Employment of.....See Public Property IX A 2 c.
Payment of.....See Articles of War LXII C 4.
Soldier as.....See Pay and Allowances I C 6 b.

AUTHENTICATION.

By President.....See Discipline XIV H 1 a.
By Secretary of War for President.....See Army I B 1 a (1); (2)
By reviewing authority.....See Discipline XIV E 9 m.
By judge advocate.....See Discipline IV C 3 b (1) to (4).
By indorsement.....See Discipline VII B 1.
Of proceedings.....See Discipline IX M
Official papers.....See Discipline XI A 17 a (2) (*a*) [1] [*a*].

AUTHOR.

May copyright his work.....See Copyright I.

AUTHORITY.

Delegation of.....See Articles of War LXXII A.
Of general court-martial.....See Discipline VII A to F.
To discharge soldier.....See Discharge III B 1; XX A to F.
Trial judge advocate.....See Discipline IV B 1 to 5.

AUTOMOBILES.

Not subject to State license when in service of United States.....See Tax III N.
Transportation by.....See Army I G 3 b (2) (*a*) [4].
Militia VI B 2 f.

BACHELOR'S MESS.

Use of liquor at.....See Intoxicants II C.
Mess bill.....See Army I G 3 b 3 (*a*) [1].

BADGES.

See Insignia of merit III.
Campaign, issue to Militia.....See Militia XIII B.

BAGGAGE.

Transportation of retired officers'.....See RETIREMENT I n 4.

BAIL.

See ARTICLES OF WAR LIX K.
See DISCIPLINE I C.
Of enlisted men.....See COMMAND V A 2 c.

BAKERY SAVINGS.

See GOVERNMENT AGENCIES.
At joint encampment.....See MILITIA VI B 2 a.

BALLOON.

Finder of.....See PUBLIC PROPERTY I A 6.

BANKRUPTCY.

Of contractor.....See CONTRACTS X E; XX C 10.

BARRACKS AND QUARTERS.

See APPROPRIATIONS XXVIII.

BATTALION COMMANDER.

Authority to recommend appointments.....See COMMAND V C 1 b.

BATTALION STAFF OFFICERS.

Appointment of.....See COMMAND V C 1 b.

BEER.

Is intoxicating.....See INTOXICANTS I a.

BENEFICIARY.

Under Act of May 11, 1908 (35 Stat. 108)..See GRATUITY I A; B 1 to 4.

BIDS AND BIDDERS.

See CONTRACTS VI to VII.
Bond by.....See BONDS III F.
Liability of.....See CONTRACTS XI to XII.
Nonfatal defect in guaranty.....See BONDS I C.
On Government contracts.....See CONTRACTS XXIII E.
Partnership.....See CONTRACTS XXX.
Receiver.....See CONTRACTS XXXVII.

BIGAMY.

See ARTICLES OF WAR LXI B 12; LXII D.

"BLANKET" GUARANTIES.

Are legal.....See CONTRACTS XI E.

BOARD OF OFFICERS.

See DISCIPLINE XVIII A to E.
Character of soldier.....See DISCHARGE III C; XI A 2.
ENLISTMENT I D 3 to 4.
Claim damaged property.....See CLAIMS II.
MILITIA VI C 1 i.
Evidence of record.....See DISCIPLINE XI A 13.
Fifty-fourth article of war.....See ARTICLE OF WAR LIV E.
Inventor can not serve on, which is considering his invention. See PATENT V.
Promotion.....See RETIREMENT I B 6 to 8.
Retiring.....See RETIREMENT I B 1 to 6.
Squatters improvements by.....See PUBLIC PROPERTY III H 2.
Volunteer officers, examination of.....See DISCHARGE XXI A.
Volunteers, character of.....See VOLUNTEER ARMY IV H 2.
ENLISTMENT I D 3 d (4).

BOARD OF REVIEW.

See DISCHARGE XVII B.
See ARMY I G 3 d (2) to (3).
See RETIREMENT I B 7 a.

BONDS.[1]

I. BONDS IN GENERAL.

A. BOND MAY BE REQUIRED IN ABSENCE OF STATUTE..... *Page 187*

B. GUARANTY SHOULD BE AS LEGALLY SUFFICIENT AS A BOND..... *Page 188*

C. NONFATAL DEFECTS IN BIDDERS' GUARANTIES WAIVED..... *Page 189*

D. OBJECTION THAT PARTNER WAS GUARANTOR FOR COPARTNER MAY BE WAIVED.

E. CONSTRUCTION OF GUARANTY INCOMPLETELY FILLED OUT.

F. THE SEAL.

1. Effect of guaranty without seal.
2. Bonds not under seal may still be valid contract.
3. Printed scroll or other device valid substitute for adhesive seal in most States ..... *Page 190*

G. BONDS OF CORPORATIONS.

1. Corporate name must be exactly expressed.
2. Officer signing name of corporation and attaching seal should have proper authority to do so.
3. Practice where authority to execute bonds does not clearly appear and it is impracticable to have bonds reexecuted.
4. Corporation may use any seal like an individual..... *Page 191*

H. BONDS OF ORGANIZATION THAT HAVE NO LEGAL ENTITY.

1. In practice bonds on behalf of such organizations are signed by a proper person as principal.
2. Proper procedure where United States Soldiers' Home gives bond.
3. Where individual conducts business under company name papers should be in name of individual.
4. Bond of Philippine Islands while being administered under authority of the President should run in name of United States..... *Page 192*

---

[1] Prepared by Maj. H. M. Morrow, judge advocate, assistant to Judge Advocate General

I. BONDS IN GENERAL—Continued.

I. Contracting Officer in a Bond May be Designated by Title Alone.

J. Validity of Bond Not Affected by Absence of Witness to Signature of Principal.

K. Date of Bond.

1. Validity of bond not affected by omission of date.
2. Where date of bond differs from date of resolution authorizing its execution.
3. Where bond recites that the principal had on a subsequent date entered into a contract for performance of which bond was given.. *Page 193*

L. Guaranty Signed by Members of Bidder's Family.

M. Sureties.

1. Bond should not be accepted unless sureties are clearly bound.
2. Erasures and interlineations in bond without consent of surety.
3. Sureties not bound by supplemental contract unless they assent.
4. Not bound by unauthorized modifications of contract..... *Page 194*
5. Sureties not bound beyond period originally fixed by contract, unless they assent.
6. Where bond provides surety shall be bound during period of extension of contract, surety continues to be bound though contract extended more than once.
7. Double aspect of bond to secure performance of contract and payment of laborers. Obligation not affected as to labor and material-men by modification without surety's consent.
8. Validity of bond not affected by omission of name of surety from body of bond.
9. Affidavit of justification of sureties..... *Page 195*
10. Failure to secure consent of one surety to modification of contract releases all sureties.
11. Where one surety on joint and severel bond dies, new bond not required.
12. Where changes are made in bond and it is not known whether they were made by consent of sureties.
13. Stockholders of a corporation as sureties for the corporation.
14. Married woman as surety..... *Page 196*

N. Bond to United States Usually Considered as Made and to be Performed at Washington. Bond Connected with River Improvement is Possible Exception.

O. Power of Treasury Department to Review or Exercise Control Over War Department Bonds.

P. Contrary to Practice of War Department to Surrender Bonds After Performance or to Release Sureties..... *Page 197*

Q. In Absence of Law Requiring a Joint and Several Bond, Such Bond Not Required.

R. Power of Partners to Execute Bond for Partnership.

S. Authority to Sign All Bonds Necessary to Carry on Business of Company is Prospective Only..... *Page 198*

T. Rule as to Obligation Where New Bond for Reduced Amount is Given in Place of Old Bond.

II. BONDS OF DISBURSING OFFICERS.

A. May be Taken Even Where no Statutory Authority.

B. Cumulative Bonds..... *Page 199*

C. Sureties Should Justify in Double the Amount of Bond.. *Page 200*

II. BONDS OF DISBURSING OFFICERS—Continued.

D. Where Each of Sureties on Joint and Several Bond is not Bound for Full Amount of Bond.

E. Bond Inoperative as to Future Acts on Promotion of Principal to Higher Grade, or on His Ceasing to Hold Office..... *Page 201*

F. Bond Once Given Continues in Force, Notwithstanding Officer Not for the Moment Disbursing Funds.

G. "Office" Means Office Named in Bond; Does Not Apply to Office to Which Promoted.

H. Bond Continues Where Only Title of Office Changed..... *Page 202*

I. Upon Promotion to Higher Grade Officer Not Required to Give Bond Uuntil He Enters on Performance of Duty.

J. Where a Line Officer Appointed Disbursing Officer.

K. Army Officer May Be Surety on Official Bond of Another Army Officer.

L. By Regulations in Aid of Section 1191, R. S., Which Requires Certain Officers to Give Bond, Secretary of War May Authorize Acceptance of Bond Signed by Surety Only, and May Delegate to Commanding General, P. I., Right to Approve Bonds.

M. Sufficiency of Description of Office in Bond.

N. Par. 589, A. R., 1910, as to Substituting One Surety Company for Another ..... *Page 203*

O. Disbursing Officer's Bond Under Military Government o Cuba Should be Filed in Insular Bureau.

P. Bond of Treasurer of United States Military Academy for Funds Not Strictly Public.

Q. Inspection of Official Bonds Under Act of March 2, 1895.

R. Bond Given to Carefully Discharge Duties of Office, No Responsibility for Failure of Subordinate to Perform Duties..... *Page 204*

III. BONDS OF CONTRACTORS.

A. Bond May be Waived Where Not Required by Statute.

B. Approval of Contract Includes Acceptance of Bond..... *Page 205*

C. Can not be Assigned to Creditors of Contractor to Enable Them to Sue.

D. Where Contract Partly Performed New Bond May be Proportionately Reduced.

E. Requirement Fixed by Regulation as to Amount of Bond May be Waived.

F. Where Bidder Notified that Bond will be Required to Secure Performance of Contract and Lowest Bidder Failed to Enter into Contract, and Thereupon Contract Let to Another, Such Contract Not Required to be Secured by Bond..... *Page 206*

G. Where Sureties are Individuals Additional Security can not be Required.

IV. BONDS OF EDUCATIONAL INSTITUTIONS—COLLEGES.

A. There Must be Evidence that Officer Signing has Authority to Represent Institution.

B. Usually Must be Shown that Officer Signing has been Duly Elected. Exceptions ..... *Page 207*

C. Resolution Authorizing Officer to Sign Bond Must be Clear and Specific as to Such Authority.

D. General Authority to Sign Bonds is Sufficient.

IV. BONDS OF EDUCATIONAL INSTITUTIONS—COLLEGES—Continued.

E. Authority of Officer to Sign Bond Must Appear from Copy of Records; Certificate of Officer to this Fact Not Sufficient.

F. Copy of Records Must Show that the Particular Person Signing is an Officer..... *Page 208*

G. Bond of Corporation Must be Strictly in Corporate Name; Name of Corporation on Seal.

H. It Must Appear that Board or Committee Executing Bond or Authorizing Officer to Sign Bond is Vested with Sufficient Power for the Purpose. Instances.

I. Bond Should be Accompanied by Copy of Charter Showing Institution has Power to Give Bond..... *Page 209*

J. Under Section 1225, Revised Statutes, Principal on Bond for Corporation May be Individual Instead of Corporation..... *Page 210*

K. Bond with One Surety May be Accepted.

L. Under Section 1225, Revised Statutes, Bond May be Given by Surety Company Alone, Institution Not Signing..... *Page 211*

M. Bond Must State College can Educate 150 Male Students.

N. Bond Given Pursuant to Resolution of Board Should Not be Accepted where it is Greater than the Amount Authorized by Board.

O. Condition that Property of College Should be Resorted to Before Surety is Liable Not Proper.

P. Bond May be Given to Secure Future Issues of Ordnance, as Well as Issues Already Made.

Q. Bond Double the Value of Stores Issued.

R. Bond Should Distinguish Between Stores Already Issued and Those to be Issued.

V. BONDS WITH CORPORATE SURETY.

A. Even in Absence of Statute Authorizing Corporate Surety Such May be Accepted..... *Page 212*

B. Copy of Record Showing Selection and Qualification of Officers Must be Attached to Bond; Certificate of Secretary Not Sufficient.

C. Surety Bound Notwithstanding Failure of Principal to Pay Premium.

D. Surety Bound by Acts of Agent Until Notice Given of Ratification of His Authority.

E. Act of March 2, 1895, Biennial Examination of Bonds..... *Page 213*

F. Letter of Superintendent of Surety Company that Company Would Be Held on Bond After Promotion of Officer to Higher Grade not Sufficient to Bind Company.

G. Appointment of Agent on Whom Process May be Served.

H. Under Act of August 13, 1894, Which Authorizes the Acceptance of Corporate Sureties, Attorney General Can Not Require Additional Security for Work Already Done as Condition of Being Allowed to Complete Work..... *Page 214*

I. Foreign Corporation Not Required to Comply With Laws of State Before Doing Business with United States.

J. Act of August 13, 1894, Which Authorizes the Acceptance of Corporate Sureties, Does Not Apply to Contract with Foreign Contractor to be Performed in Foreign Country or to be Performed in the Philippine Islands.

V. BONDS WITH CORPORATE SURETY—Continued.

K. Paragraph 585–(2), Army Regulations, 1910, as to Bond Being Not Greater than Ten Per Cent of Company's Paid-up Capital and Surplus ..... *Page 215*

L. Act of March 23, 1910, Amending Act of August 13, 1894, Authorizing Secretary of the Treasury to Inquire into Solvency of Corporation.

I A. Although there may be no express statutory provision requiring a disbursing officer to give a bond, the Government may require such officer to give one,[1] and where public property is

[1] Bonds may be required by the Government from officers appointed to places of trust though there is no statutory authority to take such bonds, and they will be valid instruments. In a bond with sureties given by an officer of the Government it is sufficient to make the bond valid that it is voluntarily given and that the office and the duties assigned to the officer and covered by the bond are duly authorized by law.

In United States *v.* Tingey (5 Pet., 116) the court said: "A voluntary bond taken by authority of the proper officers of the Treasury Department, to whom the disbursement of the public moneys is intrusted, to secure the fidelity in official duties of a receiver or an agent for disbursement of public moneys, is a binding contract between him and his sureties and the United States, although such bond may not be prescribed or required by any positive law. The right to take such a bond is in our view an incident to the duties belonging to such a department, and, the United States having a political capacity to take it, we see no objection to its validity in a moral or a legal view." See to the same effect Jessup *v.* United States (106 U. S., 147). In Moses *v.* United States (166 U. S., 587) the court said: "The consideration or the condition of the bond must not be in violation of law; it must not run counter to any statute; it must not be either *malum prohibitum* or *malum in se*. Otherwise, and for all purposes of security, a bond may be valid though no statute directs its delivery.

"We do not understand by the decision in Peters, above cited, that the meaning of the term 'voluntary bond' is that the bond must have been offered and pressed upon the Government when never asked for or demanded by it. It is a voluntary bond when it is not demanded by any particular statute or regulation based thereon and when it is not exacted in violation of any law or valid regulation of a department. Having the right to take a bond, the Government in a case like this has the right to demand it from the officer and to say to him that if he do not give it he will not be continued as a 'property and disbursing officer of the Signal Service.' Such a demand when complied with does not amount to the illegal exaction or extortion of the bond. The case of a bond so procured differs radically from a case like that of Tingey, *supra*, inasmuch as the bond in the latter case was extorted from a reluctant officer with a condition therein contained different from that which the statute called for.

"The power of the Government to take bonds in cases of this nature in the absence of any law or general regulation to that effect, but by direction of the head of a department, was recognized again in the case of the United States *v.* Bradley (10 Pet., 343, 359). In that case the bond taken contained conditions beyond those provided for in the act of Congress, yet it was held that those conditions which were within the act were valid and could not be regarded as extorted from the obligor, although they were set forth in the same instrument which contained other and illegal conditions. The case of Tingey *supra*, was cited by the court and approved as to the principle that the United States may take a bond as security, etc., when not in violation of any statute.

"In this case we think the bond was a voluntary bond in the sense that it was not illegally extorted from the defendant Howgate under color of office or by threats from a superior officer; that the United States, through the Secretary of War, had the right to demand a bond with conditions such as the bond in question contains, and that it did not cease to be a voluntary bond merely because Lieut. Howgate did not gratuitously and without request proffer it and ask that it might be received, or because he was reluctant to give it and only gave it upon the demand of the Secretary. Under the facts developed in this case, situated as Lieut. Howgate was with respect to the public moneys, the United States, having the right to take a bond, had the right to demand it under penalty of refusing to permit him to longer remain as a disbursing officer or to further receive public moneys for disbursement by him." (See also United States *v.* Rogers, 28 Fed. Rep., 607, and 32 id., 890; 6 Op. Atty. Gen., 24.)

intrusted to individuals, there being no law requiring a bond, the Secretary of War may properly require a bond. *51 P. 446, Jan. 28, 1892.* In practice bonds are frequently required by the United States in the course of its business, although there may be no statutory authority for the bond. Such bonds have been required under the following circumstances: Where the title to property leased by the United States from a private individual is in litigation, *recommended* that a bond be required from the lessor before payment of the rent is made. *C. 5352, Nov. 19, 1898.* Where a statute directed the Secretary of War to deliver obsolete cannon to national and State homes for soldiers and sailors, "subject to such regulations as he may prescribe." *Held*, that the Secretary would properly require that bonds be furnished for the safe-keeping and due return of such ordnance. *51, R. 446, Jan. 28, 1892.* Where the title to personal property to be purchased by the United States is at all doubtful a bond of indemnity might be required from the seller. *C. 6881, Aug. 12, 1899.* Where a vessel was made in a foreign country and it was possible the laws of the country would give labor and material-men a lien, and the act of Congress of August 13, 1894 (28 Stat., 278), would not be applicable, a bond might be required to secure the payment of laborers and material-men. *C. 19164, Feb. 14, 1906.* Where certain payments to a contractor had been suspended by the auditor, and an appeal had been taken to the comptroller and pending the comptroller's decision further payments to the contractor had been suspended by the Secretary of War, and the contractor requested a removal of the suspension and payment to him, offering to give bond to secure the repayment, *held*, a bond might be accepted as requested conditioned to refund all payments if the decision of the comptroller should be adverse to the contractor, but the refunding should not be conditioned upon the determination of a question of fact which might have to be referred to the courts for decision. *C. 13359, Sept. 24, 1902.* Where a contract for the installation of a steam-heating plant provided that the plant should stand a certain test during the coming winter, but in fact the plant was not installed until spring, thereby making it impossible to apply the test, *held*, there was no legal objection to paying the amount retained on the contractor filing a bond conditioned to make good any defects that might develop at a proper test in freezing weather. *C. 13001, July 22, 1902.* Where certain officers representing the United States used certain patented articles, the patent not being owned by the contractor from whom obtained, and although the United States could not be sued in tort or enjoined from using the articles, yet the officers and agents of the United States possessed no such exemption from suit, *recommended* a bond be required from the contractor, before payment to him of the money due under the contract, conditioned to indemnify the officers and agents of the United States. *C. 21164, Sept. 3, 1907.*

I B. The purpose of a bidder's guaranty is to furnish sufficient security that the bidder will, if his bid be accepted, enter into contract as prescribed. But the direct object is to enable the Government to collect the difference between the bidder's bid and the amount the Government would have to pay some one else for the supplies or work in case the bidder should not enter into contract according to his bid. The guaranty can not be used to force him to enter into

his contract; but it is valuable and essential in the event of a suit to recover such difference. It should therefore be as formal and legally sufficient as a contractor's bond, and prepared with a view to serving as a basis for a legal claim by suit if necessary. *P. 56, 412, Nov. 29, 1892.*

I C. Such defects in bidders' guaranty bonds as are not fatal to the validity of the bond, are in practice waived by the department. *C. 26905, June 17, 1910.*

I D. Where instructions to bidders provide that a partner will not be accepted as a guarantor or surety for a copartner,[1] this objection may be waived since it would not in any way affect the validity of the guaranty. *C. 20670, Nov. 23, 1906.*

I E. A bid was accompanied by a guaranty defective in that blank spaces were left in filling it out as follows: "We ——— hereby guarantee that if the accompanying proposal of ——— be accepted in any or all of its items within 60 days after the opening of said proposal, the said bidder (naming him) will, upon written notice of such acceptance, if so required by the United States or its legal representatives, within —— days after written notification of said acceptance, enter into a contract," etc. *Held*, the first omission does not affect the validity of the guaranty and may be waived; the second omission is cured by the subsequent appearance of the name of the bidder; the third omission as to the time of entering into the contract is cured by the fact that in the "accompanying proposal" the bidder undertook to enter into the contract "within the time designated in the advertisement." *C. 20701, Nov. 30, 1906.*

I F 1. Bids were required to be accompanied by a guaranty that the bid if not withdrawn prior to the opening of bids should remain open for 60 days thereafter, and that if accepted within that time the bidder would deliver the required articles, or, if required, enter into a contract for delivery of the articles in accordance with the terms of the proposal and acceptance, and give proper bond for performance of the contract. Bidders were advised that no bid would be considered unless accompanied by a proper guaranty. A bid was received accompanied by a guaranty that was defective by reason of the omission of a seal. *Held,* that such a guaranty was not enforceable and was equivalent to no guaranty, that the actual omission of the seal destroyed the validity of the instrument as a sealed instrument (which is valid without a consideration as it conclusively presumes a consideration), even though it recited that a seal was attached. The instrument was not valid as an unsealed instrument, that is a common contract, because it lacked consideration to sustain the undertaking of the guarantors. *C. 20670, Nov. 26, 1906; 21707, Jan. 21, 1907.* But where a guaranty was made and delivered in California and was intended to be binding on delivery, the proper law of the contract is the law of California, and where the code of that State abolished all distinctions between sealed and unsealed instruments, and provided that a written instrument was presumptive evidence of a consideration, *held* that the omission of a seal did not affect the validity of the guaranty. *C. 18583, Sept. 18, 1905.*

I F 2. Where a paper purporting to be a bond and reciting that it was "sealed," was not in fact sealed, *held* that not being sealed it

[1] See par. 581, A. R., 1910, to same effect.

was not a bond, but if it was entered into by competent parties, and for a lawful purpose not prohibited by law, and was founded upon a sufficient consideration, it would be a valid contract, and could be legally enforced.[1] *R. 34, 141, Feb. 25, 1873.*

I F 3. As a printed scroll or other device is recognized in all States and Territories (including Alaska, Hawaiian Islands, Porto Rico, and the Philippines) where any seal at all is required, except Maine, Massachusetts, and New Hampshire, as a valid substitute for a seal in the execution of an instrument under seal, the War Department will not require an adhesive seal to be attached to a Government instrument purporting to be under seal, unless such instrument is executed or to be performed in one of these excepted States.[2] *C. 1769, May 29, 1907.*

I G 1. Where a corporation is principal in a bond given to the United States its full legal corporate name should be expressed. Thus where the laws of the State in which such a corporation was created required that the name of a corporation should always include the name of the city or county in which it was formed, and a corporation obligor had been incorporated as "The * * * Company of Baltimore City," *held* that the bond was incomplete unless this addition was set forth, and the instrument executed accordingly.[3] *P. 58, 147, Feb. 24, 1893; C. 2395, July 21, 1896.*

I G 2. Where a corporation is named as principal in a bond its corporate name and seal (if it has one) should be affixed by the officer having authority to do so. *R. 55, 686, June 30, 1888; P. 65, 190, 409, 412, and 414, June to Sept., 1894.*

I G 3. Where the principal on a bond was a foreign corporation and there was no evidence to show that the persons who executed it as the directors and manager were such or that they had authority to execute it as required by Army Regulations,[4] and the case would not admit of the delay necessary to secure proper evidence as to the execution of the bond,[5] *recommended*, that the individual sureties on the bond be required to sign a statement that the bond is properly executed by and is binding upon the principal. This would estop the sureties from contending in case of a suit on the bond that it is not binding on the principal.[6] *C. 6817, July 29, 1899.* So, also,

---

[1] United States *v.* Linn, 15 Peters, 290. Where an official bond offered by the principal without seals was returned to him to have the seals put on, and was brought back by him with the seals attached, the consent of the sureties thereto will be presumed in action on the bond, unless the contrary appears. Moses *v.* U. S., 166 U. S., 571; 18 Op. Atty. Gen., 458.

[2] Par. 578, A. R., 1910, requires that contractor's bonds shall be under seal (not necessarily an adhesive seal). In practice bonds of all kinds in the business of the War Department are invariably required to be under seal (not necessarily an adhesive seal) regardless of any requirement of statute or regulation, and a scroll seal is printed on the blank forms, which scroll is adopted by the signer as his seal. See District of Columbia *v.* Camden Iron Works, 181 U. S., 453, that either a corporation or an individual may use and adopt any seal.

[3] See "Bonds" IV G.

[4] Par. 582, A. R., 1910, is to the same effect.

[5] In practice it is only in cases where it is very difficult to obtain the regular execution of the bond by the principal, or where the conditions will not permit of delay, that it is recommended the bond be approved upon obtaining the statement of the sureties that the principal has properly executed the bond.

[6] The statement by the sureties need not be under seal, as their liability would be based on the principles of equitable estoppel and not on any principle relating to sealed instruments.

where the surety was a corporation, *recommended*, that the proper agent of the surety company be required to sign a similar statement. *C. 6901, Aug. 18, 1899; 7278, Dec. 11, 1899; 6817, Sept. 15, 1904; 28049, Mar. 29, 1911.* So, also, where a corporation was principal and its board of directors attempted to ratify the prior execution of a bond, but failed to show that the bond when executed was binding on the corporation, *recommended*, that the sureties be required to sign a similar statement. *C. 6887, Sept. 22, 1899.* So, also, where it did not clearly appear that the person executing the bond for the corporation principal was authorized to do so, a similar recommendation was made. *C. 6901, Aug. 18, 1899; 13024, Dec. 14, 1908.* So, also, where there was no evidence of the express authority of a partner to sign the firm name to a bond, and it was impossible to obtain such authority, similar action was recommended. *C. 7348, Nov. 28, 1899.*

I G 4. The fact that a corporation has not adopted a corporate seal will not affect the validity of its execution of a bond in which it is principal or surety, provided some form of seal be added to its signature. A corporation may make and use any seal in its discretion in the same manner as a private individual.[1] *R. 50, 525, July 15, 1886; C. 836, Nov. 7, 1905.*

I H 1. An unincorporated body that has no legal entity can not become a party to a bond to secure the safe return of public property received by it. In such a case it is the practice to require the bond to be signed by a private person as principal.[2] As, where public property was by authority of Congress loaned to the inaugural committee a bond signed by a private individual as principal was required. *C. 9788, Feb. 24, 1909.* Where public property was loaned as an exhibit to an unincorporated body. *C. 12868, June 27, 1902; 27003, July 11, 1910.* So also where a railroad company carried on a transfer business under the name of "The Blue Line Transfer Co." *held* that as there was no such legal entity as the Blue Line Transfer Co. the bond should be in the name of the railroad company as principal, or if desired in the name of the manager of the Blue Line Transfer Co. individually as a principal, and that if the latter method was adopted the condition of the bond should recite that the contract had been entered into by the railroad company under the name of the Blue Line Transfer Co. *C. 28614, Sept. 5, 1911.*

I H 2. The United States Soldiers' Home desired to obtain from a bank money of a deceased inmate of the home. *Held* that as the home was not a legal entity it could not give a bond, but that the proper procedure would be to have the board of commissioners pass a resolution authorizing the treasurer of the home in his official capacity to execute the bond, and the bond should then be executed by the treasurer in his official capacity. *C. 11965, Jan. 23, 1902.*

I H 3. Where an individual conducts his business under a company name, a contract and bond should be in the name of the individual and not in the name of the company, as the latter being a mere name having no existence as an artificial being such as a partnership or corporation has, is incapable of being a party to a bond. *C. 18197, May 11, 1907.*

---

[1] See 26 Op. Atty. Gen., 507, and District of Columbia *v.* Camden Iron Works, 181 U. S., 453, to same effect.

[2] See "Bonds" IV J.

I H 4. While the government of the Philippine Islands was being administered under the authority of the President, there being no act of Congress or the Philippine Commission establishing a political society with corporate existence by the name of the "Government of the Philippine Islands," *held* there was no legal entity by the name of "Government of the Philippine Islands" capable of being the obligee in a bond; that a bond given to secure the deposit of funds of the government of the Philippine Islands should run to "The United States of America" either with or without the additional words "for the use of the government of the Philippine Islands." *C. 12852, June 24, 1902.*

I I. There is no legal objection to a bond reciting that the contract secured thereby has been executed by the "Chief of Ordnance," "Commanding officer, Watervliet Arsenal," etc., the name of the officer being omitted. *C. 18396, Aug. 3, 1905.*

I J. The absence of a witness to the signature of a principal or surety on a bond does not affect the validity of the bond, and may be waived where the signature of the principal is known to the department. *C. 1435, Nov. 26, 1900.*

I K 1. A bond should of course be dated, but the omission of the date will not affect the validity of the instrument, as the true date of execution can be otherwise proved, in the event of a suit on the bond.[1] *C. 3511, Sept. 15, 1897; 2687, Nov. 2, 1897; 2990, Aug. 13, 1904; 1595, Aug. 13, 1906; 4279, June 8, 1898; 3645, Oct. 28, 1902.*

I K 2. Where a bond was executed on a certain date by a corporation as principal to secure the safe-keeping of a deposit of public funds and the bond recited that on a *subsequent* date a resolution of the board of directors had been passed authorizing the execution of the bond, *held* this inconsistency of dates did not constitute a fatal defect, that parol evidence could be introduced to prove the real date of the bond was different from that stated in the bond and the bond would take effect from delivery. *C. 6817, Oct. 27, 1904.* But where a bond given by a corporation to secure the safe-keeping of a deposit of public funds was dated September 6, 1900, and recited that the board of directors on September 19, 1900, had authorized the execution of the bond, and the authority given by the board referred only to the execution of bonds in the future, *held* that *if the dates were correct* the bond should be reexecuted on a date subsequent to September 19, 1900, or the bond of September 6, 1900, should be ratified. *C. 6825, Oct. 5, 1900; 20656, Mar. 19, 1907.* So, where a bond for the safe keeping of ordnance issued to an educational institution was dated September 9, 1906, the authority for the execution of the bond being a resolution of the board of regents passed October 4, 1906. *Held*, the bond should be reexecuted as of or subsequent to, October 4, 1906. *C. 3543, Oct. 15, 1906; 27659, Jan. 4, 1911.* But where a bond given by a corporation was dated July 5, 1907, while the resolution authorizing its execution was dated July 8, 1907, *held* that the irregularity of dates in no way affected the validity of the bond, that

[1] Bishop, on Contracts, sec. 114. "It (an instrument under seal) need have no date; it is even good with an impossible one, or one differing from the fact. Its date in law is that of the delivery. Nor need it mention the place where executed." See, also, Murfree on Official Bonds, sec. 6.

the bond became operative from delivery which was subsequent to the date of the resolution. *C. 15730, July 24, 1907.*

I K 3. A bond was executed on a certain date, and it was recited therein that the principal had on a *subsequent* date entered into the contract for the due performance of which the bond was given. *Held,* the inconsistency does not affect the validity of the bond; the fact that the bond was executed before the contract was, is immaterial, but the recital is a part of the means of identifying the bond and should not be contradictory. Therefore *recommended* in the particular case that to avoid in the event of a suit on the bond the necessity of resorting to outside evidence to identify the contract, a new bond be required, the latter to refer to the contract as one which *will be* entered into. *C. 2765, Nov. 24, 1896; 3053, Apr. 12, 1897; 3164, Apr. 29, 1897; 3640, Nov. 5, 1897.*

I L. Where a guaranty accompanying a bid was signed by the father of the bidder, *held,* binding on the father. *C. 580, Oct. 29, 1894.* But where a contractor offered a bond subscribed by his two daughters as sureties, *advised* that notwithstanding the financial relations of the daughters to the parent might be satisfactorily explained, and notwithstanding the daughters were unmarried, the bond should not be accepted. *R. 39, 518, Apr. 26, 1878.*

I M 1. Obligations incurred by sureties are strictly construed in their favor, and, as a rule, are paid only when enforced by law. A bond, therefore, should not be accepted where suit can not be successfully brought upon it against the sureties, whose contract, on the face of the instrument, must thus be clearly valid and binding. *P. 56, 412, Nov. 29, 1892.*

I M 2. If after the execution of a bond a material change be made in the name or description of the principal, by erasure, interlineation, or otherwise, without the assent of the sureties or a surety, even though such change be made to correct a mistake, the surety or sureties not consenting will be released. In a case of such an alteration *recommended* that a new bond be required, as, for instance, where the name of the principal is changed from "Michigan State Board of Agriculture" to "The State Board of Agriculture." *P. 35, 283, Sept. 27, 1889.* Where the name of the principal is changed from "Purdue University" to "The Trustees of Purdue University." *P. 57, 41, Dec. 14, 1892; 58, 400, Mar. 24, 1893.* So, also, where the name of one of two sureties was erased and a new surety was substituted without the consent of the remaining surety, *recommended* that the written assent of the remaining surety to the substitution be obtained. *C. 1262, May 21, 1895.* And where the penalty was changed by the principal from $40,000 to $20,000 subsequent to the execution of the bond, *recommended* that a statement signed by the sureties be required to the effect that the change was made with their consent. *C. 237, Sept. 12, 1898.* But the alteration of a bond by striking out the words "captain and commissary U. S. Army," which described the principal, and interlining the words "commissary U. S. Army with rank of captain" is not a material alteration. *C. 9119, Aug. 31, 1901.*

I M 3. A bond for the faithful performance of a contract will not cover material modifications of the contract, in the form of a supplemental agreement or otherwise, unless the sureties formally assent to

the same.[1] *P. 30, 116, Feb. 6, 1889; 55, 365, Sept. 14, 1892; C. 1244, Apr. 12, 1895; 21688, Nov. 19, 1907.*

I M 4. A bond to secure the performance of a contract is valid to secure the performance of any such modifications thereof as are authorized by the terms of the contract itself,[2] but will not cover modifications not thus authorized and which substantially make a new contract. *P. 54, 7 and 162, May 27 and June 20, 1892.*

I M 5. A bond can not be extended beyond the period originally fixed by its terms so as to continue to bind the sureties, unless they consent to such extension. *R. 20, 270, Apr. 13, 1870.* Where the United States rented certain premises to a private individual and the rent was secured by bond and the lessee applied for a material delay in making payment of rent, *held* that to grant such application would discharge the sureties unless they gave their assent to the delay, and *recommeded* that the same be not acceded to without their consent to the arrangement.[3] *R. 55, 196, May 12, 1888.*

I M 6. Where a bond given for the due performance of a contract provided that the surety should be bound "as well during any period of extension of said contract that may be granted on the part of the United States as during the original term of the same," *held* that the surety would continue to be bound even though the contract was extended more than once, either by an extension to a specific date or by a waiver of the time limit.[4] *C. 13906, Jan. 3, 1903; 20423, Nov. 21, 1906.*

I M 7. A contract was modified by supplemental agreement without the consent of the surety on the contractor's bond. *Held,* that such a bond may be considered as in effect two obligations, one to the United States to secure the due performance of the contract, and the other to the United States but on behalf of labor and material-men to secure their payment, and that the obligation for the benefit of the labor and material men was not released by the action of the contractor and the United States in modifying the contract without the surety's consent.[5] *C. 17474, Feb. 3, 1905.*

I M 8. The omission of the name of the principal or surety from the body of the bond does not affect its validity. *C. 24908, May 10,*

---

[1] See also, VIII Comp. Dec., 555, where, as to the payment of retained percentages to a contractor before completion of the contract, it is said: "* * * the very purpose of such retention was to keep the contractor a creditor and spur him on to complete the work according to the contract in order that he may collect such retentions and make them his own. The sureties are interested in such retention, and if the owner should pay them to the contractor before they are due under the contract such act would result in the release of the sureties on the ground that such action deprives them of a substantial means of indemnity from loss if they are called upon to finish the work or respond in damages in case the work is relet at an advance in price over that originally contracted for. (See 57 Fed. Rep., 179.)"

[2] See United States *v.* Freel, 186 U. S., 309.

[3] See U. S. *v.* McMullen (222 U. S., 460), where the contract provided for possible extensions of time, but did not expressly provide that the sureties should continue bound, and it was held that the sureties were not discharged by an extension of the time for performance. See also U. S. *v.* Fidelity & Guaranty Co. (178 Fed. Rep., 721), where it was held, on the authority of Guaranty Co. *v.* Pressed Brick Co. (191 U. S., 416), that the obligation of a paid surety company *in respect to labor and material-men* is not affected by a reasonable extension of the time for payment of such claims in the absence of a showing of actual injury.

[4] All contract bonds under the War Department contain the above-quoted provision continuing the liability of sureties during any period of extension of the contract.

[5] See Conn. *v.* State, 125 Ind. 514; 46 Nebr., 644; 41 Nebr., 655; 40 Minn., 27; U. S. Rundle, 100 Fed. Rep., 400; U. S. *v.* National Surety Co., 92 id., 549; U. S. *v.* American Bonding Co., 89 id., 921; U. S. Fidelty, etc., Co. *v.* Golden Pressed Brick Co., 191 U. S., 416.

1909. So where the Christian name of the principal in the body of the bond was written "Alvin" while the name signed was "Alva," *held* in view of the similarity in sound of the names, and the fact that it is the signature or seal of the party that fixes his liability on the bond, not the recital of his name in the body of the instrument, the bond is valid. *C. 25293, Aug. 14, 1907.*

I M 9. The affidavit of justification should be taken before some officer, like a notary public, having authority to administer oaths for general purposes.[1] If the officer has an official seal it must be affixed; otherwise the proper certificate as to his official character must be furnished. *P. 38, 412, Feb. 12, 1890; 63, 117, Jan. 2, 1894; 65, 192, June 4, 1894.* But as the justification is no part of the bond, and as the administration of the oath by an official not competent to administer it does not affect the validity of the bond, the irregularity of the justification, where there is nothing to show that the oath was not taken in good faith by the surety, may be waived by the Secretary of War, and in practice is waived and the bond accepted if otherwise valid. *P. 62, 367, Nov. 21, 1893; C. 78, Nov. 5, 1894; 372, Sept. 24, 1894.* The omission of affidavits of justification and the omission of a certificate as to the sufficiency of the guarantors of a bid does not affect the validity of the guaranty and may be waived. *C. 23365, June 5, 1908.*

The affidavit of justification of a surety should be dated, so that it may appear when he was worth the amount specified. *P. 30, 233, Feb. 19, 1889.*

I M 10. The failure to secure the consent of one of the bondsmen to the modification of a contract releases not only that bondsman, but all the bondsmen. *C. 1244, Apr. 12, 1895.*

I M 11. Where the obligation of a bond is joint and several[2] (as is the case in official bonds), the estate of the deceased surety is not discharged by the death of the surety, and there is no necessity of a new bond. *C. 4341, Sept. 9, 1902.*

I M 12. Where it became known to the United States that at the time a bond given to secure a contract was delivered to the agent of the United States it was incomplete by reason of the omission of the date of the contract, the names of the members of the commission representing the United States and the seals opposite the names of the principals and sureties, and these omissions were supplied before the approval of the bond, but whether with the knowledge and consent of the sureties was not known. *Held,* that it should be assumed the supplying of the omissions was not with the knowledge and consent of the sureties and that a new bond should be required. *C. 2765, Nov. 24, 1896.*

I M 13. Paragraph 561, Army Regulations, 1895 (581 of 1910), provides that "stockholders who are not officers of a corporation may be accepted as sureties for such corporation." *Held,* that a director or member of a board of trustees of a corporation are "officers." *C. 8745, Aug. 9, 1900. Held,* also, that the regulation does not apply where the treasurer of a corporation is not a stockholder, and he may be accepted as surety. The reason for the regulation is that usually officers of corporations are the principal stockholders and have the

[1] See par. 586, A. R., 1910, to same effect. Under section 19 of act of Congress of May 28, 1896 (29 Stat., 184), United States commissioners and all clerks of United States courts are authorized to administer oaths generally. (III Comp. Dec., 65.)

[2] If the obligation should be joint only, the estate of the deceased surety would be discharged by death, and the surviving surety alone would remain liable on the bond.

bulk of their fortunes invested in the business of the corporation, so that the Government would get little, if any, additional security by accepting them on the bond of the corporation. *C. 27242, Sept. 13, 1910. Held*, also, that if a stockholder of a contracting company becomes a surety on the company's contract and subsequently during the performance of the contract is elected secretary of the contracting company, he does not thereby become disqualified from continuing as surety. *C. 28351, May 17, 1911.* The objection that a stockholder who is an officer of a corporation is a surety on the bond of the corporation does not affect the validity of the bond and may be waived. *C. 27302, Nov. 29, 1910.*

I M 14. It is not the practice of the War Department to accept a married woman as surety, and before an unmarried female surety will be accepted she is required to make oath that she is single in addition to justifying as required of other sureties, the affidavit showing that she is worth the sum stated in her own right. *C. 1262, Apr. 18, 1895; 2360, June 12, 1896; 2990, Mar. 8, 1897; 4623, July 15, 1898; 4247, Apr. 9, 1910.*

I N. The law of the place at which a contract was made governs as to its interpretation, obligation, and legal effect, except where the contract is to be performed elsewhere, in which case the law that governs in these respects is the law of the place of performance; but the law of the place where the contract was made or the act was done governs in respect to the formalities of execution and the capacity of the parties.[1] An official bond, made to the United States, wherever actually signed, is, as has been held by the Supreme Court, a contract to be performed at Washington, and is to be governed as to its interpretation, obligation, and legal effect by the law of the District of Columbia.[2] So where the river and harbor act of March 2, 1907 (34 Stat., 1073), provided for the improvement of Bayou Teche, La., "upon the United States being secured against possible claims for damages resulting from the overflow of lands by reason of the lock and dam improvement, or from the draining of Spanish Lake," and the bonds given were not under seal but were executed in Louisiana where the laws do not provide for instruments under seal, *recommended* that, as the bonds were to be accepted by the Government and as the law as to the formalities of execution is the law of the place where the acceptance is made, the bonds be referred to the district engineer officer at New Orleans for acceptance in the State of Louisiana. *C. 24625, Sept. 1, 1909.*

I O. The duty of taking and approving bonds under the War Department, whether taken by virtue of a statute or not, rests entirely in the War Department. The Treasury Department has no authority to review the action of the War Department so taken or to pass upon the sufficiency of the sureties on bonds given under section 1191, R. S.[3] *P. 50, 118, Nov. 2, 1891; C. 18002, Apr. 18, 1908; 13893, July 23, 1909; and Aug. 6, 1909.*

---

[1] U. S. *v.* Garlinghouse (Fed. Cas. No. 15189); 9 Cyc., 671, and authorities cited.

[2] Cox *v.* U. S. (6 Pet., 172); Duncan *v.* U. S. (7 id., 435).

[3] In U. S. *v.* Jones, 18 Howard, 92, the court said "the acts and decisions of the head of a department on subjects submitted to his jurisdiction and control by the Constitution and laws do not require the approval of any officer of another department to make them valid and conclusive. The accounting officers of the Treasury have not the burden of responsibility cast upon them of revising the judgments, correcting the supposed mistakes or annulling the orders of the heads of departments."

I P. Even after due performance of the conditions of a bond, it is contrary to the practice of the department to surrender such bonds. Where the records show that all the conditions have been fully performed bondsmen in answer to a request are so advised. If the information so given should happen to be erroneous it is not believed its communication would operate as an estoppel, as the question of whether the bond is valid by reason of complete performance depends upon the question of whether or not the conditions have been performed in fact. *C. 18610, Sept. 20, 1907.* So, where a surety requested to be advised whether "deliveries have been satisfactorily completed" by his principal, *held,* there was no objection to advising him of the status of the contract in question, coupled with the caution that the information is not intended to compromise the interest of the United States, should it be found that the contract has not, in fact, been faithfully performed by the contractor. *C. 18589, Sept. 21, 1905.* So, *held,* where a bond was given for the disbursement of funds appropriated for a Cuban exhibit. *C. 8034, Jan. 14, 1901.* In case of a contractor's bond, the requirement of the act of August 13, 1894 (28 Stat., 278), that the principal "shall promptly make full payments to all persons supplying it labor or material in the prosecution of the work provided for," and the requirement that the Secretary of War shall furnish a copy of the bond to labor and material-men, would deprive the Secretary of authority to surrender the bond. *C. 7849, Mar. 16, 1900.* But there is no objection to returning a bond that the United States refused to accept. *C. 7313, Nov. 18, 1899. Held,* also, that in the absence of a statute no executive officer had authority to cancel or nullify a bond or release a surety thereon.[1] *C. 1999, Jan. 22, 1896; 8553, July 5, 1900; 5352, Aug. 22, 1900; 13145, Jan. 7, 1903; 22194, Nov. 18, 1907.* Such release can not be given even if other sureties of undoubted financial responsibility should be given. *C. 5352, Sept. 28, 1900.*

I Q. There being no law requiring bonds under the War Department to be joint and several, a bond so worded that each surety is bound as to a specific part only of the penalty and is not bound jointly and severally with the principal or with another surety is legally sufficient.[2] *C. 23165, Apr. 30, 1908.*

I R. The implied authority of a partner to execute contracts for the firm of which he is a member does not extend to contracts under seal—bonds, for instance. Therefore, where a partner signs a bond for the firm there should be filed with it evidence of an express authority from the other partners to sign for them.[3] *C. 5066, Sept. 28, 1898; 6902, Aug. 19, 1899; 7348, Oct. 30 and Nov. 28, 1899; 15894, Feb. 12, 1904; 21219, Mar. 12, 1907; 23734, Aug. 18, 1908; 20947, May 10, 1909.* Such express authority need not be under seal. *C. 7348, Nov. 28, 1899; 23734, Aug. 18, 1908.* The above principle has been applied where the names of all partners were signed to a bond but all the names were in the same handwriting,

[1] 7 Op. Atty. Gen., 62.

[2] See, however, par. 576, A. R., 1910, which requires the official bonds of disbursing officers to be joint and several.

[3] In 20 Op. Atty. Gen., 312, it was held: "The rule that one partner has no implied authority to bind his copartners by executing a bond in the firm name is well established. It can not be said, however, that the partners constituting a firm are powerless to authorize one of their number, or another proper person, to bind the partnership by executing a bond to be used in the transaction of its business. The inhibition of the common-law rule referred to is against an *implied* power in one partner to execute the instrument without specific authority."

which suggested that one had signed for all. *C. 5031, Sept. 21, 1898.* However, if the instrument, although sealed in fact, is of a character that does not require a seal, the presence of the seal may be disregarded and the instrument treated as a simple contract. *C. 20989 B, July 31, 1911.*

Where a contract is made with a partnership there is no legal objection to accepting as a bond for the performance of the contract one signed by less than all of the partners, as principals, the partners who do sign to sign as individuals, not as partners, and the partnership name not to be signed. *C. 6902, Aug. 19, 1899.*

I S. A resolution of a board of directors which purports to vest the treasurer with "power to make and sign on behalf of the company all contracts that may be necessary to carry on the business of the company" is prospective only and does not ratify the execution of a bond already made. *C. 20319, Sept. 1, 1906.*

I T. Where a contractor gave a bond guaranteeing, among other things, to replace or repair all defects in cables which might develop in five years, and in case of failure to do so promptly to pay the Government on demand the cost of such repairs, and most of the work having been performed, the bond of $37,500 was considered unnecessarily large for the Government's protection; *held* that if a new bond in the penal sum of $5,000 were accepted, with recitals that the penalty of the existing bond is unnecessarily large and that the new bond is intended as a substitute for the present bond and is given to relieve the principal from the payment of premiums thereon, these recitals, together with the cessation of payments of premiums under the old bond, would make the loss fall entirely on the sureties under the new bond to the extent of the penalty of the same. Of course, the United States might sue under the old bond, but any loss recovered thereunder would be recoverable by the sureties on the old bond from the sureties on the new bond. *C. 22194, Nov. 18, 1907.* Also, where a contractor desired to substitute personal bondsmen in lieu of the corporate bond then in force in order to avoid the payment of another annual premium to the surety company; *held* there was no legal objection to the contractors presenting a further bond signed by personal sureties, but the effect would not be to release the old bond unless there was some special provision in the old bond which allowed it to be discontinued. Ordinarily the old bond would remain in full force as to all defaults of the contractor committed up to the date of the new bond, and thereafter the liability of the two bonds would be joint.

II A. Although there may be no express statutory provision requiring a disbursing officer to give a bond,[1] the Government may require such officer to give one, and where public property is intrusted to individuals, there being no law requiring a bond, the Secretary of War may properly require a bond.[2] *P. 51, 446, Jan. 28, 1892.*

---

[1] The form of official bond authorized, Dec. 31, 1900, secures the fidelity of the officer from the date of approval of the bond. *C. 9482, Dec. 28, 1900.* This change enables accounting officers to definitely fix the responsibility under each bond, so as to prevent bonds from overlapping. *C. 9482, Dec. 28, 1900; Feb. 18, 1902.* In practice the date of approval is, for the convenience of accounting officers, on the first day of a month, in all cases except where the bond is the first one given. Sec. 1191, R. S., requires all officers of the Quartermaster's, Subsistence, and Pay Departments to give a bond, but it does not refer to other disbursing officers.

[2] See U. S. *v.* Tingey, 5 Pet., 116; Jessup *v.* U. S., 106 U. S., 147; Moses *v.* U. S., 166 U. S., 587; U. S. *v.* Rogers, 28 Fed. Rep., 607; 32 id., 890; 6 Op. Atty. Gen., 24, and note to "Bonds" I A.

II B. Where a bond had been given by a commissary officer conditioned to become void if he should during his holding and remaining in the office of commissary of subsistence with the rank of major, carefully discharge the duties of said office, and a new bond was given with the same conditions, *held*, the giving of the new bond would be cumulative, and would operate to make the sureties on both the old and new bonds responsible as to future transactions, but would not release the sureties on the old bond.[1] *C. 667, Nov. 24, 1894; 20591,*

[1] See Digest Dec. Second Comp., vol. 3, sec. 1356; II Dec. First Comp., 337. In V Comp., 918, it was held that where, under the act of Mar. 2, 1895 (28 Stat., 807), which provides that "every officer whose duty it is to take and approve official bonds shall cause all such bonds to be renewed every four years after their dates," an officer renews his bond by giving a bond during the same term of office, the new bond does not operate to release the sureties on the first bond from liability for future transactions, but the sureties on the old and new bonds would be jointly and severally liable therefor. As appears below in order to overcome the embarrassing effect of the above rule, the form of official bond was changed on Dec. 14, 1895, so that the condition would be that the officer should be bound under the bond "until a new official bond in his case shall be approved." Under this form of bond it was intended that the old bond, after the approval of a new one, should remain in force simply to cover any defaults that might have occurred prior to the date of approval of the new bond. *C. 21784, July 10, 1907; 23656, July 27, 1908.* On Oct. 17, 1906, in 26 Op. Atty. Gen. 70, the Attorney General, however, gave the opinion that a provision in an official bond shortening the life of the bond from the entire period during which the office is held until such time as "a new official bond shall be accepted by the proper authority and substituted" therefor, ran counter to the statute and would be without effect, but that in other particulars the bond would be good. As to this opinion of the Attorney General, the Judge Advocate General of the Army stated that the opinion "is understood to apply to a case where the form of bond is prescribed by statute and the officer is appointed for a limited term. Such is not the case with army officers. They are appointed for an indefinite tenure, practically during good behavior and until promoted, and the statute (sec. 1191, R. S.), provides simply that they shall, before entering upon the duties of their respective offices, give good and sufficient bonds to the United States, in such sums as the Secretary of War may direct. The statute is understood, and has been construed as imposing on the Secretary of War the duty of approving the bond both as to form and amount." *C. 20591, Jan. 26, 1907.* Official bonds under the War Department are still conditioned that the officer shall continue to be bound "until a new official bond in his case is approved."

The recent history of the form of disbursing officers' bonds is as follows: The form of official bond authorized by the Secretary of War, Dec. 14, 1895, was conditioned that the officer should at all times "henceforth during his holding and remaining in said office, *until a new official bond in his case shall be approved by the Secretary of War*, carefully," etc. *C. 1769;* the form authorized Dec. 31, 1900, was conditioned that if the officer "shall and do at all times during his holding and remaining in said office, *from and including the date of approval of this bond by the Secretary of War thenceforth until the date of approval by the Secretary of War of a new official bond in his case*, carefully," etc. *C. 9482, Dec. 28, 1900.* The form authorized Mar. 13, 1902, amended the preceding form by substituting the words "proper authority" for "Secretary of War," the purpose being to include approval by the Assistant Secretary of War, who, pursuant to the distribution of business in the Secretary's office, now passes upon and approves official bonds. *C. 9482, Mar. 6, 1902.* In 1907, the Secretary of War authorized the commanding general, Philippines Division, to approve bonds of paymasters. *C. 22296, Oct. 29, 1907.* In such case the action of the Secretary of War if he approves, is expressed in the following language: "Approval by division commander confirmed." *C. 4216, Mar. 6, 1908.* In April, 1901, the War Department adopted also a form of bond, the condition of which is so worded that it covers a recess appointment and continues to secure the fidelity of the officer after his appointment and confirmation by the Senate "until a new official bond in his case shall be approved by proper authority." In the absence of such a provision, as held by the United States Supreme Court in U. S. *v.* Kirkpatrick, 9 Wheaton, 720, a bond given under a recess appointment for the fidelity of the officer would not cover his fidelity after his confirmation by the Senate, the offices being legally different offices having different terms of tenure, etc. *C. 3689, Nov. 29, 1897, and Jan. 10, 1906; 9482, Feb. 18, 1902; 20591, Jan. 26, 1907.*

Jan. 26, 1907. So *held*, also, where an ordnance storekeeper gave a new bond intending to release the surety on a former bond. *C. 674, Nov. 24, 1894.* So *held*, as to a paymaster. *C. 733, Dec. 11, 1894.*

II C. Where the Army Regulations[1] (par. 990, A. R., 1863) provided that the sureties on the bonds of certain disbursing officers should be bound jointly and severally for the whole amount of the bond, and should satisfy the Secretary of War that they were worth jointly double the amount of the bond, by the affidavit of each surety that he is worth that sum over and above his debts and liabilities, *held*, that although this regulation appears to contemplate that there shall be two or more sureties on the bond, the regulation is not mandatory and such a bond with one surety who justified in double the amount of the bond may be accepted. *R. 41, 169, Apr. 2, 1878.* And where the sureties on such a bond made a joint affidavit that they were jointly worth double the amount of the bond over and above their debts and liabilities, *held*, the justification did not comply with the regulation as the affidavit might be true and yet one of the sureties be worth nothing. *R. 33, 272, Aug. 23, 1872.* But *held* further that where the aggregate of the amounts in which the sureties on such a bond justify equals or exceeds double the amount of the bond, the objection that one or more of them individually justified in less than that sum may be and is in practice frequently waived. *C. 373, Sept. 24, 1894 and Dec. 21, 1898; 2212, Apr. 15, 1896; 3261, June 5, 1897, Jan. 8, 1898 and Mar. 31, 1904.* *Held*, further, that each of the sureties on such a bond should sign his own separate affidavit, an affidavit signed only by the official administering the oath is irregular, but the irregularity may be waived. *R. 34, 147, Feb. 27, 1873, 271, May 19, 1873, and 337, June 28, 1873.* So, also, where a disbursing officer having given a bond in the sum of $12,000, one of the sureties deceased, and a new bond was offered with only one surety in the sum of $6,000. *Held*, that the new surety would not be bound either jointly or severally with the surviving surety for the whole amount required, and, therefore, the bond was not legally sufficient. *P. 62, 351, Nov. 18, 1893.*

II D. The obligation of each surety on a bond given by a disbursing officer must be for the whole amount of the penalty; the regulation[2] requiring that the sureties shall be jointly and severally bound for the whole amount of the bond. So, where the penalty in a quartermaster's joint and several official bond was $10,000, and the sureties, in executing the same, assumed to be bound only in the sum of $5,000 each, the words "for five thousand dollars" being written under each signature—*held*, that the instrument was contradictory, did not conform to the regulations, and should not be accepted.[3] *R. 26, 327, Dec. 29, 1867.* And similarly *held* in a case of a bond of a disbursing officer with a penalty of $40,000, where the sureties wrote

[1] Par. 576, A. R., 1910, is to the same effect. The only statute on the subject is sec. 1191, R. S., which requires that all officers of the Quartermaster's Department, Subsistence Department, and Pay Department shall, before entering upon the duties of their offices, give bond in such sum as the Secretary of War may direct, faithfully to account for all public moneys and property which they may receive.

[2] Par. 576, A. R., 1910, is to the same effect.

[3] In a contractor's bond, however, where the sureties are two or more surety companies, a form has been authorized whereby each surety is bound jointly and severally with the principal for a part only of the penalty.

opposite their signatures, respectively, "for $35,000," "for $5,000." *R. 34, 183, Mar. 20, 1873; C. 1974, Jan. 8, 1896; 2895, Jan. 27, 1897.*

II E. The official bond of a disbursing officer being in terms limited to the office he held at the time he gave it, becomes inoperative upon the promotion of such officer to a higher grade. He then enters upon a new office and a new bond is required. The old bond remains, however, a valid obligation to cover any defaults which may subsequently be found to have occurred between the dates of its execution and the date of the officer's promotion. *C. 1999, Jan. 22, 1896; 9482, Dec. 21, 1900.* So, also, a disbursing officer's bond terminates as to future acts on the officer ceasing to hold the office, by resignation or otherwise, or, if the bond is conditioned that it shall be in force "until a new official bond in his case is approved," it will so terminate by the approval of a new bond, even though the officer continues to hold the same office. *C. 9482, Dec. 21, 1900.*

II F. Where a disbursing officer has given a bond to continue in force while he holds his office until a new official bond shall be approved by the Secretary of War the bond continues in force until a new official bond shall be approved by the Secretary of War in lieu of it, notwithstanding that the officer may be performing duties that do not call upon him to disburse the money covered by the bond, as, for instance, in case of a commissary officer detailed on the General Staff (*C. 4396, Feb. 19, 1904*); or a quartermaster acting as treasurer of the island of Cuba (*C. 4156, May 19, 1899*); or a commissary officer as colonel of a volunteer regiment (*C. 6250, Nov. 7, 1900*), and the bond will continue in force to cover the officer's fidelity after he shall have been relieved from his nondisbursing duties and returned to his ordinary duties as a disbursing officer. *C. 4156, May 19, 1899.* However, where the surety is a company that charges a premium for performing the services of a surety it would be proper for the disbursing officer to stipulate with the surety that no premiums shall be paid during any period that he is on duty which involves no disbursement of public money. Such an agreement, however, would not affect the liability of the surety to the Government. *C. 4396, Feb. 19, 1904; 27191, July 26, 1911.*

II G. A disbursing officer (a commissary officer) while under bond which provided that the officer should carefully discharge his duties "during his holding and remaining in office until a new official bond in his case shall be approved by the Secretary of War," was promoted during a recess of the Senate, received letters of appointment, accepted and qualified thereunder, *held* that the word "office" in the bond meant the office named in the bond; that by accepting his appointment to a higher grade and qualifying under the appointment he ceased to hold the former office named in the bond and became invested with the new office, the term of which new office was limited to the end of the next session of the Senate, and therefore that under section 1191, R. S., and 571 A. R. (575 of 1910), a new bond should be given to cover the new office, and *held*, also, that after confirmation by the Senate and the commissioning thereunder the office would be different from the one held during the recess of the Senate and a new bond would again be necessary.[1] *C. 3689, Nov. 29, 1897.* So,

[1] United States *v.* Kirkpatrick, 9 Wheat., 720; 2 Op. Atty. Gen., 336 and 500; 4 id., 30. But see note to Bonds II B for a new form of bond in case of recess appointments, the condition of which covers both offices until the approval of a new bond.

under a similarly worded bond, *held* that the office of captain and assistant quartermaster, United States Volunteers, is different from that of major of the Forty-third Infantry, United States Volunteers. *C. 7091, Sept. 27, 1899.*

II H. Under the act of February 2, 1901 (31 Stat., 751), changing the name of the office of "captain and assistant quartermaster" to "quartermaster," *held* that existing commissions and official bonds remained in force. *C. 10180, Apr. 10, 1901.*

II I. An officer of the subsistence department (regular establishment) was appointed chief commissary with rank of lieutenant colonel in the Volunteer Army and gave the prescribed bond. While serving in the latter capacity he was promoted in the subsistence department of the regular establishment. *Held,* that it was not necessary to require of him a bond on account of such promotion until it was proposed to place him on duty in the office resulting therefrom. *C. 4341, July 13, 1898.*

II J. Where an officer of the line was appointed captain and commissary of subsistence during a recess of the Senate, *held* that in view of the provisions of section 1191, R. S., and A. R. 571 (575 of 1910), he should furnish the bond required before entering upon his duties under such appointment whether or not he had yet resigned his line commission. *C. 2775, Nov. 30, 1896.*

II K. There is no statute or regulation prohibiting an officer of the Army from acting as a surety on the official bond of another officer. Such a relation, however, is not one to be favored. *R. 34, 164, Mar. 10, 1873; 38, 659, July 3, 1877.*

II L. Section 1191, R. S., provides that all officers of the Quartermaster's, Subsistence, and Pay Departments shall, before entering upon the duties of their respective offices, give good and sufficient bonds to the United States, in such sum as the Secretary of War may direct, faithfully to account for all public moneys and property which they may receive. The Secretary has made a number of regulations in furtherance of this section, and among them a regulation requiring bonds to be approved by the Secretary of War. *Held,* that the duty of approval not being prescribed by law may be properly delegated to the commanding general, Philippines division. *C. 22296, Oct. 29, 1906. Held,* further, that as the above section does not prescribe the form of bond, an indemnity bond signed only by a surety company and not signed by the officer as principal is a sufficient official bond under the statute.[1] *C. 10277, Apr. 17, 1909.*

II M. Where a bond recited that the principal "has been appointed assistant quartermaster in the Army of the United States," and the fact was he had been appointed an assistant quartermaster in the Volunteer Army, *held,* that the recital was not inconsistent with the fact, and that the actual office held could be shown by parol and the bond was valid. *C. 8080, May 24, 1900.* So *held* where the bond of an officer "detailed" as quartermaster from the line recited that he had been "appointed" as quartermaster. *C. 22292, Oct. 30, 1907.* So, where a bond recited that the principal had been appointed general treasurer National Home for Disabled Volunteer Soldiers "in the Army of the United States," the quoted words being incorrect, *held,* the office was sufficiently described by other words of description and the erroneous words should be disregarded. *C. 11337, Oct. 4, 1901.*

[1] See "Bonds" IV, where a similar opinion was given under sec. 1225, R. S.

II N. Paragraph 583, A. R. (589 of 1910), provides that: "In case of financial embarrassment, failure, or other disqualifying cause on the part of the surety to a bond, the Secretary of War will require the bond to be renewed to his satisfaction, upon notification to the principal. Official bonds may not be renewed at the will of the principal or surety, but only by direction of the Secretary, and the substitution of one corporate company for another as surety on a bond will not be permitted except by direction of the Secretary, or after the bond has run for a period of four years, when a renewal thereof is required by law." A disbursing officer was bonded in a surety company, and was offered a lower rate by another company, but after correspondence between the old company and the new company the new company withdrew its low offer; the old company, however, offered to reduce its rate to that offered by any other company. The result was the disbursing officer became dissatisfied with the old company and asked to have his bond renewed in any company but the old one. *Advised*, that under the above regulations the reason was not sufficient to justify the submission of a new bond, involving as it would the trouble and expense of examining and approving a new bond and closing the accounts under one bond and opening them under another. *C. 25462, Aug. 8, 1910.*

II O. A bond given to secure the faithful disbursement of funds relating to the military government of Cuba should not be filed in the Treasury Department as in the case of officers charged with the disbursement of public money *of the United States* but should be filed in the Insular Bureau. *C. 10551, Sept. 6, 1905.*

II P. Where a bond was given by the treasurer of the Military Academy to cover funds coming into his possession which were not strictly public funds, *held* that the bond should run to the superintendent of the Military Academy in trust for the cadets of the academy and should be filed either at the headquarters of the Military Academy or in the office of The Adjutant General of the Army, through which the Military Academy and its affairs are administered. *C. 26449, Apr. 19, 1910, and Apr. 29, 1910.*

II Q. The act of March 2, 1895 (28 Stat. 807), provides that: "Hereafter every officer required by law to take and approve official bonds shall cause the same to be examined at least once in every two years for the purpose of ascertaining the sufficiency of the sureties thereon;[1] and every officer having power to fix the amount of an official bond shall examine it to ascertain the sufficiency of the amount thereof and approve or fix said amount at least once in two years and as much oftener as he may deem it necessary." *Held*, that the first half of the above provision relating to the sufficiency of the "*sureties*" is sufficiently complied with as to bonds on which a corporation is

[1] The provision of the first half of the act of March 2, 1895, requiring the officer to *cause* the bonds to be examined as to the sufficiency of the *sureties* is supplemented by G. O. 29, A. G. O., May 1, 1895, which requires the necessary examination to be made by "the heads of bureaus or departments of the War Department under whom or in whose department there are bonded officers whose bonds are taken and approved by the Secretary of War," and prescribes the form of certificate to be obtained as to the sufficiency of sureties. The order makes this certificate when properly filled out and signed the evidence of the present sufficiency of the bond. The certificate should not be referred to the Secretary of War but should be acted on by the head of the bureau by approval or by requiring a new bond as provided in the order, the bond in the latter event to be submitted to the Secretary for approval. *C. 1414, June 3, 1895.*

surety, if the corporation files periodically in the War Department the financial statement required by paragraph 574, Army Regulations (585 of 1910), and that General Order 29, Adjutant General's Office, May 1, 1895, has no application to a bond on which a corporation is a surety. *C. 2516, Aug. 12, 1896. Held*, that the second half of the above provision relating to the sufficiency of the "*amount*" of the bond is sufficiently complied with if the chief of each bureau or department having bonded officers reports to the Secretary of War twice a year a list of all the bonds of officers serving under him which at the time of making the report shall have been in existence as much as 18 months, giving the names of the officers and the amounts of their respective bonds, and the greatest amounts of money liable to be handled by them respectively at one time during the succeeding two and a half years, and also recommending the action to be taken by the Secretary of War with respect to the amount of the bond of each officer, that is, whether its present amount should be "approved" or whether a new amount, should be "fixed," owing to the circumstances of that officer's duty, etc., and if a new bond is to be fixed, what it should be; and for the Secretary of War to act on the recommendation made by the chief of bureau. Thereupon the statement and certificate provided for in General Order 29, Adjutant General's Office, May 1, 1895, would need to be sent to those officers the amount of whose bond had been "approved."[1] *C. 1414, June 3, 1895. Held*, further, that where an inspector has investigated the matter of sufficiency of the *amount* of the bond and recommended approval of the amount of the existing bond, an approval of the recommendation constitutes a compliance with the second part of the act. *C. 418, Dec. 1, 1896.*

II R. Where a bond for the safe-keeping of public property was conditioned that the obligor should "carefully discharge the duties of his office or employment" and a subordinate of the obligor, whom the obligor was not empowered to select or discharge, received personal physical custody of certain property, which possession was not shared with the obligor, *held* that the obligor was required only to discharge carefully his own duties, including the important duty of supervision, and that if he did this fully and completely he would not be liable for a loss resulting from the neglect or misconduct of his subordinate. *C. 3102, Apr. 19, 1911.* And where under the same facts as above set out a bond was further conditioned that the obligor should faithfully and honestly account for all public property which might be intrusted to "his care or custody," *held* that the obligor would not be liable for the loss of property which did not come into his personal physical possession. *C. 3102, Apr. 19, 1911.*

III A. The giving of bonds to secure the performance of contracts made for furnishing supplies, doing work, etc., for the War Department is not required by statute,[2] but is a subject of administrative regulation.[3] So, where the amount involved in a contract for com-

[1] The above procedure is still followed in the War Department.

[2] The act of Aug. 13, 1894 (28 Stat. 278), as amended by the act of Feb. 24, 1905 (33 Stat. 811), directs that bonds shall be required with formal contracts for the construction of, or repairs upon, public buildings and public works, and that such bonds shall contain a provision that "the contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract." The statute does not prescribe the amount of the penalty, but this has been fixed by the Secretary of War in par. 577, A. R., 1910.

[3] See pars. 577–589, A. R., 1910.

missary stores was small, *advised* that the Commissary General be authorized to approve the contract without a bond.[1] *P. 16, 167, Apr. 9, 1887.* So, *advised* that the Secretary of War was empowered to dispense with bonds to secure the performance of contracts for furnishing meals to recruiting parties and recruits; he being indeed authorized to dispense at discretion with all contractor's bonds, where such are not specifically required by statute. *P. 65, 233, June 12, 1894; C. 2074, Mar. 5, 1896.*

III B. Where a bond is required for the due performance of a contract, *held* that in the absence of a statute or regulation to the contrary, the approval of the contract includes the acceptance of the bond, and that an additional written approval or acceptance of the bond is not necessary. *C. 22961, Mar. 24, 1908.*

III C. There is no legal authority, after a contract has been completed, for assigning the bond to creditors of the contractor (whom he owes for materials furnished him) to enable them to sue him upon it in the name of the United States.[2] *P. 61, 16, Aug. 1, 1893.*

III D. Where a contract has been partly performed, and, by reason of the surety on a contractor's bond being no longer considered sufficient security a new bond has been required, the penalty may be proportionately reduced by reason of the partial completion of the contract and by reason of the amount of the retained percentages held by the Government. *C. 23265, Feb. 16, 1909; 27937, Mar. 3, 1911.*

III E. Paragraph 571, Army Regulations, 1908 (577 of 1910), provided that the amount of penalty in a contractor's bond will not be less than one-tenth nor more than the full amount of the consideration of the contract. Where the amount to be expended under a contract *exceeded* $250,000 and the bond given in accordance with the estimate was only $25,000, *held*, the requirement of the regulation could legally be waived and the contract be approved. *C. 23887, Sept. 25, 1908.* So, also, where a contract was made at Fort Gibbon, Alaska, for a storehouse and it appeared that all materials were furnished by the Government, the contract being for labor only, and that the contracting quartermaster undertook to supervise personally all labor

[1] See the following act of Apr. 10, 1878 (20 Stat. 36), as amended by the act of Mar. 3, 1883 (22 Stat. 487): "That the Secretary of War is hereby authorized to prescribe rules and regulations to be observed in the preparation and submission and opening of bids for contracts under the War Department; and he may require every bid to be accompanied by a written guarantee, signed by one or more responsible persons, to the effect that he or they undertake that the bidder, if his bid is accepted, will, at such time as may be prescribed by the Secretary of War or the officer authorized to make a contract in the premises, give bond, with good and sufficient sureties, to furnish the supplies proposed or to perform the service required. If after the acceptance of a bid and a notification thereof to the bidder he fails within the time prescribed by the Secretary of War or other duly authorized officer to enter into a contract and furnish a bond with good and sufficient security for the proper fulfillment of its terms, the Secretary or other authorized officer shall proceed to contract with some other person to furnish the supplies or perform the service required, and shall forthwith cause the difference between the amount specified by the bidder in default in the proposal and the amount for which he may have contracted with another party to furnish the supplies or perform the service for the whole period of the proposal to be charged up against the bidder and his guarantor or guarantors, and the sum may be immediately recovered by the United States for the use of the War Department in an action of debt against either or all of such persons."

[2] Since the opinion in the text the act of Aug. 13, 1894 (28 Stat., 278), amended by the act of Feb. 24, 1905 (33 Stat., 811), has been enacted. It provides for contractors giving a bond to secure the payment of labor and material-men, and for suit by labor and material men on such bond.

employed, and in view of these circumstances it was proposed to secure the performance of the contract by a cash deposit of 15 per cent in lieu of a bond, as a bond would be very difficult to secure at such a place, *held*, that as a bond was required by statute for the benefit of persons supplying labor, it could not be waived, but as the statute only required a bond, the amount of the penalty being a matter of regulation only, the regulation could be waived and the penalty fixed in such amount as might be deemed by the Secretary of War appropriate under the circumstances of the case. *C. 29269, Nov. 29, 1911.*

III F. Under the act of March 3, 1883 (22 Stat., 487), a bidder may be required by the Secretary of War to accompany his bid with a guaranty that upon notice to him of the acceptance of his bid he will enter into contract and furnish bond for the proper fulfillment of his contract. *Held*, that if under such a requirement a bond should not be given, and a contract should be entered into with some other person, the statute does not require such contract so entered into with the other person to be accompanied by a bond.[1] *P. 60, 285, July 6, 1893.*

III G. Where the sureties on a contractor's bond are individuals as distinguished from surety companies, and there is a failure of financial responsibility on the part of one or more of the sureties so that there is a probability that the bond is no longer good for the required amount, *held*, that there is no method by which additional security on the bond can be required.[2] *C. 28995, Sept. 25, 1911.*

IV A. A bond executed in his official capacity by the president or other officer of an incorporated college or university[3] to secure arms,

---

[1] There is no statute regulating the subject of contractors' bonds other than that contained in the act of Aug. 13, 1894 (28 Stat., 278), as amended by the act of Feb. 24, 1905 (33 Stat., 811), which refer to bonds to secure the payment of persons supplying labor and material, but the Secretary of War, pursuant to his implied authority to require a bond at any time in connection with public business, has provided in par. 577, A. R., 1910, for contractors' bonds, in case of contracts for supplies or services.

[2] Sec. 4 of the act of Aug. 13, 1894 (28 Stat., 279), provides for additional security where the surety is a corporation; sec. 5 of the act of Mar. 2, 1895 (28 Stat., 807), provides for the renewal and strengthening of official bonds when necessary, the surety being an individual, and par. 589, A. R., 1910, provides for additional security in the case of official bonds.

[3] The issue of ordnance to educational institutions was regulated by sec. 1225, R. S., which provides that. "The Secretary of War is authorized to issue, at his discretion and under proper regulations to be prescribed by him, out of any small arms or pieces of field artillery belonging to the Government and which can be spared for that purpose, such number of the same as may appear to be required for military instruction and practice by the students of any college or university under the provisions of this section; and the Secretary shall require a bond in each case in double the value of the property, for the care and safe-keeping thereof, and for the return of the same when required." The above portion of sec 1225, R. S., was replaced by the act of Sept. 26, 1888 (25 Stat. 491), which in part provides that: "The Secretary of War is authorized to issue, at his discretion and under proper regulations to be prescribed by him, out of ordnance and ordnance stores belonging to the Government, and which can be spared for that purpose, such number of the same as may appear to be required for military instruction and practice by the students of any college or university under the provisions of this section, and the Secretary shall require a bond in each case, in double the value of the property, for the care and safe-keeping thereof, and for the return of the same when required." This provision was subsequently amended by the act of Feb. 26, 1901 (31 Stat. 810), and the act of Apr. 21, 1904 (33 Stat. 226), so as to require the approval of the governor of the State or Territory. The other changes are immaterial. The identical wording of most of the provisions leaves the early opinions of the Judge Advocate General still valuable. See G. O. 231, W. D., Nov. 16, 1909, for instructions regulating the execution of bonds under the above act. As to stipulation that suit may be brought in the court where the contract is executed, see Harvard L. R., Vol. XXVI, No. 4, page 300, citing Mittenthal *v.* Mascagni, 183 Mass., 19 (66 N. E., 425).

etc., issued under section 1225, R. S., can not properly be accepted as binding the corporation without evidence that, by the act of incorporation or otherwise, such officer is legally empowered to act for and bind the institution. *R. 41, 499, Feb. 1, 1879, 647, Aug. 8, 1879; 43, 70, Oct. 29, 1879; C. 768, Oct. 24, 1903, and Jan. 14, 1908.*

IV B. Where the bond offered purported to be signed by the president of the corporation, it should be shown in connection with the bond that the person so signing had been duly elected such president by the corporation or by a managing body authorized by the articles of incorporation to elect him. *P. 29, 307, Jan. 15, 1889; C. 9167, Oct. 23, 1900; 3543, May 24, 1906.* However, where it is a matter of common knowledge that certain persons hold certain official positions, such as president and secretary of the board of directors of city trusts of the city of Philadelphia, the proper evidence of that fact may be waived, as the bond is valid without such evidence. *C. 2366, June 21, 1910.* Also, where the value of the ordnance stores is small and it appears from letter heads, the certificate of some officer, or other evidence not ordinarily considered sufficient, that the person signing is probably president or that he has been authorized to execute the bond. *C. 717, Apr. 18, 1908.* As where the value is $113.97. *C. 7666, Aug. 26, 1909.* Where the value is $260. *C. 13024, June 10, 1909.* Where the value is $352.60. *C. 20827, Jan. 8, 1907.*

IV C. Where a board of trustees controlling a corporation passed a resolution empowering the president of the board "to negotiate and carry on any business which, in his judgment, tended to the welfare of the institution," *advised* that this resolution was not sufficiently specific to authorize the president to execute an instrument under seal, such as the bond required by section 1225, R. S. *P. 39, 158, Mar. 1, 1890.* A by-law to the effect that in the recess of the board of regents an executive committee of the board should "have general care of all matters pertaining to the welfare of the university," *held* not sufficient to empower such committee to enter into so legally formal and binding an engagement as the giving of a bond. *P. 63, 467, Feb. 10, 1894.*

IV D. A general authority from the board of regents of a university to their president to execute such bonds as may be needed from time to time to secure ordnance stores issued is sufficient to authorize the execution of bonds. *C. 3543, Jan. 8, 1909.*

IV E. Where the trustees, regents, etc., have, by a resolution or vote of the board, duly authorized their president, or other officer, to execute the bond for the corporation, there should be furnished, with the executed bond, as evidence of the legality of the execution, an extract of the minutes of the proceedings of the board, fully setting forth the adopting of the resolution giving the requisite authority, such extract being certified by the secretary, or other proper custodian of the records, under the seal of the corporation as a true copy of such minutes. The certificate, or affidavit, of the secretary that such a resolution, giving a copy of it, was adopted is not a sufficient substitution for the record evidence, and where the execution by the president rests only upon such a certificate the bond will not be accepted. The only proper evidence of the proceedings of a body which keeps a record is the record itself or a transcript duly authenticated by the legal custodian, and where it

exists its place can not be supplied by the mere statement of the secretary or other official of the corporation.[1] *P. 29, 166, Jan. 5, 1889; 55, 180, Aug. 24, 1892; C. 641, Nov. 19, 1894; 2260, May 4, 1896; 2038, Aug. 28, 1899; 3704, Mar. 1, 1907; 3543, Jan. 20, 1908.*

IV F. Where a resolution of a board was passed authorizing the president to execute a bond, the resolution not giving the name of the president, and a bond is offered purporting to be signed by the president, *held*, that a copy of the record showing that the person whose name is signed as president was such officer should accompany the bond.[2] *C. 768, Sept. 1, 1906; 942, Jan. 11, 1907; 831, Nov. 16, 1908.* This copy may be waived where one is already on file with another recent bond. *C. 768, Sept. 1, 1906; 3104, Apr. 2, 1910; 918, June 30, 1910; 18951, Nov. 17, 1910.*

IV G. The bond offered must be executed by the proper obligor and legal principal. If executed by a corporation as such, the name as signed must be the corporate name; i. e., the same as that given in the articles of incorporation expressed in full.[3] *P. 42, 113, July 24, 1890; 62, 460, Dec. 7, 1893; 63, 117, Jan. 2, 1894; C. 412, Aug. 14, 1907; Oct. 16, 1907; 836, June 17, 1908; Feb. 15, 1909 Aug. 9, 1910.* Where the corporation as created by the legislature is a body of persons, as "trustees," or "board of trustees," or "regents," etc., the bond must be executed in the corporate name of this body by some one duly authorized thereby and not in the name of the "college" or "university," the latter being merely an institution of learning or *property*, having no legal existence as a person. *P. 29, 461, Jan. 24, 1889; 30, 304, Feb. 21, 1889; 48, 226, July 15, 1891; C. 28, July 18, 1894; 2038, Feb. 5, 1896, and Aug. 28, 1899; 16109, Mar. 31, 1904; 3168, June 4, 1906; 942, Feb. 25, 1907.* The name of the corporation as it appears in the body of the bond and in the signature should be the same. *P. 62, 122, Oct. 16, 1893; C. 27423, Nov. 30, 1910.* If the name is impressed on the *seal*, it should agree with that of the execution, though if the latter be correct a variation in the seal will be immaterial. *P. 31, 300, Apr. 6, 1889.*

IV H. The bond of a corporation must be signed for it by the officer of the corporation or some other person authorized to do so. If the corporation consists of a certain body of persons, or if such a body be specifically designated in the articles of incorporation as empowered to authorize such acts as the execution of bonds for the corporation, the authority can not be delegated to other persons. Thus where, under the articles, the power is vested in a board of trustees, it would not be legal for such board to delegate the authority for executing the bond to an executive committee of the board. *P. 29, 307, Jan. 15, 1889; 39, 475, Mar. 20, 1890; 56, 278, 308, Nov. 3 and 10, 1892; C. 8870, Aug. 29, 1900; 603, July 30, 1906.* Where the articles of incorporation do not recognize such a body as an "executive committee" of the trustees, regents, etc., as empowered to act for the corporation, but simply devolve the management and control of the corporation upon a board of trustees, etc., a bond executed or authorized to be executed by such a committee will not be accepted

[1] See "Bonds," IV B, to the same effect, and note under Bonds IV A for instructions of the War Department to same effect.
[2] See par. 584, A. R., 1910.
[3] See "Bonds," I G 1.

as sufficient. In such a case it is the board which should authorize the execution of the obligation. *P. 64, 370, Apr. 16, 1894; 65, 38, 48, 102, May 8, 18, 23, 1894; C. 3704, Feb. 15, 1898; 9167, Nov. 20, 1900; 2260, Sept. 8, 1906; 16109, Apr. 18, 1904, Apr. 30, 1909.* Where the articles of incorporation declared that the corporation should consist of and be controlled by certain trustees, but recognized an executive committee, in providing that such committee should, "under the direction of the board of trustees, have a general supervision of the affairs of the college and the property of the corporation," *held*, that such words were not sufficient to empower the executive committee to bind the corporation in so important a matter as the execution of a bond. *P. 64, 274, Mar. 31, 1894.* Where the act creating a university vested the management of its affairs in a board of trustees, and provided that the board might entrust "all routine business" to an executive committee, *held* that a bond executed pursuant to a resolution of the executive committee was not properly authorized, as it did not constitute "routine business" of an educational corporation. *C. 323, Sept. 15, 1894.* The board of trustees of a university established a rule that "during the intervals between the meetings of the board of trustees, all authority needful for carrying on the operations of the university shall be exercised by the prudential committee," and the prudential committee by a resolution authorized the chancellor to execute a bond for the safekeeping of ordnance stores, *held* that it was questionable whether the rule contemplated the giving of such a bond as being "needful for carrying on the operations of the university." *C. 18951, Dec. 20, 1910.* The act of incorporation provided for an executive committee whose duties should be prescribed by the by-laws of the board of regents. Such by-laws authorized the committee "to transact all such business as may from time to time be required by the board." *Held*, that a bond executed pursuant to resolution of the committee, without any specific authority or requirement by the board being shown, could not be accepted, but that, if the board could not readily be convened, a personal bond of some individual, with sureties, should be substituted. *P. 64, 327, Apr. 7, 1894; C. 2687, Oct. 17, 1896.* So, where the character of incorporation of a college vested the "full control of the affairs of the college" in a board of trustees, and the board, by vote, devolved upon an executive committee power to "act for the trustees," *held* that even if this delegation were legal, such indefinite action, while authorizing the committee to transact ordinary business, was not sufficient to empower it to exercise the special discretion involved in the execution of a sealed obligation binding the corporation to the United States. *P. 65, 48½, May 8, 1894.* So, where a board of trustees passed a resolution giving an executive committee authority to "exercise all the power of the board of trustees not inconsistent with the acts and resolutions of the board, subject, however, to reversal or modification of its action by the full board," *held*, that in the absence of knowledge of the acts and resolutions of the board it could not be determined whether the committee had been given authority to sign a bond to secure ordnance stores, and that the attempted delegation of authority was not legal. *C. 603, Aug. 30, 1906.*

IV I. A bond furnished by any incorporated college or university should be accompanied by a duly certified copy of the charter or

articles of incorporation showing that the institution is a corporation and has power to enter into the obligation. *P. 63, 322, Jan. 29, 1894; 65, 190,* and *191, June 4, 1894; C. 12568, June 28, 1906.* The copy should be authenticated by the certificate of the official who is custodian of the record of the same. A certificate by a United States commissioner would be of no effect. *P. 64, 44, Feb. 23, 1894.* Where the copy of the papers showing incorporation was certified by a county recorder who had no seal, *held* that if he had no seal which he could affix, his official character should be certified to by the county official who was the custodian of the record of his election and qualification. *P. 64, 274, Mar. 31, 1894.*

IV J. Though bonds tendered under section 1225 R. S. have usually been those in which the corporation controlling the institution is principal, it is not essential that the corporation should be the principal. The bond of an individual as principal—the president or other officer of the institution or other person in a private capacity—may properly be accepted if the security is deemed sufficient. *R. 42, 598, Apr. 24, 1880; C. 13024, Oct. 24, 1908.* Where the college was not incorporated, and therefore could not enter into the bond, and its trustees were merely appointees of certain regents of education in charge of all the public educational institutions of the State, *recommended* that a personal bond be required. *P. 65, 31, May 7, 1894.*[1] A "Military and Agricultural college" was not a corporation but a branch or "department" of the State University, a corporation, by which it was governed, *held* that, not being a legal person, it had not the capacity to enter into a bond, but that the bond should be in the name of the corporation and its execution should be authorized by the board of trustees of the university, or—if they could not be assembled for the purpose—that an individual bond should be furnished. *P. 64, 110, Mar. 3, 1894; C. 9167, Nov. 20, 1900.* A State university, which, though managed by trustees appointed by the State, is not incorporated, is only a piece of property of the State, having no personal existence or capacity to give a bond. In such case, if the trustees are not incorporated, the bond for arms furnished should be a personal one. *P. 64, 304, Apr. 5, 1894; C. 3168, June 4, 1906.* Where the university was not an incorporated institution, but property belonging to a Territory, by which it was carried on through trustees, and the legislature had made no provision for a special bond, *held* that the case was one in which a personal bond should be required. *P. 41, 377, July 1, 1890; 55, 322, Sept. 8, 1892; C. 23553, July 7, 1908.* Where such an unincorporated university was the property of a State, *held* that the State would be the proper principal in the bond. *P. 42, 119, July 24, 1890.*

IV K. No form for the bond being prescribed by section 1225, R. S., the Secretary of War may, if he deems the security ample, accept a bond with *one* surety, or he may even accept the bond of the corporation without sureties. In general, however, it will be safer to require sureties; such a requirement being also in accordance with the general rule governing bonds given to the United States. Sureties to bonds given by colleges should in general be required to justify in the usual manner. *R. 39, 312, Nov. 26, 1877.* So *held,* also, under the act of September 26, 1888 (25 Stat. 491), where it was *advised* that, the city of Philadelphia as trustee for the Girard Col-

[1] See "Bonds," I H 1.

lege fund being the principal, sureties might well be dispensed with. *P. 59, 176, Apr. 25, 1893; C. 768, June 8, 1900; 2366, June 26, 1906.*

IV L. *Held*, that a bond of indemnity of a security company wherein the company would be the only obligor might, in the discretion of the Secretary of War, legally be accepted in place of the usual bond, given under section 1225, R. S., wherein both the college and the surety are obligors. Such acceptance would not *per se* release the college from its liability as bailee to take care in preserving and duly returning the arms, but the instrument should be executed in such form as to leave no question as to such liability continuing.[1] *P. 64, Feb. 27, 1894.*

IV M. A form of bond presented for acceptance which failed to recite that the college was of a capacity to educate 150 male students, the complement required by the act of September 26, 1888 (25 Stat. 491), but stated its capacity as extending to the education of 80 only, *held* defective and not legally acceptable. *P. 65, 48, May 8, 1894.* It should be specifically stated in the bond that the capacity was for the education of 150 *male* students. *P. 65, 182, June 1, 1894.*

IV N. Where the penalty of the bond as offered was twice as great as the sum for which the president was, by resolution of the board, authorized to give bond, *held* that the bond could not be accepted and that a new bond should be furnished. *P. 35, 82, Sept. 6, 1889.* So, *held* also, where the penalty of the bond as offered was $1,052, while the resolution of the board authorizing the bond authorized a bond in the sum of $1,051.20. *C. 3543, Apr. 23, 1910.* So, also, where the penalty of the bond as offered was $17,592.08 while the resolution of the board authorized a bond in the sum of $17,574.28. *C. 24272, Dec. 30, 1908.*

IV O. The obligor and sureties should be bound without condition or reservation. Where a bond offered by a college contained a provision to the effect that to satisfy any liability incurred thereunder, recourse should be had to the property of the college before the property of the sureties was resorted to, *advised* that such bond be not accepted by the Secretary of War. *R. 38, 340, Oct. 20, 1876.*

IV P. The regulations governing the issue of ordnance stores to educational institutions require that the bond given to secure the safe-keeping of the stores shall be in double the value of the stores issued. *Held*, there was no legal objection to accepting a bond in excess of double the value of the stores, the excess to cover future issues as well as stores already issued. *C. 942, Nov. 22, 1909.*

IV Q. As the statute requires the bond shall be in double the value of the ordnance stores issued a bond which lacks $20 of being double such value is defective. *C. 950, Jan. 24, 1908.* But a bond that lacked 55 cents of being double the value of the stores issued was held to be a substantial compliance with the statute. *C. 1766, Jan. 5, 1905.*

IV R. Where a bond recited that certain ordnance stores "have been issued," whereas the bond was intended to cover stores not yet issued, the language should be changed to "to be issued." *C. 1828, Nov. 18, 1895; 24272, Dec. 30, 1908.* But where the bond failed to state whether the stores had been issued or were to be issued, the space for that purpose being left blank, the omission may be waived. *C. 1711, Oct. 17, 1906.*

---

[1] See "Bonds" II L, where a similar opinion was given under sec. 1191 R. S.

V A. Section 1191, R. S., provides that "all officers of the Quartermaster's, Subsistence, and Pay Departments, * * * shall before entering on the duties of their respective offices, give good and sufficient bonds to the United States,[1] in such sums as the Secretary of War may direct; faithfully to account for all public moneys and property which they may receive." *Held*, that while this section does not specifically vest in the Secretary of War the power to decide upon the sufficiency of the sureties to bonds, still by implication it does so as he is the only official mentioned as having any duty to perform in passing upon bonds, and it is not reasonable to suppose Congress intended to divide between several officials the duties involved in passing on bonds. The Secretary may, therefore, legally accept security companies as sureties on such bonds, as in the case of contractors' bonds.[2] *P. 50, 118, Nov. 2, 1891.*

V B. Where the regulations regarding corporate sureties required there should be filed in the War Department a copy of the record of the selection and qualification of the officers, as well as a copy of the by-laws or other records, authorizing certain officers of the corporation to execute bonds in its behalf, and there was attached to the bond a certificate signed by "A, secretary," to the effect that "B is the president and A is the secretary duly elected and qualified" to execute the bond. *Held*, this certificate is not proper evidence for the reason that the facts rest on the certificate of the secretary, instead of appearing as they should from certified copies of the records.[3] *C. 1482, June 21, 1895; 3946, Aug. 16 and 22, 1906.* Such a defect may be waived by the War Department where the value of the property is small, as, for instance, $113.97. *C. 7666, Aug. 26, 1909.*

V C. A corporate surety continues to be bound by a bond notwithstanding the principal may fail to pay the company the premiums agreed upon. The United States not being a party to the arrangement between the principal and the surety whereby the surety is paid certain premiums in consideration of its acting as surety, it would not be affected by the failure of the principal to pay the premium. An attempt by the surety to cancel the bond is without legal effect. *C. 8553, July 5, 1900; 22571, Jan. 6, 1908.* The liability of the surety on a bond for the performance of a contract continues until the contract is satisfied by performance or by the payment of damages for the breach thereof. The United States therefore has no interest in the matter of payment of premiums to a surety company and will not undertake to decide when the contractor should discontinue the payment of premiums. *C. 12359, Apr. 7, 1902.*

V D. Where a surety company has furnished the War Department with the proper evidence of the authority of an agent to bind the com-

[1] The act of Aug. 13, 1894 (28 Stat. 279), as amended by the act of Mar. 23, 1910 (36 Stat. 241), constitutes the statutory authority for the acceptance of corporate surety on bonds. These acts are supplemented by Army Regulations, pars. 581–589, A. R., 1910, and by G. O. No. 17, War Department, Jan. 27, 1911, this order being republished at intervals to bring it up to date as to the list of surety companies.

[2] The act of Aug. 13, 1894 (28 Stat. 279), now authorizes the acceptance of corporate surety "whenever any recognizance, stipulation, bond, or undertaking conditioned for the faithful performance of any duty, or for doing or refraining from doing anything in such recognizance, stipulation, bond, or undertaking specified, is by the laws of the United States required or permitted to be given with one surety or with two or more sureties.

[3] See "Bonds" IV E to the same effect. The present requirement of the Army Regulations is found in par. 584, A. R., 1910. See Hanson *v.* Scituate, 115 Mass., 336.

pany, and has failed to give notice of the revocation of such authority, it will continue to be bound by the acts of the agent under his authority. *C. 18002, Apr. 18, 1908.*

V E. The act of March 2, 1895 (28 Stat., 807), requiring official bonds to be examined at least once every two years for the purpose of ascertaining the sufficiency of the sureties thereon, is sufficiently complied with as to bonds on which a corporation is surety, if the corporation files periodically in the War Department the financial statement required by paragraph 574, Army Regulations (585 of 1910). *C. 2516, Aug. 12, 1896.*

V F. Where upon the promotion of a disbursing officer from captain to major the superintendent of a surety company wrote to the War Department to the effect that the company was willing that the official bond pertaining to the old office of captain and upon which the company was surety should extend to the new office of major, *held* that the letter of the superintendent was not sufficient to extend the bond as proposed; that to extend the same to the new office of major would require an instrument under the corporate seal referring to the bond in such a way as to identify it, executed by officers of the company authorized to bind it in the matter of executing bonds. *C. 4224, Apr. 21, 1899.*

V G. Paragraph 575, Army Regulations (583 of 1910), as to bonds of disbursing officers, bidders, and contractors provided that: "Before a corporation will be accepted as surety on the bond of a principal residing in a State or Territory other than the one in which it was incorporated it must comply with the requirements of section 2 of act of August 13, 1894, as to the appointment of an agent on whom process may be served, etc., and must file with the Secretary of War a copy of the power of attorney to such agent, authenticated under the seal of the United States district court for the judicial district within which the agent resides, or the certificate of the Department of Justice that the company has complied with the provisions of section 2 of said act of August 13, 1894." *Held,* that an appointment of an agent having once been made, it would not be necessary to file in the War Department a copy of an appointment of another agent subsequently appointed. The purpose of the regulation requiring such evidence as to the original appointment of an agent is to enable the Department to know whether the company is authorized to do business in the judicial district, but after this requirement as to appointing an agent has once been complied with, the act of August 13, 1894 (28 Stat., 279), provides that in the event of the death, removal, or disability of the agent service may be made on the clerk of the court, and the authority of the company to do business continues regardless of the appointment of a successor to the agent. *C. 3946, Oct. 12, 1905.*

The act of August 13, 1894 (28 Stat. 279), provides that no surety company shall do business beyond the limits of the State or Territory "under whose laws it was incorporated * * * until it shall, by a written power of attorney, appoint some person residing within the jurisdiction of the court for the judicial district wherein such suretyship is to be undertaken, who shall be a citizen of the State, Territory, or District of Columbia, wherein such court is held, as its agent upon whom may be served all lawful process against said company." *Held,* this requires that an agent shall be appointed in the judicial district in which the principal on the bond resides or, if a corporation,

has its principal place of business.[1] *C. 501, Oct. 16, 1894; 3946, May 6, 1898, and Nov. 10, 1898.* The appointment of an agent in the District of Columbia only, with the intention of having all bonds signed by the principal wherever he may reside, and signed in the District of Columbia by the District of Columbia agent of the surety company, would not constitute a compliance with the above act. *C. 11618, Dec. 18, 1905.* As there are no "judicial districts" in the Philippines within the meaning of the above act,[2] *recommended* that surety companies doing business there be required to file with the division commander evidence of the appointment of some person residing there upon whom service may be had in case suit should be brought upon bonds or contracts of suretyship. *C. 13893, Jan. 3, 1903.*

V H. The provision in section 4 of the act of August 13, 1894 (28 Stat. 279), that where the Attorney General deems a surety company no longer sufficient security he "may require that additional security be given" is prospective only and does not authorize the Government to require a new bond for work already done as a condition of being allowed to complete the work. *C. 23265, Feb. 16, 1909.*

V I. The act of August 13, 1894 (28 Stat. 279), relating to the acceptance of corporate surety does not require a compliance with any laws or regulations which a State may impose to qualify a foreign surety company to do business within the State with the officers or citizens thereof. Under the act referred to a bond of the surety company to the United States would be valid even though it had not complied with such laws or regulations of the State.[3] *C. 3604, Oct. 22, 1897; 29275, Dec. 11, 1911.*

V J. The act of August 13, 1894 (28 Stat. 279), relating to the acceptance of corporate surety does not apply to a contract made with a foreign contractor, the contract to be made and performed in the foreign country. In such a case a foreign surety company could be accepted as surety although it had not qualified as required by that act. *C. 19164, Feb. 9, 1906.* Nor does the act apply to a contract made and to be performed in the Philippine Islands,[4] but that under

---

[1] See Par. 583, A. R., 1910, as amended by G. O. No. 60, War Department, May 8, 1911.

[2] See 27 Op. Atty. Gen., 136, holding that the Panama Canal Zone was not a "judicial district" within the meaning of the act.

[3] See, however, 28 Op. Atty. Gen., 34, to the effect that the Treasury Department should not accept the bond of a surety company in a State where the company is forbidden by the laws of the State to do business, notwithstanding the company may have complied with the provisions of section 2 of the act of Aug. 13, 1894. Also, 28 Op. Atty. Gen., 127, to the effect that bonds of surety companies executed in States in which they are not licensed, for principals residing in those States, or for contracts to be performed therein, are valid and enforceable against such companies, no matter how flagrant their violations of the law of the State may have been as regards failure to qualify to do business in the State; and that the execution of a bond by a surety company at its home office, or outside of the boundaries of a State wherein it is not licensed, for a principal residing in such State or for a contract to be performed there, would not be the doing of business by the surety within the State.

[4] In 27 Op. Atty. Gen., 136, the opinion was given that the Panama Canal Zone was not a "judicial district" within the meaning of the act of Aug. 13, 1894. See also 27 Op. Atty. Gen., 208, that under the same act surety companies may appoint process agents in Porto Rico but not in the Philippines. See also 27 Op. Atty. Gen., 208, that: "A surety company may be accepted as surety on the official bond of an officer of the Government who is to discharge his duties in the Panama Canal Zone, provided the surety company has appointed process agents in the judicial district in which the principal in the bond resided at the time it was made or guaranteed, and in the judicial district in which the office is located to which it is returnable, and provided the company has also complied with all other legal requirements."

his general authority the Secretary of War may legally authorize the acceptance of any corporation doing business in the islands as sole surety upon any bond for the performance of a contract, provided the corporation has legal authority to act as a surety. So held that an incorporated bank might act as surety. *C. 13893, May 1, 1909, July 23, 1909.*

V K. Where the regulations (par. 585—2, A. R. 1910) of the War Department provided that no surety company will be accepted as surety which shall execute bonds in excess of 10 per cent of its paid-up capital and surplus "unless such company shall be secured as to such excess to the satisfaction of the head of the department by insurance or by deposit with such company in pledge or conveyance to it in trust for its security or indemnity, of property equal in value to such excess," and further provided for a report showing the amount and character of such securities as to all bonds in excess of the 10 per cent limit. *Held* that collateral securities or counter indemnity received from persons secured, may be regarded as a deposit with the company in pledge, within the meaning of the regulations, and if sufficient as to both character and amount credit may be taken in the report. *C. 11618, June 3, 1907.*

V L. The act of March 23, 1910 (36 Stat. 241), amending the act of August 13, 1894 (28 Stat. 279), provides that the Secretary of the Treasury may institute inquiry into the solvency of an incorporated surety and "may require that additional surety be given at any time by any principal when he deems such company no longer sufficient surety." *Held* that the statute does not in terms vest the Secretary of the Treasury with authority to determine the amount or character of the additional surety that is to be exacted, and that in the absence of express language to that effect the law should not be construed as giving the Secretary of the Treasury such a control over the administration of another department, and that therefore it rests with the Secretary of War to determine the amount and character of the additional surety in bonds under the War Department. *C. 27826, Feb. 9, 1911, and Mar. 21, 1911. Held* also that the above acts do not authorize the Secretary of the Treasury to determine the character of the instrument by which a surety shall be bound, nor the amount for which each surety may be accepted in one instrument. *C. 29037, Nov. 18, 1911.*

CROSS REFERENCE.

See CONTRACTS XX C to XXI.
Of officer.....See ARMY I B 1 a (1); 2 b (1) (*a*).

BONUS.

Reenlistment.....See PAY AND ALLOWANCES I C 5 c.

BOUNDARY.

International, not to be crossed by armed troops. See ARMY II K 1 d; f (1); (2).
Street as.....See PUBLIC PROPERTY II C.
Tidewaters.....See PUBLIC PROPERTY III G to H.
Water as.....See PUBLIC PROPERTY II D to E.

BOXER UPRISING.

Beginning of.....See WAR I B 4.
Claims arising during.....See CLAIMS VII B 6.
Desertion during.....See ARTICLES OF WAR CIII F 2 a.
Termination of.....See WAR I F 4.

BREACH OF PEACE.

By soldier.....See ARTICLES OF WAR LXII E

BREAD.

Baking at joint encampment.....See MILITIA VI B 2 j.

BREVET RANK.

See RANK IV to V.

BRIBE.

Disposition of money tendered.....See PUBLIC MONEY I E.

BRIDGES.

Over navigable waters.....See NAVIGABLE WATERS III to V.

BRIGADE POST.

Summary court at.....See DISCIPLINE XVI E 7.

BROWNSVILLE COURT OF INQUIRY.

Retired officers as members.....See RETIREMENT I K 2 e.

BUILDINGS.

Occupation of, during war.....See WAR I C 6 b (1) (a).
On leased land.....See PUBLIC PROPERTY VII A 2.
Post exchange.....See GOVERNMENT AGENCIES II G to H.
Title to.....See PUBLIC PROPERTY II E to F.

BURDEN OF PROOF.

As to loyalty of Filipinos.....See CLAIMS VII A.
Before court.....See DISCIPLINE XI A 4 to 5.

BUREAU CHIEF.

Deposition of.....See ARTICLES OF WAR XCI A 1.
Reappointment.....See RANK I B 1 d to e.

CADET.

See ARMY I D to E.
Appointments as.....See OFFICE III A 4 a.
Residence.....See RESIDENCE.
Privilege as witness.....See DISCIPLINE X II 1 a.
Dismissal.....See DISCHARGE XVIII A.
Summary dismissal.....See OFFICE IV E 2 g to F.
Dismissal commuted to suspension.....See PAY AND ALLOWANCES III F 1.
Discharge without honor.....See DISCHARGE III F 2.
Graduation leave.....See ABSENCE I B 1 k.
Jurisdiction over after graduation.....See DISCIPLINE VIII I 2.
Service as, counts for retirement.....See RETIREMENT I A 1 b; 2 a.
Service otherwise than as.....See RETIREMENT I C 1 a.

CALLING FORTH.

See MILITIA I to II.
See VOLUNTEER ARMY II B 2 to 3.

CAMPAIGN BADGES.

See INSIGNIA OF MERIT III B to C.
Issue to militia.....See MILITIA XIII B.

CAMP FOLLOWERS.

See ARTICLES OF WAR LXIII A to E.

CAMP RETAINERS.

See ARTICLES OF WAR LXIII A to E.

CANADA.

Absconding to.....See DESERTION XX A.
Extradition from.....See EXTRADITION I.
Official of, can receive reward for apprehension of deserter.....See DESERTION V B 14 c.
Shipment of troops through.....See ARMY I G 3 b (2) (*a*) [2] [*a*]; [*b*]. CONTRACTS LX.

CANAL.

Appropriation for.....See APPROPRIATIONS XXXVIII.
Rules for navigation.....See NAVIGABLE WATERS VIII.

CANCELLATION.

Of contract.....See CONTRACT VII J 1.

CAPITAL CRIME.

Charge of, under 59th Article of War.....See ARTICLES OF WAR LIX I 1.
Inferior court.....See ARTICLES OF WAR LXXXIII B 1.
Violation of parole.....See WAR I C 11 b.

CAPITAL SENTENCE.

Based on several offenses.....See ARTICLES OF WAR XCVI A; B.
Commutation of.....See ARTICLES OF WAR CXII A 1 a (1).
In time of peace, by general court-martial...See ARTICLES OF WAR XXI E 1.
Record of.....See DISCIPLINE XIII M.

CASH.

As guaranty.....See CONTRACTS XI L.
Seizing in bank.....See WAR I C 6 e (1).

CEMETERIES.

See PUBLIC PROPERTY IV to V.
Fencing of.....See APPROPRIATIONS LVII.
Maintenance of.....See APPROPRIATIONS LXVII.

CERTIFICATE.

Destruction of property to prevent contagion.See PAY AND ALLOWANCES II A 3 a (4) (d) [1] [*b*].
Discharge.....See DISCHARGE XIII E 1 to 3; XIV A to D 5.
Discharged soldier's right to.....See DISCHARGE II B 5.
Evidential value of.....See MILITIA XVI H.
Health.....See TAX III L.
Of discharge not required at muster out.....See VOLUNTEER ARMY IV B 5.
DISCHARGE XVI A 1.
Officer refuses to sign.....See ARTICLES OF WAR XXI C 1 a.
With application for pardon of deserter.....See DESERTION XV E 1.

CERTIFICATE OF DISABILITY.

See DISCHARGE V A to D; XIII D 4 a.
Authority to give.....See DISCHARGE XX D 1; 2.
Effect of, on retirement of enlisted men.....See RETIREMENT II A 1 a.

CERTIFICATE OF MERIT.

See INSIGNIA OF MERIT II TO III.
Awarding during fraudulent enlistment....See ENLISTMENT I A 9 n.

CERTIFIED CHECK.

See CONTRACTS XX C 3.
Accompanying bid.....See CONTRACTS XI to XII.

CESSION OF JURISDICTION.

See PUBLIC PROPERTY V E to G.
DISCIPLINE VIII D 4.
COMMAND V A 3 f.
Over reservation.....See PUBLIC PROPERTY III A 1.
TAX III A to E.

CHALLENGE OF MEMBER.

Failure to exercise.....See DISCIPLINE XV F 7.
Judge advocate.....See DISCIPLINE IV N.
Member of general court-martial.....See ARTICLES OF WAR LXXXVIII A to D.
DISCIPLINE XIII C 2; 2 a.
Military commission.....See WAR I C 8 a (3) (*d*) [1].
Overruled improperly.....See DISCIPLINE XIV E 9 a (15).
Right to.....See DISCIPLINE XV E 10.

CHALLENGE TO FIGHT.

Elements of.....See ARTICLES OF WAR XXVI A.
Inciting to.....See ARTICLES OF WAR LXII D.

CHAPLAIN.

Porto Rican Regiment.....See ARMY I G 2 a (1) (*b*).

CHARACTER.

Deserter.....See DISCHARGE II B 2 a.
ENLISTMENT I D 3 c (13); (14).
Discharge by purchase.....See DISCHARGE VI D 5.
Evidence of.....See DISCIPLINE X A 2; XI A 11; 11 a.
Fraudulent enlistment.....See ENLISTMENT I A 9 f.
Reenlistment.....See ENLISTMENT I D 3 to H.
Resignation of officer.....See OFFICE IV D 6.
Soldier.....See DISCHARGE V A to B; XL A to C 1.
Summary discharge of officer.....See OFFICE IV E 2 e.
Volunteer, how determined.....See VOLUNTEER ARMY IV H 2.

CHARGES.

See DISCIPLINE II to III.
Disposition of.....See OFFICIAL RECORDS I B 1.
List of witnesses.....See DISCIPLINE X A 4.
Military.....See DISCIPLINE II A to K; I B 3.
Military commission.....See WAR I C 8 a (3) (d) [1]; [5].
Service of, on accused.....See ARTICLES OF WAR LXXI A to D.
Retired soldier.....See RETIREMENT II B 3 a; b.
Retiring board can not try.....See RETIREMENT I B 1 c (3).

CHECK.

Forged checks.....See PUBLIC MONEY II B 2.
Loss of.....See PUBLIC MONEY II B 3.
"No funds".....See ARTICLES OF WAR LXI B 10.
Payable to whom.....See PUBLIC MONEY III.
Sending through the mail.....See PUBLIC MONEY II B 6.

CHIEF FORESTER.

Can not use Army to police forest reserves...See ARMY II H.

CHIEF MUSICIAN.

Status of.....See ARMY I E 4.

CHIEF OF BUREAU.

Deposition of.....See ARTICLES OF WAR XCI A 1.
Reappointment.....See RANK I B 1 d to e.

CHIEF OF COAST ARTILLERY.

Not part of War Department.....See CIVILIAN EMPLOYEES VIII A.
See ARMY I G 2 b (1).

CHIEF OF ENGINEERS.

Authority to grant leaves.....See ABSENCE I B 1 c (3).
Custodian of public buildings.....See PUBLIC PROPERTY I E.

CHIEF OF ORDNANCE.

Authority of.....See ARMY I G 3 b (4) (*a*).
Demands return of arms from colleges.....See MILITARY INSTRUCTION II B 2 e (1).

CHIEF OF PHILIPPINE CONSTABULARY.

Civil office with military rank attached.....See COMMAND I C.
Eligibility to command.....See COMMAND V B 5.
TERRITORIES IV B 2 a.
ARMY II G 1 a; 2 a (1).
Heat and light.....See PAY AND ALLOWANCES II A 1 c (4).

CHIEF OF STAFF.

Of Department.....See ARMY I G 3 a (1) (*a*).

CHILD.

As witness.....See DISCIPLINE X B 3.

CHINAMAN.

See OFFICER'S SERVANT I.

CHOSE IN ACTION.

See PUBLIC PROPERTY I D.

CHURCH.

Attendance.....See ARTICLES OF WAR LII A.

CITIZEN.

See CIVILIAN.
Filipino is not citizen of United States.....See DESERTION XIV B 1.
Should cooperate to suppress violence.....See WAR I B 5 a (1).

CITIZENSHIP.

Eligibility for enlistment is not a right of...See ENLISTMENT I D 3 c (6).
How acquired.....See ALIEN II; III; VI D 4.
ENLISTMENT I B 1 b (2); C 1 c (1) g.
How acquired in Alaska.....See TERRITORIES III A.
Pardon, rights of, restored by.....See PARDON V.

CIVIL AUTHORITIES.

I. CIVIL COURTS.
A. WHEN GOVERNMENT IS A PARTY.
1. May order witnesses at public cost.
B. GOVERNMENT NOT A PARTY.
1. Officers or enlisted men may be allowed to attend as witnesses.
2. Look to officers of civil court for fees.
3. General prisoner desired as witness.
a. Transferred under guard to station nearest court.

II. COMPTROLLER OF THE TREASURY.
A. VIEW DOES NOT CONCLUDE THE WAR DEPARTMENT.

I A 1. Where the Government is a party to a civil action,[1] it is proper for an officer or soldier to be ordered to appear as a witness

[1] Civil courts take judicial notice of executive orders of the President of the United States, reserving lands within the jurisdiction for military purposes. (See U. S. *v.* Kauchi Matohara, U. S. District Court for the Territory of Hawaii, Oct., 1911 term. *Cases, 773 and 784.*)

at public cost, as the Government is a party to the action, and each party must pay the traveling expenses of its witnesses.[1] *C. 17860, Nov. 19, 1909.*

I B 1. On application made to have certain officers and military employees ordered to appear as witnesses before a civil court, *held* that a military order could not properly issue for that purpose, but that it would be proper for the desired witness to be allowed to attend the court.[2] *C. 23824, Apr. 12, 1909.*

I B 2. Neither the appropriation "for the compensation of witnesses" attending military courts, nor the appropriation for the contingent expenses of the Army, is applicable to the payment of allowances, as witnesses before *civil* courts, of officers or soldiers of the Army or of civil employees of the military establishment. For such allowances they must look to the laws and appropriations fixing and authorizing the payment of witness fees in these courts.[3] *P. 55, 471, and 56, 97, Oct., 1892; C. 5335, Nov., 1898; 7540, Jan., 1900; 11244, Sept. 14, 1901; 14418, Apr. 2, 1903; 16068, Mar. 24, 1904; 17860, Apr. 19, 1905; 23824 Apr. 12, 1909.*

I B 3 a. The evidence of a general prisoner confined at Fort Jay, N. Y., was desired in the trial of a case before a civil court in the State of Massachusetts. *Held* that upon request by the proper court such prisoner would be transferred under guard to Boston Harbor for the purpose of being brought before the court as a witness. *C. 19427, Sept. 23, 1907.*

II A. *Held* that the views of the Comptroller of the Treasury as to matters of Army administration are not conclusive on the War Department except so far as they are applied to matters within his jurisdiction. Thus, on a question of organization he may hold one way for the purpose of pay and the War Department may hold differently for other purposes.[4] *C. 8196, May 2, 1900.*

CROSS REFERENCE.

Apprehension of deserter.....See DESERTION V A to G.
Commanding general may remove.....See WAR I C 8 a (2) (*b*).
Contraband turned over to.....See ARMY II K 1 e to f.
Discharge of soldier by United States Commissioner......See DISCHARGE XVI D 1.
Enlisted man in hands of.....See ABSENCE II B 4 a ; a (1); 9 a.
COMMAND V A 2 c.
ENLISTMENT I B 2 b.
PAY AND ALLOWANCES II A 3 a (2).
Employment of Army to aid.....See ARMY II to III.
Forcible entry of dwelling.....See DESERTION III B.
Neutrality, information of violation of.....See ARMY II K 1 c.

[1] The United States District Court for District of Hawaii has jurisdiction of an assault committed upon a military reservation in the Territory of Hawaii (Id.).

[2] See Par 75, A. R., 1910 ed.

[3] If, however, it is absolutely necessary to furnish them transportation in kind to enable them to appear, as witnesses for the Government, before a *civil court of the United States*, an account of such expenditure, together with the evidence that they were properly subpœnaed and did attend the court, will be forwarded to the War Department for presentation to the Department of Justice. Officers providing such transportation will notify the court, or the marshal thereof, that it was furnished to enable the witnesses to perform the requisite journeys in obedience to the summons. A. R., 72, edition of 1895 (par. 75, 1910 ed.).

[4] Finding of Comptroller on claims against the United States is not conclusive on the courts. See U. S. *v.* Gillmore (189 Fed. Rep., 761).

Offenders turned over to.....See COMMAND V A 3 c (1).
ARMY I A 6.
ARTICLES OF WAR LIX A to L 2.
Officer in hands of.....See ABSENCE II A 1.
Prisoners kept for.....See COMMAND V A 8.
Subpœna by.....See ARMY I G; 3 b (2) (*a*) [3] [*c*].
PUBLIC PROPERTY III A 1; V F 1 b (3) (*h*).
War status can not be terminated by decision of civil court. See WAR I F 1.

CIVIL BANDS.

See ARMY BANDS.
May employ Army musicians.....See ARMY BANDS I C 3.

CIVIL COURTS.

Appeal not taken from general court-martial. See DISCIPLINE XV I 1.
Commanding general appoints in time of war. See WAR I C 8 a (2) (a).
Concurrent jurisdiction of.....See ARTICLE OF WAR LVIII A; CII C.
Condemnation of land.....See PUBLIC PROPERTY II A 4 b.
Discharge by.....See DISCHARGE VII A; B.
Discharge on account of punishment by....See PAY AND ALLOWANCES III C 2 c (2).
Jurisdiction over officer or soldier.....See ARTICLE OF WAR CII A to I.
Jurisdiction over retired officer.....See RETIREMENT I G 2 d.
Jurisdiction under military government....See WAR I C 8 a (3) (*b*) to (*d*).
Pay not earned while in hands of.....See PAY AND ALLOWANCES I C 3.
President's action in dropping officer, as deserter can not be reviewed. See DESERTION XX D.
Prisoners of war, trial of.....See WAR I C 11 c (2); (3); 12 a.
Prisoner turned over to.....See ARMY I A 6.
Records furnished to.....See ARMY I B a c (1).
OFFICIAL RECORDS I A 2 a.
Right of accused to be confronted with witnesses. See ARTICLE OF WAR XCI H.
Soldiers tried by.....See ARTICLE OF WAR XXI E 1.
State courts can not enjoin United States courts. See PUBLIC MONEY II C 6.
State courts can not enjoin Federal agent....See CONTRACTS LVIII.
Subpœna of.....See ARMY I E 5.
Territorial jurisdiction.....See DISCIPLINE VIII D 4.
War status can not be terminated by decision. See WAR I f 1.
Warrant of.....See COMMAND V A 3 1; V B 2 b; V B 2 c.
Witnesses before.....See CIVIL AUTHORITIES I A; I A 1; I B 1; I B 3 a.

CIVIL DISORDER.

See ARMY II to III.

CIVILIAN.

Abuse of by Army.....See ARTICLE OF WAR LIV A to H 2.
Abuse of by militia.....See ARTICLE OF WAR LIV F 2; LIX A to L 2.
Appointment to military office.....See OFFICE III A 1 c to e.
Armed and equipped, but not soldiers.....See VOLUNTEER ARMY II F 1 b to c.
Arrest of by military.....See COMMAND V A 3 c; V A 3 c (1); V A 3 d (1).
Arrest of by mistake.....See CLAIMS XII E.
Arrest of deserter by.....See DESERTION III F.
Camp follower.....See ARTICLE OF WAR LXIII A to E.
Can not convene court-martial.....See DISCIPLINE XV H 1.
Can not keep captured property.....See WAR I C 6 c (3) (a).
Charges initiated by.....See DISCIPLINE II B.

Company tailor.....See ARTICLE OF WAR XXI B 1.
Contract surgeon.....See ARMY I G 3 d (4) (c).
Debts against officers.....See ARMY I A 2 a (2).
Detention of.....See DISCIPLINE IV B 4 a.
Enlistment changes status.....See ENLISTMENT I A.
Exclusion from reservation.....See COMMAND V A 3 a; 3 b.
DISCIPLINE XVII A 4 g (4).
Fishing on military reservation.....See COMMAND V A 3 f.
Injured on transport.....See COMMAND V B 2 b.
Inmates of Soldiers' Home.....See SOLDIERS' HOME I A.
Judge Advocate.....See DISCIPLINE III C 2 b.
Jurisdiction over.....See DISCIPLINE VIII G 2 a to b; XIV E 2.
Medical attendance on.....See ARMY I G 3 d (1).
Messenger to cross international boundary...See ARMY II K 1 f (1).
Military instruction of.....See MILITARY INSTRUCTION II.
Not surrendered under Fifty-ninth article of war.....See ARTICLE OF WAR LIX H.
Offenses against.....See ARTICLE OF WAR LXII C 5 a.
Removal from reservations.....See PUBLIC PROPERTY III H to I.
COMMAND V A 3 d (2).
Reward for apprehension of deserter.....See DESERTION V A to F 19.
Squatters on military reservation.....See PUBLIC PROPERTY II B 3 a.
Subpœna served by.....See DISCIPLINE X F 1; 2.
Trial of by military.....See ARTICLE OF WAR XL A.
DESERTION V F 4 a; 5; IX O.

CIVILIAN EMPLOYEES.[1]

I. LEAVES.

A. WHO ARE ENTITLED TO.

1. Expert accountant, Inspector General's Department..... *Page 226*
2. Employees of navy yards, gun factories, naval stations, arsenals, armories, ordnance and powder depots, *but not* employees of inspectors of ordnance on duty at works not belonging to the United States.

B. NATURE OF.

1. Thirty days' annual leave and 30 days' sick leave may be granted.
2. More than a total of 60 days' leave, with pay, may not be granted even though the cause of absence be sickness..... *Page 227*
3. Within the limit of 60 days, leave may be granted because the presence of clerk would jeopardize health of fellow clerks.
4. In case of absence without leave surgeon's certificate does not operate to restore pay, but may be a guide to the Secretary of War in acting on the case.

C. CERTAIN RULINGS IN REGARD TO.

1. The Secretary of War may not detail a clerk of the War Department as military instructor at a school without deduction of time or pay.
2. No authority for granting indefinite leave without pay to clerk to cover absence as officer of volunteers..... *Page 228*
3. Time lost by employees of Ordnance Department due to lay-offs by proper authority, does not interrupt continuity of service for leave.
4. It is a proper expenditure for the quartermaster's department to use its funds to procure the services of temporary employees to replace the employees at large who are absent on leave without pay.

---

[1] Prepared by Lieut. Col. John Biddle Porter, judge advocate, assistant to Judge Advocate General.

I. LEAVES—Continued.
D. Holidays.
1. *Per diem* employees may enjoy holidays established by States, but not receive pay if they do.
2. *Per diem* employees may receive pay for the holidays established by law unless employment ended the day before or began the day after such holiday.
3. Pay allowed *per diem* employees for holidays specified in joint resolution of 1885, except July 4, only when holiday does not fall on Sunday. Pay allowed for July 4 on day celebrated as such.
4. *Per diem* employees suspended and not at work during period which includes holiday not entitled to pay for same.
5. Employees who work on holidays not entitled to double pay.
6. The operation of the joint resolution of 1887 granting pay to *per diem* employees is not restricted to city of Washington nor to permanent *per diem* employees.
7. Days proclaimed by President for mourning:
a. *Per diem* employees at arsenal not entitled to pay... *Page 229*
b. Employees employed and paid by the day not entitled to pay, but employees for definite periods longer than day or indefinite periods entitled to pay, although their compensation be measured by the day.

II. STOPPAGE OF PAY.
A. Pay of Civil Employee can not be Stopped to Liquidate Private Indebtedness.
B. Pay of Employee may be Stopped by Commanding Officer of Arsenal to Amount Necessary to Make Good Damage to Government Property Due to Neglect of Employee.
C. Hospital Charges Due United States from Civil Employees may be Collected from Sums Found Due Them for Services to United States.
D. Clerk Discharged from One Office, Reinstated and Assigned to Another Office may Have Pay Stopped to Meet Excess of Leave Under First Appointment.

III. JURY DUTY.
A. Officers of the Army and Civil Employees of Military Establishment Should not be Called upon for Jury Duty, Road Work, etc.

IV. DUTY AS WITNESS.
A. Employees Covered by Act of 1898 not Entitled to Leave with Pay While Absent as Witnesses Except Where Summoned as Witness for United States ..... *Page 230*
B. Employees not Covered by Act of 1898 Entitled to Leave with Pay While Absent as Witnesses.

V. DEFINITIONS.
A. Crew of Transport are Civilian Employees.
B. Superintendents of National Cemeteries are Civil Officers of United States and not Part of Military Establishment.
C. Master Mechanic at Arsenal does not Hold Federal Office, but Employment Simply.

VI. HOLDING OTHER OFFICE.
A. Civil Service Clerk May not Accept Appointment as Vice Consul of Foreign Power, Though no Salary Attach.
B. Clerk May not Accept Office as Alderman or as City Attorney.
C. Quartermaster Employees not Prohibited by *Law* or *Regulations* from Accepting Office as Member of City Council.... *Page 231*

VII. NOTARY PUBLIC.

A. A Clerk Who is Also a Notary Public not Precluded from Receiving Fees as Notary in the Execution of Contracts with Government.

VIII. DETAILS.

A. Enlisted Man May not be Detailed for Clerical Duty in Quartermaster's Department, but May be so Detailed in Office of Chief of Artillery.

B. Clerk not Eligible for Appointment as Post Noncommissioned Staff Officer.

C. Clerks Provided for Headquarters of Divisions, Departments, and the Chief of Staff May be Assigned to Duty with Artillery Board, Fort Monroe. Restriction is to Details to Duty in Bureaus of War Department.

IX. TRAVEL.

A. No Precedent for Allowing Traveling and Other Expenses of Personal Clerk of Officer Ordered Before Court of Inquiry.

B. Transportation to Five Postal Clerks, with Sleeping-Car Accommodation, Requested by Quartermaster's Department, en Route "for Duty with Troops in the Field," Payable from Army Transportation.

X. ADDITIONAL COMPENSATION.

A. Discussion. Clerk in War Department may Receive Additional Compensation for Work Under Appropriation for Gettysburg National Park.

B. Under Appropriation Act of 1894 Clerks and Messengers "Employed and Apportioned to the Several Headquarters and Stations by the Secretary of War" may not be Discharged or Their Salaries Increased or Reduced by a Department Commander ..... *Page 232*

C. Clerk of Bureau of War Department may not Have Additional Compensation for Services Rendered as Acting Chief Clerk.

XI. VACATION OF POSITIONS.

A. Resignation.

1. Resignation of an employee may be accepted to take effect upon the last day he worked, although acceptance be subsequent to that date.
2. Where civilian accepts employment as clerk, with no understanding as to tenure of office, he may resign when he sees fit.
3. Rule as to acceptance of resignation of clerk same as that of officers, where notice of acceptance has been communicated .. *Page 233*
4. Resignation of civil-service employee under investigation for political activity should not be accepted but the employee dismissed.

B. Discharges.

1. The ultimate discharge of employee as of the date of his suspension is lawful.
2. Clerk discharged for cause may not be allowed to resign.
3. A clerk having been discharged, the discharge is beyond recall, even when there was mistake on part of officer recommending or issuing discharge.

93673°—17——15

XII. INJURIES.
A. Discussion.
B. Compensation.
1. Under act of May 30, 1908, compensation may include commutation of rations, if subsistence was furnished the employee at time of accident.
2. Relief could not be granted under act of May 30, 1908, to carpenter injured while working on bridge in connection with water supply at West Point..... *Page 234*

XIII. MILITARY SERVICE.
A. Clerks in Quartermaster's Department who, in 1862, were Employed as an Armed Force were not in the Military Service, but Remained Civilians.
B. The Term "Service in War" in Uniform Regulations Relates to Service as Officer or Enlisted Man and does not Attach to Status of Civil Employee.

XIV. DESERTION.
A. A Civil Employee does not become Liable as a *Deserter* by Abandoning his Employment.

XV. SEAMAN.
A. If a Seaman is Discharged by Voluntary Consent in a Foreign Port he is Entitled to Wages up to Time of Discharge, but Unless his Time has Expired he Should not be Discharged in Foreign Port to Become a Public Charge.

XVI. MISCELLANEOUS.
A. Clerk of War Department who was Treasurer of a Society having for its Object the Making of Personal Loans to Employees at 2 per cent per Month Violated the Executive Order of April 13, 1911.
B. Civil Service Rules as they Stand Permit the Appointment without Examination of a Second Driver for the Secretary of War.
C. Where the Commissioner for Marking Graves of Confederate Dead died while in Office the Chief Clerk of the War Department should Certify such Vouchers as Remain to be Accomplished ..... *Page 235*

I A 1. Although the expert accountant is not a part of the clerical force of the War Department, he is a civil officer of the department who, from the nature of his qualifications, is employed in the office of the inspector general or in the military establishment at large at the discretion of the proper military superior. To such a case the terms of the departmental regulation of August 5, 1899 (having relation to leaves), seem to have full application. *C. 26298, Mar. 3, 1910; 14290, Aug. 23, 1911.*

I A 2. *Held* that in the act of February 1, 1901 (31 Stat. 746), which grants 15 days' leave in each year to employees of the navy yards, gun factories, naval stations, and arsenals, the word "arsenals" is broad enough to include armories and ordnance and powder depots, but does not embrace employees of inspectors of ordnance on duty at works not belonging to the United States. *C. 10039, Mar. 20, 1901; 13440, Oct. 29, 1902.*

I B 1. Section 7 of the act of March 15, 1898 (30 Stat., 316), provides that the head of any department may grant 30 days' leave with pay in any one year to each clerk or employee, and also that, in excep-

tional and meritorious cases, where a clerk or employee is personally ill, and where to limit the annual leave to 30 days would work peculiar hardship, the leave may be *extended* with pay not exceeding 30 days. In a later act (July 7, 1898, 30 Stat., 653) it was provided that nothing contained in the said section of the act of March 15 shall be construed to prevent the head of the department from granting 30 days' annual leave with pay to a clerk or employee, notwithstanding the clerk or employee may have had not exceeding 30 days' leave with pay on account of sickness. *Held*, that construing these two acts together, they reestablish the old and simple law and custom of the department to the effect that the Secretary of War may (through the heads of bureaus or personally) grant to each clerk and employee during each year 30 days' leave with pay (called in the statutes "annual leave"), and in addition thereto, during the same period, a leave with pay not to exceed 30 days, if during such time the clerk or employee is compelled by personal illness to be absent.[1] Sixty days' leave with pay is all that may be granted in any one year. Thus where a clerk has been absent sick 39 days and had drawn pay therefor, *held* that he could be allowed 21 days' leave with pay during the remainder of the year, but no more. *C. 4694, July 29, 1898; 16250, May 2, 1904.*

I B 2. *Held*, that the head of an executive department can not legally grant more than 60 days' leave of absence with pay to any employee in any one calendar year, and this regardless of whether the employee has been absent beyond the legal allowance of leave because of sickness. *C. 13425, Oct. 10, 1902.*

I B 3. *Held*, that under section 7 of the act of March 15, 1898 (30 Stat., 316), which amends section 5 of the act of March 3, 1893 (27 Stat., 715), a clerk who was absent because his presence "would jeopardize the health of his fellow clerks" might receive pay during such absence, provided that his entire absence during the year should not exceed the period of 60 days.

I B 4. Under the provision of section 4 of the act of March 3, 1883 (22 Stat., 563), relating to absences of clerks of the departments, such a clerk, when absent without leave, whether sick or well, forfeited his pay for the period of absence. Where a clerk of the War Department, who had been absent without leave, produced, to account for his absence, a surgeon's certificate, *held* that such certificate did not *per se* operate to restore pay, but that it was in the discretion of the Secretary of War to accept or not such certificate and ratify the absence as authorized; that unless he should do so the pay would remain forfeited. *P. 57, 231, Jan., 1893.*[2]

I C 1. Where an application was made for the detail of a clerk on duty in the War Department to instruct the battalion of cadets of the Washington High School six hours each week, without deduction of time or pay being made against him, *held* that the Secretary of War, in the absence of a statute authorizing such a detail, was without power to make it. *P. 45, 495, Mar., 1891.*[3]

---

[1] See circulars, War Department, dated Dec. 2 and 3, 1898. 22 Op. Atty. Gen., 255.

[2] Leaves to clerks in the executive departments are governed by sec. 7, act of Mar. 15, 1898 (30 Stat. 316), and sec. 4, act of Feb. 24, 1899 (30 Stat. 890). See also War Dept. circulars of Aug. 5, 1899, and May 25, 1900.

[3] While the foregoing decision is based on sec. 4 of the act of Mar. 3, 1883 (22 Stat. 563), it is equally apposite to the law as it stands to-day. (Sec. 7, act of Mar. 15, 1898, 30 Stat. 316.)

I C 2. *Held* that there was no authority of law for granting to a clerk in the Record and Pension Office an indefinite leave of absence without pay, to cover his absence as an officer of United States Volunteers. *C. 4129, May 16, 1898.*

I C 3. *Held* that time lost by employees of arsenals, gun factories, etc., of the Ordnance Department due to lay-offs by the proper officer of the Department, does not interrupt the continuity of service for leave of absence within the operation of the act of February 1, 1901 (31 Stat., 746). *C. 11608, July 1, 1908, Nov. 18, 1910.*

I C 4. Where employees of the Quartermaster's Department at large are absent on annual leave with pay, *held*, that it is a proper expenditure of funds of that department to procure the services of temporary employees to replace them. *C. 20069, July 17, 1900.*

I D 1. By the joint resolution of Congress of January 6, 1885, it was provided that the "*per diem* employees" of the United States should be allowed certain days as holidays, namely, January 1, February 22, July 4, and December 25, together with "such days as may be designated by the President as days for national thanksgiving," and should receive the same pay for those days as for other days. *Held*, that while such employees might be allowed by the the Secretary of War to enjoy the Saturday half holiday established at New Orleans by a statute of Louisiana, they could not, if taking the holiday, legally be paid for such time. *P. 62, 31, Oct. 12, 1893.*

I D 2. Where *per diem* employees have been present for duty either before or after a holiday, but not present both before and after, being absent a day or more either prior or subsequent thereto, they are entitled to be paid for such holiday, unless their employment was terminated the day before or began the day following it; in which cases they would not be employees of the United States at the time of the holiday. *C. 5879, Feb. 17, 1899; 16558, July 8, 1904; 20358, Sept. 13, 1906; 23607, July 15, 1908; 14290, Aug. 23, 1911.*

I D 3. Pay shall be allowed per diem employees for the dates specified in the joint resolution of January 6, 1885 (23 Stat., 516), viz, January 1, February 22, July 4, and December 25, other than July 4, only when those dates do not fall on Sunday. Pay shall be allowed to per diem employees under the joint resolution of February 23, 1887 (24 Stat., 644), for the day celebrated as "Memorial" or "Decoration" Day and also for the day *celebrated* as the "Fourth of July." *C. 17645, Mar. 10, 1905.*

I D 4. *Per diem* employees suspended and not at work during a period which includes a holiday are not entitled to pay for the holiday. *C. 1668, Aug. 21, 1895.*

I D 5. Employees who work on a holiday can not be given double pay for such service in the absence of a statute expressly authorizing the same. *C. 4335, June 16, 1898; 15979, Feb. 25, 1904.*

I D 6. A joint resolution of Congress approved February 23, 1887 (24 Stat. 644), provides "that all per diem employees of the Government on duty at Washington or elsewhere shall be allowed the day of each year which is celebrated as 'memorial' or 'Decoration Day,' and the Fourth of July of each year, as holiday and shall receive the same pay as on other days." A per diem employee of the Government at West Point, N. Y., having been refused pay for the Fourth of July, submitted a claim therefor. *Held*, that under the joint resolution quoted, the claim was a valid one, that the resolution was not

limited as to place to the city of Washington nor as to per diem employees or to permanent ones. *P. 61, 125, Aug. 16, 1893.*

I D 7 a. On January 19, 1893, the President proclaimed that on the day (January 20) of the funeral of ex-President Hayes, all public business in the departments should be suspended. This not being one of the days included as public holidays by the joint resolution of January 6, 1885, *held* that the *per diem* employees at the Watervliet Arsenal were not entitled to be paid for that day. *P. 57, 424, Feb., 1893.*

I D 7 b. Where the question was raised as to whether certain employees paid by the day, could be paid for two days on which public work was suspended, by a War Department order, in consequence of the death of a President of the United States, *held*, that employees who were employed and paid by the day, although they may have been thus employed for some time, would not be entitled to pay for the days in question on which they did no work; but that all the employees who were employed for definite periods longer than a day, or for indefinite periods, although their compensation be measured by the day, are entitled to pay for these days, if they happened during such employment.[1] *C. 11301, Oct. 31, 1901.* See also *P. 57, 424, Feb., 1893.*

II A. It is well established that the pay of a civilian employee can not be stopped to liquidate a private indebtedness to an enlisted man. *C. 26835, July 21, 1910.*

II B. *Held*, that the commanding officer of an arsenal, as representing the United States, has the power to withhold from the pay of an employee of the arsenal, the amount necessary to make good damage to Government property due to the neglect of the employee. *C. 18064, May 24, 1905.*

II C. *Held*, that when hospital charges due to the United States from civilian employees have not been voluntarily paid, they may be collected from any sums subsequently found to be due to such employees on account of services rendered to the United States. *C. 20613, Mar. 5, 1910.*

II D. *Held*, that a civil-service clerk who was discharged from one office and later reinstated and assigned to another office might after such reassignment have his pay stopped to make good certain days of absence in excess of 30 discovered to have been taken while serving under the first appointment. *C. 821, Jan. 3, 1895.*

III A. On the question as to whether officers of the Army and civil employees of the military establishment should be called upon for jury duty, to work upon the roads of the State, Territory, or district in which they may be stationed, etc. *Semble* to this office, in view of their required duty to the United States, that they should not, but *held* that the question was one for the courts to determine in each case.[2] *C. 8229, Sept. 2, 1902; 13513, Oct. 22, 1902, July 24,*

---

[1] VIII Comp. Dec., 219, id., 235.

[2] In Pundt *v.* Pendleton, 167 Fed. Rep. 1003, a case involving *habeas corpus* proceedings in relation to a teamster in military employment at Fort Oglethorpe, who had been imprisoned by a State court for failure to comply with the State law requiring work upon the roads, the court said: "I believe Pundt is exempt from this road duty * * * because of the fact that he is a necessary instrumentality in that portion of the United States Army stationed at Fort Oglethorpe, and that he is such an important and necessary part of the military establishment as that the State and the County of Catoosa has no right to call on him to be absent from the fort when such

1905; 20390, Sept. 17, 1906, Apr. 25, 1908, Dec. 5, 1908, and Apr. 19, 1910; 20327, Mar. 14, 1910, Sept. 24, 1910, and Oct. 1, 1910.

IV A. Where a clerk in the office of the Secretary of War was summoned as a witness to Alexandria, Va., necessitating his absence from duty for one day, *held* that his request that he be given leave with pay for this time without having the same charged against his annual leave must be denied. The act of March 15, 1898 (30 Stat., 316), provides for 30 days' leave only in one year for clerks and employees of the executive departments and for an extension of this leave to 60 days in the case of sickness and certain other contingencies. Had the clerk been required as a witness for the United States he would be considered to have been on duty and under pay, but this can not be held where he was absent in a proceeding in which the United States was not a party. *C. 20390, Feb. 20, 1909.*

IV B. A civil employee not coming within the purview of the act of March 15, 1898 (30 Stat., 316), is entitled to his pay while absent in attendance as a witness upon a State court.[1] *C. 17968, May 16, 1905.*

V A. Members of the crew of a transport are civilian employees and are amenable to the same laws as are merchant seamen. *C. 28492, Sept. 12, 1911.*

V B. Superintendents of national cemeteries are civil officers of the United States in the sense that the several incidents of the office of superintendent are established by law. They form no part of the military establishment, however, and for that reason are not entitled to any of the allowances which are furnished to officers and enlisted men in conformity to law and regulations. *C. 9393, Dec. 8, 1906.*

V C. *Held* that the position of master machinist at the Springfield Arsenal, conferred by the appointment of the commanding officer, was not properly a Federal office, but an employment simply, so that, upon the appointee being elected a member of the school committee and of the Board of Water Commissioners of Springfield, he could not be said to come within the application of the Executive order of January 28, 1873, declaring that persons holding Federal office should, if accepting State, Territorial, or municipal office, be deemed to vacate and resign the Federal office. *R. 36, 223, Feb., 1875; C. 14795, Dec. 16, 1908.*

VI A. On the question of whether a draftsman in the classified civil service could accept from a foreign Government an appointment as vice consul, there being no salary attached to the office, *held* that he could not do so. *C. 14795, May 8, 1907.*

VI B. Where a clerk in the Quartermaster's Department at Large accepted the office of alderman, *held* that his doing so was a violation of

---

absence would interfere with the proper discharge of his duties as a necessary and important, even if an humble, part of the Army of the United States."

In U. S. *v.* Naylon, an unreported case determined in the district court of Alaska (Div. No. 1), in July, 1906, in which the defendant demurred to an indictment for failure to render service under the road law of Alaska, the court said in sustaining the demurrer: "There can be no doubt that a civilian employee of the Army who resides within the bounds of and upon a military reservation, falls within the sixth exemption as set forth above (those who do not reside within the precinct), and hence is not subject to the road tax. It is, I think, equally beyond question that, owing to his peculiar status, a civilian employee of the Army is not within the provisions of the statute."

[1] XIII Comp. Dec., 211.

the Executive orders of January 17, 1873. *C. 14795, June 15, 1903.* So, also, in the case of a clerk in the Subsistence Department who was nominated for the position of city attorney. *C. 14795, Mar. 4, 1910.*

VI C. There is nothing in the United States statutes or Army Regulations which prohibits a quartermaster employee (post engineer) from accepting the office of member of a city council. *C. 5023, Sept. 21, 1898.*

VII A. A clerk in the employ of the Government, who is also a notary public, is not precluded by reason of his employment as such clerk from receiving the statutory fees from parties who may secure his services as notary in the execution of contracts with the Government. *C. 167, Aug. 18, 1894.*[1]

VIII A. In view of the requirements of the act of August 5, 1882 (22 Stat., 255), it is forbidden to detail an enlisted man for clerical duty in the Quartermaster's Department. Otherwise, however, as to the detail of an enlisted man in the office of the Chief of Artillery, which is no part of the War Department. *C. 22133, Sept. 24. 1907.*

VIII B. A clerk appointed under the act of Congress, approved August 6, 1894, is not eligible under existing law and regulations for appointment as a post noncommissioned staff officer. *C. 2034, Feb. 3, 1896.*

VIII C. *Held,* in view of the wording of the appropriation act, that one of the clerks provided for the headquarters of divisions and departments and the office of the Chief of Staff may be assigned to duty with the Artillery Board at Fort Monroe. The restriction is to the assignment of such clerks to duty in the several bureaus in the War Department. *C. 19058, Jan. 16, 1906.*

IX A. There is no precedent for allowing the traveling and other legitimate expenses of the personal clerk of an officer ordered before a court of inquiry. If he be a material witness, he may of course be subpœnaed as such and be paid the legal witness fees. *P. 57, 196, Jan., 1893.*

IX B. Transportation requests were issued by the Quartermaster Department to five postal clerks, also requests for one double berth each in sleeping car, from Washington, D. C., to Tampa, Fla., on a verbal order from the Assistant Secretary of War, the nature of the journey being "for duty with troops in the field." *Held* that the accounts could legally be paid from the appropriation for Army transportation. *C. 6927, Sept. 9, 1899.*

X A. In construing statutes (secs. 1763–1765, R. S.) restraining the Executive from giving dual or extra compensation, courts have aimed to carry out the legislative intent by giving them sufficient flexibility not to injure the public service and sufficient rigidity to prevent executive abuse.[2] These statutes can by no fair interpretation be held to embrace an employment which has no affinity or connection, either in its character or by law or usage, with the line of his official duty, or where the service to be performed is of a different character and for a different place and the amount of compensation is regulated by law.[3] Taking the sections all together, the purpose of the legislation

[1] See, however, War Department order (A), Jan. 3, 1905.

[2] Landram *v.* United States, 16 Ct. Cls., 74, 82.

[3] Converse *v.* United States, 21 How., 463, 470, 473; United States *v.* Brindle, 110 U. S. 688, 694; United States *v.* Shoemaker, 7 Wall., 338; Meigs *v.* United States, 19 Ct. Cls., 497; 15 Op. Atty. Gen., 608.

was to prevent a person holding an office or appointment for which the law provides a definite compensation by way of salary or otherwise, which is intended to cover all the services which, as such officer, he may be called upon to render, from receiving extra compensation, additional allowance, or pay for other services which may be required of him either by act of Congress or by order of the head of his department, or in any other mode, added to or connected with the regular duties of the place which he holds; but that they have no application to the case of two distinct offices, places, or employments, each of which has its own duties and its own compensation, which offices may be held by one person at the same time. In the latter case he is, in the eye of the law, two officers or holds two places or appointments, the functions of which are separate and distinct, and according to all the decisions he is in such case entitled to recover the two compensations. In the former case he performs the added duties under his appointment to a single place, and the statute has provided that he shall receive no additional compensation for that class of duties unless it is so provided by special legislation.[1] Where, therefore, the disbursing clerk of the War Department (salary, $2,000) performed certain clerical duties for the Gettysburg National Park Commission, which were separate and distinct from his duties as such disbursing clerk, it was held that he could legally be paid for such extra services from the appropriation for the Gettysburg National Park. *C. 3747, Dec. 29, 1897; 10446, May 22, 1901; 11026, Sept. 7, 1901; 12629, May 28, 1902; 21852, Aug. 16, 1907.*

X B. The appropriation act approved August 6, 1894, provides expressly that the clerks and messengers provided for by it "shall be employed and apportioned to the several headquarters and stations by the Secretary of War." *Held* that they are each to be employed by the Secretary of War at a particular specified salary, and that department commanders have no power to discharge any of them or to increase or reduce their salaries. *C. 380 Sept. 25, 1894.*

X C. Upon an application by a clerk of a bureau of the War Department to be paid an amount in addition to his regular salary, as a compensation for services performed by him for a certain period as acting chief clerk, *held*, in view of the provisions of sections 1764 (and 1765), R. S., that such additional compensation could not be allowed except by the authority of Congress."[2] *R. 39, 643, Aug. 1878.*

XI A 1. On the question of whether the resignation of an employee could be accepted to take effect upon the last day he worked, although that day might be of a date prior to that upon which the resignation was accepted, *held* that it could, as the acceptance of such resignation merely amounts to a declaration of the fact that the employee separate himself from the service by resignation on such prior date. *C. 18445, Aug. 18, 1905.*

XI A 2. Where a civilian accepted Government employment as a clerk, there being no understanding as to the tenure of office, *held* that the clerk had a right to resign when he saw fit and that his abandonment of the service, on a refusal to forward his resignation for

[1] United States *v.* Saunders, 120 U. S., 126, 129, 130; V Comp. Dec., 9; 6 id., 683.
[2] Compare Hoyt *v.* United States, 10 Howard, 109; United States *v.* Shoemaker, 7 Wallace, 338; Stansbury *v.* United States, 8 Wallace, 33.

acceptance is no legal ground for withholding his pay. *C. 11800, Dec. 20, 1901; 14814, June 18, 1903; 18445, Aug. 18, 1905.*

XI A 3. *Held*, that the rule in regard to the acceptance of the resignation of a clerk is similar to that governing the resignation of officers of the Army, and that "after due notice of the acceptance has been communicated, there can of course, be no withdrawal of the tender or revocation of the acceptance." *C. 18318, July 18, 1905.*

XI A 4. Where an employee (civil service) who had displayed political activity and was under investigation therefor, as having violated the civil-service rules, tendered his resignation to take effect immediately, *held*, that the resignation should not be accepted, but the employee dismissed for violating the civil-service rules. *C. 27007, July 14, 1910.*

XI B 1. *Held*, that the ultimate discharge of a civil employee as of the date of his suspension is lawful. *C. 20297, Aug. 29, 1906.*

XI B 2. A clerk was discharged for cause. He applied for permission to resign. *Held* that the discharge had been executed and could not be revoked, and that to substitute a permission to resign for the discharge would be to substitute something that did not happen for what actually happened, and therefore to make a false record. *C. 3976, Mar. 29, 1898; 15767, Jan. 12, 1904.*

XI B 3. A clerk in the Insular Bureau was discharged. *Held* that it is well settled that a legally executed discharge is beyond recall and that mere mistake on the part of the officers in recommending or issuing the discharge will not justify its revocation. *C. 15767, Jan. 12, 1904.*

XII A. Prior to the enactment of the act of May 30, 1908 (35 Stat. 556), no payments could lawfully be made to civil employees for damages for personal injuries, or for medical or surgical expenses, out of the appropriation for the work in which the injured man was engaged,[1] unless medical or surgical treatment was provided for in his contract of employment; in cases arising subsequent to May 30, 1908, where bills for the relief of injured employees have been referred to the department for recommendation, the view of this office has been that the relief afforded should be measured by the requirements of the act above cited.[2] *C. 23069, Apr. 14, 1908.*

XII B 1. In view of a letter dated June 30, 1910, from the Secretary of Commerce and Labor in which the section of the act of May 30, 1908 (35 Stat. 556), which provides that an employee's compensation shall be "the same pay as if he continued to be employed" is construed as including subsistence in cases where subsistence was furnished at the time of the accident, *held*, that this interpretation settles the law unless it be reversed by the courts and that payment of such compensation may take the form of a commutation of rations. *C. 23069, July 18, 1910.*

---

[1] I Comp. Dec., 62; I id., 1881; VI id., 955.

[2] The act of May 30, 1908 (35 Stat. 556), as amended by the acts of Feb. 24, 1909 (35 Stat. 645), and of Mar. 4, 1911 (36 Stat. 1452), has relation to persons injured in the course of their employment by the United States as artisans or laborers in any of its manu facturing establishments, arsenals, or navy yards, or in the construction of river and harbor or fortification work, or in hazardous employment on construction work in the reclamation of arid lands, or the management and control of the same, or in hazardous employment under the Isthmian Canal Commission.

XII B 2. *Held,* that relief could not be granted under the act of May 30, 1908 (35 Stat. 556), to a carpenter who was injured while working on a bridge acquired in connection with the water supply for West Point, since such work did not come within the scope fixed by the statute. *C. 23853, Sept. 17, 1908.*

XIII A. *Held,* that the clerks in the Quartermaster Department who, in 1862, were employed as an armed force to protect public property at Washington, and to assist in its defense, were not in the military service proper, but remained civilians. The mere fact, therefore, that they served till their service was no longer required did not, at the end of that time, place them in the *status* of being "honorably discharged" in the sense of the civil-service rules regulating appointments to civil office. *P. 35, 371, Oct., 1889; C. 16441, June 9, 1904.*

XIII B. The term "service in war" as used in the uniform regulations relates to service as an officer or enlisted man in the military establishment and does not attach to the status of a civil employee. *C. 17243, Feb. 1, 1905.*

XIV A. A civil employee of the Quartermaster's Department does not become liable as a *deserter* by abandoning his employment.[1] *R 50 226, Apr., 1886.*

XV A. A sailor shipped under articles which provided for a voyage to a distant port and back to a final port of discharge in the United States and contained the clause that all those who are discharged at their own request within the time covered by the articles are not entitled to be discharged at a port in the United States. *Held,* that if the seaman is discharged by voluntary consent before a consul in a foreign port he shall be entitled to his wages up to the time of his discharge, but not for any further period. Further, *held,* that unless the time has expired or the voyage for which the seaman shipped has been completed he should not be discharged in a foreign port where he is liable to become a public charge. *C. 24054, Nov. 12, 1908.*

XVI A. Inquiry having been made as to whether a clerk of the War Department who was treasurer of a society incorporated under the laws of the District of Columbia and having for its purpose the making of personal loans to employees in the Government service at 2 per cent per month came within the provision of the Executive order of April 13, 1911, which prohibits the loaning of money at usurious rates of interest by clerks or other civilian employees in or under the War Department or the military establishment either as principal or agent, directly or indirectly, to others in the Government service, *held,* that while the duties which devolved on the clerk as treasurer of the society are not indicated there can be no doubt that he falls within the language "principal or agent" engaged "directly or indirectly" in making the loans. That the loans negotiated by the society are usurious in character and the relation to them of the clerk in question, as treasurer of the society, brings him within the prohibition of the Executive order. *C. 28023, May 11, 1911.*

XVI B. *Held,* that under the exception from the requirements of the civil service rules regarding examination of "one driver of carriage" for the "head of any executive department" followed by the words "and such other drivers of carriages as may from time to time

[1] See sec. 412 Digest Second Comp. Treas., vol. 2, 1869–1884.

be authorized by competent authority" permits of the appointment, without examination, of a second driver for the Secretary of War. *C. 13238, Mar. 1, 1911.*

XVI C. The act of March 9, 1906 (34 Stat. 56) provided an appropriation for marking the graves of the soldiers and sailors of the Confederate Army and Navy who died in northern prisons, etc., and placed the appropriation under control of the Secretary of War. A commissioner appointed under the act to carry on the work died while in office, leaving uncertified vouchers for salary due the clerk of the commissioner. *Held*, that under section 173 R. S., the chief clerk of the War Department should certify the vouchers. *C. 19834, Jan. 2, 1908.*

CROSS REFERENCE.

Batson's Squadron of Philippine Cavalry..See INSIGNIA OF MERIT III B 3.
Contract dental surgeon.....See ARMY I G 3 d (4) (*d*).
Contract surgeon.....See ARMY I G 3 d (4) (*c*).
Debts of.....See PRIVATE DEBTS X.
Deserter at large.....See DESERTION II A.
Forfeiture of pay.....See CONTRACTS XXXIII.
Forfeiture of pay by sentence of military court.....See APPROPRIATIONS LXVI.
Hot Springs Hospital.....See ARMY I G 3 d (7) (*a*) [1].
Insane, disposition of.....See INSANITY I C
Medical care of.....See LAWS I B 9; APPROPRIATIONS XLV.
Military hospital, patient in.....See LAWS II A 1 e (1).
Pensionable status of Macabebe Scouts.....See PENSIONS I A 1.
Prisoner of war.....See WAR I C 11 c (1).
Quartermaster's volunteers, 1864.....See VOLUNTEER ARMY II F 1 b (3).
Retainers to the camp.....See ARTICLES OF WAR LXIII A.
Retired soldier as.....See RETIREMENT II E 1.
Retirement.....See III to IV.
Road tax or work.....See TERRITORIES III G 1.
Service as, under act of April 23, 1904 (33 Stat., 264).....See RETIREMENT I C 1 c.
Service in militia.....See MILITIA XVI E.
Soldier cooks for.....See ARTICLES OF WAR XXI B 2.
Supplies purchased from.....See CONTRACTS XV A 3.
Taxation of.....See TAX II.
Telegraph lines, work on.....See APPROPRIATIONS LVI.

CIVIL OFFICE.

Holding of, by Army officer.....See OFFICE IV A to B.
Holding of, by Volunteer officer.....See OFFICE V A 7 d to e.
Holding of, by enlisted man.....See ARMY I E 3 a (1); b; b (1).
Holding of, by civilian employee.....See CIVILIAN EMPLOYEES VI to VII.
In Philippine Constabulary.....See COMMAND I C.
Positions which are not.....See OFFICE IV A 2 e to f; B to C.
Superintendent of national cemetery.....See CIVILIAN EMPLOYEES V B.

CIVIL SERVICE.

Enforcement of discipline in.....See ARTICLES OF WAR LXIII C.

CLAIMS.[1]

I. HEAD OF DEPARTMENT HAS NO AUTHORITY TO REOPEN A CLAIM ONCE SETTLED..... *Page 238*
II. EXECUTIVE AND ACCOUNTING OFFICERS HAVE NO AUTHORITY TO CONSIDER, FOR UNLIQUIDATED DAMAGES..... *Page 240*

[1] Prepared by Maj. H. M. Morrow, judge advocate, assistant to Judge Advocate General.

III. CLAIMS AGAINST U. S. DO NOT BEAR INTEREST..... *Page 242*
IV. UNITED STATES NOT LIABLE FOR TORTS OF ITS OFFICERS, SOLDIERS, OR OTHER AGENTS.
V. UNITED STATES NOT LIABLE FOR ACT OF AN AGENT WHICH IS NEITHER UNLAWFUL NOR NEGLIGENT..... *Page 246*
VI. SALVAGE AND CLAIMS FOR GENERAL AVERAGE CONTRIBUTION.
A. MILITARY SALVAGE..... *Page 247*
B. PUBLIC PROPERTY SUBJECT TO CLAIM FOR SALVAGE AND GENERAL AVERAGE.
C. WHERE PRIVATE PROPERTY OF OFFICER SHIPPED AT GOVERNMENT EXPENSE BECOMES SUBJECT TO GENERAL AVERAGE CONTRIBUTION, SUCH CONTRIBUTION SHOULD BE PAID BY THE OFFICER, NOT BY THE GOVERNMENT..... *Page 248*
D. IF ACTING BEYOND REQUIREMENTS OF OFFICIAL DUTY, SOLDIERS MAY BECOME ENTITLED TO SALVAGE..... *Page 249*
E. PROPERTY CAST ON SHORE OF MILITARY RESERVATION BECOMES PROPERTY OF UNITED STATES AND NO ONE IS ENTITLED TO SALVAGE.
F. VESSEL BEING CONSTRUCTED UNDER CONTRACT PROVISION THAT IT BECOMES PROPERTY OF UNITED STATES AS RAPIDLY AS PARTIAL PAYMENTS ARE MADE CAN NOT BE SUBJECT OF ADMIRALTY LIEN.
VII. WAR CLAIMS.
A. WHAT CONSTITUTED LOYALTY OF NATIVES DURING PHILIPPINE INSURRECTION.
B. MILITARY NECESSITY.
1. Where Government offers to compensate owner for private property seized as military necessity will pay value only without profit to owner..... *Page 250*
2. Rule of nonliability of Government for torts of its officers is not affected by the fact that person against whom tort was committed was American sympathizer.
3. Construction paragraphs 15 and 38, G. O. 100, 1863, relating to seizure and destruction of property on account of military necessity.
4. Government not liable for damage accidentally resulting from destruction of property as military necessity..... *Page 251*
5. Instructions of President directing that private property taken for Army be paid for, and forbidding retention of private property under certain circumstances, do not supersede the laws of war authorizing the seizure of private property.
6. Where forces of several nations operating jointly against common enemy and one furnishes transportation to the other reimbursement should be made..... *Page 252*
C. OCCUPATION OF PROPERTY BY TROOPS.
1. No obligation to pay rent for occupation of public property.
2. No compensation due for occupation of property in the actual train of war.
3. Obligation to pay rent for use of private property occupied dependent on loyalty of owner.
4. Government not liable to reimburse owner of private property occupied by United States troops because premises destroyed by reason of the owners being American sympathizers..... *Page 253*
D. UNITED STATES NOT LIABLE FOR PRIVATE PROPERTY DESTROYED AS AN INCIDENT TO MILITARY OPERATIONS.
E. UNITED STATES NOT LIABLE FOR VALUE OF MATERIAL IN BUILDINGS TORN DOWN TO MAKE PUBLIC IMPROVEMENTS WHILE COUNTRY UNDER MILITARY OCCUPATION.

VII. WAR CLAIMS—Continued.

F. Steam Launch Captured by the Army in Enemy Territory During Philippine Insurrection Not a Maritime Capture and Complete Ownership Passes to United States..... *Page 254*

G. Claims for Property Taken from Loyal Citizens During Civil War Barred by Statute of Limitations.

VIII. CLAIMS BASED ON MEDICAL SERVICE RENDERED OFFICER OR SOLDIER.

IX. CLAIMS OF SOLDIERS FOR PROPERTY TAKEN FROM THEIR POSSESSION BY MILITARY PERSONS WHILE SICK IN HOSPITAL, CONFINED IN GUARDHOUSE, ETC..... *Page 255*

X. SECTION 5498, R. S., AS TO OFFICER ACTING AS ATTORNEY IN PROSECUTION OF CLAIM AGAINST UNITED STATES..... *Page 256*

XI. PARAGRAPH 838, A. R. 1910, AS TO PERSON IN MILITARY SERVICE PROVIDING INFORMATION WHICH CAN BE MADE BASIS OF CLAIM AGAINST GOVERNMENT.

XII. MISCELLANEOUS.

A. Claims Growing Out of Civil War..... *Page 257*

B. United States Not Liable for Use of Vessel During San Francisco Earthquake by Army Officers While Acting in Capacity of Relief Agents.

C. United States Not Liable for Services of Counsel for Defendant Before a Court-Martial.

D. United States Not Liable for Time, Cost, and Expenses of Civilian Witness Before Court-Martial in Collecting His Fee.

E. United States Not Liable to Civilian Who Was Arrested as a Deserter, But Was Subsequently Found to be Innocent.

F. No Law Authorizing Payment of Damages on Account of Injuries Received in Construction of Public Buildings or River and Harbor Improvements..... *Page 258*

G. Section 1304, R. S., as to Deduction from Pay of Army Officers on Account of Deficiency.

H. United States Not Liable to a Person Cashing a Final Statement of a Soldier Which Has Been Given Him Erroneously.

I. United States Not Liable for Private Property of a Contract Nurse Because of Sinking of a United States Hospital Ship.

J. United States Not Liable to an Officer Whose Allowance of Personal Baggage Was Being Transported at Government Expense, the Baggage Being Broken Into and Part of the Contents Stolen.

K. United States Not Liable for Registered Mail Package Lost on Army Transport.

L. Extent of Liability of United States Where Land Leased for Maneuver Purposes.

M. Section 1876, R. S., Prohibiting Employment of Attorney at Expense of United States.

N. United States Not Liable for Attorney Fees for Services Rendered Soldier in Habeas Corpus Proceedings..... *Page 259*

O. United States Not Liable for Fees and Expenses of Coroner in Holding Inquest over Deceased Soldier.

P. Even a Just Claim Can Not be Satisfied by Secretary of War Without Authority of Congress.

Q. Method of Procedure Where Disbursing Officer Has Lost Funds and Desires to Apply To Court of Claims for Relief.

XII. MISCELLANOUS—Continued.

R. UNITED STATES NOT LIABLE TO OFFICERS OR SOLDIERS FOR PRIVATE PROPERTY LOST OR DESTROYED WHILE STORED IN A GOVERNMENT STOREHOUSE.

S. UNITED STATES NOT ENTITLED TO A HORSE PURCHASED FROM PERSON WHO HAD NO TITLE..... *Page 260*

T. UNITED STATES NOT LIABLE TO MEMBER OF COURT-MARTIAL FOR COMPENSATION FOR ACTING AS CLERK OF COURT.

I. Under the law and practice governing the executive departments a head of a department is held in general not to be empowered, without specific statutory authority for the purpose, to reopen a claim or other controversy once duly settled by his predecessor. So *held*, that the Secretary of War would not be empowered to reopen and reconsider a claim for the repayment of a certain sum (paid as commutation money by a party who claimed to have been illegally drafted), the question of the allowance of which had been duly considered by a former Secretary (under a statute authorizing him to repay the same if deemed to be justly due), and had been unfavorably determined 10 years before. And this though the correctness of such determination was considered to be doubtful; the proper recourse of the claimant in such case being to Congress. *R. 42, 357, July 11, 1879; P. 42, 413, Aug. 27, 1890; C. 687, Dec. 10, 1894; 1408, June 15, 1895.* So, where the Secretary of War[1] refused to consider a claim on the ground that there was no evidence upon which action could be taken, the vouchers having been lost, *held*, that a succeeding Secretary was with-

[1] The reason of the restricted authority (illustrated under this title) of the executive department in the allowance of claims may be found in the principle of public law, as expressed by Miller, J., in the case of The Floyd Acceptances, 7 Wall., 666, 676—that "in our structure of government all power is delegated and defined by law: * * * We have no officers, from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority." U. S. *v.* Bk. of Metropolis, 15 Peters, 377; Rollins and Presbrey *v.* U. S., 23 Ct. Cls., 106, and cases cited; Waddell's Case, 25 id., 323; 9 Op. Atty. Gen., 32; 12 id., 355; 14 id., 275; 15 id., 192; 16 id., 452; 1 Comp. Dec. 193; 2 id., 264, 401; 4 id., 303; 6 id., 236, 245. In Rollins and Presbrey, *v.* U. S., *supra*, it was held, quoting from syllabus, that "any public officer in an executive department may correct his own errors and open, reconsider, or reverse any case decided by himself." In delivering the opinion of the court, Chief Justice Richardson said: "It has long been held in the executive departments that when a claim or controversy between the United States and individuals therein pending has once been fully considered, and final action and determination had thereon by any executive officer having jurisdiction of the same, it can not be reopened, set aside, and a different result ordered by any successor of such officer, except for fraud, manifest error on the face of the proceedings, such as a mathematical miscalculation or newly discovered evidence, presented within a reasonable time and under such circumstances as would be sufficient cause for granting a new trial in a court of law. This ruling and practice of the departments has been approved elsewhere and has been sustained by the courts. (9 Op. Atty. Gen., 34; 12 id., 172, 358; 14 id., 275, 387, 456; 15 Pet., 401; *Lavalette's Case*, 1 Ct. Cls., 147; *Jackson's Case*, 19 id., 504; *State of Illinois Case*, 20 id., 342; *McKee's Case*, 12 id., 560; *Day's Case*, 21 id., 264, and the opinion of the Judiciary Committee of the Senate, reported by Senator and Judge David Davis, quoted in Jackson's Case above referred to.) But it has never been doubted that any public officer in the departments may correct his own errors, and open, reconsider, and reverse in whole or in part any case decided by himself." The principles above stated apply fully to accounting officers in reference to the acts of their predecessors. Heads of departments may properly reverse constructions placed on acts of Congress by their predecessors, except in so far as vested rights may be affected thereby. Haughton *v.* Payne, 194, U. S., 99.

See Cir. 22, W. D., Apr. 18, 1910, directions regarding the method to be followed in filing and investigating claims.

out authority to consider the claim, there still being no vouchers or other evidence. *P. 42, 444, Sept. 2, 1890.* So *held*, also, where the Secretary of War had made a decision as to whether a certain person was entitled to a medal of honor, and it was proposed that a succeeding Secretary, under the act of April 23, 1904 (33 Stat., 274), should reconsider his predecessor's decision. *C. 16913, Sept. 20, 1904.* So, also, where an enlisted man was retired as a private and it was proposed that a succeeding Secretary of War should reopen the case and retire the soldier as a noncommissioned officer. *C. 20446, Sept. 27, 1906.* So where the proceedings of a court of inquiry had been fully acted on by the President, *held* that the above well-established executive procedure, as well as the rule that the power to review such proceedings is one that can be exercised but once and then is completely exhausted, makes the proceedings of the court of inquiry immune from further revision. *C. 13244, Sept. 2, 1902.* It is only for fraud, lack of jurisdiction, manifest error on the face of the proceedings (an erroneous calculation, for example), or newly discovered evidence presented within a reasonable time and sufficient to warrant a new trial at law, that a claim or controversy finally passed upon by a head of a department may, in the absence of specific authority from Congress, be reopened by a successor. *P. 34, 225, 357, Aug. 1 and 13, 1889: 39, 23, Feb. 20, 1890; 47, 223, May 16, 1891: 53, 443, May 20, 1892; 54, 462, Aug. 3, 1892; 58, 109, Feb. 18, 1893.* But any public officer may correct his own errors and reopen his own decisions. *P. 34, 225, Aug. 1, 1889.*

Where a claim has once been settled by a preceding Secretary under the provisions of a statute imposing such duty upon him, and subsequently a resolution is adopted by one house of Congress, or a committee thereof makes a report, adverse to the decision of the Secretary, such resolution or report may properly serve as a ground for reopening and again examining and settling the case; and while the views of the committee, or those indicated in the resolution, as to the meaning of the statute are entitled to respectful examination and consideration by the Secretary, they are not binding upon him in the reexamination and settlement of the claim. He must look solely to the statute which gave him jurisdiction and act according to his own best judgment of its meaning.[1] *P. 56, 6, Oct. 2, 1892.*

A final settlement of a claim under special statutory authority, followed by receipt and acceptance by the claimant of the amount awarded, estops the claimant from questioning that such allowance and payment constituted a full and final satisfaction of his entire claim.[2] So where the Secretary of War, pursuant to act of Congress, had settled the claim of a railroad company for military transportation by the allowance of a sum which was paid and accepted as a final award, *held* that without new authority from Congress he could not reopen the case for the purpose of allowing further credits, except to correct errors in calculation. *R. 42, 332, June 17, 1879.*

---

[1] 19 Op. Atty. Gen., 388.

[2] 5 Op. Atty. Gen., 122; 10 id., 259; 12 id., 386; 4 Comp. Dec., 328; 6 id., 858. "Where a claimant has heretofore presented and has been allowed a claim for a part of an entire demand arising out of the same service and in the same right, such partial allowance is a settlement of the whole demand and a subsequent application for the remainder will be disallowed." 4 Comp. Dec., 328.

II. As a general rule, neither the Secretary of War nor any executive officer nor the accounting officers, in the absence of authority from Congress, is empowered to entertain, allow, settle, or pay a claim for unliquidated damages[1] against the Government, the term "damages" being here used in its legal sense. Therefore *held*, where a citizen, who had been permitted to make certain improvements upon public land, asked to be indemnified on account of alleged injury to his property and business caused by the extending of the limits of a military reservation over the land occupied by him. *R. 42, 592, Apr. 13, 1880.* So, *held*, that the Secretary of War was not empowered to allow a claim for indemnity for his alleged wrongful arrest and imprisonment as a deserter, made by a party who claimed to have been arrested by mistake for the real offender (*R. 42, 122, Dec. 23, 1865; 26, 597, June 17, 1868*); or a claim for his arrest and detention as a deserter made by a party claiming to have been illegally drafted (*R. 14, 405, Apr. 20, 1865*); or a claim for an alleged wrongful arrest and confinement made by a prisoner of state, or suspected person in time of war (*R. 19, 166, Nov. 1, 1865; 36, 522, June 10, 1875*); or a claim for reimbursement by a military employee

[1] Dennis *v.* U. S., 20 Ct. Cls., 119; Brannen *v.* U. S., id., 219; Pitman *v.* U. S., id., 253, I Comp., 261, 283; II id., 174, 488; IV id., 446, 560; V id., 693, 770; VI id., 707; XVII id., 806, 810.

But the rule against paying unliquidated damages does not prohibit payments made for work or materials actually *furnished and received* under a contract, express or implied, though the price is not fixed by such contract. McClure *v.* U. S., 19 Ct. Cls., 179; Dennis *v.* U. S., 20 id., 119; Pitman *v.* U. S., 648, id., 253; Brannen *v.* U. S., id., 223; I Comp., 283; II id., 365; III id., 365, 565; VI id., 953; VII id., 517. The rule controlling the payment of unliquidated damages is stated in Dennis *v.* U. S., cited above, as follows:

"Technically, all claims for money due on contracts, where the exact amount payable is not thereby fixed, as in the case of goods purchased or work done without an agreed price, are claims for unliquidated damages. But they arise necessarily and of course from otherwise fulfilled and executed agreements, and their settlement rarely requires anything more than the ordinary processes of accounting, the prices being readily determined by the vouchers and reports of the public officers incurring the expenses, or by other means within reach of the accounting officers, who very properly take jurisdiction and pass upon such claims. (McClure's case, 19 Ct. Cls. R., 179.)

"When serious controversies arise in such cases they may be transmitted to this court for adjudication, under either the Revised Statutes, section 1063, or the Bowman Act. (Mar. 3, 1883, ch. 116, 22 Stat., 485.)

"But claims for unliquidated damages founded on neglect or breach of obligations contrary to the terms of a contract, and not necessarily arising therefrom are of quite a different class. They must be sustained by extraneous proof, often involving a broad field of investigation and requiring the application of judgment and discretion upon the measure of damages and the weight of conflicting evidence. As was said in Power's case (18 Ct. Cls. R., 275), 'the results to be reached in such cases can in no sense be called an account, and are not committed by law to the control and decision of Treasury accounting officers.' (See Brannen's case, post 219, where the authorities are more fully cited.)"

Also, notwithstanding the rule against the payment of unliquidated damages, where it is not against the interest of the United States, the Secretary of War may enter into a supplemental contract with a contractor discontinuing or modifying an existing contract and settling all claims between the contractor and the Government arising thereunder. U. S. *v.* Corliss Engine Co., 91 U. S., 321; Satterlee *v.* U. S., 30 Ct. Cls., 31; 21 Op. Atty. Gen., 78, 207; 22 id., 437; III Comp. Dec., 54; VI id., 953; VIII id., 549; IX id., 43; XV id., 439.

No executive or accounting officer, however, has authority to settle by a supplemental contract such unliquidated claims as may arise from a *breach of the contract;* but resort must be had to the courts for their liquidation. Cramp & Sons *v.* U. S., 216, U. S., 503; XVII Comp. Dec., 806, 810.

for loss of wages during a period of an arrest and trial by court-martial, the conviction in his case having been held to be invalidated by reason of a defect in the proceedings (*R. 14, 225, Feb. 27, 1865*); or a claim for the value of personal property illegally appropriated by a soldier (*R. 42, 295, May 20, 1879*). And, similarly, *held* where the claims were for corn taken from a field and damage done to fences by United States soldiers encamped in the vicinity (*C. 668, Nov. 22, 1894*); for damages to a crop by cavalry horses breaking into the field (*C. 1553, July 17, 1895*); for damage to a phaeton and harness caused by the runaway of a horse resulting from a stampede of United States cavalry horses (*C. 2611, Sept. 17, 1898*); for damages done by United States troops to crops and fences in field maneuvers and to lands used for drilling purposes, if there was no contract express or implied by which the Government agreed to pay for the damages [1] (*C. 4315, June 17, 1898; 4658, July 27, 1898; 4686, July 28, 1898; 5029, Oct. 3, 1898*); for damages on account of an alleged infringement by the United States of a patent (*C. 595, Nov. 6, 1894, and Jan. 20, 1898*); for the value of a vessel wrecked on the beach of a military reservation, the vessel after several years on the beach having been removed in obedience to general instructions to clear up the reservation (*C. 3627, Nov. 10, 1897*). So, *held*, also, where a contractor had undertaken to commence the erection of certain buildings by March 30, 1898, but owing to the Spanish War was not permitted by the Government to begin the buildings until June 29, 1898, the contractor claiming $758 as an extra expense due to the increase in cost of lumber and the hire of workmen after war with Spain was declared. *C. 5901, Mar. 4, 1899.* So, *held*, where damages were claimed for a breach of contract for transportation of freight to Alaska. *C. 3969, Sept. 10, 1898.* So, *held*, also, where damages were caused to a tug by its fouling the buoy lines of certain mines lawfully planted by the military authorities. *C. 18526, Sept. 12, 1905.* So, *held*, also, where a battery of light artillery lawfully engaged in target practice fired certain shells which missed the target and, not exploding when they came to rest, were lost and a year afterwards were found by some children, who caused them to explode, thereby causing severe injuries to the children. *C. 19319, Mar. 10, 1906.* So, *held*, where a claim was for damages to property resulting from the firing by coast artillery batteries. *C. 9818, Feb. 12, 1901; 15872, Feb. 9, 1904; 19812, May 29, 1906.* So, *held*, where the claim was for damages to a sawmill resulting from light artillery target practice. *C. 17495, Feb. 4, 1905.* So, *held*, where the claim was for damages resulting from the diversion of a water course so as to cut a channel through the property of the claimant. *C. 11634, Nov. 26, 1901.* So, *held*, where the claim was for damages to a private vessel resulting from its collision with an army trans-

[1] But the rule would be otherwise where the premises were occupied under such circumstances that the law would imply a contract to pay rent to those owning the premises occupied and to pay damages to those owning the premises or other property so damaged, and in such case an appropriation for paying the "expenses" of the Organized Militia to participate in joint encampment with the Regular Army would cover an expenditure for such a purpose. XVI Comp. 589. So also where an act of Congress appropriated money for "leases of land and damages of property," it would include unliquidated damages. *C. 16525, May 19, 1904.*

port.[1] *C. 14628, May 9, 1903.* So, *held*, also, where the claim was for damages to a launch of the Philippine Government resulting from its collision with an army launch. *C. 22946, Mar. 21, 1908.*

Notwithstanding the rule against the payment of unliquidated damages, it would be proper to provide in a lease of land for maneuver purposes for the consideration by a board of the damage done to fences, crops, and the like by troops in the execution of military maneuvers, notwithstanding that such claims are unliquidated claims and for the payment of such damages as might be awarded by the board.[2] *C. 16525, May 19, 1904.*

III. Notwithstanding the equitable principle that interest is an incident of a debt, the rule is well settled that, except where its payment is expressly stipulated for by contract, or specifically authorized by act of Congress, the United States is not bound, nor is any executive official empowered, to pay interest on claims, whether arising out of contract or otherwise.[3] *R. 21, 564, July 31, 1866; 32, 606, May 20, 1872; P. 52, 448, Mar. 22, 1892; 54, 464, Aug. 3, 1892.*

IV. It is well settled that the United States is not legally responsible for the torts or criminal acts of its officers or agents, whether of commission or omission,[4] and as the Government can act only through its officers or agents, no wrong resulting from a tortious or criminal act would be the wrong of the Government, but would be the wrong of only the person commiting it. So *held*, where claims were for personal injuries inflicted upon citizens by United States soldiers. (*C. 5108, Oct. 4, 1898; 6100, Mar. 20, 1899; 6586, June 17, 1899*); for the support of the wife and children of a citizen killed by a soldier (*C. 5261, Nov. 5, 1898; 16825, Sept. 3, 1904*); for damages on account of injuries resulting from accidental or negligent shooting of a citizen

---

[1] In XIII Comp. Dec., 349, it is said, "Moreover, it is doubtful if the head of a department is authorized to liquidate a claim for a marine tort committed by a vessel of the United States. It is well established that in ordinary cases the United States is not liable for damages resulting from the negligence or tortious acts of its officers or agents. (VI Comp. Dec., 751; XI id., 767; XII id., 580, 825.) But an exception to this rule appears to be recognized in the case of marine torts. But even in such cases claims for damages are not enforceable against the United States," citing the *Siren*, 7 Wall., 155. The Comptroller further remarked in the same opinion, "It has been the practice to refer such claims to Congress for appropriation."

[2] Such a provision is now incorporated in all leases of land for maneuver purposes and for the use by the Organized Militia as target ranges.

[3] Angerica *v.* Bayard, 127 U. S., 260; U. S. *v.* McKee, 91 id., 450; Tilson *v.* U. S., 100 id., 43; Harvey *v.* U. S., 113 id., 243; Todd *v.* U. S., Devereaux (Ct. Cls.), 95; Wightman *v.* U. S., 23 Ct. Cls., 144; 1 Op. Atty. Gen., 550, 554; 2 id., 463; 3 id., 635; 4 id., 14, 136, 286; 5 id., 72, 105, 138, 334, 356; 6 id., 533; 7 id., 523; 9 id., 57, 449; 14 id., 30; 17 id., 351. But where a sum of money was paid by a State for interest upon its bonds issued in 1861 to defray expenses to be incurred in raising troops for the national defense, that sum is regarded as a principal sum which the United States agreed to pay, and not interest within the meaning of the rule prohibiting the allowance of interest accruing upon claims against the United States prior to the rendition of judgment. U. S. *v.* New York, 160 U. S., 598; Pennsylvania *v.* U. S., 36 Ct. Cls., 507. The act of Mar. 3, 1911 (36 Stat., 1141), relating to the Court of Claims, reenacts the following provision: "No interest shall be allowed on any claim up to the time of rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest."

In the absence of statutory authority, a military officer, in entering into a contract as the representative of the United States, should not stipulate with the contractor that, in case payments due him under the contract are delayed beyond a certain time, he will be entitled to claim interest thereon.

[4] Pitman *v.* U. S., 20 Ct. Cls., 255; Gibbons *v.* U. S., 8 Wall., 269; id. 7 Ct. Cls., 105; Langford *v.* U. S., 101 U. S., 341; German Bank *v.* U. S., 148 U. S., 580; Hill *v.*

by a soldier (*C. 5260, Nov. 5, 1898*); for damages to railroad train equipment by soldiers traveling thereon (*C. 5433, Dec. 10, 1898*); for damages on account of injury received while a contract nurse on a United States transport and due to alleged negligence of officials of the Government (*C. 6641, June 28, 1899*); for damages on account of injuries inflicted by a soldier upon a Cuban policeman while the latter was attempting to arrest the soldier (*C. 17758, Mar. 25, 1905*); for damages to a private vehicle resulting from its collision with a battery caisson (*C. 25035, May 27, 1909*) or other Government vehicle (*C. 29294, Jan. 15, 1912*); for damages from personal injuries caused by a visitor to a national cemetery stepping into a drop pipe, which it was claimed was not kept in a condition of reasonable safety (*C. 15861, Feb. 6, 1904*); for damages to a thrashing machine caused by the collapse of a bridge in a national cemetery, due to the alleged weakened condition of the bridge arising through governmental negligence (*C. 15861, Dec. 10, 1905*); for damages for the killing of an American soldier by a Cuban policeman during the time Cuba was under military government, it appearing that the killing was not justified, and the policeman being considered as an agent of the United States in carrying on the military government in Cuba (*C. 11027, Aug. 22, 1901*); for damages for the negligent injury to property or wounding or killing of a human being or private animal by a bullet fired by troops while engaged in target practice (*C. 13584, Nov. 5, 1902; 16675, Aug. 4, 1904; 21939, Aug. 16, 1907*); for damages caused by a member of a recruiting party leaving the water running in a bathtub at the recruiting office, so that the water ran over and damaged goods on a lower floor (*C. 22049, Sept. 10, 1907*); for the value of a private launch that soldiers while in swimming

---

U. S., 149 U. S., 593; Schillinger *v.* U. S., 155 U. S., 163; Belknap *v.* Schild, 161 U. S., 10; Morgan *v.* U. S., 14 Wall., 531; XII Comp. Dec., 580.

Judge Story in his work on agency, sec. 319, says: "It is plain that the Government itself is not responsible for the misfeasances or wrongs or negligences or omissions of duty of the subordinate officers or agents employed in the public service; for it does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs since that would involve it, in all its operations, in endless embarrassments and difficulties and losses, which would be subversive of the public interests." In Shields *v.* Ohio, 95 U. S., 319, it was said "A Government may be a loser by the negligence of its officers, but it never becomes bound to others for the consequences of such neglect, unless it be by express agreement to that effect."

While the Government is not pecuniarily responsible for torts committed by officers and enlisted men, the latter are so responsible, and aside from their liability to civil suit may and should in cases covered by the fifty-fourth article of war be proceeded against as required by that article. See the following cases to the effect that a Government agent committing a tort is personally responsible: Little *v.* Barreme, 2 Cranch, 170; Cammeyer *v.* Newton, 94 U. S., 234; Osborn *v.* U. S., 9 Wheat., 871; Board of Liquidation *v.* McComb, 92 U. S., 541; Allen *v.* Baltimore, etc., R. Co., 114 U. S., 311; Pennoyer *v.* McConnaughy, 140 U. S., 1; Belknap *v.* Schild, 161 U. S., 18. Claims against the United States for damages arising from the torts of Government agents have repeatedly been presented to Congress, but that body has refused to appropriate for them except in a few unusual cases. An appropriation was made in the following instances among others: In connection with an explosion in the Washington Arsenal, June 17, 1864 (13 Stat., 416–417); in connection with an explosion in the Washington Arsenal in March, 1866 (14 Stat., 351); in connection with the death and injury of a number of clerks at Ford's Theater in Washington, June 9, 1893 (28 Stat., 392; 29 Stat., 273; 30 Stat., 109; 31 Stat., 1612); in connection with the explosion of an ammunition chest in the city of Chicago, July 16, 1894 (32 Stat., 1452); in connection with an injury to a German subject injured by a bullet fired by troops while at target practice in 1892 (30 Stat., 106).

used without authority to dive from, the launch being accidentally sunk from overcrowding (*C. 29108, Oct. 10, 1911*); for damages to a private vessel from a collision with a Government vessel (*C. 20194, Aug. 10, 1906*); for the value of property stolen or illegally appropriated by a soldier (*R. 53, 279, Apr. 7, 1887; P. 33, 165, June 21, 1889*); for the value of certain ships' supplies stolen by military prisoners on board a chartered transport (*C. 11974, Jan. 27, 1902*); for the value of jewelry stolen from natives by soldiers during active military operations in the Philippine Islands (*C. 16527, Nov. 12, 1904*); for the value of timber cut on private land by soldiers wrongfully and in ignorance that the land was private property, even though such soldiers were at the time engaged in the discharge of official duties (*P. 38, 319, Feb. 8, 1890*); for injuries to fences and crops resulting from the unauthorized maneuvering of troops over private lands near a military post (*C. 12972, July 23, 1902*); for the value of intoxicating liquors destroyed by troops while on duty in the city of San Francisco in the prosecution of relief work after the earthquake in 1906, it appearing that Congress had not assumed responsibility for such acts and had made no appropriation for the payment of such damages. The liquor referred to above was destroyed by the troops as a matter of necessary police precaution in order to minimize the danger from fire and to prevent possible mob violence (*C. 20212, Dec. 19, 1906*); for the value of cigars, clothing, and other property (not consisting of intoxicating liquors) claimed to have been looted by troops during the San Francisco earthquake (*C. 20212, Mar. 27, 1907*); for reimbursing enlisted men for sums of money deposited by them with their company commander and embezzled by him (*C. 17191, Nov. 23, 1904*).

Where certain trees on private land were cut down for use in the construction of a pontoon bridge in the course of tactical instruction under direction of the authorities of a service school, *held* that while the owner of the trees might lawfully be paid for the timber out of the funds set aside for the use of the service school in connection with which the pontoon instruction was being carried on, he could not be allowed anything in the nature of damages for the tortious act of the troops in cutting the timber. *C. 24968, May 17, 1909.*

A reward having been offered by the military authorities for three Government mules that had been stolen, a sheriff seized three mules which he had good reason to believe were the stolen animals. The person from whose possession the sheriff had taken the mules sued the sheriff for the value of the mules and obtained judgment against him. The sheriff made claim against the Government to be reimbursed for the amount of the judgment and his expenses. *Held*, that the Government was not legally responsible for such items and that if the sheriff had been misled by an officer or agent of the Government as to the identity of the three mules seized the Government would not be liable, as it would not be responsible for the torts of its officers or agents. *C. 17526, Feb. 11, 1905.* So, *held*, also, where a city marshal arrested as a deserter a private citizen who was not in fact a deserter from the Army, and the person arrested sued the marshal and recovered judgment against him. *C. 19263, Feb. 28, 1906.*

A provision in a lease of land for maneuver purposes for the consideration by a board of the damage done to fences, crops, and the

like by troops would not include losses resulting from thefts, larcenies, and other predatory acts committed by the troops which took part in the maneuvers, as the United States, in the absence of authority of Congress, would not be responsible for the torts or criminal acts of its agents.[1] *C. 16525, May 19, 1904; 17585, Feb. 27, 1905.* Nor would any executive officer of the Government be authorized, in the absence of Congressional legislation, to enter into a contract to make the United States responsible for tortious or criminal acts of its agents. *C. 14971, Jan. 29, 1904; 17585, Feb. 27, 1905.*

During the Philippine insurrection United States troops occupied private property under an implied lease, and the premises were burned while in their possession. *Held,* that if burned through the carelessness of the troops the Government would not be liable as it is not liable for the torts of its agents and, *held,* further, that the occupation of the premises did not give rise to an implied obligation to reimburse the owner for the destruction of the premises.[2] *C. 15541, Dec. 2, 1903; 25460, Aug. 24, 1909.*

As the United States is not legally responsible for the torts of its officers or agents, the Secretary of War could not authorize from the appropriation for "all contingent expenses of the Army not otherwise provided for," the payment of damages as compensation for personal injury to a native Filipino accidentally shot on a rifle range. *C. 27214, Aug. 27, 1910.*

Where damages were claimed by the owners of a private tug, due to the tug fouling the buoy lines of certain mines planted by the military authorities (*C. 18526, Sept. 12, 1905*); and where a battery of light Artillery while engaged in target practice, fired certain shells which missed the target and, not exploding when they came to rest, were lost and, a year afterwards, were found by some children who caused them to explode, thereby seriously injuring the children (*C. 19319, Mar. 10, 1906*); and where a sewer was constructed across private lands over which a right of way had been granted and an injury was done to private property by reason of the construction of the sewer (*C. 19295, Mar. 13, 1906*); where a contractor had a contract to cut hay on a military reservation and deliver the same to the military authorities and certain of this hay in stacks and not yet accepted by the Government caught fire from the burning of fire guards on the reservation (*C. 24842, May 1, 1909*); where a horse was injured by falling into the opening of a coal vault on Government property (*C. 27683, Jan. 12, 1910*); where a bullet fired by troops engaged in target practice wounded a private citizen at a distance from the target range (*C. 15281, Oct. 24, 1903; 15537, Nov. 24, 1903*); where the mules of a siege train ran away and injured private property (*C. 8949, Sept. 17, 1900; 14606, May 1, 1903*); where a private

[1] See XVI Comp. Dec., 589.

[2] See U. S. *v.* Bostwick, 94 U. S., 68, where it is said: "As to the destruction of a part of the buildings by fire, there was, as has been seen, no express agreement to repair in the lease. The implied obligation is not to repair generally, but to so use the property as to make repairs unnecessary as far as possible. It is in effect a covenant against voluntary waste and nothing more. It has never been so construed as to make a tenant answerable for accidental damages, or to bind him to rebuild, if the buildings are burned down or otherwise destroyed by accident. In this case it has not been found, neither is it claimed in the petition, that the premises were burned through the neglect of the United States. No judgment can, therefore, be rendered against the United States on this account."

vessel was damaged by a collision with a Government tug (*C. 19114, Feb. 1, 1906; 19571, Apr. 26, 1906*); where a citizen was shot by a member of the provost guard in attempting to kill a mad dog (*C. 5983, Mar. 9, 1899*); where fishing nets were damaged by the removal of a cable, the nets having been built over the cable after it was laid (*C. 18760, Oct. 24, 1905*); where a bicycle belonging to a clerk of the War Department was injured by a public animal, the bicycle being lawfully in the courtyard of the State, War and Navy Building at Washington (*C. 15324, Oct. 6, 1903*); where a small boat that had come ashore at a military reservation in violation of repeated warnings not to land, was destroyed by the commander of a military patrol in obedience to orders of his commanding officer (*C. 9762, Feb. 4, 1901*), *held*, that if the action of the Government or its agents in the above instances was a perfectly legal one, there being no negligence of any character, the Government would not be responsible in damages;[1] and that, on the other hand, if the injury resulted from an unlawful act or negligence on the part of any agent of the Government, the latter would not be responsible, since it is not liable for the torts of its agents.

V. Where a private landowner claimed that the value of his property had been reduced by the erection of a Coast Artillery battery near his premises, *held* that as Congress, by authorizing the erection of a battery at that place, had, in effect, declared that there was a legal necessity therefor, the battery could not be considered a legal nuisance, and the United States would not be liable for any damages that might result therefrom. *C. 15872, Feb. 9, 1904.* So where the Secretary of War authorized State and county officials to establish, under the supervision of the Marine-Hospital Service, on lands under the control of the War Department a hospital for contagious and infectious diseases, *held* that the establishment of such a hospital would not be a nuisance, but that if it could be considered a nuisance, the nuisance would be one created through the tort of an officer of the United States, and as the United States is not liable for the torts of its officers, it would not be liable to adjoining property owners who claimed to be injured by the establishment of the hospital. *C. 21749, July 6, 1907.*

Two native women of Porto Rico received gunshot wounds, the accidental result of a shot fired by a United States soldier who at the time lawfully fired the same while attempting to arrest another party. They submitted claims for damages. *Held* that the United States was not legally liable therefor whether or not there was negligence on the part of the soldier. But as these claims were of a class for which Congress sometimes makes compensation, and as the military authorities were exercising all the powers of government in the island of Porto Rico, *advised* that compensation for the injuries could legally be made from the revenues of the island. If made, however, in the form of an annuity it would remain operative during the continuance of the military government only. *C. 6642, June 26, 1899.*

Although there is no law of Congress which vests in any officer or department of the Government authority to exercise control over shipping in navigable waters of the United States with a view to

[1] The Nitro-Glycerine case, 15 Wall. 524.

restraining its movement in order to facilitate target practice or minimize danger therefrom, yet as the seacoast defenses are constructed out of funds appropriated by Congress and the guns and ammunition used in target practice are obtained with similar funds, *advised*, that when the guns in any particular work of seacoast defense are used by its garrison for target practice and the firing is being conducted in conformity to regulations prescribed by the Secretary of War, the garrison would be not only engaged in a lawful occupation but would be carrying into effect the will of Congress, and should be considered as engaged in the performance of their public duty and, therefore, if while so engaged and exercising a due degree of care to prevent accidents to passing vessels a vessel is injured, it is doubtful whether a claim for reimbursement could be successfully maintained before Congress. *C. 16665, Aug. 4, 1904.*

VI A. A *loyal* citizen of a State within the theater of the Civil War, in order to prevent the capture by the enemy of a steamer belonging to him, caused it to be run up a small stream and concealed. It was, however, discovered by a partisan Confederate force, by which it was dismantled and partly sunk but not held—the owner continuing to assert through an agent who remained with it, his right of property therein. Subsequently it was taken possession of, raised, refitted and used in the war by the Federal military authorities. Upon an application by the owner at the end of the war for its restoration and compensation for its use, *held*, that not having been in fact taken from the possession of the enemy it was not subject to a claim for military *salvage*, such as that allowed for property recaptured [1] or recovered from pirates;[2] but that the sums expended by the Government in raising and refitting it might properly be offset against the amount claimed for its use. *R. 20, 473 and 485, Mar. 16 and 26, 1866.*

The capture from an *enemy* of *enemy's* property, though by civilians, does not entitle the captors to military salvage. Thus where a steamer belonging to the enemy, and which had been used by them in the prosecution of the war, was removed from New Orleans just before its occupation by the Federal forces and concealed in Bayou Jacques where it was found and taken possession of by a detachment of United States troops and military employees, by whom a claim for military salvage was thereupon interposed, *held*, that such claim was quite without legal sanction, the steamer having become, upon capture, under the provisions of sec. 1 of the act of March 12, 1863 (12 Stat. 820), the property of the United States. *R. 20, 565, Apr. 25, 1866.*

VI B. It is a general principle of law that public property stands on the same footing with private property as regards salvage and general average, and there is a lien against public property for services and general average, except that where property of the United States is in the actual possession of the United States it can not, in the absence of authority from Congress, be the subject of an admiralty lien to enforce such claims for salvage and general average. Therefore where the possession of public property has been turned over to a carrier the property may become subject to such

[1] See the Amelia, 4 Dallas, 34; Bas *v.* Tingy, id. 37; Talbot *v.* Seeman, 1 Cranch, 1; The Adeline, 9 id. 244; Marshall *v.* Delaware Ins. Co. Fed. Cas., 9127.

[2] Davison *v.* Seal-skins, 2 Paine, 324; Lea *v.* The Alexander, id. 466.

a lien, and if the United States again gets possession such possession of the United States will be subject to the lien.[1] *R. 21, 241, Feb. 16, 1886; C. 17725, Mar. 31, 1905; 17851, Apr. 14, 1905, 23938, Jan. 26, 1909; 24565, Mar. 1909;* but to this rule exceptions have been established. It has been held that our national ships of war should not be liable to arrest and detention at the suit of salvers, "on account of the injury and inconvenience which might result to the public interests therefrom." This reasoning would appear to be equally applicable to a case of supplies en route to armies in the field in time of war. So, *held,* where certain subsistence and quartermaster stores, in transit to our armies in the field and needed for their use, were detained by the United States marshal at Cairo, Ill., at the suit of the salvers of a steamer sunk with her cargo (including these supplies) in the Mississippi River. *R. 21, 241, Feb. 16, 1866.*

During the war between Russia and Japan an English merchant ship carrying public property of the United States was stopped by a Russian cruiser in the Red Sea, searched, and held for some time and then released. *Held,* that the United States was subject to a claim for general average for losses sustained by the ship. *C. 19690, May 18, 1906.*

VI C. Where the private property of officers is being transported at Government expense on a private vessel, which was disabled and became subject to a lien for salvage, *held,* that the general average claim against the property of the officers should be paid by the Government in the first instance, and the subject of reimbursement by the officers left to future adjustment between them and the United States. *C. 17725, Mar. 31, 1905.*

On a change of station from New York to Fort Caswell, N. C., an officer's property was shipped by sea, and the ship having stranded a general average contribution was declared on the cargo. The officer objected to paying his share of the contribution and urged that it should be paid by the Government because the military authorities should have shipped his property by rail at carrier's risk instead of by sea. *Held,* that in the absence of an express stipulation to the contrary shipment by sea as well as by rail would be at carrier's risk the Government was not required by law or regulations to ship private property of an officer by rail rather than by sea, but as an expenditure of public funds was involved should ship in the way that would be most economical, time being considered as an element, and that if in case of a shipment by sea the private prop-

[1] U. S. *v.* Wilder, 28 Fed. Cas. No. 16694; The Merrimac, 1 Benedict, 201; Rees *v.* U. S., 134 Fed. Rep. 146; Brown's administrator *v.* U. S. 15 Ct. Cls. 392; 5 Op. Atty. Gen. 757; I Comp. 166; II id. 409; IV id. 567; but see VII Comp. Dec., 365, where services in the nature of towing were rendered and a claim for salvage was denied. In The Davis, 10 Wall. (U. S.) 15, the syllabus is as follows:

"1. Personal property of the United States on board of a vessel, for transportation from one point to another, is liable to a lien for salvage services rendered in saving the property.

"2. Such lien can not be enforced by the courts by a suit against the United States.

"3. Nor by proceeding *in rem* when the possession of the property can only be had by taking it out of the actual possession of the officers or agents of the Government charged therewith.

"4. It may be enforced by a proceeding *in rem* where the process of the court can be enforced without disturbing the possession of the Government, which, being thus compelled to appear in the court to assert its claim, must discharge the lien before the property will be delivered to it." (2 Parsons Maritime Law, 625.)

erty of an officer should become subject to a general average contribution such contribution should be paid by the officer and not by the Government. *C. 20919, Jan. 16, 1907.*

VI D. The troops at a seacoast post exerted themselves, as required by their official duty, to save certain Government property, and, exerting themselves in addition beyond the requirements of their official duty, saved the cargo of a ship in distress near the post. The commanding officer of the post refused to release the cargo until the master of the vessel had paid $160 as salvage. This sum, when paid, was placed in the several company funds. The master of the vessel, after paying the salvage demanded, applied to the War Department to have it refunded. *Held*, that under the circumstances of the case the troops engaged in saving the cargo were entitled to salvage, and that if those engaged in the salvage acquiesced there was no objection to the money being distributed among the several company funds. *C. 12721, June 13, 1902.*

VI E. Certain lumber was cast ashore within the limits of the military reservation of Fort Caswell, N. C. The lumber probably came from vessels lost or damaged off the coast. Exclusive jurisdiction over the reservation had been ceded to the United States, and the Treasury Department had been given a license by the War Department to use a portion of the beach for a life-saving station. A portion of the lumber cast ashore was taken possession of by the keeper and crew of the life-saving station and the remainder by the military authorities. *Held*, that all lumber cast ashore, whether upon that portion of the beach assigned to the life-saving service or upon other portions, became the property of the United States, subject to the claims of any possible owner, and this regardless of whether it should be considered technically as "wreck" or "drift stuff." *Held*, also, that the services rendered by the keeper and crew of the life-saving station and by others were not services entitling them to payment for salvage. *C. 20582, Nov. 5, 1906. Held*, further, that if lumber, logs, and driftwood have come ashore on a military reservation, and thus become the property of the United States, they should be cared for like other Government property, and if considered unsuitable to the service may be disposed of as provided by section 1241, R. S. *C. 20721, Dec. 6, 1906.*

VI F. Where a contract for the construction of two scows provided that "all parts of the scows paid for under the system of partial payments above specified shall become thereby the sole property of the United States, but this provision shall not be interpreted as relieving the contractor from the sole responsibility for the proper care and protection of said parts prior to the delivery of the completed scows to the United States," *held*, a private person could not obtain an admiralty lien on the scows as against the Government. *C. 3946, Nov. 5, 1907.*

VII A. In determining whether during the Philippine insurrection the owner of property was an enemy—that is, was not loyal—consideration should be given to the peculiar circumstances connected with the warfare in the Philippine Islands. In the Philippines when the Spanish War was over the United States ceased to be in enemy territory. An insurrection broke out and a condition of war existed for several years. This war was, however, not in enemy country, and the policy of the United States was to consider all Philippine communities loyal except where resistance was met

or there was direct knowledge of disloyalty. The people at large were not required to take the oath of allegiance. Therefore, all inhabitants of the Philippines, except in certain limited areas where the conduct of the inhabitants led to the conclusion that an entire community was disloyal, should be presumed to be loyal to the *de jure* government unless they were serving in the insurgent ranks or were otherwise known to be in opposition. As the people at large were never required to take an oath of allegiance, the failure to take such an oath should not be considered as conclusive in determining the question of the loyalty of the owner of property taken for military purposes. So, also, the fact that property was found to be abandoned by its owner should not be considered as conclusive that the owner was disloyal, as it is a well-known fact that in many instances there was a wholesale abandonment of towns on the approach of American troops by reason of the wild stories circulated among the natives for political effect, and that within a few days or weeks practically the entire population would return to reoccupy their property. In such cases the act of fleeing from the Americans usually was not an indication of disloyalty to the American Government. Therefore, in the Philippines where property had been taken or occupied by the Government, the burden should be upon the Government to prove the disloyalty of the native and not on the native to prove his loyalty. The state of affairs in the seceding States during the Civil War was not analogous to that in the Philippines. During the Civil War those States which seceded were recognized as enemy country, and their inhabitants were recognized as enemies, and therefore individuals who resided within the limits of the seceding States and yet claimed to be loyal were required to prove their loyalty. *C. 17219, Jan. 13, 1906; 15204, Apr. 19, 1906; 15699, Apr. 28, 1906; 16545, May 1, 1906; 16784, May 2, 1906.*

VII B 1. Where private property is seized in time of war as a military necessity and the Government undertakes to compensate the owner, there will be paid a sum sufficient to cover the value alone without profit to the owner. *C. 15448, Nov. 5, 1903.*

VII B 2. Where certain carabaos were killed during the Philippine insurrection by American troops, *held* that if they were destroyed as a matter of military necessity, as authorized by paragraph 15 of General Orders 100, Adjutant General's Office, 1863, the United States would not be liable to the owners of the animals, nor would the United States be liable if the animals were destroyed without authority by individual soldiers of the United States, as the United States is not liable for the torts of its officers or agents. The foregoing principles would apply whether the owners of the animals were in sympathy with the American cause or not, and also whether or not they had been persecuted because of their American sympathy. *C. 18418, Dec. 22, 1905.*

VII B 3. Where property is destroyed under paragraph 15 of General Orders 100, Adjutant General's Office, 1863, which provides that "Military necessity * * * allows of all destruction of property, * * * of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the Army; it makes no difference where the title to destroyed property lies, whether in a national of the belligerent who destroys,[1] or in the enemy, or in a

[1] See Juragua Iron Co. *v.* U. S., 212 U. S. 297.

neutral (within the zone of operations), and no compensation is due the owner, and any compensation that may be given for such losses is entirely of bounty. But under paragraph 38 of the above order, which provides that "private property, unless forfeited by crimes or by offenses of the owner, can be seized only by way of military necessity for the support or other benefit of the Army or of the United States," and which applies to property taken for the support of the Army, or for the furtherance of its operations, compensation for private property taken is usually paid the owner. Paragraph 38, however, does not apply to cases of looting by soldiers. *C. 16527, Nov. 12, 1904; 16526, Apr. 17, 1906.*

VII B 4. During the Philippine insurrection the public market in a town was burned by order of the commanding officer as a military measure. The fire accidently spread to houses adjoining the market which were not intended to be burned, and they were consumed by the fire. Claims were filed for the value of the property burned in the market, and also for the houses and other property burned outside of the market. *Held* that the United States was not liable for the loss of property in the market, as the burning was done as an act of military necessity as authorized by paragraph 15 of General Orders 100, Adjutant General's Office, 1863; and that as to the property outside of the market the United States would not be liable, as the setting fire to the market place was a lawful act, and the burning of the houses in question was the result of an accidental spreading of the fire without negligence on the part of anyone. *C. 14972, July 22, 1903.*

VII B 5. A Spanish vessel was captured by the Army in 1898 in the harbor of Ponce, Porto Rico, at the time of the landing of the United States troops at that place, and was detained and used by the United States military authorities. The captain of the vessel subsequently made claim for damages on account of such detention and use. *Held*, that the claimant was not legally entitled to compensation for the seizure, use, and detention of, or for damages to, the vessel, as it was private property belonging to the enemy and seized in a hostile country by way of military necessity for the benefit of the Army of the United States.[1] *C. 6046, Mar. 18, 1899; 11143, Oct. 5, 1901. Held* also that the instructions of the President in regard to the method of carrying on the war, directing that receipts be given for private property taken for the use of the Army, that the property be paid for, and that means of transportation, though they may be seized by the military authorities, yet unless destroyed under military necessity shall not be retained, were directions to the officers charged with their execution and do not give rise to contractual rights against the United States in behalf of the owners of private property of the enemy seized or dealt with contrary to such instructions, and that the United States would not be liable to compensate the owner for the use and detention of such a vessel.[2] *C. 11143, Dec. 23, 1901.*

---

[1] See 11 Op. Atty. Gen., 378; U. S. *v.* Pacific R. R. Co., 120 U. S., 227.

[2] See Herrera *v.* U. S., 43 Ct. Cls. 430; 222 U. S. 558; Diaz *v.* U. S., 43 Ct. Cls. 444. As to the effect of the President's proclamation referred to in the above paragraph, the Supreme Court in the latter case said: "It is not possible to hold that the proclamation of the President was intended to supersede the laws of war and attach to every appropriation by the military officers conducting operations of war the obligations and remedies of contracts. It could not have been the intention of the President to prevent the seizure of property when necessary for military uses, or to prevent its confiscation or destruction." See, also, Magoon's Reports on the Law of Civil Government under Military Occupation, page 615.

VII B 6. During the operation of the British, German, Russian, and American troops in China during the Boxer rebellion of 1900 the railroad running between Tientsin and Peking was taken possession of as a military necessity by the military authorities. The road was not taken possession of by the several military commanders acting jointly, but was alternately seized by the Russian, German, and British military authorities. While in possession of these authorities the road was used for transportation purposes by the military authorities of the United States, and for this service claim was filed by the military representatives of these several armies with the commander of the United States forces. *Held* that there could be no doubt of the right of a belligerent to take forcible possession of a railroad or other means of transportation and to use the same in his military operations, and that the same right would exist where several powers were operating against a common enemy, although the powers so operating may not have been formally allied. *Held*, further, that as, when the forces of several States are operating against a common enemy, one may furnish the other with military assistance in the way of arms, military supplies, transportation, medical aid, etc., and as the property rights of the corporation owning and operating the railroad should be considered as, for the time being, vested in the State whose military representatives took forcible possession of the railroad as a military necessity, the transportation furnished over the road in question should be considered as furnished by the State whose military representatives were in charge of the road at the time, and reimbursement for such service should be made by the United States to such military representatives. If a charge is to be made for transportation services rendered in favor of the United States the practice should be reciprocal, and in passing on such claims the United States should take credit by way of a set-off for similar services rendered the State whose military representative filed the claim. *C. 11107, Aug. 19, 1901.*

VII C 1. During the Philippine insurrection a municipal building in the Philippine Islands was occupied by United States troops and while in their possession was burned through the negligence of the troops; *held*, that as the building was public property there was no implied obligation to pay rent, and that as the United States was not liable for the torts of its agents it would not be liable for the burning of the building. *C. 15318, May 7, 1906; 26626, Apr. 30, 1910.*

VII C 2. The determination of whether the owners of property occupied during the Philippine insurrection should receive compensation for its use must depend upon the circumstances of each case. Where property is used in the actual train of war, as for a stronghold or a fort, or for the preparation of defenses no compensation is due, but where houses, for instance, are occupied in a semipermanent way for quarters or storehouses compensation is paid as on an implied contract. *C. 16545, May 1, 1906.*

VII C 3. Upon the occupation of Manila in August, 1898, the military authorities leased from a native certain premises, which the United States continued to occupy until April, 1901. On the outbreak of the insurrection on February 4, 1899, the owner of the premises allied himself with the insurrection. The owner was arrested by the military authorities in January, 1901, as a member of an insurgent committee and took the oath of allegiance to the

United States January 13, 1901. *Held*, that the lease between the owner and the United States was abrogated by the action of the owner in taking part in an insurrection against the lawful authority of the United States, and that while the owner continued as an insurgent the United States was entitled to the free use of the premises as abandoned property belonging to a public enemy; and that upon the taking of the oath of allegiance an implied contract to pay a reasonable rent arose in regard to the premises. *C. 14994, July 28, 1903.*

VII C 4. Where in time of war a building was occupied under an implied lease by United States Army officers, *held*, that the fact that the building was burned by enemies of the United States because it was occupied by American officers and because the owners were supposed to be friendly to the United States does not make the United States liable to reimburse the owner for the value of the building. *C. 11739, Sept. 4, 1902.*

VII D. Where certain cotton was accidentally destroyed by fire resulting from an explosion of powder and ammunition during the possession, by the United States military forces, of Mobile, Ala., in 1865, *held*, that the owner was without legal claim against the United States. For injuries to, or destruction of, personal property, incidental to legitimate military operations in war, the Government is not responsible,[1] and the settlement of such claims arising during the Civil War was specially inhibited by the act of February 21, 1867 (14 Stat. 397). *R. 55, 328, Jan. 20, 1888.* So *held*, where a wounded and convalescent soldier was on military duty rendering clerical services at the time Chambersburg, Pa., was burned, and in consequence lost personal property valued at $300. *C. 11181, Sept. 12, 1901.*

Where a claim was made by the owner for damage to a dwelling house "by a shell fired from an American warship on or about the 5th of July, 1898, during the bombardment" of Santiago, *held*, that the United States was not legally liable for the claim.[1] *C. 5619, Jan. 5, 1899.*

VII E. During the Philippine insurrection the commanding officer of a certain town had the schoolhouse belonging to the town torn down and the stones used to repair the town road. After the reestablishment of civil government the town filed a claim against the United States for the value of the schoolhouse. *Held* that during the period of military government the civil administration was in military hands and that officers of the Army exercised the dual functions of military officers and civil administrators, and that as the repair of roads in the Philippines was a charge against Philippine funds, the action of the commanding officer in tearing down the schoolhouse and repairing the road was done in his capacity as a civil administrator. When the military government ceased its successor was the Philippine civil government and not the United States, and therefore any claim for the value of the schoolhouse should be made against the Philippine government and not against the United States. *C. 19575, May 8, 1906.* So *held* where a stone wall belonging to a private person was torn down by orders of the commanding officer during the Philippine

[1] See U. S. *v.* Pacific R. R., 120 U. S., 227, and authorities cited.

insurrection, and the material used to revet the bank of a river to prevent the flooding of the town. *C. 15126, May 3, 1906.*

VII F. During the Philippine insurrection a steam launch was captured by the Army in enemy territory and was appropriated to the use of the Army. After the insurrection the former owner demanded return of the launch. *Held* that the launch did not constitute a maritime capture, and that upon its capture the ownership passed to the United States, and there was no authority to return the property except by authority of Congress.[1] *C. 14801, June 19, 1903; 15693, Jan. 26, 1904.*

VII G. Claims for property taken from loyal citizens for the use of the Union army during the Civil War were taken cognizance of by the Southern Claims Commission; but this commission by the act of June 15, 1878 (20 Stat. 566), was brought to an end March 10, 1880. Such claims, except in certain special cases, were excluded from the jurisdiction of the Court of Claims, and the general statute of six years' limitation would exclude from its jurisdiction any such claims accruing at dates prior to that period; nor has the Secretary of War authority to allow such claims. The only means of relief which could now be afforded in such cases would be by express legislation of Congress.[2] *P. 61, 468, Oct. 3, 1893; C. 2764, Nov. 27, 1896.*

VIII. A bill for medical service incurred by an officer or soldier while in a status of leave of absence or furlough—as distinct from a pass for not exceeding 24 hours—(*C. 24393, Feb. 19, and Dec. 21, 1909, and Jan. 6, 1910*); or while in a status of absence without leave (*C. 12124, Mar. 15, 1902; 13421, Oct. 10, 1902; 24393, Dec. 21, 1909*) is a private indebtedness of the soldier, and not an obligation of the Government, for the reason that the officer or soldier is not in a duty

---

[1] Lamar *v.* Browne, 92 U. S., 187.

[2] See section 1059, Rev. St., and the act of Mar. 3, 1887 (24 Stat., 505). The following acts have been passed for the relief of those who have suffered losses in consequence of war: The act of Mar. 12, 1863 (12 Stat., 820), known as the "captured and abandoned property act." The act of July 4, 1864 (13 Stat., 381), as amended by the act of Feb. 21, 1867 (14 Stat., 397), provides for the payment of claims of loyal citizens in States not in rebellion, for quartermasters' and subsistence stores taken and actually used in the Army during the Civil War. Section 2 of the act of Mar. 3, 1871 (16 Stat., 524), makes similar provision in regard to claims of loyal citizens in States in insurrection. The act of Feb. 27, 1902 (32 Stat., 43), as amended by the act of May 30, 1908 (35 Stat., 499), provides for the relief of those who had their horses, side arms, and baggage taken from them by Federal troops at and after the surrender at Appomattox, in violation of the terms of the surrender. See, also, 16 Stat., 678; 18 id., 604; 23 id., 12; 25 id., 1188, 1189, 1312; 27 id., 744; 28 id., 1039; 30 id., 1401; 32 id., 2345; see, also, 33 Congressional Record, 3516, pt. 4. The act of May 27, 1902 (32 Stat., 234), provides for the payment of certain sums of money to churches and colleges which were occupied and damaged by the military forces of the United States during the Civil War. The act of Mar. 2, 1901 (31 Stat., 877), provides for a Spanish Claims Commission to carry into effect the stipulations of art. 7 of the treaty between the United States and Spain of Dec. 10, 1898, relative to the claims of American citizens growing out of the Spanish War. The act of Mar. 26, 1908 (35 Stat., 1227), provides for the payment of the claims of the Roman Catholic Church in the Philippine Islands for damages by the troops of the United States. The act of Apr. 21, 1910 (36 Stat., 1697), provides for the payment of the claims of certain religious orders of the Roman Catholic Church in the Philippine Islands, for the use and occupation of property by the military forces of the United States. Acts have also been passed to reimburse the several States and Territories for expenses incurred by them in connection with the Civil War and the Spanish War.

status at such times.[1] An officer absent by verbal permit for not exceeding 24 hours, or a soldier absent on pass for not exceeding 24 hours, is considered to be in a duty status, and a bill for medical services properly incurred while in such status is not a private indebtedness but an obligation of the Government to be paid out of the proper appropriation. *C. 20974, Jan. 24, 1907, and Nov. 21, 1908; 24393, May 28 and Oct. 3, 1910.* If a soldier, while absent on pass for not exceeding 24 hours and therefore in a status of duty becomes insane, not the result of his own misconduct, and absents himself without authority, the insanity so occurring while in a status of duty will prevent the absence from becoming a military offense, the soldier will be considered as continuing to be in a duty status within the meaning of paragraph 1493, Army Regulations (1498 of 1910), and a bill for medical services properly incurred while so absent without authority is not a private indebtedness of the soldier, but is an obligation of the Government. *C. 24393, Dec. 21, 1909, and May 28, 1910.* Where a soldier is injured while playing football, the soldier being absent from his station with authority as a member of the post football team, bills for medical service in connection with this injury are an obligation against the Government under paragraph 1493, Army Regulations (1498 of 1910). *C. 24398, Feb. 13, 1909.* If a soldier while absent without leave or in desertion, is taken into a hospital at the request of proper military authority he should be regarded while in hospital as in constructive military custody and bills for medical attendance from that moment are an obligation against the Government under an act appropriating for "medical care and treatment of officers and enlisted men on duty, and prisoners of war and other persons in military custody or confinement." *C. 16642, July 25, 1904.*

IX. Where a soldier, sick in a military hospital, turned over to the ward master his money for safe-keeping with the knowledge of the commanding officer of the hospital, and the money was stolen by the ward master; *held*, the United States could not be held for the loss. *C. 6269, Apr. 20, 1902; 15157, Aug. 27, 1903.* So, *held*, where jewelry and money of a soldier was taken possession of by his company commander when the soldier was placed in confinement, and was not returned to the soldier. *C. 18292, July 14, 1905.* So, *held*, also, where the clothing of a military convict in the United State military prison was for his convenience stored according to prison regulations, and the clothing was destroyed by fire. *C. 25692, Oct. 23, 1909.* So, *held*, where the clothing of a patient in a military hospital was stolen, and it had been recommended that the stolen articles be replaced by the Quartermaster's Department. *C. 15157, Dec. 14, 1906.* So, *held*, where a sum of money was deposited in the company safe while a soldier was sick and was afterwards forwarded to him and lost in the mail. *C. 12621, May 28, 1902.*

---

[1] See par. 1498, A. R., 1910: V Comp. Dec., 363; also, unpublished decisions of Comptroller of Treasury of Sept. 11 and Oct. 1, 1907, filed with documents belonging to *C. 17860, Aug. 13 and 23, and Sept. 21, 1907*, that a bill for medical services rendered a soldier absent with authority to enable him to attend as a witness before a civil court is a private indebtedness of the soldier, and not an obligation against the Government.

X. Where a retired Army officer desired, in a friendly and gratuitous way, to help a discharged regular soldier to get the evidence necessary to support the ex-soldier's claim for a pension, *held* that a retired officer was an "officer of the United States" within the meaning of section 5498, R. S., which provides that "every officer of the United States * * * who acts as an agent or attorney for prosecuting any claim against the United States, or in any manner or by any means otherwise than in the discharge of his proper official duties, aids or assists in the prosecution or in support of any such claim," and makes such person subject to fine or imprisonment.[1] *C. 20254, Aug. 20, 1906.* But where a retired post quartermaster sergeant solicited the claims of enlisted men for a 20 per cent increase in pay for foreign service, *held* that he was not an "officer of the United States or a person holding a place of trust or profit or discharging any function under or in connection with any executive department" within the meaning of section 5498, R. S. *C. 18202, June 29, 1905.*

An officer proposing to bring suit in the Court of Claims, under section 1059, R. S., for the amount of certain subsistence funds, for which he had been made responsible through the dereliction of a commissary sergeant, applied to the Secretary of War to detail an officer of the Army to act as his attorney in the prosecution of the claim. *Held*, in view of the provisions of section 5498, R. S., that such detail could not lawfully be made.[2] *P. 35, 452, Oct. 15, 1889.*

XI. Paragraph 831, A. R., 1908,[3] (838 of 1910), provides that "no information will be furnished by any person in the military service which can be made the basis of a claim against the Government except it be given as the regulations prescribe to the proper officers of the War, Treasury, or Interior Departments or the Department of Justice," etc. *Held* that this paragraph applies to giving voluntary information and was not intended to prevent testimony from being given in the due and orderly administration of legal procedure by an officer or soldier of the Army, and that there was no objection to an officer or soldier testifying in a claim case or in any other action in which he was a material witness and could be compelled by due process of law to appear and testify. *C. 7912, Apr. 7, 1900; 23462, June 16, 1908.* But while officers and employees of the Government are subject to summons as witnesses in private litigation the same as other citizens, they are not required to testify with regard to matters of public business if, in the opinion of the head of a department, the disclosure would injuriously

[1] See Flower et al. *v.* United States, 31 Ct. Cls., 35.

[2] See 16 Op. Atty. Gen., 478.

[3] G. O. 163, W. D., Sept. 21, 1906, provides that "The soliciting of pension or other claims against the United States on military reservations or at military posts, camps, or stations, including general hospitals, is hereby prohibited, and commanding officers will take measures effectually to prevent such soliciting within the limits of military reservations, posts, camps, stations, or hospitals under their command. Officers or enlisted men who give information with a view to aiding persons in soliciting such claims will be brought to trial for violation of paragraph 831, A. R., as amended by G. O., No. 159, W. D., Sept. 15, 1906, and civilian employees who so offend will be discharged," and invites attention to sec. 5498, R. S., which punishes by fine or imprisonment "every officer of the United States, or person holding any place of trust or profit," etc., "who acts as agent or attorney for prosecuting any claim against the United States, or in any manner or by any means, otherwise than in discharge of his proper official duties, aids or assists in the prosecution or support of any such claim," etc.

affect the public interest.[1] *C. 7912, Feb. 8, 1910.* *Held* also that the furnishing of information as to the injury of an employee making claim against the Government under the act of May 30, 1908 (35 Stat. 556), granting to certain employees of the United States the right to receive from it compensation for injuries sustained in the course of their employment, the information being furnished in accordance with the regulations adopted by the Secretary of Commerce and Labor, is not within the operation of the above paragraph of the regulations. *C. 23069, Apr. 30, 1910.*

XII A. *Held* that the provision of section 3480, R. S., making it unlawful to pay certain claims against the United States to persons who promoted, etc., the late rebellion, created a personal disability only, which could not operate against the heirs of parties thus disqualified unless they too participated in the rebellion. *R. 39, 417, Feb. 7, 1878.*

XII B. At the time of the San Francisco earthquake a private steamer was used for several days in connection with the relief work, the master during that time receiving orders from several Army and Navy officers. A claim was made against the United States for compensation for the use of the vessel. *Held*, that the use of the vessel did not benefit in any way the Army or Navy, and that the orders given by the Army and Navy officers were given in their capacity as relief agents and not as representing the United States, and the United States would not be liable to the owners. *C. 20652, Mar. 4, and Apr. 2, 1907.*

XII C. A claim was made against the United States by an attorney for services rendered as counsel for an accused officer in a court-martial trial. *Held*, that the claim was without merit as against the United States, and that the Government had nothing whatever to do with its payment. *P. 32, 165, May 2, 1899.*

XII D. Where a claim was made for compensation for time, cost, and expenses incurred in going from Brooklyn, N. Y., to Governors Island, N. Y., to collect fees due a civilian witness before a court-martial, *held* that there was no provision of law for the payment of such a claim. *C. 1807, Nov. 2, 1895.*

XII E. A soldier, though become by discharge a civilian, has no claim against the United States for pay, in the nature of damages, for a period during which, though innocent in fact, he was detained awaiting trial for a military offense and action on the proceedings. *P. 42, 375, Aug. 23, 1890.* So, where a civilian, arrested on reasonable grounds of suspicion that he was a deserter from the military service, was detained in confinement at a military post till it was ascertained that he was not such, *held* that he had no legal claim for damages against the United States. *P. 43, 145, Oct. 4, 1890.*

---

[1] Sec. 882, R. S., provides that: "Copies of any books, records, papers, or documents in any of the executive departments, authenticated under the seals of such departments, respectively, shall be admitted in evidence equally with the originals thereof." In reference to the above section of the Revised Statutes, the Secretary of War, in a circular of the War Department of 1887, directed that: "In submitting copies of papers for the attestation of the Secretary of War chiefs of bureaus will state whether the rule of the department on the subject has been complied with, viz: It is not deemed proper to intrust attested transcripts of the public records to private persons for use in controversies in which the United States has no real interest, except upon the certificate of the tribunals before which such controversies are to be decided that such transcripts of the public records are deemed essential to the ends of justice."

XII F. There is no law authorizing the executive department of the Government to pay claims for damages on account of injuries received by persons employed in the construction of public buildings, or in river and harbor improvements, and in the absence of such a statute the executive department is without power to pay them.[1] *C. 366, Sept. 21, 1894; 2082, Feb. 24, 1896.*

XII G. Section 1304, R. S., which requires that a deficiency charged against an officer, as in the present case, shall be deducted from his monthly pay, unless he shall show to the satisfaction of the Secretary of War that such deficiency was not occasioned by his fault, applies only to claims for relief from accountability on the part of actual officers of the Army, and can not be extended to a case of such a claim made by a person formerly in the Army but had long been a civilian. *P. 60, 124, June 17, 1893; 65, 137, May 28, 1894.*

XII H. A certificate of pay, as due on a final statement, was erroneously given by his commanding officer to a soldier, to whom there was in fact no pay due. The soldier indorsed the certificate for collection to a bank, by which it was indorsed for the same purpose to another bank. This bank presented it to a paymaster, who paid it. On discovery of the error, the amount was stopped against the paymaster. The second bank then refunded to him the sum paid, and made claim for it upon the War Department. *Held* that such bank had no legal claim upon the United States, but that its recourse was properly against the first bank. *P. 35, 447, Oct. 15, 1889.*

XII I. A contract nurse who lost private property by the sinking of a United States hospital ship submitted a claim for the amount of the loss. *Held,* that such claims could not be paid without special authority from Congress. *C. 5215, Nov. 4, 1898.*

XII J. Where in the course of the transportation by railroad, at Government expense, of an officer's allowance of personal baggage, the boxes containing the same were broken into and a portion of the property was stolen, *held,* that the remedy of the officer was against the railroad company, not against the United States. The United States does not make itself an insurer in such a case; nor can the officer require the United States to sue the company in damages, for this could be done only on the theory that the United States was responsible to the officer for the value of property lost by no fault or negligence of its own. *R. 49, 572, Dec. 24, 1885.*

XII K. There is no appropriation under the War Department from which the sender of a registered mail package lost while on board an Army transport can be paid. *C. 18316, July 20, 1905.*

XII L. Where certain lands were leased for maneuver purposes and a claim was made for the cost of forage necessary to be fed to the stock of a lessor during the period of the maneuvers because the stock had to be kept off the pasture lands, *held* that such an expense was a necessary incident to the operation of the lease, as the lease would operate to deprive the lessor of the use and occupancy of the land during the period of maneuvers, and therefore the claim should be denied. *C. 16525, Sept. 26, 1904.*

XII M. Section 1876, R. S., provides that "No head of a department shall employ an attorney or counsel at the expense of the United

[1] But since the above opinion was rendered the act of May 30, 1908 (35 Stat. 556), was enacted granting to certain employees of the United States the right to receive from it compensation for injuries sustained in the course of their employment.

States, but when in need of counsel or advice shall call upon the Department of Justice, the officers of which shall attend to the same." Section 365, R. S., provides that no compensation shall be allowed to any person, besides the respective district attorneys, for services as attorney or counsel to the United States. *Held* that, in view of the prohibition of the above statutes, the Secretary of War had no authority to pay the claim of an attorney for legal services in connection with the purchase of land at Fort William McKinley, Manila, P. I.[1] *C. 12154, Jan. 3, 1903.*

XII N. Where an attorney submitted to the War Department a claim for services rendered an enlisted man in a *habeas corpus* proceeding, no notice of such employment having been previously given, it was *held* that the employment and payment of the attorney were prohibited by sections 189 and 365, R. S., and, further, that in view of section 366, R. S., payment of the claim could not be made except by special act of Congress.[2] *C. 7256, Dec. 9, 1899.* So *held*, also, where an attorney rendered services in connection with the recovery of property of the United States that had been stolen. *C. 11458, Nov. 8, 1901.* Also, where an attorney defended an officer before a civil court in a matter growing out of the discharge of his official duties. *C. 14570, Apr. 29, 1903.*

XII O. The United States is not liable for fees and expenses of a coroner in holding an inquest over a deceased soldier, and no officer of the Government is authorized to bind the Government for such services. *C. 6341, May* 1, 1899.

XII P. An executive official can not, of his own authority, appropriate the money of the United States for the purpose of satisfying a claim. So *held* that the Secretary of War could have no authority to reimburse a claimant for the amount of a tax assessed upon him by the military authorities during the war, and expended in the public service, whether or not the same was legally exacted, but that Congress must be applied to for the necessary action.[3] *R. 18, 668, March* 16, *1866.*

XII Q. Where a paymaster of the Army seeks to be relieved from liability for public funds stolen when in his charge, he should credit himself in his account current with the amount, and this credit being disallowed at the Treasury, he will have the recourse of an application for relief to the Court of Claims under section 1059, R. S. It has been ruled by the Supreme Court[4] that, until the disbursing officer has been "held responsible" by the accounting officers, his right to have recourse to the Court of Claims does not accrue. *P. 51, 439, Jan. 27, 1892.*

XII R. Where the personal property of an officer is stored in a Government storehouse during his absence on duty, and while so stored

---

[1] See VI Comp. Dec., 133, making a distinction between legal services and services rendered in preparing an abstract of title.

[2] See par. 1012, A. R., 1910.

[3] A claim, though deemed by the Secretary of War to be probably just, can not in general, in the absence of any appropriation for its payment, or other authority to allow the same, properly be entertained by him. And where to pass upon a claim must be clearly quite futile, a consideration of its merits will in general be out of place, and the claimant, without being heard thereon, will properly be referred to the department of the Government empowered by law to take specific action in his case.

[4] U. S. *v.* Clarke, 96 U. S., 37.

is stolen, *held* that the Government is not liable for the loss. *C. 6690, July 6, 1899; 15548, Nov. 30, 1903.* So, *held*, also, where the lockers of certain enlisted men were stored on a military reservation during their absence on temporary duty and the contents were stolen. *C. 22715, Feb. 6, 1908.* So, *held*, also, where the property of a military convict was stored for his convenience on the reservation and was destroyed by fire. *C. 25692, Oct. 23, 1909.*

XII S. Several years after a horse had been purchased by the Government a private person laid claim to it, alleging that the animal had been stolen from him and subsequently sold to the Government, *held* that if the claimant could establish his ownership of the horse he was entitled to it, since the vendor could grant no better title than he himself had, and *recommended* that if the claimant should attempt to replevy the animal, the person from whom the Government purchased should be advised of the action and called upon to defend the proceedings in order that in any subsequent suit by the United States against him for damages resulting from a breach of the warranty of title he would be concluded on the question of title by the suit. *C. 17433, Feb. 7, 1905.*

XII T. *Held* that a claim by an *officer* to be allowed extra compensation for services rendered by him as clerk to a general court-martial of which he was the junior member, was wholly without sanction in law or regulation. *R. 22, 578, Feb. 4, 1867.*

CROSS REFERENCES.

Assignment of.....See CONTRACTS XIV G.
Captures in war.....See WAR I C 6 c (3).
Court reporter for service.....See ARMY I G 3 a (4) (*a*) [3].
Final statement—incorrect.....See PAY AND ALLOWANCES III B 6 a.
Pay of deceased soldier.....See MILITIA XI Q.
Reimbursement for, in case of judgment against apprehender of deserter.....See DESERTION V F 19.
Settlement of.....See ARMY I B 1 b.
Suspension of.....See DISCIPLINE XII A 11 a.
Unauthorized claim arising from joint encampment.....See MILITIA VI B 2 l.
United States, for damage to arms issued to colleges.....See MILITARY INSTRUCTION II B 2 d.

CLEMENCY.

Grounds for.....See DISCIPLINE XV F to G.
PARDON VI.
Recommendation by court.....See DISCIPLINE XII E 1 to 2.

CLOTHING.

Disposition of condemned.....See MILITIA IX D.
Issues.....See PAY AND ALLOWANCES II A 3 a (4) to (5).
Prisoners, issues to.....See PAY AND ALLOWANCES III C 1 d (1).
Seizure of, after sale by soldier.....See PUBLIC PROPERTY IX B 2.
Sold to a State.....See PUBLIC PROPERTY I A 4 a.
Title to soldier's.....See PUBLIC PROPERTY IX B 2.
See PAY AND ALLOWANCES II A 3 a (4) (*a*).

CLOTHING ALLOWANCE.

To general prisoners.....See ARMY I B 7 a.
To soldiers.....See PAY AND ALLOWANCES II A 3 a to b.

COAST ARTILLERY.

See ARMY I G 2 b (1); (2).
Enlistment of colored men.....See ENLISTMENT I A 12.
Of militia.....See MILITIA III D.

COLLEGES.

Bonds of.....See BONDS IV to V.
Furnishing arms to and military instruction at.....See MILITARY INSTRUCTION II B 1; 2.
Militia company at.....See MILITIA III L.
Retired officers instructors at.....See RETIREMENT I K 3 to 4.

COLLUSION.

Among bidders.....See CONTRACTS VI J 4.
With bounty jumpers.....See ARTICLES OF WAR LXII D.
With contractor.....See ARTICLES OF WAR LX A 2.
With deserter.....See DESERTION V F 14.

COMMAND.

I. ELIGIBILITY TO COMMAND.
A. IS CONVEYED BY RANK..... *Page 263*
1. In staff departments by presidential assignment.
a. Detailed staff officers.
B. MARINE OFFICER REQUIRES PRESIDENTIAL ASSIGNMENT.
C. BY CHIEF OR ASSISTANT CHIEF OF CONSTABULARY..... *Page 264*
II. JUNIOR CAN NOT COMMAND SENIOR.
III. BY THE COMMANDER IN CHIEF.
A. MAY ASSUME DIRECT COMMAND.
B. HE GENERALLY DELEGATES COMMAND.
C. MAY DETAIL ENGINEER OFFICERS TO WORK COMMITTED TO THE INTERIOR DEPARTMENT..... *Page 265*
IV. BY DIVISION OR DEPARTMENT COMMANDER.
A. CAN NOT ASSIGN MARINE OFFICER TO DUTY.
B. CAN NOT ISSUE TRAVEL ORDERS FOR SANITARY INSPECTOR.
V. BY COMMANDING OFFICER.
A. POST COMMANDER.
1. Over officer.
a. May relieve him from duty with an organization and assign him to another.
b. May withdraw privilege of leaving post.
c. Can not issue travel orders.
d. May allow limits of command to officer under suspension.
2. Over enlisted men.
a. Can not prohibit soldier from marrying..... *Page 266*
b. May forbid them to enter saloons, etc.
c. Can require duty of soldier on bail.
d. Responsibility for ordering to duty a soldier whom the surgeon has excused.
e. Can not surrender private trust money of men of command.
f. Should return to the owner money seized from a soldier which the latter has obtained unlawfully.

V. BY COMMANDING OFFICER—Continued.
A. Post Commander—Continued.
3. Over civilians.
a. Can exclude them from reservation..... *Page 267*
b. Should not allow post to become asylum for fugitives from justice.
c. Arrest of civilian on post for commission of crime.
(1) At Rock Island Arsenal.
d. Removal from post.
(1) At West Point, N. Y.
(2) Can remove soldier's wife from post.
e. Can not search private house for soldier's clothing without a warrant.
f. As to fishing on the reservation ..... *Page 268*
g. Prosecution of civilians for cutting hay.
4. Can not refer cases to general court-martial.
5. Can not act as counsel for accused.
6. Procedure in case of receipt of writ of habeas corpus.
a. From Federal court.
(1) Produces body.
b. From State court.
(1) Makes return ..... *Page 269*
(*a*) Resists attempt to discharge party..... *Page 270*
(*b*) Rearrests prisoner if discharged.
7. Procedure in case of death of officer or soldier.
8. May furnish guardhouse accommodations for civilian prisoners on request.
B. Transport Commander.
1. May assign officer to duty on his return from leave.
2. Duty when offense is committed on board.
a. By person subject to Articles of War..... *Page 271*
b. Against a civilian.
c. By civilian against civilian on high seas.
3. When United States and State warrants are presented.
4. Transport quartermaster may command.
5. Officer of constabulary may not command.
C. Regimental Commander.
1. Appoints.
a. Regimental staff officers..... *Page 272*
b. Battalion staff officers.
c. Noncommissioned officers.
2. Can not reduce company noncommissioned officers without recommendation of company commander.
VI. COMPANY COMMANDER.
A. Delegation of Authority to Noncommissioned Officers.
1. To make arrests.
2. To hear requests or complaints..... *Page 273*
B. Can Not Force Soldier to Deposit Money.
C. Holding Soldier's Money in Trust.
VII. AN INDEPENDENT COMMANDER.
A. May Issue Travel Order.

I A. The terms "rank" and "command" are neither convertible nor synonymous. Rank is created by law and is conferred by an exercise of the appointing power. It conveys *eligibility* merely to exercise command or control in the military service. Neither is rank *office*, but it may be an attribute or incident of office. *Held* that the power to exercise command or control is conferred in some cases by statute and in other cases is conferred or delegated by the President in his capacity as Commander in Chief of the constitutional military forces. *C. 17508, Feb. 15, 1905.*

I A 1. While all commissioned officers of the Army are assigned military rank by express operation of law, they are not all equally eligible to exercise military command. What are known as staff officers exercise command, or, more properly speaking, control in their own departments only.[1] They are expressly forbidden by law to exercise command in the line, but by the express order of the President and in virtue of a specific assignment they may exercise the functions of any command in the line of the Army to which it may please the President to assign them. *Held* that it is within the authority of the President as the Commander in Chief of the constitutional military force to assign the Adjutant General of the Army to the command of the Department of the East, and that the latter after such assignment may legally exercise in such department such powers of command as the President may be pleased to delegate in appropriate Executive orders to that effect.[2] *C. 15253, Sept. 12, 1903.*

I A 1 a. Under recent legislation officers of the line are detailed for a limited tenure to office in certain of the staff departments and on the General Staff. *Held* that during the incumbency by a line officer of office in the General Staff that his power to assume or exercise command in the line is in abeyance, and that for that reason such an officer can not assume command of a department in the event of its permanent commander being ordered to another field of duty in the military establishment. *C. 23317, May 25, 1908.*

I B. An officer of the Marine Corps was returning from the United States to Cuba, where the organization to which he belonged was on duty with the Army of Cuban Pacification. *Held* that he could not legally assume command of troops on board the transport without a direct assignment by the President to that effect. *C. 24712, Apr. 2, 1909.* Similarly *held* in the case of a Marine officer who had been detailed for service with the Army in Cuba, but who was traveling

---

[1] Officers of the Engineer, Pay, and Medical Departments are expressly forbidden by law to exercise command in the line or in other corps or departments of the staff.

[2] Staff officers have been assigned to command in several instances. Thus (1) Maj. Gen. Alexander Hamilton, Inspector General, exercised command of the Army from 1798 to 1800; (2) Brig. Gen. Zebulon M. Pike, Adjutant General, was in command of a brigade when killed, Apr. 27, 1813; (3) Brvt. Maj. Gen. Thomas S. Jesup, Quartermaster General, was assigned to the command of troops in Florida, in General Orders, No. 32, A. G. O., May 20, 1836; (4) Col. J. K. F. Mansfield, Inspector General, was assigned to the command of the Department of Washington by General Orders, No. 12, War Dept., A. G. O., Apr. 27, 1861; (5) Maj. Gen. H. C. Corbin, Adjutant General, was detailed as a member of the General Staff in General Orders, No. 88, Hdqrs. of the Army, A. G. O., June 20, 1903, and as Assistant to the Chief of Staff by General Orders, No. 2, War Dept., Aug. 15, 1903. He was relieved from duty on the General Staff by par. 16, Special Orders, No. 41, War Dept., Oct. 2, 1903, and assigned by the President to the command of the Division of the Atlantic by General Orders, No. 65, War Dept., Dec. 22, 1903; relieved from the command of the Division of the Atlantic and assigned to the command of the Philippines Division by General Orders, No. 106, War Dept., June 16, 1904.

without troops and under orders that did not contemplate any exercise of military command on his part. *C. 25586, Sept. 25, 1909.*

I C. The office of assistant chief of Philippine Constabulary is a civil office to which military rank attaches by operation of law, and the rank so attached is in no way necessary to or involved in the exercise of the functions of the office of assistant chief of constabulary, which was purely civil in their nature, and must, I think, be regarded as having been authorized by Congress for the purpose of determining the pay and emoluments of the incumbent. It will, I think, also appear that the measure of the command which may be exercised by a detailed incumbent of such office is set forth in the act of January 30, 1903 (32 Stat., 783). The first section of the act expressly authorizes the detail of officers of the Army "for service as chief and assistant chiefs of the Philippine Constabulary"; but, as the offices named are civil offices, service in that capacity is civil, as distinguished from military service, and the status occupied by such chief or assistant chiefs is a civil status to which, in conformity to the requirements of the section last above cited, a limited power to exercise military command attaches. From the definitions already given of "rank" and "command" it has been seen that the mere possession of military rank does not authorize its possessor to exercise military command. The officer in charge of public buildings and grounds in Washington, for example, is clothed with the rank of colonel in virtue of the legislative grant of rank which is embodied in the act of March 3, 1873 (17 Stat., 535), but he can exercise no command in the line or control in the staff in virtue of the attribution of rank which is attached to his incumbency of that office. In a precisely similar manner the rank of colonel attaches by operation of law to the office held by Col. S—— as assistant chief of the Philippine Constabulary, but mere attribution of rank conveys no right to exercise military command, which must be sought in a special assignment by the President or in an appropriate enactment of Congress; and such a grant of power to exercise military command will, in fact, be found in section 2 of the act of January 30, 1903. *C. 17508, Feb. 15, 1905.*

II. The power to command can only be delegated to a senior to be exercised over his juniors in rank. This follows from the fact that the organization prescribed by Congress provides for grades of rank and, in its rules for the government of the land forces, that body prescribes a system of subordination in accordance therewith. In the rules so prescribed, obedience to superiors is made the foundation of all discipline, and the specific article which enjoins obedience makes the crime of disobedience of orders a capital offense. Command, therefore, whether exercised directly or in delegation, must be exercised in accordance with the legislation of Congress in respect to rank and subordination in the military service. *C. 15253, Sept. 12, 1903; 26612, Apr. 6, 1910, and May 13, 1910.*

III A. The President may, as Commander in Chief, assume direct command of troops in the field when his discretion dictates that to be necessary in the public interest.[1] *C. 8383, May 26, 1900.*

III B. The power of the President to command not only *can* but, in a majority of cases, *must* be made the subject of delegation; the

[1] During the whisky insurrection of 1794 in Pennsylvania, President Washington assumed command of the Federal troops in person.

President can not be personally present in every theater of military activity or at every point where military forces are stationed, and this fact is recognized by Congress in its legislation providing a special class of officers, of the grade of major and brigadier general, who do not form a part either of the line or staff, but are maintained for the express purpose of exercising such commands in the military establishment as may be delegated to them by the President. *C. 15253, Sept. 12, 1903.*

III C. When the detail of officers of the Engineer Corps was desired in connection with engineering questions, committed to the Interior Department for execution, *held* that under the authority conferred by section 1158, R. S., the President would be authorized to make the detail.[1] *C. 26574, Apr. 22, 1910.*

IV A. A department or division commander is without authority to assign an officer or enlisted man of the Marine Corps to duty on shore or on an Army transport, as such an assignment can only be made by the President. *C. 24362, July 21, 1909; 25586, Sept. 17, 1909.*

IV B. *Held* that in view of the act of August 6, 1894 (28 Stat. 235), division commanders may not legally issue orders to sanitary inspectors (medical officers), of their command directing such sanitary inspectors to make inspections or investigations involving travel and claims for mileage. *C. 28833, Aug. 14, 1911.*

V A 1 a. On the question of whether a post commander has authority under the regulations and approved customs of the service to relieve an officer (not of his own regiment) from command of the company to which he is regularly assigned and attach him to duty with another company that is provided with an officer, *held* that a post commander has such authority. *C. 26140, June 2, 1910.*

V A 1 b. Leaving the limits of the station at which an officer is on duty is a privilege and not a right, the privilege being accorded by the commanding officer. *Held,* therefore, that a post commander may withdraw from an officer under his command the privilege of leaving the post without regard to whether or not the officer is under charges or in arrest, or under sentence. *C. 26140, June 2, 1910. Held,* that an order by a post commander to the effect that any officer whose explanation of an absence from a roll call was not satisfactory would be restricted to the limits of the post, except when permitted to absent himself upon a written application for such absence approved by such commander, was a legal order. *R. 55, 391, Mar., 1888.*

V A 1 c. An officer of the Army was ordered by his post commander to visit another post to observe the operation of apparatus for the incineration of offal. *Held,* that while a post commander can not, unaided by superior authority, order travel involving the payment of mileage, he may, in an appropriate case, order an officer of his command on detached service for such a purpose. *C. 19087, Jan. 22, 1906.*

V A 1 d. A sentence of suspension from duty and pay for 15 days does not imply confinement to quarters, or involve a condition of arrest. It is customary for an officer undergoing sentence of suspension from pay and duty to be allowed the limits of his command. *R. 7, 242, Feb., 1864.*

---

[1] See 28 Op. Atty. Gen., 270.

V A 2 a. A military commander, authorized to grant or refuse passes or furloughs to his command, may of course refuse permission to leave the post to a soldier whose purpose is to become married. A commander may also, if the interests of discipline require it, exclude the wives of soldiers from a post under his command at which their husbands are serving. But while the Army Regulations forbid the enlisting (in time of peace, without special authority) of married men, there is no statute or regulation forbidding the contracting of marriage by soldiers, any more than by officers, while in the service. So *held* that, under existing law, a military commander could have no authority to prohibit soldiers, while under his command, from marrying; and that the contracting of marriage by a soldier (although his commander had forbidden him, or refused him permission, to marry) could not properly be held to constitute a military offense. Where indeed there is involved in the conduct of the soldier at the time any military neglect of duty or disorder, he may, for this indeed, be brought to trial, but not for the marrying as such. And *remarked* that if the marrying by soldiers after enlistment becomes so generally practiced as to be demoralizing to the Army or otherwise prejudicial to discipline, the evil can effectually be repressed only through new legislation by Congress. *R. 38, 47, Apr., 1876, 407, Jan., 1877; 43, 109, Dec., 1879.*

V A 2 b. Where a post commander issued an order allowing the soldiers of his command between certain hours, when "off duty," limits extending one mile beyond the military reservation, and forbidding them to enter or patronize within said limits gambling houses, saloons, etc., *held* that he did not exceed his authority in the matter. *C. 1210, Apr., 1895.*

V A 2 c. A soldier, arrested by the civil authorities and released on bail to await trial, may, on returning to his station, be required to perform the usual military duty appropriate to his rank (*R. 24, 279, Feb., 1867*), and while on such duty, his pay status is unaffected. *C. 1717, Sept., 1895.*

V A 2 d. Although the post commander may order to duty a soldier who has been excused from duty by the surgeon on account of sickness or disability, *held* that if he does so he assumes the responsibility for any material injury that may thus result to the individual or the service, and if injury does in fact result, is amenable to trial for the military offense involved. *R. 43, 250, Mar., 1880.*

V A 2 e. A soldier was charged with the larceny of a certain sum of money in currency from the post trader's store. At his arrest a sum in currency of about the same amount, but not capable of identification as the same money, was found on his person, and, being claimed by the trader, was turned over to him by the post commander. The soldier was then tried and acquitted. *Held* that the post commander should refund to the soldier the amount taken from him and improperly turned over to the trader. *R. 50, 520, July, 1886.*

V A 2 f. One soldier obtained from another by false pretenses three $20 gold pieces. Upon being arrested for the offense the sum of about $49 in bills and silver was found upon his person. It appeared that the money obtained by false pretenses had been converted into money of other denominations and that the sum found upon the soldier at the time of his arrest was the unexpended balance. The soldier was tried and convicted of the offense. *Held* that the

sum taken from him at the time of his arrest should be returned to the other soldier from whom it had been obtained by false pretenses. *C. 23320, May 29, 1908.*

V A 3 a. A post commander can, in his discretion, exclude all persons other than those belonging to his post from post and reservation grounds, but should he admit everybody except one individual against whom no charge of wrongdoing existed, such action would be considered an abuse of discretion on the part of the post commander. *C. 2682, Oct., 1896; 6704, July 5, 1899, and Apr. 6, 1909; 12941, July 16, 1902; 16272, May 6, 1904; 16983, Oct. 8, 1904; 21258, Apr. 18, 1907; 28974, Sept. 16, 1911.*

V A 3 b. A post commander can not properly allow his post to become an asylum for fugitives from civil justice. *R. 36, 450, May, 1875.*

V A 3 c. A civilian may legally be arrested without a warrant as well by a military person as by any citizen where he commits a felony, or crime in breach of the public peace, in such person's presence; or where, a felony having been committed, such person has probable cause for believing that the party arrested is the felon.[1] In a case of such an arrest at a military post, the arresting officer or soldier should use no unnecessary violence, should disclose his official character, and inform the party of the cause of his arrest, and should deliver him as soon as reasonably practicable to a civil official authorized to hold and bring him before a court or magistrate for disposition. *P. 39, 51, Feb., 1890; 41, 457, July, 1890; C. 10241, Apr. 15, 1901; 16983, Apr. 10, 1908; 25609, Nov. 8, 1909.*

V A 3 c (1). The State of Iowa has ceded to the Unites States exclusive jurisdiction over the portion of the Rock Island Arsenal Bridge and approaches situate within that State. In a case of a crime or offense against the United States committed by a civilian on such portion, *held* that the commanding officer at the arsenal or his subordinates would be authorized to arrest the offender without warrant within limits authorized by law and cause him to be brought before a United States commissioner or other official specified in section 1014, R. S. He could not properly hold the party and notify the commissioner to send for him, but must himself have him taken before the commissioner. Where indeed no such official is accessible at the time, the commanding officer may hold the offender in the guardhouse, but only for such interval as may be necessary. *P. 39, 51, Feb., 1890.*

V A 3 d (1). The superintendent of the Military Academy is not in general authorized to arrest and confine in the guardhouse a civilian for a mere breach of the police regulations of the post or academy. His proper remedy is to have the offender removed as soon as practicable, and without unnecessary force, from the reservation.[2] *P. 41, 457, July, 1890; C. 6704, Feb. 25, 1909; 16983, Oct. 8, 1904; 28974, Sept. 16, 1911.*

V A 3 d (2). *Held* that a post commander can legally order the removal of a soldier's wife from the post for sufficient cause. *C. 25177, July 14, 1909.*

V A 3 e. Although section 3748, R. S., makes the possession of articles of uniform clothing presumptive evidence of a sale; *held* that

[1] U. S. *v.* Boyd, 45 Fed. Rep., 851, 866, Feb., 1890.
[2] 3 Op. Atty. Gen., 271; 9 *id.*, 106, 476.

where there is reason to believe that such clothing is in possession of a citizen, a search warrant should be obtained from the proper United States court. *C. 5303, Nov. 22, 1898; 1927, Dec. 18, 1895; 16107, Apr. 4, 1904.*

V A 3 f. *Held* with respect to the right of citizens of New Jersey to fish on and along the shore of the military reservation of Fort Hancock that in view of the cession of exclusive jurisdiction over the reservation to the United States for military purposes, the grant should be regarded as including the necessary easement in the shore and in the waters adjacent thereto required for the "free use and enjoyment" of the premises for military purposes; that the obligation to observe such easement should be regarded as binding on all citizens in so far as respects public rights claimed by them as members of the State, and that the post commander should therefore continue to exercise such control of the shore between high and low water mark as would prevent any occupation which would interfere with the proper military use of the reservation. *C. 19657, Oct. 21, 1910.*

V A 3 g. *Held* that grass cut for hay upon a military reservation was in law, at least if not at once removed, personal property, so that a person wrongfully cutting such grass and allowing it to remain till it became hay or for any material period before asportation, was chargeable with a stealing of property of the United States under the act of March 3, 1875, c. 144, which makes such stealing a felony punishable by fine and imprisonment. *P. 64, 270, 303, Mar. and Apr., 1894.*

V A 4. Where a general court-martial has been convened at a military post by the department commander, the commander of the post is not empowered, in the absence of authority from such superior, to refer cases to the court for trial. Such action has sometimes been taken and acquiesced in, but (unless specially authorized) it is irregular and a transcending of his province by the post commander. *R. 41, 306, July, 1878.*

V A 5. *Held* that a regulation [1] providing for the detail by the commander of a post at which a general court-martial is ordered to sit, of a suitable officer of his command to act as counsel for prisoners to be arraigned, if requested by them, is not to be construed as sanctioning the detail or voluntary appearance of a post commander himself in such capacity at his own post. *P. 65, 77, May, 1894.*

V A 6 a. In a case of a soldier or other person held in military custody, in which a writ of *habeas corpus* is issued by the *United States* judiciary—a coordinate branch of the same sovereignty as that by which the party is restrained—it is the duty of the officer to whom the writ is addressed to make thereto a full return of the facts and to bring into court the body of such party, submitting to the court the whole question of authority and discharge, and abiding by its decision and order in the case. *R. 19, 377, and 21, 157, Jan., 1866; C. 14042, Sept. 23, 1904.*

V A 6 b. Independently, on the one hand, of any proclamation or act of the President, suspending the privilege of the writ, or, on the other hand, of any proclamation revoking a previous suspension, and on constitutional grounds alone, *held* that no court or judge of any State could in any instance be authorized to discharge, on *habeas corpus*, a person, military or civil, held in military custody by the

[1] See par. 977 A. R., 1910.

authority of the United States. *R. 1992, Dec., 1865; 21, 92, and 133, Dec., 1865; 27, 50, Aug., 1868; C. 14495, Apr. 14, 1903.* And *held*, particularly, in regard to soldiers arrested or confined by the military authorities under a charge of or sentence for desertion,—that their discharge, upon any ground, by writ of *habeas corpus* was wholly beyond the jurisdiction of any State tribunal. *R. 2, 34, 190, 484, Feb. to June, 1863; 3, 104, June, 1863; 5, 398, Dec., 1863.* So *held*, in regard to persons arrested by a provost marshal as deserters for not responding to a draft in time of war. *R. 3, 457, 578, Aug. and Sept., 1863.* And further, *held* that no State court could have jurisdiction on a proceeding for the discharge by writ of *habeas corpus* of an enlisted soldier, to pass upon the question of the legality of the soldier's enlistment, or to discharge him from his contract of enlistment on the ground of its invalidity by reason of minority, non-consent of parent, or other cause; the authority to discharge from the restraint and obligation of the ordinary military status being considered to be governed by the same principle as that to discharge from an arrest or confinement under a military charge or sentence, or from the custody of a United States marshal under civil process of the United States.[1] *R. 21, 157, Jan., 1866; 29, 140, July, 1869; 33, 271, Aug., 1872; P. 32, 313, May, 1889; C. 394, Sept., 1894; 12069, Feb. 17, 1902.*

V A 6 b (1). Where a writ of *habeas corpus*, issued by a State court or judge for the relief of a person held in arrest, confinement, or under enlistment, by the military authorities, is served upon a military

[1] Opposed to this view was the opinion of Atty. Gen. Stanbery in Gormley's case (Oct., 1867), 12 Op. Atty. Gen. 258. But in December, 1871, the ruling of the Judge Advocate General in this class of cases was sustained by the United States Supreme Court in Tarble's Case, 13 Wallace, 397, in which the judgment of a State court, which had ordered the discharge, on *habeas corpus*, of an enlisted soldier from "the custody of a recruiting officer," i. e. from the obligation of his contract of enlistment, on the ground that he had enlisted when under eighteen years of age and without his father's consent, was reversed as an unconstitutional assumption of authority. In applying to the case the principle laid down in Ableman *v.* Booth, 21 Howard, 506, the court, by Field, J., observes: "State judges and State courts, authorized by laws of their States to issue writs of *habeas corpus*, have undoubtedly a right to issue the writ in any case where a party is alleged to be illegally confined within their limits, unless it appears upon his application that he is confined under the authority, or claim and color of the authority, of the United States, by an officer of that Government. If such fact appear upon the application the writ should be refused. If it do not appear the judge or court issuing the writ has a right to inquire into the cause of imprisonment, and ascertain by what authority the person is held within the limits of the State; and it is the duty of the marshal, or other officer having custody of the prisoner, to give, by a proper return, information in this respect. His return should be sufficient, in its detail of facts, to show distinctly that the imprisonment is under the authority, or claim and color of the authority, of the United States, and to exclude the suspicion of imposition or oppression on his part. And the process or orders under which the prisoner is held should be produced with the return and submitted to inspection, in order that the court or judge issuing the writ may see that the prisoner is held by the officer in good faith, under the authority, or claim and color of the authority, of the United States, and not under the mere pretence of having such authority. * * * The State judge or State court should proceed no further when it appears, from the application of the party, or the return made, that the prisoner is held by an officer of the United States under what, in truth, purports to be the authority of the United States; that is, an authority, the validity of which is to be determined by the Constitution and laws of the United States. If a party thus held be illegally imprisoned, it is for the courts or judicial officers of the United States, and those courts or officers alone, to grant him release." This decision put an end to a controversy of many years standing, and swept away a mass of counterrulings by the State courts, the majority of which had sustained the authority of the State judiciary in such cases.

officer, he is not required to comply with the direction of the writ to produce before the court the *body* of the person so held. It is sufficient for him merely to make return showing clearly that such person is held by the authority of the United States as a deserter, or under a contract of enlistment, or otherwise, as the case may be. The State court, upon being thus apprised, will properly dismiss the writ. *R. 3, 104, June, 1863; 21, 157, Jan., 1866.*

V A 6 b (1) (*a*). Where, prior to the decision of the United States Supreme Court in Tarble's case, a State court, having issued a writ of *habeas corpus* in a case of a military prisoner, attempted to enforce a process of contempt against the officer in charge, who, though duly making a return showing that the party was detained by the authority of the United States, refused to produce his body in court, *held* that such attempt should be resisted by the officer, who should be supported in his resistance by such military force as might be necessary. *R. 3, 502, Aug., 1863; 19, 305, Dec., 1865; 21, 92, Dec., 1865.* So, where a State court, after such a return, still assumed to proceed in the case and to order the discharge of the party, here a soldier in arrest as a deserter, *held* that the execution of such order should be resisted and prevented by military force. *R. 3, 104, June, 1863; 21, 157, Jan., 1866.*

V A 6 b (1) (*b*). Where, prior to the decision in Tarble's case, an officer undergoing, in a State penitentiary, a sentence duly imposed by a court-martial, was discharged from his imprisonment by a State court and was at large, *advised* that he be forthwith rearrested and reconfined. *R. 30, 56, Dec., 1869.* So, in a case of a soldier discharged from his enlistment, on the ground of minority, by a State court, *advised* that he be arrested by the military authorities and held to service. *R. 30, 190, Mar., 1870; C. 14042, Mar. 16, 1904.*

V A 7. *Held* that where officers and enlisted men or civilians resident thereon meet with death on reservations under circumstances which can present no question of violation of State laws, there is no necessity or propriety of any inquest at all beyond an investigation by a board of officers or court of inquiry; but where an individual of one of these classes dies at a place outside the reservation limits or within such limits, in each case, as a result of criminal acts committed upon him outside the reservation, the right of the coroner to conduct an inquest to determine the nature of death is plain, and, as a matter of comity, the post commander should interpose no obstacle to holding the inquest on the reservation or to the removal of the body from the reservation for the purpose of holding an inquest elsewhere. *C. 20050, July 13, 1906.*

V A 8. *Held* that a commanding officer may in emergencies furnish guardhouse accommodations on the request of the civil authorities for the safe-keeping of civilian prisoners, provided that the men charged with the safe-keeping of the prisoners be furnished by the civil authorities, as there is no authority for the employment of troops for that purpose. *C. 25768, Nov. 9, 1909.*

V B 1. An officer returning from leave on an Army transport may lawfully be placed on duty by the commanding officer of the troops on board, but while so engaged becomes entitled to the allowances accruing to officers on duty while traveling by sea. *C. 24362, Jan. 19, 1909, and July 13, 1909.*

V B 2 a. Where an offense is committed on an Army transport by a person subject to the Articles of War, *held* that a military prosecution should be initiated at once by the preparation of charges and specifications and by notification to such person that military jurisdiction has attached. *C. 5635, Oct. 31, 1910.*

V B 2 b. Where an offense is committed on an Army transport, but in the Territorial waters of a State or organized Territory of the United States, the injured party being a civilian, not a member of the ship's company, the offender will be surrendered upon the presentation of a warrant by the proper Federal, State, or Territorial authority, and the officer serving the same will receive the necessary assistance in execution as provided in the fifty-ninth article of war. *C. 5635, Oct. 31, 1910.*

V B 2 c. When an offense amounting to a felony or a serious misdemeanor is committed by one member of a transport company against another on the high seas, neither party being subject to the Articles of War, *held*, that the offender will be confined and turned over to the proper United States court at the first port of entry, but if there be no court of the United States at such port of entry having jurisdiction over the offense committed the offender will be held in confinement on board the ship until a port is reached in which there is a court of the United States having jurisdiction over the offense committed. If, however, the offense be committed in the Territorial waters of a State or Territory, the prisoner will be turned over to the proper State or Territorial court if there be one having jurisdication over the offense. Should the offense be less serious, amounting to an infraction of the ship's discipline or a mere misdemeanor, reasonable disciplinary punishment may be imposed by the ship's master. *C. 5635, Oct. 31, 1910.*

V B 3. If warrants from a United States court and from a State or Territorial court issue in the same case the commanding officer of a transport will surrender the offender to the officer whose service is first in point of time. *Held*, however, that no officer of the Army will undertake to pass upon the sufficiency of a warrant issued by a court of the United States or by a State or Territory, as such question is for judicial rather than executive determination. *C. 5635, Oct. 31, 1910.*

V B 4. A transport quartermaster, not serving by detail as an officer of the Quartermaster's Department, succeeds to the command of troops on board such transport, in the operation of the one hundred and twenty-second article of war, if he is the senior officer of the line present; otherwise, however, if he has been detailed for service in the Quartermaster's Department, as in the operation of section 36 of the act of February 2, 1901 (31 Stat., 757), he becomes, for the time being, a staff officer, and as such is not entitled to exercise command in the operation of the one hundred and twenty-second article of war. *C. 17508, Nov. 27, 1906.*

V B 5. A captain in the line of the Army, serving by appointment as assistant chief of the Philippines Constabulary, with the temporary rank of colonel, while entitled to the benefits and privileges which attach to military rank, is not entitled to assume, and may not lawfully be assigned to, the command of the troops on an Army transport upon which he is traveling as a passenger; such a captain having the rank and pay of colonel in the operation of the act of January 30, 1903 (32 Stat., 783), and not being a colonel in the line of the Army,

his right to exercise command as such being measured by the requirements of the act of January 30, 1903. *C. 17508, Feb. 15, 1905.*

V C 1 a. The authority to "appoint" regimental staff officers, conferred upon regimental commanders by the Army Regulations, is no part of the constitutional appointing power, but is merely an authority to select and detail. As such it may be regulated by orders from the War Department, where desirable to prevent its being so exercised as to prejudice the interests of the service. Thus, it is competent for the Secretary of War to direct by general order that such appointments shall not be dated back so as to take effect as of dates prior to those on which they were actually made, as also that appointees shall not become entitled to the additional pay for a period prior to their entering upon their duties.[1] *R. 41, 609, July, 1879; 42, 567, Apr., 1880.*

V C 1 b. The Army Regulations confer upon battalion commanders the right to recommend officers for appointment to vacancies in the battalion staff. The regimental commander is bound to consider these recommendations in making such appointments. *Held,* that such appointment is not a mere ratification of the act of a subordinate. *Held,* also, that the regimental commander is not deprived, however, of all discretion in the matter. He may, for certain public reasons, disapprove a recommendation and require a new one to be submitted. The fact that the officer recommended is attached to another battalion will not of itself exclude him from the field of recommendation or appointment. *C. 13292, Sept. 16, 1902; 9052, Nov. 23, 1906.*

V C 1 c. A regimental commander is not obliged by army regulations, to appoint to be sergeants or corporals of companies, the soldiers recommended to him for such appointments by the company commanders. He is to be regarded as vested with a discretion in the matter, and though in the great majority of instances he will properly appoint as recommended, he may, and should, decline to appoint where he believes the nominee to be an unfit person. *R. 27, 159, Sept., 1868.*

V C 2. *Held* that a regimental commander is without authority to reduce a company noncommissioned officer without the recommendation of the company commander. *C. 10056, Mar. 27, 1901.*

VI A 1. The custom of the service for nearly a century has recognized the right of a company or detachment commander to delegate to a noncommissioned officer the right to confine an enlisted man or to place him in arrest in quarters where it is impossible to obtain the prior order of the company commander or other proper superior, provided the case be immediately reported to the proper commander, who, if the enlisted man is to remain in confinement or under arrest, must confirm the act of the noncommissioned officer and adopt it as his own. *Held* that the delegation of authority in this instance to noncommissioned officers is not based upon the positive grant of authority contained in the twenty-fourth article of war. *C. 18878, Dec. 9, 1905.*

---

[1] See the subsequent G. O., 73, Hdqrs. of Army, 1879, in accordance with this opinion.

VI A 2. Extract from an indorsement of the Judge Advocate General, in submitting to the Secretary of War a communication (concurred in by the Judge Advocate General) from Brig. Gen. E. O. C. Ord, commanding Department of Texas.

"Though I am aware of no law *in terms* prohibiting a company commander from delegating to a noncommissioned officer so important a part of his authority and duty as the entertaining in the first instance of the complaints and requests of the men of the company, I can but consider such a delegation to be at variance with the principle and system of our military organization. Further, such a practice, as it appears to me, must tend to render commissioned officers negligent and irresponsible, and noncommissioned officers arbitrary and overbearing. Indeed I can conceive of nothing that would sooner spoil a good sergeant than to place him in a position to determine at his discretion whether the complaints of his inferiors should be entertained by his superior, and to color them at will when transmitted. Thus, though the practice may, in some instances, have been found convenient and innocuous, its effect in general must, I think, be prejudicial to the best interests of the service." [1] *R. 42, 273, May, 1879.*

VI B. *Held* that a company commander can not legally force a soldier to deposit with the paymaster, nor can he, without the soldier's consent, deposit private money of the soldier which is in the company commander's possession. *R. 39, 471, Mar. 4, 1878.*

VI C. A soldier deposited with his company commander a sum of money for safe-keeping. Upon being relieved from duty the company commander, without the authority, expressed or implied, of the soldier, transferred the money to his successor in command. *Held* that the deposit of the money by the soldier with his company commander constituted a bailment and probably something more than a gratuitous one. But considering the bailment as a gratuitous one only, the action of the bailee in delivering the money without authority to an unauthorized person, even though the delivery was not with a wrongful intent, constituted a conversion of the funds, and the company commander to whom the money was delivered by the soldier would continue liable for the money. *Held* also that as the soldier was in the post at the time the company commander was relieved from duty, the action of the company commander in turning the money over to his successor was not a prudent act such as one in the exercise of reasonable care and precaution would have resorted to. *C. 14332, Mar. 9, 1903.*

VII A. By an order of the President, of 1892, a special command, independently of any department commander, of all troops on escort duty with the International Boundary Commission, was devolved upon a lieutenant colonel of engineers. *Held* that his order, requiring travel on duty by an officer of the command, entitled such officer to the usual *travel allowances*, equally as would a similar order issued by a department commander. *P. 57, 357, Jan., 1893.*

[1] Compare remarks of reviewing officer in G. C. M. O., 26, Dept. of the Columbia, 1879; do. 2, id., 1880.

CROSS REFERENCES.

Authority to order a court.....See ARTICLES OF WAR LXXII A.
Chief and assistant chief of Philippine Constabulary.....See TERRITORIES IV B 2 a.
Commander in Chief.....See ARMY II I 2.
General court-martial.....See DISCIPLINE IX N 2.
General Staff.....See ARMY I G 3 a (1) (*a*).
Joint encampment.....See ARTICLES OF WAR CXXII B.
Neglect to assume.....See ARTICLES OF WAR LXII D.
Officer under sentence.....See PARDON XV D 1.
Power to convene courts-martial.....See DISCIPLINE XV I 1.
Right to require officer to submit list of debts..See PRIVATE DEBTS VII.
Suspension from.....See DISCIPLINE XII B 3 f (3) (*a*).
Transport.....See ARTICLES OF WAR CXXII A.

COMMANDER IN CHIEF.

See ARMY I A to B.
Appointing power.....See OFFICE II to IV; V A to B.
Approval of sentence.....See DISCIPLINE XIV E 3.
Assignment by to command.....See COMMAND I a 1; III A to D.
Can not create office.....See OFFICE II to III.
Command by.....See ARMY II I 2.
Convening authority.....See DISCIPLINE III B to C.
Court of inquiry, ordered.....See ARTICLES OF WAR CXV A; B; CXIX A; B; CXXI A.
Cuba, intervention in.....See WAR I C 8 c (1) to (2).
Delegation of right to command.....See COMMAND I A.
Deserters dropped.....See DESERTION XX D; E; F.
Disbandment of Volunteer Army.....See ENLISTMENT I B 2 e.
Discharge by.....See DISCHARGE XX A to F.
Evidence of how taken.....See DISCIPLINE X D 1.
Examining board, action on.....See RETIREMENT I B 6 e to g.
Execution of the law.....See ARMY II B.
Habeas corpus, suspension of.....See WAR I C 12
Martial law.....See WAR I E 1 to 2.
Medals of honor awarded by.....See INSIGNIA OF MERIT I A to B.
Military contribution ordered.....See WAR I C 6 f (1).
Military reservations.....See PUBLIC DOMAIN III F 3.
Militia called forth.....See MILITIA I to II.
Orders by.....See COMMUNICATIONS I A 1.
Pardon by.....See ARTICLES OF WAR, CXII A to E. PARDON I A; A 1; B 1; III to IV.
Philippines, order in.....See ARMY II G 2 a; a (1).
Receipts for property, directions as to.....See CLAIMS VII B 5.
Reduction of Army at end of war.....See DISCHARGE IX A.
Regulations by.....See LAWS II A 1; 1 b; 1 f; g; g (1).
Retiring board, action on.....See RETIREMENT I B 3 to 4.
Reviewing authority.....See ARTICLES OF WAR CVII A; CXI A. DISCIPLINE XIV H to I.
Revocation of proclamation.....See WAR I C 12 a.
Riots.....See ARMY II I to K.
Summary dismissal of officer.....See OFFICE IV E 2 to 3.
Suspension of proclamation.....See WAR I E 1 e.
Uniform of Army.....See INSIGNIA OF MERIT III B 1.
Use of troops in Indian country.....See ARMY II C.
Usury, control over.....See ARTICLES OF WAR LXII C 15.
Volunteer Army, raising of.....See VOLUNTEER ARMY I A.

COMMANDING GENERAL.

Martial law.....See WAR I E 1 c to d.
Neutrality.....See ARMY II K to III.
Riot.....See ARMY II I to K.
War.....See WAR I C 8 a (2) to (3).
War correspondents.....See WAR I G 1.

COMMANDING OFFICER.

See COMMAND V to VI.
See ARTICLES OF WAR LXV B.
Arrest by.....See DISCIPLINE I D 1.
Assault on.....See ARTICLES OF WAR XCVII A.
Confinement of retired soldier by.....See RETIREMENT II B 3 a; b.
Counsel for accused.....See DISCIPLINE V G 3.
Court of inquiry.....See ARTICLES OF WAR CXV A; B; CXIX A; B; CXXI A.
Discharge by.....See DISCHARGE XIV A 3.
Disrespect to.....See DISCIPLINE II D 17 a.
Duty in case of homicide.....See ARTICLES OF WAR CII H 1.
Forwards charges.....See DISCIPLINE II G 1.
Liquor: decides whether intoxicating.....See INTOXICANTS II B.
Liquor: prevents introduction into Indian country.....See INTOXICANTS III C to D.
Riot.....See ARMY II D.
Squatters on reservation.....See PUBLIC PROPERTY II B 3 a; III H to I.
Subpœnas.....See DISCIPLINE X F 1; 2.
Taxes: duty in connection with.....See ARMY I B 11.
Uniform: duty to protect dignity of.....See UNIFORM I B 1 a.
Waste products, abandoned property, etc.: disposition of.....See PUBLIC PROPERTY I to II.
Witnesses.....See DISCIPLINE X D.
Writ of replevin.....See ARMY II K 1 e (2).

COMMISSARY SERGEANT.

Appointment of.....See ARMY I E 2 a.

COMMISSION.

Of officer.....See DISCHARGE II A 1.
To medical reserve officer.....See ARMY I G 3 d (3) (*b*); (*c*) [4].

COMMUNICATIONS.

I. ORDERS.
A. WAR DEPARTMENT.
1. Are orders of the President..... *Page 276*
B. BECOME OPERATIVE WHEN?
1. Rule of notice.
a. General and special orders.
2. At future designated time..... *Page 277*
C. ASSIGNING OFFICER TO DUTY IN LIEU OF ANOTHER RELIEVES THAT OTHER.
D. NUNC PRO TUNC ORDERS MAY NOT BE ISSUED.
II. LETTERS, ETC.
A. PENALTY ENVELOPES.
1. "Penalty for private use, $300," sufficient..... *Page 278*
2. May be used in discharge of official duty.
a. May be inclosed for use with return official letter.
b. Can not be inclosed for return of signed vouchers.
3. May be used by recruiting officer.
4. Used by State adjutants general.
III. TELEGRAMS.
A. RECOMMENDING EXTENSION OF FURLOUGH MAY BE PUBLIC BUSINESS.
IV. CHANNELS.
A. MILITARY. (See Army Regulations.)
B. NONMILITARY.
1. Used to reach War Department..... *Page 279*
2. Used in correspondence with congressional committee.

I A 1. General or special orders relating to the Army, issued from the War Department by the Secretary of War or by his direction, are to be presumed to be made by the authority of the President, and to be viewed as his orders equally as if he had subscribed the same. *R. 8, 297, Apr., 1864.*

I B 1. An order becomes operative, and a military person chargeable with notice of it, when it is shown that an order has been forwarded in the regular way to an officer's regiment, in which case it will be presumed, unless there is something to indicate the contrary, that it reached its destination, and also that it was delivered to the officer unless he was absent from his regiment; and if the officer is absent without authority, the receipt of the order at his proper station is held to be a constructive delivery to him. *R. 12, 230, Jan., 1865; 13, 284 and 335, Jan., 1865; 19, 696, Oct., 1866; 22, 506, Dec., 1866; 28, 423, and 426, Mar., 1869; 30, 481, July, 1870; 31, 327, Apr., 1871; 34, 364, July, 1873; P. 49, 91, 176, Sept., 1891; 65, 289, June, 1894. C. 1289, Apr. 24, 1895.*

I B 1 a. An order affecting a military person becomes operative as to such person when he has received military notice of its existence and contents; that is, if the order be general in character, it becomes operative when it has been formally promulgated to the command to which it pertains; if it be special or individual in its operation, it becomes effective when it has been served upon or received by such person through the usual military channels.[1] It may be regarded as an established practice in our service that the date of receipt of a general order by a command is the date on which it takes effect as to that command. It is not necessary to go further and attempt to trace the general order to each individual. Such a general order is not unlike a statute of general character in that it puts forth a binding general rule of action, intended for the guidance of a whole community, and when no other date is indicated, the date of the order is the date when it takes effect;[2] but the custom of the service (established practice) which it must be remembered has the force of law[3] modifies this to the extent stated above, but to that extent only. This custom of the service is a modification of the principle that no military person can plead ignorance of military law (including regulations), and were it not for this modification the principle in all its severity would be legally applicable. When the date of the receipt of the general order by the command can not be ascertained, the only fixed date that there is, namely, the date of the order, should be taken as the date when it took effect, particularly in cases where the general orders affect the military history of soldiers in the past and a fact of that past history is to be determined; but a soldier can not be held criminally responsible under a general order after its date, but before knowledge of it could have

[1] Davis's Military Law, 382.

[2] This refers to the rule that, except when otherwise provided by Constitution or statute, a statute takes effect on its passage, as in the case of an act of Congress.

[3] 84th A. W.; Winthrop Military L. & P. 42, 438; Davis's Military Law, 10; De Hart, 164; Benét, 119.

In the Regulations for the British Army it is laid down that "ignorance of published orders will never be admitted as an excuse for their nonobservance"; but in that service the regulations in reference to the promulgation of orders are more specific than ours. They require, among other things, that all orders specially relating to the soldiers are to be read and explained to them immediately after such orders are received and those of an important nature are to be read to them on three successive parades.

reached the command to which he belonged. *C. 8962, Sept., 1900; 13962, Jan. 29, 1903.*

I B 2. It is the established practice of the department to issue orders detailing officers for duty, which are to become operative at a future date; *held*, that such an order does not operate to detach the officer from his organization or post of duty until it becomes time for him to start for his new post in order to comply with the order. *C. 22176, Oct. 4, 1907.*

I C. An order from the War Department assigning a certain officer to a duty (acting judge advocate) in lieu of another named, relieves the latter and his detail ends with the date of such assignment. That the commander of the department in which he was serving omits at the time to issue the usual order relieving him does not affect his status, or entitle him to be paid, as of the special rank of the detail up to a subsequent date when the department commander did actually issue such an order. He was relieved *in fact* by the original order of assignment of a successor when the latter entered upon the duty under the order. *P. 52, 499, Mar., 1892.*

I D. An order can not create a fact to-day and carry it back to some date, and there set it up as a fact occurring on that date, whereas in reality no such fact then occurred. But care should be taken to distinguish between such an impossibility and a legally retroactive executive order or regulation, as when a thing is done without the approval of the Secretary of War, his approval being required, and he subsequently ratifies the thing done.[1] Between such action as this and the attempt to manufacture a fact as happening in the past it is important but not difficult to distinguish. Thus all orders in the cases of officers and enlisted men, which purport to make appointments, acceptances

[1] This is certainly correct, but it would be well to notice that the instance of a legal ratification which is given does not cover the whole subject. There are acts which neither statute nor regulation authorizes an officer to do subject to the approval of a higher authority, but which, when done by him, may be validated by ratification; and it would probably be useful to determine what kind of acts these are.

The principal rule to be laid down in this regard would seem to be that the act must be one power to do which the higher authority might legally delegate to the inferior at the time of the ratification and might have delegated at the time the act was done. If the superior authority could not thus delegate the power he could not ratify the act. He could not ratify an act which he had no authority to do himself; thus, he could not ratify an act violating a law. And another restriction arises out of the character of the act, whether ministerial or judicial or discretionary. Judicial power and also such power as is by law intrusted to the discretion of the superior authority can not be delegated by him to another, nor can he ratify such an act when done by the other. Such at least would seem to be the strict rule in the relation of the superior officer and subordinate. As stated by Mechem (Mechem on Public Officers, sec. 567):

"In those cases in which the proper execution of the office requires, on the part of the officer, the exercise of judgment or discretion, the presumption is that he was chosen because he was deemed fit and competent to exercise that judgment and discretion, and, unless power to substitute another in his place has been given to him, he can not delegate his duties to another." And the same author says (sec. 529):

"It is, therefore, the general rule that one may ratify the previous unauthorized doings by another in his behalf, of any act and of that only which he might then and could still lawfully do himself, and which he might then and could still lawfully delegate to such other to be done."

Whether the foregoing can, in all strictness, be applied to military relations, I am not entirely prepared to say. Theoretically it is, I think, correct, but I believe that it has not been very closely adhered to in practice. The performance of acts of a purely ministerial or executive nature can always be delegated or ratified, unless expressly prohibited or the power is expressly exclusively vested in the superior. (Note by Judge Advocate General to opinion of Sept. 14, 1900, *C. 8962, supra.*)

of resignations, discharges from the service, or muster-out of service date from, or take effect from, dates prior to the issuance of the orders therefor, are instances of the attempts referred to and are illegal. *C. 8962, Sept., 1900.*

II A 1. *Held* that the words "penalty for private use—$300," printed upon an official envelope, constituted a sufficient "statement" under the act of July 5, 1884 (23 Stat., 158), which provides simply that the envelopes shall "bear a statement of the penalty for their misuse." *P. 60, 425, July, 1893; C. 11337, Nov. 12, 1907.*

II A 2. If the matter of carrying on correspondence becomes the official duty of a public officer and he conducts it in the discharge of that official duty, he is entitled to use the penalty envelope; otherwise he would not be. *C. 276, Sept., 1894.*

II A 2 **a.** The law regarding the use of penalty envelopes (act of Mar. 3, 1877, c. 103, s. 5 and 6, and the act of July 5, 1884, c. 234, s. 3) restricts the use of such envelopes, for the free transmission of inclosures, to "officers of the United States Government"; *except* that in the latter act it is provided "that any department or officer authorized to use penalty envelopes may inclose them, with return address, to any person or persons from or through whom official information is desired, the same to cover such official information and indorsements relating thereto." *C. 6236, Apr., 1899. Held* therefore that the authorities of a college, etc., where an officer of the Army is on duty under section 1225, R. S., are not authorized to *initiate* the use of the penalty envelope for the transmission of official papers pertaining to the military department thereof, but may legally transmit the same to the proper department of the Government in penalty envelopes previously furnished to them by the department for the purpose. *C. 729, Dec., 1894.*

II A 2 **b.** *Held* that penalty envelopes can not be inclosed by an officer in a letter to contractor for use in returning signed vouchers. *C. 20371, Jan. 23, 1907, and June 22, 1907.*

II A 3. *Held* that recruiting officers may legally use the penalty envelope for the transmission to private persons of circulars, letters, etc., giving information with regard to enlistment in the military service, and may also when verifying, by letter, an applicant's character inclose a penalty envelope to cover the information sought. *C. 1593, July, 1895.*

II A 4. When matters pertaining to the muster in of United States volunteers "relate exclusively to the business of the Government of the United States," adjutants general of the respective States assisting in such muster in may legally use the penalty envelope in their correspondence to the extent stated, but any person using it must decide for himself whether in the particular case it may legally be used, having in mind his criminal liability for a misuse thereof. *C. 4610, Jan., 1898; 6173, Apr., 1899; 7351, Nov., 1899.*

III A. A post commander requested authority by telegraph to extend a furlough granted by him to an enlisted man; *held*, that such a dispatch did not come within the prohibition of (paragraph 1203) Army Regulations (of 1910) as it related to the public business and did not originate with the beneficiary of the furlough. *C. 23362, June 4, 1908.*

IV B 1. An officer attempted to influence the action of the War Department through channels otherwise than military. *Held* that his action was a violation of Army Regulations and of the Executive order of July 7, 1905. (G. O. 112, W. D., 1905), and that a proper notation should be entered on his efficiency record. *C. 24509, Feb. 17, 1909.*

IV B 2. *Held* that in reply to a request from a committee of Congress an officer stationed outside of Washington can furnish information direct to such committee, but that an officer stationed in Washington must forward such reply through military channels. *C. 28796, Aug. 3, 1911.*

CROSS REFERENCE.

Confidential.....See ARMY I G 3 a (3); (4) (*a*) [2].
Convening order.....See DISCIPLINE III G 1; XIII B; XV E 8.
Evidence of.....See DISCIPLINE XI A 17 a to b.
Illegal convening order.....See DISCIPLINE XV H 1 to 3.
Militia.....See MILITIA XIV to XV.
Order for revision.....See DISCIPLINE IX N 2.
Privileged.....See DISCIPLINE XI A 5.
Promulgating order.....See DISCIPLINE XIV F 1 to 3.

COMMUTATION OF QUARTERS.

See PAY AND ALLOWANCES II A 2 b to c.
Absent.....See ABSENCE I B 1 n.
Heat and light allowance.....See PAY AND ALLOWANCES II A 1 e (3); (6); d (2).
Promotion.....See PAY AND ALLOWANCES II A 1 c (5).
State disbursing officer.....See MILITIA VI B 1 e (1).
Traveling on duty.....See PAY AND ALLOWANCES II A 2 b (3).

COMMUTATION OF RATIONS.

See ABSENCE I C 4 e (1).
Fixing of rates.....See PAY AND ALLOWANCES II A 3 b to c.
Forfeiture of, by deserter.....See DESERTION V D 3 to E 6.
With heat and light.....See PAY AND ALLOWANCES II A 1 b (2).

COMMUTATION OF SENTENCE.

Dismissal: Effect of on pay.....See PAY AND ALLOWANCES III F 1. DISCIPLINE VIII D 1 c (1).
Notice of.....See DISCHARGE XIII D 5.
Operates when.....See PAY AND ALLOWANCES III C 1 b.
Power of.....See ARTICLES OF WAR CXII A to E.
Unauthorized.....See DISCIPLINE XIV E 9 a (17); b (1).

COMPANY.

Unincorporated, bonds of.....See BONDS I H to I.

COMPANY COMMANDER.

Appointments recommended.....See COMMAND V C 1 c.
Appointment of noncommissioned officers.See RANK I D to E.
Apprehended deserter, how taken up.....See DESERTION VII A 1; XII B.
Barber shops, billiard and pool tables authorized.See GOVERNMENT AGENCIES VII.
Character on soldier's discharge.....See DISCHARGE XI A to C 1.
Clothing to apprehended deserter.....See PAY AND ALLOWANCES II A 3 a (4) (*c*).
Death of soldier.....See ARTICLES OF WAR CXXVI A.
Deserter not discharged.....See DESERTION XV F.
Desertion by soldier.....See DESERTION V F 15.
Delegation of authority.....See COMMAND VI A 1 a; 1 b.
DISCIPLINE I E 1.
Exceeds authority.....See COMMAND VI B.
First sergeant, detail of.....See ARMY I E 1 b.
Objection to reenlistment.....See DISCHARGE XI C 1.
Punishments by.....See DISCIPLINE XVII A 1.
Recommendation for certificate of merit.....See INSIGNIA OF MERIT II B.
Reduction of noncommissioned officers.....See COMMAND V C 2.
Unauthorized punishment by.....See DISCIPLINE XVII B 1 e.
Waste products, abandoned property, etc.....See PUBLIC MONEY I to II.

COMPANY FUND.

See GOVERNMENT AGENCIES.
Cooks paid from.....See PAY AND ALLOWANCES I C 6 b (4).
Forced contributions to.....See DISCIPLINE XVII B 1 e.
Indebtedness to.....See DESERTION XIV F.
Salvage paid into.....See CLAIMS VI D.
Stoppage of officer's pay, to reimburse.....See PAY AND ALLOWANCES III B 7 to 8.

COMPANY TAILOR.

Debts to.....See ARTICLES OF WAR XXI B 1.

COMPETITION.

When useless.....See CONTRACTS VII G to H.

COMPTROLLER OF THE TREASURY.

Views of.....See CIVIL AUTHORITIES II a.

CONCERTS.

By Army band.....See ARMY BANDS I C 1.

CONCURRENT JURISDICTION.

See ARTICLES OF WAR, LVIII A.
See PUBLIC PROPERTY V C 1 to D; E 1 a.

CONDEMNATION.

Land.....See PUBLIC PROPERTY II A 4 to 5; IV A 1. a (1).
Military stores.....See PUBLIC PROPERTY IX A 2 a to b.
Money, deposit of.....See PUBLIC PROPERTY II A 6 d.

CONDEMNED PROPERTY.

Disposition of.....See MILITIA IX G.

CONFESSION.

Evidence of.....See DISCIPLINE XI A 7 a; b.

CONFINEMENT.

See DISCIPLINE XVII A 4 a to i.
At date of discharge.....See ENLISTMENT I D 3 c (17).
Considered in imposing sentence.....See DISCIPLINE XII B. 3 g (4).
Discharge while in.....See DISCHARGE III D.
Escape from.....See DESERTION I C 1.
For contempt of court.....See ARTICLES OF WAR, LXXXVI B 1 a.
For serious offenses only.....See ARTICLES OF WAR, LXVI A.
Honest and faithful service while in.....See ENLISTMENT I D 3 c (1).
Notice of discharge.....See DISCHARGE XIII D 6 a; b.
Retired soldier.....See RETIREMENT II B 3 b.
Sentence to.....See DISCIPLINE XII B g (1) to (4).
Several penalties of.....See ARTICLES OF WAR, LXXXIII C; C 2.
Two sentences.....See DISCHARGE IV E.

CONGRESS.

Communication with, by officer.....See COMMUNICATIONS IV B 2.
Creates office.....See OFFICE II to III.
Nunc pro tunc appointments authorized....See PAY AND ALLOWANCES I B 1 a.
Pardoning power no control over.....See PARDON I B; B 1.
Public property, disposal of.....See PUBLIC PROPERTY I; I A; A 1.
WAR I C 6 c (3) (*b*).
Right of way.....See PUBLIC PROPERTY VI B to C.

CONGRESSIONAL MEDAL.

See INSIGNIA OF MERIT I E.

CONGRESSMEN.

Appointment of cadets.....See ARMY I D 1 to 2.
Purchase of supplies from.....See CONTRACTS XV to XVI.
Remarks by, during debates.....See LAWS I B 6.

CONSCRIPTION.

Of militia.....See MILITIA I C.

CONSTITUTIONAL APPOINTING POWER.

See OFFICE II to VI.
Not exercised by regimental commander.....See COMMAND V C 1 a.

CONSTRUCTIVE DISCHARGE.

See DISCHARGE VIII A.

CONSTRUCTIVE ENLISTMENT.

See ENLISTMENT I A 3 to 4.

CONSTRUCTIVE MUSTER IN.

See VOLUNTEER ARMY II B 1 d to e; 2 a (1).

CONSTRUCTIVE NOTICE.

Of acceptance of resignation.....See OFFICE IV D 5 c (1).
Of discharge.....See DISCHARGE XIII D 1.

CONSTRUCTIVE PARDON.

See PARDON XV to XVI.
See ABSENCE II B 7.
By restoration to duty without trial.....See DESERTION IX N; XV D.

CONSULAR SERVICE.

Employment of United States civilian employee in.....See CIVILIAN EMPLOYEES VI A.
Exterritoriality as to transports.....See ARMY I G 3 b (2) (*a*) [3] [*g*].
Officer of, designated to cause deposition to be taken.....See ARTICLES OF WAR XCI D.

CONTAGION.

Destruction of property to prevent.....See PAY AND ALLOWANCES II A 3 a (*d*) to (*e*).

CONTEMPT OF COURT.

See ARTICLES OF WAR LXXXVI A to B 1 b.
See DISCIPLINE X G 1.
Of civil court.....See ARMY I E 5.
See PRIVATE DEBTS IX.
Punishment for.....See DISCIPLINE VII A; C 2.

CONTINGENCIES OF THE ARMY.

See DISCIPLINE X F 1; 2.
See CIVIL AUTHORITIES I B 1.
Appropriations for.....See APPROPRIATIONS XXIV.
Civilian messenger, payment of.....See ARMY II K 1 f (1).
Claims, not available to pay certain.....See CLAIMS IV.
Reward paid from.....See DESERTION V B 1 a to d.

CONTINGENCIES OF THE WAR DEPARTMENT.

Appropriations for.....See APPROPRIATIONS XXIII.

CONTINGENT INCAPACITY.

Can not be retired for.....See RETIREMENT I B 1 b (1) (*b*).

CONTINUANCE OF COURT-MARTIAL.

See ARTICLES OF WAR XCIII A 1; 2.

CONTINUING PUNISHMENT.

Incapacity to hold office.....See PARDON XVI A 1.
Pardon of.....See PARDON IV to V.

CONTINUOUS SERVICE.

See ABSENCE II B 9.
Affected by acceptance for reenlistment.....See ENLISTMENT I A 8 b; c.
During fradulent enlistment.....See ENLISTMENT I A 9 o.
Pay.....See PAY AND ALLOWANCES I C 5 to 6.

CONTRABAND.

Seizing of, to preserve neutrality.....See ARMY II K 1 e to f.

CONTRACTS.[1]

I. PARTIES TO CONTRACTS AND SIGNING OF CONTRACTS.
A. THE UNITED STATES.
1. Where name of contracting officer recited in body of contact varies from name actually signed ..... *Page 291*
2. Where Congress imposes upon certain named officials duty of making contract, such duty can not be delegated.. *Page 292*
B. THE CONTRACTOR.
1. Where individual conducts business under company named contract and bond should be in name of individual.
2. Assignees and executors should execute contract in their own name not in name of assignor or testator.
3. No objection to an executor being a party to a contract.
4. A Government agency or instrumentality may contract with the Government.
II. CONTRACT WITH PUBLIC OFFICER IN HIS OFFICIAL CAPACITY DOES NOT BIND HIM PERSONALLY..... *Page 293*
III. SCOPE AND PURPOSE OF SECTION 3709, REVISED STATUTES, WHICH REQUIRES ADVERTISING.
A. IN GENERAL.
B. PERFORMANCE OF WORK BY HIRED LABORERS ..... *Page 294*
C. NOT ILLEGAL TO LIMIT BIDS TO CERTAIN SPECIAL MAKE OF APPARATUS.
D. SUFFICIENCY OF DESCRIPTION IN ADVERTISEMENT.
IV. OTHER ACTS THAT REQUIRE ADVERTISING.
A. ACT OF MARCH 2, 1901 ..... *Page 295*
B. ACT OF JUNE 17, 1910.
V. SECTION 3828, REVISED STATUTES, FORBIDDING ADVERTISEMENTS FOR EXECUTIVE DEPARTMENTS EXCEPT BY AUTHORITY OF HEAD OF DEPARTMENT.
A. WRITTEN AUTHORITY MUST PRECEDE PUBLICATION.
B. DOES NOT APPLY TO CALIFORNIA DÉBRIS COMMISSION.. *Page 296*
VI. BIDS AND BIDDERS.
A. IN GENERAL WHO IS LOWEST BIDDER ..... *Page 297*
B. LOWEST RESPONSIBLE BIDDER FOR PRINTING UNDER ACT OF JUNE 30, 1886..... *Page 298*
C. WHERE BIDDER DEFAULTS CONTRACT WITH "SOME OTHER PERSON" AND LOSS CHARGED TO GUARANTORS.
D. CONTRACT VOID IF NOT MADE WITH LOWEST RESPONSIBLE BIDDER UNDER ACT OF JULY 5, 1884.
E. BIDS RECEIVED AFTER HOUR FOR OPENING BIDS ..... *Page 299*

[1] Prepared by Maj. H. M. Morrow, judge advocate, assistant to Judge Advocate General.

VI. BIDS AND BIDDERS—Continued.
F. Letter Accompanying Bid Considered Part of it... *Page 300*
G. Failure to Sign.
H. Verbal Authority to Sign Bidder's Name to Bid is Sufficient.
I. Requirements of Advertisements that May be Waived.
J. Rejection of Bids.
1. Readvertisement equivalent to rejection of all bids not before accepted..... *Page 301*
2. Acceptance of one bid constitutes rejection of all others.
3. Where all bids rejected all guarantors released ..... *Page 302*
4. For fraud, collusion, etc.
5. Under General Order 167, War Department, 1905, for unjustifiable failure to fill former contract ..... *Page 303*
6. Where bidder interested in more than one bid.
7. Where contract executed, it can not be canceled on account of failure to perform previous contract.
K. Bidder Can Not Demand Prices of Other Bids.
L. Variance Between Advertisement and Bid.
M. Variance Between Acceptance and Bid ..... *Page 304*
N. Bidders Can Not Make Material Amendment to Bid After Bids Have Been Opened..... *Page 305*
O. Instances as to Whether Bid Is for All or Part Only of the Articles or Quantity.
VII. EXCEPTIONS TO THE RULE REQUIRING ADVERTISING.
A. Where There Is an Exigency Under Section 3709 Revised Statutes.
1. What constitutes an exigency..... *Page 306*
2. Who can determine whether exigency exists.
B. Where Supplies or Services Are Not Under a "Department" Under Section 3709, Revised Statutes..... *Page 307*
C. Where Subject of Contract Is Not "Supplies" Under Section 3709, Revised Statutes..... *Page 308*
D. Where Subject of Contract Is "Personal Services" Under Section 3709, Revised Statutes.
E. Where the Aggregate Amount Does Not Exceed $500 Under Act of June 12, 1906.
1. The act of June 12, 1906, in general..... *Page 309*
2. Does not apply to river and harbor improvements and other civil work of nonmilitary character.
3. War College is branch of "Army Service."
4. When aggregate does not exceed $500 not necessary to advertise or make written contract as required by section 3744, Revised Statutes.
5. Meaning of purchases "in open market."
F. Where Statute Provides Work May Be Done "by Contract or Otherwise."
1. Under the act of August 11, 1888, relating to river and harbor improvements.
2. Under the act of March 3, 1905, relating to improvements at West Point..... *Page 310*
G. Where Competition Would Be Useless.
1. Patented and copyrighted articles..... *Page 311*
2. Obtaining of rare maps.
3. Miscellaneous instances.

VII. EXCEPTIONS TO THE RULE REQUIRING ADVERTISING—Con.
H. Where Previous Advertisement Is Without Result.
I. Where the Purchase Is from Another Executive Department or Bureau, or From a Governmental Agency Such as a Post Exchange, Post Laundry, etc ..... *Page 312*
J. Where Additional Work is Required as "Extras" or Under a Supplemental Contract.
1. If contract still in existence there may be a supplemental contract, but not if contract has been canceled or annulled.
2. Where contract provides for additional time, such time may be granted by a mere letter..... *Page 313*
3. Supplemental contract must be confined to subject of original contract..... *Page 314*
4. Illustrations of supplemental contract..... *Page 317*
5. General character of an "extra"..... *Page 320*
6. Illustrations of "extras."
7. "Extras" where contract requires approval before performance of work..... *Page 321*
8. Supplemental contract must not be against interest of United States. Illustrations of the nature of the consideration which will make a supplemental contract in the interest of the United States..... *Page 322*
9. Even after expiration of time limit extension of contract may be made to specific date by supplemental contract. *Page 324*
10. Even after waiver of time limit partial payments may be made in accordance with contract.
11. Instances that do not constitute an extension of the time for completing the contract.
12. Contract gives subordinate power to decide a certain matter, his discretion can not be controlled by superior... *Page 325*
VIII. CONTRACTOR NOT RELEASED FROM CONTRACT WHEN RELEASE WOULD BE AGAINST INTEREST OF UNITED STATES... *Page 326*
IX. MISTAKE AS GROUND FOR RELEASING BIDDER OR FOR NONPERFORMANCE OF CONTRACT.
A. Mistakes That Release Bidder..... *Page 328*
B. Sale by Sample and Description, Mistake as to Sample. *Page 332*
C. Mistake Ground for Nonperformance of Contract... *Page 333*
X. MISCELLANEOUS GROUNDS FOR NONPERFORMANCE OF CONTRACT.
A. Variance Between Contract and Requirement of Officer in Charge.
B. Difficulty of Performing an Unconditional Contract not an Excuse..... *Page 334*
C. Act of God is an Excuse..... *Page 335*
D. Injunction against Contractor not an Excuse.
E. Bankruptcy of Contractor not an Excuse.
XI. LIABILITY OF BIDDERS AND GUARANTORS—CERTIFIED CHECKS, ETC.
A. Withdrawal after Opening, before Acceptance—Changes in Guaranty.
B. Withdrawal before Opening—Partial Withdrawal.. *Page 336*
C. Withdrawal after Acceptance..... *Page 337*

XI. LIABILITY OF BIDDERS, ETC.—Continued.
D. Guarantors' Liability Strictly Construed.
1. Where bidder dies within time limit, estate not bound.
2. Notice called for in guaranty must be actual.
3. Acceptance after expiration of time limit not binding on guarantors.
E. "Blanket" and "General" Guaranties Legal..... *Page 338*
F. Regulation Requiring Guaranties may be Waived.
G. Omission to File Guaranty not Cured by Filing Bond after Opening.
H. Where Guaranty is not Required by Instructions.
I. Certified Check Substantial Compliance with Requirement for Guaranty.
J. Certified Check, Bidder not Liable beyond Amount. *Page 339*
K. Where Certified Check was to be Retained to Secure Contract, should be Cashed and Suit Instituted for Balance of Loss.
L. Cash Deposited to Secure Contract Applied to Complete Work, Balance, if any, Returned to Contractor.
XII. ADVANCES OF PUBLIC MONEY—SECTION 3648, REVISED STATUTES.
A. Rent may be Paid in Advance.
XIII. CONTRACTS AND EXPENDITURES IN EXCESS OF APPROPRIATIONS.
A. Section 3679, R. S.—Fiscal-Year Contracts, etc..... *Page 340*
B. Section 3679, R. S., as Amended March 3, 1905..... *Page 341*
C. Section 3732, Revised Statutes—Subsistence, etc., of Army Excepted..... *Page 343*
D. Section 3733, Revised Statutes, Buildings and Public Improvements..... *Page 345*
E. Contracts in Excess of Appropriations, Conditioned on Future Appropriations or Imposing Indefinite Liability on the United States, Unauthorized..... *Page 346*
XIV. ASSIGNMENT OF CONTRACTS, ETC.—SECTIONS 3477 AND 3737, REVISED STATUTES.
A. General Effect of These Statutes..... *Page 347*
B. Assignment Voidable not Void.
C. Contract Provisions Regarding Assignment..... *Page 348*
D. Do not Include Assignments in Bankruptcy, for the Benefit of Creditors, etc.
E. Do not Apply to Assignments by Operation of Law—Executors, etc.
F. Receiver Bound and Entitled to Perform..... *Page 349*
G. Distinction Between Assignment of Contract and of Claim under Contract.
H. Money Due under Contract Payable to Contractor Only.
I. Agreement With Surety..... *Page 350*
J. Instances of Assignments Void under Section 3477, Revised Statutes.

XV. PURCHASES FORBIDDEN FROM PERSONS IN THE MILITARY SERVICE OR IN WHICH MEMBERS OF CONGRESS INTERESTED.

A. Under Paragraph 603, Army Regulations, 1910.

1. Directory only, officer under no statutory incapacity. *Page 351*
2. Does not apply where contract requires approval of Secretary of War ..... *Page 352*
3. Does not include civilian employees, etc.
4. Does not apply to wife of soldier carrying on independent business..... *Page 353*
5. Does not apply where contract is with corporation in which officer holds stock.

B. Contract in Which Member, etc., of Congress Interested—Sections 3739 to 3742, Revised Statutes.

C. Lease of Building by Retired Officer..... *Page 354*

XVI. CONTRACTS TO BE IN WRITING AND SIGNED AT THE END—SECTION 3744, REVISED STATUTES.

A. Scope and Effect—Illustrations..... *Page 355*

B. Where under Accepted Bid Performance Begins With Acceptance, on Refusal to Approve Contract, Bidder to be Paid for Work Performed..... *Page 359*

C. In Absence of Written Contract no Recovery for Failure to Perform.

D. Effect of Papers Signed by One Party Only.

E. Contracts for Soldiers' Home not Within Section 3744, Revised Statutes..... *Page 360*

F. Paragraph 558, Army Regulations, 1910, as to Methods of Purchasing Supplies.

G. Formal Written Contract Not Required under Act of June 12, 1906.

H. Sufficient Signing under the Statute..... *Page 361*

XVII. RETURNS OFFICE—OATHS—SECTION 3745, REVISED STATUTES.

XVIII. SET-OFFS AND RIGHT TO WITHHOLD MONEYS DUE CONTRACTOR ..... *Page 362*

XIX. DAMAGES, LIQUIDATED DAMAGES, AND PENALTIES TO SECURE ACTUAL DAMAGES.

A. Provision for Forfeiture a Penalty..... *Page 363*

B. Provision for Reduction in Price May be a Penalty.

C. Provision for Forfeiture of all Retained Percentages a Penalty.

D. Provision for Damages for Failure as to Any of Two or More Independent Things a Penalty.

E. Where Forfeiture of Certified Check is a Penalty... *Page 364*

F. Where Damages are Excessive, Stipulation will be Regarded as a Penalty.

G. Salary, etc., of Inspector..... *Page 365*

H. Delay by Subcontractors no Ground for Relief.

I. Damages Where Similar Articles can not be Procured.

1. Principal contractor liable where his failure requires increased payments to contractors for minor parts of work.

XIX. DAMAGES, LIQUIDATED DAMAGES, ETC.—Continued.

J. Damages Where There is Such Delay as to Amount to Abandonment of Contract..... *Page 366*

K. Where Damages can not be Ascertained Owing to Abandonment of Project by Government.

L. Contractor Responsible for Actual Damages, Although None Stipulated for.

M. Where Delay is Chargeable to Government.

N. Where a Certified Check Given to Secure Return of Plans Actual Damages Only Can be Deducted..... *Page 367*

XX. LABOR AND MATERIAL-MEN.

A. Have No Lien on Government Property.

B. Prior to Act of August 13, 1894, Secretary of War Could Not Authorize Subcontractor to Sue on Contractor's Bond in Name of United States..... *Page 368*

C. Bonds Under the Act of August 13, 1894.

1. Scope of act.
2. Where vessel built in foreign country..... *Page 369*
3. Certified check can not be received in lieu of bond.
4. Allegations in affidavit required to accompany application for copy of bond.
5. When copy of contract and bond should be furnished.
6. United States should not withhold money due contractor in order to pay debts of contractor or indemnify surety.
7. Double aspect of bond..... *Page 370*
8. Contract between United States and municipality not within act.
9. Failure to pay subcontractors' claim no sufficient cause to strike company off list of qualified sureties.
10. Assignee in bankruptcy should give bond for protection of labor and material-men.
11. Where, on default, supplementary contract made with surety to finish the work, new bond should be given..... *Page 371*
12. On proper application copy of contract and bond should be furnished to subcontractors.
13. Where the work has been performed, bond should be required before payment for the protection of labor and material-men.
14. Copy furnished should be authenticated as required by section 882, Revised Statutes.
15. Permission under Secretary of War not required for commencement of suit.

XXI. ANNULMENT OF CONTRACT BY UNITED STATES.

A. Where Forfeiture Follows Annulment, Positive Action to Indicate Intent to Annul.

B. Mere Breach of a Term of Contract Insufficient.. *Page 372*

C. Action in Annulling Contract Final and Can Not Be Rescinded.

D. Where Contract Provides for Taking Possession of and Retaining Plant., etc., of Contractor on Annulment, Use of Plant on Other Improvements.

E. To Justify Annulment there Must Be a Substantial Failure to Perform Faithfully.

XXII. ABANDONMENT AND REPUDIATION BY CONTRACTOR.

A. Unreasonable Delay in Commencing Performance May Be Treated as Abandonment ..... *Page 373*

B. Where There Is an Anticipatory Breach, Government Need Not Await Expiration of Time Before Taking Steps to Supply Deficiency.

XXIII. CONTRACTS WITH ALIENS AND EMPLOYMENT OF ALIEN AND CONVICT LABOR.

A. No Authority to Restrict Purchases to Articles of Domestic Production, nor to Forbid Employment of Aliens, in Absence of Statute.

B. No Authority to Prevent Contractor from Using Convict Labor in Absence of Statute.

C. No Statute Justifying Annulment Because Italian Labor Employed..... ..... *Page 374*

D. The Executive Order of May 18, 1905, Forbidding the Employment of Persons Undergoing Sentences of Imprisonment.

E. Aliens are Competent to Bid for Government Work.

F. Contract Provision that Contractor Should not Permit Anyone Furnishing Him Labor or Material to Employ Convicts.

G. The Act of March 3, 1875, as to Giving Preference to American Material ..... *Page 375*

H. Under Act of March 4, 1911, as to Purchase of Foreign Material for Fortifications, General Authorization.

XXIV. CONTRACTS CONTAINING PROVISION FOR AN INCREASE OR DECREASE IN ORIGINAL QUANTITY ..... *Page 376*

XXV. OCCUPATION OF PREMISES UNDER CONTRACT, EXPRESS OR IMPLIED, RAISES IMPLIED OBLIGATION SO TO USE PREMISES AS NOT TO INJURE THEM UNNECESSARILY..... *Page 377*

XXVI. WHERE DESCRIPTION AMOUNTS TO WARRANTY.

XXVII. WHERE A CONTRACTOR IS RESPONSIBLE FOR LOSS BY FIRE AND FAILS TO COMPLETE BUILDING AND GOVERNMENT COMPLETES THE BUILDING IT MAY BE INSURED AT EXPENSE OF CONTRACTOR.

XXVIII. WHERE BIDDER FAILS TO ENTER INTO CONTRACT, CONTRACT MAY BE MADE WITH GUARANTOR AS AN OPEN-MARKET TRANSACTION ..... *Page 378*

XXIX. WHERE CONTRACTOR FAILS TO CARRY OUT CONTRACT, SURETY NOT ENTITLED TO PERFORM IN ABSENCE OF PROVISION TO THAT EFFECT.

XXX. WHERE A PARTNERSHIP IS DISSOLVED, ONE OF THE MEMBERS MAY BE ALLOWED TO MAKE CONTRACT.

XXXI. PAYMENTS MAY BE MADE TO ANY MEMBER OF A PARTNERSHIP, ALTHOUGH ONE OF THE MEMBERS MAY HAVE FILED PROTEST.

XXXII. ARMY REGULATIONS, ALTHOUGH NOT STRICTLY APPLICABLE TO CONTRACT OF UNITED STATES SOLDIERS' HOME, SHOULD BE FOLLOWED.

XXXIII. CONTRACT WITH EMPLOYEE TO FORFEIT ALL PAY DUE IF HE QUITS SERVICE WITHOUT NOTICE IS LEGAL.

XXXIV. WHERE GOVERNMENT HAS OPTION TO RENEW CONTRACT, THE SOLICITING OF BIDS FOR NEW FISCAL YEAR IS NOT AN ABANDONMENT OF OPTION.

XXXV. PRINTING FOR CONSTRUCTING QUARTERMASTER NOT PRINTING "AT DEPARTMENT HEADQUARTERS" ..... *Page 379*

XXXVI. CONTRACTS UNDER WAR DEPARTMENT NOT REQUIRED TO BE UNDER SEAL.

XXXVII. WHERE BIDDER HAS BEEN PLACED IN HANDS OF RECEIVER APPROVING OFFICER MAY REFUSE TO APPROVE CONTRACT.

XXXVIII. WHERE ARTICLES BID FOR NOT CONSIDERED SUITABLE BY THE GOVERNMENT, APPROVING OFFICER MAY REFUSE TO APPROVE CONTRACT.

XXXIX. ACCIDENTAL FIRE NOT "FORCE OR VIOLENCE OF THE ELEMENTS"; CONSTRUCTION OF THE WORDS "BY NO FAULT OF HIS OWN."

XL. VOLUNTARY SERVICES NOT REQUIRED ..... *Page 380*

XLI. EVEN AFTER CONTRACT IS ENTIRELY COMPLETED ADDITIONAL PAYMENT MAY BE MADE ACCORDING TO TERMS OF CONTRACT TO COVER TARIFF DUTIES PAID.

XLII. WHERE THE CONTRACT PROVIDES FOR SUPPLY OF FORAGE FOR A PARTICULAR STATION ONLY IT IS ILLEGAL TO ASK FOR FORAGE BEYOND THE NEEDS OF THAT PARTICULAR STATION.

XLIII. THE LANGUAGE "—— HEIRS, EXECUTORS, AND ADMINISTRATORS" NOT ESSENTIAL IN CONTRACT.

XLIV. MEANING OF WORD "LOCALITY" WHERE HAY CALLED FOR OF A CERTAIN GRADE OF THE "LOCALITY"..... *Page 381*

XLV. CONSTRUCTION OF VARIOUS PROVISIONS IN CONNECTION WITH DREDGING AND EXCAVATING CONTRACTS.... *Page 382*

XLVI. THE EFFECT OF CONSTRUCTION OF POST SEWER IS TO BENEFIT NOT ONLY THE GOVERNMENT BUT ALSO A WATER COMPANY FROM WHICH THE GOVERNMENT PURCHASES WATER, IT IS LEGAL TO CONTRACT WITH WATER COMPANY FOR REDUCTION IN PRICE UNTIL THE CONSEQUENT SAVING EQUALS THE COST OF THE SEWER..... *Page 383*

XLVII. NOTWITHSTANDING DELAY IN THE APPROVAL OF CONTRACT THERE WERE UNUSUAL INSTRUCTIONS TO BIDDERS, THE DELIVERY OF SUPPLIES SHOULD BEGIN FROM THE DATE OF CONTRACT AND NOT FROM DATE OF RECEIPT OF APPROVED COPY OF CONTRACT.

XLVIII. ACTION OF GOVERNMENT IN ORDERING DELIVERY OF SUPPLIES STOPPED AFTER MINIMUM QUANTITY DELIVERED CONSTITUTES AN ELECTION TO ORDER MINIMUM QUANTITY ONLY.

XLIX. PARAGRAPH 535, ARMY REGULATIONS 1910, AS TO RENDERING ASSISTANCE IN PREPARATION OF PROPOSALS FOR CONTRACTS, APPLIES TO RETIRED OFFICERS..... *Page 384*

L. PARAGRAPH 663, ARMY REGULATIONS 1910, AS TO FORBIDDING SETTLEMENT WITH HEIRS, EXECUTORS, ETC.

LI. SECTION 216, REVISED STATUTES, GIVES THE SECRETARY POWER TO MAKE REGULATIONS.

LII. SECTION 3651, REVISED STATUTES, AS TO MAKING PAYMENTS IN MONEY FURNISHED TO DISBURSING OFFICER.

LIII. SIGNING OF VOUCHERS, BONDS, CONTRACTS, BIDS, ETC., BY TYPEWRITER OR RUBBER STAMP ..... *Page 385*

LIV. SECRETARY OF WAR MAY SET ASIDE HIS ACTION ON A CONTRACT AT ANY TIME BEFORE CONTRACTOR HAS BEEN NOTIFIED.

LV. FAILURE OF CONTRACTOR TO OBSERVE A CONTRACT PROVISION THAT HE RENDER PERIODICAL REPORTS OF WORK DONE DOES NOT PREVENT RECOVERY FOR WORK OMITTED FROM REPORT.

LVI. NO AUTHORITY OF PARTNER TO SIGN INSTRUMENTS FOR PARTNERSHIP IF SUCH INSTRUMENTS ARE UNDER SEAL.

LVII. WHERE A PURCHASE HAS NOT MET THE STRICT GOVERNMENT TEST IT MAY BE ACCEPTED UPON THE CONTRACTOR GIVING BOND TO REPLACE THE PURCHASE IF IT SHOULD PROVE DEFECTIVE ..... *Page 386*

LVIII. STOPPAGE OF SUPPLIES. (See CONTRACTS XLVIII.)

LIX. CONTRACTING OFFICER CAN NOT DESIGNATE THE OFFICIALS BEFORE WHOM A CONTRACT OR BOND SHALL BE EXECUTED.

LX. TRANSPORTATION OF TROOPS OR SUPPLIES THROUGH FOREIGN COUNTRY.

LXI. UNITED STATES CAN NOT RECOVER FROM GOVERNMENT CONTRACTOR DAMAGES RESULTING FROM PROPER BLASTING.

LXII. PAYMENT TO CONTRACTOR WHERE UNITED STATES IS IN POSSESSION OF PLANT CONSTRUCTED, ALTHOUGH THE POSSESSION IS ALLEGED TO INFRINGE A PATENT ..... *Page 387*

I A 1. A contract [1] recited that it was entered into between Capt. A and the contractor, while it was signed on behalf of the United States by Maj. B, *held* the validity of the instrument was not thereby affected. In legal effect the contract was made with the United States and was signed by a proper agent of the United States. The recital of the

[1] The power of the United States to make contracts is implied from its possession of the powers of sovereignty. The United States is competent to enter into any contract not prohibited by law which is found to be expedient in the just exercise of the powers confided to it by the Constitution without even any express legislative authority, and it may be a party to implied as well as express contracts. In U. S. *v.* Tingey (5 Pet., 127) it is said, "Upon this posture of the case a question has been made and elaborately argued at the bar how far a bond voluntarily given to the United States and not prescribed by law is a valid instrument, binding upon the parties in point of law; in other words, whether the United States have in their political capacity a right to enter into a contract or to take a bond in cases not previously provided for by some law. Upon full consideration of this subject we are of opinion that the United States have such a capacity to enter into contracts. It is, in our opinion, an incident to the general right of sovereignty; and the United States being a body politic, may, within the sphere of the constitutional powers confided to it and through the instrumentality of the proper department to which those powers are confided, enter into contracts not prohibited by law and appropriate to the just exercise of those powers." See also Dugan *v.* U. S., 3 Wheat. (U. S.), 172; U. S. *v.* Bradley, 10 Pet. (U. S.), 343; U. S. *v.* Linn, 15 Pet. (U. S.), 290; Cotton *v.* U. S., 11 How. (U. S.), 229; Neilson *v.* Lagow, 12 How. (U. S.), 107; U. S. *v.* Hodson, 10 Wall. (U. S.), 407; U. S. *v.* Powell, 14 Wall. (U. S.), 502; Jessup *v.* U. S., 106 U. S., 151; Tyler *v.* Hand, 7 How. (U. S.), 573; U. S. *v.* Mora, 97 U. S., 413; Daniels, *v.* Tearney, 102 U. S., 417; Moses *v.* U. S., 166 U. S., 571.

In Smoot's case, 15 Wall., 36, the United States Supreme Court held that contracts of the Government should be given the same construction and effect as though both parties were private individuals. In this case the court said: "There is in a large class of cases coming before us from the Court of Claims a constant and ever recurring attempt to apply to contracts made by the Government and to give to its action under such contracts a construction and an effect quite different from those which courts of justice are accustomed to apply to contracts between individuals. There arises in the mind of parties and counsel interested for the individual against the United States a sense of the power and resources of this great Government, prompting appeals to its magnanimity and generosity, to abstract ideas of equity, coloring even the closest legal argument. These are addressed in vain to this court. Their proper theater is the halls of Congress, for that branch of the Government has limited the

name of the agent in the contract is not essential and an erroneous recital may be rejected as surplusage.[1] *C. 10402, May 14, 1901.*

I A 2. Congress having imposed upon certain designated officials the duty of representing the United States in the making of the contract for the monument to Lafayette, *held* that the authority was personal and could not be delegated, and that all the officials named, or at least a majority of them, must sign the contract. *R. 52, 363, July 1, 1887.*

I B 1. Where an individual conducts his business under a company name, a contract and bond should be in the name of the individual and not in the name of the company, as the latter being a mere name having no existence as an artificial being, such as a partnership or corporation, is incapable of being a party to a bond. *C. 18197, May 11, 1907.*

I B 2. Where an assignee for a corporation has been appointed by a State court, and authorized to carry on the business, and desires to enter into a contract with the United States, the contract and bond should be in the name of and signed by the assignee, and not signed in the name of the corporation "by ——— assignee." *C. 2446, July 16 and 30, 1896.* So, where a bidder died before the contract was entered into, *held* that the contract and bond should be in the names of the executors of his estate as such executors, and not in the name of the bidder "by ——— executors." *C. 8403, May 11, 1900.*

I B 3. *Held* that there is no legal objection to making a Government contract with an executor as such. If the executor had authority to carry on the business of his testator, the assets of the estate would be bound as well as the executor individually, but if the executor had no such authority he alone would be bound. *C. 16550, July 6, 1904.*

---

jurisdiction of the Court of Claims to cases arising out of contracts express or implied—contracts to which the United States is a party in the same sense in which an individual might be and to which the ordinary principles of contracts must and should apply.

"It would be very dangerous, indeed, to the best interests of the Government—it would probably lead to the speedy abolition of the Court of Claims itself—if, adopting the views so eloquently urged by counsel, that court or this should depart from the plain rule laid down above and render decrees on the crude notions of the judges of what is or would be morally right between the Government and the individual.

* * * * * * *

"In approaching the inquiry into the effect which the action of the Bureau of Cavalry in adopting these new rules for inspection had upon the rights of the parties to this contract let us endeavor to free ourselves from the consideration that the Government was one party to the contract, and that it was for a large number of horses; for we hold it to be clear that the principles which must govern the inquiry are the same as if the contract were between individuals and the number of horses one or a dozen instead of four thousand." See also U. S. *v.* Smith, 94 U. S., 217.

In U. S. *v.* Bostwick, 94 U. S., 66, it was said, "The United States when they contract with their citizens are controlled by the same laws that govern the citizen in that behalf. All obligations which would be implied against citizens under the same circumstances will be implied against them."

In 30 Ct. Cls., 360, it was said, "The law, as we understand it, was stated by Hamilton in these words, 'When a Government enters into a contract with an individual, it deposes, as to the matter of the contract, its constitutional authority and exchanges the character of a legislator for that of a moral agent with the same rights and obligations as an individual,'" citing 3 Hamilton's Works, 518; 15 Peters, 392; Deming's case, 1 Ct. Cls., 191; 11 id., 520; 28 id., 105.

The United States as a contractor can not be held liable for acts of United States as a sovereign or legislator. Deming's case, 1 Ct. Cls., 190; Jones *v.* U. S., 1 id., 383. See also Cooke *v.* U. S., 91 U. S., 398; Curtis *v.* U. S., 2 Ct. Cls., 152, and 11 id., 520.

[1] Bishop on Contracts, sec. 116.

II. An Army officer entered into a contract for the supplying of beef in his official capacity and as an agent of the Government. Through the fault of the officer the Government failed to carry out its part of the contract. *Held,* that the contract being a Government contract, payment due on it should be made by the Government, and there was no authority for requiring the officer to make payment from his personal funds,[1] but that if the Government paid for the beef, which through the fault of the officer had become a loss, it would be proper to stop the officer's pay to reimburse the Government. *C. 20612, Nov. 15, 1906.*

Where an officer of the Government entered into a contract in his official capacity and as an agent of the Government, it being plainly understood by the contractor that he was not obligating himself personally, *held* that he could not be held personally liable to the contractor on the contract. If there should be any liability to the contractor it would be that of the Government. *C. 2601, Sept. 11, 1896.*

III A. Section 3709, R. S., provides "All purchases and contracts for supplies or services in any of the departments of the Government, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles or performance of the service. When immediate delivery or performance is required by the public exigency, the articles or service required may be procured by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals.[2] Exigencies growing out of a state of war, or hostilities with Indians, were prob-

[1] A public agent is not liable on a contract executed by him on behalf of the State, even in cases where he had no authority to make the contract; and where his authority depends on a statute all who contract with him are conclusively presumed to know its extent. Hodgin *v.* Dexter, 1 Cranch, 345, 363; Parks *v.* Ross, 11 Howard, 362; New York & Charleston Steamship Co. *v.* Harbison, 16 Fed. Rep., 688.

[2] Sec. 3709, R. S., was amended by the act of Jan. 27, 1894 (28 Stat. 33), in relation to "contracts for supplies in the departments at Washington."

The following acts also relate to advertisement in making Government purchases:

The act of June 17, 1910 (36 Stat. 531), relates to advertisement for fuel, ice, and miscellaneous supplies for executive departments and other Government establishments in Washington.

The act of July 5, 1884 (23 Stat. 109), requires public notice of from 10 to 60 days in purchases of regular and miscellaneous supplies for the Army furnished by the Quartermaster's Department and by the Subsistence Department.

The act of Mar. 2, 1901 (31 Stat. 905), requires that the purchase of supplies for the use of the various departments and posts of the Army and of the branches of the Army service shall be made only after advertisement.

The act of June 12, 1906 (34 Stat. 258), provides that the purchase of supplies and the procurement of services for all branches of the Army service may be made in open market in the manner common among business men when the aggregate of the amount required does not exceed $500.

The act of May 11, 1908 (35 Stat. 125), authorizes the Chief of Ordnance to purchase, in such manner as he may deem most economical and efficient, articles of ordnance property the character of which or the ingredients thereof are of such a nature that the interests of the public service would be injured by publicly divulging them.

The annual appropriation act for the support of the Army since 1886 has provided that purchases of horses for the cavalry, artillery, engineers, etc., shall be made after competition duly invited, and that no part of the appropriation shall be expended for printing unless the same shall be done by contract, after due notice and competition, except in emergency.

ably mainly had in view, and it is exigencies of this class which have been considered in the adjudged cases in the Supreme Court and Court of Claims.[1] It is clear, however, that other exigencies may exist requiring that contracts or purchases be made at once or without the delay incident to advertising for proposals. Thus a loss of stores, structures, etc., on hand, caused by an *actus Dei* or *vis major*—as fire, storm, freshet, or a sudden riot or violent disorder; or a loss of supplies occasioned by the neglect of military subordinates in charge; or a failure of a contractor to fulfill a contract for supplies, transportation, or other service—might properly be regarded as constituting an "exigency" under the statute, if of such magnitude or injurious consequence to the Army as to necessitate an immediate making good of the deficiency.[2] The general rule, however, of the statute in requiring a notice and invitation to the public as a preliminary to the awarding of a contract, is founded upon a sound and well-considered public policy, and exceptions thereto, especially in time of peace, should be recognized as admissible only where, if the rule were strictly complied with, the public interests would manifestly be most seriously prejudiced. *R. 37, 464, Apr. 7, 1876; 39, 527, May 3, 1878.*

III B. Section 3709, R. S., does not necessarily preclude having public work performed by hired laborers where it is not deemed desirable to enter into a formal agreement with a contractor for the purpose. So, *held*, that particular work capable of being properly done by hired day labor, may be so done, instead of under contract made upon advertisement and proposals, provided it is deemed to be for the public interest to prefer the former mode. *R. 41, 121, Feb. 25, 1878.*

III C. An advertisement for bids for certain apparatus specifically limiting the bids to a certain make of apparatus is not for that reason illegal. *C. 11397, Oct. 18, 1901.*

III D. Specifications referred to in an advertisement for bids should definitely describe all the materials and work that are to enter into the construction of the building so that each bidder will know at the time he bids just what material and work *will* enter into the construction of the building and not merely what *might* so enter. Therefore a specification that required "pink Milford or some other light-colored granite *satisfactory to the architects and board of trustees*" is insufficient, and the work should be readvertised. A proper and sufficient advertisement would be had if a particular granite was named or if it was stated that any one of a number of kinds (naming them) would be accepted, or that any kind would be accepted if it possessed certain qualities (naming them) or had the

[1] See United States *v.* Speed, 8 Wallace, 83; Reeside *v.* United States, 2 Ct. Cls., 1; Mowry *v.* United States, id., 68; Stevens *v.* United States, id., 95; Floyd *v.* United States, id., 429; Crowell *v.* United States, id., 501; Baker *v.* United States, 3 id., 343; Henderson *v.* United States, 4 id., 75; Child *v.* United States, id., 176; Wentworth *v.* United States, 5 id., 302; Wilcox *v.* United States, id., 386; Cobb *v.* United States, 7 id., 470, and 9 id., 291; Thompson *v.* United States, id., 187; McKee *v.* United States 12 id., 504; Moran *v.* United States, 39 id., 486; III Comp. Dec., 175.

[2] See G. O. 10 of 1879, secs. 22–25, pp. 14 and 15; do. 72, id. p. 52; do. 40 of 1880, p. 58.

qualities possessed by a particular kind of granite (naming it).[1] *C. 1416, June 14, 1895.*

IV A. The contingent fund allotted to the various geographical departments comes within the terms of the act of March 2, 1901 (31 Stat. 905), providing that "hereafter, except in case of emergency or where it is impracticable to secure competition, the purchase of all supplies for the use of the various departments and posts of the Army and of the branches of the Army service shall only be made after advertisement," and such fund can be expended only after advertisement except in case of emergency. *C. 11935, Jan. 24, 1902.* The above act, however, does not apply to the engagement of services. *C. 11116, Oct. 16, 1901.*

IV B. Section 4 of the act of June 17, 1910 (36 Stat. 531), making the appropriations for the legislative, executive, and judicial expenses of the Government, provided that "hereafter all supplies of fuel, ice, stationery, and other miscellaneous supplies for the executive departments and other Government establishments in Washington, when the public exigencies do not require the immediate delivery of the articles, shall be advertised and contracted for by the Secretary of the Treasury instead of by the several departments and establishments." *Held,* that this legislation was not intended to require supplies for the Army at large, appropriated for in the Army appropriation act, to be included under the contract made by the Secretary of the Treasury, and that therefore supplies for the Sandy Hook Proving Ground in New Jersey are not covered by contracts made by the Secretary of the Treasury. *C. 27154, Aug. 11, 1910. Held,* also, that under the same act supplies for the United States engineer office, Washington, D. C., and the engineer depot and engineer school at Washington Barracks, D. C., are not covered by the contract made by the Secretary of the Treasury. *C. 27154, Jan. 10, 1911.* But *held,* that under the same act supplies for the office of Public Buildings and Grounds, Washington, D. C., are included in the contract made by the Secretary of the Treasury. *C. 26982, July 7, 1910.*

V A. Section 3828, R. S., provides that "no advertisement, notice, or proposal for any executive department of the Government, or for any bureau thereof, or for any office therewith connected, shall be published in any newspaper whatever, except in pursuance of a written authority for such publication from the head of such department; and no bill for any such advertising or publication shall be paid unless there be presented with such bill a copy of such written

[1] In 1905 the Auditor for the War Department called attention to the following paragraph in the form of advertisement for bids for supplies for the Signal Corps: "Orders will probably be made on the accepted bidders for the estimated quantity; but as the actual requirements can not be determined in advance, the right is reserved of making orders at the prices at which the awards may be made for any quantity more, or to make no order at all for any item that may not be needed," objecting to the latter part of the paragraph as destroying the definite character of the advertisement, and stated that in some cases the quantities purchased had been six to nine times the quantities named in the advertisement and proposals. *Recommended* by the Judge Advocate General that the form be changed to read as follows: "Orders will probably be made on the accepted bidders for the estimated quantity; but as the actual requirements can not be determined in advance, the United States shall have the right of making orders at the prices at which the awards may be made for additional supplies, provided that the additional orders shall not exceed twice the estimated quantity." *C. 18164, July 6, 1905.*

authority." *Held*, that the written authority required must precede the publication. A subsequent approval or ratification will not be sufficient.[1] *C. 17990, May 13, 1905.*

V B. The act of March 1, 1893 (27 Stat. 509), creating the California Débris Commission, requires notices of petitions for hydraulic mining to be inserted by the "commission in some newspaper or newspapers of general circulation in the communities interested." *Held*, that the discretion of selecting the newspapers is vested in the commission, and that section 3828, R. S., which requires prior written authority of the head of the department, does not apply.[2] *C. 17209, Dec. 7, 1904.*

VI A. In general, under section 3709, R. S., the duty of advertising is a legal obligation imposed by statute, not a mere facility for the convenience of Government officers to enable them to gain information so that the United States may supply its wants in the most convenient manner and at the lowest cost regardless of the bids.[3] The main object of advertising is to induce a free and open competition for the contracts of the Government and thus to protect the United States from fraudulent combinations and collusive preferences in its business transactions.[4] At the same time the advertisement, in inviting proposals from the public, is properly to be viewed as a

---

[1] See V Comp. Dec., 167; XIV id. 747, and par. 508, A. R., 1910. In 16 Op. Atty. Gen., 616, it was held that the provision of sec. 3828, R. S., extends to all officers connected with any executive department, no matter where they may be situated, and not merely to such officers as are at the seat of government. See, also, U. S. *v.* Odeneal (10 Fed. Rep., 616; XIII Comp. Dec., 446).

[2] XII Comp. Dec., 119. See, also, XIII idem, 310.

[3] See 6 Op. Atty. Gen., 406; 10 id., 28; also opinion of the Solicitor General of March 20, 1876 (15 Op. Atty. Gen., 538), wherein, in holding contracts made without advertising to be not binding on the United States, he dissents from the opinion of Atty. Gen. Bates, in 10 Ops., 416, to the effect that while an absence of the prescribed advertisement will render illegal and inoperative an unexecuted contract, the Government can not, on account of such omission, rescind, to the damage of a contractor, a contract entered into by him in good faith and partly performed. In a later opinion of Apr. 27, 1877 (15 Op., 235), the Attorney General refers to the question, whether the provision of section 3709, R. S., requiring that contracts in general shall be preceded by advertisement, is mandatory or only directory, as one which has been much discussed (see, for example, the reference to this question in Fowler *v.* United States, 3 Ct. Cls., 47), but is not required to be decided in that opinion. In Schneider *v.* U. S., 19 Ct. Cls., 547, 551, it is held that in the absence of any exigency in fact or one determined to exist this provision is mandatory, and a contract made in violation of it is void. Whatever may be the true construction of this section, it is clear that no officer of the Army, in the absence of express authority to do so from the Secretary of War, can be justified in omitting to comply with the provision in regard to advertising. However, it was held in Mudgett *v.* United States (9 Ct. Cls., 467), that where a properly executed contract had been mutually performed and the contractor sued to recover a part of his compensation, it was not a defense that the contract was illegal because not founded upon advertisement and proposals, the price being reasonable. See also Salomon *v.* United States (19 Wall., 17.) In Schneider *v.* United States (19 Ct. Cls., 547), where a contract modifying another contract had been made without advertisement and the contractor had subjected himself to expense in preparing to carry out the terms of the modified contract, but before actually furnishing material to the United States under the modified contract, the modified contract was rescinded by the United States. *Held*, that the modified contract was void, for the reason that there had been no advertisement, and that the contractor could not recover for his outlay and prospective profits under the modified contract.

[4] See, Harvey *v.* United States (8 Ct. Cls., 506). In regard to a statute (similar to sec. 3709) governing the Post Office Department, the Supreme Court, in Garfielde *v.* United States (3 Otto. 246), says: "The object of the statute was to secure notice, * * * that bidders might compete, that favoritism should be prevented, that efficiency and economy in the service should be obtained."

pledge on the part of the United States that the contract will, as a general rule, be awarded to the lowest bidder, provided he is a responsible person and his bid is a reasonable one, and provided, of course, he complies with the existing regulations—as to bond, etc.[1] The reservation not unfrequently added in the advertisement, that "the United States reserves the right to reject any or all proposals," is simply precautionary, and should not be, and is not, in general taken advantage of except where the lowest bidder fails to meet the legal and proper conditions.[2] *R. 39, 426, Feb. 12, 1878; 41, 113, Feb. 21, 1878; C. 18153, June 12, 1905.* So, also, where the act of March 2, 1901 (31 Stat. 905), provided that supplies for the Army except as therein specified, should be purchased "after advertisement, and shall be purchased where the same can be purchased the cheapest, quality and cost of transportation and the interests of the Government considered," *held* that the statute does not require the award to be made to the lowest bidder, except where he can satisfy the department that he can furnish articles of the required quality and within the required time; if the facts leave a reasonable doubt on this point the award to the lowest bidder would not be in the interests of the Government, and he may legally be passed over and an award made to the next lowest bidder who can meet these requirements. *C. 20276, Aug. 22, 1906.* Where several bids are made in response to the advertisement, the Secretary of War may, for cause, refuse to authorize a contract with any of them. In accepting a bid he must be governed by a consideration for the public interests. If the lowest bidder, for example, is not furnished with the proper facilities to perform the proposed work—has not an available plant.[3] (*P.*

---

[1] See, regulations in regard to contracts, published in General Orders 10, Headquarters of Army of 1879, repeated and amended in General Order 72 of same year and General Order 40 of 1880, now incorporated in Articles LI and LII, Army Regulations of 1908.

[2] See, paragraph 553, Army Regulations of 1910, as follows: "Except in rare cases, when the United States elects to exercise the right to reject proposals, awards will be made to the lowest responsible bidder, provided that his bid is reasonable, and that it is in the interest of the Government to accept it."

[3] Paragraph 555, Army Regulations of 1910, is as follows: "When no guaranty is required, bidders must, if called upon by the awarding officer, furnish satisfactory evidence, before the award is made, of their ability to carry their proposals into effect."

In General Orders 167, War Department, October 10, 1905, the following instructions were issued by the Secretary of War for the guidance of officers charged with the procurement of supplies:

With a view to a thorough enforcement of the laws which require that all supplies for the Army shall be purchased "where the same can be purchased the cheapest, quality and cost of transportation and the *interests of the Government* considered," and that "such contracts shall be made with the lowest *responsible* bidders," the following instructions are published for the information and guidance of officers charged with the procurement of supplies for the several branches of the military establishment, and strict compliance therewith is enjoined, viz:

1. Advertisements for supplies should contain the instruction to bidders, who are not manufacturers of the goods called for, to submit the name of the manufacturer from whom such goods are to be obtained, unless it be manifestly impracticable to furnish this information.

2. Lack of commercial standing on the part of the bidder or inadequate facilities or plant on the part of the manufacturer will constitute good and sufficient grounds for the rejection of bids. Abnormally low bids should be subjected to the strictest scrutiny and comparison with prevailing market rates.

3. All bids received from contractors who have failed unjustifiably to fill former contracts with the Government shall be rejected.

58, 26, Feb. 10, 1893) or if (the bids being for a boiler) the article covered by the lowest bid does not represent as high a grade of efficiency as a higher bid, the article covered by the higher bid being such that, in the opinion of the contracting officer, it would in a comparatively short time save its additional cost in the saving of fuel. *C. 25493, Aug. 28, 1909*, the lowest bid may be passed over for the next higher provided the latter is satisfactory.

VI B. An act of Congress of June 30, 1886 (24 Stat. 96), appropriated a sum of money "for printing division and department orders and reports. * * * Provided, that no part of this appropriation shall be expended on printing unless the same shall be done by contract after due notice and competition." *Held*, that all such printing should, after advertisement (due notice), be given to the lowest responsible bidder who is a practical printer and who is in a position to do printing unaided by the Government. It would not be a compliance with the statute to purchase paper, ink, type, etc., and let by contract only the mere printing. *P. 61, 334, Sept. 14, 1893.*

VI C. The act of April 10, 1878 (20 Stat. 36), as amended by the act of March 3, 1883 (22 Stat. 488), authorizes the Secretary of War to make rules and regulations as to bids, bonds, and contracts under the War Department and to require a written guaranty providing that in event of default of the bidder to enter into the contract and give sufficient bond the proper "officer shall proceed to contract with some other person * * * and shall forthwith cause the difference * * * to be charged against the bidder and his guarantor." Section 3 of the river and harbor act of August 11, 1888, (25 Stat. 423), provides that "contracts for improvement of rivers and harbors shall be made with the lowest responsible bidders." *Held* that these statutes should be construed together, so that in a case where a contract had been awarded to the lowest responsible bidder in compliance with the act of 1888 and such bidder had defaulted in entering into the contract, the act of 1878 as amended would come into play and authorize a contract "with some other person," the difference to be charged to the defaulting bidder. These acts do not require the Government to let a contract to the next lowest bidder after the lowest bidder has declined to enter into the contract. *C. 22567, Feb. 17, 1908.*

VI D. The Army appropriation act of July 5, 1884 (23 Stat. 109), provided that, in purchasing supplies for the Army under the Quartermaster and Commissary Departments, the award should be made to the "lowest responsible bidder." [1] When the award for furnishing such supplies was not made to the lowest bidder, though entirely responsible and competent, but a higher bidder was preferred, *held* that the contract was void. *P. 18, 265, Aug. 5, 1887.*

VI E. Where an advertisement inviting proposals for furnishing supplies specified that the proposals would be opened at a certain hour, *held*, that ordinarily a bid received after the hour named should not be considered. *P. 47, 403, June 6, 1891.* But if it satisfactorily appears that a bid, received after the hour for opening bids,

[1] Par. 553 of Army Regulations, 1910, relating to the purchase of supplies, is as follows: "Except in rare cases, when the United States elects to exercise the right to reject proposals, awards will be made to the lowest responsible bidder, provided that his bid is reasonable and that it is in the interest of the Government to accept it."

had been duly mailed [1] or a messenger had started with it, in ample time to reach its destination before the opening of bids, that its failure to arrive on time is in no manner due to the neglect of the bidder, and above all that no unfair advantage has accrued to the tardy bidder by reason of his delay,[2] the delayed bid should be considered.[3] *C. 20416, Sept. 18, 1906; 21391, Apr. 16 and July 30, 1907; 22376, Nov. 20, 1907; 23888, Sept. 25, 1908; 24914, May 8, 1909; 25135, June 19, 1909; 26397, Mar. 24, 1910; 28204, Apr. 26, 1911.* So *held* where a bid was received three days late. *C. 16342, May 18, 1904.* So *held*, also, where a bid was mailed in ample time but was returned for want of sufficient stamps, and was then remailed without opening it, consideration being given to the fact that in the usual course of dealings between private parties the addressee would pay the trifling amount of postage. *C. 27681, Jan. 11, 1911.* So, also, where a bidder finding the time too short for his bid (which had been mailed) to reach the officer charged with opening the bids, telegraphed his prices, *held*, that as the bid was deposited in the mail before the opening, and the bidder acted in good faith and obtained no unfair advantage over other bidders, it was recommended the requirements of the Army Regulations that no proposal received after the time of opening will be received, be waived. *C. 25208, June 28, 1909; 26005, Dec. 30, 1909.* Where the messenger carrying the bid missed the train and wired to the officer in charge of the opening of bids that he would be on next train, and the circumstances showed that the bidder had obtained no unfair advantage by the delay, *held*, the bid should be received. *C. 17828, Apr. 8, 1905.* Where bids for the purchase of condemned ordnance were required to be accompanied by a check for the amount of the bid, and the sealed envelope supposed to contain one bid on being opened was found to contain only the check, and the bidder subsequently handed

---

[1] Par. 547, Army Regulations, 1910, has been amended by par. 2, General Orders, No. 99, War Department, July 22, 1911, to read as follows: "Proposals received prior to the time of opening will be securely kept. The officer whose duty it is to open them will decide when that time has arrived. No proposal received thereafter will be considered, except that when a proposal arrives by mail after the time fixed for the opening, but before the award is made, and it is clearly shown that the non-arrival on time was due solely to delay in the mails for which the bidder was not responsible, such proposal will be received and considered." All the opinions cited in the above paragraph antedated the above amendment to par. 547, Army Regulations.

[2] The syllabus in 21 Op. Atty. Gen. 546, is as follows: "There is nothing in the acts of January 27 and April 21, 1894, amending section 3709 of the Revised Statutes, inconsistent with the legal right of the board of award of the Department of Agriculture to consider any bid received by them through the mail after the hour of 2 o'clock p. m.

"The designation of 2 o'clock p. m. 'for the opening of all such proposals in each department' means only that such proposals shall not be opened *before* 2 o'clock p. m.

"A proposal received after that hour, under circumstances which warranted the belief that it had been prepared and submitted in the light of the proposals submitted by other bidders, which had been already opened and made known, should not be received or entertained; but a proposal received under conditions which precluded the possibility of such unfairness should not be rejected because it happens to be received by the board of award a few minutes after 2 o'clock p. m."

[3] Even though a bid has failed to reach its destination through the fault of the bidder a contract with such bidder without further advertisement would not be illegal, for such action would be equivalent to a rejection of all bids, and if all bids are rejected further advertising is unnecessary, and a contract could then be entered into with the tardy bidder. Such a course, however, should not be pursued if it would be unfair to other bidders or would involve a breach of the implied pledge on the part of the United States that the contract will as a general rule be awarded to the lowest bidder provided he is a responsible person and his bid is a reasonable one, etc.

in the bid for the exact amount of the check, and it satisfactorily appeared that the omission to inclose the bid was accidental and that the bidder gained no advantage by the accident, *held*, that the bid could legally be considered. *C. 11609, Nov. 16, 1901.* A clause in the advertisement for bids providing that "no bids received after the time set for opening of proposals will be considered" will not prevent consideration of the bid if the circumstances otherwise excuse the delay. *C. 7653, Feb. 7, 1900.* But where a bid was mailed so that it had only a narrow margin of time to enable it to reach its destination before the hour for opening bids, and the envelope was not marked so as to indicate the nature of its contents as required by instructions to bidders, and the bid did not reach its destination in time, *held*, that it should not be considered. *C. 21047, Feb. 4, 1907.*

VI F. Proposals were invited for construction of six locks and dams on the Monongahela River and the specifications provided as follows: "Bids will be received for the lock and dam complete at any one site, or at two or more sites, or at all six sites, and if accepted contracts will be awarded for each site separately or for two or more sites, or a single contract will be awarded for the whole improvement at the six sites as may appear most economical and advantageous to the United States." One of the bidders in a letter attached to his proposal offered, if awarded contracts for three of the locks and dams, to accept at a reduction of 3 per cent on the amount proposed for them separately; if awarded four locks and dams, the reduction should be 4 per cent, and if awarded contracts for the six locks and dams a reduction of 5 per cent could be made. *Held* that the offer made in this letter was responsive to the specifications calling for proposals and should be treated as a part of the proposal. *C. 3488, Sept. 7, 1897.*

VI G. Where a bidder failed to sign his bid and attach the necessary internal-revenue stamps to the bid, but it was evident from the fact of a formal execution of an accompanying guaranty that it was intended to sign the bid and attach the stamps. *Held*, the bid could properly be signed and the stamps attached after the opening of the bids. *C. 10361, May 4, 1901; 22874, Mar. 12, 1908.* So, where a bid was not signed but before the opening of the bids a letter was received from the bidder stating that the bidder was not sure whether the bid had been signed before mailing it, and stating that the bidder would stand by it, and the accompanying guaranty was properly executed. *Held*, the bidder was bound under the terms of the guaranty. *C. 23878, Sept. 21, 1908.*

VI H. Where a bidder's name was signed to a bid by another person, *Held* that verbal authority to sign the name was sufficient. *C. 580, Oct. 29, 1894.*

VI I. Where bids were invited for furnishing blue denim, the specifications providing that "a sample of not less than 20 yards of the material which bidders propose to furnish must be submitted prior to the time fixed for the opening of bids, and no samples will be received after the proposals are opened," and the lowest bidder through an oversight failed to furnish a sample at the time of submitting his bid, but a sample was offered within an hour or two after the opening of bids, and where it further appeared that the lowest bidder had been furnishing denim under a prior contract, and that the sample offered was up to the specifications and of the same kind furnished under the previous contract, *held* that the failure to file a sample before the opening of bids was an informality which could be waived. *C. 25021, May 26, 1909.*

Bids were requested for furnishing file cases of a certain make "or equal," and the instructions to bidders required that samples of the proposed equivalent must accompany the proposal. Several bids were not accompanied by samples. *Held*, that the failure to furnish samples was an informality which might be waived, and samples might be called for prior to making awards, as such action would not give any opportunity for collusion and would not be unfair to other bidders. In such case the guarantors would be bound, although the bids had not been accompanied by samples. *C. 20196, Aug. 10, 1906.*

A clause in the instructions to bidders provided that "reasonable grounds for supposing that any bidder is interested in more than one bid will be cause for rejection of all bids in which he is interested." *Held*, that if any bidder is interested in more than one bid the contracting officer is not by the above instruction required to reject the bid, but the clause in question may be waived. *C. 19967, June 26, 1906.*

Where a bidder failed to attach a copy of the specifications to his bid, but the bid referred to the specifications in such a way that there could be no question that the bidder offered to furnish such supplies as were called for by the specifications, *held*, the failure to attach a copy of the specifications did not affect the validity of the bid and might be waived. *C. 23552, July 7, 1908.*

Instructions to bidders required bidders to submit alternative bids in respect to certain parts of a building, depending on the material to be used. The purpose of this requirement was to enable less expensive substitutions to be made for the said parts of the building in case the bids exceed the appropriation. The lowest bidder failed to make the required alternative bids, but his bid was within the appropriation. *Held*, that under the circumstances failure to submit alternative bids was an informality which could be waived. *C. 24769, Apr. 15, 1909.* So, *held*, where bidders wee required to state the unit prices for excavation, concrete and brickwork, the purpose being to have a basis for settlement for any work ordered less than or in excess of that indicated on the drawings, and the lowest bidder failed to submit such prices. *C. 24769, Apr. 15, 1909.* Also, where the lowest bidder for certain dredging failed to state the price for rock excavation, and it appeared that the rock excavation was an insignificant part of the entire work, being less than two-tenths of 1 per cent, and that the difference between his bid and the next lowest bid was more than 10 per cent, and the lowest bidder stated that it was his intention to include all work under the miscellaneous item of his bid: *Held*, that the informality in failing to bid on the rock excavation could be waived.[1] *C. 28603, June 26, 1911.*

Where proposals were invited in duplicate and the lowest bidder submitted only one copy: *Held*, the failure to submit bids in duplicate was an informality which could properly be waived. *C. 15574, Dec. 2, 1903.*

VI J 1. A readvertisement of work is equivalent to a rejection of all bids not theretofore accepted. *C. 26565, Apr. 20, 1910.*

VI J 2. The acceptance of one bid is a rejection of all other bids, and one of the bids[2] so rejected can not be subsequently accepted so

[1] See State *v.* Commissioners of York County, 13 Nebraska, 57 (12 N. W. 816).

[2] As to acceptance with qualification, etc., see U. S. *v.* P. G. Carlin Construction Co. and Illinois Surety Co., 1912.

as to hold a guarantor of such rejected bid to his guaranty that such bidder would enter into a contract within ten days after notice of acceptance of his bid. *C. 8904, Sept. 6, 1900; 20670, Nov. 26, 1906.*

VI J 3. The effect of a rejection of all bids is to release the guarantors on all the bids, and the guaranties can not be revived by a mere letter consenting to their revival. The only proper way is to have a new set of bids called for to be accompanied by new guaranties. *C. 26846, June 7, 1910.*

VI J 4. A sound discretion is vested in the contracting officer, subject to approval by higher authority, to determine under all the circumstances of a letting of a particular contract whether the interests of the United States will be best subserved by awarding the contract to one bidder instead of to another, i. e., whether in the light of all the facts he is the "lowest responsible bidder." *Held*, on the above principles that where a contractor attempts to deliver inferior articles and causes delay by such attempts, and having been balked in his efforts by the vigilance of the contracting officer and having thereupon made charges against the contracting officer which on investigation were found to be false, these facts would justify the award being made to the next lowest bidder on the ground that his bid is that of the "lowest responsible bidder." *C. 18166, June 16, 1905; 28861, Aug. 16, 1911.*

The United States may properly reject a bid in a case of *fraud*, as where the lowest bidder is in collusion with other bidders or with the representative of the United States to impose a high price upon the Government. In such a case the bids of all bidders concerned in the fraud may properly be rejected even in the absence of a regulation or statute on the subject. *R., 37, 564, May 24, 1876.* So, also, the bid of a contractor who had previously conspired to defraud the United States (*C. 7134, Oct. 5, 1899*) or of a firm one member of which conspired to defraud the United States (*C. 8606, July 13, 1900*); or of an individual who was a member of a firm one member of which had been debarred from bidding on account of collusion, the circumstances being such as to make it certain that the bid was not a *bona fide* individual bid, but would inure to the benefit of the firm. *C. 13485, Feb. 10, 1903*, may properly be rejected. But the mere fact that a bidder, A, states that certain supplies on which he has bid will be made by a certain firm, the senior member of which, B, had been disqualified as a bidder sometime before by reason of his implication in a conspiracy to stifle competition, is not sufficient to justify rejection of A's bid. *C. 23552, July 7, 1908.*

One of the bids for furnishing shoes was submitted by A as an individual. A was in fact the vice president of a large shoe company, and stated in his bid that in case he was awarded the contract the said shoe company would manufacture the shoes. A's bid was for "all or none." Another of the bids was submitted by B as an individual. B was in fact a director in the same shoe company, and stated in his bid that in case the contract was awarded to him said shoe company would manufacture the shoes. B's bid was a graduated one. The prices named in the bids of both A and B were very low. A protesting bidder charged that the two bids were really submitted on behalf of the shoe company, so that if the bid that stipulated for "all or none" of the work was rejected the company would get at least a part of the award under the other bid. *Held* that even if the

charges were true the facts would not constitute a fraud on the United States, and would not justify the rejection of the bids. *C. 27496, Nov. 16, 1910.*

VI J 5. Section 3 of General Order 167, War Department, October 10, 1905, directs that "all bids received from contractors who have failed unjustifiably to fill former contracts with the Government shall be rejected." *Held* that where a company of high standing in the business community once had declined to enter into a contract on the ground that it had misunderstood a certain phase of the Government's proposal and in another instance had failed to deliver shingles and lumber at Honolulu within the time specified in the contract, the company could not be said to "have failed unjustifiably" to fill its former contracts. *C. 29175, Oct. 26, 1911.* Also *held* that under the above section of General Order 167, War Department, 1905, it is questionable whether an attempt to deliver inferior goods could properly be regarded as an unjustifiable failure to fill a former contract. *C. 28861, Aug. 16, 1911.*

VI J 6. A clause in the instructions to bidders provided that "reasonable grounds for supposing that any bidder is interested in more than one bid will be cause for rejection of all the bids in which he is interested." *Held*, that the interest referred to was an interest *as a bidder*, not as a manufacturer or seller of supplies to a bidder, and that a manufacturer who has quoted prices on his specialty to one of the bidders is not thereby disqualified from himself submitting a direct bid for the same article. *C. 19967, June 26, 1906.*

VI J 7. Where, after a contract for quartermaster stores had been duly subscribed and entered into by and between the lowest bidder and the proper official representative of the Government, it was ascertained that the former had failed fully to perform a certain contract sometime previously made between himself and the United States, *held* that this fact could not authorize the Secretary of War to cancel the contract thus formally executed and enter into a new contract with another party.[1] *R. 41, 258, June 10, 1878.*

VI K. A bidder is not entitled to be furnished by the War Department or any of its officers with the prices of other bidders. A bidder having had the privilege of being present at the opening of the bids and making such memoranda as he wished has been accorded every right which he can demand from the War Department, and it would not be proper to employ government labor in furnishing the desired prices. A copy of any bid may, however, be obtained from the returns office of the Interior Department under the provisions of section 515, R. S. *C. 26895, June 18, 1910.*

VI L. Where a bidder offers to furnish supplies or render services at a different place from that stated in the advertisement, however convenient the place named may in fact be to the military authorities (*R. 39, 425, Feb. 12, 1878; 41, 113, Feb. 21, 1878*); or at a time different by five months from that stated in the advertisement (*P. 56,*

[1] In G. O. 167, W. D., Oct. 10, 1905, the Secretary of War directed that all bids received from contractors who had failed unjustifiably to fill former contracts with the Government should be rejected. (See 28 Op. Atty. Gen., 389, to the effect that if a bidder had previously been in default the bid may be rejected, but held further, that an adjudication that a person or contractor is a party to an unlawful trust or monopoly from which decree an appeal has been taken is not sufficient to exclude such person or corporation from competition in the sale of supplies to the Government. (See Cir. 76, W. D., Nov. 29, 1910.)

356, Nov. 18, 1892); or in quantity different from than that stated in the advertisement (*R. 39, 425, Feb. 12, 1878*), the variance is material, and such a bid should not be entertained; to let a contract on such a bid would be in effect to make a contract without advertising.[1] So, where bids were invited for supplying lumber at some port of the Pacific coast accessible to vessels of deep draft, the purpose of the Government being to subsequently transport the lumber to Manila, and a bid was received to supply the lumber at Manila, *held* that such a bid could not be considered, as it was not responsive to the advertisement. *C. 26044, Jan. 10, 1910.*

Bids were invited for a "steel observation tower." One of the bids was for a "concrete observation tower," and a contract was proposed to be entered into for one of concrete. *Held* that such a contract would be without competition such as contemplated by section 3709, R. S. *C. 20301, Aug. 29, 1906.*

A bid for the construction of a tank and trestle purported to be "subject to all the conditions and requirements" of the advertisement and circular of instructions, but there was added on the printed form in typewriting, after the price, the following words: "Design to be as per blue print marked contract No. 4310, copy of which is attached." The blue print provided for footings thirteen feet square, while the advertisement called for footings twenty feet square. *Held* that the bid should be construed to cover footings of only thirteen feet square. *C. 27569, Dec. 9, 1910.*

VI M. Bids were invited to supply 65,000 chambray shirts, along with other supplies, the advertisement stating that "the right is reserved to reject or accept any or all proposals or any part thereof." The instructions to bidders stated that "time of deliveries will be considered in making the awards" and bidders were required to state the times and amounts of deliveries. The lowest bid was for $46\frac{3}{4}$ cents per shirt, the next lowest bid being for $50\frac{1}{2}$ cents. The lowest

---

[1] In an opinion under an act of 1843 (similar to the existing law) requiring the letting of contracts in the *Navy* upon advertisements for proposals, it was held by Atty. Gen. Nelson (4 Op., 334) that the Navy Department was not authorized, "in awarding the contract to the lowest bidder, to modify its terms, as proposed for, in regard to the *time of delivery*, or any other of its material elements. The obvious purpose," he adds "of the act in question was to invite competition in the proposals; and it therefore requires that the advertisement emanating from the department shall particularize everything that may essentially affect the contract. That the time of delivery may be, in a contract of this description, a material element the circumstances connected with this case clearly evince. *Non constat*, if the time had been extended, as now proposed, on the face of the advertisement, that other and lower offers than were received might not have been made. It may well be that a manufacturer may not be in a condition to deliver at one time and yet be fully capable of doing so at another; and that, whilst he would be restrained by this inability from competing for a contract within the time limited by the proposals, he might have successfully done so had the extended time been advertised." (See, also, VII Comp. Dec., 92, 95.) In Schneider *v.* U. S. (19 Ct. Cls., 547, 551) the syllabus is as follows: "Where one contract is to furnish sandstone for a public building at a designated price and another is to substitute marble at a different price, the material being the sole subject matter of either agreement, the latter contract can not be regarded as a modification of the former; it requires a new advertisement." (See, also, 15 Op. Atty. Gen. 538.) In 20 Op. Atty. Gen., 496, where an advertisement was published calling for proposals for performance of certain work for the Government with the specification that it be begun on or before Oct. 1, 1892, and be concluded on or before Dec. 31, 1893, and one of the proposals stated that the bid was that the entire work was to be completed on or before June 1, 1894, and provided for stopping that work in certain contingencies: *Held* that the modifications made in the proposals were inconsistent with the specifications and with the spirit and intent of section 3709, R. S., and with the river and harbor act of 1888. (25 Stat. 423.)

bid stated that it was made "in accordance with your advertisement and circular of instructions." As the rate of delivery proposed by the lowest bidder was not fast enough the Government decided to distribute the work between three companies, and the lowest bidder was offered a contract for the manufacture of 35,000 at the same rate stated in the bid. The company refused the contract at so low a rate, insisting that the bid was made low so as to get the entire contract. The work was awarded elsewhere. *Held*, that it was doubtful whether the reservation by the Government of the right to "accept any or all proposals *or any part thereof*" would make an award of a part only of the shirt item responsive to the bid, but that the language of the reservation might be construed to refer to the acceptance of one of several items proposed to be furnished. *C. 19523, Apr. 17, 1906.*

Bids were invited for furnishing 1,800,000 pounds of oats during the fiscal year. The bid of the lowest bidder was accepted at the price stated in the bid, but only for 450,000 pounds, the intention being to accept the bid for such quantity only as would be sufficient to supply the needs of the Government for the period from July 1 to September 30, after which period prices would be lower because of the new crop. The bidder refused to enter into a contract and the Government purchased elsewhere in open market at a price in excess of the price of the bid. *Held*, the bid was to supply oats as needed *during the year* and that the acceptance was not of the bid as made, and therefore recovery could not be made against the guarantor of the bid for the excess of cost of the oats. *C. 21924, Aug. 24, 1907; 21878, Aug. 5, 1907.*

An advertisement for bids stated that "the right is reserved to reject any or all bids or parts thereof, and to waive defects," and required that the bids "be accompanied by a satisfactory guaranty * * * that the bidder will execute a contract, with good and sufficient bond, if his bid be accepted for any or all the articles." The form of guaranty that actually accompanied the bids provided that the bidders would enter into contract and bond "if their *bid* be accepted." *Held*, that the guaranty did not become effective unless the bid as a whole was accepted and that the bidder could legally refuse to enter into a contract for part only of the items bid on.[1] *C. 1583, July 26, 1895.*

VI N. The circular inviting bids contained the following provision: "If prices stated by bidders are based on minimum shipments, the amount of the minimum shipments must be clearly stated in the bid." The lowest bidder stated that his bid was based on minimum shipments of 200,000 pounds, and after the opening of bids requested permission to amend his bid by eliminating the provision as to minimum shipments. *Held*, that such an amendment would make a material change in the bid and is not authorized, but that if the amendment was permitted a contract made with such bidder would not be illegal. *C. 26905, June 17, 1910.*

VI O. Bidders for certain quartermaster's stores were advised that "unless a bidder distinctly states otherwise, in his proposal, it will be assumed that he will accept award of all or any part of the quantity on which he bids." One bidder named distinct prices

[1] See U. S. *v.* McAleer, 68 Fed. Rep., 146, to same effect.

for the several items he bid on and made no mention that he would accept award for all or none. This bidder claimed his bid should be construed as for the entire lot only. *Held*, that the contracting officer was justified in construing the bid to be for the items severally. *C. 27676, Jan. 17, 1910.*

VII A 1. Section 3709, R. S., provides that "all purchases and contracts for supplies or services in any of the departments of the Government, except for personal services" shall be made by advertising for proposals "when the public exigencies do not require the immediate delivery of the article or performance of the service." *Held*, under the above provision that where a contractor failed in the performance of his contract, at a critical stage of an important and much-needed public work, and at a time of the year when, if the delay were incurred of advertising anew, there would be risked a loss of the appropriation; and a greatly increased charge to the United States, as well as serious embarrassment to the military service would be involved, the situation might properly be viewed as an "exigency" justifying an immediate contract for the continuance of the work. *R. 42, 339, June 24, 1879.*

Under the provisions of section 3709, R. S., where, notwithstanding that Congress had failed to make appropriations for the fiscal year and no extra session had been convened for the purpose of having the omission supplied, there remained ample time for advertising for proposals for certain contracts for supplies before the supplies themselves would be needed, *held*, that the circumstances did not justify a dispensing with the general rule prescribed by the statute, especially since, by the authority of section 3732, R. S., contracts for these supplies could legally be made in the absence of an appropriation. *R. 39, 527, May 3, 1878.* So, *held*, that it was no excuse for a noncompliance with the statute, that contracts made without advertisement had been made with the most reliable parties and to the advantage of the United States. *R. 39, 84, Dec. 27, 1876.* And, *held*, that the requirement as to advertising for proposals must be complied with in contracting for a supply of articles purchased for *trial*, equally as if the contract were for the regular yearly supplies. *R. 37, 464, Apr. 7, 1876.* *Held*, also, that the fact that a contractor for work cannot complete his contract without losing money and desires to abandon it does not constitute a public exigency. *R. 50, 76, Feb. 26, 1886.*

VII A 2. While existing law leaves to the heads of the several staff departments the duty of supervising all contracts and purchases made in their respective departments, it does not require them to determine whether in a particular case an emergency exists, but imposes upon the officer charged with the duty of making the purchase the discretion to determine whether an emergency exists.[1] *C. 14303, Mar. 21, 1903.*

---

[1] As to the authority who is to decide whether there exists such an exigency as is contemplated by the statute, the Supreme Court, in United States *v.* Speed, 8 Wallace, 83, has held that it is "the officer charged with the duty of procuring supplies or services who is invested with this discretion." This description is rather general, nor is the term "the purchasing officer," by which the Court of Claims explains it, in Thompson *v.* United States, 9 Ct. Cls., 196, a much more precise definition. It is clear, however, that a subordinate officer charged with the duty of being the immediate representative of the United States in a contract or purchase should not, in general, venture to dispense with advertising, on the theory of the existence of a

The commanding officer of a post who had no duty to perform in connection with procuring the supplies, except to make a requisition for them, has no authority to determine whether there was such an exigency as would make advertising unnecessary. *C. 15290, Oct. 5, 1903.*

Where there is doubt as to the existence of an emergency the contemplated purchase should be referred to higher authority if the circumstances will permit of delay. Where, however, the Secretary of War could have authorized an exigency purchase before it was made he may, if in his judgment the public exigency existed, approve the expenditure after it has been made. *C. 3481, Sept. 1, 1897; 15290, Oct. 5, 1903.*

Where the officer charged with the duty of making the purchase has certified that a public exigency existed which would not admit of the delay incident to advertising, and the papers in the case do not negative such a certificate. *Recommended*, that the purchase be approved. *C. 11473, Oct. 31, 1901.*

VII B. Where elevators were to be installed in the War Department under the act of February 3, 1905 (33 Stat. 663), making an appropriation "for a pair of new elevators," the statute imposing no restriction upon the letting of the contract except by limiting the cost, *held* that inasmuch as the work is not, strictly speaking, under "any of the departments of the Government" within the meaning of section 3709, R. S., it is doubtful whether advertising is required.[1] *C. 18153, June 12, 1905.*

Held that the purchase of the gray cloth used for the uniforms of the cadets of the Military Academy was not a purchase of supplies "in the War Department" in the sense of section 3709, R. S., and was therefore not required to be made by advertising. This section has apparently in view purchases of supplies for the uses and purposes of the United States, under appropriations made specifically for such supplies or clearly applicable to them and expended as public funds under the control and direction of the head of a department. The cadet clothing is purchased not as "supplies" for the Army in general, but for the special use of a particular class of persons, and is paid for, not out of an appropriation for the military establishment, but out of their monthly pay. The continued usage of a department in regard to any transaction is an important factor in the construction

---

public exigency, in the absence of instructions or orders from a proper superior. Nor, on the other hand, will a superior officer, in entering into a contract for his command or branch of the service, properly assume that an "exigency" exists authorizing him to dispense with the statutory forms, when the period is time of peace and no imperative necessity exists for the immediate delivery of the supplies or performance of the service proposed to be contracted for. It is to be noted that the cases both of Speed and Thompson related to contracts entered into during the Civil War. In the instructive opinions of the Attorney General on the "Fifteen per cent Contracts" of Apr. 27 and May 3, 1877 (15 Op., 235, 253), it is held that the "exigency" contemplated by the statute can be one of *time* only, and that it can be regarded as existing only where an *immediate* delivery or performance is required by a public necessity.

See, however, III Comp. Dec., 470; 5 id., 64.

[1] See VIII Comp. Dec., 128, holding that Spanish Claims Commission was not attached to any "executive department" and therefore did not come under sec. 3709, R. S., as amended. See, also, XV Comp. Dec., 606, holding Library of Congress is not attached to an "executive department."

of the law relating thereto,[1] and for upward of fifty years the clothing in question has been purchased in open market from a particular mills company. *Advised* that such usage might be continued without contravention of existing law. *P. 48, 198, July 13, 1891.*

VII C. The word "supplies" as used in section 3709, R. S., includes gun carriages purchased for the use of the Gettysburg National Park Commission.[2] *C. 15268, Sept. 16, 1903.*

Under the act of March 9, 1906 (34 Stat. 56), for the marking, etc., of the graves of the Confederate dead who died in northern prisons, etc., it was proposed to erect a monument. *Held*, that it is questionable whether a contract for the erection or repair of a monument in the execution of the above statute would constitute a contract for "supplies" within the meaning of section 3709, R. S. *C. 19834, May 24, 1910.*

VII D. "Personal services," within the meaning of section 3709, R. S., are services to be rendered in person by the party or parties who contract to furnish them whether the character of the services are skilled or not.[3] So, *held*, that services of physicians, services of washerwomen, services in repairing mattresses, bedsteads, clocks, chairs, etc., and in hauling rubbish, ashes, etc., if to be rendered in person by those who contract to perform them, are "personal services" within the meaning of this section. *C. 653, Nov. 22, 1894; 10967, Aug. 5, 1901; 16493, June 18, 1904.* Laundry work to be done at a steam laundry where the contractor does not perform the work in person is not "personal services." *C. 10783, July 1, 1901; 16493, June 18, 1904.* The fact that certain work is to be paid for by the job does not prevent it being "personal services." *C. 10967, Aug. 5, 1901.*

---

[1] 2 Op. Atty. Gen. 558; 4 id. 467, 470; 10 id. 52.

[2] See VII Comp. Dec. where it was held that the word "supplies" as used in appropriation acts applied to such only as are required for annual consumption. In III Digest Decisions of 2d Comptroller, p. 288, it is said: "The word 'supplies' as used in sec. 3709 of the Revised Statutes, evidently has reference to those things which the well-known needs of the public service will from time to time require in its different branches for its successful and efficient administration, and the statute was intended to afford the Government the pecuniary benefits, as well as the protection against fraud and favoritism which open and honest competition is always likely to secure." In Gleason *v.* Dalton, 5 N. Y. Supp., 337; 28 App. Div. 555, it is said " 'Supplies' as used in reference to a city, in its broad etymological sense embraces anything which is furnished to a city or its inhabitants; but as used in sec. 419 of the Greater New York charter, requiring competitive bids for supplies, it has no application to contracts for furnishing water to the inhabitants of New York." So, also, in Farmers' Loan & Trust Co. *v.* City of New York, 17 N. Y., Super. Ct. 89, it was held that the use of a pier hired by the city for the purposes of removing offal from the city, is not a "supply" furnished, within the meaning of a law that all supplies to be furnished for the city involving an expenditure of more than $250 must be by contract founded on sealed bids.

[3] In an opinion of Attorney General Bates, dated May 23, 1862 (10 Op., 261), it was held that a contract for surveying reservation lands under a treaty with the Indians was "personal services" within the meaning of section 10 of the act of March 2, 1861 (12 Stats., 220), now embodied in sec. 3709, R. S.—the reason assigned being that the services required not only fidelity and integrity but a certain kind of skill and knowledge, and that the contracting officer should have discretion in selecting those who possess the required qualifications. In later opinions, however, "personal services," as used in sec. 3709, R. S., are held to include services to be rendered in person by the party contracted with, who thus becomes a servant of the Government. (15 Op. Atty. Gen., 235, 253; 19 id., 96.) In VI Comp. 314, the term "personal services," as used in this section, is defined as services to be "performed by a single person, or by firms, for the Government, under a contract made with the Government to render for it, his, or their individual services, of either skilled or unskilled labor, under the direction of the Government, thereby becoming the servant of the Government in the performance of such labor." (See also par. 528, A. R., of 1910.)

VII E 1. The act of June 12, 1906 (34 Stat. 258), provides that "Hereafter the purchase of supplies and the procurement of services for all branches of the Army service may be made in open market, in the manner common among business men, when the aggregate of the amount required does not exceed $500." *Held*, that there is nothing in the act to justify construing the words "aggregate of the amount required" to require that the purchase should be limited to any particular period of time, as a day, month, or year, or shall be limited to purchases made from a single firm, etc. The aggregate should include all supplies which are properly grouped together in a single transaction, and which would be included in a single advertisement for bids, if advertising were resorted to. Purchases arising from the same need of the same articles of subsistence stores should not be made more frequently than the necessities of the service require, so as to limit the aggregate in each case to $500, and supplies which are usually purchased together should not be divided simply for the purpose of avoiding advertising for the same. If the character of the supplies is such that good administration would require their purchases in quantities sufficient to last a month, purchases should not be made weekly or daily for the purpose of bringing the amount within the limit authorized for open-market purchases. Subject to the above considerations, the matter is one depending upon the sound discretion of the purchasing officer. *C. 28931, Sept. 2, 1911.*

VII E 2. The act of June 12, 1906 (34 Stat. 258), does not apply to river and harbor improvements and other civil work of a nonmilitary character that may be under the actual control of Army engineers, as such work is not "Army service." *C. 20326, Sept. 7, 1906.*

VII E 3. The Army War College is a branch of the "Army service" within the meaning of the act of June 12, 1906 (34 Stat. 258), which provides for the purchase and procurement of supplies and services "for all branches of the Army service" in open market, where the aggregate of the amount does not exceed $500, etc. *C. 14944, Oct. 14, 1907.*

VII E 4. The act of June 12, 1906 (34 Stat. 258), provided that "hereafter the purchase of supplies and the procurement of services for all branches of the Army service may be made in open market, in the manner common among business men, when the aggregate of the amount required does not exceed five hundred dollars; but every such purchase exceeding one hundred dollars shall be promptly reported to the Secretary of War for approval, under such regulations as he may prescribe." *Held*, that when the aggregate of the amount required does not exceed $500 it is not necessary to either advertise or to enter into a written contract as required by section 3744, R. S. *C. 23214, May 5, 1908.*

VII E 5. To purchase "in open market" is to purchase without advertising, and in the manner in which one person in civil life ordinarily purchases from another in private business.[1] *C. 313, Oct. 6, 1894; 23214, May 5, 1908.*

VII F 1. The act of August 11, 1888 (25 Stat. 423), relating to river and harbor improvements provides that the Secretary of War shall apply the money appropriated "in carrying on the various works, by contract or otherwise, as may be most economical and advantageous

[1] See par. 559, A. R. 1910.

to the Government. Where said works are done by contract such contract shall be made after sufficient public advertisement for proposals in such manner and form as the Secretary of War shall prescribe; and such contracts shall be made with the lowest responsible bidders, accompanied by such securities as the Secretary of War shall require conditioned for the faithful prosecution and completion of the work according to such contract." *Held*, that while this act does not, like section 3709, R. S., in words except cases of emergency from the necessity of advertising, it may be, and in practice has been, construed to permit such contracts to be made without advertising in cases of emergency. *C. 5279, Nov. 21, 1898; 7315, Nov. 18, 1899, and Aug. 8, 1910.* So, also, where the Government owned a number of iron rails, *held*, that under the provision of the above act of August 11, 1888, authorizing the work to be carried on "*by contract or otherwise*" the Government could properly make a supplemental contract with a contractor without advertisement for renting the rails to the contractor for use in connection with the river improvement work (*C. 10819, July 13, 1901*); and under the same provision to the above act, *held*, that the government by a supplemental contract without advertisement could terminate a contract for river improvement, the contractor releasing all claims against the Government, the Government paying him for the work already performed, purchasing all the material on hand and hiring the contractor's entire plant until the completion of the work by the Government. *C. 2275, May 12, 1896; 8087, Apr. 27, 1900.* So, also, where a contractor for a river improvement abandoned the contract after performing part of the work, *held* that, under the same provision of the above act, the Government could purchase the plant of a subcontractor and complete the work by hiring labor and purchasing material. *C. 27790, Feb. 6, 1911.* So, also, where a dredging company offered to do dredging at a certain price per cubic yard, which price was a very low one for the reason that it had an arrangement with a railroad company that was interested in the work to receive additional compensation from that company. *Held*, under the same provision of the above act, that an agreement without advertising could be made with the dredging company whereby the dredging company should do the work at the very low figure named under the supervision of the engineer officer. *C. 7980, Apr. 11, 1900.* So, also, under the same provision of the above act, where a contract called for the removal of rock to a width of 40 feet and it was desired to have the same contractor remove rock for an additional 60 feet in width, *held*, that if the work was to be done by hiring the contractor to remove rock at a certain price per cubic yard and not by agreeing with him to remove a given quantity of rock, the work might be considered as being done otherwise than by contract, and no advertisement would be necessary. *C. 8658, Aug. 6, 1900.*

VII F 2. Where the act of March 3, 1905 (33 Stat., 860), which authorized improvements at West Point provided that "after general plans had been prepared and approved by the Secretary of War, he might, within the limit of cost fixed, proceed with their execution in such order as the detailed plans might be approved by him and in such manner '*by contract or otherwise*' as he might see fit." *Held*, that the buildings might be constructed on the percentage plan and without advertisement. *C. 20947, Jan. 18, 1907, and Feb. 3, 1911.*

VII G 1. Where Congress makes an appropriation applicable to the alteration of a particular monument upon the report of a committee which referred to a particular plan for the alteration as meeting with the approval of all parties interested, *held*, that such action would imply a legislative adoption of the plan so that it could not be materially departed from, and if a private company had the exclusive right to use those plans the case would be one where competition would be useless and would constitute an exception to the rule laid down in section 3709 R. S., that advertising should be had. *C. 19834, May 24, 1910.*

VII G 2. Where the Army War College wished to obtain certain maps, many of which were rare and difficult to obtain, so that it would be impossible for bidders to determine what the maps would cost them, *held*, that competition would be useless, and under the provisions of the act of March 2, 1903 (32 Stat., 936), which requires advertising except "where it is impracticable to secure competition," advertising could be dispensed with. *C. 16018, Mar. 12, 1904.*

VII G 3. Where the Government desired to purchase electric power under circumstances where there was no real competition, *held*, that advertising would not be necessary, as it would be useless. *C. 18169, June 16, 1905.*

Where it was desired to install wireless telegraph stations in Alaska, *held*, that as each bidder is in possession of certain information and methods of transmitting messages which are but partially developed and are not available to any other bidder, the case is not one where there can be true competition. Therefore, section 3709 R. S., does not require advertising in such a case.[1] *C. 12705, May 31, 1902.*

The Government licensed certain telegraph instruments obtained under a contract which provided that the Government should not dispose of the instruments in any way except by total destruction or by sale to the licensor upon terms to be mutually agreed upon. *Held*, that in selling the instruments to the licensors it would not be necessary to advertise for bids, as competition would be useless. *C. 20523, Oct. 17, 1906.*

Where it was desired to enter into a contract in the nature of a lease to take sand and gravel from certain land, *held*, that competition would be useless and advertisement was not necessary. *C. 17642, Mar. 8, 1905.*

Where bids for supplying sand and gravel had been invited in January, 1903, and the prices ranged from $1 to $1.50 per cubic yard, *held*, that a contract could be made in July, 1903, for sand and gravel at 40 cents per cubic yard without advertising, as competition would be useless. *C. 14919, July 9, 1903.*

VII H. Where, pursuant to section 3709, R. S., advertisement has been once duly made, the law has been complied with. If this advertisement is without result, it is not necessary (though it is permissible) to advertise again, or to go on advertising till an acceptable

[1] See I Comp. Dec., 229; II id., 632; V id., 554; 17 Op. Atty. Gen., 84, that sec. 3709 R. S., does not require advertising to precede contracts for the purchase of patented and copyrighted articles. In an unpublished opinion of the Comptroller of June 30, 1908, found on C. 25747, J. A. G. O., the determination by the Secretary of War that the purchase of a particular vehicle was needed, and his determination that the circumstances rendered competition impracticable were accepted as sufficient to excuse the absence of advertisement. See also U. S. *v.* Speed, 8 Wall., 83.

proposal be received, but open-market purchase without advertising may be resorted to.[1] *62, P. 494, Dec. 14, 1893; C. 8198, May 4, 1900; 9036, Sept. 27, 1900; 16342, May 18, 1904; 16493, June 18, 1904; and 24059, Oct. 27, 1908.* In the latter case, however, the purchase must be limited to the article or articles previously advertised for. *C. 313, Oct. 5, 1894; 8198, May 4, 1900.* So, where bids were invited for certain road work in the Gettysburg National Park, coupled with the statement that $15,000 had been set aside for the work, and no bid was received within that figure, and it was then decided to let a contract without advertisement for a part only of the road work formerly designated. *Held,* that readvertisement was necessary. *C. 20298, Aug. 28, 1906.*

VII I. It is the established practice in the fiscal administration of the several executive departments that one department or bureau may obtain from another, at cost price, such articles as are needed in its administration, the theory being that the requirements of law, in respect to advertising and contracting, have been complied with in the original purchase of the articles so transferred at cost price. Therefore, *held,* that the commissioners of the National Soldiers' Home may lawfully purchase clothing from the quartermaster's department, if such clothing is considered more suitable than that obtained by contracts between the commissioners and manufacturers. *C. 26911, June 20, 1910.* Where the Government of the Philippine Islands, after an opportunity for competition had been afforded, entered into a contract with the owners of certain merchant vessels for the transportation of passengers and freight between certain parts of the Philippine Islands at reduced rates, and the United States had an opportunity to obtain the same rates, *held,* that the United States could lawfully take advantage of the reduced rates without a fresh advertisement. *C. 22672, Jan. 24, 1908.* Where the United States desired to have insane Filipino soldiers cared for in the San Lazaro Hospital, Manila, which institution was under the control of the Government of the Philippine Islands, *held,* that the agreement for this purpose should be by an informal agreement without advertising not by a formal contract, under section 3744, R. S.[2] *C. 23229, Aug. 4, 1909.*

Applying the same principle to the operations of a post exchange (which is an instrumentality of the United States), a post hospital could properly contract without advertisement to have the hospital laundry work done at the post-exchange laundry, and on the other hand, as the post exchange is not a legal entity, and is exempt from burdens borne by private commercial institutions, such as rent, taxes, license fee, etc., it would be improper for it to compete with other bidders for public supplies or services.[3] *C. 18156, Oct. 31, 1905.*

VII J 1. If a contract is still in existence as an executory contract, even though one party may have completely performed his part of the contract, *and it is not against the public interest* to close it out by a compromise agreement between the parties, compensating either

---

[1] Par. 559, A. R., 1910, provides that "an open-market purchase of supplies or engagement of services is one made without advertising, and is authorized in the following cases: * * *

"3. When proposals have been invited and none have been received.

"4. When proposals are above the market price or otherwise unreasonable."

[2] XVI Comp. Dec., 163.

[3] See Cir. 57, W. D., Nov. 7, 1905.

party for damages suffered instead of carrying the contract to completion according to the original intention, the Secretary of War may by a supplemental contract make such a compromise agreement; but, if on the contrary, the contract has already actually been canceled and annulled,[1] and therefore the contract is out of existence as an executory contract, the Secretary of War can not settle with the contractor for any damages he may have suffered by reason of anything that has been done. Before the Secretary can close out a contract by a compromise agreement there must be a live contract to close out. There must be an executory contract in existence for the contractor to perform and fulfill according to its terms. But if a contract has been actually canceled and annulled there is nothing that the contractor would have the right to proceed with and therefore nothing that the Secretary could close out by a compromise agreement. If a contract is already canceled and annulled, it is already closed and the rights of all parties are fixed.[2] *C. 3969, Oct. 11, 1898; 10502, May 16, 1902.*

VII J 2. Where a contract provides that the contractor may be allowed such additional time as the constructing officer may determine to be due to certain causes, *held* that a supplemental contract is not necessary, but that it is sufficient to notify the contractor in writing of the determination made. *C. 17597, Feb. 27, 1905.*

VII J 3. Even where a contract stipulates for a modification of its terms, by consent of parties, to be set forth in a supplemental contract, such supplemental contract must be confined to modification merely of the specific undertaking which is the subject of the original contract. A modification which introduces any new matter not originally contracted for—as different and distinct work to be done or service to be performed—is a new and independent contract made without advertising for bids, and not legitimate. So, *held*, that a contract for dredging in North River and at North River Bar, N. C., could not legally be modified by a supplemental contract substituting dredging in Carrituck Sound, a quite different locality. *P. 64, 344, Apr. 12, 1894.* An advertisement for a certain quantity of quartermaster stores was duly made. The contract contained a provision that the contract "may be changed, altered, modified, or abrogated in whole or in part and the quantity of the article herein contracted for may be increased at any time during the present fiscal year."

---

[1] But the fact that one of the parties to the contract has failed or refused to carry out the contract does not constitute a cancellation, rescission, or annulment. The contract is still in force and the rights and claims of both parties may be settled by a compromise agreement between them if not against the interest of the United States. In 22 Op. Atty. Gen., 437, it was said: "It is a mistake to suppose, except where it is expressly so provided, that one party to a contract can, without the consent or default of the other, cancel, rescind, or put an end to the contract or its obligations. The law neither provides nor recognizes any such easy road to repudiation. A party may abandon or fail or refuse to perform his contract, but its obligations still continue, although at law there may be no means for their enforcement. This is shown by the fact that it is the usual practice of courts of equity to enforce the specific performance of contracts against parties after their breach of or refusal to perform them. This, of course, could not be done if the obligations of the contract did not continue after breach as before."

[2] The rule stated in the paragraph must be understood as subject to the limitation that no executive officer has authority to settle by a supplemental contract such unliquidated damages in favor of the United States as may arise from a breach of the contract (as distinguished from unliquidated damages arising from the performance of the contract), but in such cases resort must be had to the courts for their liquidation. Cramp & Sons *v.* U. S., 216 U. S., 503, XVII Comp. Dec., 806, 810.

Held, that this provision did not authorize the parties to the contract, even by mutual agreement, to permit the contractor to deliver a quantity not called for in the advertisement and contract, and that additional stores could be obtained only after advertisement as required by law.[1] *R. 37, 478, Apr. 18, 1876; 39, 653, Sept. 3, 1878; 41, 182, Apr. 4, 1878.*

---

[1] In the case of a contract in the Post Office Department, containing a stipulation for extension, etc., by the authority of which the operation of the contract had been extended beyond the period expressly limited therein, although by a statute governing the case it was required that all such contracts should be made upon advertisement, proposals, etc., it was held by Attorney General Hoar (13 Op., 174), as follows: "I am of the opinion that the provisions of that statute apply to the contract in question, and that, although the contract contained a provision for its extension and modification at the pleasure of the contracting parties, such a provision was not authorized by law. If a contract, which the law only allows to be made in pursuance of an advertisement, could afterwards be renewed and extended at the pleasure of the Postmaster General without any advertisement, it would be in the power of that officer and his successors in office, unless restrained by some subsequent act of the legislature, to make for all future time such contracts as he might think expedient, without reference to the conditions contained in the original advertisement for proposals, or to the terms upon which the contract was offered to public competition." The above opinion, however, is not inconsistent with the right of the United States to modify an existing contract with the consent of the contractor, or even to entirely abandon an existing contract, either with or without the consent of the contractor, *if such a course is deemed not to be against the interest of the Government*. This right exists whether the contract does or does not contain a provision for its modification, and is usually and regularly accomplished by means of a brief written supplemental contract briefly reciting the facts which show the contract is not against the interest of the United States, signed as required by sec. 3744, R. S., and approved by the officer charged with the approval of the original contract. The right may, however, be exercised by the officer in charge of work verbally ordering changes commonly known as "extras." If the contractor performs the "extra" work or supplies "extra" material he should be paid the reasonable value of the same unless the parties agreed upon a price before performance.

The following decided cases illustrate the broad scope of supplemental contracts: In U. S. *v.* Corliss, 91 U. S., 321, the Secretary of the Navy had made contracts for engines and machinery to be placed on one of our vessels of war, but before the work was completed, the war being closed, the Secretary suspended the further performance of the contracts. The contractor proposed that in settlement of the whole matter he would retain the uncompleted engines and machinery and accept $150,000 or he would deliver the work in its uncompleted state and accept $259,068 in full settlement. The Secretary accepted the latter proposition, and there being no appropriation therefor, gave the contractor a certificate for this sum, and the Supreme Court upheld the settlement and expressly decided that it was within his power. In that case the court said: * * * "As, in making the original contracts, he (the Secretary of the Navy) must agree upon the compensation to be made for their entire performance, it would seem that, when those contracts are suspended by him, he must be equally authorized to agree upon the compensation for their partial performance. Contracts for the armament and equipment of vessels of war may, and generally do, require numerous modifications in the progress of the work, where that work requires years for its completion. With the improvements constantly made in shipbuilding and steam machinery and in arms, some parts originally contracted for may have to be abandoned and other parts substituted; and it would be of serious detriment to the public service if the power of the head of the Navy Department did not extend to providing for all such possible contingencies by modification or suspension of the contracts, and settlement with the contractors. When a settlement in such a case is made upon a full knowledge of all the facts, without concealment, misrepresentation, or fraud, it must be equally binding upon the Government as upon the contractor; at least, such a settlement can not be disregarded by the Government without restoring to the contractor the property surrendered as a condition of its execution." The power to settle with a contractor by means of a supplemental contract has been limited by a recent opinion of the United States Supreme Court to the extent of holding that a supplemental contract can not settle unliquidated claims against the Government arising from a *breach of the contract*. See Cramp & Sons *v.* U. S., 216 U. S., 503; XVII Comp. Dec., 806, 810.

Where a dredging contract provided that the contractors should provide their own dumping grounds at their own expense, and it was proposed to modify the contract

A contract provided for the construction of the Barnes Landing Levee and the Warfield Point Levee, Mississippi, and it was proposed to enter into a supplemental contract for the construction of 40,000 cubic yards at Ingomar, Miss., instead of at Barnes Landing. *Held,* a supplemental contract for that purpose would be illegal, as Ingomar was a different locality and was not mentioned in the advertisement for the work, and even the provision in the advertisement authorizing the engineer in charge to "designate the exact locality"

---

by having the United States authorize proceedings in its name, to condemn land for a dumping ground, and it was questioned whether the proposed modification could be made under the original advertisement, the Attorney General, in 21 Op. Atty. Gen., 78, said: "The advertisement under which the original contract was made can no longer be regarded as of any material importance, since the work contracted for has been partially executed, while unforeseen obstacles have arisen which threaten to greatly hinder and probably prevent its complete execution. Under such circumstances, what the contractors propose is a modification of the contract, which, while it relieves them of their difficulty, is in reality more favorable to the Government than the original contract. Under its terms the contractors were to furnish the necessary dumping grounds. But under the terms as modified, not only will the contractors practically furnish the dumping grounds by paying the United States all they cost, but when the contract has been fulfilled the United States will own the dumping grounds, and will be pecuniarily benefited to the extent of their value. Without approving the precise terms of the proposed supplemental contract—which I think may be advantageously changed in some particulars—the advertisement pursuant to which the contractors bid for and were awarded the original contract does not, in my judgment, offer any legal difficulty to the making of substantially such a supplemental contract as is suggested."

In 21 Op. Atty. Gen., 207, it was held that a clause in contracts of the War Department providing for future modifications of the contract was reasonable and proper, and that a modification of the contract made under that provision, which does not prejudice the interests of the Government or violate any statutory provision, is not such a new contract as must be preceded by advertisement, citing 18 Op. Atty. Gen., 101, and 28 Ct. Cls., 332.

In VIII Comp. Dec., 549, where a contract provided for the payment of the entire price stipulated therein upon the completion and delivery of a lighthouse, *held* the officers of the Government were not authorized to modify the contract by providing for a partial payment of the amount before completion if such modification would be prejudicial to the interests of the Government.

In IX Comp. Dec., 43, a contractor having failed to complete the work provided for in the contract, *held,* a supplemental contract might be entered into with him and his sureties by which it might be provided that the work should be completed by the sureties and payment made to them therefor, and also from the amounts retained from payments made to the original contractor for any excessive cost thereof less the amount of any damages suffered by the Government.

In XV Comp. Dec., 439, it was *held* that where it becomes necessary for the exclusive benefit of the Government to abandon work under a contract and otherwise depart therefrom, resulting in loss and damage to the contractor, and a supplemental contract, providing for such damages, is entered into between the parties and approved by the Secretary of War, in which the damages to the contractor are agreed upon and fixed in a lump sum as a fair and just compensation for said damages and in full liquidation thereof, payment of the sum so agreed upon is authorized, and *held,* further, that the contractor's profit on work under a contract abandoned by the Government for its exclusive benefit and his loss resulting from additional expenses incurred by reason of such abandonment are proper elements of damage. On the latter point see also Venable Construction Co. *v.* U. S., 114 Fed. Rep., 763.

In 22 Op. Atty. Gen., 437, where a contract had been made for the transportation of supplies for the relief of destitute people in the Yukon River region and the expedition was abandoned by the Government, *held* that the Secretary of War had the right to abandon the contract and decline to perform it if he deemed that the public interests so required, and that he had the power to settle and pay the claims of the contractors growing out of the abandonment, and this regardless of whether such claims were liquidated or unliquidated.

Under the rule laid down in 91 U. S., 322, the time for completion of a contract may be extended to a future specified date provided the Government interests will not be thereby prejudiced. II Comp. Dec., 242, 635; 4 id., 38; 8 id., 104; 14 id., 237.

at which the work should be prosecuted would not authorize him to designate a locality other than at the place named in the advertisement. *C. 475, Oct. 18, 1894.* So, also, where a contract had been made for dredging "hard pan with bowlders imbedded therein" and "soft mud" from the channel at the mouth of Aswegatchie River and Ogdenburg Harbor, and it was proposed to do additional dredging of "fine hard sand" from the "outer bar at the upper entrance to the harbor." *Held*, that the localities and material being different from those set out in the advertisement a supplemental contract to cover the additional work would be illegal. *C. 1454, June 18, 1895.* So, also, where a contract had been made for removing rocks and bowlders from a river within the width of 40 feet, and the work having been completed, it was proposed to enter into a supplemental contract for removing the rock along the northerly side for an additional width of 60 feet. *Held*, that the additional work not being a modification of the original contract, nor being made necessary by a change in the work covered by the original contract, and the only connection between the additional work and the original work being that it is to be in the same locality alongside of it, it could not legally be covered by a supplemental contract, but should be readvertised for. *C. 8658, July 26, 1900.* So, where in the course of the execution of a contract for the dredging of a river, there was developed certain work requiring to be done which was not embraced in the work contracted for, but was quite new and distinct, viz, the removal of a bar formed in the river after the work under the contract had commenced—*held*, that the same could not be included by consent in the existing contract, or covered by a supplemental contract entered into, without advertising, with the same contractor, though such course might be more advantageous to the United States, but that the law must be complied with by a new advertisement for proposals followed by a separate formal contract. *P. 47, 257, May 20, 1891.* A contract duly made for the removing of a wreck in Charleston Harbor, rendered difficult of completion by stormy weather, the action of the tides, etc., can not legally be allowed to be superseded by a supplemental contract for partially breaking up the wreck, to be entered into with the same party without advertising and to provide for paying the party for the work already done in partially removing the wreck and for relieving the contractor from further liability under his contract.[1] *P. 63, 256, Jan. 16, 1894.*

Where the time within which quartermaster's stores were to be furnished to and received by the United States was limited to a stated period, *held*, that the Secretary of War would not be authorized to renew or extend the operation of the contract beyond that period, so as to admit the delivery of additional stores under the same, but that for such additional quantity it would be necessary to contract anew in the regular legal mode, upon new advertisement, proposals, and award. *R. 36, 463, May 14, 1875.* Where bids were invited for 30,000 yards of Kersey, subject to an increase not to exceed 50 per cent, and the prices named by the lowest bidder and the next

[1] In Schneider *v.* U. S. 19 Ct. Cls. 551, where a contract had been made to furnish sandstone for a public building for $58,000, and it was sought to modify this contract by substituting marble for $113,000, without advertisement, the material being the sole subject matter of both the original and the modified contract, *held* the latter contract was not a modification of the former, and a new advertisement should be had.

lowest bidder were nearly equal, *held*, that contracts could not be made with each of the contractors for the entire amount advertised for, subject to a possible 50 per cent increase. A fresh advertisement would have to be made to cover the amount over that stated in the original advertisement. *C. 25979, Dec. 23, 1909.*

VII J 4. The following cases illustrate the nature of the action or settlement that may properly be the subject of a supplemental contract, *it appearing in each case that the supplemental contract would not be against the interest of the United States.*[1]

To provide for an additional expenditure to cover the cost of additional masonry, rendered necessary by the site of a quartermaster and commissary storehouse, but not shown on the plans or provided for in the original contract for the building of the house. *C. 2705, Oct. 27, 1896.* For excavation found necessary in addition to the excavating contracted for in the construction of a cofferdam, and piling foundation for a lock. *C. 2927, Feb. 10, 1897.* To cover expense to contractor of maintenance, etc., during suspension of river and harbor work which was directed by the engineer officer in charge on account of high water, and on account of damage to the levee which the driving of piles, etc., by the contractor might cause. *C. 2927, June 8, 1897.* To substitute in the wings of a lock 800 round piles 60 feet in length for that number 50 feet in length. *C. 2927, July 2, 1897.* To provide for necessary "rock excavation," as well as "common excavation," the original contract providing for "common excavation" only. *C. 5244, Nov. 5, 1898.* To substitute brick piers and curtain walls for pile foundation in connection with the erection of certain buildings. *C. 11041, Aug. 13, 1901.* To provide for depositing dredged material on private ground instead of towing same to public dumping ground. *C. 3423, Aug. 10, 1897.* To provide for working two or three shifts of men, each for eight hours, instead of one shift only for eight hours, as provided in the original contract, *C. 9085, Oct. 11, 1900.* To provide for the vesting in the United States of the title to property being manufactured for the United States and being paid for by partial payments, the original contract failing to specify where the title vested after partial payments began. *C. 9410. Dec. 14, 1900.* To provide for the purchase at a reduced price of mineral oil of a lower flash test than required by the original contract. *C. 26846, Oct. 7, 1910; 28353, May 17, 1911.* The United States entered into a contract for the filling of a certain piece of ground to a certain grade. Unexpectedly, the ground subsided, making it necessary to increase the fill in order to reach the required grade. *Held*, that the contract was made on the assumption of the continued and practically unchanged existence of the foundation for the fill; that is, that there would be a foundation for the proposed fill which would not materially subside, and that a supplemental contract could properly be made to cover the increase of fill on account of the subsidence. *C. 24531, Mar. 5, 1909.* A contract was made for the construction at Fort Hancock, N. J., of 32 buildings and one double bake oven at a stated price for each building, etc., the prices aggregating a stated amount. The contract provided that the payments should be made at such times and in such amounts as the officer in charge of the work should elect, based upon estimates to be made by him of completed

[1] See Satterlee *v.* U. S., 30 Ct. Cls., 31.

work, and that 20 per centum of each payment should be retained until the final completion and acceptance by the Government of all the work under contract. After several of the buildings had been completed the Government occupied and continued to use them. *Held*, that the price of the several buildings could not be paid in full until all the buildings were completed, but that if it were desirable to make payment in full for each building when completed a supplementary contract could be made providing for such payment. *C. 4825, Aug. 23, 1898.* A contract was made for the earthwork construction of "mile 24," Illinois and Mississippi Canal. At the time the specifications of the contract were prepared it was assumed that the work could be done by building part of the embankment with the clay and gravel from the high grounds at the east and west ends of the mile in question, this method appearing to be perfectly feasible and practicable from the test borings which had been made. The latter were, however, made in very dry weather. During the rainy season which followed further examination developed that the mile for two-thirds of its extent was a peat bog of great depth. The construction outlined in the specification could not be successfully executed except by excavating this peat from the greater part of the mile and then making the slopes and bottom of good water-tight clay and gravel which could not be obtained on the mile. The changed conditions rendered it desirable that the Government should not enforce the construction outlined in the specifications, and that the embankments be made of other material which must be transported from a distance. The contractors asked that the contract be annulled without prejudice to them. *Held*, that there was no legal objection to a supplemental contract annulling the original contract as indicated. *C. 5195, Oct. 24, 1898.* Where the progress of a contractor in the performance of important work, contracted to be done by him in connection with the improvement of the Savannah River, was quite unsatisfactory, and the alternative under the terms of the contract appeared to be either the absolute annulment of the contract by the United States, or the supplementing of the operations of the contractor by work carried on by the Engineer Department of the Army, the contractor paying the extra expense if any—*held* that a supplementary contract made with him to the effect that the engineer officer in charge of the improvement should render him aid in the performance of the work, charging to him the actual cost of such aid and deducting it from the payment to be made him under the contract, was without legal objection. *P. 62, 451, Dec. 2, 1893.* Where a contract was made to manufacture campaign badges according to a design submitted by the Government, and owing to the failure of the Government to provide suitable designs from which dies might be made the contractor was unable to make the badges. *Held*, a supplemental contract might be made annulling the contract and reimbursing the contractor. *C. 19861, June 7, 1906.* Where a contract had been made for the construction of a cabinet with files and drawers, and it was subsequently desired to add a sliding support for each file and drawer, *held* that the original contract could be modified to this effect by a supplemental contract. *C. 13401, Oct. 4, 1902.* A contractor may by a supplemental contract be granted compensation for additional time and attention required by the work because of the delay in its execution due to a failure or error on the part of the Government. *C. 23546, Nov. 3, 1910; 27508, Nov. 21, 1910.* Where

a contractor became unable to complete his contract and the surety was willing to complete it, *held* there was no legal objection to a tripartite contract between the United States, the original contractor, and the surety company that the surety should complete the work within the time specified in the original contract and should use the plant of the contractor therefor; that the price to be paid should be that specified in the original contract, so that the amount already paid under the original contract with payments to be made should not exceed, for the entire work, the amount stipulated in the original contract; that all payments due or to become due under the terms of the original contract should be paid to the surety company, and that the contractor should release the United States from all claims on account of the original contract or work performed thereunder, and should look only to the surety company therefor. *C. 11328, Oct. 3, 1901; 28731, July 25, 1911.* Where a contract for furnishing frozen beef for the Army in the Philippines provided that the beef "will be admitted free of customs duties" and it appeared that at the time the contract was made the law in force provided for the free admission of all goods and merchandise for the use of the Army, but that before the period covered by the contract had expired this law was repealed. *Held,* that the repeal of the law by Congress did not constitute a violation of the contract on the part of the United States;[1] but that the provision in the contract for free admission of beef was an undertaking in the nature of a warranty by the United States as a contractor that the beef would be admitted free, or if duties were imposed that the United States would pay them, and the United States would be legally liable to the contractor for duties so paid, and it would therefore be legal to enter into a supplemental contract to pay an additional price to cover the duties. *C. 13893, Aug. 18 and Dec. 29, 1909.* Where a contractor was delayed in the completion of his contract by reason of the fault of the Government and the additional work required would be sufficiently secured by a smaller bond, *held* there was no legal objection to a supplemental contract which should provide for an extension of the time of completing the contract, for a reduced bond, and for reimbursing the contractor for additional expense due to the delay, including the premium required on a new bond with a surety company. *C. 28472, June 6, 1911.*

A contractor was authorized by the terms of the contract to take stone from a quarry owned by the United States, it being provided in the contract that "operations must be so conducted by the contractor as to leave the quarry in good shape for continuing the work at some future time," and that the contractor "must leave the quarry in good condition, with nearly vertical faces, at the termination of the contract." The operations were so conducted as to cause a landslide which carried such a large amount of rock and débris into the quarry that the contractors were compelled to abandon it and obtain stone elswehere. The contract was completed in all respects except as to leaving the quarry clear. *Held,* that if it was in the interest of the United States the clearing of the quarry might be omitted upon entering into a supplemental contract to authorize the deduction from the money due of the value of the quarry. *C. 10049, Mar. 26, 1901.*

[1] See Deming *v.* U. S., 1 Ct. Cls., 190; Brown *v.* U. S., 1 id., 384; Wilson *v.* U. S., 11 id., 513; 28 Op. At. Gen., 121.

The river and harbor act of August 11, 1888 (25 Stat., 423), provided "that it shall be the duty of the Secretary of War to apply the money herein and hereafter appropriated for improvement of rivers and harbors, other than surveys, estimates, and gaugings, in carrying on the various *works* by contract or otherwise as may be most economical and advantageous to the Government." *Held*, that according to the practice under the above provision the funds appropriated might be applied to purchase without advertising *supplies* to be used in carrying on river and harbor works, and therefore a supplemental contract might be entered into for the termination of a river improvement contract and the purchase of the plant of the contractor. *C. 2275, May 12, 1896.*

Where a contract for installing a steam-heating plant provided that the plant should be subjected to a practical test during the coming winter, but the winter had passed before the plant had been installed, *held*, that the test having become impossible of performance there was no legal objection to paying the contractor the retained percentages upon his giving the United States a bond that the plant would come up to a certain test during the next winter. *C. 13001, July 22, 1902.*

VII J 5. Where, in addition to the work required under a contract, certain extra work is required by the officer in charge which is practicable of performance only by the contractor, such extra work may be performed by the contractor without advertising,[1] and in the absence of an agreement as to the price the reasonable value of the services and material may be paid the contractor.[2] *C. 5901, Mar. 4, 1899; 10920, Aug. 3, 1901.*

VII J 6. A contract for the construction of a building provided that the excavations were to be of such depth as will provide absolute security against insecure foundations, and that whatever excavation was necessary to secure such depth should be without extra charge. The contractor in carrying out instructions to excavate deeper than he and an expert believed necessary found quicksand. Thereupon the officer in charge authorized a change in the character of the foundation to meet the unexpected condition of the soil, and the building was then completed, *held*, that the extra cost of the new kind of foundation may well be considered as an "extra" within the meaning of the contract, and the contractor may be paid for it. *C. 9874, Feb. 25, 1901.* Where the footings and foundation walls of a certain building had to be carried to a greater depth than shown on the plans, *held* that the contract for construction of the building proceeded on the assumption that a stable foundation was to be had within reasonable limits, and that as the contractor had to excavate to an unreasonable depth to reach a foundation on ledge rock he was entitled to additional compensation for the extra work on the basis of a *quantum meruit*. *C. 19437, Apr. 2, 1906.*

Where the Government agreed to furnish crushed stone which the contractor was to haul and use for road building, and Government

[1] See II Comp. Dec., 373. Where a contract is authorized without restriction as to cost, the Government would be liable for "extra" work and materials accepted by it, and also, where a contract is made under a general appropriation, the contractor is not bound to know the condition of the appropriation and the Government will be liable for "extras," but where a contract on its face assumes to provide for all the work authorized by an appropriation the contractor is bound to know the amount of the appropriation, and can not exceed it by doing "extra" work. 2 Ct. Cls., 151; 16 id., 528; 18 id., 146, 496; 21 id., 188; 31 id., 126; 33 id., 1.

[2] Grant *v.* U. S., 5 Ct. Cls., 71; Ford *v.* U. S., 17; id., 60; Wilson *v.* U. S., 23 id., 77.

failed to provide the stone in sufficient quantities, making it necessary for the contractor to haul stone from a more distant point, *held*, that the contractor was entitled to consider the increased expense arising from the hauling from a more distant place as an extra for which he should be allowed a reasonable compensation in a supplemental contract. *C. 23546, Nov. 3, 1910.*

Through a mutual error a contract was so worded as to misstate the real agreement and intentions of the parties and required the contractor to perform certain work not intended to be covered, and the contractor offered to do the said work as an extra. He was required to do the work by the quartermaster on the assumption that the contract was properly worded. *Held*, that as the contractor was not estopped by his conduct from claiming that the contract misstated the real intentions of the parties and as the facts clearly established his claim, he was entitled to be compensated for the extra work performed. *C. 22238, Oct. 24, 1907.*

VII J 7. Where a contract provided that any modification of the contract should be approved before the work covered by the modification was performed, but in violation of this provision the extra work was performed without such approval, the performance of the work being with the consent of the officer in charge, *held* that the provision in question was waived and a supplemental contract should be approved.[1] *C. 23501, June 27, 1908.* So, where a contract pro-

[1] In Barlow *v.* U. S., 35 Ct. Cls., 514, the syllabus is as follows:

"Additional work or better material than that required by the contract, ordered by a subordinate without authority to do so, must be regarded as voluntary service and no contract for it can be implied.

"Where alterations or additions are ordered by an officer or agent of the Government authorized to contract, a contract will be implied to the extent of the benefit which the Government has received, notwithstanding a provision in the original contract that such orders must be in writing.

"Where a contract provides that alterations or additions must be ordered in writing, and the cost thereof agreed upon before the work is done, the principals may waive the requirement. In Government contracts the officer who has authority to contract or order changes must be regarded as a principal."

On page 548, idem, the court said: "Where a contract expressly provides that alterations or additions must be ordered in writing and the cost be agreed upon before the work be done, the principals to the contract in ordinary cases between individuals may waive the requirement; so in the case of Government contracts, the officer who has authority to order or agree in writing must be considered *pro hac vice* as the principal, and if he orders a change orally, and the contractor acts on the order and performs the extra work, the parties will be deemed to have mutually waived the requirement. (Ford's Case, 17 Ct. Cls. R., 75).

"In a few words, it may be said that the statutes and these contractual provisions must be construed for the protection of the Government and not for the embarrassment of the contractors; and that they can not be used by public officers to cloak breaches of contract or justify improper interference with the work, or to acquire in anyway an unfair advantage over the other party. It is for the interest of the Government that its good faith and business responsibility shall be upheld. A policy which precludes legal redress will drive every prudent and responsible contractor out of the field of competition."

See, also, Venable Construction Co. *v.* U. S., 114 U. S., 776; Grant *v.* U. S., 5 Ct. Cls., 72; Ford *v.* U. S., 17 id., 60; 7 Comp., 361. So, *held*, that the provisions of a contract for constructing a vessel, which excludes extras of every description, do not apply to alterations from, or additions to, the plan fixed by the contract, made at the request of the Government. Bestor *v.* U. S., 3 Ct. Cls., 425. See, also, Moore *v.* U. S., 46 Ct. Cls., 139, where the contractor was allowed the cost of extra work caused by the faulty plan of the Government engineer. But where a contract expressly provided that it could be modified only by consent of the Secretary of the Treasury, *held* that the contractor could not recover compensation for work performed under a modification ordered only by the officer in charge of the work. Hawkins *v.* U. S., 96 U. S., 689. See also 14 Ct. Cls., 514; Kennedy *v.* U. S., 24 id., 122; McLaughlin *v.* U. S., 36 id.,138; 37 id., 197; Hyde *v.* U. S., 38 id., 649.

vided that any work required that was not included in the specifications should be ordered in writing, *held* that as it appeared that the work was ordered by the officer in charge, this action on his part constituted a waiver of the contract provision. *C. 10449, May 18, 1901; 19437, Apr. 2, 1906.*

VII J S. A supplemental contract can not be entered into if against the interest of the United States. The following cases illustrate the nature of the consideration, which will make a supplemental contract in the interest of the United States:

The consideration was the acceptance at a reduced price of mineral oil which did not meet the test required by the original contract, but was suitable for Government use. *C. 26846, Oct. 7, 1910.* The consideration was a *bona fide* claim for compensation for extra work, not merely a colorable one, which the contractor agreed to relinquish. *C. 20423, Sept. 25, 1906.* A contractor for road work became insolvent and was unable to proceed with his contract, and his backer, who had advanced the securities upon which a surety company had become surety on the contractor's bond, together with the contractor and the surety proposed a settlement with the United States by the terms of which the United States was to retain all percentages and other moneys due under the contract and receive the penal sum of the bond, provided the Government released the contractor from further liability under the contract. The cost to the Government of finishing the road would be about $5,000 over the aggregate of the above sums. *Held,* that as the contractor was insolvent and therefore it would be impossible to recover more than the above sums from him, and as the effect of the settlement would be to give the United States control of the above sums of money so that they might be applied on other more important work, the settlement was in the interest of the United States, and a supplemental contract as proposed might be made. *C. 19802, May 28, 1906.* Where a contract for dredging provided that 300,000 cubic yards of excavation per month must be made as a condition precedent to receiving monthly payments, and this amount of excavation the contractor was unable to accomplish, although carrying on the work to the best of his ability, and the contractor was constructing another large dredge to enable him to reach and maintain a monthly average of 300,000 cubic yards, but was financially embarrassed, *held,* it would not be against the interests of the United States to reduce the requirements of the contract from 300,000 to 200,000 cubic yards of excavation per month for a limited period to enable the contractor to receive monthly payments which would result in the early construction of the additional dredge and consequent acceleration of the work. *C. 12608, Aug. 8, 1903.* Where a contract provided for partial payments for completed work only, *held* that if the work would be expedited by the payment for structural steel as soon as delivered on the ground and before being placed in the building, and if it would be otherwise to the advantage of the United States to make such payments, it would be legal to enter into a supplemental contract so as to provide for such payments, the supplemental contract to provide that the materials upon payment should become the property of the United States. *C. 23642, Nov. 20, 1909.* Where a contract called for furnishing bed casters known as the "Faultless" and the contractor was unable to procure that particular kind of caster fast enough to comply with his contract, and it was proposed

to enter into a supplemental contract authorizing the substitution of a caster known as the "Legmount," *held*, there was no legal objection to such a supplemental contract provided the "Legmount" casters were as good as the "Faultless." If not equally good, the supplemental contract should provide for a reduction in price in order that the contract might not be against the interest of the United States. *C. 23511, June 29, 1908.* So, *held*, also, where a contract called for "loose native hay" and it was proposed to substitute "Nebraska baled hay." *C. 20906, Jan. 12, 1907.* So, where, owing to a vague description in an advertisement, and carelessness on the part of both the United States and the contractor, a stretcher was furnished that was not the exact article desired by the United States, *held*, that a supplemental contract might be entered into for the acceptance at a suitable price of the article actually furnished. *C. 25407, Aug. 9, 1909.* Where the Government sought to modify the plans for the construction of a pier, and the contractor consented to complete the pier in accordance with the modified plans provided, he was paid the balance due on the contract and $2,500 in addition and provided further that he should not thereby "prejudice any rights which he might have to apply to Congress for relief and repayment of * * * the loss necessarily sustained by the modification of the contract," *held* that there was no legal objection to a supplemental contract as proposed, but *recommended* that the supplemental contract should constitute a full settlement of all claims, so that there could be no claim to be acted on by Congress. *C. 15887, Jan. 5, 1904.*

Where a request was made for the extension of a contract to a specific date, and it did not appear whether the proposed extension would be in the interests of the United States, *recommended* that the contractor be allowed to go on with the work, leaving the question of deduction for damages to be determined on the final settlement when the work was completed.[1] *C. 13873, Dec. 29, 1902; 13916, Jan. 7, 1903.*

---

[1] Where it is not against the interest of the United States a contract may be extended to a *specific date* by a supplemental contract in writing, signed by the officer in charge, and this supplemental contract is usually required to be approved by the officer whose approval was necessary to the original contract. If the supplemental contract does not provide for a new consideration which would make the supplemental contract to the interest of the United States, it should be expressly provided therein that the contractor will continue liable for the liquidated damages, if any, and for such other damages as may be expressly stipulated for therein, if any, resulting from the delay, and that such damages shall be deducted in settlement with the contractor; or, if the contract provides for a penalty or makes no provision for damages it should be expressly provided in the supplemental contract that the contractor shall continue liable for all extra cost of superintendence and inspection and other actual damages caused the United States by the delay, and that they shall be deducted in settlement with the contractor. As such a supplemental contract will preserve the United States from any possible damage, the extension will not be against the interest of the United States.

Where it is not against the interest of the United States, a contract may be *indefinitely extended* by the officer in charge, with the approval of the officer whose approval was necessary to the original contract, by waiving the time limit. (A formal supplemental contract is not necessary for the purpose. The waiver may be either by a letter expressly waiving the time limit, or by tacitly allowing the contractor to go on with the work after the time limit fixed by the contract has expired.) Where such a waiver is made by the United States the contractor will remain subject to all stipulations of the contract, including those in regard to liquidated damages, if any; or, if the contract provides for a penalty or contains no provision in respect to damages, the contractor will remain liable for any extra cost of superintendence and inspection and other actual damages caused the United States by the delay in completion of the

VII J 9. Even after the expiration of the time limit provided for in a contract, if the contract is still in force, a supplemental contract extending the time of completion of a contract to a specified date may be entered into without advertisement where the interests of the United States will not be prejudiced.[1] *C. 14649, July 1, 1903; 15818, Jan. 22, 1904.* So, also, where a contract required a contractor to commence delivery of certain articles under his contract on January 7, *held*, that a supplemental contract, without advertising, providing that deliveries should commence February 10, might be entered into even after February 10 if the interests of the United States would not be prejudiced. *C. 7484, Dec. 28, 1899; 24207, Mar. 13, 1909.*

VII J 10. Even after waiver of the time limit (not an extension to a specific date) partial payments may be made in accordance with the terms of the contract, as the effect of a waiver of the time limit is to leave all other provisions of the contract in force.[2] *C. 15818, Jan. 22, 1904.*

VII J 11. A party entered into a contract with the United States to do a certain amount of dredging between April 1 and August 1, 1895. The contract contained the following provision: "Should the time for the completion of the contract be extended, all expenses for inspection and superintendence during the period of the extension shall be deducted from payments due or to become due the contractor." He did not begin work at the time agreed upon, but on his own application and the recommendation of the engineer officer in charge was given from August 14, 1895, to January 1, 1896, in which to do it. He worked from the 14th of August through September, October, and November, completing part only of the work. His contract was then annulled and the uncompleted balance of the work let to another contractor. On the question whether the amount paid by the Government for "superintendence and inspection" during the months last named should be deducted from payments due under the contract it was *held* that the deduction could not legally be made. There had not been an "extension" within the meaning of the contract. The work was to be completed during a specified period of four months, and during that length of time the Government had agreed to pay the expenses of superintendence and inspection. The later agreement changed the time at which the specified period should begin, but did not materially lengthen it. The extension contemplated by the contract was any period of time in addition to the four months which

---

contract. As, in a case of waiver of the time limit, the contractor always remains liable for liquidated damages, if any, or extra cost of superintendence and inspection and other actual damages, a waiver of the time limit will usually not be against the interest of the United States. Wherever there is a waiver of the time limit there will arise an implied contract to complete the work within a reasonable time.

The regular procedure for obtaining an extension of a contract to a specific date, or for obtaining a waiver of the time limit, is for the contractor to apply for it in writing at the time the conditions arise which threaten to occasion delay in the performance of the contract. Such application should be made in sufficient time to secure the action of the approving officer before the time limit has expired. It may, however, be made after the time limit has expired if no steps have been taken to annul or cancel the contract.

[1] See VIII Comp. Dec., 104.

[2] See VIII Comp. Dec., 104, to the effect that the waiver of the time limitation in a contract leaves all other provisions of the contract in force, and for the performance of the work provided for therein the contractor is entitled to the price stipulated therefor in the contract, less the amount of damages arising from the delay.

the contractor might require to complete the work. But further *held*, that if the time required by the succeeding contractor to complete the job, added to the time actually occupied by the first contractor, exceeded four months, then the expense of inspection and superintendence during such part of the total time as exceeded four months is a loss sustained by the Government by reason of the original contractor failing to fulfill his contract, and the original contractor is liable therefor. *C. 2400, July 8, 1896.* Where a bond given for the due performance of a contract provided that the surety should be bound "as well during any period of extension of said contract that may be granted on the part of the United States as during the original term of the contract," *held*, that it is not clear that an extension of the time of commencement without a corresponding extension of the time of completion would be an "extension of the contract" within the meaning of the bond. *C. 13906, Jan. 3, 1903; 20423, Nov. 21, 1906.*

VII J 12. Where the only provision of a contract as to granting additional time for commencing or completing the work required that such additional time must be allowed by the contracting officer with the approval of the Chief of Engineers, *held*, that the Secretary of War has no authority to reverse or control their action in the premises.[1] *C. 20410, May 5, 1908.*

VIII. A head of a department, in making and executing a public contract acts as an agent of the United States and in the absence of express statutory authority can not legally relinquish, by a supplemental contract, by an increase of compensation to be paid by the United States, or otherwise, any right or property of his principal, *if such action would be against the interest of his principal.*[2] Congress

---

[1] In Barlow *v.* United States, 35 Ct. Cls., 514, the syllabus is as follows:

"Under a contract which provides that stone to be furnished by the contractor must be '*sandstone of quality approved by the engineer*,' the decision of the engineer binds the Government as well as the contractor.

"Where a contract prescribes '*sandstone of a quality approved by the engineer*,' and the superior officer who entered into the contract requires '*the best sandstone which can be obtained*,' the stone required is not the stone contracted for, and the contractor can recover for the difference."

In Baldwin's case, 15 Ct. Cls., 297, it was held that where a contract provides that the receiving officer may charge the contractor with loss resulting from neglect to deliver at the prescribed time, subject, however, to the approval of the department commander, the contractor is entitled to have exercised the discretion of the receiving officer and the department commander, and is not bound by the action of the receiving officer who is ordered by the post commander to make the charge and in obedience to the order does so without the approval of the department commander.

In Kennedy *v.* United States, 24 Ct. Cls., 122, it was held that where the engineer in charge is authorized by the contract to extend the time for performance, the fact that the Chief of Engineers approves of his extending it to a day specified does not compel him to do so.

[2] In an opinion addressed to the Secretary of War, in regard to an application for relief by a contrac or for work on the Washington Aqueduct, Atty. Gen. Black (9 Op., 81) remarks as follows: "He now says he is doing the work at a loss, and asks you, in a memorial, either to give him a larger compensation than he bargained for or else to release him from the contract. You have no authority to do either of these things. You can not absolve him from his obligation to do the work; and, if he does it, you can not authorize him to be paid for it at higher price than the contract stipulates for. * * * In short, you have no power to relieve him from the hardship he complains of, either by giving him damages, by releasing him from his present contract, or by making a new one. * * * If the contractor quits the work or otherwise violates the covenants he has made with the Government, he must do so at his own peril and that of his sureties." See, also, 2 Op. Atty. Gen., 482; 7 id. 62.

In 15 Op. Atty. Gen., 481, it is said: "It is asked that the contractor shall, without any consideration therefor, be released from the full performance of his contract and

alone can grant relief. Such action, however, could be taken if a consideration passed to the United States sufficient to make it to the interest of the United States. *C. 17234, Dec. 16, 1904; 20875, Jan. 7, 1907.* Therefore the Secretary of War has no power, without proper consideration, to release a contractor from the due performance of his contract, or relieve or compensate him on account of losses suffered by him in fulfilling or attempting to fulfill his contract where there has been no breach on the part of the United States. *C. 2402, June 27, 1896.* To release an ascertained debt due to the United States. *C. 10550, June 5, 1901.* To release a contractor from his obligation to pay liquidated or actual damages. *C. 7314, Oct. 16, 1900; 19801, May 31, 1906; 22270, Oct. 28, 1907.* To omit to charge a contractor with the *difference* between the contract price and the price which the Government was obliged to pay in supplying by purchase in the market articles failed to be furnished according to contract. *R. 32, 6, May 27, 1871; 37, 437, Mar. 28, 1876.* To release a contractor from his contract on the ground that he has encountered unexpected difficulty in completing it, or that its execution will involve a material pecuniary loss, in other words, to relieve a contractor from a bad bargain. *C. 262, Dec. 4, 1901; 2569, Sept. 3, 1896.* To release a

---

from the delivery of an article still required by the necessities of the Government, when (as before observed) the effect of such a course will be to give the contract to the highest bidder as to all supplies furnished under it. This would be virtually to give away the public property and funds and to disregard the law relating to the award of contracts. My opinion is that you have not the lawful power to grant the relief desired."

In 17 Op. Atty. Gen., 370, it is said: "The company complains also that because of the refusal of the riparian proprietors to allow the dredged matter to be put upon their premises it is compelled to carry it a great distance, to pass through several drawbridges, etc. This also was a thing to be considered by the company before undertaking the work. What it agreed to do is to remove and deposit the material in such place as shall be approved by the engineer in charge. The language is very plain. The obligation is perfect. Can the company be discharged from performance because the transportation is more difficult and to a greater distance than they at first expected? Upon a full consideration of the case made in the papers, I am unable to discover sufficient grounds to justify the Secretary of War in releasing said company from its contract, nor do I think he has the power to do so. He can not discharge the legal and just claim of the Government upon the company that it shall fulfill its obligations undertaken with knowledge of their extent and requirements."

In V Comp. Dec., 632, it is said: "Undoubtedly, upon a sufficient consideration, a new contract could legally be made releasing a contractor from forfeiture incurred, but the consideration would have to be real, substantial, and not imaginary, or one growing out of or based wholly upon the failure in performance of the conditions of the original contract. In the present case I am unable to see how the contractors have been damaged by the extension of the contract, or what real benefit will accrue to the United States by this extension. It is not difficult to see how the Government and the general public may have been injured by the failure of the contractors to complete the work at the time originally agreed upon. The presumption is that the work was needed or it would not have been undertaken; therefore, the time for its completion can hardly be called immaterial. The fact that the total cost of inspection and superintendence will not be increased because of the extension can not be regarded as a consideration upon which to base a contract. Furthermore, I am unable to see how the decreased obstruction to the channel (caused by the slower progress of the work) which was the direct result of the failure of the contractors to comply with the obligations of their contract, and which failure resulted in an extension of time for the completion of the project *at the request and for the benefit of the contractors,* and presumably to the detriment of navigators desiring to use a deeper channel, can be deemed a sufficient consideration to support a promise to waive an accrued forfeiture. To hold that this can be done would be to make the contractors the beneficiaries of their wrong." See, also, XII Comp. Dec., 409; Op. Atty. Gen., Feb. 14, 1913.

In XIV Comp. Dec., 253, it was held that a modification of a contract by a supplemental contract providing for an earlier partial payment to the contractor than is

lessee from the payment of rent under the act of July 28, 1892 (27 Stat., 321). *C. 11731, Dec. 10, 1901; 21212, May 20, 1908.* To release a surety company from a bond on another bond being provided with two sureties of undoubted financial responsibility. *C. 5352, Sept. 28, 1900; 21991, Aug. 29, 1907.* To release sureties on the bond of a contractor who had failed to perform his contract, the sureties representing that they had been induced to enter into the bond by false representations made to them by the contractor and that they were ignorant of what was required of a bondsman. *R. 37, 275, Jan. 22, 1876; C. 15601, Dec. 11, 1903.* To release a guarantor from the obligations he had assumed in a guaranty accompanying a proposal. *C. 3489, Sept. 3, 1897; 5462, Dec. 14, 1898; 15932, Feb. 18, 1904.* To cancel or nullify a bond or release a surety thereon.[1] *C. 1999, Jan. 22, 1896; 13145, Jan. 7, 1903; 22194, Nov. 18, 1907; 5352, Aug. 22, 1900.* To grant relief to a contractor for potatoes and onions, by canceling his contract or increasing the prices, the contractor at the time of his bid having expected to raise these vegetables on his own farm, but the entire crop and others having been destroyed by a hail storm, obliging him to buy at high prices in the open market. *C. 11208, Sep. 21, 1901; 11259, Sept. 21, 1901.* To accept mineral oil which does not come up to the tests

---

specified in the original contract is not authorized without a new consideration therefor, and that the changed and stringent financial condition of the section of the country where such contract is to be performed furnishes no consideration moving to the Government for such modification. See, also, XV Comp. Dec., 55 and 256.

In VIII Comp. Dec., 106, it was said on the subject of the right of a Government officer to waive the time limitation in a Government contract: "There can be no question that private persons may waive this limitation in a contract, and it is a general rule that the Government has the same power in respect to contracts that private persons have. (U. S. *v.* Smith, 94 U. S., 217, 218.) The only limitation upon the Government of which I am aware relates to the means of executing its powers. Its officers do not possess plenary powers, and it must be presumed that they are not authorized to sacrifice its interests. Therefore it has been properly held that a Government officer is not authorized to extend the time of a contract if such extension will operate to release the contractor or his sureties from liability for damages or be otherwise detrimental to the interests of the Government."

In XIII Comp. Dec., 322, it was held that when work is not completed under a contract until after the expiration of the period fixed in the contract for its completion, and liquidated damages have accrued for the period of the delay, an extension of time can not be granted after the expiration of such period and after the completion and acceptance of the work without a new and adequate consideration, as it would operate as a release or waiver of the liability of the contractor for liquidated damages for the delay. See, also, XI Comp. Dec., 394; XII id., 466; XIV id., 237.

In General Order No. 167, War Department, Oct. 10, 1905, the following instructions were issued by the Secretary of War for the guidance of officers charged with the procurement of supplies: "5. Contracts once executed will be strictly construed, and no variation from standards or specifications will be permitted or authorized. If it be demonstrated that contract requirements are unreasonable, or that the prescribed tests are not practical, or that for any reason the stipulations can not be rigidly applied or enforced, such contract must not be modified but may be annulled with the approval of the Secretary of War, if for the best interests of the Government; and after again inviting competition from bidders, who are fully informed of the changed requirements, a new award and contract can be entered into. To sanction variations or to relax stringency in any particular of an existing contract is irregular and is likely to give the contractor an advantage which is unfair to competitors whose proposals were based on the expectation of being held to the strictest observance of the published requirements."

But in 28 Op. Atty. Gen., 121, where pending the execution of a contract the tariff was changed so as to impose a heavy loss on the contractor if compelled to carry out his contract, it was held that the Secretary of War could release the contractor from his contract, although the effect would impose a pecuniary loss on the Government.

[1] 7 Op. Atty. Gen., 62.

required by the terms of the contract, although it may be a suitable article for the Government's use. *C. 26846, Oct. 7, 1910.* To surrender an option of the United States to renew a contract for a series of years. *C. 18832, Nov. 9, 1905.* So, where a bidder through a clerical error proposed to furnish 600 jugs of lime juice at 75 cents instead of $1.50 per jug, and with knowledge of the error entered into a contract and completed the same, *held*, that while the mistake might have been a ground for declining to furnish the supplies, the contractor by entering into the contract with knowledge of the error had waived it, and a price additional to that named in the contract could not be paid.[1] *C. 8942, Sept. 13, 1900.* And *held*, to the same effect where through an error in calculation the lowest bid for installing heating plants was $1,108.40 instead of $2,216.80, and the next and lowest bid was for $3,460, and the lowest bidder with knowledge of the error entered into a contract and completed the same. *C. 19506, Apr. 17, 1906.* A contract provided that "the United States shall be entitled to the fixed sum of forty dollars as liquidated damages for each and every day's delay not caused by the United States * * * and that the collection of said sum may, in the discretion of the Secretary of War, be waived in whole or in part." *Held*, that the provision purporting to give the Secretary of War the power to waive the liquidated damages is inoperative and void unless under the circumstances of the case it would be to the interest of the United States to waive such damages, that the contracting officer and the contractor have no power to vest the Secretary of War with such power to surrender the rights of the United States without compensation. Such power vests in Congress only. *C. 22730, Feb. 10, and Dec. 7, 1908; 23642, Mar. 6, 1911.* Where a contract contained a provision "that this contract shall be subject to the approval of the Commissary General of Subsistence, United States Army, and be terminable at any time by him," *held*, this provision was inserted for the benefit of the United States, and does not authorize the terminating of a contract against the interests of the United States. *C. 11259, Sept. 21, 1901.* So, where a contract with a telephone company required the company to render a certain service at the rate of $4 a month, and the company demanded $5 a month on the ground that it had filed a new schedule of rates which had been approved by the Public Service Commission of the State of Washington, *held* that the Secretary of War was without authority to waive the rights of the United States acquired under the contract, and the Public Service Commission was without power to impair the obligation of a Government contract. *C. 29280, Dec. 8, 1911, and Jan. 4, 1912.*

Where the same contractor had two contracts for furnishing hay, the prices being different, and hay had been ordered and delivered under the low-priced contract and payments had been made and accepted under the low-priced contract, *held* that the deliveries of hay could not be subsequently considered as made under the high-priced contract. *C. 21418, Apr. 22, 1907.*

IX A. The lowest and next lowest bids (from the same place of business) for supplying 25,000 mosquito bars were, respectively, 45¼

[1] But where a person contracted in writing to sell to the Government a quantity of shucks at 60 cents a pound at a time when the market value was 1¾ cents a pound, and the shucks had been delivered and consumed, *held*, he could recover only the market value of the shucks. Hume *v.* U. S., 132 U. S., 406.

and 46¼ cents per bar. On the day following the opening of bids and before the award was made these bidders claimed that errors were made in copying their bids into the blank proposals, referring to their original memoranda to show that the price intended in one was 75¼ cents and in the other 76¼, and asked to have the corrections made. To grant the requests would make another party the lowest bidder, at 67½ cents per bar. *Held*, that the mistakes were such as to exclude consent to the same thing, so that on acceptance of the bid there would be no true contract—one party intending one thing, and the other party another thing; that therefore the proposals containing the erroneous prices should not be treated as binding upon the parties making them.[1] *C. 6802, July 31, 1899.* Similarly, *held*, where a company submitted a proposal for furnishing 48 handcuffs, the price for the lot being $17.90, and it appeared that before the award was made it reported that it had intended to bid $179, and that the error was a clerical one, and it further appeared that the next lowest bid was $150. *C. 5958, Mar. 4, 1899.* Similiarly, *held*, where bids were invited for furnishing 1,250 gross of olive drab buttons of two sizes, one-half to be of each size, and the lowest bidder bid for the total quantity without naming the size, and, as the result of correspondence, it appeared that the larger button cost considerably more

[1] In Pollock on Contracts, under the head of "Mistake as excluding true consent," it is stated that "It may happen that each party meant something, it may be a perfectly understood and definite thing, but not the same thing which the other meant. Thus their minds never met, as is not uncommonly said, and the forms they have gone through are inoperative;" and that in this "class of cases either one party or both may be in error, however that which prevents any contract from being formed is not the existence of error but the want of true consent," and that in such cases "we may say that the agreement is nullified by fundamental error; a term it may be convenient to use in order to mark the broad distinction in principle from those cases where mistake appears as a ground of special relief." Wald's Pollock on Contracts, p. 582, Third American Edition.

Under date of Jan. 14, 1891, Attorney General Miller (20 Op. 1), where an advertisement was made for proposals for installing an electric-light plant, and one of the bids was $4,350, and the bidder asked to withdraw the bid, claiming that it had been made erroneously instead of $9,350, the real bid, the first figure 4 being substituted for the figure 9 through a clerical error, *held*, that the bid was no bid at all and ought not to be considered, and that if accepted it would not be binding on the bidder.

See, also, Moffett, Hodgkins & Co. *v.* Rochester (178 U. S., 373), where the court held that a bidder was relieved on account of a serious mistake by which $1.50 per cubic yard was bid for certain excavation for which $15 per cubic yard would have been a reasonable charge, the court holding that there was no doubt as to the error having been made; that it was promptly availed of; and that "when this was done the *transaction had not reached the degree of a contract*," citing with approval the following extract from the opinion of the Circuit Court: "The complainant is not endeavoring 'to withdraw or cancel' a bid or bond. The bill proceeds upon the theory that the bid upon which the defendants acted was not the complainant's bid; that the complainant was no more responsible for it than if it had been the result of agraphia or the mistake of a copyist or printer. In other words, that the proposal read at the meeting of the board was one which the complainant never intended to make, and that the minds of the parties never met upon a contract based thereon. If the defendants are correct in their contention there is absolutely no redress for a bidder for public work, no matter how aggravated or palpable his blunder. The moment his proposal is opened by the executive board he is held as in a grasp of steel. There is no remedy, no escape. If, through an error of his clerk, he has agreed to do work worth a million dollars for ten dollars, he must be held to the strict letter of his contract, while equity stands by with folded hands and sees him driven to bankruptcy. The defendant's position admits of no compromise, no exception, no middle ground." See, also, the decision of the Comptroller of Nov. 7, 1911, to the same effect, where, through a typographical error, a bidder submitted a bid of $285 per 1,000 feet, instead of $485 per 1,000 feet, for a certain cable.

than the smaller one, and that the bidder had clearly intended to bid only upon the smaller size button, he erroneously supposing that only one size was called for, this error having been partly contributed to by an error of the contracting quartermaster in a letter written to the bidder before the submission of bids. *C. 28279, Dec. 5, 1911.* Similarly, *held,* where a bidder offered to furnish 2,000 halyards at $19\frac{8}{10}$ cents per *pound,* which would make the cost of each *halyard* $11\frac{1}{2}\frac{4}{0}$ cents, and it appeared the person making the bid had been instructed to bid not exceeding $19\frac{8}{10}$ cents per *halyard,* but as rope is usually sold by the pound, had inadvertently written the word pound instead of halyard. *C. 8258, May 21 and July 6, 1900.* Similarly, *held,* where the lowest bidder offered to do the plumbing in a set of quarters for $2,997 the next lowest bid being $4,460, and upon receiving the contract for execution the lowest bidder refused to execute it, claiming that his bid was only on half the set of quarters—the set being double. An examination of the details of the bid clearly supported this claim. *C. 8786, Aug. 20, 1900.* Similarly, *held,* where the only bid received for memorandum books was for 5 cents each, and it clearly appeared that the cost of manufacture of books exceeded 5 cents each and that the price of 5 cents was the result of a clerical error. Similarly, *held,* where the lowest bid for a 12 months' supply of oats was $1.07 per 100 pounds, and at the opening of the bids the lowest bidder promptly called attention to his bid of $1.07 and claimed it was an error and should be $1.17, and clearly showed that an error had been made in transposing figures, and asked to be permitted to correct the bid accordingly. It appeared that all other bids were substantially higher than $1.17. *C. 28493, June 7, 1911.* Similarly, *held,* where bids were invited for constructing "one barrack, two double sets and one single set officers' quarters," the lowest bidder offered to construct "four buildings numbered on plans 120–A and 121–E, and 136–B" for $42,700, not intending to bid on one of the double officers' quarters, and on the same day bids were opened wrote the quartermaster that his bid was not on all the buildings but on only "four buildings, one single officers' quarters, one double officers' quarters, and one barrack, making in all four buildings," and agreed to construct the additional set of officers' quarters for $6,500. The claim of the bidder as to his intention was supported by ample evidence. The next lowest bid was $49,243. *C. 8726, Aug. 8, 1900.* A company submitted a proposal for manufacturing undershirts at $68\frac{5}{8}$ cents per garment. Before the award was made the company claimed that an error of 10 cents a garment had been made in transferring the figures for the cost of the work from the papers made out by the bookkeeper (who was taken sick and laid up for 10 days) and who discovered the error when he returned to duty. The figures of the bookkeeper showed an estimate of the actual cost averaged $74\frac{1}{4}$ cents per garment. In submitting the proposal this cost was erroneously set down as $64\frac{1}{4}$ cents and $4\frac{3}{8}$ cents were added as profit, making the bid $68\frac{5}{8}$ cents, whereas it should have been $78\frac{5}{8}$ cents. The price was so low that the officer representing the Government would have noticed it was probably erroneous. *Held,* that the bid might be corrected to conform to the intention of the bidder, and then considered along with other bids. *C. 25048, May 27, 1909.* The lowest bid for constructing quarters at Fort D. A. Russell, Wyo.,

was $49,000; the next lowest bid was $55,450, and the estimate of the Quartermaster General's office for the work was $60,158. On the day following the opening of the bids the lowest bidder wrote to the Quartermaster General stating that he had made a serious mistake in failing to add any percentage for profit, and subsequently declined to accept the work unless allowed to add 10 per cent for profit. *Held*, that the error in failing to include the percentage for profit was a fundamental error in calculation, and that the bid did not express the true intention of the bidder, which was to make a bid covering his estimate for the work with the usual percentage for profit. *C. 19795, May 28, 1906.* The lowest bid for constructing a "sewer system, water-distributing system, the steel tank and trestle" at Fort Miley, Cal., was $9,682; the next lowest bid was $15,821. The lowest bidder refused to enter into a contract for the above construction, claiming that his bid was a mistake; that it was intended to be on the sewer system only. The contracting officer stated that when the lowest bidder asked for the plans "he asked only for the sewer plans, stating that he did not desire to figure on the water-distributing system or the steel trestle and tank." *Held*, that the error was a fundamental one, and was clearly known to the contracting officers to be an error at the time of the bid and that the guarantors of the bid could not be held on their guaranty. *C. 12446, Apr. 21, 1902.* The lowest bid for arctic overshoes was $1.5425 a pair. The only other bid was $2.55, and previous bids for regular sizes had varied from $2.48 to $2.87 a pair. When asked as to the source from which the articles would be furnished, the lowest bidder named the rubber company which had made the bid of $2.55. The lowest bid was made after an examination of only the sample, which had the word "Candee" branded on it, from which circumstances the bidder supposed the sample to be what for many years had been known to the trade under that name. But, in fact, there was another kind of arctic overshoe specially manufactured under the same name and selling for about $2.55 a pair, the existence of which was unknown to the bidder. The specifications which had not been seen by the bidder clearly showed, however, that the desired article was to be manufactured to order. *Held*, that the bidder was not entitled to withdraw his bid on the ground that he had been misled by the standard sample, but was entitled to withdraw his bid on the ground that the bid was so clearly an error as to price that the error was a fundamental one and must have been known to the representatives of the Government, and the bid could not properly be accepted with the knowledge of its being erroneous. *C. 22558, Jan. 7, 1908.*

A bidder proposed to furnish 50,000 pairs of canvas leggins, the duck to be "evenly and thoroughly dyed through in the fiber," the manufacture to commence 30 days from date of award. The bidder requested that his bid be not considered or that he be allowed five months in which to commence the manufacture, giving as a reason for the request the fact that prior to submitting the bid a certain firm had promised to deliver in 30 days any desired quantity, but that a few days after opening the bids this firm notified the bidder that it had overlooked the requirement as to the material being dyed "in the fiber," and that in consequence of this requirement the price

would be at least 30 per cent higher and that no goods in any quantity could be delivered within five months. Thereupon the bidder attempted to obtain the material elsewhere and was told that the firm in question was the only one that could furnish that particular material. *Held*, that if investigation showed that it was a practical impossibility to procure the materials within five months, the time for commencing manufacture could lawfully be extended accordingly. *C. 22587, Jan. 6, 1908.*

The lowest bid for the construction of a proposed railroad track on Sandy Hook was $46,000, the next lowest bid being $74,202. Subsequent to the opening of the bids the lowest bidder notified the contracting officer that an error had been made in its bid, and submitted an amended bid of $67,000, which it stated was "based on correcting error in former bid, making sum $60,200, and adding $5 apiece for driving 1,360 piles," which would be $6,800. In support of its claim the bidder presented the original lead-pencil estimate on which the bid was based, on which appeared an item for "40,000 feet piling, $0.34½, $1,380." This should have been $13,800, an increase of $12,420. In the lead-pencil estimate the total of the items was $40,725.60, the bid submitted being $46,000; the difference, about 13 per cent of the estimate, being the bidder's profit. If the amount of the error, with the same percentage of profit thereon, were added to the bid, it would be slightly over $60,000. The amended bid, however, was $67,000, the difference being the proposed charge for driving 1,360 piles at $5 each, and profit thereon. With reference to the last item, the original lead-pencil estimate included an item for driving piles as follows: "Driving 1,352 piles, $2.20, $2,974.40." It did not appear that the 1,360 piles referred to in the amended bid were additional to those covered by the lead-pencil estimate. *Held*, that the bidder should be required to clearly establish his error by evidence under oath, and also establish that the lead-pencil memorandum was the original estimate on which the bid was based, and that this, in connection with the comparison of the bid itself with other bids, would be sufficient to show that the error occurred as claimed and would justify the reformation of the bid. *Held*, also, that the bid was based on a fundamental error and did not express the real intention of the bidder, and that it would be proper to allow the error to be corrected and to treat the bid so corrected as the real bid, and that the corrected bid should include the same percentage of profit on the amount of the error as was calculated in the bid, but nothing more. *Held*, also, that the bidder should not be permitted to amend his bid to include the proposed charge for driving 1,360 piles at $5 each, as this item was covered by the original estimate and it did not appear the original estimate was the result of a fundamental error. *C. 16544, July 6, 1904.*

IX B. Where bids were invited for "200 galls. oil, sperm, in gall. cans" and the lowest bidder submitted a sample labeled "sperm oil," and no tests were made at the time of the award, and the bidder was notified that his bid for "200 galls. oil, sperm, in gall. cans, like sample" was accepted, and upon delivery of the oil a chemical test revealed that the oil was not sperm oil, but fish oil, and the sample previously submitted was found to be the same kind of fish oil. *Held*, that the sale was one by both sample and description, and that it was not sufficient that the goods delivered conformed to the sample, but

they must conform also to the description.[1] *C. 24332, Jan. 14, 1909; 26294, Feb. 28, 1910.* So, where bidder offered to supply 500 dozen spools of "basting cotton" conforming to standard sample, *held*, that if the standard sample was not known to the trade as "basting cotton" and was not such in fact the bidder could legally withdraw his bid. *C. 23732, Aug. 18, 1908.*

IX C. A bidder offered to furnish 1,600 pounds of bacon at 14¾ cents for $23.60 instead of for $236. The error was due to the carelessness of a clerk of the bidder. The next lowest bid was for more than $236. A contract was entered into to furnish the bacon at $23.60. After part of the supplies had been furnished the error in calculation was discovered. *Held*, the contract was not binding on the contractor, and a supplemental contract could be entered into on the basis of paying for all supplies already furnished, and another contract made with the actual lowest bidder. *C. 20323, Sept. 4, 1906.*

X A. Where a contract provided for installing a wireless-telegraph system in Alaska between two points, one of which was described as "at or near the mouth of Delta River and Bates Rapids," *held*, that the selection of a point 75 miles distant from the mouth of the Delta River would not comply with the terms of the contract. *C. 12705, Apr. 3, 1903.*

Where a contract provided for the erection of quarters at a certain designated place in a post which all bidders were urged to examine before bidding, and after the contract had been signed the United States changed the site of the proposed quarters to a location about 450 feet from the original site. *Held*, the contractor was under no legal obligation to carry out the contract on the new site, even though the new site was considered by the United States to be more advantageous than the old one. *C. 20300, Aug. 31, 1906.*

X B. Where a contractor, expressly and without condition or reservation, engages to perform a specific work or service, he is bound by his contract, although its execution prove to be beyond his power, if within the scope of other private exertion to accomplish. As where one contracted to remove the boiler of a steamer wrecked in Chesapeake Bay, but, after extended search, was unable to find it—*held*, that he could not legally be paid the amount stipulated in the contract. *P. 39, 330, Mar. 30, 1890.* Also, where a contractor agrees absolutely to furnish potatoes and onions at a stated price, without any condition limiting them to those he shall grow or which shall be grown in the vicinity, and without any saving exception on account of failure of crops. *Held*, he can not legally be excused from the performance of his contract by reason of the destruction of his own crops by a local hail storm. *C. 11259, Sept. 21, 1901.* Also, where a contractor agreed absolutely and unconditionally to supply fresh beef at the Presidio of San Francisco, it being provided in the contract that in case of the contractor's failure "the commissary is authorized to supply by open purchase any deficiency resulting from such failure" and that the contractor "shall be

[1] Section 14 of the uniform sales act, which is the law in practically every State, is as follows: "Where there is a contract to sell or a sale of goods by description, there is an implied warranty that the goods shall correspond with the description, and if the contract or sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description."

charged with any excess of cost over that of furnishing at contract price," and the contractor failed to furnish beef for several days owing to his plant being partially wrecked by the earthquake of 1906, and the contractor sought to be relieved from the excess of cost resulting from the open purchase. *Held*, that, as the contract did not contemplate beef from a particular herd or slaughtered on the premises of the contractor, such that if the herd perished or the plant was destroyed by act of God, the contract would become impossible of performance as contemplated, but as the contract simply became somewhat more expensive as a result of conditions growing out of the earthquake, the contractor could not legally be relieved of the charge. *C. 19820, June 9, 1906.* A contract for supplying certain hams for shipment to the Philippine Islands provided that the hams should be cured by a process not used in curing hams for the general trade. To be acceptable, they must have been in process of cure for not less than 60 days, during which time the United States was to have the right of making various inspections. The contract further provided "that in case of failure of the party of the second part (the contractor) to deliver any article as stipulated, the party of the first part (the United States) is authorized to supply, by open purchase or otherwise, any deficiency resulting from said failure, the articles so procured to be as nearly as practicable of the same kind and quality in all respects as those to be furnished hereunder; and the said party of the second part shall be charged with any excess of cost over that of furnishing at the price named herein." *Held*, the contract did not relate to any particular hams but only to hams cured in a particular manner, and was an absolute and unconditional contract to furnish hams so cured, and an act of God making it impossible to comply literally with the contract as to the method of curing did not relieve the contractor from the obligation to substantially carry it into effect by furnishing other hams as nearly as practicable of the same kind and quality. *Held*, further, that if the Government did not give the contractor an opportunity to substantially comply with the contract after its literal compliance was rendered impossible by an act of God the contractor would be relieved thereby from any further obligation of the contract. *C. 15152, Aug. 31, 1903.* So, also, where a contractor in the Philippine Islands agreed absolutely and unconditionally to supply foreign beef and mutton. *Held*, he would not be relieved from his contract by reason of a breaking down of the refrigerating machinery. *C. 18589, Oct. 11, 1907.* Where the contractor in a Government contract for installing an electric-lighting system at Fort William McKinley, Philippine Islands, agreed "to complete in all respects the work called for under this agreement, on or before the date stipulated for such completion," without an exception of any kind, *held* that the contract was an absolute undertaking to complete the work by the stipulated time, and that the contractor could not be excused for his failure to complete the work within the time fixed, the failure being due to delays in procuring material from the United States by reason of strikes and washouts of railways in the United States. *C. 24076, Nov. 16, 1908.* Where a contract was made to enlarge a certain levee, and about one-seventh of it was washed out before work was entered on, *held* that as the work to be performed under the contract was divisible, and as much the larger part of it was intact and the partial destruction had not rendered the

remaining work more difficult or expensive, the partial destruction would not relieve the contractor from his obligation to enlarge the remaining portion of the levee. *C. 15923, Feb. 18, 1904.*

X C. A contractor was required by the terms of his contract to furnish 2,000,000 pounds of "wild Arizona hay." By reason of a drought and consequent failure of the grass crop it became impossible to carry out the contract. *Held*, the drought constituted an act of God, and the contractor should be excused from performance of his contract. *P. 56259, Oct. 31, 1892.*

X D. *Held* with respect to the question whether the contractor for dredging in Great South Bay, N. Y., was released from the obligation to finish the contract by reason of an injunction obtained by the Lewis Blue Point Oyster Cultivation Co.—the dredging being through submerged lands leased by the State to that company for oyster culture, that where, as in this case, the impossibility is created by law and is only temporary, the obligation is not extinguished, but only suspended[1] during the continuance of the injunction; and that the United States would not be liable to the contractor for any damages on account of the suspension. *C. 22703, Feb. 5, 1908.*

X E. Where a contractor for the manufacture of certain khaki caps was forced into bankruptcy proceedings before the date fixed by the contract for its completion and a receiver was appointed, *held* that the fact that the contractor had become a bankrupt prior to the time set for the final delivery of the caps did not relieve him from the necessity of completing the contract according to its terms, and that the Government could, in accordance with the terms of the contract, decline to receive deliveries after the date of delivery as fixed by the contract. *C. 27968, Mar. 13, 1911.*

XI A. A bid for furnishing forage was accompanied by a duly executed guaranty that in case the bid should be accepted, the bidder would execute a contract within ten days after notice of such acceptance. After the bids were opened, but before the bid was accepted, the bidder by letter withdrew it. *Held*, that the bidder could not be held for the reason that the bid alone did not constitute a contract under section 3744, R. S., which requires a contract "to be reduced to writing and signed by the contracting parties with their names at the end thereof." *Held*, also, that the sureties on the guaranty could not be held for the reason that the bid had not been accepted as required by the condition of the guaranty, as the bid was withdrawn before acceptance and having been withdrawn could not thereafter be accepted.[2] *P. 65, 378, July 7, 1894; C. 419, Oct. 3, 1894.*

---

[1] 7 Mass. 324; 9 Cyc. 627, 630; Sherman County *v.* Howard, 98 N.W. 666. The injunction was afterwards dissolved, it being held that the title of the lessee, under the grant from the State, was subject to the right of the Federal Government to take the submerged lands for the improvement of navigation without compensation to the State or its grantee.

[2] 9 Op. Atty. Gen., 174; 15 id., 648, 651. In the latter opinion the Attorney General held that as the *guaranty* accompanying the bid was for the acts of the bidder "after being notified of the acceptance of said bid," and the withdrawal of the bid having taken place prior to its acceptance, neither the bidder nor his sureties were liable upon the guaranty. He intimated, however, that a recurrence of the difficulty might be avoided by a properly worded statute or guaranty. In a later opinion, dated August 31, 1894 (21 Op. Atty. Gen., 56), in an opinion rendered the Secretary of the Navy, he cited these opinions as the rulings of the Department of Justice "in the absence of any special statutory provision;" but referring to sec. 3719, R. S., which specially relates to bids in the Navy Department, and requires each proposal to be accom-

XI B. Paragraph 548, Army Regulations, 1910, provides: "Before the time for opening any bidder may, without prejudice, withdraw from competition by giving written notice of his decision to the officer

panied "by a written guaranty * * * that the bidder if his bid is accepted, will * * * give bond with good and sufficient sureties to furnish the supplies proposed," said: "Strictly construed, this does not prevent a withdrawal before acceptance. Liberally construed, in conformity with the manifest intent of the provision, I think it may fairly be held that it binds the bidder to stand by his bid, at least after the hour of opening. The case being doubtful, I am inclined to give a liberal construction to the statute, since in this way only can its authoritative construction be obtained from the courts. I would therefore advise that Mr. Neville be held to his proposal, and that no right of withdrawal on his part be recognized, but that he and his guarantors be held responsible."

A statute similar to sec. 3719, R. S., referred to above, regulates the letting of contracts by the War Department. The acts of Apr. 10, 1878 (20 Stats., 36), and Mar. 3, 1883 (22 Stats., 487), authorize the Secretary of War to "prescribe rules and regulations to be observed in the preparation and submission and opening of bids for contracts under the War Department. And he may require every bid to be accompanied by a written guaranty, signed by one or more responsible persons, to the effect that he or they undertake that the bidder, if his bid is accepted, will, at such time as may be prescribed by the Secretary of War or the officer authorized to make a contract in the premises, give bond, with good and sufficient sureties, to furnish the supplies proposed or to perform the service required. If after the acceptance of a bid and a notification thereof to the bidder he fails within the time prescribed by the Secretary of War or other duly authorized officer to enter into a contract and furnish a bond with good and sufficient security for the proper fulfillment of its terms, the Secretary or other authorized officer shall proceed to contract with some other person to furnish the supplies or perform the service required, and shall forthwith cause the difference between the amount specified by the bidder in default in the proposal and the amount for which he may have contracted with another party to furnish the supplies or perform the service for the whole period of the proposal to be charged up against the bidder and his guarantor or guarantors, and the sum may be immediately recovered by the United States for the use of the War Department in an action of debt against either or all of such persons." Where under the above statutes a guaranty accompanying a bid provided that if the bid "be accepted * * * within sixty days * * * the said bidder * * * will, within ten days after notice of such acceptance enter into a contract with the proper officer," etc., and after the opening of the bids but before acceptance the lowest bidder gave notice of withdrawal of its bid, it was held by the Attorney General that under such a wording the bidder could withdraw his bid before acceptance without rendering the guarantors liable. Card 23180, May 12 & 18, 1908. Thereupon the form of guaranty to accompany bids was changed to read as follows, so as to hold the sureties on the guaranty even in case of a withdrawal of the bid before acceptance. "The accompanying proposal, if not withdrawn prior to the opening of said proposal, *shall remain open for sixty (60) days thereafter*, unless accepted or rejected within that time; and if it be accepted in any or all of its items or any part or parts thereof, within said period of sixty (60) days, the said bidder ——, ——, will, upon written notice of such acceptance, deliver accepted items within the time and in accordance with the terms if said proposals and acceptance, or will, if so required by the United States or its legal representative, within — days after written notification of said acceptance, enter into contract with the proper officer of the United States for the delivery of the accepted items in accordance with the terms of the said proposal and acceptance and will give bond, with good and sufficient sureties, for the faithful and proper fulfillment of such contract. And we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, to pay the United States, in case the said bidder —— shall withdraw said proposal within said period of sixty (60) days, or shall fail to furnish such articles and services in accordance with said proposal as accepted, or shall fail to enter into such contract and furnish such bond, if so required, within —— days after said notice of acceptance, the difference in money between the amount of the proposal of said bidder —— on the articles and services so accepted and the amount for which the proper officer of the United States may procure the same from other parties, if the latter amount be in excess of the former."

In Haldane *v.* U. S., 69 Fed. Rep., 819, it was held that under a statement in a circular that a bid should not be withdrawn for sixty days the Government had no right to accept a bid after that period.

Par. 548, Army Regulations, 1910, authorizes a bid to be withdrawn without prejudice before the time for opening bids. See Scott *v.* U. S., 44 Ct. Cls., 524.

holding his bid, and when his bid is reached at the opening it will be returned to him or his authorized agent unread." The Government advertised for bids for certain supplies, the bids to cover the whole or any one or more of the articles. A bidder submitted a bid on hay, straw, and oats, and on the day previous to that on which the bids were to be opened wired the quartermaster to withdraw his bid on oats. *Held*, that the word "unread" in the above regulations applied only to the bid on oats, and did not prohibit the reading and consideration of the bids on hay and straw. *C. 28967, Sept. 12, 1911.*

XI C. As a contract under the War Department *inter alia*, is not binding until reduced to writing and signed by both parties, as required by section 3744, R. S., the refusal of a bidder to execute a contract after the acceptance of his bid did not render him personally liable to the Government for damages for such refusal, although his guarantors would be liable under their guaranty. As the bidder did not sign the guaranty, he could not be held under the terms thereof. *C. 12385, Apr. 17, 1902; 19523, Apr. 11, 1906.*

XI D 1. Where a bid was accompanied by a guaranty that in case the bidder should fail to enter into the contract within 10 days after notice of acceptance, the guarantors would pay the difference in money between the amount of the bid and the amount for which the proper officer of the United States might contract with another party to do the work if the latter amount should be in excess of the former, and the bidder by reason of a fatal illness (an act of God, which excused the failure to enter into the contract), failed to enter into the contract before the expiration of 10 days, and the administrator of the deceased bidder refused to enter into the contract. *Held*, the guaranty should be construed strictly, that the guarantors did not undertake that the administrator of the deceased bidder should enter into the contract, and were not liable on the guaranty for his refusal to do so, and were not liable for the failure of the bidder to enter into the contract, as the time allowed him to do so had not expired on the date he was taken ill. *C. 8904, Sept. 6, 1900, and Sept. 25, 1901.*

XI D 2. Where guarantors have undertaken that if a bid shall be accepted the bidder will "within 10 days after being notified of such acceptance, enter into a contract" and give bond. *Held*, that nothing less than actual notice will satisfy the terms of the guaranty, and that if the acceptance was given by mail the 10 days should not be computed from the date the notice of acceptance reached the address of the bidder, although there would be a strong presumption of actual notice on that date, but from the date the bidder actually received the notice.[1] *C. 8904, Oct. 8, 1901.*

XI D 3. Proposals were invited for four contemplated river improvements. The lowest bid for one of the works was accepted and contract entered into, but no action on the proposals for the other three was taken at that time. The guaranties accompanying the proposals were conditioned on the acceptance of the bids within 60 days. After the expiration of the period named in the guaranties the acceptance of the lowest bids on two of the works was recommended. *Remarked* that there was no legal objection to such acceptance, provided the bidders to whom it was proposed to award the contracts were willing to enter into the same, but if they declined

[1] See to same effect Haldane *v.* U. S. 69, Fed. Rep., 819.

to enter into contracts the guaranties could not be enforced. *C. 371, Sept. 22, 1894.*

XI E. There is no statute or regulation *requiring* a guaranty to accompany a bid, but under the act of March 3, 1883 (22 Stat., 487), which provides that the Secretary of War "*may* require every bond to be accompanied by a written guaranty," etc., the Secretary may, and in practice usually does, require one. *C. 9061, Oct. 16, 1900.* Under the above statute there would be no legal objection to providing by regulation for a "blanket guaranty" to cover all bids by a particular bidder during the fiscal year, though there might be practical objections owing to the fact that the contracting for the War Department is not centralized. A "general guaranty" so worded that it might be submitted with any bid the bidder might make during the fiscal year would be preferable. Such a guaranty could be accepted under existing regulations. *C. 9061, Oct. 16, 1900; 18880, Nov. 28, 1905, and Oct. 12, 1906; 23330, May 29, 1908.*

XI F. Paragraph 533, Army Regulations, 1895 (543 of 1910), provided that "guaranties, signed by two responsible parties, will be required to accompany proposals whenever in the opinion of the officer authorized to make the contract they are necessary to protect the public interests, and when so required no proposal unaccompanied by a guaranty, made in manner and form as directed in the advertisement or specifications, will be considered." Where a guaranty was required to accompany a proposal and none was furnished, *held* that the contract itself would nevertheless be valid, the regulation being viewed as directory only. *C. 6285, Apr. 20, 1899; 7613, Jan. 26, 1900; 7956, Mar. 31, 1900; 14535, Apr. 25, 1903; 20670, Nov. 26, 1906; 21707, Jan. 21, 1907.* In good faith to other bidders a bid without a guaranty should not be accepted. *C. 20670, Nov. 26, 1906; 21707, June 21, 1907.*

XI G. Where bids were required to be accompanied by a guaranty and bidders were notified that no proposal unaccompanied by a guaranty would be considered and a bid was made without a guaranty but the following entry was made on the bid: "Annual guaranty for 1910 on file," which entry referred to a guaranty on file in the Navy Department and which applied to that department only, and upon being so notified the bidder within a few days after the opening of the bids filed a suitable bond, *held*, the bid could not properly be considered. *C. 27062, July 22, 1910.*

XI H. Specifications and instructions for the use of bidders had attached to them a form of guaranty to accompany proposals, but they did not contain any distinct provision to the effect that a guaranty would be required or that no proposal would be received which was unaccompanied by a guaranty. *Held*, that an unguaranteed bid might be accepted. *C. 21707, Jan. 21, 1907.*

XI I. The lowest bidder failed to furnish a guaranty, one for $500 being specifically required in the instructions to bidders, but submitted his certified check, adding to his proposal and signing the following statement: "In lieu of above we submit certified check to the amount of guarantee." *Held*, that as the certified check was submitted in lieu of the guaranty it could be applied to secure the United States on the conditions specified in the instructions, and should be treated as a substantial compliance with paragraph 533, Army Regulations, 1895, which provided that, "Guaranties, signed by two responsible parties, will be required to accompany proposals

whenever in the opinion of the officer authorized to make the contract, they are necessary to protect the public interests, and when so required, no proposal unaccompanied by a guaranty, made in manner and form as directed in the advertisement or specifications, will be considered." [1] *C. 7613, Jan. 26, 1900.*

XI J. A bidder gave his certified check for $500 in lieu of a guaranty, but his bid having been accepted failed to enter into the contract, and the Government thereupon contracted with another party, at a price more than $500 in excess of the bid. *Held*, there being no written contract as required by section 3744, R. S. on which the bidder could be held, the bidder is not liable to the Government beyond the amount of the check for his failure to enter into the contract. *C. 28575, June 21, 1911; 28928, Sept. 6, 1911.*

XI K. A contract was entered into for the construction of two derricks, the specifications stating that the time of delivery would be an essential factor in determining the awards of the contract, and requiring bids to be accompanied by a certified check for $1,000 which the specifications stated would "be retained until the completion of the contract." The contractor failed to commence the execution of his contract, causing the Government to relet the contract at a price $2,150 in excess of the former. *Held*, that the intention of the parties was that the check should be held to reimburse the United States for any loss it might suffer by reason of the failure of the contractor to comply with his contract, and that the check should be cashed and applied on the loss to the Government, and suit instituted for the balance of the loss not covered by the check. *C. 15966, Feb. 26, 1904.*

XI L. The successful bidder for the purchase and removal of certain buildings deposited the sum of $225 with the quartermaster as a guaranty for the faithful performance of his contract. The contract was duly entered into, but the contractor failed to complete it as required by the term of the contract. *Held*, that while the money deposited could not be forfeited to the United States so as to require it to be deposited in the Treasury, still it was held charged with a certain trust, and was subject to be applied to the completion of the contract, and that after the uncompleted work had been performed in as economical a manner as possible the remainder, if any, should be returned to the contractor. *C. 29276, Dec. 2, 1911.*

XII A. Section 3648, R. S., provides in part that: "No advance of public money shall be made in any case whatever. And in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment." *Held*, the payment of rent in advance for lands leased by the Government, of which it has been placed in possession by the lessor is not in violation of section 3648, R. S.[2] *C. 21506, Mar. 17, 1908*, and *July 23, 1908.*

XIII A. Section 3679, R. S., provides that—"No department of the Government shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for the fiscal year, or

[1] Par. 543, A. R., of 1910, authorizes the use of certified checks by providing that "at the option of bidders certified checks for the amount of the guaranty required may be received in place of the written guaranty. These checks will be kept in a secure place, and will be returned to bidders by the purchasing officer when no longer required to protect the interests of the Government."

[2] See XII Comp. Dec., 782.

involve the Government in any contract for the future payment of money in excess of such appropriations." *Held*, under this section that all contracts, based on an *annual* appropriation, by which the Government may be bound for the future payment to contractors of any moneys in excess of the appropriations of the fiscal year are unauthorized and incapable of being enforced at law, so far as they relate to such future payments.[1] *R. 31, 40, Nov. 11, 1870.* So, such a contract purporting to be for the "calendar year" 1872 would be unauthorized, as it would cover parts of two fiscal years. *R. 31, 392, May 18, 1871.* Military contracts (including leases) under an annual appropriation will thus, where practicable, properly be made to run concurrently with the fiscal year in or for which they were made. *R. 35, 613, Oct. 16, 1874.* So, *held*, that a contract of lease made for a term of years (as three, five, or ninety-nine years), at a certain stated rent, to carry out an *annual* appropriation would be in derogation of Section 3679, R. S., and, *unless specially authorized by some other statute*, inoperative to bind the Government for a longer period than the fiscal year, even though providing that the payment for rents after the fiscal year should be contingent upon future appropriations.[2] *R. 32, 642, May 27, 1872; 42, 677, June 5, 1880; 43, 98, Nov. 28, 1879. Held*, also, that a lease of land at a certain rent for an indefinite term, payable out of an annual appropriation, would not, in the absence of specific statutory authority, be legal or operative beyond the end of the existing fiscal year. *R. 36, 315, Mar. 13, 1875.* So, of a proposed contract by the United States for the use (for a fixed compensation) of a ferry for an indefinite period, the appropriation being an annual one. *R. 42, 454, Dec. 17, 1879.* Or for the rent of telephones for "one year and thereafter until terminated" by written notice, the appropriation being an annual one. *C. 4722, Aug. 3, 1898.* Where it was desired to occupy premises for a longer term than one year, the appropriation being annual, *advised* that a lease should be taken to the end of the current fiscal year at a certain

---

[1] In Hooe *v.* U. S., 218 U. S., 322, the syllabi are as follows:

Congress, proceeding under the Constitution, declares what amount shall be drawn from the Treasury in pursuance of an appropriation.

Heads of departments can not by express or implied contract render the Government liable for an amount in excess of that expressly appropriated by Congress for the subject matter of the contract.

When an officer of the United States takes or uses private property without authority of law he creates no condition under which the Government is liable by reason of its constitutional duty to make compensation. If private property has been taken or used by an officer of the United States without authority of law the remedy is not with the courts, but with Congress alone.

A claim for such compensation does not rest on the Constitution, and as an unauthorized act of the officer does not create a claim against the United States, the Court of Claims has no jurisdiction thereof under the Tucker Act of Mar. 3, 1887, 24 Stat., 505.

One renting a building to a department of the Government and receiving the entire appropriation for rent for such department has no claim against the Government for any amount in excess of the appropriation, even though he demands more and though he expressly excepts a part of the building from the lease and the department actually occupies the part reserved, nor has the Court of Claims jurisdiction of such a claim as one arising under the provision of the Constitution that private property shall not be taken without compensation.

[2] See McCallum's case, 17 Ct. Cls., 92, to the effect that a lease for a term of years founded on an annual appropriation is binding on the Government only until the end of that year, with a future option from year to year till the end of the lease. See also Geddes *v.* U. S., 38 Ct. Cls., 426, and authorities cited.

rent, and then a new lease be entered into for the next fiscal year, and so on; a fresh lease being necessary for each fiscal year, though the successive leases be mere repetitions and extensions of the original lease and though it be expressly stipulated in the original lease that the United States shall have the privilege of such extensions if desired. *R. 32, 642, May 27, 1872; 42, 677, June 5, 1880.* But *held,* that as the main object of the statute was to protect the United States from arbitrary expenditures and improvident pecuniary obligations on the part of the executive officials, it would not apply to contracts which do not bind the Government to the payment of money, and therefore would not preclude a lease for five or more years of land required for military purposes, where *no rent whatever* was reserved therein, or where the rent reserved was a mere nominal sum inserted by way of formal consideration—as $1 per annum. *R. 42, 564, Apr. 1, 1880; 676, June 5, 1880.* Also, where an appropriation is a *permanent* one, a contract providing for payments therefrom may be made covering a greater period than the current fiscal year. *C. 14919, July 9, 1903.* Also, where section 1661, R. S., as amended by the act of June 22, 1906 (34 Stat. 449), provided that "the sum of two million dollars is hereby annually appropriated to be paid out of any money in the Treasury not otherwise appropriated, for the purpose of providing arms," etc., for issue to the militia "such appropriation to remain available until expended," and the act further provided that the appropriation should be apportioned among the States and Territories on a certain basis, and a lease was entered into for five years, the rent to be paid annually in advance and the lease expressly reserved the "option on the part of the lessee (the United States) to terminate this lease at any time within said term upon giving the lessor ninety days' notice thereof," *held,* that in view of the reservation of the option to terminate the lease it was legally unobjectionable. *C. 19798, June 5, 1907.* And, under the same statute (34 Stat. 449), where a lease was made covering parts of two fiscal years *held,* it would be legal to reserve or set aside from the allotment already made (which is a permanent appropriation) a sufficient sum to pay the rental for the entire period of the lease, and after the end of the fiscal year to reserve or set aside from the allotment then available (which is another permanent appropriation) the rental for the remainder of the period of the lease, the effect being to have always on hand for that purpose a sum sufficient to pay all future rent up to the end of the lease. *C. 21506, Oct. 18, 1907; 19798, May 27, 1907.* But in a case involving enlisted men, where the payments of the extra-duty pay authorized by section 1287, R. S., was omitted to be appropriated for in a certain fiscal year, *held,* that notwithstanding the provisions of section 3679, R. S. and the act of May 1, 1884 (23 Stat. 17), the services of the men might be required and accepted under the express understanding that the payment therefor depended upon Congress, and that their rendition of service would not give them any claim upon the United States unless Congress should appropriate for such payment. *R. 55, 43, Sept. 6, 1886.*

XIII B. Section 3679, R. S., as amended by the act of March 3, 1905 (33 Stat., 1257), is as follows: "No department of the Government shall expend, in any fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Govern-

ment in any contract or obligation for the future payment of money in excess of such appropriations unless such contract or obligation is authorized by law. Nor shall any department or officer of the Government accept voluntary service[1] for the Government or employ personal service in excess of that authorized by law, except in cases of sudden emergency involving the loss of human life or the destruction of property. All appropriations made for contingent expenses or other general purposes, except appropriations made for the fulfillment of contract obligations expressly authorized by law, or for objects required or authorized by law without reference to the amounts annually appropriated therefor, shall, on or before the beginning of each fiscal year, be so apportioned by monthly or other allotments as to prevent undue expenditures in one portion of the year which may require deficiency or additional appropriations to complete the service of the fiscal year;[2] and all such apportionments shall be adhered to except when waived or modified in specific cases by the written order of the head of the executive department or other Government establishment having control of the expenditure; but this provision shall not apply to the contingent appropriations of the Senate or House of Representatives; and all such waivers or modifications, together with the reasons therefor, shall be communicated to Congress in connection with estimates for any additional appropriations required on account thereof. Any person violating any provision of this section shall be summarily removed from office and may also be punished by a fine of not less than one hundred dollars or by imprisonment for not less than one month." The purpose of this section is to cause the expenditure of the several appropriations for the support of the executive departments of the Government to be so supervised as to prevent deficiencies from arising, except in a case of emergency. There are excluded from the operation of the statute appropriations "for objects required or authorized by law without reference to the amounts annually appropriated therefor." *Held*, that section 3732, R. S., which authorizes purchases of clothing, subsistence, forage, etc., to be made, where an appropriation has been exhausted, provided the purchases do not exceed the necessities of the current year, is not affected by section 3679, R. S., as amended,[3] but *advised* that purchases should not be made under section 3732 while Congress was in session, but Congress should be notified of the deficiency. *C. 19675, May 9, 1906.* So, also, *held*, that section 3732, R. S., is not affected by section 3679, R. S., as amended by the act of February 27, 1906 (34 Stat., 49), which for present purposes is substantially the same as noted above. *C. 22225, Oct. 18, 1907.* So, also, paragraphs 496 and 550, Manual of the Medical Department, which provide for utilizing the services of the

[1] In XI Comp. Dec., 622, it is said: "'Service' means the performance of some duty or labor for *another;* 'voluntary service,' the performance of some duty or labor *freely* or *of one's own accord for another.*

"Where the title remains in the proposed vendor, without any agreement for sale, the labor and expense incurred by said proposed vendor in the installation of an appliance on a naval vessel or in a navy yard *for trial purposes only* is, in my opinion, labor and expense incurred by said vendor *for his own benefit and in his own behalf* as an incident to or necessary concomitant of a proper exhibition of his appliance for sale, and is not 'service' or 'voluntary service' within the meaning of section 3679 of the Revised Statutes as amended."

[2] See XIII Comp. Dec., 97.

[3] See XI Comp. Dec., 564.

authorized private societies for the aid of sick and wounded, and for using the services of civilian physicians, nurses, litter bearers, cooks, etc., voluntarily offered, are not affected by section 3679, R. S., as amended by the act of February 27, 1906, as the services under the above paragraphs are rendered in time of war and great public emergency and without the expectation of reimbursement, are in behalf of the sick and wounded and are calculated to prevent the "loss of human life" within the meaning of the statute, and they include services rendered by the Red Cross, which is expressly authorized by law and fully sanctioned to treaty stipulation, while on the other hand "voluntary services" under section 3679, R. S., as amended, are such as are rendered with the understanding that they are to be made the basis of a subsequent claim for compensation. *C. 20866, Jan. 2, 1907.* The acceptance of "voluntary service" under paragraph 3679, as amended, means that the service is rendered under an agreement whereby a claim for payment may subsequently be made against the Government. *C. 20916, Jan. 12, 1907. Held*, that the apportionment under section 3679, R. S., as amended, may be monthly or quarterly, or in part monthly and in part quarterly, or for unequal periods. The apportionment need not be uniform but the amounts allotted to each month, quarter, or other unit may vary, and *held*, also, that it was not the intent of Congress to prohibit the occurrence of deficiencies, but to require a resort to such measures of supervision as will be calculated to prevent their occurrence or to minimize their amount. *C. 18240, June 30, 1905. Held, further*, that under section 3679, R. S., as amended, bills incurred in one apportionment period in excess of the apportionment may be paid in the next or in any subsequent period, provided the payment is within the proper fiscal year. *C. 18240, Feb. 2, 1906.* When an apportionment under section 3679, R. S., as amended, has been made, it is the duty of the head of a department, as for instance the Quartermaster General, to see that the apportionment or allotment is not exceeded, but a disbursing officer under the Quartermaster General would not be charged with any duty except in the case where the disbursing officer disbursed an entire appropriation. As a single disbursing officer would control and disburse no more of the appropriation than was furnished him by the Quartermaster General on duly approved estimates which had been submitted by the disbursing officer, it would be impossible to fix upon any one of several disbursing officers the responsibility for exceeding the apportionment in any particular month or other period of apportionment. If a disbursing officer incurred obligations in excess of the allotment to him he could be tried for neglect of duty, but would not be subject to the penalty provided by the act of Congress. *C. 18240, July 11, 1905.*

XIII C. Section 3732, R. S., provides that—"No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation, adequate to its fulfillment, except in the War and Navy Departments, for clothing, subsistence, forage, fuel, quarters, or transportation, which, however, shall not exceed the necessities of the current year.[1] Where a

[1] Secs. 3679 and 3732, R. S., are to be read together as one law. 15 Op. Atty. Gen., 124, 209. These two sections apply to the public service in general and must yield to special provisions relating to a particular department. New York Cent. R. R. Co. *v.* U. S., 21 Ct. Cls., 468. It will be observed that section 3732, R. S., limits the power of the executive department, in making contracts binding upon the

purchase of subsistence stores had been made in excess of the appropriation, *held* that it is well settled that it is beyond the power of an officer charged with making purchases to issue an undertaking in the nature of a certificate of indebtedness, but that there is no legal objection to advising the vendor by letter of the essential incidents of the purchase, and of the reason why payment has not been made on delivery.[2] *C. 25789, Nov. 17, 1909.*

Although public contracts can not in general be made in advance of, or in the absence of, a proper appropriation for the purpose, or other special statutory authority, yet from this rule are expressly excepted, by section 3732, R. S., military and (naval) contracts "for

---

Government, to two cases: First, where the contract is authorized by law, second, where there is an appropriation sufficient to cover the amount contracted for. Under the first case it has been held by the Attorney General in 15 Opins., 240, that to be "authorized by law" it must appear that express authority was given to make such contract, or that such authority was necessarily to be inferred from some duty imposed upon, or from some authority given to, the person assuming to contract on behalf of the United States. (See, also, 3 Ct. Cls., 43.) In Chase *v.* U. S., 155 U. S., 500, it was held that the power of the Postmaster General "to establish post offices" did not "authorize" him within the meaning of section 3732, R. S., to lease premises for a post office for twenty years. Under the first case, where the contract is authorized by law, a contract may legally be made for the entire project authorized, the contract to be limited by the amount then fixed, if a limit was then fixed, even though the amount covered by the contract is in excess of the annual appropriation, but the actual payment must be limited to the amount in the Treasury appropriated for the project. Under such a contract, appropriations made subsequent to the fiscal year in which the contract was made, could be used in paying for the work contemplated by the contract. Under the second case, where the only power to enter into a contract arises from the existence of an appropriation sufficient to cover the amount contracted for, the power to contract is limited by the appropriation. A contract for a larger amount than appropriated is void. As soon as the appropriation is exhausted the power to contract is at an end. If a subsequent appropriation is made this gives rise to a new power to contract. III Comp. Dec., 438; IV id., 318; V id., 968; IX id., 422; X id., 284; XIII id., 478; XIV id., 755; 4 Op. Atty. Gen., 600; 9 id., 18; 15 id., 235; 19 id., 654; Bradley *v.* U. S., 98 U. S., 133; Chase *v.* U. S.; 15 id., 500. Under the second case a contract in excess of the appropriation would not be binding even though the contract expressly provided that it should be contingent upon future appropriations. In 15 Op. Atty. Gen., 235, it was held that such a contract would not "be binding so far as to affix itself to future appropriations, even if it is subject to the contingency that such appropriations shall be made," referring to an opinion of Attorney General Mason in 4 Op., 490, where such a contract proposing to bind the Government to payments in advance of appropriations "was held to be of no validity, even though it provided that such contract should depend for its validity upon the contingency that an appropriation should be made and such appropriation was, in fact, thereafter made." (See also, Bradley *v.* U. S., 98 U. S., 104; IX Comp., 424.)

Where a contract is authorized without restriction as to cost, the Government would be liable for "extra" work and materials accepted by it, and, also, where a contract is made under a general appropriation, the contractor is not bound to know the condition of the appropriation and the Government will be liable for "extras," but where a contract on its face assumes to provide for all the work authorized by an appropriation the contractor is bound to know the amount of the appropriation and can not exceed it by doing "extra" work. 2 Ct. Cls., 151; 16 id., 528; 18 id., 146, 496; 21 id., 188; 31 id., 126; 33 id., 1.

[2] The practice of issuing certificates of indebtedness was disapproved in G. O. 77, A. G. O., July 24, 1873, in the following language: "Disbursing officers are not allowed to issue vouchers, which act as due bills against the United States, for unpaid accounts. The only exceptions under the foregoing will be the issuance of a certified statement of personal services and of wages due, in the case of an employé discharged, and not paid at time of discharge for want of funds." But the Secretary of War may properly issue an order authorizing paymasters to make a certificate upon the accounts of officers in the following form: "The within account is believed to be correct, and would be paid by me if I had public funds available for that purpose." Such certificate would not come under the prohibition of section 3679, R. S.

clothing, subsistence, forage, fuel quarters or transportation,"[1] which, however, it is added, "shall not exceed the necessities of the current year."[2] Such contracts may therefore be entered into irrespective of the adequacy of the appropriations, or entirely on credit, where Congress has omitted (as it did in the session ending Mar. 4, 1877), to make any appropriations at all for the Army for a fiscal year.[3] But *held* that by the term "current year" was to be understood current fiscal year, and that, in the excepted cases, the military authorities could bind the Government by contracts only for *necessary supplies* for the fiscal year in which such contracts were made. *R. 38, 504, Mar. 8, 1877; 42, 135, Jan. 29, 1875; C. 26334, Mar. 10, 1910.*

The act of June 12, 1906 (34 Stat., 255), which is identical in its wording with section 3732, R. S., except that it includes "medical and hospital supplies" among the articles that may be purchased without a specific appropriation, is permanent legislation. *C. 26334, Mar. 10, 1910.*

XIII D. Section 3733, R. S., provides that "No contract shall be entered into for the erection, repair, or furnishing of any *public building*, or for any *public improvement* which shall bind the Government to pay a larger sum of money than the amount in the Treasury appropriated for the specific purpose." By the act of June 16, 1890 (26 Stat., 157), the Secretary of War was "authorized and directed to cause to be erected at the National Armory, Springfield, Mass.," a building for machine shops, etc., not to cost over a specified total of $211,639.54. By a subsequent appropriation act of August 30, 1890 (26 Stat., 395), an appropriation was made of $100,000 "to commence the erection" of the same building. *Held*, that a contract might be entered into with a proviso that only $100,000 shall be paid for the satisfactory completion of the whole work until Congress makes an appropriation for the completion of the shops, even though it does conditionally bind the Government for a greater sum than has been appropriated. *Held*, further, that the act of June 16, 1890, should be taken as an exception to the rule stated in section 3733, R. S., and as sufficient authority for making the contract under consideration.[4] *P. 43, 375, Oct. 30, 1890.*

XIII E. Where an appropriation was so depleted that there were not sufficient funds to enable the Government to pay for some very desirable work and it was proposed that in order to permit the work to proceed the Government should enter into a contract upon the condition that the contractor should wait for payment until an appropriation should be made, and that he should have no claim against the Government for compensation unless an appropriation should be made. *Held*, that such a contract could not legally be entered into for the reason that it would violate the provisions of sections 3679 and 3732, R. S., and of the act of May 1, 1874 (23 Stat., 17). The effect of incorporating such conditions in the contract would be no more than expressing what would be the legal effect of the contract, even without such conditions. Without authority from

[1] By the act of June 12, 1906 (34 Stat., 255), "medical and hospital" supplies are also excepted.

[2] As to the *reason* of this statute, see the opinion of Nelson, J., in the case of The Floyd Acceptances, 7 Wallace, 666, 685.

[3] To a similar effect, see subsequent opinions of the Attorney General in 15 Opins., 124, 209.

[4] See XIII Comp. Dec., 480.

Congress, no executive officer could bind the United States in the matter by contract or otherwise. The statutes in question were intended to prevent transactions such as that proposed, which, while not creating a legal claim against the United States, would involve it in an imperfect or moral obligation which would be urged as a ground for an appropriation to discharge the obligation.[1] *C. 15401, Mar. 10, 1904.*

It was proposed that the Government should lease a pier for the period of the fiscal year, one of the covenants in the lease providing that the Government should rebuild the pier if it should be destroyed by certain means. *Held*, that in view of sections 3679 and 3732, R. S., a lease with such a covenant would not be legal, unless a sufficient sum from the appropriation applicable to hiring the property be reserved or set aside to rebuild the pier in case of its destruction, otherwise it could not be said there was an "appropriation adequate to the fulfillment" of the contract.[2] *C. 12360, Apr. 7, 1902.* So where certain landowners offered to donate their land to the United States for the extension of a levee, provided the United States would agree to pay all future cost of maintenance of the levee, *held*, that in view of section 3679 R. S., the Secretary of War would have no authority to bind the Government for the future maintenance of the levee. *C. 5089, Nov. 4, 1898.* And where, under an appropriation for the construction of a sewer, it was proposed to enter into a contract for the payment of damages indefinite in amount. *Held*, that as the amount of such damages would depend upon facts which could not be determined at the time of making the contract, it would be impracticable to set aside a sufficient amount from the appropriation to meet the liability under the proposed contract, and therefore such a contract would be without authority of law. *C. 27468, Nov. 23, 1910.*

In view of the provisions of sections 3679 and 3732, R. S., there can be neither a contract, nor an award or acceptance of a bid, until there shall be an adequate appropriation applicable to the subject, and, therefore, in advertising for bids in a case where an appropriation has not been made, it is proper, although not necessary, to insert a clause notifying bidders of that fact. *R. 50, 338, June 14, 1886.*

By the river and harbor act of September 19, 1890, the Secretary of War was authorized to enter into contract for a certain improvement of the Delaware River, "the work to be paid for as appropriations may from time to time be made by law." A contract was entered into for the whole work at a cost largely in excess of the appropriation available. It provided that when appropriations permitted, monthly payments should be made, 10 per cent thereof to be "reserved," and that if payment be discontinued for a period of one year owing to lack of funds, the total amount reserved from previous payments should be paid to the contractor. On the question whether the amounts so

---

[1] See XIV, Comp. Dec., 755.

[2] See XV Comp. Dec., 405, where it was held that the execution of a contract with a railroad company, which proposes to make the Government liable for any and all damages to the property of said railroad company arising from accident or injury thereto by reason of the use along its railway lines of velocipede cars by Government employees, is unauthorized and that under the act of Mar. 3, 1905 (33 Stat., 1257), amending section 3679 of the Revised Statutes, no officer of the Government has a right to make a contract on its behalf involving the payment of an indefinite and uncertain sum that may exceed the appropriation, and which is not capable of definite ascertainment by the terms of the contract, but is wholly dependent upon the happening of some contingency the consequence of which can not be defined by the contract.

reserved could be used in paying for work not yet appropriated for, *held*, that to do so would involve a violation of the contract entered into, and would operate indirectly as a payment for work in advance of an appropriation therefor. *C. 620, Nov. 15, 1894.*

XIV A. Previous to the act of July 17, 1862 (now sec. 3737, R. S.), Government contracts were legally assignable under limitations, and the act of February 26, 1853 (now sec. 3477, R. S.), prescribed the mode in which such assignments should be made. The act of July 17, 1862 (now sec. 3737, R. S.), however, clearly inaugurated a new policy and one which looked to the repression of traffic or commerce in Government contracts. *R. 31, 436, June 8, 1871; 38, 13, May 17, 1875.*

XIV B. Under section 3737, R. S., the assignment of a contract does not render it absolutely void, but voidable at the option of the Government.[1] By accepting from the assignee labor or materials under the contract, or by permitting a part performance, it ratifies the assignment and payment under the contract should be made to the assignee.[2] *P. 16, 1, Apr. 2, 1887; C. 2933, Feb. 10, 1897; 16085, Mar. 24, 1904.* So, where a contractor became financially unable to continue his contract and his surety for its own protection carried on the work and paid the debts, *held*, that upon proof of an assignment, either voluntary or involuntary, to it of all the contractor's rights under the contract, that payments due the contractor might be paid such surety;[3] and that upon completion of the work all retained percentages might be paid the surety, for by permitting the assignee to perform the work the assignee becomes entitled to pay-

[1] According to early authorities the assignment of a contract in violation of section 3737 R. S. is absolutely null and void. McCord *v.* U. S., 9 Ct. Cls., 155; 10 Op. Atty. Gen., 523. But subsequently it was held, in 15 Op., 245, by the Attorney General that the statute is intended simply for the benefit and protection of the United States, which, therefore, is not compelled to avail itself of the right to annul the contract, but may recognize the same and accept and pay the assignee. "Were it to be held," observes the Attorney General, in 16 Op., 277, "that a transfer of an interest would absolutely avoid the contract, it would enable any party making a contract with the United States to avoid it by simply transferring an interest therein, which is a construction manifestly inadmissible." See also 18 Op. Atty. Gen., 88; Dulaney *v.* Scudder, 94 Fed. Rep., 6; Wheeler *v.* U. S., 5 Ct. Cls., 504; Federal Manufacturing and Printing Co. *v.* U. S.; 41 id., 321; 2 Comp. Dec., 49. The practice of the War Department is in accordance with the later opinion of the Attorney General, but it is clear that an officer of the Army could not properly assume to treat an assignment of a contract as valid without the authority and direction of the Secretary of War. In 19 Op. Atty. Gen., 186, it is held that there is no authority given by the statute nor to be inferred from it, that any officer of the United States can in advance either approve or recognize any proposed assignment. Partnership arrangements and arrangements for financial assistance in connection with a contract will not ordinarily constitute an assignment. Hobbs *v.* McLean, 117 U. S., 567; Coates *v.* U. S., 53 Fed. Rep., 989; Dulaney *v.* Scudder, 94, id., 6. A contractor with the United States does not, by contracting with a third party to furnish material for the work, assign the contract within the meaning of sec. 3737 R. S. U. S. *v.* Farley, 91 Fed. Rep., 474.

In Burck *v.* Taylor, 152 U. S., 634, the court said: "The express declaration that, so far as the United States are concerned, a transfer shall work an annulment of the contract, carries, by clear implication, the declaration that it shall have no such effect as between the contractor and his transferee. In other words, as to them, the transfer is like any other transfer of property, and controlled by the same rules. Its validity is only so far as the Government is concerned, and it alone can raise any question of the violation of the statute. The Government, in effect, by this section, said to every contractor, 'You may deal with your contract as you please, and as you may deal with any other property belonging to you, but so far as we are concerned you, and you only, will be recognized either in the execution of the contract or in the payment of the consideration.'"

[2] 2 Comp. Dec., 49; Wheeler's Case, 5 Ct. Cls., 504; Heathfield's Case, 8 id., 215.

[3] IX Comp. Dec., 43; 19 Op. Atty. Gen., 240.

ment therefor. Such an assignment would not be within the mischief intended to be remedied by section 3737, R. S. *C. 11328, Oct. 3, 1901.*

XIV C. The provision that the transfer of the contract or any interest therein "shall cause the annulment of the contract so far as the United States is concerned," being the words of section 3737, R. S., may properly be incorporated in a contract, but it would be better to substitute therefor the provision that "in case of such transfer the United States may refuse to carry out this contract either with the transferor or the transferee," as more clearly expressing what is intended by the statute as construed by the courts. *C. 2878, Jan. 19, 1897.*

XIV D. Sections 3477 and 3737, R. S., do not apply to involuntary assignments in bankruptcy, or to voluntary assignments for the benefit of creditors[1] (*C. 2828, Dec. 24, 1896; 13961, Jan. 13, 1903*); or to assignments by order of a State court to a receiver appointed by the State court (*C. 13961, Jan. 13, 1903*), and where there has been an assignment for the benefit of creditors payments due or to become due on the contract should be made to the duly appointed assignee and could not legally be made to the assignors. Paragraph 1, Circular 13, A. G. O., 1895, which directs disbursing officers to refuse to pay the assignee of any claim, except as to assignments authorized by the Army Regulations, does not apply to an assignment for the benefit of creditors.[2] *C. 2052, Feb. 13, 1896.*

A receiver duly appointed for a company having a contract with the United States may be permitted to execute the contract, payments being made to the receiver on receipts signed by him. Such action would not amount to an assignment of a contract prohibited by section 3737, R. S. This section applies to voluntary transfers and not to such as are made under judicial proceedings. The receiver is an officer of the court which appointed him, acts under its orders, is appointed on behalf of all parties interested, and stands in the place of the company. And after his appointment the company can exercise no acts with reference to its property and contracts, such matters being in the hands of the receiver.[3] *C. 7508, Jan. 6, 1900; 9247, Nov. 8, 1900; 19612, Apr. 28, 1906.* After the appointment of a receiver by a State court all payments due the contractor should be paid to the receiver. Payment to the contractor would not be a legal discharge of the debt.[4] *C. 13961, Jan. 13, 1903.*

XIV E. Section 3737, R. S., does not apply to an assignment by operation of law. Thus, where a party died pending the execution of a contract by him with the United States, *held* that his executor or administrator could legally be permitted to complete the contract after filing a certificate from the proper court of his appointment, but for the executor or administrator to assign the contract to others would be a violation of section 3737, R. S.[5] *C. 5849, Feb. 20, 1899; 11168,*

---

[1] Erwin *v.* U. S., 97 U. S., 392. Goodman *v.* Niblack, 102 U. S., 556; II Comp. Dec., 49. Nat. Bank of Commerce *v.* Downie, 161 U. S., 839.

[2] This opinion was concurred in by the Comptroller of the Treasury under date of Feb. 20, 1896.

[3] Price *v.* Forest, 173 U. S., 410.

[4] Borcherling *v.* U. S., 35 Ct. Cls., 311; People's Trust Co. *v.* U. S., 38 id., 359; U. S. *v.* Borcherling, 185 U. S., 223.

[5] II Comp. Dec., 514, but where the receiver of a company which was under contract with the Government transferred and assigned the contract by order of the court, such assignment is not a violation of secs. 3477 and 3737, R. S., X Comp. Dec., 159 and 168; Burke's Case, 13 Ct. Cls., 231; McKay *v.* U. S.; 27 id., 422.

Aug. 31, 1901. So also, where one of two joint contractors (not constituting a partnership) died before the completion of a Government contract, his executor or administrator, together with the other contractor, should complete the contract and sign all receipts for money paid, but if the contractors were partners the surviving partner should complete the contract and receipt for money paid. *C. 10005, Mar. 18, 1901.* However, if the contract called for the personal services of the contractor, as, for instance, his services as an artist, the contract terminated with his death, and can not be carried out by his executor or administrator.[1] *C. 9383, Dec. 4, 1900.*

XIV F. A receiver duly appointed for a company having a contract with the United States is both bound and entitled to perform the contract,[2] and if he declines to do so, or fails in the performance of the contract to such an extent that the United States, under the terms of the contract, would be entitled to procure the work to be done elsewhere, the work may be procured elsewhere, and any loss to the United States resulting from such refusal or failure will be chargeable to the contractor or his receiver. *C. 17207, Dec. 5, 1904.*

XIV G. There is a manifest distinction between the assignment of a Government contract and an assignment of a claim for money due under the contract. The former is prohibited by section 3737, R. S.; the latter is not prohibited and is lawful if properly made, but where a contractor not only assigns all his claims against the United States for work done and materials furnished under his contract with the Government, with power to collect and receive all moneys due thereunder, but in addition recites in the assignment that it is given "as a further continuing collateral security for all liabilities incurred or to be incurred," and in addition gives a mortgage to the assignee on his property, *held*, it constitutes an assignment of the contract within the meaning of section 3737, R. S. An assignment, to have the effect of invalidating a contract, need not be express, nor need it be technical, formal, or written. It may be evidenced by the various facts or circumstances illustrating the relations and intention of the parties.[3] *P. 62, 211, Nov. 3, 1893.*

XIV H. Where a formal written contract as required by section 3744, R. S., had been made for furnishing meals and lodgings to a recruiting party, and after part performance the contractor abandoned

---

[1] VII Comp. Dec., 402.

[2] In VIII Comp. Dec., 553, where a contractor, having failed to complete the work provided for in the contract with him, died, and the contract had not been annulled or rescinded, it was said:

"In this state of the case the personal representative of Jacoby has exactly the same right to go ahead with the work under the terms of the contract as Jacoby would have if he were living, and no more right, suffering the same penalties in case you have not exercised your authority to rescind and relet as would Jacoby himself if he were completing the contract in person.

"If the estate of Jacoby refuses to complete the work under the terms of the contract and you fail to exercise your right to rescind and relet the contract, then the sureties of Jacoby have exactly the same right to complete the work under the terms and limitations of the contract as had Jacoby if he had lived or as has his personal representative.

* * * * * * *

"It is not intended herein to say that when a contractor defaults that his contract should not be rescinded and relet, but it is intended to be said that the sureties have a perfect right to prevent such default as would result in your right to rescind and relet, by doing the work themselves, thereby preventing such default."

[3] See Francis's case, 11 Ct. Cls., 638; 15 Op. Atty. Gen., 235; 16 id., 280.

the contract and his wife and family and thereupon his wife claimed pay for meals furnished prior to his departure on the ground that the business had been carried on with her capital and labor and as her separate business, *held*, that as the contract was made with her husband the money due for meals and lodgings furnished prior to his departure could be paid to him only, that to pay the wife would defeat the purposes of section 3737, R. S.[1] *C. 27131, Aug. 4, 1910.*

XIV I. Where a bond had been given in accordance with the act of Congress of August 13, 1894 (28 Stat., 278), to protect labor and material-men, and the contractor in applying to a surety company for a bond had agreed that in case of breach or default by the contractor of the provisions of his contract the surety should be subrogated to all the rights and property of the contractor, and that deferred payments and any moneys due the contractor should be credited to the surety, and the agreement was claimed to be an equitable assignment to the surety of all money due from the Government. *Held*, that under section 3477, R. S., the agreement was void as an assignment to the surety of any money due from the Government under the contract. *C. 7311, Dec. 28, 1899; 7726, Feb. 28, 1900.*

XIV J. The Government will in general recognize assignments of claims to moneys in its hands due and payable to individuals, so far as to consent to pay over the amount to the assignee, where the assignment is made according to law, viz section 3477, R. S.[2] But an assignment by a Government contractor to a bank of all amounts due or to become due to it by the United States Government under its contract is without effect as against the United States unless made in compliance with section 3477, R.S. *C.28261, May 1, 1911.*[3] Parties

---

[1] See X Comp. Dec., 201.

[2] In Buffalo Bayou R. Case, 16 Ct. Cls. 238, it was said: "This statute to prevent frauds upon the Treasury is of the nature of a statute of frauds. It was designed to absolve the Treasury from all complicity in or responsibility for the sale or assignment of claims until they had reached the point where in the form of drafts they would be merged in negotiable evidence of debt, and where, the amount being ascertained and fixed, the assignment or power of attorney could describe the chose assigned with the most accurate exactitude and certainty. At the same time the statute did not forbid the officers of the Treasury from recognizing or acting upon the instruments declared void, nor did it declare the sale and assignment of claims to be champertous or penal. In a word, it left these assignments and powers of attorney precisely where the statute of frauds left the agreements which it declares void—as instruments which can not be enforced at law, but which, when voluntarily given by the Government creditors, and voluntarily carried into effect by the defendant's officers, must be deemed by all courts to have expressed and executed the true intent of the parties." Section 3477, R. S., embraces every claim against the Government, however arising, of whatever nature and whenever and wherever presented; it applies as well to liquidated, certain, and undisputed demands as to those which are unliquidated, uncertain, or disputed. U. S. *v.* Gillis, 95 U. S. 407, Ball *v.* Halsell, 16 id., 72; I Comp. Dec., 276. It also embraces the pay of contract surgeons, Circular 41, A. G. O., Sept. 8, 1902, but does not include Government agencies such as tailors, barbers, and dentists of the Navy, XII Comp. Dec., 423, and does not apply to checks that have been given by disbursing officers in payment of a claim. 22 Op. Atty. Gen., 637; Farmers Nat. Bank *v.* Robinson, 59 Kans., 777, does not forbid the transfer by an Army officer of his pay account when actually due. 15 Op. Atty. Gen., 271; XII Comp. Dec., 164; and the assignment may be revoked at any time prior to payment to assignee, XII Comp. Dec., 164. Sec. 3477, R. S., does not prohibit a disbursing officer from accepting the receipt of an agent or attorney of an individual, firm, or corporation, and receiving credit for a voucher so receipted, provided it appears thereon that the check issued in payment was made payable to the order of the individual, firm, or corporation. II Comp. Dec., 295; 9 id., 210; par. 654, A. R., 1910.

[3] Henningsen *v.* U. S., Fidelity & Guaranty Co., 143 U. S., 810; Nat. Bank of Commerce *v.* Downie, 161 U. S., 839; Prairie State Bank *v.* U. S., 164 U. S., 227.

representing opposing interests can not, by presenting to a head of a department conflicting claims to such money, compel him to become a stakeholder for them or an arbitrator upon the merits of their demands. *R. 19, 266, Dec. 11, 1865.* Where a claim for pay for military service, not yet allowed, had been won from the owner in a bet on a horse race, and a power of attorney to collect the same had been executed by the owner to the claimant, *held*, that such power was, in effect, an assignment of the claim, and as such was absolutely void, under section 3477, R. S. *R. 52, 95, Mar. 17, 1887.* So, also, an allotment by a Government employee of part of his pay in advance is void under section 3477, R. S. *C. 17322, Apr. 3, 1906.* So an assignment by a discharged general prisoner of the right to collect the donation of $5 given to him on his discharge would be void. *C. 14494, Apr. 20, 1903.* An informal assignment by a Government employee of his wages, not made as required by section 3477, R. S. is void.[1] *C. 8411, June 15, 1900; 17322, Jan. 3, 1905; Sept. 29, 1908.* But if an account assigned in violation of the statute is actually paid the payment will be a valid one.[2] *C. 9498, Dec. 27, 1900; 10576, June 5, 1901.* So, where an officer signed a paper requesting the Secretary of War and the Paymaster General to retain out of his pay and pay to his wife a certain sum each month, *held* that such a paper constituted a violation of section 3477, R. S., but if the paper continued unrevoked and undisputed and payments were made thereunder they would be binding on the officer. *C. 10956, Aug. 2 and Oct. 15, 1901.*

XV A 1. An officer of the Army is under no statutory incapacity to be a party to a contract with the United States, or to become connected with such a contract by acquiring an interest therein if the same relates to matters separate from his office and is no way connected with the performance of his official duties.[3] *Held*, that paragraph 746, Army Regulations, 1889 (603 of 1910), which provides that: "Officers or agents in the military service shall not purchase supplies for the Government from any other person in the military service; nor shall they contract with any such person to furnish supplies or service to the Government, nor make any Government pur-

[1] So, held, even where the assignment of wages is in the nature of a writ of attachment, III Comp. Dec., 222; 11 id., 790. See, also, XII Comp. Dec., 267 and 14 id., 396, holding that under sec. 3620, R. S., checks can be drawn only in favor of persons to whom payment is made, and a power of attorney authorizing a disbursing officer to draw a check in favor of the attorney is without effect.

[2] Assignments of claims not made as prescribed in this section are declared to be "absolutely null and void;" but this statute was intended to protect the Government and not the claimant, and to prevent frauds upon the Treasury, and, therefore, while the accounting officers will not approve powers of attorney not executed in accordance with the statute, if disbursing officers in fact make payments to persons holding unrevoked and undisputed powers of attorney, the accounting officers must allow the disbursing officers credit for such payments in the settlement of their accounts, and the original claimant can not recover a second time from the Government. I Comp. Dec., 120, 142, 432, 453; 16 Op. Atty. Gen., 261; McKnight *v.* U. S., 98 U. S., 179; Bailey *v.* U. S., 109 id., 432; Buffalo Bayou R. Case, 16 Ct. Cls., 238; Lopez Case, 24 id., 84. This section, however, does not prohibit the passing of claims to heirs, devisees, assignees in bankruptcy, or even voluntary assignment for the benefit of creditors, because the passing or transfer of claims in such cases does not come within the evil at which the statute is aimed. Erwin *v.* U. S., 97 U. S., 392; Goodman *v.* Niblack, 102 id., 556; Butler *v.* Gorley, 146 U. S., 303; II Comp. Dec., 50. See, also, 20 Op. Atty. Gen., 578. The section does not apply where land under lease to the Government is sold, thereby requiring the Government to pay rent to another landlord. Freedman's Saving Co. *v.* Shepherd, 127 U. S., 494.

[3] 14 Op. Atty. Gen., 482.

chase or contract in which such person shall be admitted to share or receive benefit," was directory merely, and that a contract might still be legal and binding though entered into in contravention of its terms. *P. 43, 147, Oct. 6, 1890.*

As paragraph 589, Army Regulations, 1895 (603 of 1910), which forbids officers or agents in the military service from contracting with any other person in the military service, etc., is a prohibition proceeding from the Secretary of War to the officer or agent in the military service, it may be waived by the Secretary in a given case. So *held* that whether it should be waived where the contract was to be between a quartermaster of a volunteer regiment and a firm whose business it had been and was to furnish quartermaster supplies and of which the quartermaster had been and was a member, was a question for the Secretary of War to decide on the facts of the particular case. *C. 4218, June 1, 1898; 22237, Oct. 22, 1907; 29248, Nov. 18, 1911.* So, where a soldier had been authorized to erect a house on a military reservation and was subsequently ordered to another station and desired to sell or lease the building to the Government, *held* the above regulation might be waived by the Secretary of War, and the building purchased or leased. *C. 21670, June 13, 1907, and Aug. 16, 1907.*

XV A 2. Paragraph 746, Army Regulations, 1889 (603 of 1910), which forbids officers or agents in the military service from contracting with any other person in the military service, does not apply to contracts on behalf of the United States which require for their validity the approval of the Secretary of War.[1] *P. 31, 106, Mar. 15, 1889; C. 19856, June 5, 1906.* On the question whether, in view of the above regulation, an Army quartermaster may enter into a contract with a retired officer of the Army for the rent of rooms in a building owned by the latter, *held* that under the construction put upon this regulation by the Supreme Court of the United States, the Secretary of War may authorize the contract in question to be entered into, in which event it becomes unnecessary to consider whether a retired officer is in fact "in the military service" within the meaning of the regulation cited. *C. 2508, Aug. 4, 1896; 21670, Aug. 16, 1907.* Similarly *held* with respect to a retired officer who as agent of a corporation desired to enter into a contract with the Government to furnish it military supplies. *C. 4828, Aug. 23, 1898; 16166, Apr. 9 ,1904.*

XV A 3. Paragraph 1002, Army Regulations, 1863 (603 of 1910), which provides that "no officer or agent in the military service shall purchase from any other person in the military service, or make any contract with any such person to furnish supplies or services, or make any purchase or contract in which such person shall be admitted to

[1] The paragraph of the regulations cited is substantially the same as par. 1002 of the Regulations of 1863; and with reference to the latter the Supreme Court held (U. S. *v.* Burns, 12 Wall., 251): "That regulation does not apply to contracts on behalf of the United States which require for their validity the approval of the Secretary of War. Though contracts of that character are usually negotiated by subordinate officers or agents of the Government, they are in fact and in law the acts of the Secretary whose sanction is essential to bind the United States. The Secretary, although the head of the War Department, is not in the military service in the sense of the regulation, but on the contrary is a civil officer with civil duties to perform, as much so as the head of any other of the Executive Departments. It would be carrying the regulation to an absurd extent to hold it was intended to preclude the War Department from availing itself by purchase or any other contract of any property which an officer in the military service might acquire if its possession or use were deemed important to the Government."

any share or part, or to any benefit to arise therefrom," prohibits purchases by officers of the Army "from any other person in the military service." *Held*, that this prohibition did not embrace civilians employed in the public service under the War Department, or in connection with the military administration, and therefore did not preclude the making of a contract by an ordnance officer, as representing the United States, with a civil employee at an arsenal, for the use of an invention patented by the latter. *R. 31, 320, Apr. 11, 1866; C. 19856, June 5, 1906.* So *held* that a commissary officer could enter into a contract with a quartermaster's employee at the post to supply the same post with potatoes. *C. 29248, Nov. 18, 1911.* But where the form of a proposed contract contained the stipulation that "No person belonging to or employed in the military service of the United States is or shall be admitted to any share or part of this contract," *held* that the description "person * * * employed in the military service" is understood to mean all such clerks, mechanics, laborers, or other civilians as are legally employed by the military authorities in or in connection with military works, operations, or other authorized transactions, and that where the lowest bidder was a civilian laborer at the Springfield Armory, the contract should be made with the next lowest bidder, who was under no such incapacity. *P. 48, 375, Aug. 6, 1891.*

XV A 4. Paragraph 589, Army Regulations, 1895 (603 of 1910), provides that no officer or agent in the military service shall make any purchase or contract in which any other person in the military service shall be "admitted to any share or part, or to any benefit to arise therefrom." *Held* that this prohibition does not embrace a contract with the wife of a soldier in a case where it clearly appeared that the wife had her own funds and carried on her business in her own name, and that the husband did not in any way share in the business. *C. 10752, June 26, 1901.*

XV A 5. Paragraph 593, Army Regulations, 1904 (603 of 1910), which forbids officers or agents in the military service from contracting with any other person in the military service, etc., applies to a contract between the United States and an officer or employee of the United States who contracts in his own name, but does not apply to a contract between the United States and an incorporated company in which an officer or employee of the United States holds stock. *C. 18809, Nov. 6, 1905; 16166, Nov. 15, 1905.*

XV B. Under sections 3739–3742, R. S., it is illegal for an officer of the United States to contract for or purchase for the United States, any supplies from a Member or Delegate to Congress or from a firm or association, other than an incorporated company, of which such a Member or Delegate is a member or in which he is pecuniarily interested.[1] *R. 42, 344, June 27, 1879.* But these sections do not prohibit the acceptance of a Member or Delegate as a surety on a bond given to secure a contract with the United States.[2] *R. 49, 377,*

[1] See 2 Op. Atty. Gen., 40; 4 id., 47; U. S. *v.* Dietrich, 126 Fed. Rep., 671. That sec. 3739, R. S., does not affect contracts made with persons who have been simply *elected* Members of or Delegates to Congress, but have not actually become such by being *sworn in*, see opinion of the Attorney General in 15 Op., 280. But see secs. 114 and 115 of the Federal Penal Code of Mar. 4, 1909 (35 Stat., 1109), which supersede secs. 3739 and 3742, R. S., and broaden the former provision so as to apply to Members of Congress from the time of their election and before qualification.

[2] See 18 Op. Atty. Gen., 287.

Oct. 17, 1885. But as in case of a failure of the principal the surety may become subrogated to the rights of the principal and offer to carry out the contract, the acceptance of a Member of Congress as surety would be calculated to establish contractual relations between the United States and a Member of Congress, *recommended* that Member of Congress be not accepted as surety. *C. 14923, July 6, 1903.*

XV C. There is no illegality or impropriety in a retired Army officer leasing a building owned by him to the Post Office Department. *C. 18010, May 15, 1905.*

XVI A. Section 3744, R. S., prescribes that "it shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior to cause and require every contract made by them severally on behalf of the Government, or by their officers under them appointed to make such contracts, to be reduced to writing, and signed by the contracting parties with their names at the end thereof." Were it not for the provisions of this section the acceptance of a bid would, under the general law of contracts, bind the United States. But this section has been construed by the Supreme Court as being in the nature of a statute of frauds and mandatory in its requirements, and therefore as making it essential that a contract, to be legal and obligatory, shall be in writing and signed by the parties.[1] The mere proposal of a bidder, accepted on

[1] In Clark *v.* U. S. 95, U. S. 541, the court, in holding that the requirements of sec. 3744 are mandatory, states: "It is contended on the part of the Government that this act is mandatory and binding both on the officers making contracts and on the parties contracting with them, whilst the claimant insists that it is merely directory to the officers of the Government and can not affect the validity of contracts actually made, though not in writing. The Court of Claims has heretofore held the act to be mandatory and as requiring all contracts made with the departments named to be in conformity with it. The arguments by which this view has been enforced by the court are of great weight and, in our judgment, conclusive. The facility with which the Government may be pillaged by the presentment of claims of the most extraordinary character, if allowed to be sustained by parol evidence, which can always be produced to any required extent, renders it highly desirable that all contracts which are made the basis of demands against the Government should be in writing. Perhaps the primary object of the statute was to impose a restraint upon the officers themselves and prevent them from making reckless engagements for the Government; but the considerations referred to make it manifest that there is no class of cases in which a statute for preventing frauds and perjuries is more needed than in this. And we think that the statute in question was intended to operate as such. It makes it unlawful for contracting officers to make contracts in any other way than by writing signed by the parties. This is equivalent to prohibiting any other mode of making contracts. Every man is supposed to know the law. A party who makes a contract with an officer without having it reduced to writing is knowingly accessory to a violation of duty on his part. Such a party aids in the violation of the law. We are of opinion, therefore, that the contract itself is affected and must conform to the requirements of the statute until it passes from the observation and control of the party who enters into it." In the above case the claimant agreed with the Government for the use of claimant's vessel and for the payment of the value ($60.000) of the vessel if she should be lost in the Government service. The agreement was not reduced to writing. While in the Government service she was lost, but no negligence was attributed to the Government. *Held*, the agreement not being in writing was void, and therefore the claimant could not recover the value of the vessel, but could recover on an implied contract to pay a reasonable sum for the actual use of the vessel, which would be only $1,200. See XII Comp. Dec., 79, a similar case.

In South Boston Iron Co. *v.* U. S., 118 U. S., 37, the claimant offered to the Secretary of the Navy by letter to construct new boilers for certain vessels of the Navy. The offer was accepted by letter, and he was also thereby informed that the drawings and specifications would be furnished as soon as possible. A few days later he was notified to discontinue all work contracted for by him with the department. The claimant sued to recover damages for nonperformance of the contract. *Held*, the letters did not

the part of the Government, does not therefore operate as a contract, but is simply a proceeding preliminary to a contract: nor does such an acceptance bind the United States or the bidder to enter into a contract. Either the bidder or the Government may legally refuse to carry out the bid as accepted, or if the bidder enters on the performance of the work before the signing of the contract, or enters on the performance of the work after an oral agreement to do the work, the bidder or the Government may at any time legally discontinue

---

constitute a contract with the United States under sec. 3744, R. S.; that they were nothing more than preliminary memoranda made by the parties in preparing a contract for execution in the form required by law. See also International Contracting Co. *v.* Lamont, 2 Appeal Cases, D. C., 532, Salomon's Case, 19 Wall., 17; Henderson's Case, 4 Ct. Cls., 75; Lindsley *v.* U. S., 4 id., 359; Danolds *v.* U. S., 5 id., 70; Lender's Case, 7 id., 530; Mitchell *v.* U. S., 19 id., 39; Sawyer & Moody *v.* U. S., 40 id., 47; VI Comp. Dec., 880; IX id., 700; holding that a bid for the transportation of Government property and the acceptance thereof by the Government do not constitute a valid contract within the meaning of sec. 3744, R. S.; XI Comp. Dec., 604; XIII id., 12.

But where a contract, void because not in writing and signed as required by sec. 3744, has been wholly or partially executed, the party so performing will be entitled to recover the fair value of the property or services furnished as upon an implied contract. Clark *v.* U. S., 95 U. S., 539; Salomon *v.* U. S., 19 Wall., 17. See also Danolds *v.* U. S., 5 Ct. Cls., 65; Thompson *v.* U. S., 9 id., 187; Dougherty *v.* U. S., 18 id., 496; Mitchell *v.* U. S., 19 id., 39; Steele *v.* U. S., 19 id., 181; Wilson *v* U. S., 23 id., 77; Moran Bros. Co. *v.* U. S., 39 id., 486; III Comp. Dec., 365; IV id., 680; V id., 246, 588, 826; VI id., 553; VII id., 342, 366, 517; XIV id., 242. In XII Comp. Dec., 647, it was held that where the owner of a wharf refused to enter into a written contract for its lease, but the Government used it with the permission of the owner, the Government is liable to the owner for the reasonable value of the use. In Wilson & Goss *v.* U. S., 23 Ct. Cls., 77, it was held that a parol agreement enlarging the quantity of work required by a written contract is not obligatory upon the Government where the contract is required by law to be in writing. See also Jones *v.* U. S., 11 Ct. Cls., 733; but compensation for work actually done thereunder may be recovered on an implied contract. See also 22 Op. Atty. Gen., 104; IX Comp. Dec., 559. In the absence of other evidence the amount agreed upon may be assumed to be the fair value of the property or services. Clark *v.* U. S., 95 U. S., 539; IV Comp. Dec., 680; VI id., 553, 951; VII id., 345; XIV id., 594.

The principle that a recovery may be had for the fair value of the property furnished or services rendered has been modified by more recent decisions of the United States Supreme Court to the effect that after actual performance, on the strength of the agreement, recovery may be had for the amount agreed upon, notwithstanding the instrument itself was void. The leading case so holding is St. Louis Hay & Grain Co. *v.* U. S., 191 U. S., 163, where a bid was made to furnish certain hay to the Government and the bid was accepted; but the agreement was not reduced to writing, as required by sec. 3744, R. S. The Government did not require the full amount contemplated and mentioned when the Government advertised for bids. The Government paid the claimant in full the price agreed upon by the bid and acceptance. The bidder thereupon, treating the bid and acceptance as void because not reduced to writing, sued the Government for the market value of the hay (which was more than the price offered by the bidder and accepted and paid by the Government) less the amount already paid by the Government according to the terms of the bid and acceptance. The court denied the claim, holding that it could recover no more than the price agreed upon, stating: "On the facts stated it is evident that the claimant has no case. The invalidity of the contract is immaterial *after it has been performed.* When a lawful transfer of property is executed, it does not matter whether the terms of the execution were void or valid while executory, the transfer can not be revoked or the terms changed. A promise to make a gift does not bind, but a gift can not be taken back, and a transfer in pursuance of mutual promises is not made less effectual by those promises or by the fact that money was received in exchange. The contract may be void as such, but it expresses the terms on which the parties, respectively, paid their money and delivered their goods." See to the same effect U. S. *v.* Andrews, 207 U. S., 229; XIV Comp. Dec., 594. On the authority of St. Louis Hay & Grain Co. *v.* U. S., the comptroller, in XV Comp. Dec., 65, has held that when an informal contract by proposal of a contractor and acceptance thereof

the further performance under the bid or oral agreement, the Government being liable for only such supplies as have been furnished or such services as have been rendered prior to the discontinuance of the work. *P. 56, 87, 355, Oct. 10 and Nov. 18, 1892; 64, 379, Apr. 17, 1894; 65, 378, July 7, 1894; C. 1345, May 3, 1895; 8458, June 19, 1900; 8842, Sept. 1, 1900; 12274, Mar. 22, 1902; 12572, May 7, 1902; 12827, Sept. 10, 1902; 16889, Sept. 15, 1904; 18823, Nov. 9, 1905; 19525, Apr. 17, 1906; 26994, July 11, 1910.* So, where a written

---

by the Navy Department has been fully executed by both the parties thereto without default, with the exception that the Government has not paid the full contract price, the contractor is entitled to be paid the full contract price, although the price is in excess of the current price at the time and place of delivery.

Where a contractor died prior to the completion of certain work under a contract which was void because not in writing, and the work was subsequently completed by a subcontractor, payment of the reasonable value thereof should be made to the administrator of the estate of the decedent and the subcontractor must look to said estate for payment. X Comp. Dec., 353.

Sec. 3744, R. S., applies to contracts made in an emergency without advertising as well as to others. Cobb *v.* U. S., 18 Ct. Cls., 514.

In XV Comp. Dec., 89, it was held that when an informal contract by proposal of a contractor and acceptance thereof by the Commissioner of the General Land Office has been *fully executed on the part of the contractor*, and has been accepted by the Government, it becomes as binding as a formal contract, although not reduced to writing and signed by the contracting parties as required by sec. 3744 of the Revised Statutes, and that in such case the original proposals and the acceptance thereof should be filed with the auditor in accordance with sec. 18 of the act of July 31, 1894, in order to enable the auditor to intelligently audit the accounts by having the evidence before him.

In Camp *v.* U. S., 113, U. S., 648, it was held that when a regulation, made by the head of an executive department in pursuance of law, empowers subordinates, of a class named, to contract on behalf of the United States as to a given subject matter; and further directs that "any contract made in pursuance of this regulation must be in writing," a verbal executory contract relating thereto is not binding upon the United States.

While the provisions of sec. 3744, R. S., are mandatory in those cases where they apply, the following are exceptions to the rule that contracts under the War Department should be in writing:

If there is an exigency or emergency *requiring immediate delivery of property or immediate rendition of services* a written contract is not necessary. IX Comp. Dec., 460; XV Comp. Dec., 65; 36 Ct. Cls., 105; 42 Ct. Cls., 351; par. 558, A. R., 1910. See also Ceballos *v.* U. S., 42 Ct. Cls., 318, as to emergency contracts in time of war.

The time fixed in an existing written contract for the completion of the same may be orally waived, that is, extended indefinitely, and the written contract will continue in force, with a reasonable time for performance. VIII Comp. Dec., 104. But if it is desired to extend the time to a specific date, sec. 3744, R. S., applies, and the extension should be accomplished by a formal written contract. VIII Comp. Dec., 104.

A written contract is not necessary in expending the sum of $50,000,000 appropriated in 1898 (30 Stat., 273) for national defense, which was "to be expended at the discretion of the President." IX Comp. Dec., 457.

The act of Mar. 23, 1910 (36 Stat., 261), provides that "hereafter whenever contracts which are not to be performed within sixty days are made on behalf of the Government by the Chief of Ordnance, or by officers under him authorized to make them, and are in excess of five hundred dollars in amount, such contracts shall be reduced to writing and signed by the contracting parties with their names at the end thereof. In all other cases contracts shall be prepared under such regulations as may be prescribed by the Chief of Ordnance."

The act of June 25, 1910 (36 Stat., 676), provides that "the requirements of section thirty-seven hundred and forty-four of the Revised Statutes shall not apply to the lease of lands, or easements therein, or of buildings, rooms, wharves, or rights of wharfage or dockage, or to the hire of vessels, boats, and other floating craft, for use in connection with river and harbor improvements, where the period of any such lease or hire is not to exceed three months."

See contracts XVI B for an instance in which, under unusually worded instructions to bidders, the Government would be liable for partial performance in a case where the Government declined to sign the contract.

contract authorizing the United States to procure riprap stone from a certain part of the river front was extended by a written agreement signed only by the contractor, *held*, the written agreement of extension was not a contract and gave the United States no rights in the premises. *C. 12083, Feb. 21, 1902.* So, where a manufacturing concern upon the request of the Chief of Ordnance enlarged its plant to enable it to fill anticipated large orders at the outbreak of the War with Spain, but no written contract for such anticipated orders was entered into, *held*, the United States was not bound to reimburse the company for money spent in enlarging its plant. *C. 17302, Dec. 21, 1904.* So, where a bid was accepted by the Government, but the bidder refused to sign the form of contract submitted to him, and thereupon the Government entered into a contract with the next lowest bidder, the bidder who had refused to sign the contract claimed damages by reason of the fact that he had already given orders for part of the supplies bid on, *held*, there was no legal claim for damages against the Government. *C. 24879, May 3, 1909.* So, *held*, that a lease for rooms to be binding must comply with the provisions of section 3744, R. S. *C. 17098, Nov. 1, 1904; 17826, Apr. 13, 1905.* So, where, on written proposal and acceptance a launch was hired for one month, and after three days' use the Government declined to continue the hire, *held*, there being no written contract as required by section 3744, R. S., the Government was legally liable only for the three days' use of it. *C. 21993, Aug. 29, 1907.* So, in April, 1898, when extraordinary efforts were being made to mine a harbor for defense against possible attack, the local engineer officer ordered from an electric company by letter a large quantity of leaded cable which the company promised by letter to furnish and deliver at the place needed. No formal written contract was made. The cable had not arrived at the time it was needed and the officer thereupon purchased the amount he required from other parties. Subsequently the cable first ordered arrived, but too late to be used, and was returned, the Government paying freight charges both ways. *Held*, that the Government was under no legal obligation to accept and pay for the cable, the agreement made not having been reduced to writing, etc., as required by section 3744, R. S. *C. 5275, Nov. 11, 1898.* A contract for gun carriages provided that the Government might increase the number 50 per cent, and that "for such increased number as may be called for a necessary time allowance for delivering will be made, *as may be agreed* upon." The Government gave written notice of an increase to be furnished "within such time as may be necessary to their manufacture," which was agreed to in writing by the contractor. *Held*, that, under section 3744, R. S., the correspondence does not constitute a binding contract, and that the furnishing of the increased number should be provided for by a supplemental contract. *C. 11926, Jan. 18, 1902.* Where bids were invited for supplying fresh meat for one year, to be furnished weekly and paid for monthly, and it was sought to avoid the use of a formal contract, *held*, that, as the agreement was not to be immediately executed, but would continue through the year, a formal contract as required by section 3744, R. S., should be entered into, for an oral agreement would not be binding on the parties. *C. 2074, Feb. 21 and Mar. 5, 1896.* Where a private steamer transporting Government property became disabled and the commanding officer of the

troops orally agreed to pay another steamer $3,000 for salvage services in saving the Government property, *held*, that in view of the provisions of section 3744, R. S., the oral stipulation would not be binding upon the United States, but as the claimant had fully rendered the services required by the agreement, he should be paid the agreed amount which, under the circumstances of the case, was regarded as reasonable for salvage services, and as the claim arose out of the transportation of Government property, recommended that this sum be paid to the claimant from the fund "Transportation of the Army." *C. 11126, Aug. 23, 1901.* Where there was an oral agreement to furnish a certain number of mules to the Government and the Government failed to promptly purchase the full number agreed upon, *held*, there was no claim against the Government for its failure. *C. 5102, May 21, 1901.* So, where a written offer to sell land adjoining a military reservation was accepted in writing, but owing to exceptional conditions the purchase was not made, *held*, that in view of the provisions of section 3744, R. S., the negotiations amounted to preliminary memoranda only and did not constitute a valid contract binding on the Government. *C. 12081, Oct. 1, 1902, Apr. 5 and June 23, 1905, Mar. 27, 1907, and Jan. 23, 1908.* So, where a civilian was employed as a clerk in the Philippine Islands without a written contract but upon a certain verbal understanding that he was to be ordered to the United States for discharge, *held*, that as contract was not in writing and signed as required by section 3744, R. S., the understanding was not binding upon the Government. *C. 11713, Feb. 1, 1902.*

The owner of a steamship offered its vessel for charter at the rate of $50 per day, with a proviso that in a certain contingency the rate should be $60 per day. The chief quartermaster of the department forwarded the offer recommending approval. The chief quartermaster of the division recommended approval for $50 a day only, without the provision for an increase in any contingency. The division commander approved the offer for $50 per day straight. The owner made out a charter party for $50 per day, with the provision for an increase to $60 per day in the event of a contingency. This was returned by the division commander inviting attention to the fact that the approval was for only $50 a day straight. Thereupon the owner signed the charter party for $50 a day straight, protesting at the same time against the reduced rate, stating that he did it only "to avoid any friction with the Quartermaster's Department." The properly signed charter party for $50 a day straight was approved by the division commander. Subsequently the contingency mentioned by the owner occurred, and the owner requested the increased rate. *Held*, that all the negotiations preliminary or prior to the actual signing of the charter party were by reason of section 3744, R. S., only preliminary and did not bind the parties, and that the charter party first submitted by the owner not having been approved by the division commander was not binding on the parties. The fact that the consent of the owner to the terms insisted upon by the Government was a "grumbling consent" made it none the less a real consent, and the signed and approved charter party was the only measure of the rights and liabilities of both parties. *C. 18634, Oct. 2, 1905.*

Where a contract is not ambiguous or technically obscure, parol evidence is not admissible to establish a new term or add an under-

standing at variance with its written stipulations. Thus where, prior to the execution of a contract, the officer acting for the United States advised the contractor that it would be necessary to deduct from the whole amount to be paid him certain sums which would be required to be disbursed by the Government for certain clerical work and the employment of certain assistants, but failed to insert in the contract any stipulation for such deduction—*held* that in view of the requirements of section 3744, R. S., and also in view of the general legal principle that the written contract represented the consummation of all previous negotiations and the final act of the parties, the United States was estopped from setting up, by parol evidence, the existence of an understanding that such deduction should be made. *R. 50, 488, July 1, 1886.*

Owing to the fact that an improper plane had been taken for several years as the average flood tide in the matter of measuring the depth to be maintained at the South Pass, La., by the James B. Eades estate, certain moneys to which the estate was lawfully entitled had been withheld from it. The executors of the estate, while claiming the right to be paid all amounts so withheld, proposed to waive their right to all that accrued prior to January 1, 1895, if the Secretary of War would authorize payment of the amounts withheld since that date. The Secretary of War accepted the proposal. *Held,* that the letters of the executors proposing the compromise and expressing satisfaction with the Secretary of War's acceptance did not constitute a sufficient waiver of all claims against the United States for the years prior to January 1, 1895. The letters and indorsements relating to the waiver constitute under section 3744, R. S., only preliminary negotiations. To legally bind both parties to the agreement reached, it should be reduced to writing and signed as required by that statute. *C. 2116, Mar. 11, 1896.*

XVI B. The circular of instructions to bidders for certain fire apparatus stated that as early delivery was essential bidders "will state in their proposals the number of days from date of award that delivery will be made," and the accepted bidder stated that he would begin work "at once after receipt of award," and that the several items would be delivered within a certain number of days "from acceptance of bid." *Held* that if the Government should refuse to approve the contract, a part performance before the refusal, by reason of the bidder commencing the manufacture of the apparatus immediately on receiving notice of the award, would give the bidder a claim to compensation so far as the proposed contract had been executed, but no further. *C. 26752, May 23, 1910.*

XVI C. Where a contractor for river-improvement work failed to sign a written contract as required by section 3744, R. S., but performed a portion of the desired work, *held* that the contractor was entitled to pay for the work actually performed, but that the United States could not deduct from this any loss which it may have sustained by reason of his failure to complete the work.[1] *C. 8842, Sept. 1, 1900; 18823, Nov. 9, 1905.*

XVI D. Certain transportation companies signed an "agreement" purporting to bind them to accept shipments of passengers and freight at certain rates filed with the Interstate Commerce Commission, the agreement purporting to be effective during the calendar year of 1911

[1] IX Comp. Dec., 664.

and "thereafter from year to year unless the carrier files notice of withdrawal with the Quartermaster General of the Army at least sixty days prior to the beginning of any calendar year." *Held* that as there was no consideration for the agreement and it was not signed by any officer of the United States it is not a binding contract under section 3744, R. S., but simply a continuing proposal, good until withdrawn by the parties signing it. *C. 27803, Feb. 8, 1911.*

XVI E. The United States Soldiers' Home entered into a contract for certain material. A third party, whose name did not appear in the contract, notified the home that he was interested in the contract which stood in the name of the contractor, and notified the home not to pay any money to the contractor on the contract during the pendency of a certain suit. *Held* that if the contract were one governed by the provisions of section 3744, R. S., the notice from the third party should be disregarded, as the Government in such cases deals only with the person named in the contract;[1] but as the home was under the control of a board of commissioners the contract was not one "under the Secretary of War" within the meaning of section 3744, R. S., and, therefore, was not required by law to be executed in the manner prescribed by that section. The contracts for the home in practice are executed in the same manner as those controlled by section 3744, R. S., but as this practice is not based on a legal requirement, such contracts would be governed by the general law of agency, which law permits an undisclosed principal to come forward and claim the benefit of a contract made by an agent in his own name. *C. 19648, May 7, 1906.*

XVI F. Paragraph 549, Army Regulations (558 of 1910), provides three methods of purchasing supplies, etc., to wit: (1) "By contract 'reduced to writing and signed by the contracting parties with their names at the end thereof'"; (2) "by written proposal and written acceptance"; and (3) "by oral agreement." This paragraph further provides that "when delivery or performance does not immediately follow an award or bargain, the first method will be used," i. e., "by contract reduced to writing," etc.; and that "when delivery or performance immediately follows an award or bargain the second method may be resorted to." The first method constitutes a "contract" under section 3744, R. S., but the second (proposal and acceptance) does not. The regulation permits the second method to be used only when the material is to be delivered at the time the bargain is made, because in that case it is not necessary to bind anyone, but requires the first method to be used in cases where the delivery is to be made in the future, because in these cases it is necessary to bind the parties, and this can not be done except by "contract reduced to writing," etc.[2] *C. 5275, Nov. 11, 1898.*

XVI G. The act of June 12, 1906 (34 Stat., 258), provided that "hereafter the purchase of supplies and the procurement of services for all branches of the Army service may be made in open market, in the manner common among business men, when the aggregate of the

---

[1] See X Comp. Dec., 201.

[2] The present regulations (par. 558 of 1910) authorize the use of the third method (oral agreement) under certain circumstances indicated in par. 559, A. R. 1910, "if delivery or performance immediately follows the agreement." The reason for allowing the use of the third method only in case delivery or performance immediately follows the agreement is the same as indicated above for the second method. See, also, XII Comp. Dec., 507.

amount required does not exceed $500," etc. *Held* that this act dispenses with the necessity of a formal written contract as provided by section 3744, R. S. *C. 32214, May 5, 1908.*

XVI H. Where a lease was made for one year with a provision for renewal from year to year for several years, at the option of the United States, it was *held* that in view of section 3744, R. S., written notice of the renewal with an *indorsement* thereon of acceptance by the lessor would not be a binding contract, as it would not be signed by both parties "with their names at the end thereof"; but *advised* that a brief contract referring to the original lease in a way to identify it and providing for the renewal for the succeeding fiscal year, and signed by the proper officer on behalf of the United States and the lessor with their names at the end thereof, would comply with the requirements of the statute. Such a brief contract could be made at the beginning of each fiscal year during the term named in the original lease. *C. 7214, Oct. 27, 1899.*

Where it was desired to enter into a supplemental agreement, and the contracting officer wrote to the contractor stating the terms and conditions which he desired to have incorporated into the supplemental agreement, and the contractor returned the letter, stating at the end of the same, below the signature of the contracting officer, that he (the contractor) accepted the "above modifications" and signed the paper himself, and below his signature appeared the signed assent of the surety on the bond, *held* that the paper constituted a written supplemental contract within the meaning of section 3744, R. S. *C. 29314, Dec. 19, 1911.*

XVII. Section 3745, R. S., provides that every contract shall, before being filed in the Returns Office of the Department of the Interior, have attached to it an affidavit that the same was fairly made, and further requires that the affidavit shall be taken "before some magistrate having authority to administer oaths." The act of July 27, 1892 (27 Stat., 278), provides that "judge advocates of departments and of courts-martial and the trial officers of summary courts are hereby authorized to administer oaths for the purposes of the administration of military justice and for other purposes of military administration." *Held*, that the oath required by section 3745, R. S., comes within the language "other purposes of military administration" and the act of July 27, 1892, having been passed subsequent to the Revised Statutes modifies section 3745, R. S. *C. 3671, Nov. 20, 1897; 3746, Dec. 30, 1897. Held*, also, that the administering of oaths to sureties on a Government contractor's bond is within the language "other purposes of military administration." *C. 3768, Jan. 5, 1898.*

XVIII. In settling with a contractor under a duly executed contract, there may be set off against the amount due to him an amount due from him as damages under the terms of *another* contract which he has failed to perform, provided the amount due from him is a liquidated amount. But where the amount due from the contractor is not liquidated, the Government has no strict legal right to insist that this unliquidated amount, fixed by the Government itself as properly due from the contractor, shall be set off against the amount due to him. But although the strict legal right to set off an unliquidated claim due to the Government against the amount due from the Government does not exist in favor of the Government, still the Gov-

ernment has an equitable right to withhold in its discretion money due from it until the unliquidated claim can be adjusted in the Court of Claims, which has jurisdiction of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the Government against any person making claim against the Government in that court. *R. 32, 257, Jan. 25, 1872; C. 6841, Aug. 4, 1899; 8973, Nov. 23, 1900; 19004, Jan. 5, 1906.* So, where the Navy Department had supplied a construction company with fresh water to the amount of $431.86 and was unable to collect this amount, and the same company had a contract with the War Department, *held* that the above amount could be withheld from money due or to become due the company under its contract with the War Department, and this whether the amount was liquidated or unliquidated. *C. 6841, Aug. 4, 1899.* So, also, where a dredging company failed to perform its contract with the Navy Department and the amount of the loss to the Navy Department resulting therefrom was uncertain, *held*, that an amount sufficient to cover the Government's loss caused by the failure to carry out the Navy contract might be withheld from money due the company under another contract with the War Department.[1] *C. 8973, Sept. 18, 1900, and Nov. 23, 1900.* So, also, where a *prima facie* claim for loss to the United States by the sinking of a steamboat on the Missouri River, existed against a contractor for transportation, and the Government was indebted to him on other contracts, *advised* that the sums due him be withheld until a balance should be mutually agreed upon, or till the accounts should be judicially adjusted upon his resorting to proceedings in the Court of Claims. *P. 36, 398, Nov. 12, 1889.* But where a steamer was chartered to transport troops, and the ship having met with an accident the troops on board were required to work at bailing and firing the ship, as the result of which their clothing and shoes were ruined, and it was sought to withhold from the money due for the charter of the ship the value of the clothing and the shoes

[1] See VII Comp. Dec., 213, containing the comptroller's decision in the same case, in which it is said:

"As this Navy contract is yet unexecuted, the total amount of actual damage which has been and may be sustained is yet unliquidated and unascertained; therefore said damage is not a proper subject for a set-off against a definite debt owed by the United States to the contractors under an independent contract. However, if at the present time a definite ascertained amount of damage has already accrued, I think said amount would be a proper subject of set-off and should be retained, especially as it is understood that the War Department contract is completely executed and danger of complications with the sureties on that contract can not occur.

"So far this subject has been considered as to the legal right of a set-off at the present time. The equitable right to retain money due the contractors as security against probable loss under the Navy contract is a different matter, especially in view of their unreasonable delay in completing that work, and also the intimation from the Navy Department of either the insolvency of the principal and sureties or insufficiency of the bond. Why the Navy Department has permitted 10 months to elapse since the default without taking steps to annul the contract and have the work done by other parties does not appear. The equitable right to retain the money now due the contractors under the War Department contract to meet probable loss under the Navy contract under the circumstances is more a matter of public policy than of law. As a matter of common justice the dredging company have little right to expect the United States to pay them money now due and take the chances of recovering damages from them under the Navy contract on which they have been long in flagrant default.

"In specific answer to your questions I will say that unless there has now a definite amount of damages accrued under the Navy contract, which is the proper subject of a set-off as indicated above, I think the matter of withholding money due the company rests within your discretion, having due regard for the public interests."

ruined and an additional sum as wages for the labor rendered by the men, *held*, that as the claims were private claims in favor of the soldiers, the United States would not be justified in withholding payments due the owners of the ship to compensate them. *C. 9037, Oct. 4, 1900.*

A bidder refused to enter into a contract after the acceptance of his bid, which was accompanied by a guaranty that if the bid was accepted the contract would be entered into. The Government was indebted to the bidder on another contract. *Held* that the acceptance of the bid did not constitute a contract under section 3744, R. S., and created no debt or obligation from the bidder, that the Government had an action on the guaranty for its loss occasioned by the refusal to enter into a contract (the amount of the loss being the difference between the bid in question and the amount for which a contract might afterwards be entered into with another person), but as the bidder was not a party to the guaranty there was no right of action against the bidder; and as the Government had no right of action against the bidder it could not withhold the payments on the other contract to compensate the Government for the refusal of the bidder to execute the proposed contract. *C. 19523, Apr. 17, 1906.* Where a contract for the construction of a steamship provided for the payment of liquidated damages and through mistake the constructing officer on settlement with the contractor failed to deduct the liquidated damages that had accrued, *held* that there could be withheld from the contractor money due him on another contract to reimburse the Government for the erroneous overpayment. *C. 23141, June 3, 1908.*

XIX A. Where a contract provides for a forfeiture for delay in completing a contract, but does not state whether the sums to be forfeited are to be regarded as penalties or as liquidated damages, and where the actual damages are capable of ascertainment, the forfeiture should be treated as a penalty from which to indemnify the United States for the actual damages, if any, and the excess over such actual damages should be remitted.[1] *C. 6407, May 9, 1899; 6684, July 6, 1899.*

XIX B. A contractor agreed to furnish certain supplies, the contract providing that if the supplies were delivered within the stipulated time the contractor should receive a certain price, but that for a later delivery the price should be determined by deducting from the first-named price one-half of 1 per cent for each day of delay. *Held*, that the provision for a reduction in price was a penalty for delayed delivery, and that the contractor was entitled to receive the full price less actual damages only. *C. 19725, May 15, 1906.*

XIX C. A provision in a contract that on default of the contractor all sums due or to become due and all percentages retained shall be forfeited to the United States is a provision for a penalty, and the contractor on default is entitled to payment of the moneys withheld over and above any actual damage sustained by the United States on account of the default.[2] *C. 5082, Aug. 15, 1900; 7484, Jan. 8, 1901.*

XIX D. Where a contract provides for the doing of two or more things, as, for instance, for the erection of two or more houses or

[1] IV Comp. Dec., 217.
[2] See VII Comp. Dec., 95; 15 Op. Atty. Gen., 420; Kennedy *v.* U. S., 24 Ct. Cls., 122.

dredging in two or more places, or for the furnishing of different articles, the completion and use of no one of them being connected with or dependent upon the completion of either of the others, and provides that the entire contract shall be completed by a stipulated date, and the entire contract is not so completed but some of the things to be done are entirely completed by that date, a provision in the contract for the liquidated damages for delay will not be enforced, but will be construed as penalty.[1] So, *held*, where a contract is made for the construction of two new water tanks and the alteration of an old one for a lump sum. *C. 24450, Feb. 5, 1909.* So, where a contract was made for the erection of four buildings. *C. 23801, Sept. 1, 1908.*

XIX E. The Government advertised for bids for the sale of certain stores. Bidders were required to accompany their proposals with current funds or a certified check for 20 per cent of the amount of the bid. The highest bidder deposited a certified check, but failed to carry out the purchase. Therefore, the contract officer declared the check forfeited. *Held*, that the deposit of 20 per cent was a penalty for failure to comply with the terms of the sale, and that it should be returned, less any actual damages sustained by reason of the failure to carry out the purchase. *C. 11420, Oct. 22, 1901.*

XIX F. Where in a Government contract it is provided that a certain sum shall be paid "as liquidated damages" for each day's delay, and such sum appears to be grossly in excess of the damages which are likely to accrue for the failure to complete the contract within the stipulated time, thereby violating the principle that liquidated damages are to constitute a just compensation for the loss or injury actually sustained and are to place the Government in as good a position as it would have been in had the contract not been broken, the provision for liquidated damages will be construed to be a provision for a penalty which will be enforced to the extent of the actual damages only. So, *held*, where the liquidated damages for one year would be from 19 to 27 per cent of the contract price of the buildings to be constructed under several contracts. *C. 15977, Feb. 29, 1904.* So, where the liquidated damages for one year would amount to 40 per cent of the contract price of the building to be constructed under the contract. *C. 14449, Apr. 9, 1903.* So, where the liquidated damages in one year would amount to 77 per cent of the contract price of the building to be constructed. *C. 14172, Feb. 19, 1903.* So, where the liquidated damages in one year would amount to more than twice the contract price of the building. *C. 11599, Nov. 19, 1911.* So, where the liquidated damages in one year would amount to nearly three times the contract price for the building to be constructed. *C. 13328, Sept. 20, 1902.* But where certain machines were required for use on the Panama Canal, and at the time of the making of the contract there was supposed to be urgent need of them, and the liquidated damages would amount in one year to about 36 per cent of the contract price of the machines, *held*, that in view of the circumstances under which the contract was entered into the provision for liquidated damages should not be construed to be one for a penalty. *C. 25176, June 12, 1909.* But where the liquidated damages in one year would amount to only 11 per cent of the contract price for installing an electric-lighting system at Governors Island, N. Y.,

[1] See VIII Comp. Dec., 487; 11 id., 513; 14 id., 617.

held, that in making the contract the principle of compensation had not been disregarded, and the provision should not be held to be one for a penalty. *C. 16167, Apr. 13, 1904.* And *held*, that it could not be said the principle of compensation had been ignored where the liquidated damages in one year would amount to about 20 per cent of the contract price for installing an electric-lighting system at Fort William McKinley, P. I. *C. 24076, Nov. 16, 1908.*

XIX G. Where a supplemental contract stipulated that "any additional expense or other loss incurred by the United States because of the failure of the contractor to make deliveries as originally fixed, shall be charged to the contractor and may be deducted from any money due or that may become due under said contract." *Held*, that the salary and expenses of an inspector for the period of the extension are in no sense penalties imposed on the contractor, but are actual damages sustained by the United States and must be withheld in settlement with the contractor. *C. 22270, Oct. 28, 1907.*

XIX H. A contract for liquidated damages provided for an additional allowance of time "on account of unusual freshets, * * * State quarantine restrictions, or other unforeseeable cause of delay arising through no fault of the contractor, and which actually prevented such contractor from commencing or completing the work or delivering the material within the period required by the contract." *Held*, that the tardy delivery of material by a subcontractor was not an "unforeseeable cause of delay arising through no fault of the contractor." *C. 27659, Oct. 31, 1911.*

XIX I. In a contract for supplying potatoes and onions it was provided, "In case of failure of the party of the second part to deliver the potatoes and onions as herein stipulated, the depot commissary, Manila, P. I., is authorized to supply, by open purchase or otherwise, any deficiency resulting from said failure, and the said party of the second part shall be charged with any excess of cost over that of furnishing at contract prices." The contractor failed during one month to deliver the required quantity of potatoes, and as the United States was unable to procure potatoes in the local market it purchased what was considered an equivalent of canned tomatoes, canned sweet potatoes, and canned cabbage, and charged against the contractor the excess of cost for these articles. *Held* that the words "any deficiency resulting from said failure" refers to any deficiency in potatoes and onions and under the above provision only potatoes and onions could be supplied, but *held* further that under the general law of damages the parties to the contract should be considered to have contemplated that in case of breach the United States would have to purchase like articles elsewhere, and in case of inability to do so would have to purchase some other articles of another kind as a substitute for them, and the contractor should be held responsible for the increased cost of such purchases, and therefore that the charge against the contractor of the excess of cost for these articles was legal. *C. 18160, Sept. 27, 1905, and Dec. 28, 1906.*

XIX I 1. Where contractors for installing plumbing, heating, and lighting were unable to proceed with their contracts by reason of the failure of another contractor A to construct the building, and it was necessary to extend the time for completing the plumbing, heating, and lighting at an increased price for the work, *held* the

additional cost to the United States should be charged against the contractor A and his surety. *C. 20508, Oct. 13, 1906.*

XIX J. Under a contract for the construction of two river steamers the work was so delayed that at the time the contracts should have been completed one vessel was only about 20 per cent constructed and the other only about 12 per cent constructed. No payment had been made to the company, and there had been no acceptance of the partially constructed vessels. *Held* that while the United States might under the terms of the contract take charge of the vessels and complete them at the expense of the company, it was not required to do so; and, further, that the provision for liquidated damages, while it contemplated the continuance of the contract for a reasonable time after the date fixed for its complete performance, could not properly be construed to provide for an unreasonable extension of the contract. Therefore *recommended* that the contract be treated as abandoned [1] by the contractor, and that the contractor and its surety be notified that they will be held liable for actual damages which may be shown to result from the breach, and that fresh contracts be made after the usual advertisement. *C. 15267, Sept. 23, 1903.*

XIX K. A contract was let for sinking a well at a stipulated price per foot, payments to be made as the work progressed, reserving 20 per cent to secure the completion of the contract. The work was taken out of the contractor's hands on account of the very unsatisfactory progress made. Subsequently the Government removed the contractor's plant and adopted a different system of water supply. *Held* that the retained percentages were to secure the Government against loss, and as the work had been abandoned by the Government and a new water-supply system adopted it therefore had become impossible to ascertain whether the Government had been damaged, and the retained percentages for work already done should be paid to the contractor. *C. 14029, Jan. 22, 1903.*

XIX L. A contract for furnishing hay to be shipped to Manila provided that all hay delivered under the contract should be compressed to a density of 72 cubic feet per ton. The contractor failed to compress the hay to the density required by the contract, in consequence of which the Government was required to pay excess freight to Manila. *Held,* that notwithstanding the absence of an express stipulation in the contract penalizing the contractor for delivering hay not sufficiently compressed, the contractor would be legally responsible for actual damages which might result from his failure to strictly comply with his contract obligations, and that the damages so suffered could properly be deducted on final settlement from moneys due the contractor under his contract. *C. 22666, Jan. 27, 1908.*

XIX M. A contract for electrical installation in a building being erected by another contractor provided for the completion of the electrical installation by March 6, 1910, but by reason of the failure to complete the building the work of electrical installation could not be commenced until April 9, 1910. After that date the work was

[1] "If there be no performance within the time, the contract may be rescinded. If there be substantial performance, with only minor deficiencies, it may not be. But a defective, negligent, and worthless performance is the same as no performance at all." Miller *v.* Philipps, 31 Pa. St. (7 Casey), 218; Lauman *v.* Young, id., 306.

prosecuted and completed with reasonable promptness. The contract for electrical installation did not provide for liquidated damages nor a penalty, but provided that the excess of cost resulting from a failure to complete the work according to the terms of the contract should be charged to the contractor. *Held*, that actual damages could not be charged for the period that the contractor for electrical installation was delayed in commencing the work, that is, up to April 9, 1910, and that after that date he was entitled to a reasonable time for completing the installation.[1] *C. 27978, Mar. 15, 1911.*

XIX N. Bidders for the construction of certain dredges for the use of the California Débris Commission were required to deposit a certified check, which check was to be returned to the bidder upon his returning to the Government certain plans for the construction of dredges, which were turned over to each bidder. *Held*, that if the checks were not intended as liquidated damages nor to reimburse the United States for the cost of the plans, the contracting officer, in case of failure to return the plans, could legally deduct only such sum as would reasonably reimburse the United States for the value of the plans and other damages. *C. 29402, Jan. 27, 1912.*

XX A. A Government contractor for the construction of certain buildings failed financially, and certain unpaid material men claiming to be subcontractors took steps to obtain a lien on the land of the United States on which the buildings stood. *Held*, that as subcontractors their claim against the United States would be by virtue of having succeeded to the rights of the original contractor by being in a sense substituted for him in the contract. But this would be in contravention of sec. 3737, Rev. Stat., which prohibits the transfer of a contract or order or any interest therein, since it would amount to a transfer to the subcontractors of an interest in the contract. This section was intended for the protection of the United States, and to secure it from the necessity of having to decide controverted questions of liens and assignments, and must be held to apply to indirect as well as direct transfers. To recognize a lien on the part of a subcontractor would be to sanction an indirect transfer of an interest in a contract. *P. 29, 210, Jan. 8, 1889; 48, 341, Aug. 1, 1891; C. 2457, July 20, 1896.*

A subcontractor for building materials furnished a Government contractor at Fort Riley, Kans., could not enforce a lien against the United States under the statutes of that State.[2] This, for the reasons among others: 1st. That the State law requires that the lien be prosecuted in the State district court, a tribunal in which the United States is not suable. Thus the remedy can not be pursued against the United States as owner of the buildings. 2d. That public policy forbids the obstruction of the legal operations of the United States by State legislation or process. *P. 29, 210, Jan. 8, 1889.*

There is no law of the United States which authorizes an interference, by means of a material-man's lien, with an instrumentality of government in the District of Columbia. Soldiers' homes are instrumentalities of government.[3] *Held*, therefore, that a mechanic's (material-man's) lien filed against the amusement hall at the Soldiers'

[1] See XV Comp. Dec., 362, for a corresponding decision where the contract contained a provision for liquidated damages.
[2] See 23 Op. Atty. Gen. 176 to same effect.
[3] *In re* Kelly, 71 Fed. Rep., 545.

Home, Washington, D. C., could not be recognized as a ground for withholding payments due the contractor who had built it. *C. 2457, July 20, 1896.*

XX B. A contract stipulated—according to a usual form—that the contractor should be responsible for and pay all liabilities incurred for labor or materials. After its completion certain subcontractors who had furnished materials to the contractor applied to the Secretary of War for his consent to their suing the sureties on the contractor's bond, in the name of the United States, for their own use, for the sums claimed by them. *Held* that no such consent could legally be given, for the following reasons: (1) The contract had been duly performed. (2) If not performed, to yield the claim would be to part with a right of action, property of the United States, without the authority of Congress. (3) The contract did not authorize or provide for such a proceeding. The covenant referred to is inserted mainly to further a prompt performance and incidentally to protect the United States from being recurred to by the creditors of contractors. The failure to observe the covenant would doubtless give the United States a remedy in damages against the contractor and his sureties in case appreciable damages were suffered. But such damages, if any, would be wholly independent of the liabilities which the contractor might be under to his creditors and would not be measured by their amount. Thus *held* that the suit proposed could be instituted only by the authority of legislation.[1] *P. 56, 265, Nov. 2, 1892.*

XX C 1. The act of August 13, 1894 (28 Stat. 278), required that in the "construction of any public building or the prosecution and completion of any public work" bond should be given conditioned for the payment of persons supplying "labor and material," and gave to such persons the right, if not promptly paid, to recover on such bond. *Held* that in practice the act has been understood to apply to the removal of wrecks from navigable waters or the dredging of channels therein,[2] and as the act is a remedial one it should be liberally construed, and a bond exacted unless it is clear the contract does not involve the "prosecution or completion of any public work" within the meaning of the statute. *C. 24519, Feb. 19, 1909. Held*, also, that the act covered repairs upon an Army transport wherever the repairs are made, the reason being that the title continues in the Government and therefore no lien on it can be acquired. *C. 8430, June 2, 1900; 8429, June 15, 1900; 9356, Nov. 27, 1900; 19164, Feb. 9, 1906.* But the act does not cover work on a statue which, until the time of its acceptance, remains the property of the contractor and is subject to any remedy provided by law for the protection of persons supplying labor and material.[3] *C. 25761, Nov. 12, 1909, and Dec. 22, 1909.*

XX C 2. As the act of August 13, 1894 (28 Stat. 278), does not expressly provide that it shall govern contracts made abroad, and in the light of the principle that the laws of any State, can not, by any

---

[1] Such authority has been given, since the date of this opinion, in the act of Aug. 13, 1894 (28 Stat. 278), amended by the act of Feb. 24, 1905 (33 Stat. 811).

[2] See Ellis *v.* U. S. 206, U. S., 246, where the phrase "any of the public works" in the Eight-Hour Law was held by a divided court not to include dredging a channel in Boston Harbor.

[3] See 23 Op. Atty. Gen., 174, to the effect that the act does not refer to contracts for the construction of a naval vessel, where the whole title remains in the contractor until its completion and acceptance by the Government. See also 26 Op. Atty. Gen., 30. See also 218 U. S., 452; 219 U. S., 24.

inherent authority, operate beyond the limits of that State, it is believed the statute does not apply to a contract made and to be performed in a foreign country. In the absence of a stipulation to the contrary such contract is to be understood as made with reference to the laws of such foreign State and as governed thereby. *Held*, also, that if the laws of the foreign State give a lien upon a vessel so constructed in a foreign country, unless payment is made to labor and material-men, a claim might be made against the United States on the acquisition of the vessel subject to such lien. *C. 19164, Feb. 14, 1906.*

XX C 3. Under the act of August 13, 1894 (28 Stat. 278), a certified check could not be received in lieu of the bond for the payment of labor and material-men. *C. 24519, Feb. 20, 1909.*

XX C 4. The act of August 13, 1894 (28 Stat. 278), requires that a certified copy of the contractor's bond shall be furnished upon application accompanied by an affidavit. *Held*, that an affidavit "upon information and belief" by the attorney of a material-man, or by an assignee of a person who furnished labor, is not a sufficient compliance with the act, the affidavit should be of the party furnishing the labor or material or at least of some one who can speak from his own knowledge, but as the act does not restrict the authority of the Secretary of War as to furnishing a copy on less evidence than is specified in the act, there is no legal objection to his doing so. *C. 8996, Sept. 24, 1900; 13560, Oct. 30, 1902; 14029, Aug. 12, 1904.*

XX C 5. Where a bond has been given under the act of August 13, 1894 (28 Stat. 278), as amended by the act of February 24, 1905 (33 Stat. 811), and it is clear that the contract has been completely performed so that there will be no suit on the bond by the United States, a copy of the contract and bond should be furnished upon proper application, without waiting for the expiration of the period of six months from the completion and final settlement of the contract.[1] *C. 19264, Mar. 29, 1909.* So, also, they should be furnished notwithstanding a receiver had been appointed for the contractor, and all creditors had been directed by the court to present their claims to the receiver, and the applicant for the bond had failed to present his claim. *C. 19264, Apr. 12, 1909.* If, however, suit has been brought by the Government, parties furnishing labor or material may intervene in such suit but should not be furnished a copy of the contract and bond. *C. 19264, June 28, 1909.*

XX C 6. The new obligation[2] of the surety under the act of August 13, 1894 (28 Stat. 278), does not create an additional obligation on the part of the United States in the nature of an equitable lien or other right against the United States. The United States has no right to withhold any funds due a contractor for the purpose of indemnifying a surety for moneys paid out by him to material men and laborers.[3] For the United States to withhold, except for its own

[1] Complete performance and final settlement under act Feb. 24, 1905, means final settlement by auditor. Stitzer *v.* U. S., 182 Fed., 513.

[2] "The bond which is provided for by the act was intended to perform a double function: In the first place to secure to the Government, as before, the faithful performance of all obligations which a contractor might assume toward it; and in the second place, to protect third persons from whom the contractor obtained materials or labor." U. S. *v.* National Surety Co., 92 Fed. Rep., 549; U. S. *v.* Rundle, 100 Fed. Rep., 400.

[3] See III Comp. Dec., 708; XV id., 711; XVI id., 426. See also Central Law Journal, 367, as to meaning of "final settlement," etc. See also Richards Brick Co. *v.* Rothwell, 18 D. C. Appeals, 516; Sanborn *v.* Maxwell, 18 D. C. Appeals, 245.

protection, payments due a contractor in order to pay therewith either liabilities on the part of the contractor or to indemnify his surety would be an assumption by the United States to insure the very payments which are intended to be secured by the provisions of the contract and the bond, and would cause the United States through the disbursing officers to adjudicate the matters of fact and law arising between contractors and their creditors. *C. 7311, Nov. 21, 1899; 15003, July 29, 1903; 20410, Sept. 27, 1907; 23265, July 20, 1909; 28079, Apr. 4, 1911; 20423, Nov. 4, 1911.* So, where the surety, claiming that it was the intention of the contractor to decamp from the United States after receiving his money and to defraud the labor and material-men, had obtained an injunction from a State court prohibiting the contractor from receiving the money due him from the United States, *held*, the United States had no right to withhold at the request of the surety on the contractor's bond money due the contractor. *C. 20021, July 10, 1906.*

XX C 7. A contract was modified by supplemental agreement without the consent of the surety on the contractor's bond. *Held*, that under the act of August 13, 1894 (28 Stat. 278), a contractor's bond may be considered as in effect two obligations, one to the United States to secure the due performance of the contract, and the other to the United States, but on behalf of labor and material-men, to secure their payment, and that the obligation for the benefit of the labor and material-men was not released by the action of the contractor and the United States in modifying the contract without the surety's consent.[1] *C. 17474, Feb. 3, 1905.*

XX C 8. Where the United States contracted with the board of water commissioners of a city for the construction of a water main to supply water to a Government post, *held*, that it was doubtful whether a contract with such an instrumentality of a municipality was within the true intent of the act of August 13, 1894 (28 Stat. 278), and recommended that no bond be exacted for the protection of persons supplying labor and materials. *C. 25610, Sept. 24, 1909.*

XX C 9. A contract was entered into conditioned as required by the act of August 13, 1894 (28 Stat. 278), and the principal and surety having failed to pay a subcontractor money due him the subcontractor requested the War Department to strike the surety company from the list of companies acceptable to the War Department with a view to compelling it to settle its alleged obligation to the subcontractor. *Held* that such action on the part of the War Department was outside of its duty under the act in question. *C. 10553, June 4, 1901.*

XX C 10. Where a Government contractor went into bankruptcy the purchaser under a bankrupt sale of the contract rights of the contractor may be recognized and permitted to carry out the Government contract. In such a case a bond given by the original contractor conditioned for the faithful performance of the work by the original contractor will continue in force, and the sureties thereon will be liable for any damages suffered by the Government by reason of the failure of the original contractor to fully perform the contract. But

[1] See Conn. *v.* State, 125 Ind., 514; 46 Nebr., 644; 41 Nebr., 655; 40 Minn., 27; U. S. *v.* Rundle, 100 Fed. Rep., 400; U. S. *v.* National Surety Co., 92 id., 549; U. S. *v.* American Bonding Co., 89 id., 921; U. S. Fidelity, etc., Co., *v.* Golden Pressed Brick Co., 191 U. S., 416. See 111 Fed., 474, as to whether bond covers plant.

in such a case a bond given by the original contractor to protect labor and material men under the act of August 13, 1894 (28 Stat. 278), would not continue in force as such a bond is limited by the terms to labor and material supplied to the original contractor. The purchaser of the original contractor's contract rights should furnish a new bond to secure labor and material-men.[1] *C. 23265, Oct. 30, 1908.*

XX C 11. Where a contractor defaulted and a supplemental agreement was entered into by which the original contract was terminated, and the surety of the contractor undertook the work in its own name, *held* that such surety should give bond to protect labor and material-men as required by the act of August 13, 1894 (38 Stat. 278). *C. 18079, Oct. 1, 1906.*

XX C 12. The act of August 13, 1894 (28 Stat. 278), it is believed protects persons furnishing labor or materials to subcontractors as well as to the original contractor, but whether it does or not is a proper question for the courts to determine. *Advised*, therefore, that a party who had furnished material to a subcontractor, be given a certified copy of the contract and bond upon filing the affidavit required by the act.[2] *C. 1908, Jan. 4, 1896.*

XX C 13. A party entered into a formal contract with the United States for certain work. He submitted two bonds, but both were rejected because not properly executed. In the meantime he completed the work to the satisfaction of the Government, but owing to his failure to furnish a bond as required by the act of August 13, 1894 (28 Stat. 278), for the protection of persons supplying labor and materials, no payments had been made under the contract. *Held*, that until such bond was filed no payment should be made; and that this rule would apply to the assignee of the contractor if one had been appointed. *C. 4082, May 3, 1898.*

XX C 14. The certified copy of the contract and bond to be furnished under the act of August 13, 1894 (28 Stat. 278), should, in accordance with section 882, R. S., be authenticated under the seal of the War Department in order that such copy may be in proper form for use as evidence. *C. 1743, Sept. 24, 1895.*

XX C 15. A duly certified copy of the contract and bond relating to material-men having been furnished under the act of August 13, 1894 (28 Stat. 278), the party furnished with a copy may institute suit as provided therein, and it is not necessary for him first to obtain the permission of the Secretary of War. *C. 2319, May 25, 1896.*

XXI A. Where a contract for the delivery of lumber provided that in case of failure to prosecute faithfully and diligently the delivery in accordance with the specifications and requirements of the contract, then the contracting officer should have power, with the sanction of

---

[1] But see Mullin *v.* U. S., 109 Fed. Rep., 817, that "where a contractor and obligor on a bond given under the act of Aug. 13, 1894, gave up the work, and with the consent of all concerned an indemnitor of the surety to the bond took up the completion of the work for the contractor, under the contract with the Government, and where a company kept on and furnished materials and labor to those taking up such contracts, under their contract with the original contractor with the Government, such furnishing of materials and labor is covered by the bond of the contractor and such company comes within the description of 'all persons supplying him labor and materials in the prosecution of the work.'"

[2] See U. S. *v.* American Surety Co., 200 U. S., 197, to the effect that labor and materials furnished to a subcontractor are within the obligation of the bond.

the Chief of Engineers, to annul the contract by giving notice in writing to that effect to the contractor; and provided further, that upon the giving of such notice all money or reserved percentages due or to become due to the contractor should become forfeited to the United States, and that the United States should have authority to provide the lumber by open purchase or contract. *Held* that the mere failure to deliver the lumber within the time named in the contract did not operate as a forfeiture of the retained percentages, but that there must be some positive action on the part of the contracting officer indicating an intention to annul, and this intention should be communicated to the contractor.[1] *P. 34, 229, Aug. 2, 1889.*

XXI B. A breach of some term of the contract, as, in a case of a contract for supplies for the Army, a failure to deliver some of the articles at the agreed time, will not ordinarily, in the absence of an express covenant to that effect, authorize the Secretary of War to declare the contract annulled, but will give the United States only a right of action for damages. *P. 29, 324, Jan. 16, 1889; 34, 261, Aug. 5, 1889.*

XXI C. A contract was regularly annulled in accordance with its terms. *Held* that the action of annulment was final and that such action could not be rescinded so as to revive the contract.[2] *C. 7931, Apr. 7, 1900.*

XXI D. The contract for a river improvement provided for its annulment in case of the default of the contractor and for its completion by the Government, "the Government to take possession of and retain all materials, tools, buildings, tramways, cars, etc., or any part or parts of the same prepared for use or in use in the prosecution of the work, together with any or all leases, rights of way, or quarry privileges, under purchase and at a valuation to be determined by the engineer officer in charge." The contractor having defaulted and the United States having taken possession under the above provision, *held* that the Government took possession *by way of purchase*, and that for the purpose of giving the defaulting contractor and its surety the proper debit and credit in final settlement, the plant should be revalued, the United States to receive credit for any depreciation in the value of the plant resulting from its use in the prosecution of the work, and that as there was nothing in the contract requiring the plant to be sold for what it would bring upon the completion of the particular contract, there would be no legal objection to using the plant on other works of improvement, upon giving proper credit to the appropriation from which it was purchased. *C. 27890, Mar. 6, 1911.*

XXI E. A Government contract provided that if the contractor should "fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract," the contract might be annulled[3] by the Government, and further provided for liquidated damages, *held* that the mere failure of the contractor to complete the work within the stipulated time would not authorize

---

[1] See Kennedy *v.* United States, 24 Ct. Cls., 122.

[2] IV Comp. Dec., 679.

[3] See United States *v.* O'Brien, 220 U. S., 321, construing language similar to that used in the above contract, and further holding that the word "annulled" as used in the contract was incorrectly used, the word being used in the sense of "refusing to perform further," and not in the sense of rescinding or avoiding. See also United States *v.* McMullen, 222 U. S., 460.

the Government to declare the contract to "have expired by limitation," nor would it authorize the annulment of the contract, but that to justify an annulment there should be a substantial failure on the part of the contractor "to prosecute faithfully and diligently the work in accordance with the specifications and requirements." *C. 9201, Nov. 1, 1900.*

XXII A. An unreasonable delay to commence the delivery under a contract may indicate an abandonment on the part of the contractor which will justify the Government in treating the contract as relinquished and will release the Government from the contract. *P. 29, 324, Jan. 16, 1889; 34, 261, Aug. 5, 1889.*

XXII B. Where a contractor for furnishing certain articles to the Government did not make satisfactory progress in the work and was frequently urged to furnish at least a part of the articles to be supplied, but failed to supply the articles or to give any satisfactory information concerning the probable date of furnishing them, and moved away from its place of business without giving any new address, *held* that the facts indicated a repudiation of the contract, and the contracting officer was justified in taking steps prior to the arrival of the date when the contract should have been completed, to supply the deficiency according to the terms of the contract. *C. 24639, Mar. 27, 1909.*

XXIII A. Where it was proposed that a clause be inserted in Government contracts which would prohibit the employment on Government work of any but citizens or those who had declared their intention to become citizens, *held*, that there was no law which authorized the insertion of such a provision in Government contracts and that in the absence of such legislation the Secretary of War was without authority to require it. *C. 2087, Feb. 29, 1896; 15451, July 27, 1905.* In the absence of a statute restricting the purchase of supplies intended for use in the military service to articles of domestic production (*C. 16057, Mar. 21, 1904*), or restricting the purchase to articles produced by American labor only (*C. 18209, June 27, 1905*), there is no authority to restrict the same by executive regulation.[1]

XXIII B. In the absence of any statutory regulation of the subject, *held* that the Secretary of War is not empowered to exercise control over the labor employed by the contractors for the work on the jetties at Galveston, Tex., or to prevent their availing themselves of the labor of convicts authorized by the laws of Texas to be hired out to contractors. The only statute of the United States relating to the use of such labor—that of February 23, 1887 (24 Stats. 411)—merely makes it a criminal offense to hire out criminals incarcerated for offenses against the United States, prescribing a penalty. But even this statute the Secretary of War has no authority to enforce, but the same is to be executed in the same manner as any other criminal statute of the United States. *P. 48, 402, Aug. 7, 1891; C. 3542, Sept. 24, 1897.*

---

[1] Sec. 3716, R. S., provides that "the Quartermaster's Department of the Army, in obtaining supplies for the military service, shall state in all advertisements for bids for contracts that a preference shall be given to articles of domestic production and manufacture," etc. The act of Mar. 3, 1875 (18 Stat., 455), provided that "In all contracts for material for any public improvement, the Secretary of War shall give preference to American material; and all labor thereon shall be performed within the jurisdiction of the United States."

XXIII C. There is no statute requiring or justifying the annulment of a contract with the United States on the ground that Italian labor was being employed in its execution. *C. 4652, July 23, 1898.*

XXIII D. An Executive order of May 18, 1905, published in General Order 78, War Department, May 31, 1905, provided that "All contracts which shall hereafter be entered into by officers or agents of the United States involving the employment of labor in the States composing the Union, or the Territories of the United States contiguous thereto, shall, unless otherwise provided by law, contain a stipulation forbidding, in the performance of such contracts, the employment of persons undergoing sentences of imprisonment at hard labor which have been imposed by courts of the several States, Territories, or municipalities having criminal jurisdiction." *Held*, that as the order restricts the freedom of contracts, it should be strictly construed, and that in a case where a contract was entered into for the erection of a building, the above Executive order did not apply to bricks made by convict labor and procured by the contractor in the open market. *C. 18831, Nov. 9, 1905.* Where a contract was made to furnish "all labor, plant, and appliances necessary and incident to the delivery, loaded on board of railroad cars at Vidalia, La., * * * of 7,000 tons of rock," *held* that under the Executive order of May 18, 1905, quoted above, if it was contemplated that the contractor should quarry and deliver the stone, the contract involved the "employment of labor," both as respects the quarrying and the delivery of the stone. *C. 20668, Nov. 24, 1906.* Also, where a contract was to furnish all materials and labor necessary to launder certain articles, *held*, that the contract involved the "employment of labor." *C. 18102, June 7, 1905.* And, also, where a contract was for the manufacture of an article according to a particular specification and the matter was treated by the Government as a purchase of the article itself rather than as a contract for work or the employment of labor, *held*, the Executive order of May 18, 1905, did not apply. *C. 18102, June 7, 1905.* Also, where it was desired to work a thousand convicts from Bilibid prison in the construction of fortifications on Corregidor Island, *held*, that the above Executive order would prevent a contract from being entered into with the Philippine government to obtain the services of its prisoners at a cost per man per day equal to their keep, but that if the Philippine government was willing to employ its prisoners in the construction of United States fortifications, as the United States benefited by their employment, it might lawfully charge the cost of their support and subsistence against the appropriation for the construction of the defensive works on Corregidor Island. *C. 24573, Mar. 2, 1909.*

XXIII E. The law does not prescribe that citizens or any other particular class of persons shall be the only competent bidders for Government contracts or that aliens shall not be competent to bid. *P. 49, 134, Sept. 9, 1891.*

XXIII F. A contract prohibited the employment by the contractor of convict labor in the execution of the contract, and provided further that the contractor should not "permit such employment by any person furnishing labor or material to said contractor in the fulfillment of this contract." *Held* that if the contractor procured his coal from one who bought it from the State of Tennessee, which uses convict

labor in mining its coal, the contractor would not be violating his contract. *C. 23652, July 27, 1908.*

XXIII G. Section 2 of the act of March 3, 1875 (18 Stat. 455), provides that "in all contracts for material for any public improvement the Secretary of War shall give preference to American material; and all labor thereon shall be performed within the jurisdiction of the United States." *Held* that the requirement of the above statute is not an absolute one, but leaves a discretion in the Secretary of War to authorize the procuring elsewhere of supplies where the conditions are such as to justify it, and that where a suboffice of the officer in charge of certain work is located in Canada and it is more convenient to purchase in Canada minor and emergency articles, *held* that such purchases might be made. *C. 24264, Dec. 29, 1908.*

XXIII H. The fortification appropriation act of March 4, 1911 (36 Stat. 1343), provided that "all the material purchased under the provisions of this act shall be of American manufacture, except in cases when, in the judgment of the Secretary of War, it is to the manifest interest of the United States to make purchases in limited quantities abroad, which material shall be admitted free of duty." *Held* that in the exercise of the discretion vested by the above statute the Secretary could issue a general authorization under proper conditions as to the admission of material. *C. 29307, Dec. 14, 1911.*

XXIV. A dredging contract provided that the approximate quantities specified in the contract were subject to a possible variation of 10 per cent above or below the figures stated. After more than three-fourths of the work was completed the contractor requested to be advised as to the approximate quantity of material to be removed under the contract. He was notified that the approximate quantities specified in the contract would be reduced 10 per cent. This decision was made in view of the state of the appropriation, but as additional funds subsequently became available the United States sought to change its decision and require the maximum quantity of material to be removed. *Held* that the United States having elected to require the minimum quantity only was bound by such election and could not subsequently elect to require the maximum dredging. *C. 21308, Mar. 28, 1907.* So also, where a contract for supplying dark-blue cloth was subject to an increase of 20 to 50 per cent if desired by the United States, and the United States notified the contractor that the quantity was increased 20 per cent, but did not reserve the right to make a further increase, and the contractor in response to his request was advised that no further increase was contemplated. *Held* that the United States having exercised its option to increase the quantity by 20 per cent could not again increase the quantity, as the contract did not contemplate the exercise of more than one option. *C. 24676, Mar. 22, 1909.*

Where a contract for the delivery of oats during the fiscal year provided that it might "at the option of the United States be increased not exceeding 20 per cent or diminished not exceeding 20 per cent thereof at any time during the continuance of the contract," and after the delivery of the quantity originally bid for the chief quartermaster of the department paid the contractor in full, including retained percentages, marking the final voucher "contract completed," and thereafter, 18 days before the expiration of the fiscal year the contractor

was called on for the additional 20 per cent, *held* that this action of the chief quartermaster in so paying the contractor and marking the final voucher did not constitute a technical "release" from the contract, for there would be no consideration for such a release, and without a consideration no agent of the United States can surrender the contract rights. But if in consequence of the action of the chief quartermaster the contractor failed to lay in supplies to meet the calls of the United States and would now have to procure the supplies at an advanced figure, or has been otherwise placed at a disadvantage thereby, the United States would be estopped from calling on him for the additional 20 per cent. *C. 12974, July 15, 1902.*

A contract for woolen blankets provided that the number to be supplied might be increased 50 per cent if desired by the United States, and also provided for partial payments based on supplies delivered and accepted, "reserving 10 per cent from each payment until final settlement, on completion of the contract or otherwise." The United States gave notice that a 50 per cent increase was required. Thereupon the contractor demanded that he be paid the retained percentages, claiming that the 50 per cent increase constituted a separate contract. *Held* that the words "or otherwise" refer to a final settlement based on a termination of the contract otherwise than by completion of deliveries thereunder and do not authorize the United States to pay the retained percentages prior to a final settlement. *Held*, further, that the contract would not be finally settled until the 50 per cent increase had been supplied.[1] *C. 22420, Nov. 27, 1907.*

A contract for the delivery of oats provided that the Government should have the option to increase or decrease the quantity at any time during the continuance of the contract. The Government called for an additional quantity of oats, not for the purpose of supplying the current needs of the Government, but "as a distinct saving to the Government," which saving would result from the fact that the prices were lower than could be obtained at a subsequent stage of the same contract. *Held* that the order for additional oats was lawful, but by the authority of the opinion of the Attorney General in 28 Op., 121, the Secretary of War in the exercise of his discretion could properly direct that the order for the additional quantity be canceled although such cancellation would cause financial loss to the Government. *C. 29107, Nov. 1, 1911.*

A contract for supplying dark blue cloth expired February 21, 1909. The contract provided that the amount called for would be subject to an increase of from 20 to 50 per cent in quantity if desired by the United States "during the continuance of this contract." *Held* that the contractor could not be required subsequent to February 21, 1909, to furnish an increased quantity. *C. 24676, Mar. 22, 1909; 29107, Oct. 12, 1911.*

A contract provided that "the quantity of each article specified shall be subject to not to exceed 50 per cent increase if desired by the United States during the continuance of this contract," but no provision was made as to the time within which the additional quantity if ordered should be delivered. *Held*, that the contractor would have a reasonable time within which to make the deliveries. *C. 25825, Nov. 22, 1909.*

---

[1] See XII Comp. Dec., 409.

A contract for the delivery of a quantity of oats provided that deliveries should commence in October, and "that the quantity herein specified may be increased or decreased at the option of the United States, not to exceed 20 per cent thereof, at any time or times, during the continuance of the contract," and further provided for a delivery of a certain quantity each month. The contractor contended that each monthly delivery should be treated as a separate contract and that the 20 per cent reduction should be applied to each monthly delivery. *Held*, that there is nothing in the language of the contract to warrant the construction that the 20 per cent reduction should be applied to each monthly delivery separately but all might be made at one time. *C. 27506, Nov. 22, 1910.*

XXV. When the United States comes into the occupancy of premises under a contract either express or implied to pay rent, there arises an implied obligation on the part of the United States to so use the premises as not to injure it unnecessarily. Such an obligation results from the relation of landlord and tenant.[1] So, where lands are leased for maneuver purposes; *held*, that the United States would be liable for damage to buildings, fences, or crops in consequence of such use and occupation, and the officer charged with executing the contract could liquidate such damages. *C. 14971, July 23, 1903.* So, where a house was occupied under circumstances constituting an implied lease; *held*, the United States would be liable for damage to the house and furniture during such occupancy. *C. 14617, May 12, 1903.* So, where a berth and landing place for the use of boats of the Quartermaster's Department was leased, and a United States steamer collided with a portion of the wharf adjacent to the berth leased by the Government, *held* that the United States would be liable for the resulting damage under an implied covenant to use the premises in a tenantable and proper manner. *C. 14485, Apr. 11, 1903.*

XXVI. Where a contract provided for installing a wireless telegraph system in Alaska between two points, one of which was described as "accessible to boats propelled by steam or other power," and it was subsequently discovered that it was impossible for a steamer to approach closer than 75 miles of the point in question, *held* that the representation as to reaching the point by boats was one which was understood to be peculiarly within the knowledge of the United States authorities, and should be treated as a warranty. *C. 12705, Apr. 3, 1903.*

XXVII. A contract was entered into by the Government for the construction of certain buildings at Fort St. Philip, La., the contract providing that the contractor should be responsible for damage by fire. In order to protect himself the contractor took out fire insurance on the buildings. The time limit for the work expired on December 15, 1907, on which date the Government took possession, according to the terms of the contract, for the purpose of completing it and charging the excess cost to the contractor. *Held*, that as the insurance was intended to protect the contractor and its surety from the liability imposed by the contract, and as the contractor was chargeable with the excess of the cost of the work, the Government could continue the insurance, charging the expense of the same to the contractor as a part of the cost of the work. *C. 21735, Feb. 18, 1908.*

[1] U. S. *v.* Bostwick, 94 U. S., 65; Mann. *v.* U. S., 3 Ct. Cls., 411; II Comp. Dec., 407.; 9 id., 488.

XXVIII. Where, at the end of the 10 days specified in his guaranty, the accepted bidder had failed to enter into the contract, *held* that the liability of the guarantors had attached, and that, the public interests not being prejudiced, the contract might legally be entered into with one of the guarantors, as an open-market transaction in which he takes the risk on his own account at the rate proposed in the bid. *P. 32, 188, May 4, 1889.*

XXIX. In the absence of a provision in the contract or the accompanying bond requiring the Government to call upon the surety to carry out the contract in the case of a default of the contractor, *held* the Government would be under no obligation to give the surety such an opportunity. *C. 24639, Mar. 27, 1909.*

XXX. Where the lowest bidder was a partnership, and before the contract based on the bid could be signed, the partnership was dissolved, *held*, that there was no legal objection to allowing one of the members of the partnership to take up the bid and enter into a contract. This would be equivalent to rejecting all bids and then making a contract without further advertisement with the member of the partnership. *C. 12827, Sept. 10, 1902.*

XXXI. Payments due on a contract with the Government, where the contractors are partners, may legally be made to any member of the firm, notwithstanding one of them may have filed a protest and notice against payment to one of the partners.[1] *C. 3210, May 20, 1897.*

XXXII. *Held*, that the Army Regulations are not strictly applicable to contracts of the United States Soldiers' Home, as the home is under the control of a board of commissioners who are expressly empowered to establish regulations for the general and internal direction of the home. However, as the Army Regulations provide comprehensive instructions for the letting of public contracts based on law and experience, it is believed that they may wisely be followed, except where the board of commissioners for the home shall have prescribed different regulations. *C. 19921, June 16, 1906.*

XXXIII. A proposed contract, to be signed by both the contracting officer and the employee, provided that the employee would not leave the service of the Engineer Department unless by the consent of the local representative of the Engineer Department without giving 50 days' notice of his intention to do so, and that in case of his violation of this provision the employee would forfeit to the United States all pay due him at the time of quitting the service. *Held*, that the proposed contract was not unreasonable or oppressive, and there was no legal objection to it. *C. 23026, Apr. 3, 1908.*

XXXIV. The Government had a contract with a company to furnish electricity, the contract giving the Government an option to renew the contract from year to year for 10 years. Toward the close of the first fiscal year the Government advertised for bids for furnishing electricity for the second fiscal year. *Held*, that the act of the Government in inviting bids did not constitute an abandonment on its part of its option to renew the contract, but should be regarded merely as a means used by it of ascertaining whether or not it would be to the interest of the United States to exercise the option. *C. 28514, June 10, 1911.*

---

[1] Noyes *v.* New Haven, New London, and Stonington R. R., 30 Conn., 14, 15; Lindley on Partnerships, 218; American and Eng. Encyclopædia of Law, 2d ed., vol. 22, 160; 30 Cyc., 482.

XXXV. A contract for printing provided that the contractor should furnish the labor and material "to do promptly all printing and ruling, and furnish the paper and cardboard for the same that may be required at Headquarters Atlantic Division and Department of the East during the fiscal year." *Held*, that printing for a constructing quartermaster in the department who was carrying on the work of construction under the authority of the Quartermaster General is not included in the contract. *C. 23212, July 7, 1908.*

XXXVI. There is no statute that requires contracts under the War Department to be under seal, and therefore a corporation contracting with the War Department need not attach its corporate seal. *C. 2878, Jan. 19, 1897; 15675, Dec. 23, 1903.*

XXXVII. A contract which expressly provided that "it shall be subject to approval of the Chief of Engineers" was duly signed by the contracting parties, but before approval the contractor failed and its business was placed in the hands of a receiver; *held*, that the Chief of Engineers legally could refuse to approve the contract and then readvertise for proposals or could approve the contract and permit the receiver to carry it out. *C. 7508, Jan. 6, 1900.*

XXXVIII. Where bids were requested for a certain type of pickaxe which the Quartermaster General considered obsolete and the contract was subject to the approval of the Quartermaster General; *held*, that the Quartermaster General could properly withhold his approval of the contract and call for bids for a more suitable kind of pickaxe. *C. 28136, Apr. 14, 1911.*

XXXIX. A contract for dredging provided that "should the time for the completion of the contract be extended, all expenses for inspection and superintendence during the period of the extension, the same to be determined by the engineer officer in charge, shall be deducted from payments due or to become due to the contractor: *Provided, however,* That if the party of the first part shall, in the exercise of his discretion, because of freshets, ice, or other force or violence of the elements, allow the contractor additional time, in writing, as provided for in the form of contract, there shall be no deduction for the expenses for inspection and superintendence for such additional time so allowed," and further provided that if the contractor should "by freshets, ice, or other force or violence of the elements, and by no fault of his own, be prevented either from commencing or completing the work, or delivering the materials at the time agreed upon in this contract, such additional time may, in writing, be allowed him from such commencement or completion, as, in the judgment of the party of the first part, or his successor, shall be just and reasonable," *held*, that it would seem that the loss of a dredge by fire not resulting from lightning or some other superhuman agency would not be a loss by "force or violence of the elements," *held* further, that under the rule that general words following specific instances are to be understood as covering cases similar to those specified, the words "force or violence of the elements" should be construed to mean a force or violence of the kind specified in the preceding words—that is, such a force or violence as would interrupt the work, and *held* further, that even if it should appear the fire occurred without fault or negligence on the contractor's part, still no reason appeared why the contractor could not have bought or hired another dredge to replace the one destroyed by fire, and in the absence of such a showing it can not be said that the failure of the contractor to com-

plete the work was "by no fault of his own."[1] *C. 12598, May 13, 1908.*

XL. Where a contract called for the removal of "silt, sand, clay, and gravel," and many bowlders were found which the contractor was not required under his contract to remove, but the contractor, without contract, order, or request from the proper officer removed such bowlders. *Held*, that the extra work involved in removing such bowlders should be considered as having been voluntarily rendered by the contractor, and there could be no recovery against the Government for such work. *P. 63, 180, Jan. 10, 1894; C. 23546, Nov. 3, 1910.* So *held*, also, where, although the work was not required under the terms of the contract, it was done for the protection of the contractor, and without orders from the officer in charge.[2] *C. 23546, Nov. 3, 1910.*

XLI. Prospective bidders for a contract to install an electric lighting system in the Philippine Islands were notified "that proposals will be considered with free entry of all material to be used therein, with the proviso that if duty is collectible the contract price will be increased to cover the amount of duty collected," which provision was made a part of the contract. The contractor was required to pay duty on some of the material used in carrying out the contract. After the contract had been entirely completed the contractor requested an additional payment to compensate him for duties paid on material used in the contract. *Held*, there was no legal objection to making such additional payment.[3] *C. 24076, Dec. 30, 1908.*

XLII. A contract provided for the delivery of hay, oats, etc., "at the various stables, officers' quarters, and other places in the city of Washington and within one mile beyond the limits of said city, Soldiers' Home, National Cemetery, and Battle Ground National Cemetery, Brightwood, D. C.," with a further provision for reducing the quantity in case of withdrawal of troops, *held*, that the contract clearly provided for the supply of such forage as may be required to meet the needs of the service in the city of Washington and immediate vicinity, and that the contract could not be construed so as to permit the Quartermaster's Department to require the contractor to furnish forage at Washington beyond the needs of the service at that point, the forage to be subsequently shipped by the Government to Front Royal, Va., for the needs of the service at the latter place. *C. 29239, Nov. 14, 1911.*

XLIII. The expression in a contract that the contractor agrees "for ——— heirs, executors, and administrators" is not essential. The personal representatives of a deceased contractor are entitled to carry out his contracts, and the estate, both personal and real, of

---

[1] In XVI Comp. Dec., 618, in construing the words "by freshets, ice, or other force or violence of the elements, and by no fault on his part," it was said, "The only thing for which additional time may be allowed under the terms of the contract are freshets, ice, or other force or violence of the elements, and then only in case the delay was caused by no fault on the part of the contractor."

[2] See Kingsbury *v.* U. S., 1 Ct. Cls., 13. Murphy *v.* U.S., 13 id., 372. Utica, Ithaca, etc., Ry. *v.* U. S., 22 id., 265. In Barlow *v.* U. S., 35 Ct. Cls., 514, it was held that additional work or better material than that required by the contract, ordered by a subordinate without authority to do so, must be regarded as voluntary service, and no contract for it can be implied.

[3] This opinion was concurred in by the Comptroller under date of Jan. 21, 1909. Decision not published.

such contractor is liable for his debts and contracts independently of the provisions of the contracts. *C. 2878, Jan. 19, 1897.*

XLIV. Certain contracts for forage provided that the oats and hay furnished should "be of the best merchantable quality and of the highest recognized commercial grade of the locality." *Held,* that the language quoted simply furnished a standard by which the receiving officer was to judge the forage offered under the contract; that the term "locality" had reference to the towns and country in the vicinity of the post where the contractor could reasonably be expected to purchase the forage. State lines would have nothing to do with the matter, and no particular number of miles could be given as the distance to which the locality would extend. It has reference to the sources from which the forage could reasonably be obtained; that is, where the purchasing officer, the local quartermaster, would probably, in the exercise of good judgment, purchase in open market. *C. 1993, Jan. 22, 1896; 2673, Oct. 12, 1896.*

XLV. The specifications of a contract for dredging stated that the material ranged from soft mud to clay and sand, but stated that the information as to character of material was in no wise guaranteed, that bidders were expected to satisfy themselves in all respects as to the work to be done, and that all material encountered must be removed by the contractor at the contract price "except solid ledge." The contractor encountered material which it was admitted by him was not "solid ledge," but he contended that it was such material as was not contemplated by the contractor, that in respect to the difficulty of removal, it approximated in character "solid ledge" and was not such material as would reasonably come under a contract for "dredging." *Held,* that the removal of this material came within the terms of the contract. *C. 13525, Oct. 23, 1902.* A contract for grading and sewer and drain trenches was let for a certain sum with "an additional allowance per cubic yard for rock excavation." The specifications which were made part of the contract provided that "the nature of the material to be excavated is not known, but bidders should ascertain this for themselves, if possible, before submitting bids. If rock is encountered in the excavation it will be measured and paid for as rock excavation, provided that no bowlder is to be considered as rock excavation unless it equals or exceeds 1 cubic yard in volume. * * * All work to be paid for by the cubic yard as earth or rock excavation, both being measured in place before being distributed. No other classification of material will be considered, and only actual ledge rock or bowlder to be considered as rock excavation." The contractor made his bids on the best information he could obtain from the contracting officer and others, but unexpectedly encountered more rock than expected, a large quantity being "in the form of bowlders, frequently large and in great masses, but not of the size to be paid for as rock under the terms of the specifications; also, an enormous quantity of hardpan, but not more than 10 to 15 per cent of the amount of soft and easily moved earth" that he assumed in his estimate, and the material being further described as a kind of "concrete of cement and fine stones." *Held,* there was no room to say the contract contemplated only ordinary earth and rock excavation, that the excavation was included in the terms of the original contract, and a supplemental contract could not legally be made to pay higher prices than set out therein. *C. 17234, Dec. 16, 1904.* The specifications on which bids were invited, and which

became part of the dredging contract, defined the material to be removed as "sand, gravel, stones, and bowlders," and stated that "the indications given as to the character of material to be excavated shall not be accepted as conclusive, but bidders are expected to examine the several localities and determine this question for themselves. It will be assumed that proposals are based on a thorough understanding of the character of the work to be done; that the price bid will cover all contingencies or risks attaching to it, and that no concession or allowance will be made for any lack of information on the part of the contractor." The contractor in prosecuting the work actually encountered "a very heavy stratum of bowlders embedded in a compacted sand, very tenacious and very difficult to dredge, the upper slope of the shoal, beyond the limits of the trial dredging, consisting of very firmly packed bowlders and proving to be much harder than originally anticipated." *Held*, there was no room to say the contract contemplated only ordinary sand, gravel, stones, and bowlders, that the dredging was included in the terms of the original contract, and a supplemental contract could not be made to pay higher prices. *C. 20875, Jan. 7, 1907.* A contract for the construction of earthwork along the Illinois & Mississippi Canal provided that "the material throughout the canal trunk, as far as known, is shown by borings * * * but bidders must satisfy themselves as to the nature of the material to be encountered," and that "the prices bid for earthwork shall include all work of every character necessary to deliver to the United States the complete and finished construction." The contractor reported that "the material encountered and which could not be foreseen when the original specifications were prepared is a very fine sand or quicksand in pockets, alternating with soft mud or vegetable matter that flowed, and makes it impracticable to secure the slopes and grades specified." *Held*, that the contractor was bound to construct the earthwork in conformity with the specifications, without regard to the character of the material encountered, that a supplemental contract modifying the original contract in certain particulars, and providing that the contractor be paid at contract rates for about 100,000 cubic yards of material for which payment could not be made under the original contract but which was necessary for the construction of the canal and would have to be performed by the contractor himself would not be for the benefit of the United States and therefore could not legally be made.[1] *C. 5082, Oct. 10, 1898.* Where a contract expressly stated that "the river bed at No. 2 consists of gravel throughout." *Held*, that such language did not constitute a guaranty by the United States that the bed shall be gravel throughout, in view of other provisions in the contract that bidders are expected "to visit the site of the lock and dam and ascertain the nature and location of quarries," etc., and that the encountering of rock at sites other than the one under consideration "may make a difference in the amount of excavation necessary, and a variation of the amount of material required in the construction of the lock walls; but, as all prices are based on units of materials

[1] In Simpson *v.* U. S., 172 U. S., 372, it was held that the discovery of unforeseen and unexpected difficulties in the execution of a contract, such as the existence of quicksand on the site selected for a structure, is no ground upon which to reform the contract as having been entered into under mutual mistake. The contractor should assume the risk of construction.

removed and built in place, these differences in the foundations at the different sites can only affect the cost of the lock to the United States, and not to the contractor."[1] *C. 5244, Nov. 5, 1898.*

XLVI. Where the outlet for the post sewer, Fort Leavenworth, was located above the point of intake of the water company that supplied the post with water and it was necessary to extend the sewer to a point below the intake, in order to preserve the purity of the water supply, *held,* that as the proposed extension of the sewer is necessary to protect the post water supply, and as the entire sewer will be the property of the Government, the Secretary of War may properly authorize its construction as a Government undertaking, and that as an incident of such undertaking he may legally authorize an agreement with the water company that in consideration of such construction by the Government and of the benefits resulting therefrom to the water company the price of water to the Government shall be reduced by furnishing water at one-half the contract price until the saving to the Government shall amount to the cost of extension. *C. 26930, Dec. 8, 1910.*

XLVII. The circular of instructions to bidders for certain fire apparatus stated that as early delivery was essential, bidders "will state in their proposals the number of days from date of award that delivery will be made," and the accepted bidder stated that he would begin work "at once after receipt of award," and that the several items would be delivered within a certain number of days "from acceptance of bid." The letter awarding the bid was sent to the lowest bidder January 5, 1910, and to allow time for the receipt of the same the contract was dated January 10, but was not approved until February 4.[2] In the contract it was stated that the several items would be delivered within a certain number of days "from the date of contract." The contractor contended that the time for delivery should be calculated from the date of receipt by him of an approved copy of the contract. *Held* that the supplies should be delivered within the specified number of days after January 10, the date of the contract. *C. 26752, May 23, 1910.*

XLVIII. A contract was entered into for furnishing the Government 10,000 barrels of cement, with the option on the part of the engineer officer in charge of increasing or decreasing the amount by 50 per cent, which would make the minimum amount to be supplied 5,000 barrels, and, as the cement was not passing satisfactory tests,

---

[1] See Atlantic Dredging Co. *v.* U. S., 35 Ct. Cls., 463.

[2] In Cathell *v.* U. S., 46 Ct. Cls. 368, the effect of requiring a contract to be approved by a superior officer was stated as follows: "It has been decided repeatedly by this court that a contract providing for the approval of a superior officer is not a valid subsisting agreement until such approval is made according to the contract. (Snare & Triest Co. *v.* United States, 43 Ct. Cls., 367; Ittner *v.* United States, 43 Ct. Cls., 336; Little Falls Knitting Mill Co. *v.* United States, 44 Ct. Cls., 1.) The Supreme Court in Camden Iron Works *v.* United States (181 U. S., 453), and Monroe *v.* United States (184 U. S., 524), affirmed this doctrine. Neither the contractor nor the defendants incurred liabilities under the contract until it was approved. The defendants were in no position to assert rights under a contract which they neglected to execute. The contract having expressly held in abeyance the date of its validity and lodged in a supervising official the final word of assent or dissent, made the approval thereof a condition precedent to its binding character. The defendants having failed to perform this condition until a time subsequent to the date fixed in the agreement for the performance thereof, waived this clause of the contract and imposed upon the contractors an obligation to complete the work within a reasonable time. The record discloses that they did complete the work within a reasonable time."

the contractor, after 5,000 barrels had been ordered and delivered, was notified "that no further cement would be ordered under the contract." All the cement already ordered and delivered was rejected, and purchases elsewhere were made to the extent of 10,500 barrels at an excess of cost over the contract price. *Held*, that the action of the Government amounted to an election to order the minimum quantity of 5,000 barrels only and that by such action the contract was terminated. Therefore the Government was entitled to recover from the contractor only the loss on 5,000 barrels. *C. 26455, May 9, 1910.*

XLIX. Paragraph 525, Army Regulations (535 of 1910), which provides that "information in regard to supplies or services for which proposals have been invited will be furnished, on application, to all persons desiring it but no person belonging to or employed in the military service will render assistance in the preparation of proposals." *Held*, that this regulation is so general as to include within its scope all persons belonging to the military service. It includes an officer on the retired list. *C. 16166, Nov. 15, 1905.*

L. Paragraph 734, Army Regulations, 1901 (663 of 1910), provides that "disbursing officers will not settle with heirs, executors, or administrators, except by authority of the proper bureau of the War Department, and upon accounts that have been duly audited and certified by the proper accounting officers of the Treasury." *Held*, that this regulation refers only to accounts arising out of dealings with the testator or intestate, and does not refer to a case where a contract was made with an executor or administrator in his official capacity. *C. 16550, July 6, 1904.*

LI. The Army appropriation act for the year ending June 30, 1895 (28 Stat. 233), provided that open-market purchases could be made when the aggregate amount required did not exceed $200, but that "every such purchase shall be immediately reported to the Secretary of War."[1] On the question as to the powers and duties of the Secretary of War in reference to the class of purchases referred to, *held*, that this legislation considered in connection with section 216, R. S., which provides that the Secretary of War "shall perform such duties as shall from time to time be enjoined or entrusted to him by the President relative to military commissions, the military forces, the warlike stores of the United States, or to other matters respecting military affairs," vests in the Secretary the power and the duty to make necessary regulations to carry into effect the legislation in question and in doing so he may legally require proposed open-market purchases to be submitted for his approval.[2] *C. 1112, Mar. 12, 1895.*

LII. Section 3651, R. S., forbids disbursing officers to exchange the funds furnished them, with certain exceptions which do not include foreign coin, and "every such disbursing officer, when the means for

[1] In V Comp. Dec., 259, it was held that the provision of the act of July 5, 1884 (23 Stat. 109), that purchases of supplies for the Quartermaster's and Commissary Departments in cases of emergency "must at once be reported to the Secretary of War for his approval" is directory only, and the failure of certain officers of these departments to make reports of such purchases does not invalidate the purchases or the payments therefor. A provision of the act of Mar. 15, 1898 (30 Stat. 322), requiring open-market purchases to be reported to the Secretary of War, was held by the comptroller in an unpublished opinion to be directory only, and that a failure to make a report did not affect the validity of the purchase. *See C. 6931, Oct. 9, 1899.*

[2] The act of June 12, 1906 (34 Stats. 258), which is still in force specifically authorizes the Secretary to prescribe regulations.

his disbursements are furnished him in gold, silver, United States notes, or national-bank notes, shall make his payments in the moneys so furnished." *Held*, that in view of the above statute a Government contract should not call for payment in foreign coin, but an amendment to the Army Regulations requiring that in contracts in the Philippines calling for the payment of money by the United States, payment should be of a specified amount of United States money, or of so much United States money as might, at the time of payment, be equal to a specified number of Mexican silver dollars at a designated bank, would not be in conflict with the above section of the Revised Statutes. *C. 8393, July 9, 1900.*

LIII. Where communications and other papers are received from business firms with the name of the firm signed by means of a typewriter or rubber stamp, *recommended* that in view of the commercial practice in this regard that such signatures should be accepted without question, except as to formal instruments such as formal vouchers, contracts, bonds, bids, etc. *C. 27933, Mar. 3, 1911.*

LIV. A contract for the making of an 18-inch gun provided for a test to be prescribed by the Secretary of War. In pursuance of this provision the contractor wrote to the Secretary suggesting that tests should consist of the firing of five shots. The Secretary indorsed this request "approved" and referred it to the Chief of Ordnance, who returned it with the statement that five shots was not the usual test to which guns were subjected. Thereupon the Secretary of War wrote to the contractor and, without informing him that he had approved its request, informed him of the reply of the Chief of Ordnance. *Held*, that under the circumstances the Secretary of War could set aside his first action of approval and prescribe whatever test of endurance he might decide to be a proper one. *C. 6945, Aug. 28, 1899.*

LV. Where a contract for repairing a transport required that the contractors should render each morning a sworn itemized statement setting forth in detail the amount and cost of material and labor used in making the repairs during the preceding day, and, after the completion of the work, bills for a large amount that was not included in the daily statements were submitted, *held*, that if the work represented by the bills was actually performed and was covered by the contract the United States is legally bound to pay for it, notwithstanding the failure to include it in the daily statements. *C. 10299, May 4, 1901.*

LVI. Where a bill of sale of a steamship belonging to a partnership was under seal and signed by only one member of the partnership, *held* that the implied authority of a partner to execute contracts for the firm of which he is a member does not extend to contracts under seal, and, therefore, where a partner of a firm signs a paper under seal on behalf of the firm there should be filed with it evidence of an express authority from the other partners to sign for them;[1] but that in a case where such express authority has not been obtained, and it is not convenient to obtain the signature of all the members of the firm, a statement should be obtained, signed by the other members, to the effect that the signing member had authority to execute the bill of sale. Such a statement, taken in connection

[1] See Bonds. I. R.

with the delivery of and the payment for, the vessel, will pass title to the United States. *C. 4611, July 15, 1898.*

LVII. A cylinder installed in a steamer constructed for the Government did not meet the tests required by the contract, but it was probable that the cylinder as installed would continue to prove satisfactory. *Held* that there was no legal objection to accepting the cylinder as installed upon the contractor filing with the department a bond guaranteed by a surety conditioned to replace the cylinder and pay for the hire of a substitute vessel in the event that it was necessary to replace the cylinder within two years and upon the contractor further giving his sole bond to cover the remaining period of the natural life of the cylinder. *C. 26577, Apr. 22, 1910.*

LIX. The officer charged with the letting of a contract wrote to the bidder whose bid had been accepted to appear at the office of the officer to execute the contract and to bring his sureties with him. In response to this direction the bidder appeared and his papers were executed before a notary in the office, and for the services of the notary a charge was made. *Held* that when a contract is awarded to a person he has a right to go before officers of his own choosing (if they are of a class of officers such as the Government requires) and execute his bond and make his affidavit, etc., and submit them to the Government officers for acceptance. The Government officer has not the right to call him before a particular official of his choosing to execute the necessary papers. *C. 167, Aug. 18, 1894.*

LX. A bid for the transportation of troops and supplies to Alaska was received from a company whose road ran partly through Canadian territory. *Held,* as to the transportation of troops, that as the rule of international law in respect to the passage of detachments of foreign troops through friendly territory is that such troops can pass only with the express permission of the friendly nation, a clause should be inserted in the contract requiring the company to obtain the written consent of the Canadian Government to the transportation of United States troops through Canadian territory, and that in case such permission should be refused the troops should be carried to their destination by another route without additional expense to the United States. *Held,* as to the transportation of supplies, that although the rule of international law does not require the consent of a friendly nation to the passage through its territory of supplies belonging to a foreign nation in the ordinary course of commerce, and although duties ordinarily are not levied on such supplies, yet as a matter of precaution a clause should be inserted in the contract that any duties or impositions in the nature of customs dues should be paid by the contractor and should not become a charge against the United States. *C. 14552, Dec. 18, 1903, Jan. 19, 1906.* Where a contract was to be made for the transportation of supplies of the United States through Mexican territory at a time when conditions were somewhat unsettled, *advised* that there should also be inserted in the contract a clause requiring the carrier to make good any loss to the property which might result from political or other disturbances, as well as a clause requiring the contractor to pay any duties or impositions in the nature of customs duties. *C. 28430, May 26, 1911.*

LXI. Blasting carried on in the execution of a Government contract for rock excavation near a military post injured the plastering. It appeared that the blasting was carried on with reasonable care.

Held, that in the absence of facts showing that the performance of the contract by blasting was not contemplated by the parties, or that the contractor assumed the responsibility for damages to the United States as the result of its operations, no recovery could be had against the contractor for damages. *C. 27673, Jan. 23, 1911.*

LXII. In the case of Belknap *v.* Schild (161 U. S., 10), decided by the United States Supreme Court in February, 1896, it was held that where the United States owns a piece of property and is in peaceable possession of it, the Government can not be enjoined by courts and prevented from using it for the Government purposes for which it was intended. So where, after an electric plant had been constructed under contract at Watervliet Arsenal, suit was subsequently brought against the contractor by another electric company for infringement of its patent in the construction of the plant, making the commanding officer of the arsenal a defendant, asking for damages and that the latter be permanently enjoined from using the plant, *held* upon a request by the contractor for final payment, that in view of the decision of the Supreme Court cited, there was no objection to making the payment. *C. 716, Apr. 17, 1896.*

CROSS REFERENCE.

Bonds not under seal.....See BONDS I F 2.
Double aspect of bond.....See BONDS I M 7.
Enlistment contract.....See ENLISTMENT.
PAY AND ALLOWANCES I C 2.
Extension of.....See BONDS I M 6.
Implied.....See CLAIMS VII C 2; 3.
Lease renewed.....See PUBLIC PROPERTY VII A 5.
Modifications.....See BONDS I M 4; 10.
Muster in.....See VOLUNTEER ARMY II E.
Payment for preparation of.....See APPROPRIATIONS V C.
Rescinding of, for fraud.....See PAY AND ALLOWANCES III C 2 c (1).
Supplemental, sureties on bond not bound by.....See BONDS I M 3.
To pay local authorities for inspection services.....See TAX III J.
To carry troops.....See ARMY I G 3 b (2) (*a*) [2] [*a*].

CONTRACT DENTAL SURGEON.

See ARMY I G 3 d (4) (*d*).

CONTRACT SURGEON.

See ARTICLES OF WAR LXXXII A 2.
See ARMY I G 3 d (4) to (5).
Disability of, not basis for retirement.....See RETIREMENT I B 5 b.
Service as, under act of Apr. 23, 1904 (33 Stat. 264).....See RETIREMENT I C 1 d.

CONTRACTOR.

See CONTRACTS.
See EIGHT-HOUR LAW III.
Alien, employment of.....See ALIEN VII.
Bonds of.....See BONDS III TO IV.
Cutting wood on military reservation.....See PUBLIC PROPERTY III F 1.
Penalty envelopes.....See COMMUNICATION II A 2 b.
River and harbor work.....See NAVIGABLE WATERS X C to D.
Title of, in bond.....See BONDS I I.

CONVENING AUTHORITY.

See ARTICLES OF WAR LXXI A to LXXII 1 3 a (1).
See DISCIPLINE III to IV; VII B 2; IX L 2.
Charges, withdrawal of.....See DISCIPLINE II I.
Contempt, action in case of.....See DISCIPLINE VII C 2.
False swearing, action on.....See DISCIPLINE VII F.
Incompetent.....See DISCHARGE XVI G; G 4.
DISCIPLINE XV H 1 to 2.
Of summary court.....See DISCIPLINE XVI E 1 to 9.

COOK.

Paid from company funa.....See PAY AND ALLOWANCES I C 6 b (4).
Soldier detailed as.....See ARTICLES OF WAR XXI B 2.
Volunteers.....See VOLUNTEER ARMY III B 2.

COPIES OF OFFICIAL RECORDS.

See DISCIPLINE XI A 17 a (2) (*a*) [1] [*a*].
Furnished from War Department.....See OFFICIAL RECORDS I A 1 to 3.

COPY OF CONTRACT.

See CONTRACTS XX C 12; 14.

COPYRIGHT.

I. AUTHOR OR PROPRIETOR ALONE CAN COPYRIGHT.

I. The author or proprietor of a literary work is the only one who can legally copyright it, and he has the exclusive right to do so.[1] *Held* that a retired Army officer who had purchased a set of electrotype plates of the Drill Regulations from the Public Printer was not authorized to copyright them, as he was not the author and did not become so by making an "abridgment."[2] *P. 50, 350, 373, Nov. 25 and Dec. 1, 1891. Held* that an official of the War Department could not copyright in his own name a compilation of facts derived from records the property of the United States. *P. 43, 294, Oct. 25, 1890. Held* that an officer may not copyright a book which he prepares under orders from competent authority and which, after submission to a board of officers and a slight revision, is approved by the Secretary of War for publication to and use by the Army.[3] *C. 3433, Aug. 17, 1897.*

CROSS REFERENCE.

By officer.....See ARTICLES OF WAR LXII D.

CORAM NON JUDICE.

Discharge by United States Commissioner..See DISCHARGE XVI D 1.

CORONER.

Fees of.....See CLAIMS XII O.
Inquest by.....See COMMAND V A 7.

---

[1] Drone on Copyright, 324; sec. 4952, R. S.; and sec. 1, c. 565, act of Mar. 3, 1891.
[2] Gray *v.* Russell, 1 Story, 11; Drone on Copyright, 158, also see sec. 52 of the public printing and binding act of Jan. 12, 1895 (28 Stat., 608).
[3] Wheaton *v.* Peters, 8 Peters, U. S., 591; American and English Enc. of Law, Vol. IV, pp. 154, 158, first edition.

CORPORATIONS.

Bonds of.....See BONDS I G to H; IV G; J.
Foreign.....See BONDS V I; J.
Officer may belong to.....See CONTRACTS XV A 5.
Post exchange is not.....See GOVERNMENT AGENCY II A 2.
Stockholders as sureties.....See BONDS I M 13.

CORPS COMMANDER.

As convening authority.....See ARTICLES OF WAR LXXII D 1.

CORPUS DELICTI.

Proof of.....See DISCIPLINE XI A 7 b.

CORRESPONDENCE.

See COMMUNICATIONS.

COUNSEL.

Assignment of.....See DISCIPLINE VII D.
Assistant to judge advocate.....See DISCIPLINE IV I 1; 2.
Continuance to secure.....See ARTICLES OF WAR XCIII A 1.
Examining board.....See RETIREMENT I B 6 a (1).
General court-martial.....See COMMAND V A 5.
DISCIPLINE V. G to H.
In absence of accused.....See DISCIPLINE VIII H 2.
Retired officer as.....See RETIREMENT I H 1.
Right to.....See DISCIPLINE XV B.

COURT OF INQUIRY.

See ARTICLES OF WAR CXV A; B; CXIX A; B; CXXI A.
Juridiction of.....See DISCIPLINE XVIII B.
Opinion by.....See ARTICLES OF WAR CII G.
Retired officers as members.....See RETIREMENT I K 2 e.

COWARDICE.

Punishment for.....See ARTICLES OF WAR (100) C A; B.

CRIME.

Charging of.....See DISCIPLINE II D 19.

CRIMINATING EVIDENCE.

By witness.....See DISCIPLINE X H 1; 2
By accused.....See DISCIPLINE XI A 14 b; b (1).

CRITICISM.

Of officer.....See ARTICLES OF WAR LXII C 1; D.

CROPS.

Claim for damage to by soldiers.....See CLAIMS II; IV.
Damage to, during State encampment.....See MILITIA VI B 1 e (6).

CUBA.

Extradition from.....See EXTRADITION IV.
Fifty-fourth article of war enforcible in.....See ARTICLES OF WAR, LIV G.
Intervention in.....See WAR I C 8 c (1) to (2).
Naturalization.....See ALIEN III.
Officer holding civil office in.....See OFFICE IV A 2 e (6) (*a*).

CUMULATIVE BONDS.

See BONDS II B.

CUSTOM OF THE SERVICE.

Accuser remaining in court room.....See DISCIPLINE IV K.
Ball and chain punishment.....See DISCIPLINE XII B 3 h.
Challenge by judge advocate.....See DISCIPLINE IV O.
Charges.....See DISCIPLINE II D 8 a.
Clothing: Issues of to prisoners.....See PAY AND ALLOWANCES II A 3 a (3) (*a*).
Colleges: Issue of arms to.....See MILITARY INSTRUCTION II B 2 a.
Considered by courts.....See DISCIPLINE V G 4.
Constructive pardon.....See ABSENCE II B 7.
Delegation of authority.....See COMMAND VI A 1 a.
DISCIPLINE I E 1.
Discretionary punishment.....See DISCIPLINE XII B 2 a to e.
Judge advocate advising court.....See DISCIPLINE IV C 1.
Military commission.....See WAR I C 8 a (3) (*a*).
Notice of discharge.....See DISCHARGE XVII D 1.
Pass.....See ABSENCE I C 1.
Rank: date of.....See RANK I B 1 b.
Receipt of orders.....See COMMUNICATIONS I B 1 a.
Recess of court.....See DISCIPLINE XIII F.
Relief of officer from duty.....See COMMAND V A 1 a.
Remarks by court.....See DISCIPLINE XII C.
Remission.....See PARDON XVI C.
Sentence: adoption of.....See DISCIPLINE XII B 3 a.
Sentence of incapacity to hold office.....See PARDON XVI A.
Sentence of suspension from pay and duty..See COMMAND V A 1 b.
Surrender of bonds by War Department....See BONDS I P.
Three the minimum membership of military commission......See WAR I C 8 a (3) (*d*) [1].
Unauthorized punishments.....See DISCIPLINE XVII B 1 a; c.
Wholly retiring officer.....See RETIREMENT I B 3 c.

CUSTOMS.

Appropriation for paying.....See APPROPRIATIONS XXXIX.
Collection of under military government....See WAR I C 6 f (1).
Commanding general may collect.....See WAR I C 8 a (2) (*c*) to (*d*).
On Government property.....See ARMY I G 3 b (2) (*a*) [2] [*a*]; [*b*].

DAMAGES.

See CONTRACTS XVI C; XIX to XX.
To private property during joint encampment......See MILITIA VI B 2 m; C 1 i; j.

DATE.

Bond.....See BONDS I K to L.
Discharge of sick soldier.....See ENLISTMENT I B 2 i.
Enlistment.....See ENLISTMENT I A 8 to 9.
Forfeiture.....See PAY AND ALLOWANCES III C 1 a (1) (*a*) [1].
Heat and light increased at promotion.....See PAY AND ALLOWANCES II A 1 c (5).
Muster-in.....See VOLUNTEER ARMY II C 1.
Muster-out.....See VOLUNTEER ARMY IV D to E.

Rank, attachment of.....See RANK I B to C.
Relative rank, attachment of.....See RANK II A to B.
Retirement of officer.....See RETIREMENT I A 1 a; D.
Sentence operates.....See PAY AND ALLOWANCES III C 1 b.
Separation from service.....See PAY AND ALLOWANCES I A 1 a.
Suspension after examination.....See RANK V C to D.
Vesting of office.....See OFFICE III A 6 to 7; B 3 to 4.

DEATH.

Of bidder.....See CONTRACTS XI D 1.
Of retired soldier.....See RETIREMENT II F 1.
Procedure in case of.....See COMMAND V A 7.

DEBT

See PRIVATE DEBT.
Due to company fund.....See GOVERNMENT AGENCIES III A to B.
Of post exchanges.....See GOVERNMENT AGENCIES II E to F.
Refusal to pay.....See ARTICLE OF WAR XXI B 1.

DECEASED OFFICER OR SOLDIER.

See PUBLIC PROPERTY V F 1 b (3) (g).
Appointment of deceased officer.....See OFFICE III B 3 a (1).
Burial of retired officer.....See RETIREMENT II.
Claim for pay.....See MILITIA XI Q.
Deserter's release.....See DESERTION XVII D.
Pardon of.....See PARDON II.
Pay due, used to reimburse company fund..See PAY AND ALLOWANCES III B 7 a.
Rank increased of retired officer not authorized.See RETIREMENT I C 2 c.
Responsibility of quartermaster in connection with shipment.See GOVERNMENT AGENCIES IX.
Transportation of.....See APPROPRIATIONS LXIII.

DECLARATION OF WAR.

Not necessary.....See WAR I B 1.
Not necessary in Indian war.....See WAR I A 5 a.

DECREPIT OFFICERS.

See MILITIA IV G.

DE FACTO OFFICERS.

Status of.....See OFFICE V A 6 a.
Vice illegally dismissed officer.....See OFFICE IV E 1 b (1) (a).

DEED.

Acceptance of.....See PUBLIC PROPERTY II A 3.
Cancellation of.....See PUBLIC PROPERTY II A 3
Disposition of land without.....See PUBLIC PROPERTY II B 1.
Execution of, by President.....See ARMY I B 1 a (2).
Execution of, by Secretary of War.....See ARMY I B 2 b (3) (*a*).
Under authority of statute.....See PUBLIC PROPERTY II B 2.
Warranty to land sold by Government.....See NAVIGABLE WATER X F 1

DEFAULT.

On contract.....See CONTRACTS XX C 11.

DEFENSES.

Responsibility for.....See ARMY I B 10.

DEFENSE.

Accused.....See DISCIPLINE V A to I 1.
Conduct unbecoming.....See DISCIPLINE XII A 11 a.
Constructive pardon.....See ABSENCE II B 7.
Desertion.....See DESERTION IX A to O.
Drunkenness.....See DISCIPLINE XII A 9 a.
Embezzlement.....See ARTICLES OF WAR LXII C 2.
DISCIPLINE XII A 12 b.
Sleeping on post.....See DISCIPLINE XII A 10 a.
Statute of limitations.....See ARTICLES OF WAR CIII B.

DELAYED DELIVERY.

See CONTRACTS XIX B.

DELEGATION OF POWER.

By President.....See COMMAND I A.
By Secretary of War.....See ARMY I B 2 e (1).
To accept bonds.....See BONDS II L.
To administer oath.....See OFFICE III A 8 a (1).
To arrest or confine.....See DISCIPLINE I E 1.
To Chief of Engineers under river and harbor act......See NAVIGABLE WATERS V B; X F 2.
To convene court.....See ARTICLES OF WAR LXII E 1.
DISCIPLINE III C 3.
To pardon.....See ARTICLES OF WAR CXII A 1.
To remove wrecks.....See NAVIGABLE WATERS VII A.
To review proceedings.....See DISCIPLINE XIV C.
To sign contracts.....See CONTRACTS I A 2; VI H.

DEPARTMENT COMMANDER.

Assignment to command by.....See COMMAND IV A.
Convening officer.....See ARTICLES OF WAR LXXII A to I 3 a (1).
DISCIPLINE III to IV.
Deposition of.....See ARTICLES OF WAR XCI A 1.
Duty under fifty-ninth article of war.....See ARTICLES OF WAR LIX K.
Jurisdiction over retired enlisted men.....See RETIREMENT II B 3.
Neutrality.....See ARMY II K to L.
Reviewing officer.....See DISCIPLINE XIV to XV.
Summary courts.....See DISCIPLINE XVI F.

DEPARTMENT JUDGE ADVOCATE.

Formulation of charge by.....See ARTICLES OF WAR LXXII I 3 a (1).
Oath administering.....See OFFICE III A 8 to 9.

DEPENDENT PARENT.

Discharge on account of.....See DISCHARGE VI C 1; 2.

DEPORTATION.

Of persons by commanding general.....See WAR I C 8 (2) (*d*).

DEPOSIT.

Attachment of public money in bank.....See PUBLIC MONEY II C 3.
Forfeiture of.....See DESERTION XIV E.
Sentence to, improper.....See DISCIPLINE XII B 4 C.
Soldier's pay.....See PAY AND ALLOWANCES I C 7 to 8.

DEPOSITION.

See ARTICLES OF WAR XCI A to K.
Important officials.....See DISCIPLINE X D 1.
Preparation of.....See DISCIPLINE IV B 3 a (1).
Retiring board.....See RETIREMENT I B 1 c (2).

DEPRIVATION OF PAY.

See PAY AND ALLOWANCES I A 1 b; III to IV.
See DISCIPLINE XII B to C.
See DESERTION V D to F; XIV to XV.

DESCRIPTIVE LIST.

Evidential value of.....See DISCIPLINE XI A 17 a (2) (*b*) [4].
See DESERTION IX B.

DESERTER.

Alien, discharge of.....See DISCHARGE XXVI A.
Arrest of, while on pass.....See ABSENCE I C 1 a; a (1).
Character of.....See DISCHARGE II B 2 a.
Claim for wrongful arrest as.....See CLAIMS II.
Clothing issued to, upon return.....See PAY AND ALLOWANCES II A 3 a (4) (*c*).
Discharged without honor for.....See DISCHARGE III B 5 a.
Draft of.....See ENLISTMENT II F.
Enlistment of.....See ENLISTMENT I A 9 f (2); (5); (8); g (3); h; D 3 b; c (13); (14); (15); (16); (18); (18) (*b*); (*f*); (*h*) (1).
From draft.....See ENLISTMENT II E.
Honorable discharge of.....See DISCHARGE II B 2.
Make good time lost.....See ARTICLES OF WAR XLVIII A to F.
Medical attendance for.....See CLAIMS VIII.
Muster out of.....See DISCHARGE XIII F.
Pardon of.....See PARDON VII B; XII; XIV.
Restoration to duty.....See RESTORATION TO DUTY.
ENLISTMENT I D 3 c (7); (14).
Statement by.....See DISCIPLINE IX I 2.
Status after muster out of organization, United States Volunteers......See VOLUNTEER ARMY IV C 1 a (2) (*b*).
Volunteer dropped as.....See VOLUNTEER ARMY IV D 1 a (5) (*b*).

DESERTER'S RELEASE.

See DESERTION XVII A to H; V F 6.

DESERTION.

I. DEFINED ..... *Page 399*
A. TWO ELEMENTS—EACH MUST BE PROVEN.
B. DOES NOT NECESSARILY INCLUDE ABSENCE FROM POST.
1. Desertion from pass.
C. DESERTION OF PRISONERS.
1. Escape.
2. By enlisting in enemy's army ..... *Page 400*
D. BY PERMITTING ONESELF TO BE DRUMMED OUT.
E. MISBEHAVIOR BEFORE ENEMY NOT ELEMENT OF DESERTION.
II. DESERTERS AT LARGE.
A. MAY NOT RECEIVE PAY IF FRAUDULENTLY SECURES POSITION IN QUARTERMASTER'S DEPARTMENT.

III. APPREHENSION.
A. As Much Force May be Used as is Necessary.
B. Any Forcible Entry into a Private Dwelling that Would be Warranted by State Law Would be Sustained by Federal Courts ..... *Page 401*
C. Once Arrest is Made Police Officer May Take Prisoner Beyond His Jurisdiction.
D. Arresting Officer Need Not Obey a Writ of Habeas Corpus of State Court, But Should Reply, Giving a Reason for Non-compliance.
E. Civilian Official Who Connives at Escape is Liable to Prosecution.
F. Civilians May, Upon Request of the Military, Arrest Deserters.
G. Right of United States Over Minor Deserter is Paramount to Right of Parents.
H. If Evidence Conclusive of Intent Not to Return, Pass Does Not Protect From Apprehension.
IV. EXTRADITION.
A. If Deserter Extradited From Mexico on Other Charges Can Not be Held as Deserter.
B. In Absence of International Convention Deserter Can Not be Arrested as Such in Mexico.
C. No Existing Extradition Treaties With Great Britain in Case of Desertion ..... *Page 402*
V. REWARD.
A. Understanding With Civil Authorities.
1. Appropriation acts do not nullify specific acts for apprehension of deserters.
a. Authority granted to civil officers does not replace authority of military officers to direct arrest by civilians.
B. May be Paid for Delivery of Deserter.
1. When he is charged with desertion ..... *Page 403*
2. Not charged but shown administratively to be a deserter in fact.
3. If convicted of absence without leave only.
4. If tried for absence without leave only.
5. If charge is erroneously made.
6. Desertion established administratively.
7. Even if after delivery, discharged on writ of habeas corpus.
8. To a recruiting officer.
a. If specially authorized.
b. If recruiting officer erroneously releases him..... *Page 404*
9. To an Army detachment.
10. Paid to a civilian official who received his surrender.
11. Paid to Indian police.
12. Paid to an immigration inspector.
13. Paid to a constable even if after delivery at jail sheriff releases deserter.
14. Paid to a civilian.
a. Who arrests deserter on request of the military.. *Page 405*
(1) Nationality of deliverer unimportant.
b. An Indian.
c. A Canadian detective.
d. A scavenger at a post.

V. REWARD—Continued.

B. May be Paid for Delivery of Deserter—Continued.

15. Paid to several who jointly arrest and deliver.
    a. By check payable to them jointly.
16. Paid for a second delivery of the same deserter.
17. Paid for delivery of escaped general prisoner.
18. Paid from "Contingencies of the Army" for delivery; expenses only.
    a. Of deserter and embezzler.
    b. Of deserter delivered by police of Canada..... *Page 406*
    c. Of escaped insane soldier.
    d. Of soldier charged with other offenses.

C. Amount of Reward is That Which is Authorized at the Date of Apprehension.

1. The reward is in full for all services.

D. Stoppage Against Deserters' Pay.

1. Of reward upon conviction.
    a. Of desertion.
    b. Of absence without leave if sentence so directs.
2. Stoppage of reward, of expense of apprehension, etc., and original payment of reward are distinct transactions..... *Page 407*
3. Expense of apprehension and transportation may be charged against a convicted deserter.
    a. Transportation and commutation of rations of self and guard.
    b. Transportation of sergeant sent to identify deserter.
    c. Expenses incurred in arresting wrong man.
4. Expense of returning deserter from place of delivery to proper station not included in reward.
    a. Over shortest usually traveled route..... *Page 408*

E. Stoppage Can Not be Made.

1. If acquitted or conviction disapproved.
2. If acquittal disapproved.
3. Expense of transportation if conviction disapproved.
4. Expense of transportation in execution of sentence.
5. If charge removed as erroneously made.
6. If soldier not a deserter arrested without request.

F. Reward Not to be Paid.

1. For partial performance only..... *Page 409*
2. For merely giving notice of location of deserter.
    a. If he has reenlisted.
        (1) In the Army.
        (2) In the Navy.
        (3) In the Marine Corps.
3. Without delivery.
    a. After apprehension released on writ of habeas corpus.
4. If man has been dishonorably discharged.
    a. Unless by mistake he is still carried on the rolls.. *Page 410*
5. For apprehension of a man discharged without honor for the desertion.
6. If a man has deserter's release.
7. If statute of limitations has run.
    a. Fair remuneration for time and expense may be allowed.
    b. Exception—desertion in time of war.

V. REWARD—Continued.
F. Reward Not to be Paid—Continued.
8. If deserter arrested abroad without authority.
9. If deserter extradited on other charges..... *Page 411*
10. If deserter surrendered.
a. To a recruiting officer and was delivered by the police in whose custody he was placed.
b. To a recruiting officer and while proceeding on Government transportation to a post was arrested.
11. To commissioned officers or enlisted men.
12. To customs officer for apprehension without request.
13. To Idaho justice of the peace for apprehension without request.
14. If evidence of collusion.
15. Where no evidence of desertion..... *Page 412*
16. For suspected naval deserter who is discovered to be Army deserter.
17. If delivered to police on other charges.
18. For arrest of man not charged with desertion and not a deserter in fact.
19. In case of arrest of wrong man no reimbursement for damages and expenses incurred by the arresting officer.
20. If deserter himself gives notice.
a. To a policeman who arrests him.
b. To military authorities by letter..... *Page 413*
VI. REENLISTMENT.
A. Of Deserter Restored to Duty Without Trial.
B. Policy in Handling Fraudulent Enlistment of Deserters.
C. The Draft of a Deserter is Legal.
D. Secretary of War May Decide Deserter's Service Has Been Honest and Faithful for the Purpose of Reenlistment.
VII. UNDER MILITARY CONTROL.
A. Should be Taken up as a Private.
1. Case of a first-class private, Engineer Corps,
2. If insane (not in line of duty) when delivered should be discharged without honor.
VIII. STATUTE OF LIMITATIONS. (See One Hundred and Third Article of War.)
IX. EVIDENCE OF.
A. Charge is Not.
B. Notation on Records..... *Page 414*
C. Report of Adjutant General Containing Extracts from Records.
D. Entry in Prison Report.
E. First Sergeant's Statement That Man is a Deserter.
F. Entry on Rolls "Dropped for Desertion."
G. Desertion from Marine Corps.
H. Date of Enlistment.
I. Upon Enlistment Was Unapprehended Deserter
K. Illtreatment, Poor Food, etc.
L. Homesickness.
M. Called to Germany for Military Duty.
N. Restored to Duty Without Trial..... *Page 415*
O. A Volunteer Not a Deserter After Volunteer Army Disbanded.

X. PUNISHMENT.
A. Sections 1996 and 1998, R. S., Unduly Severe for Time of Peace.
B. Evidence of Previous Desertion Not Limited to Current Enlistment.
C. Confined in Penitentiary.
1. Convicted of desertion only, may not be.
2. Convicted also of other offenses also, may be.
D. Desertion in Time of War but Trial in Time of Peace—Punishment May Not Exceed Limit Fixed in Executive Order.
XI. LESSER INCLUDED OFFENSE.
XII. RESTORATION TO DUTY WITHOUT TRIAL.
A. No Legal Objection if Deserter Surrenders..... *Page 416*
1. No legal objection if deserter fraudulently enlists.
B. Application Should be by Company Commander.
XIII. MAKING GOOD TIME LOST. (See Forty-eighth Article of War.)
XIV. FORFEITURES.
A. Of Pay and Allowance.
1. No service, no pay.
2. Conviction disapproved on ground that evidence did not sustain charge—no forfeiture.
3. Restoration to duty without trial.
4. Discharged without honor..... *Page 417*
5. Conviction disapproved, no reason given—question of forfeiture settled administratively.
6. Acquitted—no forfeiture.
7. Removal of charge removes liability to forfeiture.
B. Of Rights of Citizenship and Incapacity to Hold Office.
1. Philippine scout does not forfeit citizenship..... ..... *Page 418*
C. Private Money Not Forfeited.
D. Insane Deserter Does Not Suffer Forfeiture.
E. Deposits Forfeited.
F. Balance in Deserter's Favor After Settlement Can Not be Used to Pay Debt to Company Fund.
XV. PARDON.
A. Can Not Remove a Charge of Desertion.
B. By Proclamation on Condition of Return to Service.
1. A deserter of two offenses returned and finished one enlistment—pardoned..... *Page 419*
2. Proclamation, March 11, 1865, applies to men arrested.
3. No amnesty proclamation in force.
C. Pardon Not Extended to Deserters at Large
D. Restoration to Duty Without Trial is Constructive Pardon.
E. Practice to Restore Citizenship to Convicted Deserter Whose Conduct in Civil Life Has Been Good.
1. Should submit certificates from reputable citizens.... *Page 420*
F. Soldier Convicted of Desertion but Retained in Service Should Apply for Pardon.
XVI. REMOVAL OF CHARGE OF DESERTION.
A. Secretary May Remove Charge.
1. He may decide a deserter's service to be honest and faithful for the purpose of reenlistment. (*See* VI D *ante*.)
B. By an Honorable Discharge.
C. Because Erroneously Made.
1. Prisoner of war.
2. Insane soldier ..... *Page 421*

XVI. REMOVAL OF CHARGE OF DESERTION—Continued.
C. Because Erroneously Made—Continued.
3. Procedure in removing charge.
4. Soldier on furlough dropped as deserter due to failure of mails.
5. Soldier on pass injured and put in hospital.
6. Soldier furloughed by mistake.
D. Charge Removed Under Special Act of Congress.
1. Act of March 2, 1899.
a. Charge that was disposed of when law passed can not be removed.
b. When disposed of since can not be removed..... *Page 422*
c. Service must have been honest and faithful.
d. Charges that can be removed are not limited to those made before May 1, 1865.
e. After desertion, enlistment in Navy can not be held to be a gratuity.
f. Not removed if deserted while under charges .... *Page 423*
g. An enrolled man did not meet his draft but enlisted elsewhere as a volunteer—not a deserter.
2. Act of May 17, 1886.
a. Purpose of act to change status from that of deserter to that of soldier honorably discharged.
E. Restoration to Duty Without Trial Does Not Operate as an Acquittal to Remove Charge.
F. Finding of Not Guilty by an Illegal Regimental Court-Martial Does Not Remove Charge of Desertion.
XVII. DESERTER'S RELEASE.
A. Intended for Men in Whose Favor One Hundred and Third Article of War Has Run.
1. After return to military control One Hundred and Third Article does not run ..... *Page 424*
B. A Pardoned Dishonorably Discharged Soldier Not a Subject for Release.
C. Designed for Persons in Service.
D. Not Intended for Issue to Deceased Persons.
E. Not Intended as a Discharge from the Army.
F. Not Given for Desertion in Time of War.
G. Must be Prepared so as to Show That it is Not a Discharge.
H. Procedure to Obtain ..... *Page 425*
XVIII. DESERTION IN TIME OF WAR.
A. Desertion Before Exchange of Ratifications.
B. During War With Foreign Enemy, Time of War at Home.
XIX. RESPONSIBILITY FOR GOVERNMENT PROPERTY.
A. Acquittal of Desertion Does Not Relieve from Responsibility.
XX. OFFICER.
A. An Officer Absconded to Canada.
B. An Officer Went to Place Far from the Place He Was Authorized to Visit.
C. Effects of Deserted Officer.
D. No Court Can Review Action of President in Dropping Officer as a Deserter.
E. After the President Has Dropped an Officer the Statute of Limitations Does Not Run ..... *Page 426*
F. Not Entitled to Trial Under Section 1230, Revised Statutes.

XXI. CIVIL EMPLOYEES. (See CIVIL EMPLOYEES.)

A. CAN NOT BE DESERTERS.

XXII. RUNNING AWAY OF RECRUIT.

A. LIABLE FOR EMBEZZLEMENT IN VIOLATION OF SECTION 5439, R. S.

I. The offense of desertion is committed by an officer or enlisted man who absents himself without authority from the military service with the intent not to return thereto.[1] The offense becomes complete when the intent not to return has been fully formed, and the officer or enlisted man has committed an overt act looking toward his separation from the military service. *C. 15257, May 9, 1910; 9787, Feb. 7, 1901.*

I. A. Both elements of desertion—i. e., the *fact* of the unauthorized voluntary withdrawal and the *intent* permanently to abandon the service—must be proved. The intent may be inferred, not from the fact of absenting alone, but from the circumstances attending this fact, and the duration of the absence. An unauthorized absence of a few hours may be sufficient evidence of such intent and thus proof of a desertion[2] (*C. 10562, Mar. 13, 1902*), while an absence for a considerable interval, unattended by circumstances indicating a purpose to separate premanently from the service, or to dissolve the pending engagement of the soldier, may be proof simply of absence without leave. Each case must be governed by its own peculiar facts, and no general rule on the subject can be laid down. *R. 8, 109, Mar. 14, 1864; 26, 346, Jan. 6, 1868; 33, 123, July 1, 1872.*

I B. Desertion does not necessarily include the offense of absence from station. Thus *held* that if at one of our large stations an enlisted man should leave his company and barracks and proceed to another barracks at the same station where men are being enlisted for foreign service, and there enlist himself without a discharge from his company, he must be held to be a deserter, even though technically he has not committed the offense of absence from his post or station without leave. *C. 24722, Apr. 5, 1909.*

I C 1. The nature of the offense of desertion is well illustrated in cases of *escape*. The mere fact that a soldier, while awaiting trial or sentence or while under sentence (and not discharged from the service) escapes from his confinement is not *proof* of a desertion on his part, since he may have had in view some minor object, such as the procuring of liquor, etc.[3] But an escape, followed by a considerable absence, especially if the soldier is obliged to be forcibly apprehended, is strong presumptive evidence of the existence of the intent necessary to constitute the crime. So, though the absence involved may be comparatively brief, the circumstances accompanying the escape or attending the apprehension, may be such as to justify an equally

[1] See sec. 546, Digest of Decisions of 2d Comp., vol. 3.

[2] See cir. 66, War Department, series 1908.

[3] See a case of this nature (an escaping in order to obtain liquor) in G. O. 32, Dept. of the South, 1873; and compare the case in G. O. 87, id., 1872, in which a conviction of desertion is disapproved on the ground that the evidence showed "merely an escape from the guardhouse without intention to leave the service or the vicinity of the post." And see in this connection Samuel, 324, where to be "discovered," after a short absence, "in the pursuit of some accidental temporary object, though perhaps otherwise illicit," is instanced as not indicating an intent by the offender "to sever himself from the service."

strong presumption. An escape, with intent not only to evade confinement, but to quit the service, while the party is held awaiting proceedings for desertion, is of course a second or additional desertion. *R. 31, 282, Apr., 1871; 35, 626, Oct., 1874; 37, 291, 597, Jan. and June, 1876; 38, 43, Apr., 1876; 41, 119, Feb., 1878; 53, 35, Sept., 1886.* Of course an escape from legal military custody is always an *offense*, and the soldier who has escaped may (where his act does not amount to desertion) be brought to trial for such offense as "conduct to the prejudice of good order and military discipline." *R. 10, 574, Nov., 1864.* It need hardly be added that an escape from imprisonment by a military convict can not constitute a desertion, or other offense, the party at the time of escape being no longer in the military service.[1] *R. 35, 626, Oct., 1874; C. 16395, May 26, 1904.*

Undoubtedly, in the great majority of cases, escape is desertion.[2] *C. 12785, Jan. 27, 1902.*

I C 2. Enlisting in the enemy's army by a prisoner of war is desertion unless submitted to as a last resort to save life or to escape extreme suffering or to obtain freedom. Thus *held* in a case of a United States soldier who entered the service of the enemy from Andersonville, Ga., in the Civil War, that the burden of proof was on him to establish that he resorted to such enlistment with design of effecting his escape and rejoining his own army; and that his abandoning such enlistment and coming within our lines at the first opportunity was material evidence of such a design. *P. 43, 144, Oct., 1890; 51, 100, Dec., 1891.*

I D. A soldier during the Civil War permitted himself to be drummed out of the service pursuant to the illegal sentence of a court composed of enlisted men. *Held* that he was technically a deserter. *C. 2213, May 9, 1896; 16113, Apr. 14, 1904.*

I E. *Held* that misbehavior before the enemy may be evidence of desertion, but that it is not an essential element of it. *C. 9787, Feb. 8, 1901.*

II A. A deserter at large obtained employment in the Quartermaster's Department as a teamster by representing himself to be a citizen. It was discovered that he was a deserter at large. *Held* that he was not competent to enter into contractual relations of any sort with the United States, and this is especially true when his undertaking was in direct conflict with the terms of his enlistment contract, which was in full force at the date of his employment, and that as his employment as a teamster was obtained by fraudulent concealment of the fact that he was a deserter no benefit can accrue under his employment and he is not entitled to pay for services rendered in that capacity. *C. 14017, Jan. 22, 1903.*

III A. Peace officers generally are authorized by law to arrest deserters and to restore them to the proper military authority. *Held* that if in making such arrest resistance is encountered, the officer has the right to use such force as is necessary to overcome such resistance, but no more. *C. 23930, Oct. 3, 1910.*

---

[1] But see now sec. 5 of the summary court act, approved June 18, 1898 (30 Stat., 484), which subjects general prisoners to punishment for violating the Articles of War.

[2] See cases published in G. C. M. O. 14, H. Q. A., 1880; do. 40, 44, id., 1882; do. 31, id., 1884; do. 279, Dept. of the East, 1885; do. 11, Dept. of the Mo., 1885; do. 18, Dept. of Cal., 1877; do. 125, Dept. of the Dakota, 1882; do. 54, id., 1885; do. 5, Dept. of the Platte, 1873; do. 35, Dept. of Texas, 1875; do. 54, id., 1885.

III B. On the question of whether or not a forcible entry of a dwelling can be made by a peace officer to arrest a deserter, *held* that any entry which would be warranted by the law of a State would in all probability be sustained by the Federal courts. *C. 23930, Oct. 3, 1908; 395, Oct., 1894.*

III C. Certain peace officers designated by the statutes are empowered to make arrests in their own jurisdictions. *Held* that once the arrest is accomplished, all question of locality in so far as the delivery of the prisoner is concerned falls—and the prisoner may be delivered at any designated point regardless of State or other jurisdictional lines.[1] *C. 23930, Oct. 9, 1908.*

III D. In view of the requirements of section 2 of the act of June 18, 1898 (30 Stat. 484), authorizing civil officers to arrest deserters, etc., *held* that the officer making the arrest, in the event of a writ of habeas corpus being issued by a State court, should make return to the court justifying his custody in the operation of that act. *C. 17327, May 5, 1906; 23930, Oct. 9, 1908.*

III E. Where a civil official, having made an arrest of a deserter, concealed him from the military authorities and afterwards permitted or connived at his escape, *recommended* that the Attorney General be requested to instruct the proper United States district attorney to initiate proceedings under section 5455, R. S. *R. 41, 481, Dec., 1878; C. 561, Oct. 26, 1894.*

III F. The statute conferring authority upon civil officers to apprehend and deliver deserters should not be construed as taking away the authority for their apprehension by a citizen under an order or direction of a military officer,[2] 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. Under this view, the arrest of a deserter by a citizen is legal if made pursuant to the order or request of proper authority, but not otherwise. *C. 17327–A, July 20, 1909.*

III G. 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.[3] *P. 58, 287, Mar., 1893; C. 1967, Jan., 1896; 2872, Jan. 14, 1897; 4167, May 23, 1898; 4244, June 2, 1898; 12296, Mar. 25, 1902; 19266, Feb. 16, 1906; 2561, Aug. 28, 1906; 2870, Jan. 14, 1907.*

IV A. A soldier who had been extradited from Mexico solely on a charge of theft, *held* not liable to trial as a deserter; the principle that a person extradited on account of a certain alleged offense is exempt from trial on any other criminal offense[4] being deemed applicable where the other offense is a military one. *P. 37, 495, and 38, 167, Jan., 1890; 49, 62, Sept., 1891; C. 5361, Oct. 2, 1911.*

IV B. A deserter from our Army can not, in the absence of any international convention allowing it, legally be arrested as such in Mexico and brought thence into Texas. *P. 39, 458, Mar., 1890.*

---

[1] See Cir. 87, War Department, Oct. 23, 1908, which publishes the above opinion.

[2] See Kurtz *v.* Moffitt (115 U. S., 505).

[3] *In re* Cosenow, 37 Fed. Rep., 668; *In re* Kaufman, 41 id., 876. And compare *In re* Grimley, 137 U. S., 147, and *In re* Morrissey, id., 157.

[4] U. S. *v.* Rauscher, 119 U. S., 407.

IV C. The existing extradition treaties with Great Britain contain no provision for the extradition of a deserter or for the surrender of an escaped convict. *P. 53, 446, May, 1892; C. 15491, Mar. 30, 1909.*

V A. The United States has entered into an understanding with the civil authorites of the country at large by which, if the latter apprehend a deserter and surrender him at a military post, they will be rewarded.[1] This law is not coupled with the requirement that the reward shall be contingent upon the conviction before a court-martial of the soldier surrendered, nor upon any other contingency, but simply demands that where there is a good, honest belief on the part of the person making the arrest, and this belief is founded on sufficient evidence to warrant the arrest being made, there should be no quibbling as to technical reasons for the failure on the part of the United States to meet its obligation. With this should not be confounded the question of whether the $50 paid as a reward shall be charged to the United States or charged to the deserter. *C. 17327-A, Aug. 16, 1909, Oct. 16, 1910, Oct. 18, 1910, and Oct. 31, 1910.*

V A 1. The clause in successive acts of appropriation for the support of the Army authorizing the payment of rewards to civil officers or citizens does not nullify the requirements of permanent legislation as found in section 6, act of June 18, 1898 (30 Stat. 484), and in the act of June 16, 1890 (26 Stat. 157). *C. 17327, Jan. 2, 1906.*

V A 1 a. *Held,* that the statutes which confer authority upon civil officers to apprehend and deliver deserters should not be construed as taking away the authority for their apprehension under an order or direction of a military officer, and that these statutes should be treated as providing additional means of securing the arrest of deserters by conferring authority upon civil officers to apprehend them without military order, leaving the former method still legal.[2] *C. 17327, Jan. 7, 1905; 18677, Nov. 7, 1905.*

V B. The law and the regulations evidently contemplate the apprehension and delivery to the military authorities of deserters who are at large, viz, are fugitives from military custody. *C. 16201, Apr. 26, 1904; 17327, Sept. 21, 1908.*

---

[1] The laws under which the reward is paid are as follows: Sec. 3, act of June 16, 1890 (26 Stat. 158): "That the United States marshals and their deputies, sheriffs, and the deputies, constables, and police officers of towns and cities are hereby authorized to apprehend, arrest, and receive the surrender of any deserter from the Army for the purpose of delivering him to any person in the military service authorized to receive him." And sec. 2, act of Oct. 1, 1890 (26 Stat. 648): "That it shall be lawful for any civil officer having authority under the laws of the United States or of any State, Territory, or District, to arrest offenders, to summarily arrest a deserter from the military service of the United States and deliver him into the custody of the military authority of the General Government." Sec. 6, act of June 18, 1898 (30 Stat. 484): "That it shall be lawful for any civil officer having authority under the laws of the United States, or of any State, Territory, or District, to arrest offenders, to summarily arrest a deserter from the military service of the United States and deliver him into the custody of the military authority of the General Government." And the item that runs in the annual appropriation act reads as follows: * * * "for the apprehension, securing, and delivering of deserters, including escaped military prisoners, and the expenses incident to their pursuit, and no greater sum than fifty dollars for each deserter or escaped military prisoner shall, in the discretion of the Secretary of War, be paid to any civil officer or citizen for such services and expenses; * * * Act of Mar. 3, 1911 (36 Stat. 1048).

[2] See acts of June 16, 1890 (26 Stat. 157), and June 18, 1898 (30 Stat. 484), and Apr. 23, 1904 (33 Stat. 269).

V B 1. *Held* that as the word "deserters" as used in the appropriation act which makes provision for the apprehension and delivery of deserters has been construed to include soldiers charged with desertion, that the word is not limited to soldiers who may subsequently be convicted of that offense, and that the reward can legally be paid for the apprehension and delivery of the soldier *charged* with desertion, although he may subsequently be discharged without trial. *C. 8273, May 24, 1900; 11025, Sept. 4, 1901; 11239, Sept. 20, 1901; 15284, Sept. 24, 1903; 17327, Sept. 29, 1911.*

V B 2. A reward may legally be paid either where the soldier has been charged with desertion, or, though not charged with desertion, it can be determined as an administrative question that the soldier was a deserter in fact. Where a soldier has not been charged with desertion, a person apprehending him as such, in order to claim the reward, must be able to show that he was a deserter in fact.[1] *C. 17327, Apr. 29, 1907.*

V B 3. A police officer arrested and delivered a man who was charged with desertion. *Held*, that the reward was properly paid to him even though subsequently the man was convicted of absence without leave only. *C. 10190, Apr. 10, 1901; 14557, Apr. 29, 1903; 18892, Dec. 5, 1905; 17327, Feb. 23, 1906, Nov. 6, 1907, and July 13, 1908.*

V B 4. When a reward is offered for a soldier who is claimed to be absent in desertion and who is subsequently apprehended and tried for absence without leave; *held*, that the officer effecting the apprehension is entitled to the payment of the reward as, for purposes of apprehension, the absentee was a deserter in fact. *C. 12986, July 21, 1902; 5432, Dec. 5, 1898.*

V B 5. A deserter was arrested and delivered. *Held*, that the reward was properly paid even though the charge was subsequently set aside as having been erroneously made. *C. 17327, Nov. 28, 1908.*

V B 6. *Held*, that in order to entitle an officer to the reward it is not necessary that the fact of desertion should be found by a court-martial, but that it is sufficient if the Secretary of War, on the facts presented, decides that the soldier apprehended and delivered was actually a deserter. This is a question of civil liability and a court-martial is organized to enforce military discipline and not to determine such questions, but its verdict may be made the basis of a determination of such questions by the department. *C. 11285, Sept. 25, 1901, and Mar. 30, 1903; 11510, Nov. 14, 1901; 18524, Sept. 8, 1905; 17327 B, Jan. 13, 1911.*

V B 7. The fact that a deserter was discharged after apprehension and delivery on habeas corpus proceedings on the ground of minority at enlistment, is not ground for refusal of payment of reward for his apprehension. *C. 3717, Dec. 8, 1897; 13908, Jan. 15, 1903; 19635, May 3, 1906.*

V B 8 a. Claim was made for reward for the apprehension and delivery to a recruiting officer of a deserter.[2] *Held*, that while a subordinate officer would not be authorized to pay the reward unless delivery was made as required by the regulation, the Secretary of War could legally waive strict compliance therewith, as the act of appropriation does not specify the place of delivery, and *recommended*

[1] VI Comp. Dec., 743.
[2] See par. 123, A. R., Ed. 1910.

that the authorized reward be paid less the expense incurred by the United States in sending the deserter to the nearest military post. *C. 17327, June 10, 1907, Oct. 29, 1907, Feb. 21, 1908, July 28, 1908, Dec. 15, 1908, and Feb. 20, 1909.*

V B 8 b. *Held* that where a deserter was delivered to a recruiting officer who, on erroneous information, released him, the person making the delivery was none the less entitled to the reward, if the delivery was made in accordance with the regulations. *C. 17327, Feb. 25, 1907.*

V B 9. Where a recruiting officer was informed by the deserter's company commander of the place where the deserter could be found, and employed a policeman to go with him to make the arrest, *held*, that as the preliminary work of locating the deserter was done by the military authorities, and the only part performed by the claimant was the actual arrest, confinement in the city, and subsequent delivery to a guard sent from the military post, the policeman was entitled to a part of the reward only, to be determined under the law and regulation, by the Secretary of War; and that $25 would be ample to cover the portion of the services performed by the claimant including his expenses.[1] *C. 17327, Jan. 20, 1908, and Feb. 18, 1908, and May 1, 1908.*

V B 10. Where a deserter was not arrested by, but *surrendered* himself to, the civil official, who in good faith took him into custody and securely held and duly delivered him, *held* that the reward was properly payable.[2] *R. 52, 293, June, 1887; P. 58, 134, Feb., 1893; C. 1290, Apr. 23, 1895; 9196, Oct. 30, 1900; 16030, Mar. 16, 1904; 16116, Apr. 1, 1904; 18409, Aug. 11, 1905; 18727, Oct. 17, 1905; 17327, Nov. 28, 1908, and Jan. 27, 1910.*

V B 11. *Held* that a member of the Indian police, established under the regulations of the Indian Office, was a civil officer having authority to arrest offenders, and was entitled to the reward for the arrest of a deserter.[3] *C. 346, Oct. 4, 1894.*

V B 12. An immigration inspector is vested, by the act of May 6, 1882 (22 Stat., 58), with authority to "arrest offenders," within the meaning of section 6 of the act of June 18, 1898 (30 Stat. 484). *Held*, in a particular case, that such an inspector was entitled to receive a reward for the delivery of a deserter. *C. 17327, Jan. 2, 1906.*

V B 13. A constable notified The Adjutant General of the whereabouts of a deserter. The Adjutant General advised the constable that delivery of the deserter at a designated place would be accepted, and that a detachment would be sent to the place for the purpose of receiving the deserter. The constable arrested the man and held him in custody at the designated place. The sheriff, however, acting on the advice of the attorney of the Commonwealth, released the deserter, and, as a result, delivery could not be made when the detachment arrived. *Held* that as the constable had done all that was required of him, the subsequent release of the deserter by the unlawful act of the sheriff should not be allowed to deprive the constable of his right to the reward, and that he was entitled to the reward. *C. 561, Mar. 6, 1911.*

---

[1] In this case the Assistant Comptroller held that the payment of the account was authorized.

[2] Circ. No. 1, A. G. O., series 1886.

[3] See Circ. 12, A. G. O., 1894, revoking par. 1, Circ. 20 of 1893.

V B 14 a. *Held* that prior to June 16, 1890, a police officer or private citizen had no authority as such to arrest deserters without an order or request of a military officer,[1] but that the acts of June 16, 1890 (26 Stat. 157), and June 18, 1898 (30 Stat. 484), conferring on officers authority to arrest deserters, should not be regarded as taking away the right of a civilian or citizen to arrest a deserter pursuant to the order or request of a military officer.[2] *Held* further that the reward could legally be paid to a citizen or civilian making an arrest under such order or request. *R. 33, 414, Oct. 16, 1872; P. 27, Sept. 5, 1888; C. 12376, Apr. 12, 1902; 17327, Jan., 7 1905, Aug. 2, 1905, Sept. 6, 1905, Nov. 24, 1905, and July 20, 1909; 17327A, Dec. 4, 1908.*

V B 14 (*a*) (1). The reward for the apprehension of a deserter is payable to any civil officer or citizen who delivers such deserter into military custody, independently of the nationality of the person making the apprehension and delivery. *C. 17327-A, Dec. 4, 1908.*

V B 14 b. *Held* that the term "citizen" as used in the appropriation act which carries a reward for the apprehension of deserters is synonymous with the word "civilian" and is intended to describe a person who is not in the military service, and that the reward could therefore legally be paid to an Indian making such arrest pursuant to request of military authority. *C. 17327, Oct. 23, 1905.*

V B 14 c. Similarly *held* that a reward could be paid to a Canadian detective. *C. 17327, Dec. 4, 1908.*

V B 14 d. As the current appropriation act provides "Reward shall be paid to any officer or citizen," *held* that, as citizen is here used synonymously with civilian, where there is no fraud or collusion it may be paid to a scavenger at a military post, notwithstanding the fact that he is there employed. *C. 17327, Aug. 29, 1905.*

V B 15. An offer of reward has been complied with by the joint efforts of several persons. *Held* that they are jointly entitled to the reward.[3] *R. 20, Mar., 1866.*

V B 15 (*a*). A deserter was apprehended and delivered by two men neither one of whom performed the entire service for which alone the reward is payable. *Held* that the check in payment of the reward should be drawn in favor of both men and the division of the reward left to them. *C. 12026, Feb. 6, 1902; 17538, Feb. 14, 1905; 18677, Oct. 7 and Nov. 8, 1905.*

V B 16. A deserter was placed in confinement and a reward paid for his apprehension. Afterwards he escaped from confinement. *Held* that a reward could be paid for his second apprehension, as it was a second desertion. *C. 8654, July 25, 1900; 14781, June 10, 1903.*

V B 17. *Held* that a reward may be paid for the apprehension and delivery of an escaped general prisoner. *C. 15891, Feb. 11, 1904; 7651, Feb. 7, 1900.*

V B 18 a. A deserter at large was also charged with embezzlement of a large amount of Government funds. *Held* that the fact that he was a deserter and that the statutory reward would be paid

---

[1] Kurtz *v.* Moffitt, 115 U. S., 505. See Hickey *v.* Huse (56 Me., 493), in which it was held that provost marshals had the right to arrest deserters and that no warrant was necessary.

[2] See Hutchins *v.* Van Bokkelem (34 Me., 126), in which it was held that a military officer can confine a deserter in a county jail, although the jailer is under no obligation to receive him.

[3] Cyc. 1751–1756.

for his apprehension as such would not preclude the Secretary of War from offering an adequate reward for his apprehension as an embezzler[1] to be paid from the appropriation "Contingencies of the Army."[2] *C. 17327, Aug. 25, 1910.*

V B 18 b. The superintendent of mounted police of British Yukon Territory apprehended a deserter from the American Army and delivered him at Camp Skagway, under pledge from the commanding officer of that camp to pay the costs in addition to the prescribed reward. *Held* that upon approval by the Secretary of War $20 could be paid from appropriation for "Incidental expenses, Q. M. Department" and the balance from appropriation "Contingencies of the Army, 1904."[3] *C. 16578, July 18, 1904.*

V B 18 c. A soldier left his post and was subsequently apprehended and delivered to the military authorities as a deserter by a civil officer. It was supposed that the soldier was a deserter, but upon his return he was adjudged insane. *Held* that the statutory reward could not be legally paid, but advised that the expenses which the officer had incurred be paid him from the appropriation for the contingent expenses of the Army; also that a reasonable amount in addition be allowed him for his services and made a part of the expense of caring for and taking the man to the asylum. *C. 1407, June, 1895; 13776, Dec. 9, 1902; 21117, Feb. 25, 1907.*

V B 18 d. Request was made for the apprehension of a man on account of *other offenses than desertion* and there is no evidence to indicate that he was a deserter in fact. *Held* that the expenses of the officer or citizen making the arrest, together with a reasonable compensation for his time, may be paid from the appropriation "Contingencies of the Army" since the service was actually rendered and the expense incurred upon the request of the military authorities. *C. 17327, Apr. 29, 1907, Mar. 25 and Apr. 8, 1908, Jan. 8, 1909, Nov. 23 and Dec. 10, 1910.*

V C. After a soldier had deserted the amount of reward authorized by law for the apprehension of deserters was changed. *Held* that the reward authorized for his apprehension and delivery was the reward authorized at the date of his apprehension. *C. 994, Feb. 11, 1895; 1076, Feb. 28, 1895.*

V C 1. The reward shall be in full for all services and expenses. *C. 18677, Oct. 7, 1905; 17327–A, Dec. 29, 1908; 17327–B, May 29, 1911.*

V D 1 a. The legal liability imposed upon the soldier by Army Regulations, to have the amount of the reward stopped against his pay, is quite independent of the *punishment* which may be imposed upon him by sentence of court-martial on conviction of the desertion. Such stoppage need not be directed in the sentence; courts-martial indeed have sometimes assumed to impose it, like an ordinary forfeiture of pay, but its insertion in the sentence adds nothing to its legal effect.[4] *R. 12, 326, Feb., 1865.*

V D 1 b. Where a soldier, for whose apprehension as a supposed deserter the legal reward has been paid, is subsequently brought to trial upon a charge of desertion and is found guilty not of desertion but only of the lesser and distinct offense of absence without leave, he

---

[1] See XVI Comp. Dec., 132, Sept. 1, 1909.
[2] See XI Comp. Dec., 124, Sept. 3, 1904, and XVI Comp. Dec., 132, Sept. 1, 1909.
[3] XI Comp. Dec., 124, dated Sept. 3, 1904.
[4] See par. 127, A. R., ed. 1910.

clearly can not legally be held liable for the reward by a stoppage of the amount against his pay [1] unless indeed the sentence of the court expressly *stops* the amount.[2] *R. 26, 347, July, 1868; 27, 255 and 306, Oct., 1868; 31, 468, June, 1871; 34, 533 and 590, Nov., 1873; 42, 315, June, 1879; 43, 222, Feb., 1880; 49, 150, Sept. 1891; C. 6036, June 3, 1893; 11708, July 1, 1902; 12772, July 3, 1902; 13080, Aug. 8, 1902.*

V D 2. The right of a "civil officer or citizen" to the reward for the apprehension and delivery of a soldier charged with desertion accrues when the absentee has been delivered into proper military custody and, where no fraud is alleged, no portion of the sum so paid can be recovered from a *bona fide* payee.

But the original payment of the reward, which is, in its essential elements, a contractual undertaking, and a subsequent stoppage of all or part of the expenses of apprehension, etc., against a soldier are independent transactions; the determination of the stoppage to be made having no necessary connection with the payment of the reward which, in a majority of cases, is a completed transaction when the matter of stoppage is taken up with a view to reimburse the United States for the expenses attendant upon the apprehension of a deserter and his return, in a proper case, to the station of his company. *C. 17327–A, Mar. 22, 1910.*

V D 3. A soldier was tried for desertion, convicted, and sentenced, *inter alia*, to forfeit the cost of his apprehension and transportation. The reviewing authority did not approve that part of the sentence. *Held* that such a provision should not have been incorporated into the sentence, as the obligation to pay the cost of the apprehension and transportation of a deserter does not depend upon incorporation into a sentence to give it life.[3] *C. 5743, Jan. 31, 1899.*

V D 3 a. Paragraph 127, Army Regulations 1910, provides that "a soldier convicted by a court-martial of absence without leave will be charged with the expense incurred in transporting him to his proper station." *Held* that this authorizes a stoppage for transportation and commutation of rations for himself and the guard sent after him. *C. 6068, Mar., 1899; 6375, May, 1899; 7180, Oct., 1899; 9177, Oct., 1900; 19688, May 11 and 29, 1906; 17847, Apr. 19, 1905, Sept. 2, 1908, and June 7, 1911.*

V D 3 b. Where a sergeant was sent to identify a deserter, supposed to be serving under an assumed name in another organization, with a view to the latter's apprehension, *held* that the sergeant was not a "witness" (i. e., at the trial) within the meaning of paragraph 127, Army Regulations 1910, and that therefore the cost of his transportation was, under said paragraph, a proper charge against the deserter as expenses paid for apprehension. *C. 3556, Oct., 1897; 17330, Jan. 4, 1905.*

V D 3 c. Expenses incurred by enlisted men in the pursuit of a particular deserter, and therefore on account of his desertion, may properly be charged against him under paragraph 127, Army Regulations 1910, notwithstanding the fact that the person apprehended as such deserter proved to be the wrong man. *C. 3185, May 5, 1897; 12168, Mar. 10, 1902; 17330, Jan. 4, 1905.*

V D 4. A civil officer arrested a deserter and turned him over to a detachment that was sent in pursuit of him. *Held* that he was

---

[1] This was concurred in by the Attorney General in 16 Op., 474.
[2] See pars. 127 and 128, A. R., ed. 1910.
[3] See par. 127, A. R., ed. 1910.

entitled to the reward. *Held*, further, that the expense of transportation of the deserter from the place of delivery to his station or the place of trial is a distinct charge not included in the reward[1] which will be set against his pay upon conviction of desertion. *C. 3405, July 29, 1897; 17847, June 7, 1911.*

V D 4 a. The requirement of regulations (par. 127, A. R. 1910), that a deserter shall be charged with the cost of returning him to his station, contemplates travel from the place of apprehension or of delivery to military authority to his proper station, and such journey should be made by the shortest usually traveled route. Where a deserter was sent to a place not by such shortest route, *held* that the cost of such a journey is not that contemplated in the regulation, and its apportionment should be determined by the circumstances of the case. *C. 17847, Sept. 2, 1908.*

V E 1. Where a soldier, charged with desertion, is *acquitted*, or where, if convicted, his conviction is *disapproved* by the competent reviewing authority, he can not legally be made liable for the amount of a reward paid or payable for his arrest as a deserter, since in such cases he is not a deserter in law. *R. 26, 347, July, 1868; 30, 47, Sept., 1869; C. 9528, Jan. 3, 1901; 12002, Feb. 1, 1902; 17768, Apr. 25, June 7, 1905.*

V E 2. A soldier was acquitted of the charge of desertion and the acquittal was disapproved by the reviewing authority. *Held*, that he can not legally be made liable for the amount of a reward payable for his arrest and delivery, since in such cases he is not a deserter in law. *P. 36, 259, Nov., 1889; C. 17768, Apr. 25 and June 7, 1905.*

V E 3. A deserter is not chargeable with the expenses of transportation of himself and guard[2] if his conviction has been duly *disapproved;* such disapproval being tantamount to an acquittal.[3] *R. 50, 105, Mar., 1886; C. 2121, Mar., 1896; 9540, Jan. 3, 1901; 12002, Feb. 1, 1902; 12168, Mar. 10, 1902; 12375, Apr. 23, 1902; 17335, Jan. 4, 1905; 17768, Apr. 1 and 25, and June 17, 1905.*

V E 4. The *expense of the transportation* of a convicted deserter, incurred in the course of the execution of his sentence, is not chargeable against the deserter under par. 127, A. R., 1910, but must be borne by the United States. *P. 52, 21, Feb., 1892.*

V E 5. The stoppage against the pay of a soldier of the amount due as a reward for his apprehension is authorized by regulations (*a*) upon conviction of desertion (par. 125 of 1905, 126 of 1908, 127 of 1910); (*b*) upon restoration to duty without trial, the desertion being admitted (pars. 125–130 of 1905, 126–130 of 1908, 127 to 131 of 1910); and (*c*) upon being brought to trial for desertion and convicted of absence without leave, *if the sentence direct the stoppage* (par. 126 of 1905, 127 of 1908, 128 of 1910). *Held*, where the charge was dropped as having been erroneously made, although no formal order was issued, that the stoppage should be removed as unauthorized by regulations; but that the soldier should have been brought to trial for the desertion, and if convicted of absence without leave, the facts would have justified the court in directing the stoppage. *C. 17327, July 18, 1907.*

V E 6. Where a soldier was arrested by a peace officer in the mistaken belief that he was a deserter, and expenses were incurred for

---

[1] This is incorporated in par. 127, A. R., ed. 1910.
[2] See par. 127, A. R., ed. 1910.
[3] See 26 Op. Atty. Gen., 239.

his support without the request of the military authority; *held* that such expenses can not lawfully be stopped against the soldier's pay. *C. 19688, May 29, 1906.*

V F 1. Under the law of contracts the offer of a reward is an offer of a promise for an act and becomes binding upon substantial performance of the act. *Held* that a part performance only gives no claim for compensation.[1] *R. 20, Mar., 1866; 17327A, Dec. 17, 1908.*

V F 2 a (1). No reward will be paid where the deserter, at the time of arrest, "is serving in some other branch of the Army," etc.[2] Thus *held* that the reward was not payable for the arrest of a deserter from the Cavalry, who, subsequent to his desertion, had enlisted in an Infantry regiment in which he was serving at the date of the arrest. *P. 34, 298, Aug., 1889; 65, 235, June, 1894. C. 16201, Apr. 26, 1904; 18694, Oct. 10, 1905; 18428, Aug. 14, 1905.*

V F 2 a (2). *Held* that in the case of information furnished without request by a detective agency to the effect that a deserter from the Army was serving on board a naval vessel, no reward could be paid and no allowance could be made to the person furnishing the information for compensation for time consumed and expenses incurred in the search for the deserter. *C. 17327, May 6, 1907, and June 3, 1907.*

V F 2 a (3). A detective gave information that a deserter from the Army was serving as an enlisted man in the Marine Corps, stating that he could not arrest him without an order from the Secretary of the Navy or of War, and requesting that he be paid the reward of $50. *Held,* that the deserter had contracted a new obligation resulting in a new status, which is not void but voidable only, and that a civil officer can not lawfully take him out of such service and deliver him to be punished for his previous desertion. *Held,* further, that the reward could not be paid. *C. 18694, Oct. 11, 1905.*

V F 3. *Held,* that the reward was not due merely on the apprehension of a deserter, but that there must also be a delivery as prescribed by the regulation "to an officer of the Army at the most convenient post or recruiting station." *R. 28, 529, Apr., 1869. C. 15142, Sept. 18, 1903; 17327, Feb. 25, 1907, Apr. 5, 1909, and May 13, 1909.*

V F 3 a. A police officer arrested a man, took him to a recruiting station, and in compliance with the recruiting officer's request started to lock him in the police station, but before that was accomplished the man was released by a State court on a writ of habeas corpus on the ground that he was illegally held, having enlisted as a minor without the consent of his parents. *Held,* that the deserter was not delivered to the military authorities within the meaning of the law and regulations, providing for a reward, and that the police officer was not entitled to the reward. *Held,* further, that as the State court was without jurisdiction to release the man there was no reason why he might not be arrested again on account of the desertion. *C. 13958, Jan. 15, 1903.*

V F 4. A man was apprehended as a suspected deserter. It was then discovered that subsequent to the desertion in question he had been dishonorably discharged for another and subsequent desertion. *Held,* that as the dishonorable discharge operated as a complete

[1] Anson on Contracts, 21; 34 Cyc. 1731–43; Wald's Pollock on Contracts, 3d edition, by Williston, pp. 13 and 14.

[2] See par. 121, A. R., ed. 1910.

expulsion from the Army that he was no longer subject to military jurisdiction and therefore was not a deserter within the meaning of the statute and regulation and that no reward could be paid for his apprehension and delivery. *P. 63, 415, February, 1894; C. 17327, Feb. 26, 1907, July 28, Oct. 6, and Nov. 2, 1908.*

V F 4 a. A soldier was dishonorably discharged on account of fraudulent enlistment. By mistake, however, he was not dropped from the rolls of his company upon which he was carried as a deserter at large, and while so carried he was apprehended as a deserter. *Held,* that although he had been completely expelled from the Army and was a civilian and no longer amenable to trial by general court-martial that he should be regarded technically as charged with desertion due to the mistake on the rolls, and that therefore a reward could legally be paid for his apprehension and delivery. *C. 17327, Dec. 5, 1908.*

V F 5. A soldier was discharged without honor on account of desertion. He was later apprehended for that desertion. *Held,* that being a civilian he was not a deserter and that neither reward nor expenses incurred in his apprehension could be paid. *C. 17327, Nov. 4, 1908; 19542,*[1] *Apr. 19, 1906.*

V F 6. A deserter was furnished a deserter's release. Later he was apprehended for the desertion in question. *Held,* that neither the reward nor expenses could be paid for his apprehension. *C. 17327, Nov. 19, 1908.*

V F 7. If, in view of the limitation of the one hundred and third article, the soldier has a legal defense to a prosecution for desertion, the reward is not payable for his apprehension.[2] *P. 55, 264, Sept., 1892; 59, 428, May, 1893; C. 16172, Apr. 12, 1904; 16981, Oct. 11, 1904; 17602, Feb. 28, 1905.*

V F 7 a. After the delivery of a deserter by a civil officer it was discovered that the statute of limitations had run. *Held,* that in such cases, as a matter of policy, the full reward should not be paid, but only a fair remuneration for the time of the officer, together with reimbursement for actual expenses incurred.[3] *C. 17602, Feb. 28, 1905; 16981, Oct. 12, 1904.*

V F 7 b. A soldier deserted in the Philippines and was apprehended. At his trial he maintained that since his desertion had occurred subsequent to the ratification of the treaty of peace between Spain and the United States, the desertion was in time of peace and his trial was, therefore, barred by the statute of limitations. *Held,* that in view of the fact that a condition of war existed in the Philippines until July 4, 1902, the date upon which the President proclaimed peace in those islands, and that the desertion occurred prior to that date, the desertion was in time of war, and, therefore, the statute of limitations did not run and the reward should be paid. *C. 19734, May 15, 1906.*

V F 8. A deserter was arrested on the soil of Mexico in violation of the territorial rights of that sovereignty. As an act done in violation of law can not be made the basis of a legal claim, *held,* that

---

[1] See XII Comp. Dec. 645.

[2] See par. 121, A. R., ed. 1910.

[3] See par. 121, A. R., ed. 1910, which provides that no reward shall be paid in the case of a deserter who can claim exemption from punishment under the one hundred and third article of war.

the reward could not be paid.[1] *R. 55, 412, Mar., 1888; P. 23, 140, Mar. 20, 1888; 37, 495, Jan., 1890; C. 1967, Jan., 1896.*

V F 9. *Held* that the reward should not be paid where a deserter was extradited from another country on other charges than desertion. *P. 37, 495.*

V F 10 a. A deserter surrendered himself to a recruiting officer and was placed for safe-keeping in the custody of a police officer, who, after requesting instructions as to the proper disposition of the prisoner, delivered him to nearest military post, incurring expense in so doing. *Held* that he was not entitled to the authorized reward, but could legally be reimbursed for the expenses incurred by him from the appropriation for the apprehension and delivery of deserters. *C. 17327, Jan. 21, 1909.*

V F 10 b. A deserter surrendered to a recruiting officer, who furnished him transportation to a military post, where he directed him to report. The deserter while in transit was arrested. *Held* that he was not a deserter within the meaning of the law and regulations, viz, a fugitive from military justice. Further *held* that the officer making the arrest was not entitled to the reward. *C. 17327, Sept. 21, 1908.*

V F 11. Current acts of appropriation for the support of the Army provide for the payment of a reward for the apprehension of deserters. *Held* that the word "citizen" as therein used is synonymous with the word "civilian" and is intended to describe a civil person as distinguished from an officer or an enlisted man belonging to the military establishment, and that it was intended by the use of that term to negative the view that such officer or enlisted man could become entitled to the reward by apprehending a deserter and restoring him to military custody. *C. 17327–A, Dec. 4, 1908.*

V F 12. An officer of the customs, empowered by law to make arrests of persons violating the revenue laws, but having no such general authority as is ordinarily possessed by peace officers "to arrest offenders" (according to the terms of the act of Oct. 1, 1890, 26 Stat., 648, authorizing certain civil officials to arrest deserters), *held* not entitled to be paid the regulation reward for the apprehension, etc., without request, of a deserter from the Army. *P. 46, 397, Apr., 1891.*

V F 13. *Held* that a justice of the peace of Idaho was not, by the laws of that State, a peace officer or authorized to arrest offenders, and was therefore not within the terms of the act of October 1, 1890 (26 Stat. 648), or legally entitled to be paid the reward for the arrest etc., without request, of a deserter. Such justice may by his warrant authorize and thus cause arrests, but actual arrest pertains, under the laws of the State, to another class—sheriffs, constables, city marshals and policemen. *P. 57, 91, Dec., 1892.*

V F 14. The reward should be withheld where there is evidence of *collusion* between the alleged deserter and the civil official. *Advised* that a suspicion of such collusion was properly entertained in a case where the soldier, after an absence of but a few days, voluntarily surrendered himself at or near the post of delivery to a policeman who turned him over, without expense or difficulty, to the military authorities who did not treat him as a deserter but caused him to be

[1] See Clay *v.* U. S. (Dev. Ct. Cls. Rep., 25).

charged, tried, and convicted as an absentee without leave only. *P. 44, 64, and 100, Nov., 1890; C. 15592, Dec. 10, 1903.*

V F 15. Where the soldier when arrested had been absent but three days, and was still in uniform, and had not been reported or dropped as a deserter, and his company commander did not have conclusive evidence of his intention not to return, *held* that there was not sufficient evidence that he was a deserter to justify the payment of the reward for his arrest and delivery. *P. 53, 227, Apr., 1890.*

V F 16. Two men who were suspected of being deserters from the Navy were apprehended and delivered to the naval authorities. One of them was discovered by such authorities to be a deserter from the Army and was turned over to a military guard sent for him. *Held* that the civil officers who made the arrest and turned this deserter over to the naval authorities were not entitled to the reward, as they were ignorant of the fact that the soldier was a deserter from the Army.[1] *C. 17327, Mar. 11, 1909.*

V F 17. A merchant arrested a man and turned him over to the sheriff as a vagrant. It later developed that the man was a deserter and that the merchant did not know that fact. *Held* that as one who performs an act for which a reward is offered, in ignorance of the offer can not recover the reward,[1] that the merchant was not entitled to the reward for the apprehension and delivery of deserters. *C. 17327, July 18, 1908, and Mar. 10. 1909.*

V F 18. A civil officer without request from the military authorities arrested a man as a deserter from the Army who was not charged with being a deserter and who was not actually a deserter. *Held* that the officer making the arrest could not be compensated for his time and expenses and that he could not throw upon the Government the burden growing out of his own mistakes.[2] *R. 20, Mar., 1866; C. 9529, Jan. 2, 1901; 16086, Mar. 28, 1904; 18586, Sept. 19, 1905; 20766, Dec. 13, 1906; 17327, July 8, 1907, Sept. 14, 1908, and Sept. 18, 1911.*

V F 19. A civil officer by mistake arrested the wrong man, who sued him for wrongful arrest and obtained judgment against him. The officer then requested reimbursement from the War Department in the amount of $400.62 for damages and expenses incurred by reason of arrest. *Held* that there is no provision in the appropriation for the apprehension and delivery of deserters for the reimbursement of officers who incur liability by reason of mistakes in identity, whether such mistakes are or are not due to a failure to exercise due care in the premises, and that, therefore, the claim could not be paid. *C. 19263, Feb. 28, 1906.*

V F 20 a. A deserter stated to a police officer that he desired to surrender himself as a deserter and inquired the location of a recruiting party. The policeman arrested the deserter and delivered him as such. *Held* that while there was a technical arrest and possibly facts which might be construed as a delivery of the deserter that the claim for the reward was without merit. *C. 17327, Feb. 2, 1909.*

---

[1] Anson on Contracts, p. 25, note 1; Wald's Pollock on Contracts (Williston's ed.), p. 13, note 12.

[2] VI Comp. Dec., 743; and see par. 121, A. R., ed. 1910, which provides that the reward will be in full satisfaction of all expenses for arresting, keeping, and delivering the deserter or escaped military prisoner.

V F 20 b. A deserter who was serving a sentence for vagrancy wrote to his first sergeant announcing his wish to surrender himself as a deserter. The deputy sheriff read the letter and thus learned of the man's identity. *Held* that if the offer of a reward for the apprehension of the man was withdrawn the deputy sheriff would not be entitled to the reward, but that if the offer of the reward was not withdrawn and the deputy sheriff delivered the deserter he would be entitled to the reward. *C. 17327, Apr. 30, 1909.*

VI A. A deserter was restored to duty without trial and thereafter served faithfully. *Held* that he may be reenlisted. *C. 2004, Jan. 22, 1896; 2384, June 24, 1896; Jan. 18, 1898; 9735, Jan. 31, 1901; 9759, Feb. 4, 1901; 16119, Apr. 2, 1904.*

VI B. When a soldier deserts from one regiment and enlists in another he may be held to serve out both enlistments or either of them. In the latter case the Government abandons the first enlistment by discharging him therefrom without honor and holds him to the second enlistment. No transfer is necessary. *C. 2115, Mar., 1896.*

VI C. A deserter at large from the Volunteer Army was drafted in 1864, and served as a drafted soldier until mustered out. *Held* that his status as such drafted soldier was unaffected by the fact that he was in desertion at the time he was drafted; nor was his status as a soldier in desertion affected by his being drafted or by his service as a drafted man. *C. 2106, Mar. 21, 1896; 5708, Apr. 27, 1899.*

VI D. Upon the question of whether or not there is any way by which a man who has once been convicted of desertion, and sentenced to dishonorable discharge, the sentence having been approved and executed, can again enter the service as a soldier, *held* that it is within the power of the Secretary of War to decide, on the facts presented, that the prior service of the soldier was honest and faithful, even though it included desertion, and that upon such decision he would be eligible for reenlistment. *C. 20991, Jan. 2, 1907. See also Desertion XVI A 1.*

VII A 1. A first-class private of the Engineers was dropped as a deserter and later surrendered himself, and the question arose as to whether or not he should be taken up as a first-class private. *Held* that the action of the company commander in dropping this soldier on the morning report and rolls of the company operated to vacate his appointment as first-class private, and that the erroneous action of the company commander in taking him up as a first-class private upon his return to military control, and while in arrest and under serious charges, and his subsequent trial under that designation, did not operate to restore him to the position of first-class private. *C. 24857, Mar. 18, 1911.*

VII A 2. A deserter upon physical examination as required by the regulations was discovered to be insane and the insanity to have been contracted not in line of duty and while in desertion. *Held* that it was not one of the cases in which the Secretary of War should issue an order for the commitment of the man to the Government Hospital for the insane, but that a discharge without honor should issue if it had not already been delivered. *C. 24497, Feb. 17, 1909.*

VIII. Statute of limitations. (See 103, A. W.)

IX A. A soldier was charged with desertion. *Held* that this did not constitute evidence that he had committed the offense. *R. 2, 520, June, 1863.*

IX B. An entry on a morning-report book, descriptive list, or other official statement or return that a soldier deserted on a certain day was held as not legal evidence that he had committed the offense of desertion, but evidence only of the fact that he had been charged with commission of such offense. *R. 22, 15, Mar., 1866.*

IX C. A report from The Adjutant General's Office contained extracts from the muster rolls of a regiment in which was recorded the statement that a soldier of that regiment had deserted on a certain date. *Held* that this was insufficient proof of the fact of desertion to justify the soldier's conviction for that offense. *R. 12, 28, Oct., 1864.*

IX D. A report of prisoners contained the statement that a soldier deserted on a certain day and was subsequently apprehended as a deserter. *Held* that upon his trial for desertion this entry was not legal evidence of the fact of desertion. *R. 37, 590, June, 1876.*

IX E. A first sergeant swore on the trial of a soldier charged with desertion that the accused "deserted" at a certain time and place. *Held* that this statement was insufficient as proof to establish the offense charged, as it was the province of the witness simply to state the facts and circumstances so far as known to him attending the act alleged, and the province of the court to arrive at the conclusion of whether or not the offense committed was "desertion." *R. 38, 640, June, 1877.*

IX F. A soldier was dropped from the rolls as a deserter. *Held* that that is not legal evidence to prove the fact of desertion upon his trial for that offense. *R. 49, 118, June, 1885; C. 18764–B, May 5, 1910.*

IX G. The amenability to trial of a deserter from an enlistment in the Army is not affected by the fact that when he enlisted he was a deserter from the Marine Corps. *R. 48, 203, Dec., 1883; C. 18694, Oct. 10, 1905.*

IX H. In trials of desertion it is not necessary to introduce evidence as to the date of enlistment unless the same is alleged in the specification. *C. 2844, Jan., 1897.*

IX I. *Held* to be no defense to a charge of desertion that the accused, at the time of enlistment which he is charged with having abandoned, was an unapprehended deserter from the Army; an enlistment of a deserter being not void but voidable only.[1] *R. 34, 499, Oct., 1873; 48, 203, Dec., 1883.*

IX K. A soldier was tried for desertion and introduced evidence to show that he was induced to abandon the service because of ill treatment, want of proper food, etc. *Held* that such circumstances can only palliate, not excuse a desertion if committed, and do not constitute a defense to the charge of desertion. *R. 34, 411, Aug., 1873.*

IX L. A Swiss enlisted in our Army and after two years deserted because of intense nostalgia (homesickness), or *maladie du pays. Held* that although this, under the circumstances, was a matter of extenuation it was not a defense. *R. 28, 496, Apr., 1869.*

IX M. A German who had enlisted received notification from the military authorities of the North German Empire to report at home for military duty, under the penalty of being considered a deserter from the German Army. *Held* that this constituted no defense to

[1] See fiftieth article of war.

the desertion committed by him from our service.[1] *R. 34, 411, Aug., 1873.*

IX N. It is, however, a complete answer to a charge of desertion before a court-martial, that the accused has previously been "restored to duty without trial," as sanctioned by Army Regulations, provided he has been so restored by competent authority, i. e., the commander who would have been authorized to convene a general court for his trial; otherwise, however, when so restored by a superior not duly authorized. *R. 6, 418, Oct., 1864; P. 18, 302, Aug., 1887; 21, 223, Dec., 1887.*

IX O. *Held* that a deserter from a Volunteer regiment was, after the disbandment of the Volunteer Army, no longer amenable to military jurisdiction, having become thereupon a *civilian*. *P. 42, 406, Aug., 1890; 50, 192, Nov., 1891; C. 494, Oct., 1894.* The liability of such a deserter to trial and punishment by court-martial continues, notwithstanding the muster out of his own regiment, until the entire Volunteer Army has been mustered out of service. *C. 6410 and 6433, May, 1899; 6593, June, 1899; 9005, Sept., 1900.*

X A. A soldier pleaded guilty to the charge of desertion, was convicted and sentenced to dishonorable discharge, forfeiture of pay and allowances and confinement at hard labor for two and one-half years. Upon application for a pardon to restore his citizenship rights which were forfeited in the operations of sections 1996 and 1998, R. S., it was *held* that these sections were taken from legislation enacted about the close of the Civil War and are believed to be unduly severe for desertions in time of peace and not in the face of an enemy. Further *held* that it has been usual in like cases to grant relief by an exercise of the pardoning power. *C. 5280, Nov. 10, 1898; 6105, Mar. 23, 1899; 11855, Jan. 15, 1902; 11915, Jan. 29, 1902; 16215, Apr. 27, 1904; 16618, July 26, 1904.*

X B. The Executive order setting forth the maximum limits of punishment provides that the punishment for desertion may be increased for each previous desertion. *Held* that this is not limited to desertions in the current enlistment. *C. 2210, Apr. 13, 1896; 14161, June 27, 1908.*

X C 1. *Held* that a general prisoner who was convicted of desertion only could not in view of the prohibition in the ninety-seventh article of war be confined in a penitentiary. *C. 9002, Sept. 24, 1900.*

X C 2. A soldier was convicted of desertion and of other offenses the punishment for which ordinarily includes confinement in a penitentiary. *Held* that his conviction for desertion would not prevent his incarceration in a penitentiary. *C. 10131, Apr. 4, 1901; 19397, Mar. 31, 1906.*

X D. A soldier deserted in time of war. He was brought to trial after the end of the war, i. e., in time of peace. *Held* that while the statute of limitations does not run, the punishment may not exceed that set forth in the Executive order. *C. 17294, Dec. 24, 1904; 21018, Sept. 26, 1905; 17034, Feb. 11, 1911.*

XI. Every desertion in which the deserter leaves his station before he surrenders or is apprehended for the desertion includes an absence without leave. Upon a trial for such desertion, the accused is tried

[1] Our public law, as to the principles of the right of expatriation, is found in section 1999, R. S.

also for the absence without leave involved in the offense charged.[1] If acquitted, *without reservation*, of the desertion, he is acquitted also of the lesser offense. If convicted, as he may be, of the lesser offense only, under a charge of the greater, he is acquitted in law of the greater. *R. 33, 123, July, 1872; C. 9528, Jan. 13, 1901; 12168, Mar. 10, 1902; 12296, Mar. 25, 190 12597, June 27, 1902; 12967 May 7, 1904; 18934, Dec. 28, 1905.*

XII A. A deserter surrendered. There were circumstances which commended him to the consideration of superior authority. *Held* that there was no legal objection to restoring him to duty without trial. *C. 13554, Oct. 25, 1902; 18902, Dec. 6, 1905.*

XII A 1. A soldier deserted and reenlisted in another regiment. His superior officers recommended pardon and restoration to duty. *Held* that there was no legal objection to his restoration to duty without trial in the second or fraudulent enlistment. *C. 5465, Dec. 8, 1898.*

XII B. In the case of a soldier who, because of particularly embarrassing conditions that surrounded the incidents of his service, deserted and who as he grew older saw the error of his way and wished to return to the service and serve his country, and whose only offense had been that of desertion, *held* that upon surrender he could be restored to duty without trial by the proper authority, but that the application for such restoration should be made by a company commander. *C. 16306, May 7, 1904, Oct. 14, 1904, and Dec. 2, 1904, 18902, Apr. 10, 1907, and Dec. 15, 1909.*

XIII. Making good time lost. (See forty-eighth article of war.)

XIV A 1. *Held* that as an enlisted man while absent in desertion is not rendering service under his enlistment contract, and as such service must be faithfully rendered to entitle him to the pay and emoluments which accrue upon its rendition, that no right to pay or allowances can accrue in behalf of a soldier who by reason of unauthorized absence has put it out of his power to render the service stipulated for in his contract of enlistment.[2] *C. 17768, Nov. 9, 1909; 27004, July 11, 1910.*

XIV A 2. A soldier was tried and convicted of desertion. The reviewing authority disapproved the conviction on the sole ground that the evidence did not sustain the charge. *Held* that the soldier can not legally be subjected to the forfeiture of pay and allowances since he can not be treated as a deserter in law. *R. 27, 262, Sept., 1868; 35, 638, Oct., 1874; 36, 82, Nov., 1874. C. 17768, Nov. 9, 1909.*

XIV A 3. The forfeiture of pay and allowances prescribed for deserters by Army Regulations can be imposed in any case only upon a satisfactory ascertainment of the fact of desertion. This fact may, of course, be established by the finding of a general court-martial. *Held* that it may also be established administratively in the absence of an investigation by a court-martial as, for instance, by the restoration to duty without trial by order of competent authority of a soldier charged with desertion,[3] but that as in the case of statutory liability the forfeiture of pay and allowances is

---

[1] See 13 Op. Atty. Gen. 460.

[2] XII Comp. Dec., 328–338, Dec. 2, 1905; XV id., 661, Apr. 28, 1909.

[3] See U. S. *v.* Landers (92 U. S. 79, Oct., 1875), in which the Supreme Court held that the pay and allowances of a soldier may be withheld upon a showing on the muster roll of his company that he is a deserter. This case went up from Court of Claims. See 9 Ct. Cls. 242, December term, 1873. See also 33 id., June 21, 1897.

generally applied only upon the approved conviction by court-martial of the alleged deserter. *R. 7, 207, Feb., and 325, Mar., 1864; 50, 122, Mar., and 421, June, 1886; P. 21, 224, Dec. 20, 1887; 49, 150, Sept., 1891; C. 4937, Sept., 1898; 7232, Nov. 1, 1899.*

XIV A 4. *Held* that an order directing the discharge without honor of a soldier on account of desertion is sufficient evidence to justify the Pay Department in withholding pay and allowances that were due him at the time he was charged with desertion. *C. 7232, Nov., 1899; 8355, June 13, 1900.*

XIV A 5. A soldier was convicted of desertion. The department commander disapproved the finding without announcing the reason for the disapproval. *Held* that in such cases, viz, in which the pay of an enlisted man depends upon his status as absent with or without leave or in desertion, that the fact should be ascertained by The Adjutant General from the records of his office who should make a report to the Paymaster General in response to a request from that officer.[1] *C. 17768, Nov. 9, 1909.*

XIV A 6. A soldier charged with desertion was acquitted. *Held* that he can not be subjected to a forfeiture of pay and allowances on account of desertion even though the finding be disapproved by the reviewing authority. *R. 31, 19, Nov., 1870.*

XIV A 7. A soldier was erroneously charged on the rolls with desertion and the charge was removed in War Department orders. *Held* that the removal operated to relieve him of any and all stoppages which had been charged against his pay account on account of desertion. *R. 39, 413, Feb., 1878; 41, 518, Mar., 1879; C. 12227, Mar. 28 and Oct. 7, 1902; 14992, Aug. 27, 1903; 17311, Jan. 9, 1905; 17768, Apr. 1 and 25, and June 17, 1905.*

XIV B. The forfeiture of the rights of citizenship, and the incapacity to hold office under the United States, imposed upon deserters by the act of March 3, 1865 (secs. 1996 and 1998, R. S.), can be incurred only upon and as incident to a *conviction* of desertion by a general court martial, duly approved by competent authority.[2] *R. 32, 370, Mar., 1872; 33, 221, Aug., 1872; 35, 464, July, 1874; 38, 434, Feb., 1877; 39, 433, Mar., 1878; 42, 30, Nov., 1878; P. 3, 221, Feb., 1884; 42, 408, Aug., 1890; C. 248, Aug. 30, 1894; 2934, Feb., 1897; 3095, Apr., 1897; 4513, July, 1898; 10082, Mar. 27, 1901; 10918, July 25, 1901; 11345, Oct. 7, 1901; 11508, Nov. 7, 1901; 14163, Feb. 13, 1903, Feb. 5, 1908, and Mar. 25, 1911; 16178, Apr. 11, 1904, and Feb. 4, 1908; 16215, Apr. 27, 1904; 19577–B, Feb. 26, 1909; 19577–D, Sept. 7, 1910; 19577–E, Mar. 4, 1911.* These disabilities, though attaching to every such conviction, may be removed by an

[1] See par. 247, Manual for the Pay Department, U. S. Army, revision to include Aug. 15, 1910, in which the rule is announced that if the disapproval of the reviewing authority is based upon other reasons than lack of evidence to sustain the charge that the soldier should be held in matters of payment to be a deserter, but if on lack of evidence he is not a deserter. Also see XII Comp. Dec. 328, Dec. 2, 1905, and XV id., 661, Apr. 28, 1909.

[2] Such is believed to have been the uniform course of ruling in the civil courts. See State *v.* Symonds, 57 Maine, 148; Holt *v.* Holt, 59 id., 464; Severance *v.* Healey, 50 N. Hamp., 448; Goetcheus *v.* Matthewson, 61 N. York, 420 (and 5 Lansing, 214; 58 Barb., 152); Huber *v.* Reily, 53 Pa. St., 112; McCafferty *v.* Guyer, 59 id., 110; Kurtz *v.* Moffit, 115 U. S., 487,501.

As to the liability *to make good to the United States the time lost by a desertion*, see Forty-eighth Article.

executive pardon of the offender. *R. 35, 85, Jan., 1874; P. 42, 373, Aug., 1890; 56, 56, Oct., 1892; 63, 494, Feb., 1894.* But whether a soldier duly convicted of desertion and dishonorably discharged the service may vote at a State election would be determined by the law of the particular State. *C. 429, Oct., 1894; 15900, Oct. 17, 1904; 14725, May 28, 1903; 19577–A, May 18, 1908.*

XIV B 1. A Filipino deserted from the Philippine Scouts. *Held* that as he was not a citizen of the United States he did not forfeit citizenship in the United States. *Held* further that as no law had been passed by Congress or by the Philippine Commission forfeiting citizenship in the Philippines on account of desertion he had not forfeited any citizenship that he may have had in the Philippine Islands. *C. 23574, July 13, 1908.*

XIV C. A deserter can not legally be subjected to any forfeiture other than those prescribed by statute or Army regulation. He incurs, for example, no forfeiture of his own personal property. So, where it was proposed to sell certain private property belonging to and left by a deserter and devote the proceeds to the post fund, *held* that there was no legal authority for such appropriation by the military authorities or the Government. *R. 35, 454, June, 1874.* So a soldier, by reason of having deserted, does not forfeit local bounty money which has been paid him upon enlistment or subsequently, or any other money found in his possession upon his arrest. And such money can not legally be withheld from him, to be appropriated to a regimental or post fund or any other purpose, but, being his own personal property, unaffected by his offense, must be treated as such. *R. 13, 329, Feb., 1865; 15, 128, Aug., 1865; 16, 168, 595, May and Sept., 1865; 25, 400, Mar., 1868.*

Similarly *held* that he does not forfeit private funds that were in the care of the company commander. *C. 20812, Dec. 21, 1906.*

XIV D. Where a soldier was discharged without honor by reason of desertion, while in the Government Hospital for the Insane, and the circumstances attending his desertion indicated that he was probably not responsible for his acts, *held* that he should not be visited with the forfeitures prescribed by statute for the offense of desertion. *C. 17327, Mar. 5, 1910.*

XIV E. *Held*, that under section 1305, R. S., a soldier forfeited on desertion the money he deposited with a paymaster. *C. 9166, Oct. 24, 1900; 17295, Dec. 21, 1904; 19577, Feb. 15, 1910.*

XIV F. A soldier deserted who owed money to the company fund of his company. *Held* that after his account was settled all moneys standing to his credit were forfeited to the United States and could not be set aside to pay his indebtedness to the company fund. *C. 14992, Aug. 28, 1903.*

XV A. A pardon does not operate retroactively, and can not therefore "remove a charge" of desertion. *R. 50, 395, June, 1886; P. 42, 406, Aug., 1890; 43, 36, Sept., 1890.* It does not wipe out the fact that the party did desert nor can it make the record say that he did not desert. It can not change facts of history.[1] *P. 58, 446, Mar., 1893; C. 1883, Aug. 8, 1896, and Feb. 25, 1899; 3125, Apr. 21, 1897; 14899, July 30, 1903; 19522, Apr. 14, 1906; 20342, Sept. 7, 1906; 24305, Jan. 8, 1909; 14163, Feb. 4, 1909.*

---

[1] See 22 Op. Atty. Gen., 36.

XV B 1. A soldier, who had successively enlisted in and deserted from two companies of the same volunteer regiment, returned in response to the President's proclamation and served out his first enlistment. *Held* that the proclamation operated as a pardon for both of his desertions, and that he should be treated as discharged from his second enlistment by his restoration to duty in the first. *C. 3447, Aug. 20, 1897.*

XV B 2. A soldier, who enlisted August 16, 1862, for three years, deserted May 16, 1864, was arrested April 20, 1865, and again deserted September 29, 1865. There were thus two charges of desertion standing against him. Under the President's proclamation of March 11, 1865, all deserters who returned to service within 60 days were pardoned "on condition that they * * * serve the remainder of their original terms of enlistment and in addition thereto a period equal to the time lost by desertion." And a War Department circular of May 29, 1865, provided that when deserters had been arrested during the continuance of the said proclamation they should be entitled to its benefits. In the particular case under consideration the soldier was arrested during the continuance of the proclamation and was therefore pardoned on the conditions named therein. He thus became obliged to serve until July 20, 1866, but as he failed to comply with this condition by deserting September 29, 1865, *held* that both charges of desertion should be allowed to stand against him. *C. 1390, July, 1895.*

XV B 3. There is no law extending amnesty to soldiers who are now deserters from the United States Army. *C. 778, Dec. 19, 1894.*

XV C. Application was made for the pardon of a deserter at large. *Held* that it has not been the practice of the War Department to consider applications for the pardon of deserters so long as they remain fugitives from justice. *C. 3304, June 23, 1897; 3656, Nov. 13, 1887; 3950, Nov. 1, 1888; 5479, Dec. 16, 1898; 5733, Feb. 9, 1899; 6410, May 11, 1899; 7007, Sept. 14, 1899; 7601, Feb. 6, 1900; 7819, Mar. 20, 1900; 8032, Apr. 14, 1900; 8864, Sept. 1, 1900; 9005, Sept. 25, 1900; 9481, Dec. 28, 1900; 9842, Feb. 18, 1901; 10717, June 27, 1901; 10839, July 12, 1901; 11565, Nov. 8, 1901; 11639, Dec. 27, 1901; 11640, Dec. 28, 1901; 11901, Jan. 11, 1902; 13821, Dec. 16, 1902; 18902, June 17, 1908; 24634, Mar. 18, 1909; 24691, Mar. 20, 1909; 19577–D, Dec. 21, 1910.*

XV D. *Held* that restoration to duty is a constructive pardon for desertion. *C. 4076, Apr. 30, 1898; 16814, Sept. 3, 1904.*

XV E. The practice of the department has been to secure a pardon for the purpose of restoring citizenship in cases where a soldier has been convicted of desertion, has served the term of imprisonment imposed by the court, and where his subsequent conduct in civil life has been such as to warrant the pardon. *C. 14380, Apr. 6, 1903; 14381, Apr. 6, 1903; 14583, May 16, 1903; 14899, July 7, 1903; 14921, Sept. 12, 1903; 15323, Oct. 17, 1903; 15418, Oct. 24, 1903; 15514, Nov. 20, 1903; 15682, Jan. 18, 1904; 15747, Jan. 18, 1904; 15968, Mar. 2, 1904; 16008, Mar. 8, 1904; 16323, May 12, 1904; 16513, June 28, 1904; 16601, July 18, 1904; 17007, Oct. 15, 1904; 15900, Oct. 17, 1904; 17071, Nov. 7, 1904; 17519, Feb 15, 1905; 17582, Feb. 24, 1905; 17598, Feb. 28, 1905; 17741, Mar. 28, 1905; 17799, Apr. 8, 1905; 17693, Apr. 19, 1905; 18027, May 20, 1905; 17978, June 3, 1905; 18383, Aug. 3, 1905; 18837, Nov. 17, 1905;*

19358, Mar. 16, 1906; 19452, Apr. 12, 1906; 19577, Apr. 26, 1906, to July 30, 1911; 14163, Feb. 5, 1908.

XV E 1. It has been the practice of the department to require applicants for pardon which restores citizenship that has been lost under sections 1996 and 1998, R. S., to submit with their applications certificates of at least two reputable citizens of their community as to their reputation for being honest, industrious, and having good moral character. Generally applications will be considered only after one year has elapsed since the man has been released from military control. *C. 19577–A, Aug. 17, 1908, Aug. 21, 1908, Sept. 12, 1908, Sept. 18, 1908, Oct. 14, 1908, Oct. 30, 1908, Dec. 2, 1908, Dec. 17, 1908, Jan. 24, 1909, Feb. 26, 1909, Sept. 3, 1909, Jan. 17, 1911, Jan. 18, 1911, and Mar. 3, 1911.*

XV F. A general court-martial convicted a soldier of desertion, but gave him a sentence which retained him in the service. *Held* that in view of the fact that by conviction of desertion his citizenship was forfeited under sections 1996 and 1998, R. S., that he should be informed that if he desired a pardon which would operate to restore his citizenship that he should make application in a letter to The Adjutant General of the Army for such a pardon by the President. *C. 19579–A, Apr. 13, 20, and 23, 1908.*

XVI A. Although a legally executed discharge without honor issued by competent authority on account of desertion can not be set aside, *held* that on sufficient evidence the Secretary of War may decide that, notwithstanding the discharge without honor by reason of desertion, the man was nevertheless not a deserter.[1] *C. 8355, June —, 1900; 12227, Mar. 25 and Oct. 7, 1902, and June 5, 1904; 14992, Aug. 27, 1903; 14163, Feb. 5, 1908.*

XVI A 1. Ordinarily desertion would be sufficient evidence that service during the term in which it occurred was not honest and faithful, but if in an exceptional case the Secretary of War should decide that it was, notwithstanding the desertion, he would be acting within his discretion under the act of August 1, 1894 (28 Stat. 216). The provision in the act of June 16, 1890 (26 Stat. 157), that desertion renders service not honest and faithful is limited to the purposes of that act and does not control enlistments under the act of 1894. *C. 2004, Jan., 1896; 2121, Mar., 1896; 3530, Sept., 1897; 3794, Jan., 1898; 12004, Feb. 1, 1902; 12395, Apr. 21, 1902; 15114, June 22, 1903; 16119, Apr. 2, 1904; 16838, Sept. 1, 1904; 17658, Mar. 11, 1905; 26007, Feb. 29, 1909.*

XVI B. *Held* that a charge of desertion entered against a soldier in a particular term of enlistment is removed by an honorable discharge from such enlistment.[2] *C. 2041, May, 1896.*

XVI C 1. A soldier was charged with desertion and it was subsequently established that he was a prisoner in the hands of the enemy; *held* that the rolls could not properly be mutilated by an erasure of the entry of desertion; but in making subsequent rolls the true facts as then found could be entered, together with entry of the fact that the charge of desertion on prior roll was erroneous; and a note might properly be made on the erroneous roll referring to the subse-

[1] Where charge is removed by competent authority, the conditions are the same as though no charge of desertion had been made. 34 Ct. Cls., 446, June 5, 1899.

[2] See Digest of Decisions of 2d Comp., vol. III, sec. 559, Aug. 31, 1885.

quent roll for the record of the fact that the entry was erroneous. *C. 9534, Jan. 5, 1901; 15942, Feb. 24, 1904.*

XVI C 2. Where a soldier was insane at the time of his desertion, *held* that the charge of desertion should be removed. *C. 670, Nov. 23, 1894; 2101, Mar, 20, 1896; 21117, Feb, 25, 1907.*

XVI C 3. *Held* in the case of a soldier who was erroneously charged with desertion, that the rolls can not properly be mutilated by an erasure of the entry of desertion; but in making subsequent rolls the true facts, as then found, can be entered thereon together with an entry of the fact that the charge of desertion on a prior roll was erroneous; and a note may properly be made on the erroneous roll referring to the subsequent roll for the record of fact that the entry was erroneous. *C. 6278, Apr. 25, 1899.*

XVI C 4. A soldier in the Philippines was given a furlough with permission to return to the United States. He reported his address, but owing to a miscarriage in the mails he failed to receive notice that he should report to headquarters before a discharge could be issued to him, and was accordingly dropped as a deserter. *Held* that the charge of desertion was erroneously made and should be removed by the department commander under authority of the Army Regulations. *C. 18352, July 29, 1905; 25066, July 4, 1909.*

XVI C 5. If a soldier absent on pass should be the victim of an accident, as the result of which he is placed unconscious in a hospital and so unable to communicate with the military authorities, and thereby be dropped as a deserter at the end of 10 days, *held* that his absence would be susceptible of a perfectly proper explanation, would not entail penal consequences on account of desertion, and that under such circumstances the soldier should not be required, under the forty-eighth article of war, to make good the time lost, and that the charge should be removed. *C. 21117, Feb. 25, 1907.*

XVI C 6. A soldier having been informed by mistake that his application for furlough had been approved, left his station. The application was actually disapproved, and the man later was dropped as a deserter, and apprehended as such. *Held*, that the charge should be removed as having been erroneously made. *C. 14398, Mar. 31, 1903, and Sept. 26, 1907.*

XVI D 1. *Held* that a charge of desertion can be removed, under the act of March 2, 1889, (25 Stat. 869) only when the desertion occurred during the Civil War. *C. 2683, Oct. 16, 1896.*

XVI D 1 a. The persons from whose military record there may be a *removal* of the charge of desertion, under the act of March 2, 1889, (25 Stat. 869),[1] are those against whom such a charge is "now standing." Deserters, therefore, whose cases had, at the date of the act, been judicially duly disposed of—by trial, conviction, and sentence by court-martial—are not within the purview of the statute. *R. 53, 143, Oct., 1886; P. 18, 296, Aug., 1887; C. 359, Sept., 1894* Similarly

[1] The following acts of Congress have provided for the removal of the charge of desertion against Civil War veterans under certain circumstances:
1. Aug. 7, 1882 (22 Stat. 347).
2. Aug. 5, 1884 (23 Stat. 119).
3. May 17, 1886 (24 Stat. 51).
4. Mar. 2, 1889 (25 Stat. 869).
5. Mar. 2, 1891 (26 Stat. 824).
6. July 27, 1892 (27 Stat. 278).
7. Mar. 2, 1895 (28 Stat. 814).

held with respect to deserters restored to duty without trial. In both cases (conviction by court-martial and restoration to duty without trial) the charge of desertion no longer remains, but the fact of desertion has become a matter of record and can not be removed. *C. 2021, 2025, Jan., 1896; 2669, Oct., 1896; 2934, Feb., 1897.*

XVI D 1 **b.** The act of March 2, 1889, applies to cases in which a charge of desertion is "now standing," and does not apply to cases in which the charge has been judicially disposed of by a court-martial, or where the soldier has been restored to duty without trial. The disposition of the charge in either of the methods above mentioned operates to remove the *charge*, but the *fact of desertion*, having become a matter of record, can not be removed. *C. 21835, Apr. 16, 1910; 359, Sept. 27, 1894.*

XVI D 1 **c.** Section 3 of the act of March 2, 1889, provides for the removal of a charge of desertion if the following three conditions are fulfilled, viz: 1, That the soldier enlisted again within four months of the desertion; 2, that he served such term faithfully; and 3, that such reenlistment was not made for the purpose of securing bounty, gratuity, etc. A soldier deserted on December 6, 1861, and enlisted on the 13th of the same month in another regiment, deserted from the latter regiment on January 8, 1863, enlisted on the 15th of that month in a third regiment, and was honorably discharged from this enlistment. Each of the last two enlistments was made within four months of the desertion in the preceding enlistment and neither of them was made for the purpose of securing bounty, etc. *Held*, therefore, that as he served the third enlistment faithfully the charge of desertion pertaining to the second enlistment was properly removed, but that such removal and the consequent issue of an honorable discharge did not affect the fact that he did not serve that enlistment faithfully. Further *held*, therefore, that the charge of desertion pertaining to the first enlistment could not be removed. *C. 3928, Mar., 1898; 1361, Aug. 1, 1895; 3036, Apr. 1, 1897; 9434, Dec. 31, 1900; 11167, Sept., 1901; 12312, Apr. 21, 1902; 23100, July 26, 1910.*

XVI D 1 **d.** While the first section of the act of March 2, 1889, provides that the charge of desertion standing against a *volunteer* soldier who served until May 1, 1865, and had previously served six months shall be removed, etc., there is no good ground for holding that the act as a whole contains any provision that would warrant taking May 1, 1865, as the close of the war, so far as a soldier of the Regular Army is concerned, or as a date before which a desertion must have occurred to make section 3 of the act applicable. Thus where a soldier who had enlisted in the Regular Army on March 17, 1864, deserted August 20, 1865, and 11 days thereafter enlisted in another regular regiment not for the purpose of bounty, etc., and was honorably discharged therefrom, *held* that the charge of desertion should be removed. *C. 3891, Mar. 10, 1898; 16833, Aug. 31, 1904.*

XVI D 1 **e.** A volunteer soldier, having enlisted in 1861 for three years, deserted in 1862 and within a month enlisted in the Navy for one year, from which enlistment at the expiration thereof he received an honorable discharge. He thus escaped in fact one year's service under his Army enlistment. *Held* that his thus avoiding one year's service was not a gratuity within the meaning of section 3 of the act of March 2, 1889, and did not preclude the removal under that section of the charge of desertion. *C. 163, Aug. 20, 1894; 3090, Apr. 19, 1897; 10722, Jan. 21, 1901; 14241, Mar. 2, 1903.*

During the Civil War a soldier deserted. If he had not done so he would have been entitled to a bounty of $400. After desertion he enlisted in the Navy, and the total of the bounties credited to him on that account was $700. *Held* that under section 3 of the act of March 2, 1889 (25 Stat., 869), his enlistment in the Navy was for the purpose of securing the additional bounty and that therefore the charge of desertion can not be removed. *C. 14231, Mar. 4, 1903.*

XVI D 1 f. Section 7 of the act March 2, 1889 (25 Stat. 869), provides that the charge of desertion shall not be removed if the soldier left his command while in arrest or under charges for breach of military duty. Where a soldier deserted in 1865, while in arrest and under charges for breach of military duty, *after* the expiration of his term of enlistment, it was held that he was still a soldier at the time he deserted and that therefore the section named applied in his case and precluded a removal of the charge of desertion. *C. 3099, Apr. 12, 1897.*

XVI D 1 g. By section 13, of the enrollment act of March 3, 1863 (12 Stat. 731), a drafted man who failed to report to the board of enrollment was declared " a deserter" and triable therefor by court-martial. *Held* that this section imposed upon him the single duty of reporting to the enrollment board, and to that extent and for that purpose only gave him a military status; that prior to his acceptance or rejection by the board he was not fully in the military service of the United States, nor a soldier within the ordinary meaning of that term. Where such a drafted man failed to report and subsequently within four months enlisted elsewhere, *held* upon an application by him to have the charge of desertion removed under the act of March 2, 1889, that not being a soldier in the military service within the meaning of the act at the time he became a "deserter," the same did not apply to his case and that therefore the charge could not be removed. *C. 2041, 2042, May, 1896.*

XVI D 2. The act of May 17, 1886 (24 Stat. 51), provided that, where a soldier of the Civil War deserted from one organization and within three months enlisted in another, the charge of desertion, if certain facts were shown, should be removed and a certificate of discharge issued from the organization in which he first served. *Held* that the purpose of this legislation was to change the status of beneficiaries under it from that of deserters to that of soldiers honorably discharged as of the date of their desertion. *C. 2090, Mar., 1896.*

XVI E. A deserter was restored to duty without trial. *Held* that this did not operate as an acquittal or to remove the charge of desertion. *C. 4076, Apr., 1898; 18678, Oct. 10, 1905; 18678, Oct. 11, 1905; 14398, Sept. 26, 1907.*

XVI F. A soldier was tried and acquitted by a regimental court-martial of the charge of desertion. *Held* that the acquittal did not operate to remove the charge of desertion, since the court was without jurisdiction. *C. 995, Feb. 15, 1895; 27004, July 11, 1910.*

XVII A. A deserter's release is intended for deserters in whose favor the limitation of the present one hundred and third article of war has fully run and who therefore have a perfect defense to a prosecution. *P. 52, 326, Mar. 1892; 61, 430, Sept., 1893; 62, 1, Oct., 1893; 63, 30, Dec., 1893, and 347, Feb., 1894; C. 96, July, 1894; 4130, May 17, 1898; 21367, Apr. 12, 1907; 14163, Feb. 4, 1909, and Mar. 25, 1911; 15257, Mar., 11, 1908.*

XVII A 1. The so-called "deserter's release," provided for by General Orders 55 of 1890, is accorded when, by reason of the period which has elapsed since the end of his term of enlistment, the deserter could successfully plead the statute of limitation to a prosecution for his desertion. This period is complete at the expiration of two years from the end of his term of enlistment, exclusive of absences meanwhile from the United States. But where a soldier, who would have been eligible for such release on May 9, 1894, was, in February preceding, arrested, brought to trial, convicted, and sentenced to be dishonorably discharged, and was so discharged accordingly, *held* that he was not within the privilege of the general order, and that the release could not be accorded him.[1] *P. 65, 189, June, 1894; C. 4130, May, 1898; 11508, Nov. 7, 1901; 12563, May 6, 1902; 15257, Jan. 28, 1909.*

XVII B. A soldier who had been dishonorably discharged applied for a deserter's release. *Held* that he does not belong to the class of persons for whom it is intended. *P. 63, 32, Dec., 1893.*

XVII C. A deserter's release is designed for soldiers actually in service. *Held* therefore that it can not be given to one who was a soldier of a volunteer organization during the War of the Rebellion, which organization has been mustered out. *P. 62, 1, Oct., 1893; C. 15460, Nov. 5, 1903.*

XVII D. A deserter's release was requested in the case of a soldier who had died. *Held* that it can not be issued in such a case. *P. 52, 326, Mar., 1892; C. 11850, Jan. 6, 1902; 15154, Aug. 24, 1903; 15417, Oct. 24, 1903; 15607, Dec. 10, 1903; 17034, Oct. 20, 1904; 17294, Dec. 24, 1904; 17609, Mar. 21, 1905.*

XVII E. As the deserter's release is issued only to men who can successfully plead the limitation of the one hundred and third article of war, *held*, that it should not be given where a desertion was committed in time of war. *C. 96, July 27, 1894; 10416, May 24, 1901, and July 14, 1909; 11850, Jan. 4, 1902; 6384, Apr. 30, 1903; 11802, May 10, 1905; 15154, Aug. 24, 1903; 12563, July 30, 1909; 15417, Oct. 24, 1903; 18023, May 10, 1905; 21367, Apr. 12, 1907.*

XVII F. The purpose of the deserter's release is to release a soldier "from liability to arrest, and from trial and punishment by court-martial for his desertion." *Held* that the deserter's release does not serve as a discharge from the Army and that the language used in describing it in General Orders 55, 1890, viz: "Release from the Army," as faulty, as the release is not a discharge certificate and is not evidence of discharge, and is not furnished to soldiers.[2] *P. 52, 326, Mar., 1892; 61, 430, Sept., 1893; 62, 1, Oct., 1893; 63, 30, Dec., 1893, and 347, Feb., 1894; C. 13896, Mar. 28, 1903; 21367, Apr. 12, 1907; 14163, Feb. 4, 1909; 24691, Mar. 20, 1909.*

XVII G. *Held* that as the deserter's release is not a discharge certificate from the Army, it should be prepared in such a way as to preclude the claim that its delivery operates as an actual discharge from the service. *P. 63, 247–354, Feb., 1894; C. 15460, Nov. 4, 1903; 16064, Mar. 22, 1904; 17807, Apr. 11, 1905; 21367, Apr. 12, 1907.*

---

[1] See Circ. 5, A. G. O., 1894, as to the purpose and effect of the "release."

[2] Circular No. 5, Headquarters of the Army, A. G. O., Mar. 28, 1894, states that the deserter's release also relieves the Government from the expense of apprehending those deserters who by reason of the one hundred and third article of war can not be tried for their desertions and at the same time serves to protect them from the arrest.

XVII H. The proper course for a deserter to pursue in order to secure a "Deserter's Release" is to surrender himself to the military authorities at the place nearest to his residence and make application to the Adjutant General of the Army for a deserter's release, accompanied by an affidavit setting forth the fact that he has remained constantly in the United States since his desertion, supported by such other affidavits [1] as he may be able to obtain to establish this fact. Thereupon a deserter's release issues as a matter of course upon the establishment of these facts. *C. 14163, July 11, 1911.*

XVIII A. A question arose as to whether a soldier's desertion, committed on October 25, 1898, was or was not in time of war. *Held* that as the desertion had been committed prior to the exchange of ratification it was in time of war.[2] *C. 15417, Oct. 23, 1903; 16064, Apr. 21, 1904; 16254, Apr. 28 and July 11, 1904; 17034, Oct. 21, 1904, July 30, 1908, and Feb. 11, 1911; 17349, Jan. 5, 1905.*

XVIII B. When the United States is engaged in war under circumstances where the theater of operations is outside the territorial limits of the United States, *held* that it is "time of war" at home as well as abroad. *C. 4050, Apr. 23, 1898.*

XIX A. A soldier was responsible for certain Government property. He deserted. The property disappeared at the same time. He was apprehended and charged *inter alia* with stealing the property, and acquitted of that offense. *Held*, that such acquittal did not relieve him from responsibility for the loss of the Government property as the loss was caused by his desertion as found by a board of survey. *C. 721, Dec., 1894.*

XX A. An officer left his post on a three days' leave of absence and did not return to duty or report himself at the proper time, but absconded to Canada with a large amount of Government funds. He was subsequently arrested in the United States. *Held* that he was clearly chargeable with the offense of desertion. *R. 3, 230, July, 1863.*

XX B. An officer who had become involved in debt and was suspected of embezzlement and fraud and who was about to be placed in arrest and obtained by false representations a brief leave of absence from his post for the express purpose of visiting a certain-named place, was subsequently apprehended at another place much more distant than that designated and while rapidly traveling en route to a still more remote locality. *Held*, in the absence of any evidence to rebut the presumption thus raised, that he was properly chargeable with having absented himself with the animus of a deserter. *R. 38, 622, June, 1877.*

XX C. *Held* that the effects of a commissioned officer who has deserted will be collected the same as those of an enlisted man and will be regarded as abandoned and so treated. *C. 17191, Dec. 19, 1904.*

XX D. The President is authorized to drop from the rolls of the Army as a deserter any officer who is absent from duty three months without leave. (1229, R. S., as amended by act of Jan. 19, 1911 (36 Stat., 894).) *Held* that when the President, acting under this law, reaches the conclusion that an officer has deserted, no court can review his decision.[3] *C. 12489, May 1, 1902.*

---

[1] See G. O. No. 55, Headquarters of the Army, A. G. O., Washington, May, 26, 1890.
[2] Exparte Ortiz, 100 Fed. Rep., 955; Ribas y Hijo, 194 U. S., 315.
[3] 18 Ct. Cls., 435, Apr. 23, 1883.

XX E. *Held* that after the President has dropped an officer's name from the rolls pursuant to the authority contained in section 1229, R. S., the officer is fully separated from the military service, and, being a civilian, there is no question as to the statute of limitations running. *C. 15752, Jan. 9, 1904, and Mar. 16, 1909.*

XX F. An officer was dropped for desertion under the first clause of section 1229, R. S. He later applied for a trial under section 1230, R. S. *Held* that the provision of section 1229, R. S., which makes such a deserter ineligible for reappointment in the Army, was incompatible with his restoration by action of a court-martial under section 1230, R. S., and that that section applies only to officers dismissed by order of the President under the general power to remove public officers appointed by him and frequently exercised in cases of Army officers in time of war, but which power in time of peace has been removed by the act of July 13, 1866, which was incorporated in the Revised Statutes as the second part of section 1229. *R. 42, page 446, Dec. 3, 1879.*

XXII A. Under the system of enlistment in which applicants are not enlisted until they reach the recruit depot, if an applicant, after having been furnished transportation and subsistence for the journey from the recruiting station to the recruit depot, elopes, and does not report at the recruit depot, *held* that as he has not yet been enlisted he is not a deserter, but that he has violated section 36 of the Criminal Code (35 Stat., 1096, act of Mar. 4, 1909) in that he has embezzled United States property furnished him for use in the military service.[1] *C. 20694, Apr. 30, 1908, to Aug. 12, 1911.*

CROSS REFERENCE.

Advising or persuading to.....See ARTICLES OF WAR LI A.
Civilian employees.....See CIVILIAN EMPLOYEES XIV to XV.
Effect on deposits.....See PAY AND ALLOWANCES I C 7 a.
Elements of.....See ABSENCE II B 1.
Evidence of.....See ARTICLES OF WAR L A.
Not a discharge.....See DISCHARGE XIII A 2.
Previous convictions of.....See DISCIPLINE XII B 1 a (1).
Statute of limitations.....See ARTICLES OF WAR CIII F 1 to 6.
Time of war.....See PARDON XII.
Trial for.....See DISCIPLINE III E 3 a.
Witnesses in.....See DISCIPLINE X A 1.

DETAIL.

See ARMY I G 3 a to c.

Away, of battalion staff officers.....See OFFICE IV G.

College duty.....See MILITARY INSTRUCTION II B 1 to 2.
To staff.....See OFFICE III D 1 to 2.

---

[1] Several men who have thus eloped have been charged with embezzlement in violation of sec. 5439, R. S., tried, convicted, and punished.

See Circular No. 91, War Department, Nov. 17, 1908, for a case which was tried in the United States District Court, Northern District of Texas, Mar. 30, 1909. Other cases are as follows: In the United States District Court, Eastern Division, Northern District of Illinois, July term, 1909; in the United States District Court, Southern Division, Western District of Missouri, October term, 1909; in the United States Circuit Court, Northern District of Georgia, May 3, 1910; in the United States District Court, Western District of Oklahoma, September term, 1910. Convictions were secured in all these cases and sentences given varying in severity from a fine of $100 and five months' confinement to a fine of $1,000, with confinement until paid.

DETAILED STAFF.

Command by.....See Command V B 4.
Office in.....See Office III D to E.
Army I G 3 a to c.
Ordnance Department.....See Army I G 3 b (4) (*b*); (*c*).
Rank of officers.....See Rank I C to D.
Retirement of officers.....See Rank I C 2.

DIET.

For patients in hospital.....See Army I G 3 d (8) (*c*) [1].

DIPLOMATIC OR CONSULAR SERVICE.

Retired officer's ineligibility for.....See Retirement I G 2 f; 3 a (2) (*a*).

DIPLOMATIC SERVICE.

Official of, to cause deposition to be taken....See Articles of War XCI D.

Retired officer's ineligibility for.....See Retirement I G 2 f.

DISAPPROVAL.

Grounds for, of sentence.....See Discipline V G 1; XIV E 9 a to b
Effect of.....See Discipline XIV E 9 b to c.
Of acquittal.....See Discipline XIV E 9 b (2).
Desertion V E 2.
Of charge under seventeenth article of war....See Pay and Allowances III C 2 d.
Of conviction of deserter.....See Desertion V E 1; 3; XIV A 2; A 5.
Of sentence, same as acquittal.....See Articles of War XLVIII C 2; 4.
Retiring board finding.....See Retirement I B 3 b.

DISBURSING OFFICER.

See Public money II to III.
Bonds of.....See Bonds II to III.
Can not withhold money from contractor to pay tax.....See Tax IV A.
Congressional relief for.....See Army I B 6 b.
Court of Claims, right to enter.....See Claims XII Q.
Embezzlement by.....See Articles of War LXII C 2.
Forged vouchers.....See Public Property I F 1.
Gambling in stocks.....See Articles of War LXII E.
Philippine funds.....See Office IV A 2 d (2) (*a*).
Refusing to transfer funds.....See Articles of War LX A 4.
State.....See Militia VI B 1 c to 2; X B; C; E; XIV C.

DISCHARGE.

I. CLASSIFICATION.

A. Honorable, Without Honor and Dishonorable..... *Page 433*

II. HONORABLE.

A. Officers.

1. Unless evidence to the contrary, discharge is honorable.
2. No reason mentioned, discharge is honorable.

II. HONORABLE—Continued.
B. Enlisted Men—What Necessary to Secure Honorable Discharge?
1. Unless evidence to the contrary, discharge is honorable.
2. A deserter may receive an honorable discharge..... *Page 434*
a. Policy of War Department as to discharge of deserters.
3. Soldier in hands of civil authorities may receive an honorable discharge.
4. Soldier against whom no derogatory remark on muster roll at muster out entitled to honorable discharge.
5. Soldier sent away from Army without discharge certificate.
III. WITHOUT HONOR.
A. Origin ..... *Page 435*
B. Discharge Without Honor is Not a Punishment.
1. Soldier charged with theft.
2. Soldier charged with sodomy.
3. Soldier charged with indecent proposals to a girl ..... *Page 436*
4. Not to be discharged for offense of which he has been acquitted.
5. Not to be discharged for offense for which he has been punished.
a. Exception: Sentence set aside on account of faulty procedure.
C. When Disqualified for Service Physically or in Character Through His Own Fault, Discharge Without Honor Not to be Given at Expiration of Term of Service.
D. Soldier in Confinement by Sentence of Summary Court at Expiration of Enlistment Not Sufficient Cause for Discharge Without Honor.
E. When Service Not Honest and Faithful, Enlistment May be Terminated by Discharge Without Honor.
F. Cases in Which Discharges Without Honor Have Been Given.
1. Enlisted men..... *Page 437*
2. Cadets ..... *Page 439*
3. Officers ..... *Page 440*
G. Discharge of Organizations Without Honor.
IV. DISHONORABLE.
A. Given Only by Sentence of General Court-Martial as Punishment.
B. Entails no Disqualification for Civil Employment.
C. Sentence to Imprisonment in Penitentiary Involves Dishonorable Discharge.
D. Entails Loss of All Rights Conditioned on Honest and Faithful Service.
E. Terminates Any Existing Sentence to Confinement as a Soldier.
V. ON CERTIFICATE OF DISABILITY.
A. Honorable if Disability is in Line of Duty..... *Page 441*
B. Honorable if Disability Existed at Enlistment, But no Fraud in Enlistment.
C. Discharge by Favor Not Conclusive That There Was Not Disability.
D. Of Insane Soldiers.

VI. BY WAY OF FAVOR.
A. Illegal Except on Account of Dependent Parent.
B. Veteran's Discharge.
C. Dependent Parent.
1. Given if case comes within spirit but not letter of law.
2. Not given to general prisoners.
D. By Purchase.
1. Law authorizes discretion to President..... *Page 442*
2. Rules in Army Regulations. Privilege may be withheld.
3. Absence without leave not counted in computing time.
4. Honorable for naturalization purposes.
5. As regards character and service treated same as other discharges.
6. Possible inclusion of Philippine Scouts, matter of policy.
7. Marine service not counted.
VII. BY CIVIL COURTS.
A. Secretary of War Causes Certificate to be Issued.
B. State Court Without Jurisdiction to Discharge..... *Page 443*
VIII. CONSTRUCTIVE DISCHARGE.
A. Recruiting Officer Told a Recruit to go Home and There Await Summons, Which Was Never Sent.
IX. DISCHARGE AT END OF WAR.
A. Act of April 22, 1898 (30 Stat. 361), Did Not Give Individuals Right to Claim Discharge.
B. General Order 40, 1898, Authorized Discharge at End of War, But Gave no Direction in Regard to Character or Travel Pay.
C. Soldier Should Take Advantage of Privilege of General Order 40, 1898, Within a Reasonable Time..... *Page 444*
D. A Soldier's Waiver Upon Enlistment of Rights Under General Oder 40, 1898, of no Effect.
E. General Order 40, 1898, Not Intended to Relieve Men of Consequences of Military Offenses.
X. DISCHARGE FOR BENEFIT OF THE GOVERNMENT.
A. The Giving of This Discharge Rests Upon Grounds of Expediency.
B. For Convenience of the Government.
XI. CHARACTER.
A. Notation of on Certificate.
1. Refers to character both as man and as soldier..... *Page 445*
2. Regulations relative to board of officers directory only.
B. Honest and Faithful.
1. Board of officers called only in case of discharge at expiration of term of enlistment.
a. Soldier in confinement at expiration of term entitled to a board.
2. Consensus of opinion of company commander, board, and convening authority required to rate service as "not honest and faithful."
3. Secretary of War has discretion to rate service as "honest and faithful."
4. A nonfraudulent enlistment of dishonorably discharged soldier does not render service "not honest and faithful"..... *Page 446*

XI. CHARACTER—Continued.
B. Honest and Faithful—Continued.
5. If service "honest and faithful," honorable discharge must be given.
6. Avoiding tour of duty in Philippine Islands renders service "not honest and faithful."
7. Continuing association with a strumpet after orders to stop renders service "not honest and faithful."
8. Arrest, conviction, and confinement by civil court, renders service "not honest and faithful."
C. Objection to Enlistment.
1. Some of the grounds upon which it may be based.
XII. DISCHARGE OF MINOR.
A. Enlistment of Minor Can be Avoided on That Ground, Only Upon Application of Parent or Guardian.
B. Age, How Shown.
1. Soldier born in United States..... *Page 447*
2. Soldier born in Bermuda.
C. Emancipated Minor.
1. When married.
2. Parent domiciled outside of United States.
D. Policy.
1. Procedure when parent requests discharge of minor son.
2. Soldier punished for military offenses before application for his discharge will be entertained ..... *Page 448*
XIII. DATE OF DISCHARGE.
A. Soldier Entitled to Discharge at Expiration of Term of Enlistment.
1. Soldier can not discharge himself.
2. Desertion does not operate as discharge.
B. Soldier Held in Service.
1. Date of actual separation from the service.
C. Soldier Can Not be Discharged Before Separation from the Service.
D. Soldier Discharged When Notice is Given to Him of His Discharge.
1. Actual and constructive notice.
2. Certificate not only means of giving notice..... *Page 449*
3. Case of soldier sick in hospital.
4. Insane soldiers.
a. With and without lucid intervals..... *Page 450*
(1) At Government Hospital.
b. Insane Philippine Scouts in Philippine Islands.
5. Sentence of death commuted to imprisonment for life—date of notice is date of dishonorable discharge.
6. Soldier in confinement.
a. By civil authorities.
b. Soldier awaiting trial.
7. Soldier sentenced to dishonorable discharge..... *Page 451*
8. Soldier escapes during trial by general court martial, which sentences him to dishonorable discharge.
9. Commissioned officers.
a. Date of discharge mentioned in order.
b. Senate fails to confirm appointment of officer.

XIII. DATE OF DISCHARGE—Continued.

E. No Certificate Furnished.

1. Illegal sentence of general prisoner who had been volunteer soldier declared null and void after regiment had been mustered out ..... *Page 452*
2. Soldiers ordered dropped from roll by department commander.
3. Soldier ordered set at liberty by department commander.

F. Rule for Volunteers, Including Deserters.

XIV. CERTIFICATE OF DISCHARGE.

A. Original.

1. Certificate is legal evidence of discharge.
2. Soldier in desertion when volunteers were mustered out in Civil War ..... *Page 453*
3. Who signs certificate?
4. Beneficiaries under act of February 24, 1897 (29 Stat., 593) entitled to discharge certificate.
5. A certificate that lacks signature can later be completed.

B. Duplicate Certificate.

1. Case of soldiers who served under assumed names in Civil War.
2. Erroneous entries made on discharge after its issue.
3. A parchment duplicate may be furnished when original certificate is made on paper.
4. Section 224, R. S., is limited to soldiers of Civil War.... *Page 454*

C. Second Duplicate Certificate.

1. A second duplicate may be issued if first is lost or destroyed.

D. Certificate of Service.

1. Furnished upon proof of loss of discharge certificate.
2. Furnished when discharge certificate is rendered illegible.
3. Soldier absent in Japan when regiment mustered out.
4. Furnished to medical cadet who lost his discharge certificate.
5. Furnished man who was, through mistake, unjustly given discharge without honor ..... *Page 455*

XV. EXECUTED DISCHARGE NOT REVOCABLE.

A. A Legal Honorable Discharge Not Revocable.

1. Case of soldier discharged with conditions which were not met by Government.
2. An officer's honorable discharge can not be revoked and a dishonorable one substituted. Similarly a dishonorable discharge can not be revoked and an honorable one substituted. (See Discharge, XVII A.)

B. A Legal Dishonorable Discharge Not Revocable..... *Page 456*

C. A Legal Discharge Without Honor Not Revocable.

1. Even when notice is constructive and man is a prisoner.

D. Revoking Order Unauthorized and Illegal.

1. An order purporting to revoke is illegal if discharge be executed.
   a. A discharge based on mistake of fact as to status of man is legal.
   b. Officer discharging soldier ignorant of fact that soldier was under charges—discharge legal.
   c. No objection to noting on discharge certificate the fact that it was given through error as to fact..... *Page 457*

XVI. DISCHARGE MAY BE REVOKED.
A. When Secured by Fraud.
1. Soldier secured by fraud a delivery of his discharge held *in escrow*.
2. Soldier secured discharge by agreeing to reenlist.
3. Soldier changed term of enlistment in his descriptive list.
4. Soldier secured discharge for purpose of accepting position in civil life.
B. Insane Soldier.
1. When soldier is insane and not in Government Hospital for Insane, but under military control ..... *Page 458*
2. When not under military control.
C. When Discharge Given is of Different Class Than Ordered.
1. Through clerical mistake in preparation of discharge.
2. Through mistake in interpreting order for discharge.
D. A Discharge Issued by Incompetent Authority is not Binding on the Government.
1. Discharge issued by United States Commissioner.
E. An Order May be Issued Revoking a Discharge Before the Discharge is Executed ..... *Page 459*
F. If a Discharge Has Been Issued in Favor of a Man Who is in Hands of Civil Authorities it May be Revoked if he is Finally Acquitted.
G. Dishonorable Discharge—Illegal, Sentence Revoked.
1. Soldier returned to duty without trial.
2. Soldier brought to trial on original charges.
3. Soldier discharged without honor.
4. Status of man same as before trial ..... *Page 460*
5. Sentence of court of enlisted men illegal; discharge revoked.
H. Revoked by Act of Congress.
XVII. OFFICER. (See also Discharge, XXI.)
A. Dismissal Not Revocable.
B. Medical Officer Discharged After Failure to Pass Examination.
XVIII. CADETS.
A. Dismissal Not Revocable.
XIX. SECRETARY OF WAR MAY RECALL A DISHONORABLE DISCHARGE AND ISSUE AN HONORABLE ONE AND CORRECT RECORDS ACCORDINGLY UNDER ACT OF CONGRESS ..... *Page 461*
XX. WHO CAN DISCHARGE.
A. Revocation by President of Appointment of Officer Amounts to Discharge.
B. President Can Discharge Officer or Enlisted Man of Philippine Scouts When Service is no Longer Required, but not as a Punishment.
C. Department Commander Can Discharge Without Honor Soldiers Who are Serving Sentences of Civil Courts.
D. Certificate of Disability.
1. Department commander can determine nature of discharge in case of disability.
2. District commander can not discharge on certificate of disability.
E. Authority Not Granted Commanding General of Philippines Division to Discharge Without Honor Men Who After Promise Fail to Reenlist ..... *Page 462*
F. A Court-Martial Can Not Discharge Soldier.

XXI. DISCHARGE OF COMMISSIONED OFFICER. (See also DISCHARGE, XVII.)
A. AN OFFICER FAILED ON EXAMINATION AND WAS DISMISSED, WHICH WAS, IN EFFECT, AN HONORABLE DISCHARGE.
B. DISABILITY MAY BE PROVEN ALTHOUGH OFFICER NOT DISCHARGED ON THAT ACCOUNT.
XXII. A DISCHARGE TERMINATES MILITARY JURISDICTION OVER A SOLDIER.
A. AN HONORABLE DISCHARGE AND A DISCHARGE WITHOUT HONOR RELATE TO CURRENT ENLISTMENT.
B. A DISHONORABLE DISCHARGE COVERS ALL UNEXPIRED ENLISTMENTS.
XXIII. OF SEAMEN IN THE TRANSPORT SERVICE. (See CIVIL EMPLOYEES.)
XXIV. FROM CIVIL SERVICE. (See CIVIL EMPLOYEES.)
XXV. POST NONCOMMISSIONED STAFF OFFICER.
A. SUMMARY DISCHARGE.
XXVI. OF ALIEN.
A. WILL NOT BE GIVEN TO ENABLE ALIEN TO RETURN TO NATIVE LAND TO PERFORM MILITARY DUTY..... *Page 463*

I A. The classification of discharges has never been assumed by Congress, but has been left by it to the Executive branch of the Government. At present there are three kinds of discharges expressly recognized, to wit: The honorable, the dishonorable, and the discharge without honor. *C. 2731, Nov. 9, 1896; 15358, Oct. 9, 1903; 20754, Nov. 23, 1906; 23259, Apr. 9, 1909; 25915, Dec. 10, 1909.*

II A 1. An officer failed to pass a satisfactory examination as to his qualifications as an officer before an examining board duly appointed by the department commander and his commission was revoked by order. *Held* that his discharge was an honorable discharge in accordance with this rule, viz, in the absence of express evidence that a discharge was given on account of unfitness for the service for which he was culpably responsible, or on account of fraud in enlistment, or when the person discharged was in a status of dishonor, i. e., in confinement under the sentence of a general court-martial or of a civil court, it should be held to be honorable. *C. 270, Sept. 28, 1894.*

II A 2. An officer tendered his resignation without stating any reason therefor and it was accepted and the officer discharged without any reason being stated. *Held* that the discharge was honorable. *C. 2170, Apr. 20, 1896; 2336, June 15, 1896; 3569, Oct. 4, 1897.*

II B. *Held*, that to entitle an enlisted man to an honorable discharge he must have rendered the honest and faithful service stipulated for in his enlistment contract, and at the instant of his separation from the military service must have occupied a status of honor. *C. 6636, July 12, 1910.*

II B 1. On a question whether a discharge by order (summary) was of the class designated as not honorable, i. e., "without honor," *held* that in the absence of express evidence that such discharge was given on account of unfitness for the service for which the person discharged was culpably responsible, or by reason of fraud in the enlistment, or when the person at the time of his discharge was in a status of dishonor, i. e., in confinement under the sentence of a general court-martial or of a civil court, the discharge should be deemed honorable. *C. 270, Sept., 1894; 15358, Oct. 9, 1903; 822, Mar. 8, 1904.*

II B 2. The fact that a soldier has been a deserter does not preclude his receiving an honorable discharge, if either he be restored to duty without trial, or having been tried and sentenced, he yet, by reason of his imprisonment being fully executed or being remitted before the end of his term, is returned to duty and is in the performance of faithful service when his term is completed. An honorable discharge then given to him is an authoritative declaration by the Government that he leaves the military service in a status of honor. Thus honorably discharged he can not, by reason of his having formerly deserted, be deprived of any rights to pay, allowances, or bounty usually incident upon honorable discharge.[1] *R. 26, 484, Mar., 1868; P. 43, 48, Sept., 1890; C. 902, Feb., 1895; 15639, Dec. 19, 1903; 16644, July 25, 1904.*

II B 2 a. A soldier deserted and, after apprehension, was convicted and given a punishment less than dishonorable discharge. Upon question being raised as to the character to be given him upon his discharge, *held* that if the soldier's service should continue honest and faithful to the close of his term of enlistment he might be discharged with the remark: "Service honest and faithful," and the further remark: "No objection known to his reenlistment." *Held* further that it is not the policy of the War Department to place an insuperable barrier to a man's reformation by holding that no matter how honest and faithful his later service may be, a fault once committed can not be atoned for, and attention invited to the fact that Congress intended that even general prisoners should have an opportunity to redeem themselves and be allowed to return to an honorable career, as evidenced by section 1352 R. S. (act of Mar. 3, 1873, 17 Stat. 583), which permits the honorable restoration to duty of general prisoners in case the same is merited, which law was enacted at a time when dishonorable discharge was not given until after the confinement portion of a sentence had been executed. *C. 15639, Dec. 19, 1903.*

II B 3. A soldier was turned over to the civil authorities for trial, it appearing that at least six months would elapse before his case could be determined, a statement having been made that the evidence would undoubtedly lead to his conviction. *Held*, that there was no legal objection to giving him an honorable discharge at end of enlistment. *C. 9819, Feb. 12, 1901.*

II B 4. Company K, Fifth Missouri Volunteer Cavalry, was mustered out during the Civil War on account of the mutinous conduct of some of its members. The muster roll contains remarks opposite the names of 20 of them, showing complicity in the mutinous conduct. *Held*, in the case of a soldier of that company against whom no derogatory remarks are made on the record, that he is entitled to an honorable discharge. *C. 9230, Nov. 5, 1900.*

II B 5. A soldier immediately after enlistment was imprisoned on suspicion of being a deserter and "bounty jumper." He was subsequently released and sent away from the Army without a certificate of discharge. *Held*, that the soldier was discharged, and upon satisfactory proof being furnished that the suspicion against him was erroneous, *held*, further, that his imprisonment during the whole of his service, being through no fault of his own, did not deprive him of his right to a certificate of honorable discharge. It was recommended that one be issued to him. *C. 1916, Dec. 28, 1895.*

---

[1] This opinion is quoted and adopted by the U. S. Supreme Court in United States *v.* Kelly, 15 Wallace, 34, 36.

III A. The discharge without honor is given in the cases first specified in Circular 15, Headquarters of the Army, 1893,[1] but this circular did not *create* such discharge; it merely gave it a name. Before the issue of the circular and as far back as the Civil War this kind of discharge was out of necessity resorted to. Its name is only important as a recognition of a discharge, not technically dishonorable, and not honorable in fact. *R. 10, 286, Sept., 1864; C. 2298, May 14, 1896; 10141, Apr. 2, 1901.* It might not be going too far to say that when soldiers were summarily "dishonorably discharged" during the Civil War the order was so worded simply because the soldier had done something to disgrace the service and could not be in fact honorably discharged. *P. 60, 241, June, 1893.* Thus where a volunteer soldier under arrest for desertion was "dishonorably discharged" by order on account primarily of the desertion, *held*, that while his discharge was not technically dishonorable it was what is now called a discharge without honor, and therefore not honorable. *C. 2128, Mar. 17, 1896.* The term also covers the summary dismissal of an officer. *P. 52, 403, Mar., 1892; C. 1503, Aug. 3, 1895.*

III B. The established rule and policy of the War Department is not to discharge without honor men charged with offenses susceptible of being proved before a court-martial. *C. 24004, Apr. 5, 1909; June 11, 1910. Held*, that discharge without honor is not a punishment[2] (*P. 43, 176, Oct., 1890; C. 17964, May 18, 1905; 9362, Nov. 24, 1906; 25915, Dec. 10, 1909*) and can not be used for summarily ridding the service of undesirable soldiers who, by their misconduct, have rendered themselves liable to trial by court-martial. Further *held*, that the fact that the evidence to convict is difficult to secure is not sufficient to set aside the established policy of the War Department as regards this form of discharge and to deny the men involved an opportunity to make a defense to the charges brought against them. *C. 24004, Aug. 8, 1910, Dec. 9, 1910; 19547, Apr. 19, 1906; 24198, Dec. 7, 1908; 25833, Feb. 28, 1911; 28556, June 19, 1911.*

III B 1. The commanding general, Army of Cuban Pacification, requested authority to discharge without honor a sergeant of the Signal Corps on account of misconduct, viz, cohabitation with a woman of ill repute, and probably being an accomplice in the theft of a large sum of money. The soldier denied the alleged wrongdoing. *Held*, that to discharge him summarily without honor, without giving him an opportunity to present a defense, would appear to work an injustice and to establish a dangerous precedent. *C. 22272, Oct. 25, 1907, and June 7, 1910.*

III B 2. Certain soldiers were charged with the crime of sodomy. *Held* that in justice to them they should not be discharged without honor but should be tried by a competent court by whom the facts should be investigated. *C. 19547, Apr. 19, 1906; 19539, Apr. 18, 1906.*

---

[1] (*a*) When a soldier is discharged without trial on account of fraudulent enlistment. (*b*) When he is discharged without trial on account of having been disqualified for service, physically or in character, through his own fault. (*c*) When the discharge is on account of imprisonment under sentence of a civil court. (*d*) When at the time of the soldier's discharge, at or after the expiration of his term of enlistment, he is in confinement under the sentence of a general court-martial which does not provide for dishonorable discharge.

[2] See U. S. *v.* Kingsley, 138 U. S., 87, and Reid *v.* U. S., 161 Fed. Rep., 469.

III B 3. Recommendation was made by a post commander that a soldier be discharged without honor on account of having made indecent proposals to a young girl. *Held* that it would not be proper to so discharge him unless there were no doubt of his guilt. *C. 20615, Feb. 2, 1909 and Aug. 27, 1909; 24004, Sept. 2, 1911.*

III B 4. A soldier was tried by court-martial for offenses which, upon conviction, would have justified his discharge, but having been *acquitted* by the court, *held*, that his discharge without honor, primarily on account of said alleged offenses would not be proper. *C. 1058, Feb. 1895; 24004, Jan. 21, 1909.*

III B 5. A soldier was tried by court-martial for offenses which, upon conviction, would have justified his discharge. He was given a punishment less than discharge. *Held*, that his discharge without honor primarily on account of said alleged offenses would not be proper. *C. 1512, July 2, 1895; 15533, Nov. 24, 1903; 24103, Dec. 10, 1908; 25915, Dec. 10 and 22, 1909.*

III B 5 a. Although it is improper to discharge a soldier without honor on account of charges for which he has been tried and convicted, *held* that the discharge without honor may be used in the case of a soldier who has been convicted of desertion, and the reviewing authority, acting not on the merits of the issue but because of defects in procedure, etc., sets aside or mitigates the sentence. *C. 25915, Dec. 10, 1909.*

III C. A soldier who had been tried and convicted numerous times by court-martial during his term of service was at the expiration thereof given a certificate of discharge "without honor," for, as stated by his company commander, "being disqualified for service on account of *character* through his own fault." *Held*, that the condition referred to under which a soldier may be discharged without honor, to wit, "when he is discharged without trial on account of having become disqualified for service, physically or in character, through his own fault," does not apply to the case of a soldier discharged by reason of expiration of term of service; but that the previous convictions could properly have been considered by the board of officers provided for by the regulations in determining whether the soldier's service had been honest and faithful and upon an approved finding that it had not been, the discharge without honor could have been given. *P. 65, 40, May, 1894.*

III D. A soldier was in confinement in the guardhouse at the end of his term of enlistment under sentence of a summary court. *Held* that he should not be discharged without honor for this reason, as the regulation applies only to sentences of general courts-martial. *C. 12439, Apr. 17, 1902, Jan. 31, 1903, July 25 and Aug. 3, 1904.*

III E. If a soldier commits an offense of so serious a character as to warrant his discharge, by way of punishment, charges are preferred, and the case is tried by general court-martial. Although not having committed an offense of sufficient gravity to warrant his trial by court-martial, the conduct of a soldier may be such as to warrant the termination of his enlistment contract because he has not served honestly and faithfully. *Held*, that in such a case, when reasonable efforts have been put forth with a view to the correction of his faults, his enlistment contract may be annulled in the manner prescribed in the

fourth article of war, by a discharge without honor. *C. 20754, Nov. 23, 1906; 25915, Dec. 10, 1909.*

III F 1. It will be instructive to note some of the reasons for which, based on the opinions of this office, discharges without honor have been given.

In cases of soldiers:

An established case of *desertion*, where the soldier was not fit for service and it was not advisable to bring the case to trial. *C. 4840, Aug. 23, 1898; 5327, Nov. 15, 1898; 5676, Jan. 24, 1899; 6210, Apr. 11, 1899; 6593, June 15, 1899; 7624, Jan. 31, 1900; 18360, Aug. 1, 1905; 15533, Apr. 1, 1907; 23491, June 24, 1908; 23643, July 15, 1908.*

For being *in* a *penitentiary* under the sentence of a civil court at the expiration of his term of enlistment. *C. 5312, Nov. 12, 1898; 21785, July 12, 1907; 23066, Apr. 11, 1908.*

For *worthlessness*. *C. 5837, Feb. 8, 1899; 5981, Mar. 14, 1899; 15065, Aug. 5, 1903.*

Sentenced to confinement in a *workhouse*. *C. 8555, July 5, 1900.*

For expressing *sympathy*, in time of war, *with* our *enemies*. *C. 9744, Feb. 1, 1901.*

For *disease* contracted *through misconduct* before entering into the service. *C. 10922, Aug. 3, 1901.*

For *refusing* to permit himself *to be vaccinated*. *C. 11753, Dec. 12, 1901.*

Conviction by civil courts of *burglary* with *intent to commit theft*. *C. 12079, Feb. 20, 1902.*

Convicted of *homicide* by civil courts in Cuba, and later pardoned. *C. 12631, May 27, 1902.*

For *inefficiency*. *C. 15035, Sept. 16, 1903.*

For *not* being a *fit associate* for other soldiers. *C. 15834, Jan. 28, 1904.*

Convicted of *theft* by civil courts and given a probationary sentence. *C. 20158, July 31, 1906; 20153, July 18, 1907; 23259, Sept. 16, 1908, Mar. 16, 1909.*

Convicted of *theft* by civil courts. *C. 17213, Dec. 5, 1904, Mar. 5, 1908; 23259, June 23, 1910; 23259–A, July 12, 1911.*

Sentenced to *imprisonment* by civil courts. *C. 17373, July 21, 1908; 23259, May 20, 1908, Jan. 14, July 2 and 30, 1909.*

For *alcoholic dementia*. *C. 19547, Dec. 14, 1909.*

For *unfaithful service*. *C. 20497, Oct. 13, 1906.*

For writing an *obscene* and *insulting letter* to a woman. *C. 20615, July 1, 1910.*

For being in the *hands of the civil authorities* at the expiration of his enlistment. *C. 22526, Dec. 24, 1907.*

Held by civil authorities for *seduction*, admits guilt. *C. 22612, Mar. 12, 1908; 23259, June 8, 1910.*

For *indecent exposure of person* on a street car, for which he was sentenced to imprisonment. *C. 23259, June 25, 1908.*

Incorrigibility and drinking to excess. *C. 24004, Oct. 21, 1908.*

For *introducing cocaine* into prison and prison wards of Pacific branch of United States military prison. *C. 24004, Apr. 5, 1909.*

Morally incapacitated from rendering honest and faithful service. *C. 24004, Dec. 22, 1910.*

Totally *unfit to be a soldier*, and should never have been enlisted. Service did not justify an honorable discharge. *C. 24004, June 30, 1911.*

For *attempt* by a sane man *to commit suicide*. *C. 25962, Dec. 18, 1909.*

For being *insane at time of enlistment* while on parole from an insane asylum as improved. *C. 26566, Apr. 19, 1910; 24004, Aug. 24, 1911.*

Sentence which contained dishonorable discharge *set aside* on account of fatal defect in the record. *C. 11998, Feb. 6, 1902; 13209, Aug. 30, 1902; 13210, Aug. 29, 1902; 25915, Dec. 10, 1909.*

A sentence contained dishonorable discharge, but the *court was not sworn*. *C. 6160, Apr. 24, 1899.*

A *sentence* of confinement *extending beyond* the soldier's *term* of enlistment did not contain dishonorable discharge. *C. 6776, July 22, 1899.*

Sentenced to *dishonorable discharge* when the *code* of penalties did *not justify* such sentence. *C. 8705, Aug. 2, 1900.*

Sentenced to confinement and dishonorable discharge, and, through *error*, the mitigation intended for a portion of the confinement was held to *set aside the dishonorable discharge*. *C. 9369, Nov. 28, 1900, Aug. 28, 1901.*

Sentenced to *confinement in a penitentiary* and paroled. *C. 23259, Sept. 16, 1908.*

For *highway robbery* and *aiding a desertion to the enemy*, when protected from trial by the statute of limitations. *C. 12025, Feb. 6, 1902.*

After expiration of term of enlistment, while serving a sentence of confinement not involving dishonorable discharge, it was discovered that the *sentence was null and void*. *C. 13210, Aug. 29, 1902.*

Convicted of *murder*, in the Philippine Islands, under the fifty-eighth article of war, but sentence not approved until after the President had proclaimed peace by his proclamation of July 4, 1902. *C. 13653, Feb. 18, 1903.*

Discharged by *order* of the *civil courts* while in confinement under charge of desertion. *C. 13818, Dec. 18, 1902.*

From preceding enlistment, in case of *fraudulent enlistment without a discharge* from said preceding enlistment. *C. 20314, Aug. 31, 1906, Feb. 17, 1909.*

Disqualification for service, as to character, by reason of his *bad habits*. *C. 22487, Dec. 14, 1907; 20615, Dec. 23, 1910.*

Convicted of *larceny* of clothing, but on account of failure of judge advocate to prove the value of the articles stolen, *findings disapproved*. *C. 22902, Mar. 18, 1908.*

Convicted before a United States commissioner of *killing game* in *Yellowstone Park*, and sentenced to pay a fine, and confined, on refusal to pay the fine or to take the pauper's oath. *C. 23259, A, Jan. 27, 1911.*

For being ignorant, lazy, and dirty to the point of *filthiness*, without a single soldierly characteristic. Discharge requested by father on ground of mental unsoundness, etc., but surgeon reported no evidence of mental unsoundness. *C. 23653, Aug. 3, 1908.*

For *participating*, during a previous enlistment, *in* a *loot* of Government property at a military station. *C. 24004, Apr. 4 and 26, 1911.*

A soldier during the Civil War was tried and convicted, the offenses being eluding the guards, passing through the lines and robbing the house of a woman 6 miles from camp of jewelry to the value of about $800. He was sentenced "to be *confined* in some *military prison* for a period of *ten years*, to forfeit all pay or allowances that may be due him and to wear a ball and chain attached to his leg two months of each year." He did not receive a dishonorable discharge. *Held* that his status was that of an enlisted man undergoing sentence of imprisonment lawfully imposed by general court-martial, and as such a person does not occupy a status of honor at the instant of his separation from the military service he is regarded as having been discharged without honor. *C. 17398, Jan. 13, 1905.*

A department commander *disapproved a sentence* of dishonorable discharge and instructions were issued returning the man to duty. Before the disapproval was published in orders the department commander *reconsidered the matter*, and as the record was still in his possession he approved the sentence and ordered it executed, and this approval was published in orders. *Held* that the effect of the later approval by the department commander was to separate the soldier from the service under circumstances which are not honorable but at the same time his discharge is not a dishonorable one, and it should be treated as a discharge without honor. *C. 11509, Nov. 8, 1901.*

It developed that a deserter was absent in a sanitarium undergoing an operation of trepanning the skull, to remove the results of an *injury* he had *received prior to enlistment*, and that during his enlistment he had been subject to *epileptic attacks*. *Held* that he should be summarily discharged without honor. *C. 16017, Apr. 7, 1904.*

Held that a soldier who *believes* in the *overthrow of organized society* as now constituted should be discharged without honor. *C. 24004, Dec. 26, 1911.*

III F 2. *Held* that the *discharge* of a cadet from the United States Military Academy, in 1862, for *demerits* in excess of the limit fixed, was what is now known as a discharge without honor. *C. 2533, Aug. 17, 1896.* Similarly *held* in the case of a *summary dismissal* of a cadet. *C. 2533, Aug. 17, 1896.*

III F 3. *In cases of officers:* A volunteer officer was summarily dismissed on account of *unfitness caused by his own fault. Held*, that his discharge was without honor. *P. 52, 403, Mar. 1892.* Similarly *held* where the officer was summarily "*dropped*" for absence without leave. *P. 46, 389, Apr., 1891.* Similarly *held* in the case of a volunteer officer who was summarily dismissed by the governor of his State, under authority conferred by the President, for "having *failed to pass a satisfactory examination* before the examining board," which action was recommended by the board, as the officer's *conduct* during his examination "was *contemptuous* and *insulting* in the extreme, evincing not only his incompetency as an officer, but an utter lack of even the smallest qualification of a gentleman." *C. 1789, Oct. 18, 1895.* Similarly *held* in the case of an officer who was *summarily discharged* while awaiting confirmation of a sentence of dismissal for "*quitting his guard.*" *C. 9335, Nov. 26, 1900.* Similarly *held* in the case of an officer who by *fraud* accomplished his *muster-in*, and who was dismissed by order of the President under

section 17 of the act of July 17, 1862 (12 Stat. 594). *C. 16822, Sept. 2, 1904.*

III G. A company[1] of volunteers having in 1862 refused to proceed to a certain point when ordered to go there, was subsequently duly mustered out because of its refusal to obey the order. *Held* that the members of the company were discharged without honor. *C. 1915, Dec. 1895.* Similarly *held* in the case of a company during the Civil War which was "mustered out and discharged because it refused to serve as the authorities of the Government then in charge of matters relating to it held that it ought to serve." *C. 1915, Dec. 28, 1895.*

IV A. A dishonorable discharge is a discharge given pursuant to the sentence of a general court-martial when specifically awarded by or necessarily involved in such sentence. *P. 42, 267, Aug., 1890; C. 5870, Feb. 21, 1899, and 7102, Oct. 5, 1899.* Being a punishment, it can only be authorized by sentence of a court-martial after trial and conviction, and no executive or military official (except in executing such a sentence) can legally give or order such discharge. *P. 36, 334, Nov., 1889; 56, 220, Oct., 1892; 60, 95, June, 1893.* And when a soldier is sentenced by court-martial to imprisonment, in a penitentiary and the sentence does not also direct dishonorable discharge, it nevertheless involves such discharge.[2] *C. 1226, Apr., 1895.*

IV B. A dishonorable discharge entails *per se* no disqualification for civil employment under the United States.[3] *R. 8, 91, Mar., 1864; 28, 250, Nov., 1868; 31, 296, Apr. 1871; 34, 623, Nov., 1873.*

IV C. A soldier was sentenced to imprisonment in a penitentiary and the sentence did not direct that he should be dishonorably discharged. *Held* that it involves a dishonorable discharge nevertheless for the reason that the dishonorable status of confinement in a penitentiary is incompatible with the honorable status of a soldier. *C. 1226, Apr. 25, 1895; 12623, May 15, 1902.*

IV D. Where a soldier is dishonorably discharged from the military service in the operation of a sentence of court-martial, the operation of such discharge is to rescind the soldier's contract of enlistment, and in the operation of such rescission all contingent rights and benefits, present and future, which are conditioned upon honest and faithful service on the part of the soldier fall with it. *C. 27073, July 22, 1910.*

IV E. So where a soldier, while under a sentence of confinement for a term less than the remaining term of his enlistment (imposed without dishonorable discharge), was for a further offense tried, convicted, and sentenced to dishonorable discharge and imprisonment, and was thereupon duly discharged accordingly, *held* that the period of the pending confinement under the first sentence was thereupon terminated, leaving to be executed, after the discharge, only the confinement adjudged by the second sentence. *R. 41, 576, June, 1879;*

---

[1] In 1906 three companies of the Twenty-fifth Infantry were discharged without honor as a result of the shooting affray at Brownsville, Tex., Aug. 13, 1906. On a test case, held that the discharge was legal. (Reid *v.* U. S., 161 Fed., 469, May 14, 1908.)

[2] This was the practice during the Civil War. But it is now the practice in such cases to specifically adjudge dishonorable discharge to precede the imprisonment.

[3] Sec. 2 of the act of August 1, 1894 (28 Stat., 216), provides that "no soldier shall be again enlisted in the Army whose service during his last preceding term of enlistment has not been honest and faithful."

P. 61, 424, Sept., 1893; C. 2376, 2762, Oct. and Nov., 1896; 11393, Mar. 6, 1902; 12402, Apr. 14, 1903; 19972, June 27, 1906; 21722, July 9, 1907.

V A. If during his term of enlistment a soldier becomes incapable of rendering service, on account of disability contracted in the line of duty, he is granted a discharge on a surgeon's certificate of disability. *Held* that the discharge so granted is honorable. *C. 20754, Nov. 23, 1906, and Mar. 30, 1908.*

V B. A soldier was discharged on surgeon's certificate of disability by reason of tertiary syphilis existing at the time of enlistment. *Held*, on a question as to the character that should be entered on his discharge certificate, that as the disability was not due to any fault or misconduct of the soldier and it does not appear that there was any fraud in the enlistment, he should be given an honorable discharge. *C. 3540, Sept. 22, 1897.*

V C. The question arose as to whether or not a soldier was discharged by way of favor or because of disability. *Held* that he was discharged by way of favor, but that disability may have existed and may be proved.[1] *C. 10396, May 14, 1901.*

V D. A certain certificate of disability was made out in favor of a soldier who was insane in a hospital and the certificate of discharge delivered to the superintendent of the hospital. *Held* that as the soldier was insane he was incapable of receiving or of being charged with notice of the fact of discharge, and that his connection with the military service had not been severed and the certificate of discharge issued in his case was inoperative. Further *held* that he should be continued in service until his discharge had been ordered by the Secretary of War in pursuance of his authority to discharge soldiers who were patients at the Government Hospital for the Insane. *C. 15403, Oct. 24, 1903; 20066, Jan. 18, 1906.*

VI A. *Held*, that discharges by way of favor as distinguished from purchase are illegal and will not be granted except in case of dependent parent after one year's service of the soldier. *Held* further that a soldier shall not be discharged by way of favor until he shall have served one year.[2] *C. 15717, Dec. 28, 1911.*

VI B. A soldier served nearly 10 years as an enlisted man and about 3 years as a commissioned officer, making a total service of about 12 years and 8 months. *Held*, that although he could not be discharged by way of favor on account of having served 12 years as an enlisted man, that the character of his service justified his being discharged by way of favor. *C. 12607, May 14, 1902.*

VI C 1. A soldier's father was declared insane, leaving his mother and small sister without any support. *Held*, that although the facts do not bring the case within the letter of section 30, act of February 2, 1901 (31 Stat., 756), they bring it within the spirit of that act, and that it would be proper for the Secretary of War to decide that the soldier's discharge by way of favor would subserve the public interest, which action was recommended. *C. 16773, Aug. 19, 1904; 18329, July 21, 1905.*

VI C 2. Section 30 of the act of February 2, 1901 (31 Stat., 756), provided that an enlisted man could after one year's service, should

[1] See Circular, War Department, May 22, 1901.

[2] See G. O. 90, War Department, Washington, June 30, 1911, pars. 8 and 9.

either of his parents die leaving the other solely dependent upon him for support, upon his own application to the Secretary of War accompanied with proof of such condition, be honorably discharged. *Held*, that this law is not applicable to general prisoners. *C. 16428, June 28, 1904.*

VI D 1. Section 4 of the act of June 16, 1890 (26 Stat., 158), authorizes the President, in time of peace, in his discretion and under such rules and upon such conditions as he shall prescribe, "to permit any enlisted man to purchase his discharge from the Army." *Held*, that under this section the President could permit a soldier to purchase his discharge, even if his service had not been honest and faithful. *P. 63, 373, Feb., 1894; C. 1340, May 10, 1895.*

VI D 2. The rules and conditions prescribed under the act of June 16, 1890 (26 Stat., 158), are published in the Army Regulations, under which the granting of discharges is discretionary. *Held*, that although in 1900 active operations against an enemy were being conducted only in the Philippine Islands, if it was deemed for the best interests of the service not to do so the then existing conditions warranted withholding of the privilege and purchase of discharges within the territorial limits of the United States as well as in the Philippines.[1] *C. 7617, Jan. 27, 1900.*

VI D 3. As the enactment which authorizes an enlisted man to secure his discharge by purchase is intended to apply only to a meritorious case, *held*, that the period during which a soldier was absent without leave would not be included in computing the necessary length of service to render him eligible to purchase his discharge. *C. 22731, Feb. 10, 1908.*

VI D 4. *Held*, that a discharge by purchase is an honorable discharge within the meaning of section 2166, R. S., which section waives the declaration of the intention to become a citizen in the case of an honorably discharged soldier. *C. 22923, Mar. 19, 1908.*

VI D 5. *Held*, that a discharge by purchase stands on the same footing as any other form of discharge in all matters having to do with its execution, including the preparation of a statement of character and the determination of the service rendered as honest and faithful or otherwise.[2] *C. 27037, July 15, 1910.*

VI D 6. The Philippine Scouts are a part of the Army, section 36 of the act of February 2, 1901 (31 Stat., 757). *Held*, that they are brought within the scope of section 4, act of June 16, 1890 (26 Stat., 157), which authorizes discharge by purchase. Discharges by purchase were forbidden outside the continental limits of the United States in War Department orders, and the question of whether they shall be included is a matter of expediency and not of law. *C. 18157, June 14, 1905, and Sept. 1, 1911.*

VI D 7. A soldier who had had previous service in the Marine Corps applied for discharge by way of purchase before he had served one year in the Army. *Held* that he was not entitled to purchase his discharge as his Marine Corps service could not be held to be service in the Army. *C. 18391, Aug. 7, 1905.*

VII A. A soldier was ordered released from the military service by the civil courts on a writ of *habeas corpus*. *Held*, that in that case

---

[1] The price fixed at date of discharge governs (XIV Comp. Dec., 192, Oct. 4, 1907).
[2] See G. O. No. 90, War Department, Washington, June 30, 1911.

and in similar cases the Secretary of War should cause a discharge certificate to be issued. *C. 2739, Nov. 14, 1896.*

VII B. Where a State court on *habeas corpus* proceedings ordered that a soldier in the military service of the United States be discharged therefrom, *held* that as the court was without jurisdiction in the matter its order was absolutely void and without effect as a discharge of the soldier from the service. *P. 32, 313–319, May, 1889; C. 394, Sept., 1894.*

VIII A. A man enlisted July 23, 1898, for the Eighth Infantry (white). Three days later the recruiting officer discovered that he was colored, reported the fact to The Adjutant General's Office, making application for his discharge, and told the soldier to go to his home and remain there until sent for. A few days later the recruiting officer was relieved from duty at that station, so that his connection with the case ceased. Owing to volume of business in The Adjutant General's Office, the case was not reached for a considerable period of time. An inquiry was made of the commanding officer if this soldier was with the regiment and if so directing his immediate discharge with travel pay. The commanding officer, Eighth Infantry, replied that no one with the name given belonged to the regiment. Telegram was then sent to the officer who enlisted the man, asking what disposition was made of the record, and the papers filed to await reply. No reply was ever received, and the case so remained until discovered by clerical examination for perfection of the records. The man had never been with the regiment, nor had he been formally discharged. *Held* that as the soldier had remained at his home for over three years since being sent there by the recruiting officer, without making any claim for pay or allowances, or communicating with the War Department in regard to the status of his case, it was inferred that he understood that he was to be discharged, and that his discharge took effect on the date when he was sent to his home. *C. 11166, Sept. 6, 1901.*

IX A. The act of April 22, 1898 (30 Stat. 361), provided that "at the end of any war in which the United States may become involved the Army shall be reduced to a peace basis by the * * * honorable discharge or transfer of supernumerary enlisted men." *Held* that particular enlisted men could not claim a right under this law to be discharged. The provision is directed to the President and makes it his duty to reduce the Army by the means indicated, and of course he, through the officers of the Army, will select the men to be discharged. *C. 5085, Oct., 1898.* This act further provided that all enlistments for the Volunteer Army should be for the term of two years unless sooner terminated and that all officers and men composing said army should be discharged when the purposes for which they were called into service shall have been accomplished or on the conclusion of hostilities. *Held* that this latter provision made it the duty of the President to disband the Volunteer Army when the occurrences named took place, but did not give individuals the right to claim discharges before the end of the two years for which they enlisted. *C. 4822, Aug., 1898; 4891 and 4897, Sept. 1, 1898.*

IX B. General Orders, 40, Adjutant General's Office, of 1898, provided "that men enlisted or reenlisted during the war may be informed that they will be granted their discharges if desired at the close of the war upon their individual applications." *Held* that

this order simply authorized the discharge on their own application of men who had enlisted during the war, leaving the character of each discharge and the question of travel pay to be determined by the law and regulations on the subject. *C. 6569, June, 1899.*

IX C. General Orders No. 40, Adjutant General's Office, 1898, provided that: "Men enlisted or reenlisted in the Regular Army during the war may be informed that they may be granted their discharges at the close of the war upon their individual applications." *Held* in a particular case that the soldier was not entitled to the benefits of said order for the reason that he did not take advantage of the same at the close of the war or within a reasonable time thereafter, and his inability to do so was caused by his own misconduct. *C. 7098, Oct. 7, 1899.*

IX D. A soldier who enlisted during the Spanish War executed an instrument January 10, 1899, as follows: "I voluntarily waive the privilege of discharge granted under General Orders No. 40, Adjutant General's Office, series 1898, and agree to serve the full time (three years), for which I was enlisted, provided I am sent to the Philippines." The war closed April 11, 1899. June 13, 1899, he made application at San Francisco to be discharged; *held* that the proposal of this soldier to waive his right to elect at the close of the war to be discharged was of no effect and that the position of the Government was that he should be discharged at the close of the war in case he desired it, and that of course meant within a reasonable time. *Held* also that as the war closed April 11, 1899, his application of June 13, 1899, was not within a reasonable time, unless the soldier was so situated that he could not have acted sooner by using reasonable diligence. Further *held* that the question of whether or not he was so situated is to be determined by those in charge of the matter of discharging soldiers. *C. 6731, July 22, 1899.*

IX E. In the case of men enlisted or reenlisted in the Regular Army during the Spanish War, *held* that their discharges will be granted if discharged at the close of the war upon their individual applications, but that they will not be discharged if under charges, awaiting result of trials, or serving sentences; that General Orders 40, Adjutant General's Office, 1898, was not intended and should not be construed to operate to relieve them from consequences of military offenses. *C. 5787, Feb. 3, 1899.*

X A. The services of a soldier were desired in another department of the Government and his discharge from the Army was requested. *Held* that the discharge in such a case rests upon grounds of expediency and the question presented is, will the public interest be benefited by the discharge. Further *held* that it should affirmatively appear in the request just what the benefit to the Government will be. Further *held* that if the soldier simply seeks his discharge in the hope of securing employment in another branch of the Government and makes no showing of a desire by that other branch of the Government for his employment it would not appear to be a case for discharge. *C. 15717, Jan. 6, 1911.*

X B. The act of May 11, 1908 (35 Stat. 109), is a beneficial one enacted, in a spirit of liberality, to encourage reenlistments, and the construction should be equally liberal, in order to accomplish that purpose. To carry out the purpose of Congress a liberal construction must be given to the words "for the convenience of the

Government." *Held* that all soldiers honorably discharged by the Government on its own motion or for its own advantage after having served over half their enlistment and before the expiration of their term of enlistment, are equally deserving. There would be no reason for distinguishing between those honorably discharged because their services were no longer needed, those discharged to be immediately reenlisted, and those discharged for disability. A discharge for any of these causes is "for the convenience of the Government." *C. 23547, Mar. 28, 1910; 28327, May 10, 1911.*

XI A 1. On request for information as to whether or not the notation as to character entered upon a soldier's discharge refers to his character as a soldier or his character as a man, *held* that it refers to his character regarded from both points of view. *C. 15359, Oct. 10, 1903.*

XI A 2. *Held* that the provisions of (paragraph 147,) Army Regulations, (1910), relating to the appointment of a board of officers to determine the facts relative to a soldier's character is directory only and does not affect the validity of an executed discharge, with reference to which the directions of the regulations have not been observed. *C. 5943, March, 1899; 12942, July 11, 1902.*

XI B 1. The regulations provide that when a company commander deems the service of an enlisted man not honest and faithful, he shall, if practicable, so notify the soldier at least 30 days prior to discharge and shall at the same time notify the commanding officer, who will in every such case convene a board of officers, three, if practicable, to determine whether the soldier's service has been honest and faithful. *Held* that this applies only to discharges at expiration of term of enlistment and has never been regarded as restricting the authority vested in the Secretary of War by the fourth article of war to annul an enlistment contract whenever that course is dictated by the public interest. *C. 20754, Nov. 23, 1906; 23259, Apr. 9, 1909.*

XI B 1 **a.** *Held* that a discharge without honor should not be given to a soldier who is confined in the guardhouse at date of expiration of term of enlistment awaiting trial or result of trial or serving a sentence which does not involve dishonorable discharge, without the previous action of a board of officers.[1] *C. 28556, June 19, 1911.*

XI B 2. A company commander believed that a soldier's service had been "not honest and faithful." A board was called and expressed the opinion that the man's service had been "honest and faithful." This finding was disapproved by the convening authority. A second board was convened and made a report. *Held* that there was no authority for convening the second board, and that the soldier was entitled to an honorable discharge, service "honest and faithful" with character at least "good," as he could not be discharged without honor on account of service "not honest and faithful," without the consensus of opinion of the company commander and the board, and the convening authority. *C. 19364, Mar. 19, 1906.*

XI B 3. A company commander entered on the discharge certificate of a soldier that his service was "not honest and faithful." *Held* that the War Department would not be legally justified in directing this company commander to issue another certificate, stating that the service was honest and faithful, but that the Secretary of

[1] See par. 156, A. R., 1910, for date of discharge in such a case.

War could, if in his opinion the facts justified it, enter upon the man's discharge his opinion of the soldier's service, and he may enter thereon or cause to be entered thereon the fact that the soldier's service was "honest and faithful." *C. 12942, July 11, 1902.*

XI B 4. A soldier applied for enlistment and stated that he had been dishonorably discharged the service. He was enlisted. *Held* that he is not guilty of fraudulent enlistment and appears to be entitled to a discharge with service "honest and faithful." *C. 6599, June 17, 1899.*

XI B 5. Where a soldier's service has been honest and faithful, *held*, that discharge without honor was improper. *C. 2230, Apr., 1896.*

XI B 6. *Held* that the service of a soldier who absented himself from his command just before its departure for the Philippines, to avoid service in those islands, was "not honest and faithful." *C. 12307, Mar. 26, 1902.*

XI B 7. *Held* that for a soldier to continue his association with a negro strumpet after he had been directed by his commanding officer to discontinue such association rendered his service "not honest and faithful." *C. 17583, Feb. 27, 1905.* Similarly *held* that the marriage of a soldier to a well-known prostitute and continued association with her renders his service "not honest and faithful." *C. 29114, Oct. 16, 1911.*

XI B 8. *Held* that a soldier who had been arrested, convicted, and confined by the civil authorities had not served "honestly and faithfully." *C. 23259, Apr. 6, 1909.*

XI C 1. Among other acts of a discretionary character, the officer preparing a discharge is required to determine whether the following remark on the face of the discharge shall be erased or allowed to stand, viz, "No objection to his reenlistment is known to exist." *Held* that if the remark is erased the erasure constitutes an official statement on the part of the officer that some objection to the soldier's reenlistment exists. Such objection may be quite independent of the character given on the discharge (*C. 24222, Dec. 18, 1908*), and the erasure may be based upon several grounds. The soldier may be *incorrigibly careless*, or he may be unable to attain even moderate proficiency in small-arms firing, or in drill, or he may be *afraid of horses*. He may have some physical affection not impairing his efficiency as an able-bodied soldier, or he may be possessed of incurable *defects of temper*, rendering him an *undesirable associate* for other enlisted men, etc. Upon careful inquiry the company commander may reach the conclusion that the soldier is not a desirable candidate for reenlistment, and that his reentry into the military service would be contrary to the public interest. *Held* that when the company commander erases the remark quoted above he should note, under the head of "Remarks" on the back of the discharge certificate, the reasons upon which his conclusion to make the erasure were based—this to enable the grounds of such conclusion to be made the subject of official inquiry. *C. 24004, Mar. 10, 1909.*

XII A. It is well established that a *soldier can not himself* avoid his contract of enlistment on the ground of minority and abandon at pleasure the military service. His release on this ground can be obtained only on application of a parent or guardian entitled to his

services, and without whose consent he enlisted.[1] *P. 58, 142, Feb., 1893.* The application of the parent, whether made to the Secretary of War or on *habeas corpus* to a United States court, must be made before the soldier attains his majority and ratifies his contract.[2] *R. 55, 440, Mar., 1888; P. 53, 105, Apr., 1892; 54, 233, July, 1892; C. 2870, Jan. 14, 1897; 4167, May 23, 1898; 12296, Mar. 26, 1902; 16192, Apr. 21, 1904.*

XII B 1. By the practice of the War Department, the age of an alleged minor is generally required to be shown by the affidavits of both parents, if living, or by the affidavit of the surviving parent or guardian, supported by the affidavits of at least two other respectable persons cognizant of the fact or by an officially authenticated record of a church or court. If practicable, the affidavits should be accompanied by the certificate of a judge of a United States or State court acquainted with the parties and vouching for the truth of the representations made. *R. 53, 53, Oct., 1886.*

XII B 2. Where an application was made for the discharge, on account of minority, of a soldier born in Bermuda, *advised* that, in addition to the affidavit of the parent, there be required, as evidence of age, a transcript of the official parish, or other public, register of births, signed by the proper custodian (and sealed if he has a seal); his signature to be certified to as genuine by the United States consul. A transcript from the parish record of baptism (as sent in this case), *held* insufficient if a register of births exists. *P. 43, 77, Sept., 1890.*

XII C 1. *Advised* that an application of a parent for the discharge of a minor soldier be denied where it appeared that the soldier had married, presumably with the parent's consent. By the laws of France, and of Louisiana and some other States, marriage is an emancipation. And if it does not wholly emancipate the minor, it removes him in a measure from the parent's control and gives him a right to his earnings.[3] *P. 53, 105, Apr., 1892.*

XII C 2. A parent or guardian not domiciled in the United States but in France, *held* not entitled to the discharge from the military service of a minor enlisted without consent. By such foreign residence the parent or guardian is viewed as having emancipated the child or ward.[4] *P. 62, 132, Oct., 1893.*

XII D 1. The practice of the department is understood to be as follows, viz: When an application is made by parents for the discharge of a son on the ground that he is a minor, they are informed that the soldier is punishable for the offense of enlisting without their consent, and if allowed to remain in the service without raising the question of minority the soldier may serve his term, and if he does so faithfully he will receive an honorable discharge at its expiration. If, however, they desire to press the matter, they are requested to submit evidence of minority, and are informed that on receipt of such evidence charges will be prepared and the soldier will be charged with the offense, and if convicted given a sentence not to exceed

[1] *In re* Davison, 21 Fed. Rep., 618; *In re* Zimmerman, 30 id., 176; *In re* Cosenow, 37 id., 668; *In re* Kaufman, 41 id., 876; *In re* Morrissey, 137 U. S., 157.

[2] *In re* Dohrendorf, 40 Fed. Rep., 148; *In re* Spencer, id., 149. See Circular, War Department, Mar. 28, 1904.

[3] See Taunton *v.* Plymouth, 15 Mass., 204.

[4] So held by Attorney General Cushing, 6 Op., 607.

dishonorable discharge, forfeiture of pay and allowances, and confinement at hard labor for six months, and that upon the expiration of the confinement adjudged, the soldier will be released, and if the sentence does not include dishonorable discharge he will be given a discharge without honor in order that his parents may have his services, and that if the soldier completes one year of his enlistment, he may procure his discharge by purchase, and if his service be faithful, receive an honorable discharge *C. 16379, May 26, 1904; 17964, May 18, 1905.*

XII D 2. Fraudulent enlistment of a minor is punishable under the sixty-second article of war. *Held* that if steps should be taken to punish a soldier for that or other offenses the interests of the public in the administration of justice would be paramount to the right of the parent and would require that the soldier should abide the consequences of his offense before the right to his discharge be passed upon even by the civil courts in habeas corpus proceedings. *R. 50, 680, Aug., 1886; P. 54, 233, July, 1892; 57, 135, Dec., 1892; 61, 158, Aug., 1893; 62, 191, Nov., 1893; C. 2870, Jan., 1897; 4244, June, 1898; 5329, Nov. 16, 1898; 8982, Sept. 19, 1900; 16060, Mar. 22, 1904.*[1]

XIII A 1. A soldier is entitled to his discharge as of the date of the expiration of the stipulated period of service for which he has enlisted. He can not discharge himself, but a proper military superior becomes charged with the duty of discharging him on the date when his contract expires. *Held* that such superior neglects or refuses to perform this duty at his peril. *C. 12854, June 23, 1902; 15133, Aug. 21, 1903; 17700, Mar. 25, 1905; 26240, Feb. 19, 1910.*

XIII A 2. The act of desertion does not operate as a discharge. The name of a deserter is dropped from the proper rolls and is not again taken up until his apprehension or surrender; but he is in no sense discharged from the Army. *P. 63, 30, Dec., 1890.*

XIII B 1. Where a soldier is held in the service, after the expiration of his term, to make up lost time, in the operation of the forty-eighth article of war or of a duly approved court-martial sentence, *held*, that the discharge should be dated as of the date of actual separation from the service, and that fact should be noted on the discharge. A similar rule applies in the case of a soldier held beyond the expiration of his term for the convenience of the Government. *C. 18438, June 26, 1908.*

XIII C. An officer or soldier actually serving to a given date can not legally be mustered out or discharged as of a prior date.[2] *R. 29, 598, Jan., 1870; P. 44, 450, Jan., 1891; 46, 101, 223, 243, Mar. and Apr., 1891; 51, 126, Dec., 1891; C. 6330, Apr. 28, 1899.*

XIII D 1. A discharge takes effect from the date upon which notice of such discharge is served upon the person to be discharged. *R. 29, 598, Jan., 1870; C. 6342, May 22, 1899.* This service may be either actual or constructive. *C. 15403, Oct. 24, 1903.* Actual notice involves a direct statement to the man that he is discharged the service; constructive notice has by the custom of our service—a custom accepted and indorsed by the comptroller—been construed

---

[1] *In re* Kaufman, 41 Fed. Rep., 876; *In re* Dohrendorf, et al., 40 id., 148, *In re* Cosenow, 37 id., 668; *In re* Dowd, 90 id., 718; *In re* Miller, 114 id., 838; U. S. *v.* Reaves, 126 id., 127; *In re* Lessard, 134 id., 305; *Ex parte* Anderson, 16 Iowa, 595; McConologue's case, 107 Mass., 170; *In re* Carver, 142 Fed. Rep., 623.

[2] 13 Op. Atty. Gen., 278.

to be the lodging of notice, in the absence of the person to be discharged, at the place where properly and legally he should be; his absence for his own convenience or through his own fault, not serving to allow him to claim lack of notice. *C. 1289, Apr. 24, 1895; 15010, July 27, 1905.* A third class of cases, however, would appear to exist where the soldier to be discharged is in confinement. The discharge in this case is dated at some time prior to the release of the man from confinement, and the certificate of discharge is not delivered to him until he is released from confinement. Between the time of the release and time at which the certificate is delivered, it is held in escrow by some person in military authority. *C. 13016, July 24, 1902.* While notice lodged at the place where the person to be discharged is, should legally be deemed a constructive notice, it is believed that the mere lodging of a notice of discharge with the prison officer or the commanding officer of the post where the person to be discharged is in confinement might be held at some future time to be insufficient notice to the prisoner of his discharge. *Held* that it would be safer if the person to be discharged is present, to give him actual notice of his discharge, although there is no requirement whatever that the certificate should be placed in his possession until his release. Further *held* that it is necessary to distinguish between the actual discharge and the certificate thereof, which is merely evidence of such discharge.[1] *C. 5632, Jan. 7, 1899; 11712, Dec. 18, 1901; 27724, Feb. 13, 1911.*

XIII D 2. The discharge certificate—often called the discharge—is not really the discharge; nor is the actual or constructive delivery of it to the soldier the only means of giving him notice that he has been discharged. Such delivery would be a proper and effective notice, but to inform him verbally or otherwise of his discharge would constitute equally effective notice. *C. 1570, July 25, 1895; 1916, Dec. 28, 1895; 5632, Jan. 7, 1899; 9556, Jan. 4, 1901; 16938, Sept. 23, 1904; 17700, Mar. 25, 1905.*

XIII D 3. A soldier sick in the First Reserve Hospital at Manila, P. I., was notified by the surgeon in charge of his ward May 10, 1901, that he was discharged from the service. He was then transferred sick to the general hospital, San Francisco, Cal. He was discharged from that hospital September 15, 1901, and furnished a certificate of discharge dated May 10, 1901. He claimed that the date of discharge was September 15, 1901. *Held* that in view of the fact that notice was served on May 10, 1901, he was discharged May 10, 1901.[2] *C. 11712, Dec. 18, 1901, and Aug. 19, 1902.* But *held,* where a soldier at the expiration of his enlistment was too sick to receive notice of discharge, that he was not discharged at expiration of the time, but was held in the service until notice could be served on him of his discharge. *C. 26240, Feb. 10, 1910.*

---

[1] See par. 156, A. R., ed. 1910, as amended by G. O. No. 60. W. D. S. 1911.
"The discharge of a soldier can only take effect on the date and at the place where he receives notice, or is legally chargeable with notice, of his discharge" (II Comp. Dec., 95, Aug. 31, 1895), and M. M. S. decision of the Comptroller, dated Apr. 18, 1900 (Circ. 233, P. M. G. O., 1900). Soldier on furlough (VI Comp. Dec., 9, July 7, 1899).

[2] An enlisted man belonging to an organization which was discharged Nov. 17, 1898, who was present with his organization Nov. 16, 1898, and knew that it would be discharged the following day, but who was absent on that day and in a hospital not under military control until Dec. 12, 1898, and did not receive his discharge until Dec. 27, 1898, must be regarded as legally chargeable with notice of his discharge Nov. 17, 1898. (V Comp. Dec., 606, Mar. 23, 1899.)

XIII D 4 a. As notice can not be served on an insane soldier, *held*, that such a soldier can not be discharged except by order of the Secretary of War under authority which permits him to discharge patients in the Government Hospital for the Insane. *Held*, further, that if the patient has lucid intervals a notice given during such an interval is sufficient to render the discharge legal. *P. 61, 79, Aug., 1893; C. 11712, Dec. 18, 1901; 15403, Oct. 24, 1903; 20066, Jan. 18, 1906.* *Held*, further, that if the insanity has existed since before enlistment the man should be discharged without honor and turned over to the proper civilian authorities.[1] *C. 19208, Oct. 7, 1909.* *Held*, further, in a case where a soldier was discharged on certificate of disability on account of insanity existing since before enlistment that there is no obligation on the Government to send the patient to the Government Hospital for the Insane. *C. 19208, July 30, 1907, and Oct. 31, 1910.* *Held*, further, that in cases of insanity not incurred in line of duty the Government should return the insane soldier to the place of enlistment and there discharge him without transfer to the Government Hospital for the Insane.[2] *C. 19208, July 25, 1910.*

XIII D 4 a (1). Where the enlistment of a soldier, who was undergoing treatment at the Government Hospital for the Insane, expired, and a discharge on surgeon's certificate of disability was issued, *held*, that such discharge was complete, irrespective of the degree of insanity, or of the notice of discharge being given to, or through, a committee or guardian; *advised*, therefore, that service of notice of discharge be made through the superintendent of the hospital. *C. 20066, Jan. 18, 1906.*

XIII D 4 b. Soldiers of the Philippine Scouts are entitled, when insane, to be admitted into the Government Hospital for the Insane. *Held*, in view of the great cost involved in the transportation of insane persons from the Philippine Islands to the Government asylum in Washington and of the undesirability of removing from the Philippines natives who are members of the Army, that it would be advisable to contract for their care, maintenance, and treatment at any asylum in the Philippine Islands. *C. 15496, Jan. 16, 1907.*

XIII D 5. A soldier was sentenced to death and the sentence was commuted to imprisonment for life. *Held*, that his discharge took effect on the date upon which actual or constructive notice of the sentence as commuted was served on him. Also, *held*, that the discharge involved was a dishonorable discharge. *C. 12623, May 26, 1902.*

XIII D 6 a. Where a soldier is in confinement awaiting trial by the civil authorities at date of expiration of service he is entitled to be discharged by reason of expiration of term of service the same as if not under arrest by the civil authorities. *Held* that unless his service has been of a nature *otherwise* to warrant a discharge without honor he is entitled to an honorable discharge without regard to whether or not he shall be subsequently convicted or acquitted by the civil authorities. *C. 17373, Jan. 14, 1905.*

XIII D 6 b. During the confinement of a soldier awaiting trial his term of enlistment expired and a discharge without honor was deposited with his prison officer *in escrow* to be delivered to the soldier upon the termination of the military proceedings against him. *Held*

---

[1] See, however, "*In re* Grimley, 137, U. S., 153," in which it was held by the Supreme Court that the enlistment of an insane person is void.

[2] This opinion was published in Cir. 74, War Department, Nov. 10, 1910.

that he was not discharged on the date when the discharge was furnished the prison officer, but that he remained in the service subject to the jurisdiction of a court-martial, and that a plea in bar to the effect that he was a civilian should be overruled. *C. 13016, July 24, 1902; 15133, Aug. 21, 1903; 17380, Jan. 16, 1905.*

XIII D 7. A dishonorable discharge can not be executed until the order promulgating such sentence has been received at the place where the same is to be executed. The discharge, if to take effect forthwith, should be dated as of the day on which the order is received; and the soldier is entitled to be paid to include the date of his discharge, if any pay be due him. If confinement has also been awarded, the certificate of discharge is in practice committed to the custody of the post commander or other proper official to be held by him until the confinement has been executed and then delivered to the party entitled to it. *P. 41, 86, May, 1890; C. 1767, Oct., 1895.* Nor can an official publication in orders of a sentence of dishonorable discharge have the effect of discharging a soldier; there must still be notice, actual or constructive, of the fact of discharge. *C. 404, Oct., 1894; 3063, Apr., 1897; 16010, July 7, 1904.*

XIII D 8. An enlisted man who had deserted during the progress of his trial was sentenced to be dishonorably discharged. The sentence was approved and a discharge was executed March 12, 1901, by the commanding officer of the post where his company was serving. *Held* that the soldier was separated from the service by dishonorable discharge March 12, 1901, and thereafter was a general prisoner subject to arrest and confinement under his sentence. *Held* further that as there is no provision of regulations which provides as to where a dishonorable discharge certificate not actually delivered due to the escape of the party discharged, shall be deposited, the certificate should be placed on file in the War Department. *C. 10427, May 11, 1901.*

XIII D 9 **a.** The President or the Secretary of War acting for the President has the right to fix a day *in futuro* when the discharge of an officer shall become operative, and the date should be chosen with due regard to the time when notice of the discharge can be served. When an officer serving at an isolated station is ordered to be discharged on the date upon which the order is issued from the War Department in the city of Washington the order will become effective when the officer receives notice of his discharge.[1] *C. 16823, Sept. 13, 1904.*

XIII D 9 **b.** The Senate declined to confirm the nomination of an officer whose name had been proposed for appointment to an office in the Army. The President withdrew the name and appointed another man to the position. *Held* that the first officer was discharged on the date when the President signed the commission of the second officer. *C. 17480, Feb. 2, 1905.*

---

[1] See Gould *v.* U. S., 19 Ct. Cls., 593. "Officers discharged to take effect from a particular anterior date, who do not receive notice of their discharge until some time afterwards, and who in the meantime continue on duty, are entitled to pay to the date when notice of discharge was received." Dig. Dec., Second Comptroller, vol. 1 (1869), sec. 1144.

"An officer on detached service at the time his regiment was discharged, and actually performing duty as an officer of said regiment until he received notice of his discharge, is entitled to pay up to the date of such notice." Id., sec. 1146.

XIII E 1. A Volunteer soldier was tried during the Spanish War by a court composed of Volunteer and Regular officers and sentenced to dishonorable discharge and imprisonment for a period of ten years. After his regiment had been mustered out and while serving said sentence it was decided that his sentence was null and void, inasmuch as Regular officers sat on his court. *Held* that he was discharged from the service on the date when his regiment was mustered out and that his discharge was without honor. *C. 12103, Aug. 7, 1902; 1571, Feb. 25, 1895; 14643, Jan. 6, 1904.*

XIII E 2. The commanding general, Department of the Pacific and Eighth Army Corps, directed that certain men be dropped from the rolls of the Thirty-sixth United States Infantry. *Held* that this was an order of "the commanding officer of a department" discharging them from the service within the meaning of the fourth article of war. Further *held*, that their contracts of enlistment were terminated the day they received notice of such order, although they may never have been furnished with the usual discharge certificate. *C. 8266, June 2, 1900.*

XIII E 3. In 1902 an American who had been presumably a prisoner in the hands of Philippine insurgents was turned over to the American authorities at Bantangas, Luzon, P. I. The provost marshal recommended that the man's identity be established and the man released or returned to duty, as he claimed to belong to Company M, Twentieth Infantry. The commanding general, Division of the Philippines, directed the commanding general, Department of North Philippines, to release the man, i. e., to set him at liberty, and added that "the man has been dropped from his company rolls. If he believes he has any just claim against the Government he can present it with evidence." The man was set at liberty. Upon later evidence the commanding general, Philippines Division, caused this man to be apprehended and tried by court-martial for desertion in time of war. The man pleaded in bar of trial that he had been discharged and set forth the above facts. The court overruled his plea, found him guilty, and sentenced him to be hanged. *Held* that the plea in bar offered by the accused was a good and valid plea and should have been accepted by the court, and that the man was discharged when he was set at liberty. *C. 16938, Sept. 23, 1904, and Mar. 18, 1910; 17294, Dec. 24, 1904; 17034, May 12, 1905.*

XIII F. During the Civil and Spanish Wars there was a rule, published in general orders, to the effect that when Volunteer troops are mustered out of service the entire regiment or other organization will be considered as having been mustered out at the same time and place, except prisoners of war. *Held* that this did not include deserters at large who had been dropped from the rolls. *C. 10141, Apr. 3, 1901.*

XIV A 1. The formal *certificate of discharge*, signed as required by the fourth article of war and furnished the soldier is legal evidence of the fact of discharge and of the circumstances, when stated, under which it was given.[1] It is furnished the soldier primarily for his use, but not being a record, the statements therein are not conclusive upon the Government when contradicted by record or better evidence.

[1] Hanson *v.* S. Scituate, 115 Mass., 336; Bd. of Comrs. *v.* Mertz, 27 Ind., 103; U. S. *v.* Wright, 5 Philad., 296.

P. 51, 126, Dec., 1891. Thus an entry on a certificate of discharge of the date of enlistment is a copy from the original record of that fact. If this entry is erroneous it may be corrected by the War Department by substituting a new and correct certificate of discharge or, as is done in practice, by indorsing on the old certificate a statement that the records of the department show, etc. *P. 49, 87, Sept., 1891; C. 11883, Jan. 9, 1902; 11741, Jan. 11, 1902; 14820, Aug. 26, 1903.* The discharge is complete without the final statements. *R. 50, 494, July, 1886.*

XIV A 2. While a Volunteer soldier was absent in desertion, the Volunteer Armies were disbanded under an act of Congress. *Held* that the soldier upon the disbandment ceased, by operation of law, to be a deserter and became a civilian; that his military record, so far as the War Department was concerned, ended with the proper entry of the fact of his desertion; that in the absence of statutory authority the War Department was without power to legally discharge the soldier after the Volunteer Armies by disbandment ceased to exist. *P. 50, 192–203, Nov., 1891; C. 42267, Aug., 1890; 60214, June, 1893; 494, Oct., 1894.* If the party was in fact discharged, actually or constructively, before or at the time the Volunteer forces were disbanded, as shown by the records, a certificate to that effect could at any time be given by the War Department. *P. 36, 334, Nov., 1889; C. 12146, Mar. 1, 1902; 12464, July 8, 1902; 13118, Sept. 10, 1902; 16976, Oct. 6, 1904; 17807, Apr. 11, 1905.*

XIV A 3. *Held* that a commanding officer who is not in the same regiment as the soldier will sign the discharge certificate of a soldier under his command only when no field officer of the enlisted man's regiment is present. *C. 13594, Nov. 6, 1902.*

XIV A 4. The act of February 24, 1897 (29 Stat., 593), was to provide for the relief of certain officers and enlisted men of the volunteer forces during the Civil War. *Held* that those who were beneficiaries under that act were entitled to have discharge certificates furnished them. *C. 3021, Mar. 19, 1897.*

XIV A 5. A discharge certificate in favor of a volunteer soldier who had served during the Civil War was issued by The Adjutant General's Department. The certificate was subsequently found to be defective in that it had not been signed. *Held* that the certificate could later be completed by signature. *C. 10889, July 26, 1901.*

XIV B 1. Under the authority of the act of April 14, 1890 (26 Stat. 55), entitled "An act for the relief of soldiers and sailors who enlisted or served under assumed names * * * during the Civil War" *held* that a son of a slave, originally enlisted under the name of his former master and discharged as such in 1864, might legally have a discharge certificate issued to him in the name of his father, who had been given his freedom since the enlistment of his son. *P. 60, 354, July, 1893.*

XIV B 2. Where a certificate of honorable discharge has had its value impaired by a later erroneous entry thereon, *held* that there was no legal objection to an issue by the War Department of a new certificate containing no reference to the erroneous entry. *P. 34, 222, Aug., 1889; C. 1793, Oct., 1895; 11883, Jan. 8, 1902.*

XIV B 3. A soldier was discharged in Alaska and given a discharge certificate, not on parchment but on paper. He applied for a parchment certificate of discharge. *Held* that he is not now in the service

and can not, therefore, be given a discharge therefrom, but that no legal objection is seen to furnishing him a certified copy of the manuscript discharge made up on the parchment form and retaining the original in The Adjutant General's Office. *C. 6982, Sept. 8, 1899; 6983, Sept. 12, 1899.*

XIV B 4. Section 224, R. S., does not authorize the Secretary of War to issue a duplicate certificate of discharge to replace one lost, to an officer or soldier who served in the Mexican War, or to one who served in any war other than "the late war against the rebellion." *P. 65, 390, July, 1894.*

XIV C 1. Where a duplicate certificate, having been furnished, has been lost or destroyed, *held* that as the statute does not prohibit the issuing of a second certificate, the Secretary of War may, under the power which, as representative of the President is vested in him, issue such certificate if in his judgment it is proper to do so. *C. 3101, Apr., 1897; 12029, Feb. 15, 1902.*

XIV D 1. A soldier who had served during the Spanish War requested a certificate of service; *held* that under the Army Regulations he was entitled to such a certificate which should show the date of enlistment and discharge from the Army and character given on discharge, upon proof of the loss of the original certificate or of its destruction without the fault of the party entitled to it. Also *held* that under the same regulations and independently of section 224, R. S., a "certificate of service," substantially in accordance with the form referred to above, should be issued to a soldier of any war or to his heirs, upon satisfactory proof of the loss or destruction of the original certificate of discharge. This form bears nothing on its face to show that it was issued under any particular law or that it is anything more than an official statement of the soldier's service.[1] *C. 7114, Sept. 30, 1899; 13037, July 29, 1902.*

XIV D 2. A soldier's dishonorable discharge was rendered illegible by his being "upset from a boat." *Held* that the certificate was destroyed within the meaning of the act of July 1, 1902 (32 Stat. 629), and that he was entitled to a certificate of service. *C. 14131, Feb. 12, 1903.*

XIV D 3. A soldier of the Thirty-second Infantry, United States Volunteers, absented himself without leave at Nagasaki, Japan, when the transport carrying the regiment to the United States for muster out stopped at that port. He had not reported for duty when the regiment was mustered out, and was carried on the roll as absent without leave. *Held* that he was legally chargeable with notice of his muster out as of the date on which his regiment was mustered out, and upon that date he legally became a civilian, and not being in the military service can not be given a discharge therefrom as requested. *Held* further that there is no legal objection to giving him a certificate of service, setting forth the facts that he passed out of the military service on date of the muster out of his company, being at that date absent without leave. *C. 12464, July 8, 1902.*

XIV D 4. Section 5 of the act of August 3, 1861 (12 Stat. 288), authorized the enlistment of "medical cadets." One of them lost his discharge certificate. *Held*, that as he was an enlisted man a cer-

[1] See act of July 1, 1902 (32 Stat. 629).

tificate of service under the act of July 1, 1902 (32 Stat. 629), could be furnished to him. *C. 21108, Feb. 23, 1907.*

XIV D 5. A soldier was granted a discharge without honor under a mistake as to fact. *Held* that the corrected statement of facts could be entered by the War Department on the discharge certificate and the certificate returned to the man, or, preferably, the corrected discharge-without-honor certificate could be retained by the War Department and a certificate of service, showing the correct statement of facts, furnished to the man. *C. 11741, Jan. 30, 1902.*

XV A. An executed honorable discharge issued by competent authority can not be revoked [1] unless obtained by fraud on the part of the soldier. *C. 26092, Jan. 18, 1910.* Mere mistake on the part of the officers executing it will not justify revocation. *C. 2700, Oct. 24, 1896; 23570, July 10, 1908.* The same is equally true of a discharge without honor when once duly executed. *C. 2099, Mar. 4, 1896; 2423, July 6, 1896; 9028, Sept., 1900; 10922, July 24, 1901; 11741, Jan. 30, 1902; 12342, Apr. 4, 1902; 14425, Apr. 3, 1903; 15144, Oct. 28, 1903; 15581, Mar. 28, 1908; 15727, Jan. 6, 1904; 20908, June 19, 1909.*

XV A 1. A soldier who had less than two years and six months to serve and whose organization was under orders for service in the Philippines informed his company commander that he would reenlist for service in the Philippines if they would take him as a married man and permit him to take his wife to the Philippines with him, as he intended to take the examination for appointment as post quartermaster sergeant. An honorable discharge certificate and final statements were made out and handed to him. He then proceeded to the recruiting officer and requested to be reenlisted with the privileges of a married man, and was told that his case would remain in abeyance until the recruiting officer could communicate with authorities in Washington. Upon visiting the post shortly after, the sergeant major informed him that the delivery to him of his discharge and final statements was a mistake and directed him to turn them in. The man did this and was given a certificate by his company commander showing that he had been honorably discharged. Upon visiting the recruiting officer he was informed that authority had been secured for his reenlistment, but the privileges of a married man had not been allowed in his case. This man considered himself a free man and secured employment as a civilian without any attempt to flee from justice or escape military control. He was arrested as a deserter. *Held* that no fraud had been practiced in the securing of his discharge and that he was actually discharged the service when the discharge certificate was handed him by the sergeant major. *C. 15581, Mar. 28, 1908; 7020, Sept. 13, 1899; 10041, Mar. 23, 1901.*

XV A 2. An officer secured a commission in the volunteer service by fraud and was honorably discharged when his regiment was mustered out. Later, a War Department order was issued which purported to dishonorably discharge him as of the date of his muster out on account of certain irregularities. *Held* that the order which purported to change the honorable discharge to a dishonorable one was inoperative. *C. 9121, Oct. 13, 1900, and Aug. 17, 1906.*

---

[1] Petition of A. O. Brooks for writ of habeas corpus (1 Phil. Repts. 55, Nov. 5, 1901).

XV B. Where a soldier has been legally sentenced to be dishonorably discharged and such discharge issued by competent authority has been duly executed, it is beyond the power of the Executive, whatever the merits of the case, to substitute an honorable in lieu of the dishonorable discharge. The latter having gone into effect can not be undone,[1] moreover, the soldier having been thereby wholly detached from the military service and made a civilian, can not again be discharged from the service until he has been again enlisted into it. *R. 37, 390, Mar., 1876, and 510, May, 1876; 38, 236, Aug., 1876, and 605, May, 1877; 41, 465, Nov., 1878; C. 2174, Apr. 8, 1896; 2776, Nov. 30, 1896; 3800, Jan. 20, 1898; 5234, Jan. 9, 1899; 7448, Jan. 18, 1900; 11450, Oct. 23, 1901; 12342, Apr. 4, 1902; 14899, July 29, 1903; 15144, Oct. 16, 1903; 16180, Apr. 13, 1904; 16194, June 2, 1904; 16659, July 29, 1904; 22060, Sept. 13, 1907; 17667, Mar. 19, 1908; 23574, July 13, 1908; 20908, June 19, 1909.*

XV C. A man was legally discharged without honor by competent authority under a mistake as to fact. *Held* that the discharge was not revocable. *C. 1876, Nov. 25, 1895; 2099, Mar. 4, 1896; 11741, Jan. 30, 1902; 14425, Apr. 4, 1903; 20908, June 19, 1909; 14163, Mar. 12, 1910; see also Discharge, XV A.*

XV C 1. A soldier was serving sentence at expiration of term of enlistment and a discharge without honor was delivered to his commanding officer. Before the expiration of his sentence the sentence was discovered to be illegal and was declared void, and the man ordered released. *Held* that the discharge had been legally executed and could not be revoked, and that it should be delivered to the man upon his release from confinement. *C. 13210, Aug. 29, 1902; 13209, Aug. 30, 1902.*

XV D 1. An order purporting to revoke a legally executed honorable discharge, not obtained by fraud, and substituting therefor a dishonorable one, *held* wholly unauthorized and illegal. *R. 6, 478, Nov., 1864; 11, 197, Dec., 1864; 20, 584, Apr., 1866; 25, 541, May, 1868; C. 2700, Oct. 24, 1896; 1200 and 1399, Apr. and May, 1895; 2543, Aug., 1896.* Similarly *held*, respecting an order which purports to substitute an honorable discharge for a legally executed discharge without honor, or a legally executed dishonorable discharge. *C. 605, Nov., 1894; 1382, May, 1895; 2099, Mar., 1896; 2174, Apr., 1896; 6378, July, 1899; 11741, Dec. 11, 1901; 11851, Jan. 4, 1902; 14882, June 27, 1903; 15581, Dec. 4, 1903; 15727, Jan. 6, 1904; 25004, May 21, 1909.*

XV D 1 a. A soldier was duly discharged pursuant to an order from the War Department. The order was issued under a misapprehension in regard to his actual status at the time—a mistake of fact—which if discovered would have deferred or prevented the issuing of the order. *Held* that the mistake of fact did not invalidate the discharge; that having been duly executed, it could not be revoked. *P. 61, 421, Sept., 1893; C. 1876, Nov., 1895; 1791, Jan. 2, 1896; 11741, Dec. 11, 1901, and Jan. 20, 1902.*

XV D 1 b. Where a soldier, before the expiration of his term, received under the fourth article of war a discharge in due form, though charges were then pending against him, the authority ordering the discharge not having been made aware of such charges, *held*

[1] 4 Op. Atty. Gen., 274.

that the discharge was executed and could not be revoked with a view to bringing the soldier to trial; that he had, by the discharge, duly become a civilian and was no more than any other civilian under the control of the military authorities. *R. 23, 483, May, 1867; P. 50, 295, Nov., 1891; C. 1791, Jan. 2, 1896; 12342, Apr. 4, 1902.*

XV D 1 c. Through an error of fact a discharge without honor was given to a soldier; *held* that a notation showing this may be made on the records and also on the certificate of discharge if the soldier so desires.[1] *C. 6358, May 15, 1899; 11741, Jan. 11, 1902; 14820, June 18, 1903.*

XVI A 1. The muster-out of organizations of the volunteer forces raised during the period of the Civil War was prescribed by General Orders 108, Adjutant General's Office, April 28, 1863, which provided that discharge certificates should be prepared for enlisted men who were absent for proper and sufficient reasons, and that these should be held *in escrow* by the company or organization commander and delivered when the conditions of the escrow had been fulfilled. A discharge was made out and so held *in escrow* in the case of a soldier who was absent in desertion. He later, through fraud, secured possession of this discharge certificate.[2] *Held* that as this honorable discharge was obtained by fraud and could have been obtained in no other way, it did not operate to separate the claimant from the military service on the date and for the cause set forth in the discharge certificate. *C. 20529, Oct. 24, 1906; 1791, Jan. 2, 1896.*

XVI A 2. The honorable discharge of a soldier was authorized in advance of the expiration of his term on condition that he should reenlist immediately for service in the Philippine Islands. He was accordingly honorably discharged. He failed to reenlist and thus repudiated the agreement with the United States, in the operation of which his honorable discharge had been secured. *Held* that his discharge had been obtained by fraud and that it was not binding upon the Government and might be repudiated and set aside by the Secretary of War. The discharge was actually ordered set aside and a new discharge without honor of a different and later date was issued in its place. *C. 15581, Dec. 8, 1903, and Mar. 28, 1908; 20529, Oct. 24, 1906.*

XVI A 3. Where a soldier, by making an alteration in his "descriptive list" so as to cause it to appear that his term of enlistment, which was in fact five years, was three years only, induced the regimental commander to give him an honorable discharge at the end of three years' service; *held*, upon the fraud being presently discovered, that the discharge might legally be revoked and the soldier be brought to trial by court martial under the ninety-ninth (now sixty-second) article of war. *R. 21, 390, May, 1866.*

XVI A 4. A soldier secured his discharge by a fraudulent representation that he had secured a good position in civil life. *Held*, that his arrest, trial, and punishment, and the cancellation of the

[1] 13 Op. Atty. Gen., 201.

[2] 16 Op. Atty. Gen. 349. A soldier who was not honorably discharged at end of Civil War, but who was absent, obtained an honorable discharge later from the War Department by a fraudulent representation of his status. *Held* that the conditions did not exist under which he could have been honorably discharged and that the revocation of the discharge was proper and the cancellation of the certificate right.

discharge certificate were legal.[1] *C. 28879, Aug. 23, 1911. See also, P. 49, 454, Oct. 16, 1891.*

XVI B 1. A soldier who became insane while in the service was in hospital on account of the insanity at the expiration of his term of service. A discharge certificate was thereupon issued to him (in contravention of the Army Regulations covering such cases) and his discharge was noted on the records. *Held*, that, being insane, his notice of discharge was ineffective to deprive him of the right to be sent to the Government Hospital for the Insane or to preclude the Government from recalling and canceling the discharge. *Advised* that the same be recalled and canceled, and the man committed to the Government Hosspital in accordance with the regulations. *P. 61, 79, Aug., 1893; C. 11712, Dec. 18, 1901; 15403, Oct. 24, 1903; 19050, Jan. 13, 1906; 20066, July 17, 1906.*

XVI B 2. A soldier was discharged without honor and it was afterwards discovered that at the date of his discharge he was suffering from incipient dementia. *Held*, that he was thus irresponsible for certain derelictions of duty. He was then honorably discharged and the records in the office of The Adjutant General were amended accordingly. *C. 5897, Mar. 23, 1899.*

XVI C 1. A soldier was ordered discharged without honor, but was actually issued a dishonorable discharge; *held*, that a new discharge certificate may be issued or the present one may be changed to show he was discharged "without honor." *C. 7102, Oct. 5, 1899.*

XVI C 2. The reviewing authority mitigated a sentence which included dishonorable discharge and confinement as follows: "Sentence is reduced to 18 months." Through a belief that only the confinement portion of the sentence had been thus mitigated a dishonorable discharge was issued. *Held*, that the command issued by the reviewing authority could be interpreted only as a mitigation of the complete sentence to confinement to 18 months, even though the explanation was made that the word "sentence" was through a clerical error written instead of confinement, and further, *held*, that if a dishonorable discharge had been issued it should be recalled and canceled as void and inoperative under the terms of the mitigated sentence. *C. 11211, Sept. 11, 1901.*

XVI D. A legally executed discharge issued by competent authority can not be revoked, but, *held*, that an executed discharge issued by incompetent authority is not binding upon the Government. *C. 20529, Oct. 24, 1906; 26092, Jan. 18, 1910.*

XVI D 1. Where a United States commissioner in Indiana issued to a United States marshal a warrant for the arrest of a deserter from the Army, and, upon such deserter being brought before him, adjudicated the question of his right to discharge from the military service, and ordered him discharged therefrom, *held*, that the entire proceeding was *coram non judice* and a gross assumption and exceeding of authority, and *advised* that the facts of the case be communicated to the Attorney General for his action, and that the deserter be forthwith rearrested and brought to trial by court-martial. *P. 58, 287, Mar., 1893.*

---

[1] See 28 Op. Atty. Gen. 170, in which it was held that the Secretary of the Navy can revoke the discharge of an apprentice seaman procured by fraud.

XVI E. *Held*, that an order which directs a discharge may be revoked or suspended at any time before the discharge has actually taken effect. *R. 29, 508, Jan., 1870.*

XVI F. An order was issued from the Headquarters of the Army, directing a discharge without honor of a soldier on account of his being in the hands of the civil authorities, serving sentence of imprisonment. The discharge had not been delivered actually or constructively when it developed that the soldier, after trial by jury, was acquitted and released. *Held*, that the order directing his discharge should be revoked and the discharge certificate canceled, as the cause of the issuance of the discharge did not further exist and the discharge had not been effected. *C. 10567, May 31, 1901.*

XVI G. Several soldiers were tried in the Department of the Dakota by a court-martial convened by a lieutenant colonel and sentenced to be dishonorably discharged. The sentence was approved by the lieutenant colonel commanding the department and the execution of such sentences was entered upon. *Held*, that as a lieutenant colonel in command of a department had no authority to convene a general court-martial that the sentences of such court were null and void and that the dishonorable discharges which had been executed pursuant to such sentences should be revoked. *Held*, further, that the men who were serving such illegal sentences should, after the revocation of the dishonorable discharges which had been issued to them, be brought to trial before a legally constituted court, discharged without honor, or restored to duty without trial.[1] *C. 16710, Feb. 6, 27, and 29, 1908; P. 42, 438, Sept. 2, 1890.*

XVI G 1. In the case of a soldier who was dishonorably discharged pursuant to an illegal sentence, *held*, that as the sentence was null and void the dishonorable discharge was of no effect and the soldier could be returned to duty without trial.[2] *P. 41, 39, May 20, 1900; C. 14643, Dec. 22, 1903; 16710, Feb. 29, 1908.*

XVI G 2. In the case of a soldier who, pursuant to an illegal sentence, was dishonorably discharged, *held* that the dishonorable discharge was of no effect and that its revocation would place him in exactly the same status that he was in preceding his being brought to trial. *Held* further that he could be brought to trial before a legally constituted tribunal on the original charges. *C. 16710, Feb. 29, 1908.*

XVI G 3. A soldier pursuant to an illegal sentence was dishonorably discharged. *Held* that the dishonorable discharge was of no effect and that his status was the same as it was preceding his trial and that he could be discharged without honor, as of the date when the discharge without honor was delivered, even though he had been con-

---

[1] See "*In re* Bird," in which it was held that the dishonorable discharge of a soldier pursuant to an illegal sentence rendered by a court which had no jurisdiction did not operate to change in any particular the status of the soldier, and was stated that it was axiomatic that "a void judgment or sentence works no change in the status of the person or thing against or concerning which it is given or pronounced." (3 Fed. Cases, 427.)

[2] See General Court-Martial Orders No. 47, Headquarters Department of the Columbia, 1885, in which a military convict who was serving a two-years sentence was released from confinement and attached to one of the companies of the Fourteenth Infantry, as it was discovered that there was a fatal defect in the proceedings of the court which sentenced him. See also General Court-Martial Orders No. 23, Department of Dakota, 1888, which set aside void sentences and restored to duty soldiers who pursuant to those void sentences had been dishonorably discharged and sentenced to confinement.

fined in a military prison as a general prisoner.[1] *C. 16710, Feb. 27 and 29, and Aug. 14, 1908; 14643, Jan. 6, 1904.*

XVI G 4. A colonel who was temporarily in command of the Army of Cuban Pacification issued orders purporting to convene general courts-martial. The officers designated met and tried cases and sentenced soldiers to dishonorable discharge. *Held* that as a colonel in command of an army has no authority to convene a court-martial all the sentences were null and void and the dishonorable discharges based upon them were of no effect and that the status of the men concerned was that of men awaiting trial under the original charges. *C. 16710, July 23, 24, 26, and 29, 1908, and Aug. 12 and 14, 1908.*

XVI G 5. A soldier during the Civil War was tried by a court composed of enlisted men and sentenced to be drummed out of the service. Entry was made on the records that he was discharged. *Held* that he had not been tried and that the so-called sentence was illegal, and the discharge, for that reason, inoperative. *C. 2213, May 8, 1896.*

XVI H. A lieutenant of the Forty-third New York Infantry was dropped in 1861 by order on account of absence without leave. Legislative relief was afforded in his case by means of a private act, which provided that he should hereafter be held and considered to have been honorably discharged from the military service of the United States. *Held* that this act authorized a mutilation of the records and an entry on the old records, but that it did not authorize the issuance of an honorable discharge certificate. *C. 17797, Apr. 12, 1905.*

XVII A. An officer was lawfully separated from the military service by the legally approved sentence of a general court-martial. *Held* that it was beyond the power of the Executive to grant an honorable discharge, to revoke the dismissal which had been fully executed, or to issue an instrument in the nature of a discharge certificate purporting to separate the applicant from the volunteer service in any other way than that determined by the approved sentence of the court-martial in his case.[2] *C. 23153, May 4, 1908.*

XVII B. Section 5 of the act of April 23, 1908 (35 Stat. 67), provides that if the unfavorable finding of an examining board in the case of a medical officer is concurred in by the board of review, the officer reported disqualified for promotion shall, if a first lieutenant or captain, be honorably discharged from the service with one year's pay. *Held* that in such a case the discharge should be issued on the date when the officer's failure to qualify was reported to the Secretary of War, or so soon thereafter as, by an exercise of reasonable diligence, a discharge certificate could be procured and forwarded to the officer whose connection with the military service it operates to sever. *C. 23135, Dec. 11, 1909.*

XVIII A. Certain cadets were dismissed by order of the Secretary of War, which order was approved by the President. *Held* that as the dismissal of these cadets had been completely executed the President could not reconsider or revoke the order for their discharge or pardon them so as to restore them to their former status at the Military Academy, and that an act of Congress would be necessary.

---

[1] See pars. 3, 4, 5, 6, and 7, Special Orders No. 52, War Department, Mar. 3, 1908.

[2] See 4 Op. Atty. Gen. 274, 306; also 1 Winthrop's Military Law and Precedents, 619; and Blake *v.* U. S., 103 U. S., 227.

C. 29471, Aug. 24, and Oct. 16, 1909. Similarly *held* in the case of a cadet who was discharged for disability. *C. 25946, Dec. 11, 1909.*

XIX. The Secretary of War may by an act of Congress[1] be authorized and required to amend the rolls and records so as to show that a soldier was honorably discharged as of the date on which he was in fact dishonorably discharged, and give him a discharge certificate to that effect. *C. 2047, Feb., 1896: 13645, Nov. 17, 1903.*

XX A. The President nominated a man as an officer in the Volunteer force during the Civil War. The Senate declined to confirm the appointment. The President then revoked the appointment. *Held* that the revocation by the President amounted to a discharge from the service. *C. 9096, Dec. 11, 1900.*

XX B. *Held* that it is within the authority of the President to terminate the engagement of any officer or enlisted man of the Philippine Scouts by an honorable discharge whenever his services are no longer needed or when the public interest demands his separation from the military service. Further *held* that it is not within the power of the Executive to summarily dismiss an officer of the Philippine Scouts by way of punishment for an offense, as such separation from the service is expressly forbidden by section 1229, R. S., and the ninety-ninth article of war. *C. 22129, Dec. 10, 1907.*

XX C. In the case of six soldiers who had been imprisoned under sentence of a civil court, who were plainly undesirable as soldiers, and concerning whom it was clear that they should be summarily discharged as being an incubus to the service, *held* that the department commander had authority to order the discharge of these men without honor, as it was not one of the cases coming within that part of the regulations which requires the action of the Secretary of War. *C. 23259, Jan. 14 and 19, 1909.*

XX D 1. The fourth article of war vests in the commanding officer of a department specific authority to discharge enlisted men. *Held* that there can be no doubt as to the authority of the commanding general of the department as an incident of his power to discharge, to determine from the report of the medical officer the nature of the discharge to be issued in each case in cases of disability. If the disability was contracted in the line of duty an honorable discharge issues. If, however, the disability is shown to be due to the vicious habits of the soldier, an honorable discharge can not issue, and the separation of the soldier from the military service will be accomplished in the operation of a discharge without honor. *C. 24131, Nov. 24, 1908.*[2]

XX D 2. The commanding officer, district of North Alaska, requested authority to discharge an enlisted man on surgeon's certificate of disability; *held* that under the fourth article of war he could not be given such authority. *C. 6565, June 13, 1899.*

---

[1] The act of March 3, 1909 (35 Stat., 836), authorized the Secretary of War to appoint a court of inquiry to pass on the eligibility of all men discharged without honor from three companies of the Twenty-fifth Infantry. The title described the act as one "To correct the records and authorize the reenlistment," etc. The body of the act made no provision for amending the rolls but provided that if the court should report favorably in any case, such man should be deemed to have reenlisted immediately after his discharge without honor. A court of inquiry was appointed by par. 7, S. O. No. 79, series War Dept. 1909.

[2] X Comp. Dec. 375, Oct. 23, 1903. General Order 174, War Department, Washington, Aug. 12, 1909, directs that hereafter orders for the discharge of enlisted men on account of disability will not be issued except by the War Department.

XX E. A Signal Corps soldier was under orders for service in the Philippines Division, and preceding his departure for those islands signed a written agreement that he would reenlist for further service in the islands. When the time approached for his discharge he declined to reenlist. The commanding general, Philippines Division, recommended that this soldier be discharged without honor and that authority be given him, the commanding general, to grant discharges without honor in similar cases. *Held* that the soldier had merely changed his mind, and that as an honest change of intention does not taint a soldier's character, his change of intention could not be used as a basis for granting him a discharge without honor, and *recommended* that power should not be given to the commanding general, Philippines Division, to grant discharges without honor in similar cases. *C. 15581, Aug. 5, 1909.*

XX F. *Held* that a court-martial can not impose either an honorable discharge or a discharge without honor, nor can a dishonorable discharge be imposed except by sentence of court-martial. *C. 11741, Jan. 11, 1902.*

XXI A. An officer of Volunteers was examined as to his qualifications by a board of officers under "an act to provide for the examination of certain officers of the Army," approved June 25, 1864, and was reported mentally disqualified for the duties of his office and was thereupon dismissed by Executive order in accordance with the provisions of the act: *held* that the dismissal was in effect an honorable discharge from the service.[1] *P. 46, 333, Apr., 1891; 65, 31, May, 1894.*

XXI B. *Held* that although an officer's discharge may not have been for disability, the disability may have existed and may be proved. *C. 10396, May 14, 1901.*

XXII A. 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. *P. 49, 442, Oct., 1891; 53, 179, Apr., 1892.* Similarly *held* with respect to a discharge without honor. *C. 2115, Mar., 1896.* These discharges release the soldier from amenability for all offenses charged against him within the particular term to which they relate, including that of desertion, except as provided in the sixtieth article of war. *C. 2041, May, 1896.*

XXII B. 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 the sixtieth article of war. Nor would a subsequent enlistment after such dishonorable discharge operate to revive the amenability of the soldier for such offenses. *P. 53, 46, 179, Apr., 1892; 55, 165, Aug., 1892; 59, 55, 86, Apr., 1893; C. 3585, Nov., 1897; 7614, Jan. 25, 1900; 13579, Nov. 3, 1902; 24658, Mar. 13, 1909.*

XXV A. A post commissary sergeant was charged with serious irregularities in connection with the sale to unauthorized persons of of commissary stores. Recommendation was made that he be summarily discharged. *Held* that a noncommissioned officer of a number

---

[1] See Circ. 4, A. G. O., 1891.

of years' standing is entitled to consideration and that no man should be summarily discharged for an actual concrete offense without having been given ample opportunity to present a defense in justification of his act. *C. 20086, Aug. 3, 1911.*

XXVI A. An Austrian subject enlisted in the Army and afterwards deserted; subsequently, while held as a deserter, he asked to be discharged to enable him to return to Austria, there to meet his obligation to render military service; *held* that as he left his native country and enlisted in the United States Army, he came under the jurisdiction of the United States, and that the right of the United States to hold him to his enlistment and to punish him for offenses committed thereunder, was clearly paramount to the claim of his home Government; and that, if the applicant thought otherwise, the proper course would be for him to have the case considered through diplomatic channels. *C. 12968, July 17, 1902, Nov. 12, 1908, and Oct. 1, 1910.*

CROSS REFERENCES.

As pardon.....See PARDON XVI D.
Effect on status.....See DISCIPLINE VIII I 1; 1 a.
From militia.....See MILITIA XVI J.
Muster out is.....See VOLUNTERR ARMY IV B 3; 5.
Of civilian employee.....See CIVILIAN EMPLOYEES XI B to C.
Of drafted men.....See ENLISTMENT II C.
Of medical officer.....See ARMY I G 3 d (2) (*b*).
Of medical Reserve Corps officers.....See ARMY I G 3 d (3) (*c*) [3].
Of seamen.....See CIVILIAN EMPLOYEES XV A.
Payment.....See PAY AND ALLOWANCES I A 1 a.
Revocation of.....See DISCIPLINE XV E 9.
While in confinement.....See DISCIPLINE XII B 3 g (2).

DISCHARGE BY CIVIL COURT.

See DISCHARGE VII A; B.

DISCHARGE BY PURCHASE.

See DISCHARGE VI A; D 1 to 7.
See ARTICLES OF WAR, XXI C 2 d.
Deposit for.....See PAY AND ALLOWANCES I C 7 a to b.
Deposit of money paid.....See APPROPRIATIONS XXXV.

DISCHARGE BY WAY OF FAVOR.

See DISCHARGE V C; VI to VII.
Waiver of travel allowance.....See PAY AND ALLOWANCES III C 2 c (3).

DISCHARGED OFFICER OR SOLDIER.

Arrest of.....See COMMAND V A 6 b (1) (*b*).
Not amenable under 48 Articles of War.....See ARTICLES OF WAR XLVIII B.
Trial of.....See ARTICLES OF WAR LX E 1; 4.

DISCHARGED SOLDIER.

Award of certificate of merit to.....See INSIGNIA OF MERIT II G.
Eligibility for gunner's badge.....See INSIGNIA OF MERIT III C.
Liability to taxation.....See TAX I to II.

DISCHARGE FOR CONVENIENCE OF GOVERNMENT.

See ENLISTMENT I B 2 b (1), c.

DISCHARGE WITHOUT HONOR.

See DISCHARGE I A; III to IV; XI B 1 a.
Continuous service can not antedate.....See PAY AND ALLOWANCES I C 5 b (1).
Department commander.....See DISCHARGE XX C.
Effect on status.....See DISCHARGE XXII A.
See DISCIPLINE VIII I 1 c.
See RETIREMENT II A 1 b.
Evidential value to Pay Department.....See DESERTION XIV A 4.
For desertion.....See DESERTION XVI A.
For fraudulent enlistment.....See ENLISTMENT I A 9 f (1); g (1); (2); (4); h
See PAY AND ALLOWANCES III C 2 a.
Illegal dishonorable discharge.....See DISCHARGE XVI G; G 3.
Of cadet.....See OFFICE IV E 2 g (1) (*c*).
Of insane soldier.....See DESERTION VII A 2; XIV B.
See DISCHARGE XIII D 4 a.
Of men guilty of crimes.....See ARTICLES OF WAR LXII C 6.
Of officer.....See OFFICE IV D 6; E 2 e.
Of soldier in confinement.....See DISCHARGE XIII D 6 b.
Not to be given in addition to punishment..See ENLISTMENT I A 9 i.
Not revocable.....See DISCHARGE XV C; C 1; D 1 c.
Reasons for.....See DISCHARGE II B 1.
Reenlistment after.....See ENLISTMENT I D 3 c (17); (18) (*c*).
Retired soldier.....See RETIREMENT II F 3.
Sentence null.....See DISCHARGE XIII E 1.
Soldier takes what clothing?.....See ALLOWANCES II A 3 a (4) (b).
Travel allowance forfeited.....See PAY AND ALLOWANCES III C 2 c (1); (2).

DISCIPLINE.[1]

I. ARREST.

A. FORCE THAT CAN BE USED.

1. As much as is necessary ..... *Page 480*
2. Private house can not be entered.
   a. Public parts of public house.

B. STATUS.

1. Does not involve irons.
2. Inconsistent with duty.
3. Officer in arrest can prefer charges..... *Page 481*

C. BAIL CAN NOT BE ACCEPTED.

D. OFFICERS.

1. Placed in arrest by commanding officer only.
2. Arrest not a demandable right.
3. Manner of placing in arrest.
4. Limits of arrest.

E. ENLISTED MEN.

1. Arrest of by noncommissioned officers.
2. Can not be punished summarily and tried for same offense.
3. Paroled by civil courts can be arrested ..... *Page 482*

---

[1] The Divisions of DISCIPLINE are:

	Page.		Page.
I. Arrest	464	X. Witnesses	471
II. Charges	465	XI. Evidence	472
III. Convening authority	466	XII. Action by court	473
IV. Judge advocate	467	XIII. Record of court	475
V. Accused	468	XIV. Reviewing authority	475
VI. Member	468	XV. Revision by J. A. General	477
VII. Authority of court	469	XVI. Inferior courts	478
VIII. Jurisdiction of court	469	XVII. Punishment	479
IX. Procedure of court	470	XVIII. Board of investigation	480

II. CHARGES.

A. Military Offenses.

1. Defined.

a. Same offense repeated.

b. One act—two or more offenses.

c. Offenses that are not military offenses.

(1) General incapacity.

(2) Worthlessness.

d. Petitioning Congress over head of Secretary of War.

B. May be Initiated by Anybody.

C. May be Preferred by Officers Only..... *Page 483*

D. Preparation of.

1. Consists of two parts.

a. Each charge may have several specifications.

b. Each specification must be appropriate to its charge.

c. Reference to a writing should quote the writing.

2. Essentials.

3. Definite terms must be used..... *Page 484*

4. Put under proper article of war.

5. Charge may recite number of article violated.

6. Varying punishment depending on willfulness or negligence.

7. Joint charges.

8. Description of person.

a. Pronoun in first person not to be used.....*Page 485*

b. Initials may be used.

9. Time and place to be alleged.

a. "On or about" and "at or near."

b. "On route between —— and ——" and "between —— and —— day of ——."..... *Page 486*

10. Time.

a. Reasonably exact allegation.

b. "From — to —."

c. "Between — and —" in offenses of omission.

d. "During a period of —— days" indefinite.

11. Do not.

a. Plead evidence.

b. Plead secondary evidence..... *Page 487*

c. Plead minor included offense.

d. Plead alternatively.

12. Signing of charges.

a. By whom?

(1) When prepared by Judge Advocate General.

13. Twentieth article of war.

a. Particular acts or words should be set forth.

14. Twenty-first article of war.

a. May add "thereby causing his death"..... *Page 488*

15. Fifty-eighth article of war.

a. Not necessary to allege time of war.

16. Sixtieth article of war.

a. Not necessary to allege intent to defraud.

b. Or in embezzlement that money or property was furnished or intended for military service of United States.

17. Sixty-first article of war.

a. Abusive language to commanding officer.

II. CHARGES—Continued.
D. Preparation of—Continued.
18. Sixty-second article of war.
a. Drunkenness not on duty.
b. Manner of writing charge.
c. Instances of incorrect allegation ..... *Page 489*
d. Violation of Army regulations.
19. All crimes should be charged.
20. Disobedience by general prisoner should be charged under sixty-second article of war.
E. List of Witnesses.
F. Preferring Charges.
1. At once after commission of offense.
2. Accumulation of charges ..... *Page 490*
G. Forwarding by Commanding Officer.
1. Not required to state character of accused.
H. Amendment of Charges.
1. Before trial.
2. By plea in abatement.
I. Withdrawal of Charges.
K. Disposition of Original Charges.
1. After arraignment ..... *Page 491*
III. CONVENING AUTHORITY FOR COURTS-MARTIAL.
A. Regulations as to Constitution of Court are Mandatory.
B. Commander in Chief.
1. Secretary's order is order of President.
2. Trial under 1230, Revised Statutes.
a. Application by dismissed officer must be made in reasonable time ..... *Page 492*
b. Application can not be considered after muster out of Volunteer Army.
C. Appointment of Court.
1. Members.
a. Officers excepted from control of convening authority.
b. Officers on existing courts.
c. Volunteers may be detailed to try regulars.
d. Officers biased, etc., should not be detailed.
e. Convening authority sole judge of availability with regard to rank ..... *Page 493*
f. Medical Reserve Corps officers and dental surgeons available.
2. Judge advocate.
a. Commissioned officers.
b. Civilians.
c. Officers who should not be detailed.
(1) The accuser or an officer personally interested.
(2) An officer with charges against accused.
(3) Simply to authenticate record ..... *Page 494*
3. Can not be delegated as a routine duty to staff officer.
D. Authority over Court.
E. Action on Charges.
1. Two sets should be consolidated.

III. CONVENING AUTHORITY FOR COURTS-MARTIAL—Continued.
E. Action on Charges—Continued.
2. Enlisted men.
a. Convening authority can not impose punishment when restoring deserter to duty.
b. Convening authority's action is not affected by maximum punishment order.
3. Convening authority carefully considers charges..... *Page 495*
a. May try soldiers for fraudulent enlistment and desertion therefrom.
b. Desertion should be tried by general court-martial, but joining the enemy by military commission.
4. May decline to surrender accused to civil authorities.
5. Referring cases to court.
a. Officer under conservator may be tried.
b. Question of moral obliquity should be referred to general court-martial rather than to examining board.
6. May direct *nolle prosequi*.
7. May afford accused opportunity to explain charges.
F. Communication With Court and Judge Advocate..... *Page 496*
G. Convening Order.
1. Must show that convening officer had authority.
IV. JUDGE ADVOCATE.
A. Separate for Each Court.
B. Authority of Judge Advocate.
1. To alter charges.
2. Employ reporter..... *Page 497*
a. Or use enlisted man as such.
3. To subpœna witnesses.
a. To testify in court.
(1) To testify by deposition.
b. Can not hire service of subpœnas.
c. Can certify expense in locating witnesses..... *Page 498*
d. May employ expert witness.
(1) If question of insanity is raised.
4. To issue process.
a. Detaining civilian witnesses in guardhouse.
5. No authority over accused.
C. Duty of Judge Advocate.
1. As adviser to court.
2. To the accused.
a. As adviser.
(1) As to plea..... *Page 499*
3. To prepare record.
a. Judge advocate as witness.
b. Authenticates record.
(1) If two have been detailed, last one authenticates record.
(2) Should bind record.
(3) Should brief record.
(4) May print record..... *Page 500*
4. To administer oaths.
a. To reporter.
b. Of office and for purposes of military administration. (See Office.)

IV. JUDGE ADVOCATE—Continued.
D. Executes Orders of Court.
E. Presumption That he Does his Duty.
F. Absent from Session.
G. Not Unavailable for Other Duty.
H. No Officer Can Act as Trial Judge Advocate Except by Detail.
I. Counsel to Assist Judge Advocate.
1. Used only in important and complicated cases.
2. Can not be employed by judge advocate..... *Page 501*
K. Advised by Accuser or Prosecuting Witness.
L. Closing Address to Court.
M. Transmission of Record.
N. Not Subject to Challenge..... *Page 502*
O. May Challenge for Cause.
V. ACCUSED.
A. Trial is Not a Right.
B. Can Not be Compelled to Criminate Himself.
1. But figure cards may be introduced as evidence of identification.
C. Rights of Accused are Independent of his Rank.
D. Defense.
1. To prevent embarrassment a minimum of restraint placed on accused.
2. Insufficient defense.
a. Assault and battery by officer on soldier..... *Page 503*
b. In case of disrespectful letter to superior.
c. Duplication of pay accounts.
3. Should not be required while on trial to meet new charges before same court.
4. Failure to note variance at arraignment is waiver.
5. Drunkenness caused by medicine prescribed by surgeon.
6. Refusal to obey illegal order..... *Page 504*
E. What is Waived by Pleading the General Issue?
F. Demand for "Election" of Charges Not Allowable.
G. Counsel.
1. Not a right..... *Page 505*
2. Interview with accused and witnesses.
3. Officers not suitable for duty as counsel.
4. To employ all honorable means to acquit.
5. Civil counsel not furnished by United States..... *Page 506*
6. Accused must bear expense of.
H. Statement of Accused.
1. Permitted.
2. Admissions bind him.
3. Freedom of expression allowed.
4. If written, to be signed.
5. Not to be published by accused.
I. Acquittal.
1. Leaves accused in same status as before trial.
VI. MEMBER..... *Page 507*
A. Adding New Members.
B. Sworn as a Witness.
C. Arrest Preceding and Following Membership Does Not Render Member Ineligible to Sit.
D. Absence of Member from Session.

VI. MEMBER—Continued.
E. May be Arrested.
F. Separation of Member From the Service.
G. President of the Court.
1. By virtue of seniority of rank ..... *Page 508*
2. Duties.
3. Does not exercise command.
VII. AUTHORITY OF COURT-MARTIAL.
A. Source Statutory.
B. Over Charges.
1. If not signed.
2. To change charges ..... *Page 509*
C. Over Persons.
1. Members.
a. Can not seat them in different order than expressed in convening order.
2. Judge Advocate.
3. Accused.
D. Can Not Assign Counsel.
E. May Ask for Witnesses ..... *Page 510*
1. Or witness with papers.
F. In Case of False Swearing Before it.
VIII. JURISDICTION OF COURT-MARTIAL.
A. Criminal, not Civil.
1. Can not rescind contract or adjudge damages.
2. Can not order payment of debt.
B. Not Territorial ..... *Page 511*
C. No Presumption in Favor of Jurisdiction.
D. Attaches When?
1. Placed in arrest or charges served.
2. Arrested on day of discharge before delivery of certificate.
3. Deserter confined under charges ..... *Page 512*
4. Jurisdiction by civil courts over military offenders is abandoned.
E. Double Jeopardy. (*See One hundred and second article of war.*)
F. Under General Article.
1. Loose and indefinite pleading.
2. Indefinite pleading under specific article.
G. Over Person.
1. Accused.
a. Need not be in arrest.
b. Offense committed while in arrest.
c. Officer under suspension ..... *Page 513*
(1) By sentence or commutation thereof.
2. Civilians.
a. Trial of by military court is violation of sixth amendment to Constitution.
(1) Statute granting jurisdiction in time of peace in such cases is unconstitutional.
(2) Between enrollment and muster-in of volunteers status is that of civilians.
(3) A court has no jurisdiction simply because a civilian commits an offense against the Commander in Chief or any high official of the Army.
b. Exception—general prisoners are subject to trial by court-martial.

VIII. JURISDICTION OF COURT-MARTIAL—Continued.

H. NOT LOST.

1. By change in status of accuser ..... *Page 514*
2. By escape of accused.
3. Or set aside by process of State court.

I. ENDS.

1. With separation from service.
   a. Offense not discovered until after separation.... *Page 515*
   b. Not revived by reentry into service.
   c. Rule in case of deserters.
   d. Even if kept under control as a general prisoner.
2. Jurisdiction over cadet continues after promotion to commissioned office.

IX. PROCEDURE OF COURTS-MARTIAL.

A. HOW DETERMINED ..... *Page 516*

B. TIME OF SESSION.

1. Sunday.

C. DOORS OPENED OR CLOSED TO PUBLIC.

D. BETWEEN ADJOURNMENTS COURT MAY TRY OTHER CASES.

E. ARRAIGNMENT.

1. One act—several charges.
2. Changing of plea.
3. Evidence not to be received by plea.
4. Accused declines to plead—plea "not guilty" entered.
5. Plea is guilty.
   a. May call for evidence ..... *Page 517*
      (1) Statement made with plea.
      (2) Statement inconsistent with plea..... *Page 518*
      (3) Even after accused makes final statement.
   b. May not receive evidence after reaching a finding.

F. SPECIAL PLEAS.

1. Plea in bar.
   a. Pardon.
      (1) Constructive pardon..... *Page 519*
      (2) Reduction of noncommissioned officer to ranks and confinement can not be pleaded in bar on trial for offense.
2. Pleas in abatement.
   a. Objection to form of charges.
3. Motions.
   a. To strike out.

G. SUSPENSION OF TRIAL.

1. When accused develops insanity ..... *Page 520*

H. CLOSED SESSIONS.

1. Judge-advocate excluded.
   a. Not after court has arrived at a finding and sentence.
2. May be held before court is sworn.

I. FINAL STATEMENT OF ACCUSED.

1. In cases of desertion.
2. In cases of larceny.

K. VOTE OF COURT.

1. Majority vote required ..... *Page 521*
2. Polling of court not authorized.
3. No minority report to be made.

IX. PROCEDURE OF COURTS-MARTIAL—Continued.
L. Adjournment.
1. Requires majority vote.
2. *Sine die.*
M. Authentication ..... *Page 522*
N. Revision.
1. Court may be reconvened by convening authority.
2. Action recommended in reconvening order directory only.
3. Five members must be present.
4. Accused need not be present ..... *Page 523*
5. No testimony to be received.
6. Previous record not to be altered or mutilated—corrections to be made in new proceedings.
a. This revision is different from daily revision.
b. Indorsement by judge advocate does not amend record.
7. When court can not be reconvened no revision possible.
O. Dissolution of Court.
X. WITNESSES.
A. Competent.
1. Deserter ..... *Page 524*
2. Members and judge advocate of court.
3. Reviewing authority.
4. Persons not named in list.
5. Wife of prosecuting witness.
B. Incompetent.
1. Wife of accused.
a. Trial of husband for nonsupport.
2. Insane person.
3. Child—as to offenses against it..... *Page 525*
C. Competency.
1. Rules determining, same as in criminal courts.
D. Accused Entitled to Summoning of Material Witnesses.
1. Can not demand certain important witnesses.
E. By Deposition. (*See Ninety-first article of war.*)
F. Service of Summons.
1. By military or civil person.
2. Service can not be hired.
3. Witnesses in foreign territory ..... *Page 526*
G. Discharge of.
1. Only by notification.
H. Criminating Answers.
1. Privilege respecting, is personal.
a. If witness ignorant of right, should be instructed.
2. Medical officer may testify to facts learned in regular examination of accused.
3. Accused. (*See Discipline V B to C.*)
I. Fees.
1. Qualification for..... *Page 527*
2. Claim for loss of time, etc.
3. Of experts.
4. When giving evidence by deposition. (*See Ninety-first article of war.*)
5. Rate fixed by Secretary of War.
6. To foreign civil witnesses.

X. WITNESSES—Continued.
I. FEES—Continued.
7. Lost voucher, how replaced.
8. To policemen ..... *Page 528*
9. To postmaster.
K. WRIT OF ATTACHMENT.
1. When summons not obeyed.
2. Can not be issued to cause witness to appear before commissioner.
3. Execution of attachment.
L. EXEMPTION.
1. From arrest.
XI. EVIDENCE.
A. RULES.
1. Same as in criminal courts of United States.
2. Presumption that officer performs duty..... *Page 529*
3. Not affected by rank.
4. Burden of proof.
a. In desertion case.
5. Privileged communication.
6. Credibility.
a. Of public enemy.
7. Confession.
a. Must be free and voluntary..... *Page 530*
b. Can not be used until *corpus delicti* is proven.
8. Drunkenness may be observed and testified to.
a. In connection with intent.
9. Perjury—two witnesses required ..... *Page 531*
a. Testimony as to credibility of witness is material.
10. Testimony not to be received which results from refreshing of memory by witness who leaves court room for that purpose.
11. Prosecution can not attack character of accused until accused introduces evidence of character.
a. Evidence of insanity of accused..... *Page 532*
12. In case of homicide character of victim can not be assailed.
13. Evidence recorded in previous similar hearings must be given *de novo;* one hundred and twenty-first article of war excepted.
14. Evidence by accused.
a. Of an extenuating nature.
b. Accused takes the stand.
(1) Cross-examination of..... *Page 533*
15. Weight of evidence does not depend on number of witnesses.
16. Credibility of witnesses, appearance, etc.
17. Documentary.
a. Official records.
(1) High class of evidence of facts recorded pursuant to special object for which kept.
(2) Under military control.
(*a*) In War Department.
[1] Copies admitted.
[*a*] Orders and other papers.
[*b*] Recruiting papers ..... *Page 534*
[*c*] Court-martial records.
[*d*] Title papers.
[*e*] Muster rolls.
[A] Showing absence without leave ..... *Page 535*

XI. EVIDENCE—Continued.
A. RULES—Continued.
17. Documentary—Continued.
(a) In War Department—Continued.
[2] Compiled statement not admitted.
(b) Outside of War Department.
[1] War Department orders.
[2] Morning report books.
[3] Copies of pay accounts.
[4] Descriptive lists.
b. Private writings.
(1) Under military control.
(a) Proof of handwriting necessary ..... *Page 536*
(2) Not under military control.
(a) Telegrams.
c. Affidavits—not admitted.
18. Repeated false statements evidence of embezzlement.
XII. ACTION BY COURT.
A FINDING.
1. No evidence—finding conforms to plea.
2. Finding on charge must be supported by finding on specification.
a. One charge, one specification—not guilty of specification necessarily acquits..... *Page 537*
3. Separate finding on each charge and specification.
4. Plea is guilty to specification and not guilty to charge—finding on charge is a question of law.
5. Exceptions and substitutions authorized.
a. Name, rank, time, date, etc.
b. Word which expresses gravamen of offense can not be excepted if finding is guilty.
6. Lesser included offense.
a. Absence without leave instead of desertion.
b. "To the prejudice" instead of "unbecoming".. *Page 538*
c. The reverse not true.
7. Court can not substitute finding of an offense other than the one charged ..... *Page 539*
8. Twenty-first article of war.
a. It must be proved that—
(1) Accused "knowingly" assaulted superior.
(2) Superior was "in execution of office."
(3) Order was "lawful."
(a) Justification for disobedience of order.
9. Thirty-eighth article of war.
a. Any intoxication is violation of article ..... *Page 540*
10. Thirty-ninth article of war.
a. Accused previously "overtasked" not a defense.
11. Sixty-first article of war.
a. Duplicated pay voucher paid..... *Page 541*
12. Sixty-second article of war.
a. Specification of homicide omits "with malice aforethought."
b. Defense to charge of embezzlement.
B. SENTENCE.
1. Evidence of previous convictions.
a. May be admitted to determine measure of punishment.
(1) Of convictions during current enlistment.
(a) That were approved.

XII. ACTION BY COURT—Continued.
B. SENTENCE—Continued.
1. Evidence of previous convictions—Continued.
a. May be admitted to determine measure of punishment—Con.
(1) Of convictions during current enlistment—Contd.
(*b*) Over objection of accused that he had not raised question of character.
(*c*) Evidence of, is original record or authenticated copy ..... *Page 542*
(*d*) Date of approval fixes date of conviction.
b. Should not be received after acquittal.
2. In discretionary case court may impose any punishment sanctioned by customs of service.
a. Maximum punishment order is to determine measure and kind of punishment.
b. Convening authority can not order court to adopt particular form of sentence.
c. Punishment should be measured by gravity of military offense.
d. Under thirty-eighth article of war..... *Page 543*
e. Under fifty-eighth article of war.
3. Adoption of sentence.
a. Each member proposes a sentence.
b. Each member votes for a punishment.
c. Necessity of correct statement of name.
d. Reprimand.
e. Forfeiture.
(1) Should clearly state the penalty to be forfeiture—it can not be implied..... *Page 544*
(2) Should clearly fix exact amount to be forfeited.
(3) Can not sentence man to forfeit private money.
(4) Court can not impose fine to reimburse Government for calling the accused's witnesses.
f. Loss of rank.
(1) Reduction to the ranks.
(*a*) Of noncommissioned officer does not carry transfer..... *Page 545*
(2) Loss of files may be awarded.
(3) Suspension from rank.
(*a*) Includes suspension from command.
(*b*) Takes effect on notice.
(*c*) May carry confinement to station for same period of time.
g. Confinement.
(1) Sentence should say "at such place as the reviewing authority may designate"..... *Page 546*
(2) May adjudge confinement extending beyond term of service with or without dishonorable discharge.
(3) May be given until a fine is paid.
(4) Court may consider period of time accused has been in confinement.
h. Unusual punishments.
i. Dismissal..... *Page 547*

XII. ACTION BY COURT—Continued.
B. SENTENCE—Continued.
4. Improper sentences.
a. To perform duty.
b. To remain in service.
c. To deposit pay with paymaster.
C. REMARKS BY COURT.
D. ANIMADVERSION BY COURT UPON WITNESS.
E. RECOMMENDATION TO CLEMENCY.
1. Not part of record ..... *Page 548*
a. There may be more than one recommendation.
b. Members should state specific ground for recommendation.
c. Can not be withdrawn.
F. EXPLANATION OF SENTENCE BY COURT—IMPROPER.
XIII. RECORD OF COURTS-MARTIAL.
A. IS FULL RECITAL OF DETAILS OF TRIAL ..... *Page 549*
1. Even irregular proceedings.
B. CONVENING ORDER.
1. Authority for each member's acting as such should be cited.
C. ORGANIZATION.
1. Assembly ..... *Page 550*
2. Challenge.
a. Right to, must be extended by court ..... *Page 551*
3. Court and judge advocate sworn.
D. ARRAIGNMENT.
E. RECORD OF ALL MEETINGS ..... *Page 552*
F. RECESS.
G. SETS PROCEEDINGS OUT IN PROPER ORDER.
H. OF REVISION.
I. OF CLOSE OF SESSION.
K. OF TESTIMONY.
L. SEPARATE RECORD FOR EACH CASE ..... *Page 553*
M. DEATH SENTENCE—RECORD MUST STATE TWO-THIRDS VOTE.
N. SEPARATE RECORD OF FINDING ON EACH CHARGE AND SPECIFICATION.
O. RECORD NEED NOT SHOW JUDGE ADVOCATE CALLED ATTENTION OF ACCUSED TO PRIVILEGE OF TESTIFYING IN HIS OWN BEHALF.
XIV. REVIEWING AUTHORITY.
A. WHO IS?
1. Original when convening authority ..... *Page 554*
2. Division commander, after merging of separate brigade in division.
3. When accused leaves jurisdiction of convening authority before action on case.
B. CAN NOT BE RESTRAINED BY SUPERIOR AUTHORITY.
C. CAN NOT DELEGATE FUNCTIONS.
1. Jurisdiction same as that of court ..... *Page 555*
D. CAN NOT ACT ON SENTENCE OF GENERAL PRISONER IF OFFENSE COMMITTED BEFORE DISCHARGE WAS GIVEN.
E. SENTENCE INCHOATE UNTIL ACTED ON BY REVIEWING AUTHORITY.
1. Can not correct record.
2. Can not add to punishment.
a. By designating penitentiary as "military prison". *Page 556*
3. Not necessary to approve finding.
4. Reasons for returning record to court.
a. Record materially erroneous.

XIV. REVIEWING AUTHORITY—Continued.
E. Sentence Inchoate Until Acted on, etc.—Continued.
4. Reasons for returning record to court—Continued.
b. Finding "to the prejudice" on charge of "conduct unbecoming" ..... *Page 557*
c. Error in time alleged.
5. Presumption that proceedings are regular.
6. Record lost—sentence not effective.
7. Irregularities that are not fatal.
a. Misnaming or misdescription of rank of accused—when waived ..... *Page 558*
(1) Name misspelled but *idem sonans*.
b. No time pleaded.
c. Use of old serial number of charge.
d. Hostility of judge advocate to accused.
e. Accused shackled during trial.
f. Member acted as interpreter.
g. Revealing finding of sentence to clerk.
h. Omission of record of adjournment..... *Page 559*
i. Preparation of record by judge advocate when reporter was appointed.
8. Considerations affecting action.
a. When testimony is conflicting.
(1) Court's conclusions have weight.
(2) A sentence to be valid must rest upon an approved guilty finding.
9. Sentence.
a. Grounds for disapproval.
(1) Court denied request of accused for material witness.
(2) Presence on revision of member who did not sit on hearing ..... *Page 560*
(3) Material variance in name between specification and sentence.
(4) Accuser was prosecuting witness and interpreter on trial.
(5) Member present at finding was absent during substantial part of trial.
(6) Member acted as judge advocate..... *Page 561*
(7) Court refused to allow witness to correct testimony.
(8) Limit of solitary confinement exceeded in sentence.
(9) Sentence of confinement did not designate period.
(10) Sentence requires reviewing officer to fix date of discharge.
(11) Court excepted material allegation of false writing on charge of forgery..... *Page 562*
(12) Finding violation of fortieth article of war as lesser included offense in forty-eighth article of war.
(13) Under fifty-eighth article of war.
(*a*) Peace intervenes before sentence.
(*b*) Punishment less than required by local law.
(14) Of part of sentence in addition to dismissal under thirty-eighth, sixty-first, and sixty-fifth articles of war.
(15) Court improperly overrules challenge.

XIV. REVIEWING AUTHORITY—Continued.
E. SENTENCE INCHOATE UNTIL ACTED ON, ETC.—Continued.
9. Sentence—Continued.
a. Grounds for disapproval—Continued.
(16) Reasonable continuance not granted ..... *Page 563*
(17) Designation of penitentiary for military offense.
b. Effect of disapproval.
(1) Of conviction.
(*a*) Has effect of acquittal..... *Page 564*
(2) Of acquittal.
c. Exceeds legal limit, legal portion approved.
d. Mitigation. (See also *Discipline XV F to G.*)
(1) Reasons for.
(*a*) Protracted arrest.
(*b*) Mutiny under provocation.
e. Action changed before notice—not after ..... *Page 565*
f. Dismissal.
(1) Irrevocable after execution.
g. Penitentiary sentence—designation must be approved by Secretary of War.
(1) Sentence "in such place as the reviewing authority may direct."
h. Place of confinement may be changed.
i. Reprimand—reviewing authority judge of severity.
k. Loss of files—how effected ..... *Page 566*
l. Action must be entered at end of record.
m. Authentication must be personal.
n. Acquittal.
(1) Prisoner released before action.
F. PROMULGATING ORDER.
1. Should give date of action.
2. Notice otherwise than by publication of order..... *Page 567*
3. Should be sent to commanding officer if accused has passed out of the command.
G. REVIEWING AUTHORITY MAY RECOMMIT A PRISONER WHO HAS BEEN ILLEGALLY RELEASED.
H. THE PRESIDENT.
1. May be original and final reviewing authority.
a. Act must be personal, but need not be evidenced by sign manual ..... *Page 568*
2. May return proceedings to court for revision.
3. May remit penitentiary sentence at any time ..... *Page 569*
4. Words "approved" and "confirmation" equivalent.
5. Can not correct sentence or add to punishment.
I. MAY EXPRESS DISAPPROBATION OF COURT'S ACTION.
K. NEW TRIAL.
1. Accused applies after sentence disapproved.
XV. REVISION BY JUDGE ADVOCATE GENERAL.
A. IN SENTENCE OF REIMBURSEMENT—NOT NECESSARY THAT ALL THE ITEMS SHOULD BE PROVEN ..... *Page 570*
B. DEPARTMENT COMMANDER MAY REFUSE REQUEST FOR A PARTICULAR OFFICER AS COUNSEL.
C. PRESUMPTION IS THAT PROCEEDINGS ARE REGULAR.
1. Facts in record can not be contradicted or proven otherwise than by record ..... *Page 571*

XV. REVISION BY JUDGE ADVOCATE GENERAL—Continued.
D. Irregularities That Do Not Invalidate the Proceedings.
1. Charges not referred by convening authority.
2. Convening order dated on Sunday.
3. Incorrect, but sufficient description of accused.
4. Failure to comply with one hundredth article of war... *Page 572*
E. Fatal Defects.
1. Record must show affirmatively whatever is made essential by statutes.
2. Officer sits as member after relief.
3. Court excused judge advocate and required member to act as such.
4. Error discovered after dissolution of court—procedure, order declared inoperative and withdrawn.
5. Court declined a written statement from accused..... *Page 573*
6. No finding on the charge.
7. Court without jurisdiction to sentence.
8. Convening order null.
9. Court and judge advocate not sworn.
10. Record did not show right to challenge extended.
11. Trial for fraudulent enlistment—charges failed to allege receipt of pay and allowances.
12. Less than five proceed with business..... *Page 574*
13. Soldier already discharged when second sentence approved.
F. Grounds for Remission. (See *also Discipline XIV E 9 d to e.*)
1. Conviction of perjury on one contradicted witness.
2. Finding of offense different from that charged.
3. Accused insane during trial.
4. Accused had as an accomplice given evidence against another in a similar case.
5. Sentence excessive and exceptional..... *Page 575*
6. Disregard by court of statement by accused in extenuation of plea of guilty.
7. Accused through ignorance did not exercise right of challenge.
8. Court recommends clemency, and new evidence.
G. Loss of Record.
1. After confirmation of sentence..... *Page 576*
H. Illegal Courts.
1. Civilian convened court-martial.
2. Unauthorized officer convened court-martial.
3. Authorized convening officer, but court constituted illegally.
I. Legal Sentence Irrevocable After Execution.
1. Military courts not part of judiciary.
2. Executed legal sentence can not be changed or pardoned by Executive..... *Page 577*
a. Or by Congress.
3. Mere irregularities do not alter this principle..... *Page 578*
4. Too late to urge that sentence was not supported by evidence, etc.
K. Illegal Sentence.
1. When offense is not a military one.
XVI. INFERIOR COURTS-MARTIAL.
A. Regimental Court.
1. Has no authority to punish officers.
B. Garrison Court.
1. President of, as commanding officer, may act on case.

XVI. INFERIOR COURTS-MARTIAL—Continued.
C. Commanding Officer May Be Accuser.
D. One Hundred and Third Article of War ..... *Page 579*
E. Summary Court.
1. Can not issue process of attachment.
2. Has no jurisdiction over capital cases.
3. Summary court officer certifies witness vouchers, etc.
4. Post commander.
a. Action on record must be personal.
b. May require reconsideration by court.
c. Should not appoint himself.
5. Summary court officer the accuser.
6. Commanding officer of general hospital may appoint.
7. At brigade posts ..... *Page 580*
8. Report of—deposited where.
a. When troops are in camp.
9. Summary court officer administers oaths. (See *Discipline IV C 4 to 5.*
F. Department Commander Supervises Proceedings.
XVII. PUNISHMENT.
A. Authorized.
1. By company commander.
2. By post commander.
3. By sentence of general court-martial. (See *Articles of war* and *Discipline XII B to C*) ..... *Page 581*
4. Confinement.
a. Begins at date of order promulgating sentence.
b. Cumulative sentence.
c. Time absent in escape to be made good.
d. Prisoners' mail not to be opened ..... *Page 582*
e. Suspended sentence without precedent.
f. Good-conduct time.
g. In military prison.
(1) Prisoners may be required to manufacture articles for sale.
(2) Prisoners may be required to manufacture articles for issue.
(3) All prisoners may be required to work.
(4) Extent of separation from outside world.
(5) Private money of general prisoner not subject to forfeiture ..... *Page 583*
(6) Guard's authority over prisoner.
(7) Prisoners required to manufacture clothing.
h. In penitentiary.
(1) United States must transport men to the penitentiary.
i. Whole guard is responsible that prisoners do not escape.
B. Unauthorized Punishment.
1. Summary.
a. Hanging free from ground or immersion in water.
b. Striking soldier unnecessarily.
c. "Tied and gagged" ..... *Page 584*
d. Abuse of sentinel.
e. Forcing a soldier to contribute to company fund.

XVII. PUNISHMENT—Continued.
B. UNAUTHORIZED PUNISHMENT—Continued.
1. Summary—Continued.
f. Stopping pay under fifty-fourth article of war, as punishment.
g. For offense of which accused has been acquitted.. *Page 585*
2. By sentence of general court-martial.
a. Officer.
(1) Reduction to the ranks.
XVIII. BOARDS OF INVESTIGATION.
A. CAN NOT TRY OR SENTENCE.
B. INVESTIGATION OF CASE OF A DISMISSED OFFICER..... *Page 586*
C. WITNESS FEES NOT ALLOWED.
D. REPORTER MUST BE AUTHORIZED BY SECRETARY OF WAR.
E. AS TO CHARACTER OF ENLISTED MEN. (See *Discharge*.)

I A 1. 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, and that the circumstances, instead of meriting disgraceful punishment, indicate that the officer should be commended for the vigor and courage with which he suppressed what approximated to a mutiny.[1] *R. 11, 592, Mar., 1865.*

I A 2. The military authorities are not empowered to make forcible entrance into a private dwelling to effect an arrest of a soldier.[2] *C. 395, Oct., 1894;*[3] *23930, Oct. 2 and 8, 1908.*

I A 2 a. *Held*, that military arrests may be made in such parts of public houses as are devoted to public purposes. *C. 395, Oct., 1894.*

I B 1. A soldier while confined in arrest should not be fettered or ironed except where such extreme means are necessary to restrain him from violence, or there is good reason to believe that he will attempt an escape and he can not otherwise be securely held. *R. 30, 483, July, 1870; C. 18878, Dec. 9, 1905.*

I B 2. The status of being in arrest is inconsistent with duty. *R. 2, 77, Mar., 1863.* Placing an arrested officer or soldier on duty terminates his arrest. *R. 26, 114, Oct., 1867.* A soldier in arrest in quarters may be required to do cleaning or police work about his quarters which otherwise other soldiers would have to do for him. *P. 49, 329, Oct., 1891.* Releasing a soldier from arrest and requiring him to perform military duty, after his trial and while he is

[1] This officer was tried by court-martial and found guilty of manslaughter, but the sentence was disapproved in General Court-Martial Order 177, War Department, 1865.
[2] See Circ. 12, A. G. O., 1894.
[3] This opinion concurred in by the Attorney General. See his letter of Oct. 12, 1894, marked Office of the Secretary, War Department, Oct. 12, 1894.

awaiting the promulgation of his sentence, can be justified only by an extraordinary exigency of the service. *R. 7, 234, Feb., 1864.*

I B 3. An officer under arrest is not disqualified to prefer charges. *R. 5, 348, Nov., 1863; 16, 68, May, 1865.*

I C. No court-martial, military commander, or other military authority is empowered to accept bail for the appearance of an arrested party or to release a prisoner on bail. Bail is wholly unknown to the military law and practice; nor can a court of the United States grant bail in a military case.[1] *R. 9, 260, June, 1864; 21, 258, Mar., 1866.*

I D 1. Except in the class of cases indicated in article 24, only "commanding officers" can place commissioned officers in arrest. (See A. R. 930 of 1908.) The commanding officer thus authorized is the commander of the regiment, separate company, detachment, post, department, etc., in which the officer is serving. *R. 26, 642, July, 1868.* Where a company is included in a post command the commander of the post, rather than the company commander, is the proper officer to make the arrest of a subaltern of the company. *R. 29, 304, Oct., 1869.* Otherwise, however, as to a regimental commander whose regiment forms part of the garrison of a post. *C. 26140, June 29, 1910.*

I D 2. An arrest is by no means a privilege of an officer. He can not under any circumstances demand it, not can he complain if brought to trial that injustice or wrong has been done him because this mark of disapprobation was not put upon him. *R. 17, 419, Oct. 12, 1865; 19, 419, Feb. 15, 1866.*

I D 3. An officer may be put in arrest by a verbal or written order or communication from an authorized superior, advising him that he is placed in arrest or will consider himself in arrest, or in terms to that effect; the reason for the arrest need not be specified. At the same time he is usually required to surrender his sword, though this formality may be dispensed with. *R. 2, 77, Mar. 13, 1863; 19, 419, Feb. 15, 1866.*

I D 4. It is clearly to be inferred from the Army Regulations that unless other limits are specially assigned him an officer in arrest must confine himself to his tent or quarters. It is generally understood, indeed, that he can go to the mess house or other place of necessary resort. It is not unusual, however, for the commander, in the order of arrest, to state certain limits within which the officer is to be restricted, and, except in aggravated cases, these are ordinarily the limits of the post where he is stationed or held. *R. 5, 434, Dec., 1863.*

I E 1. *Held* that it is proper for a company commander to expressly delegate to noncommissioned officers of his company the power to place enlisted men in arrest subject to the condition that such action will be reported at once to him. This is with a view of providing a means of restraint at the instant when restraint is necessary. *Held* further that a similar delegation of authority to confine a junior is justified by the custom of the service for nearly a century. *C. 18878, Dec. 9, 1905.*

I E 2. Soldiers held in military arrest, while they may be subjected to such restraint as may be necessary to prevent their escaping or

[1] The act of July, 1864, c. 253, s. 7—which authorized a judge or commissioner of a United States district court to admit to bail a contractor or inspector, amenable to trial by court-martial under the then existing law, and arrested with a view to trial thereby—is no longer operative.

committing violence, can not legally be subjected to any summary punishment.[1] *R. 31, 597, Aug., 1871; C. 18878, Dec. 9, 1905; 26070, Jan. 15, 1910; 26140, June 5, 1910.*

I E 3. *Held* that an enlisted man who has been tried and convicted by the civil courts and released on parole may be arrested and brought to trial by military authority for any military offenses charged against him. *C. 23264, Jan. 6, 1912.*

II A 1. Military offenses proper are simply violations of the laws, orders, or rules of discipline governing the military state. Such offenses are neither "felonies" nor "misdemeanors" in the legal sense of those terms, nor can an officer or soldier, convicted of an offense of this class, properly be subjected to any of the consequences attaching to a felony. *R. 53, 14, Sept., 1886; P. 27, 71, Sept., 1888.*

II A 1 a. Where a specification alleged that the accused was absent without leave at various times between two dates, 20 days apart, *held* that the same was defective and subject to exception as being *double*, each such absence being a substantive and distinct offense.[2] *R. 10, 471, Oct., 1864.*

II A 1 b. Where the specification to a charge of violation of the sixtieth article alleged the presentation by the accused of a fraudulent claim for rations furnished for recruits, and also for lodgings furnished for the same recruits at the same time, *held* that the specification related to one transaction and was not therefore to be necessarily regarded as *double* or defective, in view of the liberal rules of pleading applicable to military charges. *R. 10, 392, Oct., 1864.*

II A 1 c (1). A specification averring a general incapacity induced by habitual intoxication does not set forth a military offense. The accused in such a case should be charged with the acts of drunkenness committed, as separate and distinct instances of offense.[3] *R. 33, 458, Nov. 1872; 50, 469, June, 1886.*

II A 1 c (2). A charge of "worthlessness," with specifications setting forth repeated instances of arrests, confinements in the guardhouse, or trials and convictions of the accused for slight offenses, *held* an insufficient pleading; such instances not constituting military offenses, but merely the punishments or penal consequences of such offenses. *R. 25, 664, June, 1868; 28, 253, Dec., 1868; 33, 169, 208, 281, 285, 345 and 416, July to Oct., 1872.*

II A 1 d. *Held* that an officer or enlisted man has no right to petition Congress through any other than military channels, and if he does so it is a military offense. *C. 24351, Jan. 18, 1909.*

II B. Military charges, though commonly originating with military persons, may be initiated by civilians; indeed it is but performing a public duty for a civilian, who becomes cognizant of a serious offense committed by an officer or soldier, to bring it to the attention of the proper commander. *C. 26517, May 12, 1910; 26591, Apr. 15, 1910.* So a charge may originate with an enlisted man. But, by the usage of the service, all military charges should be *formally* preferred by,

---

[1] See G. O. 23, Dept. of the East, 1863; do. 26, Dept. of California, 1866; do. 23, Dept. of the Lakes, 1870; do. 106, Dept. of Dakota, 1871. And compare remarks of Justice Story in Steere *v.* Field, 2 Mason, 486, 516.

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

[3] See G. O. 11, War Dept., 1873.

i. e., authenticated by the signature of a commissioned officer. Charges proceeding from a person outside the Army, and based upon testimony not in the possession or knowledge of the military authorities, should in general be required to be sustained by affidavits or other reliable evidence, as a condition to their being adopted. *R. 16, 423, July, 1865; 41, 672, Aug., 1879; 42, 202, Mar., 1879; P. 13, 231, Nov., 1886.*

II C. 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. *R. 1, 467, Dec. 1862; 5, 348, Nov., 1863; 16, 68, May, 1865; C. 22120, Sept. 21, 1907.* Charges should be preferred to the authority empowered to convene the court for their trial. *R. 42, 202, Mar., 1879.*

II D 1. In our practice, unlike that of the English, a military charge properly consists of two parts—the technical "charge" and the "specification." The former designates by its name, particular or general, the alleged offense; the latter sets forth the facts supposed to constitute such offense.[1] *R. 7, 600, Apr., 1864.*

II D 1 a. There may be one or more specifications to a particular charge. It is the office of the specifications to specify the particular acts done or omitted by the accused with time and place, which constitute the offenses charged; each specification to set forth but one instance of offense. *R. 5, 613, Jan., 1864; P. 65, 373, July, 1894; C. 4813, 1898.*

II D 1 b. The specification should be appropriate to the charge. A charge of "conduct to the prejudice of good order and military discipline," with a specification setting forth a violation of a specific article, is an irregular and defective pleading, and so of course is a charge of a specific offense with a specification describing not that but a different specific offense, or a simple disorder or neglect of duty. *R. 24, 198, Jan., 1867.*

II D 1 c. A specification, in alleging the violation of an order which has been given in writing, or of any written obligation—as an oath of allegiance, parole, etc.—should preferably set forth the writing *verbatim*, or at least state fully its substance, and then clearly detail the act or acts which constituted its supposed violation. *R. 3, 649, Sept., 1863.*

II D 2. The same particularity is not called for in a military charge which is required in an indictment.[2] *C. 14495, Apr. 15, 1903.* The essentials of a military charge are: 1. That it shall be laid under

---

[1] An accusation against an officer or soldier, not thus separated in form, would be irregular and exceptional in our practice, and, till amended, should not be accepted as a proper basis for proceedings under the military code.

[2] In regard to the proper form for a military charge, Atty. Gen. Cushing (7 Op., 601, 603) says: "There is no one [form] of exclusive rigor and necessity in which to state military accusations." He adds further: "Trials by court-martial are governed by the nature of the service, which demands intelligible precision of language, but regards the substance of things rather than their forms. * * * The most bald statement of the facts alleged as constituting the offense, provided the legal offense itself be distinctively and accurately described in such terms of precisions as the rules of military jurisprudence require, will be tenable in court-martial proceedings, and will be adequate ground-work of conviction and sentence." So it is observed by Atty. Gen. Wirt (1 Ops., 276, 286) that "all that is necessary" in a military charge is that it be "sufficiently clear to inform the accused of the military offense for which he is to be tried, and to enable him to prepare his defense." And see Tytler, 209; Kennedy, 69. It is ably remarked by Gould (Pleading, p. 4) that "all pleading is essentially a logical process;" and that, in analyzing a correct pleading, "if we take into view, with what is expressed, what is necessarily supposed or implied, we shall find in it the elements of a good syllogism." But it can hardly be expected that military charges in general will stand this test.

the proper article of war or other statute. 2. That it shall set forth (in the specification) facts sufficient substantially to constitute the particular offense. These essentials being observed, the simpler, and less encumbered with verbiage and technical terms a military charge is, the better, provided it be expressed in clear and intelligible English. However inartificial the pleading may be, it will properly be held sufficient as a legal basis for a trial and sentence, provided that the charge and specification, taken together, amount to a statement of a military offense either under a specific article or under the general article, No. 62. *R. 16, 551, Sept., 1865; 27, 524, Feb., 1869; C. 23481, June 25, 1908.*

II D 3. The accused is entitled to know for what particular act he is called to account. The charge, therefore, should be expressed in terms sufficiently definite to give him such notice. Thus *held* that a specification under the sixty-second article of war in the case of an officer which alleged not a specific act of offense, but that an habitual course of conduct, incapacitated the accused for service or for the performance of his proper duty, was seriously defective and subject to be stricken out on motion.[1] *R. 50, 469, Jan., 1886.*

II D 4. Where an offense is clearly defined in a specific article, it is irregular and improper to charge it under another specific article. So, where the article in which the offense is defined makes it punishable with a specific punishment to the exclusion of any other, it is error to charge it under an article, such as the sixty-second, which leaves the punishment to the discretion of the court. *R. 2, 51, Mar., 1863; 11, 312, Dec., 1864; 14, 599, June, 1865; 20, 533, Apr., 1866; 28, 575, May, 1869.* On the other hand, it is equally erroneous to charge under a specific article, making mandatory a particular punishment, an offense properly charged only under article 62. *R. 1, 463, Dec., 1862; 27, 413, Dec., 1868; 28, 575, supra; C. 17405, Jan. 27, 1905; 19330, Mar. 10, 1906.*

II D 5. To charge a military offense as a violation of a certain article of war, naming it by its number, is regular and proper. When a statute or an article of war enacts that whosoever shall do a particular act shall receive a specified punishment, it thereby prohibits, by the strongest possible implication, the offense named. The prohibition is part and parcel of the statute or article—is, indeed, its essence—and the act committed is necessarily in violation of it, and is properly averred so to be. Announcing a penalty or punishment for an offense is the legal language or mode for prohibiting it, and this language is so well understood as to have led to great uniformity in the use of the form in question. *R., 5, 77, Oct., 1863; 7, 457, Mar., 1864.*

II D 6. The order fixing maximum punishments prescribes different limits of punishments for wilfully and for negligently allowing (by an enlisted man) a prisoner to escape, as separate offenses, under the sixty-second article of war. A charge for suffering an escape under this article should therefore indicate in the specification whether the act is alleged to be willful or negligent only. *P. 48, 220, July, 1891.*

II D 7. Properly to warrant the *joining* of several persons in the same charge and the bringing them to trial together thereon, the offense must be such as requires for its commission a combination of

[1] In such cases the officer should be ordered before a retiring board under section 1252 of the Revised Statutes and not brought to trial by court-martial.

action and must have been committed by the accused in concert or in pursuance of a common intent. The mere fact of their committing the same offense together and at the same time, although material as going to show concert, does not necessarily establish it. Thus the fact that several soldiers have absented themselves together without leave, will not, in the absence of evidence indicating a conspiracy or concert of action, justify their being arraigned together on a common charge, for they may merely have been availing themselves of the same convenient opportunity for leaving their station. Nor is desertion, of which the gist is a certain *personal* intent, ordinarily chargeable as a *joint* offense.[1] *R., 5, 479, Dec., 1863; 12, 439, June, 1865; 24, 468, Apr., 1867; 32, 254, 333, Feb., 1872; 33, 211, 434, Oct., 1872; C. 12956, July 11, 1902.*

II D 8 a. Where a specification to a charge preferred by a superior against an inferior officer, instead of referring to the former in the third person, alleging that the accused addressed abusive language to "me," and committed an assault upon "me," without naming or otherwise indicating the subject of the abuse or assault, *held* that such a form, though supported by some of the English precedents, was not sanctioned by our practice, and that, on objection being made to the same by the accused, the court would properly either require that the specification be amended, or that, in incorporating the charge in the record, the name of the preferring officer be added. *R. 3, 429, Aug., 1863.*

II D 8 b. It is not essential to state in a specification the *full* Christian name of the accused, or other party required to be indicated. Only such name or initial need be given as will be sufficient unmistakably to identify the party. *R. 24, 299, Feb., 1867; C. 16974, Oct. 5, 1904; 22215, Nov. 4, 1907.*

II D 9. The *time* and *place* of the commission of the offense charged should properly be averred in the specification in order that it may appear that the offense was committed within the period of limitation fixed by the one hundred and third article, and to enable the accused to understand what particular act or omission he is called upon to defend.[2] *R. 1, 463, Dec. 1862; 5, 613, Jan., 1864.*

II D 9 a. 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

---

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

But where two or more soldiers have in fact deserted together as the result of a concerted plan they may properly be jointly or severally charged with desertion, the specification in either case describing in proper terms a "desertion in the execution of a conspiracy." See order prescribing maximum punishments, Court-Martial Manual (1908), p. 52.

Where two or more soldiers have, as the result of a concerted plan, attempted to desert, they may properly be charged jointly or severally with conspiracy to desert, as well as an attempt to desert, to the prejudice of good order and military discipline.

In any case under the charge of desertion the fact of concert may be put in evidence as illustrating the *animus* of the act committed.

[2] As to the latitude allowable in the allegation of time in military pleadings, compare 1 Op. Atty. Gen., 295, 296.

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

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. These terms "on or about" and "at or near" are, however, not unfrequently (though unnecessarily) employed in practice where the exact time or place is known and can readily be alleged. *R. 26, 437, Feb., 1868.*

II D 9 b. An offense of commission may not have been completed on any particular day. Thus *held* that the allegations of time and place were sufficient in a specification in which it was set forth that the offense charged (which consisted in an improper disposition of public property) was committed by the accused "while *en route* between Austin, Tex., and Waco, Tex., between the 5th and 25th days of May, 1867." *R. 25, 100, Sept., 1867.*

II D 10 a. A reasonably exact allegation of the time is also important in some cases—especially those of desertion and absence without leave—in order that the accused, if subsequently brought to trial for the same offense, or, what is the same thing in law, for an offense included in the original offense, may be enabled (by an exhibition of the record) properly to plead a former acquittal or conviction of that offense. *R. 7, 348 and 513, Apr., 1864.*

II D 10 b. The allegation of *time* in a specification should be as nearly defined as the facts will permit; but where the act or acts charged extended over a considerable space 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 the performance of which was thus continuous.[1] *P. 31, 357, Apr., 1889.*

II D 10 c. The same exactness in the averment of time is in general scarcely required, where the offense charged is one of *omission* as where it is one of the *commission* of a specific act. It is sufficient in the former case to allege that the offense occurred *between* certain named dates not unreasonably separated. *R. 30, 488, July, 1870.*

II D 10 d. Where it was alleged in a specification that the accused was drunk on duty at some time or times during a period of 70 days, *held* that the specification did not give sufficient notice to the accused of the specific offense which he was required to defend, and was therefore uncertain and insufficient.[2] *R. 1, 463, Dec., 1862.*

II D 11 a. While it is in general irregular to plead matter of evidence, there is no objection to noting in brief in the specification the immediate result or effect of the act charged, as a circumstance of description illustrating the character and extent of the offense committed. Thus while a homicide, if amounting to murder, and capital under section 5339, R. S., or by the law of the State, etc., can not as such be made the subject of a military charge in time of peace, yet a capital homicide, where it has been committed in con-

[1] See G. C. M. O. 21, A. G. O. of 1889.

[2] Compare cases in G. O. 193, Army of the Potomac, 1862; do. 98, Dept. of New Mexico, 1862.

nection with or as a consequence of a specific military offense charged against the accused—as, for example, "Mutiny" or "Offering violence to a superior officer"—may properly be stated in the conclusion of the specification as matter of aggravation and as indicating the *animus* of the accused or the amount of force employed. *R. 34, 478, Sept., 1873.*

II D 11 b. It is illogical and faulty pleading to charge a secondary offense *in lieu of* the actual or principal offense, of which that charged was merely a consequence or incident. *R. 27, 446, Jan., 1869.*

II D 11 c. Undue multiplication of charges or forms of charge is to be avoided. Thus charges should not in general be added for minor offenses which were simply acts included in and going to make up graver offenses duly charged. *R. 15, 441, July, 1865.*

II D 11 d. A charge or specification should not be expressed in the *alternative*—as that the accused "did sell *or* through neglect lose," etc. The selling, through neglect losing, and through neglect spoiling are distinct offenses and should be so charged. *P. 28, 35, 110, Nov., 1888; 29, 162, Jan., 1889; 30, 83, Feb., 1889; 51, 343, Jan., 1892; 58, 139, Feb., 1893; 62, 449, Dec., 1893; 65, 384, July, 1894.*

Such a charge is irregular and defective and upon motion may be stricken out or required to be amended. *R. 51, 248, Dec., 1886, and 297, Jan., 1887; C. 10345, July 31, 1901.*

II D 12 a. The signing of charges, like orders, with the name of an officer, adding "by the order of" his commander, is unusual and not to be recommended. Charges, where not signed voluntarily by the officer by whom they are preferred, are, in practice, usually subscribed by the judge advocate of the court. *R. 34, 598, Nov., 1873; 47, 521, Sept., 1884; C 20754, May 27, 1910.*

II D 12 a (1). Charges, though prepared in the Office of the Judge Advocate General, are not in practice signed by him. If not signed by the officer actually preferring them, they will properly be authenticated by the signature of the acting judge advocate of the department, or, preferably, by the judge advocate of the court. *R. 47, 521, Sept., 1884; P. 60, 257, June, 1893.*

II D 13 a. The disrespect indicated in the twentieth article of war may consist in acts or words;[1] and the particular acts or words relied upon as constituting the offense should properly be set forth in substance in the specification.[2] It must be shown in evidence under the charge that the officer offended against was the "commanding officer" of the accused.[3] The commanding officer of an officer or soldier, in the sense of article 20, is properly the superior who is authorized to require obedience to his orders from such officer or soldier, at least for the time being. Thus, where a battalion was temporarily detached from a regiment and placed under the orders of the commander of a portion of the army distinct from that in which the main part of the regiment was included, *held,* that it was the commander of this portion who was the commanding officer of the detachment; and that the use by an officer of such detachment of disrespectful language in reference to the regimental commander (who had remained with and in command of the main body of the regi-

[1] G. O. 44, Dept. of Dakota, 1872. And see G. C. M. O. 28, War Dept., 1875; G. O. 47, Dept. of the Platte, 1870.

[2] G. C. M. O. 35, Dept. of the Missouri, 1872.

[3] G. O. 53, Dept. of Dakota, 1871.

ment) was properly chargeable, not under this article, but rather under the sixty-second. *R. 18, 407, Nov., 1865; C. 18764, Oct. 2, 1906.*

II D 14 a. In charging a striking or doing of violence to a superior officer under article 21, 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. *R. 29, 485, Dec., 1869.*

II D 15 a. In framing a charge under this article, it will not in general be essential to allege, in connection with the date of the offense, or to show by evidence, that the act was committed at a time of war, etc.; this being a fact of which a court will ordinarily properly take judicial notice.[1] *R. 17, 396, Oct., 1865; C. 13309, July 25, 1903; 13653, Feb. 18, 1903; 13770, Dec. 6, 1902; 15711, Jan. 4, 1904.*

II D 16 a. In framing a charge under article 60 of knowingly and wilfully misappropriating, etc., public funds,[2] it is not necessary to allege an *intent to defraud* the United States. It is the *act* of the misappropriation described itself which constitutes the offense, irrespective of the purpose or motive of such act. *R. 5, 498, Dec., 1863; 23, 77–81, June, 1866; C. 23277, Nov. 30, 1908.*

II D 16 b. In charging embezzlement under the sixtieth article of war, *held* that it is not necessary to aver in terms that the money or property was "furnished or intended for the military service of the United States if that fact sufficiently appears from other allegations." *R. 47, 476, Sept. 1884.*

II D 17 a. The use of abusive language toward a commanding officer may constitute an offense under article 61. But, both as a matter of correct pleading and because the twentieth article authorizes a punishment less than dismissal, the language should be so particularized as to show that it constituted an offense more grave than the mere disrespect which is the subject of the latter article. A specification not thus setting forth and characterizing the epithets or words employed will be subject to a motion to make definite or strike out. *R. 56, 562, Sept., 1888.*

II D 18 a. Drunkenness not on duty, or when off duty, when amounting to a "disorder," should be charged under article 62, unless (in a case of an officer) committed under such circumstances as to constitute an offense under article 61. *R. 31, 52, Nov., 1870.*

II D 18 b. A crime, disorder, or neglect, cognizable under article 62, may be charged either by its name simply as "larceny," "drunkenness," "neglect of duty," etc.; or by its name with the addition of the words, "to the prejudice of good order and military discipline;" or simply as "conduct to the prejudice of good order and military discipline;" or as "violation of the sixty-second article of war." It is immaterial in which form the charge is expressed, provided the specification sets forth facts constituting an act prejudicial to good order and military discipline. *R. 7, 485, Mar., 1864; 9, 328, Mar., 1864; 11, 228, Dec., 1864; 28, 486, Apr., 1869.* Whenever the charge and specification *taken together* make out a statement of an act clearly thus prejudicial, etc., the pleading will be regarded as substantially sufficient under this general article. *R. 16, 316, 551, June and Sept., 1865.*

---

[1] See the application of this principle to the fact of the existence of the late Civil War in Justice Field's charge to the grand jury in United States *v.* Greathouse, 4 Sawyer, 457.

[2] "All money lawfully in the hands of a public officer, and for which he is accountable, is money of the United States." United States *v.* Watkins, 3 Cranch C. C., 441, Fed. Cas. 16649.

II D 18 c. A charge of "conduct to the prejudice," etc., with a specification setting forth merely trials and convictions of the accused for previous offenses, is not a pleading of an offense under article 62 or of any military offense. *R. 27, 331, Nov., 1868.* So of a charge of "habitual drunkenness, to the prejudice," etc., with a specification setting forth instances in which the accused has been sentenced for acts of drunkenness. *R. 33, 175, July, 1872.* Such charges, indeed, are in contravention of the principle that a party shall not be twice tried for the same offense. So, a specification under the charge of "conduct to the prejudice," etc., which sets forth not a distinct offense, but simply the result of an aggregation of similar offenses, is insufficient in law. *R. 36, 432, May, 1875.* Where the specifications to such a charge, in a case of an officer, set forth that the accused was "frequently" drunk, "frequently" absented himself without authority from his command, etc., *held* that these specifications were properly struck out by the court on the motion of the accused. In such a case the only correct pleading is a general charge under this article, with specifications setting forth—each separately—some particular and specific instance of offense. *R. 38, 211, Aug., 1876.*

II D 18 d. A breach of an Army regulation, imposing a duty upon an officer or soldier, is in general chargeable as "conduct to the prejudice of good order and military discipline," and punishable under article 62. *R. 39, 283, Nov., 1877; C. 19330, Mar. 10, 1906.*

II D 19. In the case of an officer tried by a court-martial in the Philippine Islands and, upon conviction, sentenced to a term of imprisonment in a penitentiary, *held* that the chief, if not the sole, purpose in bringing an officer to trial under the sixty-first article is to obtain the judgment of the court upon the character of his acts or conduct from the point of view of that article. If, upon a full showing of the facts, his acts appear to be unbecoming an officer and a gentleman, then the article requires that he shall be separated from the service. If his conduct also constitutes a crime, then the particular criminal offense which has been committed should be, and habitually is, charged under the proper article of war with a view to the imposition of such other or additional punishment as may be warranted by the nature and extent of his offending. *C. 17667, Mar. 18, 1905.*

II D 20. General prisoners who have been dishonorably discharged and are held in execution of sentences of imprisonment at hard labor are citizens and, as such, can not commit acts in violation of the twenty-first article of war. *Held* that acts of disobedience committed by general prisoner should be charged under article 62. *C. 16220, Apr. 26, 1904.*

II E. A list of the proposed witnesses is no part of the military charge, though such a list may properly be and is not unfrequently appended to a charge. In serving upon the accused a copy of the charges, it is not essential, though the better practice, to add a copy of the list of witnesses where one is appended to the original charges.[1] *R. 25, 350, Feb., 1868.*

II F 1. It is a reprehensible practice to allow charges to lie long dormant before being preferred. Charges should not be delayed but should be brought to trial as soon as practicable and while the evi-

[1] Appending such a list does not preclude the prosecution from calling witnesses not named therein.

dence is fresh; a delay of five months being *remarked upon* as prejudicial to the administration of justice and unfair to the accused. *P. 24, 283, May, 1888; C. 21889, Aug. 5, 1907.*

II F 2. 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.[1] *R. 12, 348, Feb., 1865; C. 17667, Mar. 18, 1905.*

II G 1. The statement as to enlistments, discharges, etc., required by the Army Regulations to be furnished with the original charge to the convening authority, is not intended to be accompanied by a declaration, on the part of the commanding officer of the accused, as to his present *character*. The regulation does not call for the officer's opinion on the subject, or contemplate that the character of the accused will be taken into consideration at this time. *P. 39, 459, Mar., 1890; 43, 10, Sept., 1890.*

II H 1. A material amendment of a charge should properly be made before the actual trial. Where a court-martial, after the trial was concluded, directed a specification to be amended so as to render it more definite as to time and place, and then caused the accused to be arraigned and to plead over again, *nunc pro tunc, held* that its action was without sanction of law or precedent. *R. 48, 315, Feb., 1884; C. 17547, Feb. 14, 1905.*

II H 2. A middle name or initial is no part of a person's name in law, and, except where it is necessary to identify the individual, may be omitted from the charge without affecting the validity of the finding or execution of the sentence. *P. 34, 400, Aug., 1889.* So, a misnomer in a charge, consisting of an erroneous middle name or initial, may be dirsegarded in a charge unless the accused moves to strike out or interposes an objection, in the nature of a plea in abatement, when he must also state his true name. The charge may then be amended accordingly in court, without delaying the proceedings. *R. 52, 675, Oct., 1887.*

II I. A withdrawal of charges constitutes no legal bar to their being subsequently revived and re-preferred. Charges, however, once formally withdrawn, will not in general properly be revived except upon new material evidence being obtained. *R. 11, 202, Dec., 1864; 28, 370, Feb., 1869.* Charges once accepted as a sufficient basis for action, by the commander competent to convene a court for their trial, can not properly be withdrawn except by his authority.[2] *R. 21, 56, Nov., 1865.*

---

[1] See G. C. M. O. 71, Hdqrs. of the Army, 1879.

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

II K 1. The original charges referred to a court-martial are a public document. *Held* that after the arraignment and the charges have been copied into the record, the original charges have served their purpose. The place of deposit for this public record is the office of the judge advocate of the convening authority. *C. 15833, Jan. 28, 1904.*

III A. *Held,* that regulations which relate to the constitution of the court and not merely to the method of procedure are always mandatory. *C. 5325, Nov. 15, 1898; 5484, Dec. 9, 1898; 6121, Mar. 24, 1899.*

III B. The President is empowered to convene general courts-martial, not merely in the class of cases specified in the seventy-second article of war (viz, where a military officer, thereby authorized to convene such a court, is the "accuser or prosecutor" of an officer in his command whom it is desired to bring to trial), but, generally, and in any case, by virtue of his authority as Commander in Chief of the Army. As such, he is authorized to give orders to his subordinates, and the convening of a court-martial is simply the *giving of an order* to certain officers to assemble as a court and exercise certain powers conferred upon them, when so assembled, by the Articles of War. This general power has been exercised in repeated instances by the President since the formation of the Government. Indeed, if the same could not be exercised, it would be impracticable, in the absence of an assignment of a general officer to command the Army, to administer military justice in a considerable class of cases of officers and soldiers not under the command of any department, etc., commander, as a large proportion of the officers of the General Staff for example.[1] *R. 33, 603, Dec., 1872; C. 1671, Apr. 3, 1906.*

III B 1. A court-martial convened by the Secretary of War, *held,* legally constituted; such act of the Secretary being administrative and in law the act of the President whom he represents. The order

---

article). As to the authority of the court or judge advocate to *strike out* or *withdraw* a charge or specification. See G. O. 64, Dept. of the Cumberland, 1867; do. 98, id., 1868; do. 85, Dept. of the South, 1874; G. C. M. O. 36, 42, Dept. of the Platte, 1877; do. 13, id., 1878; do. 48, Mil. Div. of the Pacific and Dept. of California, 1880.

[1] The authority of the President as Commander in Chief to institute general courts-martial has been in fact exercised from time to time, from an early period, in a series of cases, commencing with those of Brig. Gen. Hull, Maj. Gen. Wilkinson, and Maj. Gen. Gaines, tried in 1813–1816, and of Bvt. Maj. Gen. Twiggs, tried in 1858. For further instances of the exercise of the President's authority as Commander in Chief to convene general courts-martial, see the following orders: Par. 2, S. O. 151, Hdqrs. of the Army, A. G. O., Washington, June 30, 1884; Par. 3, S. O. 282, Hdqrs. of the Army, A. G. O., Washington, Dec. 2, 1898; S. O. 1, W. D., A. G. O., Washington, Jan. 18, 1899; S. O. 1, W. D., A. G. O., Washington, Apr. 21, 1902; Par. 15, S. O. 102, Hdqrs. of the Army, A. G. O., Washington, Apr. 30, 1902; S. O. 2, W. D., A. G. O., Washington, June 14, 1902; Par. 16, S. O. 302, Hdqrs. of the Army, A. G. O., Washington, Dec. 26, 1902; Par. 5, S. O. 37, W. D., A. G. O., Washington, Feb. 14, 1905; Par. 1, S. O. 169, W. D., Washington, July 19, 1906; Par. 5, S. O. 30, W. D., A. G. O., Washington, Feb. 5, 1908; Par. 9, S. O. 55, W. D., A. G. O., Washington, Mar. 6, 1908; Par. 6, S. O. 90, W. D., A. G. O., Washington, Apr. 16, 1908; Par. 9, S. O. 199, W. D., A. G. O., Washington, Aug. 26, 1908; Par. 18, S. O. 204, W. D., A. G. O., Washington, Sept. 1, 1908; Par. 38, S. O. 141, W. D., A. G. O., Washington, June 19, 1909; Par. 5, S. O. 107, W. D., A. G. O., Washington, May 8, 1911; Par. 11, S. O. 236, W. D., A. G. O., Washington, Oct. 9, 1911. His authority in this particular has been in substance affirmed by the Judiciary Committee of the Senate, in Report No. 868, dated Mar. 3, 1879, 45th Cong., 3d sess. See Swain *v.* U. S., 28 Ct. Cls., 173, and 165 U. S., 559.

here is not a judicial but an Executive act, and, like any other Executive order, is legal if made through the head of the executive department to the province of which it pertains. *R. 9, 44, May, 1864; 56, 465, Aug., 1888; P. 45, 119, Jan. 17, 1891; 64, 169, Mar., 1894.*

III B 2 a. Section 1230 R. S., which provides for the trial by court-martial, upon application, of officers who have been dismissed by order of the President, does not indicate within what period after dismissal the application for trial shall be made. *Held*, that only those applications will be considered which are made within a reasonable time.[1] *R. 16, 170, May, 1865; 42, 446, Dec., 1879; C. 4954, Jan. 20 and Feb. 4, 1899.*

III B 2 b. *Held*, that a request for trial by court-martial under section 1230 R. S. by a volunteer officer who had been dismissed by order can not be entertained after the Volunteer Army has been mustered out, as with the muster out of the Volunteer Army every officer and soldier of the same becomes a civilian, and laws which relate alone to people in the Army are no longer applicable to such officers and enlisted men, as they have become civilians. *C. 4954, Jan. 20 and Feb. 4, 1899.*

III C 1 a. The officers of the branches of the service (specified in par. 189, A. R. 1910) are subject to be detailed upon court-martial duty only by orders emanating from the War Department. An officer of the Subsistence Department, assigned to duty at a general "depot of supply," was ordered to "report, on his arrival, by letter to the department commander." *Held*, that this was not an order to report for duty and did not except him from the application of the regulation or place him, for court-martial service or otherwise, under the command of such commander, but enjoined merely a formal announcement of his arrival and entering upon his duties properly called for by considerations of courtesy and deference toward his military superior. *P. 48, 255, July, 1891.*

III C 1 b. To detail as a court-martial the same officers as those already constituting a court-martial, without dissolving the court first convened, though a proceeding for which there are precedents, is one which should not be resorted to where, without material embarrassment to the service, it can be avoided. And this view is applicable, though with less force, to the case of a single officer proposed to be detailed upon two distinct military courts at the same time; such a detail should not be made unless, on account of the scarcity of officers available for such duty, it can not well be avoided. *R. 7, 134, Feb., 1864; 19, 495, Mar., 1866.*

III C 1 c. *Held* that Regulars may be tried by a court-martial upon which Volunteer officers sit as members. *C. 13649, Nov. 11, 1902; 11050, Dec. 8, 1902; 15161, Aug. 27, 1903; 15235, Sept. 11, 1903.*

III C 1 d. Only officers can be detailed as members of courts-martial. *R. 42, 311, May 29, 1879.* Although officers on the active list are eligible for such duty, chaplains are not usually detailed. *R. 36, 451, May 8, 1875; 41, 306, July 6, 1878.* Civilians such as "Acting assistant surgeons" are not eligible. *R. 22, 542, Dec., 1866.* Officers who are biased or interested in the case should not be detailed. *R. 39, 240, Oct. 22, 1877.*

---

[1] See Newton *v.* United States, 18 Ct. Cls., 435, and Armstrong *v.* United States, 26 id., 387.

III C 1 e. *Held* that the convening authority is the sole judge of whether or not it is possible to constitute a court of members all superior in rank to the accused, and that his decision as indicated by the convening order is conclusive upon the court as to that matter. *R. 3, 82, June, 1863; 56, 604, Sept., 1888; C. 10910, Aug. 17. 1901; 24079, Oct. 12, 1908.*

III C 1 f. *Held* that either a Medical Reserve Corps officer, when lawfully on active duty in the service of the United States, or a dental surgeon commissioned as such, is legally eligible for detail as a member of a general court-martial or as a trial officer of a summary court. *C. 23135, Nov. 27, 1911. Held*, however, that in view of the fact that the sick may at any time require the attention of a doctor, that a medical officer should not be detailed to court-martial duty when it can be avoided. *R. 22, 536, Dec., 1866; 23, 522, June, 1867; C. 13150, Aug. 19, 1902; 14583, June 28, 1903; 16920, Sept. 22, 1904.*

III C 2 a. Any commissioned officer may legally be appointed judge advocate of a court-martial. Thus a surgeon, assistant surgeon, or a chaplain is legally eligible to be so detailed. *R. 9, 377, July, 1864; C. 19070, Jan. 18, 1906.*

III C 2 b. While a civilian may legally be appointed, or rather employed, as judge advocate of a court martial, such an employment has, for the past 50 years, been of the rarest occurrence in the military service.[1] Civilian judge advocates have been much more frequently employed for naval than for military courts-martial.[2] *R. 20, 507, Mar., 1866.*

III C 2 c (1). An officer can not in general fitly or becomingly act as judge advocate in a case in which he is personally interested as accuser or prosecutor. *P. 39, 35, Feb., 1890.* Where the judge advocate had prepared the charges and was the accuser in the case, and moreover entertained a strong personal prejudice or hostility against the accused, *held* that he was ill-chosen to act as judge advocate, especially in the capacities of prosecuting official and adviser to the court. *R. 49, 613, Dec., 1885.* One who, without personal prejudice against the accused or interest in his conviction, has signed the charges, may, not improperly, act as judge advocate in the case. *P. 63, 240, Jan., 1894.*

III C 2 c (2). It is desirable to detail as judge advocate, if practicable, an officer who has no considerable prejudice against the party to be tried, or any decided personal interest in his case. Thus the selection as judge advocate of an officer who was not only a material witness for the prosecution but would be promoted in case the accused, an officer of his regiment of a higher grade, were dismissed by the court, *remarked upon* as an unfortunate one.[3] *R. 21, 177, Jan., 1866; 31, 361, May, 1871.*

---

[1] The last occasions of such employment are believed to have been those of the trial of the persons charged with complicity in the assassination of President Lincoln and the trial of Maj. Haddock, Prov. Mar. Dept. (see G. C. M. O. 356 and 565, War Dept., 1865), upon which Hon. J. A. Bingham and Hon. Roscoe Conkling were respectively employed as judge advocates.

[2] In view of the provisions of sec. 17 of the act of June 22, 1870 (Sec. 189, R. S., transferring to the Department of Justice the authority to employ counsel for the executive departments, neither the Secretary of War nor the Secretary of the Navy is now authorized to retain a civilian lawyer to act as judge advocate of a court-martial. 13 Op. Atty. Gen. 514; 14 id. 13. (See Discipline IV L 1.)

[3] See G. C. M. O. 5, War Dept., 1871; do. 41, id., 1875.

III C 2 **c** (3). While a judge advocate may be relieved pending a trial and a new one appointed, it would not be proper to make such a change after the conclusion of a trial, simply for the purpose of having the record authenticated.[1] *C. 5230, Oct., 1898; 17038, Oct. 18, 1904.*

III C 3. *Held*, that the appointment of a court-martial can not be legally delegated to a staff officer as a routine duty. *C. 1499, July 17, 1895.*

III D. It may be said to be a principle of military law that a court-martial is to be left independent as to matters legally or properly within its own discretion. Such a court, however, may not assume authority over a subject belonging to the province of the officer by whom it has been convened. Thus, while it may decline to proceed with the trial of a case manifestly not within its jurisdiction, it can not properly refuse so to proceed on the ground that it is not empowered adequately to punish the offender upon conviction; or that officers junior to the accused have been placed upon the detail; or that—the detail being less than 13—a greater number might have been put upon the court without injury to the service; or that the accused has not been placed in arrest. A court declining to go on with a trial upon any such ground may be peremptorily ordered by the convening authority to proceed: if it still refuses, the preferable course will ordinarily be to dissolve it in general orders (adding, if deemed desirable, an expression of censure on account of its contumacy), and to convene, for the trial, a court composed entirely of new members. *R. 21, 177, Jan., 1866; 25, 578, May, 1868; 28, 57, Aug., 1868.*

III E 1. It is the established practice before courts-martial and military commissions to examine into as many accusations against the individual on trial, without regard to their connection with each other or their identity in respect to date or place, as it may be deemed proper and advisable by the prosecuting authority to adduce. The charges against such a prisoner may be in number unlimited and as various in character as the jurisdiction of the tribunal will permit. *R. 14, 40, Jan., 1865.* They should, if practicable, be consolidated and one trial had upon the whole. *R. 30, 265, Apr., 1870.*

III E 2 **a**. A commander, in restoring a deserter to duty without trial according to the Army Regulations, is not authorized to require him to submit to a punishment, as a condition to his being so restored, or otherwise. *R. 16, 83, May, 1865.*

III E 2 **b**. In a case where, because of previous convictions, the punishment may be dishonorable discharge,[2] the department commander may properly require the charges to be brought to trial before a general court-martial, notwithstanding that, if the alternative

---

[1] Army Regulations provide that "Whenever, by reason of the death or disability of the judge advocate occurring after the court has decided on the sentence, the record can not be authenticated by his signature, it must show that it has been formally approved by the court and must be authenticated by the signature of the president."

[2] "Whenever by any of the Articles of War, * * * the punishment on conviction of any military offense is left to the discretion of the court-martial, the punishment therefor shall not in time of peace be in excess of a limit which the President may prescribe." Act of Sept. 27, 1890.

Under this Executive orders prescribing maximum punishments have been issued. See General Orders 21 A. G. O., 1891; do. 16 of 1895; do. 16 of 1898; do. 88 of 1900; do. 42 of 1901.

punishment of dishonorable discharge be not resorted to, the punishment would be within the power of an inferior court. *P. 60, 378, July, 1893.*

III E 3. The convening authority should consider each case carefully and be satisfied that its prosecution is for the best interests of the Government before he refers the charges to a court. *Held* that no form is laid down for such consideration, and he may refer the charges to his inspector general or to any other officer, but he is not required to do so. *C. 19854, June 29, 1906.*

III E 3 **a.** *Held* that a soldier may legally be tried at the same time for fraudulent enlistment and for desertion therefrom. *C. 11196, Sept. 13, 1901.*

III E 3 **b.** As desertion and joining the enemy and taking service with him are two distinct offenses, *held*, that desertion would ordinarily be tried by a general court-martial as a violation of the Articles of War, while joining the enemy would be tried by a military commission as a violation of the laws of war. *C. 11811, Dec. 26, 1901.*

III E 4. *Held* that in accordance with a principle of comity as between the civil and military tribunals the jurisdiction which first attaches in a particular case should be carried to its termination, and that the request of the civil authorities for the surrender of the prisoner may be denied if military jurisdiction has already attached. *C. 11589, Nov. 13, 1901; 17667, Mar. 18, 1905; 19466, Mar. 31, 1906.*

III E 5 **a.** *Held* that an officer could not, by consenting to being placed under a "conservator" as a habitual drunkard, in the form prescribed by the local law, withdraw himself from the military jurisdiction; but that he remained amenable to trial and punishment for offenses committed prior to such proceeding and within the period of limitation. So *recommended* in the particular case that the officer be brought to trial for certain offenses (duplication of pay accounts) committed prior to such proceeding. *P. 63, 358, Feb., 1894.*

III E 5 **b.** An officer was examined to determine his fitness for promotion. A question arose, administratively, as to his moral qualifications. *Held*, that as the instrumentality of the general court-martial is placed at the disposal of the proper convening authority for the purpose of dealing with all cases of moral obliquity, such cases should be tried by court-martial, the agency provided by law for the investigation and punishment of offenses in violation of the Articles of War. *C. 24036, Nov. 2, 1908.*

III E 6. A prosecution before a court-martial proceeds in the name and by the authority of the Government. The United States, therefore, through the Secretary of War, or the military commander who has convened the court, may require or authorize the judge advocate to enter a *nolle prosequi* in a case on trial (or, less technically, withdraw or discontinue the prosecution), either as to all the charges where there are several, or as to any particular charge or specification. But the judge advocate can not exercise this authority at his own discretion, nor can the court direct it to be exercised. *R. 9, 488 and 533, Aug., 1864; 54, 458, Nov., 1887.*

III E 7. In cases where charges preferred against an officer are apparently susceptible of a reasonable explanation, it is not unusual, especially where the charges are preferred by an inferior against a superior to afford the officer charged an opportunity to make explana-

tion before it be determined whether to bring him to trial. *R. 20, 12, Oct., 1865; C. 22120, Sept. 21, 1907.*

III F. Strictly, communications from the convening authority to the court *as such* (and *vice versa*) should be made to (and by) the president as its organ, unless in the latter case the court directs the judge advocate to represent it; communications, however, relating to the conduct of the prosecution should be made to (and by) the judge advocate. *R. 29, 336, Oct., 1869; C. 17038, Oct. 18, 1904.*

III G 1. An order convening a general court martial should properly be so headed and authenticated, or so authenticated, as to show that it was issued by an officer authorized by the statute law—the seventy-second or seventy-third article of war—to create such a tribunal. Thus *held* that such an order (issued in time of war) signed by an officer describing himself as commanding a "post" or "district" was *prima facie* invalid and inoperative, though capable of being shown to be valid by proof that the command was of such dimensions and so situated as practically to constitute a separate army division, or separate brigade.[1] *R. 11, 162, 170, 176, 214, Nov. and Dec., 1864; 26, 510, Apr., 1868.*

IV A. A separate judge-advocate should be appointed for each general court martial convened by a department, or other competent commander. The same officer may indeed be selected to perform the duties of judge advocate as often as may be deemed desirable by the commander, but he should be detailed anew for every court-martial on which he acts. To appoint in a general order a particular officer to act as judge advocate for all the courts to be held in the same command would be quite irregular and without the sanction of precedent. *R. 2, 54, Mar., 1863; 16, 429, Aug., 1865.*

IV B. A judge advocate is not authorized to entertain charges in the first instance; he can properly act upon charges, i. e., make service of the same, prepare the case for trial, etc., only when the charges are transmitted to him for the purpose by the officer who has convened the court or detailed him as judge advocate. *R. 42, 202, Mar., 1879.*

IV B 1. The judge advocate is not unfrequently directed to prepare or reframe charges; but where charges, already formally preferred, are transmitted to him for prosecution, he should not assume to modify them in material particulars in the absence of authority from the convening officer. While he may ordinarily correct obvious mistakes of form or slight errors in names, dates, amounts, etc., he can not without such authority make *substantial* amendments in the allegations, or—least of all—reject or withdraw a charge or specification, or enter a *nolle prosequi* as to the same, or substitute a new and distinct charge for one transmitted to him for trial by the

[1] The order should properly indicate for what trial or class of trials the court is convened, or its terms should be so general in this particular as to authorize the court to entertain *any* case that may be referred to it for trial. A court, restricted by the order convening it to the trial of a special case or class of cases, would not be empowered (in the absence of further orders) to take cognizance of a case not within such designation. See G. O. 106, Army of the Potomac, 1862, where the proceedings of a court martial in a case of a private soldier were disapproved as without jurisdiction, because the convening order had authorized the court to try the cases only of such *officers* as might be brought before it.

proper superior.[1] *R. 2, 60, Mar., 1863; 21, 56, Nov., 1865; P. 20, 378, Nov., 1887.*

IV B 2. The power to appoint the reporter, under section 1203, R. S.,[2] is vested exclusively in the trial judge advocate and can not be exercised by the court. The employment, however, of a stenographic reporter should be resorted to only in an important case. *R. 2, 515, June, 1863; 11, 361, Jan., 1865; 34, 232, Apr., 1873; C. 15424, Oct. 24, 1903.*

IV B 2 a. By circular 22, Adjutant General's Office of 1898, the employment of enlisted men as reporters for courts-martial was authorized "without extra expense to the United States." Under Army Regulations 960 (1064 of 1901) "no person in the military or civil service can lawfully receive extra compensation for clerical duties performed for a military court," and section 6 of the act of April 26, 1898 (30 Stat. 365), provides "that in war time no additional increased compensation [i. e., additional to the 20 per cent increase] shall be allowed to soldiers performing what is known as extra or special duty." *Held* that under the regulation and statute referred to no extra pay can be allowed an enlisted man for services as reporter. *C. 5434, Dec., 1898; 7334, Nov., 1899.*

IV B 3 a. A judge advocate is authorized to subpœna witnesses only for testifying in court; he can not summon a witness to appear before himself for preliminary examination. For this purpose he must procure an order to be issued by the proper commander. *R. 52, 508, Sept., 1887.*

IV B 3 a (1). The judge advocate, in forwarding the interrogatories for a deposition, should transmit with them a subpœna (in duplicate) requiring the witness to appear at a stated place and date before a certain person who is to take the deposition. Particulars not ascertained may be left blank to be supplied by the officer or person by whom the subpœna is served. When the deposition has been duly taken and returned, the judge advocate should transmit to the witness (or to some officer, etc., for him) the usual certificate of attendance (accompanied by a copy of the convening order), the duration of the attendance to be ascertained from the deposition. *R. 55, 384, Mar., 1888.*

IV B 3 b. A judge advocate has no authority to employ a civil official or private civilian to serve subpœnas, if by so doing the United States will be subjected to a claim for compensation. *P. 32, 365, May, 1889; 51, 407, Jan., 1892.*

---

[1] See G. O. 64, Dept. of the Cumberland, 1867; do. 98, id., 1868; do. 85, Dept. of the South, 1874; G. C. M. O. 36, 42, Dept. of the Platte, 1877; do. 13, id., 1878; do. 48, Mil. Div. of Pacific & Dept. of Cal., 1880.

This paragraph sets forth the established practice.

A competent judge advocate will properly be left by the court to introduce the testimony in the form and order deemed by him to be the most advantageous, and generally to bring on cases for trial and conduct their prosecution according to his own judgment. Compare G. C. M. O. 97, Dept. of Dakota, 1878; do. 38, Dept. of Texas, 1878; and—as to the civil practice—United States *v.* Burr, 1 Burr's Trial, 85, 469; Lynch *v.* Benton, 3 Rob., 105; Davany *v.* Koon, 45 Miss., 71.

[2] This section provides: "The judge advocate of a military court shall have power to appoint a reporter, who shall record the proceedings of, and testimony taken before, such court, and may set down the same, in the first instance, in short hand. The reporter shall, before entering upon his duty, be sworn, or affirmed, faithfully to perform the same."

IV B 3 **c.** *Held,* that a judge advocate may certify as necessary for "Expenses of courts-martial" the necessary expense incident to locating a material witness, who had been duly summoned before the court and who had disobeyed the summons and left his former place of abode. *C. 14704, May 23, 1903.*

IV B 3 **d** (1). *Held,* that if in the trial of an officer the accused raises the question of insanity as a defense, the judge advocate may, with the approval of superior authority, employ on behalf of the Government an expert in mental diseases with a view to placing him on the stand as a witness. *Held,* further, that the necessary expense is a proper charge against the appropriation for expenses of courts-martial. *C. 14750, June 4, 1903.*

IV B 4. Section 1202, R. S., authorizes only judge advocates of courts-martial to issue process to compel the attendance of witnesses. The court itself—general or inferior—has no such power. *R. 50, 632, Aug., 1886; P. 51, 468, Jan., 1892.* But the judge advocate is authorized only to *initiate* the process of attachment. The statute does not specify by whom it shall be executed, and the judge advocate is not authorized to command any officer or person to serve it; nor has the court any such power.[1] *R. 50, 632, supra; C. 19473, Nov. 24, 1905.*

IV B 4 **a.** A judge advocate, having attached a civilian witness who was brought to the place of the court, detained him one hour in the guardhouse before bringing him before the court. For this he was indicted (for false imprisonement) in a United States district court in Texas. *Held,* that his action was warranted under section 1202, R. S., and *advised* that the Attorney General be requested to cause the prosecution to be discontinued. *R. 50, 191, Apr., 1886.*

IV B 5. 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. *R. 28, 531, Apr., 1869.*

IV C 1. It is strictly the proper practice for a judge advocate not to give his opinion upon a point of law arising upon a military trial, unless the same may be required by the court. This practice, however, is often departed from, and the opinions of judge advocates, suitably tendered, are in general received and entertained by the court without objection, whether or not formally called for. But where the court *does* object to the giving of an opinion by the judge advocate, he is not authorized to attempt to give it, and, of course, not authorized to enter it upon the record. Whether the *fact*—that the opinion was offered and objected to by the court—shall be entered upon the record, is a matter for the court alone to decide. It is, however, certainly the better practice that all the proceedings, even those that are irregular, which transpire in connection with the trial, should be set out in the record for the inspection of the reviewing authority. *R. 26, 251, Dec., 1867.*

IV C 2 **a.** The duty of the judge advocate toward the accused should not be regarded as confined to the limited province of "counsel for

[1] See par. 967, Army Regulations (1910).

the prisoner" as the same is defined in the ninetieth article of war. Where the accused is ignorant and inexperienced and without counsel—especially where he is an enlisted man—the judge advocate should take care that he does not suffer upon the trial from any ignorance or misconception of his legal rights, and has full opportunity to interpose such plea and make such defense as may best bring out the facts, the merits, or the extenuating circumstances of his case. *R. 5, 577, Dec., 1863; 55, 182, Dec., 1887.* The judge advocate should advise the accused, especially when ignorant and unassisted by counsel, of his rights in defense—particularly of his right, if it exists in the case, to plead the statute of limitation (*P. 21, 156, Dec., 1887*), and of his right to testify in his own behalf.[1] A failure to do so, however, will not affect the legal validity of the proceedings; though, if it appear that the accused was actually ignorant of these rights, the omission may be ground for a mitigation of sentence. *R. 55, 182, supra; C. 1885, Nov. 29, 1895; 16845, Oct. 3, 1904; 16974, Oct. 4, 1904; 18764, Feb. 8, 1907.*

IV C 2 a (1). For the judge advocate to counsel the accused, when a soldier or inferior in rank, to plead guilty, must in general be unbefitting and inadvisable. But where such plea is voluntarily and intelligently made, the judge advocate should properly advise the accused of his right to offer evidence in explanation or extenuation of his offense, and, if any such evidence exists, should assist him in securing it. And where no such evidence is attainable in the case, the judge advocate should still see that the accused has an opportunity to present a "statement," written or verbal, to the court, if he has any desire to do so. *R. 5, 577, Dec., 1863.*

IV C 3. It is one of the duties of the judge advocate to prepare the "complete and accurate record" which "every court-martial" is required by the Army Regulations to "keep." He should, if practicable, complete the record of each day's proceedings in time to be submitted to the court at the next day or next session for approval or correction. The record is the record *of the court,* and the judge advocate is subject to the direction of the court in preparing it. *R. 21, 679, Nov., 1866.*

IV C 3 a. Should the judge advocate be required to give evidence as a witness, the clerk or reporter of the court may go on to record his testimony while on the stand; or, if there be no clerk or reporter, he may record his own testimony as that of any other witness. *R. 21, 177, Jan., 1866; C. 10808, July 8, 1901.*

IV C 3 b (1). Where there have been two or more judge advocates successively detailed in the course of a trial, the one who is acting at the close is the one (and the only one) required to authenticate the proceedings by his signature. *R. 2, 148, Apr., 1863.*

IV C 3 b (2). The method of holding together the leaves of a court-martial record by means of a clip is not of sufficiently permanent nature to guarantee the integrity of the papers which make up the record. The method of binding is not prescribed, but it should be such a one as will securely fasten together all the leaves which compose the record. *C. 18764–A, Sept. 26, 1908.*

IV C 3 b (3). The record will conveniently and properly be indorsed on the outside, or cover, so that the name of the accused, and the

[1] See G. O. 75, A. G. O., 1887.

court by which he was tried, with the time and place of trial, etc., will be apparent without opening and examining the proceedings. *R. 31, 244, Mar. 1871.*

IV C 3 **b** (4). That there is no legal objection to *printing* the record, or any part of it (such as the orders, charges, and specifications, where numerous), provided of course the signatures of the president and judge advocate are written by them in person. *R. 13, 384, Feb., 1865.*

IV C 4 **a.** The statute does not indicate by whom the reporter shall be sworn. In practice he is sworn by the judge advocate; a form of oath being prescribed in the Manual for Courts-Martial. If the same party is employed as a reporter for more than one case, he should, properly, be sworn anew in each case.[1] *C. 294, Sept., 1894; 4646, 4647, July 1898; 5169, Oct., 1898.*

IV D. One of the functions of the judge advocate of a court-martial is the execution of its orders. If a court-martial adjourns subject to the call of the presiding officer, the judge advocate is carrying out the orders of the court when notifying members of the time designated by the presiding officer for reassembling. *R. 68, 670, Apr., 1885.*

IV E. The general presumption of law, made in favor of all public officers, in the absence of affirmative evidence to the contrary that they duly fulfill their functions, applies to the judge advocate. *R. 55, 182, Dec., 1887.*

IV F. An absence of the judge advocate from the court during the trial does not *per se* affect the validity of the proceedings, but is of course to be avoided if possible. When the judge advocate is obliged to temporarily absent himself, the court should in general suspend the proceedings for the time; or, if his absence is to be prolonged, should adjourn for a certain period. *R. 21, 177, Jan., 1866.* No one can assume his duties in his absence, except that the record of a meeting and adjournment in consequence of such absence would be made as the court might direct. *C. 2059, Feb., 1896; 17038, Sept. 10, 1909.*

IV G. A judge advocate of a court-martial may be detailed to perform other duty, as that of officer of the day or member of a board of survey (now surveying officer), if such duty will not interfere with his duties as judge advocate. But in general of course no duties, in addition to those incidental to his function as judge advocate, should be imposed upon him pending an important trial. *R. 29, 273, Sept., 1869.*

IV H. An officer serving as judge advocate on the *staff* of a department or Army commander has as such no authority to act as judge advocate of a court-martial convened by such commander. If it is desired that he should act as judge advocate of such a court, he should be specially detailed for the purpose. *R. 5, 140, Oct., 1863.*

IV I 1. There is no special provision of law for compensating attorneys retained as counsel to assist judge advocates. Such counsel should not be retained except in important and complicated cases; and the authority of the Secretary of War for their employment should first be sought and obtained. The claims of such counsel, approved by the judge advocate, should be presented to the Secre-

[1] The reporter should be excluded from the court during closed session and not permitted to record the findings or sentence.

tary of War, to be paid, if allowed, out of the contingent fund.[1] *R. 5, 446, Dec., 1863.*

IV I 2. The fact of the selection of a certain officer as the judge advocate of a military court is evidence that such officer is considered qualified to conduct the prosecution of cases before such court; and the employment of civil counsel to aid him in any case can be authorized only by the Secretary of War, or some proper commander. For a judge advocate to employ counsel without such authority, or to contract with a counsel to pay him for his services a certain amount fixed between them without the sanction of the proper superior, would be an irregular and unwarrantable proceeding, and no such contract would be binding upon the Government. If paid at all he should be paid only such amount as, upon a review of all his services and inspection of the record itself, shall be deemed reasonable and just. *R. 22, 345, Aug., 1866.*

IV K. Other than the judge advocate, who by the ninetieth article of war is "required to prosecute in the name of the United States," our military law and practice recognize no official prosecutor. The party who is in fact the accuser or the prosecuting witness is, in important cases, not unfrequently permitted by the court to remain in the court room and advise with the judge advocate during the trial, if the latter requests it; and in some cases he has been allowed to be accompanied by his own counsel. If such a party is to testify, he should ordinarily be the first witness examined; this course, however, is not invariable. *R. 2, 1, June, 1863; 29, 34, June, 1869.*

IV L. The judge advocate in our practice is entitled to the closing argument or address to the court, and he may present an address although the accused waives his right to present any; the function of the judge advocate at this stage of the proceedings not being confined merely to a *replying* to the accused. The court is not authorized to deny to the judge advocate this right to be heard. *R. 11, 377, Jan., 1865; 32, 499, Apr., 1872; 49, 613, Dec., 1885.* The judge advocate in his address is not authorized to read to the court evidence or written statements not introduced upon the trial and which the accused has had no opportunity to controvert or comment upon. *R. 22, 238, June, 1866.*

IV M. Where the court was convened by a military officer—as, in a case of a general court, the general of the Army or a department or Army commander—it is the duty of the judge advocate, upon the completion of the record, to transmit the same to such officer (or his successor in command) for the proper action. Where the court was convened by the President, it is the duty of the judge advocate to transmit the completed proceedings directly to the Judge Advocate

[1] In cases of exceptional difficulty and public importance civil counsel were formerly not unfrequently retained to assist the judge advocate, as indicated in the text. Since the creation, however, of the office of Judge Advocate General of the Army, and of the corps of Judge Advocates, by the act of July 17, 1862, such instances have been of the rarest occurrence. Under the existing law (Sec. 189, R. S.), indeed, counsel could be employed (at the public expense) for this purpose only through the Department of Justice upon the request or recommendation of the Secretary of War. See Discipline III C 2 b.

General,[1] in order that he may exercise the revisory function reposed in him by section 1199, R. S.[2] *R. 42, 457, Dec., 1879.*

IV N. A judge advocate is not subject to challenge. *R. 35, 618, Oct., 1874.*

IV O. Under the custom of the service the judge advocate may also challenge for cause. *C. 2059, Feb., 1896.*

V A. Except by the authority of express statute, an accused can never be *entitled* to be tried by court martial. Where he is amenable to trial, the Government may cause him to be tried or may waive a trial, at discretion. *R. 34, 413, Aug., 1873; P. 65, 259, June, 1894.*

V B. The principle of the fifth amendment to the Constitution, but not the amendment itself, applies to courts martial trials as a part of our common law military. As section 860, R. S., does not apply to courts martial, it does not set aside the general principle which with courts martial takes the place of the constitutional provision, but whether it applies or not, an accused on trial before a court martial can not, when testifying as a witness in his own behalf, be compelled by it to criminate himself as to an offense in respect to which he has not testified. *C. 1495, July, 1895.*

V B 1. When an accused person denies that he is the person described in the charges, *held* that evidence of identity may be introduced which was secured by surgeons in the Army at the time of the physical examination required by the Regulations and recorded in the regular records, or which was secured by surgeons of the Army when the accused was a patient under the charge of such surgeons.[3] *C. 24624, Mar. 13, 1909.*

V C. The fact that the accused is an officer of high rank should not be regarded as constituting a ground for allowing him any special right or privilege in his defense before a court martial. The administration of justice by a military as by a civil court must be strictly impartial, or it ceases to be pure. All persons on trial by the one species of tribunal as by the other are deemed to be equal before the law. *R. 11, 204, Dec., 1864.*

V D 1. In order that he may not be embarrassed in making his defense, the accused party on trial before a court martial should be subjected to no restraint other than such as may be necessary to enforce his presence or prevent disorderly conduct on his part. Except, therefore, in an extreme case, as where the accused being

---

[1] See G. O. 72, War Dept., 1873; do. 39, Hdqrs. of Army, 1877.

[2] It may here be noted that the one hundred and thirteenth article of war, the only statute relating to the forwarding, by judge advocates of the proceedings of general courts, is incomplete and not in harmony with the provisions of arts. 104 and 109. The *practice* on the subject is now regulated by paragraph 892, Army Regulations of 1895 (932 of 1910), which requires that "proceedings of all courts and military commissions appointed by the President" shall be sent direct to the Secretary of War.

[3] O'Brien *v.* Ind. L. R. A., Book 9, 1890, page 233; see also vol. 12, Cyc. of Law and Procedure, page 401; see also Wigmore on Evidence, sections 2250 to 2382. In the case of State *v.* Ah Chuey it was held that "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. *Held* that this action of the court was not in violation of the clause in the State constitution which declares that no person shall be compelled 'in any criminal case to be a witness against himself,' " that it was not prejudicial to defendant and was not erroneous." (State *v.* Ah Chuey, *alias* Sam Good, 14 Nev., p. 79.)

charged with an aggravated and heinous offense, there is reasonable ground to believe that he will attempt to escape or to commit acts of violence, the keeping or placing of irons upon him while before the court will not be justified.[1] Even in such a case it will be preferable to place an adequate guard over him. *R. 31, 102, Dec., 1870; 32, 274, 633, Jan. and May, 1872.*

V D 2 a. It is not a sufficient defense to a charge of striking or using other violence against a soldier, by an officer, that the soldier was himself violent and insubordinate, unless it clearly appears that the force employed by the officer was resorted to in self defense, or that the soldier could not have been repressed or restrained by the usual and legitimate methods and instrumentalities of discipline. *R. 53, 193, Oct., 1886; P. 43, 52, Sept., 1890; 60, 257, June, 1893.*

V D 2 b. An officer having had a verbal altercation with another officer (of superior rank) in which the latter had (as he, the former, represented) used invidious language toward him and threatened his life, addressed to the latter, on the following day, a highly abusive and insulting communication in writing. On his being brought to trial for this offense, the court-martial sentenced him only to be reprimanded—on account, as they expressed it, of the "great provocation" received by him. *Held* that the proper redress of the accused in such a case was by complaint to the proper superior and the preferring of charges; that the course taken by him was unmilitary and unbecoming, the language used by the other, however reprehensible, constituting no legal provocation and no defense to his act as charged. *P. 65, 285, June, 1894.*

V D 2 c. *Held* that it was not a sufficient defense to a charge, under article 60 or article 61, of duplication of a pay account, that the accused had an understanding with the first assignee that he was not to present the account assigned to him till the accused should have an opportunity to withdraw it and substitute other security. The fact that an accused assigns a second account, while the first, without the knowledge of the second assignee, is still outstanding in the hands of the first assignee, completes the offense. *P. 50, 45, 219, Oct. and Nov., 1891; C. 15373, Apr. 6, 1904.*

V D 3. After the accused has been arraigned upon certain charges, and has pleaded thereto, and the trial on the same has been entered upon, new and additional charges, which the accused has had no notice to defend, can not be introduced or the accused required to plead thereto. Such charges should be made the subject of a separate trial, upon which the accused may be enabled properly to exercise the right of challenge to the court, and effectively to plead and defend. *R. 24, 513 and 577, May, 1867.*

V D 4. A failure, at the arraignment, to take notice of a variance between the form of a specification to which the accused is called upon to plead and such specification as it appeared in the copy of the charges served at his arrest, is a waiver of the objection, and the same can not be taken advantage of at a subsequent stage of the proceedings. *P. 64, 172, Mar., 1894.*

V D 5. Drunkenness caused by morphine or other drug (see thirty-eighth article), prescribed by a medical officer of the Army or civil

[1] Compare G. C. M. O. 62, Dept. of the Missouri, 1877; do. 55, id., 1879; and—as to the civil practice—Lee *v.* State, 51 Miss., 566; People *v.* Harrington, 42 Cal., 175.

physician, may constitute an excuse for a breach of discipline committed by an officer or soldier, provided it quite clearly appears that this was the sole cause of the offense committed, the accused not being chargeable with negligence or fault in the case. *R. 28, 390, Feb., 1869.*

V D 6. The order of a commanding officer will in general constitute a sufficient authority for acts regularly done by an inferior in compliance with the same. Where, however, the order of the superior is a palpably illegal order, the inferior can not justify under it;[1] and if brought to trial by court-martial, or sued in damages for an act done by him in obedience thereto, the order will be admissible only in extenuation of the offense.[2] *R. 25, 592, June, 1868.*

In the Fair case (*In re* Fair, 100 Fed. Rep., 149) the following language of the court in McCall *v.* McDowell (Federal Cases, No. 8673) is cited with approval: "Except in a plain case of excess of authority, where at first blush, it is apparent and palpable to the commonest understanding that the order is illegal, I can not but think that the law should excuse the military subordinate when acting in obedience to the orders of his commander. The first duty of a soldier is obedience, and without this there can be neither discipline nor efficiency in the Army. If every subordinate officer and soldier were at liberty to question the legality of the orders of the commander, and obey them or not, as they may consider them valid or invalid, the camp would be turned into a debating school, where the precious moment for action would be wasted in wordy conflicts between the advocates of conflicting opinions." While this may be true as applied to criminal cases (although McCall *v.* McDowell was a civil case), it certainly is not correct in civil cases. See Bates *v.* Clark, 95 U. S. 204, in which the Supreme Court held in a civil suit for damages as follows: "It is a sufficient answer to the plea, that the defendants were subordinate officers acting under orders of a superior, to say that whatever may be the rule in time of war and in the presence of actual hostilities, military officers can no more protect themselves than civilians in time of peace by orders emanating from a source which is itself without authority."[3] *C. 7500, June, 1900.*

V E. An objection that a charge is not signed should be taken at the arraignment—when the omission may be supplied by the judge advocate's affixing his signature. By pleading the general issue the accused waives the objection. *P. 59, 258, May, 1893.*

V F. 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

---

[1] See Harmony *v.* Mitchell, 1 Blatch., 549; Mitchell *v.* Harmony, 13 How., 115, Durant *v.* Hollins, 4 Blatch., 451; Holmes *v.* Sheridan, 1 Dillon, 357; McCall *v.* McDowell, Deady, 233, and 1 Ab. U. S. R., 212; Clay *v.* United States, Devereux (Ct. Cls.), 25; United States *v.* Carr, 1 Woods, 480; Bates *v.* Clark, 5 Otto, 204; Ford *v.* Surget, 7 Otto, 594; Skeen *v.* Monkeimer, 21 Ind., 1; Griffin *v.* Wilcox, id., 391; Riggs *v.* State, 3 Coldw., 851; State *v.* Sparks, 27 Texas, 632; Keighly *v.* Bell, 4 Fost. and Fin., 805; Dawkins *v.* Rokeby, id., 831. The law is the same although the order to the inferior may emanate directly from the President. See Eifort *v.* Bevins, 1 Bush, 460.

[2] State *v.* Sparks, *supra;* McCall *v.* McDowell, *supra;* Milligan *v.* Hovey, 3 Bissell, 13; Beckwith *v.* Bean, 8 Otto, 266.

[3] But that officers and soldiers of the United States who, in good faith without any criminal intent, but with an honest purpose to perform a supposed duty as soldiers under the law of the United States, act in obedience to an order, the illegality of which is not apparent and palpable to the dullest understanding, are not liable to prosecution under the criminal laws of a State, see further the case of Fair cited in the text. See also U. S. *v.* Clark, 31 Fed. Rep., 710.

brought by the testimony.[1] 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. *R. 33, 306, Aug. 1872.*

V G 1. An officer or soldier put upon trial before a court-martial is not entitled as of right to have counsel present with him to assist him in his defense, but the privilege is one which is almost invariably conceded,[2] and where it is unreasonably refused, such refusal may constitute ground for the disapproval of the proceedings. *R. 32, 519, Apr., 1872.* A court-martial, however, is not required to delay an unreasonable time to enable an accused to provide himself with counsel. *R. 30, 102, Feb., 1870; C. 13892, Dec. 29, 1902.*

V G 2. An accused, prior to arraignment, even if in close arrest, should be allowed to have interviews with such counsel, military or civil, as he may have selected. *R. 12, 441, June, 1865; 21, 141, Dec., 1865.* So, his counsel should be permitted to have interviews with any accessible military person who may be a material witness for the accused, or whose knowledge of facts may be useful to the accused in preparing for trial. *R. 19, 33, Oct., 1865; C. 13892, Dec. 29, 1902.*

V G 3. Section III, Circular 8, Adjutant General's Office, 1894, provides that "no officer directly responsible for the discipline of an organization or organizations under his command—as the commanding officer of a post, band, company, battalion, squadron, or regiment—nor the trial officer of a summary court will be regarded as a 'suitable' officer under the provisions of General Order 29, Adjutant General's Office, 1890, for this duty (counsel for defense before general court-martial) at the post where he is stationed." *Held*, that the section quoted was intended to declare the officers mentioned therein *not* suitable for the duty of counsel, and that it should not be construed as conferring upon them an exemption from such duty, which they could waive. *C. 29, July, 1894.*

V G 4. By the use of the word counsel in General Order No. 29, Adjutant General's Office, 1890, without qualification, it was undoubtedly intended that officers detailed as such should perform for an accused soldier all those duties which usually devolve upon counsel for defendants before civil courts of criminal jurisdiction, in so far as such duties are apposite to the procedure of military courts. It would be proper for an officer so detailed to employ all honorable means to acquit him, that is to invoke every defense which the law and facts justify, without regard to his own opinion as to the guilt or innocence of the accused. Military law does not any more than the civil assume to punish all wrongdoing, but only such as can be ascertained by the methods of justice which the law and the customs

[1] "For the purpose of meeting the evidence as it may transpire." State *v.* Bell, 27 Md., 675.

[2] See McNaughten, p. 178; Macomb (edition of 1809), p. 94; Winthrop, Mil. Law and Precedents, 241.

In the case published in par. 4, S. O. 145, Dept. of the East, 1896, the Department Commander decided, as shown by the record, that "as there is no officer * * * available for detail as counsel, it is believed, considering each of the charges, that the judge advocate of the court should be able to guard the interests of the accused."

Compare, on this subject, People *v.* Daniell, 6 Lansing, 44; People *v.* Van Allen, 55 New York, 31.

of the service prescribe.[1] *P. 64, 164, Mar., 1894; C. 609, Nov., 1894; 15627, Dec. 7, 1903.*

V G 5. An application by an accused officer to be furnished, at the expense of the United States, with civil counsel to defend him on his trial by court-martial, *remarked upon* as unprecedented and not to be entertained. (Paragraphs 1012 and 1013) Army Regulations (1910) relate to no such a case. *P. 50, 277, Nov., 1891.* No authority exists for the payment by the United States of civil counsel employed by an officer or an enlisted man to defend him on his trial by court-martial. *P. 32, 165, May, 1889; 45, 438, Feb., 1891.*

V G 6. *Held,* that it is not the policy of the Government to incur expenses for defending officers before military courts from the consequences of their misconduct, and that counsel should look to the accused for reimbursement for any expenses incurred as counsel. *C. 13470, Oct. 20, 1902.*

V H 1. In any case tried by court martial the accused may, if he thinks proper (and whether or not he has taken the stand as a witness[2]), present to the court a statement or address either verbal or in writing. Such statement is not *evidence;*[3] as a personal defense or argument, however, it may and properly should be taken into consideration by the court. *R. 20, 432, Feb., 1866.*

V H 2. While the statement is not evidence, and the accused is not in general to be held bound by the argumentative declarations contained in the same, yet, if he clearly and unequivocally admits therein *facts* material to the prosecution, such may properly be viewed by the court and reviewing officer as practically facts in the case.[4] *R. 27, 407, Dec., 1868.* So, where the accused, in his statement, fully admits that certain facts existed substantially as proved, he may be regarded as waiving objection to any irregularity in the form of the proof of the same. *R. 27, 385, Nov., 1868.*

V H 3. 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. *R. 27, 520, Feb., 1869.*

V H 4. Where the accused submits a written statement in his behalf, or interposes a plea, such plea or statement should be signed by him, or by counsel in his behalf, and appended to the record. *C. 18764, Nov. 9, 1910.*

V H 5. The *publication* by an officer, after his acquittal, of the statement presented by him to the court on his trial, in which he

---

[1] See Counsel, Court Martial Manual of 1908, p. 26.

[2] See G. C. M. O. 2, Dept. of the Missouri, 1880.

[3] That a sworn statement can not be made to serve as the testimony of the accused as a *witness* under the act of Mar. 16, 1878.

[4] That a fact clearly admitted or assumed in the course of a trial may be considered as much in the case as if it had been expressly proved, see Paige *v.* Fazackerly, 36 Barb. (N. Y.), 392.

reflected in violent and vituperative language upon the motive and conduct of an officer of the same regiment, his accuser, and denounced him as devoid of the instincts of a gentleman and a disgrace to the service—*held*, to constitute a serious military offense, to the prejudice of good order and military discipline, if not indeed a violation of article 61; and further that it was no defense to such a publication that the court on the trial had permitted the statement to be made and recorded. *R. 33, 582, Dec., 1872; 34, 186, Mar., 1873.*

VI. *Held*, that an acquittal leaves the accused in the condition in which he was before the trial. *C. 1418, June 6, 1895.*

VI A. To add a *new* member to a military court after any material part of the trial has been gone through with, must always be a most undesirable measure, and one not to be resorted to except in an exceptional case and to prevent a failure of justice. Adding a member after all the testimony has been introduced, and nothing remains except the finding and sentence, is believed to be without precedent. *R. 41, 525, Mar., 1879.*

VI B. While it is in general undesirable that a member of a military court should testify as a witness at a trial had before such court, unless perhaps his testimony relates to character merely, yet the fact that he is called upon to testify, while it does not affect the validity of the proceedings,[1] does not operate to debar the member himself from the exercise of any of the duties or rights incident to his membership. He remains entitled to take part in all deliberations, including indeed those had in regard to the admissibility of questions put to himself or of his answers to questions. *R. 26, 216, Nov., 1867.*

VI C. An officer was released from arrest, then served as a member of a general court-martial, and was later again placed in arrest. *Held*, that since the officer at the time he sat as a member of the general court-martial was not in arrest, his status as a member of the court was entirely proper. *C. 19394, Mar. 21, 1906.*

VI D. A member of a court-martial, though strictly answerable only to the convening authority for a neglect to be present at a session of the court, will properly, when prevented from attending, communicate the cause of his absence to the president or judge advocate, so that the same may be entered in the proceedings. Where a member, on reappearing after an absence from a session, fails to offer any explanation of such absence, it will be proper for the president of the court to ask of him such statement as to the cause of his absence as he may think proper to make.[2] *R. 30, 315, May, 1870.*

VI E. An officer is not exempt from arrest by virtue of being at the time a member of a general court-martial.[3] *R. 7, 320, Mar., 1864.*

VI F. Where, in the course of a trial by court-martial, a member of a court is served with a legal order in due form dismissing or discharging him from the military service, or an official communication notifying him of the acceptance of his resignation, he becomes thereupon separated from the Army and can no longer act upon the court; he should therefore at once withdraw therefrom, and the fact of his with-

[1] Compare People *v.* Dohring, 59 N. York, 374.

[2] It need scarcely be added that the absence of a member does not affect the legality of the proceedings, provided a quorum of members remain. See 7 Op. At. Gen., 101.

[3] But an arrest of an officer while actually engaged upon court-martial duty should if practicable, be avoided.

drawal,[1] explained by a copy of the order, be entered upon the record. *R. 11, 203, Dec., 1864.* But where the term of service of a member as an officer of volunteers expired pending a trial by the court, *held* that the member was not thereupon disqualified, but could legally continue to act upon the court till actually discharged or mustered out of the service.[2] *R. 15, 111, Mar., 1865.*

VI G 1. No special rank or qualifications are required for the position of president of a military court. In our practice the president is not appointed as such; he is simply the senior in rank of the members present, and he presides by virtue of his seniority alone. If the senior of the officers detailed in the convening order is not present with the court at the original organization, the next senior present becomes president; so, if the officer who presided at the beginning of a trial is at a subsequent stage of the proceedings relieved or compelled to be absent by sickness, etc., the next ranking officer present presides as a matter of course; and the senior officer present with the court at the termination of the trial authenticates the proceedings as president. *R. 30, 246, Apr., 1870; C. 5332, Nov., 1898.*

VI G 2. While a special authority—that of swearing the judge-advocate—is devolved upon the president of a military court by statute (the eighty-fifth article of war), such officer has, in other respects, as in preforming the usual duties of a presiding officer, in authenticating the proceedings with his signature, and in communicating with the convening officer or other commander, no original authority, but acts simply as the representative and "organ" of the court.[3] *R. 27, 678, June, 1869; 30, 246, Apr., 1870.*

VI G 3. The president of a military court has no command as such; as president he can not give an *order* to any other member. As the organ of the court he gives, of course, the directions necessary to the regular and proper conduct of the proceedings; but a failure to comply with a direction given by him, while it may constitute "conduct to the prejudice of good order and military discipline," can not properly be charged as a "disobedience of a lawful command of a superior officer," in violation of article 21. *R. 30, 246, 315, Apr. and May, 1870.*

VII A. A court-martial has only statutory powers. *Held,* therefore, that it can exercise no common law functions such as the general power to punish for contempt. *R. 49, 306, Aug. 27, 1885.*

VII B 1. To be taken cognizance of by the court, it is not essential that a charge should be signed by any officer. If, though not so signed, it be duly officially transmitted by the convening commander, or other competent superior authority, to the court—either directly or through the judge advocate—"for trial," or "for the action of the court," or in terms to such effect, it is sufficiently authenticated for the purposes of trial, and trial upon it may be proceeded with by

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

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

[3] In deliberations on questions raised upon a trial, as well as in the finding and the adjudging of the sentence, the presiding member is on a perfect equality with the other members. He has no casting vote, nor, if the vote is even, does his vote have any greater or other weight or effect than that of any other member.

arraignment thereon of the accused. *R. 55, 369, Mar., 1888; 30, 489, July, 1870; P. 59, 258, May, 1893; C. 3913, Apr., 1898.*

VII B 2. A court-martial is not authorized, in its discretion and of its own motion, to reject or strike out a charge or specification formally referred to it for trial by competent authority, nor to direct or permit the judge advocate to drop or withdraw such a charge or specification, or enter a *nolle prosequi* as to the same. For such action the authority of the convening commander is requisite.[1] But where, by a special plea or objection, an *issue* is made by the accused as to the sufficiency of any pleading, the court, without referring the question to the convening officer, is empowered to allow the plea or objection and quash or strike out the charge, etc.[2] *R. 29, 370, Oct., 1869; P. 20, 378, Nov., 1887.*

VII C 1. Except where it sustains a challenge under article 88, a court-martial is not authorized to dispense with the attendance of a member.[3] *R. 37, 34, Sept., 1875.* It can not excuse a member to enable him to attend to other duties; for example, to act as counsel for the accused. For such purpose he must be duly *relieved* by the convening authority. *R. 21, 650, Sept., 1866; 35, 488, 490, July, 1874.* Where a court-martial relieved two of its members on the ground that, having been absent from a portion of the proceedings, they had not heard a portion of the testimony, *held* that, provided *five* members had always remained and been present, the validity of the findings and sentence was not affected, and the same would properly be approved unless it appeared that the action of the court had in some manner prejudiced the defense. *P. 15, 48, Feb., 1887; C. 4642, July 19, 1898; 5325, Nov. 15, 1898; 5484, Dec. 9, 1898; 6121, Mar. 25, 1899; 18305, July 17, 1905; 22162, Oct. 5, 1907.*

VII C 1 a. *Held* that a general court-martial has no authority to seat members in any order of rank different from that indicated by the convening order. *C. 15262, Sept. 8, 1903.*

VII C 2. For the court or the president of the court to place or order the judge advocate in arrest would be an unauthorized proceeding. The court indeed, in a proper case under article 86, might proceed against its judge advocate as for a contempt. But an arrest could not be imposed nor a punishment executed in the case of such officer except through the convening authority or other competent commander. *R. 3, 603, Sept., 1863; 21, 629, Sept., 1866.*

VII C 3. A court-martial has no authority over the person of an accused except when he is before it for trial. It can not arrest him, or by its own order cause him to be brought to the place of trial, the compelling of his attendance before the court being a duty of the convening officer or post commander. *R. 22, 606, Feb., 1867; 39, 44, Dec., 1876.*

VII D. A military court has no authority to *assign* counsel to an accused unprovided with counsel. So *held* that it has no power whatever to compel an officer to act as counsel for an accused. *R. 13, 400, July, 1874.* Nor can such a court excuse one of its members to enable him to act as counsel for an accused. *R. 35, 490, July, 1874; P. 57, 417, Jan., 1893.*

---

[1] Compare G. C. M. O. 13, Dept. of the Missouri, 1877; do. 36, 79, Dept. of the Platte, 1877; do. 13, id., 1878; do. 41, id., 1880; do. 45, 48, Div. of Pacific and Dept. of Cal., 1880.

[2] This paragraph sets forth the established practice in our service.

[3] Compare 7 Op. Atty. Gen., 98.

VII E. When a court-martial desires to have the benefit of the testimony of a party who has not been introduced as a witness by the prosecution or defense, it may properly call upon the judge advocate to have such party summoned, or, if he is a military person, may apply to the convening authority or post commander to have him ordered before it to testify,[1] and it may adjourn the trial for a reasonable time to await his attendance. *R. 25, 578, May, 1868.*

VII E 1. A court-martial (by *subpœna duces tecum*, through the judge advocate) may summon a telegraph operator to appear before it and bring with him a certain telegraphic dispatch. *Held* that telegrams are not privileged.[2] *P. 31, 449, Apr., 1889; C. 20085, July 19, 1906.*

VII F. A court-martial has, as such, no authority to arrest, or to require its judge advocate or other officer to arrest, a witness suspected of false swearing upon a trial which has been had before it; in such a case its proper course is to report the facts to the convening authority for his action. *R. 3, 109, July, 1863.*

VIII A 1. Courts-martial (though, within their scope and province, authoritative and independent tribunals) are bodies of exceptional and restricted powers and jurisdiction; their cognizance being confined to the distinctive classes of offenses recognized by the military code.[3] Their jurisdiction is *criminal*, their function being to award (in proper cases) *punishment;* they have no authority to adjudge damages for personal injuries or private wrongs.[4] *R. 27, 454, Jan., 1869.* They have no power to rescind a contract or to pass upon other civil rights. They are called into existence solely for the purpose of awarding punishment for military offenses. *C. 3608, Nov., 1897; 11196, Sept., 13, 1901; 17768, Apr. 25, June 17, 1905.*

VIII A 2. A court-martial can not be availed of for the collection of the private debts of officers; it can take no notice of their financial obligations except as evidence of fraud or dishonor when admissible in proof of an offense under the Articles of War. *P. 35, 463, Oct., 1889.*

---

[1] It has not been the practice in this country for the convening authority to detail an officer to attend a military court in a ministerial capacity—to summon witnesses, enforce the attendance of the accused, etc. In the special case, indeed, of the persons charged with complicity in the assassination of President Lincoln, and tried by military commission, it was ordered by the President, May 1, 1865, as follows: "That Bvt. Maj. Gen. Hartranft be assigned to duty as special provost marshal general for the purposes of said trial, and attendance upon said commission, and the execution of its mandates."

[2] See Wigmore on Evidence, Vol. IV, section 2287.

[3] *Ex parte* Watkins, 3 Pet., 193, 209; Barrett *v.* Crane, 16 Vt., 246; Brooks *v.* Adams, 11 Pick., 440; Brooks *v.* Davis, 17 id., 148; Brooks *v.* Daniels, 22 id., 498; Washburn *v.* Phillips, 2 Met., 296; Smith *v.* Shaw, 12 Johns., 257; Mills *v.* Martin, 19 id., 7; In matter of Wright, 34 How. Pr., 221; Duffield *v.* Smith, 3 Sergt. & Rawle, 590; Bell *v.* Tooley, 12 Iredell 605; State *v.* Stevens, 2 McCord, 32; Miller *v.* Seare, 2 W. Black., 1141; 6 Op. Atty. Gen., 425. "A court-martial is a court of limited and special jurisdiction. It is called into existence by force of express statute law, for a special purpose, and to perform a particular duty; and when the object of its creation is accomplished, it ceases to exist. * * * If, in its proceedings or sentence, it transcends the limit of its jurisdiction, the members of the court, and the officer who executes its sentence, are trespassers, and as such are answerable to the party injured, in damages in the courts." 3 Greenl. Ev., sec. 470. See also McNaghten, pp. 175, 176.

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

VIII B. The jurisdiction of courts-martial is nonterritorial. In a case of an officer who exhibited himself in a drunken condition at a public ball in Mexico, *held* that his offense was cognizable by a court-martial of the United States, subsequently convened in Texas by the department commander. This for the reason that the military jurisdiction does not recognize territoriality as an essential element of military offenses but extends to the same wherever committed, a principle which is amply confirmed by the comprehensive provision of the sixty-fourth article of war.[1] *R. 11, 351, Dec., 1864; P. 48, 52, Jan., 1891; 64, 64, Feb., 23, 1894; C. 13517, Aug. 14, 1903.*

VIII C. As the *origin* and *authority* of the court-martial are statutory, *held* that the statutes must be closely followed and no presumption can be made in favor of the court's jurisdiction. *R. 55, 486, Mar. 31, 1888.*

VIII D 1. A soldier, provided he has not been in fact discharged, may be brought to trial by court-martial after the term of service for which he enlisted has expired, provided, before such expiration, proceedings with a view to trial have been duly commenced against him by arrest or service of formal charges.[2] By such arrest or service the military jurisdiction attaches, and, once attached, trial by court-martial, and punishment, upon conviction, may legally ensue, though the soldier's term of enlistment may in fact expire before the trial be entered upon. In the leading case on this point of a seaman in the navy (*In re* Walker, 3 American Jurist, 281), the Supreme Court of Massachusetts held[3] (Jan. 25, 1830) as follows: "In this case the petitioner was arrested, or put in confinement, and charges were preferred against him to the Secretary of the Navy before the expiration of the time of his enlistment; and this was clearly a sufficient commencement of the prosecution to authorize a court-martial to proceed to trial and sentence, notwithstanding the time of service had expired before the court-martial had been convened." So *held*, in a case of a soldier of the Regular Army, arrested on the day before the expiration of his term of enlistment, with a view to trial for a military offense by court-martial, that the jurisdiction of the court had duly attached, and that his trial might legally be proceeded with. *R. 26, 512, Apr., 1868.* And similarly *held* in repeated cases of soldiers and officers of regular and volunteer regiments. *R. 5, 313, Nov., 1863; 7, 24, July, 1864; 12, 352, Feb., 1865; 14, 229, Mar., 1865; 16, 562, Sept., 1865; 27, 599, Apr., 1869; C. 2011, Jan., 1896; 13016, July 24, 1902; 15133, Aug. 21, 1903; 17022, Oct. 17, 1904; 17380, Jan. 16, 1905.*

VIII D 2. The discharge of a soldier not taking effect until notice thereof, actual or constructive, *held* that a soldier who committed a military offense on the day on which he was to be dishonorably discharged under sentence but before the discharge was delivered to him (or to the officer in charge of the prision at whch he was also to be confined under the same sentence) was amenable to the military jurisdiction for the trial and punishment of such offense as being still in the military service. *P. 27, 383, Oct., 1888.*

---

[1] See G. C. M. O. 11, Dept. Texas, 1894.

[2] See G. C. M. O. 16, War Dept., 1871.

[3] And see Judge Story's charge to the jury in United States *v.* Travers, 2 Wheeler Cr. C., 490, 509; In the matter of Dew, 25 L. R., 540; *In re* Bird, 2 Sawyer, 33.

VIII D 3. A military prosecution in the case of a deserter has been instituted when he is confined under a charge of desertion and, in case of civil criminal proceedings, priority in prosecution would relate to that date. *C. 14042, Dec. 5, 1904.*

VIII D 4. A soldier committed a murderous assault on his superior officer on a military reservation in Oklahoma Territory; *held* that he is not triable by a court of the United States having criminal jurisdiction, as no punishment is prescribed. (See secs. 5339–5342 R. S. and U. S. *v.* Williams, 2 Fed. Rep., 61.) The offense is triable by the criminal courts of the Territory of Oklahoma, and the offender is also triable by a general court-martial for striking his superior officer in violation of the twenty-first article of war, or for assault and battery in violation of the sixty-second article of war, and upon abandoning the prosecution instituted in the United States courts, the jurisdiction of a general court-martial will attach.[1] *C. 20902, Jan. 10, 1909.*

VIII E. Double jeopardy. (*See One hundred and second article of war.*)

VIII F 1. Such loose and indefinite forms of charge as "fraud," "worthlessness," "inefficiency," "habitual drunkenness," and the like, will be avoided by good pleaders. Such charges, however, in connection with specifications setting forth actual military neglects or disorders (not properly chargeable under specific articles) may be sustained as equivalent to charges of "conduct to the prejudice of good order and military discipline." *R. 19, 280, Dec., 1865; 28, 253, Dec., 1868.*

VIII F 2. Where a specific offense is charged (i. e., an offense made punishable by an article other than the general—sixty-second—article), and the specification does not state facts constituting such specific offense, the pleading will be insufficient as a pleading of that offense. Legal effect may, however, be given to a pleading if the charge and specification taken together amount to an allegation of an offense cognizable by a court-martial under article 62. And in all cases—whatever be the form of the charge or specification—if the two are not inconsistent, and, taken together, make out an averment of a neglect or disorder punishable under this general article, the pleading will be sufficient in law and will constitute a legal basis for a conviction and sentence. *R. 11, 491, Mar., 1865; 15, 680, Oct., 1865; 16, 551, Sept., 1865.*

VIII G 1 **a.** But an arrest, though an almost invariable, is not an essential preliminary to a military trial; to give the court jurisdiction it is not necessary that the accused should have been arrested; it is sufficient if he voluntarily, or in obiedience to an order directing him to do so, appears and submits himself to trial. So, neither the fact that an accused has not been formally arrested, or arrested at all, nor the fact that, having been once arrested and released from arrest, he has not been rearrested before trial, can be pleaded in bar of trial or constitute any ground of exception to the validity of the proceedings or sentence. *R. 2, 77, Mar. 13, 1863; 17, 419, Oct., 1865; 19, 419, Feb. 15, 1866; 28, 27, July, 1868; 29, 470, Nov. 27, 1869; 35, 142, Jan. 28, 1874; C. 8982, Sept. 17, 1900.*

VIII G 1 **b.** Persons in the military service are amenable to the jurisdiction of courts-martial for military offenses committed by them

[1] Case of Corp. Edward L. Knowles for assault on Capt. Macklin, tried and convicted by general court-martial.

while in arrest or confinement awaiting trial by court-martial. *P. 33, 335, June, 1889.*

VIII G 1 **c.** A suspension from rank does not affect the right of the officer to his office. He retains the same as before, and, as an officer, remains subject as before to military control as well as to the jurisdiction of a court-martial for any military offense committed pending the term of suspension.[1] *R. 30, 157, Mar., 1870; 37, 536, May, 1876; 38, 221, Aug., 1876; 39, 446, Feb., 1878; C. 17277, Dec. 15, 1904.*

VIII G 1 **c** (1). The status of an officer under suspension is the same whether such suspension has been imposed directly by sentence or by way of commutation of a more severe punishment. Thus where a sentence of dismissal was commuted to suspension from rank on half pay for one year, *held* that the officer, while forfeiting the rights and privileges of rank and command during such term, was yet amenable to trial by court-martial for a military offense committed pending the same. *R. 38, 221, Jan., 1877.*

VIII G 2 **a.** By the sixth amendment of the Constitution, civilians are guaranteed the right of trial by jury "in all criminal prosecutions." Thus—in time of peace—a court-martial can not assume jurisdiction of an offense committed by a civilian without a violation of the Constitution. It is only under the exceptional circumstances of a time of war that civilians may, in certain situations, become amenable to trial by court-martial.[2] *R. 19, 475, Mar., 1866; 38, 641, June, 1867; C. 17901, Apr. 27, 1905.*

VIII G 2 **a.** (1). *Held* that any statute which attempts to give jurisdiction over civilians, in time of peace, to military courts is unconstitutional. *R. 42, 250, Apr. 1879; C. 20120, July 31, 1906; 17901, Apr. 27, 1905.*

VIII G 2 **a.** (2). In order to become amenable to the military jurisdiction, an officer or soldier must have been legally and fully admitted into the military service of the United States. Thus, *held* that an officer of State volunteers appointed by a governor of a State, but not yet mustered into the United States service, was not amenable to the jurisdiction of a court-martial of the United States for an offense committed while engaged in recruiting service under the authority of the governor. *R. 12, 475, July, 1865; C. 4294, June 8, 1898.*

VIII G 2 **a.** (3). *Held* that a court-martial would have no jurisdiction over a civilian who in time of peace had assaulted the commander in chief or any other high official of the Army. *Held* further, that such jurisdiction is exercisable in time of peace only over those who have subjected themselves thereto by entering the Army. *C. 11210, Sept. 10, 1901.*

VIII G 2 **b.** The act of June 18, 1898 (30 Stat. 483), gave jurisdiction to general courts-martial over offenses committed by general

[1] See 5 Op. Atty. Gen., 740; 6 id., 715.

[2] See, in support of this view, *Ex parte* Milligan, 4 Wallace, 121–123; Jones *v.* Seward, 40 Barb., 563; In matter of Martin, 45 id., 145; Smith *v.* Shaw, 12 Johns., 257, 265; In matter of Stacy, 10 id., 332; Mills *v.* Martin, 19 id., 22; Johnson *v.* Jones, 44 Ills., 142, 155; Griffin *v.* Wilcox, 21 Ind., 386; *In re* Kemp, 16 Wis., 382; *Ex parte* McRoberts, 16 Iowa, 605; Antrim's case, 5 Philad., 288; 3 Op. Atty. Gen., 690; 13 id., 63.

A civilian brought to trial before a court-martial, can not, by a plea of guilty or other form of legal assent, confer jurisdiction upon the court where no jurisdiction exists in law. Compare People *v.* Campbell, 4 Parker, 386; Shoemaker *v.* Nesbit, 2 Rawle, 201; Moore *v.* Houston, 3 Sergt. & Rawle, 190; Duffield *v.* Smith, id., 599.

prisoners during their confinement as such. *Held* that this act was not intended to make any other change in existing law and should not be so construed. *C. 5589, Dec., 1898; 10003, Apr. 25, 1901; 13926, Jan. 12, 1903; 16220, Apr. 23, 1904.*

VIII H 1. It can not affect the authority of a court-martial to take cognizance of the military offense involved in an injury committed by a soldier against an officer, that, before the trial, the latter has resigned or been otherwise separated from the Army. *R. 32, 623, May, 1872.*

VIII H 2. The accused has a right to be present during all the material proceedings of his trial. *Held*, however, that he may waive the right to be present, and if he does so, the validity of the proceedings is not affected.[1] *R. 24, 488, Apr., 1867. Held* further, that where an accused had thus absented himself, the court had jurisdiction to continue the proceedings and arrive at a finding and sentence.[2] *R. 11, 260 and 295, Dec. 1864; 21, 169, Jan. 1866; C. 14767, June 13, 1903; Jan. 4 and Feb. 18, 1904, and Feb. 6, 1906; 23941,[3] Mar. 1, 1909. Held* further, in such a case that if the accused has counsel, the court may in its discretion allow such counsel to continue the presentation of the case, including the introduction of evidence and the presentation of an argument. *R. 19, 487, Mar., 1866; C. 14767, June 13, 1903; 21787, July 16, 1907; 23941, Mar. 1, 1909.*

VIII H 3. When an officer or enlisted man has been arraigned before a duly constituted court-martial for an offense legally triable by it, the jurisdiction thus attached can not be set aside by a process of a State court; the jurisdiction of the latter being for the time suspended. The offender may, of course, be voluntarily surrendered by the United States.[4] *P. 8, 484, June, 1886.*

VIII I 1. An officer or soldier (except as otherwise provided in the sixtieth article) ceases to be amenable to the military jurisdiction, for offenses committed while in the military service, after he has been separated therefrom by resignation, dismissal, being dropped for desertion, muster out, discharge, etc., and has thus become a civilian.[5] *R. 1, 395, Nov., 1862; 2, 49, Mar., 1863; 12, 476, July, 1865; 13, 108, Dec., 1864; 19, 64 and 71, Oct., 1865; 21, 37, Nov., 1865; 31, 34 and 48, Nov., 1870, and 571, Aug., 1871; 33, 354, Sept., 1872; 34, 406 and 422, Aug., 1873; 35, 649, Nov., 1874; 42, 313, June, 1879; 50, 634, Aug., 1886; C. 14389, Aug. 13, 1903.*

---

[1] 12 Cyc. 527 and authorities cited.

[2] See Fight *v.* The State, 7 Ohio, 180; McCorkle *v.* The State, 14 Ind., 39; State *v.* Wamire, 16 Ind., 357; U. S. *v.* Longhory, 13 Blatch., 267 (Fed. Cas. 15631); State *v.* Peacock, 50 N. J. Law 34; State *v.* Commonwealth, 2 Ky. Law Rep., 305; Commonwealth *v.* Fred M. Smith et al, 163 Mass., 411.

[3] In this case the accused officer escaped during the trial and went outside the limits of the United States. The court proceeded with the trial and sentenced the officer to dismissal and confinement at hard labor in a penitentiary for five years. The sentence was approved and confirmed by the President and ordered carried into execution, and the proceedings were published in G. O. No. 45, War Department, 1909, and a penitentiary designated as the place of confinement.

[4] 6 Op. Atty. Gen., 423, *Ex parte* McRoberts, 16 Iowa, 696.

[5] See this principle repeated and illustrated in G. C. M. O. 4, 16, War Dept., 1871; G. O. 90, Dept. of Pennsylvania, 1865; do. 43, Middle Dept., 1865; do. 22, Dept. of the Missouri, 1866.

See Parker *v.* Clive, 4 Burrow, 2419 (dated 1779), that officers of the (British) army, "after resigning their commissions, cease to be objects of military jurisdiction." The Sackville case is not a precedent either in England or this country.

VIII I 1 a. A person who, by reason of acceptance of resignation, dismissal, discharge, etc., has become wholly detached from the military service, can not be made liable to trial by court-martial for offenses committed while in the service on the ground that such offenses were not discovered till after he had left the army. *R. 37, 374, Mar., 1876.*

VIII I 1 b. The returning by a dismissed, etc., officer or soldier to the service does not revive a jurisdiction for offenses committed while he was in the service which had lapsed upon his being separated from it.[1] *R. 5, 314, Nov., 1863; 35, 649, Nov., 1874; 50, 501, July, and 634, Aug., 1886; C. 22840, Mar. 4, 1908.*

VIII I 1 c. An honorable discharge releases from and marks the termination of the particular contract and term of enlistment to which it relates only, and does not therefore relieve the soldier from the consequences of a desertion committed during a prior enlistment. *P. 49, 442, Oct., 1891; 53, 179, Apr., 1892; 59, 86, Apr., 1893.* Similarly *held* with respect to a discharge without honor. *C. 2115, Mar., 1896.* These discharges release the soldier from amenability for all offenses charged against him within the particular term to which they relate, including that of desertion, except as provided in the sixtieth article of war. *C. 2041, May, 1896.* But a dishonorable discharge (i. e., by sentence) 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 the sixtieth article of war. Nor would a subsequent enlistment after such dishonorable discharge operate to revive the amenability of the soldier for such offenses. *P. 53, 179, supra; 55, 165, Aug., 1892; 59, 55, Apr., 1893; C. 7614, Jan., 1900.*

VIII I 1 d. The retention of military control over a dishonorably discharged soldier for the purpose of execution of sentence does not confer military jurisdiction over offenses that may have been committed by him previous to his separation from the service, as he is held under control as a general prisoner, not as a soldier. *R. 31, 34, Nov., 1870; 32, 190, Dec., 1871; 33, 354, Sept., 1872; 41, 228, May, 1878; C. 7614, Jan., 1900; 8051, Apr. 19, 1900; 9406, Dec. 20, 1900; 10003, Apr. 25, 1901; 13926, Jan. 12, 1903; 17857, Apr. 17, 1905. Held,* that the act of June 18, 1898 (30 Stat., 483), which conferred military jurisdiction over general prisoners, did not confer upon courts-martial jurisdiction as to offenses committed by such men previous to their dishonorable discharge. *C. 7762, Mar., 1900; 8051, Apr., 1900; 9406, Dec., 1900.*

VIII I 2. On the question as to whether a commissioned officer could be tried for misconduct as a cadet, *held*, that there is ground for the view that a prosecution may be instituted against an officer for an offense committed while a cadet, although no precedent exists in the military service for such prosecution. Cadets are not discharged upon graduation, but may be *promoted* second lieutenants; there

[1] It is to be understood that the general rule of the nonamenability to military trial of officers and soldiers after discharge, dismissal, etc., for offenses committed prior thereto is subject to a specific statutory exception, viz, that provided for in the concluding provision of the sixtieth article.

would, therefore, appear to be no hiatus in the military status of a man between the time he serves as a cadet at the Military Academy and the time when he serves under a commission. *C. 22475, Mar. 2, 1907.*

IX A. A court-martial should in general be left to determine its own course of procedure, except where the same is defined by law, regulation, or usage. It would be unwarranted by usage to require in orders that a court-martial shall adopt a certain procedure in any case or class of cases as to a matter properly within its discretion. Thus a commander could not properly *order* that courts-martial convened by him should take testimony in cases in which the accused pleaded guilty, though he might properly recommend their doing so. *R. 34, 138, Feb., 1873.*

IX B 1. There is no law prohibiting a court-martial of the United States from sitting on Sunday, and the fact that a sentence of such a court is adjudged on that day can affect in no manner its validity in law. *R. 39, 321, 627, Nov., 1877, and Aug., 1878; C. 2955, Feb., 1897; 15591, Dec. 9, 1903.*

IX C. 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. *R. 29, 34, June, 1869.* 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. *C. 1637, Aug., 1895; G. C. M. Record No. 55974.*

IX D. A court-martial, after having entered upon a trial which has to be suspended on account of the absence of material witnesses, or for other cause, is authorized, in its discretion, to take up a new case not likely to involve an extended investigation, and proceed with it to its termination before resuming the trial of the first case. *R. 3, 281, Aug., 1863; 9, 650, Sept., 1864; 26, 548, May, 1868.*

IX E 1. Where the act committed involves several distinct offenses, the accused may properly be arraigned upon the same number of separate charges. *R. 30, 489, July, 1870.*

IX E 2. 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, and to grant it will not result in unreasonably protracting the investigation. *R. 30, 672, Oct., 1870.*

IX E 3. Facts and circumstances which are properly matters of evidence are not legitimate subjects of pleas; as, for example, circumstances going to extenuate the offense. Thus *held* that good conduct of the accused in battle subsequent to the commission of the offense charged could not properly be presented in the form of a plea. *R. 6, 79, Apr., 1864.* So *held* that the fact that the charge was preferred through personal hostility to the accused was not matter for plea, but, if desired to be taken advantage of, should be offered in evidence. *R. 34, 554, Oct., 1873.*

IX E 4. Where an accused declined to plead on the ground that he was so much under the influence of liquor at the time of the acts

charged that he could not remember what occurred, *held* that the court properly directed a plea of "not guilty" to be entered. *R. 49, 545, Dec., 1885.*

IX E 5 a. While it can not properly be *ordered* by a commander that courts-martial convened by him shall not receive pleas of guilty, or shall take evidence on the merits notwithstanding pleas of guilty are interposed by the accused, it is yet proper, and in general desirable, particularly in cases of enlisted men, and especially where the specifications do not fully set forth the facts of the case, that the prosecution should be instructed or advised to introduce, with the consent of the court, evidence of the circumstances of the offense, where the plea is guilty equally as where it is not guilty. This for the reason that the court may be better enabled correctly to appreciate the nature of the offense committed and thus to estimate the measure of punishment proper to be awarded; and further that the reviewing authority may be better enabled to comprehend the entire case, and to determine whether the sentence shall be approved or disapproved (in whole or in part), or shall be mitigated or (in whole or in part) remitted. Where indeed the sentence is not discretionary with the court, the former reason does not apply, though in such case the evidence may be desirable as the basis for a *recommendation* by the members. But where the sentence is mandatory, the latter reason applies with the greater force, since the mandatory punishments under Articles of War are in general of the severest quality, and the reviewing officer in acting upon the same is called upon to exercise an especially grave discretion. In *capital* cases particularly, it is most important that all the facts of the case—all circumstances of extenuation as well as of aggravation—should be exhibited in evidence. *R. 3, 647, Sept., 1863; 6, 370, Sept., 1864; 29, 124, July, 1869; 39, 206, Oct., 1877; C. 5093, Oct., 1898.* In practice, the absence of evidence to illustrate the offense has been found peculiarly embarrassing in cases of *deserters*. In a majority of these cases in which the plea is "guilty," the record is found to contain no testimony whatever; and a full and intelligent comprehension of the nature of the offense—whether desired upon the original review of the proceedings or upon a subsequent application for remission of sentence—is thus, in many instances not attainable.[1] *R. 27, 180, Sept., 1868.*

But in all cases where evidence is introduced by the prosecution after a plea of guilty, the accused should of course be afforded an opportunity to offer rebutting evidence, or evidence as to character, should he desire to do so. *R. 13, 423, Feb., 1865.*

IX E 5 a (1). Wherever, in connection with the plea of guilty a statement or confession, whether oral or written, is interposed by the accused, both plea and statement should be considered together by

[1] The principle that in cases in which the plea is guilty the court should take testimony, where necessary to the comprehending of the facts and the doing of justice though apparently in a measure lost sight of at a later period, was clearly enunciated in early general orders of the War Department. Thus, in G. O. 23 of 1830, Maj. Gen. Macomb (commanding the Army) expresses himself as follows: "In every case in which a prisoner pleads guilty, it is the duty of the court-martial, notwithstanding, to receive and to report in its proceedings such evidence as may afford a full knowledge of the circumstances; it being essential that the facts and particulars should be known to those whose duty it is to report on the case, or who have discretion in carrying the sentence into effect." And see G. O. 21, of 1833, to a similar effect. See G. C. M. O. 69, Hdqrs. of Army, 1877.

the court; and if it is to be gathered from the statement that evidence exists in regard to the alleged offense which will constitute a defense to the charge, or relieve the accused from a measure of culpability, the court will properly call upon or permit the judge advocate to obtain and introduce such evidence, if practicable. *R. 14, 585 and 596, June, 1865; 26, 562, May, 1868; 28, 123, Sept., 1868; 29, 11, 348, June and Oct., 1869, and 658, Feb., 1870.*

IX E 5 a (2). It not unfrequently happens upon trials of enlisted men that the accused, in pleading guilty, will proceed to make a *statement* (oral or written) to the court, which is in fact *inconsistent* with the plea. Thus, in a case where the accused, being evidently ignorant of the forms of law, pleaded guilty to an artificially worded charge and specification, and immediately thereupon made an oral statement to the court of the particulars of his conduct setting forth facts quite incongruous with his plea, and no evidence whatever was introduced in the case; *held* that the statement, rather than the plea, should be regarded as the intelligent act of the accused, and that, upon considering both together, the accused should not be deemed to have confessed his guilt of the specific charge. *R. 8, 274, Apr., 1864; 17, 48, June, 1865; 30, 33, July, 1869.* In such a case the court will properly counsel the accused to plead not guilty, or direct such plea to be entered, and proceed to a trial and investigation of the merits (*R. 6, 357, 370, Sept., 1864*); the judge advocate introducing his proof precisely as under an ordinary plea of not guilty. *P. 61, 394, Sept., 1893.*

IX E 5 a (3). In the interests of justice and for the purpose of fully informing itself of the facts, the court may, in its discretion, allow the introduction, by either side, of material testimony after the case has been formally closed,[1] but before a finding had been reached. Such a proceeding, however, must be of course exceptional, and a party should not be permitted to offer testimony at this stage, unless he exhibits good reason for not having produced it at the usual and proper time. *R. 12, 401, May, 1865; 17, 398, Oct., 1865; 31, 35, Nov., 1870.*

IX E 5 b. The admission of evidence after reaching a finding and receiving the evidence of previous convictions is highly irregular. So long as the proceedings remain in its possession the court may properly reconsider, modify, or change the findings and sentence, as it sees fit, but it is quite improper to reopen the case by hearing new evidence after reaching a finding of "guilty" or "not guilty." *C. 18764, May 5, 1906.*

IX F 1 a. An individual pardon must be pleaded; but a court is bound to take judicial notice, as affecting its jurisdiction, of a general pardon or amnesty. Thus where a court-martial failed to do so in the trial of a deserter who had returned to service under the terms of

[1] Compare Eberhardt *v.* State, 47 Ga., 598; and see the trial, by court-martial, of B. G. Harris (Ex. Doc. No. 14, H. R., 39th Cong., 1st sess., p. 25), where, on the day on which the accused was to present his final argument to the court, and which was two days after the formal closing of the case, the defense was allowed to introduce new testimony on the merits.

It is, moreover, the duty of a court-martial to see that injustice is not done the accused by the admission on the trial of improper testimony prejudicing his defense, or unfairly tending to aggravate the misconduct charged. In the interests of justice, therefore, the courts may exclude such testimony, although its admission may not be objected to on the part of the accused. Compare State *v.* O'Connor, 65 Missouri, 374.

the amnesty proclamation of March 11, 1865, this fact appearing from the specification to the charge of desertion upon which he was tried, it was held that the court was without jurisdiction of the offense and that the trial had was illegal. *C. 1274, Apr., 1895.*

IX F 1 a (1). A plea of a restoration to duty by competent authority without trial, under the Army Regulations, is in the nature of a plea of a constructive pardon, and a good special plea in bar of trial. But going to trial on the general issue waives it.[1] *R. 49, 94, May, 1885.*

IX F 1 a (2). The fact that a sergeant has been reduced to the ranks, confined in arrest, and required to perform work under the custody of a sentinel, though such a disposition may be in excess of authority, can not constitute a legal plea in bar to a trial upon the charge for which he was arrested. Such treatment is apposite to the case only as entering into the consideration of the question of the *quantum* of punishment upon conviction. *R. 47, 242, July, 1883.*

IX F 2 a. Objections to the charges or specifications in matters of *form* should be taken advantage of by special pleas in the nature of pleas in abatement, or, better, by motion to strike out. Such are objections to the specifications as inartificial, indefinite, or redundant; or as misnaming the accused (or other persons required to be specified), or misdescribing him as to his rank or office; or as containing insufficient allegations of time or place, etc. In such cases the objection should be raised by a special plea in abatement, or by motion, in order that errors capable of amendment may be amended on the spot by the judge advocate, and—the plea of not guilty (or guilty) being then made—the trial may proceed in the usual manner. Objections of this class, not thus taken, will properly be considered as *waived* by the plea of guilty or not guilty, and their existence will not then affect the validity of the proceedings or sentence. *R. 5, 577, Dec., 1864; 7, 234, Feb., 1864; 9, 518, Aug., 1864; 15, 117, Mar., 1865; 24, 140, Jan., 1867; 25, 100, Sept., 1867; 28, 372, Feb., 1869; 30, 288, Apr., 1870; 34, 32, Nov., 1872; 35, 450, June, 1874; 38, 654, June, 1877; 51, 144, Feb., 1887; 56, 243, May, 1888.*

Where without preliminary objection the accused pleads guilty or not guilty to a specification, in which he is incorrectly named or described, such plea will be regarded as an admission by the accused of his indentity with the person thus designated, and he can not thereafter object to the pleadings on account of misnomer or misdescription.[2] *R. 5, 577, Dec., 1864; 15, 117, Mar., 1865; 25, 100, Sept., 1867; 51, 144, Feb., 1887: C. 22215, Nov. 4, 1907.*

IX F 3 a. An insane person is no more competent as a witness before a court-martial than at common law. Testimony admitted of a

---

[1] Compare Heard's Criminal Pleading, 296; U. S. *v.* Wilson, 7 Peters, 150.

[2] Objections to the charges and specifications on account of matter of *substance*,—as that they do not contain the necessary allegations, or otherwise do not set forth facts constituting military offences,—should properly be made at the outset of the proceedings by a special plea in the nature of a *demurrer*, or they will in general be regarded as *waived*.

So, objections going to the legal *constitution* or *composition* of the court, or to its *jurisdiction*, should also properly be specially presented when the accused is first called upon to plead: valid objections of this *radical* character, however, are not *waived* if the accused, instead of submitting a special plea, pleads over to the merits, since *consent* can not confer jurisdiction on a court martial where none exists in law. (See *C. 15627, Dec. 7 1903.*)

person shown to be insane should be stricken out on motion made. *P. 50, 270, Nov., 1891.*

IX G 1. Where indications of insanity are developed by the accused in the course of a trial by court-martial, the court will properly suspend proceedings and report the facts to the convening authority, adjourning meanwhile to await his orders.[1] *R. 33, 661, Jan., 1873.*

IX H 1. The object of the legislation excluding the judge advocate from closed sessions of a court-martial is not only that there should be no unfairness to the accused, but that there should be no possibility of such unfairness. The statute does not contemplate the exercise of any discretion by the court in the matter, nor does it admit of any exception being made to the procedure described and required, even though such exception be in favor of the accused. A strict compliance with its requirements is necessary, and a failure to comply with them would probably be held to vitiate the proceedings.[2] *Advised* therefore in the particular case, that if the court had not arrived at a finding, the court be dissolved, and a new one appointed for the trial *de novo* of the accused. *C. 1637, Oct. 1, 1895; 4664, July 23, 1898; 12962, July 11, 1902; 15746, Mar. 18, 1904.*

IX H 1 a. The act of July 27, 1892 (27 Stat. 278), requiring the withdrawal of the judge advocate whenever the court sits "in closed session," *held* not to apply to a meeting of the court to hear read the record of the findings and sentence, such proceeding being no part of the trial. *P. 62, 363, Nov., 1893; C. 11316, Oct. 25, 1901; 15746, Nov. 25, 1904; 21294, Aug. 27, 1907.*

IX H 1 b. *Held* that a court-martial may sit in closed session before it has been sworn. *C. 5773, Jan. 31, 1899.*

IX I 1. It has not unfrequently happened that enlisted men, charged with *desertion*, have, in connection with a plea of guilty, made a statement disclaiming having had, in absenting themselves, any intention of abandoning the service, and stating facts which, if true, constitute absence-without-leave only. In such a case the accused can not in general fairly be convicted of desertion in the absence of an investigation, and the court will properly, therefore, induce him to change his plea to not guilty, or direct this plea to be entered and take such evidence as may be attainable, to show what offense was actually committed.[3] *R. 26, 562, May, 1868.*

IX I 2. Statements inconsistent with the plea have not rarely been made in cases like *larceny* where several distinct elements are required

[1] See a case of this nature, where this course was pursued, in G. C. M. O. 39, Dept. of the Missouri, 1868. As to the similar practice of the civil courts, see People *v.* Ah Ying, 42 Cal. 18; also Taffe *v.* State, 23 Ark. 34.

[2] So held in cases published in S. O. 19, Dept. of Colorado, 1896; and S. O. 23, Dept. of the East, 1896.

[3] The views of the Judge Advocate General have been adopted in the general orders of the War Department and in numerous orders of the various military department, &c., commands. In G. C. M. O. 2, War Dept., 1872, the Secretary of War observes, in regard to two cases of soldiers, as follows: "The written statements submitted by the accused are contradictory of their pleas of 'guilty.' The court should have regarded these statements as neutralizing the effect of their pleas, and should have had the accused instructed as to their legal rights, and advised to change their pleas with a view to the hearing of testimony. It not unfrequently happens that soldiers do not understand the legal difference between absence-without-leave and desertion, or are wholly unable to discriminate as to the grade of their offences, as determined by their motives. They thus, sometimes, ignorantly plead guilty and are sentenced for crimes of which they may be actually innocent. The proceedings, findings, and sentences are disapproved." And see G. C. M. O. 31, War Dept., 1876.

to constitute the crime in law. For example, a soldier will plead guilty to a charge of larceny, and thereupon make a statement disclaiming the peculiar intent (*animus furandi*) necessary to the offense, thus really admitting only an unauthorized taking. In such cases the court will properly instruct the accused that he should change his plea to not guilty, and, if he declines to do so, will properly call upon the judge advocate to introduce evidence showing the actual offense committed. *R. 28, 677, June, 1869; 29, 658, Feb., 1870.*

IX K 1. A tie vote upon any proposition submitted to the court is equivalent to a vote in the negative—a majority vote being necessary to a determination in the affirmative—and the proposition is not approved. Where the vote is a tie upon an objection to testimony, the objection is not sustained. Where it is tied upon a certain proposed finding or form of sentence, the same is not adopted. *R. 31, 511, 610, July and Aug., 1871; 32, 126, Nov., 1871; 45, 334, June, 1882; C. 2003, Jan., 1896.*

IX K 2. The *polling* of a court-martial, in the manner of a jury or otherwise, is a proceeding wholly unknown to military law. So, where an officer, acting as the counsel of a soldier on trial by court-martial, demanded, on the court ruling adversely upon the admission of a special plea, that it be polled, *held* that his action was wholly irregular as well as disrespectful to the court.[1] *R. 34, 454, Sept., 1873.*

IX K 3. Where the majority of the members of a court-martial have come to a decision upon any question raised in the course of the proceedings, or upon the finding or sentence, no individual of the minority, whether the president or other member, is entitled to have a *protest* made by himself against such decision entered upon the record. The conclusions of the court (except in cases of death sentences, where a concurrence of two-thirds is required) are to be determined invariably by the vote of the majority of its members, and it is much less important that individual members should have an opportunity of publishing their personal convictions, than that the action of the court should appear upon the formal record as that of the aggregate body, and should carry weight and have effect as such. *R. 11, 203, Dec., 1864; 25, 542, May, 1868.* Nor can a protest (against the finding or otherwise) by a minority of the members be appended to the record on a separate paper. *R. 36, 264; Feb., 1875.*

IX L 1. For the president of a court-martial to assume to adjourn the court against the vote of the majority of the members would be an unauthorized act and a grave irregularity, properly subjecting him to a charge under the sixty-second article.[2] *R. 30, 248, Apr., 1870.*

IX L 2. An adjournment *sine die* has no more legal effect than a simple adjournment.[3] It does not dissolve the court, as a court has, in fact, no power to terminate its own existence. *R. 21, 679, Nov., 1866; 26, 588, June, 1868; 42, 158, Feb., 1879.* After an adjournment *sine die*, the court may without being reconvened by the convening authority reassemble and take up and try a case referred to it by the convening authority precisely as if it had not adjourned at all. *R. 19, 628, May, 1866; 41, 282, June, 1878.* It may also be reconvened by the convening authority after an adjournment *sine die*

[1] See G. C. M. O. 37, War Dept., 1873.
[2] Case of Backenstos, G. O. 14, War Dept., 1850.
[3] Brown *v.* Root, Sup. Ct., D. C., 1900 (44087 Law); and see 23 Op. Atty. Gen., 23.

for the purpose of reconsideration of its judgment on a particular case and be directed to reframe the sentence, etc.[1] *R. 55, 208, Dec., 1887; C. 5654, July 24, 1899.*

IX M. Where, indeed, there are no material proceedings after the sentence, the subscription of the latter by the president and judge advocate will constitute a sufficient authentication of the record as a whole. *R. 19, 616, May, 1866.* Where the president or judge advocate has been changed pending the trial, it is of course the last one, the one who was serving at the close of the trial, who should sign the record. *R. 29, 604, Jan., 1875; C. 5332, Nov., 1898.* A judge advocate appointed after the conclusion of a trial would not be competent to authenticate the record of such trial. *C. 5230, Oct., 1898.*

IX N 1. Where the record of a trial, as forwarded to the reviewing authority for his action, is deemed by him to exhibit some error, omission, or other defect in the proceedings capable of being supplied or remedied by the court; as, for example, an inadequate, illegal, or irregular sentence, or a finding not authorized by the evidence; or an omission of some material matter—as a failure to prefix to the record a copy of the convening order, or to authenticate the proceedings by the signatures of the president and judge advocate, or to enter the proper statement as to the members present, or to recite as to the offering to the accused of an opportunity to object to the same or as to the qualifying of the court by the prescribed oaths, or to fully record the plea, finding, or sentence; or some mere clerical error in a matter of form—the court may and in general properly will be reconvened by the order of the reviewing officer (the convening authority or his successor in the command) for the purpose of correcting the record in the faulty particular, provided a correction be practicable. In a case of an *omission*, the object of course is that the record may be made to conform with the *fact*. If the fact is that the proceeding, *apparently* merely omitted to be recorded, was *actually* not had, the proposed correction can not of course be made. There is no limit to the number of times that a court may be reconvened for a revision of its proceedings. It is not often, however, reassembled a second time where it declines on the first occasion to make the correction desired. *R. 1, 487, Dec., 1862; 2, 154, Apr., 1863; 11, 490, Feb., 1865; 16, 202, May, 1865; 28, 286, Dec., 1868, and 304, Jan., 1869; C. 15833, Jan. 28, 1904.*

IX N 2. The order reassembling the court will properly indicate the particular or particulars as to which a revision or correction is desired, or refer to papers, accompanying it, in which the supposed omission or other defect is set forth. *R. 11, 93, Nov. 1864.* Whether to make the proposed correction will be in the discretion of the court. The reviewing authority can not of course compel and would scarcely be authorized to *command* the court to make it. *R. 7, 112, Nov., 1863; 24, 435, Sept., 1873.*

IX N 3. A correction can be made only by a legal court. At least five therefore of the members of the court who acted upon the trial, must be present. That there are fewer members at the reassembling than at the trial is immaterial, provided five are present. *R. 35, 656, Oct., 1874.* The judge advocate should be present.[2] *R. 1, 487, Dec., 1862.*

---

[1] Brown *v.* Root, cited *supra.*

[2] If the court closes he should withdraw (act of July 27, 1892, s. 2).

IX N 4. It is not in general necessary or desirable that the accused be present at a revision. Where, however, any possible injustice may result from his absence, he should be required or permitted to be present, and with counsel, if preferred. Thus, where the defect to be corrected consists in an omission properly to set forth a special plea made or objection taken by the accused, it may be desirable that he should be present in order that he may be heard as to the proper form of the proposed correction. Where the error is *clerical* merely, or, though relating to a material particular, consists in the omission of a formal statement only, the presence of the accused is not in general called for. *R. 9, 653, Sept., 1864.*

IX N 5. It is now settled in our law that a court martial is not empowered, at this proceeding, to take or receive testimony.[1] *R. 16, 562, Sept., 1865; 19, 41, Oct., 1865; 42, 275, Apr., 1879.*

IX N 6. The amendment can only be made by the court when duly reconvened for the purpose, and when made must be *the act of the court as such.* A correction made by the president or other member, or by the judge advocate, independently of the court, and by means of an erasure or interlineation or otherwise, is unauthorized and a grave irregularity.[2] *R. 28, 304, Jan., 1869.* The correction must be wholly made and recorded in and by the formal proceedings upon the revision. The record of the correction, as thus made, will refer of course to the page or part of the record of the trial in which the omission or defect occurs; but this part of the record must be left precisely as it stands. The *court* is no more authorized to correct the same by erasure or interlineation on the page, or by the substitution for the defective portion of a rewritten corrected statement, than would be the judge advocate or a member. *R. 2, 97, Mar., 1863; 11, 93, Nov., 1864; 16, 202, May, 1865; 34, 416, Aug., 1873; 45, 439, Sept., 1882.*

IX N 6 a. The revision here contemplated is of course quite distinct from the ordinary revision and correction of its proceedings by a court martial from day to day during a trial and before the record is completed. *R. 27, 581, Mar., 1869.*

IX N 6 b. *Held,* that an indorsement by the trial judge advocate can not be received in place of a regular amendment of the record by the court. *C. 4642, Aug. 4, 1898.*

IX N 7. Where the court has been *dissolved,* or, by reason of any casualty or exigency of the service, can not practically be reconvened, there can of course be no correction of its proceedings. *R. 31, 108, Dec., 1870; C. 19854, June 29, 1906.*

IX O. A court martial is not legally dissolved till officially informed of an order, from competent authority, dissolving it. The proceedings of a court martial, had after the date of an order dissolving it but before the court has become officially advised of such order, will thus be quite regular and valid. Where an order dissolving forthwith a court martial has been duly officially received by the court and has thus taken effect, an order subsequently received revoking this order will be entirely futile. It will not revive the court, but the same, to be qualified for further action, must be formally reconvened as a new and distinct tribunal. *R. 43, 160, Jan., 1880; P. 32, 29, Apr., 1889.*

---

[1] See G. O. 47, Hdqrs. of Army, 1879.
[2] See par. 19, S. O. 99, A. G. O., 1900.

X A 1. Desertion is not a felony and does not render a witness incompetent at common law or before a court-martial. Nor does the loss of citizenship upon conviction of desertion, under sections 1996 and 1998, R. S., have such effect; the competency of a witness not depending upon citizenship. A pardon of a person thus convicted would not therefore add to his competency. But where it was proposed to introduce such a person as a material witness for the prosecution in an important case, *advised* that it would be desirable to remit the unexecuted portion of his sentence, if any. *R. 51, 254, Dec., 1886.*

X A 2. The president or any member of a court-martial, as also the judge advocate, may legally give testimony before the court. That the court, at the time of a member's testifying, is composed of but five members will not affect the validity of the proceedings, since in so testifying he does not cease to be a member. It is in general, however, most undesirable that the judge advocate, and still more that a member, should appear in the capacity of a witness, except perhaps where the evidence to be given relates simply to the good character or record of the accused. *R. 2, 584, June, 1863; 7, 202, Feb., 1864; 11, 299, Dec., 1864; 42, 472, Jan., 1880.*

X A 3. It is not an objection to the competency of a witness that he is the officer upon whom will devolve the duty of reviewing authority when the proceedings are terminated. *R. 39, 518, Apr., 1878.*

X A 4. It is not an objection to the competency of a witness that his name is not on the list of witnesses appended to the charges when served. The prosecutor is not obliged to furnish any list of witnesses, but it is better practice to do so.[1] *R. 25, 350, Feb., 1868.*

X A 5. Where a court-martial refused to admit in evidence (as being incompetent) the testimony of the wife of the prosecuting witness, *held* that its action was entirely erroneous, no legal objection existing to the competency of such a person. *R. 43, 106, Dec., 1879; C. 17946, May 3, 1905; 18100, June 5, 1905.*

X B 1. It has been uniformly *held* that the wife of a person on trial before a court-martial could not properly be admitted as a witness for or against him;[2] and the statute authorizing accused parties to testify does not affect this rule. *R., 30, 672, Oct., 1870; 47, 521, Sept., 1884.*

X B 1 a. A wife is not a competent witness to prove a charge of failing to support her, for which her husband is on trial.[3] *R. 47, 521, Sept., 1884.*

X B 2. A person who is insane at the time is incompetent as a witness. An objection, however, to a witness on account of alleged insanity will not properly be allowed, unless sustained by clear proof, a man being always presumed to be sane till proven to be otherwise. *R. 33, 91, June, 1872.*

---

[1] When the list is furnished, the prosecution is not obliged to confine itself to the witnesses specified. The fact that material testimony is given by an unexpected witness may however constitute ground for an application by the accused (under art. 93) for further time for the preparation of his defense.

[2] Nor will the testimony of the wife of an accused be admissible in favor of or against a party jointly charged with him, where her testimony will be material to the merits of the question of the guilt or innocence of her husband. See Territory *v.* Paul, 2 Mont. 314.

[3] The common law rule is that, except in the case of violence upon her person, the wife's testimony can not be received to criminate her husband, or to disclose confidential communications. Bassett *v.* U. S. (137 U. S., 496); *In re* Mayfield (141 U. S., 113); Hopkins *v.* Grimshaw (165 U. S., 349); Stein *v.* Bowman (13 Peters., 209).

X B 3. Where a conviction of rape rested mainly on the testimony of the victim, a child of 8 years of age, *held* that the competency of the witness was doubtful, and that the trial should have been sus-suspended and the child instructed.[1] *R. 50, 37, Feb., 1886.*

X C 1. The rules governing the competency of witnesses before the criminal courts of the United States and the States are, where apposite, generally (though not always necessarily) followed in the practice of courts-martial. *R. 29, 480, Dec., 1869; 30, 672. Oct., 1870; 42, 74, Dec., 1878.*

X D. Except where their testimony will be merely cumulative, and will clearly add nothing whatever to the strength of the defense the accused is in general entitled to have any and all material witnesses summoned to testify in his behalf.[2] A prompt obedience to a summons is incumbent upon all witnesses, nor is a commanding or superior officer in general authorized to place any obstacles in the way of the prompt attendance, as a witness, of an inferior duly summoned or ordered to attend as such.[3] *R. 33, 100, June, 1872; 43, 341, June, 1880; C. 17212, Feb. 17, 1905; 17666, Mar. 13, 1905.*

X D 1. An accused party at a military trial can rarely be entitled to demand the attendance, as a witness, of a chief of a staff corps, much less that of the President or Secretary of War, especially as some minor official can almost invariably furnish the desired facts. If, however, the testimony of one of these officials be found to be necessary or most desirable, and the same can not legally be taken by deposition, the court, if convened at a distance, may properly be adjourned to Washington or other convenient point, in order that the witness may be enabled to attend without detriment to the public interests. *R. 39, 517, Apr., 1878.*

X E. By deposition. (*See Ninety-first article of war.*)

X F 1. A summons may legally be served either by a military or a civil person,[4] but will in general preferably be served by an officer or noncommissioned officer of the Army. A judge advocate, or a commanding or other officer to whom a summons is sent for service, will not be authorized, by employing for the purpose a United States marshal or deputy marshal, or other civil official, to commit the United States to the payment of fees to such official. *R. 43, 284, Apr., 1880.* The action, however, of a judge advocate in employing a deputy marshal to serve a summons, where apparently the service could not otherwise be so effectually or economically made, has in a few cases been so far ratified by the Secretary of War as to allow, out of the appropriation for Army contingencies, the payment of a small and reasonable account of charges rendered by such official. *R. 37, 570, May, 1876.*

X F 2. There is no fee or compensation established or authorized to be paid, by statute or regulation, for the service of subpœnas, for the attendance of witnesses before military courts. Neither a commanding officer nor a judge advocate is authorized to employ a civil official or any civilian for such service or to commit the United States to the payment of any compensation to such a person. But in a case where the employment of a civilian for such purpose had been resorted

---

[1] Greenleaf on Evidence, sec. 367.
[2] See G. C. M. O. 21, 24, War Dept. 1872; do. 128, Hdqrs. of Army, 1876.
[3] See G. C. M. O. 18, Dept. of the Platte, 1877.
[4] See G. O. 93, Hdqrs. of Army, 1868.

to, and it clearly appeared that, to employ him, was the most economical as well as effectual course open to the officer, *advised* that his reasonable compensation be paid out of the appropriation for contingencies of the Army. *P. 32, 365, May, 1889; 51, 407, Jan., 1892; C. 5549, Dec., 1898; 13418, Oct. 9, 1902.*

X F 3. Subpœnas for witnesses residing in foreign territory should be transmitted through the Department of State for service. *C. 13046, Aug. 7, 1902.*

X G 1. A witness can have no authority to discharge or relieve himself from attendance on the ground that the testimony desired of him is immaterial, or for any other reason. In the civil practice such an act would be a grave contempt of court. It is for the court to judge as to the materiality or pertinency of the evidence of witnesses; and unless a witness has been determined by the court to be incompetent or his testimony to be inadmissible, he should remain and stand his examination till duly informed by the court or judge advocate that his attendance is no longer required in the case. *R. 39, 354, Dec., 1877.*

X H 1. The privilege, recognized by the common law, of a witness to refuse to respond to a question, the answer to which may criminate him, is a *personal* one, which the witness may exercise or waive as he may see fit. It is not for the judge advocate or accused to object to the question or to check the witness, or the court to exclude the question or direct the witness not to answer. Where, however, he is ignorant of his right, the court may properly advise him of the same. *R. 11, 220, Dec., 1864.* But where a military witness declines to answer a question on the ground that it is of such a character that the answer thereto may criminate him, but the court decides that the question is not one of this nature and that it must be answered, the witness can not properly further refuse to respond, and, if he does so, will render himself liable to charges and trial under article 62.[1] *R. 34, 242, Apr., 1873.*

X H 1 a. Upon the trial of a cadet of the Military Academy, the court, against the objection of the accused, required another cadet, introduced as a witness for the prosecution, to testify as to facts which would tend to criminate him. *Held* that such action was erroneous, the not answering in such cases being a privilege of the witness only,[2] who (whether or not objection were made) could refuse to testify, and who, if ignorant of his rights, should be instructed therein by the court. *P. 38, 194, Jan., 1890.*

X H 2. The ninetieth article of war charges the judge advocate of a court-martial with the duty of objecting, during the progress of a trial, "to any question to the prisoner the answer to which might tend to criminate himself." *Held* that to "compel" is to constrain a witness, by force or duress, to give incriminating testimony under the sanction of an oath, or otherwise, but no such case arises where, in the execution of the physical examination imposed by a competent military superior, a medical officer becomes possessed of information in respect to the person of an enlisted man; and he may testify to any facts that have come under his observation in the course of such physical examination. *C. 24624, Mar. 13, 1909.*

---

[1] See G. C. M. O. 23, War Dept., 1873; also Brown *v.* Walker, 161 U. S., 591.

[2] That the accused can not take advantage of the error, see Greenleaf on Evidence, 16th edition, vol. 1, sec. 469 d, p. 613.

X I 1. To entitle a witness to the payment of fees, it is not absolutely essential that he should produce a formal summons or subpœna addressed to and complied with by him, or that he should have been formally summoned in the case. It will in general be sufficient if he has duly attended in compliance with a verbal or informal written request from the judge advocate, or even at the instance of the accused, if this action has been acquiesced in by the judge advocate.[1] But a party can not entitle himself to witness fees by merely appearing in court on his own responsibility and not at the instance of either party. *R. 23, 196, Aug., 1866; C. 7890, Apr., 1900; 15789, Jan. 19, 1904.*

X I 2. Where a party who had attended as a witness before a military court, claimed, in addition to the regular *per diem* compensation, to be indemnified for the loss of time and injury to his business alleged to have been occasioned by reason of his being obliged to attend as such witness; *held* that such claim could not be allowed by the executive branch of the Government, the loss and injury complained of being disadvantages to which citizens were liable to be subjected in the course of the discharge of their obligations to civil society, and for which the law has provided no remedy. *R. 22, 264, July, 1866.*

X I 3. The compensation allowed by the Secretary of War for witnesses summoned as *experts* in handwriting before courts-martial, *held* payable out of the annual appropriation "for compensation of witnesses attending upon courts-martial and courts of inquiry."[2] *P. 49, 187, Sept., 1891; C. 16556, July 7, 1904, and Apr. 20, 1911.*

X I 4. When giving evidence by deposition. (*See Ninety-first article of war.*)

X I 5. *Held* that the annual appropriation by Congress for the compensation of witnesses attending before courts-martial was evidently based upon the understanding that such compensation, not being prescribed by statute, was one left to be fixed by the Secretary of War (the authority charged with the expenditure of the appropriation), and was indeed that which had been so fixed and published in Army Regulations. Thus the appropriation, made as it is from year to year, is to be regarded as made in knowledge and recognition of the rates of compensation as established by such regulations. Section 848, R. S., prescribing witness' fees, and constituting a part of the chapter entitled "The Judiciary," has reference to such fees in the Federal civil courts only, and has no application whatever to courts-martial, which are no part of the judiciary of the United States. *P. 57, 490, Feb., 1893.*

X I 6. Fees to foreign civilian witnesses before courts-martial are the same as those allowed by United States courts at the place of trial.[3] *C. 13046, Aug. 6, 1902.*

X I 7. 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

[1] A strict observance, however, of the Army Regulations would call for the issue of formal summonses or subpœnas to the witnesses on both sides, and it is the better practice for the judge advocate to cause such to be served in each instance, particularly in the case of civilian witnesses.

[2] See Smith *v.* U. S., 24 Ct. Cls., 209. Cir. 30, War Department, July 18, 1904, requires that when the necessity for the employment of an expert arises, such necessity must be shown by a resolution of the court, and the authority of the Secretary of War must be secured in advance.

[3] See act of Mar. 2, 1901 (31 Stat., 950); I Comp. Dec. 79.

noted as to indicate its character, and should be forwarded to the Paymaster General for settlement. *C. 21516, May 8, 1907.*

X I 8. Policemen of the District of Columbia are "civilians in the employ of the Government" in the sense contemplated by (paragraph) (1006,) Army Regulations (1910). *C. 17481, Feb. 1, 1904.*

X I 9. A postmaster is a "civilian in the employ of the Government" in the sense contemplated by paragraph 1006, Army Regulations (1910). *C. 17481, Mar. 10, 1910.*

X K 1. To authorize a resort to an attachment there must have been a formal summons, duly issued and served upon the witness, and not complied with. *R. 36, 152, Dec., 1874.*

X K 2. *Held* that the statute could not properly be construed as authorizing the issue of an attachment to compel a witness to attend before a commissioner or other person and give his *deposition*. *R. 36, 152, Dec., 1874.*

X K 3. A judge advocate can not properly direct an attachment to a United States marshal or deputy marshal, or other civil official. Some military officer or person should be designated by him, or detailed for the purpose by superior authority.[1] *R. 27, 147, Aug., 1868.* In executing the attachment, the needful force may be employed. *R. 11, 234, Dec., 1864.*

X L 1. The principle of the common law by which a witness is protected from arrest[2] should in general be applied to military cases. If it can well be avoided, an arrest should certainly not be imposed upon an officer or soldier while attending a court-martial as a witness. But such an arrest would constitute an irregularity only, and would not affect the validity of the proceedings of a trial to which the party thus arrested was subsequently subjected. *R. 39, 12, May, 1876.*

XI A 1. Courts-martial should in general, of course, follow—so far as apposite to military cases—the rules of evidence observed by the civil courts, and especially the courts of the United States, in criminal cases.[3] They are not bound, however, by any statute in this

---

[1] Upon the subject of the execution of process of attachment in military cases, see the opinion of the Atty. Gen. in 12 Op., 501; also the directions—based upon the same—in G. O. 93, Hdqrs. of Army, 1868.

Prior to the adoption of the Constitution, Congress (then the Government) appears to have relied upon the State authorities for the necessary process to compel the attendance of witnesses before military courts. See resolution of Nov. 16, 1779—III Journals of Congress, 392. In the British law, by a provision first incorporated in the mutiny act in the year 1800, witnesses neglecting to comply with a summons requiring their presence at such courts, are made "liable to be attached in the Court of Queen's Bench," etc. This provision well illustrates the close connection between executive and the other governmental powers in the British constitution, where the sovereign is a part of the judiciary as well as of the legislature. The fact of the express distinction and separation of the three powers in our own organic law, one result of which has been to leave courts-martial, as agencies of the executive power, quite independent of any review or control on the part of the United States courts, has also no doubt availed to preclude the devolving upon the Federal tribunals of a power, fitly conferred in the foreign statute, but which, with us, would be exceptional and out of harmony with our constitutional system.

It may be added, in regard to the exercise of the authority to issue compulsory process, as vested in judge advocates by the act of 1863 (sec. 1202, R. S.), that the occasions of such exercise have not been frequent in practice, and no case is known in which such authority has been abused.

[2] 1 Greenl. Ev., sec. 316; Smythe *v.* Banks, 4 Dallas, 329.

[3] See 3 Greenl. Ev., sec. 476; Lebanon *v.* Heath, 47 N. Hamp., 359; People *v.* Van Allen, 55 N. York, 39; 2 Op. At. Gen., 343, 17 id., 310; Grant *v.* Gould, 2 H. Black, 87; 1 McArthur, 47; McNaghten, 180; Harcourt, 76; DeHart, 334; O'Brien, 169; G. O. 51, Middle Dept., 1865; G. C. M. O. 60, Dept. of Texas, 1879; do. 3, 52, Dept. of the East, 1880.

particular, and it is thus open to them, in the interest of justice, to apply these rules with more indulgence than the civil courts—to allow, for example, more latitude in the introduction of testimony and in the examination and cross-examination of witnesses than is commonly permitted by the latter tribunals. In such particulars, as persons on trial by courts-martial are ordinarily not versed in legal science or practice, a liberal course should in general be pursued, and an overtechnicality be avoided.[1] *R. 29, 480, Dec., 1869; 31, 273, Mar., 1871; 42, 74, Dec., 1878; 55, 497, Mar., 1888; C. 8471, June, 1900.*

XI A 2. The law presumes that public officers duly perform their official functions, and this presumption continues till the contrary is shown. *P. 42, 246, Aug., 1890.*

XI A 3. 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.[2] *R. 32, 642, May, 1872; 41, 33, Oct., 1877.*

XI A 4 **a.** Where a soldier charged with desertion pleads guilty of absence without leave but not guilty of desertion; *held*, that the operation of such a plea is to cast upon the judge advocate the burden of proving the *animus non revertendi*, which is the gist of the offense of desertion. While the circumstance that the absence has been exceptionally protracted will, when unexplained, ordinarily furnish a presumption of the existence of the necessary intent, the court will not be justified in arriving at a finding of guilty upon the plea of the accused where the plea amounts to a traverse of the charge, and practice requires that evidence be introduced, although it be of necessity slight, to enable the court to correctly arrive at such a finding. *C. 17313, Dec. 23, 1904.*

XI A 5. 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. *P. 52, 344, Mar., 1892.*

XI A 6 **a.** The fact that a party is a public enemy of the United States or has engaged in giving aid to the enemy does not affect the competency of his testimony as a witness before a court-martial. Where testifying, however, in time of war, either in favor of a person in the enemy's service or an ally of or sympathizer with the enemy, or against a Federal officer or soldier, his statements (like those of an accomplice) are ordinarily to be received with caution unless corro-

[1] Compare the views expressed in G. C. M. O. 32, War Dept., 1872; do. 23, Dept. of Texas, 1873; do. 60, Dept. of California, 1873.

[2] See opinion of the Judge Advocate General, as adopted by the President, in G. C. M. O. 66, Hdqrs. of Army, 1879; and compare remarks of reviewing officers, in G. O. 11, Dept. of California, 1865; G. C. M. O. 31, Dept. of Dakota, 1869; do. 8, Fourth Mil. Dist., 1867.

borated. *R. 9, 164 and 173, June, 1864; 10, 330, Sept., 1864; 13, 499, Mar., 1864; 14, 645, June, 1865; 20, 86, Oct., 1865; 21, 54, Nov., 1865.*

XI A 7 a. A confession is competent evidence when free and voluntary; otherwise where made through the influence of fear or hope of favor.[1] So a confession that he had deserted, made by an alleged deserter to a police officer, who, on arresting him, assured him that if he told the truth he (the officer) would give him an opportunity to escape before being delivered up to the military authorities—*held* clearly not admissible in evidence as having been induced by promise of favor on the part of a person in authority. *R. 55, 217, Dec., 1887; C. 25937, Dec. 14, 1909.*

XI A 7 b. Where a soldier charged with desertion voluntarily confesses that he has been absent without authority such confession may be used in evidence at his trial; *held*, that before the admission of the confession the *corpus delicti* must be proved. In a case of desertion the *corpus* is the unauthorized absence, the intent, which makes the difference between absence without leave as an offense and desertion, is a matter of opinion for the court to determine after considering all the evidence attainable. *C. 17635, Mar. 7, 1905.*

XI A 8. Upon a trial where the offense is drunkenness or drunken conduct charged under article 62, or drunkenness on duty charged under article 38, 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.[2] *R. 22, 635, Mar., 1867; 24, 79, Dec., 1876; 56, 165, May, 1888.*

XI A 8 a. While drunkenness is no excuse for crime,[3] and one who becomes voluntarily drunk is criminally responsible for all offenses committed by him while in such condition, yet the fact of the existence of drunkenness may be proper evidence to determine the ques-

---

[1] United States *v.* Pumphreys, 1 Cranch C. C., 74; United States *v.* Hunter, id., 317; United States *v.* Charles, 2 id., 76; United States *v.* Pocklington, id., 293; United States *v.* Nott, 1 McLean, 499; United States *v.* Cooper, 3 Qu. L. J., 42.

If an officer were to admit to a superior, in writing, the commission of a military offense and promise not to repeat the same, under the well-founded hope and belief that a charge which had been preferred against him therefor would be withdrawn, the admission thus made, in case he were actually brought to trial upon such charge, would not properly be received in evidence against his objection. Confessions made by private soldiers to officers or noncommissioned officers, though not shown to have been made under the influence of promise or threat, should yet, in view of the military relations of the parties, be received with caution. See G. C. M. O. 3, War Dept., 1876; G. O. 54, Dept. of Dakota, 1867. And compare Cady *v.* State, 44 Miss., 332.

Mere silence on the part of an accused, when questioned as to his supposed offense, is not to be treated as a confession. See Campbell *v.* State, 55 Ala., 80.

[2] People *v.* Eastwood, 14 N. York, 562; Stacy *v.* Portland Pub. Co., 68 Maine, 279; Sydleman *v.* Beckwith, 43 Conn., 12; State *v.* Huxford, 47 Iowa, 16; G. O. 42, Dept. of the Platte, 1871. Lawson on expert and opinion evidence, p. 473 et seq.

[3] Coke, in laying down the doctrine, now general, that drunkenness does not extenuate but rather aggravates the offense actually committed, says: "It is a great offense in itself." Beverly's case, 4 Coke, 123 b. So "The law will not suffer any man to privilege one crime by another." Blackstone Com., v. 4, p. 26. "The vices of men can not constitute an excuse for their crimes." Story, J., in United States *v.* Cornell, 2 Mason, 91, 111.

tion of the species or grade of crime actually committed, especially where the point to be decided is whether the accused was actuated by a certain specific *intent*. Thus the fact and measure of the drunkenness of the accused may properly be considered by the court as affecting the question of the existence of an *animus furandi* in a case of alleged larceny.[1] *R. 23, 222, Aug., 1866; 30, 337, May, 1870; C. 16402, May 31, 1904.*

XI A 9. It is a well settled rule of the common law that to sustain the charge of perjury the evidence of two witnesses or of one witness with strong corroborating circumstances is necessary to prove the falsity of the statements to which a witness has testified. *R. 12, 631, Sept., 1865.*

XI A 9 a. Under this charge testimony which consists of answers to questions going to the credit of a particular witness or of other witnesses whom he corroborated is "material to the issue." *P. 36, 359, Nov., 1889; 54, 316, July, 1892.*

XI A 10. Where a witness for the prosecution was permitted by a court-martial to temporarily suspend his testimony and leave the court room for the purpose of refreshing his memory as to certain dates, *held* that such action was irregular and the further testimony of the witness as to such dates inadmissible. By the course pursued the court and accused were prevented from knowing by what means the memory of the witness had been refreshed—whether, for instance, it may not have been refreshed by oral statements of some person or persons. *P. 24, 284, May, 1888.*

XI A 11. Evidence of the good character, record, and services of the accused as an officer or soldier is admissible in all military cases without distinction—in cases where the sentence is mandatory as well as those where it is discretionary—upon conviction. For, where such evidence can not avail to affect the measure of punishment, it may yet form the basis of a recommendation by the members of the court, or induce favorable action by the reviewing officer whose approval is necessary to the execution of the sentence. *R. 19, 35, Oct., 1865; 36, 446, 471, May, 1875.* Where such evidence is introduced, the prosecution may offer counter testimony, but it is an established rule of evidence that the prosecution can not attack the character of the accused until the latter has introduced evidence to sustain it, and has thus put it in issue.[2] *R. 28, 593, May, 1869.*

---

[1] Rex *v.* Pitman, 2 C. & P., 423; 1 Bish. Cr. L., sec. 490. So in fact the drunkenness has been held admissible in evidence in cases of *homicide* upon the question of the existence of malice as distinguishing murder from manslaughter; as also upon the question of deliberate intent to kill in States where the law distinguishes degrees of murder. State *v.* Johnson, 40 Conn., 136, and 41 id., 588; People *v.* Rogers, 18 N. York, 9; People *v.* Hammill, 2 Parker, 223; People *v.* Robinson, id., 235; State *v.* McCants, 1 Spears, 384; Kelly *v.* State, 3 Sm. & M., 518; Shannahan *v.* Commonwealth, 8 Bush., 463; Swan *v.* State, 4 Humph., 136; Pirtle *v.* State, 9 id., 663; Haile *v.* State, 11 id., 154; People *v.* Belencia, 21 Cal., 544; People *v.* King, 27 id., 509; People *v.* Williams, 43 id., 344; 3 Greenl. Ev., secs. 6, 148; 1 Bish. Cr. L., secs. 492, 493.

[2] In commencing the examination of a witness it is a *leading* of the witness and objectionable to read to him the charge and specification or specifications since he is thus instructed as to the particulars in regard to which he is to testify and which he is expected to substantiate. So, to read or state to him in substance the charge and ask him "what he knows about it," or in terms to that effect, is loose and objectionable, as encouraging irrelevant and hearsay testimony. The witness should simply be asked to state what was said and done on the occasion, etc. A witness should properly also be examined on specific interrogatories and not be called upon to make a general statement in answer to a single general question. Compare General

XI A 11 a. Without regard to any action of the defense, the judge advocate may, with the consent of the court, introduce evidence as to the sanity of the accused for the purpose of removing any doubt on that subject that may exist in the mind of any member of the court. *Held*, however, that in the absence of such doubt by any member of the court he need not introduce such evidence.[1] *C. 2994, Aug. 30, 1897.*

XI A 12. At the trial, in 1894, of an officer charged with a disorder and breach of discipline which involved the killing by him of another officer, there was offered in evidence, on the part of the accused, to exhibit the character and disposition of the officer killed, a copy of a general court-martial order of 1872, setting forth certain charges alleging dishonest and unbecoming conduct, upon which the latter officer was then tried and convicted, and the findings of the court thereon. *Held*, that such evidence was wholly inadmissible for the purpose designed. *P. 65, 270, June, 1894.*

XI A 13. Except by the consent of the opposite party, the testimony contained in the record of a previous trial of the same or a similar case can not properly be received in evidence on a trial by court-martial; nor can the record of a board of investigation ordered in the same case be so admitted without such consent. In all cases (other than that provided for by the one hundred and twenty-first article of war) testimony given upon a previous hearing, if desired to be introduced in evidence upon a trial, must (unless it be otherwise specially stipulated between the parties) be offered *de novo* and as original matter. *R. 19, 41, 1865; 27, 318, Oct., 1868.*

XI A 14 a. It is in general competent, on trials by court-martial, for the accused to put in evidence any facts going to extenuate the offense and reduce the punishment, as the fact that he has been held in arrest or confinement an unusual period before trial; the fact that he has already been subjected to punishment or special discipline on account of his offense; the fact that his act was in a measure sanctioned by the act or practice of superior authority, etc. *R. 28, 104, Aug., 1868.*

XI A 14 b. The testimony of an accused party is competent only when presented as authorized by the act of March 16, 1878, c. 37, viz, when the party himself *requests* to be admitted to testify. Such testimony is not excepted from the ordinary rules governing the admissibility of evidence, nor from the application of the usual tests

---

Orders 12, Department of the Missouri, 1862; General Orders 36, id., 1863; General Orders 29, Department of California, 1865; General Orders 67, Department of the South, 1874; General Court-Martial Orders 14, 24, Department of Dakota, 1877.

[1] U. S. *v.* Davis, 160 U. S., 469, 492, where the Supreme Court of the United States quoted with approval the following from the Supreme Court of the District of Columbia: "The principle is accurately stated by Mr. Justice Cox, of the Supreme Court of the District of Columbia as follows: 'The crime, then, involves three elements, viz, the killing, malice, and a responsible mind in the murderer. But after all the evidence is in, if the jury, while bearing in mind both these presumptions that I have mentioned—i. e., that the defendant is innocent until he is proved guilty, and that he is and was sane, unless evidence to the contrary appears—and considering the whole evidence in the case, still entertain what is called a reasonable doubt, on any ground (either as to the killing or the responsible condition of mind), whether he is guilty of the crime of murder, as it has been explained and defined, then the rule is that the defendant is entitled to the benefit of that doubt and to an acquittal.' Guiteau's case, 10 Fed. Rep., 161, 163."

of cross-examination, rebuttal, etc.[1] But an accused so testifying can not be compelled against his objection to testify or criminate himself as to an offense in respect to which he has not testified.[2] *C. 1495, July, 1895.*

XI A 14 **b** (1). As the accused is not required to testify and need not go on the stand at all, *held*, that he must, if he takes the stand, testify to all facts within his knowledge relevant to the case under the rules of evidence, as would any witness in the case.[3] *C. 18006, May 15, 1905; 18764, Nov. 9, 1910.*

On objection the accused can not be compelled on cross-examination to testify to matters not brought out on the direct examination.[4] *C. 1495, July 6, 1895.*

XI A 15. The weight of evidence does not depend upon the *number* of the witnesses. A single witness, whose statements, manner, and appearance on the stand are such as to commend him to credit and confidence, will sometimes properly outweigh several less acceptable and satisfactory witnesses.[5] *R. 35, 55, Dec., 1873.*

XI A 16. It is an important part of the judgment of the court, in a case where the evidence is conflicting, to determine the measure of the credibility to be attached to the several witnesses. In its finding, therefore, the court may, in connection with the testimony, properly take into consideration the appearance and deportment of the witnesses on the stand and their manner of testifying, especially when under cross-examination.[6] *R. 30, 383, 447, May and June, 1870.*

XI A 17 **a** (1). Muster-in rolls are primary evidence of the dates of muster in as muster-out rolls are of the dates of muster out. It is not the primary object of either muster-and-pay rolls or muster-out rolls to fix the date of muster in. They can not therefore be used to impeach the muster in as fixed by the muster-in roll. Official records are of a high class of evidence as to the facts which are recorded in them pursuant to the special objects for which they are kept, but they have not this weight as evidence with reference to other facts incidentally recorded in them.[7] *C. 9421, Dec., 1900.*

XI A 17 **a** (2) (*a*) [1] [*a*]. War Department Orders of May 15, 1894, section XV, paragraph 2, provides that "official copies of orders and other papers shall be authenticated solely by an impressed seal of the bureau issuing the same, e. g., 'Adjutant General's office, official copy.'" This provision was intended and should be construed to apply to copies of papers to be used in the administrative business of the War Department and not as evidence before courts, either civil or military. Copies so authenticated would not be admissible as evidence in civil courts. They would have to be authenticated as

---

[1] See G. C. M. O. 8, 16, Dept. of the Platte, 1879; do. 6, id., 1880; do. 34, Dept. of Texas, 1879. And compare Wheelden *v.* Wilson, 44 Maine, 11; Marx *v.* People, 63 Barb., 618; Fralich *v.* People, 65 id., 48; People *v.* McGungill, 41 Cal., 429; Clark *v.* State, 50 Ind., 514; Fitzpatrick *v.* U. S., 178 U. S., 304.

[2] See Wigmore on Evidence, vol. 3, sec. 2276.

[3] Ex parte Spies, 123 U. S., 180; and Jones on Evidence, sec. 748, 1608; and Douglass Military Law, 3d ed., sec. 264; and Fitzpatrick *v.* U. S., 178 U. S., 315.

[4] Seymour *v.* Lumber Company, 58 Fed. Rep., 957; also Balliet *v.* U. S., 129 Fed. Rep., 689; also Jacobs *v.* U. S., 161 Fed. Rep., 694.

[5] Compare Rudolph *v.* Lane, 57 Ind., 115; McCrum *v* Corby, 15 Kans., 117.

[6] That a court can not arbitrarily disbelieve and reject from consideration the statement, duly in evidence, of a witness, not clearly shown to have perjured himself, is held in the case of Evans *v.* George, 80 Ill., 51.

[7] Greenleaf Ev., 16 ed., vol. 1, secs. 491, 493. Am. and Eng. Ency. of Law, 1st ed., vol. 20, p. 513.

required by section 882, R. S. In some cases copies of papers for use as evidence before courts-martial have been authenticated in the manner specified in section 882, but in the majority of cases they have been authenticated by the official stamp of the bureau in the manner stated above. In the absence of objection, copies so authenticated by the bureau stamp would be legally admissible before courts-martial; and as courts-martial are not bound to follow strictly the rules of evidence observed by the civil courts, the Secretary of War could legally provide by regulation that in court-martial trials such copies would be admissible notwithstanding the objection of the accused.[1] *C. 8471, June, 1900; 5914, Apr. 5, 1901; 18723, Oct. 13, 1905; 15556, Dec. 29, 1908.*

XI A 17 a (2) (*a*) [1] [*b*]. The enlistment paper, the physical examination paper, and the outline card are *original* writings made by officers in the performance of duty and are competent evidence of the facts recited therein. Copies, authenticated under the seal of the War Department, according to section 882, R. S., are equally admissible with the originals.[2] *P. 61, 218, Aug., 1893; C. 8471, June 23, 1900.*

XI A 17 a (2) (*a*) [1] [*c*]. Copies of records of courts-martial authenticated under the seal of the War Department, as provided by section 882, R. S., are admissible in evidence "equally with the originals." *R. 54, 77, July, 1887.*

XI A 17 a (2) (*a*) [1] [*d*]. *Held* that papers which contain evidence of title, such as deeds, conveyances, etc., by which the United States holds lands, and which are on file in the War Department, may be proven by copies, as provided by section 882, R. S. *C. 784, Dec., 1894; 1577, July, 1895.*

XI A 17 a (2) (*a*) [1] [*e*]. The muster rolls on file in the War Department are official records and copies of the same, duly certified, are evidence of the facts originally entered therein and not compiled from other sources—subject of course to be rebutted by proper evidence that they are mistaken or incorrect. *R. 3, 523, Aug., 1863; C. 17635, Mar. 7, 1905.* So, though such rolls are evidence that the soldier was duly enlisted or mustered into the service and is therefore duly held as a soldier, they may be rebutted in this respect by proof of fraud or illegality in the enlistment or muster (on the part of the representative of the United States or otherwise), properly invalidating the proceeding and entitling the soldier to a discharge.[3] *R. 8, 488, May, 1864.*

---

[1] In accordance with these views, the following regulation by the Secretary of War was published in G. O. 91, A. G. O., 1900: "Copies of any records or papers in the War Department or any of its bureaus, if authenticated by the impressed stamp of the bureau or office having custody of the originals (e. g., 'Adjutant General's office, official copy'), may be admitted in evidence equally with the originals thereof before any court-martial, court of inquiry, or in any administrative matter under the War Department." See G. O., 198, series 1908, War Department.

[2] Compare Evanston *v.* Gunn, 99 U. S., 660; Sandy White *v.* U. S., 164 U. S., 100.

[3] But note in this connection the ruling of the Supreme Court of Massachusetts in the case of Hanson *v.* S. Scituate, 115 Mass., 336, that an official certificate from the Adjutant General's office to the effect that certain facts appeared of record in that office but which did not purport to be a transcript from the record itself, and was therefore simply a personal statement, was not competent evidence of such facts.

It was held by the United States Supreme Court in Evanston *v.* Gunn, 9 Otto, 660, that the record, made by a member of the United States Signal Corps of the state of the weather and the direction and velocity of the wind on a certain day, was competent evidence of the facts reported, as being in the nature of an official record kept by a public officer in the discharge of a public duty.

But that the entries in such rolls are not proof of the *commission of an offense*, as desertion for example.

XI A 17 a (2) (*a*) [1] [*e*] [A]. Absence without leave of a soldier may be shown by extracts from the muster rolls, covering the period of absence, authenticated in the manner specified. Of course, if the entry be that the soldier deserted or was in desertion, the entry would be evidence of the fact of absence without leave—the intent being one for the determination of the court in the light of all the facts and circumstances. An extended absence without leave, shown in this way, was unexplained, together with the fact of apprehension in civilian clothes at a point distant from the station of the soldier's company, would, it is believed, justify the court in convicting the soldier of desertion. *C. 17635, Mar. 7, 1905; 16965, Oct. 1, 1904.*

XI A 17 a (2) (*a*) [2]. A compiled statement is not admissible as evidence before courts-martial, as it is not a copy of an original record, but simply a statement of what is therein contained. *Held* that its authentication by the impressed stamp "official copy" of the bureau or office having custody of the original would be improper.[1] *C. 15556, Nov. 27, 1903.*

XI A 17 a (2) (*b*) [1]. General orders issued from the War Department or Headquarters of the Army may ordinarily be proven by printed official copies in the usual form. The court will in general properly take judicial notice of the printed order as genuine and correct. A court-martial, however, should not, in general, accept in evidence, if objected to, a printed or written *special* order, which has not been made public to the Army, without some proof of its genuineness and official character.[2] *R. 15, 216, May, 1865; C. 8471, Nov. 19, 1908, and Jan. 15, 1909.*

XI A 17 a (2) (*b*) [2]. The Morning Report Book is an original writing. To properly admit extracts in evidence, the book should be first identified by the proper custodian, and the extracts then not merely read to the court by the witness, but copied and the copies, properly verified, attached as exhibits to the record of the court. *P. 61, 218, Aug., 1893.*

XI A 17 a (2) (*b*) [3]. Copies of pay accounts (charged to have been duplicated) are admissable in evidence where the accused has by his own act placed the originals beyond the reach of process, and fails to produce them in court on proper notice. *R. 47, 269, Aug., 1883.* Similarly *held*, where the originals were in the hands of a person who had left the United States so that they could not be reached, on notice to the accused to produce them or otherwise. *R. 56, 604, Sept., 1888.*

XI A 17 a (2) (*b*) [4]. A descriptive list is but secondary evidence and not admissible to prove the facts recited therein. It is not a record of original entries, made by an officer under a duty imposed upon him by law or the custom of the service, but is simply a compilation of facts taken from other records. *P. 61, 218, Aug., 1893; C. 15556, Nov. 27, 1903; 15953, Feb. 23, 1904; 16107, Mar. 27, 1905.*

---

[1] 155 Mass., 336; and Oakes *v.* Hill, 14 Pick., 442; and 20 Pick., 345.

[2] See par. II (G. O. 198), series 1908: which provides that:

"Copies of any records or papers in the War Department or any of its bureaus, or at the headquarters of an army, corps, division, or brigade, or of a territorial division or department, if authenticated by the impressed stamp of the bureau or office of the War Department, or of the headquarters having custody of the originals (e. g., '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."

XI A 17 b (1) (*a*). To the admission in evidence of a letter written and signed by the accused (of which the introduction is contested), proof of his handwriting is necessary. *P. 61, 218, Aug., 1893.* Evidence of handwriting by comparison is not admissible at common law except where the standard of comparison is an acknowledged or proved genuine writing already in evidence in the case. A writing not in evidence and simply offered to be used as a standard is not admissible. *R. 49, 566, Dec., 1885; C. 25937, Dec. 14, 1909.*

XI A 17 b (2) (*a*). In view of the embarrassment which must generally attend the proof before a court-martial of the sending or receipt of telegraphic messages by means of a resort, by *subpœna duces tecum*, to the originals in possession of the telegraph company,[1] *advised* that the written or printed copy, furnished by the company and received by the person to whom it is addressed, should in general be admitted in evidence by a court-martial in the absence of circumstances casting a reasonable doubt upon its genuineness or correctness. But where it is necessary to prove that a telegram which was not received, or the receipt of which is denied and not proven, was actually duly sent, the operator or proper official of the company, or other person cognizant of the fact of sending, should be summoned as a witness. *R. 5, 458, Dec., 1863; 14, 259, Mar., 1865.*

XI A 17 c. Affidavits, taken *ex parte*, and not as depositions under article 91, are in no case admissible as evidence on a trial by court-martial, if objected to.[2] *R. 7, 113, Feb., 1864.*

XI A 18. Repeated false statements of the accused relative to the public moneys for which he was accountable are competent evidence going to sustain a charge of embezzlement under article 60. *R. 47, 475, Sept., 1884.*

XII A 1. Where no evidence is introduced, the general rule is that the finding should conform to the plea. *R. 37, 409, Mar., 1876; 38, 188, July, 1876.*

XII A 2. The finding on the charge should be supported by the finding on the specification (or specifications), and the two findings should be consistent with each other. A finding of guilty on the charge would be quite inconsistent with a finding of not guilty, or guilty without attaching criminality, on the specification. So, a finding of guilty upon a well-pleaded specification, apposite to the charge, followed by a finding of not guilty either of the offense charged or some lesser offense included in it, would be an incongruous verdict. *R. 4, 275, Oct., 1863; 5, 576, Jan., 1864; C. 12234, Mar. 19, 1902.* No matter how many specifications there may be, it requires a finding of guilty or not guilty on but one specification (apposite to the charge) to support a similar finding upon the charge. *R. 9, 90, May, 1864; C. 17328, Jan. 4, 1905.*

---

[1] The subject of the extent of the authority of the courts to compel telegraph companies to produce original private telegrams for use in evidence is most fully treated in an essay by Henry Hitchcock, Esq., on the "Inviolability of Telegrams," published in the Southern Law Review for October, 1879.

[2] See G. C. M. O. 10, Hdqrs. of Army, 1879; G. O. 21, Dept. of the Missouri, 1863; do. 17, Dept. of Arkansas, 1866; do. 19, Third Mil. Dist., 1867; do. 49, Dept. of Dakota, 1871.

As applied to military cases, it would be better to say, in lieu of the expression "if objected to," "unless expressly consented to by the accused with full knowledge of his rights."

XII A 2 **a.** It is not competent for a court-martial to find an accused not guilty of the specification, and yet guilty of the charge, where there is but one specification. By finding him not guilty of the specification they acquit him of all that goes to constitute the offense described in the charge. Where the court believe that the accused is guilty of the charge, but not precisely as laid in the specification, they should find him guilty of the latter with such exceptions or substitutions as may be necessary to present the facts as proved on the trial, and then guilty of the charge. *R. 5, 576, Jan., 1864.*

XII A 3. There should be a separate and independent finding upon each charge and specification, and each separate finding should cover the charge or specification as to which it is made; so that if any charge or specification is deemed by the court to be proved only in part, the finding shall show specifically what is found to be proved and what not. *R. 5, 398, Feb., 1865; 16, 73, Apr., 1865.*

XII A 4. When the accused pleads guilty to the specification and not guilty to the charge, the court is called upon to pass on the question of whether or not the specification sustains the charge as a matter of law. If it so decides, it should find the accused guilty, not only of the specification but of the charge. *P. 49, 471, Oct. 19, 1891, C. 11092, Aug. 16, 1901; 12177, Mar. 8, 1902; 12234, Mar. 19, 1902; 12375, Apr. 8, 1902.*

XII A 5. It is a peculiarity of the finding at military law that a court-martial, where of opinion that any portion of the allegations in a specification is not proved, is authorized to find the accused guilty of a part of a specification only, *excepting* the remainder; or, in finding him guilty of the whole (or any part), to *substitute* correct words or allegations in the place of such as are shown by the evidence to have been inserted through error. And provided the exceptions or substitutions leave 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. *R. 5, 576, Jan., 1864; 23, 188, Aug., 1866; C. 18764, Feb. 3, 1906; 25937, Dec. 14, 1909.*

XII A 5 **a.** Familiar instances of the exercise of the authority to *except* and *substitute* in a finding of guilty occur in cases where, in the specification, the name or rank of the accused or some other person is erroneously designated, or there is an erroneous averment of time or place, or a mistaken date, or an incorrect statement as to amount, quantity, quality, or other particular, of funds or other property, etc. *R. 13, 398, 402, Feb., 1865; 14, 228, Mar., 1865; 26, 435, Feb., 1868.*

XII A 5 **b.** In finding guilty upon a specification, to except from such finding the word or words which express the *gravamen* of the act as charged and found is contradictory and irregular. As, from a finding of guilty on a specification to a charge of fraud under article 60, to specially except the word "fraudulent" or "fraudulently," while at the same time finding the accused guilty generally upon the charge. *R. 11, 41, 44 and 81, Oct., 1864.*

XII A 6 **a.** The practice of making exceptions and substitutions in the findings is well illustrated by the finding—authorized at military law when called for by the evidence [1]—of a *lesser kindred offense*

[1] See 13 Op. Atty. Gen., 460.

included as a constituent element in the specific offense charged.[1] Of this form of verdict the most familiar instance is the finding of guilty of absence without leave under a charge of desertion. A full acquittal of desertion includes, of course, an absence without leave if it is involved in it; but where the evidence falls short of establishing a desertion but shows an unauthorized absenting of himself by the accused, he may and should, be convicted of absence without leave, as his actual offense. In arriving at this conclusion, the findings on the specification and charge should be consistent, and the finding on the former should be such as to support the latter. In their finding of guilty upon the specification, the court should in terms *except* from its application such words of the specification as allege or describe desertion exclusively, and substitute words describing the lesser offense; the words "did desert," for example, being excepted, and the words "did absent himself without authority" being substituted. The finding on the charge should regularly be "not guilty, but guilty of absence without leave."[2] *R. 7, 357, 616, 634, Mar. and May, 1864; 9, 24, 26, 46, and 49, May, 1864; 13, 655, May, 1865; C. 12177, Mar. 11, 1902; 12234, Mar. 19, 1902; 12375, Apr. 8, 1902; 12577, May 7, 1902; 18934, Dec. 11, 1905.*

XII A 6 b. It is a further peculiarity of the finding at military law that, where an accused is charged with "conduct unbecoming an officer and a gentleman," or with any specific offense made punishable by the Articles of War, and the court is of opinion that while the material allegations in the specification or specifications are substantially made out, they do not fully sustain the charge as laid but do clearly establish the commission of a neglect of military duty or a disorder in breach of military discipline as involved in the acts alleged, the accused may properly be found guilty of the specification (or specifications) and not guilty of the charge but guilty of "conduct to the prejudice of good order and military discipline." Such a form of finding is now common in our practice, especially where the charge is laid under article 61, and its legality is no longer questioned. *R. 5, 265, Nov., 1863; 9, 656, Sept., 1864; 11, 87, Nov., 1864; 29, 299, Oct., 1869; P. 64, 193, Mar., 1894.*

XII A 6 c. The authority thus to find, however, has not been extended beyond the case indicated in the last paragraph: the *reverse*, for example, of this form of finding, has never been sanctioned. A finding of guilty of a certain *specific* offense, under a charge of another specific offense, or under a charge of "conduct unbecoming an officer and a gentleman," or of "conduct to the prejudice of good order and military discipline," would be wholly irregular and invalid. Thus a finding of guilty of disobedience of orders (or of a violation of article 21) under a charge of mutiny in violation of article 22, or a finding of drunkenness on duty (or of a violation of article 38) under a charge for a drunken disorder laid under article 61 or 62, would be not only unauthorized but now almost unprecedented, and, if such a finding were made, it could scarcely fail to be formally disapproved. And so of a finding of "conduct unbecoming an officer and a gentleman" under a charge of "conduct to the prejudice of good order and military dis-

[1] Compare Reynolds *v.* People, 83 Ill., 479, and note the similar authority given in criminal cases in the United States courts, by sec. 1035, R. S.

[2] A simple finding, however, of guilty of absence without leave, though an irregular form, would amount in law to an acquittal of the higher offense charged. Compare Morehead *v.* State, 34 Ohio St., 212.

cipline." *R. 11, 274, Dec., 1864; 16, 532, Sept., 1865; C. 15114, Aug. 15, 1903.*

XII A 7. *Held* that a court may not substitute a finding of larceny on a charge of burglary. *C. 12177, May 15, 1902; 12334, Apr. 28 and May 3, 1902; 12689, May 14, 1902.* *Held* further that when a charge is laid under a specific article a finding under any other specific article is wholly irregular. *C. 15114, Aug. 15, 1903.*

XII A 8 **a** (1). To justify a conviction of a capital offense of offering violence against a superior officer under the twenty-first article of war it should be made to appear in evidence that the accused knew or believed that the person assaulted was in fact an officer in the Army and was his "superior" in rank.[1] *R. 29, 485, Dec., 1869.*

XII A 8 **a** (2). Under a charge of a violation of article 21 in offering violence to a superior officer, it should be alleged and proved that the officer assaulted was at the time "in the execution of his office." *R. 1, 462, Dec., 1862; 9, 90, May, 1864.*

XII A 8 **a** (3). Under a charge of a disobedience of the order of a superior officer in violation of article 21, it should be alleged, and should appear from the evidence introduced, that the order or "command" was "lawful." *R. 27, 488, Jan., 1869.* An officer or soldier is not punishable under this article for disobeying an *unlawful* order. *R. 26, 603, June, 1868.* But the order of a proper superior is to be presumed to be lawful, and should be obeyed, where it is not clearly and obviously in contravention of law. Unless the illegality is unquestionable, he should obey first, and seek redress, if entitled to any, afterwards. A military inferior in refusing or failing to comply with the order of a superior on the ground that the same is, in his opinion, unlawful, does so, of course, on his own personal responsibility and at his own risk. *R. 26, 256, Dec., 1867.*

XII A 8 **a** (3) (*a*). 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 characters. If not triable under the twenty-first article such disobedience may be tried under the sixty-second. *Held* that there could be no more dangerous principle in the government of the Army than that each soldier should determine for himself whether an order requiring a military duty to be performed is necessary or in accordance with orders, regulations, decision circulars, or custom, and may disobey the order if, in his judgment (taking, of course, all risks in case his judgment should be erroneous), it should not be necessary, or should be at variance with orders, regulations, decision circulars, or custom. It is his duty to obey such order first, and if he should be aggrieved thereby he can seek redress afterwards."[2] *C. 97, July, 1894.*

---

[1] See G. O. 34, Dept. of Virginia, 1863.

[2] The civil responsibility is another matter. Civil courts have sometimes made allowance for the requirements of military discipline, but, if they should not, the military obligation would remain unimpaired. The soldier, in entering the service, has voluntarily submitted himself to this double and possibly conflicting liability. The evil of an undisciplined soldiery would be far greater than the injustice (apparent rather than actual) of this principle.

XII A 9 a. Where a court in its findings substituted the words "under the influence of intoxicating liquor" for the word "drunk" in a specification under article 38, and found "not guilty" of the charge but "guilty" of conduct to the prejudice, etc., *remarked*, that such a discrimination as this finding apparently attempts, can not safely be encouraged in the disposition of cases arising under article 38. The object of the article is manifestly to enforce that measure of sobriety which is essential to the full and calm control of both the mental and physical faculties, and thus to protect the military administration from the great mischief to which it may be liable from the blunders and excesses of officers attempting to perform their duties under the influence of drink. 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; and should the condition of an officer accused of that offense not have partaken of this description, it is better that he be acquitted than that courts by endeavoring to mark degrees of drunkenness should attempt distinctions, which in practice would tend to defeat, in great measure, the purpose of the article. *Recommended*, therefore, that the findings in this instance be disapproved.[1] *R. 36, 444, Apr., 1875; 37, 118, 152, and 673, Nov., 1875, to June, 1876; 38, 272, Aug., 1876; 41, 339, July, 1878.* It is not a sufficient defense to a charge of drunkenness on duty to show that the accused, though under the influence of liquor, contrived to get through and somehow perform the duty. *R. 37, 118, Nov., 1875; C. 25940, Jan. 15, 1910.*

XII A 10 a. It is no *defense* to a charge of "sleeping on post" that the accused had been previously overtasked by excessive guard duty;[2] or that an imperfect discipline prevailed in the command and similar offenses had been allowed to pass without notice;[2] or that the accused was irregularly or informally posted as a sentinel.[3] Evidence of such circumstances, however, may in general be received in extenuation of the offense; or, after sentence, may form the basis for a mitigation or partial remission of the punishment.[4] An officer who places or continues a soldier on duty as a sentinel when from excessive fatigue, infirmity, or other disability, he is incompetent to perform the impor-

[1] This opinion and recommendation were concurred in; see the order publishing the case, G. C. M. O. 33, War Department, 1875.

Article 38 has been repeatedly construed in general orders. In G. O. No. 53, headquarters Army of the Potomac, of 1862, the general commanding, in stating that he finds it hard to understand the doubts sometimes entertained "as to the degree of intoxication which unfits a soldier for the performance of his duties," observes:

"Unfitness may be more or less complete; but to be intoxicated at all unfits a man either to give an order or to execute it."

In a subsequent general order of the same Army, No. 98, of 1862, it is said:

"Nothing can be more erroneous than to suppose that as long as an officer is not drunk to insensibility—a condition, moreover, in which he is far less apt to do mischief than when he is simply drunk enough to be indiscreet—he is not drunk at all. * * * The fullest possession of his faculties by every officer is necessary to fit him to discharge his duties properly. These duties are not so simple as to be within the competency of a half sober person."

See also G. C. M. O. 21, Dept. of the Mo., 1870; do. 48, Dept. of Va. & N. C., 1864; do. 33, Dept. of the Platte, 1871.

[2] See G. O. 74, Army of the Potomac, 1862.

[3] G. O. 10, Middle Mil. Dept., 1865; do. 166, Dept. of the South, 1864.

[4] See G. O. 10, 62, Dept. of Va. & N. C., 1863; do. 2, Northern Dept., 1865; do. 67, Dept. of Washington, 1866; do. 9, Dept. of the South, 1870; G. C. M. O. 44, Dept. of Texas, 1875.

tant duties of such a position, will ordinarily render himself liable to charges.[1] *C. 18036, May 23, 1905; 20325, Sept. 4, 1906.*

XII A 11 a. It is no defense whatever to a charge under article 61, that between the date of the refusal by the United States to pay the assignee of a duplicated voucher and the date of the arraignment of the officer or of the service of the charges, the money due has been paid, or somehow secured or made good to the assignees, or that he has been induced to withdraw or suspend his claim against the officer.[2] *P. 50, 45, Oct., 1891.*

XII A 12 a. *Held* that a specification alleging homicide, but not adding "with malice aforethought," or in terms to that effect, was pleading of manslaughter only and thus within article 62. *R. 47, 385, July, 1884.*

XII A 12 b. It is a defense to a charge under article 62 of the embezzlement defined in section 5490, R. S., as consisting in a failure to safely keep public moneys by an officer charged with the safe-keeping of the same, that the funds alleged to have been embezzled were, without fault on the part of the accused, lost in transportation or fraudulently or feloniously abstracted. *R. 1, 435, Nov., 1862.*

XII B 1 a. Under the Executive order of March 30, 1898, previous convictions "whatever their number within the prescribed period," are admissible to aid the court in determining upon the proper measure of punishment,[3] whether the limit of punishment is within or greater than the punishing power of an inferior court; but if greater the prescribed limit can only be increased on account of such convictions. (See p. 58, Manual, 1908.) The limits of punishment are, however, operative only "in time of peace." (Act of Sept. 27, 1890; Manual, 1908, p. 51.) In time of war, therefore, courts-martial are remitted to the discretion conferred upon them by the Articles of War. *C. 5781, Feb., 1899.*

XII B 1 a (1). Previous convictions except of desertion on a trial for desertion, not adjudged during the current pending enlistment of the soldier but incurred during a prior enlistment, are not admissible. *R. 56, 305, July, 1888; P. 61, 225, Aug., 1893.* Nor is evidence of a previous conviction by a *civil* court admissible in this procedure.[4] *P. 26, 380, Sept., 1888; C. 14161, Feb. 13, 1903.*

XII B 1 a (1) (*a*). Evidence of a previous conviction is not admissible where the findings and sentence were *disapproved* by the proper reviewing authority. *R. 52, 121, 508, Mar. and Sept., 1887.* As to all trials (except those had by a summary court where the post commander acts as the court, and no approval of the sentence is required by law), the term "previous conviction" means a conviction to which effect has been given by the approval of the sentence by competent authority.[5] *P. 58, 210, Mar., 1893; C. 11830, Dec. 30, 1901.*

XII B 1 a (1) (*b*). A court-martial refused to take into consideration evidence of previous convictions offered by the judge advocate

[1] See G. O. 15, Army of the Potomac, 1861; do. 62, Dept. of Va. & N. C., 1863; G. C. M. O. 59, Dept. of Texas, 1872; do. 80, Dept. of the Missouri, 1875.

[2] See the remarks of the reviewing authority in the cases published in G. C. M. O. 88 of 1886 and 56 of 1893.

[3] This provision is repeated in the new Executive order of June 12, 1905, prescribing limits of punishment, published in G. O. 204, War Dept., Dec. 15, 1908, as amended by G. O. 77, War Dept., June 10, 1911.

[4] See S. O. No. 23, Dept. of the Columbia, Feb. 1, 1905 (G. C. M. O. Rec. No. 42626).

[5] See Circ. 10, A. G. O. 1893.

on the grounds (1) that the accused had been previously punished for each offense; (2) that he had not introduced any testimony in support of his character, and, in the absence of such testimony, the rules of evidence preclude attacking the same. *Held* that such objections were not well taken.[1] *R. 50, 647, Aug., 1886.*

XII B 1 a (1) (*c*). The proper evidence of a previous conviction is the record of the trial or a duly authenticated copy of the record or of the order of promulgation. *R. 52, 508, Sept. 8, 1887.* Copy of the summary court record should be certified by the post commander or adjutant to be a true copy. *P. 64, 36, Feb. 20, 1894; 65, 170, June, 1894.* The certificate of the company commander to the fact of conviction as shown by the company records is not a legal substitute. *P. 65, 170, June, 1894.* When the proof produced is the copy furnished the company or other commander it should be returned to him and a copy attached to the record of the general court-martial before which the trial is had. *C. 208, Sept., 1894.* The statement of service required by Army Regulations to be furnished the convening authority with general charges is not evidence of previous convictions. *P. 39, 459, Mar. 20, 1890.*

XII B 1 a (1) (*d*). As the date of approval fixes the date of conviction, *Held* that the date of approval is the date which should be considered in the receipt of evidence of previous convictions. *C. 11830, Dec. 30, 1901.*

XII B 1 b. *Held* that after an acquittal evidence of previous convictions should not be presented to the court. *C. 12459, Apr. 19, 1902; 12579, May 2, 1902.*

XII B 2. In a case where its sentence is discretionary, a court-martial may impose any punishment that is sanctioned by custom of the service, although (in cases of soldiers) the same may not be included in the list of the more usual punishments contained in the Army Regulations. *R. 4, 131, 217, Sept. and Oct., 1863; 22, 555, Jan., 1867; 24, 192, 479, Jan. and Apr., 1867.*

XII B 2 a. The order prescribing maximum punishments also provides for certain substitutions of punishment. The purpose of these provisions is not only to determine the measure but also the kind of punishment, which should be considered authorized, so far as the offenses specified in the order are concerned. Thus where the prescribed limit is forfeiture and confinement, a reprimand in lieu thereof can not legally be adjudged. *C. 436, Oct., 1894.*

XII B 2 b. While a specific punishment may be *recommended* in orders to be adjudged by courts-martial in a certain class of cases, it is not competent to *order* such courts to adopt a particular form of sentence in any case. The duty and discretion of courts-martial in the imposition of punishments are prescribed and defined by the Articles of War. *R. 31, 354, May, 1871.*

XII B 2 c. While upon the conviction of an officer or soldier under a charge of a crime, such as manslaughter, robbery, larceny, etc., to the prejudice of good order and military discipline, the statute of the United States or State, providing for its punishment as a civil offense, may well be referred to as indicating the nature and extent of the punishment deemed proper for the same by the civil authori-

[1] A statute imposing heavier penalties on a person convicted of a felony, if twice before convicted of a crime, is not unconstitutional, as putting twice in jeopardy. McDonald *v.* Mass., 180 U. S., 311.

ties, the punishment to be imposed by the court-martial should nevertheless be measured less by the criminality of the act as a civil offense than by its gravity as a breach of military discipline. Thus where a soldier, having been brought to trial before a civil court for the homicide of another soldier, and inadequately sentenced, was subsequently tried by a general court-martial for the military offense involved in his act, *held* that the court would only properly impose upon him a penalty proportioned to the injury done to the good order and discipline of the service, and should not, by an excessive punishment, attempt to compensate for the overlenient judgment of the civil court. *R. 41, 188, Apr, 1878; C. 14851, July 13, 1903.*

XII B 2 **d.** Drunkenness on duty on occasions other than those specified in the order prescribing maximum punishments are offenses under the thirty-eighth article, for which maximum punishments have not been prescribed. They remain, therefore, punishable at the discretion of the court-martial as authorized by the Articles of War and the custom of the service. *P. 64, 445, Apr., 1894.*

XII B 2 **e.** *Held* in a case arising in 1898 in the Department of Porto Rico under the fifty-eighth article of war that the provision in the fifty-eighth article of war that punishment "in any such case shall not be less than the punishment provided for the like offense by the laws of the State, Territory or district in which such offense may have been committed," did not refer to the laws of Porto Rico at that time or to the laws of foreign Governments where penalties might possibly be of a nature entirely foreign to American modes of punishment. *Held* further that a court can properly under such circumstances proceed to fix such punishment as may seem adequate to the offense. *C. 5267, Nov. 7, 1898; 5848, Feb. 9, 1899.*

XII B 3 **a.** The best approved practice of military courts in determining upon their sentences is believed to be as follows: For each member to write a sentence and deposit it with the judge advocate; and (no sentence having been adopted by a majority of votes) for the court, after all the sentences have been read to it by the judge advocate, to proceed to vote upon them in the order of their severity, beginning with the least severe, until some one of those proposed is agreed upon by a majority of votes.[1] It is not *essential,* indeed, that this form of voting should be pursued—it being open to the court, in its discretion, to adopt a different one. *R. 21, 551, July, 1866; C. 15627, Dec. 7, 1903.*

XII B 3 **b.** After a conviction each member of the court should vote for a punishment appropriate to the offense of which the accused has been found guilty without regard to whether or not he believes the accused innocent or guilty. *Held* that a refusal by a member to vote a punishment after a conviction is a neglect of duty under the sixty-second article of war. *R. 30, 145, Mar. 10, 1870.*

XII B 3 **c.** Care should be taken that there be no variance in the statement of the name, etc., of the accused, between the finding or sentence and the charges. *R. 2, 545, June, 1863.*

XII B 3 **d.** A court-martial, in imposing the punishment of *reprimand,* will, if adding anything in regard to its execution, properly direct that the reprimand be administered by the commander who convened the court. A sentence to be reprimanded by an officer

[1] The practice here referred to is now, of course, modified to conform to the requirements of the act of July 27, 1892, excluding the judge advocate from closed sessions.

inferior to the convening authority is not in accordance with the approved practice of the service. It is not necessary or desirable, however, that the court should direct as to the execution of the sentence, the same being the proper province of the reviewing officer. *R. 12, 18, Oct., 1864.*

XII B 3 e (1). Pay can not be forfeited (in a sentence) by implication. If the court intends to forfeit pay, the penalty of forfeiture should be adjudged in express terms in the sentence.[1] No *other* punishment, imposable by court-martial—neither a sentence of death, dismissal, suspension, dishonorable discharge, nor imprisonment—involves *per se* a forfeiture or deprivation of any part of the pay or allowances due the party at the time of the approval or taking effect of the sentence.[2] *R. 5, 409, Dec., 1863; 16, 676, Nov., 1865; 28, 338, Jan., 1869; 30, 52, Sept., 1869; 32, 236, Jan., 1872; P. 54, 192, June, 1892; 62, 340. Nov., 1893.*

XII B 3 e (2). A court-martial, in forfeiting pay by sentence, should so fix the amount to be forfeited that the same will clearly and unmistakably appear from the sentence itself without a reference to any order or other source of information being necessary. So *held* that a sentence which required a soldier to forfeit an amount of pay sufficient to reimburse the United States for the value of certain property appropriated by him, without fixing the value of such property, was irregular, and might properly be disapproved unless corrected by the court on being reassembled for a revision.[3] *R. 37, 186, Oct., 1868.*

XII B 3 e (3). Where a soldier, on enlisting, was paid an amount of money as *local bounty*, and this money, under an existing regulation of the provost marshal general's office, adopted with a view to prevent desertion and for the safekeeping of the funds, was taken from the possession of the soldier by the military authorities, and the soldier presently deserted and was subsequently apprehended and brought to trial, *held* that the court was not authorized to forfeit this money by its sentence; the same being private property of the soldier held by the authorities, not as money due him by the United States but as a special bailment and trust for his personal benefit. *R. 22, 642, Mar., 1867.*

XII B 3 e (4). An officer on trial applied to have certain witnesses summoned from a distance and a continuance granted to await their appearance. To this the court consented on his making an affidavit setting forth material matter expected to be established by the witnesses. When these appeared it was found that they could give no material testimony upon the points indicated in the affidavit. The court, in making up its sentence upon conviction, proposed to impose upon the accused (in connection with imprisonment) a *fine* of two

---

[1] Compare Elliott *v.* Railroad Co., 9 Otto, 573.

[2] This principle is well illustrated by the opinion of the Attorney General (13 Opins., 103), concurring with an opinion of the Judge Advocate General in the case of Maj. Herod, where it was held that the fact that the accused had been sentenced to death on conviction of murder did not affect his right to his pay from the date of his arrest to that of the final action taken on the sentence by the President. And see the more recent opinion of the Attorney General of November 9, 1876 (15 Op., 175), to the effect that the pay of officers and seamen of the Navy is not divested by the operation of sentences of imprisonment or suspension, but only when forfeited in specific and express terms in the sentence.

[3] Compare case in G. C. M. O. 65, Dept. of Dakota, 1880.

hundred dollars as the estimated cost to the Government of procuring the attendance of the said witnesses. *Held* that the facts stated did not constitute a proper basis for the imposition of such fine as a punishment for the offense for which the officer was convicted. His conduct in the matter, if deemed so culpable as to constitute a military offense, should be made the subject of a separate charge to be investigated on a separate trial. *R. 29, 329, Oct., 1869.*

XII B 3 f (1) (*a*). A court-martial, in sentencing a noncommissioned officer to be reduced to the ranks, is not empowered to direct that when reduced he be transferred to another regiment or company.[1] *R. 11, 205, Dec., 1864.*

XII B 3 f (2). Loss of, or reduction in, files or steps (i. e., relative rank), in the list of the officers of his grade, is a recognized legal punishment by sentence of court-martial, in a case of a commissioned officer. Like disqualification, it belongs to the class of *continuing* punishments.[2] *R. 21, 382, May, 1866; 51, 677, Mar., 1887; P. 41, 380, July, 1890; 56, 434, Dec., 1892.*

XII B 3 f (3) (*a*). The punishment of suspension, as imposed by sentence, is usually in the form of a suspension from *rank* or from *command* for a stated term, sometimes accompanied by a suspension from *pay* for the same period. Suspension from rank *includes* suspension from command.[3] *R. 7, 8, Jan., 1864.*

XII B 3 f (3) (*b*). Like dismissal, suspension takes effect upon and from notice of the approval of the sentence officially communicated to the officer,[4] either by the promulgation of the same at his station or, where he is absent therefrom by authority, by the delivery to him of a copy of the order of approval or other form of official personal notification of the fact of the approval. *R. 27, 241, Sept., 1868; 33, 109, June, 1872; 38, 341, Oct., 1876.*

XII B 3 f (3) (*c*). Suspension from rank does not involve a status of confinement or arrest. *R. 7, 242, Feb., 1864.* In sentencing an officer to be suspended from rank, it is indeed not unusual for the court to require that he be confined during the term of suspension to his proper station, or that of his regiment, etc., i. e., that the sentence be executed there. Where this is not done, while the suspended officer is not entitled to a leave of absence, it can not affect the execu-

---

[1] The authority to order the transfer of soldiers is expressly vested by the Army Regulations in certain military commanders.

[2] See 12 Op. Atty. Gen., 547.

The effect of this punishment is to deprive the officer of such relative right of promotion, as well as right of command, and of precedence on courts or boards and in selecting quarters, etc., as he would have had had he remained at his original number. Such effect continues unless the sentence, pending its execution, is remitted.

This punishment has sometimes been remarked upon as an objectionable one, apparently mainly on account of the inequality of its effect upon other officers of the grade of the officer sentenced. Thus, where an officer is reduced a certain number of files, those below whom he is placed are advanced while those below him gain nothing. (See G. C. M. O. 25, War Dept. 1873; do. 2, Dept. of Dakota, 1873.) Where he is reduced to the foot of the list, this objection does not apply; this form of the punishment, however, where the list is a long one, is extreme and severe; more severe, often, than suspension for a fixed term.

[3] McNaghten, Annotations of the Mutiny Act, p. 17, *et seq.*

[4] Suspension, as a punishment for a *noncommissioned* officer, is not authorized in terms in art. 101, nor is it contemplated in the Army Regulations. It has been adjudged in but rare cases, and can not be regarded as sanctioned by principle or usage. But see a comparatively late instance in G. C. M. O. 33, Dept. of the East, 1872.

tion of his sentence to grant him one, and leaves of absence are not unfrequently granted under such circumstances. *R. 36, 226, Feb., 1875.*

XII B 3 **g** (1). In imposing a sentence of confinement at a military prison, the court should properly add "at such place as the proper authority may designate," or words to that effect. To direct that the place of confinement be designated by an officer inferior to the convening authority is irregular and improper. *R. 4, 356, and 5, 309, Nov., 1863; 9, 600, Sept., 1864.*

XII B 3 **g** (2). It is now established by a long series of precedents that a general court-martial is authorized to adjudge, by sentence, a term of imprisonment to extend beyond the end of the pending term of enlistment of the soldier, or beyond his legal period of service. Thus, for example, where the term of the enlistment of the accused has still a year to run, the court—the gravity of the offense justifying it—may sentence him to an imprisonment for two years or longer; so, it may sentence him to be dishonorably discharged (thus itself discontinuing his period of service), and then confined for a designated term. And such sentences may be *executed* with the same legality as any other sentence of imprisonment. In the former case the soldier will not be entitled to be released from the confinement at the end of his enlistment, nor, in the latter, will he, upon the execution of the discharge, become so entitled. In each case, upon the determination of the enlistment or service, the party continues to be held under his sentence not as a soldier but as a civilian. *R. 31, 89, Dec., 1870, 353, May, 1871; 38, 513, Mar., 1877; 39, 509, Apr., 1878.* Where the approval of a sentence of confinement in a case of a soldier, in which proceedings had been duly commenced pending his term of enlistment, was not promulgated till after such term had actually expired, but no discharge had been given to the soldier before promulgation, *held*, that it would be legal to subject him to the confinement adjudged by the sentence. *R. 19, 600, Apr., 1866; C. 11156, Sept. 12, 1901; 13378, Sept. 30, 1902; 15133, Aug. 18, 1903; 15158, Aug. 25, 1903.*

XII B 3 **g** (3). Sentences of imprisonment till a fine, also imposed by the sentence, is paid, are sanctioned by the usage of the service. *Held* that it is proper in such sentences to affix a limit beyond which the confinement shall not be continued in any event. *R. 13, 472, Mar., 1865; 20, 16, Oct., 1865; 32, 47, Oct., 1871.*

XII B 3 **g** (4). The fact that the accused has been confined for an unreasonable period awaiting trial may properly be taken into consideration by the court in estimating the period of confinement to be imposed. *R. 28, 104, Aug., 1868.*

XII B 3 **h**. The punishment of ball and chain, though sanctioned by the usage of the service, should be imposed only in extreme cases. Its remission has in general been recommended by this office except in cases of old offenders or aggravated crimes, where deemed serviceable as a means of obviating violence or preventing escape. *R. 26, 508, 631, 662, 664, Apr. and July, 1868; 28, 16, 93, July and Aug., 1868, and 501, 532, Apr., 1869.* This penalty has (as have also those of shaving the head and drumming out of the service) become rare in our Army.[1] *C. 3773, June, 1898.*

[1] See ninety-eighth article of war, which forbids sentences calling for flogging, branding, marking, or tattooing.

XII B 3 i. Courts-martial are required to adjudge dismissal upon officers of the Army by the third, sixth, eighth, thirteenth, fourteenth, fifteenth, eighteenth, twenty-sixth, twenty-seventh, twenty-eighth, thirty-eighth, fiftieth, fifty-fourth, fifty-ninth, sixty-first, and sixty-fifth articles of war, upon conviction of the specific offenses therein described. In articles 8 and 50 the punishment of dismissal is referred to as "cashiering"—a term which has almost passed out of use in our service, and when employed means no more than dismissal. *R. 7, 601, June, 1864; 34, 563, Oct., 1873.*

XII B 4 **a.** Military duty is honorable, and to impose it in any form as a *punishment* must tend to degrade it, to the prejudice of the best interests of the service. Thus *advised* that sentences imposing "guard duty" for certain periods should properly be disapproved. *R. 4, 402, Dec., 1863; 26, 507, Apr., 1868.* So *held* of a sentence imposing, in connection with a term of confinement in charge of the guard, the penalty of "sounding all the bugle calls at the post during the same period." *R. 37, 499, May, 1876.* So *held* in regard to a sentence which required a deserter—not for the purpose of making good the time lost by his desertion but as a *punishment*—to serve for an additional year after the expiration of his term of enlistment.[1] *R. 14, 396, Apr., 1865.*

XII B 4 **b.** *Held* that a sentence can not legally extend the time of the service of a soldier as such beyond the term for which he originally contracted. *P. 40, 110, Mar., 1890.* Thus the existing law fixing the term of a soldier's enlistment at five years,[2] a court-martial can have no power to prolong it by adding to such term an additional period by way of *punishment.* So a sentence "to make good, at the expiration of his term, a period of 57 days during which his services were lost to the United States by being held in hospital on account of pistol wound received by him while in the commission of a disorder in violation of the sixty-second article of war," *held* unauthorized and properly disapproved.[3] *R. 50, 413, June, 1886.*

XII B 4 **c.** *Held* that a court-martial can not legally sentence a soldier to deposit any part of his pay. *P. 32, 252, and 283, May 8 and 14, 1889; 34, 22, and 124, July 18 and 23, 1889.*

XII C. The remarking by the court, in connection with the finding or sentence, unfavorably upon an officer or soldier (other than the accused) whose conduct is exhibited by the testimony, or upon an act or practice deemed proper to be noted in the interests of military discipline, though now comparatively unusual, is sanctioned by the authorities as permissible and regular in a proper case.[4] *R. 28, 626, May, 1869; 29, 216, Aug., 1869.*

XII D. A court-martial may, in connection with its judgment, properly animadvert upon a witness not only as testifying falsely, but as giving evasive and disingenuous testimony; but the power to

---

[1] See—as in accord with the spirit of this paragraph—the following orders: G. C. M. O. 329, War Dept., 1864; G. O. 17, Dept. of the Missouri, 1861; do. 56, Army of the Potomac, 1862; do. 3, Dept. of the Northwest, 1864; do. 49, Middle Dept., 1864.

[2] Now fixed at *three* years by the act of Aug. 1, 1894.

[3] That the liability to make good time lost by desertion results from a violation of the enlistment contract, that it is independent of any punishment which may be adjudged, and that it need not be adjudged or mentioned in the sentence.

[4] See Simmons, secs. 699–707; Kennedy, 196, 7; De Hart, 182, 3; O'Brien, 268. In Jekyll *v.* Moore, 2 Bos. & Pul. 341, the expression of opinion by a court-martial, in acquitting an accused, that the prosecution had been actuated by malice, was held not to constitute a libel.

thus animadvert upon witnesses should be exercised with caution. *P. 42, 156, July, 1890.*

XII E 1. A recommendation of the accused to clemency is no part of the official record of the trial, or of the proceedings of the court *as such*, but is merely the personal act of the members who sign it. It should not therefore be incorporated with the record proper, but should be appended to or transmitted with the same as a separate and independent paper. *R. 12, 572, Sept., 1865.*

XII E 1 a. It is, of course, always discretionary with a member of a court-martial whether he will make or join in a recommendation to clemency. Members, however, will, in general, do well to refrain from subscribing recommendations where the testimony on the trial as to the merits of the case or the character of the accused fails clearly to justify a remission or mitigation of the punishment. Weak and ill-considered recommendations have not unfrequently given rise to severe criticism on the part of reviewing officers. Thus in General Court-Martial Order 92, Headquarters of Army, 1867, the Secretary of War expresses himself as "surprised to find that any officer of the court could recommend remission or commutation of the sentence of dismissal in a case where the conduct of the officer tried was as reprehensible as that of" the accused.[1] Members, in offering recommendations, should be careful to state the specific grounds upon which they base the same.[2] *R. 33, 418, Oct., 1872.*

XII E 1 b. Members of a court-martial, desiring to recommend an accused to clemency need not all sign the same statement. There may be, in any case, two or more separate recommendations each signed by different members.[3] *R. 37, 121, Nov., 1875.*

XII E 1 c. Where the members of a court-martial who had joined in a recommendation which had been appended to the record and regularly transmitted to the reviewing authority, applied to have the same withdrawn on the ground that, because of information since received, their opinions had been changed, *advised* that such a proceeding would be exceptional and irregular, and that the preferable course would be to file with the record the application and statement of the members so that the same might be referred to and considered in connection with the recommendation. *R. 33, 580, Dec., 1872.*

XII F. Where, after a sentence had been duly adjudged, and the record forwarded to the reviewing officer, a majority of the members of the court transmitted to him a written statement to the effect that the sentence was intended to have a certain meaning not conveyed

---

[1] In G. O. 36 of 1843, the Secretary of War, Hon. J. M. Porter, in reviewing a case, remarks as follows: "The practice of the members of a court-martial first finding an officer guilty, and then recommending him for clemency, is to be deprecated. It is an endeavor, too frequently made, to transfer the responsibility of their finding to the Department of War when it should rest upon the court itself." And see G. O. 342, War Dept., 1863; G. C. M. O. 27, id. 1871.

[2] In G. O. 70, Dept. of Dakota, 1870, Maj. Gen. Hancock, the reviewing authority, observes: "As the members of the court are silent with regard to the considerations by which they were influenced in making their recommendation in the prisoner's behalf, it is impossible for the reviewing authority to determine whether their reasons for making the recommendation were sufficient to justify a mitigation of the sentence. No consideration can, therefore, be paid to it. The sentence is approved, and will be duly carried into execution."

[3] A case in which there were two recommendations—one signed by a single member—is published and remarked upon in G. C. M. O. 92, War Dept., 1875.

by its terms—i. e., was not intended to operate as a forfeiture of certain pay clearly forfeited by it as recorded—*held* that such irregular statement could have no effect as a correction of the sentence; that the proposed correction could only be made by the court itself, after having been reconvened to reconsider the sentence. *R. 33, 347, Sept., 1872.*

XIII A. It is clearly contemplated by the statute law (see the one hundred and thirteenth and one hundred and fourteenth articles of war, taken from the old ninetieth article; also the later provision incorporated in section 1199, R. S.) that a court-martial shall make a formal record of its proceedings, and the Army Regulations and Court-Martial Manual direct as to the substance and form of the record in certain particulars. Upon such basis, the record of a court-martial has come to be, in our practice, a full report and recital of the details of the trial in each case, including all the testimony introduced.[1] *R. 24, 540, May, 1867; 27, 647, May, 1869; 32, 130, Nov., 1871.*

XIII A 1. It is the better practice that all the proceedings—even those that are irregular—which transpire in connection with a trial or at a revision should be set out in the record for the information of the reviewing authority. *R. 26, 251, Dec., 1867.* It is, however, not necessary to encumber a record by spreading upon it documents, or other writing or matter, excluded by the court. But the character of the writing and the grounds upon which it was ruled out should be specified. *R. 49, 614, Dec., 1885.*

XIII B. The copy of the *convening order*, directed, by Army Regulations to be "set out" in each case, should properly be prefixed to the proceedings, as constituting the initial authority for the existence and action of the court. *R. 32, 130, Nov., 1871; 33, 391, Oct., 1872.* This order should of course be complete, and should exhibit, by its heading and its subscription, that it has proceeded from a commanding officer competent to order the court. *R. 23, 636, Aug., 1867.* Where several cases are tried by the same court, a separate copy of the order should be incorporated in the record in each case: Only to prefix a single copy to the first of a series of records attached together is irregular and in violation of the regulation as well as the general rule that every record should be "complete in itself." *R. 4, 607, Feb., 1864.* Where subsequent orders have been issued, adding or relieving members or a judge advocate, or otherwise modifying the original convening order, copies of these should follow the original or be elsewhere incorporated in the record. *R. 13, 384, Feb., 1865.* In their absence it may not be possible to determine on the face of the record whether the officers who composed the court on the trial were actually or legally detailed therefor, or whether the prosecuting judge advocate, or the judge advocate who authenticates the proceedings, was so detailed. *R. 21, 488, June, 1866; C. 5323, Nov., 1898.* In connection, however, with any order making a change in the original detail of members or substituting a new judge advocate, the record should note the fact of the new member taking his seat, or new judge advocate commencing to officiate, according to the order, on a certain day. *R. 29, 604, Jan., 1870.*

XIII B 1. *Held* that the record of proceedings of a general court-martial should show the authority under which each member of the court acts as such. *C. 5331, Nov. 16, 1898.*

---

[1] Testimony taken before inferior courts-martial need not be reduced to writing.

XIII C 1. The record should show that the court met and organized pursuant to the order or orders constituting it. It is necessary, *first,* to the due organization of a general court-martial that there should assemble at the time and place indicated in the order at least a quorum, i. e., five, of the officers detailed as members. And the record should show that at least five members were present and acting, not only at the original assembling and proceeding to business as well as at the formal organization after the right of challenge has been fully exercised, but also at every day's session throughout the trial to the end. *R. 3, 413, Aug., 1863; 6, 384, Sept., 1864.* The record of the first assembling should specify the members present by name, rank, etc. A statement to the effect that the *same members* were present as at a previous *trial* by the same court is improper, as being in contravention of the rule that the record of each case should be an entirety and not made up as to any particular by a reference to a record of a previous case. *R. 3, 402, Aug. 14, 1863.* It is not, however, irregular to state at the commencement of any day's proceedings—subsequent to the day of the first session of the court in any case—that all the members and the judge advocate, without specially naming them, were present. *R. 21, 351, Apr., 1866; 26, 516, Apr., 1868.* The record should also show the presence of the accused at the time of the organization of the court for his trial, as also at all the material stages and portions of the proceedings.[1] *R. 24, 488, Apr., 1867.*

In the record of the proceedings of a court-martial at its organization for the trial of a case the officers detailed as members and judge advocate should be noted by name as present or absent. In the record of the proceedings of subsequent sessions the following form of words should be used, subject to such modifications as the facts may require: "Present, all the members of the court and the judge advocate." When the absence of an officer who has not qualified, or who has been relieved or excused as a member, has been accounted for, no further note should be made of it.[2] *P. 46, 395, Apr., 1891.*

XIII C 2. The record should show that the order or orders convening the court and detailing the members were read to the accused or communicated to him, and that he was afforded an opportunity of objecting to any member; that is to say, that the privilege of challenge, accorded and defined by the eighty-eighth article of war was extended to him. *R. 2, 83, Mar., 1863; C. 16471, June 14, 1904.* This testing of the members is the *second* essential to the due organization of the court, and, though the phraseology of the question put to the accused, or of his answer thereto, need not be given in the record, it should clearly appear either that he had (or made) no objection, or if he made any, what it was. *R. 9, 166, May, 1864.* Where a specific challenge is offered, it should, preferably, be recorded in the terms in which it is expressed by the accused; and, in connection with each challenge, the record should set forth the remarks of the member, if any, and the action of the court, as also, if an issue be joined on the challenge, the evidence, if any, introduced, and the

[1] Compare Long *v.* State, 52 Miss., 23. Should the accused escape or depart from the jurisdiction of the court, the record should so state, at the first session at which he is absent, and should the court continue the trial of the case the record should at each session show the absence of the accused.

[2] See Circular 5, A. G. O., 1891.

argument had. Where a member is added to the court at a subsequent stage of the proceedings, the record should similarly show that the accused was afforded an opportunity of objecting to him, and set forth the action taken if objection was made. *R. 8, 662, July, 1864.* It may be added that while, with the convening order, any subsequent orders by which the original detail may have been modified, should be read to the accused—the fact that other orders relating to the court, but not to its *personnel*, such as an order changing the place of meeting or an order authorizing the court to sit without regard to hours, may not have been so read, will not constitute an irregularity. It is usual, however, and proper, to read all such orders, equally with those relating to the composition of the court, in the presence of the accused. *R. 39, 239, Oct., 1877.*

XIII C 2 a. As a general court-martial controls its own proceedings, the right of challenge guaranteed to the accused by the statute can be exercised by him only when the opportunity to do so is extended by the court, and this is true whether the opportunity to exercise the right of challenge was extended to the accused by the court as a result of his request, or on the initiative of the court. There is no obligation on the part of the accused to demand his statutory rights. The obligation is on the court to see that the exercise of them is accorded to him. If, therefore, the record of the proceedings does not show affirmatively that the opportunity to exercise this statutory right of challenge was accorded the accused, no intendment can be made in favor of the regularity of the record, as the extension to the accused of the opportunity to exercise this statutory right is vital to the regularity of the proceedings, and the record of it must be shown affirmatively. *C. 18764, Oct. 23, 1907; 28190, Apr. 24, 1911.*

XIII C 3. The record should show, as the final essential to the due organization of the court, that the members and judge advocate were qualified by being duly *sworn*. And this should be shown in the record of every case tried by the same court, since the court and judge advocate must be sworn independently and anew for each trial.[1] *R. 35, 8, Apr., 1873.* The approved form for recording this proceeding is: "The members of the court and the judge advocate were then duly sworn." Any statement, however, will be legally sufficient from which it can be gathered by the reviewing officer, or presumed, that the members and judge advocate were in fact qualified as required by arts. 84 and 85. Where an absent member joins or a new member is added to the court, or the first judge advocate is relieved and a new judge advocate is detailed, at a stage of the proceedings subsequent to the original organization and qualifying, the record should show that such member or judge advocate, before acting, was sworn as above indicated.[2] *R. 3, 548, Aug., 1863; 9, 222, June, 1864; C. 5323, Nov., 1898.*

XIII D. The record should further set forth the *arraignment* of the accused on the charges and specifications, with the plea or pleas made.

---

[1] Compare Coffin *v.* Wilbour, 7 Pick., 150. "It is not considered a compliance with" Army Regulations, directing that "the court is to be sworn at the commencement of each trial," "to call several prisoners into court at the same time and swear the members of the court *once* before them all." G. O. 60, War Dept., 1873.

[2] The inversion of the proper *order* of swearing the court and judge advocate was held by the Attorney General (13 Op., 374) not to have invalidated the proceedings of a naval court-martial

If special pleas are interposed, the issue joined and action taken upon the same should be clearly stated. *R. 2, 83, Mar., 1863; 15, 546, July, 1865; C. 5166 and 5187, Oct., 1898.* The charges and specifications should properly be embodied *in* the record instead of being referred to as annexed. *R. 14, 39, Jan., 1865.*

XIII E. The record of a trial by court-martial should include a record of meetings where no business is transacted, together with a statement of the reason why none was transacted. *R. 48, 209, Jan., 1884.*

XIII F. It is not customary to take notice in the record of a mere recess; but if a recess be noted at all, it should appear from the record that, on the reassembling, the members, judge advocate, and accused were duly present. *P. 57, 418, Jan., 1893.*

XIII G. Among the minor points held by the Judge Advocate General, in connection with the subject of the form of the record, are the following: That the several stages of the proceedings of the court should appear in the record in the proper order; thus, that the swearing of the court should not be recorded before the statement as to whether the accused objected to any of the members, etc. *R. 11, 1, Oct., 1864.* That, in its statement of the opening of each day's session, the record may well mention, if such was the fact, that the proceedings of the previous day or session (if any were had in the *same* case) were read and approved. *R. 25, 349, Feb., 1868; 34, 167, Mar., 1873.* Such a reading, however, though desirable as giving the court an opportunity to make corrections, is often not resorted to. *R. 21, 679, Nov., 1866.*

XIII H. Where the court is reassembled for the purpose of a *revision* of its proceedings in any particular, the record should formally recite all that is ordered and done as a new and independent chapter of the history of the case tried. The record of a revision will properly begin with setting forth a copy of the order reconvening the court, and will show that at least five members assembled, together with the judge advocate, and, where the correction required is such as to make it proper that he be present, the accused. The record will further show the action taken by the court, in making the correction or otherwise, under the order, and the proceeding will be finally authenticated by the signatures of the president and judge advocate. *R. 1, 487, Dec., 1862; 2, 97, Mar., 1863; 9, 653, Sept., 1864; 11, 93, 113, Nov., 1864; 15, 547, Aug., 1865; 17, 402, and 19, 135, Oct., 1865.* Where the court decides upon making the correction, the same should be *declared to be made* in manner and form as determined upon and with the proper reference to the part of the original proceedings in which the error occurs. The error itself, however, is to be left as originally recorded; all corrections in the body of the record by erasure, interlineation, etc., being irregular and improper. *R. 11, 93, supra; R. 16, 202, May, 1865; P. 23, 345, Apr., 1888.*

XIII I. When the court closes, the record should properly set forth that the judge advocate *withdrew.* (Act of July 27, 1892, 27 Stat., 278.) But an absence of a statement to this effect will not impair the legal validity of the record. Where it simply appears from the record that the court "closed," the presumption will be that, in closing, the requirements of law were observed. *P 56, 387, Nov., 1892; 65, 350, 356, June, 1894; C. 114, Aug., 1894.*

XIII K. The record should fully set forth all the *testimony* introduced upon the trial—the oral portion as nearly as practicable in the precise words of the witness. *R. 2, 23, Feb., 1863.* For a judge-

advocate to assume to record only such testimony as he considered material, or to summarize the testimony given, has been remarked upon as a gross irregularity. *R. 3, 189, July, 1863; 20, 42, Oct., 1865.*

It is usual and proper (though not essential) to specify by which party the witness is introduced and by whom the questions are put. *R. 34, 435, Sept., 1873.* It is also usual (though not essential) to designate the point at which the prosecution is closed and the testimony for the defense is commenced. *R. 4, 131, Sept., 1863.* It should appear that each witness (whether or not his evidence was important) was duly sworn (*R. 3, 550, Aug., 1863; 21, 43, Nov., 1865; 34, 457, Sept., 1873*), but it is not customary to add that he was sworn in the presence of the accused; this fact that he was so sworn being presumed in the absence of any statement to the contrary.[1] *R. 9, 166, May, 1864.* Objections taken to the admissibility of testimony should be set forth with the argument had thereon, if any, and the ruling of the court (*R. 26, 643, July, 1868*); and where the court is *closed* on any interlocutory objection, the fact will properly be noted. *R. 9, 221, June, 1864.*

The record need not show affirmatively that the accused was offered an opportunity to cross-examine. Where it appears that he did *not* cross-examine, the presumption will be that he waived the privilege. So, the record need not state that the accused was notified of his privilege of being assisted by counsel. *P. 44, 456, Jan., 1891. Held* that where the accused party desires to be sworn, and testifies in his own defense, his testimony is recorded like that of any other witness. *C. 18764, Nov. 9, 1910.*

XIII L. The record of each case tried by a court-martial—where several cases are tried thereby—should "be complete in itself" and as much an entirety, both in form and in substance, as if it were the only case tried. Each record should be separate and distinct from every other record, containing all that is essential to an original and independent official paper, and so perfected as to leave no material detail to be supplied from any previous or other record. The proceedings in each case should be made up separately; records therefore should not be attached together, but should be prepared and transmitted as disconnected documents. *R. 3, 402, and 413, Aug., 1863; 19, 336, Jan., 1866; 32, 130, Nov., 1871, and 453, Apr., 1872.* Where a *sentence* is pronounced, the record should contain everything necessary to sustain it in fact and in law. *R. 2, 59, Mar., 1863.*

XIII M. In a case of a death sentence the record should state that it was concurred in by two-thirds of the members. *R. 1, 487, Dec., 1862; 2, 21, Feb., 1863; 4, 158, Sept., 1863.*

XIII N. The record should set forth the *finding* on each of the several charges and specifications (*R. 9, 221, June, 1864; C. 5166 and 5187, Oct., 1898*), and the proper entry as to previous convictions (*C. 3097, Apr., 1897*).

XIII O. It is not essential that the record of the court should show that the judge advocate called the attention of the accused to the fact of his privilege of testifying in his own behalf. General Order 75 of 1887 requires only that this be done "before the assembling of the court." *P. 36, 185, Oct., 1889.*

---

[1] There is, however, no statutory requirement that a witness should be sworn in the presence of the accused.

XIV A 1. This term (reviewing authority) is employed in military parlance 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, etc., the sentence. This officer is ordinarily the commander who has convened the court. In his absence, however, or where the command has been otherwise changed, his successor in command, or, in the language of articles 104 and 109, "the officer commanding for the time being," is invested (by those articles) with the same authority to pass upon the proceedings and order the execution of the sentence in a case of conviction. *R. 13, 468, Mar., 1865.*

XIV A 2. A separate brigade was merged into a division. *Held* that the division commander became the reiviewng authority in cases tried by courts which had been convened by the separate brigade commander. *C. 5151, Oct. 15, 1898; 5231, Oct. 31, 1898; 5274, Nov. 9, 1898; 5294, Nov. 8, 1898.*

XIV A 3. Where the men who had been tried by general court martial had passed, with their command, from the department in which they had been tried, before action had been taken on their cases by the reviewing authority, it was *held* that the commanding general of the department in which they had been tried was the proper reviewing authority for the cases.[1] *C. 4942, Sept. 9, 1898.*

XIV B. In acting upon the proceedings of a court-martial, the legal reviewing officer acts partly in a judicial and partly in a ministerial capacity. He "decides" and "orders," and the due exercise of his proper functions can not be revised by superior military authority. Thus *held* that a reviewing officer who had duly acted upon a sentence and promulgated his action in orders, could not be required by a higher commander, or by the Secretary of War, to revoke such action. If the sentence be deemed unwarranted or excessive, relief may be extended through the power of pardon or remission; if void for want of jurisdiction or other cause, it may be set aside. *R. 49, 264, Aug., 1885; 50, 553, July, 1886; C. 11509, Nov. 8, 1901; 17386, Jan. 14, 1905; 21613, June 1, 1907.*

XIV C. A military commander can not of course delegate to an inferior or other officer his function as reviewing authority of proceedings or sentence of a court-martial, as conferred by the one hundred and fourth or one hundred and ninth article of war or other statute. Nor can he regularly authorize a staff or other officer to subscribe for him the action, by way of approval, disapproval, etc., which he has decided to take upon such proceedings. An approval purporting to be subscribed by the commander, "*by*" his staff judge advocate or other staff officer, would be open to question and quite irregular; as would also be any action subscribed by such an officer, purporting to be taken "in the absence and by the direction of" the commander. *R. 4, 567, Jan.. 1864; 7, 19, and 8, 639, July, 1864; 9, 27, May, 1864; 15, 548, July, 1865; 17, 191, Aug., 1865; 27, 297, Oct., 1868; 37, 429, Mar., 1876.*

[1] The same view was *held* in 1901 in a case arising in China where the prisoner had been sent, with his command, to the Philippine Islands. *Held* that the department commander in the Philippine Islands was the "successor in command" of the general in China.

XIV C 1. *Held*, that in the event of the criticism by the reviewing authority of an individual being made the subject of an action at law he could not plead that his comment was protected by official privilege. *C. 14402, July 9, 1903.*

XIV D. A soldier was dishonorably discharged and thereafter the record of another trial of the same soldier on different charges, which trial was completed before he was dishonorably discharged, was placed before the reviewing authority. *Held* that as he was not then in the service the reviewing authority had no right to approve the second sentence. Further *held* that the act of June 18, 1898 (30 Stat., 483), which provides "that soldiers sentenced by court-martial to dishonorable discharge and confinement shall, until discharged from such confinement, remain subject to the articles of war and other laws relating to the administration of military justice," did not apply to his case as he was tried for offenses which he was alleged to have committed before he was dishonorably discharged. *C. 13926; Jan. 12, 1903.*

XIV E. As an acquittal is a sentence in the sense that the latter word is used in civil jurisprudence, ordinarily meaning judgment, *held* that an acquittal similar to a sentence which carries punishment is *inchoate* until acted on by the reviewing authority, and may be returned by the reviewing authority for reconsideration by the court. *C. 5654, July 24, 1899.*

XIV E 1. A reviewing officer can not himself correct the record of a court-martial [1] by striking out any part of the finding or sentence, or otherwise; nor can he in general change the order in which different penalties are adjudged by the court to be suffered. He may, however, in general, specify the reasons for the action taken by him, without transcending his authority. Thus, where a department commander disapproved a sentence as inadequate and, in stating his grounds for so doing, commented unfavorably upon the conduct of the accused as indicated by the evidence, *held* that such comments were a legitimate explanation of the action taken and did not constitute an adding to the punishment.[2] *R. 19, 676, Aug., 1866; C. 14260, Mar. 25, 1903.*

Held that in case of a conviction of desertion the action of the reviewing authority in approving so much only of the finding as convicted the accused of the included offense of absence without leave was unauthorized, as the reviewing authority thereby substituted a finding for that of the court. *R. 47, 291, Aug., 1883; P. 48, 445, Oct., 1891; 62, 454, Dec., 1893.*

Held, where a court had found an accused "guilty, but without criminality," and the reviewing authority in disapproving this contradictory finding ordered that the words after the word "guilty" be treated as struck out of the record, that he had no such authority to make such correction in the record, and that if he desired to amend the record he should have formally reconvened the court for that purpose. *R. 12, 250, Jan. 11, 1865.*

XIV E 2. It is a principle of military law that no military authority, whether the reviewing officer or other commander, can *add to a punishment* as imposed by a court-martial. *R. 2, 446, 525, May and*

[1] See 23 Op. Atty. Gen., 23.

[2] See as a marked instance of such comments, G. C. M. O. 104, Navy Dept., Sept. 13, 1897.

June, 1863: 11, 310, Dec., 1864. Neither forfeiture of pay, for example, nor fine, nor a corporal punishment, can be inflicted upon an officer or soldier where the sentence fails to adjudge it. And neither the fact that the punishment awarded by the court is regarded as an *inadequate* one,[1] nor the fact that the period is a time of *war*, can affect the application of the principle. *R. 8, 444, 557, May and June, 1864; 20, 430, Feb., 1866; 21, 257, Mar., 1866; C. 8977, Sept. 17, 1900.* Thus, where the punishment imposed by the sentence was to carry a weight of 20 pounds, *held* that it would be illegal for the officer charged with the execution of the sentence to increase the weight to 30 pounds. *R. 27, 511, Feb., 1869.* So where the sentence imposed simply a forfeiture of pay, *held* that it was adding to the punishment to order the confinement of the accused in a military prison. *R. 11, 98, Nov., 1864; 20, 340, Feb., 1866.* So *held* that a sentence of simple "confinement" for a certain time did not authorize the imposition, in connection with its execution, of hard labor. *R. 21, 310, Apr., 1866.* Where an officer, on conviction of the embezzlement of a certain sum, was sentenced, without further penalty, to be dismissed the service, *held* that the department commander, in approving the sentence, could not legally order him to be confined at his station till he should make good the amount embezzled, since this would be an adding to the punishment imposed by the court, as well as an illegal exercise of power over a civilian. *R. 28, 122, Sept., 1868; C. 14260, Mar. 25, 1903.* Where a sentence adjudges a fine without also adding (with a view to enforcing its payment) a term of confinement, such a confinement can not of course legally be imposed by the military commander. *R. 13, 472, supra.* So *held* that paragraph II of General Order 61, War Department, 1865, to the effect that where a court-martial, in imposing a fine, has failed to require that the prisoner shall be confined till the fine is paid, "he will not be released without orders from the War Department, except on payment of the fine," transcended the authority of an Executive order, such a requirement being a *punishment*, which can be prescribed only by sentence of court-martial. *R. 33, 309, Aug., 1872.*

XIV E 2 a. Nor can penitentiary confinement be legalized as a punishment for purely military offenses by *designating* a penitentiary as a "military prison," and ordering the confinement there of soldiers sentenced to imprisonment on conviction of such offenses. *R. 35, 377, May, 1874; 39, 659, Sept., 1878.*

XIV E 3. It is no longer necessary that the *findings* of a court-martial should be expressly approved. Formerly the one hundred and fourth article of war prescribed that no sentence of a court-martial should be carried into execution until the whole proceedings were approved by the reviewing authority, but now, as amended by act of July 27, 1892 (27 Stat., 278), it simply requires that the sentence shall be approved by such officer, and this applies as well in cases requiring confirmation of the President as in those that do not. *C. 2844, Jan., 1897; 5095, Oct. 8, 1898; 12723, June 21, 1903.*

XIV E 4 a. Where the reviewing officer deems that the proceedings of the court are in any material particular erroneous or ill-advised, his proper course in general will be to reconvene the court for the purpose of having the defect corrected, at the same time furnishing it with the grounds of his opinion. Thus if he regards

[1] Compare Barwis *v.* Keppel, 2 Wilson, 314.

the sentence inadequate, he should, in reassembling the court for a revision of the same state why he so considers it. *R. 11, 490, Feb., 1865.* While he can not compel the court to adopt his views in regard to the supposed defect, he may, in a proper case, express his formal disapprobation of their neglect to do so. Thus where a court martial, on being reconvened with a view of giving it an opportunity to modify a sentence manifestly too lenient for the offense found, decided to adhere to the sentence as adjudged, and, on being again reassembled to consider further grounds presented by the reviewing commander for the infliction of a more severe penalty, again declined to increase the punishment, *held* that it was within the authority of the reviewing officer, and would be no more than proper and dignified for him, in taking final action upon the case, to reflect upon the refusal of the court as ill-judged and as having the effect to impair the discipline and prejudice the interests of the military service.[1] *R. 4, 579, Jan., 1864; 12, 546, Aug., 1865; C. 14260, Mar. 25, 1903.*

XIV E 4 b. The general finding of "conduct to the prejudice," etc., on a charge of "conduct unbecoming" is sanctioned in order to prevent a failure of justice, not for the purpose of relieving the accused of any of his due share of culpability. It should not therefore be resorted to where the specific offense charged is substantially made out by the testimony. Thus in a case where the facts set forth in the specification to a charge of "conduct unbecoming an officer and a gentleman," and clearly established by the evidence, fixed unmistakably upon the accused dishonorable behavior compromising him officially and socially, *held* that a finding by the court that he was guilty only of "conduct to the prejudice of good order and military discipline" should not be approved. In such a case the court should be reconvened for the purpose of inducing, if practicable, a finding in accordance with the facts and with justice. *R. 30, 495, July, 1870.*

XIV E 4 c. Where the offense is alleged to have been committed on a particular day, and the evidence shows that it was committed on quite a different day—in such case, provided time is not of the *essence* of the offense and the specific act charged is sufficiently identified by the other testimony, the variance between the allegation and the proof will not constitute a fatal defect and need not induce a disapproval of the sentence where there has been a conviction. A return, however, of the record to the court for correction, if practicable, would well be resorted to by the reviewing officer before taking final action.[2] *R. 13, 361, Feb., 1865.*

XIV E 5. There is always a presumption, in the absence of obvious irregularity, that the proceedings were regular and according to law. *P. 44, 456, Jan., 1891.*

XIV E 6. Where the record of the trial of a soldier who had pleaded not guilty, and in whose case considerable evidence had been introduced, was, by a casualty of war, lost before any action had been taken upon the sentence by the reviewing authority, *held* that, unless the court could be reconvened and a new record could be made out from extant original notes, the proceedings, inasmuch as they could not be intelligently reviewed or formally approved, should properly

[1] See G. C. M. O. 88, A. G. O., 1864.
[2] See, to the same effect, G. O. 16, War Dept., 1853.

be considered as inoperative and the sentence of no effect. *R. 6, 582, Dec., 1864.*

Similarly *held* that the complete destruction of the record by fire, rendering impossible the preparation of the record from notes, before action by the reviewing authority, operated as an acquittal. *P. 55, 181, Aug., 1892; 65, 338, June, 1894.*

Similarly *held* where the stenographic notes, the only record of the proceedings, were lost. *C. 24198, Dec. 7, 1908, and Jan. 12, 1912.*

XIV E 7 a. A misnaming or misdescription of the rank of the accused in the specification should be taken advantage of by exception in the nature of a plea in abatement. Where not objected to, the error is immaterial after sentence, provided the accused is sufficiently identified by the plea, testimony, etc. *R. 37, 482, Apr., 1876.*

XIV E 7 a (1). A mere clerical error in the spelling of the name of the accused, leaving it *idem sonans*, is not a case of misnomer and does not affect the validity of the proceedings as recorded. *P. 25, 234, June, 1888.*

XIV E 7 b. Where time or place is omitted to be averred, or is averred without sufficient definiteness, and the defect is excepted to by the accused on being called upon to plead, the court will properly direct that an amendment be made. But where in either such case no objection is interposed by the accused, the proceedings will be sufficient in law provided the time and place of the offense can be made out with reasonable certainty from the testimony in connection with the specifications. *R. 14, 635, and 16, 298, June, 1865; 20, 280, Jan., 1866; 26, 412, Jan., 1868.*

XIV E 7 c. For some time after the enactment in 1874 of the present Articles of War, charges were not infrequently laid under articles by their old numbers—as "violation of the ninth" (old number), instead of the twenty-first (new number) "article," or "sleeping on post, in violation of the forty-sixth" (old number), instead of the thirty-ninth (new number) "article." *Held*, in such cases, that the error was one which could only be taken advantage of by an objection in the nature of a plea in abatement—whereupon indeed an amendment could at once be made—and that, in the absence of such objection, the mistake was to be treated as immaterial after finding and sentence. *R. 37, 313, Feb., 1876; 38, 495 and 552, Apr., 1877.*

XIV E 7 d. *Held*, that the fact that the judge advocate was personally objectionable or hostile to the accused could not affect the validity of the proceedings of a court-martial. *R. 27, 127, Aug., 1868, and 43, 106, Dec., 1879.*

XIV E 7 e. The fact that an accused soldier was tried with hands or feet in shackles, or with ball-and-chain attached, these having been omitted to be removed during the hearing before the court, does not, however reprehensible, affect the legality of the proceedings or sentence. *R. 50, 33, Feb., 1886; 53, 196, Oct., 1886; 55, 686, July, 1888.*

XIV E 7 f. That a member of the court acted as interpreter on a trial, *held* an irregularity, but one which did not affect the legality of the proceedings. *R. 9, 15, May, 1864.*

XIV E 7 g. 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. Before proceeding to deliberate upon its finding, the

court should require the reporter or clerk, if it has one, to withdraw. But the fact that the finding or sentence, or both, may have been made known to the reporter or clerk of a court-martial, can not affect the legality of its proceedings or sentence. *R. 5, 478, Dec., 1863; 11, 318, Dec., 1864; 28, 146, Oct., 1868; 42, 218, Mar., 1879.*

XIV E 7 **h.** While the practice of noting the adjournment of the court at the end of the record of a trial is usual and proper, and is often of service in indicating the sequence of the cases tried and the course and order of the business transacted, a statement of such adjournment is not an essential part of the record of proceedings, and its omission will not affect their legality. *R. 23, 627, Aug., 1867; 33, 456, Nov., 1872.*

XIV E 7 **i.** 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 its president and judge advocate. The court as a whole is responsible for the record; 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 a clerk. So, where a clerk or reporter, appointed and sworn to keep the record, did not act, but the record was prepared by the judge advocate or some other person employed by him to assist him, *held*, that this circumstance did not affect the legality of the record as finally approved by the court. *R. 43, 346, June, 1880.*

XIV E 8 **a** (1). In passing upon the findings and sentence of a court-martial, the reviewing officer will properly attach special weight to its conclusions where the testimony has been of a conflicting character. This for the reason that, having the witnesses before it in person, the court was qualified to judge, from their manner in connection with their statements, as to the proper measure of credibility to be attached to them individually.[1] *R. 30, 383, 447, May and June, 1870; 35, 542, Aug., 1874; 38, 272, 325, Aug. and Sept., 1876; C. 24518, Apr. 10, 1909.*

XIV E 8 **a** (2). A sentence, to be valid, must of course rest upon an approved finding of guilty of an offense for which the accused has been tried. Thus a duly approved finding of guilty on *one* of several charges, a conviction upon which requires or authorizes the sentence adjudged, will give validity and effect to such sentence although the similar findings on all the other charges are disapproved as not warranted by the testimony. Where such a sentence, though legally supported by the finding upon the single charge, is deemed too severe a punishment for the one offense, it may of course be mitigated by the proper authority. *R. 11, 67, and 12, 30, Oct., 1864; 16, 70, Apr., 1865.* But a finding of guilty of a *specification* to a charge but not guilty of the charge itself will not support a sentence unless, indeed, there is added a conviction of some lesser offense included in that charge. *R. 7, 600, Apr., 1864; 9, 19, May, 1864; C. 11092, Aug. 16, 1901; 16101, Apr. 21, 1904.*

XIV E 9 **a** (1). *Held* a good ground for the disapproval of a sentence that the court denied the request of the accused to have summoned a

[1] See the early case of Capt. Weisner, Am. Archiv., 5th series, Vol. II, p. 895. So, civil courts will rarely interfere, except in cases of clear injustice, with verdicts of juries which have turned upon the credibility of witnesses. Wright *v.* State, 34 Ga., 110; Whitten *v.* State, 47 id., 297.

clearly material and important witness whose testimony would not have been merely cumulative.[1] *R. 49, 18, Apr., 1885.*

XIV E 9 a (2). If a member, absent during the whole of the original proceedings had in a trial, is in fact present during proceedings had on revision to reconsider the sentence, the revised sentence is clearly illegal and should be disapproved. *C. 4742, 4750, 4751, 4854, and 4855, Aug., 1898.*

XIV E 9 a (3). A material variance between the name of the accused in the specification and in the sentence should, if possible, be corrected by a reassembling of the court for a revision of its sentence. If this be rendered impracticable by the exigencies of the service, the sentence should in general be disapproved as fatally defective. Thus, *held,* in a case where the names in the sentence and the specification were entirely different, the one being John Moore and the other James Cunningham (*R. 17, 601, Feb., 1866*); also in cases in which, while the surnames were the same, the Christian names were quite different, one being George and the other William, etc. (*R. 9, 27, 134, May, 1864*); also in a case where the name in the sentence, though similar to that in the specification, was not *idem sonans,* as where the accused was arraigned upon charges in which he was designated as Woodworth, but was sentenced under the name of Woodman. *R. 2, 555, June, 1863.* A difference, however, in a middle initial is not a material variance, a middle name not being an essential part of the Christian name in law.[2] *R. 13, 481, Mar., 1865; C. 9066, Oct., 1900; 12396, Apr. 9, 1902.*

XIV E 9 a (4). Where the charges against a private soldier were preferred by the captain of his company, who also acted not only as a prosecuting witness but as interpreter on the trial, *held* a grave irregularity which might well induce a disapproval of the proceedings and sentence unless it quite clearly appeared that no injustice had been done the accused.[3] *R. 7, 562, Apr., 1864.*

XIV E 9 a (5). It does not invalidate the proceedings of a court-martial that a member who has been present during a portion of the trial, and has then absented himself during a portion, has subsequently resumed his seat on the court and taken part in the trial and judgment. Nor is the legality of the proceedings affected by the adding of a *new* member to the court pending the trial. In either case, however, the testimony which has been introduced and the material proceedings which have been had while the new or absent member was not present should be communicated to him before he enters or reenters upon his duties as a member. Such was the ruling of the Secretary of War on Gen. Hull's trial,[4] and this precedent was followed in

---

[1] See G. C. M. O. 128, A. G. O. of 1876.

[2] That the law "recognizes but one Christian name," and that the insertion or omission of a middle initial or initials "will have no effect in rendering any proceeding defective in point of law," see 2 Op. Atty. Gen., 332; 3 id., 467; also Franklin *v.* Tallmadge, 5 Johns., 84; Roosevelt *v.* Gardinier, 2 Cow., 463; State *v.* Webster, 30 Ark., 168.

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

[4] See the reply dated Mar. 17, 1814, of the Secretary of War, Hon. John Armstrong, to the communication of the "acting special judge advocate," Hon. Martin Van Buren, submitting questions for the court. (Forbes' Trial of Hull, Appendix, pp. 28–29.) It was indeed held by Atty. Gen. Berrien (2 Op. 414) that a member of a court-martial who has absented himself during the taking of testimony is disqualified

repeated, though not frequent, cases during the Civil War. For a member, however, who has been absent during a substantial part of a trial to return and take part in a conviction and sentence is certainly a marked irregularity, and one which may well induce a disapproval of the findings and sentence in a case where there is reason to believe that the accused may have suffered material disadvantage from the member's action. *R. 7, 128, 411, 467, Feb. and Mar., 1864; 8, 662, July, 1864; 27, 584, Mar., 1869; C. 18305, Oct. 28, 1905; 22162, Oct. 5, 1907.*

XIV E 9 **a** (6). A direction in an order convening a general court-martial that if the judge advocate be prevented from attending, the junior member of the court will act in his stead, *held* irregular and improper; the function of a judge advocate as prosecuting officer (see art. 90) not being properly compatible with that of a member of a court-martial. And the member having acted as judge advocate and member in the case, *advised* that the proceedings be disapproved by the reviewing authority. *R. 2, 60, Mar., 1863; 21, 300, Mar., 1866.* A court-martial has of course no authority to direct or empower its junior member or any other officer to act as its judge advocate. *R. 28, 198, Oct., 1868.*

XIV E 9 **a** (7). A witness who has given his testimony should in general be allowed to modify the same where he desires to do so in a material particular. But where the court has refused to permit a witness to correct his statement as recorded, such refusal need not induce a disapproval of the proceedings unless it appear that the rights of the accused have thus been prejudiced. *R. 7, 451, Mar., 1864.*

XIV E 9 **a** (8). *Held* that a sentence of two months' confinement, which prescribed that the confinement for two days out of every three should be solitary, was unauthorized as transcending the proportion fixed by the Army Regulations; such sentence in fact requiring that the confinement should be solitary for 40 days out of 60, while the regulations authorize but *eighty-four* days of solitary confinement in an entire year. *R. 28, 329, Jan., 1869.*

XIV E 9 **a** (9). A sentence which, in imposing confinement (or imprisonment—the two terms being practically synonymous in sentences of courts-martial), fails clearly to indicate how long the same is to continue is irregular and inoperative. Such a sentence should be disapproved by the reviewing authority unless it can be procured to be corrected by a reassembling of the court for the purpose. *R. 16, 283, June, 1865.*

XIV E 9 **a** (10). Where a court-martial sentenced a soldier, in connection with confinement, to be dishonorably discharged at such date as might be fixed by the reviewing officer, *advised* that such a sentence

---

to take part in the sentence. Atty. Gen. Cushing, however, held in a later opinion (7 Op. 98) that whether the absent member should resume his seat and act upon his return "must depend upon his own views of propriety."

The Court-Martial Manual provides (p. 26, edition of 1898) that "no member who has been absent during the taking of evidence shall thereafter take part in the trial." This provision was at first viewed as mandatory and a failure to comply with it held to invalidate the sentence adjudged, but later the War Department apparently treated it as directory (see Circ. 21, A. G. O., 1899). It was, however, manifestly intended to enjoin a complete abandonment of the practice referred to in the text.

was illegal, as devolving upon the reviewing officer a duty pertaining to the court.[1] *R. 33, 401, Oct., 1872.*

XIV E 9 a (11). In a case where a court-martial made such exceptions and substitutions in its finding upon the specification to a charge of "forgery to the prejudice of good order and military discipline" as to negative the material allegation of false writing, *held* that there was no legal basis for the finding arrived at of guilty of the charge. *P. 31, 117, Mar., 1889.*

XIV E 9 a (12). *Held* that a finding, under a charge of desertion, of not guilty of desertion but guilty of a violation of the fortieth article of war, was not allowable and should be disapproved; the offense made punishable by that article—quitting guard, etc.—not necessarily being or involving an absence without leave in the military sense, and the finding not being necessarily a conviction of the absence without leave contained in desertion. *R. 57, 22, Oct., 1888; C. 15114, Aug. 15, 1903.*

XIV E 9 a (13) (*a*). A soldier in time of war committed an offense under the fifty-eighth article of war and charges were preferred. *Held* that if peace was declared before the charges were brought to trial the court would have no jurisdiction of the charges under the fifty-eighth article of war. *Held* further that if peace was declared before the sentence was imposed that the court was without jurisdiction in the proceedings and that the sentence was illegal and should be set aside. *R. 24, 42, Dec., 1866; C. 4916, Sept., 1898; 6738, July 13, 1899; 13309, July 25, 1902; 13653, Nov. 13, 1902; 13770, Dec. 6, 1902; 14882, June 25, 1903; Jan. 4, 1904; 16596, Feb. 10, 1905.* *Held* further that if peace was declared before the record had reached the reviewing authority, he could not legally act on the case, as the fifty-eighth article of war is inoperative in time of peace. *C. 13653, Feb. 18, 1903.*

XIV E 9 a (13) (*b*). *Held*, where the court awarded a less punishment under the fifty-eighth article of war than that prescribed for the offense by the local law, that the sentence was illegal and inoperative. *C. 11332, Nov. 19, 1901; 11658, Nov. 26, 1901; 11757, Dec. 13, 1901; 12136, Apr. 10, 1902; 12213, Mar. 13, 1902; 12219, Mar. 15, 1902; 12286, Mar. 22, 1902; 12400, Apr. 10 and Aug. 18, 1902, and 12456, Apr. 18, 1902.*

XIV E 9 a (14). It is an accepted principle of interpretation that under those articles of war which prescribe the sentence of dismissal upon conviction no punishment in addition to dismissal is authorized. *Held* therefore that all punishment in addition to dismissal should be disapproved upon conviction of an offense under the thirty-eighth article of war (*R. 14, 330, Mar., 1865*); or of the sixty-first article of war (*R. 4, 283, Oct., 1863; 9, 672, Oct., 1864; 14, 330, Mar., 1865; C. 25078, June 9, 1909*); or of the sixty-fifth article of war (*R. 8, 296, Apr., 1864*).

XIV E 9 a (15). The fact that a sufficient cause of challenge exists against a member but, through ignorance of his rights, is not taken advantage of by the accused, or if asserted is improperly overruled by the court, can affect in no manner the validity in law of the proceedings or sentence, though it may sometimes properly furnish occasion for a disapproval of the proceedings, etc., or a remission

[1] See an opinion to this effect, published, as approved by the Secretary of War, in G. O., 90, War Dept., 1872.

in whole or in part of the sentence.[1] *R. 8, 534, June, 1864; 9, 258, June, 1864; 20, 18, Oct., 1865; 37, 315, 491, Feb. and Apr., 1876; 39, 240, Oct., 1877.*

XIV E 9 a (16). Where "reasonable cause" is, in the judgment of the court, exhibited, the party is entitled to *some* continuance under article 93. A refusal, indeed, by the court to grant such continuance will not invalidate the proceedings, but, if the accused has thus been prejudiced in his defense, may properly constitute good ground for disapproving the sentence,[2] or for mitigating or partially remitting the punishment. *R. 22, 502, Dec. 1866; 33, 616, Dec., 1872; 39, 13, May, 1876.*

XIV E 9 a (17). A sentence of penitentiary confinement (ninety-seventh article of war), in a case of a purely military offense is wholly unauthorized and should be disapproved. Effect can not be given to such a sentence by *commuting* it to confinement in a military prison, or to some other punishment which would be legal for such offense. *R. 24, 202, Jan., 1867; 27, 299, Oct., 1868; 30, 603, Aug., 1870; C. 439, Oct., 1894.* Nor, in a case of such an offense, can a severer penalty—as death—be commuted to confinement in a penitentiary. *R. 11, 413, Feb., 1865; C. 20994, Jan. 26, 1907.*

XIV E 9 b (1). While *approval* gives life and operation to the sentence, *disapproval*, on the other hand, quite nullifies the same. A disapproval of the sentence of a court-martial by the legal reviewing authority is not a mere expression of disapprobation, but a final determinate act, putting an end to 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 *express*. As frequently remarked in the opinions of the Judge Advocate General, the mere absence of an approval is not a disapproval, nor can a mere reference of the proceedings to a superior without words of approval operate as a disapproval of the sentence.[3] The effect of the disapproval, wholly, of a sentence is not merely to annul the same as such but also to prevent the accruing of any disability, forfeiture, etc., which would have been incidental upon an approval. *R. 26, 568, June, 1868; 30, 497, July, 1870; 32, 1, Dec., 1870; 50, 121, Mar., 1886; P. 60, 36, June, 1893; C. 2195, Apr., 1896.*

Where the original reviewing officer disapproves a sentence, to the execution of which the confirmation of superior authority is made

[1] See Opinion of the Attorney General of January 19, 1878 (15 Op. 432), in which the opinion, expressed by the Judge Advocate General in the most recent of the cases upon which this paragraph is based—that the fact that one of the charges upon which the accused was convicted was preferred by a member of the court who also testified as a witness on the trial (but who, though clearly subject to objection, was not challenged by the accused), could not affect the validity of the sentence of dismissal after the same had been duly confirmed—is concurred in by the Attorney General. And, to a similar effect, see Keyes *v.* United States, 15 Ct. Cls., 532.

In G. C. M. O. 88, Dept. of Dakota, 1878, the point is noticed that where a challenge interposed by the accused has been improperly disallowed, a subsequent plea of guilty is not to be treated as a *waiver* of the advantage to which he may be entitled by reason of the improper ruling.

[2] See G. C. M. O. 35, War Dept., 1867; do. 128, Hdqrs. of Army, 1876; G. O. 24, Dept. of Arizona, 1874.

[3] See 16 Op. Atty. Gen. 312, where it is remarked that it is not a legal *disapproval* of a conviction or sentence for the original reviewing officer, in forwarding the proceedings for the action of superior authority, to indorse upon the same an opinion to the effect that the finding is not sustained by the evidence.

requisite by the articles of war—as where (in time of peace) the department commander, who has convened the court in the case of an officer, disapproves a sentence of dismissal adjudged thereby—the sentence being nullified in law, there remains nothing for the superior authority to act upon and to transmit the proceedings to him for action will be improper and unauthorized. *R. 3, 537, Aug., 1863; 7, 479, Apr., 1864; 30, 497, July, 1870; 32, 630, May, 1872.*

A reviewing officer can not disapprove a sentence and then proceed to mitigate or commute the punishment, since, upon the disapproval, there is nothing left in the case upon which any such action can be based. *R. 22, 456, Oct., 1866.*

It is quite immaterial to the legal effect of a disapproval whether any *reasons* are given therefor, or whether the reasons given are well-founded in fact or sufficient in law. *R. 28, 198, Oct., 1868.*

XIV E 9 **b** (1) (*a*). *Held* that disapproval of a finding of guilty has the effect of an acquittal.[1] *C. 2195, Apr. 4, 1896; 12168, Mar. 10, 1902; 12375, Apr. 23, 1902.*

XIV E 9 **b** (2). The formal disapproval by the reviewing authority of an acquittal is a naked nonconcurrence in the conclusions of the court, and is without *legal effect* upon the status of the accused. He still remains legally not guilty. *C. 1418, June, 1895.*

XIV E 9 **c**. Where a sentence in excess of the legal limit is divisible, such part as is legal may be approved and executed. Thus where a sentence of an inferior court imposes a fine or forfeiture beyond the limit of the eighty-third article of war, the sentence may be approved and executed as to so much as is within the limit.[2] *P. 55, 349, Sept., 1892; 59, 27, Apr., 1893; C. 439, Oct., 1894; 7363, Mar., 1899.*

XIV E 9 **d** (1) (*a*). The fact that a soldier has been held in arrest for an unreasonably protracted period before trial, or while awaiting the promulgation of his sentence, is a good ground for a mitigation of his punishment. *R. 35, 504, July, 1874.*

XIV E 9 **d** (1) (*b*). In a case where a brief mutiny (twenty-second article of war) among certain soldiers of a colored regiment was clearly provoked by inexcusable violence on the part of their officer; the outbreak not having been premeditated, and the men having been, prior thereto, subordinate and well conducted; *advised* that a sentence of death imposed by a court-martial upon one of the alleged mutineers should be mitigated, and the officer himself brought to trial. *R. 26, 64, Oct., 1867.* Similarly *advised* in the cases of sentences of long terms of imprisonment imposed upon sundry colored soldiers, who (without previous purpose of revolt) had been provoked into momentary mutinous conduct by the recklessness of their officer in firing upon them, and wounding several, in order to suppress certain insubordination which might apparently have been quelled by ordinary methods.[3] *R. 25, 51, 75, 160, Aug.–Nov., 1867.*

---

[1] A disapproval of a sentence by the proper reviewing authority is "tantamount to an acquittal by the court." 13 Op. Atty. Gen. 460.

[2] See Circ. No. 12, A. G. O. 1892.

[3] Enlisted men, tried and sentenced for insubordinate conduct, where such conduct has been induced or aggravated by illegal corporal punishments inflicted upon them by superiors, have commonly had their sentences remitted or mitigated, or altogether disapproved. See G. O. 49, 76, Northern Dept., 1864; do. 40, Dept. of the East, 1868; G. C. M. O. 90, id., 1871; G. O. 63, Dept. of Dakota, 1868; do. 76, id., 1871; G. C. M. O. 45, id., 1880; do. 93, Dept. of the South, 1873.

XIV E 9 **e.** Action taken by a reviewing officer upon the proceedings and sentence of a court-martial may be recalled and modified *before* it is published, and the party to be affected is duly notified of the same. After such notice the action is beyond recall. An approval can not then be substituted for a disapproval, or *vice versa. R. 8, 556, June, 1864; 31, 15, Oct., 1870; P. 31, 96, and 125, Mar., 1889; 40, 220, and 353½, Apr., 1890; 60, 179, June, 1893; C. 11509, Nov. 8, 1901; 17386, Jan. 14, 1905; 19854, June 29, 1906; 23140, Dec. 9, 1911.*

XIV E 9 **f** (1). When a legal sentence of dismissal has been legally *confirmed and executed, held* that the reviewing officer's power over the case is *exhausted.* This is equally true whether the reviewing officer is the President or the commanding general in time of war. The reviewing authority can not recall, revoke, rescind, or modify the official act of confirmation, or the order which is the evidence of it. The reviewing authority as such is *functus officio. Held,* also that after the sentence has been executed that the case is beyond the reach of the pardoning power.[1] So far as Executive power is concerned, the dismissal is final and irreversible. *Held* that as the law has provided no court of appeal or other revisory authority, the only manner in which a dismissed officer can reenter the service is by a new appointment.[2] *R. 20, 302, Jan. 8, 1866; 26, 462, Feb. 19, 1868; 28, 457, Mar. 27, 1869; 29, 575, Jan. 8, 1870; 30, 318, 323, 420, May 7, 1870, and June 20, 1870; 34, 634, Nov. 29, 1873; 36, 274, 330, Feb. 23, 1875, and Mar. 22, 1875; 38, 243, Aug. 14, 1876; 39, 238, 242, 248, Oct. 22 and 23, 1877; 55, 221, Dec. 19, 1887; C. 7509, Jan., 1900; 13400, Oct. 7, 1902; 15712, Jan. 4, 1904; 16710, Aug. 9, 1904; 16867, Sept. 9. 1904; 22048, Sept. 7, 1907; 23071, Apr. 11, 1908.*

XIV E 9 **g.** It is within the authority of a reviewing officer, in a case in which a soldier of his command has been sentenced to confinement in a penitentiary, to designate a particular penitentiary within such command as the place of confinement.[3] *P. 63, 330, Jan., 1894.*

XIV E 9 **g** (1). Where the sentence directs confinement at hard labor "in such place as the reviewing authority may direct," or words to that effect, the reviewing authority may, the offense warranting it, designate a penitentiary; but if in such a case he designates a military post as the place of confinement, the place of confinement can not, pending its execution at the post, legally be changed to a penitentiary. *C. 1875, Nov., 1895; 9558, Jan. 8, 1901; 10828, Oct. 28, 1901; 11756, Dec. 13, 1901; 14495, Apr. 16, 1903; 14509, Apr. 20, 1903.*

XIV E 9 **h.** It is not adding to the punishment, and is authorized at military law, to *change* the place of confinement of a prisoner, if such a change is required by the exigencies of the service, provided that no more severe species of confinement than that contemplated in the sentence is enforced after the transfer. *R. 21, 49, Nov., 1865; 39, 659, Sept., 1878; 41, 123, Feb., 1878; C. 14495, Apr. 16, 1903; 14509, Apr. 20, 1903.*

XIV E 9 **i.** Although, in adjudging a reprimand, it is generally intended by a court-martial to impose a mild punishment, the quality

[1] *Ex parte* Garland, 4 Wallace, 333, 381, and 12 Op. Atty. Gen., 548.
[2] See 4 Op. Atty. Gen., 274 and 306; 6 id. 369 and 514; 7 id. 99; 12 id. 548; 14 id. 449.
[3] See A. R. 982 of 1910, which makes approval of Secretary of War necessary.

of the reprimand is nevertheless left to the discretion of the authority who is to pronounce it, and it is open to him to make it as *severe* as he may deem expedient without being chargeable with adding to the punishment. *R. 33, 498, Nov., 1872.*

XIV E 9 k. Where a court-martial convened by a department commander for the trial of an officer sentences the accused, upon conviction, to the punishment of a loss of files or steps in the list of officers of his rank, the approval of the commander is sufficient to give full effect to the sentence, and no action by superior authority can add anything to its effect or conclusiveness. The code does not, as in the case of a sentence of dismissal, render a confirmation by the President essential to the execution of such a punishment; and the fact that the same involves a change in the Army Register does not make requisite or proper a revision of the case at the War Department. All that is called for, upon the approval of such a sentence by the commander, is simply to notify the Secretary of War thereof by forwarding a copy of the order promulgating such approval. The proceedings (or their substance), as affecting officers other than the accused, may then well be republished in orders from the Adjutant General's Office. *R. 36, 134, Dec., 1874; 37, 83, Oct., 1875; 43, 286, Apr., 1880.*

XIV E 9 l. The record should exhibit, at the end of the proceedings of the court, the *action* thereon—approval or disapproval, etc.—of the reviewing authority. *R. 2, 550, June, 1863.* This, though it has sometimes been indorsed on the outside of the record, is preferably and customarily written and signed within the record on a page following the authenticated judgment or other final proceeding of the court. *R. 4, 428, Dec., 1863.* Where several cases are tried by the same court, the action of the reviewing officer should be entered in the record of each trial; merely to indorse it upon the last of a series of cases would be irregular as not a compliance with the regulation. *R. 19, 336, Jan., 1866.* So it is irregular for the reviewing officer, in lieu of writing and subscribing his action in the record, to annex to it or file with it a copy of a general order promulgating the proceedings and his action thereon. *R. 1, 412, Nov., 1862.* Where the proceedings are to be forwarded to higher authority for final action on the sentence, a mere reference, as by the words—"respectfully referred, or forwarded, to the President" (or other superior) "for action," etc., is incomplete and irregular. In such a case the original reviewing officer should state his approval, etc., in full and formal terms. *R. 4, 337, Nov., 1863; 7, 132, Feb., 1864; C., 2844, Jan., 1897.*

XIV E 9 m. The reviewing authority should properly authenticate the action taken by him in any case by subscribing in his own hand (adding his rank and command, as indicating his legal authority to act) the official statement of the same as written in or upon the record. Impressing the signature by means of a stamp is not favored. *R. 4, 567, Jan., 1864; 22, 513, Dec., 1866, and 568, Jan, 1867.*

XIV E 9 n (1). When a trial by court-martial results in an acquittal or when the sentence does not contain confinement, *held* that the prisoner may, pending a review of the proceedings, be released from confinement. *C. 12928, July 8, 1902.*

XIV F 1. When the proceedings of general courts-martial were promulgated in general court-martial orders no difficulty was experienced in making the date of the order the same as the date of the action of the reviewing authority. This is often not practicable when

the promulgation is in special orders. As the sentence should commence on the date of the action thereon by the reviewing authority, this date should appear in the order of promulgation. *C. 1681, Aug. 1891.*

XIV F 2. Where a general court-martial has had two presidents, it is immaterial whether the first or the second is mentioned in describing and identifying the court in the caption of the order promulgating its proceedings. It is not indeed necessary to indicate the president at all. *R. 13, 324 Feb., 1865.* Nor is it necessary that such an order should set forth the specifications to the charges; nor—though this is usual, where the business of the court is completed—that it should formally dissolve the court. *R. 3, 84, June, 1863.* An order of promulgation, indeed, is a mere *form*, habitual as a means of communicating the proceedings or their result to the army, for the sake of convenience and example, and of making a summary memorandum of the same, but not necessary to the validity of proceedings or sentence.[1] Though no such order is issued in a case, the proceedings or sentence in the same will be formally complete and fully operative, if the official action thereon of the reviewing authority be duly indorsed upon or appended to the record, and actual or constructive notice thereof is given to the party affected. *R. 32, 102, Nov., 1871; C. 1226, Apr., 1895; 3810, Jan. 27, 1898; 12623, May 26, 1902.*

XIV F 3. The officer authorized to act upon the sentence is the proper authority to promulgate by order the proceedings of the court and his action thereon. If the regiment of the accused has moved outside the limits of the command at the date of such promulgation, a copy of the order promulgating the findings and sentence should be forwarded to the commanding officer of the accused. *C. 5235, Nov., 1898.*

XIV G. Where a soldier, while undergoing a sentence of confinement, was, by mistake, released by the post commander before the expiration of his legal term, *held* that the department commander by whom the sentence had been approved was legally authorized to order the soldier to be recommitted for the purpose of completing his punishment. *R. 27, 429, Dec., 1868.*

XIV H 1. In cases, however, of sentences of dismissal and of death, imposed in time of peace, and of some death sentences adjudged in time of war, as also of all sentences "respecting general officers," while the convening officer (or his successor) is the original reviewing authority, with the same power to approve or disapprove as in other cases, yet, inasmuch as it is prescribed by articles 105, 106, 108, and 109 that the sentence shall not be *executed* without the confirmation of the President, the latter becomes in these cases the *final* reviewing officer, when—the sentence having been *approved* by the commander (for, if *disapproved* by him, there is nothing left to be acted upon by the superior)—the record is transmitted to him for his action. A similar division of the reviewing function exists in cases in which sentences are approved, but the execution of the same is suspended, and the question of their execution referred to the President, under

[1] The insertion, in an order of publication, of the proceedings had upon a reassembling of the court for a *revision* of its findings or sentence, though at one time occasionally resorted to, is now unusual. Such an addition can hardly be pertinent except where it is designed as a basis for special comments, on the part of the reviewing officer, upon the action of the court in connection with the matter of the revision.

article 111. The same function is also shared between inferior and superior commanders, under article 107, in cases in which sentences are imposed by division or separate-brigade courts.

Where a general court-martial is convened directly by the President as Commander in Chief, he is of course both the original and final reviewing authority. But when final action has been taken by him in any of these cases, his function as reviewing or confirming authority is *exhausted*. Where indeed he has approved or confirmed a punishment, and the same remains in any part unexecuted, he may of course exercise the quite distinct power of pardon; but an approval or disapproval once given by him, and duly notified to the accused—though his action may afterwards be discovered to have worked an injustice—is beyond his power to revise, reverse, or modify. *R. 9, 44, May, 1864; 38, 104, June, 1876; 42, 91, Dec., 1878.*

XIV H 1 a. Article 106 does not require that the confirmation of the sentence shall be signed by the President, nor does it prescribe any form in which the confirmation shall be declared. *Held*, therefore, that a written approval of a sentence of dismissal authenticated by the signature of the Secretary of War, or expressed to be by his order, was a sufficient confirmation within the article; the case being deemed to be governed by the well-established principle that where, to give effect to an executive proceeding, the personal signature of the President is not made essential by law, that of the head of the department to which the subject belongs shall be sufficient for the purpose; the assent of the President to his order or direction being presumed, and his act being deemed in law the act of the President whom he represents.[1] *R. 9, 44, May, 1864; 23, 654, Aug., 1867; 37, 650, June, 1876; 38, 107 and 243, June and Aug., 1876; 39, 296, Nov., 1877; 41, 25, Sept., 1877; 42, 209, Mar., 1879; 43, 106, Dec., 1879. Held*, therefore, in a case which involved dismissal of an officer and which contained no entry of the action of the President, that the order publishing the case and setting forth his action thereon was sufficient and legal evidence of such action.[2] *P. 22, 436, Feb., 1888.*

XIV H 2. Although the act of March 3, 1865 (13 Stat., 489) (section 1230 R. S.), provides that if the sentence of the court be not one of death or dismissal the order of dismissal by the President shall be void—i. e., the party tried shall be restored to his office—yet *held*, in a case in which the court *acquitted* the accused, that the President possessed the authority, vested in reviewing officers in all other cases tried by court-martial, of returning the proceedings to the

---

[1] This view has been sustained by an opinion of the Attorney General of June 6, 1877 (15 Op., 290), and by a report of the Judiciary Committee of the Senate of Mar. 3, 1879 (Rep. No. 868, 45th Cong., 3d sess.).

This subject has been more recently considered by the U. S. Supreme Court in a succession of cases (Runkle *v.* U. S., 122 U. S., 543; U. S. *v.* Page, 137 U. S., 673; U. S. *v.* Fletcher, 148 U. S., 84), the effect of which is that a statement of approval of a sentence of dismissal, authenticated by the Secretary of War, is legally sufficient, provided that it appear, by clear presumption therefrom, that the proceedings have actually been submitted to the President.

In an opinion of the Attorney General of Apr. 1, 1879 (16 Op., 298), it was held that a confirmation of a sentence of dismissal of an officer, though irregularly and unduly authenticated, would be *ratified* by an appointment by the President of another officer to fill the supposed vacancy, and that the appointment thus made would be valid and operative.

[2] See 2 Op. Atty. Gen., 69; 7 id., 472; Williams *v.* U. S., 17 Peters, 152, in connection with Runkle *v.* U. S., 122 U. S., 543.

court for revision, and was therefore empowered to reassemble the court for a reconsideration of the testimony, on the ground that the same did not, in his opinion, justify the acquittal. *R. 19, 191, Nov., 1865.*

XIV H 3. A discharged soldier, serving a sentence of confinement in a State or Territorial penitentiary, still remains under military control, at least so far that his sentence may, by the President, be remitted, or may be mitigated—as for example to confinement in a military prison or at a military post. *P. 17, 216, Jan., 1887; 29, 209, Jan., 1889; 63, 370, Feb., 1894.*

XIV H 4. The word "approved," employed by the President in passing upon a sentence of dismissal, *held*, to be substantially equivalent to "confirmed," the word used in article 106. In practice the two words are used indifferently in this connection. *R. 41, 12, Sept., 1877.*

XIV H 5. *Held* that the War Department has no authority to correct the findings or sentence of a court-martial (*C. 1624, Dec. 26, 1895; 14260, Mar. 25, 1903*); or add to the sentence (*C. 187, June, 1895; 7450, Dec., 1899; 14495, Apr. 17, 1903; 14509, Apr. 20, 1903*).

XIV I. *Held* that the reviewing authority may, when taking action on a case, express his formal disapprobation of the neglect of the court to do that which he, the reviewing authority, considers its duty in connection with the trial of the case, even if such remarks might be interpreted as a censure or reprimand of the accused.[1] *C. 1426,0 Mar. 25, 1903.*

XIV K 1. New or second trials have been of the rarest occurrence in our military service. They have only been had, and are only authorized, where the sentence adjudged upon the first trial has been *disapproved* by the reviewing authority and the accused has *asked for* a second trial. It was held at an early period by Attorney General Wirt [2] that the prohibitory provision of the Articles of War (now contained in art. 102) that "no person shall be tried a second time for the same offense," did not apply to a case in which the accused himself requested a new trial, the objection to such trial being deemed to be subject to be *waived* by the consent and action of the party tried. The privilege of applying for and being allowed a retrial—for it is not a right, since the trial may be granted or denied at the discretion of the proper superior—has naturally been but seldom exercised; parties convicted and sentenced being in general satisfied that the proceedings in their cases should be terminated by the disapproval, on whatever grounds the same may be based. The principal instances of new trials in our practice are that of Capt. Hall (in whose case Mr. Wirt's opinion was given), and those of which the proceedings are published in General Orders 18, War Department, 1861, and General Orders 8, 9, and 26, First Military District, 1869. After a sentence has been duly approved and has taken effect, the granting of a new trial is, of course, beyond the power of a military commander or the President.[3] *R. 37, 492, Apr., 1876; 39, 233, Oct., 1877; 43, 423, and 44, 171, Oct., 1880; C. 5654, July 24, 1899.*

---

[1] See General Court-martial Orders 46, A. G. O., Oct. 15, 1883.

[2] 1 Op. Atty. Gen., 233. And see 6 id., 205.

[3] That a witness testified without being sworn is not ground for new trial, when no ojection was made at the trial and witness was cross-examined, see Moore *v.* State, 33 S. W. Rept., 1046.

XV A. A sentence imposing confinement for six months and the reimbursement of the United States for expenses incurred in the apprehension of the accused and his return to his station was disapproved by the convening authority, upon the ground that the items of the amounts of expenditure had not been proved; *held*, that such disapproval can not be concurred in by this department. The technical requirement suggested, viz, that the record should contain proof of all expenditures by the Government in this behalf in order to sustain the sentence, would hamper most materially the administration of military justice. *C. 18764-A, Nov. 23, 1909.*

XV B. While reasonable facilities for procuring such counsel as he may desire should be afforded an accused, his claim must be regarded as subordinate to the interests of the service. Thus, where an accused officer applied to the department commander who had convened the court, to authorize a particular officer whom he desired as counsel to act in that capacity, and this officer could not at the time be spared from his regular duties without material prejudice to the public interests, *held*, that the commander was justified in denying the application, and further that the legality of the subsequent proceedings and sentence in the case was not affected by such denial. *R. 32, 519, Apr., 1872.*

XV C. Unless it clearly appears to the contrary on the face of the record, it is in general to be *presumed* therefrom, not only that the court had jurisdiction in the case, but also that the proceedings were sufficiently regular to be valid in law.[1] *R. 12, 353, Feb., 1865; C. 16101, Apr. 21, 1904.*

---

[1] However desirable it may have been, in view of the numerous and serious defects frequently occurring in the records of courts-martial during the War of the Rebellion, and in order to induce a greater precision and uniformity in the preparation of such records, to treat (as was not infrequently done) the more grave of these defects as *fatal to the validity* of the proceedings or sentence, it is conceived that the same, in general, might properly have been regarded, and may now be regarded, as only calling for, or justifying, a *disapproval* of the proceedings. It is the effect of the ruling of the civil courts that where the court on any trial was legally constituted, had jurisdiction of the case, and has imposed a legal sentence or judgment, every reasonable intendment will be made in favor of the regularity of its proceedings, and even where the same are clearly irregular, the validity of the result will not be deemed to be affected, provided no statutory provision has been violated. See Hutton *v.* Blaine, 2 Sergt. & Rawle, 75, 79; Moore *v.* Houston, 3 id., 197; Trinity Church *v.* Higgins, 4 Robt., 1; Edwards *v.* State, 47 Miss., 581. And it is further held that the regularity or validity of the minor details of the proceedings may be shown by evidence outside the record. Van Deusen *v.* Sweet, 51 N. Y., 378. Similarly—it is believed—no omission or error in a record of court-martial, not in contravention of express statute, should, as a general rule, be regarded as absolutely invalidating the proceedings where there remains enough in the record fairly to warrant the presumption that the legal requirements have been complied with, or where the reviewing authority can supply the defect from his own official knowledge, or from current orders or other satisfactory evidence readily available to him. Thus, where no copy of the convening order accompanies the proceedings, but the reviewing authority, from the fact of having issued it himself or from the records of the command or otherwise, is officially apprised that the court was duly convened, the proceedings are not to be treated as fatally defective, but—the court appearing in fact to have been constituted and to have acted pursuant to the order—may be regarded as valid in law though imperfectly recorded. Where, indeed, the record discloses in the proceedings of a general court-martial an irremediable defect in a vital particular, as the fact that the court was composed of but four members, the proceedings and sentence, if any, must be held inoperative, since the *statute law*—article 75—has fixed five members as the legal *minimum* for such a court. But where the defect occurs in a less material feature, or is one of form only, the same, while it may, if of a grave character, properly warrant a *disapproval* of the proceedings—in case it can not be removed by a revision by the court on being reassembled for the purpose—

XV C 1. The record of a court of justice consists of two parts, which may be denominated the substantive and the judicial portions. In the former—the substantive portion—the court records (makes a record of) or attests its own *proceedings* and *acts*. To this (record or attestation) unerring verity is attributed by the law, which will neither allow the record to be contradicted in these respects nor the facts thus recorded or attested to be proved in any other way than by the production of the record itself or by copies proved to be true in the prescribed manner.[1] The Supreme Court of the United States has repeatedly held that a court-martial is a court possessing ample and exclusive jurisdiction to try and determine a certain class of cases, and that its functions are those of a court and its acts judicial proceedings, etc.[2] These proceedings and acts are all recorded, and the record thus made is ultimately filed in its proper place as the record of the judicial proceedings had. Where, therefore, after a record of a general court-martial had been duly acted upon and the sentence (dismissal of an officer) executed, the dismissed officer filed affidavits to the effect that the testimony of one witness had not been made a part of the record (which in fact did not show that any such witness testified) and asked that the sentence be set aside as void, it was held that the record could not be thus contradicted or impeached, or the validity of the sentence questioned.[3] *C. 5654, May, 1899.*

XV D 1. Charges are regularly and properly referred to a court-martial for trial by the officer who has constituted it (or his superior), and a court-martial may in general properly decline to entertain charges otherwise submitted. The validity, however, of the proceedings or sentence of a court-martial in any case will not be affected by the circumstance that the charges were in fact irregularly referred to it by a commander inferior to the convening officer and without having been approved by him. *R. 22, 502, Dec., 1866; 26, 167, Nov., 1867.*

XV D 2. *Held* that the fact that the order convening a court-martial was dated on a Sunday did not affect the validity of the proceedings in a case tried by the court under such order. *R. 37, 317, Feb., 1876.*

XV D 3. It is not a material objection to the validity of the proceedings or sentence that the regiment or corps of a member of the court or of the judge advocate is erroneously stated in the order

---

will not in general, it is held, justify the reviewing authority in pronouncing the proceedings to be void, or in treating them as necessarily without legal effect. *C. 11594, Jan. 3 and Mar. 26, 1902; 11794, Dec. 19, 1901; 11799, Dec. 20, 1901; 11831, Dec. 30, 1901.*

[1] Best, Principles of Evidence, p. 578.

[2] See Dynes *v.* Hoover, 20 Howard, 65; *Ex parte* Reed, 100 U. S., 13; Smith *v.* Whitney, 116 id., 167; Johnson *v.* Sayre, 158 id., 109; Swaim *v.* U. S., 165 id., 561.

[3] See the opinion of the Attorney General in this case, published in G. O. 21, A. G. O., 1900, the latter portion of which, referring to the record of the court-martial, reads as follows:

"The record is that which the court certify to have transpired on the trial, and embodies the action of the court. The fact that the court in due and legal form announces that it did so and so, or that so and so transpired, makes that the record and the fact, and no one except the court itself can lawfully alter that record. If it were to be held otherwise, there is not a record filed in the War Office that could not be subject to attack by *ex parte* affidavits and that, too, at a time when the officers of the court might be dead or scattered to the ends of the earth and unable to defend the solemn certificate which they made; and all the judgments of courts-martial as filed and acted on would be open to perpetual contradiction on subsequent assertions of interested parties which it would be impossible to meet or disprove."

convening the court, provided the description given is sufficient to identify the officer. *R. 35, 433, June, 1874.*

XV D 4. Though the injunction of article 100, as to the *direction* to be added to the sentence, should, of course, regularly be complied with, a failure so to comply will not affect the validity of the punishment of dismissal adjudged by the sentence.[1] *R. 22, 508, Dec., 1866; 27, 652, May, 1869.*

XV E 1. The record of a court-martial must show affirmatively whatever is made by *statute* essential to its jurisdiction and the legality of its proceedings,[2] for example, that the members and judge advocate were sworn as enjoined by the eighty-fourth and eighty-fifth articles of war. So, repeatedly *held* that if the record failed to show that the court and judge advocate were sworn and the omission could not be supplied by proceedings on revision the sentence was void; but that if the court had not been dissolved the original reviewing authority or his successor in command, the record having been transmitted to him either before or *after* his final action on the sentence, could legally reconvene the court to supply the omission in the record, if there was in fact an omission, the only purpose of such revision being to make the record conform to the actual facts; in other words, to speak the truth. *R. 1, 487, Dec., 1862; 2, 154, 155, Apr., 1863; 9, 653, Sept., 1864; 11, 93, Nov., 1864; 19, 336, Jan., 1866; C. 9600; Jan. 9, 1901; 15330, Oct. 14, 1903; 22163, Sept. 30, 1907.*

XV E 2. Where an officer, detailed as a member of a general court-martial, was duly relieved by order therefrom, but continued notwithstanding to sit upon the court during a trial, taking part in the findings and sentence, *held* that the sentence should properly be set aside as null and void.[3] *P. 41, 39, May, 1890.*

XV E 3. Where a court-martial excused its judge advocate and required its junior member to act as judge advocate in his stead, *held* that its action was wholly unauthorized and that its proceedings were properly disapproved.[4] It is only the convening authority who can relieve or detail a member or a judge advocate. *R. 28, 198, Oct., 1868.*

XV E 4. But where, after the reviewing commander had approved a sentence in general orders and the court had been *dissolved*, it was discovered that there was a *fatal defect* in the proceedings, *held* that the commander would properly issue a supplemental order declaring the proceedings a nullity and the original order inoperative and withdrawn on account of the defect.[5] *R. 49, 308, Aug., 1885; P. 31,*

---

[1] Note the action taken in the case published in G. C. M. O. 27, War Dept., 1872. The declaration of the article that after the publication "it shall be scandalous for an officer to associate with" the dismissed officer, though it has, as in cases published in G. O. (A. and I. G. O.) of May 13, 1820, and G. O. 168, Dept. of the Missouri, 1865, been incorporated in the sentence, is not intended to be and should not be so incorporated.

See G. O. 172, Hdqrs. of the Army, A. G. O., Sept. 29, 1899.

[2] Runkle *v.* U. S., 122 U. S., 543.

[3] See G. C. M. O. 20, Dept. of California, 1890, published after the date of this ruling.

[4] See G. C. M. O. 62, War Dept., 1874.

[5] See G. C. M. O. 23, Dept. of Dakota, 1888, setting aside void sentences and restoring to duty the prisoners, both of whom were serving confinement and had been under the terms of the void sentences dishonorably discharged. See also G. C. M. O. 20, Dept. of California, 1890, where a void sentence was set aside, the dishonorable discharge "canceled," and the prisoner restored to duty.

125, Mar., 1889; 41, 39, May, 1890; 42, 439, Sept., 1890; C. 4642, Sept. 14, 1898; 5325, Nov. 15, 1898; 5484, Dec. 9, 1898; 6121, Mar. 24, 1899; 18764, Jan. 24, 1908.

XV E 5. A court-martial declined to receive a written statement from an accused party on the ground that as he had offered himself as a witness he had had a sufficient opportunity to present such evidence to the court as he desired them to consider. *Held*, that the court had no authority to abridge the right of the accused to submit a written statement, and its refusal rendered its proceedings in that case fatally defective. *C. 17312, Dec. 22, 1904.*

XV E 6. *Held* that it is a fatal defect in a trial by court-martial for the court not to make any finding on the charge. *C. 5166, Oct. 18, 1898; 5187, Oct. 20, 1898.*

XV E 7. *Held* that a sentence awarded by a court which was without jurisdiction is void, and can not operate to separate a soldier from the service, and that in the particular case under consideration a soldier remained in the Volunteer service until the date of muster out of the organization to which he belonged, and that his status at the date of his separation from the service was that of a soldier in confinement under charges. *C. 13103, Aug. 7, 1902.*

XV E 8. *Held*, that court-martial proceedings are void when the order assuming to convene it is null and void. *C. 1645, Sept. 6, 1895, and 1499, July 17, 1895.*

XV E 9. *Held* that a record which fails to show that the members of the court and judge advocate were duly sworn is fatally defective. *Held*, further, that the fatal defect is not remedied upon the return of the record of revision, if the judge advocate and the president of the court make affidavits to the effect that the court and the judge advocate were duly sworn, as such affidavits are not a part of the proceedings of the court on revision. *Held*, further, in this particular case where the soldier had been dishonorably discharged pursuant to this sentence that the sentence should be set aside and the discharge issued thereunder be recalled. *C. 9600, Jan. 9, 1901; 8197, May 3, 1900; 15330, Oct. 14, 1903.*

XV E 10. Where the record of trial by court-martial failed to show that the accused was allowed an opportunity to exercise his right of challenge; *held*, that the proceedings were fatally defective and the sentence was void. *C. 13297, Sept. 11, 1902; 22163, Sept. 30, 1907; 18764, Oct. 23 and Nov. 17, 1907.*

XV E 11. Where on trial by court-martial for fraudulent enlistment, it was omitted to state in the charges that the party tried had received pay and allowances, *held* that the proceedings were fatally defective as not constituting an offense. *Held*, further, that in view

---

If, however, the court has not been dissolved it may be reconvened to amend its record to conform to the actual facts—that is, to make it speak the truth. See par. 19, S. O. 99, A. G. O., 1900, in which the following is promulgated: "By direction of the President the sentence in the case * * * published in paragraph 1, Special Orders, No. 214, Headquarters, Separate Brigade, Provost Guard, Manila, Philippine Islands, November 8, 1899, is set aside. The record of the trial failed to show that the members of the court and judge advocate were sworn, and, on being returned [by the War Department] for necessary action the court was not reconvened, as contemplated by paragraph 2, page 56, Court Martial Manual, 1898, but the judge advocate interlined a statement in the record that the members of the court and the judge advocate were duly sworn. This action was unauthorized and invalid. A defective record returned for correction can only be amended to conform to the actual facts and by the court itself on revision when duly reconvened for the purpose."

of the fact that the accused had not been subjected to a trial for a military offense that the charges might be amended and the accused brought to trial before a legally constituted court, and such trial would not constitute a second trial for the same offense within the meaning of the one hundred and second article of war. *C. 11998, Feb. 6, 1902.*

XV E 12. Where a court, though reduced by the absence of members, operation of challenges, etc., to below five members, yet proceeds with and concludes the trial, its further proceedings, including its finding and sentence, if any, are unauthorized and inoperative. *R. 2, 450, May, 1863; 7, 440, Apr., 1864; C. 18764, Aug. 5, 1908.*

XV E 13. *Held* that the approval of a sentence is null and void where the soldier in question has already been discharged from the service. *C. 24658, Mar. 25, 1909, May 17, 1910, June 23, 1910, and Sept. 23, 1910.*

XV F 1. Where the prosecution introduced but one witness to prove the falsity of the testimony under the charge of perjury, and that witness was contradicted as to a material point and the accused was convicted, *advised*, pending the execution of the sentence, that the unexecuted portion thereof be remitted on account of the failure of proof. *R. 53, 644, May, 1888.*

XV F 2. But the authority to find guilty of a minor included offense, or otherwise to make exceptions or substitutions in the finding, can not justify the conviction of the accused of an offense entirely separate and distinct in its nature from that charged. Thus *held* that it was not a finding of a lesser included offense to find the accused guilty merely of absence without leave under a charge of a violation of the forty-second article of war in abandoning his post before the enemy. *R. 11, 274, Dec., 1864.* And so *held* of a finding, under a charge of a violation of article 39, of not guilty but guilty of a violation of article 40. *R. 11, 276, Dec., 1864.* So, where a soldier charged with "conduct to the prejudice of good order and military discipline" (62d article of war) in concealing the fact that a fellow soldier had appropriated to his own use certain public property, was found not guilty of the specification as laid, but guilty of "having stolen the property himself" and guilty of the charge, and was accordingly sentenced to imprisonment, *held* that such a finding was manifestly unauthorized. Having been found not guilty of the offense set forth in the specification and which alone he was called upon to answer, he should have been acquitted on both charge and specification. The offense of which he was found guilty was not alleged against him, and not being *included* in that charged, could not properly form the subject of a finding. The remission of his sentence therefore *recommended. R. 34, 569, Oct., 1873; C. 12375, Apr. 23, 1902; 18764, Feb. 3, 1906.*

XV F 3. If an insane soldier be brought to trial by court-martial and he is shown by the record to have been insane pending the trial, the proceedings and sentence, if any, should be declared null and inoperative in orders. If the question of insanity in his case is not raised till after the proceedings have been acted upon and the sentence has been approved, and it then appears that he was actually insane, the sentence should be remitted. *R. 55, 563, Apr., 1888.*

XV F 4. In general, where an accomplice offers and is admitted to testify upon the part of the Government against an accused person, he is called to the stand under an implied promise that no proceedings

will be taken against himself, and that the question of his pardon will be favorably considered, provided he makes a full disclosure of the facts within his knowledge, and this whether or not the accused be convicted by means of his evidence.[1] So, where a party, who had thus been admitted to testify as witness, and had in good faith made a full and frank statement of the circumstances of the offense (of which, however, the accused was acquitted by the court), was himself subsequently brought to trial for the same act, and convicted and sentenced for his part in the same, *recommended* that his sentence be remitted by the President. *R. 11, 590, and 14, 259, Mar., 1865.*

XV F 5. Where for an offense not peculiarly aggravated, a court-martial imposed upon a soldier, in connection with a forfeiture of pay for six months, the further penalty of carrying a loaded knapsack weighing 24 pounds every alternate hour from sunrise to sunset of each day (Sundays excepted) during that period, *held* that this punishment was excessive and exceptional, and—the same having been suffered by the soldier for three months—*recommended* that its unexpired term be at once remitted.[2] *R. 26, 520, Apr., 1868.*

XV F 6. Where, with a plea of guilty, there was offered by the accused a written statement setting forth material circumstances of *extenuation,* and the court without taking any testimony whatever, or apparently regarding the statement, proceeded to conviction and sentence; *advised*—the case being one in which the sentence had been partly executed—that this action constituted a reasonable ground for a remission of a portion of the punishment. *R. 20, 120, 127, and 177, Nov., 1865; 15, 142, Apr., 1865; 29, 421, Nov., 1869; 32, 652, May, 1872; 33, 42, June, 1872.*

XV F 7. *Held* that the failure of the accused through ignorance to avail himself of his right of challenge in a particular instance is a proper ground for remission in whole or part of the sentence, or even for disapproval of the proceedings, etc., but *held* that it can affect in no manner the validity in law of the sentence.[3] *C. 10793, Feb. 28, 1902.*

XV F 8. *Held,* that when the members of a court-martial recommend clemency, and the reviewing authority did not mitigate the sentence, it is good policy to remit a portion of the confinement after the sentence has been partially served (see C. M. No. 69337); also when conclusive evidence is presented of a distressing case of dependency on the part of the parents of the prisoner (C. M. No. 70631); also when it appears that the evidence upon which the conviction was based was not absolutely conclusive, or when new evidence is pre-

[1] See King *v.* Rudd, Cowper, 331; United States *v.* Lee, 4 McLean. 103; Whiskey Cases, 9 Otto, 594; People *v.* Whipple, 9 Cowen, 707; 1 Chitty Cr. L., 768, 769; 1 Bishop Cr. Proc., sec. 1075, 1076, and notes; also Report (No. 352) of Committee on Judiciary of H. of Reps., 44th Cong., 1st sess., Mar. 31, 1876.

[2] Article VIII of the amendments to the Constitution prohibits the infliction of "cruel and unusual punishments." While this provision does not necessarily govern courts-martial, inasmuch as they are not a part of the judiciary of the United States, it should be observed as a general rule. That the provisions of the fifth, sixth, and eighth amendments to the Constitution, relating to criminal proceedings, apply only to the courts, etc., of the United States, see Barron *v.* Mayor of Baltimore, 7 Peters, 243; *Ex parte* Watkins, id., 573; Twitchell *v.* The Commonwealth, 7 Wallace, 326; Edwards *v.* Elliott, 21 id., 557; Walker *v.* Sauvinet, 2 Otto, 90; Pearson *v.* Yewdall, 5 id., 294; 1 Bish. Cr. L. sec. 725. See also "The Supreme Court on the Military Status," by Judge Adv. Gen. Lieber, 31 Am. Law Rev., 342, and cases cited.

[3] 15 Op. Atty. Gen., 432, and Keyes *v.* U. S., 109 U. S., 336.

sented which weakens materially the force of the evidence which sustains the conviction, it is proper to remit a portion or the whole of the unexecuted sentence. *C. 29064, Oct. 7, 1911.*

XV G 1. Where the proceedings of a court-martial have regularly terminated and the sentence has been confirmed and ordered to be executed by the proper and final reviewing authority, the fact that the record has since been *lost* does not impair or affect the judgment of the court and constitutes no legal obstacle to the enforcement of the penalty. *R. 9, 238, June, 1864.*

XV H 1. In March, 1870, the president of the National Home for Disabled Volunteer Soldiers (a civilian) convened, at the home, a court-martial composed of eight inmates of the same (all civilians, but designated by their former rank in the volunteer service, as "surgeon," "captain," "sergeant," and "private") for the trial, on charges of desertion and other offenses, of another (civilian) inmate. The court tried the accused, convicted him, and sentenced him to a term of imprisonment. The proceedings and sentence were approved by the convening authority, who thereupon applied to the Secretary of War for an order designating a military prison for the confinement of the party in execution of his sentence. *Held* (upon a reference of the case for opinion by the Secretary of War), that the proceedings were unprecedented, unauthorized *ab initio*, and void as a whole and in detail; that the provision in the act establishing the home, that the inmates should be "subject to the rules and articles of war in the same manner as if they were in the Army," even if it could be regarded as constitutional, conveyed no authority for such a court as that constituted and composed in this case; and that the sentence adjudged by the same could not legally be executed in the manner proposed or otherwise.[1] *R. 30, 286, Apr., 1870; C. 12817, July 21, 1902; 20120, July 31, 1906.*

XV H 2. *Held*, that a court convened by a lieutenant colonel in command of a department was illegal. *C. 16710, Feb. 6, 27, and 29, 1908. P. 42, 438, Sept. 2, 1890.* Similarly *held* that a court convened by a lieutenant colonel in command of the Army of Cuban Pacification was illegal. *C. 16710, July 23, 24, 26, and 29, 1908; Aug. 12 and 14, 1908.*

XV H 3. *Held*, that for the purpose of trying volunteer officers general courts-martial composed partially or wholly of regular officers are illegally constituted [2] (*C. 7895, Oct. 2, 1902*), even if such officers hold commissions in the Volunteer Army.[3] *C. 5654, Apr. 25, 1908.*

XV I 1. Courts-martial are no part of the judiciary of the United States, but simply instrumentalities of the Executive power. They are creatures of *orders;* the power to convene them, as well as the power to act upon their proceedings, being an attribute of *command.* But, though transient and summary, their judgments, when rendered upon subjects within their limited jurisdiction, are as legal and valid

[1] It is inaccurately stated in the report of the case of Renner *v.* Bennett, 21 Ohio St. 434 (Dec., 1871), that no inmate of the National Home had ever been subjected to a trial by court-martial. The instance referred to in the text, however, is the only one known of such a trial; and in this case the proceedings were, on the report of the Judge Advocate General, declared to be void *ab initio* and wholly inoperative by the Secretary of War.

[2] See McClaughry *v.* Demming, 186 U. S., 49, and XV, Comp. Dec., 875.

[3] U. S. *v.* Brown, 206 U. S., 240.

as those of any other tribunals, nor are the same subject to be appealed from, set aside, or reviewed, by the courts of the United States or of any State.[1] *R. 1, 451, Dec., 1862; 5, 656, Dec., 1863; 55, 486–492, Mar., 1888; C. 10910, Dec. 3, 1901; 17768, Apr. 23, 1905; 19465, July 19, 1907; 28010, Mar. 18, 1911.*

XV I 2. So, where a legal sentence adjudged by a court-martial has once been duly *executed*, the same is irreversible and can not be rescinded or modified by virtue of any executive authority of revision or pardon vested in the President. However severe or unjust such a sentence may have been, or whatever irregularity (short of an absolutely fatal defect) may have characterized the proceedings, the case, after the sentence, as approved, has been executed, is wholly beyond executive control.[2] *R. 36, 274, 330, Feb. and Mar., 1875; 37, 243, 390, 420, Jan. and Mar., 1876; 39, 242, and 248, Oct., 1877; P. 34, 334, Aug., 1889; C. 28010, Mar. 18, 1911.*

XV I 2 **a.** A legal sentence of court-martial, when once duly approved and *executed*, can not be reached by a pardon, nor revoked, recalled, modified or replaced by a milder punishment or other proceeding, either by the Executive or by Congress.[3] The only remedy

---

[1] See Dynes *v.* Hoover, 20 How., 79; *Ex parte* Vallandigham, 1 Wall., 243; Keyes *v.* U. S., 109 U. S., 336; Wales *v.* Whitney, 114 id., 564; Smith *v.* Whitney, 116 id., 167; Johnson *v.* Sayre, 158 id., 109, 118; Fugitive Slave Law Cases, 1 Blatch., 635; *In re* Bogart, 2 Sawyer, 402, 409; Moore *v.* Houston, 3 S. & R., 197; *Ex parte* Dunbar, 14 Mass., 392; Brown *v.* Wadsworth, 15 Verm., 170; People *v.* Van Allen, 55 N. York, 31; Perault *v.* Rand., 10 Hun., 222; Moore *v.* Bastard, 4 Taunt., 67; 6 Opins. Atty. Gen., 415, 425. "No acts of military officers or tribunals, within the scope of their jurisdiction, can be revised, set aside, or punished, civilly or criminally, by a court of common law." Tyler *v.* Pomeroy, 8 Allen, 484. Where a court-martial has jurisdiction, "its proceedings can not be collaterally impeached for any mere error or irregularity committed within the sphere of its authority. Its judgments, when approved as required, rest on the same basis and are surrounded by the same considerations which give conclusiveness to the judgments of other legal tribunals, including as well the lowest as the highest under like circumstances." *Ex parte* Reed, 10 Otto, 13. See Winthrop's Mil. L. & P., 55–57 and authorities cited; 3 Greenleaf Ev., 470; Clode Mil. F., 361; id., M. L., 58.

In Rose *ex rel.* Carter *v.* Roberts (99 Fed. Rep., 948) the court said: "It is not the office of a writ of *habeas corpus* to perform the functions of a writ of error in reviewing the judgment of a court-martial. Courts-martial are tribunals created by Congress in pursuance of the power conferred by the Constitution, and have as plenary jurisdiction of offenses committed to them by the law military as do the circuit and district courts of the United States in the exercise of their statutory powers over other offenses. The question of jurisdiction may be reached by such a writ, as it may be when the judgment of any tribunal is attacked; but the range and scope of the inquiry is controlled by the same rules and limitations in either case. There must be jurisdiction to hear and determine, and to render the particular judgment and sentence imposed; but, if this exists, however erroneous the proceedings may be, they can not be reviewed collaterally, or redressed by *habeus corpus*. These principles have been repeatedly declared by the authorities. *In re* Davison (C. C.), 21 Fed., 618; *Ex parte* Reed, 100 U. S., 13, 25 L. Ed., 538; *In re* Coy, 127 U. S., 731, 8 Sup. Ct., 1263; 32 L. Ed., 274; *Ex parte* Yarbrough, 110 U. S., 651, 4 Sup. Ct., 152, 28 L. Ed., 274; U. S. *v.* Pridgeon, 153 U. S., 59, 14 Sup. Ct., 746, 38 L. Ed., 631."

Grafton *v.* U. S. (206 U. S., 333): "The decision, therefore, of a military tribunal acting within the scope of its lawful powers can not be reviewed or set aside by the courts. Johnson *v.* Sayre, 158 U. S, 109; Mullan *v.* U. S., 212 U. S., 516; and Reaves *v.* Ainsworth, 219 U. S., 304.

[2] Such a sentence is "no longer subject to review by the President." 15 Op. Atty. Gen., 290.

[3] The well-established principles that mere irregularities in the proceedings will not affect the validity of an *executed* sentence, and that a legal sentence once duly confirmed and executed is "no longer subject to review by the President," so pointedly set forth (in 1843) in 4 Op. 274, are further illustrated in 15 id. 290, 432.

for a party who has suffered injustice from such a sentence is either a new appointment to the Army by the President or some legislation within the province of Congress relieving or indemnifying him for and on account thereof. *R. 41, 538, Apr., 1879; 42, 320, June, 1879; 53, 143, Oct., 1886; P. 47, 337, May 28, 1891; C. 4494, June, 1898; 6590, June, 1899; 11786, Dec. 23, 1901; 11876, Jan. 11, 1902; 12313, Mar. 28, 1902; 12321, Mar. 29, 1902; 13030, Sept. 16, 1902; 13637, Nov. 11, 1902; 13645, Nov. 12, 1902; 14898, July 2, 1903; 15510, Nov. 18, 1903.*

XV I 3. *Held*, that mere irregularity in the proceedings of a court, even though the rights of the accused are prejudiced in the admission or rejection of evidence, or the members of the court are biased, or the finding is unjust, or the sentence of dismissal too severe, can not cause a reopening of the case where the sentence is legal and it has been legally confirmed and executed. Neither can they add anything to the power of the Executive or of Congress to nullify or modify the dismissal as such.[1] *R. 20, 302, Jan. 8, 1866; 26, 462, Feb. 19, 1868; 28, 457, Mar. 27, 1869; 29, 575, Jan. 8, 1870; 30, 318, 323, 420, May 7, 1870, and June 20, 1870; 34, 634, Nov. 29, 1873; 36, 274, 330, Feb. 23, 1875, and Mar. 22, 1875; 38, 243, Aug. 14, 1876; 39, 238, 242, 248, Oct. 22 and 23, 1877; 55, 221, Dec. 19, 1887; C. 7509, Jan., 1900; 16710, Aug. 9, 1904.*

XV I 4. *Held*, that after the reviewing authority has acted on a case and his action has been promulgated in orders it is too late to urge that the sentence is invalid on account of weight of evidence, credibility of witnesses, or any other matter calling for the exercise of judgment or discretion on the part of the court or reviewing authority. *C. 5654, July 24, 1899; 11509, Nov. 8, 1901; 17386, Jan. 14, 1905.*

XV K 1. *Held*, that a court-martial sentence is illegal when the offense committed is not a military one because the court has no jurisdiction over offenses other than military offenses. *C. 1989, Jan. 17, 1896.*

XVI A 1. A regimental court-martial has no jurisdiction under the 30th article of war to redress a wrong which can not be righted except by punishment of the officer concerned. *C. 855, Jan. 10, 1895.*

XVI B 1. Where, after a garrison court (eighty-second Article of War) had tried the cases referred to it but before its proceedings had been acted upon, the command of the post was devolved upon the officer who had been president of the court, *held* that such officer would legally and properly act upon the proceedings; the case not being one in which the action of the department or other higher commander was required by the one hundred and ninth article of war. *R. 43, 268, Mar., 1880.*

XVI C. The provision of articles 72 and 73 that, when the convening commander is "accuser or prosecutor," the court shall be convened by the President or "next higher commander," being expressly restricted to *general* courts, has of course no application to regimental or garrison courts. The same *principle*, however, should properly be applied to proceedings before inferior courts, if it can be done without serious embarrassment to the service. *R. 34, 353, 598, July and Nov., 1873; 35, 138, Jan., 1874; 42, 231, Apr., 1879.*

---

[1] See 4 Op. Atty. Gen., 274.

XVI D. The prohibition of article 103 relates only to prosecutions before general courts-martial; it does not apply to trials by inferior courts. So, courts of inquiry may be convened without regard to the period which has elapsed since the date or dates of the act or acts to be investigated.[1] *R. 42, 213, Mar., 1879; C. 18772, Oct. 26, 1905.* Nor does the rule of limitation apply to the hearing of complaints by regimental courts under article 30. *R. 31, 452, June, 1871.*

XVI E 1. A summary court is not empowered to issue process of attachment to compel the attendance of a civilian witness. *P. 51, 468, June, 1892.*

XVI E 2. An enlisted man is not triable by a summary court for a violation of the twenty-first article of war, as capital cases are in excess of its jurisdiction. *C. 6186, Apr. 8, 1899; 7392, Dec., 1899; 10946, July 30, 1901; 11360, Oct. 11, 1901; 11676, Dec. 2, 1901; 14761, June 5, 1903; 16101, Mar. 29, 1909.*

XVI E 3. *Held* that a summary court officer is the executive officer of the summary court in the same sense that the judge advocate is the executive officer of a general court-martial, and that the summary court officer, therefore, is charged with the securing of all vouchers in regard to witness fees, etc. *C. 7890, Apr., 1900; 13418, Oct. 2, 1908.*[2]

XVI E 4 **a.** *Held* that the post commander should personally and with his own sign manual act on the records of inferior courts-martial convened by him, and should include in his action the date of approval, as forfeitures of pay operate only from that date. *C. 854, Jan., 1895.*

XVI E 4 **b.** *Held* that the post commander, being the reviewing authority, and without whose approval the sentence can not be carried into effect, may require a summary court to reconsider a sentence. *C. 6042, Mar. 14, 1899.*

XVI E 4 **c.** *Held*, that while the law establishing the summary court does not expressly forbid a commanding officer to appoint himself, yet such a detail is contrary to the whole tenor and spirit of the act of June 18, 1898 (30 Stat., 483), and of the regulations adopted in furtherance thereof. *C. 18121, June 14, 1905.*[3]

XVI E 5. *Held*, that when the "court" consists of the second in rank, and he is the accuser, the case is to be tried by the post commander; and when the "court" consists of the post commander, and he is the accuser, the case is to be tried by a regimental or garrison court-martial.[4] *P. 56, 279, Nov. 4, 1892; C. 635, Nov. 15, 1894.*

XVI E 6. The summary court act of June 18, 1898 (30 Stat., 483), provides, *inter alia:* "That the commanding officer of each garrison, fort, or other place, regiment or corps, detached battalion, or company, or other detachment in the Army, shall have power to appoint for such place or command, or in his discretion for each battalion thereof, a summary court to consist of one officer to be designated by him," for the trial of enlisted men, and "that when but one commissioned officer is present with a command, he shall hear and finally determine such cases." This was intended to provide for the trial of enlisted men under all conditions of service. *Held*, therefore, that the surgeon in command of the Army and Navy General Hospital, Hot Springs, Ark., being an officer of the Army, has authority under this act to appoint a sum-

[1] See 6 Op. Atty. Gen., 239.
[2] See Cir. No. 88, War Dept., Oct. 31, 1908.
[3] See Cir. No. 32, War Dept., June 30, 1905.
[4] Cir. 15, A. G. O., 1892.

mary court for the trial of enlisted men of the Army under his command. *C. 856, Feb., 1900. Held,* also, where the division field hospital and the division field ambulance company were independent commands and responsible direct to the division surgeon and division commander, that their respective commanders were competent to appoint summary courts for the same.[1] *C. 4966, Oct., 1898.* And the surgeon in command of a United States hospital ship is a commanding officer within the meaning of the summary court act and may appoint such court for the trial of enlisted men on such ship. *C. 4931, Sept., 1898; 14427, Apr. 22, 1903.*

XVI E 7. *Held,* that the commanding officer of a brigade post has authority as convening officer of a summary court to retain within himself the appointing power of all summary courts within his command, and that he may establish a summary court for each regularly organized battalion and squadron composing his command, and may organize other detachments serving at the post into temporary battalions for the purpose of summary court jurisdiction, but that if he does not exercise the authority which is thus vested in him by statute he allows the appointing power, including the power of review, to pass to regimental commanders by the operation of law to appoint summary courts within their regiments. *C. 22592, Jan. 11, 1908, July 8, 1909.*

XVI E 8 a. *Held,* that when a command in the execution of a practice march passes out of the territorial limits of the division in which it is stationed, the summary court report will be sent to the headquarters of that division. *Held,* further, that if such a command constitutes a part of a brigade camp, such reports will at its close be transferred to the headquarters of the division to which the troops returned. *C. 20389, Sept. 19, 1906; 28498, Aug. 23, 1911.*

XVI F. The duty devolves upon a department commander of supervising the proceedings of regimental and garrison courts-martial transmitted to his headquarters. *Held,* that if he discovers a material error, defect, or omission, he should bring the same to the attention of the proper inferior commander, and if such error is a fatal defect, such inferior commander should issue an order declaring the sentence void. But if such error is not a fatal defect, such inferior commander can remit the unexecuted punishment. *R. 35, 174, Feb., 1874.*

XVII A 1. *Held,* that a company commander under the control of the commanding officer of the post is authorized to dispose of derelictions in his company, which would be within the jurisdiction of an inferior court-martial, by requiring extra tours of company or post fatigue unless the soldier demands trial. *C. 3589, Oct., 1897; 19701, May 15, 1906; 20051, July 13, 1906; 21211, Mar. 14, 1907.*

XVII A 2. *Held,* that commanding officers are not required to bring every dereliction of duty before a court for trial, but should endeavor to prevent their occurrence by admonitions, withholding of privileges, and taking such other steps as may be necessary to enforce discipline. *C. 19701, May 15, 1906; 20051, July 13, 1906.*

---

[1] While the nomenclature of the various hospitals and ambulance companies has changed, the principle remains the same, that if it is an independent command, the right to appoint a summary court exists in the commander. And also see cir. 49, A. G. O., 1890.

XVII A 3. Punishment by sentence of court-martial. (*See* Articles of War; and Sentence, under Discipline.)

XVII A 4 a. The old rule that the term of a confinement (of so many months, years, etc.), imposed by sentence of court-martial, commenced on the day on which the prisoner was delivered to the proper officer—as the officer in charge of the prison or commanding the post—to be confined according to the sentence (*R. 11, 380, Jan., 1865*), having been found inconvenient in practice, there was substituted for it by General Order 21, Headquarters of the Army, of 1870, the rule that "the confinement shall be considered as commencing at the date of the promulgation of the sentence in orders." To hold that under this order the commencement of the confinement must be delayed until notice of it has reached the prisoner might lead to the same abuse which the order was intended to correct. *R. 30, 150, Mar., 1870; C. 18165, Dec. 26, 1905, and Jan. 12, 1906.*

XVII A 4 b. When a soldier at two successive trials is sentenced to confinement, the two sentences will be held to be cumulative when they are both approved on the same day (*R. 34, 479, Sept., 1873; C. 1608, Aug. 1, 1895; 12402, Apr. 14, 1902; 19422, Mar. 19, 1906*); or when the soldier is serving one sentence when brought to trial a second time as a result of which he received a sentence of confinement. *R. 38, 409, Jan., and 556, Apr., 1877; 43, 102, Dec., 1879; C. 1609, Aug., 1895; 12402, Apr. 14, 1902; 19972, Jan. 27, 1906; 19740, May 18, 1906.* When a sentence is cumulative upon one that is pending, its execution will properly commence at the date when the pending confinement term terminates whether by expiration of time or by remission. *R. 31, 315, Apr., 1871; 32, 670, June, 1872; 34, 479, Sept., 1873; 35, 433, June, 1874; 38, 43, Apr., 1876, and 556, Apr., 1877; 43, 102, Dec., 1879; C. 1609, Aug. 1, 1895; 19422, Mar. 19, 1906; 17200, Jan. 25, 1907; 19546, July 21, 1908.* The principle of cumulative sentence applies even where a prisoner escapes from a pending confinement, enlists, deserts, is arrested, tried for the second desertion, convicted and sentenced to confinement. *P. 38, 124, Jan., 1890.*

XVII A 4 c. When a military prisoner escapes, he must upon capture serve the unexecuted portion of his sentence. This is true when the prisoner escapes as an accused person during the progress of his trial and the court thereafter sentences him to confinement which is approved and ordered executed.[1] *C. 14767, Feb. 6, 1905; 23941, Oct. 7, 1908,* and *Mar. 1, 1909.* Also when the soldier after sentence, but before approval of same by reviewing authority, escapes. *R. 29, 7, June, 1869.* Also when pending the execution of the sentence he escapes. *R. 38, 119, July, 1876; P. 46, 176, Mar., 1891; 51, 146, Dec., 1891; 59, 173, Apr., 1893; C. 133, Aug. 6, 1894; 3702, Dec. 3, 1897; 17393, Oct. 17, 1900; 17163, Nov. 16, 1904.* The one hundred and third article of war does not prevent the escaped prisoner's being

[1] See U. S. *v.* Loughory (13 Blatchford, 267, Fed. Cases No. 15631); State *v.* Peacock (50 N. J. Law, 34); Stone *v.* Commonwealth (2 Ky. Law Rep., 305); Commonwealth *v.* Smith et al. (163 Mass., 411); Commonwealth *v.* McCarthy, (163 Mass. Rep., 459); Fight *v.* State (7 Ohio, 180); Wilson *v.* State (2 Ohio St., 319); Price *v.* State (36 Miss., 531); Hill *v.* State (17 Wis., 675); State *v.* Wamire (16 Ind., 357); Lynch *v.* Commonwealth (88 Penn. St., 189). See also G. O., 45, War Dept., Mar. 12, 1909.

required upon capture to serve the remaining portion of his sentence, as stated above.[1] *C. 1812, Feb. 17, 1909.*

XVII A 4 d. Prison authorities have no right to open and inspect letters addressed to or sent by their prisoners without the consent of the latter. They can, however, retain such letters unopened which may come into their possession until such time as the parties may be tried or released, or the letters otherwise disposed of under judicial process.[2] *C. 2469, July, 1896.*

XVII A 4 e. *Held,* that the suspension of the sentence of a court martial before or during its execution is without precedent. *C. 8838, Aug., 1900. Held,* that a post commander is not authorized under the one hundred and twelfth article of war to suspend the execution of a sentence by a garrison court-martial during good behavior on the part of soldiers so sentenced. *R. 30, 115, Feb., 1870; C. 20797, Dec. 13, 1906; 27738, Jan. 21, 1911.*

XVII A 4 f. A remission of part of a sentence of confinement leaves the reduced sentence as though it were the original, and the prisoner is entitled to good-conduct time on the reduced sentence. *R. 37, 490, Apr., 1876; P. 44, 66, Nov., 1890.*

XVII A 4 g (1). The proceeds of sales of articles manufactured by the prisoners at the military prison are clearly public funds, and, in the absence of any statutory provision in regard to their disposition—section 1351, R. S., only requiring that they shall be "accounted for" as received by the commandant—can not legally be expended in repairing or improving the prison building or otherwise without authority of Congress. *R. 42, 24, Oct., 1878.*

XVII A 4 g (2). *Held* that, under the general authority vested in the Secretary of War by section 1351, R. S., to direct as to the disposition of the articles manufactured by the convicts at the military prison at Leavenworth, and in the absence of anything in section 3716, R. S., or elsewhere in the statute law relating to contracts precluding such action, the Secretary was empowered to order that the shoes made by the prisoners should be turned over to the Quartermaster Department for issue to the Army. *R. 41, 427, Oct., 1878.*

XVII A 4 g (3). It is not adding to the punishment in executing a sentence of confinement to require the prisoner to perform work prescribed for prisoners of his class by the *statute* law. Thus persons sentenced to imprisonment at the military prison at Leavenworth, though "hard labor" be not in terms included in the sentence, may legally be employed in the labor or at the trades indicated by section 1351, R. S., *R. 37, 640, June, 1876; 51, 601, Mar., 1877; P. 42, 101, July, 1890.*

XVII A 4 g (4). *Held* that the commander of the prison post at Alcatraz Island was authorized to make and enforce all necessary and proper regulations for the safe keeping and government of the military prisoners there confined; that he might, by the use of force, if needful, but using no more force than was necessary, prevent civilians from landing on the island in violation of the regulations, and put such persons off the island as had landed there contrary to the same; that, in an extreme case, as where a civilian, engaged in aiding a prisoner to escape, and no other means of prevention would avail,

[1] See Dolan's case, 101 Mass., 219.
[2] See Circ. 8, A. G. O., 1896; also U. S. Postal Guide, May, 1896, p. 13.

he might properly order the party to be fired upon by the guard. *R. 32, 525, Apr., 1872.*

XVII A 4 **g** (5). *Held* that the private money of a general prisoner confined in a United States military prison may not be forfeited even if received as a bribe for assisting in violating prison rules, and if taken possession of by the commandant it must be returned to the general prisoner at date of release.[1] *C. 26782, May 28, 1910; 25281, Aug. 17, 1910.*

XVII A 4 **g** (6). Where a member of a United States military prison guard had shot and killed a general prisoner to prevent his escape, *held*, that it is not good policy to have a pardon issued to him for purpose of restoring him to duty without trial even though innocent; that such procedure should be taken as would keep the soldier in the hands of the military authorities, and that he should be arraigned before a general court-martial to determine whether or not he was justified in taking the extreme measures he did to prevent the escape. *C. 27119, Aug. 3, 1910.*

XVII A 4 **g** (7). *Held* that a tailor shop can be established in the military prison at Fort Leavenworth at which general prisoners can be employed in the making of civilian clothing for issue to discharged general prisoners. *C. 26193, Feb. 10, 1910, and Mar. 12, 1910.*

XVII A 4 **h** (1). Persons convicted by courts-martial and sent to the United States penitentiary under the provisions of the sundry civil act of March 2, 1895 (26 Stat. 333), can not be turned over to a United States marshal for transportation to the penitentiary, but must be delivered there by the military authorities. *C. 1201, July, 1895; 20052, July 13, 1906.*

XVII A 4 **i**. Where a sentinel at Fort Ethan Allen fired upon and killed a general prisoner who was attempting to escape, such general prisoner not being under his immediate charge, *held* that the guard at a military post must be considered as a whole, and the mere fact that certain members of the guard are assigned to the duty of watching certain designated prisoners does not relieve the other members of the guard of the duty of preventing the escape of prisoners. *C. 23423, June 12, 1908.*

XVII B 1 **a**. Two soldiers at a military post refused to do extra fatigue duty imposed upon them by their captain for failing to make a proper score at target practice. The captain caused one of them to be tied up by his wrists with his feet partly raised from the ground for some six hours, and the other to be so tied up for about one hour and to be immersed several times in a water hole. *Held* that such action was wholly without justification, the punishment inflicted not being sanctioned by law or usage, or warranted by the circumstances of the case, and that the officer was clearly amenable to trial under the sixty-second article of war. *P. 60, 257, June, 1893.*

XVII B 1 **b**. A soldier, who had been improperly allowed with others of a detachment to enter a saloon and drink, became disorderly and insubordinate in public, without however, committing violence. The captain commanding, in attempting to repress him, assaulted him by striking him on the head with a Government rifle with such force as to fell him to the ground and render him senseless, at the same time inflicting a severe contused lacerated wound on his right

[1] 19 Cyc., 1359.

ear which rendered it deaf for several days. There was nothing like a mutiny and no serious disorder in the command. *Held* that the violence of the officer was greatly in excess of his authority and wholly unjustifiable, the fact that the soldier was under the influence of liquor going to aggravate the officer's offense. And *recommended* that the captain be brought to trial under article 62.[1] *P. 43, 52, June, 1893.*

XVII B 1 c. Where, upon the trial of a soldier convicted of insubordinate conduct and severely sentenced, it was shown in evidence that at the time of such conduct he was subjected to punitive treatment by his company commander, who caused him to be tied up and gagged, and it appeared that there was no indication of mutiny or other exigency in the command, *held* that such treatment was arbitrary and unwarranted by law or usage, and a military offense on the part of the officer, and *advised* that clemency be exercised in the case of the soldier. *R. 53, 193, Oct., 1886.*

XVII B 1 d. Respect for the person and office of a sentinel is as strictly enjoined by military law as that required to be paid to an officer. As it is expressed in the Army Regulations "all persons of whatever rank in the service are required to observe respect toward sentinels." Invested, as the private soldier frequently is while on his post, with a grave responsibility, it is proper that he should be fully protected in the discharge of his duty. To permit any one, of whatever rank, to molest or interfere with him while thus employed, without becoming liable to a severe penalty, would obviously establish a precedent highly prejudicial to the interests of the service. So where, in time of war, a lieutenant ordered a soldier of his regiment, who had been placed on duty as a sentry by superior authority, to feed and take care of his horse, and, upon the latter respectfully declining to leave his post for the purpose, assailed him with abusive language—*held* that a sentence of dismissal imposed by a court-martial upon such officer, on his conviction of this offense, was fully justified by the requirements of military discipline. *R. 18, 598, Feb., 1866.*

XVII B 1 e. *Held* that a company commander has no authority to require a soldier to contribute money to the company fund in lieu of trial by court-martial. *C. 20051, July 13, 1906.*

XVII B 1 f. The pay of the offender or offenders can be resorted to under the fifty-fourth article of war only for the purpose of the "reparation." A military commander can have no authority to add a further amount of stoppage by way of *punishment. R. 8, 671, July, 1864.*

---

[1] In proper cases, of course, as where violence is employed, escape attempted, etc., by soldiers who are mutinous or disorderly, or in arrest under charges, force may be used against them according to the necessities of the case; see G. O. 53, Hdqrs. of Army, 1842; do. 2, War Dept., 1843; G. C. M. O. 47, Hdqrs. of Army, 1877; G. O. 53, Dept. of Va. and N. C., 1864; do. 40, Dept. of the East, 1868; G. C. M. O. 112, id., 1870; do. 90 id., 1871; G. O. 23, Dept. of the Lakes, 1870; do. 106, Dept. of Dakota, 1871; do. 93, Dept. of the South, 1873; do. 31, Mil. Div. of the Atlantic, 1873; G. C. M. O. 37 Dept. of Texas, 1880. This, however, is *prevention* and *restraint*, not *punishment;* the authority to use the needful force in such cases will not justify the superior, when the offender is repressed or apprehended, in subjecting him to arbitrary punitory treatment.

XVII B 1 g. *Held* that a reviewing officer is not authorized, after disapproving an acquittal, to order that the accused be confined or otherwise punished.[1] *R. 12, 249, Jan., 1865.*

XVII B 2 a (11). Reduction to the ranks was authorized to be imposed as a punishment by courts-martial upon commissioned officers of the Army, on conviction of absence-without-leave—by the act of March 3, 1863, c. 75, s. 22; and, upon conviction of the offense of neglecting or refusing to turn over to the proper official any captured or abandoned property coming into the possession of the party—by the act of March 12, 1863, c. 120, s. 6. This punishment, which involved the dismissal of the officer (*R. 16, 484, Aug., 1865*) is no longer legal; the statutory provisions indicated being impliedly confined in their application to the period of the Civil War (or for a limited period succeeding the same), and not being reenacted in the Revised Statutes.[2] *C. 22215, Oct., 15, 1907.*

XVIII A. A board of officers convened to investigate—obtain, or hear and examine, evidence—and report, can, in the absence of specific statutory authority, exercise none of the peculiar legal functions either of a court-martial or of a court of inquiry. *R. 2, 340, May, 1863; 21, 335, Apr., 1866; 26, 492, Mar., 1868; 32, 3, May, 1871; 41, 263, June, 1878.* Its members can not be sworn; it can not swear witnesses;[3] civilian witnesses can not be compelled to appear before it; nor are the witnesses who appear and testify legally entitled to any compensation for attendance or travel. *R. 11, 672, Apr., 1865; 21, 335, supra; 26, 492, supra.* Such a board can not *try*, nor can it sentence. *R. 11, 672, supra; 32, 3, supra.* There is

---

[1] In general orders, punishments inflicted merely at the will of military commanders, have been repeatedly condemned as illegal and forbidden in practice. See G. O. 81 (A. G. O.), 1822; do. 53, Hdqrs. of Army, 1842; do. 2, 4, War Dept., 1843; do. 39, Hdqrs. of Army, 1845; do. 645, War Dept., 1865; do. 49, Northern Dept., 1864; do. 22, Dept. of the Platte, 1867; do. 44, id., 1871; do. 63, Dept. of Dakota, 1868; do. 106, id., 1871; do. 40, Dept. of the East, 1868; G. C. M. O. 112, id. 1870; do. 90, id., 1871; G. O. 14, Dept. of the South, 1869; do. 1, 23, 93, id., 1873; do. 9, Mil. Div. of the Atlantic, 1869; do. 31, id., 1873; do. 23, Dept. of the Lakes, 1870; G. C. M. O. 50, Dept. of the Missouri, 1871. Officers who have resorted to such punishments have been repeatedly brought to trial and sentenced. See G. O. (A. & I. G. O.) of June 30, 1821; do. 8 (A. G. O.), 1826; do. 28, id., 1829; do. 64, id., 1832; do. 2, 6, 68, War Dept., 1843; do. 39, Hdqrs. of Army, 1845; do. 53, Dept. of Va. & N. C. 1864; do. 22, Dept. of the Platte, 1867; do. 9, Mil. Div. of the Atlantic, 1869; do. 14, Dept. of South, 1869; G. C. M. O. 50, Dept. of the Missouri, 1871. See G. O. No. 10, Hdqrs. Third Separate Brigade, Dept. of North Philippines, Batangas, Mar. 14, 1902, which publishes the acquittal of an officer who was tried for "bucking and gagging" a drunken prisoner, and causing cold water to be thrown in his face. See also G. O. No. 67, Hdqrs. of the Army, Washington, Dec. 6, 1897, which publishes the action of a court in the case of an officer, who caused a prisoner to be dragged to the place of the summary court, when that prisoner refused to proceed to that place.

[2] Cases of officers sentenced to this punishment, upon conviction under the first named statute, are published in G. O. 27, War Dept., 1864; do. 80, Dept. of the Gulf, 1863; do. 38, Dept. of the East, 1864; do. 36, Middle Dept., 1864; do. 5, 2d Div., 5th Army Corps, 1864; G. C. M. O. 25, 51, Army of Potomac, 1864; do. 12 id., 1865. No instance has been met with of the imposition of this punishment upon a conviction under the *latter* statute. In some few cases, during the Civil War, this punishment was adjudged—illegally—for offenses other than those specified in the acts designated in the text. See case of Brig. Gen. D. G. Swaim, J. A. Gen., who was sentenced to reduction in rank; in this case the record was returned to the court by the President for amendment of sentence.

[3] But see sec. 183, R. S., as amended Mar. 2, 1901, which grants authority for the administering of oaths in certain cases.

properly no "accused" party required or entitled to appear before it as before a court-martial or court of inquiry. *R. 2, 340, supra.* It is not restricted by law as to the period of its sittings, nor is it affected by any statute of limitations. *R. 26, 493, Mar., 1868.* Its members (though in this, indeed, it does not differ from a court of inquiry) may present two or more reports where they can not concur in one. *R. 41, 207, Apr., 1878.*

XVIII B. As a *court of inquiry* can not be ordered in a case of a *civilian,*[1] a body of officers convened to inquire into and report upon the facts of the case of an officer who has been legally dismissed from the service is a mere board of investigation, and can exercise none of the special powers of a court-martial or court of inquiry. *R. 41, 263, June, 1878.*

XVIII C. *Held* that parties who appeared and testified before, and at the instance of, an officer charged with the preliminary investigation of a case, but were not required to attend at the subsequent trial, were not legally entitled to witness fees. *R. 21, 463, July, 1866.*

XVIII D. The Army appropriation acts now appropriate money "for expenses of courts-martial, courts of inquiry, and compensation of reporters and witnesses attending the same." Reporters for courts of inquiry may therefore be paid out of such appropriation. If the employment of a reporter for a board of officers should be authorized by the Secretary of War, payment for such service would have to be made from the appropriation for the contingent expenses of the Army. *C. 6971, Sept., 1899.*

XVIII E. As to character of enlisted men. (See Discharge.)

DISHONORABLE DISCHARGE.

See DISCHARGE I A; IV to V.
ARTICLES OF WAR XLVIII D.
DESERTION X A.

Commutation or mitigation of.....See ARTICLES OF WAR CXII A 1 a; D.
Continuous service can not antedate.....See PAY AND ALLOWANCES I C 5 b (2).
Date of.....See ENLISTMENT I D 3 c (9).
Disqualifies for deserter's release.....See DESERTION XVII B.
Effect on status.....See DISCHARGE XXII B.
DISCIPLINE VIII I 1 c; d.
RETIREMENT II A 1 c.
Enlistment after.....See ENLISTMENT I D 3 c (2); (18); (*e*); (*g*); (*i*); (*k*); (*l*).
Expulsion from Army.....See DESERTION V F 4.
Forfeitures with.....See PAY AND ALLOWANCES III C 1 a (1) to (2); 1 f; 2 c (4).
Fraudulent enlistment after.....See ENLISTMENT I A 9 f (2); (4); (7) (*b*).
Illegal, revocable.....See DISCHARGE XVI G to H.
Issue of clothing after.....See PAY AND ALLOWANCES II A 3 a (4) (*e*) [1].
Not revocable.....See DISCHARGE XV B.
Of retired soldier.....See RETIREMENT II F 3.
Renders service not honest and faithful.....See ENLISTMENT I D 3 c (11).
Sentence of imprisonment includes.....See DISCHARGE XIII D 5.

[1] But in the case of a contract surgeon see G. O. No. 206, War Dept., Wash., Dec. 17, 1908, which publishes the findings of a court of inquiry, which court investigated the conduct of a contract surgeon, and recommended that his connection with the military service be terminated.

DISMISSAL.

See OFFICE IV E to F.
Effect on status.....See DISCIPLINE VIII I 1; 1 a; b.
For political activity.....See CIVILIAN EMPLOYEES XI A 4.
Irrevocable after execution.....See DISCIPLINE XIV E 9 f (1); XV C 1.
Is dishonorable.....See PARDON XV B.
Of officer.....See OFFICE IV E to V.
Mandatory articles.....See DISCIPLINE XII B 3 i.
Mitigation of.....See ARTICLES OF WAR CXII A 1 a.
Not revocable.....See DISCHARGE XVII A.
Of cadet, not revocable.....See DISCHARGE XVIII A.
Of officer while prisoner of war.....See WAR I C 11 d (1).
Of volunteer.....See OFFICE V A 7 f.
Payment to.....See PAY AND ALLOWANCES I A 1 a.

DISOBEDIENCE.

See ARTICLES OF WAR XXI A to E 2; LXII C 12.

DISRESPECT.

By soldier.....See ARTICLES OF WAR LXII C 11.
Of superior.....See DISCIPLINE V D 2 b.
Toward commanding officer.....See DISCIPLINE II D 13 a; 17 a.

DISTRICT OF COLUMBIA.

Laws of, over military reservation.....See PUBLIC PROPERTY V H 2 c.
National Guard of.....See MILITIA XVI to XVII.
Naval Militia of.....See MILITIA XVIII B.
Volunteers.....See OFFICE IV A 2 d (3) (*a*).

DIVINE SERVICE.

Attendance at.....See ARTICLES OF WAR LII A; B.

DIVISION COMMANDER.

See ARTICLES OF WAR LXXII A to I 3 a (1).
Assignment to command by.....See COMMAND IV A; B.
Reviewing authority.....See DISCIPLINE XIV A 2.

DIVORCE.

See ARTICLES OF WAR LXI B 14.

DOCK.

Repair of.....See APPROPRIATIONS LII.

DOUBLE AMENABILITY.

See ARTICLES OF WAR LIX D; L 1.
Custom as to punishment under.....See DISCIPLINE XII B 2 c.
Of soldier.....See ARTICLES OF WAR LIX L 2; CII A to I. DISCIPLINE III E 4; VIII D 4; H 3.

DRAFT.

During Civil War.....See DESERTION XVI D 1 g. ENLISTMENT II A to F.
Muster-in not necessary.....See VOLUNTEER ARMY II B 1 f to g.
Of deserter.....See DESERTION VI C.

DRAYAGE.

Of equipment for militia.....See MILITIA VII A.

DROPPING.

Deserter.....See DISCHARGE XIII A 2.
DISCIPLINE VIII I 1.
Noncommissioned officer for desertion: returns him to position of private.....See DESERTION VII A 1.
Not legal evidence of desertion.....See DESERTION IX F.
Officer, for desertion.....See DESERTION XX to XXI.
ENLISTMENT I B 3 b.
Officer is discharged without honor.....See DISCHARGE III F 2; XVI H.
Removal of charge when dropped erroneously.See DESERTION XVI C 4 to 7.
Volunteer for desertion.....See VOLUNTEER ARMY IV D 1 a (5) (*b*).

DRUG.

Prescription.....See DISCIPLINE V D 5.
Use of.....See ARTICLES OF WAR XXXVIII A.

DRUMMED OUT OF SERVICE.

See DESERTION I D.
By sentence.....See DISCIPLINE XII B 3 h.

DRUNKENNESS.

Defense.....See DISCIPLINE V D 5.
Enlistment while suffering from.....See ENLISTMENT I A 9 f (5).
Evidence of.....See DISCIPLINE XI A 8; 8 a; XII A 12 a.
Off duty.....See DISCIPLINE II D 18 a.
On duty.....See ARTICLES OF WAR XXXVIII A to C 1; LXII C 13; 14.
Public.....See ARTICLES OF WAR LXI B 6; 7; LXII D.
DISCIPLINE VIII B.
Punishment for.....See DISCIPLINE XII B 2 d.

DUEL.

See ARTICLES OF WAR XXVI A; LXII D.

DUPLICATION OF PAY ACCOUNT.

See ARTICLES OF WAR LX A 1; LXI B 15.
Trial for.....See DISCIPLINE III E 5 a; V D 2 c.

DUTY.

Extra by noncommissioned officer.....See ARMY I B 1 a (3).
Extra by soldier.....See PAY AND ALLOWANCES I C 6 to 7.
Mounted.....See PAY AND ALLOWANCES I B 7 to 8.
Offenses committed while on.....See ARTICLES OF WAR LXII C 5 a.
Paroled prisoner of war.....See WAR I C 11 d (2) (*c*).
Relief from.....See COMMUNICATIONS I B 2; C.
Target practice.....See CLAIMS V.
Trial judge advocate.....See DISCIPLINE IV C 1 to 4 b.
Unauthorized badges can not be worn on....See INSIGNIA OF MERIT II A 2 a; b.
Unauthorized medals can not be worn on...See INSIGNIA OF MERIT I D.

DWELLING.

Forcible entry.....See DESERTION III B.
DISCIPLINE I A 2; 2 a.

EASEMENT.

Expenditures on land subject to.....See APPROPRIATIONS XVIII.
Title subject to.....See PUBLIC PROPERTY VIII C.
In shore line.....See COMMAND V A 3 f.

EFFECTS.

Deceased officer or soldier.....See ARTICLES OF WAR CXXVI A; CXXVII A.
Officer who deserts.....See DESERTION XX C.

EFFICIENCY REPORT.

By regimental commander.....See ARTICLES OF WAR XXIX B.

EIGHT-HOUR LAW.[1]

I. SCOPE OF THE ACT OF AUGUST 1, 1892..... *Page 589*
II. "PUBLIC WORKS OF THE UNITED STATES"?..... *Page 590*
III. REQUIREMENTS AS TO PREPARATION OF CONTRACTS FOR WORK COMING WITHIN THE PURVIEW OF THE ACT OF AUGUST 1, 1892.
DUTIES OF OFFICERS HAVING CHARGE OF "PUBLIC WORKS OF THE UNITED STATES" IN REGARD TO ENFORCEMENT OF THE ACT OF AUGUST 1, 1892..... *Page 591*
IV. APPLICATION OF THE ACT OF AUGUST 1, 1892, TO RIVER AND HARBOR WORK.
V. WHAT CONSTITUTES AN "EXTRAORDINARY EMERGENCY" UNDER THE ACT OF AUGUST 1, 1892?
VI. HOW EXISTENCE OF AN "EXTRAORDINARY EMERGENCY" IS TO BE DETERMINED..... *Page 592*
VII. FOREMEN AND INSPECTORS WHO DO NOT COME WITHIN THE APPLICATION OF THE ACT OF AUGUST 1, 1892..... *Page 593*
VIII. CERTAIN CASES TO WHICH THE ACT OF AUGUST 1, 1892, DOES NOT APPLY..... *Page 594*
IX. WHAT CONSTITUTES EIGHT HOURS WORK..... *Page 595*
X. CERTAIN PERSONS WHO COME, AND CERTAIN PERSONS WHO DO NOT COME, WITHIN THE APPLICATION OF THE ACT OF AUGUST 1, 1892.
XI. WHO SHOULD INSTITUTE PROCEEDINGS IN THE CASE OF A VIOLATION OF THE ACT OF AUGUST 1, 1892.
SECRETARY OF WAR HAS NO AUTHORITY TO REQUIRE OF BIDDERS AND CONTRACTORS FOR SUPPLIES THAT THEY SHALL OBSERVE AN EIGHT-HOUR LAW.
THE ACT OF AUGUST 1, 1892, IS PENAL AND GIVES NO CAUSE OF ACTION TO RECOVER..... *Page 596*

I. The original statute on this subject—the act of June 25, 1868, incorporated in section 3738, R. S.—merely provided that eight hours should "constitute a day's work" for laborers, etc., employed by the United States. It has been held by the Supreme Court[2] (U. S. *v.* Martin, 94 U. S., 400), that this enactment was merely "a direction by the Government to its agents," not "a contract between the Gov-

[1] Prepared by Lieut. Col. John Biddle Porter, judge advocate, assistant to the Judge Advocate General.
[2] And see 19 Op. Atty. Gen., 685.

ernment and its laborers, that eight hours shall constitute a day's work," and that it did not "prevent the Government from making agreements with them by which their labor may be more (or less) than eight hours a day." The act thus failed of its apparent object. To cure this defect the act of August 1, 1892 (27 Stat. 340) was passed. *Held*, therefore, that the term "public works of the United States," used in the first section of the later act, should not be narrowly construed. *P. 55, 155, Aug. 22, 1892; C. 5429, Dec. 2, 1898; 18811, Nov. 4, 1905.*

II. *Held*, that the construction of levees on the banks of the Mississippi River, in accordance with the plans of the Mississippi River Commission, was a public work of the United States in the sense of the act of August 1, 1892 (27 Stat. 340), although the United States did not own the land.[1] A proprietorship in, or jurisdiction over, the thing constructed is not necessary. The United States expends annually more than $20,000,000 for the improvement of rivers and harbors, but the greater part of this is done without acquiring title to, or jurisdiction over, the premises.[2] The question under the act is not in whom is the title or jurisdiction, but who is doing the work. The construction of these levees is a particular work appropriated for by Congress and to be contracted for by the United States. It is therefore one of the "public works of the United States," and subject to the provisions of this statute. *P. 55, 155, Aug. 22, 1892.* It has been held that the following are "public works." (1) Works of river and harbor improvement; U. S. *v.* Jefferson (60 Fed. Rep., 736). Under this head would fall the street work and the construction of the large sewers of the District of Columbia. (2) All field works constructed for public use, as railways, canals, waterworks, roads, etc. Ellis *v.* Com. Council of Grand Rapids (82 N. W. Rep., 244); Winters *v.* City of Duluth (84 N. W. Rep., 788, 789). (3) Sewers have been excluded, though built by the public, where the cost is charged to abutting owners; City of Denver *v.* Rhodes (9 Colo., 554; 113 Pac. Rep., 729, 733). (4) Roads are public works; Lane *v.* State (43 N. E. Rep., 244, 245). The only utterance of this office on the subject will be found in paragraph I *ante* (Eight-hour law) in which it is said that the words "public works" as used in the act of 1892, should not be narrowly construed. It clearly covers works of river and harbor improvement,[3] and probably public buildings as well, but there is no decision that expressly includes buildings. *C. 18811, Nov. 4, 1905.*

Where a vessel belonging to the United States is moored to a dock, wharf, or landing, owned by the Government, *held* that the work of repairs on such vessel by a contractor would not be on a "public work" of the United States as contemplated in the act of August 1, 1892. *C. 20169, Apr. 26, 1910.*

Having regard to the opinions of the Attorney General[4] that the law is not applicable to a vessel of the Navy under construction in the operation of a contract with a private establishment, *held*, that it is likewise inapplicable to repairs on a Government transport which are similarly made by contract. *C. 20169, Oct. 8, 1906, and Aug. 2, 1907.*

---

[1] U. S. *v.* Garbish, 222 U. S., 257.

[2] 26 Op. Atty. Gen., 30.

[3] See, however, on this point Ellis *v.* U. S. (206 U. S., 245).

[4] 26 Op. Atty. Gen., 30; *Ibid.*, 36. See, however, the act of Mar. 4, 1911 (36 Stat., 1287), and the opinion of the Comptroller thereon (XVIII Comp. Dec., 93).

Where a contract is given for repairs to a Government vessel, the repairs to be made at a Government dock or under conditions which continue the vessel in the active control of the Government authorities, the eight-hour law may perhaps apply, but when, as in the case before us, the vessel is turned over to a contractor for repairs, at the contractor's plant, and so, for the time being, out of the active control of the Government, *held*, that the restrictions of the act of August 1, 1892, do not apply. *C. 20169, Feb. 27 1907, and Feb. 9, 1909.*

III. *Held*, that it was not essential that the requirement of the act of August 1, 1892, be embodied in a contract, the law itself being self-acting.[1] The responsibility rests on contractors to comply with it, irrespective of the terms and conditions of their contracts. The officers who enter into contracts on behalf of the United States are not charged with the duty of enforcing the law with reference to those with whom they contract; the latter being directly responsible in the matter.[2] Any construction by the War Department of the requirements of the act would, if erroneous and not sustained by the courts, be no protection to contractors. *P. 55, 311, Sept. 7, 1892; C. 11459, Nov. 4, 1901; 16104, Mar. 29, 1904; 16282, May 7, 1904; 18811, Nov. 4, 1905.*

IV. Inquiry having been made of the War Department by certain contractors whether the men employed on dredges, scows, and tugs on Lake Erie, under contracts with the United States, were to be regarded as excepted from the application of the act of 1892,[3] *held* that it was not the duty or province of the War Department to determine such questions, but that the same were for the courts to decide, on trials, under the second section of the act, of persons charged with violations of its provisions. Neither the War or other Department of the Government can lay down rules, or make constructions of the law, for contractors, which would effectually protect them were they brought to trial.[4] *P. 57, 36, Dec. 13, 1892; C. 18811, Nov. 4, 1905.*

Held, based on the decision in U. S. *v.* Jefferson (60 Fed. Rep. 736), that, while the ordinary status of certain men was that of seamen and as such not within the application of the act of August 1, 1892, while actually engaged in "labor upon public work in removing snags and obstructions" the men came within the application of the law. *C. 20169, Mar. 16 and 21, 1907.* But later, in view of the case of Ellis et al. *v.* U. S. (206 U. S. 246), in which it was decided that persons employed in the work of dredging and rock excavation in the improvements of rivers and harbors of the United States are not employed "upon any of the public works of the United States" within the meaning of the act of August 1, 1892, and that the persons so employed, whether on tugs, scows, or dredges, are not "laborers and mechanics" within the meaning of that act, but are to be regarded as seamen employed on vessels within the statutes and decisions relating to such

[1] See, however, the requirements of par. 742, A. R. (1910). U. S. *v.* Garbish, 222 U. S., 257.

[2] But see 26 Op. Atty. Gen., 64, as to duty of engineers to report violations of the law.

[3] See Ellis *v.* U. S. (206 U. S., 246).

[4] In a communication to the Secretary of War of Aug. 29, 1892, the Attorney General, whose opinion had been asked with regard to the application in general of the act to the "construction of levees on the Mississippi River," declines to give an official opinion with a view to the guidance of persons who may propose to enter into contract relations with the United States, in the absence of a special case requiring the action of the Secretary. See 20 Op., 459.

employment; *held*, that since the eight-hour law is clearly not applicable to dredging operations there is no requirement that in contracts for work covered by the above decisions, such as dredging, snagging, and rock excavation, a reference to the eight-hour law should appear. *C. 20169, May 22, 1907.*

While persons employed on dredges and scows in dredging a channel in a harbor are not, within the meaning of the act of August 1, 1892, laborers or mechanics employed on any of the public works of the United States (because they are seamen) *held*, that laborers employed simply to load vessels or barges are not seamen within the meaning of the foregoing premises. *C. 20169, Sept. 23, 1909, June 14, 1910.*

Where stone or other material is delivered on a breakwater from a floating plant, *held* that the work of placing, bedding, or arranging the stone or material on the breakwater does not come under the provision of the act of August 1, 1892, if the persons employed on the floating plant do the work; however, if one person is continuously employed in such work, it would seem that he should be regarded as for the time engaged as a laborer, and could not be required to work in excess of eight hours in one day. *C. 20169, Apr. 26, 1910.*

V. The term "extraordinary emergency," employed in the first section of the act of August 1, 1892 (27 Stat., 340), can not properly be construed in advance as referring or applicable to any particular class of cases. The question whether there is or was such emergency should be left to be determined by the facts of each special instance as it arises. A case in which it appeared that a compliance with the statute was not possible, might well be held to be one of "extraordinary emergency." *P. 55, 311, Sept. 7, 1892; 60, 263, July 1, 1893; C. 1365, May 18, 1895; 14790, June 12, 1903.*

Merely economical considerations will not bring a case within the exception as an "extraordinary emergency;" there must be some sudden unexpected happening.[1] *C. 20169, July 25, 1908.*

Under the act of August 1, 1892 (27 Stat., 340), circumstances of mere emergency are not sufficient to warrant an extension of the hours of labor but the emergency must be extraordinary. *C. 20169, Oct. 8, 1906.*

Held, that ordinary work of repair on an Army transport, whether performed by a contractor, or by laborers and mechanics employed by the Quartermaster's Department, does not constitute an extraordinary emergency within the meaning of the act of August 1, 1892. *C. 20169, Oct. 8, 1906.*

Under the order of the President of September 11, 1907, directing that all persons employed as watchmen, lock tenders, lock employees, etc. (see par. 742, A. R., 1910), shall "be considered as covered by the eight-hour law, and that exceptions only be made by the Secretary himself on the case being reported to him," *held* that exceptions were only intended to be made in cases of emergency or where, owing to the nature of the duties of the particular employee, he should not be regarded as within the President's order or as a laborer or a mechanic within the meaning of the law. *C. 20169, May 23, 1908.*

VI. No provision is contained in the act of August 1, 1892 (27 Stat., 340), for the *suspension* of its operation, and the Secretary of

[1] U. S. *v.* Garbish, 222 U. S., 257.

War has no power to suspend it as to certain work or places of work on the theory that an "emergency" exists as to the same. Nor can he lay down in advance any general rule as to what would be such an emergency, as would relieve an officer or contractor from liability or give him an immunity from prosecution. The question of the existence of an emergency is to be determined, in the first instance, by the person carrying on, or in charge of, the work; and, in the second, by the court, if the case comes before one.[1] It may be said generally that when the emergency can be foreseen it is not extraordinary; that increased expense and inconvenience can not constitute an emergency when they can be foreseen and guarded against. *P. 55, 153, 324, 386, 469, Aug. 22, Sept. 8 and 23, and Oct. 5, 1892; 56, 330, Nov. 14, 1892; C. 1365, May 18, 1895; 9137, Oct. 19, 1900; 14005, Jan. 19, 1903; 14790, June 12, 1903; 20169, Oct. 8, 1906.*

If "an extraordinary emergency" exists it is one of time and is created by the requirement of the existing act of appropriation which requires the filtration plant to be completed on a given date; and the determination of its existence is a question of fact, to be determined by the officer in charge of the work, whose conclusion in that regard is subject to review by the courts should an action be brought for the enforcement of the penalty which is imposed for its violation in the act of August 1, 1892 (27 Stat. 340). The application of the remedy which is provided in the statute above cited is, by its express terms, vested in the courts and not in the executive departments of the Government. *C. 16104, Mar. 29, 1904; 20169, Oct. 22, 1909.*

VII. At the Leavenworth military prison there are employed certain civilians as "foremen of mechanics," who are paid, under the sundry civil appropriation act, a stated salary of $1,200 *per annum*, and whose duty it is to direct the labor of the prisoners. The regulations framed for the government of the military prison, pursuant to section 1345, R. S., require more than eight hours' labor *per diem* of the prisoners, and consequently more from these foremen. *Held* that the latter were not entitled to the benefits of the act of August 1, 1892, chap. 352, as "laborers or mechanics," the statute not being applicable to them.[2] *P. 65, 220, June 7, 1894; C. 20169, Oct. 4, 1907.*

On the question of whether foremen and timekeepers on duty with gangs of workmen employed by contractors on public works, as well as night watchmen employed by contractors to protect their property come within the application of the act of August 1, 1892 (27 Stat. 340), *held* that the persons referred to can not properly be held to come within the terms "laborers and mechanics" as used in the statute in question. *C. 20169, Dec. 13, 1907. Held*, that a man whose employment is of a high grade, whose work is not manual in any sense, but whose employment is associated with mental labor and skill only, is not a laborer; nor can he be deemed a mechanic. If we apply the foregoing opinion to an inspector in the Quartermaster's Department, stationed in a factory, such an inspector is not a laborer or mechanic within the application of the act of August 1, 1892, since he has no manual duty to perform, but is a high-grade employee, as is shown by his salary and also the fact that he has been required to pass an educational examination, and has no work

[1] U. S. *v.* Garbish, 222 U. S., 257.

[2] 21 Op. Atty. Gen. 32; 26 id. 822.

to perform not associated with mental labor and skill. *C. 20169, Aug. 17, 1906.*

VIII. The act of August 1, 1892 (27 Stat. 340), provides that it shall be unlawful for any officer of the United States Government or any contractor or subcontractor whose duty it shall be to employ, direct or control the services of laborers or mechanics (on public works) to require or permit any such laborer or mechanic to work more than eight hours in any one calendar day except in case of extraordinary emergency. But where a subcontractor purchased window blinds, sashes, etc., for a public building at a factory in which the employees were working more than eight hours a day, but over whom he had no control, it was held that the statute did not apply.[1] *C. 7323, Nov. 21, 1899; 18831, Nov. 9, 1906; 20189, May 18, 1911.*

On the question of whether the act of August 1, 1892 (27 Stat. 340), applied to contractors furnishing the Quartermaster's Department with supplies, *held* that it did not.[1] Whether or not laborers or mechanics are employed on "public works" depends largely on the question of the title to the articles or materials upon which they are at work. If the latter belong to the contractor the laborer or mechanic can not be regarded as employed upon public works. Nor is this view of the question in any way affected by the fact that Government inspectors may be employed to inspect and report upon the various stages in the manufacture of any supplies for the Government. *C. 20169, July 25, 1906.*

Where lock gates were delivered in sections by a contractor, and erected in place, *held* that the act of August 1, 1892 (27 Stat. 340), applied to the work of assembling the sections at the lock site and to the erection of the gates in the lock by the contractor. *C. 20169, Apr. 26, 1910. Held, per contra,* that the work involved in the construction and assembling of a lock gate in the shops of a contractor, the gate to be later erected in the lock by the United States, did not come under the act of August 1, 1892 (27 Stat. 340). *C. 20169, June 21, 1909.*

The installation of electric lamps, conduits, etc., by a private company in the public parks of the District of Columbia, and on the highway bridge, the lamps, etc., to remain the property of the company, *held,* not to be a "public work" of the United States or of the District of Columbia. *C. 20169, July 26, 1909.*

Where materials or supplies, such as lumber or cement, are delivered by a contractor on land or in a warehouse owned or leased by the United States, *held,* that the the work involved in unloading, assorting, and piling such materials or supplies should not be regarded as being upon a "public work" within the meaning of the act of August 1, 1892 (27 Stat. 340), if they shall have been purchased by the United States or by a contractor on a public work from an independent contractor as supplies and materials to be put into the actual work of construction, such materials being delivered by the independent contractor, who furnishes the same under his contract and is required to deliver the same. *C. 20169, Apr. 26, 1910.*

Where a contractor quarried stone on the shore in the vicinity of the site of a proposed dam which he was under contract to construct

[1] See 20 Op. Atty. Gen. 454; 26 id. 30; XVIII Comp. Dec., 93.

for the Government, *held*, that neither the act of August 1, 1892, nor the Army Regulations were applicable to the preliminary work of quarrying stone along the shore in the immediate vicinity of the dam. *C. 20169, July 27, 1909.*

Where a contractor built, on private ground, a crib, to be later floated into position and sunk as the base of a pierhead he had contracted to build for the Government, *held*, that the crib could not be construed as coming under the decisions and opinions respecting the procurement of manufactured articles or materials for use in public work, and that the labor on the crib must be considered to be on a "public work" within the meaning of the act of August 1, 1892. *C. 20169, June 11, 1909.*

IX. An executive officer can not, in view of section 3738, R. S., legally direct that laborers, workmen, and mechanics employed by and on behalf of the Government shall be given time without loss of pay to vote on election day, if such indulgence would reduce the number of working hours below eight. *C. 2692, Oct. 20, 1896. Held*, that the law (act of Aug. 1, 1892) is not violated, as to the hours of work of employees, so long as the aggregate of their several periods of duty does not exceed eight hours in a calendar day. *C. 20169, Jan. 9, 1908.*[1]

Where a laborer or mechanic has worked for eight hours, in any one calendar day, for the United States, *held*, that it would be a violation of the law for a contractor, having a knowledge of that fact, to require or permit the laborer or mechanic to work for additional hours, in the same calendar day, upon any public work of the United States. *C. 20169, Dec. 26, 1907.*

The law and regulations require that the laborers and mechanics employed on a dam being built by the Government shall not be required to work in excess of eight hours in any one calendar day; and it would be an evasion of the law to employ them for less than eight hours on the work of dam construction, and then put them on quarrying work in such manner that the aggregate of the two work periods would exceed eight hours. *C. 20169, July 27, 1909. Held*, that to require a man to work in a quartermaster's stable for seven hours and further require that he shall sleep in the stable during the night, until relieved in the morning, in order to be available in case of fire or accident, would not be a violation of the act of August 1, 1892. *C. 20169, Nov. 11, 1907.*

X. *Held*, that a "hostler" at an arsenal is neither a "laborer" nor a "mechanic" within the meaning of the eight-hour act of 1892. *C. 3673, Nov. 26, 1897; 20169, May 2, 1911.* Similarly *held* with respect to lock employees on river locks.[2] *C. 4814, Aug. 20, and July 16, 1901.*[3]

Janitor for Shiloh National Park Commission, although his duties would include field work, *held*, not to be a laborer within the meaning of the eight-hour law.[4] *C. 20169, May 2, 1911.*

Stevedores and longshoremen come within the application of the act of August 1, 1892. *C. 20169, Jan. 15, 1907.*

---

[1] 26 Op. Atty. Gen., 64; id., 605.

[2] See 20 Op. Atty. Gen., 459; 26 *id., 64;* id., 623; and A. R., 742 (1910).

[3] On Sept. 11, 1907, the President ordered that all persons employed as watchmen, lock tenders, and lock employees be considered as covered by the eight-hour law. See also in this connection par. 742, A. R. (1910).

[4] 26 Op. Atty. Gen., 623.

Held, that all laborers employed by the officers of the Soldiers' Home are strictly "employed by the Government of the United States" and that the act of August 1, 1892, is applicable to them. *C. 20169, Dec. 9, 1907.*[1]

Held, that the act of August 1, 1892, is applicable to laborers and mechanics employed on the public work of the United States in the Philippine Islands. *C. 19702, May 12, 1906.*

The act of August 1, 1892, *held* not to apply to laborers and mechanics employed by the Board of Road Commissioners for Alaska. *C. 20169, May 27, 1907.*[2]

XI. It is not the duty of the Secretary of War to institute proceedings for violations of the act of 1892. Parties who think the law is being violated by contractors should submit their complaints to the proper United States attorney. *C. 7323, Nov. 21, 1899; 16104, Mar. 29, 1904; 16282, May 7, 1904.* *Held*, that it is beyond the authority of the Secretary of War to impose a condition upon bidders or contractors that articles which they undertake to furnish for the use of the military establishment shall be manufactured in shops or places in which eight hours of labor, and no more, are required of the mechanics and operatives who are engaged in their production or manufacture. *C. 20169, Mar. 13, 1908.* *Held*, that the act of August 1, 1892 (27 Stat., 344), is penal in its nature and gives a claimant no cause of action to recover for work in excess of eight hours a day. *C. 20169, Feb. 11, 1907, Mar. 16, 1907, and Oct. 29, 1908.*

ELIGIBILITY.

Civilian employees for campaign badge.....See INSIGNIA OF MERIT III B 3.
Discharged soldier for certificate of merit....See INSIGNIA OF MERIT II G.
Divorced man for appointment as cadet.....See ARMY I D 1 c (1).
For appointment as officer.....See DESERTION XX F.
For appointment as second lieutenant.....See OFFICE III A 1 b (5); (5) (a).
For appointment or enlistment after dismissal.....See OFFICE IV E 1 c; 2 f.
For appointment to Medical Reserve Corps..See ARMY I G 3 d (4) (a).
For campaign badge.....See INSIGNIA OF MERIT III B 2.
For commission in Volunteers.....See MILITIA XVII A.
For enlistment of deserter.....See DESERTION VI D.
For enlistment, not restored by pardon.....See PARDON XIV.
For enlistment.....See ENLISTMENT I A 9 c to d; 10; B 3 to D. See PARDON XIV.
For General Staff.....See OFFICE III D 1 c.
For gunner's badge.....See INSIGNIA OF MERIT III C.
For medal of honor.....See INSIGNIA OF MERIT I A 2 d; d (1).
For promotion of officer under suspension from rank.....See PARDON XV C 2 a. OFFICE III B 1 a (2).
For reappointment as cadet.....See ARMY I D 1 d (3); 2 b.
For reenlistment.....See ENLISTMENT I D to H.
Officer ineligible for certificate of merit.....See INSIGNIA OF MERIT II I.
Philippine Scout officer, for duty with militia.....See MILITIA VI A 2 d.

---

[1] Act of Aug. 1, 1892, does not apply to laborers and mechanics in the employment of the Panama Railroad & Steamship Line. 25 Op. Atty. Gen., 465.

[2] See Moses *v.* U. S., 116 Fed. Rep., 526.

The act of Aug. 1, 1892, shall not apply to alien laborers employed in the construction of the Isthmian Canal within the Canal Zone (Panama), act of Feb. 27, 1906; nor to unskilled alien laborers and to the foreman and superintendents of such laborers employed in the construction of the Isthmian Canal within the Canal Zone, act of June 30, 1906 (24 Stat., 34 and 669).

Retired officers as members of general court-martial. See RETIREMENT I K 2 f.
Retired officer for advancement in grade.....See RETIREMENT I C 2 a; 2 b.
Retired officer for membership on courts of inquiry. See RETIREMENT I K 2.
Retired officer to hold civil office.....See RETIREMENT I G 3 to 4.
Retired soldier for certificate of merit.....See INSIGNIA OF MERIT II E.
Retired soldier to hold civil office.....See RETIREMENT II D to E.
To command.....See COMMAND I A.
To command by Adjutant General.....See COMMAND I A 1.
To command by General Staff officer.....See COMMAND I A 1 a.
To command by marine officer.....See COMMAND I B.
To command by quartermaster.....See COMMAND V B 4.
To hold office.....See PARDON XVI A 1.
OFFICE I A.

EMANCIPATED MINOR.

See DISCHARGE XII C 1; 2.
RESIDENCE II B.
Enlistment of.....See ENLISTMENT I B 1 b (5).

EMBEZZLEMENT.

See ARTICLES OF WAR LX F; LXII B; C 2 to 4.
DESERTION V B 18 a.
By commissary sergeant.....See ENLISTMENT I D 3 c (18) (i).
By officer.....See ENLISTMENT I D 3 d (3).
By officer of soldier's pay.....See ARTICLES OF WAR LXI B 9 c.
By recruit.....See DESERTION XXII A.
Charging of.....See DISCIPLINE II D 16 b.
Defense of.....See DISCIPLINE XII A 12 b.
Evidence of.....See ARTICLES OF WAR LX A 4.
DISCIPLINE XI A 18.
Failure to turn public money into Treasury..See PUBLIC MONEY I A.
Pardon of.....See PARDON VII A.
Post exchange money.....See GOVERNMENT AGENCIES II B 5.

EMERGENCY.

See EIGHT-HOUR LAW V.

EMPLOYER'S LIABILITY.

For injuries.....See CIVILIAN EMPLOYEES XII to XIII.

EMPLOYMENT.

Abandonment of.....See CIVILIAN EMPLOYEES XIV A.
Alien and convict labor.....See CONTRACTS XXIII to XXIV.
Army musicians.....See ARMY BANDS I A to D 3.
Army to aid civil authority.....See ARMY II to III.
Authorized civil, of officers.....See OFFICE IV A 2 e to C.
Of alien.....See ALIEN VII.
Position of master machinist.....See CIVILIAN EMPLOYEES V C.
Retired soldier.....See RETIREMENT II D 1; E to F.
Soldier as telegraph operator.....See PAY AND ALLOWANCES I C 6 a.
Soldier on furlough.....See ABSENCE I C 4 d (1); (2).
ARMY I C 1.

ENEMY.

See PARDON X.
As prisoners of war.....See WAR I C 11 c to d.
Capture of prisoners by.....See WAR I C 11 d to e.
Courts of: during war.....See WAR I C 7 a.
Evidence by.....See DISCIPLINE XI A 6 a.
Inhabitants of insurrectionary States.....See ARTICLES OF WAR XLV B.
In Philippines.....See CLAIMS VII A.
Laws of.....See WAR I C 8 a (1).

ENGINEER BRIGADE, UNITED STATES VOLUNTEERS.

See VOLUNTEER ARMY III A to B.

ENGINEER DEPARTMENT.

Duties of, in respect to river and harbor work and seacoast defense.....See ARMY I G 3 c (1).
NAVIGABLE WATERS X B to C.

ENLISTED MEN.

See ARMY I E 1 to 5.
Appointments as officers.....See OFFICE III A 1 b to c; 6 b.
Can not be officers' servants.....See ARTICLES OF WAR XXI C 2 a.
ARMY I C 1.
Clerical duty.....See CIVILIAN EMPLOYEES VIII A.
Clothing allowance.....See PAY AND ALLOWANCES II A 3 a to b.
Court reporter.....See DISCIPLINE IV B 2 a.
Desertion of.....See DESERTION.
Discharge of.....See DISCHARGE.
Duty with militia.....See MILITIA VI A 2 c.
Heat and light to.....See PAY AND ALLOWANCES II A 1 d to e.
Line of duty status.....See LINE OF DUTY II; III.
Muster in during Civil War.....See VOLUNTEER ARMY II B to C.
Pay can not be attached.....See ARMY I C 2.
Pay of.....See PAY AND ALLOWANCES I C to D.
Purchase of supplies from.....See CONTRACTS XV to XVI.
Rank of.....See RANK I D to E.
Residence.....See RESIDENCE.
Retirement of.....See RETIREMENT II to III.
Taxation of.....See TAX I to II.
Volunteers.....See VOLUNTEER ARMY III B to C.

ENLISTMENT.

I. VOLUNTARY.
A. ENLISTMENT IS A CONTRACT..... *Page 602*
1. All enlistments are voluntary..... *Page 603*
2. Oath not essential to enlistment.
a. Statement of age.
3. Constructive contract of enlistment.
a. Civilian acquiescing in illegal sentence by general court-martial.
b. Military convict pardoned and returned to service.
c. Officer obeys illegal order reducing him to ranks.
4. Enlistment on Sunday legal..... *Page 604*
5. Pay may be reduced pending enlistment.
6. Enlistment for service at particular place not authorized.
7. Volunteers enlisted directly into the United States service.
8. Date of enlistment.
a. Fixed in oath.
b. Date antedated to correct delay by the Government.
c. Date not antedated; no delay by Government..... *Page 605*

I. VOLUNTARY—Continued.
A. ENLISTMENT IS A CONTRACT—Continued.
9. Fraudulent contract of enlistment.
a. Defined.
b. Elements of.
c. Enlistment of ineligibles without misrepresentation.
(1) Minor without consent of parents.
(2) Discharged felon ..... *Page 606*
d. Deserter from Navy fraudulently enlists.
e. Deserter from Marine Corps fraudulently enlists.
(1) Member of National Guard fraudulently enlists.
f. Fraudulent enlistment not void.
(1) Enlistment of soldier discharged without honor.
(2) Enlistment of soldier dishonorably discharged for desertion.
(3) Enlistment of escaped military convict ..... *Page 607*
(4) Enlistment of discharged military convict.
(5) Enlistment of men ineligible under sections 1116 and 1118, Revised Statutes.
(6) Enlistment of minor without consent of parents.
(7) Nonstatutory fraudulent enlistment.
(*a*) Married man ..... *Page 608*
(*b*) Concealment of disqualification not statutory.
(8) Enlistment in violation of fiftieth article of war.
g. Disposition of fraudulently enlisted soldiers.
(1) Dishonorably discharged soldiers who have enlisted.
(2) Minors who have enlisted ..... *Page 609*
(3) Deserters who have enlisted.
(4) Soldiers discharged on certificate of disability who have enlisted.
h. Policy in handling fraudulent enlistment of deserter.
i. Discharge without honor should not be given after a court has declined to dishonorably discharge a soldier.
k. Law of contract applies to fraudulent enlistment.
l. Service under fraudulent enlistment, legal, and if honest and faithful ended by an honorable discharge.
m. Fraudulent enlistment counts for retirement ..... *Page 610*
n. Service under fraudulent enlistment legal for purpose of earning certificate of merit.
o. Service under fraudulent enlistment counts for continuous service unless voided.
10. Secretary may fix status of certain classes, i. e., married men as ineligible for enlistment.
11. Enlistment of married men may be authorized.
12. Enlistment of colored men for Coast Artillery Corps not authorized.
B. STATUTORY REQUIREMENTS.
1. Age limit is 18 to 35.
a. Maximum age limit.
b. Minimum age limit.
(1) Alien, minor, consent of parents who have taken out papers.
(2) Alien, minor, without consent of parents .... *Page 611*
(3) Indian, minor, consent of parents, when minor has taken out papers.
(4) Father is natural guardian.
(5) Emancipated mino

I. VOLUNTARY—Continued.

B. Statutory Requirements—Continued.

2. Period.

a. Three years; act of August 1, 1894 (28 Stat., 216).

b. Time lost to be made good.

(1) Time not made good due to fault of Government.

c. In an emergency a soldier may, with his consent, be continued in service for more than three years.

d. Enlistment for three years or during the war..... *Page 612*

e. Enlistment for two years unless sooner terminated.

f. Held because of exigency of service.

g. Philippine Scouts can not be held in United States beyond term of enlistment to participate in an exposition.

h. Can't be held in order to pay forfeiture.

i. Held when too sick for discharge ..... *Page 613*

3. Statutory ineligible classes.

a. Pardon does not restore a felon's eligibility.

b. An officer in desertion ineligible.

c. Incarceration in a workhouse does not attach ineligibility.

C. Enlistment in Time of Peace.

1. Only citizens shall be enlisted.

a. Foreigner can not enlist.

b. Native-born minors are citizens.

c. Alien may enlist in time of war..... *Page 614*

(1) Rule for determining citizenship of aliens who reach 21 in the United States.

d. Alien, minor, may enlist in time of war with consent of parents.

e. Porto Ricans.

(1) Before eligibility was conferred by act of Congress it could be acquired on making the legal declaration of intention to become a citizen.

f. Enlistment of Filipinos in time of peace not authorized.

g. Enlistment of alien in Cuba in 1902.

D. Reenlistment.

1. No maximum age limit.

2. Previous service essential.

a. Previous naval service does not count ..... *Page 615*

b. Previous marine service does not count for Army service.

c. Previous commissioned service does not count for enlisted service.

3. Honest and faithful service an essential for reenlistment.

a. Service honest and faithful unless contrary is established.

(1) Remark "service not honest and faithful" will not be entered except after action of a board.

b. Desertion does not necessarily render service "not honest and faithful" for purpose of reenlistment.

c. Act of August 1, 1894 (28 Stat., 216), provides that no soldier shall be reenlisted whose service in last preceding term was not honest and faithful.

(1) Service is presumed to be honest and faithful until soldier's conduct renders it otherwise ..... *Page 616*

(2) Last term may have been in volunteers.

(3) Felon pardoned, returned to duty, service held honest and faithful.

I. VOLUNTARY—Continued.
D. REENLISTMENT—Continued.
3. Honest and faithful service an essential for reenlistment—Contd.
c. Act of August 1, 1894, etc.—Continued.
(4) General court-martial convicts soldier of felony but does not discharge him; may serve honestly and faithfully as each case hinges on its own merits.
(5) Remission of unexecuted sentence of a felon does not render previous service honest and faithful. *Page 617*
(6) Pardon and restoration to citizenship of a dishonorably discharged soldier does not render service honest and faithful.
(7) A pardon does not change previous character.
(8) Pardon of a discharged military convict not a deserter does not render service honest and faithful.
(9) Remission of unexecuted sentence of military convict deserter does not render service honest and faithful.
(10) Remission of unexecuted sentence of military convict not a deserter does not render service honest and faithful..... *Page 618*
(11) A dishonorably discharged soldier's service is not honest and faithful.
(12) A discharged military convict's service not honest and faithful.
(13) After mitigation of deserter's sentence of dishonorable discharge may receive an honorable discharge with service honest and faithful.
(14) Deserter restored to duty without trial, service may be honest and faithful.
(15) Convicted deserter not sentenced to dishonorable discharge, service may be honest and faithful. *Page 619*
(16) Convicted deserter not sentenced to dishonorable discharge; board under mistaken belief that service which includes desertion can not be honest and faithful so found; service may be honest and faithful.
(17) Service of soldier discharged without honor may be honest and faithful.
(18) Secretary of War has discretion to classify service as honest and faithful for purpose of reenlistment.
(*a*) Honorable discharge; service recorded as not honest and faithful.
(*b*) Deserter restored to duty without trial.
(*c*) Soldier discharged without honor.
(*d*) Soldier discharged without honor after action of board ..... *Page 620*
(*e*) Soldier dishonorably discharged for other cause than desertion.
(*f*) Soldier dishonorably discharged for desertion.
(*g*) Remission of sentence of convicted felon other than deserter.
(*h*) Convicted deserter not sentenced to dishonorable discharge; Secretary has discretion... *Page 621*

I. VOLUNTARY—Continued.
D. REENLISTMENT—Continued.
3. Honest and faithful service an essential for reenlistment—Contd.
c. Act of August 1, 1894, etc.—Continued.
(18) Secretary of War has discretion to classify service as honest and faithful for purpose of reenlistment—Continued.
(*i*) Soldier guilty of offense ordinarily calling for dishonorable discharge; Secretary can not properly determine such case as honest and faithful.
(*k*) Discharged military convict; Secretary has discretion.
[1.] Except when service clearly not honest and faithful.
(*l*) Military convict; Secretary has discretion.
d. Act of January 12, 1899 (30 Stat., 784), and act of March 3, 1899 (30 Stat., 1073), for purpose of extra pay to officers and enlisted men who served honestly and faithfuly outside of the limits of the United States.
(1) Rule, service classified and manner and character of service during enlistment.
(2) Soldier absent without leave; drunk; died; service not honest and faithful.
(3) Officer confessed embezzlement; service not honest and faithful ..... *Page 622*
(4) Regulations in aid of this statute for classifying service.
(5) Officer tried by court-martial, nevertheless service honest and faithful, rule.
e. Joint resolution of June 28, 1906 (34 Stat., 836), to classify service for purposes of pension.
(1) An officer dismissed; restored to duty, etc., service honest and faithful..... *Page 623*
II. INVOLUNTARY ENLISTMENTS.
A. DRAFTED MEN ARE NOT IN SERVICE OF UNITED STATES UNTIL ACCEPTED.
B. EXEMPTIONS.
1. Act of February 24, 1864 (13 Stat., 8), repealed certain exemptions in act of March 3, 1863 (12 Stat., 731).
2. Exemption of religious sects.
C. DISCHARGE OF DRAFTED MEN WHO ARE NOT ACCEPTED.
D. SUBSTITUTES ..... *Page 624*
E. DRAFTED MEN WHO FAILED TO REPORT AT RENDEZVOUS WERE DESERTERS.
F. DRAFT OF DESERTERS LEGAL.

I A. Enlistment is a contract for military service as a soldier, entered into between a civilian and the Government.[1] *C. 5131, Oct.*

[1] Our law not defining enlistment, nor designating what proceeding or proceedings shall or may constitute an enlistment, it may be said, in general, that any act or acts which indicate an undertaking, on the part of a person legally competent to do so, to render military service to the United States for the term required by existing law, and an acceptance of such service on the part of the Government may ordinarily be regarded as legal evidence of a contract of enlistment between the parties and as equivalent to a formal agreement where no such agreement has been had. The forty-seventh article of war practically makes the receipt of pay by a party as a soldier evidence of

13, 1898; 1916, Dec. 28, 1895; 13103, Aug. 9, 1902; 20237, Aug. 15, 1906; 20754, Nov. 23, 1906; 20540, July 6, 1909.

I A 1. The act of June 20, 1890 (26 Stat., 163), directed the mustering out of the enlisted men of the artillery detachment at West Point and their immediate reenlistment as Army service men in the Quartermaster's Department. *Held*, that it does not authorize their being forced into a new contract or reenlisted against their will, as this enlistment, like all others, is voluntary. *P. 41, 460, July, 1890.*

I A 2. While the taking of the oath prescribed by the second article of war is not *essential* to the validity of an enlistment, it is almost invariably a part of a regular formal enlistment. *R. 30, 313, May, 1870; 42, 203, Mar., 1879; C. 4631, July 22, 1898; 10980, Aug. 5, 1901; 11284, Sept. 25, 1901; 12140, Mar. 26, 1902.*

I A 2 a. A recruit's declaration as to his age is no part of the oath prescribed by the second article of war. There is no law of the United States which requires that such declaration shall be under oath. *Held*, therefore, that when the declaration is false the recruit is not indictable for perjury under section 5392, R. S. *P. 30, 176, Feb., 1889.*

I A 3 a. A soldier was dishonorably discharged by sentence of court-martial on account of desertion, subsequently arrested for the same desertion, tried by court-martial and sentenced to forfeiture of pay, etc., but not to dishonorable discharge. There is no record of his having pleaded a previous conviction. He accepted service after the second trial and was later honorably discharged. *Held*, that as the first sentence severed him from the service, he must be regarded as a civilian until he was again assigned to duty and that by acquiescing in that assignment and serving under it he was constructively enlisted, and was a soldier in the service until he was subsequently honorably discharged. *C. 4965, Sept. 12, 1898.*

I A 3 b. A soldier deserted in December, 1863, was subsequently dishonorably discharged and confined for the desertion by sentence of a court-martial, but, pending the confinement, was pardoned by the President "on condition of returning and faithfully serving out his time in his regiment." He complied with this condition and was honorably discharged. *Held* that his returning to his regiment and entering upon duty as a soldier pursuant to his agreement with the President, constituted an enlistment for the period agreed upon. *P. 65, 224, June, 1894.*

I A 3 c. A private in a volunteer company was in 1864 appointed captain in another regiment. He accepted and entered upon the

---

an enlistment on his part, estopping him from denying his military capacity when sought to be made amenable as a deserter. The continued rendering of service which is accepted may constitute an enlistment. But enlistments in our Army are now almost invariably evidenced by a formal writing and engagement under oath. See *In re* McDonald, 1 Lowell, 100. An enlistment is the act of making a contract to serve the Government in a subordinate capacity either in the Army or Navy. Erichson *v.* Beach, 40 Conn., 283. An enlistment is a contract and effects a change of status. *In re* Grimley, 137 U. S., 151; Coe *v.* U. S., 44 Ct. Cls., 419; *In re* Morrissey, 137 U. S., 157. The statutes employ the term "enlist" only with reference to contracts with persons who enter the Army as soldiers. Babbitt *v.* U. S., 16 Ct. Cls., 214.

6 Op. Atty. Gen., 190, Oct. 25, 1853: "Enlistments into the Army, made under the inducements held out by the laws of the United States, are contracts; and although the Government be a party, still the contracts ought to be construed according to those well-established principles which regulate contracts generally."

office. Subsequently an order was issued purporting to revoke the appointment and directing his return to his original company as a private. He complied with the order. *Held* that while this order was in fact void, he, by complying with it, abandoned the office of captain, and, by performing services as a private which were accepted and paid for by the Government, constructively enlisted again. *C. 2293, June, 1896.*

I A 4. There is no law or regulation affecting the validity of an enlistment made on Sunday.[1] *R. 33, 562, Dec., 1872; C. 2619, Sept., 1896; June 20, 1906* and *Oct. 19, 1908.*

I A 5. The engagement alike of officers and soldiers when entering the Army has always been held to recognize, and to be subject to, the right of the Government to change by law their pay and allowances in its discretion as the public interests may require. *Held,* therefore, that a contract of enlistment was not violated by the United States by the reduction by act of Congress, pending his enlistment, of the pay of a soldier from $16 to $13 per month.[2] *R. 34, 442, Sept., 1873.*

I A 6. There is no statute that authorizes even the President to accept into or retain in the military service of the United States an individual soldier on a condition that he shall be sent to this or that part of the country to serve. A practice of entering into such agreements would soon prove impracticable and inconsistent with public policy and the interests of the service. *C. 6731, July, 1899.*

I A 7. *Held* that under the laws relating to the raising of a volunteer army, recruits for the United States Volunteers are enlisted directly into the service of the United States.[3] *C., 4631, July 22, 1898.*

I A 8 a. *Held* that the date set forth in the oath is the date on which a soldier is enlisted within the meaning of the Articles of War.[4] *C. 10803, July 5, 1901; 16562, July 7, 1904. Held* also that proof of the date of enlistment is not essential to proof of enlistment. *C. 3947, Mar. 18, 1898.*

I A 8 b. Where application has been made for reenlistment inside of the limit of time but its acceptance has been delayed without fault on the applicant's part beyond the limit of time, *held,* that it is permissible under the authority of the Army Regulations to have the final acceptance relate back to and take effect on the date of accept-

---

[1] The same is held in the English case of Wolton *v.* Gavin, 16 Q. B., 48.

[2] "The executive department has discretionary authority to discharge before the term of service has expired (fourth article of war), but has no power to vary the contract of enlistment." 4 Op. Atty. Gen., 538. (1847.)

The Secretary of War can release a soldier from his contract of enlistment by a discharge, but has no power to suspend it even with the soldier's consent. 15 Op. Atty. Gen., 362. (1877.)

[3] *Volunteer recruiting service.*—The method of enlistment in the case of volunteers is regulated by sec. 5 of the act of Apr. 22, 1898 (30 Stat., 361), which confers authority upon the Secretary of War "to prescribe such rules and regulations, not inconsistent with the terms of this act, as may in his judgment be necessary for the purpose of examining, organizing, and receiving into service the men called for." Under the authority thus conferred regulations were prepared by the Secretary of War and promulgated to the Army in a circular from the Adjutant General's office under date of June 3, 1898. Sec. 12 of the act of Mar. 2, 1899 (30 Stat. 977), authorized the recruitment of a force of 35,000 volunteers, "without restriction as to citizenship or educational qualifications." For orders regulating the enlistment and organization of this force see General Orders, No. 122 and 150, A. G. O., of 1899.

[4] *In re* Grimley, 137 U. S., 147.

ance of the Government's offer by the applicant in order that the soldier may be considered as having continuous service.[1] *C. 2317, May 22, 1896; 233, Aug. 25, 1894; 611, Nov. 10, 1894; 2123, Mar. 12, 1896; 10833, July 26, 1901; 24837, Oct. 9, and Nov. 11, 1909; 25905, Dec. 6, 1909, and Feb. 20, 1911; 27734, Jan. 19, 1911.*

I A 8 c. A discharged soldier, because of an operation performed on him for a disease contracted in the line of duty, failed to reenlist within the legal limit of time provided for continuous service. *Held*, that the record could not be antedated so as to show that he had been continuously in the service.[2] *C. 8170, May 8, 1900; 3951, Mar. 21, 1898; 3978, Mar. 29, 1898; 19249, Feb. 24, 1906.*

I A 9 a. A fraudulent enlistment is an enlistment procured by means of a willful misrepresentation in regard to a qualification or disqualification for enlistment, or by an intentional concealment of a disqualification, which misrepresentation or concealment 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.[3] *P. 56, 219; 63, 153; C. 17919, Apr. 28, 1905; 24912, May 10, 1909.*

I A 9 b. Before fraudulent enlistment was made a military offense by the act of July 27, 1892 (27 Stat. 278), it was held that persons fraudulently enlisting (except those not discharged under a former enlistment) could not be tried for the fraudulent enlistment as a military offense, for the reason that when the act was committed they were not in the "land forces." *Held*, that the act of July 27, 1892, made the receipt of pay and allowances a part of the offense.[4] To complete the offense, therefore, entry into the service by means of misrepresentation, *and* the receipt of pay and allowances, are necessary. *C. 7668, Feb. 10, 1900; 9028, Sept. 26, 1900; 11998, Jan. 30, 1902; 12929, Aug. 7, 1902; 13686, Nov. 17, 1902; 16562, Jan. 7, 1904; 18547, Sept. 9, 1905.*

I A 9 c (1). An applicant for enlistment told a recruiting officer that he was 20 years of age, and was enlisted, without the consent of his parents. *Held* that although he was ineligible, under section 1117, R. S., yet as he had made no misrepresentation as to his age, his enlistment was, therefore, not a fraudulent one.[5] *C. 8455, June 23, 1900; 4244, June 2, 1898.*

---

[1] Reversed. See *C. 14124, Mar. 17, 1903;* also see Mms. decision of the comptroller published in Circular 63, Headquarters of the Army, A. G. O. series 1902; also see 15 Op. Atty. Gen., 362. Coe *v.* U. S., 44 Ct. Cls., 419, Mar. 29, 1909. A soldier was discharged Apr. 22, 1899. He applied for reenlistment July 21, 1899, signed an application, and passed the physical examination. The recruiting officer was then called elsewhere on official business, and July 25, 1899, certified on the soldier's discharge certificate that the man was enlisted July 25, 1899, to date July 21, 1899. Decided that the soldier was reenlisted July 21, 1899. See par. 876 A. R., 1910 ed., as amended by G. O. No. 60, W. D., series 1911 (May 8).

[2] See VI Comp. Dec., 754, Mar. 28, 1900.

[3] This definition was published in par. 6, Circ. 13, A. G. O., 1892.

[4] See *In re* Kaufman, 41 Fed. Rep., 876. In the case (*In re* Carver, 103 Fed. Rep., 624) the court said: "It may well be doubted whether under the Constitution fraudulent enlistments can be made offenses punishable by courts-martial; but there can be no question that the receipt of pay or allowance after fraudulent enlistment may be made so punishable."

[5] *In re* Burns, 87 Fed. Rep., 796. Sec. 1117, R. S., prohibits the enlistment of a minor into the Volunteer service without the written consent of his parents or guardian.

I A 9 c (2). An applicant for enlistment stated to a recruiting officer that he had been convicted of a felony, and was enlisted. *Held*, that his enlistment was in contravention of section 1118, R. S., but not void, and having been entered into without fraud could be terminated only by an honorable discharge, provided no cause for another kind of discharge had in the meantime arisen. *C. 9490, Dec. 27, 1900.*

I A 9 d. A deserter from the Navy of the United States enlisted in the Army by concealing the fact of such desertion. *Held*, that he committed the offense of fraudulent enlistment and might be brought to trial therefor. *R. 43, 167, Jan., 1880; P. 59, 91, Apr., 1893.*

I A 9 e. A soldier on trial for desertion from the Army pleaded in bar of trial that as he was a deserter from the Marine Corps at the time of his enlistment, it was void. *Held* that the court properly overruled the plea. While the enlistment in the Army was fraudulent, it was not void, but voidable at the option of the Government only, which might hold him to the existing obligations of either or both enlistments. Fraud gives only the defrauded party the option of disaffirming the contract, but until so disaffirmed it remains good.[1] *R. Book 48, 203, Dec., 1883; P. 2, 466, Dec. 28, 1883.*

I A 9 e (1). An applicant by concealing the fact that he was a member of the National Guard was enlisted. *Held* that his enlistment was fraudulent.[2] *C. 13943, Nov. 9, 1910.*

I A 9 f. A soldier was mustered into the service and later dishonorably discharged by sentence of a court-martial. He subsequently reenlisted in another regiment and served therein until mustered out. *Held*, that if one who is physically and mentally capable of rendering service as a private soldier is employed as a soldier and renders that service, he is a soldier even though there may be a law forbidding his enlistment in positive terms, unless that law declares him wholly incapable of making a contract of enlistment (so that any such contract entered into with him would be absolutely void). The law that merely provides that he shall not be enlisted would be violated by enlisting him, but that could not alter the fact that he had been enlisted and had become a soldier and had performed service. If, therefore, men are enlisted by a recruiting officer, through his own or their own willful disregard of the provisions of the law, or through their fraud or deception, or the recruiting officer's ignorance of the facts, the contract is simply voidable, and has the same force and effect as the enlistment of any person until duly voided by the Government. *P. 48, 366, Aug., 1891; 55, 183, Aug., 1892; C. 4797, Aug. 15, 1898; 6398, May 11, 1899.*

I A 9 f (1). *Held* that the fraudulent enlistment of a soldier who had been discharged without honor was not void but that the Secretary of War may cause him to be tried for the fraudulent enlistment, or to be summarily discharged therefrom without honor, or to be restored to duty. *C. 4077, Apr. 28, 1898.*

I A 9 f (2). *Held* that the fraudulent enlistment of a soldier who had been dishonorably discharged for desertion was not void. *P. 48, 366; C. 321, Sept. 12, 1894; 359, Sept. 19, 1894; 494, Oct. 15, 1894; 1429, June 3, 1895; 1571, July 19, 1895; 1624, Aug. 6, 1895; 2115, Mar. 9, 1896; 2717, Oct. 30, 1896; 4711, July 30, 1898; 5592, Dec. 29, 1898.*

---

[1] Bigelow, Law of Fraud, 121.

[2] Cir. 13, A. G. O., 1903, and 62, W. D., 1908.

I A 9 f (3). *Held* that the fraudulent enlistment of an escaped general prisoner was not void, and in a particular case that his record after such enlistment warranted the remission of the unexecuted portion of his sentence, and the continuation of his enlistment. *C. 9099, Oct. 10, 1900.*

I A 9 f (4). *Held* that the fraudulent enlistment of a discharged general prisoner was not void, and that the soldier may be tried for the offense, discharged without honor, or restored to duty. *C. 5481, Dec. 9, 1898.*

I A 9 f (5). *Held* that sections, 1116–1118, R. S., which provide that deserters, convicted felons, insane and intoxicated persons and certain minors shall not be enlisted, etc., are directory only, and do not necessarily make void such enlistments, but render them voidable merely at the option of the Government.[1] *P. 42, 82, July, 1890; 48, 367, Aug., 1891; C. 9490, Dec. 27, 1900, and Oct. 3, 1911; 17807, Apr. 10, 1905; 27507, Nov. 19, 1910; 27711, Jan. 17, 1911.*

I A 9 f (6). *Held* that the fraudulent enlistment of a minor without the consent of his parent or guardian is not void, but voidable; until avoided it is valid.[2] *R. 49, 353 and 376, Oct., 1885; 50, 139, Mar.,*

---

[1] Secs. 1116–1118, R. S., forbid the enlistment of deserters, convicted felons, insane and intoxicated persons, persons over 35 years of age, minors under 16 years of age, and minors over 16 without the written consent of their parents or guardians. The Supreme Court held (*In re* Grimley, 137 U. S., 147, 153) that the enlistment of a person over 35 years of age was not void, but voidable at the option of the Government only. In delivering the opinion of the court, Mr. Justice Brewer, excepting insanity, idiocy, infancy, or other causes which disable a party from changing his status, remarked with reference to the disqualifications of overage, desertion, and conviction of felony: "These are matters which do not inhere in the substance of the contract, do not prevent the change of status, do not render the new relations assumed absolutely void."

The third article of war, however, makes the offense of knowingly enlisting such a man, punishable, upon conviction, by dismissal or such other punishment as a court-martial may direct.

[2] *In re* Wall, 8 Fed. Rep., 85; McConologue's case, 107 Mass., 170; *In re* Drew, 25 Law Rep., 538; *In re* Graham, 8 Jones (N. C.), 416; Wilbur *v.* Grace, 12 Johns., 67; *Ex parte* Anderson, 16 Iowa, 598; Com. *v.* Gamble, 11 Sergt. & Rawle, 93; Tyler *v.* Pomeroy, 8 Allen, 480, 501.

The enlistment of a minor over 16 years of age without the written consent of the parent or guardian is not void but voidable only. *In re* Morrissey, 137 U. S., 157. It is not voidable at the instance of the minor (id.); but is voidable by the United States or by the parent or guardian. Id.; *In re* Wall., 8 Fed. Rep., 85; *In re* Davison, 21 id., 618; *In re* Hearn, 32 id., 141; *In re* Cosenow, 37 id., 668; *In re* Dohrendorf, 40 id., 148; *In re* Spencer, id., 149; *In re* Lawler, id., 233; *In re* Dowd, 90 id., 718; McConologue's case, 107 Mass., 170. As the enlistment of such a minor is not void but voidable only, he is, until the enlistment is duly avoided, legally a soldier and can desert or commit any other military offence; and when held for trial or punishment therefor, 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 shall abide the consequences of his offence before the right to his discharge is passed upon. *In re* Cosenow, 37 Fed. Rep., 668; *In re* Kaufman, 41 id., 876; *In re* Dowd, 90 id., 718; McConologue's case, 107 Mass., 170. See, also, General Orders, No. 127, A. G. O., 1900, and other authorities cited therein.

It is voidable at the instance of the parent or guardian. Com. *v.* Blake, 8 Phil., 523; Turner *v.* Wright, 5 ibid., 296; Menges *v.* Camac., 1 Serg. and R., 87; Henderson *v.* Wright, ibid., 299; Seavey *v.* Seymour, 3 Cliff., 439; *In re* Cosenow, 37 Fed. Rep., 668; *In re* Hearn, 32 ibid., 141; *In re* Davison, 21 ibid., 618; U. S. *v.* Wagner, 24 ibid., 135; *In re* Dohrendorf, 40 Fed. Rep., 148; *In re* Spencer, ibid., 149; *In re* Lawler, ibid., 233; *In re* Wall, 8 ibid., 85.

In re Lawler, 40 Fed. Rep., 233, it was held that the enlistment of a minor under 16 years of age would be void, with or without the consent of the parent; but this is not thought to be the correct view. The statute probably renders the enlistment voidable at the instance of the minor, as well as at the instance of the parent or guardian where the enlistment was without his consent, but if the minor has capacity to enter

1886; C. 2870, Jan., 1897; 8982, Sept. 19, 1900; 12968, July 15, 1902; 16192, Oct. 17, 1907.

I A 9 f (7) (*a*). A married man enlisted as a single man.[1] *Held* that such an enlistment is not prohibited by statute and is therefore not intrinsically illegal. *Held* further that as the only provision on the subject is a regulation, which forbids such enlistments, such regulation is really no more than a direction to the recruiting officer.[2] *R. 32, 72, Oct., 1871; 38, 616, June, 1877; 39, 467, Feb., 1878.*

I A 9 f (7) (*b*). A soldier who had twice been dishonorably discharged, enlisted fraudulently and served his term honestly and faithfully. He reenlisted again and was tried and convicted upon his plea of guilty of fraudulently enlisting by falsely representing that he had never been discharged from the service of the United States by a sentence of a court-martial and was sentenced to confinement and forfeiture. *Held* that the fact that his service during his last preceding term of enlistment had been honest and faithful removed his case from the operation of the act of August 1, 1894 (28 Stat. 216), but did not protect him from the effect of the fraudulent enlistment, viz, his intentional concealment of a disqualification for reenlistment, which, if known, would have prevented his reenlistment. *C. 6290, Apr. 20, 1899; 6406, May 16, 1899; 7542, Jan. 13, 1900; 11677, Dec. 3, 1901; 16119, Apr. 2, 1904.*

I A 9 f (8). An enlistment in violation of article 50 is not void but voidable at the option of the United States only. Until so avoided service under it is valid service. *P. 43, 48, Sept., 1890; 53, 254, Apr., 1892; C. 321, 355 and 359, Sept., 1894; 494, Oct., 1894; 538, Oct. 22, 1894; 902, Feb., 1895; 1429, June, 1895; 1571, July, 1895; 1624, Aug., 1895; 2022, Jan., 1896; 2115, Mar., 1896; 2269, May, 1896; 2717, Oct. 30, 1896; 18492, Aug. 31, 1905.* On a trial for an offense committed during such enlistment, a plea by the accused, in bar of trial, that this enlistment being fraudulent on his part, is void, should not be sustained. *P. 39, 257, Mar., 1890; C. 23644, Mar. 2, 1909.*

I A 9 g (1). A soldier who had been dishonorably discharged for other offenses than desertion fraudulently enlisted. *Held* that he may be allowed to serve out such enlistment or he may be discharged therefrom without honor, or brought to trial for the offense of fraudulent enlistment at the option of the Government. *C. 4797, Aug., 1898; 5481, Dec., 1898; 15533, Nov. 24, 1903; 16192, Apr. 22, 1904;*

---

into the *status* of a soldier, and while in that status commits a military offence, he should abide the consequences of the offence before being discharged.

See also, *Ex parte* Hubbard (182 Fed. Rep., 76) where the decision of the court, quoting the syllabus, was as follows:

"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."

[1] The enlistment of married men is discouraged by the Army Regulations (869 A. R.), ed. 1910.

[2] "If a man at the time of his enlistment denies that he is a married man and enlists as a single man, the fact that he has a wife and child does not entitle him to be discharged on *habeas corpus*, although it is provided in the Army Regulations that no married man shall be enlisted without special authority from the Adjutant General's Office." *Ex parte* Schmeid, 1 Dillon, 587 (1871—No. 12461, Federal Cases). See similar ruling in Ferren's case, 3 Benedict, 442 (1869—No. 4746, Federal Cases).

19520, Apr. 14, 1906; 23394, June 6, 1908. *Held* further that when a man, since his fraudulent enlistment, has had a good character and a record for good service, it is the policy of the War Department to retain the man and enjoy the advantage of his service. *C. 27507, Nov. 19, 1910.*

I A 9 g (2). A minor who enlists without the consent of his parent or guardian and procures his enlistment by intentionally concealing the fact that he is a minor, receiving pay and allowances thereunder, may be retained in the service, discharged without honor, held for trial for fraudulent enlistment, honorably discharged, or restored to duty without trial, in the discretion of the Secretary of War. *C. 4244, June, 1898.*

I A 9 g (3). A soldier fraudulently enlisted without a discharge from a prior enlistment. *Held* that he may be brought to trial for desertion and fraudulent enlistment, or he may be restored to duty without trial and held to serve either the fraudulent enlistment or the one from which he deserted, or both, at the option of the Government. *P. 49, 442, Oct., 1891; C. 321, Sept. 12, 1894; 359, Sept., 1894; 2115, Mar., 1896; 4663, July 23, 1898; 4711, Aug., 1898; 5465, Dec. 8, 1898; 5513, Dec. 20, 1898; 5592, Jan., 1899; 13322, Sept. 17, 1902; 20314, Mar. 19, 1908; 25906, Dec. 18, 1909.*

I A 9 g (4). A soldier who was not a deserter fraudulently enlisted by concealing the fact that he had previously been discharged on a certificate of disability. *Held* that the case could be disposed of by referring it to a court-martial or, if that course be impracticable, he could be discharged without honor, or service could be accepted under the fraudulent enlistment, in which case if the enlistment be faithfully served the soldier would become entitled to an honorable discharge. *C. 27409, Oct. 28, 1910.*

I A 9 h. In a case where a soldier while absent in desertion fraudulently enlisted, *held*, in accordance with the view held for many years by the Department, that if he was not to be tried for the desertion and fraudulent enlistment he should be discharged without honor from the former enlistment from which he deserted, and be held to the second or fraudulent enlistment. *C. 23644, July 12, 1909; 20314, Aug. 31, 1906, Feb. 17, July 12, and Sept. 13, 1909.*

I A 9 i. A soldier enlisted fraudulently, was tried but not sentenced to dishonorable discharge. *Held* that the Government could not properly also summarily discharge him. While it might have resorted to either course, it would scarcely be just to subject the offender to both. *P. 60, 174, June, 1893; C. 1512, July 2, 1895; 18492, Aug. 31, 1905; 22983, Mar. 26, 1908.*

I A 9 k. The enactment of the law making fraudulent enlistment a military offense (sec. 2, act of July 27, 1892, 27 Stat., 278) did not take it out of the law of contracts. Fraudulent enlistment has a two-fold character—criminal and civil. In the latter character it is a fraudulent contract which may be avoided, and when a contract is avoided for fraud, the party committing the fraud has no right to the benefits of the contract. *Held* that it is legal to summarily discharge a fraudulently enlisted soldier with this loss of rights under the contract of enlistment, if it should be deemed best to so dispose of him instead of bringing him to trial. *P. 58, 318, Mar., 1893.*

I A 9 l. There is a distinction between a fraudulent contract of enlistment and the character of service thereunder. While the

former is voidable at the option of the Government, the service is legal service and, if the contract be not avoided on account of the fraud, the soldier would be entitled to such a discharge upon completion of his term as his services may merit. *Held* that if the discharge is an honorable one, it should in general be viewed as establishing the fact that the service referred to therein was honest and faithful. *C. 355, Sept. 18, 1894; 2022, Jan. 27, 1896; 2269, May 6, 1896; 6406, May, 1899.*

I A 9 m. *Held* that time actually served under a fraudulent enlistment should be counted in computing the 30 years necessary to entitle the soldier to retirement under the provisions of the act of September 30, 1890 (26 Stat. 504). *C. 355, Sept., 1894; 2022, Jan., 1896; 7108, Oct., 1899.*

I A 9 n. *Held* that the award of a certificate of merit to a soldier who was serving under a fraudulent enlistment was lawful, and that upon being restored to duty without trial he was entitled to the additional pay which is authorized by the statutes. *C. 16644, July 27, 1904.*

I A 9 o. *Held* that service under a fraudulent enlistment counts toward continuous service, unless the enlistment is voided as fraudulent by the Government.[1] *C. 2269, May 6, 1896; 16644, July 27, 1904; 22333, Nov. 9, 1907.*

I A 10. *Held*, that section 1162, R. S., which provides for enlistment for service in the Ordnance Corps, does not prevent the Secretary of War from designating a class of persons, such as married men, from whom enlistment shall not be made. *C. 1655, Aug. 13, 1905.*

I A 11. *Held* that there is no legal objection to giving general authority to the Chief Signal Officer of the Army to enlist married men and men who have minor children for service in the Volunteer Signal Corps. *C. 4208, May 31, 1898.*

I A 12. Upon request for an opinion as to whether colored men could be enlisted for the Coast Artillery, *held* that in view of the fact that Congress had designated certain organizations in the Army to be composed entirely of colored men and that as the Coast Artillery did not include such organizations, the enlistment of colored men for duty in the Coast Artillery is not authorized.[2] *C. 17030, Apr. 30, 1907.*

I B 1 a. Upon request for information as to whether the age limit is fixed by regulations, *held* that the act of March 2, 1899 (30 Stat. 977), fixes the age limits as 18 to 35, and that it is beyond the power of the executive to waive the limit in a particular case.[3] *C. 4306, Feb. 8, 1907.*

I B 1 b. A minor with the signed consent of his guardian applied for enlistment. *Held*, that the written consent of the legally appointed guardian of a minor is sufficient for his enlistment unless there is some restriction on the guardian's authority by the court appointing him. *C. 10040, Aug. 2, 1909; 12968, Aug. 12 and 28, 1908.*

I B 1 b (1). An alien minor, with the consent of his parent, who had taken out preliminary naturalization papers, requested enlistment. *Held*, that the enlistment of the minor is lawful and within

[1] XII Comp. Dec., 326.

[2] 17 Op. Atty. Gen. 47, Feb. 24, 1881. The enlistment of white men in colored regiments is prohibited by implication by secs. 1104 and 1108, R. S.

[3] See secs. 1116, 1117, and 1118, R. S.

the operation of section 4 of the act of March 2, 1899 (30 Stat., 978), which fixes the age of enlistment as from 18 to 35. *C. 6726, May 3, 1907.*

I B 1 b (2). An alien minor with the consent of his guardian requested enlistment. He was rejected at the depot under the misunderstanding that an alien minor whose father is living is not competent to declare his intention to become a citizen of the United States without the consent of his parents. *Held* that as section 4 of the act of June 29, 1906 (34 Stat., 596), authorizes an alien minor independently of his family to make a declaration of his intention to become a citizen at any time after he reaches the age of 18, the applicant could declare his intention to become a citizen of the United States, without the consent of his father. *C. 10040, Nov. 28 1910; 12968, Sept. 2, 1908.*

I B 1 b (3). An Indian minor, whose father was dead, was enlisted with the consent of his uncle who had not been appointed his guardian. *Held,* that neither the uncle nor the Indian agent was guardian, and that the enlistment was in violation of the regulation.[1] *C. 184, Aug., 1894.*

I B 1 b (4). An applicant for enlistment who was a minor presented the written consent of his mother and stated that she had been separated from the father for a number of years. *Held* that the father is the natural guardian of a minor child, if living, or unless a total divorce has been decreed by which the custody of the children is granted to the mother. Mere separation, unless in the operation of a formal agreement, does not affect the custody of the minor children or vest guardianship in the mother. *C. 10040, July 11, 1910.*

I B 1 b (5). A minor in Texas without his parents' or guardian's consent applied for enlistment and presented evidence to show that his disabilities as a minor had been removed under articles 3499 to 3502, Civil Laws of Texas. He was enlisted. *Held,* that his enlistment was legal. *C. 22418, Nov. 30, 1907.*

I B 2 a. The act of August 1, 1894 (28 Stat., 216), fixes the term of enlistment as three years. *Held,* that this applies to all enlistments for the Army, and no exception can be made in the case of an Indian. *C. 249, Aug., 1894; 18486, Aug. 26, 1905.*

I B 2 b. The act of May 11, 1908 (35 Stat., 109), provides "that an enlistment shall not be regarded as complete until the soldier shall have made good any time lost during an enlistment period by unauthorized absences exceeding one day." *Held* that under this law a soldier absent in the hands of civil authorities is absent without leave unless he shall be acquitted. *C. 17518, Oct. 2, 1911.*

I B 2 b (1). After a soldier had served three years he was discharged per expiration of term of enlistment. He could have been held to make good time lost, but this was not done, due to neglect on the part of the company clerk and the first sergeant. *Held* that the discharge was for the convenience of the Government and that the soldier was entitled to have the enlistment recorded as a complete enlistment under the provisions of the act of May 11, 1908 (35 Stat. 109). *C. 18438, Sept. 19, 1911.*

I B 2 c. An enlisted man of the Signal Corps was employed at a telegraph station in Alaska, which was inaccessible at certain seasons

[1] Sec. 1117, R. S., also forbids such enlistment.

of the year. *Held* that where it is believed to be to the public interest, such enlisted man may be discharged before the end of his enlistment and reenlisted; or, in an emergency, and with a view to prevent the interruption of the telegraph lines, he may be continued in service, with his consent,[1] under his enlistment, until he can reach a place where he can be reenlisted.[2] *C. 19281, Mar. 2, 1906; 16900, Sept. 16, 1904, Aug. 27 and Oct. 23, 1907; 17700, Mar. 25, 1905.*

I B 2 d. The enlistment of certain volunteer soldiers in 1862 was "for three years or during the war." *Held* that this meant three years from the date of muster, if the war should last that long, and if it should not, then until it should end; that the reference to the duration of the war was a restriction and not an extension of the term.[3] *R. 42, 524, Mar., 1880; C. 6312, Apr., 1899.*

I B 2 e. Under the act of April 22, 1898 (30 Stat. 361), it was provided that "all enlistments for the Volunteer Army shall be for the term of two years, unless sooner terminated * * *." Also that "all officers and men composing said Army shall be discharged from the service of the United States when the purposes for which they were called into service have been accomplished or on the conclusion of hostilities." *Held* that this last provision is directed to the President and makes it his duty to disband the Volunteer Army when the occurrences named take place, but that no right is therein given to an individual to claim a discharge before the end of the two years for which he enlisted.[4] *C. 4822, Aug. 20, 1898; 4891, Sept. 1, 1898; 4897, Sept. 3, 1898; 6312, Apr. 24, 1899.*

I B 2 f. Soldiers whose terms of enlistment expired before they reached San Francisco, after service in the Philippine Islands, were held in service for discharge in the United States. *Held* that such retention was proper and based upon an exigency of the service,[5] viz, the necessity for retaining enlisted men under military control throughout the homeward voyage. *C. 13517, Aug. 13, 1903; 16900, Sept. 16, 1904; 17700, Mar. 25, 1905.*

I B 2 g. In 1904 a battalion of Philippine Scouts were in the United States participating in the Louisiana Purchase Exposition at St. Louis. Their terms of enlistment expired September 30 and it was desired to retain them in the service for the convenience of the Government for about two months, viz, until about November 30, 1904. *Held* that there was no authority of law for retaining them in the service beyond the term of their enlistment. *C. 16900, Sept. 16, 1904.*

I B 2 h. Where a soldier was sentenced to a forfeiture of $10 per month of his pay for 18 months, and his term of enlistment expired before the end of that time, *held* that he could not legally be retained in the service beyond such term for the purpose of the full execution of the forfeiture. *R. 16, 94, May, 1865.*

---

[1] 15 Op. Atty. Gen., 152, Sept. 1, 1876. "A soldier's engagement expires with the last day of the term, unless before the term is up he consents to an extension."

[2] II Comp. Dec., 94, Aug. 31, 1895. An enlisted man remains in the service until receipt of his discharge or until such action is taken as will render him legally chargeable with notice thereof, notwithstanding the expiration of his term of enlistment during his absence on a furlough granted at his own request.

[3] Breitenbach *v.* Bush, 44 Pa. St., 317. And see Clark *v.* Martin, 3 Grant's Cases, 393; do., 5 Phila., 251.

[4] 4 Op. Atty. Gen., 538.

[5] See Dinsman *v.* Wilkes (53 U. S., 389.)

I B 2 i. *Held* that a soldier too sick to receive notice of discharge at expiration of term of enlistment is held in the service awaiting service of notice of discharge, and his status is one of duty. *C. 26240, Feb. 19, 1910.*

I B 3 a. A soldier was honorably discharged after 30 years' service and upon application for reenlistment it appeared that he had been convicted of a felony, served his sentence, and had then been granted a full and unconditional pardon by the President. *Held* that the pardon released him from all his disabilities imposed by the offense, but did not restore his eligibility for enlistment, as the fact remained that he was a convicted felon and was ineligible for enlistment under the provisions of section 1118, R. S. Also *held* that the conviction can not be imputed to him to prevent the assertion of his legal rights and that the privilege of enlisting in the Army is not a legal right.[1] *P. 36, 262, Nov., 1889; C. 2769, Nov. 30, 1896; 4219, June 1, 1898; 4513, July 12, 1898; 6729, July 15, 1899; 8293, June 4, 1900; 11048, Sept. 10, 1901.*

I B 3 b. Section 1229, R. S., provides that an officer shall be dropped from the rolls for desertion. *Held* that an officer so dropped is ineligible for reappointment as an officer and, under section 1118, R. S., for enlistment or muster into the military service as a soldier. *C. 4513, July 12, 1898.*

I B 3 c. Paragraph 859, Army Regulations of 1908, prohibits the enlistment of a man who has been imprisoned under sentence of a court in a reformatory, jail, or penitentiary. *Held* in the case of an applicant for enlistment who had committed no criminal offense, but who had been sent at his own request to a workhouse in the city of New York, that the regulation in question did not prohibit his enlistment. *C. 9490, Apr. 2, 1910.* Similarly *held* in the case of a boy who was convicted of maliciously destroying certain personal property and committed by the court to the State Industrial School for Boys at Golden, Colo. *C. 9490, Dec. 9, 1911, and Jan. 10, 1912.*

I C 1 a. A foreigner requests enlistment in the Army. *Held* that unless he has become a citizen of the United States or made legal declaration of his intention to do so his enlistment is prohibited in time of peace [2] by section 2 of the act of August 1, 1894 (28 Stat. 216). *C. 168, Aug. 13, 1894; 804, Dec. 26, 1894; 5148, Oct. 21, 1898; 12968, Nov. 12, 1908, and Oct. 1, 1910.* Service by an American in a foreign army does not renounce his United States citizenship. *C. 14609, May 5, 1903, and Jan. 24, 1910.*

I C 1 b. Article 14 of the amendments to the Constitution of the United States defines the term "citizens." *Held* that native-born minors are citizens of the United States under this definition and may be enlisted under the act of August 1, 1894 (28 Stat. 216). *C. 181, Aug. 16, 1894; 804, Dec. 26, 1894.* Also *held* that persons born in the United States of alien parents who were not enjoying the privilege of exterritoriality and who have not left the jurisdiction of the United States are, after becoming of age, citizens and capable of enlisting. *C. 20540, Jan. 11, 1911.*

---

[1] See sec. 1116–1118, R. S., which forbid the enlistment of deserters, convicted felons, insane and intoxicated persons, persons over 35 years of age, minors under 16 years of age, and minors over 16 without the written consent of their parents or guardians.

[2] 3 Op. Atty. Gen., 671.

I C 1 c. The act of August 1, 1894 (28 Stat. 216), is limited to "time of peace." *Held*, that the enlistment of four musicians formerly in the Spanish Army in Porto Rico, could, the war with Spain not having terminated, legally be authorized. *C. 5148, Oct., 1898; 6726, July 12, 1899.*

I C 1 c (1). The act of August 1, 1894 (28 Stat. 216) provides that with the exception of Indians, only citizens, or those who have made legal declaration of their intention to become such, shall be enlisted for first enlistment in the Army. *Held*, that aliens may enlist in the Volunteer Army now being raised (July 12, 1899), also that alien children of alien parents who reach their majority after their parents have become naturalized are citizens of the United States, but that if they reach their majority before their parents are naturalized they are not citizens of the United States. *C. 168, Aug. 13, 1894; 5550, Dec. 20, 1898; 6726, July 12, 1899*

I C 1 d. The act of August 1, 1894 (28 Stat. 216), limits eligibility for enlistment in time of peace (with the exception of Indians) to citizens of the United States or to those who have made legal declaration of intention to become citizens. *Held*, that this does not prohibit the enlistment of an alien minor with the consent of his parents in time of war. *C. 5550, Dec. 20, 1898.*

I C 1 e (1). The treaty with Spain entered into on the 11th of April, 1899, vested in the United States sovereignty over the island of Porto Rico, but it remains for Congress to determine what relations shall be best suited to the conditions of these inhabitants and the welfare of the United States. *Held*, that pending such action there could be no legal objection to an individual Porto Rican becoming a naturalized citizen of the United States by complying with the requirements of law, and that if such Porto Rican makes legal declaration of his intention to become a citizen, he will thereby acquire eligibility for enlistment in the Army under the act of August 1, 1894 (28 Stat., 216). *C. 11287, Sept. 25, 1901; 9928, Mar. 1, 1901.*

I C 1 f. Two natives of the Philippine Islands enlisted (Nov., 1903), as musicians in the band of the Twenty-ninth Infantry and another native enlisted (Aug., 1902), in the band of the Ninth Cavalry, under telegraphic authority from the Adjutant General to the Commanding General of the Philippine Islands, dated March 17, 1900. *Held*, that the enlistment in time of peace of these Filipinos under that authority given in time of war was unlawful and that they should be discharged. *C. 15893, Feb. 11, 1904; 16096, Mar. 22, 1904.*

I C 1 g. An alien in Cuba in 1902 desired to enlist in the Army and requested information as to the proper official before whom he could declare his intention to become a citizen of the United States. *Held* that naturalization can only be obtained in accordance with the statutes of Congress on the subject and that those statutes give no jurisdiction in the matter to any official in Cuba and that therefore a declaration before any official in Cuba would not be a "legal declaration" within the meaning of the statute. *C. 12973, July 17, 1902.*

I D 1. The term "reenlistment" is sometimes used in the narrow sense of an enlistment within one month after discharge under sections 1282 and 1284, R. S.; but these sections simply prescribe increased pay in case of reenlistment within one month.[1] They do not prevent

[1] The act of Aug. 1, 1894 (28 Stat., 216), extends this period to three months.

a reenlistment after the expiration of the month. Section 1116, R. S., is based upon the law of March 16, 1802 (2 Stat. 135), in which there is no such limitation as to time. *Held* that reenlistment under this statute means a reentry into the service and it is prescribed that as to such reentry the limitation as to age shall not apply. *R. 57, 41, Oct., 1888.*

I D 2 a. The act of February 27, 1893 (27 Stat., 486), (now obsolete) fixed a certain length of service as one of the essentials for reenlistment of privates in the army. *Held* that under this act previous naval service can not be counted to make up the length of service required to make a private eligible for reenlistment.[1] *P. 62, 90, Oct. 17, 1893.*

I D 2 b. A man more than 35 years of age with previous service in the Marine Corps, enlisted in the Army. *Held* that his Marine Corps service was not service as a soldier in the Army, that his enlistment was not a reenlistment, and that it was subject to the age limit provided for first enlistments in the Army.[2] *C. 3758, Dec. 31, 1897; 467, Oct. 10, 1894; 599, Nov. 5, 1894; 1339, May 7, 1895; 18391, Aug. 7, 1905; 2530, Aug. 15, 1896.*

I D 2 c. The act of March 2, 1899 (30 Stat. 978), provided "that the limits of age for original enlistments in the Army shall be 18 and 35 years." *Held* that an applicant over 35 years of age, who had served as an officer of volunteers only, could not enlist under the statute, as his previous commissioned service would not count as prior service as an enlisted man. *C. 6844, Aug., 1899.*

I D 3 a. A soldier had been sentenced to reduction and confinement on conviction of desertion; his sentence had been executed and he had thereupon returned to duty and served for a considerable further period in a status of honor. *Held*, that the fact that the soldier may have been tried and punished by court-martial did not *per se* render his service unfaithful, and each case should be decided on its own merits. *Held*, further, that where it is shown that a soldier has served to the end of his enlistment it is assumed that he has served faithfully, unless the contrary has been determined in the manner provided by law. *P. 36, 184, Oct. 31, 1889; 48, 219, July 14, 1891; C. 3036, Mar. 31, 1897.*

I D 3 a (1). *Held*, that the remark "service not honest and faithful" will not be noted on a soldier's discharge or final statement unless the remark expresses the approved finding of a board of officers. *C. 3756, Jan. 8, 1898.*

I D 3 b. The act of June 16, 1890 (26 Stat. 157), provides that no soldier who has deserted at any time during the term of any enlistment shall be deemed to have served such term honestly and faithfully. *Held* that this provision is limited in its application to the act of June 16, 1890, and does not operate necessarily to render service "not honest and faithful" for purposes of reenlistment in cases of desertion. *C. 2004, Jan. 22, 1896; 2121, Mar., 1896; 3530, Sept., 1897; 3794, June, 1898.*

---

[1] 20 Op. Atty. Gen., 684.

[2] (31 Ct. Cls., 196) Jno. Walton *v.* The United States. A soldier honorably discharged from the Army who enlists in the Marine Corps within one month is entitled to the same additional pay that he would be entitled to if his enlistment had been in the Army.

I D 3 c (1). A soldier was enlisted and immediately arrested and confined on suspicion of being a deserter. Later he was released from confinement and sent away from the Army by order of the commanding general, Department of the East. He had no serivce with troops. Upon request for his status it was *held* that his service constituted an enlistment and was honest and faithful; that in view of the fact that he was not a deserter and enlisted in good faith and that during the time he was in the service he did the only thing it was possible for him to do in the position in which he was placed, he committed no offense whatever after he became a soldier and was not confined by reason of his own fault. His service was honest and faithful notwithstanding the whole time was spent in confinement. *C. 1916, Dec. 28, 1895.*

I D 3 c (2). A soldier who had been dishonorably discharged reenlisted fraudulently in the Volunteer Army and at the expiration of his term of enlistment was given an honorable discharge, with character "excellent" and service "honest and faithful." He then reenlisted in the Regular Army, was tried and convicted of fraudulent enlistment. *Held*, that the enlistment in the Volunteer Army should have been considered his "last preceding term of enlistment" within the meaning of section 2 of the act of August 1, 1894 (28 Stat., 216). *C. 5840, Mar. 7, 1899; 1883, Feb. 23, 1899; 6203, April 8, 1899.*

I D 3 c (3). A soldier was convicted by the civil courts of assault with intent to rob and commit murder, and was sentenced to five years' imprisonment. Upon the representation of his company commander, and others, he was pardoned by the governor of the State, and after having been discharged was returned to duty for the purpose of completing his enlistment. After the expiration of his term of enlistment he was held in the service pending a decision as to the character of his services. *Held* that there was no legal objection to discharging him on account of the expiration of his term of enlistment and to reenlisting him, on the ground that the facts would justify a decision that, notwithstanding his absence was occasioned by his own misconduct, his services, taken altogether, were honest and faithful within the meaning of the act of August 1, 1894 (28 Stat. 216). *C. 9648, Jan. 17, 1901.*

I D 3 c (4). A first sergeant was convicted of assault with intent to kill and sentenced to be reduced to the ranks and confined at hard labor for 18 months. This soldier had completed 25 years' service, and the court gave, as its reason for leniency, "the long and faithful service of the accused, and the previous mental strain under which he was laboring as shown by the evidence." He applied for reenlistment, and under the provisions of paragraph 148, Army Regulations of 1895, a board of officers was convened and came to the conclusion that although, under a strict interpretation of the regulations, this soldier's services had not been honest and faithful, his offense should not debar him from reenlistment.[1] *Held* that from the strictest point of view a soldier's services are no longer honest and faithful after he has committed any offense no matter how trivial, and that regarding his services from that point of view we would have to debar from reenlistment any soldier who has been confined even for

[1] Army Regulations now provide that a soldier's service shall not be characterized as not honest and faithful except upon the approved finding of a board of officers.

a day in the guardhouse as well as a soldier who has been confined for a year. *Held*, also, that such an interpretation would be absurd and has not been attempted; and that it is not practicable to draw a line between services honest and faithful and those not honest and faithful for all cases, since "it is a matter that must necessarily be left indefinite, each case hinging on its own merits." *C. 2158, Mar. 25, 1896; 15119, June 22, 1903; 24340, Jan. 18, 1909.*

I D 3 c (5). A soldier was dishonorably discharged with confinement in a penitentiary by sentence of a court-martial, and pending the confinement, the unexecuted portion was remitted. *Held*, that he was not eligible for enlistment, his service during his last term not having been honest and faithful; and that the remission did not make him eligible. *C. 1072, Feb., 1895; 2496, Aug. 4, 1896; 5339, Nov. 17, 1898; 5675, Apr. 13, 1899; 6713, May 7, 1900.*

I D 3c (6). Under its constitutional power to raise and support armies, Congress can designate the classes of persons from whom they are to be raised. This is done by the act of August 1, 1894 (28 Stat. 216), in which it is prescribed, amongst other things, that no soldier shall be again enlisted in the Army whose service during his last preceding term of enlistment has not been honest and faithful. *Held*, that a pardon and restoration to citizenship[1] will not bring a soldier who has been dishonorably discharged for desertion within the class of persons eligible for enlistment, as eligibility for enlistment is not a right of citizenship. The fact that the man was a deserter can not be obliterated by pardon and such a man would, if pardoned, still be of that class from whom Congress has said that enlistments shall not be made.[2] *C. 1765, Oct. 4, 1895; 1883, Feb. 25, 1899; 3125, Apr. and June, 1897; 4513, July 12, 1898; 4645, July, 1898; 5280, Nov. 11, 1898; 6729, July 14, 1899; 10994, Aug. 7, 1901; 11028, Aug. 14, 1901; 15288, Sept. 26, 1903; 16323, May 11, 1904; 16151, Aug. 18, 1904; 17661, Apr. 17, 1908; 26007, Jan. 3, 1910, Nov. 28 and 29, 1911, and Dec. 11, 1911.*

I D 3 c (7). In case of a deserter who was restored to duty without trial, *held*, that his pardon does not change the character of his service previous to restoration,[2] under the act of August 1, 1894 (28 Stat. 216). *C. 3794, Jan. 18, 1898.*

I D 3 c (8). A soldier was dishonorably discharged for other reasons than desertion. *Held*, that his pardon would not operate to make him eligible for reenlistment, as his last preceding term of enlistment had not been honest and faithful within the meaning of the act of August 1, 1894 (28 Stat., 216).[3] *C. 2769, Nov. 28, 1896; 11028, Oct. 2, 1901; 10994, Nov. 27 and Dec. 2, 1901.*

I D 3 c (9). A soldier was dishonorably discharged for desertion and sentenced to two years' confinement. Upon his applying for restoration to duty, *held*, that the discharge had been executed and that the remission of the unexecuted portion of his sentence did not

[1] The loss of citizenship under secs. 1996 and 1998 R. S. follows only on conviction of desertion. (Kurtz *v.* Moffitt, 115 U. S., 501.)

[2] See 22 Op. Atty. Gen., 36.

[3] See 22 Op. Atty. Gen., 36, where it is held that while the President's pardon restores a criminal to his legal rights and fully relieves him of the disabilities legally attaching to his conviction, it does not destroy the existing fact that his service was not honest and faithful.

render him eligible for reenlistment, as his last term of service had not been honest and faithful. *C. 4668, July 25, 1898; 1097, Mar. 5, 1895; 4466, June 25, 1898; 4832, Aug. 23, 1898.*

I D 3 c (10). A soldier having been found guilty by a court-martial of having committed other offenses than desertion, including a threat against the life of the surgeon, was sentenced to dishonorable discharge, forfeiture of pay, and confinement at hard labor for three years. He later was released upon the remission of the unexecuted portion of his sentence. Upon request for reenlistment, *held* that his service under the last preceding enlistment had not been honest and faithful under the act of August 1, 1894 (28 Stat. 216). *C. 3170, July 20, 1897; 3722, Dec. 11, 1897; 4748, Aug. 6, 1898; 4783, Aug. 21, 1898; 5339, Nov. 17, 1898; 5643, June 7, 1899.*

I D 3c (11). A dishonorably discharged soldier applied for reenlistment. *Held,* that he was ineligible, as his service during the last preceding term of enlistment was not honest and faithful under the act of August 1, 1894 (28 Stat. 216).[1] *C. 1588, July 25, 1895; 5492, Dec. 12, 1898; 5977, Mar. 4, 1899; 7233, Oct. 30, 1899; 7644, Feb. 5, 1900; 8701, Aug. 1, 1900; 11570, Nov. 11, 1901; 11851, Jan. 4, 1902; 11914, Jan. 16, 1902; 12759, June 10, 1902; 15059, Aug. 10, 1903; 15330, Oct. 14, 1903; 15657, Jan. 11, 1904; 16637, July 26, 1904; 18021, May 19, 1905; 19934, June 20, 1906; 20991, Oct. 11, 1907; 26007, Dec. 29, 1909, and Mar. 4, 1910.*

I D 3 c (12). A discharged general prisoner applied for reenlistment. *Held,* that under the act of August 1, 1894 (28 Stat. 216), he was ineligible as his service during his last term had not been honest and faithful.[2] *C. 2496, Aug. 5, 1896.*

I D 3 c (13). A deserter was convicted, and that part of his sentence imposing dishonorable discharge was mitigated. *Held,* that if his service continues honest and faithful to date of discharge he may be discharged with remark "service honest and faithful" and no objection known to his reenlistment. *C. 10620, Mar. 9, 1903; 21536, May 17, 1907.*

I D 3 c (14). A soldier deserted, was apprehended and restored to duty without trial. His company commander proposes to give the soldier character excellent, but understands that because of the desertion he will be forced to state on the man's discharge that his service has been "not honest and faithful," *held* that if the soldier's service continues honest and faithful to the end of his enlistment he may be discharged with the remark "service honest and faithful" and the further remark "no objection known to his reenlistment," as it is not considered that the policy of the War Department should be to place an insuperable barrier to a man's reformation by holding that no matter how honest and faithful his latter service may be, a fault once committed can not be atoned for, and that Congress has held this rule is shown by section 1352, R. S., which authorizes the Secretary of War in certain cases to remit in part sentences of certain military convicts and to give them honorable restoration to duty in case the same is merited. *C. 15639, Dec. 19, 1903; 9735, Jan. 31, 1901; 16838, Sept. 1, 1904; 17541, Feb. 13, 1905; 18214, June 26, 1905.*

---

[1] See Power of Secretary of War to decide this question (*post*).

[2] See Enlistment I D 3 c (18) to (19) for statement of the discretionary authority of the Secretary of War in such cases.

I D 3 c (15). A soldier was convicted of desertion but not sentenced to dishonorable discharge. *Held*, that the desertion is not conclusive against the service being considered honest and faithful. *C. 2004, Jan., 1896; 2121, Mar., 1896; 3530, Sept., 1897; 3794, Jan., 1898; 21536, May 17, 1907.*

I D 3 c (16). A soldier deserted, enlisted from desertion, was recognized, tried, and convicted of desertion, his sentence not including dishonorable discharge. A board of officers, convened to determine the character to be given, recommended that he be given "character good subsequent to desertion," and "service not honest and faithful," under the belief that the desertion required it. *Held*, that there was no legal objection to noting his service as honest and faithful. *C. 12395, Apr. 10, 1902; 5569, Dec. 22, 1898.*

I D 3 c (17). A soldier, on account of being at the time of his discharge under sentence of a general court-martial which did not include dishonorable discharge, was discharged without honor. His company commander requested authority for his reenlistment. *Held*, that there was no objection to remitting the unexecuted part of his sentence with permission to reenlist him for the company of the officer making the request. *C. 16638, July 29, 1904; 11741, Jan. 11, 1902.*

I D 3 c (18). It is not practicable to prescribe what misconduct shall constitute a failure to render honest and faithful service within the meaning of the act of Congress approved August 1, 1894 (28 Stat. 216), regulating enlistments. Each case should be decided upon its own merits. *C. 2158, Mar. 1896.* The decision is a matter intrusted to the discretion of the Secretary of War.[1] The restriction relative to deserters imposed upon him by the proviso in sec. 1, of the act of June 16, 1890 (26 Stat. 157), being limited solely to the purposes of that act, does not apply to the act of 1894. *C. 2004, Jan., 1896; 2121, Mar., 1896; 3530, Sept., 1897; 3794, Jan., 1898; 5569, Dec., 1898.*

I D 3 c (18) (*a*). A soldier was discharged with character "fair" and service "not honest and faithful." *Held*, that it is within the discretion of the Secretary of War to decide that this man's service was honest and faithful during his last preceding term of enlistment, and that, if he so decides, the soldier's reenlistment may be legally authorized. *C. 14782, June 9, 1903; 14913, July 9, 1903.*

I D 3 c (18) (*b*). A soldier, after serving a five-year enlistment, reenlisted, deserted, and, while in desertion, reenlisted again under an assumed name; was apprehended and restored to duty without trial, making good the time lost, etc. He was discharged as sergeant with "character excellent in every respect," and upon application for reenlistment, *held*, that the Secretary of War may decide that the soldier's last term of service was honest and faithful, notwithstanding that during some portion of it he was a deserter, and that cases of this kind should be decided on their merits as justice may dictate.[2] *C. 2004, Jan. 22, 1896; 2025, Jan. 29, 1896; 2121, Mar. 11, 1896; 2384, June 23, 1896; 3530, Sept. 21, 1897; 3794, Jan. 18, 1898; 12004, Feb. 1, 1902.*

I D 3 c (18) (*c*). Where a soldier has been discharged without honor upon the ground that his service was not honest and faithful, *held*, that while the discharge could not be revoked, the Secretary

[1] See III Comp. Dec., 557.

[2] See Cir. 73, W. D., series 1907.

of War could upon an application to enlist reconsider the question of the character of the applicant's service, and if found to have been in fact honest and faithful, could authorize his enlistment.[1] *C. 1197, Apr., 1895; 415, Oct. 1, 1894; 2423, July, 1896; 3131, Apr., 1897; 9039, Sept. 28, 1900; 9728, Feb. 1, 1901; 11741, Jan. 30, 1902.*

I D 3 c (18) (*d*). A board of officers decided that a soldier's service had not been honest and faithful for purposes of furlough under the act of June 16, 1890 (26 Stat. 157), and for the purpose of deciding whether or not he should receive his retained pay. He was not granted a furlough and was discharged without honor, forfeiting all pay and allowances. Upon request for reenlistment it was *held* that the action of the board was merely advisory to the Secretary of War; that he was the authority vested in such cases (directly or representing the President) with power of determining whether service has been honest and faithful; that the finding of the board was not a judicial determination of that fact; and that the Secretary of War may decide that the man is not debarred from reenlistment. Permission was granted for the soldier to reenlist and he was reenlisted. *C. 1197, Apr. 4 and June 21, 1895; 2731, Nov. 7, 1896.*

I D 3 c (18) (*e*). A soldier was dishonorably discharged by sentence of a court-martial for other offenses than desertion and upon his applying for reenlistment, *held,* that although a dishonorable discharge is *prima facie* evidence that the service is not honest and faithful, still it is within the discretion of the Secretary of War to determine, for the purpose of reenlistment, whether a soldier's previous service has been honest and faithful, under the provisions of the act of August 1, 1894 (28 Stat. 216). *C. 4667, July 26, 1898; 4406, June 27, 1898; 4419, June 20, 1898; 4665, June 25, 1898; 4601, July 15, 1898; 5339, Nov. 17, 1898; 5658, Jan. 11, 1899; 5675, Mar. 2, 1899; 6477, June 22, 1899; 6576, June 13, 1899; 6727, July 11, 1899; 7070, Sept. 26, 1899; 7254, Nov. 3, 1899; 7456, May 14, 1900; 7576, Jan. 12, 1901; 9781, Feb. 7, 1901; 9789, Feb. 7, 1901; 9811, Feb. 11, 1901; 10208, Apr. 11, 1901; 12374, Apr. 7, 1902; 12741, June 30, 1902; 13044, Dec. 13, 1902; 13196, Aug. 25, 1902; 16252, Oct. 4, 1904; 16540, July 2, 1904; 16798, Aug. 30, 1904; 19823, May 31, 1906; 26007, Jan. 13, 1912.*

I D 3 c (18) (f). Upon application for reenlistment of a deserter, *held,* that the Secretary of War has power to decide, on the facts, that the prior service was honest and faithful, although it included a desertion, but that it would have to be a very strong case. *C. 20991, Jan. 2, 1907.*

I D 3 c (18) (*g*). A soldier shot and killed another soldier. He was tried and convicted by general court-martial and sentenced to serve five years in the penitentiary. The unexecuted part of his sentence was remitted. Upon request for further relief by friends, *held,* that it was within the power of the Secretary of War to decide for the purpose of enlistment that, notwithstanding his dishonorable discharge, the last term of service of this soldier was honest and faithful, and *recommended* that the Secretary so decide. *C. 5675,*

[1] But see the act of Mar. 3, 1909 (35 Stat. 836), in which Congress authorized the Secretary of War to appoint a court of inquiry with jurisdiction to pass on the character of men discharged without honor because of the Brownsville shooting affray.

Apr. 13, 1899; 5339, Nov. 19, 1898; 6477, Aug. 3, 1899; 9494, Jan. 5, 1901.

I D 3 c (18) (*h*). A soldier was convicted of desertion and not sentenced to dishonorable discharge. *Held*, that after a board had decided that his service was not honest and faithful, the Secretary had discretion to decide whether his service was honest and faithful. *C. 20991, Apr. 28, and May 25, 1910.*

I D 3 c (18) (*i*). A commissary sergeant was dishonorably discharged by sentence of a general court-martial upon conviction of embezzlement. Upon application for reenlistment, *held* that while it is within the discretion of the Secretary of War to determine, for the purpose of reenlistment, the character of prior services, he can not properly determine such services to be honest and faithful where, as in this case, it appears that the applicant was guilty of the offense for which he was sentenced to dishonorable discharge, and the offense is one ordinarily calling for such punishment. *C. 12741, June 30, 1902, and Nov. 30, 1909; 10138, Apr. 8, 1901; 11650, Nov. 25, 1901; 15748, Jan. 11, 1904; 15837, Jan. 28, 1904; 15961, Mar. 1, 1904; 26007, Nov. 28, 1911.*

I D 3 c (18) (*k*). A discharged general prisoner applied for reenlistment. *Held*, that notwithstanding his dishonorable discharge the Secretary of War had discretion to decide whether or not, in view of all the circumstances of the case, his service during his last term of enlistment was honest and faithful within the meaning of the act of August 1, 1894 (28 Stat. 216). *C. 9714, Jan. 29, 1901; 15603, Dec. 12, 1903; 19017, Dec. 18, 1905; 26007, Jan. 3, 1912, and Jan. 13, 1912.*

I D 3 c (18) (*k*) [1.] A discharged general prisoner applied for reenlistment. *Held*, that as his service during his last preceding term of enlistment was clearly not honest and faithful, the act of August 1, 1894, did not, in that instance, give the Secretary of War the power to waive that objection to his enlistment.[1] *C. 413, Oct. 1, 1894; 4466, June 30, 1898; 4832, Aug. 31, 1898; 6378, May 3, 1899; 26007, Dec. 11, 1911.*

I D 3 c (18) (*l*). A soldier deserted, surrendered, was tried and convicted of desertion, and sentenced to dishonorable discharge with confinement for 18 months. A troop commander requested that the unexecuted part of the prisoner's sentence be remitted and that permission be granted for the man to enlist in his troop. *Held* that it is within the discretion of the Secretary of War to decide whether the service of this man was honest and faithful. *C. 17658, Mar. 11, 1905; 16909, Sept. 21, 1904; 17052, Oct. 25, 1904; 17661, Mar. 13, 1905.*

I D 3 d (1). The question of whether a soldier's services have been honest and faithful under the act of March 3, 1899 (30 Stat. 1073), which grants extra pay to men who served outside the United States during the Spanish War, depends on the manner of his serving and the character of his services. *Held* that this is without regard to the circumstances of his enlistment or the methods by which he procured the same, or his physical condition prior to enlistment. *C. 6732, July 21, 1899.*

I D 3 d (2). The act of January 12, 1899 (30 Stat. 784), made provision for the granting of extra pay in lieu of leaves of absence and

[1] See Cir. No. 73, W. D., Oct. 31, 1907.

furloughs to officers and enlisted men of the United States Volunteers who had served honestly and faithfully without the limits of the United States during the Spanish War. Similarly, the act of March 3, 1899 (30 Stat. 1073), made provision for extra pay to enlisted men of the Regular Army who had so served honestly and faithfully. *Held* that the service of a soldier who, while absent without leave and under the influence of liquor, had fallen and died from the resulting concussion of his brain, should not be considered as having been honest and faithful within the meaning of the two laws cited above. *C. 7333, Nov. 29, 1899.*

I D 3 d (3). An officer of Volunteers was tried on the charge of embezzlement, and sentenced to be dismissed the service and to be confined in a penitentiary at hard labor for one year. Upon application for two months' extra pay under the provisions of the act of January 12, 1899 (30 Stat. 784), and March 3, 1899 (30 Stat. 1073), *held,* that he was not entitled to the extra pay as the fact that as defendant in a suit brought against him by the United States for the value of bacon embezzled, he was willing to confess judgment for so much of the bacon as was not recovered by the Secret Service, furnished indubitable proof that his service had not been honest and faithful. *C. 10908, June 6, 1906.*

I D 3 d (4). Section 3, General Orders 13, Headquarters of the Army, 1899, extending paragraph 148, Army Regulations, to officers of Volunteers, operates in connection with said paragraph as a regulation in aid of the statute, viz, the act of January 12, 1899 (30 Stat. 784), which provides for extra pay to officers and enlisted men of the Volunteer forces who served outside the limits of the United States during the Spanish War. *Held,* that the above-cited section and paragraph provide a means of determining whether the services of an officer or enlisted man have been honest and faithful; and that when under this statute a board has been appointed its approved finding should be held to be conclusive, as should also the decision of the commanding officer, when no board has been appointed or applied for, since discretion has been vested in them by the Secretary of War. *C. 6409, May 29, 1899; 15928, Mar. 10, 1904; 16801, Sept. 7, 1904.*

I D 3 d (5). An officer of Volunteers was tried, convicted, and sentenced to dismissal by an illegally constituted court. The sentence did not operate, as it was null and void. Upon application for extra pay under the act of January 12, 1899 (30 Stat. 784), *held,* it has never been held that the trial and conviction by court-martial of an officer or enlisted man necessarily stamps his service as not honest and faithful; if it were so held no option would remain as to the quality of the service. A man once convicted by a court-martial would, under such a ruling, suffer a continuing punishment so far as his military record was concerned; and the law might then be translated to mean that no man who had ever been tried by court-martial, and found guilty, could be reenlisted or could, on discharge, have his service rated as "honest and faithful." The punishment awarded by a court-martial is supposed to be sufficient to meet the offense committed, and not to carry with it a black mark which amounts to a continuance of punishment beyond the terms of the sentence. *Held,* in this particular case, that the officer was entitled to have his service considered as honest and faithful. *C. 16801, Sept. 7, 1904.*

I D 3 e (1). Joint resolution of Congress of June 28, 1906 (34 Stat., 836), provided that in the administration of the pension laws any commissioned officer of the Army who had received an honorable discharge from a subsequent commission should be held and considered to have been honorably discharged from all previous contracts of service as a commissioned officer. An officer after having been summarily dismissed by direction of the President and having had the disabilities resulting from such dismissal removed by the President's order, was mustered in as a colonel of Volunteer troops, and later cashiered by sentence of a general court-martial from the Army. This sentence was set aside by War Department orders, which restored him to his command with pay from date of dismissal. Subsequently he was brevetted brigadier general of Volunteers for faithful and meritorious service. *Held* that his entire service while holding the last commission as colonel in the Volunteer service was faithful. *C. 26282, Feb. 28, 1910.*

II A. The act of March 3, 1863 (12 Stat. 731), for enrolling and calling out the national forces, and for other purposes, divided the United States into districts and created a board of enrollment for each district, whose duty it was to enroll all persons in that district who were subject to military duty, and, after the President had assigned to a district the number of men to be furnished by that district, to draft that number and 50 per cent in addition, and make an exact and complete roll of the names of the persons so drawn, and the order in which drawn. *Held*, that the enrollment only established the liability of men so enrolled to be called out, and did not put them into the military service. Also *held*, that neither the draft nor the act of reporting at the rendezvous put them into the service, but that the acceptance of a drafted man by the board of enrollment after his physical examination by the surgeon on the board operated to put him in the service, and that no muster in was necessary. *P. 50, 311, Nov. 23, 1891; C. 1570, July 25, 1895; 2033, Feb. 4 and Aug. 4, 1896; 2050, Feb. 11, 1896; 2041, May 82, 1896; 2042, May 28, 1896; 2085, June 6, 1896; 2389, Aug. 1, 1896; 4081, July 15, 1898; 20237, Aug. 15, 1906.*

II B 1. The exemptions from the conscription in the late Civil War are specifically set forth in section 2 of the act of March 3, 1863 (12 Stat. 731), and section 10 of the amendatory act of February 24, 1864 (13 Stat. 8). The exempting provision of the later act in effect repealed and superseded that of the earlier act, so that a person exempted and not drafted under the act of 1863 may have been liable to draft under that of 1864. *P. 64, 498, May, 1894.*

II B 2. In 1898 the question was raised as to whether or not members of religious sects whose tenets forbid members to engage in war or armed conflict are exempt from service in the Army. *Held*, that the act of March 3, 1863 (12 Stat. 731), is no longer in force.[1] *C. 4424, Mar. 22, 1898; 5406, Nov. 29, 1898; 5794, Feb. 3, 1899; 7905, Mar. 31, 1900; 20076, May 15, 1906.*

II C. The act of March 3, 1863 (12 Stat. 731), provided for the discharge of drafted men who were rejected by the enrollment board.

[1] But see the act of Jan. 21, 1903 (32 Stat. 775), which exempts members of any well-recognized religious sect or organization organized at that time (Jan. 21, 1903) from service in the militia or any other armed or volunteer force under the jurisdiction of the United States.

Held that the word "discharged" as there used did not mean discharged from the military service, but only a release from liability to service. *P. 50, 314, Nov. 23, 1891; C. 1570, July 25, 1895.*

II D. Section 13 of the act of March 3, 1863 (12 Stat. 733) provided that any person drafted and notified to appear may, on or before the day fixed for his appearance, furnish an acceptable substitute to take his place in the draft, or he may pay to such person as the Secretary of War may authorize to receive it, such sum, not to exceed $300, as the Secretary may determine, for the procuration of such substitute. *Held*, that drafted men who were forced to enter the service, and substitutes for drafted men who entered the service in lieu of the men drafted, stand on the same footing and should be treated alike. If a name not drawn is substituted on the list of those drawn for a name that was drawn, then the name substituted and the person who bore it are treated as if that name had been drawn instead of the one for which it was substituted. *C. 1570, July 25, 1895.*

II E. The act of March 3, 1863 (12 Stat. 731), provided that a drafted man who should fail to report at the rendezvous without furnishing a substitute or paying the commutation should be deemed a deserter. *Held*, that the object of this provision was to enforce the appearance of those notified, and that holding these men to be deserters was not in conflict with the view that drafted men were not in the service of the United States until they were accepted by the board of enrollment. *P. 50, 314, Nov. 23, 1891; C. 2041, May 28, 1896; 2042, May 28, 1896.*

II F. A soldier deserted from the Ninth Kentucky Infantry, November 10, 1862, and while in desertion was drafted September 29, 1864, and served under the draft as a private in Company F, Thirty-eighth Indiana Infantry. *Held*, that his being drafted and his service as a drafted man were not affected by his being a soldier in desertion at the time and that his condition or status as a soldier in desertion was not affected by his being drafted or by his service as a drafted man. *C. 2106, Mar. 21, 1896.*

CROSS REFERENCE.

Eligibility of dismissed officer for.....See OFFICE IV E 1 c; 2 f.
Expiration of, while in confinement.....See DISCIPLINE XII B 3 g (2).
Extension of, by sentence.....See DISCIPLINE XII B 4 a; b.
In enemy's army.....See DESERTION I C 2.
Insane soldier.....See INSANITY I A 1.
Militia.....See MILITIA V to VI.
Of retired soldier.....See RETIREMENT II F 2.
Of prisoner of war.....See WAR I C 11 c (6) (*a*); d (3).
Pay before.....See PAY AND ALLOWANCES I A 1 a.
United States Volunteers.....See VOLUNTEER ARMY II C 2.

ENLISTMENT CONTRACT.

Breach of.....See ABSENCE II B 8 b.
Civil liability under.....See DESERTION V B 6; XIV A 1; 3.
Civil obligation under.....See PAY AND ALLOWANCES I C 2; III C 2 b.

ENROLLMENT.

Is not muster-in.....See VOLUNTEER ARMY II B 1 b.
Of drafted men.....See DESERTION XVI D 1 g.
ENLISTMENT II A.
Of volunteers, status.....See VOLUNTEER ARMY II C 1.

ESCAPE.

. See DESERTION I C 1; C 2.
Accused.....See DISCIPLINE VIII H 2; XVII A 4 c.
Conniving at.....See DESERTION III E; V B 16.
Force to prevent.....See DISCIPLINE XVII A 4 g (4); (6); i.
From civil authorities.....See ARTICLE OF WAR LIX K.
From military authorities.....See ARTICLE OF WAR LXII D.
General prisoner under unaccepted pardon..See PARDON II A.
Statute of limitations runs in.....See ARTICLE OF WAR CIII G.
Suffering to.....See DISCIPLINE II D 6.
Time spent in must be served.....See DISCIPLINE XVII A 4 b; c.

ESCHEAT.

Of estate of deceased inmate of Soldiers' Home.....See SOLDIERS' HOME I F.
Of private property.....See ARMY I G 3 d (8) (*b*).

ESTOPPEL.

Of claimant.....See CLAIMS I.

EXAMINATION.

Bonds.....See BONDS V E.
Candidate for commission.....See OFFICE III A 1 b (4).
Date of suspension from rank.....See RANK V C to D.
Failure to pass.....See OFFICE IV F.
For commission in Volunteers.....See MILITIA XVII A.
For promotion.....See RETIREMENT I B 6 to 8.
Of detailed staff officer.....See ARMY I G 3 b (4) (*b*); (*c*).
Of officer.....See DISCHARGE II A 1; III F 2; XVII B.
DISCIPLINE III E 5 b.
Promotion subject to.....See OFFICE III B 3 a (4) (*a*); (*b*).
Second.....See ARMY I G 3 d (2) (*a*).

EXAMINING BOARD.

For promotion.....See DISCHARGE XVII B.
RETIREMENT I B 6 to 8.

EXCHANGE.

Disbursing officer can not take credit for.....See PUBLIC MONEY II E.
Of public money by disbursing officers.....See PUBLIC MONEY VIII.

EXCHANGE OF PUBLIC PROPERTY.

Between departments.....See PUBLIC PROPERTY. I B.
Requires authority of Congress.....See PUBLIC PROPERTY I A 4.

EXECUTOR.

Execution of contract by.....See CONTRACTS I B 2; 3.

EXEMPTION.

From being called forth.....See MILITIA IV A.
From service.....See ENLISTMENT II B 1; 2.
From taxes.....See RETIREMENT I G 2 e.
Of private property from attachment.....See PRIVATE DEBTS XI.

EXIGENCY.

Under 3709, Revised Statutes.....See CONTRACTS VII A to B.

EXPEDITION.

Military, defined.....See ARMY II K 1 a.

EXPENDITURES.

In excess of appropriation.....See CONTRACTS XIII to XIV.

EXPERT.

Payment of, in connection with test of coal..See APPROPRIATIONS XLVIII.
Witness.....See DISCIPLINE IV B 3 d (1); XI a 8.
Witness, payment of.....See DISCIPLINE X I 3.

EXPLANATION.

By member of general court martial.....See DISCIPLINE VI D.
By officer.....See DISCIPLINE III E 7.

EXTERRITORIALITY.

Rule of, as to Army transport.....See ARMY I G 3 b (2) (*a*) [3] [*g*].

EXTRADITION.

I. FOR ACT COMMITTED IN DEMANDING STATE..... *Page 626*
II. BETWEEN THE UNITED STATES AND MEXICO.
A. MEXICO THE DEMANDING STATE.
B. THE UNITED STATES THE DEMANDING STATE..... *Page 627*
III. EXTRADITION OF DESERTERS. (See DESERTION.)
IV. OF SOLDIER FROM COUNTRY UNDER OUR MILITARY CONTROL.

I. Fugitives from justice are not surrendered by one Government to another under extradition treaties except on account of offenses committed within the jurisdiction of the Government demanding their extradition. So where a United States soldier deserted and went to Canada and there forged a check on the assistant treasurer, New York, which was paid, *held* that he could not be extradited for the forgery thus committed outside the jurisdiction of the United States. *P. 53, 446, May, 1892.*

II A. By Article II of the extradition treaty with Mexico of December 11, 1861, it is stipulated that: "In the case of crimes committed in the frontier States or Territories of the two contracting parties, requisitions may be made through their respective diplomatic agents, or through the chief civil authority of said States or Territories, or through such chief civil or judicial authority of the districts or counties bordering on the frontier as may for this purpose be duly authorized by the said chief civil authority of the said frontier States or Territories, or when, from any cause, the civil authority of such State or Territory shall be suspended, through the chief military officer in command of such State or Territory." So where a United States soldier charged with having committed a crime against the laws of Mexico was held in military custody within the State of Texas, *held* that, as a requisition by the Mexican Government directly upon the military commander in Texas would not be authorized, such commander would not be justified in taking action upon an application for such surrender, and that any application made through him would properly be trans-

mitted to the Secretary of War to be referred to the State Department. *R. 38, 118, July, 1876.*

II B. The extradition treaty between the United States and Mexico provides that "when from any cause the civil authority" of a frontier State, etc., of either nation "shall be suspended," the requisition shall be made "through the chief military officer in command of such State," etc. A criminal having escaped into Mexico from Texas at a time when the civil authority of that State was suspended as a result of the Civil War, a requisition for him was issued, not by the officer commanding in the State but by a subordinate of inferior rank. *Held* that as such action was clearly unauthorized, the Mexican Government was justified in refusing to comply with the requisition, and that a new one should accordingly be made by the proper commander. *R. 29, 4, June, 1869.*

IV. The arrest and delivery of a soldier serving in the Philippine Islands or Cuba to the authorities of one of the United States is not, during the military occupation of such places by the United States, a matter of international extradition. If a soldier so serving has been indicted in one of the States, the War Department may legally direct his surrender to such civil officer as may be sent, supplied with the proper papers, to receive him. *C. 5955, 6055, Mar. 1899; 8425, June 15, 1900; 13389, Nov. 12, 1902.*

CROSS REFERENCE.

Of deserters.....See DESERTION IV A to C; V F 9.

EXTRA DUTY.

By post noncommissioned staff officers.....See ARMY I E 2 c.
Noncommissioned officers.....See ARMY I B 2 a (3).
Pay.....See PAY AND ALLOWANCES I C 6 to 7.
Pay from special appropriations.....See PAY AND ALLOWANCES I C 6 d.

EXTRAS.

As additional work.....See CONTRACTS VII J to VIII.

EVIDENCE.

Before surveying officer.....See PUBLIC PROPERTY I F 3 to 4.
Certificates of officers.....See MILITIA XVI H.
Criminating.....See DISCIPLINE X H 1; 2; XI A 14 b; b (1).
Introduced after plea of guilty.....See DISCIPLINE IX E 5 a to b.
New, after approval of sentence.....See DISCIPLINE XV F 8.
Newly discovered, effect on a settled claim....See CLAIMS I.
Not received after finding.....See DISCIPLINE IX E 5 b.
Of challenge.....See ARTICLES OF WAR XXVI A.
Of desertion.....See DESERTION IX A to O; I E.
Of discharge.....See DISCHARGE XIV A 1.
Of disrespect.....See DISCIPLINE II D 13 a.
Of embezzlement.....See ARTICLES OF WAR LX A 4.
Of fraud or dishonor.....See DISCIPLINE VIII A 2.
Of identity.....See DISCIPLINE V B 1; X H 2.
Of muster in.....See VOLUNTEER ARMY II D 1.
Of rank of enlisted man.....See RANK I D to E.
Patentee is inventor.....See PATENT I.
Pleading of.....See DISCIPLINE IX E 3.
Presumption of law.....See DISCIPLINE IV E.
Record of.....See DISCIPLINE XIII K.
Rules of.....See DISCIPLINE XI A to B.
Statement of accused.....See DISCIPLINE V H 1; 2.

FALSE ACCUSATION.

See ARTICLES OF WAR LXI B 2.

FALSE CERTIFICATE.

See ARTICLES OF WAR LXI B 1.

FALSE CLAIM.

See ARTICLES OF WAR LX A to F.

FALSE REPORT.

See ARTICLES OF WAR LXI B 1.

FALSE STATEMENT.

See ARTICLES OF WAR LXI B 1; LXII D.
As evidence.....See DISCIPLINE XI A 18.

FALSE SWEARING.

See ARTICLES OF WAR LXII C 9.
DISCIPLINE VII F.

FAMILY OF OFFICER.

Occupation of quarters by.....See PAY AND ALLOWANCES II A 2 b (2).
Transportation by sea.....See ARMY I G 3 b (2) (*a*) [3] [*f*].

FATAL DEFECT.

See DISCIPLINE IX H 1.
Absence of member.....See DISCIPLINE XIV E 9 a (2).
Court not sworn.....See ARTICLES OF WAR LXXXIV B.
List of.....See DISCIPLINE XV E to F.
Proceedings of examining board.....See RETIREMENT I B 6 e (1).
Right to challenge not extended.....See DISCIPLINE XIII C 2 a.
Variance in name.....See DISCIPLINE XIV E 9 a (3).

FATIGUE.

As a punishment.....See DISCIPLINE XVII A 1.

FEDERAL OFFICE.

Retired officers eligible for.....See RETIREMENT I G 3 a to b.

FEDERAL TROOPS.

See ARMY.
MILITIA II to III.

FEES.

Of witness before general court-martial.....See DISCIPLINE X I to K.

FELON.

Enlistment of.....See ENLISTMENT I A 9 c (2); D 3 c (4); (5); (18) (g).
Fraudulent enlistment of.....See ENLISTMENT I A 9 f (5).
Reenlistment of.....See ENLISTMENT I D 3 c (3).

FELONY.

Stealing hay from military reservation.....See COMMAND V A 3 g.

FENCES.

Claim for damage to, by soldier .....See CLAIMS II; IV.

FILIPINO.

See OFFICER'S SERVANT II to III.
Is not citizen of United States.....See DESERTION XIV B 1.

FINAL STATEMENT.

Not part of discharge.....See DISCHARGE, XIV A 1.

FINDING.

See DISCIPLINE, XII A to B.
Disclosing of.....See ARTICLES OF WAR, LXXXIV C 4.
Examining Board.....See RETIREMENT, I B 6 to 7.
Retiring board.....See RETIREMENT, I B 2 to 3.

FINE.

See PAY AND ALLOWANCES, III D to E.
As punishment.....See DISCIPLINE, XII B 3 e (4).
Disposition of.....See PUBLIC MONEY, I M.

FINGER PRINTS.

Of accused.....See DISCIPLINE, V B 1; X H 2.
Of interned prisoners improper.....See ARMY, II K 1 h (1).

FISHING.

By civilians on military reservation.....See COMMAND, V A 3 f.

FISHING PASS.

See ABSENCE, I C 3.

FLAG.

I. DESCRIBED..... *Page 629*
II. TRADE-MARK CAN NOT COMPRISE.
III. A STATE CAN PROTECT THE FLAG..... *Page 630*
IV. INSULT TO FLAG.
V. ACCEPTANCE OF FLAG.

I. The flag of the United States is described in the Revised Statutes (secs. 1791–1792), the flags of foreign nations are recognized under international law and the Army Regulations, and the flag of the Geneva Convention is recognized by law and regulations.

Beyond this, if we except the flag of truce in time of war and certain flags or guidons used to distinguish military persons and units, this office has no knowledge of any flag being officially recognized either by the War Department or the United States in the ordinary sense in which the word "recognition" is used. *C. 22135, Sept. 26, 1907.*

II. *Held*, that under the act of February 20, 1905 (33 Stat. 725), a trade-mark can not be registered which consists of or comprises the

flag, coat of arms, or other insignia of the United States, or any simulation thereof, or of any State or municipality, or of any foreign nation. *C. 499, May 6, 1905, and Sept. 28, 1906.*

III. *Held*, that it is within the authority of a State to prohibit the flag from being put to improper uses.[1] *C. 499, Mar. 18, 1907, and Apr. 12, 1907.*

IV. *Held*, that if the flag of the United States is insulted in such a manner as to constitute a menace to the public peace, the law of the State should be invoked to provide an adequate remedy. *C. 599, Feb. 21, 1906.*

V. *Held*, that the Executive Department has no authority in the absence of legislation to accept any flag on behalf of the United States.[2] *C. 10004, Mar. 19, 1901.* *Held*, that recaptured flags can be returned to a regiment if still in the service. *P. 118, Feb. 21, 1893.*

CROSS REFERENCES.

Of another country.....See ALIEN I.
Of truce.....See WAR I C 9.
Recapture of.....See WAR I C 6 c (3) (*e*) [2].

FLOATABLE STREAMS.

Navigation of.....See NAVIGABLE WATERS I A 2.

FORAGE.

Sale to retired officers.....See ARMY I G 3 b (2) (*c*).
Claim for furnishing.....See CLAIMS XII L.

FOREIGN GOVERNMENTS.

Employment of United States civilian employee by.....See CIVILIAN EMPLOYEES VI A.
Permission to pass through foreign territory..See ARMY I G 3 b (2) (*a*) [2] [*a*]; [*b*].
Remuneration from.....See ARMY I C 3.

FORFEITURE.

Because of absence.....See ABSENCE II B 8 a.
Because of contempt of court.....See ARTICLES OF WAR, LXXXVI B 1 a.
By civilian employees.....See APPROPRIATIONS LXVI.
By sentence.....See DISCIPLINE XII B 3 e (1).
Can not be implied.....See PAY AND ALLOWANCES II A 3 a (1); III A 2 a.
Certificate of merit-pay.....See INSIGNIA OF MERIT II K.
Civilian employee's pay.....See ARTICLES OF WAR LXIII E.
Deposited money.....See PAY AND ALLOWANCES I C 7 a to b.
Deserter's pay and allowances.....See DESERTION XIV A to F.
Diversion of, improper.....See ARMY I B 2 b (2) (*b*).
In connection with stoppage under fifty-fourth article of war.....See ARTICLES OF WAR LIV D 2.
Of pay and allowances.....See PAY AND ALLOWANCES II A 3 a (3) (*a*); III C to D.
Of private property.....See DISCIPLINE XVII A 4 g (5).
Several penalties of.....See ARTICLES OF WAR LXXXIII C; C 1 a.

---

[1] See Halter *v.* Nebraska, where it was held that a State statute punishing the desecration of the flag of the United States and prohibiting the sale of articles upon which there is a representation of the flag for advertising purposes is not unconstitutional. (205 U. S., 34.) Several States have passed laws having for their object the enforcement of respect for the flag.

[2] The Federal Government keeps flags that were captured from enemies, and restores when possible to regiments or States flags that have been recaptured from enemies. (See H. Ex. Doc. No. 163, 50th Cong., 1st sess.; War Dept., Cong. Doc. 2558.)

FOREIGN SERVICE.

Counts double for retirement of soldiers.....See RETIREMENT II A 4 b to d.
Of militia.....See MILITIA I E.
WAR I C 8 c (1) (*b*).

FORGERY.

See ARTICLES OF WAR LXII B; D.
By general prisoner.....See PARDON II a.
By soldier.....See ARTICLES OF WAR LX B 1.
Extradition for.....See EXTRADITION I.
Responsibility for forged checks.....See PUBLIC MONEY II B 2.

FORTIFICATIONS.

Appropriations for.....See APPROPRIATIONS XXX; XXXVII.
Blank forms.....See APPROPRIATIONS XXXVI D.
Photographing.....See WAR I C 6 g (1).
Responsibility for.....See ARMY I B 10.

FRANCHISE.

Exercise right of, by deserter.....See DESERTION XIV B.
Issuance of, war.....See ARMY I B 2 d (1).

FRAUD.

See ARTICLES OF WAR. C A.
In claims.....See ARMY I B 1 b.
Muster in.....See VOLUNTEER ARMY II D to F.
DISCHARGE V F 2.
Muster out.....See VOLUNTEER ARMY IV F to H.
Post exchange steward.....See GOVERNMENT AGENCIES II J 8.
Rejection of bid for.....See CONTRACTS VI J 4.

FRAUDULENT CLAIM.

See ARTICLES OF WAR LX A to F.
DISCIPLINE II A 1 b.

FRAUDULENT DISCHARGE.

May be revoked.....See DISCHARGE XV A, A1; 2; XVI A to B.

FRAUDULENT ENLISTMENT.

See ENLISTMENT I A 9 to 10.
Certificate of merit during.....See INSIGNIA OF MERIT II D.
Continuous service.....See PAY AND ALLOWANCES I C 5 b (1).
Discharge without honor for.....See DISCHARGE II B 1.
Elements of.....See ARTICLES OF WAR E 1.
DISCIPLINE XV E 11.
Forfeiture of clothing allowances for.....See PAY AND ALLOWANCES III C 2 a.
Policy in disposition under fiftieth article of war.....See DESERTION VI B; XII A 1.
Service—for retirement.....See RETIREMENT II A 1 a.
Statute of limitations on.....See ARTICLES OF WAR CIII H.
Trial for.....See DISCIPLINE III E 3 a.
Under fiftieth article of war.....See ARTICLES OF WAR L A.

FREIGHT.

Of Militia.....See MILITIA VII A to F.

FUEL.

Heat and light.....See PAY AND ALLOWANCES II A 1 to 2.
To Militia.....See MILITIA VI B 2 i.

FURLOUGH.

See ABSENCE.
Arrest while on.....See ARTICLES OF WAR LIX I 2.
Cadet.....See ARMY I D 2 a.
Candidate for commission.....See OFFICE III A 1 b (3) (*a*).
Indefinite.....See ABSENCE I C 4 g.
Medical attendance.....See CLAIMS VIII.
Not actual service.....See RETIREMENT II A 4 b (1).
Not line of duty status.....See GRATUITY I A 4 a (2).

FURNITURE.

Appropriation for.....See APPROPRIATION LI.
Militia.....See MILITIA XVI I 4.
Retired officer.....See RETIREMENT I K 5.

GAMBLING.

By officer.....See ARTICLES OF WAR LXI B 8.
By officers or soldiers.....See ARTICLES OF WAR LXII D.

GARBAGE.

Sale of.....See PUBLIC PROPERTY I M.

GARNISHMENT.

Of public money.....See PUBLIC MONEY II C to D.

GARRISON COURT-MARTIAL.

See ARTICLES OF WAR LXXXII A to C 2;
LXXXIII A to C 2.
DISCIPLINE XVI E 5.
Review of proceedings.....See ARTICLES OF WAR CIV C 4.
DISCIPLINE XVI B 1.

GAS WELL.

On military reservation.....See PUBLIC PROPERTY I A 2.

GENERAL AVERAGE CONTRIBUTION.

See CLAIMS VI to VII.

GENERAL COURT-MARTIAL.

See DISCIPLINE VI to XIV.
Authority of.....See ARTICLES OF WAR XCI G.
Contempt of.....See ARTICLES OF WAR LXXXVI A to B 1 b.
Copy of record as evidence.....See DISCIPLINE XI A 17 a (2) (*a*) [1] [*c*].
Copy of record to accused.....See ARTICLES OF WAR CXIV A.
Irregularities in proceedings of.....See ARTICLES OF WAR LXXIII A 1.
Jurisdiction of.....See DISCIPLINE III 5 b.
Jurisdiction over civilians.....See ARTICLES OF WAR LXIII A to E.
No jurisdiction over private debts.....See PAY AND ALLOWANCES III D 2.
Power to sentence.....See PAY AND ALLOWANCES III C 1 a (1) (*a*).
Quorum.....See ARTICLES OF WAR LXXV B 1 to 4.
Referring cases to.....See COMMAND V A 4.

GENERAL HOSPITALS.

See ARMY I G 3 d (7) to (8).

GENERAL MESS.

Fund of.....See GOVERNMENT AGENCIES X.

GENERAL OFFICER.

See ARMY.
COMMAND.
WAR.

Right to Aids.....See ARMY I B 2 f.

GENERAL PRISONER.

Apprehension of.....See DESERTION V B 17.
Can not be restored to duty.....See ARMY I B 2 a (4).
Civilian clothing for.....See DISCIPLINE XVII A 4 g (7).
Clothing issues.....See ARMY I B 7 a.
PAY AND ALLOWANCES II A 3 a (4) (*e*) [1].
Confinement in penitentiary.....See DESERTION X C 1.
Dependent parent.....See DISCHARGE VI C 2.
Disobedience of orders by.....See ARTICLES OF WAR LXII D.
Forgery by.....See PARDON II A.
Fraudulent enlistment of.....See ENLISTMENT I A 9 f (3).
Insane.....See INSANITY I A 2.
Jurisdiction over.....See DISCIPLINE VIII G 2 b; I 1 d.
Private property of.....See DISCIPLINE XVII A 4 g (5).
Private property of, destroyed.....See CLAIMS IX.
Redemption of.....See DISCHARGE II B 2 a.
Reenlistment of, after release.....See ENLISTMENT I D 3 c (12).
Trial of.....See DISCIPLINE II D 20.
Witness before civil courts.....See CIVIL AUTHORITY I B 3 a.

GENERAL STAFF.

Command by.....See ARMY I G 3 a (1) (*a*).
COMMAND I A 1 a.
Details to.....See ARMY I B 2 b (1) (*a*).

GENEVA CONVENTION.

Purpose of.....See RED CROSS I B.

GIFT.

From allies.....See WAR I C 6 d (1).
Money to United States.....See APPROPRIATIONS VII.
Secretary of War can not accept land or interest in land for United States......See PUBLIC PROPERTY II A.
Secretary of War may accept personal property for United States......See PUBLIC PROPERTY I G.

GIVING INTELLIGENCE TO ENEMY.

See ARTICLES OF WAR XXXXVI A; B.

GOOD CONDUCT.

Of prisoners.....See DISCIPLINE XVII A 4 f.

GOVERNMENT AGENCIES.[1]

I. GOVERNMENT AGENCIES AND INSTRUMENTALITIES IN GENERAL.
A. Government Agencies May be Created by Either Legislative or Executive Authority..... *Page 636*
B. Stoppage in Favor of Government Agencies.
C. Debt Due Government Agency Collectible from Pay Where Pay is Received at Pay Table by Company Commander or Subsequently Deposited with Him..... *Page 637*
D. Loss of Funds of Government Agency.
1. Custodian's responsibility greater than that of gratuitous bailee; he is official performing a duty. Illustrations..... *Page 638*
2. Post not under command of division commander..... *Page 640*
3. No appeal from decision of department commander, but Secretary of War may reexamine the case to determine whether a stoppage may be made.
4. Procedure where deceased officer indebted to company funds leaves unindorsed check for amount of indebtedness.
E. Government Agency May Sell Supplies to and Render Service for the Government.
F. Disposition of Funds of Government Agency Where Agency Ceases to Exist..... *Page 641*
G. Garnishment, Attachment, etc., of Public Property. (See Public money.)
H. Taxation of Government Agency. (See Tax.)
II. POST EXCHANGE.
A. Characteristics and Purposes of Post Exchanges.
1. Government agency and recognized by acts of Congress... *Page 642*
2. Not a corporation, but a cooperative store..... *Page 643*
B. Officer in Charge.
1. Allowance for services.
2. Represents post exchange in litigation.
3. If litigation necessary, may properly request to be furnished with counsel at Government expense.
4. Not personally responsible to creditor of post exchange merely because exchange regulations make him responsible for management of exchange.
5. Responsible for a shortage in exchange funds, notwithstanding his acquittal of charge of embezzling such funds..... *Page 644*
C. Limitations as to Business.
1. Can not accept deposits from soldiers.
2. Can not collect a tax on dogs in a post.
D. Credits by Post Exchange.
1. To officers.
2. To enlisted men.
a. Credits in excess of amount authorized by regulations.
E. Liability for Debts of Post Exchange.
1. Officers stationed at the post not liable for debts of post exchange.
F. Post Exchange Council, as well as Officer in Charge, May be Held Responsible for Losses.
G. Post Exchange Buildings..... *Page 645*

[1] Prepared by Maj. H. M. Morrow, judge advocate, assistant to Judge Advocate General.

II. POST EXCHANGE—Continued.

H. Appropriations for Post Exchange. (See Appropriation XXIX.)

I. Membership of Post Exchange.

1. Organizations comprising membership of post exchange construed as continuing organizations regardless of change in personnel.
2. In case of dispute as to terms of admission of a new organization to an exchange the decision of department commander final, except in case of fraud..... *Page 646*
3. Rule of distribution where membership of organization is reduced after it has bought into an exchange.
4. Membership in the post exchange not obligatory on units forming garrison..... *Page 647*
5. What constitutes an organization or detachment competent to become a member of a post exchange.

J. Miscellaneous.

1. Several independent exchanges or one exchange with several branches may be established at a post.
2. As post exchange is Government instrumentality it may be ordered to readjust accounts with a paymaster.
3. Under paragraph 318, Army Regulations, 1910, as to proceedings of exchange council minority of council may make report, but only the proceedings of majority should be acted on by division commander.
4. Regimental adjutant may receipt to receiver of a bank for dividends on deposits the regimental exchange officer having died.
5. Government property may be transferred by a Government bureau to the post exchange.
6. Telegrams on post-exchange business.
7. In case of error on final statement transferred to a post exchange and final statement is paid by paymaster, the soldier and not the post exchange is the debtor to whom the paymaster should look for reimbursement for his overpayment..... *Page 648*
8. Fraud by the steward of a post exchange is a military offense.
9. Fuel and lights for a canteen are a proper charge against the Army appropriation for fuel and lights.
10. Paragraph 1060, Army Regulations, 1910, as to issue of fuel where post exchange runs a laundry.
11. A contribution may be made from the post exchange to support a "volunteer band"..... *Page 649*
12. "Volunteer band" not entitled to share in net profits.

III. COMPANY FUND.

A. Debts Due the Company Fund.

1. A debt from an officer to a company on account of boarding with the company is a debt to the company fund.
2. Where a company fund receives a percentage of the profits on work done by a private laundry, a debt due the laundry from a member of the company is not a debt to the company fund.
3. No legal authority for loaning a portion of company fund to enlisted men to enable them to represent the company at an athletic meet.

B. Expenditures From the Company Fund.

1. Paragraph 331, Army Regulations, 1910, as to disbursing the company fund "solely for the benefit of the company."
2. A company exchange not being authorized by law, the company fund is not liable for its debts..... *Page 650*

III. COMPANY FUND—Continued.
B. EXPENDITURES FROM THE COMPANY FUND—Continued.
3. The expense of a bond to secure a bank against loss on account of a lost certificate of deposit in favor of the company may be paid from the company fund.
IV. SOLDIER CAN NOT BE REQUIRED TO PAY FOR THE LAUNDERING OF HIS CLOTHES BY AN EXCHANGE OR COMPANY LAUNDRY UNLESS HIS CLOTHES WERE ACTUALLY LAUNDERED THERE.
V. LAW OF STATE OR TERRITORY CAN NOT PROHIBIT SOLDIER CARRYING HIS ARMS.
VI. PRACTICE BY MEDICAL OFFICERS..... *Page 651*
VII. EFFECT OF WAR DEPARTMENT ORDER AUTHORIZING COMPANY BARBER SHOPS, BILLIARD AND POOL TABLES.
VIII. BAND FUND OF "VOLUNTEER BAND" TO BE ACCOUNTED FOR LIKE A REGIMENTAL FUND.
IX. RESPONSIBILITY OF QUARTERMASTER FOR EFFECTS OF DECEASED OFFICER RECEIVED FOR SHIPMENT.
X. EXPENDITURE FROM FUNDS OF GENERAL MESS SHOULD BE SOLELY FOR THE BENEFIT OF THE MEMBERS OF THE MESS.
XI. THE POWERS OF A GOVERNMENT AGENCY AS ESTABLISHED BY CONGRESS CAN NOT BE INTERFERED WITH BY THE EXECUTIVE OR BY ANOTHER GOVERNMENT AGENCY.

I A. Congress may establish such agencies or instrumentalities in connection with the military establishment as it may deem necessary to the efficiency or comfort of the troops or desirable for their welfare. A similar right to establish Government agencies and instrumentalities and to prescribe suitable regulations for their government and administration has been resorted to by the Secretary of War whenever the necessities of the military establishment have warranted such exercise of executive power, and his action in establishing them and prescribing rules for their government and control has been recognized by Congress in making appropriations for their support and has been recognized by the courts and by other executive departments of the Government. The practice of establishing such Government agencies and instrumentalities has existed for more than a century. *Held*, therefore, that it is within the authority of the Secretary of War to authorize the establishment of a laundry at a military post and to prescribe regulations for its administration and control.[1] *C. 18224, Sept. 8, 1906.*

I B. When the post exchange (then called canteen) was of a private character, it was held that stoppages of pay could not be made to reimburse losses of canteen funds; and at that time the Treasury Department also held that canteens were taxable by the Government. Subsequently (in 1897) the Treasury Department held that post exchanges as then organized under the orders of the War Department

[1] Pursuant to the above recommendation, G. O. 159, W. D., Sept. 15, 1906 (par. 351 A. R. 1910), established post laundries and made provision for the collection of indebtedness due them from enlisted men. See also par. 1, G. O. 253, W. D., Dec. 27, 1907, and the current acts of appropriation for the support of the Army relative to competition of post laundries with private establishments for doing laundry work. Current acts of appropriation now provide "for the construction, operation, and maintenance of laundries in Army posts in the United States and in its island possessions."

were Government instrumentalities or agencies and were therefore not taxable under the internal revenue laws.[1] Now the funds of the post exchange are moneys used in carrying on this public agency, and the Government has a right to protect its instrumentalities—the establishments through which it carries on public business. *Held*, therefore, that stoppages against the pay of officers and enlisted men, whether on the active or retired list, may legally be made to reimburse the post-exchange fund on account of losses for which such officers and enlisted men are responsible, and in case of a deceased officer or soldier the amount due the post exchange may be deducted from the pay and allowances due the estate of the deceased. *C. 3171, June 7, 1897; 7186, Oct. 19, 1899; 12195, Mar. 12, 1902; 13104, Aug. 14, 1902; 15714, Jan. 18, 1904; 19112, Jan. 2, 1907; 26161, Apr. 3, 1911.* As company, hospital, and regimental funds are also Government agencies, the pay of officers and soldiers may be stopped for indebtedness due them. *C. 3171, June 7, 1897; 7186, Oct. 19, 1899.* As the pay of an officer or soldier or employee may be stopped to pay an indebtedness due the United States, it may with equal legality and propriety be stopped to pay an indebtedness due to a Government agency or instrumentality which has been established by proper legislative or executive authority. *C. 18224, Sept. 8, 1906.*

I C. The pay of an enlisted man which has been turned over to his company commander at the payment of the company because the soldier was absent from the pay table continues to be Government funds until it reaches the hands of the soldier unless some act of the soldier, such, for instance, as a request to the company commander in respect to the disposition of the whole or a part of his pay, operates as a technical reduction to possession. In the event of such an act such portion as the soldier should request the company commander to pay to creditors would be regarded as having been reduced to possession and might be paid in accordance with the soldier's request, and if the soldier has deserted the balance should be treated as the effects of a deserter, provided the soldier's request was that the balance be held as a deposit subject to the soldier's order. But where there is a well-established practice to collect at the pay table sums due to the post exchange, the company fund and other Government instrumentalities, such collections being made at the instant of payment when the soldier is present to receive his pay, a corresponding deduction should be made at the same instant in a case where the money due the soldier is handed to his company commander. Such a well-established custom may be regarded as a request by the soldier to pay the dues established by custom. Therefore *held* that the total amount due a post exchange, company fund or other Government instrumentality, and, according to the established custom payable to those instrumentalities on the receipt of pay from the paymaster, should be considered by reason of such custom as technically reduced to possession, and paid to the creditors in conformity to such custom, and the balance, not having been reduced to possession either actually or technically, should be considered as retaining the character of public funds and returned to the paymaster. *C. 12227, Feb. 12, 1907, and Oct. 12, 1909.*

[1] The same conclusion was reached in Dugan *v.* United States (34 Ct. Cls., 458).

I D 1. Post exchange, company, hospital, bakery, etc., funds are quasi public funds, i. e., funds used to carry on public agencies or instrumentalities of the Government, losses of which can be reimbursed from stoppages of pay of the officer or soldier responsible therefor. From this it follows that the liability of the responsible officer or soldier is not that of a bailee without compensation, but of an official charged with the custody of funds in a public capacity devolving an official duty and a material trust, in the discharge of which a greater degree of care is required than in the case of a gratuitous bailment. *C. 13597, Nov. 24, 1902; 13867, Jan. 2, 1903; 14575, May 1, 1903; 16065, Mar. 24, 1904; 25552, Sept. 11, 1909.* So where the officer in charge of a post exchange, in conveying the funds of the exchange from the post to a bank in town for deposit, placed them in a package inside of the breast of his blouse which was without pockets, and the package slipped down and was lost, *held* that the officer had not used due care and should be charged with the amount lost. *P. 54, 41, June 7, 1892.* So where a post exchange officer placed in a sack a sum amounting to over $1,600 for deposit in a bank at a distant point, and without properly sealing and stamping the sack, delivered it to an enlisted man, who in turn delivered it to a private stage company, which was not prepared to properly guard and protect a package of such value, and the stage line delivered it to the Wells-Fargo Express Co., which latter company delivered the package to the bank, where it was found that there was a hole in the sack and the original sum was short by over $500, *held* that the exchange officer was guilty of carelessness and should be held for the loss. *C. 19112, Feb. 2, 1906.* Where an officer stationed in the island of Mindanao kept his company fund in a wooden box made of inch lumber bound with iron, the box being securely bolted to the house and locked with a Yale lock, and it appeared that other officers had kept their private funds in the box, *held* that the fact that the officer could have used the safe of the post quartermaster in which to deposit his company fund, but did not do so because the deposit of the funds in that place would subject him to more or less delay in handling the funds, did not necessarily constitute evidence of proper lack of care. *C. 20003, Oct. 2, 1906.* Where a company commander placed over $600 of his company fund and over $450 of his private funds in a steel box of ⅛-inch steel plates, which was placed in his company quarters at Camp Bumpus, Leyte, P. I., and fastened to the floor by screws from the inside of the box so that they could be reached only after the box had been opened, and during the absence of the officer from his quarters about 6 p. m. the box was broken into by means of a hatchet and the contents stolen, *held* that the officer should not be held responsible for the loss of the funds. *C. 25552, Sept. 11, 1909.* A company was to leave the next day for another station and a bill for company supplies was to be paid, and an apparently entirely reliable noncommissioned officer whose duties as acting quartermaster sergeant naturally pointed him out for the work was given $50 by the company commander to pay a creditor, and the noncommissioned officer disappeared with the money, and it appeared the noncommissioned officer at the time of his desertion had a deposit of $50, about $36 of pay due him, an undrawn clothing balance of several

dollars, and the prospect of his discharge in four months with mileage from San Francisco to New York, *held* that as in the conduct of business it is absolutely necessary that certain persons be trusted, and there appeared to be every reason to trust the noncommissioned officer in the case, the officer was without negligence. *C. 16065, Mar. 24, 1904.* But where there was no urgent haste about the payment of the bill, and the sum of $115 was intrusted by the company commander to a sergeant to pay a bill against the company fund, and the sergeant disappeared with the money, and it appeared there was a month's pay due the sergeant, with mileage from San Francisco to Washington, and a probable small balance on his clothing account, the two latter items, however, not being due for about 18 months, *held* that the facts were not sufficient to justify the release of the company commander from responsibility. *C. 18898, Dec. 8, 1905.* Where the officer in charge of a post exchange at a post adjoining a city, having in his hands for deposit in bank about $1,000 of post exchange funds, instead of personally attending to the deposit, sent in to the bank with the funds the post exchange steward, who appropriated to his own use a portion of the amount and did not return to the post till arrested by the civil authorities—*held* that the officer had not taken the degree of care properly required of him, and was responsible for the amount lost. *P. 64, 138, Mar. 8, 1894; C. 13867, Jan. 2, 1903.* And where the company commander was sick in his quarters and the only other officer on duty with the company was officer of the day, and it was necessary to obtain change for use on pay day, and the company commander intrusted to his first sergeant a check for $75, with which to obtain change at a town 7 miles away, and the first sergeant disappeared with the money, *held* that as in the conduct of all business operations, there must be necessarily a certain degree of trust shown in the handling of funds, and the company commander had no reason to be on his guard against the theft or desertion of the first sergeant, he should not be held responsible for the loss to the company fund. *C. 29057, Oct. 3, 1911.* The "bakery fund" is a Government instrumentality. Not being public money the officer in charge may be relieved by competent authority from responsibility for a loss. Therefore, where a medical officer detailed as post treasurer places the bakery fund, with the consent of the senior medical officer of the post, for safe keeping in the safe provided by the Government at the hospital for the use of the medical officer in charge, and in which were kept the hospital fund and other valuables, the combination of the lock being known only to the senior medical officer and the post treasurer and the surgeon general's office, and while the door of the safe had been carelessly left open by the senior medical officer the bakery fund was stolen, *held* that the post treasurer was not required to keep the bakery fund in a bank, and that the placing of it in the safe was, under the circumstances of the case, a proper care of the fund. *Held* further that the fact that the post treasurer had replaced the bakery fund from his private funds immediately after the loss occurred, did not prevent him from subsequently requesting relief. *C. 15609, Dec. 15, 1903.* The officer in charge of athletics and amusements at a post, for his own convenience, sent a private who was his assistant to the post exchange to cash a voucher for $18.50.

The soldier cashed the voucher and deserted with the money. *Held* that as between the officer and the post exchange the loss should be borne by the officer. *C. 28866, Aug. 25, 1911.*

A post exchange was entered and robbed of a sum of money, consisting in part of that day's receipts and in part of a small and reasonable sum left by the officer in charge with the exchange steward, to make change. Under paragraph 337, Army Regulations (par. 4, G. O. 46, A. G. O., 1895), the officer in charge is not responsible for the day's receipts till turned over to him by the steward on the following morning. *Held,* in the absence of any evidence of negligence or want of precaution on his part, that the officer was not legally liable for the amount of the loss. *P. 58, 437, Mar. 28, 1893.*

I D 2. Paragraph 318, Army Regulations of 1908 (321 of 1910), provided that: "In case of loss of regimental, bakery, exchange, company, or mess funds, the circumstances will be carefully investigated and reported by the post council, with recommendation as to responsibility, for the decision of the department commander." Where the loss occurred in a post exchange on Alcatraz Island, *held* that as the post on that island is not within the command of the department commander, the report should be forwarded by the post commander to The Adjutant General of the Army. *C. 24380, Feb. 6, 1909.*

I D 3. Paragraph 317, Army Regulations, 1904 (321 of 1910), in relation to the loss of regimental, exchange, company, or mess funds does not provide for an appeal from the decision of the department commander, but where an officer has been held responsible by the decision of the department commander for the loss of funds and does not replace the funds of his own motion, the question of stoppage of his pay arises and the Secretary of War, before ordering a stoppage of his pay under section 1766, R. S., as amended by the act of July 16, 1892 (27 Stat. 177), may reexamine the case to determine whether the officer should be held responsible. *C. 20003, July 5, 1906.*

I D 4. An officer at the time of his death was accountable for $360 company fund. A board of survey reported that he had left in lieu of the money an unindorsed Government check for that amount, payable to his order and purporting to be for pay due him. It thus appeared that the officer owed the company fund $360, and that the Government owed him the same amount for salary, the check not having been presented and paid. *Advised,* therefore, that as an officer's pay may legally be stopped to reimburse the company fund, $360 be stopped against the pay due the deceased officer, and that the check referred to be returned to the drawer to be cancelled. *C. 7957, Apr. 7, 1900.*

I E. Paragraph 593, Army Regulations, 1904 (603 of 1910), provided that "Officers or agents in the military service will not purchase supplies for the Government from any other person in the military service, nor contract with any such person to furnish supplies or service to the Government, nor make any Government purchase or contract in which such persons shall be admitted to share or receive benefit." *Held* that the prohibition of the paragraph is directed at *persons* in the military service, and as a post exchange is not a *person,* but a form of governmental *agency,* the paragraph does not apply to a post exchange. *Held* further that it would not be unlawful for an exchange to repair a typewriter for the Signal Department, charging therefor a

reasonable compensation. *C. 17927, June 15, 1905.* Also *held* that a post exchange laundry could do laundry work for the Government. *C. 18156, Oct. 31, 1905.*

I F. A company of a volunteer regiment operated an exchange. After the muster out of the company a debtor paid to one of the officers of the company his indebtedness to the exchange. *Held* that the profits from the post exchange are considered as belonging to the organization as such and not to the individual enlisted men composing the organization, and therefore as the company is no longer in existence no attempt should be made to distribute the money among the former members of the company. However, as the profits arose from the savings of enlisted men they should be applied to the benefit of enlisted men, and there would be no legal objection to applying them to the company fund or funds of one or more companies as may be thought to best subserve the interests of the Government. *C. 11089, Aug. 29, 1901; 10917, Jan. 25, 1902.* So held where an exchange was operated by a large detachment of recruits who were ordered away, leaving a surplus in the hands of the exchange officer. *C. 13625, Nov. 12, 1902.* So where a volunteer regiment was mustered out, leaving in possession of the colonel $145 belonging to the regimental fund, recommended that this sum be distributed among new infantry regiments being organized for use as a part of their regimental funds. *C. 13616, Nov. 12, 1902.*

Post exchanges are by their nature intended to be continuous in their operation, new organizations taking membership in the exchange as the old ones leave, but where an exchange was entirely closed out and a new one came into existence entirely distinct and separate from the old one, and upon closing out the affairs of the old exchange there was a balance of some $75 to be declared as dividends and it appeared that the new exchange had voluntarily assumed certain debts of the old exchange, the total being unknown, and it appeared that a period of four years had elapsed since the old exchange was closed out, *held* that it would be proper to turn over to the new exchange the balance belonging to the old one. *C. 17463, Feb. 8, 1905.*

A debt from a deceased member of a hospital detachment which belonged to the post exchange was assigned to the surgeon in command of the detachment as a part of the detachment dividend. Subsequently, and before the debt could be collected from the estate of the deceased, the station was abandoned and the hospital detachment ceased to exist, the various members being sent to different stations. *Held* that as hospital detachments do not constitute a permanent organization like companies a proper disposition to make of the debt would be to turn it over to the chief surgeon of the department to be applied by him to a proper beneficiary. *C. 19321, Mar. 10, 1906.*

Upon the return of the Army of Cuban Pacification to the United States there remained unexpended the sum of $500 in a prison mess fund. This fund had accumulated from savings on the rations of military prisoners brought from all parts of the island of Cuba. *Recommended* that this sum be distributed between the military prisons at Fort Jay and Fort Leavenworth. *C. 24686, Mar. 23, 1909.*

II A 1. The post exchange was not established by Congress, but is maintained under special regulations prepared by the War Department. It is a Government instrumentality[1] and has been recog-

[1] In the case of Thomas B. Dugan *v.* U. S., decided June 5, 1899 (34 Ct. Cls. 458,) the court said: "Under Post Exchange Regulations adopted by the War Department, and published by General Orders, No. 46, Headquarters of the Army, July 25, 1895, post exchanges were established and the commanders at every post thereby required to institute the same; to set apart, rent, or construct as therein provided a suitable building or rooms therefor and to detail an officer to be designated as 'officer in charge' to manage the business and affairs of such exchanges under the superintendence of a council consisting of three officers. * * *

"Such exchanges were first organized under General Order No. 10, Adjutant General's Office, February 1, 1889, and as thus organized superseded the 'canteens' which were organizations in the nature of social clubs, voluntarily formed by the officers of a regiment or other command with their own money and conducted independently of their official duties, as we are advised.

"These social clubs, known as 'canteens,' were organized after the office of sutler in the Army had been abolished by the act of July 28, 1866 (14 Stat. L. 366). They were held liable to internal-revenue tax the same as social clubs in cities selling manufactured tobacco, cigars, and liquors to their members.

"By the act of January 28, 1893 (27 Stat. L. 426; 2 Supp. Rev. Stats. 76), post traderships in connection with the military service were also abolished, and following this came the establishment of 'post exchanges' by the regulations therefor, published in 1895, as aforesaid. * * *

"On the application of the claimant (Post Exchange Officer at Jefferson Barracks, Mo.), * * * the Commissioner of Internal Revenue, under Revised Statutes, section 3426, as amended by section 17 of the act of March 1, 1879 (20 Stat. L. 349; 1 Supp. Rev. Stat. 241), made allowances or awards in his favor for the repayment to him of the special tax so paid, and the Commissioner certified the same for payment. * * *

"The decision of the Commissioner presumably based on 'satisfactory evidence of the facts' was that the post exchanges so established were 'no longer the mere social clubs that the old canteens were,' but that they were 'brought under the complete control of the Secretary of War by the regulations as governmental agencies' and for that reason the special tax was not required to be paid by post exchanges as 'dealers in oleomargarine, or as liquor dealers, or malt liquor dealers.' * * *

"True, such exchanges have not been authorized by direct legislation, but the President has the undoubted power to establish rules and regulations for the government of the Army, and whatever rules and orders are promulgated through the Secretary of War 'must be received as the acts of the Executive and as such be binding upon all within the sphere of his legal and constitutional authority,' as was held by the Supreme Court in the case of the United States *v.* Eliason (16 Peters, 291). * * *

"If, therefore, in the judgment and wisdom of the Executive the establishment of such post exchanges and their management by the officers of the Army are essential to the welfare, good order, and discipline of the troops stationed at such Army posts, as seems evident from the exchange regulations thus promulgated, then we think such exchanges, though conducted without financial liability to the Government, are in their creation and management, governmental agencies, established for the purpose as the regulations provide of supplying 'the troops at reasonable prices with the articles or ordinary use, wear, and consumption not supplied by the Government and to afford them means of rational recreation and amusement,' and also 'through exchange profits, to provide the means for improving the messes.' * * *

"Thus it will be seen that the establishment, maintenance, management, and closing up of such exchanges are under the control of and subject to the regulations of the War Department as governmental agencies for the purpose aforesaid. * * *

"The Government, through its officers, by authority of the regulations not only establishes and maintains such exchanges, but receives, handles, and disburses the funds in connection therewith, and whatever profit accrues is paid over to and held by the officer in command of such organizations as a company fund.

"It has never been the policy of the Government to tax its own enterprises or its own manner or method of doing business; and inasmuch as post exchanges are established and maintained by it for the mental and physical betterment of its troops in garrisons and posts, with resulting if not immediate benefit to itself, we think such exchanges are exempt from the payment of special tax for the sale of such articles as the regulations permit. * * *"

nized by Congress, as for instance, in the act of June 13, 1890 (26 Stat. 154), which prohibits the sale of intoxicating liquors in post exchanges in certain States, and the act of July 16, 1892 (27 Stat. 178), which authorizes the use by post exchanges of public buildings and public transportation when not required for other purposes. Congress has repeatedly appropriated money for the construction, equipment, and maintenance of suitable buildings at military posts and stations for the conduct of post exchanges. *C. 5394, Nov. 30, 1890; 12194, Mar. 12, 1902; 13104, Aug. 14, 1902; 15714, Jan. 18, 1904; 19268, Mar. 1, 1906.*

II A 2. A post exchange is not a corporation. It is a cooperative association of organizations, &c., which have paid for their shares in the exchange. Articles donated to the exchange are donated to the association and such articles should be considered as part of the assets of the exchange, to be turned over, or accounted for, by its members to their successors. *P. 65, 127, May 26, 1894.* A post exchange is a voluntary unincorporated association between various military organizations. It is joint venture to form a kind of cooperative store. *C. 27964, Mar. 6, 1911.*

II B 1. *Held* that there is no legal objection to an allowance to the post-exchange officer out of the exchange funds, to offset in a measure the pecuniary risk which he is obliged to take. *C. 3108, Apr. 15, 1897.*

II B 2. As a post exchange is not a corporation but a voluntary association of organizations and the business is carried on by an officer of the Army detailed for that purpose who has full charge and represents the exchange in all its transactions, *held* that litigation on behalf of the post exchange should be in the name of the exchange officer as exchange officer and on behalf of the exchange.[1] *C. 19268, Mar. 1, 1906.*

II B 3. As a post exchange is an instrumentality of the Government, the duties imposed on an officer in the management of the affairs of the exchange are as binding upon him as is any other duty to which he may be detailed under competent military authority. Therefore, if in the performance of his duties as an exchange officer it is necessary for him to have legal advice, he may properly apply under paragraph 1005, Army Regulations (1013 of 1910), for such legal advice, and in a proper case request will be made upon the Department of Justice for the assistance of the proper United States attorney. So, *held*, where a post exchange contemplated bringing an action against a corporation for the price of certain articles sold to the exchange. *C. 19268, Mar. 1, 1906.* So, where a so-called company exchange was carried on at a post by the consent of the commanding officer, although such exchange was not authorized by law or regulations, and an action was brought against individual officers for the debts of the concern, *held* that, owing to the fact that the exchange had existed by the authority of the commanding officer and owing to other peculiar circumstances of the case, it would be proper for the officers sued to request to be provided by the Government with counsel. *C. 20279, Apr. 20, 1907.*

II B 4. Paragraph 3, page 8, General Orders, 176, War Department, August 14, 1909, which publishes the regulations for the post exchange,

[1] In the case of Dugan *v.* U. S. (34 Ct. Cls. 458) the action was brought in the name of the exchange officer.

provides: "The management of the affairs of the exchange will be conducted by an officer designated 'Exchange Officer,' selected and detailed by the commanding officer. The exchange officer is in charge of the exchange and is responsible for its management." *Held*, that the above language did not necessarily make an exchange officer personally responsible to an unpaid creditor of the exchange, the creditor not having been paid at the time the affairs of the exchange were closed. An exchange officer might become personally responsible to a creditor of an exchange if he assumed personal responsibility for the debt, or by his conduct has caused the creditor to lose his right to recover from the exchange. *C. 27964, Mar. 6, 1911.*

II B 5. A post-exchange officer, having been charged with embezzlement of the exchange funds, made good the shortage. Having been acquitted of the charge, he requested that the amount paid by him to make good the shortage be refunded. *Held*, that the findings of the court-martial had solely to do with the officer's culpability from the point of view of discipline, that the acquittal did not relieve him from financial responsibility, and that the amount paid by him to make good the shortage should not be refunded. *C. 17944, May 5, 1905.*

II C 1. As the doing of a general banking business is not among the purposes for which a post exchange is established, *held*, that it would not be authorized to accept from a soldier a deposit for safekeeping. *C. 11155, Aug. 31, 1901.*

II C 2. Where it was proposed at a military post to authorize the post exchange to collect funds accruing from a tax on dogs in the post to be levied by the post commander, the purpose being to limit the number of dogs at the post, *held* that as such a tax constituted an important restriction upon the military and police administration of the post and does not come clearly within the scope and meaning of the orders and regulations governing the sources of revenue that post exchanges may avail themselves of, recommended that the proposed tax be not authorized. *C. 27317, Sept. 30, 1910.*

II D 1. It is well settled that a reasonable credit may be given to an officer by the post exchange for purchases made. *C. 20869, Jan. 11, 1907.*

II D 2. An indebtedness from a soldier may be collected on the pay rolls or final statement notwithstanding the fact that such indebtedness may have resulted from giving the soldier a credit with the exchange in excess of that authorized by the regulations. *C. 10298, Mar. 18, 1911.* And where a post exchange suffered a loss by reason of the fact that an officer failed to charge against a soldier on the pay rolls a debt owing the exchange by the soldier, *held* that the officer should make good the loss to the post exchange notwithstanding that the indebtedness of the soldier to the post exchange was in excess of the credit authorized by the exchange regulations. *C. 14828, Dec. 26, 1903.*

II E 1. As the membership of a post exchange consists of organizations, companies or detachments of enlisted men, and as officers are not eligible to membership, *held*, that the officers of a post at which a post exchange is located are not liable for its debts. *C. 19533, Jan. 7, 1911.*

II F. Where an exchange has suffered a loss, all officers responsible for such loss should be held for it. For instance, where losses extend-

ing over a period of two years were caused by neglect and mismanagement, *held*, that the post exchange council as well as the exchange officer should be held responsible for it. *C. 26516, Apr. 14, 1910.* So, *held*, where for six months the exchange officer and post exchange council failed to take steps to compel payment of an indebtedness of $54.39 owing by an officer and the officer resigned from the Army without having paid the debt. *C. 20869, Jan. 11, 1907.*

II G. The Post Exchange Regulations of May 1, 1899, provided that the post commander "when sufficient exchange funds are available may cause a suitable building to be erected for the purpose, and if a temporary building, or if constructed wholly or in part by the labor of troops, use of the necessary teams and such tools, window sash, doors, and other material as can be spared by the Quartermaster's Department is authorized, but no permanent structure will be erected on a reservation without first obtaining the authority of the Secretary of War. Expenses of repairs or alterations of public buildings for use of the exchange will be borne by the exchange when they can not be provided for by the Quartermaster's Department." Where a post exchange building at Fort Egbert, Alaska, was erected by authority of the Secretary of War without cost to the Government, except that the doors, windows, nails, and chimney tiles were furnished by the Quartermaster's Department, *held*, that the building did not become the property of the Government by reason of furnishing the doors, etc., but became an asset of the exchange and should be so treated, subject to the claim of the Government for the doors, etc. *C. 10034, Oct. 15, 1901.*

Where a building was erected on a reservation without the authority of the Secretary of War as an addition to a public building which had been set aside for the use of the post exchange, *held*, that the addition so erected without authority became the property of the United States. *C. 10305, May 14, 1901.*

Where a building was erected by a post exchange under a license by the Secretary of War, *held*, that if the license was revoked and the building could be removed so as to realize an amount in excess of the damage to the reservation and other property of the United States, the removal of the building should be permitted, but if this could not be done the building should be held to be the property of the United States. *C. 10305, May 14, 1901.*

II I 1. In 1896 a dividend was due the organizations constituting a post exchange, but was not paid because the bank in which the money was deposited suspended payment. In 1903 the bank resumed payment and a new certificate of deposit was issued in favor of the officer who was exchange officer at the date of the bank's suspension. *Held* that as the companies were continuing organizations the dividend due them in 1896 should be paid to them. *C. 14928, July 8, 1903.* So, in 1900, the post exchange at Ponce, P. R., was indebted to the post exchange at San Juan, P. R., but failed to pay the debt and the organizations at both stations were ordered away. In 1903 it was *held* that as a company fund is a continuing fund and does not depend upon the personnel of the company, and as it belongs, not to the individual members of the company but to the company as a unit, the companies constituting the Ponce exchange in 1900 should pay to the organizations comprising the

San Juan exchange in 1900 the amount of the indebtedness of the Ponce exchange at that time. *C. 15428, Oct. 27, 1903.*

Where a post exchange officer was required over his protest to pay out of his private funds for certain supplies ordered furnished and used by the post exchange, and the organizations constituting the exchange had been ordered to another station and the exchange was dissolved, *held* that as an exchange is a voluntary unincorporated association between various military organizations and constitutes a joint venture to form a kind of cooperative store, the various organizations comprising it are liable to third parties for obligations incurred on account of the joint business. Ordinarily the liabilities incurred on the joint account are extinguished by the post exchange itself, but if in a particular case, such as the present, it is impracticable to have the exchange pay the obligation, the several organizations comprising it would still remain liable as individual partners remain liable for partnership debts after the dissolution of a partnership. Therefore *recommended* that the post-exchange officer be reimbursed for his involuntary payment by the several organizations comprising the exchange at the time the indebtedness was incurred. *C. 27964, Mar. 6, 1911, and Oct. 3, 1911.*

II I 2. Prior to the admission of a new organization to an established post exchange, a board of officers, as required by exchange regulations, made an examination of the affairs of the exchange and adjusted the accounts and values. No appeal was taken from the findings of the board to the department commander. Subsequently it was discovered that some of the bills due the exchange were valueless and some bills due by the exchange, the existence of which was not known before, were presented for payment. *Held,* that questions as to the liability of members of an exchange should be considered as finally determined by the action provided by exchange regulations except in cases where, after a settlement, fraud is alleged or facts are discovered bearing on the value of the membership in the exchange which were not known at the time the values were adjusted and which with the exercise of due care and diligence could not have been known to those having the adjustment in charge. In such an exceptional case it would be proper for the department commander to appoint a board to investigate the facts and recommend equitable settlement. *C. 19178, Feb. 9, 1906. Held,* further that it was the intent of the exchange regulations that the action of the department commander should be final and that such cases should not be forwarded to higher authority. *C. 19248, Mar. 6, 1906.*

II I 3. A hospital corps detachment bought into the post exchange on a basis of 12 men in the detachment. The number of men having been reduced to 6 the dividends of the exchange were distributed to the detachment on the basis of 6. *Held,* that although membership in an exchange is by organization, the exchange regulations take into consideration the size of the organization, the size on joining being taken from the number of men present at the time of joining, whereas the dividends are calculated on the basis of the whole number of men who have been present with the organization during the period covered by the distribution. Therefore the method of distribution on the basis of six was in accordance with the exchange regulations. *C. 20043, July 11, 1906.*

II I 4. Membership in an exchange is not obligatory on the units which go to form the garrison. *C. 19248, Mar. 6, 1906.*

II I 5. The enlisted men detailed for a course of instruction at the Artillery School, which course lasted practically during the entire year, during that time occupied separate quarters and had a separate mess. *Held,* that they constituted an organization or detachment competent to acquire membership in a post exchange. *C. 29351, Jan. 4, 1912.*

II J 1. As post exchanges are created by orders there is no legal objection to the establishment of one exchange with several branches at a military post, or to the establishment of several independent exchanges at the same post, as, for instance, several regimental exchanges. *C. 27345, Oct. 11, 1910.*

II J 2. A soldier's final statements which had been transferred to a post exchange were cashed by a paymaster. It was subsequently discovered that the paymaster had overpaid the post exchange. By the time the discovery was made the membership of the post exchange had changed. *Held,* that as the post exchange is an instrumentality of the Government and a part of the military system of administration, the accounts between the paymaster and the post exchange could be ordered to be readjusted. *C. 24167, Dec. 2, 1908.*

II J 3. Paragraph 318, Army Regulations, 1910, provides that the proceedings of the post exchange council will be submitted to the post or other commander, who will sign his approval or objection in the council book, and that should the post or other commander disapprove the proceedings, and the council, after reconsideration, adhere to its conclusions, a copy of the proceedings will be sent by the commanding officer to the division commander, whose decision thereon will be final. *Held,* that the "proceedings" referred to by this paragraph is the record of the action taken by a majority of the council, and it is upon this record that the post or other commander must note his approval or disapproval, as the case may be. While there can be no objection to a minority report being appended to the proceedings of the council, such minority report, however, represents merely the personal views of the minority and is not the "proceedings" to be approved or disapproved. Therefore where the action taken by the post commander consisted in the approval of the minority report, *held* that it did not constitute a compliance with the above regulations.[1] *C. 29268, Nov. 28, 1911.*

II J 4. At the time a bank went into the hands of a receiver it had funds on deposit in the name of the regimental exchange officer. Before a dividend was declared this post exchange officer died. *Held,* that it would be proper for the regimental adjutant to receive and receipt for the dividends. *C. 16517, June 28, 1904.*

II J 5. Post exchanges having been recognized by statute as Government agencies a bureau of the Government may legally transfer property to the post exchange at cost price. *C. 20993, Jan. 26, 1907.*

II J 6. The cost of telegraphic messages over the lines of commercial companies on post exchange business does not constitute a lawful charge against the appropriations for the payment of telegrams

[1] See Retirement.

on public business, but as the post exchange is an instrumentality of the Government, such messages should be transmitted free over lines owned and operated by the War Department. *C. 19479, Mar. 26, 1910.*

II J 7. A discharged soldier transferred his final statements to a post exchange officer, who thereupon advanced him from the post exchange funds $75 and forwarded the statements to a paymaster. Upon receipt from the paymaster of a check for $102.79 in payment of the final statements, the post exchange officer remitted $27.50 to the discharged soldier, retaining 29 cents to cover postage, registration fee, and cost of money order. Five months later the paymaster discovered that he had made an overpayment through his own error in computation, and called upon the post exchange to reimburse him on the ground that it had received public money to which it was not entitled. The post exchange council disallowed the claim, setting forth in its proceedings that "the post exchange is expressly debarred from making any profit by these transactions, exchange officers being required to certify on each of the statements that they were cashed as a matter of accommodation to the soldier and without profit to the post exchange; that in consequence it has been the custom to make an advance or partial payment to the men and upon receipt of the paymaster's check to make final settlement; that the Government does not furnish the exchange officer with any facilities for making computations in these cases, and hence he is obliged to regard the paymaster's check in settlement as officially accurate and final." *Held*, that the loss should not fall on the post exchange, as under the circumstances it acted simply as the agency through which payment was made by the paymaster to the soldier and was in no way responsible for the error. The soldier and not the post exchange was the debtor to whom the paymaster should look for reimbursement for the overpayment. The error having been made by the paymaster the loss should fall on him under Army Regulations, 654 (665 of 1910). *C. 7589, Jan. 28, 1900.*

II J 8. The post exchange is a part of the administrative machinery of the Army established by Army Regulations, which have the force of law. A fraud committed by the steward of a post exchange in its management is therefore clearly a military offense. *C. 5255, Nov. 15, 1898.*

II J 9. *Held*, that the appropriation in an Army appropriation act, "for fuel and lights for enlisted men," included the fuel and lights required at a canteen,[1] since thus used they are for "enlisted men" almost if not quite as much as when used in their places of messing and sleeping. But as the act authorizes a *sale* of articles for fuel or light for cash to "officers" only, a sale could not be made to a canteen. Even though the official in charge of a canteen is a commissioned officer, a sale to him of such material would not be for his use but for that of the canteen, and therefore unauthorized. *P. 51, 239, Jan. 7, 1892.*

II J 10. Paragraph 1051, Army Regulations of 1904 (1060 of 1910), provided that the allowance of fuel to be issued to a post exchange should be such quantity as might be certified to by the officer in charge and approved by the commanding officer. *Held*, that the

[1] See note to "Government Agencies and Instrumentalities," II A 1, for a description of a "canteen."

regulation would apply to a post exchange which maintains a laundry as well as to one which does not. *C. 21521, May 13, 1907.*

II J 11. Where a "volunteer band" was organized at a military post by soldiers voluntarily associating themselves for that purpose, the band not being one recognized by the statutes or regulations, but furnishing martial music for the post, *held* that it would be proper to apply a portion of the profits of the post exchange for the support of the band. *C. 14893, July 1, 1903.*

II J 12. A "volunteer band" is not entitled to share in the allotment of 5 per cent of the net profits of a post exchange. *C. 23870, May 24, 1911.*

III A 1. A debt due from an officer to the company on account of boarding with the company is a debt to the company fund for which the officer's pay can be stopped. *C. 21595, May 31, 1907.*

III A 2. A private laundry undertook to pay to a company fund a percentage of the profits on the laundry work of members of the company who patronized that laundry. *Held,* that the mere fact that the company fund received a profit from the laundry did not make a debt owing by a member of the company for washing, a debt to the company fund. *C. 21595, May 31, 1907.*

III A 3. A sum of money was advanced from the company fund to several enlisted men to enable them to creditably represent their company and regiment at an athletic meet. *Held,* that there was no warrant of law for the loaning of money for any purpose to enlisted men from the company fund. *C. 23694, Aug. 6, 1908.*

III B 1. Paragraph 331, Army Regulations, 1901 (331 of 1910), provides that the company fund shall be disbursed by the company commander "solely for the benefit of the company." *Held* that under the above provision, it would be proper to purchase a typewriter for the use of the company if it was "solely for the benefit of the company."[1] *C. 15447, Nov. 3, 1903.* Also a gardener or pool-room attendant might be paid from the company fund for their services. *C. 15447, May 9, 1911.* Also a filing cabinet or document file which contained not only manuals, pamphlets and official books, but phonograph disks for use in the company phonograph, provided such a cabinet was deemed of sufficient benefit to the men of the company to warrant purchase. *C. 15447, July 7, 1911.* Also the purchase of certain articles of furniture for the comfort and convenience of the men of the company. *C. 25758, Nov. 6, 1909.* But a room orderly could not properly be paid extra compensation out of the company fund, even though he was in charge of over $3,000 worth of Government property, as the custody of such property would be part of his military duty. *C. 15447, May 19, 1911.*

---

[1] Circular 6, War Department, Jan. 27, 1904, provides that "The company fund is not intended for expenditure in the purchase of articles to facilitate the transaction of business in a company. On the contrary the legitimate and proper application of this fund is in supplementing the articles already furnished by the supply departments for the purpose of increasing the comfort, pleasure, contentment, mental and physical improvement of the organization. To accomplish this purpose, disbursements of company fund are authorized; disbursements for all other purposes are unauthorized."

Circular 56, War Department, Oct. 31, 1906, provides "Circular, No. 6, War Department, Jan. 27, 1904, is construed as not prohibiting the purchase or repair of typewriting machines from the company fund, provided the officer responsible for expenditures from that fund decides that the same are made solely for the benefit of the company and for the purpose of increasing the comfort, pleasure, and contentment of the enlisted men."

III B 2. Such an organization as a company exchange is not recognized by regulations and has no official status as a government agency. It must be regarded as a civil association instituted for the purpose of trade and subject to all the rules and responsibilities which the laws attach to merchants whether they operate alone or as partners or members of a voluntary association. So where an exchange called a company exchange was run at a post by one of the companies by authority of the commanding officer, and it appeared that the exchange was established by the company officers for the benefit of the company, and that none of the company fund was actually used in the operation of the exchange, although two small contributions to the company fund had been made from the profits of the exchange, *held* that the company fund would not be liable for the debts of the concern.[1] *C. 20279, Sept. 14, 1906.*

III B 3. Where a certificate of deposit respecting a dividend of a company from the profits of a post exchange was lost without the fault of any one, and the bank declined to pay the certificate unless a bond was given to secure it against loss, *held* that the expense of obtaining such a bond could properly be paid from the company fund. *C. 14716, May 26, 1903.*

IV. At a certain post where a laundry was operated as a feature of the post exchange, a rule of the exchange required that a charge for washing should be made against each recruit at that station, whether he sent his clothes to be washed or not. *Held* that there was no authority by which an arbitrary charge could be made against a recruit for clothes not washed. *C. 21900, Aug. 14, 1907; 23958, Oct. 15, 1908.* So, *held*, also, as to a company order that each member of the company should pay the company one dollar per month for laundering his clothes, where a soldier did not have his clothes laundered by the company laundry. *C. 22627, Jan. 29, 1908.*

V. A soldier on duty requiring him to bear his arms may do so, notwithstanding that a law of a State or Territory may prohibit the carrying of arms. This is on the ground that he is an instrumentality of the Government of the United States, and as such can not lawfully be interfered with by State, Territorial, or municipal regulations when performing his duties in the proper way. While en route under orders from one station to another with his arms he is on a duty requiring him to bear arms. If an unlawful attempt is made to interfere with such a soldier it would be his duty to resist it, using as much force as was necessary. *C. 3448, Aug. 19, 1897, Sept. 25, 1897, and June 11, 1907.* So where the rules established by a railroad company for the protection of the general traveling public required all passengers to "break" their guns or leave them in the baggage car, *held* that to comply with such rules would be a violation of Army Regulations, and the War Department should decline to permit soldiers traveling on duty, and therefore acting as an instrumentality of the United States, to comply with such rules.[2] *C. 3448, June 25, 1907, and July 22, 1907.*

---

[1] G. O. 165 War Department, Oct. 1, 1906, prohibits the establishment of company exchanges or other undertakings not authorized by Army Regulations.

[2] The railroad company in the above case modified its rules so as to provide that the rule as to carrying arms should "not apply to United States soldiers or State militia traveling with arms under orders from competent military authority on any coaches or trains of the company."

VI. Medical practice by officers of the Medical Corps of the Army, outside of military posts, should conform to the laws of the State, but this is subject to the qualification that medical treatment of members of the Army on the active list, being an instrumentality of the United States Government, can not be controlled by State legislation, and may be furnished wherever the soldier may be stationed. Under paragraph 1451, Army Regulations (1496 of 1910), enlisted men on the retired list are allowed medical attendance at the stations of medical officers only. By paragraph 1450, Army Regulations (1495 of 1910), medical officers on duty are required to attend officers and enlisted men and when *practicable* their families. Medical officers in their attendance upon the families of officers and enlisted men, outside of military posts, would have to comply with the State laws; otherwise such attendance would not be "practicable." So in the treatment of civilians not living on military reservations, the laws of the State would have to be complied with. *C. 3270, June 10, 1897; 20395, Sept. 18, 1906.*

VII. General Orders, No. 28, War Department, February 28, 1911, provided that "the establishment of company barber shops and of company billiard and pool tables, from which revenues may be derived, is authorized. All funds accruing therefrom will be accounted for as part of the company fund." *C. 23694, June 27, 1911.*

VIII. A band fund which has been collected at a post for a volunteer band should be accounted for in the same way that regimental funds are accounted for. *C. 23870, Sept. 16, 1910, and Jan. 11, 1912.*

IX. Where the effects of a deceased officer were turned over to a quartermaster for shipment to the legal representatives of the deceased, and while awaiting the necessary information as to the whereabouts of the representatives, the effects, including cash and a paymaster's check, were stolen, *held* that as the property came into the custody of the quartermaster as part of his official duty, it devolved upon him to perform such duty without fault or negligence and with more than ordinary care. *C. 9541, Apr. 29, 1901.*

X. Paragraph 328, Army Regulations, 1908 (331 of 1910), provides that the company fund shall be disbursed by the company commander "solely for the benefit of the company." While there is no corresponding statement as to a mess fund, still, owing to the fact that the company and mess funds are treated together in the same set of paragraphs and are of the same general character, the general mess fund should be considered as subject to limitations similar to those governing a company fund. Therefore *held* that the erection of a small house for the shelter of the keeper of a general mess dairy is not for the benefit of the members constituting the general mess, and the general mess fund should not be expended for that purpose. *C. 15447, Aug. 8, 1910.*

XI. It is well settled that the effect of an Executive proclamation reserving public lands in a Territory for a military reservation is to withdraw them from sale. As the President has no power to suspend the operation of the Territorial laws or to vary their execution in any particular, it follows that the Territorial laws in force continue to operate over such a reservation in the same manner and to the same extent after the establishment of the reservation as they did before, for the Territorial government is a mere agency of the United States, and has no power to cede or otherwise divest itself of political jurisdiction. Therefore, after a reservation has been declared, the

laws of the United States and of the Territory would continue to operate on the reservation unless their operation was modified by Congress, or unless Congress exempted the reservation from their operation, or (both the Territory and the Army being agencies of the United States) unless the Territorial statutes interfered with the purpose for which the reservation was established. Therefore where the Executive proclamation declaring the Subig Bay naval reservation added at the end "and said reservation and all lands included within said boundaries are hereby placed under the governance and control of the Navy Department," *held* that it was beyond the power of the Executive to withdraw the reservation from the control of the insular government and to place the reservation beyond the civil and criminal jurisdiction of the insular courts in cases where the control of the insular government and the exercise of jurisdiction by the courts did not interfere with naval administration. *C. 12975, July 15, 1902.*

CROSS REFERENCE.

Compensation paid by.....See PAY AND ALLOWANCES I C 6 c (1).
Debt to.....See ARTICLES OF WAR LXII D.
Not subject to tax.....See TAX III P.
TERRITORIES I B.
Purchase from.....See CONTRACTS VII I.
Reimbursement of by retired soldier.....See RETIREMENT II C 2.

GOVERNMENT HOSPITAL FOR THE INSANE.

See INSANITY.
Discharge of inmate.....See DISCHARGE V D; XIII D 4 a (1); b.
DESERTION XIV D.
Payment of officer in.....See PAY AND ALLOWANCES I B 5.
Retired officer.....See RETIREMENT I G 2 c.
Retired soldier.....See RETIREMENT II B 5.
Soldier committed to.....See DESERTION VII A 2.
DISCHARGE XVI B 1.

GOVERNOR OF STATE.

Abuse of civilians by militia.....See ARTICLES OF WAR LIV F 2.
Accountability for public property.....See MILITIA IX D.
Aides to.....See MILITIA III I.
Appointments by, to volunteers.....See OFFICE V A 4 to 5; 5 b to c.
Arms to colleges.....See MILITARY INSTRUCTION II B 2 b.
Can not command Federal troops.....See ARMY II E; I 2.
WAR I E 1 f.
Control over troops previous to muster in...See VOLUNTEER ARMY II A 1.
Public money.....See MILITIA X A 2.
Sale of public property to State.....See MILITIA IX B 1.
State camp of instruction.....See MILITIA VI B 1 a; b.

GRATUITY.

I. ACT OF MAY 11, 1908 (35 STAT. 108), LINE OF DUTY LAW.
A. RULE —, BENEFICIAL, THEREFORE CONSTRUED LIBERALLY..... *Page 653*
1. Rule when death has several causes..... *Page 654*
2. Rule when soldier dies in the post.
3. Rule when soldier dies on pass.
4. Self-destruction.
a. Rule when soldier is sane and dies by his own wrongful act.
(1) When in the post.
(2) When on furlough.
b. Rule when soldier is insane and dies by his own wrongful act.

I. ACT OF MAY 11, 1908 (35 STAT. 108), LINE OF DUTY LAW—Continued.
A. Rule —, Beneficial, Therefore Construed Liberally—Continued.
5. Athletic sports.
a. Rule —, line of duty status.
B. Amended by Act of March 3, 1909 (35 Stat. 735). (This law since that date is a misconduct law rather than a line of duty law, but still requires *liberal construction*.)
1. Married men.
a. Widow receives gratuity in absence of designation.... *Page 655*
2. Single men.
a. Gratuity paid to designated beneficiary.
b. No beneficiary designated, no gratuity.
3. To what class of troops paid?
a. Philippine Scouts.
b. Veterinarian.
4. Rules for designation.
a. Continuous service, new designation not required.
b. An alternate beneficiary may be designated.
5. Suicide is misconduct.
6. Cases of misconduct other than suicide..... *Page 656*
II. SECTION 1298, REVISED STATUTES.
A. Issue of Clothing to Replace Clothing Destroyed to Prevent Contagion. (See Clothing.)
III. ACT OF MARCH 3, 1885 (23 STAT. 350).
A. Issue to Replace Clothing Destroyed by Fire, etc. (See Pay and Allowances II A 3 a (4) (*d*) [1] to [2].)
IV. ISSUE OF RATIONS TO DESTITUTE PERSONS. (See also Laws II A 1 e (1).)

I A. The act of May 11, 1908 (35 Stat. 108)[1] giving six months' extra pay to the beneficiary of an officer or an enlisted man who dies

[1] The act of May 11, 1908, is as follows:
"That hereafter immediately upon official notification of the death from wounds or disease contracted in line of duty of any officer or enlisted man on the active list of the Army, the Paymaster General of the Army shall cause to be paid to the widow of such officer or enlisted man, or to any other person previously designated by him, an amount equal to six months' pay at the rate received by such officer or enlisted man at the date of his death, less seventy-five dollars in the case of an officer and thirty-five dollars in the case of an enlisted man. From the amount thus reserved the Quartermaster's Department shall be reimbursed for expenses of interment, and the residue, if any, of the amount reserved shall be paid subsequently to the designated person. The Secretary of War shall establish regulations requiring each officer and enlisted man to designate the proper person to whom this amount shall be paid in case of his death, and said amount shall be paid to that person from funds appropriated for the pay of the Army."
The act of Mar. 3, 1909 (35 Stat. 735), amends the above act of May 11, 1908 (35 Stat. 108), by striking out the words "contracted in the line of duty" and inserting in lieu thereof the words "not the result of his own misconduct."
The Comptroller holds that the act of Mar. 3, 1909 (35 Stat. 735), which amends the act of May 11, 1908, speaks only from its date and is applicable only in cases of officers and enlisted men who died subsequent to Mar. 3, 1909. XV Comp. Dec., 896.
Reference to the debates in Congress on the act of Mar. 3, 1909 (Vol. 43, Part III, Cong. Rec., 60th Cong., p. 2688), shows that there was no intention in the congressional mind of altering the theretofore construction of the words "line of duty," and that the new words "not the result of his own misconduct" were intended to change the construction of the law as a whole, but not to be an interpretation of the words "line of duty."
The question of line of duty therefore does not enter in connection with the act of May 11, 1908, after its amendment by the act of Mar. 3, 1909.

upon the active list, is a gratuity. *Held*, therefore, that the phrase "line of duty" should be construed with great liberality, and doubts resolved with a view to give the beneficiary the benefit of the gratuity. *C. 25498, Sept. 2, 1909.*

I A 1. When several causes contribute to produce a disability resulting in loss of life, some of which clearly are in the line of duty and some not, *held*, that a reasonable test for determining whether or not the loss of life was in line of duty is as follows, viz, if the disability not in line of duty would not have produced death independently of those contracted in the line of duty then the death must be held to have been in line of duty. *C. 23666, Nov. 19, 1908.*

I A 2. *Held*, in the case of the death of a soldier within the limits of his reservation, that, in the absence of evidence that the death was due to willful neglect or criminal conduct, it was in line of duty. *C. 23666, Nov. 20 and Dec. 14, 1908.*

I A 3. A soldier when not required to be in ranks with his command which was on practice march and, while on pass, was watching the breakers and was knocked off from the bowlder upon which he was standing and carried out to sea. *Held*, that as the soldier was not engaged in anything criminal or unlawful, and as there was not anything in his conduct which implied carelessness or negligence as to his personal safety, his death was accidental and in the line of duty. *C. 23666, Nov. 19, 1908, Dec. 8, 9, 12, and 24, 1908, Jan. 5, Feb. 3, 4, 13, 16, and Mar. 2, 1909.*

I A 4 a (1). A soldier, thinking that he was drinking aromatic spirits of ammonia, drank tincture of opium which he had stolen from the horse medicines pertaining to the Quartermaster's Department. He died. *Held* that as his death was the result of his own misconduct it was not in line of duty. *C. 23666, Nov. 20, 1908.*

I A 4 a (2). A soldier on furlough took his own life by taking an overdose of opiate to relieve pain. *Held* that the death was not caused in line of duty, first, because while on furlough he was not on a duty status; second, because the immediate cause of his death was his own misconduct in taking the opiate. *C. 23666, Dec. 7, 1908.*

I A 4 b. *Held* that where a suicide results from insanity the death is in line of duty in the absence of testimony that the insanity or mental depression was incurred by the fault of the soldier or as a result of his misconduct. *C. 23666, July 15, Nov. 7 and 19, 1908, and Mar. 9, 1909.*

I A 5 a. Precedents in the War Department demand that injuries received in playing baseball and football should be deemed to have been incurred in the line of duty, and it is not understood that even in pension cases the Department of the Interior has ruled against these precedents. The necessity of manly sports among the men has become so well recognized as to place the position of the War Department in this respect on a much firmer basis than it has been in the past. *Held*, therefore, that the death of a sergeant who, while on pass, was in charge of a football team, and whose death was incurred in connection with the game of football, was in line of duty under the act of May 11, 1908. *C. 23666, Feb. 3, Mar. 11, 1909.*

I B. The act of May 11, 1908 (35 Stat. 108), giving six months' extra pay to the beneficiary of an officer or enlisted man who dies upon the active list, is a gratuity. *Held*, therefore, that the act should be construed with great liberality, and doubts resolved with a

view to give the beneficiary the benefit of the gratuity.[1] *C. 25498, Sept. 2, 1909.*

I B 1 a. *Held* that when an officer or an enlisted man dies, leaving a widow, the widow shall receive an amount equal to six months' pay of the deceased, provided no other person shall have been previously designated by him to receive said amount under the act of May 11, 1908. *C. 23666, Sept. 9, 1908.*

I B 2 a. *Held* that in the case of an unmarried man the six months' pay shall be paid to the person designated by him previous to his death. *C. 23666, Sept. 9, 1908.*

I B 2 b. *Held* that there is no obligation placed by the act of May 11, 1908, upon an officer or an enlisted man that requires him to designate a beneficiary under that act. *Held also* that where an officer or an enlisted man has refused or failed to appoint a beneficiary, the action should be accepted by the Government, and in the absence of a widow the Government is thus saved the expense of paying a gratuity. *C. 23666, Sept. 9, 1908.*

I B 3 a. *Held* that the gratuity of six months' pay provided for in the act of May 11, 1908, may be paid to widows or beneficiaries of Philippine Scout officers or men, as the Philippine Scouts constitute a part of the Army of the United States. *C. 23666, Sept. 22, 1908.*

I B 3 b. *Held* that veterinarians of the Field Artillery and Cavalry arms of the service come within the beneficial operation of the act of May 11, 1908 (35 Stat. 108). *C. 23666, Sept. 25, 1908.*

I B 4 a. Where the service rendered by the soldier is continuous, *held* that it is not necessary for him to make a new designation at each new enlistment unless he desires to make a change in the beneficiary previously designated. *C. 23666, Nov. 13, 1908.*

I B 4 b. *Held* that under the act of May 11, 1908 (35 Stat. 108), as amended by the act of March 3, 1909 (35 Stat. 735), an officer or enlisted man may name an alternate beneficiary in the event of the death of the principal beneficiary.[2] *C. 23666, Mar. 2 and 8, 1911.*

I B 5. *Held* that a soldier who commits suicide[3] dies of an unlawful act and that this act causes his death to be considered as a result of his own misconduct, unless it can be shown by competent evidence that he was suffering from a mental disability at the time he committed suicide, and that such mental disability was an incident or a result of his military service. *C. 23666, June 8, 1910. See also id., Sept. 27, Oct. 6, Nov. 5, 16, and 17, Dec. 9 and 17, 1909, Jan. 5 and 13, Feb. 8, 10, and 15, Mar. 16, 20, and 30, May 5, 10, and 27, June 1 and 25, July 16 and 23, Aug. 13, 27, and 31, Sept. 3, 17, 19, 20, and 29, Oct. 24 and 31, Nov. 1, 10, and 23, Dec. 9 and 17, 1910, Jan. 31, Feb. 20 and 24, Mar. 20, July 15, Aug. 7, 21, and 26, 1911, Jan. 1, 1912.*

---

[1] As the act of Mar. 3, 1909 (35 Stat. 735), strikes out the words "contracted in the line of duty" in the act of May 11, 1908, and substitutes therefor the words "not the result of his own misconduct," the gratuity law does not involve a question of line of duty since Mar. 3, 1909, but does involve a question of "misconduct."

[2] XVI Comp. Dec., 595. See Moore *v.* U. S. (Ct. Cls.), decided Feb. 3, 1913, that second act made certain, without changing the meaning, the intent of the first act.

[3] "A self-killing by an insane person who understands the physical nature and consequences of the act, but not the moral aspect, is not a death by suicide within the meaning of a condition that a policy of insurance upon his life shall be void in case he shall die by suicide." Manhattan Life Ins. Co. *v.* Broughton (109 U. S., 121, 127, 132); cases by Justice Gray; Accident Ins. Co. of North America *v.* Crandel (120 id., 530); 21 Central Law Journal, 378–82; 25 American Law Register, 386–90.

I B 6. *Held* that under the act of May 11, 1908 (35 Stat. 108), as amended by the act of March 3, 1909 (35 Stat. 735), which provided for the payment of a gratuity to the beneficiary of a deceased officer or soldier unless his death should be considered as the result of his own misconduct, the following acts are misconduct within the meaning of the law:

The excessive use of alcohol. *C. 23666, Jan. 30, Oct. 18, and Dec. 10, 1910, Jan. 4 and Mar. 14, 1911, and Jan. 1 and 13, 1912.*

Drinking wood alcohol. *C. 23666, Aug. 22, Oct. 4 and 14, and Dec. 27, 1910.*

Drinking bay rum and hair tonic. *C. 23666, June 2, July 26 and Aug. 30, 1910.*

Disobeying sentinel's order to halt. *C. 23666, Feb. 18, 1910, Feb. 6, 1911.*

Absence without leave. *C. 23666, Mar. 7, May 3 and 5, June 2, 8, 15, 16, and 18, July 18, Aug. 9 and 22, Sept. 3, 13, and 14, Nov. 23 and 28, 1910, Feb. 15 and 20, Mar. 15, July 8 and 21, and Aug. 11, 1911.*

Trespassing on railroad track. *C. 23666, Aug. 4, 1910, Mar. 16, July 6, and Aug. 26, 1911.*

Attempting to board a moving train while on furlough. *C. 23666, Sept. 8, 1910.*

Presence in a house of prostitution for an improper purpose. *C. 23666, Apr. 23 and 26, 1910, and Jan. 4, 1912.*

Quarreling with his mistress whom he had introduced to the world as his wife. *C. 23666, May 26, 1910.*

Being the aggressor in a fight. *C. 23666, Dec. 22, 1909, June 13, 1910, Aug. 7, 1911, and Jan. 30, 1912.*

Quarreling with a policeman. *C. 23666, July 5, 1911.*

Escaping while a garrison prisoner. *C. 23666, Jan. 4, 1911.*

Drunkenness. *C. 23666, Mar. 23, 1911, and Jan. 30, 1912.*

Quarreling in a saloon. *C. 23666, Nov. 11, 1910, and Aug. 26, 1911.*

Standing up in a rowboat and causing it to capsize. *C. 23666, Mar. 29, 1910.*

Unauthorized sailing in bad weather, in which the boat is likely to capsize. *C. 23666, Jan. 18, 1912.*

IV. The issue of rations to destitute citizens is governed by Army Regulations.[1] Issues to entire communities, in behalf of sufferers by fire, flood, hurricane, etc., can only be authorized by Congress. In an emergency, it is within the discretion of the President to make such issues, but his action should be reported to Congress for approval.[2] Funds appropriated by Congress for relief of such sufferers can not be used to reimburse private parties for disbursements for similar purposes. *C. 7344, Nov. 27, 1899; 6875, Aug. 12, 1899; 7483, Jan. 9, 1900; 7493, Jan. 12, 1900; 7640, Feb. 3, 1900; 11077, Aug. 22, 1901.* A similar rule applies to reimbursements for transportation. *C. 11919, Jan. 24, 1902.*

---

[1] See par. 1241 A. R., 1910 ed.

[2] See Op. Atty. Gen. (MS.) of Oct. 15, 1898.

CROSS REFERENCE.

Act of Mar. 2, 1889 (25 Stat. 869).....See DESERTION XVI D 1 e.
Clothing issues.....See PAY AND ALLOWANCES II A 3 a (4) (*d*) to (*e*).
Flood sufferers.....See PUBLIC PROPERTY I A 5.
Widow of retired officer not entitled to.....See RETIREMENT I K 4.

GREAT BRITAIN.

Extradition from.....See DESERTION IV C.

GUARANTOR.

Contracts with.....See CONTRACTS XXVIII.
Liability of.....See CONTRACTS XI to XII.

GUARANTY.

Bids.....See BONDS I A to F 1.
Bond signed by bidder's relatives.....See BONDS I L.
History of.....See CONTRACTS XI A.

GUARDIAN.

For officer.....See ARMY I B 2 a (2) (*a*).
Officer's pay to.....See PAY AND ALLOWANCES I B 5.
Rights of, over minor.....See ENLISTMENT I B 1 b to 2.
DISCHARGE XII a.
Soldier's pay to.....See PAY AND ALLOWANCES I C 4.

GUNNER'S BADGE.

See INSIGNIA OF MERIT III C.

HABEAS CORPUS.

Commanding officer.....See COMMAND V A 6 to 7.
Discharge on.....See DISCHARGE VII A; B.
Minor.....See DESERTION V B 7.
DISCHARGE XII D 2.
State court.....See ARTICLES OF WAR CII H 2.
COMMAND V A 6 b; b (1); (1) (*a*); (*b*).
DESERTION III D; V F 3 a.
DISCHARGE VII B.
Suspension of.....See WAR I C 12 to 13; E 1 e.
United States court.....See COMMAND V A 6 a.

HANDWRITING.

Proof of.....See DISCIPLINE XI A 17 b (1) (*a*).

HARBOR LINES.

See NAVIGABLE WATERS VI to VII.

HARBOR REGULATION.

United States not subject to fee for.....See TAX III K.

HAWAII.

A Territory.....See MILITIA X D.

HAY.

Right to cut on military reservation.....See PUBLIC PROPERTY I A 1; III H 3.

HAZING.

By cadets.....See ARMY I D 3 b (2) (*a*).

HEAT AND LIGHT.

See PAY AND ALLOWANCES II A 1 to 2.
Excavation for underground conduits.....See APPROPRIATIONS LV.
Gas.....See APPROPRIATIONS XLVII.
Post exchanges.....See GOVERNMENT AGENCIES II J 9; 10.

HEIRS.

Claimants.....See CLAIMS XII A.
Contracts need not mention.....See CONTRACTS XLIII.
Settlement with.....See CONTRACTS L.

HIS ARMS OR AMMUNITION.

See ARTICLES OF WAR XLII B.

HISTORY OF REGIMENTS.

See MILITIA XX.

HOLDING CORRESPONDENCE WITH ENEMY.

See ARTICLES OF WAR XLVI, A; B.

HOLIDAY.

See CIVILIAN EMPLOYEES I B to C.

HOMESICKNESS.

Cause of desertion.....See DESERTION IX L.

HOMICIDE.

By guard.....See DISCIPLINE XVII A 4 g (6) to i.
By officer.....See ARTICLES OF WAR CII C 1 a.
DISCIPLINE I A 1.
By sentinel.....See ARTICLES OF WAR LIX L 1; CII H to I.
Character of victim.....See DISCIPLINE XI A 12.
Charge of.....See DISCIPLINE II D 14 a; XII A 12 a.
Officer or soldier.....See ARTICLES OF WAR LIX D.

HONEST AND FAITHFUL SERVICE.

See DISCHARGE XI B 1 to 8.
See ENLISTMENT I D 3 to 4.
Discharge by purchase.....See DISCHARGE VI D 2; 5.
Discharge without honor when not rendered..See DISCHARGE III E.
Essential for reenlistment.....See ENLISTMENT I D 3 to 4.
In fraudulent enlistment.....See ENLISTMENT I A 9 f (7) (b); g (4); l.
Necessary for honorable discharge.....See DISCHARGE II B.
Of deserter.....See DESERTION VI D.
DISCHARGE II B 2 a.
Previous convictions considered.....See DISCHARGE III C.
Rights contingent on.....See DISCHARGE IV D.

HONORABLE DISCHARGE.

See DISCHARGE I; II to III; V A; B.
Certificate of disability.....See DISCHARGE V A; B; XX D 1.
Effect on status.....See DISCHARGE XXII A.
DISCIPLINE VIII I 1 c.
For naturalization purposes.....See DISCHARGE VI D 4.
Irrevocable.....See DISCHARGE XV A 1; 2; D 1; 1 a; b.
On writ of habeas corpus.....See DISCHARGE VII A.
Of felon.....See ENLISTMENT I A 9 c (2).
Of fraudulently enlisted minor.....See ENLISTMENT I A 9 g (2); (4); l.
Officer failing on promotion.....See RETIREMENT I B 6 c (2); (3).
Removes charge of desertion.....See DESERTION XVI B.
Retired soldier.....See RETIREMENT II F 3.
Soldier in hands of civil authorities.....See DISCHARGE XIII D 6 a.

HORSE.

Forage for.....See PAY AND ALLOWANCES II A 2 d to e.
Sale of officer's, to Government.....See ARMY I G 3 b (2) (*b*).
Suitable mount.....See PAY AND ALLOWANCES I B 7 to 8.
Transportation of.....See ARMY I G 3 d (3) (*c*) [4].
See PAY AND ALLOWANCES II A 2 a (2) to (3).

HOSPITAL CORPS.

See ARMY I G 3 d (5) to (6).

HOSPITALS.

See ARMY I G 3 e (7) to H.
Appropriation for.....See APPROPRIATIONS XXII.
Care of civilian employees.....See CIVILIAN EMPLOYEES II C.
Construction of.....See APPROPRIATIONS XLII.
Electric fans for.....See APPROPRIATIONS XLI.
Larceny in.....See CLAIMS IX.
Laundry work.....See CONTRACTS VII I.

HOT SPRINGS, ARK.

See ARMY I G 3 d (7) to (8).
Garrison court-martial at.....See ARTICLE OF WAR LXXXII C 2.
Summary court at.....See DISCIPLINE XVI E 6.

HUMANITY.

Issue of rations to flood and famine sufferers.See LAW II A 1 e (1).
Sale of coal to civilians in Alaska.....See TERRITORIES III C.

HUNTING LEAVE.

See ABSENCE I B 2.

HUNTING PASS.

See ABSENCE I C 2.

IDENTIFICATION.

Evidence of.....See DISCIPLINE V B 1; X H 2; XI A 17 a (2) (*a*) [1] [*b*].

ILLEGAL ACQUITTAL.

Does not remove charge of desertion.....See DESERTION XVI F.

ILLEGAL COURTS.

See DISCIPLINE XV H 1 to 3.
ENLISTMENT I D 3, d. (5).

ILLEGAL DISCHARGE.

By way of favor.....See DISCHARGE VI A.

ILLEGAL ORDER.

Convening.....See DISCIPLINE XV H 1 to 3.
Disobedience of.....See DISCIPLINE XII A 8 a (3) (*a*).
ARTICLES OF WAR XXII B.
Dismissing officer already mustered out.....See VOLUNTEER ARMY IV B 2.
Duty under.....See DISCIPLINE V D 6; XII A 8 a (3) (*a*).
ARTICLES OF WAR XXI D.
Executive reserving private lands.....See PUBLIC PROPERTY III A 2.
Inoperative.....See DISCHARGE XV A 2.
ENLISTMENT I A 3 c.
Revoking executed discharge.....See DISCHARGE XV D 1 a; b; c.

ILLEGAL SENTENCE.

See DESERTION I D.
DISCIPLINE XIV E 9 to 10; XV E to F; H; K.
Action on.....See DISCHARGE XVI G 1 to 5.
Correction of.....See PAY AND ALLOWANCES III E 1.
Dismissal.....See OFFICE IV E 1 b to c.
In peace for offense committed in war.....See DISCIPLINE XIV E 9 a (13) (*a*); (*b*).
Jurisdiction, lack of.....See DISCIPLINE IX F 1 a.
Mitigation of.....See ARTICLES OF WAR CXII C.

IMMIGRATION INSPECTOR.

Civil officer.....See DESERTION V B 12.

IMPEACHMENT.

Of witness.....See ARTICLES OF WAR CXXI A.

IMPERSONATION.

As agent for American National Red Cross.See RED CROSS II C.
Of officer.....See UNIFORM I C.

IMPLIED ACCEPTANCE.

Of appointment.....See OFFICE, III A 7 a; B 5 a.

IMPLIED AUTHORITY.

In appropriation act to purchase article named in estimate.....See APPROPRIATIONS I C.
To construct bridges.....See NAVIGABLE WATERS III B 4.

IMPLIED CONTRACT.

See CLAIMS VII C 2; 3.

IMPLIED LEASE.

See CLAIMS IV.

IMPROPER PRACTICE.

See ARTICLES OF WAR, LX A 3.

INCIDENTAL EXPENSES.

Appropriations for.....See APPROPRIATIONS XXI.
Use of, to pay armed civilian employees....See INSIGNIA OF MERIT III B 3.

INDIAN.

Enlistment of.....See ENLISTMENT I B 1 d (3); 2 a; C 1 c (1).
Instruction of, by Army officer.....See ARMY II C 1.
Reward for arresting deserter.....See DESERTION V B 14 b.
Trial by military court.....See WAR I C 8 a (3) (*c*) [1].

INDIAN AGENT.

Army officer as.....See PAY AND ALLOWANCES II A 2 b (1)

INDIAN COUNTRY.

Intoxicants sold in.....See INTOXICANTS III to IV.
Order in.....See ARMY II C.
Right of way through.....See PUBLIC PROPERTY III C; D.
Trespassers ejected from.....See ARMY II I 5.

INDIAN POLICE.

Civil officer.....See DESERTION V B 11.

INDIAN WAR.

See ARTICLES OF WAR LXIII B.
WAR I A 5 to 6.

INFAMOUS CRIMINAL OFFENSE.

See ARTICLES OF WAR III A.
WORDS AND PHRASES.

INFERIOR COURT.

See ARTICLES OF WAR LXXXII A to C 2;
LXXXIII A to C 2.
See DISCIPLINE XVI A to F.

INFRINGEMENT OF PATENT.

See PATENT IV; IV A; VII C.

INJUNCTION.

Against contractor.....See CONTRACTS X D.
Relating to payment of public money.....See PUBLIC MONEY II C to D.

INSANE OFFICER.

Awaiting retirement.....See RETIREMENT I B 6 d.
Payment of.....See PAY AND ALLOWANCES I B 5.
Resignation by.....See OFFICE IV D 2.

INSANE SOLDIER.

See INSANITY.
Charge of desertion.....See DESERTION XVI C 2.
Discharge.....See DISCHARGE V D; XIII D 4 a; a (1); b; XVI B 1; 2.
Forfeiture.....See DESERTION XIV D.
Reward for arrest of.....See DESERTION V B 18 c.
Suicide of.....See GRATUITY I A 4 b.
Trial of.....See DISCIPLINE XV F 3.

INSANITY.

I. DISPOSITION OF INSANE PERSONS.
A. SENT TO GOVERNMENT HOSPITAL FOR INSANE..... *Page 662*
1. Insane when enlisted.
2. General prisoner.
3. Transportation authorized..... *Page 663*
B. MAY BE TURNED OVER TO LOCAL AUTHORITIES.
1. If he refuses to go to Government hospital.
2. If a legal resident where employed.
C. CIVILIAN EMPLOYEES NOT AUTHORIZED TO ENTER GOVERNMENT HOSPITAL.
D. INSANITY NOT IN LINE OF DUTY, NOT ADMITTED TO GOVERNMENT HOSPITAL.

I A. Section 4843, R. S., which provides for the admission of certain persons to the Government Hospital for the Insane on the order of the Secretary of War, is not mandatory upon the latter, but charges him with an exercise of discretion in the preparation and execution of commitments to the institution. *C. 19208, July 25, 1910.* The section is, however, mandatory upon the superintendent of the hospital, who must receive the patient under the order of the Secretary. *C. 19208, July 25, 1910.*

I A 1. Where a soldier was found to be insane, the insanity antedating his enlistment and, therefore, rendering the latter fraudulent and so voidable, *held*, that so long as the enlistment was not voided the man was still a soldier and might, under section 4843, R. S., be sent to the Government Hospital for the Insane. *C. 19208, Feb. 15, 1906.*

I A 2. An insane general prisoner is usually sent to the Government Hospital for the Insane under the fifth clause of section 4843, R. S., relating to "Indigent insane persons who have become insane within three years after their discharge from such service, from causes

which arose during and were produced by said service." Should, however, the foregoing clause not be applicable, such insane prisoner may be sent to the Government Hospital for the Insane under the right given in the act of June 23, 1874 [1] (18 Stat. 215). *C. 18802, Nov. 1 and 18, 1905.*

I A 3. Where admission to the Government Hospital for the Insane is provided for by law (sec. 4843, R. S., as amended), the transportation of the patient is also authorized as an incident of the right of admission. *C. 11067, Apr. 24, 1907.*

I B 1. Where, under section 4843, R. S., an insane civil employee of the Army may properly, under the order of the Secretary of War, be admitted to the Government Hospital for the Insane, and yet decline to enter the said hospital, he may be turned over to the local authorities of the place where he may be stationed for custody and treatment. *C. 11067, Apr. 8, 1910.*

I B 2. Section 4843 R. S. (as amended) authorizes the admission of insane persons belonging to the Army and of certain insane civil employees of the Army to the Government Hospital for the Insane on the order of the Secretary of War; it does not, however, *require* that such an order shall be made. It follows that where such insane persons are legal residents of the locality where they may be employed at the time of their disability, they are as much entitled to admission to a local asylum as is any other citizen or resident of the locality. *C. 11067, Apr. 24, 1907, May 10 and Nov. 14, 1910; 19208, July 30, 1907, Oct. 7, 1909, and July 25, 1910.*

I C. Under existing law (sec. 4843 R. S. as amended) authority exists for the Secretary of War to send to the Government Hospital for the Insane, for treatment and custody, insane persons *belonging to the Army* and insane civilians employed in the *Quartermaster's, Pay,* and *Subsistence Departments* of the Army. *Held,* that civilians employed in the Army, other than in the departments enumerated, might not be sent to that hospital under the order of the Secretary of War, as they were not persons belonging to the Army nor yet included among the civilians mentioned in the statute. *C. 11067, Aug. 16, 1901, July 1, 1907, and Apr. 17, 1908, June 3, 1908, Apr. 9, May 10, Nov. 15 and 25, 1910.*

I D. *Held,* that a double condition is imposed as a prerequisite for admission to the Government Hospital for the Insane. The insanity of the indigent person must be due, not only to causes which arose during that service, but which were produced by such service. It is clear from the papers in reference that the syphilitic disorder from which this man is suffering was not "produced by such service"—that is, was not an incident of his military service, but was due to his own misconduct. *C. 25122, June 15, 1909.*

CROSS REFERENCE.

Accused..... See DISCIPLINE IV B 1 d (1).
Deserter..... See DESERTION V B 18 c.
Enlistment while suffering from..... See ENLISTMENT I A 9 f (5).
Evidence of..... See DISCIPLINE XI A 11 a.
In line of duty..... See CLAIMS VIII.
Renders witness incompetent..... See DISCIPLINE X B 2

[1] See Sec. 4852, R. S., as to prisoners becoming insane in the United States penitentiary.

INSIGNIA OF MERIT.

I. MEDALS.
A. MEDAL OF HONOR.
1. Act of March 3, 1863 (12 Stat. 751).
a. Existing law ..... *Page 664*
b. Not awarded to contract surgeon ..... *Page 665*
c. Private property.
2. Act of April 23, 1904 (33 Stat. 274).
a. "Official record" defined.
b. President can not refuse to replace medal.
c. "Replace" defined.
d. Time limit on recommendation not to be made.
(1) Recommendation not made within one year. *Page 666*
e. Not granted to deceased persons.
B. LIFE-SAVING MEDALS.
C. SPECIAL MEDALS.
D. UNAUTHORIZED MEDALS.
E. CONGRESSIONAL MEDAL FOR PHILIPPINE SERVICE.
1. Surgeon of volunteers.
2. Regular Army.
II. CERTIFICATE OF MERIT.
A. ACT OF FEBRUARY 9, 1891 (26 STAT. 737), RETROACTIVE..... *Page 667*
B. APPLICANT BELONGS TO A REGIMENT.
C. NOT LIMITED TO DISTINGUISHED SERVICE IN BATTLE.
D. MAY BE EARNED IN FRAUDULENT ENLISTMENT.
E. RETIRED ENLISTED MAN MAY RECEIVE.
F. EYE WITNESS.
G. DISCHARGED SOLDIER ..... *Page 668*
H. "CORPS" DEFINED.
1. Unassigned recruit.
2. Philippine Scouts.
I. MAY NOT BE AWARDED TO AN OFFICER.
K. CERTIFICATE OF MERIT PAY MAY BE FORFEITED BY SENTENCE OF COURT-MARTIAL.
III. BADGES.
A. SOCIETY.
1. "In their own right" defined.
2. Unauthorized.
a. Society of Foreign Wars.
b. Association of Military Surgeons.
B. CAMPAIGN.
1. Part of uniform—issued as such.
2. Claim to, of discharged men ..... *Page 669*
3. Quartermaster employees, not entitled to.
C. GUNNERS.

I A 1 a. The act of March 3, 1863 (12 Stat. 751), did not appear in the Revised Statutes. The President continued, however, to award medals of honor after December 1, 1873. The joint resolution of May 2, 1896 (29 Stat. 473), authorized the issue and use of a rosette or knot to be worn in lieu of a medal, and a ribbon to be worn with any medal that had been theretofore or would be thereafter awarded under the provisions of the joint resolution of July 12, 1862 (12 Stat. 623), and the act of March 3, 1863 (12 Stat. 751). *Held*, that this

was an express legislative sanction of the continuance of the practice of issuing medals of honor since December 1, 1873. *Held*, further, that the act of April 23, 1904 (33 Stat. 274), had the same force. *C. 14778, June 5, 1903; 16913, Sept. 20, 1904.*

I A 1 b. As section 6 of the act of March 3, 1863 (12 Stat. 751), provides for the award of the medal of honor under certain conditions to officers, noncommissioned officers, and privates only, *held*, that it may not be awarded for distinguished services in action by a contract or acting assistant surgeon, who is no longer in the service.[1] *C. 1128, Mar. 20, 1895; 17222, Dec. 13, 1904.*

I A 1 c. A medal of honor is a recognition of gallantry, which is granted by authority of Congress to such officers or enlisted men, "as have most distinguished themselves in action." When a medal is conferred there is included in the grant a conveyance of ownership of the medal, regarded as a chattel, which becomes the property of the grantee, and is subject to such disposition as he may see fit to make of it as a part of his personal estate; subject, however, to the qualification that it may be worn and used as a medal of honor only by the person upon whom it was originally conferred in recognition of his military services. *C. 11582, Nov. 13, 1901; 16954, Sept. 30, 1904.*

I A 2 a. The act of April 23, 1904 (33 Stat. 274), provides, "Whenever it shall appear from official records in the War Department that any officer or enlisted man of the Army so distinguished himself in action as to entitle him to the award" of the medal of honor under the then existing law, the award shall not be prevented by the fact that the person has since become separated from military service, or that it was not recommended or applied for while he was in the service. *Held*, that the "official record" is one that must have been made by an officer of the Army pursuant to statute, regulation, orders, or custom. *Held*, further, that an oral recommendation was not an "official record," and, therefore, could not be the basis of the award of a medal.[2] *C. 17810, Apr. 20, 1905.*

I A 2 b. *Held*, that the President has no authority under the act of April 23, 1904 (33 Stat. 274), to refuse to replace a medal that was awarded under the joint resolution of July 12, 1862 (12 Stat. 623), and the act of March 3, 1863 (12 Stat. 751), when the same is presented for that purpose by its owner. *C. 16913, Sept. 21, 1904.*

I A 2 c. The act of April 23, 1904 (33 Stat. 274), authorizes the Secretary of War to *replace* medals of honor that had been issued under the joint resolution of July 12, 1862 (12 Stat. 623), and the act of March 3, 1863. *Held*, that the word "replace" implies the loss, destruction, or surrender of the old medal.[3] *C. 16913, July 28, 1905.*

I A 2 d. As the act of April 23, 1904 (33 Stat. 274), eliminates the element of time in making recommendation for the medal of honor, and requires the award to be based upon official records in the War Department: *Held*, that the establishment of an extra-statutory

---

[1] See 20 Op. Atty. Gen., 421, in which advice was given not to grant the medal as when the application was received nearly 28 years after the gallant conduct, there was no official record on file in the War Department to substantiate the claim.

See 24 Op. Atty. Gen., 580, in which it is held that the fact that after the application or recommendation is made, the applicant leaves the service does not prevent the President from making the award.

[2] Cir. 22, 1905, War Dept.

[3] See Cir. 36, War Dept., Aug. 22, 1904; 25 Ops. Atty. Gen., 529, Nov. 23, 1905.

limitation that the recommendation must be made within a fixed time limit in the case of those still in the service is highly inexpedient, and should not be attempted in the form of an executive regulation.[1] *C. 16305, Dec. 21, 1904; 19139, Feb. 8, 1906.*

I A 2 d (1). The recommendation for a medal of honor was not made until more than a year had elapsed after the gallant conduct upon which it was based, i. e., July 1, 1863. *Held,* that under the legislative rule fixed by the act of April 23, 1904 (33 Stat. 274), if it shall appear from the official records in the War Department that an officer or enlisted man has so distinguished himself in action as to entitle him to the award under the act of March 3, 1863 (12 Stat. 751), the award may be made. *C. 16305, Dec. 21, 1904.*

I A 2 e. As the joint resolution of July 12, 1862 (12 Stat. 623), and the acts of March 3, 1863 (12 Stat. 751), and of April 23, 1904 (33 Stat. 274), show a congressional intent to provide for the manual, personal presentation of a medal of honor: *Held,* that the application for the award of the medal in the case of a deceased person can not be approved. *Held,* further, that if after the application has been approved, the person who was to have been the grantee shall die, it may be given to his heirs. *C. 17605, Mar. 7, 1905; P. 49, 55, Sept., 1891, and 52, 30, Mar., 1892.*

I B. In view of the fact that the act of January 21, 1897 (29 Stat. 494), provides that the acts of June 20, 1874 (18 Stat. 127), and June 18, 1878 (20 Stat. 165), and the act of May 4, 1882 (22 Stat. 57), empower the Secretary of the Treasury to bestow life-saving medals upon persons making signal exertion in rescuing and succoring the ship-wrecked and saving persons from drowning in the waters over which the United States has jurisdiction, *held,* on the request of the Secretary of the Treasury for a decision, that the Quingua River in the Philippine Islands is a body of water "over which the United States has jurisdiction" within the meaning of the act of January 21, 1897, and that therefore a life-saving medal may be granted for the saving of life in that river. *C. 27240, Nov. 28, 1910.*

I C. *Held,* that there is no authority of law for the preparation and presentation of special medals for distinguished service incident to the rescue of American and Spanish prisoners during the Philippine insurrection. *C. 12938, July 31, 1902.*

I D. Medals which have not been authorized by law or regulations can not be worn on duty. *C. 5153, Oct. 18, 1898.*

I E 1. A surgeon of Volunteers, not attached to an organization, accompanied the expeditionary force to the Philippine Islands in 1898 and continued in service over a period which, had he belonged to a regiment or other organization of Volunteers, would have entitled him to a congressional medal. *Held,* that a surgeon of Volunteers so serving in the Philippine Islands would be entitled to the medal authorized by the act of June 29, 1906. *C. 14201, Dec. 16, 1908.*

I E 2. The act of June 29, 1906 (34 Stat. 621), authorizes the award of a medal to officers and enlisted men who served beyond the terms of their enlistments to assist in the suppression of the Philippine insurrection. *Held,* by the Secretary of War that those men, or the families of those men, who enlisted or reenlisted in the Regular Army dur-

[1] U. S. *v.* Symonds (120 U. S., 46); U. S. *v.* Bishop (120 U. S., 51); Lowrey *v.* U. S. (32 Ct. Cls., 259).

ing the war with Spain and who were entitled to their discharges upon the conclusion of the war, but who served beyond that time and were subsequently honorably discharged, or who died in the service, be considered entitled to the medals provided by the act of June 29, 1906. *C. 14201, Jan. 6, 1908.*

II A. *Held,* that the act of February 9, 1891 (26 Stat. 737), which provided for the granting of certificates of merit, is retroactive.[1] *C. 1124, Mar. 18, 1895; 13084, Nov. 13, 1903.*

II B. When an enlisted man belongs to a regiment, *held,* that the recommendation of the regimental commander is necessary to the award to him of a certificate of merit. This recommendation may be based upon any fact or facts deemed by him to justify the award, such as the recommendation of the company commander or any other officer, or upon any other authentic information brought to his knowledge. *C. 10679, June 13, 1901; 13819, Jan. 29, 1903; 13864, Feb. 2, 1903; 15391, Dec. 15, 1903; 16095, Mar. 26, 1906; 17222, Jan. 9, 1911.*

II C. Under section 1216, R. S., as amended by the act of March 29, 1892 (27 Stat. 12), a certificate of merit may be given to any enlisted man who shall distinguish himself in the service. *Held* that this is not limited to distinguished service in battle. *Held* further that the certificate may be given where an enlisted man participated in subduing a fire which threatened to destroy public property. *C. 4108, May, 1898. Held,* also where an enlisted man saved another enlisted man from drowning. *C. 13086, Aug. 7, 1902; 13087, Aug. 7, 1902; 19139, Feb. 8, 1906. Held* that where an enlisted man saved from drowning a member of the military establishment who was not an enlisted man that the award could be made. *C. 13088, Aug. 7, 1902; 18517, Sept. 6, 1905.*

II D. An enlisted man, while serving a fraudulent contract of enlistment, performed an act of gallantry, for which a certificate of merit was awarded by the President, *held,* that as the status of the applicant at the date of the act and of the subsequent award was that of an enlisted man who was rendering legal service, the award was lawful and he is entitled to the additional pay which is authorized by the statute. *C. 16644, July 25, 1904.*

II E. Section 1216, R. S., as amended by the act of March 29, 1892 (27 Stat. 12), provides "that when any enlisted man of the Army shall have distinguished himself in the service the President may, at the recommendation of the commanding officer of the regiment or the chief of the corps to which such enlisted man belongs, grant him a certificate of merit." *Held,* that a retired enlisted man is an "enlisted man of the Army" within the meaning of this statute and therefore eligible for a certificate of merit. The recommendation required should come from the commanding officer of the regiment or the chief of the corps to which such enlisted man belonged. *C 8445, June, 1900.*

II F. *Held,* that a requirement in Army Regulations that the recommendation "must originate with an eyewitness" is an interpolation not authorized or called for by the original statute, section 1216, R. S., as amended by the act of February 9, 1891 (26 Stat. 737), and the act of March 29, 1892 (27 Stat. 12), and an instance of *quasi*

[1] See McNamara *v.* U. S., 28 Ct. Cls., 416

legislation unwarranted in an Army regulation. *P. 47, 152, May, 1891; C. 19139, Feb. 8, 1906.*

II G. *Held,* that a certificate of merit may be given to an honorably discharged soldier with pay from the date of the gallant conduct for which the certificate was granted to date of discharge, if the recommendation was made before the soldier was discharged. *Held,* further, that if the recommendation was not made until after the soldier's discharge the certificate can not be granted.[1] *C. 12558, July 25, 1902; 16315, May 9, 1904; 23262, May 28, 1908.*

II H. *Held,* that the word "corps" as used in the acts of February 9, 1891 (26 Stat. 737), and of March 29, 1892 (27 Stat. 12), means "any staff corps or department of the Army." *C. 8445, June 21, 1904.*

II H 1. An unassigned recruit was recommended for the certificate of merit. *Held,* that The Adjutant General was the "chief of the corps" upon whose recommendation award might be based within the meaning of section 1216, R. S., as amended by the act of March 29, 1892 (27 Stat. 12). *C. 13978, Jan. 20, 1903.*

II H 2. *Held,* in the case of a Philippine Scout whose company is not a part of a battalion or regiment, that his company commander is the "chief of the corps" upon whose recommendation the certificate of merit may be awarded. *Held,* further, that if a Philippine Scout's company belongs to a battalion which does not belong to a regiment, the battalion commander is the "chief of the corps" upon whose recommendation the certificate of merit may be awarded. *C. 16973, Oct. 13, 1904.*

II I. *Held,* that under the law which controls the award of the certificate of merit, viz, section 17, act of March 3, 1847 (9 Stat. 186); sections 3 and 4, act of August 4, 1854 (10 Stat. 575); sections 1216 and 1285, R. S.; act of February 9, 1891 (26 Stat. 737), and the act of March 29, 1892 (27 Stat. 12), the certificate of merit may not be granted for gallant conduct by a commissioned officer. *C. 22110, Nov. 15, 1907.*

II K. *Held,* that as certificate-of-merit pay is a part of a soldier's pay it is subject to forfeiture by sentence of court-martial. *C. 1308, Apr. 30, 1895.*

III A 1. *Held,* that the words "in their own right" which occur in those laws which authorize the wearing of certain society badges mean "right" because of their own service or because of their kinship to one who had been in the service.[2] *C. 14956, Jan. 30, 1904.*

III A 2 a. *Held,* that there is no authority of law for wearing in uniform the badge of the Society of Foreign Wars. *C. 14956, Sept. 12, 1903.*

III A 2 b. *Held,* that the insignia of the Association of Military Surgeons of the United States may not be worn by officers or enlisted men in uniform. *C. 15610, Apr. 6, 1905.*

III B 1. The President prescribes the uniform of officers and enlisted men under section 1296 R. S. *Held,* that the manner in which service in war generally, or service in a particular war, or service in any particular military operations shall be shown, is entirely within the Executive discretion, and he may cause it to be indicated by a service

[1] See 24 Op. Atty. Gen., 127, Sept. 23, 1902, and IX Comp. Dec., 160, Oct. 24, 1902.
[2] 23 Op. Atty. Gen., 454.

stripe as at present prescribed for enlisted men, or by a suitable metallic device to be worn as an article of uniform[1] in a manner to be prescribed by him in suitable uniform regulations. He may cause such devices or stripes to be procured by the Quartermaster's Department and issued to the soldier to be charged in his clothing allowance, or he may treat it as an article of equipage and issue it free to enlisted men to be replaced at the soldier's expense if lost by his own fault or carelessness. *C. 23875, Sept. 21, 1908; 17243, Nov. 29, 1904.* The Quartermaster's Department may supply these badges or devices to officers, at cost price, who may wear them in pursuance of appropriate uniform regulations. Such a distinctive badge may not be issued to officers and enlisted men of the volunteer armies who are no longer in the military service, as such issue would constitute a donation of property and would for that reason be beyond the power of the Executive. *C. 14201, Feb. 25, 1903; 17243, Nov. 29, 1904; 23839, Oct. 8, 1908, and May 30, 1910. Held,* further, that as such badges constitute stores and supplies within the meaning of section 17 of the act of January 21, 1903 (32 Stat. 775), they may be issued to the governors of the several States for the use of their Organized Militia as part of the uniform. *C. 14148–F, Oct. 13, 1908; 23839, Oct. 26, 1908, and Dec. 2, 1908.*

III B 2. *Held,* that any officer or enlisted man who served in a campaign, service in which is recognized by a campaign badge, is, other conditions being complied with, entitled to such badge if he was in the service at the date when service in such campaign was designated for recognition by said badge, or if he was not in the service at the date of such designation but is now, he shall likewise be entitled to the badge. *C. 17243, Sept. 23, 1911.*

III B 3. An organization entitled "Batson's squadron of Philippine cavalry" was formed from among the civilian employees of the Quartermaster's Department during the Philippine insurrection. Its employment was assimilated, in all of its essential incidents, to that of the Philippine Scouts and guides whose services are obtained by contract and paid for out of the appropriation for incidental expenses. But the squadron was actually paid out of insular funds furnished for that purpose to the Quartermaster's Department. *Held,* therefore, that the members of that squadron are not entitled to the Philippine campaign badge. *C. 17683, Mar. 15, 1905.*

III C. A soldier became entitled to a first-class gunner's badge, but was discharged before it was awarded. *Held,* that the fact that he has since left the Army should not be considered to be a bar to his receiving the badge. *C. 18563, Sept. 14, 1905.*

INSPECTION.

Bonds.....See BONDS II Q.
Militia.....See MILITIA VI D 1.

INSPECTOR GENERAL'S DEPARTMENT.

Inspection of funds by.....See ARMY I B 2 b (2) (*a*).
Redetail in.....See OFFICE III D 1 d.
Reports of.....See ARMY I G 3 a (3).

[1] See G. O. No. 4, War Dept., 1905, as amended by G. O. 129, 1908. See also Cir. 82, War Dept., 1908, and G. O. 96 and 97, War Dept., 1909.

INSTRUCTORS.

Military at colleges.....See MILITARY INSTRUCTION II B 1 to 2.
Service schools.....See ABSENCE I B 1 g (1); (2).

INSUBORDINATION.

See ARTICLES OF WAR LXV A.

INSULAR BUREAU.

Bonds filed in.....See BONDS II O.

INSULAR POLICE.

Unauthorized force.....See MILITIA IV C.

INSURANCE.

Buildings on target range.....See MILITIA VI C 1 e.
Expense of contractor.....See CONTRACTS XXVII.

INTENT.

Burglary.....See ARTICLES OF WAR LXII C 7.
Challenge.....See ARTICLES OF WAR XXVI A.
Congressional, as to treatment of general prisoners.....See DISCHARGE II B 2 a.
Desertion.....See ARTICLES OF WAR L A.
DESERTION I; I A; V F 15; XX A; B.
DISCIPLINE II D 7; IX I 1; XI A 4 a.
Embezzlement.....See ARTICLES OF WAR LXII C 2.
Homicide.....See DISCIPLINE II D 11 a.
Larceny.....See DISCIPLINE IX I 2; XI A 8 a.
Misappropriation.....See DISCIPLINE II D 16 a.
Mutiny.....See ARTICLES OF WAR XXII A.
DISCIPLINE XIV E 9 d (1) (*b*).
Place of residence.....See TAX I E.
RESIDENCE I.

INTEREST.

See ARTICLES OF WAR LXII C 15; E.
In land, how conveyed.....See PUBLIC PROPERTY I A 1.
Loaning money at.....See CIVILIAN EMPLOYEES XVI A.
ARTICLES OF WAR LXI B 11.
Not allowed on claims.....See CLAIMS III.

INTERNAL REVENUE.

Appropriation for paying.....See APPROPRIATIONS XXXIX.

INTERMENT.

Officer.....See PAY AND ALLOWANCES II A 2 c to d.

INTERNED PRISONERS.

Finger prints of, improper.....See ARMY II K 1 h (1).

INTERVENTION.

In Cuba.....See WAR I C 8 c (1) to (2).
In Panama.....See WAR I C 8 c (1).

INTOXICANTS.[1]

I. DEFINED ..... Page 671
A. Beer.
II. PURCHASE, SALE, OR USE OF, ON MILITARY RESERVATION.
A. May be Shipped Into Such Reservation.
1. Rule as to deliveries in original packages.
2. Order and delivery in small package ..... Page 672
B. Commanding Officer Decides Whether Liquor is Intoxicating.
C. Use of, at Bachelors' Messes.
D. Use of, at State Maneuver Camp.
E. Restraint of Sale of Opium.
F. Jurisdiction of Offense. (*This applies also to Indian country*).
III. INTRODUCTION OF, INTO INDIAN COUNTRY.
A. Indian Country Defined ..... Page 673
1. Introduction forbidden if Indian in any degree under control of Indian agent.
B. Power of Secretary of War to Issue License.
1. Exception when to be used by Army or for sacrament..... Page 674
C. Duty of Commanding Officer.
1. May arrest civilians to prevent introduction.
2. May destroy liquor.
D. Duty of Officers.
1. To destroy liquor found.
IV. SALE AT NATIONAL HOME FOR DISABLED VOLUNTEERS.. Page 675

I. In the absence of a legislative definition of the phrase "intoxicating liquors," and having regard to the very general language used in the act of February 2, 1901, *held*, that the sale of a beverage at post exchanges which contains an appreciable quantity of alcohol, would fall within the prohibition of the statute. *C. 18094, June 5, 1905; 19521, Apr. 14, 1906; 19768, May 19, 1906; 23027, Apr. 3, 1908.*

I A. Section 17 of the act for increasing the efficiency of the Army of the United States, etc., approved March 2, 1899 (30 Stat. 981), provides "that no officer or soldier shall be detailed to sell intoxicating drinks, as a bartender, or otherwise, in any post exchange or canteen * * * ". *Held*, that beer is an intoxicating drink within the meaning of this section.[2] *C. 5992, Mar., 1899.*

II A. There is no law forbidding the shipment of intoxicating liquors to military reservations as such. *C. 13829, Dec. 26, 1902.*

II A 1. The act of February 2, 1901 (31 Stat. 758), does not prohibit the use, but it does prohibit the sale, of beer, wine, or any intoxicating liquor upon any premises used for military purposes by the United States, *held*, therefore, that the delivery on a military reservation, by railroad and express companies of liquors, in original packages, to bona-fide consignees for their own use, would not be an infraction of the law; *otherwise*, however, if general consignments of liquors were made by dealers to an express company to be delivered to parties who had not ordered the same and were unknown at the time to the dealers and the express company, the goods to be paid for on delivery. *C. 14323, Mar. 27, 1903.*

---

[1] Prepared by Lieut. Col. John Biddle Porter, judge advocate, assistant to the Judge Advocate General, U. S. A.

[2] But see act of Feb. 2, 1901 (31 Stat. 748).

II A 2. *Held*, that for a person to take orders on a military reservation from enlisted men for whisky in small quantities and then to deliver the same would constitute an express violation of section 38 of the act of February 2, 1901 (31 Stat. 758). *C. 18037, Apr. 26, 1909.*

II B. In cases where the question of whether certain specific beverages, alleged to be nonintoxicating, might be sold at post exchanges, has been referred to the War Department for decision, *held*, that the department should not assume the determination of such questions, which are left under the regulations (par. 357, A. R., 1910), to commanding officers; that no hard and fast rule exists by which the intoxicating property of a beverage may be determined by the percentage of alcohol therein and *suggested* that the fact of whether or not the sale of the specific beverage was permitted in prohibition States might serve as a guide to post commanders. *C. 18094, June 5, 1905; 22782, Feb. 27, 1908; 23027, Apr. 3, 1908, May 7, 1908, June 4, 1908, July 25 and 30, 1908, Mar. 1, 1909, and Aug. 22, 1911.*

II C. *Held*, that the act of February 2, 1901 (31 Stat. 758), in so far as it prohibits the sale of or dealing in certain intoxicants in a post exchange or canteen or Army transport or upon any premises used for military purposes by the United States, is not intended to apply to the officers' messes established at military posts for the accommodation of unmarried officers and others, who do not desire to establish individual messes or eating arrangements in their own quarters. *C. 12779, Apr. 5, 1909.*

II D. Where the Federal Government accepted the use of a State maneuver camp for military maneuvers in which the troops of the State were to join the Regular Army for a short period, *held*, that during the period of the joint maneuvers the laws of the State in regard to the sale of intoxicants within the limits of the maneuver camp should govern in that portion of the camp used by the State troops, but that in the remainder of the camp, and during the period of the sole occupancy of the maneuver camp by the Federal forces, the provisions of the act of February 2, 1901 (31 Stat. 758), forbidding the sale of intoxicating liquors "on any premises used for military purposes by the United States" were operative. *C. 19983, June 29, 1906.*

II E. It having been reported that the unrestricted sale by civilians of opium was causing injury to the military service at Fort Sherman, Idaho—*held*, that such sale might be restrained by Congress under its general power of legislation over the Territories;[1] or that, in the absence of action by Congress, the legislature of the Territory would be authorized to regulate the same; and that through one of these two means the evil might be abated. *P. 30, 72, Feb., 1889.*

II F. Under the act of July 23, 1892 (27 Stat. 260), amending section 2139, R. S., the Secretary of War may give authority in writing for the introduction of intoxicating liquors into the Indian country. But this authority is subject to the restriction of the existing act of June 13, 1890, so that the Secretary could not properly permit the introduction of such liquors into Indian country within a prohibition State with a view to their being sold or supplied to enlisted men. Where certain "Hop Tea Tonic," alleged to be intoxicating,

[1] See Natl. Bk. *v.* Co. of Yankton, 101 U. S., 133.

was attempted to be introduced at the post of Fort Yates, situated upon an Indian reservation in North Dakota, exclusive jurisdiction over which is vested in the United States, *held*, that the admission or sale of such liquor, if intoxicating, would be an offense against the United States, not against the State, since the act of August 8, 1890, providing that intoxicating liquor shipped into a State shall be subject to the operation of the State laws as soon as it enters the territory of the State, can not apply to a district over which the United States has exclusive jurisdiction, and therefore that the State authorities would not be empowered to make a *seizure* of such liquor. *P. 62, 405, Nov., 1893; C. 12941, Sept. 13, 1902; 14323, Mar. 27, 1903; 18037, May 23, 1905; 19219, Feb. 19, 1910.*

III A. *Held*, that the term "Indian country," as employed in the statutes regulating trade and intercourse with the Indians (see, particularly, Ch. IV, Title XXVIII, R. S.), might properly be defined in general as including the following territory, viz: Indian reservations occupied by Indian tribes; other districts so occupied to which the Indian title has not been extinguished; any districts not in other respects Indian country, over which the operation of those statutes may be extended by treaty or act of Congress.[1] *R. 39, 214, Oct., 1877.*

III A 1. *Held*, that the introduction of liquor into the Indian country is forbidden by section 2139 R. S. as amended, where the Indians are in any degree under the control or charge of an Indian agent.[2] *C. 25468, Aug. 23, 1909.*

III B. The Secretary of War has no general authority to license the introduction of spirituous liquors into the Indian country. Under section 2139, R. S., and the act of July 23, 1892 (27 Stat., 260), amending that section and extending it to beer and other malt liquors,[3] the Secretary of War is without authority to permit the introduction into that country of any spirituous or malt liquors intended for sale. *P. 55, 172, 283, 380, Aug. and Sept., 1892; 56, 31, Oct., 1892; C. 506, Oct. 7, 1894.* The statutes cited do not authorize the Secretary of War to license the *sale* of spirituous or malt liquors in the Indian country. Whether a particular article is in fact spirituous or malt liquor is a question for the courts, and not the War Department, to decide. *C. 1747, Nov., 1895; 7813, 7981, Mar. and Apr., 1900; 10810, July 10, 1901; 11160, Aug. 28 and Sept. 10, 1901; 11190, Sept. 5, 1901; 11966, July 25, 1902; 20195, Aug. 9, 15, and Sept. 25, 1906; 23027, Apr. 3, 1908.*

---

[1] See this opinion as adopted and incorporated in G. O. 97, Hdqrs. of the Army, 1877; also, in the same connection, 14 Op. Atty. Gen., 290; United States *v.* Forty-three Gallons of Whisky, 3 Otto, 188; Bates *v.* Clark, 5 id., 204; United States *v.* Seveloff, 2 Sawyer, 311.

[2] See Renfrow *v.* United States, 1895 (3 Okla., 161); and United States *v.* Fling, 870 (25 Fed. Cas., No. 15124).

See also 191 Fed. Rep., 673, where it was held that the portion of Oklahoma which was formerly the Indian Territory did not cease to be Indian country on the admission of the State, nor did such admission affect the application to that part of the State of sec. 2139, R. S., or of the act of Jan. 30, 1897 (29 Stat. 506), relating to the sale of liquor to Indians and its introduction into Indian country. *Also held*, that the power of Congress over Indian relations is plenary. *Also held*, that the provision in the Oklahoma enabling act (34 Stat. 269) that the State constitution shall prohibit the manufacture or sale of intoxicating liquor in certain portions of the State did not repeal that portion of the act of Jan. 30, 1897 (29 Stat. 506), which made it a crime to introduce liquor into the Indian country.

[3] See now this section as amended by act of Jan. 30, 1897 (29 Stat. 506).

III B 1. Prior to the act of July 23, 1892[1] (27 Stat. 260), no formal rule or regulation governing the subject of the introduction of liquor into the Indian country was promulgated by the War Department, but shortly after the passage of the act the Secretary of War decided that no permits would be granted except in cases where the liquor was to be used in or connected with the United States Army. This decision was adhered to until October, 1897. Since the latter date it has been the view of the department that although the act should not be construed to establish in the War Department a license bureau to regulate the liquor traffic in the Indian country, yet permits should be given to introduce wine into the Indian country for sacramental, hospital, and in certain cases for private medicinal use where there would be some guaranty that the privilege would not be abused. A permit to introduce wine for sacramental purposes is granted only upon the application of a minister of the Gospel having charge of a congregation or district in the Indian country, and only when forwarded to the War Department through the applicant's ecclesiastical superior, or upon other evidence of authenticity. The authority of the War Department to issue permits under the statutes covering the matter has in practice been viewed as limited to permits to introduce intoxicating liquor into the Indian country and as not extending even by implication to permits for its sale. Thus repeatedly *held* that permits to individuals to introduce into the Indian country any kind of intoxicating liquor, intended for sale either as a beverage or by druggists for medicinal purposes, can not legally be granted. *C. 2399, 2406, 2571, 2795, July to Dec., 1896; 3140, 3404, 3716, Apr. to Dec., 1897; 4002, 4105, May, 1898; 6857, 6900, Aug. and Sept., 1899; 4105, June, 1900; 7063, Dec. 31, 1910, July 26, 1911; 17024, Jan. 16, 1912.*

III C 1. Under section 2150, R. S., a military commander may be authorized and directed by the President to arrest by military force and deliver to the proper civil authorities for trial, any white persons or Indians who may be in the Indian country engaged in furnishing liquor to Indians in violation of law; as also to prevent, by military force, the entry into such country of persons designing to introduce liquor therein contrary to law. *Held,* that this authority to *prevent* was clearly an authority to *arrest,* where arrests were found necessary to restrain persons attempting to introduce liquor or other inhibited property. *R. 42, 192, Mar., 1879.*

III C 2. In view of the duty devolved by section 2140, R. S., upon "any person in the service of the United States," to take and destroy spirituous liquors in the Indian country, *held,* that a post commander in such country who seized and destroyed a quantity of such liquors introduced into such country without the authority of the Secretary of War, but not found within the limits of his military command, had not exceeded his powers. *R. 31, 205, Feb., 1871.*

III D 1. In view of the positive terms of section 2140, R. S., an officer of the Army not only *may* but *should* "take and destroy any ardent spirits or wine found in the Indian country, except such as may be introduced therein by the War Department." The section imposes this as a "duty" upon "any person in the service of the United States"—including of course military as well as civil officials. *Held,*

[1] This act has been amended by the act of Jan. 30, 1897 (29 Stat. 506).

however, that the authority given by the statute to destroy liquor brought into an Indian reservation did not authorize the destruction by the military of a building, the private property of a citizen, in which the liquor was found stored. *R. 35, 350, Apr., 1874.*

IV. The premises occupied by the National Home for Disabled Volunteer Soldiers (including the various branches thereof) are not "premises used for military purposes" within the meaning of section 38, act of February 2, 1901, forbidding the sale of intoxicants. *C. 12817, July 2, 1902.*

CROSS REFERENCE.

Use of.....See ARTICLES OF WAR XXXVIII A.
Introduction into Indian country.....See ARMY II C.
Permits for introduction into Alaska not authorized.....See TERRITORIES III E.
Prohibition laws.....See PUBLIC PROPERTY V F 1 a (1).

INVENTION.

Property right.....See PATENT VI A.

INVESTIGATION.

Boards of.....See DISCIPLINE XVIII A.
Court of inquiry.....See ARTICLES OF WAR CXV A; B; CXIX A; B; CXXI A.
Department commander.....See ARTICLES OF WAR LXXII I.
Oaths administered.....See OFFICE III A 8 b (1.)
Regimental court.....See ARTICLES OF WAR XXX A.

IRRIGATION.

License for.....See PUBLIC PROPERTY VIII A 4 d.
Military reservation.....See PUBLIC PROPERTY I A 1.
Right of way for.....See PUBLIC PROPERTY VI B to E.

ISSUE.

Public property to Militia.....See MILITIA IX A; A 1; 2; 2 a.

JEOPARDY.

Twice in.....See ARTICLES OF WAR CII A to I.

JOINT AND SEVERAL BOND.

See BONDS I M 11.
When required.....See BONDS I Q.

JOINT ENCAMPMENT.

See MILITIA II TO III; VI B 2 to C.
Payment of Militia at.....See MILITIA XI C.

JUDGE ADVOCATE.

Department—Signing of charges by.....See DISCIPLINE II D 12 a (1).
General court-martial.....See DISCIPLINE IV A to O.
General court-martial, signing of charges by..See DISCIPLINE II D 12 a.
General court-martial, detail of.....See DISCIPLINE III C 2 to 5.
Military commission.....See WAR I C 8 a (3) (*d*) [1].
Service of subpœna.....See DISCIPLINE X F 1; 2.

JUDGE ADVOCATE GENERAL.

Duties of.....See ARMY I G 3 a (4) to (5).
Does not render opinions on matters that relate only to the States.....See ARMY I G 3 a (4) (*a*) [4]
See MILITIA XXI.
Grounds for recommending clemency.....See PARDON VI.
DISCIPLINE XV F to G.
Record of general court-martial.....See DISCIPLINE XV to XVI.
Record of military commission.....See WAR I C 8 a (3) (*c*) [3].
Revision of court-martial records.....See DISCIPLINE XV to XVI.
Signing of charges by.....See DISCIPLINE II D 12 a (1).

JUDICIAL NOTICE.

Amnesty.....See DISCIPLINE IX F 1 a.
Printed orders.....See DISCIPLINE XI A 17 a (2) (*b*) [1].
Time of war.....See DISCIPLINE II D 15 a.

JURISDICTION.

Attaching of.....See COMMAND V B 2 a.
Board of review.....See ARMY I G 3 d (2) (*a*).
Bridges.....See NAVIGABLE WATERS III A 1.
Cession of.....See COMMAND V A 3 c (1) f.
Civil court.....See DISCHARGE VII B.
Department commander over troops temporarily in department.....See ARTICLES OF WAR LXII H.
Double amenability.....See ARTICLES OF WAR LIX D; CIIC.
Civil court over retired officer.....See RETIREMENT I G 2 d.
Over civilians by general court-martial.....See ARTICLES OF WAR LXIII A to E.
Comity between civil and military.....See DISCIPLINE III E 4.
See ARTICLES OF WAR LIX D.
Court-martial can not pass on question of contract.....See PAY AND ALLOWANCES I C 2.
Court-martial, over cadets.....See ARMY I D 3 a.
Enforce statutes.....See NAVIGABLE WATERS IX to X.
General court-martial.....See DISCIPLINE VIII A to I 2; III D; XV C 1; I 1.
General court-martial over murder.....See ARTICLES OF WAR LXII A.
Military commission.....See WAR I C 8 a (3) (*b*) to (*d*).
Military courts.....See ARTICLES OF WAR LVIII A.
DISCIPLINE XIV E 9 a (13).
Military reservation.....See ARMY I E 5.
PUBLIC PROPERTY III A 1; V to VI.
Over questions of carrying weapons.....See ARMS II.
Over soldier.....See DISCHARGE XXII A; B.
Presumption that court has.....See DISCIPLINE XV C.
Retiring board.....See RETIREMENT I B 1 c to d.
Retired enlisted men.....See RETIREMENT II B 3 to 4.
Reviewing authority.....See DISCIPLINE XIV C 1; D.
Sale of intoxicants on reservations.....See INTOXICANTS II F.
Summary court.....See DISCIPLINE XVI E 2.
Volunteer after muster out of organization..See VOLUNTEER ARMY IV C to D.

JURY DUTY.

Liability of officers and civilian employees to.See CIVILIAN EMPLOYEES III A.

JUSTICE OF THE PEACE.

Officer as.....See OFFICE IV A 2 d (2) (*b*).

LABOR AND MATERIAL-MEN.

See CONTRACTS XX to XXI.
How affected by modification of bond.....See BONDS I M 7.

LABORERS.

See EIGHT-HOUR LAW I; VII.
Surgeon General's office.....See APPROPRIATIONS LIV.
Without advertising.....See CONTRACTS III B.

LAND.

See PUBLIC PROPERTY II to III.
Purchase of.....See NAVIGABLE WATERS X D to E.
See APPROPRIATIONS III.

LARCENY.

By soldier.....See COMMAND V A 2 e.
Hay on military reservation.....See COMMAND V A 3 g.
Intent.....See DISCIPLINE XI A 8 a.
Pardon of.....See PARDON VII A.
Public money.....See CLAIMS XII Q.
Statement by accused.....See DISCIPLINE IX I 2.

LAUNDRY.

Construction of.....See APPROPRIATIONS XVII.
Cost of operation.....See PAY AND ALLOWANCES I C 6 b (5).
Debts to.....See GOVERNMENT AGENCIES IV.
Establishment of.....See GOVERNMENT AGENCIES I A.
Failure to pay debt to.....See ARTICLES OF WAR LXII D.
Government work.....See GOVERNMENT AGENCIES I E.
Heat furnished to.....See GOVERNMENT AGENCIES II J 10.
Military prison.....See APPROPRIATION XXXVI B.

LAW.

I. STATUTES.

A. REVISED STATUTES.

1. Are a single act of Congress dated June 22, 1874..... *Page 678*
2. Do not require publication in General Orders to become effective on Army.
3. Acts of a temporary character that were not included were not repealed.

B. CONSTRUCTION OF.

1. "May" equivalent to "shall" or "must."
   a. In statutes conferring power upon public officer.
   b. In appropriation act..... *Page 679*
2. "Authorized" may mean "required" or "directed."
3. If details are prescribed, they must be executed without variance.
4. Computation of time from act done excludes date of act..... *Page 680*
   a. Reviving of act lapsed due to passage of time.
5. Section 3716, Revised Statutes, relates to advertising and not to purchase.

I. STATUTES—Continued.
B. CONSTRUCTION OF—Continued.
6. Remark by Member of Congress, reports of committees, etc., can not be safely followed in construing law.
7. Articles of War.
a. Penal and construed strictly..... *Page 681*
8. Authority to install lights is authority to lay conduit for electric current.
9. Permanent legislation in appropriation bill.
II. REGULATIONS.
A. ARMY REGULATIONS.
1. Three classes—described.
a. No statutory sanction for regulations as a whole..... *Page 682*
b. When in conflict with statutes they are null.
c. Can not grant legislative authority ..... *Page 683*
d. Can not occupy a field already occupied by statute.
e. Regulations founded on necessity.
(1) Issue of rations to flood and famine sufferers.
f. Not retroactive unless specifically provided.
g. In furtherance of statutes.
(1) Do not extend to subjects, control of which is constitutionally vested in Congress.

I A 1. The Revised Statutes are a single act of Congress, which, in the absence of any special provision as to the date on which the same (or any part of the same) should take effect, went into operation on the day of its approval by the President—June 22, 1874.[1] The date of the certificate, published with the same, of the Secretary of State, viz, February 22, 1875, simply fixes the time at which the contents of the printed volume became evidence of the laws therein contained. *R. 36, 630, Aug., 1875.*

I A 2. The laws relating to the Army, embraced in the Revised Statutes, became operative as to the Army upon the approval by the President of the body of the revision, irrespective and independently of any publication of such laws in general orders. *R. 36, 666, Sept., 1875.*

I A 3. *Held,* that an act of 1856, authorizing the transfer of certain lands in Florida (which had been reserved for military purposes) to the Secretary of the Interior, with the consent of the Secretary of War, and their disposition and sale as public lands—belonged to the class of "provisions of a local or temporary character" indicated in the proviso to section 5596, R. S., and was therefore not repealed by such statutes, but, having remained unexecuted, might legally be executed at this time (1878). *R. 41, 215 Apr., 1878.*

I B 1 a. It is well settled that the word "*may,*" in a statute conferring power upon a public officer, is to be construed as equivalent

[1] Since the date of this opinion, the revision of 1874 has been itself revised, under an act of Congress of Mar. 2, 1877 (19 Stat. 268), and the re-revision, published in 1878, and certified to by the Secretary of State, constitutes "legal evidence of the laws therein contained." This second revision, however, is not a new statute, but merely a "new edition" of the Revised Statutes of 1874, with additions and corrections.

Under a joint resolution of Congress, of June 7, 1880 (21 Stat. 308), and an act of Apr. 9, 1890 (26 Stat. 50), a supplement to the Revised Statutes was published, by which the revision was brought down to Mar. 3, 1891. By a second volume of the supplement, the revision has been brought down to Mar. 4, 1901.

to "must" or "shall," where the enactment imposes a public duty, or makes provision for the benefit of individuals whose rights can not be effectuated without the exercise of the power.[1] So where the Secretary of War was "authorized" by an act of Congress to reopen a settlement previously made with a railroad company for Government transportation, &c., adjust the same upon a certain stated basis, and issue his warrant on the Treasury for such amount as might be found due the company on such readjustment, *held* that the statute did not confer a mere discretionary authority but was mandatory upon the Secretary.[2] *R. 42, 328, June, 1879.*

I B 1 b. The proper construction of appropriation acts providing that a certain sum or so much of it as may be necessary, *may* be expended on a certain work for the benefit of the public is, in general, if there be no modifying clause, that it was the intention of Congress that so much of the appropriation as may be necessary for the work, *shall* be expended on it. In such cases it can not be presumed merely from the use of the word "may" in the acts that it was the intention to vest the one whose duty it is to expend the appropriation, with a discretion to do or not to do the work appropriated for. The word may have such a meaning but it is not to be inferred from the word alone when used in acts of this character. *C. 2473, July, 1898.*

I B 2. While there is a distinction between a statute in which a public official is "*authorized*" and one in which he is "required" or "directed" to perform a certain act, in that a discretion is, in general, conferred by a statute of the former class, yet *held*, that where the President was, by the act of February 23, 1892 (27 Stat., 825), "authorized" to issue to an officer of the Army a commission of a date prior to his existing commission, the word "authorized" should be construed to be mandatory.[3] *P. 58, 309, Mar., 1893.* Similarly *held* that in section 224 R. S., which "authorizes" the Secretary of War, in case of the loss of a soldier's discharge certificate, to issue a duplicate, the word "authorized" means "directed" or "required." *P. 36, 409, Nov., 1889.* Also, where the Secretary of War was "authorized" by an act of Congress to sell a portion of a military reservation, *held*, that it was evidently contemplated by Congress that the sale should be made, and that a public duty was imposed upon the Secretary of War, who could not properly omit to proceed with the sale. *R. 27, 525, Feb., 1869.*

I B 3. Where a statute clearly requires a thing to be done in a particular mode and form, the same can not legally be varied from in material details by the officer charged with the performance.[4] Thus, where Congress appropriated certain funds for a bridge, which, it was expressly specified in the act, was to be erected according to a certain designated plan which had been recommended for the purpose by the Chief of Ordnance, *held*, that the construction of the bridge in accordance with such a plan was a condition to the due expenditure

[1] See Minor *v.* Mechs. Bk., 1 Peters, 46; Supervisors *v.* United States, 4 Wallace, 435, and cases cited; also Fowler *v.* Pirkins, 77 Ill. 271; Kans. P. R. R. Co. *v.* Reynolds, 8 Kans. 628; People *v.* Comrs. of Buffalo Co., 4 Neb. 150.

[2] See concurring opinion of the Solicitor General in 15 Op. Atty. Gen., 621; also Supervisors *v.* United States, 4 Wallace, 435.

[3] See Supervisors *v.* United States, 4 Wall., 435; Endlich On the Interpretation of Statutes, sec. 309.

[4] See Commissioners *v.* Gaines, 3 Brev., 396.

of the money appropriated, and that the plan could not legally be departed from in the construction.[1] *R. 28, 664, June, 1869.*

I B 4. It is a uniform principle in the construction of statutes, which do not expressly prescribe a different rule, that where time is to be computed from an act done the day on which the act is done shall be excluded.[2] *C. 1084, Mar. 2, 1895.*

I B 4 a. In the act of September 26, 1890 (26 Stat. 483), authorizing a railroad company to bridge certain navigable waters, it was provided that the authority should cease and be inoperative if after the expiration of two years the work was not commenced. The work was not in fact commenced within the period limited, but on February 28, 1893, after such period had elapsed, a further act was passed, which, without reenacting the former act, simply extended the time within which the construction might be commenced and completed. *Held*, that such act had the effect of reviving the former act. *P. 59, 21, Apr., 1893.*

I B 5. Section 3716, R. S., provides that in all advertisements by the Quartermaster's Department the statement shall be made that preference will be given to articles of domestic production and manufacture, conditions and prices quoted being equal. The Army appropriation act of September 22, 1888 (25 Stat. 484), and subsequent similar acts, provide that "after advertising" Army supplies "shall be purchased where the same can be purchased the cheapest, quality and cost of transportation considered." *Held*, that the appropriation acts do not repeal section 3716, R. S., since the provision of that statute is that the statement shall be made in the advertisement, and the provision of the Army appropriation acts relates only to the purchasing. *P. 60, 130, June, 1892.*

I B 6. *Held*, that the remarks of members of Congress in a debate on a bill as to the purpose of the proposed measure, the reasons for adopting the same, etc., do not ordinarily constitute a safe basis for the accurate construction of the same after it has become enacted.[3] *R. 37, 656, June, 1876.*

---

[1] See concurring opinion of the Attorney General in 13 Op., 78; also, later opinion in 20 Op., 653.

[2] See 9 Op. Atty. Gen., 131.

[3] "In expounding a law, the judgment of the court can not be influenced in any degree by the construction placed upon it of individual members of Congress, in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered." Taney, C. J., in Aldridge *v.* Williams, 3 Howard, 24. So, in Lockington's Case, Brightly, 289, it was held by the Supreme Court of Pennsylvania, *per* Yeates, J, as follows: "I regard the true meaning of the law, to be collected *ex visceribus suis*, as the only correct ground of decision thereon. It is of no moment, in my idea, how it was treated by different gentlemen on the floor of Congress." And see United States *v.* Union P. R. R. Co., 1 Otto, 79; Leese *v.* Clark, 20 Cal., 388; Keyport, &c., Co. *v.* Farmers, &c., Co., 18 N. Jersey Eq., 13; 13 Op. Atty. Gen., 368. But it is said by Mr. Justice Field, in Ho Ah Kow *v.* Nunan, 5 Sawyer, 560, that while "statements in debate can not be resorted to for the purpose of explaining the meaning of the terms used," the same "can be resorted to for the purpose of ascertaining the general object of the legislation proposed and the mischiefs sought to be remedied."

In an opinion of Aug. 23, 1879 (16 Op., 378), the Attorney General remarks that the construction of a statute, when doubtful, may be aided by a reference to the debate when the members concurred as to the purpose of the measure, but scarcely so when they expressed different views on the subject. In an earlier opinion (15 Op., 625), the Solicitor General, in referring to the general rule (as held in the text), cites the case of Bank of Pa. *v.* Commonwealth, 19 Pa. St., 156, to the effect that "it is delusive and dangerous to admit messages of governors, journals of the legislature, or reports of committees to aid in construing statutes."

I B 7 a. In applying the Articles of War to particular cases, a case should not be treated as within the penal provisions of an article unless it is quite clearly included by the words of description employed. *R. 37, 199, July, 1876; C. 15844, Jan. 21, 1904.*

I B 8. Where an appropriation was made under the act of July 1, 1898, for the lighting and maintaining in good order of 20 arc lights for 365 nights at a cost not exceeding 25 cents each per night, *held* that this included authority to make the necessary excavations and extension of underground conduits to carry the current for the new lights. *C. 4641, July 30, 1898.*

I B 9. The act of March 3, 1883 (22 Stat. 459), making appropriations for the support of the Army, provides in the clause making appropriations for the Medical Department that "civilian employees of the Army stationed at military posts may, under regulations to be made by the Secretary of War, purchase necessary medical supplies prescribed by a medical officer of the Army at cost, with 10 per centum added." Although the quoted language was in form a proviso,[1] it in fact neither limited nor excepted from the matter preceding it, but was an independent provision. The next appropriation act omitted the quoted language. *Held*, that the quoted language constituted general and permanent legislation.[2] *P. 4 159, Aug. 2, 1884.*

II A 1. Army Regulations may be divided into three classes: (1) Those which have received the sanction or confirmation of Congress; (2) those that are made pursuant to and in execution of a statute, and (3) those made, not pursuant to a statute but by the President as Commander in Chief of the Army. As to regulations of the first class, where the approval of Congress is given to them *as regulations* and is not intended to communicate to them the quality or effect of *statute law*, such approval adds nothing to their legal effect. *R. 39, 235, Oct. 23, 1877.* As to regulations of the second class, while they have the force of law so long as they are operative,[3] they are, like other regulations, subject to the authority of the Executive to modify them from time to time, or to waive their operation in particular cases.[4] *Held* therefore with regard to regulations prescribing physical qualifications of candidates for appointment in the Army from civil life, under act of March 3, 1911 (36 Stat., 1045), that the President could legally waive the same in a particular case. *C. 29295, Dec. 7, 1911.* With reference to regulations of the third class,[5] it has been held repeatedly that they are subject to the authority of

---

[1] See Henry, administrator, *v.* U. S., 27 Ct. Cls., 142, as to enactment of general legislation by provisos.

[2] See Army appropriation act for the fiscal year ending June 30, 1866 (13 Stat. 497), in which the sale of tobacco to enlisted men, and the sale of stores to officers on credit was similarly held to be general and permanent legislation. See also 14 Op. Atty. Gen., 681; 10 Comp. Dec., 281; 12 id., 306; 13 id., 429; 14 id., 607.

[3] United States *v.* Barrows et al., 1 Abbott, 351 (Fed. Cas. No. 14529).

[4] See IX Comp. Dec., 280, 284, where is is said:

"A regulation is usually simply a method of administering a law. Such is the regulation in question. It was made to aid you in the administration of this appropriation and is binding upon your subordinates so long as you do not abrogate or waive it. You are at liberty, in my judgment, to change, modify, or waive it at your pleasure, always provided that you do not violate some law in your changed or modified regulation, or by making such change, modification, or waiver you do not encroach upon or abrogate some contractual right fully vested before notice of such change, modification, or waiver." See also 24 Ct. Cls., 215, 216.

[5] See Lieber on Regulations, War Department Document No. 63. 1898.

the Executive to change, modify, or waive their operation as the public interests may require. Thus *held* that the Secretary of War could, where the interests of the Government demanded it, dispense with the bond required of contractors for military supplies,[1] by Army Regulations (par. 577 of 1910). *C. 2074, Mar., 1896; 17488, Jan. 30 and May 4, 1905.*

II A 1 a. *Held*, that the provision of the act of July 28, 1866 (14 Stat., 338), which, in directing the Secretary of War to prepare and report to Congress at its next session a new set of regulations, added, "the existing regulations to remain in force until Congress shall have acted on said report," meant merely that the same should remain in force *as regulations;* it did not communicate to them the quality or effect of *statutes. R. 33, 666, Jan., 1873; 37, 417, Mar., 1876; 39, 235, Oct., 1877.*

This enactment was but temporary, and was not incorporated in any form in the Revised Statutes. (It expired at the end of the second session of the Thirty-ninth Congress, no code of regulations having been reported to that Congress by the Secretary of War as required by the act.) Meanwhile the regulations in force in July, 1866, have been very considerably modified and added to.[2] Thus there is now existing statutory sanction—such as that of section 1547, R. S., in regard to the regulations of the Navy [3]—for the Army Regulations as a whole. No such sanction, however, or recognition, is *necessary* to give effect to regulations proper. *R. 39, 235, Oct., 1877.*

II A 1 b. Army regulations proper are executive or administrative rules and directions as distinguished from statutes.[4] A regulation in conflict with an existing act of Congress can have no legal effect; if, subsequently to the issue of a regulation, an act is passed with which

---

[1] This does not apply to contracts for public work, as to which a bond is required by statute for the protection of labor and material men.

[2] The opinion expressed by the Attorney General (14 Op., 164, 173—January, 1873) that by the act of 1866, "the authority to modify" the then existing army regulations, "previously possessed by the Executive," under the act of Apr. 24, 1816, "would seem to have been taken away," was apparently not concurred in by the Secretary of War, repeated modifications of these regulations having been published in orders since (as well as before) the date of this opinion. In United States *v.* Eliason, 16 Peters, 296, 301, the Supreme Court, referring to the general power of the Executive to institute army regulations, observes: "The power to establish implies, necessarily, the power to modify * * * or create anew."

[3] This section is as follows: "The orders, regulations, and instructions issued by the Secretary of the Navy prior to July 14, 1862, with such alterations as he may since have adopted, with the approval of the President, shall be recognized as the regulations of the Navy subject to alterations adopted in the same manner."

[4] Army regulations are not to be confounded with the "rules for the government and regulation of the land (and naval) forces," which Congress is empowered to make, by sec. 8, Art. I of the Constitution; these being, of course, *statutory* rules. The use in this section of the word "regulation;" the fact that the published Army Regulations contain sundry statutory provisions not distinguished from the mass of regulations proper, and embrace also some subjects which seem scarcely within the scope of executive direction or military orders, but to pertain rather to the province of the statute law; and the further fact that the Army Regulations as a body received a special recognition in the act of July 28, 1866—these circumstances have contributed to confuse regulations with statutes much to the embarrassment of the student of military law. Regulations proper (unlike articles of war, which are statutes) are simply orders and directions made and published to the Army by the President, either as Commander in Chief, for the purposes of the exercise of command over the Army, or as Executive, for the purposes of the execution of powers vested in him by law.

the regulation conflicts, it becomes at once inoperative.[1] *R. 38, 255, Aug., 1876, and 641, June, 1877; 53, 7, Sept., 1886; P. 43, 422, Nov., 1890; 49, 276, Sept., 1891; 60, 471, July, 1893; 65, 187, June, 1894. C. 1572, July, 1895; 1939, Dec., 1895; 2065, Feb., 1896; 3305, Feb. 10, 1898; 18356, July 28, 1905; 20444, Oct. 2, 1906.*

II A 1 c. An authority which can legally be vested by legislation only can not of course be conferred by an executive regulation. Thus *held*, that the expenditure of the proceeds of the sale of articles manufactured by the prisoners at the military prison, such proceeds being public funds, could not properly be the subject of an Army regulation. *R. 42, 24, Oct., 1878.*

II A 1 d. There is a large mass of matters over which the Executive would have jurisdiction if Congress, with its superior jurisdiction (under the constitutional power to raise armies and to make rules for the government and regulation of the land and naval forces) had not occupied the field. In all such cases, to the extent that Congress regulates the subject, the power of the Executive to act in regard to it is taken away. Thus Congress, by section 1102, R. S., prescribed that each Cavalry regiment shall consist of 12 troops. To "skeletonize" some of these troops—that is, to discontinue them for a time—would be practically to change the statutory organization, and whether this can be done by executive order, in the absence of statutory authority, is open to serious doubt. *C. 3606, Oct., 1897.*

II A 1 e (1). There is no statutory authority for making a regulation placing civilian employees of the Government on the same footing as discharged soldiers with regard to rations while under treatment in hospital, but neither is there statutory authority for the regulation in regard to discharged soldiers. The best that can be said of such regulations, like the orders of the War Department for issue of rations to sufferers from flood and famine, is that they are founded on a kind of necessity. Undoubtedly they should be authorized by statute. *C. 9491, Dec., 1900.*

II A 1 f. *Held*, that the Army Regulations, like statutes, are not to be given a retroactive effect unless the language used clearly requires it. *P. 28, 260, Nov., 1888.*

II A 1 g (1). It is questionable whether the somewhat restricted power vested in the President to prepare and promulgate regulations

---

[1] As illustrating the distinction between statutes and regulations, and the principle that regulations can have force only so far as they are not inconsistent with the statute law, see United States *v.* Webster, Daveis, 38, 56–59, and 2 Ware, 46, 54–60; Boody *v.* United States, 1 Wood. & Minot, 150, 164; McCall's case, 5 Phila., 259; *In re* Griner, 16 Wis., 447; Magruder *v.* United States, Devereux (Ct. Cls.), 148; 1 Op. Atty. Gen., 469; 4 *id.*, 56–63, 223, 225–7; 6 *id.*, 10, 211, 215, 357, 365; 8 *id.*, 335, 343; 11 *id.*, 251, 254; O'Brien, 31; also 22 Op. Atty., 54.

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

That regulations promulgated through the Secretary of War are to be "received as the acts of the Executive,"—see United States *v.* Eliason, 16 Peters, 291, 301; United States *v.* Webster, Daveis, 38, 59; United States *v.* Freeman, 1 Wood. & Minot, 45, 50–51; Lockington's case, Brightly, 288; McCall's case, 5 Phila., 289; In matter of Spangler, 11 Mich., 298, 322.

See also, for an exhaustive discussion of this subject and citation of authorities, "Remarks on the Army Regulations and Executive Regulations in General," by G. Norman Lieber, Judge Advocate General, U. S. Army, War Dept. Document No. 63 1898.

in furtherance of statutes can be construed to extend to subjects the control of which is expressly vested in Congress by the Constitution, but in respect to which that body has failed to legislate. Such an exercise of power to legislate in the form of executive regulation is at least of doubtful validity and should not be attempted. *C. 14749, June 1, 1903.*

CROSS REFERENCE.

Construction directory.....See VOLUNTEER ARMY IV D 1 a (2) (*b*) [2].
ENLISTMENT I A 9 f (5).
Construction, general words following special.....See APPROPRIATIONS XI.
Construction mandatory.....See VOLUNTEER ARMY IV D 1 a (2) (*b*) [1].
Construction, reasonable.....See RETIREMENT II A 4 c.
Construction, remarks before congressional committee.....See APPROPRIATIONS LXIV.
Enemy's, during war.....See WAR I C 7 a.
Military government.....See WAR I C 8 a (1) to (2).
Operative on reservations.....See PUBLIC PROPERTY V H to I.
Pardon, violation of State.....See PARDON III B.
State considered by military commission.....See WAR I C 8 a (3) (*e*).
State forbidding soldiers carrying arms is inoperative.....See GOVERNMENT AGENCIES V.

LAW OF WAR.

See WAR I C to D.
Martial law.....See WAR I E to D.

LEASE.

See PUBLIC PROPERTY VII to VIII.
Abrogation of.....See CLAIMS VII C 3.
Fraudulent.....See ARTICLES OF WAR LX A 5.
Quarters, heat, and light.....See PAY AND ALLOWANCES II A 1 d (1); (2).
Implied.....See CLAIMS IV.
Land.....See MILITIA VI B 2 a.
NAVIGABLE WATERS X D 2.
Maneuvers.....See CLAIMS XII L.
Provision for repairs.....See PUBLIC MONEY XI.
Public property to private persons.....See TAX III E.
Target ranges for militia.....See MILITIA VI C 1 c to d.

LESSER INCLUDED OFFENSE.

See DESERTION XI.
DISCIPLINE XV F 2.
Finding of.....See DISCIPLINE XII A 6 to 7.

LETTERS.

See COMMUNICATIONS II A 1 to 4.
Part of bids.....See CONTRACTS VI F.

LICENSE.

See PUBLIC PROPERTY VIII to IX.
Ex-soldiers not exempt from for peddling...See TAX I G.
Local for selling.....See TAX III M.
Occupy public land.....See PUBLIC PROPERTY I B.
Residence, retired soldier on reservation.....See RETIREMENT II B 4 b.
Revocable.....See PUBLIC PROPERTY I A 2.
River and harbor work.....See NAVIGABLE WATERS X E to F.
Theater ticket.....See UNIFORM I B 2 a.
Trade in Indian country.....See INTOXICANTS III B.

LIEN.

Admiralty.....See CLAIMS VI F.
Labor can not have, on public property.....See CONTRACT XX A.
On wreck for cost of removal.....See NAVIGABLE WATERS VII C 1; 2.
Taxes on land.....See TAX III B.

LIFE-SAVING MEDAL.

See INSIGNIA OF MERIT I B.

LINEAL RANK.

See RANK III to IV.

LINE OF DUTY.

I. OFFICERS. (See RETIREMENT.)
II. ENLISTED MEN.
A. RULE—DISABILITY IS IN LINE OF DUTY UNLESS SURGEON KNOWS TO CONTRARY..... *Page 686*
1. Surgeon and company commander must investigate cause.
a. Misconduct not required to render cause not in line of duty.
b. Contributory negligence.
(1) Rule of ordinary prudence.
(2) Rule of gross carelessness.
(*a*) Negligence short of culpable contributory negligence.
c. Athletic sports.
(1) Line of duty status.
d. Prisoner (line of duty status)..... *Page 687*
(1) Insanity cause of confinement.
e. When absent.
(1) Pass (line of duty status).
(*a*) Unauthorized act.
(2) Hunting pass..... *Page 688*
(3) Furlough (not line of duty status).
2. Pension law.
a. Rule—law beneficial, therefore liberal construction.
(1) Rule of gross carelessness.
(2) Rule of infraction of discipline.
(*a*) Offense serious.
(*b*) Offense not serious.
[1] Soldier frozen..... *Page 689*
[2] Accidental discharge of gun.
(3) Prisoner.
(4) When absent.
(*a*) Furlough not duty status.
[1] Sick furlough—duty status..... *Page 690*
[2] Veteran furlough.
3. Resection law.
a. Surgeon General decides whether disability is in line of duty.
(1) But can not divest persons of right to claim artificial limb.
(2) Applies to mechanics, etc., at arsenals.
b. Rights accrue triennially.
4. Bounty laws..... *Page 691*
a. Legislative rule in act of April 12, 1866.
III. ACT OF MAY 11, 1908 (35 STAT. 108). (See GRATUITY.)

II A. *Held*, that the rule may be followed which was laid down in a circular dated May 11, 1893, from the Surgeon General's Office, as approved by the Secretary of War, which provided that "It is just to assume that all diseases contracted or injuries received while an officer or soldier is in the military service of the United States occur in the line of duty unless the surgeon knows, first, that the disease or injury existed before entering the service; second, that it was contracted while absent from duty on furlough or otherwise; or third, that it occurred in consequence of willful neglect or immoral conduct of the sick man himself."[1] *C. 2474, Aug. 3, 1896.*

II A 1. In a case of alleged disability the company commander and post surgeon are required to investigate the circumstances connected therewith and to determine, as a result of such investigation, whether the disability was or was not incurred in the line of duty.[2] *Held*, that such a determination of fact reached by military officers in the performance of their duty would under ordinary circumstances be regarded as conclusive, provided, always, that when possible the man has been accorded a hearing. *C. 13077, Aug. 26, 1092; 17202, Dec. 1, 1904.*

II A 1 a. Disability, though not caused by misconduct, may be caused by something outside of the line of duty, as, for instance, loss of life while trying to save another's life. *C. 101, July 28, 1894; 12423, Apr. 19, 1902.*

II A 1 b (1). In cases of apparent contributory negligence, *held*, that the disability is in line of duty if the soldier has used that reasonable degree of care and diligence which a man of ordinary prudence and capacity might be expected to exercise under the same circumstances.[3] *C. 12370, Apr. 21, 1902.*

II A 1 b (2). *Held*, that the rule with respect to contributory negligence can not be applied in all its strictness in determining the question whether a soldier's injuries have been received in the line of duty, but that injuries caused by gross carelessness are not in line of duty. *Held*, further, that beyond this it is not safe to lay down any rule, but best to leave each case to be determined upon its own merits. *C. 2474, Aug. 3, 1896.*

II A 1 b (2) (*a*). *Held*, that certain acts may, in a measure, be contributory causes of disability and yet not to such a degree as to bring the case within the general rule of contributory negligence, as when the disability is the result of negligence, but the negligence is not of such a degree as to amount to *culpable* contributory negligence. *C. 2658, Oct. 15, 1896; 2474, Aug. 3, 1896, and Feb. 7, 1907.*

II A 1 c. Encouragement of athletic pursuits as a part of the training of the Army has advanced by long strides during recent years. A soldier's physical as well as moral welfare are benefited thereby. Among athletic contests there is no game more encouraged as tending toward military training and the proper military spirit and the under-

[1] See footnote, p. 99, Manual for Courts-Martial, Revised Edition, 1908.

[2] They should remember that if possible they are to record facts, and that their opinions are only evidence which is neither conclusive nor exclusive proof. See 7 Op. Atty. Gen., 165.

[3] Am. and Eng. Enc. of Law, vol. 7, p. 380, note 1.

See VI, Comp. Dec., 794, in which it was held that a soldier's death caused by his attempt to "run the guard" was not in the line of duty within the meaning of the act of Mar. 3, 1899 (30 Stat. 1070), which provides for the transportation and burial of remains.

standing of discipline than the game of football. *Held*, that injuries received in athletic sports properly indulged in by officers and enlisted men while in camp or garrison are incurred in the line of duty. *Held*, further, that in view of the fact that football is a contest which requires return games, a soldier's status while engaged in such return game away from the reservation is as much that of line of duty as though he were playing on the parade ground of his own post. *Held*, therefore, that if he should be disabled in a duly authorized football game away from his reservation such disability would be in line of duty. *C. 24398, Feb. 13, 1909.*

II A 1 d. A soldier is not taken out of the line of duty by the fact of his being in arrest or confinement, even though that is not the kind of military duty for which he was enlisted.[1] Thus, *held*, that a military prisoner who incurred a disability while aiding the guard in suppressing a mutiny incurred his disability in line of duty. *Held also* that if the prisoner incurs disability while at work, without contributory negligence, it would be in line of duty. *Held also* that if the prisoner becomes disabled simply as a result of the confinement (for example, rheumatism), it is in line of duty. A deserter who had surrendered and was being conveyed as a prisoner on board a Government transport was killed by the explosion of the boilers. *Held*, that his death occurred in the line of duty. *C. 2658, Oct. 15, 1890; 3063, Apr. 1, 1897.*

II A 1 d (1). A soldier who was confined in the guardhouse brooded over his confinement until he became insane. The surgeon marked the insanity "not in line of duty" for the reason that the insanity was due to the confinement and the confinement was due to the soldier's misconduct. *Held*, that the insanity was in line of duty and that to urge that it was not in line of duty because he was confined due to his own misconduct, would be no more reasonable than to hold that he was confined because of original sin, i. e., that as a cause for the insanity the misconduct was too remote. *C. 25809, Nov. 20, 1909.*

II A 1 e (1). It is an essential incident in the operation of a "pass" that the permission to be absent should not be for more than 24 hours, i. e., for such a length of time as to operate to remove the soldier from the possibility of being called for the performance of the more important duties for which he is expected to hold himself in constant readiness. Men on pass are thus not removed from the list of those who are "present for duty" on the rolls. *Held*, therefore, that to regard a man on pass as "absent with leave" or "on furlough" would work a serious injury in respect to the soldier who is in the immediate neighborhood of the post and subject to call for duty if needed, and whose status therefore while on pass is, in the general case, in line of duty. *C. 15600, Dec. 10, 1903; 2658, Oct. 16, 1896; 17202, Dec. 1, 1902; 23666, Sept. 21, 1909, and Sept. 8, 1910; 24393, May 7, June 1, and Oct. 3, 1910; 26949, June 23, 1910.*

II A 1 e (1) (*a*). An enlisted man while on pass for the purpose of bathing, discharged a borrowed .22-caliber rifle and was thereby injured by the blowing open of the breech block. *Held*, that although

[1] See VI Comp Dec., 453, in which it was held that a soldier in confinement serving sentence is not on duty for the purpose, if he dies, of having his remains after interment at Government expense, exhumed and transported under the act of Mar. 3, 1899 (30 Stat. 1070), which makes provision in case of death on duty, in the field, or at military posts, or on the frontiers, or when traveling under orders.

he was in a status of duty the act was unauthorized and the resulting disability was not incurred in line of duty. *C. 2658, Mar. 25, 1910.*

II A 1 e (2). What are known as "hunting passes," which are provided for in Army Regulations, are privileges for the purpose of hunting game, the purpose of which is principally instruction in small-arms practice. *Held,* that this status falls within the description of duty in respect of any injuries received or disabilities incurred while so engaged. *Held, further,* that the character of the instrument with regard to "line of duty," in the operation of which the soldier absents himself, should be determined by the duration of the absence and the status created rather than by its name. *C. 15600, Dec. 10, 1903; 23666, Sept 8, 1910; 24393, Oct. 3, 1910.*

II A 1 e (3). *Held,* that a soldier when on furlough may be in line of duty as when en route to his station, or when during his furlough he is, in compliance with orders, on his way to a place to report his whereabouts.[1] *C. 2658, Oct. 15, 1896.*

II A 2 a. The term employed in the pension laws—"in the line of duty"—is much more comprehensive than the term "on duty," as used in the thirty-eighth article of war. Its application is not limited to a status of actual present performance of some specific military duty, but it relates to a condition under which military duty may be regularly performed in contradistinction to a condition inconsistent with the performance of any ordinary duty—such as the condition of being on leave of absence or of being retired. These laws being beneficial in their character, the term is to be construed so as to advance the benefit rather than to restrict it.[2] *R. 41, 257, June 10, 1878; 51, 347, Jan. 13, 1887; C. 3063, Mar. 31, 1897; 14627, May 8, 1903.*

II A 2 a (1). *Held,* that gross carelessness by a soldier renders his title to a pension from an injury resulting from such carelessness questionable on the ground of contributory negligence. *C. 2474, Aug. 3, 1896.*

II A 2 a (2) (*a*). Two soldiers engaged in a scuffle, in which one was permanently injured. *Held,* that the scuffle was not in the performance of military duty, but was in fact an infraction of military

[1] See VI Comp. Dec., 343, in which it was held that the death of a soldier on furlough was not "on duty" within the meaning of the act of Mar.3, 1899 (30 Stat. 1070), which provided for interment at public expense. But see XII Comp. Dec., 562, in which it was held that if a furlough is terminated by a competent order to enter a hospital as a patient the expense of the treatment is authorized under the acts of Apr. 23, 1904 (33 Stat. 272), and Mar. 2, 1905 (33 Stat. 838.)

[2] See 1 Op. Atty. Gen., 182; 7 id., 166.

The most satisfactory definition of line of duty given, was by the Hon. Caleb Cushing, Attorney General, in his exhaustive opinion on line of duty with regard to pensions, which reads as follows: "He who contracts disease or dies in consequence of the ordinary performance of his military duty, or in the performance of any special act of military duty, whether at the moment of performance he was on duty or off duty, in active service, or on furlough, of habits virtuous or habits vicious, gallantly fighting his country's enemy or expiating an offense in the guardhouse or prison bay, he, I say, who in this or under other circumstances contracts disease in the performance of an act of duty contracts it "in the line of duty." (7 Op. Atty. Gen., 161.)

See also 17 Op. Atty. Gen., 173, in which the Attorney General states that as Congress, since the publication of the above opinion of Attorney General Cushing, has not seen proper to substitute any other expression "we are justified in concluding that it stands in the statutes invested with the meaning expressed by Mr. Cushing."

The Interior Department ordinarily decides for itself whether, for pension purposes, a death or disability was incurred in the line of duty.

discipline within the meaning of the twenty-fourth article of war and the sixty-second article of war, and that the injury was not incurred in the line of duty for pensionable purposes.[1] *C. 13017, July 25, 1902; P. 58, 10, Feb. 8, 1893; 61, 188, Aug. 25, 1893; C. 13067, Aug. 14, 1902; 13357, Sept. 24, 1902; 26696, May 10, 1910; 25748, Mar. 14, 1911.*

II A 2 **a** (2) (*b*) [1]. A soldier went outside of the reservation line to mail a personal letter, and was frozen so badly that he was permanently disabled for the performance of his duty. *Held,* that the infraction of discipline on the soldier's part for leaving the reservation is not of such a degree as to amount to culpable contributory negligence, and that the disability was incurred in line of duty for pensionable purposes.[2] *C. 13077, Aug. 26, 1902.*

II A 2 **a** (2) (*b*) [2]. *Held,* that a pistol-shot wound caused by the accidental discharge of the weapon while the soldier was engaged in cleaning the same for use in the performance of special duty, being unattended by contributory negligence, was in the line of duty for pensionable purposes. *C. 2474, Aug. 3, 1896.*

II A 2 **a** (3). As it is a part of the military duty of a soldier to submit to such punishment as may be awarded him for the commission of a military offense, *held,* that he is not necessarily out of the line of duty when in confinement. *Held, further,* that if he receives an injury which was in fact a casualty of the service not incurred by his own fault or negligence pending such confinement his claim for pension should not be prejudiced.[3] *R. 41, 257, June 10, 1878; C. 3063, Mar. 31, 1897; 14627, May 8, 1903.*

II A 2 **a** (4) (*a*). A soldier, while on furlough, became permanently disabled for the performance of his duty. *Held,* that in view of the provision of section 4694, R. S., the disability was not incurred in line of duty for pensionable purposes, since the soldier was not, at the time, in the field, on the march, at a post, fort, or garrison, or en

---

[1] See 2 Op. Atty. Gen., 589, also 7 id., 153, in which it was held that "No man, it is clear, is acting in the line of duty, while the act he performs is a violation of his duty," but also held in same opinion that a soldier "who is laboring under all the worst effects of vicious indulgence, and subject to die at any moment of disease occasioned by that cause, may yet happen to die of other disease contracted, or by casualty occurring, or of injury received while indubitably in line of his duty; and so transmit a right to pension."

[2] See 7 Op. Atty. Gen., p. 166, where it was said: "If called upon to suggest any rule for the guidance of his discretion in the matter, it would be obvious for you to say that the pension laws are beneficial in their nature, and therefore to be construed beneficially in matters of inevitable doubt. In this view, it seems to me, not that the mere fact of an officer having died in the service, and with utter absence of proof as to the origin or cause of his death, suffices to raise a pension; but that where the proofs are balanced, and it is impossible to determine by them as to the fact of 'disease contracted,' and the fact of 'line of duty,' found in juxtaposition, whether this collocation be of contiguity only, or of actor and subject, of contemporaneity or sequence, only, or of cause and consequence, it would be reasonable to presume in favor of the pension; and also to presume in favor of the pension in cases where the line of duty appears to enter potentially into the causes of the death, although it should happen not to be certainly provable that it was the exclusive or predominant cause, so that a possible error of absolute and mere uncertainty shall not be suffered to defeat the liberal intentions and beneficial policy of the Government."

[3] See 7 Op. Atty. Gen., 154, in which it was held that a soldier "under arrest" or "in confinement" is not discharged from the obligation of duty, and is occasionally called upon to perform duty in which he may distinguish himself, and die honorably; and leave a right of pension to his widow or children.

route, by direction of competent authority, to some post, fort, or garrison.[1] *C. 13357, Sept. 29, 1902; 26949, June 23, 1910.*

II A 2 a (4) (*a*) [1]. It has uniformly been ruled, in the administration of the pension laws, that a soldier absent from his command on *sick furlough* remained "in the line of duty." So, in the case of a volunteer soldier who had been given a sick furlough for twenty days, and was disabled by the kick of a horse so that he could not return, *held*, that if the disability was incurred before the expiration of his furlough, he was then "in the line of duty" within the meaning of the act of March 2, 1889 (25 Stat. 869), providing for the removal of the charge of desertion in certain cases. *P. 44, 462, Jan., 1891.*

II A 2 a (4) (*a*) [2.] Section 4700, R. S., puts enlisted men "on veteran furlough with the organization to which they belong" upon the same footing as men on sick furlough. So, *held*, that a volunteer soldier furloughed with the rest of the organization to which he belonged might also properly be considered as "in the line of duty," while absent from his command on such furlough, within the meaning of the act of March 2, 1889. *P. 47, 448, June, 1891.*

II A 3. Section 4787, R. S., and the acts of August 15, 1876 (19 Stat. 203), February 27, 1877 (19 Stat. 252), and March 3, 1891 (26 Stat. 1103), provide that artificial limbs shall be issued in cases of injury in line of duty. *Held*, that under these laws the Surgeon General is specifically designated as the authority to pass on the question for this purpose of deciding whether the disability was or was not incurred in line of duty. *C. 24221, Dec. 15, 1908, and Jan. 16, 1909.*

II A 3 a (1). *Held*, that the act of August 15, 1876 (19 Stat. 203), authorizing the Surgeon General of the Army to prescribe regulations under which persons shall receive artificial limbs, etc., referred only to regulations auxiliary to the act and designed to give it effect, and did not empower him to divest persons of the right of prosecuting claims for the same. *R. 49, 225, July, 1885.*

II A 3 a (2). The description, "hired men of the land forces," employed in the act of February 27, 1877 (19 Stat. 252), amending section 4787, R. S., may properly be construed to include the mechanics and laborers employed at arsenals by the authority of the provisions of Title XVII of the Revised Statutes. *R. 39, 316, Nov., 1877.*

II A 3 b. *Held*, that the effect of section 4787, R. S., as amended by the act of March 3, 1891 (26 Stat. 1103), was as follows: 1. All persons entitled to be furnished by the War Department with artificial limbs or apparatus for resection, in whose cases three or more years (and less than five years) had, on March 3, 1891, fully elapsed since the date of their last legal receipt of a limb, etc., became entitled,

---

[1] See 7 Op. Atty. Gen., 154, in which it is held that a soldier, while absent by authority may occasionally be called upon to perform duty and thereby acquire a pensionable status. On page 163 of same opinion it is held that:

"When it is remembered that no commissioned officer or enlisted soldier, seaman, or marine has power to cast off his obligation at will; that whether he be on duty or off, in glory or in disgrace, still the banner of his country is over him and its oath upon his conscience; when this great fact shall be remembered, it must be inevitable to concede that any rule, based on the assumption of its being impossible for an officer or soldier on furlough, on leave of absence, in arrest, under sentence, to perform acts, suffer casualties, receive wounds, or incur causes of disease in the line of his duty, is not a truth, and, like all things not true, can not be conformable to justice or wisdom."

on said March 3, 1891, to receive at once a new limb, as of the end of the third year from such receipt, and further to receive another new limb at the end of three years from the completion of said third year, and so on. 2. All persons who have received a limb, etc., on March 3, 1888, or on any subsequent date prior to the date of the act of March 3, 1891, became entitled to a new limb on March 3, 1891, or other date three years succeeding such receipt, and again on March 3, 1894, or at the end of a further three years, and so on. 3. The act of 1891, being prospective in terms, can not be construed as operating retrospectively or as authorizing a revision of former quinquennial receipts or money payments as their equivalents. 4. There is nothing in the amending act of 1891 to repeal, or affect the operation of, the provisions of section 4788 or 4790, R. S., in regard to payments of money in lieu of delivery of limbs. These provisions are held clearly to apply to triennial rights equally and in the same manner as they applied to quinquennial.[1] *P. 46, 58, Mar., 1891.*

II A 4. Formerly the expression "line of duty" was more strictly construed than latterly, but the earlier construction has not been adopted in practice. By section 4 of the act of March 3, 1865 (13 Stat. 488), it was provided "that every noncommissioned officer, private, or other person, who has been or shall hereafter be discharged from the Army of the United States by reason of wounds received in battle, or skirmish, on picket, or in action, or in the line of duty shall be entitled to receive the same bounty as if he had served out his full term." And by an act approved April 12, 1866, it was declared, "that the true intent and meaning of the words 'or in the line of duty,' used in the fourth section of the act approved March 3, 1865, * * * requires that the benefit of the provision of said section shall be extended to any enlisted man or other person entitled by law to bounty who has been or may be discharged by reason of a wound received while actually in service under military orders, not at the time on furlough or leave of absence, nor engaged in any unlawful or unauthorized act or pursuit." For the purpose of the earlier legislation this legislative construction is conclusive, but it is not necessarily so in determining the soldier's condition or military status in other cases; for example, as to his right of admission to the soldiers' home. A further limitation has been in practice recognized, viz, that the disability must not be the result of the unlawful or unauthorized act as a direct or contributory cause. The principle as stated in the act of April 12, 1866, modified by the limitation just stated, is as accurate a general statement of the meaning in military administration of the expression "in the line of duty" as can be given. It is, however, subject to exceptions. *C. 2658, Oct. 15, 1896.*

CROSS REFERENCE.

See GRATUITY I A to B.
Determined by retiring board.....See RETIREMENT I B 2 d; e.
Disability contracted in.....See DISCHARGE V A; XX D i.
Finding by examining board.....See RETIREMENT I B 6 b to d.
Insanity.....See DISCHARGE XIII D 4 a.
INSANITY I D.
Pass.....See CLAIMS VIII.
Sick soldier retained in service.....See ENLISTMENT I B 2 i.
Status of.....See ABSENCE I B 1 b (1).

[1] Compare 20 Op. Atty. Gen., 83.

LIQUIDATED DAMAGES.

See CONTRACTS XVIII to XX.

LOAN.

Company-fund money not authorized.....See GOVERNMENT AGENCIES III A 3.
Money at usurious rates.....See CIVILIAN EMPLOYEES XVI A.
Property to militia not authorized.....See MILITIA IX C; XVI I 5; 6.

LOSS OF RANK.

See RANK II A 3 a to d; III A; V to VI.
Failure in promotion.....See RETIREMENT I B 6 c to d.
Pardon of.....See PARDON IV to V.
RANK II A 3 b to c.
Suspension, effect on pay.....See PAY AND ALLOWANCES III A 2 a.

MACHINE-GUN PLATOON.

Militia.....See MILITIA III C.

MAKE GOOD TIME LOST.

See ARTICLES OF WAR XLVIII A to F; CIII F 4.
ABSENCE II B 9; 9 a.
DESERTION XV B 2.
Discharge after.....See DISCHARGE XIII B 1.

MALPRACTICE.

See ARTICLES OF WAR LXII D.

MANEUVERS.

Damage to property during.....See CLAIMS II.
Lease of land for.....See CLAIMS XII A.
Liquor at.....See INTOXICANTS II D.
Post exchange at.....See MILITIA XV A.

MANSLAUGHTER.

See ARTICLES OF WAR LXII B; F; CII C 2.
Punishment for.....See ARTICLES OF WAR XCVII E.

MARINE CORPS.

Enlistment of deserter from.....See ENLISTMENT I A 9 e.
Previous service in.....See ENLISTMENT I D 2 b.
DISCHARGE VI D 7.
Retirement of soldier.....See RETIREMENT II A 2.

MARINE OFFICER.

Eligibility to command.....See COMMAND I B; IV A.
ARTICLES OF WAR CXXII A.
Trial of.....See ARTICLES OF WAR LXXVIII A.

MARITIME CAPTURE.

See CLAIMS VII F.

MARRIAGE.

Enlisted men.....See COMMAND V A 2 a.
Polygamous.....See ARTICLES OF WAR LXI B 12.
Refusal of soldier to contract.....See ARTICLES OF WAR XXI C 2 b.

MARRIED MAN.

Beneficiary of.....See GRATUITY I B 1; 4.
Enlistment of.....See ENLISTMENT I A 9 f (7) (*a*); 10; 11.

MARRIED WOMEN.

As surety.....See BONDS I M 14.
Removal from post.....See COMMAND V A 3 d (2).

MARTIAL LAW.

See WAR I E to F.
See ARMY II I 3 b.

MEDAL OF HONOR.

See INSIGNIA OF MERIT I A to B.

MEDALS.

See INSIGNIA OF MERIT I to II.

MEDICAL DEPARTMENT.

See ARMY I G 3 d to h.
Appointments to.....See OFFICE III A 1 c (2); 6 c.
RANK I B 1 c to d.
Examination of officers.....See RETIREMENT I B 6 c (4); 7 a.

MEDICAL RESERVE CORPS.

See ARMY I G 3 d (3) to (4).

MEDICAL SERVICE.

Absentees.....See CLAIMS VIII.
Militiamen.....See MILITIA VI B 1 e (4); (5).

MEMBER OF COURT OR BOARD.

See DISCIPLINE VI A to G 3.
RETIREMENT I B 1 d (1).
As witness.....See DISCIPLINE X A 2.
Detail of.....See ARTICLES OF WAR LXXII D 1.
DISCIPLINE III C 1 a to f.

MESS.

Officers.....See ARMY I G 3 b (3) (*a*) [1].
INTOXICANTS II C.

MESS SERGEANTS.

Detail of, in Hospital Corps.....See ARMY I G 3 d (5) (*b*).

MEXICO.

Arrest of deserter in.....See DESERTION V F 8.
Extradition.....See DESERTION IV A; B.
EXTRADITION II to III.
Neutrality.....See ARMY II K to L.

MILEAGE.

See PAY MANUAL.
Appropriations for.....See APPROPRIATIONS XIX.
Cadets not entitled to.....See ARMY I D 5.

MILITARY ACADEMY.

See RESIDENCE.
ARMY I D to E.
Appointments from.....See OFFICE III A 1 a; 6 a (1).
Appointments for.....See APPROPRIATIONS XXII.
Appointments to.....See OFFICE III A 4 a.
Bond of treasurer.....See BONDS II P.
Hazing.....See ARMY I D 3 b (2) (*a*).
Leaves of instructors.....See ABSENCE I B 1 g (1).
Master of the sword.....See OFFICE III E 3.
RANK II C 1.

MILITARY ATTACHÉ.

Entertainment of, at State camp.....See MILITIA VI B 1 e (9).

MILITARY COMMISSION.

See WAR I C 8 a (3) to (4).
Copy of record to accused.....See ARTICLES OF WAR CXIV A.
Jurisdiction of.....See DISCIPLINE III E 3 b.
Porto Rico.....See APPROPRIATIONS LXI.

MILITARY CONTROL.

Volunteers after muster out of organization..See VOLUNTEER ARMY IV C to D; D2 a (3).

MILITARY COURTS.

See DISCIPLINE.
Appropriations for.....See APPROPRIATIONS XXV.

MILITARY GOVERNMENT.

Bonds of officers under.....See BONDS II O.
Civil administration during.....See CLAIMS VII E.
Customs.....See PUBLIC MONEY II.
Law of war.....See WAR I C 1; C 8 to 9.
Regular officer holding civil office.....See OFFICE IV A 2 e (6) to (7).

MILITARY INSTRUCTION.

I. OF THE ARMY.
A. AT UNITED STATES MILITARY ACADEMY. (See ARMY I D to E.)
B. AT SERVICE SCHOOLS. (See "ABSENCE.")

II. OF CIVILIANS.

A. Of the National Guard. (See "Militia.")

B. Of College Students.

1. Details of Army officers to colleges.
   - a. Retired officers ..... *Page 695*
   - b. More than one officer may be detailed.
   - c. Private schools not included.
   - d. May be detailed in Philippines.
   - e. Single detail limited to four years.
   - f. Retired officers may be detailed to high schools..... *Page 696*
   - g. May be detailed in Porto Rico.

2. Furnishing arms, etc.
   - a. Furnished only to colleges to which officers have been detailed.
   - b. Governor should approve requisition.
   - c. The responsible officer must render returns.
   - d. Rights of U. S., protected if arms are damaged..... *Page 697*
   - e. Return of arms.
     - (1) Letter signed by Chief of Ordnance.

II B 1 a. *Held,* that the limitation placed by section 1225 R. S., as amended by the act of November 3, 1893 (28 Stat. 7), on the number of officers who may be detailed as instructors at colleges is not exclusive of retired officers.[1] *R. 37, 201, Dec., 1875.*

II B 1 b. *Held,* that more than one officer may be detailed at the same time to one institution. *C. 23701, Aug. 11, 1908.*

II B 1 c. The act of September 26, 1888, chapter 1037, in amending section 1225, R. S., authorizes the detail of officers and issue of arms to "any established military institute, seminary or academy, college or university." *Held,* that the term "established," construed in connection with the terms of the previous legislation on this subject, was to be interpreted as including incorporated institutions or those established by law, such as State institutions, and that an unincorporated private school or other institution of learning was not to be regarded as "established" in the sense of this statute. Thus, *held,* that an unincorporated academy, owned and controlled by a partnership, was of the class of private institutions to which a detail of an officer as professor, or an issue of ordnance, could not legally be made. *P. 64, 442, Apr., 1894; 65, 67, May, 1894.*

II B 1 d. Under section 1225, R. S., officers of the Army may be detailed for duty at a college or university in the Philippine Islands. *C. 16485, June 21, 1904.*

II B 1 e. The act of November 3, 1893 (28 Stat. 7), restricts the tour of college duty to four years. *Held,* that neither an active nor a retired officer can be employed for a longer period than four consecutive years under a single detail to college duty, and that such four years' detail dates from the original assignment of the retired officer to college duty. During the continuance of his detail, however, he may serve at one or more than one college, but the aggregate period of service comprised within the "detail," as that

[1] Under sec. 1225 R. S. 30 officers could be detailed. This was increased by the act of Sept. 26, 1888 (25 Stat. 491), to 50 from the Army and 10 from the Navy; by the act of Jan. 13, 1891 (26 Stat. 716), to 85; and by the act of Nov. 3, 1893 (28 Stat. 7), to 110, including 10 Navy officers.

term is used in the Act of November 3, 1893, must be limited to four years.[1]

Held, also that the word "detail," as used in the act of November 3, 1893, must be regarded as having been used in the sense ordinarily attributed to it in the military service. The frequency of detail and the interval of time which shall elapse between successive details are incidents which, if not provided by statute, are to be determined by the Secretary of War in regulation or orders prepared for that purpose. The limiting words of the statute were intended to describe the length of a detail, rather than to preclude a reassignment of the officer to the same or similar duty at the expiration of a four years' detail.

If it be desired to assign a retired officer to a second detail, it will be necessary, as the period of detail is rigorously restricted by statute, that the officer should be formally relieved from college duty and subsequently redetailed in appropriate orders from The Adjutant General's office. *C. 13791, Dec. 12, 1902.*

II B 1 f. *Held*, that under the act of February 26, 1901 (31 Stat. 810), a retired Army officer may, with his consent, be detailed to duty with a high school. *C. 24566, Feb. 26, 1909.*

II B 1 g. *Held*, that under section 1225 R. S. an officer of the Army can be detailed as an instructor to a college in Porto Rico and that such detail is in line with the military policy of the United States in the dissemination of military instruction. *C. 27865, Feb. 15, 1911.*

II B 2 a. It has been the general practice of the War Department under section 1225, R. S., as amended by the act of September 26, 1888 (25 Stat. 491), to refuse applications for arms, etc., except when made by some "established military institute, seminary or academy, college or university," to which an army (or naval) officer had been regularly detailed; and this practice is believed to be in accordance with a fair and reasonable interpretation of the statute referred to.[2] *C. 3271, June, 1897; R. 37, 201, Dec. 1875; P. 41, 308, June, 1890; C. 21782, July 15, 1907.*

II B 2 b. *Held*, that the Secretary of War is authorized to issue arms to any college, etc., where either an Army or a Navy officer has been detailed under the provisions of section 1225, R. S., as amended by the act of September 26, 1888 (25 Stat. 491).[3] *P. 38, 201, Jan., 1890. Held*, further that requisitions for such supply of arms and ordnance stores require the approval of the governor of the State or Territory in which the college is located. *C. 18007, Jan. 21, 1910.*

II B 2 c. The official of the college, etc., to whom the ordnance stores issued under this section are intrusted, may properly be required to render the returns indicated in section 1167, R. S., which directs that all "officers, agents or persons" receiving or intrusted with ordnance stores or supplies shall make certain regular returns

---

[1] See VI Comp. Dec., 120.

[2] In 1885 arms were issued to the Washington High School by the Secretary of War; but subsequently under date of Nov. 25, 1890, the then Secretary held, upon an application from the same school for 100 cadet rifles, that there was no authority of law for the issue, and declined to follow the precedent of 1885. At the same time he recommended Congressional action in the matter and Congress by joint resolution approved Feb. 5, 1891, authorized the issue.

[3] If 100 Army officers should be detailed to duty with colleges, under the act of Nov. 3, 1893 (28 Stat. 7), but 10 naval officers could be detailed, since under the provisions of that act the total number of Army and Navy officers is limited to 110, and the number of Army officers which can be detailed is also limited to 100.

of the same according to forms and rules prescribed by the Chief of Ordnance with the approval of the Secretary of War. *R. 42, 282, May, 1879.*

II B 2 d. Where it was found that arms issued by the Government to an institution were, through carelessness, damaged in a stated amount, *held*, that, in default of payment, if it be desired to sue for the damages the bond and sureties may be ignored and suit brought directly against the owners of the institution (academy) alone, or suit may be brought on the bond; or if it be decided to demand, under the regulations of the War Department relating to the issue of arms to colleges, etc., the return of the arms, and the same were not returned in 30 days, the bond could be put in suit and the claim for damages included therewith. *C. 2902, Feb., 1897; 17891, Apr. 22, 1905; 22056, Nov. 25, 1910.*

II B 2 e (1). *Held*, that when it becomes necessary to demand the return of ordnance and ordnance stores which have been issued to institutions of learning under the acts of September 26, 1888 (25 Stat. 491), and the act of April 21, 1904 (33 Stat. 226), the demand is legal if signed by the Chief of Ordnance by authority of the Secretary of War. *C. 19878, June 11, 1906.*

CROSS REFERENCE.

See MILITIA VI to VII.
By retired soldier.....See RETIREMENT II E 2 b.
Civilians by retired officers.....See RETIREMENT I K 3 to 4.

MILITARY NECESSITY.

See CLAIMS VII B to C.
Destruction of property.....See WAR I C 6 h.

MILITARY OCCUPATION.

Cuba.....See WAR I C 8 c to d.
Philippine Islands.....See ARTICLES OF WAR LVIII D.

MILITARY PRISON.

See DISCIPLINE XVII A 4 g to h.
Appropriations for.....See APPROPRIATIONS XXXVI A; B.
Articles manufactured by.....See LAWS II A 1 c.
DISCIPLINE XVII A 4 g (1) to (6).
Labor at.....See EIGHT-HOUR LAW VII.
Prisoners.....See ARTICLES OF WAR CXII A 1 c (1); B; C.

MILITARY RESERVATIONS.

See PUBLIC PROPERTY I A 1; III to IV.
Cutting grass.....See COMMAND V A 3 g.
Cutting wood.....See PUBLIC PROPERTY II F to G.
Grazing.....See PUBLIC PROPERTY VIII E.
Hotel on.....See PUBLIC PROPERTY I A 1.
Intoxicants.....See INTOXICANTS II to III
Jurisdiction.....See ARMY I E 5.
Offenses on.....See ARTICLES OF WAR LXII C 5 a.
Residence of retired soldier.....See RETIREMENT II B 4 b.
Road school tax, civilian employees.....See TAX II to III.
Sale of timber.....See PUBLIC PROPERTY IX A 2 a (3).
School tax.....See TAX IV B.
Ship wrecks.....See CLAIMS VI E.
Shore Line.....See COMMAND V A 3 f.
Squatters.....See PUBLIC PROPERTY II B 3 a; III H to I.
State camp.....See MILITIA VI B 1 c.
Taxations of private property.....See TAX III to IV.
Territorial statutes.....See TERRITORIES I to II.

MILITARY SERVICE.

Making good time lost.....See ARTICLES OF WAR XLVIII E.

MILITIA.

I. CALLING FORTH.
- A. WHAT CONSTITUTES A CALLING FORTH?..... *Page 702*
  1. May not be called forth for drill or in anticipation of war.
- B. THE SECRETARY OF WAR MAY ISSUE THE ORDERS.
- C. MANNER OF CALLING FORTH.
- D. WHEN CALLED FORTH, MEMBERS CAN NOT DECLINE.
- E. CALLED OUTSIDE OF UNITED STATES..... *Page 703*
- F. PRESIDENT SOLE JUDGE OF NECESSITY TO CALL FORTH.

II. MILITIA NOT FEDERAL TROOPS.
- A. WHEN EN ROUTE TO JOINT ENCAMPMENT OVER LAND-GRANT RAILROAD.
  1. When en route to joint encampment by march.
- B. DURING JOINT ENCAMPMENT WITH REGULAR ARMY..... *Page 704*
- C. MEDICAL OFFICERS OF MILITIA CAN NOT MAKE EXAMINATION OF SCHOOL TEACHERS FOR SERVICE IN THE PHILIPPINES.
- D. MEMBERS OF MILITIA CAN NOT BE PROSECUTED UNDER SECTIONS 3748 AND 5438, REVISED STATUTES, FOR SALE OF ARMS.

III. ORGANIZATION.
- A. MUST BE THE SAME AS THAT OF THE REGULAR OR VOLUNTEER ARMY.
- B. OF INFANTRY, CAVALRY, AND FIELD ARTILLERY..... *Page 705*
- C. OF MACHINE GUN PLATOON..... *Page 706*
- D. OF COAST ARTILLERY.
- E. DISCRIMINATION BECAUSE OF COLOR.
- F. OFFICE IS NOT CIVIL OFFICE.
- G. ADJUTANT GENERAL.
- H. QUARTERMASTER GENERAL.
- I. GOVERNOR'S AIDS.
- J. AUTHORIZED PRIVILEGES..... *Page 707*
- K. RETIRED REGULAR SOLDIER ACCEPTS COMMISSION IN MILITIA.
- L. COMPANY OF STUDENTS AT A COLLEGE.

IV. UNAUTHORIZED FORCES.
- A. STATE CAN NOT CREATE FORCE WHICH SHALL BE EXEMPT FROM BEING CALLED FORTH.
- B. VOLUNTARY ORGANIZATIONS.
- C. INSULAR POLICE, PORTO RICO, AND ALASKAN INDIANS..... *Page 708*
- D. INDIAN MILITIA IN INDIAN TERRITORY.
- E. NATIONAL GUARD VETERANS OF OREGON.
- F. HONORARY QUARTERMASTER GENERAL.
- G. DECREPIT OFFICERS.

V. ENLISTMENT.
- A. QUALIFICATIONS FOR, IN MILITIA..... *Page 709*
- B. ENLISTMENT OF MEMBER OF MILITIA IN REGULAR ARMY.

VI. INSTRUCTION.
- A. THEORETICAL INSTRUCTION.
  1. At Regular Army schools..... *Page 710*
  2. By details from Regular Army.
     - a. By Regular officer—active list..... *Page 711*
     - b. By Regular officer—retired..... *Page 712*
     - c. By enlisted man—Regular Army..... *Page 713*
     - d. Philippine Scout officer not eligible for detail.

VI. INSTRUCTION—Continued.
B. FIELD INSTRUCTION.
1. State camps of instruction.
a. Governor selects portion for participation.
b. Governor selects place of instruction ..... *Page 714*
c. Instruction may be given with permission on a military reservation.
d. Subsistence stores may be sold to officers.
e. Disbursing officer.
(1) Not entitled to commutation of quarters in camp.
(2) Purchase of rations.
(3) Hiring of wagon transportation for practice march.
(4) Medical attendance for man en route to camp.
(5) Expense of sending sick man to his home.
(6) Payment for damage to crops..... *Page 715*
(7) Reimburse officers who had purchased transportation to camp.
(8) Reimburse officer whose horse had been foundered in camp.
(9) No fund for entertainment of attachés.
2. Joint camps of instruction with Regular Army.
a. Lease of land for.
b. Relative rank of Regular and Militia officers ..... *Page 716*
c. What constitutes "participation."
d. Payments made by Regular officers.
e. Transportation—how secured.
f. Automobile transportation not allowed in certain cases.
g. Sales, subsistence stores to officers and enlisted men.
h. Allowances limited to "pay, subsistence, and transportation."
i. Fuel for cooking, and hay for bedding..... *Page 717*
j. Baking bread.
k. Bakery profits.
l. Unauthorized bills for transportation, labor, material, board, lodging, transfers, and hospital expenses.
m. Damage to property..... *Page 718*
n. U. S. not responsible for torts of officers ..... *Page 719*
C. TARGET PRACTICE.
1. Acquisition of ranges, etc.
a. By setting aside public land.
b. By purchase.
c. By lease.
(1) Ground for ranges and buildings for galleries, leased and expense of adaptation met..... *Page 720*
(2) Execution of lease.
(3) Lease for several years..... *Page 721*
(4) Insufficient description in lease with actual occupation.
d. Expenses of officer in selecting range.
e. Insurance of buildings on range.
f. Issue of forage to mules used on a range..... *Page 722*
g. Range may be equipped with water plant.
h. United States will not protect use of range.
i. Method of selecting members of property damage boards.

VI. INSTRUCTION—Continued.
C. Target Practice—Continued.
1. Acquisition of ranges, etc.—Continued.
j. Damage to property leased for use as a range.
k. A target range may be rented for use as a pasture.
2. Field practice.
a. Promotion of under Act of June 22, 1906 ..... *Page 723*
b. A State competition is a camp of instruction.
c. The National Match.
D. Inspection.
1. Year preceding allotment is "calendar" year ..... *Page 724*
VII. TRANSPORTATION.
A. Freight, Storage, and Drayage of Equipment for Target Range.
B. Transportation of New Material to Militia and Return of Old to United States.
C. Freight from State Arsenal to Stations of Companies.... *Page 725*
D. Transportation of Target Teams to National Match.
E. When Traveling under War Department Orders Entitled to 50 Per Cent Land-grant Reduction the Same as Regular Troops.
F. Of Armament Foreman of a District ..... *Page 726*
VIII. ARMORY.
A. State's Duty to Provide Armory Facilities.
B. May Not be Used for Drill Purposes by Aliens.
IX. UNITED STATES PROPERTY.
A. Issues.
1. Books, clothing, fire-control equipment, etc.
2. Act of May 27, 1908. (35 Stat., 399.)
a. Armament ..... *Page 727*
B. Sales to a State.
1. Request must be by governor—special cases.
C. Loan of Property to Militia not Authorized..... *Page 728*
D. Governor's Accountability.
E. Repair of Property..... *Page 729*
F. Recovery of Property From Men.
G. Disposition of Condemned Clothing.
H. Surveying Officer.
I. Surveying Officer Requires Affidavits ..... *Page 730*
J. United States Property Carried into Volunteer Service.
X. UNITED STATES FUNDS.
A. How Disbursed.
1. Sec. 1667 Revised Statutes, remain available until expended.
2. Turned over to State on request of governor, and disbursed under his direction, etc.
B. Inspection of Disbursing Officer's Account..... *Page 731*
C. Clerk for Disbursing Officer not Allowed.
D. Hawaii Held to be a Territory for Purpose of Allotment.
E. Veterinary Attention and Care of Horses.
F. Caretaker for United States Property can not be Paid From.
XI. PAY.
A. The Adjutant General of a State.
B. Heads of Staff Department, at State Camps ..... *Page 732*
C. Officers Authorized for Pay at Joint Encampment With Regular Army.
D. Pay of Disbursing Officer.
E. Pay of Assistant Surgeon.

XI. PAY—Continued.
F. Extra Pay for Keeping Horse.
G. Longevity Pay..... Page 733
H. Officer on Special Duty Preparing Camp Ground for Troops.
I. Pay of Members of Damaged Property Board.
K. Officer on Leave.
L. Retired Officers.
M. Decrepit Officers.
N. Pitmen, Markers, etc., of Target Ranges..... Page 734
O. En Route to Rendezvous, Preceding Joint Maneuvers.
P. Members of Rifle Team.
Q. Claim for Pay of Deceased Soldier.
XII. SMALL ARMS, AMMUNITION, AND EQUIPMENT.
A. Exchange of New for Old..... Page 735
B. Issue of Ammunition..... Page 736
XIII. UNIFORM.
A. Federal Control Over.
B. Campaign Badge..... Page 737
XIV. CORRESPONDENCE.
A. Penalty Envelopes.
B. Telegrams..... Page 738
C. Of Disbursing Officer with War Department.
XV. CANTEEN.
A. At State Maneuver Camp Ground.
XVI. NATIONAL GUARD OF DISTRICT OF COLUMBIA.
A. Definition of..... Page 739
B. Disbandment of.
C. Retiring Board.
D. Retirement.
E. Service in, of Government Employees..... Page 740
F. Uniform..... Page 741
G. Property Responsibility.
H. Evidential Value of Certificates of Officers.
I. Supplies.
1. Act of March 1, 1889. (25 Stat., 772)..... Page 742
2. Shares in $2,000,000, clause of act of March 2, 1903. (32 Stat., 942.)
3. Typewriting machines.
4. Furniture.
5. Loan of property to National Guard of District of Columbia by Secretary of War, not authorized..... Page 743
6. Loan of 2-mule team with wagon requested by District National Guard.
J. Discharge of Enlisted Men.
XVII. VOLUNTEERS.
A. Examinations to Determine Class of Men Eligible for Volunteer Commission.
XVIII. NAVAL MILITIA.
A. Naval Militia of the States..... Page 744
B. Naval Militia of the District of Columbia.
XIX. NATURALIZATION OF ALIEN.
A. Service in Militia Does Not Count Toward..... Page 745
XX. HISTORY OF REGIMENTS.
A. Act of March 2, 1895.
XXI. OPINIONS NOT RENDERED BY JUDGE ADVOCATE GENERAL ON MILITIA QUESTIONS THAT RELATE ONLY TO THE STATE.

I A. The President has no original authority over the militia by right of his office. He can only call them out when Congress provides for his doing so as the agent of the United States for such purpose. When the call is complied with he becomes their commander in chief.[1] *P. 51, 120, Dec., 1891.* No employment of the militia, save in the cases presented in the above sections of the Revised Statutes and in the act of January 21, 1903 (32 Stat. 775), as amended by the act of May 27, 1908 (35 Stat. 399), constitutes a calling forth within the meaning of the Constitution. *P. 60, 475, July, 1893; C. 186, Aug., 1894; 232, Mar., 1895.*

I A 1. The power of the President to call forth the Organized Militia is restricted to the objects mentioned in section 8, article 1, of the Constitution, "to execute the laws of the Union, suppress insurrection, and repel invasion." There is no power to call forth the militia, much less employ it, in "anticipation of war." *Held,* therefore, that the President is without power to call forth the Organized Militia for the purpose of garrisoning military posts made vacant by the sending of the troops of the Regular Army, for any purpose, beyond the continental limits of the United States; and that it can only be so employed when the conditions exist which would warrant him in calling forth the militia. *C. 16273, June, 1904.*

I B. The calling forth of the militia into the United States service is an administrative function, a ministerial act, in which the Secretary of War may issue the necessary orders as the organ of the Executive; and his act is the act of the President. *P. 61, 55, Aug., 1893; C. 2806, Dec. 18, 1896.*

I C. The manner of the calling out of the militia by the President under the act of 1795 (sec. 1642, R. S.), is indicated by the Supreme Court in the leading case of Houston *v.* Moore,[2] where it is observed that, "the President's orders may be given to the chief executive magistrate of the State, or to any militia officer he may think proper." The call would ordinarily be addressed to the governor, who, in most of the States, is made commander in chief of the active militia of the State. A further form indeed of calling out the militia, viz, by a conscription, was authorized during the civil war by the act of July 17, 1862. *P. 51, 325, Jan., 1892; C. 22878, Nov. 27, 1908.* The act of May 27, 1908 (35 Stat. 400), provides that it shall be lawful for the President to issue orders for calling out the militia through the governor of the respective State or Territory, or through the commanding general of the militia of the District of Columbia, from which State, Territory, or District such troops may be called, to such officers of the militia as he may think proper. *Held,* that should the governor refuse to act as the channel of communication from the President to the militia, that he could not be compelled to act, but that in such a contingency the President may address his orders direct to the proper organization commanders of the militia forces. *C. 4003, Nov. 3, 1910.*

I D. Section 4 of the act of January 21, 1903 (32 Stat. 776), authorizes the President in certain contingencies to call forth the militia. *Held,* that the members of an organization that has been

[1] See the act of Jan. 21, 1903 (32 Stat. 775), as amended by the act of May 27, 1908 (35 Stat. 400), and secs. 5297, 5298, and 5299, R. S.

[2] 5 Wheaton, 15 (1820).

so called forth would be compelled to enter the service of the United States. *C. 14148, Mar., 1906, and Mar., 1908. Held* that "calling forth" militia into the service of the United States removes it from the status of militia as that term is used in section 1661, R. S., as amended. *C. 5455, Dec. 19, 1898.*

I E. Under sections 1642 and 5298, R. S., the President has the power to call the militia from one State into another to execute the laws of the Union, suppress insurrection, and repel invasion. *C. 7574, June, 1900.* But he can not constitutionally order militia "called into the service of the United States" for the purpose of invading a foreign country.[1] *C. 3937, 4073, Mar. and Apr., 1898. Held,* that as the laws of the Union are operative in Porto Rico and in the Philippine islands, that the militia of the United States may be used in those islands for any of the purposes for which it may be used as defined in section 8, article 1, of the Constitution. *C. 16273, May 3, 1904.*

Held, that the President is not authorized to call out the National Guard and send it into a foreign country as a part of an army of occupation, either in case of war or in case of intervention, unless as an incident of its use in repelling invasion or in executing laws which may be extended over such territory, and such use would be unauthorized and contrary to the Constitution.[2] *C. 14148, Dec. 29, 1911.*

I F. *Held,* that the President is the sole judge of the necessity for calling forth the militia and that his judgment is conclusive upon all others.[3] *C. 14148, Dec. 29, 1911.*

II A. Under the Constitution, Congress is given power "to provide for calling forth the militia to execute the laws of the Union, suppress insurrection and repel invasion." No authority is given to call the militia into the service of the United States for any other purpose. Upon the question, therefore, as to whether the United States was entitled, under section 5 of the act of July 25, 1866 (14 Stat. 241), to have the Oregon militia, as "troops of the United States," transported free of charge over the Southern Pacific Railroad, a land-grant road, while en route to the place of encampment, to participate in joint maneuvers with the Army, it was *held,* that as the militia in question were not "called forth" in the manner or for any of the purposes prescribed in the Constitution, they could not be regarded as "troops of the United States" within the meaning of said act; and that the railroad company could not be required, therefore, to transport them at its own expense under its contract with the United States.[4] *C. 20204, Aug., 1906; 14971, Feb. and July, 1904; 16925, Sept., 1904.*

---

[1] Ordronaux Constitutional Legislation 501; Kneedler *v.* Lane, 45 Penn., 238; Martin *v.* Mott, 12 Wheat., 19; Houston *v.* Moore, 15 id., 1. See sec. 4 of the act of May 27, 1908, (35 Stat. 400), which recognizes service of the militia outside of the territorial limits of the United States. Such service could arise in connection with repelling invasion, as is indicated in Martin *v.* Mott (12 Wheat., 19, 29).

[2] Art. I, sec. 8, U. S. Constitution. See 29 Op. Atty. Gen.—Feb. 17, 1912, in which he held that the President can not call the militia forth for the purpose of sending it into a foreign country as a part of an army of occupation.

[3] See Martin *v.* Mott (12 Wheat., 19, 29) Luther *v.* Brown (7 New, 1), also Story on the Constitution, sec. 1211.

[4] See XVI Comp. Dec. 70, in which it is held that the militia so traveling are included in the term "troops" as used in the act of July 25, 1866. (14 Stat. 241). See XIV Comp. Dec. 912, where no deduction is allowed in the case of a target team. But see Militia VII E *post* in which it is held that militia en route to joint encampment are entitled to land-grant deductions.

II B. A joint encampment of the militia and a part of the Regular Army was about to be held in the Department of the East. The question was raised whether or not the militia there in camp would be in the service of the United States, so that they would be subject to the articles of war for the Army, as provided in section 9 of the act of January 21, 1903. *Held*, that section 15 of the act of January 21, 1903, confers no authority upon the President or the Secretary of War to issue orders to the organized militia in time of peace, or at any time, or under any condition save in the cases enumerated in the Constitution and expressly provided for in sections 4, 5, and 6 of the act of January 21, 1903. *C. 14971, July 28, 1904; 14148–A, Aug. 29, 1904.*

As the militia forces while participating in the recent maneuvers at West Point, Ky., were not "called forth" in the manner or for any of the purposes prescribed in the Constitution, *held*, that they continued to be State forces and did not at any time pass into the service of the United States and similarly *held*, that if any member of a military organization received injuries during the period of his participation in any joint encampment necessitating medical attendance the claimant for compensation for such service should apply to the State government for relief, and not to the War Department, as the injuries were incurred in the service not of the United States but of the State. *C. 16925, Sept. 22, 1904; 14148, Feb. 11, 1904, Aug. 9, 1905, Oct. 3, 12, and 14, 1907; 20402, Aug. 3 and Sept. 26, 1906.* The horse of a trooper of the First Cavalry, New Jersey National Guard, died during the march to Mount Gretna, Pa., to participate in joint maneuvers with the Regular Army. *Held*, that the War Department is not responsible for the loss of the horse and the United States can not under existing law reimburse for the loss of that horse. *Held*, also, that the allotment of the State of New Jersey, under section 1661, R. S., may not be used for that purpose. *C. 20402, Sept. 26, 1906.*

II C. As officers of the Organized Militia are not Federal officers, *held*, that a medical officer of the National Guard can not lawfully make the examination of school teachers, which must be made under the requirements of the Philippine civil service regulation by a medical officer who holds office under the United States. *C. 14148–E, Mar. 11, 1908.*

II D. Sections 3748 and 5438, R. S., describe the offenses of selling arms, equipments, ammunition, etc., by any person employed in the military service of the United States, and of purchasing the same from such person, and provides the punishment for the commission of such offenses. *Held*, that members of the Organized Militia are not in the service of the United States in the sense contemplated in these sections. *C. 14148–E, Mar. 23, 1908.*

III A. Section 3 of the act of January 21, 1903 (32 Stat. 775), provides that within five years from January 21, 1903, the organization[1] of the Organized Militia shall be the same as that which is now or may hereafter be prescribed for the Regular and Volunteer Armies of the United States. *Held*, that until the five years shall have expired, if a State has not altered the organization of its Organized Militia to con-

[1] See Acker *v.* Bell (57 S. R. 357) in which it is held that the word "organization" as used above does not relate to or include the enlistment of a soldier, but relates to the distribution of the personnel of the Army or militia into units.

form to that prescribed for the Regular or Volunteer Army of the United States, the authorized Organized Militia of the State is that force which was in existence January 21, 1903, which force can participate in the apportionment of funds appropriated by section 1661, R. S., as amended by the act of February 12, 1887 (24 Stat. 401), and the act of June 6, 1900 (31 Stat. 662). *C. 14148, July 2, 1903.* *Held* that any change in the organization of the militia of a State within five years after January 21, 1903, must be to make the organization conform to that of the Regular or Volunteer Army, or else the extra officers so created can not be recognized by the War Department in making payments under section 15 of the act of January 21, 1903, or in passing accounts for payment made by a disbursing officer of a State or Territory or the District of Columbia under the authority to that end which is conferred by section 14 of the act of January 21, 1903. *C. 14148, July 7, 1903.* *Held*, that in order that a State may qualify for sharing in the annual apportionment of the appropriation provided in section 1661, R. S., as amended, it must provide an organization for its Organized Militia which is the same as that provided by statutes for the Regular or Volunteer Armies of the United States. *C. 14148–C, May 31, July 8, and July 29, 1907.*[1] *Held* that section 3 of the above act does not require the States to copy the retirement feature of the Regular Army. *C. 14148–D, Oct. 24, 1907.*

III B. Under existing laws on organization of the Army the Infantry is organized into companies and battalions of four companies each and regiments of three battalions each. The Cavalry is organized into troops and squadrons of four troops each and regiments of three squadrons each, and the Field Artillery is organized into batteries and battalions of three batteries each and into regiments of two battalions each. *Held*, that under existing law, if the Organized Militia of a State includes Infantry it must be organized into companies. If it includes four companies, they must be organized into a battalion. If it includes three battalions, they must be organized into a regiment. If the Organized Militia includes Cavalry, it must be organized into troops. If it includes four troops, they must be organized into a squadron. If it includes three squadrons, they must be organized into a regiment. If the Organized Militia includes Field Artillery, it must be organized into batteries. If it includes three batteries, they must be organized into a battalion. If it includes two battalions, they must be organized into a regiment.[2] *C. 14148–B, May 14, 1906; 14148–D, Sept. 16 and 25, 1907.* Also *held*, that as long as that portion of the Organized Militia of a State, which consists of Infantry, Cavalry, and Field Artillery, conforms to the organization prescribed in section 3 of the act of January 21, 1903, it will be entitled to receive the annual allotments in the operation of section 1661, R. S., as amended. *Held*, further, that the establishment of higher commands than regiments is committed to the discretion of the several States. *C. 14148–F, June 29, 1909.*

[1] See act of June 22, 1906 (34 Stat. 449), which requires each State to have at least 100 men regularly enlisted, uniformed, and organized for each Senator and Representative to which such State is entitled in the Congress of the United States.

[2] Sec. 3 of the act of Jan. 21, 1903 (32 Stat. 775), as amended by the act of May 27, 1908 (35 Stat. 399), provides that this requirement that the organization of the militia shall conform to that of the Regular Army is "subject in time of peace to such general exceptions as may be authorized by the Secretary of War."

III C. As the "machine-gun platoon" is not an essential element either of the organization of a battalion or regiment in the Regular Army, *held*, that if a State has made no provision for a machine-gun platoon it is not required to create one in order to comply with the requirement contained in section 3 of the act of January 21, 1903, that the organization of the militia shall, within five years, be the same as that of the Regular or Volunteer Armies of the United States. Further *held*, that if a State has made provision for a machine-gun platoon, section 3 of the act of January 21, 1903, requires that its organization must be made to conform to that of a machine-gun platoon in the Regular Army as fixed in War Department orders or regulations.[1] *C. 14148–C, June 28, 1907.*

III D. The acts of January 25, 1907 (34 Stat. 861), and May 11, 1908 (35 Stat. 124), prescribe the ratings of enlisted men in the Coast Artillery Corps of the Regular Army. *Held*, that these ratings are fully applicable to the Coast Artillery troops of the Organized Militia in the operation of sections 14 and 15 of the act of January 21, 1903, as amended. *C. 14148–H, July 1, 1910.*

III E. If a State discriminates in the composition of its Organized Militia against a class because of color, *held*, that the act of January 21, 1903 (32 Stat. 775), deprives the Federal Government of the power to devise or to apply an adequate remedy. *C. 14148–B, Mar. 10, 1906.*

III F. *Held*, that as office in the militia is not civil office, an officer of the Regular Army is not prevented by the restriction in section 1222, R. S., from accepting a commission in the militia.[2] *C. 29273, Dec. 2, 1911.*

III G. As the United States provides itself with sufficient adjutants general to execute that class of staff duty, *held*, that section 3 of the act of January 21, 1903, permits a State to provide itself with sufficient adjutants general to execute that class of staff duty for its Organized Militia. *C. 14148–D, Oct. 8, 1907.*

III H. Paragraph 1, Circular 11, Department of the Gulf, June 2, 1908, required the quartermasters general of the Organized Militia of the different States which were to participate in the joint encampment at Chickamauga Park, Ga., to issue the bills of lading. *Held*, that the quartermaster general of a State may lawfully be designated as a quartermaster's agent in connection with the joint encampments of the Regular Army and Organized Militia, to assist the Quartermaster's Department in the performance of the duties with which that department is charged in the current act of appropriation. *C. 14148–F, May, 1909; 27148, Aug., 1910. Held*, that it has been customary to designate quartermasters general of State militia as quartermaster agents for the purpose of transporting the militia. *C. 27148, Aug., 1910. Held*, that in his capacity as agent of the Quartermaster's Department he may use penalty envelopes in his official correspondence. *C. 14148–F, July, 1908.*

III I. Upon request by the governor of a State for information as to whether or not, in the selection of his aids he is restricted by section 3 of the act of January 21, 1903, to officers already commissioned in the Organized Militia of the State, *held* that he is not so restricted. *C. 14148–F, Aug. 5, 1908.*

---

[1] See footnote to previous paragraph.

[2] Concurred in by the Attorney General Jan. 31, 1912. 29 Op., 298.

III J. In view of the exact language used in the proviso of section 3 of the act of January 21, 1903, *held*, that only those privileges can be authorized to the National Guard which had become accustomed before May 8, 1792, and which have been enjoyed continuously since that date. *C. 14148, Oct. 8, 1907, and July 11, 1911.*

III K. There is no law or regulation of the United States which would prevent a retired enlisted man from organizing and drilling a militia company or would prevent him from accepting an office or employment under a State. *C. 3638, Nov. 8, 1897, and Jan. 9, 1909.*

III L. If the enlisted men of a company of students at a college are over the age of 18, and if there are enough students over that age to furnish a constant membership in the school organization equal to the minimum prescribed by law, *held*, that the mere fact that they are matriculated students of an institution of learning would not operate to defeat their contracts of enlistment or to deprive the State of the right to regard them as a part of its Organized Militia in all matters relating to the expenditure of funds arising in the operation of section 1661, R. S., as amended, or other acts of legislation *in pari materia*. *C. 14148–G, Apr. 11, 1910.*

IV A. In view of the restriction contained in section 10, article 1, of the Constitution of the United States, which provides that "No State shall, without the consent of Congress, keep troops, or ships of war in time of peace * * *, or engage in war unless actually invaded, or in such imminent danger as will not admit of delay," *held*, that on January 21, 1903, the date of approval of the general militia law, there were in existence in the several States and Territories, for which there was no authority, military organizations which did not conform to the organization prescribed in the act of May 8, 1792 (1 Stat. 271), and which force was in fact maintained by the States in disregard of the requirement of the Constitution above cited. *C. 14148, July 2, 1903.* Also *held*, that because of the restriction contained in the above section of the Constitution of the United States, it is beyond the power of a State, without the consent of Congress, to create a military force which shall form a part of its militia and shall at the same time be exempt from being called forth by the President. *C. 14148, Sept. 5, 1903, and Aug. 10, 1908.*

IV B. *Held*, that a company of cadets composed of boys under 18 years of age can not be considered militia, and even if organized and uniformed can not be entitled to receive the benefits provided for in section 14 of the act of January 21, 1903 (32 Stat. 775), as that act limits the militia to able-bodied men between the ages of 18 and 45. *C. 14148–A, Dec. 2, 1905.* *Held* that the "Fremont Signal Corps," a purely voluntary organization which forms no part of the National Guard of California, is not entitled to receive stores of any kind from the United States under the act of January 21, 1903. *C. 14740, May 29, 1903.* *Held*, that there is no authority of law by which any part of the Federal appropriation for the militia may be employed to cover the expenses of sending Company A, Veteran Reserves of California, which is not a part of the Organized Militia of the State, to the St. Louis Exposition. *C. 16039, Mar., 1904.* *Held*, that a cadet corps was not contemplated by the general militia act of January 21, 1903 (32 Stat. 775), and that such an organization at the West Virginia University does not constitute a part of

the Organized Militia of the State of West Virginia. *C. 14148–D, Dec. 17, 1907.*

IV C. *Held,* that the insular police of Porto Rico, which has not the legal status of militia, is not entitled to share in the appropriation made by the General Government for the support of the militia. *C. 14604, May 7, 1903, and Jan. 3, 1906. Held,* that the Alaska Indians do not come within the rules of eligibility for membership in the militia as prescribed in the act of January 21, 1903 (32 Stat. 775). *C. 14086, Jan. 31, 1903.* As the establishment of a force of Organized Militia in a Territory is a legislative act lying quite beyond the power of the governor, whose acts in that regard must be in execution of the will of the legislature, and as Congress has provided no legislative department for the Territory of Alaska, *held,* that before the governor of Alaska can act in the matter of organizing militia it will be necessary that Congress take the necessary steps looking to the establishment of a Territorial militia. *C. 14125, Dec. 14, 1907.*

IV D. The Indian Territory has no governor or other territorial authority competent to organize a force of militia. No militia force, therefore, has ever been organized in that Territory, and no apportionment has been made to that Territory of funds accruing in the operation of section 1661, R. S., as amended. *Held,* that there is no authority for organizing a company of militia of Indians in the Indian Territory. *C. 3076, May, 1897.* Also *held,* that the organization of "boys" in the Indian Territory as home guards is unlawful and can not be authorized by the War Department. *C. 11099, Aug. 22 and Nov. 20, 1901.* The Congress, in sections 467, 2132, and 2134–2137, R. S., has expressly forbidden the sale of arms or ammunition in the Indian Territory. Request was made for 60 or more of the latest pattern United States rifles, with necessary ammunition and accouterments, for the purpose of arming and equipping a military company which it is proposed to organize in the Indian Territory. *Held,* that there is no authority of law for such issue of arms or munitions of war. *C. 11099, Mar. 23, 1907.*

IV E. Officers and enlisted men in the National Guard of the State of Oregon may, after seven years' service, or because of disability for active service, be transferred to a list known as the "National Guard Veterans," and shall retain their rank and be entitled to wear the uniform. *Held,* that such officers and enlisted men are not a part of the Organized Militia of that State. *C. 14148–E, May 29, 1908.*

IV F. As one who holds an "honorary" commission as quartermaster general of a State is not a part of the Organized Militia of the State, *held,* that he is not eligible for appointment as disbursing officer of the State. *C. 14148–E, May 12, 1908.*

IV G. It is within the authority of Congress to impose reasonable limits of age upon commissioned officers as a condition precedent to the assistance in the way of money and war material which it affords to the Organized Militia of the several States. *Held,* that this would not be an invasion of the appointing power in respect to the officers of the Organized Militia which is expressly reserved to States by the Constitution of the United States. *C. 14148–G, Feb. 12, 1910.*

Held, that as the Government may condition its allotment to the militia upon the conformation of the National Guard to the physical standards of the Regular Army, it can deny pay to a militia officer

upon the ground that he is not physically fit. *C. 14911, Mar. 7, 1911.*

V A. The qualifications for enlistment in the militia depend on the laws of the States.[1] *Held,* that the prohibition contained in section 2 of the act of August 1, 1894 (28 Stat. 216), providing that no soldier whose service during his last preceding term of enlistment has not been honest and faithful shall be again enlisted in the Army, does not preclude enlistment in the militia of a State. *C. 18021, May 19, 1905.* As there is no enactment of Congress which restricts service in the militia of a particular State to citizens of that State, *held,* that noncitizenship in such a State would not, under section 4 of the act of January 21, 1903 (32 Stat. 775), operate to defeat a contract of enlistment entered into by a nonresident who is a student of a college within that State if the organization to which the student belonged should be called into the service of the United States. *C. 14148–G, Apr. 11, 1910. Held,* that the status of a retired soldier of the United States Army would not be affected by accepting the position of sergeant major in a regiment of the Organized Militia of a State. *C. 14911, Jan. 29 and July 11, 1910. Held,* that there is no legal objection to the enlistment in the National Guard of a retired officer of the Regular Army, but the expediency of making such an enlistment is not apparent. *C. 14148–G, Oct. 25, 1909.*

V B. Upon request for an opinion as to whether or not a recruiting officer of the Regular Army has the right to enlist men of the National Guard, before they are discharged from the guard, *held,* that the enlistment of a member of the National Guard in the Regular Army does not operate as a discharge from the National Guard; and that by so enlisting he becomes and remains liable to such penalties as may be authorized by the law of the State, Territory, or district in whose militia he has been enlisted.[2] *C. 5753, Jan., 1899; 13943, Jan., 1903, Jan. 3, 1905, and Nov. 19, 1907; 16594, July, 1904.* An appointment to a cadetship at West Point does not discharge an enlisted man from the militia of a State. *C. 26337, Mar. 16, 1910.*

VI A 1. Section 16 of the act of January 21, 1903 (32 Stat. 778), provides "That whenever any officer of the Organized Militia shall, upon recommendation of the governor of any State, Territory, or general commanding the District of Columbia, and when authorized by the President, attend and pursue a regular course of study at any military school or college of the United States, such officer shall receive from the annual appropriation for the support of the Army the same travel allowances and quarters, or commutation of quarters, to which an officer of the Regular Army would be entitled if attending such school or college under orders from proper military authority, and shall also receive commutation of subsistence at the rate of one dollar per day while in actual attendance upon the course of instruction."

[1] See Acker *v.* Bell (57 S. R., 356), in which it was held that under the constitution and statutes of a particular State, a minor over the age of 18 years is bound by the enlistment into the military service of the State, even though the consent of his parents was not obtained for such enlistment.

[2] Such enlistments are now forbidden by Cir. 13, Adj. Gen. Office, 1903; and any member of the militia or National Guard of any State who now enlists in the Regular Army without first having obtained a discharge from said militia or National Guard is guilty of the offense of fraudulent enlistment, for which he may either be tried by court-martial or discharged without honor, at the option of the Government. Also see Cir. 62, War Dept., S. 1908.

Held, that officers of the Organized Militia attending military schools in the operation of the above law are not in the military service of the United States. *C. 14148–D, Dec. 21, 1907, and Jan. 22, 1908. Held,* that as attendance by military officers at such schools is, by the strongest implication, restricted to officers on the active list, a retired officer is not authorized to attend a military school of the United States as a student. *C. 14148–E, Feb. 7, 1908. Held,* that a retired officer of the organized Militia is not thereby eligible to attend the United States Engineer School at Washington Barracks, D. C. *C. 14148–F, Oct. 29, 1908. Held,* that such a militia officer so attending a military school of the United States is entitled to the same travel allowances as an officer of the Regular Army would have been, had he been so detailed. *C. 14148–A, Dec. 6, 1905.*

A captain of the National Guard had successfully completed the course at the Infantry and Cavalry School at Fort Leavenworth, Kans. *Held,* that he may be ordered to his home by the governor of his State and detailed for the course at the Staff College at Fort Leavenworth, Kans., and, if such detail is authorized by the President, he will be entitled to mileage under the above law. *C. 14148–B, July 12, 1906.* An officer of the Organized Militia was attending the Staff College at Fort Leavenworth, Kans., and lived in the adjoining city of Leavenworth, *held,* that he was not entitled to mileage while traveling to and from Fort Leavenworth. *C. 14148–B,*[1] *Nov. 6, 1906.*

In the case of National Guard officers who are attending garrison schools of the United States and who are the recipients of commutation of quarters, *held,* that under the act of March 3, 1909 (35 Stat. 742), they are entitled to be furnished with heat and light,[2] which is a lawful charge against the appropriation for regular supplies in the act of March 3, 1909. *C. 14148–G, Jan. 19, 1910, Jan. 27 and June 19, 1911. Held,* that a militia officer who is so attending a military school or college in the United States is entitled to commutation of quarters. *C. 14148–A, June 15, 1905.* In the case of a militia officer who was attending the Post School at Fort Wayne, Mich., *held,* that he would be entitled to the same commutation of quarters that a Regular officer would have been entitled to under the same circumstances, but if he were absent during the entire period of the course there would be a failure to "pursue a regular course of study," which would operate to prevent the right to quarters or commutation therefor. *C. 14148–D, Dec. 21, 1907.* As the act of May 11, 1908 (35 Stat. 114), which provides the means for the payment of commutation of quarters, is restricted in its operation to "officers of the National Guard," which is synonymous with the term "Organized Militia," as used in the act of January 21, 1903, *held* that such funds can not be used to pay commutation of quarters to a retired officer of the National Guard of a state or a civilian who has, under section 23 of the act of January 21, 1903, become eligible for appointment as a volunteer officer and as such is attending a military school of the United States. *C. 14148–F, Oct. 29, 1908.* In the case of militia officers who have become authorized to attend the Army Medical School, *held,* that they are not entitled to draw stationery or forage but there is no legal objection to their purchasing fuel at the contract rates at the posts where such schools are estab-

[1] See 36 E, 1070, Mar. 3, 1911, and G. O. No. 70, W. D., 1910.
[2] See V Comp. Dec., 263 and 592; VI id., 170; III id., 170.

lished as they are allowed quarters. *C. 14148–A, Oct. 19, 1904.* Also, *held,* that such a militia officer is not authorized to purchase clothing from the Quartermasters Department as the appropriation under which clothing is furnished is intended to clothe the Army and not to furnish clothing at cost price to persons not connected therewith. *C. 14148–E, Jan. 22, 1908. Held,* that a militia officer so attending a military school of the United States is not entitled to any allowances while absent from the school or on ordinary leave or sick leave.[1] *C. 14148–F, Feb. 4, 1909. Held,* that a commanding officer of a post at which militia officers are attending a garrison school should recognize the obligation of those officers to the Organized Militia of their States, by authorizing their absence during the period of their performance of the duty of participating in an approaching inaugural ceremony, to which duty their organizations had been detailed. *C. 14148–F, Feb. 5, 1909.*

VI A 2 a. The reimbursement of officers for expenses incurred in travel is now substantially regulated by the act of June 12, 1906 (34 Stat. 246), which is supplemented, where the travel is accomplished in the execution of militia inspection in the operation of section 14 of the act of January 21, 1903, by the act of June 22, 1906 (34 Stat. 449), which provides that traveling expenses incurred in excess of the regular mileage allowance shall constitute a charge against the allotment of the State in whose behalf the journeys are undertaken. *Held,* that in a case where a Regular officer was assigned to temporary duty at Seagirt, N. J., with the National Guard of that State and his order carried no allowances except those authorized by the mileage law, there is no relief for any excess of expenditure that he may have been subjected to in the execution of his duty, and Congress must be looked to for the application of a remedy. *C. 20369, Dec., 1906. Held,* that as the act of June 22, 1906, is restricted in its operation to the reimbursement of inspecting officers "for the actual excess of expenses of travel," a Regular officer who was required, in the execution of his duty of inspecting the Organized Militia of a State, to use a telephone, may not be reimbursed under the above act but from appropriation for the support of the Quartermaster's Department. *C. 14148–E, July 11, 1908. Held,* that as the expense incurred by a Regular officer in having the report of his inspection of the Organized Militia of a State typewritten was not one properly chargeable to any of the other appropriations for the support of the military establishment, it should be paid out of the appropriation for contingencies of the Army. *C. 18112, Sept., 1905.*

VI A 2 b. Retired officers of the Regular Army are assigned to duty with the militia under authority of the act of March 2, 1903 (32 Stat. 932), and not under authority of section 20 of the act of January 21, 1903 (32 Stat. 779). *C. 14148, Nov. 23, 1903.*

The act of March 2, 1903, also establishes the pay of such officers. *Held,* that an officer so detailed is entitled to the increased pay and to the allowances [2] thus authorized from the moment when he reports to the governor of the State.[3] *C. 15849, Feb. 4, 1904. Held,* that

[1] See XIV Comp. Dec., 638.

[2] A retired officer of the Regular Army below the grade of major on duty with the militia is not entitled to reimbursement for the hire of horse which he used in a parade. XV Comp. Dec., 311.

[3] See XIV Comp. Dec., 628, for pay of such officer. See XII Comp. Dec., 95. Such an officer not entitled to mileage.

duty with the militia is not per se mounted duty. *C. 14148–H, Aug. 25, 1911.*

The act of April 23, 1904 (33 Stat. 264), authorized the Secretary of War to assign retired officers of the Army, with their consent, to active duty with the Organized Militia. *C. 18413, Aug., 1905.* That act, which authorized full pay for officers so serving, was modified by the act of June 12, 1906 (34 Stat. 245), which provided the pay and allowances of a major as the maximum pay which a retired officer upon such duty should receive. *Held,* that a lieutenant colonel, on duty with the National Guard of a State, is entitled under his detail to the pay and allowances which a retired major would receive under a like assignment, namely, full pay and allowances of a major. *C. 23957, Feb. 5, 1909. Held,* that a retired officer of the Regular Army may hold any State, county, or municipal office and receive the emoluments of the same without affecting his military office or pay in any way. *C. 14063, Jan. 27, 1903, and Dec. 4, 1909. Held,* that a retired officer may hold any office in the government of the State unless he is prevented from so doing by a law of the State. *C. 17764, Mar. 24, 1905. Held,* that there is no statute of the United States, or existing regulation of the War Department, which prohibits a retired officer, who is detailed for duty with the National Guard of a State, from accepting from the State additional compensation as pay or expenses, and that if such officer holds a commission in the Organized Militia of the State to which he is detailed he can legally accept from such State the pay and allowances authorized by the law of the State. *C. 18413, Aug., 1905. Held,* that there is no law of the United States which prevents a retired officer so detailed from holding the office and drawing the pay of adjutant general of a State. *C. 17631, Mar., 1905. Held,* that a retired officer of the Regular Army who is on duty with the National Guard of a State has no right to demand additional pay from the State except for expenses. *C. 14063, Feb. 2, 1910. Held,* that the assignment of a retired officer to active duty with the National Guard of a State does not place the officer on the active list of the Regular Army in the sense in which that term is used in section 1222, R. S. *Held,* in a case which arose in a State, where the State law of February 26, 1908, provided that "the United States officer detailed for duty 'with that State' shall have the title of military secretary to the governor with the rank of 'colonel,'" that such State legislation did not create an office in the sense in which that term is used in section 1222, R. S., which prohibits an officer of the Regular Army on the active list from holding any civil office. *C. 18413, June, 1908.* Also *held,* that while on duty with the National Guard of a State a retired officer would not vacate his position as an officer on the retired list of the Regular Army. *C. 14063, Dec. 4, 1909. Held,* that there is no Federal statute or regulation which would forbid a retired officer of the Regular Army on college duty from accepting a commission in the National Guard of a State. *C. 22170, Oct. 5, 1907. Held,* that a retired officer who had been commissioned in the National Guard would, if the National Guard were called into the service of the United States, be entitled to the pay of his militia office during the period of such service, but not to the pay pertaining to his office on the retired list. *C. 14063, Dec. 3, 1909. Held,* that the same rule would apply during joint maneuvers. *C. 14148–H, Feb. 4, 1911.*

The act of April 23, 1904 (33 Stat. 264), provides that the Secretary of War may assign retired officers to "staff duties not involving service with troops." *Held*, that he may assign a retired officer of the Regular Army to the duty of inspecting the Organized Militia. *C. 14148–E, Mar. 11, 1908.* *Held*, that a retired officer above the grade of major, who was on duty inspecting the militia, was not entitled to mileage under the act of March 2, 1905 (33 Stat. 831).[1] *C. 18112, Sept. 8, 1905.*

The status of duty which attaches to a retired officer who is assigned to duty with the Organized Militia of a State, though indefinite in some of its incidents, should be held to apply, in the absence of highly exceptional circumstances, to the entire period of time intervening between his reporting for duty and his relief therefrom. *Held*, that a governor of a State or Territory is without authority to grant a leave of absence to a Regular officer who has been so placed on duty with the militia of a State, which can be done by the War Department only. *C. 22330, Nov., 1907.*

VI A 2 c. Section 20 of the act of January 21, 1903 (32 Stat. 779), as amended by the act of May 27, 1908 (35 Stat. 403), provides that enlisted men of the Regular Army may, upon the application of the governor of a State or Territory, be detailed for duty in connection with the Organized Militia. *Held*, that an enlisted man so detailed is entitled to pay and commutation of rations, and to quarters, the number of rooms being fixed in the Army Regulations. Also *held*, that under the act of March 2, 1907 (34 Stat. 1167), he is entitled to a sufficient allowance of heat and light.[2] *Held*, further, that the cost of maintenance of an enlisted man so detailed constitutes a charge against the appropriations for the support of the Army and can not be paid out of funds accruing to the several States in the operation of section 1661, R. S., and the act of January 21, 1903, both as amended. *C. 14148–F, Feb. 5, 1909.* *Held*, further that commutation of rations [3] may lawfully be paid in advance to an enlisted man of the Regular Army, who has been placed on detached service with the Organized Militia of the State of Pennsylvania. *C. 14148–G, Nov. 9, 1909.*

VI A 2 d. The law authorizing the establishment of a force of Philippine Scouts vests authority in the President to appoint such officers as "he shall deem necessary for the proper control." *Held*, that in view of the restriction in the above language, the assignment of an officer of Philippine Scouts to duty with the militia of a Territory, would be unlawful. *C. 22742, Feb. 11, 1908.*

VI B 1 a. Section 14 of the act of January 21, 1903 (32 Stat. 777), in describing what part of the National Guard of a State shall participate in a State camp of instruction, uses the words "such portion." *Held*, that it is within the discretion of the governor of a State or Territory to determine what portion of its Organized Militia "shall engage in actual field or camp service for instruction." *C. 14148–A, May 2, 1905.* *Held*, that the officers of Coast Artillery Reserve organizations

---

[1] XII Comp. Dec., 95.

[2] See XVI Comp. Dec., 287. There is no authority of law for the payment of commutation of quarters, heat, and light to enlisted men of the Army when detailed for service with the militia under the act of May 27, 1908.

[3] For rate see G. O. 116, par. III, W. D., Aug. 29, 1911.

may be ordered to engage in preliminary field or camp service for instruction. *C. 14148–H, Jan. 4, 1911.*

VI B 1 b. Section 14 of the act of January 21, 1903 (32 Stat. 777), contains no restriction as to the place where the "actual field or camp service for instruction" shall take place. *Held,* that that is controlled by the governor's discretion subject to the condition that the militia of one State can on the initiative of that State pass through another State only with the latter's consent. *C. 14148, Dec. 22, 1903.*

VI B 1 c. The governor of a State asked permission for the First Battalion of Artillery (Coast) to camp for three days at the guns at an Army post. *Held,* that the mere location of this National Guard organization in camp on the reservation for purposes of instruction does not classify the camp as a participation in the encampments, maneuvers, or field instruction of any part of the Regular Army, even though Regular officers acted as instructors. The instruction should properly be classified as that contemplated in section 14 of the act of January 21, 1903. *C. 14148–A, Apr. 30, 1904.*

VI B 1 d. At a State encampment held under section 14 of the act of January 21, 1903 (32 Stat. 777), subsistence stores may be sold to officers and the sale will be regarded as a sale to the State under section 17 of the act of January 21, 1903, and the selling price should be the cost to the United States plus 10 per cent for transportation. *C. 14148, Aug. 5, 1904.*

VI B 1 e (1). As the service of the disbursing officer under section 14, act of January 21, 1903 (32 Stat. 777), is limited to field or camp service, and as quarters are not furnished to officers for this kind of service, *held,* that commutation of quarters can not be paid to such a disbursing officer for the time so spent by him in camp. *C. 14148–A, Sept., 1904.*

VI B 1 e (2). A disbursing officer purchased rations under section 14 of the act of January 21, 1903 (32 Stat. 777). *Held,* that he can take credit for the amount actually spent if the average does not exceed the value of the Regular Army ration, but if the average does exceed the value of the ration he can take credit to the amount of the value of the Regular Army ration only.[1] *C. 14148–B, Aug. 11, 1906.*

VI B 1 e (3). Wagons were hired by Cavalry troops of a State while on a practice march on which they engaged in actual field service for instruction. *Held,* that under section 14 of the act of January 21, 1903 (32 Stat. 777), the cost of hiring such transportation is a proper charge against the State's allotment of funds under section 1661, R. S. *C. 14148–A, Oct. 16, 1905.*

VI B 1 e (4). Two enlisted men of the National Guard, while on their way to a State camp of instruction, were taken sick, necessitating medical attendance. No medical officer accompanied the troops. The troop commander employed medical attendance and now asks to be reimbursed for the sum paid. *Held,* that there is no authority in section 14 of the act of January 21, 1903, for the payment of medical expenses of sick militiamen who were taken sick while on their way to a State camp. *C. 16925, Aug. 10, 1909.*

VI B 1 e (5). A member of the organized militia of a State became sick with epileptic fits during a State encampment, and was so violent that it was necessary to send him under two attendants to his

[1] X Comp. Dec., 400; id., 700.

home. *Held*, that as the expenses incurred in the transportation of this sick man were necessary and reasonable, they are properly payable out of the State allotment under section 1661, R. S., as amended, and section 14 of the act of January 21, 1903. *C. 14148–E, Feb. 19, 1908.*

VI B 1 e (6). Certain farmers of a State claimed remuneration for damage done to crops by troops of the National Guard during maneuvers held in connection with a State encampment. *Held*, payment of such a claim would not constitute a lawful charge against the allotment of the State in the operation of section 1661, R. S., as amended, and could be made only as incidental expenses, but only when authorized by the Secretary of War; and where before the encampment, a lease had been executed providing for placing the leased premises in the same condition in which they were at the beginning of the encampment. *C. 14148–G, Oct. 1, 1909.*

VI B 1 e (7). Certain officers purchased transportation to a State encampment, as prior to the necessities of each case it was not possible for the disbursing officer to secure the transportation or make arrangements for it. *Held*, that the State disbursing officer may reimburse these officers for the expenses of such travel in those cases where the travel was properly ordered and the expenditures were actually made. *C. 14148–D, Oct. 31, 1907.*

VI B 1 e (8). The horse of a staff officer had been foundered in the service while the officer was in camp and the horse was left behind until it should be in fit condition to be shipped. *Held*, that the State disbursing officer may lawfully reimburse the owner, a mounted officer, for the amount expended by him in the transportation of the horse, which had been used by a member of his staff, from the place of encampment back to his home. *C. 14148–D, Oct. 12, 1907.*

VI B 1 e (9). During maneuvers in a State $98.65 was expended from the appropriation for "Encampment and maneuvers, Organized Militia," in entertaining the visiting foreign military attachés. *Held*, that the funds accruing to the State under that appropriation are subject to the restrictions in sections 15 and 21 of the act of January 21, 1903 (32 Stat. 778), as amended, and are not available for paying the cost of entertaining foreign military attachés, who may be present at a State encampment. *C. 14148–G, Dec. 23, 1909.*

VI B 2 a. Preceding joint maneuvers with the Reguler Army, lands were leased for maneuvering purposes. *Held*, that these leases of lands to the United States operated to deprive the lessors of the use and possession of such land during the period of the maneuvers and to that extent prevented their use by the lessors for grazing purposes.[1] *C. 16525, Sept. 26, 1904.* Before the beginning of the lease certain of the lands were used for quartermaster and commissary depots under conditions which indicated an understanding between the proprietor and the quartermaster that the lands were to be so used for a reasonable compensation.[2] *Held*, that there was an implied contract for a reasonable compensation

[1] XI Comp. Dec., 293, in which it is held that the United States is not liable for damage by fire to lands leased as a military maneuver camp.

[2] Payment in advance by month, quarter, or year, for leased lands of which the lessee has been placed in possession by the lessor is not in violation of sec. 3648 R. S. (XII Comp. Dec., 782.)

for the use and occupancy of the premises from August 1, 1904, to August 25, 1904, and although leases for that period which were made out after August 25, 1904, are ineffectual to create an actual term, they may be treated as a liquidation of the claim for use and compensation. *C. 16525, Nov. 16, 1904.*

VI B 2 b. When the Organized Militia and the Regular Army serve together as contemplated in section 9 of the act of May 27, 1908 (35 Stat. 402), which amends section 15 of the act of January 21, 1903, *held*, that the one hundred and twenty-fourth article of war requires that no officer of the militia of a particular grade can rank any Regular officer of that grade. *C. 14148–F, Sept. 12, 1908.*

VI B 2 c. Section 15 of the act of January 21, 1903 (32 Stat. 777), provides for "participation" of the militia in "encampment, maneuvers and field instruction" of any part of the Regular Army. *Held*, that "participation" begins when the movement from the several rendezvous begins and ends when the troops reach the place of their respective rendezvous on their return. During this period of time they are entitled to the same pay, subsistence, and transportation as troops of the Regular Army. *C. 14148, Aug. 4, 1903.*

VI B 2 d. In the annual acts of appropriation for support of the Army, certain sums are provided for the expenses of joint encampments of the Regular Army and Organized Militia. *Held*, that none of these funds can lawfully be transferred to a disbursing officer of a State, but they must be disbursed by the regularly appointed officers of the several staff departments of the Regular Army. *C. 14148–F, July 1, 1908, and Dec. 13, 1910.*

VI B 2 e. Upon a request for information as to the proper manner of securing transportation for the Organized Militia of a State to and from the maneuvers on a military reservation, it was *held*, that under section 15 of the act of January 21, 1903 (32 Stat. 777), transportation of the militia forces must be obtained in the same way and in pursuance of the same statutes and regulations that would be applied in obtaining transportation for corresponding detachments of the Regular Army. *C. 14148, Sept. 11, 1903.*

VI B 2 f. As the adjutant general and certain other staff officers of the Organized Militia of a State were not designated by the Secretary of War to take part in the joint encampment, *held*, that the hire of an automobile for their transportation from the State capital to the place of the joint encampment of the Regular Army and the Organized Militia does not constitute a lawful charge against the appropriation for the joint encampment of the Regular Army and the Organized Militia. *C. 14148–H, Sept. 6, 1910.*

VI B 2 g. At a joint encampment the following question was raised, viz., can the officers and enlisted men of the Organized Militia who participate in such joint encampment be permitted to purchase subsistence stores for sale to officers and enlisted men of the Regular Army? *Held*, that such stores should be sold to them at cost prices, that is, at the same prices which are charged to officers and enlisted men of the Army under the same circumstances. *C. 14148, Aug. 5, 1904.*

VI B 2 h. As section 15 of the act of January 21, 1903 (32 Stat. 777), restricts the allowances to which the National Guard becomes entitled when they participate in encampments with the Regular

Army to "pay, subsistence, and transportation,"[1] *held*, that forage would not be allowed. *C. 14148, July 13, 1903.*

VI B 2 i. Rations are furnished to the National Guard when it participates in encampment with the Regular Army under section 15 of the act of January 21, 1903 (32 Stat., 777). *Held*, that fuel for cooking purposes, under the Army Regulations, may be issued, as it is used to cook the ration, and hay for bedding purposes may be issued, as it is a minor allowance which was probably included in the substantial allowances mentioned. *C. 14148, Sept. 12, 1903.*

VI B 2 j. The appropriation act for the Army of April 23, 1904 (33 Stat., 265), contained a clause, i. e., "For purchase of subsistence and supplies, one hundred thousand dollars" in connection with joint encampments of the militia with the Regular Army. *Held*, that the language is broad enough to authorize the employment of civilians to bake bread under the same circumstances which would justify their employment for the same purpose in connection with troops of the Regular Army. *C. 16524, July 27 and Aug. 3, 1904.* The same clause of that appropriation can be used to pay for the ordinary labor necessary for the handling of subsistence stores in the maneuver camp composed of both Regulars and Volunteers, but *held*, that the pay for the labor required should be made from the appropriation for the subsistence of the Army and the subsistence of the militia in proportion to the strength of the Regular and militia forces composing the camp. *C. 16524, July 27, Aug. 3 and 8, 1904.*

VI B 2 k. Bakery profits are neither pay nor allowances. *Held*, that a militia organization which, under section 15 of the act of January 21, 1903 (32 Stat., 777), participates in an encampment at an Army post for less than 10 days is not entitled to share in the bakery savings of the post. *C. 14148–E, May 21 and June 10, 1908.*

VI B 2 l. A Regiment of Heavy Artillery, of the National Guard, which was participating in a joint Army and Navy maneuver, contracted various bills for transportation, labor, and material, and the bill of the superintendent of State arsenal for board, lodging, and transfers while on State duty attending to business at the camp of the guard. *Held*, that officers of a State National Guard can not contract such bills as they deem desirable at their discretion without reference to or authority of the proper bureau of the War Department, for payment under section 15 of the act of January 21, 1903. *C. 14148, Oct. 28 and Dec. 18, 1903, and Jan. 28, 1904.*

A private of the National Guard, who had been on duty at Camp Capt. John Smith, Jamestown Exposition, was not able, because of sickness, to accompany his regiment home and was placed in a civil hospital. *Held*, that the bill for his hospital expenses, which was incurred after the breaking of camp, can not be paid from funds of the United States in the hands of the disbursing officer. *C. 14148–D, Oct. 3 and 14, 1907.*

VI B 2 m. The act of appropriation for the support of the Army, of April 23, 1904 (33 Stat., 265), appropriated money for the militia participating in joint encampment with the Regular Army, *inter alia*, for "transportation of the militia and its supplies, clothing, and equipage, lease of land, and damage to property." *Held*, that the above clause

[1] An officer's travel allowance is limited to actual transportation (XI Comp. Dec., 545).

must provide for the payment of damages naturally and necessarily arising out of the use of the lands leased for the purpose of military maneuvers, as, for instance, if considerable bodies of troops march through and over the fields in the execution of tactical problems, a certain amount of damage to growing or standing crops will inevitably ensue; fences, detached buildings, and inclosures will also be so used as to make repairs necessary, but the theft of fowls and animals, the larceny or felonious taking or carrying away of articles of personal property, or the wanton destruction of such property, or injuries which are not susceptible of compensation in the manner hereinbefore described, are damages which are not payable out of the above appropriation, nor are they susceptible of liquidation by a resort to the method provided in the leases. *Recommended*, that the several governors interested in the maneuvers be advised that claims for damages due to tortious acts of individuals can not be paid out of any appropriations of Congress and that for that reason the States to which the militia forces belong will be expected to provide for their adjustment. *C. 16525, May 19, 1904. Held*, that damages to property used during maneuvers can only be paid if there is a contract, express or implied,[1] providing therefor; that is, they would then be included as a part of the compensation for the use of the land. *C 14971, Aug. 28, 1903. Held*, that the executive departments can neither entertain nor adjudicate claims for unliquidated damages to buildings, crops, fences, or land, by troops during maneuvers. *C. 14971, July 23, 1903. Held*, that such claimants must have recourse to Congress or, in a limited class of cases, to the Court of Claims. *C. 16525, May 19, 1904.*

During the progress of joint maneuvers with the Regular Army, the troops entered upon certain parcels of land which had not been made the subject of leases. Claims were made for rent, and for injury to crops, fences, etc. *Held*, that the claim for rent should be rejected, but that the claim for injury to crops and fences after adjustment should be paid. *C. 16525, Nov. 3, 1904.*

A railroad company that carried National Guard troops to a joint encampment submitted a claim for $8.30 for loss of equipment on baggage car which was so used. *Held*, that the War Department can not pay this claim for the reason that none of the appropriations at the service of the War Department can be used for the adjustment of unliquidated damages unless express provision has been made by contract to cover such adjustment. Also, *held*, that the equipment lost was not a legitimate part of the cost of transportation. *C. 14971, July 29, 1904; 20402, Sept. 26, 1906.*

---

[1] Sec. XVI Comp. Dec., 589, for questions arising when premises are occupied without leases. Dennis *v.* U. S., 20 Ct. Cls., 119; Brannen *v.* U. S., id., 219; Pitman *v.* U. S., id., 253; I Comp. Dec., 261, 283; II id., 174, 488; IV id., 446; V id., 693, 770; VI id., 707. But payment may be made for work or materials furnished and received under a contract, express or implied, though the price is not fixed by such contract. McClure *v.* U. S., 19 Ct. Cls., 179; Dennis *v.* U. S., 20 id., 119; Pitman *v.* U. S., id., 253; I Comp. Dec., 283; II id., 365; III id., 365, 565; VI id., 648, 953; VII id. (dated Mar. 12, 1901). And where it is to the interest of the United States the Secretary of War may enter into a supplemental contract with a contractor, discontinuing an existing contract on payment to the contractor of a stipulated sum. U. S. *v.* Corliss Steam Engine Co., 91 U. S., 321; Satterlee *v.* U. S., 30 Ct. Cls., 31; III Comp. Dec., 54; VI id., 953. See 4 Op. Atty. Gen., 327; 6 id., 499, 516; 9 id., 81; 14 id., 24, 183. The act of Mar. 3, 1909 (35 Stat., 740), is available as an appropriation act for the payment of damages to property.

VI B 2 n. The United States is not responsible for the unlawful acts of its soldiers or employees. The remedy in such a case is a suit against the individuals who commit the trespass or an application for relief to Congress. *C. 16525, May 19, 1904. Held,* that the United States is not legally responsible for torts of its officers or agents, whether of commission or omission. *C. 16525, May 19, 1904.*[1] *Held,* that it is not within the power of any of the executive departments to compensate an individual for damages due to tortious acts committed by the Organized Militia of the States. If there be any remedy for such injuries, it must consist in an application to the State or States by whose troops the acts were committed. Moreover, it is beyond the power of an officer of the War Department to commit the United States to the payment of tortious damages; and a contract purporting to do so would be without operative force. *C. 17585, Feb. 27, 1905.* A private horse that had been used in joint maneuvers was shot by a militiaman after the encampment while the man and his organization were on the cars en route home, about nine hours' journey from the encampment grounds. *Held,* that the injury done was not due to the act or order of any person in the military establishment, and that reimbursement can not lawfully be made by the United States, and the injured party should look to his State or to the individual by whom the animal was shot for compensation for the loss he has sustained.[2] *C. 16961, Oct. 1, 1904.*

VI C 1 a. If a quarter section of the public domain has been withdrawn from entry and set apart for use as a rifle range, *held,* that no further action would be necessary as a condition to the expenditure of money in the improvement of the range. *C. 19798, Aug., 1909.*

VI C 1 b. The title to the lands purchased under the provisions of section 1661, R. S., as amended, for use as State target ranges will vest in the United States. *Held,* that the relation of the State or Territory or district to such lands is that of a trustee vested with the charge and charged with the administration of such properties for the purpose for which they were acquired. *C. 19798, May 29, 1906. Held,* that it is not legal to enter into a contract binding the United States for the purchase of property from future appropriations. *C. 20989, Mar. 15, 1909; 20864, Feb. 6, 1909.*[3] *Held,* that after proper notice has been received that the title has been approved by the Attorney General, payment may be made for the land, the deeds recorded, and all papers forwarded to the War Department. *C. 20864, Apr. 3, 1907. Held,* that a State may be the vendor and pay for the range out of its apportionment under section 1661, R. S., as amended, the title to be approved by the Attorney General

---

[1] Pitman *v.* U. S., 20 Ct. Cls., 255; Gibbons *v.* U. S., 8 Wall., 269; id., 7 Ct. Cls., 105; Morgan *v.* U. S., 14 Wall., 531.

Judge Story in his work on agency, sec. 319, says: "It is plain that the Government itself is not responsible for the misfeasances or wrongs or negligencies or omissions of duty of the subordinate officers or agents employed in the public service; for it does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs, since that would involve it, in all its operations, in endless embarrassments and difficulties and losses, which would be subversive of the public interests."

[2] While the Government is not pecuniarily responsible for torts committed by officers and enlisted men, the latter are so responsible, and aside from their liability to civil suit may and should in cases covered by the fifty-fourth article of war be proceeded against as required by that article.

[3] See sec. 3736, R. S.

under section 355, R. S. *C. 20864, Jan. 7, 1909.* The provisions of section 355, R. S., have been construed as not forbidding the purchase of land by the United States prior to the consent of a legislature being obtained, but as applying to the expenditure of money upon such land after purchase.[1] *Held,* that the recording of the deeds, etc., is a proper charge against the amount allotted to the State for the purchase of a target range. *C. 20864, Apr. 3, 1907. Held,* that the payment from a State's allotment under section 1661, R. S., as amended, of the following expenses connected with the acquiring of a target range are allowable if the acquisition of the range is consummated: (1) Expense of travel in securing an option; (2) expenses involved in securing the consent of the owners to sell; (3) the expense of preparation of the title for submission to the Attorney General; (4) the expense of the necessary surveys; (5) the expense of the purchase of the land. *Held,* however, that the surveying of a proposed range and the obtaining of options to lands which were not later required can not properly be charged to the allotment, nor is it proper to pay a consideration for an option. *C. 19798, Dec. 29, 1909.*[2]

VI C 1 c (1). The renting of grounds for target ranges, or of grounds or buildings for shooting galleries, together with the expenses necessarily attending their adaptation for use in the instruction of the Organized Militia in small-arms' firing are proper subjects for the expenditure of the sums accruing to the State in the operation of section 1661, R. S., as amended, and act of January 21, 1903 (32 Stat. 775), as amended by act of June 22, 1906[3] (34 Stat. 449). *C. 14148–B, Sept., 1906. Held,* that the approval of the Secretary of War is not required in the case of lands leased for target-range purposes under the act of June 22, 1906 (34 Stat. 449), but the approval of the governor of the State is required. *C. 20989, Apr., 1907. Held,* that if the lease contains an option for the purchase of the property the exercise of the option would require the approval of the Secretary of War. *C. 20989, July 5, 1907.* .

VI C 1 c (2). It is not usual to require an abstract of title to property leased by the Government, where the lease is not for a long term of years and does not call for payment of the rental for the entire period in advance. If the lease of land for use as a target range is for a long term of years and the rental is paid in advance, the lease should be properly executed, acknowledged, and recorded, and evidence should be furnished of the title of the lessor, in order that the Government may be assured of the occupancy during the term for which the rental has been paid. Where the lease is from year to year, or for less than five years, and calls for the rental to be paid from year to year during the lease, it is assumed that the party in possession of the premises, claiming as owner and executing the lease as such, is entitled to execute the lease, and it is not usual to require evidence of his title. The description of the property should be in terms sufficient to identify it, but need not be as exact as is required in a conveyance of property. If the lease is for a short term, it is not necessary that the signature of the lessor should be

[1] 15 Op. Atty. Gen., 212.
[2] III Comp. Dec., 216; VI id., 133.
[3] See XIV Comp. Dec., 836.

witnessed, although it would be preferable to do so. Unless evidence as to title is furnished, it is believed that the lease should not stipulate for the rental to be paid in advance. *C. 20989, June, 1909, Apr. and May, 1910. Held,* that the lease of land for use as a target range should show the purpose for which the premises are leased. *C. 20989, Jan., 1907.*

VI C 1 c (3). After the allotment of funds apportioned under section 1661, R. S., for the purpose of leasing land for use as a target range, the details of the lease devolve upon the State authorities, and there is no objection to the payment of the sum due on its lease in advance. *Held,* that such a lease may extend over several years. *C. 19798, May, and June, 1907.* As no contract can be made that will bind future appropriations by Congress, *held,* that it would not be proper to enter into an obligation to lease land for use as a target range, to be satisfied out of future allotments which may not materialize; but money could be set aside from allotments of appropriations already made, of the rental for the entire period of the lease, as the provisions of section 3690, R. S., relating to expenditures of annual appropriations for the services of the fiscal year only has been held not to apply in the accounting of funds issued to the militia under section 1661, R. S., and section 14 of the act of January 21, 1903. *C. 21506, Oct., 1907; 14148–B, Jan., 1906.* There is no legal objection to a lease for a term of five years from May 1, 1907, for a lump consideration, payable in advance, as in the accounting for the appropriation made by section 1661, R. S., as amended, the fiscal year is not considered. *C. 21506, Oct., 1907; Mar. and July, 1908; 20989, Dec., 1908.*[1] A lease for a target range was for 10 years. *Held,* that unless there are funds from the existing appropriation to meet the rental for the entire period, a stipulation should be inserted in the lease to the effect that its continuance beyond one year is conditioned from year to year upon future appropriations from which the rent can be paid. *C. 20989, Dec., 1909, Mar., April, and May, 1910. Held,* that there would be no objection to an option in such a long term lease, on the part of the lessee to terminate the lease upon giving 90 days' notice. *C. 21506, Oct., 1907.*

VI C 1 c (4). The property intended to be leased was not described in terms sufficient to identify it, but *held,* that if a certain "strip of land" answering to the description is used for target-range purposes during the period specified, the lease followed by such use of the premises may be regarded as sufficient for the purpose in view. The rent, of course, should not be paid in advance. *C. 20989–A, Apr., 1910.*

VI C 1 d. An officer of the Organized Militia traveled *under competent orders* in connection with the acquisition and development of target ranges. *Held,* that he was entitled to his actual expenses for travel and subsistence out of the funds allotted in the operation of section 1661, R. S., as amended.[2] *C. 14148–E, Feb. 5, 1908; 19798, Apr., 1908.*

VI C 1 e. If a lease for a target range provided that the buildings should be insured, *held,* that the expenditure involved in taking out

[1] See XII Comp. Dec., 782.

[2] XIII Comp. Dec., 69.

the insurance was a proper one, and that the policy should be kept with the other papers in regard to the lease in the custody of the disbursing officer or his successor. *C. 20989, Apr., 1908.* The above expenditure would be a part of the consideration for the rental of the property. But *held*, if there is no provision in the lease requiring the lessee to insure the building, the payment of premium for insurance would not be a proper charge against the appropriation.[1] *C. 20989, May, 1908.*

VI C 1 f. A team of mules was purchased out of State funds for use on a State rifle range. *Held*, that there is no authority for issuing forage purchased from funds accruing in the operation of section 1661, R. S., for mules so purchased, and the necessary forage must be purchased from State funds. *C. 14148–G, Dec., 1909.*

VI C 1 g. The necessity for the presence of water on a target range in case of fire, and also for the use of the men, is well understood. *Held*, that if it is necessary to dig a well and equip the same with a pump and tanks to render a range suitable, the necessary expense connected therewith would be a proper charge against the apportionment of that State in the sum appropriated by Congress June 22, 1906 (34 Stat. 449). *C. 19798, July, 1907.*

VI C 1 h. A State leased a target range with funds from its allotment under section 1661, R. S. A Mr. ——, under a claimed prescriptive right, proposed to run a road along the beach in such a way as to seriously interfere with the operations of the range, as the road would be in the danger zone between the firing point and the bay. *Held*, that although a United States appropriation is used for the payment of the rental, the lease is one entered into by the State with the lessors, and the matter is one for the consideration of the State authorities, who should take it into the State courts for the purpose of seeking whatever remedy is necessary and proper. *C. 21506, Oct. 30, 1907.*

VI C 1 i. On request by the Chief of Division of Militia Affairs for an opinion as to the membership of a board appointed to examine into claims for damages to property because of target practice, it was *held* that it is usual for leases of land for target practice purposes to stipulate, concerning the membership of the board to pass on damage to the property, that one member shall be appointed by the lessor, one by the lessee, and the third by these two so appointed, and that their finding shall be final when approved by the disbursing officer or by some general officer of the militia. *C. 20989–A, Apr. 28, 1910.*

VI C 1 j. The lease of a tract of land for use as a rifle range provides for the payment, *inter alia*, of "damages done as specified to crops and all other property on said premises." A claim was submitted for $24.75, the value of fruit trees which were destroyed or removed in order to better adapt the premises for the purposes for which they had been leased. *Held*, that the claim is a legitimate claim against the funds placed to the credit of the disbursing officer, under section 1661, R. S., as amended. *C. 20989, May, 1909.*

VI C 1 k. Land was purchased from appropriations made by Congress for the use of the militia of the State as a rifle range, the title

[1] XIV Comp. Dec., 836. Insurance of buildings on a range that has been leased is not authorized under the act of June 22, 1906 (34 Stat. 450).

being in the United States. *Held*, that it might be leased for use as a pasture under such conditions as would not interfere in any way with the use of the range for the purposes for which acquired. The rent would belong to the United States, and should be deposited to the credit of miscellaneous receipts. It would, however, be legal for the adjutant general of the State to authorize the use of the range for pasture, under a revocable license, and conditions might be imposed requiring the licensee to do certain work, under the supervision and to the satisfaction of the adjutant general, in the nature of betterments of range. *C. 26465, Apr., 1910.*

VI C 2 a. The act of June 22, 1906 (34 Stat. 449), makes provision in favor of the militia for the promotion of rifle practice. *Held*, that that appropriation covers payment of salary and expenses of inspectors engaged in the work of promoting rifle practice within a State, except during encampment, maneuvers, etc., when they, with other militia are entitled to pay, transportation, and subsistence under another appropriation. Also *held*, that the act of June 22, 1906, would not cover the payment of a yearly sum to officers or enlisted men of the Organized Militia of a State, where the laws of a State provide for the payment of 3 cents per shot for from 50 to 250 rounds fired by each man on a State range during the year. *C. 20168, Aug. 8, 1906.* *Held*, that the expenditure for the incidental expenses of carrying on rifle matches, including pay of men working targets and purchase of prizes can only become a proper charge against the allotment to a State under section 1661, R. S., as amended, where the subject presented has been made the subject of the favorable exercise of discretion on the part of the Secretary of War, in which case these expenditures would be properly chargeable to that portion of the allotment set aside for the promotion of rifle practice. *C. 20168, July 15, 1909.*

VI C 2 b. The service of teams of 5 men from each company of the National Guard of a State at a target competition ordered by the governor, *held*, to be "actual field or camp service for instruction," and the members of the teams entitled to pay, subsistence, and transportation under section 14, act of January 21, 1903.[1] *C. 14148–A, Aug. 21, 1905.*

VI C 2 c. On request for information as to whether or not State teams at the annual competition at Seagirt, N. J., or elsewhere, may be paid from funds accruing to the several States under section 1661, R. S., and section 14 of the act of January 21, 1903 (32 Stat. 777), *held*, that transportation[2] and subsistence may be so paid. *C. 14148, Feb. 11, 1903.* *Held*, also that the cost of commutation of rations at a rate specified in Army Regulations would constitute a proper charge in favor of enlisted militia competitors participating in matches at Seagirt, N. J., against the allotment accruing to a State in the operation of section 14 of the act of January 21, 1903 (32 Stat. 777). *C. 14148–A, May 2, 1905.*

A rifle team to represent a State in the national match is made up of men from different companies. *Held*, that each man, respectively, is entitled to pay, transportation and subsistence under section

[1] X Comp. Dec., 477.
[2] XIII Comp. Dec. 715, an officer not entitled to mileage.

14 of the act of January 21, 1903, from the date of starting from the station of his company.[1] *C. 14148-B, Aug. 10, 1906.*

A team composed of commissioned officers and enlisted men having been selected to represent the Organized Militia of a State or Territory at the national match, actually attends the national competition for a greater period of time than necessary to shoot the national match, and participates in prior matches. *Held*, that while in attendance on the national match the subsistence of the enlisted men will be defrayed from the support of the Army and while in attendance at the prior matches the subsistence of the enlisted men will be defrayed from the funds accruing to the State under its apportionment under section 1661, R. S. The commissioned officers must subsist themselves from their pay as do regular officers.[2] *C. 14148-G, Aug. 19 and 20, 1909.*

An organization of artillery in a State was classed as reserve militia and not a part of the National Guard of the State. It does not receive any funds from the State's apportionment under section 1661, R. S. *Held*, that service in that organization does not count as service in the National Guard of the State, that can be used to render men eligible to serve on the State rifle team at the national match. *C. 19798, July, 1907.*

On a request that five officers of the National Guard be permitted, as spectators, to accompany the State team of 18 to the national match at Seagirt, N. J., it was *held*, that transportation, pay and subsistence can not be allowed them. *C. 14148-A, June 3, 1905.*

VI D 1. Section 18 of the act of January 21, 1903 (32 Stat. 778) provides that each State or Territory shall, during the *year next preceding* each annual allotment of funds in accordance with section 1661, R. S., as amended, require every company, troop and battery in its Organized Militia, not excused by the Governor, to participate in practice marches, camps of instruction, or drill instruction at armories, or target practice for a stated time, or number of days, and have required during such year an inspection by an officer of the militia or of the Regular Army. *Held*, that the word "year" refers to a calendar and not a fiscal year. *C. 14148, May 20, 1903.*

VII A. Section 1661 R. S., as amended by the act of June 22, 1906 (34 Stat. 450), makes provision for the promotion of rifle practice. *Held*, that the cost of transportation[3] of freight of target supplies from the State arsenal to the different rifle ranges in the State is a proper charge against the above appropriation. *C. 14148-F, Apr. 16, 1909.* Also *held*, that the above appropriation includes authority to pay for the storage of equipment pending the completion of the lease of the target range, and to pay the dray charges from the place of storage to the place where the equipment is to be installed. *C. 14148-C, Feb. 9, 1907.*

VII B. The cost of transporting new material and supplies which are issued by the staff departments to the Organized Militia will be borne by the United States and paid out of "Transportation of the Army." But *held*, that the cost of return transportation from the

[1] X Comp. Dec., 392 and 479.
[2] X Comp. Dec., 400 and 479.
[3] See XIII Comp. Dec., 420. Appropriations for Regular Army not available for payment of transportation of militia.

State armories to the depots and arsenals of the United States can not be paid from "Transportation of the Army." Also, *held*, that articles of equipment and supplies which have been rendered unserviceable by fair wear and tear in the service, must be transported at the cost of the State to which they have been issued under its apportionment of section 1661, R. S. Also, *held*, that repairs made necessary by reason of unavoidable accident or fair wear and tear in the service can not be differentiated from those which have been made necessary through neglect or carelessness or avoidable accident, in determining the cost of payment of transportation. *C. 14148–G; Dec. 4, 1906, Apr. 18, 1907, Mar. 24, 1908, Jan. 5, 1909, and May 6, 1910; 14455, Feb. 27, 1908.*

VII C. The act of April 23, 1904 (33 Stat. 265), forbids the payment of any of the expenses of the Organized Militia in joint encampment with the Regular Army out of funds appropriated for the Regular Army, and the act of June 12, 1906 (34 Stat. 249), limits the expenditure of funds appropriated for expenses of the Organized Militia so participating in joint encampments to the period of time from the date of leaving the home rendezvous to date of return thereto.[1] *Held*, that a State can not be reimbursed for freight on blankets and ponchos shipped from the State arsenal to stations of the different companies as part of their equipment for movement to the camp of instruction. *C. 14148–C, Feb. 15, 1907.*

VII D. The Comptroller of the Treasury having decided that the travel of the rifle team of the Territory of Hawaii from Honolulu to Camp Perry, Ohio, and return, under orders from the War Department, arrangements having been made by the Territorial authorities, was properly chargeable against the pro rata amount allotted by the Secretary of War to the Territory of Hawaii from funds appropriated by Congress for the support of the militia, and that the travel of the team is therefore as troops of the United States, and that the laws relating to the transportation of United States troops apply;[2] and that the team is entitled to transportation at a rate not to exceed 50 per cent of the compensation for such Government transportation over 50 per cent land-grant lines as shall at that time be charged to and paid by private parties to any such company for like and similar transportation, and it is also entitled to bond-aided deductions over the Central Pacific bond-aided line. *Held*, that the above decision of the comptroller would be held to apply to rifle teams from the different States as well as to the team from Hawaii, as the orders for such travel are issued with the prior sanction of the War Department, and the payment for the expense of executing such orders is made from appropriations by Congress, expended, as stated, through a disbursing officer of the United States.[3] *C. 19798, Aug., 1907.*

VII E. A railroad claimed that the Militia of a State while traveling under War Department orders was not entitled to the 50 per cent land-grant reduction which is allowed the United States when regular troops are transported. *Held*, that the travel required of Organized Militia under the orders of the War Department is as troops of the United States and that the laws relating to the transportation

[1] For transportation of horses of mounted officers from home rendezvous to the place of encampment and return see X Comp. Dec., 227.
[2] See X Comp. Dec., 227, Transportation of horses of mounted officers.
[3] See Comptroller's Decision published in Cir. No. 41, June 22, 1907.

of United States troops apply. The payment under the act of March 23, 1910 (36 Stat. 251 and 255), for such travel should, therefore, be governed by the same restrictions as apply to the transportation of troops of the United States.[1] *C. 14148–G, May 10, 1910; 19798, Aug. 8, 1907; 14148, Aug. 22, 1907.*

VII F. The spring inspection of militia batteries required travel by an armament foreman of a district. *Held,* that this travel is a lawful charge against the funds accruing to the State in the operation of section 1661, R. S., and section 14 of the act of January 21, 1903, as amended. *C. 14148–F, Mar. 13, 1909.*

VIII A. The intent of Congress in its legislation respecting the militia has been to contribute to its support by providing the arms, armament, clothing, and equipment which were necessary to prepare it for active service, leaving to the States the duty of providing its armory facilities and current expenses, including such outlay as might be found necessary for the security and preservation of the armament and military stores provided for its use by the General Government. *Held,* that the cost of the installation of wall lockers in the barracks to preserve arms and equipment should be defrayed by the State and not by the United States. *C. 11083, Aug. 22, 1901. Held,* that wall lockers can not be supplied under section 3 of the act of June 22, 1906. *C. 14148–C, May 23, 1907.*

VIII B. Where aliens desired to use a State armory for drill purposes; *suggested* that, as the association of aliens might result in acts constituting a violation of the neutrality laws and, as such, call for action on the part of the proper departments of the United States Government with a view to the maintenance of its neutrality obligations, the proposed organization of aliens be regarded with disfavor, and the Department of State be requested to advise the proper State authorities of the consequences which may ensue upon the granting of permission to use the State armory for the purposes above mentioned. *C. 18088, Sept. 7, 1910.*

IX A 1. Blank forms and blank books prescribed for use of the Army are "supplies" within the meaning of section 17 of the act of January 21, 1903 (32 Stat. 778), and are, therefore, subject to issue or sale as therein provided, to State authorities for the use of the militia. *C. 14148-C, Jan. 29, 1907. Held,* that the expense of printing blank forms for the use of the Organized Militia of a State would constitute a proper charge against its allotment under section 1661, R. S., as amended, as authorized in the first part of section 17 of the act of January 21, 1903 (32 Stat. 777). *C. 14148-B, Nov. 3, 1906. Held,* that a cashbook such as is supplied to disbursing officers of the Quartermaster's Department, can be issued as a part of a State disbursing officer's equipment under the last clause of section 14 of the act of January 21, 1903. *C. 14148, Dec. 29, 1903. Held* that the issue of clothing in stock to a State upon proper requisition, which clothing is not needed to supply the current demands of the Regular Army, is mandatory, provided the sum standing to the credit of the State in the operation of section 1661, R. S., is enough to reimburse the Department for the cost of the articles called for. *C. 14148-F, Oct. 13, 1908. Held,* that the same fire control equip-

[1] See 41 MSS. Comp. Dec., 927, May 23, 1907. See also XIV Comp. Dec., 912; XVI id., 70.

ment that is issued by the Signal Corps to field batteries of the Regular Army may be furnished without cost to States by the Signal Corps through the Ordnance Department, and the appropriation in favor of the Signal Corps may be reimbursed by the transfer from the balances remaining from the several appropriations in question. This permits the accounting to be made on one set of returns to the Ordnance Department.[1] *C. 14148-G, Feb. 2, 1910.*

IX A 2 **a.** Section 3 of the act of January 21, 1903 (32 Stat. 775), was amended by the act of May 27, 1908 (35 Stat. 399), so as to provide an exception to the rule that the regularly enlisted, organized, and uniformed active militia in the several States and Territories and the District of Columbia shall be required to have on and after January 21, 1910, the same armament as that which is prescribed the Regular Army of the United States. This rule is "subject in time of peace to such general exceptions as may be authorized by the Secretary of War." *Held,* that under this exception the Secretary of War may prescribe a rule of armament for Field Artillery in the National Guard under which if a battalion of Field Artillery has the complete personal equipment which fits it for active service, but has, due to the fact that the United States has not yet made ample provision for Field Artillery material, only sufficient Field Artillery material, including guns, caissons, etc., to fully equip one battery, its armament shall be held to conform to the requirement of section 3 of the act of January 21, 1903, as amended by the act of May 27, 1908. *C. 14148-H, May 10, 1911.*

IX B 1. Section 17 of the act of January 21, 1903 (32 Stat. 778), brings all stores that are procured and issued to the Army by way of the supply departments within the operation of section 1661, R. S., as amended, and the act of February 12, 1887 (24 Stat. 401), in respect of ownership and accounting. This property must be accounted for by methods prescribed in the act of February 12, 1887, and June 22, 1906 (34 Stat. 449). *C. 14148-B, Sept. 29, 1906. Held,* that the only sales[2] which are thus authorized to be made to the militia are to States. Sales to individuals are not authorized. *C. 14148, June 19, 1903, Oct. 26, 1907, and Jan. 22, 1908.* And the request for the purchase of such supplies should be signed by the governor of the State or by some officer representing him. *C. 14148, June 20, 1903.* But if the requests are signed by the governor he may vest the duty of signing the receipts in an officer of the State Militia. *C. 14148-F, Nov. 5, 1908.* States can purchase public documents for cash direct from the office of the superintendent of documents. Purchases can also be made under section 17 of the act of January 21, 1903, and the amount charged to the allotment of the State under section 1661, R. S., but no department has been charged with the duty of making these sales. *C. 14148, June 22, 1903. Held,* that a trunk locker may be sold to a State under the general terms of section 17 of the act of January 21, 1903. *C. 14148-F, Apr. 24, 1909. Held,* in view of the requirement of the act of June 6, 1906 (34 Stat. 252), that the number of horses purchased under that appropriation added to the number now on hand, shall be limited to the actual needs of the military service; that bat-

[1] For appropriation against which tentage is charged, see XI Comp. Dec., 356.
[2] X Comp. Dec., 165. Disposition of moneys received from sales to States.

tery horses can not be issued or sold to a State in the operation of section 17 of the act of January 21, 1903. *C. 14148-C, Mar. 25, 1907.* This prohibition applies also to Cavalry and Artillery horses. *C. 14148-G, Nov. 8, 1909, and Apr. 3, 1911.* And, also, *held* that sales to a State for the use of its State police would not be authorized under section 17 of the act of January 21, 1903. *C. 14148-B, Jan. 11, 1906.*

Under the militia act of January 21, 1903, sales may be made to States at the discretion of the Secretary of War, for the use of the militia. There is no authority for sales to States and Territories for other purposes. *Held,* therefore, upon application by a governor for permission to purchase flags for the capitol, that such purchase could not be considered as for the use of the militia. *C. 15286, Oct. 6, 1903. Held,* that under authority of the act of March 3, 1905 (33 Stat. 986), a rifle of the model used by the Army may, upon the request of the governor of a State, be sold by the Secretary of War, provided it is purchased for the use of a rifle club and is to be used in conformity to the regulations prescribed by the Secretary of War, with a view to the promotion of rifle practice among members of the reserve militia. *C. 14148-B, Feb. 3, 1906.*

IX C. Requests for the *loan* of tents, flags, and other public property under the control of the War Department have as a rule been denied on the ground that the Secretary of War had no authority to loan public property under his control unless authorized to do so by resolution or act of Congress.[1] While there have been instances in which dredges and other public property used for the improvement of navigation have been loaned under authority of the War Department, the practice has been with few exceptions, in accordance with the view that, in the absence of authority from Congress, the Secretary of War can not legally loan personal property of the Government. *C. 1561, July, 1895; 2265, May, 1896; 14148-E, Feb. 29, 1908. Held* that in the absence of congressional authority Government ambulances could not be loaned to the National Guard of a State for use on a practice march. *C. 1561, supra. Held,* that United States horses can not be loaned to the National Guard for use at an annual encampment. *C. 10655, June, 1901.*

IX D. The Secretary of War has no authority to relieve a governor for accountability for supplies which have been receipted for by him, although they may have been subsequently lost, destroyed, or stolen. Congress alone can grant the desired relief. *C. 13419, Nov. 20, 1902; Mar. 11, 1903.* But *held,* that where ordnance and ordnance stores of the United States in custody of the governor of a State have been destroyed and the loss is covered by insurance, the insurance money may be applied by the State to the purchase, under authority of the act of February 24, 1897 (29 Stat. 592), of stores and supplies in lieu of those destroyed and be taken up and accounted for by the State in place of those destroyed. *C. 10795, July 12, 1901.* Also *held,* however, that such incidental acquisition of property by renting, as becomes necessary in the establishment, construction, and maintenance of target ranges and shooting galleries, need not be annually accounted for by the governor, but instead, dropped on the

[1] Such action, for example, was taken by the War Department June 24, 1895, on a request for the loan of flags to be used at an encampment.

vouchers reporting their rent, provided the rental is approved by the Secretary of War. *C. 14148–B, Sept. 29, 1906.* Also *held,* that section 4 of the act of June 22, 1906 (34 Stat. 450), relates to all property in the hands of the militia not accounted for at the date of its approval, as to which no final settlement has been reached, and its operation is to provide a method of settlement in such cases. It extends relief for property lost, destroyed, or rendered unserviceable due to carelessness or neglect prior to the passage of said statute by providing that the money value of stores so lost or destroyed shall be charged against the allotment to the State under section 1661 R. S., as amended. *C. 14148–C, Apr. 18, 1907.* Also *held,* that it is now settled law that in the absence of legislation sanctioning it no executive department or officer can dispose of personal property of the United States by sale or otherwise. *C. 14454, Apr. 17, 1903.*

IX E. Two ambulances which had been issued to a State for the use of its Organized Militia needed repair. *Held,* that the cost of such repairs constitutes a proper charge against the allotment accruing to that State in the operation of section 1661, R. S., as amended by the act of June 22, 1906 (34 Stat. 449). *C. 14148–H, Sept. 5, 1910.*

IX F. Certain members of the National Guard of a State refused, upon demand, to return property which had been used by them while participating in the maneuvers on a military reservation. *Held,* that any legal proceeding with a view to the recovery of arms or other property, which had been issued to a State for the use of its Organized Militia, should be instituted in the State courts, whose jurisdiction in the matter is original, as the custody and possession of the property is in the State, although the ultimate ownership of the arms and other property is in the United States. *C. 14148–B, Oct. 25, 1906, July 5, 1907, Mar. 23, 1908, July 27, 1909; 16107–A July 17, 1909.*

IX G. Under section 4, act of June 22, 1906 (34 Stat. 450), clothing which has been in use by the National Guard of the District and which has been condemned may be placed in the custody of the trustees of the National School for Boys, for the use by the boys brigade which is being organized at the school, upon the receipt of a satisfactory undertaking by the trustees that the clothing so transferred shall after use be destroyed. *C. 14148–F, Apr. 6, 1909.* In view of the fact that the authority of the Secretary of War over the property in the custody of the department is plenary, and that it is within his power to order another disposition of the property than that recommended by the inspector, *held,* that if he is satisfied that condemned clothing of the District National Guard will be used to relieve suffering, he may regard its transfer to the Associated Charities as equivalent to its destruction, and may modify the action recommended by the inspector in such a way as to authorize the transfer of the condemned article to the Associated Charities for charitable uses. *C. 25978, Dec. 20, 1909. Held, also,* that a fire-control system damaged by fire should be acted upon by a surveying officer. *C. 14148–H, Feb. 15, 1911.*

IX H. Section 4 of the act of June 22, 1906, provides "That whenever any property furnished to any State or Territory or the District of Columbia, as herein before provided, has been lost or destroyed, or has become unserviceable or unsuitable from use in

service, or from any other cause, it shall be examined by a disinterested surveying officer of the Organized Militia." *Held*, that under the limitation contained in the above law, a Regular Army officer on duty with the Organized Militia of a State can not legally be ordered to act as a surveying officer on the unserviceable property. *C. 14148–E, Feb. 5, 1908.* *Held*, that the above provision applies also to a retired officer of the Regular Army who is on duty with the Organized Militia of a State. *C. 14148–E, May, 1908.* *Held*, however, that if such retired officer on duty with the National Guard of a State actually holds a commission as an officer of the Organized Militia of the State, he may act as surveying officer under the provisions of the law above cited. *C. 14148–G, Nov. 1, 1909.*

IX I. The practice of accepting certificates in matters relating to property accountability has thus far been restricted to officers of the Army, and is to some extent based on the oath of office which is required by law to be taken by that class of public officers. Officers of the Organized Militia do not take that oath, and are not subject to the operation of the Articles of War. *Held*, that affidavits instead of certificates should be required in support of the findings of boards of survey in respect to the loss of or damage to articles of public property which are issued to the several States for the use of their Organized Militia. *C. 17099, Nov. 18 and Dec. 21, 1904; 17255, Dec. 15, 1904.* *Held*, that an oath to the loss of or damage to property can be administered only by one who has been thereto expressly authorized by law. *C. 18026, May 18, 1905.*

IX J. The Army appropriation act of May 26, 1900 (31 Stat. 205), contains a proviso to the effect that the Secretary of War is authorized, on the application of a governor, to replace quartermaster supplies, which the volunteers carried into the service of the United States, during the recent War with Spain, and which have been retained by the United States. *Held*, that the proviso applies not only to stores which were furnished the States or Territories under the annual militia appropriation, but also to supplies purchased by the States and Territories; and it authorizes the replacing of the property, article for article, but does not require that the replacing articles must be strictly new. *C. 8417, June, 1900.*

X A 1. Section 3690, R. S., in providing that balances of appropriations for any fiscal year remaining unexpended at the end of such year shall not be applied to the "fulfillment" of any contracts except those "properly incurred during that year,"[1] expressly excepts "permanent or indefinite appropriations." The existing law (sec. 1661, R. S.) makes a permanent appropriation of a certain sum annually "for the purpose of providing arms and equipments for the militia." *Held* that a balance of this appropriation, remaining unexpended on the last day (June 30) of a certain fiscal year, could legally be used for the payment of a contractor in December following, under a contract entered into, in November, with the Ordnance Department for the manufacture of an arm intended to be issued to the militia. *R. 31, 85, Dec., 1870.*

X A 2. Moneys drawn from Treasury under section 14 of act of January 21, 1903, are to be disbursed under direction of the governor, for payment, subsistence, or transportation, and are to be accounted for in accordance with the rule governing the disbursing officers of

[1] See VI Comp. Dec., 815; id., 898.

the War Department. *C. 14148, June 10, 1903. Held,* that under section 14 of the act of January 21, 1903, funds can only be turned over to a State or Territory on a requisition made by the governor thereof.[1] *C. 14148–A, Aug. 25, 1905. Held* also that a payment of National Guard forces, by a State adjutant general, from personal funds does not constitute a payment under the law, or operate to prevent a payment by the disbursing officer from public funds. *C. 14148–H, Jan. 19, 1911.*

X B. The Secretary of War is not required by the act of April 20, 1874, to cause the accounts of the disbursing officers appointed by the governors of States and Territories under authority conferred by act of January 21, 1903, to be inspected. *C. 14148, Oct. 15, 1903.*

X C. In view of the restrictions contained in section 14, act of January 21, 1903, and in the act of June 22, 1906, on the expenditure of money appropriated for the Organized Militia, *held,* that clerk hire for disbursing officers does not constitute an expenditure which is properly chargeable to the allotment of a State under the two acts cited above. *C. 14148–C, Apr., 1907.*

X D. *Held,* that the status of Hawaii is that of a Territory of the United States within the meaning of the militia act of February 12, 1887 (24 Stat. 401), which provides that of the annual appropriation for the militia (act of June 6, 1900, 31 Stat. 662), such proportion thereof and under such regulations as the President may prescribe shall be apportioned to the Territories and District of Columbia. *C. 9176, Oct., 1900.*

X E. A State may, under its allotment under section 1661, R. S., hire horses for its National Guard and this *held* to include the necessary horses for mounted officers. *C. 14148–F, Aug. 6, 1908. Held,* that the cost of veterinary attention and care for such hired horses will constitute a charge against the allotment of the State in the operation of section 1661, R. S., as amended, and of section 2 of the act of June 22, 1906 (34 Stat. 450). *C. 14148–D, Aug. 9, 1907, Oct. 12, 1908, and Oct. 23, 1908.*

X F. *Held,* that money appropriated under section 1661, R. S., as amended can not be used for the payment of caretakers of United States property in the custody of the National Guard. *C. 14148, Jan. 18, 1912.*

XI A. The adjutant general of a State is clearly an officer of the Organized Militia. *Held,* that if he takes part in actual field or camp service for instruction by order of the governor, he is entitled to pay under section 14 of the act of January 21, 1903, and, also, if, after having been properly detailed in appropriate orders by the Secretary of War, he participates in joint maneuvers with the Regular Army as is contemplated in section 15 of the act of January 21, 1903, he is entitled to pay.[2] *C. 14148, Aug. 4, 1903.*

---

[1] See XIII Comp. Dec., 463. Disbursing officers authorized to disburse funds for promotion of target practice under sec. 2 of the act of June 22, 1906 (34 Stat. 449).

[2] See XV Comp. Dec., 120. The method of computing pay prescribed in the act of June 30, 1906 (34 Stat., 763), is not applicable to the militia. A militia officer on duty at an encampment is not entitled to pay if not mustered by an officer of the Regular Army. (See XV Comp. Dec., 414.) Militia participating in joint encampments with the Regular Army should be paid from the appropriation "Encampments and maneuvers, Organized Militia." (XV Comp. Dec., 514 and 587.) Accounting officers of the United States have no jurisdiction over claims arising under sec. 14, act of Jan. 21, 1903. (See X Comp. Dec., 183, 392 and 635.)

XI B. Under section 14 of the act of January 21, 1903 (32 Stat. 776), the governor of a State has discretion to order the heads of staff departments to take part in a camp of instruction and to perform certain duties in connection therewith. *Held*, that these officers while so engaged are entitled to pay as provided in the above section. *C. 14148 B, Sept. 11 and 17, 1906.*

XI C. Inquiry was made as to whether or not all officers on the governor's staff would be entitled to be paid from the allotted Government funds while in attendance at an authorized encampment. *Held*, that when one or more organizations of the Organized Militia of a State is or are authorized by the Secretary of War to participate in an encampmnet of the Regular Army under section 15 of the act of January 21, 1903 (32 Stat. 776), no officers, other than those belonging to the organizations which have been authorized to participate, can be paid by the United States for services rendered during the encampment.[1] *C. 14148 B, Sept. 11, 1906.*

XI D. If a disbursing officer be selected from among those who in pursuance of the orders of the governor from a part of the forces which engage in camp or field service for instruction, *held*, that he becomes entitled to pay under section 14 of the act of January 21, 1903; otherwise not. *C. 14148, Oct. 1903. Held*, that he is also entitled to pay for not to exceed 10 days while necessarily engaged after his return from camp in preparing his accounts, but a disbursing officer who is not a member of the militia and actively participating in the encampment is not entitled to pay for his services.[2] *C. 14148, Oct. 20, 1903, and Sept. 9, 1904.*

XI E. An assistant surgeon of a State National Guard has the rank of captain either by an appointment to the office of assistant surgeon with that rank or by advancement thereto by operation of law after five years' service in the grade of first lieutenant. *Held*, that he is entitled while engaged in the service specified in sections 14 or 15 of the act of January 21, 1903 (32 Stat., 775), to the pay of the rank of captain.[3] *C. 16975, Oct. 5, 1904; 14148 F, Apr. 15, 1909.*

XI F. A disbursing officer can not legally pay enlisted men at a different rate of pay from that allowed enlisted men of the Regular Army for the purpose of covering the hire of horses. *C. 14148–B, Aug. 23, 1906. Held*, that if an officer of the Organized Militia below the grade of major, whose duty requires him to be mounted, provides himself with a mount, he is entitled to the same extra pay for the same period of time as an officer of the Regular Army would be entitled to under the act of May 11, 1908 (35 Stat. 108). Also *held*, that if the State furnishes an officer with a mount from horses which it has hired under its allotment under section 1661, R. S., for the use of its National

---

[1] See X Comp. Dec., 360. An officer temporarily assigned to duty with an organization which participates is entitled to pay. See XIV id., 665. Participating in a review of the Organized Militia with the governor during the annual encampment is not actual field or camp service for instruction.

[2] See XVI Comp. Dec., 52, and XIV Comp. Dec., 418, for pay of disbursing officer who participates in an encampment. Not entitled to pay for participating in rifle practice. See X Comp. Dec., 405. Disbursing officer not entitled to reimbursement for expenses connected with furnishing his bond.

[3] XI Comp. Dec., 345.

Guard, he would not be entitled to extra pay because of being mounted.[1] *C. 14148–E, June 29, 1908, and Aug. 6, 1908. Held,* that there is no provision of law authorizing reimbursement in full of the amounts claimed by the militia officers who have provided their mounts at their own expense. *C. 14148–F, Aug. 6, 1908.*

XI G. An officer of the National Guard is not entitled to increased pay for length of service, when the service has been rendered as a commissioned officer of the Organized Militia of a State or Territory, or of the District of Columbia.[2] *C. 16975, Oct., 1904.* Also *held* that officers of the Organized Militia are not entitled to longevity pay because of previous service in the Regular Army.[3] *C. 14148–F, July, 1908.*

XI H. An officer was ordered, in a lawful order, by the governor, to a camp ground with a view to making preparation for the reception of troops who were there to go into camp. He submitted his accounts with the muster and pay rolls, as required by the militia regulations. *Held,* that the charge can be paid from funds allotted under sec. 1661, R. S., as amended. *C. 14148–F, June 19, 1909.*

XI I. An officer of the National Guard of a State served as a member of a board to assess damages, as a result of joint maneuvers. *Held,* that he was entitled to the pay and allowances of his rank while the organization to which he belonged remained on duty, and after its return to its home station, until the board completed its labors. The compensation to be paid from the Army appropriation act of June 12, 1906 (34 Stat. 252),"Barracks and quarters"—item "For the hire of buildings and grounds for summer cantonments." *C. 20112, July 25 and 31, 1906.*

XI K. Upon request for an opinion as to whether an officer on duty at encampment is entitled to pay while on leave under proper orders, during a portion of the period while encampment is in progress, *held,* that he is not entitled to pay during the time specified. *C. 14148–A, Aug. 25, 1905, and Oct. 14, 1907.*

XI L. If an officer of the retired list of the militia of a State be placed on active duty in connection with camps of instruction, small-arms competition, etc., without being recommissioned on the active list in the Organized Militia, *held,* that he will not be entitled to pay under section 15 of the act of January 21, 1903. *C. 14148–E, May 29, 1908.*

XI M. Upon consideration of the question of whether or not an officer of the State militia, who is more than 64 years of age, can draw pay for his services it was *held,* that the Congress has expressed its legislative will to the effect that an officer ceases to be able, after he is 64 years of age, to encounter the hardships and vicissitudes of active military service in the field. Also *held,* that the department is not obliged to compensate persons who are not able-bodied, and who are disqualified by reason of age or other physical disability, from rendering efficient service in connection with the administration of camps of instruction or maneuvers. Also *held,* that

[1] XV Comp. Dec., 15.
[2] XII Comp. Dec., 522.
[3] X Comp. Dec., 18. Longevity pay not allowed.

the War Department may describe classes of disabled persons to whom payment shall not be made out of funds accruing to the States in the operation of section 1661, R. S., or out of funds provided by Congress to defray expenses of detachments of the Organized Militia, which, pursuant to the invitation of the department, take part in joint camps of instruction and maneuvers.[1] *C. 14148–G, Apr. 11, 1910; 14911, Mar. 7, 1911.*

XI N. The act of June 22, 1906 (34 Stat. 449), makes provision in favor of the militia for the promotion of rifle practice. *Held,* that the appropriation covers the pay of men as "pitmen," "markers," "caretakers," etc.,[2] for work done on ranges built and heretofore maintained by a State on leased ground with money appropriated from the treasury of the State. *C. 20168, Aug. 8, 1906.* A State furnished markers, pitmen, etc., for the competition at Camp Perry in 1907, and submitted a request to the War Department for reimbursement. *Held,* that the States which sent teams to Camp Perry could contribute from their apportionment under section 1661, R. S., as amended, and that after all had done so, the remainder would represent the amount properly chargeable to the United States, which can be paid out of the Army appropriation. *C. 14148–D, Dec. 5, 1907.*

XI O. A regiment of Organized Militia participated in joint maneuvers at Chickamauga Park, Ga., and was mustered for 14 days as time consumed in going from and returning to its regimental headquarters. The Second Battalion consumed four days in addition, as its home station is different from the regimental headquarters. *Held,* that if the members of the Second Battalion were mustered for pay by a Regular officer for the period of time consumed in returning to their home station, such muster would constitute a basis for payment for the four days' travel.[3] *C. 14148–H, Sept. 6, 1910.*

XI P. A member of a State rifle team,[4] which team had participated in the national match, was taken sick while enroute home, and was delayed in hospital for a period of time. *Held,* that he was not entitled to pay during the time of his illness and up to and including the date of his arrival at his home, as the law limits the right to pay, etc., to the period of time in which the militia are engaged in "actual field or camp service of instruction." *C. 14148–D, Oct. 14, 1907.*

XI Q. A soldier of the Organized Militia of a State participated in a camp for instruction under section 14 of the act of January 21, 1903, and died before signing the roll. No demand has been made by the legal representatives of the estate for the pay. *Held,* that the act of June 30, 1906 (34 Stat. 750), vests no jurisdiction in the disbursing officer of the Army to make payment to the heirs of such decedent.[5] *C. 14148–B, Oct. 8, 1906.*

---

[1] See 22 Op. Atty. Gen., 176.
[2] See XIV Comp. Dec., 631. Employment of members of militia as civilians at target ranges and encampments.
[3] See act of June 12, 1906 (34 Stat. 249).
[4] Pay at State camp of rifle practice and at national match (X Comp. Dec., 477).
[5] X Comp. Dec., 635.

XII A. The act of March 2, 1907 (34 Stat. 1175),[1] directs that rifles of new types and ammunition therefor, when adopted for the Regular Army, shall be furnished to the Organized Militia. *Held*, that this statute is mandatory in terms, and vests no discretion in the Secretary of War in respect to the several incidents of issue and exchange which are therein directed to be made. *C. 14455, Apr., 1908. Held*, that the exchange of ammunition suited to the old type rifle must be at the expense of the United States, in conformity to the requirements of section 13 of the act of January 21, 1903 (32 Stat. 777). *C. 14455, Feb. and Apr., 1908. Held*, that section 13 of the act of January 21, 1903, has been already executed and for that reason has become *functus officio* in that it is not sufficient authority to warrant the department in rearming the militia without cost to the appropriation under section 1661, R. S. *C. 14455, Oct., 1906. Held*, that the number of magazine arms to be issued to a particular State or Territory under section 13 of the act of January 21, 1903, will be determined by the strength of its Organized Militia as authorized by the act of January 21, 1903, upon which date the militia law became effective. *C. 14148, July 13, 1903. Held*, that the expense of issue or exchange of small arms and equipment under section 13 of the act of January 21, 1903, is chargeable against the appropriation carried under that section, but it was not contemplated that the value of the articles issued or exchanged should be so charged. *C. 14455, Apr. 28, 1903, and Sept. 27, 1905. Held*, that under section 13 of the act of January 21, 1903, and the act of March 2, 1907, the Secretary of War is required to receive from a State ammunition which had been purchased by the State from State funds, and which was fitted to a rifle of an old model, which had been exchanged under authority of the act of March 2, 1907, and to issue in exchange therefor, round for round, ammunition suitable for the new type of small arm which had been adopted for the Regular Army and issued to the State. *C. 14455, Apr. 30, 1908. Held*, that the issue of small arms to a military company which is not a part of the Organized Militia of the State is not authorized under section 13 of the act of Jauuary 21, 1903. *C. 14148–A, Dec. 18, 1905. Held*, that the expenses of hauling the arms to be issued to a State under section 13 of the act of January 21, 1905, and of hauling those to be returned to the United States, between the railway depot or nearest steamboat dock and the State storehouse, are to be paid by the United States from the appropriations therein made, and the arms to be returned to the United States are to be accepted by the United States where they are. *C. 14148–E, Mar. 24, and Apr. 7, 1908.*

---

[1] The act of Mar. 2, 1907, provides that: "It shall be the duty of the Secretary of War, whenever a new type of small arm shall have been adopted for the use of the Regular Army, and when a sufficient quantity of such arms shall have been manufactured to constitute, in his discretion, an adequate reserve for the armament of any Regular or Volunteer forces that it may be found necessary to raise in case of war, to cause the Organized Militia of the United States to be furnished with small arms of the type so adopted, with bayonets and the necessary accouterments and equipments, including ammunition therefor: *Provided*, That such issues shall be made in the manner provided in section thirteen of the act approved January twenty-first, nineteen hundred and three, and entitled 'An act to promote the efficiency of the militia, and for other purposes.'" (34 Stat. 1174.)

The act of March 2, 1903 (32 Stat. 942), appropriates $2,000,000 for the purpose of furnishing the necessary articles requisite to fully arm, equip, and supply the Organized Militia of the several States, Territories, and the District of Columbia, with the same armament and equipment as are now prescribed for the Regular Army. *Held,* that as $2,000,000 is not sufficient for that purpose, a method of distribution similar to an allotment will have to be resorted to, and in making the portion which can be assigned, the number of Organized Militia in existence on January 21, 1903, will determine the proportion to which each State and Territory is entitled for the use of its Organized Militia. *C. 14455, June 8, 1903.*

XII B. Upon request for an opinion as to whether or not ammunition can be issued under section 21 of the act of January 21, 1903 (32 Stat. 779), to troops engaged in maneuvers, *held,* that instruction in target practice is an essential condition to the free issue of ammunition to the national guard under section 21 of the act of January 21, 1903, and that therefore it can not be issued free to be fired away in maneuvers, although some incidental instruction in small-arms firing may be imparted. *C. 14791, Nov. 20, 1903, June 14, 1904, and Aug. 10, 1907. Held,* that small-arms' ammunition can not be supplied to the Organized Militia for maneuvers from the appropriation of $2,000,000 carried by the current Army appropriation act of March 2, 1903 (32 Stat. 942), for the purpose of arming, equipping, and supplying the Organized Militia with the same armanent and equipment as are now provided for the Regular Army and that the words "armament and equipment" in that act should be construed as including ammunition. *C. 14791, Aug. 18, and Nov. 21, 1903.* Also, *held,* that the cost of ammunition furnished the Organized Militia for joint maneuvers will constitute a charge against any amount standing to the credit of the State under section 1661 R. S. *C. 14791, Nov. 20, 1903, and June 14, 1904.* Upon a request from a State for a supply of seacoast artillery ammunition for the use of the Heavy Artillery during its approaching term of duty of instruction in one of the forts in New York Harbor, *held,* that funds made available in the fortification bill, when not set apart for a purpose inconsistent with such use, may lawfully be expended for that purpose. The cost of such ammunition may also be accounted for by charging it against the State's allotment under section 1661 R. S., with the governor's consent as expressed in a proper requisition therefor. *C. 14791, June 11, 1903.*

XIII A. The Constitution gives to Congress the power "to provide for organizing, arming, and disciplining the militia," but vests in that body no authority to prescribe its uniform, which authority was left to the States. *Held,* however, that it is within the power of Congress in making gratuitous issues of uniform clothing to the militia to impose conditions in connection with such issues and to provide that any distinctive marks or designations which are used on the uniforms of the Regular Army, such as the coat of arms of the United States, shall not be used, or shall appear in a modified form on such uniforms as may be worn by the Organized Militia to whom they are issued. Such power, however, pertains to Congress, and without legislative authority can not be exercised by the Executive. *C. 14368, Mar. and June, 1903, and Aug., 1906; 14148–F, Oct. 13, 1908.*

XIII B. Campaign badges constitute stores and supplies which are supplied to the Army within the meaning of section 17 of the act of January 21, 1903 (32 Stat. 778). *Held,* that as such, they may be issued to the governors of the several States for the use of their Organized Militia as part of the uniform. *C. 14148–F, Oct. 13, 1908; 23839, Oct. 26, 1908, and Dec. 2, 1908. Held,* that the medals furnished to members of the military establishment for proficiency in small-arms practice are procured out of the funds appropriated for the Regular Army and can not be furnished to a cadet battalion at a State university which was not a part of the Organized Militia of the State. *C. 14148–D, Dec. 28, 1907.*

XIV A. Penalty envelopes can not lawfully be supplied to State or Territorial authorities for discretionary use, but *held,* that if official information is called for by the War Department, respecting the militia, their use would be lawful in carrying the reply. *C. 6419, May, 1899; 12272, Mar., 1902. Held,* that as the adjutants general of the different States in 1898 were aiding the War Department in raising and recruiting the volunteer branch of the United States Army, they were entitled to use War Department penalty envelopes in that work, being personally liable criminally for any improper use made of such envelopes. *C. 4610, July, 1898; 6173, Apr., 1899. Held,* that the adjutants general of the States, Territories, and the District of Columbia are entitled to use penalty envelopes in making the reports and returns to the Secretary of War required by section 12 of the militia act of January 21, 1903 (32 Stat. 776), and in the correspondence regarding them; but that as the militia remains State militia, and as, with certain exceptions, the officers thereof are not "officers of the United States Government," they would not be entitled to use penalty envelopes in correspondence relating to the organization and equipment of the militia, as such correspondence can not be considered as "relating exclusively to the public business of the Government."[1] *C. 14192, Feb. 26 and July 28, 1903; 12272, Mar. 22, 1902; 15183, Aug. 31, 1903; 17336, Jan. 3, 1905.* But *held,* that an adjutant general would not be entitled to a more extensive use of the penalty envelope than is indicated above. And *held,* that he would not be entitled to use penalty envelopes in correspondence with officers of the National Guard, as neither he nor they are "officers of the United States Government" within the meaning of the act of July 5, 1884 (23 Stat. 158). *C. 14192, July, 1903. Held,* that in his capacity as agent of the Quartermaster's Department, a State quartermaster general may use penalty envelopes in his official correspondence. *C. 14148–F, July, 1908. Held,* that a quartermaster general of a State is authorized to use penalty envelopes for correspondence with officers of the National Guard of the State, and with the chief quartermaster of the department on business pertaining strictly to transportation accounts in connection with transportation of the National Guard of the State to and from the camp at Chickamauga Park, where it participated in maneuvers with the Regular Army. *C. 14192, Nov., 1906. Held,* that State disbursing officers may use penalty envelopes for their correspond-

[1] Sec. 3 of the act of July 5, 1884 (23 Stat. 158). See also act of Mar. 3, 1877 (19 Stat. 355), and Cir. 1, A. G. O., Jan. 11, 1892.

ence with the War Department on official business. *C. 14148, Dec., 1903; 15183, Aug., 1903.* A disbursing officer may also use penalty envelopes in making payments provided for on rolls which were transmitted to the War Department for approval. But *held*, that he is not authorized to use free registration for such letters, or for letters sent to the War Department. *C. 17336, Jan., 1905.* *Held*, that penalty envelopes could not be furnished to a bank which desired to use them for the purpose of inclosing blank check books when they might be ordered by a State disbursing officer. *C. 6542, June, 1899.* *Held*, that each person using the penalty envelope must decide for himself his right to do so, having in mind his criminal liability for a misuse thereof. *C. 7351, Nov., 1899.*

The militia of the District of Columbia is not placed under the control of the District government. It is exclusively under the control of the National Government. The President commissions all its officers and is its Commander in Chief. If the officers of the District Militia are, therefore, officers of the United States, and if official matters relating to it are matters relating exclusively to the business of the Government,[1] *held*, that there can be no objection to the use of penalty envelopes in the transaction of its business. These, however, are matters which the Secretary of War is without authority to decide, except to the extent of determining whether or not penalty envelopes shall be issued on requisition therefor. Questions relating to their use are for the consideration of the Post Office Department in the execution of the postal laws, and, finally, for the courts, in prosecutions instituted for violations of those laws. It is clear, however, that penalty envelopes may be issued for making the returns required by section 12 of the militia act of January 21, 1903 (32 Stat. 776). *Recommended*, therefore, that penalty envelopes be furnished without deciding the question as to the scope of the authority for their use. *C. 12272, Mar. 22, 1902; 14192, Feb. 26 and July 28, 1903; 15183, Aug. 31, 1903; 17336, Jan. 3, 1905.*

XIV B. Telegrams were sent by militia officers to the War Department. *Held*, that the cost thereof should be paid from the allotment to the State from section 1661, R. S., and not from appropriation by Congress for carrying on the business of the General Government. *C. 14148, Nov. 7, 1903.*

XIV C. The disbursing officer of a State National Guard communicated direct with the Secretary of War on matters pertaining to his duties as an officer of the National Guard of the State. *Held*, that such correspondence of a disbursing officer with the War Department should be through the adjutant general of the State, as required by Circular No. 62, series 1906, War Department. *C. 14148–D, Aug., 1907.*

XV. The commanding general of a Department, during the period of his exclusive occupation of a State maneuver camp ground, is barred by the act of February 2, 1901 (31 Stat. 758), from permitting the sale of any intoxicating liquors thereon, and may protect his exclusive occupation of said camp site by ejecting any persons coming thereon and attempting to engage in such sales; but *held*, that he should not interfere with any of the canteens established

[1] See acts of Mar. 3, 1877, and July 5, 1884.

and maintained for the sale of "spirituous liquors, wine, ale, or beer" under permission of the authorities of the State, and upon the premises occupied by National Guard organizations of that State as sites for their camps, during the period of joint encampment. *C. 19983, June 29, 1906.*

XVI A. In view of the legislation embodied in the act of March 1, 1889 (25 Stat., 772), none of which is inconsistent or in conflict with the act of January 21, 1903 (32 Stat. 775), it was *held;* (1) that the active militia of the District of Columbia, otherwise known as the National Guard of the District of Columbia, constitutes the "Organized Militia" of the District within the meaning of section 3 of the act of January 21, 1903; (2) that the brigadier general commanding and the brigade staff should be commissioned as officers of the "Militia of the District of Columbia," in conformity to the requirements of sections 7 and 8 of the act of March 1, 1889 (25 Stat. 773); and (3) that the officers of the organizations of the active militia "should be commissioned as officers of the National Guard of the District of Columbia," in conformity to the requirements of section 10 of the same enactment. *C. 14946, July, 1903.*

XVI B. By section 18 of the act of March 1, 1889 (25 Stat. 774), the commanding general of the militia of the District of Columbia is authorized to disband any company of the National Guard or consolidate it with any other company in a case where, for a period of not less than 90 days, it shall have contained less than the minimum number of enlisted men prescribed by the act, or, upon a duly ordered inspection, shall be found to have fallen below a proper standard of efficiency, and to grant honorable discharges to the supernumerary officers and noncommissioned officers produced by such consolidation. *C. 18032, May, 1905.* But *held* that the authority thus conferred does not extend to the Naval Militia of the District of Columbia, established by the act of May 11, 1898 (30 Stat. 404). *C. 19218, Feb. 1906.* The commanding general, National Guard, District of Columbia, disbanded a regiment of the National Guard of the District and issued an honorable discharge to the colonel of the First Regiment. *Held,* that his action was legal and recommendation made that it be sanctioned by the Secretary of War. *C. 18032, May 26, 1905.*

XVI C. Section 20 of the act of February 18, 1909 (35 Stat. 631), provides, *inter alia,* for the retirement of commissioned officers of the District of Columbia National Guard for physical disability. *Held,* that in the absence of a requirement of statute that the board shall be appointed by the President or Secretary of War, it is within the authority of the commanding general of the District National Guard to appoint the medical board provided for in that section. *C. 19789, Apr. 12, 1909.*

XVI D. Section 11 of the act of February 18, 1909 (35 Stat. 629), vests considerable legislative power in the President of the United States. In the exercise of that power he issued regulations for the National Guard of the District of Columbia. *Held,* that the composition of the medical department of the National Guard of the District is fixed in paragraph 8 of those regulations. Also, *held,* that an officer holding a commission in one department or organization of the militia or National Guard may be commissioned in another with

the same grade and date of rank now held under section 76 of the act of February 18, 1909 (35 Stat. 636). *C. 19789, July, 1909.* A captain of a company of the District of Columbia National Guard resigned his commission on November 15, 1899, and the same date was commissioned a captain and inspector of rifle practice, the duties of which he entered upon at once; but he did not accept the commission as inspector of rifle practice until December 28, 1899. *Held,* that his service may be regarded as continuous within the meaning of the clauses of the act of February 18, 1909, which regulates the retirement of officers in the National Guard of the District of Columbia. *C. 19789, July and Aug., 1909,* and *July, 1910.*

XVI E. Section 49 of the act of March 1, 1889 (25 Stat. 779), provides that all officers and employees of the United States and of the District of Columbia who are members of the National Guard shall be entitled to leave of absence from their respective duties, without loss of pay or time, on all days of any parade or encampment ordered or authorized under the provisions of this act.[1] *Held,* that the above section (49) is limited to the National Guard of the District of Columbia. *C. 14873, June 27, 1903. Held,* that a messenger in the Record and Pension Office, who, as a member of the District National Guard, performed one day of duty on the rifle range, pursuant to proper orders, was not entitled to pay for that day as a messenger, as he was not engaged in actual parade proper, or in "encampment."[2] *C. 2694, Oct. 29, 1896; 7242, Nov. 3, 1899; 7418, Dec. 14, 1899.* Upon request by a clerk in the Record and Pension Office for a leave of absence without pay from date of muster in as major of volunteers to date of discharge from such service, it was *held,* that a clerk who is a member of the National Guard of the District of Columbia can not be given an indefinite leave of absence in order to accept a volunteer commission. *C. 4129, May 16, 1898.* The act of July 1, 1902 (32 Stat. 615), declared that the act of March 1, 1889, shall be construed as covering all days of service which the National Guard or any portion thereof may be ordered to perform by the commanding general, District of Columbia, as leave of absence from duty. *Held,* that the act was not retroactive. *C. 13650, Nov. 29, 1902.* If District troops are paid out of funds obtained under section 14 of the act of January 21, 1903 (32 Stat. 777), they are not entitled for the same period to the pay provided in the District appropriation bill. *Held,* that as Government employees receive their pay without deduction during the period of the encampment under section 49 of the act of March 1, 1889 (25 Stat. 779), they are not entitled to receive pay under section 14 of the act of January 21, 1903. *C. 14148, July 14, 1903. Held,* that the act of January 21, 1903 (32 Stat. 775), did not repeal section 49 of the act of March 1, 1889, or extend its operation to the National Guard of the States and Territories. *C. 14873, June 7, 1904. Held,* that the absence of employees in the Commissary Department, in order to attend rifle and revolver matches, which were ordered by the commanding general of the National Guard of the District of Columbia, should not be charged against any time due them in the operation of the laws granting leaves of absence, and that there should be no reduction of pay for absence while so employed. *C. 13650, Oct. 9, 1909.*

---

[1] An inspection not a parade, etc., VI Comp. Dec., 836.
[2] 20 Op. Atty. Gen., 669.

XVI F. The act of March 1, 1889 (25 Stat. 772), provides that the uniform of the National Guard of the District of Columbia shall be the same as prescribed and furnished to the Army of the United States. *Held*, that as members of the Organized Militia of the District of Columbia, officers would be entitled to receive campaign badges under the same conditions as regulate their distribution to officers of the Army, as the campaign badge is part of the uniform. *C. 17243, Dec., 1907.* *Held*, that the above opinion had application to such members of the National Guard as are now in service. *C. 17243, Jan., 1908.* *Held*, that the badges for enlisted men may lawfully be included in issues, but the badges for commissioned officers should be obtained by purchase. *C. 17243, May 23, 1908.* *Held*, that the badge can not be withheld from an enlisted man of the National Guard of the District of Columbia, who had served honorably during the Philippine campaign as an enlisted man of the Regular Army. *C. 17243, Mar. 29, 1910.* *Held*, that the commanding general of the National Guard of the District of Columbia is competent to determine in what case an officer has rendered service in campaign as a militia officer which is of a character to entitle him to wear the distinctive campaign badge. *C. 17243, Apr., 1909.*

XVI. G. An officer of the National Guard of the District of Columbia later became an officer of the United States Volunteers. He had failed to accout for certain United States property for which he was alleged to be accountable as an officer of the District National Guard. The commanding general of the District National Guard recommended stoppage of his pay as a volunteer officer to make good his failure to account for public property. The Secretary of War suspended further payment of his volunteer pay pending prompt action against him by the commanding general of the District National Guard, under the provisions of the militia act of March 1, 1889 (25 Stat. 775), particularly section 33. *Held*, that if a judgment in any case is obtained which can not be satisfied, report thereof should be promptly made to the Secretary of War for his action in the premises, and that in the meantime the commanding general of the District Militia must continue solely responsible to the United States for all United States property in the possession of such militia unless regularly relieved from such responsibility. *C. 10261, Aug. 9, 1901; 11559, Nov., 1901.* *Held*, that if under the act of March 1, 1889, the officer had any property within the District, the District Militia authorities could proceed against it, and if he had none within the jurisdiction the action could abide his return; and in any event, as he denied having received the property, the War Department could not on such a showing grant the commanding general of the District Militia permission to drop the United States property from his returns. *C. 11559, Feb. 28, 1902.*

XVI. H. As the system of property accountability in the National Guard of the District of Columbia is, by the act of March 1, 1889 (25 Stat. 774), as amended by the act of February 18, 1909 (35 Stat. 629), closely assimilated to that prevailing in the Regular Army, it would seem that the same, or similar rules of evidence, should apply in determining questions of property responsibility, and that the rules so applied should differ from and require higher standards of performance than are established by law in the States at large. *Held*, that where officers of the National Guard of the District are required to

give testimony concerning questions of property accountability they may lawfully be permitted to give such testimony in the form of certificates similar in form and character to those required of officers of the Regular Army in similar circumstances. *C. 17099, July 28, 1910.*

XVI. I 1. The act of March 1, 1889 (25 Stat. 772), provides for the organization of the Militia of the District of Columbia. *Held,* that no subsequent legislation annuls, affects, or invalidates the requirement of section 31 of that act, which regulates the armament, clothing, and equipment, or of section 57, which, during the annual encampment or when ordered on duty to aid the civil authorities, regulates the subsistence of the National Guard of the District. *C. 16354, May 26, 1904. Held,* that forage and fuel can be furnished the National Guard of the District of Columbia under section 31 of the above act while in camp. Also *held,* that "consumable property" continues to be the property of the United States until it is actually consumed by its use.[1] *C. 3239, May 28, 1897. Held,* that Dyer's Handbook of Artillery may, under the above law, be issued to the National Guard of the District, as it would come under "other military stores as may be necessary for the proper training and instruction of the force." *C. 17665, Mar. 13, 1905. Held,* that under section 55 of the above act such blank forms as are needed for the administration of the National Guard of the District may be furnished. *C. 16354, Nov. 12, 1907. Held,* that section 14 of the act of January 21, 1903 (32 Stat. 777), does not conflict with section 57 of the above act, and that section 17 of the act of January 21, 1903, has no connection with section 57 of the above act, but simply operates to extend the scope of section 1661, R. S. *C. 14148, July 3, 1903.*

XVI I 2. The commanding general, National Guard of the District of Columbia, submitted a requisition for certain clothing, camp and garrison equipage for the use of the Organized Militia under his command. *Held,* that the Organized Militia of the District of Columbia is entitled to share in the benefits conferred by what is known as the "two million dollar" clause of the act of March 2, 1903 (32 Stat. 942), and the cost of supplies can be charged against the District's allotment under that act. *C. 16354, May 26 and July 19, 1904,* and *May 7, 1908.*

XVI I 3. War Department orders prescribe the kinds of typewriting machines that shall be purchased during the fiscal year 1901, "for the use of the Army." *Held,* that that does not prohibit the Quartermaster's Department from issuing and charging to the Militia of the District a typewriting machine now on hand, which is of a different make. *C. 8580, July, 1900. Held,* that typewriting machines may be issued to the National Guard of the District to the same extent that they are issued to corresponding organizations of the Regular Army by the Quartermaster's Department and their cost will constitute a charge against the allotment to the District under section 1661, R. S., as amended by the act of June 6, 1900 (31 Stat. 662). *C. 14663, May 16, 1903.*

XVI I 4. The commanding general, District National Guard, requested that furniture be furnished and charged against the appropriation of June 6, 1900, for arming and equipping the militia. *Held,*

[1] See III Comp. Dec., 632.

that the cost of the articles requested can not be charged to the appropriation made by the act of June 6, 1900 (31 Stat. 662), but must be met by the special annual appropriation which includes an item for "furniture." *C. 10182, Apr., 1901.*

XVI I 5. The marshal of a G. A. R. parade requested the Secretary of War to authorize the commanding general, District National Guard, to loan 12 sets of horse equipments for the use of his staff. *Held,* that the Secretary of War has no authority to direct the commanding general, District Militia, to loan property of the United States in his custody. *C. 13385, Sept. 30, 1902.*

XVI I 6. Request for the loan of a two-mule team with wagon was made by the National Guard of the District of Columbia for use in connection with rifle practice. *Held,* that while the loan might be authorized as being within the spirit of the act of March 1, 1889 (25 Stat. 779), it becomes of doubtful propriety when considered in connection with the restrictive requirement of the act of appropriation for the support of the Army, and in view of the express provision for incidental expenses of the National Guard of the District of Columbia which is made in the act of appropriation for the support of the District government. *C. 18113, June 6, 1905.*

XVI J. A sergeant in a company of the District National Guard was elected to the position of second lieutenant, examined as the law requires and found competent and otherwise qualified, which fact was duly certified to the commanding general. He was then reduced to the ranks and then subsequently honorably discharged by order of the commanding general, "in the interests of the service" under section 28 of the act of March 1, 1889, from which action he appealed. *Held,* that there is no appeal from his discharge by the commanding general of the District Militia, and that it can not be recalled or set aside. *C. 3398, Aug. 3, 1897.* An enlisted man was dishonorably discharged from the District Militia in pursuance of the approved sentence of a court-martial. He requested that an honorable discharge be substituted for the dishonorable one. *Held,* that the sentence is executed and relief can not be afforded. *C. 10715, June 24, 1901.*

XVII A. Section 23 of the act of January 21, 1903 (32 Stat. 779), provides that certain examinations he held of persons having specific qualifications. One of the qualifications is that the candidate "shall have served in the Regular Army of the United States, in any of the volunteer forces of the United States, or in the Organized Militia of any State or Territory or District of Columbia, or who, being a citizen of the United States, shall have attended or pursued a regular course of instruction in any military school or college of the United States Army." *Held,* that the purpose of the statute is to secure a list of persons specially qualified to hold commissions in any future volunteer force and, therefore, the act should be liberally construed. *C. 14148–E, Mar. 11, 1908. Held,* that it was obviously within the meaning of the act of January 21, 1903, that members of the Organized Militia should be considered as proper candidates for the list of eligibles for volunteer commissions provided for in section 23 of that act. *C. 14148–A, Aug. 26, 1904. Held,* that the entry of the name of an applicant on the list of eligibles provided in the above

section does not confer military rank. *C. 14148–F, Oct. 29, 1908. Held,* that the current appropriations for the support of the Army are applicable to the purpose of paying to eligibles for volunteer commissions who attend military schools, the same allowances and commutation as provided in the act of January 21, 1903, for the officers of the Organized Militia. *C. 14148, Oct. 2, 1903.*

XVIII A. As no legislation of Congress imposes duties upon the War Department or any of its bureaus in connection with the Naval Militia, and as arms for its use are expressly provided for in the current appropriation for the Navy, *held,* that if small arms of the type used by the Regular Army be furnished it would constitute a charge against the appropriation for the support of the Navy. *C. 14694, May 22, 1903.* The War Department has no statutory relations with the Naval Militia, which does not constitute a part of the Organized Militia of the United States within the scope of the act of January 21, 1903 (32 Stat. 775), as no portion of it has ever participated in the apportionment of the appropriation provided by section 1661 R. S., as amended. *Held,* that the War Department is without authority to sell stores to a State for the use of its Naval Militia, and that the act of January 21, 1903, conveys no authority for the exchange of arms issued to the State by the Navy Department for the use of its Naval Militia. *C. 14148–A, Jan. 6, 1904.*

The Naval Militia has received legislative recognition in several acts of appropriation for the Navy and other enactments of Congress, all of which are executed by the Navy Department. In the expenditure of these appropriations and in the training of the Naval Militia, the War Department is without jurisdiction and has never attempted to assert or exercise control. It is a well settled priniciple in the accounting of the Government that where one appropriation is available for a specific object no other appropriation is available for the same work unless there is something in the second appropriation to indicate an intention upon the part of Congress to make it available in addition to the appropriation for the specific object.[1] *Held,* that the Naval Militia is, therefore, not a part of the Organized Militia of the State under section 14 of the act of January 21, 1903.[2] *C. 14148–A, Oct. 18, 1904.* The right to participate in the national competition, which is provided for in the act of April 23, 1904 (33 Stat., 274), is restricted to the forces therein named; and, as the Naval Militia is not among the forces expressly mentioned in that enactment as entitled to compete for prizes and trophies therein provided for, *held,* that members of the Naval Militia as such, should be excluded from the competition.[3] *C. 14694, Mar. 30, 1906, and June 15, 1907.*

XVIII B. The naval battalion, National Guard, District of Columbia,[1] engaged in a 10-day's practice cruise, in connection with

---

[1] I Comp. Dec., 418.

[2] See XIII Comp. Dec., 673, officers of the Navy on duty on United States ships loaned to a State for use of its Naval Militia under act of Aug. 3, 1894 (28 Stat. 219), are entitled to sea pay.

[3] See (26 Op. Atty. Gen., 303) to the contrary. In which opinion the Secretary of War did not concur, he holding that the opinion can not authorize the department to pay for any of the expenses of the team from the naval brigade, or to furnish its supplies, or to do anything except to allow it to take part in the contest and receive the benefit, if it wins, of the trophy which the War Department will pay for. *C. 14694, Aug. 16, 1907.*

joint maneuvers with the Regular Army, under section 15 of the act of January 21, 1903 (32 Stat. 776). *Held*, that it was not entitled to pay from the appropriation "encampment of the Organized Militia with troops of the Regular Army, 1907 and 1908" as Congress in that legislation had in view solely that portion of the militia assimilated to the Army, and did not contemplate payment to the Naval Militia. *Held*, also, that it was not entitled to pay under section 14 of the act of January 21, 1903, as the maneuvers come under section 15 of the act, and, also *held* that the battalion is entitled to pay out of moneys appropriated by Congress for the District in the act of March 2, 1907 (34 Stat. 1154), which specifically provides for practice cruises.[2] *C. 5326, July, 1907.*

XIX A. Request was made for an opinion as to whether or not an honorable discharge from the Organized Militia entitles an alien to citizenship on a showing of a residence of one year in the United States. *Held*, that service in the militia is not regarded as service "in the Armies of the United States, with the Regular or Volunteer forces" within the meaning of section 2166, R. S., relating to the naturalization of aliens. *C. 16818, Aug., 1904; 14148–G, June, 1910.*

XX A. The act of March 2, 1895 (28 Stat. 788), authorizes the Secretary of War to furnish to the governor of any State, at the expense of the State, a transcript of the history of any regiment or company "of his State." *Held* that this act applies to State troops organized, officered, etc., by the States to enter as volunteers into the service of the United States and also to the Organized Militia of the States that were mustered into the service of the United States, but not to those organizations that were distinctively United States organizations and with which the States had nothing to do. The fact that the United States necessarily went into the States to recruit and raise the latter organizations does not make them regiments and companies of the State within the meaning of the act cited. *C. 3894, Feb., 1898.*

XXI. Prior to January, 1903, it was contrary to the practice of the Judge Advocate General's Office, War Department, to discuss matters relating to the military administration of the States. *C. 685, Nov. 24, 1894; 1287, Apr. 20, 1895; 3720, Dec. 9 and 21, 1897, and Sept. 10, 1907; 5638, Jan. 10, 1899; 6345, May 1, 1899; 10103, Mar. 29, 1901; 21594, May 28, 1907. Held*, that purely State matters relative to the State militia should be settled in the State. *C. 4065, Apr. 27, 1898. Held*, that the propriety of the War Department passing on the sufficiency of a State law with regard to its complying with the condition in section 3 of the act of January 21, 1903 (32 Stat. 775), as amended by the act of May 27, 1908 (35 Stat. 400), that the organization of the National Guard must conform to that of the Regular or Volunteer Army of the United States is not free from doubt.[3] *C. 14148–C, June 15, 17, and 18, Sept. 16 and 26,*

[1] For question of purchasing clothing from moneys received from fines see XV Comp. Dec., 466. Chief boatswain of Navy, on duty without troops in connection with vessels loaned to a State is entitled to commutation of quarters (XII Comp. Dec., 713).

[2] 26 Op. Atty. Gen., 303.

[3] Note: Observe the fact that this opinion is limited to the sufficiency of the State law, and does not touch the question of the jurisdiction of the War Department to pass on the question of the conformity of the organization of the national guard of a State to the requirements of the law above cited.

1907, and Sept. 16 and 29, 1908. Upon presentation of a contemplated militia law for a State, with request for information as to its sufficiency to meet the requirements of section 3 of the act of January 21, 1903, it was *held* that the Judge Advocate General of the Army may advise as to the sufficiency for that purpose of the proposed law. *C. 14148–H, Dec. 30, 1910.*

CROSS REFERENCE.

Abuse of civilians.....See ARTICLES OF WAR LIV F 2.
Blank forms.....See APPROPRIATIONS XXXVI D.
Campaign badges to.....See INSIGNIA OF MERIT III B 1.
Command of, at joint encampment.....See ARTICLES OF WAR CXXII B.
Fraudulent enlistment of.....See ENLISTMENT I A 9 e (1).
Muster-in.....See VOLUNTEER ARMY II B 2 to 3.
Regular officer holding commission.....See OFFICE IV A 2 d (1).
Retired soldier may hold office in.....See RETIREMENT II D 1.
Sale or exchange of property to.....See PUBLIC PROPERTY I A 4 a.
Service in.....See RETIREMENT I C 1 e.
Status after called forth.....See VOLUNTEER ARMY I.
Volunteers not part of.....See VOLUNTEER ARMY I B.

MINES.

On military reservations.....See PUBLIC PROPERTY I A 1; III B.

MINOR.

Alien.....See ALIEN II.
Candidate for West Point.....See ARMY I D 1 a (2) (*a*) to (*b*).
Desertion.....See DESERTION V B 7.
Discharge.....See DISCHARGE XII A to D 2.
Enlistment.....See ENLISTMENT I A 9 f (5); (6); g (2); C 1 b; d.
Rearrest of discharged minor.....See COMMAND V A 6 b (1) (*b*).
Residence.....See RESIDENCE.

MINORITY REPORT.

Court of inquiry.....See ARTICLES OF WAR CXIX B.
Retiring board.....See RETIREMENT I B 1 d (3); 6.

MISAPPROPRIATION.

See ARTICLES OF WAR LX A 3; D; LXI B 4.
Captured property.....See WAR I C 6 c (3) (*d*).
Public money.....See DISCIPLINE II D 16 a.

MISCONDUCT.

Act of Mar. 3, 1909 (35 Stat. 735).....See GRATUITY I B to II.
Retired soldier.....See RETIREMENT II B 3 to 4; F 3.
Retirement.....See RETIREMENT I B 3 c.
Rule as to honest and faithful service.....See ENLISTMENT I D 3 c (18).

MISBEHAVIOR BEFORE THE ENEMY.

See ARTICLES OF WAR XLII A.
DESERTION I E.

MISTAKE.

Bidder released.....See CONTRACTS IX to X.

MITIGATION.

See ARTICLES OF WAR CXII A to E.
After disapproval.....See DISCIPLINE XIV E 9 b (1).
Grounds for.....See DISCIPLINE IV C 2 a; XIV E 9 a (16); d (1) (*a*); (*b*); XV F to G.
PARDON VI.
Of sentence.....See DISCHARGE XVI C 2.
Penitentiary sentence.....See DISCIPLINE XIV H 3.
Status, how affected.....See DISCIPLINE XVII A 4 f.

MORAL OBLIQUITY.

Examining board lacks jurisdiction.....See RETIREMENT I B 6 a to b.
Retiring board lacks jurisdiction.....See RETIREMENT I B 1 b (1) (*a*).

MORNING REPORTS.

Evidential value.....See DESERTION IX B.
DISCIPLINE XI A 17 a (2) (*b*) [2].

MORPHINE.

Prescribed by surgeon.....See RETIREMENT I B 6 f (1).

MOTION.

To strike out.....See DISCIPLINE II D 17 a; H 2; IX F 2 a; 3 a.

MOTIVE.

Embezzlement.....See ARTICLES OF WAR LXII C 2.
Misappropriation.....See DISCIPLINE II D 16 a.

MOUNT.

Suitable.....See PAY AND ALLOWANCES I B 7 to 8
Forage.....See PAY AND ALLOWANCES II A 2 d to e.

MURDER.

By soldier.....See ARTICLES OF WAR LIX L 2.
Charge by civilian.....See ARTICLES OF WAR LIX G.
Jurisdiction over by general court-martial...See ARTICLES OF WAR LXII A.
Of prisoner of war.....See WAR I C 11 a.
Of superior officer.....See ARTICLES OF WAR XXI E 1.

MUSICIAN.

Army in competition with civil.....See ARMY BANDS.
Retired soldier.....See RETIREMENT II E 2 a.

MUSTER AND PAY ROLL.

Evidential value.....See DESERTION IX C.
DISCHARGE II B 4.
DISCIPLINE XI A 17 a (1); (2) (*a*) [1] [*e*] [A].
Purpose of.....See ABSENCE II B 8; 8 b.

MUSTER IN.

See VOLUNTEER ARMY II to III.
Drafted men.....See ENLISTMENT II A.
Evidence of.....See DISCIPLINE XI A 17 a (1); (2) (*a*) [1] [*e*].
Pay before.....See PAY AND ALLOWANCES I A 1 a.
Volunteer officers.....See OFFICE V A 5 b to c.

MUSTER OUT.

See VOLUNTEER ARMY IV to V.
Date of.....See DISCHARGE XIII C.
Effect on status.....See DISCIPLINE VIII I 1.
Evidence of.....See DISCIPLINE XI A 17 a (1).
Jurisdiction of military, ends.....See DISCIPLINE III B 2 b.
Notice of.....See DISCHARGE XIV D 3.
Organizations.....See DISCHARGE II B 4; III G; XIII F.

MUTINY.

See ARTICLES OF WAR XXII A; B; XCVII A.
Muster out for.....See DISCHARGE II B 4.
Punishment.....See DISCIPLINE XIV E 9 d (1) (*b*).

NAME.

I. NO LEGAL OBJECTION TO DROPPING—
A. MIDDLE NAME ..... *Page 748*
B. "JUNIOR."

II. RESUMPTION OF CORRECT NAME.

III. PROCEDURE TO CHANGE LEGAL NAME.

IV. AUTHORITY TO CHANGE NAME ON ROLLS.

I A. *Held*, that an officer can drop his middle initial in his official signature.[1] *C. 9066, Oct. 5, 1900.*

I B. *Held*, that there is no legal objection to an officer's dropping the "Junior" from his name during the life of his father, as the father is a civilian and there is no chance of confusion in their names. *C. 3617, Nov. 4, 1897.*

II. An officer upon entrance to West Point gave the name of his uncle, with whom he had lived. Later he applied for permission to resume the name of his father. *Held*, that upon satisfactory evidence being presented as to the correctness of the name presented as that of his father, the War Department could change the records so as to give him his legal surname, namely, that of his father. *C. 3705, Dec. 4, 1897.*

III. A young man after appointment to West Point requested authority to change his name. *Held*, that he should apply to the proper State court at *his* domicile for authority to change his name, and should upon reporting at West Point show that the name borne on his appointment had been legally changed. *C. 18897, June 8, 1911.*

IV. A soldier with an unpronounceable name requested authority to adopt a new name. *Held*, that the Secretary of War was without authority to authorize a change of the legal name, as that can be done only in the manner provided by State statute at his domicile, or by his acquiring a new name by "reputation, general usage, or habit."[2] *Held* further, that outside of the inconvenience attending the notation of the change of the name on the records, etc., there was no objection to the Secretary of War authorizing the change, and that a simple notation on the rolls that the Secretary of War had

[1] See Bouvier's Law Dictionary under "name," and 2 Op. Atty. Gen., 332; 3 id., 467.
[2] Enc. of Law, vol. 16, p. 118.

authorized the change would be sufficient. *C. 3848, Feb. 8, 1898; 9228, Nov. 3, 1900; 11507, Nov. 6, 1901; 14165, Feb. 16, 1903; 18609, Sept. 25, 1905.*

CROSS REFERENCE.

Assumed.....See DISCHARGE XIV B 1.
Change of by cadet.....See ARMY I D 4.
Charges.....See DISCIPLINE II D 8 a; b; H 2.
Company.....See CONTRACTS I B 1.
Corporation on seal.....See BONDS IV G.
Omission of surety's, in bond.....See BONDS I M 8.
Variance in.....See DISCIPLINE XIV E 9 a (3).

NATIONAL CEMETERY.

See PUBLIC PROPERTY IV A to B.
Superintendent.....See RETIREMENT D 4.
TAX II A.

NATIONAL HOME FOR DISABLED VOLUNTEERS.

See SOLDIERS' HOME II.

NATURALIZATION.

See ALIEN II; III.

NAVAL CADET.

See RETIREMENT I A 1 c; C 1 b.

NAVAL MILITIA.

See MILITIA XVIII to XIX.

NAVIGABLE WATERS.[1]

I. LEGISLATION RESPECTING OBSTRUCTIONS ..... *Page 752*
A. WHAT ARE NAVIGABLE WATERS OF UNITED STATES?..... *Page 753*
1. Highway for commerce with other States, etc ..... *Page 754*
a. May include artificial channels.
(1) Erie and Atlantic Basins.
(2) Bayonne Canal, N. J.
b. Includes improved natural waterway ..... *Page 755*
2. May include floatable streams.
B. EXTENT OF CONTROL.
1. Limited to interstate, etc., commerce..... *Page 756*

II. TITLE TO SOIL UNDER.
A. IN STATE OR RIPARIAN OWNER.
1. Islands in Missouri River..... *Page 757*
2. Islands in St. Clair Flats, Mich.
B. TITLES SUBJECT TO SERVITUDE OF UNITED STATES.
1. In hands of grantee from State ..... *Page 758*
2. In hands of lessee of oyster beds.
3. Riparian rights subject to same ..... *Page 759*
a. Protection of banks.
C. SUBJECT TO SERVITUDE FOR DEFENSIVE PURPOSES ..... *Page 760*
D. PROTECTION OF IMPROVEMENTS.
1. Title remains in owner.
a. Right of use in owner..... *Page 761*

[1] Prepared by Mr. Lewis W. Call, Chief Clerk and Solicitor, Office of the Judge Advocate General, U. S. A.

III. BRIDGES, ETC., CONSTRUCTION OF—LEGISLATION.
A. Approval Under State Authority..... *Page 762*
1. Jurisdiction of State and War Department distinguished.
2. State authority should appear..... *Page 763*
a. Plans must conform to State authority.
b. Where bridge, etc., would stop navigation.
c. Where structure is above point of navigability.
3. Of plans for rebuilding bridge.
B. Approval Under Special Statute.
1. Where no approval required..... *Page 764*
2. Approval of plans of existing bridge.
3. Statute requirements as to plans, etc.
a. Evidence required by War Department..... *Page 765*
(1) Copy of charter.
(2) Acceptance of act..... *Page 766*
b. Minimum length of span.
c. Where approved plans departed from.
4. Where authority is implied.
5. Time of commencement or completion.
a. Secretary of War can not extend..... *Page 767*
C. Assignment of Franchise.
1. Must be authorized.
a. Not implied in use of words "successors and assigns."
b. Incident to transfer of property.
D. Rock Island Bridge..... *Page 768*
E. Merchants Bridge—Forfeiture.
F. Temporary Structure on Ice.
IV. BRIDGES: ALTERATION OF.
A. Notice to Specify Changes..... *Page 769*
1. Hearing as to changes and time..... *Page 770*
2. Must be existing obstruction.
3. Future needs to be considered.
B. Notice Should be Precise.
C. New Notice Under Repealing Statute.
D. Where Receiver Appointed..... *Page 771*
E. Where Plans Were Approved.
F. Approval of Plans in Lieu of Notice.
G. Enforcement of Alterations..... *Page 772*
H. Closing of Draw During Repair.
V. PERMITS FOR STRUCTURES, ETC., EFFECT OF.
A. Kind of Permit.
B. Delegation of Authority..... *Page 773*
C. Matters Considered—Jurisdiction.
1. As to structures in District of Columbia..... *Page 774*
D. Kinds of Structures—Water Main.
1. Siphon.
2. Fish weir.
3. Booms.
E. Deposits in Harbors, etc.
1. Beyond 3-mile limit..... *Page 775*
2. In "roadstead" opposite Chicago.
3. In New York Harbor.
F. Harvesting Ice.
G. Necessary for Removal of Dam.
H. For Diversion from Niagara River.

VI. HARBOR LINES: GENERAL CONSIDERATIONS ..... *Page 776*
A. Established for Interstate, Not Local Traffic.
1. Where located ..... *Page 777*
2. Relocation of.
B. Where None Located, State May Establish.
VII. REMOVAL OF SUNKEN WRECKS, ETC.
A. Delegation of Authority ..... *Page 778*
B. Notice to Owners.
1. Right of owners to remove.
2. Obligation where result of negligence ..... *Page 779*
3. No obligation where without fault.
C. When Not Abandoned.
1. Lien for costs.
2. Priority of liens.
D. When no Menace to General Navigation ..... *Page 780*
VIII. CANALS: RULES FOR NAVIGATION ..... *Page 781*
IX. JURISDICTION TO ENFORCE THE STATUTES.
A. In the Law Officers and Courts.
1. Where draw closed.
2. Against dumping in Lake Michigan ..... *Page 782*
B. Authority for Arrest, etc.
C. Authority of Secretary of War to Order Removal of Obstructions in General.
X. IMPROVEMENTS OF.
A. Execution of Appropriations Not Discretionary.
1. Permissive words mandatory ..... *Page 783*
2. Estimates for.
3. Effect of proviso in.
B. Under Engineer Department.
1. Work civil, not military ..... *Page 784*
a. Pay of engineer officers on.
2. Disbursement of appropriation by.
C. May be by Contract or Otherwise ..... *Page 785*
1. Contractor may obstruct navigation.
D. Purchase of Land, etc., for.
1. Purchase of flowage rights.
a. Easement not revocable ..... *Page 786*
2. Lease of land for.
3. Government liable for property taken.
4. Officer liable for trespass.
E. Under License from Owner.
1. Withdrawal of grant or license after expenditure.
F. Sale of Land, etc. ..... *Page 787*
1. Warranty deed.
2. Delegation of authority ..... *Page 788*
3. Property not military stores.
4. Abandoned property, sale or use of.
G. Lease of Land Acquired for ..... *Page 789*
XI. RIVER COMMISSIONS.
A. Mississippi Commission: Authority of.
1. Disposal of maps by.
B. Missouri Commission: Duties of.
C. Traveling Expenses of Members.
D. Subsistence of Guests.

I. The power of Congress to legislate, under the commerce clause of the Constitution, for the prevention and removal of physical obstructions to navigation was not exercised otherwise than by way of improvements carried on by the United States, and except for an occasional act of Congress authorizing the erection of a bridge across a navigable river, and except for the general legislation regarding bridges over the Ohio River (act of Dec. 17, 1872, 17 Stat. 398, as amended Feb. 14, 1883, 22 Stat. 414), until the act of July 5, 1884 (23 Stat. 148), section 8 of which made it the duty of the Secretary of War, on satisfactory proof that any bridge then or thereafter constructed "over any navigable water of the United States, under authority of the United States or of any State or Territory, is an obstruction to the free navigation of such water, by reason of difficulty in passing the draw opening or raft span of said bridge," to require the company or persons owning or operating the bridge to provide the same with such aids to navigation as he may specify in the order. This was followed by more explicit legislation in the act of August 11, 1888 (25 Stat. 400), section 9 of which empowered the Secretary of War to give notice to the persons or corporations owning or controlling any obstructive bridge to "so alter the same as to render navigation through or under it free, easy, and unobstructed;" and section 10 made the failure to remove the bridge or to alter the same, after receiving such notice, punishable by a fine of $500 per month. The jurisdiction of Congress was more fully exercised in the act of September 19, 1890 (26 Stat. 426). Sections 4 and 5 amended sections 9 and 10 of the act of 1888 so as to make them more definite, and increased the penalty for failure to comply with the notice of the Secretary of War—requiring, also, that the parties interested be given reasonable opportunity to be heard before the issue of the notice. Section 6 prohibited the deposit of refuse matter where it would tend to obstruct navigation. Section 7 (as amended by sec. 3 of the act of July 13, 1892) (27 Stat. 88) prohibited the erection of wharves, dams, breakwaters, or other structures or excavation or filling, in navigable waters of the United States, without the permission of the Secretary of War; precluded States from authorizing the construction of bridges over navigable waters which are not wholly within their territorial limits; and provided that it should not be lawful to commence the construction of a bridge over a navigable water of the United States, under an act of a State legislature, "until the location and plans of such bridge" have "been submitted to and approved by the Secretary of War." Section 8 authorized the removal of wrecks of vessels; section 9 prohibited injury to works for the improvement of navigation; section 10 forbade the location or continuance of obstructions to navigation; and section 12 authorized the establishment of harbor lines. The prior legislation on the subject was amended and consolidated by the act of March 3, 1899 (30 Stat. 1121); and forms sections 9 to 20, inclusive, of that act. Section 9 relates to bridges, dams, or causeways; section 10 relates to other structures and to excavating or filling; section 11 relates to the establishment of harbor lines; section 12 prescribes a penalty for violations of sections 9, 10, and 11; section 13 prohibits the deposit of refuse matter where it will injure navigation; section 14 forbids injury to works for the improvement of navigation; section 15 relates to

obstructions caused by anchoring vessels or by sunken vessels, timber, etc.; section 16 provides a penalty for violations of sections 13, 14, and 15; section 17 provides for the enforcement of the provisions of sections 9 to 16, inclusive, by the Department of Justice; section 18 relates to the alteration of obstructive bridges; and sections 19 and 20 relate to the removal of sunken or grounded vessels, etc. By the act of March 23, 1906 (34 Stat. 84), general provisions were enacted to govern as to grants by Congress to "any persons to construct and maintain a bridge across or over any navigable water of the United States"—the act requiring, *inter alia*, the approval of the plans by the Chief of Engineers and the Secretary of War; and by the act of June 21, 1906 (34 Stat. 386), as amended June 23, 1910 (36 Stat. 593), similar legislation was enacted to govern in respect to dams which Congress might thereafter authorize over navigable waters.

I A. Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used or are susceptible of being used in their ordinary condition as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves or by uniting with other waters a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary mode in which such commerce is conducted by water.[1] The true test of the navigability of a stream does not depend on the mode by which commerce is or may be conducted, nor the difficulties attending navigation. It would be a narrow rule to hold that in this country unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway. The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent or manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact and becomes in law a public river or highway.[2] Applying these tests to a tributary of the Mississippi River in Tennessee, it was *held* that the same was a navigable water of the United States; that the fact that all acts of the State legislature declaring a certain part of the river navigable had been repealed did not affect the question of the navigability of that part so far as the laws of the United States were concerned. For example, the duty of the Secretary of War, under section 4, act of 1890, with respect to unreasonable obstructions to navigation over the part referred to, would be unaffected by the repeal of the State laws. *C. 1511, July, 1895; 1709, Sept., 1895; 15029, July 30, 1903; 17989, May 6, 1905.*

[1] See the definition of the term, "navigable waters of the United States," in the Daniel Ball, 10 Wall., 557; *Ex parte* Boyer, 109 U. S., 629. See also Chisholm *v.* Caines, 67 Fed. Rep., 285; St. Anthony Falls Water Power Co. *v.* Water Commissioners, 168 U. S., 349; Leovy *v.* U. S., 177, id., 621. Statutes passed by the States for their own uses, declaring small streams navigable, do not make them so within the Constitution and laws of the United States. Duluth Lumber Co. *v.* St. Louis Boom & Improvement Co., 17 Fed. Rep., 419.

[2] The Montello, 20 Wall., 430.

I A 1. A river is a navigable water of the United States when it forms by itself or by its connection with other waters a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water. If a river is not itself a highway for commerce with other States or foreign countries, or does not form such highway by its connection with other waters, and is only navigable between different places within the State, then it is not a navigable water of the United States but only a navigable water of the State.[1] So *held*, that Devil's Lake being wholly within the State of North Dakota and having no visible outlet was not a navigable water of the United States and therefore not subject to the laws of Congress relating to such waters. A bridge may be built across this waterway under the laws of the State without reference to the Federal Government unless the bridge is to be located on Federal property. *C. 7750, Mar., 1900; 11394, Oct. 18, 1901; 18947, Dec. 21, 1905.*

Held, also, that the French Broad River, which has two navigable stretches, one in North Carolina and the other in Tennessee, separated by a long stretch of river not navigable within the accepted definition of that term, could not be regarded as a navigable water of the United States; and that to make it such there must be a *continuity of navigation or of navigable capacity. C. 24811, Apr. 23, 1909.*

I A 1 a. The engineer officers of the Army, in opening a channel in a navigable river, for the improvement of which appropriation had been made by Congress, were assisted and cooperated with by a local transportation company which owned the land adjoining the channel which it was using for its own boats. Upon the completion of the improvement this company proceeded to levy a toll on other vessels passing through the channel. *Held* that such toll was an obstruction to navigation and could not legally be enforced, the fact that the company owned the land giving it no exclusive right to the free use of navigable waters of the United States. *R. 50, 538, July, 1886.*

I A 1 a (1). The Erie and Atlantic Basins, in New York Harbor, are private property, but they are also navigable waters of the United States; and the owners of the soil under the water hold the title subject to the rights of the public to navigate such waters, and are therefore not empowered to fill in the basins and deprive the public of their use. Moreover, they are waters over which the United States has expressly assumed jurisdiction in prohibiting, by the act of June 29, 1888, the dumping of deposits "in the tidal waters of the harbor of New York, or its adjacent or tributary waters, within the limits which shall be prescribed by the supervisor of the harbor." *Held*, that the subsequent establishment, under the act of August 11, 1888, s. 12, of harbor lines in that harbor outside these basins did not oust this jurisdiction, but that the act of June 29, 1888, was still in force. *P. 50, 366, Nov., 1891; C. 21290, Mar. 14, 1907.*

I A 1 a (2). *Held*, that the Bayonne Canal, in Hudson County, N. J., was navigable water of the United States subject to the admiralty jurisdiction of the United States district court and to the laws of Congress for the enrollment and licensing of vessels and otherwise regu-

[1] The Montello, 11 Wall., 411; 20 Op. Atty. Gen., 101.

lating commerce, and could not therefore legally be obstructed by filling up or damming, by a railroad company, without the permission of the Secretary of War under the act of September 19, 1890. *P. 44, 152, Dec., 1890; C. 16231, May 4, 1904; 18728, Oct. 16, 1905.*

I A 1 b. On the question of whether the Bayou St. John at New Orleans, La., is a navigable water of the United States under the control of the Secretary of War, *held*, that as the bayou was improved by the Carondolet Canal & Navigation Co. and its privies in title, under contract with the State, there could be no question that the corporation had a valid right to charge tolls as authorized by its contract; that such right could not be divested without compensation to the company for the franchise as well as for such property as it might have acquired incident to the improvement;[1] that a river does not become a canal from having had its navigation improved by artificial means;[2] and that the bayou, as improved, was a navigable water of the United States, subject to the powers of Congress to regulate commerce and to the general legislation of Congress for the protection of navigable waters from obstructions. *C. 18982, Dec. 23, 1905.*

I A 2. *Held*, that it was doubtful whether "floatable" streams, i. e., streams capable only of being used for floating sawlogs, timber, etc., not being navigable in a general sense, were included in the term "navigable waters of the United States," as employed in statutes providing that dams shall not be constructed in such waters without the permission of the Secretary of War. But *held* that it was clearly competent for Congress, under the commerce clause of the Constitution, to exercise control over such streams as highways of interstate commerce. *P. 63, 375, Feb., 1894; C. 12905, Sept. 29, 1902; 21290, Mar. 14, 1907 (p. 15).*

I B. *Held* that as the withdrawal of water from the Rio Grande for the purpose of irrigation by means of pumps had reached such a stage as to seriously impair its navigable capacity, the Secretary of War could legally prevent, not only the installation of new plants for the withdrawal of the waters of this river, but also the further withdrawal by existing plants; and *advised* that notice be published that the War Department regards further diversion of its waters as a violation of sections 10 and 12 of the act of March 3, 1899 (30 Stat. 1151); that the construction of any additional works for the purpose will not for the present be sanctioned; and that diversion by existing works be limited so as not to injuriously affect the navigable capacity of the river. *C. 27899, Nov. 21, 1911.* *Held* further, with reference to the contention that the withdrawal of water by means of pumps involves no construction in the stream such as is forbidden by section 10 of said act, that the statute applies not only to structures which obstruct navigation but also to other changes which "modify the course, location, condition, or capacity of * * * the channel of any navigable water of the United States"; and that the withdrawal of sufficient water to affect the navigable capacity of a stream would be within the letter

[1] Huse *v.* Glover (119 U. S., 543); Sands *v.* Manistee River Improvement Co. (123 U. S., 288), Monongahela Navigation Co. *v.* United States (148 U. S., 312).
[2] People *v.* Improvement Co. (103 Ill., 491).

as well as the spirit of the prohibition.[1] *C. 27899, June 27, 1911.* *Held* further that the word "channel," sometimes used in a restricted sense and sometimes as comprising the entire bed of a river, including the flowing water, in view of the object and purpose of the statute and in the light of the decision of the Supreme Court in United States *v.* Rio Grande Irrigation Co. (174 U. S., 690, 708), should be regarded as here used in the enlarged sense. *C. 27899, June 27, 1911.*

I B 1. *Held*, with respect to the authority of the Secretary of War to prevent the construction of a sewer outlet in the Hudson River, that the navigable waters of the United States are not brought within the exclusive control of Congress save in matters connected with interstate and foreign commerce; that in other respects all internal or riparian waters are fully subject to State control,[2] as in the regulation of fisheries, the control of the shores, the ownership of submerged lands, etc., so that the control of waters for drinking and sanitary purposes, and the regulation of the flow and of the deposit of sewage, are matters fully within the control of the several States as an incident of their police power, except in so far as concerns structures which may obstruct navigation, which must be authorized by the Chief of Engineers and the Secretary of War under section 10 of the act of March 3, 1899. *C. 21290, Mar. 14, 1907.*

II A. The United States is not the owner of the soil of the beds of navigable waters, nor of the shores of tide-waters below high-water mark, nor of the shores of waters not affected by the tide below the ordinary water line of the same, except as it may have become grantee of such soil from the State or from individuals. The property in and over the beds and shores of navigable waters is in general in the State, or in the individual riparian owner.[3] But under the power to regulate commerce, Congress may assume, as it has recently assumed, the power so to regulate navigation over navigable waters within the States as to prohibit its obstruction and to cause the removal of obstructions thereto, and such power when exercised is "conclusive of any right to the contrary asserted under State authority."[4] In

[1] See U. S. *v.* Rio Grande Irrigation Co. (174 U. S., 690, 708), where the court, having under consideration sec. 10 of the act of Sept. 19, 1890 (26 Stat. 454), substantially identical, so far as respects this question, with the act of 1899, held that the withdrawal of water above the point of navigation by means of a dam so as to impair the navigability of the river was within the probibition of the act, using the following language regarding the scope of the prohibition: "It is not a prohibition of any obstruction to the navigation, but any obstruction to the navigable capacity, and anything, wherever done or however done, within the limits of the jurisdiction of the United States which tends to destroy the navigable capacity of one of the navigable waters of the United States, is within the terms of the prohibition."

[2] McCready *v.* Virginia (94 U. S., 391, 396); Escanaba *v.* Chicago (107 id., 678); Lake Shore & Michigan Southern Ry. Co. *v.* Ohio (165 id., 365); Cardwell *v.* American Bridge Co. (113 id., 205); Huse *v.* Glover (119 id., 543); Cummings *v.* Chicago (188 id., 410, 430).

[3] Pollard *v.* Hagan, 3 Howard, 212; Barney *v.* Keokuk, 94 U. S., 337; Gilman *v.* Philad., 3 Wallace, 713; South Carolina *v.* Georgia, 93 U. S., 4; 6 Opins. Atty. Gen., 172; 7 id., 314; 16 id., 479; Illinois Cent. R. Co. *v.* Illinois, 146 U. S., 387; Shively *v.* Bowlby, 152 id., 1; Scranton *v.* Wheeler, 57 Fed. Rep., 803; Scranton *v.* Wheeler, 179 U. S., 141; West Chicago R. R. Co. *v.* Chicago, 201 U. S., 506; Union Bridge Co. *v.* U. S., 204 U. S., 364.

[4] Wisconsin *v.* Duluth, 96 U. S., 379; U. S. *v.* City of Moline, 82 Fed. Rep., 592; Leovy *v.* U. S., 92 id., 344; Leovy *v.* U. S., 177 U. S., 621.

exercising this power, it can not divest rights of title or occupation in a State or individuals, but these rights are left to be enjoyed as before, subject, however, to the paramount public right of freeing navigation from obstruction possessed and exercised by the United States through Congress. In the execution of the laws relating to obstructions to navigation the Secretary of War has no general authority, but only such as may have been vested in him by legislation of Congress, especially in the river and harbor appropriation acts.[1] *P. 15, 272, and 16, 244, Mar. and Apr., 1887; 31, 42, B, 386, and 35, 234, Apr. to Sept., 1889; 42, 85, July, 1890; 51, 196, 55, 140, and 56, 483, Jan. to Dec., 1892; 58, 450, Mar., 1893; 63, 365, Feb., 1894; C. 2138, Mar., 1896; 7658, Feb. 7, 1900; 8360, June 4, 1900; 11019, Aug. 10, 1901; 11111, Aug. 29, 1901; 11827, Dec. 30, 1901; 16691, Sept. 10, 1901; 12081, Feb. 25, 1902; 16213, Apr. 25, 1904; 16231, May 4, 1904; 17329, Jan. 6, 1905; 25947, Dec. 15, 1909.*

II A 1. All islands in the Missouri River and in the State of Missouri, which were formed and in existence prior to the admission of the State into the Union, belonged either to the United States or to the parties to whom the United States or Spain had granted them. Upon the admission of the State into the Union the National Government relinquished to the State ownership of the bed of the river[2] therein, and since admission of the State islands formed on the bed have belonged to the State,[3] or may belong for school purposes to the counties in which they are situated under an act of the Missouri Legislature approved April 8, 1895. The matter of purchasing for river improvement purposes for the United States willow brush and other material, products of these islands, would thus depend upon the question of title to the islands and control thereof at the time the purchases are made. *C. 3186, May, 1897.*

II A 2. On the question raised as to the authority to reserve two islands formed by the deposits of material from the new canal, at the St. Clair Flats, Mich., *held*, that if the St. Clair Flats belong to the system of lakes, under the law of Michigan the title to land below low-water mark would be in the State, otherwise in the riparian owners[4] and that the United States would not acquire title by filling in the submerged land. *C. 20170, Aug. 9, 1906.*

II B. *Held*, with respect to the claim that all the property required for a right of way for the canal connecting Lake Washington with Puget Sound had not been acquired because there were outstanding leases to certain submerged lands in Salmon Bay, a navigable waterway of the United States, which would be required for the canal and lock sites, that the title of the State or its grantee thereto is subject to the right of the United States to take and use the lands for any construction in aid of navigation, or for any channel for navigation,

---

[1] See the subsequent opinion of the Attorney General in 20 Op., 101.

[2] See Pollard *v.* Hagan, 3 Howard, 212; Goodtitle *v.* Kibbe, 9 id., 471; Doe *v.* Beebe, 13 id., 25; Withers *v.* Buckley, 20 id., 84.

[3] Cooly *v.* Golden, 23 S. W. Reporter, 100.

[4] Gould on Waters, 3d edition, sec. 75, and authorities cited, especially Backus *v.* Detroit (49 Mich., 110); and Lincoln *v.* Davis (53 id., 375).

without compensation to the State or its grantee,[1] so that it would not be necessary to acquire such submerged lands. *C. 20959, June 29, 1911.*

II B 1. *Held*, with respect to the right of the United States to maintain a wharf projecting from the military reservation of Fort Mason, Cal., on submerged land held by private parties under grant from the State, through the city of San Francisco, and to dredge channels through such lands for access thereto, that the title to submerged land under navigable waters of the United States, whether in the State or a private grantee, was subject to the servitude or easement in favor of navigation, and to the power of the United States, under the commerce clause of the Constitution to occupy the same for any purpose in aid of navigation, without compensation, and also to the regulation by the United States of the use of the same so far as necessary to prevent the obstruction of navigation; and that the wharf, being an aid to navigation, could be lawfully maintained thereon without compensation to the owners.[2] *C. 16630, Nov. 27, 1907, and Mar. 2, 1908.*

II B 2. On the question of whether the adoption of a resolution by Congress, declaring the tunnels under the Chicago River to be obstructions to navigation and directing their modification in accordance with its terms, would involve the United States in any pecuniary liability, *held* that as the tunnels were constructed without authority of Congress the builders were presumed to know that in placing them under a navigable water of the United States they could be maintained only so long as they afforded no obstruction to the navigation of such water; that their alteration could be required in the interests of navigation, without compensation; and that the ownership of the soil under the river was immaterial, since such ownership, whether in the State, municipality, or in a private individual, is subject to the paramount right of navigation and to the authority of Congress to remove obstructions to navigation. *C. 7798, Jan. 12, 1903.*

Held also with respect to the question of whether, in carrying out a project authorized by Congress for the improvement of Tuckerton Creek, N. J., by dredging a channel at the mouth of the same through oyster beds occupied under lease from the State of the submerged lands for oyster culture, it would be necessary to extinguish the leasehold interests of the lessees, that such action would not be necessary, since the title to submerged lands, whether in the State or a grantee or a lessee of the same, is a qualified one subject to the easement or servitude in favor of public navigation and to the right of the Govern-

[1] Hawkins Point Light House case, 39 Fed. Rep., 77; Lewis Bluepoint Oyster Cultivation Co. *v.* Briggs, 198 N. Y., 297—91 N. E., 846. In the latter case it was held that the lessee of land under navigable waters, for use in the cultivation of oysters, had no right in the land which was not subject to the power of the United States to construct improvements in aid of commerce and navigation; that in planting oysters he ran the risk that the crop might be interfered with whenever Congress decided to improve navigation; and that "The rule rests upon the principle of implied reservation, and that in every grant of lands bounded by navigable waters where the tide ebbs and flows, made by the crown or the State as trustees for the public, there is reserved by implication the right to so improve the water front to aid navigation for the benefit of the general public without compensation to the riparian owner."

[2] So *held* by the Acting Attorney General in an unpublished opinion, dated May 8, 1906.

ment to take the lands without compensation for the improvement of the waterway to make it subserve the purposes of commerce.[1] *C. 21814, July 23, 1907.*

II B 3. With reference to the proposed dredging of a channel in Sabine Lake, Tex., near the shore, the effect of which would be to throw up an embankment on the lake alongside of the proposed cut and thus prevent riparian owners from constructing docks out beyond the channel to the deep water of the lake, *held* that the riparian owners could have no legal claim against the United States on this ground, regardless of whether or not they owned the title to the soil in front of their uplands, since any title which they might have would be subject in their hands to the same paramount right or servitude of the Government as it would be in the hands of the State.[2] *C. 17329, Jan. 6, 1905; 11827, Dec. 30, 1901.* Similar *held*, with respect to the lowering of the level of Lake Washington, in the project for a ship canal connecting Lakes Union and Washington with Puget Sound; and that the State would have the same power in respect to its navigable waters, so that even if the lake be regarded as a navigable water of the State, the release of the United States, by the act of February 8, 1901 (Laws of Washington, 1901, p. 7), from all liability to the State, its successors or assigns which would result from the proposed improvement, would be sufficient, as such release would bind subsequent grantees of the State.[3] *C. 20959, Mar. 2, May 17, and June 2, 1911.*

II B 3 a. With reference to the claim of the property owner of submerged lands in Chesapeake Bay under grant from the State of Maryland for compensation for the occupation of a portion of the same by a sea wall in front of the Fort Armistead Military Reserva-

---

[1] It is generally held that the title to submerged lands under a navigable water of the United States and within the limits of a State is in the State and may be granted to individuals subject to the right of the United States to take the same without compensation for the improvement of navigation or for structures in aid of navigation. Hawkins Point Lighthouse case, 39 Fed. Rep., 77; Gibson *v.* U. S., 166 U. S., 269, 276; Scranton *v.* Wheeler, 179 U. S., 141; Chicago, Burlington & Quincy R. R. Co. *v.* Drainage Com'rs, 200 U. S., 561; West Chicago R. R. Co. *v.* Chicago, 201 U. S., 506; Union Bridge Co. *v.* U. S., 204 U. S., 364; Lane *v.* Smith, 71 Conn.—41 Atl., 18; Lane *v.* Board of Harbor Commissioners (Connecticut), 40 Atl., 1058. See also Gilman *v.* Philadelphia (3 Wall., 713, 725), where the court said, respecting the control of navigable waters for commerce: "For these purposes they are the *public property of the United States*, and subject to all the requisite legislation by Congress." And in Pollard's Lessee *v.* Hagan (3 How., 230), the court said: "The right of eminent domain over the shores and the soil under the navigable waters *for all municipal purposes belongs exclusively to the States* within their respective territorial jurisdictions * * * But in the hands of the States this power can never be used so as to affect the exercise of *any national right of eminent domain or jurisdiction* with which the United States have been invested by the Constitution. For although the territorial limits of Alabama have extended all her sovereign power into the sea, it is there, as on the shore, but municipal power, subject to the Constitution of the United States *and the laws which shall have been made in pursuance thereof.*"

[2] Gibson *v.* United States (166 U. S., 272); Scranton *v.* Wheeler (179 U. S., 143); Lewis Bluepoint Oyster Cultivation Co. *v.* Briggs (198 N. Y., 297); Hawkins Point Lighthouse case (39 Fed. Rep., 88); Sage *v.* City of New York (47 N. E., 1101); Philadelphia Co. *v.* Stimson, 223 U. S., 605, Mar. 4, 1912.

[3] Bilger et al. *v.* State et al. (116 Pac., 19). See also Van Siclen *v.* Muir (46 Wash., 41—89 Pac., 188), where it was held that an "Upland owner has no riparian or littoral rights in the navigable waters of a lake. These belong to the owners of the shore lands, and if they belong to the State it only can claim that an obstruction placed in the waters is an interference with the riparian and littoral rights."

tion, *held* that the United States, as riparian owner, had the right to construct the sea wall as a right of necessity[1] to protect the bank without obstructing navigation. *C. 12081, Feb. 25, and Aug. 22, 1902.*

II C. Where claim was made for the use by the Government of a wharf on submerged land in front of Fort Mason, Cal., under grant from the State, through the city of San Francisco, *held* that the Government would appear to have acquired title by prescription.[2] *C. 16630, Aug. 3, 1904.* *Held* further that the reservation having been declared prior to the grant from the State, the submerged lands in front of the same should be regarded as subject to a servitude in the United States for defensive purposes, so that no use could be made by the grantee of the submerged land which would interfere with such purposes; and that there was strong analogy between this power and that of commerce. *C. 16630, Feb. 12, 1906.* Similarly *held* with respect to the authority of the United States to lay and maintain water mains under navigable waters between the States of New Jersey and New York, for the purpose of supplying water from the State of New Jersey to Fort Wadsworth, N. Y.—the statutes of New Jersey forbidding the transportation of water from the State, and also the use of the submerged land of the State for the purpose—that while the title to the soil under the water was in the State, this ownership, under the decisions, was not an absolute one, but qualified by the servitudes in favor of navigation; that similar reasons justify the view that the title of the State to such submerged lands is subject also to the right of the United States to use the same for other constitutional purposes, such as the laying of mines for harbor defenses, the laying of conduits and mains for electrical communication between fortifications, and for supplying water for the use of the garrisons of the fortifications. *Held* further that the statutes of the State could not be regarded as including the United States, since the State could not control the operations of the General Government within the sphere of its activities. *C. 26142, June 7, 1910.*

II D. Under the power to improve navigation, Congress may appropriate for, and the Secretary of War may cause to be erected, a pier in Lake Michigan, and after its erection the United States has the authority of *conservation* of the same. *P. 54, 477, Aug., 1892.* And see *R. 51, 609, Mar., 1887.* Its exercise may be discontinued or abandoned when the work—such as a pier, dam, breakwater, etc.—is no longer needed for the improvement of navigation. *P. 32, 375, May, 1889; 39, 99, and 42, 210, Feb. and July, 1890; C. 13680, Nov. 25, 1902.*

II D 1. *Held* that the building of a dyke, under an appropriation for the improvement of the navigation of the Hudson River, did not of itself vest in the United States a property in the soil or give it any title thereto;[3] that the property in the river frontage was affected by the rights of the United States only so far as concerned the navigation of the river and the maintenance and conservation of the work of improvement, and that the owner might legally make any use of his property that he might see fit provided it did not obstruct naviga-

[1] Diedrich *v.* Northern Union Ry. Co., 42 Wis., 262; Gould on Waters, sec. 160.
[2] So held by the Attorney General in an unpublished opinion dated May 6, 1906.
[3] 6 Op. Atty. Gen., 172; 7 id., 314; Hawkins Point Lighthouse Case, 39 Fed. Rep., 77; Scranton *v.* Wheeler, 179 U. S., 141.

tion or interfere with the improvement.[1] *R. 51, 609, Mar., 1887; P. 54, 477, Aug., 1892; C. 13680, Nov. 25, 1902.*

II D 1 a. Where a railroad company, which, as riparian proprietor, owned the land upon which was located a revetment of the bank of a navigable stream (constructed by the United States in the improvement of the navigation of the same), was authorized to rebuild the revetment, subject to the condition that the work should be so done and maintained as to fully subserve its purpose as a safe and secure revetment and protection to the channel of the stream—*held* that the company, as riparian owner, was legally entitled to use the revetment so long as such use did not impair its serviceableness or involve such an exclusive possession as would be in violation of the provisions of section 9 of the act of September 19, 1890 (26 Stat. 426), and that a failure on its part to perform the condition would not, *per se*, divest it of such right of use, or empower the Secretary of War to enforce such performance by revoking the authority to rebuild the revetment. *P. 64, 11, Feb., 1894; C. 3931, Mar. 14, 1908.*

III. There is no general legislation of Congress authorizing the construction of bridges over streams or waterways, the navigable portions of which are not wholly within the limits of a single State, except as to bridges over the Ohio River.[2] Such authority has hitherto been given, with the exception stated, by special acts, which have uniformly contained provisions requiring that the plans of the bridges be submitted to the Secretary of War for approval before construction is commenced. But in the case of a stream or waterway whose navigable extent is wholly within the limits of a single State, Congress has provided by section 7 of the river and harbor act of September 19, 1890, as amended by section 3 of the corresponding act of July 13, 1892 (27 Stat. 88), by a negative pregnant with an affirmative, and by section 9 of the act of March 3, 1899, directly, that a bridge may be built thereover under authority of an act of the State legislature, provided the plans and location thereof are approved by the Secretary of War.[3] *C. 307, Sept., 1894; 1375, May, 1895; 1943, Jan.,*

---

[1] 16 Op. Atty. Gen., 486. See, however, act of Congress of Mar. 3, 1899 (30 Stat. 1152), and Scranton *v.* Wheeler, *supra.*

[2] See act of Congress approved Dec. 17, 1872 (17 Stat. 398), as amended by act approved Feb. 14, 1883 (22 Stat. 414). See also acts of Mar. 23, 1906 (34 Stat. 84), prescribing requirements to govern as to grants thereafter by Congress of authority for bridges; and act of June 21, 1906 (34 Stat. 386, as amended by 36 Stat. 593) for similar legislation as to dams.

[3] See 20 Op. Atty. Gen., 488, and Lake Shore & Michigan Southern Ry. Co. *v.* Ohio, 165 U. S., 365. The intention of Congress is more clearly expressed in section 9 of the river and harbor act approved Mar. 3, 1899 (30 Stat. 1151), which, after making it unlawful to construct any "bridge, dam, dike, or causeway," over any navigable water of the United States until the consent of Congress thereto shall have been obtained, etc., specifically provides: "That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced."

Under date of Sept. 25, 1899, the Secretary of War held that this section does not authorize the Secretary of War or the Chief of Engineers to approve the plans for a bridge or other structure which would be an obstruction to navigation liable to be proceeded against under the other sections of the act or of the statutes theretofore existing; that the intent of the section appears to be to commit to the States the determination of the question whether or not there should be a bridge at any particular place over navigable waters wholly within the State, and to commit to the Secretary of War the protection of navigation against obstructions by such a bridge.

1896; 2448, 2470, July, 1896; 2596, Sept., 1896; 2677, Oct., 1896; 3047, Mar., 1897; 3428, Aug., 1897. In the latter case the plans of the bridge should be accompanied by proper evidence that the State has authorized its construction. *C. 1389, May, 1895; 12022, Feb. 6, 1902; 12905, Sept. 29, 1902; 13652, Nov. 19, 1902.*

III A. Section 7 of the act of 1890 (26 Stat. 426), in leaving the matter of the authorization and construction of bridges over navigable waters wholly within States entirely to the jurisdiction of the State, except in so far as to require the approval by the Secretary of War of the location and plan of the bridge, indicates that Congress did not desire to exercise any further control over the subject. So, upon an application for the approval by the Secretary of War of the plans of a bridge over the Harlem River, which is wholly within the State of New York, *held* that the fact of the unusual importance of this stream, and of its immediate connections with great interstate waterways and the sea, did not except it from the jurisdiction of the State under the statute or make necessary any special or additional legislation by Congress for the authorization or control of its system of bridges. *P. 53, 354, May, 1892; C. 13652, Nov. 19, 1902.*

III A 1. Section 9 of the act of March 3, 1899 (30 Stat. 1151) provides affirmatively that bridges, inter alia, "may be built under authority of the legislature of the State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided that the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced." On the question raised with respect to the proposed construction by the Northern Pacific Railway of pile bridges across certain waterways of Puget Sound, as to whether the Chief of Engineers and the Secretary of War could legally decline to consider plans for these crossings, under authority of the State, *held*, that in view of the provisions of said section the necessity of crossing the waterways is a matter for the consideration of the State, subject only to the authority of the Chief of Engineers and the Secretary of War to approve only such plans and locations as will prevent the structures from being an unreasonable obstruction to navigation. *C. 25442, Aug. 30, 1909. Held,* however, that there would be no objection to the local engineer officers suggesting to the railway company the advisability of changing the location of the railway in order to avoid the expense of constructing and maintaining drawbridges across these waterways. *C. 25442, Sept. 1, 1909.*

On the application of the city of Boston for the approval of the plans of a bridge across Fort Point Channel, in Boston, a navigable waterway of the United States lying wholly within the State, said bridge to be erected under State authority, *held* that the jurisdiction of the Secretary of War and of the Chief of Engineers, under section 9 of the act of March 3, 1899 (30 Stat. 1151), relates to the situation and dimensions of the piers, the length of the spans, width of the draw openings, etc., but does not include the power of determining whether or not a bridge should be built across the waterway at or near the location of the proposed bridge, that being a matter for the State to determine under the statute.[1] *C. 17600, Feb. 27, 1905.*

[1] See Lake Shore & Michigan Southern Railway Co. *v.* Ohio (165 U. S. 366, 368, 369); Cummings *v.* Chicago (168 U. S. 410); Montgomery *v.* Portland (190 U. S. 89).

III A 2. *Held*, under section 7 of the act of September 19, 1890, as amended by section 3, act of July 13, 1892, and by section 9, act of March 3, 1899 (30 Stat. 1151), that the authority of a State for the erection of a bridge over navigable water within the State should be shown as a condition precedent to the approval by the Secretary of War.[1] *P. 55, 61, and 140, Aug., 1892; 62, 94, Oct., 1893; C. 7774, Mar. 8, 1900; 12022, Feb. 9, 1902; 13652, Nov. 13, 1902; 18947, Dec. 13, 1905.* The fact that the title to the soil under the water is vested in a municipality of the State does not affect the power of the State to grant such authority, nor dispense with the necessity of its doing so. The title to the soil is distinct from the right of conservation. Though this title be vested in a town by the State, there remains in the latter by reason of its sovereignty, "*a jus publicum* of passage and repassage, with consequent power of conservation,"[2] under which power it may concede the authority required by the statute. *P. 62, 94, supra; C. 12081, Feb. 19, 1902; 16213, Apr. 25, 1904; 17329, Jan. 6, 1905.*

III A 2 **a.** Where the act of a State legislature required a *draw*, and the plan of the bridge submitted did not provide for one, *held*, that there being no State authority for the construction of the bridge as proposed, the Secretary of War was without jurisdiction to approve the plans presented. *C. 1443, June, 1895.*

Similarly *held*, where plans were submitted for the construction of a dam or dams without locks, while the statutory authority relied on required "a lock or system of locks." *C. 26797, June 1, 1910.*

III A 2 **b.** As the object of this legislation is to protect the navigable waters of the United States from unreasonable obstructions, *held*, that it should not be construed to authorize the location and plan of a bridge which would have the effect of stopping navigation at the point where it is to be constructed. *C. 5863, Feb., 1899.*

With reference, however, to the construction by the city of New York of an embankment or causeway to hold a sewer outlet across a navigable creek in that city with a view to filling solid above the same, *held*, that the city having authority from the State for the purpose, the location and plans could be approved. *C. 25047, June 5, 1909.*

III A 2 **c.** On the question of whether the Secretary of War had authority to approve the plans for a power dam across St. Joseph River, Ind., the navigable portion of said river being in Michigan, *held*, that as the portion of the river to be affected by the structure is not navigable, no approval of the plans by the department was required. *C. 11394, Oct. 18, 1901.* Similarly *held*, with reference to power dams across the Missouri River in the section known as "The Rapids," near Great Falls, Mont. *C. 25647, Dec. 21, 1909.*

III A 3. With reference to the question of the authority of the Chief of Engineers and the Secretary of War to approve plans for rebuilding a bridge over the Taunton River, a stream lying wholly within the limits of the State of Massachusetts, under State authority given in 1864, *held* that the right originally given to construct the bridge included the right to maintain it, i. e., to repair or rebuild it;[3]

---

[1] See L. S. & M. S. R. Co. *v.* Ohio, 165 U. S., 365, and 20 Op. Atty. Gen., 488.

[2] 6 Op. Atty. Gen., 172, 178.

[3] Rogers Sand Co. *v.* Pittsburgh, Fort Wayne & Chicago R. R. Co. (139 Fed. Rep., 7); Hamilton *v.* Pittsburgh, etc., Ry. Co. (119 U. S., 281); Central Trust Co. *v.* Wabash, St. Louis & Pacific R. R. Co. (32 Fed. Rep., 566).

and that as the act provided for a draw of "not less" that 60 feet in width, implying that in case of future reconstruction a greater width might be required, the Secretary of War and the Chief of Engineers, in the exercise of the powers conferred on them, in passing upon the plans could require such changes in the location and structural relations of the bridge as might seem to them best calculated to secure the free and unobstructed navigation of the river. *C. 18947, Dec. 21, 1905.*

III B 1. Where the special act does not require that a plan of the bridge shall be approved by the Secretary of War, he will preferably not give his approval to any plan, since if he did so he might perhaps commit the Government to the sanction of a bridge which might prove to be an obstruction to navigation. *P. 25, 96, June, 1888.* Where, however, it was proposed to rebuild a bridge, originally constructed over the Missouri River under a special act of Congress which did not require approval of the plans, *held,* that as the later legislation in section 9 of the act of March 3, 1899 (30 Stat. 1150), requires the approval of the plans by the Chief of Engineers and the Secretary of War, as well as the consent of Congress, approval of the plans for the rebuilding of the bridge would be required. *C. 11500, Nov. 2, 1901.*

III B 2. Where a special act of Congress authorized the construction of a bridge across the Mississippi River, upon obtaining approval by the Chief of Engineers and the Secretary of War of the location and plans of the same, and the applicant, after the piers had been completed and the grade fixed, applied for the approval of the location and plans, the approval was withheld on account of the objectionable location of the bridge; and thereafter an act was passed authorizing the applicant "to maintain and operate a bridge and approaches thereto now constructed," upon the proviso, *inter alia,* that the plans and specifications should be approved by the Secretary of War and the Chief of Engineers, otherwise the act to be null and void. On the question raised as to whether it was intended that the bridge should be allowed to stand as built, except for such minor changes as could readily be made, or to make the legalization of the bridge depend upon the judgment of the War Department that the location and plans would afford reasonable facilities for navigation, *held,* that the latter view would defeat the operation of the statute; and therefore that the approval contemplated by the act was of the plans and location of the existing bridge, with such aids to navigation and minor changes as might be deemed necessary in the interests of navigation. *C. 26773, June 3, 1910.*

III B 3. Where a special statute (act of Congress), authorizing the erection of a bridge over navigable water by a railroad corporation named, provided that the bridge should not be commenced till the company should submit for approval by the Secreatry of War a certain plan and design with designated particulars and specifications, *held,* that the authority of the Secretary was thus restricted, and that he could not lawfully act and approve till the *data* described were submitted. *P. 30, 29, Jan., 1889; C. 163, May, 1890.*

The application for the approval must be accompanied by the particulars specified in the act; otherwise the Secretary has no jurisdiction. Here the map and plan submitted failed to show the character of the stucture, as also the full shore line and the direction and

strength of the current, and gave only partial soundings. *P. 43, 259, Oct., 1890; C. 205, 208, and 209, Oct., 1890.* Plans are insufficient as a basis for action where they do not show what the statute requires.[1] *C. 9950, Mar. 7, 1901.* Where the special act designates the kind of bridge authorized, details of the plan, etc., the Secretary of War is empowered to approve only such a bridge and such plans as comply with the statute. If he gives his approval to others, his action will be ineffectual in law, and the bridge if completed will not be a legal structure.[2] *C. 229, Nov., 1890; 1477, June, 1895; 1532, July, 1895; 8892, Sept. and Nov., 1900; 9950, Mar. 7, 1901; 11678, Dec. 2, 1901.*

III B 3 a. Where a special act authorizes the placing of a bridge across navigable water of the United States, by a railroad or other corporation, in addition to the plan of location and particulars required by the statute, a standing "rule" of the War Department of July 31, 1886, requires certain other evidence to be submitted to the Secretary of War, to establish the legal existence and authority of the corporation and its acceptance of the privileges and conditions granted and imposed by the act.[3] *R. 53, 379, Apr., 1887; 56, 574, Sept., 1888.* In particular cases still other evidence may be essential; as in a case where there has been a consolidation of two companies, when copies of the agreement and of the enactment authorizing the consolidation, etc., should also be submitted. *R. 52, 199, May, 1887.*

III B 3 a (1). Under the rule of July 31, 1886, it has been decided by the Secretary of War that the copy of the charter or articles of incorporation of the company should be authenticated under the signature and official seal of the Secretary of State, or other proper State official, in whose office the original is on file. *Held* that a printed copy of a copy, under the certificate of the secretary of the company and its corporate seal, was not sufficient evidence. *R. 53, 32, 37, Sept. 1886.* But the fact that the company has not furnished proper evidence of its incorporation does not affect the jurisdiction of the Secretary of

---

[1] In practice, however, the location and plans of bridges have been approved, although the map of location failed to show all the details specified in the statute, the provisions of the statute, in this respect, being treated as directory.

[2] See Hannibal & St. J. R. Co. *v.* Missouri River Packet Co., 125 U. S., 260, 263; Missouri River Packet Co. *v.* Hannibal & St. J. R. Co., 2 Fed. Rep., 285; Gildersleeve *v.* New York, N. H. & H. R. Co., 82 id., 763; Assante *v.* Charleston Bridge Co., 41 id., 365.

[3] This rule is as follows:

Rule to be observed when application is made, pursuant to an act of Congress, for the approval by the Secretary of War of plans for a bridge, or a right of way, or other privilege.

When an act of Congress granting a privilege to an individual or a corporation contains a clause requiring the approval of the Secretary of War to certain matters of detail, the grantee will be required to establish his identity; if the grant is to a corporation, there will be required a copy of its charter or articles of incorporation, and of the minutes of the organization of the company; also extracts from the company minutes showing the names of the present officers of the company and the acceptance by the company of the provisions of the act of Congress, all properly authenticated.

The identity of the grantee having been established, and the provisions of the law having been complied with, the terms, conditions, requirements, etc., will be reduced to writing. This paper will be signed by the grantee in token of his acceptance of the conditions imposed, and will be approved by the Secretary of War, one copy thereof to be filed in the War Department and the other given the grantee.

WM. C. ENDICOTT,
Secretary of War.

WAR DEPARTMENT, *July 31, 1886.*

War to approve plans of a bridge submitted, and the objection may be waived. *C. 447, Oct., 1894.*

III B 3 a (2). *Held* that the statement of the secretary of the company that it had accepted the provisions of the special act (or of the general act of July 5, 1884) (23 Stat. 133), was not proper evidence under the rule, but that there should be furnished a duly authenticated extract from the minutes of the company exhibiting the fact of acceptance. It should similarly be shown that the map of location and plan of bridge submitted have the approval and sanction of the company. *R. 53, 12, 163, Sept. and Oct., 1886.*

III B 3 b. Where a specific act required a bridge to have at least three channel spans "of not less than" 500 feet each in length, and it was proposed to require one of the spans to be 700 feet in length, *held* that the Secretary of War, on the recommendation of a board of engineer officers, could require a greater length of span, within reasonable limits, but could not properly require such a length of span as would be unreasonable for the locality or as would require an impossible structure. *C. 5662, Jan. 14, 1899.*

III B 3 c. Where a special act of Congress authorized a "free wagon, foot and street railway bridge" across the Arkansas River at Little Rock, Ark., and the approved plans were changed during construction and the bridge thereby weakened so that it could not be safely used for street railway purposes, *held*, on the question of whether the Secretary of War could "insist upon the terms of the charter being carried out," so that a street railway could be built to the military post, that the act did not confer on the Secretary of War any authority to so insist; that his only authority to require the bridge to be altered would be under section 18 of the river and harbor act of March 3, 1899, but that as it did not appear that the bridge was an unreasonable obstruction to navigation, no action could be taken under this act; and that the only way the requirement could be enforced would be to submit the matter to Congress for its action under the reservation in the special act of the power to repeal it or require changes in the bridge at the expense of the owners. *C. 2354, Aug. 5 and 18, 1903.*

III B 4. It is well settled that an unrestricted grant of an authority to construct a railroad from one designated point to another includes by implication the authority to bridge navigable streams *en route*, where the road can not practicably or reasonably be constructed without crossing them.[1] Thus, where, by an act of Congress of June 1, 1886, authority was given to a railway company to construct and operate a railway through the Indian Territory, from a point at or near Fort Smith to a point to be selected by the company on the northern boundary line of the Territory, *held* that the company would be authorized to bridge the Arkansas River. *P. 25, 92, June, 1888.* Similarly *held* as to bridging the same river by the Kansas City, Pittsburg & Gulf Railway Co. under the act of Congress approved February 17, 1893. *C. 1510, July, 1895; 7774, June 16, 1900.*

III B 5. An act of May 14, 1888, in authorizing the Tennessee Midland Railway Co. to bridge the Tennessee River, provided "that this act shall be null and void if the actual construction of the bridge

[1] Gould on Waters, 3d ed., sec. 129; Fall River Iron Works Co. *v.* Old Colony & Fall River R. R. Co., 5 Allen, 221; U. P. R. R. Co. *v.* Hall, 91 U. S., 343.

herein authorized be not commenced within one year and completed within three years from the date of the approval of this act." In the absence of words making *time* an essential element of the performance, legislative acts of this character, although they may designate a period within which a certain thing is to be done, are construed to be directory only and not mandatory as to time. But *held* here that the statute was mandatory and that the time specified was made of the essence of the grant, and therefore that the company, in applying for the approval by the Secretary of War of the location and plan, required by the act to be approved by him, must show that the work had been commenced within the time fixed. *P. 33, 409, July, 1889; 47, 99, May, 1891; C. 8736, Aug., 1900.*

III B 5 a. Where the act of Congress authorizing the construction of a bridge fixes the time for the completion thereof, the Secretary of War can not grant an extension of the time. In such a case the bridge should be completed as soon as possible and application made to Congress for the necessary extension. *C. 250, Nov., 1894.*

III C. Authority granted by an act of Congress to a corporation or an individual to construct a bridge over navigable water of the United States is a franchise which can not be assigned without the permission of the grantor.[1] And the Secretary of War can not in such a case lawfully entertain an application for the approval by him of the plans of a bridge made by a party or a corporation to which the right to build the bridge has been, without the authority of Congress, transferred. *R. 49, 618, Dec., 1885; P. 31, 378, Apr., 1889; 32, 469, June, 1889; C. 17979, Sept. 1, 1905; 18990, Dec. 29, 1905.* Where a specific grant to build a bridge for a specific purpose—*i. e.* to complete its line and to accommodate the public—is made to a railroad corporation by an act of Congress conferring no power of substitution, new legislation is requisite to authorize the transfer of the franchise to another company. *R. 49, 618, supra; 630, Jan., 1886; C. 1660, Aug., 1895.*

III C 1. Where the plans were submitted and the approval of the Secretary was applied for, not by the corporation to which the authority to build the bridge had been granted by an act of Congress, but by a construction company, which, by contract, was to erect all the bridges for such corporation and to own them when completed, *held*, that the Secretary of War could not legally approve the application, the substitution of the company not having been authorized by Congress. *P. 31, 378, Apr., 1889.*

III C 1 a. Where the authority for the bridge is given in terms to the company, "its successors and assigns," it is held that these words, being the ordinary words of limitation of an estate granted in perpetuity to a corporation, confer no right of transfer.[2] There must still be specific authority of statute for the purpose, or the transfer, if assumed to be made, will be ineffectual and void. *P. 31, 378, Apr., 1889; 34, 276, Aug., 1889; C. 17979, Sept. 1, 1905; 18890, Dec. 5, 1905.*

III C 1 b. On the question whether plans for the reconstruction of a bridge submitted by the assignee of the company which received

[1] Branch *v.* Jesup, 106 U. S., 468; Thomas *v.* Railroad Co., 101 U. S., 71.
[2] 18 Op. Atty. Gen., 512.

the franchise from Congress could be approved, *held* that after the plans had been approved and the bridge built the franchise should be regarded as passing with the title to the property, and that plans for the renewal, reconstruction, or repair of the bridge will be accepted from the person or corporation in actual possession or control of the property—the presumption being that the possession or control of the party in occupation is legal.[1] *C. 24818, May 20, 1909.*

III D. The bridge across the Mississippi River connecting the cities of Rock Island, Ill., and Davenport, Iowa, belongs to the United States, which has complete control of the same, subject to the right of way of the Chicago, Rock Island & Pacific Railroad Co. (under the acts of June 27, 1866, and March 2, 1867.) The bridge is both a wagon and a railroad bridge. The railroad company has no interest in or authority over the wagon way or right to dictate what use shall be made of it. The wagon way is established for the use of the United States, not for that of the public, but has been opened to the public for passage and transportation subject to conditions, one of which is that certain railroad freights shall not be conveyed over it. *Held,* that neither the railroad company nor the commanding officer of the arsenal was authorized to prevent the American Express Co. from hauling across between the two cities express matter not of the character precluded by such conditions. *P. 34, 213, July, 1889.*

III E. The "Merchants' Bridge" over the Mississippi River at St. Louis, Mo., was constructed under an act of Congress which provided for the forfeiture of all rights to maintain the bridge and of all property therein in the event of a violation of the provisions against consolidation or pooling of earnings, and that the Secretary of War "shall take possession of the same in the name and for the use of the United States" (act of Sept. 10, 1888, 25 Stat. 474), *held,* on petition for such action, that although the statute requires the Secretary of War to act in an administrative way and "without legal proceedings," the procedure should resemble that of a court of equity where remedy by mandamus or injunction is sought, and that the owners of the bridge should be called upon to show cause why the bridge should not be taken possession of as directed by the statute.[2] *C. 15025, July 28, 1903.*

III F. The street railway companies of Duluth, Minn., and Superior, Wis., applied for permission to construct a temporary structure of piles and pontoons across the St. Louis River between Minnesota and Wisconsin, the structure to be put on and through the ice after navigation had entirely closed and to be removed before the opening of navigation in the spring. *Held,* that the structure was not a bridge within the meaning of the legislation on the subject and that the Secretary of War had authority to grant the permission requested. *C. 705, Dec., 1894; Nov., 1895, and Nov., 1896.*

IV. The power expressly vested in the Secretary of War by section 4 of the act of September 19, 1890 (26 Stat. 426), to determine whether a bridge is an obstruction to navigation, is of a judicial nature, not

[1] See 21 Op. Atty. Gen., 293.

[2] After a hearing the Secretary of War decided, June 5, 1905, that no occasion had arisen for the action of the Secretary of War under the statute.

ministerial merely.[1] The law makes him the agent of the United States for the purpose and vests him with a specific discretion.[2] *Held*, that the power devolved pertained to him alone and could not legally be exercised by the Assistant Secretary of War.[3] *C. 135, May, 1890; 14832, June 24, 1903.*

IV A. Under the act of August 11, 1888 (25 Stat. 400), it was *advised*—though the statute did not require it—that the Secretary of War, being constituted judge in the first instance, would properly give the corporation, etc., owning or controlling a bridge an opportunity to be heard, and not decide the question of obstruction or alteration upon the report of the engineer officer alone. *P. 35, 166, Sept., 1889.* But it was also *held* that the notice was sufficiently specific under the law, though it did not indicate how the proposed alteration was to be made; that the Secretary of War, indeed, was not empowered to prescribe *how* the bridge should be altered, but that the responsibility for the proper alteration was wholly upon the corporation. *P. 28, 14, Nov., 1888; 35, 265, Sept., 1889.* The act of September 19, 1890, section 4, however, amended the provision as to *notice* in the act of August 11, 1888, section 9, by requiring that the notice to be given to the person or corporation owning or controlling a bridge which obstructs navigation to so alter it as to do away with the obstruction "shall specify the changes required to be made," such party being first given a "reasonable opportunity to be heard." *P. 49, 72, Sept., 1891; C. 14832, June 24, 1902.*

Held, that under section 18 of the act of March 3, 1899 (30 Stat. 1151), the jurisdiction to determine whether a bridge is or is not an unreasonable obstruction to navigation is in the Secretary of War, but that the statute requires that in giving the notice "he shall specify the changes recommended by the Chief of Engineers that are required to be made," so that in respect of specific structural changes his duty is to require such modifications to be made as have been expressly recommended by the Chief of Engineers, and he has no authority to require other or additional structural changes than those so recommended. *C. 22317, Apr. 15, 1909.*

---

[1] In U. S. *v.* Rider, 50 Fed. Rep., 406, it was held (by Sage, U. S. Dist. J.) that this section was unconstitutional in delegating to the Secretary of War "powers exclusively vested in Congress." See, however, Rider *v.* U. S., 178 U. S., 251. At the trial of this case in the circuit court there was a division of opinion, but the presiding judge charged the jury that Congress had the constitutional power to confer upon the Secretary of War the authority to determine when a bridge, such as the one in question, was an unreasonable obstruction to navigation, and on writ of error to the Supreme Court the judgment was reversed, without deciding this question, on the ground that the municipal officers controlling the bridge did not have public moneys which could lawfully be applied to the purpose and could not obtain such moneys within the time specified in the notice. In an able and exhaustive opinion by Acting Attorney General Dickenson, dated Oct. 24, 1896, it was held that this act was not an unconsitutional delegation of legislative function; that Congress is not required to consider each case of alleged obstruction, but may generally define the offense and leave the facts to be determined by a court or special tribunal. 21 Opins. Atty. Gen., 430, and authorities cited.

[2] Miller *v.* Mayor of New York, 109 U. S., 385, 393.

[3] See XII Comp. Dec., 483; ibid., 484. Where the notice purports to be from the Secretary of War it is sufficient although signed by the Assistant Secretary. Hannibal Bridge Co. *v.* U. S., 221 U. S., 194.

IV A 1. Before the notice to alter a bridge is given, the party owning or controlling the same is entitled, under the act of 1890, section 4, to be heard *on the changes* specified in the notice as well as on the time in which they are to be made; and unless an opportunity for such hearing has been given, the party will not be liable to the penalties specified in section 5 of the said act. *C. 798, Dec., 1894; 1511, Nov., 1895; 14832, June 24, 1903.*

IV A 2. *Held,* under section 18 of the act of March 3, 1899, on the question of whether proceedings to alter a bridge could be begun prior to the time the bridge becomes an unreasonable obstruction to navigation, that under the statute this notice is to be given when the bridge "*is*" an unreasonable obstruction. *C. 14752, June 25, 1903.* Where, therefore, a bridge is not an unreasonable obstruction to navigation, the Secretary of War can not initiate proceedings for its alteration on the ground that it will obstruct navigation at some future time, whether definite or indefinite. *C. 22317, Aug. 28, 1908, and Apr. 15, 1909.*

IV A 3. With respect to the alteration of a railway bridge across Pablo Creek, Fla., it appeared that the construction, under authority of the State of Florida, of a proposed canal to connect the waters of the creek with those of the St. Johns River, would have the effect of largely increasing commerce on the creek; *held,* with regard to the question of whether, in determining the character of the alterations, this increase of commerce on the creek could properly be considered, that such increase is to be treated as a part of the public commerce in respect to the right of public navigation on this creek; that any changes required to be made in the bridge should have in view this increase as well as the commerce now existing on the creek; and that in authorizing bridges it is usual to take into consideration, not only existing commerce on the stream, but also the probable future requirements of the same. *C. 22317, Aug. 28, 1908.*

IV B. Especially in view of the fact that the giving of the notice to alter, under the act of 1890, section 4, is a proceeding preliminary and necessary to the fixing of criminal liability upon a failure to make the alteration, such notice should be strict and precise.[1] It should set forth the situation and character of the bridge so as clearly to identify it, stating the name of the owner, etc., and specify fully the change or changes "required to be made" as to height, width of span or draw opening, etc.; and it should appear from the notice, or in connection therewith, that the party has had a "reasonable opportunity to be heard." *P. 43, 431, Nov., 1890; C. 14832, June 24, 1903.*

IV C. *Held,* that the provision of the act of August 11, 1888 (25 Stat. 400), as to the proceedings to be taken against a corporation refusing after due notice under that act to alter a bridge, was repealed by that of the act of September 19, 1890, and that such corporation could not be prosecuted without a new notice under the existing statute, followed by a failure to comply. An offender can not be punished under a penal act which has expired or been repealed prior to conviction.[2] So, *advised* that proceedings initiated under the act of 1888 be commenced *de novo.* *P. 43, 431, Nov., 1890; 49, 72, Sept.,*

[1] "A purely statutory authority or right must be pursued in strict compliance with the terms of the statute." Bishop, Written Laws, sec. 119.

[2] Endlich, Interpretation of Statutes, 435.

1891. Under the act of 1890, section 4, it is made the duty of the Secretary of War to initiate proceedings (by notifying the proper district attorney) only in case of alterations, not made, of *completed bridges;* as to other obstructions, the duty to enforce the provisions of the act is devolved upon the "officers and agents" specified in section 11. *P. 52, 343, Mar., 1892.*

IV D. Where, after notice to alter a bridge, as constituting an obstruction to navigation, the bridge company owning the same has failed, and the property has passed into the hands of a *receiver,* the proper method of procuring the alteration to be made is by motion in the proper court for an order requiring the receiver to make it. *P. 37, 404, Jan., 1890.* In such a case neither the owner nor the receiver can be made personally amenable for failure to alter. *P. 60, 118, June, 1893.* A similar proceeding is to be pursued where a receiver has been appointed before notice or before the obstruction was developed. Thus where a bridge, on the line of a railroad, which had been placed under receivers, was discovered to be an obstruction to navigation because of having no draw, *advised* that the Secretary of War apply to the Attorney General to have the case brought by the proper motion to the attention of the court by which the receivers were appointed, whose duty it then would be to order the receivers to make the alteration out of the income accruing from the operation of the road.[1] And *held* that it would not be necessary to notify the receiver as such, since without the order of the court he could not legally incur the requisite expense for the purpose.[2] *P. 60, 118, supra; 62, 55, Oct., 1893; 64, 399, Apr., 1894.*

IV E. Where the plans of a bridge had been approved, under section 7 of the act of September 19, 1890 (26 Stat. 454), without reserving the right to require changes, and as it was proposed, in view of the widening of the river under authority of Congress, to serve notice on the bridge owner to alter the same, *held* that sections 4 and 5 of the same act vested the Secretary of War with jurisdiction in the matter of requiring changes in any bridge "now constructed or which may be hereafter constructed over any navigable waterway of the United States," so that such bridge, when altered, may not be "an unreasonable obstruction to the free navigation of such waters," and that under the combined operation of the two provisions the approval, although not reserving the right, was, nevertheless, subject to such future alterations in the bridge as might be required to render navigation through it reasonably free, easy, and unobstructed.[3] *C. 27747, Feb. 13, 1911.*

IV F. Where a bridge has been reported an unreasonable obstruction to navigation the Secretary of War may proceed under section 4 of the act of September 19, 1890, to give the owners thereof a hearing with a view to notifying them to make the necessary alterations. But if in the meantime the owners waive hearing and notice and submit plans of alterations, the Secretary may approve the same; and his approval will in effect prescribe that the bridge be altered as indicated by the plans. This procedure has been followed in a number of cases. *C. 1157, Mar., 1895; 24, 818, May 7, 1909.*

---

[1] See U. S. *v.* St. Louis, A. & T. R. Co., 43 Fed. Rep., 414.
[2] Cowdrey *v.* Galveston, etc., R. Co., 93 U. S., 352.
[3] See opinion of the Attorney General dated June 9, 1911 (29 Op., 139, 149).

IV G. The acts of July 5, 1884, chapter 229, section 8, and August 11, 1888, chapter 860, section 9, in providing for the removal of obstructions to navigation caused by *bridges*, by requiring their alteration, etc., do not empower the Secretary of War to resort to military force to effect the purpose. They leave the execution of their provisions to the law officers and the courts. They make it the duty of the Secretary of War, whenever the owners or responsible parties, after having been notified to do so, neglect to so alter a bridge as to abate the obstruction, to apprise the Attorney General, who is thereupon required to initiate the proceedings specified in the statute. *P. 42 85, July, 1890.*

IV H. The department of public works of the city of New York requested that the necessary steps be taken to permit that department to close the drawbridge across Harlem River at Madison Avenue for not to exceed two weeks to make needed repairs. *Remarked* that there is no statute of the United States which in terms empowers the Secretary of War to authorize the closing of a drawbridge during its repair, but recommended that the applicant be advised that no steps would be taken by the War Department in regard to the bridge as an obstruction to navigation during the time necessary for its repair. *C. 3299, June, 1897.*

V. Section 10 of the act of March 3, 1899 (30 Stat. 1151) makes it unlawful to construct any wharf, pier, etc., in any navigable water of the United States outside established harbor lines or where none have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War, etc. A permit under this statute confers on the grantee no right or franchise for the structure or interest in the shore or bed of the stream where it is to be built, but simply makes the authority required therein a condition precedent to the exercise of such right as the applicant may have with respect to its effect on commerce and navigation.[1] It can not in any sense be regarded as vesting in the grantee any power to avoid or contravene State and local laws or individual privileges and immunities held by other parties thereunder. *C. 8360, June, 1900; 28869, Aug. 23, 1911; 29359, Jan. 9, 1912.* The jurisdiction to approve plans for structures in navigable waters under this section is not vested in the Secretary of War alone but in the Secretary of War and the Chief of Engineers, each of whom is charged in the statute with an independent exercise of discretion. *Held*, therefore, that a permit can not lawfully issue until the Chief of Engineers has approved or recommended the proposed works. *C. 21193, Feb. 12, 1907.*

V A. *Held* that section 10 of the act of March 3, 1899 (30 Stat. 1151), does not limit the discretion of the Secretary of War as to the character of the permit which he may issue under the authority conferred therein; and therefore the permission may be formal as to piers, wharves, etc., or by way of letter, as to booms, ferry cables, pipe lines, etc. (*C. 14890, June 30, 1903*), or by way of waiver of objections. *C. 27899, Nov. 7, 1911.* Further *held*, as to the taking of water from the Rio Grande, that the permit may be revocable at will absolutely; may be limited either as to amount or by the condition of the river or the season of the year; and may be so worded as to impose notice, upon all subtakers or assignees, of the restrictions of

[1] Cummings *v.* Chicago, 188 U. S. 410.

the permit. *C. 27899, Nov. 7 and 8, 1911. Held*, further, that the riparian owners' rights in regard to the use of the navigable stream whatever they may be under State law, are subject to the paramount authority of the United States to regulate the matter, so that any withdrawal may be prohibited which would injure the navigable capacity of the stream. *C. 27899, Nov. 7 and 8, 1911.*

V B. *Held*, with reference to the question of whether the Secretary of War may legally authorize the Chief of Engineers to permit the placing of log booms, fish weirs, and fish traps in navigable waters of the United States, that while it is well settled that discretionary duties are not a proper subject of delegation, the action proposed should not be regarded as a delegation of discretionary duties, but as the approval by the Secretary of War of such structures in advance, charging the Chief of Engineers with the duty of communicating to the applicants the fact that the Secretary of War has approved the placing of the structures in the navigable waters. *C. 16336, May 13, 1904.* Similarly *held*, with reference to the extension of the authority to include routine applications for permits for excavating approaches to wharves; dredging to obtain sand or gravel for commercial purposes, and to deposit dredged materials under the usual conditions for such deposits; placing of wires, cables, or pipe lines; removal of logs, etc. *C. 16336, Nov. 19, 1910, and Feb. 18, 1911; 25049, July 5, 1910.* Where, however, it was proposed to authorize the local engineer officer to permit the "driving of piles, or the establishment of other structures for mooring purposes, in Newport Harbor, *in such manner and at such points as, in his opinion*, will not seriously interfere with navigation," *held* that the duty imposed on the Secretary of War by the statute is discretionary, not ministerial, and can not legally be delegated.[1] *C. 7767, Mar. 7 and 15, 1900.*

V C. On the protest against granting permission to the Union Oil Co. for a pipe line in the Pacific Ocean at Santa Barbara, Cal., on the ground that a certain amount of oil would be spilled in transfer to the pipe line and would later reach shore, resulting in injury to the bathing facilities for which Santa Barbara is famous, *held* that section 10 of the act of March 3, 1899 (30 Stat. 1151), under authority of which the permit would be given, does not give to any applicant the franchise for the proposed structure but presupposes that the applicant has a franchise for the same; and in order that the structure may not unreasonably obstruct navigation, forbids its erection except upon plans to be approved by the Chief of Engineers and the Secretary of War; and that the jurisdiction conferred on the Chief of Engineers and the Secretary of War should be exercised solely with reference to the interests committed to their charge, i. e., the protection of the navigable waters of the United States from unreasonable obstruction to commerce.[2] *C. 24527, Feb. 25, 1909. Held*, how-

[1] Birdsall *v.* Clark et al. (73 N. Y., 76); Metchem on Public Officers, sec. 567; Throop's Public Officers, sec. 672.

[2] This view was concurred in by the Attorney General in 27 Op. Atty. Gen., 284. See also Montgomery *v.* Portland (190 U. S., 89), where it was held that "under existing enactments the right of private persons to erect structures in a navigable water of the United States that is entirely within the limits of a State is not complete and absolute without the concurrent or joint assent of both the Federal Government and the State government," citing Cummings *v.* City of Chicago (188 U. S., 410), and Willamette Bridge Co. *v.* Hatch (125 U. S., 1). See also North Shore Boom Co. *v.* Nicomen Boom Co. (212 U. S., 406), and Gring *v.* Ives (222 U. S., 365).

ever, in the case of an application for permission to place an advertising sign off the coast at Atlantic City by an applicant who was not an owner of shore property, that the Secretary of War might properly require, as a condition precedent to granting the permission, a showing that the applicant was authorized to construct the same. *C. 26678, May 9, 1910.*

V C 1. With reference to the question of the jurisdiction of the Commissioners of the District of Columbia under the wharf act of March 3, 1899 (30 Stat. 1377), *held* that this jurisdiction is to be exercised subject to the authority conferred on the Secretary of War and the Chief of Engineers by the general legislation of the act of March 3, 1899, *supra*, so that all applications which contemplate work outside the harbor lines should be submitted for the recommendation of the Chief of Engineers and the authorization of the Secretary of War. *C. 13900, May, 27, 1903.*

V D. *Held* that under section 3 of the river and harbor appropriation act of July 13, 1892 (27 Stat. 88), the Secretary of War was empowered to authorize the laying of a water main across the bed of the channel of any navigable water of the United States. *P. 65, 352, June, 1894.*

V D 1. Upon an application by the City of Boston to the Secretary of War for a license to construct and maintain siphons for water pipes at Warren Bridge in the waters of Charles River, *held* that under the authority given him by the river and harbor act of 1888 to require the removal of obstructions to free navigation, at bridges, the Secretary might properly grant such a license as a form of assent to the construction as not likely to interfere with navigation. *P 29, 343, Jan., 1889.*

V D 2. The construction, without the authority of the Secretary of War, of *wiers* in a harbor which is navigable water of the United States outside of established harbor lines (or where there are no harbor lines established) is, under section 7, act of September 19, 1890 (26 Stat. 454), unlawful when the same will be detrimental to navigation. And whether or not the persons who constructed such weirs had any license from the town is immaterial. *P. 53, 45, Apr., 1892.*

V D 3. A fish weir so constructed as in a measure to obstruct the navigation of navigable waters can not be legally placed in such waters without the authority of the Secretary of War, who, by section 7, act of September 19, 1890, is empowered to grant permission for the purpose. And so of a boom desired to be placed in a navigable river. *P. 58, 347, Mar., 1893.*

V E. The act of August 17, 1894 (28 Stat. 338), provides (sec. 6) that "it shall not be lawful to place, discharge, or deposit, by any process or in any manner, ballast, refuse, dirt, * * * or any other matter of any kind other than that flowing from streets, sewers, and passing therefrom in a liquid state, in the waters of any harbor or river of the United States for the improvement of which money has been appropriated by Congress elsewhere than within the limits defined and permitted by the Secretary of War." And any and every such act is made a misdemeanor punishable by fine and imprisonment, etc. This statute prohibits the discharging or depositing of matter "in the waters of any harbor or river for the improvement of which money has been appropriated by Congress." As the statute is

a penal one, and therefore subject to the rule of strict construction, this prohibition should not be construed to extend to the tributaries of such waters, notwithstanding the pollution of the tributaries would result in injury to said waters. *C. 581, Oct., 1894; 21290, Nov. 14, 1907.*

V E 1. *Held* that the prohibition, by section 6, act of September 19, 1890 (26 Stat. 453), of the dumping of ballast could not legally be enforced in New York Harbor beyond the 3-mile limit.[1] *P. 51, 154, Dec., 1891; C. 21290, Mar. 14, 1907.*

V E 2. *Held,* under section 3 of the act of July 13, 1892 (27 Stat. 88), that the dumping, in Lake Michigan opposite Chicago, of material from the Chicago Drainage Canal so as to cause shoaling, would be a violation of the section, the locality being regarded as a "roadstead" within the meaning of the statute; and that the Secretary of War could legally designate limits outside which dredgings might be deposited in the waters of the lake. *C. 1537, July 24, 1895.*

V E 3. On the question raised as to the authority of the Secretary of War, under the act of June 29, 1888 (25 Stat. 209), as amended by the act of August 18, 1894 (28 Stat. 338), which forbids deposits, except from sewers in liquid state, in the tidal waters of the harbor of New York or its adjacent or tributary waters elsewhere than as designated by the supervisor of the harbor under the direction of the Secretary of War, to prevent the dumping of garbage where it would be liable to be washed ashore along the New Jersey coast, *held* that while police jurisdiction is ordinarily confined within the 3-mile limit, many States assume a wider zone in defining offenses against their revenue laws, and it would seem that they might with equal propriety do so for the protection of their harbors; that by the above legislation Congress intended to conserve the sanitation of the harbor and of the adjacent coast; and that it would be competent for the supervisor of the harbor, with the approval of the Secretary of War, to designate a place of deposit beyond the 3-mile limit at a point sufficiently remote to insure not only the protection of the harbor against obstructions to navigation but also to conserve the sanitation of the adjacent coast. *C. 20031, July 11, 1906.*

V F. No executive department of the Government can give private parties the exclusive privilege of harvesting ice from any part of a navigable river of the United States. *C. 1817, Nov., 1895.*

V G. With reference to the threatened removal, under the authority of the State of Illinois, of certain State dams the removal of which would modify the capacity of the Illinois River, a navigable water of the United States, *held,* on the question whether such threatened removal could be prevented, that under section 10 of the act of March 3, 1899 (30 Stat. 1151), such removal would be unlawful without the proper authorization of the Secretary of War, upon the favorable recommendation of the Chief of Engineers. *C. 14235, Mar. 25, 1903.*

V H. The diversion of water from the Niagara River above the falls was regulated, prior to the ratification of the treaty of January 11, 1909 (36 Stat. pt. 2, p. 2448), by the act of June 29, 1906 (34 Stat. 626), which was extended in its operation by joint resolution of March 3, 1909 (35 Stat. 1169). The act, as extended, expired by

[1] Compare the concurring opinion of the Attorney General in 20 Op. 293.

its own limitation June 29, 1911.[1] *Held* that the treaty of January 11, 1909 (*supra*), being of later date and of precisely equal obligatory force, replaces the provisions of the act of June 29, 1906, in all incidents in which it conflicts with said act; that the licenses given under said act will expire, each in accordance with its terms, on June 29, 1911, after which any action in respect to the issue of new licenses will have to be regulated by article 5 of said treaty of January 11, 1909; and in respect to the appointment of commissioners under the treaty that the requirements of said treaty were fully operative, and no further legislation would be necessary to warrant the appointments, provision having been made by the act of June 25, 1910 (36 Stat. 766), for the expenses of commission incurred under the treaty for the fiscal year ending June 30, 1911. *C. 19094, Jan. 11, 1911.*

Held, under the act of June 29, 1906 (34 Stat. 626), forbidding the diversion of water from the Niagara River except as authorized therein, that in respect to the withdrawal of water by the city of Lockport, N. Y., for domestic and sanitary purposes it was questionable whether the proviso of said act, that the prohibition should not apply to diversion for "sanitary or domestic purposes, or for navigation, the amount of which may be fixed from time to time by the Congress of the United States *or by the Secretary of War* under its direction," the Secretary of War could not authorize such diversion except in pursuance of appropriate enabling legislation.[2] *Held*, however, that permission for the necessary intake could be given under the act of March 3, 1899, pending the obtaining of such legislation. *C. 20607, Oct. 25, 1906.*

VI. On the general question of the proper location of harbor lines, *held*, that they should be kept as near to the shore as the reasonable demands of navigation, present or prospective, may require, since when they are once established and reclamation work and structures have been started in rear of the same, it will be exceedingly difficult to afterwards move the lines farther toward the shore across the existing structures. *C. 28243, Apr. 29, 1911.*

VI A. *Held*, under section 12 of the act of September 19, 1890 (26 Stat. 455), authorizing the Secretary of War to establish harbor lines, that, in establishing a harbor line in the harbor of Bridgeport, Conn., he was authorized to prescribe regulations under which the littoral owners (who, by the laws of Connecticut, have a right of property in the flats on their fronts, and may wharf or dock out to the navigable channel so as to avail themselves of the use of it) should have their vested rights recognized and protected; that while he might, for the protection of navigation, regulate their building out to the channel, he could not prohibit their doing so, or condemn, or deprive them of, their property. But *held*, that his authority for establishing a harbor line—which consists in locating an imaginary line beyond which wharves, etc., shall not be extended or deposits dumped—could be exercised only so far as necessary for the protection of the navigable channel as an interstate waterway, and not to protect mere local traffic. *P. 52, 211, Feb., 1892; 51, 132, Dec., 1891.*

---

[1] Provisions of act of June 29, 1906, reenacted and extended to Mar. 1, 1912 (37 Stat. 43).

[2] The Secretary of War held that the exception in the said act of June 29, 1906, referred "as well to authority previously as to that which may be conferred by subsequent statute," and directed that the necessary permit be issued.

VI A 1. With reference to the establishment of harbor lines in Sheepshead and Jamaica Bays, on question raised as to the legal authority of the United States to establish harbor lines in navigable waters below high-water mark at points where the same are not navigable in fact, *held*, that the authority of the United States to improve navigable waters is not limited to the parts of such waters which are navigable in fact, but extends to all parts of a navigable waterway, so that new channels may be dredged, or the erection of structures prevented which would interfere with the navigable waterway as a whole; and that any title of a State or of a private grantee to submerged areas or to tide lands below high-water mark would be held subordinate to the authority of the United States to take and use the same, without compensation to the owners, for any purpose in aid of navigation; and that therefore there could be no question of the authority to approve harbor lines as recommended, if regarded as reasonably necessary for the preservation and protection of the harbor.[1] *C. 28243, Apr. 29, 1911. Held*, further, on the question whether the lines recommended were reasonably necessary for the protection of the harbor, that the fact that the lines had been recommended by the United States Harbor Line Board, after extended inquiry, in connection with the application of the local dock commission for their establishment on the lines proposed, might properly be regarded as establishing this point. *C. 28243, Apr. 29, 1911.*

VI A 2. *Held*, that the fact that harbor lines had been established in particular waters would not prevent the Secretary of War from reestablishing them along different lines, where such action is regarded as essential to the preservation and protection of the harbor.[2] *C. 4557, July 9, 1898; 5097, Oct. 8, 1898; 5238, Nov. 3, 1898.*

VI B. *Held* that the river and harbor act of August 11, 1888, section 12, did not make the approval of the Secretary of War essential to the establishment by a State of harbor lines on its internal navigable waters, and therefore that, until the United States exercises control in the manner provided for by section 12 of said act, the State of Wisconsin was empowered, through the municipality of Duluth, to change and regulate the harbor lines of Duluth Harbor without such approval.[3] *P. 33, 308, July, 1889.*

VII. The river and harbor act of June 14, 1880 (21 Stat. 180), makes it the duty of the Secretary of War, on being satisfied that a *sunken vessel* obstructs navigation, to give 30 days' notice, to all persons interested in the vessel or cargo, of his purpose to cause the same to

---

[1] See Philadelphia Co. *v.* Stimson (223 U. S., 605), where the court held, with reference to the change by the Secretary of War in 1907 of the harbor lines in the back channel of the Ohio River at Brunot's Island so as to make the line coincide with the actual high-water mark, no improvements having been made since the line was originally established in 1895, that such change was within the authority of the Secretary of War; that the title to the soil under navigable waters was "subject to the authority of Congress under the Constitution of the United States"; and that "the exercise of this power could not be fettered by any grant made by the State of the soil which formed the bed of the river or by any authority conferred by the State for the creation of obstructions to its navigation."

[2] See Philadelphia Co. *v.* Stimson (223 U. S., 605), referred to in note to VI A 1, *ante*, in which the court said: "That officer (the Secretary of War) did not exhaust his authority in laying the lines first established in 1895, but was entitled to change them, as he did change them in 1907, in order more fully to preserve the river from obstruction."

[3] See County of Mobile *v.* Kimball, 102 U. S., 691; and Gring *v.* Ives, 222 U. S., 365.

be removed unless removed by the persons interested as soon thereafter as practicable, before himself proceeding to take measures for its removal under the act. If the removal be effected by the Secretary of War, the act requires that the vessel and cargo shall be sold at auction and the proceeds deposited in the Treasury. Under this legislation—especially in view of the fact that the act authorizes the taking possession of the property of private individuals and the disposing of it without compensation to the owners—*held* that the notice should be strictly given to all interested, the owners of the cargo as well as the vessel, unless indeed such notice were waived, in which case the waiver should be definite and express and joined in by all the interested parties. *P. 35, 466, Oct., 1889; C. 13444, Oct. 29, 1902.*

VII A. In view of the provisions of section 20 of the act of March 3, 1899 (30 Stat. 1154), relating to the removal of sunken or grounded craft and vesting authority in the "Secretary of War or *any agent of the United States to whom the Secretary of War may delegate proper authority*," *held* that under the authority to delegate thus expressly conferred on the Secretary of War he could legally delegate to the officers of the Corps of Engineers in local charge the authority to take the necessary steps to remove or destroy any sunken craft which obstructs the navigation of any Government canal, lock, or navigable waterway. *C. 17418, Jan. 20, 1905, Apr. 26, 1910.*

VII B. Where derelict articles—wrecks for example—are encountered by officers of the Engineer Corps, as obstructions to the improvement of rivers, harbors, etc., required by Congress (in the exercise of its power to regulate commerce) to be cleared and improved, it will be legal and proper for such officers to remove such obstructions in the most effectual manner. If the property is not actually abandoned and is valuable, it will in general be expedient first to give notice to the owners (personally if practicable, or, if not, through the newspapers) themselves to make the removal within a certain reasonable time.[1] *R. 36, 569, July 1875; C. 10628, June 10, 1901.*

VII B 1. *Held*, with reference to the question of the authority of the War Department to permit the removal of sunken logs from the Neches River, Tex., under section 19 of the act of March 3, 1899, that this section is not understood to assert a property right in the United States to sunken wrecks, etc., except as such right may arise from the taking possession of abandoned property; that the statute recognizes the right of the owner of the obstruction to remove the same promptly; but that if he fails to do so it will be treated as abandoned and the property applied *pro tanto* to the payment of the cost of removal; and that there would be no legal objection to granting the permission applied for in respect to such logs as were abandoned, or to entering into a contract for their removal, upon the provision that the logs

[1] See sec. 4 of act of June 14, 1880 (1 Sup. R. S., 296), which provides for the removal of sunken wrecks and prescribes the giving of such notice. Also, later acts of Aug. 2, 1882 (id., 369); Sept. 19, 1890 (id., 802); and sec. 15 of act of Mar. 3, 1899 (30 Stat. 1152).

In an opinion of the Attorney General of May 24, 1877 (15 Opins., 284), it is held that the Secretary of War, where authorized by an appropriation act to improve the navigation of a navigable stream, may cause to be removed wrecks, not yet abandoned but still private property, if he considers them obstructions to navigation. And see his later opinion of April 27, 1880 (16 Opins., 479) (*C. 12081, Oct. 1, 1902; 17329, July 6, 1905*), as to the authority of the United States to improve navigable rivers to the disregard of individual rights of property in the soil of the bed.

should become the property of the contractor. *C. 14259, June 12, 1906.*

VII B 2. Where a boat which had been left by its owner anchored or tied up was sunk by carelessness of the owner, on the question whether the burden of removal rests on the United States, upon the owner by whose carelessness it was sunk, or upon the city in the service of which it was *held* that, under the circumstances, the War Department should not remove the wreck, but that the burden of its removal rests on the owner. *C. 10878, July 22, 1901.*

VII B 3. On the application of a transportation company for the removal of the wreck of a steamship belonging to said company, which sank near the wharves of the company, accompanied by evidence of the abandonment of the same by the company and by the underwriters, *held,* with reference to the question of whether the company or the underwriters could be required to remove the wreck, that the statute does not impose such a duty upon the owners or upon the underwriters of the vessel; that so long as it is not abandoned it makes it the duty of the owners to use due precaution to prevent its being a menace to navigation; but that it recognizes the right to abandon the wreck without further liability on account of the same; and that in the event of its abandonment, if it be such menace as the statute contemplates, it should be removed under the provisions of the statute. *C. 18824, Nov. 14, 1905.*

VII C. Where a contract was about to be made with a civilian for the removal, from a harbor channel, of certain wrecks, not known to be fully abandoned (and directed by act of Congress to be caused to be removed by the Secretary of War), and it was proposed by the engineer officer in charge to stipulate in the contract that the wrecks when removed should belong to the contractor, *held* that this could not properly be done, the United States having no property in such wrecks (the same not being Government vessels), but simply a right to remove them as constituting obstructions to commerce between the States. *R. 43, 284, Apr., 1880.*

VII C 1. Section 19 of the river and harbor act of March 3, 1899 (30 Stat. 1154), provides that "whenever the navigation of any river, lake * * * shall be obstructed or endangered by any sunken vessel * * * or other similar obstruction, and such obstruction has existed for a longer period than thirty days * * * the sunken vessel * * * shall be subject to be broken up, removed, sold, or otherwise disposed of by the Secretary of War at his discretion without liability for any damage to the owners of the same." In carrying on the work of improving the Black River, Ark., in August, 1909, a steamer which had been sunk a year before was removed by the Government, subsequently the owner requested the return of the machinery in the steamer. *Recommended* that the owner be informed that the Secretary of War would direct the machinery to be turned over to the owner on payment of $150, the cost of the removal. *C. 7077, Sept. 22, 1899.*

VII C 2. Under the provisions of section 20 of the act of March 3, 1899 (30 Stat. 1154), an agreement was made for the removal from the channel between Lakes Superior and Huron of the steamer *John B. Ketcham, 2d,* which sank in the channel completely obstructing navigation, the contract calling for the swinging of the vessel free

from the channel. Upon the completion of this work the wrecking company raised the vessel for the owners and took it to Port Huron, Mich., for the stipulated consideration, and certain expenses were incurred for repairs to the vessel. Upon the demand of the wrecking company for the payment of the agreed price for services rendered in clearing the channel, it was advised that payment would be made if the vessel was turned over to the Engineer Department to be proceeded against under the statute. *Held* that as the services in raising the vessel and the expenses of the necessary repairs were incurred in saving the vessel for the benefit of all interests, they should be regarded as having the priority over the claim of the Government under the statute for swinging her free from the channel, by analogy to the rule that "bottomry bonds take priority in the inverse order of their execution,"[1] and that as the summary remedy given by the statute requires the entire proceeds to be turned over to the Government, instead of resorting to this remedy proceedings in admiralty should be taken to enforce the lien of the Government, in which proceedings the priority of the respective liens could be determined; and *advised* that payment be not made until the vessel shall have been returned to the United States and suit instituted by the Department of Justice.[2] *C. 28032, Jan. 10 and Mar. 23, 1911.* *Held*, also, in regard to the contention that the statute was unconstitutional because it requires the entire proceeds to be turned over to the Government regardless of whether they exceed the amount expended by the Government, that this procedure is to be resorted to only if the owners decline to take the vessel, upon satisfying the lien of the Government, and that by so declining the owners should be regarded as electing to abandon the vessel to the United States rather than pay the charges against her. *C. 28032, Jan. 10, 1911.* *Held*, further, after the vessel had been sold in admiralty proceedings in Canada, on notice to the United States, without bringing sufficient to satisfy the claim of the Government after the payment of liens entitled to priority that the further retention of the contract price for swinging the vessel free from the channel would not be justified, but that interest thereon should not be paid.[3] *C. 28032, Oct. 30, 1911.*

VII D. On the application of a transportation company for the removal of the wreck of a steamship of said company, under the act of March 3, 1899 (30 Stat. 1154), and it appearing that the wreck was not located where it was a menace to general navigation, but was simply an obstruction to the approach to the wharves of said company, requiring greater care in approaching the same, *held* that the Secretary of War might properly decide that the wreck was not such a one as it was incumbent upon the department to remove under the statute in question, so that if its removal was required in the inter-

[1] 36 Cyc., 201.

[2] These views were concurred in by the Attorney General in his opinion dated Feb. 28, 1911.

[3] In an opinion of the Attorney General, dated Nov. 22, 1911, it was held that under the facts, as they then appeared, it was no longer proper to require the wrecking company, as a condition precedent to the payment of the contract price, to bring the vessel within the jurisdiction of the United States, and that the contract price should be paid, but that the statute under which the claim arose made no provision for the payment of interest.

ests of the applicant the expense should be borne by it. *C. 18824, Nov. 14, 1905.*

VIII. The river and harbor act of Aug. 18, 1894 (28 Stat. 338), section 4, makes it the duty of the Secretary of War to prescribe rules and regulations for the use and navigation of all "canals and similar works of navigation," owned, operated, or maintained by the United States, etc., and also makes the violation of any of these regulations a misdemeanor punishable in the proper United States court. *Held* that this section does not apply in general to natural waterways, though their navigability has been improved and is being maintained by the Government. *C. 424, Oct., 1894; 1047, Mar., 1895; 2919, Feb., 1897; 3449, Aug., 1897; 12683, June 3, 1902.*

IX. By legislation prior to 1890, Congress had exercised some control over the subject of obstructions to navigation, principally with reference to bridges over navigable streams. But by the river and harbor appropriation act of September 19, 1890 (26 Stat. 454), a *general* authority over the subject was assumed,[1] and it was enacted, in section 10, as follows: "That the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of *any waters*, in respect of which the United States has jurisdiction is hereby prohibited." The act does not make it the duty of the Secretary of War to enforce this provision in all cases, but, in sections 4, 6, 7, 8, and 12, it invests him with specific authority with regard to certain kinds of obstructions, as, to take precautions against obstruction by bridges and to approve the location of bridges, etc.; to give permits for making deposits of substances or materials in navigable waters; to permit the erection of wharves, dams, breakwaters, and the like; to break up and remove wrecks, etc.; and to cause the establishing of harbor lines under regulations prescribed by him. But the prosecution and punishment of individuals creating obstructions without proper permit or authority of law is left by the act to the law officers and the courts. *P. 63, 365, Feb., 1894.*

IX A. There is no law authorizing the Secretary of War to cause obstructions to be removed from navigable waters, except as he may direct his subordinates, charged with river or harbor improvement, etc., to remove them where appropriations exist for the purpose. The act of September 19, 1890 (26 Stat. 454), makes it unlawful to place obstructions in navigable waters without the permission of the Secretray of War, but when the law is violated it is not for the Secretary to initiate proceedings but for the legal and judicial authorities under sections 10 and 11 of the act, to take action by prosecution and injunction. *P. 52, 343, Mar., 1892; 63, 365, Feb., 1894.*

IX A 1. Under the provisions of section 10 of the act of September 19, 1890, it becomes not only unlawful but a criminal act to obstruct the navigation of navigable waters of the United States. Thus, where a railroad company, under color of authority from certain State officials, proceeded to close for a month, pending the repairing of one of its bridges, the passage up and down an interstate navigable stream, so that in fact the United States was prevented from transporting upon the same a gun carriage manufactured within the State for the

[1] See sections 9 to 20, inclusive, of the river and harbor act of Mar. 3, 1899 (30 Stat. 1151), for existing statutes on the subject.

Government, *held* that the assumption of jurisdiction over such waters by the United States through the legislation of Congress had displaced the jurisdiction previously exercised by the State to authorize such obstructions; and that under this legislation the river was a public highway, open, not only to the United States for public purposes, but to all private individuals whatsoever, and could not lawfully be closed or interrupted; and *advised* that the proper United States district attorney be communicated with, with a view to the initiation of proceedings under section 11 of the act. *P. 64, 210, Mar., 1894.*

IX A 2. The act of June 23, 1910 (36 Stat. 593), makes it unlawful to dump refuse material in Lake Michigan opposite Cook County at any point within 8 miles of the shore, except under certain conditions; but imposes no duty on the Engineer Department with respect to marking the 8-mile limit nor with respect to the enforcement of the statute. On the question as to whether the expense of marking, placing, and maintaining buoys, including patrolling, could properly be charged to river and harbor appropriations, *held* that the act being penal in its nature, its provisions are supposed to be enforced, like those of other penal statutes of the United States, by the matter being brought to the attention of the proper United States attorney and the offender brought to trial for violation of the statute; and that no appropriation under the control of the Engineer Department could be applied to the purposes in question. *C. 27101, Aug. 3, 1910.*

IX B. With reference to the question of the right of the Secretary of War to confer on certain officers of the Charlestown Navy Yard the authority to make arrests, etc., under section 17 of the river and harbor act of March 3, 1899 (30 Stat. 1152), for violations of sections 14 and 15 of that act, *held* that the statute confers on certain officers the authority to swear out processes and make arrests but does not empower the Secretary of War to authorize arrests by other officials; and that the general duty of enforcing the law is in the Department of Justice—the statute expressly making it the duty of United States attorneys to vigorously prosecute all offenders against the law whenever requested to do so by the Secretary of War or by any of the officials authorized to make arrests. *C. 15182, Aug. 29, 1903.*

IX C. *Held*, that under the acts appropriating money for the improvement of the Columbia River, to be expended under the direction of the Secretary of War, the Secretary, while authorized to make regulations for the prosecution and protection of the works of improvement, was not empowered to require, by such regulations, the removal of fish traps and pound nets as obstructions to navigation; that it was not within the province of the Secretary of War to determine what is or what may become an obstruction to navigation, and cause to be removed the one or prohibited the other by a mere order or regulation, in the absence of authority given by specific legislation of Congress. *R. 53, 257, Apr., 1887.*

X A. When Congress, in the exercise of its exclusive power to direct how the public money shall be employed, has appropriated a certain sum, to be devoted, without exceptions or provisos, to a certain specific internal improvement, it devolves upon the executive department of the Government, charged as it is with the execution of the laws enacted by the legislative, to proceed with the work

under the appropriation, without entertaining any question as to the expediency of the expenditure. Thus where Congress had made in general terms an appropriation of a specific amount for improving a certain river, *advised* that it was for the officer charged with the improvement simply to do the work, without delaying to raise or consider questions or claims of title to the land, etc., to be affected by the improvement; such matters being quite beyond the province of an executive official under the circumstances.[1] *R. 43, 101, Nov., 1879; C. 21814, July 23, 1907; 22703, Feb. 5, 1908.*

X A 1. *Held*, that the permissive words in the river and harbor act of June 13, 1902 (32 Stat. 342), viz, that the "Secretary of War *is authorized* to cause to be built a suitable dregde for use in the improvement of the harbors upon Lake Erie," like the corresponding expressions "it shall be lawful" or "is authorized and empowered," should be regarded as equivalent to the word "may," and as mandatory in character, and that the authority so conferred should be carried into effect.[2] *C. 2473, Jan. 2, 1903.* Similarly *held*, with respect to the proviso in the appropriation made by the act of March 2, 1907 (34 Stat. 1087), for the improvement of Mobile Harbor, "that so much as may be necessary *may* be expended in the construction of a dredge for said harbor," that it is a peculiarity of river and harbor legislation that the duties are imposed by the use of the word "may" which, in the majority of such enactments, has a mandatory signification. *C. 24027, Oct. 30, 1908.* Similarly *held*, with respect to the provision in the amendatory act of May 28, 1908 (35 Stat. 430), that the sum so set apart, except the amount expended for the plans of the dredge, "may" be used in the work of dredging. *C. 24027, Oct. 30, 1908. Held*, however, that in the last clause of the act of 1908, "that the Secretary of War may, *in his discretion*, enter into contracts for the work," the context clearly deprives the word "may" of the obligatory character. *C. 24027, Oct. 30, 1908.*

X A 2. Section 13 of the river and harbor act of August 18, 1894 (28 Stat. 338), provides "that after the regular or formal report on any examination, survey, project, or work under way or proposed is submitted, no supplemental or additional report or estimate for the same fiscal year shall be made unless ordered by a resolution of Congress." To construe this language strictly would lead to two conclusions which it is improbable Congress intended, to wit: (1) Additional estimates for work which has become necessary in order to preserve that already done or being done during the fiscal year, can not be made. (2) The Senate and House of Representatives, acting separately, can not call for information on this subject. *Held*, therefore, that the section should be liberally construed as follows: That it prohibits additional estimates (unless ordered by resolution of Congress), *extending* the work already estimated for; and that the "resolution of Congress" referred to includes separate resolutions of either House. *C. 2148, Mar., 1896.*

X A 3. Where authority was given, by a proviso in the appropriation for a channel through Sabine Lake, to select a longer route near the west shore and to connect the same with the Port Arthur Canal,

---

[1] See 24 Op. Atty. Gen., 594.

[2] This view was concurred in by the Attorney General in his opinion dated Feb. 28, 1903 (24 Op. Atty. Gen., 594.)

upon a further proviso for the free navigation of said canal, *held*, that as the office of a proviso is not to enlarge or extend the act of which it is a part but rather to limit or restrict the language employed,[1] the route in question could not be selected in the event of the refusal of the owners of said canal to allow the free navigation thereof. *C. 13394, Oct. 7, 1902.*

X B 1. Work done by the United States upon rivers and harbors is civil work. The fact that military officers are assigned to duty on it does not make it a branch of the military service. The work itself does not relate to military matters or in any way affect the military establishment of the Government. It is paid for, not out of any appropriation for the military establishment, but out of a separate civil appropriation for the improvement of rivers and harbors. *Held,* therefore, that paragraph 808, Army Regulations of 1889, was not applicable to civilians employed in the improvements of rivers and harbors, said civilians not being "in the employ of any branch of the military service." *C. 147, Aug., 1894.* It was the intention, however, to have paragraph 569, Army Regulations of 1895 (see 648 of 1901), apply to river and harbor work; but whether it applies or not the Secretary of War has discretionary power to require with reference thereto the reports mentioned in the regulations. *C. 3418, Aug., 1897.*

X B 1 a. *Held* with reference to the item in the river and harbor act of February 27, 1911 (36 Stat. 957), increasing the Corps of Engineers and providing that "officers of the Corps of Engineers, when on duty under the Chief of Engineers, connected solely with the work of river and harbor improvements, *may*, while so employed, be paid their pay and commutation of quarters from the appropriation for the work or works upon which employed"; that the proviso in question, being connected with permanent legislation increasing the Corps of Engineers, should be regarded as of like permanent character; and that the use of the permissive word "may" in legislation of this character should be considered as mandatory, so that where an officer is so engaged he not only may but must be paid from the appropriation for the work on which he is employed.[2] *C. 28632, June 27, 1911.*

X B 2. On the question of whether the appropriation in the river and harbor act of June 3, 1896, for the investigation of the rights of the United States in connection with the improvement of the Fox and Wisconsin Rivers to be made under the direction of the Secretary of War, should be disbursed by the Chief of Engineers, *held* that as the item occurs along with other appropriations in the same act the expenditure of which is under the direction of the Chief of Engineers, although it makes no provision on the subject, it should be disbursed by the Engineer Department under the general provision applying to other appropriations made by the same act; and further, that it was clearly competent for the Secretary of War to direct that the appropriation be disbursed by the Engineer Department. *C. 3900, Feb. 25, 1898.*

---

[1] Sutherland on Statutory Construction, p. 299.

[2] This view was concurred in by the comptroller in his decision dated July 24, 1911 (XVIII Comp. Dec., 45).

X C. Section 3 of the river and harbor act of August 11, 1888 (25 Stat. 423), made it the duty of the Secretary of War to apply the money appropriated by the act "in carrying on the various works by contract or otherwise as may be most economical and advantageous to the Government." *Held* that he was thus empowered to authorize the engineer officer in charge of the work for the protection of the levees at New Orleans to hire without formal contract, a steamboat for transporting material, and for other uses in connection with such work. *P. 40, 95, Mar., 1890; C. 15488, Nov. 9, 1903.*

X C 1. A contractor engaged upon river and harbor work for the Government may obstruct navigation to the extent necessary to do his work, if such obstruction can not reasonably be avoided. He is, however, liable both civilly and criminally for an unauthorized obstruction, and the Secretary of War is without authority to relieve him from such liability. *C. 3839, Feb., 1898.*

X D. Section 3736, R. S., provides that "no land shall be purchased on account of the United States, except under a law authorizing such purchase." By the act of April 24, 1888 (25 Stat. 94), the Secretary of War was authorized to "cause proceedings to be instituted, in the name of the United States, in any court having jurisdiction of such proceedings for the acquirement by condemnation of any land, right of way, or material needed to enable him to maintain, operate, or prosecute works for the improvement of rivers and harbors for which provision has been made by law." Further provision as to the method of condemning lands for public use was made by the act of August 1, 1888 (25 Stat. 357). The act of April 24, 1888, *supra*, provided "that when the owner of such land, right of way, or material shall fix a price for the same, which in the opinion of the Secretary of War shall be reasonable, he may purchase the same at such price without further delay; and provided further that the Secretary of War is hereby authorized to accept donations of lands or materials required for the maintenance or prosecution of such works." The authority to condemn, purchase, or "accept donations" applies only to works "for which provision has been made by law." *Held*, therefore, that in the absence of an appropriation for the works or express authority from Congress, the Secretary of War is precluded by section 3736, R. S., from acquiring lands for river and harbor improvements; the word "purchase" in this statute having been construed in its legal sense as including every mode of acquiring land other than by descent.[1] *C. 3896, Feb., 1898; 2111, Mar. 12, 1896; 11024, Aug. 10, 1901; 13586, Nov. 20, 24, 25, 1902.*

X D 1. The owner of lands flooded by dams constructed in improving navigation is entitled to compensation for damages sustained by such flooding.[2] *Held*, that the Secretary of War has authority under the act of April 24, 1888 (25 Stat. 94), to purchase lands flooded by dams constructed in river and harbor improvements, or the right to flood the same, and where springs are located on such lands this

[1] See 7 Ops. Atty. Gen., 114, 121; *Ex parte* Hebard, 4 Dillon, 384. A conveyance of lands to the United States is, under this statute, void and inoperative unless the purchase is authorized by Congress. U. S. *v.* Tichenor, 12 Fed. Rep., 415; VI Comp. Dec., 791.

[2] Gould on Waters, 2d edition, sec. 243, and authorities cited; Hackstack *v.* Keshena Imp. Co., 66 Wis. 439; Am. & Eng. Ency. of Law (1st edition), vol. 16, p. 265, note 1.

fact may properly be considered in determining the amount to be paid. *C. 1074, Mar., 1895.*

X D 1 a. Where the State of Washington, by act of February 8, 1901 (Laws of Washington, 1901, p. 7), granted to the United States the right to raise the level of Salmon Bay, *inter alia*, and subsequently disposed of the shore lands to the riparian owners, who served notices of the revocation of the grant and requested their acknowledgment, upon the theory that it amounted merely to a revocable license, *held*, that under the grant the Government acquired a perpetual easement or servitude for the purposes specified therein, and that the subsequent grant of the shore lands to the present owners would be subject to the same, but that there could be no objection to acknowledging the receipt of the notices as requested. *C. 26425, Mar. 26, 1910; 20959, Mar. 2 and May 17, 1911.*

X D 2. The Secretary of War is authorized to acquire, by purchase or condemnation, land, right of way, or material, needed to maintain, operate, or prosecute works for the improvement of rivers and harbors, when provision for the same has been made by law. *C. 301, Sept., 1894.* But he can not lease land unless appropriation has been made to pay the rental thereof. *C. 195, Aug., 1894.*

X D 3. *Held*, that it was not within the constitutional power of Congress to enact that the United States should not be liable for damages caused by the prosecution of a public work, and therefore that the Government could not, through a provision of law to that effect, escape liability for losses incurred by third parties from flowage caused by a harbor improvement. If it would be liable to them in the absence of such law, a statute providing that it should not be liable would be unconstitutional as being an attempt to deprive them of a property right by legislation. *P. 56, 478 and 485, Dec., 1892.*

X D 4. The owner of land occupied by a canal, constructed as an improvement under a river and harbor act, may, by the authority of the ruling of the Supreme Court in the leading case of United States *v.* Lee,[1] maintain an action of ejectment or trespass against the official representative of the United States in charge of the improvement. *P. 35, 191, Sept., 1889.*

X E. *Held*, that the work of constructing a levee near the mouth of the Mississippi River might legally be proceeded with under the appropriation available therefor, upon obtaining licenses from the owners of the land upon which the levee would rest, and that the provisions of section 355, R. S., have not been regarded as forbidding such improvements without acquiring title to the lands underlying the same. *C. 13680, Nov. 25, 1902.*

X E 1. With reference to the appropriation for the improvement of the Hudson River, under the act of June 25, 1910 (36 Stat. 635), which was conditioned upon the extinguishment by the State of New York of all power rights and privileges to be affected by the improvement, the State canal board passed a resolution formally abandoning the State lock and dam and authorizing their destruction, this action including the extinguishment of the power rights and privileges in question. Thereupon the Engineer Department incurred expenses and entered into a contract for dredging and rock excavation in the execution of the project authorized by Congress. After such action

[1] 106 U. S., 196. And see the case of Stanley *v.* Schwalby, 147 U. S., 508; 162 id., 255.

the State canal board rescinded its former resolution, and the State authorities requested the amendment of the project accordingly. *Held* that the project was to be treated as an entirety and that unless the conditions of the appropriation were satisfied the War Department could not proceed with any part of the work of improvement; but *questioned* whether, the United States having once entered upon the work of improvement upon the faith of the former action of the canal board, it was competent for the State authorities to rescind such action.[1] *C. 28390, May 22, 1911.*

X F. Section 5 of the river and harbor act of June 13, 1902 (32 Stat. 373), provides: "That when any land * * * acquired for the improvement of rivers and harbors is no longer needed, * * * it may be sold in such manner as the Secretary of War may direct, and the proceeds credited to the appropriation for the work for which it was *purchased or acquired;* * * * ." *Held*, with reference to the question of whether this statute could be regarded as authorizing the sale of land which had not been purchased or acquired through any appropriation for river and harbor improvements, but had been reserved from the public domain for such purpose, that while the word "purchase" includes, in its legal sense, every method of acquisition other than by descent, it should, as here used, receive a more restricted construction as designating acquisition by voluntary sale, while the word "acquire" was intended to cover acquisition by donation or condemnation; that the intent of Congress was to provide for the elimination of property which had become useless for the purpose for which procured, without diminishing the provision for a particular improvement; but that as to lands which had simply been segregated from the public domain, they should be returned to the Department of the Interior; and that a different construction from that above would place it in the power of the Executive indirectly to provide for a particular improvement by reservation and sale of public lands therefor. *C. 12479, Mar. 1, 1905.*

X F 1. Section 5 of the river and harbor act of June 13, 1902 (32 Stat. 373) provides: "That when any land * * * acquired for the improvement of rivers and harbors is no longer needed * * * it may be sold *in such manner as the Secretary of War may direct.*" *Held* that under this authority certain lands at Dam No. 5, Ohio River, not needed, might legally be sold. *C. 13432, Oct. 21, 1902.* Similarly *held* as to land acquired for Yuba River settling basin. *C. 28349, May 9, 1911.* Also *held*, in regard to the sale of certain land condemned for a cut-off in Mantua Creek, N. J., that under the broad authority conferred by this act the Secretary of War could legally convey the same by warranty deed [2]—the former owner claiming that

[1] In his opinion dated July 3, 1911, the Attorney General held that the earlier resolution of the canal board might be regarded as "an extinguishment of the existing leases and a resumption of the surplus water created by the State lock and dam, although not as an abandonment of those structures; that this action was a substantial compliance with the conditions of the appropriation; that under the paramount control of the United States over the Hudson River the State lock and dam could be removed as an obstruction to navigation; and that the attempted rescinding of the earlier action, after it had been accepted and acted upon by the Federal Government, was inoperative to defeat the execution of the work authorized by Congress."

[2] The Attorney General, by opinion dated Apr. 26, 1911, held that this statute gives authority "to adopt a form of deed best suited to the particular transaction being carried on;" that the United States acquired a fee simple title to the property in question; and that the Secretary of War had authority to execute the form of warranty deed submitted.

the title of the United States was limited to the use for which condemned; and *advised* that such a deed be tendered to the highest bidder, and that should he refuse to complete the purchase the deposit be forfeited. *C. 26472, Mar., 1911; Apr. 21, 1911.*

X F 2. In view of the authority conferred on the Secretary of War by section 3 of the act of August 11, 1888 (25 Stat. 423), to apply the moneys appropriated for river and harbor improvements "by contract or otherwise as may be most economical and advantageous to the Government;" and of the authority conferred by section 5 of the act of June 13, 1902 (32 Stat. 373), to direct the transfer of river and harbor property from one project to another upon proper credits and debits, *held* that there would be no legal objection to authorizing the Chief of Engineers to permit the temporary transfer between projects upon such equitable adjustment of charges and credits as may be agreed upon by the local engineer officers concerned. *C. 16202, Apr. 20, 1904.* Similarly *held*, with reference to authorizing the Chief of Engineers to permit the sale of unserviceable river and harbor property, under section 5 of the said act of June 13, 1902, where the amount does not exceed $500 and where there is no doubt as to the propriety of the sale, so that the exercise of the authority may be regarded as routine in its nature. *C. 16336, Feb. 18, 1911.*

X F 3. Section 1241, R. S., prescribes that the President may cause to be sold any military stores which, upon proper inspection or survey, appear to be damaged or unsuitable for the public service. *Held* that the term "military stores" does not include public property purchased in carrying out the civil works of river and harbor improvements. The regulations, however, with reference to property accountability, as contained in the Army Regulations of 1895, were intended to cover all public property under the control of the Secretary of War, whether military stores or not. The regulations (and orders) relating to the inspection of unserviceable property with a view to its condemnation apply, therefore, to public property used in river and harbor improvements. There is, however, no existing law which would prevent such modification of these regulations as would authorize the proper engineer officer to drop property, other than military stores, from his returns on his own certificate that its condition resulted from wear and tear in the service, that it was worthless and had been destroyed in his presence. *C. 3419, Aug., 1897.*

X F 4. Section 5 of the river and harbor act of June 13, 1902 (32 Stat. 373), provided that "when any land or other property which has been heretofore or may be hereafter purchased or acquired for the improvement of rivers and harbors is no longer needed, or is no longer serviceable, it may be sold in such manner as the Secretary of War may direct, and proceeds credited to the appropriation for the work for which it was purchased or acquired." In carrying on the work of improving the harbor at Mobile various sticks of timber and a number of sawed logs which had escaped from booms and rafts were recovered from the stream and many of them had been there for more than thirty days and were without marks that enabled their ownership to be determined. *Held* that the material might properly be treated as abandoned and as belonging to the one recovering it; i. e., the United States, and as the material was acquired in prosecuting the work of improving the harbor, it might legally be used for that purpose, and

if it was found not to be needed or serviceable for such use it might be sold as provided by the statute. *C. 15651, Dec. 18, 1903.*

X G. The Secretary of War may permit the use of land under his control by revocable license or by lease under the act of July 28, 1892 (27 Stat. 321). *C. 241, Aug., 1849.* On the question raised as to the authority of the Secretary of War to lease a frontage on the tidal canal in Oakland Harbor, Cal., to a bridge company owning the abutting property, and on protest against such lease as imposing a burden on commerce, *held*, that the protest was without merit, as it claimed a right in the abutting owner to appropriate a particular portion of the property of the United States for its own private business and to use the same without charge to the exclusion of others; that if the lands *are not now* required for public use they may be leased under the act of July 28, 1892 (27 Stat. 321); and that if they are *no longer needed* they may be sold under section 5 of the act of June 13, 1902 (32 Stat. 373). *C. 19015, Jan. 4, 1906.*

XI A. *Held*, that the Mississippi River Commission derived no authority from the statutes relating to its functions to make allotments of the moneys appropriated by Congress for the improvements proposed. Its province is to indicate to Congress what improvements are needed and how much should be appropriated therefor. It has no authority to disburse money appropriated. An allotment made by it is to be treated by the Secretary of War as a recommendation only. The Secretary may adopt the recommendation, but in the disbursement should not omit any of the works specially designated by Congress in the appropriation act. *P. 43, 187, Oct., 1890.*

XI A 1. *Held*, that the maps prepared by the Mississippi commission, under appropriations by Congress, may legally be disposed of at the discretion of the commission; it being evidently intended by Congress that the information therein contained should be made public and circulated for the public use and benefit. *P. 33, 326, July, 1889.*

XI B. The duties, under the law, of the Missouri River Commission, composed partly of civilians, relate exclusively to certain work quite other than the establishing of *harbor lines*. It is therefore not, as a body, subject to the directions of the Secretary of War in the matter of establishing harbor lines, nor are the civilian members subject individually to his orders. Thus, while they may consent to establish such lines, it is preferable for the Secretary to cause such work to be done through engineer officers of the Army. *P. 56, 218, Oct., 1892.*

XI C. *Held*, that the allowances for the traveling expenses of the civilian members of the Mississippi and Missouri River Commissions were not regulated by any order of the War Department regulating the allowances of civil employees of the military establishment, but were such as are fixed by statute. They are not thus necessarily $4 *per diem*, since the statute law provides for the reimbursement of their actual necessary outlay, which may be more or lessthan this allowance.[1] *P. 44 477, Jan., 1891; C. 17890, Apr. 29, 1905.*

XI D. On the question raised as to the subsistence of the wives and guests of the members, etc., of the Mississippi River Commission, under the provision of the act of April 28, 1904 (33 Stat. 495), for "traveling and miscellaneous expenses of the Mississippi River Com-

[1] See Dig. Second Comp. Dec., vol. 3, pars. 838 and 841.

mission," etc., *held*, that the right to subsistence is one which accrues only to the members of the commission and their authorized assistants and employees; and that in the absence of legislation for the subsistence of the wives or guests of the members, the same would not be legal. *C. 17890, Apr. 29, 1905.*

CROSS REFERENCE.

Dredging.....See ARMY I B 9.

NAVY.

Deserter from.....See ENLISTMENT I A 9 d.
Previous service in.....See ENLISTMENT I D 2 a.
Relative rank.....See RANK II D.
Retirement.....See RETIREMENT I A 1 c.

NEUTRALITY.

Preservation of.....See ARMY II K to III.

NEWSPAPER.

Rule of nonintercourse in war.....See WAR I C 2 c.
Suppression of, in time of war.....See WAR I C 4 to 5.
Reporters of, subject to military control.....See WAR I G 1.

NEW TRIAL.

See DISCIPLINE XIV K 1.

NOLLE PROSEQUI.

Entering of.....See DISCIPLINE III E 6; IV B 1; VII B 2.

NONCOMMISSIONED OFFICER.

See ARMY I E 1 to 3.
Abuse of soldiers.....See DESERTION IX K.
Appointment.....See CIVILIAN EMPLOYEE VIII B.
COMMAND V C 1 c.
Discretion of, as to complaints.....See COMMAND VI A 1 b.
Dropped for desertion.....See DESERTION VII A 1.
Loaning money by.....See ARTICLES OF WAR LXII C 15; E.
Power to arrest a soldier.....See COMMAND VI A 1 a.
Rank of.....See RANK I D to E.
Reduction.....See COMMAND V C 2.
Summary discharge of.....See DISCHARGE XXV.
Warrants of.....See ARMY I E 1 a.

NONINTERCOURSE.

Law of, in war.....See WAR I C 2 to 3.

NONPERFORMANCE.

Contract.....See CONTRACTS X to XI.

NOTARY PUBLIC.

Enlisted man as.....See ARMY I E 3 b.
Civilian employee as.....See CIVILIAN EMPLOYEE VII to VIII.

NOTICE.

Of acceptance of bids.....See CONTRACTS XI D 2.
Of acceptance of resignation.....See OFFICE IV D 5 c to e.
CIVILIAN EMPLOYEE XI A 3.
Of action of reviewing authority.....See DISCIPLINE XIV E 9 e.
Of commutation of sentence.....See PAY AND ALLOWANCES III C 1 b.
Of confinement.....See DISCIPLINE XVII A 4 a.
Of discharge.....See DISCHARGE VIII A; XIII D 1 to 9 b; XVI E.
DISCHARGE VIII D 2.
Of discharge of witness.....See DISCIPLINE X G 1.
Of discharge to insane soldier.....See DISCHARGE V C; XIII D 4 a.
Of dismissal.....See OFFICE IV E 1 a to b.
Of dismissal to prisoner of war.....See War I C 11 d (1).
Of muster out.....See DISCHARGE XIV D 3.
VOLUNTEER ARMY I D 1 a (3); 2 a to b.
Of order.....See COMMUNICATIONS I B 1; 1 a; 2.
Of retirement.....See RETIREMENT I A 1 a; I D.
Of school tax.....See TAX IV B.
Of summary dismissal.....See OFFICE IV E 2 b to c.
Of suspension and dismissal.....See DISCIPLINE XII B 3 f (3) (*b*).
To remove wrecks.....See NAVIGABLE WATERS VII B.
To specify changes in a bridge.....See NAVIGABLE WATERS IV A to D; F
To squatters on military reservation.....See PUBLIC PROPERTY II B 3 a.

NUISANCE.

Hospital, not.....See CLAIMS V.

NUNC PRO TUNC.

Acceptance of resignation.....See CIVILIAN EMPLOYEES XI A 1.
Appointments.....See COMMAND V C 1 a.
LAWS I B 2.
Appointments of noncommissioned officers.See ARMY I E 2 c.
Approval of advertisement.....See CONTRACTS V A.
Approval of gratuitous issues.....See PAY AND ALLOWANCES II A 3 a (4) (*a*) [1] [*a*].
Cession of jurisdiction.....See PUBLIC PROPERTY V E 2 d.
Charges.....See DISCIPLINE II H 1.
Discharge.....See DISCHARGE XIV A 2.
Dismissal unauthorized.....See PAY AND ALLOWANCES III A 1 a.
Leaves of absence may not be granted.....See ABSENCE I B 1 c (2); II B 10.
Muster out.....See VOLUNTEER ARMY IV D 3 to 4.
Order.....See COMMUNICATIONS I D.
Pardon.....See DESERTION XV A.
PARDON VIII.
Rank.....See ALLOWANCES I B 1 a.
Separation from service.....See PAY AND ALLOWANCES I A 1 a.

NURSE CORPS.

See ARMY I G 3 d (6) to (7).
Leave of absence.....See ARMY I G 3 d (6) (*a*) [2].
Status.....See ARMY I G 3 d (6) (*a*) [1].

NURSES.

Status.....See ABSENCE I D.
Subsistence of.....See ARMY I G 3 (*b*) (3) (*a*) [4].

OATH.

Authority to administer.....See OFFICE III A 8 b.
Members of general court-martial.....See ARTICLES OF WAR LXXXIV A to C 4.

OATH OF ALLEGIANCE.

See CLAIMS VII A.
Prisoner of war.....See WAR I C 11 c (5) (*a*).
United States Volunteers.....See VOLUNTEER ARMY II C 2.

OATH OF ENLISTMENT.

Fixes date of enlistment.....See ENLISTMENT I A 8 a.
Not essential to validity.....See ENLISTMENT I a 2.

OATH OF OFFICE.

See OFFICE III A 8 a; b.

OBJECTION TO REENLISTMENT.

Of deserter.....See DISCHARGE, II B 2 a; XI C 1.
ENLISTMENT I D 3 c (13).

OBSTRUCTION TO NAVIGATION.

See NAVIGABLE WATERS I to II.
Bridges.....See NAVIGABLE WATERS III A 2 b.
By contractor.....See NAVIGABLE WATERS X C 1.

OBTAINING MONEY UNDER FALSE PRETENCES.

By soldier.....See COMMAND V A 2 f.

OFFICE.

I. DEFINED..... *Page 796*
A. CREATING POWER PRESCRIBES INCIDENTS OF OFFICE..... *Page 797*
II. APPOINTING POWER.
A. CAN NOT CREATE OFFICE.
1. Can not revive an office that has ceased.
B. MUST KEEP OFFICES FILLED.
C. ADVANCEMENT IS BY APPOINTMENT OR PROMOTION.
D. NOMINATION *vice* PREVIOUS OCCUPANT.
E. APPOINTING POWER, WHEN EXHAUSTED.
III. APPOINTMENTS.
A. ORIGINAL ENTRY INTO SERVICE.
1. Source.
a. From United States Military Academy..... *Page 798*
b. From ranks.
(1) Must be a citizen.
(2) Must be less than 30 years of age.
(3) Must have served two years.
(*a*) Furlough not deducted.
(4) Physical examination not one of two examinations required.
(5) Status of eligibility.
(*a*) May be lost how?
c. From civil life.
(1) To Porto Rican regiment..... *Page 799*
(2) To Medical Corps.
(3) Age limit.

III. APPOINTMENTS—Continued.
A. ORIGINAL ENTRY INTO SERVICE—Continued.
2. Recess appointment.
3. Appointment with consent of Senate.
4. Appointment by President alone.
a. Cadets ..... *Page 800*
(1) Reappointment of discharged cadet.
b. Volunteer regiment—field and staff officers.
c. Dismissed officer.
5. Can not be conditioned ..... *Page 801*
6. Vesting of office.
a. Date fixed by acceptance.
(1) Exception: Appointments from United States Military Academy.
b. Appointments from ranks.
c. Appointment of surgeons.
7. Acceptance.
a. Express or implied.
8. Oaths.
a. Oath of office.
(1) Authority to administer given by law ..... *Page 802*
(2) Postmaster can not administer to officer.
(3) New oath required after confirmation of recess appointment.
(4) Must take oath prescribed.
b. Authority to administer.
(1) In investigations.
(2) For purposes of administration.
B. PROMOTION.
1. By seniority.
a. Exception.
(1) Special act of Congress ..... *Page 803*
(2) Sentence of suspension by general court-martial.
(3) Suspension from promotion, upon failure in examination.
2. No vested right in promotion.
3. Vesting of office.
a. Date fixed by appointment ..... *Page 804*
(1) Provided acceptance follows.
(2) No obligation before date of appointment.
(3) Commission not delivered.
(4) Promotion subject to examination.
(*a*) Sickness is an exigency.
(*b*) New commission not issued ..... *Page 805*
4. By operation of law.
5. Acceptance.
a. Express or implied.
6. From line to staff.
a. Requires appointment, confirmation and commission.
C. TRANSFER.
1. Rights which accrue.
D. DETAILED STAFF.
1. Office vests by detail.
a. On date of the order ..... *Page 806*
b. For four years.
c. Detail to general staff corps of a detailed staff officer.
d. Redetail of lieutenant colonel to inspector general's department.

III. APPOINTMENTS—Continued.
D. DETAILED STAFF—Continued.
2. Promotion.
a. Causes relief.
b. May be redetailed ..... *Page 807*
3. Relieved in emergency.
4. May transfer as line officer with other line officers.
E. APPOINTMENTS BY SECRETARY OF WAR.
1. Veterinarians.
2. Paymasters' clerks.
3. Master of the Sword at West Point.
F. RESTORATION OF OFFICER LEGALLY SEPARATED FROM SERVICE.
1. By appointment only ..... *Page 808*
G. TENURE OF OFFICE.
IV. VACATION OF OFFICE.
A. BY ACCEPTING ANOTHER OFFICE.
1. General rule.
a. Accepting other office in Army.
2. Under section 1222, Revised Statutes.
a. Exercise of congressional power to raise armies..... *Page 809*
b. "Exercise functions of civil office" defined.
c. "Civil office" means *public office*.
(1) Civil offices which can not be held ..... *Page 810*
d. Offices which can be held.
(1) In militia.
(2) In Philippines.
(*a*) Disbursing officer ..... *Page 811*
(*b*) Power of justice of peace.
(3) In State volunteers.
(*a*) In District volunteers.
e. Positions which are not offices.
(1) Devising sewerage system for a city.
(2) Consulting engineer to city or State officials... *Page 812*
(3) Director of business enterprise.
(4) Attending civilian patients as surgeon.
(5) Consulting engineer to city board.
(6) Country under military control.
(*a*) In Cuba and Porto Rico.
(*b*) In Philippine Islands.
[1] Administered by the Army .... *Page 813*
[2] When administered by the civil government.
[3] Detail with governor general .... *Page 814*
(7) Advisory duty in connection with international boundary commission.
B. UNDER SECTION 1224, REVISED STATUTES.
1. Assisting in engineer work for State ..... *Page 815*
2. Detailed with World's Fair Commission.
C. BY APPOINTMENT OF SUCCESSOR.
D. BY RESIGNATION.
1. May be revoked before acceptance.
2. By an insane officer..... *Page 816*
3. With pledge

IV. VACATION OF OFFICE—Continued.
D. By Resignation—Continued.
4. Of deserter.
5. Acceptance of resignation.
a. May be refused.
b. Power to accept may be delegated.
c. Notification of acceptance.
(1) Constructive notification.
(2) By appointment of successor..... *Page 817*
d. Not revocable after notification.
(1) Even if acceptance is *in futuro*.
(2) Remarks in acceptance.
6. Character of discharge.
E. Dismissal.
1. By sentence of court-martial.
a. Date of confirmation fixes date of dismissal.
(1) Previous date can not be fixed..... *Page 818*
(2) Case of failure of notification due to capture by enemy.
b. Irrevocable if legal.
(1) If illegal, office not vacated.
(*a*) *De facto* officer mustered in, vice officer illegally dismissed..... *Page 819*
c. Does not render ineligible for appointment to office or enlistment.
2. By order of President.
a. Removes from office.
(1) Whether members of antecedent advisory board were sworn or not.
b. Date of is date of notification..... *Page 820*
(1) Date fixed *in futuro*.
c. By officer inferior to President.
(1) By Secretary of War.
(2) By officer inferior to Secretary of War.
d. Irrevocable.
(1) If revoked status of *de facto* officer attaches... *Page 821*
e. Character.
f. Does not render person ineligible for appointment or enlistment.
g. Cadets.
(1) Summarily discharged.
(*a*) For cause.
(*b*) Irrevocable.
(*c*) Discharge is without honor.
F. By Failing to Pass Examination after Promotion Subject to Examination.
G. Of Battalion Staff Officers by Detail Elsewhere..... *Page 822*
V. OFFICE IN VOLUNTEERS.
A. Appointment.
1. Executive has power to prescribe rules of.
2. Acceptance of Presidential appointment necessary.
3. Restoration to command of dismissed officer.
a. Is new appointment if Volunteer Army still exists.
b. Impossible after Volunteer Army has been mustered out.
4. State volunteers.
a. Past appointment by governor not to be held to be unconstitutional.
b. Governor appoints by authority of United States under act of April 22, 1898..... *Page 825*

V. OFFICE IN VOLUNTEERS—Continued.
A. APPOINTMENT—Continued.
4. State volunteers—Continued.
c. Office in State volunteers analogous to military office in Regular Army.
d. Three parties to the appointment—the United States, the State, and the individual.
e. Power to appoint includes power to fill vacancies.
5. Vesting of office.
a. When appointed by President.
(1) Date of acceptance fixes date ..... *Page 824*
(2) Even if remedial legislation gives pay for service previous to date of acceptance.
b. Appointment by governor.
(1) Volunteer office vests through muster-in only.
(2) Date of muster-in fixes date of vesting.
(3) Date previous to muster-in can not be fixed.
6. *De facto* officers.
a. Acts lawful as far as rights of third persons are concerned.
7. Vacation of office.
a. By accepting another office in the volunteers..... *Page 825*
b. By abandoning office.
c. By summary dismissal.
d. Two offices may be held without vacating either, viz:
(1) Public civil officer may accept a volunteer commission.
(2) Volunteer officer holding office in Regular Army.
(*a*) Regular office vesting first.
(*b*) Volunteer office vesting first ..... *Page 826*
e. By abolishing office.
f. By sentence of general court-martial.

I. A public office [1] is a place created by statute or by virtue of a power conferred by statute, for the purpose of the administration of public affairs, and the holder of which is appointed or elected and not

[1] An office is a public station or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties. The duties are continuing and permanent, not occasional and temporary, and are defined by rules prescribed by government and not by contract. U. S. *v.* Hartwell, 6 Wall. 385; U. S. *v.* Germaine, 99 U. S. 508. See also U. S. *v.* Mouat, 124 id. 307; U. S. *v.* Maurice, 2 Brock. 98 (Federal Cases, No. 15747); U. S. *v.* Bloomgart, 2 Benedict, 356 (Federal Cases, No. 14612); *In re* Hathaway, 71 N. Y. 238; Rowland *v.* Mayor, 83 id. 372; People *v.* Duane, 121 id. 367; *In re* Corliss, 11 R. I. 640; Wilcox *v.* People, 90 Ill. 186; Throop *v.* Langdon, 40 Mich. 673; State *v.* De Gress, 53 Tex. 387; 13 Opins. Atty. Gen. 310; 20 id. 686; 4 Comp. Dec. 696, and authorities cited. A public officer is the incumbent of an office "who exercises continuously, and as a part of the regular and permanent administration of the Government, its public powers, trusts, and duties." Sheboygan Co. *v.* Parker, 3 Wall. 93. In view of the provisions of the Constitution as to the appointment of officers, unless a person in the service of the United States holds his place by virtue of an appointment by the President, or of one of the courts of law, or heads of departments, authorized by law to make such appointment, he is not, strictly speaking an officer of the United States. U. S. *v.* Germaine, 99 U. S., 508; U. S. *v.* Mouat, 124 id. 307; U. S. *v.* Smith, id. 525; 1 Comp. Dec. 540; 4 id. 703; 5 id. 649. An officer of the Army or Navy of the United States holds his office at the will of the sovereign power, and not by contract. Crenshaw *v.* U. S., 134 U. S. 99 (24 C. C. 57). Rank is not office. Cloud *v.* U. S., 43 C. C. 69. A military office is a public office. Oliver *v.* Jersey City, 63 N. J. Law, 96 (34 Vr. 96 or 42 Atlantic 782). For same case in court of errors and appeals of N. J. see 63 N. J. Law 634 (34 Vr. 634 or 44 Atlantic 709); Kerr *v.* Jones, 19 Ind. 351.

employed by contract merely, and is vested with functions involving the action of some part of the machinery of government (legislative, executive, or judicial) belonging to the political community whose agent he is. *C. 2301, May, 1896; R. 26, 652, July, 1868; 28, 22, July, 1868; 30, p. 437, June, 1870.*

I A. Offices are created by law and the power to create an office involves the corresponding power to prescribe the necessary incidents of such office such as tenure, salary, emoluments, and, within certain limits, conditions of eligibility. *C. 23122, Apr. 22, 1908.*

II A. As all offices in the military establishment are created by law, the Executive is without authority to establish or maintain offices which are not expressly provided for in suitable enactments of Congress or to increase their number unless authorized to do so by law, either expressly or by necessary implication.[1] *C. 15844, Jan. 21, 1904.*

II A 1. An officer of volunteers was sentenced, by a general court-martial, to be dismissed the service and to be confined. He was later pardoned by the President, who used the words: "Restore him to his former rank and position in the service." In the mean time the regiment of which he had been an officer had been mustered out. *Held* that although the language of the President was fit and proper for an appointment to office, it did not operate to invest the man with office since the office had ceased to exist. *C. 23071, Apr. 11, 1908.*

II B. The Constitution vests in Congress the power "to raise and support armies." In the exercise of that power Congress determines the composition of the commissioned personnel of the several branches of the line and departments of the staff. *Held* that it is the duty of the appointing power to see to it that the offices which make up the several branches of the military establishment are at all times kept filled to their authorized statutory strength. *C. 21053, Mar. 8, 1910.*

II C. Advancement in the military establishment may be had in two ways—by promotion or by appointment. Thus, an officer of a particular branch of the line or department of the staff may, upon the occurrence of a vacancy in his arm or department, be advanced to fill a vacancy caused by the death, resignation, dismissal, etc., of a superior in the same line of promotion; or a vacancy may occur in the lowest grade of a staff department, and may thus be filled by appointment, that is, by the selection of a duly qualified person, and by his nomination and confirmation in the manner prescribed in the Constitution. *C. 19425, Mar. 17, 1906.*

II D. Where an officer duly appointed to office refuses to accept, his successor is nominated in his place and not in that of the preceding incumbent. *C. 23983, Oct. 7, 1908.*

II E. Where an appointment to a specific military office has been duly made and accepted and has taken effect, *held*, that the appoint-

[1] Maj. Gen. John C. Frémont, commanding the Western Department in 1861, claimed the right to appoint officers to existing offices and to offices that did not exist except as to the claim that his appointment created such offices, and actually made such appointments. He had no power to create office, and no authority to appoint officers to public office. See R. and P. 456, 829. Power of appointment under the United States can not be communicated by act of Congress to persons not named to that end by the Constitution. 8 Opins. Atty. Gen. 41. The President can not appoint a greater number of quartermasters in the regular Army than that fixed by law. Montgomery *v.* U. S., 5 C. C. 93. Appointments can not be made by legislative enactment. Wood *v.* U. S., 15 C. C. 151. For constitutional rule governing appointments to office see 13 Opin. Atty. Gen. 516; 15 id. 3, 17 id. 537, and 23 id. 574.

ing power, as to that office, is *exhausted*. The Executive may indeed correct an *error* (of fact) in the date of such appointment, but—no such error existing—he can not remake the same as of a different and earlier date, either by his own action or by means of a renomination to the Senate, for the purpose of redressing an injury or grievance claimed by the officer to have resulted from the date originally given to the appointment. For such would be a granting of *relief*, and relief of a sort which can be accorded only by Congress.[1] *R. 43, 208, Feb., 1880; C. 19650, May 7, 1906.*

III A 1 a. *Held* that the legislation of Congress in regulating appointments to the lowest commissioned grade in the Army recognizes the graduating class of the United States Military Academy as the principal and primary source of supply, and failing from this source in the numbers necessary to fill vacancies, it recognizes for such appointments applicants from among qualified enlisted men and from civil life in that order. Held further that all vacancies existing July 1 each year after assignment of the graduating class has been made are open to the competition of enlisted men; that qualified civilians are eligible for appointment only to such vacancies as remain after the list of enlisted competitors is exhausted; that remaining vacancies and those thereafter occurring are properly reserved for the next graduating class.[2] *C. 20217, Aug. 6, 1906; 3305, June, 1897; 28113, Apr. 8, 1911, and July 5, 1911.*

III A 1 b (1). Where a soldier who had not been naturalized desired to compete for appointment as a lieutenant, *held* that he should be discharged and reenlisted immediately upon the completion of his naturalization.[3] *P. 57, 155, Dec., 1892; 62, 186, Oct., 1893; C. 3366, July, 1897; 19108, Jan. 29, 1906.*

III A 1 b (2). The requirement of the act of July 30, 1892 (27 Stat. 336), that enlisted men should be less than 30 years of age in order to "compete" does not require that they shall be under that age at date of appointment. *C. 20444, Oct. 2, 1906; 17381, Jan. 13,* 1905.

III A 1 b (3) (*a*). In the computation of the two years which an enlisted man must have served before he becomes eligible for appointment to the grade of second lieutenant, under the act of July 30, 1892 (27 Stat. 336), *held* that absence on furlough shall not be excluded therefrom. *C. 1939, Dec. 26, 1895.*

III A 1 b (4). Section 3 of the act of July 30, 1892, provides "that no more than two examinations shall be accorded to the same competitor." *Held* that the physical examination required is merely preliminary to the mental, and a failure to pass it does not constitute an examination within the meaning of the statute. There must be two failures to pass the competitive mental examination to render the candidate ineligible for further examination. *C. 9521, Jan., 1901.*

III A 1 b (5) (*a*). *Held* that when a soldier holding a "Certificate of Eligibility" for appointment to a second lieutenantcy either marries or fails to reenlist after discharge (*C. 4118, May, 1898; 3577, Oct., 1897; 18033, May 27, 1905*) or becomes physically disqualified

---

[1] Section 3 Op. Atty. Gen., 307.

[2] 36 Stat. 1045, Mar. 3, 1911.

The Attorney General held that the word "appointment" as used in sec. 1219, R. S., applies only to original entry into the regular service or his subsequent appointment by selection, and does not include his appointment on promotion. See 17 Op. Atty. Gen., 196, reversing id., 34.

[3] See act of July 30, 1892 (27 Stat. 336).

for active service, he is no longer eligible for such appointment.[1] *C. 3577, Oct., 1897.*

III A 1 c (1). *Held* that under section 4 of the act of May 27, 1908 (35 Stat. 392), the President may appoint persons who are not citizens of the United States but are citizens of Porto Rico to the office of second lieutenant in the Porto Rico Regiment of Infantry. *Held* further that the act in question is a legislative suggestion to the President to give special recognition in making such appointments to the citizens of Porto Rico, whether they be civilians pure and simple or enlisted men of the Porto Rico Regiment of Infantry. *C. 23668, Apr. 28, 1909.*

III A 1 c (2). There is no statute or regulation which prevents a citizen of Porto Rico from being appointed an officer of the Medical Corps; the instructions to candidates for examination being in the nature of a self-imposed restriction on the appointing power, *suggested* that it be waived as to citizens of Porto Rico. *C. 17488, Jan. 30, and May 4, 1905.*

III A 1 c (3). *Held* that a civilian is not eligible for appointment to a commissioned office in the Army if at the date of the issue of the commission he is older than the limiting age fixed by law for civil appointees.[2] *C. 20639, Dec. 16, 1911, and Jan. 18, 1912.*

III A 2. A man was appointed, by a recess appointment, to the office of captain and adjutant general of Volunteers. Upon the convening of Congress he was nominated to the same grade, but the Senate rejected his nomination. *Held* that this rejection did not of itself oust him from office; and if no action had been taken by the President thereon his occupation of office would have continued until the end of that session of Congress.[3] *C. 9096, Oct. 10, 1900.*

III A 3. A recess appointment is not continued by a new appointment and commission submitted during a session of the Senate; the latter is a new and distinct appointment.[4] *C. 2805, Dec., 1896; 7790, Mar. 8, 1900; 11466, Oct. 5, 1901; 17480, Feb. 2, 1905.*

---

[1] See 22 Op. Atty. Gen., 91.

[2] See act of Mar. 3, 1911 (36 Stat. 1045).

[3] See 2 Op. Atty. Gen., 336; 4 id., 30; Cl. 3, sec. 2, Art. II of the Constitution provides that the President shall have power to fill up all vacancies that may happen during the recess of the Senate, etc. *Held* by the Attorney General that the words "may happen during the recess" are equivalent to "may happen to exist during the recess." 1 Op. Atty. Gen., 631. Also *held* that the exercise of this power by the President is not limited to filling those vacancies which occur during the recess. 2 Op. Atty. Gen., 525. Also *held* that he may fill vacancies by recess appointment that occur due to an omission of the Senate to act on a nomination. 3 Op. Atty. Gen., 676; and 4 id., 523. The President has full and independent power to fill vacancies in the recess of the Senate without any limitation as to the time when they first occurred. 12 Op. Atty. Gen., 32, and 449 and 455; 14 id., 563; 15 id., 207; 16 id., 523. A vacancy occurring during a temporary adjournment of the Senate is one happening "during the recess of the Senate" which the President may fill by a commission expiring at the end of their next session. Gould *v.* U. S., 19 Ct. Cls., 593, contra, 23 Op. Atty. Gen., 599.

[4] A recess appointment is made pursuant to the authority contained in Art. III, sec. 2, par. 3, of the Constitution, which provides that: "The President shall have power to fill up all vacancies that may happen during the recess of the Senate by granting commissions which shall expire at the end of their next session."

9 Wheaton, 720, 721; 2 Op. Atty. Gen., 336; 1 Fed. Rep., 104, 109; 20 id., 379, 382; Dig. 2d Comp. Dec. (1869), vol. 1, sec. 152, p. 22.

The Senate may not originate an appointment. Neither can it vary the conditions of appointments submitted by the President. 3 Op. Atty. Gen., 189.

III A 4 a. The President appoints all cadets[1] to the Military Academy. *Held*, that the nomination to the President, by Members of Congress, of applicants for such cadetships rests on custom alone, which has been unbroken for such a length of time as to have acquired the character of established Executive practice and that no change should be made in the custom without legislative sanction. *C. 22924, Jan. 7, 1911.*

III A 4 a (1). Where a cadet has been found deficient and, as a result, has been discharged from the military service, his return or reappointment to the Academy is in the nature of a new appointment. *Held*, however, that the age limit for the admission of cadets, set forth in sec. 1317 R. S., does not apply to such reappointment, since the provisions of sec. 1325 R. S., fix no age limit, the object of returning or reappointing the dismissed cadet being to permit of his continuing or fulfilling a career already begun. *C. 16602, July 26, 1904, and Mar. 22, 1912.*

III A 4 b. *Held*, that as the Volunteer Army act of April 22, 1898 (30 Stat. 361), contains no express provision for the appointment by any one of the regimental (field and staff) officers of a volunteer regiment composed of companies taken from two or more States, the President may, under section 2 of article 2 of the Constitution, appoint such field or staff officers.[2] *C. 4624, July, 1898.*

III A 4 c. The Constitution (Art. II, sec. 2, par. 2) provides that "Congress may by law vest the appointment of *inferior* officers in the President alone, in the courts of law, or in the heads of departments." So, where, in three several cases, Congress, by special legislation, authorized the President to "restore," or "reinstate," in his former rank and office, an officer (who had been—as expressed in the act, or indicated by the reports of committees, debates, etc.—in the opinion of Congress, erroneously or unjustly dismissed or mustered out), and to place him on the retired list in his previous grade, *held*, that such legislation empowered the President to reappoint the party without the concurrence of the Senate, and that the simple act of appointment by the President alone fully invested the party with the military office.[3] *R. 42, 178, 193, 196, 246, 353, Feb., Mar., and July, 1879; 43, 130, Jan., 1880; C. 18785, Oct. 25, 1905.*

---

[1] A cadet in the United States Military Academy at West Point is not an officer of the Army within the meaning of sec. 1229, R. S., prohibiting dismissals from service in time of peace, except after trial and conviction by court-martial. Hartigan *v.* U. S., 196 U. S. 169.

[2] See 22 Op. Atty. Gen., 146.

During the Civil War a large number of volunteer officers were appointed by the President alone through notification by the Secretary of War or the Adjutant General. This class includes officers of colored troops appointed through the bureau of colored troops, and officers of white volunteers from States whose authorities refused or omitted to respond to the President's call for troops, officers of Territorial organizations, the Mississippi Marine Brigade, the Indian Home Brigade, the First Army Corps, U. S. V., and the First U. S. Vol. Eng. See R. and P. 456, 829.

[3] As to who are inferior officers see Collins *v.* U. S., 14 Ct. Cls., 568.

Appointments to office can be made by heads of departments only in those cases which Congress has authorized by law, and consequently the appointment of an agent of fortification by the Secretary of War is irregular. U. S. *v.* Maurice: Case No. 15747, Fed. Cases.

See this ruling confirmed by the Court of Claims in Collins *v.* United States, 14 Ct. Cls., 568. The Solicitor General (16 Op. Atty. Gen., 624) had previously held *contra*.

See acts of July 22, 1861; June 21, 1876, c. 143; June 19, 1878, c. 330; Mar. 3, 1879, c. 175.

III A 5. An applicant for an original appointment as an officer of the Army offered, if some alleged physical defect which stood in the way of his appointment were passed over, to waive any future right he might have to a pension; *held*, that there is no right to exact from such applicant a waiver of his right to a pension under the statutes. It would, however, be proper to make a record of defects shown by the examination of the applicant; in order, should the case arise, that it might be shown that the defects antedated the appointment of the person examined. *C. 25392, Aug. 6, 1909; 29295, Dec. 8, 1911.*

III A 6 a. In the case of original appointments to office the general rule is that the office vests on the date of its acceptance by the appointee, even if the oath of office is not taken until afterwards.[1] *C. 23668, Dec. 7, 1908; 4567, July 12, 1898; 6644, June, 1899; 12599, May 12, 1902; 16732, Aug. 17, 1904.*

III A 6 a (1). The appointment of a graduate of the Military Academy to the office of second lieutenant in the Army differs from a similar appointment from other sources in that as the cadet has signed articles, under the requirements of section 1321, R. S., to serve the Government eight years, a formal acceptance is not required of him in order to vest in him the office of second lieutenant. *Held*, in a particular case in which a cadet did not furnish the oath of allegiance required by section 1757, R. S., and desired to sever himself from the military service by not accepting his appointment as second lieutenant and by not reporting for duty, that the office had vested at the date of appointment. *Held*, further, that after the lapse of the statutory period he could be dropped for desertion as provided in section 1229, R. S. *C. 27241, Sept. 9, 1910.*

III A 6 b. In a case in which a sergeant read in the press that he had been appointed a second lieutenant and without formal notice of his appointment accepted it by letter to The Adjutant General. The press notice was a correct statement of the appointment *Held*, that the sergeant became fully invested with the office on the date when he mailed acceptance.[2] *C. 16732, Aug. 16, 1904.*

III A 6 c. *Held* that under the acts of July 5, 1884 (23 Stat. 112), and February 2, 1901 (31 Stat. 752), the office of assistant surgeon, with rank of first lieutenant in the Medical Department, vests when the President signs the appointment or commission.[2] *C. 23135, Mar. 10, 1909.*

III A 7 a. No statute of the United States requires an office to be accepted. *Held* that under existing practice, however, an acceptance is required. It may be "express" as by a formal acceptance in writing, or "implied" as by entering upon the performance of the duties of the office.[3] *C. 27241, Oct. 7, 1910; 19425, Mar. 17, 1906; 23668, Dec. 7, 1908.*

---

[1] See U. S. *v.* Flanders, 112 U. S., 88; U. S. *v.* Eaton, 169 U. S., 331; IV Comp. Dec., 496, 601; VI id., 672.

In the case of an original appointment, if after confirmation by the Senate the President withholds a commission, the office does not vest. 4 Op. Atty. Gen., 218; 12 id., 304.

[2] See Marbury *v.* Madison, 5 U. S., 137.

[3] See Digest 2 Comp. Dec. of 1869, pars. 1103 and 1105. Also see 3 Op. Atty. Gen., 577.

III A 8 **a** (1). Neither a major general commanding nor the Secretary of War can authorize an officer to administer an oath—such authority must be given by law. *R. 34, 648, Dec. 1873; P. 56, 88, Oct., 1892; C. 4892, Sept. 1, 1898.*

III A 8 **a** (2). A postmaster is not competent to administer the oath of office to an officer of the Army. *P. 39, 19, Feb., 1890; C. 26721, May 14, 1910.*

III A 8 **a** (3). A graduate of the Military Academy having received a recess appointment to the office of second lieutenant and taken the required oath, was promoted before he had been confirmed a second lieutenant by the Senate. *Held* that on his confirmation as a second lieutenant he need not again take an oath as such, his acceptance of the office to which he had been promoted serving to vest a new office and to vacate the office to which he had been originally appointed. *Held*, however, in the case of an officer who received a recess appointment and took the oath of office that a new oath must be taken on confirmation should the officer at that time hold the same office. *C. 22670, Jan. 31, 1908; 22889, Mar. 13, 1908.*

III A 8 **a** (4). *Held* that an officer of the Army, in entering upon his office, could not be allowed (in the absence of special authority from Congress) to take a modified oath of office on the ground that his religious convictions would not permit him to take the oath as prescribed in the statute. *R. 11, 503, Feb., 1865; 19, 89, Oct., 1865, and 376, Jan., 1866.*

III A 8 **b** (1). An officer of the Army has no authority, *virtute officii*, to administer an oath. He is indeed specially empowered to exercise this function under certain circumstances by statute—as by the second, eighty-fourth and eighty-fifth articles of war; and further by section 183, R. S., in a case where, being an officer of the War Department, he is detailed to investigate frauds, etc.[1] *R. 34, 648. Dec., 1873.*

III A 8 **b** (2). *Held* that judge advocates of departments (even though line officers merely assigned to that duty, *C. 3746, Dec., 1897; 9060, Oct., 1900*) and trial judge advocates, including trial officers of summary courts, are authorized under the act of July 27, 1892 (27 Stat 278), and section 1758 R. S. to administer oaths of military office. *C. 4441, June, 1898.* They may also administer the oaths required to be made by officers who signed contracts under section 3745 R. S. on behalf of the Government, under the act of July 27, 1892 (27 Stat. 278). *C. 3671, Nov., 1897; 3768, Jan. 5, 1898; 4892, Sept. 1, 1898; 8725, Aug. 7, 1890.* They may also administer

[1] By sec. 4 of the act of July 27, 1892 (27 Stat. 278), "judge advocates of departments and of courts-martial, and the trial officer of summary courts, are * * * authorized to administer oaths for the purposes of the administration of military justice, and for other purposes of military administration."

Under sec. 19 of the act of May 28, 1896 (29 Stat. 184), United States commissioners and all clerks of United States courts are authorized to administer oaths generally (III Comp. Dec., 65).

Sec. 183, R. S., was amended Mar. 2, 1901, to read as follows: "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 detailed to conduct an investigation, and the recorder, and, if there be none, the presiding officer of any military 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."

oaths to sureties on a Government contractor's bond.[1] *C. 3768, Jan. 5, 1898.* The passage of the act of July 27, 1892, does not affect the power of administering oaths of officials who were authorized to do so before the passage of that act. *P. 56, 408, Nov., 1892.*

III B 1 a (1). *Held* that a civilian (in this case a late captain who had been made a civilian by the approval and execution of a sentence dismissing him from the Army) could, under existing law, be appointed to the line of the Army only in the grade of second lieutenant, in the absence of express authority from Congress.[2] For his appointment to his former grade, so as to except his case from the operation of the rule of promotion by seniority,[3] the authority of Congress would be necessary.[4] *R. 29, 47, June, 1869; 37, 363, Mar., 1876; 38, 159, July, 1876; 39, 525, May 1, 1878; 43, 130, Jan., 1880. Held* that promotion by seniority is required for the Porto Rican Regiment. *C. 13323, Sept. 18, 1902.*

III B 1 a (2). An officer who is senior in his grade is ineligible, while under a legal sentence of suspension from rank, to promotion to a vacancy occurring in a higher grade pending the term of his suspension. Upon such vacancy, the next senior officer becomes entitled to the promotion in his stead. *R. 7, 8, Jan., 1864; 28, 164, Oct., 1868; 33, 69, June, 1872; 37, 536, May, 1876.*

III B 1 a (3). The suspension from promotion, upon failure to pass a qualifying examination, is in the nature of a *penalty*, and the suspension becomes operative when the right of the officer to promotion would have accrued had he passed a satisfactory examination. *C. 15028, July 30, 1903.* Such suspension runs for one year, in any event, and until a vacancy occurs to which the officer can be appointed should he succeed in passing his examination. *C. 15028, July 30, 1903; 15097, July 29, 1903; 15561, Nov. 30, 1903; 23096, Apr. 18, 1908, May 12, 1910.*

III B 2. There is no vested right in promotion as such on the part of officers of the Army. All that can be said is that officers have certain rights of promotion under whatever may be the law from time to time. These rights vary with the law. Congress may change the date of an officer's commission so as to give him a right of promotion over other officers who ranked him before, and so postpone their right to his. Thus, where an act of Congress authorized the President to issue a new commission to a lieutenant, the effect of which would be to give him a precedence over 24 other officers, *held* that such legislation was within the power of Congress, which was the sole judge as to its expediency. And *held* that the giving of authority in such case being one in which individual rights were concerned, was to be construed as a *requirement* upon the President.[5] *P. 58, 309, March, 1893.*

---

[1] By sec. 4 of the act of July 27, 1892 (27 Stat. 278), "judge advocates of departments and of courts-martial, and the trial officer of summary courts, are * * * authorized to administer oaths for the purposes of the administration of military justice, and for other purposes of military administration."

[2] See sec. 1228, R. S.

[3] Promotion by seniority is now required by the act of Oct. 1, 1890 (26 Stat. 562).

[4] See 14 Ops. Atty. Gen., 2, 164 and 499.

[5] Supervisors *v.* U. S., 4 Wallace, 435.

Where there are two or more offices of the same grade in a corps, each requiring a separate commission, on a vacancy the appointing power may appoint the senior of the next lower grade to either. 17 Op. Atty. Gen., 465.

III B 3 a. In the case of an appointment to a vacancy which leads, by promotion, to higher grades of rank in the military establishment, *held* that the office vests in the appointee when the appointing power has been fully exercised in respect thereto.[1] *C. 15262, Sept. 8, 1903; 19425, Mar. 17, 1906.*

III B 3 a (1). In cases of promotion an office vests on the date of the appointment or commission on condition always that the appointment or commission is thereafter accepted. In the case of an officer who died before the Senate had confirmed his nomination to an office by promotion, *held* that due to the death of the officer and the consequent lack of an acceptance of the office, the office had not vested.[2] *C. 28369, May 19, 1911; 7050, Oct. 6, 1900; 12599, May 12, 1902; 16732, Aug. 17, 1904; 19650, May 8, 1906; 16359, Dec. 28, 1911. Held*, that the office does not vest without acceptance even if the appointment had been confirmed by the Senate.[3] *C. 16359, Dec. 28, 1911.*

III B 3 a (2). A vacancy in the list of lieutenant colonels occurred March 1. The President could, March 1 and on each successive date, have appointed the senior major to the vacant lieutenant colonelcy. He did appoint him a lieutenant colonel March 11. *Held* that the major became fully invested with the new office of lieutenant colonel March 11. Had specific duties been attached by law to the office of lieutenant colonel and had a penalty been imposed by law for nonperformance, no duty of performance would have been required of the major prior to the vesting of the office of lieutenant colonel, March 11; nor in the event of nonperformance would he have been liable to the enforcement of the penalty. *C. 14473, Apr. 11, 1903, and Apr. 9, 1906.*

III B 3 a (3). The nomination of a first lieutenant to the office of captain was made by the President to the Senate. The nomination was confirmed and a commission made out and signed. Before delivery, however, the President was made aware of certain charges against the moral character of the officer and the commission was not delivered. *Held*, that the law and the regulations governing the advancement of the officer had been fully executed;[4] that the office of captain had been fully vested in the officer and could only be divested by regular procedure. *C. 22818, Apr. 21, 1908.*

III B 3 a (4) (*a*). *Held*, that where an officer whose right to promotion has accrued, in the operation of the act of October 1, 1890 (26 Stat. 562), is obliged by reason of sickness to remain absent from the place where a board for his examination has been convened by the President, such sickness, when verified by the proper medical

---

[1] A mere notification that an examination has been passed, held sufficient as an appointment to office. (95 U. S., 760.) In the case of Marbury *v.* Madison, the Supreme Court held that as to an officer who is not removable by the President, the signing and sealing of a commission vested the office irrevocably in the officer, although the commission had never been delivered to him. 5 U. S. 50; and 12 Op. Atty. Gen., 365.

[2] That an appointment is complete when made out and signed by the appointing power, and confers on the appointee the right to the office, see Marbury *v.* Madison, 1 Cranch, 137; U. S. *v.* Bradley, 10 Peters, 343; U. S. *v.* Le Baron, 19 How., 73; Montgomery *v.* U. S., 5 Ct. Cls., 93. The office, however, can not be considered as filled until the appointee has, in fact, accepted it. (Mechem on Public Officers, sec. 247; Am. & Eng. Ency. of Law, 1st Ed., vol. 19, p. 437.)

[3] See 29 Op. Atty. Gen., 254. Sept. 22, 1911, for opinion on this case.

[4] See Marbury *v.* Madison, 5 U. S., 137.

authorities, constitutes an exigency of the service within the meaning of section 32 of the act of February 2, 1901 (31 Stat. 756), and that such officer may therefore be lawfully advanced to the next higher grade, subject to examination which shall take place as soon thereafter as practicable. *C. 23096, June 29, 1908.*

III B 3 a (4) (*b*). An officer was promoted under the provisions of section 32 of the act of February 2, 1901 (31 Stat. 756), without examination and the words "subject to examination" were written on his commission. After passing his examination he requested that a new commission be furnished him with those words omitted. *Held,* that, as the office had vested, a different commission could not be issued to the officer without another exercise of the constitutional appointing power, of which the new commission would be the record. *C. 19267, Feb. 27, 1906.*

III B 4. *Held* that it is a peculiarity in the *status* of assistant surgeons and lieutenants of engineers and ordnance that promotion to a higher grade results by operation of law from mere duration of service and independently of any action by the appointing power. *R. 43, 208, Feb., 1880.*

III B 5 a. In the case of an officer appointed to fill a vacancy which was to occur on a given date, the officer entered upon the duties of his office on the date of the vacancy but did not communicate his acceptance until four days later, when he requested that it be made effective from the date he took up his duties, *held,* that the acceptance should be considered to date form the time this officeholder actually entered upon the duties of his office. *C. 27305, Sept. 27, 1910.*

III B 6 a. An officer of the line, on passing the examination for a vacancy in the Ordnance Corps, does not become an ordnance officer by a mere transfer. He must be appointed, confirmed, and commissioned in the usual way. *P. 37, 156, Dec., 1889.*

III C 1. Prior to the approval of the act of January 25, 1907 (34 Stat. 861), Lieut. D., an Infantry officer, effected a mutual transfer with Lieut. M., of the Artillery Corps. The nominations to effect the transfer were confirmed by the Senate on January 29, 1907, two days subsequent to the approval of the act reorganizing the Artillery. *Held,* that had there been no transfer the officer who exchanged with Lieut. D. would have been entitled to advancement in accordance with the terms of the reorganization bill; and it is clear that Lieut. D. succeeded to all the rights in that regard which vested in Lieut. M. when the reorganization act became operative. *Held,* that Lieut. D. may lawfully be regarded as entitled to the advancement which is conferred upon officers who were in the Artillery Corps at the date of approval of the act of reorganization. *C. 21053, Apr. 9, 1907.*

III D 1. An officer of the line detailed for duty in a staff department in the operation of section 16 of the act of February 2, 1901 (31 Stat. 751), becomes during such period of detail an officer of the staff department in which he is detailed. The vacancy created in the line of the Army by his detail has been filled by promotion, and during the period of such detail office in the staff is as fully vested in him as if his appointment in the department in which he is detailed were permanent; his commission in the line remains dormant, being superseded during his incumbency of office in the Quartermaster's Department or elsewhere by his detail to the staff.

While so detailed he occupies precisely the same status in respect to the exercise of command as other officers of the staff; that is, he can exercise command or control in his own department, but is, by the nature of his office, inhibited from exercising command elsewhere in the military establishment save by assignment of the President. As the detailed officer is during the period of such detail an officer of the staff, he is not entitled, as an officer of the line, to assume and exercise the command provided for in the one hundred and twenty-second article of war. *C. 14018, Jan. 22, 1903.*

III D 1 a. A captain in the line of the Army was detailed as a member of the General Staff on January 29, 1904. *Held* that office in the General Staff vested on the date of the order promulgating the detail, and that the statutory tour of duty terminated four years after the date of the order promulgating such detail. *C. 15844, Jan. 21, 1904; 22482, Dec. 2, 1907.*

III D 1 b. The act of February 14, 1903 (32 Stat. 830), provides that "all officers detailed in the General Staff Corps shall be detailed therein for periods of four years, unless sooner relieved." *Held* that the clause above cited places a restriction in point of time upon details in the General Staff and forbids the employment of officers for periods differing from or in excess of those expressly provided by law. At the end of the statutory tour the further continuance of an officer in that form of staff duty is without authority of law, and the Secretary of War becomes charged with the duty, largely ministerial in character, of issuing the necessary orders for his relief. *Held*, also, that an officer who has been relieved from the General Staff prior to the expiration of four years' duty therewith, may be redetailed to complete an unexpired term, but such officer will become ineligible as soon as he shall have completed a total of four years of such duty. *Held*, further, that while serving in the General Staff Corps officers may be temporarily assigned to duty with any branch of the Army. *C. 24868, Apr. 30, 1909.*

III D 1 c. An officer of the line, serving in the detailed staff, is eligible, while so serving, for detail in the General Staff; this for the reason that section 3 of the act of February 14, 1903 (32 Stat. 831), which establishes the General Staff Corps, authorizes officers to be detailed to that corps from "the Army at large."

Officers serving in the detailed staff, equally with officers of the line and staff, constitute the Army at large, and, for that reason, are eligible for detail in the General Staff. *C. 20140, July 26, 1906.*

III D 1 d. The detail of a lieutenant colonel in the Inspector General's department being about to expire, his redetail in the same department is asked for; *held* that the case comes within the excepting clause of section 26, act of February 2, 1901 (31 Stat. 755), the officer not being below the grade of lieutenant colonel, and that his redetail in the same department would be lawful. *C. 22393, Nov. 20, 1907.*

III D 2 a. In construing those sections of the act of February 2, 1901 (31 Stat. 748), which established the detail system as a method of filling vacancies in the several staff departments of the Army, and of the act of February 14, 1903 (32 Stat. 830), which established the General Staff, it was *held* that when the right of a detailed officer to promotion in the line has accrued, such promotion involves his separation from the staff department in which he happens to be serving,

because his retention on the staff would cause the number of staff officers in the higher grade to be increased by one, which is forbidden by the requirement that the number of officers in each particular grade of the department in which he is detailed shall consist of the number expressly stated, and no more. *C. 15004, July 23, 1903; 15686, Jan. 8, 1904; 15844, Jan. 21, 1904; 18515, Sept. 5, 1905.*

III D 2 b. A second lieutenant of cavalry, while detailed in the Ordnance Department, was promoted to a first lieutenancy of cavalry; *held* that he was ineligible for a redetail in the ordnance, as he had not finished a four-year detail in that department. *C. 15844, Jan. 21, 1904; 18515, Sept. 2 and 5, 1905; 13942, Jan. 13, 1908.*

III D 3. *Held*, that the requirements of sections 26 and 27 of the act of February 2, 1901 (31 Stat. 755), are directory in character, and that an officer detailed to the staff upon the existence of an emergency which, in the opinion of the Secretary of War, requires a resort to that course, may be relieved from his assignment and may be replaced by an officer of the same arm of service having similar qualifications. *C. 11466, Feb. 11, 1902.*

III D 4. The fact that an officer is serving by detail in a staff department does not operate to prevent him from effecting a transfer as a line officer with an officer of equal grade in the line of the Army. *C. 21783, July 12, Aug. 22, 1907, Jan. 29, 1909.*

III E 1. Paragraph 2, section 2, Article II of the Constitution provides that "Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments." Section 1 of the act of February 2, 1901 (31 Stat. 748), provided for the organization of a regiment of cavalry. In the enumeration it includes two veterinarians. Section 20 of the same act provided that the two veterinarians authorized for each cavalry regiment and the one authorized for each artillery regiment should receive the pay and allowances of second lieutenants mounted. *Held*, that veterinarians are actual incumbents of military office; that they are inducted into such office in the operation of appointments by the Secretary of War; that they are not commissioned officers as they are not appointed by the President. *Held*, further, that they are appointed under the provision of the Constitution cited above by the Secretary of War. *C. 8587, Oct. 10, 1910; 10566, Nov. 5, 1909.* And when on duty at the Service School are entitled to leaves as authorized for officers. *C. 17388, May 26, 1910.*

III E 2. *Held* that paymasters' clerks in the Army are inferior officers of the type that are appointed by the Secretary of War under paragraph 2, section 2, Article II of the Constitution.[1] *C. 10603, July 7 and Oct. 7, 1911.*

III E 3. The office of master of the sword was created by the acts of May 10, 1854 (10 Stat. 277), March 2, 1901 (31 Stat. 914), and March 3, 1905 (33 Stat. 850). *Held* that the incumbent is appointed by the Secretary of War. *C. 18009, Mar. 23, 1910.*

---

[1] See 27 Op. Atty. Gen., 493, and U. S. *v.* Hartwell (73 U. S., 385). See G. O., 103 and 143, W. D., series 1911.

Paymasters' clerks in the Navy wear a uniform, have a fixed rank, and are held by the United States courts to be a part of the Navy and amenable at all times to trial by naval courts-martial. See *Ex parte* Reed, 10 Otto, 13; *In re* Bogart, 2 Sawyer, 396; United States *v.* Bogart, 3 Benedict, 257. But see *Ex parte* Van Vranken, 47 Fed. Rep., 888. See also Cir. 53, W. D., July 31, 1909.

III F 1. While, as provided in section 1228, R. S., an officer duly dismissed from the army *by sentence of court-martial* can be restored to it only by a new appointment; so, except by a new appointment, the President can not restore an officer separated from the Army *otherwise* than by sentence, viz, by summary dismissal by order, or by being "wholly" retired, or by the acceptance of a resignation. Thus separated, the officer is made a civilian as effectually as if he had been dismissed by sentence; and, as to a readmission to the service, he is in precisely the position of a civilian who has never been in the Army at all. He can therefore be admitted to it only in the mode pointed out in the Constitution (Art. II, sec. 2, par. 2). A *revocation* of the order by which he was dismissed or wholly retired, or of the acceptance of his resignation, must (after notice) be quite futile and ineffectual. An order purporting to *revoke* a previous order by which an officer has been legally detached from the military service is a simple nullity. *R. 35, 466, July, 1874; 37, 451, Apr., 1876; 39, 474, Mar., 1878; 41, 611, July, 1879.*

III G. The Regular Army was mainly distinguished from the *other* principal contingent of the Army of the United States during the Civil War—the volunteer force—by the fact that the tenure of office of the officers of the former was not in general limited, either expressly or by implication, to the period of the war. An unlimited tenure, however, is not a necessary or invariable incident of office in the Regular Army. The 11 new regiments, for example, added to the Regular Army by the act of July 29, 1861, were "declared to be for service during the existing insurrection," etc. *R. 34, 459, Sept., 1873.*

IV A 1. It is a rule of law that when a person holding one office enters upon another, a performance of the duties of which is incompatible with the performance by him of the duties of the first, he abandons and vacates the first office in entering upon the second.[1] *P. 40, 153, Apr., 1890; 56, 151, Oct. 1, 1892.*

IV A 1 **A.** A second lieutenant of Cavalry received and accepted a recess appointment as a first lieutenant of Artillery. On receiving notice of his confirmation by the Senate, he asked if he might decline his office in the Artillery and revert to that held in the Cavalry. *Held,* that by accepting office in the Artillery arm he had vacated his

---

[1] In the absence of a statutory prohibition a person may hold two distinct offices, places, or employments which are not incompatible, and receive the compensation attached to each. Converse *v.* U. S., 62 U. S., 463; 75 U. S., 33; 99 U. S., 510; U. S. *v.* Brindle, 110 U. S., 688; U. S. *v.* Saunders, 120 id. 126; Meigs *v.* U. S., 19 Ct. Cls. 497; 5 Op. Atty., Gen. 768; 19 id. 283; 3 Comp. Dec. 432; 4 id. 115; 5 id. 9; 6 id. 284, 683. But the services for which extra compensation is allowed must, under the statutes, be such as have no connections with the duties of the officer and must be rendered under an appointment or employment. Converse *v.* U. S., 21 Howard, 463; U. S. *v.* Saunders, 120 U. S. 126; 19 Op. Atty. Gen., 283; 5 Comp. Dec. 9; 6 id. 284, 683.

Two offices are incompatible when a performance of the duties of the one will prevent or conflict with the performance of the duties of the other, or when the holding of the two is contrary to the policy of the law. See Crosthwaite *v.* U. S., 30 Ct. Cls. 300. Reversed on other grounds 168 U. S. 375. But when an incumbent of an office accepts a position incompatible with the one held by him, the acceptance of the new position is an abandonment or resignation of the office theretofore held. Digest of 2d Comp. Dec., Vol. II, pars. 728, 729, 730.

In peace an officer may cease to be a member of the Army by death, resignation, dismissal under sentence of general court-martial, absence without leave or absent in confinement in prison after conviction for three months; failure on examination for promotion; retirement (wholly) on disability not incident to service, by nomination and confirmation of successor.

office in the Cavalry and that there remained no military office to which he could revert.[1] *C. 22663, Jan. 25, 1908.*

IV A 2 a. Section 1222, R. S. (act of July 15, 1870) (16 Stat. 319),[2] provides that—"No officer of the Army on the active list shall hold any civil office, whether by election or appointment, and every such officer who accepts or exercises the functions of a civil office shall thereby cease to be an officer of the Army, and his commission shall be thereby vacated." *Held* that this provision was an exercise by Congress of its constitutional power "to raise armies," which includes the power to determine of whom they shall consist.[3] *R. 30, 556, Aug., 1870; 35, 54, Dec., 1873.*

IV A 2 b. The words "exercises the functions of a civil office" were used in section 1222, R. S., in order that it might not be necessary to prove in every case that an officer of the Army entering upon a civil office had qualified according to all the formalities of the law, but, rather, that the holding of the office whether by formal qualification or otherwise should have the effect of vacating his commission in the Army. "Exercising the functions of an office" means something more than merely transacting some of the business of an office as the agent of some one else; it means transacting the business by virtue of holding the office. Thus where an officer on the active list of the Army, after having had conferred upon him by a governor of a State the honorary title of colonel and assistant adjutant general in the State militia, took temporary charge of the adjutant general's office of the State at the request of the governor, during the absence of the adjutant general, *held* that such action on the part of the officer did not amount to the acceptance of a civil office.[4] *C. 272, Sept., 1894.*

IV A 2 c. By "civil office" as the term is used in section 1222, R. S., is meant civil *public* office. *P. 62, 420, Nov. 29, 1893. Held,* that to bring an office within the prohibition of section 1222, it is necessary that the civil office held by an officer of the Army should be one created by Congress or by a State or municipality. *C. 23931, Oct. 3, 1908, and Sept. 13, 1911; 19979, July 3, 1906. Held,* that

---

[1] See 20 Op. Atty. Gen., 427, where Attorney General Miller held that the acceptance of an appointment as Chief of the Record and Pension Office, War Department, by a surgeon of the Army created a vacancy in the latter office, the offices being held to be inconsistent.

And where an appropriation was made for "the pay of one assistant professor" of the Military Academy, the act providing for the appointment of such professor in addition to those theretofore authorized, Attorney General Olney held that as the term of the new office would not begin until the next fiscal year, the acceptance of the appointment thereto by an officer of the Army would not vacate his office until the term of the new office actually commences. 20 Op., 593. In a decision of the Comptroller the positions of "acting judge advocate and aid to a major general" were held to be "incompatible, and an officer is not entitled to the additional pay of both positions at the same time." (V Comp. Dec., 971.)

An acting judge advocate can not hold the position of A. D. C. (V Comp. Dec., 971.)

[2] Applies to Federal and State offices, and to those for which no compensation is provided as well as to those for which compensation is allowed. 13 Op. Atty. Gen., 310.

See 22 Op. Atty. Gen., 88, June 10, 1898, in which it is *held* that section 1222, R. S., does not apply to office in the Volunteers. See 29 id. 298, Jan. 31, 1912, in which he *held* that sec. 1222, R. S., does not apply to office in the Organized Militia.

[3] See United States *v.* Bainbridge, 1 Mason, 71; *In re* Riley, 1 Benedict, 408.

[4] See 29 Op. Atty. Gen., 298, Jan. 31, 1912, in which he holds that sec. 1222, R. S., does not prevent an officer on the active list of the Army from holding and exercising the functions of office in the Organized Militia.

the term "civil office" embraces not only Federal, State, Territorial, and municipal office, but also certain cases of public civil employment. *C. 18017, Dec. 6, 1911.*

IV A 2 c (1). *Held* that the term civil office employed in section 1222, R. S., included Federal, State, county, or municipal office. *R. 36, 477, May, 1875; 55, 501, Apr., 1888.* So *held* that an officer of the Army could not, without thereby vacating his military office, accept or exercise the office of park commissioner of the city of Philadelphia (*R. 30, 555, Aug., 1870*); *C. 19350, Mar. 2, 1906;* or of trustee on the board of trustees of the Cincinnati Southern Railroad [1] (*R. 38, 31, Mar., 1876*); these being offices created by State statute. So *held* that a medical officer of the Army could not accept the office of a county physician, and retain his military office. *R. 36, 477.* Similarly *held* that membership on the "River Commission for Mobile River and Branches" is a civil office. *R. 55, 501, 1888.* Similarly *held* that the "assistant to the postmaster" at Mescalero, N. Mex., can not be filled by an Army officer without vacating his commission. *C. 1854, Nov., 1895.* Similarly *held* that membership on the "International Boundary Commission" is a civil office, and that an officer on the active list could not, without vacating his commission, become a member of such commission.[2] *C. 2236, Apr., 1896.* Similarly *held* that an officer on the active list can not hold the office of "assistant to the Deputy Commissioner of Indian Affairs," without vacating his commission. *C. 2789, Dec., 1896.*

IV A 2 c (1). *Held* that the position of a member of the sanitary commission of Honolulu is a "civil office" within the meaning of section 1222, R. S., and can not be accepted by an officer on the active list without placing in jeopardy his commission as an officer of the Army. *C. 18017, Apr. 28, 1911.*

IV A 2 d (1). Where under the laws of a State the superintendent and commandant of a military school are entitled to military commissions in the militia of the State, such commission not to carry pay or rank or command outside of the school, *held* that the acceptance of such commission by an officer of the Army detailed to the school did not come within the prohibition of section 1222, R. S. *C. 25242, July 7, 1909. Held*, further, that section 1222, R. S., does not prevent an officer on the active list of the Regular Army from accepting a commission in the Organized Militia, as such office is not civil office.[3] *C. 29273, Dec. 2, 1911.*

IV A 2 d (2). On the question of whether an officer of the Army could, without vacating his commission (secs. 1222 and 1860, R. S.), hold a civil office in the Philippines, *held* that in those sections of the Philippines which are still under the jurisdiction of the Philippine Commission, in contradistinction to the remainder, which is under the joint jurisdiction of the commission and the Philippine Assembly, an officer of the Army could hold civil office, as the commission is but a continuation of the government of military occupation; and under the latter officers who hold civil office are doing military duty. *C. 25629, Sept. 30, 1909.*

---

[1] Concurred in by the Solicitor General, 15 Op. Atty. Gen., 551.

[2] See joint resolution of Dec. 12, 1893 (28 Stat., 1017), which authorized a specially named officer to serve as a member of that commission.

[3] Concurred in by the Attorney General Jan. 31, 1912; 29 Op. 298.

IV A 2 **d** (2) (*a*). Where the Philippine Government had turned over to an officer of the Army a sum of money to be expended in connection with an exhibit at the World's Fair, *held* that the acceptance of the money by the officer did not serve to create him a civil officer of the Philippine Government.[1] *C. 17667, Feb. 14, 1907.*

IV A 2 **d** (2) (*b*). On the question of whether the law of the Philippine Islands which gives to certain officers of the Army the powers of a justice of the peace in so far as is needed in certain cases involving the traffic in liquors, brings such offices within the prohibition contained in section 1222, R. S., *held*, that it does not. *C. 14939, July 13, 1903.*

IV A 2 **d** (3). Section 10 of the act of April 22, 1898 (30 Stat. 363), provides, *inter alia*, that "the staff officers herein authorized for the corps, division, and the brigade commanders may be appointed by the President, by and with the advice and consent of the Senate as officers of the Volunteer Army, or may be assigned by him, in his discretion, from officers of the Regular Army, or the Volunteer Army, or of the militia in the service of the United States: *Provided*, that when relieved from such staff service said appointments or assignments shall terminate." *Held*, that the acceptance of an assignment as provided for here would *not vacate* a Regular officer's commission. *Held* further, that a nomination and confirmation is not required in the case of Regular officers so "assigned." *C. 4149, May 19, 1898.*

IV A 2 **d** (3) (*a*). *Held*, that in the absence of statutory authority the President can not appoint a Regular officer to office in any volunteer force that may be called out from the District of Columbia. *C. 4119, May 12, 1898.*

IV A 2 **e.** *Held*, that a surgeon can accept a position as teacher in a medical college, which is a private institution. *C. 18017, Oct. 23, 1909.* *Held*, also, that a surgeon may be assigned for duty in the office of the head of the Department of Health of Porto Rico, and that the health conditions of the Army and of the people of Porto Rico are so interdependent that there exists a sufficient military motive to support the detail. *C. 18017, Mar. 16 and June 8, 1911.*

Held that an Army surgeon could, without vacating his commission under section 1222 R. S., accept appointment as an honorary member of the Porto Rico anemia commission, as such membership does not embrace the idea of tenure, duration, fees or emoluments, rights, powers or duty.[2] *C. 18017, July 28, 1906.*

IV A 2 **e** (1). A resolution of the board of supervisors of the city and county of San Francisco empowered an engineer officer of the Army, with others, to devise and provide a system of sewerage for that city and county. *Held* that such officer, in accepting, would not be appointed to a civil office in the sense of section 1222, R. S., but would be simply *employed* (with the approval of the Secretary of War) to perform a certain temporary service. The case *distinguished* from that of Col. Gillmore, Corps of Engineers.[3] *P. 54, 64,*

---

[1] See Carrington *v.* U. S., 208 U. S., 1.

[2] See U. S. *v.* Fisher (8 Fed. Rep., 414); U. S. *v.* McCroy (91 id. 295); 18 Op. Atty. Gen., 551.

[3] Col. Gillmore's case referred to is reported in 18 Op. Atty. Gen., 11. And see Gen. Meade's case in 13 id. 310; also case in 16 id. 499. Compare the still more recent opinion of the Attorney General, in 20 Op. 604.

June, 1892; C. 23931, Oct. 1, 1908, and Sept. 13, 1911; 19976, July 3, 1906.

IV A 2 e (2). A State statute authorized the employment, by the board of water commissioners of a city, of a person as an engineer, and the position was offered to an engineer officer of the Army; *held*, that such officer, in accepting the same, by the authority of the Secretary of War, would not be affected by the provision of section 1222, R. S.; such a position being in fact, as it was designated in terms in the statute, an *employment* merely, and one of a temporary and incidental character, and thus properly distinguished from an office. *R. 37, 540, May, 1876.* And similarly *held*, later, in regard to the employment of the same officer (under a similar statute) as a consulting engineer to the State engineer; the function of the latter being the office established by the statute, while that of the former was but an incidental employment. *R. 43, 307, May, 1880; 52, 271, June, 1887; C. 19979, July 3, 1906.*

IV A 2 e (3). There can be no objection to an officer investing his private funds as he pleases; it follows that he may lawfully invest them in the securities of an incorporated company, even though that company may at some time stand in the relation of a vendor to a department of the Government. So, also, an officer may serve as a director in a business corporation, provided the performance of his military duties is not impaired or prevented by such service.[1] *C. 22765, Feb. 17, 1908.*

IV A 2 e (4). So, also, an officer of the Medical Corps may render medical services to the prisoners in a jail in the neighborhood of his post; such service being purely contractual.[2] *C. 27213, Aug. 29, 1910.*

IV A 2 e (5). *Held*, that an engineer officer of the Army may accept employment as consulting engineer of the Board of Estimate and Apportionment of the City of New York. *C. 25912, Dec. 7, 1909.*

IV A 2 e (6) (*a*). The only prohibition in the matter of Army officers holding civil office is that embodied in section 1222, R. S. That prohibition forms part of the act of July 15, 1870 (16 Stat. 319.), which accomplished a reduction in the strength of the military establishment after the increase of January 28, 1866. *Held*, that is obviously applied to civil office within the territorial and legislative jurisdiction of the United States and of Congress, and had no application to the performance of civil duties by officers of the Army in occupied territory. This for the reason that military occupation is an incident of command and so comes within the plenary and exclusive jurisdiction of the President as commander in chief, and under ordinary circumstances had application to foreign territory—i. e., to territory which has not yet been incorporated into that of the United States. *C. 5771, Feb., 1899; 20396, Apr. 17, 1908.* Thus, assignments of officers of the Army to be collectors of customs in Cuba and Porto Rico, when under military occupation, were assignments to military duty and not to civil offices within the meaning of section 1222 R. S. *C. 5771, Feb., 1899.* *Held*, that officers so assigned may not receive

[1] See 7 Opins. Atty. Gen., 156.

[2] An Army surgeon is entitled to remuneration for services rendered as physician at an Indian agency. Digest of 2d Comp. Dec., Vol. III, pars. 389 and 636; 120 U. S., 126.

additional compensation for the execution of such duty. *C. 5771, Feb. 2, 1899.*

IV A 2 **e** (6) (*b*) [1]. A battalion adjutant of the Thirty-third United States Volunteer Infantry was assigned to duty with the superintendent of police of the city of Manila by the commanding general of the Philippines Division, that place during the period of such employment being in the military occupation of the United States. *Held* that there can be no doubt of the power of the President, or the Secretary of War as his representative in the conduct of military affairs, to assign any officer of the Army to any duty falling properly within the scope of his office. A colonel, a major, or a captain, in any branch of the line, or in any department of the staff, may, by the order of the President, or of a competent military superior, be detached from the duties of his office and assigned to duty elsewhere in the Military Establishment; and, while so detached, it has never been the practice of the department to require any deduction to be made from the salary to which he is entitled by law. Pending the detached service of the incumbent, the duties attached to such office are performed by a successor in command or by an officer duly detailed for that purpose. An order assigning an officer to the temporary performance of the duties of another military office would be a lawful military order, which the officer to whom it was addressed would disobey at his peril; and during such temporary incumbency the detailed officer, even though exercising the functions of a higher grade in the Military Establishment, would not become entitled to higher pay, unless expressly thereto authorized by law; as, for example, in the case provided for in the act of April 26, 1898. Nor, on the other hand, would the detached officer undergo any reduction of pay, or be deprived of any of the emoluments to which he is entitled by law, as a consequence of his temporary detachment from his office to perform the duties of another office in the Military Establishment.

What has been said in regard to the power of the President to assign an officer to duty in connection with the ordinary administration of the Military Establishment, applies with equal force to his authority to assign an officer to duty in connection with the administration of the military government of the Philippine Islands, which grew out of the fact that, at the time such assignment was made, those islands were in the military occupation of the United States. It seems hardly necessary to trace the authority for the assignment of an officer to any duty which he was considered capable of performing in connection with the military occupation of the city of Manila. The right to employ military officers upon such duty, in territory in the military occupation of the United States, has never been doubted.[1] *C. 16906, Sept. 26, 1904.*

IV A 2 **e** (6) (*b*) [2]. A lieutenant of Infantry held the position of inspector of constabulary. The question was raised as to whether or not his occupation of that position vacated his office under the provisions of section 1222, R. S. *Held* that in view of the fact that the Philippine Constabulary is a military organization and is under the Department of War, the officer in question did not occupy a civil office within the meaning of section 1222, R. S., which is a penal

[1] Cross *v.* Harrison, 16 How. 189–193; Jecker *v.* Montgomery, 13 id. 515; Texas *v.* White, 7 Wall., 700.

statute and must be strictly construed, but was merely executing a duty to which he had been properly detailed. *Held further* that he was subject to control only through the line of command extending through the Chief of Constabulary to the Secretary of War.[1] *C. 22400, Nov. 21, 1907; 24236, Dec. 21, 1907; 23328, May 27, 1908; 25629, Sept. 30, 1909.*

IV A 2 e (6), (*b*) [3]. A captain of Infantry was assigned to duty by the Secretary of War with the Governor General of the Philippine Islands. *Held* that the consitutional authority of the President to command the Army does not extend to detaching officers for the performance of purely civil duties, and that details of this latter character must be specially authorized by Congress. It is not believed, however, that this case presents any question of detail to civil duties. Under the scheme of government provided by Congress for the Philippine Islands special provision is made for the use of the military forces of the United States in preserving order and in dealing with emergencies beyond the power of the civil officials to control. Congress has thus recognized that in the administration of public affairs in the Philippine Islands the closest cooperation of the military authorities and the civil government is necessary; and it seems to have been the opinion of the Secretary of War and the civil governor of the Philippine Islands that this cooperation could be facilitated by the detail of a military officer upon the staff of the latter. In this view an officer who has been so detailed is to be regarded as being detailed for duty with the civil governor for the performance of important military duties. His status under such detail is that of an officer on detached service performing military duties under the direction of the civil governor. *C. 20251, Aug. 21, 1906.*

IV A 2 e (7). The detail of a captain of Engineers was proposed as an "associate member" of the International Boundary Commission (United States and Mexico). *Held* that office in such commission was created by treaty and that it is beyond the power of the Executive to create the office of "associate member" of such commission. Suggested that the officer be assigned to advisory duty in connection with the commission, such duty being military, and not inconsistent with the office held by the captain of engineers as a member of the Military Establishment.[2] *C. 2236, Apr. 26, 1896.*

---

[1] The act of the Philippine Commission of July 18, 1901, providing for the organization and government of a force of Philippine Constabulary and for a corps of inspectors for the same was approved, ratified, and confirmed by the act of July 1, 1902 (32 Stat. 691). The act of July 1, 1902, also provided for the further temporary government of the Philippine Islands under the Department of War. It also provided that all laws thereafter passed by the government of the Philippine Islands should be reported to Congress, which reserved the power and authority to annul the same. Congress later in the act of Jan. 30, 1903 (32 Stat. 783), specifically recognized the Philippine Constabulary as an existing force, duty with which was fit and appropriate for an Army officer, and created and bestowed additional rank upon such officers of the Army as should be detailed for service as chief and assistant chief of constabulary. The governor of the Philippine Islands thereafter requested the detail of a Regular officer for assignment to duty as chief of the corps of inspectors. The detail was approved by the Secretary of War Feb. 25, 1904, and published in par. 4, S. O. 75, War Department, Mar. 30, 1904. This order directed the officer to report to the governor of the Philippine Islands for duty in inspecting the constabulary of the islands. That procedure has since been followed in the matter of detailing officers to duty with the government of the Philippine Islands.

[2] See opinion of the Attorney General of May 5, 1910 (28 Op. Atty. Gen., 270).

IV B 1. *Held* that an officer of Engineers detailed by the President to perform, or assist in, engineering work, for State or municipal authorities, at their request, could not be said to exercise a civil office, and was thus not affected by the provision of section 1222, R. S., the only question to be determined in cases of such employment being that indicated by section 1224, viz, whether such work would require the officer to be separated from his corps or otherwise interfere with the performance of his military duties proper.[1] *R. 37, 540 and 542, May, 1876; 52, 271, June, 1887.*

IV B 2. *Held*, in view of the provisions of section 1224, R. S., that an officer of the Army could not legally be detailed in the service of "The World's Exposition of 1892," which is a *corporation*, nor upon "civil works" under the "World's Columbian Commission," which is not a corporation. And *advised* that, irrespective of the statute, to assign an officer of the Army to a duty which must, entirely or in great measure, and for any considerable period, separate him from the military duty for which Congress has authorized his employment and his pay, would, in the absence of statutory sanction, be unauthorized. *P. 49, 211, Sept., 1891.* Also further *held*, in view of section 1224, R. S., that an officer of the Army could not legally be detailed to inspect the buildings in the course of construction for the World's Columbian Exposition, since such inspection would be an employment "on civil works," and would require his separation from his corps and interfere with the performance of his military duties.[2] *P. 49, 245, Sept., 1891.*

IV C. An office was vacated by the appointment of a successor; *held*, that it was vacated on the date when the successor took rank. *Held*, further, that if no date of rank was stated in the nomination that the successor took rank from date when the appointing power in his case was completely exhausted, i. e., on the date when the President signed his commission.[3] *R. 55, 546, Apr., 1888; P. 24, 7, Apr., 1888; C. 17480, Feb. 2 and Mar. 13, 1905.*

IV D 1. A mere offer to resign or tender of resignation is revocable at any time before acceptance. *C. 25005, Jan. 4, 1910.* But after an acceptance, and before effect has been given to the same by notice, the offer can not be withdrawn or materially modified by the act of the officer alone, but the consent of the appointing power is also necessary. *R. 39, 375, Jan. 5, 1878. C. 12732, June 5, 1902;*

---

[1] It is held by the Attorney General (16 Op., 499) that while to detail an officer of the active list for duty with Prof. King on the U. S. Geological Survey would not be to invest him with a *civil office*, yet that, as such survey is a *civil work*, an officer could not, in view of the provisions of section 1224, R. S., legally be detailed for duty thereon if the effect of such detail would be to separate him from his regiment, corps, etc., or otherwise interfere with the performance of his military duties proper. See also 8 Op. Atty. Gen., 325.

See 28 Op. Atty. Gen., 270, where it is held that the President has power to detail officers of the Engineer Corps of the Army to act as experts at a hearing involving the granting of a permit to the city and county of San Francisco to use the Hetch-Hetchy Valley, in the Yosemite National Park, for maintaining a water supply for municipal purposes.

[2] Compare case in 19 Op. Atty. Gen. 600. Congress, subsequently, by act of Aug. 5, 1892, expressly authorized the Secretary of War to detail at his discretion officers of the Army "for special duty in connection with the World's Columbian Exposition."

[3] U. S. *v.* Kirkpatrick, 22 U. S., 733, 1824; Blake *v.* U. S., 103 U. S., 227, Oct., 1880; Keys *v.* U. S., 109 U. S., 336, Nov. 26, 1883; also 16 Op. Atty. Gen., 298, and 20 id., 427.

As to 2 persons holding the same office pending notice of appointment of successor, see 7 Op. Atty. Gen., 303; I Comp. Dec., 576; 3 id., 249.

15493, Nov. 13, 1903: 15767, Jan. 12, 1904; 16183, May 7, 1904; 18318, July 18, 1905; 18851, Nov. 20, 1905; 2170, Apr., 1896; 23448, June 18, 1908.

IV D 2. While a tender of his resignation by an *insane* officer is in general without legal effect and incapable of being legally accepted,[1] yet where a resignation tendered by an insane officer was, in the absence, at the War Department, of any knowledge of his insanity, formally accepted, and the vacancy created by the resignation was thereupon filled, *held* that the acceptance could not legally be revoked, and that the appointment to the vacancy was valid and operative.[2] *R. 39, 420, Feb., 1878.*

IV D 3. *Held* that a resignation without date placed in the hands of superior authority as an inclosure to a pledge given by an officer who authorized superior authority to complete the resignation by supplying the date is a valid tender of resignation on condition subsequent. *Held*, further, that upon the occurrence of the condition the resignation may be accepted.[3] *C. 18851, Nov. 21, 1905; 25005, Jan. 4, 1910.*

IV D 4. An officer deserted and went to Canada. From that place he tendered his resignation before he had been absent without leave three months. *Held* that as he was in desertion it would not be proper to accept his resignation. *Held*, further, that in view of the fact that he was outside of the limits of the United States, the statute of limitations did not run in his case, and that at the first opportunity he should be apprehended and tried as a deserter. *C. 24233, Dec. 22, 1908.*

IV D 5 a. The right of an incumbent of military office to resign his office at pleasure is subject to certain restrictions growing out of the military status. Thus the resignation of an officer under charges need not be accepted. Similarly the resignation of an officer in time of war may properly be refused. *R. 14, 129, Feb. 8, 1865; C. 16183, May 7, 1904.*

IV D 5 b. The acceptance of a resignation is an executive act which may be exercised by the President through any proper officer selected by him, as by a military commander in the field in time of war. *P. 54, 205, June 25, 1892.*

IV D 5 c. An officer may vacate an office by resignation. *Held* that the date of vacation is the date of the notification to the officer of the acceptance of his resignation.[4] *R. 42, 68, Dec., 1878; C. 15493, Nov. 13, 1903.*

IV D 5 c (1). A notice to an officer that his resignation has been accepted may be either actual or constructive. Unless there is something to indicate the contrary, it is presumed that when the acceptance of the resignation has been forwarded in the regular way to an officer's regiment or station it reached its destination and was delivered to the officer affected thereby if he was present. *Held* that if he is absent without authority the receipt at his proper station of the notice of the acceptance of his resignation is a constructive

[1] 6 Op. Atty. Gen., 456; 10 id., 229; 12 id., 557.

[2] See, to a similar effect, 15 Op. Atty. Gen., 469.

[3] 12 Op. Atty. Gen., 555. See Mimmack *v.* U. S., 10 Ct. Cls., 584, and id., 97 U. S., 426.

[4] See forty-ninth article of war. See also Barger *v.* U. S., 6 Ct. Cls., 35; Mimmack *v.* U. S., 10 id., 584; also 97 U. S., 426.

delivery to him. *P. 36, 337, Nov., 1889; 42, 370, Aug., 1890; 50, 458, Dec., 1891; C. 1289, Apr., 1895; 6409, May, 1899; 12732, June 5, 1902; 15493, Nov. 13, 1903; 16183, May 7, 1904; 17696, Mar. 18, 1905; 18318, July 18, 1905; 18851, Nov. 20, 1905; 19391, Mar. 19, 1906; 22934, Mar. 23, 1908.*

IV D 5 c (2). An officer tendered his resignation and the President without formally accepting the resignation by letter appointed a successor. *Held* that the appointment of the successor was in effect the acceptance of the resignation and that the officer who tendered the resignation vacated his office when he received actual or constructive notice of such appointment. *C. 7251, Nov. 14, 1899, and Dec. 17, 1901.*

VI D 5 d. *Held* that after an officer has been notified of the acceptance of his resignation, a revocation of the acceptance will not operate to return him to office. *Held*, further, that he can be returned to office only in the operation of a new appointment.[1] *C. 1289, Apr. 24, 1895; 2321, May 26, 1896; 16183, May 7, 1904; 24583, Feb. 27, 1909.*

IV D 5 d (1). In the case of an officer whose resignation was accepted, to take effect at a future date, and who, after receiving notice of the acceptance but before the date fixed, attempted to withdraw the resignation, *held*, that the withdrawal should not be considered in connection with the resignation, as the serving of notice on the officer of the acceptance of his resignation had fixed his status beyond recall as that of vacating the office on the date specified.[2] *C. 26210, Feb. 12, 1910.*

IV D 5 d (2). The power of the President in the matter of accepting the resignations of officers in the military service is analogous to that exercised by the reviewing authority of a court-martial. *Held* that he may accompany his action by such remarks as he may deem necessary or appropriate to the discipline of the military service. *Held*, further, that after assigning reasons for his actions in accepting the resignation such reasons so assigned become an essential part of the acceptance. *C. 16183, May 7, 1904.*

IV D 6. *Held* that an unqualified acceptance of a resignation is an honorable discharge from the service. *C. 2170, Apr. 20, 1896; 3569, Oct. 4, 1897; 16183, May 7, 1904. Held*, also, that where the acceptance was "for the good of the service" the discharge was "without honor." *C. 427, Oct., 1894; 2170, Apr. 20, 1896; 14536, Apr. 30, 1903; 18107, June 5, 1905.*

IV E 1 a. A legal sentence of dismissal of an officer when finally confirmed by the competent authorities (according to the one-hundred and sixth or one hundred and ninth article of war) takes effect upon the officer on the day on which the confirmation is officially communicated to him, either by the promulgation of the order of confirmation at his station or other form of official notice. Thus the date of the actual confirmation is not necessarily—is not probably in the majority of cases—the date on which the dismissal goes into effect. The declaration is indeed sometimes added in the order of confirmation, that the party ceases thereupon to be an officer of the

[1] See Barger *v.* U. S., 6 Ct. Cls., 35; Mimmack *v.* U. S., 10 Ct. Cls., 584 and 97 U. S., 426; 2 Op. Atty. Gen., 406; 12 id., 555; 14 id., 262.

[2] Barger *v.* U. S., 6 Ct. Cls., 645; Mimmack *v.* U. S., 10 Ct. Cls., 584; id. 97, U. S., 426; 12 Op. Atty. Gen., 1255; 14 id., 202.

Army; but this declaration is immaterial and surplusage. It not unfrequently happens—especially in time of war, and particularly when the officer has, since his trial, been taken prisoner by the enemy—that a considerable period may elapse before the officer is officially informed of the confirmation of the sentence and thus becomes, in law and fact, dismissed from the service. *R. 36, 110, Dec., 1874; 38, 341, Oct., 1876; P. 49, 176, Sept., 1891; C. 16823, Sept. 13, 1904.*

IV E 1 a (1). A sentence of dismissal can not legally be confirmed so as to take effect as of a date prior to that of the formal confirmation. *R. 30, 480, July, 1870; P. 42, 370, Aug., 1890.*

IV E 1 a (2). Where an officer who had been tried by a court-martial was, while awaiting the promulgation of the proceedings, taken prisoner by the enemy, and after his capture an order was published in his regiment, by which a sentence pronounced by the court, dismissing him from the service, was duly confirmed—*held* that as he was beyond the control of the national authorities at the time of such publication, he could not be regarded as notified of such order or affected by it; and that he therefore continued to be an officer in the Army and entitled to pay as such up to the date—about six months subsequent to his capture—when, upon being exchanged, he returned to his regiment in the field and was first notified of his dismissal as approved. *R. 12, 230, Jan., 1865.*

IV E 1 b. Even before the passage of the act of July 20, 1868 (15 Stat. 125), which was incorporated in section 1228, R. S., it was *held* that the legal execution of a legal sentence of dismissal separated an officer from the military service, and after the notice of such dismissal was served upon him his status was that of civilian as completely as if he had never been in the service. *Held* further that after such notice is served he can not be honorably discharged or placed on the retired list, or permitted to resign, and that the order of dismissal is not revocable. The only channel of reentering the service is by way of reappointment.[1] *R. 29, 108, July 12, 1869; 30, 317, 323, May 7 and 9, 1870; 31, 503, July 8, 1871; 37, 420, 492, Mar. 22, and Apr. 26, 1876; 39, 248, Oct. 23, 1877; 41, 673, Sept. 1, 1879. P. 47, 337, May 28, 1891; C. 13400, Oct. 7, 1902; 13654, Nov. 13, 1902; 15973, Mar. 1, 1904; 16867, Sept. 9, 1904; 18318, July 19, 1905; 23071, Apr. 11, 1908.*

IV E 1 b (1). When a sentence of dismissal is not legal, *held* that there has been no dismissal in law. *Held* further that this fact may at any time be declared in orders. Thus if a court was illegally constituted or composed, or was without jurisdiction, or its proceedings were invalidated as by some such fatal defect as that less than five members took part in the judgment, or in case one or more of the members were not sworn the sentence will be illegal. Similarly, an officer can not be dismissed pursuant to a legal sentence until it shall have been approved or confirmed by competent authority. *R. 20, 302, Jan. 8, 1866; 26, 462, Feb. 19, 1868; 28, 457, Mar. 27, 1869; 29, 575, Jan. 8, 1870; 30, 318, 323, 420, May 7, 1870, and June 20, 1870; 34, 634, Nov. 29, 1873; 36, 274, 330, Feb. 23, 1875, and Mar. 22, 1875; 38, 243, Aug. 14, 1876; 39, 238, 242, 248, Oct. 22 and 23, 1877; 55, 221, Dec. 19, 1887; C. 7509, Jan. 6, 1900; 16710, Aug. 9, 1904.*

[1] See 4 Op. Atty. Gen., 318; 14 id., 448, 502; also Report 868 of Judiciary Committee of Senate, of Mar. 3, 1879, 45th Cong., 3d sess.

IV E 1 b (1) (*a*). An officer of Volunteers was sentenced to dismissal. The sentence was approved and another officer was mustered in, vice the dismissed officer. Later it was discovered that the sentence of the general court-martial was illegal and the dismissed officer was returned to duty. *Held* that the officer who was mustered in, vice the dismissed officer, was a *de facto* officer and his acts as far as they affected third parties were legal.[1] *C. 55, Aug. 15, and 691, Dec. 4, 1894.*

IV E 1 c. *Held* that dismissal by sentence of a general court-martial does not render an officer ineligible for appointment to office in the military establishment (*R. 36, 330, Mar., 1875);* or for enlistment as a soldier (*R. 7, 253, Feb., 1864);* or for holding civil office under the United States. *R. 8, 601, June, 1864; 22, 517, Dec., 1866; and 31, 486, June, 1871. P. 38, 95, Jan., 1890; 40, 14, Mar., 1890.*

IV E 2 a. Dismissal by Executive order is quite distinct from dismissal by sentence. The latter is a *punishment;* the former is *removal from office.*[2] The power to dismiss, which, as being an incident to the power to appoint public officers, had been regarded since 1789 as vested in the President by the Constitution,[3] was, for the first time in 1866 (by the act of July 13 of that year, reenacted in the second clause of the present ninety-ninth article of war and in section 1229, R. S.), expressly divested by Congress in so far as respects its exercise in time of peace.[4] By the statute law it is now authorized only in time of war. *C. 13323, Sept. 18, 1902; 13654, Nov. 13, 1902.* During the War of the Rebellion it was exercised in a great number of cases, sometimes for the purpose of summarily ridding the service of unworthy officers, sometimes in the form of a discharge or muster-out of officers whose services were simply no longer required. The distinction between this species of dismissal and dismissal by sentence is illustrated by the fact that the former has, with the sanction of legal authority, been repeatedly ordered in cases where a court-martial has previously acquitted the officer of the very offenses on account of which the summary action has been resorted to.[5] *R. 23, 265, Oct., 1866; 26, 5, Sept., 1867; 31, 557, Aug., 1871; 42, 470, July, 1880; 48, 243, Jan., 1884. C. 4953, Sept. 24, 1898; 10513, May 16, 1901.*

IV E 2 a (1). A board appointed under the provisions of section 14 of the act of April 22, 1898 (30 Stat. 363), "to provide for temporarily increasing the military establishment," is not required either by statute or regulation to be sworn or to record the evidence taken. It was evidently intended as a summary proceeding adapted to time of war, and may be regarded as merely in aid of the President's authority in time of war to dismiss an officer without trial. It is doubtful whether in the present state of the law it would be proper to swear the members. The boards appointed under section 1 of the act of July 15, 1870 (16 Stat. 318), were sworn, but those appointed under the act

---

[1] An officer can not maintain an action for his salary unless he has a legal title to the office. Mere occupancy is not sufficient. See Runkle *v.* U. S. 19 Ct. Cls., 396 (reversed on other grounds).

[2] See 7 Op. Atty. Gen., 251.

[3] See, as among the principal authorities on this subject, Commonwealth *v.* Bussier, 5 Sergt. & Rawle, 461; *Ex parte* Hennen, 13 Peters, 258, 259; United States *v.* Guthrie, 17 Howard, 307; 4 Op. Atty. Gen., 1, 609–613; 6 id., 5–6; 7 id., 251; 8 id., 230–232; 12 id., 424–426; Sergeant, Const. Law, 373; 2 Story's Cons. § 1537, note; 1 Kent's Coms., 310; 2 Marshall's Washington, 162; and 114 U. S., 619.

[4] See 16 Op. Atty. Gen., 315.

[5] See 12 Op. Atty. Gen., 427.

of July 22, 1861 (12 Stat. 270), were not. Those sections were similar to the one under consideration. Where the proceedings of a board appointed under this later statute did not show that the members were sworn, and did not contain a report of the evidence taken, *held*, the President having approved the report and in accordance therewith discharged the officer, that the discharge was legal. *C. 4842*, Aug., 1898.

IV E 2 b. A summary dismissal of an officer does not properly take effect until the order of dismissal or an official copy of the same is delivered to him, or he is otherwise officially notified of the *fact* of the dismissal.[1] *P. 49, 91, and 176, Sept., 1891; C. 4842, Feb. 2, 1900; 16823, Sept. 13, 1904.*

IV E 2 b (1). *Held* that the President, when dismissing an officer by order, may fix a date in *futuro* when the discharge shall become operative. When such date has been fixed in *futuro* he can not be discharged or mustered out as of a previous date by order of the War Department.[2] *Held, further,* That all the acts of such officer, whether of command or in connection with staff duty, if he be a staff officer, are legal until he receives notice of his order of discharge. *C. 16823, Sept. 13, 1904.*

IV E 2 c (1). A summary dismissal "by order of the Secretary of War" is in law the act of the President.[3] *R. 5, 319, Nov., 1863; P. 36, 322, Nov., 1889; C. 15973, Mar. 1, 1904.*

IV E 2 c (2). A department or Army commander can have of course no authority to summarily dismiss or discharge an officer from the military service. *R. 11, 405, Feb., 1865; 16, 553, Sept., 1865; 41, 84, Jan., 1878; 42, 263, Apr., 1879. P. 47, 191, May 13, 1891.* But where in a case of a Regular officer this authority was in fact exercised during the Civil War and the President, treating his office as vacant, proceeded to fill the vacancy by a new appointment, *held* that he had made the dismissal his own act by appointment of a successor. *R. 41, 84, Jan., 1878.* So where (in 1863) an officer of volunteers was dismissed by the order of an Army commander, which was never ratified in terms by the President, but a successor, appointed to the vacancy by the governor of the State, was accepted and mustered in by the United States; *held* that the office vested in the new incumbent at muster in. *R. 44, 82, July, 1880; C. 3728, Dec., 1897.*

IV E 2 d. There can be no *revocation* of a legally executed order of dismissal, however unmerited or injudicious the original act may be deemed to have been. For distinct as dismissal by order is, in its nature, from dismissal by sentence, the effect of the proceeding in divesting the office is the same in each case. An officer dismissed by an order, though his dismissal may have involved no disgrace, is assimilated to an officer dismissed by sentence in so far that he is completely relegated to a civil status, having in law no nearer or other relation to the military service than has any civilian who has never been in the Army. *C. 691, Dec., 1894; 3735, Mar., 1898; 4586, July, 1898; 4954, Mar. 26, 1908; 13323, Sept. 18, 1902; 14882, June 27, 1903; 15767, Jan. 12, 1904.* Thus an order assuming to revoke a legal order of dismissal is as unauthorized as it is ineffectual. The

[1] Gould *v.* U. S., 19 Ct. Cls., 593, 595; IV Comp. Dec., 601; V id., 419.
[2] Allsteadt *v.* U. S., 3 Ct. Cls., 284.
[3] See 12 Op Atty. Gen., 421; McElrath *v.* United States, 12 Ct. Cl. R., 202.

original dismissal is an act done which can not be undone, and the order, which is the evidence of it, is therefore incapable of revocation or recall.[1] *C. 4586, July 13, 1898.* Nor can that be effected indirectly which can not legally be done directly. An officer dismissed by Executive order can not be relieved by being allowed to resign or be retired, or by being granted an honorable discharge. For, in order to be discharged, etc., from the Army, he must first be *in* the Army, and there is but one mode by which an officer once legally separated from the Army can be put into it, viz, by a new appointment according to the Constitution.[2] *R. 31, 504, July, 1871; 35, 392, 466, May and July, 1874; 36, 216, 330, Jan. and Mar., 1875; 37, 451, Apr., 1876; 38, 61, 159, Jan. and July, 1876; 39, 248, Oct., 1877, and 474, Mar., 1878; 41, 153, Mar., 1878, and 611, July, 1879; 42, 73, Dec., 1878; P. 35, 251, Sept., 1889; 36, 323, Nov., 1889; 52, 384, Mar., 1892; 59, 80, Apr., 1893; 65, 51, May, 1894; C. 4953, Sept., 1898; 15973, Mar. 1, Apr. 13, and May 7, 1904; 18318, July 18, 1905.*

IV E 2 d (1). While an order assuming to revoke an executed legal order or sentence of dismissal is void and inoperative, yet where such dismissed officer enters upon the duties of the office under the void order, *held* that he was during the period he thus performed such duties a *de facto* officer, so far as the rights of third persons were concerned. *C. 691, Dec., 1894; 3735, Mar., 1898; 15973, Mar. 1, 1904. Held,* further, that where such revoking order was forged by the interested officer he was indebted to the United States for the pay drawn by him as a *de facto* officer. *C. 9121, Oct. 13, 1900.*

IV E 2 e. *Held* that the summary discharge of an officer is a discharge without honor in the same manner that the summary discharge of an enlisted man is a discharge without honor. *P. 52, 403, Mar. 21, 1892; 60, 250, June 30, 1893; C. 1789, Oct. 18, 1895.*

IV E 2 f. A dismissal of an officer by executive order does not operate to disqualify him for reappointment to military office, or for appointment to civil office under the United States. *R. 36, 330, Mar., 1875.*

IV E 2 g (1) (*a*). *Held,* that the President has authority to dismiss cadets from the United States Military Academy without trial by court-martial for cause.[3] *C. 10513, May 20, 1901.*

IV E 2 g (1) (*b*). *Held,* in the case of certain cadets at the United States Military Academy who had been dismissed, that after notice of such dismissal had been served upon them the President was without power to restrict or revoke the order dismissing them, or to pardon them so as to restore them to their former status at the Military Academy. *C. 25471, Aug. 24, 1909.*

IV E 2 g (1) (*c*). The summary dismissal of a cadet is a discharge without honor. *C. 2533, Aug. 17, 1896.*

IV F. An officer was promoted from the grade of first lieutenant to that of captain, subject to examination. When examined he failed

---

[1] See 4 Op. Atty. Gen., 124; 12 id., 424–428; 14 id., 520; 15 id., 658. A contrary view expressed by the Court of Claims, in its earlier period, in a series of cases—see Smith *v.* United States, 2 Ct. Cls., 206; Winters *v.* United States, 3 id., 136; Barnes *v.* United States, 4 id., 216; Montgomery *v.* United States, 5 id., 93—was finally practically abandoned in McElrath *v.* United States, 12 id., 201. See also U. S. *v.* Carson, 114 U. S., 619.

[2] See 8 Op. Atty. Gen., 235; 12 id., 421; 13 id., 5; McElrath *v.* United States, 12 Ct. Cls., 201.

[3] Hartigan *v.* United States, 38 Ct. Cls., 346; id. 196, U. S., 169.

for reasons other than physical in line of duty. *Held*, that upon the date when the Secretary of War approved the adverse findings of the examining board the officer reverted from the grade of captain to that of first lieutenant and entered upon the year's suspension as first lieutenant required by the act of October 1, 1890. *C. 23096, May 25, 1910.*

IV G. *Held*, that the detail of a battalion adjutant to duty with the chief of police in a city under military control does not relieve him as battalion adjutant. *C. 16906, Sept. 27, 1904.*

Similarly *held* that the detail of a battalion quartermaster and commissary at the school of musketry does not relieve him as battalion quartermaster and commissary. *C. 28998, Sept. 26, 1911.*

V A 1. *Held* that, in the absence of statutory regulation, the Executive has power to prescribe rules governing the appointment and promotion of officers of the volunteer forces. *C. 12599, May 9, 1902.*

V A 2. In case of an officer of volunteers who was mustered out of service before his appointment to a higher grade reached him; *held*, that as his acceptance was essential to the completion of the appointment tendered him, his appointment was not completed. *C. 12599, May 9, 1902.*

V A 3 a. *Held* that the restoration to command of dismissed volunteer officers while the Volunteer Army and the organization to which they belonged were still in existence should be regarded as a new appointment. *C. 23071, Apr. 11, 1908.*

V A 3 b. In a case of a volunteer officer unjustly dismissed by sentence or order during the Civil War, and applying for restoration, there is the obstacle (not encountered in a case of a regular officer) that the volunteer contingent of the Army has been long since disbanded, so that a restoration to office in the same is impracticable. And as a dismissed officer can not, of course, be granted an honorable discharge from the Army without first being readmitted to the Army by a new appointment, and a volunteer officer can not *as such* be so readmitted, *advised*, in a case of a volunteer officer applying for relief on account of an unjust dismissal, that the form of relief most apposite to his case would be a special enactment giving him *pay* from the date of his dismissal—reciting that the same was based upon insufficient grounds—to the date of the final muster-out of his regiment, precisely as if he had continued regularly in the service during the interval. *R. 43, 235, Feb., 1880.*

V A 4 a. Upon a question of the constitutionality of the appointment of officers of State volunteers by the executives of the States, *held* that in the absence of a decision of the Supreme Court to the effect that such appointments in the past have been unconstitutional, and considering that we have for many years proceeded upon the theory that legislation which authorized such appointments was valid, we should not now question the legality of such past appointments.[1] *C. 9773, Feb. 26, 1901.*

---

[1] Approved by the Secretary of War and published to the service in circular form Mar. 18, 1901.

During the Civil War all officers who were not appointed by the President, by and with the consent of the Senate, were mustered into the service. (See R. and P., 456829.)

The President, in his proclamation of May 3, 1861, which embodied the first call for volunteers during the late war, announced that the men called for would be mus-

V A 4 b. *Held*, that in appointing an officer of volunteers under the act of April 22, 1898 (30 Stat. 363), the governor of a State acts by authority and on behalf of the United States and not for or by the authority of his State. *C. 5161, Oct. 26, 1898.*

V A 4 c. The officers of the State volunteer forces authorized during the Civil War held office in the volunteer military service analogous to military office in the Regular Army, the incumbents of which were inducted into office in the operation of the constitutional appointing power. It became necessary to provide some means by which military offices in the volunteer forces could be filled, and a requirement that such offices should be filled by election, which was embodied in section 10 of the act of July 22, 1861 (12 Stat. 270),[2] was subsequently replaced by a requirement of section 3 of the act of August 6, 1861 (12 Stat. 318), which vested power in the governors of the several States to fill vacancies thereafter occurring in regiments and other volunteer organizations furnished by said States for service in the Volunteer Army. Officers so appointed were "accepted" as officers of the organizations in which they had been duly appointed by the governors of the several States by "muster-in" by a duly authorized mustering officer representing the United States. *C. 25831, Nov. 22, 1909.*

V A 4 d. When State volunteer troops are raised as those of the Civil War and of 1898 were, there are three parties to the act—the individual entering the service, the State, and the United States, and it is the acceptance by the United States that completes the act. *Held* that the well-established method of accepting the officers was by muster-in. *Held* also after a regiment had been mustered in if a vacancy occurred and a new appointment of an officer, whether by *promotion* or otherwise, was to be made that there were the same three parties to the act—the individual entering the service, the State, and the United States. The concurrence of the United States in this appointment was likewise essential in order to give it effect, and this concurrence was evidenced by a muster-in in the office to which the appointment was made. The former muster into service only related to the appointment then made; it could not possibly cover a subsequent appointment to another office.[3] *C. 9774, Feb. 25, 1901; 9773, Feb. 26, 1901; 14587, Jan. 12, 1904; 25831, Nov. 22, 1909.*

V A 4 e. The act of Congress approved April 22, 1898 (30 Stat. 363), prescribed "that all the regimental and company officers shall be appointed by the governors of the States in which their respective organizations [volunteer] are raised." *Held*, that this included not only the original appointments in such organizations, but appoint-

---

tered into the service, and that the details of "enrollment and organization" would be made known through the Department of War. On the following day the War Department published a "plan of organization" which provided, among other things, for the appointment of certain commissioned officers of each regiment by the governor of the State furnishing it; and shortly afterwards the department sent out to mustering officers and others instructions relative to mustering into service the organizations that should present themselves. Ibid.

[2] The class of officers who were mustered in without previous appointment or commission was composed chiefly of officers raised hastily, notably in Missouri, Kentucky, Tennessee, and Maryland, early in the war. (See R. & P. 456829.)

[3] Approved by the Secretary of War and published to the service in circular form Mar. 15, 1901.

ments to fill vacancies thereafter occurring.[1] *C. 4084, 4228, April and June, 1898.*

V A 5 a (1). The date on which a volunteer officer, appointed by the President, formally accepts his appointment should be considered as the date of the commencement of his military service. No such officer should be recognized as having been in the military service under his appointment because of any service that may have been rendered by him prior to his formal acceptance of that appointment. *C. 6644, June, 1899.*

V A 5 a (2). During the War with Spain regiments of United States Volunteers were organized. *Held* that the commissioned officers of such regiments did not hold office until they were commissioned. *Held* further that the remedial legislation of March 3, 1899 (30 Stat. 1073), which appropriated money for the payment of such organizations for a time preceding commissioning of the officers was a recognition of the fact that the officers were not in the service of the United States during the period. *C. 7050, Sept., 1899, and Oct., 1900.*

V A 5 b (1). Although men may undoubtedly become soldiers in the military service of the United States without formal enlistment, *held* that the War Department has never admitted that volunteer officers appointed by governors of States could become officers in the service of the United States without muster-in,[2] i. e., they can not be constructively mustered in. *C. 9773, Feb. 26, 1901; 25831, Nov. 23, 1909.*

V A 5 b (2). The act of July 22, 1861 (12 Stat. 261), vested the authority to appoint all commissioned officers of the volunteer forces in the governors of the several States. *Held* that office did not fully vest in such appointees until they had been formally mustered in by a duly authorized commissary of musters acting in behalf of the United States. *Held*, further, that until such muster-in had been accomplished the appointment was revocable by the governor. *Held*, further, that after muster-in the power of the governor in respect thereto was exhausted and the subsequent tenure of the incumbent was determined by the laws of Congress relating to the maintenance of volunteer forces.[3] *C. 14587, Jan. 12, 1904; 16516, July 5, 1904.*

V A 5 b (3). *Held* that the War Department can not recognize the authority of a mustering officer to muster in an officer on one date, to date from an earlier date, nor can it recognize the officer so mustered in as of the grade conferred by such muster-in from the earlier date mentioned in the muster-in roll.[4] *C. 9773, Feb. 26, 1901.*

V A 6 a. Officers of Volunteers appointed by the governors of States under the act of April 22, 1898 (30 Stat. 361), who performed serv-

---

[1] The majority of all officers of Volunteers during the Civil War were appointed by the governors and mustered into the service of the United States by duly appointed United States mustering officers. (See R. & P. 456829.) See a *previous* opinion of the Attorney General to the contrary, 22 Op. Atty. Gen., 536, July 18, 1899.

[2] Approved by the Secretary of War and published to the service in circular form Mar. 18, 1901.

[3] Only officers of the Regular Army, including additional aides-de-camp appointed by the President under the law of Aug. 5, 1861, and even these only when detailed to do so by competent authority could act as muster-in officers (G. O. No. 66, 1861; G. O. No. 48, 1863, and the Mustering Regulations of Nov. 20, 1863). See R. and P. 456829. Also see 23 Op. Atty. Gen., 412.

[4] This opinion was approved by the Secretary of War and published in circular form Mar. 18, 1901.

ice and were treated as though in office, and were recognized in contemporaneous official record but not mustered in, would not acquire rights based upon such defective title, but *held* that their lawful acts, so far as the rights of third persons are concerned, if done within the scope and by the apparent authority of the offices, are as valid and binding as if such officers were legally qualified for the offices and in full possession thereof.[1] *C. 9773, Feb. 26, 1901.*

V A 7 a. A captain of New York Cavalry accepted during the Civil War the office of captain and assistant quartermaster of Volunteers. *Held* that his acceptance of that office vacated the office of captain of Cavalry, which he had theretofore occupied. *P. 40, 158, Apr., 1890.*

V A 7 b. An enlisted man was appointed to the office of captain in another organization and accepted such appointment. Upon the issuance of an order purporting to revoke his appointment he returned to service as a private, as directed in the order. *Held* that he abandoned the office of captain and it thereby became vacant. *C. 2293, June 2, 1896.*

V A 7 c. In view of the fact that the tenure of office of a volunteer officer is for a fixed term and for a limited time only, the President has not the same power of dismissal as in the case of a regular officer, since dismissal in the case of a volunteer officer is not an incident of the appointing power. *Held*, however, that where the President directed the cancellation of the muster in of a volunteer officer on account of unfitness to hold commission it was a legal exercise of the authority of summary dismissal for cause vested in the President by section 17 of the act of July 17, 1862[2] (12 Stat. 594). *P. 46, 102, Mar., 1891; 52, 496, Mar. 1892; 61, 264, Aug., 1893.*

V A 7 d (1). *Held* that in view of the fact that the Government does not need or demand a complete and final severance of a volunteer officer's relation with civil life, as he is not permanently engaged in the military service, that a civil officer does not vacate such office by accepting and holding a commission in the Volunteer Army.[3] *C. 4223, June 1, 1898. Held*, however, that the acceptance by an officer of Volunteers after muster in of the position of a member of the State legislature would vacate his office in the Volunteers.[4] *C. 4233, June 2, 1898.*

V A 7 d (2) (*a*). The act of Congress approved May 28, 1898 (30 Stat. 421), provided that officers of the Regular Army receiving commissions in the Volunteer Army should not be held to vacate their offices in the Regular Army by accepting the same, and the act of Congress approved March 2, 1899 (30 Stat. 979), provided that

[1] This reverses a previous opinion of Mar. 31, 1879 (*R. 41, 535*), in the case of so-called Chaplain Blake.

Approved by the Secretary of War and published to the service in circular form Mar. 18, 1901.

[2] See Mechem on Public Officers, p. 283, sec. 445; and Parsons *v.* United States, 30 Ct. Cls., 222.

The act of July 17, 1862, ceased to exist after the completion of the Civil War; it has been the practice of Congress, however, in subsequent legislation authorizing the employment of Volunteers to vest in the President during the period of the war power to dismiss officers of such Volunteers.

[3] 22 Op. Atty. Gen., 88, June 10, 1898.

[4] The governor of a State has no power to depose an officer or interfere with the organization of a regiment to which he belongs after such regiment is accepted and mustered into the service of the United States. (10 Op. Atty. Gen., 279, 306, and 22 id., 536.

Regular Army officers continued or appointed as field or staff officers of Volunteers under the provisions of that act should not vacate their Regular Army commissions. The foregoing enactments were obviously intended to apply to officers already in commission in the Regular Army at the date when the Volunteer Armies of 1898 and 1899 were organized and enabled them to hold higher military office in such volunteer forces without vacating their Regular Army offices. *C. 16823, Sept. 13, 1904.*

V A 7 d (2) (b). *Held*, that an officer of Volunteers who in the operation of the act of February 2, 1901 (31 Stat. 748), and subsequent acts amendatory thereof, had been appointed to office in the Regular Army might lawfully continue to hold his Volunteer commission and to exercise the functions and perform the duties which are incident to his office in the Volunteer establishment; and that office in such Volunteer forces is not vacated merely because the incumbent has been appointed to office in the Regular Army. *C. 16823, Sept. 13, 1904.*

V A 7 e. The abolishment of an office through operation of law necessarily changes the status of the person who had occupied the office before its abolishment from that of an officer to that of a civilian. *Held* that the rules which govern the matter of dismissing an officer from an office which continues to exist do not apply here. *Held*, therefore, in a particular case where a man held the office of supernumerary second lieutenant of Company G, Eleventh Kentucky Cavalry, and the office was abolished by the act of March 3, 1863, that the status of that man changed from that of officer to civilian on the date of the approval of the act of March 3, 1863. *P. 53, 452, May 21, 1892; C. 23071, Apr. 11, 1908; 14148, Dec. 15, 1911.*

V A 7 f. An officer was sentenced by a general court-martial to be cashiered, and the sentence was approved and published in orders. It is not shown that the order was communicated to the officer, who, pending its publication was returned to duty "without prejudice to sentence of court-martial," and remained thereafter in performance of duty with the company until it was mustered out. *Held* that the sentence of the court was not carried into effect prior to the muster out of the officer and for that reason was without force. *P. 37, 407, Jan. 6, 1890.*

CROSS REFERENCE.

Abolishment of.....See VOLUNTEER ARMY IV D I a (5) (a).
Army officer, eligibility for commission in National Guard.....See MILITIA III F; XVI K.
Description of, in bond.....See BONDS II M.
Distinguished from rank.....See COMMAND I A.
Engineer Brigade, United States Volunteers.See VOLUNTEER ARMY III A to B.
Is not rank.....See RANK I A.
Medical Reserve Corps.....See ARMY I G 3 d (3) (e) [2].
Militia, not Federal office.....See MILITIA II to III.
Retired enlisted men.....See RETIREMENT II B 2; D to E.
Retired officer.....See CLAIMS X.
RETIREMENT I G; G 2 to 4.
Right to.....See DISCIPLINE VIII G 1 c.
Without rank.....See RANK I A 1.
Vacation of, by disbursing officer.....See BONDS II E.
Volunteers.....See OFFICE V to VI.
VOLUNTEER ARMY II F 1 to 2.

OFFICER.

See ARMY I C to D.
Abuse of soldier.....See DISCIPLINE V D 2 a; XIV E 9 d (1) (*b*); XVII B 1 a to g.
DESERTION IX K.
ARTICLES OF WAR LXII D.
Arrest of.....See DISCIPLINE I D 1 to 4.
Bonded, relief of.....See ABSENCE I B 1 f.
Can not serve foreign Governments.....See ARMY I C 3.
Certificate of merit.....See INSIGNIA OF MERIT II I.
College instructors.....See MILITARY INSTRUCTION II B 1 to 2.
Congress, correspondence with.....See COMMUNICATIONS IV B 2.
Conservator.....See DISCIPLINE III E 5 a.
Contract by.....See CONTRACTS II.
Court of inquiry.....See ARTICLES OF WAR CXV A; CXIX A; B; CXXI A.
Debts of.....See ARMY I B 2 a (2); (2) (*a*).
Defense of, in civil courts.....See ARMY I B 5 a.
Deprivation of pay and allowances.....See PAY AND ALLOWANCES III A to B.
Desertion of.....See DESERTION XX A to F.
OFFICE IV D 4.
Discharge of.....See DISCHARGE II A 1; 2; XVII A; B; XXI A; B.
Examination for promotion.....See RETIREMENT I B 6 to 8.
Expert accountant, Inspector General's Department.....See CIVILIAN EMPLOYEES I A 1.
Forage.....See PAY AND ALLOWANCES II A 2 d to e.
Heat and light.....See PAY AND ALLOWANCES II A 1 c to d.
Horse, sale to Government.....See ARMY I G 3 b (2) (*b*)
Impersonation of.....See UNIFORM I C.
Improper attempt to influence War Dept...See COMMUNICATIONS IV B 1.
Indians, instruction of.....See ARMY II C 1.
Interment of.....See PAY AND ALLOWANCES II A 2 c to d.
Intoxicants.....See INTOXICANTS III D to E.
Jury duty and road tax.....See CIVILIAN EMPLOYEES III A.
Militia duty with.....See MILITIA VI A 2 a.
Mounted.....See PAY AND ALLOWANCES I B 7 to 8.
Patent by.....See PATENT VII to VIII.
Pay.....See PAY AND ALLOWANCES I B to C.
Pay can not be attached.....See ARMY I C 2.
Quarters.....See PAY AND ALLOWANCES II A 2 b to c.
Refuses to sign certificate.....See ARTICLES OF WAR XXI C 1 a.
Regular, holding office in militia.....See MILITIA XVI K.
OFFICE IV A 2 d (1).
Relief of, by act of Congress.....See ARMY I B 6 a.
Residence.....See RESIDENCE I.
Retired status.....See RETIREMENT I G.
Retirement of.....See RETIREMENT I to II.
Servant.....See OFFICER'S SERVANT.
ARTICLES OF WAR XXI C 2 a.
Supplies purchased from.....See CONTRACTS XV to XVI.
Taxation.....See TAX I to II.
Transportation.....See PAY AND ALLOWANCES II A 2 a to b.
Unassigned list.....See ARMY I G 2 b (2).

OFFICER IN CHARGE OF PUBLIC BUILDINGS AND GROUNDS IN WASHINGTON.

Status of.....See COMMAND I C.

OFFICER OF THE DAY.

Drunk.....See ARTICLES OF WAR XXXVIII B 3.

OFFICER'S SERVANT.

I. CHINESE.
II. FILIPINO.
A. PRIVATE ARRANGEMENT.
B. OFFICER'S CONTROL OVER SERVANT.

I. As the enforcement of the Chinese exclusion acts is in the Treasury Department, *held* that an officer should apply to that department for authority to introduce a Chinese servant into the United States. *C. 11127, Aug. 22, 1901.*

II A. An Army officer has no greater authority over Filipino boys brought back with him from the Philippine Islands than has any other citizen. *C. 20468, Oct. 5, 1905.*

II B. If Filipino boys are brought to this country on the condition that they act as servants and with the understanding that they shall be transported back to the Philippine Islands at the expense of the officer bringing them over here, and they leave the service of such officer, *held* that the officer would be under no liability to get them back to the Philippines. *C. 20468, Aug. 31, 1909.*

CROSS REFERENCE.

Admission to hospital.....See ARMY I G 3 d (8) (*a*).
As camp follower.....See ARTICLES OF WAR LXIII A 1.
Soldier can not be.....See ARTICLES OF WAR XXI C 2 a; ARMY I C 1.

OFFICIAL RECORDS.

I. OFFICIAL PAPERS.
A. ON FILE IN WAR DEPARTMENT.
1. Confidential archives, copies may be furnished ..... *Page 828*
2. Copies furnished ..... *Page 829*
a. To civil courts upon certificate as to necessity.
3. No official can change a record.
B. ON FILE AT DEPARTMENT HEADQUARTERS.
1. Charges and specifications ..... *Page 830*
C. USELESS PAPERS.
1. Outside of War Department.
a. May be destroyed by order of Secretary of War.

I A 1. The official papers on file in the War Department are not public records open to the inspection of any citizen; but, except in so far as law or usage has provided for the furnishing of copies of the same or the publication of their contents, as in the case of the records of military courts, such papers are confidential archives of the Government which may be consulted, or of which copies may be furnished, only by the authority of the Secretary of War, except where the courts of law may properly require their exhibition in evidence.[1] The Secretary, in his capacity as an agent of the public, will of course be disposed to grant to proper persons such facilities for obtaining information from the records of his department as may, with due regard to the public interests, be accorded. Where application is made for copies of papers, it will be for him, in view of the nature of

[1] The admission of copies in evidence is authorized by sec. 882, R. S., as follows: "Copies of any books, records, papers, or documents in any of the executive departments, authenticated under the seals of such departments respectively, shall be admitted in evidence equally with the originals thereof."

the information sought, the use proposed to be made of the same, etc., to determine, in his discretion, whether the private interests involved are such as properly to outweigh any public considerations which may exist against granting the privilege. In furnishing copies, a distinction will properly be made between documents in the nature of permanent records, such as general or special orders, muster rolls, discharges of soldiers, commissions of officers, etc., and the reports and communications of officers addressed to military superiors or to the Secretary of War in the line of their official duty. The latter are generally regarded as *privileged communications* which even the courts, on grounds of public policy, will in general hold to be incompetent testimony and of which they will refuse to require the production in evidence.[1] *R. 19, 375, and 21, 142, Jan., 1866; 24, 27, Nov., 1866; 28, 26, July, 1868; C. 7912, Apr., 1900.*

I A 2. It is the well established practice of the War Department to decline to furnish copies of records, save upon a call from Congress or one of its committees, or upon the order of a court of the United States or a request from some other branch of the executive, for its official use, as from the accounting officers of the Treasury, or from the Land Office, the Indian Bureau, etc. This practice is believed to be general among the executive departments.[2] *C. 7912, Oct. 5, 1910.* The same rule would apply as to furnishing copies of Government papers and records which are not a part of the records of the War Department. *C. 26841, June 1, 1910.* Where a request was received from a Member of Congress for a copy of certain papers in the War Department to enable him to prepare a bill for legislative relief of the family of a citizen who was killed by a stray shot while troops were engaged in target practice, *recommended* that the copies be not furnished. *C. 7912, Oct. 5, 1910; 23069, Dec. 9, 1911.*

I A 2 a. Where copies of bonds and other papers and records of the War Department are necessary to aid in the administration of justice, and are applied for, it is usual to require a certificate of the tribunal before which the matter is pending to the effect that the same is necessary and material to such proceeding. *C. 19264, July 9 and Sept. 10, 1909.*

I A 3. No official of the War Department, or other executive officer, is empowered to change a record of *fact*—to so alter the official record of a soldier that it shall state that as a fact which is not a fact, whatever may be the equities of the case. It can not, for example, be made to appear on such a record that the soldier has been discharged,

---

[1] See Dawkins *v.* Ld. Rokeby, 8 Q. B. 255; Dawkins *v.* Ld. Paulet, 5 L. Reps., Q. B. 94; Dickson *v.* Earl of Wilton, 1 Fos. & Fin. 419; Home *v.* Ld. Bentinck, 2 Brod. & Bing. 130; Beatson *v.* Skene, 5 Hurl. & Nor. 837, 855 (Am. Ed.); Gardner *v.* Anderson, 22 Int. Rev. Rec. 41; 1 Greenl. Ev., sec. 251; 11 Opins. Atty. Gen. 142; 15 id. 378, 415. In the recent case of Maurice *v.* Worden, 54 Md. 233—an action for damages on account of a libel claimed to have been contained in a communication of the class indicated in the text—it was held that, while such a communication is not "absolutely privileged," it is privileged to the extent that the occasion of making it rebuts the presumption of malice, and throws upon the plaintiff the onus of proving that it was not made from duty but from actual malice and without reasonable and probable cause." But see dissenting opinion of Miller, J. See also Am. and Eng. Ency. of Law (1st ed.), v. 19, 123; Best, Principles of Ev., 561, note (a); Wharton Law of Ev., v. 1, sec. 604; Worthington *v.* Scribner, 109 Mass., 487; Appeal of Hartranft et al, 85 Pa. St., 433; U. S. *v.* Six Lots of Ground, 1 Woods, 234 (Fed. Cases, No. 16.299).

[2] See Boske *v.* Cumingore, 177 U. S., 459; Barney *v.* Schmeider, 9 Wall., 248; Marbury *v.* Madison, 1 Cranch, 137; United States ex rel Dunlap *v.* Black, 128 U. S., 40; United States ex rel Boynton *v.* Blaine, 139 U. S., 306.

mustered out, reenlisted, or mustered in, when in fact he has not been. Congress alone can grant relief in such cases by authorizing such entries of record as would in effect accomplish the object sought—as it has indeed done in repeated instances.[1] *P. 35, 357, 393, and 36, 175, Oct., 1889; 40, 225, Apr., 1890; C. 2934, Feb. 10, 1897; 8962, Sept., 1900.* The general rule is that only erroneous records shall be amended, and the object of their amendment should be to make them state the truth (by correction by the person who made them or such entry thereon by another as may be duly authorized). The exception to the general rule is where a *statute* requires a certain amendment to be made. But in such an instance the statute should be strictly observed and applied only to the class of cases falling within its purview. *P. 56, 352, Nov., 1892.*

I B 1. The charge and specifications which are referred to a court martial for trial are a public document, and I know of no authority for its destruction. The paper has no further official function after the arraignment has been made and the record of the court contains the charges upon which the accused is to be tried. The official character of the paper suggests the disposition which should be made of it. It was referred to the judge advocate of the court by the convening authority, and should be returned to him for file in his office. The statement of service, in a case where there has been a conviction of desertion, should be forwarded to the office of the Judge Advocate General; in all other cases it should be returned to department headquarters for file in the judge advocate's office. *C. 15833, Jan. 28, 1904.*

I C 1 a. *Held* that all useless and valueless official papers pertaining to the records of military headquarters, posts or stations, could legally be destroyed by an order of the Secretary of War without a resort to legislation. *P. 63, 120, Jan., 1894.*

Held that the term "Executive departments" as used in the act of February 16, 1889 (25 Stat. 672), and in prior legislation in pari materia which authorized the destruction of certain useless papers, had obvious relation to the executive departments in the city of Washington.[2] *C. 16319, May 12, 1904.*

CROSS REFERENCE.

Alteration.....See VOLUNTEER ARMY IV H 1.
Amendment.....See DISCHARGE XVI B 2; XIX.
Changed by act of Congress.....See DISCHARGE XVI H.
Confidential.....See ARMY I G 3 a (3); (4) (*a*) [2].
Evidence.....See DISCIPLINE XI A 17 a to b.
DESERTION IV A to O.
Medal of honor.....See INSIGNIA I A 2 a.
Mistake.....See DESERTION V F 4 a.
Muster-in rolls.....See VOLUNTEER ARMY II D to E.
Muster-out date.....See VOLUNTEER ARMY IV D 3 c.
Mutilation, improper.....See DESERTION XVI C 1; 3; D1a; b.
Name changed.....See NAME IV.
Nunc pro tunc.....See ENLISTMENT I A 8 c.
Pardon does not change.....See DESERTION XV A.
Rule as to furnishing.....See ARMY I B 2 c (1); (2).
Summary court record.....See DISCIPLINE XVI E 8 a.

[1] But see the act of Mar. 3, 1909 (35 Stat. 836), in which the Congress authorized the appointment of a court of inquiry with jurisdiction to pass on the question of the character of service of men who had been discharged without honor, and to correct their records.

[2] For rule as to destruction of old regimental and company papers see par. 258 and 281 A. R., 1910, ed.

OPEN MARKET TRANSACTION.

See CONTRACTS VII E 5; XXVIII.

OPIUM.

Restraint of sale.....See INTOXICANTS II E.
Use of.....See ARTICLES OF WAR XXXVIII A.

OPTION.

See CONTRACTS XXXIV.
Renewal of lease.....See PUBLIC PROPERTY VII A 4.

ORDERS.

See COMMUNICATIONS I to II.
Convening.....See DISCIPLINE III to IV.
For revision.....See DISCIPLINE IX X 2.
Nunc pro tunc.....See COMMUNICATION I D.
Promulgating.....See DISCIPLINE XIV to XVI.
Retiring, irrevocable.....See RETIREMENT II G.
Revoking order null.....See PARDON XVI B.
To home for discharge.....See VOLUNTEER ARMY IV D 2 a (1); (2)
"Waiting".....See PAY AND ALLOWANCES I B 2.

ORDNANCE DEPARTMENT.

See ARMY I G 3 b (4) to (5).
Retirement of officer.....See RETIREMENT I B 4 a.

ORGANIZATION.

Militia.....See MILITIA III to IV.
Regiments.....See LAWS II A 1 d.
Volunteers.....See VOLUNTEER ARMY III to IV.

ORIGINAL PACKAGE.

Delivery of intoxicants in.....See INTOXICANTS II A 1.

OTHER FORCES.

See ARTICLES OF WAR LXXVII A to B.

PANAMA.

Intervention.....See WAR I C 8 c (1).
United States responsible for order.....See TERRITORIES V A.

PARDON.

I. AUTHORITY TO GRANT.
A. PRESIDENT'S POWER IS COMPLETE ..... *Page 832*
1. Prisoner transferred from department in which tried.
B. CONGRESS MAY NOT CONTROL PARDONING POWER OF THE PRESIDENT.
1. Can not confer pardoning power on Secretary of War.
II. MUST BE DELIVERED AND ACCEPTED ..... *Page 833*
A. MAY BE REVOKED BEFORE DELIVERY.
III. REMOVES ALL UNEXPECTED PENALTIES.
A. INCLUDING PUNISHMENTS.
B. STATE STATUTES EXCEITED ..... *Page 834*

IV. EXTENDS TO CONTINUING PUNISHMENTS.
A. Application of Pardon to Loss of Files.
V. RESTORES CITIZENSHIP FORFEITED BY DESERTION.
VI. GROUNDS UPON WHICH PARDON IS RECOMMENDED—CASES. *See also Discipline* XV *F to G.*
VII. CONDITION PRECEDENT.
A. To Pardoning Embezzler or Thief ..... *Page 835*
B. To Pardoning Deserter at Large.
VIII. NOT RETROACTIVE—CASES..... *Page 836*
IX. DOES NOT REACH EXECUTED SENTENCES—CASES.
X. PARDON OF ENEMY..... *Page 837*
XI. PARDON FOR POLITICAL OFFENSE DOES NOT EXTEND TO CRIME.
XII. MEN WHO LEAVE COUNTRY IN TIME OF WAR NOT PARDONED.
XIII. SUMMARY DISCHARGE WHILE SERVING SENTENCE.
XIV. DOES NOT CONFER ELIGIBILITY FOR ENLISTMENT.
XV. CONSTRUCTIVE PARDON.
A. Withdrawal of Charge in View of Pledge, is Not..... *Page 838*
B. Reappointment of Dismissed Officer, is Not.
C. Promotion of Officer.
1. Before sentence is promulgated.
2. During execution of sentence.
a. To retain place on lineal list.
3. By selection.
4. By seniority alone.
5. Under orders for summary dismissal.
D. Ordering to Duty.
1. Officer or soldier under sentence.
2. By authority inferior to the convening authority ..... *Page 839*
a. Division commander, convening authority; department commander, restoring officer to duty.
3. After charge is preferred, before sentence is promulgated.
4. Of deserter without trial.
XVI. REMISSION.
A. Release From Punishment.
1. Disqualification to hold office..... *Page 840*
B. Irrevocable.
C. Sentence Credited With Time Previously Served..... *Page 841*
D. Discharge of Soldier Serving Sentence.
E. In Double Sentence, Remission of Unexecuted Portion of One Does Not Affect the Other.

I A. *Held* that Article II, section 2, paragraph 1 of the Constitution confers complete power on the President to grant pardons.[1] *C. 12430, Apr. 10, 1902.*

I A 1. The President alone may grant pardon in cases where a prisoner has been transferred from the department in which he was tried. *C. 2001, Jan. 22, 1896.*

I B. Congress can not control the exercise of the pardoning power by the President.[2] *C. 12430, Apr. 16, 1902.*

I B 1. Where it was proposed to authorize and direct the Secretary of War, by act of Congress, "to revoke and set aside the proceedings

[1] See par. 501, Dig. 2d Comp. Dec., Vol. III. Sec. 20 Op. Atty. Gen., 330 and 368.
[2] See 22 Op. Atty. Gen., 36; 20 id., 330. For power of Congress as to granting pardons, see Brown *v.* Walker, 161 U. S., 591, and U. S. *v.* Wilson, 32 U. S., 150.

had by a court-martial * * * during the month of November, 1865, and to remit the sentence promulgated thereunder by order of April 13, 1866," *held* that it was beyond the constitutional power of Congress to thus invest the Secretary of War with the pardoning power[1] (*C. 12430*) and to extend it to a sentence long since carried into execution. The pardoning power of the President under Article II, section 2, paragraph 17, of the Constitution, can neither be added to nor detracted from by legislation,[2] and it has been repeatedly *held* with reference to this power that it can not reach an executed sentence. It must be therefore beyond the authority of Congress to vest in a subordinate official a power to pardon which the constitutional pardoning power can not exercise. Congress can not in this or any other way undo the executed judgment of a court-martial. *P. 51, 357, Jan., 1892, C. 23068, Feb. 11, 1909.*

II. A pardon, like a deed, must be delivered to and accepted by the party to whom it is granted.[3] *Held*, that there can be no pardon of a *deceased* officer or soldier even though requested by the party's widow or heir, who is to be pecuniarily benefited thereby. *R. 15, 486, 654, July and Sept., 1865; 21, 564, and 22, 291, July, 1866.* Or even requested for the purpose of having the stigma removed from the record in the service of an officer who had died while under suspension. *R. 7, 138, Feb., 1864.*

II A. A pardon was issued in favor of a general prisoner confined at Alcatraz Island, Cal., but before it was delivered and accepted by the prisoner he, by means of a forged instrument, secured his release, and when the pardon was received at Alcatraz was at large as an escaped prisoner. *Held* that the pardon could be legally revoked and the subject of the pardon apprehended and compelled to complete his sentence.[4] *C. 11380, Nov. 6, 1903; 28879, Apr. 23, 1911.*

III. *Held*, that a full pardon (otherwise of a mere *remission* of the *punishment*) removes all unexecuted penal consequences and all disabilities, attached by United States statute (or army regulation) to the office, or to the conviction or sentence.[5] *R. 31, 183, Feb., 1871.*

III A. It is the effect of the exercise of the pardoning power by the President to relieve the party from all punishment remaining to be suffered. Where, therefore, he remits the unexecuted portion of a term of imprisonment, an additional penalty which, by the express terms of the sentence, was to be incurred at the end of the adjudged term, as a dishonorable discharge from the service, can not be enforced. The pardon having intervened, the sentence ceases to have any effect whatever in law, and the soldier, the remainder of his service being

---

[1] *Ex parte* Garland. 71 U. S., 380, Dec., 1866; 22 Op. Atty Gen., 36, Feb. 9, 1898.

[2] See Senate Doc. No. 708, 60th Congress, 2d session, which publishes a message of the President of the United States, in which he vetoed an act which provided for the vesting of such portion of the pardoning power in the secretaries of the Army and Navy as should be necessary to restore the rights of citizenship which had been forfeited by desertion from the Army or Navy, for the reason that such act was an attempt to transfer to his subordinates a portion of the pardoning power which had been vested in the President by the Constitution.

[3] United States *v.* Wilson, 7 Peters, 150; *In re* De Puy, 3 Benedict, 307; 6 Op. Atty. Gen., 403. And, in the absence of an express rejection, it is conclusively presumed to be accepted on actual or constructive notice.

[4] The pardon was revoked on the ground that the prisoner secured his release on a forged order.

[5] 12 Op. Atty. Gen., 81; *Ex parte* Garland, 4 Wallace, 380; 8 Op. Atty. Gen., 284; 9 id., 478; 14 id., 124. And see People *v.* Bowen, 43 Cal., 439.

regular—must be honorably discharged. *R. 8, 669, July, 1864; 20, 460, Mar., 1866; C. 2174, Mar. 28, 1906; 4678, July 27, 1898; 7848, Mar. 17, 1900.*

III B. *Held*, that a pardon by the President will be ineffectual to remove a disqualification incurred by the offender under a State statute.[1] *R. 29, 251, Sept., 1869; 41, 465, Nov., 1878; C. 6573, July 12, 1899; 10806, July 11, 1901; 12430, Apr. 10, 1902, with citations; 3531, Feb. 9, 1910.*

IV. The pardoning power extends to *continuing* punishments, or punishments which are never fully executed, remitting in each case the punishment from and after the taking effect of the pardon. *C. 2174, Mar. 28, 1906.* Of this class is the punishment of disqualification to hold military or public office, as also that of the losing of or reduction in "files" (or relative rank) in the list of officers of the offender's grade; these, being continuing punishments, may be put an end to at any time by a remission by the pardoning power.[2] *R. 30, 262, Apr., 1870; 31, 24, Nov., 1870; 41, 158, Mar., 1878; P. 41, 380, July, 1890; 56, 434, Dec., 1892; 60, 348, July, 1893; C. 14389, May 15, 1906.*

IV A. *Held* that a pardon in the case of an officer suffering a sentence of a loss of files would operate to restore him to his former rank according to the date of his commission, the officer losing, of course, such opportunities for promotion as might in the meantime have accrued.[3] *C. 14389, Aug. 8, 1907.*

V. Where a soldier has been duly convicted of desertion, the loss of the rights of citizenship incident thereto is in practice restored by a formal pardon from the President; a remission of the punishment adjudged by the court-martial does not have such effect. *R. 31, 183, Feb., 1871; C. 3010, June, 1897; 4146, May 19, 1898; 11345, Oct. 7, 1901; 16215, Apr. 27, 1904.*

VI. The pardon or remission of the unexpired punishments of *soldiers*, where favored by the Judge Advocate General, has been recommended on grounds of which the principal were the following: That the soldier was a *minor* at enlistment. *C. 19577, Dec. 12, 1907.* That he was *enlisted under false representations* as to the kind of service which would be required of him, made by the recruiting officer. That he enlisted as a *mere recruit*, did not have the Articles of War read to him, and had no proper comprehension of the gravity of his offence; that he *did not comprehend* his military obligations on account of an imperfect knowledge of the English language; that he was an *Indian scout* unacquainted with our language or with the Articles of War; that his offence was wholly or in part induced by *harsh or injudicious treatment* by a military superior; that excessive or *unreasonable duty* had been required of him, or that he had been put on duty (as a guard or sentinel, for example) when unfit for the same on account of *illness or partial intoxication;* that his offence was *committed under a provocation*, or was accompanied by circumstances of extenuation, to which the court had not given due weight; that prior to his trial and sentence he had been *adequately disciplined* by his commander; that he had been *improperly held in irons*, or

[1] 7 Op. Atty. Gen., 760.

[2] See 12 Op. Atty. Gen., 547; 17 id., 31, 656; G. C. M. O., 54, 1884, and S. O., 116, A. G. O., 1886; also G. C. M. O., 85, A. G. O., 1891.

[3] 17 Op. Atty. Gen., 31.

handcuffed, pending the trial; that his confinement had so seriously *impaired his health* that if continued it would endanger his life; that an *unreasonable time* was allowed to *elapse* between his arrest and trial, or after trial and before the approval and promulgation of the sentence. These and other grounds have been taken into consideration, sometimes alone and sometimes in combination or in connection with such further favorable circumstances as *voluntary return* in case of desertion, *previous good character*, *good conduct* under sentence, etc. In cases of *officers*, the principal grounds for recommending pardon or remission have been—a *previous good record* for efficiency in the service, especially in time of war, a high personal *character* or reputation, and an apparent *absence of* a fraudulent or *criminal intent* in the offence as committed. *R. 9, 245, 595, June and Sept., 1864; 13, 99, Dec., 1864; 26, 540, Apr., 1868; 27, 505, Feb., 1869; 28, 340, Jan., 1869; 32, 675, June, 1872; 34, 661, Dec., 1873; P. 40, 386, May, 1890; 41, 273, June, 1890; C. 14389, Apr. 24, 1905.*

The following have also been the bases for recommending pardon, viz:

Deserted soon after enlistment. C. 11915, Jan. 25, 1902; 16601, July 20, 1904; 19577, Jan. 11, 1907.

Faithful service in previous enlistments. *C. 13099, Aug. 14, 1902; 17519, Feb. 10, 1905; 19577, Feb. 27 and Mar. 6, 1907.*

Did not appreciate gravity of offence. *C. 19577, May 3, 1907.*

No specially aggravating circumstances connected with the desertion. *C. 2974, Aug. 6, 1898.*

For good service during San Francisco catastrophe. *C. 19577, Sept. 12, 1907.*

Prompt surrender after deserting. *C. 12270, Mar. 24, 1902; 13099, Aug. 14, 1902; 13555, Oct. 27, 1902.*

Also recommendation to the reviewing authority for clemency by the members of the court and the judge advocate. *C. 15747, Jan. 16, 1904.*

Insane since before the preferring of the charges. *C. 17386, Oct. 8, 1907. See also Discipline XV F to G.*

VII A. In certain cases of military offenders convicted of larceny of public property or conversion of public funds (or who had escaped from military custody while under charges for such offenses) and applying for pardon, *advised* that, even if otherwise thought worthy of pardon, no pardon should be extended to them except upon the condition precedent of their making good the funds appropriated, or the property stolen or its value. *R. 1, 366, Oct., 1862; 19, 132, Nov., 1865; 26, 648, July, 1868.*

VII B. In cases in which military offenders—such as deserters from the Army remaining at large or officers or soldiers who have escaped from military custody while in arrest or under sentence—have applied from their places of refuge for Executive pardons, it has almost invariably been *advised* by the Judge Advocate General that the application be not entertained till the fugitive from justice should return and surrender himself to the military authorities to stand his trial or abide by his sentence. *R. 17, 264, Sept., 1865; 19, 132, Nov., 1865, and 690, Sept., 1866; 22, 285, July, 1866; 23, 309, Oct., 1866; 26, 648, July, 1868; 34, 661, Dec., 1873; 35, 551, Aug., 1874; 38, 607, 652, May and June, 1877; 39, 324 and 326, Nov. 1877; 43, 171, Jan. 1880; P. 39, 482, Mar., 1890; 44, 390, Dec., 1890; C. 3304, 3656, June and Nov., 1897; 5342, 5733, 5885, Jan. and Feb., 1899; 9947, June 13, 1901; 22725, Feb. 8, 1908; 25059, June 4, 1909.*

VIII. A pardon is not retroactive. *C. 4678, July 27, 1898; 2174, Mar. 28, 1906.* It can not remit an executed punishment or restore an executed forfeiture resulting either by operation of law or sentence. It can not, therefore, restore the forfeitures incident upon desertion. Further, it can not modify past history, or reverse or after the facts of a completed record. *C. 12430, Apr. 16, 1902; 20342, Sept. 7, 1906.* From and after the taking effect of a pardon the recipient is innocent in law as to any subsequent contingencies, but the pardon does not annihilate the fact that he was guilty of the offense. The pardon, indeed, proceeds upon the theory that the party was guilty in fact. The asking for it is an admission of guilt, and the granting of it is a recognition of the fact of guilt.[1] Thus *held* that the President could not, by a pardon, remove the charge of desertion from the record of a former soldier (*C. 3794, Jan. 18, 1898; 4678, July 27, 1898*) who had long since become a civilian by reason of the muster out and nonexistence of the Volunteer Army to which he had belonged in the Civil War; and that the effect of his pardon would not be to give him an honorable discharge. A pardon would not only not remove a charge of desertion, but would, in fact, confirm it and constitute an additional reason for retaining it on the record. And a party can not, by an Executive act, be discharged from the service unless he is *in* the service. *R. 50, 395, June, 1886; P. 42, 406, Aug., 1890; 43, 36, Sept., 1890; 48, 232, July, 1891; C. 3125, Apr., 1897; 3794 and 3810, Jan., 1898.*

IX. A pardon can not reach or remit a fully *executed* sentence, though the same may have been unjustly imposed. *R. 8, 228, Apr. 1864; 36, 631, Aug., 1875; C. 2174, Mar. 28, 1896; 3531, Sept. 23, 1897; 4094, May 7, 1898; 12430, Apr. 16, 1902; 13879, Jan. 5, 1903; 18614, Sept. 22, 1905; 26007, Dec. 11, 1911.* A pardon can not of course undo a corporal punishment fully inflicted;[2] nor can it avail to restore to the Army an officer legally separated therefrom and made a civilian by a duly approved sentence of dismissal,[3] or a soldier by a dishonorable discharge.[4] *R. 12, 427, and 14, 568, June, 1865; 20, 302, Jan., 1866; 41, 465, Nov., 1878; C. 2049, 2216, 2174, 2809, Feb. to Dec., 1896; 3810, Jan., 1897; 2809 and 3531, Sept. 23, 1897; 5624, Jan., 1899; 12430, Apr. 16, 1902; 18614, Sept. 22, 1905.* Nor can it restore a fine paid (*R. 16, 305, June, 1865; 35, 471, July, 1874*) or pay forfeited[5] (*R. 20, 90, Oct., 1865; 28, 567, May, 1869*), when the amount of the same has once gone beyond the control of the Executive and been covered into the United States Treasury and become public funds,[6] whatever may have been the merits

[1] See *Ex parte* Garland, 4 Wallace, 333; Knote *v.* U. S., 95 U. S., 153; *In re* Spenser, 5 Sawyer, 195 (Fed. Cases, No. 13234).

[2] See 8 Op. Atty. Gen., 284.

[3] 12 Op. Atty. Gen., 548; *Ex parte* Garland, 4 Wallace, 381.

[4] 27 Op. Atty. Gen., 179, Feb. 17, 1909.

[5] Digest 2d Comp. Dec., Vol. II, par. 736, and Vol. III, par. 502. XII Comp. Dec., 276.

[6] 2 Op. Atty. Gen., 330; XVI, id. 1. This, because the same Constitution which confers the pardoning power contains a provision "of equal efficiency" (Art. 1, sec. 9, par. 7), to the effect that money in the Public Treasury shall not be withdrawn except by an appropriation made by law. VIII, id. 281. Compare, in this connection, Knote *v.* United States, 5 Otto, 149, where it was held that an Executive pardon would not entitle a party to the proceeds of certain personal effects, confiscated and sold by the United States as the property of an enemy, *after* such proceeds had been duly paid into the Treasury.

of the case. *R. 36, 192, Jan., 1875; 37, 445, Mar., 1876; P. 34, 334, Aug., 1889; C. 3810, supra.* Otherwise, however, where the money still remains in the hands of a military disbursing officer or other intermediate official.[1] *R. 16, 676, Nov., 1865; P. 61, 226; Aug. 29, 1893; C. 2174, Apr. 8, 1896.* Where, however, any portion of a punishment remains *unexecuted*, that portion may be remitted by the pardoning power.[2] *R. 2, 29, Feb., 1863.* Congress alone can restore pay fully forfeited to the United States, or otherwise pecuniarily indemnify an officer or soldier for the consequences of a legally executed sentence. *R. 44, 270, Jan., 1881; P. 34, 334, Aug., 1889, C. 11034, Aug. 17, 1901.*

X. *Held*, that a pardon extended to an enemy for his offense or offenses *as such*, committed during the war, did not entitle him to be paid rent for the occupation of his real estate by the United States military authorities while occupying by the right of conquest the region of country in which such estate was situated. *R. 22, 5, 16, Mar., 1866.*

XI. A party who has been pardoned by the President for a political offense, or has taken advantage of a proclamation of amnesty (such as that of May 29, 1865, or Dec. 25, 1868), is not thereby relieved from amenability to trial and punishment for a crime, not of a political character, committed by him, or from the legal consequences of the commission of such a crime. *R. 28, 394, Feb., 1869; 29, 35, June, 1869.*

XII. In cases of deserters from the Army and from the draft, who, during the Civil War, when men of patriotism and honor were offering their lives in the service of their country, took refuge in Canada—shirking a grave public duty at a critical period of national peril—and remained there till the close of the war, when, in the prospect of returning peace, they addressed to the Executive applications for pardon, *advised*, invariably, that such applications be denied. *R. 17, 208, Aug., 1865; 20, 44, Oct., 1865.*

XIII. *Held*, that a soldier may be summarily discharged while in confinement under sentence, but a summary discharge under such circumstances would not only discharge him from the service but would effect a remission of so much of the sentence as remained unexecuted on the date of the discharge.[3] *P. 53, 409, May, 1892; C. 1906 and 1907, Dec. 16 and 1912, Dec. 17, 1895; 3695, Nov. 30, 1897; 6034, Mar. 15, 1899; 11393, Oct. 17, 1901.*

XIV. *Held* that the full pardon of a deserter would not render him eligible for reenlistment if his service during his last preceding term was not honest and faithful.[4] *C. 1883, Feb. 25, 1899; 1765, Oct. 4, 1895; 3125, Apr. and June, 1897; 4513, July 12, 1898; 4645, July, 1898; 5280, Nov. 11, 1898; 6729, July 14, 1899; 10994, Aug. 7, 1901; 11028, Aug. 14, 1901; 15288, Sept. 26, 1903; 16323, May 11, 1904; 16151, Aug. 18, 1904; 17661, Apr. 17, 1908; 19577, July 13, 1909; 26007, Jan. 3, 1910, Nov. 28 and 29, 1911, Dec. 11, 1911.*

---

[1] 14 Op. Atty. Gen., 601.

[2] And the Executive, in the exercise of the pardoning power, "may pardon or remit a portion of the sentence at one time and a different portion at another." 3 Op. Atty. Gen., 418.

[3] That a discharge by reason of expiration of term of service given pending the execution of a period of confinement, which extends beyond the term of enlistment, does not have such effect, see G. O., 138, A. G. O., 1899.

[4] See 22 Op. Atty. Gen., 36, Feb. 9, 1898.

XV. A. *Held,* that a withdrawal by a department commander of a pending charge against a soldier, upon his giving a pledge to abstain in the future from the conduct which was the subject of the charge, did not operate as a pardon and could not be pleaded as such. Had it been done by an order of the President, it could have had no further operation than as a *quasi* conditional pardon, leaving the charge legally renewable upon a repetition of the offense. *P. 35, 423, Oct., 1889.*

XV B. The reappointment to the Army of a dismissed officer does not operate as a condonation.[1] The dismissal remains a dishonorable separation from the service. *C. 2893, Jan. 1897.*

XV C 1. The promotion of an officer while under charges, while awaiting trial by court-martial, or while awaiting action on the sentence does not operate as a constructive pardon as he is presumed to be innocent until his guilt is established by an approved sentence of a court-martial. *C. 14389, Aug. 13, 1903; 10600, July 12, 1901, and Apr. 23, 1902.*

XV C 2. The promotion of an officer who is suffering punishment under a duly approved sentence, *held* to be a constructive pardon if the promotion is inconsistent with the further operation of the sentence; otherwise not.[2] *C. 14389, Aug. 13, 1903.*

XV C 2 a. Where an officer was sentenced "to retain his number on the lineal list of second lieutenants of infantry for three years," *held* that the sentence, while operative, rendered him ineligible for promotion under the act of October 1, 1890 (26 Stat. 562), and that his promotion pending the execution of the sentence would operate as a pardon. *P. 47, 293, May, 1891.*

XV C 3. Should an officer be selected for appointment to a higher office in the Army outside of the line of promotion in the branch of the line of the department or staff to which he belongs, *held* that such promotion would be a constructive pardon of any offense that he may have been charged with committing. *C. 25574, Apr. 27, 1910.*

XV C 4. If an officer is promoted on seniority alone, without any other test, *held* that it can not be contended that such advancement in the operation of law has the effect of condoning offenses committed by the officer, i. e., of a constructive pardon. *C. 25574, Apr. 27, 1910.*

XV C 5. An officer was ordered summarily dismissed, but before he received notice he was promoted. *Held,* that such promotion did not operate as a constructive pardon, and that he should be dismissed under his new rank. *R. 6, 558, Nov., 1864.*

XV D 1. Ordering or authorizing an officer or soldier, when under *sentence,* to exercise a command or perform any other duty inconsistent with the continued execution of his sentence, has been viewed

[1] The appointment of an officer to a new commission is constructive pardon of a previous sentence pronounced but not yet executed (6 Op. Atty. Gen., 123).

[2] The opinion by the Attorney General, 6 Op., 123, Sept. 20, 1853, and the statement in Winthrop's Military Law and Precedents, 2d Edition, p. 724, was based on the case of an officer under sentence of suspension from the naval service on half pay. This status deprived the officer of all right to promotion while the sentence was in force. The promotion of the officer during such time was not required by law, and as it was inconsistent with the continued operation of the sentence it could not be otherwise construed than as a constructive pardon.

as a constructive pardon,[1] but *held*, that to allow an officer, while under a sentence of suspension from rank, to perform certain slight duties in closing his accounts with the United States, could not be regarded as having any such effect. *R. 37, 190, Dec., 1875; C. 12292, Mar. 29, 1902.*

XV D 2. *Held*, that restoration to duty by an authority inferior to the authority which is competent to order the trial of the officer or enlisted man is not a constructive pardon. *C. 24694, Apr. 8, 1909.*

XV D 2 **a.** A department commander preferred charges against an officer on his staff. Later he released the officer from arrest, relieved him from duty at department headquarters, and ordered him to join his company. Upon the trial of this officer ordered by the division commander it was contended in a special plea that the above was an assignment to duty under circumstances which made it a constructive pardon. The court overruled the plea. *Held*, that the ruling of the court was correct and that the action of the department commander did not constitute a constructive pardon. *C. 20731, Mar. 2, 1907.*

XV D 3. *Held*, that while placing a soldier on a duty which is inconsistent with a sentence which he is serving has been viewed as a pardon; that such action while the soldier is under charges or awaiting the result of trial would not ordinarily be so construed, and that if the soldier is placed on duty by an authority inferior to that which ordered his trial, it would clearly not be a constructive pardon. *C. 11868, Jan. 15, 1902.*

XV D 4. The restoration of a deserter to duty without trial is practically a pardon before conviction; it is termed by some military writers "a constructive pardon," [2] and is a valid plea in bar of trial for desertion. As all pardons proceed upon the hypothesis of the legal guilt of the person pardoned, the restoration of a deserter to duty without trial presupposes the commission of desertion. A pardon, like a deed, must, in order to take effect, be delivered to, and accepted by the party to whom it is granted. In military cases the acceptance is commonly indicated by the soldier voluntarily submitting to the proceeding or performing the act required as a condition. This acceptance of, or submission to, the restoration to duty without trial is virtually a confession of his guilt; his desertion thus becomes an established fact, as much as if he had been tried and convicted.[3] *P 21, 223, Dec., 1887.*

XVI A. Remission is relieving the person from a *punishment* or the unexecuted portion of a punishment, but not pardoning the *offense* as such, or removing the disabilities or penal consequences attaching thereto or to the conviction.[4] The pardoning of "punishment," authority for which is vested in certain commanders by the one hundred and twelfth article of war, is remission. An offender can be completely rehabilitated only by a *full pardon* granted under

---

[1] Restoration to duty remits any unexecuted portion of the sentence for forfeiture. (Par. 507, Digest of 2d Comp. Dec., Vol. III, Nov. 20, 1888.)
See 6 Op. Atty. Gen., 714.

[2] Winthrop, 380.

[3] See Circ. 4, A. G. O., 1884; A. R. 132 of 1895, and 143 of 1901.

[4] Compare Perkins *v.* Stevens, 24 Pick. 277; Lee *v.* Murphy, 22 Grat. 799; 1 Bish. Cr. L. sec. 763; 2 Opins. Atty. Gen. 329; 5 id. 588; 8 id. 283–284.

the pardoning power of the Constitution.[1] *R. 24, 679, July, 1867; 37, 613, June, 1876; 57, 89, Oct., 1888; P. 32, 401, May, 1889.*

XVI A 1. Disqualification, or incapacity to hold office under the United States, is a punishment certainly sanctioned by precedent in the military service.[2] Being a *continuing* punishment, it may of course be removed by a remission of the same by the pardoning power at any time during the life of the party. *R. 31, 24, Nov., 1870; 41, 158, Mar., 1878; 42, 636, May, 1880.*

XVI B. After a sentence is once unconditionally remitted, it can not be renewed or revived. An order purporting to revoke the

---

[1] *Ex parte* Garland, 4 Wallace, 380.

[2] It is indeed specifically authorized in two articles of war, Nos. 6 and 14 (providing for the punishment of false muster and like offences), but is here apparently intended not as an independent punishment but as a penal consequence incident upon conviction and sentence of dismissal. As a distinctive punishment, however, it has been imposed in many cases, and has apparently been regarded as a particularly suitable penalty in cases of embezzlement of public funds or other fraud upon the Government.

Instances of sentences, including (generally with dismissal) the punishment of disqualification, are to be found in the following orders of the War Department (or Hdqrs. of Army), published before the Civil War, the instances being none of them cases of conviction of false muster: G. O. of April 2, 1818; do. of Sept. 25, 1819; do. 71 of 1829; do. 15 of 1860. The infrequency of this punishment in the early orders may perhaps be owing in part to the fact that it was considered that "cashiering"—a sentence often then adjudged—involved disqualification. Similar instances of the same punishment occur in the following orders issued from the War Department during and since the Civil War: G. O. 18, 94, 159, 184, 242, 249, 332, 389, of 1863; do. 36, 51, 69, of 1864; G. C. M. O. 175, 251, 277, 369, 395, 404, of 1864; do. 6, 46, 85, 125, 201, 205, 219, 232, 238, 260, 270, 315, 365, 397, 432, 541, 565, 584, 602, 649, of 1865; do. 22, 68, 82, 89, 111, 161, 181, of 1866; do. 21, 52, 56, 62, 89, 91, 98, of 1867; do. 2, 58, of 1868; do. 44 of 1869; do. 14, 15, of 1870. Instances of this punishment have also been noted in the following orders issued from the military departments, armies, &c.: G. O. 60, 64, 76, 86, 89, 99, 106, of 1863; do. 2, 4, 20, 24, 28, 30, 32, 51, of 1864; do. 9, 12, of 1865—Army of the Potomac. G. O. 18, 81, of 1864; do. 11 of 1865—Dept. of the East. G. O. 81 of 1864—Dept. of Pennsylvania. G. O. 96 of 1864; do. 23, 27, of 1865—Middle Department. G. O. 22 of 1865—Middle Military Division. G. O. 15 of 1863; do. 30 of 1865—Dept. of West Virginia. G. O. 34, 113, 175, of 1864; do. 49, 82, of 1865—Dept. of Virginia and North Carolina. G. O. 32, 33, of 1864—Dept. of the Ohio. G. O. 19 of 1865—Dept. of Kentucky. G. O. 17, 21, 33, of 1863—Dept. of the Tennessee. G. O. 3 of 1863; do. 6, 22, of 1864—Dept. and Army of the Tennessee. G. O. 14 of 1865; do. 5 of 1866—Dept. of Tennessee. G. O. 21 of 1863; do. 24 of 1864; do. 77, 112, of 1865—Dept. of the Missouri. G. O. 8 of 1866—Dept. of Florida. G. O. 67 of 1863; do. 74, of 1865—Dept. of the Gulf. G. O. 55 of 1864—Mil. Div. of W. Mississippi. G. O. 87 of 1867—Second Mil. Dist. This punishment, however, has, since 1870, been discontinued in the practice of our courts martial, and this discontinuance is to be traced to the ruling of the Attorney General in an opinion addressed to the Secretary of the Navy in 1868 (12 Opins. 528) to the effect that a sentence of a *naval* court martial by which a contractor for naval supplies was excluded from future dealings for such supplies with the Government, was illegal; sentences of disability in general being further held to be "not in accordance with the custom of the service except where expressly authorized by law." This ruling was applied to a military case in G. C. M. O. 22 (as also in do. 57,) to War Dept., &c., of 1870, and the punishment of disqualification imposed upon an officer disapproved as unauthorized. But whatever may have been the usage of *naval* courts martial, the very numerous precedents of cases in which such punishment had been adjudged by *military* courts for a great variety of offences, were, it is considered, quite sufficient to have established that this penalty was sanctioned by custom in the Army. In some instances the disqualification, as adjudged, has extended to the holding of public office in general; in others it has been confined to the holding of military office. But, while the disqualification for *military* office is less objectionable than the more general form, it may well be doubted whether this species of punishment, inasmuch as it assumes in effect to inhibit the exercise by the Executive of the appointing power, is within the authority of a court martial. As will be perceived from the above, this punishment has been discontinued in our service, but on another and less tenable ground.

order promulgating the remission, would be void and of no effect. *C. 2170, Apr., 1896.*

XVI C. Where a soldier, prior to his entering upon a term of imprisonment under sentence, has been held confined in the guardhouse, it has been a practice of the War Department to credit him with so many days on his term as he was so confined in excess of 30 days. This is a form of remission of so many days of the term imposed by his sentence. *R. 11, 380, Jan., 1865; 28, 340, 482, Jan. and Apr., 1869; P. 57, 371, Jan., 1893; 62, 368, Nov., 1893.*

XVI D. The discharge, by executive authority under the fourth article of war, of a soldier whose enlistment has not expired but who is undergoing a term of imprisonment imposed upon him by a sentence of court-martial (which did not also include the penalty of dishonorable discharge, or imposed it to take effect at the end of the imprisonment), *held* to operate not merely as a discharge of the soldier from his enlistment but as a remission of the unexecuted term of his confinement and to entitle him to be set at liberty.[1] *R. 31, 556, Aug., 1871; 41, 350, July, 1878; C. 11393, Oct. 17, 1901; 19972, June 27, 1906; 21722, July 9, 1907.*

XVI E. A sentence to confinement with forfeiture of pay imposes two distinct and independent punishments. *Held* that the remission of an unexecuted portion of one would not affect the other.[2] *R. 38, 329, Oct., 1876; P. 45, 287, Feb., 1891; C. 1780,* Oct., *1895; 19145, Feb. 9, 1906.*

CROSS REFERENCE.

See ARTICLES OF WAR CXII A to E.
After execution of sentence.....See DISCIPLINE XV I 2 a.
Before conviction.....See DISCIPLINE XVII A 4 g (6).
Can not create office.....See OFFICE II A 1.
Deserter.....See DESERTION XV A to F; X A; XII A 1; XIV B.
ENLISTMENT I D 3 c (7).
Eligibility for enlistment not restored.....See ENLISTMENT I B 3 a; D 3 c (5); (6); (8); (9); (10).

PARENT.

Applies for discharge of minor.....See DISCHARGE XII A.
Dependency of.....See DISCIPLINE XV F 8.
Right over minor.....See DESERTION III G.
ENLISTMENT I B 1 b to 2.

PAROLE.

By civil courts.....See DISCIPLINE I E 3.
Prisoner of war.....See WAR I C 11 d (2) to (3).
Violation of.....See DISCIPLINE II D 1 c.
WAR I C 11 b; c (4).

PARTIES TO CONTRACTS.

See CONTRACTS I to II.

---

[1] This opinion was approved and published in Circular letter from the War Department to department commanders, Aug. 12, 1871. And note an instance of its application—to the cases of twenty-three prisoners—in G. C. M. O. 118, Dept. of the Missouri, 1871.

[2] Circular No. 63, War Department, 1906.

PARTISANS.

Trial of, by civil courts.....See WAR I C 11 c (3).

PARTNERSHIP.

See CONTRACTS XXX; XXXI.
Bonds by.....See BONDS I R.
One partner guarantor for other.....See BONDS I D.
Signature by.....See CONTRACTS LVI.

PASS.

See ABSENCE.
Injury while on.....See DESERTION XVI C 5.
GRATUITY I A 3.
Line of duty status.....See GRATUITY I A 5 a.
Medical attendance on.....See CLAIMS VIII.

PATENT.

I. GRANT OF LETTERS PATENT IS PRIMA FACIE EVIDENCE THAT PATENTEE WAS INVENTOR..... *Page 842.*
II. ROYALTY.
A. IS A LEGAL LIEN UPON A PATENTED ARTICLE.
III. ASSIGNMENT OF PATENTED RIGHT TO UNITED STATES.
A. DOES NOT PRECLUDE ASSIGNMENT TO ANOTHER COUNTRY.... *Page 843.*
IV. QUESTION OF INFRINGEMENT.
A. UNITED STATES REQUIRES BOND FOR INDEMNIFICATION AGAINST LOSS.
V. INVENTOR CAN NOT SERVE ON BOARD WHICH IS CONSIDERING HIS INVENTION.
VI. INVENTION NOT YET PATENTED.
A. IS A PROPERTY RIGHT.
VII. PATENT BY OFFICER.
A. WITHOUT FEE, GOVERNMENT DOES NOT PAY ROYALTY..... *Page 844.*
B. RULE AS TO USE OF, BY GOVERNMENT.
C. ASSIGNMENT OF PATENT.

I. The presumption in favor of the validity of a patent, arising from the action of the authorities in granting it, can be overcome only by reliable and certain proof.[1] The grant of letters patent is *prima facie* evidence that the patentee was the first inventor of the device described in the letters, and of its novelty.[2] So, *held* that a claim by a patentee for a reasonable royalty for the use of his patent by the United States was not impugned by the affidavits of a third party to the effect that he was the real inventor, when such party had taken no action to contest the issuance of the patent nor resorted to the courts for his legal remedies. *P. 53, 416, May, 1892.* The use of a patent with the knowledge and consent of the patentee is an implied promise or agreement to pay for the same. *C. 725, Dec., 1894; 6107, Mar. 23, 1899; 8321, Aug. 20, 1900; 22877, Mar. 10, 1908.*

II A. An existing royalty on a patented article is in the nature of a legal lien upon it, to be paid off before it can be safely used, and is also an element properly entering into the price to be paid for it, if purchased. The article is in law sold subject to this claim. So, *held*

[1] Osborne *v.* Glazier, 31 Fed. Rep. 402.
[2] Cantrell *v.* Wallick, 117 U. S. 695.

that the United States, in purchasing a patented article, as being necessary to the due prosecution of a certain work provided to be done by an appropriation act should justly pay a price estimated by the intrinsic value of the article, augmented by the probable amount of the royalties likely to accrue as income. *P. 44, 358, Dec., 1890; C. 8321, Aug. 20, 1900; 17647, Mar. 10, 1905.*

III A. The assignment to the United States of a patent right, for use in the public service,[1] does not preclude the assignor from also assigning the right to a foreign government, provided the original assignment were not absolute in its terms. A sale of patent right for use in one district is not incompatible with a sale for use in another, such sales being in the nature of independent licenses. But, as a general rule, the United States should accept in such a case nothing short of an absolute assignment. *P. 54, 214, June, 1892.*

IV A. Where the lowest bidder for a dredging contract proposed to use a dredging machine which had become the subject of a suit against him for infringement of a patent, *advised* that if deemed proper to accept the bid and enter into a contract, a clause should be required to the effect that in the event of any legal proceedings by other parties against the United States or any of its officers or agents for the infringement of any patent or claimed patent, during the execution of the work, or afterwards, the contractor shall hold the United States harmless and refund to it all expenses, damages and outlays of every kind it may be subjected to on account of the same. And that if said proceedings tend to create delay in the execution of the work, the United States shall have the right to immediately employ other parties to complete the same, the contractor to reimburse the United States for any extra amount it may have to pay for such completion over and above the amount which the contractor would have been entitled to for the same work. *C. 725, Dec., 1894; 4558, July, 1898; 23546, July 3, 1908.*

V. While it is clearly a violation of law (act of Feb. 18, 1893, 27 Stat. 461) for the inventor of a device (range finder) considered and adopted by the Board of Ordnance and Fortification "to be a member or serve on said board," the act does not, where he has in fact so served, prohibit the purchase of the instrument invented by him. It merely affects his eligibility for membership of or service on the board. *C. 6941, Aug., 1899.*

VI A. An invention is property though it be not patented, and an injunction will be granted to restrain an infringement though the patent has been merely applied for. Thus it is safer for the United States not to purchase the right to use an invented article from any person other than the inventor, since a liability to the latter might thus attach.[2] *P. 43, 264, Oct., 1890. Held* that, should the Government make a purchase—from a person other than the inventor but claiming to be such—of telephones, the sale of which had been enjoined by the real patentee, the United States would be liable to him in damages, whether or not the fact of infringement or illegal sale was actually known at the time of the purchase. *P. 57, 297, Jan.,*

[1] See act of June 25, 1910 (36 Stat. 851) under which the United States is entitled to free use of any patent by any one in its employment or service.

[2] See James *v.* Campbell, 104 U. S., 356.

1893. The Government becomes a tort-feasor in permitting the use in its service of an infringed patent.[1] *C. 725, Dec., 1894.*

VII A. Provision for the issuance of a patent to persons who invent or discover "any new and useful art, machine, manufacture or composition of matter, or any new and useful improvement thereof not known or used by others in this country, and not patented or described in any printed publication in this or any foreign country," etc., is made by law. *Held* that, under the act of March 3, 1883 (22 Stat. 625), an officer of the army is entitled to the issuance of a patent without any fee for an invention of the class enumerated above and if so patented the United States is entitled to use the patent without payment of royalty.[2] *C. 12517, Apr. 28, 1902.*

VII B. It is well settled by decisions of the United States courts that where a person in the employ of the United States, using Government time and Government funds for the purpose and in the line of his duty, makes an invention and takes out a patent on the same, the Government has an implied license to use the invention, with an unrestricted right to manufacture it or have it manufactured for its use; but that where a person in Government employ, and not specifically employed for the purpose makes an invention he is entitled to the benefits of the same.[3] *Held,* therefore, that an officer was entitled to compensation for the use by the United States of his patented pneumatic gun. *P. 31, 106, Mar. 15, 1889.* Also *held,* with respect to certain portable field ovens invented by officers and soldiers in the line of their duty and at the cost of the United States, that the United States had the right to manufacture or have manufactured for its use the patented articles. *C. 25188, June 25, 1909, July 29, 1909, and Oct. 31, 1910.* Similarly *held,* with respect to a process for forage rations (*id., Dec. 28, 1910*); with respect to machinery for operating lock gates of the Isthmian Canal (*id., Apr. 21, 1911*); with respect to a blast meter (*id., June 28, 1911*); and with respect to a device for an oscillating tool box (*id., Nov. 27, 1911*).

VII C. *Held* that the act of June 25, 1910 (36 Stat. 851), gives to a bona fide patentee a right to recover reasonable compensation for an article patented by him which is used by the United States, but enables the United States to avail itself of any and all defenses, general or special, which might be pleaded by a defendant in an action for infringement; it also provides that the benefits of this act shall not inure to any patentee who, at the time of making his claim, is in the employment or service of the United States and, what is more important, makes the act applicable to the assignee of any such patentee. *C. 27038, July 15, 1910.*

---

[1] See Schillinger *v.* U. S., 155 U. S., 163.

[2] See Act of June 25, 1910 (36 Stat. 851).

[3] See U. S. *v.* Burns (12 Wal., 246); Solomons *v.* U. S. (21 Ct. Cls., 479–83, and 22 id., 335); Solomons *v.* U. S. (137 U. S., 346); Gill *v.* U. S. (160 U. S., 426); Gill *v.* U. S. (25 Ct. Cls., 415); McAleer *v.* U. S. (150 U. S., 424); and Fager *v.* U. S. (35 Ct. Cls., 556–568). See, however, act of June 25, 1910 (36 Stat. 851), which authorizes a suit against the United States for infringement of patent rights with the proviso that the act shall not "apply to any device discovered or invented" by an employee of the United States, "during the time of his employment or service." While no suit for infringement can be brought under the statute in respect to such device, the statute stops short of changing the law as above stated.

CROSS REFERENCE.

Infringement of.....See CLAIMS II.

PAY.

See PAY AND ALLOWANCES.
Absence without leave.....See ABSENCE II A 2.
Armed civilian employees in Philippine Islands.....See INSIGNIA OF MERIT III B 3.
Board of officers on damaged property.....See MILITIA XI I.
Cadet on furlough.....See ARMY I D 2 a.
Can not be attached.....See ARMY I C 2.
Can not be stopped to pay private debts.....See PRIVATE DEBTS II.
Certificate of merit.....See INSIGNIA OF MERIT II D.
Chief of Philippine Constabulary.....See COMMAND I C.
Deposit of.....See COMMAND VI B.
Engineer officer.....See NAVIGABLE WATERS X B 1 a.
Extra.....See CIVILIAN EMPLOYEES X to XI.
Extra duty.....See DISCIPLINE IV B 2 a.
Extra to mounted officers.....See MILITIA XI F.
Extra while on detail.....See COMMUNICATIONS I C.
Forfeiture of.....See DISCIPLINE XII B 3 e (1) to (5).
Joint encampment.....See MILITIA VI B 2 d.
Longevity.....See MILITIA XI G.
Longevity of retired officers.....See RETIREMENT I L 1.
Militia.....See MILILIA XI to XII.
Muster for, is not muster-in.....See VOLUNTEER ARMY II A 2.
Of deserters.....See DESERTION V D to E 6; XIV A to F.
Of discharged soldier.....See ARTICLES OF WAR LX E 4.
On furlough.....See ABSENCE I C 4 h.
On leave.....See ABSENCE I B 1 g (2); 1 m (1).
Reduced by law.....See ENLISTMENT I A 5.
Retired soldier.....See RETIREMENT II B 5; C to D.
Seaman.....See CIVILIAN EMPLOYEES XV A.
Stoppage.....See CIVILIAN EMPLOYEES II to III. GOVERNMENT AGENCIES I B, C
Suspension from.....See DISCIPLINE XII B 3 f (3) (*a*)
Suspension of cadet without.....See ARMY I D 3 b (1).
Volunteers previous to muster-in.....See OFFICE V A 5 a (2).
While in hands of civil authorities.....See COMMAND V A 2 c

PAY ACCOUNT.

Not commercial paper.....See PAY AND ALLOWANCES I B 4.
Not signed in blank.....See PAY AND ALLOWANCES I B 3.

PAY AND ALLOWANCES.

I. PAY.

A. IN GENERAL.

1. Right to, by officers and enlisted men.
   - **a.** Begins and ends with period of legal service ..... *Page 849*
   - **b.** Can be overthrown only by operation of law ..... *Page 850*
   - **c.** Not affected by status of arrest.
   - **d.** Foreign-service pay. (*See Pay Manual.*)

B. OFFICERS' PAY.

1. Rule as to when right to, begins.
   - a. Appointment with back pay requires act of Congress.
2. While on "waiting orders."
3. Pay accounts should not be receipted in blank..... *Page 851*
4. Pay account is not commercial paper.
5. May be paid to guardian.
   - a. Even to a wife.

I. PAY—Continued.
B. OFFICERS' PAY—Continued.
6. Longevity pay. (*See Pay Manual*).
a. Service as medical cadet counts.
7. Extra pay when mounted, etc.
a. Duty must require officer to be mounted ..... *Page 852*
(1) Assistant quartermaster at quartermaster depot.
b. Mount must be "suitable."
C. ENLISTED MEN'S PAY.
1. Title passes to soldier upon receipt of pay.
2. Not entitled to pay while absent without leave, and, if deserter, until restored to duty ..... *Page 853*
3. No pay while in hands of civil courts, if convicted..... *Page 854*
4. Payment may be made to guardian.
5. Continuous-service pay.
a. In counting continuous-service deduct all absence without leave.
b. Continuous service can not be carried back to a date.
(1) Preceding a discharge without honor.
(2) Preceding a dishonorable discharge.
c. Philippine Scouts not entitled to reenlistment bonus. *Page 855*
6. Extra-duty pay.
a. Paid only for labor which may be legitimately performed in military service by soldier.
b. For constant labor for a period of not less than 10 days.
(1) To clerks at post and regimental headquarters.
(2) To school-teacher at arsenal.
(3) To enlisted men of staff department for duty in other departments.
(4) To cooks not regularly appointed..... *Page 856*
(5) To messenger at post laundry.
c. Not paid in time of war.
(1) Except from company, bakery, or post-exchange funds.
d. Paid out of special appropriations.
7. Deposits.
a. Money deposited to secure a discharge is unconditional like any other deposit.
(1) And can not be refunded ..... *Page 857*
8. Allotments.
a. Voluntary.

II. ALLOWANCES.
A. IN GENERAL.
1. Heat and light.
a. Furnished only to buildings used by officer or enlisted man at his post of duty.
b. No limit fixed on cost of heat and light to Government.
c. Allowance to officers.
(1) Right accrues after assignment to quarters or allowance of commutation.
(2) Heat and light is an allowance in kind and can not be commuted into money..... *Page 858*
(3) Officer drawing commutation of quarters does not lose right to heat and light for temporary absence in hospital for treatment.

II. ALLOWANCES—Continued.
A. In General—Continued.
1. Heat and light—Continued.
c. Allowance to officers—Continued.
(4) Chief and the assistant chiefs of Constabulary entitled to allowance of heat and light on their actual rank in the Army only.
(5) Right to increased allowance accrues at date of promotion.
(6) An officer who retains quarters at a post or draws commutation of quarters while on leave of absence is entitled to his allowance of heat and light.
d. Allowance to enlisted men.
(1) In leasing quarters for enlisted men lease should stipulate that heat and light will be furnished.
(2) Right to heat and light not affected because enlisted man draws commutation of quarters ..... *Page 859.*
(3) Enlisted men living outside of reservation not entitled to heat and light.
e. Not to be sold to others than officers and enlisted men.
2. Allowance to officer.
a. Transportation.
(1) For himself. (*See Mileage in Pay Manual and Army Regulations, and Transportation of officer in Army Regulations.*)
(2) Of horse.
(*a*) When changing station.
[1] Reimbursement of expense of.
(*b*) From other place than last station.
(3) Of baggage. (*See Army Regulations, Transportation of the Army—Baggage.*)
b. Quarters. (*See Army Regulations.*)
(1) Commutation of quarters..... *Page 860.*
(2) Use of quarters by officer's family while officer is on duty that carries commutation.
(3) Stops when traveling on duty ..... *Page 861.*
c. Interment, expense of.
(1) Not allowed if officer on sick leave.
(2) Temporary interment does not preclude permanent interment elsewhere.
d. Forage.
(1) A horse must be owned and actually kept.
(*a*) Act of May 11, 1908, does not change that fact.
(*b*) Duty requires a mount..... *Page 862.*
(2) Ficticious assumption of ownership does not carry right to forage.
3. To enlisted men.
a. Clothing allowance.
(1) Not a part of pay.
(2) Not credited when pay is not earned.
(3) Forfeiture. (*See Pay and Allowances III C to D.*)
(*a*) Forfeited by sentence of court-martial. *Page 863.*
(4) Clothing issued in kind.
(*a*) Does not become private property.

II. ALLOWANCES—Continued.
A. In General—Continued.
3. To enlisted men—Continued.
a. Clothing allowance—Continued.
(4) Clothing issued in kind—Continued.
(*b*) When discharged without honor for fraudulent enlistment soldier not permitted to take clothing drawn in excess of allowance with him.
(*c*) Upon return from desertion a soldier can not claim clothing left behind at desertion as private property.
(*d*) Gratuitous issues.
[1] To replace clothing destroyed.
[*a*] In campaign.
[*b*] To prevent contagion..... *Page 864*
[*c*] By fire.
(*e*) To dishonorably discharged soldier.
[1] Not authorized unless sentenced to confinement.
b. Rations. (*See Army Regulations and Subsistence Manual.*)
(1) Commutation.
(*a*) Rates of are fixed by Secretary of War.
(*b*) When traveling.
[1] Limited to the trip.

III. DEPRIVATION OF PAY AND ALLOWANCES.
A. Of Officer.
1. Can not be done by summary dismissal..... *Page 865*
a. Or by *nunc pro tunc* summary dismissal.
2. Can not be done by implication.
a. Case of suspension from service.
B. Stoppage.
1. In connection with arrest as deserter. (*See Desertion.*)
2. May be collected in monthly amounts.
3. Overpayments to employees may be stopped against the disbursing officer.
4. Can not be stopped to satisfy private claims..... *Page 866*
5. Is a "charge on account" to make good a loss.
6. Can not be made to reimburse a personal indebtedness.
a. Which grows out of an incorrect final statement..... *Page 867*
7. May be made to reimburse company fund.
a. Even in paying account of deceased officer.
C. Forfeiture.
1. By sentence of court-martial.
a. Of pay earned.
(1) If sentenced to dishonorable discharge.
(*a*) Forfeits pay due at discharge.
[1] If discharge remitted, forfeits pay due at date of receipt of order at post.
[2] If paid before discharge, title to money paid passes..... *Page 868*
(2) Applies only to current enlistment.
b. Of pay to be earned.
(1) Sentence operates from date of promulgation.

III. DEPRIVATION OF PAY AND ALLOWANCES—Continued.
C. FORFEITURE—Continued.
1. By sentence of court-martial—Continued.
c. Of pay and allowances due and to become due.
(1) Forfeits commutation of quarters, fuel, and rations.
d. Of "all pay and allowances" for a certain period.
(1) Necessary clothing and subsistence may be issued.
e. Destruction of record before approval.
(1) Forfeitures nullified.
f. Sentenced to dishonorable discharge.
(1) Forfeits travel pay.
g. Money forfeited returns to the Treasury.
(1) There credited to the pay of the Army even if accrues from forfeitures in volunteers..... *Page 869*
2. Forfeitures otherwise than by sentence.
a. Clothing allowance on discharge without honor for fraudulent enlistment.
b. Pay and allowances while absent without leave.
c. Travel allowances.
(1) When discharged without honor for fraudulent enlistment.
(2) When discharged without honor on account of conviction by civil court.
(3) When discharged by way of favor.
(4) When dishonorably discharged.
d. Public property lost charged to soldier..... *Page 870*
D. FINES.
1. Accrue only by sentence of court-martial.
2. Accrue to United States only.
3. Distinguished from stoppage.
E. REMISSION OF FORFEITURE.
1. Operates only on pay not due.
F. COMMUTATION OF DISMISSAL OF CADET TO SUSPENSION.
1. Does not forfeit pay.

I A 1 a. The right to pay begins and ends with the period of legal service. Except by special authority of Congress, an officer or soldier can not be paid for military service rendered *before* appointment, enlistment, or muster in. *R. 38, 120, July, 1876.* A soldier, however, who by accident or through some exigency of the service, is held to service for a period *after* the date on which his term of enlistment expired, is properly entitled to be paid for such additional period. *R. 29, 424, Nov., 1869; 38, 662, July, 1877.* So, a soldier, detained in the service, after his term of enlistment has expired, by reason of the pendency of proceedings under charges preferred against him, and who, upon trial is acquitted or sentenced to a punishment not including forfeiture of pay, and is thereupon discharged, is entitled to be paid up to the date of discharge. *R. 21, 448, June, 1866.* An officer separated from the service by dismissal, by being "wholly" retired, or by resignation, is entitled to be paid up to the day on which he personally receives official notice of the order or act thus detaching him from the Army and making him a civilian. *R. 27, 423, 426, Mar., 1869; 30, 549, Aug., 1870.* An officer or soldier can not

be dismissed, discharged, or mustered out as of a prior date, with the effect of depriving him of pay accrued between that date and the date of the actual discharge, etc.[1] *R. 16, 406, July, 1865; 22, 506, Dec., 1866; C. 17173, Nov. 17, 1904; 20446, Sept. 27, 1906.*

I A 1 b. While he remains in the military establishment, an officer or soldier, whether or not actually performing military service, can be deprived of his legal pay only through a duly adjudged and approved *sentence* of court martial, or by the *operation of law* under some express statutory enactment or Army regulation.[2] The fact that an officer or soldier is under charges, in arrest, or waiting sentence, can not (except in so far as his case may be within the application of Army Regulations, affect in any manner his right to the regular pay of his rank. *R. 12, 230, Jan., 1865; C. 14787, June 12, 1903; 16955, Sept. 29, 1904.*

I A 1 c. The imposition of an arrest affects in no manner the right of an officer or soldier to receive the pay and allowances of his rank. *R. 9, 64, May, 1864; 12, 230, 1865; 13, 386, Feb., 1865; 23, 18, June, 1866.* Except in a case of a deserter no legal inhibition exists to paying a soldier while in arrest—either before trial or while awaiting sentence—his regular pay and emoluments.[3] *R. 30, 419, June, 1870; C. 14787, June 12, 1903.*

I B 1. *Held*, that in the case of an original appointment an officer's pay begins to run from the date of acceptance of the appointment, and in the case of promotion from the date of vacancy.[4] *C. 19425, Mar. 17, 1906.*

I B 1 a. There can be no question as to the power of Congress to authorize the appointment of an officer with both rank and pay from a back date. So the President (except where expressly prohibited by statute) may, with the concurrence of the Senate, appoint an officer with rank from an earlier date, though not, except by express authority of Congress, with back pay.[5] *R. 43, 208, Feb., 1880.*

I B 2. *Held*, that an officer ordered to his home to await orders did not occupy the status of an officer on leave of absence, and was not, therefore, on half pay during the period of thus awaiting orders, but

---

[1] See Allstaedt *v.* United States, 3 Ct. Cls., 284; VII Comp. Dec. (dated Mar. 16, 1901). On the other hand, where an officer who has been dismissed is restored (by the authority of Congress) to office with the rank which he had when dismissed, or other rank of a date prior to the restoration, he is not thereby entitled to back pay. In such cases in the absence of any grant of pay in the statute "the relation back is for rank only, not pay." 4 Ops. Atty. Gen., 603; 5 id., 101, 132; 9 id., 137.

[2] See, to the same effect, the opinion of the Attorney General in 15 Ops., 175.

[3] See A. R. 986, 1910 ed., which provides that a soldier awaiting result of trial will not be paid before the result is known.

[4] In the absence of a statute requiring adjustment on a different basis, pay of an officer begins with the date of acceptance. (Dig. 2d Comp. Dec., vol. 3, secs. 892, 908, 933. See, also, U. S. *v.* Flanders, 112 U. S., 88; U. S. *v.* Eaton, 169 id., 331; 16 Op. Atty. Gen., 38; IV Comp. Dec., 496; VI id., 672.) The acceptance may be implied from the entry upon the discharge of the duties of the office (Am. & Eng. Ency. of Law, 1st ed., vol. 19, p. 437), and such acceptance may, it seems, be of an anticipated appointment so that it will take effect and pay begin when the appointment is complete and prior to notice thereof. (V Comp. Dec., 375; VII Comp. Dec. 511.)

See Pay Manual 496 and 498, 1910 ed.

[5] 4 Op. Atty. Gen., 318, 603, 608; 5 id., 132; 8 id., 223; United States *v.* Vinton, 2 Sumner, 299.

was entitled for such period to the full pay of his rank.[1] *R. 31, 599, Aug., 1871.* An officer relieved from duty and placed on "waiting orders," by the direction of the Secretary of War, is not liable to loss of pay by reason of such status. *P. 63, 106, Dec., 1893.*

I B 3. *Held*, that the principle enunciated in Army Regulations of forbidding officers to take or receive receipts in blank for public money or property is sound and no good reason exists for making an exception in the case of officers' pay accounts. *P. 58, 426, Mar. 27, 1893.*

I B 4. An officer's "pay account" is not commercial paper, but, in its legal aspect, a mere receipt.[2] So *held* that a *bona fide* assignee of an officer's pay account for a certain month, who, on receiving payment thereon from a paymaster, delivered to the latter the account with his name written on the back of the same, did not thereby incur the obligation of an *indorser*, or render himself liable as such for the amount to the paymaster, on its being ascertained that the officer had already himself drawn his pay for that month, and that a double payment had thus been made.[3] *R. 43, 68, Oct., 1879.*

I B 5. *Held* that where an officer has been declared *non compos mentis* the War Department will on proper representation, recognize the committee or guardian appointed by the civil authorities and undertake to pay to such committee or guardian the salary due the officer. *C. 29315, Dec. 12, 1911.*

I B 5 a. The Government has no power to compel an officer of the Army to furnish his wife, for her support, with a certain proportion, or any part, of his pay. Where such an officer is confined in an insane asylum, his wife may, by having a curator appointed, be enabled to avail herself of his pay for the support of herself and her family. *P. 59, 348, May, 1893.* The wife of an officer under treatment at the Government Hospital for the Insane, who has been duly appointed, and has given bond, as the guardian of her husband, under the laws of the State of her residence, may, by the authority of section 952, R. S. (District Code), collect and receive his pay or other moneys that may be due him in the same manner as if her "authority had been derived from the tribunals of the District." *P. 57, 479, Feb , 1893.*

I B 6 a. In considering service for the purpose of computing longevity pay under section 1262, R. S., *held* that service as a medical cadet may be counted, as such cadets, although not privates or non-

---

[1] This opinion was affirmed, in the same case (United States *v.* Williamson) by the Court of Claims, in 1873 (9 Ct. Cls., 503), and by the Supreme Court, in the next year (23 Wallace, 411). But in United States *v.* Phisterer, 4 Otto, 219, it was held that an officer, ordered to his home to await orders, was not entitled to *commutation for quarters and fuel*, his home not being a "station." See G. O. 78, Hdqrs. of Army, 1877, issued in consequence of this decision. But see the case of United States *v.* Lippitt, 10 Otto, 663, where the officer was ordered to the *headquarters of a military department* to await orders.

[2] Note in this connection the opinion of the Attorney General, in 16 Op., 191, to the effect that an approved account or voucher issued to a contractor for an amount due him under his contract is "not in any proper sense negotiable paper."

[3] Under date of Dec. 27, 1911, the comptroller held that the practice of drawing checks to the order of the indorsee in the payment of officers' monthly pay accounts indorsed for deposit to the credit of themselves, or other persons named, with individuals or institutions is in violation of sec. 3620, R. S. This decision does not affect the right of an officer to transfer his account on or after maturity under the act of Mar. 2, 1907, which reads: "Hereafter all commissioned officers of the Army may transfer or assign their pay accounts, when due and payable, under such regulations as the Secretary of War may prescribe."

commissioned officers, were clearly enlisted men.[1] *R. 43, 196, Feb. 14, 1880; C. 21108, Feb. 23, 1907.*

I B 7 a. The designation in Army Regulations of classes of officers who are required to be mounted is not conclusive that such officers are entitled under all conditions to additional pay when they provide suitable private mounts, *but that the duty which the officer is performing is the test as to whether or not he is required to be mounted,* and whether or not, in view of his providing suitable mounts for such duty, he is entitled to mounted pay for the time being.[2] *C. 27952, Sept. 8, 1911; 28285, May 5, 1911.*

I B 7 a (1). *Held* that, under section 1270 R. S., the duty of acting assistant quartermaster, at a general depot of the Quartermaster's Department, is one that requires an officer to be mounted. *C. 19403, Mar. 20, 1906.*

I B 7 b. *Held,* that the act of May 11, 1908 (35 Stat. 108), conditions the increased pay therein authorized upon the number of horses owned. *Held,* that if one suitable mount is owned an addition of $150 accrues. If two are owned the officer becomes entitled to $200. No "first" or "second" mounts are recognized or provided for in the statute. All mounts for which pay is drawn must be suitable, and if suitable the owner becomes entitled to the allowances above indicated.[3] *C. 24000, Oct. 23, 1908.*

I C 1. A soldier in confinement awaiting the result of his trial by court-martial was, contrary to (paragraph 986) Army Regulations (1910), paid one month's pay, which, in compliance with instructions, he delivered to the officer of the day, who turned it over to the adjutant of the post. The latter delivered it to a paymaster with the statement that at the time of payment the prisoner was "awaiting result

---

[1] For the law controlling longevity pay see sec. 1262, 1263, and 1267, R. S., and sec. 7 of the act of June, 18, 1878 (20 Stat. 150); act of Feb. 24, 1881 (21 Stat. 346); act of June 30, 1882 (22 Stat. 118); act of June 30, 1902 (32 Stat. 511); act of Mar. 2, 1903 (32 Stat. 932); and act of May 11, 1908 (35 Stat. 108). See also Pay Manual Subject, Longevity Pay, and Army Regulation subject Longevity Pay.

[2] See XVI Comp. Dec., 113, in which it is remarked as follows: "Bearing in mind the purpose of the act of May 11, 1908, is to give the same regular pay to officers of the Army of corresponding grades in all branches of the service, whether mounted or not mounted, before an officer is entitled to receive said addition to his pay as in said act provided, it must appear that he was required to be mounted and that he provided himself with suitable mounts at his own expense. * * * If a captain of cavalry is not required to be mounted, although he should provide himself with mounts at his own expense, he is not entitled to said addition to his pay. In this respect, as in respect to regular pay of officers of corresponding grades, Army officers in all branches of the service are upon an equal footing. An assignment of a captain of cavalry to duty on a Government transport, where he is required to perform duty at sea, is obviously an assignment to a duty the performance of which does not require him to be mounted. In such case the United States would not furnish him with mounts and horse equipments in kind, nor would he be entitled to an addition to his pay if he should under such circumstances provide himself with suitable mounts at his own expense. Upon such facts the certificate of the officer that he was required to be mounted and that he provided himself with suitable mounts at his own expense would not be conclusive upon the accounting officers. On the other hand, if an Army officer, whether Cavalry, Artillery, or Infantry, is required to be mounted and while so required provides himself with suitable mounts at his own expense, is temporarily detached from the station where his mounts are kept, so long as his mounts are actually and exclusively owned and kept for his use in the military service, such mere temporary detachment from such station would not deprive him of his right to said additional pay."

[3] For definition of "suitable mount," see G. O. 29, War Department, Washington, Mar. 4, 1911.

of trial." The paymaster deposited it to the credit of the Treasurer of the United States. *Held*, that upon payment to the soldier the title to the money vested in him, and *advised* therefore that his application for reimbursement be referred to the Auditor for the War Department. *C. 3258, June, 1897; 14787, June 12, 1903; 12227, Feb. 13, 1907.*

I C 2. As the enlistment of a soldier is a *civil obligation*, the contractual rights of the Government or of the soldier should be determined, to some extent at least, by the rules governing the interpretation and execution of contracts. It has also been the endeavor of this office to discourage the disposition, in determining the right to pay, to attach too much weight to the findings of courts-martial, and to the acts of convening officers in reviewing records of trial.

Courts-martial are executive agencies that are charged by law with the performance of certain judicial functions; but, like other courts having criminal jurisdiction, they are without power to pass upon questions of civil responsibility or contractual obligation or to dispose of the pay of an accused person, save to direct that it be applied in the satisfaction of a fine imposed by way of punishment for an offense. The tendency is to regard the court-martial as a tribunal which is competent to pass upon questions which relate to the civil obligation of the soldier, and to accept its judgments in that regard as final.

It would seem that, when an undertaking exists by which the soldier agrees to serve, for a definite period of time, at certain rates of pay, he is entitled to pay for the time he serves and, *per contra*, is not entitled to pay for time during which, through the fault of the soldier, no service has been rendered under his enlistment contract. If it be claimed in behalf of the soldier that he was prevented from rendering service, but that he otherwise stood ready to render it, then the burden would be upon him to show that such an impossibility of performance existed.

A court-martial has jurisdiction to try the criminal offenses of desertion and absence without leave; that is, the court is authorized by law to determine whether an offense against the thirty-second or forty-seventh articles of war have been committed. If the soldier be tried for either offense, and is acquitted, the acquittal has weight in determining whether service under his enlistment contract has been rendered. But it is not necessarily decisive; and, under the rules to which I have alluded, it would be possible to state his accounts, under his contract, without a reference to the collateral conclusions which have been or may be reached by the court-martial. *C. 17768, June 17, 1905. Held*, in the case of an enlisted man who was convicted of desertion, but whose conviction was set aside by the convening authority, as the records showed that for a period of more than a year, the soldier had been absent from duty and had rendered no service under his enlistment contract, that he was not entitled to pay during the period of such unauthorized absence. *C. 17768, June 17, 1905.* In computing the period during which a soldier is not entitled to pay on the ground that, by reason of his absence, he has failed to render service under his contract of enlistment, the view expressed by the comptroller [1] evinces no disposition to trespass upon the field

[1] XII, Comp. Dec., 328. XV. id., 661; Pay Manual, 1910 Ed., 246, 247, 248.

of activity prescribed by law for the several bureaus and offices of the War Department. *Held*, that where the facts upon which computations of time are based are not fully set forth upon the muster rolls which have been referred to an officer of the pay department, the facts as they stand of record should be obtained from The Adjutant General, who is their legal custodian. *C. 17768, Mar. 9, 1906.*

Similarly *held*, in the case of a deserter, that he is not entitled to pay until he is restored to a duty status. *C. 25833, Dec. 14, 1911.*

I C 3. The requirements of army regulations are that officers and enlisted men absent in confinement by the civil authorities receive no pay during such absence; if released without trial, however, or after trial and acquittal, their right to pay for the period of such absence is restored; *held* that the reason for this regulation is that if a soldier is withdrawn from duty by his own fault, so that he can not earn his pay, he is not entitled thereto; but that if he is withdrawn from duty without fault on his part, he should not be deprived of his pay. The regulation assumes that if the civil authority released him without trial, or tried and acquitted him, his failure to render service was not due to his fault; but that if his trial resulted in conviction, the arrest and consequent withdrawal from duty was due to his fault. *C. 16561, July 8, 1904.*

I C 4. A competent State court appointed a guardian of the person and estate of a retired enlisted man of the United States Army, resident in that State, who had been duly found to be an incompetent. To avoid the order of the court the latter left the State and requested that a paymaster outside the State make payment to him. *Held* that his pay could legally be delivered to the guardian.[1] *C. 3676, Nov., 1897; 15344, Oct. 9, 1903.*

I C 5 a. In counting continuous-service time all absence without leave should be deducted. There is no legal relation between "continuous service" and "terms of enlistment." Under the former head only service unforfeited by reason of absence without leave can be counted; a term of enlistment, upon the other hand, is not affected by the fact that the soldier during that particular term may have been absent from his command without leave.[2] *C. 18438, Apr. 4, 1907, and June 24, 1908.*

I C 5 b (1). Where a soldier was discharged without honor and allowed to reenlist, or, to speak more correctly, where service under a subsequent fraudulent enlistment was accepted by the department, *held*, that he is not entitled to continuous-service pay, as his discharge from his last preceding enlistment was not honorable. *C. 22855, Mar. 11, 1908.*

I C 5 b (2). The operation of a dishonorable discharge being to terminate all unexpired enlistments, where a soldier who had been dishonorably discharged afterwards enlisted in the volunteer forces, from which he was honorably discharged on January 29, and on May 15, 1901, again enlisted in the Regular Army, *held* that the status of such soldier is that of one who enlisted on May 15, 1901, and service in a prior enlistment terminating in a dishonorable dis-

[1] Concurred in by the comptroller under date of Jan. 8, 1898.
[2] See XV Comp. Dec., 79, 165, 339.

charge can not be considered in determining his pay status.[1] *C. 22333, Nov. 9, 1907.*

I C 5 c. *Held*, that Philippine Scouts are not entitled, under section 36 of the act of February 2, 1901 (31 Stat., 755), in the absence of regulations in furtherance thereof, to the bonus for reenlistment which is granted to enlisted men of the Regular Army in the act of appropriation for the support of the Army. *C. 23990, Oct. 21, 1908.*

I C 6 a. The provision as to extra-duty pay of section 1287, R. S., is evidently intended to cover only such labor as may legitimately be performed in the military service by soldiers as such. So *held* that an enlisted man could not legally be paid extra-duty pay for services proposed to be rendered as a telegraph operator to a private telegraph company, the same being an employment for which he could not legally be detached from his legitimate duties as a soldier. *R. 51, 281, Dec., 1886.*

I C 6 b. The extra-duty pay is payable only for "constant labor for a period of not less than ten days." Thus *held*, that a noncommissioned officer who acted, during a single day, as auctioneer at a sale of condemned quartermaster stores was not legally entitled to the payment of a 10 per cent commission on the proceeds of the sale or to any other compensation whatever,[2] and that the post quartermaster in paying him the said commission was chargeable with a misapplication of public funds. *P. 60, 363, July, 1893; 62, 95, Oct., 1893; C. 6988, Sept. 12, 1899; 11983, Feb. 1, 1902.*

I C 6 b (1). The Army appropriation act of 1885–86 (23 Stat. 359) provided that thereafter extra-duty pay of enlisted men on extra duty at constant labor of not less than 10 days would "be paid at the rate of 50 cents per day for mechanics, artisans, school-teachers and clerks, at Army, division, and department headquarters, and 35 cents per day for other clerks, teamsters, laborers and other enlisted men on extra duty." *Held*, that this would authorize the payment of extra duty pay to enlisted men detailed as clerks at post and regimental headquarters whenever there is money available for such payment; but *remarked* that the current Army appropriation act contained no appropriation from which the payment could be made.[3] *C. 3762, Jan., 1898.*

I C 6 b (2). *Held*, that an arsenal was a *post* within the meaning of section 1231, R. S., relating to the establishing of schools at posts, etc., and that an enlisted man detailed as a school-teacher at an arsenal was therefore entitled to the extra-duty pay specified in the act of March 3, 1885, amending section 1287, R. S., the principle being that an enlisted man belonging to a particular staff department is not entitled to extra-duty pay for services rendered in that department. *R. 55, 30, Sept., 1886.*

I C 6 b (3). The principle governing the allowance of extra-duty pay to enlisted men belonging to the several staff departments is, that such enlisted man is not entitled to extra-duty pay for the per-

[1] See XIV Comp. Dec., 367.

[2] This view was concurred in by the Second Comptroller of the Treasury in a decision published in Circ. No. 3, A. G. O., 1894, overruling prior decision of May 22, 1893.

[3] See Brady *v.* U. S., No. 30458, Ct. Cls., Feb. 12, 1912, in which it was *held* that a soldier on special duty as company clerk was not entitled to extra-duty pay for that service. This decision will appear in 47 Ct. Cls.

formance of duty pertaining to the department to which he belongs; if, however, he renders service in another staff department, having no relation to the duties required of him in his own department, he may properly receive extra-duty pay. *C. 25352, July 31, 1909.*

I C 6 b (4). The Army regulation providing for the payment from the company fund of the extra compensation of 25 cents per day to enlisted men who are cooks has reference to ordinary enlisted men and does not apply to persons enlisted under the act of July 7, 1898, as cooks with the rank and pay of corporals.[1] *C. 4762, Aug., 1898.*

I C 6 b (5). Where enlisted men were paid for extra duty as messengers in operation of post laundry at Columbus Barracks, Ohio, from the receipts for laundry work, *held* that, as the act providing for laundry plant[2] required that the entire cost of operation shall be paid from receipts of laundry work before any surplus is deposited to the credit of appropriation, the extra-duty pay was properly paid from such receipts.[3] *C. 28968, Sept. 13, 1911.*

I C 6 c. War between the United States and Spain as declared by act of Congress approved April 22, 1898, existed when the act of April 26, 1898, was passed. *Held*, therefore, that enlisted men in all departments of the Army ceased to be entitled to extra-duty pay upon the date of the approval of the last-named act. *C. 4089, 4135, 4143, 4144, May, 1898; 4256, June, 1898.*

I C 6 c (1). Section 6 of the act of April 26, 1898, "For the better organization of the line of the Army," in providing that in war time no additional increased compensation (i. e., additional to the twenty per centum increase) shall be allowed to soldiers performing what is known as extra or special duty, applies to increased compensation made directly from appropriations for the support of the Army and not to payments made from the company, bakery, or post exchange funds. *C. 4414, 4539, 4540, 5442, June to Dec., 1898; 5661, Jan., 1899; 20121, July 25, 1906; 20152, July 31, 1906.*

I C 6 d. Where appropriations are made for work other than that covered by the items for extra-duty pay, enlisted men may, under proper restrictions, be employed on extra duty thereon and paid extra compensation from such appropriation, even though the appropriation itself does not specify payments for extra-duty services. In such a case the proper authority may select means of accomplishing the work authorized by the appropriation and compensate enlisted men for extra duty thereon instead of doing it wholly by civilian labor. *C. 15827, Feb. 2, 1904.* So, *held* that extra-duty pay might be paid to printers at posts out of the appropriation for printing. *C. 15827, Feb. 2, 1904, and Oct. 21, 1904.* So, enlisted men might receive extra-duty pay in connection with the construction of a target range from the money set aside for the construction of such ranges.[4] *C. 19038, Jan. 11, 1906.*

I C 7 a. Where a soldier deposited $50, under the act of May 15, 1872, presumably in anticipation of his application for purchase of discharge, and subsequently while such application was pending

[1] The pay of cooks enlisted since the act of Mar. 2, 1899, is that of sergeants of Infantry.

[2] Act of Mar. 23, 1910 (36 Stat. 253).

[3] See manuscript decision of Comptroller of the Treasury of Nov. 20, 1911, sustaining above views and reversing the Auditor for War Department.

[4] See "Appropriations" XXII.

deserted, *held* that said deposit was necessarily unconditional and like any other deposit was forfeited by desertion. *C. 807, Jan., 1895; 14901, July 6 and Aug. 24, 1903; 17311, Jan. 4, 1905.*

I C 7 a (1). *Held* that there was no legal authority for the *refunding*, by the military authorities, of money paid to purchase a discharge under the act of June 16, 1890. This clearly appears from the terms of the act which provides that the money when paid "shall be deposited in the Treasury" to the credit of the appropriation for pay of the Army, to be "available for the payment of expenses incurred during the fiscal year in which the discharge is made." The act moreover authorizes the President to permit such purchases "under such rules and upon such conditions as he shall prescribe," and nothing is found in the rules actually prescribed (G. O. 81, 108, of 1890; G. O. 90 June 30, 1911, which contemplates or refers to the refunding of such purchase money. *P. 65, 71, May, 1894; C. 14901, July 6, Aug. 24, 1903.*

I C 8 a. *Held* that both allotments and discontinuances of allotments by soldiers are voluntary and entirely within the discretion of the soldier making them. *C. 11403, Nov. 9, 1901.*

II A 1 a. The act of March 2, 1907, creates an allowance *in kind*, as distinguished from one which can be commuted in money, in accordance with a rate or measure of commutation, which is prescribed by law, as in the case of commutation of quarters or rations, or the reimbursement by means of mileage of the cost of travel performed in the public service. *C. 19126, Mar. 6, 1907. Held* that heat and light can not be furnished at any other place or to any other building than that occupied by the officer or enlisted man at his post of duty. *C. 19126, Jan. 21, 1909, Dec. 16, 1911.*

II A 1 b. The act of March 2, 1907 (34 Stat. 1167), is positive in its requirements, and charges the War Department with the duty of providing heat and light for the quarters lawfully occupied by commissioned officers and enlisted men. It matters not whether the quarters belong to the United States, or are procured by the Quartermaster's Department in the operation of leases, or are occupied by commissioned officers who are in receipt of the statutory allowance of commutation. The law simply provides that, as to *all the buildings or parts of buildings so occupied* by officers or enlisted men, it is the duty of the Quartermaster's Department to furnish the necessary heat and light.

The statute is silent as to the method in which such heat and light shall be provided, and it places no limitation on its cost. Finally, the details of execution are committed to the discretion of the Secretary of War by the express requirement that the heat and light shall be furnished under such regulations as the Secretary of War may prescribe. *C. 19126, Aug. 27, 1908.*

II A 1 c (1). The right to quarters accrues in behalf of an officer in the operation of an order from competent authority assigning him to a particular post or place for duty. The duty of heating and lighting is charged to the Quartermaster's Department only where an officer, at the station to which he has been regularly assigned to duty, has been provided with quarters in kind, or, there being no such quarters available, has been allowed commutation. *C. 22467, Dec. 9, 1907.*

II A 1 c (2). The furnishing of heat and light is in the nature of an allowance in kind, and is not an allowance payable to an officer in money, as is the case with commutation of quarters, mileage, per diems, etc. In other words, the Quartermaster's Department is charged by law with the duty of furnishing heat and light, such duty becoming operative when quarters are occupied by persons entitled thereto by law or regulations, and payments when due are not made to the officer who occupies quarters or obtains them in the operation of commutation, but to persons who furnish heat, light, fuel, or illuminants. *C. 19126, May 9 and June 4, 1910.*

II A 1 c (3). An officer in receipt of commutation of quarters was ordered to Hot Springs, Ark., for treatment; *held* not to change the status of the officer, who continues to be entitled to heat and light at his permanent station. *C. 19126, Apr. 18, 1907.*

II A 1 c (4). *Held*, that heat and light could lawfully be furnished for such rooms only as the Chief and Assistant Chiefs of Philippine Constabulary are entitled to by virtue of their actual rank; any additional allowance must come from the Philippine Government. *C. 19126, June 26, 1907.*

II A 1 c (5). An officer of the grade of major, who was in occupation of commuted quarters, was promoted to the grade of lieutenant colonel on April 2, 1910, his commission bearing date of April 14, 1910; *held* that he was entitled to pay and commutation of quarters from the same date. He would also appear to be entitled to occupy the number of rooms appropriate to his new grade from the same date; that is, from the date of the vacancy; in other words, if he was entitled to one additional room from and after April 2, 1910, the Quartermaster's Department, upon due notification, would have become charged with the duty of furnishing heat and light for the additional room from the date of the vacancy. *C. 19126, May 9, 1910.* If the additional room was actually used by the officer from and after the date of his promotion, *held* that he would seem to be entitled to heat and light therefor during such time, subsequent to his promotion, as the room has been occupied by him as quarters. *C. 19126, June 4, 1910.* *Held* also that rights to heat and light allowance begin to accrue at the same time that rights to pay begin to accrue. *C. 19126, Apr. 1, 1911.*

II A 1 c (6). Where an officer received a leave of absence, retaining his quarters during the period of such leave, *held* that the quarters were standing in his name and that he was, theoretically at least, occupying them, so that the fact that he was on leave was not material, the officer's occupation being such that no junior could take the quarters from him, as he could vacant quarters, and his occupation being also such that he could not occupy other quarters or draw commutation of quarters while continuing to hold them. In other words, his holding exhausted his rights to quarters. The occupation of quarters while on leave is something real, not a fiction merely, and an officer if holding quarters or drawing commutation of quarters is entitled to his allowance of heat and light while on leave of absence. *C. 19126, Sept. 4, 1909, and Feb. 4, 1911.*

II A 1 d (1). Under the law it is the duty of the Quartermaster's Department to see that rooms furnished to enlisted men in the operation of the law and regulations are heated and lighted. If the local practice in renting is to include heat and light, or if the lease or the

rates paid call for it, the requirements of the statute are satisfied; otherwise heat and light should be stipulated for in the lease in order that proper execution may be given to the statute (act of Mar. 2, 1907), which requires heat and light to be furnished at the cost of the United States. *C. 19126, Aug. 27, 1908.*

II A 1 d (2). The Quartermaster General is charged by law with furnishing heat and light to quarters furnished to officers and enlisted men, and it is the opinion of this office that the right of the enlisted men is not defeated and the duty of the Quartermaster's Department is not diminished by the fact that commutation of rations is paid to the soldier by the Subsistence Department. This view is strengthened by the fact that the lease of the quarters in question does not stipulate that heat and light are to be furnished by the landlord, leaving it a duty with the Quartermaster's Department to furnish heat and light in conformity to the requirements of the statute.

If the existing requirements and regulations on the subject are obscure or lacking in clearness, it is suggested that they be amended so as to remove the doubts of the rights of enlisted men serving in places where public quarters are not furnished by the United States. *C. 19126, Jan. 11, 1909.*

II A 1 d (3). An enlisted man living outside the military reservation on which he is serving as a soldier is not entitled, as of right, to heat and light. *C. 19126, Dec. 28, 1909.*

II A 1 e. In view of the provisions of successive appropriation acts impliedly restricting the selling by the United States of material for fuel and light, to sales to "officers," and of the previous practice to that effect, *held* that such sales should not be permitted to be made to other classes of persons until Congress shall have so authorized. *P. 58, 470, Apr., 1893.*

II A 2 a (2) (*a*). An officer was ordered from Fort Custer to Washington, D. C., to await retirement, but was not in fact retired till at the end of about five months after his arrival at Washington. *Held* that he was entitled to the regulation allowance for the transportation of his horses from Fort Custer, on the ground that he was changing station. Washington became on his arrival, and continued to be during the five months mentioned, his proper station, where he was entitled to receive the *other* allowances accruing to an officer at his station—commutation of quarters, forage, medical attendance, the right to purchase commissary stores and fuel, etc. *P. 60, 22, June, 1893.*

II A 2 a (2) (*a*) [1]. A Cavalry lieutenant, ordered from Washington to report to the superintendent of the Military Academy for duty at the academy, *held* entitled to be reimbursed the amount paid by him for the transportation of his horse to West Point, such amount being reasonable and within the regulation limit. An assignment to duty at the academy is not a "college detail." *P. 59, 7, Apr., 1893.*

II A 2 a (2) (*b*). The act of March 23, 1910 (36 Stat. 255), provides that: "Hereafter transportation may be furnished for the owned horses of an officer not exceeding the number authorized by law from point of purchase to his station, when he would have been entitled to and did not have his authorized number of owned horses shipped from his last change of station, and when the cost of shipment does not exceed that from his old to his new station." Para-

graph 1114 Army Regulations of 1910 reads in part as follows: "4. When horses are purchased by officers at points other than their station the Quartermaster's Department will transport them from points of purchase to the station of the officer, provided the cost of shipment from point of purchase to new station does not exceed the cost of shipment from the old to new station on last change of station, and provided the officer has not had his authorized private mounts shipped from his old to his new station." *Held* that a mount purchased at Fort Reno, Okla., by an officer of the Army, may not legally be shipped to him at San Francisco, Cal., wholly at the expense of the Government, for the reason that the cost of shipment from Fort Reno to San Francisco would exceed the cost of shipment from San Diego, Cal., the officer's last preceding station, to San Francisco, his present station (Aug. 5, 1911). *C. 24000, Aug. 5, 1911.*

II A 2 **b** (1). An officer of the Army, acting as Indian agent, occupied as his quarters, without rent, a house at the agency, placed at his disposal for the purpose by the Interior Department. *Held* that he was not entitled to *commutation of quarters.* Moreover the appropriation in the Army appropriation act for commutation of quarters is for "officers on duty," etc. Further *held* therefore that this "duty" meant military duty, and did not include duty as an Indian agent under the act of June 13, 1893, which, in authorizing the detail of officers of the army as Indian agents, detaches them from military service and duty for the time being, and places them "under the orders and direction of the Secretary of the Interior."[1] *P. 64, 121, Mar., 1894, C. 12939, July 25, 1902; 14574, Jan. 8, 1910.*

II A 2 **b** (2). It is within the power of the Secretary of War to assign an officer to any military duty and to give him a station at any place within or without the United States where the duty to which he has been assigned can most conveniently be performed. *Held* that to meet the case of an officer who was on the duty of mapping the country, it is only necessary to assign the officer to duty at a place convenient to his work. And *held* further that as there are no public quarters at such place, he becomes entitled to commutation. It may be necessary to accompany this action by a grant of authority, when an officer is married, to permit his family to continue in occupation of quarters during the absence of the officer so assigned. But this is a

[1] See the case of U. S. *v.* Dempsey, decided Sept. 28, 1900, by the U. S. Circ. Court, D. Montana (104 Fed. Rep., 197), in which the court held—

1. That under par. 1480, Army Regulations (1322 of 1910) which provides that "officers on duty, without troops, at stations where there are no public quarters, are entitled to commutation therefor," any suitable quarters provided by the Government for the use of an officer answer the requirement for "public quarters," though not expressly built for Army officers; and an officer assigned to duty as an Indian agent, and furnished a suitable building on the reservation for his quarters, without charge, is not entitled to receive commutation for quarters.

2. That where an Army paymaster has paid an officer a sum as a commutation allowance through an error of law, the United States is not bound by such payment, and may recover the money so paid in a proper action, with interest from the date when the officer's accounts were settled by the Treasury Department, at the rate established by the laws of the State in which the action is brought, citing in support of the latter, McElrath *v.* U. S., 102 U. S., 441; Wisconsin Central R. Co. *v.* U. S., 164 *id.*, 190.

matter falling entirely within the discretion of the Secretary of War.[1] *C. 17407, Jan. 18, 1905.*

II A 2 b (3). If an officer not in the field is on a duty that requires him to travel, and finds it necessary to make frequent stops varying in length from a few days to a few weeks, he is entitled during such stops to either quarters in kind or commutation of quarters. *C. 18963, Sept. 30, 1904.*

II A 2 c (1). *Held* that the regulation allowance for the expenses of the interment of an officer was not payable in a case of an officer who at the time of his death was on sick leave, this not being one of the cases specified in the Army appropriation acts (see acts of June 30, 1892, and Feb. 27, 1893), in which such allowance is authorized to be paid. *P. 60, 47, June, 1893.* Similarly *held* in a case of an officer who died at Hot Springs, Arkansas, when not on duty but on leave of absence.[2] *P. 47, 253, May, 1891; C. 6126, Mar. 27, 1899; 13598, Nov. 11, 1902.*

II A 2 c (2). *Held* that the fact that an officer had been interred at the post where he died did not preclude the Secretary of War from authorizing his permanent interment elsewhere, provided the entire expenses of burial did not exceed the maximum amount of $75 allowed for such purposes by the Army Regulations. But *held* further that, under the provision on the subject of the Army appropriation act of February 27, 1893,[3] such expenses could not be allowed for the interment of an officer dying at a military post unless he was on duty there at the time of his death, and therefore could not legally be allowed in the case of an officer who died at a post where he was staying while on sick leave of absence from his station in another military department. *P. 65, 183, June, 1894; C. 13598, Nov. 11, 1902.*

II A 2 d (1). The acts of June 18, 1878 (20 Stat. 150), and February 24, 1881 (21 Stat. 347), still regulate the issue of forage to officers, who become entitled to the allowance "only for horses owned and actually kept * * * in the performance of their official military duties." *Held* that a subaltern officer who owns one horse may draw forage for one. If he owns two he may draw forage for two, provided the conditions above cited in respect to ownership and use are complied with. *C. 24000, Oct. 23, 1908.*

II A 2 d (1) (*a*). *Held*, that the act of March 2, 1907 (34 Stat. 1166), was never intended to impair the efficiency of the acts of June 18, 1878 (20 Stat. 150), and February 24, 1881 (21 Stat. 347), in which the forage allowance of mounted officers is regulated and provided for. *Held*, also, that the act of May 11, 1908 (35 Stat. 108), made no change in respect to issues of forage for mounts which are owned by commissioned officers, but left their forage supply to be governed by the acts of 1878 and 1881. The public animals issued to officers for their official use in the operation of the act of May 11, 1908, continue to be foraged and cared for by the United States, as they always have been; and no change has been made in the long-established arrangements for the foraging of horses owned and actually

[1] See IX Comp. Dec., 379; Pay Manual, 126, 1910 ed.

[2] The transportation of the remains of deceased officers and enlisted men is now regulated by the requirements of the act of Mar. 3, 1909 (35 Stat. 743).

[3] See act of Mar. 3, 1909 (35 Stat. 743).

kept by the commissioned officers in the performance of their official military duties. *C. 23277, Feb. 16, 1909.*

II A 2 **d** (1) (*b*). *Held*, that the duty upon which a retired officer is placed when he is detailed as professor at an educational institution is not one which requires him to be mounted. He therefore is not entitled to a forage allowance, as forage for private horses is not a part of the allowances to which an officer is entitled, irrespective of the duty on which he is engaged. *C. 23957, Oct. 28, 1911.*

II A 2 d (2). A contract surgeon, who was not entitled to forage, purchased horses that were practically unbroken and untrained, and either personally or through his employees trained them as driving horses. He accomplished the feeding of his horses by entering into an arrangement with officers who were by law entitled to forage under which arrangement he claimed that he had sold the horses to such officers and submitted as evidence the statement that a bill of sale had passed with a consideration of $1.00. Several officers became parties to this transaction, and forage was drawn against their allowance for the feed and bedding of these horses. He later sold these horses to other parties for considerations commensurate with their values. The law allows forage to mounted officers for horses "owned and actually kept" by such officers "in the performance of their official military duties." (Sec. 8, act of June 18, 1878, 20 Stat. 150; act of Feb. 24, 1881, 21 Stat. 347.) None of the horses in this case could have been used as suitable mounts in the performance of the official military duties of their putative owners. None of them were "kept" and cared for by any of the officers. They were kept and trained by the contract surgeon and his employees, but were foraged by the Quartermaster's Department. *Held* that these horses were not "owned and actually kept" by the mounted officers against whose forage allowance the horses were subsisted "in the performance of their official military duties."[1] *C. 23277, Feb. 16, 1909.*

II A 3 **a** (1). Where a soldier was sentenced to dishonorable discharge "forfeiting all pay due or to become due," *held* that his right to clothing allowance, if there was any due him at date of discharge, was wholly unaffected by the sentence; "allowances" being distinct from "pay." *R. 49, 526, Dec., 1885.*

II A 3 **a** (2). Pay and allowances are given to a soldier because he earns them or is, without fault on his part and by circumstances not within his control, prevented from doing so; and when pay is withheld from him for the reason that he (by his own fault) failed to earn it, his clothing allowance should be withheld for the same reason. Thus *held* that a soldier absent without leave by his own fault, or in the hands of the civil authorities serving sentence of a civil court, should not be allowed either pay or clothing allowance for the period of such unauthorized absence from duty. *C. 12025, Feb. 6, 1902; 2010, Feb., 1896; 14642, May 22, 1903; 17518, Feb. 13, 1905; 16966, July 17, 1905.*

---

[1] See G. O. 206, War Department, Washington, Dec. 17, 1908, which published the finding and opinion of a court of inquiry on this case. See also G. O. 202, War Department, Washington, Dec. 12, 1908, which promulgated the sentences awarded by the ensuing courts-martial in this case.

II A 3 **a** (3) (*a*). A soldier was sentenced "to be confined at hard labor with forfeiture of all pay and allowances for six months" and while serving such sentence he drew clothing to the value of about thirty dollars which amount was charged against his clothing allowance accruing prior and subsequently to the period of confinement. *Held* that he forfeited his clothing allowance during the period of confinement under the terms of the sentence, and that it was proper to charge the same against him as stated. This is understood to accord with the practice in such cases. *C. 1525, July, 1895.*

II A 3 **a** (4) (*a*). *Held* to be manifest from the provisions of sections 1242, 1296, 1303 and 5438, R. S., and the seventeenth article of war, that the clothing issued to soldiers for their use in the military service continues to be the property of the United States [1]—the practice of charging them with the money value on issue being required by statute merely for convenience in accounting and to incite economy in the use and care of the clothing. *R. 45, 552, Jan. 20, 1883; P. 51, 159, Dec. 30, 1891; C. 11251, May 12, 1910; 16107, Sept. 20, 1911; 21179, Dec. 23, 1911.*

II A 3 **a** (4) (*b*). When a soldier is discharged without honor because of fraudulent enlistment *held* that he should not be permitted to take clothing with him which has been drawn in excess of his allowance. *C. 2113, Mar. 9, 1896; 7782, Mar. 6, 1900; 11251, Sept. 24, 1901; 16048, Mar. 19, 1904.*

II A 3 **a** (4) (*c*). *Held* that upon the return of a deserter to military control he can not claim as private property articles of uniform clothing which had been issued to him before his desertion and which he left behind at desertion. *C. 3251, June 2, 1899; 21179, Mar. 7, 1907; 29407, Jan. 30, 1912.*

II A 3 **a** (4) (*d*) [1] [*a*]. Under section 1302, R. S., "the money value of all clothing overdrawn by the soldier beyond his allowance shall be charged against him," and section 1298 provides for gratuitous issues to replace clothing destroyed to prevent contagion, but there is no other statutory authority for gratuitous issues to enlisted men. Under section 1296 the "President may prescribe the uniform of the Army and quantity and kind of clothing which shall be issued annually to the troops of the United States"; and under this authority tables are issued showing the price of clothing, the allowance in kind

[1] The opinion of May 12, 1910, was approved by the Secretary of War, and published in Circular 36, War Dept., June 6, 1910. The views above expressed are in accordance with the decisions of the civil courts, where prosecutions have been had under sec. 5438, R. S., and its reenactment in sec. 35 of the Criminal Code, of persons purchasing uniform clothing from soldiers. See U. S. *v.* Hart, 146 Fed. Rep., 202; U. S. *v.* Koplik, 155 id., 920; U. S. *v.* Smith, 156, id., 859; Lobosco *v.* U. S., 183, Fed. Rep., 742; Ontai *v.* U. S., 188 Fed. Rep., 310. In Lobosco *v.* U. S., *supra*, in affirming the conviction, it was said that the uniform clothing "being regarded as public property, whether remaining in a public depot, or in the possession of the individual soldier, and this notwithstanding the soldier is allowed to retain such articles of clothing as he has then in use on the expiration of his term of service." In Ontai *v.* U. S., in affirming the conviction, it was said "clothing furnished to a soldier by the United States under a clothing allowance does not become his private property which he has a right to dispose of while in the service, but is public property within sec. 35 of the Penal Code (act of Mar. 4, 1909, c. 321; 35 Stat. 1095)." Sec. 35 of the Criminal Code is a reenactment of sec. 5438 of the Revised Statutes, with the addition of the words "whether furnished to the soldier, sailor, officer, or person, under a clothing allowance, or otherwise;" thus making it clear that the clothing issued to a soldier is public property.

to each soldier for each year of his enlistment, thus giving the money value of his clothing allowances, and these are changed from time to time in orders. Army Regulations provide for gratuitous issues of certain articles to troops serving in extremely cold climates, such articles to be charged to the soldier only in case of loss or damage other than from fair wear and tear; and these regulations while purporting to provide for gratuitous issues may be treated as prescribing an increase of the allowance under the conditions named in the regulations. Where, therefore, the department commander directed a gratuitous issue of one suit of khaki uniform, one campaign hat, one pair of leggings and one pair of shoes to each enlisted man who was engaged in the campaign which ended with the attack upon and fall of Manila, P. I., on August 13, 1898, presumably to replace articles lost or damaged under the extraordinary conditions of the campaign, the issues to be made upon properly approved requisitions, etc., it was *held* that there was no legal objection to a regulation providing for an increase in the clothing allowance to replace articles thereof which have been practically destroyed in carrying on a campaign under the conditions of the campaign in question, and that the regulation could be made retroactive to cover issues already made with respect to such conditions. *C. 5862, Feb., 1899.*

II A 3 **a** (4) (*d*) [1] [*b*]. Circular 57, A. G. O., 1898, provides that "whenever articles of clothing of enlisted men have been destroyed to prevent contagion a gratuitous issue of such articles of clothing will be made to the enlisted men to whom such clothing belonged upon the certificate of the officer who has personal knowledge of the facts." [1] *Held* that there was no provision for paying for the clothing destroyed, in lieu of the gratuitous issue authorized. *C. 5588, Jan., 1899; 20143, Aug. 3 and 16, 1906.*

II A 3 **a** (4) (*d*) [1] [*c*]. A soldier is not entitled to be credited in his clothing account with the value of clothing lost by fire or other casualty. This can be made good to him only through the reimbursement authorized by the act of March 3, 1885 (23 Stat. 350). *P. 63, 278, Jan., 1894; C. 10025, Mar. 22, 1901; 20143, Aug. 2, 16, and Sept. 21, 1906, and Oct. 13, 1910.*

II A 3 **a** (4) (*e*) [1]. *Held* that the provision in an Army appropriation act "for a suit of citizen's outer clothing * * * to be issued upon release from confinement to each prisoner who has been confined under a court-martial sentence involving dishonorable discharge," did not apply where the sentence of the court adjudged dishonorable discharge without any term of confinement.[2] *C. 2925, Feb. 9, 1897, and Jan. 5, 1912; 14256, Mar. 12, 1903.*

II A 3 **b** (1) (*a*). Authority to establish the rates of the allowance for commutation of rations has not been given by statute, but these rates have been left to be fixed by Army regulation. But these amounts are recognized and sanctioned in the provisions of the Army appropriation acts relating to the Subsistence Department. *P. 49, 441, Oct., 1891.*

II A 3 **b** (1) (*b*) [1]. The allowance for *commutation of rations*, made payable, by the Army appropriation act of February 27, 1893, "to enlisted men traveling on detached duty, when it is impracticable

[1] See sec. 1298, R. S., and par. 1188, A. R., 1910 ed.
[2] See par. 4, circ. 4, A. G. O., 1897.

to carry rations," etc., *held* to be restricted to the period covered by the travel, and not to be payable to a soldier for commutation of rations consumed at the destination where he was placed by his orders on detached duty, viz, for four days board at a hotel at the terminus of his travel. *P. 59, 38, Apr., 1893.*

III A 1. A dismissal of an officer by order of the President does not involve a deprivation of any part of the pay due him, and if the order is so expressed as to dismiss him "without pay or allowances," or in terms to that effect, it is, as to this portion, unauthorized and inoperative. *R. 10, 216, Aug., 1864; 42, 73, Dec., 1878, and 470, Jan., 1880.* So where a legal muster into service of a volunteer officer was *revoked* by order, after an interval of service rendered, with the effect (given to the order) of depriving him of pay for such service, *held* that the so-called revocation was unauthorized and inoperative. A legal executive act can not be thus nullified to the prejudice of a vested right. *R. 42, 470, Jan. 19, 1880.*

III A 1 a. The Executive, in summarily dismissing an officer in time of war, can not at the same time deprive him of pay due. Nor can the right of an officer to his pay for any period prior to a summary dismissal ordered in his case be divested by a dating back of the order of dismissal. Such an order can not be made to relate back so as to affect the status or rights of the officer as they existed before the date of the taking *effect* of the dismissal. *R. 6, 379, 405, Sept. and Oct., 1864; 10, 1, 4, July, 1864; 17, 670, May, 1866; 31, 125, Jan., 1871; 35, 112, Jan., 1874; 42, 73, Dec., 1878, and 470, July, 1880; C. 16823, Sept. 13, 1904.*

III A 2 a. Where a sentence suspended an officer "from the service for the term of six months," *held*, in view of the general principle that pay may not be forfeited by implication, that such sentence could not properly be construed as intending a forfeiture of pay, but should be regarded as imposing a suspension from rank, promotion, and command only; that a larger meaning should not be ascribed to its language merely because it was expressed in general terms.[1] *R. 23, 427, Apr., 1867.*

III B 2. Section 1766, R. S., which prescribes that "no money shall be paid to any person for his compensation who is in arrears to the United States, until he has accounted for and paid into the Treasury all sums for which he may be liable," has not in practice been so strictly construed as to preclude the making of stoppages against the pay of officers and enlisted men in such monthly amounts as to leave a margin for necessary living expenses. Thus where the stoppage against an enlisted man was $100, *advised* that it be collected at the rate of $10 per month. *C. 7415, Dec., 1899; 3292, Dec. 18, 1897.*

III B 3. A civilian, then at Pittsfield, Mass., was duly employed, by the engineer officer in charge of a river improvement, as an assistant at a compensation of $150 per month, and ordered to

[1] The forms, "to be suspended from service" and "from duty," are rarely employed in the military service. The form, "to be suspended from rank and duty," occurs, however, in G. C. M. O. 19, A. G. O. of 1885. Suspension *from duty*, as distinguished from suspension from rank, is a recognized punishment in the *naval* service. Harwood, 134 and 135.

report at Montgomery, Ala. In subsequently settling with him for his services the officer allowed and paid him, in addition to his salary, the amount of his expenses of travel between Massachusetts and Alabama. *Held*, that such allowance was unauthorized as being in excess of the contract, which stipulated only for the payment of the salary named, and was therefore legally stopped by the accounting officers against the engineer officer's pay.[1] *P. 43, 182, Oct., 1890.*

III B 4. Pay due an officer or soldier can not legally be stopped to reimburse a telegraph company for moneys received by a sergeant of the then Signal Corps for transmitting private messages over its line, the same not being a line "operated by the United States," in the sense of the act of March 3, 1883, c. 143, and the indebtedness of the sergeant being to the telegraph company only, not to the United States. *P. 61, 185, Aug., 1893; C. 20083, July 30, 1906.* An officer or soldier can not legally be mulcted of any part of his pay for the satisfaction of a private claim. *P. 33, 171, June, 1889; C. 5446, Dec., 1898; 8355, June, 1900; 11383, Oct. 16, 1901.*

III B 5. A stoppage differs from a fine or forfeiture, in that the latter is imposed as punishment for an offense, while the former is a means of reimbursement or a "charge on account" to make good a loss. A stoppage can not therefore, in the absence of a statute or regulation authorizing it, legally be imposed as a punishment for an offense. *P. 36, 87, Oct., 1889.* But it is entirely legal to stop against a soldier's pay, under the Army Regulations, an amount required to reimburse the United States for loss on account of damage done to public property, while at the same time bringing the soldier to trial by court-martial for the offense involved. *P. 62, 481, Dec., 1893; C. 18115, June 7, 1905.*

III B 6. The United States is not authorized to stop against the pay of an officer or soldier an amount of personal indebtedness to another officer or soldier, though such indebtedness may have grown out of the relations of the military service. Thus, in the absence of a sentence of court-martial forfeiting the same, an officer's pay can not legally be stopped with a view to the reimbursement of enlisted men who have deposited with him money for safe-keeping, which he has failed to return when required, the officer being accountable for the same in a personal capacity only. *R. 12, 510, Aug., 1865; 16, 637, Oct., 1865; C. 11383, Oct. 16, 1901; 20083, July 30, 1906; 26835, July 21, 1910.*

---

[1] It was held by the Court of Claims in Billings *v.* U. S., 23 Ct. Cls., 166, that Sec. 191, Revised Statutes, which declares that the balances stated by the accounting officers "*shall be conclusive upon the Executive branch of the Government*" did not conclude the Secretary of War in the exercise of his legal discretion as to orders issued to his subordinates; that under that section the decision of the accounting officers was conclusive as to the "balances" stated by the accounting officers and their "decision thereon" for the purpose of determining for what amounts, if any, warrants may be drawn on the Treasury; but that when the accounting officers report an officer indebted to the United States, it is a matter wholly within the discretion of the Secretary of War, under Sec. 1766, Revised Statutes, and the Army Regulations "whether to order a stoppage of pay or not." See, also, McKee *v.* U. S., 12 Ct. Cls., 504; Longwill *v.* U. S., 17 id., 291; Hartson *v.* U. S., 21 id., 453; 5 Op. Atty. Gen., 386. The accounting officers of the Treasury have not the burden cast upon them of revising the action, correcting the supposed mistakes, or annulling the orders of the heads of departments. U. S. *v.* Jones, 18 Howard, 96; U. S. *v.* Hahn, 107 U. S., 402; Brown *v.* U. S., 113 id., 568.

III B 6 a. Where a discharged soldier regularly assigned his final statements, which upon presentment for payment were found to call for more than was in fact due, *held* that the difference between the amount paid and the amount erroneously called for on the final statement could be made the subject of a claim against the discharged soldier, the assignor, but not against the United States. The man having reenlisted, it was further *held* that a stoppage against his pay to satisfy the claim above referred to would be a stoppage to satisfy a private claim and therefore not authorized. *C. 8355, June, 1900; 13604, Nov. 11, 1902.*

III B 7. Where certain officers had misappropriated and applied to their own use $589.08, company funds, *recommended* that that amount be stopped against their pay. *C. 7186, Oct., 1899; 15177, Aug. 31, 1903.*

III B 7 a. An officer at the time of his death was accountable for $360, company fund. A board of survey reported that he had left in lieu of the money an unindorsed Government check for that amount, payable to his order and purporting to be for pay due him. It thus appeared that the officer owed the company fund $360, and that the Government owed him the same amount for salary, the check not having been presented and paid. *Advised,* therefore, that as an officer's pay may legally be stopped to reimburse the company fund, $360 be stopped against the pay due the deceased officer, and that the check referred to be returned to the drawer to be canceled. *C. 7957, Apr., 1900; 15177, Aug. 31, 1903.*

III C 1 a (1) (*a*). By the third subdivision of Article III of the Executive order of March 30, 1898 (G. O. 16, A. G. O., 1898), it is provided that in consideration of previous convictions the limit of punishment shall be "dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for three months." Such a sentence means, so far as the forfeiture is concerned, forfeiture of pay and allowances due at the date of the discharge. A court-martial when it has the power to award this sentence may award a lesser one, but in doing so can not award confinement and forfeiture greater in amount than confinement for three months and forfeiture of pay and allowances due, or its equivalent under the rule of substitution authorized in the order.[1] *C. 3694, Apr., 1898; 2381, June, 1896; 2751, Nov., 1896; 13734, Dec. 2, 1902; 17203, Dec. 20, 1904; 17352, Jan. 11, 1905.*

III C 1 a (1) (*a*) [1]. Where a soldier was sentenced "to be dishonorably discharged, forfeiting all pay and allowances, and to be confined for three months," and the dishonorable discharge was remitted in approving the sentence, *held* that the forfeiture was evidently intended to relate to pay due at the date of discharge, and that, as the discharge had been remitted, the forfeiture could apply only to pay due at the date of the receipt at the post of the order publishing the sentence. *R. 51, 176, Dec., 1886.*

---

[1] Since the rendition of this opinion, the Executive order referred to has been amended by adding thereto the following (G. O. 88, A. G. O. 1900): "Article IX. If, in cases where the limit of punishment is dishonorable discharge, forfeiture of all pay and allowances and confinement at hard labor for a stated number of months, dishonorable discharge be not adjudged, the limit of forfeiture shall be all pay due and to become due during the prescribed limit of confinement." See Art. V of Executive order, published in G. O. 204, War Dept., 1908 (Court-Mar. Manual, 1908, p. 60), as amended by G. O. 77, War Dept., 1911.

III C 1a (1) (*a*) [2]. Where an officer was sentenced to be dismissed with forfeiture of pay due, and, subsequently to the approval of the sentence but before such approval had been promulgated to the Army or the officer had been officially notified of the same, he applied for and received the pay due him, *held* that, inasmuch as the forfeiture had not taken effect at the time of the payment, no illegal act was committed by the officer, and that the paymaster who paid him was not properly to be held accountable for the amount paid. *R. 10, 609, Nov., 1864.* So where a soldier in confinement awaiting the result of his trial by court-martial was, contrary to Army regulations 945, paid one month's pay, it was *held* that his title thereto became thereupon vested and was unaffected by the sentence of forfeiture of all pay and allowances subsequently published in his case. *C. 3258, June, 1897; 14787, June 12 1903; 16955, Sept. 29, 1904.*

III C 1 a (2). A sentence expressly forfeiting all pay due a soldier applies only to pay due him under his pending contract. It will not affect pay which may be due for service rendered under a previous enlistment and not yet settled. *R. 14, 371, Apr. 1865; 42, 73, Dec., 1878.*

III C 1 b. The rule prescribed in Army Regulations to the effect that confinement and forfeiture, when the sentence is silent as to the time of their taking effect, shall be *operative from the date of the promulgation of the sentence in orders,* is an exception to the general rule that orders affecting the status or rights of officers or soldiers shall take effect from notice. But where a sentence of dismissal of a cadet of the Military Academy was, on October 31, 1893, commuted to suspension from the academy without pay until August 28, 1894, *held,* that the general rule, in the absence of any specific exception of such a case by the Army Regulations, applied, and that the sentence as commuted took effect upon and from *notice,* the forfeiture commencing to run from date of such notice. *P. 64, 280, Apr., 1894.*

III C 1c (1). A sentence to forfeit all pay and allowances due and to become due forfeits commutation of quarters, fuel, and rations, the same being included in the term "allowances." *R. 53, 270, Apr., 1887.*

III C 1 d (1). Where a sentence of a soldier forfeits "all pay and allowances" for a certain period, the necessary clothing may be supplied. All prisoners in the manual custody of the authorities, civil or military, are entitled to subsistence during their detention, and it can not be forfeited by sentence. *P. 62, 244, Nov., 1893.*

III C 1 e (1). Where the record of the trial of a deserter was destroyed by fire before it could be acted upon (and it could not be reproduced from existing notes), and the accused was thereupon restored to duty, *held,* that the destruction of the record before the reviewing authority had acted on the case, had the legal effect of an acquittal and relieved the deserter from the forfeiture of pay due at date of desertion. *P. 55, 181, Aug., 1892; 65, 338, June, 1894.*

III C 1 f (1). In a case of a forfeiture by sentence, of "pay due" (or "pay due and to become due"), the amount of pay due and payable to the party at the date of the approval of the sentence is, in contemplation of law, returned from the appropriation for the Army to the general treasury and becomes public money, and, being in the Treasury, cannot, without a violation of Article I, section 9, paragraph 7, of the Constitution, be withdrawn and restored to the party except by the authority of Congress. *R. 23, 642 and 659, Aug., 1867;*

28, 63, Aug., 1868, and 567, May, 1869; 29, 139, July, 1869; C. 11594, Nov. 13, 1901; 14068, Jan. 29, 1903; 15510, Nov. 16, 1903.

III C 1 g (1). *Held* that money accruing from forfeitures due to sentences in the cases of soldiers of the Volunteer Army should be left in the Treasury and credited to the pay of the Army. *C. 7696, Feb. 19, 1900.*

III C 2 a. A soldier does not forfeit clothing money due him at date of discharge, if discharged without honor, except for fraudulent enlistment. *C. 2107, Mar., 1896; 18398, Aug. 5, 1905.*

III C 2 b. A court-martial is called into existence for the purpose of enforcing military discipline and not to determine questions of civil liability; and its findings are not conclusive as to such questions. In accordance with this view this office has held that the acquittal of a soldier of desertion, including the criminal offense of absence without leave, did not prevent the forfeiture of pay and allowances accruing during his absence as prescribed by the regulations; i. e., that the acquittal was not conclusive as to the civil obligation under his contract of enlistment to furnish his personal services in consideration of his pay. *C. 12168, Mar. 6, 1902.*

III C 2 c (1). *Held* that one who had entered the Army by a fraudulent enlistment was not entitled, upon his summary discharge without honor on the discovery of the fraud, to be paid the *travel allowance* provided by section 1290, R. S. The principle that the party to a contract, against whom a fraud is committed by the other party in entering into the contract, may at once rescind the contract, the defrauding party thereupon losing all rights and profits under it, applies equally to contracts of enlistment. *P. 54, 373, July, 1892.*

III C 2 c (2). In the case of a soldier discharged without honor from the Army because of his punishment by a civil tribunal, *held* (in view of the rulings of the comptroller on the point) that the soldier may be considered as having been discharged "by way of punishment for an offense" within the meaning of section 1290, R. S., and of the act of March 2, 1901, which provides that the soldier so discharged shall not receive travel pay. *C. 14937, July 15, 1903; 14642, May 22, 1903.*

III C 2 c (3). Discharges are granted by way of favor, upon the application of the soldiers eligible therefor and subject in each case to a waiver of travel allowances.[1] *C. 15176, Sept. 4, 1903. Held* that this waiver could legally be required; and that the soldier, by applying for the discharge, consents to such waiver as a condition upon which the discharge will be granted. *C. 1862, Dec., 1895.* As the discharge can be granted only by the President or Secretary of War, a department commander has no authority to refuse to forward an application therefor. *C. 203, Aug., 1894; 9336, Nov. 26, 1900; 14002, Jan. 19, 1903; 14937, July 11, 1903.*

III C 2 c (4). A soldier sentenced to dishonorable discharge only, being discharged by way of punishment for an offense, forfeits his travel pay under section 1290, R. S., by operation of law. *C. 3608, Nov., 1897.*

---

[1] See II Comp. Dec., 252; VI id., 326. See par. 8, G. O. 90, War Department, series 1911, which reads: "Discharges by favor, as distinguished from purchase, are illegal, and will not be granted except under the conditions set forth in par. 9 of this order." Soldiers discharged under par. 9, G. O. 90, 1911, are entitled to travel pay. VI Comp. Dec., 686.

III C 2 d. Where a revolver was lost by a soldier, and he was acquitted by a court-martial, but the findings were disapproved; *held*, that the cost of the revolver should be charged against his pay. *C. 22144, Oct. 15, 1907.*

III D 1. The only *fine* known to military law is the fine authorized to be imposed by way of *punishment* by sentence of court-martial. No military commander is empowered under any circumstances to impose a fine upon an officer or a soldier. *R. 8, 444, May, 1864.*

III D 2. Fines adjudged by courts-martial accrue to the United States. A court-martial can not impose a fine for the benefit of an individual, nor can a fine adjudged in general terms be in any part appropriated for the benefit of an individual by executive authority. *R. 7, 52, 643, Jan. and May, 1864; 8, 632, June, 1864.* A court-martial, in sentencing a party to pay a fine, has no authority to direct the collection of the same by a provost marshal, or by any compulsory process: such a direction added in a sentence should be disregarded as mere surplusage. *R. 8, 298, Apr., 1864.*

III D 3. A fine is distinguished from a "stoppage." The former is a *punishment* and therefore imposable only by court-martial. The latter is a *charge on account*, being an enforced reimbursement, by means of a debit entered against the pay of the party on the rolls, either for an amount due the United States—as for the value of public property lost, extra clothing issued, reward paid for apprehension as a deserter, etc., or for an amount due an individual and expressly authorized by law or regulation to be thus charged. *R. 35, 457, July, 1874; P. 38, 88, Jan. 1890.*

III E 1. A sentence forfeiting pay can be remitted only as to pay not due and payable at the date of the remission. *R. 1, 393, Oct., 1862; 8, 392, 576, June, 1864; 9, 196, May, 1864; 10, 676, Dec., 1864; 35, 372, May, 1874; 50, 221, Apr., 1886; P. 34, 334, Aug., 1889.* Where a soldier's pay has been forfeited by an executed sentence, no mere amendment of the muster-roll upon which the same has been noted can operate to undo such forfeiture. *R. 30, 44, Sept., 1869.* If, however, the sentence was in fact illegal and void, the soldier should be credited on subsequent rolls with the forfeiture as having been illegally collected and the amount refunded to him. *C. 5392, Nov., 1898; 11594, Nov. 13, 1901; 11742, Dec. 11, 1901; 11786, Dec. 23, 1901; 11576, Jan. 8, 1902; 12596, May 10, 1902; 16955, Sept. 28, 1904.*

III F 1. The sentence of dismissal in the case of a West Point cadet was commuted to suspension. *Held*, that no forfeiture of pay was involved in the suspension.[1] *C. 3226, May 26, 1897.*

CROSS REFERENCE.

Cadets not entitled to mileage.....See ARMY I D 5.
Deserter.....See DISCHARGE II B 2.
Forage to retired officers.....See ARMY I G 3 b (2) (c).
Medical Reserve Corps officer.....See ARMY I G 3 d (3) (c) [2].
Mileage to retired officers.....See RETIREMENT I M to N.
Militia.....See MILITIA VI B 2 h.
Officer fails on promotion.....See RETIREMENT I B 6 c (2); (3).
Officer wholly retired.....See RETIREMENT I N 3.
Retired officer on college duty.....See RETIREMENT I K 3 a.
Soldier while absent.....See ABSENCE II B 8 a.
DESERTION XIV A 1.

[1] See 32 Ct. Cls., 139.

PAYMASTER'S CLERK.

Appointment of.....See Office III E 2.

PEACE OFFICER.

Arrest of deserters.....See Desertion III A to H; V A to G.

PENAL STATUTE.

Forty-eighth article of war.....See Articles of War XLVIII D.

PENALTIES.

See Contracts XIX to XX.

PENALTY ENVELOPES.

Use of.....See Communications II A to B.
Use of, by militia.....See Militia XIV A.

PENITENTIARY.

Clemency.....See Articles of War CXII A 1 c (1).
Confinement in.....See Articles of War XCVII A to E.
Desertion X C 1; 2.
Delivery of prisoner to.....See Discipline XVII A 4 h (1).
Discharge without honor for incarceration in.See Discharge III F 1.
Mitigation of confinement in.....See Discipline XIV H 3.
Sentence to confinement in.....See Discipline XIV E 9 a (17); g; g (1).

PENSION.

I. ARMED QUARTERMASTER'S EMPLOYEES.
A. In Philippines.
1. Did not have pensionable status..... *Page 871*
II. PENSION MONEY.
A. Before Payment Not Subject to Attachment.

I A 1. During the Philippine insurrection a force of armed Filipinos was formed in the Quartermaster's Department, which in the case of certain organizations was called Macabebe Scouts. *Held* that this was an organization of civilians and that they had no pensionable status. *C. 11981, Feb. 27, 1902, and Apr. 29, 1903.*

II A. *Held* that pension money is exempt from attachment or seizure, under Section 4747 R. S., before payment to the pensioner, but no such exemption exists in favor of property purchased with pension money.[1] *C. 6393, May 12, 1899; 6799, July 29, 1899; 7823, Mar. 17, 1900; 6430, Dec. 5, 1908; 24346, Jan. 19, 1909.*

CROSS REFERENCE.

Administration of pension laws.....See Enlistment I D 3 e (1).
Retired officer as counsel in case of.....See Retirement I G 2 a.
Taxation of pensioner.....See Tax I to II.
Waiving right to.....See Office III A 5.

[1] See McIntosh *v.* Aubrey, 185 U. S., 122.
Memo.—In some States lands purchased out of pension money are exempt from taxation, but there is no such exemption under any law of the United States.

PER DIEM EMPLOYEE.

See CIVILIAN EMPLOYEES.

PERJURY.

Evidence of.....See DISCIPLINE XI A 9;9 a.
Proof of.....See DISCIPLINE XV F 1.
Under fifty-ninth article of war.....See ARTICLES OF WAR LIX I 3.

PERMIT.

Structures, etc.....See NAVIGABLE WATERS V to VI.

PERSONAL PROPERTY.

See PUBLIC PROPERTY I A 3.
Public, can not be loaned by Secretary of War.See PUBLIC PROPERTY I C.
Public, title to after treaty of peace.....See WAR I D 1.

PERSONAL SERVICE.

Under 3709, Revised Statutes.....See CONTRACTS VII D.

PERSUADING TO DESERT.

See ARTICLE OF WAR LI A.

PETITION.

By officer.....See DISCIPLINE II A 1 d.

PHILIPPINE CONSTABULARY.

See TERRITORIES IV B to C.
Command by chief of.....See ARMY II G 1 a; 2 a (1).
Officers.....See RETIREMENT II A 3 a.

PHILIPPINE INSURRECTION.

See WAR I B 3; F 3.

PHILIPPINE ISLANDS.

See TERRITORIES IV to V.
Civil courts, jurisdiction of.....See ARTICLES OF WAR LVIII D.
Civil government, duty with.....See ABSENCE I B 1 g (3).
Civil governor.....See ARMY II G 2 a (1).
Civil office.....See OFFICE IV A 2 d (2) to (3); e (6) (*b*) to (7).
Colleges in.....See MILITARY INSTRUCTION II B 1 d.
See RETIREMENT I K 3 b.
Enemy's property.....See CLAIMS VII A.
Extradition from.....See EXTRADITION IV.
Fifty-fourth article of war.....See ARTICLES OF WAR LIV G.
Military governor.....See CLAIMS VII E.
Natives.....See ENLISTMENT I C 1 f.
Naturalization in.....See ALIEN III.
Order in.....See ARMY II G to H.
Philippine bonds.....See BONDS I H 4.
Sureties for contracts.....See BONDS V J.
Transport.....See RETIREMENT II A 4 b (2).

PHILIPPINE SCOUTS.

See ARMY II to III.
Certificate of merit.....See INSIGNIA OF MERIT II H 2.
Chief of Constabulary.....See ARMY II G 1 a; 2 a (1).
Death.....See GRATUITY I B 3 a.
Desertion.....See DESERTION XIV B 1.
Insane.....See DISCHARGE XIII D 4 b.
ARMY II G 1 a.
Not foreign service.....See RETIREMENT II A 4 c.
Officer.....See RETIREMENT I B 5 a; II A 3; D 2.
Part of Regular Army.....See ARMY I G 2 a (2) (*a*).
ARTICLES OF WAR LXXVII A 1.
DISCHARGE VI D 6.
Reenlistment bonus.....See PAY AND ALLOWANCES I C 5 c.

PIRATES.

Recovery of property from salvage..... See CLAIMS VI A.

PLEA IN ABATEMENT.

See DISCIPLINE II D 17 a; II 2; IX F 2 a; XIV E 7 c.
Incorrect description.....See DISCIPLINE XIV E 7 a.

PLEA IN BAR.

Civilian status.....See DISCHARGE XIII D 6 b.
Desertion cases.....See ARTICLES OF WAR XLVIII F.
Pardon.....See DISCIPLINE IX F 1 a to b.
Statute of limitations.....See ARTICLES OF WAR CIII B.

PLEDGE.

Abstain from use of liquor.....See PARDON XV A.
Accompanying resignation.....See OFFICE IV D 4.
Violation of.....See ARTICLES OF WAR LXI B 5; LXII D.

POLICEMAN.

Witness fees of.....See DISCIPLINE X I 8.

POLICY.

Character, how affected by trial.....See ENLISTMENT I D 3 d (5).
Civil authorities, turning prisoners over to..See ARMY I A 6.
Civil courts, defense of officers.....See ARMY I B 5 a.
Collection of private debts.....See PRIVATE DEBTS IV.
Congressional relief for officers.....See ARMY I B 6 a.
Counsel for accused officers.....See DISCIPLINE V G 6.
Deserters, reenlistment of.....See ENLISTMENT I D 3 c (14).
DISCHARGE II B 2 a.
Discharge without honor.....See DISCHARGE III B; B 1 to 5a.
Discharge without honor not to be given after acquittal.....See DISCHARGE III B 4.
Discharge without honor not given after trial on issue.....See DISCHARGE III B 5.
Enlistments, unconditional.....See ENLISTMENT I A 6.
Fraudulent enlistments, disposition of.....See ENLISTMENTS I A 9 g to k.
Judge Advocate General as to State questions.See ARMY I G 3 a (4) (a) [4].
Military instruction of civilians.....See RETIREMENT I K 3 c.
Minor, age how fixed.....See DISCHARGE XII B 1.
Minors, discharge of.....See DISCHARGE XII D 1; 2.
Neutrality cooperation with State.....See ARMY II K 1 g (1); (2).
Reenlistment of deserters.....See DISCHARGE II B 2 a.
Sentence set aside.....See DISCHARGE III B 5 a.
Trial in case of homicide.....See DISCIPLINE XVII A 4 g (6).
United States in Philippine Islands.....See CLAIMS VII A.

PORTO RICO.

Civil office in.....See Office IV A 2 e (6) (*a*).
Colleges.....See Military Instruction II B 1 g.
Retirement I K 3 c.
Funds of.....See Claims V.
Military commission, confinement of natives.See Appropriations LXI.
Military government customs.....See Public Money I I.
Natives, appointment of.....See Office III A 1 c (2).
Provost courts.....See War I C 8 a (4).
Public domain.....See War I C 6 c (3) (*f*) [1].
Public property.....See War I D 1.
Punishment.....See Discipline XII B 2 e.
Regimental appointments.....See Army I G 2 a (1) (*a*); (*b*).
Office III A 1 c (1).
Sovereignty over.....See Enlistment I C 1 e (1).

POSSE COMITATUS.

See Army II F; I 1.
Alaska.....See Territories III B.

POST COMMANDER.

Church, can not require attendance at.....See Articles of War LII A.
Civilians.....See Command V A 2 a; 3 a; b; c; c (1); d (1); f; g; 8.
Discipline XVII A 4 g (4).
Public Property II B 3 a.
Death of officer or soldier.....See Articles of War CXXVII A.
Command V A 7.
Duty, always on.....See Articles of War XLVIII B 1.
Exceeds authority.....See Command V A 2 e; f 4.
Fifty-fourth article of war.....See Articles of war LIV A to LIV H 2.
Fifty-ninth article of war.....See Articles of War LIX A to L 2.
General court-martial, authority over.....See Command V A 4; 5.
Joint encampment.....See Articles of War CXXII B.
Leave, granting of.....See Absence I B 1 c (1).
Command V A 1 b.
Mitigation by.....See Articles of War CXII E.
Officers, relieved.....See Absence I B 1 e.
Command V A 1 a.
Post exchange council.....See Government Agencies II J 3.
Privileges refused by.....See Command V A 2 a.
Saloons, etc.....See Command V A 2 b.
Sentence, suspension of.....See Discipline XVII A 4 e.
Sick, control over.....See Command V A 2 d.
Summary court.....See Discipline XVI E to F.
Telegrams.....See Communications III A.
Travel orders by.....See Command V A 1 c.
Warrant of arrest, receipt of.....See Articles of War CII I.
Writ of habeas corpus, receipt of.....See Command V A 6 a; b; b (1); (1) (*a*).

POST COMMISSARY SERGEANT.

Summary discharge of.....See Discharge XXV A.

POST EXCHANGE.

See Government agencies.
Appropriation for.....See Appropriations XXIX.
Contracts by.....See Government agencies I E.
Debt to.....See Articles of War LXII D.
Laundry work.....See Contracts VII I.
Library books.....See Public property IX A 3 a.
Militia.....See Militia XV to XVI.
Reimbursement by retired soldier.....See Retirement II C 2.
Stoppage of pay to reimburse.....See Government agencies I B.

POST HOSPITAL.

See Army I G 3 d (8) to II.

POST LIBRARY.

Books for.....See Public property IX A 3 a.

POSTMASTER.

Enlisted man as.....See Army I E 8 a (1).
Oath by.....See Office III A 8 a (2).
Witness fees of.....See Discipline X I 9.

POST NONCOMMISSIONED STAFF OFFICER.

See Army I E 2 a; b; c.
Summary discharge of.....See Discharge XXV A.

PRACTICE MARCH.

Evasion of.....See Articles of War XXXII C.

PRESENT.

Acceptance of, by officer.....See Army I C 4.

PRESIDENT OF COURT-MARTIAL.

See Discipline VI G 1 to 3; VII C 2; IX L 1.
Record corrected by.....See Discipline IX N 6.

PRESIDENT OF UNITED STATES.

As Commander in Chief.....See Army I A to B.
As convening authority.....See Discipline III B to C.
Disrespect to.....See Articles of War XIX A.
As Reviewing Authority.....See Discipline XIV H to I.
Pardon by.....See Pardon I to II.

PREVIOUS CONVICTION.

See Articles of War LXXXIV C 3.
Board of officers.....See Discharge III C.
Evidence of.....See Discipline XII B 1 to 2.
Of desertion.....See Desertion X B.

PRISONER.

Counsel.....See Command V A 5.
Illegally released.....See Discipline XIV G.
Interned.....See Army II K 1 h (1).

PRISONER OF WAR.

See Claims VIII.
See War I C 11 to 12.
Abuse of.....See War I C 8 a (3) (*d*) [5].
Charge of desertion removed.....See Desertion XVI C 1.
Enlistment of.....See Desertion I C 2.
Muster out of.....See Discharge XIII F.
Volunteer Army IV D 1 a (4) (*c*).
Officer, dismissal of.....See Office IV E 1 a.
Trial by military commission.....See War I C 8 a (3) (*b*) [2]; (*c*) [1] [*a*].

PRIVATE CORRESPONDENCE.

Evdience of.....See Discipline XI A 17 *b* (1) (*a*).

PRIVATE DEBT.[1]

I. DISTINGUISHED FROM DEBT TO UNITED STATES ..... *Page 876.*
II. STOPPAGE OF PAY FOR—ACT OF JULY 16, 1892 ..... *Page 877.*
III. WAR DEPARTMENT WILL NOT PROTECT OFFICERS AND SOLDIERS AGAINST SUITS TO COLLECT PRIVATE DEBTS. COUNSEL NOT FURNISHED TO RESIST EXECUTION ALTHOUGH JUDGMENT ARISES OUT OF OFFICIAL CONDUCT.
IV. PROCEDURE ON COMPLAINT OF FAILURE TO PAY..... *Page 878.*
V. JUDGMENT CONCLUSIVE AS TO INDEBTEDNESS..... *Page 879.*
VI. DEBTS INCURRED BEFORE ENTERING SERVICE.
VII. WHEN LIST OF PRIVATE DEBTS MAY BE REQUIRED OF OFFICER.
VIII. OFFICERS MAY NOT APPLY MONEY OF SOLDIER IN THEIR CUSTODY TO HIS PRIVATE DEBTS..... *Page 880.*
IX. ARREST OF SOLDIER ON MESNE PROCESS, ETC. SECTION 1237, REVISED STATUTES.
X. DEBTS OF CIVILIAN EMPLOYEES.
XI. EXEMPTION FROM ATTACHMENT OR EXECUTION..... *Page 881.*

I. By "private indebtedness" is meant an indebtedness to a private creditor as distinguished from an indebtedness to the United States or to an agency or instrumentality of the United States. The fact that all parties connected with the alleged indebtedness are members of the Army does not alter the private character of the indebtedness. *C. 14438, June 29, 1910.* The fact that the indebtedness has grown out of the relations of the military service does not alter the private character of the indebtedness, as, where a discharged soldier regularly assigned his final statements, which upon presentment for payment were found to call for more than was in fact due, and the soldier reenlisted. *Held*, that the difference between the proper amount which was paid and the amount erroneously called for on the final statements was not an indebtedness owing by the soldier to the United States, and the pay of the soldier can not be stopped to satisfy it. *C. 13604, Mar. 20, 1903; 22247, Oct. 24, 1907.* So where a discharged soldier regularly assigned his final statements, which upon presentment for payment, were found to call for more than was in fact due, *held*, that any claim growing out of the fact that the officer signing the final statements made erroneous entries on them was not a claim in favor of the United States, but was a private claim in favor of the assignee. *C. 13604, Aug. 17, 1911.*

In the following instances it was held that the indebtedness was a private indebtedness for the satisfaction of which the officer's or soldier's pay could not be stopped or diverted. A claim by a wife against her husband, an Army officer, for support of herself and children (*C. 26935, July 18, 1910*); or a decree for alimony against an Army officer or soldier on the active or retired list (*C. 3500, Sept. 9, 1897; 6882, Aug. 15, 1899; 13439, Oct. 14, 1902; 17915, May 4, 1905; 22358, Dec. 3, 1907; 26991, July 20, 1910*); *13395, Oct. 19, 1910;* or a decree for alimony against a soldier, rendered before enlistment (*C. 7635, Feb. 3, 1900; 11383, Oct. 16, 1901*). A claim by the wife based on a formal separation agreement duly signed by an Army officer and his wife, whereby he agreed to pay her a fixed sum periodically and to deposit his pay accounts regularly with the proper paymaster with an indorsement directing the paymaster to pay his wife a certain sum (the reason being that the officer's promise in the

[1] Prepared by Maj. H. M. Morrow, judge advocate, assistant to the Judge Advocate General, United States Army.

agreement was equivalent to no more than an acknowledgment of a private indebtedness). *C. 26991, July 22, 1910.* A claim against a soldier for taxes due a Russian Commune from which the soldier had emigrated. *C. 24922, May 8, 1909.*

Pay due a soldier can not be stopped to reimburse a telegraph company for moneys received by the soldier (a sergeant of the Signal Corps), for transmitting private messages over its line, the same not being a line "operated by the United States" in the sense of the act of March 3, 1883 (22 Stat. 616), and the indebtedness of the sergeant therefore being to the telegraph company and not to the United States. *P. 61, 185, Aug. 24, 1893.*

Notwithstanding that an officer's mess is aided by an allowance of public quarters and fuel, such a mess is a private undertaking and indebtedness due from an officer can not be stopped against his pay. *C. 18016, May 18, 1905.* Notwithstanding that the regulations for the government of the Infantry and Cavalry School provide that the commandant may "assign an officer to the duty of supervising the accounts of the messes established for the accommodation of student officers," it appearing that such messes are not operated by the United States, and that no Government obligation is incurred in respect to their maintenance, the indebtedness of an officer to the officers' mess is a private indebtedness, and his pay can not be stopped to satisfy such indebtedness. *C. 22200, Oct. 22, 1909.* Notwithstanding the fact that a laundry at a post is designated "post steam laundry," and is operated under regulations of the War Department providing for proper sanitary supervision, as the United States incurs no obligation in respect to its maintenance, the indebtedness of an officer to the laundry is a private indebtedness and his pay can not be stopped to satisfy such indebtedness. *C. 22200, Oct. 22, 1907.*

II. The pay of an officer or soldier can not be stopped or diverted for the payment of private indebtedness or a private claim, except as provided by statute. *C. 5446, Dec. 10, 1898; 6103, Mar. 23, 1899; 6882, Aug. 13, 1899; 13395, Apr. 29, 1909.* The Army appropriation act of July 16, 1892 (27 Stat. 177), provides that "the pay of officers of the Army may be withheld under section 1766, R. S., on account of an indebtedness to the United States admitted or shown by the judgment of a court, but not otherwise unless upon a special order issued according to the direction of the Secretary of War." *Held,* that the last part of this provision (the words "unless upon a special order issued according to the direction of the Secretary of War") was to be construed not separately but in connection with the former, and relates only to stoppages against persons in arrears to the United States, and could not be interpreted as empowering the Secretary of War to stop the pay of officers of the Army to satisfy private debts. *P. 64, 154, Mar. 13, 1894; C. 7635, Feb. 3, 1900.*

III. Officers and soldiers may be sued in the civil courts by their alleged private creditors and it is not the policy of the War Department to afford them protection against such suits. *P. 64, 63, Feb. 27, 1894; C. 23624, July 21, 1908; 20063, Apr. 25, 1910.* After a final personal judgment has been rendered against an officer the War Department will not recommend that counsel be furnished at the Government expense or that other affirmative action be taken by the Department to enable that officer to resist the execution of

the judgment, even though the judgment is based on conduct of the officer connected with his official position, as, for instance, where the officer, in obedience to the order of his commanding officer, removed certain trespassing horses from the reservation, but the owner claimed the horses were removed in a cruel and wanton manner, thereby damaging the animals, and the jury so found. *C. 22007, Apr. 18, 1911.*

IV. The military authorities will not compel officers and soldiers 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, he will be advised to settle it, and in case of failure to do so as rapidly as his financial condition permits an officer may be brought to trial if his failure is considered to be a violation of the sixty-first [1] or sixty-second

[1] In U. S. *v.* Fletcher, 26 Ct. Cls., 541, the question was raised by counsel as to the sufficiency of specifications alleging nonpayment of indebtedness to sustain a charge of "conduct unbecoming an officer and a gentleman," and the court decided that this may consist in refusing to pay a debt, adding: "It must be confessed that, in the affairs of civil life, and under the rules and principles of municipal law, what we ordinarily know as fraud relates to the obtaining of a man's money, and not to refusing to pay it back. * * * In military life there is a higher code, termed honor, which holds its society to a stricter accountability; and it is not desirable that the standard of the Army shall come down to the requirements of a criminal code."

"The Secretary of War does not undertake the collection of debts due private persons from officers and soldiers, nor to require a preference for any particular creditor in payment in such cases. His aim is to protect the character and standing of the Army, and to eliminate from it those guilty of dishonorable conduct. Where charges of such conduct are made they will be promptly investigated, and where statements of nonpayment of debts are made against officers, they will be investigated with this end in view." Ruling, Secretary of War, Nov. 18, 1897, copy filed with documents to C. 3649, J. A. G. O."

Complaints of nonpayment of debts due from officers on the active list and under the control of department commanders are in practice referred for the "necessary action" to the proper headquarters and the complainants notified of the above ruling of the Secretary of War. The complaints need not be accompanied by or be in the form of formal charges. A statement of the acts and conduct complained of is sufficient as a basis for investigation. Formal charges can be prepared when as a result of the investigation such action is required.

In Cir. 47, W. D., July 16, 1910, the War Department announced its policy as to assisting in the collection of private debts of enlisted men as follows:

"In view of the fact that the practice by dealers of selling articles of merchandise to enlisted men on credit burdens the War Department with unnecessary correspondence in the cases of nonpayment of the indebtedness, and that such transactions, which are rapidly increasing in number, often involve enlisted men in debts which they can not pay, and frequently lead up to desertion, the following statement of the policy of the department with respect to this matter is published for the information and guidance of all concerned:

"The department will no longer concern itself with the business of persons, firms, or corporations selling merchandise to enlisted men on credit, and all communications with respect to such sales, and all arrangements looking to the establishment of such business relations, must be had with the commanding officers of the organizations to which the enlisted men belong. The War Department will decline to assist, by answering inquiries or otherwise, in securing the payment of obligations of this character that are incurred without the previous knowledge and consent of the commanding officers of the organizations to which the debtors belong."

article of war, and a soldier may be tried if his failure is considered to be a violation of the sixty-second article of war, but no action will be taken by the military authorities to enforce payment. 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. *C. 13047, Aug. 21, 1902; 14438, Apr. 6, 1903, and June 29, 1910; 13395, June 26 and July 5, 1906; 20083, July 30, 1906; 23286, May 25, 1908; 20063, Apr. 25, 1910, May 25 and Dec. 11, 1911; 26991, July 22, 1910, and May 23, 1911; 13604, Aug. 17, 1911.* 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, *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. *C. 13395, Aug. 18, 1910.*

V. After a claim against an officer or soldier has been reduced to a final personal judgment, if no proceedings are pending to set it aside it will be considered by the War Department as an indebtedness beyond dispute. *C. 20063, Apr. 25 and May 4, 1910; 26858, June 8, 1910; 26991, May 23, 1911.* An explanation of the nature of the judgment claim, and such defenses to the merits of the judgment claim as could have been presented to the court, will not be considered by the War Department to determine whether there is an indebtedness in fact, the judgment being deemed conclusive on that point, but the explanation and defenses may be considered to determine whether the failure to satisfy the judgment properly constitutes a violation of the sixty-first or sixty-second article of war. *C. 9651, July 29, 1902; 13576, Feb. 2, 1903; 14438, Apr. 6, 1903; 15111, Aug. 17, 1903; 20063, Apr. 25 and May 4, 1910; 26858, June 8, 1910; 26991, July 20, 1910.* No distinction will be made between judgments based on a contract and those based on a tort. *C. 20063, May 4, 1910; 26858, June 8, 1910.*

VI. The War Department will not make private indebtedness [1] or an irregular transaction of an officer or soldier antedating entry into the service the basis of charges, but if conduct since entry into the service in respect to matters antedating entry constitutes a military offense charges may be preferred on account of such conduct. *C. 15088, Aug. 12, 1903; 13395, June 23, and Oct. 4, 1910.* A dishonorable failure of an officer since entry into the service to pay private indebtedness contracted before entry may properly be made the basis of charges. *C. 19829, Mar. 24, 1910.*

VII. Where the failure of an officer to pay his private debts threatens scandal to the service it becomes the duty of the officer's superiors to investigate his indebtedness and to call upon the officer for information. Under such conditions the officer may legally be ordered to submit to superior authorities a schedule of all his private indebtedness, and a refusal to obey the order will constitute a violation of the twenty-first article of war. *C. 19525, Apr. 13, 1906.*

---

[1] Sec. 1237, R. S., provides "No enlisted man shall, during his term of service, be arrested on mesne process, or taken or charged in execution for any debt, unless it was contracted before his enlistment, and amounted to twenty dollars when first contracted."

VIII. Private B claimed that Private A owed him money. Private A was discharged without paying the alleged debt. Subsequently Private C being indebted to Private A gives a sum of money to the former company commander of Private A as money due Private A. The company commander, without the consent of the former Private A, pays this money to Private B to apply on the former Private A's alleged indebtedness to Private B. *Held* that the company commander had no authority to adjudicate and settle the alleged indebtedness of the former Private A, and is liable to him for the amount paid to Private B. *C. 14439, Apr. 6, 1903; 21947, Aug. 21, 1907; 13395, Sept. 3 and Oct. 4, 1910.* So where a company commander took the money of a soldier of his company at the pay table and applied it without the soldier's consent to the payment of certain alleged indebtedness, *held* that his action was completely without the authority of law and he would be liable to the soldier for the money so expended. *C. 13395, Sept. 3, 1910.*

IX. The arrest of an enlisted man for a contempt in not complying with the legal order of a civil court to pay a certain sum for the maintenance of his wife, is a legal proceeding and not within the prohibition of section 1237, R. S., that "no enlisted man shall, during his term of service, be arrested on mesne process, or taken or charged in execution for any debt, unless it was contracted before his enlistment and amounted to twenty dollars when first contracted." Such an arrest is not an arrest "on mesne process" or "in execution for a debt," but an arrest on a judgment on conviction of a criminal offense,[1] analogous to an imprisonment duly adjudged on conviction of an ordinary crime or misdemeanor. *P. 51, 475, Feb. 1, 1892.* There is no statute like 1237, R. S., by which a commissioned officer is exempted from arrest for debt, where such arrest is otherwise legally authorized. *R. 33, 8, Mar. 23, 1872.*[2]

X. The salary of a civilian employee can not be stopped for the payment of private indebtedness even though it is a judgment debt. *C. 18830, Nov. 14, 1905.* The fact that the indebtedness has grown out of the relations of the military service does not alter the private character of the indebtedness, as, for instance, where the alleged indebtedness consisted of the claim of a soldier against a civilian employee for the loss of the soldier's property caused by the official negligence of the employee (*C. 26835, June 4, 1910*), or where the indebtedness consisted of a claim of a civilian for damages against the civilian master of a Government tug on account of injury caused by gross carelessness of the master in handling the tug. *C. 24258, Dec. 28, 1908.* As a contract surgeon is a civilian employee his pay can not be stopped to pay a judgment in favor of a private person. *C. 23759, Aug. 24, 1908.* However, if the circumstances connected with the indebtedness of a civilian employee make his honesty questionable

[1] That contempt of court is "a specific criminal offense." See New Orleans *v.* Steamship Co., 20 Wall., 387, 392.

[2] See Moses *v.* Mellett, 3 Strobh., 210; McCarthy *v.* Lowther, 3 Kelly, 397; Ex parte Harlan, 39 Ala., 565. But note in this connection the general principle of public policy by which public servants are exempted from arrest on *civil* (though not on *criminal*) process while on public duty. United States *v.* Kirby, 7 Wall., 482; Coxson *v.* Doland, 2 Daly, 66.

action may be taken looking toward dismissal.[1] *C. 18830, Nov. 14, 1905.* Where a civilian loaned money to a Government clerk the money to be loaned by the clerk to his fellow employees at a usurious rate of interest; *held*, that the loan to the clerk was partly on the strength of the clerk's official position and that it would be proper to compel the clerk to repay the loan in installments under penalty of dismissal for failure to do so, on the ground that the evasion of his obligation to repay the loan would constitute dishonesty on the clerk's part. *C. 27856, July 12, 1911.*

XI. *Held* that the personal property of an officer required to be possessed and used by him in the regular performance of his military duties—as, for example, his sword, or, in a case of a mounted officer, his horse—could not legally be seized upon an attachment or execution issued in a suit brought in a State court. *R. 33, 8, Mar. 23, 1872.*

Held, on the analogy of the principle protecting an officer's pay from being taxed by the authorities of a State that the necessary baggage of an officer traveling on duty, of not greater amount than allowed by the Army Regulations to be transported with him at the public expense, was properly exempt from attachment in a suit for a private debt. An officer, however, can not be allowed to claim such an exemption to an unreasonable extent, and should he assume to transport or procure to be transported with him any considerable amount of baggage greater than that permitted by the regulations, he would justly become liable to the consequences of the abuse of his privilege. In such a case he could not claim to be sustained by the Government in resisting an attachment or execution levied upon his effects. *R. 35, 484, July 15, 1874.*

CROSS REFERENCE.

Court-martial has no jurisdiction over.....See PAY AND ALLOWANCES III D 2.
For medical attendance while absent.....See CLAIMS VIII.
Nonpayment of.....See ARTICLES OF WAR LXI B 9 a; b; 9 c; LXII D.
Pay not stopped to satisfy.....See CIVILIAN EMPLOYEES II A.
PAY AND ALLOWANCES III B 4; 6.
Retired soldier.....See RETIREMENT II B 3 a.

[1] Under date of Apr. 2, 1902, the Secretary of War issued the following circular:

"Hereafter the War Department will take no cognizance of a debt complaint against an employee, so far as the creditor is concerned, beyond acknowledging receipt of his communication. Creditors and collectors will be denied access to employees for the purpose of presenting or collecting claims during the hours set apart for the transaction of public business.

"But while the Department will not permit itself to be used as a collection agency, it will not harbor any one who contracts a debt on the strength of his official position and then without sufficient excuse neglects to make payments, and upon receipt of a debt complaint it will be referred to the proper chief of bureau for a report in writing from the employee concerned, which, together with a notation of the conclusions reached by the Department in the matter, will be made part of the official record in his case.

"An employee who contracts indebtedness on the strength of his official position and then without sufficient excuse or reason neglects or avoids payment thereon will be discharged."

While the above circular does not in words rescind a former circular dated May 19, 1897, issued by the Secretary of War, it partially covers the ground covered by the former.

PRIVATE PROPERTY.

Abandoned.....See PUBLIC PROPERTY I K.
Capture during war.....See WAR I C 6 c to d.
Damage to.....See APPROPRIATION LVIII.
ARTICLES OF WAR LIV to LV.
MILITIA VI B 2 m; C 1 i; j.
Destruction in battle.....See WAR I C 6 a to b.
Escheat.....See ARMY I G 3 d (8) (*b*).
Exemption from attachment.....See PENSIONS II A.
PRIVATE DEBTS XI.
Finding.....See ARMY I G 3 b (2) (*a*) [3] [*d*].
Forfeiture of.....See DISCIPLINE XII B 3 e (3); XIV C.
General average contribution.....See CLAIMS VI C.
Larceny of, in hospital.....See CLAIMS IX; XII R.
Medal of honor.....See INSIGNIA OF MERIT I A 1 c.
Navigable waters.....See NAVIGABLE WATERS I A 1 a (1).
Occupation of.....See CLAIMS IV; VII C to D.
CONTRACTS XXV.
Prisoner's.....See DISCIPLINE XVII A 4 g (5).
Recapture.....See WAR I C 6 c (3) (*e*) [1].
Reserved for public use.....See PUBLIC PROPERTY III A 2.
River and harbor work.....See NAVIGABLE WATERS X D 3.
Salvage of.....See CLAIMS VI B.
Soldier's clothing is not.....See PAY AND ALLOWANCES II A 3 a (4) (*a*); (*c*).
Taxation.....See TAX.
Use of, during war.....See WAR I C 6 b (1) to (2).
Warrants of noncommissioned officers.....See ARMY I E 1 a.

PRIVILEGE.

Arrest is not.....See DISCIPLINE I D 2.
Contract surgeon purchasing supplies.....See ARMY I G 3 d (4) (*c*).
Enlistment.....See ENLISTMENT I B 3 a; D 3 c (6).
Leave of absence.....See ABSENCE I B 1 a; C 1.
COMMAND V A 1 b.
Medical reserve officers.....See ARMY I G 3 d (3) (*c*) [1].
National Guard customs.....See MILITIA III J.
Promotion.....See ARMY III B 2.
Trial is not.....See DISCIPLINE V A.
Withholding of, by commanding officer.....See DISCIPLINE XVII A 2.

PRIZE MONEY.

Not authorized.....See WAR I C 6 (*c*) (3) [*c*].

PROCEDURE OF BOARD.

Retiring.....See RETIREMENT I B 1 d to e.

PROCEDURE OF COURT MARTIAL.

See DISCIPLINE IX to X.

PROCEDURE OF MILITARY COMMISSION.

See WAR I C 8 a (3) (*d*) to (*e*).

PROCLAMATION BY PRESIDENT.

Amnesty.....See PARDON XI.
Indian War.....See WAR I A 5 a.
Declaration of martial law.....See WAR I E 1 b; c (1).
Instances of.....See WAR I C 8 c (1).
Pardon to deserters.....See DESERTION XV B to C.
Peace in Philippines.....See WAR I F 3.
Revocation of suspension of writ of habeas corpus.....See WAR I C 12 a; E 1 a.
Riots.....See ARMY II I 1.
WAR I B 5 a (1).
Suspension of writ of habeas corpus.....See WAR I C 12; E 1 e.

PROFIT.

Not paid on claims.....See CLAIMS VII B 1.

PROHIBITION LAW.

Military reservations.....See PUBLIC PROPERTY V F 1 a (1).

PROMOTION.

See OFFICE III B to C.
Constructive pardon.....See PARDON XV C 1.
Detailed staff officer.....See ARMY I G 3 b (4) (*b*); (*c*).
OFFICE III D 2 to 3.
Disbursing officer's bond.....See BONDS II E; I; V F.
Heat and light, increased.....See PAY AND ALLOWANCES II A 1 c (5).
Pardon.....See PARDON IV A.
Pay, date of increased.....See PAY AND ALLOWANCES I B 1.
Suspension, date.....See RANK V C to D.

PROPHYLACTIC.

See ARTICLES OF WAR XXI C 2 d.

PROPERTY.

Accountability.....See ABSENCE I B 1 e.
PUBLIC PROPERTY I F to G.

PROVOST COURT.

Under military government.....See WAR I C 8 a (4).

PUBLIC DOCUMENT.

Original charges.....See DISCIPLINE II K 1.
Printing.....See ARMY I B 2 h (1); (2).

PUBLIC LANDS.

Secretary of War, authority over.....See ARMY I B 2 b (3) (*a*).
Target range on.....See MILITIA VI C 1 a.
Transfer of.....See ARMY I B 1 a (2).

PUBLIC MONEY.[1]

1. WHAT CONSTITUTES PUBLIC MONEY? SECTIONS 3617 AND 3618 REVISED STATUTES.
   - A. FUNDS RECEIVED FOR PRIVILEGES AND FACILITIES GIVEN AND SALES OF PUBLIC PROPERTY IS PUBLIC MONEY..... *Page 885*
   - B. FUNDS RECEIVED AS DAMAGES IS PUBLIC MONEY..... *Page 886*
   - C. FUNDS RECEIVED FOR THE USE OF A PUBLIC DRY DOCK IS PUBLIC MONEY.
   - D. FUNDS RECEIVED FOR THE USE OF A PORTION OF THE WATER FRONT OF A RESERVATION IS PUBLIC MONEY.
   - E. MONEY USED IN AN ATTEMPTED BRIBE OF AN EMPLOYEE OF THE GOVERNMENT AND SUBSEQUENTLY SEIZED BY A GOVERNMENT OFFICIAL IS PUBLIC MONEY.
   - F. MONEY RECEIVED FROM APPLICANT FOR ENLISTMENT WHO DECLINED TO ENLIST IS PUBLIC MONEY..... *Page 887*

[1] Prepared by Maj. H. M. Morrow, Judge Advocate and assistant to the Judge Advocate General U. S. Army.

I. WHAT CONSTITUTES PUBLIC MONEY, ETC.?—Continued.

G. Unexpended Portion of Prison Fund not Used at United States Military Prison When Prison Turned Over to Department of Justice is Public Money.

H. Money Received by a Government Official From a Private Citizen as Compensation to Soldiers for Private Work Done by Them is Not Public Money.

I. Money Received by Army Officers Acting as Collectors of Customs During Military Occupation not to be Accounted for as United States Funds.

J. When Proceeds of Sale of Empty Packages, etc., That Contained Supplies are to be Accounted for as United States Funds.

K. Proceeds of Sale of Abandoned Private Property Found in Government Storehouse is Public Money.....*Page 888*

L. Proceeds of Sale of Abandoned Civilian Clothing of Recruits is Not Public Money.

M. Proceeds From Sale of Garbage at Post Not to be Accounted for as United States Funds.

N. A Fine Paid in Accordance With the Sentence of Court-martial is Public Money.

O. Money Found on the Body of an Unidentified Man Washed Ashore on a Military Reservation is Public Money.

Act of May 1, 1888, Relating to Funds Arising From "Incidental Sources" at Military Academy.....*Page 889*

II. DISBURSING OFFICERS.

A. Who is a Disbursing Officer.

B. Responsibility of Disbursing Officer for Funds.

1. General rule as to responsibility.
2. Responsibility for forged checks.
3. Responsibility for loss of check in mail.....*Page 890*
4. Responsibility for loss of funds while being transported for payment of troops.
5. Responsibility for payment "without due care" within meaning of paragraph 665, Army Regulations, 1910.
6. Responsibility in sending check to contractor by mail.

C. Garnishment, Attachment, and Injunctions Relating to Payment of Public Money.

1. Funds in hands of disbursing officer can not be attached or garnisheed.....*Page 891*
2. The purpose of an attachment can not be accomplished by bringing suit against the contractor and joining the disbursing officer as defendant.....*Page 892*
3. Purposes of attachment can not be accomplished by attaching public funds on deposit in a bank.
4. Subcontractor can not control disbursement of public funds by claiming a lien on money due the contractor and filing a notice of a lien with the disbursing officer.
5. Subcontractor can not control disbursement of public funds by injunction against disbursing officer.
6. Injunction against payment of public money by disbursing officer.

D. Disbursing Officer Should Pursue in His Own Name Remedies Relative to Public Money.....*Page 893*

II. DISBURSING OFFICERS—Continued.
E. DISBURSING OFFICER NOT ENTITLED TO CREDIT FOR EXPENSE OF COLLECTING MONEY DUE ON A CHECK DRAWN ON TREASURER OF PHILIPPINE ISLANDS.
III. SECTION 3620, REVISED STATUTES, AS TO DRAWING CHECK ONLY IN FAVOR OF PERSON TO WHOM PAYMENT IS MADE.
IV. SECTION 1766, REVISED STATUTES, AS TO PAYING PERSONS IN ARREARS TO THE UNITED STATES.
V. WHERE ACT PROVIDES THAT MONEY SHALL BE EXPENDED UNDER DIRECTION OF THE SECRETARY OF WAR, SECRETARY MAY COMMIT DISBURSEMENT TO ANY PROPER PERSON ..... *Page 894*
VI. LIABILITY ON PAYMASTER'S CHECK INDORSED FOR IDENTIFICATION BY PAYMASTER AND SUBSEQUENTLY RAISED IN AMOUNT AND CASHED BY AN ASSISTANT TREASURER OF THE UNITED STATES.
VII. ACT OF APRIL 20, 1874, AS TO INSPECTION OF DISBURSEMENTS APPLIES ONLY TO DISBURSEMENTS OF MONEYS APPROPRIATED BY CONGRESS.
VIII. SECTION 3651, REVISED STATUTES, PROHIBITING THE EXCHANGE OF FUNDS BY DISBURSING OFFICER.
IX. GOVERNMENT ACCOUNTS SHOULD BE KEPT IN UNITED STATES CURRENCY ONLY.
X. PARAGRAPH 694, ARMY REGULATIONS, 1910, REQUIRING THAT DAMAGE TO PUBLIC PROPERTY SHALL BE DEDUCTED FROM OFFICERS' PAY DOES NOT PREVENT OFFICER VOLUNTARILY PAYING THE AMOUNT OF THE DAMAGE TO A DISBURSING OFFICER ..... *Page 895*
XI. A PROVISION IN A LEASE OF GOVERNMENT PROPERTY WHEREBY THE LESSEE MIGHT MAKE REPAIRS AND DEDUCT THE COST FROM THE RENT IS LEGAL.

I A. Congress is vested by the Constitution with the exclusive power of disposition of the personal as well as the real property of the United States;[1] and by section 3618, R. S., Congress has provided generally that the proceeds of sales of personal property of the United States shall be paid into the Treasury as "miscellaneous receipts." *Held* therefore that the various funds received at military posts, on military reservations or otherwise, as compensation for public property occupied, sold, or allowed to be used or appropriated, or for labor furnished, or privileges or facilities conceded, etc. (such as moneys received for rents of fisheries, for fallen timber, for surplus lumber, manure, etc., for metallic cartridge shells collected at target ranges, for grazing privileges, brickyard privileges, quarrying privileges, the privilege of cutting ice, repairs done to wagons, shoeing of teams, tolls for teams and wagons passing across reservations, etc.), were public money of the United States, to be accounted for to the Treasury, and could not be legally retained as a so-called "slush fund," or disbursed for the use or benefit of the post or command. Otherwise, as to the proceeds of the sale of the savings from rations, or of the sale of any other company or regimental, etc., property. And money paid

[1] U. S. *v.* Nicoll, 1 Paine, 646 (Fed. Cas., 15, 879); Seabury *v.* Field McAllister 1; U. S. *v.* Hare, 4 Sawyer, 653,669

to a band for playing to citizens, being for a *quasi* personal service, may go to the band fund. But the proceeds of all *public property* of any material value,[1] including all moneys exacted or received from civilians, are to be turned into the Treasury; and otherwise to dispose of them is embezzlement. *P. 43, 308, Oct. 25, 1890; R. 52, 138, Feb. 18, 1892; C. 29123, Oct. 16, 1911.* So where money was received as fees for impounding animals which were found astray on a military reservation, *held* that under section 3618, R. S., the money so received should be deposited in the Treasury, and this should be the procedure whether the funds were collected in the operation of the State law or in the operation of a post regulation merely. *C. 23964, Oct. 15, 1908.*

I B. Where an officer in charge of certain river and harbor improvements exacted and received, from certain contractors for the work, sundry small sums of money claimed as due from them as amercements for damage or loss caused by them to the United States, *held* that such sums were public money of the United States, and that a failure to account for the same as such rendered the officer liable to a charge of embezzlement. *P. 52, 137, Feb. 18, 1892.*

The commanding officer of a post having collected from a private citizen a sum of money for damage done to Government property at the post resulting from blasting, he proposed to deposit the money collected to the credit of certain specific appropriations according to the damage done, *held* that in view of sections 3617 and 3618, R. S., the money collected could not be so deposited or expended, but should be deposited in the Treasury without deduction.[2] *C. 29225, Nov. 9, 9, 1911.* So *held* as to money collected on a contractor's bond as damages suffered by United States in consequence of failure to complete the contract. *C. 2527, Aug. 19, 1896.* So *held* as to a stoppage for loss of Government property. *C. 16445, June 10, 1904.* So *held* as to money deducted from a certified check to cover damages to the United States. *C. 29402, Jan. 27, 1912.*

I C. *Held* that the amounts received from private parties as "compensation" for the use of the Des Moines Dry Dock, under the act of August 2, 1882 (22 Stat. 204), were public money, and, in the absence of any authority for the purpose in this act or other statute, could not legally be expended without an appropriation by Congress. *P. 39, 395, Mar. 13, 1890.*

I D. *Held* that money received as rent or compensation for the use of portions of the water front of the Fort Canby Reservation, Wash., for fish traps, was public money and was to be accounted for as such, and that it could not legally be turned into the "mess fund" for the purchase of vegetables for the post. *P. 40, 73, Mar. 27, 1890.*

I E. Where an attempt was made to bribe an employee of the Government and the money offered as a bribe came into the possession of a Government official, *held* that under section 3617, R. S., which provides that "the gross amount of all moneys received from whatever source for the use of the United States * * * shall be

[1] Pars. 690–1, A. R., 1910, provide that "Empty barrels, boxes, crates and other packages, together with metal turnings, ground bone, and other waste products, which accumulate at arsenals, depots, and military posts, and which are unsuitable for public service," shall be disposed of by condemnation and sale.

[2] I Comp. Dec., 568; VII id., 856; XIII id., 484.

paid by the officer or agent receiving the same into the Treasury," the money should be deposited in the Treasury. *C. 11082, Aug. 21, 1901, and Aug. 14, 1908.*

I F. Where an applicant for enlistment declined to complete the enlistment at the end of the period of probation and insisted on depositing with the recruiting officer a sum of money to cover the expense to which the United States had been subjected on his account, *held* that the sum so deposited should be turned into the Treasury under section 3617, R. S. *C. 12780, June 27, 1902.*

I G. The regulations for the government of the military prison at Fort Leavenworth provided that where subsistence was drawn the officer in charge should draw such articles only as were prescribed in the diet for prisoners and should sell to the commissary the rations not drawn, and from the proceeds form a prison fund. This fund was added to by an occasional sale of products of the farm cultivated by the prisoners. The prison was turned over to the Department of Justice under an act which did not provide for transferring the prison fund. *Held* that under the provisions of section 3618, R. S., the unexpended portion of the prison fund should be covered into the United States Treasury as miscellaneous receipts. *C. 1481, June 25, 1895.*

I H. Where a private citizen by blasting near a military post injured a telephone line at the post and employed certain soldiers to repair the same outside of the hours in which they were employed on military work, and subsequently deposited with the commanding officer a sum of money to pay the soldiers, *held* that the money should not be deposited in the Treasury, but the matter should be treated as a private transaction and the money turned over to the soldiers.[1] *C. 29225, Nov. 9, 1911.*

I I. Where the collectors of customs (Army officers) under the military government in Porto Rico were required to transfer a portion of the funds to subsistence officers to be expended for the subsistence of the Army, *held,* that the collection, transfer, and disbursement of, and accountability for, these funds were under the control of the military commander or military governor and did not form any part of an appropriation made by Congress for the support of the Army. Such funds should not therefore be taken up on accounts current of disbursing officers in connection with funds from such appropriations. *C. 5464, Dec. 12, 1898.*

I J. Paragraphs 683–684, Army Regulations, 1908 (690–691 of 1910), provide that empty barrels, boxes, crates and other packages, together with metal turnings, scrap metal, ground bone and other waste products, which accumulate at arsenals, depots and military posts, and which are unsuitable for the military service, will be disposed of by condemnation and sale. *Held* that the cost of packages, etc., containing stores and supplies procured by the Subsistence Department are included in the price of the contents which are issued or sold. As those to whom such stores are issued are entitled to them as articles of ration, and as those to whom they are sold are entitled to them by reason of purchase, the ownership in the package, etc., passes with the title to the contents. But where grain is issued not to officers or enlisted men, but to public or private

[1] See XIV Comp. Dec., 310.

animals that are entitled to forage, the title to the sack will not pass, as the grain is not issued to persons as rations. However, in case there is an authorized sale of grain, the title will pass. Therefore in those cases where the title to the package, etc., does not pass, the property should still be accounted for, but in other cases if sold by those to whom the supplies have been issued or sold the proceeds should not be turned into the Treasury. *C. 22748, Feb. 13, 1908, and Apr. 30, 1908.*

I K. Where private property of officers, soldiers or civilians has been stored in a Government storehouse and is unclaimed and apparently abandoned and the owners or their relatives or representatives can not be located, and a period of time in excess of that prescribed by local laws for the recovery of personal property has elapsed; or where the owners, their relatives or representatives fail to remove the property after being notified to do so, *held* the property may be sold at auction and the proceeds deposited with a paymaster.[1] *C. 21533, May 21, 1907, and Aug. 31, 1909.* So where the effects of a deceased officer contained valuable historical data in the shape of an account of certain military operations in which the deceased had participated, and efforts to locate relatives or representatives of the deceased had been unsuccessful, and a private person engaged in writing a history of the events recounted in the papers desired to use them, *recommended* that the papers be temporarily transferred to him for that purpose. *C. 21533, Jan. 31, 1911.*

I L. Where recruits have cast off and abandoned their civilian clothing to such an extent that they would be estopped from reclaiming it, there is no legal objection to the commanding officer directing that such clothing should be collected and sold, the proceeds to be applied for the support of the general mess. *C. 22763, Feb. 15, 1908.* And where a good suit of civilian clothing was, through error, sold as authorized above, *held*, that the owner could properly be reimbursed from the general mess fund which had received the benefit of the sale. *C. 27550, Nov. 30, 1910.*

I M. Money received at military posts from the sale of garbage which is derived principally from the waste products of the company messes, although partly including waste products from the property of the United States, may be disposed of as directed by the commanding officer, and the proceeds need not be covered into the Treasury of the United States. *C. 23876, Jan. 11, 1912.*

I N. A fine paid by an Army officer in accordance with sentence of court-martial is public money and should be deposited in accordance with section 3617, R. S. *C. 3672, May 9, 1900.*

I O. The body of an unidentified man was washed ashore on a military reservation over which the State had ceded exclusive jurisdiction. The sum of $20 was found on the body and there were no expenses connected with the interment. *Held* that the money should be deposited in the Treasury as required by section 3618, R. S.[2] *C. 23692, Aug. 4, 1908.*

---

[1] If the property is considered to be of no value, it is the practice to destroy it after a year's storage if the owner, his relatives or representatives fails to remove it after being notified to do so, or after reasonable efforts the whereabouts of himself, his relatives or representatives can not be ascertained.

[2] The Solicitor of the Treasury concurred in the above opinion. See, also, 19 Op. Atty. Gen., 247.

I P. The act of May 1, 1888 (25 Stat. 112), relating to the Military Academy, provided that "all funds arising from the rent of the hotel on the academy grounds and other incidental sources, from and after this date, be, and are hereby, made a special contingent fund, to be expended under the supervision of the superintendent of the academy," etc. *Held* that the general words "and other incidental sources" in the above act should be construed to apply to funds arising from an incidental source [1] and not embracing funds which the law expressly requires to be disposed of in another manner. Therefore such words would not cover the proceeds of a sale of condemned property purchased from appropriations for the Military Academy, and such proceeds should be disposed of as required by section 3618, R. S. *C. 27201, Aug. 31, 1910.*

II A. Any officer of the United States "having any public money intrusted to him for disbursement" is a "disbursing officer" within the meaning of sections 3620 and 5488, R. S. *Held*, therefore, that medical officers intrusted with moneys for disbursement under general orders 116 and 136, Adjutant General's Office, 1898, relating to the expenditure by medical officers of the appropriation "Subsistence of the Army" for the diet of enlisted men, were such disbursing officers. *C. 5269, Nov. 7, 1898.* But *held* that the moneys received by the quartermaster in charge of a United States transport from parties traveling thereon for meals furnished them can be applied, under section 3618 R. S., and the act of March 3, 1875 (18 Stat. 410), to the purchase of fresh supplies.[2] *C. 5048, Oct. 6, 1898.*

II B 1. A paymaster's responsibility for public funds intrusted to him continues until such funds have been disbursed or possibly until the loss of them can be fixed on another officer or soldier and stopped against his pay. If a paymaster loses a portion of his funds, he is not thereby relieved of his responsibility as to the money lost even though the loss be through no fault of his own.[3] *C. 2304, May 19, 1896.*

II B 2. A disbursing officer who pays out money of the United States upon vouchers that are forged will in general make himself liable for the amount paid. Thus where such an officer paid out public money upon transportation requests, addressed to a railroad company and accepted by it, which requests had been fraudulently prepared by a quartermaster's clerk who had forged the name of the quartermaster thereto, *held* that the disbursing officer was responsible

---

[1] See Appropriations XI.

[2] See Dig. Second Comp. Dec., vol. 3, p. 324.

[3] In Smythe *v.* U. S., 188 U. S., 156, and earlier cases therein cited the rule was laid down that the obligation of a bond "to keep safely the public money is absolute without any conditions, expressed or implied, and nothing but the payment of it when required can discharge the bond." The severity of this rule is mitigated by the provisions of sec. 1062, R. S., which authorizes a paymaster, quartermaster, commissary of subsistence, or other disbursing officer to apply to the Court of Claims for relief from responsibility on account of capture or otherwise of Government funds, and authorizes the court to grant relief where the loss was "without fault or negligence on the part of such officer." The rule as to the degree of care that should be exercised by such officers in order to justify the granting of relief by the court is set out in 4 Ct. Cls., 506; 5 id., 489; 7 id., 415; 37 id., 531. The facts in the following cases illustrate the practical view taken by the court: 4 Ct. Cls., 501; 5 id., 486; 7 id., 431, 512; 11 id., 698; 15 id., 314; 19 id., 125; 21 id., 300; 25 id., 98; 37 id., 527; see I Comp. Dec., 191. The act of Mar. 2, 1903 (32 Stat. 955), provides specially for the allowance of such credits for payments and for losses of funds, vouchers, and property during the Spanish War as the Secretary of War may recommend.

for the amount paid. *P. 56, 208, Oct. 22, 1892.* So where a forged transportation request was accepted by the railroad company but not accepted by the disbursing officers, *held* that the loss should be borne by the railroad company.[1] *C. 7400, Apr. 21, 1900; 29056, Oct. 3, 1911.*

A disbursing officer of the Army who has paid out public moneys upon vouchers which prove to have been false or forged is personally responsible to the United States for the amount of the loss; and it is the usage of the Government to hold such an officer so responsible, however innocent of criminality he may be; the fact that he has acted in good faith not affecting his legal liability. Such an officer, further, is not entitled to call upon the Government to prosecute a civil suit against the party chargeable with the fraud, but he may himself initiate such a suit if he desires to do so for his own indemnity. *R. 16, 635, Oct. 25, 1865; 28, 20, July 29, 1868; 42, Aug. 7, 1868; 32, 423, Mar. 22, 1872.*

II B 3. Where a Government check was lost from the mail before reaching the payee, *recommended* that the incident be regarded as one involving a loss of public funds, and that the case be submitted to Congress with a view to legislation relieving the disbursing officer who drew the check from responsibility in connection therewith. *C. 18853, Nov. 23, 1905.*

II B 4. The act of February 27, 1893 (27 Stat. 478), provided that "The Secretary of War is also authorized to arrange for the payment of the enlisted men serving at posts or places where no paymaster is on duty by check or by currency, to be sent to them by mail or express, at the expense and risk of the United States." *Held* that the "expense and risk" referred to means the expense and risk of transportation. A loss occurring during transportation would fall on the United States, but a loss not occurring during transportation would not fall on the United States. *C. 2427, July 7, 1896.*

II B 5. Paragraph 658, Army Regulations, 1908 (665 of 1910), is as follows: "If a payment made on the certificate of an officer as to the facts is afterwards disallowed for error of fact in the certificate, it will pass to the credit of the disbursing officer and be charged to the officer who gave the certificate; but the disbursing officer can not protect himself in an erroneous payment made without due care by charging lack of care against the officer who gave the certificate." Where an officer certified that rooms had been occupied under a lease for 10 days in the month of March and made out a voucher for ten-thirtieths of the monthly rent instead of ten thirty-firsts, *held* that the vouchers showed on their face the erroneous method of computation, and the disbursing officer made the payment "without due care." *C. 25340, July 26, 1909.*

II B 6. Where a contractor requested the District engineer officer to mail him checks in payment of work by registered mail and the

[1] See IX Comp. Dec., 484, holding that an officer from whom a transportation request was stolen, the request having been honored by the road and paid by a disbursing officer, was not chargeable with the cost of the transportation. So where a Government meal ticket was stolen and filled in and subsequently honored by a railroad company, the Comptroller in an unpublished opinion of Feb. 25, 1908, *held* that as the order was not made by the Government or by any officer duly empowered to make it there was no legal obligation resting upon the United States to pay for the meals furnished.

engineer officer objected, insisting on a representative of the contractor coming to the office of the District engineer officer to receive and receipt for the checks, *held* there would be no added risk in sending the checks by mail as requested by the contractor, as the checks have no intrinsic value in themselves, but are merely the means of securing payment from the proper depository of public funds. Therefore if the checks are made out to the order of the contractor so that they would require the indorsement of the contractor, neither the Government nor the engineer officer would incur additional risk in committing them to the mails. As to obtaining a receipt for the checks, the officer would hold the request of the contractor that the checks be sent by mail, and the checks after payment would be in the possession of the Government and available as evidence of payment. If desired, the engineer officer could send a blank receipt with the checks, to be signed and returned by mail, and in the meantime could, if desired, have an employee of his office witness the fact of the mailing of the checks, so that in case of a failure of the contractor to return the receipt as requested, there would be proof that the checks had been mailed. *C. 19072, Jan. 20, 1906.*

II C 1. It is well settled upon considerations of public policy, that funds in the possession of a paymaster of the Army or other disbursing agent of the United States due as pay, salary, or wages to an officer or soldier of the Army or other Government employee can not be attached in a suit instituted against such officer, etc., by a private creditor.[1] *R. 8, 493, May 20, 1864; 20, 413, Feb. 21, 1866; 26, 466, Feb. 20, 1868; 28, 47, Aug. 10, 1868; 33, 8, Mar. 23, 1872; 34, 26, Nov. 1, 1872; C. 1901, Dec. 1895; 2767, Dec. 28, 1896; 4887, Sept. 1, 1898; 6103, Mar. 23, 1899.* As the United States Soldiers' Home which was established by the act of March 3, 1851, 9 Stat. 595, is simply an agency of the United States, the title to the property and funds being in the United States, the above principle would apply where the creditor of a contractor for work at the home attempted to garnishee the officials of the home. *C. 16767, Aug. 18, 1904.* Where, indeed, the pay due has been paid over to a third person as the authorized agent or attorney of the party entitled to receive it, it may be attached by the garnishee process in the hands of such person. *C. 4887, Sept. 1, 1892.*

The principle is well established that money in the hands of a disbursing agent of the United States is not subject to attachment in a suit by a creditor of a party to whom such money is due and payable. A military disbursing officer is therefore not empowered to pay moneys in his hands, due a Government contractor, to any creditor of such contractor, or to any person other than the contractor himself, or his agent or attorney or personal representative; nor can he be made liable to pay over any part of such moneys as garnishee in a suit brought against such contractor. *R. 54, 514, Jan. 23, 1888; P. 63, 292, Jan. 20, 1894.*

---

[1] Buchanan *v.* Alexander, 4 Howard, 20; Averill *v.* Tucker, 2 Cranch, C. C., 544; Derr *v.* Lubey, 1 McArthur, 187; 13 Op. Atty. Gen., 566; I Comp. Dec., 171; II *id.*, 222. And the same principle is applied to moneys due from municipal corporations. Hawthorn *v.* St. Louis, 11 Mo., 59; Burnham *v.* Fond du Lac, 15 Wis., 211; Wilson *v.* Bk. of La., 55 Ga., 98; Pruitt *v.* Armstrong, 56 Ala., 306; Boone Co. *v.* Keck, 31 Ark., 387.

II C 2. A creditor of a Government contractor, to whom the Government owes a balance, can not attain the object of a foreign attachment by bringing suit against the contractor, and joining with him, as defendants, the United States, as also the officer of the Army who executed the contract, and praying judgment against the United States, or for an order of court upon the officer to pay over the amount claimed. An individual can not be allowed so to control the operations of the Government.[1] *P. 40, 251, Apr. 18, 1890.*

II C 3. A general service clerk received from a paymaster of the Army, in payment of his monthly pay, a check upon a national bank, which was a United States depositary. On presentation the bank retained the check and refused payment on the ground that the county sheriff had levied an attachment on all the property of the payee in the bank. *Held* that such refusal was unauthorized. The pay due was public money in the hands of the depositary, and could be paid only to the payee of the check or his order. *P. 54, 361, July 19, 1892.*

II C 4. Where a subcontractor claiming a lien on the money due from the United States to the contractor filed with the Government notice of the alleged lien, *held* that in the absence of a provision in the contract specifically providing for retaining money due the contractor until he should have settled other claims against him,[2] settlement should be made with the contractor without regard to the notice of lien. *C. 20947, Jan. 3, 1912.*

II C 5. A subcontractor can not, by injunction or otherwise, restrain the Secretary of War, or a military officer, from paying the entire consideration of the contract, or so much as may be due and payable, to the contractor. There is no privity of contract between the Government and a subcontractor[3] and he has no legal claim whatever upon the United States for any part of the contract money. He must look to the principal contractor for the payment of anything that may be due him. *R. 52, 194, May 19, 1887; C. 746, Dec. 13, 1894.*

II C 6. It is settled that a State court can have no authority to enjoin the United States judiciary from executing their judgments, or from proceeding with actions of law pending before them.[4] Similarly *held* that a State court was not empowered to enjoin an executive department or officer of the United States from performing the *contracts* of the United States, and, accordingly that an injunction issued in a suit in a State court prohibiting an officer of the Army, charged with the duty of paying to a contractor a certain sum of money due him under a contract between him and the United States, from paying said

[1] Moreover, when suit is initiated against the United States, the plaintiff is required to proceed according to the provisions of secs. 4, 5, and 6 of the act of Mar. 3, 1887 (24 Stat. 506), and must duly serve a copy of the petition upon the proper United States district attorney, as notice to appear and defend the interests of the United States, and mail a copy to the Attorney General, etc.—a procedure which had not been followed in this case.

[2] XVII Comp. Dec., 80.

[3] See XVI Comp. Dec., 426.

[4] McKim *v.* Voorhies, 7 Cranch, 279; Duncan *v.* Darst, 1 How., 306; City Bk. of N. Y. *v.* Skelton, 2 Blatch. 26; Riggs *v.* Johnson Co., 6 Wallace, 166; United States *v.* Council of Keokuk, id., 514; Mariposa Co. *v.* Garrison, 26 How. Pr., 448; English *v.* Miller, 2 Rich. Eq. 320; Chapin *v.* James, 11 R. I., 86.

sum, would legally and properly be disregarded by such officer.[1] *R. 42, 128, Jan. 22, 1879.*

II D. It is in accordance with the usage of the military service, as well as the general practice under existing laws, for an officer of the Army charged with the disbursement of public funds to pursue in his own name and representative capacity the proper legal remedies when such funds are illegally appropriated or withheld by third parties. This official function of the officer can not properly be imposed upon the head of his department. The Secretary of War can not be required to institute the legal proceedings, nor would his doing so make the claim any more a public claim of the United States than it is as prosecuted by the disbursing officer in his official capacity. Thus *advised*, in the case of such an officer, a portion of whose public funds were in the possession of a bank, as an authorized public depository, at a time when the same stopped payment and went into insolvency, that the officer should file and prove his claim before the register in bankruptcy and prosecute the collection of the same so far as necessary and practicable; and further, that a due and reasonable diligence on his part in pursuing the legal measures open to him for realizing the amount for which he was officially responsible would furnish the strongest support to any application, which he might in future prefer, to be discharged from liability for any loss to the United States resulting from the failure of the depository. *R. 35, 365, May 7, 1874.*

II E. A disbursing officer deposited in a bank at Denver, Colo., for collection a check drawn on the treasurer of the Philippine Islands. The bank made a charge of $30.11 as exchange. *Held* that the disbursing officer was not entitled to take credit in his account for the above sum required to be paid as exchange. *C. 18853, Aug. 21, 1907.*

III. Section 3620, R. S., provides that a disbursing officer, having on deposit in a public depository public moneys intrusted to him for the purpose of disbursement, shall "draw for the same only in favor of the persons to whom payment is made." Where, upon the order of a party to whom the United States was indebted in a certain amount, a disbursing officer made payment of the amount to a firm to which such party was indebted—*advised* that such payment was clearly in contravention of the statute. *P. 53, 239, Apr. 29, 1892.*

IV. Upon construing section 1766, R. S., in connection with the original act—that of January 25, 1828 (4 Stat. 246), entitled "An act to prevent defalcations on the part of the disbursing agents of the Government"—*held* that such section, though expressed in somewhat general terms, properly applied only to bonded disbursing officers.[2] *P. 61, 167, Aug. 22, 1893.*

---

[1] See the subsequent confirmatory opinion of the Attorney General in this case, in 16 Op., 257. In an earlier opinion of the Solicitor General (15 Op., 524), it was held that as a State can not by its judicial process legally obstruct or indirectly interfere with the operations of the United States Government, a State court could not be authorized to enjoin a contractor with the United States from receiving payments under his contract and thus hinder him in the due performance of the same.

[2] But see the general provision of the Army appropriation act of June 16, 1892 (27 Stat. 177), which provided that "the pay of officers of the Army may be withheld under section seventeen hundred and sixty-six of the Revised Statutes on account of an indebtedness to the United States admitted or shown by the judgment of a court, but not otherwise unless upon a special order issued according to the discretion of the Secretary of War."

V. Congress, in appropriating money for the new State, War, and Navy Building, has provided that the amounts shall "be expended under the direction of the Secretary of War." While the Secretary would thus be authorized to commit the disbursing of the funds employed to any proper person, yet *advised*, in view of the policy of the law as expressed in section 1153, R. S., that the Secretary would properly designate as the disbursing agent the engineer officer engaged in superintending the work, especially since—as provided in said section—the duty of disbursing would thus be performed without any charge to the United States. *R. 41, 283, June 22, 1878.*

VI. A paymaster drew his check in favor of a discharged soldier for the amount due him on final settlement. The payee indorsed the check in blank, and the paymaster then, according to a common practice, subindorsed it, adding his official designation, merely for the purpose (though the indorsement did not so state), of identifying the signature of the payee. The writing in the body of the check was then removed or altered and the check filled in for a very much greater amount. The check thus raised was on the next day presented to and paid by the Assistant Treasurer at New York. *Held* that, while, in the hands of a *bona fide* indorsee, the liability of the paymaster would have been that of a regular indorser, parol evidence not being then admissible to show that he indorsed merely for identification,[1] yet the loss in this case legally fell upon the assistant treasurer whose liability was the same as that of a bank which pays a forged check in a case in which the forgery has not been facilitated by the negligence of the drawer.[2] *P. 53, 312, May, 1892.*

VII. *Held* that the act of April 20, 1874 (18 Stat., pt. 3, p. 33), entitled "An act to provide for the inspection of the disbursements of appropriations made by officers of the Army," applied only to the inspection of disbursements of moneys appropriated by legislation of Congress. *P. 48, 184, July 9, 1891.*

VIII. Section 3651, R. S., prohibits the exchange of funds by any disbursing officer or agent of the Government. *Held* that an exchange by a disbursing officer of funds appropriated for the pay of the Army for Philippine currency at the market rate to enable him to pay in that currency creditors who desired to receive it in satisfaction of the obligation of the United States, would not be an exchange forbidden by this section. *C. 17604, Feb. 28, 1905.*

IX. After the establishment of a new currency for the Philippine Islands by the act of March 2, 1903 (32 Stat. 952), the question arose as to the payment of debts due the United States in the Philippine currency and the payment by the United States of its own debts in the same currency, *held* that under sections 3473, 3474, 3475, and 3476, R. S., all funds received by disbursing officers of the United States from the sale of stores and other public property must be in United States currency, and that under sections 3617, 3618, 3651, 3652, and 3692, R. S., the accounts of disbursing officers must be kept in United States currency, but there is no objection to the payment of a debt of the United States in any local currency which the creditor was willing to receive. For instance, if an employee of the United States is employed at the rate of $100 per month he is entitled to demand his pay in United States currency. If he desires to be paid in Mexican

[1] Daniel on Negotiable Instruments, vol. 1, p. 719, and cases cited.
[2] Byles on Bills (Sharswood's edition), 337, and cases cited.

dollars there is no objection to his being paid in such number of Mexican dollars as are equal on the day of payment to $100 in gold. So, too, a disbursing officer may make a contract payable in Mexican dollars or other foreign currency, but the account must be stated in legal tender of the United States at the market quotation of such currency on the day of payment. With the above exceptions, the accounts of disbursing officers must always be kept in United States currency. *C. 15316, Dec. 23, 1903.*

X. Paragraph 687, Army Regulations of 1904 (694 of 1910), provided that damage to public property for which an officer was responsible would be 'deducted' from his monthly pay. *Held* that the regulation was intended to cover cases where the officer did not voluntarily pay the amount of the damage, but that where an officer was willing to pay the amount of the same it should be received from him and deposited in a Government depository to the credit of miscellaneous receipts and the officer relieved from his accountability. *C. 22134, Oct. 1, 1907.*

XI. Sections 3617 and 3618, R. S., have no application until the money has been received to the use of the United States. Therefore, *held* that a provision in a lease of Government property that the lessee might make necessary repairs and have the cost of the same credited on the rent was legal. *C. 29129, Oct. 18, 1911.* So, held, that a contract might be made between the commanding officer of a post and a private laundry whereby the laundry should launder at a reduced rate articles belonging to the United States as well as articles of officers and enlisted men and in consideration thereof should be furnished fuel and water by the Government at cost price. *C. 14948, July 15, 1903.*

CROSS REFERENCE.

See MILITIA X TO XI.
PUBLIC PROPERTY.

Blank receipts unauthorized.....See PAY AND ALLOWANCES I B 3.
Can not be advanced.....See CONTRACTS XII.
Can not be given to flood sufferers.....See PUBLIC PROPERTY I A 5.
Loss of.....See DISCIPLINE XII A 12 b.
Misapplication of.....See PAY AND ALLOWANCES I C 6 b.
Misappropriation of.....See DISCIPLINE II D 16 a.
PAY AND ALLOWANCES I C 6 b.
Sources of.....See ARMY I G 3 b (2) (*a*) [3] [*d*]; d (8) (*b*).
DISCIPLINE XVII A 4 g (1).
LAWS II A 1 c.
PAY AND ALLOWANCES I C 6 b (5); 7 a (1); III C 1 f (1); g (1); D 2.
PUBLIC PROPERTY IX A 3.
WAR I C 6 c (3).

PUBLIC PROPERTY.[1]

I. IN GENERAL..... *Page 901*
A. DISPOSITION MUST BE AUTHORIZED BY CONGRESS..... *Page 902*
1. Required for the grant of any interest in public property.
2. Distinction between license and grant of interest..... *Page 903*
3. Applies to both personal and real property..... *Page 904*
4. Applies to exchanges as well as other dispositions..... *Page 905*
a. Sale to State, or exchange, of arms, etc.
b. Issues of arms and ammunition to protect public money and property.

[1] Prepared by Mr. Lewis W. Call, chief clerk and solicitor, office of the Judge Advocate General, U. S. Army.

I. IN GENERAL—Continued.
A. Disposition Must be Authorized by Congress—Continued.
5. Issues to sufferers ..... *Page 906*
a. Civilian employees in hospital.
6. Finder obtains no title.
B. Transfer, etc., of Property Between Bureaus and Departments.
1. Transfer or exchange of lands ..... *Page 907*
C. Loan of Tents, Flags, etc ..... *Page 908*
D. Choses in Action.
E. Custody of, in District of Columbia.
F. Accountability for.
1. For transportation requests ..... *Page 909*
2. For loss as gratuitous bailee.
3. Fixing accountability—Surveying officer.
a. Swearing of, and witnesses.
b. May receive affidavits ..... *Page 910*
4. Relief from accountability.
G. Donation of Personal Property, Acceptance of.
II. LAND.
A. Purchase of, Must be Authorized by Law (Section 3736, Revised Statutes).
1. Term "purchase" includes donation, etc ..... *Page 911*
2. Statutory authority for, must be clear.
a. Where appropriation is insufficient.
b. Where appropriation for monument does not authorize purchase ..... *Page 912*
3. By deed, formal acceptance not necessary.
a. After delivery, etc., cancellation not authorized.
4. Authority to condemn must be express.
a. Must precede suit ..... *Page 913*
b. Whether in State or United States court.
c. Condemnation for Gettysburg battlefield.
5. Title for joint use where statute calls for "title."
6. Title must be approved by Attorney General.
a. Abstract of title, survey, etc ..... *Page 914*
b. Certificate as to liens.
(1) Lien for purchase money.
(2) Lien of judgment, appealed from
c. Title for limited use ..... *Page 915*
(1) Subject to condition subsequent.
d. Deposit, in condemnation ..... *Page 916*
e. When title vests.
f. Where error as to area.
g. Subject to right to cut timber.
h. Where easement only is acquired ..... *Page 917*
7. Title under settlement of suit.
8. Temporary forts in emergency with consent of owner.
B. Disposition Must be Authorized by Law.
1. By statute without deed ..... *Page 918*
2. By deed under authority of statute.
3. No title against United States by adverse possession.
a. Protection of possession of United States ..... *Page 919*
b. Process respecting title.
C. Boundaries on Streets.

II. LAND—Continued.
D. Boundaries on Waters..... *Page 920*
1. Natural accretions.
E. Buildings, Generally Property of Owner of Soil.
1. On land occupied *jure belli*.
2. Temporary buildings, removal of..... *Page 921*
3. Buildings erected without authority.
4. Where reserved in contract for sale.
F. Trees, the Property of the Owner of Soil.
1. Cutting for use of garrisons.
III. MILITARY RESERVATIONS.
A. Reservation, Meaning of.
1. Authority of President..... *Page 922*
2. Order inoperative as to private lands..... *Page 923*
3. Order withdraws lands from jurisdiction of Interior Department.
4. Within national park.
5. In Porto Rico and in Philippine Islands.
B. Not Subject to Location for Mines..... *Page 924*
C. Not Subject to Location of Railway Through "Public Lands."
D. On Indian Reservation, Subject to Rights of Indians.
E. Error in Location of Post.
F. Disposition of Military Reservations.
1. Authority of Congress required.
2. Conflicting claims of private parties..... *Page 925*
3. Under act of July 5, 1884.
4. Grant to municipal corporations (act of Mar. 3, 1893).
5. Sale under special act. Expenses of sale.
6. In the Philippine Islands..... *Page 926*
G. Boundary on Tide Waters
1. In States.
2. In Territories.
H. Squatters or Trespassers.
1. Removal by force if necessary.
2. Improvements, removal of, valuation..... *Page 927*
3. Hay or wood cut by trespassers not to be removed.
4. Removal where on reservation for injurious purposes.
5. Business on reservation.
IV. CEMETERIES.
A. National Cemeteries.
1. Acquisition of.
a. Law authorizing.
(1) Condemnation when authorized..... *Page 928*
(2) Effect of appraisement.
b. For volunteer homes.
2. Right of way for roadway to.
a. Restriction as to railways on.
b. Police jurisdiction over.
c. Restriction as to repairs.
3. Superintendent of.
a. Status of..... *Page 929*
b. Authority to make arrests.
c. To enforce rules regarding speed.

93673°—17——57

IV. CEMETERIES—Continued.
A. National Cemeteries—Continued.
4. Persons entitled to burial.
a. Superintendent Army Nurse Corps.
b. Indigent of Civil and Spanish Wars..... *Page 930*
c. Revenue-Cutter Service.
B. Confederate Dead, Northern Prisons.
1 No authority to permit interment of others.
V. JURISDICTION—GENERAL DISCUSSION..... *Page 931*
A. Not Incident to Ownership by United States..... *Page 933*
B. Retained on Admission of State. (See Public Property, V A.)
C. Acquired by.
1. Purchase with consent of State. (See Public Property, V; V A; V E 1 a.)
2. Direct cession by State. (See Public Property, V; V E 1 a.)
D. How Lost. (See Public Property, V; V A; V E 1 a.)
1. By abandonment or relinquishment of reservation..... *Page 934*
a. Not lost by grant of right of way for railway
E. Conditions and Restrictions.
1. Purchase with consent.
a. For purpose specified in Constitution gives exclusive jurisdiction.
(1) Reservation of right to serve process..... *Page 935*
(2) Reservation of concurrent jurisdiction not acceptable.
b. For other purposes. (See Public Property, V; V E 1 a.)
(1) May be accompanied with limitations. (See Public Property, V.)
(2) Questionable whether exclusive jurisdiction is desirable. (See Public Property, V.)
c. Construction of cession of "exclusive legislation" with the reservation of "concurrent jurisdiction."..... *Page 936*
d. Construction of cession of jurisdiction with proviso for operation of State laws over premises.
e. Construction of term "purchase."
2. In case of direct cession.
a. Cedes only so much as is expressed. (See Public Property, V; V E 1 a.)
b. Reservation of right to tax persons and corporations. (See Public Property, V; V E 1 a.)
c. Of concurrent jurisdiction. (See Public Property, V; VE 1 a.)
d. Cession not retroactive unless so worded..... *Page 937*
F. Effect of Cession.
1. Where exclusive.
a. State laws not operative.
(1) Prohibition laws.
b. Removes territory from political and legal jurisdiction of State.
(1) Withdraws persons and property thereon from civil and criminal jurisdiction of State. (See Public Property, V F 1 b.)
(*a*) From liability to State taxation. (See Public Property, V F 1 b.)

V. JURISDICTION—GENERAL DISCUSSION—Continued.
F. Effect of Cession—Continued.
1. Where exclusive—Continued.
b. Removes territory from political and legal jurisdiction of State—Continued.
(2) Deprives persons thereon of school and other privileges. (See Public Property, V F 1 b.)
(3) Deprives State officers of jurisdiction within reservation..... *Page 938*
(*a*) To hold inquests thereon. (See Public Property, V F 1 b (3.)
(*b*) To enforce quarantine regulations. (See Public Property, V F 1 b (3.)
(*c*) To require vital statistics. (See Public Property, V F 1 b (3.)
(*d*) To control public easement for highway. (See also Public Property, V F 1 b (3.).. *Page 939*
(*e*) To require license for business thereon. (See Public Property, V F 1 b (3.)
(*f*) To regulate marriages. (See Public Property, V F 1 b (3.)
(*g*) To administer effects thereon of deceased persons.
(*h*) To serve process unless right reserved. *Page 940*
2. Where not exclusive.
a. Reservation of right to tax persons and corporations. (See Public Property, V E 1 a.)
b. Reservation of concurrent jurisdiction. (See Public Property, V E 1 a (2.)
G. Jurisdiction Required by Section 355, Revised Statutes.
1. Construction of language "other public building of any kind whatever."
a. For park purposes, etc..... *Page 941*
2. Does not preclude purchase prior to cession.
3. Cession required before expenditure of appropriation.
H. Law Operative Within Reservations.
1. When jurisdiction ceded.
a. Laws, other than criminal, continue.
b. Criminal laws of United States..... *Page 942*
2. In Territories. (See Public Property, V H 1 a.)
a. Territorial laws, civil and criminal, continue. (See Public Property, V H 1 a.)
b. Process of Territorial courts.
c. Local government of District of Columbia..... *Page 943*
VI. RIGHTS OF WAY.
A. Rights of United States Under Grant.
1. Authority of municipal officers.
B. Over Public Property—Authority of Congress Required.
1. A State can not authorize..... *Page 944*
2. Formal acceptance not necessary.
3. Selection of location where grant indefinite
4. Requirement as to joint use of tracks.

VI. RIGHTS OF WAY—Continued.
C. PUBLIC RIGHTS—EXISTING WHEN LANDS REQUIRED.
1. Statute authorizing Secretary of War to grant.
D. IRRIGATION DITCHES, LAW AS TO WATER RIGHTS.
1. Approval of location. (See Public Property VI D.)..... *Page 945*
2. Where lands acquired subject to right of way.
E. FOR RAILWAYS—NORTHERN PACIFIC RAILROAD..... *Page 946*
1. Railways through water-reserve lands.
VII. LEASE.
A. TO THE UNITED STATES.
1. Assignment by lessor not within section 3737, Revised Statutes.
2. Buildings erected on leased land.
3. Construction of term "month."..... *Page 947*
4. Option for renewal.
5. Renewal by formal contract.
6. Where property is occupied after expiration of term.
7. Where rent is claimed adverse to lessor.
B. BY THE UNITED STATES.
1. On Muskingum River—Act of August 11, 1888 (25 Stat. 417).
a. Acceptance of rent from assignee ratifies assignment. *Page 948*
b. Termination for nonpayment of rent.
2. Under act of July 28, 1892 (27 Stat. 321).
a. Exception as to mineral lands.
b. Discretion as to amount of rent..... *Page 949*
c. Commencement of term.
d. Revocation of lease.
e. Disposition of rent.
VIII. LICENSE, GENERAL DISCUSSION..... *Page 950*
A. NATURE OF..... *Page 952*
1. No usufructuary interest.
2. Not assignable or transferable.
a. Issue of new license to assignee.
3. Will not authorize taking of property..... ..... *Page 953*
4. Can not authorize permanent changes or damage to property.
a. Can not authorize waste.
b. Can not authorize use of mineral lands.
c. Can not authorize permanent structures.
d. For use of surplus water for irrigation..... *Page 954*
e. To receive water through Government system.
5. For landing of ferry on reservation..... *Page 955*
6. For use of personal property.
B. INSTANCES WHERE LICENSES HAVE BEEN GRANTED.
1. For post office..... ..... *Page 956*
C. WHERE UNITED STATES OWNS FEE SUBJECT TO PUBLIC EASEMENT.
D. WHERE UNITED STATES HAS A SPECIAL INTEREST ONLY.
E. REVOCATION AND REMOVAL OF PROPERTY..... *Page 957*
1. Change of location of railroad track.
IX. SALES.
A. MILITARY STORES—SECTION 1241, REVISED STATUTES.
1. Meaning of term "military stores."
a. Containers of supplies.

IX. SALES—Continued.
A. Military Stores—Section 1241, Revised Statutes—Continued.
2. Manner and terms of sale.
a. Must be condemned as damaged or unsuitable..... *Page 958*
(1) Unsuitable where not adapted for use.
(2) Unsuitable by reason of situation.
(3) Matured or fallen timber or driftwood..... *Page 959*
(4) Timber, etc., in clearing land.
b. May be sold on credit.
c. Employment of auctioneer.
d. Where property is returned under contract.
e. Can not be exchanged. (See Public Property I A 4.)
f. Use, etc., of condemned property..... *Page 960*
3. Disposition of proceeds of sales. (Sec. 3618, R. S.)
a. Property not subject to section 3618, Revised Statutes.
4. Property not under section 1241, Revised Statutes. (See, also, Navigable Waters, X F and X F 3.)
B. Of Arms, Clothing, etc., by Soldiers.
1. Seizure of arms sold.
2. Seizure of clothing sold..... *Page 961*
(As to title, See Pay and allowances: II A 3 a (4) (*a*)

I. The Constitution—Article IV, section 3, paragraph 2—provides that "the Congress shall have power to dispose of, and make all needful rules and regulations respecting, the territory or other property belonging to the United States." The scope of this provision is most comprehensive; the authority conferred thereby upon the legislative branch of the Government being held to extend from the formation of a Territorial Government to the matter of the sale of a small amount of personalty. That neither land nor any interest in land of the United States can be sold or otherwise disposed of by the head of an executive department or other executive official or by a military officer, without the authority of Congress, is settled law.[1] *R. 7, 404, Mar., 1864; 22, 135, July, 1866; 30, 605, Aug., 1870; 35, 307, Apr., 1874; 42, 283, May, 1879; 54, 609, Feb., 1888.* In the absence of such authority, the lands of the United States, whether held by original proprietorship, or acquired by purchase or gift, or by conquest, cannot, even for a purely benevolent or religious purpose, be given away any more than they can be transferred for a valuable consideration. *R. 39, 337, Dec., 1877.* Nor, in the absence of legislative authority, can the Secretary of War authorize the use of Government land for street purposes. *C. 3864, Feb., 1898; 7891, Mar. 31, 1900; 7959, Mar. 31, 1900; 17478, Jan. 31, 1905.* Nor (without such authority) can they be conveyed temporarily by *lease*,

[1] This fundamental rule of our public law is expressed by Attorney General Hoar (13 Opins. 46), as follows: "I am clearly of opinion that the Secretary of War cannot convey to any person any interest in land belonging to the United States, except in pursuance of an act of Congress expressly or impliedly authorizing him to do so." And see United States *v.* Nicoll, 1 Paine, 646 (Fed. Cas., 15,879); Seabury *v.* Fields, McAllister (Fed. Cas., 12574), 1; United States *v.* Hare, 4 Sawyer, 653, 669 (Fed. Cas., 15303). See also 29 Op. Atty. Gen., 272, to the effect that the title to a school building in Petersburg, Alaska, purchased from the "Alaska fund" could not be transferred from the Government to the town of Petersburg, except by an act of Congress.

whether for a short or long term.[1] *R. 32, 2, May, 1871; 39, 336, Dec., 1877; 42, 230, Mar., 1879; C. 10819, July 13, 1901; 12497, Apr. 24, 1902; 13102, Aug. 9, 1902; 13757, Dec. 6, 1902; 14360, Apr. 1, 1903; 14454, Apr. 17, 1903; 15286, Oct. 6, 1903; 16062, Mar. 15, 1904; 19140, Feb. 5, 1906; 19896, June 16, 1906; 21384, Apr. 13, 1907; 27466, Nov. 9, 1910; 11131, Oct. 11, 1901.*

I A. As, under the resolution of annexation of Hawaii "absolute fee and ownership of all public Government, or Crown lands" vested in the United States, which resolution provided further that Congress would "enact special laws for the management and disposition of such lands," *held* that the continued disposition of such lands by the Territorial Government of Hawaii was unauthorized.[2] *C. 6488, May 27, 1899; 7359, Dec. 1, 1899.*

I A 1. Nor, without authority from Congress, can an executive department or officer convey away any *usufructuary interest* in land of the United States. Thus it has been repeatedly held by the Judge Advocate General that the Secretary of War (or a military commander) was not empowered, of his own authority, to grant a right of way over a military reservation to a railroad company or other corporation.[3] *R. 31, 237, Mar., 1871; 34, 197, 470, Mar. and Sept., 1873; 35, 554, Aug., 1874; 36, 207, Jan., 1875; C. 241, Aug., 1894.* And such rights when given by Congress can be exercised only within the terms of the grant. Thus where by an act of Congress there was granted to a railroad company a limited and defined right of way across a military reservation (occupied by a military post), *held* that the company was authorized simply to construct a track or roadway, and was not empowered to put up depots, stock yards, cattle pens, or other erections upon the land, or to appropriate land otherwise than for the roadway.[4] *R. 41, 214, Apr., 1878; 42, 187, Mar., 1879.* So *held* that the Secretary of War could not, of his own authority, grant, in consideration of the payment of toll to the United States, a right of way over a bridge belonging to the United States. *R. 31, 136, Jan., 1871; 38, 41, Apr., 1876.* So *held* that the Secretary could not legally grant to a company or individual the right to erect and maintain for an indefinite period a hotel on the military

[1] See Friedman *v.* Goodwin, 1 McAllister, 148, where a lease made, by the post commander at San Francisco, of a part of a "Government reserve," though approved by the military governor of the then Territory and also by the Secretary of the Interior, was held void because not authorized by Congress. The court declares the "utter impotency of any attempt by an officer of the Government to alien any land, the property of the United States, without the authority of an act of Congress," adding that "the President with the heads of the departments combined" could not effect such an object. And see 4 Opins. At. Gen. 480; 9 *id.* 476; 13 *id.* 46; United States *v.* Hare, 4 Sawyer, 670–1. In the last case the court says: "The Secretary of the Treasury cannot execute or approve of a lease of any property belonging to the United States without special authority of law."

But see now the act of July 28, 1892 (27 Stat. 321), which gives the Secretary of War authority to lease for a period not exceeding five years and revocable at any time, public property under his control (except mineral and phosphate lands), not for the time required for public use.

[2] Following this opinion an Executive order was issued on Sept. 11, 1899, setting aside all sales made since the adoption of the resolution of annexation.

[3] In numerous statutory enactments such a right has been expressly given by Congress as the only authority competent for the purpose.

[4] See this opinion affirmed by the Attorney General in 14 Op., 135.

reservation at Sandy Hook.[1] *R. 38, 351, Nov., 1876.* So *held* that the Secretary would not be authorized to transfer a lot belonging to the United States in Washington to the Commissioners of the District of Columbia for the erection of a hospital. *R. 36, 668, Sept., 1875.* So *held* that neither the Secretary of War nor a department commander could grant to an individual or individuals the exclusive right to use for an indefinite period certain water power belonging to the United States (*R. 41, 136, Feb., 1878*); nor the exclusive right to mine the soil of a military reservation for a certain term of years (*R. 41, 37, Nov., 1877*); nor a similar right to make and maintain for an indefinite period ditches through a portion of such a reservation for the purpose of irrigating the lands of private parties (*R. 38, 232, Aug., 1876*); nor the right annually to enter upon and occupy a military reservation and cut and possess the hay crop growing thereon[2] (*R. 42, 128, Jan., 1879*); nor the right permanently or indefinitely to occupy and use a portion of a reservation for a burying ground. *R. 39, 337, Dec., 1877; C. 10720, June 26, 1901; 19020, Jan. 15, 1906; 19254, Feb. 27, 1906; 19482, Apr. 6, 1906; 21940, Aug. 17, 1907; 11886, Jan. 13, 1902; 16827, Aug. 31, 1904.*

I A 2. *Held,* however, that a distinction was to be observed between a grant of a usufructuary interest in land and a revocable *license,* not involving a transfer of such an interest.[3] *R. 33, 657, Jan., 1873; 34, 196, Mar., 1873; 43, 278, Apr., 1880.* Thus *held* that the Secretary of War would be authorized to permit a telegraph company to erect posts upon a military reservation and attach to the same telegraph wires, subject to their being removed at the will of the Government if found to interfere with the purposes for which the reservation was established. *R. 38, 591, May, 1877.* So *held* that a municipal corporation might legally be permitted by the Secretary of War to lay water pipes in the soil of the arsenal grounds at Springfield, Mass., the same being equally for the benefit of the military authorities and the citizens, and subject to removal at the will of the Government. *R. 36, 653, Aug., 1875.* And *held* that a post trader might legally be licensed by the Secretary of War to erect the buildings necessary for his business upon the land of the post for which he was appointed. *R. 33, 453, Oct., 1872; 35, 78, Dec., 1873.* But *held* that the Secretary of War was not empowered to accede to the application of an individual to establish a ferry across a river within the limits of a military reservation, where what was asked was not a mere license revocable at the will of the Secretary but a permanent franchise and grant of an exclusive usufructuary interest in the premises, including even the right to charge tolls to the United States. *R. 38, 564, Apr., 1877;*

---

[1] See confirmatory opinion of the Attorney General in 16 Op., 205. In this case there was the further objection that the State of New Jersey, in ceding to the United States jurisdiction over the premises, by deed of Mar. 10, 1846, had expressly declared that the grant was "for military purposes"; adding, "and the said United States shall retain such jurisdiction so long as the said tract shall be applied to the military or public purposes of the said United States, and no longer."

[2] *A fortiori* in regard to growing timber. See Spencer *v.* United States, 10 Ct. Cls., 255.

[3] See this distinction recognized in opinions of the Attorney General of Oct. 1, and Nov. 22, 1878 (16 Op. 152, 205), in the former of which it was held that the Secretary of the Navy was not empowered to authorize the city of Chelsea, Mass., to continue one of its main sewers through the grounds of the United States Naval Hospital. See 14 Op. Atty. Gen., 125.

39, 457, Mar., 1878; 42, 454, Dec., 1879. And similarly *held* in a case of an application to be permitted to erect and maintain a permanent bridge across a river forming a boundary of a military reservation, one end of which was to be built upon the soil of the reservation; the application contemplating not a mere license revocable at the will of the Government, but a permanent right of property in the bridge involving an easement in the land. *R. 43, 167, Jan., 1880.* Also similarly *held* where the application was to bore for gas on a military reservation and for the exclusive privilege of piping and disposing of the same, if found in paying quantities. *C. 285, Sept., 1894.*

I A 3. The provision of the Constitution in regard to the disposition of public property applies to *personalty* equally as to realty. Thus no executive department or officer can be empowered, except by the authority of Congress, to dispose of personal property of the United States.[1] *R. 30, 605, Aug., 1870; 38, 11, Dec., 1875; C. 148, Aug., 1894; 1299, May, 1895; 3555, 3679, Oct. and Nov., 1897; 5008, Sept., 1898.* So *held* that the Secretary of War would not be authorized, in the absence of enabling legislation, to sell or negotiate the bonds or promissory notes made to the United States by certain railroad companies, in consideration of rolling stock, &c., sold and transferred to the same. *R. 30, 605, Aug., 1870.* And *held* that the fact that certain valuable public property was perishable and liable to waste was not legally sufficient to justify the sale in the absence of statutory authority. *R. 28, 479, Apr., 1869. Held* that the "Cavalry Tactics," a work prepared under the orders of the Secretary of War by a board of officers, was the property of the United States, and therefore could not, without the authority of Congress, be disposed of to a bookseller with a view to its publication and sale by him on his private account. *R. 35, 264, Mar., 1874.* And *held* that the telegraph lines of Porto Rico, which by the treaty of Paris, became the property of the United States, could not be alienated except by authority of Congress. *C. 8097, Apr., 1900; 10819, July 13, 1901; 11131, Oct. 11, 1901; 13102, Aug. 9, 1902; 13757, Dec. 6, 1902; 13419, Mar. 11, 1903; 14454, Apr. 17, 1903; 21384, Apr. 13, 1907; 19282, Mar. 2, 1906.*

---

[1] The leading case on this point is United States *v.* Nicoll, 1 Paine, 646 (Fed. Cas. 15879), in which it was held that a sale or loan, by the commandant of an arsenal, of a quantity of *lead* belonging to the United States, was illegal and invalid. The court say: "The Constitution declares that 'Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.' No public property can therefore be disposed of without the authority of law, either by an express act of Congress for that purpose, or by giving the authority to some department or subordinate agent. No law has been shown authorizing the sale of this lead; nor is any such authority to be inferred from the general power vested in any of the departments of the Government. The power, if lodged anywhere, would seem most appropriately to belong to the War Department. But there is no such express or implied power in that department to sell the public property put under its management." And see the same principle recognized in an opinion of the Attorney General (16 Op. 477), in which it is held that the Secretary of War was not empowered to sell *arms* to a State, in the absence of authority from Congress.

In certain emergencies, however, the use of property of the United States to relieve suffering among persons not entitled to such aid has been authorized by the President, and similarly the Army Regulations contain provisions with reference to the care of certain sick persons not entitled to such care; but there is no authority of law for this. It can only be said to rest on the *necessity* of furnishing relief in such cases.

I A 4. The provision of the Constitution in regard to the disposition of public property applies to exchange as well as to other disposition thereof. An exchange of public property for other property not belonging to the United States can not, therefore, be made except by authority of Congress. *R. 52, 316, June, 1887; P. 37, 204, Dec., 1899; C. 613, Nov., 1894; 1223, Apr., 1895; 2127 and 2183, Mar. and Apr., 1896; 3414, Aug., 1897; 11743, Dec., 1901; 12479, Apr. 24, 1902.* However, an exchange is recognized as a common business transaction, and where there is authority for the condemnation and sale of unsuitable materials, such as is given in section 1241 R. S., with respect to old material, condemned stores, etc., and also authority for the purchase of new supplies, an exchange may legally be effected, provided the amount allowed for the old materials in part payment be covered into the Treasury in conformity to the requirements of section 3618 R. S., as amended by the act of July 8, 1896 (29 Stat. 268), which requires the net proceeds of the sale of the same to be "covered into the Treasury as miscellaneous receipts," the appropriation for the new supplies to be charged for the full value of the same.[1] *C. 3414, Dec. 19, 1904, and Aug. 12, 1905; 16420, June 4, 1904; 20159, Aug. 8, 1906.* And where there is statutory authority to credit the proceeds of the sale of unserviceable property to the appropriation for the work for which it was purchased, as in sales of river and harbor property under section 5 of the act of June 13, 1902 (32 Stat. 373), the exchange of the old supplies may be made for new in part payments without the necessity of any transfer of appropriations.[2] *C. 3414, Jan. 6, 1904, Dec. 19, 1904, and Aug. 12, 1905; 20159, Aug. 8, 1906.*

I A 4 a. *Held*, that in the absence of authority from Congress the Secretary of War could not be empowered to sell military stores to a state or to exchange for such stores in possession of a State. *P. 41, 497, July, 1890; 42, 371, Aug., 1890.* The militia act of January 21, 1903 (32 Stat. 775), authorizes the sale to a State, Territory, or the District of Columbia of military stores, etc., and the exchange of old arms and ammunition for new. On application by the governor of Hawaii for the sale to that Territory of a flag for use on the capitol building, *held* that while supplies for the militia might be sold to the Territory, under section 17 of said act, there was no statutory authority for a sale for other purposes, and that, as to such sales, the fundamental rule is applicable that Congress alone can authorize the disposition by sale or otherwise of public property. *C. 15286, Oct. 6, 1903.*

I A 4 b. Under the provisions of the act of March 3, 1879 (20 Stat. 412), the Secretary of War is, upon the request of the head of any department, authorized and directed to issue arms and ammunition whenever they may be required for the protection of public money and property, to any officer of the department designated by the head thereof, to be returned when the necessity for their use has passed. *Held* that under this statute the Secretary of War could furnish arms and ammunition, upon the request of the Secretary of the Interior, to an Indian agent for use of his police to meet any threatened armed opposition that might arise in the attempt of the agent to evict trespassers from the reservation under his charge. *C. 1419, June, 1895.*

[1] V Comp. Dec., 716; 15 Op. Atty. Gen., 322; Cir. 1, W. D., Jan. 3, 1906.
[2] IX Comp. Dec., 311.

I A 5. Where it was reported that the Indians in the Copper River district of Alaska were destitute and in need of food, and it was proposed that rations should be issued them by the War Department, *held* that although there is no statutory authority for furnishing rations in such a case, issues of rations have heretofore been made by the War Department to destitute persons where the overruling demands of humanity made it necessary.[1] *C. 6836, Aug. 3, 1899; 7493, Jan. 12, 1900; 14347, Mar. 23, 1903; 23289, Sept. 27, 1909.* Similarly *held* as to the authority to sell coal at net cost (*C. 19307, Mar. 2, 1906*); and as to the loan of coal, security being taken therefor. *C. 19307, Oct. 13, 1906.*

I A 5 a. *Held* that while there is no statutory authority for making a regulation placing civilian employees of the Government on the same footing as discharged soldiers with regard to rations while under treatment in hospital, neither is there such authority for the regulation in regard to discharged soldiers.[2] The best that can be said of such regulations, like the provisions for the issue of rations to sufferers from flood and famine, is that they are founded on a kind of necessity. *C. 9491, Dec. 24, 1900.*

I A 6. Where a balloon, property pertaining to the Signal Corps, had been sent on a voyage and was picked up by a private person who refused to give it up until paid the sum of $20, *held* that the sending of the balloon on the voyage did not constitute an abandonment of the property so as to entitle the finder to keep it, such action being the appropriate method of using the property so that it must be assumed there was an intention to retain title and recover the property if possible; that unless a reward was offered, the finder would have no lien on the property, either for reward or expenses;[3] that if he appropriated it to his own use, he would render himself liable, both civilly and criminally;[4] and advised that the papers be referred to the Attorney General, with request that action be taken to recover possession of the balloon. *C. 18456, Aug. 22, 1905.*

I B. The Secretary of War is not authorized, without the authority of Congress, to turn over property of his department, in his charge,

---

[1] Such issues are sanctioned by par. 1241 A. R., which provides that the issues will only be made "when the commanding officer assumes the responsibility of ordering the issue to relieve starvation or extreme suffering." In an unpublished opinion of the Acting Attorney General, Oct. 15, 1908, in regard to the issue of provisions and rations to citizens of Georgia made destitute by recent storms, it was said: "That while there is no direct authority by statute for affording temporary relief in such an emergency, yet there is no statutory prohibition; and, in view of the fact that such relief has been extended in the past, the Attorney General thinks that under the general executive power the contemplated relief may be given in the present emergency." Rations were issued in conformity with this opinion; and, under date of July 6, 1899, the Secretary of War authorized the issue of 10,000 rations for the benefit of sufferers from floods in Texas. Provision for similar relief were made by Congress as follows, *inter alia:* By act of Mar. 31, 1890, for the relief of persons driven from their homes by floods in Arkansas, Mississippi, and Louisiana; by joint resolution of Apr. 25, 1890, for purchase and distribution of subsistence stores for persons suffering from floods of the Mississippi River; by joint resolution of Dec. 25, 1893, for pecuniary aid, in the discretion of the Secretary of War, to Government employees injured by the Ford's Theater disaster; by public resolutions No. 17, Apr. 30, 1908, and Nos. 20 and 21, May 11, 1908, to relieve the distress occasioned by recent storm or cyclone.

[2] See par. 1474 and 1475 A. R., 1910, as to discharged soldiers' receiving hospital treatment and rations while under treatment. See also par. 1483 as to civilian employees.

[3] Tome *v.* Four Cribs of Lumber, Fed. Cases No. 14083; Reeder *v.* Anderson, Administrator, 34 Ky., 193; Chase *v.* Corcoran, 106 Mass., 286.

[4] Am. & Eng. Ency. of Law, 2d Edition, vol. 18, pp. 504, 520.

to another department for its permanent use and disposition. *P. 51, 414, Jan., 1892. C. 1623, Aug., 1895.* But such transfer may be made with proper debit and credit of appropriations.[1] *C. 3679, Jan., 1898; 7840, Mar., 1900; 12491, May 6, 1902; 16202, Apr. 20, 1904.*

Under paragraph 616, Army Regulations (630 of 1910), "The transfer of public property from one bureau or department to another is not regarded as a sale."[2] Paragraph 671 (682 of 1910) requires for such transfer "special authority of the Secretary of War" and provides that "when between a bureau of the War Department and any other executive department the amount to be paid will include the contract or invoice price, and cost of transportation." The amount thus determined should be transferred as indicated on page 602, volume 3, Decisions of the Comptroller of the Treasury. *Held* that a transfer of certain clothing from the Quartermaster's Department to the Department of Justice for the use of prisoners in the United States penitentiary at Fort Leavenworth could legally be made under the provisions of the regulations cited, the latter department having an appropriation made by Congress for the purchase of clothing for the prisoners named. *C. 7184, Oct., 1899.* Similarly *held* with respect to a proposed transfer of five mules purchased from the appropriation for river and harbor improvements, to the Quartermaster Department of the Army. *C. 3679, Jan., 1898; 11839, Jan. 3, 1902; 12191, Mar. 10, 1902; 12491, May 6, 1902; 14817, June 17, 1903; 16202, Apr. 20, 1904; 17672, Mar. 10, 1905.*

I B 1. The exchange of a lighthouse reservation for a military reservation by the Treasury and War Departments would not be legal without the authority of Congress, but *advised* that it would be in accordance with precedent for each department to give to the other a license to occupy the lands of that department pending action by Congress. *C. 3657, Nov., 1897; 8743, Aug., 1900; 11478, Oct. 30, 1901.*

Instances of transfers to another department are: The transfer of Dry Tortugas, Fla., to the Navy Department by direction of the President in April, 1900 (*C. 7968, Apr. 2, 1900*); the transfer of a portion of the reservation of Point Loma, Cal., to the Navy Department for a coaling station (*C. 11133, Sept. 13, 1901*); and the lease of the reservation of Fort Trumbull, Conn., to the Treasury Department. *C. 24526, Feb. 23, 1909, and June 21, 1910.* With reference to the transfer of Dry Tortugas, *supra*, it was thought that this reservation, having been reserved from public domain and being of no further use for military purposes, could be transferred direct by the President instead of being placed under the control of the Department of the Interior under the act of July 5, 1884 (23 Stat. 103), and subsequently reserved for naval purposes. *C. 24597, Mar. 9, 1909.* Where, however, land has been purchased and not reserved from public domain, a complete transfer would require authority from Congress. *C. 20674, Oct. 14, 1907; 24597, Mar. 9, 1909.*[3]

---

[1] See pars. 630 and 682 (1910), and III Comp. Dec. 602.

[2] See 17 Op. Atty. Gen. 480.

[3] Opinion of Attorney General, dated Nov. 21, 1907, not published. See, however, decision of Acting Secretary of the Interior, June 4, 1885 (3 Land Decisions, p. 577), to the effect that Fort Sullivan, Me., a military reservation acquired by purchase and within a State having no public lands, could be disposed of under the act of July 5, 1884 (23 Stat. 103), and to transfers in Porto Rico, see 25 Op. Atty. Gen., 269; 28 Op., 262 (as to transfers in P. I.). See also opinion of July 17, 1911, as to Porto Rico.

I C. Requests for the *loan* of tents, flags, and other public property under the control of the War Department have, as a rule, been denied on the ground that the Secretary of War had no authority to loan public property under his control unless authorized to do so by resolution or act of Congress.[1] While there have been instances in which dredges and other public property used for the improvement of navigation have been loaned under authority of the War Department, the practice has been, with few exceptions, in accordance with the view that, in the absence of authority from Congress, the Secretary of War can not legally loan personal property of the Government. *C. 1561, July, 1895; 2265, May, 1896. Held,* therefore, that in the absence of congressional authority Government ambulances could not be loaned to the National Guard of a State for use on a practice march. *C. 1561, supra.* But *held* that it was within the discretion and power of the Secretary of War to temporarily furnish transportation and an escort for a United States judge, on his request, while traveling from place to place for the purpose of holding court in the Indian Territory. Such use would not be a loan. *C. 228, Aug., 1894; 10655, June 11, 1901; 16155, Apr. 7, 1904; 19282, Mar. 2, 1906; 20846, Dec. 28, 1906, and Jan. 30, 1907.*

I D. When a general deposit is made in a bank, the depositor parts with the title to the money deposited and takes in the place of it a credit. This credit is a *chose in action* and is "property." This kind of property when belonging to the United States may, under paragraph 585, Army Regulations (496 of 1910), be protected like any other property. *C. 314, Sept., 1894.*

I E. Except the State, War, and Navy Building, provided for by a separate statute of March 3, 1883, the other buildings owned by the United States and occupied by the War Department are not found to have been taken from the charge of the Chief of Engineers. The fact that a "superintendent of building" is authorized, as in the case of the appropriation for the Record and Pension Office, would not take the building from the general charge devolved upon the Chief of Engineers by section 1797, R. S. *P. 60, 237, June, 1893.*

I F. In a case where an officer had been relieved from duty as company commander and another officer placed in temporary command pending the arrival of the officer who was to assume permanent command—the order relieving the officer providing that he should retain charge of the funds and property—*held,* on the question of whether it was competent to require the officer who had been relieved to continue his responsibility for the company property, that where, as in this case, an officer is permanently relieved, the responsibility and accountability should devolve upon his successor in office, proper receipts being taken by the officer relieved, and that he can not properly be required to retain responsibility after he has been permanently relieved and another officer placed in command, unless the exigencies of the service require his immediate departure without making the formal transfer required by the regulations. *C. 27780, Feb. 4, 1911. Held,* further, that the regulations

[1] Such action, for example, was taken by the War Department, Jan. 16, 1881, on a request for the loan of tents for a camp meeting, and again on June 24, 1895, on a request for the loan of flags to be used at an encampment.

contemplate that any officer who has the custody of Government property is responsible for it regardless of where the accountability or responsibility might otherwise rest on paper; and that the general principle is that all officers are responsible for any Government property with which they are in any way connected, and the mere fact that an officer has not receipted for any given article can not be accepted as a warrant for his failure to exercise the utmost diligence under all circumstances to see that such property is properly safeguarded. *C. 27780, Feb. 4, 1911.* He will be liable only where a loss has been incurred, and then only where the loss is the result of his failure to exercise that degree of care which the circumstances required. *P. 46, 340, Apr., 1891.*

I F 1. A recruiting officer's clerk (a corporal), having access to blank transportation requests, filled out several in favor of a railroad company, forged thereto the name of the officer, and disposed of the same.[1] The forged requests were paid by a disbursing officer. *Held* that the latter, having paid out money of the United States on forged vouchers, was alone legally accountable for the loss. If the officer who permitted access to the blank requests thereby committed a military offense, his amenability for such offense could be enforced only by means of a trial, conviction, and punishment by court-martial. Whatever may be the legal effect of paragraph 35, Circular 7, Adjutant General's Office, 1892, the loss in question occurred prior to the promulgation of the circular. *P. 56, 208, Oct., 1892.*

I F 2. Where an officer, having had intrusted to him by another officer a medal of honor intended for and to be delivered to an enlisted man, gave such care to its safe-keeping as he gave to his own property, locking it up in his trunk for the purpose of transportation, *held* that he was not legally accountable for the loss of the medal *in transitu*. He was simply a gratuitous bailee, of whom is required only the lowest degree of care and who is not liable for a loss which is not the result of gross negligence. *P. 44, 382, Dec., 1890.*

I F 3. A board of survey (now surveying officer) is not a *court* and can not legally exercise the powers expressly vested by statute in courts-martial or courts of inquiry. *R. 34, 306, June, 1873.* It is no part of the province of a board of survey to convict of crime. Where such an officer or board, in fixing upon an officer a pecuniary responsibility for the loss of certain subsistence stores, expressed incidentally the opinion that the same had been stolen by a certain soldier, *held* that this opinion could not operate as a finding of theft or constitute authority for the stopping against the pay of the soldier of the value of the stores.[2] *R. 42, 605, Apr., 1880.*

I F 3 a. There is no statute or regulation authorizing the swearing of a board of survey (now surveying officer), nor indeed is it necessary that such a body should be specially sworn. A board of survey, moreover, has no legal capacity to swear persons attending before it as witnesses, nor is it within the province of an executive order to authorize such a board to administer an oath either to itself or to

[1] It was held by the Comptroller that where a stolen transportation request was accepted in good faith by a railroad company the company was entitled to payment for the services so rendered. VI Comp. Dec. 936; XIV id. 7; I Mss. Comp. Dec. 251.

[2] See Article LVI, Army Regulations of 1910.

a witness.[1] *R. 5, 590, Jan., 1864; 33, 548, 561, Dec., 1872; 34, 305, June, 1873.*

I F 3 b. A board of survey (now surveying officer), though it may not swear witnesses, may receive and file with its report affidavits of persons cognizant of facts under investigation. *R., V, 590, Jan., 1864.*

I F 4. A person who, as an officer of the Army, has been subjected under section 1304, R. S., to a charge, against his pay, of the money value of military stores deficient or damaged for which he has been held accountable, can not, after he has ceased to be such officer and has left the Army, be relieved from such liability by the Secretary of War under that section. For such relief he must have recourse to Congress. *P. 65, 137, May, 1894.*

I G. *Held*, with respect to the proposed donation to the United States of six horses, that in the absence of a statute forbidding the acceptance of the same, such as applies to the purchase of land (sec. 3736 R. S.) or to the acceptance of voluntary services (sec. 3679 R. S., as amended Feb. 27, 1906—34 Stat. 49), there would be no legal objection to the acceptance of the proposed donation. *C. 27872, Feb. 17, 1911.* Similarly *held*, with respect to the acceptance of a proposed donation by the county of Galveston, Tex., of shell for the repair of Government roads at Fort Crockett—the work being of benefit to the community as well as to the Government. *C. 29257, Nov. 22, 1911.*

II A. In the absence of statutory authority, land can not be purchased *for* the United States with any more legality than land of the United States can be sold or disposed of. By a provision of an act of May 1, 1820, now contained in section 3736, R. S., it is declared that "no land shall be purchased on account of the United States except under a law authorizing such purchase." *Held* that the term "purchase" was to be understood in its *legal* sense, as embracing any mode of acquiring property other than by descent;[2] and that therefore the Secretary of War would not be empowered to accept a gift of land or interest in land, for any use or purpose independently of statutory authority.[3] *R. 32, 19, Sept., 1871; 38, 175, July, 1876; 39, 313, Nov., 1877; 44, 9, June, 1880; C. 3896, Feb., 1898; 11024,*

---

[1] See opinion of Judge Advocate General published in full in G. O. 68, War Dept., 1873; also par. 712, A. R. (795 of 1901). But see sec. 183, R. S., as amended Mar. 2, 1901, so as to provide, *inter alia*, that "Any officer of the Army detailed to conduct an investigation, and the recorder, and, if there be none, the presiding officer of any military 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." See also par. 725, A. R., 1910.

As to the procedure of boards of survey, action on their reports, etc., see G. O. 179 of 1898.

[2] See 7 Op. Atty. Gen. 114, 121; Ex parte Hebard, 4 Dillon, 384; Fed. Cas., 6312.

[3] See this opinion concurred in by the Attorney General, in 16 Op. 414. As statutes specially authorizing the acceptance of donations of land, note the early acts of Mar. 20 and May 9, 1794, and, later, the acts of Feb. 18, 1867; Mar. 3, 1875; June 23, 1879. That authority, however, to purchase, and, a fortiori perhaps, to accept a gift of, the necessary land, may be implied from an appropriation act granting a sum of money for a public work requiring for its construction the occupation and use of certain land of an individual or corporation, see opinions of the Attorney General in 15 Op. 212; 16 id. 119, 387 In the opinion in 16 Op. 119, it was held that where no statutory authority whatever existed for accepting a gift of land, a head of department would not be justified in accepting the same on the condition that Congress ratify the acceptance and in anticipation of such ratification.

Aug., 1904; 12702, May, 1902; 13854, Jan., 1903; 13586, Nov., 1902. And similarly *held* as to the construction of the same word ("purchase") as employed in sec. 355, R. S., and advised that an appropriation of public money could not legally be expended for the erection of a public building upon land *donated* to the United States, until the Attorney General had approved the title, and the legislature of the State in which the land was situated had given its consent to the grant.[1] *R. 32, 19, supra; 39, 313, supra; 42, 452, Dec., 1879; C. 12242, Apr., 1904.*

II A 1. In view of the prohibition of section 3736, R. S., that "no land shall be purchased on account of the United States, except under a law authorizing the same," the Secretary of War can not accept a grant by *gift* of land or of an easement in land, without statutory authority.[2] *R. 45, 359, June, 1882; P. 40, 447; May, 1890; 43, 70, Sept., 1890; C. 3896, Feb. 24, 1898; 12242, Mar., 1902.* And *held* that, in the absence of authority from Congress, a purchase of lots in a city cemetery for the burial purposes of a neighboring military post would not be legal or operative. *P. 31, 426, Apr., 1889.* Also *held* that under the act of August 18, 1890 (26 Stat. 316), authorizing the acquisition by purchase, condemnation, or donation of land or easement therein for fortification and coast defense purposes, the proposed donation of the right of way for a macadamized road between Fort Mansfield and Watch Hill, R. I., being in aid of such purposes, could legally be accepted, if a proposed clause binding the United States to maintain the road be eliminated. *C. 13854, Jan. 29, 1903.*

II A 2. The statutory authority relied upon for the purchase of land by a head of a department should be clear and indisputable. Thus *held* that authority to purchase additional land for the interment of soldiers could not be derived from the general provision of the annual appropriation act, appropriating a certain sum for maintaining the *existing* national cemeteries. *R. 41, 50, Nov., 1877.* And *held* that an appropriation for the "establishment" of a military post in the vicinity of Manila would not be sufficient in view of the positive prohibition of the statute.[3] *C. 12154, Mar., 1902.*

II A 2 a. A statute conferring a specific authority to purchase certain land should, in the exercise of the authority, be strictly construed. Thus where a statute authorized the Secretary of War to purchase, for a certain stated sum, a certain described tract containing a specified number of acres, *held* that the act did not invest him with discretion to purchase a portion only of such tract. *R. 38, 346, Oct., 1876; P. 37, 203, Dec., 1889; C. 13580, Nov. 4, 1902; 15110, Sept. 1903; 24464, Sept., 1909. Held,* however, that pur-

[1] But under the implied authority contained in sec. 1838, R. S., lands required as sites for forts, arsenals, etc., or needful public buildings, may be purchased (or acquired by gift) without the consent of the State, though, in the absence of such consent, public money can not, in view of the provisions of sec. 355, legally be expended upon the buildings. 10 Op. Atty. Gen. 35; 15 id. 212.

[2] But by act of Apr. 24, 1888 (25 Stat. 94), the Secretary of War is expressly empowered to purchase, or accept donations of, land for river and harbor improvements; and sections 4870–4872, Rev. Stats., give general authority in respect to national cemeteries; and the acts of Aug. 18, 1890 (26 Stat. 316), and June 6, 1902 (32 Stat. 305), and Apr. 28, 1904 (33 Stat. 497), confers similar authority with respect to lands needed for fortifications and coast defenses and barracks in connection therewith.

[3] See VII Comp. Dec., 524; 11 Op. Atty. Gen., 201; 12 Fed. Rep., 415.

chases can legally be made of portions of the lands authorized to be acquired under a given appropriation at prices indicating that the balance of the appropriation would be sufficient to cover the acquisition of the quantities specified, and that such a course is often necessary to accomplish the object of an appropriation. *C. 13580, Nov. 4, 1902; 15110, Sept., 1903, and Aug., 1906; 24464, Sept., 1909.*

II A 2 b. The deficiency appropriation act of March 3, 1899, authorized the Secretary of War, "in cooperation with the Floyd Memorial Association," to cause to be erected over the remains of Sergt. Charles Floyd, a member of the Lewis and Clarke Expedition, a suitable monument near Sioux City, Iowa, and appropriated $5,000 for the purpose. *Held* that the act did not authorize or require the acquisition by the United States of the land upon which the monument was built; that it may be assumed that Congress intended that the monument should be cared for by the association, and that the United States should be at no other expense than that of the appropriation for assisting in its construction.[1] There is no statute which would prohibit the expenditure of this particular appropriation if title to the site be not acquired by the United States, and in practice appropriations have frequently been expended in works of improvement where such title to the sites has not been obtained, especially in improvements of navigable waters and highways. The prohibitions of section 355, R. S., are not viewed as applicable to the case under consideration. *C. 7842, Mar., 1900.*

II A 3. No formal acceptance of a deed, apart from the delivery, is necessary, and in the practice of the War Department a formal acceptance is not usually given. An acceptance may be presumed from a variety of circumstances, such as placing the deed on record, possession of the deed, the conveyance being beneficial to the grantee, the exercising of ownership over the property conveyed, etc. Thus, where the Secretary of War secured in 1871, under section 18 of the act of July 17, 1862, a deed to a certain piece of land for use as a cemetery, which deed was duly delivered, placed on record, and forwarded to the War Department, and the land was so used until 1880, at which time the Secretary of War declined to accept the said deed of 1871, it was held that the deed had long since been legally accepted, vesting the title in the United States, that the subsequent refusal to accept it, did not divest the title, and that, in the absence of authority from Congress, the Secretary of War could not convey it to other parties.

II A 3 a. The owner of a certain tract of land subject to overflow from the Government reservoir system at the headwaters of the Mississippi River, conveyed to the United States by a deed, duly executed, acknowledged, and recorded, the perpetual right to overflow the said tract for a nominal consideration. Subsequently he asked that the deed be canceled and another and larger consideration be paid him for the easement. *Held* that the Secretary of War had no authority to cancel the deed or to release the easement conveyed by it. *C. 3782, Jan., 1898.*

II A 4. Authority to acquire land in a State, by the exercise of the right of eminent domain, whether by proceedings for condemnation in the United States circuit court or in the courts of the State,[2] can be vested in an executive official of the United States, only by express legislation of Congress. *R. 42, 63, Dec., 1878.*

---

[1] See VI Comp. Dec., 791. [2] See Kohl *v.* United States, 1 Otto, 367.

II A 4 a. The Constitution declares that private property shall not be taken "for public use without just compensation." It does not provide or require that compensation shall actually be paid in advance of occupancy of land to be taken. But the owner is entitled to reasonable, certain, and adequate provision for obtaining compensation before his occupancy is disturbed.[1] When there is no provision for compensation private property should not be taken against the consent of the owner for public use. Thus *held* that condemnation proceedings against land adjoining the Presidio of San Francisco, Cal., should not be instituted prior to an appropriation by Congress. *C. 3231, May, 1897; 20561, Oct. 26, 1906.*

II A 4 b. *Held* that there was no general act of Congress making State courts an agency of the United States for the purpose of condemning lands; and that proceedings for this purpose should be had in a United States court under an act of Congress, or in a State court when such court has been by such act made an agency for the purpose. *P. 38, 271, Feb., 1890.*

II A 4 c. Where certain land, part of the battlefield of Gettysburg, was in danger of being so cut up and altered by the construction of an electric railroad as to cause the obliteration of important tactical positions occupied by different commands engaged in the battle, *advised* that the Attorney General be requested to have initiated the proper proceedings for the condemnation of the land so that the United States may acquire the fee, and for an injunction restraining the railroad company from constructing or operating its road upon the land pending the condemnation proceedings.[2] *P. 64, 411, Apr., 1894.*

II A 5. Where an enactment of Congress (the river and harbor appropriation act of Sept. 10, 1890) required the Secretary of War to "acquire the title" to certain lands sufficient for a right of way for a canal, *held* that a contract of conveyance made with the owner of the land, a railroad company, by which a use was granted of such way jointly with the company, was not a compliance with the law, and that if no better title could be obtained by agreement, the Secretary should proceed to the alternative (authorized in the act) of causing the premises to be condemned. *P. 51, 184, Jan., 1892.*

II A 6. Section 355, R. S., prohibits the expenditure of public money upon any site of land purchased for military purposes, *inter alia*, "until the written opinion of the Attorney General shall be had in favor of the validity of the title." Before payment can be made for any land acquired by purchase, condemnation, or donation, the title must be approved by the Attorney General. *C. 12154, Mar. 31, 1902; 15611, Dec. 15, 1903. Held*, however, where it was proposed to reimburse the city of Manila for a gun shed or storehouse erected, out of insular funds for military purposes, on lands of the city, that such reimbursement might legally be made from the appropriation "barracks and quarters"; that in practice appropriations for similar purposes have been used in erecting temporary shelter for the Army without first acquiring title to the sites of the same, and that in such cases section 355, R. S., does not apply. *C. 12347, Apr. 1, 1902; 13680, Nov. 25, 1902.*

---

[1] Cherokee Nation *v.* Kans. Ry. Co., 135 U. S., 641, 659.

[2] Compare subsequent opinion of Attorney General, in 20 Opins., 628.

II A 6 a. *Held* with reference to the purchase of land at Pine Plains, N. J., where the option bound the owners of the property to give a "good and sufficient full covenant deed * * * free and clear from all * * * incumbrances," but did not include any obligation to furnish an abstract of title, that under the American rule where a contract of sale does not require the seller to furnish one, he is not bound to do so; and that if the land is to be purchased, the expense of procuring an abstract of title would be a proper charge against the appropriation for the property.[1] *C. 25446, Aug. 26, 1909. Held*, also, that the expense of survey would be a proper charge against the appropriation if the land is to be acquired by purchase. *C. 25446, Nov. 11, 1909.* Further *held*, after it had been found necessary to acquire certain tracts by condemnation proceedings, that since the expenses for abstracts were incurred when it was intended to purchase the property, they could not be considered a part of the expenses of condemnation, and were properly payable from the appropriation for the property. *C. 25446, Feb. 16, 1910.* With reference to the expense of serving offers in condemnation proceedings *held* that they were a part of the expenses of the proceedings and could not therefore be paid from the appropriation for the property.[2] *C. 25446, Mar. 28, 1910.*

II A 6 b. The title to lands purchased on account of the United States is not properly assured by a certificate of "no liens," signed by the attorney who made the abstract of title. The proper person to make such a certificate is the custodian of the records of judgment and other record liens in the county in which the land is located.[3] *P. 33, 292, July, 1889.*

II A 6 b (1). Where the Attorney General certified the title to land in Texas, subject to a vendor's lien for purchase money, and the person having said lien could not be located, *held* that as the deed recited that the money was "secured to be paid," the terms of the sale should be regarded as excluding the implied or equitable lien for the payment of the purchase money;[4] but that, assuming that the circumstances did not exclude the lien, being an implied or equitable one only, it would not survive the statute of limitations as applied to the deed secured thereby.[5] *Advised*, therefore, that the conveyance be accepted, secured by a certified check in the amount of the deed. *C. 21021, Dec., 1906.*

II A 6 b 2. Where, in the purchase of land for fortifications, title was encumbered by the lien of a judgment against one of the vendors, who appealed the case, *held* that there was no legal objection to making the purchase under an agreement to withhold a portion of the purchase price until the removal of the lien. *C. 26834, June 6, 1910.*

---

[1] See III Comp. Dec., 216; VIII id., 212, IX id., 569. With reference to the act of Mar. 2, 1889 (25 Stat. 941), providing that in procuring sites for *public buildings* the Attorney General shall require the grantors to furnish, without expense to the Government, "all requisite abstracts," etc., the comptroller held that this statute did not apply in procuring sites for fortifications under the War Department. III Comp. Dec., 216.

[2] I Comp. Dec., 317; II id., 202, III id., 216, IX id., 569-572.

[3] See G. O. 47 of 1881, for Attorney General's regulations as to making deeds, proving title to lands, etc.

[4] Houston *v.* Dickson (64 Texas, 79); 29 A. & E. Encyc. of Law, 2d ed., 742.

[5] Pitschki *v.* Anderson (49 Texas, 3), and Howard et al. *v.* Windom (86 id., 561).

II A 6 c. A grant of land for a particular use is sometimes held to constitute a qualified or determinable fee, so that if the land is put to other uses it reverts to the grantor; but where the proposed use is kept up the grantor can not claim the property under his right of reverter because it is also put to another use, "unless by the grant the use is, by words excluding any other use, restricted to the purpose recited."[1] *Held*, therefore, that land acquired for military purposes, subject to such limited use, might be leased temporarily without endangering the title thereto. *C. 4100, Oct. 27, 1898.* Similarly *held*, with reference to the issue of a permit to the Treasury Department for a life-saving station on the military reservation of Fort Ontario, N. Y., which was granted by the State for military purposes with a provision for reversion to the State whenever it should cease to be occupied for such purposes, that the proposed permission, being a revocable one, and the reservation as a whole continuing to be occupied for military purposes, the proposed permit would not lead to any legal complications. *C. 28650, July 8, 1911. Held*, also, that the Gettysburg National Cemetery, which was acquired for the burial of soldiers who fell in defense of the Union in the Battle of Gettysburg, might be used for the burial of other persons specified in section 4878 R. S., including deceased soldiers of the war with Spain, without impairing title to the property. *C. 5246, Nov. 10, 1898.*

II A 6 c (1). The State of North Carolina ceded to the United States, by an act of its legislature of 1794, the land of the present military reservation at Southport, N. C., the site of old Fort Johnson. A condition of the deed of cession was to the effect that a fortification should be erected on the land within three years and be maintained forever thereafter for the public service, or the land should revert to the State. The time allowed was repeatedly extended, the last extension expiring in 1818, when a fortification had been constructed if not fully completed. The fort has long since ceased to be garrisoned. In 1889 an individual citizen "entered" the site as State land. *Held* that this act was without legal authority or effect; that the condition subsequent in the deed was one of the breach of which the grantor, the State, could alone take advantage; and that, as the State had not proceeded to re-enter for such breach, the United States was not ousted and could legally continue to hold the premises.[2] *P. 36, 107, Oct., 1889; C. 13448, Oct. 24, 1902; 19419, Apr. 13, 1906.*

Certain lands were granted to the United States for canal purposes, and it was expressly stipulated in the deed that the same should be "occupied, used, and employed in and for no other use or object whatever." A revocable license was granted by the Secretary of War to a bridge company to enter upon and lay a temporary railway over a part of such lands. *Held* that this was a mere permission for a transient use not inconsistent with the grant; and that, whether the stipulation in the deed was construed to be a mere covenant or a condition subsequent, there was here no such diversion of the premises from the purposes for which they were granted as to work a forfeiture.[3] *R. 55, 37, Sept., 1886.*

---

[1] See leading cases in American Law of Real Property, vol. 2, pp. 24–27.

[2] See Schulenberg *v.* Harriman, 21 Wallace, 44.

[3] See 2 Washburn on Real Property, 6; McKelway *v.* Seymour, 29 N. J. Law, 231, Chapin *v.* School Dist., 35 N. H., 452; Thornton *v.* Trammel, 39 Ga., 202.

II A 6 d. *Held*, with reference to the deposit of money with the clerk of court in condemnation proceedings of land at Pine Plains, N. Y., that the investigation of the title by the United States attorney in charge of the proceedings, the approval of the same by the United States, together with the assent of the Department of Justice, may be regarded as a sufficient compliance with the statute to justify the proposed deposit. *C. 25446, June 1, 1910.*

II A 6 e. On the question of whether possession could legally be taken of property under a decree of condemnation of the same—an appeal having been taken therefrom—upon tender of the amount awarded, and buildings be commenced thereon, *held* that while, under the decisions of the courts, possession might be taken of the property,[1] in view of the requirements of section 355, R. S., no public money could be expended thereunder, since title to land acquired by condemnation "does not vest until the amount of compensation is ultimately fixed and made to the owner,"[2] and the Attorney General could not, therefore, approve title. *C. 8649, Feb. 8, 1901, and May 13, 1902; 15110, Jan. 8, 1907. Held*, also, that title to lands transferred to the Government by deed vests in the United States only when the Attorney General approves the title. *C. 15110, Jan. 8, 1907.*[3]

II A 6 f. Where part of a tract of land was purchased for a lump consideration, the deed describing it as containing 150 acres, more or less; and later an agreement was made with the grantor for the balance of the tract at $100 per acre; and on survey of the same it was found that the land originally conveyed contained 193 acres; and the question was raised as to whether the Secretary of War could legally add to the purchase price, in procuring the said addition, sufficient to compensate the owner for the excess: *held* that he could not legally do so, since this would in effect be the application of that amount, not to the purchase of the additional land, but to the satisfaction of a claim. *C. 9469, Jan. 3, 1901.* And where the United States purchased certain tracts for the Fort Oglethorpe target range by deeds calling for a lump consideration for the lands conveyed thereby, although describing the same as containing a specific number of acres, more or less, and it was found that owing to the fact that the tier of land lots, instead of containing 160 acres each as described in the official survey, contained only about 120 acres each, so that there was a shortage of about 22 per cent of the supposed area of the tracts purchased: *held* that as the tracts were purchased in gross and not by the acre, and as there was no evidence of fraud on the part of the grantors, the United States could not recover on account of the shortage.[4] *C. 24464, Sept. 5 and 23, 1911.*

II A 6 g. Where lands were conveyed to the United States by deed with the reservation of the "right to cut and remove * * * timber * * * within five years from" its date, on the application of the grantor for an extension of one year in which to remove the

[1] As to right of possession upon tender or payment into court, see Packard *v.* Bergen Neck R. Co. (48 N. J. Eq., 281); Mercer & S. Ry. Co. *v.* Delaware & B. B. R. Co. (26 N. J. Eq., 464); Redman *v.* Philadelphia, etc. R. Co. (33 N. J. Eq., 165); Penna R. Co. *v.* National Docks R. Co. (53 N. J. Eq., 178); Jefferson *v.* N. Y. R. Co. (12 N. J. L. J., 175); Am. & Eng. Encyc. of Law, 2d Ed., vol. 10, 1137–1138.

[2] Cherokee Nation *v.* Kansas Ry. Co. (135 U. S., 659).

[3] Ryan *v.* United States (136 U. S., 86).

[4] 24 L. R. A., 525; 68 id., 908.

timber, he having been in error as to the expiration of the time, *held* that any rights under this reservation expired with the time limit, and that such of the timber as remained unsevered at the expiration of the time limit was the property of the United States,[1] so that the Secretary of War could not legally grant the request. *C. 21027, Sept. 27, 1911.*

II A 6 h. On the question of whether the opinion of the Attorney General is required, under section 355, R. S., where an easement is acquired for a pipe line for a water main to a military reservation, *held* that where no lands are purchased, but only an easement therein is acquired, or where the purchase is not for the erection of structures such as are described in said section, whether the interest acquired be a leasehold interest or an easement, temporary or perpetual, the opinion of the Attorney General is not required by law, and the decision of the proper department as to the sufficiency of the title for the purposes for which the same is required is not subject to review by the accounting officers.[2] *C. 11585, Nov. 30, 1907.* Similarly *held*, with respect to the donation to the United States of a perpetual easement for a levee. *C. 22661, Jan. 25, 1908.*

II A 7. *Held*, in the matter of the proposed settlement of suit regarding title to lands claimed as a military reservation at Rockaway Point, Long Island Sound, N. Y., that suit having been instituted by the United States in respect to such lands, the Attorney General would have authority, under his power to compromise the suit, to consent to a decree by which the title to a portion of the premises would be adjudged to the United States and the title to another portion of the premises in dispute to the defendants; that such procedure would not be contrary to the provisions of section 3736, R. S.,[3] and that no special authority of Congress would be necessary to the acceptance of a conveyance of the portion to be awarded to the United States. *C. 25778, Aug. 4, 1910.*

II A 8. *Held*, that joint resolution No. 18, of April 11, 1898 (30 Stat. 737), providing for the erection of a temporary fort or fortification in case of emergency, with the consent of the owner and without compliance with section 355 R. S., although passed just prior to the outbreak of the War with Spain, has always been regarded as permanent legislation. *C. 15611, Feb. 21, 1908.*

II B. The Constitution vests in Congress the exclusive power to dispose of the property of the United States, real or personal.[4] The Secretary of War, in the absence of authority from Congress, can not alienate land of the United States. Thus, where a company proposed to cut out and remove a part of a dam (some 140 feet) on Fox River, Wis., belonging to the United States, and to substitute another, as a private improvement, below, *held* that this was a proposition for the alienation by an executive official of public property and could not legally be entertained. *P. 29, 259, Jan., 1889; C. 13074, Aug. 19, 1902; 14454, Apr. 17, 1903; 19896, June 16, 1906.*

---

[1] Adkins *v.* Huff, 3 L. R. A. [n. s.], 649, and notes thereto. See, also, authorities cited in 55 L. R. A., 513.

[2] XII Comp. Dec., 691.

[3] See Neilson *v.* Lagow, 12 How. 98; U. S. *v.* Lane, 3 McLean, 365 (26 Fed. Cas., No. 15559).

[4] 16 Op. Atty. Gen. 477.

Where the title to a small portion of the land acquired for a military reservation and post was disputed by a private individual, *held* that the Secretary of War had no jurisdiction to pass upon and decide such a question. He could not surrender such portion, even if he believed the claim to be sound, any more than he could surrender the entire reservation, to a claimant who could show evidence of an outstanding title in himself. It is not for the executive officers of the Government to determine whether the United States has a good title, or any title at all, to lands placed under their charge as property of the United States. Such questions are for the courts to decide. *P. 62, 442, and 63, 90, Dec., 1893; C. 19896, June 16, 1906.*

II B 1. A statute may grant title, and a statutory grant is equivalent to a patent—is, in fact, in the words of Attorney General Bates, "the highest and strongest form of title known to our law." [1] Thus where a statute vests in terms in an individual or corporation the title of the United States to certain land or other public property, in occupation or charge of the military authorities, no deed or conveyance from the Secretary of War is necessary, all that is required being that the proper military commander or officer relinquish or turn over the premises or property to the grantee. *R. 37, 596, June, 1876; 41, 28, Oct., 1877.* And where the grant by the statute is made upon a condition precedent, the title, upon the condition being performed by the party, becomes complete without any written deed. Thus where an act of Congress granted to a railroad company certain land for buildings and a right of way within the limits of a military reservation, upon the company's filing with the Secretary of the Interior a map of its route to be approved by him, and also locating, under the direction of the Secretary of War, the land required for its buildings and roadway; *held* that, upon these conditions being duly performed, a complete title vested in the company. *R. 36, 130, Dec., 1874.*

II B 2. An act of Congress authorized the Secretary of War simply to "*cede*" to a city certain piers. *Held* that the term "cede" called for a simple absolute grant, and that a deed of bargain and sale for a valuable consideration was not the correct form of transfer; further, that as the authority was in terms to *cede*, without more, the Secretary would not be empowered to attach to the grant any covenants or conditions as to the use or care of the piers or otherwise. Should the city hereafter permit its piers to become an obstruction to navigation, there is a remedy provided by law. *R. 53, 381, Apr., 1887.*

An act of Congress authorized and directed the Secretary of War to sell a certain parcel of land at public auction and to convey the same to the purchaser. The act also prescribed in detail the manner of advertising, &c. *Held* that the deed should preferably contain recitals showing that the provisions of the act of Congress under which it was given were complied with. *C. 631, Nov., 1894.*

II B 3. It is well settled that while the United States is entitled to avail itself of statutes of limitation, it is not bound thereby.[2] *Held*, therefore, that the occupancy of portions of the Washington Aqueduct

[1] 11 Op. Atty. Gen. 49. And see 9 id. 346; 12 id. 254; 14 id. 320; Terrett *v.* Taylor, 9 Cranch, 50.

[2] See U. S. *v.* Thompson, 98 U. S. 486.

lands by private parties, however long continued, gave them no title thereto. *C. 1069, Mar. 13, 1895.* And where a claim of a right of way for a road through a military reservation was based on continued use, *held* that no title was acquired by user since the reservation was purchased, as it is well settled that no title against the Government can be acquired by adverse possession. *C. 9003, Oct. 3, 1900.* Also *held,* with respect to a claim of prescriptive title to water power of the Niagara River, on the ground of long possession of the riparian land "with the belief and claim of title to the water power," that such claim was without legal foundation, and that, both under the common law and the civil law, title can not be acquired by prescription against the sovereign.[1] *C. 19094, Sept. 24, 1906; 19896, June 16, 1906.*

II B 3 a. *Held* that the title and possession of the United States to and of land situate at El Paso, Tex., duly purchased for cemetery purposes, would properly be protected against a continuous trespass on the part of the municipality in cutting a street through the land by an injunction sued out in the proper court, the remedy by suit for damages being inadequate.[2] *R. 49, 240, July, 1885.*

Where certain persons had entered unlawfully upon a military reservation and had proceeded to cultivate the soil of the same for their personal benefit and to lead off water, needed for the use of the garrison, in order to irrigate the ground so cultivated—*advised* that the commandant be instructed to give such persons reasonable notice to quit with their property, and if they did not comply, to remove them by military force beyond the limits of the reservation.[3] *R. 42, 256, Apr., 1879; C. 12941, July 16, 1902; 16983, Oct. 8, 1904.*

II B 3 b. A United States officer or agent in charge of lands of the United States who is made defendant in a suit in a United States or a State court in which title to such lands is claimed by an individual should duly appear and answer in court, and is not authorized to interpose physical force against the service of due process of the court in such a suit, however groundless he may believe it to be. So *advised* that the military force employed to protect the possession by the United States of a cemetery reservation at El Paso, Tex., to which title was claimed in a suit instituted by a citizen, be withdrawn, or at least ordered to obstruct in no manner the due execution of judicial process on the premises. *P. 52, 182, Feb., 1892.*

II C. Under the general rule, the purchase of land bounded by streets or highways gives title to the fee to the center of the street or highway, where such title is in the grantor, unless the conveyance excludes the street or highway. *Held,* therefore, where title to lots of a subdivision was acquired for the enlargement of a military reservation, that on the vacation of the streets within the military

---

[1] That adverse possession can not give title as against the Government, see Lindsey *v.* Miller, 6 Pet. 666; Jordan *v.* Barrett; 4 How. 169; Burgess *v.* Gray, 16 id. 448; Frisbie *v.* Whitney, 9 Wall. 187; Gibson *v.* Choteau, 13 id. 92; Oaksmith's Lessee *v.* Johnston, 92 U. S. 343; Sparks *v.* Pierce, 115 id. 408.

"The only manner in which title to lands owned by the United States can be acquired is under some act of Congress directly making the grant or authorizing it to be made by some person or officer." 1 Cyc., 1111.

[2] Pomeroy, Eq. Jur, secs. 138, 1347, 1356.

[3] As to the authority to remove trespassers from military reservations, see 3 Opins. At. Gen., 268; 9 id., 106, 476; G. O. 74, Hdqrs. of Army, 1869.

reservation the unencumbered title would be in the Government. *C. 15110, Dec. 9, 1911; 19435, Apr. 2 and July 2, 1906; Nov. 19, 1908. Held,* also, that if the title did not pass with the lots, the Government, by the purchase of the several lots of the subdivision, acquired, as appurtenant thereto, a private easement or servitude for egress and ingress to the several lots. *C. 15110, Dec. 9, 1911; 19435, July 2, 1906, July 8, 1907, and Nov. 19, 1908. Held,* further, where the entire subdivision was acquired and the streets simply led into the reservation, on the application of the town to sell the streets for a considerable sum, that the streets were virtually abandoned, and if so, title was in the United States; and that, at most, the title of the town would be a naked one, barren of value to the town; and *advised* that the purchase be not made. *C. 19435, July 2, 1906; Feb. 8 and Mar. 19, 1909.*

II D. Where land proposed to be conveyed by a State to the United States for the purpose of fortifications was described in the proffered deed as extending to the sea and in a line along the sea, *held* that such a deed would convey only land extending to and bounded by high-water mark, and advised that the grant should be so expressed as specifically to include the shore to low-water mark, and should also embrace such water-covered lands as would be sufficient to prevent the erection by the authority of the State of structures that might interfere with the proper use of the land for purposes of fortifications. *P 64, 249, Mar., 1894.* Where, however, under the laws of the State, a private owner's title extends to ordinary low-water mark, so that a conveyance bounding the lands "on the sea or salt water" would give title to low-water mark,[1] *held* that a conveyance of "all that portion of Peddocks Island * * * lying north of a straight line across the island" would give title to low-water mark. *C. 14897, July 7, 1903.*

II D 1. As between the United States and a State, the soil of the bed of navigable waters and of the shores of tide waters below high-water mark, or—on rivers not reached by the tide—the soil of the shores below the ordinary water line (as not affected by freshet or unusual drought), belongs to the State. But natural accretions to land owned by private individuals belong to the owners of the land.[2] Thus, *held* that the accretions to Hog Island in the mouth of the Missouri River belonged, not to the United States or to the State of Missouri, but to the owner of the island. *R. 51, 636, Mar., 1887.*

II E. *Held* that the granite monument erected by the United States, under an appropriation by Congress for the purpose, on land belonging to the State at Newburgh, N. Y., and known as Washington's Headquarters, became, in the absence of any provision in the statute or agreement with the State, the property, as a fixed improvement, of that State. *P. 49, 20, Aug., 1891.*

II E 1. *Held* that the principle that buildings erected on the land of another without his consent become his property, did not apply to buildings erected by the United States on land occupied *jure belli* by the Army in an enemy's country; but that, on subsequently surrendering the land to the owner, the military authorities might legally

[1] Storer *v.* Freeman, 6 Mass. 435.

[2] As to change of boundary by gradual erosion or accretion, see **Philadelphia Co. *v.*** Stimson, 223 U. S., 605.

remove and retain or dispose of the buildings. *R. 35, 565, Sept., 1875.*

II E 2. Temporary buildings erected by military orders on land of the United States at a military post, to serve only a temporary purpose, are in general personal property of the United States which may be removed by the direction or authority of the Secretary of War.[1] But if the same be permanent structures and real estate, the authority of Congress is necessary to their removal. *P. 58, 162, Feb., 1893.*

II E 3. Where a post commander, without authority, took possession of land of the United States, for the purpose of erecting thereon a building for his personal use, and having erected it assumed to hold and dispose of it as his own property, *held* that his act was unauthorized and illegal, and that he acquired no legal estate in the building. And similarly *held* where, without authority, he permitted an enlisted man of his command to use land of the United States for the erection thereon of a dwelling and to hold and dispose of such dwelling as his own property. *P. 63, 64, Dec., 1893.*

II E 4. Under contract for the purchase of the required amount of land for a military reservation for the amount available in the appropriation, it became necessary to have a small portion of the lands condemned, and the cost of the land condemned and of the condemnation proceedings were deducted from the contract price and settlement made under the contract on that basis. On the claim for compensation for the buildings and for the use of the same on the tract condemned, said contract having reserved the improvements, *held* that under the condemnation proceedings the Government acquired the legal title to the buildings but that the equitable title was in the other party to the contract. *C. 2952, Feb. 20, 1897, Dec. 7, 1898, June 13 and Oct. 11, 1901.*

II F. Wood growing on a military reservation is the property of the United States. So, *held* that a contractor who cut such wood to fill a contract made by him with the United States to furnish wood to a military post could not legally be allowed to remove or dispose of the same as his own property. *P. 48, 218, July, 1891.*

II F 1. *Held* that the act of March 3, 1875, c. 151, "to protect ornamental and other trees on Government reservations and on lands purchased by the United States," etc., which makes penal the unlawful cutting or injuring of such trees, was clearly not intended to, and did not, preclude the reasonable cutting of wood on military reservations, under the direction of the proper officer, for the supplying of the necessary fuel for the garrisons stationed thereon; the authority to establish a reservation, where in fact lawfully existing, being deemed to include an authority to efficiently maintain the same when established. *R. 39, 8, May, 1876; C. 20531, Oct. 15, 1906.*

III A. A reservation may be defined as a portion of the public lands of the United States which is withdrawn from the operation of the land laws and set apart by Congress or by the President under authority of law for some administrative purpose.[2] *C. 16691, Sept. 10, 1902.*

---

[1] But such buildings can not be *sold* without the authority of Congress. Lear *v* U. S., 50 Fed. Rep., 65.

[2] See 7 Op. Atty. Gen., 571, 574; Grisar *v.* MacDowell (6 Wall., 363, 381).

III A 1. A military reservation, being simply territory of the United States withdrawn from sale, preemption, etc.,[1] the mere fact of the establishing of such a reservation can not affect the power of the State or Territorial authorities (according as it may be located in a State or Territory) to serve civil or criminal process therin, or to attach or levy upon personal property[2] except in so far of course as such service may be specially precluded or restricted, by law, as to

[1] The Constitution (Art. IV, sec. 3, par. 2) has vested in Congress the exclusive power "to dispose of and make all needful rules and regulations respecting the *territory*" (held in U. S. *v.* Gratiot, 14 Peters, 537, to mean "lands") "or other property belonging to the United States." As a consequence perhaps of the indefiniteness of this grant (see 7 Op. Atty. Gen., 574) no general enactment providing for the setting apart of land for military reservations has ever been made by Congress. In a few cases, indeed, a special authority to establish a military reserve has been conferred upon the President by statute, but the great majority of the military reservations heretofore located or now existing have been made by the President without any such specific authority whatever. But though no general authority has been directly given by Congress for the reserving of lands for military purposes, an authority for the purpose has been deemed to exist, and this authority is found in the *usage* of the executive department of the Government, as indirectly *sanctioned* by Congress in repeated preemption acts, acts relating to the survey of the public domain, appropriation acts, &c., in which lands reserved for military purposes by the President have been in general terms excepted from sale, exempted from entry, &c., or special provision has been made for the cost of improvements to be erected upon the same. In Grisar *v.* MacDowell, 6 Wallace, 381, the U. S. Supreme Court, by Field, J., observes: "From an early period in the history of the Government, it has been the practice of the President to order, from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public uses. The authority of the President in this respect is recognized in numerous acts of Congress." The court then cites several statutes as containing this recognition, including the preemption acts of May 29, 1830, and Sept. 4, 1841, and adds: "The action of the President in the making the (military) reservations" (the title to which was at issue in the particular case) "was indirectly approved by the legislation of Congress in appropriating moneys for the construction of fortifications and other public works upon them." And see 12 Op. Atty. Gen., 381; 14 id., 182; 17 id., 258; Wilcox *v.* Jackson, 13 Peters, 512; U. S. *v.* Hare, 4 Sawyer, 653; also U. S. *v.* R. R. Bridge Co., 6 McLean, 517; 1 Land Dec. (Int. Dept.) 30, 702; 6 id., 18, 317; 13 id., 426, 607, 628; 8 Fed. Rep., 883; 12 id., 449; 92 U. S., 733; 101 id., 768; 5 Wall., 681. The President, in setting apart land, is regarded as acting under authority of Congress. 1 Land Dec. 30.

It is moreover to be noted that the provision of the act of 1841, referred to by the Supreme Court, has been incorporated as a general enactment in the Revised Statutes, in the chapter (Ch. 4 of Title XXXII) on preemptions, sec. 2258 expressly excepting from the lands of the United States "subject to the rights of preemption"—"lands included in any *reservation* by any treaty, law, or proclamation of the President for any purpose." And see sec. 2393, specifically excepting military reservations from the operation of the laws authorizing the establishing of town sites.

The "proclamation" of the President reserving lands for military purposes is usually in the form of a military general order, issued by the Secretary of War, whose act in this, as in other administrative proceedings pertaining to the military administration, is in legal contemplation the act of the President whom he represents. But no head of a department or executive official inferior to the President can, of his own authority, make a reservation of public lands. The power is vested only in Congress and the President. United States *v.* Hare, 4 Sawyer, 653, 669.

In this connection may be noted the ruling of Atty. Gen. Bates (10 Op., 359) in opposition to that of Justice McLean of the Supreme Court (in United States *v.* The Railroad Bridge Co., 6 McLean, 517), but apparently concurred in by Atty. Gen. Williams (14 Op., 246), to the effect that where a tract of land of the United States has once been legally reserved for military purposes the President is not empowered, in the absence of authority from Congress, to *relinquish* such reservation and restore the land reserved to the general body of the public lands. See also, 2 Land Dec. (Int. Dept.) 603, 606; 5 id., 632; 6 id., 19.

[2] See opinion of Judge Advocate General published in G. O. 30, Hdqrs. of Army, 1878.

military persons in general.[1] Where indeed there has been a cession of exclusive jurisdiction over the land by the State to the United States, the question whether the State authorities may still serve process within the reservation on account of liabilities incurred or crimes committed outside of its limits, will depend upon the terms of the cession.[2] *R. 39, 541, May, 1878; C. 16691, Sept. 20, 1902. Aug. 5, 1904.*

III A 2. An order reserving lands for public purposes is inoperative as to lands which were not, at the time of its issue, subject to reservation, i. e., lands which were not then public lands.[3] *C. 5951, Mar. 11, 1899. Held,* therefore, that an Executive order making a reservation would be void and inoperative as to lands in lawful private ownership. *C. 12851, June 24, 1902; 16691, Sept. 10, 1902; 16653, July 28, 1904.*

III A 3. Where lands within the exterior limits of a military reservation have been set apart by the President as a wood reservation for a military post, *held* that the lands passed under the jurisdiction of the War Department and that no jurisdiction over them remained in the Interior Department for any purpose. *C. 2642, Oct. 8, 1896 and Oct. 8, 1901.*

III A 4. *Held,* with reference to the establishment of a military post within the limits of the Chickamauga and Chattanooga National Military Park, that in view of the act of May 15, 1896 (29 Stat. 120), authorizing the park, in the discretion of the Secretary of War, to be used for maneuvering purposes, and the desirability of a garrison for the protection of the park, it would be permissible to select a portion of the park, not included in the scheme of marking the lines of battle, upon which to locate buildings for the accommodation of a regiment of Cavalry. *C. 12895, June 30, 1902.*

III A 5. Under the treaty with Spain the ownership of all public buildings and lands within Porto Rico, the Philippine Islands, and elsewhere, was transferred to the United States, and under the act of July 1, 1902 (32 Stat. 731), the President was expressly authorized to make reservations of public lands in Porto Rico for public purposes within one year after the approval of that act, after which all public lands not so reserved, with certain exceptions, passed to the ownership of the Government of Porto Rico; and by section 12 of the act

---

[1] As by sec. 1237, R. S., exempting enlisted men from arrest for certain debts; or by the operation of the provisions of the 59th Article of War as to the *form* to be observed in making criminal arrests of military persons.

[2] See 7 Op. Atty. Gen., 574–5; also 14 id., 557. That it is "not open to the courts on a question of jurisdiction to inquire what may be the actual uses to which any portion of the reserve is temporarily put." See Benson *v.* U. S., 146 U. S., 331.

[3] Where an applicant has complied with the requisites of the preemption laws so that his right has accrued under such laws, no reservation or appropriation of the land for public purposes thereafter can defeat his rights. United States *v.* Fitzgerald (15 Pet., 407). "A mere entry upon land, with continued occupancy and improvement thereof, gives no vested interest in it. It may, however, give under our national land system privilege of preemption. But this is only a privilege conferred on settlers, to purchase the land in preference to others. * * * His settlement protects him from intrusion or purchase by others, but confers no right against the Government." 10 Op. Atty. Gen., 57. These views were cited with approval by the Supreme Court in Frisbie *v.* Whitney (9 Wall., 187), where the Court expressly held that "a vested right, under the preemption laws, is only obtained when the purchase money has been paid, and the receipt of the proper land officer given to the purchaser." See also Yosemite Valley case (15 Wall., 77) and Shiver *v.* United States (159 U. S., 491).

of July 1, 1902 (32 Stat. 695), all public lands in the Philippine Islands, except such lands or other property "as shall be designated by the President of the United States for military and other reservations," were placed under the control of the Government of said islands to be administered for the benefit of the inhabitants thereof. *Advised* that steps be taken to have the required reservations made. *C. 16691, Sept. 10, 1902.*

III B. *Held* that the right to the "free and open exploration and purchase" of mineral lands, accorded to citizens, etc., by section 2319, R. S., could not authorize an entry for the purpose of prospecting for mines upon a military reservation once duly defined and established by the President; the mineral lands intended by the statute being clearly such as are included within the "public lands" of the United States. *R. 38, 596, May, 1877; C. 10727, June 22, 1901.*

III C. *Held* that an act of Congress granting a railroad company a right of way through "the public lands" of the United States, did not authorize it to enter and construct a track upon the soil of a military reservation, the same being no part of the "public lands";[1] and that such entry was therefore a trespass. *R. 39, 146, Aug., 1877.* Similarly *held* where the acts granted rights of way through the Indian Territory and Indian reservations, lands and allotments. *C. 6840, Sept., 1899; 7572, Feb., 1900.*

III D. Land which has been set apart as a portion of an Indian reservation under a treaty can not be occupied as a military reserve;[2] nor can even a military post be maintained thereon, in derogation of the terms of the treaty or against the consent of the Interior Department. *R. 38, 179, July, 1876; C. 3342, July 9, 1897.*

III E. In locating Fort Missoula, Mont., an error of survey was made by which the post became established upon a section which had been granted to the State by the enabling act as school land, instead of upon the contiguous section which had been reserved for military purposes. *Recommended,* as the preferable mode of rectifying the error, that legislation of Congress be obtained granting to the State for school land the section omitted to be occupied, and, upon its acceptance by the State, that the legislature then cede to the United States exclusive jurisdiction over the section actually occupied by the post. *P. 36, 402, Nov., 1889; 44, 299, Dec., 1890.*

III F 1. The President's power in the matter of military reservations is limited to the setting apart and declaring of the reservation; and, for the purpose of adding to, and modifying the boundaries of, the original reserved tract, a reservation may be redeclared by the Executive. *P. 39, 132, Feb., 1890; 50, 108, Oct., 1891.* But the President can not unreserve duly reserved lands, either by revoking the order of reservation or otherwise.[3] *P. 50, 108, supra; C. 16691, Sept. 10, 1902.*

---

[1] Wilcox *v.* Jackson, 13 Peters, 499, 513; 5 Op. Atty. Gen. 578; 6 id., 670; 7 id., 574. See, also, Scott *v.* Carew, 196 U. S., 100; and 38 Land Dec., 496.

[2] By Art. VI, par. 2, of the Constitution "all treaties made * * * under the authority of the United States" are declared to be "the supreme law of the land"; and Indian reservations "have generally been made through the exercise of the treaty making power, and the fulfillment of treaty obligations." 14 Op. Atty. Gen., 182. That land can not be reserved or occupied for military purposes to the prejudice of a title previously vested in an individual or a corporation, see, further, 9 id., 339; 13 id., 469.

[3] See 10 Op. Atty. Gen., 363, 366; 16 id., 123. See Public Property, II A 1, footnote.

III F 2. Where conflicting claims, not clearly groundless, were made by several persons to the title to a portion of a military reservation, *advised* that the Secretary do not attempt to pass upon the questions involved, but refer the parties to the courts for their legal remedies. *R. 30, 72, Feb., 1870.*

III F 3. Lands once duly reserved for a public purpose become separated from the mass of public lands, and the President, in the absence of authority from Congress, is not empowered to restore them to their original status. So, *held*, that a proclamation of the President, issued under an act of Congress opening to settlement lands in Oklahoma Territory, could not embrace or affect land previously duly reserved as a military timber reservation for the use of the post of Fort Reno.[1] *P. 21, 327, Apr., 1889.* Also *held* that under the act of July 5, 1884 (23 Stat. 103), he may place lands which have become useless for military purposes under the control of the Secretary of the Interior for disposition and sale as therein authorized.[2] *P. 48, 10, June, 1891; C. 1839, Nov., 1895.*

Where it was proposed to turn over to the Interior Department, under the act of July 5, 1884 (23 Stat. 103), a military reservation as "useless for military purposes," but subject to the provisions of a contract permitting a contractor to take therefrom 2,000 cords of wood, for a military post, *advised* that the transfer be deferred until the contract was performed, the reservation not being "useless for military purposes," during the existence of the contract, and furthermore such contract might interfere with the sale of the land by the Interior Department. *C. 54, July, 1894; 20531, Oct. 15, 1906.*

III F 4. The power of the President, under the provision of the act of March 3, 1893 (27 Stat. 593), to "withhold from sale, and to grant for public use to municipal corporations in which the same is situated, all or any portion of any abandoned military reservation not exceeding twenty acres in one place," extends only to such abandoned military reservations or parts of abandoned military reservations as have been turned over by the Secretary of War to the Secretary of the Interior under the act of July 5, 1884. *P. 58, 471, Apr., 1893.*

III F 5. *Held*, with reference to the proposed sale of Columbus Barracks, Ohio, under the act of June 30, 1902 (32 Stat. 515), as amended by the act of April 28, 1904, that as section 3618 R. S., as amended by the act of June 8, 1896 (29 Stat. 268), regulating the disposition of the proceeds of sales of "old material, condemned stores, supplies, *or other public property of any kind*," requires the "net proceeds" only to be deposited in the Treasury, any proper expense connected with the appraisement and sale of the military reservation would be defrayed out of the sum realized from the sale

---

[1] See 14 Land Dec., 233. See, however, 27 Fed. Case, 687 (U. S. *v.* Railroad Bridge Co.); also 10 Op. Atty. Gen., 360, and 14 id., 244.

[2] That lands turned over under the act of July 5, 1884, can not be disposed of under the general law regarding the disposition of public lands, and that the President can not restore them to entry and settlement, see 5 Land Dec., 632; 6 id., 19; 14 id., 210; 27 id., 82; 30 id., 301. That a reservation acquired by purchase, in a State where there are no public lands, if abandoned should be disposed of under the act of July 5, 1884, see 3 Land Dec., 577. Under the practice, an order placing lands under the control of the Secretary of the Interior, under the act of July 5, 1884, may be revoked and the lands again withdrawn for military purposes. Such action was taken with respect to the military reservations of Fort Keogh, Mont.; Fort Townsend, Wash.; Fort Walla Walla, Wash., etc. As to reservation of lands turned over under act of July 5, 1884 for purposes of a National Forest, see 36 Land Dec., 342.

of the reservation. Cards 14693, May 22, 1903; 16394, May 31, 1904. Similarly *held*, with reference to the disposition of a portion of the Fort Gaines Military Reservation, Ala.[1] *C. 22573, May 13, 1911.*

III F 6. *Held* that, the land laws not being applicable in the Philippine Islands, if military reservations there are abandoned the land reverts to the control of the Philippines Commission. *C. 25558, Oct. 4, 1910.*

III G 1. The ownership and jurisdiction of the soil between high and low water mark on navigable waters within or bordering upon a State are vested in the State, not in the United States. Tidelands belong to the State only; the United States has no interest in the soil below high-water mark other than such as may have been ceded by the State.[2] *R. 47, 596, Feb., 1886; P. 15, 452, Mar., 1887.* So, where a military reservation within a State fronted upon navigable waters of the United States, at the mouth of the Columbia River, *held* that the military authorities could not, by the removal of fishing nets or fish traps placed below high-water mark or otherwise, legally prevent or interfere with the exercise of the right of fishery as to scale or shell fish on the tidelands; such right being common to all citizens except in so far as it may be abridged by the State.[3] *R. 52, 137, Mar., 1887.*

III G 2. In the case of a Territory, the sovereign right to the whole soil is exclusively in the United States. Thus the reservation of an island in the tidewaters of a Territory includes not only its soil down to high-water mark but all its tidelands also. *R. 47, 596, Feb., 1886.* But in a Territory, in the absence of special regulation of the subject by Congress, no executive authority can lawfully restrict the common-law right of piscary of the inhabitants (including the taking of shell-fish) in the tidewaters of the Territory. So, the commander of a reserved military post fronting upon navigable water of a Territory is not empowered to remove from such tidewaters the seines or traps of fishermen; though if the public interests require it he may forbid or restrict the use of the shore above high-water mark for the hauling of seines or landing of fish. *P. 15, 452, Mar., 1887.*

III H 1. Squatters and other trespassers and intruders may and should be expelled, by military force if necessary, from a military reservation.[4] *R. 49, 208, July, 1885; 50, 314, May, 1886.* But such persons when they have been suffered to own and occupy buildings on a reservation should be allowed reasonable time to remove them. If not removed after due notice the same should be removed by the military. Material abandoned on a reservation by a trespasser on vacating may lawfully be utilized by the commander for completing roads, walks, etc. *R. 50, 273, 378, May and June, 1886.* Squatters on United States reservations (timbered) may also be forced therefrom by criminal proceedings had under section 5388, R. S., or ejected

[1] See pars. 1251 and 1253, Dig. 2d Comp. Dec., vol. 3.

[2] Pollard's Lessees *v.* Hagan, 3 Howard, 212; Goodtitle *v.* Kibbe, 9 id., 477; Doe *v.* Beebe, 13 id., 25; 6 Opins. At. Gen., 172.

[3] Washburn, Easements and Servitudes, 410; Martin *v.* Waddell, 16 Peters, 367; Smith *v.* Maryland, 18 Howard, 71; McCready *v.* Virginia, 94 U. S., 391; Lay *v.* King, 5 Day, 72; Arnold *v.* Mundy, 1 Halst., 1; Parker *v.* Cutler, etc., Co., 20 Maine, 353; Moulton *v.* Libbey, 37 id., 472; Weston *v.* Sampson, 8 Cush., 347.

[4] See G. O. 62 of 1869.

by civil action. *C. 138, Sept., 1894; 12941, July 16, 1902; 16983, Oct. 8, 1904.*

III H 2. Where squatters have made any considerable improvements upon a reservation, and their value has been duly estimated—as by a board constituted by the department commander and presenting in its report all the evidence on the subject—an award by the Secretary of War, acquiesced in by the claimant, may be sued upon in the Court of Claims, which (in the absence of evidence of fraud or mistake) will accept such award as conclusive.[1] *P. 17, 265, June, 1887; C. 12941, July 16, 1902; 16983, Oct. 8, 1904; 24196, Dec., 1908.*

III H 3. The cutting of timber on a military reservation is an offense against the United States, made punishable by section 5388, R. S. (amended by the act of June 4, 1888), and by the act of March 3, 1875, chapter 151. So, grass cut on a reservation and removed as hay would be personal property of which the asportation would be larceny under the act of March 3, 1875, chapter 144. And persons coming upon a military reservation for the purpose of cutting wood or grass or to plow up the soil, or commit other trespass, may be removed as intruders, and the post commander should not hesitate to resort to military force if necessary for the purpose. And he may of course prevent such trespassers from carrying off with them any property of the United States. *P. 64, 270, 303, Mar. and Apr., 1894; C. 3315, June, 1897; 16983, Oct. 8, 1904; 20531, Oct. 15, 1906; 20544, Oct. 18 and Nov. 20, 1906; 20818, Dec. 22, 1906.*

III H 4. The general principle of the authority to remove trespassers, their structures and property, from land of the United States embraced in a military reservation, *held* specially applicable where the intrusion was for an injurious purpose, as where the object was to lay a sewer intended to discharge into a main sewer constructed by the United States upon and for the use of its own premises. In this instance, as the trespass was committed by the authorities of a municipality, *advised* that reasonable notice be given them to remove their property before resorting to military force for the purpose, and meantime that precautions be taken to prevent a connection between the proposed sewer and the sewers under the control of the United States. *P. 65, 6, May, 1894.*

III H 5. *Held* that a butcher who was under contract with the United States to supply beef to the post of Fort Brown, Tex., should not be permitted to sell beef on the reservation to citizens of the town, to the prejudice of the butchers doing business there. Such a party is not a post trader, and Congress, in providing specifically for post traders, would seem to have considered legislation necessary to authorize an individual to engage in trade or traffic at a military post. *P. 30, 475, Mar., 1889.*

IV A 1 a. Sections 4870–4872, R. S., constitute the only existing general law authorizing the purchase or acquisition of land as cemetery grounds for the interment of soldiers. The general provision on the subject, of section 18 of the act of July 17, 1862, c. 200, has ceased to be in force under the operation of section 5596 of the repealing provisions of the Revised Statutes. *P. 32, 261, May, 1889.* And where is was proposed to donate land for a right of way to a national cemetery on condition that the United States build the road and a

[1] Maddox *v.* U. S., 20 Ct. Cls., 193, 199.

substantial wire fence with gates, etc., *held* that the authority given by the sections to purchase the property includes the authority to accept title by donation; that the authority to acquire the site could be construed as including the authority to acquire the right of way thereto; but that the condition of the proposed donation would preclude its acceptance. *C. 12242, Mar. 25, 1902.*

IV A 1 a (1). To authorize the acquisition, by the exercise of the right of eminent domain, of private land for a national cemetery under sections 4870 and 4871, R. S., there must be (1) an existing appropriation (in conformity with the rule of section 3736, R. S.) authorizing the acquisition; and (2) the private owner must be unwilling to give title or the Secretary of War be unable to agree with him as to price. *P. 32, 277, May, 1889.*

IV A 1 a (2). The appraisement of land for a national cemetery, as duly made by a United States court under sections 4871 and 4872, R. S., is conclusive upon the Secretary of War, who must thereupon pay the appraised value as indicated in the latter section. If indeed there has been *fraud* in the valuation by which the court has been deceived in its decree, or its original appraisement is deemed *excessive*, it may properly be moved for a new appraisement on the part of the United States.[1] *R. 26, 617, June, 1868.*

IV A 1 b. The Government is under no legal obligation to provide burial places for destitute soldiers at a volunteer home. Section 4878, R. S., in providing that the soldiers, etc., there designated, "may be buried in any national cemetery free of cost," does not require the establishment of a national cemetery specially for the purpose of interments at such a home. *P. 32, 277, May, 1889.*

IV A 2 a. The sundry civil act of March 3, 1899 (30 Stat. 1108), contains the provision "that no railroad shall be permitted upon the right of way which may have been acquired by the United States to a national cemetery or to encroach upon any roads or walks constructed thereon and maintained by the United States." *Held* that this provision was intended to prevent the occupation of and encroachment upon the rights of way or roads named therein, but did not forbid the granting of permission to lay a railroad track across a Government roadway leading to a national cemetery. *C. 7466, Dec., 1899.*

IV A 2 b. With reference to the authority to regulate the speed of vehicles on the roadway of the national cemetery at Vicksburg, Miss., *held* that in the absence of any cession of jurisdiction over the roadway it would be under the police jurisdiction of the local authorities as to offenses committed thereon, but that there was no objection to posting notice that violations of the local laws regarding speed limits would be punished as prescribed therein, and to bringing to the attention of the proper local authorities any violations of such notice. *C. 26691, Sept. 2, 1910.*

IV A 2 c. On the question whether the restriction in the appropriation for roadways to national cemeteries: "That no part of this sum shall be used for repairing any roadway within the corporate limits of any State, town, or village," should be considered as an abandonment of a portion of the Government roadway to the Salisbury (N. C.) National Cemetery, the title in fee being in the United States, *held*

[1] See 14 Op. Atty. Gen., 27.

that the law regarding the divesting of title by abandonment applies where the title is of an easement only, but has no application to a fee simple title. *C. 26103, Jan. 20, 1910.*

IV A 3 a. Superintendents of national cemeteries are no part of the Army, but civilians, being required indeed by section 4874, R.S., to be selected from persons who have been honorably discharged from the military service. They are therefore, of course, not subject to the Articles of War or to trial by court-martial;[1] and, for any serious misconduct on the part of a superintendent, a removal from office would be the only adequate remedy. *R. 35, 34, Oct., 1873; 38, 381, Nov., 1876; 577, Apr., 1877.*

IV A 3 b. By section 4881, R. S., the superintendent of a national cemetery is authorized to arrest persons who injure, etc., gravestones, trees, shrubs, etc., within the cemetery. *Held* that he could not, under this authority, legally arrest a person who fired a gun into or across the cemetery without causing any such injury as is specified in the statute, but, for the arrest and punishment of such a trespasser, must have recourse to the local authorities. *R. 32, 425, Mar., 1872.*

IV A 3 c. *Held* that the Secretary of War might legally make rules for the use of roads within national cemeteries and for the rates of speed thereon, and that any regulations so promulgated might be executed by the superintendent under the authority of section 4873 R. S. *C. 26691, May 10, 1911.*

IV A 4. Under section 4878 R. S. and the act of March 3, 1897 (29 Stat. 625), the following classes of persons are entitled to interment in a national cemetery:

(1) Officers and enlisted men who served in the Regular or Volunteer Army or Navy during the Civil War.

(2) Officers and enlisted men who served in the Regular or Volunteer Army or Navy during the War with Spain.

(3) Army nurses who have been honorably discharged from such employment without regard to the time or place of service.

(4) Officers and enlisted men of the Army and Navy who died while in the military service.

Held where certain lots were assigned for the burial of officers, particularly at Arlington, Va., that under the precedents there was no objection to permitting the interment of the remains of the wife or minor children of the officer to whom the lot had been assigned. *C. 16508, June 22, 1904.*

IV A 4 a. Under the act of March 3, 1897, providing for the interment of deceased Army nurses honorably discharged as such, *held* that the services of the contract surgeon charged with the duty of superintending the organization of Army nurses during the Spanish War—a duty substantially that of superintendent of the Army Nurse Corps (a position subsequently made a part of the Army Nurse Corps by sec. 19 of the act of Feb. 2, 1901)—while not within a literal description of the statute, were of such a character as would justify the Secretary of War in placing such a liberal construction upon the law as would permit of the assignment of a lot for her future interment. *C. 29060, Oct. 5, 1911.*

---

[1] See the subsequent opinion, concurring in this view, of the Attorney General, in 16 Op. 13.

IV A 4 b. Under the appropriation for the burial of ex-Union soldiers, sailors, and marines of the Civil War and of the War with Spain "who die in the District of Columbia, or in the immediate vicinity thereof," *held* that the words "immediate vicinity" should be interpreted in a reasonable sense, and as including the towns, etc., which lie near the District boundaries, and whose inhibitants are employed in the District or regard it as the center of their business relations; and that it would be proper to include all those towns, etc., which are within a distance of 10 miles of the District line.[1] *C. 16396, June 6, 1904.*

IV A 4 c. On the question of whether officers and enlisted men of the Revenue Marine Service are entitled to interment in the several national cemeteries, *held* that under ordinary conditions the Revenue Cutter Service is not a part of the constitutional military or naval service of the United States, but is a part of the civil establishment, and as such its members are not entitled to interment in a national cemetery. *C. 19774, Oct. 26 and Nov. 25, 1910. Held,* however, that when cooperating with the Navy, under sections 1492 and 2757, R. S., they are to be considered, during such service, a part of the Navy, and as such entitled to be buried in a national cemetery.[2] *C. 19774, May 24, 1906; Nov. 25, 1910.*

IV B. The act of March 9, 1906 (34 Stat. 56), to provide for the appropriate marking of the graves of the soldiers and sailors of the Confederate Army and Navy who died in Northern prisons, etc., authorized the Secretary of War "to acquire possession or control" of such burial places, and empowered him "to cause to be erected over said graves white marble headstones, * * * to build proper fencing for the preservation of said burial grounds, and to care for said burial grounds in all proper respects not herein specifically mentioned." *Held,* the Secretary had authority to erect headstones in the Johnsons Island Confederate cemetery, and to cause the same to be inclosed by a suitable fence, without acquiring the ownership of the land constituting the cemetery. *C. 19834, Apr., 1907, and Mar., 1908. Held,* further, that the appropriation under above act covered all necessary and proper expenses of the commissioner in immediate charge of the work and authorized him and a stenographer to visit the places falling within the scope of the act. *C. 19834, June, 1906. Held,* further, that above act authorizes the Secretary to empower the commissioner to employ an architect to design the fencing and attend to its construction, and pay him the usual compensation. *C. 19834, July, 1907. Held,* further, although it was contemplated by the act in question that a headstone should be erected over the grave of each soldier and sailor, yet if it was now impossible to identify the graves of individuals, that in view of the purpose and nature of the act the most complete execution possible should be given to the statute, and that a suitable monument to the unidentified dead might be erected on the location of their burial. *C. 19834, Nov., 1908.*

IV B 1. On the question of whether the Secretary of War might authorize the burial, in the Confederate section of the Arlington National Cemetery (which section was set apart for the interment, under the act of June 6, 1900, 31 Stat. 630, of the remains of Con-

[1] See Langley *v.* Birnsted (63 N. H., 246); Timmerman *v.* Dever (52 Mich., 56).
[2] See 19 Op. Atty. Gen., 505; 27 id., 8.

federate soldiers buried in certain other places), of Confederate veterans dying in the District of Columbia or vicinity, *held* that while the plot might be rearranged to receive the additional remains, the purposes for which national cemeteries can be used have been prescribed by statute; that where Confederate dead have been interred there has been express authority therefor; and that the Secretary of War could not legally permit any such burials in the absence of a statute authorizing the same. *C. 28774, July 29, 1911.*

V. Jurisdiction over territory in a State may be acquired by the United States, under the seventeenth clause of section 8 of article 1 of the Constitution, by the purchase of such territory, with the consent of the State, "for the erection of forts, magazines, arsenals, dockyards, and other needful buildings." The Constitution gives Congress the power of exercising exclusive legislation over such place, and this is held to mean exclusive jurisdiction. The State's consent to the purchase for any one of these constitutional purposes invests the United States with exclusive jurisdiction, and the State can not, even by the express language of its legislation, reserve to itself any part of this jurisdiction. (The reservation of the right of serving process for causes of action arising outside such territory is not held to be an actual reservation of a part of the exclusive jurisdiction intended to be vested in the United States.) But it would seem that this is only true when the purchase is for one of the constitutional purposes. By correct construction, "other needful buildings" would mean buildings of the same character as those specified—buildings intended for military or defensive purposes. A more comprehensive meaning has, indeed, been sometimes given to the expression, but no justification for such construction is found. In Pinckney's draft of a constitution there was this clause: "To provide such dockyards and arsenals, and erect such fortifications, *as may be necessary for* the United States, and to exercise exclusive jurisdiction therein." (This draft was submitted May 29, 1787.)

There was no corresponding provision in the Constitution reported by the committee of detail (Aug. 6), but the committee of 11, by report of September 5, recommended the adoption of the clause as it now reads, except that it did not have the words "by the consent of the legislature of the State." In the debate on the proposition, "Mr. Gerry contended that this power might be made use of to enslave any particular State by buying up its territory, and that the *strongholds proposed* would be a means of awing the State into an undue obedience to the General Government. Mr. King himself thought the provision unnecessary, the power being already involved; but would move to insert, after the word 'purchased,' the words, 'by the consent of the legislature of the State.' This would certainly make the power safe." (5 Elliot's Debates, 511.)

And in the Federalist (No. 43) it is remarked: "Nor would it be proper for the places on which the *security* of the entire Union may depend to be in any degree dependent on a particular member of it."

So Story remarks (sec. 1224):

"The other part of the power, giving exclusive legislation over places ceded for the erection of forts, magazines, etc., seems still more necessary for the public convenience and safety. The public money expended on such places, and the public property deposited

in them, and the nature of the military duties which may be required there, all demand that they should be exempted from State authority. In truth, it would be wholly improper that places on which the security of the entire Union may depend should be subjected to the control of any member of it. The power, indeed, is wholly unexceptionable, since it can only be exercised at the will of the State; and therefore is is placed beyond all reasonable scruple. Yet, it did not escape without the scrutinizing jealousy of the opponents of the Constitution, and was denounced as dangerous to State sovereignty."

And, as observed by Judge Seaman (*In re* Kelly, 71 Fed. Rep., 545, 549):

"The rule thus stated, whereby legislative consent operates as a complete cession, is applicable only to objects which are specified in the above provision, and can not be held to so operate, *ipso facto*, for objects not expressly included therein. Whether it rests in the discretion of Congress to extend the provision to objects not specifically enumerated, although for national purposes, upon declaration as 'needful buildings,' and thereby secure exclusive jurisdiction, is an inquiry not presented by this legislation (see 114 U. S., 541); and I think it can not be assumed by way of argument that such power is beyond question."

In New Orleans *v.* U. S., 10 Pet., 662, 737, the opinion of the Supreme Court is expressed by Mr. Justice McLean, without dissent, as follows:

"Special provision is made in the Constitution for the cession of jurisdiction from the States over places where the Federal Government shall establish forts or other military works. And it is only in these places, or in the Territories of the United States, where it can exercise a general jurisdiction."

And, in U. S. *v.* Bevans, 3 Wheat., 336, 390, the claim was urged that the words "other place" would include a ship of war of the United States lying at anchor in Boston Harbor, and bring it within the statute defining murder committed "within any fort, arsenal, dockyard, magazine, or in any other place or district of country under the sole jurisdiction of the United States;" but it was stated by the court, through Chief Justice Marshall, that "the construction seems irresistible that by the words 'other place' was intended another place of a similar character with those previously enumerated;" that "the context shows the mind of the legislature to have been fixed on territorial objects of a similar character." (See also The Federalist, No. 43, by Madison.)

Section 355, R. S., prescribes that no public money shall be expended upon any site or land purchased by the United States for the purposes of erecting thereon any armory, arsenal, fort, fortification, navy yard, customhouse, lighthouse, or other building, of any kind whatever, until the * * * consent of the legislature of the State in which the land or site may be, to such purchase, has been given. This section is in part based on the clause of the Constitution referred to, and in part not. The consent of the State to a purchase, given in order to satisfy the requirement of this section, would invest the United States with exclusive jurisdiction, if the purchase be for one of the constitutional purposes; but the section provides for other purposes also, and as to these it would seem that a simple consent to the

purchase (assuming that such consent, being for a purpose not falling under the clause of the Constitution, amounts to a cession of jurisdiction) would only carry with it so much jurisdiction as would be necessary for the purpose of the purchase. Probably this would be held to be concurrent jurisdiction. Taking into consideration the fact that States can not, under any circumstances, interfere with the instrumentalities of the Government of the United States, it may, indeed, be questioned whether, even under this view, unnecessary precautions have not been taken in regard to the acquisition of jurisdiction; and, certainly, it can not be presumed that a State intends to part with more of its sovereignty than is necessary. A consent to the purchase, under section 355, R. S., if the purchase be for other than one of the purposes described in the clause of the Constitution, may, therefore, be accompanied with any limitations not interfering with an instrumentality of the Government of the United States.

The most common way of acquiring jurisdiction, however, is by the State's expressly ceding it to the United States. In such case the State may make similar limitations, and this even if the place be used by the United States for one of the purposes mentioned in the clause of the Constitution. To bring the case under the clause there must be a purchase with consent.[1] *C. 1953, Dec., 1895.*

V A. The mere fact of its being the *owner* of land situated within a State does not entitle the United States to exercise *exclusive jurisdiction* over the same or of offenses committed thereon,[2] nor does the fact that the land has been duly *reserved* for military purposes confer such authority.[3] Where the United States is the proprietor of the land at the time of the admission of the State, it may obtain such exclusive jurisdiction, by expressly reserving the same to itself in the act of admission. Where this has not been done, or where the land has been purchased or otherwise acquired by the United States subsequently to the admission of the State, exclusive jurisdiction over the same can be vested in the United States only by an act of *cession* of such jurisdiction on the part of the State, or by the State's giving its *consent* to the "purchase" by the United States. See the terms of the provision of clause 17, section 8, Article I, of the Constitution.[4] A mere consent by a State, through its legislature, to the "purchase" by the United States of land within its limits for any purpose covered by the clause of the Constitution cited is as operative for the purpose of vesting

[1] See Fort Leavenworth R. R. Co. *v.* Lowe, 114 U. S., 525, 539; Chicago & Pacific Ry. Co. *v.* McGlinn, 114 U. S., 542; Benson *v.* U. S., 146 U. S., 325, 331; *In re* Kelly, 71 Fed. Rep., 545; *In re* Ladd, 74 id., 31.

[2] United States *v.* Stahl, 1 Woolworth, 192, and McCahon, 206; *Ex parte* Sloan, 4 Sawyer, 330, 331, 332; Clay *v.* State, 4 Kans., 49. Much less does the mere fact of its being the *occupant* of the land give it this authority—as where it occupies land as a camp. United States *v.* Tierney, 1 Bond, 571; Divine *v.* Unaka Nat. Bank (Tenn.), 140 S. W., 747.

[3] See the first three cases cited in last note. The fact that the person against whom the offense has been committed—as the person killed in a case of alleged murder—is an employee of the United States, adds nothing to its jurisdictional authority. *Ex parte* Sloan, *supra.*

[4] That the term "exclusive legislation," employed in the Constitution, is equivalent to exclusive jurisdiction, or rather that exclusive jurisdiction is a necessary incident of exclusive legislation, see 6 Op. Atty. Gen., 577, 578; United States *v.* Cornell, 2 Mason, 60; *Ex parte* Sloan, 4 Sawyer, 330.

the exclusive jurisdiction as is an express cession of the same.[1] *R. 42, 514, 524, Mar., 1880; 43, 234, Feb., 1880.*

Held that notwithstanding the provision in section 4872, R. S that the jurisdiction of the United States over land taken for a national cemetery, by the right of eminent domain, "shall be exclusive," such a jurisdiction, where the land is within a State, can not be legally vested in the United States, except by the cession of the State legislature. In the absence of such cession on the part of the State sovereignty, an act of Congress must be powerless to confer such an authority.[2] *R. 27, 661, May, 1869.*

V D 1. *Held* that there was no occasion for a statutory provision ceding back, or requiring the ceding back, of jurisdiction, by the United States to the State, when a military reservation was abandoned and turned over to the Interior Department under the act of July 5, 1884 (23 Stat. 103). Such provision has sometimes appeared, as in the act of Congress of March 3, 1819 ("authorizing the sale of certain military sites"), as also in some of the State acts ceding jurisdiction, in which the grant is expressly limited to the period during which the premises may be held for public uses by the United States. But such provisions are deemed unnecessary, the jurisdiction ceasing of itself with the use and occupation of the land for the purposes for which it was granted. It is believed to be clearly inferable from the clause on the subject in the Constitution (Art. I, sec. 8, cl. 17) that the State relinquishes its jurisdiction only for such term as the particular status subsists in contemplation of which it was ceded.[3] *P. 43, 475, Nov., 1890; C. 11668, Jan. 29, 1902.*

V D 1 a. *Held* that the act of Congress granting to the West Shore R. R. Co. a right of way across a part of the military reservation at West Point, N. Y., did not operate to oust, as to such way, the exclusive jurisdiction over the reservation previously ceded by the State to the United States. It simply imposed upon the military authorities the duty of not interfering with the legitimate use of its right by the railroad company. *P. 41, 457, July, 1890; C. 14323, Mar. 27, 1903.*

V E 1 a. A *cession of jurisdiction* by a State to the United States may be qualified or conditional, and concedes only so much as is specifically expressed.[3] So *held;* that a reservation in the act ceding jurisdiction over the military reservation of Fort D. A. Russell, Wyo., of the power to tax persons and corporations therein, was constitutional and operative. *C. 27365, Oct. 15, 1910.* But a *consent to purchase*, as the term is intended in the constitutional provision (Art. I, sec. 8, cl. 17), conveys the whole or an exclusive jurisdiction where the purchase is for a purpose covered by such provision. So where a State legislature, in giving consent to a purchase for a purpose covered by said clause of the Constitution, couples with it a condition or qualification inconsistent with the possession of exclusive

[1] See United States *v.* Cornell, 2 Mason, 60; 6 Op. Atty. Gen., 577, 578; 7 id., 628, 629; 8 id., 30, 101, 387; 13 id., 411. A State may give such consent by a single general act, prospective in terms, and covering all cases of future purchases by the United States. Note, for example, the act of the Legislature of Texas of Apr. 4, 1871, remarked upon in the opinion of the Attorney General of Apr. 10, 1878 (15 Op., 480).

[2] See the subsequent opinion of the Atty. Gen. in 13 Op., 131.

[3] See Fort Leavenworth R. R. Co. *v.* Lowe, 114 U. S., 525.

jurisdiction by the United States—as a condition that the State shall retain the same civil and criminal jurisdiction over persons and their property on the land that it has over other persons and property in the State, or shall retain the right to tax persons living on the land and their property—*held*, that the jurisdiction is not such as is designed by the Constitution, and can not legally be accepted by the United States.[1] *P. 59, 159, 408, Apr. and May, 1893; 63, 98, Dec., 1893; 64, 330, Apr., 1894.* Where, however, consent was given to the purchase of lands for the Washington Aqueduct, in terms which authorized the United States to exercise, concurrently with the State, "such jurisdiction over the premises as may be necessary for the said purpose," *held* that the cession, being limited to concurrent jurisdiction with a State, did not exclude the authority of the local State officials to make arrests for offenses committed within the premises covered by the cession.[2] *C. 20606, Oct. 19, 1906, and June 7, 1907.*

V E 1 a (1). Where a State statute, in ceding jurisdiction to the United States over certain lands purchased within the State by the authority of Congress as sites for public structures, added—"But the State reserves the right to execute process lawfully issued under its authority within and upon said sites," etc., *advised* that such reservation might properly be regarded as having the same effect as that indicated by Attorney General Cushing in 8 Op., 387, viz, as reserving merely the right to serve process *within* the lands for acts done and crimes committed *without* the same (so as to prevent them from becoming an asylum for fugitives from justice), and that the cession might therefore properly be accepted as sufficiently vesting in the United States the exclusive jurisdiction over the premises contemplated by the Constitution. *R. 42, 567, Apr. 3, 1880; 43, 234, Feb., 1880; P. 27, 132, Oct., 1888.*

V E 1 a (2). Where a State statute, in consenting to the purchase by the United States of land within the State and ceding to the United States jurisdiction over the same, added that such jurisdiction should be exercised "*concurrently with*" the State, *held* that this qualification was subject to the objection that it amounted to more than the mere reservation (not unfrequent) of the right to serve upon the land legal process for acts done and crimes committed *outside* of the same, and should therefore be regarded as inconsistent with a grant of exclusive jurisdiction to the United States over such land;[3] *further* that it so far qualified the consent given to the purchase as to make it at least doubtful whether, in view of the provisions of section 355, R. S., the Secretary of War would be authorized to expend an appropriation which had been made by Congress for the erection of public buildings on the land. *R. 43, 197, Feb., 1880.*

---

[1] See 8 Op. Atty. Gen., 418.

[2] See, however, opinion of the Attorney General dated July 3, 1907 (26 Op. Atty. Gen., 289), where it was held that the constitutional provision covers the purchase of land "needful" for any reason "to the discharge of any of the constitutional duties or the exercise of any of the constitutional powers of the United States," and that the United States acquired exclusive jurisdiction over the premises.

[3] See United States *v.* Cornell, 2 Mason, 60; United States *v.* Davis, 5 id., 356; Lasher *v.* State, 30 Texas Appeals, 387; 6 Op. Atty. Gen., 577, 578; 7 id., 628, 634; 8 id., 30, 102, 411, 417; 20 id., 242, 298, 611.

V E 1 c. It has repeatedly been held, and is now regarded as well settled law, that exclusive legislation and exclusive jurisdiction mean one and the same thing, and that where a State has ceded to the United States the right of exclusive legislation over a tract of land within the territorial limits of the State, a reservation to the State of concurrent jurisdiction is valid only so far as it is not repugnant to the exclusive jurisdiction of the United States. Thus where the act of the legislature provided that "the United States may enter upon and occupy any land which may have been or may be purchased, or condemned, or otherwise acquired, and shall have the right of exclusive legislation and concurrent jurisdiction together with the State * * * over such land and the structures thereon, and shall hold the same exempt from all State, county, and municipal taxation," it was *held* that the only legal effect of the "concurrent jurisdiction" therein reserved to the State was to admit of the service of civil and criminal process by the State upon the lands of the United States, and thus to prevent such places from becoming a sanctuary for fugitives from justice. *R.50, 255, May, 1886; C. 1581, July, 1895.*

V E 1 d. Where the State of New Jersey ceded jurisdiction over land at Sandy Hook, N. J., for military purposes, with the proviso that the jurisdiction so ceded shall not "prevent the operation of the public laws of this State within the bounds of the said tract so far as the same may not be incompatible with the free use and enjoyment of the said premises by the United States for the purposes above specified," *held* that without this proviso there could be no doubt that the cession would be of the entire jurisdiction of the State with reservation of the right to serve process; that if the proviso be given full operation it would, apparently, retain the right to pass laws and enforce the same within the reservation subject to the limitations stated, so that the jurisdiction ceded by the act would be concurrent only; that the proviso might also be construed as intended to provide that on the separation of the territory from the jurisdiction of the State the laws of the State then in force would continue operative within the ceded territory until changed by Congress;[1] and that as the latter construction would not be inconsistent with the terms of the cession and with the apparent intent to cede to the United States the jurisdiction contemplated by clause 17, section 8, of Article I of the Constitution, it should be adopted so that the act as a whole would be construed as conferring on the United States exclusive jurisdiction over the premises.[1] *C. 21044, Feb. 6, 1907.*

V E 1 e. The term "purchase," as employed in statutes, has been construed as embracing all the forms of acquiring title—including condemnation—except that by descent.[2] But in Kohl *v.* U. S.,[3] the Supreme Court says: "It is true the words 'to purchase' might be construed as including the power to acquire by condemnation, for, technically, purchase includes all modes of acquisition other than that of descent. But, generally in statutes, as in common use, the word is employed in a sense not technical, only as meaning acquisition by contract between the parties, without governmental interference." In a case, therefore, of certain lands in a State acquired by the United States by condemnation in the exercise of the right of eminent

[1] Chicago & Pacific Ry. Co. *v.* McGlinn (114 U. S., 542).
[2] VII Op. Atty. Gen., 114, 121, *Ex parte* Hebard, 4 Dillon, 380, 384; Burt *v.* Mchts. Ins. Co., 106 Mass., 356, 364.
[3] 91 U. S., 367, 374.

domain, *advised* that a special act of cession of jurisdiction be obtained from the State. *P. 50, 474, Dec., 1891.*

V E 2 d. In view of the general rule of interpretation, that a statute is not to be construed as retrospective unless its language clearly shows that it was so intended, *held* that a general statute of 1891, giving the consent of the State of Louisiana to the purchase by the United States of land within the State for public purposes, was in effect prospective and did not apply to the purchase of the land at Jackson Barracks, made before the date of such act.[1] Moreover the Constitution of Louisiana of 1868 forbids the enactment of retrospective laws. *R. 45, 436, Sept., 1882; L. 50, 95, Mar., 1886.*

V F 1 a. The laws of a State regulating the use of the water of streams thereof for irrigation purposes are not operative on a military reservation over which the United States has exclusive jurisdiction. Thus where the creek had its source on such a reservation, *held* that parties residing on said creek outside the reservation had no legal rights under the laws of the State in the waters of the creek until the same left the reservation, but recommended that the proper commanding officer be directed to so regulate the use of the water on the reservation that there would be no unnecessary waste. *C. 2453, July and Sept., 1896.*

A law of the State of New York of February 17, 1909 (Consolidated Laws, 1909, vol. 3, p. 2100, sec. 203), required employers to insure their workmen against injury. *Held* that the law did not extend over the military reservation of West Point, jurisdiction over which was ceded by the State to the United States, reserving only the right to serve "any process, civil or criminal, under the authority of the State, except so far as such process may affect the real or personal property of the United States." *C. 20947, Oct. 12, 1910.*

V F 1 a (1). The State of Kansas having surrendered to the United States its jurisdiction over the military reservations of Forts Leavenworth and Riley by an act of its legislature of February 23, 1872, which was earlier in date than the prohibition laws of the State (having their origin in the constitution adopted Nov. 2, 1880), *held* that such laws did not extend over and could not be applied to those reservations. *P. 39, 17, Feb., 1890.*

V F 1 b. The law is settled that where consent to purchase has been given, or exclusive jurisdiction has been ceded over land in a State, occupied for public purposes, the land is no longer a part of the State in a political or legal sense,[2] and no taxes, poll tax, or State,

---

[1] Compare XV Op. Atty. Gen., 480.

[2] See, on this general subject, the following as the principal authorities: Fort Leavenworth R. R. Co. *v.* Lowe, 114 U. S., 525; United States *v.* Travers, 2 Wheeler C. C., 490; Do. *v.* Tierney, 1 Bond, 571; Do. *v.* Stahl, Woolworth, 192, and McCahon, 206; Commonwealth *v.* Clary, 8 Mass., 72; Mitchell *v.* Tibbetts, 17 Pick., 298; Opinion of Justices, 1 Met., 580; State *v.* Dimick, 12 N. Hamp., 194; People *v.* Godfrey, 17 Johns., 225; Do. *v.* Lane, 1 Edmonds, 116; Commonwealth *v.* Young, Bright, 302; *In re* O'Connor, 37 Wisc., 379; Clay *v.* State, 4 Kans., 49; Painter *v.* Ives, 4 Nebr., 122; Sinks *v.* Reese, 19 Ohio State, 316; 6 Opins. Atty. Gen., 577; 7 id., 628; 8 id., 30, 102, 387, 418.

In this connection note an opinion of the Attorney General of February 7, 1880 (16 Opins., 468), that whether a superintendent of a national cemetery can legally be required to work upon the public roads of the State (in compliance with a law of the State requiring all male citizens between certain ages to perform such work), must depend upon whether he resides upon land acquired by the United States over which the State has parted with its jurisdiction; that if the jurisdiction over the cemetery grounds within which the superintendent resides has been surrendered to the United States, he is exempt from such obligation.

county, town, or school tax, or other form of taxation, can thereafter legally be imposed upon those lawfully resident or commorant thereon (*R. 49, 187, July, 1885*); and that such persons are withdrawn from the civil and criminal jurisdiction of the courts of the State, and from liability to the process of the same (except so far as may legally have been reserved by the State—see V and V E 1 a (1) *ante*). On the other hand, such persons are not entitled to enjoy any of the privileges of such citizen as the privilege of voting or the use of the public schools, etc. *R. 21, 567, July, 1866; 33, 8, Mar., 1872; 39, 151, Aug., 1887; C. 3521, Sept., 1897.* *Held*, therefore, that officers stationed at Fort Trumbull, Conn., were not entitled to send their children to the schools of the city of New London without paying the fees exacted by the city in cases where parents elect to send their children to a school in a district different from that in which they reside. *P. 62, 348, Nov., 1893.*

V F 1 b (3). The effect of the cession of exclusive jurisdiction is to withdraw the territory and its inhabitants from all control of the State authorities.[1] So, *held* that exclusive jurisdiction having been ceded over Davids Island, the coroner of Westchester County, N. Y., would have no authority to hold inquests on the bodies of persons dying on the island; but *advised* that he be permitted to hold inquests on the island on the bodies of unknown persons found washed upon its shores or floating in the neighboring waters. *P. 36, 143, Oct., 1889; C. 25936, Dec., 1909.* Also *held*, with respect to the proposal of the board of health of New Rochelle, N. Y., to apply quarantine regulations to enlisted men on the military reservation of Fort Slocum, N. Y., that the local board of health would have no authority as a matter or right within the reservation, and that whether they should be permitted to do so, by comity, was a matter to be determined by the local military authorities after consultation with the officers of the said board of health. *C. 17372, Jan. 16, 1905.* Also *held*, that the act of the Missouri Legislature providing for vital statistics was not operative within the national cemeteries near Jefferson City and Springfield, Mo., over which exclusive jurisdiction had been ceded. *C. 26128, Jan. 27, 1910.* Also *held*, with respect to the easements for highways within the military reservations of Fort Hamilton, N. Y., and Fort Revere, Mass., that the right to regulate and dispose of the easements was in the United States and not in the local highway authorities. *C. 3565, Oct. 13, 1897; 15264, Sept. 29, 1903; 21396, Apr. 17, 1907.* Also *held*, with respect to permitting agents of life insurance companies to solicit business on the military reservation of Fort Leavenworth, Kans., without license from the State authorities, that as no reservation was made in the act ceding jurisdiction of the right to regulate such matters, no State license was necessary. *C. 22466, Dec. 11, 1907.* Also *held*, that the State authorities had no jurisdiction regarding the licensing and regulation of marriage ceremonies on the reservation of Springfield Armory, Mass., but advised that the marriage, including the procuring of a license, registration, and ceremony, be entered into in accordance with the State law, in order that evidence of the marriage may be a matter of public record. *C. 1826, June 6, 1910.*

[1] *In re* Ladd, 74 Fed. Rep., 31; Story on the Constitution, vol. 2, sec. 1227.

V F 1 b (3) (*d*). Where the fee-simple title to highways was in the abutting property owners, subject to the public easement for highway purposes, and the Government acquired title to the land on both sides of a public roadway running through a military reservation, and the State by general law ceded exclusive jurisdiction over the entire reservation to the United States, *held* that the effect of the cession was to cede to the United States political jurisdiction over that portion of the roadway within the limits of the reservation, so that the State authority over the roadway ceased with such cession, and if it became necessary for the proper use of the reservation to close the roadway, such action could legally be taken by the United States. *C. 3565, Oct. 13, 1897; 21396, Apr. 17, 1907; 14715, May 12, 1909. Held,* further, that the road could be closed by the local military authorities under orders of the Secretary of War. *C. 14715, May 12, 1909.*

V F 1 b (3) (*g*). On an application of the administrator appointed by the court of the parish of Orleans of the succession of a deceased soldier who died at Jackson Barracks, La.—a place over which jurisdiction had been ceded by language that the United States "shall have the right of exclusive legislation, and concurrent jurisdiction together with the State of Louisiana"—to have certain effects within the reservation turned over to him, *held* (1) that the language of the cession should be construed to give the United States exclusive jurisdiction, subject only to the right of the State to serve process on the reservation; (2) that if so construed, the State court was without jurisdiction to administer the effects on the reservation,[1] if that State was not the domicile of the deceased, since the situs of the property was not within the jurisdiction of the State; and (3) that as the court assumed jurisdiction it might be assumed that the domicile of the deceased was in the State. *Advised,* however, that the effects be taken outside the reservation and there turned over to the administrator, in which case the property would be within the jurisdiction of the State. *C. 16153, Apr. 8, 1904.*

Held, with reference to the disposition of money found on a body which could not be identified and which was washed ashore on the reservation at Fort Dade, Fla., that as it did not appear that jurisdiction had been ceded over this reservation, the money should be turned over to the sheriff of the county, who, by the law of the State, was *ex officio* administrator of the effects of deceased persons found in the State in the absence of a legal representative otherwise appointed. *C. 11973, Jan. 27, 1902.* In a similar case where the body of an unidentified sailor was found on the beach at Fort McRee, Fla., over which jurisdiction had been ceded by the State, *held* that the money should not be turned over to the State officials, but, in the absence of a representative entitled thereto, should be deposited in the Treasury as property escheated to the Federal Government.[2] *C. 23692, Aug. 4, 1908.*

Held, with reference to the disposition of the effects of ex-soldiers dying at military hospitals where exclusive jurisdiction had been ceded, that in the absence of application of an executor or adminis-

[1] See, however, Divine *v.* Unaka Nat. Bank (Tenn.), 140 S. W., 747, where it was held that the State courts had jurisdiction on the ground that jurisdiction over such matters had not been conferred on the Federal courts.

[2] This view was concurred in by the Solicitor of the Treasury Aug. 11, 1908.

trator appointed by the court of the domicile of the deceased, after a reasonable time the effects should be disposed of and the proceeds deposited in the Treasury of the United States in accordance with the custom as to effects of deceased soldiers. *C. 7843, Mar. and June, 1900, Mar., 1910; 21856, July, 1907; 28515, June 10, 1911.*

V F 1 b (3) (*h*). Where the jurisdiction of the United States over any military reservation or other place is unconditionally exclusive, no State official can legally serve a warrant upon an officer or soldier within the limits of such reservation or place.[1] *R. 31, 567, July, 1866.*

The legality of the service, at a military post, of process issued in a suit or prosecution instituted in a *State* court depends (as to its original authority) upon the question whether the sovereignty of the soil resides wholly in the United States (either by virtue of a reservation of the same by the United States upon the admission of the State, or of its subsequent surrender by the State) or is shared by the State government. Where, by an act of consent or cession of the legislature of a State in which a military reservation or post is situated, exclusive jurisdiction over the same has become unconditionally vested in the United States, as contemplated by Article I, section 8, clause 17, of the Constitution, no process issued from the State courts can legally be served thereon, but only process issued from courts of the United States can be there executed. Where, however, in ceding jurisdiction, the State has reserved to itself the right, not unfrequently reserved under the circumstances (and which it is often for the advantage of the United States to have reserved, since otherwise the post might become an asylum for criminals) to serve within the premises civil and criminal process on account of rights accrued, obligations incurred, or crimes committed in the State but *outside* of the premises, then the writs of the State tribunals may be executed on the land in the class of cases thus excepted. Of course where there has been no cession of jurisdiction by the State, its officials have the same authority to serve the process and mandates of its courts, and its courts have the same jurisdiction over acts done and crimes committed within the military post as elsewhere in the State, the mere fact of the ownership or occupation of the land by the United States having no effect to except it from the operation of the State laws. *R. 16, 514, Aug., 1865; 21, 567, July, 1866; 33, 8, Mar., 1872.*

V G 1. The term "or other public building of any kind whatever" used in section 355, R. S., *held* to include the *viaduct* at Rock Island Arsenal, for the construction of which appropriation was made by Congress by acts of 1889 and 1890.[2] *P. 43, 454, Nov., 1890.* Also *held* to include the "*observation towers*," for the erection of which in the Chickamauga and Chattanooga National Park appropriations were made in the acts of August 5, 1892, and March 3, 1893. Cession of jurisdiction by the State is therefore requested in each case

[1] See Civil suit, etc. It is further held, in *Ex parte* McRoberts, 16 Iowa, 600, 603, that the provisions of the article apply only to officers and soldiers while within the immediate control and jurisdiction of the military authorities, and therefore do not apply to a case of a soldier *absent on furlough;* but that such a soldier, pending his furlough may be arrested in the same manner as any civilian.

[2] In 7 Op. Atty. Gen., 114, Mr. Cushing treated the land acquired by the United States for the use of the Washington Aqueduct as coming within the provisions of sec. 355, R. S.

before the appropriation can legally be expended. *P. 60, 30, June, 1893; 63, 60, Dec., 1893; C. 3060, Apr. 3, 1897; 3066, Apr. 17, 1897; 6946, Sept. 20, 1899; 7534, Jan. 17, 1900; 7553, Feb. 2, 1900; 7793, Mar. 9, 1900; 8649, Feb. 8, 1901; 12154, Mar. 31, 1902; 13817, Dec. 19, 1902.*

V G 1 a. On the question whether cession of jurisdiction is required where land is purchased for park purposes, *held* that in view of section 355, R. S., the cession would be required,[1] but that apart from this statute it might be questioned whether such cession would be necessary or desirable where lands are acquired for park or river and harbor purposes, since, if the State retains its jurisdiction over such places, there would be a convenient forum for the trial of offenses committed thereon. *C. 13817, Dec. 19, 1902.*

V G 2. Section 355, R. S., in prohibiting the expenditure of public money upon lands purchased for a purpose therein mentioned, before the consent of the State to the purchase of the land is obtained, does not preclude the mere purchase itself. The land therefore may legally be paid for, and the title thereto acquired, in the absence of such consent.[2] *P. 63, 1, Dec., 1893.* Neither the constitutional provision (Art. I, sec. 8, cl. 17) nor the statute (sec. 355, R. S.) precludes the United States from acquiring the title to the land. *P. 64, 330, Apr., 1894; C. 7793, Mar., 1900; 13817, Dec., 1902.*

V G 3. The title of the United States to the lands at Fort Monroe, as ceded by the State of Virginia, being limited to the line of ordinary low-water mark, *held* in view of the provisions of sections 355 and 4661, R. S., that a cession of jurisdiction over the necessary soil under the water beyond low-water mark should be obtained from the State before the appropriation, made by the act of August 10, 1888, for the iron pier to be constructed at Fort Monroe, be expended. *R. 53, 328, Apr., 1887.*

V H 1 a. Where political jurisdiction over a Territory passes from one sovereignty to another it is a well-established rule that the municipal laws continue in force until abrogated by the new sovereign.[3] *Held*, therefore, that where exclusive jurisdiction has been ceded over reservations within States, the State laws other than criminal continue operative within the reservations until changed by Congress, but that the operation of the State criminal laws is superseded by the criminal laws of the United States. *C. 16691, Sept. 10, 1902; 19489, Mar. 29, 1906; 19855, June 4, 1906.* With respect to reservations in Territories, *held* that the act of the President in making the reservation has no effect on the operation of the Territorial laws unless their operation is modified by Congress.[4] *C. 16691, Sept. 10, 1902; 19855, June 4, 1906.*

---

[1] See 7 Op. Atty. Gen., 114, where the statute was held to require cession of jurisdiction over lands required for the use of the Washington Aqueduct.

[2] See 10 Op. Atty. Gen., 34, 39; 15 id., 212, 213; III Comp. Dec., 530.

[3] Fort Leavenworth Railroad Co. *v.* Lowe, 114 U. S., 525; Chicago Railroad Co. *v.* McGlinn, id., 542; Divine *v.* Unaka National Bank (Tenn.), 140 S. W., 747.

[4] With respect to the operation of the laws of Porto Rico, the Secretary of War, in a letter to the governor dated June 6, 1906, said: "I concur in the opinion rendered by the acting judge advocate general in so far as it is held that the laws and ordinances of Porto Rico, when not in conflict with laws of the United States not locally inapplicable extend, and are in force in and over all lands reserved by the United States for military and other purposes, saving always that instrumentalities of the Federal Government located thereon are exempt from local control."

V H 1 b. Section 5391, R. S., provides that any offense committed in any place ceded to and under the jurisdiction of the United States, shall, where not specially made punishable by any law of the United States, be visited with the same punishment as is provided for such offense by the laws "now in force" of the State within which such place is situated. This provision, originally enacted March 3, 1825, was substantially reenacted April 5, 1866. In 1832 it was ruled by the Supreme Court [1] that the provision of 1825 was "limited to the laws of the several States in force at the time of its enactment." And in recent cases, arising in Montana [2] and Colorado,[3] it has been held that the provision in section 5391 did not apply to the offense because these States, with their laws, did not come into existence till subsequently to the date of the enactment of 1866. Thus the section (5391) is operative neither as to offenses committed in States which entered the Union since 1866, nor as to those committed in States where, April 5, 1866, there existed no criminal statute providing for the punishment of the particular offense. A modification of the existing law is called for. This can not be done by legislation adopting beforehand all the criminal laws of a State which shall be in force at the time of the criminal act, because that would be a delegation by Congress of its legislative power to the States. The reenactment, from time to time, therefore, of section 5391, or of a provision to a similar effect, *recommended.*[4] *P. 57, 488, Feb., 1893; 61, 435, Sept., 1893; C. 3546, Sept., 1897; 19489, Mar. 29, 1906.*

V H 2 b. Where a military post or reservation is situated in a *Territory*, the Territorial courts are authorized to issue process for the arrest of officers or soldiers of the command charged with crime, or to cite them to appear before them as defendants in civil actions, or to attach, replevy upon, or take in execution any property belonging to them within the posts, etc., not specially exempted from legal seizure. This for the reason that the courts in which is vested the judicial power of a Territory are not the courts of a sovereignty distinct from the United States but are the creatures of Congress,[5] being established by it directly or indirectly by its authority through the Territorial legislature, under the provision of the Constitution (Art. IV, sec. 3, par. 2) empowering Congress "to make all needful rules and regulations respecting the Territory belonging to the United States." Thus while officials charged with the service of the process of such—as, indeed, of any—courts would, in comity, properly refrain from entering a military post for the purpose of serving process therein, or at least from making the service, till formal permission for the purpose had been sought and obtained from the commanding

---

[1] U. S. *v.* Paul, 6 Peters, 141.

[2] U. S. *v.* Barnaby, 51 Fed. Rep., 20.

[3] U. S. *v.* Curran, cited in Ex. Doc. No. 14, H. R., 53d Cong., 1st sess.

[4] See sec. 289 of Criminal Code, approved Mar. 4, 1909 (35 Stat. 1088, 1145).

[5] In United States *v.* Kauchi Motohara and United States *v.* Matsunaga, cases pending in the United States district court for the Territory of Hawaii, said court overruled the demurrer for want of jurisdiction, holding that the words "exclusive jurisdiction of the United States" in the Penal Code mean the power and authority of the United States, whether partly exercised through its subordinate (i. e., the Territorial Government) or not. The opinion conceded that the Territorial courts would have jurisdiction over offenses committed on the reservation, but held that such jurisdiction did not exclude the jurisdiction of the United States district court also. See also 7 Op. Atty. Gen., 564; 26 id., 91; Burgess *v.* Territory (8 Mont., 57, 19 Pac., 558); Reynolds *v.* People (1 Colo., 179); Scott *v.* Wyoming (1 Wyo., 40).

officer, yet, on the other hand, officers commanding military posts in the Territories should certainly interpose no obstacle to the due service within their commands of the legal process of the Territorial courts.[1] *R. 28, 1, July, 1868; 39, 541, May, 1878; C. 11141, Aug. 27, 1901.*

V II 2 c. In the absence of any statute directly or by necessary implication extending the powers of the local government of the District of Columbia over the military reservation and post at the arsenal in Washington, *held*, that the health officer appointed by the commissioners (constituting such government) would not be empowered of his own authority and without the consent of the military commander to enter upon such reservation and remove or abate a nuisance deemed by him to exist thereon. The effect of the legislation in regard to the government of the District is to except therefrom the public buildings and grounds of the United States, which are left to the charge of certain specified officials. Even further removed from such government is the reservation at the arsenal, the same being a military post commanded by the President, through a military subordinate, and governed by military orders and regulations. *R. 42, 270, May, 1879; C. 17372, Jan. 16, 1905; 26450, Mar. 31, 1910.*

VI A. The vesting of a right of way in the United States does not merely authorize the Government to send its agents and employees on the land for purposes of construction, etc., but endows it with such right and control as to enable it to keep the way open and insure its continued use for the purposes designed. But where it was proposed to cede to the United States a right of way from a city, by one of its laid-out streets, to an adjacent national cemetery, *held* that the municipality, in the absence of specific authority conferred by the legislature, was not empowered to convey such a right, but that the legislature alone could do so, just as the legislature alone could vacate or discontinue a street.[2] *P. 30, 45, Jan., 1889.*

VI A 1. So, *held* that an appropriation made by Congress for constructing a road from a city through one of its streets to a national cemetery could not legally be expended upon a right of way granted by a city ordinance, the legislature not having delegated such jurisdiction over its streets to the municipality, which could not therefore transfer to a third party a permanent property therein. *P. 54, 423, July, 1892. Held* that where such a municipality had not been empowered to convey a right of way outside its corporate limits, the conveyance should be made directly to the United States from the individual owners of the land, and that for the latter to convey, mediately, to the city would be an unnecessary proceeding. *P. 29, 68, 69, Dec., 1888.*

VI B. Without express authority from Congress, the Secretary of War can not grant to railway companies rights of way over the lands of the United States under his control, but he has frequently by revocable license granted permission to lay and maintain railway

[1] See the opinion of the Judge Advocate General, published in G. O. 30, Hdqrs. of Army, 1878, in connection with 7 Op. Atty. Gen., 564. But see *contra, In re* Charles Brown and Austin Burke, on Habeas Corpus (Sept., 1884), "In the district court [Territorial] of the second judicial district, holding terms at Vancouver," published in Circular 21, Department of the Columbia, June 15, 1885.

[2] Dillon on Municipal Corporations, 647, 652, 665; Kreigh *v.* Chicago, 86 Ill., 407.

tracks upon such Government lands. *C. 241, Aug., 1894; 6539, June, 1899; 20944, Jan. 15, 1907.*

VI B 1. A State can have no authority to appropriate land included in a military reservation of the United States to the purposes of a right of way for a railroad.[1] Such a right of way granted by a State legislature can not be recognized as legal by the United States. *R. 31, 249, Mar., 1871.*

VI B 2. Where an act of Congress grants to an individual or corporation a right of way (or other franchise), no formal *acceptance* of the same is necessary. By simply acting under the grant, the grantee accepts the same with all its conditions. *P. 59, 418, May, 1893.*

VI B 3. Where a grant of a right of way is made by the United States to a particular grantee over lands of the United States, but without designating the precise strip of land in the entire body of land which is to be occupied, it is held by recent authority that if the grantee selects such way, and the grantor does not object to such selection but silently acquiesces therein, he substantially constitutes the grantee his agent for such selection, and himself joins, in law, in the selection, and the title to the tract selected passes to the grantee.[2] This ruling *held* applicable to the case of the right of way through the Fort Leavenworth Military Reservation, granted to the Kansas & Missouri Bridge Co., by the act of July 20, 1868, c. 179. *P. 50, 395, Dec., 1891.*

VI B 4. Where authority was given to the Secretary of War, by act of Congress, to grant permission for an electric railway on a reservation under such conditions and requirements as he might prescribe, *held*, on the question of whether the Secretary of War could require the joint use of the tracks on the reservation by another railway company, that it was not intended to confer a monopoly upon the first company, and that it was within the authority of the Secretary of War to require both companies to use the tracks upon payment of their respective shares of the cost of construction and maintenance. *C. 13246, Sept. 26, 1904.*

VI C 1. To legalize the use of a public road (State, county, or Territorial) across a corner of a military reservation, *held* as follows: (1) The Secretary of War may, under the act of July 5, 1884 (23 Stat. 104), permit the extension of such a road across a military reservation "whenever, in his judgment, the same can be done without injury to the reservation or inconvenience to the military forces stationed thereon." (2) Or he can abandon to the Secretary of the Interior, under the same act, the strip of the reservation to be traversed by the road, and the latter official can then authorize the road under section 2477, R. S., by which "rights of way for the construction of highways are granted over public lands not reserved for public uses." *P. 43, 415, Nov., 1890.*

VI D. Questions of rights to the use of *water* in States and Territories where the rainfall is not sufficient to supply the land with water for irrigation are determined by rules not found in the common law. In England and generally in this country the right of one person to conduct water over the land of another is an interest in real estate which must be conveyed by deed. In districts where there is

[1] See United States *v.* R. R. Bridge Co., 6 McLean, 517; Ill. Central R. R. Co. *v.* United States, 20 Law Rep., 630; 6 Op. Atty. Gen., 670; 16 id., 114.

[2] Railway Co. *v.* Alling, 99 U. S., 468; Onthank *v.* Railroad Co., 71 New York, 196.

sufficient rain to fertilize the land there is no reason for distinguishing this interest from other easements in the soil. In regions where the fertility of the soil is dependent upon irrigation a different principle arises. By it the right of a person, who can not otherwise secure a necessary supply of water, to enter the land of another for such purpose, is recognized.[1] The use of this right is secured and regulated by statute in the Western States, and is further recognized by Congress in the act of March 3, 1891, chapter 561, sections 18–20, which extends to individuals and associations the right to enter the *public* lands and reservations of the United States, and have a right of way upon the same for the construction of irrigating ditches.[2] So, *held*, that where an individual had constructed such a ditch over the soil of a military reservation in Wyoming, after filing the map of the line of the same required by section 20 of the act, his use of the water could not be controlled or interrupted by the military authorities so long as he did not, by the location of his right of way, "interfere with the proper occupation" of the reservation by the Government (sec. 18 of the act). *R. 49, 97, May, 1885; P. 55, 268, Sept. 1892.*

VI D 1. By sections 18 and 20 of the act of March 3, 1891 (26 Stats. 1110–1112), the right of way is granted across the public lands and reservations of the United States for the construction of irrigating ditches, subject to the approval of the location of right of way across a reservation by the department of the Government having jurisdiction of such reservation. Where the Secretary of War, under this statute, approved the location of a right of way across a military reservation, but subject to certain conditions for the benefit of a third party, *held*, that the Secretary of War was without authority to compel the grantee of the right of way to comply with the conditions, or to deprive him or his assigns of such right of way on account of his or their failure to comply with the conditions. *C. 1063, May, 1896; 13789, Dec. 9, 1902.*

On the request for authority to construct a diversion dam and irrigation ditch on the military reservation of Whipple Barracks, Ariz., *held*, that the act of February 15, 1901 (31 Stat. 790), gives ample authority for the approval of any permit which the Secretary of the Interior might issue for the proposed work. *C. 28557, June 19, 1911.*

VI D 2. *Held*, that as the act of February 15, 1901 (31 Stat. 790), in giving the Secretary of the Interior authority to permit the use of rights of way through the public lands and reservations of the United States for irrigation purposes, *inter alia*, expressly provides that it shall be "only upon the approval of the chief officer of the department under whose supervision such contract or reservation falls," upon the acquisition of lands for the Fort Logan Reservation, Colo., no right of way could be thereafter located under State law, but only in accordance with the said act of February 16, 1901. *C. 25616, Mar. 2, 1911, and June 21, 1911. Held*, however, that if such a right

[1] Yunker *v.* Nichols, 1 Colo., 551. But, it seems, that in the absence of statute the person would have no right to construct a ditch on the lands of another without the owner's consent. Gould on Waters, 3d edition, sec. 233.

[2] As to the operation of the act of July 26, 1866, and other prior enactments relating to this subject, see Broder *v.* Water Company, 101 U. S., 274; Sturr *v.* Beck, 133 id., 541. See, also, Gould on Waters, 3d edition, sec. 240, and authorities cited.

of way had been located under license, followed by actual work in enlarging an existing ditch or making a new one prior to the acquisition of the property, although not held under formal conveyance, such a license would be irrevocable and would bind the property in the hands of the United States.[1] *C. 25616, June 21, 1911.*

VI E. The right of way granted to the Northern Pacific Railroad Company by section 2 of the act of July 2, 1864 (13 Stat. 367), unlike the grant of lands by section 3, was subject to no exceptions or limitations. So, *held*, that the fact that, subsequently to the date of the act, the President reserved land on the line of the railroad for military purposes, before the company had definitely fixed its line and filed its maps, did not affect the right of way as granted by the act, and that such way was not interrupted by such reservation.[2] *R. 49, 357, Oct., 1885.*

VI E 1. The act of September 10, 1888 (25 Stat. 473), relating to rights of way of railroads through water-reserve lands in Wisconsin, confirms, as to that State, the rights of way given by the act of March 3, 1875 (18 Stat. 511). *P. 32, 223, May, 1889.* But the act of 1888 leaves these rights still subject to the right of flowage, which, under the authority of the United States, may need to be resorted to in connection with the improvement of the Mississippi River, and subject also to the condition that no railroad company shall take material for construction from the water-reserve lands outside the right of way. *P. 33, 489, July, 1889.* Where the location of a railroad has been approved by the Secretary of the Interior, and its right of way perfected, under the act of 1875, it is not required that there should be a reapproval by the Secretary of War under the act of 1888. *P. 31, 352, Apr. 1889; 33, 156, June, 1889.* An approval by the Secretary of War, under the act of 1888, of the location of a right of way for a certain railroad, not *recommended* until the company file with their application a perfect profile and full and minute description of the proposed line. *P. 29, 253, Jan., 1889.*

VII A 1. Where a lease made to the United States, of land to be used for public purposes, contained no stipulation other than one for the payment of certain rent, *held* that such lease was not annulled by transfer under section 3737, R. S., but was legally assignable. The case is deemed to be governed by the ruling of the Supreme Court in Freedman's Saving Co. *v.* Shepherd,[3] to the effect that section 3737 did not apply to a lease so made, "under which the lessor is not required to perform any service for the Government, and has nothing to do in respect to the lease except to receive from time to time the rent agreed to be paid." *P. 43, 175, Oct., 1890; C. 18707, Oct. 12, 1905; 20350, Sept. 10, 1906.*

VII A 2. The United States, being tenant of land leased for military purposes at Fort Davis, Tex., erected buildings thereon for the purposes of a military post. In view of the fact that the relation was that of landlord and tenant; that the buildings were erected for a purpose analogous to that of trade, and for a public use; and that in their erection there could certainly have been no intention to benefit

[1] Gould on Waters, 3d edition, sec. 323; Yunker *v.* Nicholls, 1 Colo., 551, 554. De Graffenried *v.* Savage, 9 Colo. Ap., 131; 47 Pac. Rep., 902.

[2] See Railroad Co. *v.* Baldwin, 103 U. S., 426; 18 Op. Atty. Gen., 357.

[3] 127 U. S., 494; IV Comp. Dec., 43.

the inheritance or add to the freehold—*held* that such buildings were to be regarded not as fixtures, but as personal property,[1] and removable by the tenant at any time before the expiration of his lease.[2] Should the Government sell the buildings standing, the purchaser would have the same right of disposition as the United States and no more. He would therefore be obliged to remove them before the termination of the lease, unless otherwise permitted by the owner of the premises. *P. 47, 71, May, 1891.* And *held* similarly of like buildings erected at Fort Union, N. Mex., where the United States was tenant at will; the buildings not being intended as improvements, but merely for the use of the troops. *P. 47, 138, May, 1891.*

VII A 3. The word "month" in a lease, in the absence of an expressed intention to the contrary, means a "calendar month," and a "calendar month" means a month as expressed in the calendar, i. e., the actual number of days in the month is to be counted.[3] *C. 25340, July, 1909.*

VII A 4. Where land was leased by the United States for a target range in the State of Texas and the lease contained a covenant for renewal at the end of the year at the option of the United States, *held* that unless the lease were acknowledged (or proved) and recorded as provided by the statutes of Texas, such covenant would not be binding upon a purchaser for value without notice thereof. *C. 2439, July, 1896.*

VII A 5. *Held,* in view of section 3744 R. S., that a written notice of the intention to renew the lease, with the acceptance of the lessor indorsed thereon, would not be sufficient, but that a brief formal contract, referring to the original lease in such a way as to identify it, and signed with the names of the parties at the end thereof, would meet the requirements of the statute. *C. 7214, Oct. 27, 1899.* Also *held,* where the lessor refused to renew the lease on the ground of misapprehension, that in the absence of fraud on the part of the contracting officer this would not relieve him from his obligation, and *advised* that in case of his continued refusal suit be brought for specific performance. *C. 10768, July 1, 1902.*

VII A 6. Where the United States continued in possession of leased land after the expiration of the term, paying the rental quarterly as provided in the lease, *held* that from such possession, and the acceptance of rent by the lessor, a tenancy from year to year was created.[4] *C. 7490, Jan. 3, 1900.*

VII A 7. Where rent was due by the United States for the occupation of a house which it had leased for a recruiting rendezvous, and the title to the premises was claimed both by the lessor and another person as parties to a pending suit in a court of chancery, *advised* that if the rights of the parties to the rent were so involved in the litigation as to enable the United States to pay the amount of

---

[1] Van Ness *v.* Pacard, 2 Peters, 141; King *v.* Wilcomb, 7 Barb., 263; Hutchins *v.* Masterson, 46 Texas, 555; Moody *v.* Aiken, 50 Texas, 65; Conrad *v.* Saginaw Mining Co., 54 Mich., 249; Meigs' Appeal, 62 Pa. St., 28.

[2] Sumner *v.* Tileston, 4 Pick., 307; Griffin *v.* Ransdell, 71 Ind., 441; 18 Op. Atty. Gen., 270; Taylor's Landlord and Tenant, 433. But such buildings could not be sold without the authority of Congress. 20 Op. Atty. Gen., 284.

[3] See XI Comp. Dec., 494.

[4] Ryder *v.* Jenvy, 2 Robertson (N. Y.), 56; Holseman *v.* Abrams, 2 Duer (N. Y.), 435; Wood's Landlord and Tenant, pp. 76–84.

the rent into court and receive an acquittance therefor, this course would properly be pursued; otherwise that the payment should be withheld entirely until the question of title be determined and the United States be enabled to receive a final receipt from one of the parties or both jointly. *P. 64, 15, 300, Feb. and Apr., 1894.*

VII B 1 a. By the river and harbor act of August 5, 1886, the United States formally accepted from the State of Ohio the Muskingum River Improvement, with all its franchises, appurtenances, water rights, &c., subject to any existing leases of water rights under leases granted by the State. The State, by its official representative, had made a lease to certain individuals which contained a clause providing for a forfeiture of the lease in case of an assignment without the sanction of the lessor. The lease was assigned to a third party without any formal sanction or concurrence on the part of the lessor, but the lessor, subsequently to the assignment, accepted rents from the assignee. *Held* that such acceptance amounted to an absolute waiver of the forfeiture clause, and made the lease valid in the hands of the assignee, investing him with all the rights of the original lessees,[1] and was therefore binding upon the United States under the reservation of the act. *P. 22, 45, Jan., 1888.*

VII B 1 b. The act of Congress approved August 11, 1888 (25 Stat. 417), authorized the Secretary of War "to grant leases or licenses for the use of the water powers on the Muskingum River at such rate and on such conditions and for such periods of time as may seem to him just, equitable, and expedient * * * and * * * to grant leases or licenses for the occupation of such lands belonging to the United States on said Muskingum River as may be required for mill sites or for other purposes not inconsistent with the requirements of navigation." Under this statute two leases for periods of 20 years each were granted, but neither provided for a forfeiture of the term for nonpayment of rent. *Held*, therefore, that the Secretary of War could not terminate them on account of nonpayment of rent;[2] and *advised* that the proper way to terminate them would be to have the lessees execute instruments surrendering their terms. *C. 2096, Mar., 1896; 3242, Jan., 1900.*

VII B 2 a. Under the act of Congress approved July 28, 1892 (27 Stat. 321), the Secretary of War has authority, when in his discretion it will be for the public good, to lease for a period not exceeding five years and revocable at any time such property of the United States under his control as may not for the time be required for public use, and for the leasing of which there is no authority under existing law, provided that nothing in the act should be held to apply to mineral or phosphate lands. Under this act revocable leases have been granted in a number of instances. *C. 851, Jan. and Apr., 1895; 1790, Nov., 1895; 2102, Mar. and Oct., 1896; 4100, May, 1898.* In practice the leases or assignments thereof are required to be in duplicate. *C. 178, 179, Aug., 1894; 414, Oct., 1894.* Under the express terms of the act the Secretary of War has no authority to lease mineral or phosphate lands. *C. 3619, Nov., 1897; 6389, 6721, May and July, 1899. Held*, in view of the express prohibition contained in the act of July

[1] Taylor's Landlord and Tenant, sec. 497.

[2] Taylor's Landlord and Tenant, 8th ed., sec. 489; Am. and Eng. Ency. of Law (1st ed.), vol. 12, p. 758*k*.

28, 1892, against the leasing of mineral or phosphate lands, that the Secretary of War could not grant permission to locate and work mineral claims on a military reservation either by lease or license. *C. 7281, Nov., 1899; 9722, Jan. 29, 1901; 10720, June 26, 1901; 10727, June 22, 1901; 11886, Jan. 13, 1902; 19020, Jan. 5, 1906; 19254, Feb. 27, 1906.* Also *held* that the term "mineral lands" should be construed, with reference to other statutes relating to the public lands, as including lands chiefly valuable for building stone.[1] *C. 27025, July 23, 1910.* In a certain class of cases, to wit, where the parties applied for permission to construct certain buildings upon reservations and to build docks in a Government harbor, revocable leases were granted in lieu of licenses.[2] *C. 3350, 3356, 3378, July, 1897; 5926, Feb. 27, 1899; 18942, Dec. 12, 1905; 19254, Feb. 26, 1906; 20350, Sept. 10, 1906.*

Also *held* that a quartermaster's dock comes within the purview of the act of July 28, 1892, and may be leased. *C. 12980, July 17, 1902.*

VII B 2 **b.** As there is no law requiring the Secretary of War to call for bids in leasing property under the act of July 28, 1892, the amount for which it shall be leased rests in his discretion. *C. 273, Sept., 1894.*

VII B 2 **c.** The Secretary of War leased a part of a military reservation, the rent to be paid monthly during the continuance of the lease. The lease provided that the term should be three years from the 12th day of July, 1894, but it was not in fact executed by the Secretary until September 12, 1894. The lessee entered upon the reservation about the latter date and vacated the same on July 12, 1897, the date of the termination of the lease. *Held* that in point of *computation* the three years' term dated from July 12, 1894, but that in point of *interest* the lease took effect only from the delivery of the instrument, and that therefore rent could be collected for only about 2 years and 10 months.[3] *C. 273, July and Oct., 1897; 11195, Apr. 16, 1902.*

VII B 2 **d.** Where property was leased, under the act of July 28, 1892, and the lessee requested to be relieved from the payment of further rent, *held* that as the lease was revocable the Secretary of War could have terminated it at the expiration of any period for which rent had been paid, and *advised* that the lease be regarded as terminated on payment of rent up to the time when the premises were no longer held by the lessee. *C. 11731, Dec. 10, 1901.*

VII B 2 **e.** The act of July 28, 1892, c. 316, authorizes the Secretary of War, in his discretion, to "lease for a period not exceeding five years, and revocable at any time, such property of the United States under his control as may not for the time be required for public use," such leases to be "reported annually to Congress"; but does not prescribe as to the disposition of the moneys received as rents. Section 3621, R. S., provides for the disposition of public moneys coming into the possession of any person, and paragraph 698, Army Regulations (1889), directs that "the face of the certificate or receipt" shall "show to what appropriation" the funds belong. *Advised* that it would be sufficient for any post quartermaster or other disbursing

[1] Northern Pacific Ry. Co. *v.* Soderberg, 188 U. S., 526.
[2] See Op. Atty. Gen. of May 19 and July 7, 1897, 21 Op., 537, 565.
[3] See Taylor's Landlord and Tenant, eighth ed., sec. 70.

officer into whose hands such rents should come to note the character of the payment upon his certificate, leaving it to the War Department to report the same in the aggregate to Congress at the end of each year. *P. 59, 369, May, 1893.*

VIII. It is impracticable for Congress to provide by legislation for every case in which a license may be granted, because unforeseen necessities for permissions of various kinds, often needing immediate action, spring up, and these can only be met by an exercise of the power of the Executive. These permissions are not always granted by formal written licenses. They may not be reduced to writing at all, but may be entirely informal, oral permissions to do acts which would otherwise constitute trespasses. Such permissions are in effect and substance revocable licenses, just as much as those expressed in a written instrument. Indeed, the great mass of licenses to do acts of various kinds on military reservations are informal permissions of this character. Whether it be to enjoy some continuous privilege or to do a single act, makes no difference. All are in effect revocable licenses, emanating from the same authority. And the only advantage of the revocable license by written instrument is that it is the most convenient evidence of the permission. Many acts are, however, such that it would be absurd to resort to written instruments for the purpose of granting permission to do them. They are simply orally authorized or silently permitted, the authority being the authority of the President executed through the commanding officer of the post. At every large post there are, no doubt, a number of such acts done daily by the authority of these unwritten permissions, or unwritten revocable licenses. The power of the President probably does not extend to the granting of licenses for the doing of anything which would be an injury to the property, nor can he grant other than revocable permissions, but there appear to be no other restrictions. He can not grant licenses that are not revocable. The power is one to be exercised by the President at his discretion, subject only to the restrictions mentioned, and of course to such other restrictions as may be imposed by or be the result of acts of Congress. The act of July 28, 1892, authorizing the Secretary of War to grant leases, seems to have been intended as an extension, certainly not as a restriction, of his power. It is inapplicable to the purposes for which revocable licenses are used. And the sixth section of the act of July 5, 1884, (23 Stat. 103) "to provide for the disposal of abandoned and useless military reservations," authorizing the Secretary of War to permit the extension of roads across military reservations, the landing of ferries and the erection of bridges thereon, and to permit cattle to be driven across them, was apparently intended to confer power on him to grant more permanent privileges than revocable licenses give. A license is a bare authority to do a certain act or series of acts upon the land of the licensor without possessing or acquiring any estate therein. The Judge Advocate General's Office has always held that the Secretary of War may, by revocable license, permit a temporary use, terminable at his discretion, as the public interests may require, of United States lands under his control, provided such license conveys no usufructuary interest in the land, and such use does not conflict with the purpose for which the land is held. The word license, as applied to real property, imports an authority to do some act or series of acts upon the land of another. It passes no interest in the

land itself and its only effect is to legalize an act which in the absence of the license would constitute a trespass. It may be created by parol, although a writing defining the exact nature and scope of the license is preferable.[1] In 1891, the Secretary of War decided that military reservations and lands occupied by the War Department are held and occupied for military purposes only, and that no licenses for their use or occupation would be given without authority from Congress, unless such use or occupation would be of some benefit to the military service. (Circ. 12, A. G. O., 1891.) It will be noticed that this is merely the announcement of a policy, and not the denial of the existence of the power. And, as a matter of fact, the policy thus declared was not carried out. In practice it is fully recognized that the Secretary of War may thus license any act which would not be an injury to the property nor conflict with the purpose for which it is held. This is giving a reasonable application to the rule against the granting of usufructuary interests or permission to commit waste. So far as the "sectarian purpose" for which a license may be required, is concerned, it is evident that such purpose does not affect the power to grant the license but the policy of granting it only. In the absence of action by Congress, the exercise of the power rests in the discretion of the President, and the purpose can be no restriction on his discretion, except in so far that it must not be incompatible with—that is, an interference with or an obstruction to—the general use for which the land is held.[2] *C. 2961, Feb., 1897; 8360, May 18, 1900; 10624, June 11 and Aug. 27, 1901; 29247, Nov. 17, 1911.*

---

[1] Rice on Real Property, p. 505.

[2] Under date of Aug. 4, 1890, the Attorney General (19 Op. 628) said:

"It has been the practice for many years for the Secretary of War, and sometimes the President, * * * to grant revocable licenses to individuals to enter upon military reservations and prosecute undertakings there which may be beneficial to the military branch of the public service as well as advantageous to the licensees.

"For many years a part of the tracks of the Baltimore & Ohio Railroad Co. was laid by a revocable license on a part of the land at Harpers Ferry used by the United States for a manufactory of arms. Under a similar license a part of the land belonging to the fort at Old Point Comfort was allowed to be used as a site for a hotel, and in 1864 President Lincoln gave a license of this kind to a railroad company to use a part of the Government land at Sandy Hook, and in 1869 another license was granted to said company to use part of the same land 'so long as it may be considered expedient and for the public interest by the Secretary of War, or other proper officer of the Government, in charge of the United States lands at Sandy Hook.' (See 16 Op. 212.)

"In this case the license applied for [to construct an irrigating ditch] relates to a military reservation situated in an arid region, and therefore, in view of the advantage to Fort Selden of the use of this water, and in view of the frequent exercise of a similar power by granting such licenses as occasions have arisen through so many years, it seems clear that such license may be granted, the same to be under well considered restrictions and revocable at the will and pleasure of the Secretary of War."

See also opinion of Attorney General Griggs (XXII Ops., 245), where it is said:

"The long-continued exercise of a power of this kind by the Secretary of War, and the open and notorious use of Government reservations by such licensees without legislative objection from Congress, and with the adoption of no legislative rules upon the subject, implies the tacit assent of Congress to this custom. At the same time, I deem it proper to call your attention to the fact that this custom can not be maintained upon any grounds except the benefit of the public interests, either directly or indirectly. It can not be used as a basis for granting, under the guise of a temporary license, a substantially permanent right to maintain a railroad."

The practice above referred to appears to have since obtained, except in the class of cases covered by the later opinions of the Attorney General of May 19 and July 7, 1897 (21 Op., 537, 565). For a published list of the revocable licenses granted by the Secretary of War between Jan. 1, 1893, and Jan. 1, 1897, and of revocable leases

VIII A. A license is defined as a bare authority to do a certain act or series of acts upon the land of the licensor without possessing or acquiring any estate therein.[1] *R. 50, 619, Aug., 1886.* The Secretary of War may, by revocable license, permit a temporary use, terminable at his discretion, as the public interests may require, of United States lands under his control, provided such license conveys no usufructuary interest in the land,[2] and such use does not conflict with the purpose for which the land is held. *R. 49, 490, Nov., 1885; C. 285, Sept., 1894; 2961, Feb., 1897.* The Secretary of War may grant to a civilian, not a Government employee, a revocable license to reside and do bnsiness on a military reservation. *C. 304, 315, Sept., 1894.* A formal acceptance of a license is not in general necessary; the grantee, by acting under it, sufficiently indicates its acceptance. *P. 59, 418, May, 1893; C. 155, Dec., 1894; 639, Mar., 1895; 10624, June 7, 1901; 12995, July 23, 1902.*

VIII A 1. An instrument termed a revocable license, but which in effect is a grant of an interest, is in excess of executive authority and inoperative. Thus an executive permit to erect upon United States land a building amounting to a permanent improvement to be used and occupied, or disposed of, by the licensee at his discretion as his property, is not a legitimate revocable license; is in fact (or, if valid, would be) irrevocable as conveying a usufructuary interest.[3] *P. 38, 49, Jan., 1890; 56, 366, Nov., 1892; C. 3293, June 17, 1897; 6960, Aug. 31, 1899; 10766, June 27, 1906; 18273, July 11, 1905; 22340, Nov. 14, 1907, Mar. 15 and Apr. 17, 1908; 22600, Jan. 10, 1908.* So, a so-called revocable license to reside upon and cultivate certain land of the United States at a fixed rental named, *held* really a lease at will, conveying a usufructuary interest and not legal in the absence of authority from Congress. *P. 54, 212, June, 1892.*

VIII A 2. A license does not justify any use of the property other than as specified in the grant. It is therefore not assignable. *R. 55, 603, June, 1888; C. 639, Nov., 1894; 1155, Dec., 1895.* And a transfer of it avoids the license. *P. 42, 456, Sept., 1890.* Thus held that an assignment to another, by the holder of a license to erect a hotel on the military reservation of Fort Monroe, was legally inoperative and an avoidance of the license. *P. 44, 225, Dec., 1890.*

VIII A 2 a. Where a joint resolution of Congress authorized the Secretary of War to grant an Army and Navy contractor at Fort Monroe "permission to rebuild" at that post a storehouse "upon such conditions and under such restrictions as the Secretary of War shall deem compatible with the interests of the Government," it was *held* that the resolution only authorized the Secretary of War to grant a license to build on and use lands of the United States and did not authorize him to grant an interest in the same. So the license thus

---

granted during the same period under the act of July 28, 1892, see public document (not numbered), described as follows: "Granting permits for the occupancy or use of military reservations for nonmilitary purposes (H. Res. 250, 54th Cong., 2d sess., in the House of Representatives, Feb. 8, 1897)."

Permission to land ferries and to erect bridges on military reservations and to drive cattle, sheep, or other stock animals across the same, is granted by the Secretary of War under sec. 6 of the act of Congress approved July 5, 1884.

[1] Angell on Watercourses, 457.

[2] A license confers "no interest whatever in the land itself." 16 Op. Atty. Gen., 212. See also 19 id., 628.

[3] See 21 Op. Atty. Gen., 541.

granted not being assignable, *advised* that in lieu of the approval of a proposed transfer thereof a revocable license be issued to the transferee. *C. 639, Nov., 1894.*

VIII A 3. A license to go upon land of the United States will not authorize the licensee to take public property therefrom. *Held* that the Secretary of War was not empowered to grant a revocable license allowing the licensee to gather the fruit from trees growing upon Government land, such fruit being public property, disposable only by Congress. *P. 56, 134, Oct., 1892; C. 18389, Aug. 5, 1905.*

VIII A 4. The city of Miles City, Mont., applied to the Secretary of War for permission to enter upon the Fort Keogh Military Reservation and make cuts for the purpose of straightening the channel of Tongue River, forming the boundary of the reservation, so as to prevent its encroaching upon the city. The proposed work would probably throw 175 acres of the reservation to the opposite side of the new channel, thus resulting in a permanent change and perhaps in permanent damage to the reservation. *Held* that the Secretary of War would not be empowered to grant a license in such a case, and that Congress alone could authorize the use of the land and operations designed. *P. D, 3, Aug., 1892.*

VIII A 4 **a**. *Held* that the Secretary of War is without authority to license the commission of waste upon military reservations, or under the act of July 28, 1892, to lease them for a purpose which would amount to waste; but the rule here stated has not been strictly observed in practice. *C. 2879, 2930, Feb., 1897; 3619, Nov., 1897; 4126, May, 1898; 7900, Apr., 1900. Held,* therefore, that a license to take earth from a military reservation to be used in the manufacture of brick would be of doubtful validity. *C. 4126, May, 1898. 7900, Apr., 1900; 8141, May, 1900; 11131, Oct., 1901; 16827, Aug. 31, 1904; 27798, Feb. and Mar., 1911.*

VIII A 4 **b**. *Held* that the act of July 28, 1892 (27 Stat. 321), in excepting "mineral or phosphate lands" from the authority therein given to lease such lands "as may not for the time be required for the public use," should be regarded as withholding from the Secretary of War authority to permit of the use of such lands under revocable license. *C. 29247, Nov. 18, 1911.* Where, however, a valid location of a mining claim was made prior to the order declaring the reservation, *held* that the working of the claim should be permitted. *C. 28627, Sept. 1, 1911.* Also *held* that permission may be given for dredging the channel of a creek within a reservation for the improvement of navigation without regard to the fact that gold may be obtained in the process of dredging. *C. 25094, June 11, 1909, and Mar. 11, 1911.*

VIII A 4 **c**. In an opinion dated May 19, 1897, the Attorney General held with reference to the license for the construction of a Roman Catholic chapel on the West Point reservation, that the Secretary of War had no authority to grant it. He also held in an opinion, dated July 7, 1897, that the Secretary of War had no authority to grant permission for the erection of a Bethel reading room and library within the military reservation on Ship Island, Miss.[1] By act of July 8, 1898 (30 Stat. 722), the Secretary of War was given authority to permit the erection of buildings for religious purposes on the West

[1] 21 Op. Atty. Gen., 537, 565.

Point reservation, but no such authority has been given with reference to other military reservations. *Advised* that under the opinions of the Attorney General above cited the Secretary of War was without authority to license the construction of a building for a Roman Catholic chapel on the Fort Hancock Military Reservation. *C. 6960, Aug., 1899.* Similarly *advised* with respect to an application for license to erect on the same reservation a building to be used exclusively for Union Protestant worship. *C. 4974, Sept., 1898; 18273, July 12, 1905; 20173, Aug. 6, 1906.* Also with respect to an application for a license for a proposed Young Men's Christian Association building on the Fort Hancock Military Reservation. *C. 10766, July 10, 1901.* After the passage of the act of May 31, 1902 (32 Stat., 262), authorizing the Secretary of War to license the construction, by the Young Men's Christian Association, of such buildings as their work for the promotion of the "welfare of the garrisons may require," *held* that this authority should be regarded as giving the assent of Congress to the construction of buildings for strictly nonsectarian uses, for the purposes specified in the statute, although not constructed by the particular body named in the statute; and that a license might be given for the construction of a chapel at Fort Sam Houston, Tex., as a place of worship for all denominations. *C. 18273, July 12, 1905.*

On the application of a railway company for permission to construct a railway tunnel under Fort Mason, Cal., *held* that the character of the improvement and the purpose for which it was desired were inconsistent with the nature of revocable license. *C. 21619, June 13, 1907.* Similarly *held* with respect to the application for a license for a tunnel for sewer outlet across the reservation of Fort Lawton, Wash. *C. 21851, July 26, 1907.*

VIII A 4 d. Licenses to enter upon and use lands of the United States have generally been guarded with such conditions as to prevent any permanent injury to Government property. *Held* that a revocable license might be given to a farmer to use for irrigation the water flowing on a reservation and not needed for the purposes of the command, provided its use by him involved no material damage to the land or other public property. *R. 46, 5, Jan., 1882; P. D. 3, Aug., 1892.*

VIII A 4 e. The Army appropriation act of March 3, 1911 (36 Stat., 1048), gives authority to dispose of surplus ice and electric light and power "on such terms and in accordance with such regulations as may be prescribed by the Secretary of War." but gives no similar authority in respect to the sale of surplus water from a post water system. *Held*, on the application of the municipality of Parang, Mindanao, P. I., to make connection with the water main of the military post at that place and to use the surplus water raised by the Government pumping plant, that the authority conferred by said act of March 3, 1911, was not broad enough to cover the sale of water that is being acquired or appropriated by the Government from day to day, but that an arrangement might legally be made whereby the town would supply the fuel and labor for the purpose of pumping water over and above the supply needed for military purposes and would receive the same through the Government system; and that this would not be a sale of property appropriated by the Government, but a license to receive water through the Govern-

ment system. *C. 21384, Apr. 13, 1907.* Similarly *held*, with respect to connecting the railway station with the post water system at Madison Barracks, N. Y., the post being directly interested in the sanitary condition of said station, the railway company to supply such labor and fuel, as a proportional share of the operating expenses of the plant, as the post commander might determine to be equitable. *C. 29023, Aug. 22 and Dec. 12, 1911.* *Held*, also, that a license might properly be given to connect certain houses built for the occupancy of enlisted men and their families and situated just off a military reservation with the post water system, the water so withdrawn to be for the use of the enlisted men and their families only. *C. 28586, June 20, 1911.*

VIII A 5. Congress has no power to grant or to provide for granting a license to establish and operate a ferry across navigable waters of the United States at a point within a State, or to prohibit the operation of a ferry at such point. This is a matter which comes within the police power of a State, and it has uniformly been held by the courts that the States did not surrender that power by the adoption of the Constitution or otherwise. But the Secretary of War may give a revocable license for the landing of a ferry (duly licensed by the proper local authority) at a pier of the United States, providing such landing may be made without injury to the pier and so as not to involve an exclusive use of any part of it. *P. 58, 450, Mar. 1893; C. 14729, June, 1903.*

VIII A 6. Where a stock of musical instruments has accumulated in excess of the legitimate demands of troops, *held* that in a case where the welfare, comfort, and contentment of the enlisted men of the Army would be promoted by their use, the Secretary of War may permit their use by members of a volunteer band at a post (volunteer in the sense that the band is not one that has been authorized by Congress). *C. 23870, Sept. 21, 1908.*

VIII B. Revocable licenses (other than those instanced in the foregoing paragraphs) for the temporary use or occupation of the soil of a military reservation have not unfrequently been granted under proper regulations by the Secretary of War. As, for example, a license to occupy the land for target practice by a gun club (*P.* D, *91, Jan., 1893*); for the landing of boats (*P.* A, *218, Mar., 1887; P.* B, *343, Mar., 1889*; for the landing of a submarine cable (*P.* A, *166, Dec., 1886; P.* B, *172, Mar., 1888, and 323, Feb., 1889*); or for use as a bathing beach (*P.* C, *296, June, 1891*); to occupy vacant buildings (*P.* B, *136, 198, Jan. and Apr., 1888; P.* C, *84, Jan., 1889, and 173, June, 1890*); or unused defenses such as a Martello tower (*P.* B, *49, July, 1887; P.* C, *427, Apr., 1892*); to erect a temporary building for telephone office (*P.* A, *249, May, 1887; P.* B, *231, June, 1888*); for a storehouse (*P.* C, *123, and 124, Apr., 1890*); for refuge for fishermen (*P.* B, *354, Apr., 1889*); for a church (*P.* B, *45, June, 1887, and 416, June, 1889*); for a schoolhouse (*P.* B, *45, June, 1889*); for a keeper of a life-saving station (*C. 817, Jan., 1895*); to put up a stockyard or shipping pens for cattle to be transported by railway (*P.* A, *123, July, 1886*); to carry a road across a part of the land as a convenient continuation of a town street (*P.* C, *6, Oct., 1889*); to lay a track for a tramway or temporary railway (*P.* A, *99, July, 1886; P.* B, *22, June, 1887, and 355, Apr., 1889; P.* C, *213, Oct., 1890; P.* D, *131, Feb., 1893; C. 10624, June 11, 1901*); to extend, maintain, and operate an

electric railway across a reservation (*C. 1155, Apr., 1895; C. 16182, Apr. 18, 1904*); to a railway company to build spur tracks (*C. 3221, May, 1897*); to erect poles and carry a line of wire for telegraph or telephone communication (*P.* A, *173, Jan., 1887; P.* C, *350, Oct., 1891; P.* D, *77, Dec., 1892*); to carry an electric wire across a Government bridge (*P.* A, *198 and 201, Mar., 1887; P.* B, *132, Jan., 1888; P.* C, *89, Feb., 1890*); to lay underground pipes for water, oil, or gas (*P.* A, *106, 118, July, 1886, and 211, Mar., 1887; P.* B, *430, June, 1889; P.* C, *481, July, 1892; P.* D, *213, June, 1893; C. 155, 316, Aug. and Sept., 1894*); to construct an irrigating ditch (*P.* A, *94, 169, Apr. and Dec., 1886; P.* B, *76, Aug., 1887, and 475, Aug., 1889; P.* C, *26, Nov., 1889, and 376, Dec., 1891*).

VIII B 1. *Held*, with respect to the use for a post office of a room at Fort Bayard, N. Mex., that the mail facilities should be regarded as a sufficient consideration for placing accommodations at the service of the Post Office Department, similar arrangements having been made at a number of other posts; that the use and rental of lock boxes in the Post Office Department is regulated by statutes which the Postmaster General can not waive; and that the existing arrangements for the use of such room should be continued so long as they are to the public interest. *C. 26377, Mar. 17, 1910.*

VIII C. If the United States acquires a military reservation subject to the public easement in a highway across the same and does not acquire exclusive jurisdiction over the reservation, the right to control and regulate the use of the public easement in such highway remains in the legislature of the State.[1] Where, in such a case, the reservation was in the State of New York, it was *held* that the consent of the State highway authorities and of the United States as owner of the fee to the highway within the limits of the reservation would be necessary to authorize the construction of an electric railway or an electric-light line on such highway, the railway and line being under the laws of New York a burden on the fee additional to the easement for a highway. If the fee to the highway were owned by a private individual, the railway and line could be located thereon without his consent on payment of just compensation; but as the highway was on a reservation held by the United States for military purposes, there was no power in the State to authorize the appropriation of any part of such reservation without the consent of the United States. In the absence of statutory authority the Secretary of War could not give the consent of the United States so as to enlarge the easement to the highway, or rather so as to impose a new easement on the fee, but he could permit the railway and line to be located on the highway under a license which would impose no new easement on the fee and would be revocable by him at any time, such license to be issued preferably after the parties applying for the same had obtained the necessary consent from the proper highway authorities of the State. *C. 1240, 1545, May and July, 1895; 2143, Mar., 1896; 16182, Aug. 16, 1904.*

VIII D. The Secretary of War is not empowered to grant a revocable license to use, any more than to lease, premises not belonging to the United States or under his control. *P. 60, 350, July, 1893.* Thus where the United States did not own certain land upon which

[1] See Faust *v.* Pass. Railway Co., 3 Phila., 164.

had been erected, under appropriation by Congress, certain structures for the improvement of navigation, as cribs and pilework, *held* that as it had no interest in the soil but only a right of conservation of such structures, it could not, through the Secretary of War, grant a revocable license to use the land for any purpose which would interfere with the owner's rights, without his concurrence. *P. 40, 42, 232, Mar. and Apr., 1890.* *Held*, however, on the application of the owner of the land, that permission might be given such owner for the construction of a dock, it fully appearing that it would not injure the dike or obstruct navigation. *R. 51, 609, Mar., 1887.*

VIII E. A revocable license to go upon a military reservation and use the land for a purpose not affecting the interests or convenience of the military authorities, is an assurance to the person that he will not be molested as a trespasser while his license remains unrevoked. When revoked, he may be required to remove his property without unreasonable delay. *P. 50, 420, Dec., 1891.* Where certain cattlemen were permitted to erect a temporary fence on a military reservation and later the permission was withdrawn, *held* that they should be allowed to remove the materials. *R. 49, 615, Dec., 1885.*

VIII E 1. Where the track of a railroad company was located upon a military reservation by license or sufferance, the company having no right of way granted it by Congress, *held* that the company could be ejected by judicial proceedings and its property moved off the reservation; but *advised* that a new location be designated, to better accommodate the requirements of the command, and that the company be given notice to move its tracks to the designated location, for the occupation of which a revocable license may be given it by the Secretary of War. *P. 42, 324, Aug., 1890; C. 169, Aug., 1894.*

IX A 1. *Held* that the term "military stores," in section 1241, R. S.,[1] covers property purchased for works of fortification, but not property purchased for the civil works of river and harbor improvement (*C. 3419, Aug. 7, 1897; 10272, Apr. 21, 1901*); but that the regulations as to property accountability cover all property under the control of the Secretary of War, including river and harbor property. *C. 3418, Aug. 6, 1897; 3419, Aug. 7, 1897.* *Held*, however, that paragraph 679, Army Regulations, 1895 (691 of 1910), providing for the disposition of "military stores and public property condemned and ordered sold," related only to public property in the custody of the military establishment, and did not apply to property in the custody of the Chief of the Supply Division of the War Department, and pertaining to the War Department as a civil establishment. *C. 3774, Jan. 10, 1898.* Also *held*, with respect to the inspection of river and harbor property, that the Secretary of War might authorize this to be done by division engineers on their tours of inspection. *C. 5553, Dec. 29, 1898.*

IX A 1 a. *Held* that it is doubtful whether empty barrels, boxes, crates, and other packages, together with metal turnings, scrap metals, ground bone, and other waste products of manufacture which accumulate at arsenals, depots, and military posts, constitute "mili-

[1] Section 1241, R. S., provides that: "The President may cause to be sold any military stores which, upon proper inspection or survey, appear to be damaged or unsuitable for the public service. Such inspection or survey shall be made by officers designated by the Secretary of War, and the sale shall be made under regulations prescribed by him."

tary stores" in the sense in which those words are used in section 1241 R. S., as no inspection or survey would be necessary to determine whether such articles were in fact "damaged or unsuitable" or to ascertain how they became so.[1] *C. 13628, Nov. 18, 1902, and Feb. 24, 1908.*

IX A 2 a. Section 1241, R. S., provides: "The President may cause to be sold any military stores which, upon proper inspection or survey, appear to be damaged or unsuitable for public service. Such inspection or surveys shall be made by officers designated by the Secretary of War, and the sales shall be made under regulations prescribed by him." *Held* that before a sale can be made under this statute the property must be inspected and pronounced unsuitable for public service, and the regulations (A. R. 691 of 1910) require the sale to be at public auction. *C. 965, Feb., 1895; 2127, Mar., 1896; 8184, May, 1900; 8668, 8675, July, 1900; 8716, Aug., 1900; 16960, Oct. 1, 1904; 26973, June 30, 1910.*

Held, that under section 1241, R. S., unserviceable tools and materials, which had been in use at a national cemetery, could not legally be ordered to be sold upon the mere inspection and report of their unserviceableness made by the superintendent of the cemetery, but that, as required in the section, there must be first an inspection "by an officer (i. e., commissioned officer) designated by the Secretary of War." *R. 54, 609, Feb., 1888.* Also *held* that coffee roasters could not be sold on the certificate of the Commissary General that they are unsuitable, but only "upon proper inspection and survey." *C. 20302, Aug. 29, 1906.* *Held*, however, with respect to a sale of the distilling plant at Malihi Island, P. I., that the certificate of the division commander that the plant was not needed, and recommending that it be sold at the appraised value, coupled with such appraisement, may be regarded as constituting the proper inspection and survey which is required by statute. *C. 19153, Jan. 31, 1906.*

IX A 2 a (1). The word "unsuitable," as used in section 1241, R. S., evidently refers to some unfitness for use other than that caused by being "damaged." Uniform clothing, for instance, of sizes that could not be used would be *unsuitable.* But *held* that the meaning of the word could not properly be restricted to things of a quality inferior to that which is required for the service. A thing may be unsuitable by reason of its being of such superior quality as not to be adaptable for the purpose for which it was intended. And *held* that military stores can not properly be deemed *unsuitable* under this statute for the *sole* reason that they are *in excess of the quantity* required for use.[2] *P. 64, 218, Mar., 1894; C. 7796, Mar., 1900; 20011, July 9, 1906; 24743, Apr. 8, 1909.*

IX A 2 a (2). Certain Government property (a quantity of cord wood and a hay scale) was left on hand at a military post which had been abandoned. The property was no longer needed there and the expense of transporting it elsewhere would largely exceed its cost. *Held*, therefore, that it was "unsuitable for the public service" within

[1] As a result of the above opinion par. 760, A. R. (690 of 1910), was amended so as to do away with the inspection and survey of the articles enumerated above.

[2] See Comptroller's opinion *contra* of Dec. 4, 1900 (VII Comp. Dec., 260), which, however, can not be regarded as having the weight of authority, inasmuch as the Comptroller, in rendering the opinion, was not acting within the jurisdiction conferred upon him by the act of July 31, 1894.

the meaning of section 1241 R. S.[1] *C. 8795, Aug., 1900; 9334, Nov. 27, 1900; 9359, Nov. 28, 1900; 10272, Apr. 22, 1901; 12491, May 6, 1904; 12777, June 12, 1902.*

IX A 2 **a** (3). There is no statute which would authorize the sale of timber on military reservations, and in the absence of such a statute the Secretary of War can not authorize such sale. *C. 8141, May, 1900; 16983, Oct. 8, 1904; 20531, Oct. 15, 1906; 20544, Oct. 18 and Nov. 20, 1906; 20818, Dec. 22, 1906. Held,* however, that timber which has reached maturity, so that it begins to deteriorate, may be regarded as damaged and unsuitable, and may be sold under the provisions of section 1241 R.S. *C. 20531, Oct. 15, 1906; 25236, July 8, 1909 and Apr. 1, 1910; 25558, Sept. 14, 1909, and Oct. 4, 1910.* Similarly *held,* with respect to timber thrown down and injured by a tornado, that if on inspection and survey it should be found unsuitable, it should be disposed of under this section. *C. 20544, Nov., 1906; 20818, Dec. 22, 1906.* Also *held* that driftwood coming ashore on a military reservation, if it has any value, must be treated as other property under the control of the War Department. *C. 20720, Dec. 4, 1906.*

IX A 2 **a** (4). Where for sanitary reasons it was necessary to clear a reservation of timber and underbrush, *held* that under the provisions of section 1241 R. S., a contract might properly be entered into for the clearing of the reservation of timber and underbrush, the contract to provide that the timber and underbrush should become the property of the contractor, the proper clearing of the ground in such case being regarded as an incident of the sale of the timber and underbrush. *C. 29123, Oct. 16, 1911.*

IX A 2 **b.** In view of the general authority vested in the President and Secretary of War by the provision, in regard to the sale of military stores damaged or unsuitable for the public service, of the act of March 3, 1825 (now contained in sec. 1241, R. S.), *held* that such stores might legally be sold *on credit,* if such mode of disposition was deemed for the public interest. *R. 29, 330, Oct., 1869.*

IX A 2 **c.** *Held* that a noncommissioned officer who acted as *auctioneer* at a public sale of condemned quartermaster stores could not legally be paid, out of the proceeds of the sale, a commission of 10 per cent, or any other commission or compensation, for his services as auctioneer. The pay and allowances of all enlisted men are fixed by law, and, in the absence of any authority in the statute providing for such sales or other statutory provision, such a compensation must necessarily be without legal sanction. *P. 60, 363, July, 1893; 62, 95, Oct., 1893.* But *held* that a civilian employee hired by the Quartermaster's Department, under the provision for "hire of teamsters and other employees" in the appropriation for "transportation of the Army and its supplies," whose pay is not fixed by "law or regulations," may legally be paid for services as an auctioneer at a public sale of condemned quartermaster property. *C. 2567, Sept., 1896; 6988, Sept., 1899; 11983, Feb. 1, 1902.*

IX A 2 **d.** Where oil was purchased in barrels with the understanding that the empty barrels should be returned at an agreed valuation, *held* that the transaction should not be regarded as a sale, but as a settlement under contract, so that no inspection would be required. *C. 1324, May 16, 1895.*

---

[1] See VII Comp. Dec., 260, to same effect.

IX A 2 f. On request by a veterinarian for permission to make medical experiments on a condemned Cavalry horse with a view to embodying the results of the same in a report to the department, *held* that there was no legal objection to granting the authority requested. *C. 3792, Jan. 17, 1898.* Also, *held* that condemned cannon might legally be used for casting bronze tablets for marking lines of battle. *C. 25359, July 21, 1909.* And where a searchlight had been condemned and ordered sold, on application for the loan of the same to a National Home for Disabled Volunteer Soldiers, *held* that it was within the discretion of the Secretary of War to defer the sale for such time as he might deem warranted; and that the requirements of the statute are directory to the extent of vesting the incidents of the sale, including the date, in the discretion of the Secretary of War. *C. 25236, Mar. 18 and Apr. 1, 1910.*

IX A 3. *Held* that the provision of section 3618, R. S., requiring that "all proceeds of sales of old material, condemned stores, supplies, or other public property of any kind" shall, with certain specified exceptions, be deposited and covered into the Treasury as miscellaneous receipts and not withdrawn except by authority of a statutory appropriation, applied to the proceeds of surplus cuttings of material for clothing manufactured by the Quartermaster's Department of the Army—the same not being within any of the designated exceptions and, therefore, that the proceeds of such cuttings could not legally be retained and used in the business of that department. *R. 42, 653, May, 1880. Held*, further, that this statute, as amended by the act of June 8, 1896 (29 Stat. 268), requires the "net proceeds" only to be deposited in the Treasury, so that all expenses of sale should be paid from the proceeds, and if no sale takes place, any cost of advertising would constitute a proper charge against the appropriation for contingencies of the Army. *C. 25236, Mar. 18, 1910.*

IX A 3 a. Books for a post library purchased out of post exchange funds or donated to the library are not "public property" within the meaning of section 3618, R. S. Proceeds from a sale of them may therefore legally be expended in the purchase of new books. *C. 2649, Sept., 1896.* So, where the property was not public property of the United States but pertained to the road fund of the District of Alaska to be used and expended in its behalf, *held*, that the moneys received from sales should be applied to the purposes for which the fund was appropriated by Congress. *C. 20353, Sept. 10, 1906.*

IX A 4. Where property not covered by section 1241, R. S., is to to be disposed of, *held*, that if the property has been in use and repaired, so that its value is less than its cost, the Secretary of War may fix a price at which the property shall be disposed of. *C. 26372, Mar. 17, 1910.*

IX B 1. *Held*, that the provisions of section 23, chapter 75, act of March 3, 1863, prohibiting the sale, &c., of their arms, &c., by soldiers, and declaring that no right of property or possession should be acquired thereby, &c., were not limited in their operation to the period of the civil war, but were still in force,[1] and that an officer of the army would therefore be authorized to seize arms, &c., disposed of contrary to such prohibition, whenever and wherever found. *R. 22, 525, Dec., 1866.* But inasmuch as there have been sundry

[1] See these provisions as now incorporated in the Revised Statutes, in sections 1242 and 3748.

authorized sales of arms and other ordnance stores since the end of that war, *advised*, that officers, before making seizures, should assure themselves that the parties in possession have not acquired title in a legal manner. *R. 29, 187 and 204, Aug., 1869; C. 11219, Sept. 12, 1901.*

IX B 2. Section 3748, R. S., provides that clothing furnished by the United States to a soldier shall not be bartered, exchanged, pledged, loaned or given away, and that no person not a soldier or officer of the United States who has possession of any such clothing so furnished and which has been the subject of such sale, barter, etc., shall have any right, title, or interest therein, but that the same may be seized and taken wherever found by any officer of the United States, civil or military, and shall thereupon be delivered to any quartermaster or other officer authorized to receive the same, that the possession by a civilian of clothing, etc., furnished to a soldier shall be presumptive evidence of the sale, barter, exchange, etc. The language of this statute indicates that a summary seizure is intended to be authorized and the fact that the military officer is authorized to seize the property shows that no writ or other process of the courts is required. But while the power to summarily make the seizure exists, the officer authorized to take possession of the property may also assert his rights through the courts, and this latter course may be in many cases the preferable and better one. *C. 5303, Nov., 1898.*

CROSS REFERENCE.

Applying to own use.....See ARTICLES OF WAR LX A 3 a.
Blank receipts unauthorized.....See PAY AND ALLOWANCES I B 3.
Captures.....See CLAIMS VI A.
WAR I C 6 c (3) (*b*).
Damage to.....See CIVILIAN EMPLOYEES II B.
PUBLIC MONEY X.
Deserter's responsibility for.....See DESERTION XIX A.
Exchange of old for new.....See ARMY I A 7.
Hay on reservations.....See COMMAND V A 3 g.
Loan of.....See ARMY I B 2 b (5).
Militia.....See MILITIA IX to X; XVI G.
Misappropriation of.....See ARTICLES OF WAR LX A 3.
Occupation of by United States.....See CLAIMS VII C 1.
Post exchange.....See GOVERNMENT AGENCIES II J 5.
Recruit embezzlement.....See DESERTION XXII A.
Responsibility for by militia.....See MILITIA XVI G.
Sale price of.....See ARMY I B 2 b (4).
Salvage.....See CLAIMS VI B.
Secretary of War.....See ARMY I B 2 b to c.
Soldier's clothing.....See PAY AND ALLOWANCES II A 3 a (4) (*a*); (*c*).
Title, evidence of.....See DISCIPLINE XI A 17 a (2) (*a*) [1] [*d*].

PUBLIC WORKS.

See EIGHT-HOUR LAW II; III.

PUNISHMENT.

Addition to, illegal.....See DISCIPLINE XIV E 2; 2 a; 9 h; XVII A 4 g (3).
By military court.....See DISCIPLINE XVII A to C.
Cadets.....See ARMY I D 3 to 4.
Deserter.....See DESERTION X A to D.
Discharge without honor is not.....See DISCHARGE III A to G.
Dishonorable discharge.....See DISCHARGE IV A to E.

Imposition of.....See DISCIPLINE XII B 3 d to h.
Pardon.....See PARDON.
Summary.....See DISCIPLINE I E 2.
Unauthorized.....See DISCIPLINE XVII B 1 a to g.
PAY AND ALLOWANCES III D 1.

PURCHASE.

Expenses preliminary to.....See APPROPRIATIONS VIII.
Jurisdiction.....See PUBLIC PROPERTY V C 1; E 1 to 2.
Land.....See PUBLIC PROPERTY II A.
NAVIGABLE WATERS X D to E.
Supplies from allies.....See WAR I C 6 d (1).
Target range.....See MILITIA VI C 1 b.

QUARANTINE.

Inspection.....See TAX III K.

QUARTERMASTER'S DEPARTMENT.

See ARMY I G 3 b (2) to (3).
Campaign badges.....See INSIGNIA OF MERIT III B 1.
RETIREMENT I K 5.
Clothing.....See PAY AND ALLOWANCES II A 3 a (4) to (5).
Details to.....See ARMY I B 2 a (1).
Electric fans for hospitals.....See APPROPRIATIONS XLI.
Forage.....See PAY AND ALLOWANCES II A 2 d to e.
Heat and Light.....See PAY AND ALLOWANCES II A 1 to 2.
APPROPRIATIONS XL.
Purchases from military prison.....See DISCIPLINE XVII A 4 g (2).
Quarters.....See PAY AND ALLOWANCES II A 2 b to c.
Transportation.....See PAY AND ALLOWANCES II A 2 a to b.

QUARTERMASTER GENERALS OF STATES.

See MILITIA III H.

QUARTERMASTER SERGEANT.

Appointment of.....See ARMY I E 2 b.

QUARTERS.

Commutation of, and heat and light.....See PAY AND ALLOWANCES II A 1 c (3); (6).
Retired officer.....See RETIREMENT I K 2 d.
Right to, accrues when.....See PAY AND ALLOWANCES II A 1 c (1).
Traveling on duty.....See PAY AND ALLOWANCES II A 2 b (3).

QUASI PUBLIC FUNDS.

Loss of.....See GOVERNMENT AGENCIES I D to E.

QUORUM.

General court-martial.....See DISCIPLINE VII C 1.

RAILROAD.

Military reservation.....See PUBLIC PROPERTY VIII E 1.
National cemetery.....See PUBLIC PROPERTY IV A 2 a.
Right of way.....See PUBLIC PROPERTY III C; VI E to F.
Seizure.....See WAR I C 6 b (1) (*b*).

RANK.

I. ACTUAL RANK.
A. Is Not Office—May be Attached to Office..... *Page 964*
1. Office without rank.
B. Date of Attachment of Rank.
1. Appointment, acceptance or date mentioned in nomination.
a. Appointment or included mentioned date.
b. Vacancy.
(1) Acts of October 1, 1890, and April 26, 1898... *Page 965*
c. Medical Corps.
(1) Date of appointment or commission.
(2) Period to captaincy runs from date of appointment.
(*a*) Under act of June 23, 1874.
(*b*) Under act of April 23, 1908.
d. Bureau chief, War Department.
(1) On reappointment, rank antedated.
C. Detailed Staff.
1. Officers have line rank only unless otherwise provided by law.
2. Retirement for disability with detailed rank.
D. Enlisted Men.
1. Noncommissioned officers rank from date of appointment... *Page 966*
2. Warrant made continuous is a reappointment with antedated rank.
3. Rank can not be created except by act of Congress.
4. Warrant is evidence of rank—if lost, replaced.
II. RELATIVE RANK, OFFICERS.
A. Fixed by Date of Actual Rank.
1. Confirmed in orders different from order of appointment.
2. Interpretation of section 1219, Revised Statutes.
a. Fixed by acceptance of original commissions..... *Page 967*
3. Relative rank once fixed can not be changed; exceptions.
a. Sentence of court-martial.
(1) To retain present number on lineal list.
(2) To be reduced files.
(3) To be reduced to foot of list.
b. Pardon.
(1) Of unexecuted sentence.
(2) Of executed sentence.
c. Act of Congress..... *Page 968*
B. Volunteers.
1. Relative rank can not antedate muster-in.
2. Act of April 22, 1898 (30 Stat. 361).
C. By Act of Congress.
1. Sword master, United States Military Academy.
D. Service as a Naval Cadet Does Not Count.
III. LINEAL RANK.
A. Loss of Rank by Sentence of General Court-Martial Means Loss of Lineal Rank.
IV. BREVET RANK.
A. Incident of Full Rank of a Lower Grade.....*Page 969*
B. Assignment to Duty Under Brevet Rank.
1. Rights when so assigned.
V. SUSPENSION FROM RANK.
A. Does Not Lose Right to Rise in Files in His Grade.
B. Does Not Affect Rights Previously Vested.
C. Under Act of October 1, 1890.
1. Dates from date when right to promotion accrued.

I A. Rank is not office. It may be attached to office. Thus the office of "Chief of the Record and Pension Office" had attached to it at one time the rank of colonel and at a later time the rank of brigadier general. Also, the office of "Inspector General" may have the rank of colonel of Cavalry, and the office of "Judge Advocate General" has the rank of brigadier general, and the office of "Chaplain" may have the rank of captain or major, and the office of "Adjutant General" has the rank of brigadier general, etc.[1] *C. 6020, Mar. 10, 1899; 19425, Mar. 17, 1906; 4747, Aug. 6, 1898; 17508, Feb. 15, 1905.*

I A 1. *Held* that although veterinarians are officers of the Army they have no rank. *C. 16604, July 20, 1911.* Similarly *held* that the teacher of music at the United States Military Academy, West Point, N. Y., is an officer of the Army without rank.[2] *C. 25070, Oct. 13, 1909.*

I B 1. There are three dates from which the rank and *precedence* of an officer of the regular establishment may be determined, viz, (1) the date of his appointment or commission; (2) the date of his acceptance of the appointment; and (3) a date anterior to that upon which the appointing power was fully exercised, which date is established by the date of rank conferred in the appointment or commission of the officer. *C. 23135, Apr. 3, 1909.*

I B 1 a. An accepted appointment or commission takes effect in respect to rank as of and from the date on which it is completed by the signature of the appointing power, unless the appointment or commission specifies a fixed date for the attachment of the rank, in which case the rank is held from such specified date.[3] *R. 39, 609, July, 1878; 43, 208, Feb., 1880; C. 7588, Jan. 25, 1900; 10698, June 18, 1901; 12599, May 12, 1902; 14473, Apr. 11, 1903; 15262, Sept. 17, 1903; 16732, Aug. 16, 1904; 19650, May 7, 1906; 21053, Feb. 6 and 18, 1907; 23688, Sept. 16, 1909; 23983, Oct. 7, 1908.*

I B 1 b. From the organization of the Government the practice of specifying dates of rank in appointments and commissions has not always been uniform. *Held* that the rank of an officer may relate back to the date of the occurrence of the vacancy to which the commission has reference.[4] *C. 19425, Mar. 17, 1906; 14473, Apr. 11, 1903, and Apr. 9, 1906.*

---

[1] Wood *v.* United States, 15 Ct. Cls., 151; 107 U. S., 414; 40 Ct. Cls., 110; 25 Op. Atty. Gen., 591. If Congress changes the rank attached to an office it is not necessary that the incumbent should be nominated and confirmed by the Senate in order that the new rank shall attach. (22 Op. Atty. Gen., 381, 480.)

An officer while holding one office which has ordinarily a certain rank, may acquire a new and higher rank. (Digest 2d Comp. Dec., Vol. III, par. 879.) Also rank and pay do not necessarily run together. (*Ibid.*, par. 892.) Also see act of July 7, 1898 (30 Stat. 714).

Interesting data concerning "Rank, etc., of certain Army officers," and a résumé of legislation relating to changes in the rank of officers, are set forth in Senate Report No. 2153, 58th Congress 2d session.

[2] Paymasters' clerks in the Army are officers and have a military status, but they have no rank. See act of Mar. 3, 1911 (36 Stat. 1044).

Similarly veterinarians are officers and have no rank. See sec. 20 of the act of Feb. 2, 1901 (31 Stat. 748). IX Comp. Dec., 455.

See sec. 1111, R. S., as amended by the act of Mar. 2, 1901 (31 Stat. 912), and the act of Mar. 3, 1905 (33 Stat. 853).

The act of Mar. 3, 1905, also conferred *relative rank* on the sword master at the Military Academy.

[3] See 6 Op. Atty. Gen., 68; 17 id., 362.

[4] See Wood *v.* U. S., 107 U. S., 416.

I B 1 b (1). *Held* that when officers are appointed under the acts of October 1, 1890 (26 Stat. 562), and of April 26, 1898 (30 Stat. 364), the rank conferred should relate back to the date of the vacancy. *C. 17201, Dec. 1, 1904; 15262, Sept. 8, 1903.*

I B 1 c (1). Under the act of July 5, 1884, etc., *held* that officers of the Medical Department take rank in the Medical Department *in accordance with the dates of rank specified in their appointments or commissions therein*, regardless of their relative rank in the Army at large. *C. 16120, Apr. 5, 1904; 19613, Apr. 28, 1906; 19650, May 8, 1906; 23135, Mar. 10 and Apr. 3, 1909; R. 39, 491 and 508, Mar., 1878.*[1]

I B 1 c (2) (*a*). The five-year period under the act of June 23, 1874, begins to run *as to lineal and relative rank* at the *date of rank* specified in the appointment, and *as to pay* five years from the *date of acceptance* of appointment. *C. 23135, Mar. 11 and Apr. 5, 1909.*

I B 1 c (2) (*b*). *Held* that officers in the Medical Corps who, prior to the approval of the act of April 23, 1908, have served three years or more as assistant surgeons with the rank of first lieutenant, should be commissioned as captains, and those who may hereafter serve three years in the grade of first lieutenant, beginning from the date in which the office of first lieutenant in the Medical Reserve Corps vested, should be similarly promoted with rank from date three years subsequent to that in which the appointing power was fully exercised in each case, their rank on the list of captains in the Medical Corps being determined in either case by the date of their original entry as commissioned officers in the Medical Department of the Army. *C. 23135, May 21, 1908.*

I B 1 d (1). *Held* by the Secretary of War that a chief of bureau appointed by the President for a term of four years may lawfully be reappointed to such office. *Held* also that as the grant of rank to an officer upon reappointment is an incident of the constitutional appointing power, such chief of bureau may, on reappointment, be given rank back to the date of his first appointment as chief of bureau. *C. 14730, Dec. 21, 1905.*

I C 1. The requirements of the act of February 2, 1901 (31 Stat. 748), which operate to preserve the rank of line officers while they are serving by detail in the several branches of the staff, are so clear as to negative the view that it was intended that during such periods of detail they should be clothed with any other rank or a different status in respect of rank or precedence than that which they brought with them from the line of the Army.[2] *C. 15686, Jan. 8, 1904; 25677, Oct. 13, 1909.*

I C 2. Where an officer of the line, serving with increased rank as a detailed officer in a staff department, incurs disability while so serving, *held* to be entitled to retirement, if found to be qualified therefor by a retiring board, with the rank of the office in which he is serving in the detailed staff.[3] *C. 25677, Oct. 15, Dec. 16, 1909.*

---

[1] See 16 Op. Atty. Gen., 56, 605.

[2] Officers detailed in the Ordnance Department under the act of June 25, 1906 (34 Stat. 455), and as acting judge advocates under the act of Feb. 2, 1901 (31 Stat. 751), may be selected from the grade next below.

[3] The Judge Advocate General's Department and the Medical and the Engineer Departments are excepted from the operation of sec. 16 of the act of Feb. 2, 1901, covering details to the departments named in that section.

I D 1. A company commander on duty with the home battalion on July 1 appointed a private to the position of corporal, and as the regimental headquarters was outside the limits of the United States the battalion commander acted and on July 13 disapproved the appointment. *Held* that the private became a corporal on July 1 and held that rank and was entitled to pay as such from that date until July 13. *C. 22346, Nov. 11, 1907.*

I D 2. At discharge at expiration of an enlistment a noncommissioned officer vacates his position and rank. *Held* that a reappointment is necessary in order that he may again have the rank which he held during the expired enlistment. *Held, further,* that in cases of warrants made continuous under the regulations the regulation operates to reappoint a soldier to the position vacated by him at termination of enlistment, with rank antedated to the same date that held in the previous enlistment. *C. 19959, Nov. 19, 1910.*

I D 3. In view of the fact that rank can not be conferred except by act of Congress, *held* that under the act of July 7, 1898 (30 Stat. 721), which created the grading of company cooks and fixed the pay as that of corporal, but did not specifically attach rank to that position, the rank corporal did not attach to the position of company cook. *C. 21443, Apr. 26, 1907.*

I D 4. As a warrant is evidence of the rank held by a noncommissioned officer, *held* that if a warrant is lost without fault of the noncommissioned officer it may be replaced with notation placed thereon assigning rank back of the date of original appointment of the noncommissioned officer to the grade which carries the rank in question. *C. 25535, Sept. 7, 1909.*

II A. The general rule is that relative rank in the Army is regulated by the actual rank held by the officer in his corps and this by the date given him in his commission in such corps.[1] *P. 60, 210, June, 1893. See also R. 15, 49, Mar. 11, 1865; 21, 171, Jan. 19, 1866; 23, 439, Apr., 1867; C. 18668, Oct. 3, 1905.*

II A 1. Where to certain appointments made on the same date a particular order was given, with the intention of having the appointees rank in that order, but subsequently, in sending the names to the Senate for confirmation, this order was by mistake reversed; *held,* after a confirmation of the appointees as thus sent, that this mistake and action could properly have no effect to change the relative rank of these officers as given and *fixed* by the original act of appointment. *R. 42, 254, Apr., 1879.*

II A 2. Section 1219, R. S., provides a rule for determining the relative rank of officers of the same grade and date of appointment by reference to time of service. *Held* that the time of service as a commissioned officer in the Army is alone to be considered.[2] *P. 40, 51, Mar., 1890; R. B. 41, 238, May, 1878; 55, 672, June, 1888; C. 2805, Dec., 1896; 7449, Dec., 1899; 7790, Mar., 1900; 7869, Apr., 1900; 15262, Sept. 8, 1903; 16520, June 29, 1904; 17381, Jan. 13, 1905.*

---

[1] See 13 Op. Atty. Gen. 441; 16 Op. Id., 56, 605, 652; 17 Op. Id., 10, 12. For rule in case of transfer from one corps to another, see par. 47, A. R., 1910 Ed. Under the provisions of the act of Mar. 3, 1911 (36 Stat. 1058), this rule is departed from in the case of certain officers advanced under that act and known as "additional officers."

[2] See 13 Op. Atty. Gen., 441; 15 id., 411; 17 id., 34, 362, and 402; 23 id., 232.

II A 2 **a**. Two officers of the Regular Army were commissioned as officers of Volunteers in 1898 on the same date. *Held* that the relative rank will be determined by reference to the date of acceptance of the two officers of their original commissions upon first entry into the service. *C. 4254, June 3, 1898; 7282, Nov. 15, 1899; 7790, Mar. 8, 1900.*

II A 3. As relative rank among officers of the same grade is established by referring back to the dates when actual rank attached to the offices which they respectively hold, *held* that such relative rank of two officers can not be changed except by act of Congress, or pursuant to the sentence of a general court-martial, or an exercise of the pardoning power.[1] *C. 21054, Feb. 6, 1907; 15262, Sept. 8, 1903; 22359, Dec. 2, 1907; 24568, June 27, 1911.*

II A 3 **a** (1). A second lieutenant was sentenced "to retain his present number on the lineal list of second lieutenants for three years." *Held* that this sentence necessarily deprived him of all right to promotion so long as it continued in force. Lieutenants junior to him may be advanced without any regard to him and precisely as if he were not on the list at all. The promotion of an officer in such a status would have the effect of a pardon. *P. 47, 293, May, 1891.*

II A 3 **a** (2). A lieutenant was sentenced "to be reduced two files in regimental rank." As the regimental rank of a line officer is the basis of his rank in his arm and in the Army at large, *held* that his reduction on the regimental list involved a corresponding reduction on the lists of lineal and relative rank. *R. 55, 620, June, 1888.*

II A 3 **a** (3). An officer, as the result of two successive trials by court-martial, stood sentenced to be reduced to the foot of the list of lieutenant colonels of Cavalry and to remain there without advancement for two years. *Held* that his status was equivalent to that of an officer sentenced to *lose files* for two years, and that his sentence was a continuing punishment, subject to be discontinued by pardon. *R. 51, 677, Mar., 1887.* And further *held* that such a sentence was a legal one, and that as the officer had no rank in the Army independent of his rank in the Cavalry arm, the former rank being incidental to and measured by the latter, his relative Army rank was necessarily affected by the sentence in the same manner as his lineal rank. *P. 29, 487, Jan., 1889.*

II A 3 **b** (1). A sentence of a first lieutenant "to be reduced in rank so that his name shall appear in the Army Register next below the name of" a certain other first lieutenant of his regiment, *held* not a punishment executed upon approval, so as to be beyond remission, but, like a sentence to lose files, a continuing punishment removable by pardon.[2] *P. 56, 434, Dec., 1892.*

II A 3 **b** (2). In 1874 an officer, then a first lieutenant, was sentenced "to be reduced in rank so that his name should thereafter be borne on the rolls of the Army next after that of" a certain other first lieutenant of the same regiment. This officer was promoted to a captaincy May 10, 1888, and the officer under sentence was similarly promoted August 20, 1889. Upon an application by the latter (in 1890) to have his sentence remitted, *held* that, by the operation of the first of these promotions, the sentence was rendered irrevocable. A remission or pardon would not at this time restore the officer to

[1] See 8 Op. Atty. Gen., 223. [2] 12 Op. Atty. Gen., 547; 17 id., 17 and 656.

the position he occupied prior to the sentence, nor divest the rights of others acquired by promotion during the pendency of his reduction. The sentence had indeed been fully executed and was therefore beyond the reach of the pardoning power. *P. 41, 380, July, 1890.*

II A 3 c. An executive department has in general *no power* either *to undo an executed legal act of the past* or to indemnify a party for injury suffered by him therefrom. Thus where an officer claimed that he had been unjustly prejudiced by not having had a higher relative rank in his grade given him by his original appointment, but it appeared that said appointment had been confirmed by the Senate, accepted, and held for nearly 13 years, and that to increase as desired the relative rank thereby conferred would divest the rights of 12 officers who now ranked the claimant in his grade, *advised,* that however unjustly his appointment, when made, may have discriminated against this officer, his case was one in which Congress alone could grant the appropriate relief.[1] *R. 43, 206, Feb., 1880.*

II B 1. The act of March 3, 1899 (30 Stat. 1065), appropriated money for the pay of officers of certain United States Volunteers for a certain time that had elapsed after they had reported for duty and prior to their being commissioned. *Held* that this time should not be counted in fixing relative rank under section 1219, R. S.[2] *C. 7050, Sept. 21, 1899, and Oct. 6, 1900; 7869, Apr. 7, 1900.*

II B 2. *Held* that the relative rank of volunteer officers mustered into the service under the provisions of April 22, 1898 (30 Stat. 361), dated from the date of appointment. *C. 4139, May 18, 1898.*

II C 1. The master of the sword at the United States Military Academy is an officer and under the provisions of the act of March 3, 1905 (33 Stat. 850), was given the "relative rank" of a captain, mounted. *C. 18009, Mar. 23, 1910.*

II D. *Held* that *naval cadets,* not having been commissioned officers, could not, upon afterwards becoming lieutenants in the Army, compute, for relative rank, their period of service as such cadets. *P. 25, 214, June, 1888.*

III A. Under the provisions of section 2 of the act of June 18, 1878 (20 Stat. 149), and the act of October 1, 1890 (26 Stat. 562), all officers of each arm of the service are placed upon one list in accordance with their rank in the several grades of office of which that arm is composed. This list resulting from such arrangement represents their lineal or military rank and serves to determine their rights in respect of advancement in the military service. *Held* that a sentence "to be reduced thirty files in military rank" means a loss of thirty files in lineal rank, i. e., it means that an officer's name will be reduced thirty files in the list of officers of his grade in his arm. *C. 12440, Apr. 30, 1902; 17201, Dec. 1, 1904; 21249, Mar. 15, 1907; 21590, May 31, 1907.*

---

[1] The authority of the executive department of the Government to grant relief is limited by strict law and to a few subjects. *Congress, in our system, is the fountain of general relief.* By its authority to authorize special appointments, and to dispose of the public money, it can meet and adequately provide for nearly all the applications for relief presented by officers and soldiers of the Army which the Executive is not empowered favorably to act upon.

[2] Relative rank of volunteer officers in the military service of the United States under sec. 1219, R. S., must be determined by reference to the time of muster-in and not from the time of enrollment. (23 Op. Atty. Gen., 406.)

IV A. Brevet rank can, properly, neither be conferred, nor take effect, except as an incident to full rank of a lower grade.[1] *R. 21, 608, Aug., 1866; C. 2122, Mar. 10, 1896; 12419, Apr. 14, 1902.*

IV B. Under section 1211, R. S., an officer may legally be assigned to duty according to his brevet rank for a *special* command or duty, and in such case the assignment will not be effective generally, but only for the purposes of such command or duty and during its continuance. Thus *held* that an officer assigned to duty according to his brevet rank "while in command of" a certain department, could legally exercise the authority and privileges of such rank only when holding such command, and for the purposes of the same.[2] *R. 42, 21, Oct., 1878.*

IV B 1. When an officer has been duly assigned to duty or command according to a certain brevet rank, that rank becomes his actual military rank for the period of the assignment. He is empowered to exercise the authority which belongs to such rank under the circumstances, to wear the uniform, and to be addressed by the title of such rank, etc. *Held*, however, that a colonel assigned to command according to a brevet rank of general was not *entitled* to the aids-de-camp of a general except by the authority of the Secretary of War. *R. 42, 21, Oct., 1878.*

V A. Suspension from rank does not deprive the officer of the right to rise in files in his grade, upon the promotion, for example, of the senior officer of such grade. The number of an officer in the list of his grade is not an incident of his rank, but of his appointment to office as conferred and dated, and, as we have seen, suspension does not affect the *office*. Moreover loss of files is a *continuing punishment*, and if held to be involved in suspension from rank, the result would be that, for an indefinite period after the term of suspension had expired, the officer would remain under punishment, the sentence imposed by the court being thus *added to* in execution, contrary to a well-known principle of military law. *R. 33, 69, 109, June, 1872.*

V B. It is the effect of a suspension from rank that the officer loses for the time the minor rights and privileges of priority and precedence annexed to rank or command. Among these is the right to select quarters relatively to other officers. And where quarters are to be selected by several officers, one of whom is under sentence of suspension from rank, the suspended officer necessarily has the last choice. Or rather he has no choice, but quarters are *assigned* him by the commander; for, being still an officer of the Army, though without rank, he is entitled to *some* quarters. But *advised* that an officer sentenced to be suspended from rank could not, because of such suspension alone, be deprived of quarters previously duly selected and occupied at the time of the suspension, such a sentence not affecting a right previously accrued and vested.[3] *R. 27, 241, Sept., 1868; 29, 672, Feb., 1870; 37, 536, May, 1876; P. 50, 371, Nov., 1891.*

---

[1] See 13 Op. Atty. Gen., 31.

[2] But see now act of March 3, 1883 (22 Stat. 457), which provides that officers of the Army shall be assigned to duty or command according to their brevet rank, only when actually engaged in hostilities.

[3] But the Secretary of War decided, May 27, 1876, that an officer under suspension is not deprived of his usual right to quarters according to rank. This was reaffirmed by the War Department in 1892. See Par. VII, Circ. 1, A. G. O., 1892.

V C 1. *Held* that when an officer fails in his examination for promotion under the act of October 1, 1890 (26 Stat. 562), with the resultant effect of suspension from rank for one year, the suspension will date from the date when the right to promotion accrued. *C. 29327, Dec. 19, 1911.*

CROSS REFERENCE.

Acquisition of.....See COMMAND I A 1.
Chief of Philippine Constabulary.....See COMMAND I C.
Contract surgeon.....See ARMY I G 3 d (4) (*e*).
Deserter is a "private".....See DESERTION VII A 1.
Distinguished from command.....See COMMAND I C.
Loss of.....See DISCIPLINE XII B 3 f (1) to (3) (*c*); XIV E 9 k.
Muster-out.....See VOLUNTEER ARMY IV E.
Nunc pro tunc.....See PAY AND ALLOWANCES I B 1 a.
Pardon of loss of.....See PARDON IV to V.
Regular and militia officers.....See MILITIA VI B 2 b.
Retired officer, rank increased.....See RETIREMENT I C to D.
Retirement.....See RETIREMENT I B 4 to 5.
Suspension.....See ABSENCE I B 1 m (1).
DISCIPLINE VIII G 1 c; c (1); XII B 3 f (3) (*a*); (b); (*c*).
OFFICE III B 1 a (2); (3).
RETIREMENT I B 6 c to d.
Unauthorized assumption.....See ARTICLES OF WAR LXII D.

RATIONS.

See ARMY I G 3 b (3) to (4).
Civilian employees.....See LAWS II A 1 e (1).
Destitute persons.....See GRATUITY IV.
LAWS II A 1 e (1).

READVERTISEMENT.

Rejection of bids.....See CONTRACTS VI J 1.

REAL PROPERTY.

See PUBLIC PROPERTY I A 3.
Can not be alienated.....See WAR I C 6 a (2).

REAPPOINTMENT.

Cadets.....See ARMY I D 1 d (1) to (3); 2 b.
Dismissed officer.....See OFFICE III A 4 c; F 1; IV E 2 c (2).
Is not pardon.....See PARDON XV.

REASONABLE DOUBT RULE.

Retiring boards.....See RETIREMENT I B 2 e.

RECEIPTS.

Blank not to be given.....See PAY AND ALLOWANCES I B 3.
Private property taken.....See CLAIMS VII B 5.

RECEIVER.

Bidder.....See CONTRACTS XXXVII.
Bridge company.....See NAVIGABLE WATERS IV D.
Contractor.....See CONTRACTS XIV F.

RECOMMENDATION.

By court.....See Discipline XI A 11; 11 a; XII E to F.
Medal of honor.....See Insignia of merit I A 2 a; d; d (1).

RECORDER.

Court of inquiry.....See Retirement I K 2 e.
Retiring board.....See Retirement I B 1 d (2).

RECORD OF GENERAL COURT-MARTIAL.

See Discipline IV C 3 to 4; XIII to XIV.
Copy to accused.....See Article of War CXIV A.
Correction of.....See Discipline IX N 6; 6 a; b.
Evidence of.....See Discipline XI A 13.
Lost.....See Discipline XIV E 6; XV G 1.
Pay and Allowances III C 1 e (1).
Reasons for returning.....See Discipline XIV E 4 to 5.
Transmission of.....See Discipline IV M.

RECOVERY.

Public property.....See Militia IX F.

RECRUIT.

Clothing, abandoned.....See Public Property I L.
Muster of is not muster in.....See Volunteer Army II B 1 a.
Running away.....See Desertion XXII A.
Statement of age.....See Enlistment I A 2 a.

RECRUITING OFFICER.

Deserter, receipt of.....See Desertion V B 8 a; b; 9; F 10 a; b.
Penalty envelopes.....See Communications II A 2 a.

RED CROSS.[1]

I. AS AN INTERNATIONAL EMBLEM.
- A. International Use Differentiated from Domestic Use..... *Page 971*
- B. Purpose of Geneva Convention and Scope Thereof in Regard to Civil Volunteer Sanitary Formations..... *Page 972*
- C. Red Cross Has No International Value Except by Treaty.
- D. No Authority for Charitable Organizations to Penetrate Foreign Country Except With Consent of Latter's Government.

II. AMERICAN NATIONAL RED CROSS.
- A. Rights of, in Time of Peace..... *Page 973*
- B. Status of, in Peace or in War. Duty of the Government in Connection Therewith.
- C. Duty of Military Where Emblem is Misused.

I A. In considering questions affecting the use of the Red Cross or Geneva emblem care must be taken to differentiate between the use of the emblem under the international rules of the Geneva Convention and its use under the charter granted by the Congress to the

[1] Prepared by Lieut. Col. John Biddle Porter, judge advocate, assistant to the Judge Advocate General, United States Army.

American National Red Cross, act of January 5, 1905 (33 Stat. 599), amended by act of June 23, 1910 (36 Stat. 604). *C. 16453, June 7, 1911.*

I B. The main purpose of the Geneva Convention is to ameliorate the condition of the wounded of armies in the field and is intended to cover the case of nations at war. For this purpose the convention has adopted the Red or Geneva Cross as an emblem of neutrality to be used only to protect those persons and things which, under the convention, are to be deemed neutral and devoted to the care and comfort of the sick and wounded. It is provided that, under the auspices of a government, civil sanitary formations may be authorized for use in war, and for the purpose of being distinguished shall use the Geneva Cross in the same manner as the regular military or naval sanitary formations of the Government. It is also agreed, in furtherance of the general purpose of ameliorating the condition of the sick and wounded, that the civil sanitary formations of a neutral nation may, with the consent of their own government, offer their services to a belligerant power, and if accepted by such belligerent, assist in caring for the sick and wounded of those at war. It follows that where such civil organizations of a neutral, with the consent of their own government, offer their services to a belligerent power and these are accepted by that power, they become, for the time being, a part of the sanitary establishment of its army. Thus, in order that a civil organization may, by international law, serve, under the Geneva emblem, a foreign belligerent power, there must be consent of the home government and acceptance by the foreign belligerent. Such civil organization is then only entitled to the same protection under the Red Cross as are the organizations of the belligerent with whom they are serving, and should one of the powers at war not have acceded to the Geneva Convention, the volunteer civil neutral sanitary formation is no more protected by the Geneva Red Cross than are the sanitary formations of the power with which they are serving. *C. 16453, June 7, 1911.*

I C. From the point of view of international law the emblem of the Red Cross has no value or meaning except that which has been placed upon it by treaty. The emblem was first created by the Geneva Convention of 1864, the rules established for its use having been brought up to date at the conference of 1906, also held at Geneva. Each nation which accedes to that convention thereby enters into a treaty with each of the other nations who have acceded, to carry out and respect the terms of the convention. The United States has acceded, the President having so proclaimed on August 3, 1907. Except as between the acceding nations there is no requirement of international law that the Red Cross shall be recognized or respected. *C. 16453, June 7, 1911.*

I D. There is clearly no authority for a charitable organization to penetrate a country at peace with its own, for the purpose of rendering aid to the wounded during a war in that country, except it be with the full consent of a belligerent operating therein. Should such charitable organization penetrate into a foreign country under any other conditions than those established by the Geneva Convention, no value whatever attaches in international law to its use of the Geneva Cross. Whatever protection that emblem may insure under

such circumstances must be due to the municipal laws of the country penetrated. The entry of the American National Red Cross into Mexico during the civil troubles in that country in the year 1911, the Mexican Government not having accepted the tender of service made by the organization, would be an instance of such unauthorized entrance and the members of the American National Red Cross entering Mexico would not be entitled to the protection contemplated by the Geneva Convention. *C. 16453, June 7, 1911.*

II A. The American National Red Cross has under its charter the right, in time of peace, to continue and carry on a system of national and international relief and apply the same in mitigating the sufferings caused by pestilence, famine, fire, floods, and other great national calamities. Under paragraph 3, section 4 of the charter, the Red Cross would appear to be entitled to all proper assistance from the Army, but it must be remembered that the international status granted by the Geneva Convention to the Red Cross is intended solely for the amelioration of the condition of the wounded of armies in the field. *C. 16453, June 7, 1911.*

II B. Under the charter of the American National Red Cross, granted to that organization by Congress (act of Jan. 5, 1905, 33 Stat. 599, and act of June 23, 1910, 36 Stat. 604), the use of the Red Cross emblem under certain circumstances and for certain purposes is forbidden and made a misdemeanor, punishable in a Federal court by fine and imprisonment. The foregoing, it will be observed, however, is a municipal law of the United States and can in nowise affect the conduct of a person outside of that country. Where, in time of peace, in the presence of the military forces of the United States, a misuse is made of the Red Cross emblem such as has been determined by Congress to amount to a misdemeanor, it is not the duty of the military to exercise any other authority than would be exercised by them in the case of any other misdemeanor by a civilian. In case of a war, however, in which the United States is a participant, it will be for the Federal Government to see that any aid society operating with our armies conforms to the requirements of the Geneva Convention and to the laws and regulations governing the conduct of those who are operating with the armies of the United States. (Art. 10, Geneva Convention of 1906.)[1] *C. 16453, June 7, 1911.*

II C. Within the jurisdiction of the United States it is a misdemeanor for a person to falsely represent himself as a member of or an agent for the American National Red Cross for the purpose of soliciting, etc., money or material, or for any person to wear the Red Cross or an imitation thereof for the fraudulent purpose of inducing the belief that he is a member of or an agent for the American National Red Cross (36 Stat. 604). The military authorities, however, would have no right to arrest such a misdemeanant and are charged with no greater duty in regard to him than would be any citizen; that is, to lodge information in regard to the alleged misdemeanor with the nearest peace officer or other person charged with the enforcement of the criminal law. *C. 16453, June 7, 1911.*

---

[1] See proclamation of the President, Aug. 22, 1911, published in G. O., No. 170, W. D., 1911.

REDETAIL.

See OFFICE III D 1 d; 2 b.
Bureau chief.....See RANK I B 1 d to e.
College duty.....See MILITARY INSTRUCTION II B 1 e.
Ordnance department.....See ARMY I G 3 b (4) (*c*).

REDUCTION TO THE RANKS.

See ARTICLES OF WAR LXXXIII C 2.
See DISCIPLINE XII B 3 f (1) (*a*).
Noncommissioned officer.....See ARMY I E 1 b.
Unauthorized for officers.....See DISCIPLINE XVII B 2 a (1).

REENLISTMENT.

See DESERTION VI A to D.
See ENLISTMENT I D to II.
Bonus for.....See PAY AND ALLOWANCES I C 5 c.
Deserter.....See DISCHARGE II B 2 a.
PARDON XIV.
Pay not stopped or forfeited to reimburse previous claim. See PAY AND ALLOWANCES III B 6 a; C 1 a (2).
Voluntary.....See ENLISTMENT I A 1

REEXAMINATION.

Failure.....See RETIREMENT I B 6 c to e.

REGIMENTAL COMMANDER.

See POST COMMANDER.
See COMMANDING OFFICER.
Appointing power.....See COMMAND V C 1 a; b; c.
RANK I D to E.
Authority to reduce noncommissioned officers. See COMMAND V C 2.
Brigade post.....See ARTICLES OF WAR LXV B.
Certificate of merit.....See INSIGNIA OF MERIT II B; E.
Convening officer.....See ARTICLES OF WAR XXX C.
Exceeds authority.....See ARTICLES OF WAR XXIX A.
Reports on officers.....See ARTICLES OF WAR XXIX B.

REGIMENTAL COURT.

See ARTICLES OF WAR XXX A to D.
See DISCIPLINE XVI A 1; E 5.

REGIMENTAL STAFF OFFICER.

Appointment of.....See COMMAND V C 1 a.

REGULAR ARMY.

See ARMY I G to H.
Joint encampment.....See MILITIA II A; B; VI B 2 to C.
Philippine duty.....See ARMY II G 2 a; a (1).
Philippine Scouts.....See ARTICLES OF WAR LXXVII A 1.
ARMY II G 1 a.
Tenure of office.....See OFFICE III G.
Volunteer engineers.....See VOLUNTEER ARMY III A 1.

REGULATIONS.

See LAWS II to III.
Extra statutory limitation.....See INSIGNIA OF MERIT I A 2 d.
Force of law.....See VOLUNTEER ARMY IV A 1.
Mandatory.....See DISCIPLINE III A.
Statute can not be abridged.....See ARMY I B 2 f.
Statute can not be contravened.....See ARMY I D 3 b (1).
Unwarranted quasi legislation by.....See INSIGNIA OF MERIT II F.

REIMBURSEMENT.

Allies for loan.....See WAR I C 6 d (1).
Damage to public property.....See PAY AND ALLOWANCES III B 5.
Illegal forfeiture.....See PAY AND ALLOWANCES III E 1.
Militia officer.....See MILITIA VI B 1 e (7); (8).
Overpayment.....See GOVERNMENT AGENCIES II J 7.
Private parties, disbursements of, to destitute persons. See GRATUITY IV.
PUBLIC PROPERTY I A 5.
Service by allies.....See CLAIMS VII B 6.
Soldier, of expense.....See ARTICLES OF WAR LIX G 1 b.
Transportation of horse.....See PAY AND ALLOWANCES II A 2 a (2) (*a*) [1].
Unauthorized to cancel private debt.....See PAY AND ALLOWANCES III B 6.

REJECTION OF BIDS.

See CONTRACTS VI J to K.

RELATIVE RANK.

See RANK II to III.
Medical Department.....See RANK I B 1 c (2) (*a*).

RELEASE.

Bidder.....See CONTRACTS IX to X.
From contract.....See CONTRACTS VIII.

RELIEVING THE ENEMY.

See ARTICLES OF WAR XLV to XLVI.

RELIGIOUS SECTS.

Exemption from service.....See ENLISTMENT II B 2.

REMISSION.

By summary discharge.....See PARDON XIII.
Forfeiture.....See PAY AND ALLOWANCES III E 1.
Grounds for.....See DISCIPLINE XV F to G.
PARDON VI.
Prisoner of war.....See WAR I C 11 c (5) to (6).
Sentence.....See DISCHARGE II B 2.
PARDON VI, XVI.

REMOVAL OF CHARGE OF DESERTION.

See DESERTION V B 5; XIV A 7; XVI A to F.

REMUSTER.

See VOLUNTEER ARMY II F to G.

RENT.

See CLAIMS VII C 1.
From assignee.....See PUBLIC PROPERTY VII B 1 a.
Nonpayment of.....See PUBLIC PROPERTY VII B 1 b; 2 b; e.
To enemy.....See PARDON X.

REPAIR.

Public property.....See MILITIA IX E.

REPORTER.

Appointment of, for court.....See DISCIPLINE IV B 2; 2 a.
Claims for pay.....See ARMY I G 3 a (4) (*a*) [3].
Court of inquiry or board.....See DISCIPLINE XVIII D.
Duties.....See DISCIPLINE IV C 3 a.
Swearing of.....See DISCIPLINE IV C 4 a.

REPORTS.

Congressional committees.....See LAWS I B 6.

REPRIMAND.

See DISCIPLINE XII B 3 d.
By reviewing authority.....See DISCIPLINE XIV E 9 i; l.

REPUDIATION.

Of contract.....See CONTRACTS XXII to XXIII.

RESIDENCE.

I. DOMICILE AT ENTRY INTO SERVICE..... *Page 976*
A. NOT LOST BY ENTRY INTO SERVICE..... *Page 977*
1. Intention to return is presumed.
B. CHANGE OF DOMICILE.
1. What action required?..... *Page 978*
II. OF MINOR.
A. UNEMANCIPATED.
B. EMANCIPATED.

I. In the case of an officer or enlisted man in the military establishment, *held* that his domicile during his continuance in the service is the domicile or residence which he had when he received his appointment as an officer or entered into an enlistment contract with the United States. This is true whether such domicile was original, i. e., established by nativity, or by residence with the requisite intention, or derivative, as that of a wife, minor, or dependent. This residence or domicile does not change while the officer remains in the military service, as his movements as an officer are due to military orders; and his residence, so long as it results from the operation of such orders, is

constrained, a form of residence which works no change in domicile.[1] *C. 12023, Apr. 28, 1911; P. 60, 223, June, 1893.*

I A. A person in the military service of the United States, is entitled to vote where he has his *legal residence* provided he has the qualifications prescribed by the laws of the State. He does not lose such residence by reason of being absent in the service of the United States. The laws of a particular State in which he is stationed and has only a temporary as distinguished from a *legal* residence may, however, permit him to vote in that State after a certain period of actual residence. *C. 472, Oct., 1894 and 601, Nov., 1894; 3877, Feb. 23, 1898; 14852, June 25, 1903; 15367, Oct. 14, 1903.*

I A 1. If a legal residence in a certain State has once existed, mere temporary absence, however long continued, as the result of an enlistment or enlistments in the Army, will not destroy it.[2] *R. 50, 392, June, 1886.* Liability to taxation or other liability, as a *resident* of a certain locality, is not ordinarily affected by the enlisting or holding of a commission in the Army and the being stationed at a place other than such locality; the party being at such place not by his own volition, and the *animus revertendi* to the original domicile being presumed to still subsist.[3] *R. 55, 623, Jan., 1888; C. 14852, June 25, 1903.*

I B. An officer may, however, establish a new legal residence or domicile where he is stationed, although as he is subject to orders, the evidence of such intention should be clear and convincing, such as the acquisition of real property for a home, with the intention of living there whenever not required to be elsewhere under military orders.[4] *C. 21091, Feb. 14, 1907.* In the cases of officers who are not subject, or likely, to have their places of habitancy changed by superior military authority, such as the chiefs of the staff corps or departments, whose duties require them to have their offices permanently in Washington, less evidence of intention is required. This is also true as to officers on the retired list. The question of residence, where it is at

---

[1] Graham *v.* Commonwealth (51 Pa. St., 258); Wood *v.* Fitzgerald & Wingate (3 Oregon, 568); G. O. 13, First Mil. Dist., 1868; Taylor *v.* Reading, (4 Brewst., 439); Delvin *v.* Anderson (38 Cal., 92). "Soldiers of the United States do not acquire or lose their residence by reason of being stationed in the line of duty at any particular place, no matter how long their occupancy of such place may continue." Mead *v.* Carrol (6 D. C., 338); People *v.* Holden (28 Cal., 123); Hunt *v.* Richards (4 Kans., 549); Inhabitants of Brewer *v.* Inhabitants of Linnaeus (36 Maine, 428); Tibbetts *v.* Townsend (15 Abb. Prac., 221).

[2] Brewer *v.* Linnaeus, 36 Maine, 428.

[3] Jacobs, Law of Domicile, 401.

[4] Beale Cases on Conflict of Laws, vol, 1, p. 168, where the following extract is taken from Attorney General *v.* Pottinger (6 H. & N., 833, 744 (1861)), where the question was whether Sir Henry Pottinger at the time of his decease was domiciled in England or in India: "The only doubt arises from this, that he continued in the service of the East India Company, and might have been called upon at any time to serve in India. * * * I think that, notwithstanding Sir Henry Pottinger continued in the Indian Army, his purchase of a dwelling house in Eaton Place, his continuing to hold it whilst absent from England, his return to it as his place of residence and his home, and his reference to it in his will as his residence, abundantly establishes his English domicile." See also 14 Cyc., 849, as follows: "In general it can be said that a domicile is neither gained nor lost during military service, and although a soldier, if both the fact and intent occur, can establish a new domicile during his term of enlistment, this will not be deemed to have occurred in the absence of the clearest and most unequivocal proof. No domicile will be acquired merely from having been stationed in the line of duty at any particular place."

all doubtful, will in the main, as in the cases of civilians, be determined by the evidence of an *animus manendi*, as exhibited by the acts and declarations of the party. *R. 29, 85, July, 1869; 30, 215, 528, Mar. and July, 1870.*

I B 1. An officer who has resided elsewhere can not make a certain place his residence by merely declaring that it is so, or that he has elected it to be such. He must take some definite action indicating an intention and an ability to permanently remain, such as providing himself with a dwelling there, removing his family there, entering into business there, etc., to constitute the place designated his legal residence or domicile in law. *P. 53, 443, May, 1892; C. 21091, Feb., 14, 1907.*

II A. *Held* that an unemancipated minor can not acquire a residence different from that of his father.[1] *C. 1220, Apr., 1895; 6615, Dec. 23, 1910, Feb. 24 and Mar. 6, 1911.*

II B. *Held* that an emancipated minor can acquire a *bona fide* actual residence different from that of his father. *C. 6615, June 17, 1899.*

CROSS REFERENCE.

Cadets.....See ARMY I D 1 a to b.
Retired officer.....See RETIREMENT I O.
Retired soldier.....See RETIREMENT II B 4 to 5; 7.
Taxation.....See TAX I E.

RESIGNATION.

Affects status.....See DISCIPLINE VIII I 1; 1 a.
Cadet.....See ARMY I D I d (1).
Civilian employee.....See CIVILIAN EMPLOYEES XI A to B; B 2.
Good of the service.....See OFFICE IV D 6.
Office.....See OFFICE IV D to E.
Officer.....See DISCHARGE II A 2.

RESTORATION OF OFFICER.

By appointment only.....See OFFICE III F 1.
To Volunteers.....See OFFICE V A 3 to 4.

RESTORATION TO DUTY.

While under sentence.....See PARDON XV D 1; 3.

RESTORATION TO DUTY WITHOUT TRIAL.

See DISCIPLINE III E 2 a.
See PARDON XV D 2; 2 a; 4.
Constructive pardon.....See DESERTION IX N; XV D.
DISCIPLINE IX F 1 a (1).
Charge of desertion not removed.....See DESERTION XVI E.
Deserter.....See DESERTION VI A; XII A to B; XIV A 3.
DISCHARGE II B 2.
ENLISTMENT I D 3 c (7); (14).
Effect of.....See RETIREMENT II A 1 b; 1 c.
Fraudulent enlistment.....See ENLISTMENT I A 9 f (1).
Fraudulently enlisted dishonorably discharged soldier.....See ENLISTMENT I A 9 f (4); g (1); (3); h.
Fraudulently enlisted general prisoner.....See ENLISTMENT I A 9 f (3).
Illegally dishonorably discharged soldier.....See DISCHARGE XVI G; G 1; 5.
Make good time lost.....See ARTICLES OF WAR XLVIII A.

[1] The act of Mar. 1, 1843 (5 Stat. 606) requires the individual selected for appointment to the Military Academy to be an actual resident of the District. (See also 13 Op. Atty. Gen., 130).

RETAINED PERCENTAGES.

Forfeiture.....See CONTRACTS XIX C.

RETAINERS TO THE CAMP.

See ARTICLES OF WAR LXIII A to E.

RETALIATION.

Laws of War.....See WAR I C 9.

RETENTION IN SERVICE AFTER ORGANIZATION MUSTERED OUT.

See VOLUNTEER ARMY IV C to D.
Date of muster out.....See VOLUNTEER ARMY IV D 2 to 3; 3 b.

RETIRED OFFICER.

Civil office, eligibility for.....See RETIREMENT I G 3 to 4.
Contract with Post Office Department.....See CONTRACTS XV C.
Forage.....See ARMY I G 3 b (2) (c).
In military service.....See RETIREMENT I G 2 to 3.
CLAIMS X.
Instructors at colleges.....See MILITARY INSTRUCTION II B 1 a; 4 f.
Militia duty.....See MILITIA VI A 2 b.
Militiaman.....See MILITIA XI L.
Public office not exercised.....See RETIREMENT I G.
Taxation.....See TAX I to II.

RETIRED SOLDIER.

Certificate of merit.....See INSIGNIA OF MERIT XX E.
Commission in militia.....See MILITIA III K.
Does not hold office.....See CLAIMS X.
Musician.....See ARMY BANDS I C 4.
Taxation.....See TAX I to II.

RETIREMENT.

I. OFFICERS.

A. VOLUNTARY.

1. 30 years' service.
   - a. Date of ..... *Page 983*
   - b. Count service United States Military Academy.
   - c. Midshipman service does not count.
2. 40 years' service
   - a. Count service United States Military Academy.

B. INVOLUNTARY.

1. Retiring board.
   - a. Acquired disability.
     - (1) In volunteers.
     - (2) As an enlisted man.
   - b. Reasons for retirement.
     - (1) Can not be retired for.
       - (*a*) Moral obliquity..... *Page 984*
       - (*b*) Future contingent incapacity.
   - c. Jurisdiction of board.
     - (1) Not limited as to time.
     - (2) Taking of depositions.
     - (3) Charge can not be tried.
     - (4) Officer present.

I. OFFICERS—Continued.
B. INVOLUNTARY—Continued.
1. Retiring board—Continued.
d. Procedure.
(1) Duties of members neglected.
(2) Duties of recorder..... *Page 985*
(3) Minority report may be submitted.
2. Findings.
a. "Active service" defined.
b. "Permanent" defined.
(1) Test—Is disease curable?..... *Page 986*
c. "Incident of the service" or "Line of duty" defined.
d. "Line of duty" if no evidence to the contrary.
e. "Not line of duty"—reasonable doubt rule.
3. President's action.
a. Finding is recommendation only.
b. Disapproval—no change in status..... *Page 987*
c. Discretion if "Not line of duty"—rule.
d. One action exhausts President's power.
4. Increased rank.
a. If in Ordnance Department.
b. If vacancy occurs before approval.
5. No authority for retirement.
a. Of Philippine Scout officer.
b. Of officer who contracted disability as contract surgeon.
6. Examining board under act of October 1, 1890.
a. Not a court for trial of moral delinquent.
(1) Officer entitled to full hearing on such issue.. *Page 988*
b. Physical incapacity in line of duty.
(1) Healed before retirement.
(2) Not subject for retiring board or general court-martial except for new causes.
c. Incapacitated otherwise than for physical disability in line of duty.
(1) One year's suspension—not subject for retiring board.
(*a*) Second examination: found incapacitated physically..... *Page 989*
(2) Second examination found physically not in line of duty; wholly retired.
(3) First and second examinations found physically not line of duty; wholly retired.
(4) Medical officer found professionally; second examination found physically in line of duty.
d. Examination passed; officer becomes insane; second examination or retiring board authorized..... *Page 990*
e. President's action.
(1) Members not sworn: proceedings disapproved.
(2) Effects a change of status.
f. President's discretion.
(1) Officer contracts morphine habit in taking medicine.
7. Examining board under act of March 3, 1909 (35 Stat., 737).
a. Examination of major, Medical Department.

I. OFFICERS—Continued.
C. RANK OF RETIRED OFFICERS INCREASED UNDER ACT OF APRIL 23, 1904 (33 STAT., 264).
1. Status during Civil War.
a. West Point cadet on leave.
b. Midshipman.
c. Civil employee ..... *Page 991*
d. Contract surgeon.
e. Militiaman not called forth.
2. Status since Civil War.
a. Convicted by a general court-martial.
b. Promoted under act of October 1, 1890.
c. Officer deceased.
D. DATE OF RETIREMENT ..... *Page 992*
E. RETIREMENT ORDER CAN NOT BE REVOKED.
F. UNIFORM, TITLE, ETC., OF RETIRED OFFICERS.
G. OFFICE.
1. Retired officer does not exercise "public office."
2. Retired officers are in military service.
a. In sense of section 5498, Revised Statutes.
b. Subject to trial by general court-martial.
c. May enter Government Hospital for the Insane.
d. May be kept in civil court jurisdiction ..... *Page 993*
e. Exemption of salary from taxes.
f. In sense of section 1223, Revised Statutes.
3. Retired officers may hold civil office.
a. Federal.
(1) Elective or appointive.
(2) Limitations.
(*a*) Diplomatic or consular office.
(*b*) $2,500 salary ..... *Page 994*
(3) Clerk in Quartermaster's Department.
b. State and municipal ..... *Page 995*
H. EMPLOYMENT.
1. Counsel before general court-martial.
I. BURIAL.
K. ACTIVE DUTY.
1. "Active duty" and "Active service" defined.
2. "Staff duty not involving service with troops."
a. Limited to existing military establishment ..... *Page 996*
b. Rule.
c. "Service with troops" defined.
d. Quartermaster at Fort Bayard, N. Mex.; quarters.
e. Court of inquiry.
f. General court-martial ..... *Page 997*
3. College duty.
a. Pay and allowances.
b. College in the Philippines.
c. College in Porto Rico.
4. Widow not entitled to six months' gratuity.
5. Can not buy or draw furniture from quartermaster.
L. PAY.
1. Longevity.

I. OFFICERS—Continued.
M. Mileage.
1. To home after retirement.
2. Witness before a court-martial.....*Page 998*
N. Wholly Retired. (*See also Retirement, I B 6 to 7.*)
1. Reasons for.
2. Full and fair hearing.
3. One year's pay and allowances..... *Page 999*
4. No authority for transporting goods to home.
O. Transportation to Home.
II. ENLISTED MEN.
A. What Service Counts for Retirement?
1. Fraudulent enlistment service.
a. Previously discharged on certificate of disability.
b. Previously discharged without honor.
c. Previously discharged dishonorably.
d. Fraudulent enlistment without previous discharge.
2. Active service—act of September 30, 1890..... *Page 1000*
3. Commissioned service counts.
a. As officer Philippine Constabulary does not count.
4. War service counts double.
a. In Civil War.
b. Foreign service.
(1) "Actual service" defined.
(2) On transport in Philippine Islands..... *Page 1001*
c. Service of natives in Philippines does not count double.
B. Status of Retired Soldiers.
1. They are not discharged.
2. They do not hold office.
3. They are subject to military control.
a. May be tried for not paying debts.
b. Subsistence while in confinement.
4. Residence.
a. Abroad with permission.
b. On military reservation with license..... *Page 1002*
5. Government Hospital for the Insane.
6. Soldiers' Home.
7. Transportation to home and subsistence.
C. Pay May be Stopped.
1. To make good overpayment.
2. To reimburse post exchange, etc., funds.
D. May Hold Office.
1. In militia.
2. In Philippine Scouts.
3. Municipal.
4. Superintendents of national cemeteries.
E. May Accept Employment.
1. In Government service.
2. In civil life.
a. As a musician..... *Page 1003*
b. As instructor in high school.
c. As interpreter to foreign commissioner.

II. ENLISTED MEN—Continued.
F. STATUS TERMINATED.
1. By decease.
2. By enlistment.
3. Discharge.
G. RETIREMENT ORDER CAN NOT BE REVOKED.
III. CIVIL EMPLOYEES.

I A 1 a. *Held* that an officer who has applied for retirement after 30 years' service [1] will not pass to the retired list before the date when he receives notice, or becomes legally chargeable with notice, of the order for his retirement. *C. 20430, Sept. 24, 1906.*

I A 1 b. *Held* that cadet service at United States Military Academy can be legally included in computing the 30 years' service upon which an officer may be retired on his own application in the discretion of the President, under section 1243, R. S.[2] *C. 1699, Sept. 3, 1895.*

I A 1 c. *Held* that service rendered as a cadet at the Naval Academy can not be computed in determining an officer's eligibility for retirement after 30 years' service. *C. 22352, Nov. 11, 1907.*

I A 2 a. The act of June 30, 1882, 22 Stat., 118, provides that 40 years' service, "either as an officer or soldier," shall entitle an officer to be retired. *Held* that, in computing the 40 years' service, the period served by the officer as a cadet at the Military Academy could legally be counted.[3] *P. 49, 379, Oct., 1891.*

I B 1. Section 1248, R. S., authorizes a retiring board to inquire into and determine the facts touching the nature and occasion of the disability of any officer who *appears* to be incapable of performing the duties of his office. No mention is made in this legislation as to the manner in which the attention of the Secretary of War is to be drawn to the case of an officer as to whose capacity for active service doubt has arisen. *Held* that it may be due to a discovery by any superior commander in the ordinary performance of the officer's duty, or it may result from the report of an inspector, or be made the subject of representation by a department commander, etc. *C. 22399, Nov. 22, 1907; 26612, Apr. 6, 1910.*

I B 1 a (1). It does not affect the authority to retire under section 1251, R. S., that the incapacity of the officer may have been found to have resulted from a wound received by him while in the *volunteer* service before entering the Regular Army. *R. 26, 104, Oct., 1867; C. 15892, Mar. 18, 1904.*

I B 1 a (2). *Held* that a commissioned officer was entitled to be retired on a disability which had been contracted while he was an enlisted man. *C. 12277, Mar. 22, 1902.*

I B 1 b. Officers have been retired on three-fourths' pay for "heat exhaustion and overwork causing melancholia and dementia" (*C. 12277, Mar. 22, 1902*); for "chronic Bright's disease of the kidneys" (*C. 17113, Nov. 31, 1904*); for "deafness" (*C. 17177, Nov. 18, 1904*); for "valvular disease of the heart and Bright's disease" (*C. 17223,*

[1] Sec. 1243, R. S.
[2] See cir. 10, 1895.
[3] See cir. 13, A. G. O., Dec. 5, 1891.

Dec. 5, 1904); for "valvular heart disease"[1] (*C. 23059, Oct. 10, 1908*); etc. *C. 15871, Feb. 5, 1904; 15978, Feb. 27, 1904.*

I B 1 b (1) (*a*). *Held* that the "cause" of "incapacity" intended in section 1249, R. S., was not moral obliquity (*C. 19189, Feb. 12, 1906; 22399, Nov. 22, 1907*), and that the matter of the financial integrity of the officer was beyond the jurisdiction of the board. So, *held* that the board was not authorized to recommend the retirement of an officer because he did not pay his debts. *P. 41, 403, July, 1890. Held also* that the inability of a disbursing officer to furnish a bond when duly required to do so was not sufficient ground for his retirement. *P. 64, 53, Feb., 1894; C. 22399, Nov. 22, 1907.*

I B 1 b (1) (*b*). *Held* that the law—sections 1248 and 1249, R. S.—contemplated an existing and not a purely prospective and contingent incapacity; and that an inquiry into an officer's general efficiency could be pertinent only in so far as it could be regarded as going to show that his inefficiency, if found, was the result of an impairment of health. *P. 35, 49, Sept., 1889.*

I B 1 c (1). The investigation of a retiring board is not affected by any limitation of time, as is that of a court martial, viz, by article 103. Such a board may therefore inquire into the matter of a disability, however long since it may have originated. *R. 20, 619, May, 1866.*

I B 1 c (2). As the object of giving a retiring board the power of a court martial is to insure a full investigation and a fair hearing and to enable it satisfactorily to determine the question referred to it, *held* that in the exercise of these duties the board is the judge of whether or not the taking of a deposition is necessary. *C. 13046, Sept. 23, 1907.*

I B 1 c (3). The provision of section 1248, R. S., giving to a retiring board such powers of a court martial and court of inquiry as may be necessary to enable it to inquire into and determine a question of alleged disability, does not authorize such a board to entertain a charge of a military offense as such or to *try* an officer.[2] *R. 20, 619, May, 1866.*

I B 1 c (4). An officer has the right to be present before the retiring board which is considering his case. *Held* that the board should not proceed in his absence unless he has waived his right to be present. *C. 26756, May 24, 1910.*

I B 1 d (1). In view of the disposition of retiring boards to rely upon the report of the medical officers, the findings in many cases are unsatisfactory, and the evidence as to the cause of the disability

[1] See 27 Op. Atty. Gen., 163, Jan. 22, 1909, in which it is held that an officer may be retired because of ill temper, irritability, lack of self-control, boorishness, discourtesy, or similar cause, if they render him incapable of performing the duties of his office. Also see 27 Op. Atty. Gen., 14, July 10, 1908, in which the word "incapable" is defined to mean that an officer is "no longer responsible for his own actions or subject to infirmities or disabilities which make the reasonable fulfillment of his military duties impossible for him, notwithstanding an honest desire and firm purpose on his part to fully discharge them."

[2] Par. 9, cir. 10, A. G. O., 1895, which directs that when an officer is ordered before an examining or retiring board original or copies of all official records affecting his character or efficiency shall be furnished the board. See 27 Op. Atty. Gen., 14, July 10, 1908, in which it is held that an officer can not be retired for the acts or omissions which are alleged as evidence of incapacity.

is so meager as to make it impossible for the Secretary of War to determine whether or not the disability is in line of duty. *Held* that nothing short of a strict enforcement of section 1248, R. S., will apply an adequate remedy.[1] *C. 15600, Feb. 24, 1904; 15913, Feb. 16, 1904; 22743, Feb. 12, 1908.*

I B 1 d (2). Sections 1246–1252, R. S., charge the board itself with the conduct of the investigation[2] and furnish it with a recorder to assist it in its inquiry. It may vest in the recorder such duties as it deems best and may charge him wholly or in part with the production and presentation of testimony, and it may also direct him to prepare replies to the contentions of counsel, but *held* that unless so specially directed by the board the duties of the recorder are restricted to the summoning of witnesses and the preparation of the record. *C. 17288, Dec. 19, 1904.*

I B 1 d (3). *Held* that a member (or members) of a retiring board may submit a minority report when he feels that his view will assist the President in reaching a conclusion on the question before the board. *C. 29401, Jan. 21, 1912.*

I B 2 a. The term "active service," as used in statutes regulating retirement, simply relates to that period in the career of an officer which intervenes between his appointment to military office, and his vacation of such office due to death, resignation, dismissal, or retirement. During this period all officers are presumed to be physically and mentally capable of performing the duties of the office into which they have been lawfully inducted. If the contrary appears, the laws vests authority in the Secretary of War to convene a retiring board and to charge it with an inquiry into the nature and extent of the disability, with a view to ascertain whether the officer is incapacitated from performing the duties of his office. *C. 22399, Nov. 22, 1907; 23200, May 5, 1908.*

I B 2 b. Upon the examination of an officer for promotion, it was discovered that he had a rupture and was using a truss, and the evidence before the board showed that the rupture could be removed by an operation which was so certain of success that of the seventy cases

[1] "A retiring board may inquire into and determine the facts touching the nature and occasion of the disability of any officer who appears to be incapable of performing the duties of his office, and shall have such powers of a court-martial and of a court of inquiry as may be necesary for that purpose." (Sec. 1248, R. S.)

The opinion of a surgeon must not be taken as conclusive. See 7 Op. Atty. Gen., 165, in which it was held that:

"In the first place, a casualty is a question of fact, to be proved according to the ordinary rules of evidence and to the reasonable satisfaction of the inquiring and deciding mind. That mind is entitled to have the very facts before it, and is not bound to accept as final the opinions even of an expert. Such opinions are evidence, but neither conclusive nor exclusive proof. Every person of judicial training well knows that the opinions of medical or other scientific or practical experts often differ and that they sometimes err in a body as if by some epidemic contagion. There is a judicial case involving scientific inquiry, in the printed record of which are the answers of twenty-three experts to the same question; twenty-two of them give decision one way, and a single one of them gives a reverse decision; and, in the conclusion, it was proved, beyond all controversy, that he alone was right and that all the others erred. In general, the opinions of an expert are of more or less weight and value, according to the person's constitution of mind and the degree of completeness of the collection of pertinent facts on which his mind acts."

[2] If an officer makes no objection to the proceedings or rulings of a board, he waives irregularities. (24 Ct. Cls., 265.)

in the United States Army which up to that time had been subjected to it but three had relapsed. The officer refused the operation. *Held* that the disability was not permanent. *Held* further, that manifestly the incapacity in consequence of which the law authorizes the retirement of an officer from active service is one that is thought to be permanent, or such that the removal of the disability which causes it is highly improbable, and that Congress can not possibly have intended to provide for the maintenance of an officer in the prime of life without receiving an equivalent in the way of service, unless he be suffering from an incurable disease or injury. *C. 3831, Mar. 10, 1898; 11223, Sept. 10, 1901; 22399, Nov. 22, 1907; 24129, Dec. 3, 1908.*

I B 2 **b** (1). Incapacity for service by reason of physical disability relates, of course, to a permanent, incurable disease, or injury of such a character as to absolutely disqualify the officer affected by it for duty on the active list. Deafness, defective vision, and incurable organic diseases are examples of such a disability. If, however, the disease be curable or of such a character as to yield to treatment then, even though a cure may require considerable time, the disability is not permanent and the officer may be passed. And that question is for the board to determine. The test should be, Is the disease or injury curable or incurable? If it be curable within a reasonable time, then the officer should be passed; if it be incurable within such reasonable time, the finding should be adverse. *C. 11350, Oct. 7, 1901.*

I B 2 **c.** The phrases "in line of duty" and "incident of the service," while not synonymous, are not widely separate in meaning. *Held* that the efficient execution of a statute involving the one would give reasonable operation to the other. In other words, the several "incidents" which go to make up the daily or yearly routine of military service constitute, when added together, the "line of duty" which is contemplated in the pension laws, and no public interest will suffer if either understanding be applied by a retiring board in the determination of a particular case. *C. 15600, Feb. 24, 1904; 19323, Feb. 24, 1906.*

I B 2 **d.** In a specific case there was no testimony before the board to show that the officer had contracted prior to his entry into the military service any of the diseases which the surgeons found to exist. There was evidence, however, that one of the diseases from which he suffered was incurred in the military service, and it was highly probable that another one, viz, incipient tuberculosis, was due to the same cause. *Held* that the board properly found that the officer's disability was in line of duty.[1] *C. 15600, June 9, 1904.*

I B 2 **e.** *Held* that an officer should not be wholly retired on the findings of a retiring board unless the testimony as to the cause of the disability establishes the fact, beyond a reasonable doubt, that the incapacity is not the result of any incident of the service.[2] *C. 12992, July 21, 1902.*

I B 3 **a.** The finding of a retiring board under section 1251 or section 1252, R. S., is in the nature of a recommendation, and till it is

[1] See 7 Op. Atty. Gen., 154.

[2] See 27 Op. Atty. Gen., 163, Jan. 22, 1909, in which it is held that sections 1245–1252, R. S., deal with the actual incapacity of an officer and not with its cause or causes, except in determining what shall be done in case the officer is found incapacitated.

"approved by the President" no retirement can be ordered thereupon.[1] *R. 26, 104, Oct., 1867; C. 22743, Feb. 12, 1908.*

I B 3 b. If the President disapproves the findings of a retiring board the officer's status remains the same as it was before the question of referring his case to the retiring board was considered by the department. *C. 22743, Feb. 12, 1908.*

I B 3 c. When a retiring board finds an officer incapable of performing the duties of his office and also finds such incapacity not incident to the service, the President is vested with discretion to retire the officer with three-fourths pay of his rank or wholly retire him with one year's pay and allowances. *Held* that this discretion is properly exercised in favor of the officer where the disability is incurred through an untoward incident or without fault or with excusable fault. *C. 22809, Feb. 24, 1908. Held* further, that where the main contributing cause of such disability is inexcusable misconduct on the part of the officer the latter is subject to being wholly retired. *Held* further, that where the main cause of the disability is misconduct extending over a long period of service and persisted in after repeated warnings the officer should be wholly retired. *C. 26234, Apr. 24, 1911.*

I B 3 d. The finding of a retiring board, approved by the President, is conclusive as to the facts. The board finds the facts, and the President approves or disapproves the finding. There is here a judicial power vested in the two and not in the President acting singly, and when the power has been once fully exercised it is exhausted as to the case.[2] *P. 56, 426, Dec., 1892; C. 6671, June, 1899; 11223, Sept. 10, 1901; 22399, Nov. 22, 1907.*

I B 4 a. *Held* that if an officer be retired while detailed in the Ordnance Department under the acts of February 2, 1901 (31 Stat. 748), and June 25, 1906, and March 3, 1909 (35 Stat. 751), he should be retired with the additional rank held in the Ordnance Department. *C. 25677, Oct. 15 and Dec. 17, 1909.*

I B 4 b. *Held* that an officer can not be retired with increased rank after the action of a retiring board unless a vacancy occurs before the President approves the finding of the board.[3] *C. 9236, Nov. 7, 1900.*

I B 5 a. *Held* that there is no authority of law for the retirement of an officer of Philippine Scouts as such on account of disability incurred. *C. 14314, Mar. 14, 1903.*

I B 5 b. *Held* that an officer can not be placed on the retired list for disability incurred while a contract surgeon. *C. 15892, Mar. 18, 1904.*

I B 6 a. The general theory upon which the Army has proceeded in the past is that examining boards and retiring boards should not be considered courts for the trial of moral delinquents; that where an officer is notoriously morally unfit for promotion, he is equally unfit to be an officer in whatever rank he may be serving, and that disciplinary measures should be taken at the time the evidence of the moral unfitness is available and the punishment of the morally unfit officer not postponed until such period as he shall have reached

---

[1] See 21 Op. Atty. Gen., 385, and 27 id., 193.

[2] See 13 Op. Atty. Gen., 99 and 209; 19 id., 203, Dec. 3, 1888; U. S. *v.* Burchard (125 U. S., 179); Potts *v.* U. S. (125 U. S., 175).

[3] See G. O. No. 41, A. G. O., June 24, 1897. See also Par. 20 S. O., No. 173, W. D., 1911.

the time for his promotion. *C. 23674, July 31, 1908; 24036, Nov. 3, 1908.*

I B 6 a (1). An examining board found an officer not qualified morally for promotion. A court of inquiry which later investigated the case recommended that War Department orders be amended so as to provide specifically that all the proceedings during the examination of an officer as to moral qualifications should be in the presence of himself and counsel "if he desires counsel"; that he be furnished full information as to any allegations against his moral conduct, names of accusers, witnesses, and documentary evidence against him; that he be allowed to examine such witnesses and evidence and to testify and introduce evidence in his own behalf; that if found morally disqualified, he be furnished a full statement of the reasons, *Held*, that "the very fact that an adverse finding on moral qualification points very certainly to an officer's severance from the Army reveals, I think, that adequate provision for a full and complete hearing upon the moral issue should be conducted." *C. 18566, June 22, 1906.*

I B 6 b (1). The act of October 1, 1890 (26 Stat. 562), contemplates that before an officer can be retired under it he shall be incapacitated for active service. The existence of that fact must be ascertained before the law can be applied. If an officer is regularly found incapacitated physically by an examining board appointed under the act, but before being retired recovers from his disability, he can not legally be retired. Where such recovery is alleged, a new examination is not only proper but necessary.[1]
C. 1979, Jan., 1896; 18723, Oct. 13, 1905.

I B 6 b (2). Under the act of October 1, 1890 (26 Stat. 562), the finding of the board of examination that the officer is incapacitated for duty is not *per se* final, but must be reported for the action of the Secretary of War and passed upon by him.[2] *C. 15738, Jan. 7, 1904.* Where the finding and report of the board have been approved but not yet executed by actual retirement, there may intervene contingencies which would supersede such proceeding, as the trial and dismissal of the officer by court-martial or the arising of new causes which might make proper, that the question of his disability be inquired into by a retiring board convened under section 1246, R. S. But unless some such new occasion and ground of disqualification be presented, the action of the Secretary of War in approving the report remains final and exhaustive, and the officer is entitled to be retired under the act of 1890 and can not legally be ordered before such retiring board. *P. 61, 148, 269, Aug. and Sept., 1893; C. 1979, Jan., 1896; 15738, Jan. 7, 1904; 18723, Oct. 13, 1905; 23135, June 5, 1909.*

I B 6 c (1). An officer was suspended from promotion for one year, he having failed in his examination for promotion otherwise than physically in line of duty.[3] *Held* that it was not proper to order him

[1] See 21 Op. Atty. Gen., 385, July 31, 1896.
[2] See 27 Op. Atty. Gen., 193, Feb. 19, 1909.
[3] See 25 Op. Atty. Gen., 568, Mar. 24, 1906, in which it is held in a Marine Corps case that the year's suspension begins to run from the date of approval of the proceedings of the board, except when the vacancy has occurred previous to the approval, in which case the suspension runs from the date of vacancy. The "loss of date," i. e., "loss of numbers," begins to run from the date of vacancy.

before a retiring board, as the act of October 1, 1890, provided that at the end of one year he should be reexamined to determine his fitness for promotion. *Held*, further, that the order of suspension began to run at the date when he would have been promoted had he passed his examination. *C. 28645, July 6, 1911.*

I B 6 c (1) (*a*). An officer was found professionally not qualified for promotion and after one year's suspension was found physically not qualified for promotion, owing to disability in line of duty, under that portion of section 3 of the act of October 1, 1890 (26 Stat. 562), which reads: "If he should fail for any other reason he shall be suspended from promotion for one year, when he shall be reexamined, and in case of failure on such reexamination he shall be honorably discharged with one year's pay from the Army." *Held* that the physical examination was a proper part of the second examination and that the finding of the board was legal and subject to approval. *C. 22770, Mar. 4, 1908.*

I B 6 c (2). An officer was found mentally and professionally disqualified for advancement by a promotion board. Upon reexamination at the end of one year he was found physically incapacitated for active service, due to disability not incurred in line of duty. Further examination was desisted from. *Held* that the final clause of the act in question became operative and that the officer should be honorably discharged with one year's pay. *C. 22701, Feb. 4, 1908; 22809, Mar. 14, 1908.*

I B 6 c (3). *Held* that if an examining board called pursuant to the provisions of the act of October 1, 1890, should find an officer physically incapacitated, not in line of duty, he shall be suspended from promotion for one year, at the expiration of which time he shall be reexamined, and in the event of his failure to pass the physical examination on account of disability not incurred in line of duty, no executive discretion is possible, as the law provides that he shall be honorably discharged with one year's pay and allowances. *C. 22809, Mar. 15, 1908; 28645, July 5, 1911.*

I B 6 c (4). The examination of officers of the Medical Department for promotion is controlled by the provisions of the act of October 1, 1890, as replaced by the act of April 23, 1908 (35 Stat. 67), and subsequently modified in its application to medical officers of the grade of major by the act of March 3, 1909 (35 Stat. 737).[1] A major upon examination was found professionally suspended for a year and then found disqualified for promotion—incapacity in line of duty. It was urged that he was entitled to be retired with the rank of lieutenant colonel before a vacancy should occur in the grade of lieutenant colonel to which he would have been promoted if he had not been found incapacitated.[2] *Held* that he could not be retired with the rank of lieutenant colonel until a vacancy should occur in that grade. *C. 23135, June 5, 1909.*

---

[1] See 27 Op. Atty. Gen., 193, Feb. 19, 1909, in which it was *held* in the case of a major of the Medical Department, who was found incapacitated professionally for promotion and the finding approved by a board of review, that in view of apparent physical incapacity in line of duty not discovered at original examination he may be reexamined by order of the Secretary of War.

[2] See Retirement, I B 4 b, which announces the rule to be followed on a question of retirement with increased rank, when a vacancy occurs before the approval of the proceedings, to which the officer normally would have been entitled to promotion to if no question had been raised as to his incapacity.

I B 6 d. After an officer had successfully passed an examination for promotion, and before his promotion, he became incurably insane. *Held* that the approval of the favorable finding of the examining board did not bind the War Department to await his promotion. *Held*, further, that he might be given a second physical examination or might be ordered before a retiring board. *C. 28852, Aug. 14, 1911.*

I B 6 e (1). *Held* that the regulations prepared by the President under legislative sanction in furtherance of the act of October 1, 1890, are sufficiently mandatory in character as to warrant the disapproval of the proceedings of an examining board, whose members had failed to take the oath in the manner prescribed in the regulations as published in general orders of the department.[1] *Held* further that the subsequent swearing of the members did not operate to cure the defect as indicated in the record. *C. 20588, Oct. 25, 1906.*

I B 6 e (2). An examining board convened under the act of October 1, 1890, found an officer incapacitated for active service. The finding was approved. *Held* that as this officer was the senior in his grade, and a vacancy had occurred in the next grade, this operated to transfer the officer from the active to the retired list and to place him in the status occupied by retired officers in the operation of sections 1255 and 1257, R. S. The change of status having been legally accomplished, it is beyond the power of the Executive to restore the officer to the active list. *C. 23135, July 21, 1909.*

I B 6 f (1). Morphine was given to an officer to relieve neuralgic pain. Later the officer was found by an examining board to be incapacitated for active service, the cause being chronic morphinism, not in line of duty. *Held* that the acquisition of the habit had been contributed to sufficiently by incidents of the service to warrant the President in exercising his discretion and placing the officer's name on the retired list. *C. 22809, Apr. 16, 1908.*

I B 7 a. An examining board convened under the act of April 23, 1908 (35 Stat. 67), as amended by the act of March 3, 1909 (35 Stat. 737) found that a major of the Medical Corps was not qualified professionally for promotion. *Held* that the proceedings of the board should be referred to a board of review. If the latter board disapproves the findings of the board of examination the officer will be entitled to his promotion, but if it approves those findings the course outlined by the statute should be followed, viz, suspension from promotion for a period of one year with a later examination at the end of that period, and in the event of a second similar failure to establish the necessary professional qualifications for advancement, retirement without promotion. *C. 23135, Nov. 12, 1909.*

I C 1 a. A retired officer served with credit against the enemy while on leave of absence from the Military Academy preceding April 9, 1865. *Held* that he served otherwise than as a cadet and was entitled to advancement in grade under the act of April 23, 1904 (33 Stat. 264). *C. 19271, Mar. 2, 1906, Feb. 19, and Dec. 4, 1907.*

I C 1 b. The act of April 23, 1904 (33 Stat. 264), provides that an officer who served with credit as an officer or enlisted man, otherwise than as a cadet, during the Civil War, may in the discretion of the President, by and with the advice and consent of the Senate, have his

[1] An officer can not be retired on the findings of an examining board unless the President approve such findings. The approval of the Secretary of War is not sufficient. See 21 Op. Atty. Gen., 385, July 31, 1896.

name placed on the retired list of the Army, with rank and retired pay of one grade above that actually held by him at the date of retirement. *Held* that this did not apply to an officer who, during the Civil War, served as a midshipman at the Naval Academy; and did not participate during the Civil War against the enemy on land or sea, or in any respect otherwise than as a cadet. *C. 16243, Mar. 2, 1911.*

Held further that advancement was warranted under the statute in the case of a midshipman who had otherwise than as a cadet actually participated in the operation of the Civil War, and had voluntarily submitted to its hardships and dangers. *C. 16271, May 16, 1904; 16409, June 2, 1904, and Feb. 20, 1905; 22459, Dec. 24, 1907.*

I C 1 c. *Held* that an officer on the retired list can not be advanced in grade under the provisions of the act of April 23, 1904 (33 Stat. 264), because of service performed by him for the United States as a civil employee, no matter how nearly such service may be assimilated to that of a commissioned officer or an enlisted man, and even though he had taken the oath of allegiance to the United States.[1] *C. 16312, Sept. 29, 1904, and July 5, 1911; 16442, June 9, 1904; 16441, June 11, 1904; 19271, Feb. 28, 1907.*

I C 1 d. *Held* that an officer can not be advanced in grade under the terms of the act of April 23, 1904 (33 Stat. 264), because of service during the Civil War as a contract surgeon.[2] *C. 16672; from July 28, 1904, to June 30, 1909.*

I C 1 e. A retired officer served as a militiaman not called into the service of the United States, with credit against the enemy preceding April 9, 1865. *Held* that as he did not serve in the Regular Army or volunteer forces he was not entitled to advancement in grade under the act of April 23, 1904 (33 Stat. 264). *C. 19271, Feb. 3, 1908; 16312, Jan. 9, 1912.*

I C 2 a. After the act of April 23, 1904 (33 Stat. 264), had been passed, the question arose as to whether or not those officers on the retired list, who had served otherwise than in the Volunteers, and who were otherwise qualified, but who had been convicted by courts-martial preceding April 9, 1865, were subject to advancement under that act; *held*, that their conviction by court-martial did not render their services not creditable and that they were, therefore, subject to advancement. *C. 16313, May 7, 1904, and Mar. 24, 1909.*

I C 2 b. *Held* that an officer who has been retired under the act of October 1, 1890 (26 Stat. 562), can be advanced in grade on the retired list under the act of April 23, 1904 (33 Stat. 264).[3] *C. 28769, July 28, 1911.*

I C 2 c. The act of April 23, 1904 (33 Stat. 264), authorizes the President, in his discretion and with the consent of the Senate, to advance certain retired officers to a rank on the retired list one grade in advance of the rank actually held by them at the time of retirement. *Held* that this act does not operate in the case of a deceased officer.[4] *C. 16359, Dec. 27, 1911.*

---

[1] See 27 Op. Atty. Gen., 471, July 14, 1909, in which the expression "the regular or volunteer forces" mentioned in the act of Apr. 23, 1904, is defined as including "only those who by regular appointment in the usual way or by regular enlistment were members of the Regular or Volunteer Army."

[2] See 27 Op. Atty. Gen., 468, July 14, 1909.

[3] 25 Op. Atty. Gen., 312; 27 id., 212 Feb. 23, 1909.

[4] See 29 Op. Atty. Gen., 254, Sept. 22, 1911.

I D. In the case of an officer found incapacitated for active duty, *held* that he passes to the retired list upon the date when he is notified of the approved action of the retiring board in his case. *C. 23873, Sept. 19, 1908, and Apr. 6, 1909.*

I E. *Held* that when an officer has once been retired in pursuance of the requirement of a statute authorizing such retirement, the order by which such retirement was effected can not subsequently be revoked [1] or modified so as to make the retirement relate to another statute, even though the case was one to which more than one statute properly applied at the time when the retirement was accomplished. *C. 16416, May 27, 1904, Jan. 9, 1905, and Dec. 6, 1906.* Nor can the action be reopened by a new Secretary of War. *P. 41, 358, June, 1890; 42, 438, Sept., 1890; C. 16202, Apr. 20, 1904; 16416, May 27, 1904, Jan. 9, 1905, and Dec. 6, 1906.*

I F. As section 34 of the act of February 2, 1901 (31 Stat. 757) does not repeal section 1212, R. S., *held* that a retired officer is not authorized to wear any uniform other than that of his actual rank or to be addressed in orders or official communications by any title other than that of his actual rank. *C. 9826, Feb. 14, 1901.*

I G. Retired officers (except when assigned to duty under section 1259, R. S., or other statutes) do not exercise public office.[2] *C. 1121, Mar. 14, 1895; 1077, Mar. 1, 1895; 8126, May 2, 1900.*

I G 2 a. *Held* that in the sense in which the word "officer" is used in section 5498, R. S., a retired officer may not assist a regular soldier in getting the evidence necessary to support his application for a pension.[3] *C. 20254, Aug. 20, 1906; 19205, Feb. 12, 1906.*

I G 2 b. An officer on the retired list, being as much a part of the Army as an officer on the active list,[4] would be subject to trial by general court martial independently of the provision, specifically so subjecting him, of section 1256, R. S.[5] *R. 33, 613, Dec., 1872.* The retirement of an officer has no effect upon his status in respect to trial by court-martial, and he is equally liable to trial after as before retirement for an offense committed prior to his retirement, within the limitation prescribed in the one hundred and third article of war. *C. 25574, Sept. 14, 1909.*

I G 2 c. *Held* that as retired officers are a part of the Army, they are entitled to admission to the Government Hospital for the Insane upon a commitment issued by the Secretary of War; and that the expenses of furnishing a military escort constitutes a proper charge against the appropriation for transportation of the Army. *C. 23922, Oct. 1, 1908.*

---

[1] He can not be reinstated by order of the President. See 13 Op. Atty. Gen., 99 and 209, June 14, 1869, and Feb. 5, 1870, respectively, and 19 id., 609.

[2] See Andrew Geddes *v.* U. S., 38 Ct. Cls., 429, Mar. 9, 1903. See People *v.* Duane, 121 New York, 367. See Reed *v.* Sehon, 2 Cal. App. Rept., 55; 183 Pac. Reporter, 771. Rehearing denied by Supreme Court of State, Dec. 22, 1905.

[3] See 16 Ct. Cls., 223; 18 Ct. Cls., 25; 29 Ct. Cls., 6; 31 Ct. Cls., 35; U. S. *v.* Tyler (105 U. S., 244).

[4] See 25 Op. Atty. Gen., 185, July 11, 1904, and 15 Ct. Cls., 185. See also United States *v.* Tyler, 105 U. S., 244, Oct., 1881; Wood *v.* U. S., 107 U. S., 417; and VIII Comp. Dec., 443, Jan. 11, 1902. If a former officer by special act of Congress is appointed major in the Army and immediately retired, he must take the oath of office. (19 Op. Atty. Gen., 283; U. S. *v.* Gillmore, 189 Fed. Rep., 762.)

[5] A retired officer, upon conviction, may be sentenced similarly to an officer on the active list, except that the punishments of suspension and loss of files or relative rank are not appropriate to the status of a retired officer.

I G 2 d. It having been reported that a retired officer against whom there were pending proceedings for alimony by his wife was about to leave the United States to avoid the same, *held*, that it would be legal for the proper military authority to require the officer to remain within the jurisdiction of the civil court in which he had been proceeded against; the object being to protect the service from the disgrace which he would cast upon it by evading his obligations in such a case. *C. 5946, Mar. 2, 1899.*

I G 2 e. *Held* that under the principle which exempts from taxation by a State the salary of an officer of the United States, the salary of a retired Army officer is equally exempt from such taxation with the salary of officers on the active list of the Army. *C. 14582, Oct. 15, 1907; 22521, Dec. 19, 1907.*

I G 2 f. *Held* that a retired officer holds office within the meaning of section 1223, R. S., which provides for the vacation of his office by an officer of the Army who accepts or holds any appointment in the diplomatic or consular service of the Government.[1] *C. 14148, Dec. 15, 1911.*

I G 3 a (1). A retired officer may hold any Federal office to which he may be elected by the people or appointed by the President.[2] *C. 2301, Mar. 8, 1906; 4051, Apr. 25, 1898; 16823, Sept. 13, 1904; 17613, Mar. 6, 1905.* *Held* that he can not accept any position which is incompatible with his position as a retired officer. *Held*, further, that except as above he can not accept any office the salary of which is more than $2,500 per year otherwise than one under the direction of the Chief of Engineers in connection with river and harbor improvements.[3] *C. 14399, Apr. 8, 1903; 19353, Mar. 14, 1906, and June 23, 1909.* *Held*, further, that he may accept the position of Member of Congress.[4] *C. 2301, Oct. 22, 1910.*

I G 3 a (2) (*a*). Retired Army officers are precluded from holding diplomatic and consular offices by section 1223, R. S. (*R. 29, 1, June, 1869*), and this is the only existing prohibition.[5] *C. 2301, Mar. 8, 1906; 14399, Apr. 8, 1903.* There is no prohibition against their holding commissions in the military forces other than the Regular Army, whether militia or volunteers, and whether appointed by the President or governors of States. *C. 4051, Apr. 25, 1898.* Section 2 of the act of July 31, 1894 (28 Stat. 205), recognizes the legality of appointments of retired officers by the President, by and with the consent of the Senate, and such office may be office in the volunteer force as well as any other branch of the Government, except the

[1] See Badeau *v.* U. S., 30 U. S., 439.

[2] See 15 Op. Atty. Gen., 306; 19 id., 283; 22 id., 176 and 199; Meigs *v.* U. S. (19 Ct. Cls. 497); Converse *v.* U. S. (62 U. S., 464); U. S. *v.* Brindle (110 U. S., 688); U. S. *v.* Saunders (120 U. S., 126).

[3] See sec. 7, act of June 2, 1896 (29 Stat. 235), and sec. 2, act of July 31, 1894 (28 Stat. 205). See II Comp. Dec., 596, June 12, 1896.

[4] See par. 231, Dig. 2d Comp. Dec., Vol. IV., Feb. 24, 1894. *Held* that the position of assistant general treasurer and inspector general for disabled volunteer soldiers is not an office of the United States within the meaning of the act of July 31, 1894 (28 Stat. 205), and can be filled by a retired Army officer whose salary exceeds $2,500 per year. See also VIII Comp. Dec., 443, Jan. 11, 1902, and 38 Ct. Cls., 428.

[5] See 15 Op. Atty. Gen., 306, June 11, 1877, and 407, Dec. 11, 1877. See 19 id. 283 and 609, and 21 id., 510, Mar. 26, 1897, and Badeau *v.* U. S. (130 U. S., 439).

That a *resignation* of a second office, the acceptance of which has operated to vacate an office previously held, will not work a reinvestiture of the original office, see *In re* Corliss, 11 R. I., 643.

Regular Army. And assuming that a retired officer holds an office within the meaning of this statute, governors of States may appoint them officers of Volunteers, provided their annual compensation as retired officers is less than $2,500, even if it should he held that they do not come within the description of "officers of the Regular Army" as that term is used in the tenth, eleventh, and thirteenth sections of the act of April 22, 1898. *C. 4051, Apr., 1898; 22500, Dec. 19, 1907.*

I G 3 a (2) (*b*). The act of Congress approved July 31, 1894 (28 Stat. 205), provides that "no person who holds an office the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars shall be appointed to, or hold any other office to which compensation is attached unless specially heretofore or hereafter specially authorized thereto by law; but this shall not apply to retired officers of the Army or Navy whenever they may be elected to public office, or whenever the President shall appoint them to office by and with the advice and consent of the Senate." This legislation seems to assume that a retired officer holds a public office. But that a retired officer does not hold an office has not always, nor even generally, been conceded.[1] But irrespective of this consideration the legislation does not apply to those whose salaries are less than $2,500. *C. 1121, Mar., 1895; 2301, May, 1896; 8126, May, 1900.*

I G 3 a (3). *Held* that, under the opinion of the Attorney General of June 11, 1877, distinguishing between the receiving of compensation for extra services[2] and of compensation for two distinct (and not incompatible) offices, a retired officer could legally hold the office of a clerk in the Quartermaster Department, and receive the pay of such office, while at the same time retaining his office in the Army and receiving the pay of the same.[3] *R. 43, 197, Feb., 1880.*

---

[1] In people *v.* Duane, 121 N. Y., 367, the Court of Appeals of N. Y. held, in a forcible and elaborate judgment, that a retired officer did not hold an office within the meaning of a statute of that State authorizing the appointment of aqueduct commissioners and providing that "they and their successors shall hold no other Federal, State, or municipal office except the offices of notary public and commissioner of deeds." The question as to whether retired officers hold offices was treated as doubtful by the Attorney General in an opinion as to whether Gen. Sickles, a Member of Congress, could receive his pay as a retired officer, 20 Op., 686; but in this matter Second Comptroller Mansur held in an elaborate decision dated Feb. 24, 1894, that "the place and rank on the retired list held by an officer of the Army is a military office under the United States." The following cases treat retired officers as holding offices: Tyler *v.* U. S., 16 Ct. Cls., 223; U. S. *v.* Tyler, 105 U. S., 244; Wood *v.* U. S., 15 Ct. Cls., 151, and 107 U. S., 414; Franklin *v.* U. S., 29 Ct. Cls., 6; Badeau *v.* U. S., 130 U. S., 439; State *v.* De Gress, 53 Texas, 387; case of Maj. Smith, 19 Op. Atty. Gen., 283. See also, II Comp. Dec., 7. Decision of Comptroller in the case of Capt. Geddes, VII Comp. Dec. (dated Feb. 6, 1901). In the cases of Tyler and Winthrop *supra*, the Court of Claims held that retired officers of the Army are officers within the meaning of section 5498, R. S., which prohibits officers of the United States from acting as agents or attorneys for prosecuting claims against the Government.

[2] A retired officer may be employed by the War Department to supervise work where he could not have been assigned to that duty. 25 Ct. Cls., 296, also 38 id., 39.

A retired officer is not prohibited by law from holding office in an executive department, nor from receiving the salary thereof in addition to his retired pay. Collins *v.* U. S., 15 Ct. Cls., 22; Meigs *v.* U. S., 19 id., 497; Yates *v.* U. S., 25 id. 296; 19 Op. Atty. Gen., 283. If the retired officer receives $2,500 or more, the holding of any other office is forbidden by sec. 2 of the act of July 31, 1894 (28 Stat. 205), except as specified in that act. See also sec. 7, act of July 3, 1896 (29 Stat. 235), as to employment of retired officers on rivers and harbors.

[3] 15 Op. Atty. Gen. 306. And see id. 608, and 16 id. 7, based like the opinion referred to in the text, mainly upon the ruling of the United States Supreme Court in Converse *v.* United States, 21 Howard, 463.

I G 3 b. *Held* that a retired officer may accept any State office in the absence of a State statute to the contrary. *C. 3327, June 30, 1897; R. 31, 136, Jan., 1871; 41, 662, Aug., 1879; 42, 165, Feb., 1879; C. 22500, Dec. 19, 1907.* Thus, he may accept the position of mayor of a city. *C. 2301, Nov. 23, 1905, July 22, 1908, and Mar. 13, 1909;*[1] *4051, Apr., 1898; 14063, Jan. 27, 1903.* Or he may accept the position as member of the State legislature. *C. 2301, July 22, 1908, and July 27, 1910. Held,* however, that if he is on duty with the militia of a State, it would be incompatible with the spirit of his duty for him to accept the position of member of a State legislature. *C. 2301, Dec. 14, 1910.*

Held that he may accept the position of adjutant general of a State, or colonel of a regiment in the National Guard of a State. *C. 17631, Mar. 6, 1905; 17764, Mar. 24, 1905.* Or while on college duty a commission in the National Guard. *C. 22170, Oct. 5, 1907.* *Held* also that he may hold the position of prison physician. *C. 2301, Sept. 13, 1911.*

I H 1. *Held* that there is no objection to a retired officer acting as counsel for an officer before a court-martial or retiring board, and to receiving such fees or other compensation as may be agreed upon by his client and himself. *C. 26975, July 5, 1910.*

I I. There is no provision of law or regulation authorizing the payment of the burial expenses of a retired officer. Army regulation 85 (87 of 1910) is limited, in the cases of officers dying at a military post, to those who die "when on duty" there, and therefore does not include retired officers who may die at a military post. *C. 3662, Nov., 1897; 22330, Nov. 8, 1907.*

I K 1. The act of April 21, 1904 (33 Stat. 225), authorizes the assignment of a retired officer "to active duty" in certain employments which are mentioned in the act; *held,* that the status of "active duty" which is provided for in the act, differs from the status of an officer in "active service," who has never been placed on the retired list.

In military phraseology, the term *active service* must be taken as indicating that an officer on such service has not been retired, and it follows that an officer on the retired list may be detailed to *active duty* but is not thereby removed from the retired list, or restored to active service. The incidents of the employment of a retired officer in the operation of competent orders may bear a close resemblance to active service, but differs from it in the fact that whatever may be the extent and character of such employment it is not and, in the absence of furthering legislation, it can not be regarded as restoring the officer to the *active list.*

The general status therefore of retired officers who under competent order are placed upon active duty is one involving pay and allowances given to them under the various statutes applying to their cases. The status of active duty in all such cases is but temporary, and is maintained only so long as the detail is continued. The status of an officer on active service is continuous, and is maintained by him until he either leaves the service entirely or is placed upon

[1] See Reed *v.* Sehon, 2d Cal. App. Reports, 55 (83 Pac. Rep., 77). Rehearing denied by the supreme court of California, Dec. 22, 1905. See, also, 15 Op. Atty. Gen., 306, June 11, 1877. See the act of Mar. 3, 1883 (22 Stat. 567), which authorizes retired Army officers to hold elective or appointive office in a Territory.

the retired list. While a duty status is given to the various retired officers for certain definite purposes, nowhere do we find the suggestion that such active duty removes them from the retired list and places them once more upon the active list of the Army. The difference between the retired list and the active list is one which does not depend on the question of pay which an officer may be drawing under any given detail. *C. 24306, Feb. 25, 1909; 23623, Oct. 11, 1909; 23760, Aug. 22, 1908.*

I K 2 a. *Held* that the phrase "staff duties not involving service with troops" which occurs in the act of April 23, 1904 (33 Stat. 225), contemplates only staff duties in connection with the existing military establishment. *Held* further that the above law can not be held to authorize the detail of retired officers on full pay to the duty of familiarizing themselves with the facts in pending litigation in order that they may appear as witnesses. *C. 23916, Jan. 12, 1911.*

I K 2 b. The act of April 23, 1904 (33 Stat. 264), authorizing the detail of retired officers "with their consent to staff duties not involving service with troops," should be read in connection with the several enactments of Congress which fix the commissioned strength and prescribe the duties of the several staff departments. *Held*, that, except in case of unusual emergency, an officer of the retired list can not properly be assigned to staff duty which, under the law, officers of the staff departments are expected to perform. *C. 22635, Jan. 18, 1908.* *Held*, also, that the views above expressed would not apply in strictness to the assignment of a retired officer to an employment in a staff department the duties of which are performed—not by a commissioned officer, but by a civilian; such would be the case when a retired officer is employed as an inspector of articles supplied under contract. Such employment, however, would be subject to the objection that the rank of the retired officer would be revived by his assignment to active duty, and considerable friction and inconvenience would doubtless arise were he assigned to duty under a junior in rank. For the reason above stated such assignments are believed to be inexpedient and are not recommended. *C. 16311, Jan. 2, 1906; 22635, Jan. 18, 1908.*

I K 2 c. *Held* that the limitation in the act of April 23, 1904, expressed by the words "service with troops" as contained in the clause "staff duties not involving service with troops" is fully accomplished when details of retired officers to staff duties are so limited that they are called upon to exercise, in representation of superior authority, functions of command over organizations of troops in the Regular Army. *Held* further that a retired officer may be assigned, with his consent, to the duty of librarian at the service schools (*C. 20030, July 11, 1906*), or to duty in charge of construction work in the Quartermaster's Department. *C. 29052, Oct. 3, 1911.*

I K 2 d. *Held* that a retired officer on active duty, without troops, at Fort Bayard, N. Mex., should be furnished with quarters in kind, after the staff of the hospital has been provided for; and if no quarters remain, authority to hire the necessary quarters should be furnished. *C. 25890, Dec. 6, 1909.*

I K 2 e. The act of March 3, 1909 (35 Stat. 836), authorized the Secretary of War to appoint a court of inquiry consisting of five officers of the United States Army to hear and report upon all charges and testimony relating to the shooting affray which took place at

Brownsville, Tex., on the night of August 13 and 14, 1906. *Held* that retired officers were eligible for such duty.[1] *C. 20754–A, May 25, 1909,*

I K 2 f. *Held* that under existing law retired officers may, with their consent, be appointed members of general courts-martial, and that courts composed entirely of retired officers may be convened for the trial of officers and enlisted men. *C. 28289, May 8, 1911.*

I K 3 a. A retired officer was detailed on college duty under the provisions of section 1225 R. S., as amended by the act of November 3, 1893[2] (28 Stat. 7). *Held* that he should be regarded as on active duty within the meaning of the act of March 2, 1905 (33 Stat. 831), and entitled to his full retired pay, unless he is a colonel or lieutenant colonel, in which case he will receive the full pay and allowances of a major on the active list. *C. 18199, June 26, 1905.*

I K 3 b. As section 1225 R. S. is permissive in character in its operation in the Territories, *held* that an officer on the active or retired list may be assigned to duty at a college or university in the Philippine Islands which has a capacity to educate at the same time not less than 150 male students. *C. 16485, June 21, 1904.*

I K 3 c. *Held* that section 1225 R. S. contains nothing that is locally inapplicable to Porto Rico, but that, on the contrary, its application to that island is of importance to the United States to further its military policy in respect of the dissemination of military instruction, and that under said section a retired officer of the Army may be detailed to an institution of learning in Porto Rico. *C. 27865, Feb. 15, 1911.*

I K 4. The act of May 11, 1908 (35 Stat. 108), as amended, authorizes six months' pay to the widow of an officer or enlisted man who dies on the "active list"; *held* that a retired officer assigned to "active duty," in the operation of the act of April 21, 1904 (33 Stat. 225), is not an officer of the "active list" within the meaning of the act of May 11, 1908. *C. 23760, Aug. 22, 1908.*

I K 5. *Held* that a quartermaster may not issue or sell to retired officers, even if they are on active duty, furniture which he has purchased under the terms of the act of May 11, 1908 (35 Stat. 119). *C. 23623, Oct. 11, 1909.*

I L 1. Officers on the retired list are entitled to longevity pay[3] which had accrued previous to retirement. *Held* that this limitation does not hold as to those who are retired on account of wounds received in battle.[4] *C. 15878, Feb. 9, 1904.*

I M 1. Where an officer did not make the journey to his home under the order retiring him until one year and a half after his retirement, his claim for mileage was disapproved by the Secretary of War June 5, 1890, "for the reason that the journey * * * to the place he now

---

[1] For detail of court, see Special Orders, No. 79, War Department, 1909. For report of court, see Senate Document No. 701 (61st Cong., 3d sess.). All of the members were retired officers, but the recorder was on the active list.

[2] See 20 Op. Atty. Gen., 687.

[3] See 16 Ct. Cls., 223. That an officer placed upon the retired list can not, by an Executive order, be allowed any pay greater than or additional to that authorized by statute to be paid to retired officers. See 15 Op. Atty. Gen., 442. The rank and pay of retired officers are matters within the control of Congress. Wood *v.* U. S., 15 Ct. Cls., 151, and 107 U. S., 414. See also 105 U. S., 244.

[4] Also no time can be allowed for time served on active duty after retirement. XV Comp. Dec., 235, Oct. 13, 1908. See act of Mar. 2, 1903 (32 Stat. 932).

calls his home at so long a period after the date of his retirement can not be considered as falling within the rule of giving an officer mileage when retired, to enable him to resume his residence at his home.[1] * * * *." *C. 2978, Mar., 1897.*

I M 2. *Held* that a retired officer is entitled to the mileage and witness fees of a civilian witness when subpœnaed as a witness before a general court-martial.[2] *C. 19611, Apr. 28, 1906.*

I N 1. *Held* that an officer may be wholly retired [3] for being "mentally incapacitated for performing the duties of an officer of the Army and that such incapacitation does not result from long and faithful service, or any cause incident to the service, but from natural causes which existed prior to his entry into the military service." *C. 10820, July 9, 1901.*

I N 2. The provision of section 1253, R. S., that an officer shall not "be *wholly* retired from the service without a full and fair hearing before an Army retiring board, if, upon due summons he demands it," may be said to entitle an officer subject to be thus retired, to appear before the board (with counsel if desired), and to introduce testimony of his own, and cross-examine the witnesses examined by the board, including the medical members of the board who may have taken part in the medical examination and have stated or reported to the board the result of the same.[4] *R. 23, 626, Aug., 1867; 31, 603, Aug., 1871.* If the officer does not elect to appear before the board when summoned, he waives the right to a hearing, and can not properly

[1] In this case the Comptroller of the Treasury later held (vol. 4, p. 175) that an officer "retired and ordered to repair to his home should promptly obey the order and should be deemed to have selected the place to which he repairs within a reasonable time as his home."

[2] See X Comp. Dec., 51, July 15, 1903.

[3] It will be instructive to note some of the causes for which officers have been wholly retired, as follows: For "chronic alcoholism" (*C. 28224 and 28288, May 8, 1911*); for being "utterly unfit for the performance of the duties required of him by law and regulations under his present commission, and such unfitness is not the consequence of his military service. His mental condition is abnormal, and his unfitness for duty is clearly due to such mental condition, but he is not insane, and the abnormal condition which the board has discovered to exist antedates his admission to the medical staff of the Army" (*C. 10820, July 6, 1910*); for "mental inaptitude which existed before entering into the service and which has been found to be progressive and which has been aggravated and intensified by the excessive use of alcoholic stimulants while in the service" (*C. 26234, Apr. 24, 1911*); for "age and corpulency, which condition existed prior to his entry into the regular establishment" (*C. 28224, Apr. 27, 1911*); for "constitutionally weak condition of the heart, lungs, and stomach" and for "valvular weakness of the heart preexistent to his entry into the service"; for "physical weakness preexistent to his entry into service"; for "incapacity resulting from immoral conduct"; for "sickness not an incident to the service"; for "neglecting to properly care for a disease originally contracted in line of duty"; for "insanity not incident to the service"; for "improper use of stimulants and anesthetics"; for "general anemia and epilepsy not incident to the service"; for "mental alienation of the form known as melancholia of persecution which existed prior to entry into service"; for "neurasthenia not an incident of the service"; for "cardiac dilatation and fatty degeneration existing prior to entry into service"; for "disability resulting from abuse of narcotics and stimulants"; for "disability brought about by the excessive use of morphine and cocaine"; for "disability resulting from immoral conduct"; and for "mental incapacity existing prior to his entry into service." *C. 28224, Apr. 27, 1911.*

[4] The provisions of secs. 1245 and 1252, R. S., authorizing the President to "*wholly* retire" an officer, are not inconsistent with those of sec. 1229 and the ninety-ninth article of war, prohibiting the dismissal of officers by executive order in time of peace. Sections of the same statute, as these are (see Revised Statutes, *post*), must all be given equal force and effect, unless repugnant and irreconcilable.

take exception to a conclusion arrived at in his absence.[1] *R. 20, 621, May, 1866.*

I N 3. The provisions of section 1275, R. S., that an officer wholly retired[2] shall receive, upon retirement, one year's pay and allowances, entitles such an officer to receive a sum equal to the total of one year's pay and all the pecuniary allowances of an officer of his rank. *R. 29, 360, Oct., 1869.* And *held*, that the fact that an officer, at the time of being wholly retired, was under a sentence of suspension from rank and pay, did not affect his right to receive such full sum upon the retirement. *R. 29, 645, Jan., 1870.* But officers wholly retired, unlike officers otherwise retired, are not entitled upon retirement to the authorized change of station allowance of baggage, etc., to their homes. *C. 2071, Feb., 1898.*

I N 4. An officer when wholly retired, becomes a civilian and no authority exists for shipping his goods to his home at public expense. *C. 2071, Oct. 5, 1908.*

I O. *Held*, that an officer upon retirement may designate a city in Porto Rico as his home, and thereby become entitled to transporta tion to that place for his baggage. *C. 23915, Oct. 2, 1908.* *Held* further, that he is not entitled to a transportation request for such sea travel for himself, but that he must pay for the transportation by sea, subject to subsequent reimbursement by the Pay Department for the expenses actually incurred by him in the performance of the journey. *C. 23915, Nov. 3, 1908.*

II A 1 a. A soldier who had been previously discharged for disability reenlisted by concealing the fact of such discharge, and after having served 30 years, by successive reenlistments, applied for retirement. *Held*, that he was entitled to be retired on such service, since the only requisite in the act of September 30, 1890 (26 Stats. 504), is that the soldier shall have rendered and the Government received from him 30 years' service as an enlisted man. *C. 2022, Jan. 29, 1896.*

II A 1 b. An enlisted man was held to serve in an enlistment which was fraudulent, due to his concealing the fact at enlistment that he had been previously discharged without honor. *Held*, that in view of the fact that the Government continued him in service without trial, his service previous to his discharge without honor, as well as his service subsequent thereto counted toward retirement. *C. 22855, Mar. 11, 1908.*

II A 1 c. An enlisted man was held to service in an enlistment which was fraudulent, due to his concealing the fact at enlistment that he had been dishonorably discharged. *Held*, that the service subsequent to the dishonorable discharge was valid for retirement, but the service previous to the dishonorable discharge was not. *C. 27073, July 22, 1910; 27507, Nov. 19, 1910.*

II A 1 d. *Held*, that time actually served in a fraudulent enlistment without a discharge from a previous enlistment counts for

---

[1] It is held by the Attorney General (16 Op. 20) that where an officer of the Navy had been retired without having had, through no fault of his own, the full and fair hearing before the board to which he was entitled by sec. 1455, R. S., and the vacancy on the active list occasioned by his retirement had not been filled, the President would be authorized to revoke the order of the retirement so that the officer might have the proper hearing, before final action in his case.

[2] After being wholly retired an officer becomes a private citizen (19 Ct. Cls., 338).

retirement.[1] *C. 355, Sept., 1894; 2022, Jan., 1896; 3777, Oct. 21, 1899; 7108, Oct., 1899.*

II A 2. A marine, after serving nine years and six months in the Marine Corps, deserted therefrom in 1866, and subsequently while thus in desertion served about 16 years in the Army. *Held* that if his service in the Marine Corps during the Civil War was "active service" within the meaning of the act of February 14, 1885 (23 Stat. 305), as amended by the act of September 30, 1890 (26 Stat. 504), he would be eligible under said acts for retirement. *C. 6693, July 3, 1899.*

II A 3. *Held* that service as a commissioned officer of volunteers or in the Philippine Scouts during the War with Spain in 1898 counts toward the retirement of an enlisted man.[2] *C. 12913, July 25, 1910; 8696, Aug., 1900; 10041, Mar. 25, 1901; 29270, Nov. 28, 1911.*

II A 3 a. *Held* that there is no law which authorizes service as an officer in the Philippine Constabulary to be credited toward the retirement of an enlisted man in the United States Army. *C. 23327, Aug. 11, 1909.*

II A 4 a. *Held* that the term "war service" in the proviso of the act of September 30, 1890 (26 Stat. 504), relating to the computing of the period of such service with a view to the retirement of enlisted men, included service as a commissioned officer equally with service as an enlisted man. *P. 44, 209, Dec., 1890; C. 8473, June 25, 1900; 10041, Mar. 25, 1901. But see C. 22403, Nov. 23, 1907.*

II A 4 b. The act of April 23, 1904 (33 Stat. 264), provides that "hereafter, in computing length of service for retirement, credit shall be given soldiers for double the time of their actual service in China, Cuba, the Philippine islands, the Island of Guam, Alaska, and Panama; but double credit shall not be given for service hereafter rendered in Porto Rico or the Territory of Hawaii. *Held* that "hereafter," as used in the clause above cited, fixes the date when the statute becomes operative, viz, April 23, 1904. *Held*, further, that double time should be credited for service rendered in China, Cuba, the Philippine Islands, Guam, Alaska, and Panama. *Held*, further, that service rendered in Porto Rico prior to April 23, 1904, should be counted double; subsequent to that date it should be counted at its actual duration. *C. 16443, June 11, 1904.*

II A 4 b (1). In computing the time of service required for retirement of an enlisted man, *held* that the words "actual service," which occur in the act of May 26, 1900 (31 Stat. 211), and in the act of April 23, 1904 (33 Stat. 264), apply to a soldier who occupies a status of present with his command, either for duty, sick, or in confinement. *Held*, further, that the status so created is different from that occupied by a soldier who is absent on furlough, during which no actual service is being rendered. *Held*, further, that if a soldier while serving beyond the sea goes on furlough, such period spent on furlough will not be counted as double time toward retirement. *C. 26995, July 11 and 29, 1910; 8529, June 29, 1900; 14187, Feb. 25, 1903. Held*, further, that the date when the soldier crosses the boundary of the territorial possession is the date when the actual service begins. *C. 26995, July 11, 1910.*

---

[1] Comptroller holds otherwise in MSS. decision dated Sept. 28, 1900, filed with C. 3777.

[2] See acts of Mar. 2, 1903 (32 Stat. 934), and June 12, 1906 (34 Stat. 247).

II A 4 b (2). *Held* that an enlisted man is entitled under the act of May 26, 1900 (31 Stat. 209), to have service on an Inter-Island Transport in the Philippine Islands count double for the purpose of retirement. *C. 15311, Oct. 2, 1903.*

II A 4 c. Under the act of May 26, 1900 (31 Stat. 211), as amended by act of April 23, 1904 (33 Stat. 264), service in the Philippine Islands, etc., counts double for purposes of retirement. Under the act of February 2, 1901 (31 Stat. 757), authority was granted for the enlistment of native troops. *Held* that a construction of these statutes which would permit service by natives of the Philippine Islands, in the Philippine Islands, to count double for purposes of retirement is not permissible.[1] *C. 29355, Jan. 5, 1912.*

II B 1. *Held* that retired enlisted men are not formally discharged from the service at the date of their retirement.[2] They are, in fact, pensioners; their retired pay being in consideration of past services. By statute they continue to be subject to the Articles of War and to military orders, and to such discipline as is consistent with their status; but there is no authority for their employment on military duty. *C. 24788, Apr. 17, 1909; 8445, June 22, 1900; 10843, July 12, 1901; 14336, May 6, 1903.*

II B 2. On the question of whether a retired post quartermaster sergeant who solicited by means of a printed circular the claims of enlisted men to the 20 per cent increase pay for foreign service should be prosecuted under section 5498, R. S., *held* that the sergeant was not prohibited by the statute from assisting in the prosecution of claims mentioned in his circular, nor was it improper for any such claimants to turn their claims over to him. *C. 18202, June 29, 1905.*

II B 3. *Held* that military control over him in so far as such administrative or disciplinary control is necessary is vested in the commanding general of the department in which the retired enlisted man resides. *C. 16401, June 1, 1904; 17182, Nov. 28, 1904.*

II B 3 a. *Held* that a retired enlisted man may be tried for not paying his debts. *C. 2716, Nov. 2, 1896.*

II B 3 b. *Held* that a retired soldier may be furnished subsistence in kind instead of the commutation allowances during the time he may be in confinement at a military post under military charges, and either subsistence in kind or full commutation while en route under guard to or from the post. *C. 3234, June, 1897.*

II B 4 a. *Held* that a retired enlisted man must secure the permission of the War Department to reside abroad. *C. 28028, Mar. 28, 1911.*

---

[1] See Smythe *v.* Fiske, 23 Wall., 374, in which it is held that "a thing may be within the letter of a statute and not within its meaning."

See also People *v.* Utica Ins. Co., 15 Johns, 358, in which it is held that "a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter, and a thing that is within the letter of the statute is not within the statute unless it be within the intention of the makers."

See also United States *v.* Kirby, 7 Wall., 482, in which it is held that "all laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an *absurd consequence*. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter." The language of this latter citation is cited in Hawaii *v.* Mankichi, 190 U. S., 197, where other authorities to the same effect are also cited.

[2] See G. O. No. 43. A. G. O., 1889, and Digest 2d Comp. Dec., Vol. III, par. 874, Aug. 9, 1888.

II B 4 b. *Held*, that a retired enlisted man may not, without a revocable license from the Secretary of War, occupy quarters on a military reservation unless he is employed on the reservation. *C. 304, Sept. 13, 1894; 1330, June 5, 1895; 1968, Jan. 15, 1896; 2699, Oct. 26, 1896.*

II B 5. *Held*, that, as a retired soldier is a part of the Army, he is entitled to admission to the Government Hospital for the Insane. *Held*, further, that the cost of transporting him and attendants should not be charged against his pay. *C. 18746, Oct. 18, 1905; 25245, July 8, 1909.*

II B 6. A retired soldier may not be admitted to the Soldiers' Home. *C. 11790, Jan. 15, 1902; 18722, Oct. 18, 1905.*

II B 7. An enlisted man, three years after his retirement, applied for transportation to his home, under the provisions of General Order 43, Adjutant General's office, 1889. *Held* that by not availing himself within a reasonable time after retirement of his right to transportation and subsistence he had waived his right to the same.[1] *C. 2978, Mar. 2, 1897.*

II C 1. *Held*, that the pay of a retired soldier may be stopped to make good an overpayment. *C. 26161, Apr. 3, 1911.*

II C 2. As the post exchange is a Government instrumentality, *held* that the pay of a retired enlisted man may be stopped to reimburse the post exchange funds in payment of a debt. *Held*, further, that it may be stopped to reimburse company, hospital, bakery, post, and regimental funds. *C. 3171, June 7, 1897.*

II D 1. There is no statute of the United States or regulation of the War Department which prevents a retired enlisted man of the Army from accepting an office or employment under either the United States or a State. *Held*, therefore, that no law or regulation prevents a retired enlisted man from organizing and drilling a militia company. *C. 3638, Nov. 9, 1897.*

II D 2. *Held*, that a retired enlisted man may accept a commission as an officer of Philippine Scouts and serve as such. *C. 10843, July 12, 1901.*

II D 3. *Held*, that, in the absence of a State statute disqualifying him, a retired enlisted man may hold the office of city constable. *C. 1077, Mar. 1, 1895; 3638, Nov. 8, 1897; 14911, July 6, 1903.*

II D 4. The language "who have been honorably mustered out or discharged from the service of the United States" used in section 4847 R. S., in describing those persons who may be appointed superintendents of national cemeteries, *held* not to debar retired enlisted men from such appointments. *C. 24788, Apr. 16, 1909.*

II E 1. *Held*, in the absence of any legislation to the contrary, that retired enlisted men, like retired officers,[2] might legally be employed, in any department of the Government, as clerks, messengers, watchmen, etc., and received pay for such employment, while at the same time retaining their positions on the retired list and receiving retired pay.[3] *R. 56, 144, 493, May and Sept., 1888; P. 24, 240, May 5, 1888; C. 10843, July 12, 1901; 14911, July 6, 1903.*

---

[1] V Comp. Dec., 175.
[2] 15 Op. Atty. Gen., 306.
[3] See Digest 2d Comp. Dec., Vol. IV, par. 73, Sept. 28, 1894.

II E 2 a. *Held* that the law does not prohibit a retired soldier (musician) from following his profession in civil life because at one time he formed part of a military band. *C. 24179, Dec. 9, 1908.*

II E 2 b. *Held* that a retired enlisted man may accept employment as an instructor of high-school boys in military tactics. *C. 3638, Jan. 9, 1909.*

II E 2 c. *Held* that a retired enlisted man may accept a position as interpreter to the Austro-Hungarian commissioner at the St. Louis Exposition. *C. 16024, Mar. 15, 1904.*

II F 1 a. *Held* that the remains of a deceased retired soldier may not be shipped on a Government bill of lading. *Held*, further, that the cost of transportation in such a case is not a proper charge against the United States. *C. 13773, Dec. 8, 1902.*

II F 2. *Held*, that the enlistment of a retired soldier would operate to terminate his status of retirement. *C. 14511, Apr. 24, 1903.*

II F 3. An enlisted man on the retired list is subject to trial by court-martial (*C. 21089, Feb. 11, 1907*) and to dishonorable discharge by sentence, if such be adjudged. But the existing law, in entitling him to be retired if he complies with its conditions, evidently contemplates that he shall remain a pensioner on the bounty of the Government during the remainder of his life, if not forfeiting his claim by serious misconduct. So, *held*, that retired enlisted men could not legally be discharged by Executive order under the fourth Article of War, which contemplates soldiers on the active list only. *R. 55, 305, Jan., 1888; C. 18202, June 29, 1905.*

II G. An enlisted man with an exceedingly good record of service was retired as a private. He requested that the order be revoked, so that he could be retired as a noncommissioned officer. *Held*, that when he was retired, the power of the President was exhausted as to his case, and that the order retiring him could not be revoked.[1] *C. 20446, Sept. 27, 1906.*

III. Forage masters and wagon masters employed by the Quartermaster General under section 1137, R. S., are not "enlisted," and therefore not entitled to be retired under existing law—act of September 30, 1890 (26 Stat. 504). *P. 51, 466, Jan., 1892; C. 157, Aug. 9, 1894.*

RETIREMENT OF OFFICER.

Allowances while awaiting.....See PAY AND ALLOWANCES II A 2 a (2) (*a*).
Detailed staff officer.....See RANK I C 2.
Militiaman.....See MILITIA XVI D.

RETIREMENT OF SOLDIER.

See ABSENCE I C 4 f (1); (2).
Computation of time.....See ENLISTMENT I A 9 m.

RETIRING BOARD.

See RETIREMENT I B to C; N to O.
In Militia.....See MILITIA XVI C.

---

[1] 11 Op. Atty. Gen., pp. 8, 9; 12 id., 172, 358; 13 id., 387, 456; 14 id., 275; 15 id., 208; United States *v.* Bank of the Metropolis, 15 Peters, 400, 401, in which it is held that an Executive can not reopen a case decided by a previous Executive.

RETURNS.

Colleges.....See MILITARY INSTRUCTION II B 2 c.

RETURNS OFFICE.

See CONTRACTS XVII.

REVIEWING AUTHORITY.

See ARTICLES OF WAR CIV to CV; CVI A; CVII A; CXI A.
DISCIPLINE XIV to XV.

Charge not sustained.....See DESERTION XIV A 2.
Disapproval.....See DESERTION XIV A 5.
Evidence by.....See DISCIPLINE X A 3.
Garrison court.....See ARTICLES OF WAR CIV C 4.
Mitigation.....See ARTICLES OF WAR CXII A 1 b.
Of military commission.....See WAR I C 8 a (3) (*d*) [2].
Of summary court.....See DISCIPLINE XVI E 4 a; b.
Unauthorized punishment by.....See DISCIPLINE XVII B 1 g.

REVISED STATUTES.

See LAWS I A to II.

REVISION BY INFERIOR COURT.

See DISCIPLINE XVI E 4 b.

REVISION BY GENERAL COURT-MARTIAL.

See ARTICLES OF WAR CII F.
See DISCIPLINE IX N to O; XIII H.

By order of President of United States.....See DISCIPLINE XIV H 2.

REVOCATION.

Acceptance of resignation.....See OFFICE IV D 5 d to e.
Congress can not revoke executed sentence....See PARDON I B 1.
Contract can not be annulled.....See CONTRACTS XXI C.
Date of rank.....See RANK II A 3 to 4.
Discharge.....See CIVILIAN EMPLOYEES XI B 3.
DISCHARGE XV; XVI A to H.
ENLISTMENT I D 3 c (18) (*c*).
Discharge of cadet.....See OFFICE IV E 2 g (1) (*b*).
Dismissal.....See DISCHARGE XVII A.
OFFICE III F 1; IV E 1 b to c.
Muster in.....See VOLUNTEER ARMY II E to F.
Muster out.....See VOLUNTEER ARMY IV F to H.
Order proclaiming martial law.....See WAR I E 1 d to e.
Pardon.....See PARDON II A.
President's proclamation.....See WAR I C 12 a.
Resignation.....See OFFICE IV D 1.
Retirement of officer.....See RETIREMENT I B 3 d; 6 b (1); b (2); E.
Retirement of soldier.....See RETIREMENT II G.
Summary dismissal.....See OFFICE IV E 2 d to e.

REWARD.

Deserters.....See DESERTION V to VI.
Detection of crime.....See APPROPRIATIONS XII.

RIGHT OF WAY.

See PUBLIC PROPERTY VI to VII.
Joint title.....See PUBLIC PROPERTY II A 5.
Jurisdiction over.....See PUBLIC PROPERTY V D 1 a.
Military reservation.....See PUBLIC PROPERTY I A 1.
National cemeteries.....See PUBLIC PROPERTY IV A 2 to 3.
Public land.....See PUBLIC PROPERTY III C.

RIGHTS OF CITIZENSHIP.

See ALIEN.
Forfeited by desertion.....See DESERTION XIV B; B 1.

RIOT.

See ARMY II I to K.

RIOT ACT.

Reading of.....See ARMY II I 1.

RIVER COMMISSIONS.

See NAVIGABLE WATERS XI to XII.

RIVER AND HARBOR WORK.

See EIGHT-HOUR LAW IV.
See NAVIGABLE WATERS.
Appropriations.....See APPROPRIATIONS XIV; XXXVIII
Bond, execution of.....See BONDS I N.
Contracts in connection with.....See CONTRACTS VII F to G.
Dredging.....See CONTRACTS XLV.
Improvements.....See NAVIGABLE WATERS X to XI.

ROCK ISLAND BRIDGE.

Jurisdiction.....See COMMAND V A 3 c (1).
NAVIGABLE WATERS III D.

ROUND ROBIN.

Offense.....See ARTICLES OF WAR LXII D.

ROYALTY.

Lien upon patented article.....See PATENT II A.

RULES.

Of evidence.....See DISCIPLINE XI A to B.

SABERS.

Sharpened.....See WAR I C 5 a.

SAFE CONDUCT.

See WAR I C 10.

SALARY.

See TAX.
Exemption from taxes.....See RETIREMENT I G 2 e.

SALE.

See PUBLIC PROPERTY IX to X.
Damaged property.....See TAX III M.
Empty boxes, crates, etc.....See PUBLIC MONEY I J.
Garbage.....See PUBLIC PROPERTY I M.
Heat and light, to civilians not authorized..See PAY AND ALLOWANCES II A 1 e.
Public property to State.....See MILITIA IX B; B 1.
NAVIGABLE WATERS X F to G.
PUBLIC PROPERTY I A 4 a.
Uniform clothing.....See COMMAND V A 3 e.
PAY AND ALLOWANCES II A 3 a (4) (*a*).

SALVAGE.

See CLAIMS VI to VII.
On recapture.....See WAR I C 6 c (3) (*e*) [1].

SAMPLE.

With bids.....See CONTRACTS III I.

SANITARY INSPECTORS.

See COMMAND IV B.

SEA.

Boundary.....See PUBLIC PROPERTY II D.

SEAL.

Bonds, etc.....See BONDS I F to G.
Contracts.....See CONTRACTS XXXVI.

SEAMEN.

See ARMY I G 3 b (2) (*a*) [3] to [4].
See EIGHT-HOUR LAW IV.
Discharge.....See CIVILIAN EMPLOYEES XV A.

SECOND DESERTION.

See ARTICLES OF WAR CIII F 2 a; 3; 4.
See DESERTION V B 16.

SECRETARY OF THE TREASURY.

Control over bonds.....See BONDS I O.
Solvency of corporations.....See BONDS V L.

SECRETARY OF WAR.

See ARMY I B to C.
Action irrevocable after notice.....See CONTRACTS LIV.
American material.....See CONTRACTS XXIII G; H.

Appointments by.....See OFFICE III E to F.
Army bands.....See ARMY BANDS I C 2.
Attorney General, request on.....See DISCIPLINE IV B 4 a.
Bids, bonds, and contracts.....See CONTRACTS VI C.
Bridges, construction of.....See NAVIGABLE WATERS III to IV.
Cadets, authority over.....See ARMY I D 2 a; b.
Cadet, summary dismissal.....See DISCHARGE XVIII A.
Civil authorities, rule of comity.....See ARTICLES OF WAR LIX D.
ARMY I B 11.
Civil War claims.....See CLAIMS VII G.
Commutation of rations.....See PAY AND ALLOWANCES II A 3 b (1) (*a*).
Congressional relief for disbursing officer...See ARMY I B 6 b.
Contractor and eight-hour law.....See EIGHT-HOUR LAW VII.
Deposition by.....See ARTICLES OF WAR XCI A 1.
Deserters, enlistment of.....See ENLISTMENT I D 3 c (14).
Discharge by.....See DISCHARGE VI C 1; 2; XI B 1; 3.
Discharges by way of favor.....See PAY AND ALLOWANCES III C 2 c (3).
DISCHARGE VI to VII.
Dishonorable discharge irrevocable.....See DISCHARGE XIX.
Enlistments.....See ENLISTMENTS I A 10.
Evidence by.....See DISCIPLINE X D 1.
Extra duty by soldier.....See ARMY I E 2 c.
Fraudulent enlistment, disposition.....See ENLISTMENT I A 9 g to k.
Gift to United States.....See PUBLIC PROPERTY I F 4.
Heat and light allowance.....See PAY AND ALLOWANCES II A 1 b.
Honest and faithful service.....See ENLISTMENT I D 3 c (18) to d.
DISCHARGE XI to XII.
Indian country, trade license.....See INTOXICANTS III B.
Insane deserter.....See DESERTION VII A 2.
Insane persons, care of.....See INSANITY.
Insane soldiers, discharge.....See DISCHARGE V D.
Lawyer to represent United States.....See CLAIMS XII M.
License.....See PUBLIC PROPERTY I A 1.
Militia called forth.....See MILITIA I B.
Militia, property not loaned to.....See MILITIA IX C; XVI I 5; 6.
Muster-out order has force of law.....See VOLUNTEER ARMY IV A 1.
Nolle prosequi.....See DISCIPLINE III E 6.
Obstructions to navigation, removal.....See NAVIGABLE WATERS IX C.
Officer's leave status.....See ABSENCE I B 1 b.
Officer, summary dismissal.....See OFFICE IV E 2 c (1).
Officer, supplies purchased from.....See CONTRACTS XV A 2.
Orders by.....See COMMUNICATIONS I A 1.
Pardoning power, ineligible for.....See PARDON I B 1.
Personalty, disposition of.....See PUBLIC PROPERTY I A 3.
Post laundry.....See GOVERNMENT AGENCIES I A.
Predecessor's action irrevocable.....See CLAIMS I.
RETIREMENT I E.
President, Secretary acts for.....See DISCIPLINE III B 1.
Public property can not be given away.....See PUBLIC PROPERTY I A 5; B.
Public property can not be loaned.....See PUBLIC PROPERTY I C.
Public property, changes in or damage to....See PUBLIC PROPERTY VIII A 4 to 5.
Quartermaster sergeant's appointment.....See ARMY I E 2 b.
Records amended by.....See DISCHARGE XIX.
Reenlistment of deserter.....See DESERTION VI D; XVI A; A 1.
Regimental staff officers, appointment.....See COMMAND V C 1 a.
Regulations.....See CONTRACTS LI.
Reimbursements unauthorized.....See CLAIMS XII P.
Reward for deserter.....See DESERTION V B 6; 8 a; 9.
Reward for embezzler.....See DESERTION V B 18 a.
Right of way, can not grant.....See PUBLIC PROPERTY I A 1.
Sentence can not be corrected.....See DISCIPLINE XIV H 5.
Substitutes.....See ENLISTMENT II D.
Unassigned list of officers.....See ARMY I G 2 b (2).
Unliquidated damages.....See CLAIMS II.
Useless papers.....See OFFICIAL PAPERS I A 1 c.

SELF-DEFENSE.

See DISCIPLINE V D 2 a.

SENATE.

Confirmation of appointment.....See OFFICE III A 3.

SENIORITY.

Promotion by.....See OFFICE III B 1 to 2.

SENTENCE.

See DISCIPLINE XII B to C.
Confirmation, death or dismissal.....See ARTICLES OF WAR LXXII D 1; XCVI to XCVII.
Cumulative.....See DISCIPLINE XVII A 4 b.
Death.....See ARTICLES OF WAR XCVI A; B.
Disapproval, effect of acquittal.....See ARTICLES OF WAR XLVIII A 2.
Disclosing.....See ARTICLES OF WAR LXII D; LXXXIV C 4.
Dismissal.....See OFFICE IV E 1 to 2.
Exceeds limit.....See DISCIPLINE XIV E 9 c.
Executed, can not be pardoned.....See PARDON IX.
Executed, irrevocable.....See DISCIPLINE XV I to K.
OFFICE III F 1; IV E 1 b to c.
Executed, irrevocable by Congress.....See PARDON I B 1.
Fines.....See PAY AND ALLOWANCES III D to E.
Forfeiture.....See PAY AND ALLOWANCES III C 1 to 2.
Grounds for disapproval.....See DISCIPLINE XIV E 9 a to b.
Illegal.....See ARTICLES OF WAR CXII C.
DISCHARGE XV C 1; K 1.
Military commission.....See WAR I C 8 a (3) (*d*) [1]; (*e*).
Of military court.....See DISCIPLINE XII B 1 to F.
Null and void.....See DISCHARGE XIII E 1.
ENLISTMENT I D 3 d (5).
Pay while awaiting.....See PAY AND ALLOWANCES I A 1 b; c.
Reduction to the ranks.....See ARTICLES OF WAR LXXXIII C 2.
Reviewing authority's action.....See ARTICLES OF WAR CIV A to C 5 a.
DISCIPLINE XIV E to F.
Set aside.....See PAY AND ALLOWANCES I C 2.
Suspended.....See COMMAND V A 1 b.
DISCIPLINE XVII A 4 e.
PAY AND ALLOWANCES III A 2 a.

SENTINEL.

Homicide by.....See ARTICLES OF WAR LIX L 1; CII A to I.
On post.....See ARTICLES OF WAR LIX A.
Respect for.....See DISCIPLINE XVII B 1 d.

SEPARATE BRIGADE.

Convening authority.....See ARTICLES OF WAR LXXII D 1.
Reviewing authority after discontinuance of..See CIV C 1; 3; CVII A.
See DISCIPLINE XIV A 2.
Under 73 Article of War.....See ARTICLES OF WAR LXXIII to LXXIV.

SERVICE SCHOOLS.

Artillery school.....See APPROPRIATIONS XXXVII.
Instructors' leaves.....See ABSENCE I B 1 g (2); (2) (*a*).
Maneuvers, destruction of private property..See APPROPRIATIONS LVIII.
Medical school.....See APPROPRIATIONS XLIV.
Militia officers.....See MILITIA VI A 1.

SERVICE WITH TROOPS.

See RETIREMENT I K 2 c.

SERVITUDE.

Defensive purposes.....See NAVIGABLE WATERS II C.
Submerged land.....See NAVIGABLE WATERS II B to C.

SET OFF.

See CLAIMS VII B 6.
See CONTRACTS XVIII.

SHOES.

Manufactured at military prison.....See DISCIPLINE XVII A 4 g (2).

SIGNAL CORPS.

Inspection of funds.....See ARMY I B 2 b (2) (*a*).

SIGNATURE.

See CONTRACTS I to II.
Authority to sign.....See BONDS I S.
College bond.....See BONDS IV A to F; II.
End of contract.....See CONTRACTS XVI to XVII.
Junior dropped.....See NAME I B.
Middle initial dropped.....See NAME I A.
Omission of.....See CONTRACTS VI G.
Partnership.....See CONTRACT LVI.
To bond.....See BONDS I II 1.
Typewritten or stamped.....See CONTRACTS LIII.
Witness.....See BONDS I J.

SINGLE MAN.

Designation of beneficiary.....See GRATUITY I B 2; 4.

SKATING RINK.

Exclusion of soldiers from.....See UNIFORM I A 1; B 1 a.

SMALL-ARMS COMPETITION.

By militia.....See MILITIA VI C 2 to D.

SOCIETY BADGES.

See INSIGNIA OF MERIT III A to B.

SOLDIERS.

See ENLISTED MEN.

SOLDIERS' HOME.

I. AT WASHINGTON, D. C.
A. INMATES NOT SUBJECT TO ARTICLES OF WAR..... *Page 1010*
B. INMATES MAY LEAVE VOLUNTARILY.
C. ALLOWANCE OF SUPPLIES TO OFFICERS.
D. QUARTERS NOT PUBLIC..... *Page 1011*
E. TRANSPORTATION TO HOME OF NEEDY DISCHARGED SOLDIERS.
F. ESCHEAT TO UNITED STATES OF ESTATES OF DECEASED INMATES.
G. MAY ESTABLISH BRANCH..... *Page 1012*
H. TITLE IN UNITED STATES.
II. NATIONAL VOLUNTEER HOME.
III. STATE HOMES.

I A. Section 4824, R. S., subjecting the inmates of the Soldiers' Home to the Rules and Articles of War, is unconstitutional and a dead letter. These inmates are no part of the Army, nor are they supported by the United States. They are civilians occupying dwellings and sustained by funds held in trust for them. The territory of the home being within the District of Columbia, and not having been exempted by Congress from the operation of the criminal laws of the District, the inmates are subject to those laws like any other residents.[1] *P. 55, 406, Sept., 1892; C. 16062, Mar. 15, 1904; 18322, July 20, 1905; 22730, Feb. 10, 1908; 27456, Nov. 7, 1910.*

I B. An inmate is not required to remain at the home if he wishes to leave it. The privileges of the institution may be renounced by any act showing an intention to renounce them—such as direct notice of such intention, or by absenting himself with the evident purpose of not returning. In February, 1864, a certain inmate was transferred from the home to the Government Hospital for the Insane, and was discharged thence as sane in June, 1864. He did not return to the home and was not again heard of till March, 1886, when it was ascertained that he was at a State hospital for the insane. As he was sane when he left the Government hospital and did not return to the home within a reasonable time, but remained absent nearly 22 years, *held* that he must be deemed, in the absence of contrary evidence, to have intended to permanently separate himself from the institution, and that he therefore was not now an inmate or member of the same. *R. 50, 167, Apr., 1886.*

I C. The funds for the support of the Soldiers' Home are not of the class of public moneys annually appropriated for a specific object, as for the pay of the Army, but a special trust fund committed to and administered by the board of commissioners for the benefit of the institution. From an early period in the history of the home it has been the usage for the commissioners to permit the officers of the home (retired officers of the Army residing thereat), gratuitously to receive and use a reasonable portion of the ordinary supplies of fuel, light, forage, milk, ice and vegetables, either produced at the home or obtained for its consumption. *Held* that such allowance was not in contravention of law; that the articles thus issued are not of the class of military pay and emoluments, and therefore unauthorized because not allowed by law to retired officers, but are a reasonable share of

[1] Compare opinion of Attorney General in 20 Op., 514.

the supplies for the use and benefit of the home, the disposition of which is properly within the discretion of the commissioners as charged by law with the "government and interests" of the home. And similarly *held* in regard to the amount of $1,000, allowed annually out of such funds to the treasurer of the home, as a compensation for his special services and in consideration of his pecuniary responsibility as a bonded officer.[1] *P. 51, 296, Jan., 1892; C. 12965, Jan. 23, 1902.*

I D. *Held* that a medical officer of the Army, occupying quarters at the Soldiers' Home, was not thereby precluded from receiving commutation of quarters at New York, on being ordered to duty there as a member of a medical examining board. The quarters occupied by him at the home are not "public quarters"; he does not occupy them at the expense of the United States; and by allowing him the commutation the Government is not put to a double expense for his quarters. *P. 56, 174, Oct., 1892.*

I E. Section 4745, R. S., should not be construed as prohibiting the practice by which transportation to the Soldiers' Home is furnished by it to a needy discharged soldier, with the understanding that the home will repay itself out of his pension when collected. This is not a pledge, etc., of his pension by a discharged soldier within the meaning of section 4745, but a repayment by a governmental agency to itself out of money belonging to him and placed in his hands by law, of money advanced by it to him solely for his interest. *C. 5922, Feb., 1899.*

I F. The law of the United States for the District of Columbia is to the effect that where a person dies intestate, leaving an estate in the District and there is no relation of the intestate within the fifth degree, the estate shall belong to the United States. Under this law, whenever an inmate has died in the Soldiers' Home at Washington, D. C., leaving money in bank in that city, or other moneys or personal effects, in the District, the same become the property of the United States; and all such property and effects other than money should (by the proper proceedings in court) be converted into money, and then this, together with the money left by the soldier in bank or elsewhere in the District, should be turned into the United States Treasury by order of court, as money of estates escheated to the United States. Section 3689 of the United States Revised Statutes appropriates for the Soldiers' Home "*out of any moneys in the Treasury,* * * * all moneys belonging to the estates of deceased soldiers." After, therefore, the moneys and the proceeds of the other effects of inmates of the home have been paid by order of court into the United States Treasury as moneys of escheated estates, the Soldiers' Home is entitled to receive the same from the Treasury. The home is not, however, entitled to it until it shall have gone into the Treasury, so that section 3689 can apply to and appropriate it to the use of the home. It is not the duty and probably not within the power of the Soldiers' Home to move in the matter of enforcing the law with regard to the moneys or property of any estate, whether the decedents were inmates of the home or not. But as it is the duty of the Attorney General of the United States (through the United States attorney of this district) to look after and collect all moneys and property the United States is entitled to under the law, whether

[1] See opinion of Attorney General to same effect, in 20 Op. 350.

the decedents are inmates of the home or whether they are civilians who reside elsewhere in the District, *advised* that he be informed by the proper officials of the home of the death of all inmates who leave any money or property in the District and the whereabouts of the same, which it may be in his power to collect and turn into the Treasury, as above indicated. Money so turned in should be obtained by the home by direct application to the Treasury for the same. *C. 3493, Sept., 1897.*

I G. On the questions (1) whether the board of commissioners of the Soldiers' Home has authority to establish a branch home; (2) whether the Secretary of War has legal authority to grant to the Soldiers' Home the right to locate a branch of the home on a military reservation and to occupy buildings erected for the military establishment; and (3) whether, if such right were granted, the board of commissioners would have authority to expend funds of the Soldiers' Home in keeping such buildings in repair—*held*, first, that it was the intention of the original legislation relating to the Soldiers' Home to establish it at one *or more* places, and no subsequent legislation has interfered with this, except as to one locality, and that under the legislation as it now stands it would not be illegal to establish a branch; second, that the Secretary of War has no authority independently of Congress to grant away any interests in buildings erected on military reservations, but that he may do so under legislation of July 28, 1892 (27 Stat. 321), which vests him with authority, "when in his discretion it will be for the public good to lease for a period not exceeding five years, and revocable at any time, such property of the United States under his control as may not for the time be required for public use and for the leasing of which there is no authority under existing law"; and third, that if the Soldiers' Home may thus lease buildings on a military reservation, to be used as a branch, the expenditure of funds of the home in keeping the buildings in a condition fitting them for this purpose would be a legal expenditure notwithstanding that the home could not, on the termination of the lease, recover any money so expended. *C. 6818, July, 1899.*

I H. The Soldiers' Home is not a legal entity, but is simply an agency of the United States. The title to its property and funds is in the United States and it is supported by funds appropriated by Congress. As the title to its property is in the United States, it is not subject to attachment by private individuals. *C. 16767, Aug. 18, 1904.*

II. *Held* that section 4835, R. S., which provides that the inmates of the "National Home for Disabled Volunteer Soldiers" shall be subject to the rules and Articles of War, is unconstitutional, and that such inmates are not a part of the Army of the United States, but are civilians. *R. 30, 286, Apr., 1870; C. 12817, July 2, 1902.* *Held*, also, that under the act of March 3, 1891 (26 Stat. 984), all receipts must be reported to the Secretary of War. *P. 51, 104, Dec. 31, 1891.*

III. The act of August 27, 1888 (25 Stat. 450), makes provision for the payment of money by the United States to such States or Territories as have established, or which shall hereafter establish, State homes for disabled soldiers and sailors of the United States who served in the Civil War or in any previous war, who are disabled by age, disease, or otherwise, and by reason of such disability are incapable of earning a living. *Held* that the United States, aside from

verifying the number of inmates cared for, makes no inspections of, or exercises no supervision over, such State or Territorial homes. *C. 2222, Apr., 1898. Held*, further, that a State is entitled to receive under the above act an allowance on account of inmates who are insane and being cared for in asylums. *C. 3121, Apr., 1897.*

CROSS REFERENCE.

Attendant to entering inmate.....See ARMY I B 8.
Bonds of.....See BONDS I H 2.
Contracts with.....See CONTRACTS XVI E; XXXII.
Intoxicants, sale of.....See INTOXICANTS IV.
Retired soldier not eligible.....See RETIREMENT II B 6.
Taxation of inmates.....See TAX I F.

SPANISH WAR.

Beginning of.....See WAR I B 2.
Termination of.....See WAR I F 2.

SPECIFICATION.

See DISCIPLINE II A to H 2.
Defective.....See DISCIPLINE II A 1 a.

SPY.

Offense.....See WAR I C 2 d; 3 to 4.
Sentence.....See WAR I C 8 a (3) (*e*).
Trial by military commission.....See WAR I C 8 a (3) (*b*) [3].

UATTERS.

Indian country.....See ARMY II J 5.
Military reservation.....See PUBLIC PROPERTY II B 3 a; III H to I.

STAFF.

See ARMY I G to H.
Detailed.....See ARMY I B 2 a (1); G 3 to H.
OFFICE III B 6 a; D 1 c.
Soldiers, extra duty.....See PAY AND ALLOWANCES I C 6 b (3).

STAFF DUTY NOT INVOLVING SERVICE WITH TROOPS.

See RETIREMENT I K 2 to 4.

STAFF OFFICERS.

Battalion.....See OFFICE IV G.
Bond of.....See ARMY I G 3 b (1).
Command.....See COMMAND I A 1; VII A.
Convening authority.....See ARTICLES OF WAR LXII E L.
Detailed.....See ARMY I B 2 a (1); G 3 to 4.
OFFICE III B 6 a.
General Staff.....See OFFICE III D 1 c.
Leaves.....See ABSENCE I B 1 f.
Reviewing authority.....See DISCIPLINE XIV C.
State, payment of.....See MILITIA XI B.

STAMPS.

On bids.....See CONTRACTS VI G.

STATE.

Arms, right to carry.....See GOVERNMENT AGENCIES V.
Comity between military and civil.....See ARMY I B 11.
ARTICLES OF WAR LIX D.
Courts can not enjoin Federal agent.....See CONTRACTS LVIII.
Courts can not enjoin United States courts..See PUBLIC MONEY II C 6.
Flag, protected by.....See FLAG III.
Military reservation, jurisdiction over.....See PUBLIC PROPERTY V F 1 to 2.
Protection of.....See ARMY II A.
WAR I E I f.
Republican form of government.....See ARMY II I 4.
Submerged land, title to.....See NAVIGABLE WATERS II A to B.

STATE AND MUNICIPAL OFFICE.

Retired officers' eligibility for.....See RETIREMENT I G 3 b.

STATE CAMPS OF INSTRUCTION.

See MILITIA VI B 1 to 2.

STATE HOMES FOR DISABLED SOLDIERS.

See SOLDIERS' HOME III.

STATION.

Proper station.....See ABSENCE II B 6.

STATUS.

Absence with leave.....See ABSENCE I C 4 b.
Absence without leave.....See ABSENCE I C 1 b; II B 3; 4 a; b; 5.
PAY AND ALLOWANCES I C 2.
Accused, after disapproval.....See DISCIPLINE XIV E 9 b to c.
Accused after escape.....See DISCIPLINE VIII H 2.
Active service.....See RETIREMENT I k 1.
After acquittal.....See DISCIPLINE XII I 1.
After discharge without honor.....See PAY AND ALLOWANCES I C 5 b (1).
After dishonorable discharge.....See PAY AND ALLOWANCES I 5 b (2).
After resignation, dismissal.....See DISCIPLINE VIII I 1 to 2.
American National Red Cross in time of war.See RED CROSS II B.
Arrest.....See DISCIPLINE I B to C.
Awaiting orders.....See ABSENCE I B 1 h.
PAY AND ALLOWANCES I B 2.
Certificate of merit awarded during fraudulent enlistment.....See INSIGNIA OF MERIT II D.
Civilian, changed by enlistment.....See ENLISTMENT I A.
Civilian employees armed.....See CIVILIAN EMPLOYEES XIII to XIV.
Chief of Philippine Constabulary.....See COMMAND I C.
Confinement in penitentiary.....See DISCHARGE IV C.
Consolidation of regiments.....See VOLUNTEER ARMY II B 1 e.
Continuous service.....See PAY AND ALLOWANCES I C 5 to 6.
Contract dental surgeon.....See ARMY I G 3 d (4) (*d*).
Contract surgeon.....See ARMY I G 3 d (4) to (5).
Department commander, absent.....See ARTICLES OF WAR LXXI A.
Deserter after draft.....See ENLISTMENT II F.
Desertion fixed administratively.....See DESERTION XIV A 3; 5.
Dishonor.....See DISCHARGE II B 1.
Dismissed officer.....See PARDON XV B.
Duty.....See ABSENCE I A; B 1 b; b (1).
ARTICLES OF WAR XXXVIII B 1; 2.
Duty, termination.....See COMMUNICATIONS I B 2; C.

Duty with civil government, Philippine Islands ..... See ABSENCE I B 1 g (3).
Engineer officers ..... See NAVIGABLE WATERS X B 1.
Enrolled men ..... See ENLISTMENT II A.
Enrollment previous to muster in ..... See VOLUNTEER ARMY II A to B.
Escaped general prisoner ..... See PARDON II A.
Extra duty ..... See PAY AND ALLOWANCES I C 6 to 7.
General Staff officer ..... See ARMY I G 3 a (1) (*a*).
Honest and faithful service ..... See ENLISTMENT I D 3 a.
DISCHARGE XI to XII.
Honor ..... See DISCHARGE II B 2.
Illegally, dishonorably discharged ..... See DISCHARGE XVI G to H.
In hands of civil courts ..... See PAY AND ALLOWANCES I C 3.
Insane officer awaiting retirement ..... See RETIREMENT I B 6 d.
Medical cadets ..... See PAY AND ALLOWANCES I B 6 a.
Medical Reserve Corps officer ..... See ARMY I G 3 d (3) (*c*) to (4).
Member of general court-martial ..... See DISCIPLINE VI C.
Military, of enlisted men ..... See ARMY I E 3 to 4.
Militia at joint encampment ..... See MILITIA II A; B.
Militia when called forth ..... See MILITIA I D.
VOLUNTEER ARMY I.
Mustered-out Volunteer ..... See DISCIPLINE III B 2 b.
VOLUNTEER ARMY IV B to C.
Noncommissioned officers absent, sick ..... See ARMY I E 1 b.
Nurse Corps ..... See ARMY I G 3 d (6) (*a*) [1].
ABSENCE I D to E.
Officer after approval of examining board's proceedings ..... See RETIREMENT I B 6 e (2).
Officer after disapproval retiring board's finding ..... See RETIREMENT I B 3 b.
Officer in hands of civil authorities ..... See ABSENCE II A 1.
Officer on transport ..... See COMMAND V B 1.
Officer under charges in arrest, or under sentence, leave status ..... See COMMAND V A 1 b.
Officer under "conservator" ..... See DISCIPLINE III E 5 a.
Officer wholly retired ..... See RETIREMENT I N to O.
Orders affecting, take effect when? ..... See PAY AND ALLOWANCES III C 1 b.
Pay ..... See PAY AND ALLOWANCES I A to B.
Pensionable ..... See ABSENCE I B 1 b (1).
ARMY I G 3 b (2) (*a*) [3] [*b*].
Porto Rican Regiment ..... See ARMY I G 2 a (1).
Present with command ..... See RETIREMENT II A 4 b (1).
Prisoner after mitigation ..... See DISCIPLINE XVII A 4 f.
Prisoner of war ..... See WAR I C 11 c (6) to (7); 11 d (2) (*a*)
Retired officer ..... See RETIREMENT I C to N.
Retired soldier ..... See RETIREMENT II B to H.
Ship's officers ..... See ARMY I G 3 b (2) (*a*) [3] [*b*].
Shown by muster roll ..... See ABSENCE II B 8 b.
Soldier in hands of civil authorities ..... See COMMAND V A 2 c.
ENLISTMENT I B 2 b.
Soldier under punishment ..... See DISCIPLINE XI B 4 a; b.
Superintendent of national cemetery ..... See PUBLIC PROPERTY IV A 3 a.
Suspension from rank ..... See DISCIPLINE VIII G 1 c; c (1).
RETIREMENT I N 3.
Under act of April 23, 1904 (33 Stat. 264) ..... See RETIREMENT I C to D.
Volunteers ..... See VOLUNTEER ARMY I B to D; IV C.
Volunteers before muster-in ..... See VOLUNTEER ARMY II C to D; F 1 a to b
War, termination ..... See WAR I F 2; 3.

STATUTE.

See LAWS I to II.

STATUTE OF LIMITATION.

See ARTICLES OF WAR CIII to CIV.
Courts of inquiry ..... See DISCIPLINE XVI D.
Desertion ..... See DESERTION X D; XVII to XVIII.

STOPPAGE.

See CIVILIAN EMPLOYEES II to III.
See PAY AND ALLOWANCES III B to C.
Contract, faulty.....See CONTRACT II.
Deserter's pay.....See DESERTION V D to F; XIV to XV.
Government agencies, reimbursement.....See GOVERNMENT AGENCIES I B.
Private debts not paid thus.....See PRIVATE DEBTS II.
Retired soldiers.....See RETIREMENT II C to D.
Unauthorized.....See DISCIPLINE XVII B 1 f.
Under fifty-fourth article of war.....See ARTICLES OF WAR LIV B; C; C 1; D 1, 2.

STOREHOUSES.

Occupation of.....See CLAIMS VII C 2.

STREETS.

Boundary.....See PUBLIC PROPERTY II C.

STUDENTS.

College.....See MILITARY INSTRUCTION II B 1 to 2.
Company of militia.....See MILITIA III L.

SUBMERGED LAND.

Jurisdiction over.....See COMMAND V A 3 f.
Title to.....See PUBLIC PROPERTY II D 1.
Towing targets over lobster pots.....See ARMY I G 2 b (3).

SUBORNATION OF PERJURY.

See ARTICLES OF WAR LXI B 2.

SUBPŒNA.

By Judge Advocate.....See DISCIPLINE IV B 3 a to d (1).
Civil court.....See ARMY I E 5.
Duces tecum.....See DISCIPLINE VII E 1; XI A 17 b (2) (*a*).
Obedience to.....See DISCIPLINE X D.
Service of.....See DISCIPLINE X F to G.
Territorial courts.....See TERRITORIES II A.

SUBROGATION.

Surety to contract.....See CONTRACTS XIV I.

SUBSISTENCE.

Militia, sale to.....See MILITIA VI B 1 d; 2 g.
Officers' servants.....See ARMY I G 3 d (8) (*a*).
Prisoners.....See PAY AND ALLOWANCES III C 1 b (1).
Recruit.....See DESERTION XXII A.
Retired soldier.....See RETIREMENT II B 3 b.

SUBSISTENCE DEPARTMENT.

Allowances furnished by.....See PAY AND ALLOWANCES II A 3 b to c.
Details to.....See ARMY I B 2 b (1) (*a*); G 3 b (3) to (4).
Heat and light.....See APPROPRIATIONS XL.

SUBSTITUTE.

For draft.....See ENLISTMENT II D.

SUBSTITUTION.

In finding.....See DISCIPLINE XIII A 5 to 6.
Of punishment.....See ARTICLES OF WAR CXII A 1 b.

SUICIDE.

See GRATUITY I A 4 to 5; B 5.

SUMMARY COURT.

See DISCIPLINE XVI E to F.

SUMMARY DISCHARGE.

See DISCHARGE II B 1.
As pardon.....See PARDON XIII; XVI D.
Discharge without honor.....See DISCHARGE III A; F 2.
Organizations.....See DISCHARGE II B 4; III G.

SUMMARY DISMISSAL.

Cadets.....See DISCHARGE XVIII A.
Effect of.....See PAY AND ALLOWANCES III A 1 to 2.
Officer.....See OFFICE IV E 2 to 3.
Philippine Scout.....See DISCHARGE XX B.
Volunteer.....See OFFICE V A 7 c.

SUMMARY PUNISHMENT.

See DISCIPLINE I E 2.
Hazing.....See ARMY I D 3 b (2) (*a*).
Unauthorized.....See DISCIPLINE XVII B 1 to 2.

SUNDAY.

Enlistments on.....See ENLISTMENT I A 4.

SUPERIOR OFFICER.

See ARTICLES OF WAR XXI A.
Homicide of.....See ARTICLES OF WAR XXI E 1; 2.

SUPPLEMENTAL CONTRACT.

See CONTRACTS VII J to VIII; XX C 11.
Sureties on bond not bound.....See BONDS I M 3.

SUPPLIES.

See ARMY I G 3 b to H.
Allies furnish.....See CLAIMS VII B 6.
WAR I C 6 d (1).
Appropriation for.....See APPROPRIATIONS XXXI.
Sale of.....See PUBLIC PROPERTY IX A.
Salvers' suit.....See CLAIMS VI B.
To militia.....See MILITIA IX to X; XVI I to J.
Under section 3709, Revised Statutes.....See CONTRACTS VII C.

SUPPLY STAFF.

See ARMY I G 3 b to H.

SURETY.

See BONDS I M to N.
Acceptance of.....See BONDS IV K.
Bonds with corporate.....See BONDS V A to L.
Disbursing officer.....See BONDS II C; D.
Individual.....See BONDS III G.
Liability of.....See BONDS IV O.
Of contractor.....See CONTRACTS XIV I.
Officer as.....See BONDS II K.
Opportunity to enter.....See CONTRACTS XXIX.
Substitution of.....See BONDS II N.
To bonds.....See BONDS I M to N.

SURGEON.

Always on duty.....See ARTICLES OF WAR XXXVIII B 2.
Morphine prescribed.....See RETIREMENT I B 6 f (1).
Practice of.....See ARMY I G 3 d.
OFFICE IV A 2 e (4).
GOVERNMENT AGENCIES VI.

SURGEON GENERAL.

Duty of.....See ARMY I G 3 d (3) (*a*).
Library in office of.....See APPROPRIATIONS LIV.

SURVEYING OFFICER.

Fixes accountability.....See PUBLIC PROPERTY I F 3 to 4.
Jurisdiction of.....See ARTICLES OF WAR XVII C.
Militia.....See MILITIA IX H I.

SUSPENSION.

Cadet.....See ARMY I D 3 b (1).
Civilian employee.....See CIVILIAN EMPLOYEES XI B 1.
Effect.....See PAY AND ALLOWANCES III A 2 a.
Failure on examination.....See RETIREMENT I B 6 c to d.
From rank.....See OFFICE III B 1 a (2); (3).
RANK V to VI.

TARGET PRACTICE.

False record.....See ARTICLES OF WAR LXII D.
Is lawful.....See CLAIMS V.
Militia.....See MILITIA VI C to D; XI P.
Towing of targets.....See ARMY I G 2 b (3).

TARGET RANGES.

Acquisition of.....See MILITIA VI C 1 to 2.

TAX.[1]

I. TAXATION OF OFFICERS, SOLDIERS, EX-SOLDIERS, AND PENSIONERS AND THEIR PRIVATE PROPERTY.

A. OFFICER OR SOLDIER CAN NOT BE TAXED FOR PAY OR PROPERTY USED IN CONNECTION WITH MILITARY DUTIES..... *Page 1019*

B. ABOVE RULE APPLIES TO RETIRED OFFICERS AND SOLDIERS.... *Page 1021*

C. POLL TAX CAN NOT BE IMPOSED ON OFFICERS AND SOLDIERS.

D. OFFICERS AND SOLDIERS TAXABLE FOR PROPERTY NOT MILITARY.

E. RESIDENCE DEPENDS UPON INTENT.

F. FORMER SOLDIERS, PENSIONERS, AND INMATES OF SOLDIERS' HOMES NOT FOR THAT REASON EXEMPT..... *Page 1022*

G. EX-SOLDIERS NOT EXEMPT FROM LICENSE FEE.

II. TAXATION OF GOVERNMENT EMPLOYEES.

A. CIVILIAN EMPLOYEE CAN NOT BE COMPELLED TO WORK ON ROADS FOR FAILURE TO PAY TAX.

B. CIVILIAN EMPLOYEE RESIDING ON A RESERVATION IN A TERRITORY IS LIABLE FOR PAYMENT OF SCHOOL TAX.

[1] Prepared by Maj. H. M. Morrow, judge advocate, assistant to Judge Advocate General, U. S. Army.

III. TAXATION OF PRIVATE PROPERTY ON MILITARY RESERVATIONS, AND OF PROPERTY OF THE UNITED STATES AND ITS AGENCIES.

A. State Can Not Tax Government Property ..... *Page 1023*

B. Taxes Which Were Lien on Land When Conveyed Not Enforceable when Exclusive Jurisdiction Has Been Ceded.

C. In Act Ceding Jurisdiction State May Reserve Power to Tax Persons and Corporations in Reservation.

D. Where Exclusive Jurisdiction Not Ceded, State May Tax Sale of Liquor in "Canteen."

E. Private Improvements on Reservation Taxable where Exclusive Jurisdiction Not Ceded.

F. Government Property Not Subject to Tax for Street Improvements.

G. Although United States Can Not be Taxed for Construction of Sewer, It Can Not Use Sewer Without Paying Privilege. *Page 1024*

H. A State Tax on Sales of Real Estate Not Operative Against United States.

I. "Consumption Tax" on Sugar Purchased in Porto Rico Not Operative Against United States.

J. United States Can Not be Compelled to Pay Local Authorities Fee for Inspection Services in Accordance With State Laws, But May Enter into Contract to Have Such Inspection Made.

K. United States Not Subject to Fee for Quarantine Inspection and Harbor Regulation..... *Page 1025*

L. United States Not Subject to Fee for Health Certificates Required by State Authorities for Soldiers While Being Transported to Another Station ..... *Page 1026*

M. United States not Subject to Payment of Local License Fee for Selling Damaged Property as Authorized by United States Laws.

N. United States Not Subject to Payment of State License Fee for Automobile Used in Service of United States.

O. United States Not Subject to Tax in District of Columbia for License for Government Vehicle.

P. Government Instrumentality Not Subject to State or Municipal Taxation.

IV. MISCELLANEOUS.

A. Government Disbursing Officer Can Not Withhold Money From a Contractor or Employee to Pay Their Territorial School Tax.

B. A Notice of a Territorial School Tax May be Posted on a Military Reservation in a Territory if it Does Not Interfere With Military Administration.

I A. The authorities of a State or Territory (or, of course, of a county, town, etc.) are not empowered to tax an officer or soldier of the Army on account of his pay, or for any personal property in his possession properly required for the due exercise of his office or performance of his military duties. Officers and soldiers of the Army are instrumentalities provided by law to enable or assist the President to exercise his constitutional function of Commander in Chief and Executive of the Nation. The pay and emoluments furnished them by Congress are means to make their services possible and effective, and their right to receive and enjoy the same can not in any degree be impaired or infringed upon by the authorities of a State, which is a distinct and inferior sovereignty, or of a Ter-

ritory, which is another instrumentality of the United States. And the same principle of exemption properly applies to their arms, equipments, horses, and other personal property required to be possessed and employed by them in the military service.[1] *R. 30, 215, Mar. 31, 1870; 39, 563, June 3, 1878; C. 3574, Mar. 14, 1902, Jan. 9, 1905, and Feb. 13, 1911; 14582, May 1, 1903; 22521, Dec. 19, 1907, and May 8, 1908; 23343, June 6, 1908.* The Philippine Islands and Porto Rico are Territories within the meaning of the above rule. *C. 21469, Apr. 24, 1907.* But, of course, an instrumentality of the United States may be taxed by a State or Territory, if such tax is

[1] In the leading case applicable to this subject—Dobbins *v.* Commissioners of Erie County, 16 Peters, 435—the Supreme Court of the United States, in declaring to be unconstitutional a State statute, so far as it authorized the taxing of the *office* of a captain in the U. S. revenue service, held as follows: "The compensation of an officer of the United States is fixed by a law made by Congress. It is in its exclusive discretion to declare what shall be given. It exercises the discretion and fixes the amount, and confers upon the officer the right to receive it when it has been earned. Any law of a State imposing a tax upon the office, diminishing the recompense, is in conflict with the law of the United States which secures the allowance to the officer." Further: "Taxation by a State can not act upon the instruments, emoluments, and persons which the United States may use and employ as necessary and proper means to execute their sovereign powers. * * * The State governments can not lay a tax upon the constitutional means employed by the Government of the Union to execute its constitutional powers." In a later case—Society for Savings *v.* Coite, 6 Wallace, 605, the same court declares: "All subjects over which the sovereign power of a State extends are, as a general rule, proper subjects of taxation, but the power of a State to tax does not extend to those means which are employed by Congress to carry into execution the powers conferred in the Federal Constitution. Unquestionably the taxing power of the States is very comprehensive and pervading, but it is not without limits. State tax laws can not restrain the action of the National Government nor can they abridge the operation of any law which Congress may constitutionally pass." This general doctrine is applied by Attorney Genenal Black (9 Op., 477) as follows: "The authorities of a State can not impose a tax upon the salary of a Federal officer, or upon the compensation paid by the United States to any person engaged in their service." And as illustrating the principle involved, see also McCulloch *v.* Maryland, 4 Wheaton, 316; Weston *v.* Charlestown, 2 Peters, 449; Searight *v.* Stokes, 3 Howard, 151; Bank of Commerce *v.* N. Y. City, 2 Black, 620; Provident Inst. *v.* Mass., 6 Wallace, 611; The Banks *v.* The Mayor, 7 id., 16; Bank *v.* Supervisors, id., 26; McGoon *v.* Scales, 9 Wall., 23; Railroad Co. *v.* Peniston, 18 id., 5; Van Brocklin *v.* Tennessee, 117 U. S., 151; Wisconsin Railroad Co. *v.* Price County, 133 U. S., 497; Ohio *v.* Thomas, 173 U. S., 276; Carrol *v.* Perry, 4 McLean, 25; Stetson *v.* Bangor, 56 Maine, 274; Opinion of Justices, 53 N. Hamp., 634; United States *v.* Weise, 5 Pa. L. J. R., 61; West. Un. Tel. Co. *v.* Richmond, 26 Grat., 1; State *v.* Garton, 32 Ind., 1; 7 Op. Atty. Gen., 578; 14 id., 199. In the case of Railroad Company *v.* Peniston, *supra*, it is specified by Strong, J., that, "the States may not levy taxes, the direct effect of which shall be to hinder the exercise of any powers which belong to the National Government." In Ohio *v.* Thomas, *supra*, the syllabus reads as follows: "In making provision for feeding the inmates of the soldiers' home in Ohio, in accordance with the legislation of Congress in that respect, and under the direction of the board of managers, the governor of the home is engaged in the internal administration of a Federal institution, and the State legislature has no constitutional power to interfere with the management which is provided for it by Congress, nor with the provisions made by Congress for furnishing food to the inmates, nor does the police power of the State enable it to prohibit or regulate the furnishing of any article of food approved by the officers of the home, by the board of managers, and by Congress." In the 14 Op. Atty. Gen., 199, it was held that with respect to land owned by the United States within the limits of a State, over which the State has not parted with its jurisdiction, the United States stands in the relation of a proprietor simply; and the State officers have the same right to enter upon such land, or into the buildings located there, and seize the personal property of individuals for nonpayment of taxes thereon, as they have to enter upon the land or into the buildings of any other proprietor for the same purpose, such right being so exercised as not to interfere with the operations of the General Government.

authorized by Congress. For instance, the two acts of August 5, 1909 (36 Stat. 11, 130), authorized the imposition of customs duties and internal-revenue taxes on supplies imported into the Philippine Islands for the use of the Army. *C. 27447, Mar. 14, 1911.*

I B. The principle exempting from taxation the office or salary of an officer of the United States applies to officers on the retired list equally with those on the active list of the Army. Retired officers, being a part of the Army, are a part of the machinery of the Government, though a part not often called into active operation. *R. 36, 154, Dec. 21, 1874; 291, Mar. 2, 1875; C. 14582, May 1, 1903.* But though a retired officer can not legally be taxed by State or municipal authorities on account of his Army pay as property or income, he is subject to be taxed for other property owned by him like any other citizen. *R. 42, 669, June 1, 1880; C. 3574, July 23, 1909.* Similarly held with respect to enlisted men on the retired list of the Army. *C. 3016, Mar. 25, 1897; 6799, July, 1899; 14582, May 1, 1903; 22521, Dec. 19, 1907, and May 8, 1908.*

I C. The imposition of a poll tax with the alternative that if the tax was not paid the person taxed should work upon the road would be a tax on the earnings of an Army officer or soldier on the active list, or tax on such an officer's time, and therefore can not legally be made.[1] *C. 11873, June 21, 1909; 22808, Mar. 24, 1909.*

I D. An officer or soldier of the Army, though not taxable officially, may be and often is taxable personally. He is not taxable by a State for his pay, or for the arms, instruments, uniform clothing, or other property pertaining to his military office or capacity, but as to household furniture and other personal property, not military, he is (except where stationed at a place under the exclusive jurisdiction of the United States) equally subject with other residents or inhabitants to taxation under the local law.[2] *R. 53, 598, Apr. 27, 1888; 55, 623, June 8, 1888; P. 49, 217 Sept. 19, 1891; C. 472, Oct. 11, 1894; 3521, Sept. 18, 1897; 4888, Sept. 1, 1898; 3574, Mar. 14, 1902, and Jan. 9, 1905, and Feb. 13, 1911.*

I E. The question of residence is one of personal intent, an act of will being necessary to acquire it. An officer or soldier on the active list can not properly be taxed as a *resident* of a State or Territory on the sole ground that he is stationed at a post or place within such State or Territory. A member of the Army is commorant at his military station not by his own volition but in pursuance of the orders of a military superior. By further orders, also, he is liable at any time to be removed to a different station and one in another State. His abiding at his station is therefore both involuntary and temporary, and it is in general much more reasonably presumable that an officer's

---

[1] See Pundt *v.* Pendleton, 167 Fed. Rep., 997, where it was held that persons employed by the Quartermaster's Department as teamsters were exempt from road duty, the court saying: "This view of the matter, however, is not controlling with me because I believe Pundt is exempt from this road duty not only for the reason just mentioned, but because of the fact that he is a necessary instrumentality in that portion of the United States Army stationed at Fort Oglethorpe, and that he is such an important and necessary part of the military establishment as that the State and the county of Catoosa have no right to call on him to be absent from the fort when such absence would interfere with the proper discharge of his duties as a necessary and important, even if an humble, part of the Army of the United States."

[2] See Finley *v.* City of Philadelphia, 32 Pa. St., 381.

station is not his residence than that it *is* such.[1] *R. 30, 215, Mar. 31, 1870; 37, 396, Mar. 16, 1876; 39, 563, June 3, 1878; 41, 120, Feb. 21, 1878; C. 3574, Mar. 14, 1902; 14852, June 25, 1903; 21091, Feb. 14, 1907.*

I F. The fact that a man has formerly been a soldier, or is now in the receipt of a pension, or is an inmate of a National Home of Volunteers can affect in no manner his liability to taxation in the State of his residence or habitancy, unless, and only so far as, he may belong to a class specially exempted from taxation by the laws of the State. There is nothing in the laws of the United States to relieve such a person from a per capita tax or a tax on his property. *P. 60, 325, July 8, 1893; 65, 161, May 29, 1894; C. 2513, Aug. 11, 1896; 3574, July 23, 1909; Feb. 13, 1911; 11063, Aug. 15, 1901; 13119, Sept. 6, 1911; 13515, Oct. 23, 1902; 13880, Dec. 31, 1903; 17962, May 3, 1905.* Nor is there anything in the laws of the United States to relieve a discharged soldier who had become disabled in the service, or is a pensioner, from paying a road tax or working on the public roads. *C. 2167, July 6, 1897; Feb. 14, 1906.*

I G. There is no statute of the United States exempting ex-soldiers of the regular or volunteer service from paying the usual license fees for selling or peddling goods that may be required by State laws or municipal ordinances. *C. 17962, May 3, 1905, Apr. 16, 1908, Dec. 11, 1911.*

II A. The superintendent of a national cemetery can not be imprisoned or compelled to work upon the roads for failure to pay a tax levied by the State authorities.[2] *C. 29377, Jan. 17, 1912.*

II B. A Territorial law provided that every male inhabitant of the Territory should be liable to pay a school tax, and that any person,

---

[1] That a person, however, shall be a resident or inhabitant (terms having practically the same meaning in law) of a State is not essential to render him or his property taxable. The power of a State to tax, which is "one of its attributes of sovereignty," extends to all subjects—persons, property, or business *within its jurisdiction*, and it may, as a general rule, legally tax personal property held or being within its limits, without regard to the domicil of the owner. See case of State Tax on Foreign-Held Bonds, 15 Wallace, 319; Railroad Co. *v.* Peniston, 18 id., 29; Duer *v.* Small, 4 Blatch., 263; People *v.* McCreery, 34 Cal., 432; Hanson *v.* Vernon, 27 Iowa, 48; City of Philad. *v.* Tryon, 35 Pa. St., 404; 14 Op. Atty. Gen., 200; Pundt *v.* Pendleton, 167 Fed. Rep., 997. *C. 14335, Mar. 20, 1905.* In the opinion last cited, the Attorney General, upon the question of the authority of the State of New York to tax the property of soldiers held by them upon a part of the Government lands at West Point as to which a cession of the State jurisdiction had not in fact then been obtained, held as follows: "If the personal property referred to is of a kind subject to taxation by the laws of the State, and its *situs* is within the territorial jurisdiction of the State, I do not think that the fact that the owner is an enlisted man in the service of the United States and has done nothing to gain residence or citizenship in the State is in itself sufficient to exempt the property from State taxation." And it is added: "In regard to land owned by the United States within the limits of a State, over which the State has not parted with its jurisdiction, the United States stand in the relation of a proprietor; and the local officers have, in my opinion, the same right to enter upon such land, or into the buildings located there, and seize the personal property of individuals for nonpayment of taxes thereon, as they have to enter upon the land or into the buildings of any other proprietor for the same purpose; it being understood that in the former case the right must be so exercised as not to interfere with the operations of the General Government." And see 14 Op., 27. Persons, however, residing within a reservation or place, *exclusive jurisdiction over which has been ceded to or reserved by the United States*, are not taxable by the authorities of the State within the limits of which the post or place is situated. See Mitchell *v.* Tibbetts, 17 Pick., 298; Opinion of Justices, 1 Met., 580; Commonwealth *v.* Young, Bright, 302; 6 Op. Atty. Gen., 577.

[2] See Pundt *v.* Pendleton (167 Fed. Rep., 997), holding that Government teamsters were exempt from work on the public roads.

company, or corporation having in his or their employ any person liable to pay such school tax should, on demand by the school-tax collector, furnish a list of the names of such persons and pay the tax for them. *Held* that Government employees residing on the reservation would be liable for the payment of the school tax unless it appeared that an instrumentality of the United States was adversely affected as the result of the imposition of the tax. *C. 23343, June 6, 1908, and June 9, 1909.*

III A. In ceding to the United States exclusive jurisdiction over a military reservation, the act of the legislature of the State need not specifically relinquish the right to tax the property of the United States, as the State independently of any act of cession has no right to tax the means or instrumentalities whereby the Government of the United States performs its functions. *P. 64, 330, Apr. 9, 1894.*

III B. Where taxes are a lien upon land at the time it is conveyed to the United States, and exclusive jurisdiction has been vested in the United States, the taxes are not enforceable against the property of the United States.[1] *C. 1838, May 14, 1906.*

III C. The act ceding jurisdiction over the military reservation of Fort D. A. Russell reserved to the State power to tax persons and corporations doing business on the reservation. *Held* that such a reservation of power was constitutional.[2] *C. 27365, Oct. 15, 1910.*

III D. *Held* that as exclusive jurisdiction had not been ceded by the State of Nebraska over the military reservation of Sidney Barracks, the State authorities could legally levy a license tax for the selling of beer at the post canteen.[3] *R. 50, 153, Mar. 30, 1886.* And similarly held as to the authority of officials of Michigan to tax, under the laws of that State, the selling of liquor at the canteen of Fort Mackinac, a post not under the exclusive jurisdiction of the United States. *P. 36, 161, Oct. 29, 1889.*

III E. The Mackinac National Park was established by the act of Congress of March 3, 1875 (18 Stat. 517), which also authorized the Secretary of War to grant leases, for building purposes, of certain small parcels of land within the park. Under this authority a number of parcels were leased upon which improvements were made by the lessees, and the State authorities have proceeded to impose taxes upon such improvements. By the act of Congress of June 15, 1836, authorizing the admission of the State of Michigan, lands of the United States within the State were to be exempted from taxation. But the State has never ceded to the United States exclusive jurisdiction over the lands of this park, and therefore never parted with its authority to tax private property located therein. *Held* that the improvements referred to were legally taxable as the private property of individuals under the laws of the State. *P. 39, 89, Feb. 26, 1890.*

III F. Certain land was conveyed to the United States by the city of St. Paul, Minn., in 1892, for the erection thereon of a quartermaster and commissary depot, an appropriation having been made by Congress for the purpose on condition that the land should be conveyed to the United States free of cost. *Held* that the property

---

[1] 15 Op. Atty. Gen., 167; Martin *v.* House, 39 Fed. Rep., 694; Brannon *v.* Burnes, 39 id., 892. See XIV Comp. Dec., 506.

[2] See Fort Leavenworth R. R. Co. *v.* Lowe, 114 U. S., 525.

[3] The "canteen," referred to in this section, was not the same as the "post exchange," which is maintained under existing regulations. See the opinion of the Court of Claims quoted in Dugan *v.* United States, 34 Ct. Cls., 458.

is an instrumentality of the United States Government, and as such is not subject to local taxation of any kind, and therefore not subject to an assessment for street improvements. This principle, declared by Chief Justice Marshall in McCulloch *v.* Maryland (4 Wheat., 315), has been applied in a large number of later cases and can no longer be questioned.[1] *C. 2598, Sept. 10, 1896; 8272, May 23, 1900; 10094, Mar. 29, 1901.* Similarly *held,* with respect to assessments, under State legislation and municipal ordinance, for the improvement of street and sidewalks adjacent to the military reservation of Jackson Barracks, La. *C. 2637, Sept. 25, 1896; 25195, July 26, 1909.* So, *held,* with respect to a municipal assessment for sprinkling the street in front of the United States clothing depot at St. Louis.[2] *C. 11874, Jan. 10, 1902.* Also *held* that the United States was not liable for an assessment for laying water pipes or constructing a sewer[3] along a street adjacent to a national cemetery. *C. 3930, Mar. 12, 1898; 13428, Oct. 11, 1902.*

III G. Although the United States is not liable to the payment of an assessment for the construction of a sewer along the street adjacent to its property, still if it desires to use a sewer constructed and owned by a town it must pay for such privileges.[4] *C. 6831, June 24, 1902; 13428, Oct. 11, 1902.*

III H. A tax on real estate purchases under the laws of Tennessee would not be operative against the United States as a purchaser of land in that State for the Shiloh National Military Park.[5] *C. 2062, Apr. 2, 1897.*

III I. The United States is not liable for a "consumption tax" levied on sugar purchased in Porto Rico for the use of United States troops. *C. 6054, Mar. 18, 1899.*

III J. The board of animal inspectors at Honolulu, appointed under a statute of Hawaii, submitted a claim for inspecting cavalry horses and draft mules of the United States, amounting to the statutory fee, *held* that the claim was in effect a tax by the Territory of Hawaii on the operations of the Government of the United States;

---

[1] The Comptroller of the Treasury, in an opinion dated January 30, 1896 (Vol. II, 375), said: "It is well-established law that the property of the United States, or any of the instrumentalities employed by them in the performance of their proper functions, is not the subject of taxation by the States or any subdivisions thereof. (McCulloch *v.* Maryland, 4 Wheat., 316; Osborn *v.* Bank of the United States, 9 Wheat., 738; Weston *v.* Charleston, 2 Pet., 449; Dobbins *v.* Commissioners, 16 Pet., 435; Bank of Commerce *v.* New York City, 2 Black, 620; Bank Tax Case, 2 Wall., 200.) Most of these cases related to the taxation of instrumentalities adopted by the United States for the proper execution of the powers vested in the Federal Government. The principle has been specifically applied to the taxation of the property of the United States (9 Op. Atty. Gen., 291), has been acquiesced in by the courts of all the States in which the question has arisen (Andrews *v.* Auditor, 28 Grattan, 115; Chicago, etc., Railway Co. *v.* City of Davenport, 51 Iowa, 451), and has also been specifically applied to assessments for public works from which specific benefits would be derived (Fagan *v.* Chicago, 84 Ill., 227)." See also *IV Comp. Dec. 1, 16.* It has been the policy of Congress to refuse appropriations for such assessments. *C. 22781, Feb. 24, 1908; 26768, May 31, 1910; 28164, Apr. 21, 1911.* But, of course, where a sidewalk or other improvement adjacent to Government property is reasonably necessary for the proper use or improvement of such property, it may be constructed out of any appropriation applicable thereto.

[2] See IX Comp. Dec., 181, to same effect.

[3] See XI Comp. Dec., 629, to same effect.

[4] See remark of Comptroller in XI Comp. Dec., 630, last sentence on page.

[5] See XIV Comp. Dec., 256.

that the instrumentalities and agencies of such Government are exempt from local taxation; and that, therefore, the claim could not legally be paid, but that if the inspection provided for by the statutes of Hawaii *were* valuable to the United States it would be proper for the United States to enter into a contract with the proper Hawaiian authorities for such inspection and to pay therefor a sum equal to the statutory fee. *C. 5554, Dec. 30, 1898; 18351, July 28, 1905.* So, where the city of Manila imposed an inspection tax of 50 cents on each horse landed from any vessel and it was attempted to collect the tax on private horses of Army officers arriving on transports from the United States, the horses being of a class for which forage was furnished at the expense of the Government, *held*, that reimbursement could not be made to officers for payment of such charges. *C. 5554, Dec. 31, 1909; Jan. 6, 1910.* So, *held*, where a claim was made by a State veterinarian for the statutory fee for inspecting and administering the mallein treatment to public horses of the United States. *C. 5554, Oct. 22, 1910.* So *held*, also, where the city of Manila claimed a fee for the inspection by the city engineer of the boilers in public buildings and vessels of the United States. *C. 5554, Dec. 3, 1909; 19212, Feb. 17, 1906.* So, *held*, where the city of Manila claimed the right to inspect all electrical installations for lighting purposes on a military reservation and to charge fees for the same. *C. 21469, Apr. 24, 1907.*

III K. Where the State authorities at Newport News attempted to charge against an Army transport the fee fixed by State laws for quarantine inspection and harbor regulation, *held* that such a charge would constitute a tax on an instrumentality of the United States and could not be imposed. As under its police power a State could legally establish quarantine and port regulations, a transport entering a harbor should submit to such inspection and obey such regulations, but no charge could be imposed for such services, as such a charge would be in the nature of an impost. However, if the inspection and port regulations are valuable to the United States, it would be proper to enter into a contract with the proper State authorities whereby the State authorities would render such service and the United States would pay therefor an amount equal to the statutory fee. *C. 20564, Oct. 27, 1906, and Nov. 13, 1906.* So, where an attempt was made to charge against an Army transport entering the harbor of Habana a fee of $5 required by a Cuban statute for inspection services, at a time when Cuba was under military occupation by United States troops, *held* that whatever might be the character of the government established by the United States in Cuba, it was clear that such government, together with the United States military forces and the agencies and instrumentalities which accompanied them, was independent of the constitution and laws of the Republic of Cuba, and not subject to their operation. But *held*, further, that the public vessels of the United States arriving in Cuba are not exempt from supervision, and that it would be proper for the Governor General to call upon the commanding officer of the occupying forces to require Army transports to provide themselves with bills of health at their respective ports of origin, and for the Governor General to require them to submit to such inspection in Cuban ports as might be necessary to prevent

the introduction of disease. Such requirements would, however, be by the authority of the United States and not by that of the Government of Cuba, and no fee should be charged for such inspection. *C. 20564, Nov. 21, 1906.*

III L. Where the State authorities at Little Rock, Ark., put in a claim for 177 health certificates at 50 cents each issued to soldiers transported through that city to Memphis, Tenn., claiming that it was necessary for the troops to have these certificates because Memphis was at that time quarantined against Little Rock, *held* that the police power of a State in the matter of quarantine can not be exercised so as to interfere with a movement of United States troops, since it is not competent for a State to fetter the operations of the United States in this way, and therefore such claim is not a proper charge against the United States and can not be paid out of the appropriation for the contingencies of the Army. *C. 6339, May 1, 1899.*

III M. *Held* that an officer of the Army, duly charged with the duty of making a sale of damaged, etc., medical supplies under the authority of section 1241, R. S., by which the President is empowered to order such sales in certain cases, could not lawfully be required to take out and pay for a license as a merchant under the laws of the State in which the sale was to be made. Such a requirement would be a restriction upon the regular and legal execution of the powers of the General Government, and therefore beyond the authority of a State. *R. 39, 6, May 8, 1876.*

III N. A State can not legally impose a license fee on a Government automobile used in the service of the United States. *C. 25127, July 25, 1909, June 13, 1909, Nov. 6, 1909, Dec. 5, 1910, and Oct. 25, 1911.*

III O. The District of Columbia can not impose a license fee on a Government vehicle used in the service of the United States.[1] *C. 28165, Apr. 24, 1911.*

III P. A post exchange is not legally liable for local or municipal taxes or licenses, on the sale of commodities for the exclusive use of persons in the military service, as such exchange is an instrumentality of the Government of the United States.[2] *C. 7324, Nov. 21, 1899.*

IV A. A Territorial law provided that every male inhabitant of the Territory should be liable to pay a school tax and that any person, company, or corporation having in his or their employ any person liable to pay such school tax should, on demand by the school-tax collector, furnish a list of the names of such persons and pay the tax for them. *Held* that under the above law a quartermaster at a post in that Territory could not act as agent for the Territory in the collection of its taxes by withholding from a contractor or employee any money that might be due him for the purpose of paying school tax. *C. 23343, June 6, 1908, and June 9, 1909.*

IV B. Where a Territorial law provided for the posting of notices of school tax, *held* that a notice of such tax could legally be posted on a military reservation in the Territory so long as it did not interfere with military administration. *C. 23343, June 6, 1908, and June 9, 1909.*

---

[1] See XV Comp. Dec., 231, to the same effect.
[2] See Dugan *v.* U. S., 34 Ct. Cls., 458.

CROSS REFERENCE.

Commanding officers' duty.....See ARMY I B 11.
Military government.....See WAR I C 6 f (1); 8 a (2) (*c*) [1.]
Military reservation.....See PUBLIC PROPERTY V E 1 a.
Retired officer.....See RETIREMENT I G 2 e.
Road tax.....See CIVILIAN EMPLOYEES III A.

TELEGRAM.

See COMMUNICATIONS III A.
Appropriations for.....See APPROPRIATIONS XXVI.
As evidence.....See DISCIPLINE XI A 17 b (2) (*a*).
By militia.....See MILITIA XIV B.
Commercial.....See TERRITORIES III D to E.
Post exchanges.....See GOVERNMENT AGENCIES II J 3.

TELEGRAPH LINES.

Maintenance.....See APPROPRIATIONS LVI.

TELEPHONE CALLS.

See APPROPRIATIONS XXVI.
Hospitals.....See APPROPRIATIONS XLIII.

TENURE OF OFFICE.

Army.....See OFFICE III G.
Volunteers.....See VOLUNTEER ARMY I B.

TERM OF ENLISTMENT.

See ENLISTMENT I B 2 to 3.
Medal for serving beyond.....See INSIGNIA OF MERIT I E 2.
Paid for serving beyond.....See PAY AND ALLOWANCES I A 1 a.
Retention of sick soldier.....See ENLISTMENT I B 2 i.
Retention of Volunteers in service after organization mustered out. See VOLUNTEER ARMY IV C to D.

TERRITORIES.

I. STATUTES OF.
  A. OPERATIVE ON RESERVATIONS UNLESS IN CONFLICT WITH UNITED STATES LAWS OR REGULATIONS..... *Page 1028*
  B. CAN NOT TAX GOVERNMENT INSTRUMENTALITY.
II. COURTS OF.
  A. MILITARY MUST OBEY SUBPŒNAS.
III. ALASKA.
  A. CITIZENSHIP IN UNITED STATES, HOW OBTAINED THERE.
  B. USE OF TROOPS AS A POSSE COMITATUS..... *Page 1029*
  C. COAL MAY BE SOLD TO CIVILIANS FOR HUMANE REASONS.
  D. COMMERCIAL TELEGRAPH BUSINESS.
    1. Accepted for cash paid in advance.
    2. Not privileged.
  E. MILITARY AUTHORITIES CAN NOT ISSUE PERMITS FOR INTRODUCTION OF LIQUOR INTO ALASKA.
  F. ALASKAN ROAD COMMISSION.
    1. Authority of.
  G. CIVIL EMPLOYEES OF UNITED STATES.
    1. May be required to work on roads..... *Page 1030*

IV. PHILIPPINE ISLANDS.
A. USE OF REGULAR TROOPS. (*See Army II to III.*)
B. CONSTABULARY.
1. Force of peace officers.
2. Status of Army officers who hold office in constabulary.
a. May not assume command of transport by virtue of increased rank ..... *Page 1031*
(1) But entitled to quarters, etc., in accordance with increased rank.
V. PANAMA CANAL ZONE.
A. UNITED STATES RESPONSIBLE FOR ORDER.

I A. A Territorial statute is operative upon a military reservation within the Territory so long as it does not conflict with the laws of the United States or with the military administration or legitimate operations of the Government. Thus, *held* that a statute of Arizona making it penal to sell intoxicating liquor to Indians, while it would inhibit a post canteen from selling beer (if intoxicating) to Indians in general, could not legally affect the sale of such beer (at a time when the sale of beer to soldiers was permitted) to Indians who were enlisted soldiers of the United States, and therefore within the regulations of the Army allowing such sale to soldiers under certain conditions.[1] *P. 48, 464, Aug., 1891; 51, 199, Jan., 1892; C. 11357, Oct. 10, 1901; 12700, June 2, 1902; 14335, Mar. 20, 1903; 18063, Sept. 6, 1905; 21469, Apr. 24, 1907.*

I B. It is well settled that the government of a Territory or territorial possession of the United States can not, unaided by legislation, impose a tax upon an instrumentality of the United States.[2]

Where the service rendered by an agency of a Territorial or insular government is necessary, *recommended* that it be placed upon a contractual basis, the compensation not to exceed in any case the rates established by law. *C. 21469, Apr. 24, 1907.*

II A. The military should obey the subpœnas of the district courts of Territories, which, under section 1910, R. S., are vested, in all cases arising under the Constitution and laws of the United States, with the same jurisdiction as the United States circuit and district courts. Sections 877 and 911, R. S., prescribe as to the form and effect of such subpœnas, and where a subpœna served upon an officer or soldier conforms substantially with these forms it should be complied with. *R. 54, 124, July, 1887; C. 21469, Apr. 24, 1907.*

III A. By the treaty of cession with Russia subjects of that nation inhabiting the Territory of Alaska at the date of the treaty and continuing to remain such inhabitants for three years became thereupon American citizens. But the treaty neither mentions nor refers to British subjects or the subjects of any foreign nation other than Russia; such persons, therefore, residing in the Territory can become citizens only in the mode and form prescribed by the United States naturalization laws. *R. 38, 555, Apr. 12, 1877.*

---

[1] See U. S. *v.* Hurshman (53 Fed. Rep., 543), in which it was held that an Indian of the Nez Perces tribe, a soldier in the United States Army, was an Indian under the charge of an Indian superintendent or agent within the meaning of sec. 2139, R. S., which provides that every person who disposes of spirituous liquors to any Indian "under the charge of any Indian superintendent or agent * * * shall be punishable * * *."

[2] II Comp. Decs., 375; 4 id., 116.

III B. The "posse comitatus act" of June 18, 1878 (20 Stat. 152), is, by section 29, act of June 6, 1900 (31 Stat. 330), made inoperative in Alaska. *C. 3119, Apr. 17, 1897; Apr. 1, 1907.* As the United States marshal is by statute made the judge of the necessity of using military force in Alaska (act of Mar. 3, 1899, 30 Stat. 1324), the commanding officer of military forces in that Territory should assist the marshal in maintaining order, but such order should pass to the local commanding officer, who, with the forces under his command and acting under his orders, should carry the views of the marshal into effect. *C. 3119, Feb. 13, 1908.* It is for the marshal to determine when the emergency exists which necessitates the employment of military force; and it is for the commanding officer of the troops to direct their employment for the accomplishment of the purposes so indicated. *C. 3119, Feb. 13, 1908.*

III C. Where it is necessary, by reason of emergency and on account of the overruling demands of humanity, to sell small amounts of coal to civilians in Alaska, when the supply for military purposes is in excess, *held* that such sales may be made at net cost, delivered at place of sale, but that such sales should be reported to Congress at its next meeting. *C. 19307, Mar. 2 and Oct. 13, 1906.*

III D 1. While a discretion is vested in the Secretary of War by the act of May 26, 1900 (31 Stat. 206), in the matter of allowing commercial telegraph business to be done on credit, *held* that the present regulations do not authorize credit messages, and that, until new regulations are published authorizing such credit, business over the Alaskan telegraph lines should be conducted on a cash basis. *C. 20409, Sept. 21, 1906.*

III D 2. Authority was requested by the United States marshal in Alaska to examine telegrams sent over the Alaskan telegraph lines by parties suspected of robbery; *held*, to be lawful upon request of the proper court or civil authority, as such telegrams are not privileged. *C. 20085, July 19, 1906.*

III E. In view of the terms of the act of May 17, 1884 (23 Stat. 24), establishing a civil government for Alaska, *held* that the military authorities could no longer legally issue permits for the introduction of liquors into Alaska under General Order 57 of 1874, section 14 of said act being deemed impliedly to repeal, as to Alaska, that portion of section 2139, R. S., which empowered the Secretary of War to authorize such introduction.[1] *R. 50, 529, July, 1886.*

III F 1. *Held* to be within the authority of the Alaskan road commission to construct a wooden tramway over portions of roads and trails where that form of road will best subserve the purposes of traffic. *C. 18173, June 15, 1905.*

The Alaskan road commission asked authority to transfer a certain horse, purchased out of Army appropriations, to the list of property purchased out of tax funds; *held* that such transfer would not be lawful. *C. 18173, Aug. 2, 1907.*

Authority was requested to purchase the right of way of the Copper River & Northwestern Railway Co. as part of the road which the commission was authorized to construct. *Held*, that such a conveyance in the operation of a license from the railroad company for a period of five years, at the expiration of which the roadway was to be

[1] See U. S. *v.* Nelson, 29 Fed. Rep., 202.

restored to the licensor, would be within the authority of the commission. *C. 18173, Apr. 10, 1908.*

III G 1. Where certain civilian employees of the United States were required to perform labor on roads in Alaska, in the operation of the act of April 27, 1904 (33 Stat. 391), *held* that the War Department is without the power to excuse compliance, but that the employee should present his claim for exemption to the proper precinct authorities, accompanied by a certificate showing the character of his employment, and that his entire services are necessary in the administration of the regiment, post, or depot at which he is employed by the United States. *C. 20327, Mar. 14, Sept. 24, and Oct. 1, 1910.*

IV B 1. The Philippine Constabulary is a force of peace officers created by an act of the Philippine Commission in virtue of its power to legislate in matters affecting the Philippine Islands. The duties of the officers and men composing the constabulary are prescribed by law and chiefly relate to the maintenance of public order and the enforcement of the laws. When resistance to such enforcement is encountered or when the peace of the islands is threatened, it is made their duty to overcome such opposition and to restore civil order, using such and so much force as is necessary for that purpose. *C. 17508, Feb. 15, 1905.*

IV B 2. The status of the Philippine Constabulary and the officers of the Army who are by law permitted to hold civil office in that body was made the subject of an expression of opinion by this office, under date of April 8, 1904, in which it was said, with the approval of the Secretary of War, that "The Philippine Constabulary is a force of peace officers created by an act of the Philippine Commission, in virtue of its power to legislate in matters affecting the Philippine Islands. The duties of the officers and men composing the constabulary are prescribed by law and chiefly relate to the maintenance of public order and the enforcement of the laws. When resistance to such enforcement is encountered or when the peace of the islands is threatened, it is made their duty to overcome such opposition and to restore civil order, using such and so much force as is necessary for that purpose." *C. 17508, Feb. 15, 1905.* And "The operation of the act of January 30, 1903 (32 Stat. 783), has been to vest in certain officers of the Philippine Constabulary the same power of military command over companies of the Philippine Scouts, which are ordered to assist the constabulary in the maintenance of order, as is habitually exercised by the officers of the line of the Army over the commands to which they have been assigned by the President, or by military superiors deriving their authority from the President. The control of the Chief of the Philippine Constabulary over his subordinates in that service is derived from the legislation of the Philippine Commission and from the orders of the civil governor, conveyed to such chief either directly or through the secretary of commerce and police; and his authority over such companies of Philippine Scouts as are employed, in support of the constabulary, in the maintenance of order is a strictly military command and is derived from the act of January 30, 1903, which obviously has application to cases in which the disturbance is so limited and localized that order can be restored by the employment of the civil agencies provided for that purpose with the assistance of a detachment of Philippine Scouts; in other words, the extent and amount of the disorder is known to the civil governor, who

has ground for the belief that the constabulary force, with the assistance of one or more companies of scouts, can restore order or secure the execution of the laws in the disturbed locality without formally calling upon the military commander for the employment of troops in the method prescribed in the President's proclamation of July 3, 1902." *C. 17508, Feb. 15, 1905.*

IV B 2 a. Where an officer of the Philippine Constabulary, having the rank of colonel and assistant chief of constabulary, was prosecuting a voyage to Manila on an Army transport, *held* that he was not entitled to command the troops on board in the operation of the one hundred and twenty-second article of war—his power to command being restricted in the operation of the act of January 30, 1903 (32 Stat. 783), to the command of Philippine troops in certain conditions of emergency. *C. 17508, Feb. 15, 1906.*

IV B 2 a (1). The rank of colonel, which has been conferred upon an Army officer as assistant chief of the Philippine Constabulary, entitles the officer upon whom it has been conferred to the same precedence, dignities, and privileges to which a colonel in the line or staff of the Army is entitled by law, regulations, or the orders of the War Department; and he is also entitled to the same consideration in the assignment of stateroom accommodations upon an Army transport to which a colonel of the line or staff would be entitled under the same circumstances. *C. 17508, Feb. 15, 1905.*

V A. It is the duty of the State of Panama to maintain public order within its territory, and in the execution of that duty it may enact and enforce such laws as are calculated to attain that end. It is assumed that such a body of laws and regulations exists in the State, and that their due and proper enforcement will suffice to maintain public order. If those laws are set at defiance, or if their execution is hindered or prevented by any persons, or combinations of persons, and the existence of that fact has been determined to the satisfaction of the President, then it becomes his duty to remove such hindrances and to take such steps as are, in his opinion, necessary to give such full and unimpeded operation to the laws as will restore and secure the maintenance of civil order within the territorial limits to which his jurisdiction under the treaty extends.

It is also the opinion of this office that the President can give such directions to the Secretary of War as in his judgment are necessary to secure due execution of the treaty, and that the Secretary of War, by the issue of appropriate instructions in the name of the President to the commanding officer of the forces stationed in the Canal Zone, can cause such steps to be taken as will be calculated to remove or overcome the obstacles to the execution of the laws, and thus secure the restoration of public order within the limits of such zone, and in the cities of Colon and Panama and the territories adjacent thereto. *C. 17164, Nov. 15, 1904.*

CROSS REFERENCES.

Hawaii.....See MILITIA X D.
Laws of, on military reservations.....See PUBLIC PROPERTY V H 2 to 3.
School tax.....See TAX IV B.

THE ADJUTANT GENERAL.

Chief of corps.....See INSIGNIA OF MERIT II H 1.
Custodian of records.....See VOLUNTEER ARMY IV H 1.
Duties of.....See ARMY I G 3 a (2).
PAY AND ALLOWANCES I C 2.

THEATER TICKET.

Owned and used by soldiers.....See UNIFORM I B 2 to 3.

THE NATIONAL MATCH.

See MILITIA VI C 2 c.
Transportation of teams.....See MILITIA VII D.

TICKETS.

Street car.....See ARMY I G 3 b (2) (*a*) [1].
Theater.....See UNIFORM I B 2 to 3.

TIME OF PEACE.

Enlistments in.....See ENLISTMENT I C to D.
Punishment in.....See DISCIPLINE XII B 1 a.

TIME OF WAR.

Boxer uprising.....See ARTICLES OF WAR CIII F 2 a.
Department commander as reviewing authority.....See ARTICLES OF WAR CVI A.
Deserter's release.....See DESERTION XVII E.
Desertion.....See ARTICLES OF WAR CIII F 2.
DESERTION V F; X B; XVIII A; B.
Extra duty.....See PAY AND ALLOWANCES I C 6 c to e.
Judicial notice.....See DISCIPLINE II D 15 a.
Mitigation during.....See ARTICLES OF WAR CXII A 1 a (1).
Offense in.....See DISCIPLINE XIV E 9 a (13).
Philippines.....See ARTICLES OF WAR LXXIII A 2.
Under fifty-ninth article of war.....See ARTICLES OF WAR LIX I 1.

TITLE.

Against United States.....See PUBLIC PROPERTY II B 3 to 4.
Attorney General approves.....See PUBLIC PROPERTY II A 6 to 7.
Balloon found.....See PUBLIC PROPERTY I A 6.
Captured property.....See WAR I C 6 c (3).
Joint.....See PUBLIC PROPERTY II A 5.
Occupied property.....See WAR I C 6 a (2).
Officers' pay.....See PAY AND ALLOWANCES III C 1 a (1) (*a*) [2].
Payment for abstract of.....See APPROPRIATIONS XV.
Public movable property.....See WAR I D 1.
Soldiers' pay.....See PAY AND ALLOWANCES I C 1; 1 a (1) (*a*) [2].
Submerged land.....See NAVIGABLE WATERS II to III.

TOLL.

Navigable waters.....See NAVIGABLE WATERS I A 1 a.

TORTS OF GOVERNMENT AGENTS.

See MILITIA VI B 2 n.
United States not responsible for.....See CLAIMS IV; VII B 2; C 1.

TRADEMARK.

Can not include flag.....See FLAG II.

TRANSFER OF OFFICERS.

See OFFICE III C to D; D 4.

TRANSFER OF SOLDIERS.

Volunteers to Regular Army.....See VOLUNTEER ARMY III B 1.

TRANSPORT.

See ARMY I G 3 b (2) (a) [3] to [4].
Crew.....See CIVILIAN EMPLOYEES V A; XV A.
End of voyage.....See ABSENCE I B 1 i.
Loss of mail on.....See CLAIMS XII K.
Quarantine inspection and harbor regulation.See TAX III K.
Service in Philippine Islands.....See RETIREMENT II A 4 b (2).
Summary court.....See DISCIPLINE XVI E 6.

TRANSPORTATION.

See ARMY I G 3 b (2) (*a*) to (*b*).
APPROPRIATIONS XX.
CIVILIAN EMPLOYEES IX to X.
Allies.....See CLAIMS VII B 6.
Automobile.....See MILITIA VI B 2 f.
Borrowing from allies.....See WAR I C 6 d (1).
Deserter.....See DESERTION V D 3 to E 6.
Dock, repair of.....See APPROPRIATIONS LII.
Insane soldier.....See INSANITY I B 1.
Militia.....See MILITIA VI B 2 e; VII to VIII.
Mustered out volunteers.....See VOLUNTEER ARMY IV B 4.
Recruit.....See DESERTION XXII A.
Retired officer.....See RETIREMENT I N 4; Q.
Retired soldier.....See RETIREMENT II B 7.
Seizure.....See WAR I C 6 b (1) (b).
Soldiers.....See ABSENCE I C 4 e (1); 4 h.
SOLDIERS' HOME I E.
Under fifty-ninth article of war.....See ARTICLE OF WAR LIX G 1 a; 1 b.

TRANSPORT COMMANDER.

Authority.....See COMMAND V B 1.
Discipline.....See COMMAND V B 2 a; b; c; V B 3.
Eligibility for.....See COMMAND V B 4.
ARTICLES OF WAR CXXII A.
Summary court.....See DISCIPLINE XVI E 6.

TRANSPORT QUARTERMASTER.

Eligibility to command.....See COMMAND V B 4.

TRAVEL ALLOWANCE.

Discharge without honor.....See ARMY I G 3 b (2) (*a*) [3] [*a*].
Forfeiture of.....See PAY AND ALLOWANCES III C 1 f; 2 c to d.

TREATY.

China and United States.....See Army V A
Cuba and United States.....See WAR I C 8 c (1) to (2).
Effect on military government.....See WAR I C 8 b.
Peace, ratification ends war.....See WAR I F 2.
Peace rule as to movable property.....See WAR I D 1.

TREES.

Title to.....See PUBLIC PROPERTY II F to G.

TRESPASS.

Ejection by owner.....See NAVIGABLE WATERS X D 4.

TROOPS.

Right to salvage.....See CLAIMS VI D.

TRUST.

Debts paid by bailee.....See PRIVATE DEBTS VIII.
Money.....See DISCIPLINE XII B 3 e (3).
Property held in, lost.....See PUBLIC PROPERTY I F 2.
Soldier's pay.....See PAY AND ALLOWANCES I C 1; III B 6.

TWICE IN JEOPARDY.

See ARTICLES OF WAR CII A to I.
See DISCIPLINE XII B 1 a (1) (*b*).
At own request.....See DISCIPLINE XIV K 1.
Previous trial null.....See DISCHARGE XVI G; G 2.

TYPEWRITING MACHINES.

Issue to militia.....See MILITIA XVI I 3.

UNAUTHORIZED FORCES.

See MILITIA IV to V.

UNCONDITIONAL CONTRACT.

Difficulty in performing.....See CONTRACTS X B.

UNIFORM.

I. PROTECTION OF DIGNITY.
A. WITHIN UNITED STATES JURISDICTION.
1. Soldier excluded from skating rink ..... *Page 1034*
B. WITHIN STATE JURISDICTION.
1. If laws permit.
a. Prosecution by commanding officer..... *Page 1035*
2. Right of ticket holder.
a. Theater ticket defined.
C. PROSECUTION FOR CRIMINAL IMPERSONATION OF AN OFFICER.

I A 1. *Held* that the exclusion of soldiers from a skating rink in a Territory because they were in uniform was a violation of the act of March 1, 1911 (36 Stat. 963), for the protection of the dignity and honor of the uniform of the United States.[1] *C. 18958, Dec. 7, 1911.*

[1] The proprietor was tried and convicted for the offense in the United States District Court of the Fourth Judicial District of the Territory of Arizona and punished.

The indictment in this case reads as follows:

"Did knowingly, wrongfully, willfully, and unlawfully discriminate against one D. K. M—, jr., he, the said D. K. M—, jr., then and there lawfully wearing the uniform of the Army of the United States of America, they, the said defendants, being then and there the proprietors of a public place of amusement, to wit, a skating rink, by then and there refusing to permit him, the said D. K. M—, jr., to skate at said skating rink because of said uniform so worn as aforesaid by said D. K. M—, jr."

I B 1 a. The proprietor of a skating rink attempted to exclude soldiers because they were in uniform. *Held* that the commanding officer pursued the proper course in instituting a prosecution against the proprietor for a violation of the laws of the State. *C. 18958, Jan. 23, 1907.*

I B 2. *Held* that the rights of persons to purchase tickets to a place of amusement or the rights of ticket holders to enter a place of amusement for which they hold tickets is one which turns entirely on the laws of the various States. *C. 18958, Nov. 28, 1906.*

I B 2 a. A theater ticket is a license which may be revoked by the licensor, before it has been tendered at the door of the theater.[1] *Held*, however, that the purchaser of a particular seat has more than a license his right of entrance being in the nature of a lease,[2] and his right is affected in no way by the fact that he may be a soldier in uniform. *C. 18958, Dec. 14, 1905.*

I C. *Held* that when it appears that any person with intent to defraud either the United States or any person falsely assumes[3] or pretends to be an officer or employee, by the wearing of a uniform or otherwise, the case should be referred to the Department of Justice for prosecution under the act of April 18, 1884 (23 Stat. 11). *C. 14779, June 26, 1906, Aug. 28, 1906, Oct. 13, 1906, Dec. 23, 1907, Feb. 4, 1908, Apr. 29, 1908, May 2, 1908, and Aug. 14, 1909.*

CROSS REFERENCE.

Campaign badges, part of.....See INSIGNIA OF MERIT III B 1.
MILITIA XIII B.
Furlough.....See ABSENCE I C 4 c.
Militia.....See MILITIA XIII to XIV; XVI F.
Offenses while in.....See ARTICLES OF WAR LXII C 5 a; LXII C 16.
Possession of by civilian.....See COMMAND V A 3 e.
President prescribes.....See PAY AND ALLOWANCES II A 3 a (4) (*d*) [1] [*a*].
Retired officer.....See RETIREMENT I F.
Wearing of unauthorized badges on.....See INSIGNIA OF MERIT II A 2 a; b.

UNION LABOR.

Competition with.....See ARMY BANDS I A 5.

U. S. COMMISSIONER.

Can not discharge soldier.....See DISCHARGE XVI D 1.
Turning offenders over to.....See COMMAND V A 3 c (1).

U. S. MILITARY ACADEMY.

See ARMY I D to E.
Authority of superintendent.....See COMMAND V A 3 d (1).

---

[1] See McCrea *v.* Marsh (78 Mass., 211).
[2] See Drew *v.* Peer (93 Pa., 234).
[3] See U. S. *v.* Ballard (118 Fed. Rep.,757). Also an impostor who by impersonation of an officer through wearing a uniform was convicted in the western district of Pennsylvania and sentenced to two years in the penitentiary. See *C. 14779, Oct. 27, 1909*, Judge Advocate General's office.

UNLIQUIDATED DAMAGES.

Claim for.....See CLAIMS II.

USELESS PAPERS.

Destruction of.....See OFFICIAL PAPERS I C 1 a.

VACATION OF OFFICE.

Active list.....See OFFICE IV to V.
Retired list.....See RETIREMENT I G 2 f.
Volunteers.....See OFFICE V A 7.

VARIANCE.

Acceptance and bid.....See CONTRACTS VI M.
Advertisement and bid.....See CONTRACTS VI L.
Charge and copy.....See DISCIPLINE V D 4.
Charge and evidence.....See DISCIPLINE XIV E 4 c.
Charge and sentence.....See DISCIPLINE XII B 3 c; XIV E 9 a (3).
Contract and requirements.....See CONTRACTS X A.

VESSEL.

Foreign built.....See CONTRACTS XX C 2.
Wreck.....See CLAIMS II.

VESTING OF OFFICE.

See OFFICE III A 6 to 7; B 3 to 4; V A 5 to 6.
Detailed staff.....See OFFICE III D 1 to 2.
Volunteers.....See OFFICE V A 5 to 6.
VOLUNTEER ARMY II F 1 a (1).

VESTING OF RIGHT OF WAY.

See PUBLIC PROPERTY VI A.

VESTING OF TITLE.

See PUBLIC PROPERTY II A 6 e.

VETERINARIAN.

Appointment.....See OFFICE III E 1.
Eligibility for gratuity.....See GRATUITY I B 3 b.
Leave.....See ABSENCE I B 1 g (2).
Militia.....See MILITIA X E.

VOLUNTARY SERVICE.

See CONTRACTS XL.

VOLUNTEER ARMY.

I. DEFINED AND DESCRIBED..... *Page 1038*
A. USUAL MEANING—FORCE RAISED INDEPENDENT OF STATES... *Page 1039*
B. NOT A PART OF THE MILITIA..... *Page 1040*
C. OFFICERS ARE OFFICERS OF UNITED STATES.
D. SOLDIERS ARE ENLISTED INTO SERVICE OF UNITED STATES.
II. MUSTER IN.
A. PREVIOUS TO CIVIL WAR.
1. Before muster in under exclusive control of governor.
2. Muster for pay not a muster in..... *Page 1041*

II. MUSTER IN—Continued.
B. During Civil War.
1. Enlisted men.
a. Mustering recruits not a muster in.
b. Enrollment not a muster in.
c. Muster in without signing enlistment papers.
d. Constructive muster.
(1) Enrollment and acceptance of service.
e. Consolidation of regiments ..... *Page 1042*
f. Drafted men.
(1) Muster in not required.
2. Militia.
a. Muster in necessary to entry in the United States service.
(1) Constructive.
C. Spanish War Volunteers.
1. Date of muster in determines date of entering the service.
2. United States Volunteers not mustered in, but enlisted directly in service of United States.
D. Muster-in Rolls.
1. Formal muster-in roll is official record ..... *Page 1043*
E. Irrevocable Unless Tainted with Fraud.
F. Remuster.
1. Not allowed for following reasons.
a. Man never mustered in.
(1) Even though commissioned.
(2) State recruiting officer.
b. Organization never existed.
(1) Seventeenth New Hampshire Volunteers.
(2) Pierrepont Rifles.
(3) Quartermaster Volunteers, 1864.
c. Office never existed ..... *Page 1044*
III. ORGANIZATION.
A. Engineer Brigade.
1. May have three regular officers, two engineers, and one other.
B. Enlisted Force.
1. May transfer to Regular Army.
2. Cooks may be colored.
IV. MUSTER OUT.
A. Authority to Muster Out.
1. War Department order has force of law.
B. Is Termination of Military Service
1. Of an organization as such.
2. Of an officer ..... *Page 1045*
3. Of an enlisted man.
4. Even if organization not disbanded until later.
5. No discharge certificate required.
C. Retention in Service After Organization Mustered Out.
1. Authority to muster out can retain.
a. Retained if military control exercised over him by competent authority.
(1) As long as under such control.
(2) Competent authority defined.
(*a*) Under General Order 108, 1863.
(*b*) Under General Order 13, 1899.. *Page 1046*
b. Certain classes not retained, viz, deserters, absentees, absent sick, etc.
c. Proper to retain men for trial.

IV. MUSTER OUT—Continued.
D. Date of Muster Out.
1. When not retained in service after muster out of organization.
a. True date is actual date of muster out.
(1) Regardless of date fixed in advance or entered in discharge certificate or date of payment.
(2) Date fixed in advance.
(a) Executively.
(b) Legislatively.
[1] Act provides "that volunteer force continue in service not later than July 1, 1901," is *mandatory* ..... *Page 1047*
[2] Act provides "that bands shall be mustered out within thirty days after passage of the act," is *directory.*
(3) Term of service expires before organization mustered out—notice fixes date of muster out.
(4) Absentees.
(a) General rule—same date as date of muster out of organization.
(b) Without leave.
(c) Prisoners of war.
(5) Men not subject to muster out as already out of service.
(a) Officer because office abolished.
(b) Enlisted man dropped as a deserter... *Page 1048*
2. When retained in service after muster out.
a. Date is date of notice.
(1) Officer ordered home for discharge.
(2) Ordered to report to mustering officer for discharge.
(3) Rule—if after being retained he withdraws himself from service.
3. Date can not be changed.
a. Muster out can not be *nunc pro tunc.*
b. Even if officer was retained for trial..... *Page 1049*
c. The record of muster out can not be changed.
E. Rank at Muster Out.
F. If Legal, Irrevocable.
G. If Illegal, Revocable.
1. Secured by fraud.
a. Government may ignore or revoke muster out.
H. Records of Organizations.
1. Deposited in War Department.
2. Finding of board as to service of officer being "honest and faithful" at discharge ..... *Page 1050*

I. The term "Volunteer Army" (as comprehensively used) means that temporary military organization or body of men which the Government usually employs and maintains in the military service in time of war or other public danger. It is made up of (1) persons who voluntarily make their engagements directly with the United States to serve; (2) persons who are conscripted directly by the United States and forced to serve; (3) persons who voluntarily engage with a State to serve in a State militia organization, and are (together with that organization) called into the United States

service as State militia by the President; (4) persons who are drafted by a State and forced into a State militia organization, and are (together with that organization) called into the United States service as State militia by the President. Those who make volunteer engagements directly with the United States to serve, and those who are conscripted directly by the United States and forced to serve, constitute organizations which (as well as the Regular Army) are called into existence by Congress under its constitutional power, "to raise and support armies." The State organizations are made a part of the Army of the United States under authority of a different provision of the Constitution, which provides for "calling forth the militia to execute the laws of the Union, suppress insurrection, and repel invasion." These organizations are usually formed (either by volunteer engagement on the part of the men or by conscription by the State authorities) to serve the State but the President can call them from the service of the State into the service of the United States. And sometimes the State organizations are formed (either by volunteer engagement on the part of the men or by conscription by the State authorities) with the purpose in view of their being transferred to the service of the United States (under the call of the President) as soon as the organizations are formed. But under all of these circumstances these militia organizations retain their character of State militia, and yet are at the same time (while in the active service of the United States under a call of the President) a part of the Army of the United States, and for general purposes, are considered as belonging to that branch of the United States Army known as the "Volunteer Army,"[1] and this, notwithstanding the men may have been conscripted and forced into the State militia organization by the State (to serve the State or to be transferred into the service of the United States), and then called into the service of the United States against their will and under their protest. After State militiamen, called into the United States service by the President, once get into that service, no distinction is made between the two classes on account of the manner in which the State got them into its organization—whether by volunteer engagement or by conscription. All of them are designated as militia called into the service of the United States. *C. 1301, May, 1895; 21406, Apr. 19, 1907.*

I A. The term "volunteers" is, however, usually applied to soldiers of a temporary United States Army—an army raised and organized and supported and maintained for a limited period by the United States independently of any State.[2] This kind of an army the President can not raise and maintain at any time without express authority of Congress. He has a general authority given him by Congress to call the militia of the States into the United States service whenever it becomes necessary for the purposes mentioned in the statute. But he has not such an authority to engage or employ what are usually called "Volunteers." It follows, therefore, that evidences that they were "called into service" by the President are not so important in

[1] Compare the provisions relating to organization of the "Volunteer Army," in the act of Apr. 22, 1898, and see V Comp. Dec., 25.

[2] For instances of such "Volunteers," see act of May 11, 1898, to provide for a volunteer brigade of engineers, and an additional force of ten thousand men specially accustomed to tropical climates; also sec. 12 of the act of Mar. 2, 1899, for increasing the efficiency of the Army and for other purposes.

the case of Volunteers as they are in the case of militia. If it be found that Volunteers actually performed service at a time when an act of Congress authorized them to be raised and maintained and employed, their status is usually determined to be that of Volunteers. But if there be no statute which authorized them to be raised and maintained and employed at that time, or authorized their recognition since, their claim to a status as Volunteers, rather than militia called into the service of the United States, must fall, no matter how often they were paid as such or how much or how long they have been recognized by the executive branch of the Government. *C. 1377, May, 1895; 17678, Mar. 10, 1905.*

I B. The Volunteer force during the Civil War was not a part of the militia, but of the Army of the United States. Though assimilated to the militia in some respects, as, for example, in the mode of original appointment of regimental and company officers, it was as distinct *in law* from the militia as was the so-called "Regular" contingent of the Army.[1] Volunteer officers, once mustered into the service of the United States, and while they remained in that service, did not differ substantially from Regular officers in their status, rights, or otherwise. Their tenure of office was indeed briefer; this, however, was not a material legal distinction, since the term of Regular officers was also in some cases limited by statute to a definite period—as the duration of the existing war. *R. 34, 459, Sept., 1873.*

I C. *Held*, that all the officers of the Volunteer Army are officers of the United States. *C. 5075, Sept. 28, 1898.*

I D. *Held*, that, under the law relating to the raising of a Volunteer Army, recruits are mustered directly into the service of the United States. *C. 4631, July 22, 1898.*

II A 1. The practice of receiving volunteer organizations into the military service through the operation of "muster in" was well established at the outbreak of hostilities in 1861. Volunteer forces had been employed in Indian hostilities upon several occasions prior to 1846, and a number of volunteer regiments, raised and tendered by the States, were received into the military service during the War with Mexico. *Held* that no regiment, company, or other organization of Volunteers could, under the law and regulations which controlled muster in, be regarded as having been "accepted" or received into the military service of the United States until it had been formally mustered into such service by a commissioned officer of the Army, duly authorized thereto by the Secretary of War. *Held, further*, that previous to such muster in such persons as had enrolled themselves, or otherwise indicated their intention to enter the volunteer service continued subject to the exclusive jurisdiction and control of the governors of their respective States. By undergoing the process of "muster in" such organizations of Volunteers were "accepted" into the military service of the United States and passed out of State control and into the exclusive control and jurisdiction of the United States as part of its volunteer forces. Over regiments and other commands, while in process of recruitment and organization, the

[1] As illustrating the distinction made in sec. 8, Art. I, of the Constitution, between the Army and militia, and indicating the status of the Volunteers, during the Civil War, as a part of the former, see Kerr *v.* Jones, 19 Ind., 351; Wantlan *v.* White, id., 471; In the matter of Kimball, 9 Law Rep., 503; Burroughs *v.* Peyton, 16 Grat., 483, 485.

jurisdiction of the several States was plenary, but it ceased to be exercised, save as to the appointment of commissioned officers to vacancies in completed organizations, from the instant of their muster into the military service of the United States. *C. 25831, Nov. 22, 1909.*

II A 2. In 1846, after Ohio had furnished its quota of Volunteers and they had been accepted, certain other organizations called "Camp Washington Volunteers" assembled near Cincinnati. Their services were not requested or required. Congress on August 8, 1846, by a joint resolution directed the Secretary of War "to cause to be paid * * * to the companies of Ohio Volunteers assembled at Camp Washington near Cincinnati, and who *claim* to have been mustered into service, one day's pay and allowances for every day detained in service, and the usual traveling allowance, and no more." The Adjutant General detailed an officer to pay the Camp Washington Volunteers and incorrectly instructed him to muster them as in the service, as he believed that an assemblage of civilian volunteers could not be paid. This detailed officer did actually muster the Camp Washington Volunteers for pay and paid them. *Held* that although they were listed on a muster roll by this officer in obedience to the order of the Adjutant General they were not mustered into the service of the United States, as there was no authority for their muster into the service of the United States. *Held*, further, that the Adjutant General incorrectly interpreted the law in directing that they should be mustered for pay, as the law merely intended their payment without muster into the service. *Held*, further, that the Camp Washington Volunteers were not mustered into the service by the act of the detailed officer in mustering them for pay. *C. 2351, June 13, 1895.*

II B 1 a. *Held* that the mustering of recruits by a State official during the Civil War is an act which has no connection with the muster in of a volunteer organization when presented to a duly authorized mustering officer of the War Department with a view to its acceptance as an organized part of the volunteer forces of the United States. *C. 25831, Nov. 22, 1909.*

II B 1 b. A volunteer soldier's entry into service depends upon two acts of volition, one being the offer to enter the service and the other the accepting and carrying out of the offer. *Held* that the enrollment for service is only a proposal to enter such service [1] a declaration or readiness to do so, and before a man who makes such declaration can become a soldier in the military service of the United States it is necessary that his proposal be accepted by a duly authorized representative of the United States. This acceptance is manifested by muster in. *P. 54, 313, July 9, 1892; C. 7050, Oct. 6, 1900.*

II B 1 c. A man who has been duly mustered into the service of the United States and has received the pay and performed the duties of a soldier should be treated as duly enlisted, though he may not have signed enlistment articles. *R. 3, 84, June 24, 1863.*

II B 1 d (1). A muster in is not necessarily formal. In some cases, indeed, there was no formal muster in, but *held* that placing a man on duty, or availing of his services, or treating him as duly in the military service, or paying him as a soldier, or taking up his name upon the rolls and accepting his services as a soldier, was a constructive

[1] See 23 Op. Atty. Gen., 406.

muster in. *P. 41, 136, June 3, 1890; 54, 313, July 9, 1892; C. 186, Aug., 1894; 1067, Apr. 25, 1895; 2293, June 2, 1896; 2643, Sept. 26, 1896; 7050, Oct. 6, 1900; 9159, Oct., 1900; 20237, Aug. 15, 1906.*

II B 1 e. Where a regiment is consolidated with another, under the name of the latter, no remuster or change of any kind taking place in the *status* of the enlisted men of either regiment, the men of each organization become members of the new regiment, not by virtue of any consent on their part, but because of the conditions of their original enlistment and muster into the United States service. *R. 5, 595, Dec. 31, 1863.*

II B 1 f (1). A muster in is not necessary in the case of a drafted man or a substitute. *Held* that examining him and holding him to service and actually putting him on duty takes the place of the "muster in." *P. 45, 72, Jan. 13, 1891; C. 1570, July, 1895; 2033, Aug. 4, 1896.*

II B 2 a. In 1862 Gen. Morgan recommended to the Secretary of War that the "Kentucky Home Guards" be called into immediate service to the number of 5,000 men. The Secretary of War acknowledged receipt, but did not call this militia forth. The Kentucky Home Guards, however, began service May 7, 1862, under the command of Gen. Morgan, and continued such service until July 7, 1862. They were not mustered in by a United States mustering officer. They were later paid for their services under joint resolution of February 8, 1867. *Held* that they were not mustered into the service of the United States.[1] *C. 783, Apr. 24, 1895.*

II B 2 a (1). Certain organizations of Alabama Territory militia in 1817 and 1818 served in the Seminole War without being formally mustered in. They were, however, mustered out of the service of the United States by officers of the Regular Army and paid from money appropriated in the Army appropriation acts, and were recognized fully at the time by both the Territorial and National authorities as being in the military service of the United States. *Held* that such recognition should at this time be deemed binding upon the United States. *C. 232, Mar., 1895.*

II C 1. State volunteers were enrolled in 1898, during the war with Spain, in many instances preceding the dates of muster in. *Held* that the date of muster in and not that of enrollment was the date of entry into the service of the United States. *Held* further that the remedial legislation by Congress for the purpose of paying such Volunteers the same pay as would have been given to officers and soldiers of the Regular Army was a specific recognition by Congress of the fact that they were not officers and soldiers during that period, since if they had been, no remedial legislation would have been needed in their behalf. *C. 7050, Oct. 6, 1900;[2] 9159, Oct. 20, 1900; 25831, Nov. 22, 1909.*

II C 2. *Held* that under the laws relating to the raising of United States Volunteers during the Spanish War, recruits are enlisted directly into the service of the United States and become soldiers in such service

[1] Militia in which the officers were appointed and commissioned in accordance with the laws of their States were called out under laws enacted by Congress, and such troops were mustered in by regiments and in some instances by brigades. See R. & P. 456829; see also 21 id., Op. Atty. Gen., 130, 24, 651.

[2] This opinion was approved by the Secretary of War and published in circular form, dated War Department, Mar. 23, 1901. See 23 Op. Atty. Gen., 406.

on the completion of enlistment by taking the oath of allegiance. *C. 4631, July 22, 1898.*

II D 1. The record of a formal muster in is an official record, duly made by the proper officers pursuant to law, of an official act performed under the law. It is therefore, in the absence of fraud, conclusive evidence of the facts recorded, and no other evidence is admissible to show a different state of facts. Great uncertainty would ensue could such records be set aside by parol or other evidence. *P. 60, 394, July, 1893; C. 10061, Mar. 26, 1901; 17810, Apr. 19, 1905; 20237, Aug. 14, 1906.*

II E. A muster in is the final act which closes a contract between a person and the Government and fixes certain relations between them. *Held* that a legal muster in is irrevocable. *Held* further that a muster in may be rescinded during the continuance of the contract if tainted with fraud. *P. 44, 60, Nov. 19, 1890.*

II F 1 **a** (1). A private of the One hundred and twenty-sixth New York Infantry Volunteers was commissioned a second lieutenant of that regiment by the governor of New York under the act of July 22, 1861 (12 Stat. 261). The mustering officer refused to muster in this appointee as a second lieutenant. *Held* that the appointee did not become vested with the office of second lieutenant. *Held* further that as he did not at any time act as a lieutenant under a valid commission he is not entitled to a remuster under the act of February 24, 1897 (29 Stat. 593).[1] *C. 14587, Jan. 12, 1904; 16516, July 5, 1904.*

II F 1 **a** (2). A man holding a recruiting commission under the appointment of the governor of a State, but not formally mustered into the service of the United States, is not, in the absence of a special provision by Congress including him as a part of the Volunteer Army, in the military service of the United States. *C. 20237, Aug. 15, 1906.*

II F 1 **b** (1). A man claimed recognition as colonel in the Seventeenth New Hampshire Volunteers. *Held* that as there was never a completion of the organization no such United States office ever existed as that of colonel in that regiment. *Held*, therefore, that the United States could not have accepted into its service a man as colonel of such regiment. *P. 40, 288, Apr. 22, 1890.*

II F 1 **b** (2). A man claimed recognition as captain in the Pierrepont Rifles. *Held* that as no such such organization was ever lawfully mustered into the military service of the United States, no such office as captain in that organization ever existed in the military service of the United States, and that therefore the claimant could not be recognized as an officer holding such office. *C. 25831, Nov. 22, 1909.*

II F 1 **b** (3). The so-called Quartermaster's Volunteers of 1864, composed of clerks and other civilian employees of the War Department, were not authorized by statute to be formed into a volunteer

[1] The Attorney General has held that "to give a citizen the status of the United States soldier in the Volunteer Army, his consent and that of the United States are both necessary, and the formality which marks this agreement of the two parties to the contract and the commencement of the obligations thereunder is the muster in." (23 Op. Atty. Gen., 408.) He has also held that "it is evident that those who are physically and mentally incapacitated for military duty should never be received into the military service of the United States, and the question of fitness und unfitness of a militiaman reporting under a call, can only be determined at the inspection which is required to be made as preliminary to muster in; the purpose of the law being to prevent the acceptance into the military service of the United States of officers and men unfit for that service." (24 id., 661.)

organization, nor were they authorized to be paid; nor were they mustered into the military service, nor mustered out or discharged from it. They were merely a civilian body organized with a view to service during the temporary emergency that might arise through the invasion of Maryland by the enemy. *Held* that the officers of such a force did not hold office in the military establishment. *P. 32, 42, Apr. 22, 1889; 38, 435, Feb. 12, 1890.*

II F 1 c. A man claimed that he was a volunteer aid-de-camp in the Civil War, and asked that his name be placed on the muster rolls and a discharge issued to him. *Held* that since there was no such office or position known to the law at the time as volunteer aid-de-camp, and since he had made no engagement with the Government and was not mustered into the service in any capacity or borne on United States muster rolls or reports as being attached to such service, he could not be regarded as having been the occupant of such a place or office. *P. 37, 462, Jan. 9, 1890.*

III A 1. Section 13 of the act of April 22, 1898 (30 Stat. 363), provided that "Not more than one officer of the Regular Army shall hold a commission in one regiment of the Volunteer Army at the same time." The act of May 11, 1898 (30 Stat. 405), which provided for the organization of a volunteer brigade of engineers in addition to the Volunteer Army authorized in the act of April 22, 1898, provided that "Not to exceed three officers of the Corps of Engineers of the Regular Army may hold volunteer commissions in any one regiment of the volunteer brigade of engineers at the same time." *Held* that under these two laws two officers might be taken from the Engineers and one from another branch of the Regular Army for appointment in the volunteer brigade of engineers. *C. 4371, June 18, 1898.*

III B 1. *Held* that volunteer soldiers may be transferred to the Regular Army and there serve the unexpired term. *C. 4245, June 3, 1898.* And, under the act of March 1, 1887 (27 Stat. 435), to the Hospital Corps. *C. 4122, May 17, 1898.*

III B 2. *Held* that there is no legislation which would prevent the enlistment of colored cooks in white regiments of volunteers, and that therefore such enlistment would be legal. *C. 4715, Aug. 1, 1898.*

IV A 1. An order issued by the War Department directing the muster out of volunteer troops must be regarded as promulgated by authority, since it can be issued only by authority of the Secretary of War. *Held* that such order is a regulation with reference to the administration of the Army which the President has the constitutional authority to make, and, as such, it has the force of law.[1] *R. 5, p. 319, Nov. 19, 1863; C. 6980 and 8962, Sept., 1900.*

IV B 1. Paragraph 1 of General Orders, No. 108, Adjutant General's Office, paragraph 15 of General Orders, No. 124, of 1898, and paragraph 2, General Orders, No. 13, Adjutant General's Office, 1899, provided that when an organization is mustered out the whole organization will be considered to have been mustered out except certain classes of absentees. *Held* that General Orders, No. 124, of 1898 had the same effect as General Orders, No. 108, of 1863, viz, to discharge all absentees not retained in service by competent authority, and that the Regulations of 1899 accomplished nothing more except that under the Regulations of 1899 the retention in service after muster out of an organi-

[1] Published in War Department circular of Sept. 20, 1900.

zation must, in order to be valid, be by special authority of the War Department. *C. 8962, Sept. 14, 1900;*[1] *6980, Sept., 1900; 10141, Apr. 2, 1901; 13103, Aug. 9, 1902.*

IV B 2. An order purported to dismiss an officer who has been mustered out of the service. *Held* that it was absolutely void. *P. 45, 57, Jan. 12, 1891.*

IV B 3. The muster out is a formal discharge from the Army, making a soldier a civilian and terminating all military authority and jurisdiction over him; even as the muster in converted the civilian into a soldier, so the muster out converts the soldier into a civilian. *P. 46, 237, Mar. 30, 1891; 65, 105, May 23, 1894; C. 9596, Jan. 2, 1901, 10037, Mar. 22, 1901; 10865, July 15, 1901.*

IV B 4. The United States may have as a matter of fairness provided for the transportation to their homes and the subsistence en route of persons mustered out of the service. *Held* that this was not because they were soldiers, but because they had been soldiers. *Held* further that if it had been intended that they should remain in the service until the "disbandment" they would not have been mustered out until then. *P. 51, 210, Jan. 5, 1892.*

IV B 5. *Held* that a discharge certificate is not necessary to effect a muster out, as the muster out is a formal discharge. *P. 65, 105, May 23, 1894; C. 9556, Jan. 2, 1901.*

IV C. *Held* that as an officer in a regiment of Volunteers is not an officer of the regiment merely, but an officer of the Volunteer branch of the Army, he may be held in service after the muster out of his regiment. *C. 5075, Sept. 28, 1898.*

IV C 1. General Orders 108, Adjutant General's Office, 1863, prescribed that whenever Volunteer troops were mustered out of the service the entire regiment or other organization, except prisoners of war, would be considered as mustered out at the same time and place, but *held* that neither that regulation nor similar provisions incorporated in General Orders 124, Adjutant General's Office, 1898, and General Orders 13, Adjutant General's Office, 1898, are applicable to officers and enlisted men specially retained in service after the muster out of the organizations to which they belonged, because in such case the exceptions are ordered contemporaneously by the same authority that made the rule. *C. 8962, Sept. 14, 1900.*[2]

IV C 1 **a** (1). As a general rule an officer or enlisted man of Volunteers, who was not actually mustered out of service with his command, must be considered as having been retained in the military service of the United States, notwithstanding General Orders No. 108 of 1863, and other orders and circulars, of similar import, provided that he was retained in service, or military control was exercised over him, by competent authority. *C. 5075, Sept. 28, 1898.*

IV C 1 **a** (2). An officer or enlisted man so retained in service, or subjected to military control, must be considered to have been in service so long as he was actually so retained or subjected to control. *C. 5075, Sept. 28, 1898.*

IV C 1 **a** (2) (*a*). Under General Order 108, Adjutant General's Office, 1863, all men, both present and absent, who belonged to a certain organization were mustered out on the date of the muster

[1] Published in War Department circular dated Sept. 20, 1900.
[2] This opinion was published in War Department circular of Sept. 20, 1900.

out of the organization to which they belonged, unless they were retained in service by competent authority. *C. 8962, Sept. 14, 1900. Held* that a "*competent authority*" was the order of any superior whom it was the duty of the person kept in the service to respect and obey while in the service, and who would have had authority to issue such order to, or exercise control over, the subordinate officer or enlisted man, while the latter was in the service. *C. 5075. Sept., 1898.*

IV C 1 a (2) (*b*). General Order 13, Adjutant General's Office, 1899 made provision for the execution of the act of January 12, 1899 (30 Stat. 784), which provided that the discharge of officers and enlisted men from the Volunteer forces of the United States should as far as practicable, take effect on the date of the muster out of the organization to which they belonged. *Held* that under this regulation the Secretary of War had authority to retain in service officers and enlisted men. *C. 5075, Sept., 1898; 6621, July 7, 1899; 7593,*[1] *Jan. 29, 1900; 8962, Sept. 14, 1900; 6980, Sept. 18, 1900.*

IV C 1 b. *Held* that officers and enlisted men who were retained for the service or convenience of the Government, or by reason of the refusal or neglect of superior officers to cause them to be discharged were not mustered out at date of muster out of organization; but that deserters at large or absentees with or without leave, at the date of muster out of their commands, or any persons who, through fault or neglect of their own, failed to be mustered out or discharged at the proper time, or those who were *permitted* to remain under partial military control solely for their own comfort, convenience, or safety, such as sick or wounded men undergoing treatment in hospital or elsewhere, were not so retained in the service. *C. 5075, Sept. 28, 1898.*

IV C 1 c. *Held* that it was proper to retain in the service officers or enlisted men of the Volunteer forces after the muster out of their regiments in 1899, for the purpose of bringing them to trial by court-martial for offenses charged. *C. 5767, Jan. 31, 1899.*

IV D 1 a. *Held* that the true date of muster out is the date when the organization or individual was actually mustered out. *R. 16, 406, July 22, 1865; P. 44, 450, Jan., 1891; 46, 101, 223, 243, Mar. and Apr., 1891; 51, 126, Dec., 1891; C. 2888, Jan., 1897; 6621, July, 1899; 7451, Dec., 18 1899; 8722, Aug. 3, 1890; 8962, Sept. 14, 1900.*[2]

IV D 1 a (1). When it is clearly shown by the official records that a Volunteer organization was actually mustered out of the military service of the United States on a certain date, *held* that that date should be accepted as the true date of the muster out, regardless of the date which may have been fixed in advance for the muster out, or of the date to which payment was made, or of the date of discharge entered upon the discharge certificates that may have been given to men mustered out of the organization. *C. 7451, Dec. 18, 1899; 8722, Aug. 3, 1900.*

IV D 1 a (2) (*a*). Certain Volunteer officers who were absent with leave from their commands were ordered by the President, on May 6, 1865, to be honorably mustered out of the service, to date "the fifteenth instant," and to apply immediately by letter for their muster-out and discharge certificates. *Held*, that the muster out operated in that case on the 15th instant, though the muster-out and

[1] See G. O. 108, A. G. O., 1863; G. O. 13, A. G. O., 1898, and G. O. 124, A. G. O., 1898, for muster out regulations.

[2] This opinion was published in War Department circular of Sept. 20, 1900.

discharge papers may not have reached these officers until after that date. *C. 1636, Oct., 1895; 1945, Dec., 1895; 10141, Apr. 2, 1901.*

IV D 1 a (2) (*b*) [1]. Section 12 of the act of March 2, 1899 (30 Stat. 980), provided that "such increased Regular and Volunteer force shall continue in service only during the necessity therefor, and not later than July 1, 1901." *Held*, that officers and enlisted men of such force, in the absence of remedial legislation, ceased to be in the military service on the 30th of June, 1901. *C. 11860, Jan. 6, 1902.*[1]

IV D 1 a (2) (*b*) [2]. The act of July 17, 1862 (12 Stat. 594), provided that the men composing regimental bands should be mustered out of the service within 30 days after the passage of the act. *Held*, that the act was directory only, and did not invalidate service continued beyond the time indicated by reason of the failure of the proper officer to muster out the men at the time when the law provided that it should be done. *P. 52, 392, Mar. 18, 1892.*

IV D 1 a (3). A Volunteer soldier was absent at the date when the expiration of his term of service arrived. A detachment from his organization, whose service ended on the same date, was mustered out on that date on the detachment roll. *Held*, that the absent soldier was not mustered out as of that date, under the provisions of General Order No. 108, Adjutant General's Office, 1863, but was mustered out at a later date when he received notice of his discharge in the hospital, where he was being treated for wounds. *C. 1297, June 19, 1895.*

IV D 1 a (4) (*a*). General Orders Nos. 108 of 1863, 124 of 1898, and 13 of 1899, Adjutant General's Office, fix the general policy that Volunteers who are absent at the date of muster out of their organizations shall be held to have been mustered out at the date of muster out of the organization to which they belonged. *C. 6980, Sept., 1900; 8962,*[2] *Sept. 14, 1900; 10141, Apr. 2, 1901; 13103, Aug. 9, 1902.*

IV D 1 a (4) (*b*). A Volunteer soldier was absent without leave at the time his regiment was mustered out and the Volunteer forces were disbanded. *Held*, that upon the muster out of the Volunteer forces he became a civilian, and that, being no longer in the service, he could not later be discharged, but that a certificate to that effect may be given him by the War Department.[3] *C. 12464, July 8, 1902.*

IV D 1 a (4) (*c*). Under the provisions of General Orders, No. 108, Adjutant General's Office, 1863, soldiers who were prisoners of war when their company was mustered out were to "be considered as in the service until their arrival in a loyal State, with an allowance of time necessary for their return to their respective places of enrollment." *Held*, in the case of a soldier who was a prisoner of war at the time his company was mustered out but who, after release from captivity, was furloughed and ordered to report at a military post on a certain date, that he was in the service until the date designated for him to report at such post. *Held* further that he should be considered to have been mustered out on that designated date. *P. 64, 430, Apr. 25, 1894.*

IV D 1 a (5) (*a*). A person held the office of supernumerary second lieutenant of Company G, Eleventh Kentucky Cavalry, which office was abolished by the act of March 3, 1863. *Held*, that at the abolition

---

[1] Published in War Department circular of May 26, 1902.
[2] Published in War Department circular of Sept. 20, 1900.
[3] See War Department circular of June 1, 1901.

of the office the occupant reverted to the status of citizen and that no muster out was necessary. *P. 53, 452, May 21, 1892.*

IV D 1 a (5) (*b*). *Held,* that volunteers who had been dropped from the rolls as deserters preceding the muster out of their organizations were not mustered out at the date of muster out of their organizations, but were separated from the service by the operation of being dropped from the rolls. *C. 6980, Sept., 1900; 8962,*[1] *Sept. 14, 1900; 10141, Apr. 2, 1901; 13103, Aug. 9, 1902.*

IV D 2 a. In the case of a Volunteer soldier held in the service, by proper authority, after the muster out of his organization, *held,* that his discharge takes effect on the date when he receives notice that he has been discharged, but that if he be not held in service by proper authority his discharge takes effect on the date of the muster out of the organization to which he belongs. *C. 6980, Sept. 18, 1900; 8962, Sept. 14, 1900; 9556, Jan. 2, 1901.*

IV D 2 a (1). An officer who, having been retained in service after his command has been mustered out, was ordered by The Adjutant General, or by other competent authority, to proceed to his home and report by letter to The Adjutant General for discharge, must be considered to have been in service until he received the order for his discharge, or, in case it can not be ascertained when he received notice of his discharge, until the date of the order directing his discharge, provided that it appears that upon receiving the order to go to his home and report he obeyed the order without delay. *C. 5075, Sept. 28, 1898; 2940, Feb. 12, 1897.*

IV D 2 a (2). An officer or enlisted man who was retained in service after the muster out of his command and was subsequently ordered to report to the chief mustering officer of his State for discharge, must be considered to have been in service until the date of the issue of that discharge, provided that it appears that he obeyed his order and reported to the chief mustering officer of his State without delay. *C. 5075, Sept. 28, 1898.*

IV D 2 a (3). Neither an officer nor an enlisted man, retained in service or subjected to military control after the muster out of his command, who voluntarily withdrew himself from such service or control without permission from the proper authority, or who failed to promptly obey an order to proceed to his home and report to The Adjutant General, or an order to report to the chief mustering officer of his State, must be considered to have been separated from the service on the date on which he withdrew himself from military control or was relieved from duty; and if that date is not ascertainable, then his service must be considered to have terminated on the date of the last official order issued, or the last official act done to or concerning him, while he was still actually rendering military service or was under actual military control. *C. 5075, Sept. 28, 1898, 2940, Feb. 11, 1897.*

IV D 3 a. There can be no such thing as a man's being mustered out from the military service *nunc pro tunc* any more than a man can die *nunc pro tunc.* Even as a man has to live until he dies and can not be killed after he has ceased to live, so a soldier must remain a soldier until he changes to the status of civilian, and can not be changed to the status of civilian years after he has ceased to be a soldier. *P. 46 232, Mar. 30, 1891. Held,* that we can not by order create a fact

[1] Published in War Department circulars of June 1 and Sept. 20, 1900.

to-day and carry the same back to a date and there set it up as a fact occurring on that date, whereas in reality no such fact then occurred. *R. 16, 406, July 22, 1865; P. 44, 450, Jan., 1891; 46, 101, 223, 243, Mar. and Apr., 1891; 51, 126, Dec., 1891; C. 2888, Jan., 1897; 7451, Dec. 18, 1899; 8722, Aug. 3, 1900; 8962, Sept., 1900.*[1]

IV D 3 **b.** An officer was retained in the service after the muster out of his organization for the purpose of his trial by court-martial. *Held,* in one case, that pending his trial he may not be mustered out as of a date previous to the trial. *R. 12, 672, Sept. 25, 1865. Held,* in another case, where the officer was acquitted, that he may not be mustered out as of a date prior to the proceedings of the court. *R. 16, 406, July 22, 1865.*

IV D 3 **c.** *Held* that after a Volunteer Army has passed out of existence there is no authority of law under which the War Department can change the record of muster out of a soldier so as to make it appear otherwise than as shown by the official records. *P. 35, 355, Oct. 3, 1889; C. 9170, Oct. 24, 1900.*

IV E. *Held* that an officer will be mustered out with the rank which he actually has in connection with the office into which he has been mustered, and that he can not be mustered out with a certain grade simply because he is performing the duties of an officer of that grade.[2] *C. 9774, Feb. 25, 1901.*

IV F. A legal muster out of service of an officer can not be revoked. *R. 6, 478, Nov. 5, 1864; 11, 197, May 1, 1865; 25, 541, May 8, 1868; P. 35, 303, Sept. 30, 1889.* While the Volunteer Army was in existence a muster out not secured by fraud through misrepresentation (*R. 6, 661, Dec. 28, 1864*), or through withholding evidence (*R. 20, 584, May 1, 1866*), was irrevocable. But *held* that after the Volunteer Army had passed out of existence there is no authority of law under which the War Department can change the record of a soldier so as to make it appear otherwise than as shown by the official records. *P. 35, 355, Oct. 3, 1889.*

IV G 1. *Held* that while a volunteer army was in existence a muster out secured by fraud, misrepresentation, or withholding evidence, was revocable. *R. 6, 661, Dec. 28, 1864; 11, 463, Feb. 21, 1865; 20, 584, May 1, 1866; 23, 169, Aug. 11, 1866.*

IV G 1 **a.** As it is a general principle that fraud vitiates any compact, and that no party is bound by an engagement or obligation into which he has been induced to enter through the fraud or false representation of another, *held* that in cases of fraudulent muster out, the Government may elect to treat the mustering out order as of no effect; or it may revoke it, or discharge without honor or dismiss the officer, or, order him to be tried by court-martial for his offense, at any time preceding the passing out of existence of the volunteer army to which the officer belonged. *R. 11, 463, Feb. 21, 1865; 23 id., 121, July 19, 1866; 25 id., 394, Mar. 14, 1868; P. 35, 35, Sept. 30, 1889.*

IV H 1. The War Department (The Adjutant General's office) is merely the custodian of the records of disbanded volunteer organizations. Undoubtedly there were many things which should have been recorded but which were not recorded while the organizations to which the records pertain were still in the service of the United States. This fact however does not by any means justify the department in

[1] See War Department circular of Sept. 20, 1900.
[2] Published in War Department circular of Mar. 25, 1901.

undertaking to alter or amend the original records in its custody so as to make them show what it may now be thought they ought to have been made to show originally. If such a procedure were permissible with regard to one subject, such, for instance, as that of charges against the pay of enlisted men, it would be equally permissible with regard to an infinite number of other subjects; and there would be no end to the alterations and amendments to which the records might be subjected in the course of years.[1] *C. 9170, Oct., 1900.*

IV H 2. By General Orders, No. 13, Adjutant General's office, 1899, paragraph 148, Army Regulations, was extended to officers of volunteers. Section 3 of this order is a regulation in aid of a statute, viz, the "act granting extra pay to officers and enlisted men of United States volunteers," approved January 12, 1899, and with Army Regulations 148, provides a means of determining whether an officer's or soldier's service has been honest and faithful. *Held*, therefore, that when under these regulations a board is appointed, its approved finding should be held conclusive, as should also the decision of the commanding officer when no board has been appointed or applied for.[2] *C. 6408, May, 1899.*

CROSS REFERENCE.

Appointments by President.....See OFFICE III A 4 b.
Army.....See VOLUNTEER ARMY.
Enlistment in.....See ENLISTMENT I B 2 d; e.
Examination for commission.....See MILITIA XVII to XVIII.
Office.....See OFFICE V to VI.
Office in, abolished.....See OFFICE II A 1.
Public property carried into.....See MILITIA IX J.
Regular officer.....See OFFICE IV A 2 d (3); (3) (*a*).
Relative rank.....See RANK II B to C.
Service in counts for retirement.....See RETIREMENT II A 3.
Trial.....See DISCIPLINE XV I 1.

VOLUNTEER BANDS.

See ARMY BANDS I D to E.
Funds of.....See GOVERNMENT AGENCIES VIII.
Instruments.....See PUBLIC PROPERTY VIII A 6.
Music.....See APPROPRIATIONS LX.
Post exchange profits.....See GOVERNMENT AGENCIES II J 11; 12.

---

[1] Under date of Mar. 2, 1889, the Secretary of War held that "a record can not be altered unless there is express provision of law authorizing such alteration. Where evidence is filed which convinces the officer whose duty it is to report upon a record that the record is not correct, the fact as shown by the record will be stated, followed by a remark showing what in his opinion the correct record should be. It is entirely proper to make a note opposite the record believed to be erroneous, to show what the correct record is, and where the evidence to substantiate the fact may be found. This decision should not be construed to prohibit the correction of errors in a report or record of current or recent date where the officer who made the record makes satisfactory explanation in writing of such erroneous record and authorizes its correction."

[2] This opinion was concurred in by the War Department and the following action noted: "Hereafter in the case of any officer or enlisted man of a volunteer organization that has been mustered out of service a record of 'service not honest and faithful' that has been made against such officer or enlisted man at the time of his discharge, in accordance with paragraph 148, Army Regulations, and section 3, of General Orders, No. 13, A. G. O., 1899, will be held to be conclusive. No cancellation, alteration, or amendment of such a record will be made, and all applications for the cancellation, alteration, or amendment of such a record will be denied, regardless of any and all testimony that may be submitted in support thereof, on the ground that the War Department has no lawful authority to review the decision that was made in such a case or to change the record of that decision."

VOTE.

I. LOSS OF ON CONVICTION.

A. MEANS CONVICTION BY CIVIL COURT.

I A. Where a State statute imposed the disability of loss of the right of the suffrage upon persons convicted of larceny, *held* that the conviction intended was a conviction by a civil court, and that a conviction of this crime by a military court (even if convened within the State) did not work such disability, or—to enable the soldier to vote in the State—require a pardon by the President. *P. 27, 65, Sept., 1888.*

CROSS REFERENCE.

See RESIDENCE.
By civilian emptoyees.....See EIGHT-HOUR LAW IX.
By deserter.....See DESERTION XIV B.
Member of general court-martial.....See ARTICLES OF WAR LXXXIV C I; 2. DISCIPLINE IX K 1 to 3.

VOUCHER.

Certification of by Assistant and Chief Clerk of War Department.....See CIVILIAN EMFLOYEES XVI C.
Forged.....See PUBLIC MONEY II B 2
Lost.....See DISCIPLINE X I 7

WAIVER.

Accused right to be present at trial.....See DISCIPLINE VIII H 2.
Amount of bond.....See BONDS III E.
Bond of contractor.....See BONDS III A.
By admission.....See DISCIPLINE V H 2.
By pleading general issue.....See DISCIPLINE V E; IX F 2 a.
Defects in bidders' guaranties.....See BONDS I C.
Defects in bonds.....See BONDS.
Examination requirements.....See LAWS II A 1.
Guaranties.....See CONTRACTS XI F.
Guarantor for copartner.....See BONDS I D.
Plea in bar.....See DISCIPLINE IX F 1 a (1).
Privilege by witness.....See DISCIPLINE X H 1.
Right to appear before retiring board.....See RETIREMENT I N 2.
Right to discharge.....See DISCHARGE IX D.
Right to pension.....See OFFICE III A 5.
Sample with bids.....See CONTRACTS VI I.
Time limits.....See CONTRACTS VII J 10.
Travel allowance in discharge by favor.....See PAY AND ALLOWANCES III C 2 c (3).
Trial by Government.....See DISCIPLINE V A.
Variance.....See DISCIPLINE V D 4.

WAR.

I. DEFINED..... *Page 1054*

A. CLASSES.

1. Perfect.
2. Imperfect.
3. Civil.
4. Mixed.
5. Indian..... *Page 1055*

a. Declaration not required.

B. BEGINNING OF WAR.

1. Declaration not necessary.
2. Spanish War.
3. Philippine insurrection.
4. Boxer uprising.
5. Proclamation.

a. Should call on citizens to cooperate.

I. DEFINED—Continued.
C. LAWS OF WAR.
1. Defined.
2. Rule of nonintercourse.
a. Civilians may be put under surveillance..... *Page 1056*
b. Applies to aliens.
c. Enforcible as to newspapers in occupied territory.
d. Violation of, is not offense of spy..... *Page 1057*
3. Spies.
a. Must be captured *in flagrante delicto*.
b. Hostile officer.
c. Hostile straggler.
d. Gravamen of offense.
4. Newspapers.
a. May be suppressed..... *Page 1058*
5. Weapons.
a. Saber may be sharpened.
6. As to property.
a. Destruction of, in battle.
(1) Must be borne by sufferers.
(2) Any compensation is bounty rather than right.
b. Use of.
(1) Real property.
(*a*) Public buildings..... *Page 1059*
(*b*) Transportation.
c. Captured property.
(1) Not violation of article 5, amendments to Constitution.
(2) Not impressed under section 3483, Revised Statutes.
(3) Title accrues to United States.
(*a*) Civilian can not convert to own use..... *Page 1060*
(*b*) Disposed of only by Congress.
(*c*) No prize money in Army.
(*d*) Personal appropriation of property is a military offense.
(*e*) Disposition of recaptured property.
[1] Of loyal owner..... *Page 1061*
[2] Of a regimental flag.
(*f*) Immovable can not be alienated.
[1] Use of, may be licensed..... *Page 1062*
d. Borrowed property.
(1) From allies.
e. Seizing of property.
(1) Of money in bank.
f. Taxes.
(1) Become payable to military occupant.
g. Mapping, etc.
(1) Photographing fortifications forbidden..... *Page 1063*
h. Destruction of property as a military necessity.
7. Enemy's government.
a. Courts enforce local law until suspended.
8. Military government.
a. War power—source of and execution of.
(1) Any proper law of military government after promulgation is valid law..... *Page 1064*

I. DEFINED—Continued.
C. Laws of War—Continued.
8. Military government—Continued.
a. War power—source of and execution of—Continued.
(2) Commanding general.
(a) May appoint civil courts.
(b) May remove civil officials..... *Page 1065*
(c) May collect tariff..... *Page 1066*
[1] On cotton.
(d) May deport persons for cause.
(3) Military commissions.
(a) Are criminal law courts.
(b) Jurisdiction.
[1] Source..... *Page 1067*
[2] Cases that arise before organization of military government.
[3] Offenses of spy..... *Page 1068*
[4] Continues until peace.
[5] Special statutory jurisdiction under act of March 3, 1867.
(c) Lack of jurisdiction.
[1] Not under military government .. *Page 1069*
[a] Even over offenses at prison camp.
[2] Over civil suits.
[3] Concurrently with courts-martial.
(d) Procedure.
[1] Of court-martial applicable..... *Page 1070*
[2] Action by convening authority.
[3] Types of principal cases during Civil War.
[4] Types of crimes during Civil War. *Page 1071*
[5] Types of offense against prisoners of war.
(e) Sentence ..... *Page 1072*
(4) Provost courts.
b. Continues until Congress makes other provision.
c. In Cuba by intervention.
(1) Duty is an executive one.
(a) Question of intervention arises, How?... *Page 1073*
(b) Steps to be taken.
9. Retaliation..... *Page 1074*
10. Flag of truce.
11. Prisoners of war.
a. Unnecessary taking of prisoner's life is murder.
b. Violation of parol is capital offense..... *Page 1075*
c. Taken from enemy.
(1) Civil employees.
(2) May be turned over to civil courts for trial of murder committed in a prison.
(3) Civil courts may pass on status of prisoner of war if such prisoner has become subject to the court's jurisdiction.
(4) Parol does not authorize prisoner to come within our lines.
(5) Grounds for remission of sentence of prisoner of war.
(a) Enemy's chaplain entered line to purchase bibles.
(6) Termination of status.
(a) By enlistment..... *Page 1076*

I. DEFINED—Continued.
C. Laws of War—Continued.
11. Prisoners of war—Continued.
d. Taken by the enemy.
(1) If under sentence of dismissal remain in service until notice of dismissal.
(2) Parol.
(a) Returns to duty status.
(b) Paroled prisoner not required to return to regiment.
(c) May be assigned to duty not in contact with enemy.
(3) Enlisting in enemy's army.
12. Writ of habeas corpus may be suspended ..... *Page 1077*
a. Revocation of ..... *Page 1078*
D. Treaty.
1. Public movable property not mentioned remains property of former owner.
E. Martial Law.
1. Defined.
a. Modified degree of law of war..... *Page 1079*
(1) Military power supreme.
b. Exists when military government takes control.
c. Commanding general supreme governor..... *Page 1080*
(1) May stop suits against United States.
d. When emergency ceases occasion for martial law passes.
e. Revocation of suspension of writ of habeas corpus.
f. When Federal troops protect State they are not under command of State authorities..... *Page 1081*
F. Ending of War.
1. State judge can not decide when war ends.
2. Spanish War.
3. Philippine insurrection ..... *Page 1082*
4. Boxer uprising.
G. Newspaper Correspondents.
1. Subject to military control.

I. War is that state in which a nation prosecutes its right by force. Parties belligerent in a war are independent nations, but it is not necessary to constitute war that both parties be acknowledged as independent nations or sovereign States. War may exist if one of belligerent parties claims sovereign rights against the other.[1] *C. 7721, May 9, 1907; 17609, Mar. 21, 1905.*

I A 1. A perfect war is one which disturbs the national peace and tranquillity and lays the foundation of every possible act of hostility. *C. 7721, May 9, 1907.*

I A 2. An imperfect war is said to be that which does not entirely disturb the public tranquillity, but interrupts it only in some particulars, as in the case of reprisals.[1] *C. 7721, May 9, 1907.*

I A 3. A civil war is a war *de facto* existing within the borders of a State.[2] *C. 7721, May 9, 1907.*

I A 4. A mixed war is described as a war carried on between a nation on one side and private individuals on the other. *C. 7721, May 9, 1907.*

---

[1] The Bank of the Commonwealth *v.* The Commissioner of Taxes, 67 U. S., 635.
[2] Four Federal cases, 384.

I A 5. Active hostilities with Indians do not constitute a state of foreign war, the Indian tribes, even where distinct political communities, being subject to the sovereignty of the United States.[1] Warfare inaugurated by Indians is thus a species of domestic rebellion, but it is so far assimilated to foreign war that during its pendency and on its theater the laws and usages which govern and apply to persons during the existence of a foreign war are to be recognized as in general prevailing and operative. *Held* that the mere making of predatory incursions by parties of Indians with whose tribe no general hostilities have been inaugurated does not constitute an Indian war. *C. 20570, Nov. 27, 1906.*

I A 5 a. No formal declaration of war by Congress or proclamation by the President is necessary to define and characterize an Indian war. It is sufficient that hostilities exist and military operations are carried on.[2] *C. 7721, May 9, 1907.*

I B 1. *Held* that a state of actual war may exist without any formal declaration by either party, and this is true of both civil and foreign war.[3] *C. 17609, Mar. 21, 1905.*

I B 2. The act of April 25, 1898 (30 Stat. 364), declared "that war has existed since April 21, 1898." *Held* that a state of war between the United States and Spain began on April 21, 1898. *C. 5424, Dec. 1, 1898; 15754, Dec. 23, 1904.*

I B 3. *Held* that the insurrection in the Philippine Islands was fully initiated as a state of war by the battle of Manila on February 4, 1899,[4] and that there followed a rebellion in which a hostile party occupied, and held in a hostile manner, a certain portion of territory, declared their independence, organized armies and engaged the troops of the United States in hostilities in which thirty or forty thousand men were involved. *C. 8197, May 3, 1900; 10002, Mar. 18, 1901; 12184, Mar. 12, 1902; 15754, Dec. 23, 1903; 19734, May 15, 1906.*

I B 4. *Held* that a war status existed in behalf of officers and enlisted men of the Army of the United States who were in China beginning with May 26, 1900. This gave them the increased allowance of pay for service in time of war. *C. 16596, Feb. 10, 1905.*

I B 5 a (1). *Held* that if a stage is reached where in the performance of his duty "to execute the laws of the Union" it becomes necessary for the President of the United States to issue a proclamation calling upon the insurgents and other evil-disposed persons to retire to their homes, it would be advisable to incorporate into such proclamation a clause calling upon all citizens to cooperate in the effective suppression of unlawful violence.[5] *C. 20396, Sept. 17, 1906.*

I C 1. The law of war is, in brief, the law of military government and authority as exercised in time of war, foreign or civil. Its usual field is the territory of a conquered country in the occupation of a hostile army; it is sometimes extended, however, though generally in

---

[1] See Worcester *v.* Georgia, 6 Peters, 515.

[2] Alaire *v.* The United States, 1 Ct. Cls., 238, and Marks *v.* The United States, 28 Ct. Cls., 147.

[3] Prize Cases, 67 U. S., 636. See Hague Conventions of 1907; 36 Stat. 2241; also Military Laws of United States with Supplement of 1911, p. 1461.

[4] See Thomas *v.* U. S., 39 Ct. Cls., 1.

[5] This was done by President Washington in his proclamation dated Sept. 1, 1794, and by President Lincoln in his proclamations dated Apr. 15 and May 3, 1861, respectively.

a milder form, to localities under "martial law." It is properly a part of the law of nations, though its application may be materially varied by the circumstances of the country or the people brought under its sway.

It is a fundamental principle of the law of war that, during a state of war, all commercial intercourse between the belligerents is interdicted and made illegal except when and where it may be expressly authorized by the Government. During the Civil War, which, as respects the application in general of the laws and usages of war, was assimilated to a foreign war,[1] all trade or intercourse with the enemy, except so far as permitted by the President under authority from Congress (or in rare cases by a commanding general in the field representing the President) was necessarily suspended.[2] *R. 11, 533, 647, 651, Mar. and Apr., 1865; 12, 259, Jan., 1865; 14, 241, Mar., 1865; 16, 572, Sept., 1865; 19, 673, July, 1866; 30, 346, May, 1870.*

I C 2 a. Where a party arrested in attempting without authority to cross the Potomac for the purpose of holding communication with persons in the enemy's country, was ordered by the department commander—his offense having been committed in a district in military occupation—to be placed under military surveillance and to furnish a bond with sufficient sureties, obliging him not to attempt again during the war to join or hold intercourse with the enemy, *held* that such proceeding was warranted by the laws and customs of war. *R. 3, 255, July, 1863.*

I C 2 b. Offenses against the law of nonintercourse between the belligerents in time of war are no less such when committed by foreigners than when committed by citizens. Thus where certain persons made their way early in the civil war from Scotland to South Carolina, engaged for a considerable period in the manufacture of treasury notes for the Confederate authorities, and at the end of their employment came secretly and without authority into our lines with the design of returning to their home, *held* that, though British subjects, they had identified themselves with the cause of the enemy, and were properly amenable to trial for the offense of penetrating our military lines in violation of the laws of war. *R. 15, 112, Mar., 1865.*

I C 2 c. *Held* that a system of correspondence which had been concerted and maintained between northern and southern newspapers by means of an interchange of published communications entitled "Personals," was an evasion of the rule interdicting intercourse with the enemy in time of war, and, not being within the regulations established

[1] See Prize Cases, 2 Black., 666-9; Dow *v.* Johnson, 10 Otto, 164; Brown *v.* Hiatt, 1 Dillon, 372; Philips *v.* Hatch, id., 571; Sanderson *v.* Morgan, 39 N. York, 231; Perkins *v.* Rogers, 35 Ind., 124; Leathers *v.* Com. Ins. Co., 2 Bush, 639; Hedges *v.* Price, 2 West Va., 192.

[2] The Ouachita Cotton, 6 Wallace, 521; Coppell *v.* Hall, 7 id., 542, 554; McKee *v.* United States, 8 id., 163; United States *v.* Grossmayer, 9 id., 72; Montgomery *v.* United States, 15 id., 395; Hamilton *v.* Dillin, 21 id., 73; Mitchell *v.* United States, id., 350; Matthews *v.* McStea, 1 Otto, 7; Dow *v.* Johnson, 10 id., 164; Kershaw *v.* Kelsey, 100 Mass., 561; Lieber's Instructions, G. O. 100, War Dept., 1863, par. 86. Besides the suspension incident to the state of war, a suspension of commercial intercourse with the enemy was specially directed by act of Congress of July 13, 1861, and proclaimed by the President on Aug. 16, 1861. By authority conferred by the same statute, general regulations, concerning commercial intercourse with and in the States declared in insurrection, were approved by the President, Jan. 26, 1864, and published in G. O. 53, Dept. of the Gulf, of Apr. 29, 1864.

for correspondence by letter between the lines by flag of truce, should not, however innocent might be many or most of the communications, be sanctioned by the Government, but that the proprietors of the northern newspapers concerned should be notified that unless the practice were discontinued, they would be liable to be proceeded against for promoting correspondence with the enemy in violation of the laws of war or of the special act of February 25, 1863.[1] *R. 12, 259, Jan., 1865.*

I C 2 d. A mere violation of the law of war prohibiting intercourse between belligerents, committed by a civilian in coming without authority within our lines from the enemy's country, can not properly be regarded as attaching to him the character of the spy. *R., 9, 95, May 9, 1864.*

I C 3 a. The spy must be taken *in flagrante delicto.* If he succeeds in making his return to his own army or country, the crime, according to a well-settled principle of public law, does not follow him, and, if subsequently captured in battle or otherwise, he can not properly be brought to trial as a spy.[2] *R. 5, 248, 286, Nov., 1863; 9, 100, May, 1864; 23, 459, May, 1867; C. 2644, Sept., 1896; 21529, May 14, 1907, Oct. 20, 1908.*

I C 3 b. Where an officer of the enemy's army, arrested while lurking in the State of New York in the disguise of a citizen's dress, was shown to have been in the habit of passing, for hostile purposes, to and from Canada, where he held communication with agents of the enemy and conveyed intelligence to them, *held* that he was amenable to trial as a spy before a military court under the statute. *R. 11, 474, Feb., 1865; C. 21529, May 14, 1907, and Oct. 20, 1908.*

I C 3 c. Where a soldier of the enemy's army, separated from it on its retreat from Maryland in 1864, was arrested after wandering about in disguise within our lines for a month, seeking for an opportunity to make his way to the enemy's forces and join his regiment, *held* that he was not properly chargeable with the offense of the spy, but should, because of his disguise, be punished for a violation of the laws of war. *R. 11, 82, Oct., 1864; C. 21529, May 14, 1907, and Oct. 20, 1908.*

I C 3 d. Section 1343, R. S.,[3] is one of the few provisions of our statute law authorizing the trial, in time of war, of *civilians,* by military courts. The majority, however, of the persons brought to trial as spies during the Civil War were members of the army of the enemy. The gravamen of the offense of the spy is the treachery or deception practiced—the being in disguise or acting under false pretenses.[4] An

[1] See G. O. 10, Dept. of the East, 1865.

[2] The leading case on this point in this country is, In the matter of Martin, reported in 45 Barb. (N. Y.), 142, and 31 How. Pr., 228. See also par. 104, G. O. 100, A. G. O., of 1863.

See also Hague convention of 1907, 36 Stat. at L., 2241; also Military Laws of United States, with Supplement of 1911, p. 1461. Spies must be tried (Hague convention, 1907).

[3] This section provides: "All persons who, in time of war, or of rebellion against the supreme authority of the United States, shall be found lurking or acting as spies, in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be triable by a general court-martial, or by a military commission, and shall, on conviction thereof, suffer death."

[4] Halleck, Int. Law, 406 and 407.

officer or soldier of the enemy discovered "lurking" in or near a camp or post of our Army, disguised in the uniform or overcoat of a United States soldier, is *prima facie* a spy, and liable to trial as such. *R. 14, 579, June, 1865.* So an officer or soldier of the enemy who, without authority and covertly penetrates within our lines disguised in the dress of a civilian, may ordinarily be presumed to have come in the character of a spy, unless, by satisfactory evidence that he came for some comparatively venial purpose, as to visit his family, and not for the purpose of obtaining information, he may rebut the presumption against him and show that his offense was a simple violation of the laws of war. *R. 2, 580, June, 1863; 4, 307, and 5, 315, Nov., 1863; 5, 572, and 7, 66, Jan., 1864; 15, 14, Feb., 1865.*

I C 4 a. There can be no doubt as to the authority of the commander of an army, in occupation and government of the enemy's country, to suppress a newspaper or other publication deemed by him to be injurious to the public interests in exciting opposition to the dominant authority or encouraging the support of the enemy's cause on the part of the inhabitants. A newspaper may be a powerful agent for such a purpose, and, when it is so, it may, under the laws of war, as legally be silenced as may a fort or battery of the enemy in the field. *R. 2, 585, June, 1863.*

I C 5 a. *Held* that the sharpening of sabers is not a violation of the laws of war nor is it a violation of any of the conventions which have been accepted by the United States either expressly or by implication for the government of its military forces when engaged in actual military operation. *C. 14000, Jan. 19, 1903.*

I C 6 a (1). The destruction or injury of private property in battle or the bombardment of cities and towns has to be borne by the sufferers as one of the consequences of war. Whatever would embarrass or impede the advance of the enemy, as the breaking up of roads or the burning of bridges, or would cripple and defeat him, as destroying his means of subsistence, may be lawfully ordered by the commanding general. The necessities of war justify all this. The safety of the State in such cases overrides all considerations of private loss. *Salus populi* is then in truth *suprema lex.*[1] So *held* that the United States was not legally responsible for damages to the house of a resident and citizen of Santiago, Cuba, caused "by a shell fired from an American war ship on or about the fifth day of July, 1898, during the bombardment of the city." *C. 5619, Jan. 5, 1899; 11181, Sept. 12, 1901.*

I C 6 a (2). During the Civil War the commanding officer of the United States forces at Paducah, Ky., ordered the destruction of a dwelling house and its contents in order that he might secure an open range for the guns of the United States fort, and because, with other houses also destroyed, it had been used as a cover for Confederate troops attacking the fort. The Congress appropriated $25,000 to indemnify the owner of that house. The President vetoed the bill.[2] Concerning this destruction of property it was held that it is a general principle of both international and municipal law that all

[1] See U. S. *v.* Pacific Railroad, 120 U. S., 227, and authorities cited.

[2] See Messages and Papers of the President, Vol. VII, pp. 172–173; see also Vattel's Law of Nations, Book III, Ch. V, p. 321.

property is held subject, only to be taken by the Government for public uses, in which case under the Constitution of the United States the owner is entitled to just compensation, but also subject to be temporarily occupied, or even actually destroyed, in times of great public danger and when the public safety demands it; and in this latter case Governments do not admit a legal obligation on their part to compensate the owner. The temporary occupation of, injuries to, and destruction of property caused by mutual and necessary military operations are generally considered to fall within the last-mentioned principle. If the Government makes compensation under such circumstances it is a matter of bounty rather than of strict legal right. *C. 14292, Mar. 12, 1903.*

I C 6 b (1) (*a*). *Held* that where a state of war exists the right of an army to occupy public buildings without compensation in the territory affected can not be questioned. Public buildings include buildings of a municipality as well as those of a State. *C. 15318, May 7, 1906; 5076, Sept. 29, 1898; 5457, Dec. 8, 1899.*

I C 6 b (1) (*b*). As there is no doubt of a belligerent's right to take forcible possession of a railway or other means of transportation and to use the same in his military operations, *held* that the same right exists where several powers cooperating against a common enemy, though not formally allied, make a similar seizure of means of transportation.[1] *C. 11107, Aug. 19, 1901.*

I C 6 c (1). *Held* that the property of enemies, captured *jure belli* in a civil war, did not belong to the class of property indicated in Article V of the amendments to the Constitution, the taking of which "for public use without just compensation" is prohibited. *R. 30, 231, Apr., 1870; C. 10787, July 17, 1901; 11583, Nov. 12, 1901; 15448, Nov. 5, 1903.*

I C 6 c (2). The owner of property captured *jure belli* is not entitled to recover its value under the provisions of section 3483, R. S., as being property *impressed* in the military service.[2] *R. 38, 476, Feb., 1877.*

I C 6 c (3). It is a general principle that captured property of an enemy with whom we are at war accrues to the United States. The application, however, of this principle during the late Civil War was affected by the operation of certain acts of Congress. Personal property, indeed, of the Confederate States, or of one of them, became on capture by the Federal forces the property *jure belli* of the United States. So the title to their real estate, occupied by the United States Army at some period of the war and held till its end, was completed in the United States by the subjection and dissolution of the hostile Government, and became public property, subject to the disposition of Congress. But real estate of individual enemies (including private corporations), while subject to be sold, etc., under the act of July 2, 1864, could not in general become vested in the United States except through the judgment of a competent court, confiscating the same upon proceedings instituted under the act of

[1] See Hague Conventions of 1907, 36 Stat., 2241; also Military Laws of United States with Supplement of 1911, p. 1461.

[2] As to the distinction between capture and impressment, see 11 Op. Atty. Gen., 378.

July 17, 1862. As to the personal property of individuals, this (though in some instances made the subject of proceedings for confiscation) was mostly disposed of by and under the act of March 12, 1863, known as the "Captured and abandoned property act," by which such property (except munitions of war and other material used or intended to be used in prosecuting the war against the United States, and which were of course subject to seizure by the Army and became on capture the property of the United States) was required to be collected, sold, and the proceeds paid into the Treasury, subject to the claims therefor of parties who should establish their ownership of the property and the fact that they had not "given aid or comfort to the rebellion."[1] *R. 18, 511, Feb., 1866; 19, 162, Nov., 1865; 23, 90, July, 1866; 26, 160. Nov., 1867; 28, 610, May, 1869; 29, 6, 364, June and Oct., 1869; 42, 540, Mar., 1880; 43, 164, Jan., 1880; C. 5076, Sept. 29, 1898; 5457, Dec. 6, 1898; 10787, July 3, 1901.*

I C 6 c (3) (*a*). *Held* that a civilian into whose hands had come, at the end of the Civil War, certain captured personal property of the enemy was not entitled to convert it to his own use or to demand compensation as a condition of its surrender to the United States authorities. *R. 21, 479, June, 1866; C. 12951, July 18, 1902.*

I C 6 c (3) (*b*). Section 5586, R. S., authorizes the delivery to the Smithsonian Institution of certain kinds of property, to be delivered to such persons as may be authorized by the Board of Regents to receive the same. Upon a request from the Secretary of the Institution that a small Spanish cannon captured in the trenches before Santiago, Cuba, by United States Volunteers, and brought by them to Washington, D. C., be assigned to the United States Museum at the Institution, *held*, that the provisions of section 5586 did not apply to the property named; that the same being public military stores captured from the enemy was property of the United States, and that the power to dispose of all property of the United States was exclusively vested by the Constitution in Congress. *C. 5033, Sept., 1898; 11131, Oct. 11, 1901.*

I C 6 c (3) (*c*). All property captured from the enemy becomes the property of the United States subject to disposition by Congress. Where it inures to the benefit of individuals it is in consequence of a grant by Congress. But there is no act of Congress which extends to members of the Army, Regular or Volunteer, the right to share in prize money resulting from captures by the Navy of public or private vessels of the enemy, though the Army may have aided in the operations which led to the capture. *C. 5250, Nov., 1898; 12951, July 18, 1902.*

I C 6 c (3) (*d*). The provision in the 9th article of war that "all public stores taken from the enemy shall be secured for the service of the United States" is in accordance with the principle of the law of nations and of war. "Private persons can not capture for their own

[1] See under this paragraph, United States *v.* Padelford, 9 Wallace, 531, 538; United States *v.* Klein, 13 id., 128, 136; United States *v.* Huckabee, 16 id., 414; Haycraft *v.* United States, 22 id., 81; Lamar *v.* Browne, 2 Otto, 187; Williams *v.* Bruffy, 6 id., 176, 188; Young *v.* United States, 7 id., 39, 60; Ford *v.* Surget, id., 594; Dow *v.* Johnson, 10 id., 158; Porte *v.* United States, Devereux (Ct. Cls.), 109; Winchester *v.* United States, 14 Ct. Cls., 13; United States *v.* A Tract of Land, 1 Woods, 475; Atkinson *v.* Central Ga. Mfg. Co., 58 Ga., 227.

benefit."[1] Military stores taken from the enemy becoming upon capture the property of the United States, Congress, which, by the Constitution, is exclusively vested with the power to dispose of the public property, as well as to make rules concerning captures on land and water, can alone authorize the sale or transfer of the same. An officer or soldier of the Army who assumes of his own authority to appropriate such articles renders himself chargeable with a military offense.[2] *R. 2. 41, Feb., 1863; C. 12019, Feb. 8, 1902.*

I C 6 c (3) (*e*) [1]. The property of a loyal owner captured by the enemy during the Civil War, and afterwards *recaptured* by the Federal forces, may be turned over to him by executive authority, where clearly identified as belonging to him, and he should in general be allowed to receive it free from any charge in the nature of salvage.[3] *R. 1, 424, 428, 456, Nov. and Dec., 1862; 11, 266, Dec., 1864; 20, 485. Mar., 1866.*

I C 6 c (3) (*e*) [2]. Section 218, R. S., in requiring the Secretary of War to collect, etc., "all such flags, standards, and colors as are taken by the Army from the enemies of the United States," is believed to have reference to the flags of the enemy. So *advised*, that a flag of a Massachusetts regiment, captured by the enemy, and retaken at the end of the war at Richmond, was not to be considered as one of the class placed by the statute under the charge of the Secretary of War, and might therefore properly be returned to the State or the regiment, if originally belonging to or furnished by the same. Otherwise, if furnished by the United States: in such case the flag is property of the United States disposable only by Congress. *P. 58, 119, Feb., 1893.*

I C 6 c (3) (*f*). Under the law of war a government by military occupation has no power to alienate immovable property so as to render such alienation effective after the reinstatement of the former government.[4] And it would seem that the same rule should apply to the granting of franchises to railways, electric-light plants, etc. Whether the effect of a treaty of peace substituting the sovereignty of the United States for that of the former government would be to render such alienations and grants binding is doubtful. Upon this point the authorities do not seem to agree, but it is laid down in the "Instructions for the Government of the Armies of the United States in the Field" (G. O. 100, A. G. O. 1863, par. 31) that "a victorious army appropriates all public money, seizes all public movable prop-

[1] Although the general or express consent of Congress is necessary for the sale or other disposition of captured property, it is within the authority of the Secretary of War to allow its custody to remain in the State or other government. The custody of the fixed ammunition in the fortification at Habana was left in the Cuban Government on the evacuation of the island in 1902; so also as to certain obsolete artillery at Santiago, Cuba.

[2] United States *v.* Klein, 13 Wallace, 128, 136; Decatur *v.* United States, Devereux (Ct. Cls.), 110; White *v.* Red Chief, 1 Woods, 40; Brannen *v.* Felkner, 1 Heisk., 232; Worthy *v.* Kinamon, 44 Ga., 299; Huff *v.* Odom, 49 id., 395; 13 Op. Atty. Gen., 105; Hough (Practice), 329, 330, G. O. 54, Hdqrs. of Army, Mexico, 1848; G. O. 21, War Dept., 1848; do., 64, 107, id., 1862. And see also Lamar *v.* Browne, 2 Otto, 187, 195, in regard to the same principle as illustrated by the captured and abandoned property act of Mar. 12, 1863.

[3] See Wilson *v.* United States, 4 Ct. Cls., 559.

[4] Wheaton Int. Law, third Eng. edition by Boyd, p. 469; Hall's Int. Law, fourth edition, 482–508; Birkhimer's Military Government and Martial Law, 197.

erty until further direction by its Government and sequesters for its own benefit or that of its Government, all the revenues of real property belonging to the hostile Government or nation. The title to such real property remains in abeyance during military occupation and until the conquest is made complete." If the title to real property is in abeyance as stated, it would seem that the military authorities would be without power to make an alienation of it by the granting of franchises or otherwise which would be valid after the termination of the government by military occupation. *C. 5076, Sept., 1898; 5457, Dec., 1898.*

I C 6 c (3) (f) [1]. When the treaty of peace with Spain took effect, April 11, 1899, the military government was in control in Porto Rico, and rightfully continued as the *de facto* government of the island exercising both executive and legislative powers,[2] subject to such constitutional limitations as were applicable. As the island had become territory of the United States, under the treaty, the Secretary of War was without power in the absence of congressional authority to alienate any part of the public domain, but *held* that he could, as representative of the President, lawfully license the temporary use of the same during the occupancy and government of the island by the military authorities.[3] *C. 6260, Nov., 1899.*

I C 6 d (1). *Held* that when the forces of several States are cooperating against a common enemy, whether in the execution of a treaty of alliance or in the mere attainment of a common purpose only, one may furnish the other with military assistance in the way of arms, military supplies, transportation, medical aid, etc., in the form of loans, gifts, or sale. *Held* further that reimbursement will be made in such a case by the proper staff department upon the presentation of the proper claim. *C. 11107, Apr., 19, 1901.*

I C 6 e (1). The taking possession, by the order of the commander of the military department at New Orleans, for the use of the military service in the prosecution of the war, of moneys belonging to enemies on deposit in the banks of that city, while occupied (in 1863) by our Army, *held* an act justified by the strict law of war.[3] *R. 19, 612, May, 1866.*

I C 6 f (1). As a result of military occupation the taxes and duties payable by the inhabitants to the former government become payable to the military occupant unless the latter sees fit to substitute for them other rates or modes of contribution to the expenses of the Government. So, *held* that the President acted clearly within his powers when under date of August 8, 1898, as Commander in Chief of the Army and Navy he ordered and directed what the tariff and duties to be levied and collected *as a military contribution* upon the occupation and posession of any ports and places in the Island of Cuba by the forces of the United States should be; that regulations

---

[1] Cross *v.* Harrison, 16 Howard, 164, 193.

[2] See opinion of Atty. Genl. of July 26, 1899 (22 Op., 544).

[3] See New Orleans *v.* Steamship Co., 20 Wallace, 394; Witherspoon *v.* Farmers' Bank, 2 Duvall, 497. But in Planters' Bank *v.* Union Bank, 16 Wallace, 483, this particular order was held to have been an exceeding of authority, not because unauthorized by the law of war, but for the reason that a previous commander—Gen. Butler—on first occupying the city, by his proclamation of May 1, 1862, had pledged the Government to the holding inviolate of all rights of property. And see *The Venice*, 2 Wallace, 258.

for the administration of such tariff and duties should take effect and be in force in the ports and places when so occupied; and that questions arising under said tariff and regulations should be decided by the general in command of the United States forces in said island. *C. 5268, Nov., 1898.*

I C 6 g (1). *Held* that a person taking photographs of fortifications in time of war runs the risk of being treated as a spy, or at the least of doing a thing forbidden by the law of war. His arrest outside the limits of a military reservation would not be a trespass; nor would the seizure and retention of the photographic plates be unlawful. Their retention would be proper though no notice to the public prohibiting the taking of such photographs had been given. *C. 4784, Aug., 1898; 7362, Nov. 28, 1899; 13188, Aug. 23, 1902.*

I C 6 h. It having been established that the owner of certain property at Santo Domingo, P. I., was holding communication with and forwarding supplies to the insurgents his house was burned. *Held* that as the property was destroyed as a military necessity the United States could not be held pecuniarily responsible therefor. *C. 14972, July 25, 1903.* Similarly *held* with regard to the destruction of a market house at Bauan, Luzon, P. I., in which a native who was friendly to the American cause was murdered because of such friendship, the burning of the market house being held to be a necessary military measure to prevent such future lawless acts. *C. 14972, July 22, 1903, and Jan. 27, 1904.*

I C 7 a. It is a principle of the law of war that the municipal laws of a conquered country continue in force during the military occupation by the conqueror, except in so far as the same may necessarily be suspended or their operation be affected by his acts.[1] So, where a testator had executed in Vicksburg, Miss., after its capture and during its occupation by our forces a will devising real estate; but such will, in not being attested by the required number of witnesses, was invalid under the State law; *held*, that as this law was in no respect modified upon the capture, the devisee under the will, however loyal, could not properly be invested by military authority with the legal title to such estate against the heirs at law. *R. 19, 474, Mar., 1866.*

I C 8 a. The war power of the United States is vested in Congress by Article I, section 8, paragraphs 11, 12, 13, 14, 15, and 16, of the Constitution. The President, as Executive and Commander in Chief of the Army and Navy, becomes authorized, in time of war, to execute this power under the public acts of Congress initiating and defining the same. An official of a State can no more lawfully exercise any

[1] "By the well-recognized principles of international law, the mere military occupation of a country by a belligerent power or a conqueror does not *ipso facto* displace the municipal laws. Such conqueror or belligerent occupier may suspend or supersede them for the time being, but in the absence of orders to that effect they remain in force." Wingfield *v.* Crosby, 5 Coldw., 246. "Supreme military authority in a city is not incompatible with the existence and authority of courts of civil jurisdiction and procedure." Pepin *v.* Lachenmeyer, 45 N. Y., 27. And see Kimball *v.* Taylor, 2 Woods, 37; Rutledge *v.* Fogg, 3 Coldw., 554; Hefferman *v.* Porter, 6 id., 391; Murrell *v.* Jones, 40 Miss., 566; Dow *v.* Johnson, 10 Otto, 158, 166. But where the courts of a hostile country are left open by the conqueror it is only the citizens of such country that are subject to their jurisdiction; the officers and soldiers of the occupying army are in no manner amenable to the same. This principle was illustrated by the Supreme Court in the cases of Coleman *v.* Tennessee, 7 Otto, 509; Dow *v.* Johnson, The Philippine Sugar Estates Development Co. *v.* United States., 39 Ct. Cls., 225.

part of such function than can an individual citizen.[1] Thus, where, during the civil war, the governor of a State of his own authority caused to be arrested and confined at hard labor in a chain-gang certain inhabitants of the State suspected of sympathizing with and giving aid to the public enemy—announcing that they would be so confined until certain civilians and military officers, who were residents of such State and had been seized by the enemy, should be released; *held*, that such proceeding was a transcending of the police power of the State and an assumption of an exercise of the *war power* belonging exclusively to the Government of the United States, and was therefore unauthorized and illegal. *R. 2, 511, June, 1863.* And similarly *held*, that the seizing and holding by a governor of a State, of certain persons as "hostages," in reprisal for citizens of that State captured by the enemy, was an exercise of the war-making power belonging to the General Government and could not be recognized as legal by the Secretary of War. *R. 3, 258, July, 1863.*

I C 8 a (1). Anything that may properly be made a law of a military government, and which is promulgated in any effective way that the supreme military commander may see fit to promulgate it, becomes a valid law of that government on being so promulgated and must be obeyed by all persons within the territory. No rules or laws that may have been in force in the territory prior to its military occupation can compel the commander to adopt any particular manner of promulgation of the rules enjoined by him. The chief commander in the territory governed by military government does not fill any office or position that formed a part of the government of the country prior to the military occupation; nor is he bound by any rules or laws relating to the performance of official duties by any governor or other officer of the government displaced.[2] *C. 5978, May, 1898.*

I C 8 a (2) (*a*). It is authorized by the laws of war for a military officer commanding in time of war in a region in military occupation, and where the ordinary courts are closed by the exigencies of the war, to appoint a special court or judge for the determination of cases not properly cognizable by the ordinary military tribunals. In the

[1] While "war can alone be entered into by national authority," so "no hostilities of any kind (except in necessary self-defense) can lawfully be practised by one individual of a nation against an individual of any other nation at enmity with it, but in virtue of some public authority." Talbot *v.* Janson, 3 Dallas, 160.

Cases on Military Government—

The Prize cases (2 Black, 635); U. S. *v.* Reiter (Fed. Case, 16146); Tharington *v.* Smith (8 Wallace, 1); U. S. *v.* Rice (4 Wheaton, 246); Fleming *v.* Page (9 Howard, 603); Cross *v.* Harrison (16 Howard, 164); De Lima *v.* Bidwell (182 U. S., 1); Dooley *v.* U. S. (182 U. S., 222); Santiago *v.* Nogueras (214 U. S., 260); Leitensdorfer *v.* Webb (20 Howard, 176); Handlin *v.* Wickliffe (12 Wallace, 173); Mrs. Alexander's Cotton (2 Wallace, 404); The Bark *Grapeshot* (2 Wallace, 129); The *Venice* (2 Wallace, 258); New Orleans *v.* The Steamship Co. (20 Wallace, 387); The *Sea Lion* (5 Wallace, 630); The *Reform* (3 Wallace, 617); U. S. *v.* Lane (8 Wallace, 185); Hall *v.* Coppell (7 Wallace, 542); Hamilton *v.* Dillin (21 Wallace, 73); Mitchell *v.* U. S. (21 Wallace, 350); Matthews *v.* McStea (91 U. S., 7); The *William Bagaley* (5 Wallace, 377); Harmony *v.* Mitchell (Fed. Case, 6082); Mitchell *v.* Harmony (13 Howard, 115); Mechanics' and Traders' Bank *v.* Union Bank (22 Wallace, 276); Dean *v.* Nelson (10 Wallace, 158); Coleman *v.* Tennessee (97 U. S., 509); Dow *v.* Johnson (100 U. S., 158); Neely *v.* Henkel (180 U. S., 109); Brown *v.* U. S. (8 Cranch, 110); Planters' Bank *v.* Union Bank (16 Wallace, 483); Gates *v.* Goodloe (101 U. S., 612); Coolidge *v.* Guthrie (Fed. Case, 3185); U. S. *v.* Padelford (9 Wallace, 531); Lamar, Executor, *v.* Brown (92 U. S., 187); Ford *v.* Surget (97 U. S., 594); *Ex Parte* Ortiz (100 Fed. Rep., 955). (These citations were compiled by the Staff Class, Fort Leavenworth, Kans., 1910–11.)

[2] See the Havana (Cuba) Slaughterhouse case where Gen. Brooke's act was sustained. O'Reilly de Camara *v.* Brooke, 142 Fed. Rep., 858, 209 U. S., 45.

Civil War such courts were not unfrequently constituted and were commonly designated *provost courts. R. 2, 14, Feb., 1863; 15, 519, July, 1865.* Such courts had no jurisdiction of purely military offenses (i. e. offenses which the Articles of War make cognizable by court-martial), and were therefore not properly authorized to impose forfeitures of pay or other strictly military punishments upon officers or soldiers of the Army. *R. 6, 635, Dec., 1864; 8, 638, 10, 39 and 560, 13, 55 and 114, July to Dec., 1864.* These courts were in general resorted to as substitutes for the ordinary police courts of cities, and their jurisdiction was in general confined to cases of breaches of the peace and of violation of such civil ordinances or military regulations as might be in force for the government of the locality.[1] *R. 13, 392, Feb., 1865.*

I C 8 a (2) (*b*). *Held* that the military governor of a hostile city may remove for cause in time of war the duly elected alcaldes and may appoint others. *C. 5873, Feb. 17, 1899.*

---

[1] Some of these courts, however, took cognizance, in the course of their existence of cases of very considerable importance, civil as well as criminal. See the following General Orders establishing or relating to Provost Courts and similar tribunals: G. O. 41, Dept. of Virginia, 1863; do. 45, Dept. of the Gulf, 1863; do. 6, 77, id., 1864; do., 103, 146, Dept. of Washington, 1865; do., 39, id., 1866; do. 102, Dept. of the South, 1865; do. 30, 38, 49, 68, Dept. of S. Carolina, 1865; do. 37, id., 1866; do. 31, Dept. of the Mississippi, 1865; do. 12, Dept. of Arkansas, 1865; do. 5, Mil. Div. of the James, 1865; do. 31, First Mil. Dist., 1867; Circ., Second Mil. Dist., May 15, 1867; G. O. 29, 61, Second Mil. Dist., 1868; do. 4, Fifth Mil. Dist., 1869; also Gen. Wool's G. O. 516 of 1847.

While the majority of these special tribunals were confined to the exercise of such functions as are commonly devolved upon police or justices' courts, their authority when empowered for the purpose by a competent military commander, to take cognizance of important civil actions has been affirmed by the Supreme Court of the United States in the case of Mechanics' & Traders' Bk. *v.* Union Bk., 22 Wall., 276, in which a "Provost Court," established at New Orleans by an order of the department commander, of May 1, 1862, was held to be a lawful tribunal, and a judgment rendered by it in an action for the recovery of $130,000, money borrowed by one bank from another, was recognized as legal. See this case also in 25 La. An., 387.

So, the authority of the "Provisional Court of Louisiana" (which succeeded the "Provost Court" last indicated, and was established by the President, in an Executive order of Oct. 20, 1862) to determine a cause in admiralty, was affirmed by the United States Supreme Court in The Grapeshot, 9 Wallace, 129, and later its jurisdiction in a civil action on a mortgage debt was recognized by that tribunal in Burke *v.* Miltenberger, 19 Wallace, 519. And see the same case, as Burke *v.* Tregree, in 22 La. An., 629. The authority of the same court to take cognizance of a case of murder and one of arson (as also of civil controversies) was maintained in an elaborate opinion of its judge, Hon. C. A. Peabody (in 1865), in the cases of the United States *v.* Reiter & Louis, reported in 13 Am. Law Reg., 534.

The civil jurisdiction of a similar war court—the "Commission" established by the department commander in Memphis in 1863—was similarly recognized in Hefferman *v.* Porter, 6 Coldw., 391. And as to the full authority of this tribunal as a substitute for the ordinary civil courts of the locality, see also State *v.* Stillman, 7 id., 341. But see, *contra,* Walsh *v.* Porter, 12 Heisk, 401.

In the cases thus sustaining the action of special tribunals during the Civil War, the courts in general refer to the earlier and leading case of Leitensdorfer *v.* Webb, 20 Howard, 176, in which was affirmed the authority of the courts established in 1846 in New Mexico as a part of the system of civil government instituted by Gen. Kearney, the military commander. With this case consult also United States *v.* Rice, 4 Wheaton, 254; Cross *v.* Harrison, 16 Howard, 164.

The reasoning upon which the above-cited later rulings is based is, that the authority to create courts with a civil as well as a criminal jurisdiction in a conquered country in military occupation attaches to the dominant power by the law of war and of nations as an incident to the power to establish a military government; that it is not only the right but the duty of the conqueror to institute such courts "for the security of persons and property and for the administration of justice"; and that when during the Civil War such courts were created by commanding generals—such as the commanders of separate departments or armies—the order of the commander was to be presumed to be the order and act of the President.

I C 8 a (2) (c). *Held*, when military government is maintained within an enemy's country, that a military government may collect duties, and that no court can question a right to collect such duties. *C. 6138, Apr. 12, 1899.*

I C 8 a (2) (c) [1]. Contributions of money exacted from the enemy by competent military authority, being justified by the law of war and conquest,[1] *held* that a tax of $5 per bale, levied (in 1864) by the military commander at New Orleans, Gen. Canby, upon cotton brought into that city, and applied to hospital, sanitary, and charitable purposes, was authorized under the discretionary power with which such a commander was properly invested in time of war.[2] *R. 18, 668, Mar., 1866.*

I C 8 a (2) (d). *Held* that when the United States occupies hostile territory and places in charge a military governor he may, upon proper cause, deport from that hostile territory persons "as a menance to the military situation." *C. 10002, Mar. 18, 1901.*

I C 8 a (3) (a). By a practice dating from 1847 [3] and renewed and firmly established during the Civil War,[4] military commissions have become adopted as authorized tribunals in this country in time of war. They are simply criminal war courts, resorted to for the reason that the jurisdiction of courts-martial, creatures as they are of statute, is restricted by law, and can not be extended to include certain classes of offenses which in war would go unpunished in the absence of a provisional forum for the trial of the offenders. Their authority is derived from the law of war,[5] though in some cases their powers have been added to by statute.[6] There competency has been recog-

[1] Lewis *v.* McGuire, 3 Bush, 202; Clark *v.* Dick, 1 Dillon, 8. And see Maj. Gen. Scott's order (G. O. 395, Hdqrs. of Army, 1847) levying assessments upon Mexican communities for the support of the military government and occupation.

[2] See Hamilton *v.* Dillin, 21 Wallace, 73.

[3] See Maj. Gen. Scott's G. O. 20, Hdqrs. of Army, Tampico, Feb. 19, 1847, republished "with important additions," in G. O. 190 and 287 of the same year. And see the following orders convening military commissions, issued by Gen. Scott: G. O. 81, 83, 121, 124, 147, 171, 194, 215, 239, 267, 270, 273, 292, 334, 335, 380, 392, 1847; and 9, 1848, Hdqrs. of Army. Also the following issued by Gen. Taylor: G. O. 66, 106, 112, 121, of 1847; and the following issued by Gen. Wool: G. O. 140, 179, 216, 463, 476, 514, of 1847.

In this connection, note also the institution by Gen. Scott of "Councils of War"—summary courts for the punishment of certain violations of the laws of war—as exhibited in G.O., 181, 184, and 372, 1847, and do. 35 and 41, 1848, Hdqrs. of Army.

[4] The first military commission of the Civil War is believed to have been that convened by Maj. Gen. Fremont, by G. O. 118, Western Dept., St. Louis, Sept. 2, 1861.

[5] See G. O. 100, War Dept., 1863, Sec. I, par. No. 13; do. 1, Dept. of the Missouri, 1862; do. 20, Hdqrs. of Army, 1847; United States *v.* Reiter, 4 Am. Law. Reg. (N. S.), 534; State *v.* Stillman, 7 Coldw., 341; Hefferman *v.* Porter, 6 id., 697.

[6] See act of Mar. 3, 1863, c. 75, s. 30, declaring that, in time of war, &c., murder, manslaughter, robbery, larceny, and other specified crimes, when committed by persons in the military service, shall be punishable by sentence of court-martial "or military commission," &c.—an enactment repeated, as to courts-martial, in the 58th article of war: Also, sec. 38 of the same act (repeated in sec. 1343, R. S.), making spies triable by general court-martial "or military commission" and punishable with death. See, further, act of July 2, 1864, c. 215, s. 1, by which commanders of departments and commanding generals in the field were authorized to carry into execution sentences imposed by military commission upon guerrillas: Also, act of July 4, 1864, c. 253, secs. 6 and 8 (not now in force), making inspectors in the Quartermaster Department triable and punishable by sentence of court-martial or "military commission," for fraud or neglect of duty, as also other employees and officers of that department for accepting bribes from contractors, &c. Also the reconstruction act of Mar. 2, 1867, c. 153, s. 3, by which commanders of military districts were authorized to convene military commissions for the trial of certain offenders.

nized not only in acts of Congress,[1] but in executive proclamations,[2] in rulings of the courts,[3] and in the opinions of the Attorneys General.[4] During the Civil War they were employed in several thousand cases; more recently they were resorted to under the "Reconstruction" act of 1867; and still later one of these courts has been convened for the trial of Indians as offenders against the laws of war.[5] *P. 41, 12–18, May, 1890; C. 10750, Aug. 10, 1901; 11341, Jan. 16, 1902; 17328, Jan. 4, 1905; 23136, Apr. 24, 1908.*

I C 8 a (3) (*b*) [1]. The jurisdiction of the military commission is derived primarily and mainly from the law of war; that special authority has in some cases been devolved upon it by express legislation has already been noticed. Military commissions are authorized by the laws of war to exercise jurisdiction over two classes of offenses, committed, whether by civilians[6] or military persons, either (1) in the enemy's country during its occupation by our armies and while it remains under military government, or (2) in a locality, not within the enemy's country or necessarily within the theater of war, in which *martial law* has been established by competent authority.[7] The two classes of offenses are: I. Violations of the laws of war. II. Civil crimes, which, because the civil authority is superseded by the military and the civil courts are closed or their functions suspended, can not be taken cognizance of by the ordinary tribunals. In other words, the military commission, besides exercising under the laws of war a jurisdiction of offenses peculiar to war, may act also as a substitute, for the time, for the regular criminal judicature of the State or district. *R. 2, 242, Apr., 1863; 3, 404, Aug., 1863; 7, 20, 418, Jan. and Mar., 1864; 8, 153, 529, Mar. and June, 1864; 20, 502, Mar., 1866.*

I C 8 a (3) (*b*) [2]. A military commission, whether exercising a jurisdiction strictly under the laws of war or as a substitute in time of war for the local criminal courts, may take cognizance of offenses committed, during the war, *before* the initiation of the military government or martial law, but not then brought to trial. *R. 19, 390, Jan., 1866.* So *held* that an enemy, taken prisoner of war, was triable by a military commission for a violation of the laws of war committed before his capture.[8] *R. 8, 529, June, 1864.*

---

[1] See the acts cited in last note, together with secs. 1199, 1343, and 1344, Rev. Sts., as also the appropriation acts of July 24, 1876, Nov. 21, 1877, June 18, 1878, June 23, 1879, and May 4, 1880, in which, among other items for the Pay Department, appropriation is made "for compensation for citizen clerks and witnesses attending upon courts-martial and military commissions."

[2] See the proclamations of Sept. 24, 1862, and Apr. 2, 1866.

[3] Ex parte Vallandigham, 1 Wall., 243; In the matter of Martin, 45 Barb., 146; State *v.* Stillman, 7 Coldw., 341. In the last case the court say: "A military commission is a tribunal now (1870) as well known and recognized in the laws of the United States as a court-martial. It has been "recognized by the executive, legislative, and judicial departments of the Government of the United States."

[4] See 5 Op. Atty. Gen., 55; 11 id., 297; 12 id., 332; 13 id., 59; 14 id., 249.

[5] The case of Modoc Indians tried by military commission in July, 1873 (G. C. M. O. 32, War Dept., 1873). See 14 Op. Atty. Gen., 249.

[6] The general orders issued during the Civil War contain nearly 150 cases of *women* tried by military commissions.

[7] Note, in this connection, Chief Justice Chase's description of the jurisdiction exercised under military government and martial law, as distinguished from that conferred by the military law proper—in *Ex parte* Milligan, 4 Wallace, 142.

[8] But when an officer or soldier of the enemy's army is, upon capture, charged before a military commission with a violation of the laws of war, the proof should of course be clear that the act committed was as charged. i. e., was *not* a legitimate act of war.

I C 8 a (3) (*b*) [3]. As to the special *statutory jurisdiction* with which the military commission has, in certain cases, been invested, the acts of Congress by which this has been conferred and defined have already been cited. Of these, the provision in the act of March 3, 1863, by which a jurisdiction, concurrent with that of the court-martial, is given to this tribunal in cases of *spies*, is the only one now in force, and is embodied in section 1343, R. S.

I C 8 a (3) (*b*) [4]. The jurisdiction of a military commission convened under the law of war may be exercised up to the date of a peace agreed upon between the hostile parties or the declaration by the competent authority of the termination of the war status.[1] *R. 20, 484, Mar., 1866; C. 6003, Mar. 10, 1899; 6286, Apr. 13, 1899; 6306, Apr. 24, 1899; 15057, Aug. 3, 1903.*

I C 8 a (3) (*b*) [5]. Under the "Reconstruction" act of March 3, 1867, in section 3 of which the commanders of the military districts constituted thereby were empowered, in their discretion, "to organize military commissions," in lieu of the "local civil tribunals," for the trial and punishment of "all disturbers of the public peace and criminals,"[2]—it was *held* by the Judge Advocate General as follows:

That the military commissions convened under the act would properly be governed, as to their form of procedure, by the rules and forms governing military commissions under the laws of war while, as to their jurisdiction and power of punishment, they would in general properly be regulated by the local statutes governing the courts for which they were substitutes. *R. 29, 406, Nov., 1869.*

That, being substitutes for the State criminal courts, they were authorized to take cognizance of offenses committed (but not brought to trial) *before* the date of the act, equally with those committed *after* such date. *R. 25, 424, Mar., 1868; 26, 234, Nov., 1867.*

That cases of soldiers offending against the criminal law, whose offenses were not within the jurisdiction of a court-martial, might legally be brought to trial before military commissions convened under the act. *R. 26, 487, Mar., 1868.*

That commissions ordered under this act, being in lieu of the State tribunals, could not assume to take cognizance of a case within the jurisdiction of a court of the United States in operation in the district. *R. 28, 612, May, 1869.*

That sentences duly adjudged by commissions convened under this statute, and which had been duly and finally approved by the competent authority (see sec. 4 of the statute) might legally be executed prior to the passage of the act admitting to representation in Congress the State in which the offense was committed; but that such sentences, not carried into effect (or of which the execution had not been entered upon) at that date, could not thereafter legally be enforced.[3] And *held*, generally, that all proceedings of military commissions which remained pending or incomplete at such date became thereupon ter-

---

[1] See 11 Op. Atty. Gen., 250, where this principle is applied to an Indian war. See also 5 id., 58.

[2] The constitutionality of this act and the legality of the institution under it of military commissions were affirmed by Atty. Gen. Hoar in 13 Op., 59–67.

[3] Compare United States *v.* Tynen, 11 Wallace, 88, where it is held that "there can be no legal conviction, nor any valid judgment pronounced upon conviction, unless the law creating the offense be at the time in existence." And to a similar effect, see United States *v.* Finlay, 1 Ab., U. S. R., 364.

minated. *R. 27, 89, 90, 93, July, 1868; 28, 51, Aug., 1868; 29, 620, Jan., 1870; 30, 181, Mar., 1870; C. 15057, Aug. 4, 1908.*

I C 8 a (3) (*c*) [1]. In a State or district where military government or martial law has not prevailed, or having prevailed for a time, has ceased to be exercised, and the regular criminal *courts are open* and in operation, a military commission can not be empowered to assume jurisdiction of a public offense, although the nation be still involved in war.[1] *R. 9, 657, Sept., 1864; 12, 422, June, 1865; 14, 382, Apr., 1865, 16, 298, June, 1865; 30, 34, July, 1869. A fortiori*, where, at the date of the offense, there was, properly, no state of war in which the nation was involved with an enemy. Thus *held* that a military commission could not legally be convened for the trial of Indians, for violations of the laws of war, on accounts of thefts, robberies, and murders committed by them upon incursions made into the State of Texas, where said Indians (unlike the Modocs) were mere raiders, with whose tribe, as such, the United States was not engaged in war, and whose crimes, therefore, were not committed *flagrante bello*.[2] *R. 36, 221, Jan., 1875; C. 10750, June 29, 1901.*

I C 8. a (3) (*c*) [1] [*a*]. Where the State was not under martial law or military government, the fact that the offense was committed by a prisoner of war at a prison camp (within the State) for the confinement of prisoners of war, and guarded by Federal troops, was *held* insufficient to give a military commission jurisdiction of the case. *R. 15, 358, June, 1865.* But *held* that the mere fact of the appointing by the Executive of a "provisional governor" for an insurrectionary State in June, 1865, prior to the date of the proclamation (of Apr. 2, 1866) declaring the war at an end in that State, and while the territory of the same still remained in military occupation, did not operate to oust military commissions of jurisdiction of criminal offenses committed within the State.[3] *R. 16, 415, July, 1865.*

I C 8 a (3) (*c*) [2]. A military commission, convened for the trial of offenses under the law of war, has no jurisdiction of civil suits or proceedings, either based upon contract or brought to recover damages on account of private transactions or personal injuries.[4] *R. 3, 190, July, 1863; 5, 86, Oct., 1863; 9, 205, May, 1864; 11, 657, Apr., 1865.*

I C 8 a (3) (*c*) [3]. It is a further restriction upon the jurisdiction of the military commission that, except where it may be invested by statute with a jurisdiction *concurrent* with that of courts-martial (as by secs. 30 and 38 of the act of Mar. 3, 1863), its authority can not be extended to the trial of offenses which are, specifically or in general terms, made cognizable and punishable by courts-martial by the Articles of War or other statute. In repeated instances during the

---

[1] See the leading case of *Ex parte* Milligan, 4 Wallace, 1; also Milligan *v.* Hovey, 3 Bissell, 13; In re Murphy, Woolworth, 143; Devlin *v.* United States, 12 Ct. Cls., 271; 12 Op. Atty. Gen., 128.

[2] As to the nature of the hostility which may properly bring Indians "within the description of public enemies," compare 13 Op. Atty. Gen., 471. That a detached band of marauding Indians was not an "enemy" in the sense of the act of Mar. 3, 1849 (sec. 3483, R. S.), providing for the making good of damage sustained by the capture or destruction of certain property "by an enemy," was held by the Supreme Court in Stuart *v.* United States, 18 Wallace, 84.

[3] See Belding *v.* State, 25 Ark., 315. And compare 13 Op. Atty. Gen., 65 and 66; Coleman *v.* Tennessee, 7 Otto, 516.

[4] See State *v.* Stillman, 7 Coldw., 341; G. O. 1, Dept. of the Missouri, 1862. As to the *civil* jurisdiction of special courts and commissions instituted during the Civil War.

Civil War the proceedings of military commissions, in cases in which these tribunals had improperly assumed jurisdiction of offenses legally triable by courts-martial only were recommended by the Judge Advocate General to be disapproved. *R. 468, 482, Dec., 1862; 7, 440, 486, Apr., 1864; 9, 236, June, 1864; 15, 373, June, 1965; 16, 73, Apr., 1865; 19, 63, Oct., 1865.*

I C 8 a (3) (*d*) [1]. Except in so far as to invest military commissions in a few cases with a special jurisdiction and power of punishment,[1] the statute law has failed to define their authority, nor has it made provision in regard to their constitution, composition, or procedure. In consequence, the rules which apply in these particulars to general courts-martial have almost uniformly been applied to military commissions. They have ordinarily been convened by the same officers as are authorized by the Articles of War to convene such courts;[2] the accusations investigated by them have been presented in charges and specifications similar in form to those entertained by general courts; their proceedings have been similar and similarly recorded; and their sentences have been similarly passed upon and executed. *R. I. 453, 465, Dec., 1862; 2, 27, 83, 563, Feb. to June, 1863; 3, 428, Aug., 1873; 5, 95, Oct., 1863; 7, 556, Apr., 1864; 8, 111, Mar., 1864; 13, 392, Feb., 1865; 29, 39, June, 1869.* Their composition has also been the same, except that the *minimum* of members has been fixed by usage at *three*. *R. 15, 149, Apr., 1865.* They have generally also been supplied with a judge advocate as a prosecuting officer. A military commission constituted with less than three members, or which proceeded to trial with less than three members, or which was not attended by a judge advocate, would be contrary to precedent.[3] *R. 9, 591, Sept., 1864; 11, 479, Feb., 1865; 13, 286, Jan., 1865; 15, 204, May, 1865; C. 17328, Jan. 4, 1905.*

In view of the analogy prevailing and sanctioned between these bodies and courts-martial, *held* that military commissions would properly be sworn like general courts-martial (*R. 11, 111, Nov., 1864*); that the right of challenging their members should be afforded to the accused; that two-thirds of their members should concur in death sentences (*R. 23, 650, Aug., 1867*); and that the two years' limitation would properly be applied to prosecutions before them. *R. 9, 657, Sept., 1864.*

I C 8 a (3) (*d*) [2]. *Held* that the proceedings of a military commission should be completed by the action at the end thereof of the officer who convened the commission or by his successor in command, the mode of procedure being the same as is followed by general courts-martial. *C. 5292, Nov. 8, 1898.*

I C 8 a (3) (*d*) [3]. During the Civil War a very great number and variety of offenses against the laws and usages of war—charged either, generally, as "violation of the laws of war," or, specifically, by their

[1] See statutes cited in notes to preceding section.

[2] A military commission was appointed to meet at Calamba, P. I., in 1900. It tried cases which were awaiting trial in that district without the cases being formally referred to the commission by the convening authority. These cases are published in G. O. No. 4, Headquarters Division of the Philippines, series 1900.

[3] In the absence, however, of any statutory provision on the subject, a commission which departed from the general usage in any of these respects would not necessarily be held to be an illegal tribunal.

particular names or descriptions—were passed upon and punished by military commissions. Of these some of the principal (committed mostly by civilians) were as follows: Unauthorized trading or commercial intercourse with the enemy; unauthorized correspondence with the enemy; blockade running; mail carrying across the lines; drawing a bill of exchange upon an enemy, or by an enemy upon a party in a northern city;[1] dealing in, negotiating, or uttering Confederate securities or money;[2] manufacturing arms, etc., for the enemy; furnishing to an enemy articles contraband of war; dealing in such articles in violation of military orders; publicly expressing hostility to the United States Government or sympathy with the enemy; coming within the lines of the army from the enemy without authority; violating a flag of truce; violation of an oath of allegiance, or of an amnesty oath; violation of parole by a prisoner of war; aiding prisoner of war to escape; unwarranted treatment of Federal prisoners of war; burning, destroying, or obstructing railroads, bridges, steamboats, etc., used in military operations; cutting telegraph wires between military posts; recruiting for the enemy within the Federal lines; engaging in "guerrilla" or partisan warfare; assisting Federal soldiers to desert; resisting or obstructing an enrollment or draft; impeding enlistments; violating orders in regard to selling liquor to soldiers or other military orders of police in a district under military government; attempt without success to aid the enemy by transporting to him articles contraband of war; conspiracy by two or more to violate the laws of war by destroying life or property in aid of the enemy. *R. 2, 144, Apr., 1863; 3, 401, 589, 649, Aug. and Sept., 1863; 4, 320, Nov., 1863; 5, 36, Sept., 1863; 590, Jan., 1864; 6, 20, Jan., 1864; 7, 413, Mar, 1864; 8, 529, June, 1864; 9, 149, 202, 225, 481, 524, 535, May to Aug., 1864; 10, 567, Nov., 1864; 11, 473, 513, Feb. and Mar., 1865; 13, 125, Dec., 1864, and 675, June, 1865; 16, 446, Aug., 1865; 21, 101, Dec., 1865, and 280, Mar., 1866, etc.*

I C 8 a (3) (*d*) [4]. Of the ordinary crimes taken cognizance of under similar circumstances by these tribunals, the most frequent were homicides, and after these, robbery, aggravated assault and battery, larceny, receiving stolen property, rape, arson, burglary, riot, breach of the peace, attempt to bribe public officers, embezzlement and misappropriation of public money or property, defrauding or attempting to defraud the United States, etc. *R. 7, 418, Mar., 1864; 8, 194, 529, Apr. and June, 1864; 14, 40, Jan., 1865; 15, 281, May, 1865; 18, 525, Jan., 1866; 19, 319, and 390, Jan., 1866; 21, 225, Feb., 1866; 22, 116, Aug., 1866; 27, 423, Dec., 1868, and 522, Feb., 1869; 29, 157, 233, Aug., 1869; 30, 380, 638, May and Sept., 1870, etc.*

I C 8 a (3) (*d*) [5]. Not unfrequently the crime, as charged and found, was a combination of the two species of offenses above indicated. As in the case of the alleged killing, by shooting or unwarrantably harsh treatment, of officers or soldiers, after they had surrendered, or while they were held in confinement as prisoners of war; of which offenses persons were in several cases during the Civil War convicted by military commissions under the charge of

[1] See Britton *v.* Butler, 9 Blatch., 457; Williams *v.* Mobile Sav. Bk., 2 Woods, 501; Woods *v.* Wilder, 43 N. York, 164; Lacy *v.* Sugarman, 12 Heisk., 354.

[2] See Horn *v.* Lockhart, 17 Wallace, 580.

"murder, in violation of the laws of war." [1] *R. 7, 360, Mar., 1864; 17, 455, and 19, 221, Oct., 1865; 20, 650, May, 1866.*

I C 8 a (3) (e). Except in a case of a spy whose sentence must be death (sec. 1343, R. S.), the discretion of the military commission in the imposition of sentence is not in terms restricted or defined by the existing law. *R. 7, 62, Jan., 1864.* The sentence, however, should award a criminal punishment; a judgment of debt or damages, on conviction of a criminal offense, would be irregular and properly disapproved. *R. 3, 190, July, 1863.* Where a military commission was acting under the reconstruction laws, practically as a substitute for a State criminal court, *held* that it should, in general, in determining the proper measure of punishment to be inflicted, take into consideration the State statute law, if any, prescribing the penalty or penalties for the offense.[2] *R. 29, 406, Nov., 1869; C. 12397, Apr. 10, 1902.*

I C 8 a (4). *Held* that after the declaration of peace the rule of hostile occupation can no longer be enforced in Porto Rico, as the treaty of peace assumes that the ordinary criminal courts will continue to exist. But *held* that if these courts can not be relied upon to suppress crime the President has the power to appoint provisional courts with competent jurisdiction over such offenses to continue until Congress has provided a system of government for Porto Rico. *C. 6003, Mar. 9, 1899; 6286, Apr. 13, 1899.*

I C 8 b. A government that may have been established under military occupation over territory that may have been acquired by conquest or treaty may continue until Congress shall have made other provision, and is not necessarily terminated by a treaty. *C. 25629, Sept. 30, 1909.*

I C 8 c (1). The treaty between the United States of America and the Republic of Cuba of May 22, 1903, in article 3, provides that: "The Government of Cuba consents that the United States may exercise the right to intervene for the preservation of Cuban independence, the maintenance of a government adequate to the protection of life, property, and individual liberty, and for discharging the obligations with respect to Cuba imposed by the treaty of Paris on the United States, now to be assumed and undertaken by the Government of Cuba" (33 Stat. 2248). *Held* that the treaty containing this clause was made under the authority of the United States and in the manner prescribed in the Constitution and is therefore a part of "the supreme law of the land." *Held* further that the duty of intervention described above is primarily an executive

[1] See G. C. M. O. 607, War Dept., 1865; do., 153, id., 1866. A more recent illustration was the principal offense of the Modoc Indians (tried by military commission in July, 1873), which, as a treacherous killing of an enemy during a truce, was charged as "murder in violation of the laws of war." (G. C. M. O. 32, War Dept., 1873.)

[2] Except where the death sentence was pronounced, the punishment adjudged by military commissions during the civil war was in the great majority of cases, an imprisonment for a certain term or "till the end of the war." Fines were sometimes imposed and a sending beyond the lines of the United States forces was not infrequent. A confiscation of property was also occasionally adjudged. In many instances, in lieu of any punishment, it was directed or recommended by the commission that the accused be required to take an oath of allegiance, or give a parole, and in some cases also to give a bond for future loyal behavior.

duty,[1] and that any duties which in the course of its performance devolve upon other departments of the Government are collateral and secondary, and are subordinate in importance and obligation to those which devolve upon the Executive. *C. 20396, Sept. 15, 1906.*

I C 8 c (1) (*a*). *Held* that the exclusively executive character of the duty of intervention with which the United States is charged in article 3 of the treaty between the United States and the Republic of Cuba is indicated by the several steps which it may be found necessary to take in the performance of that duty. Thus: If an insurrectionary movement should come into being on the island of Cuba with which the Cuban Government was powerless to deal, and such condition should be made known to the President of the United States, either as the result of his own observation or of representations made to him, or upon admission by the Cuban Government that it had exhausted its powers and was unable, by its own agencies and instrumentalities, to maintain order in the island, *held* that the duty of intervention, with a view to the establishment and maintenance of public order, will have accrued.[2] *C. 20396, Sept. 15, 1906.*

I C 8 c (1) (*b*). *Held* that should the condition described in article 3 of the treaty between the United States and Cuba obtain, and intervention by the United States become necessary, the first steps would be political and advisory. The Government and people of the island may be officially notified of the power and duty of the Executive under the treaty, and negotiations may be undertaken with a view to the restoration of order by pacific methods, a resort to good offices, compromise, or redress of grievances. Should these methods fail, however, the next steps in execution will consist of the issue of a proclamation by the President calling upon all persons composing the insurrectionary combinations to disperse and retire peaceably to their respective abodes within a specific date from the date of issue of such proclamation. Assuming the issue of such a proclamation, it will then become necessary for the President to employ the land and naval forces of the United States in the restoration of order in the island and in the removal of opposition to the execution of the laws. A forcible uprising becomes, in virtue of article 3 of the above treaty, and the fact that the Cuban constitution itself contains the treaty provisions above referred to, authorizing intervention by the United States, a forcible resistance to the

[1] The duty of suppressing insurrectionary movements has in the past devolved upon the Executive department. Thus: President Washington issued a proclamation on Aug. 7, 1794, calling upon those engaged in the "Whisky Insurrection" to retire to their homes. President Pierce similary issued a proclamation on Feb. 11, 1856, on the occasion of the disturbances in the Territory of Kansas. Similarly, President Cleveland issued a proclamation on Feb. 9, 1886, upon the occasion of an insurrectionary movement in Washington Territory, in which he gave the evil disposed but one day to disperse.

Similarly, upon at least two occasions, the last in 1902, the President has intervened on the Isthmus of Panama and has used the land and naval forces to maintain freedom of transit under article 35 of the treaty of Dec. 12, 1846, with Colombia. No Executive proclamation was issued in either case, and the intervention was accomplished in the operation of instructions communicated, in the name of the President by the Secretary of the Navy, to the commanding officer of the naval forces in the Carribean Sea. In both cases the action taken by the President was reported to Congress under the method prescribed by the Constitution.

[2] Act of Mar. 2, 1901, 31 Stats. 897.

authority of the United States, and brings the matter within the operation of paragraph 14, section 8, Article I, of the Constitution, which authorizes Congress "to provide for calling forth the militia to execute the laws of the United States, suppress insurrection, and repel invasions." The land and naval forces of the United States may be employed, under section 5298, R. S., in order that Cuban independence may be preserved, and that a government adequate to the protection of life, property, and individual liberty may be made secure. *C. 14148, Dec. 28, 1911; 20396, Sept. 15, 1906.*

I C 9. Two soldiers of the United States Army having been seized and delivered across the lines to the enemy by a party of *civilians* in a portion of one of the insurrectionary States in the occupation of the Federal forces, an equal number of citizens of the district were ordered by the commanding general to be arrested and held till the offenders, who, meanwhile, had taken refuge with the enemy, should be surrendered for trial. *Held* that such an act of retaliation was warranted by the laws and usages of war. *R. 9, 210, June, 1864.*

I C 10. The use of flags of truce by the enemy during the Civil War was recognized as a belligerent right.[1] But the admission by flag of truce within the lines of the United States Army in time of war of persons coming from the lines of an enemy can not entitle such persons to immunity from subsequent inquiry into their character and business, or from restraint and detention upon reasonable grounds of suspicion appearing against them. Moreover a flag of truce does not operate as a *safe-conduct*, allowing the party admitted under it a free passage through the territory or a dispensation from the legal effects of war, but affords him a merely temporary protection not to be continued after the immediate mission of the flag has been accomplished. *R. 5, 193, Oct., 1863; 6, 434, Oct., 1864; 8, 612, June, 1864.* So *held* that a person who, during the War of the Rebellion, availed himself of a flag of truce to enter our lines for an illegal purpose, was in no degree protected by the flag from liability to arrest upon his purpose becoming apparent, or from amenability to trial and punishment for any overt act in violation of the laws of war.[2] *R. 19, 673, July, 1866.*

I C 11 a. The taking of the life of a prisoner of war, when not concerting an escape or engaging in any violence or breach of discipline justifying such an extreme measure, is as fully murder as could be any homicide committed with deliberate malice in time of peace.[3] *R. 7, 360, Mar., 1864.*

---

[1] Williams *v.* Bruffy, 6 Otto, 176, 187.

[2] See Instructions relative to the dispatch and reception of Flags of Truce, prepared in the Judge Advocate General's Office, published in G. O. 43, A. G. O., 1893.

[3] Murder, at common law, is "the unlawful killing, by a person of sound memory and discretion, of any reasonable creature in being and under the peace of the State, with malice aforethought either express or implied." In many of the States, two or more degrees of murder are now distinguished by the statute law; murder in the first degree—generally defined as a killing accompanied by express malice, or a deliberate unlawful intent to cause the death of the particular person killed—being ordinarily alone made *capital*. Manslaughter, at common law, is distinguished from murder by the absence of malice aforethought. The State statutes have generally constituted degrees of manslaughter, also, a different measure of punishment being assigned to each degree. The laws of the United States, through prescribing different punishments for manslaughter under different circumstances, recognize no discriminations of grades in either manslaughter or murder. See Coke. Inst. 47; 4 Bl. Com. 95; 1 East, P. C. 214; 1 Russell, Cr. 482, 1 Gabbett, 454, 2 Wharton, Cr. L. sec. 930;

I C 11 b. The violation of his parole by a paroled prisoner of war is an offense against the common law of war and punishable with death.[1] *R. 6, 20, Jan., 1864.*

I C 11 c (1). An engineer captured while doing duty on a steamer of the enemy, *held* properly detained as a prisoner of war, civil employees of the enemy serving with its army in the field being regarded as on the same footing in this respect with the soldiers of such army.[2] *R. 6, 542, Aug., 1866.*

I C 11 c (2). Where a prisoner of war, held with other prisoners at a prison camp within a State in which the civil courts were in operation, killed one of his fellow prisoners, *advised* that the Government might in its discretion turn him over for trial to the State authorities, or exchange him under the cartel and leave him to be tried by the Confederate authorities. *R. 13, 498, Mar., 1865.*

I C 11 c (3). Where certain persons, apprehended, while engaged apparently as partisans in a raid from Kentucky into Indiana, were held to trial by a civil court of the latter State for robbery, and the Confederate agent for the exchange of prisoners of war made thereupon official application that they should be treated and exchanged as such prisoners, on the ground that they were Confederate soldiers acting under the orders of their military superiors, *advised*, in view of the serious doubt as to their real status, that they be left to have their offense passed upon by the court which had assumed jurisdiction of their case, and by which the defense that their operations were legitimate acts of war could be properly investigated.[3] *R. 2, 591, June, 1863; 5, 344, Nov., 1863.*

I C 11 c (4). Where certain soldiers of the enemy's army, having been taken prisoners in Virginia upon Lee's surrender, were released on parole, on condition of their returning to their homes, *held* that this parole did not authorize them, in the absence of special authority from the United States Government, to come within our lines and into the State of Maryland, although that State had been their place of residence before the war; and that, in actually coming into Maryland, they were chargeable with a violation of their parole.[4] And *held*, further, that a citizen of Maryland, in harboring and relieving them after coming into that State, was chargeable with an offense under article 45. *R. 12, 400, May, 1865.*

I C 11 c (5) (*a*). Where a chaplain of the Confederate Army came within the lines of the United States Army during the war without the authority of the Federal Government, and was apprehended,

---

3 Greenl. Ev. sec. 130; Commonwealth *v.* Webster, 5 Cush. 304; G. O. 23, Dept. of California, 1865 (Remarks of Maj. Gen. McDowell). "Murder, originally," says Forter (p. 302, citing Bracton "de murdro"), was "an insidious secret assassination; *occulta occisio, nullo sciente aut vidente.*" Now, secrecy in the commission of the act is significant only as evidence of legal malice.

While it is lawful to kill an enemy "in the heat and exercise of war," yet "to kill such an enemy after he has laid down his arms, and especially when he is confined in prison, is murder." State *v.* Gut, 13 Minn., 341.

[1] See G. O. 100, War Dept., 1863, par. 124 (Lieber's Instructions).

[2] See Hague Convention of 1907, 36 Stat., 2240; also Military Laws of United States with Supplement of 1911, p. 1461.

[3] See 11 Op. Atty. Gen., 240.

[4] In 11 Op. 207, Atty. Gen. Speed says of these paroled prisoners that they "can not be regarded as having homes in the loyal States. * * * As belligerents their homes were, of necessity, in the territory belligerent to the Government of the United States."

tried, and convicted of the offense involved, and sentenced (Dec., 1864) to be confined during the war, *advised* that while his act was in violation of the law of war, yet, as it appeared that his only object in coming within our lines was to purchase Bibles, his punishment might well be remitted on his taking the usual oath of allegiance to the Federal Government. *R. 11, 553, Mar., 1865.*

I C 11 c (6) (*a*). *Held*, that a prisoner of war terminates his status as such when he enlists in the Army, and can not be returned to it upon his discharge. *C. 16, July 13, 1894; 1193, Apr. 13, 1895.*

I C 11 d (1). Where an officer of our Army, while on trial or awaiting sentence, is taken prisoner by the enemy, and a sentence of dismissal adjudged by the court and duly approved is not officially communicated to him till, upon being exchanged, he has returned to his regiment, he is entitled to be treated and paid as having been in the United States service up to the date of such notification. And so of an officer dismissed by order, or a soldier dishonorably discharged by sentence under similar circumstances.[1] *R. 12, 230, Jan., 1865; 13, 589, Apr., 1865; C. 2039, Feb., 1896.*

I C 11 d (2) (*a*). A paroled prisoner is simply a soldier who has been placed under a disability to engage in active operations against the enemy. He remains a part of the Army and as much subject to military control as he was before his capture. If he absents himself without authority from the post or station to which as a paroled prisoner he has been assigned by the military authorities, he is absent without leave or in desertion according to the intent with which he absented himself. *C. 1746, Sept., 1895; 17937, May 4, 1905.*

I C 11 d (2) (*b*). A prisoner of war, on being paroled, is not *necessarily* bound to return to the regiment or other command to which he was attached upon capture, or subject, if he does not return, to be treated as a deserter. In the absence of any special order given him by competent authority he is required only to abide by the existing orders in regard to paroled prisoners in general. *R. 39, 339 Dec., 1877.*

I C 11 d (2) (*c*). *Held*, in the absence of any stipulation to the contrary in the cartel of exchange,[2] that a prisoner of war of our Army, released on parole by the enemy, might legally be put on duty as one of the post guard at a post not in the field or threatened by the enemy.[3] *R. 21, 592, Aug., 1866.*

I C 11 d (3). While it is laid down by the authorities [4] that a prisoner of war is, strictly, justified in enlisting in the service of the enemy only by a well-founded apprehension of immediate death, yet where soldiers of the Federal Army, while subjected when prisoners in the hands of the enemy, to extreme privation and suffering by which their lives were imperiled, were induced, solely in order to find means of escape from such desperate situation to enlist in the enemy's army, *advised* that such soldiers, on subsequently surrendering to or being

[1] Note the provision of the act of 1814, now incorporated in section 1288, R. S., entitling certain officers and soldiers to be paid as such during their captivity when made prisoners of war by the enemy. And see Jones *v.* United States, 4 Ct. Cls., 197; Phelps *v.* United States, id., 209—adjudicated cases of officers dismissed while prisoners of war and claiming pay under the statute.

[2] See 10 Op. Atty. Gen., 357.

[3] See G. O. (A. & I. G. O.) of Feb. 14, 1814; do. 100, War Dept. 1863, par. 130 (Lieber's Instructions).

[4] Respublica *v.* McCarty, 2 Dallas, 86; United States *v.* Vigol, *id.* 346. And compare United States *v.* Griner, 4 Philad., 396, 401.

captured by our forces, should not as a general rule be treated as deserters, but should be returned to duty with their regiments without punishment. *R. 14, 135, Feb., 1865; 16, 40, 271, Apr. and June, 1865.* But where it appeared that certain soldiers of our Army who when prisoners of war had enlisted in the enemy's service, had not attempetd to escape when they might have done so but had voluntarily remained and fought in the ranks of the enemy's army till forcibly captured by our forces, *advised* that their representations to the effect that they had joined the enemy to escape cruel treatment as prisoners of war should not be allowed to weigh in their favor, but that they should be brought to trial for the crime of desertion to the enemy. *R. 16, 136, May, 1865.*

I C 12. In a proclamation of May 10, 1861, the President authorized the commander of the United States forces on the Florida coast, if he found it necessary, "to suspend there the writ of *habeas corpus.*" By General Order 104, War Department, August 13, 1862, the President suspended the privilege of the writ of *habeas corpus* in cases of persons liable to draft who should attempt to depart to a foreign country, or should absent themselves from the State or county of their residence in anticipation of a draft to which they would be subject. By a proclamation of September 24, 1862, the President declared the privilege of the writ suspended in respect to all persons arrested or imprisoned "during the rebellion by any military authority," or under "sentence of any court martial or military commission." These proclamations and orders were all based upon the theory that under Article I, section 9, paragraph 2, of the Constitution, or otherwise, the President alone, in the absence of any authority from Congress, was empowered to suspend the privilege of the writ.[1] *R. 1, 345, Sept. 10, 1862.*

But in the following year, by the act of Congress of March 3, 1863, chapter 81, section 1, it was provided: "That during the present rebellion the President of the United States, whenever in his judgment the public safety may require it, is authorized to suspend the privilege of the writ of *habeas corpus* in any case throughout the United States or any part thereof"—Congress, by thus asserting the right in itself to authorize the suspension, implying that, in its opinion, the power to suspend did not reside in the President.[2]

In sundry particular cases, referred to the Judge Advocate General by the Secretary of War, of persons detected in holding correspondence with, or giving intelligence or otherwise lending aid to, the enemy, as also in obstructing enlistments in the Army, etc., the opinion was expressed that the suspension of the writ by the President would be legally justified under this act. *R. 2, 174, 456, Apr. and May, 1863; 3, 72, June, 1863.* The instances, however, of suspension in individual cases were not numerous; for, presently, viz, on September 15, 1863, and pursuant to the act of March, 1863, above cited, the President

[1] The question whether the President was authorized, in his own discretion and independently of the sanction of Congress, to exercise this power, was much discussed early in the Civil War. The fullest argument in favor of the existence of the power in the President, is contained in Mr. Horace Binney's treatise on "The Privilege of the Writ of *Habeas Corpus* under the Constitution." And see also, *Ex parte* Field, 5 Blatch., 63; Opinion of Attorney General Bates in 10 Op., 74. The weight of judicial authority, however, was the other way. See *Ex parte* Merryman, Taney, 246; McCall *v.* McDowell, 1 Abbott U. S. R., 212; Griffin *v.* Wilcox, 21 Ind., 383; *In re* Kemp, 16 Wis., 382; *In re* Oliver, 17 *id.*, 703.

[2] See *In re* Murphy, Woolworth, 141.

issued a proclamation suspending the privilege of the writ generally, and "throughout the United States" in all cases "where, by the authority of the President of the United States, military, naval, and civil officers of the United States, or any of them, hold persons under their command or in their custody, either as prisoners of war, spies, or aiders or abettors of the enemy, or officers, soldiers, or seamen enrolled or drafted or mustered or enlisted in, or belonging to, the land or naval forces of the United States, or as deserters therefrom, or otherwise amenable to military law, or the rules and articles of war, or the rules or regulations prescribed for the military or naval services by authority of the President of the United States, or for resisting a draft, or for any other offense against the military or naval service." In a case in which, by the operation of this last proclamation, the writ was suspended, *held* that any judge or court, whether of the United States or of a State, would be required to dismiss the writ, on being advised (in the manner and form indicated in the act of Mar. 3, 1863, sec. 1) that the party sought to be relieved was "detained as a prisoner under the authority of the President." *R. 15, 157, May, 1865.*

I C 12 a. By a proclamation of December 1, 1865, the President "revoked and annulled" the suspension (by ploclamation of Sept. 15, 1863) of the privilege of the writ in certain States, including New York. *Held,* that such revocation did not operate to authorize the discharge, by a court of that State, of a prisoner detained in military custody under color of the authority of the United States. *R. 21, 92, Dec., 1865.*

I D 1. Under the terms of the protocol of August 12, 1898, and of the treaty of peace signed at Paris on December 10, 1898, all of the immovable property on the island of Porto Rico belonging to the general government and as such "to the Crown of Spain," together with certain property in the nature of public records, was ceded to the United States. All other movable property of the general government for which no special provision was made either in the protocol or treaty remained the property of Spain to be disposed of as desired by the latter. Certain articles of this movable property (office furniture) which it appeared had been, like the public buildings and other public works of the island, paid for from appropriations collected from the island, were ordered purchased from the Spanish Government out of the insular funds collected by the United States. *Held* that the payment could legally be made as ordered, the property belonging to Spain and not to the "island government," there never having been an independent government for Porto Rico. *C. 6828, Aug., 1899.*

I E 1. Martial law is defined as military authority exercised in accordance with the rules and usages of war,[1] and "Martial Law at Home," (or as a domestic fact) as military power exercised in time of war, insurrection, or rebellion, in parts of the country retaining their allegiance, and over persons and things not ordinarily subject to it.[2] Martial law as a domestic fact presupposes a condition in which the civil courts are unable to enforce their processes, and is justified by the necessity of society's protecting itself by suppressing the resistance, so as to enable the civil courts to fulfill their proper functions. It is the suspension of all law but the will of the military

[1] Instructions for the Armies of the United States in the Field, G. O. 100, A. G. O., 1863.

[2] Manual for Courts-Martial (1908), p. 5.

commanders entrusted with its execution, to be exercised according to their judgment, the exigencies of the moment and the usages of the service, with no fixed or settled rules of law, no definite practice, and not bound by even the rules of the military law.[1] When martial law prevails the civil power is superseded by the military power, and the ordinary safeguards to individual rights are for the time being set aside,[2] but it is incumbent on those who administer it to act in accordance with the principles of justice, honor, and humanity and the laws and usages of war.[3] *C. 8383, May, 1900.*

I E 1 a. Martial law is a modified degree of the law of war, or a law assimilated to the latter, called into exercise temporarily and for a specific purpose, at a time of war or public emergency, and generally in a place or region not constituting enemy's country, or under permanent military government.[4] Whether proclaimed by the President or declared by a competent military commander, martial law overrides and supersedes, for the time being, all civil law and authority, except in so far as the same may be left operative by the terms of the announcement,[5] or the action or acquiescence of the dominant power. While the status of martial law continues, the military power, instead of being subordinate, is superior to the civil power, and the natural and normal condition of things is thus reversed. But while martial law will warrant a resort by the commander, at his will, to summary and arbitrary measures, by which the liberty of the citizen may be restrained, his action coerced, and his rights suspended, it can not be availed of by subordinates to justify acts of unnecessary violence, personal persecution, or wanton wrong.[6] *R. 12, 105, Dec., 1864; 19, 41, Oct., 1865; C. 8383, May, 1900.*

I E 1 a (1). Under martial law the military power is supreme. *Held* that the only limitation to it is that it must be exercised in accordance with the principles of justice, honor, humanity, and the laws and usages of war. *C. 8383, May 26, 1900.*

I E 1 b. A proclamation declaring that a "state of insurrection and rebellion" exists in a particular region of a State is in effect a declaration of martial law, but such declaration is not essential. Martial law as a domestic fact exists when, the resistance to law having reached such a stage that the civil authorities are powerless to cope with it,

---

[1] Pomeroy's Constitutional Law, sec. 712; Finlason on Martial Law, p. 107.

[2] See Lieber's Use of the Army in Aid of the Civil Power. War Department Document 64.

[3] As to the rights, duties, and obligations of a military commander who is directed to suppress an insurrection in a State, see Birkhimer's Military Government and Martial Law, pp. 395–399.

[4] Note the distinction between *military government* proper and *martial law* as illustrated in Milligan's Case, 4 Wallace, 142. The "martial law" referred to in the test is defined in the Manual for Courts-Martial (1908), p. 5, as "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."

[5] Luther *v.* Borden, 7 Howard, 13–14; United States *v.* Diekelman, 2 Otto, 526; *In re* Egan, 5 Blatch., 319, 321; Griffin *v.* Wilcox, 21 Ind., 376; Johnson *v.* Jones, 44 Ill., 153; *In re* Kemp, 16 Wis., 382; Clode (Military and Martial Law), 183–191, Hough (Precedents), 514, 549; G. O. 100, War Dept., 1863, Sec. I.

[6] "But the existence of martial law does not authorize general military license, or place the lives, liberty, or property of the citizens of the States under the unlimited control of every holder of a military commission." Despan *v.* Olney, 1 Curtis, 308. And see Luther *v.* Borden, 7 Howard, 14; G. O. 100, War Department, 1863, Sec. I, par. numbered 4.

the military take control to suppress the resistance and restore the civil authority. Such martial law ceases when the necessity for it ceases. It ceases when the civil authorities resume their unobstructed functions, although the military may be present to aid them if the need of such aid should arise. *C. 8383, May, 1900.*

I E 1 c. Where a city or district has been put under martial law by the commanding general, he becomes its supreme governor, and, in governing, is ordinarily to be presumed to be empowered to exercise the same authority which the President might have exercised had *he* proclaimed martial law therein.[1] *R. 10, 669, Dec., 1864.*

I E 1 c (1). In view of the President's proclamation of July 5, 1864, suspending the writ of *habeas corpus*, and establishing martial law in the State of Kentucky, *held* (Dec., 1864) to be competent for the general commanding the military district of Kentucky, if in his judgment the effective maintenance of martial law and the accomplishment of the ends proposed by its declaration required it, to restrain, by such means as in his discretion might be deemed needful, the prosecution of suits instituted against United States officers for acts done in the line of their duty, and having the effect (indicated in the proclamation) of impeding "military operations," and of embarrassing "the constituted authorities of the Government of the United States." *R. 10, 669, Dec., 1864.*

I E 1 d. The occasion for the exercise of martial law properly ceases when the emergency has passed which made it necessary or expedient.[2] So, the commander of the Middle Military Department having, in view the presence in the department of an army of the enemy, proclaimed, by order of June 30, 1863, a state of martial law in Baltimore City and County and the counties of the western shore of Maryland, with the assurance expressed that such status should not extend beyond the necessities of the occasion, *held* that as the exigency had long ceased to exist, the order, though never in terms revoked, should properly be considered as no longer operative. *R. 12, 422, June, 1865.*

I E 1 e. The President's proclamation of September 24, 1862, subjected to martial law and trial by military courts throughout the United States certain classes of persons named, and suspended the privilege of the writ of *habeas corpus* as to all persons imprisoned under military sentence or by military authority "during the rebellion." The further executive proclamation of September 15, 1863 (issued pursuant to the act of Mar. 3, 1863), suspended the privilege of the writ throughout the United States as to certain classes of persons enumerated. The further proclamation of December 1, 1865, in revoking generally the suspension declared by the proclamation of September 15, 1863, excepted from such revocation, and left the suspension in force in, certain States and Territories specified and "in the District of Columbia." The proclamation of April 2, 1866 (which

[1] In Clark *v.* Dick, 1 Dillon, 8, the court, referring to the placing of the city of St. Louis under martial law by the department commander, Maj. Gen. Halleck (by G. O. 34, Dept. of the Missouri, 1861), observes: "That this officer represented the President, who is Commander in Chief of the Army, and was vested with all the authority as such military commander that belonged to the President, can not be doubted."

[2] *In re* Egan, 5 Blatch., 319, 322; In the matter of Martin, 45 Barb., 145; Hough (Precedents), 535.

in one of its preambles declared that martial law and the suspension of the writ of *habeas corpus* were "dangerous to public liberty, incompatible with the individual rights of the citizen," etc., and "ought not to be sanctioned or allowed except in cases of actual necessity," etc.), announced the rebellion as at an end throughout the United States, the State of Texas only excepted. *Held*, in view of these proclamations, that, so far as concerned the exercise of military authority and jurisdiction, martial law might be considered to have existed in the District of Columbia from September 24, 1862, as to the classes of persons indicated in the proclamation of that date, and from September 15, 1863, as to other classes of persons indicated in the proclamation of that date, to April 2, 1866, the date of the proclamation issued at the end of the war.[1] *R. 35, 177, Feb., 1874.*

I E 1 f. When the United States is called upon to protect a State against "domestic violence," its military forces act in aid of the State authorities to the extent necessary to reestablish the civil authority; they are not however under the command of the State authorities, but of their military officers under the President. To this extent they are an independent force, operating under the orders of the President, to perform a duty to the State imposed upon the United States by the Constitution.[2] *C. 8383, May, 1900.*

I F 1. *Held*, in a case in which a State judge had discharged a soldier enlisted for the war on the ground that the war had ended, that the judiciary, even of the United States, would not be empowered to determine, originally, the question whether the war had terminated, but upon such question would properly await and abide by the action of the President or Congress.[3] *R. 18, 293, Oct., 1865.*

I F 2. *Held* that the status of war between Spain and the United States terminated on the date of the exchange of ratifications of the treaty of peace.[4] *C. 12488, Apr. 29, 1902; 12881, July 1, 1902; 15154, Aug. 27, 1903; 16064, Apr. 21, 1904; 16254, May 25, 1904; 16754, Dec. 23, 1903; 17349, Jan. 5, 1905; 19734, May 15, 1906.*

---

[1] "It would seem to be conceded that the power to suspend this writ" (the writ of *habeas corpus*) "and that of proclaiming martial law, include one another. * * * The right to exercise one power implies the right to exercise the other." 9 Am. Law Reg., 507 and 508. And see *Ex parte* Field, 5 Blatch., 82.

[2] See Report No. 1999, House of Representatives, 56th Cong., 1st sess. (Coeur d'Alene labor troubles).

[3] It has subsequently been similarly held in repeated cases. See Phillips *v.* Hatch, 1 Dillon, 571; Semmes *v.* City Fire Ins. Co., 36 Conn., 543; Conley *v.* Supervisors, 2 West Va., 416; Perkins *v.* Rogers, 35 Ind., 124; Sutton *v.* Tiller, 6 Coldw., 595; also United States *v.* Anderson, 9 Wallace, 56, 71.

In the case of The Protector (12 Wallace, 700) it was held by the Supreme Court that the war *began* in all the insurrectionary States, except Virginia and North Carolina, on April 19, 1861, the date of the first "proclamation of intended blockade," and in those two excepted States on April 27th, 1861, the date of the second such proclamation; further that the war *ended* in all the States except Texas on April 2d, 1866, the date of the proclamation declaring the war at an end as to all the other States, and in Texas on August 20th, 1866, the date of the proclamation declaring the war at an end in that State and generally. And see Adger *v.* Alston, 15 Wallace, 555, and Burke *v.* Miltenberger, 19 id., 519, in which the ruling in The Protector is affirmed by the same court; also United States *v.* Anderson, *supra.*

[4] See Ribas y Hijo, 194 U. S., 315. See also *ex parte* Ortiz, 100 Fed. Rep., 955, where it is held that: "As affecting private right a treaty between two nations becomes effective only from the date when the ratifications by the respective Governments are exchanged." See also U. S. *v.* Arredonde, 31 U. S., 691, 748; Haver *v.* Yaker, 76 U. S., 32.

I F 3. In the proclamation of the President of the United States, July 4, 1902, there occurred the following provisions: "*Whereas*, many of the inhabitants of the Philippine Archipelago were in insurrection against the authority and sovereignty of Spain at divers times from August, 1896, until the cession of the archipelago from that Kingdom to the United States of America, and since such session many of the persons so engaged in insurrection have, until recently, resisted the authority and sovereignty of the United States: *And whereas*, the insurrection against the authority and sovereignty of the United States is now at an end, and peace has been established in all parts of the archipelago except in the country inhabited by the Moro tribes, to which this proclamation does not apply." *Held* that the war status in the Philippines except in the Moro country, was terminated on the date of the publication of the above proclamation, viz, July 4, 1902. *C. 13743, Dec. 2, 1902; 12184, Feb. 12, 1903; 14348, Mar. 25, 1903; 15754, Dec. 24, 1903; 16859, Sept. 7, 1904.*

I F 4. *Held* that the war in China ended May 12, 1901, the date fixed in General Order No. 19, Headquarters China Relief Expedition at Pekin, China. *C. 17609, Mar. 22, 1905.*

I G 1. War correspondents as a class are noncombatants within the theater of military occupation. *Held* that they fall within the jurisdiction of the commanding general of the army which they accompany, and that he may issue rules or regulations which govern their conduct while within the limits of his command. *C. 16351, May 19, 1904.*

WAR COLLEGE.

Appropriation.....See APPROPRIATIONS XXII.
Army service.....See CONTRACTS VII E 3.
Students.....See ABSENCE I B 1 g (2) (*a*).

WAR CORRESPONDENT.

Military control over.....See WAR I G 1.

WAR DEPARTMENT.

See SECRETARY OF WAR.
Bonds.....See BONDS I O; P.
Chief of Coast Artillery not part of.....See CIVILIAN EMPLOYEES VIII A.
Collection of private debts.....See PRIVATE DEBTS IV.
Contracts under seal.....See CONTRACTS XXXVI.
Discharge of minor.....See DISCHARGE XII D 1; 2.
Erroneous discharge corrected.....See DISCHARGE XIV A 1; B 2; D 5; XV D 1 c.
Fixing age of minor.....See DISCHARGE XII B 1.
Improper attempts to influence.....See COMMUNICATIONS IV B 1.
Nunc pro tunc discharge can not be issued..See DISCHARGE XIV A 2.
Official papers in.....See OFFICIAL RECORDS I A to B.
Policy as to deserters.....See DISCHARGE II B 2 a.
Policy when deserter's sentence is set aside...See DISCHARGE III B 5 a.
Policy as to discharge without honor.....See DISCHARGE III B; B 1 to 5 a.

WAR POWER.

See WAR I C 8 a to b.

WARRANT.

Of noncommissioned officer.....See RANK I D to E.
Search warrant.....See ARTICLES OF WAR LIX G 1 a.
COMMAND V A 3 e; B 2 b; 3.

WAR SERVICE.

Counts double for retirement of soldier.....See RETIREMENT II A 4 to 5.

WARRANTIES.

See CONTRACTS XXVI.

WATCHWORD.

See ARTICLES OF WAR XLIV.

WATER COURSE.

Claim for diversion of.....See CLAIMS II.

WATER PLANT.

Mains and hydrants in street.....See APPROPRIATIONS LIII.
On target range.....See MILITIA VI C 1 g.

WATER POWER.

License to use.....See PUBLIC PROPERTY I A 1.

WHOLLY RETIRED.

Examining board.....See RETIREMENT I B 6 c (2); (3).
Retiring board.....See RETIREMENT I N to O.

WIFE.

Abuse of.....See ARTICLES OF WAR LXI B 13; 14.
Evidence by.....See DISCIPLINE X A 5; B 1; 1 a.
Supplies purchased from soldier's.....See CONTRACTS XV A 4.

WITHDRAWAL.

Of bids.....See CONTRACTS XI B; C.

WITNESS.

Before surveying officer.....See PUBLIC PROPERTY I F 3 a.
Civil court.....See CIVIL AUTHORITIES I A; A 1.
Civilian.....See CIVILIAN EMPLOYEES IV to V.
DISCIPLINE IV B 4 a.
Expert.....See DISCIPLINE IV B 3 d (1).
Insane person.....See DISCIPLINE IX F 3 a.
List of.....See DISCIPLINE II E.
Military court.....See DISCIPLINE X A to L.

WITNESS FEES.

Board of investigation.....See DISCIPLINE XVIII C.
Civil courts.....See CIVIL AUTHORITIES I B 1.
Retired officer.....See RETIREMENT I M 2.

WORDS AND PHRASES.[1]

"*Accouterments*" applies in the military service to those parts of the soldier's personal equipment which are issued by the Ordnance Department in connection with his arms and ammunition, such, for example, as belts and cartridge pouches. *C. 18944, Dec. 9, 1905; 18764, Oct. 15, 1906; 18944, Dec. 12, 1905.*

"*A court of justice*" defined.....See ARTICLES OF WAR LXXXIV.
"*Active duty*" defined.....See RETIREMENT I K 1.
"*Active service*" defined.....See RETIREMENT I B 2 a.
"*Actual service*" defined.....See RETIREMENT II A 4 b (1).
"*Any of U. S.*" under fifty-ninth article of war defined.....See ARTICLES OF WAR LIX F.
"*Arms*" defined.....See ARMS I.
"*At or near*" defined.....See DISCIPLINE II D 9 a.

"*Authorized confinement*" as used in Article IV of General Order 16 of 1895 (now Art. IV, G. O. 42 of 1901), is not limited to the maximum authorized. Confinement for a period less than the maximum is also authorized confinement. The article means that when the maximum term may be more than six months, dishonorable discharge with forfeiture of pay and allowances may be awarded with whatever confinement, within the prescribed limit, the court may adjudge. *C. 1551, July, 1895. Held* also that such "authorized confinement" is limited to the specific confinement authorized by Article II, or if not provided for therein, by the custom of the service; that is to say, such confinement may not be increased by substitution of confinement for forfeiture, or on account of previous convictions, the same not being provided for by the terms of Article IV. *C. 8543, July, 1900.*

"*Authorized*" construed.....See LAWS I B 2.
NAVIGABLE WATERS X A 1.
"*Burglary*" defined.....See ARTICLES OF WAR LXII C 7.
"*Cashiering*" defined.....See DISCIPLINE XII B 3 i.
"*Civil office*" defined.....See OFFICE IV A 2 c.
"*Civil War*" defined.....See WAR I A 3.
"*Competent authority*" to muster out.....See VOLUNTEER ARMY IV C 1 a (2) (*a*).
"*Competition*" defined.....See ARMY BANDS I A 1.
"*Corps*" defined.....See INSIGNIA OF MERIT II H.
Crew of transport are civilian employees...See CIVILIAN EMPLOYEES V A.
"*Crimes*" construed.....See ARTICLES OF WAR LXVI A.
"*Crimes*" defined.....See ARTICLES OF WAR LXII A.

"Day" or "days" when used in the maximum punishment order has reference to a day of twenty-four hours. *P. 53, 149, Apr., 1892.*

"*Disbursing officer*" defined.....See PUBLIC MONEY II A.
"*Electric fixtures*" include meters.....See APPROPRIATIONS XLVI.
"*Embezzlement*" defined.....See SECTION 5488, REVISED STATUTES, and ARTICLES OF WAR LXII C 2.
"*Emergency*" defined.....See ARMY I G 3 d (3) (*a*).
"*Enlistment*" defined.....See ENLISTMENT I A.
"*Established*" construed.....See MILITARY INSTRUCTION II B 1 c.
"*Exercise functions of civil office*" defined..See OFFICE IV A 2 b.
"*False swearing*" defined.....See ARTICLES OF WAR LXII C 9.
"*Fine*" differentiated from "*stoppage*"...See PAY AND ALLOWANCES III B 5; D 3.
"*Flag*" described.....See FLAG I.
"*Forfeiture*" differentiated from "*stoppage*".....See PAY AND ALLOWANCES III B 5.
"*Fraudulent enlistment*" defined.....See ENLISTMENT I A 9 a.
"*Grant*" distinguished from "*license*".....See PUBLIC PROPERTY I A 2.
"*His arms or ammunition*" described.....See ARTICLES OF WAR XLII B.

[1] No synopsis of words and phrases is presented as in view of the fact that most of the citations are cross references, it is deemed better to arrange the words and phrases alphabetically.

"*His clothing*" defined.....See PAY AND ALLOWANCES II A 3 a to b. ARTICLES OF WAR XVII A.
"*Imperfect war*" defined.....See WAR I A 2.
"*Incident of the service*" defined.....See WAR I B 2 c.
"*Indian country*" defined.....See INTOXICANTS III A.
"*Indian war*" defined.....See WAR I A 5.
"*Infamous criminal offense*" defined.....See ARTICLES OF WAR III A.
"*In open market*" defined.....See CONTRACTS VII E 5.
"*In their own right*" defined.....See INSIGNIA OF MERIT III A 1.
"*Intoxicating liquor*" defined.....See INTOXICANTS I.
"*It shall be lawful*" or "*is authorized and empowered*" equivalent to "*may*" in river and harbor act.....See NAVIGABLE WATERS X A 1.
"*Jeopardy*" defined.....See ARTICLES OF WAR CII A.
"*Law of war*" defined.....See WAR I C 1.
"*Laws of the land*" under fifty-ninth article of War defined.....See ARTICLES OF WAR LIX C.
"*Legal representative*" defined.....See ARTICLES OF WAR CXXVII B.
"*Line of duty*" relation to "*incident of the service*".....See RETIREMENT I B 2 c.
"*Locality*" defined.....See CONTRACTS XLIV.
"*Martial law*" defined.....See WAR I E 1.
The word "*may*" equivalent to "*must*" or "*shall*".....See LAWS I B 1 a.
"*Military expedition*" defined.....See ARMY II K 1 a.
"*Military stores*," meaning of.....See PUBLIC PROPERTY IX A 1.
"*Misbehavior before the enemy*" described..See ARTICLES OF WAR XLII A.
"*Mixed war*" defined.....See WAR I A 4.
"*Month*" in a lease construed.....See PUBLIC PROPERTY VII A 3.

"Month" or "months," employed in a sentence, is to be construed as meaning *calendar* month or months; the same significance being given to the term as is now commonly given to it in the construction of American *statutes* in which the word is employed.[1] The old doctrine that "month" in a sentence of court-martial meant *lunar* month, has long since ceased to be accepted in our military law. *R. 26, 374, Jan., 1868.*

"*Mutiny*" defined.....See ARTICLES OF WAR XXII A.
"*Navigable waters*" described.....See NAVIGABLE WATERS I A.
"*Necessary*" defined as used in act of July 7, 1884 (23 Stat. 227).....See ARMY—I B to C.
"*Office*" in bond means what.....See BONDS II G.

"Officer" ("superior officer") in the twenty-first as in all other articles of war means commissioned officer. *R. 9, 90, May, 1864.* (See also the provision introductory to the Articles of War of sec. 1342, R. S., in which it is specified that "the word *officer*, as used therein, shall be understood to designate commissioned officers.")

"*Official record*" defined.....See INSIGNIA OF MERIT I A 2 a.
"*On or about*" defined.....See DISCIPLINE II D 9 a.
"*Participation in joint encampment*" defined.....See MILITIA VI B 2 c.
"*Penitentiary*".....See ARTICLES OF WAR XCVII C.
"*Perfect war*" defined.....See WAR I A 1.
"*Permanent disability*" defined.....See RETIREMENT I B 2 b.
"*Previous conviction*" defined.....See DISCIPLINE XII B 1 a (1) (*a*).
"*Private indebtedness*" defined.....See PRIVATE DEBTS I.
"*Public money*," what constitutes.....See PUBLIC MONEY I to II.
"*Public office*" defined.....See OFFICE I.
"*Purchase*" defined.....See PUBLIC PROPERTY II A; V E 1 d.
"*Regular Army*".....See ARMY I G 1.
"*Remission*" defined.....See PARDON XVI A.
"*Replace*" construed.....See INSIGNIA OF MERIT I A 2 c.

[1] See Moore *v.* Houston, 3 Sergt. & Rawle, 184; Sedgwick, Cons. Stat. and Const. L., 2d ed., p. 358; also 1 Rev. Stats. of New York, sec. 4. See R. S., N. Y., 1896, Collins, vol. 1, p. 116, sec. 26.

"*Reputable person.*" *Held*, that a man who engages in the illicit trade of purchasing clothing from soldiers is not a "*reputable person*" as that term is used in the Regulations (par. 1406, A. R., 1910) in connection with witnessing transfers of final statements. *C. 25191, June 25, 1909.*

"*Service with troops*" defined.....See RETIREMENT I K 2 c.
"*Stealing*" defined.....See ARTICLES OF WAR LX C.
"*Suitable mount*" defined.....See PAY AND ALLOWANCES I B 7 b.
"*Superintendents national cemeteries are civil officers.*" See CIVILIAN EMPLOYEES V B.
"*Theater ticket*" defined.....See UNIFORM I B 2 a.
"*Volunteer Army*" described.....See VOLUNTEER ARMY I to II.
"*War*" defined.....See WAR 1.

WRECK OR DRIFT STUFF.

See CLAIMS VI E.
See PUBLIC MONEY I O.
Sale of.....See PUBLIC PROPERTY IX A 2 a (3).

WRECKS.

Appropriation for removing.....See APPROPRIATIONS XXXVIII.
Removal of.....See NAVIGABLE WATERS VII to VIII.

WRIT OF ATTACHMENT.

By judge advocate.....See DISCIPLINE X K to L.
On pension money.....See PENSIONS II A.
Public money.....See PUBLIC MONEY II C to D.
Summary court can not issue.....See DISCIPLINE XVI E 1.

WRIT OF REPLEVIN.

Receipt of by commanding officer.....See ARMY II K 1 e (2).

APPENDIXES.

Appendix I.

REFERENCES TO THE CONSTITUTION OF THE UNITED STATES.

CONSTITUTION.

Art. 1, sec. 8.....See Militia I A 1; I E; II A.
Laws II A 1 b.
Art. 1, sec. 8, pars. 11 to 16.....See War I C 8 a.
Art. 1, sec. 8, par. 14.....See War I C 8 c (1) (*b*).
Art. 1, sec. 8, par. 16.....See Militia XIII A.
Art. 1, sec. 8, par. 17.....See Public property V to VI.
Art. 1, sec. 9, par. 2.....See War I C 12.
Art. 1, sec. 9, par. 7.....See Pay and allowances III C 1 f (1).
Art. 1, sec. 9, par. 8.....See Army I C 3.
Art. 1, sec. 10.....See Militia IV A.
Art. 2, sec. 2, par. 1.....See Pardon I A.
Art. 2, sec. 2, par. 2.....See Office III A 4 c; E 1; F 1.
Art. 3, sec. 2, par. 3.....See Office III A 3.
Art. 4, sec. 3, par. 2.....See Public property I A to B; III A 1; V H 2 b.
Art. 4, sec. 4.....See Army II A; A 1; E.

AMENDMENTS.

Art. 2.....See Arms I.
Art. 5.....See War I C 6 c (1).
Discipline V B.
Articles of War CII A.
Art. 6.....See Discipline VIII G 2 a.
Articles of War XCI H.
Art. 8.....See Discipline XV F 5.
Art. 14.....See Enlistment I C 1 b.

Appendix II.

REFERENCES TO LAWS AND JOINT RESOLUTIONS.

May 8, 1792 (1 Stat. 271).....See Militia IV A.
Jan. 25, 1828 (4 Stat. 246).....See Public money IV to V.
Mar. 1, 1843 (5 Stat. 606).....See Residence II A.
Mar. 3, 1847 (9 Stat. 186).....See Insignia of merit II I.
May 10, 1854 (10 Stat. 277).....See Office III E 3.
Aug. 4, 1854 (10 Stat. 575).....See Insignia of merit II I.
July 22, 1861 (12 Stat. 261).....See Office V A 5 b (2).
Volunteer Army II F 1 a (1).
July 22, 1861 (12 Stat. 270).....See Office IV E 2 a (1); V A 4 c.
Aug. 3, 1861 (12 Stat. 288).....See Discharge XIV D 4.

Aug. 6, 1861 (12 Stat. 318)....See OFFICE V A 4 c.
Dec. 24, 1861 (12 Stat. 330)....See ARTICLES OF WAR LXXII D 1.
July 12, 1862 (12 Stat. 623, 751)....See INSIGNIA OF MERIT I A 1 a; 2 b; c; 2 e
July 17, 1862 (12 Stat. 594)....See ARMY I G 3 a (4) (*a*) [1].
DISCHARGE III F 2.
OFFICE V B 7 c.
VOLUNTEER ARMY IV D 1 a (2) (*b*) [2].
Mar. 3, 1863 (12 Stat. 731)....See DESERTION XVI D 1 g.
ENLISTMENT II A; B 1; 2; C to E.
Mar. 3, 1863 (12 Stat. 751)....See INSIGNIA OF MERIT I A 1 to 2; 2 b; d (1); e.
Mar. 3, 1863 (12 Stat. 735)....See PUBLIC PROPERTY IX B 1.
DISCIPLINE XVII B 2 a (1).
Mar. 12, 1863 (12 Stat. 821)....See DISCIPLINE XVII B 2 a (1).
Feb. 24, 1864 (13 Stat. 8)....See ENLISTMENT II B 1.
July 2, 1864 (13 Stat. 365)....See PUBLIC PROPERTY VI E.
July 4, 1864 (13 Stat. 397)....See DISCIPLINE I C.
Mar. 3, 1865 (13 Stat. 488)....See LINE OF DUTY II A 4
July 25, 1866 (14 Stat. 241)....See MILITIA II A.
July 28, 1866 (14 Stat. 337)....See LAWS II A 1 a.
July 20, 1868 (15 Stat. 125)....See OFFICE IV E 1 b.
Mar. 3, 1869 (15 Stat. 318)....See ARMY I E 4.
June 22, 1870 (16 Stat. 162)....See ARMY I B 5 a.
July 15, 1870 (16 Stat. 319)....See OFFICE I A 2 e (6) (*a*); IV E 2 a (1).
Mar. 3, 1873 (17 Stat. 535)....See COMMAND I C.
Apr. 20, 1874 (18 Stat. pt. 3, 33)....See PUBLIC MONEY VII.
June 20, 1874 (18 Stat. 127)....See INSIGNIA OF MERIT I B.
June 22, 1874 (Revised Statutes)....See LAWS I A 1.
June 22, 1874 (18 Stat. 144)....See APPROPRIATIONS XXVIII.
June 23, 1874 (18 Stat. 215)....See INSANITY I A 2.
June 23, 1874 (18 Stat. 203)....See ARMY I D 3 a.
Mar. 3, 1875 (18 Stat. 410)....See PUBLIC MONEY II A.
Mar. 3, 1875 (18 Stat. 455)....See CONTRACTS XXIII G.
Mar. 3, 1875 (18 Stat. 479)....See ARTICLES OF WAR LX F.
COMMAND V A 3 g.
Mar. 3, 1875 (18 Stat. 511)....See PUBLIC PROPERTY VI E 1.
Mar. 3, 1875 (18 Stat. 517)....See TAX III E.
July 29, 1876 (19 Stat. 102)....See ABSENCE I B 1 m; m (1); n.
ARMY I G 3 a (2).
Aug. 15, 1876 (19 Stat. 203)....See LINE OF DUTY II A 3; 3 a (1).
Feb. 27, 1877 (19 Stat. 252)....See LINE OF DUTY II A 3; 3 a (2).
Mar. 2, 1877 (19 Stat. 268)....See LAWS I A 1.
Mar. 3, 1877 (19 Stat. 335)....See COMMUNICATIONS II A 2 a.
Mar. 16, 1878 (20 Stat. 30)....See DISCIPLINE XI A 14 b.
Apr. 10, 1878 (20 Stat. 36)....See CONTRACTS VI C.
June 18, 1878 (20 Stat. 149, sec. 2)....See RANK III A.
June 18, 1878 (20 Stat. 150)....See APPROPRIATIONS XIV.
PAY AND ALLOWANCES II A 2 d (1); (2).
June 18, 1878 (20 Stat. 152, sec. 15)....See ARMY II B; C; F 1.
TERRITORIES III B.
June 18, 1878 (20 Stat. 165)....See INSIGNIA OF MERIT I B.
Mar. 3, 1879 (20 Stat. 412)....See PUBLIC PROPERTY I B.
June 23, 1879 (21 Stat. 35)....See ARMY II C 1.
June 7, 1880 (21 Stat. 308)....See LAWS I A 1.
Feb. 24, 1881 (21 Stat. 347)....See PAY AND ALLOWANCES II A 2 d (1); (1) (*a*); (2).
May 4, 1882 (22 Stat. 57)....See INSIGNIA OF MERIT I B.
May 6, 1882 (22 Stat. 58)....See DESERTION V B 12.
June 30, 1882 (22 Stat. 117)....See ARMY I G 3 a (2).
RETIREMENT I A 2 a.
July 31, 1882 (22 Stat. 181)....See ARMY II C 1.
Aug. 2, 1882 (22 Stat. 204)....See PUBLIC MONEY I C.
Aug. 5, 1882 (22 Stat. 255)....See ARMY I G 2 b (1).
CIVILIAN EMPLOYEES VIII A.
Aug. 7, 1882 (22 Stat. 347)....See DESERTION XVI D 1 a.
Mar. 3, 1883 (22 Stat. 457)....See ARMY I G 3 a (2).
RANK IV B.
Mar. 3, 1883 (22 Stat. 459)....See LAWS I B 9.

Mar. 3, 1883 (22 Stat. 487).....See BONDS III F.
CONTRACTS XI E.
Mar. 3, 1883 (22 Stat. 488).....See CONTRACTS VI C.
Mar. 3, 1883 (22 Stat. 563, sec. 3).....See CIVILIAN EMPLOYEES I B 4; C 1.
Mar. 3, 1883 (22 Stat. 567).....See RETIREMENT I G 3 b.
Mar. 3, 1883 (22 Stat. 616).....See PRIVATE DEBTS I.
Mar. 3, 1883 (22 Stat. 625).....See PATENTS VII A
Apr. 18, 1884 (23 Stat. 11).....See UNIFORM I C.
May 1, 1884 (23 Stat. 17).....See CONTRACTS XIII A; E.
May 17, 1884 (23 Stat. 24).....See ARMY II B.
May 21, 1884 (23 Stat. 28).....See TERRITORIES III E.
July 5, 1884 (23 Stat. 103).....See PUBLIC PROPERTY III F 3; V D 1.
July 5, 1884 (23 Stat. 104).....See PUBLIC PROPERTY VI C 1; VIII to IX.
July 5, 1884 (23 Stat. 109).....See ARMY I E 2 b.
CONTRACTS VI D.
July 5, 1884 (23 Stat. 112).....See OFFICE III A 6 c.
July 5, 1884 (23 Stat. 119).....See DESERTION XVI D 1 a.
July 5, 1884 (23 Stat. 148, sec. 8).....See NAVIGABLE WATERS I; IV G.
July 5, 1884 (23 Stat. 158, sec. 3).....See COMMUNICATIONS II A 1; 2 a.
MILITIA XIV A.
July 7, 1884 (23 Stat. 227).....See ARMY I B 2 h (1).
Feb. 14, 1885 (23 Stat. 305).....See RETIREMENT II A 2.
Jan. 6, 1885 (23 Stat. 516).....See CIVILIAN EMPLOYEES I D 3.
Mar. 3, 1885 (23 Stat. 362).....See ARMY II C.
May 17, 1886 (24 Stat. 51).....See DESERTION XVI D 1 a; 2.
June 30, 1886 (24 Stat. 96).....See CONTRACTS VI B
Dec. 20, 1886 (24 Stat. 351).....See ABSENCE I B 1 k.
ARMY I D 6.
Feb. 12, 1887 (24 Stat. 401).....See MILITIA IX B 1; X D.
Feb. 17, 1887 (24 Stat. 405).....See APPROPRIATIONS I A.
Feb. 23, 1887 (24 Stat. 644).....See CIVILIAN EMPLOYEES I D 3; 6.
Mar. 1, 1887 (27 Stat. 435).....See ARMY I G 3 d (5) (*a*).
VOLUNTEER ARMY III B 1.
Apr. 24, 1888 (25 Stat. 94).....See NAVIGABLE WATERS X D; D 1.
May 1, 1888 (25 Stat. 112).....See PUBLIC MONEY I P.
June 29, 1888 (25 Stat. 209).....See NAVIGABLE WATER V E 3.
Aug. 1, 1888 (25 Stat. 357).....See NAVIGABLE WATERS X D.
Aug. 11, 1888 (25 Stat. 417).....See PUBLIC PROPERTY VII B 1 to 2.
Aug. 11, 1888 (25 Stat. 423, sec. 3).....See CONTRACTS VI C; VII F to G.
NAVIGABLE WATERS X C; F 2.
Aug. 11, 1888 (25 Stat. 424, sec. 9).....See NAVIGABLE WATERS I; IV A; C; G.
Aug. 11, 1888 (25 Stat. 425, sec. 12).....See NAVIGABLE WATERS I A 1 a (1); VI B.
Aug. 27, 1888 (25 Stat. 450).....See SOLDIERS' HOME III.
Sept. 10, 1888 (25 Stat. 473).....See PUBLIC PROPERTY VI E 1.
Sept. 10, 1888 (25 Stat. 474).....See NAVIGABLE WATERS III E.
Sept. 22, 1888 (25 Stat. 484).....See LAWS I B 5.
Sept. 26, 1888 (25 Stat. 491).....See BONDS IV K; M.
MILITARY INSTRUCTION II B 1 a; c; 2 a; b; e (1).
Feb. 8, 1889 (25 Stat. 657).....See ARMY I G 3 d (7) (*a*) [2].
Feb. 16, 1889 (25 Stat. 672).....See OFFICIAL RECORDS I C 1 a.
Mar. 1, 1889 (25 Stat. 772).....See MILITIA XVI A; F to I 1.
Mar. 1, 1889 (25 Stat. 774, sec. 18).....See MILITIA XVI B.
Mar. 1, 1889 (25 Stat. 779).....See MILITIA XVI E; I 6; J.
Mar. 2, 1889 (25 Stat. 869).....See DESERTION XVI D 1 to 2.
LINE OF DUTY II A 2 a (4) (*a*) [1].
Mar. 3, 1889 (30 Stat. 1324).....See ARMY II B.
Apr. 9, 1890 (26 Stat. 50).....See LAWS I A 1.
Apr. 11, 1890 (26 Stat. 54).....See ARTICLES OF WAR CIII F 1.
Apr. 14, 1890 (26 Stat. 55).....See DISCHARGE XIV B 1.
June 13, 1890 (26 Stat. 154).....See GOVERNMENT AGENCIES II A 1.
June 16, 1890 (26 Stat. 157).....See DESERTION XVI A 1.
DISCHARGE VI D 6.
ENLISTMENT I D 3 b; c (18); (18) (*d*).
June 16, 1890 (26 Stat. 158).....See APPROPRIATIONS XXXV.
DESERTION V A; A 1; 1 a; B 14 a.
DISCHARGE VI D 1 to 3.

June 20, 1890 (26 Stat. 163) ..... See ENLISTMENT I A 1.
Aug. 2, 1890 (26 Stat. 316 ..... See PUBLIC PROPERTY II A 1.
Aug. 19, 1890 (26 Stat. 333) ..... See ARMY I B 2 b (3) (*a*).
Stpe. 19, 1890 (26 Stat. 426) ..... See NAVIGABLE WATERS I; I A 1 a (2).
Sept. 19, 1890 (26 Stat. 453, sec. 4) ..... See NAVIGABLE WATERS IV; IV A; 1; B; C; F.
Sept. 19, 1890 (26 Stats. 453 ,sec. 6) ..... See NAVIGABLE WATERS V E 1.
Sept. 19, 1890 (26 Stat. 454, sec. 7) ..... See NAVIGABLE WATERS IV E; V D 2; 3.
Sept. 19, 1890 (26 Stat. 454, sec. 9) ..... See NAVIGABLE WATERS II D 1 a; III.
Sept. 19, 1890 (26 Stat. 454, sec. 10) ..... See NAVIGABLE WATERS IX; IX A; 1.
Sept. 19, 1890 (26 Stat. 455, sec. 12) ..... See NAVIGABLE WATERS VI A.
Sept. 26, 1890 (26 Stat. 483) ..... See LAWS I B 4 a.
Sept. 27, 1890 (26 Stat. 491) ..... See DISCIPLINE XII B 1 a.
Sept. 30, 1890 (26 Stat. 504) ..... See ENLISTMENT I A 9 m.
RETIREMENT II A to B.
Oct. 1, 1890 (26 Stat. 562) ..... See ARMY I G 3 b (4) (b).
OFFICE III B 3 a (4) (*a*).
PARDON XV C 2 a.
RANK I B 1 b (1); III A; V C.
RETIREMENT I B 6 to 7; C 2 b.
Oct. 1, 1890 (26 Stat. 648) ..... See DESERTION V A; V F 12.
Jan. 13, 1891 (26 Stat. 716) ..... See MILITARY INSTRUCTION II B 1 a.
Feb. 9, 1891 (26 Stat. 737) ..... See INSIGNIA OF MERIT II A; F; H; I.
Feb. 16, 1891 (26 Stat. 763) ..... See ARMY I G 3 a (2).
Mar. 2, 1891 (26 Stat. 824) ..... See DESERTION XVI D 1 a.
Mar. 3, 1891 (26 Stat. 978) ..... See APPROPRIATIONS I B.
Mar. 3, 1891 (26 Stat. 1103) ..... See LINE OF DUTY II A 3; 3 b.
Mar. 3, 1891 (26 Stat. 1110) ..... See PUBLIC PROPERTY VI to VII.
Feb. 23, 1892 (27 Stat. 825) ..... See LAWS I B 2.
Mar. 29, 1892 (27 Stat. 12) ..... See INSIGNIA OF MERIT II C; E; F; H; 1; I.
July 13, 1892 (27 Stat. 88) ..... See NAVIGABLE WATERS I; III.
July 16, 1892 (27 Stat. 177) ..... See GOVERNMENT AGENCIES I D 3; II A 1.
PRIVATE DEBTS II.
July 23, 1892 (27 Stat. 260) ..... See INTOXICANTS II F; III B; B 1.
July 27, 1892 (27 Stat. 278) ..... See ARTICLES OF WAR CII E 1.
CONTRACTS XVII.
DESERTION XVI D 1 a.
DISCIPLINE IX H 1; XIII; I; XIV E 3.
ENLISTMENT I A 9 b; k.
OFFICE III A 8 b (2).
July 28, 1892 (27 Stat. 321) ..... See PUBLIC PROPERTY VII B 2 to 3; VIII A 4 b.
SOLDIERS' HOME I G.
July 30, 1892 (27 Stat. 336) ..... See LAWS II A 1.
OFFICE III A 1 b; b (2); (3) (*a*); (4).
Aug. 1, 1892 (27 Stat. 340) ..... See EIGHT-HOUR LAW I to XII.
Feb. 18, 1893 (27 Stat. 461) ..... See PATENTS V.
Feb. 27, 1893 (27 Stat. 478) ..... See PUBLIC MONEY II B 4.
Feb. 27, 1893 (27 Stat. 482) ..... See APPROPRIATIONS XLVII to XLVIII; LII.
Feb. 27, 1893 (27 Stat. 486) ..... See ENLISTMENT I D 2 a.
Mar. 1, 1893 (27 Stat. 509) ..... See CONTRACTS V B.
Mar. 3, 1893 (27 Stat. 715, sec. 5) ..... See CIVILIAN EMPOYEES I B 3.
Nov. 3, 1893 (28 Stat. 7) ..... See MILITARY INSTRUCTION II B 1 a; e; 2 b.
RETIREMENT I K 3 a.
July 31, 1894 (28 Stat. 205, sec. 2) ..... See RETIREMENT I G 3 a to b.
July 31, 1894 (28 Stat. 208) ..... See ARMY I B 1 b.
Aug. 1, 1894 (28 Stat. 216) ..... See ARMY I B 2 a (4).
DESERTION XVI A 1.
ENLISTMENT I A 9 f (7) (b); B 2 a; C 1 a; c; e (1); d; e (1); D 3 c (2); (6); (7); (8); (11); (12); (18); (18) (*e*); (*k*); (*k*) [1].
MILITIA V A.
Aug. 6, 1894 (28 Stat. 235) ..... See COMMAND IV B.
Aug. 6, 1894 (28 Stat. 236) ..... See APPROPRIATIONS XXIV.
Aug. 13, 1894 (28 Stat. 278) ..... See BONDS I A; P; V G to J.
CONTRACTS XIV 1; XX C to D.

Aug. 13, 1894 (28 Stat. 279).....See BONDS V L.
Aug. 18, 1894 (28 Stat. 338).....See NAVIGABLE WATERS V E 3.
Jan. 12, 1895 (28 Stat. 601).....See ARMY I B 2 h (2).
Mar. 2, 1895 (28 Stat. 788).....See MILITIA XX A.
Mar. 2, 1895 (28 Stat. 807).....See BONDS II Q; V E.
Mar. 2, 1895 (28 Stat. 814).....See DESERTION XVI D 1 a.
Mar. 2, 1895 (28 Stat. 957).....See DISCIPLINE XVII A 4 h (1).
May 2, 1896 (29 Stat. 473).....See INSIGNIA OF MERIT I A 1 a.
May 28, 1896 (29 Stat. 189).....See ARMY I G 3 b (2) (*a*) [3] [*b*].
June 3, 1896 (29 Stat. 213).....See APPROPRIATIONS II.
CONTRACTS XIII E.
June 3, 1896 (29 Stat. 225).....See APPROPRIATIONS IX.
Jan. 21, 1897 (29 Stat. 494).....See INSIGNIA OF MERIT I B.
Feb. 24, 1897 (29 Stat. 593).....See DISCHARGE XIV A 4.
VOLUNTEER ARMY II F 1 a (1).
June 4, 1897 (30 Stat. 50).....See APPROPRIATIONS IX.
July 19, 1897 (30 Stat. 121).....See APPROPRIATIONS IX.
Dec. 18, 1897 (30 Stat. 226).....See APPROPRIATIONS XIII.
Mar. 15, 1898 (30 Stat. 316).....See CIVILIAN EMPLOYEES I B 1; 3; 4; IV A; B.
Apr. 22, 1898 (30 Stat. 361).....See DISCHARGE IX A.
ENLISTMENT I B 2 e.
OFFICE V A 6 a.
RANK II B 2.
Apr. 22, 1898 (30 Stat. 362, sec. 10).....See OFFICE IV A 2 d (3).
Apr. 22, 1898 (30 Stat. 363, sec. 13).....See VOLUNTEER ARMY III A 1.
Apr. 22, 1898 (30 Stat. 363, sec. 14).....See OFFICE IV E 2 a (1); V A 4 b; e.
Apr. 25, 1898 (30 Stat. 364).....See WAR I B 2.
Apr. 26, 1898 (30 Stat. 365, sec. 6).....See DISCIPLINE IV B 2 a.
PAY AND ALLOWANCES I C 6 c (1).
RANK I B 1 b (1).
May 11, 1898 (30 Stat. 404).....See MILITIA XVI B.
May 11, 1898 (30 Stat. 405).....See VOLUNTEER ARMY III A 1.
May 28, 1898 (30 Stat. 421).....See OFFICE V A 7 d (2) (*a*).
June 8, 1898 (30 Stat. 437).....See APPROPRIATIONS V B.
June 18, 1898 (30 Stat. 483).....See DISCIPLINE VIII G 2 b; I 1 d; XIV D; XVI E 4 c; 6.
June 18, 1898 (30 Stat. 484, sec. 6).....See DESERTION V A; A 1; 1 a; V B 12; 14 a.
July 1, 1898 (30 Stat. 628).....See APPROPRIATIONS LV to LVI.
July 7, 1898 (30 Stat. 653).....See CIVILIAN EMPLOYEES I B 1.
July 8, 1898 (30 Stat. 722).....See PUBLIC PROPERTY VIII A 4 c.
July 7, 1898 (30 Stat. 721).....See RANK I D 3.
July 8, 1898 (30 Stat. 730).....See APPROPRIATIONS LXIII to LXIV.
Jan. 12, 1899 (30 Stat. 784).....See ENLISTMENT I D 3 d (2) to (5).
VOLUNTEER ARMY IV C 1 a (2) to (5).
Feb. 24, 1899 (30 Stat. 890, sec. 4).....See CIVILIAN EMPLOYEES I B 4.
Mar. 2, 1899 (30 Stat. 977).....See ENLISTMENT I B 1 a.
Mar. 2, 1899 (30 Stat. 978).....See ARMY I E 4.
ENLISTMENT I B 1 b (1); I D 2 c.
Mar. 2, 1899 (30 Stat. 979).....See OFFICE V A 7 d (2) (*a*).
Mar. 2, 1899 (30 Stat. 980).....See VOLUNTEER ARMY IV D 1 a (2) (*b*) [1].
Mar. 2, 1899 (30 Stat. 981, sec. 17).....See INTOXICANTS I A.
Mar. 3, 1899 (30 Stat. 1065).....See RANK II B 1.
Mar. 3, 1899 (30 Stat. 1073).....See ENLISTMENT I D 3 d (1) to (3).
OFFICE V A 5 a (2).
Mar. 3, 1899 (30 Stat. 1108).....See PUBLIC PROPERTY IV A 2 a.
Mar. 3, 1899 (30 Stat. 1121).....See NAVIGABLE WATERS I.
Mar. 3, 1899 (30 Stat. 1151, sec. 9).....See NAVIGABLE WATERS III A 1.
Mar. 3, 1899 (30 Stat. 1151, sec. 10).....See NAVIGABLE WATERS I B; V; V A; C.
Mar. 3, 1899 (30 Stat. 1152, sec. 17).....See NAVIGABLE WATERS IX B.
Mar. 3, 1899 (30 Stat. 1154, sec. 19).....See APPROPRIATIONS XXXVIII.
NAVIGABLE WATERS VII C 1.
Mar. 3, 1899 (30 Stat. 1154, sec. 20).....See APPROPRIATIONS XXXVIII.
NAVIGABLE WATERS VII A; C 2.
Mar. 3, 1899 (30 Stat. 1223).....See APPROPRIATIONS XXXII.
Mar. 3, 1899 (30 Stat. 1225).....See APPROPRIATIONS XVIII.
Mar. 3, 1899 (30 Stat. 1324).....See TERRITORIES III B.
Mar. 3, 1899 (30 Stat. 1377).....See NAVIGABLE WATERS V C 1.

May 25, 1900 (31 Stat. 183).....See APPROPRIATIONS XXX.
May 26, 1900 (31 Stat. 205).....See MILITIA IX J.
May 26, 1900 (31 Stat. 206).....See APPROPRIATIONS III.
TERRITORIES III D 1.
May 26, 1900 (31 Stat. 209).....See RETIREMENT II A 4 b (2).
May 26, 1900 (31 Stat. 211).....See RETIREMENT II A 4 b (1); c.
June 6, 1900 (31 Stat. 656, sec. 4).....See ARMY I D 1 a (2) (*c*).
June 6, 1900 (31 Stat. 662).....See MILITIA X D; XVI I 3; 4.
June 6, 1900 (31 Stat. 321, sec. 26).....See ARMY I B 9.
June 6, 1900 (31 Stat. 330, sec. 29).....See TERRITORIES III B.
Feb. 1, 1901 (31 Stat. 746).....See CIVILIAN EMPLOYEES I A 2; C 3.
Feb. 2, 1901 (31 Stat. 748).....See ARMY I G 3 b (1).
OFFICE V A 7 d (2) (*b*).
RANK I C 1.
RETIREMENT I B 4 a.
Feb. 2, 1901 (31 Stat. 748, sec. 1).....See OFFICE III E 1.
Feb. 2, 1901 (31 Stat. 749, sec. 6).....See ARMY I G 2 b (2)
Feb. 2, 1901 (31 Stat. 751).....See BONDS II H.
Feb. 2, 1901 (31 Stat. 751, sec. 15).....See ARMY I G 3 a (4) (*a*) [1].
Feb. 2, 1901 (31 Stat. 751, sec. 16).....See ARMY II G 1 a.
OFFICE III D 1; 2 a.
Feb. 2, 1901 (31 Stat. 753, sec. 18).....See ARMY I G 3 d (4) (*a*); (*d*).
Feb. 2, 1901 (31 Stat. 753, sec. 19).....See ABSENCE I D.
ARMY I G 3 d (6) (*a*) [2].
Feb. 2, 1901 (31 Stat. 754, sec. 22).....See ARMY I G 2 a (1).
Feb. 2, 1901 (31 Stat. 755, sec. 26).....See ARMY I B 2 a (1).
OFFICE III D 1 d; 3.
Feb. 2, 1901 (31 Stat. 755, sec. 27).....See OFFICE III D 3.
Feb. 2, 1901 (31 Stat. 756, sec. 30).....See DISCHARGE VI C 1; 2.
Feb. 2, 1901 (31 Stat. 756, sec. 32).....See OFFICE III B 3 a (4) (*a*); (*b*).
Feb. 2, 1901 (31 Stat. 757, sec. 34).....See RETIREMENT I F; II A 4 c.
Feb. 2, 1901 (31 Stat. 757, sec. 36).....See COMMAND V B 4.
DISCHARGE VI D 6.
PAY AND ALLOWANCES I C 5 c.
Feb. 2, 1901 (31 Stat. 758, sec. 38).....See INTOXICANTS II A 1; 2; C; D; IV.
MILITIA XV.
Feb. 15, 1901 (31 Stat. 790).....See PUBLIC PROPERTY VI D 2.
Feb. 26, 1901 (31 Stat. 810).....See MILITARY INSTRUCTION II B 1 f.
Mar. 2, 1901 (31 Stat. 895).....See APPROPRIATIONS XLIV to XLV.
Mar. 2, 1901 (31 Stat. 902).....See ARMY I G 3 a (2).
Mar. 2, 1901 (31 Stat. 903).....See ABSENCE I B 1 i.
Mar. 2, 1901 (31 Stat. 905).....See ARMY I G 3 d (8) (*c*) [1].
CONTRACTS IV A.
Mar. 2, 1901 (31 Stat. 911).....See ARMY I D 3 b (2) (*a*).
Mar. 2, 1901 (31 Stat. 914).....See OFFICE III E 3.
Mar. 2, 1901 (31 Stat. 950).....See DISCIPLINE X I 6.
Mar. 2, 1901 (31 Stat. 951).....See ARTICLES OF WAR LXXXI I 1; LXXXVI B 1.
Mar. 3, 1901 (31 Stat. 1168).....See APPROPRIATIONS V B.
Feb. 14, 1902 (32 Stat. 12).....See APPROPRIATIONS III; LIX to LX.
May 13, 1902 (32 Stat. 198).....See APPROPRIATIONS XVI.
June 13, 1902 (32 Stat. 342).....See NAVIGABLE WATERS X A 1.
June 13, 1902 (32 Stat. 373).....See PUBLIC PROPERTY I A 4.
June 13, 1902 (32 Stat. 373, sec. 5).....See NAVIGABLE WATERS X F 2; 4.
ARMY I B 2 e (1).
June 30, 1902 (32 Stat. 507).....See APPROPRIATIONS X.
June 30, 1902 (32 Stat. 516).....See APPROPRIATIONS XXVIII.
July 1, 1902 (32 Stat. 615).....See MILITIA XVI E.
July 1, 1902 (32 Stat. 629).....See DISCHARGE XIV D 1; 2; 4.
Jan. 21, 1903 (32 Stat. 775).....See INSIGNIA OF MERIT III B 1.
MILITIA IV B; VI C 1 c (1); XVIII A.
Jan. 21, 1903 (32 Stat. 775, sec. 3).....See MILITIA III to IV; IX A 2 a; XVI A; XXI.
Jan. 21, 1903 (32 Stat. 776, sec. 4).....See MILITIA I A; D; V A.
Jan. 21, 1903 (32 Stat. 776, sec. 9).....See MILITIA II B.
Jan. 21, 1903 (32 Stat. 776, sec. 12).....See MILITIA XIV A.
Jan. 21, 1903 (32 Stat. 777, sec. 13).....See MILITIA XII A.

Jan. 21, 1903 (32 Stat. 777, sec. 14).....See MILITIA VI A 2 a; B 1 a to e (5); C 1 c (3); 2 b; c; VII F; X A 2; C; XI A; B; D; E; Q; XVI E; XVIII A; B.
Jan. 21, 1903 (32 Stat. 777, sec. 15).....See MILITIA II B; VI B 1 e (9); 2 b; c; e; h; i; k; l; XI A; C; E; L; XVIII B.
Jan. 21, 1903 (32 Stat. 778, sec. 16).....See MILITIA VI A 1.
Jan. 21, 1903 (32 Stat. 778, sec. 17).....See MILITIA IX A 1; B 1; XIII B; XVI I 1.
Jan. 21, 1903 (32 Stat. 778, sec. 18).....See MILITIA VI D 1.
Jan. 21, 1903 (32 Stat. 779, sec. 20).....See MILITIA VI A 2 b; c.
Jan. 21, 1903 (32 Stat. 779, sec. 21).....See MILITIA VI B 1 e (9); XII B.
Jan. 21, 1903 (32 Stat. 779, sec. 23).....See MILITIA VI A 1; XVII A.
Jan. 30, 1903 (32 Stat. 783).....See ARMY II G 1 a; 2 a (1).
COMMAND I C; V B 5.
TERRITORIES IV B 2; 2 a.
Feb. 14, 1903 (32 Stat. 830).....See OFFICE III D 1 b; c; 2 a.
Mar. 2, 1903 (32 Stat. 927).....See APPROPRIATIONS XXII.
Mar. 2, 1903 (32 Stat. 932).....See MILITIA VI A 2 b.
Mar. 2, 1903 (32 Stat. 936).....See CONTRACTS VII G 2.
Mar. 2, 1903 (32 Stat. 942).....See MILITIA XII A; B; XVI I 2.
Mar. 2, 1903 (32 Stat. 952).....See PUBLIC MONEY IX.
Apr. 21, 1904 (33 Stat. 225).....See RETIREMENT I K to L.
Apr. 21, 1904 (33 Stat. 226).....See MILITARY INSTRUCTION II B 2 e (1).
Apr. 23, 1904 (33 Stat. 264).....See MILITIA VI A 2 b; VII C.
RETIREMENT I C to D; K 2 to 3; II A 4 b; b (1); c.
Apr. 23, 1904 (33 Stat. 265).....See MILITIA VI B 2 j; m.
Apr. 23, 1904 (33 Stat. 269).....See DESERTION V A 1 a.
Apr. 23, 1904 (33 Stat. 272).....See ARTICLES OF WAR LII B.
Apr. 23, 1904 (33 Stat. 274).....See INSIGNIA OF MERIT I A to B.
MILITIA XVIII A.
Apr. 27, 1904 (33 Stat. 391).....See TERRITORIES III G 1.
Apr. 28, 1904 (33 Stat. 496).....See APPROPRIATIONS XXVIII.
NAVIGABLE WATERS XI D.
Apr. 28, 1904 (33 Stat. 518).....See ARMY I G 3 b (2) (*a*) [3] [*e*].
Jan. 5, 1905 (33 Stat. 599).....See RED CROSS I A; II B.
Feb. 3, 1905 (33 Stat. 663).....See CONTRACTS VII B.
Feb. 20, 1905 (33 Stat. 725).....See FLAG II.
Feb. 24, 1905 (33 Stat. 811).....See CONTRACTS XX C 5.
Mar. 2, 1905 (33 Stat. 827).....See APPROPRIATIONS XI.
Mar. 2, 1905 (33 Stat. 831).....See RETIREMENT I K 3 a.
Mar. 3, 1905 (33 Stat. 845).....See APPROPRIATIONS XXX.
Mar. 3, 1905 (33 Stat. 850).....See OFFICE III E 3.
RANK II C 1.
Mar. 3, 1905 (33 Stat. 860).....See CONTRACTS VII F 2.
Mar. 3, 1905 (33 Stat. 986).....See MILITIA IX B 1.
Mar. 3, 1905 (33 Stat. 1257).....See CONTRACTS XIII B.
Feb. 27, 1906 (34 Stat. 49).....See CONTRACTS XIII B.
Mar. 9, 1906 (34 Stat. 56).....See APPROPRIATIONS LVII to LVIII.
CIVILIAN EMPLOYEES XVI C.
CONTRACTS VII C.
PUBLIC PROPERTY IV B.
Mar. 23, 1906 (34 Stat. 84).....See NAVIGABLE WATERS I.
June 12, 1906 (34 Stat. 240).....See APPROPRIATIONS X; XI.
ARMY I G 3 b (2) (*a*) [3] [f].
June 12, 1906 (34 Stat. 245).....See MILITIA VI A 2 b.
June 12, 1906 (34 Stat. 246).....See MILITIA VI A 2 a.
June 12, 1906 (34 Stat. 249).....See MILITIA VII C.
June 12, 1906 (34 Stat. 252).....See MILITIA XI I.
June 12, 1906 (34 Stat. 255).....See CONTRACTS XIII C.
June 12, 1906 (34 Stat. 256).....See ARMY I G 3 d (8) (*d*).
June 12, 1906 (34 Stat. 258).....See CONTRACTS VII E to F; XVI G.
June 21, 1906 (34 Stat. 386).....See NAVIGABLE WATERS I.
June 22, 1906 (34 Stat. 449).....See MILITIA VI A 2 a; C 1 c (1); g; 2 a; VII A; IX B 1; D; E; G; H; X C; E; XI N.
June 22, 1906 (34 Stat. 450, sec. 3).....See MILITIA VIII A.
June 25, 1906 (34 Stat. 455).....See ARMY I G 3 b (4) (*b*) (*c*).
June 28, 1906 (34 Stat. 836).....See ENLISTMENT I D 3 e (1).

June 29, 1906 (34 Stat. 596, sec. 4).....See ENLISTMENT I B 1 b (2).
ALIEN II.
June 29, 1906 (34 Stat. 621).....See INSIGNIA OF MERIT I E 2.
June 29, 1906 (34 Stat. 626).....See NAVIGABLE WATERS V H.
June 30, 1906 (34 Stat. 744).....See APPROPRIATIONS IX.
June 30, 1906 (34 Stat. 750).....See MILITIA XI Q.
June 30, 1906 (34 Stat. 764).....See APPROPRIATIONS II.
Jan. 25, 1907 (34 Stat. 861).....See MILITIA III D.
OFFICE III C 1.
Mar. 2, 1907 (34 Stat. 1073).....See BONDS I N.
Mar. 2, 1907 (34 Stat. 1154).....See MILITIA XVIII B.
Mar. 2, 1907 (34 Stat. 1158).....See APPROPRIATIONS LIV to LV.
Mar. 2, 1907 (34 Stat. 1166).....See PAY AND ALLOWANCES II A 2 b (1) (*a*).
Mar. 2, 1907 (34 Stat. 1167).....See PAY AND ALLOWANCES II A 1 to 2.
Mar. 2, 1907 (34 Stat. 1175).....See MILITIA XII A.
Apr. 23, 1908 (35 Stat. 66).....See ARMY I G 3d (2)(*a*);(*b*);(3)(*a*);(*b*);(*c*)[4].
RANK I B 1 c (2) (*b*).
Apr. 23, 1908 (35 Stat. 67).....See ARMY I G 3 d (4) (*a*).
DISCHARGE XVII B.
RETIREMENT I B 6 c (4); 7 a.
Apr. 30, 1908 (35 Stat. 570).....See APPROPRIATIONS XVI.
May 11, 1908 (35 Stat. 106).....See APPROPRIATIONS X.
May 11, 1908 (35 Stat. 108).....See GRATUITY I to II.
MILITIA XI F.
PAY AND ALLOWANCES I B 7 b; II A 2 d (1) (*a*).
RETIREMENT I K 4.
May 11, 1908 (35 Stat. 109).....See DISCHARGE X B.
ENLISTMENT I B 2 b; b (1).
May 11, 1908 (35 Stat. 110).....See ABSENCE II B 9.
ARMY BANDS I A 6; B 1; C 1 to 4; D 3.
May 11, 1908 (35 Stat. 111).....See ARMY I G 3 d (5) (*a*).
May 11, 1908 (35 Stat. 119).....See RETIREMENT I K 5.
May 11, 1908 (35 Stat. 121).....See APPROPRIATIONS XXVIII.
May 11, 1908 (35 Stat. 122).....See APPROPRIATIONS XLV to XLVI.
May 11, 1908 (35 Stat. 124).....See MILITIA III D.
May 11, 1908 (35 Stat. 572).....See APPROPRIATIONS XVI.
May 22, 1908 (35 Stat. 244, sec. 4).....See ARMY I B 2 g.
May 27, 1908 (35 Stat. 392, sec. 4).....See ARMY I G 2 a (1); (1) (*a*).
OFFICE III A 1 c (1).
May 27, 1908 (35 Stat. 399).....See MILITIA I A; C; E; III B.
May 27, 1908 (35 Stat. 399, sec. 3).....See MILITIA IX A 2 a.
May 27, 1908 (35 Stat. 402, sec. 9).....See MILITIA VI B 2 b.
May 27, 1908 (35 Stat. 403).....See MILITIA VI A 2 c.
May 30, 1908 (35 Stat. 556).....See CIVILIAN EMPLOYEES XII A; B to C.
CLAIMS XI; XII F.
Feb. 18, 1909 (35 Stat. 629).....See MILITIA XVI H.
Feb. 18, 1909 (35 Stat. 629, sec. 11).....See MILITIA XVI D.
Feb. 18, 1909 (35 Stat. 631, sec. 20).....See MILITIA XVI C.
Feb. 18, 1909 (35 Stat. 636, sec. 76).....See MILITIA XVI D.
Feb. 24, 1909 (35 Stat. 645).....See CIVILIAN EMPLOYEES XII A.
Mar. 3, 1909 (35 Stat. 735).....See GRATUITY I B to II.
Mar. 3, 1909 (35 Stat. 737).....See RETIREMENT I B 6 c (4); 7 to 8.
Mar. 3, 1909 (35 Stat. 742).....See MILITIA VI A 1.
Mar. 3, 1909 (35 Stat. 747).....See APPROPRIATIONS LXV to LXVI.
Mar. 3, 1909 (35 Stat. 751).....See RETIREMENT I B 4 a.
Mar. 3, 1909 (35 Stat. 836).....See RETIREMENT I K 2 e.
Mar. 4, 1909 (35 Stat. 1006).....See APPROPRIATIONS XII.
Mar. 4, 1909 (35 Stat. 1027, sec. 10).....See APPROPRIATIONS V B.
Mar. 4, 1909 (35 Stat. 1090, secs. 13 and 14).See ARMY II K 1 a; b.
Mar. 4, 1909 (35 Stat. 1096, sec. 36).....See DESERTION XXII A.
Aug. 5, 1909 (36 Stat. 122).....See APPROPRIATIONS X; XI.
Mar. 23, 1910 (36 Stat. 241).....See BONDS V L.
Mar. 23, 1910 (36 Stat. 244).....See ABSENCE I B 1 g (2).
Mar. 23, 1910 (36 Stat. 245).....See APPROPRIATIONS LVI to LVII.
Mar. 23, 1910 (36 Stat. 253).....See PAY AND ALLOWANCES I C 6 b (5).
Mar. 23, 1910 (36 Stat. 255).....See PAY AND ALLOWANCES II A 2 a (2) (*b*).
Apr. 19, 1910 (36 Stat. 312).....See ARMY I D 3 b (2) (*a*).
June 17, 1910 (36 Stat. 531, sec. 4).....See CONTRACTS IV B.

June 23, 1910 (36 Stat. 593).....See NAVIGABLE WATERS I; IX A 2.
June 23, 1910 (36 Stat. 604).....See RED CROSS I A; II B; C.
June 25, 1910 (36 Stat. 635).....See NAVIGABLE WATERS X E 1.
June 25, 1910 (36 Stat. 851).....See PATENTS III A; VII C.
June 25, 1910 (36 Stat. 725).....See APPROPRIATIONS III.
June 25, 1910 (36 Stat. 788).....See APPROPRIATIONS IX.
June 25, 1910 (36 Stat. 723).....See APPROPRIATIONS LXII to LXIII.
Jan. 19, 1911 (36 Stat. 894).....See DESERTION XX D.
Feb. 24, 1911 (30 Stat. 1457).....See APPROPRIATIONS XIX.
Feb. 27, 1911 (36 Stat. 957).....See NAVIGABLE WATERS X B 1 a.
Mar. 1, 1911 (36 Stat. 963).....See UNIFORM I A 1.
Mar. 3, 1911 (36 Stat. 1047).....See APPROPRIATIONS XVII.
Mar. 3, 1911 (36 Stat. 1048).....See DESERTION V A.
Mar. 3, 1911 (36 Stat. 1058).....See RANK II A.
Mar. 4, 1911 (36 Stat. 1343).....See CONTRACTS XXIII H.
Mar. 4, 1911 (36 Stat. 1452).....See CIVILIAN EMPLOYEES XII A.

APPENDIX III.

REFERENCES TO THE REVISED STATUTES.

Sec. 183.....See OFFICE III A 8 b (1).
Sec. 189.....See ARMY I B 5 a.
CLAIMS XII N.
DISCIPLINE III C 2 b.
Sec. 214.....See APPROPRIATIONS XXXIII.
Sec. 216.....See CONTRACTS L I.
Sec. 218.....See WAR I C 6 c (3) (*e*) [2].
Sec. 224.....See DISCHARGE XIV B 4; D 1.
LAWS I B 2.
Sec. 355.....See MILITIA VI B 1 c.
NAVIGABLE WATERS X E.
PUBLIC PROPERTY II A; A 6; V; V E 1 a (2); V G 2.
Secs. 356 to 367.....See ARMY I B 5 a.
Sec. 365.....See CLAIMS XII M; N.
Sec. 366.....See CLAIMS XII N.
Sec. 848.....See DISCIPLINE X I 5.
Sec. 860.....See DISCIPLINE V B.
Sec. 877.....See TERRITORIES II A.
Sec. 882.....See CLAIMS XI.
DISCIPLINE XI A 17 a (2) (*a*) [1] [*b*].
Sec. 911.....See TERRITORIES II A.
Sec. 952.....See PAY AND ALLOWANCES I B 5 a.
Sec. 1014.....See COMMAND V A 3 c (1).
Sec. 1045.....See ARTICLES OF WAR CIII E.
Sec. 1059.....See CLAIMS X; XII Q.
Sec. 1076.....See ARMY I B 2 c (1).
Sec. 1094.....See ARMY I D 3 a.
Sec. 1097.....See ARMY I B 2 f.
Sec. 1098.....See ARMY I B 2 f.
Sec. 1099.....See ARMY I E 4.
Sec. 1102.....See ARMY I E 4.
LAWS II A 1 d.
Sec. 1104.....See ENLISTMENT I A 12.
Sec. 1106.....See ARMY I E 4.
Sec. 1108.....See ENLISTMENT I A 12.
Sec. 1111.....See RANK I A 1.
Sec. 1114.....See ARTICLES OF WAR LXXIII A.
Sec. 1116.....See ENLISTMENT I B 1 a; D 1.
Sec. 1116 to 1118.....See ENLISTMENT I A 9 f (5); B 3 a.
Sec. 1117.....See ENLISTMENT I A 9 c (1); B 1 a; 1 b (3).
Sec. 1118.....See ENLISTMENT I A 9 c (2); B 3 b.
Sec. 1136.....See APPROPRIATIONS XXVIII.
Sec. 1137.....See RETIREMENT III.
Sec. 1142.....See ARMY I E 2 a.
Sec. 1153.....See PUBLIC MONEY V.

Sec. 1153.....See COMMAND III C.
Sec. 1162.....See ENLISTMENT I A 10.
Sec. 1167.....See ARMY I G 3 b (4) (*a*).
MILITARY INSTRUCTION II B 2 c.
Sec. 1191.....See BONDS I O; II G; J; L; V A.
Sec. 1199.....See DISCIPLINE XIII A.
Sec. 1202.....See ARTICLES OF WAR LXXXVI B 1 b.
DISCIPLINE IV B 4; 4 a; X K 3.
Sec. 1203.....See DISCIPLINE IV B 2.
Sec. 1211.....See RANK IV B.
Sec. 1212.....See RETIREMENT I F.
Sec. 1216.....See INSIGNIA OF MERIT II C; E; F; H; I.
Sec. 1219.....See RANK II A 2; B 1.
Sec. 1222.....See ARMY I E 3 a (1); b; b (1).
MILITIA III F; VI A 2 b.
OFFICE IV A 2 to 3.
Sec. 1223.....See RETIREMENT I G 2 f; 3 a (2) (*a*).
Sec. 1224.....See OFFICE IV B to C.
Sec. 1225.....See ARMY II C 1.
BONDS IV A; L.
MILITARY INSTRUCTION II B 1 a; c; d; 2 a; b.
RETIREMENT I K 3 to 4.
Sec. 1228.....See OFFICE III F 1; IV E 1 b.
Sec. 1229.....See DESERTION XX D; E; F.
DISCHARGE XX B.
ENLISTMENT I B 3 b.
OFFICE IV E 2 a.
Sec. 1230.....See DESERTION XX F.
DISCIPLINE III B 2 a; b; XIV H 2.
Sec. 1231.....See PAY AND ALLOWANCES I C 6 b (2).
Sec. 1232.....See ARMY I C 1.
Sec. 1237.....See PRIVATE DEBTS IX.
Sec. 1241.....See NAVIGABLE WATERS X F 3.
PUBLIC PROPERTY IX A to B.
TAX III M.
Sec. 1242.....See PAY AND ALLOWANCES II A 3 a (4) (*a*)
Sec. 1243.....See ARMY I G 3 a (2).
RETIREMENT I A 1 a; b.
Sec. 1244.....See ARMY I G 3 a (2).
Sec. 1246.....See RETIREMENT I B 6 b (2).
Sec. 1246 to 1252.....See RETIREMENT I B 1 d (2).
Sec. 1248.....See RETIREMENT I B 1; 1 b (1) (*b*); c (3); d (1).
Sec. 1249.....See RETIREMENT I B 1 b (1) (*a*); (*b*).
Sec. 1251.....See RETIREMENT I B 1 a (1); 3 a.
Sec. 1252.....See DISCIPLINE II D 3.
RETIREMENT I B 3 a.
Sec. 1253.....See RETIREMENT I N to O.
Sec. 1255.....See RETIREMENT I B 6 e (2).
Sec. 1256.....See RETIREMENT I G 2 b.
Sec. 1257.....See RETIREMENT I B 6 e (2).
Sec. 1259.....See RETIREMENT I G.
Sec. 1262.....See PAY AND ALLOWANCES I B 6 a.
Sec. 1265.....See ABSENCE I B 1 g (2) (*a*); I M (1); II A 2.
Sec. 1270.....See PAY AND ALLOWANCES I B 7 a (1).
Sec. 1275.....See RETIREMENT I N 3.
Sec. 1282.....See ENLISTMENT I D 1.
Sec. 1284.....See ENLISTMENT I D 1.
Sec. 1285.....See INSIGNIA OF MERIT II I.
Sec. 1287.....See PAY AND ALLOWANCES I C 6 a; b (2).
CONTRACTS XIII A.
Sec. 1288.....See WAR I C 11 d (1).
Sec. 1290.....See PAY AND ALLOWANCES III C 2 c (1); (2); (4).
Sec. 1296.....See INSIGNIA OF MERIT III B 1.
PAY AND ALLOWANCES II A 3 a (4) (*a*)

Sec. 1298.....See Pay and allowances II A 3 a (4) (*d*). [1] [*a*]; [*b*].
Sec. 1302.....See Pay and allowances II A 3 a (4) (*d*) [1] [*a*].
Sec. 1303.....See Pay and allowances II A 3 a (4) (*a*).
Sec. 1304.....See Claims XII G.
Public property I F 4.
Sec. 1305.....See Appropriations XXXIII.
Desertion XIV E.
Sec. 1308.....See Appropriations XXXIII.
Sec. 1315.....See Army I D 1 a (2); (2) (*a*) [1]; [2] [*a*]; (*b*) [1]; (*c*).
Sec. 1317.....See Army I D 1 a (1); (2); (2) (*b*) [1]; d.
Sec. 1318.....See Army I D 1 b (1).
Sec. 1325.....See Army I D 1 d (2); (3); 2 b.
Sec. 1330.....See Absence I B 1 g (1); (2).
Sec. 1343.....See War I C 3 d; 8 a (3) (*c*).
Sec. 1345.....See Eight-hour law VII.
Sec. 1351.....See Discipline XVII A 4 g (1); (2); (3).
Sec. 1352.....See Discharge II B 2 a.
Enlistment I D 3 c (6); (14).
Sec. 1547.....See Laws II A 1 a.
Sec. 1642.....See Militia I C; E.
Sec. 1658.....See Articles of War LX E 2.
Sec. 1661.....See Appropriations V B.
Militia II A 1; III B; VI A 2 c; B 1 e (5); (6); C 1 b; c (1); (3); d; f; h; j; 2 a; c; VII A; B; F; IX B 1; E; X E; XI F; H; M; N; XII B; XIV B; XVI I; I 3; XVIII A.
Sec. 1757.....See Army I G 3 d (4) (*c*).
Office III A 6 a (1).
Sec. 1758.....See Office III A 8 b (2).
Sec. 1763 to 1765.....See Civilian employees X A.
Sec. 1764.....See Civilian employees X C.
Sec. 1765.....See Army I G 3 b (4) (*d*).
Civilian employees X C.
Sec. 1766.....See Government agencies I D 3.
Pay and allowances III B 2.
Public money IV to V.
Sec. 1791.....See Flag I.
Sec. 1792.....See Flag I.
Sec. 1860.....See Office IV A 2 d (2).
Sec. 1876.....See Claims XII M.
Sec. 1892.....See Articles of War XCVII C.
Sec. 1910.....See Territories II A.
Sec. 1996 and 1998.....See Desertion X A; XIV B; XV E 1; XV F.
Enlistment.
Discipline X A 1.
Sec. 1999.....See Desertion IX M.
Sec. 2062.....See Army II C 1.
Sec. 2139.....See Intoxicants II F; III A 1; B.
Territories III E.
Sec. 2140.....See Intoxicants III C 2; D 1.
Sec. 2147.....See Army II C.
Sec. 2150.....See Army II C; D.
Intoxicants III C 1.
Sec. 2151.....See Army II C.
Sec. 2152.....See Army II C.
Sec. 2165.....See Alien III.
Sec. 2166.....See Militia XIX A.
Office III A 1 b (1).
Discharge VI D 4.
Sec. 2190.....See Army II C 1.
Sec. 3473.....See Public money IX.
Sec. 3474.....See Public money IX.

Sec. 3475.....See PUBLIC MONEY IX.
Sec. 3476.....See PUBLIC MONEY IX.
Sec. 3477.....See CONTRACTS XIV to XV.
Sec. 3480.....See CLAIMS XII A.
Sec. 3483.....See WAR I C 6 c (2).
Sec. 3617.....See PUBLIC MONEY I to II; XI.
Sec. 3618.....See PUBLIC MONEY I to II; II a; XI.
PUBLIC PROPERTY I A 4; IX A 2 e; 3 to 4.
Sec. 3620.....See PUBLIC MONEY II A; III to IV.
Sec. 3621.....See APPROPRIATIONS VII.
Sec. 3622.....See ARTICLES OF WAR LXII C 3.
Sec. 3639.....See APPROPRIATIONS VII.
Sec. 3648.....See CONTRACTS XII.
Sec. 3651.....See CONTRACTS LII.
PUBLIC MONEY VIII.
Sec. 3678.....See APPROPRIATIONS II; IV; VI.
Sec. 3679.....See APPROPRIATIONS II; IX.
CONTRACTS XIII A; B; E.
Sec. 3689.....See SOLDIERS' HOME I F.
Sec. 3690.....See APPROPRIATIONS V to VI.
MILITIA X A 1.
Sec. 3709.....See CONTRACTS III to IV; VI A; VII A 1; B; C; D; G 1; 3; H.
Sec. 3716.....See DISCIPLINE XVII A 4 g (2).
LAWS I B 5.
Sec. 3732.....See CONTRACTS XIII B; C; E.
APPROPRIATIONS II; IX.
Sec. 3733.....See APPROPRIATIONS II; IX.
CONTRACT XIII D.
Sec. 3736.....See APPROPRIATIONS III.
NAVIGABLE WATERS X D.
PUBLIC PROPERTY II A to B; IV A 1 a(1).
Sec. 3737.....See ARTICLES OF WAR LXII D.
CONTRACTS XIV TO XV.
PUBLIC PROPERTY VII A 1.
Sec. 3738.....See EIGHT-HOUR LAW I; IX.
Sec. 3739.....See CONTRACTS XV to XVI.
Sec. 3740.....See CONTRACTS XV to XVI.
Sec. 3741.....See CONTRACTS XV to XVI.
Sec. 3742.....See CONTRACTS XV to XVI.
Sec. 3744.....See CONTRACTS XI A; C; XVI; XVII; XVIII.
PUBLIC PROPRETY VII A 6.
Sec. 3745.....See CONTRACTS XVII.
OFFICE III A 8 b (2).
Sec. 3748.....See COMMAND V A 3 e.
MILITIA II D.
PUBLIC PROPERTY IX B 2.
Sec. 3828.....See CONTRACTS V to VI.
Sec. 4661.....See PUBLIC PROPERTY V G 3.
Sec. 4687.....See ARMY II C 1.
Sec. 4700.....See LINE OF DUTY II A 2 a (4) (*a*) [2].
Sec. 4745.....See SOLDIERS' HOME I E.
Sec. 4747.....See PENSIONS II A.
LINE OF DUTY II A 3; 3 a (2); b.
Sec. 4788.....See LINE OF DUTY II A 3 b.
Sec. 4790.....See LINE OF DUTY II A 3 b.
Sec. 4824.....See SOLDIERS' HOME I A.
Sec. 4835.....See SOLDIERS' HOME II.
Sec. 4843.....See INSANITY I A; A 1; 2; 3; B 1; 2; C.
Sec. 4852.....See INSANITY I A 2.
Sec. 4870.....See PUBLIC PROPERTY IV A 1 a (1).
Sec. 4870 to 4872.....See PUBLIC PROPERTY IV A 1 a.
Sec. 4871.....See PUBLIC PROPERTY IV A 1 a (1); (2).
Sec. 4872.....See PUBLIC PROPERTY IV A 1 a (2); V A.

Sec. 4874.....See PUBLIC PROPERTY IV A 3 a.
Sec. 4878.....See PUBLIC PROPERTY II A 6 c; IV A 1 b; 4 a.
Sec. 4881.....See PUBLIC PROPERTY IV A 3 b.
Sec. 5281 to 5291.....See ARMY II K 1 a.
Sec. 5287.....See ARMY II K 1 c.
Sec. 5297.....See ARMY II D; F 1.
Sec. 5298.....See ARMY II D; F 1; I 6.
MILITIA I E.
Sec. 5299.....See ARMY II F 1; I 6.
Sec. 5300.....See ARMY II I 1.
Sec. 5339.....See DISCIPLINE II D 11 a.
Sec. 5339 to 5342.....See DISCIPLINE VIII D 4.
Sec. 5388.....See PUBLIC PROPERTY III H 3.
Sec. 5391.....See PUBLIC PROPERTY V H 1 b.
Sec. 5392.....See ENLISTMENT I A 2 a.
Sec. 5438.....See ARMY I B 5 b.
MILITIA II D.
PAY AND ALLOWANCES II A 3 a (4) (*a*).
Sec. 5439.....See DESERTION XXII A.
Sec. 5455.....See DESERTION III E.
Sec. 5488.....See APPROPRIATIONS VII.
ARTICLES OF WAR LXII C 2.
PUBLIC MONEY II A.
Sec. 5490.....See APPROPRIATIONS VII.
DISCIPLINE XII A 12 b.
Sec. 5491.....See ARTICLES OF WAR LXII C 3.
Sec. 5495.....See ARTICLES OF WAR LX A 4.
Sec. 5497.....See APPROPRIATIONS VII.
Sec. 5498.....See CLAIMS X.
RETIREMENT I G 2 a; II B 2.
Sec. 5586.....See WAR I C 6 c (3) (*b*).
Sec. 5596.....See PUBLIC PROPERTY IV A 1 a.
LAWS I A 3.

APPENDIX IV.

REFERENCES TO THE ARTICLES OF WAR.

Art. 2.....See ENLISTMENT I A 2; 2 a.
OFFICE III A 8 b (1).
Art. 3.....See ARTICLES OF WAR III A.
DISCIPLINE XII B 3 i.
ENLISTMENT I A 9 f (5).
Art. 4.....See ARTICLES OF WAR XLVIII B.
DISCHARGE III D; XI B 1; XIII E 2; XIV A 1; XV D 1 b; XX D 2.
RETIREMENT II F 3.
Art. 6.....See DISCIPLINE XII B 3 i.
Art. 8.....See ARTICLES OF WAR VIII A.
DISCIPLINE XII B 3 i.
Art. 11.....See ABSENCE I C 4 a.
Art. 13.....See DISCIPLINE XII B 3 i.
Art. 14.....See DISCIPLINE XII B 3 i.
Art. 15.....See DISCIPLINE XII B 3 i.
Art. 17.....See PAY AND ALLOWANCES II A 3 a (4) (*a*).
ARTICLES OF WAR XVII; LXII.
WORDS AND PHRASES, "ACCOUTERMENTS."
Art. 18.....See DISCIPLINE XII B 3 i.
Art. 19.....See ARTICLES OF WAR XIX.
Art. 20.....See ARTICLES OF WAR XXI A; XXII A.
DISCIPLINE II D 13 a; 17 a.

Art. 21.....See Articles of War XXI; XXII A; LXXXIII B 1; XCVII A; E; CII C.
Discipline II D 14 a; 20; VI G 3; VIII D 4; XII A 6 c; 8 a (1); (2); (3); (3) (*a*); XVI E 2.
Private debts VII.
Words and Phrases, "Officer."
Art. 22.....See Articles of War XXII; XCVII A.
Discipline XII A 6 c; XIV E 9 d (1) (*b*).
Art. 24.....See Army II D.
Articles of War XXIV.
Command VI A 1 a.
Discipline I D 1.
Art. 25.....See Articles of War XXV.
Art. 26.....See Articles of War XXVI.
Discipline XII B 3 i.
Art. 27.....See Discipline XII B 3 i.
Art. 28.....See Discipline XII B 3 i.
Art. 29.....See Articles of War XXIX.
Art. 30.....See Articles of War XXX.
Discipline XVI A 1; D.
Art. 32.....See Absence II B 2; 4 a (1); 7; 8 a.
Articles of War XXXII; CII D.
Art. 33.....See Articles of War XXXII A; B.
Art. 38.....See Discipline V D 5; XI A 8; XII A 6 c; 9 a; B 2 d; 3 i; XIV E 9 a (14).
Articles of War XXXVIII.
Art. 39.....See Articles of War XXXIX.
Discipline XII A 10 a.
Art. 40.....See Articles of War XL.
Discipline XIV E 9 a (12).
Art. 42.....See Articles of War XLII; CA; CII D.
Discipline XV F 2.
Art. 45.....See Articles of War XLV.
Art. 46.....See Articles of War XLVI.
Art. 47.....See Articles of War L A.
Art. 48.....See Articles of War XLVIII; CIII C; F 4.
Discharge XIII B 1.
Art. 50.....See Discipline XII B 3 i.
Articles of War L.
Desertion IX I; XII A 1.
Art. 51.....See Articles of War LI.
Art. 52.....See Articles of War LII.
Discipline VI G 2.
Art. 53.....See Discipline VI G 2.
Art. 54.....See Articles of War LIV.
Discipline XII B 3 i; XVII B 1 f.
Art. 58.....See Articles of War LVIII; XCVII D.
Discipline II D 15 *a*; XII B 2 i; XIV E 9 a (13) (a); (*b*).
Art. 59.....See Articles of War LIX; CII I.
Command V B 2 a; b.
Discipline XII B 3 i.
Art. 60.....See Articles of War XVII B; LX; LXII B; XCVII B; CIII C.
Discharge XXII A; B.
Discipline II A 1 b; II D 16 a; b; V D 2 c; VIII I 1 c; XI A 18; XII A 5 b.
Art. 61.....See Army I A 2 a (2).
Articles of War LXI; LXII D.
Discipline II D 17 a; 18 a; 19; V D 2 c; H 5; XII A 6 b; c; 11 a; B 3 i; XIV E 9 a (14).
Private Debts V.

Art. 62.....See Army I A 2 a (2).
Articles of War XVII B; XXI B; D; E 1; XXII A; C; XXXII C; LX C; LXII; XCVII E; CII C.
Discharge XII D 2; XV A 3.
Discipline II D 3; 4; 6; 13 a; 18 a to d; 20; VIII D 4; F 1; 2; IX L 1; X H 1; XI A 8; XII A 6 c; 8 a (3) (a); 12 a; b; B 3b; 4 b; XV F 2; XVII B 1 a; b.
Private Debts V.
Art. 63.....See Army I G 3 d (4) (c).
Articles of War LXIII.
Art. 64.....See Discipline VIII B.
Art. 65.....See Articles of War LXII C 17; 18; D; LXV.
Discipline XII B 3 i; XIV E 9 a (14).
Art. 66.....See Articles of War LXVI.
Art. 71.....See Articles of War LXXI.
Art. 72.....See Articles of War LXXII.
Discipline III B; G 1; XVI C.
Art. 73.....See Articles of War LXXIII.
Discipline III G 1; XVI C.
Art. 75.....See Articles of War LXXII A; LXXV.
Discipline XV C.
Art. 77.....See Articles of War LX E 2; LXXVII.
Discipline XV H 3.
Art. 78.....See Articles of War LXXVIII.
Art. 82.....See Articles of War LXXXII.
Discipline XVI B 1.
Art. 83.....See Articles of War XXX A; LXXXIII.
Discipline XIV E 9 c.
Art. 84.....See Articles of War LXII D; LXXXIV.
Discipline XV E 1.
Office III A 8 b (1).
Art. 85.....See Articles of War LXII D.
Discipline VI G 2; XV E 1.
Office III A 8 b (1).
Art. 86.....See Articles of War LXXXVI.
Discipline VII C 2.
Art. 88.....See Articles of War LXXXVIII.
Discipline VII C 1; XIII C 2.
Art. 90.....See Discipline IV C 2 a; K; X H 2; XIV E 9 a (6).
Art. 91.....See Articles of War XCI.
Discipline XI A 17 c.
Art. 93.....See Articles of War XCIII.
Discipline X A 4; XIV E 9 a (16).
Art. 96.....See Articles of War XCVI.
Art. 97.....See Articles of War XCVII.
Desertion X C 1.
Discipline XIV E 9 a (17).
Art. 98.....See Discipline XII B 3 h.
Art. 99.....See Discharge XX B.
Office IV E 2 a.
Art. 100.....See Articles of War C.
Discipline XV D 4.
Art. 102.....See Articles of War CII.
Discipline XII B 1 a (1) (b); XIV K 1.
Art. 103.....See Articles of War XXX B; XLVIII F; LX E 1; LXII C 6; CIII.
Desertion V f 7; 7 a; b; X D; XX E.
Discipline II D 9; XVI D; XVII A 4 c.
Retirement I B 1 c (1).
Art. 104.....See Articles of War LXXII A; CIV.
Discipline IV M; XIV A 1; C; E 3.

Art. 106.....See ARTICLES OF WAR CVI.
DISCIPLINE XIV H 1 a; 4.
OFFICE IV E 1 a.
Art. 107.....See ARTICLES OF WAR LXXIII A 2.
Art. 109.....See DISCIPLINE IV M; XIV A 1; C; XVI B 1.
OFFICE IV E 1 a.
Art. 111.....See ARTICLES OF WAR CXI A.
Art. 112.....See ARTICLES OF WAR CXII.
DISCIPLINE XVII A 4 e.
Art. 113.....See DISCIPLINE IV M; XIII A.
Art. 114.....See ARMY I G 3 a (4) (*a*) [1].
ARTICLES OF WAR CXIV.
DISCIPLINE XIII A.
Art. 115.....See ARTICLES OF WAR CXV.
Art. 119.....See ARTICLES OF WAR CXIX.
Art. 121.....See ARTICLES OF WAR CXXI.
DISCIPLINE XI A 13.
Art. 122.....See ARTICLES OF WAR CXXII.
COMMAND V B 4.
Art. 124.....See MILITIA VI B 2 b.
Art. 125.....See ARTICLES OF WAR CXXVII A.
Art. 126.....See ARTICLES OF WAR CXXVI; CXXVII A.
Art. 127.....See ARTICLES OF WAR CXXVI A; CXXVII.

APPENDIX V.

REFERENCES TO TREATIES AND CONVENTIONS OF THE UNITED STATES.

China: Art. 9. Peace protocol signed Sept. 7, 1901, between China and the Powers (S. Doc. No. 357, 61st Cong., pp. 2006–2012).....See ARMY.
Cuba: Art. 3. Treaty with Cuba of May 28, 1903 (33 Stat. 2248).....See WAR I C 8 c to d.
Mexico: Art. 2. Extradition treaty with Mexico, Dec. 11, 1861 (12 Stat., 1200)..See EXTRADITION II A; B.

APPENDIX VI.

REFERENCES TO THE ARMY REGULATIONS, 1910 EDITION.

Par. 51.....See ABSENCE I B 1 f.
Par. 58.....See ABSENCE I B 1 d.
Par. 65.....See ABSENCE I B 2.
Par. 75.....See CIVIL AUTHORITIES I B 1; 2.
Par. 87.....See RETIREMENT I I.
Pars. 106 to 113.....See ABSENCE I C 4 a.
Par. 121.....See DESERTION V F 2 a (1); 7; 18.
Par. 127.....See DESERTION V D 3; 3 a; b; c; 4; 4 a; E 3; 4
Pars. 127 to 131.....See DESERTION V E 5.
Par. 147.....See DISCHARGE XI A 2.
Par. 156.....See DISCHARGE XIII E 1.
Par. 189.....See DISCIPLINE III C 1 a.
Par. 195.....See ARMY I G 3 a (1) (*a*).
Par. 273.....See ARMY I E 1 b.
Par. 276.....See ARMY I E 1 b.
Par. 318.....See GOVERNMENT AGENCIES II J 3.
Par. 321.....See GOVERNMENT AGENCIES I D 2; 3.

Par. 331.....See GOVERNMENT AGENCIES III B 1; X.
Par. 351.....See GOVERNMENT AGENCIES I A.
Par. 357.....See INTOXICANTS II B.
Pars. 493 to 498.....See ARMY II F 1.
Par. 535.....See CONTRACTS XLIX.
Par. 543.....See CONTRACTS XI F.
Par. 548.....See CONTRACTS XI B.
Par. 558.....See CONTRACTS XVI F.
Par. 575.....See BONDS II G; J.
Par. 577.....See BONDS III E.
LAWS II A 1.
Par. 581.....See BONDS I M 13.
Par. 583.....See BONDS V G.
Par. 585.....See BONDS V K.
Par. 589.....See BONDS II N.
Par. 603.....See CONTRACTS XV to XVI.
GOVERNMENT AGENCIES I E.
Par. 663.....See CONTRACTS L.
Par. 665.....See GOVERNMENT AGENCIES II J 7.
PUBLIC MONEY II B 5.
Par. 690.....See PUBLIC MONEY I J.
Par. 691.....See PUBLIC MONEY J J.
Par. 694.....See PUBLIC MONEY X to XI.
Par. 742.....See EIGHT-HOUR LAW III; V.
Par. 799.....See ABSENCE I C 4 a.
Par. 838.....See CLAIMS XI.
Par. 866.....See ENLISTMENT B 3 c.
Par. 869.....See ENLISTMENT I A 9 f (7) (*a*).
Par. 876.....See ENLISTMENT I A 8 b.
Par. 937.....See DISCIPLINE I D 1.
Par. 958.....See ARTICLES OF WAR CXII A 1 c.
Par. 970.....See ARTICLES OF WAR LIX L 2.
Par. 977.....See COMMAND V A 5.
Par. 982.....See DISCIPLINE XIV E 9 g.
Par. 986.....See PAY AND ALLOWANCES I A 1 c; C 1.
Par. 1012.....See DISCIPLINE V G 5.
Par. 1013.....See DISCIPLINE V G 5.
Par. 1060.....See GOVERNMENT AGENCIES II J 10.
Par. 1224.....See ARMY I G 3 b (3) (*a*) [3].
Par. 1241.....See GRATUITY IV.
Par. 1281.....See ARTICLES OF WAR LXI B 15.
Par. 1406.....See WORDS AND PHRASES; "REPUTABLE PERSON."
Par. 1461.....See APPROPRIATIONS XXIX.
Par. 1495.....See GOVERNMENT AGENCIES VI.
Par. 1496.....See GOVERNMENT AGENCIES VI.
Par. 1498.....See CLAIMS VIII.

O