DIGEST OF OPINIONS

OF THE

JUDGE ADVOCATE GENERAL OF THE ARMY:

CONTAINING

A SELECTION OF OFFICIAL OPINIONS FURNISHED TO THE PRESIDENT, THE SECRETARY OF WAR, THE ADJUTANT GENERAL, HEADS OF BUREAUS OF THE WAR DEPARTMENT, COMMANDING OFFICERS, JUDGE ADVOCATES AND MEMBERS OF MILITARY COURTS, AND OTHER OFFICERS OF THE ARMY, AND SOLDIERS—BETWEEN SEPTEMBER, 1862, AND JULY, 1868.

EDITED BY

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ERRATUM.

For "February 19," wherever occurring under the titles of "CLAIMS, I," and "CLAIMS, II," or elsewhere, as the date of the act of 1867, in regard to *war claims*, read *February* 21. The former date was given to the statute in the first official publication of the laws of that session of Congress; but the latter is the date fixed in the bound volume—vol. 14—of the "Statutes at Large," as that upon which the act took effect in law.

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All Paragraphs to which is prefixed a *star*, (*) and all Notes, are new to this edition.

A.

ARTICLES OF WAR.

FIFTH ARTICLE.

'*Any officer or soldier who shall use contemptuous or disrespectful words against the President of the United States, against the Vice-President thereof, against the Congress of the United States, or against the chief magistrate or legislature of any of the United States in which he may be quartered, if a commissioned officer, shall be cashiered or otherwise punished, as a court-martial shall direct; if a non-commissioned officer or soldier, he shall suffer such punishment as shall be inflicted on him by the sentence of a court-martial.*"

1. An officer who, in the course of a disloyal *letter*, intended to be made public, and the obvious purpose of which was to incite hostility to the administration, made use of denunciatory language in regard to the President and the government; *held* chargeable with a violation of this article. I, 78.

2. The use, by an officer, in the course of a political discussion with other officers, of rude and positive language of disapprobation of the public acts of the President, unaccompanied, however, by offensive or personally disrespectful expressions in regard to him; *held* not to constitute a violation of this article. Such language, however, when assuming a decided tone of disloyalty, would form a proper ground for a summary dismissal in time of war. V, 491. (See act of July 13, 1866, ch. 176, sec. 5, prohibiting summary dismissals by the President in time of peace.)

3. Where a soldier of a regiment, (passing through the streets of Washington,) having engaged in disorderly conduct, was detained by the police; and the colonel thereupon assaulted the sergeant of the police and demanded by what authority the soldier was held; and, upon being answered that it was by the same authority as that under which he himself acted—that of the President of the United States—proceeded to express contempt and defiance of the President and his authority, in loud, violent, and profane language, in the midst of an excited crowd of soldiers and citizens; *held* that he was chargeable with a violation of this article. XVIII, 592.

* 4. Where an officer, while on duty during the war, in a public place, and in the presence and hearing of many persons, violently denounced President Lincoln as engaged in constantly violating the Constitution and as exceeding his authority in issuing his proclamation of emancipation; and arraigned him and Congress in gross language for their method of carrying on the war, which he asserted was a "d—d abolition war;" insisting at the same time that the South could never be conquered; *held* that he was guilty of a violation of this article, calling for his dismissal from the service. XX, 516.

SIXTH ARTICLE.

"Any officer or soldier who shall behave himself with contempt or disrespect toward his commanding officer, shall be punished, according to the nature of his offence, by the judgment of a court-martial."

1. Disrespectful language used toward his captain by a soldier, when detached from his company and serving at the hospital, to the surgeon in charge of which he was ordered to report, is not properly charged as "disrespect toward his commanding officer"—the surgeon, not the captain, being his commander at the time. The offence should, under these circumstances, be charged as "Conduct to the prejudice of good order and military discipline." VI, 53.

2. Every officer entitled to require the obedience of another for the time being is to the latter his commanding officer. But where a battalion of a regiment was detached therefrom, and serving in another department, *held* that the regimental commander, who remained with the main body of the regiment, was not the commanding officer of an officer of inferior rank serving with the detachment, in the sense of this article. XVIII, 407.

SEE NINTH ARTICLE, (5.)
COURT-MARTIAL, II, (16.)

NINTH ARTICLE.

"Any officer or soldier who shall strike his superior officer, or draw or lift up any weapon, or offer any violence against him, being in the execution of his office, on any pretence whatsoever, or shall disobey any lawful command of his superior officer, shall suffer death, or such other punishment as shall, according to the nature of his offence, be inflicted upon him by the sentence of a court-martial."

1. Merely a recital in a specification, that because a soldier had broken his arrest he had violated the command of his superior officer, is not such a distinct and positive averment of the crime of "disobedience of orders" as would warrant the infliction of the death penalty under this article. It seems to be a straining of the true intent and meaning of the article to treat a simple breach of arrest by an enlisted man as within its purview. The language of the 77th article in the case of an officer shows that a breach of arrest is not the disobedience of the orders of a superior officer contemplated by the 9th article. I, 461. * A breach of arrest by a soldier should ordinarily be charged under the 99th article.

2. Under this article, the specification of the charge should set forth that the officer against whom the offence was committed was at the time engaged in the execution of his office, or in terms to that effect. I, 462. See IX, 90.

3. The term "*superior officer*," in this article, means a commissioned officer only. IV, 249, 348 ; VII, 280, 474. Offering violence to a *non-commissioned* officer, by a soldier, should generally be charged under the 99th article—the term "non-commissioned officer" being, in the purview of this article, synonymous with "soldier." VII, 625 ; XV, 148 ; XXV, 434. A first sergeant *acting* as a lieutenant, but not yet appointed or commissioned as such, *held* not an officer under this article. IX, 90. See OFFICER.

*4. Where a soldier was sentenced to death upon conviction of a

charge of "disobedience of orders," but the orders disobeyed were, as set forth in the specification, those of a non-commissioned officer; *held* that the charge was one which, though nominally under the 9th, could be sustained as valid only under the 99th article, which did not admit of a capital sentence; that the sentence, as it stood, was therefore void and inoperative; and that, unless the court were not dissolved, so that it could be reconvened for the correction of such sentence, the proceedings must be disapproved. XXV, 434.

5. The term "superior officer," in this article, is properly construed to mean any officer of rank superior to the accused, in the due execution of his office at the time of the offence, who may or may not, however, be, in a strict sense, the commanding officer of the accused. The 6th article provides for the punishment of an offence against a commanding officer, as such; and it is believed to have been the intention of the framers of the act that the provisions of the 9th should be much more comprehensive than those of the 6th article. XIX, 248. See SIXTH ARTICLE.

* 6. This article provides for the punishment of disobedience of "any *lawful* command of a superior officer." The laws of the service inflict no punishment upon an officer who disobeys a command of his superior which is contrary to law. The right exists at all times to refuse obedience to such an order; and it may become an imperative duty to do so. But this must be understood of an order which is plainly and palpably in violation of the well-known customs of the army or of the laws of the land, and not one in which the question of legality is merely doubtful or undecided. The step, however, of assuming to disobey an order, is one which should be taken with extreme caution, because of the responsibilities in which the officer would be involved, should it turn out that he was mistaken in his view of the law. XXVI, 256.

7. Where a captain and district provost marshal, who had received certain moneys from substitutes and drafted men, which they had voluntarily placed in his hands for safe-keeping, on being ordered by competent authority to transfer the same to a disbursing officer of the government, positively refused to do so, on the ground, as asserted, that he was responsible to the men alone for such moneys, and would continue to be responsible to them therefor, even after turning the same over to the government; *held* that as the funds had been deposited with him in his military capacity, and by men in the military service, who, in trusting him, must have relied chiefly upon the credit of the United States, whose servant he was, it was competent for the government, interested as it was in the protection of the rights and property of its soldiers, to assume to regard itself as the bailee through him, its officer, of these moneys, and thus to make such disposition of the same as it might deem best for the security of the owners; that the order of the government, when complied with, would constitute a perfect defence to the officer as against the men; and that, in refusing to obey it, when communicated through the proper superior, he was chargeable with a "disobedience of the lawful command of his superior officer," in the sense of this article. XIX, 348. See UNITED STATES AS BAILEE, &c.

* 8. *Held* that the fact that the accused was not *sworn* upon his enlistment as a soldier could constitute no defence upon his trial on a charge of "disobedience of orders," where it was shown that he had received pay and clothing as such soldier from the government for two years, and had thus estopped himself from denying that he was duly in the military service. XXIV, 419. See TWENTIETH ARTICLE, (1.)

SEE SIXTY-SEVENTH ARTICLE, (1.)
NINETY-NINTH ARTICLE, (23.)
FIELD-OFFICERS' COURT, (21.)
FINDING, (19,) (21,) (33.)

ELEVENTH ARTICLE.

* * * *"Nor shall a commissioned officer be discharged the service but by order of the President of the United States, or by sentence of a general court-martial."*

The muster-out of service of a volunteer officer, (during the rebellion,) by an order of a commanding general, who had been duly authorized to pursue this course in the case of supernumerary officers, and whose action in the case had been approved by the Secretary of War; *held*, a formal dismissal reconcilable with the provisions of this article, since the action of the general, so approved, became constructively that of the President. III, 211. (* This article is a recognition of the authority of the President to summarily dismiss officers of the army. But see the recent act of July 13, 1866, ch. 176, sec. 5, prohibiting summary dismissals by the President *in time of peace.* See DISMISSAL, I, 1.)

SEE APPEAL, (1.)

FIFTEENTH ARTICLE.

"Every officer who shall knowingly make a false muster of man or horse, and every officer or commissary of musters who shall willingly sign, direct, or allow the signing of muster-rolls, wherein such false muster is contained, shall, upon proof made thereof by two witnesses, before a general court-martial, be cashiered, and shall be thereby utterly disabled to have or hold any office or employment in the service of the United States."

1. The term "false muster" used in this article is not necessarily to be construed as referring only to a *muster-in.* Thus, where an officer made and certified in his official capacity a *muster-out roll* of certain men as entitled to be paid thereon, whom he knew were not so entitled; *held* that this act exposed the government to precisely the fraud which the article was intended to guard against and punish, and that the officer was therefore properly chargeable with the offence of "false muster." XVIII, 358.

2. Where a quartermaster entered upon his official return of persons hired and employed by him the names of certain fictitious individuals as regularly so employed; *held* that his offence was not strictly that of a false muster, but rather that of making a false return, made punishable by the eighteenth article. XV, 558.

EIGHTEENTH ARTICLE.

"Every officer who shall knowingly make a false return to the Department of War, or to any of his superior officers authorized to call for such returns, of the state of the regiment, troop, or company, or garrison under his command, or of the arms, ammunition, clothing, or other stores thereunto belonging, shall, on conviction thereof before a court-martial, be cashiered."

SEE FIFTEENTH ARTICLE, (2.)
EIGHTY-THIRD ARTICLE, (1.)

TWENTIETH ARTICLE.

"All officers and soldiers who have receeived pay, or have been duly enlisted in the service of the United States, and shall be convicted of having deserted the same, shall suffer death, or such other punishment as, by sentence of a court-martial, shall be inflicted."

(The act of May 29, 1830, ch. 183, provides that no officer or soldier shall thereafter "be subject to the punishment of death for desertion in time of peace.")

1. Receiving pay as a soldier is treated in this article as such an open acknowledgment of being in the military service as to be tantamount to proof of a formal enlistment; and it has been customary to regard *clothing* or *rations* as included in the general term "pay," as here employed. * When used in regard to the other relations of the service, the term receives a strict interpretation, being held to mean "pay proper," so-called, in distinction from allowances. But this article, in the general and comprehensive phrase, "all officers and soldiers who have received pay," evidently contemplated some unequivocal act on the part of the soldier, &c., which should estop him from denying that he was in the military service, and would be irreconcilable with any other status. The receipt of the government clothing or rations, allowed an officer or soldier by law, would, equally with the receipt of a pecuniary compensation, properly be regarded as an admission by the party that he was in the military service of the United States: such receipt, therefore, has been deemed to be equivalent to a receipt of pay, under this article. See V, 103, 146; XIX, 268. See ENLISTMENT, I, 3, 4, 5.

2. Under the discretion conferred by this article, a court-martial may, upon conviction, impose a *fine* in addition to a forfeiture; and such a penalty, though unusual, may, under certain circumstances, be a most appropriate one. XVI, 426.

SEE DESERTER.
FINDING, (17.)

TWENTY-FIRST ARTICLE.

"Any non-commissioned officer or soldier who shall, without leave from his commanding officer, absent himself from his troop, company, or detachment, shall, upon being convicted thereof, be punished according to the nature of his offence, at the discretion of a court-martial.

SEE ABSENCE WITHOUT LEAVE.
FINDING, (19,) (21.)
SENTENCE, I, (25)

TWENTY-SECOND ARTICLE.

"No non-commissioned officer or soldier shall enlist himself in any other regiment, troop, or company, without a regular discharge from the regiment, troop, or company in which he last served, on the penalty of being reputed a deserter, and suffering accordingly. * * * * *

The gist of the offence specified in the first paragraph of this article is the leaving one regiment, &c., and enlisting in another without a due discharge from the former; and the offence is consummated whether the soldier re-enlisting had, in leaving or staying away from his proper regiment, &c., been guilty either of a technical desertion or of an absence without leave.

See DESERTER, (21.)

TWENTY-FOURTH ARTICLE.

"No officer or soldier shall use any reproachful or provoking speeches or gestures to another, upon pain, if an officer, of being put in arrest; if a soldier, confined, and of asking pardon of the party offended in the presence of his commanding officer."

Where a superior officer called his inferior an "impudent pup," and threatened to have him "strung up" and "put in irons"—*held*, that his offence involved a breach of this article, (as well as of the 3d paragraph of article I of the Army Regulations,) and that he was liable "*to be put in arrest*" therefor. III, 672.

TWENTY-FIFTH ARTICLE.

"No officer or soldier shall send a challenge to another officer or soldier to fight a duel, or accept a challenge if sent, upon pain, if a commissioned officer, of being cashiered; if a non-commissioned officer or soldier, of suffering corporeal punishment, at the discretion of a court-martial."

A sentence, "to be reprimanded by the President," for a violation of this article, is irregular and inoperative. The article requires that the sentence shall be cashiering. IV, 54.

THIRTY-FIRST ARTICLE.

"No officer commanding in any of the garrisons, forts, or barracks of the United States shall exact exorbitant prices for houses or stalls let out to sutlers, or connive at the like exactions in others, nor by his own authority, and for his private advantage, lay any duty or imposition upon, or be interested in, the sale of any victuals, liquors, or other necessaries of life brought into the garrison, fort, or barracks for the use of the soldiers, on the penalty of being discharged from the service."

* The offence, committed by an officer during the war, of demanding and receiving, without authority, from a liquor dealer compensation for licensing him to sell liquor to *citizens*, in a town occupied by our forces in an insurrectionary state; *held* not properly charged under this article. The charge should have been laid under the 99th. XXI, 401. (The office of army sutler has been abolished by section 25, ch. 299, act of July 28, 1866. See Sutler, 10, 11.)

THIRTY-SECOND ARTICLE.

"Every officer commanding in quarters, garrisons, or on the march, shall keep good order, and to the utmost of his power redress all abuses or disorders which may be committed by any officer or soldier under his command; if, upon complaint made to him of officers or soldiers

beating or otherwise ill-treating any person, of disturbing fairs or markets, or of committing any kinds of riots, to the disquieting of the citizens of the United States, he, the said commander, who shall refuse or omit to see justice done to the offender or offenders, and reparation made to the party or parties injured, as far as part of the offender's pay shall enable him or them, shall, upon proof thereof, be cashiered, or otherwise punished, as a general court-martial shall direct."

1. By the authority of this article a citizen may be indemnified for a wanton injury to his property, committed by a soldier, out of the pay of the latter, upon application to the proper commanding officer. Such a penalty is not a "stoppage" by operation of law, but a summary reparation enforced by the commanding officer, (*as commander*, and without the mediation of a court-martial,) in the exercise of a due discretion, and for the maintenance of good order. VII, 263.

2. That a forfeiture has already accrued to the government, by the sentence of a court-martial for the military offence, presents no obstacle to the enforcement of a reparation for the private wrong. A double punishment is not thus inflicted, the offender being amenable to trial for his offence as a soldier, and at the same time personally responsible to the individual for the trespass to his property. *Ibid.* See FORMER TRIAL.

3. This article presents the only instance in which a soldier may be directly mulcted in his pay for the benefit of a private individual. XVI, 50.

4. *Held* that it was not competent to enforce the remedial provisions of this article against the men of a volunteer regiment chargeable with having destroyed the property of a citizen while *en route* to the place of their final discharge, *after* such regiment had been formally mustered out of the service. XII, 673. See JURISDICTION, 1, 2.

* 5. This article relates to cases of injury to "citizens," and it would be a strained construction of its provisions to extend them to the case of the class of persons who are under military protection by reason of their employment or occupation with the army. Thus *held*, that a stoppage, in favor of an army *sutler* whose store had been robbed, of the pay of the soldiers implicated in the act would not be warranted under this article. XXIV, 151. (But see SUTLER, 10, 11.)

* 6. *Held*, that this article did not authorize the reimbursement to an officer, out of the pay of a soldier, of money stolen from him by the latter. It authorizes only a summary adjustment of damages sustained by *citizens* at the hands of officers or soldiers. XXVI, 352.

* 7. *Held*, that this article did not authorize a stoppage in favor of the government for the value of its own stores stolen by soldiers. XXVI, 37.

* 8. A department commander, under the authority of the 32d article, ordered the pay of seven soldiers to be stopped in a certain amount, to reimburse a female for goods stolen by them from her store. The same men were afterwards brought to trial for the military offence involved, and, upon conviction, were sentenced—six of them to confinement at hard labor for six months and a forfeiture of eight dollars of their monthly pay for the same period, and one to the same term of confinement without the forfeiture. A few months after, their punishments were commuted to dishonorable discharge,

with forfeiture of all pay. *Held*, that the right of the party, to indemnify whom the stoppage had been directed, became vested upon the issuing of the order, and could not be divested by any subsequent action of the military authorities; that neither the fact that the parties had been tried for their offence and sentenced as above, nor the fact that all their pay was forfeited upon their subsequent discharge, could affect her right; and that her claim upon the pay of the soldiers still had precedence to that of the United States under the forfeitures, and should first be satisfied. XXI, 447.

See STOPPAGE, (2,) (6.)

THIRTY-THIRD ARTICLE.

"*When any commissioned officer or soldier shall be accused of a capital crime, or of having used violence or committed any offence against the person or property of any citizen of any of the United States, such as is punishable by the known laws of the land, the commanding officer and officers of every regiment, troop, or company to which the person or persons so accused shall belong, are hereby required, upon application duly made by or in behalf of the party or parties injured, to use their utmost endeavors to deliver over such accused person or persons to the civil magistrate, and likewise to be aiding and assisting to the officers of justice in apprehending and securing the person or persons so accused, in order to bring him or them to trial. If any commanding officer or officers shall wilfully neglect or shall refuse, upon the application aforesaid, to deliver over such accused person or persons to the civil magistrates, or to be aiding and assisting to the officers of justice in apprehending such person or persons, the officer or officers so offending shall be cashiered.*"

1. The arrest and imprisonment by the civil authorities of an officer in the service, in the same manner as if he were an ordinary citizen, is unauthorized and irregular. Application should be made for the surrender of his person to the proper commanding officer, agreeably to the requirements of this article, and the latter would then be bound to deliver him up if he appeared to be duly accused of a crime or offence within the meaning of the article. In the case of such unauthorized arrest, the release of the officer should be demanded, and, if such demand is refused, he should be liberated by military force. III, 446. See VIII, 661.

2. So where a military officer, without any formal application for his surrender, in conformity with this article, was forcibly arrested, held to bail, and confined in prison by the civil authorities of Mississippi, upon a charge of assault upon a citizen; and these authorities, as well as the governor of the State, when called upon to interfere, formally refused to release him; *held*, that the department commander, in compelling his release by the presence and use of a sufficient military force, was not only justified in law, but acted in the proper performance of his duty. XVII, 532.

3. Where a larceny was committed by a soldier *before* he entered the military service, *held* that he should be delivered up to the civil authorities, upon a proper demand being made for him, in accordance with the provisions of the 33d article. XII, 145.

*4. Where the civil authority, without regarding the provisions of the 33d article, summarily arrested a soldier for certain drunkenness and disorderly conduct, for which, as military offences, he was properly amenable to trial by court-martial; *advised*, that the proper military commander be instructed to demand the prisoner's release,

(which, it was thought, would, in this instance, be readily granted upon an explanation of the usages of the service in such cases,) and to bring him to trial forthwith by a general court-martial. XXII, 570.

*5. It results, from the very nature of the obligation of military service, that an officer or soldier shall not, while on duty as such, be liable to arrest by warrant of a civil magistrate in the form and manner ordinarily pursued with citizens. Whether or not the jurisdiction of the State is concurrent with that of the general government over the locality where the officer or soldier is stationed, it is in no case competent for the civil official to proceed in the first instance to seize his person and convey him away by virtue of the warrant alone. On the contrary, it is *from the commanding officer* of the regiment, post, &c., that the delivery of the accused is to be sought and obtained; and it is only upon application duly made to such commander that any arrest of a military person, when on duty, can legally be effected. The course to be pursued for the purpose of such arrest is clearly pointed out in this article, which, though in terms directory upon the military commander only, at the same time indicates in general language the method proper to be adopted by or in behalf of the injured party. (See Opinion of Attorney General Wirt, II Opinions, 14.) It is to be observed that the obligation of the commanding officer to deliver the accused into arrest does not depend upon the production of a warrant. If the application is formally made, upon statements, (which should of course ordinarily be under oath,) by which the commander is sufficiently informed of the circumstances of the alleged offence, as well as of the fact that an offence of the class specified by the article has actually been committed, and that the officer or soldier is formally accused thereof, the duty to surrender the party is consummate; and this duty is the same whether a warrant has or not been issued, and whether one could or not legally be issued or legally served at the station of the accused. In the opinion cited Mr. Wirt says that the application must set forth the name of the injured party, and the specific charge, and must show that the offence is one "punishable by the known laws of the land." He adds, (in reference especially to the case before him, but appositely to such cases in general:) "A copy of the affidavit ought to have accompanied the demand; and then, if as special as an affidavit ought to be to warrant an arrest, it would have given all the information that was necessary on the occasion." XXI, 567; XXIII, 490.

See NINETY-NINTH ARTICLE, (3.)
ARREST, II, (1.)

THIRTY-FOURTH ARTICLE.

"If any officer shall think himself wronged by his colonel, or the commanding officer of the regiment, and shall, upon due application being made to him, be refused redress, he may complain to the general commanding in the State or Territory where such regiment shall be stationed, in order to obtain justice, who is hereby required to examine into said complaint, and take proper measures for redressing the wrong complained of, and transmit, as soon as possible, to the Department of War, a true state of such complaint, with the proceedings had thereon."

The thirty-fourth and thirty-fifth articles are intended to authorize an inferior, after being refused redress by a superior, by whom he deems himself to have been aggrieved, to report the latter through the proper channels to the proper authority; the complaint being preferred in respectful terms and in compliance with the article applying to the case. XVIII, 406.

See ARREST, I, (7.)

THIRTY-FIFTH ARTICLE.

"If any inferior officer or soldier shall think himself wronged by his captain or other officer, he is to complain thereof to the commanding officer of the regiment, who is hereby required to summon a regimental court-martial, for the doing justice to the complainant; from which regimental court-martial either party may, if he thinks himself still aggrieved, appeal to a general court-martial. But if, upon a second hearing, the appeal shall appear vexatious and groundless, the person so appealing shall be punished at the discretion of the said court-martial.

*A regimental court-martial is convened either under the 66th article, to try an accused in the usual manner upon a formal charge, and to impose upon him a specific sentence, if convicted; or under the provisions of the 35th article "for the doing justice to a complainant;" in which latter case, in the opinion of O'Brien, the court does not properly proceed to inflict a punishment, but to determine upon and report the proper mode of redress for a personal wrong, if it decides that any has been done. But the assembling of such court for such purpose is authorized only when "an inferior officer or soldier shall think himself wronged by his *captain or other officer*;" the article being intended to provide redress for a subordinate when aggrieved by his superior. So in a case where the alleged wrong was charged upon certain "officers' servants," and it did not appear that their acts were authorized or sanctioned by the officers themselves who employed them; *held* that such case was not within the letter or spirit of the article. XXIII, 631.

See THIRTY-FOURTH ARTICLE.
DISCHARGE, (6.)

THIRTY-SIXTH ARTICLE.

"Any commissioned officer, storekeeper, or commissary, who shall be convicted at a general court-martial of having sold, without a proper order for that purpose, embezzled, misapplied, or wilfully, or through neglect, suffered any of the provisions, forage, arms, clothing, ammunition, or other military stores belonging to the United States to be spoiled or damaged, shall, at his own expense, make good the loss or damage, and shall, moreover, forfeit all his pay, and be dismissed from the service."

*The words "without a proper order for that purpose," employed in this article, apply only to the previous word "sold," and not to the words "embezzled, misapplied," &c., which follow. In charging as an offence under this article the selling of public property, it must be alleged in the specification that the accused had not a proper order authorizing, or for the purpose of, such sale. XXII, 605.

See EMBEZZLEMENT.
SENTENCE, I, (1,) (25.)

THIRTY-EIGHTH ARTICLE.

"Every non-commissioned officer or soldier who shall be convicted before a court-martial of having sold, lost, or spoiled, through neglect, his horse, arms, clothes, or accoutrements, shall undergo such weekly stoppages (not exceeding the half of his pay) as such court-martial shall judge sufficient for repairing the loss or damage; and shall suffer confinement, or such other corporeal punishment as his crime shall deserve."

* 1. *Held* that the imposition by sentence of a certain weekly stoppage of pay for violation of this article was, in all cases, mandatory upon the court. XXIV, 246.

* 2. *Held* that the offence of a soldier in selling his clothing was improperly charged as a violation of the 99th article; and that it should properly have been charged under the 38th, which not only specifically relates to this express offence, but provides therefor a separate and express penalty, instead of leaving the punishment to the discretion of the court. XXIII, 377.

See SELLING, &c., BY SOLDIERS OF CLOTHING, ARMS, &c.

THIRTY-NINTH ARTICLE.

"Every officer who shall be convicted before a court-martial of having embezzled or misapplied any money with which he may have been intrusted, for the payment of the men under his command, or for enlisting men into the service, or for other purposes, if a commissioned officer, shall be cashiered and compelled to refund the money; if a non-commissioned officer, shall be reduced to the ranks, be put under stoppages until the money be made good, and suffer such corporeal punishment as such court-martial shall direct."

1. "Money," in the sense of this article, means funds received by the officer in official trust, or entirely or mainly in his military capacity or character. The breach of a mere private trust, committed to him as an individual or in a civil capacity, is not cognizable by a court-martial under this article. XI, 401.

2. It is not essential to the offence of embezzlement, &c., of money under this article, that the United States should be the *absolute* owner of the funds. Thus, where the bounty money belonging to a substitute is temporarily intrusted to an officer, the United States is deemed to become the *bailee*, through its officer, of the amount, and to have such an interest in the funds that in case of their embezzlement or misapplication by him, such officer may properly be held chargeable with a violation of this article. XI, 150; X, 117. And *held* a violation of this article where the money embezzled, &c., did not come into the hands of the officer under the regulations of the service, (as those established by the Provost Marshal General during the rebellion,) or the orders of a superior; but where it was voluntarily intrusted to him in his military capacity by the men (substitutes, drafted men, &c.) themselves. For in this trust they must be deemed to have relied not upon him, but upon the government which he represented, and which thus became in equity their bailee for the funds. XIX, 348. See NINTH ARTICLE, 7; UNITED STATES AS BAILEE, &c. But where the moneys misapplied had merely been placed in the hands of the officer by a county agent, for the convenience of the latter, *held* that the offence involved was more properly chargeable under the 99th article. XX, 23.

3. A positive refusal by an officer to comply with the formal order of his proper superior to turn over to a United States disbursing officer certain funds in his hands belonging to substitutes, &c., and of which the government had become, in equity, the bailee, through him; *held* to constitute an embezzlement in the sense of the act of August 6, 1846, ch. 90, sec. 16, and to be chargeable as a violation of this article. XIX, 348. See EMBEZZLEMENT, 1, 2.

4. And the charge "Embezzlement," with a specification setting forth all these facts; *held* a sufficient pleading of an offence under this article. *Ibid.*

5. Where an officer, found by a court-martial to have had intrusted to him in his military capacity a certain stated sum, and to have refused to turn the same over to a United States disbursing officer when ordered to do so by competent authority, was (beside being cashiered) sentenced to pay such specific sum to the government, and to be imprisoned for a certain term and thereafter till he should make such payment; *held* that such sentence was regular and valid under a charge of a violation of this article, which requires that the accused, upon conviction, "shall be *compelled* to refund the money." And *held* that the objection, that such a sentence was under the circumstances merely an attempt to compel the accused to adjust his accounts with the government, and therefore irregular and improper, was without weight. XIX, 348.

6. *Held* that the appropriation to his own use, by an officer, of sundry premiums of two dollars paid to him for recruits, obtained by him for the regular army while he was a citizen and before the date of his commission or muster as an officer, did not constitute a violation of this article. Under the provisions of the joint resolution of Congress, No. 37, of June 21, 1862, and of General Order No. 74, of the War Department, of July 7, 1862, he was entitled to these premiums as his own property. XII, 350.

7. After the discharge of an officer from the service he cannot be brought to trial for a violation of this article, unless proceedings were formally commenced against him while still in the service. XIX, 280. See COURT-MARTIAL II, 1; JURISDICTION, 1. And this although his offence may be identical with one of those specified in sec. 1, ch. 67, act of March 2, 1863; in which case, however, he may still be brought to trial therefor under that act. See FRAUD, II, 2.

* 8. As section 16 of the act of August 6, 1846, provides that a failure to pay over or account for public money, upon a proper demand made, shall be held and taken to be *prima facie* evidence of embezzlement on the part of a public officer, it follows that the burden of proof is upon an officer charged with such a failure to show that his proceeding was justifiable or excusable. It is not for the prosecution to show what has become of the funds. So *held* that an acting commissary of subsistence, who 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 or exhibit vouchers or otherwise account for the use of the same, when so required by his

department commander; was properly convicted, on proof of these facts, of embezzlement, in violation of this article. XXII, 546.

See EMBEZZLEMENT.
LESSER KINDRED OFFENCE, (4.)
SENTENCE, I, (17.)
UNITED STATES AS BAILEE, &c.

FORTY-FIFTH ARTICLE.

"Any commissioned officer who shall be found drunk on his guard, party, or other duty, shall be cashiered. Any non-commissioned officer or soldier so offending shall suffer such corporeal punishment as shall be inflicted by the sentence of a court-martial."

1. "Drunkenness on duty" should be charged as a violation of this article, being a specific charge designated in this article alone, with a fixed penalty attached. It should not, therefore, be charged under the 99th article. I, 463. See CHARGE, 3.

* 2. A sentence of forfeiture of pay for the offence of drunkenness on duty is unauthorized and void; and no less so where the offence, instead of being charged under this article, is charged—improperly—as "Conduct to the prejudice of good order and military discipline." If the real offence, however set forth in words, is a drunkenness on duty, it can only be punished as authorized by this article. IV, 279; XXII, 221.

* 3. Where a soldier was charged with drunkenness on duty, but as a violation of the 99th article, and was sentenced, upon a plea of guilty, to fine and to seven days' confinement on bread and water; *held* that his pleading guilty, without objection to the form of the charge, could not enlarge the power of the court in the interposition of a punishment for the actual offence, and that so much of the sentence as imposed the fine should be remitted as unauthorized by this article; the remainder being allowed to stand. XXIII, 486.

4. The time when an offence was committed should be alleged with a reasonable degree of certainty. To aver in a specification to a charge under this article that an officer was intoxicated at some time or times during a period of seventy days, does not give him such notice as to enable him to defend himself or disprove the charge. The specification is, therefore, uncertain and insufficient. I, 463.

* 5. This article, in providing that an enlisted man, convicted of the offence therein specified, shall suffer such "*corporeal punishment*" as a court-martial may inflict, is deemed to preclude the imposition of any other kind of punishment in such case. At the date of the statute of which the article is a part, (1806,) punishment by *flogging* was legal and was practiced in the army; (see EIGHTY-SEVENTH ARTICLE;) and there was then no difficulty in adjudging an appropriate sentence for drunkenness on duty by a soldier. But the act of May 16, 1812, ch. 86, sec. 7, repealed so much of the act of 1806 as authorized "corporeal punishment by stripes or lashes;" and, though the act of March 2, 1833, ch. 68, sec. 7, restored such penalty for cases of deserters, the statute of August 5, 1861, ch. 54, sec. 3, abolished absolutely "flogging as a punishment in the army." In view of this abolition, courts-martial (until the article shall be amended) must needs often draw upon the customs of the service for a penalty which shall answer

the description of a "corporeal" punishment. Thus the accused may be adjudged to carry a loaded knapsack for a certain time, stand on a barrel, or suffer any other ignominy which would naturally result in a degree of bodily pain or fatigue, provided the same were not excessive and physically injurious. XXI, 496. But, in view especially of the language of the 38th article, wherein "*confinement*" is referred to as of the class of *corporeal* punishments, (the language being "confinement or such other corporeal punishment,") it is *held* that a confinement for a limited period in a guard-house, or in charge of a camp or post guard, would be an allowable punishment for the offence in question, when committed by a soldier. XXIII, 514, 523; XXIV, 544; XXVI, 344. But it is questioned whether the imposition of a sentence of *imprisonment at hard labor* in a military or other prison would not transcend the authority to inflict "corporeal punishment" conferred by this article. See XXI, 560.

* 6. 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 so legally liable to a charge of a violation of the same if he become drunk and incapable to properly perform the duties of such command. XXVI, 486.

7. Any sentence but that of cashiering or dismissal imposed upon an officer, for a violation of this article, is unauthorized. VIII, 665. Where an officer was sentenced to be cashiered *and* to be imprisoned at hard labor for two years, upon conviction of drunkenness on duty, *held* that the sentence, so far as it imposed imprisonment, was void, and should, as to this, be disapproved. XIV, 330.

SEE SIXTY-SEVENTH ARTICLE, (2.)
EVIDENCE, (15.)
FINDING, (18,) (23.)
PLEA, (22.)
SENTENCE, I, (18.)

FIFTY-SECOND ARTICLE.

"Any officer or soldier who shall misbehave himself before the enemy, run away, or shamefully abandon any fort, post, or guard which he or they may be commanded to defend, or speak words inducing others to do the like, or shall cast away his arms and ammunition, or who shall quit his post or colors to plunder and pillage, every such offender, being duly convicted thereof, shall suffer death, or such other punishment as shall be ordered by the sentence of a general court-martial."

SEE FINDING, (19.)
LESSER KINDRED OFFENCE, (3.)
MILITARY COMMISSION, III, (1.)
PLEA, (17.)

FIFTY-FOURTH ARTICLE.

"All officers and soldiers are to behave themselves orderly in quarters and on the march; and whoever shall commit any waste or spoil, either in walks of trees, parks, warrens, fish-ponds, houses or gardens, cornfields, enclosures of meadows, or shall maliciously destroy any property whatsoever belonging to the inhabitants of the United States, unless by the order of the then commander-in-chief of the armies of the said States, shall (besides such penalties as they are liable to by law) be punished according to the nature and degree of the offence, by the judgment of a regimental or general court-martial."

1. Where soldiers on a march in the enemy's country entered without authority the house of an inhabitant, and committed waste and seized and appropriated property therein; *held* (January, 1866)

that they were clearly chargeable with a violation of this article; and that it was no defence that such inhabitant was an active rebel, inasmuch as the article was evidently framed to punish such acts, under any circumstances, as breaches of military discipline. XVIII, 514.

2. The word "maliciously," used in this article, expresses the gist of the offence of destroying property specified therein. So where a court-martial, under a charge of a violation of this article, found the accused guilty only of "destroying property of an inhabitant of the United States," *excepting* specifically the word "maliciously," and then proceeded to sentence; *held* that, upon this exception being made, the accused became entitled to an acquittal upon the charge, the act of which he was convicted not constituting an offence under the article; and that the sentence was therefore unauthorized. XIV, 341.

*3. Where a subordinate officer, stationed at a military post at a town in Arkansas, proceeded, (in August, 1867,) on his own responsibility, and with the assistance of a force of soldiers, to destroy the presses, printing material, &c., of a newspaper published in the town; being incited thereto by the bitter and hostile assaults of the same upon the government, and by its obnoxious criticisms of the conduct of the troops at the post; *held* that he was legally convicted of a violation of this article; that however exasperating might be the strictures of a disloyal press in the locality mentioned, it did not rest with a subordinate officer aggrieved thereby to resort to a violent remedy, but was for the District Commander alone, in whom only was reposed the right of restraint, to dispose of the subject of offence, or of the offenders. XXV, 367.

FIFTY-SIXTH ARTICLE.

"Whosoever shall relieve the enemy, with money, victuals, or ammunition, or shall knowingly harbor or protect an enemy, shall suffer death, or such other punishment as shall be ordered by the sentence of a court-martial."

1. A citizen unconnected with the military service is triable by court-martial for a violation of this article. II, 498; XV, 136. See FIFTY-SEVENTH ARTICLE, (4;) MILITARY COMMISSION, II, (30.)

2. *Held* that the payment, by a resident within our lines, to citizens of an insurrectionary district and supporters of the rebel cause, of United States currency in exchange for a product of their soil, constituted a "*relieving of the enemy with money*" in the sense of this article; and for the following reasons: 1. The principle of the law of nations, that in a state of war not only the nations engaged, but also their subjects or citizens, become the *enemies* of each other, is applicable in its fullest sense, and has been held to be so applicable by the United States Supreme Court, to the present civil war.† The govern-

†NOTE.—See the Opinion of the Court, by GRIER, J., in the "Prize Cases," 2 Black, 666, (1862;) and by CHASE, C. J., in the cases of "Mrs. Alexander's Cotton," and "The Venice," 2 Wallace, 274, 418, (1864.) In the latter case, the Chief Justice—in a reference particularly to Louisiana and Mississippi, but applicable equally to all the rebel States—holds as follows: "The States were wholly under rebel dominion, and all the people of each State were enemies of the United States. 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."

mental organization of the seceded States is one the legal existence of which cannot be acknowledged by the government of the United States; it is merely such a *de facto* government as may exist among bandits or highwaymen. It is impossible to recognize any distinction between those who exercise official functions in the pretended body politic and the individuals who support them. Both are alike components of the treasonable resistance to the national authority, and are all *prima facie* to be looked upon, *en masse*, as enemies. The people of the insurrectionary States must therefore be held responsible both *in solido* and as individuals, for the conduct of the war, and any relief afforded to them in their private capacity is a relief to an enemy in the sense of the 56th article. 2. Apart from a consideration of this principle of international law, it must be perceived that it would altogether defeat the intention of the article to restrict its application to direct transactions with the rebel authorities or government. Upon such a construction the law would readily be evaded by carrying on such transactions through the agency of private individuals in all cases. Moreover, as it would be impracticable to follow the supplies to the actual possession of the government of the enemy, from whose lines we are excluded, or to procure from his territory witnesses to the fact that such supplies had reached him, it would ordinarily be impossible to prove that the relief was applied or attempted to be applied to the use of such government or its officers. Under the restriction indicated, therefore, the article would practically become a dead letter. 3. The fact that a valuable consideration is received for the money renders the payment no less a relief in the sense of the article. An enemy can be as effectually relieved by the transfer of articles which he does not need for the immediate support of his armies, and the receipt, instead, of the sinews of war—victuals, ammunition, or money—as he would be if the latter were bestowed without consideration. He is thus *absolutely relieved*, although the other party may have made a good bargain by the exchange. If it were held otherwise, any one, by accepting a consideration for money or articles furnished by him to the enemy, would escape the penalties of the law; and it would not be competent to enter into the question of the value of the consideration unless so grossly inadequate as to bear upon its face evidence of fraud. XIV, 266. And see XII, 385.

3. *Held* that parties resident in a northern State who were shown to have exchanged arms, ammunition, or money, with citizens of a rebel State for cotton furnished them by the latter, though upon private speculation, were triable by court-martial under this article; and that it was no defence that by getting out this cotton the parties were so far depriving the enemy of the chief means upon which he relied for maintaining the war. XVI, 446.

4. 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 special commodities by which any enemy in arms would be most directly relieved, and the latter including every kind of commercial intercourse. XIV, 266.

SEE COURT-MARTIAL, II, (15.)

FIFTY-SEVENTH ARTICLE.

"Whosoever shall be convicted of holding correspondence with, or giving intelligence to, the enemy, either directly or indirectly, shall suffer death, or such other punishment as shall be ordered by the sentence of a court-martial."

1. *Held* that it was not a *necessary* legal inference from an attempt to smuggle goods within the enemy's lines that the accused also gave intelligence to or had correspondence with the enemy. I, 343.

2. The objection of duplicity does not apply to a specification under this article, which sets forth both holding correspondence with, and giving intelligence to, the enemy, because both offences may consist in the same act. Both offences are consummated when the accused has written, and put in progress toward the enemy, a letter conveying intelligence to a person within their lines, and placed it beyond his power to recall it. IV, 368.

3. Under this article, as under the act of 25th February, 1863, chapter 60, ("to prevent correspondence with rebels,") it is essential only that the correspondence should have been commenced. It is not necessary that the letters should have reached their destination. V, 274. See V, 287.

4. Under this article a court-martial has jurisdiction of the cases of civilians as well as of persons in the military service. That this was the intention of the article is well ascertained by its history, and is evident, also, from the consideration that those who would be most likely to give intelligence to, and correspond with, the enemy in time of war, would be persons other than military, and that, therefore, in order to guard against such persons, it was necessary for Congress to enact this article as a "proper and necessary" measure for rendering effective the war-making power. V, 291. See MILITARY COMMISSION, II, 30.

5. The government has never regarded correspondence between citizens of the loyal and rebel States, when strictly confined to merely domestic affairs, as within the purview of the 57th article of war. II, 211. See CORRESPONDENCE WITH REBELS, I.

6. Writing and sending from within our lines, a letter to an officer of the rebel army, in which is expressed a personal regard for him and a solicitude on account of his wounds, as well as a request that he will accept a sword as a token of the writer's appreciation of his "noble deeds and daring bravery"—the sword itself being sent with the letter—*held*, a violation of the 57th article, in holding correspondence with the enemy. X, 567. See VIOLATION OF THE LAWS OF WAR, 8.

7. *Held* a violation of this article to have published, without authority, in a newspaper, the details of an important expedition about to be entered upon against the enemy, since such information must thus necessarily have come to the knowledge of the enemy, and the publisher must necessarily have contemplated such a result. XI, 526. And see General Order No. 67, of the War Department, of 26th August, 1861, announcing the same view and prohibiting such publications.

8. *Held* that the "correspondence with the enemy," referred to in this article, may be verbal as well as written ; but that it must be unauthorized. XIV, 273. See the General Order above mentioned, where it is declared, in construing this article, that the correspondence may be verbal or by signals.

SEE COURT MARTIAL, II, (15.)
FORMER TRIAL.
MILITARY COMMISSION, II, (6,) (30.)

SIXTIETH ARTICLE.

"All sutlers or retainers to the camp, and all persons whatsoever, serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war."

1. To restrict the term—"*serving with the armies of the United States in the field*"—to those persons only who may be employed with an army when immediately operating against the enemy, would be a construction not in accordance with the spirit of our military law, and not in keeping with the necessities of our military establishment. In view of the constant and pressing exigencies of the military service, of the manifold duties which our officers and soldiers are called upon to perform both at and away from the immediate front, and of the fact that the troops themselves are assigned to perform these indifferently and under the same rules of discipline and code of laws, it is deemed not too much to hold that *the entire army, as at present mobilized and actively employed for the prosecution of a civil war and for the suppression of a vast intestine rebellion, is an army in the field;* and that all persons engaged with it, whether in the camp or at a station, upon services made necessary or desirable by the wants and circumstances of the military body, are triable by a court-martial within the provisions of this article. So, *held* (March, 1865,) that an acting assistant surgeon, on duty at the depot of prisoners of war at Elmira, New York—a post established for an exclusively military purpose, occupied by a large body of troops, and necessarily subjected to the strictest military rule—was a person "serving with the army in the field" in the sense of the 60th article, and therefore triable by court-martial for a violation of the discipline and regulations of the post. XI, 493.

2. The fact that the army hospitals are a necessary provision for, and appendage to, the army in time of war ; that a large number of troops are usually congregated there as patients, guards, and employees; that the grounds occupied by them are frequently extensive and always under the control of military authority ; and that strict military discipline is necessary for the preservation of order, is deemed to constitute them a part of the present (March, 1865) army in the field, and to render contract surgeons serving at such hospitals, wherever situated, amenable to trial by court-martial under this article. XII, 376.

3. A contract nurse (serving at an army hospital in time of war)

held (March, 1865) within the provisions of the 60th article, and triable by court-martial. XIII, 459.

SEE SIXTY-SEVENTH ARTICLE, (5.)
CIVILIANS EMPLOYED WITH TROOPS.
COURT-MARTIAL, II, (4,) (6,) (7,) (10.)
MILITARY COMMISSION, II, (9.)
PAYMASTER'S CLERK.
RAM FLEET.
SLAVE, (2.)

SIXTY-FIRST ARTICLE.

"Officers having brevets, or commissions of a prior date to those of the regiment in which they serve, may take place in courts-martial and on detachments, when composed of different corps, according to the ranks given them in their brevets or dates of their former commissions; but in the regiment, troop, or company, to which such officers belong, they shall do duty and take rank both in courts-martial and on detachments, which shall be composed of their own corps, accordiny to the commissions by which they are mustered in the said corps."

* The term "when composed of different corps," as used in the 61st article of war and in paragraphs 6 and 10 of the Army Regulations, applies *both* to courts-martial and detachments. XXI, 356.

SIXTY-FOURTH ARTICLE.

"General courts-martial may consist of any number of commissioned officers, from five to thirteen, inclusively; but they shall not consist of less than thirteen where that number can be convened without manifest injury to the service."

1. Where, in the course of a trial, the number of the members of a general court-martial is diminished by the withdrawal or absence of a member or members, the court can still proceed with its business if five members remain. XVI, 549.

2. While less than five members cannot perform any judicial function as a general court-martial, yet they may perform such acts as are preparatory and necessary to the organization of the court. A court of less than five may adjourn from day to day; and if five are present, and one of them is challenged, the right of the four remaining to determine upon the challenge would seem necessarily to result. V, 319.

3. A general court-martial reduced to four members, and adjourning *sine die*, does not thereby dissolve itself. It may be reconvened at any time by the proper officer, who will then have authority to add to the detail such new members as the exigencies of the service may render proper. *Ibid.* See ADJOURNMENT, 4.

4. Where one member of a general court-martial composed of five members, on being challenged, asks leave to withdraw from a participation in the trial, and his request is granted, the court, being reduced below the minimum, cannot proceed with the trial. VII, 440.

5. If a general court-martial, at any time in the course of its judicial proceedings, as during the examination of the witnesses, has been temporarily reduced below the minimum number, the sentence imposed by it is void and inoperative. II, 448.

6. In view of the positive and explicit language of this article, (considered in connection with the opinion of Attorney General Wirt;

I Opinions, 296,) *held* that, where a general court-martial is *originally* constituted with less than thirteen members, an omission to add in the order convening it a statement to the effect that *no officers other than those named can be assembled without manifest injury to the service*, is fatal to the validity of the proceedings. The fact also that the use of this statement is prescribed by paragraph 883 of the Army Regulations, and is almost universal throughout the service, goes to show that it is not considered as a mere formality, but as an essential part of the order where the court is to consist of a number less than thirteen. Moreover, in view of the provision of the 75th article, that "no officer shall be tried by officers of an inferior rank if it can be avoided," the phrase in question may also be regarded essential as presenting the requisite evidence that officers of a superior rank (in case any of inferior rank to the accused have been placed upon the detail) could not have been selected; the words "no other officers" being well construable as indicating no officers of other (higher) rank, as well as no greater number. XI, 208; XVIII, 32. See XIII, 636. But the phrase is not requisite in an order convening a military commission. See MILITARY COMMISSION, I, 10.

But *advised* that a similar ruling is not to be adopted in the case of a *subsequent* order *relieving* a member without at the same time substituting another officer in his place. No instance has in fact ever been noted where it has been recited in such an order that no members other than those remaining could be assembled, &c., and the uniform usage of the service to relieve members in orders not containing a clause of this character should not at present be disturbed. XI, 208.

7. Where of a general court-martial of five members two were officers of the 2d United States volunteer infantry, (a regiment made up from rebel prisoners of war allowed to enter our military service,) who had received appointments as such from the President through the Secretary of War, but had not been formally mustered into the service, *held* (June, 1865) that the court was legally constituted, inasmuch as these officers, like officers of veteran reserves and colored troops, and unlike officers of State volunteers, were duly in the service upon such appointment and acceptance, without muster. XVI, 229; XII, 615; VIII, 584.

* 8. *Held*, (December 29, 1866,) that the proceedings of a general court-martial, of which one of the members was an acting assistant surgeon, were inoperative; such a person not being a *commissioned officer* in the sense of this article, and not qualified to sit upon a court-martial. XXII, 542.

SIXTY-FIFTH ARTICLE.

"*Any general officer commanding an army, or colonel commanding a separate department, may appoint general courts-martial whenever necessary. But no sentence of a court-martial shall be carried into execution until after the whole proceedings shall have been laid before the officer ordering the same, or the officer commanding the troops for the time being; neither shall any sentence of a general court martial, in the time of peace, extending to the loss of life, or the dismission of a commissioned officer, or which shall, either in time of peace or war, respect a general officer, be carried into execution until after the whole proceedings shall have been transmitted to the Secretary of War, to be laid before the President of the United States for his con-*

firmation or disapproval, and orders in the case. All other sentences may be confirmed and executed by the officer ordering the court to assemble, or the commanding officer for the time being, as the case may be."

(☞ The first *fifteen* paragraphs under this title are extracts of opinions given during that period of the rebellion when active hostilities were in progress, and are chiefly applicable to the state of the law and of the military organization at that time.)

1. Taking this article and the 896th paragraph of the Army Regulations together, it is clear that the law does not contemplate, in cases requiring the confirmation of the general commanding the army in the field, that the record should merely pass through the hands of the officer ordering the court, or his successor, but that he should formally act upon it, and should express such action on the record. The necessity of such action is in no way dispensed with by the provisions of the act of 24th December, 1861, chapter 3. II, 57, 62, 240; III, 177, 537.

2. The "army" which a general must command, under this article, in order to authorize him to convene a court-martial, must be held to mean a body of men under a military organization that is complete in itself, and does not exist as an integral part of some other organization. *Held* that the fact that a general, as provost marshal, commanded forty-seven companies, would not give him this authority, unless the command existed under some one of these three forms of military organization—separate brigade, division, or army. II, 177. See X, 538.

3. The general commanding the department of Washington is, in the sense of this article, "a general commanding an army," he having the command of forces under a separate military organization for the public defence; his right, therefore, to exercise in time of war the power of executing sentences of dismissal or cashiering is undeniable. V, 147.

4. 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-martial under the authority of this article. 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. VII, 237. 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 a corps of the army of the Potomac, a constituent part of a larger body. XI, 543.

5. Commanders of military divisions, (established under General Order No. 118 of the War Department of June 27, 1865,) composed of departments in which bodies of troops are serving, are commanders of armies in the field, and are authorized to confirm and execute sentences of death and dismissal. XVII, 196.

6. The fact that a general commands a "district" has nothing whatever to do with his authority to convene a court-martial, unless

such district shall amount to a separate military "department." It is the extent and character of his command in a military, and not a territorial, point of view which, in determining whether such command be actually an "army," a division, or a separate brigade, determines also whether he may call a court-martial. VII, 237.

7. A district command consisting of three brigades has all the elements of, and may be regarded as, a division, although designated as a "district;" its commander may, therefore, convene a general court-martial. XI, 506.

8. Where a department command was reduced to a district command and included in a new and enlarged department, *held* that the commander of the district was still empowered to take final action in cases (other than those of death or dismissal) tried by a military court convened by him as department commander prior to such reduction. XIX, 92.

9. Where the court was convened by the general commanding a "separate brigade," but pending the trial, and before the sentence had been adjudged, the brigade was merged in a division as a component part thereof, and ceased to be a separate organization, *held* that the brigade commander was not competent to act upon the proceedings, but that the division commander became the reviewing officer. VIII, 633.

10. Where the officer who convenes a court-martial has ceased, at the date of the sentence and termination of the proceedings, to exercise the command to which the accused belongs, the proceedings must be reviewed by his *successor* in such command. So, where, at the date of the conviction of a considerable number of enlisted men, their regiments and companies had been separated from the command of the general who convened the court, and had become attached to sundry brigades and divisions of a separate army, *held* that the proper reviewing officer in each case was the officer commanding the division, &c., to which the company or regiment of the accused was attached, and that the record in each case should be sent for review and action to such officer, he being, as far as that case was concerned, the *successor* of the general who convened the court. IX, 621.

11. Where, before action was taken upon the proceedings of a certain case, tried by a court duly convened by a district commander, and of which case such commander would have been the proper reviewing officer, the district command was discontinued and the district merged in a department, *held* that it devolved upon the department commander to review and act upon the proceedings as "*successor in command*," in the sense of this article, of such district commander. XX, 153. And see XX, 194.

12. Where, before the proceedings of a division court-martial had been reviewed by the division commander who had convened the court, the division organization was abandoned and the command was reorganized as a "separate brigade and district," under a different commander, *held* that the latter, as the "*successor*" of the former commander, was the proper officer to review the case, the regiment of the accused being a part of the new command. XIII, 298.

13. The universal interpretation of this article, in connection with the act of December 24, 1861, is, that no sentence of a military court can be carried into effect without the approval or upon the disapproval of the division, &c., commander. His disapproval is, in law, a termination and final disposition of the case. It is his power to finally confirm and execute sentences which alone is limited by law in certain cases. VI, 299; XII, 394.

14. The result of all the legislation, in regard to the action to be taken upon the proceedings of military courts, is to leave the approval and confirmation of department or army commanders, as such, essential only in capital cases and those of the dismissal of commissioned officers, while the enforcement of all other sentences is placed within the scope of the authority of the officer convening the court or his successor in command, under no restrictions except those set forth in the 65th and 89th articles. XV, 158.

15. The state of war inaugurated by the rebellion must survive in full force until such rebellion shall be formally announced to be terminated by some statutory or other proper official declaration to that effect by the political authority of the nation. So, *held* that a commanding officer in the field—who was the proper reviewing officer—was not justified in declining to act upon a sentence of dismissal on the ground that, as active hostilities had ceased, the state of war no longer existed. XX, 192. See STATE OF WAR.

16. The simple indorsement, "forwarded," is not a sufficient compliance by the reviewing officer with the requirements of this article, and of paragraph 896 of the regulations, as an expression of his *action*, and *decision* upon the case. II, 99; VII, 476. So of a mere *recommendation* that the proceedings be approved by the superior officer to whom they are forwarded. IX, 50, 54.

17. Where the record has been lost before it can be laid before the proper reviewing officer, to wit, "the officer ordering the court or the officer commanding the troops for the time being," the informal approval, subsequent to the loss, by this officer, contained in a letter, cannot stand for the approval required by the article. III, 503.

18. A major general commanding a department convened a court with an officer of the same rank upon the detail, who as presiding officer authenticated the record of a certain case. Before reviewing this case, the general commanding was relieved, and was succeeded in the command by an officer of the rank of brigadier general; *held* that the fact that the presiding officer of the court was of a rank superior to the new commander could in no way affect the question of the power or duty of the latter to approve or disapprove and act upon the proceedings, as the "*successor in command*" of the officer who convened the court, and therefore the proper reviewing officer of the case under the provisions of the 65th article of war. XIII, 390.

* 19. No principle of law is better established than that the Secretary of War, in ordering a court-martial in any case, and again in acting upon its proceedings, represents the President whose executive agent he simply is in the matter. So where it was objected to

the validity of a sentence, by an officer who had been dismissed by a court-martial convened by authority of the President, that such sentence was published as confirmed "*by order of the Secretary of War*," and that thus the requirement of the 65th article—that the proceedings in such a case shall be "laid before the *President* for his confirmation or disapproval and orders in the case"—had been disregarded; *held* that such objection could not be sustained. XXIII, 654.

SEE EIGHTY-NINTH ARTICLE.
REVIEWING OFFICER, (5)
SEPARATE BRIGADE, (10.)

SIXTY-SIXTH ARTICLE.

"Every officer commanding a regiment or corps may appoint, for his own regiment or corps, courts-martial, to consist of three commissioned officers, for the trial and punishment of offences not capital, and decide upon their sentences. For the same purpose, all officers commanding any of the garrisons, forts, barracks, or other places where the troops consist of different corps, may assemble courts-martial, to consist of three commissioned officers, and decide upon their sentences."

1. The commanding officer of an arsenal is not authorized to convene a garrison court-martial, unless his command consist of different corps. VIII, 483.

2. The commanding officer of a draft rendezvous has no authority *as such* to convene a court-martial. But as a draft rendezvous, where not strictly a "garrison" or "barracks," may properly be included in the designation, "*or such other place*," used in the article, the commander may convene a garrison court-martial, if the troops under his command consist of "different corps." XIV, 48.

3. The commanding officer of a garrison, (consisting of different corps within the sense of the article,) though a line officer, may, in the absence of any field officer, convene a garrison court-martial. VIII, 483.

4. The limitation in this article, expressed in the phrase, "where the troops consist of different corps," is *general*, and does not apply merely to "places" other than "garrisons, &c.," notwithstanding the erroneous punctuation in some copies of the Army Regulations. VIII, 483.

* 5. The commander of the engineer battalion, established by the act of July 28th, 1866, is a commander of a "corps" in the sense of the 66th article of war, and is authorized to convene the court described in the first part of said article. XXII, 497.

6. It was declared by Major General Scott, in General Order No. 5, of January 18th, 1843, that the presence on duty with a garrison, post, &c., of an *ordnance sergeant*, empowered the garrison, &c., commander to convene a court-martial under the second paragraph of this order, on the theory that his command thus consisted of "different corps." (See XXVI, 254.) Subsequently, on August 8, 1850, it was ruled by the same authority that the fact that an *officer of the medical department* of the army was stationed with such command, conveyed a like authority. These decisions are understood to be the origin of the doctrine that the mere fact of the presence on duty with the

garrison, &c., and as a substantive part thereof, of a single representative of a corps or branch of the service other than that of which the bulk of the command is composed, is sufficient to fix upon the body the character of one "*consisting of different corps,*" and to empower the commanding officer to assemble a court-martial. (See VII, 175; XIV, 48; XXI, 118.) In accordance with these decisions, it has been held by this bureau that the presence, as part of a garrison composed of infantry, of an *assistant commissary of subsistence*, would bring the command within the provisions of the article, as consisting of different corps. VII, 174. But *held* that the presence on duty at Watervliet arsenal of a *civil physician*, acting as surgeon, and of a *hospital matron*—these being civil employees of the government—was not of itself sufficient to authorize the commander of the arsenal to order a court-martial for the trial of soldiers there stationed. VIII, 483.

* 7. That the president or any member of a regimental court has succeeded the regimental commander in the command of the regiment, cannot authorize him to act as reviewing officer and "decide upon" the sentences. In such case the next higher commander in authority should take action. XXIV, 440.

* 8. For any officer, who has become the commander of a garrison, to take action as such upon the proceedings of a garrison court in a case upon the trial of which he had been a member of the court, would be manifestly unauthorized and illegal. XXIII, 602.

* 9. Where a post commander detailed a garrison court-martial consisting of himself and the only two other officers on duty at the post; *held* that the proceedings of such court—although not acted upon by such post commander, but by his superior, the regimental commander, to whom they were forwarded by the former—were wholly irregular and void. XXIV, 263.

* 10. While no judge advocate is required by law for a garrison or regimental court, it is a custom of the service for the junior member to perform the usual duties of such an officer on the court. XXVI, 314.

* 11. The recorder or judge advocate of a regimental or garrison court-martial should regard himself as counsel for the accused, in precisely the same manner and to the same extent as the judge advocate of a general court-martial is required to act as such counsel. XXVI, 344.

* 12. It should properly appear in the record of a regimental or garrison court—just as in that of a general court-martial—by *whom*, whether by the judge advocate, the accused, or a member of the court, the several interrogatories are propounded to the witnesses. XXVI, 344.

* 13. *Held* that the most strictly technical and accurate method of qualifying the officers of a regimental or garrison court-martial would be the following, viz: for the junior of the three members (who by the custom of the service, is the proper person to act as judge advocate of such court) to administer the oath to all the members, (the two others and himself,) *as members;* and for the senior member

thereupon to swear the junior member as judge advocate. Although for a party to administer an oath to himself is an unusual proceeding, yet the 69th article does not appear to authorize the administering of the oath to members of a military court except by the "judge advocate or person officiating as such." (See Benét, page 93, where it is held that the junior member and recorder of a regimental or garrison court should properly include himself in administering the oath to the members.) XXI, 334.

* 14. It is immaterial whether all the three members of a garrison or regimental court sign the record, or only the senior member who acted as president and the junior member who acted as recorder. The authentication by the president and recorder only has been the usual practice. XXIV, 540.

* 15. It is not essential to the validity of an order convening a regimental or garrison court, that it should be specified therein that it is not practicable to convene a field-officer's court in the command. It is well and proper, however, that such fact should be made to appear in the order. XXIII, 517.

* 16. Under paragraph 898 of the Army Regulations, which requires that "the proceedings of garrison and regimental courts-martial will be transmitted without delay by the garrison or regimental commander to the department headquarters for the supervision of the department commander," such a commander is authorized to set aside the proceedings of a garrison court so forwarded to him, without a reference to the War Department. XXV, 442.

* 17. Under the provisions of section 5, ch. 201, act of July 17, 1862; and of the acts of June 20, 1864, ch. 146, sec. 6, and July 28, 1866, ch. 299, sec. 12; the records of regimental and garrison courts-martial (equally with those of *general* courts-martial) are to be transmitted to the Judge Advocate General for review and file. IV, 537.

See FIELD OFFICER'S COURT, (1,) (21,) (31.)

SIXTY-SEVENTH ARTICLE.

"No garrison or regimental court-martial shall have the power to try capital cases, or commissioned officers; neither shall they inflict a fine exceeding one month's pay, nor imprison, nor put to hard labor, any non-commissioned officer or soldier, for a longer time than one month."

1. Regimental and garrison courts-martial have no jurisdiction to try cases of violation of the 9th article of war, because any of the crimes mentioned therein may he punished with death. II, 189; XXIV, 195; XXVI, 533.

* 2. A regimental or garrison court has—equally with a general court-martial—jurisdiction of the offence specified in the 45th article of war; the same not being punishable capitally. Whether a soldier charged under this article should be brought to trial before a court of the former class, or a general court-martial, must depend upon the gravity of the offence. If the act is one involving a comparatively slight misconduct the punishment which the inferior court would have it in its power to impose would probably be adequate to the occasion; if the drunkenness, however, is attended with circumstances

of aggravation, calling for a severe penalty, the general court would properly be resorted to. XXVI, 533.

* 3. Where a *larceny* is committed by a soldier under such circumstances as to constitute it a violation of the 99th article, a regimental or garrison court would not ordinarily be an appropriate tribunal for the trial of the offender, inasmuch as it would not be competent to impose an adequate punishment. In such a case a general court-martial should be resorted to. XXVI, 487.

4. It has been the usage of the service to try the lighter grades of the offence of absence without leave before a regimental or garrison court-martial; but a commanding officer should guard against submitting a case of this nature to such court, if the punishment called for would be likely to be beyond the authority of such court to inflict. VII, 36.

* 5. A regimental or garrison court-martial is deemed to have, by virtue of the 60th and 67th articles of war, jurisdiction, equally with a general court-martial, of an offence, not capital, committed by a "retainer to the camp," as well as a soldier. An offence, however, of the graver kind, when committed by a "retainer," should, like such an offence when committed by a soldier, be referred for trial to a general court-martial. XXIII, 632.

* 6. In view of the restriction of this article, as to the punishment which may be imposed by a regimental or garrison court, *held* that such court would not be authorized to reduce to the ranks a non-commissioned officer in a case in which the result of such a sentence would be to deprive the accused of more than one month's pay. The court could not be empowered to do indirectly what it is forbidden to do directly. XXI, 560.

See FIELD OFFICER'S COURT (21.)

SIXTY-NINTH ARTICLE.

"The judge advocate, or some person deputed by him, or by the general, or officer commanding the army, detachment, or garrison, shall prosecute in the name of the United States, but shall so far consider himself as counsel for the prisoner, after the said prisoner shall have made his plea, as to object to any leading question to any of the witnesses, or any question to the prisoner, the answer to which might tend to criminate himself; and administer to each member of the court, before they proceed upon any trial, the following oath, which shall also be taken by all members of the regimental and garrison courts-martial:

"'You, A. B., do swear that you will well and truly try and determine, according to evidence, the matter now before you, between the United States of America and the prisoner to be tried, and that you will duly administer justice, according to the provisions of "An act establishing rules and articles for the government of the armies of the United States," without partiality, favor, or affection; and if any doubt should arise, not explained by said articles, according to your conscience, the best of your understanding, and the custom of war in like cases; and you do further swear that you will not divulge the sentence of the court until it shall be published by the proper authority; neither will you disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence thereof, as a witness by a court of justice, in a due course of law: so help you God.'

"And as soon as the said oath shall have been administered to the respective members, the president of the court shall administer to the judge advocate, or person officiating as such, an oath in the following words:

"'You, A. B., do swear that you will not disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence thereof, as a witness, by a court of justice, in due course of law; nor divulge the sentence of the court to any but the proper authority, until it shall be duly disclosed by the same: so help you God.'"

1. *Held* that the disclosure, made in a record, of the vote or opinion of each member of a court-martial upon one specification, was a clear violation of the oath prescribed alike for the court and the judge advocate. II, 59. Such disclosure would not, however, affect the validity of the sentence.

2. A statement in the record that all the members concurred in the sentence, while it does not vitiate the sentence, is a direct violation of the obligation imposed upon the court by their oath. II, 76.

3. Until the court is sworn it is incompetent to perform any judicial act. The arraignment of the prisoner and the reception of the plea before the court is sworn are wholly irregular. These are certainly a part, and a most important part, of the trial. II, 114; IX, 293; XI, 323.

4. Until arraignment the charges are not properly before the court. So, where, after certain charges had been served upon an accused, the court was duly organized and sworn, in the usual form, to well and truly try and determine the matter before them; and thereupon, without proceeding further, adjourned; and subsequently also adjourned several times without arraignment; and meanwhile quite new and other charges were served, and the accused finally arraigned and tried upon these; *held* that it was not necessary that for such trial the court should have been *re-sworn*. XVII, 301. See CHARGE 23.

5. The presence on a court-martial, during the hearing of part of the testimony, of a member who has not been sworn as such, is a grave and fatal irregularity. VIII, 37; X, 563. Where a member came into court after the conclusion of the first day's proceedings, and remained and took part in the subsequent business and deliberations of the court without having been sworn, *held* a fatal irregularity. XIV, 350.

* 6. After a trial had been entered upon, and the testimony of several witnesses had been introduced, the accused was required by the judge advocate to plead to an additional specification, alleging a distinct offence, and of which he had had no previous notice. The trial then proceeded, and the accused was convicted upon the new specification as well as upon the one on which he had been originally arraigned. *Held*, that the proceedings were fatally irregular; not only because the accused was thus deprived of his right to due notice of the charge and to an opportunity for preparing his plea and defence, but also because the court, having been originally sworn to try and determine *the matter before them*, could not legally pass upon a new offence charged and introduced into the case after the arraignment; for as to the trial of such offence it would be acting without the sanction of the judicial oath. XXIV, 513.

SEE SIXTY-SIXTH ARTICLE, (13.)
NINETY-NINTH ARTICLE, (19.)
CHARGE, (23.)
JUDGE ADVOCATE, (1.)
MILITARY COMMISSION, I, (12.)
RECORD, IV, (1,) (2,) (3,) (4;) V, (5,)
REVIEWING OFFICER, (4.)
SWEARING THE COURT, &c.

SEVENTY-FIRST ARTICLE.

"When a member shall be challenged by a prisoner, he must state his cause of challenge, of which the court shall, after due deliberation, determine the relevancy or validity, and decide accordingly; and no challenge to more than one member at a time shall be received by the court."

1. *Held* good ground for the challenge of a member of a court-martial, that he preferred the charges and was also a material witness on the trial. II, 584. But the mere fact that a member is to be a witness on the trial, is not sufficient ground of challenge.

2. The fact that the officer who preferred the charges was also a member of the court and a witness upon the trial, would not *per se* invalidate the proceedings; but the fact that a member has preferred the charges and is proposed to be introduced as a witness, (although his testimony may not be necessary,) certainly constitutes a good ground of challenge. And where a challenge made to such a member was disallowed by the court, which went on to try, convict, and sentence the accused, *held* that such disallowance was good ground for the disapproval of the proceedings and sentence. XX, 18. But see 6.

3. *Held* good cause of challenge against a member (in this case, the *president*) of a court-martial, that he signed the charges and was the colonel of the regiment to which the accused (an officer) belonged. But if he had not been challenged, it would not have invalidated the sentence that he sat upon the trial. VIII, 534. But see 6.

*4. The fact that a member of a court is commanding officer of the company to which the accused is attached, does not render him ineligible to sit upon trial; this fact, however, is a ground for challenge, to be allowed or not by the court, according as the relations of the member and the accused may induce the presumption that the former may be prejudiced in the case. XXII, 631.

*5. *Held* a sufficient cause of challenge to a member, that he was an inferior officer to the accused in the same *regular* regiment, in the line of promotion, and thus interested in his conviction. XXIV, 555. But *held* that it was not sufficient ground of challenge that the member and the accused were both captains in the same regiment of *volunteers*, the former being junior in rank to the latter. The interest that such a junior captain would have in the dismissal of his senior, as removing an officer entitled before himself to promotion, is deemed too remote to be regarded as disqualifying such member from sitting on the court; the rule in regard to promotions in the *regular* army (paragraphs 19 and 20 of the Army Regulations) not applying to *volunteer* officers or organizations. V, 96.

6. One who signs the charges is *prima facie* an accuser, and may be rejected as a member of the court, on challenge. But where the officer who subscribed the charges stated to the court that he had no knowledge of the facts of the case, and that his name had been appended by order of his superior officer, *held* that his being allowed to sit as a member, though objected to, did not affect the validity of the proceedings. IX, 258.

7. Where a member, upon being challenged for bias, but not interrogated, by the accused, made a formal statement to the court that he

had no prejudice or interest whatever in the case on trial, *held* that the court was justified, in the absence of clear evidence to the contrary, in overruling the challenge. XVII, 405.

8. The practice of receiving the statement of a challenged member without putting him under oath may be regarded as irregular, though it is not uncommon. The accused, by not interposing an objection to this manner of statement, waives the irregularity. IX, 258.

* 9. A general court-martial before being sworn is invested with no judicial authority, but is empowered to pass upon all cases of challenge. If the accused requires (as he has a right to do) that a member challenged by him shall be put upon his *voir dire*, the court cannot, of course, administer the oath to such member; but the judge advocate, who is not a member, can do so, and it is his duty, and he is the only proper person, to administer such oath. XXIV, 555.

10. Where a member of a court-martial, being challenged and examined under oath as to his having formed any opinion upon the merits of the case—which was one of alleged disobedience of an order of a general commanding, by a regimental commander—admitted, in reply to an interrogatory of the accused, that he might have said, upon hearing of the case by report, that the order in question should have been obeyed in the first instance, and protest made afterwards, but stated that he had neither formed nor expressed any opinion as to the actual guilt or innocence of the accused, *held* that, in declining to allow the challenge, the court was justified by the weight of legal authority. XVI, 604.

* 11. Where a member of the court who was to be, and actually was, a witness on the trial, was challenged by the accused, who objected that the member had expressed hostile feelings towards him and was prejudiced against him, but offered no evidence whatever to establish the existence of such feeling or prejudice, *held* that the challenge was properly overruled. XXIV, 584.

* 12. A member on being challenged for prejudice, declared that he did not consider the accused (an officer) a gentleman, and would not associate with him, and that he had stated so; but he added at the same time that he was not prejudiced for or against him; *held*, especially as one of the charges against the accused was "conduct unbecoming an officer and a gentleman," that the challenge was improperly overruled by the court. XXIV, 584.

13. Where a court of seven was convened to try A, and five of the seven had been members of a court which had just tried B for his complicity in the same acts as those charged against A, but had not proceeded to its findings in the case, *held* that the five members could not be regarded as having "formed and expressed an opinion," and that a challenge to their competency to sit upon the trial of A was not improperly disallowed. XX, 93.

* 14. While a general court-martial, consisting in part of a member or members of a previous court of inquiry, convened to investigate the same charges as those upon which the accused is brought to trial, would not necessarily be a tribunal incompetent in law, there is no principle better established than that a challenge by the accused of

such member or members should be allowed; and the disallowance of such a challenge would constitute sufficient ground for disapproving the proceedings and sentence of the court. XXIII, 406.

SEE SIXTY-FOURTH ARTICLE, (2,) (4.)
SEVENTY-FIFTH ARTICLE, (1.)
RECORD, IV, (6;) V, (2,) (8,) (9.)
TRIAL, (7.)

SEVENTY-FOURTH ARTICLE.

"On the trial of cases not capital, before courts-martial, the deposition of witnesses, not in the line or staff of the army, may be taken before some justice of the peace, and read in evidence; provided the prosecutor and person accused are present at the taking the same, or are duly notified thereof."

A justice of the peace, applied to to take the deposition of a witness under the provisions of this article, should provide for his own reasonable compensation by requiring the same to be paid in advance, or otherwise; but where he has not done so, his bill of fees, properly certified by the judge advocate, should ordinarily be presented to the local quartermaster by whom are settled the allowances of the members of the court, reporter, &c. XXI, 169.

SEE DEPOSITION, (2,) (5.)

SEVENTY-FIFTH ARTICLE.

"No officer shall be tried but by a general court-martial, nor by officers of an inferior rank, if it can be avoided. Nor shall any proceedings or trials be carried on, excepting between the hours of eight in the morning and three in the afternoon, excepting in cases which, in the opinion of the officer appointing the court-martial, require immediate example."

1. Whether the trial of an officer by officers of an inferior rank can be avoided, or not, is a question not for the accused or the court, but for the officer convening the court; and his decision upon this point, as upon that of the number of members to be detailed, is conclusive. An officer, therefore, cannot challenge the detail, or any member or members thereof, because, *merely*, of being of a rank inferior to his own. III, 82.

2. This article is imperative upon the point that no proceedings of trials shall be carried on after 3 o'clock p. m., (or before 8 o'clock a. m.,) except in cases which, in the opinion of the officer appointing the court, "require an immediate example." Where, therefore, the record shows affirmatively that the court continued in session after 3 o'clock p. m., or was in session before 8 o'clock a. m., and sets forth no authority from such officer requiring or permitting it, the proceedings must be held irregular, and the sentence invalid. VII, 433; II, 123; XXIII, 627.

* 3. The article, however, does not require that the *record* itself shall *show* that the *hours* indicated were observed. In view of the absence of such a requirement, and of the general principle of law in regard to records, that where there is no evidence to the contrary appearing on the face of the proceedings, it is to be *presumed* that the same are regular; *held* that it was not necessary that the record of a court-martial, not authorized to sit "without regard to hours," should exhibit the hours of meeting or adjournment. XXII, 635. It will

be presumed, in the absence of evidence to the contrary, that a court did *not* sit beyond the hours prescribed by the 75th article. XXIII, 627.

See SIXTY-FOURTH ARTICLE, (6.)

SEVENTY-SIXTH ARTICLE.

"No person whatsoever shall use any menacing words, signs, or gestures in presence of a court-martial, or shall cause any disorder or riot, or disturb their proceedings, on the penalty of being punished, at the discretion of the said court-martial.

The power of a military court to punish by summary arrest for contempts is confined to those committed in its immediate presence. Such court cannot arrest an officer for a disobedience to its lawful commands, committed when absent from its session, as for a contempt. It should in such case apply for redress to the convening officer, or to the Secretary of War. V, 172.

See WITNESS, (23.)

SEVENTY-SEVENTH ARTICLE.

"Whenever any officer shall be charged with a crime, he shall be arrested and confined in his barracks, quarters, or tent, and deprived of his sword by the commanding officer. And any officer who shall leave his confinement before he shall be set at liberty by his commanding officer, or by a superior officer, shall be cashiered.

1. *All* violations of the regulations or discipline of the service are not "crimes," in the sense of this article. V, 52.

2. It cannot properly be deemed a breach of arrest for an officer in formal arrest and deprived of his sword and his command, not to follow his company or regiment into an engagement. V, 122.

3. As the offence of breach of arrest is one which, under this article, involves a most serious punishment, it is believed that it should not generally be charged except upon some determined and decided violation of the order of arrest, in the nature of a deliberate contempt of the authority issuing it. *Ibid.* See VI, 620.

4. There can be no technical breach of arrest and violation of this article, except in case of a close arrest and confinement in "barracks, quarters, or tent." VII, 141; XXV, 518. But see NINETY-NINTH ARTICLE, 18.

5. Where, for a violation of this article, the accused is sentenced to be cashiered *and* to a forfeiture of pay, the sentence is not altogether inoperative, but is valid as to the cashiering, and void only as to the forfeiture. VIII, 296. See FORTY-FIFTH ARTICLE, 3; SEVENTY-SEVENTH ARTICLE, 5; SENTENCE, I, 17.

6. Where a command is transported by railway from one station to another, but a considerable portion of the officers (with all the officers' horses) proceed by the ordinary country road, *held* not to constitute a breach of arrest for a field officer, who is in arrest at the time, to accompany on horseback the party of officers, &c., travelling by the ordinary road. It is sufficient if, under such circumstances, he accompanies a substantive portion of the command, and so remains with it as not to render himself liable to the imputation of treating with contempt or deliberate disregard the order of arrest. XI, 127.

See NINTH ARTICLE, (1.)

EIGHTY-THIRD ARTICLE.

"Any commissioned officer convicted before a general court-martial of conduct unbecoming an officer and a gentleman, shall be dismissed the service."

1. Making a false official report to a superior officer, where the offence is not within the purview of the Eighteenth Article, would ordinarily properly be chargeable as "conduct unbecoming an officer and a gentleman." I, 365.

2. *Held* that a surgeon who appropriated to his own personal use, and to that of his private mess, the food furnished by the government for his hospital patients, was, in the just sense of the words, guilty of "conduct unbecoming an officer and a gentleman." II, 33.

3. To constitute an offence, in the sense of this article, the conduct need not necessarily be "scandalous and infamous." These words, which were used in the article as originally adopted in 1776, and revised in 1786, were dropped upon the adoption of the article as it now stands, in 1806. II, 52.

4. Simple disobedience or disregard of the orders of a superior officer, without circumstances of peculiar aggravation, is not properly laid under this charge. III, 107.

5. To justify proceedings under this article it is not necessary that the officer's conduct should have any connection with the military service. It is enough that it is morally wrong, and compromises his personal honor. V, 148; XXIV, 555. The act charged need not have been committed when the officer was "on duty." See NINETY-NINTH ARTICLE, 16.

*6. 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. XXIII, 164.

*7. It having been officially reported to this bureau for its consideration that at a certain southern city there were issued by the inhabitants, to the officers of the army stationed there, invitations to social entertainments, in which it was stipulated that, in case of acceptance, the officer should appear without his uniform; *advised*, (March, 1866,) that for an officer to accept such an invitation and conform to such a condition would be to renounce his nationality and degrade his profession, and would properly subject him to trial by court-martial upon a charge of "conduct unbecoming an officer and a gentleman." XXI, 293.

8. Although 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, (see XXVI, 551;) yet when the neglect is accompanied by such circumstances of fraud, deceit, denial, &c., as to amount to dishonorable conduct, it may properly render him amenable to trial under this article. XIII, 425.

9. 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 chargeable under this article. XIII, 207.

* 10. An officer was charged with "conduct unbecoming an officer and a gentleman," with eight specifications setting forth the non-payment of debts, accompanied by false promises, evasions and misrepresentations. The evidence sustained the allegations, and showed that, through the dishonorable indifference of the accused to his pecunary obligations, and through the annoying complaints of his creditors at the headquarters of his command, great discredit and scandal had been brought upon his regiment. *Held* that he was properly charged under this article, and that his conviction and dismissal upon such charge were fully authorized. XXIII, 564.

* 11. While an officer could not be tried under this article for a borrowing of money from an enlisted man, though under discreditable circumstances, where such borrowing took place more than two years before; yet if he continued persistently to neglect or refuse to repay the amount, he might, ordinarily, upon any specific occasion of such positive neglect or refusal, properly be charged with an offence under this article; it being alleged in the specification, in aggravation and explanation, that he had always continued so to neglect and refuse. Whether an officer who has not paid a debt may be charged under this article must depend upon the question whether his default has been under the circumstances *dishonorable*. And repeated and persistent refusals to pay an acknowledged debt, continued through a considerable period of time, during which the officer has no just reason to deny payment, may well be regarded as evincing a settled intention not to pay, if it can be avoided, and as constituting dishonorable conduct, unbecoming an officer and a gentleman. XXI, 635.

12. An officer who wrote a letter to a dealer in counterfeit currency giving him an order for a quantity of the currency to be furnished himself, enclosing the price therefor, and proposing to purchase a larger amount at some future time; *held*, chargeable with the offence designated by this article. VIII, 430.

* 13. Where certain officers of a colored regiment engaged in 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. XXIII, 260; XXIV, 72.

* 14. Where an officer appeared in uniform at a theatre drunk, and conducted himself in such a disorderly manner as to attract the attention of officers and soldiers who were present, as well as the audience generally; *held* that he was properly convicted of a violation of this article. XXV, 479. See NINETY-NINTH ARTICLE, 16.

15. An officer would be properly chargeable under this article for a violation of the *parole of honor*, described in par. III of General Order No. 207 of July 3, 1863. XVI, 207.

16. The article requires that, upon conviction, the sentence shall be dismissal. A sentence to be dismissed, to forfeit all pay, and to be forever disqualified from holding office under the government, is valid only as to the dismissal. The remainder of the sentence is irregular and inoperative. IV, 283; IX, 672. See FORTY-FIFTH ARTICLE, 3; SEVENTY-SEVENTH ARTICLE, 5; SENTENCE, I, 17. A sen-

tence of imprisonment at hard labor, under a charge of a violation of this article, *held* invalid. XIV, 330.

SEE SEVENTY-FIRST ARTICLE, (12.)
CHARGE, (13.)
FINDING, (17.)
PAROLE, (4.)
PLEA, (21.)
SENTENCE, III, (17.)

EIGHTY-FIFTH ARTICLE.

"In all cases where a commissioned officer is cashiered for cowardice or fraud it shall be added in the sentence that the crime, name, and place of abode, and punishment of the delinquent be published in the newspapers in and about the camp, and of the particular State from which the offender came, or where he usually resides; after which it shall be deemed scandalous for an officer to associate with him."

*1. The requirement of this article in regard to the publication of the sentence is positive and mandatory, and cannot legally be disregarded. XXII, 508.

*2. This article requires that "in all cases where a commissioned officer is cashiered for cowardice or fraud it shall be added in the sentence that the crime, name and place of abode, and punishment of the delinquent be published in the newspapers in and about the camp, and of the particular State from which the offender came, or where he usually resides." The specific charge, "cowardice" is one which rests rather upon custom than strict law, the offence being described in the 52d article as "misbehavior before the enemy." The loose and indefinite charge expressed in the single word "fraud" is also; (except in the case of contractors, inspectors, &c.—see acts of July 17, 1862, ch. 200, sec. 16, and of July 4, 1864, ch. 253, secs. 6 and 7; but see also *note* under CONTRACTOR;) by no means technical or accurate. The article, therefore, is deemed to include all cases where either "cowardice" or "fraud," though not specifically charged in terms, is *necessarily involved* in the offence which *is* charged; and in such cases to require the addition to the sentence of the publication clause. (See VI, 239.) The article, in requiring the publication to be made in the two classes of cases only, is deemed to preclude the same, by implication, in all other cases. It would therefore be altogether irregular and improper to add it in any case of conviction of an offence which did not clearly and *necessarily* involve either fraud or cowardice. XI, 671.

EIGHTY-SEVENTH ARTICLE.

"No person shall be sentenced to suffer death but by the concurrence of two-thirds of the members of a general court-martial, nor except in the cases herein expressly mentioned; nor shall more than fifty lashes be inflicted on any offender, at the discretion of a court-martial; and no officer, non-commissioned officer, soldier, or follower of the army shall be tried a second time for the same offence."

(In regard to the repeal of so much of this article as authorizes punishment by flogging, see FORTY-FIFTH ARTICLE, 5.)

1. Proceedings commenced against the accused, but abandoned without formal acquittal or conviction, do not constitute a "trial," and he cannot plead, on a second arraignment for the same offence, that he has once been tried on the same charge. V, 192.

2. Under the constitutional provision which declares that "no person shall be subjected for the same offence to be twice put in jeopardy of life or limb," it has been held in the United States courts that the jeopardy spoken of "*can be interpreted to mean nothing short of the acquittal or conviction of the prisoner and the judgment of the court thereon.*"† A party, therefore, who has been arraigned before a court-martial on charges and specifications to which he has pleaded, cannot, in the sense of this article, be regarded as having been "tried" upon them unless the government has pursued the case to a final acquittal or conviction. V, 272. See VI, 62; VIII, 37.

3. A withdrawal of any charge may be made by the judge advocate, with the assent of the court, before judgment; and upon such charge, if the interests of public justice require it, the party may be again arraigned, he not having been tried thereon in law. V, 213. See NOLLE PROSEQUI.

4. Where the accused was arraigned upon one set of charges and these charges were withdrawn, and others, somewhat different, were substituted, and the accused was then rearraigned upon the second set before the same court; *held* that there had been no former trial which could properly be pleaded by him in bar. XIX, 222.

5. An officer who has been arraigned before a court which, before the finding, has been dissolved in consequence of becoming reduced below the requisite number by the withdrawal of members from the command, may be brought to trial before a new court. VI, 62. See XI, 190.

6. A party cannot be ordered to be tried by court-martial a second time for the same offence because the reviewing officer deems the sentence inadequate; VII, 17; or because of his disapproval of it merely. IX, 611.

7. A party has not been "put in jeopardy" when the court which tried him was without jurisdiction; or was not a competent tribunal to pass upon his case, as where a volunteer was tried by a court composed in part of regular officers. IX, 261. See XVIII, 214.

*8. Where the reviewing officer finally dissolved a court-martial because, after deliberating upon the testimony, it had found itself wholly unable to agree upon a finding; *held* that the case was analogous to that of a jury dissolved because of a hopeless disagreement; that there had been no trial, in law, of the accused; and that he might properly be again arraigned upon the same charges before a new court. XXV, 73. See *United States* vs. *Perez*, 9 Wheaton, 579.

SEE FORMER TRIAL.
MILITARY COMMISSION, I, (13.)
TRIAL, (8.)

†NOTE.—United States *vs.* Haskill, 4 Wash. C. C. R., 409. And see United States *vs.* Shoemaker, 2 McL., 114; United States *vs.* Gibert, 2 Sum., 19; United States *vs.* Perez, 9 Wheat. 579; also Opinion of Attorney General Wirt, I Opinions, 294.

EIGHTY-EIGHTH ARTICLE.

"No person shall be liable to be tried and punished by a general court-martial for any offence which shall appear to have been committed more than two years before the issuing of the order for such trial, unless the person, by reason of having absented himself, or some other manifest impediment, shall not have been amenable to justice within that period."

1. Although under section 2, ch. 67, act of 2d March, 1863, an officer discharged or mustered out of the service may be brought to trial by court-martial for the offences specified in section 1 of the same chapter, yet the order for the trial must be issued (in accordance with the provisions of this article) within two years from the date of the offence, unless some legal obstacles intervene. XV, 133; XII, 536, 481; XXI, 4.

2. The provision of section 11, ch. 200, act of 17th July, 1862, to the effect that an officer released from arrest for the causes therein set forth may be tried at any time within twelve months after such release, is not to be construed as doing away with the limitation of the 88th article, which prohibits a court-martial from assuming jurisdiction of a case when the order therefor has been issued more than two years after the date of the offence, and no legal obstacle has intervened. The provision is in fact an enunciation of the principle that the mere arrest of an officer, with a view to his trial upon charges, shall be sufficient to give a court jurisdiction of his person; and the result of such principle is not to abridge the period during which an officer may be tried as specified in the article, but to extend it in those cases where, before the expiration of the two years, an actual arrest has been made with a view to a trial which some emergency of the service has necessarily deferred. XVI, 548.

* 3. *Held* that, in view of the limitation of this article, an officer could not properly be brought to trial in September, 1866, for borrowing money from an enlisted man under supposed discreditable circumstances in August, 1864; but which proceeding, without fraud or deceit on his part, had not been brought to the knowledge of his superiors till the former date. The mere fact that his action at the period of the alleged offence had remained thus unknown to them, would not be, in law, such an "impediment" as to constitute an excepted case within the meaning of the article. XXI, 635. But see EIGHTY-THIRD ARTICLE, 11.

EIGHTY-NINTH ARTICLE.

"Every officer authorized to order a general court-martial shall have power to pardon or mitigate any punishment ordered by such court, except the sentence of death, or of cashiering an officer, which, in the cases where he has authority (by article 65) to carry them into execution, he may suspend, until the pleasure of the President of the United States can be known, which suspension, together with copies of the proceedings of the court-martial, the said officer shall immediately transmit to the President for his determination. And the colonel or commanding officer of the regiment or garrison where any regimental or garrison court-martial shall be held, may pardon or mitigate any punishment ordered by such court to be inflicted.

1. The class of cases referred to by this article as exceptional are those in which the sentence is not disapproved, but, because of some mitigating circumstances, is formally suspended until the pleasure of the President, in the exercise of the pardoning power, can be known.

Where a sentence is formally disapproved by the proper reviewing authority, it is thenceforth inoperative, and the case cannot be submitted to the President under this article, as there remains nothing for him to act upon. II, 50.

2. Under this article the power of mitigating or commuting a sentence of death or dismissal is expressly withheld from the general commanding the army in the field. If he deems it proper to be mitigated, he must suspend its execution to await the pleasure of the President. II, 67.

3. As the reviewing officer has no power to pardon or mitigate the sentence in the two classes of cases referred to in this article, he should, if he *disapproves* the sentence, be careful to do so, not because of circumstances justifying, in his opinion, a pardon or mitigation of the punishment, but upon grounds which go to the legality of the sentence. II, 70. See II, 134.

4. The act of December 24, 1861, required, as a condition to the enforcement of death sentences and sentences of dismissal, that they should receive the confirmation of the General commanding the army in the field. But this power to confirm does not necessarily import the power to pardon or mitigate. On the contrary, by a reference to this article and the 65th, it is found that, while the power to execute sentences in these classes of cases exists in time of war, the authority to mitigate or pardon is expressly withheld. There were doubtless good reasons for providing that in cases of such gravity the clemency of the government should be dispensed by the President alone. II, 125. (The act of December 24th, 1861, is limited in its operation to "time of war.")

5. Section 21, chapter 75, of the act of March 3, 1863, which authorizes generals commanding armies *in the field* to execute the sentence of death in certain cases, does not give them authority to mitigate the sentence. When the general has approved the sentence, he must either carry it into execution or suspend its execution, under this article, to await the pleasure of the President. II, 168; VII, 422.

6. The power to mitigate sentences extending to loss of life or the dismissal of an officer is virtually in the President alone, except in the cases specified in section 21, of chapter 75, of act of 3d March, 1863, which gives to the General commanding the army *in the field*, in approving the sentences, the power to carry them into execution. The execution of a sentence of death which has been approved by the General commanding is *necessarily* suspended by the provision of section 5, chapter 201, of the act of July 17, 1862, until the pleasure of the President may be known. II, 175.

☞ *But see, in modification of the decisions in the preceding six paragraphs, the act of 2d July, 1864, chapter 215, section 2, giving to commanders of departments and armies in the field the power to remit or mitigate sentences of death or dismissal,* DURING THE REBELLION.

7. In suspending the execution of a sentence under this article, the commanding general must formally *confirm* the sentence, and not merely "forward" the proceedings without more. IV, 337.

8. General Order No. 76, of 1864, which authorized generals commanding to restore to their regiments deserters under sentence, (and which applied as well to sentences existing at its date as to those pronounced thereafter,) did not at all modify the 89th article of war in regard to the power of pardon and mitigation; but simply, in the particular class of cases named, empowered the General commanding to act in the stead of and by the express direction of the President, in the exercise of the pardoning power. VII, 422.

SEE SIXTY-FIFTH ARTICLE,
APPEAL, (1.)
FIELD OFFICER'S COURT, (32.)
LOST RECORD, (3.)
NEW TRIAL, (1.)
PRESIDENT AS REVIEWING OFFICER, (1,) (2,) (4.)
SENTENCE, II, (6.)

NINETIETH ARTICLE.

* * * * * *"The party tried by any general court-martial shall, upon demand thereof, made by himself, or by any person or persons in his behalf, be entitled to a copy of the sentence and proceedings of such court-martial."*

1. Under this article a copy of the record of a general court-martial can properly be furnished only to the accused or to one who applies therefor in behalf of the accused and at his instance. A person other than the accused who applies on his individual account is not entitled to such copy. XIX, 318; XXI, 12.

2. The *brother* of an officer who has been tried by court-martial is not necessarily his agent, and where he does not show, in requesting a copy of the record, that he acts in the name of the latter, or by his authority, he is not entitled to have it furnished him. III, 348. The application, when made by an *agent*, should be in the name of the accused, and in his behalf. III, 409.

3. One making an application for a copy of a record, and subscribing himself merely as attorney at law, without indicating that he was the attorney of the accused, or showing in any way that his application was made in the behalf of the latter—*held* not entitled to be furnished with such copy. XIX, 459.

*4. A party applying in behalf of "friends and creditors" of the accused, held not *entitled* to a copy of the record of his trial. XXI, 583.

*5. The accused cannot be furnished with a copy of the proceedings until final action is taken thereon and such action has been promulgated by the proper reviewing authority. XIX, 624; XXI, 386.

*6. As only the party tried, or some person acting in his behalf, as his authorized agent or attorney,) is *entitled* to be furnished with a copy; no *other* person can obtain such a copy, except by the express authority of the Secretary of War, to whom a special application must be addressed for the purpose. (See OFFICIAL RECORDS OF THE GOVERNMENT, 3.) A party *entitled* to the copy may apply therefor directly to the Judge Advocate General, by whom it will be forwarded, free of expense for copying. XIX, 635. But where a *second* copy is applied for, it will be furnished only upon payment of the usual copying charges. XXV, 526; XXVI, 569.

*7. A party entitled to a copy of the record of a trial is not entitled to be furnished with a copy of the review thereof, or report thereon, of the Judge Advocate General—the same being no part of the proceedings, but belonging to the confidential archives of the War Department. XIX, 657. See OFFICIAL RECORDS OF THE GOVERNMENT.

SEE NINETY-SECOND ARTICLE, (3)

NINETY-FIRST ARTICLE.

"In cases where the general or commanding officer may order a court of inquiry to examine into the nature of any transaction, accusation, or imputation against any officer or soldier, the said court shall consist of one or more officers, not exceeding three, and a judge advocate, or other suitable person as a recorder, to reduce the proceedings and evidence to writing, all of whom shall be sworn to the faithful performance of their duty. This court shall have the same power to summon witnesses as a court-martial, and to examine them on oath. But they shall not give their opinion on the merits of the case, excepting they shall be thereto specially required. The parties accused shall also be permitted to cross-examine and interrogate the witnesses, so as to investigate fully the circumstances in the question."

*1. It follows necessarily from the language of this article that the party accused is entitled to be present before a court of inquiry during the taking of the testimony, and to interrogate the witnesses. XXIII, 506.

2. A court of inquiry may, if so required, express an opinion upon the facts found; but such opinion can have in no way the effect of an adjudication, but amounts, at most, to a recommendation merely. If an opinion *is* expressed by such court, the accused, upon a subsequent trial by court-martial of the charges investigated by the court of inquiry, cannot plead a former trial, acquittal, or conviction; for the proceedings before the latter tribunal were not a *trial.* He can, however, put in evidence such proceeding, subject to the proviso of the 92d article of war. XVI, 389.

3. Where an officer has been dishonorably discharged by the President, or is otherwise out of the service, he is not entitled to have a court of inquiry granted him. I, 395, 402. An officer of volunteers legally mustered out of the service cannot demand a court of inquiry to investigate acts done by him while in the service. XIX, 71.

SEE NINETY-SECOND ARTICLE, (1.)

NINETY-SECOND ARTICLE.

'The proceedings of a court of inquiry must be authenticated by the signature of the recorder and the president, and delivered to the commanding officer, and the said proceedings may be admitted as evidence by a court-martial, in cases not capital, or extending to the dismission of an officer, provided that the circumstances are such that oral testimony cannot be obtained. But as courts of inquiry may be perverted to dishonorable purposes, and may be considered as engines of destruction to military merit, in the hands of weak and envious commandants, they are hereby prohibited, unless directed by the President of the United States, or demanded by the accused."

1. To determine what authority may convene a court of inquiry, the 91st and 92d articles of war must be construed together; and the uniform ruling has been that the President alone can convene such court, except where it is demanded by an accused party in his own case. In the latter instance such court may be convened by the order of such superior officer as might properly call a court-martial for the trial of the accused. V, 590.

2. A record of a court of inquiry not duly authenticated in accordance with the requirements of this article, *held* not admissible in evidence upon a trial before a military commission. VII, 60.

3. A copy of the record of a court of inquiry is not to be furnished to parties or their attorneys, &c., as a matter of *right*, as is a copy of the record of a court-martial. It is to be formally applied for to the Secretary of War, who will furnish it in a proper case, and where public considerations do not require that its contents shall not be disclosed. I, 427. See OFFICIAL RECORDS OF THE GOVERNMENT.

NINETY-FIFTH ARTICLE.

"When any non-commissioned officer or soldier shall die, or be killed in the service of the United States, the then commanding officer of the troop or company shall, in the presence of two other commissioned officers, take an account of what effects he died possessed of, above his arms and accoutrements, and transmit the same to the office of the Department of War, which said effects are to be accounted for, and paid to the representatives of such deceased non-commissioned officer or soldier. And in case any of the officers, so authorized to take care of the effects of deceased officers and soldiers, should, before they have accounted to their representatives for the same, have occasion to leave the regiment or post, by preferment or otherwise, they shall, before they be permitted to quit the same, deposit in the hands of the commanding officer, or of the assistant military agent, all the effects of such deceased non-commissioned officers and soldiers, in order that the same may be secured for, and paid to, their respective representatives."

Where a soldier dies intestate, and property of his which, under this article, would go to his representatives, is claimed by a third party, the latter, in the absence of conclusive proof as to his interest therein, can only properly assert it by himself administering, or causing administration to be made by some other person, upon the estate. VII, 283.

NINETY-SEVENTH ARTICLE.

"The officers and soldiers of any troops, whether militia or others, being mustered and in pay of the United States, shall at all times and in all places, when joined or acting in conjunction with the regular forces of the United States, be governed by these rules and articles of war, and shall be subject to be tried by courts-martial, in like manner with the officers and soldiers in the regular forces; save only that such courts-martial shall be composed entirely of militia officers."

1. Regular officers detailed, and sitting upon general court-martial, as volunteer officers of higher grade, may try volunteers. I, 466. But only when holding commissions in the volunteer service. II, 504.

2. A general court-martial has unquestionably the right to try regular soldiers, though all its members are officers in the volunteer service. II, 34.

3. Volunteer officers may be associated with regular officers on courts-martial for the trial of regulars. II, 150.

4. Drafted men or substitutes, (who have not been assigned to regular regiments,) not belonging to the "regular forces," in the sense of this article, are entitled to be tried by courts-martial composed entirely of "militia" officers; which term is held to embrace officers of the *volunteer* service. V, 105. See IX, 198. See 6.

5. A court composed of regular officers cannot try a volunteer officer, though a regular officer may be tried by a court of volunteers. *Held*, therefore, (November, 1863,) that a mixed court, composed of officers belonging to the regular army, to the volunteer service, and

to the Invalid Corps, (regarded as part of the latter,) was authorized to try regular officers only. V, 320. See 8.

6. The words "militia officers," as employed in this article, have been interpreted, since the commencement of the rebellion, as synonymous, so far as the organization of courts-martial is concerned, with volunteer officers. This construction undoubtedly accords with the spirit of the article, and in its practical enforcement the object of the rule is accomplished. (November, 1863.) V, 321, 105; II, 504; XI, 354.

7. The fact that an officer of regulars has been commissioned as aide-de-camp to a governor of a State cannot qualify him to sit upon a court-martial for the trial of volunteers in the United States service. It is only militia officers, who are actually in the United States service, *as such*, that can properly be constituted members of such a court. But the aide-de-camp, though a militia officer, is not in the service as such, but is merely an officer of the State militia organization. In that capacity he can sit upon the trial of no officer or soldier other than those of the State militia not in the United States service. VII, 51.

8. *Held*, (November, 1864,) that officers of the veteran reserve corps could not be tried by a court-martial composed in whole or in part of officers of the regular army, this corps being regarded as a part of the volunteer force. XI, 121. See XI, 267. So *held*, (December, 1864,) of officers of "United States Colored Troops." XI, 267.

NINETY-NINTH ARTICLE.

"All crimes not capital, and all disorders and neglects which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing Articles of War, are to be taken cognizance of by a general or regimental court-martial, according to the nature and degree of the offence, and be punished at their discretion."

1. A capital offence cannot be charged under this article. I, 473. See VII, 429, 465; XI, 176. See 26.

2. The "*crimes*," the "*disorders*," and the "*neglects*," referred to in this article, are such only as affect the order or discipline of the military service. The words, "to the prejudice of good order and military discipline" describe and limit the words "all crimes not capital," as well as the words "all disorders and neglects." VIII, 590.

*3. In time of peace, the crime of "theft," "larceny," or "stealing," (as it is variously charged.—See 20, 21,) is chargeable under this article, where it affects the order or discipline of the service. Thus stealing from a fellow-soldier, by an enlisted man, has been held properly so chargeable; so stealing from an officer; and stealing of public funds. XXIV, 441. XXVI, 23, 439, 487. And so of any other crime, not capital, the commission of which clearly prejudiced the order or discipline of the service. See MANSLAUGHTER, 2; PERJURY, 4. But where a crime, not specially brought within the jurisdiction of a military court by some other article of war or other statute, does *not* affect, or prejudice, military order or discipline, it can be taken cognizance of, in time of peace, only by the State or local criminal courts. (See THIRTY-THIRD ARTICLE.) But, by sec. 30, ch.

75, act of March 3, 1863, "*in time of war, insurrection, or rebellion,*" the crime of larceny (as also the other principal crimes and felonies, capital and otherwise, mentioned in that act) is made punishable by a military court, when committed by a person in the military service—in all cases and irrespective of its affecting the discipline of the army. See XXVI, 439, 487. And see similarly as to *Robbery*, XIII, 453.

4. *Held* that the offence of manufacturing courterfeit money, committed by an enlisted man, under circumstances not affecting the discipline of the service, was not properly chargeable under this article. II, 566. See COURT-MARTIAL, II, 9. So, *held* that an attempt by an enlisted man to pass, at a shop in Washington, a counterfeit United States treasury note, was not a "disorder" in the sense of this article. XI, 521.

5. Culpable malpractice by a surgeon in the United States service, in the treatment of an officer or soldier, might ordinarily properly be regarded as a neglect in the sense of this article. II, 378.

6. A *forgery* committed by an enlisted man, in signing the name of a *fellow-soldier* to a certificate of indebtedness to a sutler, thereby attempting to make such soldier liable for a debt which he had himself contracted, is a "disorder" within the meaning of this article, of which a court-martial may take cognizance. IX, 328.

7. Where certain men of a regiment procured at a discount from brokers their own pay, as also pay for a considerable number of others and at their instance, and, in turning over their pay to the latter, charged them therefor a still higher rate of discount, which, however, was voluntarily paid; *held* to be a disreputable proceeding, but, inasmuch as growing out of a private pecuniary transaction, *not* an offence so connected with the military service as to render it a "*disorder*" or "*neglect*" chargeable under this article. XI, 490.

8. An officer or soldier is not triable under this article for a mere neglect or refusal to pay borrowed money to a fellow-soldier or citizen, where the obligation is a private affair and not due from the party in his military capacity, nor one affecting the service. The government will not interfere between creditor and debtor in such a case. XVIII, 380. But see EIGHTY-THIRD ARTICLE, 8, 9, 10, 11.

9. Where a surgeon and medical purveyor was interested in marginal contracts for the purchase and sale of gold, (the same requiring but small capital and resulting in small profits;) *held*, that however such trafficking was opposed to a scrupulous sense of moral obligation, yet it did not amount to a specific military offence for which a charge could be preferred under this article. But *advised*, that as this officer was one charged with the disbursement of public moneys, a remedy should be found in his assignment to other duty. XVII, 22.

10. An enlisted man who had once been discharged from the service for physical and mental unfitness; *held*, not amenable to a charge of "conduct to the prejudice," &c., for consenting to be enrolled again as a soldier, when he was induced to do so by the misrepresentations of an unscrupulous recruiting officer, who assured him that he was not acting improperly. VI, 203.

11. A soldier who escaped from confinement while under sentence; *held*, chargeable with a violation of this article; such offence being made by the common law a felony where the original commitment is for felony or treason, and a misdemeanor where the commitment is for a less offence. X, 574. See ESCAPE, 2.

12. *Held* that an enlisted man would properly be chargeable under this article for a violation of the *parole of honor* described in par. 3 of General Order 207, of July 3, 1863. XVI, 207.

* 13. Where certain soldiers, discarding the uniform of the United States, dressed in that of a Fenian association, and attended without authority one of its festivals, at which they bore arms and were drilled with an armed company; *held*, (October, 1867,) that they were properly brought to trial upon a charge of "conduct to the prejudice of good order and military discipline." XXVI, 83.

14. An officer *held* triable under this article for procuring fraudulent enlistments to be made and bounties to be paid thereon; as well as for collusion with others in this offence. XIV, 326.

15. An officer, though not on duty, is amenable under this article for grossly disorderly conduct affecting the discipline of the service. VIII, 366.

* 16. *Held*, that the offence of drunkenness, in presence of enlisted men, committed by an officer *not on duty* at the time, was properly charged under this article. XXIV, 79. If accompanied by conduct of a gross or shameful character, such offence might be chargeable under the 83d article as being "unbecoming an officer and a gentleman." See EIGHTY-THIRD ARTICLE, 14.

* 17. Where an officer accepted compensation for his services in recruiting colored soldiers, from a northern State agent authorized to procure such recruits in Mississippi in 1864, and was tried and convicted of such act as an offence in violation of this article; *held* that his conviction was authorized and proper; that it was the duty of every officer to aid the government in filling up the ranks of the army, and that for an officer on duty as such in the field, to engage in the business of recruiting for a pecuniary consideration, was to prejudice the order and discipline of the army. XXIII, 147.

* 18. While an officer in arrest may not be charged with a technical breach of arrest, in violation of the 77th article, unless "confined in his barracks, quarters, or tents," he may, when not so confined, be under certain circumstances chargeable with such an infraction of the order of his arrest as to constitute an offence not under the 77th but under the 99th article. Thus if, instead of being in close confinement he should be allowed certain limits, as those of the post or camp, and he should so far and in such a manner exceed those limits as to prejudice the good order and discipline of the command, he would properly become liable to a charge of a violation of the general article. XXVI, 394.

* 19. In view of the general tenor of the provisions of the 69th article, and of the obligations attaching to the officers of a military court, it would be held a highly irregular and improper proceeding

for the judge advocate or a member to disclose the *findings* of the court before the same were published by the competent reviewing authority, and such a disclosure would properly subject the officer making it to be brought to trial upon a charge of "conduct to the prejudice of good order and military discipline." XXI, 628.

20. A disorder manifestly comprehended in the provisions of the 99th article may be charged by its name, instead of as "conduct to the prejudice of good order and military discipline," though the latter is the regular form of pleading it. VII, 485. See IX, 328.

21. It is a sufficient pleading under this article, if the particular disorder complained of is distinctly and specifically set forth in the charge, and is clearly, although it is not expressed to be, "to the prejudice of good order and military discipline." Thus "using disloyal language," *in time of war*, by an officer or soldier, is properly pleaded as a charge of a disorder in the sense of this article, without the addition of the customary words of description used therein. VII, 545; XI, 228.

22. Where a soldier was charged with, and convicted of, "*burglary*," in entering a sutler's tent and taking goods therefrom, but the offence charged and proved was not burglary at common law—*held*, that the charge might properly be regarded as a good and sufficient one under this general article, and the conviction thus sustained. XVI, 316.

23. A general finding of guilty on a charge expressed as "disobedience of orders" merely, with its specifications setting forth a refusal or neglect to comply with the order of a non-commissioned, and therefore not, in the sense of the ninth article, a "superior" officer, may be supported as a valid conviction. This, in the view that such charge and specification, taken together, may be deemed to constitute a sufficient pleading of a disorder under the 99th article; and upon the rule of construction observed in regard to the pleadings and proceedings before military courts, that a legal effect is to be given thereto, when the same are not clearly fatally irregular under the articles of war or usage of the service. XVI, 551. See NINTH ARTICLE, 3, 4.

24. If the conduct set forth in the specification be such as to tend to the prejudice of good order and military discipline and lead naturally to it, it is not necessary that any overt breach of discipline or act of open disorder or violence should be proved or found to have grown out of the act charged. So *held* that a court, in striking out in its finding, from a specification, (otherwise sufficient,) under a charge against an officer of a violation of this article, the concluding words, "and did thereby excite and cause a spirit of dissatisfaction and complaint among the men of his command," did not invalidate their conviction of the accused upon the charge and specification. XX, 24.

25. *Held* that the statute, section 12, chapter 191, of July 7, 1838, which provides that captains and employees of steamboats, guilty of carelessness, &c., resulting in loss of life, shall be triable for *man-*

slaughter, did not apply to the case of a United States quartermaster who ordered the transportation of troops upon a steamer known by him to be unsafe, and the boiler of which afterwards exploded, destroying life; moreover, that such officer was not (under the rulings of the United States circuit court in *United States* vs. *Warner*, 4 McLean, 464) chargeable with manslaughter at common law; but that he was properly to be charged with "neglect and violation of duty, to the prejudice of good order and military discipline." XV, 301.

26. The death sentence cannot be adjudged for the commission of a disorder comprehended within this article, although charged by its specific name, and not generally as "conduct to the prejudice," &c. VII, 485. See 1, 14, 15.

See SIXTH ARTICLE, (1.)
NINTH ARTICLE, (4.)
THIRTY-FIRST ARTICLE.
THIRTY-EIGHTH ARTICLE, (2.)
THIRTY-NINTH ARTICLE, (2.)
FORTY-FIFTH ARTICLE, (1,) (2,) (3.)
SIXTY-SEVENTH ARTICLE, (3.)
CHARGE, (13.)
CONTRACTOR, II, (11,) (12,) (13.)
COURT-MARTIAL, II, (5,) (9.)
FINDING, (17,) (18,) (19,) 20,) (21,) (22,) (23.)
FREEDMEN'S BUREAU.
PAROLE, (4.)
PERJURY, (3.)
SENTENCE, I, (25.)

ABANDONED PROPERTY OF THE ENEMY.

See CLAIM, II, (12.)
OCCUPATION OF REBEL ESTATE, (3.)
PRIZE, (3.)
REDUCTION TO THE RANKS, I, (1.)
SALVAGE, (2.)

ABSENCE WITHOUT LEAVE.

1. Where an officer, on his return from an unauthorized absence, was, with a knowledge of all the facts on the part of his commanding officer, put upon full duty by the latter, and continued on duty with his company for a period of four months—*held*, that the general custom of the service, making such action of his superior a complete defence to this charge, applied to his case. II, 376. See II, 391.

2. "Absence without leave" is distinguished from desertion, in that it must be accompanied with an intention of returning to the service. VIII, 109.

3. The amendment of paragraph 158 of the Army Regulations, published in General Order No. 16, of the War Department, of February 8, 1865, providing that soldiers convicted of absence without leave shall make good the time lost by their absence in the same man-

ner as deserters, is not retrospective in its operation. XII, 402; XVII, 46; XV, 160.

SEE TWENTY-SECOND ARTICLE.
SIXTY-SEVENTH ARTICLE, (4.)
BOUNTY, (6.)
DESERTER, (1.)
DISMISSAL, I, (8.)
FIELD OFFICER'S COURT, (22,) (23.)
FINDING, (5,) (9,) (10,) (11,) (33.)
LESSER KINDRED OFFENCE, (3.)
MAKING GOOD TIME LOST BY DESERTION, &c., (1.)
PAY AND ALLOWANCES, (23,) (24,) (25.)
REDUCTION TO RANKS, (4,) (6.)
REWARD FOR ARREST OF DESERTER, (1.)
SENTENCE, II, (1.)
SPECIFICATION, (9.)
STOPPAGE, (4.)
VETERAN VOLUNTEER, (1.)

ABSENT MEMBER.

1. Upon the authority of the ruling in Brigadier General Hull's trial, (1814,) an absent member can properly resume his seat, and take part in the trial, without affecting the validity of the proceedings. VII, 467, 411; VIII, 692. This ruling was made by the court pursuant to an opinion given by Hon. John Armstrong, then Secretary of War, whom the court, through Hon. Martin Van Buren, special judge advocate, had addressed, asking to be advised upon certain points raised at the trial. VII, 467. Such a practice is, however, to be discouraged, and is not favored by late writers. VII, 128.

2. The member, on resuming his seat, should be made acquainted with all the testimony introduced during his absence. The questions to, and answers by, the witnesses, with all the other evidence, should properly be read over to, or by, him in detail. VII, 411. (It is of course to be understood that there can be no such thing as the resuming of his seat by a member who has temporarily absented himself from the court, in a case where, by his withdrawal, the court has been reduced below the legal minimum of five members, and is consequently no longer competent to proceed with the trial. See XXV, 640; SIXTY-FOURTH ARTICLE, 1, 2, 3, 4, 5.)

ACCEPTING BRIBES.

SEE BRIBERY.

ACCOMPLICE.

1. When one accomplice is admitted to testify on behalf of the government against another, he is called to the stand under an implied promise of pardon on condition of his making a full disclosure of the whole truth, whether or not there be an express understanding to this effect. Having performed the condition in good faith, although his testimony fail to convict his associate, he is nevertheless entitled, not indeed to an immediate discharge, but to a recommendation for pardon, and to have his own trial suspended and all proceedings against him stayed until his application for such pardon can be presented and

acted upon. Thus, where it appeared that one who had been tried and sentenced for a military offence had previously been used as a witness upon the trial of an associate in the same crime as that upon which he had himself been convicted, and that he had testified fully thereon—*held*, notwithstanding the acquittal of the former, that the trial and sentence of the latter should be treated as irregular, and that no further action should be taken in his case until the question of his pardon was decided by the President. XIV, 259. See XI, 590.

*2. A rebel emissary, arrested at St. Louis, Missouri, for a violation of the laws of war, was promised by the provost marshal general of the military department an immunity from punishment, provided he would give information of other rebel agents—his accomplices—concerned in similar acts, so that they might be brought to justice. This he engaged to do, and at the same time signed a parole by which he bound himself not to leave St. Louis without the permission of the military authorities. Soon after, he clandestinely left St. Louis by agreement with the brother of a prisoner against whom he was an important witness, and, proceeding to New Orleans, attempted to escape to Havana. *Held*, that the promise made to him was conditional, and that, by his faithlessness in not regarding the conditions, he had forfeited all claim to pardon, and was properly brought to trial and convicted for his original offence. XXI, 280.

See EVIDENCE, (16,) (17,) (18.)

ACCUSER OR PROSECUTOR.

(Act of May 29, 1830, chapter 179, section 1.)

1. Where a general officer commanding an army made out the subject-matter of the charges, and placed it in the hands of the judge advocate, *held* that he must be deemed an "accuser or prosecutor," within the sense of section 1 of the act of May 29, 1830, and that he could not legally convene a court-martial for the trial of the officer charged. I, 430.

2. The objection that the officer who convenes the court is the "accuser," &c., of the party tried, is not in the nature of a plea in abatement, which should be presented at an early stage of the proceedings; but it is one which calls in question not merely the jurisdiction of the court, but its existence as a legally organized tribunal, and may be interposed at any time before or after sentence. *Ibid.* See VIII, 38.

3. An objection made by the accused, during the progress of the trial, to proceeding further without knowing by whom the charges were drawn or advanced, should not be overruled. Every officer on trial is entitled to this information, since without it he cannot know whether the court has been legally constituted or not. I, 430.

4. The fact that the judge advocate who signs the charges is a member of the staff of the general who convened the court, does not, of itself, render the latter an "accuser or prosecutor" in the sense of the act of May 29, 1830, nor would the mere fact that the trial of the accused was ordered by such general have that effect. VII, 5.

5. It is not always an answer to the objection that the court is

convened by the "accuser" of the party on trial, to show that the charges are signed by an officer *other than* the one who convenes the court, and who does not subscribe himself as a staff officer or representative of the latter. A distinction between the characters of "accuser" and "prosecutor" is apparently contemplated by the statute, in the use of the disjunctive "*or;*" and such distinction is founded upon considerations of policy and justice. For it may sometimes occur that while the "prosecutor" of record is a certain officer, the actual "*accuser*" is really quite another; as where the prosecutor and *apparent* accuser is a staff officer, though he may not subscribe himself as such, while the true accuser is the general commanding. VIII, 38.

6. Where the copy of charges and specifications served upon the accused by the judge advocate, on the evening before the trial, was signed "A. B., lieutenant colonel and assistant inspector general —— army corps. By order of Major General C. D.," and this general was the officer who convened the court, *held* that he was the real accuser in the case, and that the proceedings and sentence were invalid and inoperative, although the charges, &c., as they appeared in the record, were without any signature whatever. VIII, 291.

7. Where an army commander having received specific instructions from the Secretary of War to bring to trial a certain officer for a designated offence, instructed a subordinate (division) commander, who was cognizant of the facts of the offence, to place such party in arrest and prefer charges against him, and thereupon himself proceeded to convene a court-martial for his trial, *held* that he was not to be deemed in any sense an accuser or prosecutor in the case, and that the court convened under such circumstances was a legal tribunal. Further, that the action of the army commander afforded no grounds for the unusual and extraordinary measure demanded by the accused, of *enjoining* such commander from finally reviewing and promulgating the proceedings. XIV, 285.

8. So, where a department commander preferred, through a staff officer, the charges, and also convened the court, but convened it by the express order of the Secretary of War, *held* that the assembling of the court was the act of the Executive, and not that of the commander, and that such court was, therefore, a legal tribunal. XIX, 339.

ACTING ASSISTANT SURGEON.

SEE SIXTY-FOURTH ARTICLE, (8.)
CONTRACT SURGEON.
OATH OF OFFICE.

ADDITIONAL AIDES-DE-CAMP.

Held, (December, 1864,) that the *additional aides-de-camp* authorized by the act of August 5, 1861, are a part of the regular army. They are appointed by the President and confirmed by the Senate, and the act creating them provides that they shall "bear the *rank* and *authority* of captains, majors, lieutenant colonels, or colonels *of the regular army.*" Moreover, this act is expressly entitled as "*supplementary*" to the act to increase the military establishment of the United States, of a prior date of the same year, which provides for

an increase of the *regular army* by the addition of new regiments. And although the act of 1861 provides for the appointment of these officers only during the rebellion, and for their discharge when not employed in active service, and their reduction in number at the discretion of the President, yet provisions of a similar character, applicable to regular officers, are found in the principal act to which this is supplementary. XI, 267.

SEE DISMISSAL, II, (1.)

ADDITIONAL CHARGE.

SEE SIXTY-NINTH ARTICLE, (4,) (6.)
CHARGE, (9,) (10.)
TRIAL, (7.)

ADJOURNMENT.

1. The adjournment from day to day of a military court need not be authenticated by the signatures of the president and judge advocate. VIII, 507.

* 2. While the practice of noting the adjournment of the court at the end of the record of a trial is a usual and proper one, and is often of much service in indicating the sequence of the cases tried and the course and order of the business transacted, a statement of such adjournnment is not an essential part of the record of proceedings, and may be omitted altogether without affecting their validity. XXIII, 627.

3. If the order convening a military court is in the more usual form, requiring it, generally, to try such cases as may be brought before it, an adjournment at some period of its sessions without a day fixed for its reassembling will not preclude its meeting again and continuing its sessions till its business is terminated. XXI, 91.

* 4. An adjournment "*sine die*" of a court-martial has no more legal effect than an ordinary adjournment from day to day ; it does not dissolve the court, since a military court has no power to terminate its own existence. See SIXTY-FOURTH ARTICLE, 3. XXI, 679; XXVI, 588. If, subsequently to an adjournment *sine die*, the reviewing authority desires that a case should be tried by the court, it is not necessary for him to formally reconvene it. He has but to refer the case for trial to the judge advocate, whose duty it thereupon is to notify the members to reassemble. When thus assembled they will proceed precisely as after an adjournment for a day or days. The reference may indeed be made to the president of the court, instead of the judge advocate; or the members may be notified separately, and either verbally or otherwise, to attend. The form by which the court is assembled is immaterial. To call it together, however, through the judge advocate, as above indicated, is the most approved method. XIX, 628.

* 5. The matter of adjournment is altogether within the discretion of the court-martial, which is the proper judge of the reasons for and the duration of an adjournment in any case. XXII, 502.

SEE SIXTY-FOURTH ARTICLE, (1,) (2,) (3.)
SIXTY-NINTH ARTICLE, (4.)

COURT-MARTIAL, I, (4.)
MEMBER OF MILITARY COURT, (4.)
POSTPONEMENT.
RECORD, I, (6.)

ADJUTANT.

Held, (April, 1865,) that an extra first lieutenant of volunteer cavalry, holding the position of adjutant, might properly be relieved as such by his regimental commander and assigned to duty with a company ; and this, though he was actually mustered into service as first lieutenant and adjutant. For such muster is irregular; existing laws and regulations authorizing neither the commissioning nor mustering of an adjutant, *as such*, in cavalry. XV, 125.

AFFIRMATION.

SEE JUDGE ADVOCATE, (14.)

AIDE-DE-CAMP.

* The act of 29 July, 1861, secs. 3 and 6, authorized, among other things, the increase of the military establishment by "four major generals with three aides-de-camp each ;" such increase "to be for service during the existing insurrection and rebellion." The act of July 28, 1866, provided that there should be in the peace establishment of the army "five major generals," with the same number of staff officers "as now provided by law." As the rebellion certainly continued till August 20th, 1866, the date of the proclamation of the President announcing that the insurrection was at an end throughout the country; *held* that the act of '61, in regard to aides-de-camp, was clearly in force at the date of the army bill of July, '66, and accordingly that the previous provision allowing three aides to a major general was continued in operation under the peace establishment. XXVI, 90.

SEE ADDITIONAL AIDES-DE-CAMP.
ORDER, I, (3.)

ALIEN.

1. An unnaturalized foreigner and British subject who has been a permanent resident of one of the States of the Union, and has enjoyed the protection of our laws, is entitled to no more favorable consideration than a citizen in regard to the payment of a claim upon the government for property taken for the use and subsistence of our troops, or destroyed or damaged during military operations in time of war. III, 61.

2. That one is a British or other foreign subject can make no difference in his amenability to trial in time of war by a military commission, for violation of the laws of war. VIII, 301.

SEE CLAIMS, I, (4,) (5,) (22,) (24,) (25,) (32;) II, (12.)
ENROLMENT, II, (1,) (2.)
NEUTRALS, (2.)
OATH, I, (1.)
VIOLATION OF THE LAWS OF WAR, (12.)

ALLOWANCES.

SEE ARREST, I, (14,) (15,) (16;) II, (3.)
BOUNTY, (1.)
CLOTHING ALLOWANCE.
DOUBLE RATIONS, (1.)
PAY AND ALLOWANCES.
MILEAGE.

AMENDMENT.

SEE CHARGE, (23.)
EVIDENCE, (12.)
FINDING, (23,) (25.)
RECORD, II.

APPEAL.

1. The eleventh article of war provides that an officer can be discharged from the service only by order of the President, or by sentence of a general court-martial. The two modes of proceeding are independent of each other, and no appeal to the President from the action of a competent court-martial is recognized, except in the cases and on the condition named in the 89th article of war. I, 365.

2. Where the proper reviewing officer has confirmed the sentence of a competent court-martial, of which the proceedings were regular, and has dissolved the court, the judgment is final; no appeal can be taken from it, or new trial ordered by the President. I, 451. See NEW TRIAL.

3. The President should not ordinarily be appealed to to interfere in behalf of parties under indictment before a proper court in a loyal State, but whose cases have not yet been tried or determined. Thus *held*, (November, 1863,) that the application of parties indicted for interfering with the elective franchise in Kentucky, addressed to the President for relief pending the judicial investigation of their cases, should be treated as premature. V, 372.

SEE PARDONING POWER.

APPOINTMENT OF FEMALE TO MILITARY OFFICE.

SEE FEMALE—APPOINTMENT OF, &c.

APPROVAL OR DISAPPROVAL OF PROCEEDINGS, &c.

*1. The original reviewing officer of the proceedings of a general court-martial—that is to say, the officer who convened the court or his successor in command—has an absolute power by a *disapproval* of the sentence to render the same nugatory, and thus terminate forever the proceedings; and this whatever be the nature of the sentence and whether or not he would have had the power to finally confirm the same. See REVIEWING OFFICER, 4, 6. Where the sentence is one which such reviewing officer is not empowered to finally confirm and

execute, he should, in transmitting the proceedings to the superior authority having such power, subscribe a formal *approval* of the same in or upon the record, as evidence that the power of *disapproval* is not exercised. See PRESIDENT AS REVIEWING OFFICER, 2.

* 2. A division commander having no authority to finally confirm and execute a sentence of dismissal, and his duty, where he did not disapprove the proceedings, being simply to approve and forward them to the department or army commander for his final action; *held* (in regard to a case occurring in 1863) that the simple endorsement, "approved," by a division commander, in forwarding to his department commander a record of a dismissal of an officer, was a form sufficient for the purpose and in accordance with the prevailing practice, and not open to legal objection. XXVI, 511.

* 3. Where the formal approval and confirmation, by a department commander of a sentence of dismissal, was expressed to be of the "*proceedings and findings*," *held* that such general expression should be deemed to include the *sentence* as intended to be confirmed also; especially since it was added by the commander in the endorsement of the approval that the accused (naming him) "ceased to be an officer in the military service" from a certain date mentioned. XXVI, 511.

SEE SIXTY-FIFTH ARTICLE.
EIGHTY-NINTH ARTICLE.
MAKING GOOD TIME LOST BY DESERTION, &c., (3.)
PAY AND ALLOWANCES, (25.)
POSTPONEMENT, (3,) (4.)
PRESIDENT AS REVIEWING OFFICER.
PUNISHMENT, (15.)
RECORD, **III**; **IV**, (25.)
REVIEWING OFFICER.
SENTENCE, **I**, (23;) **II**, (2,) (4,) (5;) **III**, (17,) (18.)

ARMY.

SEE SIXTY-FIFTH ARTICLE, (2,) (3.)

ARMY COMMANDER.

SEE SIXTY-FIFTH ARTICLE, (2,) (3,) (4,) (5,) (14.)
EIGHTY-NINTH ARTICLE, (2,) (4,) (5,) (6.)
ACCUSER AND PROSECUTOR, (1,) (7.)
COMMUTATION OF SENTENCE, (4.)
CONFISCATION, (17.)
COURT-MARTIAL, **I**, (11.)
DEPARTMENT COMMANDER, (1.)
DEPOSITION, (3.)
DESERTER, (16,) (17,) (18.)
DISCHARGE, (2.)
GUERILLA, (2.)
MARTIAL LAW.
MILITARY COMMISSION, **V**, (1.)
PRESIDENT AS REVIEWING OFFICER, (5.)
PUNISHMENT, (14.)
REDUCTION TO THE RANKS, **I**, (4,) (6.)
REVIEWING OFFICER, (13.)
SENTENCE, **II**, (2,) (4;) **III**, (7,) (20.)
SLAVE, (1.)
WITNESS, (23.)

ARMY CORPS.

SEE SIXTY-FIFTH ARTICLE, (4.)
COURT-MARTIAL, I, (11.)

ARMY IN THE FIELD.

SEE SIXTIETH ARTICLE, (2.)
SIXTY-FIFTH ARTICLE, (4,) (5.)

ARMY REGULATIONS.†

SEE TWENTY-FOURTH ARTICLE.
SIXTY-FIRST ARTICLE.
SIXTY-FOURTH ARTICLE, (6.)
SIXTY-FIFTH ARTICLE, (1,) (16.)
SIXTY-SIXTH ARTICLE, (4,) (17.)
ABSENCE WITHOUT LEAVE, (3.)
ARREST, I, (3.)
BOARD, (4,) (5,) (6.)
BOARD OF SURVEY, (2.)
BOND, (3,) (4.)
BREVET RANK, (1,) (2,) (5.)
CHARGE, (13.)
COMPANY FUND.
COMPENSATION, I, (5.) (8.)
CONTRACT WITH GOVERNMENT, (2.)
DEPOSITION, (4.)
DESERTER, (2,) (3,) (4,) (7,) (8,) (15.)
DETACHED SERVICE.
FIELD OFFICER'S COURT, (22.)
FINE, (5.)
JUDGE ADVOCATE, (22,) (25.)
MAKING GOOD TIME LOST BY DESERTION, &c., (1.)
OFFICER.
OFFICERS' SERVANTS, (1.)
ORDER, II, (3;) III, (2.)
PAY AND ALLOWANCES, (22,) (23,) (25,) (26,) (27,) (28,) (29,) (30,) (31.)
PAYMASTER, (1.)
PENITENTIARY, III, (2.)
POSTPONEMENT, (1.)
PRESIDENT'S PROCLAMATION, III, (1.)
PRISONER OF WAR, (1.)
PROCEEDINGS AT LAW AGAINST OFFICERS, &c., (3,) (4.)
PUNISHMENT, (1.)
PROMOTION, (2.)
RANK, (1.)
RECORD, I, (6;) III, (1,) (2;) VI, (25.)
RECORDER, (1,) (2.)
REGIMENTAL FUND, (3.)
REVIEWING OFFICER, (1,) (2,) (4.)
REWARD FOR ARRESTING DESERTER, (1.)
SENTENCE, I, (1,) (4,) (16.)
SUTLER, (4,) (11.)
SWEARING THE COURT, &c.
WITNESS, (4,) (11,) (15,) (19.)

† NOTE.—This part of the written law of the army, well described by Cushing (VIII Opinions of Attorneys General, 343) as being "*in aid or complement of statutes,*" like the Articles of War, derives its original authority from the constitutional provision by which Congress is empowered to "make rules for the government of the land (and naval) forces." As early as in 1813, Congress, in the exercise of this power, authorized the Secretary of War, (by sec. 5, ch. 52, of the act of March 3, of that year,) "*to prepare general regulations, better defining and prescribing the respective duties and powers*" *of the officers of the several staff corps,* "*and, generally, of the general and regimental staff;*" with the further provision that such regulations, when prepared and approved by the President, should be "laid before Congress" at its next session. A body of regulations, prepared and published (on May 1, 1813,) by virtue of this authority, was, in sec. 9, ch. 69, of the act of April 24, 1816,

ARRAIGNMENT.

SEE SIXTY-NINTH ARTICLE, (3,) (4.)
EIGHTY-SEVENTH ARTICLE.
RECORD, IV, (22.)
VARIANCE, (2,) (3.)

ARREST, I.—(MILITARY.)

1. To place an officer under arrest, it is only necessary that his commanding officer should direct him to deliver up his sword, and consider himself under arrest. While under arrest he is disqualified from performing any military duty. It is not essential that the officer or soldier should know why he was arrested. It is enough for him to know that he has been ordered under arrest by his commanding officer. II, 77.

2. An arrest is not a privilege of an officer; he cannot demand it. If, in view of some exigency of the service, a commander thinks fit not to place an officer in arrest before bringing him to trial, but continues him on duty after charges have been preferred and served, and up to the time of trial,—this constitutes no objection whatever to the regularity of the proceedings of the trial or to the findings or sentence. Moreover, the fact that his superior refrains from making an arrest is beneficial to the accused and not injurious to him, but if injurious at all, to the service only; and for this reason also he is precluded from raising this objection to the sentence of the court. XVII, 419. So *held*, that the fact that the superior refrained from requiring a compliance, on the part of an inferior officer arrested by him, with any particular form usually observed upon a military arrest

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formally "recognized" by Congress, "subject, however"—as it was added—"to such alterations as the Secretary may adopt with the approbation of the President." Down to the date of the recent act of July 28, 1866, reorganizing the army at the close of active hostilities, these two statutes of 1813 and 1816 contained all the authority vested by Congress in the Secretary of War (as representing the President in the administration of the military department) for making or altering general regulations for the army; the latter statute comprising the entire legislative *sanction* of such regulations as issued; except only that a second issue of regulations (that of September, 1816) was, by an act of March 2, 1821, ch. 13, sec. 14, "approved and adopted for the government of the army of the United States." But this special act was "repealed" by chapter 88 of the act of May 7 of the next year; and from that date till the recent legislation referred to, no action whatever was taken by Congress in formal approval or disapproval of the regulations, although some six revisions (each with important additions and modifications) were meanwhile—(there had previously been a *third* edition of July, 1821)—issued by the War Department. But at length, by section 37, ch. 299, of July, 28, 1866, it was enacted: "That the Secretary of War be, and he is hereby, directed to have prepared, and to report to Congress, at its next session, a code of regulations for the government of the army, and of the militia in actual service, which shall embrace all necessary orders and forms of a general character for the performance of all duties incumbent on officers and men in the military service, including rules for the government of courts-martial; the existing regulations to remain in force until Congress shall have acted on said report." This statute, comprehensive and ample in its provision for a code not limited in scope, but "for the government of the army" generally, in ratifying, at the same time, the body of regulations now in use, (for the new issue has not at this date—July 1, 1868—been adopted,) sets at rest any question which might have been raised in regard to the legal effect of any existing regulation not relating to the *powers or duties of staff officers*, as not being authorized under the original acts of 1813 and 1816.

—as the surrender of his sword by such inferior—furnished no ground of exception to the validity of a sentence imposed upon the latter. XIX, 419.

3. It is clearly to be inferred from paragraph 223 of the Army Regulations, that unless other limits are specially assigned him, an officer in arrest must confine himself to his quarters. It is generally understood that he can go to and from his mess-house. It is usual, however, to fix the limits at the time of arrest, and, except in aggravated cases, the limits are ordinarily the post where the officer is stationed. V, 434.

4. There is no law or usage which disables an officer from preferring charges while under arrest. V, 348; XVI, 68.

5. An officer who is under arrest should not be summoned before a retiring board, without first being relieved from arrest for this purpose; and when under arrest and awaiting sentence, he should not be summoned before such board until his sentence is promulgated. Otherwise his case may be complicated by being affected by two different jurisdictions at the same time. VII, 121.

6. It is the effect of the provisions of section 11, chapter 200, act of 17th July, 1862, to entitle an officer to be released from arrest, if not brought to trial, &c., within the time therein specified. VII, 162; XVIII, 161.

7. An officer who has been held in arrest without charges being served upon him, or without trial, longer than for the period specified in the act, (section 11, chapter 200, act of 17th July, 1862,) is not, however, entitled to terminate his arrest or resume his command independently of the authority of his superior. If not relieved from arrest, or restored to duty at the time designated by law, he should apply for the appropriate relief to the officer who ordered the arrest, or his successor. If his application is not granted, it is open to him to apply for redress to the officer superior to the latter, in the manner set forth in the 34th article of war, which in its spirit, if not in its language, applies properly to all cases of this character. When all other means of justice fail, which must be an extremely rare case, an appeal should be made to the Secretary of War. VIII, 61; IX, 467, 550. See XXIV, 387, 580.

8. The provision in section 11, chapter 200, act of 17th July, 1862, "he shall be brought to trial within ten days thereafter," means within ten days *after his arrest.* X, 572.

*9. It is a sufficient compliance with section 11 of the act of July 17, 1862, in regard to serving charges upon an officer in arrest, to furnish him with a copy of the charges and specifications, with the signature of the prosecutor, although the list of witnesses added in the original draft be omitted. Such list forms no part of the charges. It is of course the better practice, however, to repeat it in the copy. XXV, 350. See CHARGE, 21.

10. The exigencies of the service, however extreme, cannot justify the subjection of an officer, whatever his offence, to the humiliation of a protracted arrest without trial, considerably beyond the period limited by law. VIII, 539.

11. Although to release a soldier from arrest, and compel him to perform military duty after his trial, and while awaiting the promulgation of his sentence, would in general be improper and illegal, it might, however, be warranted by the exigencies of war; and in any event the soldier cannot properly refuse to do duty when so ordered. VIII, 234.

*12. Where an officer in arrest was permitted by his proper commander to take part in an engagement with the enemy; and he did take part therein accordingly, doing faithful service; *held* that his arrest should be deemed to have been thus waived and terminated. XXVI, 114.

13. An officer is not necessarily privileged from arrest by virtue of being at the time a member of a general court-martial. But the arrest of an officer while doing court-martial duty should be avoided in any but an extreme case. VII, 320.

14. No alteration in the status of an officer in relation to his right to fuel and quarters, or commutation therefor, is created by his arrest. IX, 64.

15. *Held* that an officer ordered, under arrest, to a commutation post, was to be allowed the commutation allowance for the fuel and quarters appropriate to his rank during the period of his detention at such post by the government. He is entitled to this allowance in common with his ordinary pay and allowances—subject, however, to his being deprived, by an express sentence of forfeiture, of any and all these which may remain unpaid at the date of the promulgation of such sentence. XIII, 386.

*16. The *status* of arrest does not *per se* prejudice the right of an officer or soldier to his pay and allowances; to hold that it *does* would in many cases work great wrong and injustice. So where an officer, having been held in arrest for a long period, was at length mustered out of service without trial, *held* that he was entitled to all his proper pay and allowances accruing for the period of his arrest, and that the objection that his release and discharge did not acquit him of the charges against him, and *therefore* did not remit him to his right to pay, could not be entertained, the government having voluntarily abandoned the prosecution. XXIII, 18.

*17. Where an officer of the army, stationed at a military post in Dakota, without legal excuse or authority, assumed to release by force from arrest by a United States marshal a citizen not connected with the military service, who, thereupon, went at large; *held*, (February, 1868,) upon an application to have him rearrested by the military and restored to the custody of the civil officials, that, as such citizen was in no manner subject to military control, his arrest could not legally be made or ordered by the military authorities; that the military department of the government was not authorized, in time of peace, to apprehend a citizen for a civil offence for which he is

amenable to a civil tribunal only, unless upon some emergency which had not arisen in this instance. XXVI, 468. See ARREST, II, 5.

SEE TWENTY-FOURTH ARTICLE,
SEVENTY-SIXTH ARTICLE, (1.)
SEVENTY-SEVENTH ARTICLE.
EIGHTY-EIGHTH ARTICLE, (2.)
NINETY-NINTH ARTICLE, (18.)
COURT-MARTIAL, I, (2.)
DESERTER, (6.) (11.)
JUDGE ADVOCATE, (13.)
JURISDICTION, (1.)
OFFICER OF THE DAY, (1.)
PAY AND ALLOWANCES, (10.)
PLEA, (18.)
SENTENCE, III, (9.)
SUSPENSION, (1,) (2,) (3.)

ARREST, II.—(BY THE CIVIL AUTHORITIES.)

* 1. Where a soldier, charged with the killing of a citizen, had been duly surrendered by the military commander to the civil authorities for trial, and had thereupon been held to bail; *advised* that, as the prisoner was, in the contemplation of law, in the friendly custody of his bail, the government might well afford the latter all proper facilities for bringing the accused before the court at the time fixed for the trial, and might well charge his commander, under whose command the soldier remained, (and who was to be a witness in the case,) with the duty of delivering the soldier to his bail at the proper time. XXI, 457.

* 2. A soldier cannot legally be required to make good to the service a period of time during which he may have been held in arrest or on trial by the civil authorities, unless he was so arrested while absent as a deserter or without leave. XXII, 570; XXIV, 279.

* 3. The mere fact *alone* that a soldier is held in arrest by the civil authorities, or is on trial before a civil court, constitutes no sufficient ground for withholding his pay and allowances. (But see 4.) And where a soldier so arrested is bailed to await trial he may (while under bail) be required by his proper commander to do the usual military duty appropriate to his rank. XXIV, 279; XXV, 559.

* 4. But where a soldier has committed a crime which has properly subjected him to arrest and punishment by the civil authorities, he cannot justly be allowed pay for the period during which he has been detained in arrest and away from his post of duty by such authorities by reason of such crime. It is a general principle of law that no man may take advantage of his own wrong; and before a soldier who has been detained in civil arrest is paid for any part of the term of such detention, it should be made to appear that his arrest and detention were unwarranted on the part of the authorities, as well as involuntary on his own part. To establish the fact that the act of the State officials, in apprehending and confining him, was without justification in law, it must be shown that he was not guilty of the crime for which he was seized, or that the arrest—because of some statutory limitation which had taken effect, or other cause—was unauthorized. His acquittal, upon a trial, would properly be accepted as *conclusive*,

and the entry of a *nolle prosequi* in the case as *prima facie*, evidence that the civil proceedings against him were without legal justification. XXVI, 515; XXV, 559.

* 5. The United States marshal of Dakota, holding a formal warrant against a citizen setting forth a specific felony, succeeded in arresting him near the frontier of the territory, such arrest being made in good faith, and manifestly in the interests of public justice. On the alleged ground, however, that the arrest was actually effected to the west of the line separating Dakota from Montana, the commanding officer of a post situated in Dakota and near the place of arrest, having occasion to employ the prisoner in a civil capacity, assumed to rescue him by force and set him free; such arrest and rescue occurring in time of peace, and the prisoner not being connected with the military service. *Held* that the action of such commander was, under the circumstances, inexcusable and highly reprehensible; that the fact that such a warrant was held, and such an arrest had been made, by an authorized officer of the United States, should have been sufficient to have deterred any other officer of the same sovereignty from interfering with the former in the execution of his duty; and that, whether or not the arrest was actually made in Montana or Dakota was not material. And, as it appeared that an indictment had been found in Dakota against such post commander for his forcible interposition on the occasion, *recommended* that he be ordered to surrender himself to the proper United States civil authorities for trial. XXVI, 468. See ARREST, I, 17.

* 6. Certain soldiers, having been duly mustered for the pay due them for the two preceding months, and having receipted on the pay-rolls therefor, were arrested and placed upon trial for larceny before a civil court. The paymaster, having thereupon arrived at the post to pay the command, was directed by the post commander to withhold the pay of these men on the ground that they were on trial as aforesaid, and that, if convicted, they would, as he—the commander—"presumed," be discharged the service with forfeiture of all pay and allowances. *Held* that this action was wholly mistaken and unauthorized. The fact of the arrest and trial—no matter how guilty the offenders might be proved to have been—could affect in no manner whatever their right to pay earned during a period of service before the offence. Moreover, neither would the civil court be empowered to forfeit such pay upon their conviction, nor would the government have the slightest authority to withhold it, whatever the *punishment* imposed by such court might be. XXVI, 563.

SEE THIRTY-THIRD ARTICLE.
HABEAS CORPUS.

ARREST, III.—(OF CITIZENS BY MILITARY AUTHORITIES.)

SEE ARREST, I, (17.)
BAIL.
CLAIMS, I, (1,) (3,) (3.)
RECONSTRUCTION LAWS, (1.)

ARTIFICIAL LIMBS.

1. Only soldiers, and not officers, are entitled to be furnished with artificial limbs under the acts of Congress making appropriations for that purpose. (See acts of 16th July, 1862, ch. 182, sec. 6; of 9th February, 1863, ch. 25, sec. 1; of March 14, 1864, ch. 30, sec. 1; of June 15, 1864, ch. 124, sec. 1; and of May 2, 1867, ch. 170, sec 1. See also act of July 28, 1866, ch. 305, authorizing and directing the Secretary of War to furnish to disabled soldiers "transportation to and from their homes and the place where they may be required to go to obtain artificial limbs provided for them under authority of law.")

2. In the absence of any designation in the statutes of the particular class or classes of soldiers entitled to be furnished with these limbs at the expense of the government, it is presumed that any soldier disabled while in the performance of his duty, and *honorably discharged*, is so entitled. So *held* that a deserter who had been merely sentenced to a forfeiture of pay, and had thereafter been *honorably discharged* on account of disability, was so entitled. XIV, 672.

ASSEMBLING THE COURT.

See ADJOURNMENT, (4.)

ASSESSMENT OF DISLOYAL CITIZENS.

The practice of assessing disloyal citizens for the benefit of the loyal, as well as for the purpose of reimbursing the latter for losses suffered by invasions or raids of the enemy, has been pursued by various commanders since the commencement of the rebellion, and is now, (December, 1864,) or has recently been, enforced in localities both of Missouri and Kentucky. It manifestly accords with the popular sentiment of justice and right, and would appear to have met with the general acquiescence of the Executive, and may be regarded as a measure fully sanctioned and justified by the necessities and usages of war. XII, 103.

See CLAIM, I. (11.)
PROCEEDINGS AT LAW AGAINST OFFICERS, &c., (18.)

ASSIGNMENT OF CLAIM.

See CLAIMS, I, (7.)
CONTRACTOR, II, (8,) (13.)

ATTACHMENT.

See GARNISHMENT OF PAY;
WITNESS, (23.)

AUTHENTICATION OF PROCEEDINGS.

See SIXTY-SIXTH ARTICLE, (14.)
ADJOURNMENT, (1.)
COURT-MARTIAL, I, (5.)
RECORD. I, (5,) (6;) IV, (7.)
REVIEWING OFFICER, (3.)

AUTHORITY TO RAISE A REGIMENT.

Where the Secretary of War authorized a party to raise a regiment, with the understanding that he was to have the command of it as colonel if raised in thirty days; *held* that this was not an absolute appointment, like one in the regular army, but a conditional one only, and, till the condition was fulfilled, of no more effect than a power of attorney. I, 368.

B.

BAIL.

The only cases known to the law in which the giving of bail by parties arrested for military offences is authorized are those of contractors, inspectors, &c., referred to in sec. 7, ch. 253, act of July 4, 1864. A bail bond given in any other case of an arrest for such an offence would be a mere nullity in law, and could not be enforced by legal process. But in the cases provided for in the act mentioned, it is by a judge of the United States district court, or a commissioner of such court, that the party is admitted to bail and his bond is approved. (But see *note* under CONTRACTOR, II.) A *military* court is altogether without authority in law to accept bail in a case pending before it for trial. See IX, 260; XXI, 258. (But see RECONSTRUCTION LAWS, 1, for opinion, given since the date of the above, in regard to taking bail from parties arrested for trial by military commission under the recent act of March 2, 1867, ch. 153.)

SEE ARREST, II. (1,) (3.)
BOND, (2.)
PAROLE, (7.)
PROVOST JUDGE OR COURT, (7.)

BAILMENT.

SEE NINTH ARTICLE, (7.)
THIRTY-NINTH ARTICLE, (2,) (3.)
UNITED STATES AS BAILEE, &c.

BALL AND CHAIN.

SEE PUNISHMENT, (2.)

BLOCKADE.

A special application, in the interest of private individuals, to be permitted to export wheat and tobacco from certain blockaded ports in Virginia—*advised* (September, 1862) not to be granted, since it

would operate as a violation or suspension of the blockade, which foreign nations could not then be expected to respect, as broken by ourselves. Importations into certain ports have been permitted in a limited degree, by the Secretary of the Treasury, for military purposes only. The blockade, while it remains, should be enforced by the government as strictly against its own citizens as against foreign nations. I, 342, 346.

BLOCKADE RUNNING.

SEE MILITARY COMMISSION, II, (23.)
NEUTRAL, (1.)
VIOLATION OF THE LAWS OF WAR, (19.)

BOARD.

1. *Held* that a board of officers, convened by a military commander, to pass upon and decide a disputed question of title to personal property, claimed both by an officer and a citizen, was an irregular body, without any legal authority whatever to finally determine such question; and that, however useful its investigations might be in informing the commander or the government, its judgment could in no manner conclude either claimant. XVI, 381

2. A board of three officers, styled a "military commission," appointed by a department commander, with instructions to inquire into the matter of a trade with rebels supposed to have been carried on at a certain place, and to proceed to the trial and sentence of persons found, in the course of its investigations, to be implicated in such trade—*held*, an anomalous body, unknown, *as a court*, to law or the usage of the service; and *advised*, that any sentence which it might pronounce was void, and that a charge of perjury could not be predicated upon the violation of an oath administered by it to a witness in the course of its proceedings. XI, 672.

3. Where a special commission or board was convened to investigate the affairs of a hospital, its conduct and management, the fidelity of its officers, employees, &c.; *held* that the surgeon in charge was not entitled, *as a right*, to appear before it and be present at its sittings. *Otherwise*, if the body had been a *court of inquiry*, called to investigate charges against the surgeon individually. II, 340.

4. In the case of a board detailed to investigate cases of prisoners held in custody at a military post, with a view to diminish the number of trials by court-martial at that post; *held*, that the officer, or officers, composing such board were not *entitled* to a compensation similar to that accorded to judge advocates by the Army Regulations. XIX, 19. But see RECORDER, 2.

*5. *Held* that a board, convened in a southern State during the war, to investigate the circumstances connected with a crime alleged to have been committed by rebels, was not a court of inquiry in the sense and contemplation of the 91st article of war; and that neither the members of such board, nor the witnesses who testified before it, were *entitled* to the allowances prescribed to be paid to members of military courts, or to witnesses summoned before them, by paragraphs

1138, 1139 of the Army Regulations. *Advised*, however, that loyal citizen witnesses who had been required to attend the sessions of the board should, in equity, be paid the usual compensation, upon presenting proper formal certificates of attendance subscribed by the recorder. XXI, 335.

* 6. *Held*, of a board of investigation, convened by a District Commander, (appointed under the act of March 20, 1867, ch. 153,) 1. That, *not being a court*, it was not required that its members should be sworn. 2. That, for the same reason, there was no legal restriction upon the time or duration of its sessions, which might be held and continued according to its discretion. 3. That, for the same reason, it was not necessarily "open," but might sit at all times "with closed doors," at its discretion. 4. That, if it determined that it needed a clerk, it should apply to the authority which convened it, to have one detailed, or to be authorized to employ one at a certain compensation. 5. That,—not being a court—witnesses summoned and attending before it would not be *legally entitled* to any fees or mileage; that they would, however, have an *equitable* claim to compensation; which no doubt would, upon a proper showing, be ordered to be paid them, by the District Commander, or by the Secretary of War, if the former should determine that he was without authority in the matter. 6. That there was no legal process for compelling the attendance of witnesses before such board. 7. That it further followed from the fact that such board was not a court known to military law—that neither the members nor recorder would be *entitled* to any of the compensation payable to the members or judge advocate of a court-martial, by paragraphs 1137 and 1138 of the Army Regulations. That it was the general rule that boards were not paid such allowances; and that, whether the services of the members of *this* board shall have been so peculiar or extraordinary as properly to commend them for a special extension to their case of the benefits of the regulations in regard to the compensation payable to the members, &c., of military courts, could only be determined upon a formal application addressed to the proper authority, at the final conclusion of their services upon such board. XXVI, 493. See RECORDER, 2.

SEE BREVET RANK, (5.)
RETIRING BOARD.
STOPPAGE, (8.)

BOARD OF EXAMINATION.

1. It is not a valid objection to the regularity of the proceedings of a board instituted under sec. 10, ch. 9, act of 22d July, 1861, for the examination of *volunteer* officers, that the witnesses were not sworn or cross-examined, or that no detailed record of the proceedings (such as that required in the case of a military court) was kept; none of these particulars being required or apparently contemplated by the act. II, 468.

2. The act requires that the report of such board shall be formally approved by the President before any action is taken thereon. Upon

the unfavorable report of the board, the department commander is not authorized to summarily dismiss an officer. VIII, 482.

3. It is not a proper function of a board, constituted under the provisions of section 10 of the act of July 22, 1861, chapter 9, to investigate charges relating to a single offence properly cognizable by court-martial; the object of such board being rather to inquire into the general military standing, &c., of the party ordered before it. VI, 253. See XI, 104.

4. *Held* that the Surgeon General was not competent to sit as a member of a board for the examination of assistant surgeons for promotion to surgeons, called under the provisions of paragraph 1315 of the regulations and the act of June 30, 1824. VIII, 511.

*5. The act of July 28, 1866, ch. 299, sec. 23, provides that "no person shall be appointed to any vacancy created by this act in the * * * quartermaster's department until he shall have passed the examination now required by law." The only examination required at that date for officers of that department was that enjoined for quartermasters and assistant quartermasters by the statute of June 25, 1864, ch. 149; which, in section 1, enacts that the board of examination shall be composed of three staff officers of the appointee's corps, "of whom two at least shall be officers of volunteers." In a case, (occurring in January, 1867,) where it was found to be *impracticable* to detail two such volunteer officers upon a board for the examination of certain quartermasters and assistant quartermasters, to be appointed to vacancies created by the act first named; *held* that no such board could legally be convened; that the statute of 1864 became inoperative, and that no examination of such officers could be had according to law. XXIV, 156.

See RECORDER, (2.)
RETIRING OF OFFICER, (3.)

BOARD OF SURVEY.

1. A board of survey may properly pass upon the question of the liability of enlisted men for arms lost in the service. V, 590.

2. A board of survey has no power, as such, to administer oaths to witnesses, but may receive and file with its report affidavits taken as prescribed in paragraph 1031 of the regulations. V, 591.

BOAT-BURNING.

See VIOLATION OF THE LAWS OF WAR, (21.)

BOND.

1. A mere general averment by the surety of a paymaster that his signature to the bond was obtained by his principal through fraud, without specifying the details of such alleged fraud, or furnishing any proof thereof, is not sufficient to sustain an application to the Secretary of War to have such bond revoked, or the sureties released from future liability under it. I, 420.

2. Where certain bills of exchange of a rebel which had been seized by the government were, upon his being admitted to take the proper oath and return to his allegiance, ordered to be restored to him, on his giving a bond with sufficient sureties conditioned to indemnify the United States from any liability to other parties interested in such bills; and there was accordingly presented by him for approval a bond with two sureties, who were residents of Virginia and personally unknown to this Bureau, and no information as to their pecuniary responsibility was furnished—*advised*, (January, 1866,) that before this bond were accepted, it should be satisfactorily shown that these sureties were loyal men or had been pardoned or admitted to take an oath of allegiance; and, further, that they should justify as bail in the usual form, under oath, upon the instrument. XXI, 190.

*3. It was held by the United States Supreme Court, in *United States* vs. *Linn*, 15 Peters, 290, that a certain official bond, while not conforming to a statute requiring that it should be under seal, was good at common law, though having no seals attached in connection with the signatures either of principal or sureties. The provision of the act of April 24, 1816, section 6, (repeated in paragraph 989 of the Army Regulations,) that all officers of the pay, commissary, and quartermasters' departments, and military storekeepers, shall give bond previous to entering upon the duties of their offices, does not specify that such bond shall be under seal; and it is probable that the bonds of any of these officers would be held valid and binding, though without any seals whatever. *Advised*, however, that seals should be directed to be used in all cases; and, in view of the fact that in some of the States a scrawl with the the pen is not a legal seal—that the seals of both principal and sureties should be required to be of a *formal* character, viz: impressions on wax, wafer, or other tenacious substance, irrespective of the statute requirement of the State where the instrument was executed. XXVI, 471.

*4. Where the sureties in a quartermaster's official bond for $10,000, assumed, in executing the same, to be bound only in the sum of $5,000 each; the words "for five thousand dollars" being written under each signature—*held* that such bond was not in compliance with the Army Regulation, paragraph 990, requiring that the sureties "shall be jointly and severally bound for the whole amount of the bond;" and that it should not be approved. And *held* further, that the fact that in this instance the sureties had complied with *one* requirement of the regulation in *justifying* in amounts which together equalled twice the amount of the penalty, in no manner obviated the necessity of a compliance with the other and principal requirement referred to. For the justification is no part of the bond, but merely the personal assurance under oath of the sureties in regard to their pecuniary ability at the the time of executing the instrument. XXVI, 327.

SEE BAIL.
NEUTRALITY.
PRESIDENT'S PROCLAMATION, II, (1.)
VIOLATION OF THE LAWS OF WAR, (3,) (11.)

BOUNTY.

1. Bounty is held to be a *gratuity;* and neither *pay* nor an *allowance.* X, 661; XV, 356; XVII, 130; XXI, 210. A sentence forfeiting "pay and allowances" does not forfeit bounty, XI, 352; XVIII, 217.

2. The bounty of $100, granted by the act of July 22, 1861, ch. 9, sec. 5, is payable to the soldier upon an honorable discharge after two years' service. *Held* that certain soldiers, enlisted for two years, who, having served within a few days of the end of their term, were prevented from serving the full time by the act of the government in mustering them out (honorably) of the service, were, upon a well-established principle of the law of contract, entitled to the $100 bounty. II, 403.

3. Where the discharge given to a soldier is not in express terms "dishonorable," it is presumed to be technically *honorable*, and *prima facie*, entitles him to the bounty payable upon an honorable discharge. It is also a general rule that a soldier who has served the requisite period is, at the end of his term of enlistment, entitled to an honorable discharge and to the customary bounty consequent thereon; unless either :—(1) he has been previously expressly sentenced—upon a conviction of some offence authorizing such sentence—"to be dishonorably discharged;" or (2) has been duly sentenced to a term of imprisonment or other infamous punishment, continuing up to the end of, or beyond, his term of enlistment or date of discharge. In the former case the court has decided beforehand that his discharge shall be dishonorable, and nothing short of a pardon can make it otherwise. In the latter case, the end of his term of enlistment finds him in a *status of dishonor;* his service as a soldier being tainted with disgrace and ignominy by reason of his punishment, up to its last moment. An honorable discharge at that moment would therefore be wholly inconsistent with his existing status as a soldier. For this reason it has always been held that an enlisted man sentenced to "*confinement at hard labor during the remainder of his term of service,*" (or for a period including and extending beyond the limit of his term,) cannot be entitled to an honorable discharge at the end of such term. X, 285; XII, 137; XVI, 559. But otherwise *held* where the soldier was sentenced to "*forfeit all pay and allowances due, and to become due for the balance of his term.*" For such sentence did not so affect the subsequent service of the soldier as to render it ignominious and dishonorable; inasmuch as, though receiving no pay, &c., he was continue in the army to perform the honorable duties of his rank. XI, 352; XIX, 269; XVII, 130. So *held* where the soldier was at some time during his term sentenced to confinement at hard labor with forfeiture of all pay and allowances for a period *which expired before* his term of enlistment, and after the expiration of which he had continued to perform the usual duties of a soldier up to the end of such term.

For the end of the term found him in an *honorable status;* and he was thereupon entitled to an honorable discharge, and (having served the proper period) to bounty. V, 253.

* A soldier was, for desertion, sentenced to a forfeiture of pay and "to make good the time lost by absence, and finally to be dishonorably discharged the service." While serving out the period required to be made good, he was taken prisoner and died, (having served more than two years in all,) at Andersonville, Georgia. Upon application by his heirs to be paid his bounty, *held* that the same was legally payable, inasmuch as the soldier could not properly be regarded as having died in a *status of dishonor*. He was making good the time lost by his desertion, not as a punishment, but in fulfilment of his contract. (See MAKING GOOD TIME LOST BY DESERTION, &c., 2.) It is true that he was sentenced to be dishonorably discharged at the termination of his service; but that termination had not been reached at the time of his death. From good conduct or other cause, this feature of the sentence might never have been executed, had he lived. A mere liability to be hereafter dishonorably discharged should not be held to constitute *per se* a status of dishonor. XXVI, 48. But where a soldier came to his death by drowning while undergoing a sentence of imprisonment at hard labor, *held* that his decease while occupying a status of dishonor could not operate as an honorable discharge, and that a claim by his heir at law to the bounty payable upon such a discharge was not maintainable. XX, 507.

4. A *pardon*, which wholly relieves the soldier, before the termination of his service, from the disability or punishment which would preclude his receiving an honorable discharge, (see 3,) will restore his right to bounty, whatever may have been his offence. XXIII, 649. Thus where a soldier, upon conviction of "sleeping on post," (an offence punishable capitally,) was sentenced to forfeit all pay, allowances, *and bounties*, and be *confined at hard labor during the remainder of his term*, (of three years;) and, before the expiration of his term, the *unexecuted* portion of his sentence was remitted by the President, and he released and restored to duty with his regiment—*held* that this pardon entitled him to an honorable discharge at the end of his term, and to the bounty of $100 payable in the event of such discharge. For the pardon removed the forfeiture of bounty, which could not have been executed before the period of discharge; and, by further removing that portion of the infamous punishment of confinement at hard labor which remained unexecuted at its date, restored the man to an honorable status. XIII, 27. But where a soldier who had been sentenced to forfeit all pay, bounties, and allowances, to be dishonorably discharged from the service, and *then* imprisoned during the remainder of the war, was, after a dishonorable discharge in pursuance of the sentence, and after having commenced to undergo his imprisonment, pardoned by the President for the unexecuted part of his sentence—*held*, that such pardon did not remit him to any right to bounty. For the punishment of forfeiture and dishonorable discharge having been already duly executed, could not be affected by the pardon, (see PARDONING POWER, 2,) which in such a case could only act upon the punishment of imprisonment remaining to be suffered by the party as a citizen. VII, 138.

* And where a volunteer soldier, who had been sentenced for deser-

tion, to one year's hard labor, was, after nine months, released, under Circular No. 50, of the War Department, of 1865, directing the discharge of all volunteer soldiers confined under sentence for desertion —*held* that this order did not operate as a pardon; and, inasmuch as it found the soldier in a status of dishonor, did not make his discharge an honorable one, or entitle him to bounty. XXIV, 677.

5. It is the character of the *punishment*—if any—which the soldier is undergoing when the time arrives for his discharge, and not the character of the *offence*, which determines whether such discharge shall be honorable or dishonorable, and whether he shall be paid the bounty payable on discharge. It has therefore been *held* by this Bureau, from the beginning, that where the offence was *desertion*, it did not *per se* affect the soldier's claim to an honorable discharge, or to bounty; that, (except in the case of that class of deserters whose rights of citizenship are expressly forfeited by the act of March 3, 1865, chapter 79, section 21,) a soldier convicted of desertion is still entitled to an honorable discharge, unless such a discharge is precluded by his sentence, either in terms or by a necessary implication from the character of the punishment imposed, (see 3;) and that where it is not so precluded, the deserter, upon his discharge, is entitled to the customary bounty if he has served two years, or otherwise fulfilled the conditions of the law or order under which he claims such bounty. XV, 356; XVIII, 333; XIX, 269. (See 8.) All that is necessary to entitle a deserter to honorable discharge and bounty is, that he should resume his relations to the service, without having imposed upon him any such sentence as either of those described in Paragraph 3. Thus *held* that a deserter, who, under the President's proclamation of amnesty to absentees from the army, of March 10, 1863, voluntarily returned to his regiment within the time fixed thereby, was entitled to an honorable discharge and bounty when mustered out after more than two years' service. For the penalty imposed by the proclamation consisted only of a forfeiture of pay for the period of absence, to which indeed he would have been liable in any event by operation of law. XII, 139. And similarly *held* of a deserter restored to duty by a competent commander without trial, under the authority of paragraph 159 of the Army Regulations. XII, 207. And so *held* of deserters generally who, whether voluntarily returning or not, are tried and sentenced to punishments however infamous, provided such punishments do not continue to the termination of their periods of service, and such termination finds them in the performance, again, of their usual (and consequently honorable) duties as soldiers. See 3.

6. Where a bounty is payable by *instalments*, the fact of a desertion may affect the soldier's right to a portion of such instalments; not because of the nature of the offence, but because of the absence from duty involved therein. If absent for a period, for and at the end of which an instalment is payable, he cannot receive such instalment because he has not earned it. The instalment in such case is paid on the condition of the performance of a certain service; and that particular service he has not performed. But upon his return he becomes entitled to instalments falling due thereafter, if he is not tried and

sentenced for his offence to an express forfeiture of bounty, or (expressly or by necessary implication) to a dishonorable discharge. If not actually separated by his sentence from the service he is entitled to all instalments falling due after his return and up to the end of his term; with this exception only—that if any instalment or portion of the bounty is payable upon honorable discharge, and his sentence is such as to preclude an honorable discharge. (see 3,) he cannot receive such instalment or portion. See XI, 352; XVIII, 217. And similarly, in a case where, under a charge of desertion, a soldier was found not guilty, but guilty of *absence without leave only*, and was sentenced to forfeit "all pay and bounty for the time of his absence, six months and ten days," *held* that he was deprived by this sentence only of certain instalments of bounty which fell due during the period of absence, but remained entitled to those falling due after that period. XX, 430.

7. One of the conditions to the payment of the $100 bounty established by the act of 1861 is, that the soldier shall have *performed two years' service.* In regard to this it was declared by General Order No. 38, of the War Department, of 1864, that the service should be "continuous." But *held* that it was sufficient if the two years were served under one enlistment, and were not merely made up of fragments of time served under different enlistments; that if fully two years' service had been performed under a single enlistment the honorably discharged soldier became entitled to the bounty, although the *continuity* of his service under such enlistment may have been interrupted by a prolonged unauthorized absence from all duty; that to hold that such an interruption should defeat the claim to bounty, unless some one of the portions of the whole time divided thereby amounted to two years, would be a severe construction of a beneficial statute, and would defeat the object of the law in a considerable class of cases. Thus, where a non-commissioned officer enlisted in January, 1862, for three years, deserted in November, 1862, returned in August, 1863, and (having been tried and sentenced to reduction to the ranks and forfeiture of pay and allowances for the period of his absence only) continued to perform service to the period of his honorable discharge in January, 1865; *held* that he was thereupon entitled to the bounty of $100. XI, 500.

* 8 *Extract from an extended report of the Bureau to the Secretary of War, of August* 24, 1866, *in regard to the question of the effect of a previous desertion upon a soldier's right to the payment of bounty on his discharge from service.*

It is *held* by this Bureau that a desertion does not *per se* affect the right of a soldier to an honorable discharge or to bounty; that if there has been nothing in his sentence or punishment as imposed by court-martial which necessarily subjects him to a dishonorable discharge, he is entitled to an honorable discharge, and—if he has served two years—to bounty.

The grounds upon which this opinion is based are stated as follows :

I. There is no *statute law* which in terms imposes upon a deserter, as such, a disability to receive bounty. Neither in the act of 22d July, 1861, nor in any act amendatory thereof or additional thereto, is there found any provision whatever by which *deserters* are excluded from the gratuity in question, its payment being alone conditioned upon the honorable discharge of the soldier after a certain term of service. From the fact that deserters are not excluded it is fair to infer that they were not intended to be excluded. And this inference is fortified by the fact that in certain statutes passed *before the war* in regard to *bounty lands*—the conferring of which upon soldiers engaged in former wars was an act precisely analogous to the payment of money bounties to the soldiers engaged in the war of the rebellion—there *was* a special exception of deserters, who were declared not entitled to the enjoyment of the provision made. Thus, in the acts of 28th September, 1850, sec. 1, and of 3d March, 1855, sec. 1, it is provided: "The person so having been in service shall not receive said land, or any part thereof, if it shall appear by the muster-rolls of his regiment or corps that he deserted or was dishonorably discharged from service." Here the deserters are excluded in express terms, while in the statutes in regard to the payment of pecuniary bounties they are not mentioned. And the fact that the other class of soldiers—(those dishonorably discharged)—excluded in the land bounty acts *is* mentioned and excluded in the money bounty acts, which are at the same time silent in regard to deserters, is believed to furnish a fair inference that it was in the contemplation of Congress not only that there was to be no exclusion of the latter class as such, but that such class, as composed of soldiers not necessarily precluded from being honorably discharged, was distinct in law from the other class.

II. *The rules and regulations of the army* neither directly nor indirectly disqualify the deserter, as such, to receive bounty.

The "regulations," which constitute a body of rules for the government of the army, "in aid or complement of the statute law," (Opinions of Attorneys General, VIII, 343; VI, 15,) and which have been finally confirmed as the law of the service by Congress, in the act of July 28, 1866, ch. 299, sec. 37, contain no *direct* allusion to the subject of bounty.

Nor do they, in treating of deserters, anywhere pronounce them as under such a disability as should subject them to a forfeiture of bounty. They seem indeed carefully to avoid declaring them as under any disability whatever. Thus, while enjoining (paragraphs 1357 and 1358) that the deserter shall forfeit all pay and allowances for the period of his absence as well as such as may have been in arrears at the date of his desertion, the Regulations contemplate at the same time the continuance of the deserter in the service in *the honorable status of a United States soldier in full pay*, in providing (in paragraph 161) that, for purposes of pay, the deserter "is to be considered as again in service when delivered up as such to the proper authority;" and (in paragraph 159) that deserters may be "restored to duty without trial" in certain cases, and further, (in paragraph 158, which is founded upon acts of Congress from 1796 to 1813,

hereinafter cited,) that deserters shall "make good the time lost by desertion" unless relieved from so doing by competent authority. Moreover, in the provision (par. 1359) that a fine imposed upon a deserter by court-martial shall ordinarily be satisfied out of his future earnings, the Regulations are also seen to intend that the fact of his formal *conviction* by a military court shall not affect his occupying thereafter the status of a paid soldier in honorable service. And indeed it is this very fact that, notwithstanding a judicial finding of his guilt, the deserter is deemed not disqualified to serve his country and not unworthy of his hire as such, and that—where the terms of his sentence do not preclude it—he is not only permitted, but required, to perform the ordinary duties of the soldier, which furnishes perhaps the strongest ground for holding that there is imposed upon the government the correlative obligation of granting him at the end of his term an honorable discharge, with all the privileges attendant thereon.

That the Regulations, in determining what shall be a valid objection to the re-enlistment of a soldier once discharged, do not specify, as such an objection, a desertion during his original term, is still further evidence of the absence of an intention to impose a disability upon the deserter as such. Where, indeed, the soldier has received a dishonorable discharge under the sentence of a military court which adjudged such a discharge as a *punishment*, or where he has been discharged on account of wounds or disease incapacitating him for duty, he is declared disqualified to re-enlist in the army; but there can be found nothing in the Regulations to authorize the conclusion that, because he may have been, at some period of his service, convicted or noted on the rolls as a deserter, he may not *re-enlist upon the same terms and with the same standing as any other soldier*.

III. It is thus perceived that there exists no statute law, nor regulation of the service, by the authority of which the deserter is placed, either directly or indirectly, under a disability, to receive bounty; by which he is precluded from obtaining at the end of his term the honorable discharge upon which bounty is payable; or by which a permanent ignominy or stigma is affixed to his status as a soldier.

But the argument of the officials whose opinion on the question under consideration is adverse to that of this Bureau, is understood to be, either that there is something in the crime of desertion itself which, independently of any statute or regulation, *so ineffaceably taints* the service of the soldier as necessarily to preclude his receiving an honorable discharge, and, consequently, bounty; or that it is the necessary and proper effect of the desertion as a *breach of contract* that the bounty, which is the reward of faithful service, shall be lost to the deserter.

(1.) But—in answer to the first of these positions—it is to be observed that no good reason is perceived why, if so permanent an ignominy attaches to a desertion, the same consequence should not follow upon the commission of any other military crime made *capital* by law. *Mutiny*, for instance, which is pronounced by the text writers as the gravest of all military offences—"the most dangerous crime in the

military state," (Hough's Precedents, 54)—is made punishable with death by the Articles of War; yet this Bureau is not aware that it has ever been held or claimed that a conviction of mutiny operated *per se* to so taint the entire subsequent service of the soldier as to preclude his receiving an honorable discharge or the bounty conditional thereon. So *cowardice in battle* is, like desertion and mutiny, made capital by law, and, in the general estimation, is an offence more infamous than either; yet no authority whatever can, it is believed, be found for determining that an honorable service on the part of the soldier, after he has satisfied justice by undergoing the punishment awarded him upon being found guilty of such charge, will not entitle him to be discharged in the usual form and without words of ignominy. And the same observation may be made in regard to all the other crimes made capital by the Articles of War when committed by enlisted men; as—"striking a superior officer;" "disobedience of the lawful command of a superior officer;" "failing to endeavor to suppress, or to give information of, a mutiny;" "sleeping on post, or leaving post, as a sentinel, without authority;" "casting away his arms or ammunition;" "leaving his post to plunder and pillage;" "forcing a safeguard;" "relieving, or corresponding with, or giving intelligence to, the enemy;" and "compelling a commander to abandon a post to the enemy." None of these crimes have been held to result necessarily in a permanent dishonor; but in the case of all of them it is conceived to be the policy of military law that the penalty adjudged by court-martial shall be deemed a sufficient expiation of the violation of discipline and duty. If, indeed, the principle of a *permanent taint* be insisted upon in the instance of *any* one of these offences, it must logically be in *all*, since otherwise a course of ruling both arbitrary and unjust would be pursued. But if insisted upon in all, the service of the soldier becomes fatally oppressed and overburdened with disabilities, the *locus poenitentiae* is taken away, and the desire to retrieve and reform is wholly discouraged. It could not, it is conceived, be intended that the administration of military justice should be thus implacable and relentless.

(2.) To the second position—that because of the *breach of contract* involved in desertion the soldier should lose bounty, as being in the nature of a reward for full service under the enlistment—the answer is direct and simple. And this answer is, that for this very breach the statute law has long since specifically declared and determined what shall be the proper and adequate satisfaction to be given by the soldier. The successive acts of Congress of May 30, 1796, ch. 39, sec. 17; March 16. 1802, ch. 9, sec. 18; January 11, 1812, ch. 14, sec. 16; and January 29, 1813, ch. 16, sec. 12, have, with a remarkable uniformity, provided that—"If any non-commissioned officer, musician, or private shall desert the service of the United States, he shall, in addition to the penalties mentioned in the Rules and Articles of War, be liable to serve for and during such period, as shall, with the time he may have served previous to his desertion amount to the full term of his enlistment." This requirement does not, it is perceived, impose a *punishment*, but an obligation to be performed,

which is in addition to and, as it has since been held, wholly independent of, any punishment which a military court may in its discretion adjudge for the desertion as a crime. It does not award a penalty for the military offence as such, but pronounces what shall be the full and complete satisfaction due and to be rendered the government for the mere breach of contract. It was no doubt partly in contemplation of this statute, which is a most familiar law of the service, that the acts passed during the war in regard to the payment of bounty at the end of a soldier's term of service made such payment conditional upon honorable discharge alone. For as previous enactments had provided both for the punishment of the deserter as a criminal and for the full performance of his obligation as a contractor, nothing more remained to be done as against him. If in the performance of the obligation of his contract he should serve two years, there remained no reason why, at the end thereof, the law, whose penalties and requirements he had fully satisfied, should withhold from him the ordinary discharge and the gratuity consequent thereon.

Upon the view of the law, and the reasoning thus exhibited, it is deemed to be most clear that no executive department of the government can deprive the deserter, *as such*, of bounty, without falling into the error of committing an act which is at once illegal and void. If the soldier has been already punished for his desertion by a military court, his deprivation of bounty by the executive officer is unlawful as *adding to the punishment*, which has been imposed by the only authority competent to impose any, and which has by that authority been pronounced adequate to the offence. And if the deserter has *not* been tried and punished, to compel him to forfeit his bounty is either to impose an *original* punishment without the sanction of law, or illegally to insist upon a penalty to be paid for a breach of contract which the law has declared to be fully performed. For where the soldier has been *relieved*, as he may be in a proper emergency, (par. 158 of the Regulations,) from the obligation to make good the time lost by his desertion, this relief is an exercise of the pardoning power, and the pardon is to be taken as a declaration that the obligation shall be deemed discharged.

In concluding this statement of the views of this Bureau, it is thought not inappropriate to suggest the consideration whether the omission of the bounty laws, enacted during the rebellion, to impose any disability upon deserters, has not been a part of a *policy and plan of legislation* as judicious as it was humane. The vast armies of volunteers called by a *leveé en masse* into the field, were composed of both officers and men almost wholly unacquainted with the laws of war and the strict discipline of camps. Among these it was not possible that there should not be many soldiers of youth and inexperience, whom the imprudence of incompetent officers, the bad influence of depraved associates, some physical incapacity or other temporary discouragement, might not tempt to the technical commission of the offence of desertion, of the gravity or the consequences of which they had not been made aware. And it was equally probable

that many of this class, if, without being rendered liable to a too severe penalty, they were returned to duty, would, by efficient service and bravery in battle, prove themselves good soldiers and make ample amends for their first military offence. Indeed that such cases were by no means infrequent, the records of this Bureau fully establish. It was no doubt a feeling that such cases had arisen and would arise, and that this class of soldiers might well be saved to the service, which influenced Congress in authorizing the President to issue his proclamation of amnesty to deserters, of March 10, 1863; and it is believed to be fair to conclude that it was the same spirit of charitable consideration for soldiers, who were at the same time citizens, that the national legislature abstained from affixing to deserters generally any such stigma as should necessarily preclude their retiring from the service with an honorable discharge, and left their cases to be disposed of under previous laws and regulations.

In reiterating the conclusion of this Bureau, that a desertion does not *per se* impose upon the soldier a disability to receive the government bounty, it is of course to be understood that this opinion is not intended to embrace the special cases of deserters whose rights of citizenship are expressly forfeited by the act of March 3, 1865, ch. 79, sec. 11, XXI, 614. See XXII, 653; XXIII, 501.†

SEE DESERTER, (24.)
DISCHARGE, (7.)
ENLISTMENT, I, (4.)
LOCAL BOUNTY.
LOST RECORD, (4.)
PUNISHMENT, (21.)
SLAVE, (11.)
UNITED STATES AS BAILEE, &c.
VETERAN VOLUNTEERS.

BRANDING.

SEE PUNISHMENT, (3.)

BRAVERY IN BATTLE.

SEE ARREST, I, (12.)
DISMISSAL, II, (3.)
EVIDENCE, (14.)
PARDON, (10.)
PLEA, (17.)
PRESIDENT AS REVIEWING OFFICER, (4.)
RETIRING OF OFFICER, (2.)

BREACH OF ARREST.

SEE NINTH ARTICLE, (1.)
SEVENTY-SEVENTH ARTICLE.
NINETY-NINTH ARTICLE, (18.)

†NOTE.—While the views above expressed relate especially to the payment of the bounty of $100 granted by the act of July 22, 1861, ch. 9, sec. 5, they apply equally to the matter of the payment of the *Additional Bounty* under the act, passed since the date of this opinion, of July 28, 1866, ch. 296, secs. 12 and 13. This act, also, makes the payment conditional upon honorable discharge after a certain term of service; and by further providing, in terms, that the soldier shall have received or be entitled to receive a bounty of $100 under existing laws, assimilates precisely the cases of claims for the additional bounty to those arising under the original act of 1861.

BREVET RANK.

1. Under paragraph 10 of the Army Regulations, brevet rank can take effect on military courts composed of officers belonging to the same arm of the service, only when such officers belong to different corps in that arm, as to different regiments. So *held*, that a captain of volunteer infantry was ranked upon a detail for a court-martial by another captain and brevet major of volunteer infantry, belonging to a different regiment, although the date of the commission of the latter was subsequent to that of the former. XXI, 263.

2. Where a major of a volunteer regiment, commissioned by the governor of a State, and a brevet major of regulars, commissioned by the President, (but of a date later than that of the commission of the other,) were placed together upon a detachment composed of different corps, *held*, that the latter was entitled, under the provisions of the 61st article, and of paragraphs 9 and 10 of the Army Regulations, to the command, in precedence of the former. For upon such a detachment, as between officers of such relative status, the brevet commission gives *grade*, and has the same effect as a commission to full rank of the same degree. The question of precedence, therefore, is decided by the general rule laid down in paragraph 9, that the officer serving by commission from a State shall take rank after an officer of the like grade whose commission is derived from the United States; and the fact that the commission of the former is prior in date to that of the latter cannot affect the operation of the rule. XX, 483.

* 3. A captain takes precedence on a court-martial of a first lieutenant and brevet captain. The fact that at a prior date, when the former was also a first lieutenant and brevet captain, the latter was his senior in rank, can have no effect whatever upon the question of precedence on the court. XIX, 677.

* 4. Brevet rank can properly neither be conferred, nor take effect, except as an incident to full rank of a lower grade. XXI, 608. See FEMALE—APPOINTMENT OF TO MILITARY OFFICE.

* 5 Where a number of officers were detailed, not upon a court-martial, but a board of investigation merely, and in a command which was not a "detachment" in the sense of paragraph 11 of the Army Regulations, but an established post command. *held* that brevet rank did not take effect upon the detail. XXIII, 668; XXVI, 5.

SEE FIELD OFFICER'S COURT.

BRIBERY.

The act of July 4, 1864, ch. 253, sec. 8, in providing for the trial by military court of an officer or employee of the quartermaster's department who accepts "money or other valuable consideration" from a government contractor, &c., is deemed to refer not merely to the receiving of a *consideration* in the strict legal sense as something given *in return* for something given or done by the receiver, but to include anything gratuitously given, whether as a mere present in acknowledgment of a previous favor, or as a bribe to induce the per-

formance of some act in the future. The gist of the offence is the mere accepting of the thing by the officer or employee from the contractor, &c., the object of the statute being to prevent any attempts, whether made directly or indirectly, to unduly influence the action of the former in favor of the latter; and, to establish such offence, it need not be shown that anything was actually done or given in return for the article received. So *held*, that an officer of the quartermaster's department who accepted gifts of jewelry, plate, horse equipments, &c., from persons whom he claimed to be his friends, but who were at the time government contractors, was properly convicted of an offence under this statute. XVIII, 582. See *note* under CONTRACTOR, II.

SEE CLAIMS, I, (10.)
CONTRACTOR, II, (12.)
MILITARY COMMISSION, II, (27.)
SENTENCE, I, (20,) (21.)

BURGLARY.

SEE NINETY-NINTH ARTICLE, (22.)
PARDON, (9.)

C.

CAPTURED PROPERTY.

SEE CLAIMS, I, (20,) (26;) II, (11,) (12.)
PARDON, (5.)
PRIZE, (3.)
REDUCTION TO THE RANKS, I, (1.)
SALVAGE, (2.)

CAMP FOLLOWER.

SEE CIVILIANS EMPLOYED WITH TROOPS.

CARRYING LOADED KNAPSACK.

SEE PUNISHMENT, (4,) (5.)

CASHIERING.

A sentence of cashiering has, by well-established practice, the same legal effect as a sentence of dismissal. IV, 533; VIII, 601.

SEE DISQUALIFICATION, (4.)
MILITARY COMMISSION, V (4.)

CERTIFICATE OF MERIT.

SEE SUPERINTENDENT OF CEMETERY.

CHALLENGE.

(To fight a duel.)

SEE TWENTY-FIFTH ARTICLE.

(To the detail or a member of the court.)

SEE SIXTY-FOURTH ARTICLE, (2,) (4.)
SEVENTY-FIRST ARTICLE.
SEVENTY-FIFTH ARTICLE, (1.)
FIELD OFFICER'S COURT, (19.)
RECORD, IV, (6;) V, (8,) (9.)

CHAPLAIN.

SEE MILEAGE, (1.)
PAY AND ALLOWANCES, (18.)
PROCEEDINGS AT LAW AGAINST OFFICERS, &c., (17.)

CHARGE.

* 1. In the British service, there is no distinction between the "charge," as such, and the "specification;" the fact, or body of facts, constituting each offence being only presented in a single sentence or paragraph, the separate paragraphs being numbered where the charges are more than one, but—even where the offences are all of the same class and character—introduced by no general title or descriptive heading. (See VII Opinions of the Attorneys General, 603; and examine James' Collection of Charges, &c., *passim.*) In our service, on the contrary, a military charge consists of two parts—the technical "charge" and the "specification." The former defines and designates the offence, and the latter sets forth a certain state of facts which are supposed to make out such offence. An accusation against an officer or soldier not thus separated in form, would be regarded in our practice as irregular, in not giving him due and proper notice of the specific legal offence alleged against him; and a sentence of court-martial founded thereupon would almost certainly be disapproved. See VII, 600. But this rule of practice does not preclude the considering of the charge and specification *together*, in order that legal effect may be given to the pleading as a whole; as when it is doubtful, from the phraseology of the former, under what article of war, or statute, the accusation is brought. See 2, 7.

* 2. The same particularity is not called for in military charges which is required in civil indictments. It is said by Attorney General Cushing (VII Opinions, 603) "that there is no one form of exclusive rigor and necessity in which to state military accusations." And 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; which eschews looseness or confusion in all things, but reflects that military administration must be capable of working in peace, it is true, but more especially amid the privations and the dangers of war. Hence, undoubtedly, the most bald statement of the facts alleged as constituting the offence, provided the legal offence itself be distinctively and accurately described

in such terms of precision as the rules of military jurisprudence require, will be tenable in court-martial proceedings, and will be adequate ground-work of conviction and sentence." So it is remarked by Mr. Wirt, (I Opinions, 286,) that "all that is necessary" in a military charge is that it be "sufficiently clear to inform the accused of the military offence for which he is to be tried, and to enable him to prepare his defence." The two principal essentials in a charge, including the specification, in fact are: 1. That it shall be laid under the proper article of war or statute; 2. That it shall contain averments sufficient substantially to distinguish and constitute the offence. These essentials being observed, however simple and devoid of technical expressions be the language used, the rule of construction will apply, that a legal effect is to be given to pleadings before military courts when the same are not clearly fatally irregular under the articles of war or other statutes, or under the custom of the service. See XXVI, 551.

3. Where certain conduct is a clear violation of a specific article of war, it should be charged under that article. Thus an offence which is clearly a violation of the 45th article is not properly charged as a violation of the 83d or 99th. The latter mode of charging the offence would give the court a discretion as to the punishment which it would not have if charged under the appropriate article. II, 51; XI, 312; XX, 533.

4. Where, under a charge of a violation of the 15th article, the specification set forth an entirely different offence, to wit, a violation of the 50th article—*held*, that the pleadings were insufficient in law, and that a sentence based upon a conviction of both charge and specification as they stood could not be enforced. XIV, 599.

5. The rule that when the facts indicate clearly a violation of a specific article, the offence must be charged thereunder, applies in full force to the case of one of the offences enumerated in section 30, chapter 75, act of 3d March, 1863, which cannot properly be charged as "conduct to the prejudice of good order and military discipline," especially in view of the fact that the character of the penalty is indicated by the statute. IV, 125; XIX, 603. (The act referred to is limited, in its operation, to "time of war, insurrection, or rebellion.")

6. To charge a military offence as a *violation of a certain article of war*, naming it by its number, is regular and proper, and in accordance with the mode of declaring which prevails in the ordinary criminal courts. An indictment for a crime which a statute has created by simply affixing a penalty for its commission, always concludes by averring the conduct of the party to be contrary to or in violation of the statute in such case made and provided. 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 offence 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. Denouncing a penalty or punishment for an offence 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. V, 77. See VII, 457.

7. Where the charge was "drunkenness on duty," and the specification set forth drunkenness only—*held*, that as the evidence fully sustained the charge, a conviction thereof was regular and proper. This in accordance with the general rule that the charge and specification must be considered together, and that if, when thus considered, they present an offence under one of the articles of war, a conviction is warranted if the testimony is sufficient. XV, 680.

8. Where the pleadings, instead of a formal charge and specification, consisted merely of a letter in which an inferior officer reported to his superior the conduct of the accused—*held*, that they were wholly informal, and that the arraignment of the accused thereon was irregular and improper. XII, 249.

9. It is the universal practice of military courts to take cognizance of as many accusations against the individual as it may be deemed proper by the prosecuting authority to have preferred, without regard to their connexion with each other as to time, place, or subject. A regard for despatch in the administration of justice requires this course. XIV, 40. But see 10.

10. Multiplication of charges is generally to be discountenanced, especially when they have been permitted to accumulate. Though such a proceeding may be necessary at times for the purpose of showing a uniform course of misconduct which cannot well be laid in a general charge, yet it is oftener resorted to for the purpose of securing the weight of an accumulation of offences which are in themselves trifling. The presumption of this motive is strengthened when the charges relate to a period considerably prior to the date at which they are preferred. XII, 348.

* 11. Where an enlisted man was convicted upon a charge of "utter worthlessness as a soldier," with several specifications setting forth sundry disorders, neglects, stealing from enlisted men, &c.—*held*, that the charge was an improper one; that the specifications were not appropriate to such a charge, but should have been presented under a charge of a violation of the 99th article of war; and that the proceedings should be set aside as fatally defective. XXI, 485.

* 12. Except in cases of contractors, inspectors, &c., (see acts of July 17, 1862, chapter 200, section 16, and of July 4, 1864, chapter 253, sections 6 and 7; but see also *note* under CONTRACTOR, II,) the charge expressed in the single word "*fraud*" is too loose and indefinite to be employed in military pleadings. (See EIGHTY-FIFTH ARTICLE, 2.) Where indeed the specification under such a charge properly supplies all the allegations sufficient to constitute an offence under the act of March 2, 1863, chapter 67, section 1, "to prevent and punish frauds upon the government of the United States," the charge, though irregular, may be sustained as not so defective as to invalidate the sentence. But the proper pleading in such a case is, of course, to set forth, as the charge, the distinct offence described in the statute and

in the language therein used; the facts constituting such offence being detailed in the specification. See XIX, 280.

13. The articles of war assign no penalty for *gaming*, as such; and, except in the case of a disbursing officer, (see par. 996 of the Regulations,) the same does not appear to be regarded as an offence to be taken cognizance of by military law. Except, therefore, where it is accompanied by such conduct as to bring it within the purview of the 99th article, as, for instance, where engaged in by officers with their men; or within that of the 83d, as when characterized by acts of a dishonorable or shameful character; it is not to be made the subject of a charge before court-martial. XVI, 381.

14. There is no law or usage to preclude an officer from preferring charges when himself under charges. XVI, 68. Or when under arrest. V, 348.

15. The validity of charges is not affected by the fact that they originated with a person not actually in the military service. It is the duty of such a person, equally with one connected with the army, to bring to the attention of the proper commander any grave case of crime committed by officer or soldier. If such person submits formal charges, these may be adopted, or new ones may be framed; it is only necessary that they be subscribed by a commissioned officer; and the judge advocate may in all cases formally authenticate them by his signature. That the party originally preferring the charge against an officer was not in the service, in no way affects that officer's right to proceed against him for damages in case of his acquittal. XVI, 423.

* 16. While it is certainly most desirable and proper that charges, especially when of a grave character, should be forwarded in the first instance to the authority who has convened, or is to convene, the court-martial; yet if charges are, by the officer preferring them, presented directly to the court, through the judge advocate, and the court proceed to the trial of the same—such action will not affect the validity of its findings or sentence thereon. XXVI, 167. See COURT-MARTIAL, I, 5.

17. Where charges are preferred by an officer of inferior rank against a *general officer*, without any investigation of the case having been had by competent authority, the general rule has ordinarily been observed to notify the accused of the charges, and give him a reasonable opportunity to explain the acts alleged, before resorting to judicial proceedings. XX, 12.

18. Though certain charges have been expressly ordered to be tried by the Secretary of War, yet it is not indispensable that his formal consent be obtained to abandon any particular charge or specification on trial. For though, before entering a *nolle prosequi* in such a case, it would be proper to seek and obtain such consent, yet it would not be a *fatal* irregularity for the court itself, without a reference to the Secretary, to order to be withdrawn or struck out any part of the body of the charges and specifications. XXI, 56.

19. In a specification to a charge of murder against a soldier, pre-

ferred under the act of 3d March, 1863, chapter 75, section 30, it need not be set forth that the act was committed in a time of war, insurrection or rebellion. Of such fact, if it is a fact, the court will take judicial notice. XVII, 396. And *held* (October, 1865,) that the court should take such notice, and regard the rebellion as still existing, (and therefore sustain the specification,) in a case tried in August, 1865, inasmuch as in the absence of any statutory or other proper official declaration, by the political authority of the country, to the effect that the state of war was terminated, the court had no power to pass upon the political question of its continuance. XVII, 397. See HABEAS CORPUS, 15.

20. Where the charge, upon the trial of a citizen of Maryland by a military commission, was "attempting to run the blockade," and the offence as set forth in the specification consisted in his transporting contraband goods to the Maryland shore of the Potomac, with the avowed purpose of conveying them across and within the lines of the enemy—*held* (December, 1864,) that the language of the charge, taken in connection with the allegations of the specification, was a substantial and sufficient averment of the actual offence committed, to wit: a violation of the laws of war as laid down in paragraph 86 of General Order 100, of 1863. XIII, 125.

*21. It is not *essential*, in order to give an accused due and proper notice of the charges against him, that the copy of charges served upon him before trial should contain a list of the witnesses proposed to be called on the part of the prosecution If, however, such a list is added to the original draft, it is of course the better practice to repeat it in the copy. XXV, 350. See ARREST, I, 9.

*22. If there is a single charge and specification of which the accused is found guilty which will support the sentence, an application after trial to have the proceedings set aside on the ground that the charges on which he was convicted are, when taken together, inconsistent and incompatible, being in the nature of a motion in arrest of judgment, cannot be entertained. XXV, 104.

*23. Where, after the court was sworn, and before the arraignment of the accused, an amendment was made by the judge advocate in one of the specifications of the charge; and the accused, before pleading, objected to being tried upon the amended charge on the ground (as alleged) that the amendment contained new matter and set forth a new and distinct offence, and that the charge was thus no longer *the matter before the court*, in the sense of the 69th article; *held* that such objection was properly overruled by the court; and that whether or not the amendment contained new matter, was a question which need not be considered, for such amendment was in any event competent to be made. It is the settled practice of military tribunals not to read or present to the court the charges in any case until the arraignment. Till then, therefore, they are not properly matters before the court; and up to that time they may be amended at the discretion of the prosecuting officer, subject only to the condition that, if the amendment so modify the original charge as to make it just

and proper to grant it, the accused may be allowed further time to consider his plea. XXII, 58.

SEE SIXTH ARTICLE (1.)
THIRTY-EIGHTH ARTICLE, (2.)
THIRTY-NINTH ARTICLE, (4.)
FORTY-FIFTH ARTICLE, (1,) (2.)
EIGHTY-THIRD ARTICLE.
EIGHTY-FIFTH ARTICLE, (2.)
NINETY-NINTH ARTICLE.
COURT-MARTIAL I, (3,) (5;) II, (16.)
CONTRACTOR, II, (4.)
DISCHARGE, (5.)
FINDING.
FRAUD, II, (3.) (4.)
GUERILLA, (1,) (3.)
JOINDER.
MAKING GOOD TIME LOST BY DESERTION, &c., (3.)
MILITARY COMMISSION, II, (25.)
PREFERRING CHARGES.
RECORD, V, (10,) (11.)
SPECIFICATION.
TRIAL, (7.)
VARIANCE, (2,) (5,) (6,) (7.)
WITHDRAWAL OF CHARGE.

CIVIL AUTHORITIES.

SEE THIRTY-THIRD ARTICLE.
ARREST, II.
DEPARTMENT COMMANDER, (4,) (6.)

CIVIL COMMISSION.

A "civil commission," composed of civilians and lawyers, exercising all the powers of a common law and chancery court, established by a military commander, at Memphis, Tennessee, in 1863—*held*, a tribunal unauthorized by military law. III, 192.

CIVILIANS EMPLOYED WITH TROOPS.

*For minor offences against military order and discipline, committed by civilians employed with troops, as sutlers and retainers or camp followers, it has been customary to expel them from the post or camp where they are employed or stationed. When guilty of crimes or grave offences they are generally to be turned over to the civil authorities of the locality for trial and punishment. But where employed with troops on the march, or at remote posts and in regions where there is no civil jurisdiction, they may for serious offences be brought to trial by general court-martial, or for minor offences by a regimental or garrison court, under the general authority of the 60th article of war, provided such offences are of a military character. XXIII, 331. See SIXTY-SEVENTH ARTICLE.

CIVIL RIGHTS BILL.

SEE FREEDMAN.
WITNESS, (18.)

CLAIM AGENT.

Where a claim agent had been suspended, in orders, from practice, both in the Pension Office and in the War Department, for exacting excessive charges from soldiers applying for pensions and for back pay and bounty; and an indictment had been found against him for his offence in connection with the applications for pension, but the United States district attorney had subsequently given an opinion that the act of July 4, 1864, in regard to the fees of agents in pension cases, did not apply to his case, and that the indictment should not have been found—*advised*, that such conclusion could not properly avail to modify the action of the War Department, which, in the absence of special legislation on the subject, was bound to protect soldier-claimants from the exactions of rapacious claim agents by excluding them from practice in its bureaus; and that, till the charge against this agent was disproved, his exclusion should be continued. XXV, 507.

CLAIMS, I—(GENERALLY.)

1. There is no law authorizing the executive branch of the government to allow claims for compensation for losses sustained by persons in consequence of their arrest and imprisonment, in time of war, as suspected criminals; such claims can be allowed and paid by Congress only. XIX, 166.

2. Where an arrest of a citizen was made by the military authorities, upon information that he was one of a number of persons engaged in a conspiracy to release the rebel prisoners of war at Camp Douglas and other posts; and such citizen, upon his being discharged upon his parole, preferred a claim against the government for damages as for a false imprisonment—*held*, as his arrest had been made in time of war and rebellion, and as a measure designed to promote the public security, and was based upon reasonable grounds of suspicion and accompanied with no undue force, that his claim was one which could not be favorably considered. XV, 129.

3. Where a citizen, who at the time of his arrest was in the employment and pay of the government as an engineer on the United States military railroad, was convicted by a military commission of a grave military offence of which he was clearly guilty, upon the evidence; but the sentence, of fine and imprisonment, was determined to be inoperative because one member had sat upon the court without being sworn—*held*, that the military department of the government had no authority to reimburse him for his loss of wages during confinement, or for the expenses of his defence, and that Congress alone could grant him any such relief. XIV, 225.

4. Two foreign-born residents were arrested for a desertion from the draft, of 1864, and tried and acquitted. At the time of their arrest, they claimed no exemption from the draft on account of alienage, nor did they take advantage of the ample facilities afforded by the law at the time of the publication of the enrolment lists, to have

the same corrected as to themselves on this ground. *Held*, that by thus omitting to make known their *status* they had failed to use reasonable diligence; that their case was one of *damnum absque injuria;* and that a claim preferred by them for indemnity for their arrest and detention could not be maintained. XIV, 405.

5. *Held*, that a claim for indemnity preferred by a British subject, who had been wrongfully arrested as a deserter and detained in the military service for a considerable period, was not one suitable for determination and settlement by the Secretary of War, and could be adjusted by Congress alone. XIX, 327; see XXVI, 597. And *held*, that this view applied with special force to a case in which the War Department had paid the man as a private soldier for the entire period during which he was held, and had given him an honorable discharge as a United States soldier. XXI, 122.

6. Where a late officer of the rebel army preferred a claim for the value of a horse, which, because marked "U. S.," was taken from him while a prisoner of war under the capitulation of Lee, *held*, that the horse being found so marked in such hands, was *prima facie* the property of the United States; and that the terms of the surrender of Lee, which permitted rebel officers to retain their private horses, could give the claimant no right to retain a horse which belonged to the United States, and which—inasmuch as the seizure by a rebel of the property of the government could invest him with no title whatever therein—the United States was empowered to retake and possess itself of, wherever found. XVIII, 511.

7. The government is under no obligation to recognize any assignment of moneys in its hands due or payable to an individual; nor can parties, by presenting conflicting claims to such moneys, compel the government to become a stakeholder for them, or an arbitrator upon the merits of their demands. So, in a case of a conflict between two pretended assignees of the same sum in the hands of the Secretary of War, and payable to an individual who had deposited the same as security—*advised* that the amount, when returned, be paid to such original depositor only, and to no other person. XIX, 266.

8. Certain employees at a United States arsenal in Pennsylvania, in the summer of 1864, enlisted and were mustered in the United States service in a volunteer organization, for a term of one hundred days, under an assurance by a recruiting officer, who was wholly unauthorized to give the same, that upon honorable discharge at the end of this term they should receive, in addition to the soldier's pay, their customary wages as such employees for the period of such term, precisely as if they had remained in their original employment. *Advised*, upon a claim subsequently made by them for such wages, that the government had frequently been called upon to disavow the unauthorized statements of recruiting officers as to the terms of enlistment, and that it should do so in this instance, where no authority whatever had been given for pledging to the parties their wages as employees, after muster; that their muster as soldiers vacated their position as employees, and that their claim was not only inconsistent with principle, but was prohibited by the spirit of the act of 30th

September, 1850, ch. 90, sec. 1, providing that a party shall not be allowed pay for two different offices under the government at the same time. And *advised* further, that this case differed altogether from that arising under the emergencies of the service in 1862 and 1863, (when employees at the same arsenal, volunteering as soldiers, were still paid their wages,) in *this*, that the employees who then volunteered were merely received into the service of the State of Pennsylvania, and not of the United States, and that therefore it was competent at that time for the officers of the arsenal to retain them in pay as employees thereat, by giving them, as they did, formal leaves of absence for the period for which they so volunteered. XVI, 59.

9. For the arrest of a deserter and his delivery to the proper military officer there is allowed, by paragraph 156 of the Army Regulations, amended in General Order No. 325 of September 28, 1863, "a reward of thirty dollars," in full payment and satisfaction of all charges and expenses. All disbursements attending an unsuccessful effort to make such an arrest (on the part of a person not specially authorized to apprehend deserters) are, as in the case of any other advertised reward, incurred at the risk of the individual. So *held*, that the claim of a party (not acting under such special authority) to be reimbursed for certain disbursements so incurred, could not properly be allowed by the military department. XX, 470.

10. The military branch of the government is justified in withholding payment of any claim to which attaches a suspicion of fraud which would invalidate such claim in law. So, where there was good reason to believe that a certain contractor, who had presented a claim of large amount against the government, had either procured his contract to be awarded to him by means of bribing certain military officers, or had been obliged to submit to extortions on the part of such officers, as a consideration to his entering upon the contract, *advised* that it was competent for the Secretary of War to impose as a condition to the payment of his claim that he should fully exhibit all the facts, in regard to such alleged bribes or extortions, which surrounded the inception of the contract. XVIII, 667.

11. Upon a claim for the reimbursement of the amount of a tax—five dollars per bale—levied (in 1864) by the military commander at New Orleans upon certain cotton, in common with all other cotton, brought into that city, and applied to hospital, sanitary, and charitable purposes—*held*, that such assessment was authorized by the discretionary power with which the commander was invested in time of war, and to which the interests of commerce were necessarily subordinate; and that, in the absence of proof of any peculiar merit, arising from his loyalty or otherwise, on the part of the claimant, the action of the military commander should not be reversed by the government. XVIII, 668.

12. It is the general rule that the municipal laws of a conquered country continue in force during the military occupation by the conqueror, except so far as they may be suspended or their operation may be affected by his acts. So, where a testator had executed, in Vicksburg, Mississippi, after its capture and during its occupation by

our forces, a will devising real estate, but such will, in not being attested by the required number of witnesses, was invalid under the State law; *held*, that as this law was in no respect modified upon the capture, the devisee under the will, however loyal, could not be invested by military authority with the legal title to such estate against the heirs at law; and that the executive branch of the government had no authority to entertain a claim to such estate presented by him. XIX, 474.

*13. *Held* that a claim by a government employee, not connected with the military service, to be paid a reasonable sum for an invention patented by him, which he had perfected at a government workshop, and with the aid of tools and material belonging to the government, was not invalid either in law or equity. And *remarked*, that the fact that an invention has been perfected under such circumstances, and during a period when the time and labor of the party were at the disposal of the government by virtue of its contract with him, should not, of itself, be deemed conclusive against a claim interposed by him to be paid by the United States for the permanent use of such invention, especially where (as was proposed in this instance) the patent right is upon such payment, wholly transferred. If, in experimenting, framing his models, &c., the party has availed himself to any extent of the time, materials, or labor of the government or its operatives, the value of these should be taken into account in determining what may be a reasonable price for the use and transfer of the invention and patent; but, *because* of his so availing himself, it cannot be justly held that the entire product of the labor of his hands and brain should accrue of right to his employer. He was employed, indeed, not to make this invention, but for other and ordinary labor, and if he properly performs the latter, while at the same time perfecting the former, the government, while it has no cause to complain, should, it is thought, deem itself fortunate that it has afforded an opportunity to its skilled employee to exercise his genius, especially when exercised, as here, for its own immediate benefit. And, in such a case, the government, if desiring to secure a permanent property in the invention, should not be unwilling to remunerate the inventor in such a sum as, considering how far it may have itself contributed to the result, may be just and reasonable. If an opposite view, indeed, should prevail, the inventive talent of public operatives instead of being stimulated would be discouraged, or, if exerted at all, would be placed in the first instance at the command of private individuals or companies with whom, perhaps in the end, the government would be forced to contract at a greatly advanced price. It may be observed, also, that under our patent laws it is only the *inventor*, the person in whose brain the new form or method has been conceived, who can be invested with the patent right. To one who may have furnished the labor or materials necessary to its completion a patent cannot be issued; for the subject of the patent is regarded as the *property* of the inventor alone. In this instance, therefore, the property of the party in his invention is recognized by law, and the United States, for merely using the same for public purposes, (in the absence of any

contract,) would be obliged to allow his claim for a proper compensation. XXI, 413.

*14. A quantity of pine logs, which had been washed ashore from the wreck of an English vessel, were discovered by a loyal citizen in March, 1862, cast upon the beach and floating in the sea near Port Royal, South Carolina, and were rescued by means of labor employed by him and taken into possession as his own property. When about to be transported to New York for sale, they were seized by order of the department commander and applied to the construction of Fort Mitchell. There was no evidence indicating that they had been the property of rebels or were contraband of war, or that any person other than the claimant pretended to have any interest in the same. Upon a claim by the party to be paid the value of the logs so taken from him, *held*, as follows: That the government did not, by the mere fact of its military occupation of the territory, acquire a right of property in the timber, the same not having belonged to the enemy; and that the claimant who was the first to reduce it to possession and hold it, by means of labor expended in rescuing it from the sea, had the superior title therein as against the government, which had made no attempt to possess it. That the more approved doctrine in regard to the ownership of derelict property is, (see II Parsons on Maritime Law, p. 618.) that such property is vested not in the government but in the finder, if, after a reasonable time, the original owner does not appear; and this view is far more in consonance with the spirit of modern and American law than that embodied in an early decision, (that in the case of *Peabody* vs. *The Proceeds of* 28 *bags of Cotton*, United States district court of Massachusetts, 1829, 2 Am. Jurist, 119.) which adopted the old English rulings in regard to treasure trove and wrecks held to be vested in the sovereign or lord of the manor: And that the claimant in this case should therefore be regarded as the owner (as against the United States) of the logs at the time when the same were appropriated by the department commander, and as entitled, upon the principle of rendering compensation for private property taken by paramount authority for a public use, to be paid the proper value of the same. XXIV, 285.

*15. Where certain buildings in Washington, D. C., leased and occupied as a boarding-house, were (during the war) taken possession of by the government for military uses, *held*, upon a *claim* for damages interposed by the occupant, that, in estimating the compensation to be awarded, the *loss of business* by the claimant as keeper of such boarding-house could not be allowed as an item of damage. The War Department of the government took possession of the premises in question by virtue of the paramount right of eminent domain, an inherent prerogative of national sovereignty, which, in time of war, is enlarged and strengthened for all the exigencies of military necessity. Under the constitutional guaranty for such case provided, just compensation must be made for the private property so taken for public use. Of the necessity or expediency of the taking the government must judge, but the obligation to make compensation is concomitant with the right. As the United States cannot in this case be sued,

it is the duty of the Department to determine the amount to be allowed upon a fair examination of all the facts, and in accordance with established principles of law, in such manner as to render a suitable satisfaction for the injury, and at the same time avoid creating precedents calculated to embarrass the government. In this case that which was taken was the rights of the claimant under the lease. The value of those rights and the proper measure of the compensation to be allowed, is the amount which would have been a *fair rent* for the premises during the period of dispossession. The government cannot go into the accidental peculiar value of that right to the claimant growing out of the uses to which he has seen fit to put the buildings. The adventitious circumstance, that the claimant was in fact keeping a boarding-house there at a great profit, cannot be considered, neither can the probable lucrativeness of the establishment for a future period, subsequent to the taking, properly be estimated. Where a merchant vessel is taken for public use, the government pays the value that the vessel will bring in the ship market. The fact that it happens to be employed in a specially profitable freighting business is not considered. Neither is the inquiry entered into as to how much the owner loses by being deprived of an opportunity to carry out contemplated enterprises. The future is too uncertain to be reduced to a money value. The vessel might never make another trip; perils of the sea, fire, or the public enemy might destroy or disable her. So in the case of a boarding-house, the estimate of the value of the business lost requires an assumption of a large number of contingencies, any one of which failing, the profits would cease. The damage is too remote and consequential to be assessed. (For judicial decisions on this subject see 11 Richardson's Law R., 239; 12 do., 504; 17 Wendell's R., 650, and cases cited in 1 Abbott's Digest, 612.) Indeed, it is believed that the only cases in which injury to business has been considered as an element for compensation have been those where the interest taken was actually the right to carry on a certain business; as, for instance, where a *franchise* has been impaired or taken away. But a franchise is fixed and determined property. XX, 573.

* 16. So where the government, by the right of eminent domain, took possession of a store in Washington for public use, *held* that the value of the "*good will*" of the business carried on by the occupant could not be considered in adjusting his claim for damages; that the loss of, or damage done to business *in futuro* was too remote to be regarded as any basis upon which to establish such claim; and that it was to substantive things *in esse* that the obligation of the government to remunerate attached only. XX, 590.

* 17. A party claimed a reasonable compensation for the keeping of, and for delivering up, a book (seized during the war) of the county records of a county in Virginia, which he had been required to surrender to the Secretary of War. *Held* that he was not entitled to any such compensation; that, in whatever manner he became possessed of the book, the same could not belong to him, but having been the property of those who were *prima facie* rebel enemies of the United

States, (see FIFTY-SIXTH ARTICLE, 2,) became, upon seizure, the property of the United States, and that the party could hold it only subject to the order of the government. XXI, 479.

* 18. A party who, in 1861, had been employed by the local board of health as resident physician at the quarantine station on the Mississippi at New Orleans, made, in 1866, a claim upon the board of health of that city, which had been created by military authority after the occupation of the place by the United States forces, for a balance due him on account of his salary for the month of August, 1861. At the period charged for, the city and State were under the control and authority of the rebel organization of the so-called confederate states; and no funds accruing during that period were ever turned over to the United States. *Remarked*, that this claim was an attempt to charge the fund accrued under military administration with the unpaid debts of the rebel board, with the view, as it was understood, of resorting, in case this attempt failed, to the United States for payment; that such claim must proceed upon the theory that the United States have, as the successors of the so-called confederate government, become liable for the debts of municipal corporations arising while they were under the dominion of the rebel power, a theory which ignores the guilt of the rebellion, and assumes the validity of its existence; that the United States have no relation whatever to the services alleged to have been rendered, and can be in no way responsible for the default of the board which existed under an administration which this government has uniformly treated as a usurpation and a legal nullity; that the fund, as now raised and managed, was manifestly not liable for the debts of the rebel board, and that the claim, as presented, was a fair illustration of the audacity which characterizes the supporters of the late rebellion in their demands upon the United States. XX, 557.

* 19. Certain pork and bacon, belonging to a firm consisting of several partners, was seized by the rebels at the capture of Lexington, Kentucky, in 1862, but was subsequently retaken by the United States forces on their reoccupation of the country. Meanwhile, however, a disloyal member of the firm had presented to the rebel authorities a claim for payment for the property, and had received a large amount in confederate currency which he accepted as payment, appropriating a considerable portion to his own use. *Held* that, while the seizure by the rebels, followed by the subsequent recapture by our forces, would not have divested the title of the claimants, the action of the disloyal partner in releasing the title to the enemy estopped his copartners from setting up the present claim; that the principle of law (see II Parsons on Contracts, 127, and cases cited) that partners are jointly bound by the action of one of them in the course of the business of the partnership, applied in this instance; and that the property was to be viewed as having belonged to the rebels alone at its recapture, and as thereupon having become vested in the United States. XXVI, 218.

* 20. *Held* that there was no provision of law by which the Secretary of War would be authorized to pay a claim for reimbursement to a loyal citizen of Mississippi, whose dwelling-house and furniture had

been destroyed by rebel soldiers in March, 1862, in retaliation for his loyalty to the United States; and that Congress alone could afford him relief. XX, 510; see XX, 515.

*21. Where a party, convicted of being a spy and of violation of the laws of war in carrying a rebel mail from the South to the North, and sentenced to imprisonment during the war, was subsequently pardoned by the President, and thereupon preferred a claim to have returned to him certain money and jewelry which had been taken from the mail and from his own person on his capture within our lines, *held* that the same became, upon seizure, forfeited to the United States by the laws of war, and that the pardon of the party did not vest him with any right thereto, but had the effect of removing his punishment merely. XXII, 164.

*22. Certain real estate belonging to a citizen of Georgia was, in December, 1862, sold to the so-called confederate government, which occupied and improved it by the erection of buildings for public use. The land and buildings were, in 1864, taken possession of by the United States, by the right of conquest, upon the country being occupied by its armies. Upon a claim by the former owner to have the premises restored to him, on the ground that no title had ever vested in the rebel government, *held* that it could not be doubted that that government was capable of acquiring title by purchase, and that the course of the United States in seizing throughout the insurrectionary districts cotton purchased by that government had been a constant public acknowledgment of such capacity. That the premises in question having been duly vested in the rebel authorities, had duly become the property of the United States by capture, and that the proclamation of the President declaring the rebellion at an end had completed the title, the usual method of completing a title to conquered territory by the provisions of a treaty being out of the question. That the case was the same as that instanced by Halleck, (International Law, p. 811,) as follows, viz: "If the state to which the conquered territory belonged is entirely subjugated, and its power destroyed, the title of the conqueror is considered complete from the date of the subjugation of the former sovereign owner. In this case there could be no treaty of cession or confirmation, for, by supposition, the former owner no longer exists as a sovereign State; it therefore can neither confirm or call in question the conqueror's title:" That, therefore, the present claim could not be sustained. XXIII, 90.

☞ *(The opinions presented in the following paragraphs, under this Title, relating to cases of claims for personal property appropriated, damaged, or destroyed, and for rent of real estate occupied in rebel States during the war, were all rendered prior to the enactment of the statute of February* 19, 1867, *expressly precluding the settlement of such claims. The rulings were also made irrespective of any implied exclusion of such claims by the act of July* 4, 1864; *(see* CLAIMS, II, 1, 2;*) the conclusions expressed being based chiefly upon principles of the public law of war and conquest.)*

*23. *Held*, that the military department of the government could not entertain a claim for property destroyed, as an act of war, by a

military commander in a rebel State, in the course of military operations against the enemy. XXII, 443.

So *held* in the case of the claim of an alleged French subject for property taken and destroyed by United States soldiers, at Donaldsonville, Louisiana, in 1863, when that town was destroyed by fire as a military measure. XX, 508.

*24. The executive branch of the government is not authorized to pay claims for loss or damage to property occasioned by our troops while on the march in a rebellious State during the war. XIX, 541. In the case of a claim for compensation for buildings, fences, trees, &c.. destroyed or damaged on land used as camping ground by our troops in Kentucky at different periods of the war; *held* that the claim was not within the provisions of the act of July 4, 1864; inasmuch as it was not for supplies furnished or taken, but for depredations, or damages incident to the prosecution of the war. And *advised* that as it was by no means certain what view Congress would ultimately decide to take with reference to this class of demands, the executive branch of the government, until the adoption by the legislature of some settled principle recognizing them and authorizing their adjustment, should take no action thereon. XX, 627. So *held*, that a claim for damage done by our soldiers to crops, in Virginia, in May, 1865—being a loss occasioned by the spoliation and depredation incident to war—could not be adjusted by the War Department, under this act. XXI, 480. And where a claimant—for compensation for personal property taken without authority by our soldiers in Mississippi, in 1864—was himself a United States soldier, prevented from living at his home, in that State, on account of his adherence to the Union cause; *held* that, though the case was one of unusual hardship and merit, the executive branch of the government would not be warranted in taking exceptional action in favor of the claim, which could be satisfied through an appropriation by Congress alone. XX, 625.

*25. In the absence of positive legislation on the subject, it has been the uniform rule of the War Department to decline to entertain claims, even when presented by loyal citizens, for depredations or spoliation by our armies operating in rebel States during the war. Considerations of paramount importance call for the strictest adherence to this general rule, notwithstanding the hardship which it may work in individual cases. Aliens whose residence has subjected their property to the same consequences that have befallen the property of loyal Americans living in the pathway of the contending armies, cannot reasonably complain if compelled to abide by the same rule as respects indemnity as is imposed upon the most favored class of our citizens who have suffered in like manner. So *held* that the military branch of the government was not authorized to allow the claim of an alleged British subject for fences burned and furniture, household goods, &c., destroyed or damaged by our troops in Georgia, during the war. XX, 499. See XX, 513, 626; XXI, 378. So *held*, in the case of a claim, by an alleged British subject, resident in Virginia, for damages for property destroyed by our troops on the march in

that State. XXII, 49. See also case of a similar claim of British subjects for property destroyed, at the occupation of Richmond by our forces, in April 1865. XXII, 69.

*26. *Held* that a claim by the Austrian government, through its Minister at Washington, for compensation for a quantity of tobacco belonging to that government, and destroyed by the troops of the United States, in Virginia, during the war, could not properly be adjudicated by the War Department. And *remarked* that, while the duty of observing the strictest good faith toward foreign powers can never be willingly neglected by this republic, it is conceived that no nation can reasonably complain if placed, in respect to claims growing out of the prosecution of the late war for the suppression of the southern rebellion, on precisely the same footing as our most favored loyal citizens when presenting similar demands: That paramount considerations of public policy, the force of which would be readily recognized if pointed out to the representatives of other nations, have impelled the adoption of the general rule that the executive departments of this government will not assume to settle any claims for depredations or spoliations committed by the troops of the United States in the insurrectionary districts in the course of the prosecution of the late war: That originating as they have in an unprecedented condition of affairs; complicated as they are with political questions; involving as they do disputed issues of fact; and supported, or opposed, as they are generally found to be, by *ex parte* evidence of objectionable character respecting the circumstances of each case; these numerous and heavy demands upon the treasury of the country should be suspended until the supreme authority of the nation shall, by express law, distinctly declare the treatment which they shall receive: That loyal citizens, residing at the North but owning property in the South, have suffered losses for which, under this rule, they cannot be indemnified unless Congress shall so enact; and that there are no reasons suggested by the law of nations which call for a different disposition of the like claims of a foreign government, or of individual subjects of such a government. XX, 500. See XX, 593; XXVI, 253; CLAIMS, II, 12.

*27. Where a steam hammer, originally the property of the Georgia Central Railroad Company, was loaned and transferred during the war by that company to the commander of the rebel forces at Macon, Georgia, for use in the rebel military arsenal at that place; and the said hammer was subsequently, and while in use in said arsenal, taken possession of by the United States forces upon their capture of Macon; upon a claim by said company, preferred at the termination of hostilities, to have said hammer returned to it, as being wrongfully detained by the government; *held* that the uses to which the same was being put at the time of capture invested it with the same character as ordnance stores seized in the possession of the enemy, and rendered it proper spoil of war; and that the claim should therefore be denied. XXIII, 104.

*28. Special Order No. 202, of 1863, of the Department of the Gulf, directing the several banks and banking-houses of New Orleans to pay over to the chief quartermaster of the department all deposits

belonging to public enemies, was a measure authorized by the laws of war. And *held*, if error was committed in any case in which restitution or relief would be proper on proof of the loyalty of the claimant, that as the monies thus collected had been expended in the public service, and the Secretary of War had no fund applicable for the purpose at his disposal, the action of Congress would be necessary to authorize a reimbursement. XIX, 612. Similarly *held* in the case of a claim for the proceeds of the sales of the products of a plantation in Louisiana sequestered by the department commander in 1862, and managed under his direction; such proceeds having been turned over to the quartermaster department. XX, 605.

*29. *Held*, that the President's proclamation of April 2, 1863, by which the "*port*" of New Orleans was excepted from the declaration of places in insurrection and the operation of the prohibition of commercial intercourse, did not alter the *status* of real estate occupied by our military forces during the war, or authorize the payment of rent therefor for the period of occupation subsequent to the date of such proclamation: That the object of this proclamation—which revoked the exceptions of that of August 16, 1861, as too general, and substituted others which were precise and definite—was more effectually to prevent an illegal commercial intercourse with insurrectionary districts, by restricting such intercourse to certain few localities specified: That it was the executive intent to exempt from the *status* and penalties of rebellion the port of New Orleans as a *harbor;* to remove the ban of non-intercourse from it *as such;* and not to relieve the people of the city from the legal condition of insurrection in which they had been formerly declared to be, nor to modify in any manner their *political* relations: That had it been the design of the Executive to rehabilitate the citizens of New Orleans, by this proclamation, in all those rights of which they had been restrained by an antecedent solemn decree, it would have been easy so to decree, and clear and positive language would have been employed for the purpose; and that in view of the general rule of interpretation—that a law, whether statutory or otherwise, which repeals or restricts the scope of a previously existing provision, is to be strictly construed—the use of the specific word "*port*," in connection with New Orleans, must be regarded as limiting the operation of the exception to the port alone, as such. XX, 558.

*30. Where a citizen of Florida, while adhering to the rebels, and in fact engaged in manufacturing for them munitions of war, deeded, in December, 1861, to a party professedly loyal, certain real property in that State; which property was afterwards occupied by the military authorities under a lease entered into with said parties by the local quartermaster, (but without the authority or subsequent sanction of the Quartermaster General;) *held*, upon a claim for rent under such lease, that the same could not properly be paid by the War Department; that the deed of a rebel engaged in treasonable acts was void as against the right of the United States to seize and confiscate the property with its rents and profits, under the laws of war; that if the officer who consented to the lease was ignorant of the status of the

original owner, his act would not be binding upon the government; and, if not ignorant, his act should be repudiated as unwarrantable or collusive; further, that the omission by the United States to proceed against this property as liable to confiscation did not imply a renunciation of its right to so proceed. XXII, 3.

*31. According to the universal law of war, the possession of real estate by a conquering belligerent, whether or not found abandoned, gives him a right to its use and products. So *held* that a claim by the former owner for the rent of real estate in New Orleans, taken possession of *jure belli* by the United States forces upon the capture of that city, could not be allowed. XX, 558, 561; and see XXVI, 454. And remarked that, in the absence of express legislation, providing for the settlement or disposition of claims of this class, it would be useless for the executive branch of the government to attempt to determine the question of the loyalty of the claimant. And *held* that the fact that the claimant, who had engaged in the rebellion, had recently been *pardoned* for his treason by the President, could in no manner entitle him to an allowance of his claim for rent. XXII, 3, 16.

*32. Where a tract of land including and adjacent to a military post in Texas was, in 1856, leased by the United States from a citizen at a certain rent, for military purposes; and the post and land were, in 1861, surrendered by the traitor Twiggs to the rebels, who continued in possession of the same until the occupation of the country by the United States forces—*held*, that in view of the public and political considerations involved, the executive branch of the government could not properly allow a claim for rent for the period during which the leased territory was held by the enemy. XX, 531.

*33. Certain land in Louisiana was taken possession of, in 1861, by the rebel authorities and occupied by a fortification erected for the defence of New Orleans. In February, 1862, when the city was taken by our forces, this land was occupied and the fortification maintained by the United States, such occupation continuing till February, 1866, when the works were dismantled and the ground surrendered to the owner. Upon a claim presented by him for rent for the use of the property by the United States during the period of its occupation—*held* as follows:

I. That the case was not to be regarded as one in which the *title* passed to the United States upon capture; inasmuch as that view would imply that a title existed in the rebel government. Even if the so-called confederate states had been recognized by this government as a sovereign nation, the proceedings had respecting the land would not have operated to invest that nation with title thereto. For while a "firm possession" is sufficient to establish the captor's title to personal or movable property captured on land, it is otherwise with realty; and the law is perfectly well settled that a belligerent, making himself master of the provinces, lands, &c., of an enemy, does not acquire complete ownership or dominion till his conquest is confirmed in some one of the modes prescribed by the rules of international jurisprudence; (see Halleck, p. 447;) and in the case of the rebel authorities a confirmation in any mode has been rendered impossible

by their final defeat and overthrow. But this government has never conceded to the so-styled confederate organization the *capacity* to acquire title, by conquest or seizure, to any part of the soil of the public domain; its occupation and use of these premises cannot therefore be treated as a capture, but are to be deemed a mere lawless usurpation and a legal nullity, endowing the holders with no rights known to international law, and divesting neither the owner nor the United States of any rights of property or dominion. The proper view therefore to take of this land is that it was occupied by the United States as part of the rebel territory, by virtue of the rights of possession conferred upon a conqueror by the law of war.

II. That the government of the United States having, as against rebels, both sovereign and belligerent rights, and it being impossible in law to recognize any distinction between those who exercised official functions in the pretended body politic of the confederacy and the individuals under them, all being equally territorial enemies, (2 Black R., 635,) the possession of this real property by the United States, as a conquering belligerent, conferred the right to its use and products; and that for *this* reason the present claim for rent was not maintainable. (See XX, 605.)

III. Further, that *land taken for fortifications* is—no matter what may be the status of the owner—not within the constitutional provision requiring compensation to be made for private property taken for public use, and that the owner would not have any legal claim to indemnity, whatever his political character and wherever the property were situated. A clear distinction has always been recognized between the taking of real estate or personal property for uses such as that to which the land was put in the present case and the taking of the same for the ordinary uses of peace. Mr. Whiting, (War Claims, p. 12,) in remarking that property of citizens may in time of war be destroyed by the military forces, "under certain circumstances, without a liability to pay for it," instances some cases, as follows: "Thus, if one of our armies marches across a corn-field, and so destroys a growing crop, or fires a building which conceals or protects the enemy, or cuts down timber to open a passage for troops through a forest, the owner of such property, citizen or alien, has no legal claim to have his losses made up to him by the United States." He adds: "Misfortunes like these must be borne wherever they light. If any government is obligated to guarantee its subjects against losses by casualties of public war, such obligation must be founded upon some constitutional or statute law. Thus far, no such obligations have been recognized in our system of congressional legislation." A judicial decision to the same effect is that of the court in the case of *Parham* vs. *The Justices, &c., of Decatur county*, 9 Georgia R., p. 341, where it is said: "It is not to be doubted but that there are cases in which private property may be taken for a public use, without the consent of the owner, and without compensation, and without any provision of law for making compensation. There are cases of urgent public necessity which no law has anticipated, and which cannot await the action of the legislature. In such cases the injured indi-

vidual has no redress at law; those who seize the property are not trespassers, and there is no relief for him but by petition to the legislature. For example: the pulling down houses, and raising bulwarks for the defence of the State against an enemy; seizing corn and other provisions for the sustenance of an army in time of war; or taking cotton bags, as General Jackson did at New Orleans, to build ramparts against an invading foe." XX, 598. See XXVI, 52. So *held* in the case of a claim arising in Tennessee during the war, for alleged damages sustained by the claimant in the erection by the military authorities of a fort upon his land. XXII, 304. So *held* in the case of the claim of an alleged Spanish subject for indemnity for the destruction of buildings and other property in Louisiana, in the course of the erection of fortifications by our forces. XX, 525. So *held* in the case of a claim for the value of certain buildings (with their contents) burned by our troops in West Virginia, in January, 1863, by way of a *ruse* to deceive and divert the enemy—a legitimate act of ordinary warfare—the loss incurred being one of those casualties for which the government does not become liable to the individual injured. XXVI, 242. And see XXVI, 247, for a case of a claim (preferred subsequently to the passage of the act of February 19, 1867, and so expressly precluded from settlement) for the value of cotton seized at Knoxville, Tennessee, in the enemy's country and on the theatre of war, and used for strengthening a fort threatened with attack by the rebel forces. XXVI, 247.

SEE THIRTY-SECOND ARTICLE, (11.)
ALIEN, (1.)
CLERK, (7.)
COMPENSATION, I, (5,) (8.)
COUNSEL, I, (5;) II, (1;) III, (5.)
DRAFT.
PROCEEDINGS AT LAW AGAINST OFFICERS, &c., (9,) (10,) (11,) (12.)
RECAPTURED PROPERTY, (RESTORATION OF,) (1,) (2,) (3.)
SALVAGE.
STOPPAGE, (6.)

CLAIMS, II.

(As affected by the acts of July 4, 1864, chap. 240, and of February 19, 1867, chap. 57.)

1. *Held*, that to authorize the formal examination of and report upon the classes of claims contemplated by the 2d and 3d sections of the act of July 4, 1864, not only must the claimant be a loyal citizen, but the claim also must *originate in a loyal State;* the words, "claims of loyal citizens in States not in rebellion," being regarded as descriptive alike of claim and claimant. How far claims connected with the suppression of the rebellion, arising in disloyal States at open war with the government, shall be allowed, is a question so complicated with political and other considerations proper for the determination of Congress, that it is believed that the executive administration should not assume to act on such claims without the clearest authority conferred by law. It is not supposed to have been the intention of Congress to bestow such authority by the act thus construed. XXI, 19. See 6. *(This construction of the act of* 1864 *by this Bureau, which*

was adopted and published by the Secretary of War in circular No. 51 *of the War Department, of November* 27, 1865, *was maintained by Congress in the act of February* 19, 1867, *which is entitled "An act to declare the sense of" the act of* 1864.)

*2. So. in all cases where the "quartermaster's" or "subsistence stores" (as well as other property) for which a claim was presented (subsequently to the passage of the act of 1864) appeared to have been furnished, taken, &c., *in some one of the insurrectionary States—held* that such claim could not legally be adjusted by the War Department under the provisions of that act, no matter whether the claimant himself resided in such State or in a loyal State or in a foreign country, and irrespective of any merit which his claim might have, as arising from the hardship of the case, his own loyalty, or other cause. See XVII, 599; XIX, 538; XX, 318, 355; XXI, 132, 243, 248. But otherwise where the property was taken upon the occupation by the United States forces of territory in a *loyal State.* although such territory had previously been held by the enemy. Thus a claim for property taken from a citizen for military use at New Madrid, Missouri, upon its capture in March, 1862, from the rebels who had occupied it as a military post from the beginning of the war,—*held* not affected by the provisions of this statute. For the citizens of the locality, the State remaining in the Union, were all *prima facie* loyal; and their property, unlike that of the citizens of a place captured from the enemy in an insurrectionary State, did not become spoil of war, but was entitled to be protected by the government and to be paid for if taken for the public use. XXV, 621. In the case of a claim for quartermaster stores taken for military use, in Mississippi, in March, 1865, *held* that the fact that the claimant was a female and a non-combatant could not *except* the case from the operation of the provision of the act of 1864, prohibiting or suspending, by implication, the adjustment of all such claims so arising. XXI, 464.

3. *Held*, that a claim for compensation for the use of a warehouse occupied by the government for a certain period during the rebellion, at Vicksburg, Mississippi, was not within the provisions of the act of July, 1864, not only because such claim was not one originating in a loyal State, but because the *use of a building*, taken possession of by the government in the enemy's country by the paramount right of capture, is not to be deemed as included in the term "*quartermaster's stores*," as used in this act. XVIII, 506. So *held* of a claim for rent of a house in New Orleans, appropriated in 1863 by the military authorities as a dwelling for certain families of soldiers, such use not being in the nature of quartermaster stores. XIX, 428. And *held*, generally, that the occupation of real estate was neither "quartermaster's" nor "subsistence stores," in the sense of the act of July 4, 1864. XXVI, 51. *Held* that the use, for the purposes of an army hospital, of the house and furniture of a citizen of Virginia, taken possession of and occupied during the war, was not quartermaster stores, and that a claim therefor could not be entertained under the act of 1864. So of a house taken and used for the same purpose, in Mississippi. XVII, 599. So of cotton, (XXVI, 247,) and of lumber, (XXVI, 331,) seized and used to strengthen fortifications. (See 13.)

In the case of a claim for the value of liquors furnished to or taken for the use of the medical department of the army in North Carolina, in 1865, and actually used by medical officers, who returned vouchers for the same, *held* that, while such a case, if any, might well be treated as an exception to the rule governing claims arising in rebel States, yet there was no sufficient reason for taking this case out of the constructive operation of that statute, whereby Congress is deemed to have intended to restrict the authority to adjust such demands to the limits clearly defined, and to imply that the right to adjudicate claims not distinctly enumerated and described was withheld from the departments. XX, 568. See1.

4. Under section second of the act of 1864 the "*proper officer*" receipting for the quartermaster or subsistence stores for which a claim is interposed need not necessarily have been an officer of the quartermaster's department, or one otherwise authorized *virtute officii* to receive and receipt for quartermaster's stores for the use of the army. An opposite view would result in a too literal construction of the act, which, in order that the claim shall be brought within its terms, is deemed only to require, substantially, that the stores shall have been taken from a loyal person for the use of the army and actually so used. So *held* that, where the officer, so taking stores which were so used, was merely a commander in the field, not specially authorized as above instanced, the claim of the loyal claimant for the value of such stores was within the provisions of the statute. XXI, 79. * In order that a claim may be entertained under the act of 1864 it must appear that the stores, for the value of which the same is interposed, were furnished or taken for the use of, or were actually used by, the army. XIX, 533. The fact that the property was taken for a necessary and proper purpose, or was applied to a legitimate and proper use, are circumstances which should be made to appear in each case. Otherwise the United States might be made responsible for animals and other property picked up by teamsters, camp-followers, or stragglers. XXIV, 503.

5. *Held*, that a claim for subsistence stores taken for army use during the war in one of the parishes of Louisiana specially excepted by the President from the operation of his proclamation of January 1, 1863, was not within the provisions of the act of 1864 authorizing the settlement of such claims. Such exception, which is deemed to relate to the subject of the emancipation of slaves only, leaves the excepted districts precisely as they were before the date of the proclamation—namely, as districts of a State previously declared in insurrection by the proclamation of August 16, 1861, and still so remaining. Moreover, the fact that the act of July 4, 1864, ch. 240, specifically provides for the settlement of claims arising in loyal "*States*" would appear to exclude an allowance of a claim arising in a separate *district* of a State, however loyal, provided the State itself continued, in the contemplation of law, in insurrection. XX, 399. See XVII, 607; XXI, 243. *So *held* that a claim, arising in one of these parishes subsequently to January 1, 1863, for quartermaster stores taken for the army, could no more be legally adjusted by the War Department under the act of 1864 than one arising therein before that date,

the proclamation not having modified in any manner the *status* of rebellion as there existing. XXII, 293. See XIX, 574.

* 6. Under the construction of the War Department, (as expressed in its circular No. 51, of November 27, 1865,) of the act of July 4, 1864, limiting the provisions of that statute to claims *originating in loyal States*, the question whether any claim of a loyal citizen is within the terms of the act, is to be viewed as determined alone by the political *status*, at the date of the inception of the claim, of the territory in which it originated, and not as affected in any manner by any other *status* which such territory might since have assumed. So, in the case of claims for supplies furnished for the use of the army in Berkley and Jefferson counties, West Virginia, prior to March 10, 1866, *held* as follows: By section 3 of article IV of the Constitution the consent of Congress is made one of the conditions precedent to the formation of a new State out of another State, and till such consent is given the new State can clearly not be recognized as existing. Applying this law to the analogous case, within referred to, of adding to a State (West Virginia) these counties from another State, (Virginia,) it must be decided that the counties of Berkeley and Jefferson did not become part of the loyal State of West Virginia until Congress consented—as it did by joint resolution of March 10, 1866—to their transfer to that State. Upon this the conclusion must follow that no claim of a loyal citizen for compensation for quartermaster or subsistence stores taken or furnished for the use of the army which originated in either of the two counties named prior to said date—and therefore at a period during which their *status* was that of disloyal territory—can be adjudged to be within the provisions of the act in question. XXI, 278. (But see joint resolution of Congress, of June 18, 1866, approved subsequently to the date of this opinion, by which the act is expressly extended to the two counties named.)

* 7. The claims of officers or soldiers for horses lost in the service in rebel districts cannot be held to be affected by the acts of July 4, 1864, and February 19, 1867: 1st. Because the claims contemplated therein are those of "citizens," a designation which cannot, ordinarily, and especially in the connection in which it is there employed, be construed to include military persons; and 2d, because the acts, in specifying claims as arising in insurrectionary communities, contemplated an origin in a locality which had separated itself by force of arms from the authority of the government, and among a people who had thrown off their allegiance and were *prima facie* enemies of the United States—a view which could not have intended to embrace claims originating in an army, which was not only composed of loyal men, but had no locality in law other or less than the domain of the republic. XXVI, 62.

* 8. *Held* that a claim by an army sutler for the value of horses taken from him, upon an emergency, for the use of the army in a rebel State during the war, was not precluded from settlement by the acts of 1864 and 1867. The property having been taken from the party while "serving with the armies in the field," and as a part thereof, could not properly be said to have had a particular territorial locality, but should be deemed to have been similarly situated with any per-

sonal property of an officer or soldier in his use in the field. XXIII, 485; XXIV, 495. The rights of such claimant were thus quite different from those of a local proprietor or other owner of property found in an enemy's country by an invading army. XXII, 177.

* 9. The acts of July 4, 1864, and February 19, 1867, based as they are upon political considerations arising from the *status* and relations of the States in rebellion, necessarily preclude the settlement for the present by the United States of many classes of claims previously required, by express enactment or by the principles of the law of *contract*, to be adjusted and paid. XXVI, 62. In view of the positive and comprehensive provisions of the act of February 19, 1867, *held* that the classes of claims prohibited thereby to be paid were equally precluded from adjustment, whether originating in a seizure by the right of war or arising *ex contractu*. XXVI, 373. As where the claim was for quartermaster stores formally *purchased* from a loyal citizen in Georgia in 1864. XXVI, 35. Where certain quartermaster and subsistence stores were formally purchased for the use of the army in a rebel State during the war, and receipts were duly given therefor, and the property duly accounted for in the returns of the proper officer; and the claim for such stores was supported by regular quartermaster and subsistence vouchers; yet *held* that such claim, because originating in such locality, was precluded from adjustment and allowance by the executive branch of the government under the comprehensive prohibitions of the act of July 4, 1864. XXIII, 289.

* 10. *Held*, in view of the positive and comprehensive prohibitions of the act of February 19, 1867, that a claim for the value of a barge impressed and seized for military use at New Orleans in June, 1864, could not legally be adjusted and allowed, by the Third Auditor and Second Comptroller of the Treasury, under the acts of March 3, 1849, ch. 129; of March 30, 1863, ch. 78, sec. 5; and of July 28, 1866, ch. 279, sec. 8. XXVI, 60. *Held* that a claim for compensation for the *use* of a vessel, taken and used as a transport, by the department commander, in Alabama, in 1865, was barred by the act of February 19, 1867. XXVI, 372. A vessel was chartered at New Orleans during the war at a certain rate *per diem*, which was paid in full. During her employment she incurred certain damage which her owners, on her being returned to them at the end of her charter, repaired. Upon their presenting a claim against the government for the amount expended in these repairs, *held* that such claim was one for "damage to personal property," the cost of the repairs being simply the measure of the damage; that—arising at the time and place indicated—it was one of a class prohibited to be paid by the act of February 19, 1867; and that, however meritorious their demand, the claimants could obtain relief from Congress only. XXVI, 239.

* 11. In the case of a claim by a rebel to have returned to him certain specific property—mules—taken by our forces during the war in an insurrectionary district, on the ground that he had been pardoned by the President, and that his pardon restored him, in terms, to "*his rights of property*," *held* that the animals in question became, upon seizure, the property of the United States under the laws of war, no

proceeding for confiscation being necessary to make the investiture of title complete; that the pardon granted to the applicant could have no such operation as claimed, because he had, at its date, no rights or interest whatever in the mules—the same having become duly vested in the United States; that the property being public, it was not competent for the executive branch of the government to dispose of it as asked, without the authority of an act of Congress; that not only had Congress shown no disposition to pay the rebels in the south for property taken possession of by our armies in the prosecution of the war,—there being no moral or legal obligation resting on the nation to make such payment—but that it had, on the contrary, expressly prohibited, by the act of February 19, 1867, the payment of any claim for the "appropriation" as well as "consumption" of any such property "by the military authorities or troops of the United States;" and that, certainly, if the Executive is thus forbidden to make payment for the property, it must be deemed to be the true intent and meaning of the act equally to forbid the *return* of the property itself to the claimant. XXVI, 160.

* 12. *Held* that a claim for the amount of the rents and profits of real estate, occupied in the enemy's country on the theatre of war by our military forces, was not only not sustainable upon principles of public law, (see CLAIMS, I, 30, 31, 32,) but was now expressly excluded from payment by the act of February 19, 1867. XXVI, 52. *Held*, in view of this act, that a claim could not be allowed for the rents or profits of abandoned property occupied in a rebel State during the war, by our military authorities, (or for damage done to the same during such occupation,) although the property was restored to the owner at the termination of active hostilities. For, that the United States did not proceed to confiscate the same, but on the contrary surrendered it after a time, can in no manner be regarded as an admission that its seizure and occupation were illegal, but can properly be viewed only as an act of grace to the owner. XXVI, 454. *Held*, in view of the prohibition of the act of 1867, that it could not advance the claim—arising in a rebel State during the war—of a British neutral resident, for cotton presses taken possession of by the military authorities, that it was provided in Article 14 of the treaty between Great Britain and the United States, of November 19, 1794, that free and secure liberty of commerce should be enjoyed by the citizens of the two countries in the territory of either. For in that very article the exercise of such privilege is expressly subjected "*to the laws and statutes of the two countries respectively.*" XXVI, 253.

* 13. The act of February 19, 1867, which positively prohibits, among other things, the payment of any claims "for the occupation of real estate" arising in States in insurrection, concludes with the *proviso* that nothing contained in the act "shall repeal or modify the effect of any act or joint resolution (referring to the joint resolution of Congress of July 28, 1866) extending the provisions of the act of July 4, 1864, to the loyal citizens of *Tennessee.*" But the act of 1864 does not embrace claims for the occupation of real estate—such not being "quartermaster or subsistence stores." So *held* that a claim for the occupation by our military authorities, from January to July,

1865, of a house in Murfreesboro', Tennessee, could not be allowed, without an express violation of the act of February 19, 1867. XXVI, 51. *Held*, for the same reason, that inasmuch as lumber seized in 1863 by an officer of the engineer department, and used in connection with the fortifications at Nashville, Tennessee, was not quartermaster or commissary stores, (and so within the privilege of the act of July 4, 1864,) a claim for the value of such lumber was not legally payable by the War Department under the proviso of the act of February, 1867, in regard to claims of loyal citizens of Tennessee. XXVI, 331. So a claim for cotton, seized on the theatre of war in Tennessee, and used for strengthening a fort at Knoxville, when threatened with attack by the enemy, *held* not excepted from the exclusions of the act of February, 1867, by the proviso in regard to Tennessee, because not quartermaster or commissary stores in the sense of the act of July 4, 1864. XXVI, 247.

* 14. Prior to the passage of the joint resolution of July 28, 1866, no claim arising during the rebellion in the State of Tennessee, for quartermaster or commissary stores taken or furnished for the military forces, could legally be adjusted in the War Department. That State was declared in insurrection in and by the original proclamation of August 16, 1861. The fact that early in 1862 a military government was organized therein is not evidence that the State was no longer in rebellion, but rather proof that its status of rebellion was still existing. Moreover, in the proclamation of July 1, 1862, it is again declared by the Executive to be an insurrectionary State. Further, the omission in the proclamation of January 1, 1863, to mention this State, is to be construed only as excepting it from the operation of the declaration of emancipation of slaves, not as modifying its status as a rebellious district. And in the succeeding proclamation of April 2, 1863, there is again a designation of the State as included among those still in insurrection. From the beginning to the end of hostilities, therefore, (and prior to the date of the joint resolution referred to,) there was no time in which there might have arisen a claim of the above character, which, in view of the provisions of the act of July 4, 1864, could lawfully be adjusted and paid by the Secretary of War. XXII, 293.

CLERK.

1. The clerk or "reporter" authorized to be appointed for a general court-martial by section 28, chapter 75, of the act of March 3, 1863, is not, by virtue of his appointment, authorized to be present during the deliberations of the court, or to record its findings and sentence. He should therefore be excluded from such deliberations; and that part of the proceedings which relates to the findings and sentence of the court should be withheld from him. V, 478; III, 640; XI, 318.

2. A clerk, formally employed by the judge advocate of a military court, should be deemed as occupying the same position as the "reporter" designated in the act of March 3, 1863, ch. 75, sec. 28; and, whether acting as a stenographer or not, should properly be

sworn to the faithful performance of his duty. XIII, 400. That the clerk of a general court-martial, who recorded the proceedings, was not sworn to the proper performance of his duty, *held* an irregularity which should be regarded as fatal to the validiy of the sentence. XXVI, 335.

3. The compensation of clerks and interpreters of general courts-martial (other than enlisted men detailed in these capacities) is not fixed by law or regulation. They are entitled to a reasonable allowance, which should ordinarily be fixed by the court, and should be certified to by the judge advocate. VII, 71. *In the majority of cases during the war, the sum of *three dollars per diem* has been fixed by the court and paid by the quartermaster; and this may now be regarded as the approved customary compensation of a citizen clerk of a general court-martial, not acting as stenographer.

4. In the absence of any law authorizing the payment of a clerk of a military commission, such clerk, where his employment is proper and authorized by the commission, is entitled to a reasonable compensation, to be paid and fixed as in the case of a clerk of a general court-martial. II, 338. See 3.

5. *Recommended*, that the reasonable accounts of citizen clerks, employed upon military courts on the formal application of the judge advocate, and with the approval and by the order of the court, in important cases, and where enlisted men are not attainable for the purpose, be, as a general rule, allowed, and ordered to be paid by the local quartermaster. XIX, 315.

*6. It is believed that there is no statute now in force authorizing the payment of an extra compensation to enlisted men detailed as clerks of military courts †.

*7. *Held* that a claim by an *officer* for extra pay for services rendered by him as clerk to a general court-martial, was without sanction in law or usage. Such an allowance would be in violation of the statute of August 23, 1842, ch. 183, sec. 2, providing that "no officer in any branch of the public service, or any other person whose salary, pay, or emoluments, is or are fixed by law or regulations, shall receive any additional pay, extra allowance or compensation, in any form whatever, for the disbursement of public money, or any other service or duty whatsoever, unless the same shall be

† NOTE.—Section 35, ch. 75, of the act of March 3, 1863, in providing that:—"hereafter details to special service shall only be made with the consent of *the commanding officer of forces in the field*," is deemed to have restricted the making of such details to *time of war*. The only subsequent act on the subject of general application—that of July 13, 1866, ch. 176, sec. 7—authorizes indeed the payment of a compensation for extra duty, but only to soldiers employed as "artifiers or laborers" and "non-commissioned officers employed as overseers" of work done by such soldiers;—no such labor as that performed by clerks of military courts being, as is deemed clear, contemplated. The War Department, in reciting this act, (in General Order No. 79, of September 22, 1866,) as part of an amended army regulation, (par. 902,) has indeed added:—"The allowance of thirty-five cents a day is to those employed as mechanics, overseers, and clerks in the bureaus of the War Department, at the headquarters of the army, and at military division or department headquarters." But even this interpretation, which certainly would not have been made by this Bureau, is not deemed to include soldiers detailed as clerks of military tribunals. In the construction of the act of 1863, contained in the opinion (dated April, 1863,) of Atty. Genl. Bates, (X Opinions, 472,) the question of the application of that act to any period other than time of war is not considered; and such opinion is not therefore regarded as in conflict with this view.

authorized by law, and the appropriation therefor explicitly set forth that it is for such additional pay, extra allowance or compensation." XXII, 578.

SEE BOARD, (6.)
ENROLMENT, I, (3,) (40.)
JUDGE ADVOCATE, (20.)

CLOTHING ALLOWANCE.

* Where a soldier was sentenced to forfeit his pay and allowances for four months, *held* that such forfeiture did not include his *clothing allowance* for such period, or preclude him from receiving any portion of the clothing which he would be entitled to draw during that time. The amount fixed upon by the government as the extent of this allowance should be regarded as only sufficient to properly clothe the soldier during his term of service; the practice of giving the clothing a *money* value, and paying the soldier in money on his *final settlement* such balance as may remain undrawn in kind, being obviously for the purpose of inciting economy and care, and consequent neatness, in the use of the clothing. But where a soldier was sentenced to be *dishonorably discharged* with forfeiture of all pay and allowances, *held* that such forfeiture included a money *balance*, which, upon the final settlement thereupon made with the soldier, was found to be due him for clothing not drawn, the same being a pecuniary allowance. XXV, 486.

SEE NINTH ARTICLE, (8.)
TWENTIETH ARTICLE, (1.)
DESTITUTE SOLDIERS, (2.)
FORFEITURE, III, (4.)
PAY AND ALLOWANCES, (2.)
UNDER COOKS, (2.)

COLORED TROOPS.

Where it was proposed, (in January, 1866,) by the Memphis and Little Rock Railroad Company, in Arkansas, to employ, in completing the construction of their road, the colored United States troops stationed in its neighborhood, with the understanding that they should be compensated for their labor in grants of the land belonging to the company adjoining the line of its road, *advised*, that such proposition be not acceded to by the government, and for the following reasons: 1st. The acts of 17th July, 1862, ch. 195, sec. 11, and ch. 201, sec. 12, which convey the original authority for the enlistment and employment in the United States service of colored troops or persons, justify their being employed in no work other than that ordinarily incidental to the military service, or such as may be necessary for the suppression of the rebellion; 2d. All the legislation since the date of these acts, in regard to the enlistment, pay, bounties, &c., of colored troops, aims at placing them upon the same footing, both as to their duties and their privileges, with white soldiers; 3d. The employment of colored troops as the hirelings of private individuals or corporations, and in a lower and more servile class of labor than that which white troops are called upon to perform, would be injurious to their

discipline and degrading to their *morale*, and is therefore incompatible with their *status* as United States soldiers; 4th. The sentiment of all loyal citizens is in favor of the elevation of the colored race, and their reception into the military service is one of the very measures which, in the public expression of this sentiment, have been resorted to as a means of promoting the desired end; and any measure which tends to degrade the colored soldier, or to distinguish him disparagingly from his white comrade in arms, does violence to this sentiment and defeats, so far, the worthy purposes of loyal men. Even if the proposition were fully accepted by the troops themselves and were carried out in good faith by those by whom it was made, it would not be one to be approved; for men in the situation of these soldiers can hardly be deemed prepared to determine questions so complex and involving so public and far-reaching interests as this; and certainly, in its dealings with them, in connexion with this as with other matters which concern their welfare, the government should act as their guardian and guide. The opinion is confidently entertained that any prospect of personal advantage accruing to a limited number of individuals through the scheme proposed, is far outweighed by the larger public considerations for the permanent prosperity and elevation of the race which have been adverted to. XX, 349.

See SIXTY-FOURTH ARTICLE, (7.)
SLAVE, (4,) (6,) (7,) (10,) (11.)
SOLDIERS PURCHASING THEIR ARMS.

COMMANDING GENERAL.

See SIXTY-FIFTH ARTICLE, (3.)
EIGHTY-NINTH ARTICLE, (2,) (4,) (5,) (6,) (7,) (8.)
ARMY COMMANDER.
CONFISCATION, (17.)
DEPARTMENT COMMANDER.
DEPOSITION, (3.)
DISCHARGE, (2.)
MARTIAL LAW.
PUNISHMENT, (12,) (18.)
REGIMENTAL FUND, (3.)
SENTENCE, II, (2,) (4;) III, (7,) (20.)
WITNESS, (23.)

COMMANDING OFFICER.

See SIXTH ARTICLE, (2.)
NINTH ARTICLE, (5.)
THIRTY-THIRD ARTICLE, (5.)
THIRTY-FIFTH ARTICLE.
SIXTY-SIXTH ARTICLE, (1,) (2,) (3,) (5,) (6,) (7,) (8.)
SEVENTY-FIRST ARTICLE, (3,) (4.)
COMPANY FUND.
COMMISSARY OF SUBSISTENCE.
FIELD OFFICER'S COURT, (1,) (7,) (9,) (10,) (11,) (13.)
FINDING, (33.)
ORDER, (4.)
PAY AND ALLOWANCES, (22.)
POST COMMANDER.
PUNISHMENT, (13,) (22.)

COMMISSARY OF SUBSISTENCE.

* Where a commissary of subsistence at a frontier post refused to obey an order of the post commander, requiring him to issue rations

to an indigent emigrant, *held* that such order was illegal, and that the conviction of the officer, who was brought to trial for such refusal, upon a charge of "disobedience of orders," was unauthorized. It is clear that an officer in the commissary department—one principal object of whose appointment is to prevent waste of public property—is not bound to obey without discrimination every order relating to the duties of his office which may be given him by a superior. There is nothing in the army regulations that would justify a commissary in making such an issue as that required in this case, and had he complied with the order the same would have been no protection to him in the settlement of his accounts, and he would have been held personally responsible for the amount of the issue. (This case occurred prior to the date of Circular No. 14, of the Commissary General's Office, of September 15, 1865, directing commissaries, when so required in writing by commanding officers, to make irregular issues, the same to be charged to the officer ordering the issue in each instance, in case it is not approved by the Secretary of War.) XXII, 20.

SEE THIRTY-NINTH ARTICLE, (8.)
SIXTY-SIXTH ARTICLE, (6.)
BOND, (3.)
EXTRA PAY, (2.)
FRAUD, II, (16.)

COMMISSIONED OFFICER.

SEE NINTH ARTICLE, (3,) (4.)
SIXTY-FOURTH ARTICLE, (7,) (8.)
MILITARY STOREKEEPER.
OFFICER.

COMMISSION—MILITARY.

SEE FREEDMEN'S BUREAU, (4.)
MILITARY COMMISSION, I, II, III, IV, V.
RECONSTRUCTION LAWS, (1,) (2, (3,) (4.)

COMMISSION—TO TAKE DEPOSITIONS.

SEE DEPOSITION, (6.)
WITNESS, (26.)

COMMUTATION OF FUEL AND QUARTERS.

* It is ordered, in General Orders No. 289, of the War Department, of November 28, 1864, that "officers serving on courts-martial, courts of inquiry, military commissions, or boards, will not be allowed commutation of fuel and quarters, except by special orders of the War Department;" and it has been the practice of the department to require, before authorizing the payment of such commutation, that it shall appear that the officers composing the court, &c., have properly performed their duties. So where a general court-martial duly held itself in readiness to proceed to the trial of such cases as should be referred to it, but actually tried no cases, merely for the reason that none were submitted for its consideration by the government, *held* that the court should certainly not be viewed as not having sufficiently performed its duty in the premises, and that therefore the officers composing it were fairly entitled to the commutation allowances

otherwise properly payable to them, for the period between the assembling and dissolution of the court. XXI, 303.

See ARREST, I, (14,) (15.)

COMMUTATION OF SENTENCE.

1. A sentence of dismissal of an officer cannot properly be commuted to one of reduction to the ranks. The latter is a more severe sentence than the former, since it contemplates not only a vacating of the officer's rank and office, (which is practically the same as a formal dismissal therefrom,) but in addition, the further penalty of service in a subordinate grade. XV, 457.

2. A sentence of dismissal or dishonorable discharge may legally be commuted to a forfeiture of pay. Suspension from rank and pay for a certain term is, however, the most appropriate commutation for the penalty of dismissal. XXI, 215, 484.

3. General order, No. 98, of the War Department, of May 27, 1865, remitting all cases of sentences of imprisonment expressed to be "*during the war*,"—*held* not to apply to a case of a *capital sentence* which had been *commuted by the President* to such an imprisonment. XIV, 633; XV, 468; XIX, 201.

4. *Held* that under the provisions of section 2, chapter 215, of the act of July 2, 1864, the commander of an army in the field had authority to commute sentences of dismissal of officers to forfeiture of pay, or suspension from rank and pay for a stated period. The term "*mitigate*" employed in the statute, when applied to sentences of death or dismissal, which in the strict sense of the word are incapable of mitigation, must, to accomplish the manifest intent of the law, be held to imply the power to commute. XIII, 414.

5. Where a soldier was sentenced to be dishonorably discharged, to forfeit all pay, &c., for the period succeeding the date of his offence, and to be imprisoned at hard labor for eighteen months; and subsequently, and after he had been confined for less than six months, was ordered by the Secretary of War, in a special order of the War Department, to be discharged with forfeiture of *all* pay and allowances; and the operation of such order was to deprive him of certain pay remaining overdue for four months prior to the date of his offence and not affected by the sentence; *held*, that the rule, that a soldier could not be deprived of pay except by sentence or due operation of law, did not apply to this case—the order in question being viewed as a *commutation* of the punishment of the party, who, while deprived of four months' pay was released from more than a year's term of imprisonment at hard labor; that the forfeiture as ordered was therefore authorized under the general pardoning power of the Executive, and valid; and that a claim for the four months' pay preferred by the party, after having accepted (when he might have rejected) the terms of the commutation—as evidenced by his being at large under the order—could not be favorably considered. XX, 428. See XXII, 88; XXI, 399; XIX 566; XXIII, 64.

See PENITENTIARY, III, (3.)
RETIRING OFFICER, (8.)
SENTENCE, III, (18.)

COMPANY FUND.

1. The "company fund," when once appropriated, is, in equity, the property or perquisite of the enlisted men of the company; but the legal owner and trustee thereof is the commanding officer of the company, who is obliged by the regulations to disburse it for the benefit of his men, and who is responsible to the government for a proper performance of his trust. On ceasing to command the company, he is also obliged to account to his successor in command for the fund remaining in his hands, for which the latter in turn becomes trustee. If he retains the fund to his own use without accounting for it to his successor, the latter, who is alone entitled to receive it, may institute a suit against him for its recovery, if meanwhile he has left the service. V, 588. See VIII, 148; XXIII, 13.

*2. Company savings are, by the Army Regulations, to be disbursed by the commander of the company for its benefit. The members of the company have no *individual* rights to such fund; it attaches to the *organization* only; and when a claim for the savings is not presented during the existence of the organization, the general rule would be that it should not be allowed, on the ground that the entire right to the money had then reverted to the government. But where a company of volunteers, before its formal muster-out of service, presented to the widow of a fallen comrade, with the consent of their commanding officer who signed the same, the vouchers for certain savings due the company, but payment was not made upon the same for the reason that before they were presented this officer was killed in battle and could not therefore sign the receipts—*held* that this was such a disposition as might have been made of the funds by the company had the same been actually paid to them; and, as it had been made while the organization was still in the service, that there was no sufficient reason for a withholding of the money by the government. And *advised*, in order that the intention of the company, which was a laudable one, might be carried out, that the amount of the fund, as shown by the vouchers, be paid to the donee of the company, upon the signature of the officer who commanded the company at the time of its muster out, and after the death of his superior, being obtained to the receipts. XXII, 56.

SEE PAYMENT BY MAIL, (1.)
REGIMENTAL FUND.

COMPENSATION, I.—(OF MEMBERS OF COURT, JUDGE ADVOCATE, &c.)

1. In the absence of special legislation on the subject, it is but reasonable and just that the same compensation should be allowed to the members, judge advocate, and clerks of a military commission, and to the witnesses summoned before it, as in the case of a court-martial; and it has been the practice so to pay them. VIII, 88; II, 387. See Amendment of the Regulations, (page 513, par. 30, of

the Army Regulations of 1863, and General Order No. 140, of May 21, 1863,) authorizing the payment to "members and judge advocates of military commissions" of "the same extra pay and travelling allowances as in the case of a general court-martial."

2. The additional allowance of $1 25 *per diem*, to which an officer is entitled who is obliged to leave his station when attending a court-martial, was evidently intended to cover the expenses of lodging, meals, &c., necessarily incurred by him because separated from his quarters and ordinary sphere of duties. *Held*, that a line officer attending a court-martial in Washington, whose quarters, &c., were at Fort Lincoln, about four miles distant, though within the military department, should be viewed as coming within the provisions of section 1137 of the Regulations, and entitled to this allowance. V, 139. So *held*, in regard to a judge advocate, whose quarters were at a post seven miles distant from the place of session of the court-martial upon which he was detailed, and who was obliged to do some duty daily as a staff officer at such post. XXI, 124.

3. It is the duty of the judge advocate to give to the members of a court-martial certificates of attendance, and for the proper officer of the quartermaster department to adjust and settle their compensation under section 1137 of the Regulations. I, 488.

4. An officer detailed as judge advocate upon a military court was relieved in the course of the trial and sent to a distant point in order to procure testimony to be used in the prosecution of the case. Another officer was at once detailed in his place, who acted as judge advocate of the court during the period of his absence. Upon his return this officer was in turn relieved, and he (the original judge advocate) was again detailed, and continued to act as judge advocate till the termination of the trial. *Held*, that he was not entitled to be paid for the period of his absence the extra compensation, provided by paragraph 1138 of the Army Regulations to be paid a judge advocate "for every day he is necessarily employed on the duty of the court;" that this compensation is payable only to the judge advocate *as such;* and that to rule that the officer in question had a right to receive it for the time of his absence would be to determine that the officer actually serving in his place during that period was not entitled to it, which, indeed, would be practically equivalent to holding that the acting of the latter as judge advocate was without legal sanction—a conclusion precluded by the circumstances of the case. XIII, 407.

5. Existing laws and regulations, evidently not anticipating the appointment of *civilians* as judge advocates, have made no provision for their compensation beyond the *per diem* of $1 25, to which they would be entitled in common with officers in the military service detailed for that duty. The claim for further compensation of a civilian judge advocate should, therefore, be presented to the Secretary of War for allowance out of the contingent fund of the department. Such claim should not be presented till the services are terminated, and its details should be verified by the officer who convened the court. XVI, 621.

6. *Advised*, that the members of a certain military court, other-

wise properly entitled thereto, be paid their appropriate commutation allowance for fuèl and quarters up to the day when they, in common with the judge advocate, were officially notified of the dissolution of the court, although in point of fact it had been formally dissolved twenty-four days before. XIX, 255.

* 7. Paragraphs 1137 and 1138 of the Regulations can only properly be construed as placing the judge advocate of the court-martial and the judge advocate or recorder of the court of inquiry upon precisely the same footing as to their right to the *per diem* compensation. XXIII, 589.

* 8. A judge advocate who had been detailed upon a court-martial at a place fifty miles distant from a station at which he was serving when detailed, presented an account in which, beside charging for mileage for the one original journey, he claimed the compensation of one dollar *per diem* allowed by paragraph 1137 of the Regulations to an officer who travels back and forth from the station at which he is serving to the station of the court from day to day of its session. *Held*, that, while entitled, of course, to the mileage, (which, however, was payable to him as an officer and not in his capacity of judge advocate,) it was clear that the distance in question was such that the journey could not have been so repeated as to entitle him to the *per diem* compensation, and that his claim for the latter should be wholly disallowed. XXIII, 286.

SEE BOARD, (4) (5,) (6.)
CLERK, (3,) (4,) (5,) (6,) (7.)
JUDGE ADVOCATE, (22.)
MILEAGE, (2.)
RECORDER, (1.)
STENOGRAPHER.
WITNESS, (4,) (5,) (6,) (7,) (8,) (9,) (10,) (11,) (12,) (13,) (14.)

COMPENSATION, II.—(FOR PRIVATE PROPERTY TAKEN FOR PUBLIC USE.)

* 1. While an officer in the military service cannot legally sell to the United States a patent taken out by him for an invention, (I, 349,) his right to be suitably recompensed for the same as private property, upon its being taken and used by the government, is beyond question. XXI, 415. See CONTRACT WITH THE GOVERNMENT, (2.) (See Report of Commission on Ordnance and Ordnance Stores—case of the Rodman cannon—pp. 549, 571.)

2. *Held*, that the use of a turnpike road, (in Kentucky,) by the military trains of the government, was a *use of private property*, and that the government (in compliance with the constitutional obligation to pay for private property taken for public use) should pay the regular tolls for such use. It cannot be claimed that the use and wear of the road was merely a *damage* to private property, which it should be left to Congress to liquidate. The worn condition of such roads was a natural consequence, not of their *abuse*, but of their legitimate *use*, the indemnification for which is properly measured and fixed by their charters in the form of tolls. I, 475.

SEE CLAIMS, I, (15,) (32;) II, (2.)
RECAPTURED PROPERTY, RESTORATION OF, (4.)

CONDUCT TO THE PREJUDICE OF GOOD ORDER AND MILITARY DISCIPLINE.

SEE NINETY-NINTH ARTICLE.

CONDUCT UNBECOMING AN OFFICER AND A GENTLEMAN.

SEE EIGHTY-THIRD ARTICLE.

"CONFEDERATE SECURITIES."

(Opinions dated between April, 1863, and April, 1865.)

1. Notes and bonds of the so-called "Confederate States" cannot be recognized as possessed of any moneyed value. They should be treated as any other publication calculated to incite a sympathy with the rebellion, which may fall into the hands of the officers of the United States government. II, 295, 354; XI, 647.

2. The circulation of confederate notes assists in sustaining the financial credit of the rebels, and, to that extent, gives aid and comfort to the rebellion. The circulation of *counterfeit* confederate notes could not properly be treated as a criminal offence, *eo nomine*. To punish the circulation of these notes *because counterfeit*, would be to give direct aid to the rebellion, and would be a recognition of the authority of the rebel government to issue such a currency, which, of course, cannot be permitted. II, 144.

3. It is a military offence to circulate, in time of war and within the theatre of military operations, "confederate" notes, &c.; and a party charged with such offence may properly be brought to trial, pending the war, by military commission. But, inasmuch as such securities are held to have no moneyed value, it is no military offence to forge them, or to circulate them when forged. So in the case of a party convicted by a military court, and sentenced to imprisonment, for the sale of forged and confederate counterfeit notes, *advised* that his sentence be remitted and he be discharged from confinement. XI, 513.

4. Not only are confederate notes regarded by our government as possessed of no pecuniary value, but they are also viewed as evidence of the existing rebellion, and *indicia* of treason, and as tending to excite a sympathy and an interest in the rebellion on the part of those who may use or receive them. They are illegal and disloyal publications, and as such are ordered to be destroyed wherever found. *Held*, therefore, that an application on the part of a foreign resident, to have restored to him, as their former possessor, a quantity of such notes, either in their original form or in federal currency of an equal amount, could not be entertained. II, 354.

SEE CONFISCATION, (9.)
GIVING AID AND COMFORT TO THE REBELLION, (1.)
FLAG OF TRUCE, (3.)

CONFESSION.

SEE EVIDENCE, (9.)
PLEA, (3,) (4,) (5,) (15.)

CONFISCATION.

(Opinions dated between September, 1862, and November, 1865.)

1. The confiscation act of July 17, 1862, chapter 195, is not in terms, and certainly was not intended to be, retrospective in its operation. I, 344.

2. A minor of but seven or eight years of age is incapable of disloyal practices, and his property, taken by government under a confiscation act, should be restored to him or his guardian. Even if his guardian were chargeable with such practices, (which in the present case is not shown,) the interests of his ward would not thereby be compromised. The department commander might, however, in his discretion, require the guardian to give bond that the property restored should not be used for treasonable purposes. I, 369.

3. The rents and profits of property, taken by government for proceedings *in rem* under the 7th section of the act, should follow the direction finally given to the property from which they issued. *Ibid.*

4. The act of 6th August, 1861, chapter 60, would require that the property proceeded against as "*sold*" or "*used*" shall be susceptible of *identification.* A mere agreement to contribute to the use of the "confederate states" the proceeds of 100 bales of cotton of the crop of 1861 does not bring it within the statute, because not appropriating any particular lot of cotton. Moreover, such cotton could not be held to be *tainted with treason*, and therefore liable to confiscation in consequence of such agreement, provided the party returned to his allegiance, and took the oath, under the statute of 17th July, 1862, before any cotton was appropriated or furnished under such agreement. Section 6, chapter 195, of the act of 17th July, 1862, in confiscating the property of those who do not return to their allegiance within a certain time, is a declaration by implication that the property of those who *comply* with the requirements of the statute shall not be liable to seizure, but entitled to protection. I, 403; V, 540.

5. Where a sum of money has been seized by a military commander with a view to its confiscation, but is detained in his hands and not paid into the treasury, pending proceedings instituted for its recovery—*held*, that the money may be returned at once to the claimant upon the seizure being determined to have been illegal; but otherwise, where the money has already been paid into the United States treasury. I, 403.

6. Property conveyed by a husband to his wife, which had previously been used by him in aid of the rebellion, or which was conveyed in order that it might be so used upon the transfer, would be liable to confiscation in the hands of the wife, under the act of 6th August, 1861, chapter 60, section 1. The fact that the transfer was

made in contemplation of a treasonable act by the grantor—as where it was made with the intent on his part of taking up arms against the government, after thus making provisions for his wife and family—would not render it liable to confiscation under this statute, but *would* have that effect under the act of 17th July, 1862. II, 55.

7. *Held* that a judge of the United States district court for Eastern Virginia, who, holding his court under the shelter of the bayonets of the army, was indeed but an instrumentality co-operating with it for the suppression of the rebellion and the re-establishment of the authority of the general government, might properly be assigned quarters in one of the residences of rebels in Alexandria, which had been vacated by the treason of their owners, and were under the control of the government, as property subject to confiscation. II, 294.

8. It is no ground for the confiscation of money, irrespective of any statute, that it is suspected, or even known, that it is the purpose of its owner or holder to invest it in goods designed for a contraband trade. The law punishes acts and not mere intentions. The suspicion or discovery of such intention, however, should place the party under surveillance. II, 295.

9. Under section 5 chapter 195, of act of 17th July, 1862, all property and estate of a person who gives aid and comfort to the rebellion by acting at the north as the banker and business agent of southern rebels, and by dealing in "confederate" securities, may be confiscated. But all confederate notes and securities found belonging to him should be destroyed, as they are held to possess no pecuniary value, and being disloyal utterances and *indicia* of treason, should be suppressed. By virtue of the same act, property in his hands belonging to his principals at the South may be confiscated. Such property, also, if sent to him from the South to be held as agent, &c., may be confiscated under section 5, chapter 120 of the act of 3d March, 1863; as coming from a disloyal to a loyal State otherwise than in the manner allowed and required by the act. II, 458.

10. Cotton cards, the moment they are in transitu to a rebellious State, may be seized and confiscated. But they are not subject to seizure in the hands of the manufacturer on the ground that they *may* be sent thither. II, 511.

11. Money found in the possession of persons, residents of Richmond, while passing through Washington *en route* from Richmond to Baltimore, without any pass or other authority to enter our lines—*held* subject to confiscation under the provisions of section 4, chapter 120, act of 3d March, 1863; and the parties *held* liable to be proceeded against as for a misdemeanor under the same statute. III, 33, 124.

12. Money or merchandise in transitu, without proper authority, from a loyal State or district to one in rebellion, to be used for commercial purposes or otherwise, is subject to confiscation under section 5, chapter 3, act of 13th July, 1861. III, 35.

13. Merchandise evidently intended to be used for commercial pur-

poses, belonging to a citizen of Virginia, and found stored in a warehouse in Georgetown under circumstances strongly indicating that it had been so stored merely to await a good opportunity for transportation to the South, may be confiscated as *in transitu* to the rebel lines, under the provisions of section 5, chapter 3, act of 13th July, 1861. III, 125.

14. Machinery which has been employed in the manufacture of munitions of war for the use of the rebel government may be confiscated under the act of 6th August, 1861, chapter 60, as having been used in "promoting" or "aiding and abetting" the rebellion, although the munitions so manufactured may not have reached their destination. V, 274.

15. Merchandise found for sale in the store of a merchant which bears the *indicia* of being intended for rebel use, as buttons, belts, &c., of southern patterns, and marked with southern devices, &c., may, *it seems*, be confiscated by the government under the provisions of the act of 6th August, 1861, chapter 60. V, 274; XI, 647.

16. Southern stocks brought to Baltimore from the South by a party not legally authorized to bring them under the provisions of the act of 3d March, 1863, chapter 120, are liable to confiscation under section 4 of the act. But the same cannot properly be seized and applied to a *secret service* fund by the department commander. VIII, 301.

17. A commanding general has no power to order a vessel to be forfeited for smuggling or illicit trading with the enemy, and turned over to the quartermaster's department. The penalty of forfeiture can only be enforced by proceedings *in rem* before the proper tribunal. XII, 321.

18. The provisions of section 6, chapter 3, act of 13th July, 1861, in regard to the forfeiture of vessels belonging to inhabitants of rebel States, do not apply to a vessel found in a port or the inland waters of a State declared to be in rebellion; the forfeiture declared by the act being limited to vessels found at sea, or in some part of the United States not included in an insurrectionary district. XXI, 44.

SEE CLAIMS, I, (29;) II, (12.)
MILITARY COMMISSION, V, (3.)
OCCUPATION OF REBEL ESTATE, (1.)
PRIZE, (3.)

CONQUEST—RIGHT OF.

SEE CLAIMS, I, (12,) (21,) (30,) (31,) (32.)
OCCUPATION OF REBEL ESTATE.
PARDON, (7,) (8.)

CONSOLIDATION OF REGIMENTS.

Where a regiment of volunteers was not disbanded but 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, *held* that the men of each organization became 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. V, 595.

CONTEMPT OF COURT.

SEE SEVENTY-SIXTH ARTICLE.
HABEAS CORPUS, (5,) (6,) (7.)
WITNESS, (23,) (26.)

CONTINGENT FUND.

Held that a band mustered out of service by operation of law, (under the requirements of section 5, chapter 200, of act of 17th July, 1862, which repealed the law under which it was mustered into service,) but retained in service by an express agreement with the Secretary of War, could not be recognized by a paymaster as regularly in the service, but would have to be paid out of the contingent fund of the department by special order of the Secretary. II, 64.

SEE COMPENSATION, I, (5.)
COUNSEL, I, (5;) II, (1.)

CONTRABAND TRADE.

SEE GIVING AID AND COMFORT TO THE REBELLION, (3.)
VIOLATION OF THE LAWS OF WAR, (5,) (9,) (16,) (19.)

CONTRACT NURSE.

SEE SIXTIETH ARTICLE, (3.)

CONTRACTOR, I—(GENERALLY.)

1. Where contractors agreed to furnish the government with vulcanized India-rubber blankets, and the patentees of the manufacture protested, alleging at the same time the irresponsibility of the contractors—*advised* that, to prevent the irremediable wrong threatened by such alleged want of pecuniary responsibility on the part of the latter, the blankets be received by the government under the contract, but that pay therefor be withheld until an opportunity be afforded to the patentees to obtain from the United States court an injunction to restrain the contractors from an invasion of the patent right; that, if the injunction be granted, it should be respected by the government so far as necessary to protect the rights of the patentees; that, if refused, on a full consideration of the questions involved, the interposition now recommended should cease. I, 429.

2. An order having issued from the War Department in accordance with the above recommendation—*held*, that it should not apply to blankets delivered before the order was issued. To have made it retrospective would have operated unjustly as a surprise to the parties. By making it apply to future deliveries only, an opportunity was afforded to the contractors to protect themselves, if they choose to do so, by declining to deliver the blankets on the new condition of deferred payment which had been imposed. I, 458.

3. Subsequently, in view of the fact that the patentees in this case

had not used due diligence to obtain their injunction ; in view of the denial under oath by the contractors of their alleged irresponsibility, and of the magnitude of the interests involved; and considering that irremediable damage might be done them by withholding them from the benefit of their contract, without any bond taken from the patentees, (which the War Department had no power to exact;) *held*, that no sufficient reason remained for continuing the order heretofore made; and that should an injunction be allowed, it should be respected by the government, but the rights of the parties should be left to be determined by the court to which the patentees had appealed. I, 472.

CONTRACTOR, II.

(Under sec. 16, ch. 200, act of July 17, 1862.†)

1. Every seller of supplies is not necessarily a contractor for the army of the United States, in the sense of this act. To constitute a contractor, there must be an engagement between him and the government, imparting an obligation on the one hand to sell and deliver, and on the other to receive and pay for the supplies, and this contract may be verbal or written. A continued supply, on an ordinary running account, without further stipulations fixing the obligations of the parties, and defining the prices, terms, &c., *held* not to charge the party supplying with the responsibilities of a government contractor under the act. III, 274.

2. One who contracted with the government merely to cut and cord wood, (furnished by another party,) upon land not belonging to him, *held* not to be a contractor for supplies within the meaning of the act ; his engagement being to furnish not material, nor even transportation, but labor only, which cannot be deemed a "supply." The only remedy, therefore, against such party for the non-performance of his agreement would be a civil suit for damages on his bond. XII, 283.

3. Where the alleged "fraud" is not consummated, but only attempted, and discovered by the United States inspector and so prevented, the contractor is not merely chargeable with "fraud" under the act, but should be charged with a "wilful neglect of duty." III, 279.

4. In charging "wilful neglect of duty" against a contractor, it is not necessary to allege that the neglect was accompanied by an intention to defraud. IV, 371. The offences of "wilful neglect of duty," and "fraud," are distinct under the statute ; where it is the former

† NOTE. This act, in making army contractors triable by court-martial, made them also *a part of the army*, subject to the articles of war. The act of July 28, 1866, ch. 299, fixing the military peace establishment, in providing that the army shall consist of certain specific forces named and described therein, among which contractors are not included, and in repealing all laws and parts of law inconsistent with its provisions, necessarily repealed the enactment of 1862 referred to. Since July 28, 1866, therefore, contractors (as well as the assignees, agents, &c., of contractors, and also the inspectors, mentioned in section 7, ch. 253, act of July 4, 1864) have not been a part of the army, nor triable by court-martial for fraud, neglect of duty, or otherwise. The paragraphs under this title must accordingly be viewed as applicable only to a period prior to the date of the act of 1866 referred to.

offence which has been committed, it is improper to charge it as "fraud." XIX, 280.

5. Contractors arrested for trial under this act should be proceeded against, so far as the forms of trial are concerned, as though they were *enlisted men.* V, 101.

6. A department commander has the same authority over the proceedings of a general court-martial for the trial of contractors as over those for the trial of other military offenders. V, 102.

7. The act making contractors amenable to trial by court-martial *held* to be *constitutional.* This enactment is one of the many acts of Congress passed under the authority of the WAR POWER so fully delegated by the Constitution. V, 605. Necessarily incident to the power conferred upon Congress by the Constitution of prosecuting the war, and raising military forces for that purpose, is the power to determine of what those forces shall consist; and since Congress, in the exercise of this power, has constituted contractors (a class essential to effective military operations) a part of the army, it follows, independently of the provision to this effect in the act, that they are subject to the rules and articles of war, and to the jurisdiction of a court-martial. XI, 464.

8. The act (section 16, &c.) is not repealed, by implication, by the act of 2d March, 1863, chapter 67, in regard to frauds upon the United States. The latter act does not provide punishment for the same class of offences as are mentioned and provided for in the former, and is not inconsistent therewith. V, 605.

9. The assignee of a government contractor, although assuming to act as principal under the contract, and proceeding to fulfil its stipulations, cannot be proceeded against by court-martial under the act, *as contractor*, for the reason that the 14th section of the same act prohibits all transfers of government contracts, and provides that every such transfer shall cause the annulment of the contract so far as the United States are concerned. V, 649. (But see the act passed since the date of the foregoing opinion, of July 4, 1864, ch. 253, sec. 7, by which the statute in regard to the liability of contractors is extended to cases of their assignees, agents, &c.)

10. The offence of wilful default or fraud on the part of the government contractor is made punishable *at the discretion* of the court-martial, by the terms of the act. VII, 507.

11. As the act brings the contractor within the army, and makes him subject to the rules and articles of war, generally—*held* that he is thus made amenable to trial for military offences other than the pecific "fraud" and "neglect of duty;" as, for instance, for all offences to the prejudice of good order and military discipline. VIII, 638, 583. Thus for "conduct to the prejudice," &c., in bribing a United States officer. IX, 483. So also for the offence of presenting a fraudulent claim under the act of March 2, 1863, chapter 67. IX, 146. See FRAUD, II, 13.

12. *Held* that a contractor might be proceeded against under the 99th article for offering a valuable consideration to the clerk of a quartermaster, in return for facilities improperly furnished him, but

not for bribery under the act of February 26, 1863, chapter 81, section 6, in a case where the clerk had no official "*decision*" to be influenced. VI, 566.

13. *Held*, that under the act of 4th July, 1864, ch. 253, sec. 7, (extending the provisions of the act of 17th July, 1862, ch. 200, sec. 16, to the cases of all persons engaged in executing the contracts referred to in the latter act, whether as agents of the contractors, or as their assignees, or otherwise,) a *sub-contractor* was triable for "conduct prejudicial to good order and military discipline," in publicly and grossly insulting the quartermaster, with whom the contract was made, and to whom he was to furnish supplies under the same; also that he was liable, like an enlisted man, to be placed under guard and arrest therefor. XV, 341.

14. Where, after a contract for horses had been formally entered into, a circular was issued by the cavalry bureau requiring horses offered for inspection to be detained twenty-four hours at the expense of the owner, and then, if not accepted, to be branded "R," as "rejected"—*held*, that this circular introduced new conditions, and conditions contrary to law, into the agreement; and, as it was thereafter almost impossible to procure the same supply of horses as before, practically prevented the performance of the agreement on the part of the contractor; that branding in the manner proposed by the new circular would have subjected those who engaged in it to an action at law; and that the government could not force a contractor to deliver up his property to be subjected to a wrong. VIII, 629, 652.

15. *Held*, that one who, in accordance with an advertisement of the proper officer of the government, had filed proposals to furnish commissary stores, with a suitable guarantee for their fulfilment, and had been duly notified that his proposals were accepted, became thereupon a contractor in the view of the law, and liable to a charge of wilful neglect of duty for not going on to furnish the stores, on the ground only that he did not like the inspector appointed by the government; and this though he had not signed and had refused to sign the formal contract. VIII, 594.

16. A party who furnishes rations and lodgings to recruits upon verbal agreements with recruiting officers, who had been directed to employ him for that purpose by the United States mustering and disbursing officer of the post, (who at the same time named the terms upon which such rations, &c., should be furnished,)—*held* to be a *contractor* within the meaning of sec. 16, ch. 200, act of 17th July, 1862, and amenable as such to trial by court-martial for "fraud" or "wilful neglect of duty." X, 392.

SEE BAIL.
BRIBERY.
CHARGE, (12.)
CLAIM, I, (10.)
FRAUD, II, (13.)
HABEAS CORPUS, (5.)
JURISDICTION, (11.)
PAROLE, (7.)
SENTENCE, I, (20,) (21.)
SPECIFICATION, (12.)

CONTRACT SURGEON.

1. A "contract," or "acting assistant surgeon," is not regarded as in the military service of the United States in the ordinary acceptation of the term, except when serving with the armies of the United States in the field, in the sense of the 60th article of war. IX, 678. * When not so serving, as in time of peace, a contract surgeon, having no other relation to the military organization than that established by the contract for his services, should be regarded as any civilian, and therefore as not triable by court-martial. XXVI, 18. Being so regarded, he is entitled, when duly attending as a witness before a military court, to be paid the fees provided for a "citizen witness," by paragraph 1139 of the Army Regulations. XXIV, 186.

* 2. Where it was charged that an acting assistant surgeon had (in October 1866) received a bribe from the captain of a vessel for releasing the same from a detention in quarantine, to which it had been subjected by such surgeon as health officer of a port in Georgia; *held*, in view of the termination of active hostilities, and the fact that the alleged offence of the accused did not grow out of the performance of duties of a military character, that he could not properly be made amenable to trial by a military court; but that he was liable to indictment as for a high crime and misdemeanor under the provisions of sec. 6, ch. 81, act of February 26th, 1853. And advised that his contract be terminated and that his case be turned over to the United States district attorney for proper disposition. XXIII, 269.

SEE SIXTIETH ARTICLE, (1,) (2.)
FEMALE—APPOINTMENT OF TO MILITARY OFFICE.
OATH OF OFFICE.

CONTRACT WITH THE GOVERNMENT.

* 1. Neither the right of eminent domain, nor the war power, should be allowed to override the principle which upholds the sacredness of contracts, and the government of the United States is as much interested as any individual in society in maintaining this principle unimpaired. It would moreover ill comport with the dignity and honor of the government to renounce obligations voluntarily assumed under a contract, when the performance of the reciprocal obligations of the other contracting party has been prevented by its own act and for its own interest and convenience. The government, when a party, for instance, to a contract of affreightment, should be subject to the same rules of law which regulate the duties of a private person in such a transaction. So, where the Quartermaster Department chartered a vessel at a certain rate per ton, to carry coal from Philadelphia to Key West; but the vessel was by military force, and against the protest of the master, stopped and compelled to discharge her cargo at Fortress Monroe, for the reason that the coal was more needed there; *held* that the principle of maritime law laid down by Story J. in the case of the ship Nathaniel Hooper, 3 Sumner's

Reports, p. 555, applied to this instance; that the government having seen fit to divert the carriage of the cargo and to terminate the voyage at an intermediate port, had dispensed for its own purposes with the entire fulfilment of the contract; that as the owner of the vessel had stood ready to fulfil his part, and had been prevented from full performance by the forcible interposition of the military authorities, and without fault of his own—for the United States to refuse to pay full freight would be unjustly to take advantage of its own waiver and to cause the carrier to suffer for an act done for its own benefit; that the government was therefore liable to pay freight for the entire intended voyage; and that the fact that the contract was made and the stoppage enforced in time of *war* did not affect the question of the obligation to make such payment. And *held* that the government was further liable for the value of repairs required for damages done the vessel by reason of being detained too long at the wharf at Fortress Monroe during a gale, against the request of the master, and by reason of a collision with another vessel when it was afterwards—the gale increasing—attempted to tow her out into the stream. XX, 491.

* 2. Paragraphs 1002 and 1003 of the Army Regulations, prohibiting the making of a contract by an officer with any person in the military service, and the receiving by such a person of extra compensation, *held* not to apply to a case of a purchase by the ordnance department of a patent right from a government employee at the Washington arsenal who was not connected with the military service. Such party may legally be compensated for the past use of his invention by the government, and contracted with and compensated for the right to use it exclusively for the future. XXI, 320.

SEE CLAIMS, I, (13.)
COMPENSATION, II, (1.)
CONTRACT SURGEON, (1.)
COUNSEL, II, (2.)
INTEREST.
OATH OF OFFICE.
ORDER, (2.)

CONVENING OFFICER.

* Where a court-martial refuses, on insufficient grounds, to arrive at a finding, and thereupon adjourns, and, on being reconvened for a reconsideration by the convening officer, persists in its refusal, the only proper course for such officer is forthwith to issue an order dissolving the court, and censuring the members for their conduct; and thereupon to convene a new court for the trial of the accused. And where a court refused to comply with an order of the military district commander, requiring that in all cases where the accused pleaded guilty, evidence exhibiting the facts of the offence should be introduced by the prosecution and entertained by the court—*advised* that the dissolving of the court with a reprimand was the only remedy of the convening authority. For him to *bring to trial* the members of the court who had concurred in the refusal, with the view of establishing their offence by the testimony of other members and the judge

advocate, would be without precedent and improper. XXV, 578. Where a court-martial, having, upon first assembling, come to the conclusion that the order convening it was defective or invalid; and having thereupon communicated such conclusion to the convening officer, was directed by him to proceed to business; *held* that it was bound to comply;—this being a case of an order to be obeyed, and not one of a judicial discretion to be exercised. See COURT-MARTIAL, I, 6.

SEE SIXTY-FIFTH ARTICLE.
ACCUSER AND PROSECUTOR.
APPROVAL OR DISAPPROVAL OF PROCEEDINGS, &c., (1.)
COURT MARTIAL, I, (2,) (4,) (5,) (6.)
FIELD OFFICER'S COURT, (1,) (2,) (7,) (8,) (9.)
JUDGE ADVOCATE, (9,)
SEPARATE BRIGADE.

COPY OF RECORD.

SEE NINETIETH ARTICLE.
NINETY-SECOND ARTICLE.
OFFICIAL RECORDS OF THE GOVERNMENT, (3.)
RECORD, I, (5.)

COPY OF TESTIMONY.

As a court-martial sits with open doors, and the accused has the right in person, or through a clerk or stenographer, to take down all the testimony introduced and the proceedings of the court from day to day, no objection is perceived to allowing him to take, at his own expense, a copy of the testimony from the formal record, provided it can be done without inconvenience to the prosecution. Such a copy would not be official, and the allowing it to be taken is simply an act of courtesy to the accused. VII, 100.

CORPOREAL PUNISHMENT.

SEE FORTY-FIFTH ARTICLE, (5.)

CORPS.

SEE SIXTY-FIRST ARTICLE.
SIXTY-SIXTH ARTICLE, (1,) (2,) (3,) (4,) (5,) (6.)
ARMY CORPS.

CORPS COMMANDER.

SEE SIXTY-FIFTH ARTICLE, (4.)
COURT-MARTIAL, I, (11.)

CORRECTION OF RECORD.

SEE RECORD, II.

CORRESPONDENCE WITH REBELS, I—(GENERALLY.)

The system of correspondence heretofore (January, 1865) concerted and maintained between northern and southern newspapers by means of an interchange of published communications, entitled "Personals"

—*held*, in view of the character, subjects, and language of these communications and the mode of their transmission, to be an evasion and violation of the regulations established for correspondence by letter between the lines by flags of truce, as well as a violation of the laws of war, and a means of conveying comfort and encouragement to the enemy. *Advised*, that all correspondence, however restricted, between the lines is at variance with a state of war, which is an absolute interdiction of all intercourse with the enemy, and that the fact that the interchange permitted by our authorities has culminated in the illicit, defiant and systematic proceeding in question indicates that for the future the disallowance altogether of such correspondence would be a desirable measure; but *recommended*, that, in any event, the proprietors of the northern newspapers referred to be formally notified to discontinue, wholly and at once, the publications in question, and, in case they refuse to desist, that they be brought to trial by military commission for a violation of the laws of war. XII, 259.

CORRESPONDENCE WITH REBELS, II.

(Under act of February 25, 1863, chapter 60.)

(Opinions dated in April and May, 1863.)

1. Writing and forwarding a letter addressed to a person in the rebel States, though it is not received or delivered, is commencing a correspondence within the sense of the act of 25th February, 1863, "to prevent correspondence with rebels." II, 173.

2. A letter written to a correspondent in Richmond by a person within our lines, asking the former to purchase for the writer $1,400 worth of Virginia State bonds, and acknowledging the receipt of a former lot of similar securities, may properly be held to be a letter written "with the intent to defeat the measures of the government, or to weaken their efficacy," in the sense of the act; and the writer may be prosecuted therefor, as therein specified. II, 580.

3. Where letters, in the hands of an unauthorized person, who was attempting to convey them with others through our lines to Richmond, to residents of which place they were addressed, contained vehement and emphatic vilification of the President and of Major General Schenck, and violently assailed the latter for his course as commander at Baltimore, intimating that he would be resisted by the inhabitants in sympathy with the South as soon as they could be supported by the rebel forces—*held*, that the party might be proceeded against under the act, for "promoting" a correspondence entered into "with intent to defeat the measures of the government, or to weaken their efficacy." III, 34.

See FIFTY-SEVENTH ARTICLE, (3.)

COUNSEL I—(EMPLOYED BY THE GOVERNMENT—GENERALLY.)

*1. Under the provisions of the Fee Bill of February 26, 1853, a United States district attorney is entitled, for professional services

rendered "at the request of the head of a department," to such compensation as may be agreed upon either before or after the performance of the service. (See VI Opinions of Attorneys General, p. 301; VII do., p. 53.) The compensation is to be paid from the contingent or other appropriate fund in charge of the particular department at the instance of the head of which the attorney is employed, and not from the judiciary fund. XIX, 586.

*2. The statutory law, authorizing the employment of counsel to render professional services at the expense of a department, is that of the act of February 26, 1853, ch. 80, sec. 1; by which such services are authorized to be paid for in "such sum as may be stipulated or agreed on," when "*rendered at the request of the head of a department.*" It is clear that where the authority for the employment in any case has directly emanated from a commanding officer of the army, it should be made to appear that he was himself authorized by the Secretary of War to represent him in the employment, by some general or particular instruction to that effect. Although this Bureau has generally recommended the payment of the reasonable accounts of counsel for necessary or valuable services rendered in good faith, where the employment has been irregular and without formal authority, it has repeatedly taken occasion to reprobate the practice which has appeared to prevail to a considerable extent among commanding officers of employing counsel, and especially the United States attorney, without consultation with the Department, and thus committing the government to charges contracted without its knowledge. XXVI, 366.

*3. For officers of the army to employ, without authority from the Secretary of War, United States district attorneys to defend proceedings in *habeas corpus* instituted for the discharge of enlisted men, or to perform any other professional service whatsoever, is altogether improper, as it is embarrassing to the government. An opinion seems to prevail among some officers that they are at liberty to have recourse, for legal advice or professional services, to a United States district attorney, without such authority; and this upon the supposition, apparently, that it is the duty of such attorney, being a public officer, to advise, defend, &c., other public officers, without charge to the United States. But this view is altogether erroneous; the relation of a district attorney to the military department of the government being precisely the same as that of any other attorney employed by it or under its sanction: he being—like any other counsel—entitled to be paid his reasonable compensation. So, though he is ordinarily to be employed in preference to any other professional adviser, the commander or other officer employing him must first obtain the express authorization of the Secretary of War, or—where such employment has been resorted to in a case of emergency precluding a prior formal application for such authority—must at the earliest opportunity seek the sanction of the Secretary to the action already taken and to such continued employment as may be proposed. Paragraphs 1461 and 1462 of the Army Regulations, furnish a general rule for the direction of officers needing to retain counsel in suits or proceedings relating to their public duties. XXVI, 22.

* 4. In cases of officers and others, sued or prosecuted in State courts on account of acts done under the authority of the United States, it is ordinarily the first duty of the counsel employed for their defence to cause the removal of the action to the United States circuit court, if such removal is authorized by the acts of Congress on the subject. It has been the experience of the War Department that such a proceeding has in a vast majority of the cases insured a complete protection to the defendant; resulting in a verdict or judgment in his favor, or in a dismissal of the action—on the motion often of the plaintiff or prosecutor who finds himself wholly thwarted in his scheme of retaliation or revenge. See XXVI, 586.

* 5. It is the general rule of the War Department not to settle the accounts of counsel employed by the authority or sanction of the Secretary of War, until upon the final disposition of the suit or prosecution in each case, or the termination of the full service required by the employment. The papers and proof proper to be filed in support of a claim of such counsel for compensation are: 1. A *formal detailed account*, setting forth in full the particulars of service rendered, with the specific charge for each service; and exhibiting separately all disbursements made, if any, and showing for what each was incurred. The proper *vouchers* for such disbursements should also be furnished. 2. The proper evidence of the *authority* by which the counsel has acted in the case. 3. Competent evidence that the charges presented are just and reasonable. The certificate, to this effect, of the United States circuit or district judge, or of the State judge who disposed of the case, or was cognizant of the service rendered, is generally to be preferred, if it can be procured. The written statement of opinion of the United States district attorney, (where he is not himself the claimant,) or that of reputable attorneys of the locality, may often be the best evidence of this nature that can be obtained. It may be noted, however, that the exhibition of such evidence, however respectable the position—official or professional—of the witnesses, will fail to commend an account of counsel to favorable consideration, where the charges are, upon their face, clearly excessive, for the services rendered. It may also be added that where legal *costs* have been received by the counsel from the opposite party, upon a suit resulting in favor of the officer or person for whom he has acted, these costs are properly credited in his account with the government. For it is not the officer, &c., who is his client, but the United States; and although his account is payable out of the contingent fund of the department, which is wholly within the control of the Secretary, whose practice is to pay liberally for professional service, yet such fund is money of the people, to be expended carefully and with jealous regard for their interests. And if the counsel has in any degree been compensated for his services by means of any considerable costs of court, received by him as a consequence of his appearance in the case, it is only just that to that extent his claim upon the public fund should be reduced. See XXVI, 467, 496, 498, 505, 509, 513, 539, 573.

SEE PROCEEDINGS AT LAW AGAINST OFFICERS, &c.

COUNSEL, II—(EMPLOYED TO ASSIST JUDGE ADVOCATE.)

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 Secretary of War, to be paid, if allowed, out of the contingent fund. V, 446.

* 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. XXII, 345.

COUNSEL, III—(FOR THE ACCUSED.)

1. The accused is entitled to counsel upon his trial as a *right*, and this right the court cannot properly refuse to accede to him. Wherever it is refused, and it appears that the accused could have procured counsel within a reasonable time, if proper facilities had been afforded him, the proceedings should be disapproved. IX, 538. See POSTPONEMENT, 4.

2. In the case of a party held for trial for a grave crime in violation of the laws of war and in aid of the rebellion, *held* that, in accordance with the usual practice, he should be allowed to have interviews with his counsel, at any time after formal charges were served upon him, and he was thus enabled to proceed with the preparation of his defence. XXI, 141. See XII, 441.

3. *Held* that the counsel of an accused, on trial for murder and other heinous crimes in aid of the rebellion, might properly be permitted to have an interview with a party—held in confinement on a charge of complicity with the accused, but not himself on trial or served with charges, or mentioned in the pleadings against the accused—with the design of afterwards calling such party as a witness; provided such interview were had in the presence and hearing of an officer of the government. XIX, 33.

4. A military court has no power to *compel* an officer to act as counsel for the accused. XIII, 400.

* 5. An officer was, upon charges preferred in good faith, brought to trial by a competent court duly convened by his department commander, was impartially tried and was acquitted. He was, in the usual manner, furnished counsel in the judge advocate, so far at least

as provided in the 69th article of war, and his employment of private counsel was not necessary to his proper defence. He however retained such counsel, and, upon his acquittal, presented to the Secretary of War a claim to be paid the account of the same for his services; *held* that such claim could not be allowed. XXII, 674.

SEE SIXTY-SIXTH ARTICLE, (11.)
COURT-MARTIAL, I, (8.)
JUDGE ADVOCATE, (1.)
POSTPONEMENT, (4.)

COURT-MARTIAL, I—(POWERS OF, AND GENERALLY.)

* 1. A court-martial, except when cleared for deliberation, is always open to the public during a trial. See BOARD, 6; COPY OF TESTIMONY.

* 2. Neither a court-martial nor its judge advocate has any authority over the person of a prisoner, except when he is actually before the court for trial, or as a witness, and neither has any authority to order or require a prisoner to be brought from the custody of any military commander to the place of trial. This is an executive act, which properly devolves upon the officer convening the court, and it is to this officer that application must be made when it is desired that an officer or soldier be ordered or brought to the station of the court for trial or to give testimony. XXII, 606. Except in case of a contempt committed in its presence, (see SEVENTY-SIXTH ARTICLE,) a court-martial has no power to subject an individual to any physical restraint. V, 172. *Held* that a general court-martial had no authority to require its judge advocate to place in arrest certain witnesses (an officer and an enlisted man) on the ground that they had committed perjury upon the trial; that in such case its proper course was to report the facts to the convening authority for his action. III, 109.

3. It is not only the undoubted right, but the duty, of a court-martial to reject any illegal or improper charge which does not substantially present an offence known to the military law. It is not necessary, before doing so, to refer the question to the authority convening the court. III, 230.

4. 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, may take up a new case and proceed with it to its termination before resuming the trial of the first case. III, 281; IX, 650; XXVI, 548. * A court-martial is authorized to call before it, to give testimony, witnesses whom neither the prosecution nor the defence have summoned, and this even after both have closed their case. The court, when it desires to hear the testimony of a material witness, who is absent, may adjourn the trial until he can be procured, subject, however, to being ordered to reassemble by the convening authority in case the adjournment should be unreasonably protracted. XXV, 578.

* 5. To justify a court-martial to proceed with a trial it is not *necessary* that the charges against the accused should be endorsed at all or in any manner formally referred to the court or judge advocate for

trial. It is sufficient if the prisoner is actually brought before the court for trial, and the charges appear authenticated by the signature of some responsible officer. The *reference* of the charges by some commanding officer is a usual and most desirable form, but it is a form only. Its absence in any case may put the court upon its inquiry as to the *bona fide* character of the prosecution, and they may, in a case of substantial doubt, defer the trial until assured upon the subject; but such an assurance is not *necessary* to authorize them to proceed with the trial. XXVI, 319. The formal approval by the convening officer of charges forwarded or presented to the court to be tried is not absolutely essential in order to justify the court in entertaining the same. There may be cases where a subordinate commander may with perfect propriety call upon a court to try charges without his first obtaining the sanction of a superior. XXII, 502, 522. But it is always preferable, where practicable, to pursue the usual course.

6. If a court, upon assembling under an order, is of the opinion that the order convening it is for any reason invalid—as for omitting to state that a greater number (the detail being less than thirteen) could not be assembled without injury to the service—it should at once formally communicate its conclusion to the authority which convened it, and thereupon adjourn to await his action. If the latter should not agree in the view of the court, (which must be of rare occurrence,) but should order it to proceed with its judicial business, it should of course comply, but it should cause its own action in the matter, and that of the convening authority, to be spread upon the record. XXI, 177. See CONVENING OFFICER.

*7. So long as the detail is not thus reduced below five, a general court-martial should be allowed the exercise of a reasonable discretion in temporarily excusing members and going on with the trial without them. It may properly so proceed in case of the illness of a member; and *held* also that a court acted within its authority in excusing a member, at his request, on the ground that he was to be a principal witness in the case on trial. But, in permitting a member or members to withdraw for frivolous or insufficient grounds, the officers composing the court may become liable themselves to trial and punishment by court-martial. XXIV, 634.

*8. *Held* that the action of a certain general court-martial, in relieving one of its members after he had been duly sworn as a part of the court, and permitting him to act as counsel for the accused, was unprecedented and wholly unauthorized, and that it invalidated the proceedings and judgment upon the trial. XXI, 650.

9. A general court-martial has no power, by its judgment, to "honorably discharge" an officer or a soldier. III, 426.

10. To authorize a general court-martial regularly in session to sit as a military commission also would be a course not sanctioned by precedent. If it should be necessary to constitute the same members a commission they should first be formally dissolved as a court-martial. VII, 134. To detail as a military commission the same officers as those constituting a court-martial, or *vice versa*, without dissolving the court first convened, would be a proceeding not only productive

of inconvenience but anomalous and contrary to precedent and the usage of the service. And this ruling 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 in no case be made if it can be avoided. XIX, 495.

11. An army corps can be established by the President alone, (sec. 7, ch. 201, act of July 17, 1862,) and the organization of such a corps by an army commander is a nullity, unless the same receive the approval of the President, who may thus make the act of the commander his own. A court-martial, therefore, which was convened by the commander of a corps so constituted *before* the approval of the organization by the President, *held*, (February, 1865,) not a legal tribunal, unless the approval were made to take effect as of a date prior to the appointment of the court. XIII, 349.

12. Where an officer has, by order of the President, in time of war, been dishonorably dismissed from the service, it is too late to convene a court-martial in his case. I, 395; II, 49.

13. An officer of volunteers, who has been legally mustered out of the service, is not entitled to demand and receive a trial by court-martial for acts done while in the service. XIX, 71.

SEE SIXTY-FOURTH ARTICLE, (7.)
SEVENTY-FIRST ARTICLE, (9,) (11.)
ADJOURNMENT, (5.)
BAIL.
CONVENING OFFICER.
DEFENCE OF ACCUSED, (2.)
EXPUNGING FROM THE RECORD.
JUDGE ADVOCATE, (5,) (6,) (7,) (23,) (25.)
MEMBER OF MILITARY COURT.
NOLLE PROSEQUI.
ORDER, II, (2.)
RETIRING BOARD, (1,) (5.)
SENTENCE, I, (1,) (2,) (3,) (5,) (6,) (9,) (12,) (20.)
UNITED STATES AS BAILEE, &c., (7.)
WITNESS, (15,) (20.)

COURT-MARTIAL, II—(JURISDICTION OF.)

1. The general principle of law is that a court-martial can exercise no jurisdiction over an officer or enlisted man after he has ceased to belong to the military service. If, however, a prosecution has been commenced against him while in the service, it may be continued after he has left it. The jurisdiction of the court having once attached, it will not be ousted by any change in the *status* of the party. (See JURISDICTION, 1.) Congress has, moreover, made exceptions to the general rule in the case of *deserters* and offenders under the act of March 2, 1863, ch. 67. V, 313; VII, 24. The service upon an officer, before he ceases to belong to the service, of formal charges and specifications is such a commencement of the proceedings as to give a court-martial jurisdiction of his person, although he may be mustered out before his arraignment and trial. IX, 672. Where an officer procured his discharge from the service by means of false representations in regard to his physical condition, *held* that the order of his discharge might be revoked and he be brought to

trial for his offence by court-martial. VI, 662; XIII, 185. See MUSTER OUT, 4, 5, 6.

2. The return of an officer to the service under a new commission should not be treated as reviving the jurisdiction of the court over him in regard to offences committed before his dismissal. His having been recommissioned and mustered into the United States service should rather be accepted as a condonation of the past; and this view of the case is warranted not only by the spirit of the act restoring him, but also from considerations of public policy. V, 314.

3. Where, under a charge of "*defrauding the United States*," it was merely averred in the specification that the accused, a citizen, was "an employee of the government," *held* that this vague statement was insufficient to give a court-martial jurisdiction of the case. VII, 511.

4. An enrolling officer of the sub-district of the District of Columbia, appointed by the board of enrolment, and whose duties are to enroll all parties subject to draft in the sub-district, *held*, (September, 1863,) not properly triable by a court-martial. His case is not within the 60th article of war, or brought within the jurisdiction of a court-martial by any statute. VII, 453. But see MILITARY COMMISSION, II, 7.

5. The "*deputy provost marshals*" and "*special officers*," appointed by the district provost marshals by virtue of Circular No. 19, of the Provost Marshal General's office, of June 8, 1863, are employed to assist the district provost marshals in the performance of the duties expressly devolved upon the latter by statute, and particularly in the arrest of deserters and spies. They are therefore deemed to be in the military service, during the war, and, like their principals, triable by court-martial, because, as in the performance of their duty they represent the latter, whose substitutes they are, they should be held bound by operation of law to the same military control, as well judicial as executive. VIII, 246, 658; XI, 52; XII, 119. A captain and provost marshal, (as well as a surgeon of a board of enrolment,) *held*, (March, 1865,) triable by court-martial for the offences denounced in section 23, chapter 13, act of February 24, 1864. Such offences are disorders in the sense of the 99th article, and though made specially triable by an ordinary criminal court, the military jurisdiction is not ousted. XV, 109.

6. Where a party is, within the sense of the 60th article, "serving with the armies of the United States in the field," he is within the jurisdiction of a court-martial for an offence charged generally under the 99th, as well as specifically under any other article. IV, 454.

7. The engineer and conductor of a train running from Alexandria to Manassas—*held*, (February, 1864,) triable by court-martial for neglect of duty, they being in the employment of the government and serving with the armies in the field, and therefore, under the 60th article of war, amenable to such jurisdiction upon the same grounds as are teamsters so employed and serving. VII, 116.

8. *Held*, (March, 1864,) that a confederate soldier charged with murder could not be tried by a court-martial, which had jurisdiction

of this offence only when committed by persons in the military service and subject to the articles of war. VII, 418.

9. For despatching a written order to a dealer therein for a quantity of counterfeit postal currency, (and at the same time enclosing the money therefor, and proposing to make further purchases in the future,) an *enlisted man* is not amenable to court-martial. His offence is not a "crime" within section 6, chapter 33, of act of 25th February, 1862, (in regard to the counterfeiting, uttering, &c., of this currency,) nor is it a "disorder" or "neglect" in the sense of the 99th article of war. VIII, 552. See EIGHTY-THIRD ARTICLE, 12.

10. A teamster in the quartermaster's department, serving as such with troops in the field, is within the provisions of the 60th article of war, and amenable to trial by court-martial. IX, 111, 146.

11. While military cases will ordinarily be tried near the *locus* of the offence, or where the witnesses may most readily be assembled, yet the jurisdiction of a general court-martial is coextensive with the limits of the federal domain. *Held*, therefore, (December, 1864,) that a court-martial, convened in any separate army, was competent to pass upon a case, which might happen to be brought before it, of a soldier belonging to another army and charged with desertion therefrom. And upon the deserter being sentenced to death by such court the proceedings must be acted upon, and the sentence, if approved, must (unless suspended to await the pleasure of the President) be executed by the commander of the army in which the court is convened. XI, 351. See XI, 234.

12. *Held* that an officer of volunteers was not amenable to court-martial (under act of 2d March, 1863, ch. 67, or otherwise) for offences committed while a recruiting officer under the authority of the governor of a State, and before being mustered or enlisted into the United States service in any capacity. XII, 475.

13. An officer of volunteers, who had been formally mustered out of the service, *held* not amenable to trial by court-martial for a previous neglect of duty in wrongfully releasing a prisoner in his charge; because, 1st, this charge was one which did not survive against him after his separation from the service; and, 2d, because the order of muster out not having been obtained by *fraud*, could not be revoked with a view of again bringing him into the service for the purposes of trial. In such a case the government, by mustering the officer out of the service without proceeding against him for the military offence, (of which it was bound to take notice,) waives its right to prosecute him as an officer therefor. XII, 476. See MUSTER OUT, 4, 5, 6, 7.

14. Neither the fact that at the date of his trial by court-martial a volunteer officer's term of three years' service has actually elapsed, nor the fact that his company or regiment or other command has been formally mustered out of the service, will deprive the court of jurisdiction of his case, provided he has not himself been discharged. And it is competent to retain an officer, by special order, in the service for the purposes of such trial after the discharge of his command. XVI, 562.

15. It is the general rule that citizens are not triable by court-

martial for violation of the articles of war. But to this rule there are well-established exceptions, in the cases, 1st, of citizens relieving, giving intelligence to, corresponding with, &c., the enemy, who are triable by court-martial under the provisions of the 56th and 57th articles; and 2d, in the case of *spies*, who are made so triable by sec. 2 of the Articles. XIX, 475.

*16. A soldier having deserted from a post near the frontier of Canada and crossed into that country, was encountered there by the captain of his company, to whom he conducted himself with gross disrespect, committing an offence which under ordinary circumstances would have been a violation of the 6th article of war. The man having been subsequently arrested on his returning within our territory—*held* that a court-martial, in trying him as a deserter, could not at the same time take cognizance of the other offence. The jurisdiction of such a court is co-extensive with the territory of the republic, but does not extend beyond it. It is a rule of pleading that the venue or place of the offence charged shall be distinctly averred, and this not merely to enable the accused to make his defence, but that the jurisdiction of the court may appear. What is thus necessary to be alleged in support of the jurisdiction, is necessary to be proved. In this instance, if the offence were set forth according to the fact, it would have to be declared that it was committed on the territory of a foreign nation; and under such a presentation, the proceedings would at once fall to the ground. Of course, if our military forces were upon foreign territory by the authority of their government, and in the performance of their duty, the military law would give to a general court-martial the right to try, there, offenders against the discipline and interests of the service. But in the present instance the soldier was upon English soil voluntarily, and by his own act alone; not by the authority of his government, but in defiance of it; and for this reason it is deemed clear that the jurisdiction of the court-martial did not follow him. Nor should it indeed be held that upon such soil, under such circumstances, the *relations of officer and soldier* could have had any practical existence between the offender and captain of his company to whom the disrespect was offered. XXVI, 574.

SEE FIFTY-SIXTH ARTICLE, (1.)
FIFTY-SEVENTH ARTICLE, (4.)
EIGHTY-EIGHTH ARTICLE, (2.)
DESERTER, (22.)
FRAUD, II.
JURISDICTION.
WITNESS, (17.)

COURT-MARTIAL—PROCEEDINGS OF NOT TO BE DISCLOSED TO THE ENEMY.

Where a demand was made by the rebel authorities for information in reference to the proceedings of certain of our courts-martial, which resulted in the conviction of certain spies and traitorous emissaries in Kentucky—*held*, (May, 1863,) that such demand was impertinent, and that the information sought should not be communicated;

that this government is in no way responsible to rebels in arms for the action of its own military courts, and that it would utterly degrade itself by recognizing any such responsibility; that any such recognition would involve an ignoring of the great truth that this is a war upon crime and criminals—a truth which we cannot lose sight of without incurring the risk of becoming, in the judgment of the world, criminals ourselves. II, 369; III, 86.

COURT OF INQUIRY.

SEE SEVENTY-FIRST ARTICLE, (14.)
NINETY-FIRST ARTICLE.
NINETY-SECOND ARTICLE.
BOARD, (3,) (5.)
COMPENSATION, (7.)
DISCHARGE, (5.)
RETIRING BOARD, (1,) (5.)
STENOGRAPHER, (1.)

COWARDICE.

SEE EIGHTY-FIFTH ARTICLE.

CUSTOM OF THE SERVICE.

SEE NINTH ARTICLE, (6.)
FORTY-FIFTH ARTICLE, (5.)
SIXTY-SIXTH ARTICLE, (10,) (14.)
ABSENCE WITHOUT LEAVE, (1.)
ARREST, **I**, (1,) (2,) (4,) (12.)
CASHIERING.
CIVILIANS EMPLOYED WITH TROOPS.
JUDGE ADVOCATE, (12.)
MILITARY COMMISSION, **I**, (1,) (3.)
OFFICER OF THE DAY, (2.)
PARDON, (5,) (10.)
PUNISHMENT, (1,) (3.)
REGIMENTAL FUND, (2.)
REPRIMAND, (1.)
REVIEWING OFFICER, (12.)
SENTENCE, **I**, (1,) (24.)
STENOGRAPHER, (2.)

D.

DEATH SENTENCE.

SEE SIXTY-SEVENTH ARTICLE, (1.)
NINETY-NINTH ARTICLE, (26.)
COMMUTATION OF SENTENCE, (3.)
DEPARTMENT COMMANDER, (5.)
MILITARY COMMISSION, **V**, (1.)
PARDONING POWER, (12.)
PENITENTIARY, **III**, (2.)
PRESIDENT AS REVIEWING OFFICER, (3.)
RECORD, **IV**, (19.)
SENTENCE, **II**; **III**, (7,) (8.)

DEED OF REBEL GRANTOR.

Held that a deed of trust, made at Richmond during the war by a rebel general, by which certain real estate, situate in Maryland, was attempted to be conveyed to the use of grantees resident in that State, was wholly void; not only because rendered so by the *state of war*, which necessarily operated as an interdiction of all intercourse and business transactions between the two sections at war and their inhabitants, but because such transactions had been specially interdicted by the act of July 13, 1861, chap. 3, sec. 5, as well as by the President's proclamation of non-intercourse of August 16, 1861, issued in accordance therewith.

And as such deed appeared to have been acknowledged in Richmond before an officer styling himself a commissioner for Maryland—*held*, further, that it could not be recognized because not legally acknowledged; for the United States cannot admit the right of the State of Maryland to authorize a citizen of Virginia thus officially to represent or act for it at a time when the latter State was asserting and maintaining, by force of arms, the attitude of a foreign and hostile sovereignty.

And such deed appearing also to have been recorded at the public registry at Baltimore—*held* that such a registration (as well as the transmission of the deed through the lines for the purpose of so recording it) was in fraud of the United States, and could give no validity or effect to the instrument. XX, 179.

SEE CLAIMS I, (29.)

DEFENCE OF ACCUSED.

1. There is no law or usage of the service which would justify a court-martial in denying to a prisoner on trial the right of conducting his own defence. He should, if ignorant of it, be advised of his privilege to employ counsel; but if he decline to do so, however unskilful or troublesome his mode of defence may be, he cannot be interfered with except so far as to enforce upon his part the observance of that decorum and respect for the law, and those who administer it, which it is the duty of every court to insist upon in its proceedings. V, 214.

2. Neither the high rank in the army of the accused, nor his previous political position, can be regarded as affording the slightest grounds why any more than the usual latitude or privilege should be granted him in his defence by 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 either tribunal are deemed to be equal before the law. XI, 204.

SEE SIXTY-NINTH ARTICLE, (6.)
COUNSEL, III,.
ESCAPE, (1.)
INSANITY.
JUDGE ADVOCATE, (1.)
POSTPONEMENT, (2.)
PROCEEDINGS AT LAW AGAINST OFFICERS, &c.

DEFENCE OF OFFICER SUED OR PROSECUTED.

See COUNSEL, I.
PROCEEDINGS AT LAW AGAINST OFFICERS, &c.

DEPARTMENT COMMANDER.

1. It is understood to have become the custom of the service for department commanders to remit, in their discretion, for good behavior or other sufficient cause, the unexecuted portion of the punishments of men confined with their commands, even where the court which imposed the sentence was not convened by such commander, as well as where such commander was assigned to the department at a date subsequent to the approval of the sentence by some other officer. Such action by the department commander, in remitting the punishment upon grounds which, in his judgment, render such remission just or desirable, has heretofore been invariably sanctioned by the War Department. VI, 35; VIII, 582. See XXI, 49; XXIII, 286; XXVI, 463. And *advised*, (February 1865,) that there was no good reason why the same power and discretion should not be allowed to be exercised by *commanders of armies in the field*, inasmuch as, by this means, a mass of comparatively unimportant cases, now referred to the Executive, would be promptly and justly disposed of, and by the very authority best qualified to pass upon the merits of each. XV, 6. (See General Order of the War Department, of February 26, 1864, authorizing commanding generals to restore to duty, in their discretion, deserters under sentence.)

2. *Held*, that it was competent for a department commander to issue an order requiring courts-martial, within his command, to take testimony in regard to the merits in all cases in which a plea of guilty was interposed. XI, 234.

3. The mere fact that a general has been designated by his department commander as "second in command" in the department, and ordered to perform the duties of such commander in the absence of the latter, is not sufficient to authorize him to exercise those powers which are required by express statute to be exercised by a department commander alone, as such. The authority expressly delegated by law to a department commander, as such, cannot be delegated by him to a subordinate. While, therefore, a certain officer continues to be the only commander appointed to a military department by the President, he alone can confirm, execute, remit, or mitigate sentences of death, or of dismissal or cashiering, pronounced by courts-martial convened therein. XI, 183.

4. *Held*, that a department commander was without power to appoint a sheriff or officer to levy the execution of a United States civil court in a county (of a State within his department) where there was no legal officer for this purpose; nor was he authorized to enforce, in any way, an execution for a private debt. XIII, 543.

5. Since the passage of the act of July 2, 1864, chapter 215, the authority of department commanders to execute death sentences in

time of war is derived solely from its provisions. And *held*, that the fact that a state of martial law, which had previously existed in a department, had been terminated by an order of the Executive, could in no manner impair or affect the authority of the department commander to execute such sentences during the legal continuance of the rebellion. XVIII, 626.

6. *Held*, that in the absence of any statute law, excluding the State courts of Kansas from executing their legal process within the reserve upon which Fort Leavenworth is situated, it was not perceived upon what good grounds the commander of the department could prohibit the military officials at that post from responding to, or complying with, an ordinary writ of replevin issued from the State district court, and requiring the sheriff to take property held, but not as belonging to the United States, by the military provost marshal, and claimed by a citizen plaintiff. Though the theory of the department commander, in this case, was that this property, horses, belonged to Indians, from whom it had been feloniously taken; yet, in the absence of such conclusive proof of such ownership as would justify its restoration to them, *held*, that the commander could not properly interfere with the ordinary process of the State court. XVI, 514.

SEE THIRTY-THIRD ARTICLE, (2.
SIXTY-FIFTH ARTICLE, (6,) (11,) (14.)
SIXTY-SIXTH ARTICLE, (16.)
ACCUSER AND PROSECUTOR, (8.)
APPROVAL OR DISAPPROVAL OF PROCEEDINGS, &c., (2.)
CONFISCATION, (16.)
CONTRACTOR, **II**, (6.)
MILITARY COMMISSION, **V**, (1.)
ORDER, (3,) (5.)
PENITENTIARY, **II**, (4.)
PRESIDENT AS REVIEWING OFFICER, (5.)
PROCEEDINGS AT LAW AGAINST OFFICERS, &c., (21.)
PROVOST COURT, (1.)
PUNISHMENT, (12,) (14,) (15,) (20.)
REDUCTION TO RANKS, **I**, (4,) (6.)
REVIEWING OFFICER, (10,) (12,) (13.)
SENTENCE, **II**, (2,) (3;) **III**, (3,) (4.)
SEPARATE BRIGADE, (12.)

DEPOSITION.

(Ac of March 3, 1863, chap. 75, sec. 27.)

1. The act authorizes depositions to be taken "in cases not capital." Depositions cannot, therefore, be taken in a case where the accused is charged with "being a spy." III, 485.

2. As neither the 74th article nor the 27th section of the act of March 3, 1863, chapter 75, can be construed as authorizing the use of depositions as evidence in capital cases tried by military courts, a prisoner charged with desertion is entitled to be confronted with the witnesses. IX, 646.

3. The deposition of the general commanding, like that of any other witness, may be taken in cases not capital, when he resides or has his headquarters in a different State, Territory, or district from that in which the court sits, but not otherwise. VII, 5.

4. *Held*, that the officers named in paragraph 1031 of the Army Regulations might properly administer oaths to witnesses whose depositions were proposed to be taken in States in rebellion where there were no qualified civil officers. XI, 14.

5. Although the 74th article indicates justices of the peace as the officers before whom depositions are to be taken, yet, under the act of March 3, 1863, chapter 75, section 27, *any* officer authorized to take depositions by the laws of the State, district, or Territory in which the witness is examined, may take a deposition to be used as evidence before a military court. IX, 632.

6. Except the act of March 3, 1863, section 27, which would apply only to a comparatively small number of such cases, there is no military law or regulation, or public act of the United States, providing for the taking of the deposition of soldiers in the field to be used before State courts. The provisions in the laws of the State, for taking the depositions of parties in other States, can alone be resorted to in such a case; and if the parties should agree upon an officer in the field as a proper person to take and forward the deposition, no objection is perceived to a commission issuing to him from the State authority. XIII, 239.

See SEVENTY-FOURTH ARTICLE.
RETIRING BOARD, (5.)
WITNESS, (15,) (26.)

DERELICT PROPERTY.

See CLAIMS, I, (14.)

DESERTER.

* 1. There is, and can be, no precise rule to determine how short an absence shall constitute a desertion on the part of a soldier, or shall make it proper that the soldier be brought to trial for desertion. The gist of the offence is the *animus not to return*. In order to decide whether the soldier left with this animus, all the circumstances connected with his leaving, absence, and return, (whether compulsory or voluntary,) must be considered together. Each case must be governed by its own peculiar facts, and no general rule on the subject can be laid down. If upon the return or arrest of a soldier who has absented himself without authority, his proper commander is inclined to the opinion that there has been a substantive desertion, or is in doubt upon the question, it is ordinarily his duty—in either case—to prefer a charge of desertion, so that the accused may be brought before a tribunal competent to pass finally upon all the circumstances of the offence. XXVI, 346.

2. An officer competent to order a court-martial for the trial of a deserter is authorized to return him to duty without trial, under par. 159 of the Regulations. But he has no authority to proceed at the same time to inflict a *punishment* upon him as a deserter; such punishment can be imposed by court-martial alone. XVI, 83.

3. It is no sufficient defence to the charge of desertion that the

accused, after his arrest, was returned to duty and received pay and clothing, if such return, &c., was not by the authority specified in paragraph 159 of the Army Regulations. III, 253.

4. Where a soldier who has deserted is, by competent authority, restored to duty without trial, the mere noting his name on the muster and muster-for-pay rolls as a deserter, with the proper dates in regard to his absenting himself and returning, is a sufficient notice to the paymaster to enfore the forfeiture required by paragraphs 1357 and 1358 of the Regulations; and is *prima facie* evidence for the government that the party owes military service for a period equal to that of his unauthorized absence. VII, 325.

5. It should be held a perfect defence to a charge of desertion on the trial of a soldier for that offence by court-martial, that the department commander has, by a special order, relieved him from the same charge, and restored him to duty, under par. 159 of the Regulations. VI, 418.

6. That a deserter was arrested before April, 1863, not for the desertion, but for another and graver crime, constitutes no defence to the charge of desertion. III, 276.

*7. Under the requirements of paragraphs 1357 and 1358, of the Army Regulations, a deserter, *by operation of law*, and whether or not tried or sentenced, becomes liable to a forfeiture of all pay remaining due at the date of his desertion as well as to that accruing for the period of his unauthorized absence. Under the provision (referred to in par. 158 of the Regulations) of the act of January 29, 1813, ch. 16, sec. 12, (which is the same as that contained in the successive prior acts of May 30, 1796, ch. 39, sec. 17; March 16, 1802, ch. 9, sec. 18; and January 11, 1812, ch. 14, sec. 16,) the deserter is also liable, as such, to make good to the service the time lost by his desertion, irrespective of the terms of his sentence, if tried and convicted by a court-martial, or, in the language used in the statutes, "in addition to the penalties mentioned in the rules and articles of war." But, of course, in the great majority of cases, these liabilities can properly be enforced, and justice be done, only by bringing the offender to trial and having the fact of desertion judicially determined. VII, 325.

8. The obligation to make good time lost rests upon a deserter, although restored to duty without trial by competent authority, under par. 159 of the Regulations. XVII, 42.

9. A deserter cannot be required to make good the time lost by his desertion upon merely being *charged* with that offence. He must be proved a deserter, either by testimony before a court-martial or by such satisfactory evidence (as his own admission) as would justify his commanding officer in treating him as such without resort to a judicial investigation. VI, 468. But in general, nothing short of a *conviction* of desertion should be accepted, as sufficient ground for requiring a soldier to make good the time lost by absence. And the same general rule should be applied to cases of "absence without leave." See ABSENCE WITHOUT LEAVE, 3.

10. The obligation of a deserter to make good the time lost by his

absence is imposed, as expressed in the acts on the subject, (see 7,) "*in addition to*" the penalties which a court-martial may impose. So where a deserter had been sentenced to imprisonment for "the balance of his term," and had undergone the punishment for this period, *held* that he was not absolved from the obligation to make good the time lost by his desertion; the phrase "balance of term" referring to the balance of the term of his original enlistment. XI, 615, 680.

11. The time passed by a deserter in arrest or confinement, or in hospital, while awaiting trial and after his original arrest, is not to be included in the time to be made good by him to the service, upon his conviction. XII, 326.

12. The President's proclamation of March 10, 1863, offering an amnesty to soldiers absent without leave who may return to their regiments, &c., within the period fixed thereby, operates as a limited pardon, relieving offenders from trial and punishment; but it does not relieve a *deserter* from the necessity of making good the time lost by his desertion, or affect, in any way, his obligations under his original contract with the government. X, 549; VI, 469; XII, 139. See BOUNTY, 5.

* 13. In the case of a deserter sentenced to be confined at hard labor for one year, the unexpired portion of whose sentence was remitted before the end of that time, *held* that he was not entitled to have the period passed in confinement credited to him on account of the time which he was required to make good to the United States by reason of his desertion; the obligation to make good such time being, in the language of the statutes on the subject, (see acts of May 30, 1796, ch. 39, sec. 17; March 16, 1802, ch. 9, sec. 18; January 11, 1812, ch. 21, sec. 16; and January 29, 1813, ch. 16, sec. 12,) "*in addition to*" the punishment imposed by the court-martial. XXIV, 39.

* 14. In General Order No. 43 of the War Department, of July 3, 1866, it was set forth as follows: that "by direction of the President all deserters from the regular army who voluntarily join their regiments, or surrender themselves at any military post or recruiting rendezvous, before the 15th of August, 1866, will be returned to duty without trial or punishment, on condition that they make good the time lost by desertion, and forfeit all pay and allowances for the time of their absence." A deserter who, under this order, surrendered himself on August 11, 1866, and was thereupon assigned to duty without trial, claimed the benefit of the order in applying for an amount of pay and bounty which fell due to him on June 30, 1865, the muster-for-pay day of his company next preceding his desertion of July 22, 1865; *held* that under the terms of the order, with the condition of which he had complied, he was entitled to the amount claimed. XXIII, 625. General Order No. 43 of the War Department, of July 3, 1866, offering pardons to deserters from the regular army who should surrender themselves *before* August 15, 1866, referred only to cases of deserters absent at its date. It did not contemplate a grant of immunity to soldiers who might thereafter desert and return prior to the termination of the period of grace. So *held* that it did not include a case of a soldier who deserted *after* July 3, and surrendered himself *on* August 15, 1866. XXV, 504.

15. Where, upon the conviction of a soldier of desertion, it was added in the sentence that he should make good to the service a period of time longer than that of his actual absence, *held*—upon the principle that the imposition of military duty as a *punishment* is inconsistent with the interests of the service—that so much of the sentence as required the accused to do duty beyond the term of such absence should properly be remitted. XIII, 606; XIV, 396. See PUNISHMENT, 7, 8.

16. *Held* that the General Order No. 76, of 1864, in regard to restoring to duty deserters under sentence, was prospective as well as retrospective in its operation. This order gives to "commanding generals" power to pardon this class of offenders in their discretion, but does not require the exercise of such power as a duty. VII, 674.

17. The General Order No. 76 applies to cases of deserters *only*. Where an accused was found guilty, not only of desertion, but also of four other distinct offences, one of which was capital, *held* that the "commanding general" had no power to pardon him or commute his punishment. IX, 25, 51; VIII, 563.

18. Where a general commanding suspended the execution of the sentence of a deserter, with a recommendation, and forwarded the proceedings for the action of the President, under the 89th article of war, and the President subsequently acted upon the case, adopting the recommendation, *held* that a restoration of the man to duty meanwhile, pursuant to General Orders No. 76, of 1864, by the successor of that general, was of no effect, the suspension having put the case out of the power of such successor to act upon. VIII, 401.

19. *Held* that cases where the sentences were finally approved after the date of General Order 76, but in which they were adjudged by the court prior to that date, were within the spirit of the order. IX, 119.

20. Escaping from confinement while under sentence of a military court, *held* not to constitute the crime of desertion, on the ground that an escape from a degrading punishment cannot be regarded as an abandonment of the military service, which is a *status* of honor. X, 574. But *held*, otherwise of an escape from arrest preliminary to trial, or while the accused is awaiting the result of the proceedings of the court, and before his future *status* is determined. If he escapes from the confinement of such arrest, with the intention of abandoning the service, he is a deserter. XIII, 325, 450. * *Held* that an escape from confinement by a soldier, while awaiting sentence for desertion, constituted a *new* desertion. XXVI, 479.

21. A soldier under sentence of imprisonment for a term not longer than his term of enlistment, who escapes and is not arrested till after the expiration of his term, cannot be remanded for punishment under his sentence. But if, meanwhile, (though at a date subsequent to that of the actual end of his term,) he has re-enlisted in a new regiment, without a *formal discharge* from the old, he is triable for a desertion under the 22d article. XV, 524.

* 22. Under the provisions of sec. 12, ch. 16, act of January 29, 1813, (which are the same as those of the successive prior acts of May 30, 1796, ch. 39, sec. 17; March 16, 1802, ch. 9, sec. 18, and Janu-

ary 11, 1812, ch. 14, sec. 16,) a deserter is amenable to trial and punishment by court-martial, "although the term of his enlistment may have elapsed previous to his being apprehended or tried." VIII, 375.

23. Where a deserter remaining absent and in a foreign country applied therefrom for a pardon—*advised* that, until he appeared and surrendered himself to the military authorities for trial, his application should not be entertained. XVII, 264. See PARDON, 1, 2, 3.

24. A desertion does not *per se* necessarily taint all the subsequent service of the soldier, or prevent him from receiving an honorable discharge. In the absence of any law or regulation requiring that a dishonorable discharge shall be consequent upon desertion in all cases, such a penalty can accrue only upon a sentence of court-martial specially imposing the same; or as the necessary consequence of an infamous punishment, separating the soldier from honorable service up to the end of his term, (or continuing beyond it.) To inflict such penalty in any other case is arbitrarily to impose a punishment not authorized by law; and to hold that desertion involves *in se* an infamy is really to determine that however slight the offence and brief the absence, the President has no power to grant a pardon sufficient to efface the guilt of the party, and give him a right to bounty or pension. XIV, 616. And see XVIII, 97. For an extended examination of this subject, see BOUNTY, 8.

25. Where three privates of a regiment of Indiana volunteers deserted from the army in the field, entered the Mexican territory with the design of ultimately reaching their homes, and were arrested by the Mexican authorities, convicted as spies, and held for punishment—*advised*, upon an application for relief presented in their behalf, that these men having proved recreant to their obligations both to the United States and to their State, were entitled to no protection or relief from the government. XIX, 453.

* 26. A sergeant in a regular regiment, serving at Fort Bliss, Texas, in 1861, attempted, soon after the surrender of the traitor Twiggs, to leave the United States service in order to join the rebels. He was detained by the post commander; but, upon a writ of *habeas corpus* being sued out in his behalf before a State judge, he was discharged by the latter, (on the ground that the United States was no longer a nation, and that he could owe no service to it;) and, the post commander being powerless to resist, he was thus enabled to enter the service of the rebels. At the termination of the war, this man, having been arrested in Texas as a deserter, forwarded an application to the War Department, asking to be released, and to be allowed to rejoin his regiment and serve out the term of his original enlistment. *Held* that in taking advantage of such a mockery of the forms of law, by leaving his post of duty and joining the enemy, he had been guilty of an aggravated desertion; that his discharge by the State judge could not avail him as a defence; that, because of his having been in the rebel service during the interval, the provision of the 88th article barring a trial after two years, did not apply to his case; and *recommended* that he be forthwith brought to trial for his crime. XXIII, 18.

27. An *officer* who left his post on a three days' leave of absence,

and never returned or reported himself, but absconded to Canada with a large amount of government funds, and remained concealed there—*held* guilty of the crime of desertion. III, 230.

SEE TWENTIETH ARTICLE.
TWENTY-FIRST ARTICLE.
ABSENCE WITHOUT LEAVE, (2,) (3.)
ARTIFICIAL LIMBS, (2.)
BOUNTY, (5,) (8.)
CLAIM, I, (4,) (5,) (9.)
COURT-MARTIAL, I, (11;) II, (1,) (16.)
DEPOSITION, (2.)
DISCHARGE, (7.)
DISMISSAL, I, (8.)
ENROLMENT, I, (5,) (10,) (18,) (19,) (28,) (38,) (39.)
ESCAPE, (2.)
EVIDENCE, (11,) (12,) (13.)
FINDING, (5,) (9,) (10,) (11,) (32.)
FIELD OFFICER'S COURT, (21.)
HABEAS CORPUS, (6,) (7,) (8.)
JURISDICTION, (1,) (12.)
LESSER KINDRED OFFENCE, (1.)
MAKING GOOD TIME LOST BY DESERTION, &c.
PAY AND ALLOWANCES, (25,) (26,) (27,) (28,) (29,) (30,) (31,) (32.)
PENITENTIARY, III, (2.)
PLEA, (4,) (5,) (8,) (19.)
PRESIDENT'S PROCLAMATION, III.
PUNISHMENT, (7,) (8.)
REGIMENTAL FUND, (2.)
REWARD FOR ARREST OF DESERTER.
SENTENCE, II, (2;) III, (16.)
STOPPAGE, (4,) (5.)
UNITED STATES AS BAILEE, (2,) (5,) (6.)
VETERAN VOLUNTEER, (1.)

DESERTION TO THE ENEMY.

SEE PRISONER OF WAR, (10.)

DESTITUTE SOLDIERS.

1. *Held* that under the provisions of the act of July 5, 1862, chapter 133, section 1, which places in the hands of the President a fund for the relief of disabled and destitute soldiers in certain cases, the Executive was not empowered to refund to a soldier a specific amount of money embezzled or stolen from him by a comrade in the service, who had himself deserted and escaped justice. XIX, 317.

* 2. *Held* that the act of March 22, 1867, ch. 4, entitled "An act to clothe the maimed and destitute soldiers," could properly be construed as providing only for the gift of a suit of clothing to each invalid soldier who was *at the time of its passage* an inmate of a Soldiers' Home; and that a requisition, made in March 1868, upon the Quartermaster General by a Superintendent of such an institution, could not legally be approved, under this act, by the Secretary of War. XXV, 618.

DETACHED SERVICE.

Where an officer on detached service has neglected to report to his regiment, pursuant to paragraph 468 of the Army Regulations, he

cannot properly be dropped on the rolls of the regiment, and thus deprived of pay. The proper penalty for such neglect is to be determined by some form of investigation of the facts of his case. X, 215.

See SIXTH ARTICLE, (2.)
FIELD OFFICER'S COURT, (4.)

DETECTIVE.

See EVIDENCE, (10.)
PROCEEDINGS AT LAW AGAINST OFFICERS, &c., (14,) (15.)

DISAPPROVAL OF PROCEEDINGS.

See APPROVAL OR DISAPPROVAL OF PROCEEDINGS, &c.

DISBURSING OFFICER.

It is the usage of the government to hold an officer, who has paid out public moneys upon vouchers which afterwards prove to have been forged or false, primarily responsible to the United States for the amount of the loss. So *held* that the government was not properly called upon to prosecute a civil suit against a party for the recovery of sums held by him which had been procured to be paid upon such vouchers; but that it was for the officer himself, who had made the payment, to do so for his own indemnity, if he thought fit. XVI, 635.

See NINETY-NINTH ARTICLE, (9.)
PAYMASTER, (1.)

DISCHARGE.

1. Where the discharge given to a soldier is not in express terms "dishonorable," it is presumed to be technically honorable. So *held* that an *order* by which a soldier or officer was simply in terms, "discharged," without the use of the word "dishonorably," or any equivalent term or expression indicating an intention to make the discharge dishonorable or disgracetul, or to *dismiss* the party from the service, was to be regarded as granting him an *honorable* discharge therefrom. XIX, 84.

2. For a commanding general, in discharging a soldier of his command for disability, to add also that he is "*dishonorably*" discharged, is without precedent or sanction of law; for such a discharge carries with it in effect a *punishment*, which can only result from a judicial ascertainment, through the sentence of a court-martial, of the fact involving the status of dishonor on which such discharge rests. XII, 374. See XVI, 127; XIX, 321.

3. Where a soldier was sentenced to be confined at hard labor during the remainder of his term of service—a sentence which involved a dishonorable discharge at the expiration of such term—and was accorded at the end of his term by his immediate commander an ordinary honorable discharge, under a misapprehension in regard

to his *status* at that time; *held*, that such discharge was voidable, and could be recalled by the government. So, where a soldier was specifically sentenced to be dishonorably discharged from the service, (and then to be imprisoned for three years,) and between the imposition of the sentence and its confirmation by the reviewing authority, was formally mustered out and honorably discharged, (by a subordinate officer not authorized to pardon or to restore him to duty without trial;) *held*, that his muster-out must be regarded as made without authority, and that his discharge was irregular and improper and should be recalled. XIV, 55.

*4. A discharge of a soldier, procured by means of a deceit and fraud practised upon the government, may properly be treated as void and cancelled. So where a soldier, who had been enlisted for five years, by making an alteration in his descriptive list or by concealing an error therein, so as to cause it to appear that his term was three years only, induced the military authorities to grant him an honorable discharge at the end of that time; *held* that this discharge might be revoked, and the soldier be brought to trial by general court-martial for an offence in violation of the 99th article of war. XXI, 390. But *held* that an honorable discharge given to a soldier by competent authority, with full knowledge of his standing in the service and of all proceedings pending against him, could not legally be revoked, however improperly and unadvisedly given under the circumstances. The soldier could not justly be made to suffer from an error committed by the representative of the government in such case. XXIII, 483.

*5. It is not usual in our practice to order a court of inquiry to investigate charges against an officer after he has been formally discharged from the military service. The discharge, when given with a knowledge of the facts upon which such charges are based, is ordinarily to be regarded as, in itself, a determination by the government that the same do not call for prosecution, and as a final settlement of the case. The discharge, indeed, is—*in the absence of express words to the contrary*—an *honorable* one; a declaration by the highest military authority that the officer leaves the service with honor or without serious imputation. So, where an officer of volunteers, after a full investigation had been had of charges preferred against him of fraudulent practices, was, without being brought to trial, mustered out of the service in the usual form; *held* that, upon this disposition of his case, he became entitled to view his career in the service as having been, in a military point of view, honorably terminated; and that thereafter the charges in question, once dropped, could not jutsly be officially renewed, except upon altogether new and positive evidence fixing upon him specific frauds. XXIII, 497.

*6. The necessities of the service will sometimes require that a soldier be held without discharge for a short period after the end of his term, and it has never been considered that during that period he shall be exempt from military discipline. A soldier, whose term is expired, is not necessarily absolved from a compliance with the orders of his superior. The exigencies of the service may render it proper

that he shall still be called upon to perform the ordinary soldier's duties; and it is not for him to decide that he will not perform them, or, if so deciding, to claim impunity. His duty clearly is to obey orders, while at the same time he may, in a proper manner, apply for his discharge, or may seek other appropriate redress in accordance with the provisions of the 35th article of war. Thus *held*, in a case where a soldier at the date of the expiration of his term was a paroled prisoner of war unexchanged, that this fact constituted a special and reasonable ground for his not having been formally discharged from the service according to the precise terms of his enlistment. XXI, 591.

* 7. Where a deserter—noted as such in the usual manner, at the time, on the rolls of his company—was restored to duty without trial, and at the end of his proper term was granted an honorable discharge; *held* that such discharge was a formal final judgment passed by the government upon the entire military record of the soldier, and an authoritative declaration by it that he left the service in a status of honor; that, as such, it dispensed altogether with the supposed necessity (in order that the soldier might obtain bounty) of a removal, by order, of the charge of desertion from the rolls†; and amounted, of itself, to the removal of any charge or impediment in the way of his receiving such bounty. XXVI, 484.

SEE NINETY-FIRST ARTICLE, (3.)
ARTIFICIAL LIMBS, (2.)
BOUNTY, (2,) (3,) (4,) (5,) (6,) (7,) (8.)
CLOTHING ALLOWANCE.
COURT-MARTIAL, I, (7.)
DESERTER, (21.)
DISMISSAL, II, (3.)
DISQUALIFICATION, (3.)
ENLISTMENT, II, (1,) (2.)
EXTRA PAY, (3.)
HABEAS CORPUS, (5,) (6,) (8,) (9,) (10.)
JURISDICTION, (1.)
MEMBER OF MILITARY COURT, (3,) (4.)
MUSTER OUT.
PARDONING POWER, (5,) (6.)
PAY AND ALLOWANCES, (13,) (15,) (17,) (36,) (73,) (38,) (39.)
REMOVAL OF DISABILITY, (4.)
REVIEWING OFFICER, (12,) (18.)
SENTENCE, I, (8,) (9,) (13.)
VETERAN VOLUNTEER, (2,) (3.)

DISHONORABLE DISCHARGE.

SEE BOUNTY, (3,) (4,) (5,) (6,) (8.)
CLOTHING ALLOWANCE.
DISCHARGE, (1,) (2,) (3.)
DISQUALIFICATION, (3.)
EXTRA PAY, (3.)
PARDONING POWER, (5,) (6.)
PAY AND ALLOWANCES, (37,) (38,) (39.)
REVIEWING OFFICER, (12,) (18.)
SENTENCE, I, (13.)

† NOTE.—This refers to a practice understood to prevail in some offices of the War or Treasury Department, of requiring that the "*charge of desertion*" against a soldier, as appearing on the rolls of his company or regiment, shall be "*removed*" before he can be paid bounty. But such formal removal is regarded by this Bureau, (which holds that the fact of a desertion *per se* in no manner affects the claim to bounty,—see BOUNTY, 5, 8,) as wholly unnecessary.

DISLOYAL NEWSPAPER.

See FIFTY-FOURTH ARTICLE, (3.)
SUPPRESSION OF DISLOYAL PUBLICATIONS.

DISMISSAL, I—(SUMMARY.)

1. From the foundation of the government the President has been in the habit of summarily dismissing officers in the land and naval service. The power to do so seems to inhere in him, under the Constitution, as commander-in-chief of the army and navy. The exercise of such a power is necessary to preserve the discipline of the army as at present constituted. VII, 397. The authority of the President to dismiss by order is expressly recognized in the 11th article of war. But see 4.

2. The power of summary dismissal by the President does not depend for its authority upon the act of Congress, (section 17, chapter 200, act of July 17, 1862,) that act being simply declaratory of the right which has been exercised by the President since the earliest history of the government. VIII, 297. *Indeed, the act, which, in terms, "*requests*" the President to exercise his discretion in dismissing officers, is to be regarded rather as an emphatic expression of the sense of Congress in reference to the expediency and necessity of such action in time of war than as a measure intended to initiate any new principle. XXVI, 8. But see 4.

3. The power of summary dismissal is necessary to the discipline of the service, but should be cautiously exercised. Recourse should be had to it only in cases of clear and indisputable guilt, and where the exigencies of the case require prompt action. The utmost care in resorting to this proceeding is due, not only to the officer's reputation, but to the military service, which cannot afford to lose good soldiers without sufficient cause; and where a reasonable doubt exists as to the facts, the party should be allowed an opportunity to explain his alleged conduct before final action be taken against him. XI, 538. But see 4.

*4. The act of July 13, 1866, chap. 176, sec. 5, provides that "*no officer in the military or naval service shall, in time of peace, be dismissed from service, except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof.*" This provision repeals all prior existing laws authorizing summary dismissals, and operates also to preclude the Executive from exercising the power of dismissal by order, which he has been deemed to have, *virtute officii*, and independently of statute. XXI, 570.

*5. The right of the President to dismiss an officer (prior to the recent act of July 13, 1866, chap. 176, sec. 5, prohibiting summary dismissals by him in time of peace) existed independently of any sentence or action of a military court in the case of such officer. The exercise of this right could not be forestalled by the fact that a court-martial had previously adjudicated favorably upon the case. Attorney General Legare, in holding (IV Opinions of Attorneys General, 1)

that the President was empowered to dismiss an officer of the army, notwithstanding a decision in his favor by a court of inquiry ordered to investigate his conduct, adds: "In England officers of rank in the army and navy have been dismissed, even after having been tried by court-martial and acquitted of the charges exhibited against them." See also, to a similar effect, opinion of Attorney General Clifford, IV Opinions, 611. So *held* in a case where an officer of the regular army had been found not guilty, by a general court-martial, of a charge of "neglect and violation of duty, to the prejudice of good order and military discipline," and of thirteen specifications under such charge, and had thereupon been "honorably acquitted," that the President, in proceeding, notwithstanding such finding and judgment, to summarily dismiss such officer from the service, on the ground that the testimony fully sustained the charge, and that the accused should have been convicted, was fully justified by law and authority. XXVI, 5.

*6. Orders dismissing officers have been issued at times during the war, notwithstanding a previous acquittal by a military court upon the same charge, in cases where the findings of the court have been manifestly wrong, or where additional evidence of guilt has been laid before the government, or under other circumstances deemed to warrant such action. The authority of the Executive (in time of war) to dismiss, even where there has been an acquittal, is indisputable. XXIII, 265.

7. The insertion of a clause, in an order of summary dismissal, depriving the subject of the order of all arrears of pay due, is without legal sanction. (See opinion of Attorney General Mason, 4 Opinions of Attorneys General, 444—1845;) X, 1, 4; VI, 379; XVII, 670.

8. A summary order of dismissal of an officer, made to take effect as of a date prior to its issue, has the effect of forfeiting pay due at its date, and is, therefore, in violation of the principle that an officer cannot be deprived of his pay by an order of the President, but only by sentence of court-martial. But where an officer is summarily dismissed for desertion or absence without leave, his dismissal may properly take effect as of the date of the commencement of the unauthorized absence, for at that date he ceases to perform service, and is, therefore, not entitled to pay. VI, 405.

9. *Held* that it could not affect the operation of an order summarily dismissing an officer as "second lieutenant," that before its promulgation in the regiment he had become by promotion a first lieutenant. VI, 558.

10. Where an officer, against whom charges of a grave character (and which, if he were tried and convicted thereon, would justify a sentence of dismissal) had been formally preferred by a responsible superior officer, tendered his resignation with an evident intention of avoiding a trial, and while he was serving in the face of the enemy—*held*, that his act might well be regarded as an admission of the substantial truth of the charges, and afforded a reliable ground for his summary dismissal, in orders, by the President. X, 645.

11. Where two officers were shown to have taken part in an attempt to prevent a fair and free expression of the political preferences of the enlisted men of their regiment at the late presidential election, by offering and furnishing liquor to those who voted against the administration, by promising furloughs to such only, and by giving out that others would be deprived of privileges and subjected to annoyances, and, in one case at least, by even refusing to forward a vote for Mr. Lincoln—such attempt being in some degree successful—*held* (December, 1864) that their summary dismissal was fully warranted, and that they should not be restored to the service. XII, 201.

SEE FIFTH ARTICLE, (2,) (4,)
DISQUALIFICATION, (2.)
PAY AND ALLOWANCES, (8,) (13,) (14,) (41.)
REMOVAL OF DISABILITY, (5.)
TRIAL, (2.)

DISMISSAL, II—(SUMMARY, REVOCATION OF ORDER OF.)

* 1. It is the effect of an order, revoking a previous order summarily dismissing an officer, to place him in the same military status as that which he occupied at the date of the original order, *so far as this is practicable.* If, on the one hand, the office which he held has meanwhile ceased to exist by the operation of law; or, on the other hand, the vacancy in that office created by his dismissal has been filled, then, in either case, it is *not practicable.* Of course, if, at the date of the revocation, the office is not in existence, the revocation cannot recreate it. A mere executive act cannot operate as a legislative act, nor can it undo what legislation has once formally fixed and done. Again, where the office exists but has been filled since the dismissal and stands filled at the date of the revocation, the order of revocation cannot vacate it. The dismissal of the officer having been legal and valid, the filling of the vacancy caused by his removal was legal and valid, and the officer appointed to fill it holds it by precisely the same right as he would hold an original vacancy, nor can he be dislodged therefrom by any executive action except such as might properly be taken upon sentence of court-martial. For this reason it has usually been added in orders revoking prior executive dismissals, (in cases where the office is still in existence,) that the officer is thereby restored to his position in the army—*provided*, the vacancy occasioned by his dismissal has not been filled. But the omission of a phrase or proviso to this effect cannot give to the order the force of an absolute rehabilitation of the officer, since the proviso is merely declaratory of the law, which such order could neither counteract nor abridge. So, where an officer, holding the position of quartermaster of regulars and also that of additional aide-de-camp, was dismissed the service by order of the President on November 30, 1863, and the order of dismissal was revoked by an order of November 11, 1867—*held*, (January 7, 1868,) as follows: 1. That no order could restore the party to the office of additional aide-de-camp, because that office, by the operation of the act of July 28, 1866, "to increase and fix the military

peace establishment," had ceased altogether to exist: 2. That no order could restore him to his office as quartermaster; not only because the vacancy occasioned by his dismissal had been filled by a legal appointment, but because of an express provision of law, the effect of which was positively to prohibit such a restoration at present, viz: the provision of section 13 of the said act of July 28, 1866, under which there could be no vacancy whatever in the office of quartermaster in the army, until the number of quartermasters (now fifteen) be reduced below ("to") twelve; the number twelve being fixed as the future permanent limit for the officers of that grade. Any construction, therefore, of the executive action in this case, which would restore the party to the office of quartermaster, would add to the maximum number of quartermasters as now allowed, and would thus be a direct violation of the section referred to, establishing the present quartermaster department: 3. That the party, therefore, was *not in the army* by virtue of the order revoking his dismissal. While such order certainly operated to remove the stigma attaching to the dismissal, it could not institute for him an office or a vacancy in an office, when neither was known to the statute law of the army. XXVI, 355.

* 2. *Held* that the *revocation*, by a subsequent order, of an order confirming a sentence of dismissal of an officer and duly issued by competent authority, was an act without sanction of law and a nullity. Upon the publication of the order of confirmation, the sentence became executed, the officer was separated from the military service, and the power of the reviewing authority in regard to the final disposition of the case was exhausted. To hold otherwise—to hold that the original order was a mere executive act subject to recall, would be to break in upon the well-established principle of law—that the duly executed sentence of a competent court cannot be set aside by the President, and would be productive of grave embarrassment and confusion in our military administration. XXVI, 462.

3. When an officer fell bravely in battle, before or about the time of the publication of an order dismissing him from the service—*recommended*, that for the protection of his memory the order be revoked. IX, 222. But *held* that an order dismissing an officer could not be revoked, and an *order of honorable discharge substituted* after his death; since, before he could be honorably discharged he must be restored to the service—which would be a physical impossibility. XVI, 29.

See PAY AND ALLOWANCES, (13.)
REMOVAL OF DISABILITY, (5.)

DISMISSAL, III—(SUMMARY—TRIAL IN CASE OF.)

(Act of 3d March, 1865, ch., 79, sec. 12.)

1. The act is not retroactive in its operation, and does not include cases of officers summarily dismissed before the date of its passage. XV, 150; XVI, 631. *And where an officer so dismissed was, not-

withstanding, granted a trial by a court-martial under this act, *held* that such trial having been unauthorized by law, no action should, or legally could, be taken by the Executive upon the proceedings. XX, 518.

2. *Held* to be a substantial compliance with the requirements of the act, if the officer applying, after a summary dismissal, for a new trial, makes affidavit, in terms, that he has been "*wrongfully and unjustly dismissed*," without expressly indicating in what the wrong or injustice complained of consists. XVI, 513.

3. No time is specified in the act within which the application for a trial should be preferred; but in preferring it, due diligence should be exercised. XXI, 169.

4. An officer of volunteers once summarily dismissed for drunkenness on duty, and neglect of duty, contrived, without pardon or having had his disability removed, to be re-commissioned and mustered into a volunteer regiment with a rank similar to that which he before held. After serving for some time he was dismissed for this cause, and because also of the reiteration of charges of the same character as those upon which he had been first dismissed; and thereupon made application for a trial under the act of March 3, 1864. *Held* that—without determining whether an officer who has been dismissed for the first cause alone is entitled, on making the usual affidavit, to a trial under this act—the fact that the second dismissal was based not only upon this charge but upon one in addition thereto, which might of itself have justified the action resorted to, was sufficient to bring this case within the equity of the statute, and make it proper that the application for such trial should be granted. XX, 13.

5. Where an officer who has been summarily dismissed is tried by court-martial under this act, and *acquitted*, his dismissal is thereby made void *ab initio*, and his *status* in the service is the same as if he had never been dismissed at all. Where, therefore, the regiment of such an officer had been mustered out of the service, pending the period covered by his dismissal—*held*, that he was entitled to a revocation in orders of the previous order of dismissal, and to an honorable discharge as of the date of the muster-out of his regiment, with full pay and allowances up to that time. XII, 659.

6. When the vacancy caused by the dismissal of a volunteer officer has been meanwhile filled by a new appointment, the only remedy for the officer acquitted (or not dismissed) upon the trial, is an honorable discharge, of a date not later than that at which such new appointment, &c., takes effect. The acquittal, &c., cannot retroact to disturb the rights of an officer who has meantime been regularly invested with the vacated rank and position. XVI, 169. See 7.

7. Where a dismissed officer, upon his application under this act, was brought to trial and acquitted, and meantime the vacancy caused by his dismissal was filled—*held*, that the acquittal vacated his dismissal from its date; that he was entitled to be paid from its date to that of the filling of the vacancy, as being in office for that period; and that he should be granted an honorable discharge as of the last date, expressed to be on the ground that his services were no longer

required, and thus entitling him to the three months' extra pay under sec. 4, ch. 81, act of 3d March, 1865. XX, 188.

9. Although the act provides that if the sentence of the court be not one of death or dismissal, the officer shall be restored to his position, yet *held*, in a case where an officer tried by a court convened by the Secretary of War under the act was acquitted, that the Secretary had the same right, as in other cases of courts convened by his authority, to re-assemble the court after sentence, and to return to it its record for a reconsideration of the testimony on the ground that it did not in his opinion justify such acquittal. XIX, 191.

DISMISSAL, IV—(BY SENTENCE.)

SEE CASHIERING.
COMMUTATION OF SENTENCE, (1,) (2.)
DISQUALIFICATION, (1,) (2,) (4.)
PARDONING POWER, (2,) (3,) (4.)
PAY AND ALLOWANCES, (10,) (18,) (42.)
PRESIDENT AS REVIEWING OFFICER, (3.)
RECORD, I, (2.)
REDUCTION TO RANKS, I, (5,) (6.)
REMOVAL OF DISABILITY, (1,) (2,) (3.)
SENTENCE, I, (8.)

DISOBEDIENCE OF ORDERS.

SEE NINTH ARTICLE.
NINTY-NINTH ARTICLE, (23.)
FINDING, (33.)
ORDER, I, (4,) (6.)
PLEA, (9.)

DISQUALIFICATION.

1. Section 11, chapter 183, act of July 16, 1862, which declares that no officer of the navy who has been dismissed by sentence of a court-martial shall ever again become an officer therein, amounts to a declaration that officers thus dismissed shall be forever disqualified to hold office in the navy. An attempt to reinstate an officer by revoking the approval of the sentence dismissing him, would contravene directly the provisions of this law. V, 481.

2. Dismissal as an officer does not disqualify for entering the service as an enlisted man. VII, 253.

3. *Held* that a dishonorable discharge of a soldier by an executed sentence of a court-martial, "to be drummed out of the service of the United States," deprived him of no right as a citizen, and did not disqualify him from employment under the government. VIII, 91.

4. Neither a simple sentence of cashiering nor one of dismissal (each having the same effect in law) operates to disqualify an officer of the army from subsequently holding a civil office under the government. VIII, 601; XXII, 517.

SEE MEMBER OF COURT, (3.)

DISTRICT COMMANDER.

See SIXTY-FIFTH ARTICLE, (6,) (7,) (8,) (11.)
ORDER CONVENING MILITARY COURT, (1,) (2.)
SEPARATE BRIGADE, (9,) (10.)
RECONSTRUCTION LAWS, (1,) (2,) (3.)

DIVISION COMMANDER.

See SIXTY-FIFTH ARTICLE, (6,) (7,) (9,) (12,) (13.)
APPROVAL OR DISAPPROVAL OF PROCEEDINGS, (1.)
REVIEWING OFFICER, (5,) (11,) (20.)

DOUBLE RATIONS.

1. Where an officer who entered the service as an assistant surgeon in 1846, was, in 1851, sentenced by a court-martial "to forfeit all rank, and claims, and privileges arising from services rendered previous to the promulgation of his sentence, to be placed at the bottom of the list of assistant surgeons, and be reprimanded;" *held* that the extinguishment of his grade in his arm of the service, with reprimand, was all the punishment intended by his sentence, which became at once executed when these requirements were carried out; that inasmuch as the act of June 30, 1834, ch. 133, sec. 3, which allows to surgeons and assistant surgeons double rations upon ten years' service, makes such allowance depend upon duration of service and not grade, and inasmuch as allowances as well as pay cannot be forfeited by implication, but only in direct terms, the allowance to the officer of double rations at the end of ten years—his right to which was merely inchoate at the date of the sentence—was not forfeited by such sentence; that therefore he became entitled in 1856 and thereafter to receive an allowance for such rations; and that, as the same had been withheld, the just commutation value thereof should now be paid him. XX, 257.

2. The act of June 30, 1864, ch. 133, sec. 3, provides that double rations shall be allowed to surgeons and assistant surgeons of the regular army who have "*served faithfully*" for ten years. But where an assistant surgeon, before the expiration of his ten years of service, had once become amenable to trial by court-martial for a mere technical breach of discipline, not involving moral delinquency; *advised* that it would be a harsh and unwarrantable construction of the statute to hold that he had not "served faithfully" and was not therefore entitled to the allowance. XX, 379.

DRAFT.

* Certain persons were, in June, 1864, drafted as part of the fifty *per centum* drawn to cover exemptions; and after they had been held to service and paid commutation, the enrolment as to the additional percentage was decided to be illegal, and they were discharged,

were again placed on the rolls of persons liable to be drafted, and their district received no credit for them on its quota. Upon a claim made by them to have the amount of their commutation monies returned to them, *held* that they were justly entitled thereto; but that, in consequence of the joint resolution of December 23d, 1863, sec. 2, designating all monies received by way of commutation from drafted persons as public funds and appropriating them as such, these parties could not be reimbursed by the executive branch of the government, but must resort to Congress for relief. XXI, 437.

See ENROLMENT, I, II.
HABEAS CORPUS, (7.)
PARDON, (1,) (2.)
UNITED STATES AS BAILEE, &c., (2,) (3,) (8.)

DRUMMING OR BUGLING OUT OF THE SERVICE.

See PUNISHMENT, (3.)

DRUNKENNESS.

See NINETY-NINTH ARTICLE, (16.)
EVIDENCE, (15.)
MURDER, (8.)
PLEA, (22.)

DRUNKENNESS ON DUTY.

See FORTY-FIFTH ARTICLE.
CHARGE, (7.)
FINDING, (23.)

E.

EMBEZZLEMENT.

1. Embezzlement of government property must be such a conversion as evinces an intention to deprive the government of the property itself, not of its temporary use. For a quartermaster to use temporarily in his private carriage a pair of government horses in his charge, as such quartermaster, is not embezzlement, though a reprehensible practice. IV, 421.

2. Under the act of August 6, 1846, ch. 90, sec. 16, (known as the "sub-treasury act,") a failure or refusal by an officer to pay over, or account for, public moneys in his hands, upon formal demand made, constitutes a *prima facie* case of embezzlement; liable, however, to be rebutted by proof that the money was lost without fault, or fraudulently or feloniously abstracted from him; since his default,

under such circumstances, would not amount to a conversion, loan, deposit, or exchange of the money. I, 435. See XIX, 348; XX, 527; XXI, 112.

* 3. It is enacted in section 2, ch. 122, act of July 14, 1866, that "if any disbursing officer of the United States * * * shall, for any purpose not prescribed by law, withdraw from * * * * any authorized depositary, or shall, for any purpose not prescribed by law, * * * apply, any portion of the public money intrusted to him; every such act shall be deemed and adjudged an embezzlement of the money so * * * withdrawn * * * or applied, and every such act is hereby declared a felony, and upon conviction thereof shall be punished by imprisonment for a term not less than one year nor more than ten years, or by fine not more than the amount embezzled nor less than one thousand dollars, or by both such fine and imprisonment, at the discretion of the court." So where an officer of the army, acting as a post quartermaster and commissary, was shown, upon trial by court-martial under a charge of a violation of this act, to have had deposited in a national bank certain commissary funds, subject, legally, to be drawn upon for the purpose only of making official payments; and to have habitually (viz: on fourteen different occasions set forth in as many separate specifications) withdrawn monies therefrom for his own use, applying the same to pay his private debts; *held* that his conviction of the charge by the court, and sentence to fine and imprisonment, were authorized and proper. And *advised*, that as the statute —enacted as it was for the better security of the public funds— declares a misuse of such funds in any of the modes set forth therein to be an embezzlement and felony in itself, and punishable as such, without regard to the motive of the offender, or the circumstances connected with the offence,—the accused in this case could not avert the legal consequences of his acts by any plea of ignorance of the law, or want of intent to permanently convert the money to his own use, or even of his having restored the same before its return was demanded of him. XXV, 583.

See NINTH ARTICLE, (7.)
THIRTY-NINTH ARTICLE.
FINE, (5.)
FRAUD, II, (5,) (17.)
LESSER KINDRED OFFENCE, (4.)
UNITED STATES AS BAILEE, &c., (4.)

ENEMY.

See FIFTY-SIXTH ARTICLE, (2.)
PAROLED PRISONER, (2.)
PRISONER OF WAR, (12.)
PUBLIC ANIMAL, (2.)
VIOLATION OF THE LAWS OF WAR, (12.)

ENGINEER BATTALION.

See SIXTY-SIXTH ARTICLE, (5.)

ENLISTMENT, I—(GENERALLY.)

1. The contract of enlistment of a recruit binds him to the service independently of muster. XIII, 299.

2. The oath is an essential part of a *formal* enlistment, and is necessary to complete it. It may now be administered by "any commissioned officer of the army," with like effect as if administered by a civil magistrate.† II, 111.

3. *Held*, that a volunteer soldier duly mustered into the service, who has received the pay and performed the duties of a soldier, should be treated as duly enlisted, though he may not have signed the enlistment articles. III, 84.

4. The acceptance of pay or bounty from the United States, as a soldier, estops the party from denying the *status* which he has thus openly assumed and the emoluments of which he has received. He is as fully in the service as if all the formalities of the regulations for enlistments had been complied with. VII, 132.

5. One who has rendered service as an enlisted man, and, as such, has been armed and clothed by the government, though he may not have been paid, is estopped from denying the validity of his contract of enlistment upon the ground of any informality therein, and cannot

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† NOTE.—The statute of June 12, 1858, chapter 156, section 3, enacted "that it shall be lawful for any commissioned officer of the army to administer the prescribed oath of enlistment to recruits: *provided*, the services of a civil magistrate authorized to administer the same cannot be obtained." The subsequent act of August 3, 1861, chapter 42, section 11, provides "that in all cases of enlistment and re-enlistment in the military service of the United States the prescribed *oath of allegiance* may be administered by any commissioned officer of the army." The term "oath of allegiance" employed in this latter act is clearly to be construed as referring to the ordinary *oath of enlistment* prescribed by the tenth article of war, (and by paragraph 935 of the Army Regulations,) to be taken by the soldier on entering the service; for this oath is also an oath of *allegiance*, the soldier being made therein to swear that he "will bear true allegiance to the United States," &c.; and is the *only* oath of any description which is administered on the occasion. This was no doubt the view taken in compiling the last edition of the Regulations, (see paragraph 936,) as also that taken by the Commission for revising and consolidating the public statutes; (see their recent publication of acts relating to the army, page 3.) It might have been expected that this view would have suggested itself to the court in the recent (August, 1867) case of recruit John E. Cline, (cited in General Butterfield's pamphlet on "The Writ of Habeas Corpus as affecting the United States Army and Navy,") in which it was sought to have an enlistment pronounced invalid on the ground that the oath exhibited simply the jurat of a commissioned officer, without any accompanying explanation or evidence of the circumstances under which he acted. This claim, however, was disposed of by the judge (Blatchford J. of the United States district court for the southern district of New York) in a different manner, as follows: "An objection is taken to the validity of the enlistment of Cline on the ground that the act of June 12, 1858, section 3, does not authorize an officer of the army to administer the oath of enlistment to a recruit unless the services of a civil magistrate authorized to administer the same cannot be obtained, and that the act of August 3, 1861, section 11, does not authorize an officer of the army to administer any oath except an oath of allegiance, unless it appears that he could not obtain the attendance of a civil officer authorized by law to administer oaths, and that the return should show that the attendance of such civil officer could not be obtained. It is a sufficient answer to this objection to say that the presumption is in favor of the regularity of the proceeding, when it appears that the oath was administered by the military officer, and that in such case the intendment is that the services of a civil magistrate could not be obtained, and the burden is upon the recruit to show that such services could be obtained, and not upon the United States to show that they could not be obtained. In this case nothing appears on the subject except what is shown on the face of the enlistment papers."

on that ground be relieved therefrom under a writ of *habeas corpus.* V, 618; XIX, 397.

SEE NINTH ARTICLE, (8.)
TWENTIETH ARTICLE, (1.)
EVIDENCE, (13.)
MUSTER, (1,) (3,) (4.)

ENLISTMENT, II—(OF MINORS.)

1. Under the provision of section 5, chapter 237, act of July 4, 1864, the Secretary of War is required absolutely to discharge minors under eighteen, enlisted without consent; and he has no discretion in the matter except for determining whether the evidence of such minority and non-consent amounts to the "*due proof*" specified in section 20 of chapter 13 of act of February 24, 1864. XII, 535.

2. It was provided in the act of February 13, 1862, chapter 25, section 2, that "hereafter no person under the age of eighteen shall be mustered into the United States service, *and the oath of enlistment taken by the recruit shall be conclusive as to his age.*" Under this act, it was *held* by this Bureau that the statement of age in the oath was conclusive, not only on the recruiting or mustering officer, but on all the officers of the government and on the courts; and that if the soldier swore, on enlistment, that he was at least eighteen, no evidence could be received to disprove his statement, and his enlistment was to be treated as valid in law. But by the provisions of section 20, chapter 13, act of February 24, 1864, and of section 5, chapter 237, act of July 4, 1864, it is made the positive *duty* of the Secretary of War to discharge all persons in the military service of the United States who are under the age of eighteen years at the time of the application for their discharge, when it shall appear upon due proof that such persons are in the service without the consent of their parents or guardians, as well as all persons under the age of sixteen who are in the service whether with or without such consent. Under these acts, (which appear substantially to take from the courts the whole matter of the discharge of minor soldiers and to devolve it upon the Secretary of War,) it is *held*, that the statement of age in the oath of enlistment, though it would be still conclusive upon the courts, is no longer conclusive on the Secretary of War, who, in order to determine—upon an application for discharge—whether the soldier is or not actually eighteen years of age, may receive such evidence on the subject as he may deem proper and sufficient. See XII, 151; XVIII, 293.†

†NOTE.—In the recent (September, 1867) case of recruit John Riley, on *habeas corpus*, Judge Blatchford, of the United States district court for the southern district of New York, delivered an elaborate and exhaustive opinion upon the subject of the enlistment and discharge of minors, from which the following is extracted: "These provisions of the two acts of 1864 leave the provisions of the first section of the act of December 10, 1814," (legalizing enlistments between eighteen and twenty-one without consent,) "and of the second section of the act of February 13, 1862, in full force. Enlistments of minors over the age of eighteen years, without the consent of their parents, guardians or masters, are valid, and the oath of enlistment taken by the recruit is conclusive as to his age, but it is not lawful to muster into service a person under the age of eighteen years. Certain powers of discharge are granted to the Secretary of War, which he is required to exercise in the cases specified. The sum of these provisions for discharge is as follows: 1. A minor who is

3. In a case where minors volunteered without the consent of their parents, where the same was required by law, *held* that their subsequent acceptance by the government *in lieu* of drafted men could not be regarded as supplying the legal constraint which would dispense with the parent's consent. I, 425.

SEE HABEAS CORPUS, (8,) (9.)

ENLISTMENT OF SLAVES.

SEE SLAVE.

ENROLMENT, I.

(Under act of March 3, 1863, chapter 75.)

1. When a foreigner is exempted from military duty because of his alienage, a substitute furnished by him before the question of his liability under the draft was decided is entitled to be discharged from the service. II, 225.

2. The enrolment of persons of foreign birth, who shall have declared on oath their intention to become citizens under and in pursuance of the laws of the United States, can add nothing to their rights of suffrage or to their eligibility to office, unless it may here-

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under the age of eighteen years at the time he applies for his discharge to the Secretary of War, is to be discharged by that officer when it appears, upon due proof, that such minor is in the service without the consent, either expressed or implied, of his parent or guardian, provided all bounties and advance pay which may have been paid to him are first repaid. 2. A person who was under the age of sixteen years when he was enlisted or mustered into service is to be discharged by the Secretary of War whether he was enlisted or mustered with or without the consent of his parent or guardian, provided all bounties received by him are first repaid, and provided he is under the age of eighteen years at the time he applies for his discharge, and is in the service without the consent, either expressed or implied, of his parent or guardian. The whole power of discharge is given to the Secretary of War in regard to minors, whatever their ages when they enlisted or when they apply for discharge; and although it is not lawful to muster into service a person under the age of eighteen years, yet Congress has, by the acts of 1864, confided wholly to the Secretary of War the power and duty of discharging from service a person who was under the age of eighteen years when he was mustered into service, and of ascertaining and deciding (1) whether the person is a minor under the age of eighteen years at the time he applies for his discharge? (2) Whether, if he is such minor, he is in the service without the consent, either expressed or implied, of his parent or guardian? (3) Whether such person was under the age of sixteen years when he was enlisted or mustered into service? (4) Whether all bounties and advance pay paid to such person have been repaid? The entire cognizance of these matters is given by law to the Secretary of War, and is necessarily taken from the courts. The courts cannot administer the restitution of the bounties and pay, and it is manifestly the intention of Congress that the Secretary of War shall be exclusively charged with the question of discharging minors who are under the age of eighteen years when they apply for their discharge. As to the cases provided for by the acts of 1864, and so far as the jurisdiction of the Secretary of War extends under those acts, the provision of the second section of the act of February 13, 1862, that the oath of enlistment taken by the recruit shall be conclusive as to his age, is necessarily suspended, and the Secretary is authorized and required to receive other due proof as to the age of the recruit both at the time of his enlistment and at the time he applies for his discharge." See also cases of Cline and Stokes, decided by the same judge, August, 1867; cases of Conley and Jump, decided by Judge Betts in the same court in January, 1867; case of Conroy, decided by the same judge, April, 1867; case of Reilly, before Judge Daly, New York court of common pleas, March, 1867; case of O'Connor, in New York supreme court, first judicial district, February, 1867; and other authorities, collected in General Butterfield's pamphlet on "The Writ of Habeas Corpus as affecting the United States Army and Navy."

after be provided to that effect by State or Congressional legislation. II, 509.

3. Paymasters' clerks are liable to draft, not being so far in the military service as to be liable to the specific field duties as soldiers for which the national forces are drafted. III, 269.

4. The judgment of the enrolling board is made *final* by law; but, like any other *quasi* judicial body, it may revise, correct, and reverse its own action, and the revision may be based upon errors either of law or fact. Thus, where an exemption certificate has been granted by the board, and the evidence upon which it was granted is discovered to be unreliable, the board should, on notice to the party, proceed to reconsider its action, and may, for good cause, vacate the certificate and hold the party to military duty. III, 441. Under the 14th section of the act, the decision of the board of enrolment upon a claim for exemption is final. So where the board refused to exempt a party, and the officers at a general rendezvous subsequently held him unfit for service and discharged him from liability to military duty, *held* that the action of the latter was unauthorized and of no effect. VI, 673. The provision of the act, that the decision of the board of enrolment shall be final upon all claims for exemption, necessarily precludes the Provost Marshal General, or the executive branch of the government, from repaying to a drafted man, for whatever cause, money which he had been required to pay by way of commutation. XIX, 487.

5. One who is under an obligation to perform military duty on his own account, as an enlisted man, cannot be received as a substitute for another. Where a board has accepted as a substitute one who is proved to be a deserter, it should, after notice to the principal, proceed to reconsider its action, and should set aside its former judgment and annul the certificate of exemption granted. The certificate being vacated, the party's original liability under the draft is revived. III, 273.

6. Men who are in the service of the government merely as manufacturers of fire-arms, as are the employees of Colt's establishment, are not so far in the military service as to be exempted from the draft. III, 274.

7. Sutlers are liable to draft; so are members of the enrolling board who were not in service on the 3d of March, 1863. III, 278.

8. There must be two members of the same family in the military service *at the same time* to entitle the residue of the family to the privilege granted by the seventh provision of section 2 of the act. III, 278.

9. The term "subject to draft," as found in the third provision of the second section of the enrolling act, means, simply, enrolled and liable to draft. III, 281.

10. When a drafted man is abroad, or at sea, or otherwise placed in such circumstances as to render it physically impossible for him to have had knowledge of the draft, or of his duty under it, he should nct be advertised or treated as a deserter. III, 282.

11. In the case of aged or infirm parents having two or more sons

subject to military duty, the election of the son to be exempted must be made before the draft, and his name should not then appear in the draft-box. If one of only two sons of such parents is already in the military service, the other is exempt, provided his parents are dependent upon his labor for their support. III, 299. See III, 300.

12. In case of a father having three sons, one at home, one in the military service, and one having been killed in it, the son remaining at home is not exempt, unless the father be aged and infirm and dependent on such son's labor for support. III, 338.

13. If the party is a citizen of the United States, or subject to military duty under its laws, the place of his residence cannot properly be considered in determining the question of his acceptability, either as a recruit for the regular army, or as a substitute for one drafted under the conscript act. III, 344.

14. The elements of good character and habits which are, under the regulations, required in the case of recruits for the regular army, may well be insisted on in the case of those offered as substitutes; and when the board is in doubt or without information on these points, it may, in its discretion, demand proof in relation thereto before accepting a substitute. III, 344.

15. A woman who is divorced from her husband who is still living is not a "widow;" and her only son, upon whose labor she is dependent for support, is not exempt under the second clause of the second section of the act. III, 425.

16. In the case of a widow having three sons, two of whom are in the naval service, the third is exempt, provided his mother is dependent upon his labor for her support. III, 426.

17. A person convicted of felony, though pardoned before the passage of the act, is, under the unqualified language used therein, exempt from the draft. The disability being imposed by the statute, 'the pardon will not, according to the better opinion, restore the competency of the offender, the prerogative of the government being controlled by the authority of the express law." (See Wharton's American Criminal Law, par. 765.) III, 426.

18. The board of enrolment, being charged with the duty of determining whether a substitute is acceptable, have an original jurisdiction over the question whether the substitute offered be a deserter or not, and are not bound to await its solution by any other tribunal, civil or military. III, 437.

19. A drafted man, arrested for not reporting himself, is arrested as a "deserter," and under the seventh section of the act he should be sent to the nearest military commander or post. III, 438.

20. The father of motherless children under twelve years of age, dependent upon his labor for their support, is exempt, notwithstanding he may have married a second time, and his wife be living. A step-mother is not believed to be a mother in the sense of the act. III, 438.

21. When a widow has two sons, one of whom is permanently physically disabled for duty, the other is exempt, provided his mother is dependent on his labor for her support. III, 438, 442.

22. A son who has furnished a substitute should be treated as in the service for all the purposes of the exemption secured by the 7th clause of the 2d section of the act. It is the amount of contribution to the military service, made by the members of the same family, that is the basis of the exemption; and it is wholly immaterial whether this contribution be made personally, or through a substitute. III, 442.

23. Where there is one son in the first, and two or more in the second class, subject to draft, the latter are within the meaning of the 4th provision of the 2d section of the act. III, 442.

24. The only son of parents dependent on his labor for their support is not exempt if but one of the parents is aged or infirm. The supposed disability which gives rise to the exemption must apply to both. III, 442.

25. Under the 24th section of the act, persons not in the military service arrested for aiding or harboring deserters, &c., are to be delivered to the civil authorities for trial. III, 443. But the Secretary of War has decided that of such offences, when committed in the District of Columbia, a military commission has, in time of war, concurrent jurisdiction with the civil court. VII, 252.

26. The right of exemption, secured under the 2d clause of the 2d section of the enrolling act, to the only son of a widow, does not arise out of any obligation, legal or otherwise, on his part, to support his mother. It rests upon the facts that, from a sense of duty, affection, or other influence, he does support her, and that she receives this support from him, and is dependent for it on his labor. III, 458.

27. Under the fourth clause of the second section of the act it is not necessary that the two or more sons of aged or infirm parents, subject to draft, should be of one household, in order to entitle the parent or parents to elect one of them for exemption. To protect the government from the fraud of having more than one exemption claimed. where the sons reside in different States or within the jurisdiction of different boards, it would be a justifiable precaution to require the parent making the election to accompany it with an affidavit that no other claim to exemption has been preferred by him or her on behalf of either of the sons. III, 458.

28. The 13th section of the act fully recognizes the right of the party as a deserter to appear before the board of enrolment and insist upon his exemption. III, 459.

29. If parents have one son in the army and one at home, and are not dependent on his labor for their support, the son at home cannot be exempted. The right of aged and infirm parents to elect which of two sons shall be exempt exists only when both of these sons are subject to draft, which is not the case when one is already in the service. III, 459.

30. The son elected is exempt not only from military duty, but also from draft. His name, therefore, cannot be put into the draft-box. III, 504.

31. The State in which a drafted man is enrolled is necessarily credited with one soldier, whether such drafted man enters the ser-

vice personally, or furnishes a substitute, or pays the commutation money. The theory of the governor of New York, (August, 1863,) that if the drafted man furnishes a substitute who chances to be from another State, then this State also must be credited with one soldier, is erroneous; for thus the government would be debited with two soldiers though receiving but one, and the object of the act would be defeated. III, 552.

32. The right of a widow who is aged or infirm to have one of her two sons subject to draft exempted, does not depend, under the law, upon the place of her residence; and it may be claimed when she is a resident of a foreign government. Should one of these two sons not be subject to draft, the other cannot be exempted unless his widowed mother is dependent on his labor for her support. III, 553.

33. A drafted man who furnishes a substitute must, for all the purposes of exemption, be held to be personally in the service so long as his substitute continues there. The principle announced in the 17th section of the act is one which would probably have been declared in the absence of any special legislation on this point. III, 594.

34. As it is physically impossible for the substitute to perform at the same time a double duty, one on his own account, and one on account of his principal, his acceptance by the government as a substitute operates necessarily as an exemption from the military service on his own account, so long as his engagement as a substitute continues. This is one of the practical results of the substitute system which, however it may be deplored, cannot, it seems, be avoided. III, 602.

35. The right of a board of enrolment to revise and correct errors in its proceedings is inherent in the body, and should not be surrendered, though it should be exercised with caution, and always on notice to the party to be affected, and the grounds of the revision should appear. It would not be competent for the board to *assume* that a fraud had been committed, and thereupon proceed to treat the certificate of exemption as a nullity. A fraud, before it can become the basis of any judicial action, must be *proved*, and to the proceedings in which such proof is introduced the person implicated must be a party, and must have an opportunity of disproving the allegations against him. III, 613.

36. Labor, within the meaning of the act, may be either physical or intellectual. It may be professional, mechanical, commercial or agricultural; and each of these forms of labor may exist under modifications, or in combination with each other. The means for the support of the parents or widow must be produced by this labor, whatever may be its character. It need not be wholly produced from it, but it must be *mainly* so. Where the income of the son is derived from dividends or rents, it is not produced from his *labor*. Otherwise, where the income is the fruit of professional or physical toil; where the income is the product of labor and capital co-operating together, the application of the law is rendered more difficult. In such case the income which furnishes the support must be *mainly*

derived from the personal labor of the son, in order to bring his case within the exemption. In a doubtful case the test may be found in an answer to the question, whether, if the son's personal labor be withdrawn by calling him to the military service, a support for the parent or widow would remain. III, 615. See V, 92.

37. The right of a drafted person to insist on his exemption from service is a privilege which he may waive, and which he does waive when he furnishes a substitute or pays the commutation. He cannot afterwards be permitted to retract that waiver. The act gives the right to furnish the substitute or pay the commutation only on or *before* the day fixed for the party's appearance. III, 631; III, 638.

38. If the drafted party fails to report himself, and is arrested as a deserter, he has stlll the right to go before the board of enrolment and prove that "he is not liable to do military duty;" but if, on a hearing, his claim is disallowed, he cannot escape personal service, and he is also subject to be proceeded against as a deserter. III, 638.

39. Drafted men cannot be treated as a part of the required number of able-bodied men until they have been examined and found physically capable of military service. The expression "obtained from the lists of those drafted" implies, first, that the persons referred to are in the possession of the government; secondly, that they have been found capable of, and subject to perform military duty. This necessarily excludes from the computation deserters who have failed to report. III, 639.

40. The *clerks* of naval or military commanders are not necessarily, as such, in the military service within the meaning of the act. III, 437.

41. When a claimant to exemption on the ground of physical disability has been examined and found competent to serve, he cannot be precluded from afterwards setting up the objection of "non-residence," on the ground that this objection should naturally have preceded the objection of disability. V, 147.

42. It is provided that no person who has been convicted of any felony shall be enrolled or permitted to serve in the United States forces. One who in Connecticut has committed the crime of "simple" theft is a *felon*, and exempt from enrolment. V, 269.

See CLAIMS, I, (4.)

ENROLMENT, II.

(Under act of February 24, 1864, chapter 13.)

1. Under the fifth section of this act, which repeals so much of the enrolment act of March 3, 1863, as is inconsistent with its provisions, a drafted man who has paid the commutation money is simply relieved from draft in filling the particular quota which the draft was intended to make up; but such exemption cannot extend beyond the period of one year, at the end of which time the liability to draft is revived. IX, 562.

2. The provision of section 17 of this act, in exempting from active service under the draft persons conscientiously opposed to the bear-

ing of arms, applies exclusively to non-residents or persons whose religious creed forbids them to engage in war under any condition or for any purpose whatever. Where, therefore, a member of the Reformed Presbyterian Church claimed exemption from the draft on the ground, as set forth in his application, "that this nation had failed to acknowledge Almighty God as the source of authority in civil government, the Lord Jesus Christ as the ruler among nations, and His revealed will as the supreme law;" and that the taking up of arms, *in the present war*, was therefore inconsistent with the distinctive principles of that church in regard to civil government—*held*, that such applicant could not be regarded as a non-resistant in the sense of the act, and could not properly be exempted from draft. XV, 189.

See SLAVE, (6.)

ESCAPE.

1. Where, after a trial had been continued for ten days, the prisoner effected his escape from the custody of the military authorities, and the judge advocate thereupon rested the case of the prosecution upon the evidence which had been submitted, and the court at once proceeded to convict and sentence the prisoner—*held*, upon the authority of judicial decisions in the State of Indiana, where the trial was held, and in other States, that the proceedings were regular and the sentence was operative; the prisoner being competent to waive his right to offer testimony and make a defence, and having waived it by his escape and flight. XI, 260, 295. So *held*, in a case where, after the prosecution had closed and the principal testimony of the defence had been introduced, the accused escaped and disappeared; he being deemed in law to have abandoned his defence. XXI, 160. And *a fortiori* are the proceedings not liable to objection, where, after and notwithstanding the escape of the accused, his counsel was permitted to introduce testimony and present an argument in his behalf. XIX, 487.

2. An escape by a soldier under sentence of a military court from the confinement imposed by his sentence, which is a degrading punishment, *held* not to be a technical *desertion*, which is an abandonment of the United States service, a status of honor. Otherwise, where the escape of the soldier is from confinement, while awaiting trial or the result of trial. X, 574. See DESERTER, 20, 21. But *held* that a soldier escaping while in confinement *under sentence*, may, upon being retaken, be brought to trial on a charge of "conduct to the prejudice of good order and military discipline;" such escape being, at common law, a felony where the original commitment was for felony or treason, and a misdemeanor where the commitment was for a less offence. X, 574; XII, 251. See NINETY-NINTH ARTICLE, 11.

See MURDER, (6.)
PARDON, (4,) (6.)
REWARD FOR ARREST OF DESERTER, (2.)
SENTENCE, III, (15.)

EVIDENCE.

1. A telegraphic despatch may, under certain circumstances, be used as evidence, but not without proof that it was sent by the party purporting to have signed it. V, 458.

2. Telegraphic despatches between unknown parties, purporting to be officials of the "confederate" government, and alluding to "confederate" cotton as having been sent through the lines, but unaccompanied by any legal proof of genuineness, or of the handwriting of the signatures, or that they were ever transmitted or received—*held*, not to constitute competent evidence that the cotton was the property of the rebel government, or that those who forwarded it were rebel agents. XIV, 259.

3. A record of a court of inquiry not properly authenticated is not admissible in evidence on a trial by court-martial, if objected to. VII, 60.

4. The consent of the judge advocate and of the accused, with the approval of the court, to the admission, upon the trial, of the body of testimony adduced upon the trial of another party, whereat the accused had himself been a witness, will cure what would otherwise constitute a grave irregularity in the proceedings. Nothing short of such consent would remove the objection that the accused is thus practically made a witness in his own case. XIX, 41.

5. Though there may doubtless be cases in which military courts will take judicial notice of published military orders, the general rule is that such orders should be introduced in evidence by certified copies. XV, 216.

* 6. Under a specification that the accused, as officer of the day, admitted an improper person into a fort, "contrary to orders," *held* that it was competent to introduce in proof the special post order on the subject. XIX, 640. See PLEA, 7.

7. An *ex parte* affidavit, taken without notice to the opposite party, cannot be read as evidence before a general court-martial, unless by consent. VII, 113.

8. The offence of "publication of falsehoods or misrepresentations of facts, calculated to embarrass or weaken the military authorities"—made punishable as a military offence by a General Order (No. 96, of 1863) of the department of the Missouri—*held* not sustained by evidence merely of a private letter, setting forth grievances, and addressed to the general commanding by citizens. IX, 230.

9. The confessions of a female mail-carrier, arrested for conveying intelligence to the enemy, induced to be made by means of a deception successfully practiced upon her by an officer of the government, of whose character and intentions she was ignorant, and whom she believed her friend, *held* admissible in evidence, as not having been induced by fear or hope of favor. VII, 455.

10. The government has no right to tempt innocent persons to crime and then to punish them for its perpetration, but is justified in availing itself of the services of detectives in order to convert suspected into positive guilt by an accumulation of proof. Where,

therefore, certain parties were convicted of violation of the laws of war in trading with the enemy, upon the testimony of a government detective, through whom the goods were sold to be carried by him across the lines and delivered to the rebel Mosby, who had recommended the witness to the accused—*held* that the conviction was justified by this state of fact; the opinion delivered by Taney, C. J., in the United States circuit court at Baltimore, in June, 1864, in the case of *Stern*, (a proceeding *in rem*,) being reviewed, and that case distinguished from the present. The fact that the department commander, having reason to believe that the accused had been guilty of engaging, and were seeking opportunities to engage again, in a contraband trade with the enemy, had authorized his detective to afford them facilities for doing so, with a view to a discovery of their criminal purposes, does not in any manner vary the legal aspect of the offence committed by them under such circumstances. This ruling is supported by the decision in *Regina* vs. *Williams*, 1 Carrington & Kirwan, 195. In this case "overtures were made by a person to the servant of a publican, to induce him to join in robbing his master's till. The servant communicated the matter to the master, and the former, by the direction of the latter, opened a communication with the person who had made the overtures, in consequence of which he came to the master's premises. The master having previously marked the money, it was placed on the counter by the servant, in order that it might be taken up by the party who had come for the purpose. The money being so taken up, it was *held* that the offence was *larceny*, and that the fact that the felony was induced by the artifice of the owner, exercised for the purpose of entrapping the thief, constituted no defence." (See 2 Wharton's American Criminal Law, § 1859.) This is the leading case upon the principle involved, and has been repeatedly approved by jurists both of England and this country. XI, 87.

11. A report from the Adjutant General's office containing extracts from the muster-rolls of the regiment on which a soldier was noted as a deserter on a certain date—*held* to be insufficient proof of the fact of desertion. XII, 28.

*12. A mere statement to that effect entered upon a muster-roll is not *conclusive* evidence that a soldier has deserted. The roll, as it stands, may indeed be the only proper guide for a mustering officer or paymaster; but to hold that the entry may not be disproved by evidence, and the roll amended by competent authority, upon the same being ascertained to be erroneous, would involve great hazard to the rights of the soldier. An enlisted man, in whose case an entry of "deserted" had been made, when in fact he had been properly chargeable with absence without leave only, would, if such entry could not be confuted, become liable at least to the penalties following upon desertion by operation of law; and in the case of one who had been taken prisoner while in the proper discharge of his duty, and who had died before being exchanged or paroled, such an entry, unamended, would operate to prevent his memory from being vindicated, and would preclude his personal representatives from

receiving the pay, &c., due him. It is clear that the entry can be held to be no more than *prima facie* evidence of the fact set forth. XXII, 15. See XXVI, 90. See MUSTER, 1, 3.

13. In view of the fact that the best evidence of the contract of enlistment—the enlistment papers—can rarely be procured at a military trial in the field, it has become the practice to accept, as sufficient presumptive proof thereof, such facts as show on the part of the accused an acquiescence in the status of a soldier, as the receipt of pay, the doing of military duty, &c. So *held*, that an allegation, in the specification under a charge of desertion, that the accused was "duly enlisted," was sufficiently established by evidence that he joined the regiment, as such private, on a certain day, and by his identification by the first sergeant, as a private of the company, who had continued to do military duty therein up to the time of his offence. XII, 361.

14. An accused should be allowed the benefit of the presumption which arises in his favor, from the fact of having had a good record in the service; testimony, therefore, as to his bravery, efficiency, and loyalty, as an officer or soldier, is always competent. XIX, 35.

*15. *Held* that the positive testimony of witnesses that the accused was "drunk" would be sufficient to justify a finding of guilty under the 45th article of war, (or under the 99th, according as the accused was, or not, on duty at the time of the offence.) Drunkenness is a fact, palpable to the senses like any other fact, and may be similarly established by a statement of its existence. And though the circumstances indicating it and attending it should be brought out in the testimony before a court-martial, yet proof of those circumstances is not absolutely essential to a conviction. XXII, 635. *Held* that witnesses to a charge of drunkenness were not necessarily to be confined to a detail of the circumstances surrounding the case, but that their statement that the accused *was*, in their opinion, *drunk*, was competent testimony. XXIV, 79.

16. The testimony of accomplices is always regarded with suspicion; and though in strict law a prisoner may be convicted upon the testimony of a single accomplice, it has been usual in practice to advise an acquittal where such testimony is uncorroborated in its material details. But this rule does not require that the witness shall be confirmed in every circumstance which he narrates, inasmuch as, in that case, his testimony would be merely cumulative, and there would be no necessity for calling him as a witness. It requires only that he shall be so far sustained by the evidence of unimpeachable witnesses as to satisfy the court that he is entitled to reasonable credit; and how far he is to be so corroborated must necessarily be left to the discretion of the court in each instance. XI, 510. See XV, 137; XVIII, 374. See ACCOMPLICE.

17. A party in arrest on suspicion of being implicated with another—then on trial for murder and other heinous crimes in the interest of the rebellion and in violation of the laws of war—but who was not mentioned as so implicated in the pleadings in the case of the other—*held*, not incompetent as a witness upon the defence of the latter,

the objections growing out of his arrest under such circumstances going to his credibility alone. XIX, 19.

18. *Held*, that the depositions of rebel officers in regard to the innocence of a fellow-rebel charged with being a spy, like the testimony of accomplices, should be received with suspicion, unless corroborated by other evidence. VII, 67. So *held* of the testimony of rebel soldiers in favor of the innocence of a rebel officer on trial by military commission for the murder of a loyal citizen, the witnesses having deserted to our lines as soon as they ascertained the fact of the capture of the accused. X, 330.

19. So *held*, that a letter of Robert E. Lee, commander of the rebel forces, offered in support of an application for the pardon of a member of Mosby's band—to the effect that such band was a regularly organized command of the rebel army, and was governed by the same regulations and subjected to the same control as any other part of that army—was not entitled to credit, inasmuch as it was the evidence of a leading traitor in behalf of one making war upon the government; and also because the sworn testimony, in this and other cases, of members of the same command, had established the fact that this notorious guerilla horde was mostly composed of men not mustered into the rebel service or subjected to the ordinary military discipline, but joining, and absenting themselves from the command at will, and not paid by the rebel government, but remunerated by the fruits of their raids and robberies. XIX, 111.

20. The experience of the war has shown that little weight is to be attached to the unsupported evidence of witnesses of known disloyalty when it jeopardizes the lives or liberty of loyal men. IX, 164, 173; VIII, 311, 312; XVII, 554; XX, 86; XXI, 52, 54; XXIII, 328; XXVI, 503.

21. A disloyal citizen under arrest and in confinement, but not *convicted* of any crime, is competent to testify against an officer of the United States on trial. The objection growing out of his disloyalty would, under such circumstances, go to his credibility alone. The testimony of such a witness, when affecting the rights of an officer of the government, should be received with extreme caution, and would be an unsafe basis for a sentence unless corroborated. X, 227.

22. The testimony of a rebel or secession sympathizer is ordinarily nearly valueless, when given in the behalf of one of the same sentiments, on trial before a military court, whose punishment the witness would naturally be anxious to avert. The court, in forming its judgment, is justified in rejecting such evidence altogether, or holding it of but slight weight. XIV, 645.

23. In view of the manner in which the guerilla bands are known to procure their supplies, and the outrages which have been perpetrated upon citizens who refuse to comply with their demands, *held* (March, 1865,) that a court was not justified, upon proof of the bare fact of his furnishing supplies to guerillas, in convicting a party of a charge of "aiding and assisting the enemies of the government of the United States." XIV, 321.

* 24. Where a party who had been an army sutler was arrested in

Washington, during the war, on account of having in his possession several horses and mules which appeared marked with the "U. S." brand—*advised* that this fact was, under the circumstances, to be regarded as *prima facie* evidence that the animals were public property, and that the burden of proof was on the party to show that he had acquired lawful title to the same; that this was especially incumbent upon him because the animals in this case did not bear, as they would properly, according to the usual practice, an additional mark showing that they had been *sold* by the government. XXIII, 139. See CLAIMS, I, 6.

*25. Where the accused recalls, as a witness for the defence, one who had been a witness for the prosecution, and thus makes him his own witness, the judge advocate may introduce testimony to rebut what such witness states on cross-examination. The judge advocate, under these circumstances, is entitled to prove by other persons that the witness has made, elsewhere, in regard to the case on trial, certain statements which he denied having made upon his cross-examination. XXIII, 191.

SEE GUERILLA, (3.)
JUDGE ADVOCATE, (2.)
PERJURY, (1.)
PLEA, (2.)
RECORD, IV, (17.)
RETIRING BOARD, (4,) (5.)
SPY, (2.)
VARIANCE, (6,) (7.)

EXCHANGE OF PRISONERS.

SEE PRISONER OF WAR, (3,) (7,) (8,) (9.)

EXEMPTION FROM DRAFT.

SEE ENROLMENT, I, II.

EXPUNGING FROM THE RECORD.

*For a court-martial to order any part of its proceedings to be expunged from the record would be an irregular and exceptional act; although such act—unless it involved the striking out of *testimony*, (or other material part of the *trial*,) against the consent of the accused or the judge advocate—might not fatally affect the validity of the final judgment. But wherever a court has determined upon such expunging, the entire action connected therewith—including the motion to expunge, the arguments on the subject, if any, alike of the judge advocate and the defence, the order made, &c.,—should be recorded at length. For although a court-martial has full control over the form of its record, it is not authorized to suppress or withhold any portion of its action, in the course of a trial or during any session, from the reviewing officer, who, in the absence of a complete history of all the proceedings, cannot certainly be enabled to act intelligently thereon. See XXVI, 604.

EXTRA DUTY.

*1. In section 1 of act of March 2, 1868, "making appropriations for the support of the Military Academy," it is "provided that the second section of the act approved April first, eighteen hundred and sixty-four, making appropriations for the support of the Military Academy for the year ending June thirtieth, eighteen hundred and sixty-five, is hereby repealed." The section of 1864 referred to enacted that a provision of sec. 35, ch. 75, of March 3, 1863, (which prohibited the payment for the future of "extra pay" to enlisted men for "special service,") should "not be deemed hereafter to prohibit the payment to enlisted men employed at the Military Academy of the extra-duty pay heretofore allowed by law to enlisted men when employed at constant labor for not less than ten days continuously." *Held* that the section of 1868, in thus simply repealing the specific section of 1864, did not affect the operation of section 7, ch. 176, act of July 13, 1866, which is deemed to revive the allowance of extra pay to soldiers generally (except of the engineer and ordnance departments) when employed in constant labor as artificers or laborers. And *advised* (March, 1868) that such soldiers so employed at the Military Academy might properly be paid for the performance of extra duty according to the act of 1866, out of any monies appropriated for the support of the Academy which were applicable for such purpose. XXVI, 485.

*2. Section 7, ch. 176, act of July 13, 1866, authorizes the payment to soldiers "working as artificers" of thirty-five cents "*per day*," in addition to their regular pay. The "day," in a legal sense, consists of twenty-four hours, and it is not practicable to make two working days out of this period of time, so as to justify a double payment under the act. So *held* that a soldier, who did extra duty as an artificer at the West Point Military Academy *both night and day*, was not entitled to a double compensation therefor. XXVI, 276.

SEE CLERK, (6.)

EXTRA PAY.

(Under the act of March 3, 1865, chapter 81, section 4.)

1. Held that an officer not in commission on 3d March, 1865, was not entitled, under the act of that date, (ch. 81, sec. 4,) to the extra pay therein provided for certain volunteer officers continuing in service till the close of the war. XXII, 578. But *held* that a volunteer officer, who had been commissioned, need not necessarily have been formally mustered into the service *before* the date of this act to entitle him to the extra compensation upon his subsequent discharge by reason of the termination of hostilities. The words "in commission" employed in the section are, it is believed, to be construed in their ordinary and popular, and not in any technical, sense. This construction is conceived to be justified by the generous spirit in which the section, conferring, as it does, a gratuity upon the officer

leaving the service at the close of the war, was evidently framed—a spirit deemed to preclude a too strict interpretation of the clause in question. XXI, 121.

*2. The act of March 3, 1865, ch. 81, sec. 4, providing for the payment of three months' extra pay proper, to officers "who shall continue in the military service till the close of the war," and "upon their being mustered out of such service," is regarded as properly construed as referring to officers who are mustered out for the reason that their services, because of the cessation of hostilities, are no longer required. So *held* that a captain and commissary of subsistence of volunteers, who, subsequently to the date of the act, vacated his volunteer commission by accepting an appointment as captain and commissary in the regular service, was not entitled to the pay in question—he having become detached from the volunteer service by a cause altogether independent of the state of hostilities or the exigencies of the service. XXI, 502.

*3. An officer of volunteers was sentenced to suspension from rank and pay for three months; but his regiment being mustered out about the date of the promulgation of the proceedings, (December 28, 1865,) he was himself presently—viz., on January 10, 1866—honorably discharged. Having applied to be allowed the three months' extra pay proper provided, by the act of March 3, 1865, to be paid to officers continuing in the service to the close of the war, and upon their being mustered out of said service, it was ruled in the Adjutant General's office that an honorable discharge had been improperly granted him under the circumstances, and his application was disapproved. Upon an appeal by him from this decision, *held* that the same was erroneous, and that the extra pay should be allowed;—that the sentence was not one which imposed an infamous punishment and which could thus, of itself, render the discharge dishonorable;—that it should be construed as having intended to suspend *pay proper* only, and that, as it did not forfeit, in express terms, *extra pay*, the same could not be forfeited by implication;—that for the government to impose a forfeiture of such extra pay would be *adding to the punishment* imposed, and would therefore be illegal;—that, moreover, the government, in discharging the officer from the service, had, by its own act, rendered impossible the full execution of the sentence, which thereupon became of no effect; and by making the discharge honorable had precluded itself both from recalling or modifying it, as well as from denying to the officer any of the rights properly incident to such a discharge. XXV, 545.

SEE CLERK, (6.)
DISMISSAL, III, (7.)
EXTRA DUTY.

F.

FALSE MUSTER.

SEE FIFTEENTH ARTICLE.
MUSTER OUT, (5.)
PENITENTIARY, III, (4.)

FELONY.

1. The offences specified in section 1, chapter 67, of the act of 2d March, 1863, in regard to frauds upon the government—*held* not to be felonies. They are not specially designated as such, nor is there any indication in the statute that the intention of Congress in framing the act was to create new felonies, nor are they construable as such by the rules of the common law. VIII, 332.

2. It is a well-established principle of law that all who are present aiding and abetting in a felony are principals therein, and are all alike responsible for any legitimate and natural consequence, however unforeseen, which may ensue upon their action. XVIII, 448.

SEE EMBEZZLEMENT, (3.)
ENROLMENT, I, (17,) (42.)
ESCAPE, (2.)
FIELD OFFICER'S COURT, (21.)
JURISDICTION, (3.)
SENTENCE, I, (6,)

FEMALE—APPOINTMENT OF TO MILITARY OFFICE.

A female, who had been regularly educated and graduated as a surgeon, and had practiced her profession for some years before the rebellion, devoted herself in her professional capacity during the war to the care and medical treatment of our soldiers in hospital and in the field, and was once formally contracted with and employed for a considerable period by the government as a "contract surgeon" at a military post. She was also engaged for some time in the secret service of the government, and endured great and unusual hardship and danger, having even been at one time captured and imprisoned by the enemy. On ceasing to be so employed she presented to the Executive abundant testimonials of the variety and value of her services from officers of distinguished rank and surgeons, as well as from eminent civil officials and citizens, and made an application for some formal *recognition* of such services, by way of a military appointment as surgeon, or brevet rank as such, to date as of the commencement

of her service, but to be granted with the understanding that she would require and receive no pay as such officer, and would resign the commission upon its being tendered and accepted. *Held*—1. That although there was no *precedent* for the appointment of a female to the full rank and position of an army officer, or to *brevet* rank, (which, indeed, could be conferred only as an incident to full rank.) there was yet no positive *law* prohibiting such appointment. 2. That, in the absence of any statutory prohibition, and in view of the fact that in some of the other departments—as in that of the Postmaster General—women have been appointed to offices of trust and importance, and have performed their duties with marked fidelity, the *sex* of the applicant could not be considered an *insuperable* obstacle to her receiving the recognition desired, and that her application might, therefore, properly be considered upon its *merits*. 3. That the circumstances of her case were such as to render it a signal and isolated one; and though the fact (which appeared) that her professional qualifications had not been recognized by a medical examining board might embarrass her *future* employment as a military surgeon, yet that her past services had been such as to make it proper and desirable for the government to recognize the same in the form of such an appointment as that applied for; but *advised*, if it should not be thought expedient to confer such an appointment, that some formal commendatory acknowledgment, at least, of her services, on the part of the Executive, should be made in the official communication in which she was informed of the final result of her application. XVI, 648.

FIELD OFFICER'S COURT.

(Act of July 17, 1862, chapter 201, section 7.)

1. The colonel or commanding officer of the regiment should detail the field officer as a court, where there is more than one field officer on duty with the regiment. If there be but one field officer on duty with it, *he* cannot, as commanding officer, detail himself as a court, but he may be detailed as such by the brigade or next superior commander; if there be no field officer present with the regiment, the act is inoperative, and the regimental or garrison court-martial must be resorted to. The latter court can now be held only in cases where it is impracticable to detail a field officer as a court in the regiment. In other words, the pre-existing law (*Sixty-sixth Article*) as to such court is repealed only in cases where it is practicable to convene the field officer's court under the act. Under a different interpretation of the act a numerous class of offences would be left without any tribunal for their trial and punishment. I, 368, 400; II, 58, 68; III, 81, 182, 280, 644; V, 523; VII, 49; VIII, 413.

2. Where the detail of a field officer as a court was made by the brigade commander, in a case where there was present in command of the regiment a field officer superior to the one detailed, who, in accordance with the usual practice derived from that of the regimental, &c., court-martial, would ordinarily have been the proper officer to make

the detail—*held* that such action did not affect the validity of the proceedings of the field officer's court; especially in view of the fact that his proceedings were eventually to be submitted to the brigade commander for his approval. X, 470. And see XIII, 14.

3. The captain commanding a regiment, in the absence of any field officer, cannot be detailed as a court under the act which contemplates a field officer only as constituting such court. But where, in the case of the regular regiments of the 5th corps, which were quite destitute of field officers, certain senior captains commanding were by a formal order of Major General Meade, commanding the army, appointed "acting majors" of their regiments, and ordered to be obeyed, respected, and treated as such—*held* (December, 1864) that they might be deemed field officers within the meaning of the act, and could be detailed as a court by their brigade commander. V, 523; IV, 537. But this is the only instance in which the rulings of this bureau have approved the appointment of an "*acting*" field officer as a field officer's court. XI, 209.

4. The field officer detailed must be in service with his regiment, and his jurisdiction is expressly confined to offences committed by members of the regiment to which he belongs. III, 613. An enlisted man, detached from his regiment by being detailed for duty at a division hospital—*held* not within the jurisdiction of a court held by a field officer of his regiment. X, 470.

5. The act was intended to provide for the summary disposition of cases occurring in regiments when on the march and in active field service. It is applicable to the regimental organization only. The field officer, to be detailed as the court, must be the field officer of a regiment *as such*. V, 413.

* 6. As the field officer's court is one appointed for the regiment as such, and as its jurisdiction, though confined to, is coextensive with the regiment, no sufficient reason is perceived why the field officer appointed as such court should be restricted to the trial of cases occurring in one part of the regiment only, provided the regiment, though divided into companies or portions at different stations, is all under the command of the officer who constitutes the court. XXVI, 235.

* 6. The commanding officer of a regiment is not authorized to convene a field officer's court for the trial of any men of his regiment except such as are under his own command and orders. Where a company or portion of the regiment is detached therefrom and serving independently under the orders of another commander, the relation between such company, &c., and the regimental commander—which is the source of the authority of the latter to convene such court for the trial of the men composing such company, &c.,—is severed. But otherwise where the separate company is not actually "detached" in the proper military sense of the term, but merely constitutes a temporary detail for a certain purpose. XXII, 608.

8. The commander of a post, whose command is not a regimental organization, is not competent to convene a field officer's court. XXI, 78. A post commander has not, *as such*, authority to convene this court. XXII, 495. The commanding officer of a draft rendez-

vous has no authority, as such, to appoint a field officer's court. XIV, 48.

9. *Held* that a *major* commanding a separate battalion of one of the regular regiments, organized under act of July 29, 1861, was not, *as such*, empowered by the act of July 17, chapter 201, section 7, to *convene* a field officer's court. XIII, 480. So *held* that a *captain* commanding such a battalion was not authorized to *act* as a field officer's court. XVII, 18, 50.

10. *Held* that an ordnance officer (with a field officer's rank) commanding a detachment of ordnance officers and men at an arsenal, could not legally be detailed as a field officer's court. V, 413. A post commander cannot, *as such*, be so detailed. XXIII, 546.

11. The commanding officer of a battery company cannot be detailed as a field officer's court. XI, 497. It is only where a *battery company* forms part of a regiment, or is attached for the time to some regiment, (which rarely happens in the field,) that the men may be tried by a court held by a field officer of the regiment under the provisions of this act. V, 563.

12. A captain and brevet major, assigned to duty according to his brevet rank, and doing duty with his regiment, can legally be detailed as a field officer's court by the proper superior; this capacity being an incident to the rank and command of a field officer which have thus been devolved upon him. But when no such special assignment has been made, and the captain and brevet major continues to exercise the command of a captain only, he cannot properly be so detailed. XII, 560; XXI, 351.

* 13. *Held* (December 16, 1867,) that the commanding officers of the "sub-districts" of Louisiana and Texas had, *as such*, no authority to convene field officers' courts. XXVI, 299.

14. The "field officer" need not be specially sworn before entering on his duties as a court. The law imposes this duty upon him as an officer of the army, and he discharges it under the sanction of his official military oath. I, 371; V, 395, 405.

15. The whole duty of the court is performed by the field officer. No judge advocate is provided for, or required. I, 371.

16. There is no such separate officer as a "recorder" of a field officer's court. The field officer prepares his own record. XI, 210.

17. The proceedings of the field officer are necessarily summary; he will therefore make a brief but distinct *record* thereof, setting forth the order detailing him as a court, the names of offenders, the offences with which they are charged, with the time and place of commission, the pleas, the findings, and the sentences imposed. The character and circumstances of the offence in each case should so far appear that the reviewing officer may be able to determine whether the court kept within its proper jurisdiction. The record should also show that the accused were present before the court, and that the charges were investigated. But the testimony, except under very peculiar circumstances, need not be recited, nor need it be set forth that the accused had an opportunity to offer evidence or make a statement. Though it is preferable that the record of each case should be made up sepa-

rately, it is not a fatal irregularity if the proceedings in a number of cases are united and accompanied by a single copy of the order detailing the court, instead of repeating it with each case. I, 371, 400, 486; III, 280; VIII, 249, 414; IX, 29; VI. 584; XXIV, 369.

18. In reviewing the proceedings of a field officer's court, the regularity of the proceedings, and the adaptation of the punishment to the offence of which the party has been found guilty, are the only questions on which the reviewing officer can be enabled to pass a judgment. It could not have been contemplated that he should inquire into the sufficiency of the testimony to sustain the sentence. Had this been intended, it would have been necessary to spread upon the record the evidence in all its details in each case: and such a record it would often be out of the power of the "field officer" to prepare. He may well add, however, to this record any statement he may deem proper to be made in reference to the character of the testimony, so as to put the revising authority more fully in possession of the case. I, 375, 371; VIII, 249; IX, 29.

19. It is not deemed *essential* to the validity of a field officer's court that the accused should appear from the record to have had an opportunity of challenge. It is advisable, however, if any valid objection to being tried by the field officer detailed as the court is presented by the accused, that such objection should be set forth in the record as a fact for the information of the reviewing officer. XI, 210.

20. As a field officer's court can only inflict certain slight penalties, aggravated cases calling for severe punishment, though they may be strictly within its jurisdiction, should not be brought before it, but should be sent for trial to a general court-martial. XVI, 315.

21. The field officer's court, like the regimental or garrison court, is not competent to pass upon a charge of a violation of the ninth article of war, the offences specified therein being punishable capitally; (XXVI, 533, 538;) nor, in time of war, upon a charge of desertion, which is then a capital crime. Nor should it ordinarily assume to take cognizance of a felony or other grave criminal offence, since the proper punishment therefor, in case of conviction, would be more severe than such a court is authorized to impose; the limitations upon its power to sentence (as upon its jurisdiction) being the same as those prescribed by the 66th and 67th articles for the regimental, &c., court-martial. XI, 210. See SIXTY-SEVENTH ARTICLE, 1, 2, 3, 4, 5.

22. *Held* that the sentence of a field officer's court, in a case of absence without leave, that the accused should forfeit $10, in addition to the forfeiture required by paragraph 1357 of the Army Regulations, was valid. The allusion to the latter forfeiture is mere surplusage, such forfeiture accruing in any event by operation of law, and being therefore no part of the sentence. VII, 207.

23. Though cases where the time of absence without leave is unusually long are more properly brought before a general court-martial, yet the long duration of the absence does not put them without the jurisdiction of a field officer's court, which has the right to take cognizance of all cases of absence without leave. VII, 207.

24. Though it may be inferred from the act that it was the intention of Congress to confer on the "field officer" an *exclusive* jurisdiction

over that class of offences previously triable by regimental and garrison courts-martial, yet it is not certain that the authority of *general* courts-martial, whose jurisdiction is co-extensive with the trial of *all* crimes and all persons subject to military law, should be held to be thus restricted by implication. It would probably be safer to determine that it was the purpose of Congress to put the field officer's courts (where practicable to convene them) in the place and stead of garrison and regimental courts-martial, and to do no more than this. II, 58.

* 25. The act of 3d March, 1863, ch. 75, sec. 30, by which general courts-martial and military commissions are invested, "in time of war, insurrection, or rebellion," with special jurisdiction of the crimes enumerated therein, may properly be deemed to have the effect to exclude the field officer's court, constituted by a prior statute, from assuming jurisdiction of the same class of crimes, whether or not capital. So *held* that a field officer's court was not authorized to try a soldier for larceny during the rebellion; and that a soldier convicted and sentenced thereby for this offence, at such time, might legally be subsequently tried for the same offence by a proper court. XIX, 603.

* 26. The operation of sec. 7, ch. 201, act of July 17, 1862, establishing the field officer's court, is not limited to a period of war; and such courts have been convened since the cessation of hostilities in the same manner and under the same circumstances as during the war. XXIII, 546; XXVI, 581.

27. The "field officer" can in no case review his own proceedings. Where the regiment is not in command of a "brigade commander" or "post commander," the record should be submitted to the division commander, or the commander next higher in authority to the commanding officer of the regiment, who in such case would be the proper officer to review the proceedings within the spirit of the enactment. Such commander, if he approve the proceedings, is also the proper officer to order the execution of the sentence. V, 175; XXIII, 546. See XIII, 14.

28. The punishment ordered by the field officer's court must be inflicted by the direction of the brigade commander, or commanding officer of the post, as the case may be, after having examined and approved the proceedings. V, 52.

* 29. Where an offence which, on account of its gravity, should have been referred for trial to a general court-martial, has been tried by a field officer's court, and a punishment has been imposed, which, though as severe as is authorized to be inflicted by such court, is inadequate to the offence, the reviewing officer cannot legally *add* to this punishment, nor can he bring the case anew before a general court. He must either accept and enforce the sentence, however insufficient, or disapprove it altogether. See REVIEWING OFFICER, 9; PUNISHMENT, 24.

* 30. It can constitute no exception to the rule that a judicial officer cannot review and act upon his own proceedings, that the officer who constituted a field officer's court in his capacity as a regimental officer has meanwhile become post commander. He cannot, as post com-

mander, legally review cases which he adjudicated as regimental field officer; and where the post commander is the same with the officer who constituted the court, the proper reviewing officer (there being no brigade organization) would ordinarily be the military commander next superior to such post commander. XXIII, 546.

*31. The power vested by the 66th article in the *regimental* commander to *act upon* the proceedings of the court therein authorized to be assembled by him, is taken from him in the case of a field officer's court appointed by him under the act of July 17, 1862, and is vested, in the absence of a brigade organization, in the post commander. So in a case where the post commander was actually an officer of less rank (by brevet) than the regimental commander who had convened a field officer's court, *held* that the former was, notwithstanding, the proper officer to approve and act upon the proceedings. XXIV, 329.

32. *Held* that the brigade commander who is constituted by the act the reviewing officer of the proceedings of a field officer's court, was invested with the same power of pardon or mitigation of the sentence as is conferred by the 89th article upon the commanding officer of a regiment or garrison in regard to the sentence of a regimental or garrison court-martial. X, 283. *Held*, in view of the provision of the 89th article, authorizing the commanding officer of the regiment or garrison to pardon or mitigate punishments imposed by the regimental or garrison court, that the post commander, or other superior officer upon whom it devolved to act upon the proceedings of a field officer's court, should also be deemed to be similarly authorized. XXIV, 386.

*33. Under the provisions of the several acts in regard to the Bureau of Military Justice (and the Judge Advocate General's office,) the proceedings of field officer's courts, as well as of regimental and garrison courts, are properly forwarded to the Judge Advocate General, to be filed. XXI, 505. See SIXTY-SIXTH ARTICLE.

FINDING.

1. The judgment that the court "confirm the plea of the accused" is a sufficient finding. VII, 236.

2. A finding expressed in the record in this form, "The court is of opinion that the accused (naming him) is guilty," &c., is regular. IV, 445.

3. To find guilty of the specification. attaching no criminality thereto, and guilty of the charge, is irregular, as nothing remains in the case to sustain the charge, or form the basis of a sentence. IV, 275.

4. The accused cannot be found not guilty both of the *entire* specification and of the charge of desertion, and yet guilty of absence without leave. VII, 616, 634; IX, 24, 26, 46, 49. And see VII, 357.

*5. Where the specification to a charge of "desertion" alleges that the accused "did desert," &c., to find not guilty of both specification and charge, but guilty of "absence without leave," without at the same time excepting from the finding upon the specification the

allegation describing a desertion, would be irregular and improper. XXIV, 142.

6. Where the finding is guilty of the specification, but not guilty of the charge or of any lesser kindred offence, there is nothing left upon which a sentence can rest. It is equivalent to finding that the state of facts set forth in the specification do not make out the specific offence charged. VII, 600, 608, 633. See IX, 19, 135.

7. Where, under a charge of "mutiny," the court found the accused "not guilty," but guilty of "harboring a knowledge of an intention to commit murder," *held* that this absurd finding was not a finding of a lesser kindred offence, or of *any* offence; and advised—the court being dissolved—that the proceedings be disapproved. XX, 117.

8. It is a well-settled rule, that the finding upon a specification should cover and exhaust every averment embraced in it. If the court find only a portion of the averments to be proved, the finding should make it appear precisely what are found proved and what not. XVI, 73.

9. In case of a finding of guilty of the specification, and not guilty of the charge of desertion, but guilty of absence without leave, the date when the accused absented himself, and the period of his absence, should fully appear from the finding, in connection with the specification. Otherwise there is nothing in the judgment of the court which furnishes a basis for a plea in bar in case of a subsequent arraignment for the same offence. VII, 513, 348.

10. But where there is no such specific finding as to show, in connection with the specification, the period of actual absence, and it is not possible to reassemble the court for the purpose of having such finding made, the sentence is not invalidated, nor is the accused relieved from the obligation to make good the time lost. The *fact* of desertion or unauthorized absence being found, the company or regimental rolls can be referred to, to supply the date or dates necessary to determine the period of service owed to the government. XIII, 655.

11. Where the specification to a charge of desertion alleged a due enlistment of the accused, his unauthorized absence for a certain period, and his compulsory return under guard; *held* that while these allegations were sufficient to establish, *prima facie*, the technical charge of desertion, they were not inconsistent with the lesser offence of absence without leave. So where to such a specification the accused plead guilty, but to the charge not guilty, but guilty of absence without leave; *held* that it was a grave irregularity for the court to proceed, without receiving any evidence whatever in the case, to convict of a desertion. And where a finding in this form had been made, *advised* that, if possible, the court be reconvened for a correction of such finding; although, inasmuch as upon being reassembled it could receive no evidence, it would be obliged either to confirm the precise plea of the accused, or acquit altogether. And *advised*, if it should be impracticable to reconvene the court, that the proceedings and sentence be disapproved by the reviewing authority. XIX, 495.

12. Where an officer was charged with "conduct unbecoming an

officer and gentleman" in the appropriation of monies, the gist of the offence, as set forth in the specification, being fraud; and the court found him guilty of the charge, and guilty of the specification *except* the words "corruptly and fraudulently," (by which alone the fraud was alleged)—*held* that the findings were inconsistent, and the sentence irregular and invalid. XI, 41. And see XI, 44, 81.

13. A finding of guilty upon the charge is warranted, where, of three specifications, one is void and insufficient, but the others are well pleaded and sufficient. IX, 90.

14. The fact that the finding of guilty upon one of several charges of which an accused is convicted is irregular or unauthorized, does not invalidate the proceedings of the court-martial where the remaining charges are sufficient in form to support the sentence. XI, 67.

15. Where the conviction upon one of several charges is unauthorized, the evidence failing to sustain the charge; but the findings upon the remaining charges are supported by the facts proved, and these charges are sufficient in law to warrant the sentence imposed; such sentence is to be held valid and operative. XII, 30.

16. Where the finding of guilty on one of two charges is disapproved by the reviewing officer, the sentence may still be enforced as supported by the approved finding on the other, provided such sentence is authorized by law as a proper penalty for the specific offence. As it would be, for instance, where the imposition of the particular sentence was made mandatory upon the court or the punishment was left to its discretion. XVI, 70. See SENTENCE, III, 17, 18.

17. It was held, (September, 1864,) by the Secretary of War, that an accused brought to trial under any specific charge might legally be convicted under the 99th article, where the evidence established the commission of an act contrary to good order and military discipline, but did not sustain the specific charge. IX, 656. So held in the case of *Brigadier General Revere*, (V, 265,) where the accused was found *not guilty* of "*conduct unbecoming an officer and a gentleman*"—the offence with which he was charged—but *guilty* of "*conduct to the prejudice of good order and military discipline.*" This finding was approved by the President upon the suggestion of the general-in chief, (General Halleck,) that in time of war a strict observance of the *general rule*—that if the accused is found not guilty of the specific charge he must be acquitted absolutely—was not in such case called for. So *held*, and such a finding sustained, in the case of a soldier charged with a violation of the 20th article. XI, 87. (And this form of finding may now, (July 1, 1868,) be regarded as finally sanctioned in the practice of our military courts.)

18. But *held* that the reverse of this was not to be sanctioned, to wit, a finding of not guilty of "conduct to the prejudice," &c., but guilty of a violation of some specific article, as of the 45th. XVI, 532.

19. But under a charge of a violation of a specific article the accused cannot be found not guilty but guilty of a violation of another arti-

cle, (other than the 99th,) setting forth an entirely different specific offence or offences. Thus where the accused is charged with a violation of the 46th article, a finding of not guilty, but guilty of a violation of the 50th article, is irregular and invalid. XI, 276. And so *held*, where, under a charge of violating the 52d article, the accused was acquitted, but convicted of a violation of the 21st article. or of "absence without leave." XI, 274.

*20. Where to a charge of "conduct to the prejudice of good order and military discipline," there were two specifications, one of which alleged acts constituting a violation of the 21st article only, and the other acts in violation of the 9th article only; *held* that a general conviction of the accused upon the charge and both specifications was unauthorized; and that his sentence, based upon such finding, should be declared void and inoperative. XXIV, 198.

21. Where a soldier was charged with "disobedience of orders," without adding "of a superior officer," or expressing the offence as a "violation of the 9th article," and the specifications showed that the orders disobeyed were those of a non-commissioned officer—*held*, that the charge and specification in such a case, taken together, would constitute a sufficient pleading of an offence under the 99th article, and that a finding of guilty thereon would be regular and valid. XI, 491.

22. Where, under the charge of "striking a superior officer," it was averred in the specification that a non-commissioned officer was assailed, and the accused pleaded *guilty* to both charge and specification—*held*, that the court, *notwithstanding his plea*, was sufficiently regular in finding him not guilty of the specific charge, but guilty of "conduct to the prejudice of good order and military discipline." The plea in such case was certainly an admission that the offence charged was committed, but it did not preclude the court from making a special finding, which, while substantially confirming the plea, merely presented the fact of guilt under a proper technical form. XI, 491.

*23. Where the court found the accused guilty of the specification to a charge of "drunkenness on duty," (such specification being pertinent to that charge only;) and of the charge not guilty, but guilty of "conduct to the prejudice of good order and military discipline;" and the evidence in the case sustained the specific charge, and no other; *held* that such finding was unauthorized, and, if not amended upon a reconvening of the court, should be disapproved. To hold such a finding valid would be to enable a court-martial to set at naught any article of war in which a positive and definite punishment is appointed for a specific offence, and to leave the question of the degree of punishment wholly to the discretion of the court, however manifestly guilty the accused may have been shown to be of the precise act of misconduct alleged. In this manner a slight penalty might be awarded even where the accused was proven guilty under an article which required the imposition of the death penalty and that only. XXIV, 92, 142.

*24. Where the record showed that the accused pleaded to but one

of two charges, but was found guilty on both; *held* that the proceedings were fatally irregular, and that the sentence based upon such finding should be set aside as void. XXIII, 377.

* 25. A court-martial is authorized to find an 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. The practice of military courts has invariably sanctioned the conviction and sentencing of accused parties under pleadings thus amended in the findings. XXIII, 188.

26. 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 offence described in the charge. Where the court believe that the accused is guilty of the charge, but not precisely as laid in the specification, they should find him guilty of the latter, but with such exceptions or substitutions as may be necessary to present the facts as proved on the trial, and then guilty of the charge. V, 576. And see V, 51; IX, 130.

27. If it is found that none of the facts set forth in the specification are true, then no offence is made out, and the prisoner is entitled to an unqualified acquittal; but if it is found that a portion of them are true, the finding should be, guilty of that portion, and not guilty of the remainder. If the facts set forth and proved are decided to be void of criminality, it should be so stated, and a verdict of not guilty of the charge rendered; but if they make out a kindred offence of lesser degree than that designated in the charge, then such lesser offence should be designated in the finding, by a substitution of the charge proved for the one originally set up in the pleadings. VII, 634; IX, 24, 26, 46, 49.

28. Where a soldier named Frederick Murphy was erroneously charged as "Francis Murphy" in the specification, and the court found him guilty, substituting, however, in appropriate language, in its finding, the true name for the erroneous one—*held*, that the precisely proper course had been taken, and that the court by this form of judgment had excluded any valid objection that could have been taken in law to the regularity of their proceedings in this particular. XIII, 402.

29. Where the offence of the accused was alleged to have been in violation of a statute, of which an erroneous date was given, (to wit, a date of a year before the actual approval of the act;) *held*, that the court, upon being reconvened, might properly revise its general finding of guilty, so as to substitute the proper date for the erroneous one. XIV, 228.

30. A finding expressed as follows: "of the specification, not

guilty on the day alleged; of the charge, guilty," is irregular. The finding upon the specification, while convicting the accused generally, should at the same time substitute the correct date of the commission of the offence for the erroneous one as set forth; and the following form of finding, in such case, *advised:* of the specification, not guilty, as to the date averred, but guilty on (*naming the proper date.*) XIII, 398.

* 31. Where the time and place alleged in the specification are shown by the proof to be erroneous, the court, in convicting the accused, may make an exception in its finding as to the time and place stated, and substitute the true time and place as exhibited in the testimony. XXVI, 435.

32. Where a specification to a charge of "desertion" alleges, in terms, that the accused "did desert," &c., or sets forth facts descriptive of a desertion only, to find guilty of the specification, without excepting any portion or modifying it in any way, and not guilty of the charge, but guilty of absence without leave, would be irregular and improper. VII, 357, 616, 634; IX, 24, 26, 46, 49; XIII, 655.

* 33. Where, under a charge of "disobedience of orders," the specification alleged that the order disobeyed was that of the "commanding officer" of the accused; *held* that the court—the evidence showing that the order was that of a *superior officer* though not immediate commander—was justified in substituting, in its finding of guilty of the specification, the word "superior" for "commanding," so that the allegation should correspond specifically with the provision of the article of war (the 9th) relating to this offence. XXIV, 443.

SEE FIFTY-FOURTH ARTICLE, (2.)
NINETY-NINTH ARTICLE, (19,) (23,) (24.)
CONVENING OFFICER.
LESSER KINDRED OFFENCE, (1,) (3,) (4.)
VARIANCE, (6.)

FINE.

1. A corps commander, upon discontinuing court-martial proceedings against an enlisted man charged with absence without leave, and allowing him to re-enlist as a veteran volunteer, required him by special order to forfeit the pay due for the term of his absence, (and which he would have forfeited by operation of law,) and fifty dollars additional from his pay, by way of fine. *Held* (May, 1864) that this fine, imposed as a punishment, and independently of any judicial investigation, was imposed without authority, and could not be enforced. VIII, 444.

2. Where a hospital steward, in consideration of the withdrawal of proceedings against his wife and himself before a United States commissioner for obtaining money by means of a false voucher, paid the sum of three hundred dollars to a United States district attorney, who received and accepted it by way of fine and sufficient punishment for the offence, and thereupon transmitted it to the War Department—*advised*, that the government having, by the unwarrantable act of its

own official, which it must condemn, been made the recipient of the money paid, might properly, for the purification of the public service, refund the same, (the amount not having been paid into the treasury,) as received in an immoral and dishonorable transaction, although the party was not *in law* entitled to its recovery. XII, 209.

3. Where a fine was exacted from a citizen by a deputy provost marshal, without trial, for the offence of selling liquor to soldiers in a locality in Maryland not under martial law, and the amount of such fine had been paid into the United States treasury; *held* (September, 1865) that the same, though illegally exacted, could not be restored by the Executive, but by Congress only. XVI, 555.

4. The President has no power to order the reimbursement of a fine once paid to the United States under an executed sentence, unless such sentence were void *ab initio*, and the amount of the fine has not been paid into the treasury. XVI, 556.

* 5. An officer was convicted upon a charge of accepting a receipt from a public creditor in violation of paragraph 994 of the Army Regulations, which consists of certain clauses of section 16 of the penal act of August 6, 1846, relating to embezzlements, &c., by public officers,—which act fixes the punishment for the offence at an imprisonment for a certain term and "a fine equal to the amount of the money embezzled." *Held* that this provision was reasonably construed to mean that the fine should *not exceed* such amount; and—the court having imposed a fine greater than the amount shown to have been embezzled by the accused—that it should properly be reconvened for the purpose of conforming the sentence to the law. XXIV, 473.

SEE TWENTIETH ARTICLE, (2.)
FORTY-FIFTH ARTICLE, (3.)
PARDONING POWER, (8, (9.)
SENTENCE, I, (7,) (11,) (12;) III, (10,) (11.)
STOPPAGE, (9.)

FLAG OF TRUCE.

1. The reception of persons within our lines under a flag of truce does not necessarily preclude their subsequent detention for the purpose of further examination into their character and business, as a precaution against the designs of such parties as should properly be excluded from the privilege of penetrating within our territory. That the enforcement of this rule should sometimes subject neutrals to temporary inconvenience is almost inevitable. V, 193.

2. The reception of a person within military lines under a flag of truce does not operate as a *safe conduct*, allowing him a free passage within the territory whose lines he has entered. The safe conduct and flag of truce differ materially both in their nature and purpose. The one, like a passport or safeguard, is a formal and specific instrument in writing, issued by the sovereign authority for some purpose of public policy. Since the privilege which it extends is "so far a dispensation from the legal effects of war," the instrument of safe conduct is strictly construed, and it is usual to set forth therein "every particular branch and extent of the indulgence" thereby

conveyed. It is generally granted to a subject of the enemy, or to a public minister, or other personage ordinarily entitled under the *comitas gentium* to such privilege, and authorizes him to pass through the territory of the sovereign, either alone or with his family, servants and effects, as the case may be. The sovereign is thereupon bound to afford him full protection against any of his own subjects or forces, and to indemnify him for any injury which he may sustain by reason of a violation of the security thus solemnly guaranteed. (See Vattel, chapter XVII; 1 Kent, 162; Woolsey—Introduction to the Study of International Law—paragraph 147.) On the other hand, the flag of truce is not limited to particular persons or objects, but is used for a great variety of purposes, nor is its design required to be expressed in writing. It is often merely an informal means of communication, for mutual convenience, between hostile armies; but beyond affording a safe communication and transit it is, ordinarily, in the absence of any special convention, without efficacy. The protection it insures is but temporary, and is not to be continued after the immediate mission of the flag has been accomplished. The detention and confinement, therefore, on reasonable grounds of suspicion, of one who has been permitted to enter our lines under a flag of truce from the enemy, is warranted by the laws of war. The party is protected by the flag during his transit, and is *prima facie* entitled to enter our lines under it; but he comes subject to the supervision and control of the police power, to which all strangers entering military lines must necessarily be subjected. VIII, 612. See VI, 434.

* 3. A flag of truce cannot protect rebel securities from confiscation and destruction, the same being disloyal and illegal publications intended to give aid and comfort to the enemy. A party availing himself of a flag of truce to bring such securities within our lines would be guilty of a violation of the laws of war, and be amenable to trial and punishment therefor. XIX, 673.

FORAGE ALLOWANCE.

See PAY AND ALLOWANCES, (5,) (7.)
PRISONER OF WAR, (1.)

FORFEITURE, I—(BY OPERATION OF LAW.)

See DESERTER, (4,) (7,) (15.)
FIELD OFFICER'S COURT, (22.)
PAY AND ALLOWANCES, (3,) (23,) (25,) (26,) (27,) (28,) (29,) (30,) (31.)
PRESIDENT'S PROCLAMATION, III, (1.)

FORFEITURE, II—(BY ORDER.)

See THIRTY-SECOND ARTICLE, (8.)
COMMUTATION OF SENTENCE, (5.)
DISMISSAL, I, (7,) (8.)
ORDER, (5.)
PUNISHMENT, (18,) (21.)

FORFEITURE, III—(BY SENTENCE.)

1. The sentence of a competent court-martial duly forfeiting the pay of a soldier or officer cannot be remitted except as to such of the pay as is not yet due at the date of the remission. As to all other pay, the sentence has become executed, and cannot be reached by the pardoning power. I, 393; VIII, 392, 576, 658; IX, 196; X, 676.

But where the sentence is void *ab initio*, and the forfeiture *illegal*, the amount forfeited should be made good to the accused, although the sentence has been executed. IX, 485.

* 2. Where a duly confirmed sentence of dismissal of an officer, imposed by a competent court, whose proceedings were regular, was commuted by the proper commander to a forfeiture of three months' pay, and that forfeiture had been fully executed—*held* that the executive branch of the government had no authority (upon whatever grounds or showing) to return the amount to the officer; that upon the forfeiture taking effect, the money was, in the contemplation of law, paid into the treasury, and could not, without a violation of the Constitution, (article 1, section 9, paragraph 6,) be withdrawn therefrom, except by the authority of Congress. XXIII, 642, 659.

3. A court-martial, in forfeiting pay by its sentence, has no power to apply it to satisfy a personal liability of the accused, however justly adjudged, or to the use of his family. The amount forfeited can accrue to the United States only. See SENTENCE I, 3, 4, 5.

*4. A sentence of forfeiture of "pay and bounty" does not affect an allowance due the accused for clothing not drawn. XXI, 546.

SEE THIRTY-FIRST ARTICLE, (2.)
FORTY-FIFTH ARTICLE, (2.)
BOUNTY, (1.)
COMMUTATION OF SENTENCE, (3.)
FRAUD, (6.)
MILITARY COMMISSION, III, (2.)
PAY AND ALLOWANCES, (2,) (3,) (10,) (24,) (30,) (37,) (39.)
PARDONING POWER, (6,) (7,) (8.)
PROVOST JUDGE OR COURT, (2.)
PUNISHMENT, (23.)
SENTENCE, I, (1,) (2,) (3,) (4,) (5,) (6,) (7,) (16;) III, (12,) (13,) (14,) (16.)

FORGERY.

SEE NINETY-NINTH ARTICLE, (6.)
MILITARY COMMISSION, II, (7,) (11,) (12.)

FORMER TRIAL.

* 1. Where a military trial has been for any cause terminated at any stage of the proceedings, before a final acquittal, or a conviction and sentence, the accused, on being again arraigned on the same charges, cannot plead a "*former trial*" in bar. See EIGHTY-SEVENTH ARTICLE; TRIAL, 8.

2. A party who has been acquitted by a court-martial upon a charge of a violation of the fifty-seventh article of war, in giving intelligence

to the enemy, cannot plead this acquittal in bar of a criminal prosecution, under section 2, chapter 195, of act of July 17, 1862, for "giving aid and comfort to the rebellion," since, as it is well understood, the same act may be an offence against two jurisdictions, and may subject the offender to be tried and punished by both. Such would not be a case of a double punishment, but of a punishment of a double offence.† V, 140. See THIRTY-SECOND ARTICLE, 2.

SEE NINETY-FIRST ARTICLE, (2.)
FIELD OFFICER'S COURT, (25.)
JURISDICTION, (11.)
MILITARY COMMISSION, I, (7.)
PLEA, (19.)

FRAUD, I—(GENERALLY.)

SEE EIGHTY-FIFTH ARTICLE.
CLAIMS, I, (10.)
CONTRACTOR, II, (3,) (4,) (10,) (11.)
MUSTER-OUT, (4,) (5,) (6.)
UNITED STATES AS BAILEE, (2,) (3,) (8.)

FRAUD, II.

(Under act of March 2, 1863, chapter 67.)

1. The act ("to prevent and punish frauds upon the United States") is not retroactive in its operation. Its penalties necessarily apply only to offences committed after its passage. V, 312, 338; XXI, 445.

2. The act authorizes the trial by court-martial of those who are no longer in the military service, but only for offences committed while in it. V, 341, 342.

3. In framing a charge for wilfully misappropriating, &c., public money, &c., under the act of March 2, 1863, it is not necessary to allege in terms an intention to defraud. The act itself is necessarily a fraud upon the government. V, 498.

4. A charge simply of "aiding in obtaining the payment of a claim upon the United States, knowing the same to be false," &c., is not a proper statement of the specific offence of entering into an agreement, combination or conspiracy, to cheat or defraud the government, &c., by aiding to obtain the payment of a false claim, specified in section 1 of this act. VII, 567.

5. The offence of embezzlement or misappropriation of money of the United States must have been consummated by an officer while in the service, in order to render him amenable to trial therefor under the provisions of this act. If his deficit, which is supposed to constitute this offence, was not ascertained until, at some period after

†NOTE.—As to the amenability of an officer of the army to the civil and the military jurisdiction at the same time see Assistant Surgeon Steiner's case, VI Opinions of the Attorney General, 413, where it is held that the "conviction or acquittal of an officer by the civil authorities of the offence against the general law does not discharge him from responsibility for the military offence involved in the same facts." In a subsequent case, (VI Opinions, 506,) the same principle is expressed by the same Attorney General, (Cushing,) in this form: "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."

he left the service, he was called upon to present an account, or a demand was made upon him for the deficiency, he would be held in law, in the absence of other proof of the circumstances of his offence, to have committed the act charged at the date of such demand, &c., and of his refusal to comply therewith, and not before. XI, 173.

6. A sentence imposed by a court-martial upon an officer is not executed as to him until he is formally notified of its confirmation by the proper authority. If, therefore, after the publication, in the general order of the department commander, of the confirmation of a sentence of dismissal of an officer with forfeiture of all pay due, but before he is properly notified thereof, such officer draws a portion of the pay so forfeited, he is not chargeable with a fraud under the provisions of this act. X, 609.

7. Where an assistant quartermaster employed certain teams, tools, lime and other property in his charge, belonging to the United States, in the construction of stables, &c., at the race-track of a sporting club of which he was vice-president—*held*, that this unauthorized *use* was a misappropriation of such property, within the meaning of this act; and that this officer was triable by court-martial therefor. X, 664. See XX, 35; XXIII, 360.

8. Where a soldier, who had been once formally discharged for disability, and thereupon fully paid, receipted a muster-out roll of his former company and drew his pay upon it with the rest—*held*, that he was triable by court-martial under sections 1 and 2 of this act, upon the charge of "using a false roll or receipt, knowing the same to contain a false entry, in order to obtain payment of a false claim," &c. XVI, 178.

9. *Held*, that one guilty of culpable carelessness in signing a certificate vouching a false claim upon the United States, though without deliberate fraudulent intent, but under the pretence that the act was excusable, as being in accordance with the previous practice of his superiors in office—was amenable to trial by a military court under this act. XII, 371.

* 10. The words "every person," in the last sentence of section 1 of this act refer to the classes of persons described in the first clause of the section, and it is only such persons as were, at the date of the commission of the offence, "in the land or naval forces of the United States, or in the militia in actual service of the United States in time of war," that are made amenable by the statute to the jurisdiction of a court-martial. The interpretation that the words in question do not include all persons whether or not connected with the military, &c., forces, is supported by the fact that in section 3 and succeeding sections the act proceeds to make special provision for the trial of *non*-military, &c., persons, for the offences enumerated in the first section. XIX, 601.

* 11. Section 2 of this act provides that an officer who has been discharged the service shall be liable to be held to trial by court-martial (for any of the offences named in the first section) "*in the same manner*" as if he had not been discharged. So *held*, that a volunteer officer who had been discharged could not be so tried by any court other

than one of volunteers, and that a court of regular officers would have no jurisdiction of his case. XIX, 670. The fact that it may not be *practicable* to convene a court of volunteer officers will not dispense with the requirement of the statute. XXVI, 166.

* 12. The jurisdiction vested in general courts-martial, by this act, over the offences specified in the 1st section, *held* to be exclusive. XXIII, 465.

* 13. The jurisdiction of general courts-martial under this act extends to the cases of that class of contractors who are made a part of the army by section 16, chapter 200, of the act of July 17, 1862. Such contractors are held amenable to trial under this act, whether or not their contracts have been annulled before trial; provided only they were contractors within the meaning of the last-named act at the time of the commission of their offences. XIX, 584. But see *note* under CONTRACTOR, II.

* 14. The jurisdiction conferred upon general courts-martial by section 1 of the act is not limited to time of war; the act is equally operative in time of peace. XIX, 584. Except as to militia in the public service, the operation of this act is not limited to time of war. XXII, 500. The phrase "*in time of war*," in the first section, is construed to refer to the militia alone. XXVI, 534.

* 15. In charging the misappropriation or misapplication of public property by an officer, under this act, *held*, not a material error to add, in regard to the property in question, that it was—in the precise words used in the section—"furnished *or* to be used for the military service of the United States." *Held* further, that it was not necessary to specify by name, in the charge, the officer to whom the property was *furnished*, or by whom it *was to be used*. XXIV, 299.

* 16. An acting commissary of subsistence was charged and brought to trial, as such, for misappropriations and misapplications of commissary stores, but it was not added in the charge that the same were "furnished," or were "to be used for the military service of the United States;" *held*, inasmuch as the stores received and issued by a commissary of subsistence, in his official capacity, must needs be furnished and be intended to be used for the military service—a fact of which a court-martial would take judicial notice—that the omission in the charge, though an irregularity, should not be deemed to affect the validity of the proceedings. XXIV, 315.

* 17. A paymaster was charged with a violation of this act in knowingly and wilfully misappropriating public monies furnished and to be used for the military service. His offence, as set forth in the specification and established in proof, consisted in his transferring a very large sum of money from a national bank, in which it had been deposited to his credit as paymaster, to another bank known to him to be in a condition of financial embarrassment; his act not being in the course of official disbursement, but for the purpose of lending financial aid to the latter bank, and resulting in an entire loss of the funds to the United States, upon the bank going into insolvency, as it did about two weeks after the transfer. *Held*, that his conviction of the charge, upon proof of this state of facts, was proper and unavoidable, and *remarked* as fol-

lows upon questions raised in the case:—It is not necessary under such a charge to allege or to show either that the misappropriation was to the use or benefit of the accused, or that it was accompanied with an intent to defraud. The words in the statute, "*to his own use or benefit*," are regarded as referring alone to the term "*apply*," which is separated from the term *misappropriate* by the disjunctive conjunction "*or;*" it being intended by the act to provide for the case of an application to the immediate profit and behoof of the accused, and for that of *any* intentional misappropriation without regard to the matter of personal advantage, as separate and distinct offences. Moreover the statute does not, as in the case of certain other offences enumerated in the same section, require that the misappropriation should be fraudulent, but merely that it should be wilful and knowingly done; the word "wilful" not being used in the sense of *malicious*, but in its ordinary sense of voluntary and intentional. It is the simple act of misappropriation which is declared to be, in itself, a crime, and punishable as such without reference to the end sought to be attained; the design of the law plainly being to obviate danger of loss by positively prohibiting not only purposely criminal dealings with the public funds, but also any improper diverting of those funds from their specific objects. It was understood that *any* misappropriation, however innocently made, might involve such loss, and thus amount in its results to a fraud upon the United States, and so every such act was forbidden as the only safe course. The provision of the 16th section of the act of August 6, 1846, chapter 90, by which the mere loaning by an officer of public funds is declared to be an embezzlement and felony, without regard to the intent of the act, is but another similar illustration of the general purpose of Congress to fix upon any and all improper dispositions of such monies, by officers charged with their custody or disbursement, a criminal character. And *remarked* further, that there was no less a *wilful* misappropriation in this case in the sense of the statute, although the funds were deposited in the insolvent bank with the honest and sole purpose, as claimed, of saving the bank in order to save other public funds of a less amount regularly deposited there previously and in the belief that the bank was solvent. But the duty of the accused in regard to these earlier deposits, upon his being apprized of the fact that the bank was no longer in a solvent condition, clearly was to withdraw the same altogether. Instead of doing so he attempts to protect them by a proceeding involving the possible sacrifice and certain risk of a greater amount, and, even if morally innocent, must certainly be deemed to have proceeded with the "bad purpose" which is held by the authorities to constitute a *wilful* act in law. XXIII, 69. See EMBEZZLEMENT, 3.

SEE EIGHTY-EIGHTH ARTICLE, (1.)
CONTRACTOR, II, (8,) (11.)
COURT-MARTIAL, II, (12.)
FELONY, (1.)
MILITARY COMMISSION, III, (3.)

FREEDMAN

*1. Certain freedmen, indicted, in 1866, for burglary, in a civil court at New Orleans, having applied—under the act of April 9, 1866, entitled "*An act to protect all persons in the United States in their civil rights, and furnish the means of their vindication,*" and commonly known as the "Civil Rights bill"—to have their cases removed to the United States circuit court, were denied this right by the judge of the State court, on the ground that the act in question was unconstitutional. The accused having thereupon applied for relief to the military authorities; *held*, that these could not properly interpose at this stage of the proceedings, for the reason that the act provided for such case a specific redress, as follows, viz: 1. The prosecution of the judge himself for violation of the law in refusing to permit the transfer. 2. An appeal, or removal, by writ of error or otherwise, of the case to the United States circuit court, *after judgment*, should the same be adverse to the accused. And *advised* that, should it be found impracticable in the locality referred to, to bring to justice the official indicated; and should it be attempted, in the case of a conviction of the parties, to enforce against them the judgment of the State court, in disregard of any process which might be issued under the act by the United States court; the remedy of the parties must then be an appeal to the Chief Executive of the nation, who is charged by the Constitution with the enforcement of the laws, and who is specially empowered by section 9 of the act in question to employ, or cause to be employed, "such part of the land or naval forces of the United States, or of the militia, as shall be necessary to prevent the violation and enforce the due execution of this act." XXI, 458.

*2. A freedman in Georgia—an aged preacher, of respectability and influence—was vice-president of a charitable society organized through northern philanthropists, and had as such a salary allowed him. He was prosecuted and adjudged a *vagrant*, on the ground that a salary received from such a source, and for such a purpose, could not be held in the State of Georgia to amount to "visible means of support," and was, in consequence, sentenced for twelve months to the chain-gang by a State judge, who, in his official action, allowed himself to become the servile exponent of local prejudices and resentments against the colored race. *Held*, that if such a punishment was one which could not legally have been imposed upon a *white* man for vagrancy in that State at the time, the proceeding was in derogation of the Civil Rights bill, and relief might be obtained by an appeal to the United States courts. And *recommended* that the case be referred to the Attorney General for such action as, in his judgment, the existing law would warrant. XXI, 678.

SEE FREEDMEN'S BUREAU.
MILITARY COMMISSION, II, (35.)
MURDER, (2.)

FREEDMEN'S BUREAU.

* 1. An officer of volunteers holding the position of assistant commissioner of the Bureau of Freedmen, &c., for the State of North Carolina, was brought to trial before a general court-martial convened by the President, upon a charge of "conduct to the prejudice of good order and military discipline," in becoming pecuniarily interested with two others in the cultivation of a plantation in that State, upon which were employed about 140 freedmen then being in his care and charge as such commissioner; he, the accused, thus becoming (as was alleged) interested, for his own private profit and emolument, in the labor of said freedmen, in derogation of his official duty as such commissioner. The court found the facts as set forth in the specification, but adjudged that the proceeding of the accused was not in derogation of his official duty. It was shown upon the trial that the accused had performed the duties of his office with fidelity to the government and with honesty and justice to the freedmen under his charge; that he took no part in the management of the plantation, having visited it but once, but that it was left to be conducted by one of the partners who resided on the estate, and employed and paid for the labor, &c., and that the entire connection of the accused with the plantation consisted only in an investment therein of his private means; that his proceeding was with the approval and encouragement of his superior, the head of the Bureau; that before taking part in the enterprise he was constantly applied to by southern landholders to devise some mode by which their estates might be rescued from barrenness and waste and the freedmen might be induced to engage in regular labor; and that a chief ground of his making the investment was his desire to set an example of fair and liberal treatment and compensation of the laboring class, and thus stimulate the planters to follow his example. It was testified by many witnesses, citizens of the State, that the experiment of the accused had been successful, and that the feeling of despondency which had been general throughout the State had given place, through the exertions and example of the accused, to one of confidence in the practicability of free labor, both on the cotton and the rice plantations. As to the plantation in which the accused had become personally interested, it was established that no punishments had ever been inflicted thereon, that the freedmen sought employment there with avidity, and that they were liberally compensated and cared for. *Advised* that the judgment of the court, that the act of the accused had been entirely consistent with his duty as such officer and assistant commissioner, should be *approved*. XXIII, 171.

* 2. An officer of volunteers, holding the position of assistant financial agent of the Bureau of Freedmen, &c., for the southern district of North Carolina, was brought to trial by general court-martial, upon a charge—of employing freedmen to work a plantation, for his emolument, contrary to his official duty—identical (except as to the number of freedmen) with that in the last case. The court found the facts to be as set forth in the specification; except as to the freedmen being in the care and charge of the officer as such agent, and

except as to his acts being contrary to his duty, &c.--both of which allegations they found not proven; and they acquitted him of the charge. It was established in evidence that the funds invested by the accused were his own private means; that he took no part in the management of the plantation; and that he had, as such agent, no supervision over or charge of the freedmen employed. It was further proved that, by the orders of the chief of the Bureau, the officers of the same were expressly instructed to introduce, wherever possible, practicable systems of compensated labor, with a view to remove the prejudices of the recent owners of slaves against the employment of their former servants, to correct the false impression of the freedmen that they could live without labor, and to encourage them to labor for their own support. It was in evidence that North Carolina was, at this period, full of freedmen distrustful of the honesty of their late masters and therefore refusing to make contracts to go to work, while the masters, at the same time, disbelieved in the fidelity and industry of the blacks, and had, as a general rule, abandoned the cultivation of their estates. And finally it was shown that it was at the earnest solicitation of a prominent landholder and late slave-owner of the State referred to, and on his repeated assurance that without some such encouragement it would be impossible to induce the freedmen to sustain themselves by work, that the accused was led to make the experiment upon which the charge against him was based. *Held* that it was thus clear that, however the action of the accused may have promised to advance his private interests, it was taken from high public considerations; and, instead of embarrassing, tended to promote one of the great objects for which the Freedmen's Bureau was established and had been maintained in the South; and *advised* that the proceedings of the court be approved and confirmed. XXIII, 111.

*3. So *advised*, upon a similar state of facts and findings, in the cases of two officers of volunteers, brought to trial by general court-martial upon charges substantially identical with those in the two above cases—the one as superintendent, and the other as agent, of the Bureau, for certain districts of North Carolina; and acquitted. XXIII, 184; XXII, 308. See also XXIII, 199.

Further: One of these officers was, at the same time, tried upon an additional charge of imposing unjust and burdensome taxes upon the freedmen of the Trent River settlement, North Carolina, (then being under his official charge,) and of enforcing such taxes in an oppressive manner. It was shown in evidence under this charge that a system of mild taxation had been adopted in the settlement soon after the occupation of Newbern by the federal forces and before the accused had been placed in charge; that, during his term of office, the tax, which amounted to no more than fifty cents a month upon the lot of land occupied by each freedman, was approved by the assistant commissioner of the Bureau for the State, as well as the department commander, as being needful and proper; and that the freedmen themselves generally consented to it with willingness, and appreciated its necessity; that the whole amount of tax, about eleven hundred dollars, which had come into the hands of the accused, had

been duly expended in the interests of the settlement, in cleaning its streets, paying its watchmen, and discharging the expenses of its hospital; that, in cases of extreme poverty and real inability to pay, the tax was remitted; and that only those who were notoriously able to pay and would not, were compelled to do so by being deprived of their tenements, which were the property of, and had been erected by, the government. The accused was, upon this evidence, acquitted of the charge. *Advised* that such acquittal be approved. XXIII, 184.

* 4. A citizen agent for the Bureau of Freedmen, &c., in Pitt county, North Carolina, was brought to trial, (in September, 1866,) before a *Military Commission* convened by the President on August 11, 1866, upon a charge identical with that in the case mentioned in the first paragraph. Upon the trial it was shown that at the time of the leasing of the plantation mentioned in the specification the accused was a citizen wholly unconnected with the public service, but shortly after consented to act as agent for the Bureau in the county in which the plantation was situated, and where the Bureau had previously had no agent; that he accepted the position with the full knowledge and understanding of his superiors that he had leased and was about to cultivate the plantation; that he entered upon the office of agent from motives of benevolence, without any engagement for renumeration; and that he actually received no compensation whatever from the government. It was further shown, by the uniform testimony of white and colored witnesses, that the freedmen employed on the plantation, on which also the accused took up his residence, were well and humanely treated, and were in a comfortable and happy condition; that they were "found" in rations and were promptly paid their wages at the end of each month—the men $15, and the boys $5 or $6; that they were allowed the privilege of gardens to cultivate for themselves, and of keeping hogs and poultry; that the sick were furnished medical attendance; that there were established for them two good schools, one on each farm, taught by northern women, where the pupils "learned fast," and were rewarded with prizes when they excelled; and that the accused (who had been a clergyman and chaplain in the military service) conducted a religious service for his employees on Sunday. The testimony of the latter in favor of his care and attention was unanimous; they most favorably contrasted his treatment of them with the neglect of their previous masters; and all stated that, at the time of their engaging to work for the accused, they would not have worked for such masters, because of the usage which they had received from the latter, who had not given them enough to eat, and, (as one expressed it,) had treated them "worse than his own dogs." *Remarked*—that nothing could be more clear—upon this testimony—than that the employment of these freedmen by the accused was most beneficial to them and serviceable to the cause of free labor; that the entire acquittal of the accused was not only fully warranted but was inevitable upon the evidence presented; that it was indeed an unavoidable inference from the whole proof not only that the accused was not guilty of the charge

of misconduct, but that he had distinguished himself for his fidelity as an agent of the United States, as well as for his humane and liberal care and treatment of his employees and his enlightened consideration for their interests both as laborers and citizens. And *advised* that the proceedings of the Commission, in acquitting him, be approved. XXIII, 279.

(The proceedings and findings of the court in all these cases were approved by the Secretary of War, in General Orders Nos. 212, 214, 215, 216, and 217, of the War Department, of November 17, 1866.)

FUGITIVE FROM JUSTICE.

SEE DESERTER, (23.)
PARDON, (1,) (2,) (3,) (4,) (6.)

G.

GAMING.

SEE CHARGE, (13.)

GARNISHMENT OF PAY.

* 1. It is a rule long since established and constantly adhered to in the practice of the government, that funds in the hands of a United States officer, due as wages to a government employee, are not liable to attachment in a suit instituted against the latter by a private creditor. XXIII, 550; XXVI, 466.

2. The principle of public policy which protects employees in the service from having their salaries and emoluments garnisheed in the hands of the government does not extend to a case where the pay of a soldier has been received by him, and become his private property. In that case it is liable to be proceeded against by his creditors, and may be attached by garnishee process in the hands of an agent. I, 378; VIII, 493.

3. There is no statute of the United States protecting from levy and sale upon "foreign attachment," at the suit of creditors, the personal property of a soldier in the service of the United States, during his absence as a prisoner of war. XIV, 193.

4. *Held* that funds, in the hands of a United States paymaster, due as wages to a government employee at a United States arsenal, were not liable to attachment in a suit instituted against the latter by a private creditor upon an account. XX, 413.

GIVING AID AND COMFORT TO THE REBELLION.

(Act July 17, 1862, chapter 195, section 2.)

1. *Held* that a person who acted at the north as banker and financial agent of rebels residing in the disloyal States, and as a broker dealing in "confederate" securities, was chargeable with giving aid and comfort to the rebellion, in the sense of the 2d section of the act of July 17, 1862, chapter 195. II, 458, 580.

2. One who has contracted to furnish munitions of war to the enemy, and has manufactured them under his contract, is liable to a prosecution under the act, although the munitions were not actually delivered by him. V, 275.

3. One who sells, to another, property, contraband of war, with the knowledge and understanding that it is to be conveyed by that other to the enemy, is equally criminal under the act as if he had himself shipped the goods to the South. V, 275.

4. Parties at the north who manufactured and sold (to dealers at Baltimore, New Orleans, &c.) goods clearly intended for rebel use, as buttons marked with the arms of the southern States and similar devices—*held* triable under this act for "giving aid and comfort to the rebellion." XI, 647. See VIOLATION OF THE LAWS OF WAR, 16.

See MILITARY COMMISSION, II, (3,) (32.)

GIVING INTELLIGENCE TO THE ENEMY.

See FIFTY-SEVENTH ARTICLE.

GOVERNOR OF STATE.

See JURISDICTION, (4.)
PARDONING POWER, (3.)
PRISONER OF WAR, (4,) (5.)
REMOVAL OF DISABILITY, (1.)
TRANSFER, (1.)

GUERILLA.

1. The charge of "*Being a Guerilla*" may be deemed a military offence *per se* like that of "being a spy;" the character of a guerilla having become, during the present rebellion, as well understood as that of a spy, and the charge being therefore such an one as could not possibly mislead the accused as to its nature or criminality if proved, or embarrass him in making his plea or defence. The epithet "guerilla" has, in fact, become so familiar, that, as in the case of the term "spy," its mere enunciation carries with it a legal definition of crime. The charge of "being a guerilla," with the specification "in that he did unlawfully take up arms as a guerilla, and did act and co-operate with guerillas," &c., is also held to be well averred under the rules

of pleading which apply to offences where the criminality consists, not in a single malfeasance, but in habitual conduct, or a series of similar acts, as the offence of "being a barrator," or "being a common scold." *Held* that the charge of "being a guerilla," (in a case occurring in Missouri,) was also justified as a technical and proper charge of a specific offence by the military orders of the department of Missouri, (No. 30, of April 22, 1863,) in which the character and offence of the guerilla are published and stigmatized, and he is declared to be beyond the pale of the laws of regular warfare, and to be punishable with death. III, 589.

2. Section 1, chapter 215, of the act of July 2, 1864, gives the commanders of armies in the field, and of departments, the power to carry into execution, in time of war, *all* sentences, whether of court-martial or military commission, imposed upon guerilla marauders, for the offences named therein. The expletive "*marauder*" adds nothing to, and detracts nothing from, the significance of the term *guerilla*, the programme of whose life, as understood in this country, imports marauding as one of its leading features. IX, 535.

3. Proof of a single act of robbery or criminal violence committed by the accused in company and conjunction with guerillas, will sustain the charge of being a guerilla. XV, 216.

SEE EVIDENCE, (23.)
MILITARY COMMISSION, IV, (4.)
PARDON, (6.)
PRESIDENT AS REVIEWING OFFICER, (5.)
PRISONER OF WAR, (8.)
RECONSTRUCTION LAWS, (2,)
SENTENCE, II, (2.)
VIOLATION OF THE LAWS OF WAR, (15,) (17.)

H.

HABEAS CORPUS.

1. By General Order No. 104, of the War Department, of August 13, 1862,† issued by the Secretary of War, by authority of the President, it was ordered that every person liable to draft who attempted to go to a foreign country, or who absented himself from his county or State before the draft to which he was liable was made, should be

† NOTE.—This order is supposed to have been issued upon the view entertained and advocated by many of our leading statesmen and jurists, (see Mr. Horace Binney's Treatise on "The Privilege of the Writ of Habeas Corpus under the Constitution,") that the President, as Chief Executive and independently of any authority from Congress, has the power to suspend the writ of *habeas corpus*. This power the President had previously exercised in his proclamation of September 24, 1862, in suspending the writ in respect to all persons arrested or imprisoned by military authority, or by the sentence of any court-martial or military commission.

arrested; such arrests being enjoined upon "all marshals, deputy marshals, military officers, and police authorities;" and it was further added: "*The writ of habeas corpus is hereby suspended in respect to all persons so arrested and detained, and in respect to all persons arrested for disloyal practices.*" So where a United States marshal had made an arrest of a party guilty of disloyal practices, and, to a writ of *habeas corpus* served upon him in behalf of such party, had duly returned that he held him under the authority of the President, setting forth the fact of the said order; *advised*, in case an attempt was thereupon made to rescue the prisoner, that it was the duty and right of the marshal to appeal for aid and protection to the military force in the vicinity; that he was entitled to be supported by the physical power of the government against any such attempts. I, 348, 347.

2. By the act of March 3, 1863, ch. 75, sec. 1, Congress authorized the President, whenever during the rebellion the public safety, in his judgment, required it, "to suspend the privilege of the writ of *habeas corpus* in any case throughout the United States, or any part thereof." *Recommended* to the President, *(prior* to his proclamation of September 15, 1863, suspending the privilege of the writ, generally, in certain cases, in pursuance of the act,) that he suspend the writ in the following special cases of parties arrested by the military authorities:

In the case of a most active and audacious offender, in open hostility to the government, and engaged in discouraging enlistments. I, 345.

In the case of one detected in treasonable correspondence with the enemy, and shown to be a dangerous character, alike from his ability and his intense and active disloyalty. II, 174.

In the case of one who had been largely engaged in dealing in "confederate" notes and securities, in acting as the banker and financial agent for southern rebels, and in carrying on a disloyal and treasonable correspondence with the latter, and who had also been a notorious sympathizer with the rebellion. II, 456.

In the case of a citizen of Pennsylvania, of good social position and influence, and unusual intelligence, who, upon the invasion of that State in September, 1862, by the rebels, joined them, and rendered them efficient service as a guide, and in furnishing them valuable information as to the roads and the country. III, 72.

In the case of a citizen of Baltimore, arrested while swimming the Potomac for the purpose of joining the enemy and engaging in overt acts of treason and rebellion, suspension of the writ recommended till he should enter into a sufficient bond to refrain from any similar act or attempt in the future. III, 255.

3. So *advised* (April, 1863) that in *all cases* where, from ignorance of duty or from disloyal sympathies, judges were found who persisted in issuing writs of *habeas corpus* with a view to the discharge of soldiers held in military custody, charged with military crimes, the privilege of the writ should be suspended by the President under the act of March 3, 1863; that, this having been done, the officer having the offender in custody in any case should refuse obedience to the writ, and should be supported, if necessary, by the military power of the

government in such refusal; that he should simply make a return showing that the soldier was held by the authority of the United States, under a charge of a military offence, and stating that the writ of *habeas corpus* had been suspended in his case by the President. II, 190.

4. Under the President's proclamation of September 15, 1863, suspending the privilege of the writ of *habeas corpus* in cases of persons held in military custody for military offences, *any* judge, federal as well as State, would be obliged to dismiss an application made for the writ in behalf of such parties. XV, 157.

5. Independently of any Executive proclamation suspending the writ, a *State court* can have no jurisdiction of the case of a party held in military custody under the authority of the United States, and no right whatever to discharge such party upon *habeas corpus*. It may issue the writ in the first instance, but when duly apprised by the return thereto that the party is so held, it can proceed no further, and must at once dismiss the writ. (See *Ableman* vs. *Booth*, 21 Howard, 506.)† So where a writ of *habeas corpus* was issued by a judge of the State of New York, in the case of a party held in military custody for trial by military commission for the crime of attempting, in aid of the rebellion and in violation of the laws of war, to burn the city of New York, in conjunction with Kennedy and others, in the winter of 1864; *advised* that it was the duty of the officer upon whom the writ was served simply to return that the prisoner was held by the authority of the President of the United States under these circumstances and for the purpose of such trial, and to decline altogether to produce the body of the prisoner in court, on the ground that upon these facts the case was wholly beyond its jurisdiction. XXI, 92. And so *advised* in the case of a party held by the military authorities in Missouri upon a charge of burning steamers on the Mississippi river in aid of the rebellion. XXI, 133. So *advised*, also, (October, 1865,) in the cases of a dismissed officer and of a discharged soldier held

†NOTE.—The principle of the judgment of the United States Supreme Court in the leading case of *Ableman* vs. *Booth*, and the application of that principle to cases of *military* arrests, are ably set forth in the following extract from an opinion (of March 18, 1867) by Judge Daly, of the New York court of common pleas, in the case of George Reilly, as contained in General Butterfield's pamphlet on "The Writ of Habeas Corpus as Affecting the United States Army and Navy:"—"The decision of the Supreme Court of the United States in *Ableman* vs. *Booth*, 21 How. U. S. R., 506, has put an end to the claim of the courts or judicial officers of the States to entertain jurisdiction of, and to set at liberty, persons who are in the custody or held under the control of officers acting under the authority of the government of the United States. This decision holds, in substance, that there is within the territorial limits of every State two sovereignties—the government of the United States and the government of the State; that when a State judge or court is judicially apprised that the person claiming to be discharged is in custody under the authority of the United States, they can proceed no further; that they then know that he is within the dominion and jurisdiction of another government, and that neither the writ of *habeas corpus*, nor any process issued under State authority, can pass over the line of division of the two sovereignties. He is within the dominion and exclusive jurisdiction of the United States, and, if he is wrongfully restrained of his liberty, their judicial tribunals can afford him ample redress. This decision was rendered in a case where a State court claimed the right to discharge upon *habeas corpus* a prisoner in custody of the marshal, under a warrant of commitment from a United States commissioner, and it is argued upon this application that the decision applies only where a person is in custody upon process of a United States court or judicial officer. *The ground upon which the decision of the court was put*, by Chief Justice Taney, with the concurrence, it would appear, of all his associates, *is as applicable to the case of a person held to service in the army, and who is under the control of a military officer, as to one in custody under legal process.*"

for trial by court-martial under sections 1 and 2 of the act of March 2, 1863, chapter 67; and in the case of a government contractor held for trial by court-martial under section 16 of the act of July 17, 1862, chapter 200. XIX. 92.

And in a case of this class, where, after a return had been duly made, showing that the prisoner was detained in military custody by the authority of the United States, the State judge attempted to enforce a process of contempt against the officer making the return, because of his refusing to produce the body of the accused in court; *held* that such attempt was a gross usurpation of power, and should be resisted by such officer, who should be supported in his resistance by such military force as might be necessary. XIX, 305; XXI, 92, 102, 133.

And *held*, in a case of this class, that the fact that the President had, by his proclamation of December 1, 1865, "revoked and annulled" the suspension (by the proclamation of September 15, 1863) of the writ of *habeas corpus* in the State, (in this instance, New York,) in which the prisoner was held by the military authorities, in no way affected the question of the jurisdiction of the State court, or of the duty and right of the officer upon whom the writ of *habeas corpus* was served. XXI, 92.

But *held* that where the writ, in a case of the above class, as in *any* case of a soldier or other person held by military authority, was issued by a judge of a *United States court*, it was the duty of the officer, in making his return, to bring the prisoner into court and to submit thereto the whole question of jurisdiction and discharge, such court being a co-ordinate branch of the same sovereignty as that which held the prisoner. XIX, 377.

6. Where a soldier is arrested on a charge of being a *deserter*, the determination of his case belongs properly to the forum of military law, to whose tribunals he is made directly amenable. No State court is authorized to discharge on *habeas corpus* a soldier arrested and held as a deserter from the army. See II, 34, 190, 484; V, 398. The officer on whom the writ is served must not produce the body of the deserter before the State court; it is his duty merely to make a return of facts showing that the man is an enlisted soldier, held by the authority of the United States as a deserter from its armies. If the State judge, on being duly informed by the return that the soldier is imprisoned or held by such authority, claiming jurisdiction of his person and his crime, still assumes to proceed in the case, either personally against the officer for contempt in not obeying the mandate of the writ, or in favor of the soldier held and for the purpose of enforcing his release, full and adequate protection against such action should be afforded by the military authorities. III, 104.

7. *Held*, (August, 1863,) that a provost marshal, specially required by sec. 7, ch. 75, act of March 3, 1863, "to arrest all deserters," would violate his duty in producing a drafted man, arrested as a deserter from the draft before a State court, which has issued a writ of *habeas corpus* in his case. He should in such case merely make the return prescribed in circular No. 36, issued from the Provost

Marshal General's office, showing the authority by which the prisoner is detained. The State court has no jurisdiction of the question whether the drafted man is *legally held* in the military service. It is enough to exclude that jurisdiction that he *is in fact* so held. III. 457, 578. And *advised* that if the provost marshal were arrested for an alleged contempt in not obeying the mandate to produce the body of the deserter, the arrest should be resisted by military force; and should the judge persist, through a *posse commitatus* in aid of his ministerial officer, in an endeavor to enforce such mandate, *held* that the military authorities would, in time of war, be fully justified in placing him in arrest. III, 502.

8. The fact that the soldier (held to answer to a charge of *desertion*) *enlisted when under eighteen years of age*, furnishes no ground for his discharge upon *habeas corpus* by a State court.† V, 398.

9. As no State court is empowered under any circumstances whatever to discharge from military restraints, upon *habeas corpus*, a soldier duly held in the United States service, it can assume of course, upon such proceeding, no jurisdiction to decide that the *enlistment* under which he is claimed to be duly held is void or invalid, and to release him therefrom. And if it does so assume, its order is not to be obeyed, but is to be resisted; and the particular officer whose duty, is to resist is to be protected and sustained by the military department of the government. Where, however, the writ in behalf of a soldier, sought to be discharged from his enlistment for minority or other cause, is issued from a *United States court*, the officer upon whom it is served is, as in other cases of similar writs issued by such authority, to make full return, produce the soldier in court, and abide by its orders made in the case. XXI, 157. But *held* that a United States judge, upon *habeas corpus*, could not legally discharge a soldier as having been enlisted under age, upon the testimony of his parent that he was so, when it was specifically declared by the soldier in his formal oath of enlistment that he was fully of age; that the provision of the act of February 13, 1862, chapter 25, section 2, to the effect that "the oath of enlistment taken by a recruit shall be conclusive as to his age," was to be regarded as establishing a rule of evidence binding upon all courts. XVIII, 293. *But see

† NOTE.—In the recent case of private John H. Anderson, (reported in General Butterfield's pamphlet on "the Writ of Habeas Corpus as affecting the Unitied States Army and Navy,") Judge Dillon, of the supreme court of Iowa, after stating the general principle, that the soldier, being as a deserter, guilty of a military offence, was amenable to the jurisdiction of a military court only, goes on to hold as follows: "But it is answered, that because of the minority there was no valid enlistment; and if no valid enlistment, there could be no desertion. The reply to this is, that this is a question for the military court. On a charge of desertion, infancy is no defence." He then cites (as according with his own views) the case of Commonwealth *vs.* Gamble, (11 Sergt. & Rawle, 93,) in which it was held by Gibson, J., "that whether the enlistment was valid or not, one under arrest upon a charge of desertion must abide the sentence of a court-martial before he can contest the validity of the enlistment. It appears by the return to the writ of *habeas corpus*, that he (the applicant for the writ) is in confinement on the charge of desertion from his post; and the law is clear that he must abide the sentence of a court-martial before he can contest the validity of the enlistment. There would be an end of all safety if a minor could insinuate himself into an army, and after having perhaps jeoparded its very existence by betraying its secrets to the enemy, escape military punishment by claiming the privileges of infancy." Judge Dillon therefore concludes, in the case, that the "return of the respondent, that he holds the prisoner for the crime of desertion, and that he is now awaiting his trial before a court-martial, is sufficient."

ENLISTMENT, II, 2, with extract from the recent decision of United States District Judge Blatchford, in the case of John Riley; in which it is held that the authority to discharge soldiers from their enlistment on account of minority has been, by the legislation of 1864 on the subject, transferred from the courts to the Secretary of War. So that even a United States court would not now be empowered, upon *habeas corpus*, to decree the discharge of a minor soldier. (And see also, in this connection, the recent act of February 5, 1867, ch. 28; which, though enlarging the authority of the courts of the United States to grant writs of *habeas corpus*, concludes with the following proviso :—"This act shall not apply to the case of any person who is or may be held in the custody of the military authorities of the United States, charged with any military offence, or with having aided or abetted rebellion against the government of the United States prior to the passage of this act.")

10. *Held*, (October, 1865,) that upon *habeas corpus* for the discharge of a soldier, a civil judge was not competent to decide that the war was ended, and on that ground to order a discharge. XVIII, 293. (See the recent opinion of Judge Treat, United States district judge for the district of Missouri, in the case of *ex parte Parks*, a military prisoner sought to be released upon *habeas corpus*. Referring to the question of the competency of a court to determine, at this juncture, that the war no longer exists, he says: "It has been uniformly decided that the judicial must, in such matters, follow the political department; that as courts are not clothed with power to declare war or conclude peace, they must take the *legal fact*, the *status* as to war or peace, from the only department authorized to determine it." * * * "So now, in the absence of any counter proclamation" (to the proclamation of August 16, 1861, by which a state of insurrection and civil war was recognized and declared to exist) "by the President, or action by Congress, declaring the civil war completely at an end, and the peace *status* fully restored, courts must simply hold that, in a legal sense, the war is not yet at an end; that the country is *in bello nondum cessante*."

SEE DESERTER, (26.)
VIOLATION OF THE LAWS OF WAR, (3.)

HOMICIDE.

SEE MANSLAUGHTER.
MILITARY COMMISSION, II, (20;) IV, (6.)
MURDER.

HONORABLE DISCHARGE.

SEE NINETY-FIRST ARTICLE, (3.)
ARTIFICIAL LIMBS, (2.)
BOUNTY, (2,) (3,) (4,) (5,) (6,) (7,) (8.)
COURT-MARTIAL, I, (7.)
DISCHARGE, (1,) (3,) (4,) (5.)
DISMISSAL, II, (3)
EXTRA PAY, (3.)
PARDONING POWER, (6.)
PAY AND ALLOWANCES, (17,) (36.)
REMOVAL OF DISABILITY, (4.)
SENTENCE, I, (13.)
VETERAN VOLUNTEER, (2,) (3.)

HOSTAGE.

Where two of our soldiers were treacherously captured, as well as fired upon and robbed, by eight of the enemy, by means of a pretended flag of truce, *held* that the act was one of marked atrocity, and that the government might well resort to the seizing of hostages, as a means known to civilized warfare, to compel the surrender of our soldiers as well as of the criminals who committed the act. So, when ten disloyal citizens had been seized as hostages for the two soldiers and the eight traitors who were engaged in their capture, &c., and the two captives had afterwards been given up by the enemy, *recommended*, (June, 1864,) that two of the hostages be discharged, but that these should not be the fathers or relatives of any of the criminals still at large; and further, that (such relatives, &c., being excluded) the two oldest and least noted for disloyalty should be chosen. IX, 210.

See PRISONER OF WAR, (5.)

HOURS OF SESSION OF COURT-MARTIAL.

See SEVENTY-FIFTH ARTICLE, (2,) (3.)
RECORD, IV, (20.)

I.

IMPRISONMENT.

See THIRTY-THIRD ARTICLE, (1.)
FORTY-FIFTH ARTICLE, (5,) (7.)
PAROLE, (6.)
PENITENTIARY, I, II, III.
PUNISHMENT, (12,) (15,) (16,) (18,) (22,) (25.)
SENTENCE, I, (9,) (10,) (11,) (12,) (13,) (14;) II, (9,) (11,) (15;) III, (1,) (2,) (3,) (4,) (6,) (15,) (19,) (21.)

INFAMY.

See BOUNTY, (3.)
DESERTER, (24.)
WITNESS, (24.)

INSANITY.

In capital cases, where the defence of insanity has been set up, and the evidence in support of it has consisted in eccentricities of character and numerous acts and appearances, extending back for a period

of years, which might justly be considered strange and peculiar for one in the full enjoyment of his mental faculties, it has been the custom of the President (Mr. Lincoln) to refer the case for examination and report to a medical expert, before finally acting upon it. VI, 125; V, 397; VIII, 202

SEE MURDER, (8.)

INSPECTOR.

SEE BAIL.
CHARGE, (12.)
MILITARY COMMISSION, II, (10.)

INTEREST.

*It is a general rule, founded upon sound principles, and uniformly adhered to in the administration of the government, that the executive departments neither allow nor charge interest to parties in account with the United States, except by virtue of express agreement, or in pursuance of some special provision of law. XXI, 564.

INTERPRETER.

1. That a member of the court acted as interpreter upon a trial—*held* not to have affected the validity of the proceedings. IX, 15.

2. Where the charges against a private soldier were preferred by the captain of his company, who also acted not only as prosecuting witness, but as sworn interpreter, on the trial—*held* a grave irregularity which might well be regarded as invalidating the proceedings. VII, 562.

SEE CLERK, (3.)

INVALID CORPS.

Held that there was nothing in the law or orders under which the "invalid corps" was constituted to preclude the officers of that corps being detailed as members of a court-martial. The circular of August 7, 1863, from the Provost Marshal General's office, which provides that they shall not be detached on special duty from their companies, evidently intends only to prohibit their being separated from the invalid corps, *as such*. IV, 457.

SEE NINETY-SEVENTH ARTICLE, (5,) (8.)

INVENTOR.

SEE CLAIMS, I, (13.)
COMPENSATION, II, (1.)
CONTRACT WITH THE GOVERNMENT, (2.)

J.

JOINDER.

1. No legal objection exists, when two or more persons have concurred in the commission of a military offence, to joining them in the charges, specifications, and trial, though the practice has been to try but one case at a time. V, 479.

2. Two or more accused cannot properly be joined in the charges and trial, except where the offence was committed jointly, or with some concert of action or common intent. The mere fact of their committing the same offence, (as an absence without leave,) together and at the same time, although material as going to show concert, does not necessarily establish it. XII, 439. **Held* that a trial of a number of soldiers upon a joint charge of absence without leave, the specification not alleging and the proof not disclosing any circumstances going to establish concert or combination, was irregular and improper, and that the proceedings should be disapproved. XXIV, 468.

3. Where to a joint charge of "mutiny" against several soldiers, there was added a second joint charge of a "disobedience of orders," growing out of the same facts as those which were alleged to constitute the mutiny—*held*, that this second charge might properly be stricken out as surplusage, inasmuch as the joint disobedience, if proved, would itself be mutiny, and the lesser offence be thus merged in the greater. XV, 441.

JUDGE ADVOCATE.

* 1. As to the relations between the judge advocate and accused, it is only specified in the 69th article of war that the judge advocate "shall so far consider himself as counsel for the prisoner, after the said prisoner shall have made his plea, as to object to any leading question to any of the witnesses, or any question to the prisoner, the answer to which might tend to criminate himself." But justice and the best practice do not restrict the judge advocate to this mere statutory obligation. When the accused is ignorant or inexperienced and without counsel—especially when he is an enlisted man—it is deemed to be the duty of the judge advocate to take care, generally, that the accused 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 defence as may best bring out the facts, the merits, or the extenuating circumstances of his case. For the judge advocate to counsel the accused (a soldier) to plead guilty is ordinarily improper and a thing not to be done. But where such plea is voluntarily and intelligently made, the judge advocate should still

inform the accused of his right to offer evidence in explanation or extenuation of his offence, and, if any such evidence exists, should assist him in securing it. (See PLEA, 2, 3, 4.) 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. See V, 577.

* 2. A judge advocate, in connection with his argument at the close of a trial, read to the court certain papers not introduced in evidence, which appeared to exhibit false statements of the accused in connection with the matter of his alleged offence. The judge advocate disclaimed employing such statements as evidence, but so commented upon them, as illustrating the offence, as practically to use them as evidence of guilt. No opportunity was afforded the accused to examine the papers, or to rebut or explain the statements. He interposed, however, a protest to their introduction, which was entered upon the record. *Held* that the proceeding of the judge advocate was a grave irregularity, and a clear violation of the rights of the accused; and—as it distinctly appeared that the court must have been influenced in their findings by the papers thus improperly laid before them—*advised* that their sentence be remitted. XXII, 238.

3. It is the duty of the judge advocate to see that the charges and specifications are technically accurate; and previous to the arraignment he may make formal amendments therein, or even substitute a new set where the originals are so faultily drawn as to make it proper. Amendments as to *substance* may also be made, subject to the condition that, if the pleadings originally served upon the accused are materially modified, he may thus become fairly entitled to have further time granted him to prepare his plea or defence. SEE CHARGE, 23; II, 60.

4. The position and duties of judge advocate are regarded as incompatible with those of a *member* of the court-martial on which he has been detailed. It is clear that the blending of these two characters is forbidden by principle and unsanctioned in usage, and would be in derogation of the rights of the party on trial. II, 60.

* 5. By the order of the reviewing authority a general court-martial was convened, after judgment. for the correction of its sentence as being indefinite; and it was added in the order: "Should the judge advocate be prevented from attending, the junior member of the court will act in his stead." The court thereupon reassembled, and—the judge advocate being absent—the junior member acted as such, and certified as such the proceedings and the final (corrected) sentence. *Held*, that the proceedings upon the reassembling of the court were void in law. A junior member of a military court cannot, as such, act as judge advocate; the province of the judge advocate, who is the prosecuting officer of the government, being incompatible with that of a member whose duties are judicial. Being incompetent while remaining a member to act as such, it is clear that he could not legally so act except upon orders which, while fully detaching him from the court, should formally substitute him in the place of the original judge advocate, who was as formally relieved. But in this

case the order did not detach the junior member from the court, but merely directed that as such member he should act in the place of the proper judge advocate and in his absence. Nor did it relieve the latter by any form known to military law, but left him still the only duly constituted judge advocate of the tribunal, on account of whose anticipated possible absence only a temporary provision was made. XXI, 300.

6. The court has no power to order or authorize its junior member to act as judge advocate upon a trial in place of the judge advocate originally detailed, but who has been relieved without a successor being appointed in his place by the proper authority. VII, 246.

7. A judge advocate cannot be appointed by the court; and in a case where one is so appointed and acts temporarily, the proceedings are irregular and the sentence void. IV, 26.

8. The judge advocate appointed by the order convening the court, unless relieved by an order which appears on the record, is the only judge advocate who can properly authenticate the proceedings or certify the sentence pronounced. Until such judge advocate is so relieved, an order appointing another officer judge advocate is inoperative, and no sentence certified by that officer can be enforced. II, 148.

9. It is at all times competent for the officer convening a general court-martial to relieve the judge advocate first detailed and to substitute another in his place. This course, however, especially when resorted to pending a trial, tends to embarrass the prosecution, and should not be pursued except in extreme cases. VII, 534; V, 550.

10. A military commander competent to convene military courts has no authority in law or usage to appoint by a single order an officer to act as judge advocate of all the courts to be held in the command. 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 must be detailed anew for every court-martial on which he acts. II, 54; XVI, 429. See XIII, 238.

11. *Held* that an officer detailed as "acting judge advocate" on a division staff had no authority, as such, to take any part in the proceedings of a court-martial for which a regular judge advocate had been formally detailed and was acting. V, 140.

12. While there is no law or army regulation precluding the appointment of judge advocates from civil life, the usage of the service and of the government is opposed to the employment of civil judge advocates, except in special cases requiring in the prosecuting officer such legal knowledge and experience as are not often found in a military man. (See COMPENSATION, I, 5.) But in such cases one of the corps of Judge Advocates of the regular army would now generally be selected. See III, 536; XVI, 565; XX, 507.

13. For the president of a court to order the judge advocate under arrest, is an exercise of power unwarranted and wholly without example in the military service. III, 603.

14. The judge advocate of a military court who is at his own request affirmed, instead of being sworn, is legally qualified to perform his duties. II, 562.

15. There is no law against the appointment of a surgeon as a judge advocate, but the usage of the service is opposed to it. IX, 377. See SURGEON.

16. Where a judge advocate dies or is disabled pending a trial, another may be appointed in his stead; but where he dies after the conclusion of the trial, and before authenticating the proceedings and certifying the sentence, the record cannot be completed by the signature of his successor, and the sentence is inoperative. IX, 110.

17. The refusal of a judge advocate to communicate to the court for its consideration an order transmitted to him from the Secretary of War, requiring him to enter a *nolle prosequi* in a certain case, *held* unwarrantable, and an act of insubordination. IX, 488. See NOLLE PROSEQUI.

18. *Held* to be a part of the duty of a judge advocate of a department or army in the field to cause to be corrected, as far as practicable, all errors and irregularities in the records of military courts which come into his hands for review and transmission, by forthwith calling attention to such errors, &c., on the part of commanders, who have acted upon and forwarded the proceedings. XI, 154.

19. Where a judge advocate of a department appointed one chief reporter for all the cases to be tried therein, and assigned to him all the phonographic reporting for such department, with power to select his assistants and receive commissions from them; *held*, that such proceeding was unauthorized and improper. XI, 361.

20. There is no law or regulation precluding a judge advocate from being a witness; but an officer likely to become a witness in any case to be tried before a military court should not, if it can be avoided, be detailed as the judge advocate of such court. If, however, a judge advocate becomes 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. XXI, 177.

21. An absence of the judge advocate from the court during the trial does not *per se* invalidate the proceedings, but is, of course, to be avoided, if possible. During his absence pending the examination of a witness, such examination may proceed, the members of the court, if necessary, putting questions, and the clerk recording these and the answers. But, as a general rule, when the judge advocate is obliged to temporarily absent himself, the court should suspend the proceedings for the time; or, if his absence is to be prolonged, should adjourn for a certain period. XXI, 177.

22. A judge advocate is entitled to the compensation mentioned in paragraph 1138 of the Regulations, only when attached to a general court-martial for which he has been duly detailed. VIII, 313. And a judge advocate is not, *as such*, entitled to any further compensation than as provided in paragraphs 1137 and 1138 of the Army Regulations. XVI, 213. See COMPENSATION, I.

* 23. It is strictly the more 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 are generally 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. XXVI, 251.

* 24. It is no part of the duty of the judge advocate to put to the court the question whether an objection to testimony or to an interrogatory shall be sustained. It is for the presiding officer of the court to seek and obtain the opinion of the court upon such question. XXVI, 216.

* 25. It is the general rule of the service, (see paragraph 114 of the Army Regulations,) that an officer when on duty as such shall wear his uniform, and it is conceived that a court-martial may ordinarily properly require its judge advocate to wear, at its sessions, the dress and accoutrements appropriate to his rank. The application, however, of this rule to that officer is often dispensed with, and it is rare that an objection is raised when a judge advocate, who, in the performance of his duty in regulating the routine and machinery of the court, must find it convenient to be unincumbered in his dress, does not appear before the court fully uniformed. When, indeed, he does wear during the proceedings a dress other than the prescribed military one, it may be presumed that he does so with the assent of the court, an assent which is, in fact, sometimes formally asked and given upon the first assembling of the detail. If, however, a judge advocate is actually directed by the court to wear his proper uniform in its presence, and does not comply, he is not liable to arrest by order of the court, its power to proceed in cases of contempt and disorders of that nature being limited to the instances specified in the 76th article of war. Its only proper course, if it desires to pursue the subject, is to refer the matter to the convening authority for such action as he may see fit, in his discretion, to take. XXI, 629.

SEE SIXTY-SIXTH ARTICLE, (11,) (12,) (13,) (14,) (15.)
SIXTY-NINTH ARTICLE, (1.)
SEVENTY-FIRST ARTICLE, (9.)
ACCUSER AND PROSECUTOR, (4.)
ADJOURNMENT, (1.)
CHARGE, (15.)
COMPENSATION, I.
COUNSEL, II.
COURT-MARTIAL, I, (2.)
FIELD OFFICER'S COURT, (15.)
MILEAGE, (2.)
MILITARY COMMISSION, I, (7,) (8,) (12.)
NOLLE PROSEQUI.
ORDER, II.
RECORD, I, (5;) IV, (4,) (17;) V, (1.)
RECORDER.
RIGHT TO BE LAST HEARD, &c.
SWEARING THE COURT, &c.
WITNESS, (1,) (4,) (5,) (7,) (9,) (15,) (20.)

JURISDICTION.

* 1. It is a general principle that an officer or soldier whose proper term of military service has expired is, except in the cases specially provided for by statute, (as cases of desertion by enlisted men—see DESERTER, 22—and cases of the frauds and other offences set forth in the act of March 2, 1863, chap. 67, sec. 1,) beyond the jurisdiction of a military court as to offences committed while in the service. But to this rule there is an exception in a case where a prosecution has been formally commenced against the officer or soldier before the expiration of his term; as by an arrest or by the service of charges upon him, with a view to his trial. In such case the jurisdiction attaches, although the term may expire before a trial can be entered upon. In a leading case, reported in 3 American Jurist, 281—that of *William Walker*, a seaman in the navy—it was held by the supreme court of Massachusetts (January 25, 1830) as follows: "In this case the petitioner was arrested, or put in confinement, and charges were preferred against him to the Secretary of the Navy before the expiration of the time of his enlistment; and this was clearly a sufficient commencement of the prosecution to authorize a court-martial to proceed to trial and sentence, notwithstanding the time of service had expired before the court-martial had been convened." And, to illustrate the fatal consequences of an opposite ruling, the court goes on to remark that if any of the class of offences "not punishable at common law," and "of which no other courts, excepting courts-martial, can take cognizance, should be committed by any seaman immediately before the expiration of his term of service, he would escape with impunity. He might be guilty of the grossest insults to his officers; of disobedience of orders in the most critical moment to the ship; and in the hour of battle he might refuse to fight, and there would be no power to punish him." So *held* by this Bureau 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 his trial for a military offence by court-martial, that the jurisdiction of the court had duly attached, and that his trial might legally be proceeded with. XXVI, 512. (See, also, Benét, page 36.) For cases in which, where officers have procured themselves to be discharged by means of fraud or deceit practiced upon the authorities of the government, the order of discharge has been revoked, and the party has been brought to trial for an offence committed while in the service, see MUSTER OUT, 4, 5, 6.

2. A military court has no jurisdiction to try a soldier after he is out of the service for any of the crimes enumerated in sec. 30, chap. 75, of the act of March 3, 1863, committed by him while in the service. XXI, 37; XIX, 64. But officers and soldiers of volunteers remain liable to trial and punishment for military offences, although their terms of service have expired, if they have not yet been formally mustered out. XIV, 229. And see XII, 352.

3. There can be no doubt of the constitutionality of the enactment

of sec. 30, chap. 75, act of March 3, 1863, extending the jurisdiction of military courts over certain cases of felony. V, 559.

4. *Held*, that the jurisdiction conferred by sec. 30, chap. 75, act of March 3, 1863, upon military courts in time of war, &c., to pass upon cases of the crimes therein specified, when committed by persons in the military service, was *exclusive*. It was the manifest purpose of the act to make the crimes therein mentioned military crimes, and triable by military courts, when committed anywhere in the United States, in time of war, insurrection, or rebellion, by persons in the military service of the United States and subject to the articles of war. The highest interests of the military service, as well as of the public at large, demand the prompt and summary punishment of these offences when perpetrated under the circumstances mentioned; and this consideration doubtless controlled Congress in transferring the jurisdiction from the civil to the military courts. To accomplish, therefore, the leading object of the law, as well as to prevent any conflict between the civil and military authority, it should be held that the jurisdiction thus conferred is *exclusive*. It follows that a trial for one of the crimes named, before a general court-martial or military commission, whether resulting in an acquittal or a conviction, would be a bar to any subsequent prosecution for the same offence. See II, 146; III, 252; VII, 248, 539; XVIII, 449; XIX, 306; XXIV, 160. And in any case where a person in the military service is held in custody by the civil authorities, charged with one of the crimes mentioned in this section, the governor of the State in which the prisoner is confined should be called upon to deliver him up to the military authorities for trial by a military court, he being entitled to such a disposition under the provisions of the act. Requests of this character have frequently been addressed by the Secretary of War to governors of States, and, except in a single instance, (so far as the knowledge of this Bureau extends,) have been favorably entertained, and at once acceded to. X, 651. See XI, 607.

5. The military jurisdiction conferred by the act of March 3, 1863, ch. 75, sec. 30, being *exclusive*, the soldier, &c., cannot legally waive it and submit himself to trial by an ordinary criminal court. XVII, 3. And the fact that a crime specified in this section was committed by a soldier after a desertion, and while he was absent from his regiment, cannot affect the question of jurisdiction, for he was still in the military service and amenable to military law. X, 651.

6. *Held*, (November, 1855,) that in the cases of the crimes enumerated in sec. 30, chap. 75, act of March 3, 1863, the military court could not be ousted of its jurisdiction, on the ground that a "*time of war and rebellion*" no longer existed; the political authority of the country not having yet terminated the rebellion by the proper statutory or other official declaration. XXI, 17. See HABEAS CORPUS, 10.

7. The United States courts have no jurisdiction of the crime of larceny, except as conferred by the act of April 30, 1790, sec. 16, where the crime is committed in a place under the sole and exclusive jurisdiction of the United States, or on the high seas; or, as conferred by act of March 3, 1825, sec. 3, when committed in a fort, dock-yard,

or other place, whereof the site has been ceded to the United States, and which is under their jurisdiction, though that jurisdiction may not be exclusive. VIII, 658. See XVI, 630.

* 8. If a crime, not cognizable by military law, be committed by an officer or soldier at a military reservation over which the State courts have *concurrent* jurisdiction with those of the United States, the soldier should be surrendered, upon a proper formal application being made for the purpose to the civil authorities for trial. (See DEPARTMENT COMMANDER, 6.) If the jurisdiction is *exclusive* in the United States, he should (upon such application) be surrendered to the United States marshal for trial by the United States district court. XXIV, 18.

* 9. Where the jurisdiction of the United States is *exclusive* over any military post, or other place or territory, it is clear that no local civil official can lawfully serve a warrant upon an officer or soldier within its limits. XXI, 567. See THIRTY-THIRD ARTICLE, 5.

10. Section 24, of chap. 75, of act of March 3, 1863, providing a punishment for the offence of aiding soldiers to desert, &c., applies only to "persons not subject to the rules and articles of war" at the time of the commission of the offence. Where, therefore, such offence was committed by a volunteer officer, against whom, however, no proceedings were commenced while he was in the service, but who was suffered to be mustered out without an attempt to bring him to trial therefor—*held* (December, 1864) that under the present state of the law, which in this respect certainly requires amendment, he could not be prosecuted for such offence, the ordinary criminal courts having no jurisdiction of the case, and that of the military courts having lapsed by reason of his discharge. XIII, 108. See XIV, 414.

11. An army contractor once tried by a general court-martial under the provisions of the act of July 17, 1862, chapter 200, section 16, is not thereafter amenable to a trial for the same offence by a civil court. XIX, 136.

12. Military cases will ordinarily be tried near the *locus* of the offence, or where witnesses may most readily be assembled; but the jurisdiction of a military court is coextensive with the limits of the federal domain. (See COURT MARTIAL, II, 16.) Thus a deserter from one army in the field may be tried by a court assembled in another army; and his case is to be reviewed and acted upon by the same authority and in the same manner as if he were a soldier of the army in which the court is convened. XI, 351.

13. Military courts have no power whatever to pass upon questions of title, indebtedness, &c., arising in controversies between citizens. XIX, 41.

14. A sutler at Fort Ridgley, Minnesota, to whom had been issued by an apparent inadvertence a patent for the very land upon which the fort was erected, insured against fire certain permanent buildings of the fort, and the same having been destroyed, received the amount of his policy from the insurance company, and appropriated it to his own use. *Advised* that he could not be held to have committed an offence within the jurisdiction of a military court. XVI, 53.

15. The Supreme Court of the United States has no power, either by virtue of its original or its appellate jurisdiction, to revise the proceedings of a military court, upon *habeas corpus*, *certiorari*, writ of error, or otherwise. The *original* jurisdiction of the court as expressly limited by the 3d article of the Constitution, clearly cannot extend to such revision. The *appellate* jurisdiction of the court is restricted, as declared in its repeated decisions, to a revision of the judgment or proceedings of those tribunals over which, and in respect to which, the laws of Congress have given it control. But a control over the judgment or proceedings of military courts has not been given it either by the general judiciary act of 1789, or by any subsequent statute. Moreover, courts-martial and military commissions, though acting under or by color of the authority of the United States, do not exercise any part of the "judicial power" of the United States in the sense of the Constitution; and from their very nature, therefore, their judgments are beyond the review of any superior tribunal. The opinion of the United States Supreme Court in the case of *Dynes* vs. *Hoover* (20 Howard, 65) clearly declares and settles the point that the trial and punishment of military offences is a power under the Constitution which has no connection whatever with the "judicial power" of the United States, but is entirely independent of it. The source, indeed, from which military courts derive their authority is not the *judicial*, but the WAR POWER of the government. Of this these courts are appropriate instrumentalities, and, like the army itself, are necessary to its efficient exercise; and a federal court has no more right to revise the proceedings of such tribunals than it would have to revise the programme of a campaign, or the orders of a general commanding troops in the field. *Held*, therefore, that the United States Supreme Court had no authority to review by *certiorari* the proceedings of the military commission by which Vallandigham was tried and sentenced. *(Extract from the return of the Judge Advocate General to the writ of certiorari in the case of Ex parte Vallandigham. And see the concurrent opinion of the United States Supreme Court in that case, reported in* 1 *Wallace*, 243.)†

† NOTE.—Since the date of the proceeding in the case of Vallandigham, and of the judgment of the Supreme Court therein, the same tribunal has determined the case of *Ex parte Milligan*, (4 Wallace, 2—December Term, 1866,) on *habeas corpus;* in which, under the provisions of the act of March 3, 1863, it decided that the petitioner was entitled to be discharged from a confinement imposed upon him by a military commission, the proceedings of which it, at the same time, declared to be, upon general grounds, unauthorized and void. Since that decision, however, Congress has, by positive and emphatic legislation, prohibited the courts of the United States from reversing or reviewing the proceedings of military courts; thus sustaining the views heretofore expressed by this Bureau in regard to the independent character of these tribunals. This legislation is as follows: 1. The act of February 5, 1867, ch. 28, enlarging the authority of the courts of the United States to grant writs of *habeas corpus*, and of the United States Supreme Court to entertain writs of error; which concludes with the following provision: "This act shall not apply to the case of any person who is or may be held in the custody of the military authorities of the United States, charged with any military offence, or with having aided or abetted rebellion against the government of the United States prior to the passage of this act." 2. The act of March 2, 1867, ch. 155, entitled "An act to declare valid and conclusive certain proclamations of the President, and acts done in pursuance thereof, or of his orders, in the suppression of the late rebellion against the United States." This statute provides as follows: "That all acts, proclamations, and orders of the President of the United States, or acts done by his authority or approval after the 4th of March, Anno Domini 1861, and before the 1st day of July, Anno Domini 1866, respecting martial law, military trials by courts-martial or military com-

(For jurisdiction—specially—of general courts-martial, military commissions, regimental or garrison courts-martial, field officer's courts, and provost courts, see COURT-MARTIAL, II; MILITARY COMMISSION, II, III, IV; SIXTY-SEVENTH ARTICLE; FIELD OFFICER'S COURT; and PROVOST JUDGE OR COURT—respectively.)

SEE HABEAS CORPUS.
MILITARY RESERVATION.
WITNESS, (17.)

L.

LARCENY.

The term "theft" expresses the crime of "larceny," and should be accepted as a substantial and accurate averment of the offence enumerated in the 30th section of the act of March 3, 1863. III, 461.

SEE THIRTY-THIRD ARTICLE, (3.)
SIXTY-SEVENTH ARTICLE, (3.)
NINETY-NINTH ARTICLE, (3.)
ARREST, II, (6.)
FIELD OFFICER'S COURT, (25.)
JURISDICTION, (7.)
PARDON, (9.)
PUNISHMENT, (3.)
STOPPAGE, (3.)

LAWFUL COMMAND.

SEE NINTH ARTICLE, (6.)
MUTINOUS CONDUCT.
PLEA, (9.)

LEAVE OF ABSENCE.

SEE SUSPENSION, (1,) (2.)

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missions, or the arrest, imprisonment, and trial of persons charged with participation in the late rebellion against the United States, or as aiders or abettors thereof, or as guilty of any disloyal practice in aid thereof, or of any violation of the laws or usages of war, or of affording aid and comfort to rebels against the authority of the United States, and all proceedings and acts done or had by courts-martial or military commissions, or arrests and imprisonments made in the premises by any person by the authority of the orders or proclamations of the President, made as aforesaid, or in aid thereof, are hereby approved in all respects, legalized and made valid, to the same extent and with the same effect as if said orders and proclamations had been issued and made, and said arrests, imprisonments, proceedings and acts had been done under the previous express authority and direction of the Congress of the United States, and in pursuance of a law thereof previously enacted and expressly authorizing and directing the same to be done. *And no civil court of the United States, or of any State, or of the District of Columbia, or of any district or territory of the United States, shall have or take jurisdiction of, or in any manner reverse any of the proceedings had or acts done as aforesaid.*"

LESSER KINDRED OFFENCE.

1. *Held*, that under a charge of "*desertion*" an accused could not properly be found guilty of "*having broken guard*" as a lesser kindred offence. I, 495.

2. Where, in the case of a rebel soldier convicted of being a spy and sentenced to be shot, but the execution of whose sentence had been suspended to await the action of the President, it was apparent, upon a review of the testimony, that the *gravamen* of the specific crime charged—the intent to gain information—was not made out, but that the offence of *secretly penetrating our lines and lurking within them* was fully established; *held*, that such offence was really a kindred offence, of lesser degree to that of being a spy, and bore the same relation to it as the offence of absence without leave to that of desertion; that the accused might well be deemed to have been tried upon the less, together with the graver offence, upon the same arraignment, and that, therefore, the President might legally commute the penalty adjudged the accused, upon conviction of the offence not technically made out in the testimony, to a punishment appropriate for the lesser kindred offence actually proved to have been committed. IX, 585.

3. Under a charge of violating the 52d article of war, to find the accused not guilty, but guilty of "absence without leave," is irregular and invalid, the latter offence not being a lesser kindred offence to any enumerated in that article, but quite another and different offence from any therein set forth. XI, 274. So *held*, for the same reasons, where, under a charge of violation of the 46th article, the finding was not guilty, but guilty of a violation of the 50th article. XI, 276.

* 4. Where a court-martial found an officer, charged with the embezzlement of certain monies by appropriating them to his own use in violation of the 39th article of war, not guilty of the specific charge but guilty of *misapplication* of the funds in question—the evidence showing that the act of the accused was without fraudulent intent—*held*, that such finding might properly be sustained as a conviction of a lesser offence of the same general character as that charged. A distinction between the two offences is distinctly made by the article itself; although, because so high a standard of duty is required of officers intrusted with public funds, both offences are made equally punishable. XXIV, 400.

SEE FINDING, (6,) (27.)

LIMITATION.

SEE EIGHTY-EIGHTH ARTICLE.

LOANING UNITED STATES ARMS.

* Upon an application addressed to the Secretary of War, from a private academy in Virginia, for a loan of United States arms to be used for the drilling and military instruction of the pupils; *advised*,

in view of the fact of the application coming from a district so lately in rebellion against the government, that the same be refused, unless the most satisfactory assurances be furnished both as to the loyalty of the instructors and that of the students. XXII, 499.

LOCAL BOUNTY.

SEE THIRTY-NINTH ARTICLE, (2.)
UNITED STATES AS BAILEE, &c.

LOST RECORD.

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. IX, 238.

2. Where the record of a court-martial was lost before any action was taken upon it by the reviewing officer—*held*, that the proceedings were thus terminated against the accused, unless the court could be reconvened and a new record could be made out from extant original notes of the proceedings, and could be duly authenticated by the signatures of the president and judge advocate. VI, 582. See XIII, 22; XVI, 16; XVIII, 274; XXII, 624.

3. But where the record has been lost *in transitu* to the President, in a case where the execution of the sentence has been suspended to await his action under the 89th article of war, the Pesident cannot review or act upon the proceedings unless, possibly, the history of the case can be supplied from original papers made out by the judge advocate and duly authenticated by him. In the absence of any such, the President would be justified in withholding his approval from the proceedings and declaring the sentence inoperative. VIII, 537. See IX, 677.

* 4. A soldier was arrested and tried for mutiny, but, before the proceedings in his case could be promulgated, the record of his trial was seized by the enemy. He was kept in confinement about two years awaiting sentence, at the end of which time, the record not having been recovered, he was honorably discharged. *Held*, that he was entitled to pay, allowances, and bounty, in the same manner as if no trial had been had. XXII, 624.

SEE SIXTY-FIFTH ARTICLE, (17.)

M.

MAKING GOOD TIME LOST BY DESERTION, &c.

* 1. The requirement of paragraph 158 of the Army Regulations, that "*deserters shall make good the time lost by desertion, unless discharged by competent authority,*" is taken from the provision first found in the act of May 30, 1796, ch. 39, sec. 17, and re-enacted in the successive statutes of March 16, 1802, ch. 9, sec. 18; January 11, 1812, ch. 14, sec. 16; and January 29, 1813, ch. 16, sec. 12; to the effect "*that if any non-commissioned officer, musician, or private shall desert the service of the United States he shall, in addition to the penalties mentioned in the rules and articles of war, be liable to serve for and during such a period as shall, with the time he may have served previous to his desertion, amount to the full term of his enlistment.*" By General Order No. 16 of the War Department, of February 8, 1865, amending paragraph 158 of the Regulations, the provision is extended to the case of "*non-commissioned officers or soldiers who have absented themselves without authority from their companies, regiments, or posts of duty,*" and who are, like deserters, required, "*in fulfilment of their contract of enlistment,*" to "*make good the time lost by reason of their unauthorized absence, upon such absence being found by a court-martial.*"

* 2. As the making good of time lost is not a *punishment* for the *offence* involved in the unauthorized absence, but a *legal obligation* in fulfilment of the *contract* of enlistment which has been violated by the soldier, an executive *pardon* of a deserter can relieve him in no manner from the performance of such obligation. See BOUNTY, 8.

* 3. A soldier was tried upon a *specification* setting forth a desertion to which no *charge* was attached. He pleaded guilty, and was convicted and sentenced by the court; but, in consequence of a defect in the pleadings, the proceedings and sentence were *disapproved*, and he was returned to duty. *Held* that the soldier, not being liable (as a necessary result of these proceedings) to be tried again for the offence, stood exonerated from all the legal responsibility which would otherwise have attached to it; that, though guilty in fact, as avowed by his plea, he was—after his trial and the disapproval of the action of the court—no longer guilty in law, and could not properly be visited with any of the consequences which follow legal guilt; that as the obligation to make good the time lost by the desertion was among these consequences, it was clear that such obligation could not be enforced against the soldier in the present instance. XXVI, 568.

SEE ABSENCE WITHOUT LEAVE, (3.)
ARREST, II, (2.)
DESERTER, (7,) (8,) (9,) (10,) (11,) (12,) (13,) (14.)
PRESIDENT'S PROCLAMATION, III, (1.)
PUNISHMENT, (7,) (8.)

MANSLAUGHTER.

Several soldiers left their camp at night, *in time of war*, without leave and contrary to the most positive orders, and proceeded to a neighboring town, where they created a disturbance. Their commanding officer followed them, found them at an ale-house, and was about to arrest them when they ran from him, though knowing who he was, and, although ordered by him to halt, refused. He repeated his order, and not being obeyed, fired upon them, while fleeing, with his pistol, and shot and killed one of them. *Held*, that his act should have been regarded as a justifiable one, and that his conviction of manslaughter under the circumstances was unwarranted. XI, 592.

* 2. Certain soldiers, having left their quarters without permission on the night of the 1st of January, 1868, went to a drinking saloon in the neighboring town, where their loud talking attracted the attention of a captain and lieutenant of the regiment who were passing the place on their way to their quarters from a supper which had been given in the town. These officers entered the saloon to arrest the men, who, fearing punishment if recognized, ran out upon the street and turned into a dark alley, where they could not be distinguished. The officers followed, and the captain ordered the lieutenant, who had a pistol, to fire into the alley upon the men. The latter obeyed, and the result was that one of the soldiers received a fatal wound from which he presently died. It was claimed by the captain and stated by one witness that the command "halt" was given while the men were running, but no such command appeared to have been audible to the majority of those present. *Advised* that while the lieutenant—though highly culpable—might be regarded as relieved from criminal responsibility by the order of his superior officer, the captain should be brought to trial before a general court-martial for the homicide, under a charge of "manslaughter, to the prejudice of good order and military discipline;" that when it was considered that the sole offence of the deceased was an absence with his comrades from his quarters at a time generally devoted to social gatherings and conviviality, and that he was shot down when seeking only to avoid recognition and to regain his quarters, the act of the captain was perceived to be one of a wanton and criminal disregard of human life, for which the honor of the service demanded he should be brought to trial and punishment. XXV, 592.

See NINETY-NINTH ARTICLE, (25.)
SENTENCE, I, (22.)

MARKING.

See PUNISHMENT, (3.)

MARTIAL LAW.

1. Martial law is defined to be "the will of the general who commands the army;" and its proclamation by the President necessarily invests a general, commanding in a district where it is declared that

it shall prevail, with plenary powers. While its declaration could not properly be referred to as authorizing acts of excess or wanton wrong, it would, at the same time, justify the military commander in summary and stringent measures which, in the absence of martial law, might be deemed extraordinary and oppressive. XII, 105; XIX, 41.

2. In view of the President's proclamation of martial law in the State of Kentucky, *held* (December, 1864) 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 further prosecution by disloyal persons of suits instituted against United States officers for acts done in the line of their duty, originating in a desire to obstruct military operations, and having the effect of embarrassing and oppressing "the constituted authorities of the government of the United States." X, 669; XVI, 279.

3. Where the commanding general reported that the United States district judge at Key West was disloyal and guilty of aiding and abetting the rebellion in facilitating communication between the rebel States and their chief *entrepots* at Nassau, Havana, &c.—*held* (April, 1863) that if, upon investigation, these allegations were ascertained to be well founded, the President would be justified in *declaring martial law* at Key West, and suspending the functions of his court until Congress could have an opportunity of exercising its powers of impeachment and removal. II, 172.

4. *Held* (June, 1865) that although the declaration, by Major General Schenck, of martial law over Baltimore and western Maryland, of June 30, 1863, had never been formally revoked, yet as it appeared from its terms to have had its origin in a military emergency which had passed away, and was indeed in terms confined to the necessities of the occasion, it must be deemed to have become inoperative. XII, 422.

MASSACRE OF INDIANS.

* In June, 1864, Governor Evans, of Colorado, (who was also, *ex officio*, superintendent of Indian affairs,) issued a proclamation addressed to the "friendly Indians of the plains," inviting them to separate themselves from the hostile bands, and to come in to certain military posts, (among which was Fort Lyon, C. T.,) the commanders of which would afford them protection and furnish them with provisions. In response to this invitation, a large body of Indians, principally Cheyennes, assembled in the neighborhood of the Fort mentioned, professing, through their chiefs, (who had been previously noted for their friendly character,) an earnest desire to make a permanent peace. At the same time they voluntarily surrendered several white prisoners, stated to have been purchased from another tribe. Rations were issued to them by the post commander, who assured them of the protection of the United States until such time as the department commander should determine what action should be taken in regard to them. This post commander being presently relieved by

another, the latter assured the Indians that he would fulfil all the pledges made to them by the former, and would protect them till orders were received from the department headquarters, and would then give them due notice of the result. Informing them a few days after that he was unable to issue to them any further supplies, they removed (in November, 1864) by his advice to Sandy Creek, about forty miles from Fort Lyon, and sent out a large number of their able-bodied men for buffalo. On November 29th, their village—about two-thirds of whose population then consisted of women and children—was suddenly attacked by a force of about one thousand Colorado volunteer cavalry, under the colonel commanding the military district of Colorado; their lodges were set on fire and a general massacre of the community ensued. The number destroyed is referred to, (though no doubt with exaggeration,) in the official report of the commander in the following terms: "It may, perhaps, be unnecessary for me to state that I captured no prisoners. Between five and six hundred Indians were left dead upon the field." At the time, these Indians were dwelling in peace and supposed security under the national flag, confiding fully in the national protection and good faith which had been pledged to them, and without apprehension of danger. Their relations to the government were perfectly well known to the commander of the detachment, who however not only permitted them to be slaughtered without distinction of age or sex, but their bodies also to be mutilated under circumstances of the most shocking barbarity.† This officer having been presently after (his term of service having expired) regularly mustered out and so placed beyond the jurisdiction of the military code—*advised* that it was due alike to the honor of the military service and to the character of the nation for civilization and humanity, that the government should acquit itself, as far as was possible, of any responsibility for the acts of this cowardly and remorseless slayer of women and children by announcing in the most public manner its utter condemnation of the crimes thus committed under its flag. *Recommended*, therefore, that a General Order be issued, setting forth briefly the

†NOTE.—The congressional "Committee on the Conduct of the War," in their report of May 4, 1865, describe this "Massacre of Cheyenne Indians" in the follows terms: "And then the scene of murder and barbarity began—men, women, and children were indiscriminately slaughtered. In a few minutes all the Indians were flying over the plain in terror and confusion. A few who endeavored to hide themselves under the bank of the creek were surrounded and shot down in cold blood, offering but feeble resistance. From the sucking babe to the old warrior, all who were overtaken were deliberately murdered. Not content with killing women and children, who were incapable of offering any resistance, the soldiers indulged in acts of barbarity of the most revolting character; such, it is to be hoped, as never before disgraced the acts of men claiming to be civilized. No attempt was made by the officers to restrain the savage cruelty of the men under their command, but they stood by and witnessed these acts without one word of reproof, if they did not incite their commission." Of the leader of the force the committee say: "As to Colonel Chivington, your committee can hardly find fitting terms to describe his conduct. Wearing the uniform of the United States, which should be the emblem of justice and humanity; holding the important position of commander of a military district, and therefore having the honor of the government to that extent in his keeping, he deliberately planned and executed a foul and dastardly massacre which would have disgraced the veriest savage among those who were the victims of his cruelty. Having full knowledge of their friendly character, having himself been instrumental to some extent in placing them in their position of fancied security, he took advantage of their inapprehension and defenceless condition to gratify the worst passions that ever cursed the heart of man."

circumstances of this Massacre, and branding it before the army and the world with the national abhorrence it has inspired; to the end that while the government stands exonerated from its guilt, the infamy they have earned may cleave to its perpetrators everywhere and in all time to come. XVII, 424.

MEMBER OF MILITARY COURT.

*1. The fact that a member of a court-martial is called upon as a witness in a case being tried thereby does not operate in any manner to debar him from the exercise of the duties incident to his membership. He is entitled to take part in all deliberations, including those had in regard to the admissibility of questions put to himself. XXVI, 216.

2. Officers detailed on courts-martial, boards of examination, &c., are not, as a general rule, properly liable, while thus engaged, for the discharge of their ordinary duties as regimental and company officers, &c. When the proximity of their commands will enable them to perform these duties without interference with those of the service upon which they have been thus detailed, they may, in their discretion, do so; but, in the absence of a special order requiring it, on the part of the proper superior, their detail should be regarded as necessarily relieving them from the performance of this extra labor. V, 436, 558. See VI, 53.

3. *Held* that the fact that the term of service, as an officer of volunteers, of a member of a court-martial, had expired, did not disqualify him from sitting on the court, when he had not yet been formally mustered out of or discharged from the service. XV, 111.

4. When, in the course of a trial by court-martial, a member is served with an order from the War Department, or other competent authority, discharging him from the service, (as by muster-out in the case of a volunteer, and acceptance of resignation in the case of a regular officer,) the general rule is, that he can no longer sit upon the court, and that he should withdraw therefrom, and the fact of his withdrawal, explained by a copy of the order, be entered upon the record. But where there is reason to believe that such order will be forthwith revoked by the authority issuing it, in order that the member may remain upon the court, there is no impropriety in the court adjourning for a day, in order that it may be informed whether such revocation will be resorted to. XI, 203.

SEE SIXTY-FOURTH ARTICLE.
SIXTY-SIXTH ARTICLE, (7,) (8,) (9,) (10,) (12,) (13,) (14.)
SEVENTY-FIFTH ARTICLE, (1.)
NINETY-SEVENTH ARTICLE.
ABSENT MEMBER.
COMPENSATION, I.
COURT-MARTIAL, I, (7,) (8.)
INTERPRETER, (1,)
JUDGE ADVOCATE, (4,) (5,) (6.)
MILEAGE, (2.)
MILITARY COMMISSION, I, (5,) (6,) (7,) (8,) (9,) (10,) (13,) (14.)
NEW MEMBER.
ORDER, I, (7.)
RECORD, IV, (9,) (11,) (12,) (13,) (14;) V, (1,) (2.)
WITNESS, (1.)

MILEAGE.

1. Mileage is not a "*compensation*" in the sense of section 9, chapter 200, of act of 17th July, 1862, relating to pay, &c., of chaplains. It is simply a commutation of the actual expenses supposed to be necessarily incurred by an officer while travelling under orders from the government. It should be allowed to a chaplain as to other officers. I, 371.

2. Mileage, *as such*, is not payable to the members and judge advocate of a military court, for travel while acting thereon; in lieu thereof is provided the compensation specified in paragraph 1137 of the Army Regulations, to be paid if the court is not held at the station where the member, &c., is serving. XXI, 124.

SEE WITNESS, (12,) (13.)

MILITARY COMMISSION, I—(ORIGIN, CONSTITUTION, PROCEDURE, &c.)

1. Long and uninterrupted usage has made military commissions, as it were, part and parcel of the common military law. I, 344, 358.

2. A military commission may be convened by any officer authorized to convene a general court-martial. VIII, 111.

3. Usage and the course of decision have enforced in regard to military commissions the same principles which prevail in the organization of courts-martial. II, 27.

4. Military commissions have grown out of the necessities of the service in time of war, but their powers have not been defined nor their mode of proceeding regulated by statute law. It is therefore *held*, generally, that the rules which apply to the convening, the constitution, and the proceedings of courts-martial should apply to them. The action of military commissions should also be subjected to review in the same manner and by the same authority as courts-martial. I, 453, 465; II, 563, 83; III, 428; V, 95; VII, 556, 561; XII, 394.

5. As an exception, however, to the rule that military commissions are to be constituted in all respects like courts-martial, the minimum number of members for such commission has been fixed by usage at *three*. To establish a military commission with but two members would be contrary to precedent. VIII, 7; XV, 149.

6. A majority of the detail of a military commission will constitute a quorum where it does not fall below three. IX, 591.

7. A military commission constituted with but three members, one of whom is designated as judge advocate, but without any other judge advocate, is invalid; and a party tried by such a court may be tried again before a competent tribunal. XVI, 72; XV, 149. So, a commission organized with two members and a judge advocate is invalid. XV, 209. XVII, 198.

8. A commission constituted with three members, but without a judge advocate, would not be a legal tribunal. XIII, 286; XV, 204; XI, 479. So, although the junior member of the commission may

act, and subscribe the record as judge advocate. XIV, 321; XV, 493.

9. Where a military commission of three members was convened for the trial of a series of cases mostly of an unimportant character, *advised* that, in the event of a case of unusual importance being brought before it, at least two additional members be added to the detail. XIII, 392.

10. The rule requiring that it should be set forth in an order convening a general court-martial of less than thirteen members, that a greater number cannot be assembled "without manifest injury to the service," (See SIXTY-FOURTH ARTICLE, 6,) does not apply to the case of an order convening a military commission, a tribunal which is merely required to consist of at least three members, and of which the *maximum* number of members has not been fixed by law. XIX, 40.

11. To subject military commissions partly to the laws and practice which govern civil courts, and partly to those which control courts-martial, would be to destroy the harmony between the two different military tribunals, and to embarrass the administration of military justice. Such a course would tend also to defeat the purpose of Congress, which, in placing them in many respects on the same footing, evidently contemplated that the statutory rules of procedure which apply to the court-martial should be applied, as far as practicable, to the military commission. *Held*, therefore, that proceedings before military commissions should be subject to the two years' limitation prescribed in the case of courts-martial by the 88th article. IX, 657.

12. The oaths prescribed by the 69th article to be administered to the members and judge advocate of a court-martial are properly to be taken by the members and judge advocate of military commissions. XI, 111.

* 13. *Held*, upon the principle of the analogy between the practice of the court-martial and that of the military commission, that two-thirds of the members of the latter tribunal should properly concur in a death sentence. XXIII, 650.

14. *Extract from the published official report of this Bureau to the Secretary of War, of November* 13, 1865: "This report cannot well be closed without its bearing testimony to the worth and efficiency of MILITARY COMMISSIONS as judicial tribunals in time of war, as illustrated by these two trials"—(of the assassins of President Lincoln, and of Wirz.)

"These commissions, originating in the necessities of the rebellion, had been proved, by the experience of three years, indispensable for the punishment of public crimes, in regions where other courts had ceased to exist, and in cases of which the local criminal courts could not legally take cognizance, or which, by reason of intrinsic defects of machinery, they were incompetent to pass upon. These tribunals had long been a most powerful and efficacious instrumentality in the hands of the Executive for the bringing to justice of a large class of malefactors in the service or interest of the rebellion, who otherwise would have altogether escaped punishment, and it had

indeed become apparant that, without their agency, the rebellion could hardly, in some quarters, have been suppressed. So conspicuous had the importance of these commissions, and the necessity for their continuance become, that the highest civil courts of the country had recognized them as part of the military judicial system of the government, and Congress, by repeated legislation, had confirmed their authority, and, indeed, extended their jurisdiction."

"But it was not until the two cases under consideration" (of the Assassins and of Wirz) "came on to be tried by the Military Commission, that its highest excellence was exhibited. It was not merely in that it was unencumbered by the technicalities and inevitable embarrassments attending the administration of justice before civil tribunals, or in the fact that it could so readily avail itself of the military power of the government for the execution of its processes and the enforcement of its orders, that its efficacy (though in these directions most conspicuous) was chiefly illustrated. It was rather in the extended reach which it could give to its investigation and in the wide scope which it could cover by testimony, that its practical and pre-eminent use and service were displayed. It was by means of this freedom of view and inquiry that the element of *conspiracy*, which gave to these cases so startling a significance, was enabled to be traced and exposed, and that the fact that the infamous crimes which appeared in proof were inspired by the rebellion, as they were committed in its interest, was published to the community and to the world. By no other species of tribunal, and by no other known mode of judicial inquiry, could this result have been so successfully attained; and it may truly be said that without the aid and agency of the Military Commission, one of the most important chapters in the annals of the rebellion would have been lost to history, and the most complete and reliable disclosure of its inner and real life, alike treacherous and barbaric, would have failed to be developed."

"It is due not only to the late President, who, as commander-in-chief, unhesitatingly employed this tribunal in the suppression of crimes connected with the rebellion; but to the heads of military departments and other commanders, who so resolutely and effectively availed themselves of its simple yet potent machinery; to the national legislatures which, recognizing its continuance as indispensable during the war, have confirmed and increased its jurisdiction; and to the intelligence and good sense of the people at large, who, disregarding the shallow and disloyal clamors raised against it, have appreciated its service to the country—that this brief testimony to its value, as an arm of the military administration, evidenced alike by the fairness of its judgments and by its enlightened and vigorous action, should be publicly and formally borne by this Bureau.

SEE COURT-MARTIAL, I, (10.)
NEW TRIAL, (1.)
PROVOST JUDGE OR COURT, (1.)
RECONSTRUCTION LAWS, (1.)
RECORD, IV, (14.)
SENTENCE, II, (3,) (6.)
SEPARATE BRIGADE, (11,) (12.)

MILITARY COMMISSION, II—(JURISDICTION IN CASE OF CITIZENS.)

1. In a military department the military commission is (for the trial of citizens) a substitute for the ordinary State or United states court, when the latter is closed by the exigencies of the war, or is without jurisdiction of the offence committed. VIII, 153; VII, 20.

2. A military commission is not restricted in its jurisdiction to offences committed in the State or district where it sits, as are the ordinary criminal courts of the country. VII, 20. The jurisdiction of a military commission, like that of a general court-martial, is not confined to the place of the commission of the offence, but is co-extensive with the limits of the federal domain, and extends to any military department in which, on account of facilities for obtaining testimony, or for other good reason, it may be convenient to bring a case to trial. XI, 252; XIV, 651; XIX, 63. See COURT-MARTIAL, II, 11, 16; JURISDICTION, 12. A military commission derives its authority from the unwritten or common law of war. Its jurisdiction cannot be limited to offences made penal only by the laws of the United States or of the State in which the offence was committed. XVIII, 604.

3. *Held*, (January, 1864,) that a person charged with giving "aid and comfort to the rebellion," under section 2, chapter 195, of act of July 17, 1862, might be tried for this crime by a military commission, in a case where the ordinary criminal courts are not open in the State in which the crime was committed. II, 242. And so, under the same circumstances, might an offender under section 24, chapter 75, act of March 3, 1863, in regard to aiding the escape of deserters, &c. VII, 20.

4. The offence, committed in a part of Kentucky occupied by our armies, of kidnapping and abstracting from the military service of the United States a "contraband" negro serving with the armies in the field as an employee of the quartermaster department, *held*, (September, 1863,) triable by military commission, though the ordinary courts of that part of the State may be open. V, 36.

5. A citizen of Kentucky *held* (August, 1863) amenable to trial by military commission for the offence of "using disloyal language," in violation of a general order of the department commander. III, 401.

6. A military commission has no jurisdiction of the offence of a civilian charged with the violation of the Fifty-seventh article of war. II, 541.

7. *Held*, (August, 1863,) that a military commission in the District of Columbia had jurisdiction of the offence of forging soldiers' discharge papers, committed there by a clerk or messenger of the War Department. The offence is one which is aimed directly at the efficiency of the service, and is therefore peculiarly a *military* offence. Moreover, it is committed in a district occupied by our armies, and, in fact, one vast camp, and which, being also constantly threatened by the enemy, is therefore an appropriate field for the exercise of such a jurisdiction. III, 514. See 12.

So *held*, (May, 1863,) for the same reasons, in the case of a citizen of Washington charged with the same offence, which is not, indeed, strictly punishable by the criminal law of the District. II, 331; III, 149; III, 151. And *held* (May, 1865) that a military commission in the District of Columbia had jurisdiction of the offences of making and forging "final statements" of soldiers, and of selling blank forms to be fraudulently used therefor, committed by civilians. XV, 281.

And *held* (August, 1863) that a military commission had jurisdiction of the case of a citizen of the District of Columbia charged with forging pay certificates, although this offence would ordinarily be triable by a civil court under the provisions of the act of March 2, 1831, section 11. III, 563.

So *held* (September, 1863) in the case of an enrolling officer of a sub-district of the District of Columbia, charged with violation of duty and accepting a bribe while engaged in the enrolment of inhabitants subject to draft. VII, 453.

So *held* (February, 1864) in the case of the offence of aiding a soldier to desert, committed by a citizen at one of the forts in the District of Columbia; the jurisdiction of this class of offences conferred upon the civil courts by section 24, chapter 75, of act of March 3, 1863, being deemed by the Secretary of War not to be exclusive in the District of Columbia. VII, 252. See VI, 580. And *held* (December, 1864) by the Secretary of War that a military commission has, in time of war, even in a locality where the ordinary courts are open, a jurisdiction, concurrent with these courts, of the case of a citizen charged with resisting the draft, &c., contrary to sections 24 and 25 of chapter 75, act March 3, 1863, as well as of the case of a citizen charged with having, while engaged in obstructing an enrolment, &c., contrary to section 12, chapter 13, act of February 24, 1864, caused the death of a United States officer. XI, 287. And see XI, 667; XIII, 554; XV, 9; XII, 234.

So *held* (August, 1864) in the case of parties charged with aiding and abetting the enemy by the public utterance of disloyal and treasonable sentiments in the District of Columbia, when actually invaded or threatened by a large force of the enemy. IX, 481, 524.

So *held* (April, 1864) in the case of the offence of "causing to be presented a fraudulent claim against the United States," committed in the District of Columbia, by a citizen employee of the quartermaster department not connected with the military service. By the act of March 2, 1863, chapter 67, section 3, this offence is made triable by an ordinary criminal court; but upon the principle that in the District of Columbia, in time of war, and in matters affecting the military service, the military commission has a concurrent jurisdiction of this offence, it is *held* triable by such commission, being deemed by the Secretary of War to be one affecting the military service. VIII, 194.

8. The offence committed in Washington, by an official connected with the United States district jail, of corruptly facilitating the enlistment into the United States service of convicts and criminals—in his accepting bribes or compensation for bailing them, or allowing them

to be bailed and taken out of the jail, in order to be enrolled by brokers as soldiers; *held* (April, 1865) to be triable by military commission as a crime aimed at impairing the efficiency of the military service in time of war. XIII, 554. (See act of March 3, 1865, chapter 83, passed since the date of this opinion.)

9. *Held* (September, 1864) that employees of the quartermaster department (when not actually serving with the armies in the field, and therefore triable by court-martial) might, for offences affecting the military service, be brought to trial by military commission, when the special circumstances of the case render them amenable to its jurisdiction. Upon this subject no fixed rule can be laid down, since the circumstances which might subject the employee to such jurisdiction in the District of Columbia, a vast military camp, and the theatre of constant military operations of the most active character, might not be deemed sufficient to give a military commission cognizance in his case, in a department differently situated, or in a loyal State not in the occupation of our armies. IX, 657.

10. An inspector of harness, who is a citizen, but employed as inspector by the local quartermaster, and paid for his services out of the appropriation for the Quartermaster General's department, *held* (May, 1864) triable by a military commission, in New York, for the offence committed there, of neglect of duty, in accepting defective harness and causing the government to be defrauded; such being an offence of a military character, needing, in time of war, prompt punishment, and one which could be most appropriately passed upon by a military court. VIII, 395.

(See the *act* (passed since the above opinion) of July 4, 1864, chapter 253, section 6, which makes inspectors employed in the quartermaster department amenable to trial by court-martial *or* military commission, for "corruption, wilful neglect, or fraud, in the performance of their duties." But see *note* under CONTRACTOR, II.)

11. The offence committed in time of war, in New York, by a citizen physician, of forging extensions of furloughs and medical certificates and furnishing them to soldiers, *held* (January, 1865) cognizable by military commission, as aimed at impairing the efficiency of the military service in abstracting men therefrom, to the injury and prejudice of the armies in the field. XII, 236.

12. The forging of soldier's discharge papers is an offence directly affecting, or aimed at impairing, the efficiency of the military service; and when committed by a civilian in a military department in time of war, is held triable by a military commission. XIII, 283.

13. A military commission has no jurisdiction of a case in the nature of a civil suit for damages between citizens, and to which the United States is not a party. III, 190; V, 86.

14. Where a military commission was invested, by the original order of the general convening it, "with jurisdiction in all cases, civil, criminal, and in equity, usually triable in courts established by law, *held* that such a tribunal was not authorized to be created, either by law or usage, and *recommended* that it be ordered by the Secretary of War to be dissolved. XI, 231.

15. The offence of defrauding recruits of *local* bounties, *held* grossly immoral and flagitious, but not properly within the jurisdiction of a military commission. IX, 205.

16. A robbery of a discharged soldier by a citizen at Baltimore, *held* (June, 1865) not to be in itself a military offence cognizable by military commission. XII, 422.

17. A private breach of trust, committed by a citizen against a soldier, cannot be held to so affect the military service as to be properly cognizable by military commission. XIV, 529.

18. Where one who falsely pretended to be a United States detective, arrested as a deserter a party who was not a deserter, or even connected with the service, and extorted money from him as a condition to his release, *held* that the act was a private injury, involving no detriment to the military service, and that a military commission could not properly take cognizance of it. XI, 657. See XVI, 32,22.

19. A clerk in the office of a quartermaster in New York city, who procured passes and transportation for parties to go to the South, receiving compensation therefor, but without perpetrating any fraud upon the government, and without fraudulent intent, *held*, not properly within the jurisdiction of a military commission. XI, 656.

20. In the case of a homicide committed by a party in the State of Maryland, where he resided, and where the duly constituted courts of the State were open, *held*, that the fact that the man killed was a United States soldier did not give a military commission jurisdiction of the crime, the killing having occurred in a mere personal quarrel, and the offence being in no way aimed at the efficiency of the service. And *held*, further, that the fact that the accused happened to be apprehended in Virginia did not invest a military commission in that locality with jurisdiction of the case. XVI, 298.

21. The offence of selling a negro slave, in violation of the laws of Maryland, is not one of which a military commission can properly take cognizance. XIV, 382.

22. The jurisdiction of a military commission *sustained* (May, 1864) in a case of a citizen charged with having smuggled liquors to Alexandria, Virginia, by means of bribing a soldier on the Long bridge, contrary to the orders of the department commander and to the laws of war. IX, 149.

23. Because blockade running involves a forfeiture of goods, it does not follow that it is not triable by a military commission. It involves a criminal responsibility also, and when engaged in by citizens of the United States, owing allegiance to its government, it is clearly so triable as a violation of the laws of war. IX, 205.

24. One who obstructs the authorized recruiting of colored soldiers by our government within the States in rebellion is amenable to trial for his offence by a military commission. VIII, 529.

25. *Held* (June, 1864) that the murder of Union soldiers, for the disloyal and treasonable purpose of resisting the government in its efforts to suppress the rebellion, was a military offence, quite other than the ordinary offence of murder, cognizable by the criminal courts; and that citizens who had been guilty thereof, though in a

State where the courts are open, might properly be brought to trial before a military commission. In such case, the circumstances conferring jurisdiction should be indicated in the charge and distinctly set forth in the specification. IX, 285.

26. Parties in Kentucky who, for the purpose of obstructing the enlistment of colored troops, cut off the ears of two negro men while on their way to enter the military service of the United States—*held* (June, 1864) triable by a military commission. IX, 225.

27. The offence committed by a civilian, in Baltimore, of attempting to bribe the members of a military court and the witnesses thereat —*held* (January, 1865) to be properly cognizable by a military commission. The government has the undoubted right to protect its tribunals from corruption; and the same necessity which calls for the creation of military courts requires that military law should be invoked to afford them this protection. XIV, 40.

28. *Held* (August, 1865) that parties who, in time of war and in an insurrectionary district of the South, engaged in trading in cotton and other commodities, without proper authority, and in violation of the regulations duly established by the proper military commander for the government of such trade, were chargeable with a military offence cognizable by a military commission. XVI, 446.

29. The offence of "*violating the sepulchres of the dead*" is indictable at common law; and *held* (January, 1865) that an offence of this description, when committed by a civilian on bodies of soldiers within the lines of the army, and in a locality (Winchester, Va.) where the ordinary courts were closed by the war, was triable by a military commission. XIII, 215.

30. The principle, well expressed by Major General Halleck, in General Order No. 1, of headquarters department of the Missouri, of January 1, 1862, that "many offences which, in time of peace, are civil offences, become, in time of war, military offences, and are to be tried by a military tribunal, even in places where civil tribunals exist," has been followed by this government in a great number of cases; and offences aimed at impairing the efficiency of the service, or the efforts of the government to suppress the rebellion, have been repeatedly brought to trial by military commissions when committed within our military lines and on the theatre of military operations, where the effect of the pressure of a vast civil war is, *ex necessitate*, to suspend for a time, for the preservation of the whole, some portion of the legal safeguards thrown around the citizen in time of peace. It is the fact that the State of Indiana was in this category (with the additional consideration that it had been and was being constantly threatened with invasion by the enemy) which conferred jurisdiction upon the military commission that has passed upon the cases of Dodd, Bowles, Milligan, Horsey, and other conspirators against the government.

The amendments of the Constitution, which give the right of *trial by jury* to persons held to answer for capital or otherwise infamous crimes, except when arising in the land or naval forces, are often referred to, as conclusive against the jurisdiction of military courts over such offences when committed by citizens. But though the letter of

the articles would give color to such an argument, yet in construing the different parts of the Constitution together, such a literal interpretation of the amendments must be held to give waybefore the necessity for an efficient exercise of the WAR POWER which is vested in Congress by that instrument. †

A striking illustration of the recognition of this principle by the legislation of the country since an early period of our history is furnished by the 57th article of war, in the fact that it has from the beginning rendered amenable to trial by court-martial, for certain offences, not only military persons, but all persons whatsoever.

This article, establishing this jurisdiction, was adopted by the Congress of the Confederation, and its terms and effect remained unchanged at the time of the formation of the Constitution. In 1806 a slight modification was introduced in its language—the substitution of the word "whosoever" for the words "all persons;"—and thus a Congress, composed probably of many of the founders of the republic, substantially reaffirmed the jurisdiction previously conferred. XI, 215, 454.

31. *Held* (January, 1865) that a military commission in Washington had jurisdiction of the cases of parties accused of the perpetration in that city of frauds upon the right of suffrage of soldiers of the State of New York. The offence, if committed as alleged, was directed not against citizens as such only, but against citizens as *soldiers*, since while the elective franchise in the abstract belongs only to the citizen, the right to exercise it in the field belongs only to the *soldier*, and it is this right which the government, from the highest considerations of public policy, is called upon to defend. These soldiers were beyond the jurisdiction of State laws, and it is not perceived how they could be protected in their enjoyment of the right of suffrage by State officials. The United States alone could afford them such protection, and as the offence necessarily affects the efficiency, security, and welfare of the military service, it should certainly be held that the government, in the exercise of the WAR POWER, may bring to trial before a military court, as for a military offence, any parties accused of having fraudulently attempted to defeat the right referred to. XII, 214. See XII, 204; XIV, 78.

32. Where a meeting of bank presidents in South Carolina was formally held, at the instance of the governor, for the purpose of taking measures to provide funds for the purchase of horses for the rebel cavalry, and at such meeting it was agreed to raise a certain sum, and to apportion it among the several banks, and the said sum was so apportioned, but was not, as it appeared, ever paid over to the rebel

† NOTE.—Mr. Horace Binney, in his treatise on "The Privilege of the Writ of Habeas Corpus under the Constitution," in referring particularly to the *fourth*, though his remarks apply equally to all the first six articles of the Amendments to the Constitution, has presented in the following clear and concise terms what is believed to be the only true view to be taken of the import of these Amendments:—"*Either the language of the amendment, though general, speaks in reference to the normal condition of the country only, when there is no rebellion or invasion and consequent war, foreign or civil; or, under such circumstances, rebellion or invasion supersedes the amendment* for the time. *The former seems*"—he adds—"*to be the preferable conclusion.*" And see Whiting's "War Powers of the President," &c., p. 49; I, Bishop on Criminal Law, § 57.

authorities; *held* (July, 1865) notwithstanding such non-payment, that all who participated in or co-operated with such meeting were amenable to justice, under sec. 2, chap. 195, act of July 17, 1862, for giving aid and comfort to the rebellion. and, in the absence of a sufficient local tribunal, were triable for the same offence by a military commission. XII, 479.

33. There may be many acts denounced as crimes by the legislation of Congress and of the several States, and for which punishments are provided, with a view only to their being passed upon by the ordinary civil tribunals, as offences against the persons or property of individuals, or the property or peace of the public, which, when committed in time of war and in the interest of the enemy, become violations of the laws of war and military crimes, properly cognizable by military commission. Thus where a party, holding a commission from the insurgent authorities, but proceeding secretly and in disguise, attempted, with certain others—all acting in the interest of the rebellion—to throw from the track a railroad train in the State of New York, for the purpose of destroying the lives and property of loyal citizens, and possessing himself of information, to be communicated to the rebel authorities—*held* (February, 1865) that, although his act might be punishable by the civil courts as a violation of a local statute providing penalties for depredations upon railroads, he was properly brought to trial by a military commission for the far graver public and military offence in violation of the laws of war involved in his proceeding. XI, 472.

34. *Held* (July, 1865) that the fact that the President had accorded a "provisional government" to a State in insurrection in no manner abridged or affected the jurisdiction of the military commission over the class of cases which had customarily been taken cognizance of by it during the period of active hostilities; and *advised* that this jurisdiction should especially continue to be exercised in those cases in which the local courts organized under such provisional government would be reluctant, or, because of defects in the State laws, incompetent to do justice; as, for instance, in cases of crimes in which freedmen were the victims, and of offences committed against soldiers of the army, whether white or colored. XVI, 415. And see XX, 57.

35. *Held* (January, 1866) that while minor offences committed against freedmen in the State of Tennessee might ordinarily be left to the adjudication of the assistant commissioner of freedmen for the locality, under the provisions of circular No. 5, of May 20, 1865, of the Freedmen's Bureau, a military commission, constituted in the usual manner, was the only tribunal which could properly be resorted to in that region for the investigation and punishment of crimes of any grave character of which freedmen were the victims. XIX, 319. *Advised* that such a tribunal was especially proper to be resorted to in a State the legislature of which, in disregard of the spirit of the proclamation of emancipation and the amendment of the Constitution in regard to slavery, had refused to reform its code in such a manner as to render justice to the negro by permitting him to give

testimony in its courts, and had thus left him to be protected by the federal government in the enjoyment of his personal liberty and security. So where a freedman had been forced to flee from the cruelties of an inhuman master, and during his flight in severely cold winter weather had had his feet frozen; and thereupon two rebel surgeons, under the instigation (as was alleged) of the master, had proceeded, without cause, to amputate the feet of the negro, with the intent, as was believed, of terrifying the colored people of the region, and deterring freedmen from seeking to leave the service of their employers and late owners—*held* (January, 1866) that those concerned in this brutual act should be brought to trial by military commission. XVIII, 525.

* 36. *Held* that a military commission in Savannah, Georgia, in November, 1865, when the locality was under the control of the military authorities and the civil courts were suspended, had jurisdiction to try a citizen charged with knowingly receiving goods stolen from another citizen. XX, 484.

* 37. In the case of a citizen charged with the murder of another citizen in Dade county, Missouri, in November, 1863—at a period when the local courts were suspended by the state of war, and the administration of justice was rendered virtually impossible by the burning of the court-house and public records and the continual raids of the enemy—*held* that a military commission, convened at Springfield in the adjoining county of Green, in June, 1864, was authorized in assuming jurisdiction and proceeding to try and sentence the accused. XXII, 116.

* 38. *Held*—March 30, 1866—that the condition, at that time, of Texas, as being under military control, authorized the general commanding that department to convene military commissions for the trial and punishment of the criminal offences of civilians; and that such a commission had jurisdiction of the crime of murder committed by a citizen of that State. XX, 502.

See ALIEN, (2.)
CONFEDERATE SECURITIES, (3.)
CORRESPONDENCE WITH REBELS, I.
FREEDMEN'S BUREAU, (4.)
RECONSTRUCTION LAWS, (1,) (2,) (3.)
VIOLATION OF THE LAWS OF WAR, (8,) (16.)

MILITARY COMMISSION, III—(JURISDICTION IN CASE OF MILITARY PERSONS.)

1. A military commission has no jurisdiction over a purely military offence defined in the articles of war. I, 468; VII, 440, 486; IX, 236. Thus *held* that it had no jurisdiction of a charge of "violation of the fifty-second article." XVI, 73; or of a charge of "conduct to the prejudice of good order and military discipline." XV, 373.

2. A military commission is not empowered to forfeit or stop, by its sentence, the pay of a soldier, except in a case in which, as in the case of the crimes specified in section 30, chapter 75, act of March 3, 1863, it is specially invested with a jurisdiction over him in his military character. XIII, 470.

3. A military commission has no jurisdiction to try a soldier for one of the frauds enumerated in the act of March 2, 1863, chapter 67, committed by him while in the service, although he may, since its commission, have been discharged therefrom. XIX, 63.

4. An enlisted man may be tried by a military commission in time of war for the offence of "manufacturing counterfeit money" in a region of country where there is no civil court by which it is practicable to try him. III, 404.

5. A court-martial cannot be so far superseded by a military commission as to give the latter jurisdiction of a proceeding against a commissioned officer for conduct in violation of any of the articles of war. I, 389, 482.

MILITARY COMMISSION, IV—(JURISDICTION IN CASE OF AN ENEMY.)

1. Certain soldiers in the rebel military service who took the oath of allegiance in order to effect their release as prisoners and afterwards violated their oath—*held* triable by military commission. The ordinary criminal courts of the country have no jurisdiction in such cases; and if they had, the necessities of the war would justify a military commission in assuming jurisdiction of this and similar crimes. III, 649.

2. The violation of a parole by an enemy is not defined as a crime, nor prohibited by the rules and articles of war. It is an offence within the jurisdiction of a military commission, and by the common law of war (LIEBER, in paragraph 124, General Order No. 100, of 1863) may be punished with death. VI, 20.

3. A rebel soldier charged with murder may be tried by a military commission, if his offence was committed in a region of country where the ordinary criminal courts are closed by the prevalence of war; the general powers of a military commission, under such circumstances, not being held to be restrained by the 30th section of the act of March 3, 1863, chapter 75. VII, 418.

4. Guerillas are triable by military commission for "violation of the laws and customs of war" in the commission of acts of violence, robbery, &c. V, 590.

5. A rebel soldier *held* triable by military commission for the murder of a loyal negro outside of our military lines, committed before his capture. VIII, 529.

6. *Held*, that a military commission could not properly take cognizance of a case of the homicide of one rebel prisoner by another committed at one of our prison camps. XV, 358.

7. Cruel treatment of federal prisoners of war at a rebel prison by a rebel official, in violation of the laws of war, *held* to be a crime properly cognizable by a military commission. XIII, 675.

8. Where certain loyal citizens of the United States, living in North Carolina, were forced, under the operation of a ruthless conscription, which swept into the insurgent army almost the entire serviceable population of the South, to enter the rebel military service; and

thereupon, at the earliest occasion, abandoned that service and fled to our lines; and having subsequently been taken prisoners by the enemy were put to death, under circumstances of great contumely and cruelty, by the orders of a rebel commander; *held* that these citizens, in refusing to submit themselves to the imposed *status* of service with rebels, and in taking refuge at the first opportunity under our flag, had entitled themselves to the fullest protection from our government, which was now bound to bring to trial and punishment the author of their murder. *Advised*, therefore, (December, 1865,) that the commander referred to be arrested and brought to trial by military commission. XVIII, 429, 477.

9. A rebel commissary of subsistence in Georgia, after the date of the capitulation of Johnston, delivered to a citizen a large amount of money in silver—held by him as funds of his government—in pretended payment for certain commissary stores which, however, had been contracted to be paid for in rebel currency. *Held* that upon the surrender of the rebel armies all the public property of the so-called confederate government (including this silver) became the property of the United States; that the officer in question became bound upon the capitulation to surrender such silver to the United States; and that as he had not surrendered it, but had, in connivance with such citizen, appropriated the same to private use, he was chargeable with a violation of the laws and usages of war, and might properly be brought to trial by military commission for his offence. XXI, 225.

10. Where a citizen of Florida was brought to trial and convicted by a military commission for the murder of a negro, and it was objected, to the execution of his sentence, that such commission was not authorized to assume jurisdiction of his crime, inasmuch as it was committed a short time prior to the occupation by the United States military forces of the locality of the crime; *held* (January, 1866) that such objection was without weight; that, according to the uniform usage of war, the military jurisdiction, upon the occupation of the country by our armies, wholly superseded that of the civil tribunals; that the military commander was empowered to order for trial before a military commission cases of crimes committed before as well as after the date of the occupation, and deemed by him, in the exercise of his discretion, to call for punishment; and that any other conclusion would insure impunity for an indefinite period to all criminals who remained untried at the period of such occupation. XIX, 390.

* 11. All violations of the laws of war are properly within the cognizance of a military commission. The most common form of charge before military commissions during the war, in the cases of enemies arrested for military offences in the rebel States or the States bordering thereon, was "*Violation of the laws of war.*"

SEE PRISONER OF WAR, (2,) (13.)
SPY, (6.)
VIOLATION OF THE LAWS OF WAR, (2,) (4,) (6,) (17,) (19,) (20,) (21,) (22.)

MILITARY COMMISSION, V—(JUDGMENT AND SENTENCE.)

1. The proceedings of military commissions may be confirmed and carried into effect under the same rules and regulations which govern those of courts-martial, except where the *death sentence* is imposed. In this instance the letter of the act, (section 21, chapter 75, act of March 3, 1863,) which gives the army commander the power of executing the sentence in certain cases, when adjudged by a court-martial, does not extend to a similar sentence pronounced by a *military commission.* In regard to the latter, the restriction imposed by the former act (section 5, chapter 201, act of July 17, 1862) has not been repealed, and still applies. Every case, therefore, of a death sentence by a military commission must be submitted to the President for his approval before it can be acted upon. VI, 50; II, 542; V, 479. (*But see the act passed since the date of this opinion, of July* 2, 1864, *chapter* 215, *section* 1, *which gives to the commander of a department or army the power to execute the death sentences of military commissions in certain cases.)*

2. Under a charge of a violation of the common law of war, a military commission may inflict such punishment as in its discretion may be deemed adequate and proper. VII, 62.

3. A military commission has no right to direct that the personal property of an accused be levied on and confiscated. VII, 380. Nor has a military commission (or other military court or officer) authority to issue or order an execution to satisfy judgment in damages; nor, of course, authority to *stay* an execution as such. III, 190.

4. Where a lieutenant in the United States revenue service was sentenced by a military commission to fine and imprisonment, and to be cashiered—*held*, that the sentence was valid and operative as to all but the cashiering; but that as to the cashiering it was invalid, it not being in the power of a military commission either to annul a civil appointment such as the accused held in the case, or to pronounce a sentence of cashiering in any event. X, 356.

SEE SENTENCE, II, (6.)

MILITARY RESERVATION.

*The Territories are public land of the United States, over which Congress is vested by section 3 of article IV of the Constitution with absolute control. Paragraph 2 of this section provides that "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory * * * belonging to the United States." In the exercise of this power it has designated certain localities as military reservations, or authorized the President to do so; (see case of *Wilcox* v. *Jackson*, 13 Peters, 498;) and has in a series of statutes excepted such reserved land from pre-emption by settlers. In the exercise of the same power it would be authorized to discontinue such reservations, and dispose of the lands constituting

the same in any manner that it might see fit. This power being thus given by the Constitution, no statute could enlarge it; nor would a decision of the Supreme Court be necessary to declare and establish it. It is concluded, therefore, that Congress has quite as ample and exclusive a jurisdiction and authority over military reservations in the Territories as it has over reservations in the States, where such jurisdiction, &c., has been expressly ceded to it. XXVI, 375.

See JURISDICTION, (8,) (9.)

MILITARY STOREKEEPER.

* Upon a review of all the acts in regard to military storekeepers passed prior to the late army bill of July 28, 1866, these officials, commissioned as they were by the President and confirmed by the Senate, must clearly be deemed to have been commissioned officers of the United States serving in the army. Up to the date, however, of the act of July 28th last, they were paid by salary, without any other allowance than fuel and quarters in kind; and not being entitled to *any* rations, could not prior to that date legally have claimed, after five years' service, the "additional" ration conferred by the act of July 5, 1838. They now, however, have the specific rank of *captains*; and, in view of the comprehensive language of the recent statute of March 2, 1867, chapter 159, it is concluded that such captains, are entitled in their pay accounts to compute the time during which theymay have served as military storekeepers prior to July 28, 1866. The act of 1867 provides that "in computing the length of service of any officer of the army, to determine what allowance and payment of additional or longevity rations he is entitled to, * * there shall be taken into account and credited to such officer whatever time he may have served * * * * as a commissioned officer of the United States, either in the regular army or since the 19th day of April, 1861, in the volunteer service." So, where a certain officer was appointed and commissioned a military storekeeper on 15th August, 1861, and was duly confirmed as such; *held* that, though he could not be deemed to have been, under this commission, a captain or lieutenant of the line or staff, he was certainly a commissioned officer of the United States; and, therefore, that the period during which he served under such commission should be credited to him, in passing upon a claim interposed by him, (after he had been appointed a military storekeeper under the act of July 28, 1866,) to be allowed the extra ration due upon five years' service. XXIII, 475.

MILITIA.

See NINETY-SEVENTH ARTICLE, (4,) (6,) (7.)
FRAUD, II, (14.)
MUSTER, (2.)

MISAPPROPRIATION OF MONEY OR PROPERTY OF THE UNITED STATES.

See FRAUD, II, (3,) (15,) (16,) (17.)

MISNOMER.

See PLEA, (12.)
VARIANCE, (5.)

MITIGATION OF SENTENCE.

See EIGHTY-NINTH ARTICLE.
COMMUTATION OF SENTENCE, (4.)
FIELD OFFICER'S COURT, (32.)
ORDER, I, (9.)
PARDON, (10.)
PARDONING POWER, (12,) (13.)
REVIEWING OFFICER, (8.)
SENTENCE, III, (9.)

"MONTH."

See SENTENCE, I, (24.)

MORTGAGE OF SLAVE PROPERTY.

See SLAVE, (12.)

MURDER.

1. *Held*, that a rebel officer or soldier who took the life of an officer in our service after the latter had surrendered, or was unarmed and a prisoner, was guilty of murder. VII, 360.

2. The government must and does—(May, 1864)—recognize the colored population of the rebellious States as occupying the status of freedmen. So where a negro, still held by his former master as a slave, in defiance of law and the emancipation proclamation of the President, and subjected to constant cruel treatment, on one occasion, when about being punished without cause by his master, suddenly attacked and killed him—*held* that his crime was not murder; that it wanted the element of malice and deliberate purpose, and was committed under the highest degree of provocation. IX, 182.

3. Where two negro men, who had gone to the house of a slaveholder with the justifiable purpose of rescuing the two daughters of one of them held by him in slavery contrary to law and the emancipation proclamation of the President, were driven away and pursued by the master, who was armed, and, to prevent being captured or shot, one of them fired at and killed his pursuer—*held* (June, 1864) not to be murder. VI, 178, 180.

4. Where a rebel shot at and seriously wounded an unarmed federal soldier while fleeing from him; and when the latter had fallen to the ground, and lay in a helpless and defenceless condition and apparently dying state, approached and deliberately shot him through the head and killed him—*held*, that the act was *murder;* whether or not the rebel was an enlisted soldier of the enemy's service. For, *held*, that if he *was* such soldier, the other was a prisoner of war in his

hands; that the life of such a prisoner was the most sacred trust that could be committed to his captor; and that no matter how frail might be its tenure, or how brief or painful it might promise to be, the captor had no right to shorten it by a single pulsation upon any pretext whatever, unless it might be necessary to do so to prevent an escape. XVII, 455.

5. Where the officer (Wirz) in charge of the rebel prison at Andersonville, Georgia, employed, for the purpose of tracking and arresting prisoners who had escaped, dogs known to him to be so ferocious and dangerous to life as to make it probable that those on whose track they were sent would, if found, be killed by them, and that an escaped prisoner, overtaken by them and desiring to surrender, could not, by making a stand, save his life from these animals whose instinct was for human blood; *held*—in accordance with the principle of law that it was not essential to constitute murder that the hand of the accused be the immediate cause of death, but only that means should be employed by him which were likely to cause and did cause death—that this officer was guilty of the *murder* of certain escaped prisoners, who, after ceasing from their attempt to escape and surrendering, were yet torn in pieces and killed by dogs employed by his authority and direction to pursue them. XIX, 221.

6. It is both the right and duty of a prisoner of war to attempt to escape, and any punishment inflicted upon him for such an attempt is a violation of the laws of war; and if such punishment is so severe as to cause death, the crime involved is murder. Thus, where the officer in charge of a prison for the confinement of federal prisoners of war, having apprehended certain prisoners when attempting to escape, confined them, by way of punishment, in stocks and chain-gangs, and thus subjected them to such torture that they sank under it and died—*held*, that he was justly convicted of their *murder*. XIX, 221.

*7. A prisoner of war at the rebel military prison at Andersonville, Georgia, having, while suffering from hunger, picked up a crust of bread which had fallen from a wagon containing bread rations for the prisoners, was assaulted by an official of the prison, who knocked him down, and kicked him while down several times with great violence, inflicting upon him mortal injuries, of which, on the third day after, he died. *Held* that his assailant was guilty of murder; and that his conviction of manslaughter only, on the ground that legal "malice" was wanting, was mistaken and erroneous. XX, 650.

*8. It is a familiar principle of law that drunkenness is no excuse for a crime committed under its influence; and it is said by Bishop, I Crim. Law, § 494: "If a state of temporary insanity follows, as the immediate result of drinking to intoxication, the man voluntarily drinking is criminally responsible for his drunkenness and for what he does under its influence." So *held* that the fact that the accused habitually became, upon being drunk, temporarily insane, though entirely sane at other times, constituted no sufficient defence in law

to a charge of murder for a homicide committed by him while intoxicated. XXIII, 222.

SEE CHARGE, (19.)
COURT-MARTIAL, II, (8.)
MASSACRE OF INDIANS.
MILITARY COMMISSION, II, (25,) (37,) (38;) IV, (3,) (5,) (6,) (8,) (10.)
PRESIDENT'S PROCLAMATION, II, (3.)
PRISONER OF WAR, (8,) (13.)
PUNISHMENT, (10.)
SENTENCE, I, (19,) (22;) II, (2.)
VARIANCE, (6.)
VIOLATION OF THE LAWS OF WAR, (20.)

MUSTER.

1. The muster-rolls on file in the War Department are official records; and upon any question which a soldier may raise as to his continuance in the service, or upon any claim that he may urge for a discharge, copies of these rolls, verified by a duly authorized officer, afford *prima facie* evidence as to the soldier's having been mustered in at the time and place and for the period therein set forth; and a soldier who has thus been received and accepted as such, and has been armed, subsisted, and paid by the United States, and has rendered military service, cannot, upon any ground of mere informality, deny the validity of his enlistment or of the contract of his engagement for the number of years specified in the muster-roll. III, 423.

2. Where a company of militia in the United States service was on a certain day mustered out of the service as militia, and thereupon mustered into the service as volunteers, a member thereof, then absent and a deserter, cannot be held to have thereby become connected with the volunteer service. Not being present at the muster, he could not have assented thereto, or joined in the contract. VIII, 375.

3. Where the official muster-rolls of a regiment show that certain men were duly mustered for three years, the burden of proof is upon them, in seeking to be discharged from service before the expiration of that time, to establish that fraud was practiced upon them in their muster by the United States, or its authorized representative. To prove that they were induced to enter the service by the false and unauthorized representations of *recruiting* officers, is not ordinarily sufficient to relieve them from the obligations thus assumed, in the absence of any evidence of fraud on the part of the *mustering* officer, who represented the government in the formal contract of enlistment. VIII, 488.

4. The discharge from service of the Pennsylvania reserve corps, *recommended* on the ground that, though not yet entitled to their discharge in strict law, they were *mustered* into service upon the express assurance of the United States mustering officer that such muster could not be construed to extend the time for which they had been originally enlisted; and *held* that, as the mustering officer represented the government, this condition, assented to and publicly announced by him, should be regarded as an element of the contract. VII, 599.

5. The musters into service of commanders of regiments, who have been shown to have sold, for a pecuniary consideration, the subordinate positions in their commands, have, in certain cases, been revoked at the War Department. But this course *not advised*, in a case of this class in which the proceeding of the regimental commander did not appear to have been actuated by any dishonest motive, or to have been characterized by bad faith, but in which the moneys received were duly devoted to defraying the expenses incurred in raising the regiment—which had been recruited by its commander under unusual difficulties, requiring a heavy outlay of private funds. XVII, 52.

SEE CLAIMS, I. (8.)
ENLISTMENT, I, (1,) (3.)
PAY AND ALLOWANCES, (9,) (16.)

MUSTER-OUT.

1. The right of the Secretary of War to muster out officers of volunteers appointed by the President, is regarded as well established. In exercising this authority, he acts for and in the stead of the President, who, as chief Executive and Commander-in-chief of the army, may muster out or (in time of war) dismiss officers of every grade from the service at his pleasure. V, 319. See DISMISSAL, I.

2. General Order 108 of War Department, of April 28, 1863, in regard to the muster out of two years' regiments, was intended to apply only to regiments which were about to be entitled to be mustered out as *such*, because of the expiration of the term of service of the original organization. It was *not* intended to apply to those men who, having joined these regiments at periods subsequent to their original organization, and when enlistments for two years were no longer authorized by law, were enlisted for three years. V, 595.

3. *Held*, (April, 1864,) that an officer of volunteers who upon promotion is duly mustered into his new grade in the same company, is strictly engaged to a term of service of three years from the date of such muster. It is the general rule, however, of the War Department to muster out officers of volunteers with their regiments or companies, at the expiration of the regular term of service of the latter, if not re-enlisted as veteran volunteers. VI, 80.

4. *Held*, generally, that the formal and regular muster-out of service of a volunteer officer cannot be revoked by an order of the War Department, which at the same time dishonorably discharges him instead. Having once duly left the military service, he cannot be caused to re-enter it without his consent. VI, 478; XI, 197; XX, 584. A muster-out, where not fraudulently procured, cannot be revoked in order to dismiss the officer for an offence committed before his discharge. XXV, 541. But *held* otherwise where the discharge of the party was induced by *fraud* or *false representations* on his part. As, where an officer falsely represented himself as physically disabled for duty. VI, 661. So, where an officer tendered his resignation, (which was accepted and he discharged,) on the ground of the death

of his wife and child, as reported by him, when actually both were living. XI, 463. In such cases the government may elect to treat the order mustering out the officer as of no effect, and, in revoking it, may dishonorably discharge or dismiss him, or order him to be tried for his offence by court-martial; for 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 the false representations of another. XI, 463; XXIII, 121; XXV, 394. Further, upon the principle that fraud may be constituted as well by a *suppression of truth* as by false representations; *held*, that where a volunteer officer had procured himself to be mustered out of the service by suppressing for a time the facts of a grave military offence of which he had been guilty, and thus deliberately keeping the government in ignorance of the same, his muster-out and discharge might properly be revoked, and he brought to trial for his offence. XXI, 94. * The *suppression of truth* must, to amount to a fraud, consist of some actual language or conduct involving deceit—some positive effort to cover up the transgression, divert suspicion, or draw attention from the fact. A mere failure by an officer to make confession of an offence would not of itself amount to such a suppression. XX, 584.

*5. A volunteer officer and commissary of musters, having been guilty of a false muster, did not forward the rolls exhibiting the same to the chief commissary of musters till just before the time for his own muster-out and discharge from the service as an officer; the result of which was that he was formally mustered out and honorably discharged without the fact of his offence being brought to the knowledge of the government. *Held* that he had been guilty of such a *suppressio veri* as to authorize the revocation of his discharge, as fraudulently obtained, and his trial (upon such revocation) for his offence, by court-martial. XXIII, 169.

6. But where a volunteer officer, having committed a gross neglect of duty, in wrongfully permitting the escape of a prisoner in his charge, was, without notice being taken of this offence by the government, formally mustered out by competent authority, *held*, that such action could not properly be revoked, and the officer be again brought into the service with a view to his trial; inasmuch as the case was one not of a fraud or deceit practiced upon the government, but of a specific military offence of which it was bound to have taken notice at the time if it designed to have the officer punished therefor. XII, 476.

7. Where the government has elected to retain a volunteer officer in service after the date at which he should have been discharged, (as after the end of his proper term of service, or after the date at which his regiment, by being reduced in numbers, has become no longer entitled to such an officer,) by prosecuting him before a court-martial, it cannot, upon his acquittal, properly proceed to muster him out as of a date prior to such proceedings or their publication, since the same would thereby be nullified to the prejudice of the officer, who would thus be unjustly deprived of his pay for the period intervening between

the date of such muster out and the date of the publication of his acquittal. XVI, 406.

8. A volunteer officer, having been for some time held in arrest, was tried and acquitted by court-martial; the reviewing authority, however, in thereupon ordering his release and return to duty, took occasion to disapprove the proceedings on account of a fatal defect therein appearing upon the record. Pending the trial an order had been made by the War Department mustering him out of service as of a date prior to the trial, to wit, the date of the formal discharge of his company. *Held*, that this order should be revoked, and an order substituted mustering him out as of the date of the final action upon his trial, with full pay, &c., up to that time; that though the proceedings upon his trial were really inoperative in law, yet their invalidity was occasioned by no fault of the accused; and that the government by engaging in his prosecution, had committed itself into a recognition of him as an officer of the army during the pendency of the proceedings, and up to the period of the final decision and orders of the reviewing officer. XII, 672.

SEE ELEVENTH ARTICLE.
NINETY-FIRST ARTICLE, (3)
COURT-MARTIAL, I. (13.)
CONTINGENT FUND.
DISCHARGE.
JURISDICTION, (2.)
PAY AND ALLOWANCES, (8,) (13,) (15.)
SUSPENSION, (4,) (5.)

MUSTER ROLL.

SEE DESERTER, (4.)
EVIDENCE, (11,) (12.)
FRAUD, II, (8.)
MUSTER, (1,) (3.)
PAY AND ALLOWANCES, (22.)

MUTINOUS CONDUCT.

*In March, 1861, a secession flag, a symbol of the impending rebellion, raised by the citizens of Fort Smith, Arkansas, was torn down by a soldier of our army, who, when ordered by his commanding officer to replace it, calmly and without any display of disrespect or temper tore it into shreds and trampled it under his feet. For this act he was brought to trial by court-martial on a charge of "mutinous conduct," convicted, and sentenced to a term of confinement at hard labor and forfeiture of pay. *Held* that the finding and sentence of the court (which were formally approved) were without justification in law, as well as most discreditable to the officers concerned. This flag imported, and was intended to import, open and defiant hostility to that one which this soldier's military oath required him to uphold; and his tearing it down under the circumstances in which he was placed, was an act of patriotism for which he deserved commendation and honor. The order of his commander to restore the flag to its position was an *unlawful* one, and for not complying with such order the soldier could not legally be held to trial or punishment. XXVI, 603.

MUTINY.

1. A single individual may properly be convicted of mutiny, as a soldier, I, 381. *See Benet, 206; citing Samuel, who holds that mutiny "may originate and conclude with a single person, and be as complete with one actor in it as one thousand."

*2. In a case where a brief mutiny among certain soldiers of a colored regiment was clearly wholly provoked and occasioned by the cruel, brutal, and inexcusable violence 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. XXVI, 64. 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. XXV, 51, 75, 160.

See JOINDER, (3.)
SENTENCE, II, (2.)

N.

NATIONAL CEMETERIES.

*The act of February 22, 1867, ch. 61, "to establish and to protect national cemeteries," in authorizing the Secretary of War to "enter upon and appropriate any real estate, which, in his judgment, is suitable and necessary for the purpose," and in authorizing and requiring him to make payment therefor, makes no discrimination between land taken for a cemetery in a loyal State, and that so taken in a State lately in insurrection; nor between land belonging to a loyal citizen and that belonging to one who has taken part in the rebellion. The act of February 21, 1867, ch. 57, which (among other things) forbids and suspends payment for real estate appropriated by the military authorities in insurrectionary States, having gone into effect the day *before* the statute under consideration, cannot of course effect its operation. In all cases, therefore, of land occupied for cemeteries under the provisions of this statute, the Secretary is absolutely bound to pay to the owner or owners, without any regard to his or their personal record during the war or to the locality of the

estate, the price agreed upon between the parties, or fixed by the appraisement made by the proper court. In regard to such payment the act is mandatory, and in the absence of any *fraud* in the appraisement, the Secretary is not at liberty to refuse to accept as conclusive the appraised value, on the ground that it is excessive. XXVI, 617.

SEE SUPERINTENDENT OF CEMETERIES.

NAVY, DISMISSAL OF OFFICER OF.

SEE DISQUALIFICATION, (1.)

NEUTRALITY.

Where a vessel about to put to sea from one of our ports was seized and detained by the President upon *prima facie* evidence that she had been "*attempted to be fitted out and armed*," with intent to be employed in the service of the Chilian government against that of Spain—with both of which powers we were at peace—and was, therefore, subject to such detention under the provisions of the 8th section of the neutrality act of 20th April, 1818; and an application was presented by her owners that she be released and permitted to proceed with her voyage, upon their entering into a bond with a penalty of double the value of the vessel, &c., conditioned to be forfeited upon any breach of neutrality through her transfer or employment; *advised* (March, 1866) that such application could not properly be granted, and for the following reasons: 1. Of the three sections of the act to be referred to in the consideration of this case—the 8th, 10th, and 11th—the two latter provide for the giving of such a bond in the cases of vessels about to leave our ports which are either "*armed*," or have a "*cargo consisting principally of arms and munitions of war.*" But the vessel in this case not being in either of these classes, her release upon bond cannot be held to be authorized by either section. Further, the 8th section, which does include the present case, and permits a seizure under precisely those circumstances which are alleged to exist here—namely, of an attempt to fit out and arm with intent to violate the obligation of neutrality—makes no provision whatever for the bonding of the vessel or for her release at all. That such provision indeed is wanting in the 8th section is conceived to be owing to the fact that, unlike the 10th and 11th sections, which contemplate cases in which the basis for the detention of the vessel, where authorized, is merely a suspicion or presumption arising from its character and the circumstances surrounding it, *this* part of the enactment provides for the seizure only in cases of *specific offences* of which the gist is a *criminal intent*, and established by proof *aliunde* and beyond that necessarily arising out of the character, &c., of the vessel. 2. Apart from the question of *statutory law* involved, and aside also from the general principle of the *law of nations* which exacts a scrupulous impartiality towards belligerents on the part of neutrals, it is conceived that a grave and peculiar obligation, to exercise in

this and similar instances an extreme vigilance, is imposed *at this juncture* upon our government. For it is upon such a degree of vigilance on the part of foreign powers that it has invariably insisted during the present rebellion; and it cannot now, in justice or in honor, hesitate to prescribe for itself, as a neutral, the same duty. Whenever, during the war, the rule of strict neutrality has appeared to be disregarded by a European nation, its action has not failed to be met by the most earnest protest and remonstrance on the part of our government at home and its ministers abroad; and the injury to our commerce which has been deemed to have grown out of undue facilities afforded by the foreign power, in any instance, to a piratical rebel cruiser, as to the Alabama, has been made the subject of claims for indemnity, which have been in nowise abated up to this time. Indeed, the case under consideration forcibly recalls that of the Alabama, which, like the vessel in this instance, left the neutral port, in which she had been otherwise fitted out, *unarmed*, but with the intention of receiving her armament, as she actually did receive it, from a tender awaiting her at sea. It must thus, it is thought, be perceived that the only course consistent with its dignity and honor at this period is for this government to exhibit itself as the exemplar of the principles, the observance of which it has heretofore so emphatically demanded on the part of neutrals. It is concluded, therefore, that in the present case, as in any similar case in which a breach of the law of neutrality is fairly to be presumed, the authority of the Executive for the detention of the vessel, at least till all the facts of the imputed criminality of her owners can be judicially investigated, should be rigorously maintained. If, indeed, the prompt and vigorous exertion of that authority were to be relaxed in the present instance, and the steamer be allowed to go on her way, it is clear, should the evidence offered and the official assurances given in regard to her intended employment be justified by the result, the proposed security would furnish no adequate indemnification either to this government, or to that of the belligerent upon whose commerce this vessel might make war. *Advised*, therefore, in this case, that no application for the release of the vessel should be entertained, until the issue of the trial, upon a libel for her forfeiture now pending in the United States admiralty court, should become known. XXI, 264.

NEUTRAL.

1. As this government has recognized the right of the Peruvian government to possess itself of the guano in the hands of its factors at Norfolk it would seem to be in entire harmony with this action to order these factors to pay over to the agents of the Peruvian government the proceeds of such part of the guano as they may have sold; and as Norfolk is in the possession of the United States—*recommended* (September, 1862) that this relief be afforded by a direct military order upon the parties holding the funds. I, 352.

2. *Held*, that a citizen of a neutral power taken upon a neutral ves-

sel, upon suspicion of being engaged in blockade running, (but not shown to have been otherwise connected with the rebel service,) might, under the terms of the circular of the Navy Department of May 9, 1864, be subjected to be detained as a witness if needed to be so used on the part of the government, but could not properly be required to take an oath and give his parole to leave the country and not return. And where such a party, having been required to take such oath, left the country, but soon returned upon a neutral blockade runner and was thereupon again seized; *held* (May, 1865) that he could not properly be treated as a prisoner of war who had violated his parole, or brought to trial for such offence in violation of the laws of war. XVI, 76.

SEE CLAIMS, I, (5,) (22,) (24,) (25,) (32;) II, (12.)
OATH, I, (1.)

NEW MEMBER.

Where one member of a military commission was relieved on account of sickness during the pendency of the trial, and another was detailed in his place, and on taking his seat had the evidence read over in his presence, the proceedings *held* regular and the sentence valid. VII, 411.

That new members may be added to a general court-martial, pending a trial, (to prevent the number of the court from falling below the *minimum*,) the proceedings as recorded being read to them, was ruled upon the trial of Brigadier General Hull in 1814. This ruling was made by the court pursuant to the opinion given by the Hon. John Armstrong, then Secretary of War, whom the court, through Hon. Martin Van Buren, special judge advocate, had addressed, asking to be advised upon points raised at the trial. The Secretary, in his opinion, referred to similar rulings in the cases of Generals Howe and Whitelocke. VII, 467.

SEE ABSENT MEMBER.

NEW TRIAL.

1. Whether the original trial has been by court-martial or by military commission, the President has no power to order for the accused a new trial, except in a case of which he is the reviewing authority, without whose approval the sentence cannot be carried into effect; (as where the court was convened by his immediate authority, or where the execution of its sentence has been suspended for his action under the provisions of the 89th article of war;) and where the sentence, on the ground of irregularity or error in the proceedings, or because the findings are not deemed to be sustained by the evidence, is formally *disapproved* by him. But a new trial can in no case be granted by the Executive where the proper reviewing military authority has duly confirmed and ordered the execution of the sentence of the court, the judgment of which is thus made final. I, 451; XIII, 337.

2. The proceedings, regular in form, of a trial by a competent military court which has resulted in the acquittal of the accused, cannot be set aside and a new trial ordered, *in invitum*, by executive authority. The accused being acquitted, the government is concluded by the result of the proceedings. Moreover, a new trial, when allowable, cannot be ordered except at the request or with the consent of an accused. XVI, 343.

NOLLE PROSEQUI.

The Secretary of War, as the executive officer of the President, may order a judge advocate to enter (with the consent of the court-martial) a *nolle prosequi*, or, in other words, discontinue and withdraw the prosecution, at any time after a trial has been commenced. The court should properly assent to the same being entered, since a prosecution before a court-martial, as before an ordinary criminal court, proceeds in the name and by the authority of the government, which may abandon such prosecution at will. IX, 488, 533.

SEE ARREST, II, (4.)
CHARGE, (18.)
PROCEEDINGS AT LAW AGAINST OFFICERS, &c., (15.)

NON-COMBATANT.

SEE CLAIMS, II, (2.)
PRISONER OF WAR, (3.)

NON-COMMISSIONED OFFICER.

SEE NINTH ARTICLE, (3.)
SIXTY-SEVENTH ARTICLE, (6.)
REDUCTION TO RANKS, II.

NON-RESISTANT.

SEE ENROLMENT, II, (2.)

O.

OATH, I—(OF ALLEGIANCE.)

1. A party representing himself to be a British subject applied to the President *to be absolved* from an oath of allegiance which he had taken—under duress and imprisonment, as he alleged—to the United States. *Advised* (May, 1863) that the President had no power in the premises; that if the imprisonment was illegal and the oath taken under its pressure, such duress had deprived it of all obligatory force;

that if thus invalid it should be so treated in the forum of conscience, and would be so declared in any proceeding in which the question of its legality might be involved; but that the government had no authority to declare the oath in the abstract inoperative and void, or to relieve the party from any obligations it may have imposed. II, 267.

2. *Held* (April, 1865) that a citizen of an insurrectionary district who had taken and subscribed the oath contained in the President's proclamation of amnesty of December 8, 1863, and thus returned to his allegiance to the United States, became entitled to protection of person and property; and *advised* that certain personal property which had been taken from him before subscribing such oath, by certain United States soldiers having no authority to make the seizure, but while engaged in pillaging merely, and which, having been taken into possession by the military authorities, he had applied to have delivered to him, might properly be returned in accordance with his application. XI, 647.

SEE ENLISTMENT, I, (2.)
MILITARY COMMISSION, IV, (1.)
OATH, IV.
PRESIDENT'S PROCLAMATION, II, (1.)
PRISONER OF WAR, (3.)
SPECIFICATION, (11.)
VIOLATION OF THE LAWS OF WAR, (3,) (4,) (11.)

OATH, II—(OF COURT AND JUDGE ADVOCATE.)

SEE SIXTY-SIXTH ARTICLE, (13.)
SIXTY-NINTH ARTICLE.
FIELD OFFICER'S COURT, (14.)
JUDGE ADVOCATE, (14.)
MILITARY COMMISSION, I, (12.)
ORDER, II, (5.)
RECORD, IV, (1,) (2,) (3,) (4.)
SWEARING THE COURT, &c.

OATH, III—(OF ENLISTMENT.)

SEE ENLISTMENT, I, (2;) II, (2.)

OATH, IV—(OF OFFICE.)

(Act of July 2, 1862, chapter 128.)

1. A contract surgeon, upon entering upon his office, claimed, because a member of a "covenanter church," to be permitted to take a modified form of the oath prescribed in chapter 128 of the act of July 2, 1862, and proposed to substitute the words, "I will support and defend the United States against all enemies," for the phrase, "I will support and defend the Constitution of the United States." Although the difference between the oath prescribed and that thus proposed in its stead may not be a substantial one, since it is difficult to understand how a person could "support and defend the United States against all enemies" without sustaining the Constitution, yet as the proffer to substitute such modified oath would seem to imply that, in the mind and conscience of the surgeon, it was,

in its obligations, really different from that required by the statute; and inasmuch as it is believed that the government should not, however indirectly, admit that the Constitution, *eo nomine*, is not worthy of the support of the most conscientious Christian: therefore, *advised* that such modified oath should not be accepted. XI, 503. And see XIII, 487.

2. Where the oath subscribed by a physician proposed to be contracted with in a rebel State was in the form prescribed by the statute, except that to the clause which states that the officer has not given aid, &c., to the enemy, or exercised the functions of any office under him, there were added by such physician the words, "unless attending to sick confederate soldiers for a few months be so regarded;" *advised* (January, 1866) that this oath be not accepted as a sufficient compliance with the law. XIX, 376.

3. Where a contract had been entered into by a local commander in Louisiana with a physician, who, because of having served in the rebel army, could not take the full oath prescribed by the act of July 2, 1862; *held* (October, 1865) that such *contract* should be at once rescinded. XIX, 89.

OATH, V—(OF WITNESS.)

SEE BOARD OF SURVEY, (2.)
DEPOSITION, (4.)
WITNESS, (21.)

OCCUPATION OF REBEL ESTATE.

1. Where the government occupied for hospital purposes, during the war, the estate of a rebel general, situate in Maryland, but did not proceed to cause the same to be formally confiscated; and, at the cessation of active hostilities, discontinued such occupation and allowed certain members of the owner's family to repossess themselves of the premises; *held* that the refraining from instituting proceedings for confiscation was in no manner to be regarded as an admission by the government that it had no right to so proceed, but that its continued occupation of the estate was an assertion of such right; that the restoration of the property to the owner's family was an act of grace; and that a claim on their part for rent to be paid them by the government for such occupation was wholly without foundation. XX, 179.

2. The government having taken possession of the premises of a party, in consequence of traitorous acts committed by him, and of which he had been convicted by court-martial; *held* that it might lawfully cultivate the same or authorize their cultivation by others; and that, having, by its agent, the military commander who had the estate in his custody, granted permission to an individual to cultivate the land, under the assurance that he should be allowed to gather the fruits of his labor, it could not, without a breach of faith, deprive him of the same. XIII, 387.

And where the convicted party and former owner, having been

pardoned by the President and allowed to reoccupy the premises, proceeded to eject the occupant in question and to seize the crop—*held*, that the right to such crop conferred upon such party by the action of the Executive was subordinate to that of the intermediate occupant, which had been derived from the government during its lawful possession of the land; and that the owner should be excluded from appropriating the crop, or, if he had already taken possession of it, should be compelled by military authority to make restitution thereof to the occupant under the original seizure. XIII, 389.

3. The only proper ground for the restoration of the abandoned estate of a rebel, seized and held as such by the government, to members of his family remaining in the locality, would be the *loyalty* of the latter. But in a case where these were very young women, or girls only—*held*, that their loyalty must necessarily be of a most conspicuous and active character to warrant the government in restoring to them the property. But where the estate had been improperly restored to these females by a subordinate officer of the government, and they had leased it in good faith to a *bona fide* tenant for a valuable consideration, and the latter had entered upon and occupied the property—*advised*, that the United States should revoke the action of its officer, and reassume control of the estate, but, in so doing, should not dispossess the tenant, but allow him to remain during his term, upon his attorning and paying rent to the United States. XII, 959.

* 4. The government, during the continuance of the war, erected a building upon certain land, in Mississippi, of which it had taken possession upon the occupation of the territory by the military forces. Subsequently (and prior to the peace proclamation of August 20, 1866) the former owner of the land converted and sold the building as his own property. *Held*, that the principle of law, that a structure erected upon land without the consent of the owner becomes his property, did not apply to this case; because the government erected the building and occupied the premises by virtue of the rights of possession and use which the conqueror has in the enemy's land. That, as the occupation was authorized, and divested for the time the right of the owner, he could acquire no title to the building, and that an action would lie in favor of the United States against him for the illegal conversion of the property. XXIII, 278.

SEE CLAIMS, I, (21,) (29,) (30,) (31,) (32;) II, (3,) (12,) (13.)
CONFISCATION, (3,) (7.)
PARDON, (7,) (8.)

OFFER OF RESIGNATION.

SEE DISMISSAL, I, (10.)
RESIGNATION, (1.)

OFFICER.

The term "*officer*," when used in the Army Regulations, as well as in the Articles of War and other enactments regarding the military

service, is held to mean *commissioned officer* only.† XII, 171. See NINTH ARTICLE, 3.

SEE EIGHTY-THIRD ARTICLE.
COURT-MARTIAL, II, (16.)
DESERTER, (27.)
MEMBER OF MILITARY COURT, (2.)
MILEAGE, (1.)
PRESIDENT'S PROCLAMATION, III, (5.)
PUNISHMENT, (13,) (14,) (16.)
RESIGNATION, (1.)

OFFICER OF THE DAY.

1. An officer of the day of a regiment is empowered to place in arrest a superior as well as an inferior officer in rank to himself for any disorder or violation of the discipline of the camp, of which he is for the time the chief executive officer, subject to the orders only of the regimental commander, whom, in fact, he represents. And in making an arrest of an officer he may, instead of ordering him to his quarters, properly require him to report to the commander of the regiment. XIV, 613.

2. The officer of the day is, by the settled custom of the service, responsible for the enforcement of the police regulations of the post or camp at which he is serving; but he cannot properly be made liable for any criminal act of a subordinate not brought to his knowledge, or for any defects in a system of discipline of which he is not the author. XVIII, 666.

OFFICERS' DEBTS.

SEE EIGHTY-THIRD ARTICLE, (8,) (9,) (10,) (11.)
SENTENCE, I, (5,) (7.)
STOPPAGE, (7,) (8.)

OFFICERS' SERVANTS.

1. The act of July 17, 1862, chap. 200, sec. 3, as well as the act of June 15, 1864, chap. 124, sec. 1, authorizes, by implication, the employment of soldiers as servants by officers of whatever grade, both in the regular and volunteer service. Paragraph 124 of the Regulations, which provides that no officer other than a company officer may employ a soldier as a waiter, may be regarded as superseded. IX, 620.

2. *Held*, that any officer who employs a soldier as a servant to perform for him such personal services as are usually performed by a servant, whether such employment withdraws the soldier wholly or only partially from his ordinary duties in the company or regiment, is liable to the consequences specified in the acts of July 17, 1862, chap. 200, sec. 3, and of June 15, 1864, chap. 124, sec. 1; and that such liability is not affected by the fact that the soldier is not specific-

† NOTE.—Both the new articles of war prepared and submitted to Congress by the Board of officers of which Lieutenant General Sherman was the head, and those recently presented by the "Commission for the revision and consolidation of the public statutes," commence with a declaration to the effect that wherever the term "*officer*" is used in the Articles, it shall be taken to mean a *commissioned* officer. XXVI, 589.

ally returned or entered upon the rolls as such servant. *Held*, also, that the act of 1862 apparently contemplates that the employment shall be to a certain extent continuous or regular, and for the whole or some considerable portion of a month; and that an accidental employment for a few days upon an emergency would not probably render the officer liable under the statute. XII, 486. But see 3.

* 3. Under sec. 1, chap. 79, act of March 3, 1865, there can legally be deducted from the pay of an officer employing a soldier as a servant only the amount of the pay and allowances of such soldier; and whatever further deduction or forfeiture may have been incurred by such an officer under the act of June 15, 1864, chap. 124, sec. 1, cannot now—in view of the provisions of the act of 1865, which virtually abrogate those of the former act—be legally enforced. XXIII, 596. (The Paymaster General has indorsed upon a copy of the above opinion, that the practice of his office is "in exact accordance" with the view therein expressed; and he adds: "When an officer takes a soldier as his private servant, he should omit from his pay account any charge for pay, subsistence, and clothing for servant.")

OFFICIAL BOND.

SEE BOND, (1,) (3,) (4.)

OFFICIAL RECORDS OF THE GOVERNMENT.

1. The files of the War Department are not public records, open to the examination of any person, but confidential archives of the government, to be consulted only by the express permission of the Secretary of War. Such permission, it is conceived, will ordinarily be granted in cases where such an examination would not be incompatible with the interests of the service, or prohibited by public considerations; of the weight of which, however, the Secretary, fettered as he is by no legal obligation in the matter, must alone be the judge. XIV, 313; XXIV, 27.

2. It is the general rule that private individuals are not to be allowed to withdraw from the files of the executive departments of the government the originals of public records or papers; certified copies of the same may, however, be accorded to them in proper cases, and where public considerations do not outweigh the private interests involved. XXI, 142; XIX, 375; XX, 368. Thus *advised*, that where the record of a deed of land of the government, in which the Secretary of War was grantor, had been destroyed by fire in the local registry office, a copy of the same might properly be furnished, from the records of the Ordnance Department, to the present owner of the land, who desired to complete his chain of title. XXI, 203, 324.

* 3. *Recommended* that a copy of a record of court-martial be authorized by the Secretary of War to be furnished to a party other than the accused and not applying in his behalf—in a case where the same

was evidently required in the interests of justice, and for the defence of a supporter of the government prosecuted for the performance of a public duty. XXI, 336. See NINETIETH ARTICLE.

ORDER, I—(GENERALLY.)

1. A general or special order signed "*by the order of the Secretary of War*" is valid; such order is issued by the Secretary as the executive officer representing the President, and the phrase used is the official sign of the executive authority. VIII, 297.

2. A general order cannot be allowed to retroact so as to fetter a contract with conditions which did not exist at the time it was entered into. Thus General Order 171, of the War Department, of June 9, 1863, prohibiting an officer from selling a horse purchased from the quartermasters' department—*held* not to invalidate the sale of such a horse made to a citizen before the date of the order. IX, 602.

3. Where the aide-de-camp of a department commander was, in time of war, by a special order of the War Department summarily mustered out of the service for the offence of using language expressive of disrespect to the President and hostility to the measures of the government, and the commanding general, although fully apprized of the grounds of this action, issued thereupon a department General Order, in which, while complimenting his staff officer for his general good conduct on the field, he stated that he could not part with him without expressing the regret which he felt in so doing—*advised*, that this public manifestation of commendation and regret was, under the circumstances, insubordinate and reprehensible, and that some proper action should be taken to rebuke it, in order that it might not be drawn into a precedent. IX, 646.

4. Where the formal order of a general commanding to a regimental commander—to deliver up the colors of the regiment—was transmitted by a lieutenant and staff officer, who was directed to receive the colors; and the latter proceeded to the headquarters of the regiment and communicated the order to its commander, without his sword or being dressed in full uniform, though wearing proper shoulder-straps—*held*, that though such negligence was unbecoming and reprehensible, the regimental commander (who knew the lieutenant to be such staff officer) was not for that reason alone justified in refusing to comply with the order. XVI, 604.

5. An order of a department commander made during the war, imposing a forfeiture of thirty days' charter money of a vessel upon the owners, because they did not, in his opinion, provide a competent master therefor—*held*, to have been wholly without sanction of law or the usage of the service. XVI, 303.

6. The members of a military court cannot properly refuse to comply with the orders of their superior officer, to perform their ordinary duties as officers in the intervals of the sessions of the court; but where such orders are, under the circumstances, unreasonable, a neg-

lect to strictly comply with them would not probably be regarded as an offence of the gravest character. XVI, 549. See MEMBER OF MILITARY COURT, 2.

7. If an order affecting an officer, or intended to govern him in the performance of his duty, is published at his post or regiment, or is shown to have been sent to him personally at his proper place of address, it may generally be presumed that he had knowledge of its contents; a presumption which may, however, be rebutted by proof that such knowledge was never actually brought home to him, and this by no fault of his own. A similar presumption may arise where the order is promulgated in the department or district where the officer is serving, and under such circumstances as to make it apparent that he could hardly have failed to take notice of it. XIII, 284. See XIII, 335; XIX, 696; FRAUD, II, 6.

8. It is the general rule that an order affecting the rights of any person in the United States service becomes operative from the date of its publication at his regiment, post of duty, or station, and this rule is based upon the presumption that *actual notice* of the order is given and received at that date. But this presumption may be rebutted, and the order shown to have been inoperative, by proof that such actual notice was, without fault or negligence on his part, not brought home to the individual intended to be affected. Thus where an officer who had been tried by court-martial, while awaiting the promulgation of the proceedings, was 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. *Held*, further, that such order was inoperative, because it was not practicable for the government, by carrying it into execution, to remit the party to his civil rights and *status;* it being a principle of law that when the period of service of an officer or soldier is terminated by limitation of time, or by an act of the government, he should be restored to all his rights as a citizen, subject only, in case of his conviction of crime, to the legal disabilities consequent upon his sentence. XII, 230.

9. A soldier was sentenced to death, but the execution of the sentence was suspended for the action of the President, who proceeded to mitigate it to a dishonorable discharge from the service and imprisonment during the war. Before the promulgation of such action, however, the accused was taken prisoner by the enemy. Upon an application for clemency, based upon good grounds, presented in his behalf after his exchange, *held*, that after his capture, and up to the time of his release, he must be regarded as in the service under the conditions which existed at the time of his capture; that the order of the President, of which he could have had no notice, was inoperative; and that the President might well issue a new order, in the place of the former, so mitigating the punishment as to retain the soldier in

the service, and, at the same time, visit him with a light penalty. XII, 293.

SEE SIXTH ARTICLE, (5.)
NINTH ARTICLE.
COMMISSARY OF SUBSISTENCE.
DISCHARGE, (6.)
DISMISSAL, I, II, III.
FINE, (1.)
JUDGE ADVOCATE, (8.)
MANSLAUGHTER, (2.)
MUTINOUS CONDUCT.
PAY AND ALLOWANCES, (5.)
PREFERRING CHARGES, (2.)
PUNISHMENT, (18,) (30.)
RECORD, I, (4;) IV, (25.)
RESIGNATION, (2.)
SENTENCE, III, (5,) (7,) (8.)
SEPARATE BRIGADE, (6,) (10.)

ORDER, II, (CONVENING MILITARY COURT.)

1. Where the order convening a court-martial is subscribed by a general officer, who adds to his signature, "Commanding district of West Tennessee," such order is *prima facie* invalid, further and other evidence being necessary to show that he had authority to convene the court. XI, 162. And see XI, 214. So in case of an order issued for the same purpose by an officer whose authority to convene a court-martial is not sufficiently exhibited therein, the caption of the order being only "Headquarters of the post, Vicksburg." XI, 170. So in case of an order signed by a colonel as "Commanding post at Winchester, Virginia;" the commander of a post not being competent, as such, to convene a general court-martial, and there being no evidence presented, in connection with the order, that his command was an "army," division, or "separate brigade." XI, 176.

* 2. Upon an application to have set aside the sentence of a general court-martial, on the ground that the same was not a competent tribunal, the convening order (dated in April, 1863) being headed only "Headquarters district of Kanawha," *held*, as follows: That while it was true that a district commander, at that period, was not, as such, empowered to convene a general court-martial, and that the order—thus headed—is *prima facie* insufficient in law, it has been the ruling of this bureau, in cases similar to the present, that this description did not exclude evidence to show what was the *actual military command* of the officer at that time. That inasmuch as it appeared in this case, by official information obtained from the Adjutant General's Office, that the command of the convening officer was, *in fact*, at the date of the order, a division composed of two brigades, and that such division and the district of Kanawha were identical, it was clear that this commander had full power and authority to convene the court in this instance, and that the same was therefore a legal tribunal. XXVI. 510.

* 3. *Held*, that an order convening a general court-martial, signed "By command of *Brigadier General A. B.;—C. D., Assistant Adjutan General*," was not (in not setting forth the rank of the latter officer)

such a departure from the provisions of the Army Regulations as to affect the validity of the proceedings. Under paragraphs 449 and 450 of the Regulations, it is believed that the actual rank of the staff officer need not be indicated, if it sufficiently appear that he is a staff officer, and if the proper rank of the superior, by whose command he subscribes the order, *is* set forth. XXII, 56.

4. An order convening a court-martial, where less than thirteen members are detailed, will be invalid if it does not state that a greater number of officers than those detailed could not have been assembled without manifest injury to the service. See SIXTY-FOURTH ARTICLE, 6. But an order convening a military commission need not contain such statement. See MILITARY COMMISSION, I, 10.

* 5. *Held*, that the omission to designate an officer or other person as judge advocate, in an order convening a military commission, was fatal to the validity of the proceedings. Not only is it thus not shown that the court was furnished by proper authority with the requisite prosecuting officer, but it is made impossible to ascertain by whom the oath was administered to the commission, or whether the same was administered legally. XX, 502.

SEE SIXTY-SIXTH ARTICLE, (15.)
ADJOURNMENT, (3.)
COURT-MARTIAL, I, (6.)
RECORD, IV, (5,) (6,) (23,) (25.)
SEPARATE BRIGADE, (7.)

ORDER, III—(OF PROMULGATION.)

1. A general order promulgating the proceedings of a court-martial need not contain a clause dissolving the court. III, 84.

2. It is not made requisite by law (paragraph 897 of Army Regulations) that a copy of the order of promulgation of sentence, &c., should accompany the record when transmitted to the Adjutant General; it is a judicious practice, however, to enclose a copy of such order with the record of each separate case so transmitted. X, 263.

3. The insertion of the name of the president of a military court, in the order publishing its proceedings, is a mere form customarily employed for the purpose of indicating and identifying the particular court whose proceedings are announced; but it is a form no more necessary than any other mode of designation which might properly be used with the same object. And where the original presiding officer of a certain court had been relieved at a certain period of its sessions, and the next senior officer had thereby become president—*held*, that it would affect in no way the validity of the order whether the latter or his predecessor were named therein as president; but that the president who has officially subscribed the proceedings would, in general, be most properly indicated as presiding officer in the caption of the order. XIII, 324.

* 4. Where, in the case of an officer sentenced to be dismissed, the order promulgating the proceedings and confirming the sentence was not published till after an interval of three months, and it was therein

expressed and directed that the accused cease to be an officer of the army as of the date of his *sentence; held* that such a direction was unauthorized, and that it could not affect his legal right to receive his pay for the interval, and up to the date of the receipt of the order at the post at which he was stationed. XXII, 506.

SEE DISMISSAL, II, (2.)
PRESIDENT AS REVIEWING OFFICER, (4.)
RECORD, IV, (25.)
REVIEWING OFFICER, (13.)

P.

PARDON.

1. Where a drafted man who had deserted as such and fled to Canada, without even attempting to return under the President's proclamation of amnesty of March, 1865, applied to be pardoned, stating that he "fervently regretted" his conduct—*held*, that the *regret* of a man who would leave his country in her hour of peril, and flee from the performance of his duty in her behalf, was too tardy when exhibited only in prospect of peace; that such a party should not be allowed to return and freely enjoy the prosperity which others, whom he had abandoned in their danger, had won; but that he should be required to remain in disgraceful exile from the land whose protection he had forfeited, or to return to it only at his peril and with the assurance of an immediate arrest and trial for his crime. XVII, 208.

2. Where a drafted man was sentenced, for a desertion from the draft, involving an absence of a year and a half, to a light punishment of forfeiture and imprisonment at hard labor; his pardon and release *not advised*, inasmuch as, having been duly drafted and notified to appear, he had persisted in avoiding a sacred duty, and in exhibiting a contempt and disregard of a law which was of vital importance to the defence and safety of the country; and this during the most active and eventful period of the rebellion. XVII, 258.

3. So pardon and release *not advised* in the case of a similarly sentenced deserter, who for a period of two years had shirked his duty, at a time when the country was in peril, and every motive of patriotism and manhood demanded his obedience to the draft which placed him in the military service. XVII, 263. So, in the case of a naturalized citizen, who had deserted from the army to Canada, and had not returned under the amnesty proclamation of March, 1865, *advised* tha it was difficult to conceive of a case of less merit than that of one who after abandoning the flag of his adopted country in a day of national peril, and seeking a refuge from justice on foreign soil, now sought

impunity and a restoration to those rights of citizenship which had been maintained by the sacrifices and sufferings of patriots. XX, 44. (This opinion is dated prior to the act of March 2, 1865, ch. 79, sec. 21, depriving deserters of rights of citizenship.) And *held*, generally, that a deserter, remaining at large, must return and surrender himself before any application by him for pardon can be entertained. XXII, 285.

4. An officer, who had been duly convicted by court-martial of extortion, receiving bribes, and gross malversation in office, and sentenced to fine and imprisonment, escaped from military custody and fled to Canada. Subsequently an application for his pardon was addressed in his behalf to the Executive, but no offer was made therein to settle his fine, or to reimburse the victims of his extortions, nor was there presented any indication that he ever entertained penitence for his criminal acts, or a regret on account of his record in the service. *Held*, that the case was clearly not one for the exercise of clemency; that a felon convicted of the gravest crimes, who has yet submissively yielded to legal durance, would have far more reason and merit in a petition for relief addressed by him from his prison than had this fugitive, who, having escaped the penalties of his misdeeds, was now insolently demanding a free pardon; and that till this convict should appear and surrender himself into military custody, no appeal offered in his behalf could be held entitled to any consideration whatever. XIX, 132. And see XIX, 134; where a similar opinion was given in the case of such a criminal and fugitive who himself addressed his application for pardon from Windsor, Canada. *So, in the case of an application for pardon presented in behalf of a rebel soldier, who had been convicted and sentenced to be hanged for being engaged in the conspiracy for the release of rebel prisoners confined at Chicago, and for the sacking and destruction of the city, but who had escaped before his sentence could be executed and was still at large—*held* that until he should surrender himself, no application for his pardon should be entertained. XXIII, 309. And *held*, generally, that an offender who. having escaped legal custody, addressed from his place of refuge to the Executive an application for pardon, is entitled to no consideration till he surrenders himself for trial. XIX, 690.

5. Upon the application of a pardoned citizen of Virginia to be authorized to purchase from the government at private sale a horse which had been taken from him as an enemy, by our forces, during the period of active hostilities, and thereupon turned over to the quartermaster department—*advised* (November, 1865) that such horse became, upon its capture, the property of the United States by the law of war, and that the effect of the pardon was not to invest the party with any right or privilege in regard to such property, other than that enjoyed by any citizen; that the usage of the service was to permit the purchase of government property by citizens at public sale only; and that, in the absence of any law or regulation authorizing citizens generally to purchase a public animal at private sale, the application of this party should be denied. XIX, 162.

6. Where a convicted guerilla escaped from military custody while

awaiting the execution of a death sentence, and, having meanwhile joined the rebel army, was subsequently surrendered as a paroled prisoner of war upon the capitulation of Lee, and was claimed to have been thereupon admitted to take the oath of amnesty; *held*, that, though thus relieved of legal liability for his treason, he was still amenable to the punishment imposed upon him as a guerilla; and *advised*, upon an application by him for a full pardon, that such application could not properly be considered until he should surrender himself to abide his sentence. XIX, 412.

7. The fact that a rebel has been pardoned cannot entitle him to recover from the United States rent for his real estate, which had been used and occupied, by the right of capture, by our military authorities during a period when he was engaged in active treason. XXII, 5.

* 8. Where the rebel owner of a plantation in Louisiana, occupied and worked by the military authorities during the war, had been pardoned by the President, and had thereupon had the premises restored to his possession; *held*, upon an application by him to have returned to him the amount of the rents and profits during the period of such occupation, that his pardon could confer no right to the proceeds of the land which had been duly taken and appropriated under the laws of war; and that—especially as such proceeds had been expended in the public service—the executive branch of the government could grant him no relief. XXII, 16.

9. In the case of a soldier under sentence upon conviction of theft and burglary, *recommended*, as a condition to his pardon, that he be required to restore the goods stolen or their moneyed value. I, 366.

10. It accords with the usage of the service for the President to pardon, or mitigate the sentence of, a soldier sentenced by court-martial, who is shown to have conducted himself with bravery in battle while awaiting the promulgation of his sentence. IX, 245, 595; XIII, 99.

SEE EIGHTY-NINTH ARTICLE.
BOUNTY, (4.)
CLAIMS, I, (30,) II, (11.)
DESERTER, (14.)
FIELD OFFICER'S COURT, (32.)
MAKING GOOD TIME LOST BY DESERTION, &c., (2.)
OCCUPATION OF REBEL ESTATE, (2.)
PARDONING POWER.
PAY AND ALLOWANCES, (31,) (33.)
PLEA, (18.)
PUBLIC ANIMAL, (2.)
VETERAN VOLUNTEER, (2.)

PARDONING POWER.

* 1. The sentence of a competent military court cannot be treated as a nullity, or set aside, by the President, on the ground that the evidence was insufficient; but only on the single ground that there has been some fatal defect in the proceedings, making the same void *ab initio*. Where the case is one in which his approval is not necessary

to the validity of the sentence, which has been duly approved by the proper reviewing officer, he can (in the absence of such fatal defect, afford relief only by pardon. XXI, 371.

2. The pardoning power of the President cannot reach an *executed sentence* which has been regularly imposed by a competent court. VIII, 149, 228, and *passim.* When a sentence has been executed only in part, he can remit the remainder. II, 29. It is as impossible in law to set aside a valid consummated sentence of dismissal as it is to recall and undo any corporeal punishment that has actually been wholly undergone. XX, 302.

3. When a *volunteer* officer appointed by State authority, or a militia officer in the United States service, has been dismissed by a sentence of court-martial which has been duly executed, the President can exercise the pardoning power in his behalf only by formally *removing the disability* imposed by his sentence, and thus authorizing his being recommissioned by the governor of his State; or rather declaring that if so recommissioned he will be accepted again and mustered into the United States service. I, 365, 372, 374; VIII, 465, and *passim.*

* That this is the only form and effect which can properly be given to a pardon in the case of a dismissed volunteer officer, was the view and conclusion of President Lincoln, first expressed in a case considered and determined by him on June 4th, 1862; and this decision was thenceforth followed and acted upon in all cases of volunteer officers during the war. See REMOVAL OF DISABILITY, 1.

*4. It is the law, as uniformly declared and illustrated by the Attorneys General of the United States in a succession of opinions; (see IV Opinions, 170, 274; VI do., 396, 506; VII do., 98;) and confirmed by the practice of the government prior to the war of the rebellion, that a sentence of a dismissal of a *regular* officer, imposed by a competent court and duly confirmed and executed, cannot be reopened, set aside, annulled, or modified by the President; and that the President cannot, by virtue of any revisory power over the case, or by means of a pardon alone, reinstate in his office or restore to the army such dismissed officer; but that the officer can be so restored only by a new appointment followed by a confirmation by the Senate. During the war, however, a practice grew up of remitting or removing, by Executive order, sentences of dismissal of officers originally appointed by the President, and of giving to such remission the effect of a restoration, in cases where the vacancy had not been filled; it being stated in the order that the sentence was thereby "set aside" or "remitted," and the officer "restored" to his command or office. This action, however, was wholly unauthorized in law; and though it remained some time without correction on account of the exigencies of the public service, it is likely to be presently checked by final legislation. An act, expressed to be, as it is, *declaratory* of the existing law, and positively prohibiting the reinstatement of a dismissed officer except in the form and manner authorized by law as above described, is now, (July, 1868,) pending before the Senate, having passed the House of Representatives. See XIX, 45; XX, 107, 302; XXI, 74.

5. 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 terms of the sentence, was to be incurred at the end of the adjudged term, as a dishonorable discharge from the service, cannot be enforced. The pardon having intervened, the sentence ceases to have any effect whatever in law, and the soldier must be honorably discharged. VIII, 669; X, 286; XX, 460.

6. But the pardoning power will not reach a duly executed sentence of dishonorable discharge. XIV, 568; XII, 427. Where a sentence—to forfeit all pay and be dishonorably discharged, and *then* to be confined for a certain term—had been duly approved by the proper authority, and the party had been so discharged, and had entered upon his confinement—*held*, that a remission of his sentence at that juncture by the President did not operate to remove the dishonorable discharge and entitle him to an honorable one, or to restore to him the pay forfeited, since the penalties of dishonorable discharge and forfeiture had been executed. XX, 90.

7. The duly executed sentence of a competent court forfeiting the pay of an officer or soldier is beyond remission by the Executive. XXI, 345. Monies forfeited to the United States by sentence of military court may be reached and restored by the operation of a pardon, where the same are still in the hands of a military officer or intermediate custodian, and remain thus subject to Executive control. Otherwise, where they have been *paid into the treasury* and become part of the public funds. XII, 306.

8. Though the President has power to remit forfeitures and fines before they are paid, (see 2 Story on the Constitution, 1504,) yet when the fine, &c., is *executed* by being paid into the treasury, the pardoning power cannot reach it. (See Opinions of Attorneys General, II, 330; and VIII, 281, 285.) An officer's pay, till delivered to him, is to be regarded as in the treasury, and, inasmuch as, till so delivered, he has but an inchoate right thereto, a sentence forfeiting future pay amounts simply to a prohibition upon his drawing from the treasury what is already there; and the analogy between such a case and the case of a forfeiture actually paid into the treasury by the party himself is deemed to be complete. The President, therefore, cannot, it is *held*, return the amount of such forfeited pay without a violation of the provisions of article I, section 9, of the Constitution, which prohibits the drawing of money from the treasury except under a legal appropriation specifically made by Congress. XVI, 305.

9. It is understood to have been heretofore, (see Opinions of Attorneys General, VIII, 281,) and to be still, the practice of the Treasury Department to hold sums which have been forfeited by judgment of a United States court, and thereupon paid by the parties, and deposited by the United States marshal or other officer in the hands of a public depositary to the credit of the United States, but not yet brought into the treasury by a covering warrant, to be subject to the control of the Secretary of the Treasury, and liable

to be remitted by him under his statutory authority to remit fines in certain cases. In view of this practice, and of the opinion of Attorney General Berrien in 1830, (see Opinions of Attorneys General, VI, 330,) that the pardoning power vested in the President by the Constitution could certainly not be restricted within narrower limits than this power conferred upon the Secretary of the Treasury by statute—*held*, where a fine adjudged by a military commission had been paid by the accused to the provost marshal of a department, and by him deposited with the chief quartermaster as public monies, but had not yet been formally paid into the United States treasury, that such fine might lawfully be remitted by the President and returned to the accused. XVI, 676.

10. The pardon of a deceased officer or soldier is impracticable, for the reason that it is essential to the validity of a pardon that it should be *accepted*. A pardon, like a deed, must be delivered to and accepted by the party to whom it is granted, in order to be valid. (See *United States* vs. *Wilson*, 7 Peters, 150.) XIV, 558; XV, 486, 654; XIX, 73. *That the pardon is asked by the party's widow or heir, who is to be pecuniarily benefited thereby, cannot affect the application of the rule. See XXI, 564; XXII, 291. Where it was proposed upon an application for the pardon of an officer who had been dismissed by court-martial, but was deceased at the date of the application, that a pardon should be issued as of a date prior to his decease—*held*, that such an attempt would not only be in fraud of the law and unprecedented, but would also be wholly unavailing, inasmuch as the formal voluntary act of acceptance would still be wanting and could not be implied. XXI, 138.

11. Where an officer was sentenced to suspension from rank and pay for one year, and, after the sentence had been duly confirmed and before the expiration of the year, the officer deceased—*held*, upon an application for the removal of the stigma of the sentence from his record in the service, that the same was impracticable, the pardoning power of the President not extending to such a case. VIII, 138.

12. Prior to the passage of the act of July 2, 1864, chapter 215, section 2, which empowers commanders of armies in the field and of departments to remit or mitigate—*during the present rebellion*—sentences of death, dismissal, and cashiering, when imposed by military courts, this power could have been exercised by the President alone. It is under this act only that such commanders are so empowered. The authority given to commanding generals by the Sixty-fifth Article, by the act of December 20, 1861, and by section 21, chapter 75, of act of March 3, 1863, to confirm and execute such sentences, does not import a power of pardon or mitigation. Nor is such a power given to commanding generals by General Order No. 76, of February 26, 1864, which authorizes them to restore to duty deserters under sentence of death. This order simply empowers these officers to act in the stead of the President, and by his express direction, in the exercise of the pardoning power in such cases. I, 481, 486.

13. The power to remit is the same as that to pardon, and is coordinate with that to execute. Prior to the act of July 2, 1864. ch. 215, sec. 2, which empowered "every officer authorized to order a general court-martial" to pardon or mitigate a sentence of confinement in a penitentiary, the President alone could execute such a sentence, and he alone, therefore, could remit it. VII, 609.

SEE EIGHTY-NINTH ARTICLE.
ACCOMPLICE.
MAKING GOOD TIME LOST BY DESERTION, &c., (2.)

PAROLE.

1. The violation by an enemy of a parole is an offence under the common law of war, (LIEBER; in par. 124, G. O. 100 of 1863,) and is punishable with death. VI, 20.

2. A party apprehended while serving in connection with the rebel forces was released on giving his parole to conduct himself as a good and peaceable citizen, and respect the laws in force at the place of his residence, (Loudon county, Virginia.) He subsequently, on a convivial occasion, and while intoxicated, engaged with others in acts of excess and in an assault upon a citizen, but not from any feeling of hostility towards the latter as a Union man, or from any specially disloyal motive. *Held* that he was not chargeable with such a violation of his parole as to make it proper to bring him to trial by a military court. XXI, 150.

3. Where, in the case of a prominent rebel officer, captured by our forces, and not admitted to be exchanged as a prisoner of war, but held in military custody under a charge of a grave crime in violation of the laws of war, an application was presented for his release on *parole; advised*, that it was unconscionable to ask that faith be reposed by the government in a party resting under imputations not only of deep dishonor and intense disloyalty as a traitor, but also of specific crime, and *recommended*, therefore, that such parole should not be granted. XVII, 526.

4. A violation, on the part of an officer, in the United States service, of the *parole of honor* described in paragraph III of General Order No. 207, of the War Department, of July 3, 1863, would properly be chargeable under the 83d article; and, on the part of an enlisted man, under the 99th article. XVI, 207.

5. The custom of the service does not allow the privilege of a parole to an officer in confinement and awaiting trial, when the evidence on file presents a *prima facie* case of decided criminality against him. VII, 78.

6. To grant to a soldier under sentence of imprisonment at hard labor a parole to leave his prison limits, in order to visit and relieve his family in the neighborhood, would be unprecedented. Such imprisonment is an infamous punishment, and the allowance of such a parole would be entirely inconsistent therewith, operating as it would to wholly relieve the criminal of the penalty for the time. XIV, 674.

7. The act of July 4, 1864, chapter 253, section 7, admitting a contractor under arrest to be bailed, applies only to a case where he is charged with "fraud" or "wilful neglect of duty." Where it was desired, therefore, to enlarge a contractor arrested for another offence, (and for which, as prejudicial to good order and military discipline, he was triable by court-martial under the act of July 17, 1862, chapter 200, section 16,) *advised* (March, 1865) that he be *paroled* on making a *moneyed deposit* of a certain sum to the credit of the Secretary of War, to be forfeited in the event that he failed to appear and answer such charges as might be preferred against him, or to abide by the result of his trial. XIII, 477. And see XIII, 510, where a similar parole and deposit were *advised* (March, 1865) to be required in the case of a party charged with a violation of the laws of war, whose enlargement was consented to, but in whose case also a bail bond, not being specially authorized by law, would have been a nullity. See BAIL; but see also *note* under CONTRACTOR, II.

SEE MILITARY COMMISSION, IV, (2.)
PAROLED PRISONER.

PAROLED PRISONER.

1. Paroled prisoners, so far as pay and allowances are concerned, must be regarded as in actual service. *Held*, (October, 1862,) however, that officers, whose *status* was that of prisoners of war, were not "on duty" in the sense of section 1, chapter 200, act of July 17, 1862, unless engaged in other duty than that against the rebels, (which the terms of their parole obliged them to desist from;) and except in such case, therefore, were not entitled to draw forage, &c. I, 385.

2. The fact that a prisoner of war has been paroled does not render him any the less an enemy; and to relieve such paroled prisoner is to relieve the enemy. And *held* that a paroled rebel prisoner in coming, without the authority of the government, into a loyal State within our lines, was guilty of a violation of his parole. See XII, 400.

3. The fact that a rebel prisoner of war has been paroled does not relieve him from amenability to trial and punishment for a violation of the laws of war committed by him while in the rebel service. XIX, 412, 665.

SEE DISCHARGE, (6.)
PRISONER OF WAR.

PATENT RIGHT.

SEE CLAIMS, I, (13.)
COMPENSATION, II, (1.)
CONTRACT WITH THE GOVERNMENT, (2.)

PAY AND ALLOWANCES.

1. The word "pay" has a distinct and technical signification. When used alone, in the sentence of a court-martial, it does not include allowances. II, 193; VIII, 578; X, 565.

2. A soldier who has been sentenced to confinement with forfeiture

of "*pay*," (which does not include allowances,) cannot by virtue of such sentence be subjected to a stoppage for clothing issued during his confinement. VIII, 578.

3. Pay can only be forfeited by the express language of the sentence of a military court, or by the operation of law in cases of absence without leave and desertion. So where a *cadet* was sentenced "to be suspended from the Military Academy" till a certain date, and at that date "to join the second class," *held* that this was analogous to a sentence of an officer to suspension from command and promotion, and that it did not involve a loss of any pay. XVI, 676. See EXTRA PAY, 3.

4. Upon considering together the various acts on the subject, (see acts of March 3, 1799, March 16, 1802, January 11, 1812, January 29, 1813, March 19, 1836, July 22, 1861)—*held*, (September, 1862,) that officers of volunteers or militia mustered into service for a term of six months or upwards are not entitled to an allowance for pay, clothing, and subsistence of servants during their journey, after their discharge, to their place of residence; but otherwise in the case of officers of the three-months' service, or for any entering the service for a period less than six months; to these the allowance for servants is properly payable. I, 356.

5. An officer awaiting orders cannot be regarded as on duty in the sense of the act of July 17, 1862, chapter 200, section 1, and is not entitled to draw forage in kind for his horses. The act entitles him to draw only for horses actually kept by him when and at the place where he is on duty. I, 350, 372.

6. The officers referred to in the second proviso of section 1, chapter 200, of the act of July 17, 1862, are those *temporarily assigned* from duties that *do not*, to those that *do*, require them to be mounted; and the pay, emoluments, &c., allowed them in consequence, are to continue only "during the time they are employed on such duty." The proviso does not apply to a case where an officer has been *permanently* promoted to the position requiring him to be mounted as a field officer of infantry. I, 423.

7. The act of July 17, 1862, ch. 200, sec. 1, places all officers entitled to forage on the same footing. They must receive it in kind, whenever the government can so furnish it to them. When it cannot they may claim commutation, but only then. The law is the same in regard to officers entitled, by reason of the duty to which they are assigned, to the pay and allowances of cavalry officers. II, 13.

8. Where an officer of volunteers had been duly mustered out of service, as of 31st May, 1863—*held* that a subsequent order of the President of 27th September, 1863, (based upon a mistaken supposition that he was in the service,) by which he was formally dismissed, was an absolute nullity, and that the claim of this officer to pay for the period between these dates was without foundation. V, 481.

9. Where there was a delay of four months in formally mustering into the new grades to which they had been promoted two officers of volunteers, who had used all reasonable efforts to remove the cause of the delay—which, however, proceeded from a cause beyond their

control—and meantime had done active duty, and rendered full service to the government—*advised* that their muster be dated back by order of the Secretary of War, so that they might receive pay for the four months. III, 57.

10. Where an officer was sentenced on 12th January, 1863, to forfeit all pay and be dismissed the service, and the execution of the sentence being suspended for the action of the President, the latter, under date of 28th March, 1863, approved the sentence, except as to the dismissal, which he remitted—*held* that, as in this case the President acted as the reviewing officer, his action should apply to the sentence as it stood, as of 12th January, and that the period of the forfeiture could not be extended, unless so directed in express terms by the President; therefore, that though the action of the President was indorsed under a later date, the officer was entitled to be paid from 12th January, the proper termination of the forfeiture under the circumstances. III, 116.

11. An officer, though under charges or in arrest, is still entitled to his pay. VIII, 478.

12. Except in the case of a deserter, (see paragraph 1359 of the Army Regulations,) there is no law to prevent the payment of an officer or soldier while awaiting sentence of a military court. XII, 230.

13. Where an order of the War Department for the dismissal, discharge, or muster out of an officer is subsequently revoked, and he reinstated in his former rank and position, it is competent for the President, in his discretion, to allow him pay for the interval during which he was legally separated from the service under the original order. The course of military administration has, however, developed no precise rule on this subject, each case of a claim for pay by such an officer having been, in practice, determined by the special circumstances surrounding it. XII, 429; XXII, 495.

* An officer who had held a commission in the army for sixty years, having been formally retired under the provisions of sec. 12, chap. 200, of the act of July 17, 1862, was, soon after, under the authority of the same statute, assigned by the President to active duty. Having continued to perform such duty for a considerable period, he was at length relieved therefrom, in consequence of charges preferred against him of official misconduct, and thereupon reverted to his position of an officer on the retired list. Having remained in this status for upwards of a year, he was again assigned to active duty by the President—the charges against him having been shown to have been based upon misrepresentations proceeding from an officer alleged to have been personally hostile to him. Upon an application thereupon presented by him to be allowed for the period of his suspension the difference between the pay and allowances of a retired officer of his grade and those of one engaged on active duty; *held* as follows: 1. That the object of the act of 1862 obviously was, not to cast aside, merely because of age or length of service, officers whose lives had been devoted to the government, but to provide for the retiring of those who, beside having attained the age, or been borne on the register,

for the period designated, had become *incapable* to perform active duties;—the proviso in the section giving to the President authority to assign officers of the age, &c., specified, to appropriate duty with full pay and emoluments, being regarded as clearly indicating that this view was entertained by Congress in the enactment of the law: 2. That the fact that the officer in this case was, on being retired under the act, presently assigned to duty by the President, was sufficient evidence that he was capable for such duty at the time of the retirement; and that the fact of his re-assignment after his suspension established, in the absence of any proof to the contrary, that his capacity for duty still continued : 3. That having been relieved from duty solely because of charges afterwards shown to have been without foundation, and then re-assigned, his case was analogous to the class of cases of officers dismissed by orders issued under a misapprehension of facts, which are afterwards revoked,—in which cases it has been held that the President may, in his discretion, allow full pay to the party for the period during which he has been separated from the service; and that, upon this analogy, it was competent for the President to approve the claim of this officer for the full pay and allowances of his rank for the period during which he had remained unjustly suspended as aforesaid. And *advised* that such claim, strengthened as it was in this instance by a lifelong service to the country, was one which powerfully addressed itself alike to the justice and to the generosity of the Executive. XVII, 602. See 18.

14. But where an officer was dismissed by the order of the department commander, subject to the approval of the President, and this approval was never accorded and was finally formally withheld—*held* that such order was merely in the nature of a recommendation not followed; that the intended dismissal, therefore, never took effect, and that, although by this proceeding the officer was prevented from doing duty for a time, yet that this result was caused not by his own voluntary act, but by the action of a superior, which had been disapproved and set aside, and, therefore, that the officer was entitled to full pay, &c., for the interval, as if such action had never been taken in his case. XVI, 553.

* 15. Where, in the case of an officer of volunteers about to be mustered out with his regiment, an order was issued from the War Department directing that he should not be discharged; and he was subsequently, upon charges preferred against him, brought to trial by court-martial and acquitted, and was thereupon mustered out of the service; *held* that he was entitled to the pay and allowances of his rank while thus retained in the army by the authority of the government, viz: up to the date of his actual discharge. XVII, 668.

16. A volunteer officer who, though commissioned as captain, had not been mustered, having been duly ordered on duty with his company, was presently arrested upon charges, confined, tried, and acquitted. Pending this action against him his commission was revoked and his place filled by another, who was mustered and entered upon the duties of the office of captain. After his acquittal this

revocation was rescinded. *Held* that he had under the circumstances an equitable claim to pay from the commencement of his actual performance of duty as captain with the requisite number of men, to the time when his place was filled by the appointment of another; and *recommended* that he be mustered in and out, *nunc pro tunc*, as of these dates, and paid accordingly. But *held* that he should not be paid for any period subsequent to the last date, not only because in that case two officers would be paid for the same period, but because he performed no service during such period. XX, 320.

* 17. Where, in the case of a volunteer officer about to be finally paid and mustered out of service, his discharge and final settlement were deferred, and he was brought to trial upon charges and acquitted; *held* that, having been retained in service by these proceedings, he was entitled to an honorable discharge as of a date certainly not earlier than the order promulgating his acquittal and directing his release from arrest, and to full pay, &c., up to the date of such discharge. XXI, 448.

18. Where a chaplain was sentenced to be dismissed the service by a court-martial, the proceedings of which, on account of a fatal defect in its constitution, were set aside as void *ab initio*, and the chaplain, upon the facts appearing in the testimony at the trial, was subsequently summarily dismissed by an order of the President—*held* that he was entitled to receive his pay, &c., up to the date of his being officially notified of such order. The act of July 17, 1862, ch. 200, sec. 9, provides that thereafter "the compensation of all chaplains shall be one hundred dollars per month and two rations a day *when on duty*." Where, however, an officer is prevented from doing duty, not through his own fault or voluntary action, but by reason of the unauthorized and illegal proceeding of the government, his rights, as against the government, are the same as if he had been on duty in fact. This is an elementary principle of the law of contracts, which will allow no party to take advantage of his own wrong; and from the operation of this rule it is believed that the government should not claim an exception. VIII, 640.

19. *Held*, that section 20, of chapter 42, of act of August 3, 1863, in regard to the allowances of officers absent from duty, referred to a voluntary absence and did not apply to a case where the absence was compulsory, and in consequence of a sentence of court-martial which was illegal and void. VI, 90.

20. The period of absence specified in the last-named act must be a continuing one, and cannot be made up by adding fragments of time together. VII, 44.

21. *Held*, that a major general who was required to attend on several military courts as a witness, &c., was, while so attending, performing duties appropriate and belonging to his duty as an officer, and was relieved during the period of such attendance from the operation of the limitation of six months fixed by the act last named. VII, 44.

22. *Held*, that it is only the *commanding officer* of an "officer or soldier" who, upon the latter presenting a satisfactory excuse for his

absence, is authorized, by paragraph 1357 of the Army Regulations, to legally exonerate him from the charge of absence without leave, and restore him to his rights to pay; and that the "commanding officer" in each case is the commander of the regiment or organization to which he is attached, whose duty it is to certify and authenticate the rolls, &c., upon which the name of the officer or soldier is regularly borne. When such commander has made a note upon the roll, opposite the name of the party, that he has returned, made sufficient excuse for his absence, and has been relieved of the charge and restored to duty, or in terms to that effect, the paymaster is authorized and required to pay such party as if he had never been absent. XV, 109.

23. In the case of a soldier convicted of "absence without leave," the forfeiture of his pay for the period of his unauthorized absence results by operation of law, (paragraph 1357 of Army Regulations,) and, to be enforced, need not therefore be included in the sentence.

24. Where a soldier voluntarily returned on a certain date to his regiment from an unauthorized absence, and was thereupon tried and convicted of "absence without leave," and sentenced to a forfeiture of pay for the time of his absence only; *held*, that his pay began to run again from the date of his return, and not merely from the date of the promulgation of the sentence. XIII, 502.

25. Where, in the case of a soldier convicted of an absence without leave, the proceedings, &c., were disapproved by the authorized reviewing officer; *held*, that the effect of such disapproval was to remit such soldier to all his rights to pay, which otherwise (independently of the sentence) would have been forfeited by operation of law, under paragraph 1357 of the Army Regulations, for the period of his absence; his right to receive such pay having only been held in suspense during the pendency of the proceedings. XIX, 52. And so *held* in the case of a soldier tried for desertion, but found guilty of absence without leave only. VIII, 519.

26. A soldier convicted of desertion is subject (though no forfeiture is imposed by his sentence) to a forfeiture, by operation of law, (paragraphs 1357 and 1358 of Army Regulations,) of all pay due at the time of his desertion, and of all pay accruing for the time of his unauthorized absence. But if no further forfeiture is embraced in his sentence, he is again entitled to pay from the date on which he was apprehended, or, in the language of the Regulations, (paragraph 161,) "delivered up to the proper authority as a deserter." VIII, 650.

27. A deserter forfeits, by operation of law, all pay due at the time of his desertion, (paragraph 1358 of Regulations,) and all pay for the period of his unauthorized absence, (paragraph 1357.) Whether he shall forfeit any further pay, to wit, pay accruing after his apprehension and "return," depends upon the action taken by a court-martial upon his trial, if any be had If not tried, but restored to duty by the commanding officer authorized to so restore him without trial, in accordance with the provisions of paragraph 159 of the Army Regulations, he becomes entitled to pay for the period intervening since his being "delivered up" as a deserter, (paragraph 161;) but such

commander cannot, by his order, restore him to pay forfeited for the period of his absence as such. VIII, 540.

* 28. There is no law or regulation by which a soldier's pay is forfeited for the period intervening between his formal apprehension or return as a deserter and the date of the promulgation of his sentence as such. If the pay is not forfeited by the terms of the sentence itself he is still entitled to receive it, the restriction of paragraph 1359 of the Regulations, that a deserter shall not receive pay before trial, &c., applying only to the *time* of payment. XXI, 433.

* 29. Paragraph 1359 of the Army Regulations does not impose a forfeiture of all the pay of a deserter accruing before trial or restoration to duty, but only prohibits a payment being made prior to such trial (that is, prior to the termination and issue of the trial) or restoration. XXIII, 160.

30. In case of a soldier returned from desertion on February 7, 1863; sentenced to imprisonment for one year, with forfeiture of pay, &c., during *that* period, on April 24, 1863; and pardoned by the President on August 5, 1863; the following was *held* in regard to his right to pay: 1. He was entitled to be paid for the period between his return from desertion and the date of his sentence. This pay was not forfeited by operation of law, not being pay due at the time of the desertion referred to in paragraph 1358 of the Regulations, nor pay for the time of the unauthorized absence referred to in paragraph 1357; nor was it forfeited by paragraph 1359, which merely suspends the pay due up to the time of the trial and sentence, in order that any forfeiture of back pay may, if imposed, be stopped against it; but in this case no such forfeiture is imposed. 2. The pay for the latter portion of the period (from the commencement of the term of sentence till the pardon) was forfeited by the sentence; and the interposition of the pardon did not relieve the soldier from such forfeiture, but only absolved him from liability to further punishment. He was *not* entitled, therefore, to pay for this second period. V, 386.

* 31. A soldier was sentenced, upon conviction of desertion, to be confined at hard labor for one year. Before the end of the year, the unexpired portion of the sentence was remitted, and he was returned to duty. *Held*, that he forfeited, by operation of law, under paragraphs 1357 and 1358 of the Army Regulations, his pay due at the time of desertion and for the period of his unauthorized absence; that for all time subsequent to his return from desertion he was entitled to his pay and allowances till discharged, and that neither his sentence (which imposed no forfeiture) nor his pardon affected in any manner his rights to pay. XXIV, 26.

32. A sentence, upon conviction of desertion, of a forfeiture of "all pay and allowances due," *held* not to affect pay due and unpaid under an enlistment prior to that by which the accused was connected with the service at the time of his desertion, and from which he had been honorably discharged at its expiration. Such sentence applied only to his *status* in the service at the time, and could not, without express words, divest him of the right to pay which became fixed upon his honorable discharge. XIV, 371.

33. Where a soldier has been sentenced to confinement and a forfeiture, and his sentence has been remitted by the President in the exercise of his general pardoning power, and he ordered to be released and returned to duty, he is only entitled to pay from the date of the order. No pay forfeited during the time of his confinement, and before the date of the order, is thus restored to him. III, 279.

34. Where, in a case (of a deserter sentenced to forfeit "all pay and allowances then due") in which the reviewing officer had a legal right to remit, the approval of the proceedings and the remission of the sentence were simultaneous acts; *held* that the sentence never became operative, and that the forfeiture specifically imposed thereby did not take effect. XV, 114.

* 35. Where a soldier, upon conviction of larceny, was sentenced to be dishonorably discharged and thereupon confined at hard labor for a certain term, *held* that this sentence, though one imposing an infamous punishment, could in no manner affect his right to any pay or allowances overdue at its date or accruing up to the date of the discharge. XVI, 357.

36. An order, releasing a soldier under sentence of confinement and granting him an honorable discharge, cannot be construed to remit a forfeiture of pay and allowance also specifically imposed by the sentence. XXI, 43.

37. The sentence of a soldier to forfeit all pay and allowances due or to become due, to be dishonorably discharged, and to be confined at hard labor for one year, was approved by the reviewing officer, who, at the same time, remitted the dishonorable discharge, and ordered the accused to be imprisoned at a place indicated for one year, and at the end of that time to be returned to his regiment. *Held*, that the court in adjudging this forfeiture of pay, imposed it in immediate connection with and relation to the penalty of discharge and imprisonment, and did not contemplate that there ever would be any period of further service by the accused for which he might equitably claim to be remunerated by the United States; that the remission removed the obstacle to his continuing in the service after the year, and that upon his returning to his regiment for duty after that time, he became again entitled to be paid as a soldier. XVI, 533.

* 38. A soldier was sentenced to be dishonorably discharged with loss of all pay due and to become due, and to be confined at hard labor for ten years. Within a few months after he had entered upon his confinement the department commander remitted in orders the unexpired term of his imprisonment, and directed that he be returned to duty with his regiment. He was so returned, and did duty for nearly a year, when he was regularly mustered out with his company. *Held*, that it was clearly the intention of the court that, upon his sentence, he should be forthwith dishonorably discharged with forfeiture of pay, and *then* enter upon his imprisonment, and was not contemplated that he should do any further duty as a soldier; that as he was not so discharged but was required to do, and did do, duty, his sentence should not be regarded as operating to deprive him of the pay and allowances of his rank during the period in which he performed service after his remission. XIX, 678.

39. A soldier was sentenced to be dishonorably discharged, and to forfeit all pay and emoluments overdue and that might become due. *Held*, that this sentence contemplated a forfeiture of pay only up to the time of the formal approval and publication of the proceedings, upon which also the discharge would take effect; and that when the reviewing officer confirmed the proceedings, *remitting* the *dishonorable discharge*, and ordered the accused to be returned to duty, the effect of his action was only to deprive the soldier of pay accrued before the date of such confirmation, and to restore him to the service with all the rights of a soldier thereafter, including full pay, &c., to the end of his term. XV, 260.

*40. An officer of volunteers, having been convicted of murder, was sentenced to be hung, but his sentence, having been approved by the proper intermediate commanders, was finally commuted by the President to an imprisonment for ten years. The unexecuted portion of his punishment having been remitted after the expiration of about a year, he interposed a claim to be allowed the pay and allowances of an officer of his (former) rank for the period during which he was confined under the sentence. *Held* as follows: That the capital sentence in this case, imposing as it did the extreme penalty of the law, necessarily involved a dismissal of the officer;—that by the commutation, (by which the sentence, already duly approved, was finally confirmed in law,) the President could clearly not have intended to restore the party to the service,—the imprisonment of ten years being entirely inconsistent with the tenure of a volunteer officer;—that the effect of the sentence as thus acted upon was altogether to separate the party from the military service from and after the date of the commutation, and that he could not, therefore, be held entitled to pay or allowances for any period succeeding such date. XXVI, 628.

41. An officer who is a prisoner of war at the date of his summary dismissal from the service is not legally out of the service till he receives due notice of the order of dismissal. So, in the case of an officer who did not receive such notice till exchanged as a prisoner and returned to his regiment—*held*, that he was entitled to be paid up to the day of his being notified of the dismissal at his regiment. XIII, 589. See ORDER, 8, 9.

42. An officer, who had been tried by court-martial, was taken prisoner before the publication of his sentence—of dismissal with forfeiture of pay due and to become due—imposed thereby. Subsequently to the promulgation of such sentence at his regiment, a payment of a portion of the pay intended to be forfeited by the sentence was made to his wife, upon a formal and regular application by her, in conformity with the terms of General Order 90, of 1861, accompanied by sufficient evidence of her identity, and of written authority from her husband, then in prison at Richmond. *Held*, that such payment was not made contrary to law, and that no action could properly be taken to recover from her or the paymaster the amount so paid. The officer having been beyond the reach of the federal authorities at the date of the promulgation of the order, could neither ha

formed of it nor affected by it. Moreover, the act of March 30, 1814, chapter 37, section 14, which provides that officers and soldiers whose terms of service may expire while they are prisoners of war shall be entitled to pay during the entire period of their captivity, may well be regarded as extending, in its spirit, to a case where the term of service is *otherwise* concluded; and this upon the principle that when the period of military service of an officer or soldier is terminated by limitation of time, or by an act of the government, he is entitled to be restored to all his legal rights as a citizen, and therefore, where it is impracticable to restore him, that he continues entitled to his right, as an officer, to pay, &c. XII, 230. See ORDER, I, 9.

43. But where, in case of an officer who had been taken prisoner while awaiting sentence of court-martial, there was reason to believe that his capture had been effected through his voluntary act or wilful negligence, *advised* that his pay be *suspended* till the period of his release, when the equities of his claim could be properly adjusted; and that meanwhile the circumstances connected with his capture be investigated. XII, 230.

*44. *Held*, that an officer, if made prisoner through his own fault, and without excuse, as while being absent from his command, or recklessly exposing himself to capture by the enemy, is not entitled to the benefit of the general rule allowing pay to prisoners of war for the period during which they are held by the enemy. XXII, 153.

45. 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. VIII, 493.

SEE NINTH ARTICLE, (8.)
TWENTIETH ARTICLE, (1.)
ARREST, **I**, (14,) (15,) (16;) **II**, (3,) (4,) (6.)
BOUNTY, (1,) (2.)
CLOTHING ALLOWANCE.
COMMUTATION OF SENTENCE, (2,) (5.)
DESERTER, (3,) (7,) (14.)
DETACHED SERVICE.
DISMISSAL, **I**, (7,) (8.)
ENLISTMENT, **I**, (3,) (4.)
EXTRA PAY.
FINE, (1.)
FORFEITURE, **III**.
GARNISHMENT OF PAY.
LOST RECORD, (4.)
OFFICERS' SERVANTS, (2,) (3.)
ORDER, **III**, (4.)
PARDONING POWER, (6,) (7,) (8.)
PAYMASTER, (2.)
PAYMENT BY MAIL, (2.)
PRISONER OF WAR, (1,) (10.)
PUNISHMENT, (18,) (20,) (21,) (23.)
REMOVAL OF DISABILITY, (2.)
SENTENCE, **I**, (1,) (2,) (3,) (4,) (5,) (6,) (7,) (16;) **III**, (12,) (13.)
STOPPAGE, (6,) (7,) (8,) (9.)
SUSPENSION, (3,) (4,) (5,) (6,) (7,) (8.)
TAX, (1)
UNDER COOKS, (2.)

PAYMASTER.

1. The maintenance of the public credit, and the protection of the public creditors, as far as practicable, from loss, are clearly the duty of all officers, but especially of those connected with the pay department. So soon, however, as officers are permitted to traffic in pay-rolls, or other evidences of claims against the treasury, they labor under strong inducements to depress their market value, which can best be effected by a depreciation of the public credit. The influence of a paymaster in this direction would necessarily be very great, and might operate oppressively upon the creditors of the government. Thus the conduct of a paymaster who invested the funds of his friends by buying up officers' pay-rolls at a discount, while not an offence within the provisions of the sub-treasury act, or an infraction of the requirements of paragraph 1342 of the Regulations, *held* morally reprehensible, because exposing him to the temptation to violate one of his clearest duties to the government and country. While such paragraph, in requiring that no paymaster shall be interested in the purchase of a pay certificate or other claim against the United States, contemplates a pecuniary interest only, still it is undeniable that the evil intended to be prevented might be produced in but a slightly diminished degree, by the solicitude of a faithful agent anxious to make the best possible bargain for his employers or friends. II, 36.

* 2. Though it is a common practice for paymasters to deliver to the commanding officers of companies the amount of pay due to men mustered with the company, but who may not be present at the pay-table at the time the payment is made, yet there is no law or regulation of the army authorizing paymasters to make payment in any other manner than to the soldier in person; and where a paymaster has committed the pay of a soldier to his officer, in the absence of the former and without his assent and authority, and for some reason the soldier fails to receive the amount, the government remains still liable for the same. So, where a paymaster delivered to a company commander the pay due to two men of the company who were sick in the post hospital, but whose signatures, duly witnessed, appeared upon the rolls, and the amounts paid were, without fault of the company commander, appropriated or stolen by third parties in their transmission to the men for whom they were intended—*held* that the said amounts might properly be ordered to be charged to the paymaster making the payment. XXIV, 376.

See BOND, (1,) (3.)
EVIDENCE, (12.)
FRAUD, II, (17.)

PAYMASTER'S CLERK.

A paymaster's clerk, in time of war, though not so far in the military service as to be liable to perform the duties of a soldier, and therefore subject to draft, (see ENROLMENT, 3,) is yet, in the sense of the 60th article of war, a person "serving with the armies in the field," and is therefore amenable to trial by court-martial. III, 269.

PAYMENT BY MAIL.

*1. The rule of law in regard to payment by letter is briefly but fully set forth by the court in the late case of *Gurney* vs. *Howe*, 9 Gray's (Mass.) Reports, p. 404, as follows: "A letter, containing money, sent by a debtor to his creditor through the post office, is at the risk of the debtor, unless that mode of remittance is authorized by the creditor, either by express direction or by the usual course of dealing between the parties." So, *where* an officer, (stationed at Fort Leavenworth,) having in his possession an amount of company fund due and payable to another officer, (stationed at Fort Laramie,) as his successor in command of the company, transmitted the amount to the latter by mail, (without any direction by him so to transmit, and in the absence of any such course of dealing between the parties as is referred to in the decision cited,) and the amount, or a part of it, was lost *in transitu—held*, that the loss must be borne by the officer sending the money. XXVI, 274.

2. Where the chief surgeon of a department attempted to transmit by mail, in the form of checks, to an acting assistant surgeon serving at a distant post in the department, a certain amount of pay due the latter, and these checks were stolen or lost either in the mail or while being carried to the post office—the department surgeon being unable to establish the fact that they were actually deposited in the post office—*advised*, that in the absence of proof that they were so deposited, such surgeon should be held personally responsible to the government for the amount, and that his pay should be stopped therefor; but that the government remained still liable to the acting assistant surgeon for his pay, and should render the same to him, irrespective of its being recovered from the department surgeon. XXI, 112.

PENITENTIARY, I—(GENERALLY.)

1. Where the offence charged and proved is punishable by the laws of the State where committed, as infamous—*recommended* that a penitentiary, and not a military or other prison, be designated by the court in the sentence as the place of confinement. VIII, 600.

2. Confinement in a penitentiary is intended to be and is an infamous punishment, not only because of its nature, but especially because of the place where it is suffered. A sentence inflicting such punishment is not satisfied by confining the party in one of the military prisons of the country. IX, 42. See IX, 366. A sentence of confinement in a "*State prison*" *held* equivalent to one of confinement in a penitentiary. IX, 70.

SEE PARDONING POWER, (13.)
PRESIDENT AS REVIEWING OFFICER, (5.)
REVIEWING OFFICER, (10.)
SENTENCE, III, (6.)

PENITENTIARY, II.

(Under act of July 17, 1862, chapter 201, section 5.)

1. Confinement at hard labor at the military prison at Alton, imposed by sentence of court-martial, is not "imprisonment in the penitentiary," in the sense of the act. Such prison is (May, 1864) not a penitentiary, although formerly used as such by the State of Illinois. I, 361, 362; IX, 42.

2. Fort Delaware is not a proper place for the confinement of a soldier convicted of a capital offence and sentenced to imprisonment in a penitentiary. VI, 88.

3. A general sentence of a soldier "to hard labor," which may be carried into effect in any of the posts, forts, or military prisons of the United States, is not a sentence to imprisonment in the penitentiary in the sense of the act. I, 409.

*4. *Held* that the provision of the act of 17 July, 1862, ch. 201, sec. 5, to the effect that "no sentence of imprisonment shall be carried into execution until the same shall have been approved by the President," was absolutely repealed by the act of July 2, 1864, chap. 215, sec. 2; and that from and after such repeal, either during the rebellion or subsequently thereto, it was competent for a department commander or other proper reviewing officer to execute, upon his own approval alone, a sentence of confinement in a penitentiary in any case in which such a sentence was authorized by law. XXI, 460; XXIII, 654.

PENITENTIARY, III.

(Under act of July 16, 1862, chapter 190.)

*1. This act is not limited in its operation to a period of war, but is of general application as to time. XXII, 501. And, except for offences of a purely military character, courts-martial, in cases where they have jurisdiction of the offence, may at all times impose the punishment of confinement in a penitentiary, provided the article of war or statute upon which the charge is based does not exclude this penalty by making mandatory upon the court some other specific penalty or penalties. XXIII, 415.

2. Desertion is a purely military offence, and is not, expressly, "by any statute of the United States, or at common law as it exists in the District of Columbia," or, indeed, by the laws of any of the States, made punishable by confinement in a penitentiary. A sentence to such confinement in the case of a deserter, *held* to be in conflict with the letter of the act. VII, 538; V, 500. It was indeed understood to be held by the Secretary of War, during the rebellion, (February, 1865,) that where an article of war authorized, for a particular offence, the infliction of the death penalty, "or such other punishment as may be ordered by a court-martial,"—upon the principle that the major includes the minor, a sentence of confinement in the penitentiary might properly be pronounced, as in accordance with a "statute of

the United States'' in the sense of the act referred to. XI, 413. * But this view, so far as applicable to cases of desertion, would cease, of course, to be tenable in time of peace, because of the operation of the act of May 29, 1830, prohibiting the imposition at such time of the death penalty for the offence of desertion. XXIV, 202. And—whether or not because active hostilities have ceased—the Secretary of War has lately, by General Orders No. 4, of 1867, (modifying paragraph 895 of the Army Regulations,) expressly prohibited the punishment of confinement in a penitentiary or State prison ''for purely military offences.'' The view above referred to, therefore, is to be regarded as no longer maintained. See XXIV, 202. (More lately General Order No. 4 has been, by General Order 79, of August 26, 1867, ''revoked,'' but not, as it is understood, for any purpose of withdrawing the prohibition referred to. And the same is still to be observed, as a matter of law, irrespective of regulation.)

* 3. An illegal sentence of confinement in a penitentiary, for an offence purely military, cannot be legalized by the *commutation* of the punishment to one of a different character. XXIV, 202. So *held* that it would be in conflict with the intent of the act to *commute* a death sentence imposed for a purely military offence to confinement in a penitentiary; or, in case of a sentence of ''imprisonment'' (generally) for such an offence, to *designate* a penitentiary as the place for its execution. XI, 413.

4. A sentence to the penitentiary for a ''false muster'' merely, cannot be sustained, the offence being a purely military one. If the accused had obtained money thereby, he might have been prosecuted for obtaining it under "false pretences," and under the act the offence might have been properly punished by confinement in the penitentiary. I, 443.

5. Where the charge was ''conduct to the prejudice of good order and military discipline,'' but the specification showed that the offence was assault and battery with intent to kill, *held* that the sentence of confinement in a penitentiary was valid; since the actual offence (though made by law triable by court-martial) was not strictly a military one, and by the laws of the District of Columbia was punishable by such confinement. IX, 281.

6. Where parties (citizens) were sentenced by military commission to the penitentiary of the District of Columbia for harboring deserters and aiding them to desert, *held* (March, 1863) that the sentences were unauthorized under the act, as neither the laws of the District nor any statute of the United States inflict such a punishment for these offences. II, 99; VII, 418.

7. Under the second section of the act the President may, in his discretion, commute the punishment of an offender who has been improperly sentenced to the penitentiary and is confined therein. II, 99; VII, 418.

PEONAGE.

Held that a superior officer in New Mexico, who ordered his inferior to return to the former master a fugitive peon, was, under the act of July 17, 1862, chapter 195, section 10, triable by general court-martial

for the offence of returning to the claimant a fugitive from service or labor, as well as for the additional offence involved, and also denounced by the statute, of assuming to decide upon the validity of the claim of the master to the service of the peon. XIX, 377. (And see the opinion of the Attorney General of 21st October, 1865, in which *peonage* is classed as a form of slavery; as also the official opinion of Chief Justice Benedict, of New Mexico, to the effect that the act referred to, inasmuch as it does not specify that the fugitive should be of any particular color, includes the case of returning a fugitive peon.) *See, further, the act (passed since the date of the above opinion) of March 2, 1867, ch. 187, sec. 1, abolishing peonage in New Mexico and elsewhere, and prohibiting the arrest of any peon or his return to peonage. This statute also, in the second section, makes it the duty of all persons in the military (as well as civil) service in New Mexico to aid in the enforcement of the provisions of the first section; and provides that *any* officer, or other person in the military service, "who shall obstruct or attempt to obstruct, or in any way interfere with or prevent the enforcement" of the act, "shall, on conviction before a court-martial, be dishonorably dismissed the service of the United States, and shall thereafter be ineligible to reappointment to any office of trust, honor, or profit under the government." The statute thus, so far as it relates to military persons, constitutes a new article of war.

PERJURY.

1. It is the general rule of law that the evidence to sustain a charge of perjury must consist either of the direct testimony of two witnesses to the effect that the oath of the accused was knowingly false, or that of one witness strongly corroborated by other circumstances in proof in the case. But *held* that the testimony of one witness, with additional record evidence confirmatory of his statement in slight particulars only, was insufficient in law to establish the charge. *Held*, also, that, to establish the perjury of a witness upon a former military trial, either the record of such trial must be produced, or its absence properly accounted for and competent oral evidence produced of the testimony of the witness as therein set forth. XII, 631.

2. Where, upon the enlistment of certain recruits in the District of Columbia, there were sworn to and presented by them false affidavits respecting their former period of service--*held* that such recruits were triable by court-martial for *perjury*, "to the prejudice of good order and military discipline," *provided* such affidavits were required by law or by the usage of the War Department to be made upon enlistment in cases of this character. XV, 259. (See *United States* vs. *Babcock*, 4 McLean, 23, cited in Brightly's Digest, page 213, note *d*, where it is held that affidavits, in order that perjury may be predicated thereon, "must be required by law, or by usage sanctioned by the court or a department of the government.")

*3. The crime of perjury, which, in the present state of the law, (February, 1867) can only be charged under the 99th article, may properly be charged either as "perjury to the prejudice of good order

and military discipline," or as "conduct to the prejudice of good order and military discipline." It is immaterial in law which form is employed, although the first is to be preferred, as more pointedly indicating the offence. Whatever form may be used, the specification must set forth such facts in regard to the offence as clearly to show that it was prejudicial to good order or the discipline of the service; for, unless the offence actually affected military order or discipline, a military court would not be authorized to take cognizance of it. XXII, 607.

*4. Although the specific penalties provided by the act of July 2, 1862, (prescribing the oath of office to be taken by government officers,) are apparently intended to result upon a conviction by a *civil* court, yet as this oath is required, in terms, to be taken by all "*military*" officers, and, in practice, is taken by them in all cases, *held* that the falsely taking of such oath by an officer of the army would be a "perjury to the prejudice of good order and military discipline," and so cognizable by a military court. XXVI, 584.

SEE BOARD, (2.)

PLEA.

1. *Held* not competent for a commanding general to require, by a general order, that parties arraigned before court-martial for desertion should plead "not guilty." But *advised* that he might well and properly declare, in orders, that wherever the plea of guilty was interposed by an accused, the rule dispensing with the introduction of testimony might be, and should be, especially *in capital cases*, and cases of enlisted men, relaxed, so that all circumstances of mitigation and of aggravation might be spread upon the record, and the reviewing officer be thus enabled to act understandingly. III, 647. See CONVENING OFFICER.

2. It is a general rule of law that where the accused pleads guilty, no testimony upon the merits is to be introduced. But it is believed to be essential to a proper administration of justice in the majority of cases tried by military courts—especially in cases of enlisted men—that the prosecution should offer evidence of the circumstances of the offence, notwithstanding the plea of guilty has been interposed. The duty of the court does not end with their conviction of the accused; an imperative obligation remains to determine the nature and extent of the punishment proper to be awarded, and for this purpose some testimony is ordinarily necessary; especially as the punishment for military offences is definitely fixed by law in a few cases only, and may often be of any degree, in the discretion of the court, from a reprimand to death. Such testimony is also necessary to enable the reviewing officer to pass intelligently and justly upon the whole case. These views are in accordance with the practice of the English military courts. VI, 370. But in all cases where evidence is introduced by the prosecution after a plea of guilty, the accused should be afforded an opportunity to introduce rebutting evidence, or evidence as to

character, should he desire to do so. XIII, 423. See JUDGE ADVOCATE, 1.

3. In a case where the accused, being evidently ignorant of the forms of law, pleaded guilty to an artificially worded charge and specification, and immediately thereupon made a verbal statement to the court of the particulars of his conduct, setting forth facts quite inconsistent 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. VIII, 274. In such a case the court should ordinarily direct the plea of *not guilty* to be entered, and proceed to a trial and investigation of the merits of the case. VI, 357, 370. And where, with a plea of guilty, such a statement was interposed by the accused, containing 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 the unexecuted portion. XX, 120, 127, 177; XV, 142.

4. Wherever, in connexion with the plea of guilty, a statement or confession, whether verbal or written, is interposed by the accused, both plea and statement should be considered together by the court, and all parts of the statement should be equally regarded; not only those which go to fix the specific offence upon the accused, but those which favor his innocence or the presumption of a less degree of criminality than might be implied from the bare plea. And if it is to be gathered from the statement that evidence exists in regard to the alleged offence, which will throw light upon it or relieve the accused from a measure of culpability, there is a reason, additional to that which is presented in the case of a plea of guilty *unaccompanied* by a statement, for the introduction of such evidence; and such evidence should therefore be introduced if practicable. See XIV, 585, 596; XVII, 48; XXVI, 548, 562. (*It has been the experience of this Bureau, that enlisted men charged with desertion will often plead guilty, and thereupon make a statement in regard to the offence, disclaiming having had, in committing it, an intention not to return to the service, and setting forth facts which, if true, constitute an "absence without leave" only. In such a case, without additional evidence, the guilt of the accused cannot necessarily, or often even safely, be inferred from the record as it stands. See XXVI, 562.)

5. A plea of guilty to a specification which alleges that the accused "did absent himself without authority from his regiment, and did remain absent until arrested and sent to his regiment as a deserter," is only a confession that he was arrested and sent to his regiment as a deserter. It is, therefore, not a confession that he was in law and fact a deserter, but only that the military authorities so regarded him. II, 520.

6. *Held* that the court might properly refuse to admit a plea of guilty to a specification to which the accused added the words, "but alleging no criminality thereto." It is a plea of a *conclusion* which it is for the *court*—if the facts warrant it—to arrive at upon the evidence. III, 246.

*7. It is the general rule that a plea of not guilty precludes the interposition at any subsequent period of an objection to the charge or specification on account of a defect of *form;* but it may be otherwise where the defect is one of *substance*, that is, where the charge or specification is defective in some *essential* particular. XIX, 640.

8. Where the specification to a charge of desertion was defective in form, in not describing the accused by his rank, regiment, &c., nor in alleging his enlistment, or stating that his absence was without authority—yet *held*, that a plea of guilty to both charge and specification cured the defects, and warranted a conviction of the specific offence charged. V, 577.

9. The charge "disobedience of orders" means disobedience of *lawful* orders; and *held*, that by pleading guilty to this charge and to a specification under it, which set forth the fact of the disobedience of the orders of an officer superior in rank to the accused, but did not state or show that such officer was in authority over the accused, the accused admitted that the superior had such authority, and that he thus cured by his plea the objection of the indefiniteness or insufficiency of the specification. XVIII, 339.

*10. Where the accused was charged with having, as officer of the day, admitted an improper person into a fort, "contrary to orders;" *held* that his plea of not guilty precluded him from afterwards maintaining an objection to the specification as indefinite, because not setting forth or indicating the special post order intended by the general word "orders;" and precluded him also from objecting to the admission, under such specification, of the post order, in evidence. XIX, 640. See EVIDENCE, 6.

11. *Held*, that a plea of guilty to a specification was an acknowledgment of the identity of the accused, and operated as a waiver of objection on account of a misdescription of him therein. XV, 117.

12. Where the name given the accused in the specification was "Allan," when his real name was *Alban*, *held* that by pleading not guilty, without taking exception to the misnomer, he waived any objection which he might have made to the pleading on account of the same, and that he could not afterwards raise such objection to the proceedings as being thereby irregular or invalid. XXV, 100.

13. That an accused had not at the time of the trial been mustered into service as of the higher grade mentioned in the description of him in the specification, is a matter of defence which should be taken advantage of by plea at the trial, and if not so pleaded, cannot properly be claimed to authorize an interference with the execution of the sentence. VII, 234.

*14. Where a second lieutenant pleaded guilty to a charge and specification in which he was described as first lieutenant, without objecting to such designation; *held* that his plea was an admission of

record that he was identical with the person arraigned, and that the error of description did not affect the regularity of the proceedings. XXIV, 140.

15. Where the accused is described in the specification as of the wrong regiment, his plea of not guilty—no objection being taken to the specification—is a confession that he is identical with the person therein described, and the error is not fatal. IX, 518.

16. A plea of guilty waives any objection which might have been taken by the accused on the score of want of preparation by reason of an alleged failure to serve a copy of the charges, &c., upon him. VI. 259.

17. Subsequent brave and gallant conduct cannot be pleaded in bar to a charge of misbehavior before the enemy, but may properly avail with the court to mitigate the sentence. VI, 79.

18. If an arrested soldier be released from arrest and placed on ordinary duty by competent authority, whether before or after charges are preferred against him, such release, &c., cannot be pleaded by him in bar, as a *pardon* for his offence, when brought to trial for its commission. VII, 233. But see ARREST, I, 12.

19. A plea of former trial by the *same* court, upon a charge of desertion, and consequent absence for a period covering a greater length of time, and including the period of the alleged desertion as newly charged, is a good plea in bar, since the greater includes the less. V, 577.

20. For a court-martial to take testimony on the merits, and then proceed to convict the accused and sentence him, without ever giving him an opportunity to plead to the merits, but only specially to the jurisdiction, *held* a fatal irregularity. IX, 328.

* 21. Where a specification, under a charge of violation of the 83d article, alleged that the accused, as officer of the guard, signed a false report on the guard-book to the effect that he had visited the guard at reveillé; and the accused objected to pleading to the specification on the ground that it did not set forth the specific report in full; *held* that the court properly overruled such plea—not the terms of the report but the signing the same falsely being the gravamen of the charge ; and properly required the accused to plead guilty or not guilty. XXV, 513.

32. *Held* that the mere fact of *drunkenness* at the time of the commission of the offence furnished no valid plea to a charge of a criminal offence before a military court. XII, 59. The rule obtains in all the courts that a plea of *intoxication* is no defence; the same being regarded not as mitigating a crime, but rather as aggravating it—being in itself an offence. XXVI, 567. See MURDER, 8.

SEE FORTY-FIFTH ARTICLE, (3.)
SIXTY-NINTH ARTICLE, (6.)
ACCUSER AND PROSECUTOR, (2.)
DEPARTMENT COMMANDER, (2.)
FINDING, (24.)
FORMER TRIAL.
JUDGE ADVOCATE, (1.)
MAKING GOOD TIME LOST BY DESERTION, &c., (3.)
RECORD, IV, (18,) (22.)
STATEMENT OF ACCUSED.

PLEADINGS.

SEE NINETY-NINTH ARTICLE, (23.)
CHARGE.
COURT-MARTIAL, II, (16.)
SPECIFICATION.

POLITICAL PRISONERS.

1. *Held* (June, 1863) that the "*list of political prisoners*" to be furnished the United States judges, in compliance with the requirements of section 2, chapter 81, of the act of March 3, 1863, should not properly include cases of persons clearly triable by court-martial or military commission. It is not believed that it was intended in the act to invite attention to cases of persons charged with purely military offences, or of persons suffering under sentences of military tribunals. II, 553.

2. Where certain parties (citizens) were charged with offences intended to embarrass the military operations of the government, and committed during a period of war at a place within our military lines and the theatre of active military operations, and which was constantly threatened to be invaded by the enemy; and the parties had been, or were about to be, placed on trial therefor by military commission—*held* (November, 1864) that they were not entitled to relief in having their names returned, in *lists* of citizen prisoners, to the judges of the United States circuit and district courts, in accordance with the act of March 3, 1863, chapter 81, section 3; their cases not being properly embraced within its provisions. X, 648.

POST COMMANDER.

SEE FORTY-FIFTH ARTICLE, (6.)
ARREST, II, (6.)
COMMISSARY OF SUBSISTENCE.
FIELD OFFICER'S COURT, (8,) (10,) (27,) (28,) (30,) (31,) (32.)

POSTPONEMENT.

* 1. Although a court-martial *may waive* a compliance by the accused with the forms of law, in his applying for a postponement of the trial on account of the absence of a witness, it is yet justified in refusing such an application where the same does not fulfil all the requirements of paragraph 887 of the Regulations. XXVI, 311.

* 2. That the charges and specifications upon which an accused is arraigned differ in any 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 defence. XXIV, 513.

* 3. Where the accused had been in arrest, before trial, eleven months; and his regiment (since his arrest) had moved more than a thousand miles—from Kansas to Dakota; and material witnesses for

his defence had been left behind, whose attendance, however, he had made reasonable exertions to secure; *held* that a refusal by the court to grant him time to procure such testimony, or to postpone the trial even for a day, constituted a sufficient ground for disapproving the proceedings, which had resulted in his conviction. XXIV, 555.

4. Whether a refusal on the part of the court to accede to the request of the accused, to postpone the trial for a certain time in order to afford him an opportunity to provide himself with suitable counsel, shall be held such an irregularity as to induce a disapproval of the proceedings, must depend upon the circumstances of the case, and particularly upon the probability of his procuring the counsel within a reasonable time. The accused being entitled, as a right, to be defended by counsel, the court should not refuse the application, unless it appear that the continuance will result in an unreasonable delay prejudicial to the interests of the service. Where the postponement is improperly refused, the question whether the proceedings are thereby rendered irregular or invalid is in no way affected by the fact that the counsel desired was granted the accused at a later stage of the trial. XIII, 400.

See WITNESS, (19.)

PREFERRING CHARGES.

1. An officer against whom charges have been preferred is under no disability to prefer charges against another officer. I, 467. So of an officer under arrest. V, 348.

2. Where a superior officer orders an inferior to prefer charges which the latter believes or knows to be false, it would still be an act of insubordination for him to refuse to comply. His superior cannot be presumed to have the same belief or knowledge, and must be supposed, in giving the order, to be acting in good faith and in the conscientious discharge of his duty. Moreover, the preferring of the charges would not, under these circumstances, involve the inferior in any official or personal dishonor. He would not thereby become the *accuser* in the case, inasmuch as the act performed is not his own, but that of his superior. The latter is the accuser, while the other is merely an instrument in carrying out his will; and in subscribing such charges, it would be proper for the subordinate officer to add that it was done "*by the order of*" his superior, since this would be a *fact*, and such fact would belong to the history of the case. XIII, 374.

See SEVENTY-FIRST ARTICLE, (1,) (2,) (3,) (6.)
ACCUSER AND PROSECUTOR.
CHARGE, (14,) (15,) (16,) (17.)
COURT-MARTIAL, I, (5.)

PRESIDENT—AS REVIEWING OFFICER.

1. In cases where the military commander is not authorized to exeute the sentence, and the action of the President is made necessary y law, as well as in the cases where the execution of the sentence suspended by the commander, under the 89th article of war, to

await the pleasure of the President, the latter becomes the reviewing officer. As such, under the almost unlimited discretionary power vested in him, he may, where some of the findings of guilty are unauthorized, adjust the sentence to the amount of criminality properly averred and proved in the record. VII, 594; III, 492. See SENTENCE, II, 5.

2. Both where the President is alone competent to take final action on the sentence, and where the execution of the sentence has been suspended for his action under the 89th article, the military commander who convened the court (or his proper successor) should, in forwarding to the President the proceedings, formally approve the same, and such approval should appear in or upon the record. See IX, 15; APPROVAL OR DISAPPROVAL OF PROCEEDINGS, &c., 1.

3. *Held*, (June, 1863,) that where a death sentence rested upon a finding of the prisoner's guilt, not merely of desertion, but of *other* crimes, (in case of a conviction of which the general commanding in the field was not authorized by sec. 21, ch. 75, act of March 3, 1863, or otherwise, to execute the sentence,) such sentence could be executed by the President alone, to whom, therefore, the proceedings should be transmitted by the general. III, 81; VII, 347, 476.

4. An officer was dismissed by sentence of a court-martial; but the execution of his sentence was suspended under the 89th article of war, for the action of the President. This action was published (May 31, 1864) by the President, who commuted the sentence to a forfeiture of pay. Pending this action, and before that date, the accused was killed while bravely fighting at Spottsylvania Court House, having received permission to go on duty. *Recommended*, that the order in regard to his case be recalled, and that the sentence be then formally disapproved by the President. VIII, 556.

5. In a case of a guerilla sentenced to be shot, where the President was the final reviewing authority—*recommended*, that if the sentence be mitigated, it be commuted to confinement in the penitentiary, and *not* in a military prison; that the punishment imposed upon a guerilla should be infamous, while confinement in a military prison should be reserved for those among civil offenders whose offences were more political in their character. IX, 226. (See the act of July 2, 1864, chapter 215, section 1, which gives to the commanders of armies and departments the power to execute death sentences upon guerillas in certain cases.)

SEE SIXTY-FIFTH ARTICLE, (18.)
EIGHTY-NINTH ARTICLE.
LOST RECORD, (3.)
NEW TRIAL, (1.)
PAY AND ALLOWANCES, (10.)

PRESIDENT OF MILITARY COURT.

SEE SIXTY-FIFTH ARTICLE, (18.)
SIXTY-SIXTH ARTICLE, (7,) (13,) (14)
ADJOURNMENT, (1,) (4.)
JUDGE ADVOCATE, (13,) (24.)
ORDER, III, (3.)
PROTEST.
RECORD, II, (4.)

PRESIDENT—(POWER OF, ETC.—GENERALLY.)

SEE DISMISSAL, I, (1,) (2,) (4,) (5,) (6,) (8.)
FINE, (1.)
FREEDMAN, (1.)
MUSTER-OUT, (1.)
PARDONING POWER.
REMOVAL OF DISABILITY, (1,) (2,) (3.)

PRESIDENT'S PROCLAMATION.

I. (DECLARING THE STATUS OF REBEL STATES.)

* The President's proclamation of January 1, 1863, exempts the excepted districts named merely from the operation of the emancipation edicts, leaving their *status* in other respects unaffected. To ascertain what was the previous status of any particular State or locality, reference is to be made to the proclamations of August 16, 1861, and July 1, 1862. XIX, 574.

SEE CLAIMS, I, (28;) II, (5.)

II. (OF AMNESTY TO REBELS.)

1. *Held* that a person coming from the South, who took and subscribed an oath of allegiance upon entering our lines, with the avowed intention of abandoning the cause of the rebels, (which, as a civilian, he had supported,) and of availing himself of the amnesty proclamation of December 8, 1863, could not properly be brought to trial and punished for acts previously done in Richmond in aid of the rebellion, but not in violation of the laws of war, or for an alleged treasonable intent unaccompanied by acts committed since arriving at our lines. And though the oath subscribed by him was not in the precise form set forth in the proclamation, inasmuch as it omitted to contain a pledge to sustain the emancipation policy of the government, yet, *held*, if the party took it in good faith, and under the supposition that it was the prescribed amnesty oath, that he should not be denied the benefits of the limited pardon. But, in order to complete the proof in regard to his honesty of intention, and for the further security of the government—the party being an individual of large means, and a proportionate capacity for mischief, in case he should prove unfaithful to his professions—*advised* that, before being allowed to go at large, he be required to enter into the specific obligation indicated by the proclamation, and to furnish a bond, with sufficient sureties, in the sum of $20,000, for his future deportment as a loyal citizen. XII, 298.

2. In view of the fact that the State of Maryland is (September, 1865) not under martial law or military government, *advised* that, in cases where rebel soldiers, after taking the oath prescribed in the amnesty proclamation and revisiting that State, become involved in collisions with citizens excited by the recollection of crimes commit-

ted by them or the army to which they were attached—perhaps at the very localities to which they have returned—the military authorities cannot properly be required to interpose for their protection, but can legally intervene only for the restoration of order, and upon the formal appeal of the civil magistrates. XVI, 598.

3. The President's proclamation of May 29, 1865, extends an amnesty for the political crime of rebellion, but for no other. So *held*, that a citizen of the South who, after the commission of the murder of a colored man, had been pardoned and admitted to take the amnesty oath set forth in the proclamation, was in no respect relieved from amenability to trial and punishment for the civil crime. XIX, 390.

See OATH OF ALLEGIANCE, (2.)

III. (OF AMNESTY TO DESERTERS.)

(Proclamation of March 19, 1863.)

1. The proclamation of March 10, 1863, operated as a limited pardon, relieving absent soldiers returning within the time fixed from all "punishment" except forfeiture of pay for the period of absence; but it did not relieve a deserter from making good the time lost by his desertion—an obligation incident to his original contract. X, 459; VI, 469; XII, 139. (* It is to be noted that the forfeiture referred to in this proclamation as a "punishment" is really improperly so termed, since it is an obligation which the absentee would incur *by operation of law*—see paragraphs 1357 and 1358 of the Army Regulations—*in any event*, and independently, on the one hand, of a sentence of court-martial, or, on the other, of an executive pardon.)

2. *Advised*, (in accordance with the understood views of President Lincoln,) that a deserter, arrested as such before April 1, 1863, the expiration of the period during which, if voluntarily returning, he would have been entitled to the amnesty provided in the proclamation of March 10, 1863, should be treated as having so returned, and as therefore so entitled; for, having been prevented from voluntarily returning by superior military authority, it could not certainly be known that he would not have so returned if he had not been arrested; that his case, therefore, might well be considered as within the spirit of the proclamation, which, as offering a pardon, is to be liberally construed. II, 96, 173; III, 123, 276. But see 6.

(Proclamation of March 11, 1865.)

3. Although the soldier has, since his desertion, enlisted in another regiment, he must, under the proclamation of March, 1865, return to his former regiment to serve the required time. If the latter regiment does not exist, he may, of course, be assigned to perform the designated service in the one in which he subsequently enlisted, as well as in any other. XI, 666. See XIV, 439.

4. The enlistment by the deserter in another regiment, during his absence, is void, and no discharge from such regiment is necessary. Moreover, neither the period of such enlistment nor any of its terms can affect in any way the time which he must serve under the proclamation of March, 1865. XV, 132. Nor can it be affected by the

fact that he has meanwhile actually served a full term in another organization, and been honorably discharged therefrom. XI, 666.

5. Under the general language of the proclamation—"all persons who have deserted"—"all deserters," &c., might be readily included *officers*, were it not for the provision at the close that deserters receiving the pardon should return to their regiments and serve out their original terms, as well as the periods lost by their desertion—a condition which would seem to confine the proclamation to enlisted men only. This, however, is not a *necessary* conclusion; and in view of the comprehensiveness of its terms, and the evident *spirit* of the instrument—which, in construing a general act of amnesty, ought to be especially taken into consideration—it may well be inferred that the final provision was inserted rather from inadvertence than a design on the part of the draughtsman to narrow the signification of the previous comprehensive language; and that *officers* may therefore be deemed to be entitled to the benefits of the pardon. XI, 548. Where, indeed, the officer has been dismissed since his desertion, it would be difficult to enforce the condition in his case; but the performance of the same may be properly waived by the government, which has separated the officer from the service by its own act; and especially in a case where, notwithstanding the dismissal, he presents himself and avows his readiness to enter upon such service as may be required of him. XI, 666.

6. *Held* (May, 1865) by the Secretary of War that deserters arrested prior to the date of the proclamation of March 11, 1865, were not entitled, *as a right*, to the benefits of the amnesty; but that their being admitted thereto was a matter purely within the discretion of the Executive. XVI, 145.

See PARDON, (1,) (3.)

IV. (OF EMANCIPATION.)

8. A citizen of a part of the State of Arkansas in the occupation of the federal forces, for the sum of seven thousand dollars, sold, against their will, to be conveyed into slavery beyond our military lines, ten persons, mostly women and children, who had previously been his slaves, but who had been emancipated by the operation of the President's proclamation; he himself having full knowledge of the proclamation and of its effect, and having once actually renounced his claims to the services of his slaves by informing them that they were free and could leave him. He was brought to trial by military commission upon a charge of "kidnapping and selling into slavery persons of African descent made free by the President's proclamation of January 1, 1863," and was convicted and sentenced to confinement in a military prison for five years. Upon his applying for a remission of this sentence, *held* (May, 1864) that his offence was in the highest degree criminal, as well as brutal and depraved; that the proclamation was an irrevocable decree of freedom to all within its terms, and that the absence in it of prohibitory sanctions could not exempt from punishment one who had deliberately re-enslaved persons made free

thereby; that the conduct of the prisoner in applying for a pardon, with the price of his guilt in his pocket and while his victims still remained in slavery, was an act of shameless effrontery, and that such application should not even be considered until the slaves were returned to our military lines and to freedom. VI, 352. And see XVI, 586.

See MURDER, (2,) (3.)

V. (OF MARTIAL LAW.)

See MARTIAL LAW, (1,) (2.)

VI. (OF SUSPENSION OF WRIT OF HABEAS CORPUS.)

See HABEAS CORPUS, (1,) (2,) (4.)

PRISONER OF WAR.

1. Officers, non-commissioned officers, and privates of volunteers and militia, as well as of the regular service, are entitled, while prisoners of war, to the same pay and emoluments as if in actual service; and this after their term of service has expired, if they are still held as prisoners. (See act of March 30, 1814, ch. 37, sec. 14.) The captivity of the officer or soldier is accepted as a substitute for actual service. But the officers, when prisoners, are not entitled to an allowance for horses; for the law only allows them forage for horses actually kept by them, when and at the place where they are on duty. They would, however, be entitled to an allowance for servants, though not personally attending on them, if they actually have them employed at their homes or elsewhere. I, 382. (See Amendments to Army Regulations, page 523, edition of 1863, adopted since the date of this opinion, in regard to the pay and commutation for rations of prisoners of war.)

2. *Held* (April, 1863) that parties captured in the rebel ranks and dressed in the rebel uniform, although citizens of a loyal State, (Maryland,) should not be tried for treason by a military commission, but were to be treated as prisoners of war. II, 171.

3. When prisoners of war are willing to take the oath of allegiance, they are often permitted to do so. When they are not thus willing, they have been at the proper time exchanged under the cartel. An intermediate course—allowing a prisoner to take the simple oath of *non-combatant*—has not been pursued, as the government would thereby lose the advantage of the exchange, and would have no reliable guarantee that the prisoner would not re-enter the military service. Such a course, therefore, *not advised*, (May, 1863,) in the case of a rebel major, (applying to be allowed to take such an oath,) whose treason was without any circumstances of palliation. II, 371.

4. For the governor of a State to seize, confine, and put at hard labor in a chain-gang, certain suspected rebels in his State, until certain civilians and officers thereof should be released and exchanged by the enemy, *held*, (June, 1863,) an interference in the disposition

and treatment of prisoners of war by the regular United States officials, and a transcending of the ordinary police power which the governor is authorized to exercise over rebels within his jurisdiction. II, 511.

5. The seizing and holding of *hostages* in reprisal for captures made by the enemy, is certainly an exercise of the war-making power belonging exclusively to the general government, and which cannot be shared by the governors of the States without leading to deplorable complications. III, 558.

6. Where persons not positively shown to have been mustered into the rebel military service, and apparently engaged in an independent border warfare, made a raid from Kentucky into Indiana, and were arrested by the civil authorities of the latter State for robbery and held to trial as felons—*advised* (June, 1863) that a request from the confederate agent, Ould, that they be treated and exchanged as prisoners of war, should be denied; and that they should be left to have their offence passed upon by the court which had assumed jurisdiction of the case, and by which alone their defence (that they were actually confederate soldiers acting under the orders of their superior officers) could be properly investigated. II, 591; V, 344.

7. *Held*, (November, 1863,) that the cartel was not to be regarded as at all interfering with the right of our government to punish prisoners of war, when in our possession, for crimes committed by them before they entered the military service, and not already punished by their own authorities; except in the case of spies. V, 286; VII, 360, 377. So for crimes committed by them while in the rebel service, and before their capture. VIII, 529; XIII, 675; XVI, 296.

8. *Held*, that the exchange upon parole, by a mistake, as a prisoner of war, of a rebel guerilla under sentence of death for the murder of a United States officer in violation of the laws of war, in no manner exempted him from the operation of such sentence; his exchange having been part of a general exchange of prisoners, and having dealt with him as a prisoner of war and not as a condemned murderer. And *advised*, that he be rearrested and the sentence executed. XVI, 538; XX, 367.

9. An engineer captured when doing duty on a rebel steamer *held*, (November, 1864,) properly a prisoner of war, and to be detained for exchange, or released on taking the oath of allegiance. VI, 542.

10. It is laid down in *Republica* vs. *McCarthy*, 2 Dallas, 86, (and see also *United States* vs. *Vigol*, 2 Dallas, 346,) that a prisoner of war is justified in enlisting in the service of the enemy only from fear of immediate death, and not from a fear merely of an inferior personal injury, as of famishing. But in view of all the authenticated cruelties practiced upon federal prisoners of war by rebel officials, and of the fatal results of such treatment in very many known cases of death by starvation, disease, or bodily injury, as well as of the consideration that the death which ever presented itself to so many of these wretched victims as inevitably, though perhaps slowly, approaching, was even more full of horror and despair than would have been the dread of an immediate and violent end—*held* (June, 1865) that the

rule of the case of McCarthy could not properly be applied in all its strictness to cases of our prisoners so situated who have been induced to enter the enemy's service. XVI, 271.

And in all cases of such prisoners, who having been retaken by our forces, or having otherwise entered our lines, after a service with the enemy, are held by the military authorities for prosecution as deserters to the enemy or such other disposition as may be just and proper—*advised*, (June, 1865,) that the three questions to be determined are: 1. Under what circumstances and with what fear or apprehension the party was induced to enter the rebel service; 2. What were the circumstances of his service with the enemy; how long he remained in that service; and particularly whether he was actively engaged against United States troops; and, 3. Under what circumstances he left the enemy, and especially if he left voluntarily, or procured himself to be captured. XVI, 271. Thus where it appeared that the soldier had been induced to take an oath of allegiance to the rebel government and enter its service, while being subjected to extreme suffering and destitution at the Andersonville prison, and that in a few days after and upon the first opportunity he had deserted and escaped to our lines—*advised*, (February, 1865,) that he should not be proceeded against as a criminal, but should be returned to his regiment for duty, without trial. XIV, 135. But a distinction is to be made between a soldier who leaves the enemy voluntarily and one who is captured by our troops. XI, 577. Yet where an Andersonville prisoner who, having been subjected to a long experience of cruelty, had enlisted in the rebel service in order to escape such treatment, and was shortly after retaken by our forces, but not while fighting or assuming a hostile attitude, and before the facts of his joining the enemy were known, had voluntarily enlisted, and had been accepted as a soldier in a United States regiment forming from rebel prisoners of war at one of our prison stations—*advised*, (April, 1865,) upon the whole, that his *status* as a soldier in this regiment might properly be left uninterrupted. XVI, 40. But where it appeared that certain former soldiers of our army had been captured while fighting in the rebel ranks, and after having fired upon and wounded our troops—and this upon a skirmish line whence they might readily have escaped to our forces if they had desired—*advised*, (May, 1865,) that their representations, to the effect that they had joined the enemy to escape starvation 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. XVI, 136.

Held, further, that where, in this class of cases, a favorable view was taken of the merits of the soldier, it was extending to him a sufficient indulgence to relieve him of the charge of desertion to the enemy; and that to proceed to grant him *pay* for a period during which or a part of which he was actually in the enemy's service would be against public policy, and was not therefore to be recommended. XII, 508; XVI, 599; XIX, 168.

11. Where federal officers while prisoners of war at the South, and suffering great want and destitution, had given drafts payable in gold,

on friends at the north, to a rebel sutler, in payment of loans negotiated by them in order that they might procure the necessaries of life; and it was alleged that these loans were made at an exorbitant and extortionate rate—*held*, that though they were willingly accepted by these officers under the circumstances, the government was under an obligation to protect them from the exaction involved. And where the first of a set of exchange of such drafts had been seized by the military authorities while *in transitu* to the North for collection, *advised* that the same should be retained by the government, and the drawees thereof be notified that they could not pay such drafts, owned as they were by an enemy, without a violation of the laws of war. XIV, 241. See VIOLATION OF THE LAWS OF WAR, 13, 14.

But where it was subsequently shown by the affidavits of a considerable number of the officers of our army, to whom, when prisoners of war, this rebel sutler had made loans of this character, that no extortion had been practiced upon them, but that his transactions had been fair and beneficial; and this party also established that he had since been admitted to take a formal oath of allegiance to the United States—*advised* that the prohibition against his being allowed to proceed to the collection of the drafts in question might properly be withdrawn, and that the first of his set of exchange, held by the government, be returned to him, upon his furnishing a bond to protect the United States against any claims of other parties thereon; the individual drawees being thus left to such defences as they might choose to make, either as based upon circumstances surrounding the inception of the drafts, or upon the general principles of law governing the transfer and payment of negotiable paper. XVI, 572. See BOND, 2.

12. Where a draft on the north given by a federal prisoner of war, in return for a loan to him of money for procuring the necessaries of life at a southern prison, was held by a *bona fide* holder, who was, however, a citizen of a State in insurrection—*advised*, that although it did not appear that there was any extortion in the inception of the draft, yet, since the holder was to be deemed *prima facie* a rebel enemy, the payment to him of the draft could not be permitted except upon his furnishing to the government satisfactory proof that he was really a loyal citizen of the United States and had not given aid or comfort to the rebellion. XVI, 525.

13. In the case of a murder of a rebel prisoner of war by one of his comrades, at a United States prison camp within a State where the ordinary criminal courts were open, *held*, that his case was not one proper to be brought to trial by a military commission. And *advised*, generally, in regard to rebel prisoners of war committing crimes upon other such prisoners, while in our hands, that the government might, in its discretion, either turn such offenders over to the civil authorities of the locality of the crime for trial, or, as was preferable, exchange them under the cartel and leave them to be punished by their confederates at the South. XIII, 498.

14. One who has borne arms in the rebellion against the United States, though a traitor, and therefore ordinarily to be discredited, is

yet not incompetent as a witness if he has not been actually convicted of his crime by a competent court. So *held*, that rebel prisoners of war in our hands were under no disability to give evidence in a certain criminal case. XIII, 499. But it has been decided by the Secretary of War that such prisoners shall not ordinarily be transported from their place of confinement for the purpose of being used as witnesses in a case on trial. XIII, 500.

*15. An officer taken prisoner through his own fault or neglect, as while recklessly exposing himself to capture by the enemy, or while being absent without leave from his command, should not be held entitled to the benefit of the general rule allowing pay to prisoners of war for the period during which they are held by the enemy. XXII, 153.

*16. A soldier, who is a prisoner of war on parole, though he may not perform military duty in the field against the enemy by whom he has been paroled, is not necessarily exempt from being required to do certain duty not connected with hostile operations, while he remains with his company or regiment, or at a military post, unexchanged. Thus it is said by Lieber, in his treatise, published in General Order No. 100, of 1863, paragraph 130: "A paroled prisoner may be required to perform internal service, such as recruiting or drilling recruits, fortifying places not besieged, quelling civil commotions, &c." So where a soldier, who, as a paroled prisoner of war, was stationed at a post not besieged or attacked by the enemy, was ordered to assist the post guard in enforcing the discipline of the post in putting into the guard-house another soldier of the same regiment; *held*, that there was nothing in his obligation as such prisoner to justify him in refusing to obey such order. XXI, 592. See DISCHARGE, 6. (But the duty on which the prisoner is put must not be prohibited by the terms of the *cartel* under which he has been paroled. See Opinion of Attorney General Bates, X Opinions, 357.)

SEE CLAIMS, I, (6.)
MILITARY COMMISSION, IV, (1,) (6,) (7.)
MURDER, (4,) (5,) (6,) (7.)
ORDER, I, (9,) (10.)
PAROLED PRISONER.
PAY AND ALLOWANCES, (41,) (42,) (43,) (44.)
TREASON, (2.)
VIOLATION OF THE LAWS OF WAR, (2,) (4,) (19.)

PRIZE.

1. When our inland waters become the theatre of war, the reason of the law would seem to require that captures made upon them should be treated, and the prizes should be adjudicated for condemnation, as in ordinary cases by the United States courts. I, 346. (But see the act of July 2, 1864, chapter 225, section 7, passed since the date of this opinion, by which maritime prize on inland waters is abolished.)

2. An officer of the navy, who, in prosecuting legal proceedings for the condemnation of a captured prize, incurs responsibilities and losses, should be indemnified by the government. I, 346. See PROCEEDINGS AT LAW AGAINST OFFICERS, &C.

3. Upon an application for the distribution, as prize money, among officers, &c., of the ram fleet, of the proceeds of property of the enemy seized at the capture of Memphis, in June. 1862, *held*, (December, 1865,) that such a distribution should not be made, and for the following reasons: 1. The ram fleet was a contingent of the army and not of the navy; and the act of Congress, (of 17th July, 1862,) which provides for the payment of prize money to *any* armed vessel in the service, to be apportioned in the same manner as in the case of vessels of the navy proper, was not passed till after the date of the capture. 2. A very considerable part of the property in question was probably taken on the *land*. The Supreme Court in the case of Mrs. Alexander's cotton, 2 Wallace, 404, in deciding that property taken on land by the navy subsequent to the act of 17th July, 1862, chapter 204, was not subject to be condemned and its proceeds appropriated as prize, leaves it at least in doubt whether property taken before the date of that act could be so treated. *A fortiori* would a doubt arise as to the legality of a distribution among an *army* force of such of the property as was found on land at the capture in question. 3. The subject of such distribution is complicated by the provisions of the confiscation acts of July 13, 1861, chapter 3, and August 6, 1861, chapter 60, passed before the capture. These expressly forfeit to the United States a very large and comprehensive class of the effects of rebels; and it would not be probable but that a portion, at least, of any particular lot of property taken by the ram fleet at such capture would be of the character contemplated by one or both of these acts; and such portion would be liable to be devoted to public uses only, except indeed where a private informer became entitled *with* the United States. 4. The repeated legislation of Congress since the period of such capture, to the effect that all captured, as well as abandoned, property of rebels, not liable to be distributed as naval prize, shall be held and disposed of for the benefit of the United States and not of individuals, would further render it improper for the Executive to assume to divide the proceeds in question among the body of troops named. And *held*, that if any relief was to be afforded in this case, it could properly be extended by Congress alone. XIX, 259.

PROCEEDINGS AT LAW AGAINST OFFICERS, &c.

1. It is clearly the duty of the government to protect those who have made arrests under its authority, by having a proper defence made, through counsel employed by it, to the suits instituted against them. III, 105.

2. An officer who, in arresting a soldier, acts in good faith, and in the proper discharge of a public duty, should be protected by the government from the injurious consequences of his action. The United States attorney for the district should generally be instructed to appear and defend him in a suit for false imprisonment. I. 348; XIII, 509; XVI, 565.

3. Where an officer reported, in accordance with paragraph 1461 of the Regulations, that he had been sued in a civil court for dam-

ages, alleged to have been sustained by a soldier on being illegally mustered into service. *advised*, that the United States district attorney be requested to appear for him, and to transfer the case to the United States circuit court if he deemed it desirable. X, 576. See COUNSEL, I, 4.

* 4. When a suit or prosecution is commenced against an officer of the army, it is his duty (in compliance with paragraphs 1461 and 1462 of the Army Regulations) to advise the War Department of the fact at once, and, without first taking any action himself in the case, (unless such action be absolutely necessary,) to request instructions as to the course to be pursued. If it is concluded that the suit, &c., be defended, the Secretary of War will request the attorney general to direct the proper United States district attorney to take charge of the defence, or the officer will be authorized to employ other counsel. If the officer is obliged by the nature of the proceeding or the emergencies of the occasion to resort to professional counsel forthwith and before he can communicate with the department, he should resort, if practicable, to the United States district attorney, in preference to any other counsel, and at the first opportunity inform the department what action he has taken, and whom he has employed as counsel, and, stating all the facts in the case, seek sanction for what he has done, and instruction as to his future procedure. The practice which has prevailed to some extent among military commanders of employing counsel, and especially the United States attorney, without the authority or sanction of the Secretary of War, is a censurable one, and one which often results in great embarrassment to the government. It is to be noted that the reason why the United States district attorney is ordinarily to be retained by or for an officer subjected to legal proceedings, in preference to other counsel, is, not that it is required of him to render professional services free of charge to an officer of the government, for the contrary is the fact, but that, being the legal representative of the United States, he is the most proper person to defend an action in which its interests are directly or indirectly involved, and further, that the accounts for their services rendered by such attorneys are almost invariably moderate and reasonable, while those of other counsel are often quite otherwise. See COUNSEL, I, 2, 3.

* 5. In advising that counsel be furnished or other appropriate relief be afforded to parties sued or prosecuted for acts performed in their line of duty as United States officers, no distinction has been made between officers still in the service and those who at the period of the suit or prosecution had ceased to be attached thereto. XXI, 346. But one of the latter class, in assuming to make the government responsible for the charges of his defence, is, no less than an officer in the army, properly required to keep the Secretary of War advised of the proceedings against himself, and to seek from him authority for the employment of counsel at the expense of the United States.

* 6. Where an officer is about to be involved in legal expenses which he proposes shall be undertaken by the government, it is certainly

due to that government—and this is the rule of the service—that he shall, at the earliest moment, communicate with the proper department on the subject, so that it may be enabled to control the proceeding and charges incidental thereto. And this obligation would appear to be even more binding upon a party once in the service but discharged therefrom before such expenses come to be incurred, and thus no longer in a position in which his action in incurring them could even be inquired into. So where a volunteer officer, shortly before his discharge from the service, was indicted for an alleged felony committed by him in his military capacity, and at no time during three years while the proceeding was pending against him applied to the government to undertake his defence, or for other relief in the premises, but at the end of that period presented to the department an account, excessive in amount, for the services of various counsel employed by him at different stages of the case, and for sundry other costs and charges represented by him to have been incurred therein; *held* that no obligation rested upon the government to entertain and satisfy such account. XXVI, 248.

7. An officer, against whom suits have been commenced for acts done in the line of his duty, may properly be instructed to employ counsel for his defence, with the understanding that, if upon the trial it shall appear that he was acting in the proper performance of his duty and in conformity to law, he will be indemnified by the government, as well for the expenses incurred in defending the suits as for any judgments that may be rendered against him. II, 16.

8. Where an officer is sued in damages for acts done by him while acting under the authority of the government, the question of his indemnification is not be determined till judgment shall have been rendered against him, and will then depend upon the character of his conduct, considered in all its bearings and examined in the light of the testimony produced on the trial. If he acted within the scope of his power, fairly interpreted, his claim to protection against the results of the suit should be allowed. XI, 201.

* 9. An officer tried, after his discharge from the service, for an alleged assault with intent to kill in firing upon and wounding a subordinate, was defended by counsel employed by himself, without the authority or sanction of the government, which was without knowledge of the conduct of the trial or the evidence adduced thereat. Upon a claim presented by him to be paid the charges of his counsel, *held* that even if the objection to such charges—that they were incurred without the privity of the government—should be waived, (see 6,) it would still be necessary that the Secretary of War be fully informed of the merits of the case before entertaining the claim; that satisfactory information of such merits could be derived only from a transcript of the actual testimony introduced upon the trial, which should be procured and filed by the claimant, and that neither his personal statement of such testimony nor that of his counsel would suffice. XVI, 248, 302. A copy of the entire body of testimony introduced upon his trial having accordingly been furnished by the party, and it clearly appearing from an examination of the same that, in com-

mitting the alleged offence for which he was indicted, he acted neither in the right nor in good faith; *held* that his claim to be allowed his charges of counsel was without merits. To commend such a claim to favorable consideration the party must be shown to have fulfilled one of two conditions, viz: he must either have been in the right in his act, or, if wrong or mistaken, must have proceeded in good faith, actuated by an honest purpose to perform his duty and a zeal for the public service, and not by passion and resentment. XXVI, 521. See XXVI, 586.

* 10. In the case of an officer sued or prosecuted it is only the just and reasonable fees of his authorized counsel, and—in a proper case—the amount of the judgment or fine that may be adjudged against him, that can ordinarily be borne by the United States. The individual account of the officer for his personal expenses incurred in connection with the proceeding cannot ordinarily be allowed; nor can an account presented by him for the value of the time and labor spent and performed by himself in the same connection. So where an officer against whom a prosecution had been pending for three years, in tendering at its close an account against the War Department for his counsel fees, added a further item for the value of his time and services in preparing for and attending to the action, estimated at $4,500, or $1,500 for each year—*held* that such item could in no event constitute a legitimate charge against the government. XXVI, 248.

* 11. The personal account of a *party* to a proceeding at law does not ordinarily constitute a legitimate charge against the government. Thus where the authorized counsel of an officer (the United States attorney) had charged in his account certain disbursements as incurred in connection with necessary travel, &c., to and from the place of trial, and the defendant presented an individual account for similar disbursements incurred by himself personally in the same manner—*advised* that while the account of the counsel for such disbursements was proper to be approved, the practice of the department would preclude the allowance of the claim of the *party*, who was expected in such a proceeding to bear his own expenses. XXVI, 536. See XXVI, 587.

* 12 A party who had been sued in damages for acts done in the line of his duty, while an officer of volunteers, was instructed by the Secretary of War that the United States attorney would be directed to defend him, or—if he preferred, being himself a lawyer, to defend in person—that the question of the reimbursement of his costs and expenses would be considered when the suit was terminated. He chose to conduct his own defence, and upon the successful termination of the trial, presented an account consisting of two items: first, the amount of his necessary disbursements in connection with the proceedings; second, the amount of a judgment rendered by the court in his favor for the reimbursement to him of the very expenses (under the name of costs) for which such disbursements were incurred; but which judgment had not been satisfied by the plaintiff, upon execution duly issued against him. *Held* that the claim for the disbursements, the same being those of the party as counsel, and not as an

individual defendant, should be approved and paid; but that the second item of the account could not properly be allowed. XXV, 521.

* 13. Where an officer, having arrested a citizen, who, on hearing of the death of President Lincoln, applauded in public the act of his assassin, was sued by the latter, who recovered a judgment of less than one hundred dollars damages and costs—*advised*, in concurrence with the recommendation of the United States district attorney, (who had been authorized by the Secretary of War to defend the suit,) that the amount of this judgment should justly and properly be borne by the government, the officer having acted in the arrest in good faith, and from a patriotic sense of duty, though perhaps unadvisedly. XXVI, 536.

14. Where a *detective* in the employment of the provost marshal of the middle department, in consequence of his making an arrest ordered by the general commanding, was subjected to a criminal prosecution for acts done in the regular performance of his duty—*held*, (January, 1864,) that his case was within the *spirit* of paragraph 1461 of the Regulations, and that the just charges of the counsel employed in his defence should be borne by the government. VII, 45. And see XXI, 106.

15. Where a groundless and malicious criminal prosecution for robbery was commenced against a faithful government detective for an act done in the line and proper performance of his duty—*advised*, that he be authorized to employ counsel in his defence at the expense of the government, and that the governor of the State in which he was indicted be called upon to use his influence to cause a *nolle prosequi* to be entered in the case; or, if this could not be done, to pardon him in the event of his conviction. XVIII, 290.

16. Where a *deputy provost marshal*, acting directly by the orders of the Provost Marshal General, and in the legitimate exercise of the functions of his office, arrested a noisy and violent secessionist who created disturbance at an election in Maryland, and bills of indictment for false imprisonment, &c., were consequently found against him, by a court of that State, and his case appointed for trial—*advised*, (March, 1864,) 1st, that the defence of this officer be assumed by the government and his case be removed to the United States circuit court under the act of March 3, 1863, ch. 81, sec. 5; 2d, that the governor of Maryland, in case of his conviction by the State court, be requested immediately to pardon him; 3d, that in case of his refusal, it would devolve upon the government by all needful force to promptly release him from the custody of the State authorities and set him at liberty. VIII, 51, 108, 130. And similarly *advised* (March, 1864) in the cases of certain recruiting officers of colored troops, against whom —for acts properly performed in the line of their duty—indictments were found in the circuit court of Kent county, Maryland. VIII, 51. And see XXI, 197, where it was advised that a deputy provost marshal, prosecuted in Kentucky for acts duly performed in the line of his duty as such, be defended at the expense of the government. See also XIX, 490. But *advised*, that the case of a citizen auctioneer,

employed by the government to sell certain public property, and sued by a purchaser because, as alleged, the goods purchased did not correspond in quality with the samples exhibited at the auction, was not one in which the United States could properly be called upon to provide for the defence of the party. XXI, 219.

* 17. Where an army chaplain, who, during the war, occupied by authority a house in Virginia which had been taken possession of by the United States as the abandoned property of an enemy, was, after the cessation of hostilities, sued for the rent of the same, by the former owner—*held* that his application, to be defended by counsel at the expense of the government, should properly be granted. XXIV, 135.

* 18. A loyal citizen and mayor of St. Louis, who had been the president of a county board organized in Missouri in 1862 by Major General Schofield as department commander, the duty of which board was to assess secessionists for the purpose of raising funds to equip the militia and support their families, applied to the Secretary of War to be authorized to employ, at the expense of the government, counsel to defend suits brought by one of said secessionists against tenants of his who, by the order of said board, had paid over to it their rents, as a part of its assessment upon himself. *Advised* that the case was properly to be regarded as within the general rule pursued by the government, of protecting parties sued or prosecuted because of a compliance with military orders, and that authority be given the applicant to employ a competent lawyer of unquestionable loyalty for the purposes of such defence. XXIII, 121.

* 19. A citizen of Tennessee was awarded a contract to furnish wood for the use of a railroad (in that State) then being under military control; and by the terms of the contract it was agreed that the military authorities were to provide the standing timber from which the wood was to be cut. Having cut certain timber so provided, the contractor was sued in damages by parties owning the land; and who, because, apparently, of inability to establish their loyalty, had refrained from applying to the United States for payment in the usual manner. *Held* that the contractor was entitled to be defended in these suits at the expense of the government. XXVI, 253.

* 20. *Held* that a surety in a replevin bond, given by a purchaser of government property who had been sued by a third person claiming title, had no valid claim for relief from the United States, on his being obliged to pay the penalty of the bond upon a judgment for the plaintiff; that his remedy was against his principal and him alone; and that it was the latter only who might, upon a proper showing, claim to be indemnified by the government. XXIV, 211.

21. Where, upon an application to be defended by the United States, presented by a department commander who had been subjected to a vexatious prosecution for military acts properly ordered by him, it was made apparent that various other officers in the department were about to be subjected to such prosecutions, instituted by disloyal parties—*advised*, (November, 1865,) that the Attorney General be requested to issue general instructions and authority to the local

United States district attorney to appear for the defendants, or provide for their defence in all cases of this class within that district; that by such action on the part of the legal representative of the government, its enemies generally, and especially those concerned in these vexatious proceedings, would be best impressed with the purpose of the Executive to sustain and protect in the fullest degree all military officials upon whom it might be attempted, through the medium of the local courts, to retaliate for arrests, or other acts, duly authorized and conducted.† XXI, 32. See XIX, 245.

22. That a horse is marked "U. S." is not conclusive, but only *prima facie*, evidence that it is the property of the United States. If a horse so marked be taken from the United States quartermaster or other officer in charge, upon a writ of replevin, he should employ counsel and contest the title, at the same time giving notice of the facts to the Adjutant General, in accordance with paragraph 1461 of the Regulations, whereupon the government will assume the defence of the case. VIII, 612.

23. Where one who had recently been an officer of the army was sued, not for acts done in the line of his duty while in the service, but in replevin for a horse which he had purchased while in the army, from the quartermaster department, and which was claimed by an individual as his own property; *held*, that whatever relief might be afforded in case the suit resulted in the support of the title of the claimant, the government could not properly be required to interfere in behalf of such officer or provide for his defence during the pendency of the private suit. XXI, 151. It is the duty of the purchaser in such a case to defend the suit; and if he fails in his defence, and a recovery be had against him, his claim upon the government—

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†NOTE.—A full and complete protection for officers of the army sued or prosecuted on account of arrests made, military trials instituted or conducted, imprisonments imposed, &c., or for the exercise of martial law, in the course of the late war of the rebellion, (by the authority of the Executive, which—as the statute concludes—is always to be presumed,) has been afforded by *Congress* in the recent comprehensive *act of indemnity*, of March 2, 1867, chap. 155. This act provides as follows: "That all acts, proclamations, and orders of the President of the United States, or acts done by his authority or approval after the fourth of March, anno Domini eighteen hundred and sixty-one, and before the first day of July, anno Domini eighteen hundred and sixty-six, respecting martial law, military trials by courts-martial or military commissions, or the arrest, imprisonment, and trial of persons charged with participation in the late rebellion against the United States, or as aiders or abettors thereof, or as guilty of any disloyal practice in aid thereof, or of any violation of the laws or usages of war, or of affording aid and comfort to rebels against the authority of the United States, and all proceedings and acts done or had by courts-martial or military commissions, or arrests and imprisonments made in the premises by any person by the authority of the orders or proclamations of the President, made as aforesaid, or in aid thereof, are hereby approved in all respects, legalized and made valid, to the same extent and with the same effect as if said orders and proclamations had been issued and made, and said arrests, imprisonments, proceedings, and acts had been done under the previous express authority and direction of the Congress of the United States, and in pursuance of a law thereof previously enacted and expressly authorizing and directing the same to be done. And no civil court of the United States, or of any State, or of the District of Columbia, or of any district or Territory of the United States, shall have or take jurisdiction of, or in any manner reverse any of the proceedings had or acts done as aforesaid, nor shall any person be held to answer in any of said courts for any act done or omitted to be done in pursuance or in aid of any of said proclamations or orders, or by authority or with the approval of the President within the period aforesaid, and respecting any of the matters aforesaid; and all officers and other persons in the service of the United States, or who acted in aid thereof, acting in the premises shall be held *prima facie* to have been authorized by the President; and all acts and parts of acts heretofore passed, inconsistent with the provisions of this act, are hereby repealed."

if the character of the sale to him gives rise to one—may then be considered. XIX, 498; XXI, 190, 557. *And *held* that the rule here laid down applied with even more force, in a case where the suit was brought against, not the officer who purchased the horse, but his vendee. XXI, 430. *So *held*—though the property was of more value in this instance—in the case of a party who, having purchased from the United States a building erected against the edifice of another, was restrained by an order obtained by the latter upon proceedings in the State court, from removing the building. But *advised* that the local quartermaster be instructed and enabled to afford the purchaser any such information, which might be in the possession of the government, in regard to the character of its title, as would facilitate the defence of the action. XXI, 310.

SEE THIRTY-THIRD ARTICLE, (1,) (2,) (5.)
COUNSEL, I.
DEPARTMENT COMMANDER, (6.)
DISBURSING OFFICER.
PRIZE, (2.)

PROMOTION.

*1. Where a regular officer is dismissed from the service by the duly confirmed sentence of a competent court, a subsequent remission of such sentence by the pardoning power vests him with no right whatever of promotion for the interval between the dates of approval and remission. XXII, 650.

2. Where an officer of the army of the rank of brigadier general is *retired*, under the 12th section of the act of July 17, 1862, chapter 200, because of being of the age of sixty-two years, or because his name has been borne on the Army Register for forty-five years, the officer next in rank in the same corps has no *right* in law to the promotion to which he would have been entitled if his superior had been retired for incapacity, under the act of August 3, 1861, chapter 42, section 16. In the act of 1862 there is an entire absence of provision in regard to the promotion which in the former act is expressly provided for; and as the whole subject of promotion in the service is one of positive law, the case in question must be left to the operation of the general rule, which denies promotion *as a right*, when the rank to be reached is that of a brigadier or major general. In such case, therefore, the promotion must be made by *selection* under paragraph 21 of the Army Regulations. IX, 585.

SEE SEVENTY-FIFTH ARTICLE, (5.)
DISMISSAL, I, (9.)
MUSTER OUT, (3.)
REDUCTION TO THE RANKS, I, (2.)
SUSPENSION, (1,) (8,) (9.)
VETERAN VOLUNTEER, (3.)

PROSECUTOR.

There is no doubt of the right of the prosecutor to be present and propound questions through the judge advocate. If, however, he is a witness in the case, he should ordinarily be first examined. II, 1.

SEE ACCUSER AND PROSECUTOR.
WITNESS, (2.)

PROTEST.

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, no individual of the minority, whether the president or other member, is entitled to have his *protest* against the 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. XI, 203. *It is held by Simmons, ("Courts-Martial," p. 180,) "The decision only of the court, both as to the interlocutory or final judgments, is made known, (in the record;) but in no case the details of any discussion or the judgment of particular members." Hough ("Precedents in Military Law," p. 603, note 4) says, "The judge advocate has no right to enter a protest; neither can the president, nor any member of the court, make a protest." And see again Simmons, p. 179–180, to a similar effect. XXV, 542.

PROVOST JUDGE OR COURT.

1. A general commanding in time of war a department in which the ordinary criminal courts are suspended, is authorized, under circumstances requiring the prompt administration of justice, to appoint a provost judge for the trial of minor offences. It is proper, however, that the graver violations of the law (in the case of offenders not amenable to trial by court-martial) should be referred to military commissions. While the line between the jurisdiction of a provost judge and that of a military commission is not clearly defined, both tribunals derive their power from the same source, and are alike sanctioned by the principles of public law. II, 14; XV, 519.

2. A provost court has no power to impose or enforce forfeitures or stoppages of pay in cases of enlisted men. It is deemed to be a principle of public policy that the pay of soldiers shall not be taken from them or affected by process of law, except in cases specially provided for by statute or the regulation of the service. The provost court is a tribunal whose jurisdiction is derived from the customs of war, and which is quite unknown to our legislation. It is believed, therefore, that it is without authority to exercise jurisdiction over a soldier's pay by adjudging its forfeiture. VIII, 638; X, 39.

3. A provost court has no jurisdiction of the offences of soldiers specifically made triable by law before a court-martial or military commission. Where, therefore, it appeared that the provost judge at New Orleans, (Judge Atocha,) had sentenced a considerable number of enlisted men to long terms of imprisonment at Ship Island and the Dry Tortugas for desertion, marauding, mutiny, robbery, and larceny, (and some even to death,) *held*, (December, 1864,) that such admin-

istration of military justice was without sanction of law and wholly void. VI, 635, 639; X, 560; XIII, 55, 114; and see XVII, 145. *Held*, also, that such judge had no jurisdiction of the crime of murder committed by a citizen, whom it appeared that he had sentenced to an imprisonment for life. XIII, 114. And *recommended*, especially as the sentences adjudged by this official were characterized by an unusual and excessive rigor, that measures be taken by the War Department to ascertain what soldiers or others remained confined at the posts mentioned, or elsewhere, under sentences illegally imposed by him, in order that they might at once be released and returned to duty, or for trial by a competent tribunal. *Ibid.*

4. *Held*, that a provost court had properly no jurisdiction of the crime of "robbery," or "levying black mail," committed (as alleged) by a detective in the service of the government; and where the detective was tried and convicted upon such charges by a provost judge, and sentenced to three years' imprisonment at the Tortugas, *recommended* that he be at once discharged. XI, 665.

5. *Held*, that a provost court had no jurisdiction of the specific offence of "aiding and abetting the enemy;" and that it was not empowered to banish the accused from the military department, or to confiscate his property, or to impose a fine (as in this instance) of the magnitude of $5,000. And *recommended* in this case, that the property confiscated by the judgment be restored to the owner, if found still to exist, *in specie*, in the hands of the government. XII, 388.

6. The jurisdiction of a provost court should be confined to cases of police merely, to wit, such cases as are summarily disposed of daily by the police courts in our large cities, as, for instance, cases of drunkenness, disorderly conduct, assault and battery, and of violation of such civil ordinances or military regulations as may be in force for the government of the locality. The provost judge supplies the place of the local police magistrate in promptly acting upon the class of cases described, without at the same time being necessitated (as a formal military commission would be) to preserve a detailed record of the testimony and proceedings in each case. But he should not assume to take cognizance, on the one hand, of offences committed by soldiers in violation of any article of war, or of the regulations of the service; or, on the other hand, of the offences of civilians of a strict military character, as, for instance, those in violation of the laws and customs of war, and so properly triable by a military commission. XIII, 392.

7. General Order 31, of 1865, of the department of the Mississippi, which constitutes the provost marshals throughout the department as provost courts—*advised* to be improper, for the following reasons: 1. It gives such courts jurisdiction over many cases properly triable, and which (as it specifies) have heretofore been tried by military commission only. 2. It gives them jurisdiction over cases of enlisted men and retainers of the army, who are, as a general rule, *entitled* to be tried by court-martial. 3. It authorizes such provost courts to settle questions of title to personal property, a subject of which *no* military

court can properly take cognizance. 4. It permits provost courts to impose sentences not merely of fine and imprisonment, but of hard labor on fortifications, and banishment beyond military lines; the two latter classes of punishment being beyond the province of such courts to inflict. 5. It authorizes them to take bonds and admit prisoners to bail; but such bonds and recognizances would be wholly *coram non judice* and void. *Recommended*, therefore, that the Secretary of War require this order to be revoked, and the provost courts created thereby to be discontinued; the department commander being at the same time advised that the jurisdiction of such tribunals in time of war can be extended to matters of police merely, and that they can ordinarily properly be established only at cities and principal centres of population. XII, 386. See XI, 652.

PROVOST MARSHAL.

SEE COURT-MARTIAL, II, (5.)
HABEAS CORPUS, (7.)
PROCEEDINGS AT LAW AGAINST OFFICER, (16.)
SENTENCE, III, (10.)

PUBLIC ANIMAL.

* 1. *Held* that certain horses and mules found in Washington, during the war, in the possession of a party who had been an army sutler, marked with the "U. S." brand, and without any additional mark indicating that they had been duly *sold* by the government, were to be regarded as *prima facie* government property; the burden of proof being, under the circumstances, thrown upon the party to establish a legal title. XXIII, 139.

2. As all the citizens of the rebel States occupied during the war the status of *enemies*, (see FIFTY-SIXTH ARTICLE, 2,) *held* that a horse captured from a citizen of Virginia by our forces, during active hostilities, became the property of the United States; and that such party, upon being subsequently pardoned by the President, did not become entitled to a return of the animal, or to any privilege of repurchasing the same at private sale superior to that which might be enjoyed by any citizen under the regulations of the quartermaster department. XIX, 162.

3. It is provided in General Order No. 171, of the War Department, of June 9, 1863, that no officer shall be "permitted to sell a serviceable horse which has been purchased from the quartermaster department." *Advised*, therefore, (November, 1864,) that an officer who had been allowed to buy a horse which had been captured from the enemy, and consequently belonged to the quartermaster department, could not be permitted to sell the same unless it may have been formally condemned as unserviceable. XI, 126.

SEE CLAIMS, I, (6.)
EVIDENCE, (24.)
PARDON, (5.)
PROCEEDINGS AT LAW AGAINST OFFICERS, &c., (22.)
VARIANCE, (7.)

PUBLICATION OF ORDER.

SEE ORDER, I, (7,) (8,) (9.)
ORDER, III.
SUSPENSION, (11.)

PUBLIC PROPERTY—(DISPOSITION OF.)

1. Property of the United States acquired by public law cannot be disposed of through the authority of any of the departments, but only by act of Congress. Thus, *held* that government land at Sandy Hook could not be allowed to be used and improved by a railroad company without the sanction of public law. There is no principle or precedent which can be held to empower the Executive to transfer either the absolute title to, or a usufructuary interest in, property of the United States so acquired, without the concurrence of Congress. VII, 404.

* 2. In the case of the arsenal at Macon, Georgia, captured from the rebels by our military forces, and of which the title had become fully vested in the United States upon the termination of the war, (see CLAIMS, I, 32,) *held*—upon a claim to have the same transferred to said city—that the executive branch of the government could not now (July, 1866) legally convey said estate to the city of Macon, or to any party whatsoever, without the authority of Congress; that as the property of the United States therein had become absolute, the same—like all other public estate—could be transferred only by the sanction and direction of Congress, which alone has the constitutional power "*to dispose of the territory or other property belonging to the United States.*" See *United States* vs. *Nicoll*, 1 Paine, 646. XXIII, 131.

SEE CLAIMS, II, (11.)

PUNISHMENT.

1. The punishments which may be imposed by a court-martial, where not restricted by law to particular penalties, are not limited to those enumerated in paragraph 895 of the Regulations. The custom of the service and usages of war have established various other penalties which may be resorted to in proper cases. IV, 131, 217; XXIV, 192, 479. *Especially cannot such general enumeration properly be regarded as confining a court-martial to the punishments indicated, where it is authorized by law (as by many of the articles of war) to resort to others at its discretion. XXII, 555.

2. A court-martial may no doubt *legally* impose the penalty of wearing a "ball and chain" as a punishment for enlisted men. IV, 319. *In general, however, such a penalty would be most unadvisable, as needlessly degrading the soldier, and, except in aggravated cases, should not be resorted to. XXVI, 508.

3. The punishment of *branding* rests for its sanction in this country upon the custom of the service. This custom, however, is opposed

to its infliction in any mode which might be deemed cruel or unnecessarily severe. Branding *with a hot iron* is therefore discountenanced, and a sentence of marking the letter "D" in indelible ink *on the cheek* should be disapproved. The ordinary practice is to mark this letter in ink upon the hip. But the penalty of branding, marking, or tattooing, however mildly it may be executed, is regarded as against public policy and opposed to the dictates of humanity, and consequently as not conducive to the interests of the service. The effect of fixing upon an offender an ineffaceable brand of guilt must be to deprive him of the *locus poenitentiæ* which modern legislation, as well as true philanthropy, is careful to extend to the criminal, and almost hopelessly to discourage him in making an attempt to reform his life. There is, indeed, in this punishment a certain merciless quality which might well characterize the code of a less civilized period, but is certainly abhorrent to the sense and judgment of an enlightened age. It is conceived, therefore, that if reviewing officers should, in general, remit that part of a sentence of court-martial which imposes this penalty upon the deserter, they would materially promote the welfare of the military service. XI, 205. See III, 200; IV, 380; XXII, 486, 488; XXIV, 52, 609, 671. *And so held in regard to branding or marking with the letter "T," upon a conviction of theft. XXV, 318; XXVI, 506. For similar reasons held that the punishments of *shaving the head or beard* and of *drumming or bugling out of the service*, involve a degree of degradation ordinarily uncalled for, and believed to be opposed to the better sense of the army, and should not, therefore, be employed except perhaps in extreme cases. XXIV, 570; XXVI, 506.

* 4. Where for a breach of discipline, not aggravated, a soldier was sentenced by a garrison court to walk "*four days*" with a loaded knapsack on a certain beat, *held* that such sentence should not be construed as requiring the soldier to undergo the punishment during *twenty-four hours* of each day; that such a measure of punishment, imposed for a minor offence by an inferior court, would be extraordinary as well as oppressive; and that the court should properly be regarded as having intended to use the word *day* in its more familiar sense as distinguished from *night*, and to inflict a penalty to be suffered only between reveillé and retreat on each day. XXVI, 518. See Extra Duty, 2.

* 5. For an offence, not highly aggravated in its character, a soldier was sentenced to a forfeiture of pay for six months, and for the same period to carry on his back a loaded knapsack weighing 24 pounds, every alternate hour from sunrise to sunset, Sundays excepted. Upon an application for relief, after this punishment had been undergone for three months and a half, *held* that the same was unusual, excessive, and not justified by the offence, and that the unexecuted portion should be forthwith remitted. XXVI, 520.

* 6. All military duty is to be regarded as of an honorable character, and any form of discipline which tends to lower that character is improper and should be discountenanced. Thus the imposition, as a *punishment*, of the performance of any extra military duty, is degrad-

ing both to the particular duty and to the military service, and should therefore not be resorted to by any commander. XXVI. 507. A sentence "to do guard duty every other day for a year" degrades that most important and honorable duty to the level of an infamous punishment. Such a punishment should be discountenanced. IV, 402.

7. The imposition of military duty as a punishment is inconsistent with the dignity and interests of the service. So where a deserter, the period of whose unauthorized absence was twenty-two months, was sentenced to do military duty for three years—*advised* that so much of the sentence as was not necessary to satisfy the time of service lost to the government should be remitted as inflicting an improper punishment. XIII, 606.

8. So *advised* in the case of a *deserter*, bound as such to make good one year of service, but who, upon being tried for his offence, was sentenced to serve for two years after the expiration of his term of enlistment—the additional year's service being a *punishment* not deemed proper to be executed for the above reasons. XIV, 396.

9. The phrase in section 30, chapter 75, of the act of March 4, 1863,—"shall never be less than those (punishments) inflicted by the laws of the State, Territory, or district, &c.," should be held to mean such punishments as are directed or authorized to be inflicted by the law, common or written, of such State, Territory, or district; and this whether the local government under which these laws are ordinarily enforced is in full operation, or, from rebellion or other causes, temporarily suspended. VII, 205. (The act referred to is limited in its operation to "time of war, insurrection, or rebellion.")

10. Where, in the case of a conviction of one of the crimes mentioned in section 30, chapter 75, of the act of March 3, 1863, the punishment imposed by the sentence is *less* than that prescribed by the local law, the sentence is invalid. Thus, where upon a conviction of murder in the first degree—for which crime the only punishment authorized by the local law was death—the court sentenced the accused to confinement at hard labor—*held*, inasmuch as the court had been dissolved and could not be reassembled for a correction of their judgment, that the accused must be set at liberty, the sentence being of no legal effect. XXI, 6. (See 7, as to the operation of the act referred to.)

11. That a military court may *exceed* the punishment imposed by the local law, in cases of sentences for the crimes enumerated in section 30, chapter 75, of the act of March 3, 1863, has been fully recognized. Thus, where in the case of one of these crimes, punishable by the State law with confinement in the penitentiary, the prisoner was condemned to death by a military commission, the President (June, 1863) did not hesitate to approve it as sustainable on principles of public law. II, 564; XX, 178; XXI, 77. (See 7, as to the operation of the act referred to.)

12. While a temporary confinement of a suspected party, preparatory to his being brought to trial, or for other necessary purpose, is customary and allowable, there is believed to be no precedent in our service for the imposition by a commanding general or department

commander of a formal *punishment*, and especially of an infamous punishment, as confinement at hard labor, without any trial whatever. VIII, 344. See XI, 205.

*13. While it is clear that, as a general rule, a superior company officer has no authority to inflict a punishment upon a subaltern, he has, however, a wide discretion in *ordering* duty to be done by his inferiors; and where his order does not show, or it does not clearly appear, that the duty to be performed is a *punishment*, the subaltern can hardly question his authority. XXVI, 507.

14. An officer cannot properly be subjected to a degrading punishment except by sentence of a court-martial in a case where such punishment is authorized by law. Thus, for an army or department commander to order that an officer be *reduced to the ranks*, as a punishment, without trial; *held*, an act wholly unauthorized. VI, 105; VIII, 620, 505. See REDUCTION TO THE RANKS, I, 1.

15. Where a department commander, who was the reviewing officer whose confirmation was indispensable to the legal enforcement of the sentence, formally *disapproved* it, and then ordered that the accused should be confined at hard labor at a military post till further orders; *held* that his action in imposing such punishment was illegal and unauthorized. XI, 310.

16. An officer may, by sentence of court-martial, be dismissed the service with circumstances of ignominy; but (except where such penalty is expressly authorized by law) he cannot be punished by imprisonment at hard labor. VI, 242; XI, 405.

17. *Held* that a department commander had no authority to order the maker of a promissory note (a civilian) to be arrested and committed to close confinement, unless he should give security for the payment of the debt. VIII, 414.

18. A commanding general, in one paragraph of a department general order, summarily dismissed an officer, with forfeiture of all pay and allowances, and in the next paragraph ordered him to be set at hard labor at a military prison. *Held* that the whole proceeding was unwarranted by precedent, and without the sanction of law. XI, 405.

19. Where the store of parties, charged with a violation of the laws of war, was closed by the government, upon their arrest, *advised* (after they had been tried, convicted, and sentenced to fine and imprisonment) that as their sentence could not be made to affect specifically the goods in the store, no reason was perceived why the possession of the store should not be given up to them, and that not to do so would practically be imposing a punishment beyond that inflicted by the court. XI, 364.

20. Where, in the case of a conviction for absence without leave, there was imposed a sentence merely of forfeiture of two-thirds of the pay of the accused during the remainder of his term of service; *held* that an order of the department commander that such sentence should be executed on the prisoner at the Dry Tortugas was wholly unauthorized and void, as adding to the punishment, and substituting a severer penalty for that adjudged by the court. XX, 340.

21. Where an officer had been convicted of a violation of the laws

of war, but the court, in its sentence, had not included a forfeiture of pay; *held* that the government could not add such forfeiture as a *punishment* for the *disloyalty* which appeared from the testimony to have characterized the action of the accused; although it might, upon general principles of policy, have withheld his pay on the ground of his disloyal practices, independently of any judicial proceeding. VIII, 557.

22. A sentence adjudging a civilian to be confined for a certain term in a military prison, imposes an ignominious punishment; and where the commanding officer at such a prison permitted certain citizen prisoners, held there under such sentence, to be employed upon honorable duties in the surgeon's and provost marshal's offices attached to (and outside of) the prison; *held* that such employment was in derogation of the requirements of the sentence, and should be ordered to be forthwith discontinued. XI, 544.

23. The regular army has formerly been generally composed of men without families, so that the forfeiture of their pay ordinarily fell directly upon the offender, and upon him only. In the volunteer service, however, during the war, the forfeiture of the soldier's pay had frequently the effect of taking the bread from the mouths of helpless women and children of his household. *Held*, therefore, (July, 1863,) that it was a mode of punishment which, from enlightened considerations, should be cautiously employed. III, 123; X, 662; VI, 365. * And *held*, since the reorganization of the regular army in July, 1866, that the view here expressed in regard to volunteers might properly be applied to regular soldiers, generally, who were shown to have families dependent upon their pay for support, and which, without it, would be left destitute. Thus in a case of a regular soldier, sentenced (June, 1866) not only to a term of imprisonment but to a forfeiture of pay, which latter penalty had, as was sufficiently established, the effect of impoverishing his needy and innocent family, which was wholly dependent upon him; *recommended* that such forfeiture be remitted. XXII, 271. And see XXV, 531; XXVI, 555, 558, 560, for cases where the same recommendation was made for similar reasons.

24. It is a general principle of military law that neither the reviewing authority nor any military commander can by an order, or any other action, *add to the punishment* which has been, in any case, imposed by the sentence of a military court. See XI, 364; XX, 340, 430; EXTRA PAY, 3; REPRIMAND, 4; REVIEWING OFFICER, 9, 10, 11; SUSPENSION, 2; UNITED STATES AS BAILEE, &c., 2. And *held*, that for the executive branch of the government to deprive an officer or soldier (who had been convicted of a military offence, but not sentenced to any forfeiture of pay) of his pay *from the date of his arrest*, would be wholly unauthorized and illegal, because adding to the punishment imposed by the court, and not sanctioned by any law or usage of the service. XXI, 257. **Held*, also, that to deprive of the bounty of $100 (granted by the act of July 22, 1861) a soldier who, having been convicted of a desertion, had not received a sentence which, either directly or by implication, forfeited such bounty, but who had been honorably discharged after two years' service, was *adding to the punishment*, and for *this* reason, (with others,) was illegal. See BOUNTY, 8.

* 25. Upon the principle that the specific punishment adjudged by a court-martial cannot be added to by the authority by which the sentence is executed, *held* that a sentence of "confinement" merely did not justify the imposition as a punishment, of *labor*, in connection with its execution. XXI, 310.

SEE SIXTY-SEVENTH ARTICLE.
DESERTER, (24.)
DISCHARGE, (2.)
FIELD OFFICER'S COURT, (20,) (21,) (28.)
FINE, (1.)
FREEDMAN (2.)
MAKING GOOD TIME LOST BY DESERTION, &c., (2.)
MURDER, (6.)
PAROLE, (6.)
PARDONING POWER, (5,) (6.)
PENITENTIARY, I, II, III.
PRESIDENT AS REVIEWING OFFICER, (5.)
PRESIDENT'S PROCLAMATION, III, (1.)
REDUCTION TO RANKS, I.
REVIEWING OFFICER, (15,) (19.)
SENTENCE, I, (25.)

PUT IN JEOPARDY.

SEE EIGHTY-SEVENTH ARTICLE, (2,) (7.)

Q.

QUARTERMASTER.

SEE SEVENTY-FOURTH ARTICLE.
BOARD OF EXAMINATION, (5.)
BOND, (3.)
CLERK, (3.) (6.)
DISMISSAL, II, (1.)
EMBEZZLEMENT, (1.)
FRAUD, II, (7.)

QUARTERMASTER'S EMPLOYEES.

SEE BRIBERY.
CONTRACTOR, II, (12.)
COURT-MARTIAL, II, (10.)
MILITARY COMMISSION, II, (9,) (10,) (19.)

R.

RAM FLEET.

Held (June, 1863) that the force employed on the ram fleet was to be regarded as a special contingent or portion of the army, and not of the navy. Pilots and engineers serving with the ram fleet during the war, although not technically officers or soldiers, *held* to be persons serving for pay with the armies of the United States in the field. and within the provisions of the 60th article, and, therefore, amenable to the articles of war and triable by court-martial. II, 570.

SEE PRIZE, (3.)

RANK.

1. The phrase in paragraph 9 of the Army Regulations—"officers serving by commission from any State of the Union"—applies without distinction to all officers of the army who have received their commissions from their State authorities, whether officers of volunteers or of militia in the United States service. Between officers of these two classes, therefore, no questions of rank can properly ordinarily arise except such as may be determined in the usual manner, viz: by a reference to the dates of their commissions. XV, 49.

2. *Held* that questions of precedence between regular officers and officers of volunteers of the same grade appointed by the President, were to be settled in the same manner as similar questions between officers of the regular army proper, viz: by a reference to the dates of their commissions or appointments, according to the rule of paragraph 4 of the Regulations. XXI, 171.

*3. It is the date specified in the appointment or commission of an officer as that from which he is to rank as such, and *not* the date (whatever it be) of the formal execution of the instrument, which is, in determining all questions of seniority and precedence arising under the act of March 28, 1867, ch. 159, or otherwise, to be taken as the true and proper date of his appointment or commission in the army as of the rank conferred. XXIII, 439.

*4. *Held* that the provision of the act of March 2, 1867, ch. 159, sec. 1, in regard to fixing the relative rank of officers in the army, applied only to cases of officers of the same grade, appointed or commissioned *on the same date.* XXVI, 557.

*5. Where an officer, who had been commissioned by the President, in 1861, as assistant adjutant general of volunteers, was, in 1866, mustered out as such, and immediately commissioned as captain of regular infantry; *held* that he was not entitled, under the provisions of sec. 2, chap. 159, of the act of March 2, 1867, to rank as a captain in the regular army from the date of his commission as captain of volunteers. Had he remained a captain of volunteers until after the

passage of this act, this section would have entitled him to date and determine his rank in the same manner and with the same effect as that of a regular officer is dated and determined. So, if, after the passage of the act, he had been mustered out as captain of volunteers, and was no longer in the service, this section would have authorized him to claim, upon final settlement, any such pay or allowances (remaining unpaid or withheld) as would have accrued to a regular officer for the same period of time. But except for rights and privileges of this class and character, the section referred to is deemed not to have been intended to provide. XXVI, 607.

See SEVENTY-FIRST ARTICLE, (5.)
SEVENTY-FIFTH ARTICLE, (1.)
BREVET RANK.
SENTENCE, I, (25.)
SUSPENSION, (1,) (2,) (4,) (5,) (6,) (7,) (8,) (10.)

RATION.

See TWENTIETH ARTICLE, (1.)
DOUBLE RATIONS.
MILITARY STOREKEEPER.

READING OF THE PROCEEDINGS.

See TRIAL, (4,) (5,) (6.)

RECAPTURED PROPERTY, (RESTORATION OF.)

1. Where funds taken by a commanding general from an agent of the "Confederate States" were shown by proper proof to be the property of a loyal claimant—*advised* (October, 1862) that they be paid over to him, upon his executing a bond to indemnify the United States against any loss which might hereafter accrue on account of such payment. I, 370.

2. Where the vessel of a loyal owner was recaptured by our forces from the enemy—*advised* (November, 1862) that (upon the representations in regard to ownership, loyalty, &c., being found on investigation to be true) it be at once delivered to such owner, *relieved of all claim for salvage growing out of the recapture.* To treat such property as lawful prize, or as subject to salvage, would be to recognize the confederates as *belligerents*, which has not been and cannot be done. The rebels, by such a seizure of the personal property of loyal citizens, acquire no more legal interest in it than does the robber in a purse which he snatches from a traveller on the highway. I, 424. See XI, 266.

3. If, in the case of recaptured property restored to its owner, a claim for salvage is urged, it should be left to be enforced before the proper courts. No officer in the military service should be allowed to present such a claim, since such officer, in a recapture, represents the government, which is bound to deliver the property lost by its own neglect to protect it. I, 428.

4. Where the United States authorities have had the use of a ves-

sel for a considerable time after its recapture—*held*, that a just compensation for such use should be made to the owners. I, 428, 456.

5. While the right of a loyal citizen to have restored to him property recaptured from the enemy by our forces is undoubted, yet this rule is dependent upon the condition that the property shall be identical with that seized. So, where certain moneys and stocks had been taken from a loyal citizen and appropriated to the use of the enemy, by certain banking and railroad corporations of Savannah, Georgia—*held*, (April, 1865,) that the military authorities could not at a subsequent period properly compel the latter to indemnify the party in gold for the property so seized; moreover, that it would not be politic for the government to undertake the adjustment of private claims by military force. XIV, 381. And see XIV, 624.

SEE SALVAGE, (2.)

RECONSIDERATION OF FINDING, &c.

SEE RECORD, II.
REVIEWING OFFICER, (9,) (14.)

RECONSTRUCTION LAWS.

*1. It has heretofore been held that the admitting of accused parties to bail was, except in the special cases indicated by the act of 4 July, 1864, chap. 253, sec. 7, (but see BAIL and *note* under CONTRACTOR, II,) no part of the authorized practice of military commissions, as constituted during the rebellion; and the same would still be held in regard to the classes of cases—those of *military* offences—which were ordinarily brought before such commissions at that period. But the act of March 2, 1867, chap. 153, entitled "An act to provide for the more efficient government of the rebel States," in authorizing the district commanders to organize military commissions, has fixed upon such commissions the new and specific character of *substitutes* for the local tribunals, in the place and stead of which they are empowered, if deemed necessary by the commander, to hear and determine all cases of injury to person or property, cases of persons engaged in insurrection, disorder, or violence, and cases of all disturbers of the public peace and criminals. From the large and comprehensive authority thus conveyed, and the peculiar and vicarious character assumed by the military courts convened in pursuance of such authority, it would seem clearly to follow that the acceptance of *bail* in cases of citizens charged before such commissions with offences which, in the absence of military government, would be triable by the ordinary civil courts, would not be beyond the power and direction of the district commander. Such an indulgence, indeed, would, it is thought, be no more than just, not only because of the analogy between the proceedings and those of the local tribunals, but also because, from the greatly increased number and variety of the cases ordered for trial before the commissions, there would be almost inevitably a corresponding delay in the final disposition of a consid-

erable portion. *Held*, therefore, that for a district commander to exercise the authority of admitting offenders to bail, in the classes of cases referred to, would be not only legal, but in furtherance of justice and a sound public policy; and *advised* that any such commander may properly proceed to establish such regulations as, in the exercise of his discretion, he may deem proper, in regard to the period succeeding the arrest, (at the end of which the accused, if not brought to trial, may be admitted to give bail for his appearance,) the form of the bond, amount and character of the security, number and circumstances of the sureties, &c. But the privilege of bail is, of course, to be extended only to cases other than military; and in all instances of *military* offences (with the statutory exceptions above noted) the general rule of law (see BAIL) is to be observed. XXIII, 676.

*2. In view of the specific character, as substitutes for the local tribunals, of the military commissions, organized by virtue of the act of March 2, 1867, ch. 153, and of the wide scope of the authority of the district commanders in organizing such commissions and in referring to them cases for trial, *held* that the jurisdictions of the commissions constituted under the act would properly be extended to cases of offences occurring *before* the passage of the statute, and of which the local courts might have taken cognizance had there been no legislation by Congress. XXVI, 234. So *held* that a guerilla might legally be brought to trial by a military commission, convened under the act, by the commander of the third military district, for crimes committed in Alabama during a period of active hostilities. XXV, 424.

*3. Where, in the order convening a military commission, issued by a district commander under the provisions of sec. 3, ch. 153, act of March 3, 1867, it was expressly set forth that "the proper civil authorities" had "stated that it was impossible for them to take charge" of a party accused of murder, and that it was "impracticable to administer justice in his case through the civil courts;" *advised* that while such recital was not necessary in order to invest the court with jurisdiction of the offence, it was yet a striking illustration of a necessity—arising out of the impotence of the local tribunals to adjudicate such cases—doubtless foreseen by Congress, and which must largely have influenced that body, in conferring upon district commanders the discretionary authority conveyed by this section. XXV, 92.

*4. Under the large and comprehensive authority vested in the commanders of military districts by section 5 of the act of March 2, 1867, by which they are empowered to substitute, for the trial of "*all criminals*," military commissions in the place and stead of the local courts; *held* that a district commander would be authorized to bring a case of a *soldier* accused of a crime not within the jurisdiction of a court-martial, equally with the case of a citizen, before a military commission for trial, if he should determine that justice could not properly or fairly be administered by the State tribunal. XXVI, 487. See XXVI, 543; XXV, 632.

*5. The expenses which must necessarily be incurred, *after* the

adoption of a constitution by a convention assembled by virtue of the act of 23d March, 1867, ch. 6. sec. 8, are quite as essential "to carry into effect the purposes of the act" referred to, as those incurred before. So *held* that the payment of the "fees, salary, and compensation" of the officers and agents, which constitute those expenses, must, under the language of the act, be made by the State authorities. XXVI, 376.

RECONVENING COURT.

SEE ADJOURNMENT, (4)
CONVENING OFFICER.
RECORD, II; IV, (1.)

RECORD, I—(GENERALLY.)

1. The charges and specifications should most properly be embodied in the record, not annexed on a separate sheet. II, 495. But see RECORD, V, 11.

2. When a commissioned officer has been dismissed by sentence of general court-martial, there should be found in the record itself every fact which is necessary to justify the enforcement of such sentence. Of such facts the record, with its appropriate indorsements by the reviewing officers, is the only reliable and enduring evidence. II, 59. And the same rule applies to the records of all other trials, generally.

3. In the absence of any evidence to the contrary appearing upon the face of the record, it is to be *presumed*—in accordance with the well-known principle of law—that the court had jurisdiction of the case, that the proceedings were regular, and that the findings and sentence were authorized and proper. XII, 353; VII, 141, 152. See NINETY-NINTH ARTICLE, 17.

4. All orders which have been issued modifying the detail of the court after its original organization should be included in the record of every case. This is the only safe practice, although the omission of some particular order might not invalidate the proceedings. Where the orders are numerous, and the expense is justified by the importance of the trials, it has been the usage to *print* them and annex the printed list to each record; and, where the original detail has undergone very considerable alterations, the expedient of dissolving the court and reappointing it in its latest form has been resorted to, to avoid the necessity of constantly inserting an extended series of orders in the record. XIII, 384.

* 5. It is the duty of the judge advocate to keep the record of each day's proceedings fully written up, if practicable, so that the same may be submitted to the court for approval, or correction, on its assembling on the day succeeding. And as this original is the only valid and authorized record, and the only one which can be laid before the reviewing authority, no *copy* or *abstract* of the same could properly be read to the court. And where the entire record has been thus, in separate portions on different days, read to and approved by the court, it is not necessary that the same should, at the close of the

proceedings, and before the signatures of the President and judge advocate authenticating the same are affixed, be again read as a whole. XXI, 679.

*6. It is required by Par. 891 of the Army Regulations that the record of the proceedings of a court-martial shall be "authenticated by the signatures of the President and judge advocate, who shall also certify, in like manner, the sentence pronounced by the court in each case." In practice this requirement is held to be substantially complied with when the signatures are placed but *once* at the close of the record; viz: immediately following the sentence; they being regarded as thus sufficiently authenticating or certifying not only the sentence but the entire proceedings.

It is not necessary that the proceedings of the *separate days* of a trial should be subscribed by the President or judge advocate.

The regulation, in requiring that the record of the proceedings shall be authenticated, &c., must be understood as referring to the action of the court during the trial and till its termination, that is, till the sentence is determined upon. Hence the recital sometimes added at the end of a record to the effect that the court thereupon adjourned to a certain day named, or then proceeded to the consideration of another case or other business, need not be separately authenticated, or subscribed at all. The regular authentication may be, indeed, and often is, placed upon the sheet immediately under this recital, where the same follows the sentence; but, in strictness, it would more properly be placed under the sentence and before the recital of adjournment. XIX, 616.

*7. There is no rule better established in military law than that the entire proceedings of the court upon a trial, or in any session, should be fully set forth in the record. All orders, motions, votes, or rulings of the court itself—all motions, propositions, objections, arguments, statements, &c., of the accused and judge advocate—the entire testimony of each witness given in his own language, and as nearly verbatim as possible—and, in short, every part and feature of the proceedings, material to a complete history of the case, and to a correct understanding of every point of the same by the reviewing officer—should be recorded at length. The remarks and arguments of the members of the court in discussing interlocutory questions, or in connection with their final judgment, are not, indeed, necessary to be given, and are, in practice, not detailed, as part of the formal proceedings. See EXPUNGING FROM THE RECORD; JUDGE ADVOCATE, 23; PLEA, 1; RECORD, IV, 17.

SEE SIXTY-SIXTH ARTICLE, (12,) (14,) (17.)
SEVENTY-FIFTH ARTICLE, (3.)
ADJOURNMENT, (2.)
FIELD OFFICER'S COURT, (16,) (17,) (18,) (19,) (33.)
JUDGE ADVOCATE, (16.)
LOST RECORD.

RECORD, II—(AMENDMENT OF.)

1. In the case of a fatal defect or omission in the record, the court, if it has not been dissolved, may be reconvened to make the necessary amendment, *provided the facts will warrant its being made.* If it has been dissolved, or for other cause cannot be reassembled, the sentence will remain inoperative. II, 154.

2. When a court is reconvened for a *substantial* amendment, the reconvening order should be spread upon the record, which should also show that at least five members of the court. the judge advocate, and the accused were present, and that the amendment was then made to conform to, and express, the truth in the case. I, 487. But a merely *clerical* error may be amended by the court, without having the accused present. IX. 653.

3. The correction of a clerical error in a record, in an informal manner, by erasure or interlineation, is an irregular proceeding and one not to be encouraged. The legal course to be pursued is, for the proper officer to reconvene the court, calling its attention in the order of reconvention to the error needing correction; and for the court, on reassembling, to continue the record by a report of the proceedings of the additional session in which the amendment is made. XI, 93.

4. When a military court is reconvened for the purpose of amending omissions in the record, the order reconvening it should be annexed to the proceedings; and these should be entered in full, verified in the ordinary manner by the signatures of the president and judge advocate, and transmitted to the reviewing officer for his approval. XI, 113. A separate certificate of the president of the court, setting forth certain facts amendatory of the record, is not sufficient; the amendment must be the act of the court itself. IX, 484.

5. An amendment of record, made by two of the five members composing a military commission, is invalid and inoperative, and the sentence (the amendment being necessary to its validity) remains inoperative. II, 97.

6. When a court is reconvened for an amendment, the proceedings of its session are to be recorded with the same formality as the original record, and to be similarly submitted to the reviewing officer for his action and orders. XVII, 402, 404; XIX, 135.

7. Where a clerical error, originally made in a record, does not appear therefrom to have been corrected upon a formal reassembling of the court the presumption is that the correction was made in an irregular and unauthorized manner, and the proceedings, if the error was in an *essential* point, must be held invalid. XVII, 434.

8. The correction of a clerical error in the material averment of the swearing of the court, &c., effected by means of a simple interlineation upon the record, is not sufficient in law. The authority by which the correction is made must appear, and the record must show that the court was duly reassembled and the correction regularly made at a formal session. If the court has been dissolved, the record, corrected only by such informal interlineation in the particular referred to, is invalid, and the sentence inoperative. XVI, 202.

9. Where a court has been reconvened, after sentence, for a reconsideration of its action, it is not competent for it to take any new testimony whatever, whether upon the merits of the case or otherwise. It follows, therefore, that a direction to the court in the order reassembling it, requiring it to take and exhibit testimony to establish its jurisdiction of the case tried, is irregular and unauthorized, and cannot legally be complied with. A court cannot properly be reconvened for such a purpose. XVI, 562; XIX, 41.

10. Where the command of the division general who had convened the court was discontinued before the termination of the proceedings in a certain case, *held*, that it devolved upon the next higher military authority—in this instance the department commander—to reconvene the court for a correction proper to be made in the finding in such case. XVIII, 655.

RECORD, III—(ACTION UPON.)

1. The formal confirmation of the proceedings, required by paragraph 896 of the Army Regulations, must be set forth in or upon the record by the reviewing officer, although the case may be required to be acted upon by higher authority. A mere reference or forwarding of the record is not expressive of any "decision" or "order" thereon, and does not fulfil the requirements of law. IV, 313; VII, 132.

2. The "decision" and "orders" of the reviewing officer should most properly be written *in* the record at the end of the proceedings; though it is not an irregularity to indorse the same thereon. A mere reference, by the officer, to a separate paper, such as a printed order, is not deemed a compliance with the requirement of paragraph 896 of the Regulations. IV, 428.

3. The decision and orders of the reviewing authority should be his own act, and should appear in or upon the record as signed by him, in his own name, with his full rank and command. Where the approval, &c., of the proceedings in a case was in the name of the commanding general, "by A. B., assistant adjutant general," *held*, that such form was irregular and improper. IV, 567. So where the same was signed by a staff officer, who added "by command of Major General C. D," (the proper reviewing officer.) VIII, 64. The approval, &c., of court-martial records is not a *mere executive* act, which may appear as thus proceeding from or through a staff officer, but is quasi *judicial*, and should not be delegated. See REVIEWING OFFICER, 1.

SEE APPROVAL OR DISAPPROVAL OF PROCEEDINGS.
RECORD, IV, (25.)

RECORD, IV—(FATAL DEFECTS.)

1. The following defects in the record of a military court *held* to be fatal to the validity of the sentence, *unless corrected upon a reassembling of the court for the purpose:*—Where the record does not show that the

court or judge advocate was sworn. II, 22, 480, 496; IX, 127, and *passim.* See SIXTY-NINTH ARTICLE, 5.

2. Where it does not show that they were sworn *in the presence of the accused.* II, 24, 25; VII, 141; VIII, 97.

3. Where it only states that the court and judge advocate were "*duly sworn.*" This is an averment of a legal conclusion, and not of a fact, and does not necessarily import that they were sworn in the presence of the accused. II, 240. So where it is merely set forth that the court and judge advocate were then "*sworn*" in the presence of the accused, without using the word "*duly,*" or some equivalent term; for in the absence of such term it cannot be inferred that the oaths were administered according to law. XIII, 483; XIV, 278; XVI, 569; XVII, 247; XVIII, 312; XIX, 135, 337. See SWEARING THE COURT, &c. So where it does now show that a member who took his seat after the organization of the court was sworn in the presence of the accused. IX, 222.

4. Where a new judge advocate was detailed for the court pending the trial, in place of the former one, deceased, but the record did not show that he was sworn, although acting in the case, and certifying the record as judge advocate. III, 548.

5. Where the record does not contain a copy of the order convening the court. *So where the order is defective in the omission of a material part; as where the copy of the order in the record does not show by what commander or officer it was issued. XXIII, 636. A copy of the order must be annexed to or entered upon the record of *each case.* It is not sufficient to annex a copy to the first case of a series of cases tried by the same court and attached together. IV, 607; III, 517; VIII, 649. It is always better to make up each record separately, and not to attach different records together. XIX, 336.

6. Where the record does not show that the order convening the court was read in the presence of the accused, or that he had any opportunity of challenge afforded him. II, 83, 153, 526, 531. See RECORD, V, 9, 10. Or that he was offered the privilege of challenging a member who joined and took part in the proceedings after the arraignment and organization of the court. VIII, 662.

7. Where the proceedings are not authenticated by the signature either of the president or of the judge advocate II, 546; IV, 323. Where such signatures were appended, but not until after the court had been dissolved. III, 485.

8. Where the record does not show that the court was "organized as the law requires." III, 338.

9. Where it does not show how many members were present, and took part in the trial. VIII, 649. So where it does not show how many were present at a reassembling of the court for a correction of its findings, in a case where a formal correction is made. XV, 547.

10. Where the record merely states, "The court being in session, proceeded," &c., it does not sufficiently set forth the organization of the court. Each record must be complete *per se,* and the fact that the court was duly organized cannot be made out by a reference to a preceding record in the same series. III, 413.

11. Where the record *for one of the days of a trial* shows only that the court "met and proceeded with the trial," &c., without setting forth what and how many members were present at the opening of the court. VI, 384, 593. *In drawing up the record of a military court, it is the better practice to set forth at the commencement of each day's proceedings precisely those members, by name, who are present. The statement, however, that *all the members* were *present*, does not constitute an irregularity. XXI, 351. Where it was stated at the commencement of the record of the proceeding of one of the days of a trial, "*present same members as last day;*" and the record of the proceedings of the previous day had set forth the names of the members present (more than five) in full—*held* that such statement was sufficient as showing who were present, and that the court was legally constituted, on the day in question; the principle of law that that is certain which is capable of being rendered certain being thus observed. XXVI, 516.

12. Where the record does not show that the court was organized in accordance with the order constituting it, nor how many and what members were present, these defects cannot be supplied by a reference to the record of another case tried earlier on the same day from which it *does* appear that the court was once properly organized on that day. Each record must be complete in itself. III, 402.

13. Where it appears from the record of a general court-martial that less than five members were present at the trial. III, 413. In a case where the detail of such a court consisted of six members only, and the record merely set forth that the roll of the members was called and a *quorum* was found to be present—*held* that such statement did not show that the court was organized with the minimum number. III, 415.

14. Where it appears from the record of a military commission that it was constituted with less than three members; or that less than three members took part in the trial; or that there was no judge advocate regularly detailed as such. See MILITARY COMMISSION, I.

15. Where the record does not show that the witnesses were sworn. III, 550; XXI, 43.

16. Where it does not set forth the testimony of the witnesses examined; since it is impossible in such case for the reviewing officer to determine upon the sufficiency of the proof. II, 23.

17. Where the judge advocate only recorded such testimony on the cross-examination of the witnesses as he considered material. For him to decide what testimony was material was to substitute his judgment for that of the court and the reviewing officer. III, 189. It is a fundamental rule that all the evidence should be spread upon the record, since otherwise the reviewing officer cannot properly pass upon the sufficiency of proof. For the judge advocate to omit to record testimony is a wholly unauthorized proceeding, and constitutes the gravest irregularity. Thus where, at the close of the testimony, it appeared recorded as follows by the judge advocate: "There were several other witnesses examined, but they could testify nothing in regard to the charge;" *held* that, although a brief summary of

ceedings, if they could not be formally amended so as to include the testimony of such witnesses in detail, must be held irregular and the sentence disapproved. XX, 42.

18. Where the record does not show that the accused was allowed to plead. II, 83; XV, 546; XVIII, 134. * Where it showed that he pleaded to the *jurisdiction* only, and not to the merits, and yet the trial was on the merits. IX, 328. See PLEA, 20. An omission in a record of trial by court-martial of the plea made by the accused to the *charge*—although the plea to the specification or specifications (in which are set forth all the facts constituting the offence charged) be properly noted—is an irregularity too great to be disregarded, and should be held to be fatal to the validity in law of the record. It is *held*—generally—that where the record does not show that the accused was allowed to plead, the defect is a fatal one, and no sufficient ground is perceived for holding that the defect is any the less serious where the omission is, as in this instance, of a material part of the plea than where it is omitted altogether. XXIII, 630.

19. Where, in the case of a capital sentence, the concurrence therein of two-thirds of the members of the court does not appear from the record. II, 21, 23; IV, 158.

20. Where the record shows affirmatively that the court commenced its session before 9 o'clock a. m., or continued in session after 3 o'clock p. m., and sets forth no authority therefor from the officer appointing the court. VII, 433; II, 123; XVIII, 584. See SEVENTY-FIFTH ARTICLE, 2, 3.

21. Where the record sets forth the sentence but not the findings. IX, 221.

22. Where the record shows that the prisoner was arraigned and pleaded prior to the organization of the court. XI, 1.

23. Where, in the order convening a court-martial with less than thirteen members, there is an omission to add the statement to the effect that no officers other than those named can be assembled without manifest injury to the service. XI, 208. (See SIXTY-FOURTH ARTICLE, 6.) Otherwise in the case of an order convening a military commission. See MILITARY COMMISSION, I, 10.

24. Where there is a fatal *variance* between the findings or sentence and the pleadings. See VARIANCE.

25. The record of a trial by military court is, furthermore, incomplete and insufficient where the reviewing officer fails to state his "decision and orders" at the end of the proceedings. II, 550. And it is not sufficient to state such decision, &c., at the end of a series of cases passed upon by the same reviewing officer; it must be stated independently at the end of each case. VIII, 656; XIX, 336. To annex a copy of the general order promulgating the proceedings to a collection of records is not deemed a compliance with paragraph 896 of the Regulations. I, 412; II, 438; IX, 614; XV, 648. *Held* fatal defects in a certain record: 1. That no decision or orders of the reviewing authority were stated at the end of the proceedings or indorsed thereon. 2. That while it was stated in the record that the original

the alleged testimony of these witnesses was in fact added, the pro-order convening the court had been modified by five subsequent orders, none of these were recited; so that it was impossible to determine whether the officers who composed the court upon the trial, and who were not all the same as those named in the original order, had actually been duly detailed upon the court. XXI, 488.

See WITNESS, (2.)

RECORD, V.—(DEFECTS, &c., NOT FATAL.)

1. The fact that the officer who preferred the charges was a member of the court and also a witness on the trial does not invalidate the proceedings. II, 584. Nor does it affect the validity of the proceedings that the judge advocate was a witness. See SEVENTY-FIRST ARTICLE, 1, 2, 3, 6, 11; JUDGE ADVOCATE, 20.

2. It does not affect the validity of a record that it does not show that a member of the detail who was challenged by the accused withdrew from the court during the consideration of the challenge. V, 96.

3. The failure to specify that a witness was for the prosecution or the defence does not affect the validity of the proceedings. IV, 218.

4. While it is a common practice to note formally in the record the conclusion of the testimony for the prosecution, and the close of the case on the part of the government, yet the omission to make such entry does not affect the validity of the proceedings. IV, 131, 217.

5. A statement in the record that the vote on the findings or sentence was "unanimous," though irregular, does not affect the validity of the proceedings. VII, 3. See SIXTY-NINTH ARTICLE, 2.

6. That the record does not show that the court was cleared for deliberation on the various questions arising during the trial is an informality, though not a fatal one. IX, 221.

7. The record need not show that the *witnesses* were sworn in the presence of the accused. IX, 166.

8. It need not set forth the exact words of the accused in answer to the inquiry whether he has any objection to any member of the court. It is sufficient if it simply appears that he had none. IX, 166.

9. It need not be expressly stated that the accused was *asked* if he had any objections to the members of the court, if the language used necessarily imports it. So *held*, where the statement was, "and the accused having no objections to the members of the court, the court was duly sworn," &c., that the record sufficiently showed that the privilege of objection and challenge had been accorded. XX, 120.

10. It is not a defect fatal to the validity of a record that the charges and specifications are affixed to the proceedings instead of being incorporated therein. Not, however, to embody them in the proceedings, in immediate connexion with the statement of the plea, is an objectionable informality. See RECORD, I, 1. XIV, 39.

* 11. It is not an irregularity to omit to insert in the proceedings of a military court the name, &c., of the officer who signed the charges against the accused. While it is most desirable that the name of such officer should appear in the record, in connexion with the charges, it is the more common practice not to insert it. XIX, 610.

SEE WITNESS, (3.)

RECORDER.

1. The *per diem* allowed to judge advocates by paragraph 1135 of the Regulations is now, by an order of the Secretary of War, extended to the judge advocates or recorders of military commissions. VII, 324. See General Order No. 140, of May 21, 1863, publishing an army regulation to this effect.

2. There is no law or regulation authorizing the payment to the recorder of a board for the examination of officers for colored troops an allowance similar to that which is paid to a judge advocate. Where, however, the duties of a recorder of such, or any, board have been arduous, he may properly address an application to be so paid to the Secretary of War, who may in his discretion grant the same, upon the same principle as such allowance is now paid (by General Order No. 367, of 1863) to recorders of retiring boards. XVII, 37. See BOARD, 4, 5, 6.

SEE SIXTY-SIXTH ARTICLE, (11.)
FIELD OFFICER'S COURT, (16.)
STENOGRAPHER, (1.)

REDUCTION TO THE RANKS, I—(OF OFFICER.)

1. The 22d section of the enrolment act of March 3, 1863, authorizing general courts-martial to sentence officers to be reduced to the ranks for absence without leave, is without restriction in its language, and applies to officers of the regular army as well as to those of the volunteer service. V, 224. Such penalty can be imposed only upon conviction of the offence of absence without leave. VII, 144. See IX, 606.†

† NOTE.—In view of the language of the section referred to, in describing the sentence, viz:—"to be reduced to the ranks to serve three years or during the war"—this provision is regarded as limited in its operation to the period of the rebellion. The only *other* statute, authorizing a court-martial to impose this mode of punishment in the case of an officer, is that of March 3, 1863, ch. 79, sec. 25, providing that any officer, soldier, sailor, or marine, who shall neglect or refuse to turn over to the proper authority certain described property captured or taken as abandoned in the insurrectionary States, "shall be tried by a court-martial and dismissed from the service, or, if an officer, reduced to the ranks or suffer such other punishment as said court shall order, with the approval of the President." But as a case calling for the enforcement of this provision is no longer likely to occur, the punishment of reduction to the ranks in the case of an officer may now be considered as substantially obsolete in our practice.

2. An officer reduced to the ranks by sentence of court-martial cannot be promoted or commissioned so long as the sentence remains in force. His *status* in the ranks is a punishment, and it must continue until changed by authority competent to remit or commute the sentence. V, 432.

3. The punishment of reduction to the ranks should not generally be resorted to in the case of an officer, except where the absence without leave is of a grave and aggravated character. VII, 141.

4. An army or department commander has no power, as such, to reduce officers to the ranks. VI, 105; VIII, 620. And see PUNISHMENT, 11.

5. A sentence imposed by court-martial upon an officer, to be reduced to the ranks, involves a dismissal; and the officer, if a volunteer, can only be restored to his former position through the act of the Executive in removing the disability to receive a new commission, consequent upon such sentence. (See REMOVAL OF DISABILITY.) And where it was added by the court in a sentence of reduction, that the accused should perform service in the ranks until such time as, in the opinion of his regimental, brigade, and division commanders, he might be entitled to promotion—*held*, that the act of the President was no less essential to his restoration, since no recommendation or other action of any inferior authority could avail of itself to reinstate him, or alter his *status* as a soldier. XVI, 484.

6. *Held* (May, 1865) that the sentence of an officer to be reduced to the ranks should, like a sentence of dismissal, receive the confirmation of the department or army commander. It vacates the officer's commission, and is no less a dismissal because it superadds an additional penalty. XV, 263.

SEE SIXTY-SEVENTH ARTICLE, (3.)
COMMUTATION OF SENTENCE, (1.)
PUNISHMENT, (14.)
SENTENCE, I, (15.)

REDUCTION TO RANKS, II—(OF NON-COMMISSIONED OFFICER.)

SEE SIXTY-SEVENTH ARTICLE, (6.)
SENTENCE, I, (15.)

REFUGEE.

A party who had two or three times committed a violation of the laws of war by passing without authority through the lines, in going to and from Richmond and holding intercourse with the enemy—on the last occasion, after having secretly crossed the Potomac, voluntarily presented himself to the United States provost marshal at the place at which he landed, and claimed to be a *refugee;* but, upon being required to give an account of the effects in his possession, neglected to disclose the fact that he had concealed on his person

"confederate" bonds to the amount of $10,000, (the proceeds of his services as a clerk in a drug store in Richmond.) *Held* that under the circumstances he was not entitled to be treated as a *bona fide refugee*, but should rather be proceeded against by military commission for violation of the laws of war. XI, 626. See VIOLATION OF THE LAWS OF WAR, 22.

REGIMENTAL AND GARRISON COURT-MARTIAL.

SEE THIRTY-FIFTH ARTICLE.
SIXTY-SIXTH ARTICLE.
SIXTY-SEVENTH ARTICLE.
FIELD OFFICER'S COURT, (1,) (21,) (24,) (32,) (33.)

REGIMENTAL FUND.

1. This fund belongs to, or rather is the perquisite of, the men of the regiment; but the colonel, or commanding officer, is the proper trustee thereof. As legal owner, therefore, he is the only party who can properly sue a predecessor in command, who has been discharged from the service while in default in regard to the fund in his hands. VII, 70. See COMPANY FUND.

2. There is no law, regulation, or custom of the service which would authorize a commanding officer to seize money found in the possession of a deserter. and to appropriate it to the use of a regimental fund. Nor would the fact that the greater part of the money was acquired by gambling in camp invest a commanding officer or council of administration with any such authority. XIII, 329.

3. A regiment, if forming merely a component part of a post command, cannot be held entitled to raise a regimental fund under paragraph 204 of the Army Regulations, by a tax upon its sutler, although the *post* be actually without a sutler; and so where there is a regular post sutler, but a tax is neglected to be imposed upon him. No fund can be raised by tax upon a sutler except as provided in paragraphs 198 to 204 of the Regulations; and see also paragraph 215. XXI, 155. But see—in regard to the abolishment (since the date of this opinion) of the office of sutler and consequently of the tax referred to—SUTLER, 10, 11.

RELIEVING THE ENEMY.

SEE FIFTY-SIXTH ARTICLE.

REMISSION OF SENTENCE.

SEE EIGHTY-NINTH ARTICLE.
COMMUTATION OF SENTENCE, (3.)
DEPARTMENT COMMANDER, (1.)
PARDONING POWER, (2,) (5,) (6,) (7,) (8,) (9,) (12,) (13.)
PAY AND ALLOWANCES, (25,) (33,) (34,) (37,) (38,) (39.)
PROMOTION, (1.)
REVIEWING OFFICER, (12.)
SENTENCE, III, (9,) (18.)

REMOVAL OF DISABILITY.

1. Where a volunteer officer has been dismissed by the duly executed sentence of a competent court, whose proceedings were regular and valid, he can re-enter the service only after having the disability imposed by his sentence removed by the President. This is an exercise of the pardoning power; being in fact a declaration and assurance by the Executive that if the party is recommissioned by the governor of his State, he will be accepted and remustered into the service of the United States. I, 365, 372, 374; V, 446, and *passim.* See PARDONING POWER, 3. And governors of States have not, in general, proceeded to grant new commissions to officers who have been dismissed, during the war, until notified officially of such action on the part of the President as would authorize such officers being mustered upon their commissions. XIII, 315.

2. A removal by the President of the disability consequent upon the sentence does not, *per se*, operate to restore the officer to any pay duly forfeited by reason of his dismissal. VIII, 300.

3. The fact that the court was convened and the sentence approved by the Secretary of War, acting as the executive officer of the President, does not affect the operation of the rule, that in the case of the dismissal by court-martial of a volunteer officer, the President cannot reappoint him, but can only afford relief by a removal of the disability imposed by the sentence. IX, 43.

4. The effect of a removal of disability is not to restore the volunteer officer to his former position, but to remove the stain of the sentence and to declare him qualified to re-enter the service, if desired. XXI, 426. * It is a measure of reparation, equivalent, practically, to an honorable discharge. XXIII, 184; XVII, 618. But in the case of a volunteer officer *commissioned by the President*, as an assistant adjutant general or quartermaster, "of volunteers," the form and mode of restoration to the service are the same as in the case of a regular officer. See PARDONING POWER, 4.

*5. Where a volunteer officer has been summarily dismissed by an *order*, the revocation of the order removes the disability in the same manner as in the case of a dismissal by *sentence.* It does not *reinstate* the officer, if the vacancy has meanwhile been filled; but it operates as an honorable discharge qualifying him for a reappointment. XXI, 317.

SEE REDUCTION TO RANKS, I, (5.)

REPORTER.

SEE CLERK, (1,) (6.)
JUDGE ADVOCATE, (19.)

REPRIMAND.

1. It is according to the better usage of the service that a reprimand, required to be pronounced by the sentence of a court-martial, should proceed from the commander authorized to finally confirm the

proceedings and execute the sentence. While it may be competent for the court to require that an inferior officer should give expression to the reprimand, yet the commander before whom all the facts are spread on the record will be in the best position for administering it, and can publish his remarks in the same order as that in which he promulgates his action upon the proceedings. XII, 18.

2. Where, in the case of an officer charged with permitting his men to maraud and pillage on a single occasion, the court acquitted the accused--there appearing to be a reasonable doubt of his guilt--and on being reconvened for a reconsideration of the evidence, convicted him, but sentenced him only to forfeit fifty dollars and to be reprimanded in general orders; and the commanding general issued accordingly a reprimand which pronounced the conduct of the accused to have been "criminal and disgraceful," spoke of his reckless disregard of the rules and articles of war, and of existing orders and military discipline," and said that he was "unworthy to hold a commission," and further stigmatized his offence as that of a "bandit," and added that he "should suffer the severest punishment known to the law, and should be held up to public execration, to be loathed, scorned, and despised by all good officers and law-abiding citizens;" and then concluded by ordering that he "resume his sword and return to duty"--*held*, that such reprimand was highly improper and unwarranted; and the same was therefore submitted to the Secretary of War for his consideration, lest, if allowed to pass without remark, it might be drawn into a precedent. IX 137.

3. Where the chaplain of a military prison, after having had his attention expressly called to the impropriety of forwarding directly to the President, instead of through the regular channels, applications for pardon on the part of prisoners, still persisted in his conduct; and, in connection with a certain application, made a gratuitous charge against the government of having suffered outrages to be committed by the punishment of innocent persons; *held*, that while the right of an officer to call the attention of his superiors to supposed abuses, in a proper manner, cannot be denied, yet for an officer to assume the existence of such abuses and openly charge the government with responsibility therefor, should not be allowed to pass without a severe rebuke. XIV, 321.

*4. Where an officer, having been found guilty of the first of two charges, was sentenced to a suspension from rank and pay only; and the reviewing officer, in approving the proceedings, expressed himself as not satisfied with the acquittal upon the second charge; and, in stating the effect of the evidence relating thereto, commented unfavorably on the conduct of the accused; *held* that this was legitimate criticism, and that the reviewing officer could not properly be regarded as having *added to the punishment* imposed by the court, by pronouncing a *reprimand* upon the officer. XIX, 676.

SEE TWENTY-FIFTH ARTICLE.
CONVENING OFFICER.
SENTENCE, I, (22.)

RESIGNATION.

1. The right of an officer to tender his resignation, except under circumstances where grave embarrassment to the service or prejudice to military discipline would ensue, is as undoubted and well recognized as the right of the competent authority to accept or refuse to accept such resignation. XIV, 129.

2. The revocation of an order accepting the resignation of an officer of the regular army is not in the nature of a new appointment; and upon such revocation the officer assumes his previous status and relative rank in his arm of the service, subject only to the loss of his pay and allowances for the period during which he was actually out of the service. XIX, 307.

RESPONSIBILITY FOR COMPANY CLOTHING.

*A board of survey, convened to investigate a deficiency in the clothing account of a company, determined—upon testimony consisting of two affidavits submitted by the captain himself of the company—that the sergeant who had made the issues of the clothing was liable for such deficiency, and exonerated the captain from any responsibility for the same. It appearing, however, that this sergeant had previously been brought to trial by general court-martial for the loss or misapplication of clothing substantially the same as that in regard to which the investigation was made by the board, and—upon testimony including that of the two affiants—had been fully acquitted; *held* that the decision of the board should be wholly disapproved, since to approve it, and charge the deficiency against the sergeant's pay, would be tantamount to sentencing him without trial for an offence of which he had once been formally pronounced not guilty by a court acting under the sanction of an oath. And *held* that the captain of the company, officially charged, as he was, with the responsibility for the clothing of the company, and specially paid for assuming the same, (and to whom also there was imputed negligence in the matter of issuing the clothing—no commissioned officer having been, as was stated, present at any issue,) was alone legally liable for the deficiency in question. XXV, 663.

RETAINER.

SEE SIXTIETH ARTICLE.
SIXTY-SEVENTH ARTICLE, (5.)
CIVILIANS EMPLOYED WITH TROOPS.
PROVOST JUDGE OR COURT, (7.)

RETIRING BOARD.

*1. Although the act of August 3, 1861, ch. 42, sec. 17, vests the retiring board "*with the powers of a court of inquiry and court-martial,*" the object for which it was created is widely different from that of either of those tribunals, and to such object its action must be

confined. Its province is "to determine the facts as to the nature and occasion of the disability" of the officers whose cases are before it. It has no authority to entertain any charge of a military offence, or to try an issue of fact involving the moral *status* of the officer. Its deliberations must be directed to his physical and mental capacity to discharge the duties incident to his rank and office ; and its investigation is not to be limited to any particular period of time ; for the length of the service of the officer, and the duration and continuance of his disability, are all material to be considered. † XX, 619.

* 2. The act provides that the officer shall have "a fair and full hearing before the board, if upon due summons he shall demand it." The right to such hearing he may waive or may forego by his own neglect. In either case he can properly interpose no objection to a decision of the board, arrived at without such hearing or without his being personally present before it. XX, 619.

* 3. Where a regular officer had become disabled by wounds received in battle and in the line of duty, but before he was commissioned in the regular army, and while he was in the volunteer service; *held*—in the absence of express words in the act of August 3, 1861, ch. 42, secs. 16 and 17, restricting the retiring of regular officers to cases in which the disability has arisen while they were in commission as such—that a liberal construction of the statute, in accord with its evident spirit, would authorize the retiring board to take jurisdiction of the case of such officer and to report him for retirement. One of the cases which the board is required to examine and report upon, is that of an officer "incapacitated by wounds received in the line of duty;" and as this description is not qualified by any provision that the wounds *must* have been received by the party while an officer in the regular service, it may well be held that no such qualification was intended. But if this condition be strictly construed to mean in the line of duty as a regular officer only, a ground for the retirement may be found in the *general* provision following in the section commencing with the words "*If otherwise*," and which would appear to include a disability resulting from any cause other than those of the class particularly indicated in the preceding clause, and therefore one resulting as did that in the present case. For the words "if otherwise" are regarded as merely a more compact form for the fuller phrase, occurring in the similar section 23 of the same act, in regard to retirements in the navy, viz—"*if such disability or incompetency proceeded from other causes.*" It is to be noted that if the case be deemed to come within the class of cases of officers wounded in the line of duty, this officer would be retired upon more advantageous terms than if his disability were regarded

† NOTE.—See the recent compilation of "The Statutes relating to the Army of the United States," as reported (since the date of this opinion) by the Commission for the revision and consolidation of the public laws, where, on page 53, the general power and authority of the retiring board are compactly stated as follows:—"Sec. 130. A retiring board shall be authorized to inquire into and determine the facts touching the nature and occasion of the disability of any officer who may appear to be incapable of performing the duties of his office, and shall have such powers of a court-martial and court of inquiry *as may be necessary for that purpose.*"

as coming only within the general provision. The terms, however, of the retirement are for the President to finally decide upon ; the judgment of the board in regard to the cause and character of the incapacity being in the nature of a recommendation only. XXVI, 104.

*4. If a member of a military court is introduced as a witness in a case on trial by such court, his evidence is properly subjected to the same tests as in the case of any other witness. So where the medical examination of an officer, summoned before a retiring board, convened under the act of August 3, 1861, ch. 42, sec. 17, was conducted by the surgeons who were themselves members of the board, (the statute requiring that two-fifths of the officers composing the board shall be of the medical staff)—*held* that the result of such examination should, by analogy with the above rule of law, be submitted to the board in the form of testimony, and in such a manner that the accused might be enabled, if he thought fit, to question the witnesses or to rebut their evidence. XXIII, 626.

*5. In view of the provision of sec. 17, chap. 42, act of August 3, 1861, investing the retiring board "with the power of a court of inquiry and court-martial"—*held* that the act of March 3, 1863, chap. 75, sec. 27, authorizing depositions to be taken and read in evidence before military courts, applied to retiring boards, before which testimony might be introduced by deposition in the same manner and with the same effect as before general courts-martial. XXII, 612.

See RETIRING OF OFFICER.

RETIRING OF OFFICER.

*1. A colonel of the regular army having been, on February 16, 1865, *retired*, (under secs. 16 and 17, chap. 42, of the act of August 3, 1861,) by reason of disability—total blindness resulting from a wound received during the war—applied, under the provisions of sec. 32 of the act of July 20, 1866, chap. 299, for an order placing him on the retired list as brigadier general, which rank he held in the volunteer service at the time he received his wound. *Remarked* as follows: The section of the act of 1866 referred to clearly relates to pre-existent cases of disability; and the date of its passage—a period long after active hostilities had ceased—shows that the provision was intended as an enlargement of the benefits accrued to rights already complete. Had the proceedings for his retirement not already been had, it is plain that this officer would have been entitled to be placed on the list as brigadier general upon the last statute taking effect. As to the question, whether the fact that those proceedings had passed should prevent his sharing the new advantages conferred, it is to be said, that the object of Congress, in the section referred to, evidently was to bestow the beneficence of the nation more liberally upon its officers disabled during the war; that these were contemplated as a class, and that it was their status of disability—what they had suffered and deserved—that was looked to, and not any special treatment which they might have already individually received; the fact, indeed, that the officer in any case had already

been retired, being good evidence that he belonged to the class designed to be rewarded. Therefore, although the letter of the enactment, by a strict construction, might seem to exclude from the enjoyment of the enlarged measure of the bounty of the government, those of the general class described whose cases had been previously acted upon by the War Department, notwithstanding their claims might be most conspicuous; yet, as such interpretation would manifestly do violence to the spirit of the law, it cannot reasonably be inferred that Congress purposed such an unjust discrimination against a portion of the public beneficiaries who, equally with the rest, merited the generosity of the country. So *held* that the enactment in question was to be regarded as virtually an amendment to the pre-existing provisions of law, and as designed to give the benefit of the policy thus established impartially to all who occupy the same status of honorable disability before the government, and, accordingly, that the issuing of the order asked for in this case would carry out the legislative intent, and should be directed. XXIII, 473.

* 2. A captain in the regular army, holding a volunteer commission as colonel, and in command as such of a volunteer regiment, was while under arrest, permitted by his division commander to take part in an engagement, in which, while doing brave and faithful service, though not actually commanding his regiment at the time, but temporarily assisting his said commander as a staff officer, he was severely wounded and disabled for future service. *Held* that his arrest was waived and terminated by the permission of his commander, and his availing himself of the same as described; that his gallant conduct on the field should be regarded as entitling him to a condonation of the offence for which he had been placed in arrest; that he should justly be deemed to have "*held*," on the occasion of receiving his wounds, the command appropriate to his rank, though he was not in fact actually exercising it; and that he should accordingly be judged entitled to be retired upon his full volunteer rank at the time, under the provisions of section 32, of ch. 299, of the act of July 28, 1866; that a different interpretation of the section would be severe and technical, and apparently in conflict with the liberal policy, and with the true intent and meaning of the enactment. XXVI, 114.

* 3. Among the rules, prescribed by the Secretary of War, of October 13, 1866, regulating the form of the examination of applicants for appointment in the regular army, is one requiring that boards of examination shall "not pass any candidates who have not the physical ability to endure the exposures of the service." A certain officer who was passed by the board, and afterwards received his appointment, was, at the time of examination, under such a disability from wounds received in battle as to render him, on his entering upon his office, a subject for retirement. *Held*—in the absence of any evidence that he had concealed from the examiners the real extent of his injuries—that the government was precluded by its appointment from subsequently denying him, because of the existence of such injuries, any privileges, including the privilege to be retired, to which his status as an officer would entitle him. XXVI, 104.

See RETIRING BOARD.

REVIEWING OFFICER.

1. The power exercised by a reviewing officer in approving or disapproving the sentences of military courts is judicial in its nature, and cannot be delegated. The loose practice which has grown up in some of the departments, of making the "statement" required by paragraph 896 of the Regulations, on the record, in the name of the commanding general, "by" his adjutant general, is not to be encouraged. VII, 19; IX, 27; VIII, 639; XV, 548; XVII, 191, 192. See RECORD, III, 3.

*2. The authority exercised by a reviewing officer in taking action upon the proceedings of a military court cannot be delegated by him to another. It is an authority, not merely executive, but *quasi* judicial in its nature, and it has been devolved by law specifically upon that officer. His "decision and orders," required by paragraph 896 of the Army Regulations, to be stated "at the end of the proceedings in each case," should be subscribed by him personally. XXII, 568.

*3. *Held*, that the certificate of a reviewing officer, exhibiting his approval or disapproval of a sentence, and action thereon, should properly be authenticated by a signature written by himself; and that to impress his name, as usually written, by means of a *stamp*, was a practice not to be approved. XXII, 513.

*4. In view of paragraph 896 of the Regulations, requiring that the proceedings of a trial by court-martial shall, when terminated, be transmitted to the proper reviewing officer; and of the prohibitions of the 69th article in regard to disclosing the sentence to any but such authority; it is clear that no person except such officer, or some one expressly empowered by him, can properly open an envelope transmitted in the usual manner and known to contain such proceedings. XXII, 631.

5. The review of the proceedings by the division or separate brigade commander, (authorized to, in time of war, convene a court-martial by the act of December 24, 1861,) is *final* in all cases except in the case of sentences approved by him which extend to loss of life, or to the dismissal of a commissioned officer, or which "respect a general officer;" in which cases he must forward the proceedings, with his action indorsed thereon, for the review of the army commander or the President. VI, 299; VII, 237.

6. If the reviewing officer disapproves a sentence of confinement in the penitentiary, the effect is the same as that which follows similar action in other cases; the proceedings are thereby terminated. VII, 479.

7. Where the sentence is disapproved by the proper reviewing officer without remanding the record to the court for reconsideration, the proceedings against the accused are terminated, and he should be released. II, 531; VI, 299.

*8. It is not competent for a reviewing officer to disapprove the proceedings in a case, and then proceed to commute or mitigate the sentence and order its execution as so commuted or mitigated. Upon

the disapproval there is no longer a sentence, and therefore no punishment that can be modified or executed. When action *is* taken in this form, it is no doubt generally intended that the findings, or some of them, are regarded as not authorized, or that the sentence is determined to have been too severe. But this intention, where it exists, should be expressed in appropriate terms, and not by a word implying a disapproval of the proceedings as a whole. XXII, 456.

9. It is not in the power of the reviewing officer, either directly or by implication from his language, to enlarge the measure of punishment imposed by sentence of court-martial. VII, 243. See PUNISHMENT, 21. His remedy, where he deems the sentence inadequate, is to return the proceedings to the court for reconsideration, at the same time suggesting his reasons for regarding the penalty adjudged as insufficient. XI, 490.

10. A department commander, as reviewing officer, may order the execution of a sentence of confinement in a military prison, by requiring that the prisoner be consigned to a State penitentiary within his department, which has, with other penitentiaries, been previously designated by the Secretary of War as a military prison; and an objection that the punishment was thus the joint act of the court and the reviewing officer, or, in other words, that the latter had thus *added to the punishment; held*, not well taken. XIX, 347.

11. A division commander, (in "time of war,") in disapproving the sentence of a court-martial, has no power given him by the act of December 24, 1861, to substitute therefor a more severe sentence. Further, in so doing, the original sentence being disapproved, no sentence remains, and the prisoner must be discharged. II, 446, 525.

12. It is a long-established usage of the service for reviewing officers to remit, for good cause, in the case of enlisted men within their commands, any part of a sentence remaining to be executed at any period after promulgating the same. V, 71; VIII, 582. See DEPARTMENT COMMANDER, 1. But he has no power to remit or do away with the effect of a duly executed punishment. Thus, where a soldier's sentence to be dishonorably discharged has been once formally executed by the reviewing authority, he cannot, by a remission, restore such soldier to the service. XII, 427.

13. Where, after a general commanding a department had duly confirmed a sentence of the dismissal of an officer pronounced by a court-martial in his department, but before he had promulgated his action in the case the department was divided, and a portion of the same ceased to be included in the territorial command of such general—*held*, that the mere fact that the court had been convened at a post which, after the division, was no longer within his command, did not preclude him—the sentence having been acted upon—from issuing an order promulgating the same, in the case in question. III, 555.

14. The reviewing officer has no power to compel a court to change its sentence, where, upon being reconvened by him, they have refused to modify it VII, 112.

15. When an accused is sentenced to confinement in a peniten-

tiary, *or* such "prison" or "military prison" as the commanding general may direct, it should expressly appear, in the indorsement of the reviewing authority, which of these two classes of punishment is to be suffered. The *record* will then contain a complete history of the case, and indicate, when received for examination at the office of the Judge Advocate General, precisely what action, if any—as in designating a *particular* prison—is called for. IX, 55, 56, 70.

16. An order of the reviewing authority that the sentence shall be executed "in any fortified place in the United States" does not sufficiently indicate what place is decided upon. IX, 124.

17. The mere fact that cases are referred to a court for trial, by a superior commander to the officer convening the court, does not relieve the latter from reviewing and passing upon the proceedings in such cases. XIII, 468.

18. Where a soldier was sentenced to be confined at hard labor for the balance of his term, and then to be dishonorably discharged, and the reviewing officer, in approving the proceedings, ordered that the soldier be dishonorably discharged *at once*, and thereupon sent to a certain post named, for the execution of his sentence—*held*, that this action was, in regard to the discharge, unauthorized and inoperative. XV, 408.

19. Where in the case of a finding of "guilty, but with no criminality," the reviewing officer disapproved the finding, ordered the words after "guilty" to be stricken out, (which were struck out accordingly,) and the accused to be confined for sixty days in the guard-house—*held*, that his action in thus mutilating the record by an erasure of the decision of the court, and his further proceeding, in inflicting upon the accused, though acquitted, the punishment of imprisonment, were without sanction of law and wholly unauthorized. And *advised*, (especially in view of the unusual and unexplained delay of nearly a year in forwarding the record in this case,) that such case be submitted to the Secretary of War for such action as might prevent a recurrence in the future of similar illegal and arbitrary conduct in the exercise of military power. XII, 249.

20. Where a sentence of dismissal of a commissioned officer was adjudged by a court-martial, convened by a division commander in a "provisional" corps not embraced in any specific army or department, and not of itself constituting an army in the field, *held* (July, 1865) that the proceedings should be transmitted to the Lieutenant General of the army for the necessary action and confirmation. XV, 503.

SEE SIXTY-FIFTH ARTICLE.
EIGHTY-SEVENTH ARTICLE, (6.)
EIGHTY-NINTH ARTICLE.
CONVENING OFFICER.
FIELD OFFICER'S COURT, (18,) (27,) (30,) (31,) (32.)
PUNISHMENT, (3,) (15.)
RECORD, III; IV, (25.)
SENTENCE, II, (11;) III, (1,) (2,) (3,) (5,) (6,) (9,) (11,) (18, (19.)

REVOCATION OF ORDER.

SEE DISCHARGE, (3,) (4.)
DISMISSAL, II.
MUSTER OUT, (4,) (5,) (6,) (8.)
RESIGNATION, (2.)

REWARD FOR ARREST OF DESERTER.

*1. Where there is a doubt as to whether the regulation reward (fixed by General Order, No. 325, of September 28, 1863) should be paid for the arrest of a soldier returned to his command after an unauthorized absence, arising from a doubt as to his actual offence—whether a desertion or an absence without leave only—the question of payment should be left to abide the event of the trial. If the court finds the accused guilty of a desertion, and this finding is not disapproved by the reviewing officer, the reward would ordinarily properly be paid; if the accused is acquitted, or convicted only of absence without leave, there should certainly be paid no reward. XXVI, 347. See STOPPAGE, 4.

*2. An escape by a soldier from confinement under sentence of imprisonment not being deemed to constitute a desertion in law, the apprehension of a soldier after such an escape would not strictly entitle the party apprehending him to the reward paid for the arrest of a deserter. See XXII, 608. An escape from confinement by a soldier not under such sentence, if accompanied by flight or absence, would ordinarily authorize the presumption that a desertion had been intended, and would justify the trial of the soldier for such offence, whatever the charge (whether desertion or other) for which he was held at the time of the escape; and if such original charge were desertion, the soldier might, after his apprehension, be brought to trial for the two desertions. And his apprehension after such an escape would ordinarily entitle the arresting party to the reward, whether or not a reward had been already paid for a prior desertion. XXVI, 100.

*3. Where a soldier voluntarily gave himself up to a citizen, stating that he was a deserter and wished to be taken to his regiment, and the latter kept him one night at his own expense, and on the next day conveyed and delivered him to the military authorities at an army post twelve miles distant; *held*, upon the soldier being subsequently duly convicted of desertion, that the citizen was entitled to the reward of $30 payable for the apprehension of a deserter; that the fact that the soldier surrendered himself to the party did not of itself constitute a voluntary return to the service, since, without the intervention of the latter, the return might not have ensued at all; and that it was fair to suppose that in keeping the soldier in custody and transporting him to his command, the other was actuated by the hope of securing the reward usually paid for the return of the deserter. XXVI, 302.

SEE CLAIMS, I, (9.)
STOPPAGE, (4,) (5.)

RIGHT TO BE LAST HEARD BEFORE MILITARY COURT.†

Held as follows in regard to this right, and to the form of closing a military trial :—

1. That the judge advocate or prosecuting officer is entitled to be last heard before a military court, unless upon the pleadings the burden of proof is left to be wholly sustained by the accused.

2. That it has become the almost universal practice before our courts-martial for the trial to be closed by a statement or argument on the part of the judge advocate in reply to the address of the accused, whenever such address is interposed. This privilege of the judge advocate, however, is often waived in unimportant, and sometimes even, as upon the trial of Major General Porter, in important cases. XI, 377.

ROBBERY.

SEE NINETY-NINTH ARTICLE, (3.)
MILITARY COMMISSION, II, (16.)
PROVOST JUDGE OR COURT, (4.)

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†NOTE.—The doctrine found in the later English works, (see Simmons, edition of 1863, p. 234,) that "*the prisoner has the right to speak last*," is derived from a *dictum* of Sir C. J. Napier, in his treatise entitled "Remarks on Military Law and the Punishment of Flogging;" see pages 92 and 102. This entertaining work, characterized as it is by great freedom and independence of thought and expression, yet proceeds upon the theory, as indicated in the preface, that the rules governing the practice of military courts are, or should be, quite independent of the principles of the common law. As the author himself observes, this theory is opposed to the former practice, as set forth by previous writers, as Adye, Tytler, Kennedy, and Simmons in earlier editions. "Their works," he says, "were written to expound the law *as it is*, for the instruction of young officers. Mine is written to controvert the propriety of union between the social" (meaning the "common") "and military law." In this country no such view as that advanced by Napier, of a separation between the general rules of practice on military trials and those prevailing in the courts of law, is known to have been entertained. Such rules are indeed, in our procedure, as far as possible assimilated; and of this the instance in the text is an illustration.

S.

SAFE CONDUCT.

See FLAG OF TRUCE, (2.)

SALVAGE.

1. It is the general principle of law that public property stands on the same footing with private property as regards *salvage*, and upon this principle the goods of the government are ordinarily held liable to the same rate of salvage as those of individuals, and may be arrested and proceeded against in like manner. But to this rule exceptions have been established. It has been held that the mails cannot be detained for salvage; and it has also been considered that our national ships-of-war shou d not be liable to arrest and detention at the suit of salvors, "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 or rebellion. The doctrine which exempts from a charge for salvage the mails in time of peace is not more consonant with sound policy than the view which would so exempt public stores required for the subsistence of troops, and therefore equally, if not more, indispensable. And the principle which protects a national ship-of-war from proceedings for salvage would seem clearly to apply to munitions of war, without which troops cannot fight, as well as to supplies of forage and provisions, without which an army and its animals cannot live. These considerations acquire weight in view of the embarrassments to which the government, if required to pay salvage for such supplies, would be subjected in transporting stores through disaffected and disloyal regions, where the motives to obstruct military operations would lead the hostile population to harass the government by petty detentions at every opportunity. So where certain subsistence and quartermaster stores, in transit to our armies and needed for their use, were detained by the United States marshal at Cairo, Illinois, at the suit of the salvors of a steamer sunk with her cargo (including these supplies) in the Mississippi river—*advised*, that the government should maintain the doctrine of the exemption from the law of salvage of necessary supplies *in transitu* to the armies in the field; and, in ordering the release of the goods to the military authorities, should leave the salvors to present their claim for salvage in the same manner as other claims upon the government for compensation are ordinarily preferred. XXI, 241.

2. A loyal citizen in Louisiana, 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, found by the rebels, by whom it was dismantled and sunk, but not held—the owner continuing to assert, through an agent who remained with it, his right of property therein. The steamer having been subsequently found by our forces, was taken possession of, raised, refitted, and used by the military authorities. Upon an application by the owner that the same should be restored to him—*advised*, that inasmuch as the property in question could not be regarded as either abandoned or captured from the enemy in the sense of the act of July 2, 1864, chap. 225—and therefore to be disposed of for the benefit of the United States alone—it should be restored to the loyal owner free from any claim for *military salvage* on the part of the government. XX, 473. The ordinary maritime salvage of the law merchant differs from the military salvage demandable on a recapture from a public enemy or on property saved from pirates. While it is believed that it does not comfort with the honor and dignity of this government to demand military salvage upon the recaptured property of its citizens, which it has been unable to protect from hostile seizure, it is not perceived that the government is called upon to renounce its claim to reasonable compensation for services rendered in rescuing a vessel not in the possession of the enemy from a situation of danger and difficulty. So *held*—later—in this same case that, though the government could not properly insist upon a claim for military salvage—the vessel not having been recaptured—it might justly require that a compensation should be rendered it by the owner for the services referred to. And *advised*, that should a claim for remuneration for its use by the United States be interposed by the owner, the compensation deemed to be due the government for raising and refitting the steamer might properly be offset against such claim, and a return of the vessel be ordered only upon this condition. XX, 485.

* 3. Where a steamer was removed from New Orleans by the enemy, just previous to the occupation of the city by our forces, and was afterwards found and captured in Bayou Jacques, and brought within our lines by a detachment of soldiers and military employees sent to recover her, and the United States circuit court declined to take jurisdiction of the vessel, holding that she was captured property; *held* that a claim for salvage, preferred by the parties making the capture, was without legal sanction; and *advised* (April 25th, 1866,) that the property should be turned over to the Treasury Department; that the alleged owners should be left to seek their remedy, if any, in the Court of Claims, where also the claimants for salvage might intervene, and the rights of all parties be adjusted; but that the executive departments should not assume to pass upon the questions involved. XX, 565.

SEE RECAPTURED PROPERTY, RESTORATION OF, (2,) (3.)

SECRETARY OF WAR.

SEE SIXTY-FIFTH ARTICLE, (19.)
NINETIETH ARTICLE, (6.)
AUTHORITY TO RAISE REGIMENT.
COUNSEL, I, (2,) (3.)
DISMISSAL, III, (9.)
ENLISTMENT, II, (1,) (2.)
FINDING, (17.)
HABEAS CORPUS, (9.)
NOLLE PROSEQUI.
OFFICIAL RECORDS OF THE GOVERNMENT.
ORDER, I, (1.)
PENITENTIARY, III, (2.)
PRESIDENT'S PROCLAMATION, III, (6.)
PRISONER OF WAR, (14.)
PROCEEDINGS AT LAW AGAINST OFFICERS, &c., (4.)
REMOVAL OF DISABILITY, (3.)
SENTENCE, III, (3,) (5,) (6.)
STENOGRAPHER, (1.)
SUTLER, (11.)

SELLING, &c., BY SOLDIERS, OF CLOTHING, ARMS, &c.

Held that section 23, chapter 75, of the act of March 3d, 1863—relating to the disposition by soldiers of their clothing, arms, accoutrements, &c.—is not limited in its operation to the period of the war. Though the prominent subject of the statute was the enrolment of troops for the suppression of the rebellion, it was yet enacted, expressly "*for other purposes*" also; and a considerable number of its sections are clearly framed for no temporary object. In others, though not referring to the matter of enrolment, such specific words of limitation *are* employed as to confine their operation to the period of hostilities. No such limitation being expressed in the 23d section, it is *held*, in common with the other sections similarly comprehensive in terms, to be as much in force in the time of peace, as in a time of war. XXII, 525.

SEE THIRTY-EIGHTH ARTICLE.
BOARD OF SURVEY, (1.)

SENIOR CAPTAIN.

A senior captain, upon whom the command of a regiment has devolved, cannot be permitted to impose it or confer it, at his discretion, upon a junior. It cannot be said that he may *waive* his right to the command in favor of the latter, since no question of waiver can properly be raised. It is not only his right, but his positive duty, to assume the command; and his neglect to do so, by allowing it—he himself remaining "present for duty"—to be exercised by a junior, would render him amenable to trial by court-martial for a breach of duty. XI, 172.

SENTENCE, I—(GENERALLY.)

*1. While there are cases in which the forfeiture of an *officer's* pay is expressly authorized by statute; (as by the 36th article of war; the act of 3d March, 1863, ch. 75, sec. 31; and the act of July 4, 1864, ch. 237, sec. 5;) the validity of sentences imposing such forfeiture rests generally upon a long-continued and well-established *usage of the service.* It is by the authority of this usage that a court-martial adjudges a forfeiture of pay and allowances, or either, in cases where the punishment is left by an article of war, or other statute, to its discretion. It is under the same usage, (in cases where the forfeiture is not expressly directed or authorized by law,) that such court forfeits by its sentence the pay and allowances of a *soldier;* and the usage as to this forfeiture is recognized in Par. 895 of the Army Regulations. XIX, 625.

2. It is fully within the scope of the authority of a court-martial to forfeit, by its sentence, the pay of a soldier convicted by it of a military offence; except in a case where such a forfeiture is prohibited expressly or by a necessary implication from the terms of the article of war, or other enactment, under which the soldier may be tried. II, 20.

3. A court-martial has no power to appropriate, by its sentence, the pay due a convicted prisoner, to his wife or family, or otherwise than in forfeiture to the United States. II, 54; XIII, 91.

4. In forfeiting, by sentence of a court-martial, a soldier's pay, it is in accordance with the usages of the service to except the just dues of the sutler and laundress; but their rights being recognized and provided for in the Army Regulations, (paragraph 1360,) it is not strictly necessary to refer to them in the sentence, though it is frequently and properly done. V, 405. But see SUTLER, 10.

5. A sentence requiring the accused to satisfy a private pecuniary liability is irregular. A court-martial has no power to render or collect a judgment of debt against an individual, and any fine which it imposes can accrue to the United States only. VII, 52, 643; VIII, 632. But where a sentence, besides requiring the accused to refund a certain sum to an individual, also imposes a further punishment, the sentence, though inoperative as to the former requirement, may be valid as to the latter. VI, 177; IX, 9, 240, 257, 275. Where an officer had been sentenced to have his "pay, due and to become due, appropriated" till he should "reimburse" to a certain soldier a certain amount of money of the latter which had been deposited with and embezzled by him; and an amount of pay sufficient to satisfy this sum having become overdue the officer, an order of the War Department for its appropriation for this purpose was applied for—*advised*, that such order could not properly be issued. For if an accused cannot—as is settled—be required by the direct sentence of a military court to satisfy a private pecuniary liability, it would seem that he could not be so required indirectly; and therefore that the sentence in this case, since it practically amounts to such requirement,

should be held invalid, and not proper to be enforced by such an order. XVI, 322.

6. A court-martial cannot, by its sentence, require that an appropriation be made from the pay due the accused, for the reimbursement of a party from whom the accused is found to have feloniously obtained a certain sum. XIII, 549.

7. A sentence imposing a forfeiture of pay, or a fine—with which is connected a *recommendation* that the Secretary of War issue an order for the payment, out of the amount forfeited, of a pecuniary liability of the accused to a private individual—*held*, not invalid. For the court does not thereby attempt to satisfy the personal debt; but recognizing its inability to do so, proceeds to recommend a measure by which, in its opinion, the end can legally be accomplished. But this recommendation—though it cannot legally be followed—is no part of the sentence, and is irregularly incorporated with it.† It cannot, therefore, affect its validity. XII, 572.

8. A sentence that a soldier "be dismissed from service" is equivalent to one that he be *discharged* from service, and is intended to have the same meaning, and should not be disturbed for informality. III, 671; XIV, 322.

9. There is no principle of law which forbids a court-martial from sentencing an enlisted man to confinement for a period extending beyond the term of his enlistment. III, 671; XXIII, 649. *And a soldier, so sentenced and confined, is not entitled to be discharged on the ground that his term had expired pending his imprisonment. XXIII, 649.

10. A sentence of imprisonment which does not indicate for what period the same shall continue, is irregular and invalid. XVI, 283.

11. A sentence imposing an imprisonment until a fine, imposed by the same sentence, is paid, is sanctioned by the common law and by modern legislation. XX, 16.

12. A military court, in sentencing a party to pay a fine and to a certain term of confinement, may also require that he be further im-

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†NOTE.—There is no principle better established in the practice of our military courts than that a *recommendation* is no part whatever of the record, or judicial proceedings of the court, but is the *personal* act of the members who sign it—their act as individuals and officers and not as members. This is particularly held in regard to *recommendations to mercy*, including those which are expressed in general terms, as well as those which suggest a mitigation of the punishment imposed to some specific penalty less severe. See Benét, 168; De Hart, 199; O'Brien, 276; Coppée, 85; also Simmons, 262; Kennedy, 329; Endle, 122; "Rules for the guidance of Courts-martial in the Bombay Army," 41. The first-named writer, incorporating also the language of De Hart, states the principle as follows:—"The recommendation, *not being an act of the court*, but the mere expression of the wishes and opinions of the individuals who sign it, must not be entered as part of the proceedings, but be appended to them." And in the English work last mentioned it is said:—"No recommendation to mercy is to be written in the body of the sentence. * * * A recommendation to mercy * * * does not form part of the judicial proceedings of the court." From the law as thus laid down by the authorities, it would follow that under the Ninetieth article of war, which provides that a party shall be entitled to a copy of the "sentence and proceedings" of the court-martial by which he has been tried, an accused would not be entitled to be furnished with a transcript of any recommendation to mercy which may have been signed by the members upon the conclusion of his trial; such recommendation—though ordinarily written in or annexed to the record—being properly merely an informal private communication addressed to the reviewing officer. And the same rule would properly be applied where copies of records of military courts are furnished to *other* parties, upon the order of the Secretary of War.

prisoned until the fine be paid ; but where this is not done, his further incarceration, as a means of enforcing the collection of the fine, would be adding to the punishment imposed by the court, and therefore unauthorized and illegal. XIII, 472.

13. A sentence of confinement at hard labor on the public works with forfeiture of all pay is valid, without the accompanying imposition of a dishonorable discharge, though the latter penalty is often joined with the former. But a sentence of imprisonment at hard labor during the remainder of the term of enlistment, or for a period extending beyond it, involves a dishonorable discharge ; and to *honorably* discharge the party at the end of the term would be irregular and improper. XII, 437. See BOUNTY, 3.

14. A sentence of general court-martial, that a soldier shall be confined at a certain military prison, or "*at such other place as his regimental commander may direct*," is without precedent. IX, 600.

15. Where a white sergeant of a colored regiment was, for an offence which made such punishment a proper one, sentenced to be reduced to the ranks, and the court at the same time required that he should be transferred to a white regiment—*held*, that this feature of the sentence was without precedent and clearly illegal ; and that, if it was for the interest of the service that the accused should be transferred to another regiment, such transfer should be made by the proper authority. XI, 205.

16. The punishment of "forfeiture of pay and allowances" cannot be inflicted by implication, but must be distinctly imposed by the sentence of the court. A sentence to "confinement," to "ball and chain," to "hard labor," or to any other of the punishments enumerated in paragraph 895, Army Regulations, cannot be held as involving also a forfeiture of pay and allowances. V, 409 ; XIII, 276.

17. Where an article of war is mandatory in affixing certain penalties for its violation, the sentence should conform thereto. VII, 112. But where—the article being mandatory as to a single penalty—the sentence includes another also; such sentence is valid and may be enforced as to the first, though invalid and inoperative as to the other. VIII, 296 ; IV, 283.

18. Where an enlisted man is convicted of drunkenness on duty, and at the same time of another offence, the punishment of which is left discretionary by law with the court, the court *may legally* impose a sentence which inflicts a punishment other than corporeal, such sentence being deemed sufficiently warranted by the finding of guilty upon the second charge. But a sentence affixing some other punishment, *in connection with* the penalty required by the 45th article, is more logical and regular, and therefore preferable to be adopted in a case of conviction upon both charges. VIII, 670.

19. Where a soldier, tried by court-martial under section 30, chapter 75, act of March 3, 1863, was convicted of murder, but was sentenced only to a term of imprisonment, although the statutes of the State where the crime was committed required that murder should be punished with death ; *held*, that the sentence was void and inoperative. XXIV, 42.

20. Though a court-martial is left to its discretion in imposing sentence upon a contractor, tried under the act of July 17, 1862, ch. 200, sec. 16, yet where the conviction was for an attempt to bribe a government officer—*advised*, that the court, in its sentence, should follow the requirement of the act of February 26, 1853, ch. 81, sec. 6, which provides for the punishment of this precise offence. XII, 6; IX, 483. (But see *note* under CONTRACTOR, II.)

21. The act of July 4, 1864, ch. 253, sec. 6, in regard to the offence of bribery by a contractor, was not designed to repeal or abrogate any existing laws or remedies for the punishment of such offence, but only to add the penalty of a forfeiture of the contract and a publication in the newspapers of the particulars of the offence. *Held*, therefore, that a government contractor convicted of offering a bribe to a United States inspector might properly be sentenced not only to undergo such penalty, but to the punishment provided by the act of February 26, 1853, ch. 81, sec. 6, which is directly applicable to such a crime. VI, 640. (But see *note* under CONTRACTOR, II.)

22. Where a slave woman in Tennessee on suspicion of having committed a petty theft—though there was no evidence whatever of her guilt, which she persistently denied—was by her owner seized and stripped, and, after having been half hanged, had her hands and knees tied together, and was thus for the space of some two hours and a half whipped by her master, in the presence of his neighbors and in the sight of his wife and daughters, until she expired under the lash,—a military commission found the murderer guilty of manslaughter only, and merely sentenced him to imprisonment in the penitentiary for five years. *Held*, that some action should be taken which would indicate to the service the strong disapprobation with which the government regards the disgrace brought upon it by such judicial trifling with one of the most cowardly and revolting murders on record. IV, 570. And see XII, 546; XVIII, 429, 465; where, in certain late cases of strikingly inadequate sentences imposed for the crime of murder at the South by military commissions—(in one case even after such inadequacy had been pointed out by the reviewing officer, and the court reconvened for an amending of its judgment)—it was *advised* that the members of the commission be formally reprimanded.

* 23. The disapproval of part of a sentence as void does not affect the validity of the remainder, which is at the same time duly confirmed by the reviewing officer. XIX, 696. Where there is a single charge and specification of which the accused is found guilty, which will support the sentence imposed—*held*, that an application after trial to have the proceeding set aside on the ground that the charges on which he was convicted are, when taken together, inconsistent and incompatible—being in the nature of a motion in arrest of judgment—cannot be entertained. XXV, 104.

* 24. *Held*, that the old English rule of construction of statutes, in regard to the meaning of the word "*month*," referred to by Blackstone, and cited by Benét, p. 201, (a rule which is believed to be generally discarded in this country; see Sedgwick on Statutory and Consti-

tutional Law, p. 420,) has no proper application to *sentences of court-martial.* As the word "month," when used in bills of exchange and promissory notes, is, even in England, (see Smith's Mercantile Law, p. 259,) always construed as meaning *calendar month*, because that is the meaning of the word as used in common parlance and in ordinary business transactions; so in the case of a *sentence*, this word (in the absence of any statutory provision on the subject) is to be construed as having the same significance as that which the custom and general understanding of the service gives it, namely, that of *calendar* (and not lunar) month. It is believed to have uniformly received this interpretation in our military practice. XXVI, 374.

* 25. A sentence of an officer—convicted of violations of the 21st and 99th articles of war—"to have his name placed on the list of first lieutenants of his regiment two files below where it now stands;" *held* to be authorized and proper, for the following reasons:

I. While there is no express authorization of a sentence of this character, there is no express prohibition of it. Moreover, the articles of war—the 21st and 99th—under which the accused was tried and convicted, leave the question of the proper punishment for their violation entirely to the discretion of the court. Under this discretion, and in the absence of such prohibition, it may well be held that the sentence here pronounced was a valid one. It is to be noticed that for many of the more familiar modes of punishment employed by courts-martial there is often no express legal authority. Thus, except in a very few cases, (as in that of a violation of the 36th article,) there is no express statutory authority for forfeiting by sentence an officer's arrears of pay; yet no form of sentence is better sanctioned by the usages of the service. See 1.

II. Although the sentence imposed upon the accused is not a common one, yet it would not appear to be opposed to the usage of the service. In 1851 an assistant surgeon of the army was sentenced—"to forfeit all rank and claims and privileges arising from services rendered previous to the date of the promulgation of the sentence, and be placed at the bottom of the list of assistant surgeons in the army." Here is a sentence of the same nature as that of the accused, and differing from his only in its greater severity; yet this sentence was fully approved and carried into execution; nor did the then Secretary of War, Mr. Conrad, in his extended review of the case, nor General Scott, in his written orders thereon, raise any question in regard to its legality. (See General Order No. 28, of June 9, 1851.) Further, the then judge advocate of the army is shown, by his indorsement upon an aplication for relief presented by the accused in 1853, (on file in this Bureau,) to have regarded the sentence as regular and valid. See DOUBLE RATIONS, 1.

III. Sentences in this form may well be approved upon their analogy to sentences of *suspension*, which contemplate a similar result, and often do result in a similar loss of grade and promotion. But the latter class of sentences are of common occurrence and are sanctioned by long usage; and there would seem to be no good reason why the former should not receive the same recognition. See SUSPENSION, 9.

IV. And this very analogy has heretofore been in fact perceived and acknowledged by the War Department. It has indeed gone further, and has authoritatively expressed its preference of the sentence of loss of specific grade to that of general suspension, and has recommended that the former be imposed as less prejudicial than the latter to the interests of the service. In General Order 43 of 1852—wherein the sentence of suspension for a long period of a certain assistant surgeon is mitigated as too severe, inasmuch as operating to promote above him in his corps nineteen officers then below him—the following is observed in conclusion: "And the President further directs that, by a publication in General Orders from the War Department, general courts-martial in the army before which the question may properly come, be invited to consider whether an effectual and appropriate penalty may not be inflicted without injury to the service by adjudging a certain loss of rank, instead of a suspension from rank for a period of time, the effect of which upon the officer is *not* certain, when the sentence is pronounced, but which must operate to the prejudice of the service in removing an officer from duty."

V. Sentences similar to the present appear to be sanctioned by the English practice. In Hough's Precedents, pages 734 and 736, are found two cases in which officers are adjudged to "*lose steps*," as it is expressed, in their regiment: one of the accused being sentenced "*to lose seven steps.*" No question of the validity of such punishment is suggested by the author. XXI, 382.

SEE TWENTY-FIFTH ARTICLE.
THIRTY-EIGHTH ARTICLE, (1.)
THIRTY-NINTH ARTICLE, (5.)
FORTY-FIFTH ARTICLE, (2,) (3,) (5,) (7.)
SIXTY-SEVENTH ARTICLE, (6.)
SEVENTY-SEVENTH ARTICLE, (5.)
EIGHTY-THIRD ARTICLE, (16.)
EIGHTY-FIFTH ARTICLE.
EIGHTY-NINTH ARTICLE.
BOUNTY, (1.)
COMMUTATION OF SENTENCE.
FIELD OFFICER'S COURT, (22.)
FORFEITURE, III.
PARDONING POWER, (1,) (2,) (3,) (4,) (7.)
PAY AND ALLOWANCES, (1,) (2.)
PENITENTIARY I, (1;) II, (3;) III.
PUNISHMENT.
SUSPENSION.
SUTLER, (10.)
TRIAL, (8.)
UNITED STATES AS BAILEE, &c., (7.)
VARIANCE, (2,) (3,) (4,)(5.)

SENTENCE, II—(OF DEATH.)

1. A death sentence cannot be imposed upon conviction of "absence without leave." V, 91.

2. Death sentence against "guerilla marauders" for the crimes specified in section 1, chapter 215, of act July 2, 1864, as well as for violations of the laws and customs of war; and against spies, mutineers, deserters, and murderers, may be carried into effect, in time

of war, both by department commanders or generals commanding armies in the field. In all other cases death sentences must be submitted to the President for his approval before they can be executed.† XI, 44.

3. Prior to the enactment of the statute of 2d July 1864, ch. 215, sec. 1, death sentences adjudged by *military commissions* could, in no case, be carried into execution by a general commanding an army in the field or a department. VII, 439.

4. When—in "time of war"—the division commander disapproves a death sentence, (as he has the power to do,) the case is terminated, unless he should refer it back to the court for reconsideration. The power of confirmation of such sentence, given to the generel commanding the department or army in the field, contemplates the existence of a sentence in force—not one that has been rendered inoperative by the disapproval of the officer appointing the court, and charged specially under the articles of war with the duty of reviewing its proceedings. III, 537. See VI, 299.

5. Where a death sentence rests upon findings of guilty upon different charges, and the finding upon one or more is unwarranted or defective, yet if there remain other offence or offences, properly averred and proved, upon which the accused is found guilty, and his guilt of which would warrant the sentence of death, under the law, that sentence being approved is operative and may properly be executed. III, 253, 276, 480.

6. No doubt is entertained that it was the intention of Congress, in the act of July 2, 1864, chapter 215, sections 1 and 2, to put death sentences pronounced by military commissions on the same footing with those pronounced by courts-martial, as well with reference to the power of commuting as to that of enforcing them. It is well established that the proceedings of military commissions should be subjected to review in the same manner and by the same authority as those of courts-martial; and as the act has specifically removed the limitations imposed by the 89th article of war upon the power of mitigating sentences of courts-martial *during the pendency of the rebellion*, it would seem proper to hold that such removal of previous restrictions should apply also to sentences of military commissions,

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† NOTE.—The act of July 2, 1864, ch. 215, section 1, confers upon the commanding general in the field, *or the commander of the department, as the case may be*, the power to execute "all sentences" against guerillas, spies, mutineers, deserters, and murderers. The general term "*all sentences*," especially when considered in connection with the prior act of which this section is an amendment or an extension, clearly includes sentences of death. There is no language in the section specifically limiting its operation to time of war. In time of peace, however, there are no *guerillas*, no *spies*, and no *commanders in the field*. Also, in time of peace, military persons cannot be tried by military courts for *murder*, because the act of 3d March, 1863, ch. 75, sec. 30, is operative only in time of war, &c.; and because the 99th article of war does not authorize the trial of capital offences by court-martial. But in time of peace there are *deserters* and *mutineers*, and there are also *department commanders*. It would appear, therefore, that, in strict law, a *department commander*—unless the subordinate of a commander of a military district created by the act of March 2, 1867, which, in its 4th section, prohibits the enforcement of a death sentence, "under the provisions of the act," without the President's approval—has *at this time*, (July, 1868,) as during active hostilities, the power to enforce the *death sentence* of a soldier convicted of *desertion* or *mutiny* in his command, without submitting the case to the President. XXVI, 583.

and that the lesser power of mitigating them should not be deemed to be denied where the greater power of enforcing them is expressly given. Taking the whole act together, and interpreting it in the light of previous legislation *in pari materia*, the words "*which sentences,*" occurring in the 2d section, should be expounded as referring to death sentences, &c., *in the abstract*, and not necessarily to such sentences only when pronounced by courts-martial. In this view, the act gives to the commander of the department or army in the field full authority—*pending the rebellion*—over all death sentences, whether of military commissions or courts-martial, for purposes of remission or mitigation. It is to be added that this interpretation of the act is *in favorem vitæ*, and will tend to accomplish one of the well-known objects of Congress in its enactment. IX, 592.

SEE SIXTY-SEVENTH ARTICLE, (1.)
NINETY-NINTH ARTICLE, (26.)
COMMUTATION OF SENTENCE, (3.)
DEPARTMENT COMMANDER, (5.)
MILITARY COMMISSION, V, (1.)
PARDONING POWER, (12.)
PAY AND ALLOWANCES, (40.)
PENITENTIARY, III, (2.)
PRESIDENT AS REVIEWING OFFICER, (3.)
RECORD, IV, (19.)
SENTENCE, III, (7,) (8.)

SENTENCE, III—(EXECUTION OF.)

1. The term of imprisonment to which a soldier is sentenced ordinarily commences on the day he is delivered to the officer who is charged with the execution of the order for his confinement. III, 105; XXIII, 529. And this delivery would of course properly take place immediately, or as soon as practicable, upon the publication of the approval of the proceedings by the reviewing officer. XI, 380 See 21.

* The rule here laid down, as to the proper commencement of a soldier's term of imprisonment, is believed to be sound, and in practice is not known to have been departed from. It is based, however, upon the assumption that the government will perform its duty in transferring the prisoner to his place of confinement without unreasonable delay after the promulgation of the sentence. So, in a case of a soldier sentenced at New Orleans to a term of imprisonment at Ship Island, where 49 days elapsed between the promulgation of the sentence at the former place and the arrival of the soldier at the latter place to which he had been transported for confinement; *held* that this delay, unexplained as it was, should be deemed unreasonable and oppressive, and as properly furnishing ground for relief. And *recommended* that this relief be afforded, not by any modification of the above rule, which as a general and practical one has worked well, but by remitting 49 days of the period of confinement, less the time ordinarily required for the transportation of a prisoner from New Orleans to Ship Island. XXVI, 540. And see XXV, 620.

2. Sentences of confinement in a military prison can be carried into effect by the proper reviewing officer, who may send the convict, with a copy of his order in the case, to any such prison within the limits of the department to which his command belongs. IV, 356.

3. If no suitable place of imprisonment can be found in the department where the sentence is pronounced and where the prisoner is held, the Secretary of War is to be appealed to for authority to send him elsewhere. The authority of the Secretary is also to be sought where the reviewing officer is called upon to execute a sentence of imprisonment specified in the sentence to be outside the department which he commands or to which he is attached. V, 309; IX, 174; XI, 16, 44, 65, 71; XVII, 600. It is conceived that a department commander, whose department is not supplied with sufficient military prisons or hard-labor posts for the confinement of men sentenced by military courts, may well ask of the Secretary of War such *general* instructions in regard to the disposition of prisoners as will enable him to promptly execute the sentences in all cases, by forwarding the prisoners to such posts as may be indicated to him outside his department. A separate reference to the Secretary in each case will thus be obviated. XIII, 469. And see XIV, 247.

4. Where a soldier has been tried within a certain division or district, and sentenced to be confined at a prison outside the department, the division, &c., commander must dispose of the accused according to the orders of his department commander, previously issued, or then sought and obtained. The department commander is supposed to act in this regard under the instructions of the War Department. In cases, therefore, of men sentenced within his department to be confined in another, he will either require the prisoner to be forwarded by the division, &c., commander in the first instance, under such special directions as he may think proper to adopt, or to be sent by such commander to his own headquarters to be forwarded directly thence. VI, 33.

5. Where the circumstances of the service render it no longer practicable to continue to carry out the execution of a sentence, at the place or in the manner originally ordered by the reviewing authority, reference is to be made to him, or to his successor, for such a modification of the original order as circumstances may require; and such modified order—indicating, for instance, where the sentence is to be executed in the future—is regular and authorized. Where such officer is unable to designate such place, he will refer to the Secretary of War for directions. When the order is made, the execution of the sentence will proceed, although meanwhile, and before the term of the sentence may be expired, the soldier's regiment may have been mustered out of service. XXI, 49.

6. Where the sentence was merely "to be confined in prison" for a certain term—*held*, that it was not an act in excess of the punishment imposed, for the Secretary of War, as reviewing officer, to transfer the accused from an ordinary military prison to a State penitentiary; such penitentiary having been long used and designated as a "military prison" by the War Department. The right of the Exe-

cutive to transfer military prisoners from one place of confinement to another has never been questioned. XVI, 349.

7. Where a sentence of death was confirmed by the army commander, and ordered to be carried into execution by the division commander between 12 o'clock m. and 4 o'clock p. m. of a certain day, and the hour of 4 was allowed to go by without the sentence being executed, the division commander (although required to do so by the corps commander in person) would not be justified in carrying the sentence into execution later on that day, but should report the omission to obey the order to the army commander issuing it, who would have the right to renew it, fixing another day or hour for the execution. V, 22.

8. The sentence, in capital cases, should not attempt to fix the place, day, or hour of its execution. These should be left to the discretion of the commanding general. If, however, these are so fixed by the court, and the day and hour happen to pass without the sentence being executed, the court should be reconvened, if not dissolved, and another day and hour appointed, or, what is better, the execution of the sentence ordered on a day or hour and at a place to be designated by the commanding general. Nevertheless the time named not being properly a part of the sentence, but directory merely to the officer charged with its execution, if the direction is not from any cause complied with, it would seem that the general power which belongs to the proper commanding officer to enforce the sentence would remain, and that he could exercise it at will. Where, however, the time is fixed by the *general*, and not by the court, and it passes without the sentence being executed, the case is simply one of an order not obeyed, and the right to renew and modify it at the pleasure of the commanding general is unquestionable. III, 650, 666.

9. Where there has been any considerable delay in the review and confirmation of a sentence of imprisonment, the period during which the accused has been meanwhile confined under arrest cannot legally be credited to him on account of the term imposed by the sentence. The fact of such confinement may, however, form a ground for the remission or mitigation of the punishment at some subsequent period. XI, 380. See XV, 2.

10. A military court, in imposing a fine by its sentence, has no power to collect it as a debt, or as a penalty from the individual, by any compulsory process. And held (April, 1864) that it was not competent for such a court to direct the district provost marshal to take measures to enforce the payment of a fine imposed by it; both because the collection of the same was no part of its province, and because also it had (in the absence of any order authorizing it) no power to require that officer to perform any service whatever.† VIII, 298.

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† NOTE.—It has not been the practice in this country to detail an officer to attend a military court in an executive capacity. In the important case, however, of the assassins of President Lincoln, tried by military commission, it was ordered by the President—May 1st, 1865—as follows: "That Brevet Major General Hartranft be assigned to duty as special provost marshal general for the purposes of said trial, and attendance upon said commission, and the execution of its mandates."

11. Where the sentence is to pay a certain fine, *or* be imprisoned for a certain term, *held*, that the accused might avoid the imprisonment by paying the fine. The option is his, not that of the reviewing officer. Where, therefore, the latter, in passing finally upon the case, ordered the imprisonment to be at once imposed, without giving the accused a reasonable opportunity to pay the fine, or even alluding to the same in his review—*held*, that his execution of the sentence was improper, and that the prisoner, upon payment of the fine, should be at once discharged. XIII, 670.

12. The term "*now due*" in a forfeiture, by sentence, of pay and allowances, refers to the day of the date of the sentence imposed by the court, and not to the date of the order promulgating the proceedings. XII, 326.

13. Where, in the case of a soldier convicted of desertion and sentenced merely to a forfeiture of pay during the remainder of his term of service, the department commander issued an order directing that the sentence should be executed at the Dry Tortugas, (a station outside of and distant from his command,) *held*, that such order was arbitrary and unauthorized, and wholly void. XI, 98.

14. Held, that a sentence to forfeit ten dollars per month for eighteen months, in case of a soldier whose term expired within that period, could not operate to retain such soldier in the service after the expiration of his term. XVI, 94.

15. Where a soldier, sentenced to be imprisoned for the balance of his term of service, escapes while under sentence, and is not apprehended till after his term has expired—*held*, that he cannot still be imprisoned under the sentence, the period of his punishment, which was limited by a certain event which has happened, having expired. X, 574. See XI, 615, 680.

16. Where a deserter was sentenced to a forfeiture of ten dollars per month for eighteen months, and this period would extend beyond the remaining time of his term of service as well as the additional time to be made good by reason of his desertion—*held*, that he could not legally be retained in the service, to satisfy this forfeiture, beyond the termination of such additional time; and, having been so retained, *held*, that he should be at once discharged with full pay for the time during which he had been compelled to serve beyond the period of time made good. XIV, 532.

17. Where the accused is found guilty of "conduct unbecoming an officer and a gentleman," as well as of cowardice, and sentenced to be dismissed, the disapproval of the finding upon the second charge raises no obstacle to the enforcement of the sentence, which for the first offence is mandatory by law. V, 481.

18. Where the finding of guilty on one of two charges is disapproved by the reviewing officer, the sentence may still be enforced as supported by the approved finding upon the other, provided such sentence is authorized by law as a proper penalty for the specific offence; as it would be, for instance, where the imposition of such sentence was either made mandatory upon the court or left to its discretion. When, indeed, the sentence, though legally supported

by the finding upon the single charge is deemed too severe a punishment for the one offence, it may be commuted or remitted by the proper authority before being finally enforced, or if already executed, may form the basis for an application for clemency addressed lo the Executive. XVI, 70.

*19 Where a soldier, who had been duly sentenced to a term of imprisonment, was not officially notified of such sentence until the day after the expiration of his term of service, *held*, that this fact constituted no legal obstacle to the enforcement of such sentence, he not having been discharged when so notified. XIX, 600.

20. *Held*, (May, 1863,) that sentences for the crimes enumerated in the 21st section of the act of March 3, 1863, ch. 75, might legally be "carried into execution upon the approval of the commanding general in the field," although such sentences were actually adjudged before the approval of the act by the President. II, 470.

21. In the absence of any specific words in a sentence indicating when it shall be operative, (sec. 12,) it is the *general* rule that it shall take effect at or from the date of its promulgation by the proper authority, or at or from the date at which the accused was notified of the action of the final reviewing authority. XXI, 257. (See ORDER, I, 7, 8.) But where this is impracticable—as in the case of a sentence of imprisonment to be executed at a certain place or prison designated—the time at which the sentence shall begin to take effect is fixed by the rule laid down in paragraph 1 under this Title.

SEE SIXTY-FIFTH ARTICLE.
EIGHTY-NINTH ARTICLE.
DOUBLE RATIONS, (1.)
FRAUD, II, (6.)
PENITENTIARY, I, (2,) II, (2,) (4,)
PRESIDENT AS REVIEWING OFFICER, (3.)
PUNISHMENT, (22.)
REVIEWING OFFICER, (10,) (16,) 18.)

SENTINEL.

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—paragraph 417—"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 the gravest responsibility, it is proper that he should be protected in the discharge of his duty by every safeguard that can be thrown around him. 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 a lieutenant ordered a soldier of his regiment, on duty as a sentry, to feed and take care of his horse, and, upon the refusal of the latter, assailed him with low and abusive language—*held*, that a sentence of dismissal imposed by a court-martial upon such officer, on his conviction of this offence, was fully justified, not only by the circumstances of the case, but also by the requirements of military discipline. XVIII, 598.

SEE SUSPENSION, (10.)

SEPARATE BRIGADE.

[The act of December 24, 1861, ch. 3, referred to under this Title as the origin of the authority for the convening of general courts-martial by the commanders of "separate brigades," is, in terms, limited in its operation to *"time of war."*]

1. A brigade, while attached to and forming a component part of a division, cannot properly be termed a "separate brigade," in the sense of the act of December 24, 1861. It is where it is *detached* from the division, and in a different field of duty, that it may be regarded as a "separate brigade." See IX, 629.

2. Where it appeared from the record that a court was convened by a colonel commanding "2d brigade, 3d division, 14th army corps," it was held to be clear that such colonel did not command a separate brigade, and was therefore not authorized to convene the court. III, 546; IX, 629.

3. Where the command of the officer convening the court is not attached to any division, but is at a separate post, and made up of different detachments, and is such an aggregation of troops as is ordinarily constituted into a brigade, such command, without any express designation as such, may yet properly be considered as a "separate brigade," and its commander held competent to convene the court. VI, 250; X, 52, 107; XIII, 29. But a command consisting of one regiment of infantry and three batteries of artillery cannot be held to come within such general rule, and its commander is not competent to appoint a military court. X, 107.

4. Commanders of artillery brigades in the army of the Potomac *held* (August, 1864) not to command "separate brigades," and therefore not to be qualified to convene courts-martial. VI, 271, 272.

5. Where a body of troops, sufficient to constitute a brigade command, was organized by the army commander as an artillery reserve, with the intention on his part of severing all connexion between it and the troops of the rest of the army, and to invest it with all the attributes of a separate and distinct organization—*held* that, though not serving at a separate post, it might properly be considered as a separate brigade without a special designation as such. XIV, 160.

The foregoing opinions were delivered prior to the publication of General Order No. 251, *of the War Department, of August* 31, 1864, *entitled "Courts-martial for separate brigades," and which provides 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."*

The following rulings have been made since the publication of the General Order:

6. General Order No. 251, of August 31, is regarded as directory only; and though the order constituting the command a separate brigade should accompany the proceedings, as showing the proper constitution of the court, and in order to allow the accused to take any objection to the court which he may think proper to base thereon, yet its absence from the record will not invalidate the proceedings. XIX, 280.

*7. The absence of the specific words "separate brigade," in the caption of an order convening a general court-martial, will not affect the validity of its judgments, provided the command of the convening officer (being less than a division) *is* a regularly designated separate brigade in point of fact. It is this *fact* which is essential to the legal constitution of the court; and if the fact exists, an imperfect or improper description of the command in the order—though to be avoided in practice—will not necessarily invalidate the proceedings. XIX, 681.

8. The mere fact that a command is a *mixed* one (but has not been designated as a separate brigade) does not authorize its commander to convene courts-martial. Until such a designation of his command, he is precluded, by General Order No. 251, from exercising such authority. IX, 651.

9. Though a "district" in which the military force is composed of mixed troops has no brigade organization, yet if this force is designated in orders as a "separate brigade" by the department commander, (in pursuance of General Order No. 251,) the district commander is competent to convene general courts-martial. XI, 110.

10. General Order No. 251 was intended to apply to a case of a district, &c., command, consisting of about the same force and component parts as are ordinarily united in a brigade, and might properly embrace a case where the force, though greater than that of a brigade as commonly made up, is not sufficiently large to be formed into two full brigades or a division. But to cases of greater or other district, &c., commands, the order is in no respect applicable; and in regard to these the general and well-understood laws of the service, especially as contained in the 65th article of war and the act of December 24, 1861, must be resorted to, to determine whether the power to convene military courts is vested in the district, &c., commander. XIII, 340.

11. *Held*, that the prohibition relating to the convening of general courts-martial set forth in General Order No. 251 might properly be deemed to extend to the appointment of *military commissions*. XI, 232.

12. The approval by a separate brigade commander of a sentence of imprisonment, imposed by a military commission assembled by his order, will render such sentence operative equally as if it were the sentence of a court-martial. The confirmation of the department commander is not required; his action is only necessary where it is

required to designate the place where the confinement should be suffered. XV, 158.

13. *Held*, (January, 1866,) that until the rebellion has been formally declared to be terminated by the statutory or other proper announcement of the political authority of the country, the *state of war* must continue to exist; and that until such legal announcement, the power vested, by the act of 1861, in separate brigade commanders, to convene general courts-martial, might lawfully continue to be exercised. XXI, 136.

SEE SIXTY-FIFTH ARTICLE, (2,) (6,) (9,) (12.)

SERVICE OF CHARGES.

SEE ARREST, I, (7,) (9.)
COURT-MARTIAL, II, (1.)
JURISDICTION, (1.)
PLEA, (16.)

SHAVING THE HEAD OR BEARD.

SEE PUNISHMENT, (3.)

SLAVE.

1. If a commanding general regards the presence of slaves within the camps of his command as injurious to the military service, he may expel them without any violation of existing laws; but such police power must be exercised in good faith, and solely on the ground named. If this expulsion is based upon a decision made by the commander on any claim to the service or labor of such slaves, or if the object of expelling such slaves from the camp is to place them within the reach of those claiming to be their owners, then such order of expulsion would be a violation of the letter and spirit of the 10th section of the act of 17th July, 1862, ch. 195. (April, 1863.) II, 143; V, 591.

2. Slaves who are virtually in the military service as "retainers to the camp," in the sense of the 60th article of war, are not liable to be seized as fugitive slaves by the civil authorities. Slaves of owners in rebellion, who have taken refuge within the lines of our army, are declared by the 9th section of chapter 195 of the act of 17th July, 1862, to be "captives of war, and forever free of their servitude;" and the civil authorities have no more right to seize and imprison *them* than any other captives of war taken by the armies of the United States. These classes of slaves should, therefore, be protected against such authorities, as well as against those attempting to kidnap them with a view to their sale into slavery under the local law, with the whole power of the government, if necessary. (April, 1863.) II, 212; V, 36.

3. The *status* of slaves, as growing out of the 4th section of the act of August 6, 1861, ch. 60, is, that their emancipation results *ipso*

facto from the fact of their being required to take up arms or to do labor against the United States; and it is further provided in the act that the fact of the performance of such acts by them shall be a full defence to any claim or attempt to hold them as slaves. But this defence must be made in the United States courts, in a State where such courts are open; and if the person of the slave is seized, he should sue out a writ of habeas corpus, and make this proof thereupon. But the *status* of those enumerated in the 9th section of the act of 17th July, 1862, is that of captives of war and freedmen, and they are placed by the act directly under the protection of the military authorities. This protection should be fully extended to them in good faith against all efforts made to re-enslave them or to deprive them of the freedom which the act bestows. As to the fugitive slaves of loyal masters mentioned in the 10th section of the act of 17th July, 1862, the duty of the military authorities is that of absolute non-intervention. As the military authority cannot surrender the fugitive or decide upon the validity of the claim to his service, and can exert no power in behalf of the claimant, primarily or as a *posse comitatus* to the civil authorities, or otherwise, it follows that a loyal claimant, attempting in any way to arrest his fugitive, must do so on his own responsibility, and cannot claim any support or protection whatever from the military authorities. (August, 1863.) III. 617.

4. The right of the government to employ, for the suppression of the rebellion, persons of African descent held to service or labor under the local laws, rests upon two distinct grounds:

1st. That they are "*property*"—the government being authorized to seize and apply to public use private property, on making compensation therefor. What the use may be to which it is to be applied does not affect the question of the right.

2d. That they are *persons*. Slaves, under the federal government, occupy the *status* of "persons." They are referred to as such *eo nomine* in the Constitution, and as such they are represented in Congress. The obligation of all persons, irrespective of creed or order, to bear arms, if physically able, in defence of their government, is universally acknowledged and enforced; and corresponding to this is the duty resting on those charged with the administration of the government to employ such persons in the military service, whenever the public safety may demand it. Congress has recognized both the obligation and the duty in the 12th section of the act of July 17, 1862, which authorizes the President to employ, for such military service as they may be found competent to perform, persons of African descent. No distinction is made in the act between such persons who are held to service or labor and those *not* so held. The tenacious and brilliant valor displayed by troops of this race in numerous engagements has sufficiently demonstrated the character of the service of which they are capable. In the interpretation given to the enrolment act, *free* persons of African descent are treated as "citizens of the United States," and equally with white citizens are everywhere being drafted into the service. In reference to the other class, *slaves*, the 12th section of the act of July 17, 1862, is in full force. Whether

this class shall be generally employed in the service is a question, not of power or right, but purely of policy, to be determined by the estimate which may be entertained of the conflict in which we are engaged, and of the necessity that presses to bring this waste of blood and treasure to a close. That there exists a prejudice against the employment of soldiers of African descent is undeniable. It is, however, rapidly giving way, and never had any foundation in reason or loyalty. It originated with, and has been diligently nurtured by, those in sympathy with the rebellion, and its utterance at this moment is necessarily in the interests of treason.

The action of the President in employing such persons in the service should be in subordination to the constitutional principle. which requires that compensation shall be made for private property devoted to public uses. As, however, soldiers of this class could not be re-enslaved without a national dishonor, revolting and unendurable for all those who are themselves worthy to be free, the compensation made to loyal owners of slaves enlisted in the service should be such as entirely to exhaust the interest of claimants; so that when these soldiers lay down their arms at the close of the war, they may at once enter into the enjoyment of that freedom symbolized by the flag which they have followed and defended. (August, 1863.) V, 163.

5. The law, (section 3, chapter 54, act of April 16, 1862,) in fixing the maximum of compensation for slaves freed in the District of Columbia at $300, has imposed *no other* restriction on the Commission in making its estimate of the value of the slave. The compensation is to be awarded in each case, and may be as much less than $300 as the commission shall deem just. The value of the slave, in view of the maximum thus established, should, of course, determine the amount of compensation, and the time for which such slave is held to service would, other things being equal, generally afford the most satisfactory basis for determining the amount of the compensation to be awarded in each case. VII, 503. See X, 647.

6. The loyal master of a slave volunteering in the *naval* service is not entitled, under the act of February 24, 1864, chapter 13, section 24, to be paid the *special compensation* of $300, or less, provided by that act to be paid to such master in case his slave is drafted or volunteers in the *military* service. X, 274.

7. *Held*, that a loyal person, invested by the laws of Delaware with a legal title to the labor and services, for a term of years, of a "*convict servant*," may claim, in the case of the enlistment of the latter in the army, the "just compensation" provided by section 24, chapter 13, act of February 24, 1864, to be awarded to loyal masters to whom "colored volunteers" may "owe service"—the term of the servitude due at the period of the enlistment, whether for life or years, not being deemed to affect the question of the abstract right to the compensation provided by the statute. X, 647.

8. The clause in section 24, chapter 13, of the act of February 24, 1864, in regard to the Commission for awarding compensation to the loyal owners of enlisted slaves, appears to call for the determination by them of the same questions as those required to be determined by

the Commissioners created by the act of April 16, 1862, chapter 54, section 3. The latter act authorizes the commissioners to decide upon the amount of the award, and provides that their report shall be conclusive. It would seem, therefore, to have been the intention of Congress that the decision of the commission appointed under the act of 1864 should be equally final and conclusive upon the valuation of the slave and the award to the master. But this commission is appointed by the Secretary of War, and reports to him through the adjutant general; and though the Secretary cannot legally *order* or *compel* it to make a certain decision, yet (as in the case of a military court convened by him) he may return its proceedings in the case of a particular award, with an indication of his disapproval, and with his suggestions in regard to the principles involved. If these are disregarded by the commission, and it continues thereafter to make awards upon erroneous principles, there is no remedy to be pursued except its discontinuance, and the appointment of a new commission in its stead. XI, 553.

9. It is erroneous for a commission, appointed under the act of February 24, 1864, to base its award merely upon a consideration of the money value of the slave in the market at the moment of his enlistment. It is the time for which the slave is held to service, which (other things being equal) is to control in ascertaining his value; and the ratio which this time bears to the average length of a life service in any case is to determine what amount within the statutory limit of $300 is to be awarded to the master. XI, 553.

10. The mere fact that the slave has enlisted as a *substitute* cannot affect the legality of the award to be made to the "loyal master" under the provisions of the act of February 24, 1864; for, though enlisting as a substitute for another, he is still—as to the United States—a "colored volunteer." A question, however, to be considered in such a case is whether the master has received any consideration from the principal upon the enlistment of the substitute.† XII, 504.

11. The act of July 1, 1864, chapter 201, section 4, which provides "that persons hereafter enlisted into the naval service shall be entitled to receive the same *bounty* as if enlisted in the army," cannot, in the absence of express provision to that effect, be held to apply to *slaves* so enlisted. X, 274.

12. Sundry mortgagors (in Louisiana) of property formerly *slave*, but made free by the emancipation proclamation, complained that their mortgagees were seeking, with the sanction of the local courts, to enforce the payment of their debts by recourse to the land and other property of the mortgagors, and that in so doing they were not

†NOTE.—In connection with the five foregoing paragraphs, see joint resolution of Congress, of March 30, 1867, providing—"that all further proceedings under the 24th section of the act approved Feb. 24, 1864, to award compensation to the masters of slaves draftend into the military service of the United States, and award compensation to persons to whom colored volunteers may owe service;" and under the second section of the act approved July 28th, 1866, "'making appropriation for payment to persons claiming service or labor from colored volunteers or drafted men;' be and the same are hereby suspended." The resolution further directs the Secretary of War to dissolve all the commissions appointed under said sections.

only unjustly inflicting hardship and injury upon the mortgagors, but were in effect recognizing the institution of slavery as existing; and they therefore asked that the military authorities should interpose for their protection against the action of the mortgagees and the courts. *Held.* 1st, that by the common law, as well as the law of Louisiana, a mortgage passed no title, but operated as a security only—as a guarantee for and incident to the debt; that the destruction of the incident by *vis major* did not impair the debt, and that the loss necessarily fell on the party who held the property; that, while this was the law, the result was really rather a hardship to the mortgagee than the mortgagor, inasmuch as the former, in losing the security, might lose the only means of realizing his debt. 2d. That, instead of recognizing slavery as still existing, the mortgagees, by their proceedings, recognized its inhibition; inasmuch as, in ignoring the security of the mortgage and having recourse to other property, they practically acknowledged such security to be null and void, and acquiesced in the act of the government which made it so. 3d. That the military authorities could not, either legally or with any justice or propriety, afford any remedy for this legitimate and necessary consequence of the extinction of slavery. XIX, 54.

SEE MILITARY COMMISSION, II, (21.)
MURDER, (2,) (3.)
PEONAGE.
PRESIDENT'S PROCLAMATION, IV.

SOLDIERS PURCHASING THEIR ARMS.

Where certain civil authorities in Delaware seized and confiscated (under some local law or ordinance) the arms of certain discharged colored United States soldiers of that State, who had honestly purchased these arms from the government under the authority of an order of the War Department, after having nobly earned in the field the right to possess them—*held*, that this action was but an inspiration of the rebellion, and was among the most malignant and cowardly phases which disloyalty had assumed; that these soldiers having bought their arms from the government, might well claim to be secured in their property by its authority; that in the present state of the law it was not perceived how the military power could intervene, and that Congress should therefore interpose, and by a special act protect all honorably discharged soldiers, irrespective of color, in possession of the arms received by them from the government. XXI, 88.

SPECIFICATION.

[For general principles of military pleading, and for cases applicable to this Title, see CHARGE.]

1. It is clear that upon objection made by the accused the court may reject a specification which is defective in not being sufficiently

certain, and may then proceed to trial with the remaining specifications. I, 488.

2. A specification *held* fatally defective, in which the rank of the accused, an officer, was not set forth, and in which it was not indicated that he had any rank whatever. II, 533.

3. Where a specification which was not subscribed by any person, alleged that the accused addressed abusive language to "*me*," and committed an assault upon "*me*," without naming or otherwise indicating the subject of the abuse or assault—*held*, that it was defective, and that a finding of "guilty" upon it could not be supported. III, 429.

4. It is not necessary to insert in the specification the full Christian name of a party whose name is material to be stated in an allegation in regard to the offence. Thus *held* no variance where it was alleged in the specification that the accused made an illegal sale of public property to "A. B. Smith," but the name as it appeared in the testimony was "Aaron B." *Held*, further, that in alleging the time of the commission of the offence, it was sufficient to state that it was committed on or about a certain day of a month of "1866," and that it was not necessary to say "*in the year* 1866." XXIV, 299.

5. The time of the commission of the offence alleged in the specification is not usually material to be proved *precisely* as laid, although the allegation be not preceded by the words "on or about." But the time should, of course, not be alleged as having been more than two years before the issuing of the order for the trial. V, 613; IX. 100. See VARIANCE, 6.

* 6. There is no exact construction to be placed upon the words "*on or about*," as used in the allegation of *time* in a specification. The phrase cannot be said to cover any precise or particular number of days or latitude in time. It is used, in military pleading, for the purpose of indicating to the accused some period, as nearly as can be ascertained and set forth, at or during which the offences charged were committed—in cases where the exact day cannot well be named. The words are sometimes, indeed, employed in practice, though unnecessarily, where the exact day *is* known, and perhaps appears in the body of the specification. Where the real date of the offence is not within the knowledge of the accuser, it is always convenient and proper to employ the general phrase in question. XXVI, 437. (As to the latitude allowed in the statement of the time in a specification, see I Opinions of Attorneys General, 295.)

* 7. *Held*, that the allegations of time and place were sufficient in a specification in which it was set forth that the offence charged (which consisted in an improper disposition of public property) was committed by the accused "while *en route* between Austin, Texas, and Waco, Texas, between the 5th and 25th days of May, 1867." XXV, 100.

8. While the specification in all cases should properly contain averments of the time and place of the offence, (I, 461, 473; II, 148; and see COURT MARTIAL. II, 16,) it has yet come to be held, since a ruling to that effect by the Secretary of War in 1865, that the want of such

averments, if not excepted to by the accused, is not a fatal defect, if they can be supplied from the testimony in the record. XIV, 635; XVI, 298; XX, 280; XXVI, 412.

9. It is double pleading to allege in a specification that an accused was absent without leave "at various times between July 13 and August 2, 1864;" since each such absence is a distinct substantial offence. X, 471.

10. Where it was charged in a specification that the accused presented a fraudulent claim for rations furnished to recruits, and at the same time, and as a part of the same fraudulent transaction, a false claim for lodgings furnished to the same recruits, and for the same period as that for which the rations were furnished—*held* that but one transaction and one offence were set forth, and that the specification was not a double pleading. X, 392.

11. Under a charge of "violation of the oath of allegiance," the oath, where a copy of it can be obtained, should be set out in the specification either *verbatim*, or at least substantially and fully, and the manner of its violation should be distinctly averred. III, 649.

12. The designation of a contractor, in the specification of a charge preferred under section 16, chapter 200, act of July 17, 1862, as "*special*," has no significance, and the term is surplusage merely. X, 392. See *note* under CONTRACTOR, II.

*13. *Held*, that a specification to a charge of "conduct to the prejudice, &c.," which consisted in an allegation that the accused had been put in the guard-house for cause on seven different occasions between two specified dates, was not a pleading sufficient in law, inasmuch as it set forth not a specific offence cognizable by court-martial, but rather the punishments by which past offences had been expiated. XXV, 664.

SEE NINTH ARTICLE, (1,) (2.)
THIRTY-SIXTH ARTICLE.
THIRTY-NINTH ARTICLE, (4.)
FORTY-FIFTH ARTICLE, (4.)
FIFTY-SEVENTH ARTICLE, (2.)
SIXTY-NINTH ARTICLE, (1.)
NINETY-NINTH ARTICLE, (24.)
FINDING.
MAKING GOOD TIME LOST BY DESERTION, &c., (3,)
MILITARY COMMISSION, II, (25)
PERJURY, (3.)
PLEA, (7,) (8,) (9,) (10,) (11,) (12,) (13,) (14,) (15,) (21.)
POSTPONEMENT, (2.)
VARIANCE, (1,) (4,) (6,) (7.)
VIOLATION OF THE LAWS OF WAR, (2.)

SPY.

1. A rebel soldier apprehended while lurking secretly within our lines, and near one of our camps, and disguised by wearing a United States military overcoat—*held* to be *prima facie* a spy. XIV, 579.

2. That an officer or soldier of the rebel army comes within our lines disguised in the dress of a citizen, is *prima facie* evidence of his being a spy. II, 26, 208; IV, 307; IX, 1. But such evidence

may be rebutted by positive proof that he had come within the lines to visit his family, and not for the purpose of obtaining information as a spy. IV, 307; V, 315, 572; VII, 66. And see II, 377, 580.

3. The spy must be taken *in flagrante delicto*. If he is successful in making his return to his own army, the crime, according to a well-settled principle of law, does not follow him, and, of course, if subsequently captured in battle or otherwise, he cannot be tried for it. V, 286, 248; IX, 100; XXIII, 459.

4. Merely for a *citizen* to come secretly within our lines from the South, in violation of paragraph 86 of General Order 100, of 1863, does not constitute him a spy. IX, 95.

5. A rebel soldier cut off on Early's retreat from Maryland and wandering about in disguise within our lines for more than a month, and seeking for an opportunity to join the rebel army, but not going outside our lines since first entering them—*held* (October, 1864) not strictly chargeable as a spy. XI, 82. And see II, 377, 580.

6. A rebel officer arrested while lurking in the State of New York in the disguise of a citizen's dress, and shown to have been in the habit of passing, for hostile purposes, to and from Canada, where he held communication with the enemies of the United States, and conveyed intelligence to them—*held*, to be a spy, and properly brought to trial as such before a military commission. XI, 474.

7. A rebel officer taken while secretly passing within our lines, in disguise under an assumed name, and with documents in his possession intended for the rebel authorities in Richmond, to which place he was proceeding—*held*, properly treated as a spy. It is to be presumed that such officer when arrested in disguise within our lines is there in the character of a spy; and, when covertly passing through our camps and about our military posts, or through our territory, that he is seeking information, and will carry it back with him unless apprehended. *Held*, further, that the fact that this officer, when so arrested, was a bearer of despatches to Richmond and Canada, was not inconsistent with his being a spy, in the view of the circumstance that the route pursued by him was through a region of country filled with camps and garrisons and the theatre of military movements. And the case of this officer likened to that of *Andre*; the only substantial difference in their cases being that papers conveying intelligence to the enemy were found upon the latter, while the former succeeded in destroying those which he had in charge. But the fact that he destroyed them raises a presumption that they would have served as evidence of his guilt. XV, 14.

SEE COURT MARTIAL, II, (15.
DEPOSITION, (1.)
DESERTER, (25.)
GUERILLA, (1.)
LESSER KINDRED OFFENCES, (2.)
PRISONER OF WAR, (7.)
SENTENCE, II, (2.)

STATEMENT OF ACCUSED.

The accused may, in any case, present to the court at the close of the trial a statement, either verbal or in writing. Such statement is not *evidence;* but it may properly enter into the consideration of the court, in their deliberation upon the finding and sentence; and it should especially receive consideration in a case where a plea of guilty has been interposed but no evidence has been offered, and the declarations of the statement are inconsistent with the plea. XX, 432.

SEE JUDGE ADVOCATE, (1.)
PLEA, (3,) (4.)

STATE OF WAR, I—(EFFECT OF.)

SEE FIFTY-SIXTH ARTICLE, (2.)
CLAIMS, I, (11,) (12,) (21,) (29,) (30,) (31,) (32;) II, (11,) (12.)
CORRESPONDENCE WITH REBELS, I.
DEED OF REBEL GRANTOR.
TRADING WITH THE ENEMY.

STATE OF WAR, II—(HOW TERMINATED.)

SEE SIXTY-FIFTH ARTICLE, (15.)
CHARGE, (19.)
HABEAS CORPUS, (10)
JURISDICTION, (6.)
SEPARATE BRIGADE, (13.)
VIOLATION OF THE LAWS OF WAR, (15.)

STEALING.

SEE SIXTY-SEVENTH ARTICLE, (3.)
NINETY-NINTH ARTICLE, (3.)
LARCENY.
PARDON, (9.)
PUNISHMENT, (3.)
STOPPAGE, (3.)

STENOGRAPHER.

1. The act of Congress—section 28, chapter 75, act of March 3, 1863—which authorizes the judge advocate of a military court to appoint a stenographer, does not seem to give this power to the recorder of a court of inquiry. But in important cases the Secretary of War, if applied to, would, no doubt, grant him the requisite authority. II, 94.

2. Stenographers should be retained only in cases of importance, and when the other duties of the judge advocate do not allow him the time to take down the testimony in the ordinary manner. In the absence of any regulation or order of the War Department as to their pay, stenographers have generally been allowed $10 per day, when

the charge has been *per diem;* and when the charge has been according to the number of pages reported, the rate usually allowed has been the same as for congressional reporting. II, 515; VII, 71. (*The rule here stated is understood to have been uniformly observed in the quartermaster department; and it may be regarded as a fixed usage of the service to pay stenographers $10 *per diem*, when the employment is by the day. XXVI, 519.)

See CLERK, (2.)

STOPPAGE.

1. *Held*, that a surgeon in charge of a hospital could not properly be authorized to stop, against the pay of the hospital steward, certain amounts due to merchants for tea, which such steward had purchased from them under the pretence that it was on account of the government, but which he really had appropriated to his own use. III, 628.

2. A stoppage against the pay of a regiment, imposed by a commanding general, for the amount of damage done by them, *as a regiment*, to private property, and assessed by a commission appointed for that purpose, *held*, proper and warranted by the customs of the service, as within the spirit of the provisions of the 32d article of war. But in imposing, as a *punishment*, an additional liability of 100 per cent.—*held*, that he exceeded his authority, whether sought to be derived from the Regulations, the 32d article, or the customs of war; and that such penalty could not properly be enforced against the regiment. VIII, 671.

3. There is no authority in law or the regulations of the army or usage of the service for assessing pro rata upon the officers and men at a military post the pecuniary damage resulting to the government by the larceny (not fixed or fixable upon the actual perpetrators) of public stores at the post. Where the guilty person cannot be discovered by the exercise of reasonable diligence and brought to trial, the government can reimburse itself only by means of a stoppoge against the officer (if any) officially accountable for the specific property, or by the trial, conviction, and fining of the party or parties (if any) by whose negligence the loss may have been occasioned. XXI, 139.

4. Where certain men, returned to their regiments as deserters, were thereupon tried by court-martial, acquitted of desertion, and found guilty of *absence without leave* only—*held*, that a stoppage against their pay for the amount of certain charges, incurred in apprehending them as being deserters, would be without legal sanction; they being, upon such acquittal, liable to none of the consequences resulting by operation of law from the commission or conviction of the specific crime of desertion. That the government, upon imperfect evidence of the facts, may have allowed and paid these expenses to the officer making the arrest, constitutes no reason for requiring their payment of the soldier after he has been judicially pronounced

not guilty of the charge upon which he was apprehended. XIII, 467. And see XXVI, 662.

5. Stoppages for the costs of the apprehension of a deserter are entirely independent of the sentence which may be imposed upon him as such, and are to be charged against him whether expressly provided for in the sentence or not. XII, 326.

6. An officer's pay cannot properly be stopped, except for the purpose of satisfying a claim on the part of the government, or a private claim for which reparation is required to be made under the provisions of the 32d article of war. XII, 354.

7. The government is not authorized to stop against the pay of an officer, whether before or after his discharge from the service, the amount of a private indebtedness to an enlisted man. XVI, 637.

8. A stoppage against the pay of an officer till he should reimburse a soldier for an amount of funds deposited with him and lost by his negligence—imposed by a commanding officer upon the finding of the facts by a board of investigation—*held*, void and unauthorized. Such a board is not a judicial body, and cannot make a legal judgment; such a stoppage is not among those sanctioned by law or the regulations of the service; and, moreover, the government cannot compel an officer to satisfy a private pecuniary liability. XII, 510.

*9. The government, in mustering an officer out of service in the usual form, and thus—for such is the legal effect of the act—honorably discharging him, is ordinarily justified in suspending at the same time his final payment in the following cases: 1. Where he is, or is alleged to be, pecuniarily liable or in deficit to the government, or is accountable thereto for public property. 2. Where he is charged with embezzlement, misappropriation, or some other one of the offences described in the act of 2d March, 1863, ch. 67, sec. 1, for which he may be tried and fined notwithstanding his discharge; and it is the intention and determination of the government to bring him to trial under said act. For if convicted and fined, his pay might well be withheld in offset to his fine. if not paid. XXIII, 521.

*10. In view of the abolishment by sec. 25 of the act of July 28, 1866, of the office of sutler in the army, no stoppage or retention of a soldier's pay, by virtue of a sentence of court-martial, or otherwise, for the purpose of satisfying a sutler's claim accrued after July 1st, 1867, (the date at which the section went into operation,) would be legally authorized. XXVI, 79.

SEE THIRTY-SECOND ARTICLE.
THIRTY-EIGHTH ARTICLE, (1.)
PAY AND ALLOWANCES, (2.)
PAYMENT BY MAIL, (2.)
PROVOST JUDGE OR COURT, (2.)

SUB-CONTRACTOR.

SEE CONTRACTOR, II, (13.)

SUBSTITUTE.

See ENROLMENT, I, (5,) (13,) (14,) (18,) (22,) (31,) (33,) (34,) (37.)
SLAVE, (10.)

SUCCESSOR IN COMMAND.

See SIXTY-FIFTH ARTICLE, (1,) (10,) (11,) (12,) (14,) (18.)
REVIEWING OFFICER, (5.)

SUPERINTENDENT OF CEMETERY.

*Section 7, chapter 299, of the act of July 28th, 1866, in providing for the appointment of superintendents of national cemeteries, enacts that they be "selected from among the non-commissioned officers of the regular army and volunteer forces who have received certificates of merit for services during the war." *Held*, in the absence of any statutory provision specifying what shall be the character of the "certificate of merit" referred to, that such certificate might properly consist of a medal, brevet commission, or any other similar form of recognition by the government of the value of the services of the soldier during the war. XXII, 515. (The provision here recited may be regarded as superseded by sec. 2, ch. 61, of the later act of Feb. 22, 1867, "to establish and to protect the National Cemeteries," in which the requirement in regard to the description of person to be appointed superintendent is as follows:—"And it shall be his" (referring to the Secretary of War) "duty to appoint a meritorious and trustworthy superintendent who shall be selected from enlisted men of the army disabled in service.")

SUPERIOR OFFICER.

See NINTH ARTICLE, (3,) (5.)
TWENTY-FOURTH ARTICLE.
THIRTY-FIFTH ARTICLE.
SEVENTY-FIRST ARTICLE, (5.)
EIGHTY-THIRD ARTICLE, (1.)
ARREST, I, (1.)
FIELD OFFICER'S COURT, (29,) (32.)
OFFICER OF THE DAY, (1.)
PREFERRING CHARGES, (2.)

SUPPRESSION OF DISLOYAL PUBLICATIONS.

The authority to suppress or restrain disloyal publications, made in the interest of the rebellion—as a persistently disloyal newspaper—rests on the same broad foundations as the authority to prosecute the war, and to make that prosecution effectual. That it is the duty of the government zealously to guard the fountains of public sentiment from being poisoned by traitors will scarcely be controverted. It is believed that in a period of active hostilities, with either a foreign or

domestic foe, no government has ever tolerated open traitorous utterances or publications within its military lines; nor, indeed, can any government, however strong, do so without imminent hazard to its own honor, and to the lives of its own people. The publisher of a disloyal newspaper, while sheltering himself from the dangers of war, yet serves the enemy far more efficiently than he would do with musket or sword, and to the extent of his influence the blood of our soldiers who fall in battle is upon his skirts. Were the enemies in our rear more severely dealt with, it is probable that fewer lives would have to be sacrificed in subduing the enemies in our front. If the success of his military operations demand it, the commanding general, whose forces are being demoralized by a treasonable press, may silence it with as clear a right as he may bombard one of the enemy's forts, from which shot and shell are being thrown into the ranks of his army. (June, 1863.) II, 585.

SEE FIFTY-FOURTH ARTICLE, (3.)

SURGEON.

* Though it is in accordance with the general usage of the service not to detail officers of the medical corps of the army on courts-martial, where it can be avoided, yet such details are not unfrequently, and properly, made at stations where commissioned officers are few in number. Medical officers being, as a class, men of learning and a high order of capacity and intelligence, no instance is known of any injurious result ensuing from their being appointed upon military courts. The proceedings of no trial, where an officer of this corps was a member of the court, have, it is believed, been, for that reason, disapproved during the war; and a very considerable number of records of military trials have been passed by this Bureau as regular and sufficient, from which it appeared that such officer or officers had been part of the detail. The principal reasons why surgeons and assistant surgeons should not generally be put upon court-martial duty, appear to be: 1st. That they are not ordinarily so familiar with the principles of military law as other officers; 2d. That the proper performance of their professional services, for which they are liable to be called upon at any moment, (being, practically, always "on duty,") may seriously interfere with their judicial duties as members. To these it may be added that, having special professional duties to perform as medical officers, they cannot, except where it is unavoidable, *fairly be required* to enter upon duties of so different a character as those of a member or judge advocate of a military court. See XXIII, 522; XXII, 536; JUDGE ADVOCATE, 15.

SEE SIXTY-SIXTH ARTICLE, (6.)
NINETY-NINTH ARTICLE, (5,) (9.)
BOARD, (3,)
BOARD OF EXAMINATION, (4.)
CONTRACT SURGEON.
COURT-MARTIAL, II, (5.)
DOUBLE RATIONS.
JUDGE ADVOCATE, (15.)
PAYMENT BY MAIL, (2.)
STOPPAGE, (1.)

SUSPENSION.

1. An officer suspended from rank and pay by sentence of a court-martial is entitled to a leave of absence from his command for the period of the suspension, unless it be specified in the sentence that he shall meantime confine himself to limits. Suspension from rank involves suspension of command. If during such suspension an officer in the regular army becomes entitled to promotion, he loses his promotion, and the next in rank takes it. VII, 8.

2. The operation of a sentence of suspension from rank and command is not to relieve the party absolutely from all military control. But as a court-martial in the case of such a sentence virtually separates the accused from the military service for a certain period, and declares that such separation is a proper and sufficient punishment for the offence with which he is charged, it would be *adding to the punishment* thus inflicted, and, therefore, a proceeding in conflict both with principle and precedent, to impose any further restraint upon his person than the immediate exigencies of the service demand. It has been held, therefcre, that an officer so sentenced is entitled to leave the limits of his former command, and remain absent during the period of his suspension. For such absence he may properly enough be required to procure a formal leave, in order that his action in the premises, as well as that of his commander, may be made matter of record, but to such leave he would, it is conceived, be entitled as of right. This view is analogous to that entertained (see ARREST, I, 6, 7) in regard to the privilege of an officer relieved from arrest under the provisions of the act of July 17, 1862, ch. 200, sec. 11; in which case it is held that, though the effect of the statute is to entitle him to his release, yet he cannot properly himself terminate the arrest, but must seek the appropriate relief by means of a formal application to the proper superior. XIX, 312.

3. A sentence of suspension from duty and pay for fifteeen 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. VII, 242.

4. Where an officer of volunteers had been suspended from rank and pay for three months by sentence of court-martial, and before the expiration of this period his regiment (and command) was mustered out of service by an order of the War Department—*advised*, that the act of the government in discharging the body of troops—as an officer of which the accused would alone have remained connected with the service—should be treated as abridging the term of his punishment; and that it therefore remained only to direct his muster out in the usual form. XVII, 598.

* 5. Where an officer, sentenced to be suspended from rank and pay for three months, was mustered out and discharged from the service before the expiration of the three months succeeding the publication of his sentence, *held* that his pay could be withheld only for

the period between the promulgation and the discharge, and that he could not, for the purpose of making up three months' forfeiture, be deprived of any pay that may have remained over due him for the period prior to the date on which the sentence took effect; that the case was simply one of an executory penalty, the whole of which the government had not seen fit to enforce. XXII, 113.

* 6. By sentence of court-martial of August, 1856, an officer was sentenced to be suspended from rank and pay proper for three months. By act of Congress of February 21, 1857, but which took effect July 1, 1856, the amount of twenty dollars per month was added to the pay of officers. This amount for the period of his suspension having been withheld from the officer, it was urged—upon application to have the same returned to him—that the forfeiture imposed by the sentence operated only upon the specific amount of pay as fixed by law at its date. But *held*, that the sentence took away *all* pay proper for the term of suspension, and that the increased amount was none the less forfeited because added by legislation subsequent, instead of anterior, to the sentence. XXIV, 462.

* 7. A sentence suspending an officer from rank and pay for a certain time involves necessarily an absolute forfeiture of the pay accruing during the interval, and not merely a *withholding* of it till the period of suspension has expired. XXIII, 556.

* 8. Where an order 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 order could not properly be construed as intending a forfeiture of pay, but shoud 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. XXIII, 427.

* 9. Where a cadet was sentenced "*to be suspended from the Military Academy*" till a certain date, and at that date to join the second class. *Held*, that this sentence was analogous to one of the suspension of an officer from command and promotion, and that it did not involve a forfeiture of pay. XXIII, 427. See SENTENCE I, 25.

* 10. *Held*, that an officer undergoing, at a military station, a sentence of suspension from rank and command, forfeits, for the period of suspension, all the peculiar privileges and distinctions which his commission conferred; and among these the right to an official recognition of his rank by sentinels on post. XXVI, 324.

* 11. A sentence of suspension, like a sentence of dismissal, takes effect from the date of the order of promulgation and approval, unless the accused, on account of absence or otherwise, is not personally notified at that date. Where the official promulgation is not of itself notice to the accused, the suspension takes effect from the day of *actual* notice. XXV, 527. See ORDER, I, 8, 9; SENTENCE III, 20.

SEE EXTRA PAY, (3.)
DOUBLE RATIONS, (1.)
PARDONING POWER, (11.)
PAY AND ALLOWANCES, (3.)
REPRIMAND, (4.)

SUTLER.

[The first nine paragraphs relate to cases occurring before the passage of the act of July 28, 1866, ch. 299. By section 25, "the office of sutler in the army and at military posts" was abolished from and after July 1, 1867.]

1. There is no law authorizing the appointment of a "staff sutler." The 3d and 6th sections of the act of 19th March, 1862, ch. 47, provide only for sutlers of volunteer *regiments*, to be selected by their commissioned officers. II, 49.

2. A private soldier cannot properly be appointed sutler of his regiment. The functions of the soldier and the sutler are incompatible. X, 33.

3. There is no law, regulation, or usage of the service authorizing a regimental commander to *compel* his men to make purchases of a regimental sutler, or to settle for purchases not voluntarily made by them from such sutler. Nor has such commander any authority to *compel* the sutler to engage in any transactions not contemplated by the regulations or usage of the army. XII, 411

4. Inasmuch as the act of 19th March, 1862, ch. 47, contains no provision whatever in regard to the subject of a tax upon sutlers, the paragraphs 198, 204, &c., of the Army Regulations, are held to be in no way modified by that enactment. and, being in full force, may properly be complied with in a case in which they may be applicable. XVI, 659.

5. A post or regimental fund can be raised by tax upon a sutler only in accordance with paragraphs 198 to 204 of the Army Regulations. (And see paragraph 215 of the same.) XXI, 155. See REGIMENTAL FUND, 3.

6. When one who was a post sutler becomes no longer connected with the army, there is no legal means by which a tax omitted to be levied upon him, or to be paid by him while in the service, can be collected from him. whether by offset against his own claims against deceased soldiers, or otherwise. XXI, 155.

7. The sutler's lien upon the pay of soldiers in the regular army was "abrogated" by act of 3d March, 1847, chap. 61, sec. 11; restored by act of 12th June, 1858, ch. 156, sec. 11; abrogated by act of 24th December, 1861, ch. 4, sec. 3; and is not restored by act of March 19, 1862, ch. 47, which is held to provide for a sutler's lien upon the pay of *volunteer* soldiers and officers only. In this state of the law, no military order, and nothing short of legislation by Congress, will invest sutlers with a lien upon the pay of *regular* soldiers, or authorize them to appear at the pay table and receive any part of such soldier's pay from the paymaster. XIX, 80; XXV, 164, 166.

*8. *Held* that there was no statute or custom of the service by which the goods of a sutler were exempted from attachment at the suit of a private creditor; and that the military authorities would not be authorized to interfere with the levy of such an attachment. XXI, 461.

*9. There is no privilege of free transportation for their goods legally attaching to the office of sutler. Sec. 6 of the act of March 19, 1862, relating to sutlers for volunteer regiments, expressly prohibits the use of quartermaster's conveyances by sutlers; and there is no law or regulation allowing a similar use by sutlers of regular organizations or at military posts. So where the goods of an authorized female sutler attached to the army of the Cumberland were transported for her, in government vehicles, between Nashville, Tennessee, and Huntsville, Alabama, *advised* that she was legally liable and should be held liable for the reasonable value of such transportation, in the same manner and to the same extent as any private individual. XXVI, 307, See XXV, 164.

*10. *Held* that from and after July 1, 1867, the date at which the statute (sec. 25, ch. 299, act of July 28, 1866) abolishing the office of sutler took effect, a sentence which, in forfeiting a soldier's pay, *excepted* in the form heretofore observed the "*just dues of the sutler*," would be without effect in enforcing the payment of such dues. XXV, 105, 126, 132, 149. From and after such date, also, no *stoppage* of a soldier's pay in favor of a sutler would be authorized. XXVI, 103, 391.

*11. *Held*, (February 15, 1868,) that there is at this time no tax on sutlers or traders authorized by law or regulation. The office of "*sutler*" was absolutely abolished by the act of July 28, 1866; and no such effect could legally be given to the general language employed in General Order 59 of the War Department, of 1867, as to authorize the continuance in office of any sutler, *as such*, after July 1, 1867, the date at which the abolishing statute went into operation. As to the office of "*trader*," established by joint resolution of Congress of March 30, 1867, such office is not deemed so far analogous to that of sutler as to permit the imposition upon the trader of any such tax as that formally imposed under the regulations upon sutlers. Not only is the trader not appointed by the authority who is also empowered to make army regulations, the Secretary of War; but he is not appointed for the special use or convenience of troops, but for the accommodation of emigrants, freighters, and other citizens. Moreover, instead of being the sole or chief vendor to soldiers of miscellaneous goods, he is generally restricted to the sale to them of certain articles only. It is held in the present state of the law, hat he cannot legally or equitably be subjected to any tax whatever. XXVI, 450.

SEE THIRTY-SECOND ARTICLE, (5.)
CIVILIANS SERVING WITH TROOPS.
CLAIMS, II, (8.)
STOPPAGE, (10.)

SWEARING THE COURT, &c.

A mere statement in the record that "the court and judge advocate were then sworn in the presence of the accused," without the use, at least, of the word *duly*, is insufficient, and invalidates the proceedings. It should be either set forth in full, in accordance with

the provisions of the 69th article, that the members were sworn by the judge advocate, and the judge advocate by the president of the court, &c.; or, in the terms of paragraph 891 of the Regulations, that "the court and judge advocate were duly sworn," &c. The following form is suggested as a full and explicit statement of the administration of the oath, and probably the best to be adopted in all cases: *The members of the court were then severally duly sworn by the judge advocate, and the judge advocate was then duly sworn by the president of the court: all of which oaths were administered in the presence of the accused.* XIII, 483. See XIV, 278.

SEE SIXTY-SIXTH ARTICLE, (13.)
SIXTY-NINTH ARTICLE.
FIELD OFFICER'S COURT, (14.)
JUDGE ADVOCATE, (14.)
MILITARY COMMISSION, I, (12.)
RECORD, IV, (1,) (2,) (3,) (4.)

T.

TAX.

1. Under the revenue act of July 1, 1862, (chap. 119, sec. 86,) the income tax of 3 per cent. should be deducted from the pay and allowances of military officers. These, if not included under the head of "salary," are included under the head of "payments" used in the bill. When the allowances are commuted, the tax should be collected from the money paid under the commutation. Only what remains of the salary and allowances after the deduction of $600 is taxable. Therefore, to facilitate the collection in this case, deduct $600 from the pay proper, and then collect the tax on the balance of the pay proper and allowances, as an entire sum. (September, 1862.) I, 359.

* 2. There is no law exempting a military officer, as such, from any taxation to which he would be liable as a citizen. Officers of the army having property or income, (other than their pay,) subject by law to tax, have always been held liable to satisfy the same; and no instance is known in which such liability has been disputed. XXII, 659; XXVI, 297.

3. The additional allowance by the War Department on the bills of a railroad company for the transportation of military *freight*, of two and a half per cent., being the amount of tax levied on the gross receipts of the company—*advised*, as just and proper, and as in accordance with the spirit of the act of June 30, 1864, chap. 173, sec. 103. This act, in terms, allows the addition of the tax to the rates of "*fare*" only, a provision which would literally include the hire for transportation of passengers alone, as distinct from freight. But the probable

intention of the legislature was to authorize the adding of the tax to freight as well as fare; otherwise the company under the most literal construction of the whole section might assert the right to add the whole tax upon gross receipts to the fare of passengers. XI, 502.

SEE SUTLER, (4,) (5,) (6,) (11.)

TESTIMONY.

SEE DEPOSITION.
EVIDENCE.
WITNESS.

TESTIMONY—INTRODUCTION OF, AFTER CASE CLOSED.

1. To allow the introduction of new testimony by the judge advocate, after the defence has closed, is within the discretion of the court; and where such testimony is allowed to be admitted in contravention of the ordinary rule of practice of the common-law courts, (which is also generally observed before military tribunals,) it will notinvalidate the proceedings, unless some injury is suffered by the accused; as by his not being afforded an opportunity to reply to such testimony, if he desires to do so. XIII, 423. The court may also, in its discretion, allow the *accused* to reopen the case for the introduction of testimony after it has been closed on both sides. See the trial of Hon. B. G. Harris, 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 defence was allowed to introduce new testimony. XII, 401.

2. *Held*, that the court properly exercised its discretion in allowing the judge advocate to reopen the case and introduce evidence after the defence had closed, in a case where the evidence was proposed to be offered in regard to the jurisdiction of the court, which was questioned by the defence at the close of the case, but which the judge advocate had been led, at a previous state of the trial, to suppose was admitted. XVII, 398.

SEE COURT-MARTIAL, I, (4.)

THEFT.

SEE SIXTY-SEVENTH ARTICLE, (3.)
NINETY-NINTH ARTICLE, (3.)
FIELD OFFICER'S COURT, (25.)
LARCENY.
PARDON, (9.)
PUNISHMENT, (3.)
STOPPAGE, (3.)

TIME AND PLACE.

SEE FORTY-FIFTH ARTICLE, (4.)
COURT MARTIAL, II, (16.)
FINDING, (29,((30,) (31.)
SPECIFICATION, (4,) (5,) (6,) (7,) (8.)
VARIANCE, (6.)

TITLE OF REBEL GOVERNMENT TO REAL ESTATE.

SEE CLAIMS, I, (21,) (32.)

TRADER.

SEE SUTLER, (11.)

TRADING WITH THE ENEMY.

There are two exceptions to the general rule interdicting trade with the enemy in time of war: 1st. Where it may be allowed upon considerations of *humanity* alone. 2d. Where it is sanctioned by the express authority or license of the government. The exercise of the right in the former case is necessarily rare and limited. In the latter case the State and not the individual must determine when the trade shall be permitted and under what regulations. (See GENERAL REGULATIONS, concerning commercial intercourse with and in the States declared in insurrection, approved by the President January 26, 1864, and published in General Order, Department of the Gulf, No. 53, of April 29, 1864.) XIV, 273.

SEE FIFTY-SIXTH ARTICLE.

TRANSFER.

1. The 3d paragraph of General Order 75, of 1862, does not give to the governor of a State authority to transfer men from organized companies which have been mustered into the service of the United States for the purpose of filling up unorganized companies. III, 287.

*2. When the interests of the service demand it, an officer of the regular army may, without his consent, be transferred from one company to another of his regiment. XXVI, 32.

3. It is a well-settled usage in the volunteer as in the regular service to transfer officers from one company to another. The particularization of the company in the commission by the State authorities does not affect the power of making transfers, which may be exercised by the regimental commander after the regiment has been mustered into the United States service. VIII, 162. *In the volunteer service, however, in which often the officers have recruited their own companies, have been elected officers by them, and are so, to a great extent, identified with them, such right of transfer would properly be exercised more rarely than in the regular service.

SEE SENTENCE, I, (15;) III, (6.)

TREASON.

1. The theory on which the war is prosecuted, by exchanging instead of punishing *traitors* taken with arms in their hands, would seem to give little encouragement to the prosecution of this class of offenders. The policy of the government appears to be to visit its punishments rather upon those guilty of violating the laws and usages of war, and of disloyal practices which fall short of levying war, and which are not, therefore, generally regarded as constituting *treason* in the sense of the Constitution. (January, 1864.) VII, 20.

2. Bearing arms against the United States is treason; but the government has heretofore waived its right to proceed against the offenders as criminals, by consenting to their being treated as prisoners of war under the cartel. (June, 1864.) VIII, 529.

SEE PARDON, (6.)
PRISONER OF WAR, (2,) (3.)

TRIAL.

1. No legal objection exists, when two or more persons have concurred in the commission of a military offence, to joining them in the charges, specifications, and trial, though the practice has been to try but one case at a time. V, 479.

2. An officer who has been dismissed by summary order, and upon the revocation thereof has been required to report to his command, for trial by general court-martial upon the charges on which his dismissal was based, should be arraigned upon substantially the same charges as those thus referred to. If after joining his command, and before his trial, he has been guilty of any new specific offence, a charge for this may be preferred; but upon this it would be advised that he be brought to a *separate* trial. XI, 127.

3. Where, of a court of seven convened to try A, five were members of a court previously convened, which had already nearly completed the trial of B, (A and B being charged with complicity in the same criminal acts,) and, before the court last convened had taken any evidence in the case of A, the other court went on to convict and sentence B; and the second court thereupon proceeded to take testimony in the case of A, and to convict and sentence him—*held*, that the proceedings upon the latter trial were altogether irregular and should be disapproved. XX, 93.

* 4. It is necessary and customary to state, at the beginning of a day's proceedings in the record of the trial of a certain case, that the proceedings of a former day were read, &c., only where proceedings were had by the court *in the same case* on such former day. Where, on a certain day a trial has been had and completed, the proceedings therein do *not* require to be read at the opening of the trial of a *new* case by the same court on a succeeding day. XXV, 349.

* 5. Where the accused was persistently excluded by the court,

against his repeated and earnest protest, from being present at the daily reading of the previous day's proceedings—*held*, that, as it was his undoubted right to be present on every such occasion, this exclusion constituted a sufficient ground for disapproving the proceedings which had resulted in his conviction. XXIV, 555.

*6. An officer having been tried and sentenced by court-martial, applied for an order setting aside the sentence on the ground of an alleged fatal defect in the proceedings, consisting in the fact that the court had, on three several occasions during its session, proceeded with the trial in his absence, as shown by the record. From the record it appeared that on none of these occasions had any business been transacted by the court beyond the reading and correction of the record of the proceedings of the preceding day, upon which reading, &c., the court had on each occasion adjourned because of the absence of the accused. No objection to this action had been taken by the accused upon the trial; and, upon his application, he did not show, or even aver, that the record, as adopted, was incorrect, or that he was in any manner prejudiced by the procedure in question—*held*, that the grounds of his application were insufficient. XXIV, 488.

*7. On the fourth day of the trial of an officer on certain charges, a series of new and additional charges were introduced; the court was again sworn; and the trial proceeded upon the latter as well as the former charges;—all against the protest of the accused, who objected to pleading to, or being tried upon, new and separate accusations while others were duly pending for trial. Upon his conviction of one of the original and all of the additional charges—*held*, that the proceedings should be disapproved as fatally irregular; that injustice was necessarily done the accused by requiring him to defend himself against charges, of which he had no notice, and at a time when he was occupied with the defence of other charges already on trial; and further, that, by his being compelled to answer to the second set of charges at the same trial and before the same court, instead of before another court, or upon a second trial by the same court, he had been illegally deprived of a right of challenge to the members; which right, though not exercising it upon the trial of the prior charges, he might well have desired to avail himself of upon the trial of the latter charges. XXIV, 577.

*8. The best 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 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. It is not essential, however, that this form of voting should be pursued—it being open to the court, in its discretion, to adopt a different one. In the absence, however, of a fixed and settled practice in regard to this part of their proceeding, the method described may well be preferred, and it is believed to be the one more generally followed. XXI, 551.

*9. In accordance with the rulings of the United States courts, it is *held* that nothing short of regular judicial proceedings continued to, and terminating in, an acquittal or a conviction and sentence, can constitute in law a *trial* of an officer or soldier by a military court. (See EIGHTY-SEVENTH ARTICLE.)

SEE COURT-MARTIAL, I, (1,) (2,) (4,) (5.)
DISMISSAL, III.
JOINDER, (1,) (2.)
RETIRING BOARD, (4.)
TESTIMONY—INTRODUCTION OF AFTER CASE CLOSED.

U.

UNDER-COOKS.

1. *Held*, (February, 1865,) that under-cooks, of African descent, authorized by section 10, ch. 78, of the act of March 3, 1863, to be specially enlisted as such, did not occupy the status of soldiers; and that consequently the general provisions of the act of June 20, 1864, ch. 145, increasing the pay of soldiers, did not operate to increase the compensation of "ten dollars per month and one ration per day," fixed by the former act for such under-cooks, as a distinct class of military employees. XV, 11. (This is the compensation still paid to under-cooks remaining in service at the present date, July 1, 1868; but see 2.)

*2. Section 10 of the act of March 3, 1863, ch. 78, which provides for the enlistment of "under-cooks of African descent," not being, in terms, temporary in its application, or limited to the period of the rebellion; and the retention of this class of employees not being in terms inconsistent with the provisions of the act of July 28, 1866, fixing the peace establishment of the army—*held*, (February, 1867,) that the President was empowered, since, as well as before, the passage of the last-named act, to exercise the "discretion" vested in him by the act of 1863, to "cause to be enlisted" such under-cooks; and that the under-cooks enlisted by him prior to the said enactment of 1866 might properly be left to serve out their terms of enlistment thereafter. This conclusion is strengthened by the consideration that in the cases of the regiments of artillery and cavalry established by the army bill, it is provided that they shall have the "same organization" as that before prevailing, and which must, or may, have included under-cooks for the several companies; while, in the case of infantry, a large number of companies were expressly continued in the army with the same general organization as they had before, including (as it would naturally be inferred in the absence of a special repeal) under-cooks. XXII, 603, 619. (The enlistment of under-cooks was *discontinued*, by orders of the War Department, from and

after September 2, 1867; only those then remaining in service being retained.)

* 3. *Held* that the act of March 3d, 1863, chap. 78, sec. 10, authorized the proper authorities of the government to pay the under cooks of African descent mentioned therein three dollars of their monthly pay in clothing, but did not make it obligatory upon them to do so; that such mode of part payment was a privilege or an option to be exercised under the influences of the policy which led to the adoption of the law itself, which was doubtless intended for the benefit of this class of employees in affording them the opportunity of obtaining clothing at a cheap rate compared with that at which they could purchase it in the market; that inasmuch as, however, in some cases these employees might deem it for their interest to receive the whole of their pay in money, the true intent and meaning of the act would generally be best consulted by acquiescing in their wishes; that such an acquiescence would not conflict with the public interests, and would be dealing with these parties in the spirit of kindness and generosity which should always characterize the relation of the service to this humble class of dependents. XXVI, 296. (But see 2, as to the discontinuance of under-cooks.)

UNITED STATES AS BAILEE OR TRUSTEE OF FUNDS OF SOLDIERS.

1. Of sums of local or other bounty collected for, or from, soldiers, by its officers, and placed by them in bank, the United States is merely bailee, liable only for the safe custody of the same, and payment to rightful claimants, on proof of ownership. As such general bailee there is no reason why it should not transfer the deposit of such funds from the banks to its public treasury, as a special deposit or otherwise, especially when, after a lapse of a reasonable time, such moneys remain uncalled for by the owners. But in a case where a large amount of such funds was held in bank by a department commander—*advised*, that he be required to publish a list of all such moneys, specifying the names and designations of the parties to whom the same were supposed to be due, and calling upon the latter to appear and make good their claims within a certain time named; and that the sums still remaining uncalled for after such time be paid into the treasury. XII, 536.

2. A recruit, on enlisting, received both a bounty from the United States and a local bounty, and immediately deserted, as it appeared to have been his intention to do from the outset. He was arrested, tried, and sentenced, but his sentence did not impose a forfeiture of bounty. Upon his arrest, the amount of both bounties, found in possession of the prisoner, was deposited in the hands of an officer, who, upon the accused being placed in confinement pursuant to his sentence, applied to be instructed as to what disposition he was to make of the monies in his hands. *Advised*, as follows: 1. That the *United States* bounty, having been obtained by fraud, would have

been recoverable at law by the government; and that, having come into the possession of the government by lawful means, it might legally be retained; that. in accordance with circular of the Provost Marshal General's office of June 25, 1863, it should be paid over to the nearest disbursing officer of the United States for transmission to the Second Auditor of the Treasury. (See XIV, 389.) 2. That the *local* bounty money, not having been forfeited by the sentence, could not, though obtained by fraud, be forfeited or appropriated by the government, which had no right to add to the formal punishment imposed by the court and judged by it to be adequate to the offence; and that this money, which belonged to the prisoner alone—the locality having duly received a credit for him as a recruit upon its quota—might properly be placed in the hands of the commandant of the prison, to be disbursed or employed for the prisoner's benefit, in accordance with the prison regulations. XV, 128.

3. It is the general rule of law that a bailee can no more dispute the title of his bailor than a tenant that of his landlord; but this rule is subject to exceptions; and it is held that the bailee may in good faith give up the deposit to a person other than the bailor when such person is the rightful owner; and may relieve himself from liability in an action brought by the bailor, by showing that such person had the paramount iitle—as where the property had been obtained from such person by the bailor, by felony, force, or fraud. (See 1 Parsons on Contracts, 678; *Bates* vs. *Stanton*, 1 Duer, 79.) So where the United States was bailee (through its officer charged with the deposit) of certain bounty and other specific money, taken from a recruit upon his enlistment under the requirements of General Order, No. 305, of the War Department, of Dec. 27, 1864; and it was shown that this money was obtained by *fraud* by this recruit, who was a substitute, from his principal and from the local authorities, by means of falsely representing himself as a proper person to enter the service, when in fact he was at the time already in the service and a deserter therefrom—*held*, that (as the locality could not, under the circumstances, receive a credit for him as a recruit) the United States, as bailee of such moneys, might properly pay over the same to the parties from whom they were so obtained; but that the officer charged with the deposit should be authorized and required to take security, upon such payment, for his own indemnification and the protection of the United States. XVI, 386; XVII, 471.

4. Where an officer who had been intrusted with a large amount of the bounty monies of substitutes, &c., assembled at a draft rendezvous, upon their being placed under his command to be conducted to their regiment, subsequently made way with the same, was convicted of the embezzlement thereof, and sentenced to be compelled to refund the whole amount and be imprisoned till the same was refunded, but did actually reimburse no part of the same—*held*, upon an application by these men for relief and repayment: 1st, that an appropriation could not be made for this purpose out of the so-called "post fund," (consisting of the retained bounty money of men who had deserted, accumulated at the draft rendezvous mentioned, or at any other

inasmuch as such fund, never having been forfeited by law, was not the property of the government, but only held by it as bailee for the real owners; 2d, that under existing laws no such appropriation could be made by the Secretary of War out of any government funds whatever; 3d, that the parties were clearly entitled to relief—the money not even having been placed by them in the hands of the government voluntarily and for safe-keeping, but having been taken from them by compulsory orders; that the government, by taking the funds, had constituted itself a trustee of the same for their benefit, and could not relieve itself of the obligation by showing that the funds were lost or embezzled by its officer; but that, in the absence of any specific law or appropriation authorizing their payment, relief could be afforded them by Congress alone. XI, 620. And see XVI, 135.

5. Where, in accordance with General Order, No. 305, of the War Department, of Dec. 27, 1864, certain local bounty money had been taken from a recruit upon his enlistment, and, upon his desertion presently after, remained in the hands of the government—*held*, that the government could not appropriate the sum as its own property, being simply the bailee of the amount; that the fact that the party was a *deserter* could impair in no manner his right of property in the money, and could vest no such right in the United States. XVI, 595; XXV, 400.

6. *Held*, that the United States was not entitled to appropriate to its own use the amount represented by certain bounty checks, which had been deposited by a military officer in a bank for the use of certain soldiers to whom they were made payable, (and who had not indorsed them,) although these soldiers had deserted from the service. Such checks, in the absence of any law forfeiting the same to the United States as the money of *deserters*, remained the property of the soldiers, and the government was merely the bailee thereof for their benefit. XVI, 168.

*7. Where certain local bounty money of a soldier was taken and held for him by an officer of the Provost Marshal General's department under the regulations then existing—*held*, that a court-martial, in convicting such soldier of a military offence, could not legally sentence him to a forfeiture of such money; the same not being money due or payable to him by the United States, but money actually paid him (or for him) as the consideration of an executed contract between him and an individual or individuals, and therefore belonging to himself. *Held*, further, that the fact that the government, through its officer, was in possession of the funds as bailee, could not add to the authority of the court in the case. The bailment was limited to the purpose for which it was resorted to, viz: the mere temporary holding of the amount as a measure of police; and beyond this the government had no authority or power of disposition over it. XXII, 642.

*8. Certain recruits were paid local bounties as the consideration of their entering the service as part of the quota of a district; and were thereupon formally enlisted by the proper officer. On their subsequent arrival at the regimental depot they were examined and rejected on account of disability existing prior to enlistment, and

were discharged. There was no allegation of any fraud practised by them in concealing any such disability at the time of their enlistment. *Held*, that the amounts of their bounties (temporarily retained in charge by the government in accordance with the rule then prevailing) should be paid to them; that, in the absence of fraud, (in which case the return of the funds, to the localities which paid the same, might have been justified,) the money belonged to the men alone; and that the United States could have no property whatever therein; that the localities indeed might have their action against the recruits on the ground of the failure of the consideration of their contracts; but that this circumstance could not affect the obligation of the government to pay over the monies to the individuals;—that the government in this case should—upon the discharge of the soldiers—have notified the localities, cancelled the credits on their quotas, and called upon them for new men; and that, in not doing so, it lost the only remedy of which it could have availed itself. XXIII, 478.

SEE NINTH ARTICLE, (7.)
THIRTY-NINTH ARTICLE, (2,) (3.)

UNITED STATES DISTRICT ATTORNEY.

SEE COUNSEL, I.
PROCEEDINGS AT LAW AGAINST OFFICERS, &c., (3,) (4,) (11.)

USAGE.

SEE NINETY-NINTH ARTICLE, (23.)
ARREST, I, (4.)
CUSTOM OF THE SERVICE.
JUDGE ADVOCATE, (12.)
MILITARY COMMISSION, I, (1,) (3.)
OFFICER OF THE DAY, (2.)
ORDER, I, (5.)
PARDON, (5,) (10.)
PUNISHMENT, (1.)
REPRIMAND, (1.)
REVIEWING OFFICER, (2.)
SENTENCE, I, (1,) (4,) (5.)
STENOGRAPHER, (2.)
STOPPAGE, (2,) (3.)
TRANSFER, (3.)

USING DISLOYAL LANGUAGE.

SEE NINETY-NINTH ARTICLE, (21.)
MILITARY COMMISSION, II, (5.)

V.

VACANCY.

See DISMISSAL, II, (1;) III, (6,) (7.)

VARIANCE.

1. Where the word *feasible* in a letter was written *possible* in a specification embodying the letter—*held* an immaterial variance, as it could in no way result to the prejudice of the prisoner, the portion of the letter in which the word occurred constituting no part of the gravamen of the offence. IV, 368; V, 289, 315.

2. It is a fatal variance (unless corrected upon a reconvening of the court) where the prisoner arraigned is *Daniel* Norris, while the one sentenced is *John* Norris. VIII, 666; IX, 134. So, where the accused was charged and arraigned as James Cunningham, but was sentenced under the name of John Moore. XVII, 601.

3. So where one was arraigned and pleaded guilty as *George* Sheldon, but was found guilty and sentenced as *Charles* Sheldon. IX, 27.

4. So where the specification charges that Corporal *Woodworth* committed the offence, but the sentence is pronounced upon Corporal *Woodman*. II, 555.

5. It is deemed to be established by the weight of authority that the middle name or initial is no part, in law, of a Christian name; and that a plea of misnomer, where the variance consists in the middle letter alone, cannot be sustained. So where a party was charged and arraigned as *Ira E. Freeman*, (his true name,) but was sentenced as *Ira W.* Freeman, *held* that the validity of such sentence was in no respect affected; and (the court having been dissolved, so that the clerical error could not be corrected) that it might properly be published in orders as the final judgment in the case of *Ira E. Freeman*. XIII, 481.

6. Where, under a charge of murder, the specification set forth that the crime was committed on the 24th of September, 1863, but the evidence (which fully established the commission of murder in the first degree) showed that it occurred on July 26, 1863, and the accused (who was convicted and sentenced to be hung) took no exception on account of this variance—*held*, that it was not such a fatal one as to affect the validity of the proceedings. (See General Order of the War Department, of June 9, 1853.) But *advised* in such case, that the court, if not dissolved, be reconvened in order to make a special finding, in terms substituting the proper date for the one indicated in the specification. XIII, 361.

7. Where, under a charge of "horse-stealing," the specification set forth that the horse was the property of the United States, and

the proof was that it was the private property of an officer—*held* a fatal variance, and that the finding of guilty and the sentence should be disapproved. VI, 203.

SEE POSTPONEMENT, (2.)

VETERAN RESERVE CORPS.

SEE NINETY-SEVENTH ARTICLE, (5,) (8.)
INVALID CORPS.

VETERAN VOLUNTEER.

1. One who, though charged with desertion, was convicted of absence without leave only, and sentenced merely to a forfeiture of pay for the period of his absence—*held*, eligible for re-enlistment as a *veteran volunteer*, and entitled to bounty, &c., upon such re-enlistment. VIII, 400; VIII, 441, 443.

2. Where a soldier, upon conviction for "sleeping on his post," was sentenced to forfeit all pay, allowances, and bounties, and be confined at hard labor during the remainder of his term of three years, and, before the expiration of his term, the unexecuted portion of his sentence was remitted by the President, and he released and returned to duty with his regiment—*held*, that this pardon entitled him to an honorable discharge and bounty upon his re-enlistment as a veteran volunteer. XIII, 27.

3. The only case contemplated by General Order 191 of the War Department, of June 25, 1863—besides that of an honorable discharge at the end of his full term—in which a veteran volunteer can receive the full and final bounty therein specified, is that of his honorable discharge, (*before* the expiration of such term,) for the reason that *his services as a soldier are no longer required* by the government. But where the discharge, though honorable, has resulted from any other cause, as from promotion to the position of commissioned officer, the veteran soldier is entitled only to such proportions of the bounty and premium as may have accrued at the date of discharge. XII, 548.

SEE SIXTY-FOURTH ARTICLE, (7.)
MUSTER OUT, (3.)

VIOLATION OF ARTICLE OF WAR.

SEE CHARGE, (6.)

VIOLATION OF THE LAWS OF WAR.

[All the paragraphs under this title relate to cases which occurred during the rebellion and at a period of active hostilities.]

1. Where an accused is charged with a violation of the laws of war, as laid down in paragraph 86 of General Orders No. 100, of the War Department, of April 24, 1863, promulgating Professor Lieber's treatise

entitled—"*Instructions for the government of the armies of the United States in the field;*" it is no defence that the actual offence for which he was tried was committed before the date of the order; the latter being merely a publication and affirmance of the law of war as it had previously existed. VIII, 53.

2. A recital in the specification that the accused, "being a confederate soldier, came within our lines," cannot be held to sustain a charge of violation of the laws of war as laid down in paragraph 86 of General Order 100, of 1863. It is not alleged that the accused held intercourse with our citizens; and the offence, as laid, is no more than that which might be committed by any rebel prisoner captured within the lines of our forces, and who would thereupon be entitled to be treated as a prisoner of war, and would not be triable by military commission. VIII, 274; IV, 213.

3. In the case of a citizen of Baltimore, arrested while attempting a violation of the laws of war by swimming the Potomac for the purpose of joining the enemy beyond our lines, and engaging in overt acts of treason and rebellion in their service—*held*, that though he had committed no offence strictly cognizable by a military tribunal, yet his act brought him so far within the control of our criminal courts as to authorize his being placed under legal surveillance. *Recommended*, therefore, that he be ordered before the proper United States judge, and required to enter into a bond, with sufficient sureties, obliging him to desist from any attempt to join the enemy, or engage in or in any way aid or abet the rebellion; and that at the same time the oath of allegiance be administered to him. And, further, as the accused was a highly disloyal character, and one who, if released, would probably join the enemy at the first opportunity, *recommended* that the privilege of the writ of *habeas corpus* be suspended in his case until disposed of before the United States judge in the manner suggested. III, 255.

4. Prisoners taken with arms in their hands, who had previously, under the President's amnesty proclamation, taken the oath of allegiance, are not to be treated as prisoners of war, but should be brought to trial at once by military commission for violation of their oath of allegiance and of the laws and customs of war. VII, 678.

5. Where a party had laden his vessel with goods which he intended to convey to the enemy, had made complete arrangements for reaching the disloyal States, and had sailed from port and was on his way to the place where he had agreed to deliver, and, but for his capture, would have delivered the goods—*held*, that the fact that he did not succeed in carrying out his purpose did not modify the character, nor lessen the degree, of his offence—of violation of the laws of war in engaging in a contraband trade. VII, 413.

6. Recruiting for the rebel army within our lines by rebel officers or agents is not an act of war, but a clear violation of the laws of war. The commission of the officer, detected in the perpetration of this crime, furnishes no more protection against a prosecution before a military court than it would afford in the case of a spy. Parties have been frequently sentenced to a severe punishment for this crime;

and in the cases of two conspicuous offenders a sentence of death adjudged by a military commission was approved by the President and carried into effect. XI, 290. See IV, 329.

7. The offence of proceeding toward the territory of the enemy with the intention of entering it, in a case where the entering was prevented by the vigilance of our military authorities—*held*, not a violation of paragraph 86, Order 100, of 1863, which contemplates actual intercourse with the enemy, by means of travel or otherwise. IX, 283.

8. A woman who forwarded from Baltimore to an officer in the rebel army a sword, which she had caused to be purchased for him, and toward the price of which she had contributed—*held*, triable by military commission for a violation of the laws of war in aiding the public enemy by furnishing him with arms, although the sword was seized by our military authorities before it reached the rebel lines. So *held* of the party who, at the request of this woman, personally made the purchase of the sword at New York city, and caused it to be forwarded to Baltimore; of the party at Baltimore to whom it was consigned, and who accepted the consignment; and of the party who stored it temporarily at her house; each of these three parties being represented to have been well aware of the destination of the arm. At every stage of the transit of this sword, all parties who, knowing its destination, engaged or assisted in forwarding it, were guilty of a grave offence, and one calling for a severe punishment. X, 567.

9. Packing contraband goods and transporting them to the Maryland shore of the Potomac river, with the avowed intention of conveying them within the territory of the enemy on the opposite side, constitutes a violation of the laws of war as laid down in paragraph 86 of General Order 100, of 1863. XIII, 125.

10. But where, under a charge of violation of the laws of war as laid down in said paragraph, it was shown that, though the accused contracted to convey a person across the Potomac to the enemy's lines in Virginia, and held himself in readiness to perform his engagement, yet afterwards, upon this person's objecting to proceed, he had abandoned altogether the intention to commit the specific offence, and the actual conveyance was not even commenced or entered upon by him—*held*, that the crime charged could not be deemed established by the testimony. XII, 295.

11. Though it is a technical violation of the laws of war for a rebel chaplain to come without authority within our limits to purchase Bibles, yet, in a case where this appeared to have been his only object, *advised*, that a sentence imposed upon such a chaplain, on conviction of this offence, might properly be remitted upon his taking the oath of allegience, and giving a bond, with sufficient surety, for his loyal conduct in the future. XI, 553.

12. Certain parties left Scotland early in the war and proceeded to South Carolinia, where they were for a long period employed, under an engagement with the rebel authorities, as lithographic printers in the manufacture of "confederate" treasury notes. At the end of

their term of employment they came secretly and without authority into our lines with the design of returning to their homes, and were arrested. *Held*, that, though British subjects, they had identified themselves with the cause of the rebellion, and were to be treated as public enemies, and that, therefore, they were properly triable for the offence of penetrating our military lines in violation of the laws of war. XV, 112.

13. It is a violation of the law of war interdicting all intercourse with the enemy for persons at the North to pay drafts in favor of a rebel, though voluntarily drawn at the South by federal prisoners of war, to whom, when reduced to destitution by neglect and cruel treatment, the payee had loaned money. So, for a banker at the North to hold, as agent for such rebel and for his benefit, the proceeds of any of these drafts which may have been paid. XIV, 241. See PRISONER OF WAR, 11, 12. And see XI, 651.

14. Where drafts were drawn by federal prisoners of war at southern prisons, in favor of rebel officials and others, on persons at the North, in payment of loans made to them by such officials at exorbitant rates, but which rates the drawers, being in a starving or destitute condition, had agreed to pay—*held*, that these drafts, as the property of rebels, and drawn and originated for their sole use and at their procurement, must be viewed as giving aid and comfort to the enemy, in violation of the laws of war, and as such might properly be *destroyed* when seized by our military authorities. XI, 651.

15. The *status* of war still (December, 1865) exists and must continue to exist until the political authority of the country shall enact or duly declare that it is terminated. So, where a citizen of Virginia, actuated only by hostility to the government, fired upon a United States wagon train passing through a part of that State—*held*, that he was triable therefor as an act, in the nature of guerilla warfare, in violation of the laws of war. XXI, 101.

16. Parties at the North who not only *manufactured* but *sold* certain property intended for the use of the rebels, viz: buttons stamped with southern devices, &c.—*held*, triable by military commission for a violation of the laws of war in engaging in commerce with the enemy. If such parties had only manufactured these goods it might be doubted if they were so triable, for, till the goods were actually disposed of, a *locus poenitentiæ* might be held to remain to them. But by the sale the crime was consummated, for the articles were then put upon their transit to the enemy. Neither the fact that the parties did not deal with the enemy directly, (the sales being made to merchants at Baltimore, New Orleans, &c.,) nor the fact that it was not shown that any of the commodities actually reached the enemy, can affect their responsibility in law. For, under the circumstances, it must be held to be as clear that the goods left the parties with the design that they should reach the enemy, as it would have been if they had been addressed to some officer of the rebels within their lines; and this design is the gist of the offence. XI, 647.

SEE CONFISCATION, (15.)

17. Where certain rebels took possession of a passenger steamer, upon Lake Erie, by rising upon the officers and crew—robbed the clerk of a considerable amount of money—threw overboard part of the freight, and put all on board under duress—and, further, seized upon and scuttled another steamer by approaching and attacking her in the one first captured—(these steamers and the freight thereon being the property of private individuals, and in no way pertaining to the government)—*held*, that their acts were those of banditti or guerillas, and that, though in the rebel service, they were not entitled to be treated as prisoners of war, but should be tried by military commission for a violation of the laws of war. XI, 473.

18. Where an "acting master's mate" of the so-called rebel "navy," acting under the express instructions of the rebel secretary of the navy, embarked, with other officials of the same service, upon a United States merchant steamer, in the disguise of ordinary passengers, (but secretly armed and provided with manacles,) with the intention of rising upon and making prisoners of the officers and crew of the vessel, when she had put to sea, capturing her and her cargo, and converting her into a rebel cruiser to prey upon our commerce—*held*, that the disguise and concealment of their character as enemies, and the secret and treacherous nature of the enterprise, as well as the steps taken towards its execution, clearly rendered the accused and his confederates triable for a violation of the laws of war. And *held*, that their acts no less constituted such violation, although their purpose was not fully carried out; inasmuch as the deliberate and elaborate preparation which they were shown to have made to secure the success of their plot forbade the presumption that they would have taken advantage of any *locus poenitentiæ*, or abandoned a scheme the consummation of which was clearly only prevented by their arrest by a superior force. XII, 662. And see XVII, 550; XX, 423.

19. Where certain cotton of an incorporated company in Georgia which had been, during the rebellion, engaged in blockade running and contraband trade, was captured by our military forces, and had become the property of the United States by the law of war—*held*, that the crime of stealing, as well as of conspiring to steal and appropriate, such cotton, committed by an unpardoned rebel, who at the same time was a paroled military prisoner of the United States, was properly triable, in time of war, by military commission in the locality named. XVIII, 599.

*20. Certain rebel soldiers were detailed by their regimental commander, by a separate order or paper given to each personally, to go to their homes in Barbour county, West Virginia, "to get horses," and to report within a number of days named. The several orders of detail were indorsed "approved" by their brigade commander. They proceeded to the locality specified; engaged in stealing or attempting to steal horses from citizens; and were pursued by some members of a home guard in the State (not United States) military service. Shots were interchanged, and three of the guard were killed by the rebels. *Held* that the detail could not properly be viewed as an order requiring the latter to go within our lines and

seize horses, as spoil of war, for their government; but should be regarded rather as granting leaves of absence to the parties, individually, for the purpose of enabling them to procure horses for their individual use, and on their own accounts, as by purchase or from their homes or friends; that the act of these soldiers in coming within our lines under these circumstances was a violation of the laws of war; and that the killing by them was murder. (This conclusion strengthened by the fact, as gathered from the testimony in the case. that the members of the brigade—Imboden's—to which these soldiers were attached, were in the habit of furnishing their own horses, instead of receiving them from the rebel government.) XIX, 655.

*21. Where an emissary of the rebel government left the rebel lines and entered within those of the United States forces—after taking an oath of allegiance to this government—for the purpose of engaging in the burning and destruction of steamboats and other property, and did actually engage in such burning on the Mississippi river—*held* that his proceeding was not a legitimate act of war, but a violation of the laws of war, analogous to the crime of the spy; that the fact that he was employed by the superior authority of the rebel government was no defence, for even soldiers (the accused was a citizen) committing acts in violation of the laws of war cannot screen themselves behind their superior officers; and that he was properly tried for his offence, and convicted, by a military commission at St. Louis. XXI, 280.

*22. Where a party availed himself of a flag of truce to bring within our lines rebel securities, (cotton bonds of the rebel government,) *held*, that he was guilty of a violation of the laws of war, and was amenable to trial and punishment therefor. XIX, 673. See FLAG OF TRUCE, 3.

SEE CORRESPONDENCE WITH REBELS, I.
MILITARY COMMISSION, II, (33;) V, (2.)
PAROLE, (1,) (2.)
PAROLED PRISONER, (3.)
REFUGEE.
TREASON, (1.)

VOTE OF MAJORITY OF THE COURT.

SEE TRIAL, (8.)
PROTEST.

VOTE OF SOLDIERS.

SEE DISMISSAL, I, (11.)
MILITARY COMMISSION, II, (31.)

W.

WAIVER OF DEFENCE.

See ESCAPE, (1.)

WAR POWER.

See FIFTY-SEVENTH ARTICLE, (4.)
CONTRACTOR, II, (7.)
JURISDICTION, (14.)
MILITARY COMMISSION, II, (30,) (31.)

WITHDRAWAL OF CHARGE.

A mere withdrawal of the charges in the case of an officer constitutes no legal bar to their being subsequently preferred against him; and that course should be pursued, provided the interests of the service require it. XI, 202.

See EIGHTY-SEVENTH ARTICLE, (3.)
CHARGE, (18.)
COURT MARTIAL, I, (3.)
NOLLE PROSEQUI.

WITNESS.

1. The judge advocate, the president, or any member of the court, may testify as a witness, either for the prosecution or defence. See JUDGE ADVOCATE, 20. VII, 202; XI, 299.

2. Although but the *minimum* number of members be present upon a military court, a member may still testify as a witness without affecting the validity of the proceedings. For in so testifying he does not cease for any moment to be a member. See VII, 202; XI, 299.

3. Where a witness having given his testimony and been dismissed from the stand, afterwards returned and requested permission to change it in some particular, which was not disclosed, and his request was refused by the court, such refusal should be held to invalidate the proceedings, unless, from the whole record, it can be concluded that, beyond all doubt, the defence of the accused was not prejudiced by this irregular action of the court. VII, 447.

4. It is the duty of the judge advocate to give certificates to witnesses, whether officers or citizens, showing the time they have been

in attendance; and it is for the quartermaster department to determine all questions as to their compensation which may arise upon these certificates or otherwise. I, 448; VIII, 88; XXV, 503. The same compensation is to be paid witnesses summoned before military commissions as to those before courts-martial. (See amended regulation, page 516, edition of Army Regulations of 1863.)

5. The judge advocate should not refuse the certificate in the case of any witness, civil or military, who has duly attended as such. If the certificate does not present such a case as entitles the party to compensation, it is the function of the disbursing officer to withhold payment. The act of February 26, 1853, has been decided in the Treasury Department not to affect the claim of an employee of the United States government to his proper allowance as a witness before a *military* court. V, 475.

* 6. To entitle a witness to his fees, as such, it is—though customary and regular—not absolutely essential that he should produce a formal subpœna requiring him to testify; it is sufficient if it appears from the official certificate of the judge advocate that the party actually attended the trial either as a witness for the prosecution or the accused at the instance of the judge advocate. But the mere fact that the witness came into court on his own account and responsibility, proposing to be a witness, would not entitle him to any fees. XXIII, 196.

7. The certificate of the judge advocate as to the attendance of a witness cannot properly embrace a period anterior to the date of his being summoned as such; for his attendance under the orders of the government prior thereto, he can be paid only from the proper contingent fund by special authority of the Secretary of War. XVI, 518.

8. *Recommended* (March, 1863) that the witnesses confined by military authority at Fort McHenry for twenty months to await the trial of Zarvona before a United States court be released on their personal recognizances; and that the United States attorney at Baltimore be instructed to have a *subpœna* issued for them, and served before their discharge, in order to render formal and obligatory the recognizances which it is proposed they shall execute. Further, that, as an act of simple justice, these witnesses be paid a reasonable *compensation* for the long period of time which they have lost by the confinement to which they have been subjected, inasmuch as no such allowance can be made by the court, because they have not been formally summoned,—being held in military custody and beyond the reach of civil process. II, 88.

9. In the case of persons held, by the military authorities, in confinement as witnesses for any considerable time prior to the convening of the military court before which their testimony is designed to be introduced, (and thus for a period which the certificate of the judge advocate cannot cover,) it has ordinarily been recommended by this Bureau that they should be paid a suitable compensation for their detention. V, 160; XVIII, 590. And it was *advised* that such compensation would equitably be paid to a party so detained *after* as well as before the period which would properly be covered by the

judge advocate's certificate of his attendance as a witness. XIX, 697. In the United States civil courts a witness, held as such in confinement, is allowed $1 *per diem*, over and above his subsistence. But in such courts a witness for his attendance receives but $1 50 *per diem*, whereas $3 are allowed him by the *military* law. If a rule could therefore be derived from an analogy to the action of the civil courts, the allowance to a witness detained by military authority would be $2 *per diem*. See XXI, 460.

* 10. Where a witness before a military court claimed, in addition to the fixed compensation of $3 *per diem*, provided by law, to be indemnified for the loss of time and injury to 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. XXII, 264.

*11. Certain persons were summoned to appear, and did appear and make statements, before an officer charged with the investigation of the case of a party about to be tried by a military court; and, in compliance with this officer's order, did further report to him from day to day till the close of the trial, but were not summoned as *witnesses*, and gave no testimony whatever before the court; *held*, that while not strictly entitled to the *per diem* allowance for witnesses, established by par. 1139 of the Army Regulations, they were nevertheless *equitably* entitled to such compensation as might properly be allowed them in consideration of the loss of time, damage to business, &c., to which they had been actually subjected. XXI, 463.

12. To entitle to *mileage* a witness summoned from a distance to attend a military trial, the summons must be properly complied with by him; and where a long delay occurred in the case of a witness so summoned before he appeared in court, *held*, that it devolved on him to show that he had used due and reasonable diligence in complying with the summons; and that unless such diligence was shown, he was not entitled to mileage. XX, 75.

13. Where a witness is in attendance before a military court in more than one case at a time, he is entitled to his mileage and *per diem* allowance in but one. IX, 672. (See General Order 278, of the War Department, of November 7, 1864, to this effect, issued after the date of this opinion.)

14. The exercise of a discretionary power by a military commander in detaining a witness in custody may be deemed a substituted equivalent for a summons, so far as those rights are concerned which accrue to the witness touching compensation for attendance. VIII, 88.

15. If the judge advocate declines to summon as a witness an officer of the army, because not satisfied that it is proper to do so under paragraph 890 of the Regulations, the court may still order the summons to be issued, if it disagrees with the judge advocate. XIX, 35. And if the court determine that such witness is material and that his

attendance is required, the government should not interpose to prevent his attending, unless the interests of the service make it necessary that he should not leave his command or post of duty. In that event his testimony should be taken by deposition. See XIX, 35.

16. It is not a valid objection to the regularity of the proceedings of a court-martial that the court, in time of war, refused to cause to be summoned, at the request of the accused, a witness residing without the federal lines, who was also generally reputed a disloyal man. VII, 184, 201.

17. The jurisdiction of a military court being coextensive with that of the United States government, a summons may be sent therefrom to any witness within the limits of the federal domain. XI, 234.

18. *Held*, (June, 1864,) that negroes were competent to testify before *military* courts, notwithstanding any disqualifying statute or custom in force in the State in which the court was held.† IX, 225.

19. For the court to refuse postponement to enable the accused to introduce absent witnesses, when his application is not based upon an affidavit of the character described in paragraph 887 of the Regulations, is not an irregularity. VIII, 662.

20. Where a question is put by the accused to a witness, the answer to which, if affirmative, would criminate him, it is for him alone to decide that he will avail himself of the privilege of not answering it. It is not for the judge advocate to check, or for the court to exclude, without consultation with or reference to the witness, the interrogation. XI, 220.

*21. A witness on the part of the prosecution, having been once duly sworn, need not be resworn on being recalled as a witness for the defence. XXVI, 310.

*22. Upon a trial before a military court the prosecution is not restricted to calling such witnesses only as may have been named in the list of witnesses customarily appended to the charges when served upon the accused, but may place upon the stand such other witnesses as may be deemed proper. See XXV, 350; ARREST, I, 9.

23. In the case of witnesses duly summoned who refuse to attend, the judge advocate is authorized, by the act of March 3, 1863, chapter 79, section 25, to issue, for compelling their attendance, a process of attachment similar in form to that authorized by the local law of the venue of the trial; and the officer or person appointed to serve such attachment is justified in using the needful force to arrest the witness and compel his obedience to the process. IX, 208, 278; XI, 234; XIX, 296. But the legislation on this subject has at this date (July 1, 1868) gone no further than to invest the judge advocate with this authority. This section does not confer upon military courts

† NOTE.—See the act passed since the date of the above opinion—of July 2, 1864—ch. 210, sec. 3, providing "that in the courts of the United States there shall be no exclusion of any witness on account of color." See further the act of April, 9, 1866, ch. 31, known as the "Civil Rights bill," providing, among other things, "that citizens of every race and color, without regard to any previous condition of slavery or involuntary servitude, shall have the same right in every State or Territory in the United States to give evidence, as is enjoyed by white citizens."

the power to punish the witness for his default in not obeying the *subpœna*, by fine and imprisonment, which is exercised by the ordinary criminal courts. The right of a court-martial to *punish*, as for a contempt, a party disregarding or resisting its authority is confined to cases of misconduct specially designated in the 76th article. IX, 208, 278; XXI, 215. *Held*, that a commanding general was not warranted in refusing to permit an officer or soldier under his command to comply with process issued, for his attendance as a witness before a court-martial, by a judge advocate, under the authority of sec. 25, ch. 78, of the act of March, 1863. VII, 172.

24. To incapacitate a witness for "*infamy*," the record of his conviction of the crime constituting the infamy must be produced. The mere fact that the witness offered was a rebel officer, who resigned from our army to enter the service of the rebels, is—should the government allow him to appear before the court—not sufficient to disqualify him from testifying—he not having been tried or convicted for this treason. The fact that a pardon is necessary to restore the witness to his *political* rights and to remove a *political* disability, is a matter which goes to his credibility, but not to his competency. XI , 560.

25. In a case in which it was desired by the accused, a rebel, to summon as witnesses upon his defence two chief administrative officers of the late rebel government—*advised*, (December, 1865,) that no sufficient reason was perceived for departing from the practice heretofore ordinarily observed, of refusing to issue summonses for the attendance before our military courts of witnesses belonging to this distinct and conspicuous class of offenders; that, as the officers in question were notorious as unpardoned and unrepentant traitors, the government might well consider that it would dishonor itself by calling into its courts such malefactors as witnesses, and thus evincing a willingness to administer public justice on the basis of their testimony. XIX, 267.

26. A commission issued from a State court to a notary public in Washington cannot, *ex proprio vigore*, invest such official with authority to compel the attendance before him of a witness resident in Washington, whose deposition is desired to be taken—the notary having no judicial or other power whatever, either under the commission or otherwise, to issue process of contempt, or in any manner require the witness against his consent to attend. Whether the latter will or not appear is a matter purely within his discretion alone. So *held*, (January, 1866,) in the case of such a commission issued to take the testimony of the Adjutant General and the Provost Marshal General at Washington, that they were justified in exercising their discretion in the matter by declining to attend and give their testimony before the notary; that this discretion was so exercised with a peculiar propriety in the case of administrative officers of the government occupying their position, and in a case in which the design was to procure testimony from their official records, or in their knowledge, as such officers; and that their determination should be held

final, both as to the notary and the authority issuing to him the commission. XIX, 313.

* 27. Upon the trial of an officer charged with having consented at a social entertainment to drink the joint healths of "Andrew Johnson and Jefferson Davis," which had been proposed—by way of a toast—by an ex-rebel officer present, a witness, then a commissary's clerk, but since appointed a postmaster, testified that he himself stood aside and drank the toast, although a United States officer present (other than the accused) sprang up and dashed the glasses from the hands of all those present, except the witness; *recommended*, (July, 1866,) that a statement of the name of the latter and of his testimony be furnished the Postmaster General for his information and action. XXI, 554.

SEE SEVENTY-FIRST ARTICLE, (1,) (2,) (11.)
BOARD, (5,) (6.)
BOARD OF EXAMINATION, (1.)
BOARD OF SURVEY, (2.)
CHARGE, (21.)
COURT-MARTIAL, I, (4.)
DEPOSITION.
EVIDENCE, (4,) (16,) (17,) (18,) (20,) (21,) (22,) (25.)
INTERPRETER, (2.)
MEMBER OF MILITARY COURT, (1.)
PERJURY, (1.)
PRISONER OF WAR, (14.)
RECORD, IV, (15,) (16;) V, (1,) (3,) (7.)
RETIRING BOARD, (4.)

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