

DIGEST OF
OPINIONS
OF THE
JUDGE
ADVOCATE
GENERAL
OF THE
ARMY

1866

A. W. Lyford



DIGEST OF OPINIONS

OF THE

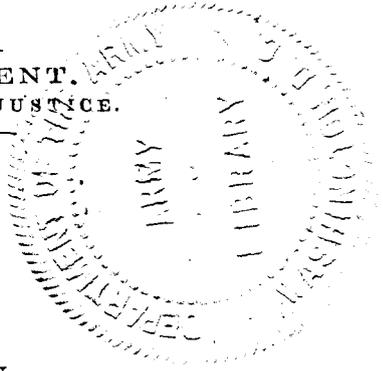
JUDGE ADVOCATE GENERAL

OF THE ARMY,

INCLUDING

OPINIONS GIVEN SINCE THE ISSUE OF THE DIGEST
OF 1865, TOGETHER WITH THOSE CONTAINED
IN THAT EDITION.

WAR DEPARTMENT.
BUREAU OF MILITARY JUSTICE.



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A.

A R T I C L E S O F W A R .

FIFTH ARTICLE.

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, does not constitute a violation of this article. Such language, however, when assuming a decided tone of disloyalty, forms a proper ground for a summary dismissal. V, 491.

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.

SIXTH ARTICLE.

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, (4.)

NINTH ARTICLE.

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.

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. 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. 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. 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.

5. 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 turn over 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 com-

petent 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 NINETY-NINTH ARTICLE, (17.)

FINDING, (21,) (22.)

TENTH ARTICLE.

SEE ENLISTMENT, I, (1.)

ELEVENTH ARTICLE.

The muster-out of service of an officer 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.

SEE APPEAL, (1.)

FIFTEENTH ARTICLE.

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.

SEE FIFTEENTH ARTICLE, (2.)

TWENTIETH ARTICLE.

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 *clothing* may well be held to be a part of a soldier's pay in the sense of this article. The

receipt, therefore, of clothing from the United States by a soldier charged with a violation of this article, estops him from denying that he is in the military service, and is sustaining the character he has thus assumed. V, 103; XIX, 268. See ENLISTMENT, I.

2. The receipt of *rations* from the government by a soldier is, in the sense of this article, the receipt of "pay." V, 146.

3. 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.

TWENTY-FIRST ARTICLE.

SEE ABSENCE WITHOUT LEAVE.

TWENTY-SECOND ARTICLE.

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, (15.)

TWENTY-FOURTH ARTICLE.

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, (and possibly 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.

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-SECOND ARTICLE.

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. It is not competent to enforce the remedial provisions of this article against the men of a regiment chargeable with having destroyed the property of a citizen while *en route* to the place of their final discharge, *after* such regiment has been formally mustered out of the service. XII, 673. See JURISDICTION, (1,) (2.)

SEE STOPPAGE, (2,) (6)

THIRTY-THIRD ARTICLE.

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.

THIRTY-FOURTH ARTICLE.

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, (7.)

THIRTY-FIFTH ARTICLE.

SEE THIRTY-FOURTH ARTICLE.

THIRTY-EIGHTH ARTICLE.

The selling, &c., by a soldier of clothing issued to him, and which has become his own *personal property*, is believed to be not one of that class of offences contemplated by this article, which is deemed to include only those cases in which the act of the soldier necessarily results in pecuniary loss to the United States. It is for such a loss that the article provides a proper compensation by a stoppage of the pay of the accused ; but to stop his pay for an act which, if resulting in such loss, would affect himself alone, could hardly have been designed by the enactment. But where such selling, &c., amounts to a "disorder" in the sense of the 99th article, the soldier would be chargeable under the same for a military offence ; and would probably also be so chargeable in any event under sec. 23, ch. 75, act of March 3, 1863. XXI, 97.

THIRTY-NINTH ARTICLE.

1. "Money," in the sense of this article, means only 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,) 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, (5.) 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 SUB-TREASURY ACT.

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 (besides 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.) And this although his offence may be precisely the same 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 EMBEZZLEMENT.

UNITED STATES AS BAILEE, &c.

FORTY-FIFTH ARTICLE.

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, (6.)

2. 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. *Ibid.*

3. A sentence of corporeal punishment *only* can be imposed upon an *enlisted man* for a violation of this article. IV, 237; VII, 232. A sentence of forfeiture of pay or of imprisonment is inoperative. IV, 379; XIV, 330.

4. Any sentence but that of dismissal, imposed upon an officer for a violation of this article, is unauthorized. VIII, 665.

FIFTY-FOURTH ARTICLE.

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* 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" expresses the gist of the offence of maliciously destroying property specified in this article. So where a court-martial, under a charge for this offence, 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 the accused; *held* that upon this exception being made the accused became entitled to an acquittal; that the charge of which he was actually convicted was one unknown to military law; and that the sentence was irregular and unauthorized. XIV, 341.

FIFTY-SIXTH ARTICLE.

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.)

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, (2 Black, 635,) to the present civil war. The governmental 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 fifty-sixth 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," the former being restricted to certain special commodities by which an enemy in arms would be most directly relieved, and the latter including every kind of commercial intercourse. XIV, 266.

FIFTY-SEVENTH ARTICLE.

1. It is 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. Sec. 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.

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.

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 FORMER TRIAL.
MILITARY COMMISSION, II, (6,) (30.)

SIXTIETH ARTICLE.

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* 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 employés; 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 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) is within the provisions of the 60th article, and triable by court-martial. XIII, 458.

SEE CONTRACT SURGEON.
COURT-MARTIAL, II, (4,) (6,) (7,) (13.)
MILITARY COMMISSION, II, (9.)
PAYMASTER'S CLERK.
RAM FLEET.
SLAVE, (2.)

SIXTY-FOURTH ARTICLE.

1. Where, in the course of a trial, the number of the members of a 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 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.*

4. Where one member of a court composed of five, 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 the court at any time in the course of its proceedings, as during the examination of the witnesses, has been temporarily reduced below the minimum number, the sentence is inoperative. II, 448.

6. In view of the positive and explicit language of the 64th article, *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. 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 second 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* 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.

SIXTY-FIFTH ARTICLE.

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 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.

3. 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. 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.

4. 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.

5. 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; and his right, therefore, to exercise in time of war the power of executing sentences of dismissal or cashiering is undeniable. V, 147.

6. 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.

7. 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.

8. The fact that a general commands a "district" has nothing what-

ever 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 his command be actually an "army," a division, or a separate brigade, determines also whether he may call a court-martial. VII, 237.

9. 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.

10. 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.

11. 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.

12.* 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.

13. 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.

14. 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.

15. 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.

16. The universal interpretation of this article, in connexion 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.

17. 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.

18. The state of war inaugurated by the rebellion must survive in full force until such rebellion shall be formally declared to be terminated by some proclamation or official announcement to that effect issued by the political executive 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.

SEE EIGHTY-NINTH ARTICLE.
REVIEWING OFFICER, (2.)
SEPARATE BRIGADE, (10.)

SIXTY-SIXTH ARTICLE.

1. Where, in addition to the three members required by this article, an officer was detailed upon a garrison court-martial, under the designation of "judge advocate"—*held*, that the constitution of the court was irregular, and its sentence inoperative. I, 456.

2. A captain of a battery company with an isolated command cannot appoint a court-martial, his command not being a "*corps*" in the sense of this article. (See XI, 497.) If in command of a garrison, fort, or barracks, where the troops consisted of different corps, he would have the power to convene a garrison court-martial. I, 491.

3. The presence on duty with the garrison, 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 garrison is composed, is sufficient to empower its commander to order a garrison court-martial. XXI, 118.

4. The presence, on formal duty with a garrison, of an officer of the medical staff, has been held to bring it within the provisions of this article, as consisting of "different corps." XIV, 48.

5. The presence, as part of a garrison, either of an ordnance sergeant or of an assistant commissary of subsistence, would bring the garrison within the provisions of this article, as consisting of different corps, and entitle its commanding officer to summon a garrison court-martial. VII, 175.

6. The commanding officer of an arsenal is not authorized to convene a garrison court-martial, unless his command consist of different corps; and the presence on duty with it of a civil physician acting as a surgeon, and of a hospital matron, does not bring it within the provisions of the article. VIII, 483.

7. Where the garrison was composed in part of veteran volunteers and in part of veteran reserves—both being volunteer infantry—held that the garrison did not "consist of different corps," in the sense of the article. XXI, 118.

8. 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.

9. 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.

10. The records of regimental and garrison courts-martial, equally with those of general courts-martial, may properly be transmitted to the Judge Advocate General for review, under the provisions of section 5, chapter 201, act of 17th July, 1862. IV, 537.

11. 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.

SEE FIELD OFFICER'S COURT, (1), (11), (12.)

SIXTY-SEVENTH ARTICLE.

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 be punished with death. II, 189.

2. 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 power of such court to properly inflict. VII, 36.

SEE FIELD OFFICER'S COURT, (7.)

'SIXTY-NINTH ARTICLE.

1. The disclosure, made in a record, of the vote or opinion of each member of a court-martial upon one specification, is a clear violation of the oath prescribed alike for the court and the judge advocate. II, 59.

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.

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.

SEE RECORD, IV, (3.)
SWEARING THE COURT, &c.

SEVENTY-FIRST ARTICLE.

1. It is a good ground for the challenge of a member of a court-martial, that he preferred the charges and is a material witness on the trial. II, 584.

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 not allowed 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.

3. It is good cause of challenge against a member (in this case, the *president*) of a court-martial, that he signed the charges and is the colonel of the regiment to which the accused belongs. But if he is not challenged, it does not invalidate the sentence that he sat upon the trial. VIII, 534.

4. It is not good ground for the challenge of a member of a court-martial that he is a captain junior to the accused in the same regiment, and therefore interested in the dismissal of the accused as his senior in the same grade. Such interest is too remote to constitute a valid cause of challenge. V, 96.

5. 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.

6. Where a member, upon being challenged, 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.

7. The practice of receiving the statement of a challenged member without putting him under oath is irregular, and should not be countenanced. But the accused, by not interposing an objection to this manner of statement, waives the irregularity. IX, 258.

8. 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.

9. 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.

SEE SIXTY-FOURTH ARTICLE, (2.) (4.)
SEVENTY-FIFTH ARTICLE, (1.)
RECORD, IV, (6;) V, (2.) (9.) (10.)

SEVENTY-FOURTH ARTICLE.

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.

SEVENTY-FIFTH ARTICLE.

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 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., except in cases which, in the opinion of the officer appointing the court, "require an immediate example." Where, therefore, the record shows that the court continued in session after that hour, 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.

SEE SIXTY-FOURTH ARTICLE, (6.)

SEVENTY-SIXTH ARTICLE.

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 appeal for redress to his superior officer, or to the Secretary of War. V, 172.

SEE WITNESS, (22.)

SEVENTY-SEVENTH ARTICLE.

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.

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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.

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 SENTENCE, I, (16.)

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., traveling 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.

1. Making a false report to a superior officer, where the offence is not within the purview of the Eighteenth article, is properly charged as "conduct unbecoming an officer and a gentleman." I, 365.

2. A surgeon who appropriates to his own personal use, and to that of his private mess, the food furnished by the government for his hospital patients, is, 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. 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 connexion with the military service. It is enough that it is morally wrong, and compromises his personal honor. V, 148.

6. A neglect upon the part of an officer to satisfy his private pecuniary obligations, when actually amounting to dishonorable conduct, may render him amenable to trial under this article. XIII, 425.

7. 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.

8. 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.

9. 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.

10. The article requires that, upon conviction, the sentence shall be dismissal. A sentence upon such conviction, 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 SEVENTY-SEVENTH ARTICLE, (5;) See SENTENCE, I, (16.) A sentence of imprisonment at hard labor, under a charge of a violation of this article, *held* invalid. XIV, 330.

SEE FINDING, (18.)

EIGHTY-FIFTH ARTICLE.

1. The publication of the sentence directed by this article is called for only in cases where *cowardice* or *fraud* is expressly laid *eo nomine* as the charge upon conviction of which the accused is cashiered. But the insertion of the publication clause, in other cases, where cowardice or fraud is necessarily involved in the offence charged, and where the punishment is discretionary with the court, will not invalidate the sentence. VI, 239.

2. This article, requiring a publication of the sentence in the special cases of cowardice and fraud, is deemed to preclude, by implication, from its terms, the imposition of such penalty in any other case. *Held*, therefore, that its infliction was irregular in a case in which neither of these offences was specifically charged upon the accused, or was involved in the charges upon which he was tried and convicted. XI, 671.

EIGHTY-SEVENTH ARTICLE.

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; and upon such charge, if the interest of public justice require it, the party may be again arraigned. 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.

SEE FORMER TRIAL.

EIGHTY-EIGHTH ARTICLE.

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 obstacle 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.

EIGHTY-NINTH ARTICLE.

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.

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 five*

paragraphs, the recent 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 PRESENT 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 authorizes generals commanding to restore to their regiments deserters under sentence, (and which applies as well to sentences existing at its date as to those pronounced thereafter,) does 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, empowers 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.
FIELD OFFICER'S COURT, (26.)
SENTENCE, II, (6.)

NINETIETH ARTICLE.

1. Under this article a copy of the record of a military court can properly be furnished only to one who applies therefor in behalf of the accused and at his instance. One 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.

SEE COURT OF INQUIRY, (2.)

NINETY-FIRST ARTICLE.

SEE COURT OF INQUIRY, (3.)

NINETY-SECOND ARTICLE.

SEE COURT OF INQUIRY, (3.) (4.)

NINETY-FIFTH ARTICLE.

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.

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, 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. A mixed court, therefore, composed of officers belonging to the regular army, to the volunteer service, and to the invalid corps, (which is regarded as part of the latter,) would have authority 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. 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. Officers of the veteran reserve corps cannot 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 of officers of the United States colored troops. XI, 267.

9. Where, in the order detailing a general court-martial, the senior officer of the detail was designated as "Brigadier General U. S. Army," held that this comprehensive term might well enough be taken to refer to the entire army as constituted during the war, including both regulars and volunteers; and, as this officer was, in point of fact, a general of volunteers only, (though an officer of lower grade in the regu-

lar establishment,) that the use of the designation referred to in the order could not be deemed to fix upon him the character of a regular officer as to the detail for this court—which was therefore properly constituted. XIX, 232.

NINETY-NINTH ARTICLE.

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

2. The “disorders” and “neglects” referred to in this article are such only as affect or are connected with the military service. VIII, 590.

3. The offence of manufacturing counterfeit money, committed by an enlisted man, is not properly chargeable under this article. II, 566. See COURT-MARTIAL, II, 10. 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.

4. Malpractice by a surgeon in the United States service is an offence cognizable by a court-martial, and should be laid under this charge. II, 378.

5. 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.

6. Where certain men of a regiment procured 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.

7. 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, 6.

8. 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.

9. A communication addressed by a number of officers to the commanding officer of their regiment, to the effect that accusations have

been made against a captain thereof in regard to his character, which, if untrue, he ought to have an opportunity to refute, and requesting that certain other officers shall be called upon to state whatever they know derogatory to his character as an officer or a gentleman, *held* an irregular proceeding, prejudicial to good order and military discipline, if not in violation of the spirit of paragraph 220 of the Regulations. VII, 77.

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 escapes 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.

12. An officer is 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.

13. An officer, whether on duty or not, is always amenable under this article for grossly disorderly conduct. VIII, 366.

14. 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.

15. 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” is a disorder in the sense of this article, and is properly pleaded as a charge without the addition of the customary words of description used in the article. VII, 545; XI, 228.

16. 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.

17. 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.

18. 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.

19. 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.

20. *Held* that the statute, sec. 12, ch. 191, of July 7, 1838, which provides that captains and employés of steamboats, guilty of carelessness, &c., resulting in loss of life, shall be triable for *manslaughter*, 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.

21. 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 SIXTH ARTICLE, (1.)
THIRTY-EIGHTH ARTICLE.
THIRTY-NINTH ARTICLE, (2.)
CHARGE, (2.) (7.) (12.)
CONTRACTOR, II, (11.) (12.) (13.)
COURT-MARTIAL, II, (5.) (10.)
FINDING, (18.) (19.) (20.) (21.) (22.)

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 Febru-

ary 8, 1865, providing that soldiers convicted of absence without leave shall make good the time lost by their absence in the same manner as deserters, is not retrospective in its operation. XII, 402; XVII, 46; XV, 160.

SEE TWENTY-SECOND ARTICLE.

BOUNTY, (11.)
 COMMISSION, (FIELD.)
 DESERTER, (12.)
 DISMISSAL, I, (7.)
 FIELD OFFICERS' COURT, (23,) (25.)
 FINDING, (6,) (7,) (8.)
 PAY AND ALLOWANCES, (13,) (14,) (15,) (25,) (27,) (40.)
 PUNISHMENT, (14.)
 REDUCTION TO RANKS, OF OFFICER.
 SPECIFICATION, (8.)
 STOPPAGE, (4.)

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. VII, 411.

ACCOMPLICE.

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 a full 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.

SEE EVIDENCE, (13.)

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 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. *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 convenes 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) com-

mander, 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.

ADDITIONAL AIDES-DE-CAMP.

Held, that *additional aides-de-camp* 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 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 are found in the principal act to which this is supplementary. XI, 267.

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. 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.

3. Whether a refusal on the part of the court to accede to the request of the accused, to adjourn 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 affect the validity 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 court should not in general refuse the application, unless it appear that the continuance will result in an unreasonable delay prejudicial to the interests of the service. Where the adjournment 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 SIXTY-FOURTH ARTICLE, (1.) (2.)

SIXTY-NINTH ARTICLE, (5.)

DISCHARGE FROM SERVICE, OF MEMBER OF MILITARY COURT.

ADJUTANT.

Held 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.)

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. III, 61.

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

SEE ENROLMENT, I, (1.) (2.)

CLAIMS, I, (4.) (5.)

NEUTRAL, (2.)

ALLOWANCES.

SEE ARREST, (13.) (14.)

BOARD, (3.)

BOUNTY, (3.)

DOUBLE RATIONS, (1.)

PAY AND ALLOWANCES.

MILEAGE.

AMENDMENT.

SEE JUDGE ADVOCATE, (3.)

RECORD, II.

A P P E A L .

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 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 and 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 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 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 regarded as premature. V, 372.

SEE PARDONING POWER.

A P P O I N T M E N T O F F E M A L E T O M I L I T A R Y O F F I C E .

SEE FEMALE—APPOINTMENT OF, &c.

A P P R O V A L O R D I S A P P R O V A L O F P R O C E E D - I N G S .

SEE SIXTY-FIFTH ARTICLE.
EIGHTY-NINTH ARTICLE.
PRESIDENT AS REVIEWING OFFICER.
PUNISHMENT, (12.)
RECORD, III.
REVIEWING OFFICER.
SENTENCE, II, (2.) (4;) III, (17.) (18.)

A R M Y C O M M A N D E R .

Such commander has the power to carry into execution sentences for the crimes enumerated in the 21st section of the act of March 3, 1863, chapter 75, whether such sentences were pronounced before or after the approval of the act by the President. II, 470.

SEE SIXTY-FIFTH ARTICLE, (6.)
CONFISCATION.
COURT-MARTIAL, I.
DESERTER, (10.) (11.) (12.)
GUERRILLA, (2.)
MARTIAL LAW, (1.) (2.)
MITIGATION.
REDUCTION TO RANKS, OF OFFICER, (4.)
REVIEWING OFFICER, (13.)
SENTENCE, III, (6.)
SLAVE, (1.)
WITNESS, (3.)

ARMY CORPS.

SEE SIXTY-FIFTH ARTICLE, (6.)
COURT-MARTIAL, I, (9.)

ARMY IN THE FIELD.

SEE SIXTIETH ARTICLE, (1.)
SIXTY-FIFTH ARTICLE, (3,) (5,) (6,) (7,) (8.)

ARRAIGNMENT.

SEE SIXTY-NINTH ARTICLE, (4,) (5.)
EIGHTY-SEVENTH ARTICLE, (2,) (3,) (4,) (5.)

ARREST.

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—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. A court-martial has no power to require the judge advocate to place in arrest certain witnesses, on the ground that they have committed perjury upon the trial. III, 109.

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

6. 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.

7. 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.

8. 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.

9. 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.

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 the war ; and in any event the soldier cannot properly refuse to do duty when so ordered. VIII, 234.

12. An officer is not privileged from arrest by virtue of being at the time a member of a general court-martial. VII, 320.

13. 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.

14. *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.

SEE THIRTY-THIRD ARTICLE.
SEVENTY-SIXTH ARTICLE.
SEVENTY-SEVENTH ARTICLE.
EIGHTY-EIGHTH ARTICLE, (2.)
DESERTER, (1.) (14.) (18.)
OFFICER OF THE DAY.
SENTENCE, III, (9.)
SUSPENSION, (3.)

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. (Act of 16th July, 1862, ch. 182, sec. 6; act of 9th February, 1863, ch. 25, sec. 1; and acts of March 14, 1864, ch. 30, sec. 1, and of June 15, 1864, ch. 124, sec. 1.) I, 394.

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.

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, 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.

ATTACHMENT.

SEE WITNESS, (22.)

AUTHORITY TO RAISE A REGIMENT.

Where the Secretary of War authorizes a party to raise a regiment, and agrees to give him the command of it, as colonel, if raised in thirty days, this is not an absolute appointment, like one in the regular army, but a conditional one only, and, till the condition be fulfilled, of no more effect than a power of attorney. I, 368.

B.

BAIL.

1. Military courts are without authority in law to accept bail in cases pending before them. IX, 260.

2. There is no legal authority whatever for admitting to bail a citizen arrested by the military authorities and held for trial before a military court. The only cases in which the law has authorized the giving of bail by a party arrested for a military offence are those of contractors, inspectors, &c., specified in sec. 7, ch. 253, of act of 4th July, 1864. A bail bond accepted by a military court, or by the military authorities, in any other case of military arrest, would be a mere nullity in law, and could not be enforced by any legal process. XXI, 258.

SEE CONTRACTOR, II, (5.)
PAROLE, (4.)

BAILMENT.

SEE NINTH ARTICLE, (5.)
THIRTY-NINTH ARTICLE, (2.) (3.)
UNITED STATES AS BAILEE, &c.

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* 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.

SEE MILITARY COMMISSION, II, (23.)

BOARD.

1. A board of officers, convened by a military commander, to pass upon and determine a disputed question of title to personal property, claimed both by an officer and a citizen—*held*, irregular and unauthorized. Such a question is one which no military court or board is empowered to determine. 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 *held*, 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. 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.

SEE 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, that the witnesses were not sworn or cross-examined, or that no record of the proceedings was kept; none of these particulars being required or apparently contemplated by the act. II, 468.

2. The act requires that the report of the 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. *Held* that the Surgeon General is 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 act of June 30, 1824. VIII, 511.

4. It is not a proper function of a board, constituted under the provisions of section 10 of 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.

SEE DISMISSAL, I, (11.)
RECORDER, (2.)

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.

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 an accused person in military custody is allowed to be enlarged upon giving bond for his appearance at the proper time for trial—*advised*, that both the principal and his sureties should be required to duly acknowledge the instrument, and, further, that the sureties should formally justify thereon, or that the certificate of some

reliable party or parties, known to the government, should be furnished, showing that the sureties are worth twice the amount of the penalty over and above all liabilities. XV, 53.

3. 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*, 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.

SEE VIOLATION OF THE LAWS OF WAR, (3,) (11.)

BOUNTY.

1. Soldiers enlisted for two years, and who, having served within a few days of the end of their term, are prevented from serving their full term by the act of the government in mustering them out of the service, are yet entitled to the customary bounty upon well-settled principles of the law of contract. II, 403.

2. It does not affect the right of a soldier under the provisions of section 5, chapter 9, act of July 22, 1861, to the bounty of \$100, upon the expiration of his term, that he has meanwhile been sentenced to confinement at hard labor with forfeiture of all pay and allowances for a term *which expired before his term of enlistment*, and since the expiration of which he has performed the usual service of a soldier up to the end of such term. V, 523.

But otherwise where the sentence is one of confinement at hard labor *during the remainder of the term of service*. In such case the service performed up to the end of the term is of an infamous character, and the taint of the punishment imposed by the sentence continues until the last moment of the term. The soldier cannot, therefore, be held entitled to an honorable discharge at the end of the term, nor to the bounty, payable only in the event of such discharge. X, 285. See XII, 137; XVI, 559.

3. Where a soldier was sentenced by court-martial to a forfeiture of "pay and allowances due and to become due for the balance of the term of enlistment;" *held*, that he was entitled to an *honorable discharge* at the end of his term, (of three years' service,) and consequently to the bounty of \$100 payable by law thereon; the mere forfeiture of pay, &c., not being regarded as involving dishonor where the status of the soldier has been otherwise determined by the government, in continuing him in the service to discharge its duties, and to associate with men engaged in the honorable profession of arms. A discharge in the case of an enlisted man is technically honorable, except where, in case of conviction of an infamous crime by court-martial, a disa-

bility to re-enlist is imposed by the sentence, or where a dishonorable discharge is held to result from a sentence of imprisonment, permanently separating the convict from the service up to the period of the expiration of his term of enlistment. XI, 352. And see XIX, 269; XVII, 130.

And *held*, where the bounty is payable *by instalments*, that a soldier sentenced for desertion to a forfeiture of all pay and allowances due or to become due, would be entitled to the instalments falling due subsequently to the sentence, unless there were some provision in the specific law or order authorizing the bounty, which excepted the case of an enlisted man so sentenced or that of a deserter generally. XI, 352. So *held*, in the absence of such a provision, that where a deserter was sentenced merely to loss of all pay and allowances due, and to forfeit ten dollars of his pay for eighteen months, and make good the time lost by desertion, he was entitled to all instalments of bounty due at the date of his sentence and all falling due thereafter. XVIII, 217. Where, under a charge of desertion, a soldier was found not guilty but guilty of absence without leave, 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 the absence, and that he remained entitled to the instalments falling due after that period, and otherwise properly payable. XX, 430. A sentence to make good time lost by desertion does not affect the soldier's right to bounty. XIX, 269.

Held, further, that bounty, whether regarded as "pay" or "allowances," (and it is deemed to be technically distinguishable from both,) is neither *due* during the term of enlistment, being payable only upon the final discharge; nor due for a balance of a term, being earned by two years' service. X, 661; XVII, 130. Bounty is a gratuity, and neither pay nor an allowance, but distinct from either XV, 356.

4. 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 having commenced to undergo his imprisonment, pardoned by the President for the unexecuted part of his sentence—*held*, that such pardon did not revive the right to pay, &c., or authorize an honorable discharge, without which the party could not become entitled to bounty. VII, 138.

But 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 at the end of his term, or upon his re-enlistment as a veteran volunteer, and to the bounty of \$100, payable in the event of such discharge, &c. XIII, 27.

5. A deserter who avails himself of the President's proclamation of amnesty to absentees, of March 10, 1863, by voluntarily returning

to his regiment within the period fixed thereby, is entitled at the end of his term of service to an honorable discharge, and to the bounty consequent thereon, if he has served two years. The acceptance of the pardon extended by the proclamation completely rehabilitates the soldier; he being subjected only to the forfeiture of pay for the time of his absence, (which he would incur in any event by operation of law,) and to the obligation to make good the time lost by his desertion. Further, if the government honorably discharges him, without requiring him to make good this time, he is entitled to the bounty if he has served two years. XII, 139.

6. *Held*, also, that a deserter restored to duty without trial, by competent authority, (under paragraph 159 of the Army Regulations,) with only the loss of pay during the period of his absence, (to which indeed he would be subjected by operation of law,) is entitled at the end of his term of service to an honorable discharge and to the bounty of \$100 if he has served two years or more; the restoration to duty in such case being an exercise of a certain delegated measure of the pardoning power, and a pardon granted before or without trial being equally valid and effective as if granted after a conviction. XII, 207.

7. Desertion *per se* does not forfeit bounty. Except in the case of a deserter not returning under the proclamation of March 11, 1865, 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. 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.

8. A soldier was honorably discharged after having performed two full years' military service, although in the course of his term he had deserted, voluntarily returned, and been tried and sentenced to a reduction (as sergeant) to the ranks and to a forfeiture of pay and allowances for the period of his absence. *Held*, that he was entitled to his bounty under the positive terms of section 5, chapter 9, act of July 22, 1861, which awards bounty in every case of honorable discharge after two years' service. General Order 38, of 1864, which declares that such bounty is incident to a "continuous" service of two years, is supposed to be intended to indicate that the two years must be served under one enlistment, and may not be made up of fragments of time served under different enlistments. To hold that such an interruption of the continuity of the service under *one* enlistment as occurred in this case shall defeat the claim to bounty, unless some one of the portions of time into which the period of actual service has been divided amounts to two years, would be a severe construction, and would defeat the object of the law in a considerable class of cases. XI, 500.

9. The only case contemplated by General Order 191 of the War Department, of June 25, 1863—beside 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 have accrued at the date of discharge. XII, 548.

10. *Held*, that bounty, being a gratuity payable upon honorable discharge, would not properly be payable to a soldier convicted of larceny, inasmuch as this crime is a felony, and a soldier convicted of a felony and not pardoned, cannot be deemed to be entitled to an honorable discharge. XXI, 210.

11. Inasmuch as desertion does not operate to forfeit bounty, it is clear that the lesser offence of absence without leave—no matter how long the unauthorized absence—cannot possibly have such effect. Thus, where a soldier charged with desertion was found not guilty, but guilty of absence without leave for a period of six months and ten days, and sentenced merely to a forfeiture of pay and bounty for the period of absence—*held*, that he was entitled to instalments of bounty falling due after his return and not included in the forfeiture declared by the sentence. And *held*, inasmuch as the court had judicially determined that there had been no desertion, and had expressly refrained from forfeiting any bounty which should fall due after the return of the soldier, that to enforce against him any further forfeiture would be to *add to his punishment*, and therefore, according to the well-known principle of law, unauthorized and illegal. XX, 430.

SEE DESERTER, (25.)
ENLISTMENT, I, (5.)
LOCAL BOUNTY.
UNITED STATES AS BAILEE, &c.

BRANDING.

SEE PUNISHMENT, (3.)

BREACH OF ARREST.

SEE SEVENTY-SEVENTH ARTICLE.

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. XXI, 263.

2. Where a major of a volunteer regiment, commissioned by the governor of a State, and a brevet major, commissioned as such 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.

SEE FEMALE—APPOINTMENT TO MILITARY OFFICE.
FIELD OFFICER'S COURT, (10.)

B R I B E R Y .

The act of July 4, 1864, ch. 253, sec. 8, in providing for the trial by military court of an officer or employé 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 performance of some act in the future. The gist of the offence is the mere accepting of the thing by the officer or employé 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 CONTRACTOR, II, (12.)
MILITARY COMMISSION, II, (27.)

B U R G L A R Y .

SEE NINETY-NINTH ARTICLE, (16.)

C.

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.)

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, (9,) (10.)

CHAPLAIN.

SEE MILEAGE, (1.)
PAY AND ALLOWANCES, (23.)

CHARGE.

1. 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.

2. 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.

3. 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.

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. A military charge consists of two parts—the charge and the specification. The first defines and designates the offence; the latter sets forth a certain state of facts which are supposed to make out such offence. VII, 600.

6. 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.

7. *Robbery*, though more properly charged under sec. 30, ch. 75, act of 3d March, 1863, may yet, without fatal irregularity, be charged as “conduct to the prejudice,” &c., under the comprehensive terms of the 99th article; this being a crime not capital, and denounced by a statute which may well be deemed as constituting an additional article of war. XIII, 453.

8. The charge “*Fraud*” is without sanction in the pleading of military courts; and where the specification to such charge does not supply the allegations proper to constitute an offence under the act of 2d March, 1863, ch. 67, or otherwise, or sets forth some offence other than fraud, as, for instance, neglect of duty, the proceedings based upon such charge should be disapproved. XIX, 280.

9. 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.

10. 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.

11. 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.

12. 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—it is not to be made the subject of a charge before court-martial. XVI, 381.

13. There is no law or usage to preclude an officer from preferring charges when himself under charges. XVI, 68.

14. 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 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 an 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.

15. 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.

16. 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 an irregularity for the court itself, without a reference to the Secretary, to withdraw or strike out any part of the body of the charges and specifications. XXI, 56.

17. In a specification to a charge of murder against a soldier, preferred 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 the court will take judicial notice. XVII, 396. And *held*, that the court should take such no-

tice, 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 official declaration of the Executive 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.)

18. 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*, that the language of the charge, taken in connexion 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.

SEE SIXTH ARTICLE, (1.)
 THIRTY-NINTH ARTICLE, (4.)
 FORTY-FIFTH ARTICLE, (1.)
 EIGHTY-THIRD ARTICLE.
 NINETY-NINTH ARTICLE.
 CONTRACTOR, II, (4.)
 DISABILITY, (2.)
 FRAUD, (3,) (4.)
 GUERRILLA, (1.)
 JOINDER.
 WITHDRAWAL OF CHARGE.

CLAIMS, I—(GENERALLY.)

1. There is no law authorizing the executive branch of the government to award compensation for losses sustained by persons in consequence of their arrest and imprisonment as suspected criminals; such compensation can be made 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 brought to trial and convicted by a military commission, of which the sentence 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, 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 was not well supported. 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 liquidated by Congress alone. XIX, 327. 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, taken from him while a prisoner of war under the capitulation of Lee, because marked "U. S."—*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 employes 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 employés 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 employés after muster; that their muster as soldiers vacated their position as employés, and that their claim was not only inconsistent with principle, but was prohibited by the spirit of the act of 30th September, 1850, chapter 90, section 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 employés at the same arsenal, volunteering as soldiers, were still paid their wages,) in *this*, that the employés 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 employés 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 so authorized, 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 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 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.

SEE COMPENSATION OF MEMBERS OF COURT, JUDGE ADVOCATE, &c., (6.)
 JUDGE ADVOCATE, &c., (6.)
 PROCEEDINGS AT LAW AGAINST OFFICER, (4.) (5.) (6.) (7.) (8.)
 RECAPTURED PROPERTY, (RESTORATION OF.)
 STOPPAGE, (6.)

CLAIMS, II.

(Under act of July 4, 1864, ch. 240.)

1. Claims for alleged losses of property, through the depredations of United States soldiers, are expressly excluded by this act from the jurisdiction of the Court of Claims. XXI, 26.

2. *Held*, that to authorize the formal examination of and report upon claims contemplated by the 2d and 3d sections of this act, 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 XX, 318, 355; XXI, 132, 243, 248.

3. But where a loyal citizen of a State in insurrection (but partially in the occupation of the United States forces) had been authorized by the commander of the military department which embraced such State to trade with the enemy, beyond the lines of our army, and such citizen,

in pursuance of this authority, had purchased a large quantity of sugar which was subsequently taken from him by the military authorities and appropriated to the use of the army—*held*, upon his claim to be reimbursed therefor, that it would not comport with the dignity and honor of the government to repudiate the official action of the department commander under the circumstances; and that good faith required that the loyal party be compensated for the property thus taken from him. XX, 399.

4. So where in the course of the prosecution of an officer on duty in North Carolina for alleged embezzlement, &c., certain grocery and other goods were seized by a government officer in the possession of a female trader of that locality, under the mistaken supposition that such goods were property of the United States fraudulently disposed of to such party by the officer; but the accused was finally acquitted of the charges upon which he was tried, and it was shown that the seizure of the goods was unwarranted and unjust; *held*, upon a claim for their restoration to the owner, that the law in regard to the disposition of claims arising in disloyal States for property taken for the use of the army did not apply to the case; and *advised*, inasmuch as the specific goods were not in the possession of the government, but had passed out of its control, through the negligence or fraud of the military agents who had them in charge, and could not therefore be restored to the claimant, that the commissary department be directed to issue to her goods equal in quantity to those seized, and either similar in kind or equivalent in value. XIX, 410.

5. Where a citizen of Tennessee, representing himself as loyal, preferred a claim for compensation for the services of his two slaves, whose labor had been used by the government upon a military railroad in that State, in the year 1863; and presented an official receipt purporting to be signed by a post commander by the order of the military governor, and certifying that such slaves had been received for such purpose from him as their owner—*held*, that such receipt did not evidence any *contract* between the claimant and the United States, or imply any legal obligation on the part of the latter, but constituted merely the official memorandum of a seizure in accordance with the laws of war; that Congress, in carefully providing by the act of 4th July, 1864, for the settlement of the class of claims therein specified, when originating in loyal States, might well be deemed to have reserved for future legislation the subject of such claims when arising in States in rebellion; and that, therefore, this claim was one for which the executive branch of the government could not properly assume any liability whatever, but that the same was appropriate for the consideration of Congress alone. XXI, 91.

6. *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, Miss., was not within the provisions of this act; 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.

7. *Held*, that the claim of an alien, residing in a State in rebellion, for compensation for property taken for the use of the army in time of war, was not within the provisions of the act. Such a party could not certainly have rights superior to those of a loyal citizen of a loyal State, whose claim, originating in a rebel State, is excluded from the privileges of the statute. XVII, 599. And where the real estate, situate in New Orleans, of a neutral French subject resident in France, had been taken possession of and occupied by our forces—*held*, that even though such seizure and occupation were unauthorized and the government bound to afford a proper compensation therefor, the claim of the owner for rent for the premises, inasmuch as it originated in a State in insurrection, and inasmuch as the use of such premises was neither in the nature of quartermaster nor subsistence stores, could not be examined and passed upon, under this act, by the executive branch of the government, but must be presented to Congress. XIX, 428. Where an alleged French subject, residing in Missouri, had not preserved an attitude of neutrality during the war, but had subscribed to a rebel loan and otherwise acted disloyally—*held*, that a claim presented by him for compensation for property appropriated in that State for military purposes could not properly be taken cognizance of under this act. XIX, 492.

8. Under section 2d of the act, the “*proper officer*” receipting for the stores for which a claim is interposed need not necessarily have been an officer of the quartermaster 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.

9. *Held*, that a claim arising 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. 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.

CLERK.

1. The clerk or "reporter" of a court-martial appointed under section 28 of chapter 75 of the act of March 3, 1863, is not entitled to remain with the court when its doors are closed for deliberation. III, 640. Nor can he be permitted to record the findings or sentence. 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.

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 be certified to by the judge advocate. VII, 71.

4. In the absence of any law authorizing the payment of a clerk of a military commission, such a clerk, where his employment is proper and authorized by the commission, is entitled to a reasonable compensation. II, 338.

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.

SEE ENROLMENT, I, (3), (40.)

COLORED TROOPS.

Where it was proposed 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 troops can hardly be deemed prepared to determine questions so complex and involving so many 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 for them 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 presented, 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.)
SOLDIERS PURCHASING THEIR ARMS.

COMMANDING OFFICER.

SEE SIXTH ARTICLE, (2.)
NINTH ARTICLE, (4.)
PAY, (14.)

COMMISSION—(CIVIL.)

A "civil commission," composed of civilians and lawyers, exercising all the powers of a common law and chancery court, established by a military commander, is a tribunal entirely unauthorized by military law. III, 192.

COMMISSION—(FIELD.)

Although the general order establishing *field commissions* to investigate cases of absence without leave (No. 100, of the War Department, of August 11, 1862) does not, in terms, require that the officer calling the commission should formally act upon the proceedings before transmitting the record to the Secretary of War, yet the rule which prevails in the case of the records of all other military courts should properly be observed in the present instance; otherwise, the record cannot be deemed authentic. V, 223.

COMMISSION—(SPECIAL.)

Where a special commission has been convened to investigate the affairs of a hospital, its conduct and management, the fidelity of its officers, employes, &c., the surgeon in charge is not entitled, *as a right*, to appear before it and be present at its sittings. Otherwise, if it be in the nature of a court of inquiry, called to investigate charges against the surgeon individually. II, 340.

COMMISSION—(TO TAKE DEPOSITIONS.)

SEE DEPOSITION, (6.)
WITNESS, (25.)

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.

3. 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 MITIGATION.

COMPANY FUND.

The "company fund," when once appropriated, is, in equity, the property 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.

SEE REGIMENTAL FUND.

COMPENSATION 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, 337.

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. A line officer attending a court-martial in Washington, whose quarters, &c., are at Fort Lincoln, three or four miles distant, though within the 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 Quartermaster General to decide upon 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. 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—otherwise properly entitled thereto—be paid their appropriate commutation allowance for fuel 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.

SEE MILEAGE, (2.)

COMPENSATION FOR USE OF PRIVATE PROPERTY.

In accordance with the principle incorporated into our national and State constitutions, it is the invariable practice of the United States government, both in peace and war, to pay for all property of loyal citizens that, either by purchase or seizure, may be appropriated to its use. *Held*, therefore, that the use of a turnpike road, (in Kentucky,) by the trains of the government, was a *use of private property*, and that the government 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 measured and fixed by their charters in the form of tolls. I, 475.

SEE ALIEN, (1.)

CLAIMS, II.

RECAPTURED PROPERTY. RESTORATION OF, (4.)

CONDUCT TO THE PREJUDICE OF GOOD ORDER AND MILITARY DISCIPLINE.

SEE NINETY-NINTH ARTICLE.

MILITARY COMMISSION, III, (1.)

PERJURY, (2.)

CONDUCT UNBECOMING AN OFFICER AND A GENTLEMAN.

SEE EIGHTY-THIRD ARTICLE.

“CONFEDERATE SECURITIES.”

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 publications 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 counterfeit confederate 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.)

CONFESSION.

SEE PLEA.

CONFISCATION.

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. *Ibid.*

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 provision 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. A judge of the United States district court for Eastern Virginia,

who holds his court under the shelter of the bayonets of the army, and is, 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, may properly be assigned quarters in one of the residences of rebels in Alexandria, which have been vacated by the treason of their owners, and are 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 sec 5, ch. 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 sec. 5, ch. 120, of 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 sec. 4, ch. 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; III, 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 sec. 5, ch. 3, act of 13th July, 1861. III, 35.

13. Merchandise evidently intended to be used for commercial purposes, 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 sec 5, ch. 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, ch. 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, ch. 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, ch. 120, are liable to confiscation under sec. 4 of the act, but 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 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, ch. 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, 46.

SEE MILITARY COMMISSION, V, (3.)

CONSOLIDATION OF REGIMENTS.

Where a regiment is 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, the men of each organization become members of the new regiment, not by virtue of any consent on their part, but because of the conditions of their original enlistment and muster into the United States service. V, 595.

CONTEMPT.

SEE SEVENTY-SIXTH ARTICLE.
HABEAS CORPUS, (11,) (13.)
WITNESS, (22.)

CONTINGENT FUND.

A band mustered out of the service by operation of law, (under the requirements of sec. 5, ch. 200, of act of 17th July, 1862, which repeals the law under which they were mustered into service,) but retained in service by an express agreement with the Secretary of War, cannot 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 COUNSEL TO ASSIST JUDGE ADVOCATE.

CONTRACT BY OFFICER WITH UNITED STATES.

SEE DISABILITY, (1.)

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 chose 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 17th July, 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., would not 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 properly 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 with an intention to defraud. IV, 371.

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*. They cannot claim to be *bailed*, this being a privilege unknown to the proceedings of military courts. V, 101. But see the recent act of July 4, 1864, chapter 253, section 7.

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) as 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 recent act of July 4, 1864, chapter 253, section 7.

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 specific “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 act of March 2, 1863, chapter 67. IX, 146.

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, 1853, 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,” for “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, for the reason only that he did not like the inspector appointed by the gov-

ernment, 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 BRIBERY.

HABEAS CORPUS, (11.)

JURISDICTION, (9.)

PAROLL, (4.)

SENTENCE, I, (18,) (19.)

SPECIFICATION, (10.)

CONTRACT SURGEON.

A “contract 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.

SEE SIXTIETH ARTICLE, (1,) (2.)

CONTRACT NURSE.

SEE SIXTIETH ARTICLE, (3.)

COPY OF RECORD.

SEE NINETIETH ARTICLE.

COURT OF INQUIRY, (2.)

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.

CORPS COMMANDER.

SEE SIXTY-FIFTH ARTICLE, (6.)

COURT-MARTIAL, I, (9.)

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 refused 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, ch. 60.)

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 carrier, 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 carrier 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 FOR THE ACCUSED.

1. The accused is entitled to counsel upon his trial as a *right*, and this right the court cannot refuse to accede to him. Wherever it is refused, the proceedings should be disapproved. IX, 538. See ADJOURNMENT, 3.

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.

SEE ADJOURNMENT, (3.)

COUNSEL TO ASSIST JUDGE ADVOCATE.

There is no 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 assent of the Secretary of War should, when practicable, be first obtained. The claims of such counsel, approved by the judge advocate, should be presented to the Secretary of War, to be paid out of the contingent fund. V, 446.

COURT-MARTIAL, I—(GENERALLY.)

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

2. An officer 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.

3. The fact that the term of service of a member of a court-martial has expired, though he has not been formally mustered out of or discharged from the service, does not disqualify him from sitting upon the court. XV, 111.

4. It is not only the undoubted right, but the duty, of a court-mar-

tial 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.

5. 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.

6. If a court, upon assembling under an order, is of the opinion that the order convening it is for any reason—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 is bound to 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.

7. A general court-martial has no power to “honorably discharge” an officer. III, 426.

8. 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.

9. An army corps can be established by the President alone, (sec. 9, 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 is convened by the commander of a corps so constituted *before* the approval of the organization by the President, is not a legal tribunal, unless the approval is made to take effect as of a date prior to the appointment of the court. XIII, 349.

SEE SIXTY-FOURTH ARTICLE, (7.)

ARREST, (2.)

DETAIL.

JUDGE ADVOCATE, (10,) (12,) (13.)

SENTENCE, I, (1,) (2,) (4,) (5,) (8.)

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. 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 delivery to 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.

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 employé 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 enrol all parties subject to draft in the sub-district, is 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, 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* triable by court-martial for the offences denounced in section 23, chapter 13, act of Feb-

ruary 24, 1864. Such offences are disorders in the sense of the 99th article, and though made specifically 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*, 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. A court-martial has not jurisdiction of a case of mutiny or murder committed by a citizen or person not in the military service. VII, 261; VIII, 394.

9. A confederate soldier charged with murder cannot be tried by a court-martial, which has jurisdiction of this offence only when committed by persons in the military service, and subject to the articles of war. VII, 418.

10. 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, 8.

11. 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.

12. 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 co-extensive with the limits of the federal domain. A court-martial, therefore, convened in any army is competent to pass upon the case, which may 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.

13. An officer is not amenable to court-martial (under act of 2d March, 1863, chapter 67, or otherwise) for offences committed while a recruiting officer under the authority of the governor of the State, and before being mustered or enlisted into the United States service in any capacity. XII, 475.

14. An officer, after having been formally mustered out of the service, is 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 does not survive against him after his separation from the service; and, 2d, because the order of muster out not being obtained by *fraud*, cannot be revoked with a view of again bringing him into the service for the purposes of a 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.

15. Neither the fact that at the date of his trial by court-martial an 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.

16. 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 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.

SEE FIFTY-SIXTH ARTICLE, (1.)
FIFTY-SEVENTH ARTICLE, (4.)
JURISDICTION.

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*, 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.

1. 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 legally mustered out of service cannot demand a court of inquiry to investigate acts done by him while in the service. XIX, 71.

2. 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. I, 427.

3. To determine what authority may convene a court of inquiry, the Ninety-First and Ninety-Second 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.

4. 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 proceedings, subject to the proviso of the Ninety-Second article of war. XVI, 389.

SEE EVIDENCE, (3.)

COWARDICE.

SEE EIGHTY-FIFTH ARTICLE.

D.

DEATH SENTENCE.

SEE SENTENCE, II.

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 send to Virginia, or of Virginia to entertain, such an officer, at a time when the latter State was asserting and maintaining by force of arms, the attitude of a foreign and hostile sovereignty.

And as such deed appeared 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.

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, of course, be advised of his privilege to employ counsel; but if he declines to do so, however unskillful or troublesome his action may be, he cannot be interfered with except so far as to enforce on 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; nor are the rules of evidence or of practice to be, under any circumstances, more relaxed in favor of one who is distinguished than of one who is obscure. XI, 204.

SEE COUNSEL FOR THE ACCUSED.
ESCAPE, (1.)

DEFENCE OF PROSECUTED OFFICER.

SEE PROCEEDINGS AT LAW AGAINST OFFICER.

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 remis-

sion just or desirable, has heretofore been invariably sanctioned by the War Department. VI, 35; VIII, 582. See XXI, 49. And *advised* 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.

2. It is 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 is 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 law to be exercised by a department commander alone. 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. A department commander is 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 is no legal officer for this purpose; nor is he authorized to enforce, in any way, an execution for a private debt. XIII, 543.

5. Where it is made to appear to a department commander that a reviewing authority (subordinate to him within his command) has confirmed an illegal or irregular sentence, he should bring the matter to the attention of such authority, with a statement of the grounds for holding the sentence an improper one, and request that the action thereon be reconsidered. Where this course cannot be resorted to, the department commander should formally bring the case to the attention of the Secretary of War, with a suggestion of the form of relief which he may deem appropriate to be extended thereto. Or, if the case is one in which the sentence is not merely irregular, but "void upon the face of the proceedings," he may adopt the course prescribed in paragraph 899 of the Army Regulations. XXI, 215.

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 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 interfere with the ordinary process of the State court. XVI, 514.

7. 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. The fact that a state of martial law, which had previously existed in a department, has been terminated by an order of the Executive, can 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.

SEE THIRTY-THIRD ARTICLE, (2.)
 CONFISCATION (16.)
 CONTRACTOR, II, (6.)
 MILITARY COMMISSION, V, (1.)
 ORDER, (4,) (6.)
 PUNISHMENT, (10,) (11,) (12,) (15.)
 REDUCTION TO RANKS, OF OFFICER, (4.)
 REVIEWING OFFICER, (8,) (12,) (15.)
 SENTENCE, III, (3,) (4.)
 SEPARATE BRIGADE, (12.)

DEPOSITION.

(Act 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. 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.

3. The officers named in paragraph 1031 of the Army Regulations may properly administer oaths to witnesses whose depositions are proposed to be taken in States in rebellion where there are no qualified civil officers. XI, 14.

4. Although the Seventy-Fourth article indicates justices of the peace as the officers before whom depositions are to be taken, yet, under the act of March 3, 1863, chap. 75, sec. 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.

5. As neither the Seventy-Fourth article nor the twenty-seventh section of the act of March 3, 1863, chap. 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.

6. 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.

DEPUTY PROVOST MARSHAL.

SEE COURT-MARTIAL, II, (5.)

DESERTER.

1. Section 26, chap. 75, of act of March 3, 1863, does not apply to cases of desertion in which arrests have been made before the passage of the act or the issuing of the proclamation, but only to deserters not apprehended at that time, and who voluntarily returned to the service before April 1, 1863. Where deserters are arrested before this date, so that their voluntary return is rendered impracticable, their case should not be prejudiced by this proceeding on the part of the government, but they should have the full benefit of the act, and be liable only to the forfeiture of pay and allowances therein prescribed. They should be treated as though they had returned, because prevented from doing so by superior military authority; for it could not be certainly known that they would not have returned had not the action of the government prevented them. II, 96, 173; III, 123, 276.

2. Deserters sentenced to make good the time lost by desertion, who are placed on duty between the promulgation and execution of their sentences, should be credited with the time during which they have been thus on duty. II, 560.

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. 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.

5. The loss of pay, &c., during the soldier's absence as a deserter, results from operation of law, and should not be treated as the punishment, in whole or in part, contemplated by sec. 26, chap. 75, of the act of March 3, 1863. V, 347.

6. Under the requirements of paragraphs 158, 1357, 1358, 1359, of the Army Regulations, and of section eighteen of the act of March 16, 1802, a deserter must be held, *by operation of law*, to forfeit all pay remaining due at the time of his desertion, as well as that which accrues during the period of his absence as a deserter; and also to be obliged to make good to the United States the time lost by his desertion. But, of course, in the vast majority of cases, justice can only be done by bringing the party to trial before a court-martial, and having the fact of desertion judicially determined. VII, 325.

7. 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 enforce the forfeiture required by paragraphs 1357 and 1358 of the regulations; and is sufficient evidence for the government that the party owes military service for a period equal to that of his unauthorized absence. VII, 325.

8. Under the acts of January 11, 1812, chapter fourteen, section sixteen, and of March 16, 1802, chapter nine, section eighteen, a deserter is amenable to trial as such after he has been discharged from or disconnected with the service. VIII, 375.

9. The General Order No. 76, of 1864, in regard to restoring to duty deserters under sentence, is prospective as well as retrospective in its operation. This order gives to commanders in the field power to pardon this class of offenders in their discretion; but does not require the exercise of such power as a duty. VII, 674.

10. 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.

11. 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 Eighty-Ninth 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.

12. 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.

13. *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.

14. 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 an arrest preliminary to trial, or while the accused is awaiting the result of the proceedings of the court. For, however close the arrest may be, the soldier is not thereby disconnected with the military service, and may at any moment be restored to an honorable status therein. If he escapes, therefore, from the confinement of his arrest, with the intention of abandoning the service, he is a deserter. XIII, 325, 450.

15. 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.

16. 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.

17. 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.

18. 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.

19. The obligation of a deserter to make good the time lost by his absence is imposed, as expressed in the act of March 16, 1802, ch. 9, sec. 18, "*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.

20. 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 all *punishment*, except forfeiture of pay; 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.

21. 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. VI, 418.

22. 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 to inflict a *punishment* upon him as a deserter; such punishment can be imposed by court-martial alone. XVI, 83.

23. Where the division commander remitted the sentence of a deserter on the ground that the intention not to return was manifestly wanting, and also, because the accused was physically unfit for service—*held*, that this was a judicial determination that he was not guilty of a *desertion*, but that, as his absence still remained unexcused,

he should be deprived of pay for the period of such absence under par. 1357, of the regulations. XIII, 528.

24. 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 considered. XVII, 264. See PARDON, 1, 2, 3.

25. 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 upon a conviction of a felony. 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.

26. 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.

SEE TWENTIETH ARTICLE.

TWENTY-SECOND ARTICLE.

ABSENCE WITHOUT LEAVE, (2,) (3.)

ARTIFICIAL LIMBS, (2.)

BOUNTY, (3,) (5,) (7,) (8.)

COURT-MARTIAL, II, (1.)

DISMISSAL, I, (6.)

ENROLLMENT, I, (5,) (10,) (18,) (19,) (28,) (38,) (39.)

FINDING, (6,) (7.)

JURISDICTION, (5.)

PARDON, (1,) (2,) (3.)

PAY AND ALLOWANCES, (12,) (20,) (23,) (24,) (25,) (38.)

PENITENTIARY, III, (1.)

PLEA, (5,) (7,) (14.)

PRESIDENT'S PROCLAMATION, II.

REGIMENTAL FUND, (2.)

SENTENCE, III, (16.)

STOPPAGE, (4,) (5.)

DESERTION TO THE ENEMY.

SEE PRISONER OF WAR, (10.)

DESTITUTE SOLDIERS.

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.

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.)

DETAIL OF MILITARY COURT.

1. There is nothing in the law or orders under which the "invalid corps" is constituted to prevent 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.

2. Officers detailed on courts-martial, boards of examination, &c., are not 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, they cannot be held to be strictly bound to the performance of this extra labor. V, 436. See ORDER.

3. Officers detailed for special duty are, while performing it, necessarily relieved, in the absence of special orders to the contrary, from the general duties of their commands, which, however, it is entirely proper for them to discharge, in whole or in part, when practicable to do so. It often happens that officers whose commands are in Washington or its vicinity pursue this course, while sitting in this city as members of military courts. V, 558. See VI, 53.

4. *Held* that officers of colored troops, appointed by Brigadier General Wild, whose appointments had been confirmed by the War Department, and who had been duly mustered, and were on duty as such,

might properly be detailed on courts-martial, though they might not have received formal commissions. VIII, 584.

SEE SIXTY-FOURTH ARTICLE.
SEVENTY-FIFTH ARTICLE, (1.)
NINETY-SEVENTH ARTICLE.
FIELD OFFICER'S COURT, (1,) (2,) (3,) (4,) (5,) (6,) (7,) (8,) (9,) (10.)
MILITARY COMMISSION, I, (5,) (6,) (7,) (8,) (9,) (10.)

DISABILITY.

1. An officer in the United States service is under a disability to sell or dispose of a patent right to the government. He cannot contract with the government till he leaves the service. I, 349.

2. 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.

SEE REMOVAL OF DISABILITY.

DISBURSING OFFICER.

1. 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.

2. Where the chief surgeon of a département 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.

3. Where a medical purveyor, charged with the disbursement of public moneys, was ascertained to be engaged, with others, in speculations in gold, although there was no evidence that he had made use of these moneys therein; *advised*, that inasmuch as the mere fact that he was concerned in such transactions would not render him chargeable with a military offence under the Ninety-Ninth article, the proper remedy in the case was to be found in his assignment to duties not requiring the disbursement of government funds. XVII, 22.

DISCHARGE.

1. 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 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; *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.

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 division commander discharged an enlisted man for “*infamy*,” in pursuance, as he believed, of section 2 of the enrolment act of March 3, 1863, in a case where the only evidence of the fact of infamy was the individual soldier’s confession; *advised*, that a discharge upon such evidence was undesirable; that, as in the case of an objection to a *witness* on the ground of infamy, the record of the man’s conviction should be required before the action in question be resorted to; and that otherwise a door would be opened to all discontented enlisted men to procure their discharges by denouncing themselves as convicts. XIX, 152.

4. An order by which a soldier or officer is 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 disgraceful, or to *dismiss* the party from the service, must be held to grant him an *honorable* discharge therefrom. XIX, 84.

SEE BOUNTY, (2.) (3.) (4.) (5.) (6.) (7.) (8.) (9.) (10.)

COURT-MARTIAL, I, (7.)

DISQUALIFICATION, (3.)

ENLISTMENT, II, (2.) (3.) (4.)

HABEAS CORPUS, (3.) (4.) (6.) (11.) (12.) (13.) (14.) (15.)

PARDONING POWER, (3.) (7.) (14.)

REMOVAL OF DISABILITY, (1.)

REVIEWING OFFICER, (7.) (14.)

SENTENCE, I, (7.) (12.)

DISCHARGE FROM SERVICE OF MEMBER OF MILITARY COURT.

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, 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.

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.

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.

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 practicable, the party should be allowed an opportunity to explain his alleged conduct before final action be taken against him. XI, 538.

4. 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.

5. The insertion in 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.

6. A summary order of the 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.

7. It cannot 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.

8. 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.

9. 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*, that their summary dismissal was fully warranted and that they should not be restored to the service. XII, 201.

10. The dismissal, under sec. 4, ch. 149, of the act of 25 June, 1864, of an officer of the Quartermaster's department, found upon examination not to possess the requisite business qualifications, is not to be regarded as a punishment attaching ignominy to the party. Had this been the intention of the act, it would hardly have proceeded to confer upon the officer a gratuity of one month's pay as a compensation for the hardship to which he might be subjected by the mode of discharge provided in the section. XIV, 129. And *held*, that the government, instead of dismissing with one month's extra pay an officer in whose case a board convened under this act had reported adversely, might, in its discretion, accept his resignation from the service; the case being one in which the report was merely upon the business qualifications of the officer as quartermaster and did not impeach his moral character. *Ibid.*

SEE FIFTH ARTICLE, (2.)
 ELEVENTH ARTICLE.
 COURT-MARTIAL, I, (1.)
 DISQUALIFICATION, (2.)
 PAY AND ALLOWANCES, (8,) (29,) (31,) (32.)
 PARDONING POWER, (3.)

DISMISSAL, II, (SUMMARY—TRIAL IN CASE OF.)

(Act of 3 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, 140; XVI, 631.

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. XVI, 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 has been meanwhile filled by a new appointment or muster, the only remedy for the officer acquitted (or not dismissed) upon the trial, is an honorable discharge or muster-out, 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.

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 3 March, 1865. XX, 188.

8. If the officer was dismissed for a cause which would have justified his examination by the board provided for by sec. 10 of act of July 22, 1861, (to examine into the qualifications, &c., of officers,) the court-martial, convened upon his application under the act of 3d March, 1865, would properly proceed to investigate his case, not under formal charges and specifications, but upon the matter of the truth or falsity of the charge of unfitness for the service. XVI, 169.

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 re-consideration of the testimony on the ground that it did not in his opinion justify such acquittal. XIX, 191.

DISMISSAL, III—(BY SENTENCE*)

SEE CASHIERING.

COMMUTATION OF SENTENCE.

DISQUALIFICATION, (1,) (2,) (4.)

PARDONING POWER, (1,) (2,) (4,) (5,) (6.)

PAY AND ALLOWANCES, (10,) (26,) (28,) (33.)

PRESIDENT AS REVIEWING OFFICER, (3,) (5.)

REDUCTION TO RANKS, (5,) (6.)

SENTENCE, I, (7.)

DISOBEDIENCE OF ORDERS.

SEE NINTH ARTICLE.

NINETY-NINTH ARTICLE, (17.)

ORDER, (5,) (7.)

PLEA, (8.)

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. 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," deprives him of no right as a citizen, and does not disqualify him from any employment under the government. VIII, 91.

4. Neither a simple sentence of cashiering or 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.

SEE REDUCTION TO THE RANKS, (2.)

DISTRICT COMMAND.

SEE SIXTY-FIFTH ARTICLE, (8,) (9,) (10,) (13.)
ORDER CONVENING MILITARY COURT, (1.)
SEPARATE BRIGADE, (8,) (9.)

DIVISION.

SEE SIXTY-FIFTH ARTICLE, (8,) (9,) (14.)

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 this 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 of 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 be now paid him. XX, 257.

2. The act of June 30, 1834, 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.

Officers of new organizations, who are appointed from civil life, and who have not previously been in the United States service may, according to a rule adopted in the War Department, be credited upon the quota of their town, &c., under a draft; but *other* officers who may sell or transfer their muster-rolls to enable themselves to be thus credited are chargeable with a military offence, and may properly be punished therefor, if not shown to have been acting in good faith. The principal object of the rule is to prevent officers who have once been credited as enlisted men to be again credited and as officers, and this rule is in strict accordance with the letter and spirit of the enrolment acts. XIII, 379.

SEE ENROLMENT, I, II.
PARDON, (1,) (2.)

DRAFT RENDEZVOUS.

SEE SIXTY-SIXTH ARTICLE, (8.)
FIELD OFFICERS' COURT, (7.)

DRUNKENNESS ON DUTY.

SEE FORTY-FIFTH ARTICLE.
CHARGE, (6.)

E.

EMBEZZLEMENT.

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.

SEE THIRTY-NINTH ARTICLE.
FRAUD, (5,) (10.)
SUB-TREASURY ACT.
UNITED STATES AS BAILEE, &c.

ENEMY.

SEE FIFTY-SIXTH ARTICLE.
PRISONER OF WAR, (12.)

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 should be administered by some one of the officers designated in the 10th article of war, or other officer or person authorized by law. II, 111.

3. A 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 on that account be relieved therefrom under a writ of habeas corpus. V, 618; XIX, 397.

ENLISTMENT, II, (OF MINORS.)

1. In a case where minors volunteered without the consent of their parents, which was then 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 parents' consent. I, 425.

2. The act of February 13, 1862, chapter 25, section 2, provides, in effect, that a person less than eighteen years of age shall be under an incapacity to contract with the government as a soldier; and it must be held to apply to a case where a soldier, notwithstanding the prohibition, has been allowed to enter the service and perform military duty. Such soldier, therefore, is entitled to be discharged by the Secretary of War. VII, 119.

3. 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. These enactments are inconsistent with the provision of section 2, chapter 25, act of

February 13, 1862—to the effect that the oath of enlistment taken by a recruit shall be conclusive as to his age—inasmuch as they evidently contemplate the admission of evidence *dehors* the oath of enlistment to establish the fact of age. Such provision must therefore now be held inoperative as far as regards the authority of the Secretary of War. Previous to the passage of the acts first mentioned, the discharge of minors was left to the discretion of the Secretary, but the legislation of 1864 indicates a well-considered determination to enforce the policy of the government in this matter, by releasing from service all minors under the age of eighteen, upon a proper application addressed to the Secretary. XII, 151.

Prior to the passage of the acts of 1864, applications for the discharge of minors between eighteen and twenty-one years, (alleged to have been enlisted without legal consent,) made to the Secretary of War under the act of February 13, 1862, being addressed to his discretion, were ordinarily not granted except when accompanied by proper surgeon's certificate of the minor's physical incapacity for military duty. I, 425. And the provision in the section, in regard to the conclusiveness of the oath of enlistment, was literally construed by the Secretary of War, and the right of the party to offer any evidence in conflict with his oath was uniformly denied. V, 210.

And *held*—previous to the legislation of 1864—that the effect of the provisions of the second section of the act of February 13, 1862, (which repealed the act of 1850, chapter 78, section 2,) was as follows: That minors between eighteen and twenty-one years were not *entitled* to be discharged because of non-age; that minors under eighteen were not *entitled* to discharge, if, in their oath of enlistment, it was set forth that they were fully of that age; and that minors of either of these classes could only be discharged by an order of the Secretary of War, upon a proper case made; lastly, that in the case of a minor actually under eighteen, and whose age was correctly stated in his oath, or who had been enlisted or mustered without taking an oath, the enlistment was wholly void, and a discharge must be granted as of right. V, 372, 398; VIII, 361.

4. Under the provisions 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.

SEE HABEAS CORPUS.

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 hereafter 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 employés 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 not 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 depended 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, ¶ 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 4th clause of the 2d 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 service personally, or furnishes a substitute, or pays the commutation money. The theory of the governor of New York, that if the drafted man furnishes a substitute who chanced 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 principal 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 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; See III, 638.

38. If the drafted party fails to report himself, and is arrested as a deserter, he has still 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 list 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.

ENROLMENT, II.

(Act of February 24, 1864, chapter 13.)

1. Under the 5th 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 bearing of arms, applies exclusively to non-resistants 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 sentence 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 ; such a permission being a mere matter of indulgence on the part of the court. 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. X, 574. See DESERTER, 14. But *held* that a soldier so escaping 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, 12.

SEE PRISONER OF WAR.

EVIDENCE.

1. A telegraphic despatch may, under certain circumstances, be used as evidence, but not without previous 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 hand-writing of their 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. 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.

7. The offence of "publication of falsehoods or misrepresentations of facts, calculate to embarrass or weaken the military authorities"—made punishable as a military offence by a general order 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.

8. 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.

9. 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.

10. 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.

11. 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 proof of his identification as a private in a certain company and regiment, by the first sergeant, and by evidence that he joined the regiment, as such private, on a certain day. XII, 361.

12. 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.

13. 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.

14. *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.

So *held*, that a letter of the rebel R. E. Lee, 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 entitled to no 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, has 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.

15. 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.

16. A disloyal citizen under arrest and in confinement, but not convicted of any crime by the judgment of the court, 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.

17. 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.

18. 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 refused to comply with their demands, *held* 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.

19. The government has no right to tempt innocent men 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 district 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, some weeks after, 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, section 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.

SEE MUSTER, (1.)
OFFICIAL RECORDS.
PERJURY.
SPY.

EXCHANGE OF PRISONERS.

SEE PRISONER OF WAR, (7.) (8.) (9.)

EXEMPTION.

SEE ENROLMENT, I, II.

EXTRA PAY.

(Act of March 3, 1865, chapter 81, section 4.)

Held that an officer need not necessarily have been formally mustered into the service *before* the date of this act to entitle him to the three months' pay proper made payable 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.

SEE DISMISSAL, II, (7.)

F.

FALSE MUSTER.

SEE FIFTEENTH ARTICLE.

FALSE PRETENCES.

1. The offence of obtaining money by false pretences is not, according to the current of authorities, technically made out by proof only of false affirmation used, and of a suppression of truth in regard to the ownership of the property by the sale of which the money was obtained. Yet *held* that this general rule should not be strictly applied to a finding of guilty by a military commission upon a charge of such offence so proved, when by the sentence justice is done in a region where the ordinary civil courts are not open, and where military tribunals can alone be depended upon for the protection of private rights. VIII, 617.

2. To circulate counterfeit confederate notes is not held to be a crime. But to exchange them for other money, or to purchase property with them, would be obtaining money or property by false pretences, and might be punished by a military commission in localities where the ordinary courts are closed. II, 66, 144.

FELONY.

1. The offences specified in section 1st, chapter 67, of 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 BOUNTY, (10.)
 DESERTER, (25.)
 ENROLMENT, I, (17,) (42.)
 ESCAPE, (2.)
 JURISDICTION, (3.)

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 services, but 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 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 irregularity 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* 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, is 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*. An ordnance officer (with a field officer's rank) commanding a detachment of ordnance officers and men at an arsenal cannot derive from the statute any authority whatever to act in the judicial capacity indicated. V, 413.

6. The commander of a post, whose command is not a regimental organization, is not competent to convene a field officer's court. XXI, 78.

7. The commanding officer of a draft-rendezvous has no authority, *as such*, to appoint a field officer's court. XIV, 48.

8. *Held* that a *major* commanding a separate battalion of one of the regular regiments, organized under the 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. XVII, 50.

9. The commanding officer of a battery company cannot be detailed as a field officer's court. XI, 497.

10. A captain and brevet major, assigned to a command with troops in his brevet rank, 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.

11. 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 in the place and stead of garrison and regimental courts-martial, and to do no more than this. II, 58.

12. The field officer's court, like the regimental, &c., court, is not competent to pass upon a charge of desertion, this being a capital crime. Nor should it assume to pass upon so serious an offence as an "attempt at murder," 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.

13. 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 the act. The enlisted men of a detached battery company in the field should be tried by a general court-martial convened in the usual manner. V, 563.

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 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 separately, 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.

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 generally 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; I, 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. 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. See XIII, 14.

21. The *punishment* ordered by the field officer's court must be inflicted by 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.

22. When detailed under the act, the officer constitutes a court, and as his jurisdiction is confined to cases arising in his own regiment, and previously to the passage of this act triable by a regimental or garrison court-martial, it seems that, with strict propriety of language, his proceedings may be designated as those of a regimental court-martial. The caption of the record should, in such case, indicate his *status* by a recital somewhat as follows: "Proceedings of a regimental court-martial, consisting of,—(name of officer;—)detailed for

that duty under the provisions of section 7, chapter 201 of act of July 17, 1862." V, 395.

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. 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.

25. The sentence of a field officer's court, in a case of absence without leave, that the accused shall forfeit \$10, in addition to the forfeiture required by paragraph 1357 of the Army Regulations, is 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.

26. The brigade commander who is constituted by the act the reviewing officer of the proceedings of a field officer's court, is invested with the same power of pardon or mitigation of the sentence as is conferred by the Eighty-Ninth article upon the commanding officer of a regiment or garrison in regard to the sentence of a regimental or garrison court-martial. X, 283.

FINDING.

1. 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.

2. 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.

3. 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.

4. 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.

5. 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.

6. 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 connexion with the specification. Otherwise there is nothing in the judgment of the court furnishing a basis for a plea in bar in case of a subsequent arraignment for the same offence. VII, 513, 348.

7. But where there is no such specific finding as to show in connexion 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.

8. A finding of guilty of the specification, (without exception,) and not guilty of the charge, (desertion,) but guilty of absence without leave, is irregular, but not invalid. XIII, 655.

9. 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.

10. 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.

11. The determination that the court "confirm the plea of the accused" is a sufficient finding. VII, 236.

12. 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.

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. Where an officer was charged with "conduct unbecoming an officer and gentleman" in the appropriation of moneys, 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.

15. The fact that the finding of guilty upon one of several charges 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.

16. 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.

17. 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 sentence was either made mandatory upon the court or left to its discretion. XVI, 70. See SENTENCE, III, (18.)

18. It is held by the Secretary of War that an accused brought to trial under any specific charge may legally be convicted under the 99th article, where the evidence proves the commission of an act contrary to good order and military discipline, but does 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 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—was not 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.

19. 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.

20. 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 article, (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.

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 con-

stitute 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 plead *guilty* to both charge and specification—*held*, that the court, *notwithstanding his plea*, might properly find 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 is certainly an admission that the offence charged was committed, but it does not preclude the court from making a special finding, which, while substantially confirming the plea, merely presents the fact of guilt under a proper technical form. XI, 491.

23. 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.

24. 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.

25. 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.

26. 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 such a finding 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.

SEE FIFTY-FOURTH ARTICLE, (2.)
NINETY-NINTH ARTICLE, (17,) (18.)
LESSER KINDRED OFFENCE, (1.)

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* 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 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* 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. XVI, 556.

SEE TWENTIETH ARTICLE, (3.)
PARDONING POWER, (9.)
SENTENCE, I, (10,) (11); III, (10,) (11.)

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 persons 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 instru-

ment 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, 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.

FORFEITURE, I, (BY OPERATION OF LAW.)

SEE DESERTER, (6.) (7.) (23.)
 FIELD OFFICERS' COURT, (25.)
 PAY AND ALLOWANCES, (12.) (13.) (22.) (24.) (25.) (27.)

FORFEITURE, II, (BY ORDER.)

SEE DETACHED SERVICE.
 DISMISSAL, I, (5.) (6.)
 FINE, (1.) (3.)
 ORDER, (6.)
 PUNISHMENT, (15.) (18.)

FORFEITURE, III, (BY SENTENCE.)

1. The sentence of a court-martial 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. 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, (2,) (4,) (5.)

SEE BOUNTY, (2,) (3,) (4,) (5.)
 COMMUTATION OF SENTENCE, (3.)
 FRAUD, (6.)
 MILITARY COMMISSION, III, (2.)
 PAY AND ALLOWANCES, (10,) (11,) (12,) (15,) (23,) (26,) (30,) (33,) (36,) (38,) (39,) (40,) (41.)
 PARDONING POWER, (7,) (8,) (9.)
 PROVOST JUDGE OR COURT, (2.)
 PUNISHMENT, (17,) (20.)
 SENTENCE, I, (1,) (2,) (3,) (4,) (5,) (6,) (15.)
 SENTENCE, III, (12,) (13,) (14,) (16.)

FORGERY.

SEE NINETY-NINTH ARTICLE, (5.)
 MILITARY COMMISSION, II, (7,) (11,) (12.)

FORMER TRIAL.

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 EIGHTY-SEVENTH ARTICLE.
 COURT OF INQUIRY, (4.)
 JURISDICTION, (9.)
 MILITARY COMMISSION, I, (7.)

FRAUD.

(Act of March 2, 1863, ch. 67.)

1. The act ("to prevent and punish frauds upon the United States") is not retrospective in its operation. Its penalties necessarily apply only to offences committed after its passage. V, 312, 338.

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 al-

lege 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, chapter 67, of the act of March 2, 1863. 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 provision of the act of March 2, 1863, ch. 67. If his deficit, which is supposed to constitute this offence, was not ascertained until, at some period after 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 fraud under the provisions of the act of March 2, 1863, ch. 67, sec. 1. 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 the act of March 2, 1863, ch. 67, sec. 1, and that this officer was triable by court-martial therefor. X, 664. See XX, 35.

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. Where money misappropriated by an officer consisted of State bounty of recruits paid into the hands of the accused in his capacity as Captain and Provost Marshal by the State of Massachusetts; *ad-*

vised, that as being contributed by the State for the benefit of the United States, for hiring recruits to be enlisted in its service, it might be viewed as in the nature of "property of the United States furnished and to be used for the military service" thereof; and that in this view the officer might be held triable by court-martial for its misappropriation under this act. XIX, 171.

SEE EIGHTY-FIFTH ARTICLE.
CHARGE, (8.)
CONTRACTOR, II, (3,) (8,) (10.)
MILITARY COMMISSION, III, (3.)

FREEDMAN.

SEE MILITARY COMMISSION, II, (55.)
MURDER, (2.)

G.

GAMING.

SEE CHARGE, (12.)

GARNISHMENT OF PAY.

1. The principle of public policy which protects employés 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 his agent. I, 378; VIII, 493.

2. 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.

3. *Held* that funds, in the hands of a United States paymaster, due as wages to a government employé 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. A person who acts at the north as banker and financial agent of rebels residing in the disloyal States, and as a broker dealing in confederate securities, is 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 contraband property to be conveyed by another to the enemy, and which he understands is to be so conveyed, 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.)
PRISONER OF WAR, (4,) (5.)
TRANSFER, (1.)

GUERRILLA.

1. The charge of "being a guerilla" may be deemed a military offense *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 annunciation 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 cooperate 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,"

The charge of "being a guerilla," (in a case occurring in Missouri,) is 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 act of July 2, 1864, gives the commanders of armies in the field, and of departments, the power to carry into execution *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 maurading 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, (14.)

MILITARY COMMISSION, IV, (4.)

PRESIDENT AS REVIEWING OFFICER, (6.)

VIOLATION OF THE LAWS OF WAR, (15.) (17.)

H.

HABEAS CORPUS.

1. Where the United States marshal has made an arrest, and a writ of *habeas corpus* is served on him, and he returns the order of the Secretary of War, issued under the authority of the President, suspending the writ in all cases of arrests of disloyal persons, and there is then an attempt to rescue the prisoner, he is to appeal for support and protection to the military force in the vicinity. He is entitled to be supported by the physical power of the government against any such attempts. I, 348, 347.

2. Under the act of 28th September, 1850, chapter 78, section 5, a parent, &c., could sue out a writ of *habeas corpus* for the release of a minor enlisted without consent, but the *minor* could not. I, 367.

3. Where a soldier escapes from the custody of the United States while under sentence of imprisonment imposed by a competent military court, his discharge from the service by a State court upon *habeas corpus*, on the ground that he enlisted when under eighteen years of age, is a nullity. A person properly in the custody of the United States authorities for a violation of the public law cannot be released upon a writ of *habeas corpus* issued from a State court. V, 398; II, 484.

4. It is a proper and sufficient return to a writ of *habeas corpus*, by an officer, that the prisoner was not in his custody, but in the custody of a military court charged with the duty of; and having full jurisdiction for, trying him for the crime of desertion, with which he was charged. Such a return ought certainly to be satisfactory to the civil authorities. II, 34.

5. When a soldier is arrested on the charge of being a deserter, the determination of any question pertaining to his case belongs to the forum of military law, to whose tribunals he is directly amenable. The civil authorities have nothing whatever to do with him. If, however, from ignorance of duty, or from disloyal sympathies, judges are found who persist in issuing and trying 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 in all cases be suspended by the President, under the act of Congress of March 3, 1863, chapter 81, section 1. This having been done, the officer having the offender in custody should refuse obedience to the writ, and should be supported, if necessary, by the military power of the government, in such refusal, and he should simply return that the party is held under military charge, and that the writ of habeas corpus has been suspended in his case by the President. II, 190.

6. If, upon the return of a writ of *habeas corpus*, the State judge is judicially informed that the soldier is imprisoned under the authority of the United States military authorities, and still assumes to proceed in the case, either personally against the officer making the return, or in favor of the soldier held, and for the purpose of enforcing his release from the custody incident to the service, complete protection against such proceeding should be afforded by the active interposition of the nearest military authorities. III, 104.

7. A provost marshal would violate his duty in producing the body of a drafted man before the State court issuing the writ of habeas corpus. He should make the return prescribed in circular No. 36, issued from the Provost Marshal General's office. 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 see *Ableman vs. Booth*, 21 Howard, 523.)

8. If the provost marshal is 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 comitatus* in aid of his ministerial officer, in an endeavor to enforce such mandate, the military authorities would be fully justified in placing him in arrest. III, 502.

9. Suspension of the writ of habeas corpus by the President under act of March 3, 1863, chapter 81, section 1, *recommended* in the following 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 trea-

sonable 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.

(*The cases in the foregoing paragraph were considered prior to the proclamation of President Lincoln, of September 15, 1863, suspending, generally, the privilege of the writ of habeas corpus in the class of cases referred to.*)

10. 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 federal or State judge would be obliged to dismiss an application made for the writ in behalf of such parties. XV, 157. And see the ruling of the United States Supreme Court in *ex parte Vallandigham*, 1 Wallace, 243, where it is held that such court has no authority to review the proceedings of military courts, upon writ of *habeas corpus* or *certiorari*, either by virtue of its original or appellate jurisdiction.

11. A State court has 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 apprized 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, 523.) 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 in the cases of a dismissed officer and of a discharged soldier held 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 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 recent proclamation, discontinued the suspension of the writ of *habeas corpus* in the State 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.

12. But *held* that where the writ, in a case of the above class, 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.

13. No State court is empowered, under any circumstances whatever, to discharge upon *habeas corpus* a soldier duly held in the United States service. A United States court may be so empowered in certain cases, because of its being a co-ordinate branch of the same sovereignty as that which holds the soldier to service, but a State tribunal, which pertains to an altogether different sovereignty, can exercise no jurisdiction over such soldier. Where, therefore, a writ of *habeas corpus* is issued in the case of such a soldier to a military officer by a State court, he is merely to return the facts showing that the man is duly held as a soldier, without bringing him into court; and the State court must thereupon dismiss the writ. If, however, it does not do so, but proceeds to attempt to discharge the soldier, or to proceed against the officer as for a contempt, the latter is to resist its process and demand from his superiors or the government adequate military force to enable him to resist successfully. XXI, 157. (See *In re Spangler*, 10 Am. Law Reg. 598; and *In re Jordan*, 11 Am. Law Reg. 749.)

14. A United States judge, upon *habeas corpus*, cannot legally discharge a soldier as having been enlisted under age, upon the testimony of his parent that he was so, when it is specifically declared by the soldier in his formal oath of enlistment that he was fully of age. 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," is regarded as establishing a rule of evidence binding upon all courts. XVIII, 293.

15. Upon *habeas corpus* for the discharge of a soldier, a civil judge is not competent to decide that the war is ended, and on that account 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 cessa te.*"

SEE ENLISTMENT, II, (2.) (3.) (4.)
VIOLATION OF THE LAWS OF WAR, (3.)

HOMICIDE.

SEE MILITARY COMMISSION, II, (20.) (25;) IV, (3.) (6.)
MURDER.

HOSTAGES.

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* 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 PRISONERS OF WAR, (5.)

HOURS OF SESSION OF COURT-MARTIAL.

SEE SEVENTY-FIFTH ARTICLE, (2.)
RECORD, IV, (20.)

I.

IMPRISONMENT.

SEE PENITENTIARY, I, II, III.
 PUNISHMENT, (12,) (13,) (14,) (15,) (17.)
 REMISSION.
 SENTENCE, III, (1,) (2,) (3,) (4,) (6,) (9,) (11.)

INFAMY.

SEE DESERTION, (25.)
 DISCHARGE, (3.)
 WITNESS, (23.)

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 to refer the case for examination and report to a medical expert, before finally acting upon it. VI, 125; V, 397; VIII, 202.

INSPECTOR.

SEE MILITARY COMMISSION, II, (10.)

INTERPRETER.

That a member of the court acted as interpreter on the trial does not affect the validity of the proceedings. IX, 15.

SEE CLERK, (2.)

INVALID CORPS.

SEE NINETY-SEVENTH ARTICLE, (5,) (8.)
 DETAIL OF MILITARY COURT, (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.

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. 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 by usage, and would be in derogation of the rights of the party on trial. II, 60.

2. It is the duty of the judge advocate to take care that the accused does not suffer from ignorance of his legal rights, and has an opportunity to interpose such pleas as the facts in this case may authorize. V, 577.

3. It is the duty of the judge advocate to see that the charges and specifications are technically accurate; and previous to the arraignment of the prisoner, any amendment may be made, and even new charges filed through the judge advocate, by the sanction of the authority convening the court. An amendment made by the judge advocate should be accepted as made by the direction of the convening authority, without any formal reference for that purpose. III, 230.

4. 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.

5. 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.

6. A division or corps commander has no authority in law or usage to appoint a permanent judge advocate for his command. He may continue the same officer in that position as long as he sees fit, but he must be detailed anew for every court-martial on which he attends. II, 54; XVI, 429.

7. An officer detailed as acting judge advocate on a division staff has no right, as such, to take any part in the proceedings of a court-martial for which a regular judge advocate has been formally detailed, and is acting. V, 140.

8. While a district commander may of course detail an officer upon his staff under the designation of "judge advocate," and assign to him duties appropriate to the position, there is no such officer known to the law as a "district judge advocate." XIII, 238.

9. While there is no law expressly forbidding the appointment of judge advocates from civil life, the long-continued usage of the service is adverse; and it is not advisable that this usage should be discontinued. III, 536; XVI, 565.

10. 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 is void. IV, 26. See (13.)

11. No precedent is known to exist of the assignment of an officer holding the appointment of judge advocate, under the act of July 17, 1862, ch. 201, sec. 6, to the duty of conducting the *defence* before a court-martial; and for him to *act* in such capacity would be manifestly improper. VII, 158.

12. 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.

13. 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.

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 present usage of the service is opposed to it. IX, 377.

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, is unwarrantable, and an act of insubordination. IX, 488. See NOLLE PROSEQUI.

18. It is 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 allowances 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 allowances than as provided in paragraphs 1137 and 1138 of the Army Regulations. XVI, 213. See COMPENSATION OF MEMBERS OF COURT, JUDGE ADVOCATE, &c.

SEE SIXTY-SIXTH ARTICLE, (1.)
 SIXTY-NINTH ARTICLE, (1.)
 CHARGE, (14.)
 COUNSEL TO ASSIST JUDGE ADVOCATE.
 FIELD OFFICER'S COURT, (15.)
 MILITARY COMMISSION, I, (7,) (8.)
 RECORD, I, (3;) IV, (1,) (2,) (3,) (4,) (7,) (14,) (17.)
 RECORDER.
 WITNESS, (1,) (5,) (6,) (8,) (9,) (16,) (22.)

JURISDICTION.

1. An officer or soldier duly mustered out of the service is, except in the cases especially provided for by statute, beyond the jurisdic-

tion of a military court as to offences committed while in the service unless a prosecution were formally commenced against him therefor before his discharge, as by the service of charges upon him with a view to his trial, or unless he has procured himself to be discharged by means of fraud or deceit practiced upon the government. So where an officer procured himself to be mustered out of the service by suppressing, for the 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—*held* that it was competent to revoke his discharge and bring him to trial for such offence by court-martial. XXI, 94. See MUSTER-OUT, 4.

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 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, is *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. 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, (as 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. (*Ibid.*)

6. *Held* 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 official proclamation or otherwise. XXI, 17. See HABEAS CORPUS, 15.

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. 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 an 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* 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.

9. 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.

10. 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. 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.

11. Military courts have no power whatever to pass upon questions of title, indebtedness, &c., arising in controversies between citizens. XIX, 41.

12. A sutler at Fort Ridgely, 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.

13. 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 connexion 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.*)

For *Jurisdiction of Court-martial*, see COURT-MARTIAL, II.

For *Jurisdiction of Military Commission*, see MILITARY COMMISSION, II, III, IV.

For *Jurisdiction of Field Officer's Court*, see FIELD OFFICER'S COURT.

SEE THIRTY-SECOND ARTICLE, (4.)
EIGHTY-EIGHTH ARTICLE, (2.)
HABEAS CORPUS.
PROVOST JUDGE OR COURT.

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 30th section of act of March 3, 1863. III, 641.

SEE JURISDICTION, (7.)
STOPPAGE, (3.)

LESSER KINDRED OFFENCE.

1. Under a charge of "*desertion*" the accused cannot 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.

SEE FINDING, (4.) (5.)

LIMITATION.

SEE EIGHTY-EIGHTH ARTICLE.

LOCAL BOUNTY.

SEE THIRTY-NINTH ARTICLE.
EMBEZZLEMENT.
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 affects in no way the decision of the court or 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.

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 President 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.

SEE SIXTY-FIFTH ARTICLE, (4.)

M.

MANSLAUGHTER.

Several soldiers left their camp at night, 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.

SEE NINETY-NINTH ARTICLE, (20.)

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* 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 *entrepreneurs* at Nassau, Havana, &c.—*held*, 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 finally suspending the functions of his court until Congress could have an opportunity of exercising its powers of impeachment and removal. II, 172.

4. *Held*, (in 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.

MEMBER OF MILITARY COURT.

SEE SIXTY-FOURTH ARTICLE.

SEVENTY-FIFTH ARTICLE, (1.)

NINETY-SEVENTH ARTICLE.

COMPENSATION OF MEMBERS OF COURT, JUDGE ADVOCATE, &c., (1.) (7)

COURT-MARTIAL, I, (3.)

DETAIL OF MILITARY COURT.

DISCHARGE FROM SERVICE OF MEMBER OF MILITARY COURT.

JUDGE ADVOCATE, (1.)

MILITARY COMMISSION, I, (5,) (6,) (7,) (8,) (9,) (10.)

ORDER, (7.)

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 made 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; 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, but their powers have not been defined nor their mode of proceeding regulated by any 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 at *three*. To establish a military commission with but two members would be against all 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," 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, and usually, employed upon the trial of citizens by military commissions. XI, 111.

13. *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 apparent 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 recog-

nized 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 unincumbered 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 fruits borne by the rebellion and authorized by its head, 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 SEPARATE BRIGADE, (10,) (11.)
NEW TRIAL, (1.)

MILITARY COMMISSION, II, (JURIDICTION IN CASE OF CITIZENS.)

1. In a military department the military commission is 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, (14.) 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 and of the State of the venue. XVIII, 604.

3. A person charged with giving "aid and comfort to the rebellion," under section 2, chapter 195, of act of July 17, 1862, may 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, may 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 employé of the Quartermaster's department, is triable by military commission, though the ordinary courts of that part of the State may be open. V, 36.

5. A citizen of Kentucky is 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. A military commission in the District of Columbia has 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*, 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*, 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* that a military commission had jurisdiction of the case of a citizen of the District of Columbia charged with forging pay cer-

tificates, 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* 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* 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* 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* 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* 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 employé of the quartermaster's 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 of bailing them, or allowing them to be bailed and taken out of the jail, in order to be enrolled by brokers as soldiers—*advised*, 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. Employés of the Quartermaster's department (when not actually serving with the armies in the field, and therefore triable by court-martial) may, 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 employé 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 of 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* 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 *recent act* of July 4, 1864, chapter 253, section 6, which makes inspectors employed in the Quartermaster's department amenable to trial by court-martial or military commission, for "corruption, wilful neglect, or fraud, in the performance of their duties.")

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* 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 soldiers' 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 the bounties to which they are entitled by the local law is grossly immoral and flagitious, but not within the jurisdiction of a military commission. IX, 205.

16. A robbery of a discharged soldier by a citizen at Baltimore, *held* 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 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*, 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 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. The murder of Union soldiers, for the disloyal and treasonable purpose of resisting the government in its efforts to suppress the rebellion, is a military offence, quite other than the ordinary offence of murder, cognizable by the criminal courts; and citizens who have been guilty thereof, though in a State where the courts are open, may 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* triable by a military commission. IX, 225.

27. The offence, committed by a civilian, of attempting to bribe the members of a military court or the witnesses thereat—*held* 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*, 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* 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 necessitat*, to suspend for a time, for the preservation of the whole, some portions of the legal safeguards thrown around the citizen in time of peace. It is the fact that the State of Indiana is in this category (with the additional consideration that it has been constantly threatened with invasion by the enemy,) which confers jurisdiction upon the military commission that has passed upon the cases of Dodd, Bowles, Milligan, Horsey, and other conspirators against the government.

The amendment of the Constitution, which gives 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, is often referred to, as conclusive against the jurisdiction of military courts over such offences when committed by citizens. But though the letter of the article would give color to such an argument, yet in construing the different parts of the Constitution together, such a literal interpretation of the amendment must be held to give way before 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 Fifty-Seventh 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*, 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 the enjoyment of their 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 authorities—*held*, notwithstanding such non-payment, that all who participated in or co-operated with such meeting were triable 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 a 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* 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*, 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 case of crimes of 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*, 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 employer, 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*, that those concerned in this brutal act should be brought to trial by military commission. XVIII, 525.

SEE SIXTY-FOURTH ARTICLE, (6.)
 CONFEDERATE SECURITIES, (3.)
 CORRESPONDENCE WITH REBELS, I.
 FALSE PRETENCES, (2.)
 PRISONER OF WAR, (13.)
 VIOLATION OF THE LAWS OF WAR, (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 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 the articles of war. I, 389, 482.

MILITARY COMMISSION, IV, (JURISDICTION IN CASE OF AN ENEMY.)

1. Rebels in the 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 confederate 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 a "violation of the laws and customs of war" in the commission of acts of violence, robbery, &c. V, 590.

5. A rebel soldier may be tried 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 prisoner 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, that the commander referred to be arrested and brought to trial by military commission. XVIII, 429; XVIII, 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 at the locality named. 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*, 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 im-

punity for an indefinite period to all criminals who remained untried at the period of such occupation. XIX, 390.

SEE PRISONERS OF WAR, (13.)

SPY, (6.)

VIOLATION OF LAWS OF WAR, (2,) (4,) (6,) (15,) (17,) (18.)

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 recent act 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 such 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 DIVISION.

SEE SIXTY-FIFTH ARTICLE, (7.)

MILITIA.

SEE NINETY-SEVENTH ARTICLE, (4,) (6,) (7.)

MITIGATION OF SENTENCE.

1. *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.

SEE EIGHTY-NINTH ARTICLE.
COMMUTATION OF SENTENCE.
PARDONING POWER.
ORDER, (10.)
REMISSION OF SENTENCE.

MORTGAGE OF SLAVE PROPERTY.

SEE SLAVE.

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 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 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*, 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 in charge of a prison for the confinement of rebel prisoners of war 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 should 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.

SEE CHARGE, (17.)
 COURT-MARTIAL, II, (8,) (9.)
 MILITARY COMMISSION, II, (25;) IV, (3,) (5.)
 PRISONER OF WAR, (8,) (13.)
 SENTENCE, I, (20.)

M U S T E R .

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 conclusive 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 been thus 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 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 represents 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.)
 CONSOLIDATION OF REGIMENTS.
 ENLISTMENT, I, (1,) (3.)
 PAY AND ALLOWANCES, (9,) (35.)

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 commander-in-chief of the army, may muster out or dismiss officers, of every grade, from the service, at his pleasure. V, 319.

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 mus-

tered 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. An officer 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 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*, that the formal and regular muster-out of service of an 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. 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. Further, upon the principle that fraud may be constituted as well by a suppression of truth as by false representations; *held*, that where an 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.

But where an 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.

5. Where the government has elected to retain an 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.

6. An 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 to 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.

BOUNTY, (1.)

CONTINGENT FUND.

COURT-MARTIAL, I, (2,) (3.) II, (14,) (15.)

DISCHARGE, (1.)

JURISDICTION, (1.)

PAY AND ALLOWANCES, (8,) (29,) (35.)

MUTINY.

A single individual can be guilty of mutiny. I, 381.

SEE COURT-MARTIAL, II, (8.)

FINDING, (5.)

N.

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* 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 toward 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 govern-

ment 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.

NEUTRALS.

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* 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 vessel, 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*, 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.

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 keep up the number of the court to thirteen,) 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, a new trial may be granted the accused by the President in a case of which he is the reviewing power, 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 cannot be granted 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 *nolle prosequi* to be entered, with the consent of the court, at any time after a trial has been commenced. The court may properly allow the same to be 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. The only instance where the court would be justified in withholding its consent to such a suspension of the proceedings is where there is reason to believe that the accused might thereby be oppressed by being subjected to a second trial for the same offence. IX, 533, 488.

SEE CHARGE, (16.)

NON-COMBATANT.

SEE PRISONER OF WAR, (3.)

NON-COMMISSIONED OFFICER.

SEE NINTH ARTICLE, (3.)

NON-RESISTANT.

SEE ENROLLMENT, II, (2.)

O.

OATH OF ALLEGIANCE.

1. The President has no power formally to absolve a party from an oath of allegiance which he has taken; he has no authority to declare the oath in the abstract inoperative and void, or to relieve the party generally from any obligations it may have imposed. II, 267.

2. *Held*, 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, being held by the military authorities, he had applied to have delivered to him, might properly be returned in accordance with his application. XI, 647.

SEE MILITARY COMMISSION, IV, (1.)
 OATH OF OFFICE.
 PRESIDENT'S PROCLAMATION, I.
 SPECIFICATION, (6.)
 VIOLATION OF LAWS OF WAR, (4), (11.)

OATH OF ENLISTMENT.

SEE ENLISTMENT, I, (2;) II, (2.)

OATH OF COURT AND JUDGE ADVOCATE.

SEE SIXTY-NINTH ARTICLE.
 FIELD OFFICER'S COURT, (14.)
 JUDGE ADVOCATE, (14.)

OATH 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 Christians; therefore, *advised*, that such modified oath should not be accepted. XI, 503. And see XIII, 487.

2. Although a citizen physician employed by a post commander in an emergency to furnish medical attendance and medicines to soldiers and contrabands at the post, cannot strictly be regarded as having been appointed to an office under the government of the United States, yet *advised*, that before his contract and further employment be approved by the surgeon general, he should be required to take the oath set forth in the act of July 2, 1862, chapter 128; and that a mere oath for *future* allegiance, but not containing the declaration that the subscriber had never borne arms against the government or given aid or comfort to the enemy, &c., would not be sufficient. XX, 11.

3. And where the oath subscribed by a physician, proposed to be contracted with at the south, 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* that this oath be not accepted as a sufficient compliance with the law. XIX, 376.

4. Where a contract had been entered into by a local commander at the south with a physician, who, because of having served in the rebel army, could not take the full oath prescribed by the act of June 2, 1862; *held*, that such *contract* should be at once rescinded. XIX, 89.

OATH OF WITNESS.

SEE DEPOSITION, (3.)

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 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, 599.

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.

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. And in making an arrest of an officer he may, instead of ordering him to his quarters, properly require him to report to the colonel 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' 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 specifically returned or entered upon the rolls as such servant. *Held*, also, that the act of 1862 appears to contemplate 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.

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.

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.

ORDER.

1. A general or special order signed "*by 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. It has not been usual to revoke an order of the commanding general of a military district, touching the liberty or property of a citizen, without first submitting to him, for explanation or remark, the grounds on which such revocation is contemplated; but *held* that such an order might properly be revoked without such reference in a case where, without prompt action, gross injustice would clearly be done. VI, 209.

3. 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 quartermaster's department—*held* not to invalidate the sale of such a horse made to a citizen before the date of the order. IX, 602.

4. Where the aide-de-camp of a department commander was 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.

5. 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 was not for that reason alone justified in refusing to comply with the order. XVI, 604.

6. An order of a department commander, 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.

7. 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 neglect to strictly comply with them would not probably be regarded as an offence of the gravest character. XVI, 549.

8. 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 actually never 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.

9. 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 or post of duty; 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.

10. 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 DISMISSAL, I.

FINE, (1.)

PAY AND ALLOWANCES, (29,) (30,) (41.)

PUNISHMENT, (10,) (11,) (12,) (14,) (15,) (17.)

RECORD, I, (5;) IV, (5,) (6,) (23.)

RESIGNATION, (2.)

SENTENCE, III, (5,) (7,) (8.)

SEPARATE BRIGADE, (6,) (9.)

ORDER 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 upon its face 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 connexion with the order, that his command was an "army," division, or "separate brigade." XI, 176.

2. 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, 10.

SEE ADJOURNMENT, (2.)
COURT-MARTIAL, I, (6.)

ORDER 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.

SEE REVIEWING OFFICER, (8.)

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 involving an absence of a year and a half, to 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* that 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.

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, had infinitely 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.

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's department—*advised*, 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 a citizen 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. 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.

SEE EIGHTY-NINTH ARTICLE.

BOUNTY, (4.) (5.)

OCCUPATION OF REBEL ESTATE, (2.)

PARDONING POWER.

PLEA, (13.)

PARDONING POWER.

1. 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.

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 to set aside a valid consummated sentence of dismissal as it is to recall and undo any corporal punishment that has actually been wholly undergone. XX, 302.

3. A pardon by the President will restore a regular officer who has been dismissed, or an officer of volunteers who has been appointed by the President. V, 446. But 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 *removing the disability* imposed by his sentence, and authorizing his being recommissioned by the governor of his State. I, 365, 372, 374; VIII, 465. The pardoning power will not reach a duly executed sentence of dishonorable discharge. XIV, 568. XII, 427. But the President may remove the disability to re-enlist imposed by an executed sentence of dishonorable discharge. XII, 427.

4. It was formerly the practice, and understood to be the law; that a pardon would not, of itself, restore to and reinstate in his office an officer, appointed by the President, who had been duly dismissed by the executed sentence of a military court; (see Opinions of Attorneys General, volume IV, 274;) but that a renomination, followed by a confirmation by the Senate, was in such case still necessary. The practice, however, has grown up during the present war of giving to a pardon the effect of absolutely reinstating such dismissed officer in his position, in cases where the vacancy has not been filled; and this practice appears to be now generally recognized and acquiesced in as the law of the service. XX, 302; XIX, 45.

5. In the case of an officer of the first Tennessee artillery regiment who—the civil government of that State having been subverted to treasonable purposes—had received his commission from the military governor, appointed by the President—*held*, that the *status* of such officer in the service was not that of an officer of State troops, but that of one appointed in the volunteer force by the President; and that the effect of a pardon by the President, after he had been dismissed, was not merely to remove the disability of his sentence, but to restore him to his position and office. XX, 107.

6. Where an officer of United States colored troops—an appointee of the President—who had been dismissed, was restored by a pardon of a certain date; and after that date, and before he received notice of the pardon, his regiment and command were mustered out of service—*held*, that he was restored from the date of pardon, and was entitled to pay for the period between that date and the muster out. XXI, 74.

7. 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. But where the dishonorable discharge was, by the terms of the sentence, to take effect at the end of a term of imprisonment also imposed thereby—*held*, that the remission by the President, before the expiration of such term, of the unexecuted portion of the imprisonment, entitled the soldier to an honorable discharge. XX, 460.

8. Money forfeited to the United States by the sentence of a military court is not beyond the reach of the pardoning power, (and may therefore be restored,) where it has not been paid into the treasury,

and the sentence thus executed, but remains in the hands of an intermediate military officer, and is thus subject to executive control. XII, 306.

9. Though the President has power to remit forfeitures and fines before they are paid, (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. XVI, 305.

10. 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 depository 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 moneys, 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.

11. 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. 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.

12. 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 this 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.

13. The pardoning power cannot be delegated; and the designation of which individuals among a number of prisoners are to be pardoned must necessarily be made by the President. The designation of those upon whom the sentence is to be executed is but the exercise of the same power, being merely an approval of the sentence and a refusal to pardon. I, 446.

14. 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 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.

15. 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.

16. 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.

PAY AND ALLOWANCES, (11,) (12,) (26,) (39.)

REDUCTION TO THE RANKS, (5.)

REMOVAL OF DISABILITY.

P A R O L E .

1. The violation 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. 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.

3. 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.

4. 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* 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* 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.

5. A party apprehended while serving in connexion 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.

6. 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.

7. A violation, on the part of an officer, 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.

PAROLED PRISONERS.

1. Paroled prisoners, so far as pay and allowances are concerned, must be regarded as in actual service. Officers, however, who are thus circumstanced are 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 oblige them to

désist from ; and except in such case, therefore, are 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.

SEE PRISONER OF WAR.

PAY AND ALLOWANCES.

1. The word "pay" has a technical signification. When found alone, in the sentence of a court-martial, it does not include allowances. II, 193; VIII, 578; X, 565.

2. *Held* that the 15th section of chapter 201, of the act of July 17, 1862, providing pay and rations for persons of African descent employed in the military service, applied only to persons of this class employed under and by virtue of the act itself, and not to those who might, prior to the date of the enactment, have been employed as teamsters or laborers in the quartermaster department. I, 377.

3. *Held* that under-cooks of African descent, authorized by section 10 of act of March 3, 1863, to be specially enlisted as such, do not occupy the *status* of soldiers, and that consequently the general provision of Congress increasing the pay of soldiers does not operate to increase the compensation already fixed for them by law as a distinct class of military employés. XV, 11.

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*, that officers 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 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, chapter 200, section 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 had been mustered out of the 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 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. 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.

12. 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 is *held* in regard to his right to pay: 1. He is entitled to be paid for the period between his return from desertion and the date of his sentence. This pay is not forfeited by operation of law, not being pay due at the time of his desertion referred to in paragraph 1358 of the Regulations, nor pay for the time of the unauthorized absence referred to in paragraph 1357; nor is 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 does not relieve the soldier from such forfeiture, but only absolves him from liability to further punishment. He is *not* entitled, therefore, to pay for this second period. V, 386.

13. 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.

14. *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 company, regimental, &c., commander, 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, (who cannot go behind the roll,) is authorized and required to pay such party as if he had never been absent. This proceeding should be resorted to and this record made thereof in every case; and *held* that the *general order* of a superior of the "commanding officer," as the brigade or division commander, announcing the fact that the party has made satisfactory excuse, &c., would not, of itself, have the effect to protect the paymaster in making the payment. XV, 109.

15. 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—*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.

16. Section 20, of chapter 42, of act of August 3, 1861, in regard to the allowances of officers absent from duty, does not apply to a case where the absence is compulsory, and in consequence of a sentence of court-martial which was illegal and void. VI, 90.

17: 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.

18. A major general who is required to attend on several military courts as a witness, &c., is performing duties appropriate and belong-

ing to his duty as an officer, and is relieved during the period of such attendance from the operation of the limitation of six months fixed by the act last named. VII, 44.

19. An officer, though under charges, is still entitled to his pay. VIII, 478.

20. 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.

21. 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.

22. A soldier convicted of desertion is subject (though no forfeiture is imposed by his sentence) to a forfeiture, by operation of law, (paragraph 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.

23. A soldier who has been sentenced to confinement with forfeiture of “pay” (which does not include allowances) cannot be subjected to a stoppage for the whole clothing issued during his confinement, but only for so much as exceeds his legal *quantum* for that period, according to the ordinary rule. VIII, 578.

24. 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, 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 arrest 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.

25. Where a soldier, tried for desertion, was found guilty of absence without leave only, and the reviewing officer disapproved the proceedings, and restored him to duty, thus terminating the case against him—*held*, that the effect of such action was to remit him to all his rights in regard to the pay which would have otherwise been forfeited, by operation of law, (paragraph 1357,) for the period of absence; his right to receive such pay having only been held in suspense during the pendency of proceedings. VIII, 519.

26. Where an officer has been sentenced to be dismissed with forfeiture of all pay due and to become due, and the sentence has been executed, his subsequent restoration by the President, in the exercise

of his pardoning power, does not revive his right to pay which has been extinguished by the sentence. He is entitled to be paid only from and after the date of the order of restoration. X, 201.

27. 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.

28. 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, chapter 200, section 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 exemption. VIII, 640.

29. 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 the general rule, (subject, however, to exceptions—each one to be determined by the peculiar circumstances surrounding it,) that he shall not be paid for the interval during which he was actually separated from the military service under the original order. XII, 429.

30. 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.

31. A soldier was sentenced to be dishonorably discharged, and to forfeit all pay and emoluments over-due 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.

32. 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.

33. 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. Subsequent 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 have been informed 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 so restore him, that he continues entitled to his right, as an officer, to pay, &c. XII, 230.

34. 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.

35. An 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.

36. 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 connexion 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, 523.

37. A soldier, sentenced "to be dishonorably discharged at the end of his term, and meanwhile confined at hard labor," *held* entitled to pay up to the date of such discharge. XVI, 357.

38. 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.

39. Where—in a case 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 became inoperative, and that a forfeiture of pay, imposed thereby, did not take effect. XV, 114.

40. 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.

41. An order, releasing a soldier under sentence of confinement and granting him an honorable discharge, cannot be construed to re-

mit a forfeiture of pay and allowances also imposed by the sentence. XXI, 43.

SEE TWENTIETH ARTICLE, (1,) (2.)
 ARREST, (13,) (14.)
 BOUNTY, (3.)
 COMMUTATION OF SENTENCE, (2,) (3.)
 DESERTER, (5,) (6,) (7.)
 DETACHED SERVICE.
 DISBURSING OFFICER, (2.)
 DISMISSAL, I, (5,) (6.)
 ENLISTMENT, I, (4,) (5.)
 FINE, (1.)
 FORFEITURE, III.
 GARNISHMENT OF PAY.
 MILEAGE, (1.)
 PARDONING POWER, (6,) (7,) (9.)
 PRISONER OF WAR, (1,) (10.)
 PUNISHMENT, (15,) (17,) (20.)
 REMOVAL OF DISABILITY, (2.)
 SENTENCE, I, (1,) (2,) (3,) (4,) (5,) (6,) (15.)

PAYMASTER.

Loyally to maintain the public credit, and to protect the public creditors, as far as practicable, from loss, is 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 invests 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 a violation of the requirements of paragraph 1342 of the Regulations, is 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 a but slightly diminished degree, by the solicitude of a faithful agent anxious to make the best possible bargain for his employers or friends. II, 36.

PAYMASTER'S CLERK.

A paymaster's clerk, 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 therefore is amenable to trial by court-martial. III, 269.

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*" is the same as one of confinement in a penitentiary. IX, 70.

SEE PRESIDENT AS REVIEWING OFFICER, (7.)
REVIEWING OFFICER, (10.)

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 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 "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.

PENITENTIARY, III.

(Under act of July 16, 1862, chapter 190.)

1. 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 would seem to be in conflict with the letter of the act of July 16, 1862, chap. 190. VII, 538; V, 500. It is understood, however, to be held by the Secretary of War, that where an article of war authorizes 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 may be properly pronounced, as in accordance with a "statute of the United States" in the sense of the act referred to. But, except

where such a provision is found, it would appear to be in conflict with the intent of this 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.

2. Where parties (citizens) were sentenced to the penitentiary of the District of Columbia for harboring deserters and aiding them to desert—*held*, 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.

3. 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.

4. 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.

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 confinement in the penitentiary. IX, 281.

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.)

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 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 periods 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.”)

SEE BOARD, (2.)

PLEA.

1. It is not competent for the general commanding to require, by a general order, that parties arraigned before court-martial for desertion shall plead “not guilty.” But where the plea of guilty is interposed by the accused, the rule precluding the introduction of testimony may be, and should be, especially *in capital cases*, relaxed, so that all circumstances of mitigation and of aggravation may be spread upon the record, and the reviewing officer be thus enabled to act understandingly. III, 647.

2. It is the general rule 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, 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 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. This ruling is in accordance with the uniform 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.

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 an additional reason, to that which is presented in the case of a plea of guilty unaccompanied by a statement, for the introduction of such evidence. See XIV, 585, 596; XVII, 48.

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. The court may properly refuse to admit a plea of guilty to a specification to which the accused adds the words, "but alleging no criminality thereto." It is the plea of a conclusion, which it is the business of the court to draw from the evidence. III, 246.

7. 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.

8. 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.

9. *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.

10. 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.

11. That an accused had not at the time of the trial been mustered into service as of the 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.

12. 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.

13. If an arrested soldier be released from arrest and placed on 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.

14. 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.

15. 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, is a fatal irregularity. IX, 328.

16. 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,

17. *Held*, that the fact of drunkenness furnished no valid plea to a charge of felony before a military court. XII, 59.

SEE ACCUSER AND PROSECUTOR, (2.)
ARREST, (10.)
FORMER TRIAL.

PLEADINGS.

SEE NINETY-NINTH ARTICLE, (17.)
CHARGE.
SPECIFICATION.

POLITICAL PRISONERS.

1. *Held*, 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*; 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.

PREFERRING CHARGES.

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,) (5.)
ACCUSER AND PROSECUTOR.
CHARGE, (11,) (13,) (14,) (15.)

PRESIDENT AS COMMANDER-IN-CHIEF.

SEE DISMISSAL, I, (1,) (2,) (3.)
MUSTER OUT, (1.)

PRESIDENT AS REVIEWING OFFICER.

1. In cases where the commanding general cannot execute the sentence, and the action of the President is made necessary by law, as well as in the cases where the execution of the sentence is suspended by the commanding general, 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. Where a death sentence rests 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 is not authorized by law to execute the sentence,) such sentence can be executed by the President alone, to whom, therefore, the proceedings should be transmitted by the general commanding. III, 81; VII, 347, 476.-

3. Before the President can act upon a sentence of court-martial, it is necessary that it should be confirmed by the authority convening the court, and by the general commanding the department or army in the field, as the case may be; and such confirmation must be expressly stated on the record. IX, 15.

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 mere 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 the death sentence upon a guerilla in certain cases.)

SEE SIXTY-FIFTH ARTICLE, (15.)
EIGHTY-NINTH ARTICLE.
LOST RECORD, (3.)
PAY AND ALLOWANCES, (10.)

PRESIDENT OF MILITARY COURT.

SEE JUDGE ADVOCATE, (12.)
ORDER OF PROMULGATION, (3.)
SENTENCE, III, (20.)

PRESIDENT'S PROCLAMATION.

I. (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 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*, that 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 committed 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.

II. (OF AMNESTY TO DESERTERS.)

(Proclamation of March 10, 1863.)

1. The proclamation of March 10, 1863, operates 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 does not relieve a deserter from making good the time lost by his de-

sersion—an obligation incident to his original contract. X, 459; VI, 469; XII, 139. See DESERTER, 1, 4, 5, 20; BOUNTY, 5.

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. See DESERTER, 1.

(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 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 properly be 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. It is held by the Secretary of War that deserters arrested prior

to the date of the proclamation of March 11, 1865, are not entitled, *as a right*, to the benefits of the amnesty; but that their being admitted thereto is a matter purely within the discretion of the Executive. XVI, 145.

III. (OF EMANCIPATION.)

1. 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 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 1st, 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* 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.

IV. (OF MARTIAL LAW.)

SEE MARTIAL LAW, (1,) (2,) (3.)

V. (OF SUSPENSION OF WRIT OF HABEAS CORPUS.)

SEE HABEAS CORPUS.

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. 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.

2. Parties found in the rebel ranks and uniform, although citizens of a loyal State (Maryland,) cannot be tried for treason by a military commission. They must 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 invariably exchanged under the cartel. An intermediate course—allowing a prisoner to take the simple oath of a *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*, in the case of a rebel major, 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* 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* 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. The cartel is not 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 a *spy*. 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 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 re-arrested and the sentence executed. XVI, 538; XX, 367.

9. An engineer captured when doing duty on a rebel steamer is properly a prisoner of war, and should be held for exchange, or released on taking the oath of allegiance. VI, 542.

10. It is laid down in *Respublica 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*, 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*, 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*, 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*, 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*, 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 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 practised upon them, but that his transactions had been fair and beneficial; and this party also showed 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, 3.

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.

But where a draft, given by a federal prisoner to a rebel, for a loan, had been presented and *paid*, *held*, that whether the case was one of extortion or not, the military department of the government could clearly not reimburse the drawer; and that Congress alone could afford him relief, if he were entitled to any. XVI, 419.

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.

SEE CLAIMS, I, (6.)

MILITARY COMMISSION, IV, (1,) (6,) (7.)

MURDER, (1,) (4,) (5,) (6.)

ORDER, (9,) (10.)

PAY AND ALLOWANCES, (32,) (33,) (34.)

VIOLATION OF THE LAWS OF WAR, (4,) (13,) (14.)

P R I Z E .

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, ch. 225, sec. 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, will be indemnified by the government. *Ibid.*

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*, 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 OFFICER.

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 damages, 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.

4. Professional services, when rendered in the interest of the government, and on retainer by one of its officers, should be paid for, on sufficient evidence that the services have in fact been performed, and that the charges are reasonable. I, 419.

5. 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.

6. 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 to 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.

7. An officer who has had judgment in damages rendered against him for acts done in his military capacity is certainly not entitled to relief by the War Department before he has been forced to satisfy the judgment, where he neglected in the first instance to report the case to the Adjutant General, in obedience to the requirements of paragraph 1461 of the Army Regulations. III, 88.

8. 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*, 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.

9. 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*, 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, 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* 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 ad-

vised 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.

10. 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—*advised*, 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

11. 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.

12. 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.

13. Where a late 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's 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 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—if the character of the sale to him gives rise to one—may then be considered. XIX, 498.

SEE THIRTY-THIRD ARTICLE, (1.) (2.)
DEPARTMENT COMMANDER, (6.)
DISBURSING OFFICER, (1.)
PRIZE, (2.)

PROMOTION.

SEE DISMISSAL, I, (7.)
MUSTER OUT, (3.)
REDUCTION TO RANKS, OF OFFICERS, (2.)
SUSPENSION, (1.)

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 be first examined. II, 1.

SEE ACCUSER AND PROSECUTOR.

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.

PROVOST JUDGE OR COURT.

1. A general commanding 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 defined, both tribunals derive their powers 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 regulations 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*, that such administration 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 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 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 strictly 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 *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 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,) (8.)
 PROCEEDINGS AT LAW AGAINST OFFICER, (9.)
 SENTENCE, III, (10.)

PUBLICATION OF ORDER.

SEE ORDER, (8,) (9,) (10.)

PUBLIC PROPERTY, (USE OF.)

Property of the United States acquired by public law cannot be disposed of through the will of any of the departments, but only by act of Congress. Thus, government land at Sandy Hook cannot 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 authorize 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.

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. IV, 131, 217.

2. A court-martial may legally impose the penalty of wearing a "ball and chain," as a punishment for enlisted men. V, 319.

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 or marking, 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 pœnitentiæ* 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.

4. 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.

4. There is no law, or regulation of the service, which requires a soldier, who has been "absent without leave," to make good the time lost by reason of his unauthorized absence; and a sentence of court-martial imposing such a penalty upon conviction of *absence without leave* must be regarded as simply a *punishment*. But such a punishment tends to degrade the profession of arms; and it does not comport with the honor, dignity, or security of the military service of the United States to make use of it as a penalty for wrong-doing. Such a sentence cannot be supported by analogy to the case of *desertion*, for the reason that in that case the requirement that the time lost shall be made good is not imposed by the sentence, but results by operation of law, in fulfilment of a broken contract. *Held*, therefore, that to execute a punishment of this character, in a case of absence without leave, would be prejudicial to the interests of the service. X, 298; and see VI, 379; VII, 42; IX, 636; XII, 402. (*But see the amendment*

of paragraph 158 of the Army Regulations, published since the date of this opinion in General Order No. 16, of the War Department, of February 8, 1865, by which soldiers convicted of absence without leave are now required, equally with deserters, to make good to the United States the time lost by their absence. And see ABSENCE WITHOUT LEAVE, 3.)

5. 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—*held*, 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.

6. So *held* 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.

7. The phrase in section 30, chapter 75, of act of March 3, 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.

8. 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.

9. 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 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 did not hesitate to approve it as sustainable on principles of public law. II, 564; XX, 178; XXI, 77.

10. 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.

11. 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, is an unauthorized act. VI, 105; VIII, 620; VIII, 505.

12. 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.

13. 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.

14. *Held*, that a "general commanding" had no right 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.

15. 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.

16. 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 keys 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.

17. 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.

18. 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.

19. A sentence 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 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.

20. The regular army is generally composed of men without families, so that the forfeiture of their pay falls directly upon the offender, and upon him only. In the volunteer service, however, the forfeiture of the soldier's pay takes the bread from the mouths of the helpless women and children of his household. It is a mode of punishment, therefore, which, from enlightened considerations, should be cautiously employed. III, 123; X, 662; VI, 365.

21. 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; BOUNTY, 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 has 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.

SEE DESERTER, (5,) (14,) (20,) (22,) (25.)
 DISCHARGE, (2.)
 FIELD OFFICER'S COURT, (21.)
 MURDER, (6.)
 PAROLE, (3.)
 PRESIDENT AS REVIEWING OFFICER, (5.)
 REVIEWING OFFICER, (5,) (14,) (15,) (16.)
 SENTINEL.

PUT IN JEOPARDY.

SEE EIGHTY-SEVENTH ARTICLE, (2,) (7.)

Q.

QUARTERMASTER'S EMPLOYÉS.

SEE COURT-MARTIAL, II, (11.)
 MILITARY COMMISSION, II, (9,) (10,) (19.)

R.

RAM FLEET.

The force employed on the ram fleet is regarded as a special contingent or portion of the army, and not of the navy. Pilots and engineers on the ram fleet, although not technically officers or soldiers, are persons serving for pay with the armies of the United States in the field, and are within the provisions of the sixtieth article. They are, 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.

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*, 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*, 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 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 enforced before the courts of the country; but no officer in the military service should be allowed to present such a claim, since such officer, in the 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 vessel for a considerable time after its recapture—*held*, that a just compensation for such use should be made to the owners. *Ibid.* I, 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*, 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.

RECONSIDERATION OF FINDING, &c.

SEE RECORD, II.

RECONVENING COURT.

SEE RECORD, II.

RECORD, I, (GENERALLY.)

1. The charges and specifications should 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.

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

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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.

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, by erasure or interlineation, is an informal 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 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 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 must be written upon the record at the end of the proceedings. Reference merely to a separate paper, such as a printed order, is not a compliance with the requirement of paragraph 896 of the Regulations. IV, 428.

3. Where the approval of the proceedings, findings, and sentence of a general court-martial, at the end of the record, was expressed as by "A. B., assistant adjutant general," it was *held* that the form of approval was irregular and insufficient. IV, 567.

4. So *held*, where the person purporting to sign the order of approval at the end of the proceedings, "by command of Major General A—," did not affix or subjoin to his name any military title, or abbreviation indicative of any official character whatever. VIII, 64.

SEE RECORD, IV, (25.)

RECORD, IV, . (FATAL DEFECTS.)

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*—

1. Where the record does not show that the court or judge advocate was sworn. II, 22, 480, 496; IX, 127, and *passim*.

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 not 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. 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. Where such signatures were appended, but not until after the court had been dissolved. III, 485. And where the *sentence* is not certified by the signatures of these officers. IV, 323.

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.

12. Where the record does not show that the court convened pursuant to 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 the alleged testimony of these witnesses was added, the proceedings, if they could not be formally amended so as to include the exact testimony of such witnesses, 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.

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 that the court 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.

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. 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.

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 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 state that a witness was for the prosecution does not affect the validity of the proceedings. IV, 218.

4. It is no objection to the validity of the proceedings that the court, after having permitted the judge advocate, against the wish of the accused, to enter upon the record that the general character of the latter as a brave officer was good, refused to allow the accused to introduce in evidence details of his bravery. III, 246.

5. 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.

6. A statement in the record that the vote on the findings or sen-

tence was "unanimous," though irregular, does not affect the validity of the proceedings. VII, 3.

7. 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.

8. The record need not show that the *witnesses* were sworn in the presence of the accused. IX, 166.

9. 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.

10. 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 challenge had been accorded. XXI, 120.

11. 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.

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.

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 such a recorder 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 FIELD OFFICER'S COURT, (16.)

REDUCTION TO THE RANKS, 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.

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. And where it was added by the court in their sentence, 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. 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 COMMUTATION OF SENTENCE, (1.)

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.

REGIMENTAL AND GARRISON COURTS-MARTIAL.

The records of these courts (equally with those of *general courts-martial*) should be transmitted to the Judge Advocate General for review, under the provision of section 5, chapter 201, act of July 17, 1862. IV, 537.

SEE SIXTY-SIXTH ARTICLE.
SIXTY-SEVENTH ARTICLE.
FIELD OFFICER'S COURT, (1.) (2.) (11.) (12.) (26.)

REGIMENTAL FUND.

1. This fund belongs to 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 to be entitled to raise a regimental fund under paragraph 204 of the Army Regulations, by a tax upon its sutler, although the post were 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.

SEE SUTLER, (5.) (6.)

RELIEVING THE ENEMY.

SEE FIFTY-SIXTH ARTICLE.

REMISSION OF SENTENCE.

General Order 98, of May 27, 1865, remitting all cases of sentences of imprisonment during the war, does not apply to a case of a *capital sentence* which has been *commuted by the President* to such an imprisonment. XIV, 633 ; XV, 468 ; XIX, 201.

SEE EIGHTY-NINTH ARTICLE.
DEPARTMENT COMMANDER, (1.)
PARDONING POWER.
PAY AND ALLOWANCES, (10.) (11.) (12.) (31.) (36.) (39.) (41.)
REVIEWING OFFICER, (7.)
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, and authorizes his being recommissioned by the governor of his State. I, 365, 372, 374; V, 446, and *passim*. And governors of States have not, in general, proceeded to grant new commissions to officers who have been dismissed, until notified officially of such action on the part of the President as would authorize such officers being mustered upon their commissions. XIII, 315. A sentence of dismissal, duly confirmed and executed, cannot be modified to an honorable discharge. VI, 578.

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, 126.

SEE PARDONING POWER, (3.) (5.) (7.)
REDUCTION TO RANKS, (5.)

REPORTER.

1. An enlisted man detailed as reporter of a court-martial, by virtue of section 28, chapter 75, of act of March 3, 1863, is entitled to receive an extra compensation of forty cents a day, and no more. V, 72.

2. The reporter authorized to be appointed for a general court-martial by section 28, chapter 75, of 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.

SEE CLERK, (1.) (2.)
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 confirm the proceedings. 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, 13.

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 re-convened for a re-consideration 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 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 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 connexion 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.

SEE SENTENCE, I, (20.)

RESIGNATION.

1. The right of an officer to tender his resignation, except under circumstances where 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.

RETIRING OF OFFICER.

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.

RETURN OF FUGITIVE SLAVE, &c.

SEE PEONAGE.

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.

2. The review of the proceedings by the division, &c., commander, or his successor, (authorized to convene a court-martial by the sixty-fifth article, or 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, in which case he must forward the proceedings, with his action indorsed thereon, for the review of the proper superior officer or the President. VI, 299; VII, 237.

3. 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.

4. Where the sentence is disapproved by the 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.

5. 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.

6. A division commander, 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.

7. 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 formally executed by the reviewing authority, he cannot, by a remission, restore such soldier to the service. XII, 427.

8. 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 from issuing an order publishing its proceedings in the case in question. III, 555.

9. When an accused is sentenced to confinement in a penitentiary, 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, is called for. IX, 55, 56, 70.

10. 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.

11. 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.

12. The proceedings of a court-martial, in a case of sentence of dismissal, require the action, in all cases, of the department commander, or general commanding the army in the field; which officer can also confirm and execute the sentence without a reference to the President. IX, 98.

13. The 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.

14. Where a soldier was sentenced to be confined at hard labor for the balance of his term, and be dishonorably discharged at the end of his term; 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.

15. 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.

16. 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.

17. Where a sentence of dismissal of a commissioned officer has been 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, the proceedings must 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.

FIELD OFFICER'S COURT, (18,) (20,) (26.)

PUNISHMENT, (3,) (12.)

RECORD, III; IV, (25.)

SENTENCE, III, (1,) (2,) (3,) (4,) (5,) (6,) (18.)

RIGHT TO BE LAST HEARD BEFORE MILITARY COURT.

Conclusions of an opinion upon this question, published in the 'Army and Navy Official Gazette,' of February 7, 1865.

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 CHARGE, (7.)
MILITARY COMMISSION, II, (16.)

S.

SAFE-CONDUCT.

SEE FLAG OF TRUCE, (2.)

SALE OF GOVERNMENT HORSE.

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's department." An officer, therefore, who has been allowed to buy a horse which had been captured from the enemy, and consequently belonged to the Quartermaster's department, cannot be permitted to sell the same unless it may have been formally condemned as unserviceable. XI, 126.

SEE ORDER, (3.)
PARDON, (5.)

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 should 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. But *held* in this case that, though the government could not properly insist upon a claim for such salvage—the vessel not having been recaptured from the public enemy—it might justly require that a compensation should be rendered it by the owner for its services in res-

cuing the property from a situation of difficulty and danger. 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.

SEE RECAPTURED PROPERTY, (RESTORATION OF,) (2.) (3.)

SENIOR CAPTAIN.

A senior captain, upon whom the command of a regiment devolved, cannot be permitted to impose it or confer it, at his discretion, upon a junior. It cannot be said that he may *wave* 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 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. 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.

2. 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.

3. 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.

4. 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, is 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 over-due 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, therefore, proper to be enforced by such an order. XVI, 322.

5. 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:

6. 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 is no part of the sentence, and is irregularly incorporated with it. It cannot, therefore, affect its validity. XII, 572.

7. 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.

8. 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.

9. A sentence of imprisonment, which does not indicate for what period the same shall continue, is irregular and invalid. XVI, 283.

10. 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.

11. 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 imprisoned 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.

12. 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 thereupon would be irregular and improper. XII, 437.

13. A sentence 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.

14. 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.

15. 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.

16. Where an article of war is mandatory in affixing certain penalties for its violation, the sentence should conform thereto; but it is valid though it include but one of the penalties prescribed, as a sentence of cashiering only for a violation of the 39th article. VII, 112. So where, being mandatory as to a single penalty, it includes another also; in which case it is valid and may be enforced as to the first, and invalid as to the other. VIII, 296; IV, 283.

17. 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 connexion 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.

18. 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.

19. 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.

20. 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 being 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; XVIII, 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.

SEE TWENTY-FIFTH ARTICLE.

THIRTY-NINTH ARTICLE, (5.)

FORTY-FIFTH ARTICLE, (3.) (4.)

SEVENTY-SEVENTH ARTICLE, (5.)

EIGHTY-THIRD ARTICLE, (10.)

EIGHTY-FIFTH ARTICLE.

EIGHTY-NINTH ARTICLE.

BOUNTY, (2,) (3,) (4,) (7,) (10.)

COMMUTATION OF SENTENCE.

DESERTER, (2,) (6,) (13,) (14,) (15,) (19,) (25.)

DOUBLE RATIONS.

FIELD OFFICER'S COURT, (12,) (18,) (21,) (25.)

FORFEITURE, III.

PARDONING POWER, (1,) (2,) (3,) (7,) (12,) (14,) (15,) (16,) (17.)

PAY AND ALLOWANCES, (10,) (11,) (13,) (15,) (22,) (23,) (26,) (27,) (31,) (33,) (36,) (37,) (38,) (39,) (40,) (41.)

PENITENTIARY, I, II, III.

PUNISHMENT.

REMOVAL OF DISABILITY.

REVIEWING OFFICER.

SUSPENSION.

VARIANCE.

SENTENCE, II, (OF DEATH.)

1. A death sentence cannot be imposed upon conviction of "absence without leave." V, 91.

2. Death sentences against "guerillamarauders" for the crimes specified in section 1, chapter 215, of act of July 2, 1864, as well as for violation of the laws and customs of war; and against spies, mutineers, deserters, and murderers, may be carried into effect 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 the division commander disapproves a death sentence, (as

he has 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 general commanding the 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 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, 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 vite*, and will tend to accomplish one of the well-known objects of Congress in its enactment. IX, 592.

SEE EIGHTY-THIRD ARTICLE.

NINETY-NINTH ARTICLE, (21.)

PENITENTIARY, III, (1.)

PARDONING POWER, (1.)

PRESIDENT AS REVIEWING OFFICER, (2.)

REMISSION OF SENTENCE.

SENTENCE, III, (7,) (8.)

SENTENCE, III, (EXECUTION OF.)

1. The term of imprisonment to which a soldier is sentenced commences on the day he is delivered to the officer who is charged with the execution of the order for his confinement. III, 105. And this

delivery would of course properly take place immediately upon the publication of the approval of the proceedings by the reviewing officer. XI, 380.

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 same course is to be taken 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 will proceed, although meantime, 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 punish-

ment 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 Executive to transfer military prisoners from one place of confinement to another has never been questioned; and the prisoner being sent to the penitentiary, is properly subjected to the routine and rules of discipline there prevailing. 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; III, 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 it is equally clear that a provost marshal cannot, either in his capacity as such, or as the executive officer for a military court, legally enforce the payment of such fine. VIII, 298.

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 date of the sentence imposed by the court, and not to the date of the order promulgating the proceedings. XII, 326.

13. 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, it is entirely incompetent for the department commander to require the sentence, as such, to be executed at the Dry Tortugas. XI, 98.

14. A sentence to forfeit ten dollars per month for eighteen months, in case of a soldier whose term expires within that period, cannot 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 the 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 remitted by the proper authority before being finally enforced, or if already executed, may form the basis for an application for clemency addressed to the Executive. XVI, 70.

19. A general commanding an army in the field cannot be regarded as failing to comply with General Order No. 270, of the War Department, of October 11, 1864, which enjoins upon commanding officers to forward promptly to the Bureau of Military Justice the proceedings of courts-martial, &c., if he retains without forwarding, until after the execution of the sentence, the record of a court-martial in a capital case; it being proper and necessary for him to so retain the record in his hands in order to pass upon such applications as may be addressed to him for the mitigation or remission of the sentence. It is to be added, that in cases of serious doubt or legal difficulty he should refer the questions involved to that Bureau for decision before proceeding to execute the sentence. XI, 196.

20. In the English court-martial practice, it is the general rule that the sentence shall take effect from the date of the signature thereto of the president of the court, provided no specific time for the commencement of its operation is designated in the sentence itself. In our practice the uniform rule has been that—in the absence of any such specific designation by the court—the sentence shall take effect from the date of its promulgation by the proper authority, or from the date at which the accused was notified of the action of the final reviewing authority. XXI, 257.

SEE SIXTY-FIFTH ARTICLE.
EIGHTY-NINTH ARTICLE.
DESERTER, (2,) (15.)
ORDER, (9,) 10.)
PENITENTIARY, I, (2;) II, (2.)
REVIEWING OFFICER, (11,) (12,) (14,) (15.)

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.

SEPARATE BRIGADE.

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 not to command "separate brigades," and therefore not to be qualified to convene courts-martial. VI, 271, 272.

5. Where a body of troops 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.

NOTE.—The foregoing opinions were delivered prior to the publication of the recent 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 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 designation of his command, he is precluded, by General Order No. 251, from exercising such authority. IX, 651.

8. 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.

9. 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.

10. *Held*, that the prohibition relating to the convening of general courts-martial set forth in General Order No. 251 may properly be deemed to extend to the appointment of *military commissions*. XI, 232.

11. 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.

12. Until the rebellion has been formally declared to be terminated by the political power of the country, the *state of war* must continue to exist. Until such declaration, therefore, the authority vested by the act of 24th December, 1861, in separate brigade commanders to convene general courts-martial, may continue to be exercised. XXI, 136.

SEE SIXTY-FIFTH ARTICLE, (3,) (8,) (11,) (14.)

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. 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 the view to their sale into slavery under the local law, with the whole power of the government, if necessary. 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 his 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. 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 color,

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 at 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. 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. 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.

8. *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.

9. The clause in section 24, chapter 13, of 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.

10. 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.

11. 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 en-

listing 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.

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 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 title to the property; that, while this was the law, the result was really rather a hardship to the mortgagee than the mortgagor, inasmuch as the latter, 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 MURDER, (2.) (3.)
PEONAGE.

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.

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 the specification, which is not subscribed by any person, alleges 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, it is defective, and a finding of "guilty" upon it cannot be supported. III, 429.

4. The specification should contain averments of the time and place of the offence. I, 461, 473; II, 148. But it is held by the Secretary of War 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.

5. The time as laid in the specification is not usually material, and need not generally be proved precisely as laid, except that it should not be laid more than two years before the issuing of the order for the trial. V, 613; IX, 100.

6. 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.

7. It is essential to allege in the specification, as well as to prove, upon the trial of a soldier, that he was in the military service of the United States. IX, 671.

8. 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.

9. Where a specification alleged the presentation of a claim for rations furnished to recruits, as well as of a 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.

10. 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 NINTH ARTICLE, (1.) (2.)
 THIRTY-NINTH ARTICLE, (4.)
 FORTY-FIFTH ARTICLE, (2.)
 FIFTY-SEVENTH ARTICLE, (2.)
 CHARGE, (4.) (5.) (6.) (8.) (9.) (17.) (18.)
 MILITARY COMMISSION, II, (16.)
 PLEA, (5.) (6.) (7.) (8.) (9.) (11.) (16.)
 VARIANCE.

S P Y.

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 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, he cannot be tried for it. V, 286, 248; IX, 100.

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*, 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, is not inconsistent with his being a spy, in 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 LESSER KINDRED OFFENCE, (2.)
PRISONER OF WAR, (7.)

STAMP.

Where an unstamped written contract was admitted in evidence without objection, the want of a stamp only being excepted to in the argument and defence of the accused—*held*, that it was competent for the court to allow the stamp to be supplied at any stage of the proceedings, and to require the judge advocate to affix it at the close of the trial. IV, 371.

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 PLEA, (3,) (4.)

STATE OF WAR, I, (EFFECT OF.)

SEE FIFTY-SIXTH ARTICLE, (2.)
 CLAIMS, I, (11.) (12.)
 CORRESPONDENCE WITH REBELS, I.
 DEED OF REBEL GRANTOR.
 TRADING WITH THE ENEMY.
 VIOLATION OF THE LAWS OF WAR, (13.)

STATE OF WAR, II, (HOW TERMINATED.)

SEE SIXTY-FIFTH ARTICLE, (18.)
 CHARGE, (17.)
 HABEAS CORPUS, (15.)
 JURISDICTION, (6.)
 SEPARATE BRIGADE, (12.)

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.

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 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, is 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 stoppage 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 regiment 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.

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—is 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.

SEE THIRTY-SECOND ARTICLE.
DISBURSING OFFICER, (2.)
PAY AND ALLOWANCES, (12,) (23.)
PROVOST JUDGE OR COURT, (2.)
SENTENCE, I, (3.)

SUB-CONTRACTOR.

SEE CONTRACTOR, II, (13.)

SUBSTITUTE.

SEE ENROLMENT, I, (5,) (13,) (14,) (18,) (22,) (31,) (33,) (34,) (37.)
SLAVE, (11.)

SUB-TREASURY ACT.

(Act of August 6, 1846, chapter 90, section 16.)

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 under this act; liable, however, to be rebutted by proof that the money was lost, 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; XXI, 112; THIRTY-NINTH ARTICLE, 3.

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. II, 585.

SURGEON.

SEE NINETY-NINTH ARTICLE, (4.)
 COURT-MARTIAL, II, (5.)
 DISBURSING OFFICER, (2.) (3.)
 DOUBLE RATIONS.
 JUDGE ADVOCATE, (15.)
 OATH OF OFFICE.

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, therefore, 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 might properly enough be required to procure a formal leave, in order that his action in the premises, as well as that of his commander, might be made matter of

record, but to such leave he would, it is conceived, be entitled as of right. This view is analogous to the opinion of this bureau as to the privilege of an officer relieved from arrest under the provisions of 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 formal application to the proper superior. XIX, 312.

3. A sentence of suspension from duty and pay for fifteen days, does not imply confinement to quarters. It is not equivalent to arrest, for arrest does not, *per se*, carry loss of pay. 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 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.

SEE PARDONING POWER, (12.)

SUTLER.

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, are conclusive upon the point. The law provides for no other sutler than one for each regiment, to be selected by its commissioned officers. II, 49.

2. A private soldier cannot legally be appointed sutler of his regiment. The functions of the soldier and the sutler are incompatible. X, 38.

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.) See REGIMENTAL FUND. XXI, 155.

6. When 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 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 of the regular army was "abrogated" by act of 3d March, 1847, ch. 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.

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-NINTH ARTICLE.
FIELD OFFICER'S COURT, (14.)
JUDGE ADVOCATE, (14.)
RECORD, IV, (1,) (2,) (3,) (4.)

T.

T A X.

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 all included under the head of "salary," are included under the term "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. I, 359.

2. 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.)

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 not invalidate 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 upon 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.

THEFT.

SEE LARCENY.

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. 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.

SEE SENTENCE, I, (14.)

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. 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. VIII, 529.

SEE PRISONER OF WAR, (2,) (3.)

T R I A L .

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 he should 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.

SEE EIGHTY-SEVENTH ARTICLE, (1,) (2,) (4.)
COURT-MARTIAL, I, (1,) (2,) (5.)
DISMISSAL, II.
JOINDER, (1,) (2.)

U.

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, 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 moneys 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 title—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. Statton*, 1 Duer, 79.) So where the United States was bailee (through its officer charged with the deposit) of certain bounty and other specific money, received from a recruit upon his muster under the regulations of the Provost Marshal's department; 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 moneys 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 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 repayment, relief could be afforded them by Congress alone. XI, 620. And see XVI, 135.

5. Where under the general regulations of the Provost Marshal's department, 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 to its own use, being simply the bailee of the amount; and that, if it should be shown that the locality paying the bounty had actually received credit for the recruit upon its quota, the amount should be returned to the soldier, when arrested, as his own property; but if not so shown, that it should be paid over to the authorities of the locality. XVI, 595.

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.

SEE NINTH ARTICLE, (5.)
THIRTY-NINTH ARTICLE, (2.) (3.)

V.

VARIANCE.

1. Where the word *feasible* in a letter is 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.

VETERAN RESERVE CORPS.

SEE NINETY-SEVENTH ARTICLE, (5,) (8.)
DETAIL, (1.)

VETERAN VOLUNTEERS.

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.

SEE SIXTY-FOURTH ARTICLE, (7.)
SIXTY-SIXTH ARTICLE.
BOUNTY, (9.)
MUSTER-OUT, (3.)

VIOLATION OF ARTICLE OF WAR.

SEE CHARGE, (3.)

VIOLATION OF THE LAWS OF WAR.

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 War Department, of April 24, 1863, 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 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 from New York, 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 this 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 lines 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 allegiance, 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 Carolina, 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 territory 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 exists and must continue to exist until the political power of the country shall declare it 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*, (in December, 1865,) 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 pœnitentiæ* 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.

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 toward 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 pœnitentiæ*, 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 a 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.

SEE CORRESPONDENCE WITH REBELS, I.
MILITARY COMMISSION, II, (33;) V, (2.)
NEUTRAL, (2.)
REFUGEE.
TREASON, (1.)

VOTE OF SOLDIERS.

SEE DISMISSAL, I, (9.)
MILITARY COMMISSION, II, (31.)

W.

WAIVER OF DEFENCE.

SEE ESCAPE, (1.)

WAR POWER.

SEE FIFTY-SEVENTH ARTICLE, (4.)
CONTRACTOR, II, (7.)
JURISDICTION, (13.)
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, (16.)

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.) The fact that the court may consist of five members only would not affect the rule. VII, 202; XI, 299.

2. For the same person who signed the charges to act as prosecuting witness, and a sworn interpreter upon the trial, is a reprehensible practice, if not necessarily invalidating the proceedings. VII, 562.

3. A general commanding is not warranted in refusing to permit witnesses under his command to obey the summons of a judge advocate, duly issued for their attendance at a trial by court-martial under the authority of section 25 of act of March 3, 1863. VII, 172.

4. 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.

5. 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 General to determine all questions as to their compensation which may arise upon these certificates or otherwise. I, 488; VIII, 88.

6. The judge advocate should not refuse the certificate in the case of any witness, civil or military. 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 not to deprive an employé of the United States government of his allowances as a witness before courts-martial. V, 475.

7. Under paragraph 1139 of the Regulations, resident citizen witnesses are entitled to a fee of three dollars per day while attending a court-martial. V, 310.

8. The certificate of the judge advocate of 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 contingent fund. XVI, 518.

9. Although under the Army Regulations the judge advocate of a court-martial cannot give a certificate of attendance to a witness to cover any period prior to the meeting of the court, yet in case of a person arrested at a period considerably prior to the convening of the court, and held in confinement for the purpose of being used as a witness, and until so used, it was *recommended* that the usual *per diem* compensation be allowed him, by the Secretary of War, from the commencement of his detention; from which, however, might well be deducted the actual cost of his subsistence. V, 160.

10. *Recommended*, 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 allowance can be made them by the court, because they have not been formally summoned, being held in military custody and beyond the reach of civil process. II, 88.

11. In the case of persons held, by the military authorities, in confinement as witnesses for a considerable period prior to the convening of the military court before which their testimony is designed to be introduced, it has ordinarily been recommended by this Bureau that they should be paid a suitable compensation for their detention. XVIII, 590. 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 drawn from an analogy to the action of the civil courts, the allowance to a witness detained by military authority would be \$2 *per diem*.

12. To entitle to mileage a witness summoned from a distance to attend a military trial, the summons must be obeyed 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 court-martial in more than one case at a time, he is entitled to his mileage and *per diem* allowance in but one. IX, 672.

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. The affidavit of the accused, to the effect that he cannot safely proceed with his defence without the testimony of certain witnesses, makes out a *prima facie* case in support of an application to have them summoned. Where, however, the witnesses are officers of high rank, whose attendance would be likely to conflict with their public duties, the court, in its discretion, may well insist on a specific statement as to what it is believed they will prove, before the issuing of the subpoenas are authorized. The question of issuing these is one for the court, and not the government. If the court determines that sufficient reason is shown for summoning the witnesses, the government should order them to attend, unless some controlling consideration, connected with the interests of the service, may forbid. XIX, 35.

16. 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.

17. It is not a valid objection to the regularity of the proceedings of a court-martial that the court 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.

18. 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.

19. Negroes may testify before a military court, notwithstanding any disqualifying statute or custom in the State where the court is held. IX, 225. And see the recent act of July 2, 1864, chapter 210, section 3.

20. For the court to refuse a continuance, 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.

21. 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.

22. In the cases 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 goes no further than to invest the judge advocate with this authority. The section does not confer upon military courts 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.

23. 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 is 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. XII, 560.

24. 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*, that no good 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.

25. 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, 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.

SEE ARREST, (2.)
 DEPOSITION.
 EVIDENCE.
 JUDGE ADVOCATE, (20.)
 PERJURY, (1.)
 PRISONER OF WAR, (14.)
 RECORD, IV, (15,) (16,) (17;) V, (1,) (3,) (8.)

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