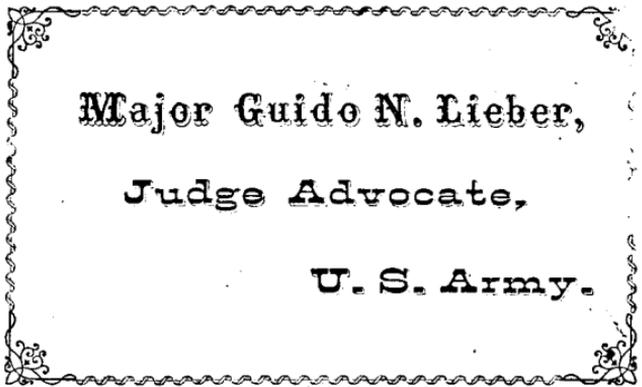


DUTIES OF
JUDGE
ADVOCATES



Major Guido N. Lieber,

Judge Advocate,

U. S. Army.

I am told that
this is the best Engl
work on the judges
advocate. The price
is enough to frighten
a general - \$4.75?
so I did not feel
analogized to buy it
for you, and must
beg you take it as
a post-christmas pre-
sent.

F. L.

29/3.63

Handwritten text, possibly a signature or name, followed by the date April 27/3.

J. M. Hughes

THE DUTIES
OF
JUDGE ADVOCATES:

COMPILED FROM

Her Majesty's and the Hon. East India Company's

MILITARY REGULATIONS,

AND FROM

THE WORKS OF VARIOUS WRITERS

ON

MILITARY LAW.

BY CAPTAIN R. M. HUGHES,
12th REGIMENT BOMBAY ARMY,
DEPUTY JUDGE ADVOCATE GENERAL, SCINDE FIELD FORCE.

~~~~~  
"Justice is the object for which a Court Martial is convened and the  
Judge Advocate appointed."

~~~~~  
Simmons.

LONDON:
SMITH, ELDER AND CO., 65, CORNHILL.

1845

10,497

London :
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Old Bailey.

TO

HIS EXCELLENCY

MAJOR-GENERAL SIR CHARLES J. NAPIER,

G.C.B., &c. &c.,

GOVERNOR OF SCINDE.



SIR,

THE unwearied interest you have ever taken in the welfare and happiness of the British soldier, and, with that object in view, your well-known solicitude that Justice should be duly administered throughout the Army, induced me to request the honour of being allowed to dedicate these pages to your Excellency.

In doing so, I beg leave to express the pride I feel in having obtained your consent; and the gratification it affords me that my humble endeavours will now go forth to the world under such distinguished patronage:—and should this com-

pilation add but a drop in the well towards the welfare and happiness of those for whom you have so long laboured, or should it draw attention to a sadly neglected department of the Army, the honour you have done me will be doubly appreciated by

Sir,

Your most obedient and obliged Servant,

R. M. HUGHES.

1st *July*, 1844.

P R E F A C E .

THERE is not a work extant in which the various and particular duties of a Judge Advocate General are to be found in a collective shape : all writers on Military Law touch on the several duties, more or less, in different parts of their works, but the subject is nowhere treated of, not even in any military code ; so that an officer on appointment cannot readily ascertain what the really responsible and multifarious duties of a Judge Advocate General actually are, without wading through codes of regulations and orders, besides a variety of treatises and works which, when required, are not always procurable. The object, therefore, of this work is to remove, as far as it is practicable, these difficulties ; to define the duties of Judge Advocates ; and to point out concisely the manner in which official rules, the customs of war, and established practice, direct these duties to be conducted.

Major-General Vans Kennedy, after twenty-five years' experience in the Judge Advocate General's

department, declares, in his Treatise on "*The Principles and Practice of Military Law*," that the duties of a Judge Advocate "*are of so anomalous a nature, that it is difficult to describe clearly the different functions which he is required to perform;*" which opinion, expressed by an officer of so much experience, makes me feel diffident in attempting the task, even in the shape of a compilation. Yet I hope the contents of the following pages, however imperfect the compilation may be, will prove useful to the Army; but more especially to those who may be appointed to conduct the very important duties of Judge Advocate, when either officiating as such, or when permanently posted to the department.

Mr. Tytler remarks,—"*that the appropriate functions of the Judge Advocate, as an essential officer in all General Courts Martial, are various in their nature; and as neither the Mutiny Act nor Articles of War describe them with precision, we are thence obliged, in supplement of what is found in those direct authorities, to resort to the less positive, though equally binding, authority of established usage and practice.*"

In detailing, therefore, the multifarious duties of a Judge Advocate, I conceive the object cannot be better attained, than by relating the various Orders and Regulations which have been issued from time to time, and are at present in force in Her Majesty's and the Honourable East India Company's Armies;

and by quoting the opinion of those writers on Military Law whose works are considered, next to official rules and regulations, the best authority on the subject. In doing this, I have endeavoured to condense as much as possible the information on the several matters treated of; and I trust the selections made will be found a safe guide, as well as the means of enabling the reader to form a correct judgment on those points regarding which difference of opinion or doubt may at any time arise.

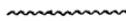
Much valuable information will be found in the extracts taken from the Regulations and Orders relating to Courts Martial duties which are in force in the East Indies. The orders are much scattered in the several military codes and general order books of the armies of Bengal, Madras, and Bombay; extend over a long period; and the greater part of them are little known, except to the Army for whose guidance they are expressly issued. All the orders herein quoted have been issued by, and the regulations drawn up under the direction of, the most eminent and distinguished officers who have at different periods held the command of Her Majesty's and the Honourable East India Company's Forces, under the three Presidencies; and I much regret the fear of increasing these pages to an unwieldy bulk has compelled me to omit many excellent orders, from their purport not bearing *wholly* on the subject herein treated of,

which might otherwise have proved both interesting and instructive.

I have taken numerous extracts from the excellent works of Tytler, M^rArthur, Adye, and others whose works are now almost all out of print, and difficult to be procured. I have indented largely on Major-General Vans Kennedy's Treatise on "*The Principles and Practice of Military Law*," 1839 edition; on Captain Simmons's "*Practice of Courts Martial*," 3rd edition, 1843; on Major General Sir Charles J. Napier's "*Remarks on Military Law and Flogging*;" on Major Hough's several works; on Captain Griffiths's invaluable "*Notes on Military Law*;" and on Major-General D'Aguilar's "*Observations on District and other Courts Martial*;" which books should all be in the possession of every Judge Advocate, for I agree with Sir Charles J. Napier, who most truly remarks,—
"AS MATTERS ARE, *I freely admit that Captain Simmons's book, and others of the like nature, are REQUISITE; no man can now act as a Judge Advocate WITHOUT such books:*" and I must beg the reader to remember, that the object of this compilation is principally intended as a guide and assistance to those who have not the above excellent works to consult or refer to.

Neilgherry Hills, Southern India,
1st July, 1844.

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THE DUTIES OF JUDGE ADVOCATES.

CHAPTER I.

MODE OF APPOINTMENT ;—WARRANTS ;—AND QUALIFICATIONS REQUIRED OF JUDGE ADVOCATES.

1.—“In conformity with the power conveyed by the Mutiny Act, WARRANTS under the sign-manual annually issue to Generals in command on foreign stations, empowering them to convene General Courts Martial, and to delegate that power to any other officer, not under the degree of field-officer, having a command of a body of the forces; also to appoint a DEPUTY JUDGE ADVOCATE for the time being, in the event of Her Majesty, or the JUDGE ADVOCATE GENERAL of Her Majesty’s Forces, not having appointed or deputed one.”—*Simmons*.

2.—In like manner, the Mutiny Act of 1841, for the Honourable East India Company’s European troops, conveys authority for similar WARRANTS, which are issued, under the sign-manual, to the Court of Directors of the Honourable East India Company, and by them to the Governor-General in Council, and the Governors in Council for the time being, at the Presidencies of Fort William, Fort St. George, and Bombay, respectively; and to general or other officers commanding any body of the forces employed in the Honourable East India Company’s Service, to appoint General Courts Martial and Judge Advocates.

* B

3.—In the warrants above alluded to, issued under the sign-manual, empowering general officers in command abroad to assemble General Courts Martial, Her Majesty's commands relative to the appointment of JUDGE ADVOCATES are thus expressed:—

“And that there may not in any case be a failure of justice from the want of a proper person authorized to act as Judge Advocate, We do hereby empower you, in default of a person appointed by Us, or deputed by the Judge Advocate General of Our Forces, or during the illness or occasional absence of the person so appointed or deputed, to nominate and appoint a fit person, from time to time, for executing the office of Judge Advocate at any Court Martial, for the more orderly proceedings of the same.”

4.—So also in the warrant issued by a commander-in-chief, empowering an officer commanding a division of the army, field-force, or a body of troops, to convene a General Court Martial, similar instructions relative to the appointment of JUDGE ADVOCATES are conveyed.

5.—The Judge Advocate General and Deputy Judge Advocate General of Her Majesty's Forces are civilians; so also is the Deputy Judge Advocate General in Ireland:—it appears to be usual in England to select a civilian, one who is professionally a lawyer, to conduct the duty of Deputy Judge Advocate. Capt. Simmons mentions:—

“That in the trial of the Canadian rebels by martial law, in 1838 and 1839, three persons—one officer and two civilians—were jointly and severally appointed to the duty of Judge Advocate.”

In the British Colonies, the duty is performed sometimes by military men, and sometimes by lawyers.

6.—Captain Simmons, in his work on Courts

Martial, gives the following form of warrant, for a Deputy Judge Advocate:—

“ By the Right Honourable———Judge Advocate
“ General of Her Majesty’s Forces,

“ To ——

“ By virtue of the power and authority to me given by Her Majesty, I do hereby appoint you the said———to act as Deputy Judge Advocate at all trial by Courts Martial, and in all matters appertaining to that office, which shall concern any of her Majesty’s land forces, from time to time serving in —— pursuant to an Act of Parliament now in force, entitled ‘ An Act for Punishing Mutiny and Desertion, and for the better Payment of the Army and their Quarters;’ or any other Act of Parliament in that behalf which shall hereafter be in force, and to such Articles of War as shall from time to time be established during the continuance of the power and authority hereby given to you to act as aforesaid.”

“ Given under my hand and seal this — day of ——
“ 1844, in the—year of Her Majesty’s reign.

“ Signed ——



“ Judge Advocate General.”

7.—In Captain Griffiths’ Notes on Military Law, I find the following form of warrant for Deputy Judge Advocate.

“ By ——

“ Judge Advocate General of Her Majesty’s Forces.

“ To ——

“ By virtue of the power and authority to me given by Her Majesty, I do hereby appoint you the said —— to act as Deputy Judge Advocate at a General Court Martial, to be holden for the trial of ——

“ Given under my hand and seal this — day of ——
“ 18—, in the — year of Her Majesty’s reign.

“ Signed ——

“ Judge Advocate General.”

8.—In the Royal Navy, when a Court Martial is ordered to assemble, the President and Members nominated to compose the Court appoint the Judge Advocate to conduct the proceedings : the President issues and signs the warrant on the assembly of the Court, authority for his so doing being conveyed in the order and warrant appointing him President.

9.—The following is the form of warrant given by M^rArthur, authorizing a JUDGE ADVOCATE to act as such at a Naval Court Martial.

“ By Admiral ————

“ Whereas the Right Honourable the Lords Commissioners of the Admiralty have directed me, by an order dated the — inst., to assemble a Court Martial and try ———— of His Majesty’s ship ———— for ———— : And whereas by an act passed——it is ordered that in the absence of the Judge Advocate and his Deputy, the Court Martial shall have full power and authority to appoint any person to execute the office of Judge Advocate.

“ I do, with the consent and approbation of the members who constitute this Court, hereby authorize and appoint you to execute the office of Judge Advocate on the above occasion. For which this shall be your warrant.”

*“ Given on board His Majesty’s ship ‘ Albion,’ where
“ the Court is assembled, in Portsmouth harbour, this
“ — day of ——— 1777.*

“ Signed ————

“ Admiral.”

*“ To ———— Esq., hereby appointed to execute
“ the office of Judge Advocate at the Court Mar-
“ tial above mentioned.”*

M^rArthur.

10.—In the East Indies, the duties of the Judge Advocate General’s department are performed exclusively by military men belonging to the Honourable East India Company’s army, who are nominated by the Commander-in-Chief, and appointed

by the Government under which they are serving ; and when any on the permanent establishment are sick, obtain leave of absence, or from other causes are unable to conduct their duties, other officers from the line are nominated to officiate temporarily for them.

11.—On all Courts Martial held for the trial of offenders belonging to the Indian navy, the Legislative Act, No. 12, of 1844, enacts:—

“ That, in the absence of the Judge Advocate and his Deputy, the Court Martial shall have full power and authority to appoint any person to execute the office of Judge Advocate.”

12.—In the BENGAL ARMY, the following is the form of warrant issued to Deputy Judge Advocates, on their appointment to the Judge Advocate General's department. General officers commanding a division, or field force, are empowered to issue a warrant of a nearly similar import to any officer *not* in the department, whose services may be required at any time to officiate as a Deputy Judge Advocate.

*“ By His Excellency the Honourable ———— Commander-
 “ in-Chief of Her Majesty's and the Honourable East
 “ India Company's Forces in India.
 “ To ———— Regiment Native Infantry,
 “ Deputy Judge Advocate General,
 “ Greeting,
 “ By virtue of the power and authority to me in this behalf given,
 “ I do hereby constitute and appoint you the said Captain ————
 “ Regiment Native Infantry, to officiate as Deputy Judge Advocate
 “ General to Her Majesty's and the Honourable East India Com-
 “ pany's Forces, stationed within the limits of the Presidency of
 “ Fort William, at all European and Native General Courts Martial
 “ authorized to be held for the trial of persons belonging thereto,
 “ and in all other respects to do and perform whatever may apper-*

“ tain to the said office of Deputy Judge Advocate General within
 “ the limits of the Presidency of Fort William.

“ Given under my hand and seal, at head-quarters, Cal-
 “ cutta, on the — day of — one thousand eight
 “ hundred and forty-four.”

C. in C.
 Seal.

“ General Commanding-in-Chief.”

“ By His Excellency's commands,

“ Military Secretary.”

13.—Major Hough says :—

“ The warrants to the Deputy Judge Advocates General in the
 “ Bengal army, authorize them to officiate in *all* cases on the trial
 “ of Queen's and Company's officers, &c. *within the limits of the*
 “ *Presidencies of Bengal and Agra:*” and further states :—“ It is
 “ unsettled, by any positive enactment, how far this instrument is
 “ valid on the death, resignation, or removal of a commander-in-
 “ chief, by whom it is granted. It was said, in a reply to a Judge
 “ Advocate who raised a difficulty on this subject: YOUR WARRANT
 “ IS GOOD TILL THE NEW COMMANDER-IN-CHIEF SENDS A FRESH ONE
 “ [*letter from Adjutant-General*]; but such warrants have no clause
 “ to this effect :—if these warrants were furnished by Government
 “ as a commission to the Judge Advocate, they would be in force
 “ while he was in office. It is clear that, as Judge Advocates are
 “ nominated by the commander-in-chief, but appointed in Go-
 “ vernment orders, such Government orders may contain suffi-
 “ cient and general authority to act till another order cancelled
 “ the former; and if warrants are retained *pro formá*, still the ge-
 “ neral order by Government should render it unnecessary to
 “ await the arrival of a new warrant from the succeeding com-
 “ mander-in-chief, and the general officer, without his warrant,
 “ cannot issue one himself.”

14.—The remarks above quoted equally apply to
 the warrants issued to Deputy Judge Advocates in
 the MADRAS ARMY, of which the following is a copy :—

“ By _____ commanding the Forces under the
 “ Presidency of Fort St. George, &c. &c. &c.
 “ To Captain _____ Regiment Native Infantry,
 “ Greeting,
 “ By virtue of the powers and authority in me vested, I do hereby con-
 “ stitute and appoint you the said Captain _____ of the _____ Regiment
 “ Native Infantry, to execute the office of Deputy Judge Advocate
 “ General at any General Court Martial or Courts Martial to be
 “ holden in the army under my command, or in any detachment that
 “ may be made from it; you are therefore to execute the office of
 “ Deputy Judge Advocate General accordingly, and at all such
 “ General Courts Martial prosecute, in Her Majesty’s name, any
 “ commissioned officer, non-commissioned officer, soldier, or other
 “ person belonging to the forces under my command, charged with
 “ misbehaviour by mutiny, desertion, or otherwise, against the rules
 “ of military discipline, agreeable to such Act or Acts of Parlia-
 “ ment, and Rules and Articles of War as now are, or may hereafter
 “ be in force for the government of the said forces respectively :
 “ Also, to do and perform such other matters and things as to the
 “ said office of Deputy Judge Advocate General now doth or
 “ usually hath appertained, and for so doing this shall be your full
 “ warrant and authority.
 “ Given under my hand and seal, at the head-quarters,
 “ Madras, this _____ day of _____, in the year
 “ of our Lord one thousand eight hundred and
 “ forty-four.”

“ Signed _____

C. in C.
Seal.

“ Commanding the Army in Chief.”

“ By order of the Lieutenant-General,
 “ Commanding the Army in Chief,
 “ Signed _____
 “ Military Secretary.”

15.—In the BOMBAY ARMY, a general warrant, similar to those of Bengal and Madras, is not issued to an officer on appointment to the Judge Advocate

General's department; but previously to the assembly of every European or Native General Court Martial, a warrant, of which the following is the form, is transmitted, empowering the person to whom it is addressed to execute the office of Judge Advocate.

“ By ——— Commander-in-Chief of Her Majesty's and
 “ the Honourable Company's Forces under the Presi-
 “ dency of Bombay,

“ To Captain ——— Regiment Native Infantry,
 “ Greeting,

“ By virtue of the power and authority in me vested, I do hereby
 “ constitute and appoint you the said Captain ——— to execute
 “ the office of Judge Advocate at an European (or Native) General
 “ Court Martial, to be holden at Eleven o'clock of the forenoon of
 “ Monday the first day of May, one thousand eight hundred and
 “ forty-four.”

“ You are therefore duly to execute the office of Judge Advocate
 “ at the said General Court Martial, according to the Articles of
 “ War and the customs of war in the like cases; and also to do and
 “ perform such other matters and things as to the said office of
 “ Judge Advocate now doth or usually hath appertained; and for
 “ your doing this shall be to you, and to all concerned, a sufficient
 “ warrant and authority.

“ Given under my hand and seal, at Bombay, this ———
 “ day of ———, in the year of our Lord one
 “ thousand eight hundred and forty-four.

“ Signed ———

C. in C.
 Seal.

“ Lieutenant-General Commander-in-Chief.

“ By order of His Excellency the

“ Commander-in-Chief.

“ Signed ———

“ Adjutant-General of the Army.”

16.—The manner in which all these warrants are expressed, notwithstanding the diversity of form,

and the fact that a warrant issued by competent authority is absolutely requisite to enable the person nominated Judge Advocate to conduct the proceedings of a General Court Martial, most clearly points out the highly responsible and important nature of the office.

17.—In the warrant issued under the sign-manual, it will be observed Her Majesty's commands to general officers are :—

“ To nominate or appoint a fit person, THAT THERE MAY NOT IN ANY CASE BE A FAILURE OF JUSTICE from the want of a proper person authorized to act as Judge Advocate, and for the more orderly proceedings of Courts Martial.”

18.—From this, it is evidently intended, for the furtherance of justice to all parties, that whoever is nominated to conduct the duty, whether he be a civilian or a military man, should in every respect be a *qualified* person; thoroughly acquainted, not merely with the provisions of the Mutiny Act, the Articles of War, and Regulations of Her Majesty's service, but well instructed in the Principles and Practice of Criminal Law, besides that of Military Courts, and the Customs of War; and in the East Indies, with all Regulations and Acts in force for the Administration of Justice in the ordinary Courts of Judicature.

19.—Without an adequate degree of knowledge on all of the above-mentioned points, it is impossible for a Judge Advocate to direct and guide the members of a Court Martial in the right path, so that justice be duly administered, the proceedings of trials correctly and legally conducted, and the members of the Court protected from the penalties every member, including the Judge Advocate himself, is liable to, should the Court (*from not having a COMPETENT LEGAL ADVISER, through ignorance, or inadvertency*) exceed its autho-

rity, in deviating from the established law of the land.

20.—On this point, Tytler observes:—

“That in all matters touching the trial of crimes by Courts Martial, wherever the military law is silent, the rules of the common law of the land, to the benefit of which all British subjects are entitled for the protection of life and liberty, must of necessity be resorted to: and every material deviation from these rules, unless warranted by some express enactment of the military code, is, in fact, a punishable offence in the members of a Court Martial, who may be indicted for the same in the King’s ordinary courts. Hence arises the absolute necessity for *some member of the Court* being versant in the general doctrines of the law, in as far as they relate to the trial of crimes and the weighing of evidence; and the person to whom the Court is naturally to look for information of this kind IS THE JUDGE ADVOCATE, who is either by profession a lawyer, or *whose duty*, if he be not professionally such, is to instruct himself in the common law and practice of the ordinary courts in the trial of crime.”

20½.—Major Adye truly remarks:—

“A Judge Advocate, in order to do justice to the trust reposed in him, should, besides being *thoroughly* master of every particular relative to Martial Law, be well acquainted with the Form of trials in Criminal Cases, where the King, whose COUNSEL HE IS, is always a party concerned; and, in a great measure, with the Municipal Laws of his country.”—*Adye*.

21.—It is upwards of ten years ago, that the Commander-in-Chief in India (Lord William Bentinck) remarked:—

“That the duties of Judge Advocates are more important *now* than they formerly were; for with the recently extended jurisdiction given to our military courts, a knowledge of law and practice becomes every day more necessary.”—*Hough*.

22.—Captain Simmons, alluding to the 102d Article of War, remarks, that

“A Court Martial exercising jurisdiction under this Article ceases to be influenced by the authorities which ordinarily

“guide it. The Mutiny Act, the Articles of War, the General Regulations of the Army, are no longer the text-books by which to ascertain offence: they are only to be resorted to as affecting the constitution of the Court; the Article in question affording a general jurisdiction over *all* crimes punishable by the known laws of the land, and limiting the sentence *in conformity of the common and statute law of England*: that is,—Courts Martial are bound to award such punishments only as are known to the laws of England, and to apply to each particular offence the same punishment, both in kind and degree, that is applied by the common or statute law of England.”—[*Horse Guards' Circular, 12th December, 1807.*] “It is therefore certain that every British officer, to be prepared to meet the duty which frequently awaits him in foreign garrisons, ought to have such a general knowledge of the criminal laws of England as may enable him, when required to dispense them, to make the distinction between crimes which the law recognises; and, by being in some measure familiarized with the subject, to have little difficulty in seeking for authorities to guide him in particular cases, or of profitably using those which a Judge Advocate may bring to his notice.”—*Simmons.*

23.—If, as Captain Simmons observes, every British officer should be prepared to meet this duty, how far more incumbent and indispensable it is that a Judge Advocate should be thoroughly instructed in such matters; for, as the Regulations more particularly call on officers to acquire a knowledge of military law, there are few who study the law relative to criminal offences, which chance alone requires them to be proficient in; and it is a well-known fact, that on the generality of trials for *civil* offences, both European and Native Courts Martial are obliged to rely in a great measure on the competency of the Judge Advocate for advice and assistance in conducting their proceedings; and it is impossible to conceive the mischief which may result, under such circumstances, if he is incompetent.

24.—General Kennedy observes, that,

“In the investigation of criminal offences by military officers unacquainted with criminal law, unless the utmost precaution be used, there is too much probability that the sentences of Courts Martial will not unfrequently be altogether illegal, and that prisoners may, in consequence, be subjected to punishment—even to capital punishment—although such sentences were not sanctioned by law.”—*Kennedy*.

25.—In such cases, however, the confirming authority has the power to prevent an illegal sentence being carried into execution;—but, on the other hand, the State may suffer by having one returned to the ranks of the army who has been clearly found guilty of infringing its laws, and whose escape from merited punishment arose solely from the incompetency of those appointed to conduct the trial.

26.—It is to obviate the possibility of such occurrences, that Judge Advocates are appointed; “*that there may not in any case be a failure of justice;*” that irregularities and illegalities may be checked; and that the proper mode of procedure throughout all trials for civil offences may be brought to the notice of Courts Martial by a *competent* person:—all of which clearly shows how really indispensable it is that the officer appointed to execute the office of Judge Advocate should be thoroughly instructed in the statute law of England; and in the East Indies with every regulation and act in force for the ordinary Courts of Judicature.

27.—But it must be equally evident, that, however well informed a Judge Advocate may be in the common law and practice of the ordinary Courts in the trial of crime, he must also be acquainted with the duties of a soldier, and fully conversant in all military

affairs, and with the customs of war. Sir C. J. Napier says, that

“No man should hold this appointment till after a certain length of service as a regimental officer, and he should go through a strict examination as to his knowledge of military law, and the practice of military courts:—an officer well instructed in social law is, indeed, now necessary; for, unless the military courts have some such *responsible* officer, they must assemble in bodily fear.”

28.—Now, with reference to this *responsible officer*, Major Adye and Captain Simmons have expressed their opinion in opposition to *all other* writers on Military Law:—“*that the Judge Advocate is not responsible to any Court of Justice for the opinion he may give;*” but if this was intended by the Legislature, wherefore is the word “*Minister*” inserted in the 76th sec. of Mutiny Act, 1843;—as also in the 56th sec. of the Mutiny Act for the Honourable East India Company’s forces?—

“That every action against any person for any thing to be done in pursuance of this act, or against any member or *Minister* of a Court Martial in respect of any sentence of such court, or of any thing done by virtue or in pursuance of such sentence, shall be brought in some of the Courts of Record at Westminster, or in Dublin, or the Court of Session in Scotland, and in no other court whatsoever.”

29.—General Kennedy observes:—

“The term *Minister* of a Court Martial, used in both Acts in contradistinction to member, can apply to no person but the Judge Advocate. Captain Simmons therefore is wrong in stating, that the Judge Advocate is not responsible to any Court of Justice for the opinion which he may give; for it is hence evident that he is equally responsible in damages to the party injured, as each individual member of the court is.”—*Kennedy*.

30.—General the Honourable Sir H. Fane, when Commander-in-Chief in India, issued a general order on 25th July, 1836, in which he expressly told the army there were authorities (meaning Deputy Judge Advocates) in every military division, “*who were responsible for the decision they gave;*” and the Madras Regulations are equally explicit on this point.—[*Vide* Chap. vi. Pars. 1, 2, and 7.]

31.—There can be no doubt, from the above-quoted extracts from the 76th and 56th sections of the two Mutiny Acts, that if a Judge Advocate should mislead a Court Martial by counsel which is contrary to law, and from which the Court is induced to act illegally, he is equally responsible to a Court of Justice as he is to his military superiors, for the opinion he may give: and this further points out the vast importance it is to himself, *individually*, to be fully competent in every respect to be able to give sound and correct advice whenever he may be consulted, whether the subject relates either to criminal or military matters.

32.—General Kennedy observes, that,

“ In the East Indies, a knowledge of the principles and practice of military law is not the only qualification required; but, on account of the jurisdiction of Courts Martial having been extended to criminal offences, it has now become indispensable that Judge Advocates should there be also competently acquainted with the principles and practice of criminal law. A few books, however, *judiciously selected, and attentively read and considered*, are sufficient for acquiring a theoretical knowledge of both military and criminal law to the necessary extent; but nothing but *practice and experience* can enable *any* one to perform, with correctness and ability, the duties of a Judge Advocate at a Court Martial; for it too frequently happens

“that the Judge Advocate, instead of receiving assistance and information from the members, has to contend with opposition and ignorance; and that his attention is withdrawn from the proper conducting of the trial by groundless objections, and irrelevant, too often angry, discussions. Before, therefore, any officer undertakes the duties of such a situation, *he should be certain that his acquaintance with them is at least sufficient for the occasion, and that he can rely upon his own self-command, and upon his capability of properly performing them,* although subject to continual interruption from both parties and the Court.”

33.—But whatever the qualifications of a Judge Advocate may be, the following points should be impressed on his mind when conducting the proceedings of a General Court Martial, viz. :—

“That Justice is the object for which a Court Martial is convened and the Judge Advocate appointed.”—*Simmons*.

“That the great principle of a Military Court is honour;—a conscientious adherence to substantial justice.”—*Sir C. J. Napier*.

“That the business of Courts Martial is not to discuss points of law, but to get at the truth by all the means in their power.”—*Sir C. J. Napier*.

“That a Judge Advocate is the mainspring of a Court Martial:—that on him the Court depends for information concerning the LEGALITY as well as the REGULARITY of their proceedings;—and if HE ERRS all may go wrong.”—*Adye*.

34.—It must not, however, be supposed, that to conduct the proceedings of a General Court Martial is the “*ne plus ultra*” of a Judge Advocate’s duty in the East Indies; for, highly responsible as that duty is, there are others of an equally important nature which demand, not only a competent knowledge of law, military regulations, and customs, but assiduity, and the most careful attention in their performance.

35.—In giving advice on all matters connected

with the administration of military law, in the supervision of the proceedings of General and Minor Courts Martial, the Judge Advocate is the adviser of Government, the Commander-in-Chief, the officers commanding divisions, and, under their authority and instruction, of all inferior commandants. No breach of discipline, nor the slightest infraction of military law, can occur without the Judge Advocate being liable to be called on for advice; no trial of any description can take place without his opinion on the merits of the case being required, and whether established form, regularity, and legality of procedure have been carefully observed.

36.—When it is considered that the maintenance of discipline and social order in the army in all such cases principally depends on his judgment, how incumbent is it that a Judge Advocate, previously to offering an opinion, or to framing a report, should *carefully* examine the documentary and all other evidence placed at his disposal, and take into consideration *every* circumstance connected with the case regarding which he is called on to report: and further, how necessary it is, that he should possess qualifications to enable him, on the examination of Court Martial proceedings, to detect errors and illegalities, and to point out the correct mode of procedure in all cases:—in short, a Judge Advocate, when consulted, should be fully capable of giving sound advice under all circumstances, and on any point relating either to criminal offence or to infractions of military law; for the slightest neglect or ignorance on his part, or even inattention to any of the above-mentioned duties, is liable to mislead those who look up to him for advice, as the law officer of the army

or division;—and it is impossible to conceive the infinite injury and mischief which the careless performance of these duties may be to discipline, and perhaps injustice to the individual most interested in the result of his opinion.

37.—Independent of all other qualifications, a Judge Advocate in the East Indies should be sufficiently acquainted with the native languages to be capable of judging if the interpretation of the charges, evidence, and all other points which are requisite to be explained in the native language on *native Courts Martial*, are correctly conveyed to the several parties; for if he is not a good linguist, the object of his appointment (*to obviate a failure of justice*) will be defeated.

38.—It is true an officer is always nominated by authority to perform the duty of interpreter, and the Judge Advocate is very properly *prohibited* from acting as such on the Court Martial, the proceedings of which he is conducting.—[*Vide* Pars. 1, 3, 4, 5, Chap. x.] Yet it must be admitted, that, on the trial of a native on which the Court, witnesses, and prisoner are *all* natives, the proceedings cannot be satisfactorily conducted if the Judge Advocate is ignorant of the language of all parties.

39.—It may happen that a question, answer, or any other point is casually misconstrued, or misunderstood, or an error of interpretation may, by chance or inadvertency, occur; any of which circumstances, though of a seemingly trivial nature, may nevertheless prove the cause of injustice, and be passed over, if the Judge Advocate, ignorant of the language in which they are expressed, is unaware of their import

or meaning; and though it would be highly irregular and incorrect for a Judge Advocate to interfere with the duties of the interpreter, yet it is as much his duty to point out to that officer *any thing* that may appear to him to be incorrect, as it is his duty to bring to the notice of the Court any deviation on their part from established law and rules.

40.—In conclusion,—a Judge Advocate should be well instructed in, and familiar with, “*The Annual Mutiny Act and Articles of War for the Queen’s Troops:*” —“*The General Regulations and Orders for Her Majesty’s Army:*”—“*The Statute Law of England:*”—“*The Mutiny Act and Articles of War for the Honourable East India Company’s European Troops, 1841:*”—“*The Articles of War for the Honourable East India Company’s Native Troops:*”—“*The General Military Regulations of each Presidency in India:*”—“*The several Acts for the Administration of Criminal Justice in India:*”—“*The Penal Regulations or Acts passed by the Government of India:*”—“*The Penal Regulations of each Local Government:*”—“*The General Orders issued from Horse Guards,*” by the Government, and “*Commander-in-Chief of the three Presidencies of Bengal, Madras, and Bombay:*”—for not a day passes that he is not liable to have occasion to refer to some of the above official and established rules for guidance in the performance of his duties. But as the above-mentioned books, &c., voluminous as they are, do not contain all that is requisite for a Judge Advocate to be acquainted with, and as he is called on “*to do and perform such other matters and things which to the said office of Judge Advocate now doth or usually hath appertained,*” or, in other words, to act according to custom and practice,

he must have recourse to the treatises and works of Kennedy, Simmons, Napier, Hough, and other writers on Military Law, and on the Practice of Courts Martial, for information on the numerous points, regarding which not any official mode of procedure has been laid down or established by authority.

CHAPTER II.

DUTIES OF A JUDGE ADVOCATE PREVIOUS TO THE
ASSEMBLY OF A GENERAL COURT MARTIAL.

1.—The orders directing the assembly of a General Court Martial having issued, and a copy of them transmitted to the Judge Advocate nominated to conduct the proceedings, together with such instructions as may be considered necessary for his guidance,—

“It is the peculiar province of the Judge Advocate to summon every person whose testimony is, in any shape, necessary to the prosecution or defence; and the Commander-in-Chief directs, that in all cases where a Court of Inquiry has been held, the proceedings shall be submitted to the Judge Advocate previously to a General Court Martial being ordered to assemble, and the Judge Advocate is held responsible that *all* witnesses whose names appear in the proceedings of the Court of Inquiry, and whose evidence is necessary to the trial, shall be duly summoned and properly examined.”—*Bengal Military Regulations.*

2.—“If there has been no Court of Inquiry, the Judge Advocate being furnished with the articles of accusation or charge, on which he is to prosecute, must, from the information of the accuser, instruct himself in all the circumstances of the case, and by what evidence the whole particulars are to be proved against the prisoner; of these it is proper, that he should

“prepare, in writing, a short analysis or plan for his own regulation in the conduct of the trial and examination of the witnesses.”—*Bengal Military Regulations*.

3.—“Where the Deputy Judge Advocate has the task delegated to him of arranging a prosecution on grounds defined for him by higher authority, it is strictly his function to inquire what persons have knowledge of the facts in issue, and to what particulars each of these individuals can bear testimony, so that he may not unnecessarily waste the time of the Court by adducing witnesses collected at random, who may prove wholly incompetent to furnish any information.”—*G. O. C. C. in India, Marquis of Hastings, 11th Nov. 1818*.

4.—A Judge Advocate, on receiving instructions to conduct a trial, should immediately ascertain if a copy of the charges on which the prisoner is to be arraigned has been transmitted to him. On this point, Captain Simmon states:—

“It is customary for the officiating Judge Advocate to furnish the accused with a copy of the charge to be preferred against him some time before the trial, or at all events to ascertain that it has been transmitted.”

5.—Major Hough observes, that

“All writers on Military Law state, that it is usual to furnish the prisoner with a copy of the charges upon which he is to be tried;” also, “that it is not only proper to give a copy of the charge, but advantageous. With regard to the private soldier, whose witnesses are generally in the barracks, if a copy be given a day before, it is enough. In the case of an officer, whose witnesses may be at a distance, the sooner a copy can be given the better; and it would, in any case, be highly improper to refuse to give a copy, which the custom of the army and the regulations of the navy concede to the prisoner.”

6.—“Although a prisoner cannot legally demand a copy of the charge on which he is to be tried, or object to any differences which may appear in it, he ought nevertheless, to be furnished with one as early as possible; and also to be made acquainted

“ with whatever alterations may be subsequently made.—*Bombay Military Regulations.* ”

7.—In the East Indies, it is usual, when the order for the assembly of the General Court Martial is issued, for the Assistant Adjutant-General of the division, or the station Staff Officer where the prisoner is residing, to furnish him, through his commanding officer, with a copy of the charges on which he is to be arraigned ; but the Judge Advocate who is directed to conduct the trial should invariably ascertain that the prisoner has had a copy of the charges transmitted to him.

8.—Having ascertained that the prisoner has received a copy of the charges preferred against him, the Judge Advocate should immediately address letters of the following import both to the prosecutor and prisoner ; and on receiving the names of the several witnesses required for the prosecution and defence, issue a summons to each individual. The summons should be sent to the Staff Officer of the station where the witness is residing, and by him to the head of the department, or the commanding officer of the regiment, to which the witness belongs ; by which arrangement it is known to all parties when the services of the several witnesses are required.

9.—Letter to prosecutor.

Camp at —, — January, 1844.

To — —

Sir,—Having received instructions to conduct the proceedings of the General Court Martial ordered to assemble on —, the — instant, and before which — — is directed to appear for trial, I have the

honour to request you will favour me at your earliest convenience with a list of the witnesses you require me to summon in support of the prosecution.

I have the honour to be, &c. &c.

—————, *Deputy Judge Advocate.*

10.—Letter to prisoner.

Camp at —, — January, 1844.

To — —.

Sir,—Having received instructions to conduct the proceedings of the General Court Martial ordered to assemble on —, the — instant, and before which you have been directed to appear for trial, I have the honour to request you will favour me at your earliest convenience, with a list of the witnesses you require me to summon on your behalf for your defence.

I have the honour to be, &c. &c.

—————, *Deputy Judge Advocate.*

11.—Letter to the station staff, with the summons.

Camp at —, January, 1844.

To the Major of Brigade,

at —.

Sir,—I do myself the honour to transmit the accompanying summons for the officers, non-commissioned officers, and privates therein named, and to request you will be good enough to have them forwarded to the respective parties.

I have the honour to be, &c. &c.

—————, *Deputy Judge Advocate.*

12.—“If either of the parties wish for the evidence of a person in a civil capacity, he may either summon him himself, or obtain a regular summons from the Judge Advocate.”—*Kennedy.*

13.—“There is no specific form of summons to civil witnesses laid down either in the Mutiny Act or Articles of War; but it

“ is essential that this document, in whatever terms prepared, should be drawn up with the greatest care and precision, otherwise the object of the Legislature, in providing a penalty for the non-observance of the summons, will be wholly defeated. The following will be found applicable in most cases.”
—*General D’Aguilar.*

14.—Form of a summons to a civil witness.—*Gen. D’Aguilar.*

Whereas a General Court Martial has been ordered to assemble at —, on —, the — day of —, for the trial of — —, of the — Regiment; and whereas it has been stated to me, that your evidence will be material on the part of the prosecution (or defence), by the power and authority in me vested, I hereby order you personally to appear before the said Court, on the — day of —, at — o’clock, and to attend from day to day until you shall be duly discharged. Fail not at your peril.

*Given under my hand and seal, at
— this — day of —, 1844.*

————, Deputy Judge Advocate.

To — —, Esq.

15.—Form of a summons to a military witness.

Camp at —, January, 1844.

To — —

Sir,—Your evidence being required on the part of the prosecution (or the defence), on the trial of — —, I do hereby summon you to attend accordingly, as a witness at a General Court Martial ordered to assemble at — o’clock, on —, the — day of January, 1844, at —.

I have the honour to be, &c. &c.

————, Deputy Judge Advocate.

16.—When a non-commissioned officer or private is to be tried, the Judge Advocate should ascertain, through the adjutant of the prisoner's regiment, that he has received a copy of charges preferred against him; that all witnesses for the prosecution and defence have been duly warned; and that the prisoner has been informed that his *previous convictions* will be brought in evidence against him, and inquiries made as to his *general character*.

17.—“Whenever charges are preferred against a native officer or sepoy, or other native of India, subject to military law, a certified translation thereof is to be prepared without delay, and the same read and delivered to the prisoner, in the presence of the commanding officer of the regiment, station, detachment, or guard, as the case may be.”—*Madras Military Regulations*.

18.—A copy of the charges against natives should be sent by the Judge Advocate to the officer ordered to officiate as interpreter at the General Native Court Martial, some days previous to the assembly of the Court; to enable the interpreter to prepare a translation of the charges before coming into Court.

19.—General Kennedy says:—

“It is not requisite that the prisoner should be furnished with the names and designations of the witnesses on the part of the prosecution, nor the prosecutor with those on the part of the defence:”

And quotes (which Captain Simmons also does) the following opinion of Sir C. Morgan:—

“I have never understood it to be the duty of a Judge Advocate, *in all cases*, to furnish a prisoner, previous to the trial, with the names and designations of the witnesses by whose testimony any act objected against him is expected to be proved; nor, on the other hand, do I consider that it is requisite for the

“ prisoner to furnish the Judge Advocate with the names of any other witnesses than those whom he wishes to be officially summoned, although such communication might possibly, in some instances, lead to inconvenience on either side.”

20.—Major Hough says:—

“ In the Bengal army it is directed, in G. O. C. C., 23rd September, 1826, that a list of witnesses for the prosecution should, in all practicable cases, be given to the prisoner; but where a prisoner demanded it as a *right*, the refusal of the Judge Advocate was approved of, G. O. C. C. 13th August, 1828.”—*Bengal General Orders.*

21.—Captain Simmons says:—

“ Unless there were some sufficient reason to justify its being withheld, it would not be in accordance with the existing practice of the service to refuse the prisoner a list of the witnesses for the prosecution; the almost universal custom is to give it as a matter of course. In the case of a soldier, the names of the witnesses for the prosecution are generally mentioned in the copy of the charge which is furnished to him when he receives notice of trial; at which time he is also asked what witnesses for the defence he wishes warned to attend the Court Martial.”

22.—“ The prisoner,” *Captain Simmons also observes*, “ has in no case the *right* to demand a list of the prosecutor’s witnesses; and, on a reference to the Judge Advocate General’s office, an officiating Judge Advocate was strongly advised not to furnish the prosecutor with a list of witnesses for the defence, a request to that effect being unusual.”

23.—“ In criminal proceedings, it is the practice to place the names of all witnesses for the prosecution on the back of the indictment, but it does not prevent the prosecution from calling other witnesses; indeed, it is only absolutely necessary to put the names of such witnesses on the back of the indictment as may be sufficient to induce the Grand Jury to find the bill, as they examine only such witnesses as are endorsed on the indictment.”—*Simmons,*

24.—Captain Simmons also observes :—

“ On the assembling of the Court, a list of witnesses on the part of the prosecution and defence is sometimes laid on the table: it is not however enjoined, nor will a deviation from this custom exclude either party from the production of any witnesses not comprehended in the list.”—*Simmons*.

25.—General Kennedy says :—

“ It has become a general practice for the Judge Advocate, on the meeting of the Court, to lay before it the lists of witnesses which he has received from the prosecutor and the prisoner, and they thus become equally known to the parties. Hence has arisen an opinion, which is entertained by some officers, that the parties cannot produce at the trial any other witnesses than those whose names are contained in these lists: an opinion which is entirely erroneous, as these lists are merely called for in order to ensure the attendance of the military witnesses, and to provide for the regular performance of duty in their respective corps and departments during their absence at the Court Martial; they also obviate the inconvenience which results from a witness being a member of the Court [for it is no sooner known that an officer ordered on Court Martial is required as a witness than he is relieved from other duty; and it is thus that a prisoner frequently prevents an officer to whom he has objections from sitting on his Court Martial, by including his name in the list of evidences]. But they in no manner preclude either of the parties from producing, as long as his case remains unclosed, such witnesses as he may think necessary; for, although these may have been in Court during all the preceding part of the trial, the Court cannot legally refuse to receive their evidence. As this, however, infringes on the established mode of examining witnesses at Courts Martial out of the hearing of each other, such evidence loses much of the weight to which it would have been otherwise entitled; and it is therefore most expedient, in all cases, that the list of witnesses furnished to the Judge Advocate should contain the names of every witness whom the parties intend to call.”—*Kennedy*.

26.—If the prisoner be a non-commissioned officer or private, the surgeon of his regiment must transmit to the Judge Advocate, on the morning the trial is to take place, a certificate of the following import [*vide* par. 7, Chapter 2]:—

I certify that No. —, private—— Company—— Regiment is in a good state of health, and fit to undergo corporal punishment or imprisonment, solitary or otherwise, and with or without hard labour. Or as the case may be.

Signed _____
Surgeon, — Regiment.

CHAPTER III.

DUTIES OF A JUDGE ADVOCATE AT A GENERAL
COURT MARTIAL.

"The great principle of a Military Court is honour;—a conscientious adherence to substantial justice."—Sir C. J. Napier.

1.—"General Courts Martial are attended either by the Judge Advocate General appointed under the sign-manual; by a Judge Advocate, also appointed by commission from the Crown; by a Deputy Judge Advocate, acting by deputation under the hand and seal of the Judge Advocate General; or by a person appointed to execute the office of Judge Advocate at such General Courts Martial as may be convened by General Officers commanding forces abroad."—*Simmons*.

2.—"The presence and assistance of an officiating Judge Advocate duly appointed is essential to the jurisdiction of a General Court Martial [*a General Court Martial assembled at Portsmouth, in 1839, sentenced a soldier of the 8th Regiment to be transported for a term of seven years. It appeared that the officer officiating as Judge Advocate on the trial had not been duly appointed or deputed, in consequence of which the prisoner was released, and the punishment remitted, though his conduct had been grossly insubordinate, and his character inveterably bad*]."—*Simmons*.

3.—"A Judge Advocate appears at a Court Martial in three distinct characters:—*First*, As an Officer of the Court, for the purpose of recording its proceedings, and administering the requisite oaths:—*Secondly*, As the adviser of the Court in matters of form and law:—*Thirdly*, As Public Prosecutor. In the first of these characters he is of course subject to the orders of

“ the Court, who may direct their proceedings to be conducted
 “ and recorded in any manner which they think proper ; but in
 “ the other two characters the Court can exercise no control
 “ whatever over the Judge Advocate, as in the performance of
 “ those duties he must be allowed to act according to his own
 “ judgment and discretion.”—*Kennedy*.

4.—Captain Simmons also observes :—

“ The duties of an officiating Judge Advocate are various and
 “ important. He registers and records all the acts of the Court
 “ and all oral evidence, as near as may be in the very words of
 “ the witness ; he notes the hour of assembly and adjournment ;
 “ and generally all incidental occurrences, particularly the clearing
 “ of the Court, the cause thereof, and, where interlocutory judg-
 “ ments are given, the decision : the Judge Advocate advises the
 “ Court on points of LAW, CUSTOM, and of FORM, and invites
 “ their attention to any deviation therefrom.”—*Simmons*.

5.—“ The Judge Advocate General, or his Deputy, cannot on
 “ any grounds be challenged, as he acts at a General Court; Mar-
 “ tial on behalf of the Crown.”—*Military Regulations, Kennedy,*
Simmons, and others.

6.—“ The absence of the Judge Advocate will not invalidate
 “ the proceedings : a deputy may be appointed by the Judge
 “ Advocate General, or by the officer empowered to convene Courts
 “ Martial, where the warrant for the purpose includes the power
 “ to appoint a Deputy Judge Advocate. Such person appointed
 “ to officiate as Judge Advocate must obviously be sworn, and it
 “ *must be entered on the face of the proceedings*, that his warrant
 “ has been read in Court. The reasons which debar the return
 “ of a member absent during the reception of evidence do not
 “ apply to the Judge Advocate ; he may resume his duties at any
 “ moment.”—*Simmons*.

7.—With respect to how far a Judge Advocate is
 required to assist a prisoner *at a General Court*
Martial, General Kennedy observes :—

“ It is expected that the Judge Advocate, if consulted by either
 “ a private prosecutor, or by the prisoner, should give him the best
 “ information and advice in his power ; but an opinion which

“ was long prevalent in the army, that it was *the official duty* of the Judge Advocate *to assist the prisoner in the conduct of his defence, appears to be no longer maintained.* To affording him, however, *such assistance, if requested as a favour,* I suppose no Judge Advocate would ever object; and if a prisoner therefore wishes to avail himself of it, he is merely to make the requisite application, which will no doubt be complied with. It is, however, to be observed, that the Judge Advocate ought not for a moment to forget his duty as prosecutor; and though he ought on the defence, as well as at all other times, to restrain the prisoner from advancing anything which might criminate himself, or prejudice his case, he is still bound, by the cross-examination of the prisoner’s witnesses, to give every effect to the prosecution. IN Court, therefore, it is not in the power of the Judge Advocate to afford the prisoner any effectual assistance, for there he could neither advise him, nor frame questions for him, nor cross-examine the prosecutor’s witnesses, which acts could alone be of any essential benefit to the prisoner; but our Court there can be no impropriety in the Judge Advocate pointing out to a prisoner the manner in which he might best conduct his defence for him. A defence, however, cannot be made without a knowledge of the circumstances of the case, and it would therefore seldom be prudent for the prisoner to acquaint the Judge Advocate with the real nature of the transaction alleged in the charge, or to disclose to him the grounds upon which he intended to rest his exculpation. A prisoner, however, may give to the Judge Advocate a memorandum of the points on which he wishes his own witnesses to be examined, and the opposite party cross-examined, or a list of questions to the same effect, and request him to put only such interrogatories to the witnesses as he thinks necessary, and to frame the questions in his own words;”—“with such a request,” *General Kennedy observes*, “he complied with on two or three occasions, and his doing so did not at all interfere with the performance of his other duties.”—*Kennedy.*

8.—At General Whitelock’s trial, in 1808, the Judge Advocate General, the Right Hon. Mr. R. Ryder, observed;—

“The only assistance which it is in the power of the Judge Advocate to give, *in any case*, is, on the one hand, by shaping any questions, which the party accused has to put, *in legal form*; by solving any difficulty as to the relevancy of the facts adduced, either by the prosecutor, or by himself; and taking care, on the other, that no illegal evidence is adduced against him.”

9.—Captain Simmons remarks, that

“It is generally understood that the parties before the Court have a *right* to the opinion of the Judge Advocate either *in or out of Court, on any given question of law arising out of the proceedings.*”—Simmons.

10.—It is the duty of the Judge Advocate

“To take care that the prisoner shall not suffer from a want of knowledge of the law, or from a deficiency of experience or ability to elicit from witnesses, or to develope by the testimony, which in the course of the trial may present itself, a full statement of the facts of the case as bearing on the defence; to this extent the Court Martial and the Judge Advocate are bound, it is conceived, to offer their advice to the prisoner. Justice is the object for which the Court is convened, and the Judge Advocate appointed: to this aim all their inquiries and attention ought to be directed; and if, in the prosecution of the design, the prisoner should be benefited, the efforts of the Court, or of the Judge Advocate, will have been satisfactorily and legitimately exerted.”—*Simmons*.

11.—“The Judge Advocate should give every reasonable assistance to the prisoner in his defence, either in *point of law or of justice*:—it is his duty that the proof, both on the part of the Crown and the prisoner, should be properly laid before the Court, and where any doubtful point may arise, he should rather incline to the part of the prisoner; and nothing should induce him to omit any circumstances in the minutes of the proceedings that may have a tendency to palliate the charges against the party accused.”—*M^r Arthur*.

12.—Major Hough mentions, that

“An officer officiating as Judge Advocate once asked the Judge Advocate General (of the Bengal Army), if he might speak to the prisoner before trial, the reply was:—*I do not conceive there is any objection to your acceding to the desire of a prisoner, to attend him previously to trial, if any good can result.*” Major Hough adds:—“He conceives great good may often result, particularly in the case of a private soldier: the Judge Advocate is more free from bias, it may be supposed, than any other person. And in the case of an officer, particularly where the Judge Advocate is not prosecutor, he may be looked on in the light of a moderator. If he is prosecutor, even his advice may be of more use than that of even a friend, who would naturally take only one view of the case,—that in favour of the accused.”—*Hough.*

CHAPTER IV.

DUTIES OF A JUDGE ADVOCATE AS AN OFFICER OF
A GENERAL COURT MARTIAL.

"In recording the proceedings of a General Court Martial, and in administering the requisite Oaths, the JUDGE ADVOCATE is subject to the orders of the Court."—Kennedy.

"A Judge Advocate is the mainspring of a Court Martial ;—on him the Court depends for information concerning the LEGALITY as well as the REGULARITY of their proceedings :—IF HE ERRS all may go wrong."—Adya.

1.—"As officer of the Court, the Judge Advocate reads the warrants constituting it, administers the requisite oaths, arraigns the prisoner, and puts the questions to the witnesses ; during the trial also, it is his duty to take down in writing the depositions of the several witnesses ; and although this may appear to be a matter of little importance, still the correctness of the proceedings, and the expediting of the trial, depend much on the quickness and precision with which the Judge Advocate performs this seemingly unimportant part of his duty."—*Kennedy*.

2.—"The proceedings of all General Courts Martial are reduced to writing by the officiating Judge Advocate."—*Simmons*.

3.—"The PRESIDENT is held strictly responsible that the proceedings are written in a clear and legible hand, without erasures or interlineations ; the pages of the minutes are to be numbered, and the sheets, when more than one, are to be stitched together, and made up separately, upon each trial."—*Her Majesty's Regulations and Orders*.

4.—In the heading of the proceedings, it must invariably be stated by what authority the Court is assembled, thus :—

*At a (Native) General Court Martial, holden at
 ———, on Monday the First day of May,
 One Thousand Eight Hundred and Forty-
 Four, by virtue of a Warrant under the hand
 and seal of His Excellency Lieutenant-General
 ———, Commander-in-Chief of Her Ma-
 jesty's and the Hon. East India Company's
 Forces, serving under the Presidency of———.*

5.—“The names of the members are registered on the proceed-
 ings according to seniority, and the regiment of each is inva-
 riably to be annexed to his name, and if on the Staff, his rank
 and situation are to be distinctly stated.”—*Simmons*.

The name of the Judge Advocate conducting the proceedings must be inserted at the bottom of the list.

6.—The dates of the commissions of the several members having been sent to the Judge Advocate some days previous to that on which the Court is held, he is enabled to register their names according to seniority, and to prepare the heading of the proceedings *before* coming into Court;—this should always be done, as it saves much time, and greatly expedites the business of the Court.

7.—The officers nominated to compose a General Court Martial having assembled at the place and time appointed in orders, the Judge Advocate stands up and calls over their names;—each member, on answering to his name, takes his seat on either side of the President according to his rank.

8.—The arrangement of the officers composing a General Court Martial, agreeably to the plan in the plate at the commencement of this volume, will be found most convenient, as it brings *directly* before

the whole Court *all* parties who are allowed to address it. The Judge Advocate sits opposite to the President; the interpreter a little to the right, and the witness on the left of the Judge Advocate: the prosecutor and prisoner, a short distance behind the Judge Advocate, should each have a small table to enable them, or their Counsel or friends, to write upon; but none of the parties should sit with their backs to the Court:—the public, military and civilians, take their seats around the room at a short distance from the Court.

9.—The Court being formed, the prisoner is called before it by name, which circumstance the Judge Advocate thus records on the proceeding:—

*Captain ——— of the ——— Regiment ———,
appears as prisoner before the Court.*

Or,

*No. ——— private in the ——— Regiment ———,
is called into Court.*

10.—“When an officer is tried he is allowed a chair; this is rarely the case when a private soldier is brought before a Court Martial; to make such a difference is wrong, and should be abolished by all Presidents of Courts Martial. Why should a man be kept on his legs from eight o'clock in the morning till four in the afternoon? This is hard upon him under such unfortunate circumstances even if he be strong; if he be a weak and agitated man, as many are, it is cruel.”—*Sir Charles J. Napier.*

11.—The Judge Advocate should ask the permission of the President that the prisoner may be allowed a chair, *in the case of non-commissioned officers and privates*:—an officer asks permission for himself. A prisoner, however, must *in all cases* stand up when the charges are read, or whenever he proposes a ques-

tion, or *addresses* the Court. Witnesses also are requested to take a seat on coming into Court, but must stand up to be *sworn in*, and when *giving* their evidence, or when *answering* any question put to them.

12.—The Judge Advocate stands up and reads the following documents:—

1st.—*The General Order directing the assembly of the Court.*

2ndly.—*The Division Order directing, in obedience to the above G.O., the Court Martial to be held at such an hour, day, and place, naming also the officers who are to compose the Court, and any after orders issued on this subject, according to their proper dates.*

3rdly.—*The President's Warrant:—*which is then given by the Judge Advocate to the President.

4thly, and Lastly.—*The Judge Advocate's Warrant.*

“And should the Court be held under authority *delegated* by a Commander-in-Chief, it is customary to read the warrant by the officer so empowered to convene General Courts Martial.”
—*Kennedy.*

All which having been done, the Judge Advocate enters a minute on the proceedings, that the above-mentioned documents have been duly read, thus:—

The Orders directing the assembly of the Court, and the President's and Judge Advocate's Warrants, are severally produced and read.

13.—Judge Advocates should be very careful and particular that a General Court Martial never proceeds to trial without being certain that it is *properly* constituted, as directed by the Articles of War, and

Her Majesty's Regulations and Orders for the Army; both as regards the NUMBER and RANK of those who compose the Court. [*Vide pages 244-5 H. M.'s Regts.*]

14.—“After a Court Martial is once assembled, neither His Majesty nor the officer by whose authority the Court may have been held can in any manner interfere in its proceedings. The PRESIDENT alone then becomes vested with the power for assembling and adjourning the Court Martial, and of preserving due order and decorum during its sittings; but the President is not vested with any further power, as all questions, of whatsoever nature, which arise at a Court Martial, *must be decided by a majority of the votes* of the members.”—*Kennedy*.

15.—“In cases of doubt, a Court may find it necessary to refer to a Commander-in-Chief for the requisite information, and any considerations or advice he may direct to be laid before the Court ought always to be received with every deference and attention.”—*Kennedy*.

16.—“It is competent for a Court Martial to forbid the publication of its proceedings during the trial, and any breach of the order may be prosecuted as a contempt of Court in the Queen's superior Courts.”—*Simmons*. “A military man might of course be tried for disobedience of orders, should he publish any part of the proceedings after such a prohibition.”—*Hough*.

17.—“All deliberations of Courts Martial take place with closed doors; at other times the Court is open to the public, military or civilians:” on these deliberations “the majority of votes decides all questions with reference to the admission or rejection of evidence, and on *all* other points involving law or custom.”—*Simmons*.

18.—The usual manner of recording such deliberations is as follows:—

The Court is closed, and having taken into consideration the ———— deems the objection valid; — or invalid; — or decides the papers handed shall or cannot be received; — or the question shall or shall not be put to the witness.

The Court is opened, and the foregoing decision is read.

The closing and opening of the Court must be invariably noted on the proceedings.

CHALLENGE OF PRESIDENT AND MEMBERS.

19.—The Judge Advocate now asks the prisoner if he has any exception or cause of challenge to make to any of the officers nominated to sit on the Court Martial before which he appears for trial. If, in answer to this question, the prisoner states that he has no objection to offer either against the President or any member of the Court, the trial proceeds.

20.—But if the prisoner objects to the President, the Judge Advocate puts the following question to the prisoner:—*Be pleased to state your reasons for objecting to Colonel ——— sitting as President on the Court Martial for your trial?* The answer to this question, with all evidence which the prisoner may wish to adduce to prove the validity of the challenge, must be taken down *regularly*, and *fully* recorded *at length* on the proceedings.

21.—In James's edition of Tytler, the following are stated to be the remarks of Sir Charles Morgan on this point:—

“The President of a Court Martial cannot be objected to by
 “challenge in the same manner as the members may be, he being
 “named in the order or warrant for the trial; if, therefore, any
 “objection be urged against his appointment, care must be taken
 “to have such objection clear and specific; the Court must then
 “separate, and the objection must be referred for decision to the
 “authority under which his name was inserted in the order or
 “warrant.”—*Sir C. Morgan.*

22.—The regulations of the Bombay army direct:—

“ If any objection be made to the President they must be fully recorded, and the Court adjourned till the matters be decided on “ by the authority under whose warrant the Court is assembled.”
—*Bombay Military Regulations.*

23.—Captain Simmons says:—

“ The President of a General Court Martial being appointed by warrant, either directly or by delegated authority, from Her Majesty, and his presence being essential to the Court, and that alone which, in dependence on the warrant, gives it life, any objection to him, though made at the same period of the proceedings, and in the same manner as on the challenge of any member, CANNOT BE DISPOSED OF BY THE COURT; but must be referred for decision to the authority which issued the warrant for its assembly; the Court separating for the purpose.”—*Simmons.*

24.—It therefore appears, that the proper mode of proceeding in such cases is, that if the prisoner hands into Court, which is usual, a written statement of his objection and reasons, it is read and appended to the proceedings; if the prisoner states his objection and reasons *vivâ voce*, they are minuted down on the proceedings, together with all evidence adduced by the prisoner, by the Judge Advocate. This done, the Court is closed when *no discussion takes place*, as the Court have not the power to decide on any objection made to their President; but a *copy* of the prisoner's *vivâ voce* or written statement (the original must remain with the proceedings of the Court), and of all that stands recorded on the proceedings relative to the prisoner's objection to the President must be taken; which copy, signed by the President and Judge Advocate as a “*true extract*” from the proceedings of the Court, must be transmitted immediately to the convening authority, who,

thus informed of all particulars, will be better enabled to judge of the justness or otherwise of the objection urged by the prisoner, and to decide whether the challenge is valid or not; this point resting *entirely* with him alone: the Court adjourns till further orders.

25.—“The Commander-in-Chief directs, that it be considered a Standing Regulation, that, at all European and Native General Courts Martial, the Judge Advocate shall, previous to swearing the members, allow the prisoner the exercise of the established and important right of objecting to any of the members composing the Court, and that in all cases the question offering the option of challenge to a prisoner, together with his reply there-to, shall be entered at length on the proceedings.”—*Bengal Military Regulations*.

26.—“Previously to the prescribed oath being taken, or affirmation made, by the members, both the prosecutor and prisoner have the right of challenging them. Peremptory challenges are not allowed at a General Court Martial, and the party must therefore assign his cause of challenge, which is to be regularly entered on the proceedings. The member objected to then withdraws, and the Court being closed deliberate and decide on the validity of the challenge.”—*Bombay Military Regulations*.

27.—“When it is practicable so to do, *all challenges should be admitted*. It is not only right to be as mild as possible towards a prisoner; but it is right also to let the public and the prisoner see that such is the case. A culprit should never be made to appear in the light of a martyr; for when this takes place, much of the advantage of punishment is lost; besides, no officer who has been challenged likes to sit as a member of a Court, and it is hard to oblige him so to do, unless the good of the service demands it.”—*Sir C. J. Napier*.

27½.—“In a Court of Law, where the King is a party concerned, *as he is in all cases at Courts Martial*, previous to the jury being sworn, he is by his counsel to challenge or except against any juror;—and it is the business of the Judge Advocate, as prosecutor for the crown, to do the same at a Court Martial.”—*Adye*.

28.—The usual mode of proceeding on a member

being objected to is as follows:—On the question, *Captain —, have you any exception to any of the officers present sitting as members on your Court Martial?* being put by the Judge Advocate, the prisoner hands into Court a written statement of his objection, and of his reasons for objecting to the member, which is read and attached to the proceedings. In some cases the prisoner states his objection and reasons *vivâ voce*; in which case the Judge Advocate minutes them down, as expressed, on the proceedings, and in both cases records at full length any evidence that may be adduced; the President then orders the Court to be cleared, and requests the member who has been objected to to leave the Court, whilst the subject of the objection made to him is under discussion. [It should be remembered in this case, as in all others, the Articles of War direct, “*the members of Courts Martial are not to quit their seats without permission of the President.*” If the member objected to has anything to urge on the subject, it must be done previous to his leaving the Court, and fully recorded. When the Court is again opened to the public, the challenged member must return to his seat at the Court Martial board. The Judge Advocate then communicates the decision of the Court regarding the challenge, as it stands recorded on the proceedings. Should the challenge be considered INVALID, the member retains his seat: if VALID, he leaves the Court, and the officer in waiting is directed to take his seat in the proper place, according to his rank, and the prisoner is asked by the Judge Advocate if he has any objection to the *new* member sitting on the Court Martial for his trial.

29.—“The prisoner may challenge the *whole Court* as being

"*incompetent to try him, and decline its jurisdiction. In this case the Court is cleared ; it decides upon the validity of the prisoner's objections, and declares the result of its deliberations in open Court. Should the decision be in favour of the prisoner's objection, the Court separates, and the President applies to superior authority for instructions.*"—*Sir C. J. Napier.*

THE COURT SWORN IN.

30.—"When all objections are disposed of, the Judge Advocate proceeds to swear in the Court, by administering the prescribed oath to the President, and then to the members collectively on his right and left; after which the President administers the prescribed oath to the Judge Advocate."—*Kennedy.*

31.—As the oaths prescribed to be taken by members of Courts Martial, when on the trial of persons belonging to Her Majesty's service, differ in form from those to be administered on the trial of all persons in the Honourable East India Company's service, the several oaths are here given:—

"The oath is taken by each person, holding the Evangelists in his right hand, repeating the words after the Judge Advocate, and finally kissing the Book."—*Tytler.*

32.—On the trial of any person in HER MAJESTY'S SERVICE, the 90th Article of War (1843) directs, "*in all trials by General Courts Martial, the Judge Advocate, or person officiating as such, shall administer to each member the following oath:*"—The Judge Advocate addresses the *first* sentence of the oath to the Court, and then each member must repeat the remainder of the oath after the Judge Advocate, and kiss the book when he expresses the words, So help me, God!

You shall well and truly try and determine, according to the evidence in the matter now before you.

So help you, God!

I —— do swear, that I will duly administer

justice according to the Rules and Articles for the better Government of Her Majesty's Forces, and according to an Act now in force for the punishment of Mutiny and Desertion, and other crimes therein mentioned, without partiality, favour, or affection; and if any doubt shall arise which is not explained by the said Articles or Act, according to my conscience, the best of my understanding, and the custom of war in like cases; And I further swear, that I will not divulge the sentence of the Court until it shall be duly approved; neither will I, upon any account, at any time whatsoever, disclose or discover the vote or opinion of any particular member of the Court Martial, unless required to give evidence thereof as a witness by a Court of Justice, or a Court Martial, in due course of law. So help me, God!

“And as soon as the said oaths shall have been administered to the respective members, the President of the Court shall administer to the Judge Advocate, or person officiating as such at General Courts Martial, an oath in the following words:—

I———do swear that I will not, upon any account whatsoever, disclose or discover the vote or opinion of any particular member of the Court Martial, unless required to give evidence thereof, as a witness, by a Court of Justice, or a Court Martial, in due course of law. So help me, God!

33.—On the trial of any person in the service of the Honourable EAST INDIA COMPANY, the 84th Article of War directs:—“*In all trials by General Courts Martial, the Judge Advocate, or person officiating as such, shall administer to each member the following oath:*”—

You shall well and truly try and determine, according to the evidence in the several cases and matters, which shall be brought before you upon the General Court Martial now assembled. So help you, God!

I ——— do swear that I will duly administer justice as a member of the General Court Martial now assembled upon the several cases and matters which shall be brought before the same, according to the Rules and Articles for the better Government of the Forces of the East India Company, and according to an Act of Parliament now in force for the punishment of Mutiny and Desertion of the said Forces, and other crimes therein mentioned, without partiality, favour, or affection; and if any doubt shall arise which is not explained by the said Articles or Act, according to my conscience, the best of my understanding, and the custom of war in the like cases: And I further swear, that I will not, upon any account, or at any time whatsoever, disclose or discover any vote or opinion of any particular member of the Court Martial, unless required to give evidence thereof, as a witness, by a Court of Justice, or a Court Martial, in due course of law. So help me, God!

“ And as soon as the said oath shall have been administered to the respective members, the President of the Court shall administer to the Judge Advocate, or person officiating as such at General Courts Martial, an oath in the following words:—

[Same oath as given in par. 32.]

34.—“ Upon all trials of offenders in the INDIAN NAVY by any Court Martial, all officers present, who are to constitute the said Court Martial, shall, before they proceed to such trial, take such oath as is hereinafter mentioned, upon the Holy

“ Evangelists, before the Court, which oath the Judge Advocate, or his Deputy, or the person appointed to officiate as such, is hereby authorized and required to administer in the words following:”—

I —— do swear that I will administer justice, according to the Articles and Orders established by an Act passed for the better securing the observance of an Exact Discipline in the Indian Navy, without partiality, favour, or affection; and if any case shall arise which is not particularly mentioned in the said Articles and Orders, I will duly administer justice according to my conscience, and the best of my understanding: And I do further swear, that I will not, upon any account whatever, disclose or discover the vote or opinion of any particular member of the Court Martial, unless thereunto required by an act of the Governor General of India in Council. So help me, God!

“ And so soon as the said oath shall have been administered to the respective members, the President of the Court is hereby authorized and required to administer to the Judge Advocate, or the person officiating as such, an oath in the following words:”—

I —— do swear that I will not, upon any account, at any time whatsoever, disclose or discover the vote or opinion of any particular member of this Court Martial, unless thereunto required by an act of the Governor General of India in Council. So help me, God!

35.—At NATIVE General Courts Martial, the Judge Advocate administers the following form of oath to the interpreter:—

I —— do swear that I will well and truly

interpret, according to the best of my skill and judgment, such matters as may be brought before this Court; that I will not divulge the sentence of the Court until it shall be approved by the General or other Commander-in-Chief of the Forces, or other competent authority; neither will I, upon any account, at any time whatsoever, disclose the vote or opinion of any particular member of the Court Martial, unless required to give evidence thereof, as a witness by a Court of Justice or a Court Martial. So help me, God!

“ And as soon as the said oath shall have been administered to the interpreter, he (*the Judge Advocate*) shall cause to be administered by a competent person (*the interpreter*) the following affirmation to the President and each member of the Court, according to the formula of his religion respectively:”—

I —— do solemnly affirm, in the presence of Almighty God, that I will duly administer justice according to the Laws, Regulations, and Articles of War, established by the Honourable the Governor in Council, for the better government of the Native Troops serving under the Presidency of ——, and for the administration of justice by Native Courts Martial, without partiality, favour, or affection; and if any doubts shall arise which are not explained in the said Laws, Regulations, and Articles of War, then, according to my conscience, the best of my understanding, and the custom of war in the like cases: And I do further solemnly affirm, in the presence of Almighty God, that

I will not divulge the sentence of the Court until it shall be approved of by the Commander-in-Chief, or the officer by whose warrant the Court Martial is held; neither will I, upon any account, at any time whatsoever, disclose or discover the vote or opinion of any particular member of this Court Martial, unless required to give evidence thereof, as a witness, by a Court of Justice, or a Court Martial, by a due course of law.

“This done, the interpreter shall administer to the Judge Advocate an oath in the following words:”—

I ——— do swear that I will not, upon any account, at any time whatsoever, disclose the vote or opinion of any particular member of the Court Martial, unless required to give evidence thereof, as a witness, by a Court of Justice, or a Court Martial. So help me, God!

36.—The prescribed oaths having been administered, the Judge Advocate records on the proceedings, *The President, Members, Interpreter, and Judge Advocate, are duly sworn or affirmed.*

COPIES OF THE CHARGES AND LIST OF WITNESSES
PLACED ON THE TABLE.

37.—The Judge Advocate now places on the table three or four authentic copies of the charges on which the prisoner before the Court is to be arraigned; which plan, instead of having only one copy to refer to, will save much time and be found a great convenience to the Court.

38.—The Judge Advocate should also, at this stage

of the proceedings lay on the table a list of all the witnesses he has summoned on the part of the prosecution and defence. The names of those witnesses subsequently required, and summoned, can be added to this list at any stage of the trial.

THE CHARGES READ AND DISCUSSED.

39.—“The Court should be cleared, and the charges read to ascertain that they are specific; for unless the Court *clearly* understands what it has *to inquire into*, and the prisoner what he has to defend himself against, the Court should refuse to receive the charges.”—*Sir C. J. Napier*.

40.—“It is the duty of the Judge Advocate to remonstrate against the Court proceeding to trial on a charge that is deficient in accuracy or perspicuity.”—*Bengal Military Regulations*.

41.—“It is the undoubted right, and even the duty, of every President and member of a Court Martial, to reject any illegal or erroneous charge: they are, nevertheless, bound to record their proceedings and resolutions upon it.”—*Bengal Military Regulations*.

42.—On this point Major-General Kennedy observes:—

“The Court having been duly constituted, by the prescribed oaths having been administered, the Judge Advocate reads the charges in an audible voice: on hearing which, should any doubt arise, whether originating with the members of the Court or with the parties on the trial, with regard either to the competency of the Court’s jurisdiction, or the relevancy of the charges, these doubts must now be discussed. For should there appear any objection to the legality of the trial which is self-evident and insurmountable, such as that the prisoner is not subject to military law, or that the crime charged is a civil offence, the Court ought to suspend their proceedings, and to submit the objection to the consideration of the authority by whom it may have been assembled: it is also held, that it is

“ an undoubted right, and even the duty, of every Court Martial
 “ to reject any illegal or erroneous charge. If, likewise, the
 “ charge or charges be drawn up in a loose and indefinite manner,
 “ although the generality of a charge may not be absolutely
 “ repugnant to military law, still the prisoner may, previous to
 “ pleading to his arraignment, call upon the prosecutor to specify
 “ the particular facts of which he intends to accuse him; and as
 “ this requisition is founded on material justice, no Court
 “ Martial can legally refuse it. Such is the power, and the
 “ STRICT DUTY, of Courts Martial before entering on any trial; but
 “ it is seldom that they think it necessary to act accordingly, and
 “ the consequence is, that charges are almost always submitted to
 “ investigation with all their imperfections on their head.”—
Kennedy.

43.—When an alleged criminal offence is to be investigated,

“ A General Court Martial ought to satisfy itself, previous to
 “ arraignment of the prisoner, that the facts alleged in the charge
 “ brought before it do constitute the criminal offence intended,
 “ and that they are described in such a *legal* manner as would
 “ authorize it to award, on conviction, the punishment which the
 “ law prescribes for each particular offence.”—*Kennedy.*

44.—If any doubts arise or any objection is made to the charges, by the Court, Judge Advocate, or prisoner, the proceedings, and the decision of the Court thereon, must be regularly and fully recorded.

45.—It must, however, be borne in mind that,

“ When a charge has been approved of by proper authority, and
 “ ordered to be investigated, it is not competent for the Judge
 “ Advocate, or any other person, to make alterations in it without
 “ the consent of such authority being previously obtained.”—
Tytler.—Bombay Military Regulations.

PROOF OF PRISONER'S LIABILITY.

46.—In the Bengal and Madras armies, it appears to be customary, after the charge has been read to the

prisoner, and previously to calling on him to plead, to adduce proof of the prisoner being the person described in the charges, which is thus taken and recorded:—

Proof of Prisoner's } A. B. Havildar (or Serjeant) in
Liability. } the Company of the
Regiment of Native Infantry, being called into
Court, is duly sworn.

Questions by the } Do you know the Prisoner? if so,
Judge Advocate. } to what Company and Regiment
does he belong? what rank does he hold? and does he
draw pay and do duty as a soldier?

Answer.—

The witness retires.

["In cases where the prisoner may be a camp follower, or bazaar man, his liability to the jurisdiction of the Court must be proved by the cutwal of the bazaar, or some other competent person."—*Madras Military Regulations.*]

THE PRISONER CALLED ON TO PLEAD.

47.—The Judge Advocate now asks the prisoner by his name and designation:—

Captain — Are you guilty of the charge or charges just read, or not guilty?

The ordinary plea is "*Not Guilty:*" but sometimes the prisoner stands mute, or pleads "*Guilty:*"—in either case the trial proceeds;

"For it is essential that the facts and particulars should be known to those whose duty it is to report on the case, or who have discretion in carrying the sentence into effect."—*Simmons.*

48.—The Madras Regulations direct that,

"In consequence of the vague and irregular opinions that have occasionally been acted upon, in cases where a prisoner has

“determined to plead ‘guilty,’ the Commander-in-Chief, in conformity with the practice prevalent at the Horse Guards, directs that, upon trials by Courts Martial in this army (Madras), an express plea of ‘guilty’ or not ‘guilty’ shall not be required of the prisoner, but that the latter shall be presumed as the most favourable to the accused, and entered upon the record on his behalf accordingly by the Judge Advocate, or officer conducting the proceedings, previous to opening the prosecution. The prisoner, when called upon for his defence, will still have the opportunity, if he knows himself guilty, of owning his offence, and throwing himself on the mercy of his judges; or, on the other hand, of offering circumstances in extenuation, or of bringing forward evidence to refute the charges against him, as he may think best. It will be the duty, then, of the Judge Advocate, or officer conducting the proceedings of the Court Martial, to enter upon the record a plea of ‘*not guilty*’ on behalf of the prisoner previous to opening the prosecution.”—*Madras Military Regulations.*

49.—Sometimes pleas in bar of trial are submitted by the prisoner for the consideration of the Court:—whatever the plea may be, it must be fully recorded on the proceedings [if a written statement of the plea is handed into Court, it is read by the prisoner and then appended to the proceedings], as well as the decision of the Court thereon. If the plea is considered valid, *an extract of the proceedings of the Court on this subject* is sent to the authority who convened the Court, for his information and instructions, the Court adjourning till they are received; but if the plea is considered invalid, such is duly recorded, and the trial proceeds; the decision of the Court being communicated to the prisoner by the Judge Advocate, on the Court being opened to the public.

50.—The prisoner having pleaded to the charge,

“The Judge Advocate cautions all witnesses on the trial to with-

“draw, and to return to Court *only* on being called.”—*Simmons*.

COUNSEL AND AMICUS CURIÆ.

51.—It is at this stage of the proceedings that the prosecutor, or the prisoner, if either or both wish it, *ask permission* of the Court to be allowed the assistance of a professional gentleman, or a friend in the Court, during the trial.

52.—“All the writers on Military Law admit it to be the custom to allow a prisoner-to have counsel.”—*Hough's Military Law Authorities*, p. 38.

53.—“If the prisoner” [or in fact either party] “employs a lawyer, the gentleman is told that he must not address the Court.”—*Sir C. J. Napier*.

54.—“The prosecutor and prisoner, on requesting it, are to be allowed the assistance either of a friend or of a professional gentleman, but no person is, on any account, *to be permitted to address the Court, or to interfere in any manner with its proceedings, except the parties themselves.*”—*Bombay Military Regulations*, p. 36.] “Such assistance must be restricted to the giving advice, framing questions, or offering, in writing, any legal objections that the course of the proceedings may appear to render necessary.”—*Kennedy*.

55.—M^r Arthur says:—

“It is likewise the practice at Courts Martial to indulge the prisoner with counsel, or at least AMICI CURIÆ (or friends of the Court), who may sit or stand near him, and instruct him what questions to ask the witnesses, with respect to matters of fact before the Court; and these friends should commit to paper the necessary interrogatories as they may arise, which the prisoner gives, on separate slips, to the Judge Advocate.”—*Hough's Military Law Authorities*.

PROSECUTION, OPENING ADDRESS, &c.

56.—“The Judge Advocate, or officer appearing as prosecutor, opens the case by such statement and view of the evidence as he may deem expedient; *nor is he to be restricted in it, except he introduce matter disrespectful to the Court, foreign to the charges; or unless he insinuate imputations not implied by them: no reproachful words are to be used to prisoners.* This

“address may be either *vivâ voce* or written: it is generally “written, and is then recorded.”—*Simmons*.

57.—If the address is made *vivâ voce*, the Judge Advocate minutes it down on the proceedings;—if it is written, it is usual, after it is read and admitted by the Court, to attach it to the proceedings; in some cases, however, short addresses are copied by the Judge Advocate and entered on the proceedings.

58.—The Judge Advocate must remember that all *written* addresses and statements from either of the parties before the Court, which are laid before and received by it, must be dated and authenticated by the signature of the party handing it into Court.

59.—“If the prosecutor has any opening of his case to submit to the Court, he should deliver *that before* he is sworn; *after* “which he is to be sworn, *and to give his testimony*.”—*MS. Observations, Sir C. Morgan.—Tytler*.

60.—“It has always been held that the Judge Advocate should “not (*if it can possibly be avoided*) blend the character of witness “for the prosecution with that of Judge Advocate, as the union “of these two characters gives upon the face of the proceedings “the appearance of a preponderating and unfair influence against “a prisoner on trial.”

61.—There is not any objection to the Judge Advocate being sworn by the President as a witness, for the purpose of authenticating official documents—which the Judge Advocate may wish to produce as evidence—or he may be called on to produce by the Court or the parties before it.

61½.—At a General Court Martial, held at Dinapore in Bengal, on the 21st of February, 1842, a most irregular proceeding appears to have taken place, which called forth the following remarks of His Excellency the Commander-in-Chief in India, Sir Jasper Nicholl:—

“In the course of the proceedings, it appears, that the Court “obliged the Judge Advocate, notwithstanding his protest, to

“take the oath of a witness, when called upon to advise the Court on a point of law. The Commander-in-Chief has to observe, that the opinion of a Judge Advocate is *not* of the nature of EVIDENCE, and that it is both UNUSUAL and IRREGULAR to swear to his construction of the Law.”—*G. O. C. C. in India, 4th May, 1842.*

62.—Major Hough says:—

“A member as well as a juror may be sworn to give evidence in a cause to a Court and his fellow-jurors.”—Hough.

Captain Simmons quotes the following from 2 *Hawk. c. 46, s. 17*:—

“A member of a Court Martial, as a judge or juror, is a competent witness, and may be sworn to give evidence in favour of or against a prisoner at any stage of the proceedings; it is, however, to be avoided, if foreseen.”—*Simmons.*

63.—Notwithstanding there is not any legal objection to a member of a Court Martial giving evidence before the Court of which he is a member, yet it certainly appears to be *highly objectionable*, especially when a member of a Court is required to give evidence on the part of the prosecution: if it is ascertained previous to the assembly of the Court that the evidence of an officer nominated as a member of a Court Martial is required, he should be *immediately* relieved: and if a member, after taking his seat and being sworn in, is called on to depose *to facts*, justice demands that he should *not* resume his seat as a member, to decide on evidence he has himself given: but when a member is called on to give evidence as *to the character* of a prisoner, no such objection exists; and in all such cases it is customary for a member so sworn, to give his testimony as to the character of the prisoner, and then to resume his seat.

64.—“The Judge Advocate and prosecutor being necessarily present during the examination of *all* witnesses, if required to give evidence, are sworn *immediately* after the opening address of the prosecutor; nor would it be proper, at any other stage of

“the proceedings, to admit their examination or deposition in chief, except when called as witnesses for the defence.”—*Simmons*.

65.—“When a prosecutor, after having read a written address offers his own evidence, it is most regular that the Judge Advocate should put to him the necessary questions, after the administration of the usual oath.”—*Kennedy*.

And when the prosecutor’s examination as a witness is finished, he should request permission to remain in Court; which circumstance, and the Court’s acquiescence therein, should be noted on the proceedings thus:—

The prosecutor here asks permission to remain in Court, which request is granted.

66.—Major-General Kennedy observes;—

“If the Judge Advocate finds it necessary, for the better conducting of the trial, to request that the person from whom he has received his principal information respecting the charges under investigation, may, after having given his evidence, be permitted to remain in Court, this request is always complied with, and the person so remaining in Court is also named an informant. But it is to be remarked, that an informant is merely allowed to be present in Court for the purposes of material justice, as an assistant to the Judge Advocate, and that he cannot of himself propose any questions, or make any observations whatever. Should any thing occur to him during the proceedings, he must state it to the Judge Advocate, who, if he think *the remarks are just*, will avail himself of the suggestions of the informant.”—*Kennedy*.

WITNESS CALLED IN AND SWORN, &c.;—OATHS, &c.

67.—“When a witness is produced, and before he is sworn, any objection to his competency ought to be stated.”—*Judges Queen’s trial—Simmons*.

68.—“When a witness appears, he must be regularly sworn, unless an objection be made to his competency:—and the course of proceeding is, that the party who objects to the witness should state all his objections at the same time in order to prevent unnecessary delay.”—*Phillips’s Law of Evidence*.

These objections must be fully recorded on the proceedings.

69.—The Articles of War direct:—

“All persons who give evidence before any Court Martial are to be examined upon oath in the following words:”—

The evidence which you shall give before this Court shall be the truth, the whole truth, and nothing but the truth. So help you, God!

70.—The Legislative Act, No. 5, of 1840, enacts, that all Hindoos and Mahomedans, when required to give evidence within the territories of the East India Company, shall make affirmation to the following effect:—

I solemnly affirm, in the presence of Almighty God, that what I shall state shall be the truth, the whole truth, and nothing but the truth.

71.—“After the above affirmation has been made by the witness, the interpreter is to caution him carefully to distinguish in giving his evidence what he personally knows as an eye-witness or otherwise, from what he may have heard from others; and that he is bound to answer all questions put to him on the trial before the Court without any regard to the prosecutor or prisoner, to the best of his information and belief.”—*Madras Military Regulations.*

72.—“Previous to the assembly of a Court Martial, the oaths which will be required to be administered to witnesses, according to their various religions, should be properly ascertained.”—*Hough.—Griffiths.*

73.—The mode of administering oaths to witnesses of various religions, is thus described in Captain Griffiths’ “*Notes on Military Law:*”—

Protestants. } “*At Courts Martial, witnesses, &c., who are Protestants are sworn by laying their right hands uncovered on the open Evangelists while the oath is recited, and afterwards kissing the book.*”

Roman Catholics. } *"In swearing Roman Catholics, the Bible is closed, and has marked upon the outer cover a cross, generally cut out on white paper, and pasted on, or a crucifix is placed upon it, which the witness, after the oath is recited, kisses. When there is any suspicion of the veracity of the evidence about to be given by a Roman Catholic, the witness, after kissing the cross, should be directed to bless himself."*

Oath for Protestants } *"Head and right hand uncovered."*
and Roman Catholics. } [*Though a soldier remains covered in the presence of a Court Martial, on taking an oath he must invariably take off glove and cap.*]

"The evidence which you shall give before this Court shall be the truth, the whole truth, and nothing but the truth." So help you, God!

Oath for Jews. } *"Hat on." [Jews regard no oath as obligatory, unless their head is covered.]*

"You swear by the Five Books of Moses, and the great God of Israel, that the evidence you shall give shall be the truth, the whole truth, and nothing but the truth." So help you, God!

Affirmation for Quakers and Moravians. } [*"Authorized by the Statute 9 Geo. 4th. cap. 32. Sec. 1."*] *"I do solemnly, sincerely, and truly declare and affirm, that the evidence which I shall give before this Court shall be the truth, the whole truth, and nothing but the truth."*

A Scotch Covenanter—*"holds up his right hand, but neither touches nor kisses the book."*

A Mahomedan—*"should be sworn on the Koran."*

A Hindoo—*"may swear by touching with his hand the foot of a Brahmin."*

[*Vide Par. 70, affirmation is sufficient.*]

A Chinese—*"was sworn at the Old Bailey by breaking a saucer, and by appealing at the same time, to the Supreme Being, whom he worshipped, that his own body might be so broken in pieces, if he told a falsehood."*—Griffiths.

74.—The prescribed oath or affirmation having been administered by the Judge Advocate (the latter to natives of India by the interpreter), the Judge Advocate enters a minute on the proceedings that

such has been done, having previously recorded the rank, name, and occupation of the witness, at full length.

CHARGES SHOULD NOT BE READ TO WITNESSES.

75.—“The established custom of reading over the charge to every witness at Military Courts, as soon as he is sworn, and before the commencement of his examination, is, generally speaking, objectionable, and *is in direct variance with the better practice of Civil Courts*;—to preserve a witness untutored by either of the parties in the cause is a constant and praiseworthy endeavour of the laws, and the less premeditated his answers are the better.”—*Sullivan*.

76.—The Bengal Military Regulations strictly prohibit charges being read to witnesses.

“*The reason,*” General Sir H. Fane told the army, “*why it is preferable to abstain from reading the charges to every witness is, that the practice may frequently operate, as a leading question would do, to guide the answer of a dishonest witness:—no rule is laid down by authority on this point; but, in the absence of a rule, analogy is the safest guide; in courts of civil law the indictment is not read to a witness.*”—*G. O. C. in India, 20th March, 1838.*

78.—General Sir Jasper Nicolls, Commander-in-Chief in the East Indies, in a G. O. 3rd September, 1841, called the attention of the army to the above quoted G. O. C., and remarked:—

“It is not essential to the ends of justice, or the *regularity of the proceedings, nor by any means conducive to the better examination of witnesses, that the charges should be read to them; on the contrary, the perusal of the charges to a witness has a tendency to put him at once upon a narrative, and not to keep him from it:—the witness is always furnished with dates by it, and with other most essential particulars.*”—*G. O. C. in India, 3rd September, 1841.*

79.—The Regulations of the Bombay Army direct that—

“The charges before the Court are *not* to be read to the witnesses.”

EXAMINATION OF WITNESSES.

80.—Major-General Kennedy says:—

“The testimony of each witness is to be separately and distinctly recorded on the proceedings in this manner:”—

“*Lieutenant ——— of the — Regiment Native Infantry, called into Court and duly sworn, and when his evidence is finished, an entry is made to this effect. The witness withdraws.*—It is most usual to take down the evidence by the way of question and answer: and on recording each interrogatory, the party putting it should be distinctly denoted as thus:—*Question by the Prosecutor,—Question by the Judge Advocate,—Question by the Prisoner, Question by the Court.* Sometimes, however, a witness gives his testimony in the way of narrative, in which manner it must likewise be taken down in writing, and the Judge Advocate is bound to adhere to the precise words of the witness.”—*Kennedy.*

81.—At the head of the examination of a witness by each party, the Judge Advocate should also insert:—*examined by the prosecutor—examined by the Judge Advocate—cross-examined by the prisoner—re-examined by the prosecutor—examined by the Court; and on the defence, examined by the prisoner—cross-examined by the prosecutor—re-examined by the prisoner—examined by the Court.*

82.—Her Majesty’s Regulations direct:—

“All evidence whatever is to be recorded on the proceedings in the order in which it is received by the Court, and as nearly as possible in the words of the witness.”

83.—“The statement of each witness must be inserted in the proceedings, and should the evidence of a subsequent witness

“ corroborate that of a former one, it must be properly inserted *at length*, instead of being recorded as a corroboration.”
—*Hough*.

84.—“ When no exception is made to a witness, he is duly sworn, or makes solemn affirmation; and is then EXAMINED IN CHIEF by the party who produces him: the opposite party next CROSS-EXAMINES him; and in case of new matter being introduced on the cross-examination, the party calling him RE-EXAMINES into that matter; and then the Court put such questions to the witness as they may think necessary. It is essential to the regularity of the proceedings of a Court Martial, that this mode of examining witnesses should be strictly adhered to; for whenever the parties or the Court put questions backwards and forwards, first one and then the other, it confuses the witness, perplexes the case, and most materially incapacitates the party producing the witness from deriving that benefit from his testimony which he might otherwise have done. If a question as to any material fact has been omitted upon the examination in chief, it is to be suggested to the Court, which will exercise its discretion in putting it to the witness.”—*Bombay Military Regulations*.

85.—It is, however, optional with the prisoner to defer his examination of a witness on the prosecution until it is closed, in which case the Court also defers its examination of the witness.

86.—“ The Judge Advocate is at liberty to put such questions as he may think necessary to the different witnesses who are examined, and these questions should always follow or supply the place of those of the prosecutor, as forming, in fact, but *one and the same examination*.”—*Kennedy*.

87.—“ The Judge Advocate should not be permitted to examine in chief a witness after he has been cross-examined by the prisoner, but he is at liberty to re-examine into any new matter which may have arisen in the course of the cross-examination.”
—*Kennedy*.

QUESTIONS, HOW TO BE PUT; AND RULES RELATIVE
TO RECEPTION.

88.—“ A question being reduced to writing by the individual originating it, whether it be by the prosecutor, prisoner, or by a member of the Court, is passed to the President; if approved by him, it is read aloud, entered by the Judge Advocate on the proceedings, and, no objection being made to it by the opposite party or the Court, addressed to the witness.”

89.—“ Leading questions, that is, such as instruct a witness how to answer on material points, are *not* allowed on the examination in chief; for to direct witnesses to their evidence would only serve to strengthen that bias which they are generally too much disposed to feel in favour of the party that call them.”—*Phillips' Law of Evidence*.

90.—“ Each party and each member of the Court, as also the Judge Advocate, when not the prosecutor, may object to the putting of any question that is proposed. It is not, however, usual to record upon the proceedings such objection and the decision of the Court thereon, *unless* the point is of *some importance*, or either party *request that it should be recorded*. But if the question be rejected, the person who proposed it cannot, in consequence, enter any remark or protest on the face of the proceedings, nor is he, if a party, at liberty to animadvert on such decision in his subsequent address to the Court.”—*Kennedy*.

91.—“ All parties may object to any question; but the ground of objection should be *clearly* stated. The Court decides whether the question shall be put; shall be shaped in a different form as to the words; or shall be rejected altogether: *the Court's decision is final*, and the party must rest satisfied with it.”—*Hough*.

92.—“ The members of a Court Martial are alone the judges what evidence shall be *admitted* or *rejected*, and neither the prosecutor nor the prisoner can insist on the admission or rejection of any contrary to their opinion, far less can they protest against such decision; but the prosecutor or prisoner may state their reasons for offering, and also their objections

“against receiving any particular evidence, and, if the Court are of a contrary opinion, may request that these reasons or objections may be recorded on the proceedings, and with this request the Court in general complies.”—*Kennedy*.

93.—“It is perfectly competent for a Court Martial to strike out of its proceedings any evidence which, upon further examination, should appear to be irrelevant to the charge.”—*Kennedy*.

WITNESS MAY REFRESH HIS MEMORY BY REFERRING TO MEMORANDA.

94.—“If a witness has made a memorandum of facts, he may refresh his memory by referring to it:”—“he is not allowed to read a written statement of his evidence; but he may refer to memoranda.”—*Sturkie*.—*Kennedy*. “The opposite party, when cross-examining, is invariably permitted to inspect the memoranda referred to by a witness.”—1 *Phil.* 298.—*Simmons*.

THE EXAMINATION OF ALL WITNESSES MUST BE IN THE PRESENCE OF WHOLE COURT.

95.—“The examination of witnesses is invariably in the presence of each member of the Court: it has been remarked that even the countenance, looks, and gestures of a witness add to, or take away from, the weight of his testimony.”—*Simmons*.

96.—“It is essentially necessary that the examination of witnesses should take place in the presence of *all* members of the Court, and as in fact no act performed by a *part* of a Court can be legal, the unavoidable absence of any member by sickness, or otherwise, at any period necessarily prevents his resuming his seat.”

97.—“Whenever a member is prevented from attending a Court Martial, *the cause must be duly certified, and a minute of the same entered on the proceedings, and that member cannot again resume his seat. NO ACT CAN BE LEGALLY PERFORMED BY A PART ONLY OF A COURT MARTIAL.*”—*Bombay Military Regulations*, 23 and 24.

98.—“Whenever a member leaves the Court with the Presi-

“dent’s permission, THE JUDGE ADVOCATE CEASES TO RECORD any evidence during his absence.”—*Hough*.

99.—“All writers on Military Law agree, that if it be necessary to examine any witness who is prevented attending by sickness, the *whole* Court must adjourn to the witness’s house, or to the hospital, or place where he may be.”—*Hough, Military Law Authorities*, p. 66.

100.—On such occasions, when all the parties have assembled in the room of the sick person, the Judge Advocate must call over the names of the officers composing the Court, in the presence of the prisoner, to ascertain that all are present, previously to administering the oath, or taking the evidence of the witness. This circumstance, and the return of the Court to its former place of assembly, should be minuted on the proceedings thus:—

Captain A. B. having been reported unable from illness to leave his quarters, and the surgeon of his regiment being of opinion that it is probable several weeks or months may elapse previous to his being able to do so, the Court adjourns to the quarters of Captain A. B.: having assembled there, the president, members, and all parties before the Court being present, Captain A. B. is duly sworn.

The evidence of the sick man is then taken; after which the Court returns to its former place of assembly, when the Judge Advocate must enter a minute to the following effect:—*The Court having returned to its former place of assembly, and all parties being present, the trial proceeds.*

THE EVIDENCE OF AN ABSENT WITNESS : HOW
TAKEN.

101.—Major-General Kennedy and Major Hough appear to be the only writers on Military Law who even allude to this subject. Major Hough says:—

“ Where witnesses are at a distance, there is an examination *de bene esse*—that is, interrogatories by the party to the parties, transmitted to, and the answers taken before, a justice of the peace.”

And then quotes in a note the following instructions contained in a Circular Letter, No. 2485, dated 22nd November, 1830, by order of Government, from the Judge Advocate General of the Bengal Army:—

“ In the event of difficulties existing to the *detention* of a witness, the Judge Advocate shall propose the evidence required being taken in the presence of” [friends of] “ both parties before a magistrate; and it is understood, that the necessity of the above cases being established, and the Court Martial being satisfied that the consent of both parties had been obtained, such evidence may be legally received on the trial.”

102.—Major-General Kennedy, however, describes most fully and clearly the manner in which the examination of an absent witness is to be taken:—

“ If it is likely,” he says, “ that a witness will be prevented from attending the trial by a sufficient cause, or he resides at such a distance that his attendance cannot be conveniently procured, he may be examined on interrogatories *DE BENE ESSE*.”—See 1 Chitty's Criminal Law, 612, in the case of the King against Morphew. “ The ATTORNEY GENERAL suggested whether there might not be a doubt as to the reading of such depositions in a criminal case; and he stated, that no instance of the sort was

“recollected, and that in the Crown Office there did not exist a form of rule for that purpose.”

“Lord Ellenborough, chief justice, said:—There is a precedent, though not in the Crown Office, in the impeachment of Mr. Hastings. A gentleman who could not attend was examined on interrogatories; and Lord Thurlow was not likely to have consented to such a proceeding if any objection had existed against it.”—2 Maule and Selwyn’s Reports, 602. “But this examination cannot take place unless with the consent of the prosecutor and prisoner. It will, however, be evident that, with respect to military men, the mode of proceeding which prevails in such a case in courts of law cannot be adopted; and it is therefore sufficient that the parties, or persons duly appointed by them, and the witness, should appear before a justice of peace, and that his examination should then be taken in the same manner as if he were examined before the Court Martial. But if the party requiring the evidence of an absent witness has not thus obtained it before the trial takes place, he must satisfy the Court that the evidence is material to his case, and the Court will then direct interrogatories to be framed from questions proposed by both parties and the Court, and will transmit them to a person at a place where the witness resides, in order that his answer to them may be given on oath before a justice of peace. [This manner of preparing the interrogatories approaches nearest to the practice in courts of law; but it would, in general, render the adjournment of the Court for some days indispensable. As the other, therefore, is liable to no objection, as the opposite party has an opportunity of cross-examining the witness, it would be best to adopt it, in order to prevent any delay in the trial.] If necessary, also, the Court will adjourn until such answers are received, or it may proceed with the trial until the case of the party requiring them is closed. But no voluntary affidavits, nor depositions taken in any other than these two modes, are admissible evidence.”—Kennedy.

103.—The following case occurred at a General Court Martial held in the northern division of the Bombay Army in 1842:—An officer and his wife, residing at a station upwards of one hundred miles

from the place where the General Court Martial was assembled, were summoned to give evidence before it on the part of the defence. They were *both* very ill at the time; two medical certificates regarding the state of their health were received by the Deputy Judge Advocate conducting the trial, stating that neither of the parties were at that time capable of leaving their residence without great risk, and that some time must elapse before either party could be sufficiently recovered to travel, or to appear personally before the Court. The trial, with the exception of these two witnesses, was finished; the medical certificates were read to the Court and to the prisoner, who thereupon stated, the evidence of both parties was of the utmost consequence to his cause. The prosecutor having no objection, the Court decided on following the course recommended by Major-General Kennedy, as above related. The several questions from the prisoner [the prosecutor and Court saw no occasion to put any], after being duly approved, were written with plenty of room between each for the insertion of the witnesses' answers, and were sent with a letter from the President to the brigadier commanding the station where the parties resided, requesting his aid in having the evidence correctly taken, which was done according to the following form drawn up on a sheet of foolscap paper for the Deputy Judge Advocate General conducting the trial:—

*8th Evidence, for the Defence.—Lieutenant A. B.
— Regiment — — —, having been duly sworn,
the following questions were put to him:—*

Question by the Prisoner.—

Answer.—

<p><i>Question by the Prosecutor.</i>—</p> <p><i>Answer.</i>—</p> <p><i>Question by the Court.</i>—</p> <p><i>Answer.</i>—</p> <p><i>Sworn to and signed</i> <i>before me, this — day</i> <i>of ———, 1842.</i> <i>(Signed) — —</i> <i>Justice of Peace.</i></p>	<p style="font-size: 3em;">}</p> <p>These are only inserted to show the manner in which questions should be put, if requisite.</p>
<p><i>(Signed) — —</i> <i>Lieutenant, — Regiment.</i></p> <p><i>Witnessed by me,</i> <i>(Signed) — —</i> <i>Major of Brigade.</i></p>	<p><i>(Signed) A. B.</i></p>

The evidence of both the witnesses was taken according to the above form, separately, and not in the presence of each other, but before the justice of peace and the brigade major of the station. The latter, by desire of the brigadier, forwarded the evidence to the President, which was read in Court, admitted as evidence, and attached to the proceedings. As the testimony given in this case was of some consequence, and the mode of procedure called forth no remarks from the confirming authority, it is presumed to have been LEGAL and CORRECT. Consequently the above may be an useful precedent for Judge Advocates, as well as Courts Martial.

104.—Long after the above was written an opportunity has been afforded me of giving another precedent on this subject, which is taken from the [*printed*] proceedings of the trial of Paymaster Walshe, H. M.'s 2nd or Queen's Royal Regiment, conducted by the Judge Advocate General of the Bombay Army. The General Court Martial was held at Bombay during the months of February and March, 1844, and on the fifteenth day, Monday the 25th day of March, 1844, it is thus recorded :—

"The prisoner lays before the Court the examination of Surgeon William Henry Young, of Her Majesty's Second or Queen's Royal Regiment, taken at Poona, which is admitted and read, and is as follows:—

"Examination of Surgeon William Henry Young, of Her Majesty's Second or Queen's Royal Regiment, taken on oath, at Poona, before John H. Peart, Esq., one of Her Majesty's Justices of the Peace, under the Presidency of Bombay, on the sixteenth day of March, 1844, in the presence of Lieutenant G. Yonge, attending on the part of Paymaster Walshe, of the aforesaid Regiment, and of Captain Liddell, on the part of Lieutenant-Colonel Brough, commanding the same Regiment.

"Questioned by Paymaster Walshe."

Question.

Answer.

"Taken before me, on oath, this sixteenth day of March, one thousand eight hundred and forty-four.

"In presence of

(Signed) "J. Liddell, Captain; and

"G. Yonge, Lieutenant of the Second

"or Queen's Royal Regiment."

(Signed) "J. H. Peart,

"Justice of Peace."

RECEPTION OF WRITTEN DOCUMENTS, AND HOW TO BE RECORDED.

105.—"Every kind of writing, if duly authenticated, is admissible at a Court Martial; but the original must be produced, and no copy, except of official papers, should be admitted, unless the Court is satisfied that it was not in the power of the party to produce the original. An attested copy of an official document is admissible evidence at a Court Martial, but the person attesting it must be produced as a witness in Court, in order to depose to its authenticity."—*Kennedy*.

106.—"It is an universal rule, that where any document is produced and read by one party, the whole is to be read if the adversary require it; for unless the whole be read there can be

“no certainty as to the real sense and meaning of the whole document.”—*Kennedy*.

107.—Judge Advocates should remember and be very careful that,

“In drawing up the proceedings of Courts Martial, *all written evidence* which tends to prove the charge *ought to be recorded in the place to which it applies*; but such as merely tends to explain or illustrate the evidence, or such parts of the documents given in evidence as do not immediately relate to the charge, should be *annexed to the proceedings as an Appendix*.”—*Kennedy*.

108.—When a letter, or any written document, is handed into Court, it is usual for the Judge Advocate to enter a minute somewhat similar to the following on the proceedings:—

The prosecutor [witness or prisoner] here hands into Court a letter from ———, to the address of ———, dated ———, which is read, admitted by the Court, marked No. 1, 2, or 3, or A, B, or C, and attached to the proceedings.

CONFIDENTIAL REPORTS CANNOT BE CALLED FOR.

109.—“A person in the employ of Government cannot be required to divulge the nature of his instructions, or any confidential communication.”—*Simmons*.

110.—“It has long been decided by the highest judicial authorities, that confidential military documents, or communications made up under orders of the Sovereign, or even a Commander-in-Chief, *cannot be called for* in evidence.”—*Letter from Deputy Advocate General of Her Majesty's Forces, Bombay, by order of the Commander-in-Chief, 8th July, 1842.*

111.—“Official communications between the governor and the law officer of a colony respecting the state of the colony, orders given by a governor to a military officer, a correspondence between an agent of Government and a Secretary of State,

“the report of a Military Court of Inquiry, respecting an officer whose conduct the Court had been appointed to examine, are CONFIDENTIAL and PRIVILEGED communications, which courts of justice will not allow to be disclosed.”—*Simmons.—Griffiths.*

EVIDENCE READ OVER TO WITNESS BEFORE LEAVING
THE COURT.

112.—“It is customary, when deemed necessary by the Court, or desired by a witness, to read over to him, immediately before he leaves the Court, the record of his evidence, which he is desired to correct, if erroneous; and, with this view, any remark or explanation is entered on the proceedings. It would, obviously, be improper to read over the record to a witness, or to permit him to refer to it when under, or previous to, cross-examination: NO ERASURE or OBLITERATION is, under any circumstances, admitted.”—*Simmons.*

WITNESS CAN CORRECT OR AMEND THE EVIDENCE HE
HAS GIVEN.

113.—“Every witness, whether on his examination in chief or on cross-examination, has a natural right to explain and make clear the evidence which he has given; but previous entries in the proceedings *are not*, in consequence, to be expunged or erased; and if any doubt should arise after his examination has closed, the Court may call upon him for such explanation.”—*Griffiths.*

114.—“At Courts Martial a witness may, after having left the Court, and even on a subsequent day, request to be readmitted, in order to correct or amend the evidence which he has given.”—*Kennedy.*

115.—In which case the Judge Advocate thus records on the proceedings:—

2nd Witness for } Lieutenant ———, — Regiment,
the Prosecution } appears in Court, and requests permis-
(or Defence). } sion that the evidence he gave on —
may be read over to him; to enable him to correct

[*amend or explain*] such portion of it which he considers was not sufficiently clear. (Or as the case may be.)

The Judge Advocate then enters on the proceedings whatever explanation the witness offers; but no erasures or alterations of the witness's former testimony should, under any circumstances, be admitted.

116.—“When the Court have asked all questions of a witness, he is directed to withdraw, and this is always noticed in the proceedings, to show that two witnesses were not in Court at the same time.”—*Hough*.

The Judge Advocate enters a minute of the circumstance, thus:—*The witness withdraws, or retires.*

ADJOURNMENT ; REASSEMBLY ; FAIR COPY OF PROCEEDINGS.

117.—“The hour of adjournment, as well as that of assembly, each day is invariably to be entered upon the record of the proceedings of Courts Martial; and in the event of adjournment at an hour earlier than usual, the cause thereof is to be explicitly stated.”—*Madras Military Regulations*.

The usual mode of recording such occurrences is as follows:—*It being 3 o'clock p.m., the Court adjourns till 11 o'clock to-morrow forenoon, Wednesday the — day of June, 1844. The Judge Advocate being ill (or a member, or as the case may be), the Court, at one o'clock p.m., adjourns till 11 o'clock a.m. to-morrow forenoon, Tuesday the 6th day of June, 1844.*

118.—“At the close of the business of each day, and in the interval before the next meeting of the Court, it is the duty of the Judge Advocate to make a fair copy of the proceedings, which he continues to copy to the conclusion of the trial.”—*Tytler*.—*Kennedy*.

119.—On the assembly of the Court daily, the Judge Advocate calls over the names of the officers composing it; and if any are absent, the cause must be stated and minuted on the proceedings thus:—

Second day.

11 o'clock a.m., Monday the 10th day of May, 1844.

At a General Court Martial, then held at —, pursuant to adjournment.

Present the same members as on Saturday last, with the exception of Captain A. B., reported sick. (Or as the case may be.)

Read over the proceedings of Saturday last.

120.—A FAIR COPY of the proceedings of the previous day should *always be ready*, which the Judge Advocate, after having called over the names of the Court, should hand over to the President, who either examines it himself, or requests a member to look over it; whilst the Judge Advocate reads over in open Court the record he took of the previous day's proceedings. This done, the Judge Advocate enters a minute of the circumstance, as above pointed out, and the trial proceeds.

121.—Major Hough says:—

“It is optional with the Court to read over the proceedings of the previous day at each reassembling of the Court: if it is done, there should be no witnesses present in Court.”—*Hough.*

But for many reasons it is highly desirable, I conceive, that the *fair copy* of the previous day's proceedings, as pointed out in the preceding paragraph, should invariably be read, when any trifling error or omis-

sion (which might be forgotten after the delay of several days) can be easily rectified; and, above all, it keeps the Court in mind of the evidence that has been given; and instead of being a loss of time, it really expedites the business of the Court, which would otherwise perhaps have to adjourn for a day or two, to enable the fair copy of the proceedings to be prepared.

AFTER THE PROSECUTION IS CLOSED NO EVIDENCE CAN BE RECEIVED TO SUPPORT IT.

122.—“The prosecutor must, during the prosecution and before the prisoner comes on his defence, produce *all* the evidence he has to support the charge; and after the prosecution has been closed he shall not be permitted to adduce any further evidence in proof of the specific facts alleged in the charge.”—*Bombay Military Regulations*, 44.

123.—When the prosecution is closed, the Judge Advocate must enter a minute to that effect on the proceedings, thus:—*The prosecution is here closed*: after which no farther evidence on the part of the prosecution can be admitted.

DEFENCE.

124.—“The prosecution being closed, the prisoner then enters on his defence, and may either address the Court first, and then adduce his evidence, or defer his address until the whole of his exculpatory proof has been laid before the Court; or he may address the Court both in opening and closing his defence, first stating the nature of the evidence he intends to adduce, and afterwards commenting on the case at large.”—*Bombay Military Regulations*.

125.—Captain Simmons says:—

“ The prisoner, being placed on his defence (to arrange and prepare which, subsequent to the closing of the prosecution, he may request, and is usually granted, a certain time, perhaps a day or two, or more), may proceed at once to the examination of witnesses ; *first to meet the charge, and secondly to speak to character*, reserving his address to the Court to the conclusion of their examination; or he may previously deliver a statement commenting on any discrepancies in the evidence produced on the prosecution, placing his conduct, which is the cause of arraignment, in that point of view which he may deem most conducive to his exculpation, and pointing out the chain of evidence by which he proposes to establish the arguments adduced in his defence.”—*Simmons*.

126.—“ The prisoner having finished the examination in chief of each witness, the prosecutor cross-examines;—the prisoner re-examines to the extent allowed to the prosecutor, that is, on such points as the cross-examination may have touched on, and the Court put any questions deemed necessary.”—*Simmons*.

127.—“ When witnesses are called to character they must be duly sworn, and cannot be cross-examined; nor can any examination take place into particular facts; but the witness may be called upon to assign his reasons for the character which he has given in evidence.”—*Kennedy*.

128.—“ Where an officer, on his trial, wishes to have his character spoken to by officers of high rank and character, whom he does not bring into Court, nothing is more common than to introduce their letters in his speech, and they are then attached to the proceedings.”—*J. A. G.'s opinion*.—*Griffiths*, No. 16.

129.—Tytler observes, the prisoner's counsel, or

“ Legal adviser, is not considered an appropriate person to read the defence: should the prisoner himself be unable to do so, any friend, who is not employed *in a legal capacity* on the trial, may be permitted to read the defence; or the prisoner may request the Judge Advocate to read the defence for him.”—*Tytler*.

130.—“ It occasionally happens, that, on presenting to the Court a written address, the prisoner is unequal to the task of

“ reading it, from indisposition or nervous excitement: on such occasions the Judge Advocate is sometimes requested to read it; but as the impression which might be anticipated to arise from it may, in the judgment of the prisoner, be affected more or less by the manner of its delivery, Courts Martial generally feel disposed to concede to the accused the indulgence of permitting it to be read by any friend named by him, and particularly if that friend be a military man, or if the Judge Advocate be the actual prosecutor. On the trial of Lieutenant-General Whitelock, the counsel was not permitted to read the defence, as being contrary to precedent; but the General was informed that any military friend, or any near connection, who did *not attend to assist him professionally*, might read it for him; indeed, no point seemed better established in the practice of Courts Martial than the custom which obtained of resisting this attempt of counsel *to address* them; but of late years it has been broken through on many trials, and the prisoner’s address has been read by the barristers and attorneys employed professionally to conduct the defence.”—*Simmons*.

131.—Captain Griffiths remarks,—

“ That peculiar circumstances, in some cases, have induced Courts Martial to allow a legal practitioner to read the defence of the prisoner.”—*Griffiths*.

132.—Major Hough, in alluding to “ *modern practice*,” says:—

“ Certainly counsel are not *to address* the Court, but there are many instances in favour of its practice at the present day.”

He then quotes several instances, and adds:—

“ I admit neither counsel nor friend should address or speak to the Court, which might lead to arguments; but having written a defence, proper in language, I do not see the reasonableness of preventing counsel from reading what he has written.”—*Hough*.

133.—At a late Court Martial, held at Poona, in July, 1843, the prisoner’s counsel, a barrister-at-law,

was allowed to read the address on the defence; notwithstanding the spirit of the 36th paragraph of the Regulations (*vide par. 54*) of the Bombay Army on Courts Martial, seems to prohibit such a proceeding.

134.—But whatever may have been, or is the practice not officially directed; whether in drawing up, or in reading the prisoner's address, the assistance of a professional man, *a lawyer*, should, if possible, be always dispensed with by all parties before a Court Martial; for, as Sir Charles J. Napier most truly remarks,

“The ideas of legal men and those of soldiers are so different as to the mode of conducting a trial, that I think a prisoner seldom finds that he profits *much* by their advice; they are dexterous, and *greatly impede* the progress of the Court * * * *a soldier does best when he defends himself*;—he speaks the same language as his judges, the attorney does not.”—*Sir C. J. Napier.*

135.—When the defence is closed, the Judge Advocate enters a minute to that effect on the proceedings, thus:—*The defence is here closed*: after which, no evidence on the part of the defence can be admitted.

REPLY AND REJOINDER.

136.—The prosecutor, if he wish it, now requests permission to reply; which is sometimes done immediately, or after a short adjournment of the Court; or if the proceedings, especially the defence, are voluminous, a day or two is requested to prepare the reply, which is usually granted.

137.—“In all cases where a prisoner *produces evidence* in his

“defence, a prosecutor *has a right to reply*, but he cannot adduce any fresh evidence unless *new matter* has been introduced in the defence, in which case he is allowed to controvert *this new matter* by evidence.”—*Bombay Military Regulations*, 49.

138.—“Under this privilege he may either recapitulate and methodize the import of his evidence, and strengthen it by pertinent argument, or show the weakness and insufficiency of the reasoning and proof on which the prisoner has rested his exculpation.”—*Tytler*.

139.—“By a reply is to be understood a right of observing upon the evidence in general; and also a right of controverting, by evidence, any new matter introduced by the prisoner in his defence.”—*Delafons*.

140.—“When a prisoner has not adduced evidence on his defence, it remains in the discretion of the Court to determine, in cases conducted by a *private* prosecutor, whether he shall be permitted to reply or not; in deciding which point, no better rule can be prescribed for its guidance, than that a reply should be permitted whenever the defence contains any assertions on any matter on which the prosecutor has not previously had an opportunity of addressing the Court; for it is equally impossible for the Court, as for the approving officer, to do impartial justice, unless the whole of the case of each party is fairly brought before them.”—*Bombay Military Regulations*, 50.

141.—“In cases in which the prosecution is *wholly* conducted by the Judge Advocate, that officer *has the right of reply*, whether evidence has been adduced on the defence or not.”—*Bombay Military Regulations*, 50.

142.—Captain Simmons says:—

“The prisoner having closed his defence, the prosecutor is entitled to reply where the prisoner has in his defence *examined witnesses*, or *put in documentary evidence*, or has in his address *opened new facts upon his own assertion*, or upon documents which he may read without proving in evidence; but *not* in those cases where the prisoner merely draws inferences from the evidence for the prosecution, or elicited from the prosecutor’s witnesses on cross-examination, even should the tendency of these observations be to reflect on the conduct, or impugn the

“ motives, of the prosecutor. It, however, seldom happens that a defence takes place before a General Court Martial without the examination of witnesses ; a reply, therefore, almost invariably follows the prisoner’s address ; to prepare which the Court, in ordinary cases, grants the prosecutor a reasonable time, and upon his reading it the trial ceases.”—*Simmons*.

143.—“ A rejoinder is not a matter of right, and should never be permitted by Courts Martial except when evidence has been adduced on the reply.”—*Bombay Military Regulations*, 51.

THE COURT, AT ANY STAGE OF THE PROCEEDINGS BEFORE FINDING, CAN RECAL EVIDENCE FOR EXAMINATION.

144.—“ After the prosecution and defence are closed, it is still competent for a Court Martial to recal a witness, for the purpose of putting any particular question deemed essential ; the parties must, however, be present.”—*Simmons*.

145.—“ *The Court* is at liberty, at any stage of the proceedings before finding, to recal evidence for examination.”—*J. A. G.’s opinion*.—No. 15, *Griffiths*.

THE TRIAL FINISHED.

146.—When the prosecutor and prisoner have laid their respective cases before the Court, the trial is finished, which circumstances should invariably be recorded on the proceedings. A minute similar to the following is usually entered :—

“ *The trial is finished, and the parties and witnesses are discharged from further attendance.*”

“ The above entry should be deferred at trials of European non-commissioned officers and privates till after the finding and proceedings in respect to previous convictions.”—*Bombay Military Regulations*.

147.—The Court is then closed, and the Judge

Advocate reads over the entire fair copy of the proceedings, or such part of it as may be considered necessary.

SUMMING UP.

148.—Tytler says :—

“ In *complicated* cases, in circumstantial proofs, in cases where
 “ the evidence is contradictory, or in trials where a number of
 “ prisoners are jointly arraigned, as on charges of mutiny or the
 “ like, it is expedient that the Judge Advocate should arrange
 “ and methodize the body of the evidence, applying it distinctly
 “ to the facts of the charge, and bringing home to each prisoner,
 “ where there are more than one, the result of the proof against
 “ him, balanced with the evidence of exculpation or alleviation.
 “ In ordinary cases, a charge of this kind from the Judge Advoca-
 “ cate is not so necessary.”—*Tytler*.

149.—“ The Judge Advocate reads the proceedings or sums up
 “ the evidence, *as may be most agreeable to the Court* ; in each
 “ case elucidating such parts as may appear, either to himself or
 “ to the different members, worthy of their attention.”—*Sullivan*.
 —*Hough's Military Law Authorities*.

150.—“ Whenever the Judge Advocate General executes this
 “ duty” [*that of summing up*] “ the course to be adopted should
 “ be similar to the course pursued by a judge in his address to
 “ the jury. The judge recapitulates the evidence to the jury,
 “ remarking upon such facts as bear upon the case, pointing out
 “ the applicability of the different parts of the whole ; and when
 “ he comes to the defence he gives due weight to the evidence
 “ for the prisoner, and tells the jury, that if there is any doubt in
 “ their minds as to the credit due to the witnesses for the prose-
 “ cution, then to let the prisoner have the full benefit of that
 “ doubt ; and then concludes by referring to the testimony borne
 “ to the prisoner's character, which, if good, ought to have weight
 “ in their minds, where they entertain any doubt, and which ought
 “ to be construed in his favour. But if, on the other hand, they
 “ entertain no reasonable doubt, and are of opinion that the crime

“ is fully substantiated against the prisoner by the evidence, then
 “ to give their VERDICT accordingly.”—*Hough*.

151.—“ Besides applying the evidence fairly to each side of
 “ the question, the Judge Advocate should inform the Court as
 “ to the legal bearing of the evidence; for it may be that the
 “ evidence shall morally satisfy the minds of the Court, and still
 “ the evidence may *legally* be deficient, or there may have been
 “ admitted evidence which ought to be rejected from their
 “ minds.”—*Hough*.

152.—Major Hough farther adds:—

“ The summing up should not assume facts to be proved, *that*
 “ should be left to the Court to decide upon; there is a duty to
 “ be performed, to show the relative bearing of the whole evi-
 “ dence, but no opinion should be given” [by the Judge Advo-
 “ cate], “ which should *only be given by the members*, who have
 “ sworn to determine according to the evidence.”—*Hough*.

FINDING.

[*Vide pars.* 18 and 19, Chapter VIII.]

153.—“ The Judge Advocate now proceeds to take *the opinions*
 “ of the members *on the evidence* in the matter before them, by
 “ putting the following question to each individual, commencing
 “ with the youngest member:—*From the evidence given for and*
 “ *against the prisoner, and from what he has said in his defence, are*
 “ *you of opinion that he is Guilty or Not Guilty of the charge*
 “ *preferred against him?*—and as they declare their opinions, he
 “ writes them down, severally, on a sheet of paper.”—*Kennedy*.

1st Instance of the Charge.

Ensign A. Guilty. Capt. G. Not Guilty.
 Ensign B. Guilty. Capt. H. Guilty.
 Lieut. C. Not Guilty. Capt. I. Guilty.
 Lieut. D. Guilty. Major J. Guilty.
 Lieut. E. Guilty. Major K. Not Guilty.
 Lieut. F. Guilty. Lieut.-Col. L. Guilty.
 Col. M. Guilty.

* J. A. Guilty of the 1st Instance of the Charge.

3rd Instance of the Charge.

Ensign A. Guilty, with the exception of the words " — — —."
 Ensign B. Guilty, do. do.
 Lieut. C. Not Guilty.
 Lieut. D. Not Guilty.
 Lieut. E. Guilty, with the exception of the words " — — —."
 Lieut. F. Guilty.
 Capt. G. Guilty, with the exception of the words " — — —."
 Capt. H. Not Guilty.
 Capt. I. Guilty, with the exception of the words " — — —."
 Capt. J. Guilty, do. do.
 Major K. Guilty, do. do.
 Lt.-Col. L. Guilty, do. do.
 Col. M. Guilty.

* J. A. Guilty of the 3rd Instance, with the exception of the words " — — —."

2nd Instance of the Charge.

Ensign A. Not Guilty. Capt. G. Not Guilty.
 Ensign B. Guilty. Capt. H. Not Guilty.
 Lieut. C. Not Guilty. Capt. I. Not Guilty.
 Lieut. D. Not Guilty. Major J. Not Guilty.
 Lieut. E. Guilty. Major K. Not Guilty.
 Lieut. F. Guilty. Lieut.-Col. L. Not Guilty.
 Col. M. Guilty.

* J. A. Not Guilty of the 2nd Instance of the Charge.

4th Instance of the Charge.

[The opinion of each member to be written down as above pointed out.]

* J. A. Guilty, but attach no criminality to the fact.

Preamble of the Charge.

[The opinion of each member to be written down as above pointed out.]

* J. A. Guilty of conduct unbecoming the character of an Officer and a Gentleman.

* J. A. Not Guilty of behaving in a scandalous, infamous manner.

154.—When the charge consists of several counts or instances, each is put consecutively: the Judge Advocate, immediately after he has taken the votes on each count or instance, states the result (as above pointed out *).

“The MAJORITY in every case binds the minority: the opinion of the majority is the opinion of the Court.”—Simmons.

155.—The Judge Advocate, in collecting the votes of a Court Martial, must invariably bear in mind that

“Courts Martial are bound to exhaust the whole charges that come before them, by EXPRESSLY ACQUITTING or CONVICTING the prisoner of EACH allegation that is contained in them.”—Kennedy.

156.—The following observations from General Kennedy’s work on this important duty demand the particular attention of Judge Advocates:—

157.—“If the Court, after having duly considered every circumstance of the case, are of opinion that the prisoner is NOT GUILTY of the charge preferred against him, he is then for ever quit and discharged of the accusation.”—Kennedy.

158.—“The manner in which this acquittal is expressed at Courts Martial varies very considerably, and may be divided into eight distinct formulas, each of them conveying a less or more favourable judgment on the innocence and conduct of the prisoner.”—Kennedy.

159.—“The Court may find that the charge is ‘not proved,’ and therefore acquit the prisoner,—an acquittal which must always leave his innocence very questionable, as it shows that the Court themselves were not convinced that he was really innocent.”—Kennedy.

160.—“The Court may simply ‘acquit him,’ which is still not altogether satisfactory, on account of Courts Martial having been too much in the habit of using a stronger formula.”—Kennedy.

161.—“The other six formulas are *all* of them *expressive of the Court being satisfied* that the prisoner is not only innocent of the specific charges preferred against him, but likewise of all impropriety of conduct in any circumstance connected with them; as they may acquit him either ‘*fully*,’ or ‘*most fully*,’ or ‘*honourably*,’ or ‘*most honourably*,’ or ‘*fully and honourably*,’ or ‘*most fully and most honourably*.”—Kennedy.

162.—“The word ‘*honourably*’ should *never be used*, except in acquitting a prisoner of charges in which his honour is implicated.”—Kennedy.

163.—“There are many offences that any officer may unfortunately commit, which, although to the prejudice of military discipline, affect not in the slightest degree either him or his character as a gentleman; it is therefore perfectly unnecessary, and even improper, for a Court to acquit a prisoner, either expressly or by implication, of a higher degree of guilt than that of which he is accused.”—Kennedy.

164.—“It is also competent for the Court, on acquitting the prisoner, to declare their opinion on the conduct of the prosecutor and on the nature of the charge,—a measure which a Court Martial ought always to adopt when the conduct of the prosecutor is deserving of censure, as it is not only a satisfaction due to the prisoner, but as it may often prevent the necessity of another trial.”

165.—“Courts Martial, therefore, may declare the charge to be ‘*frivolous*,’ ‘*vexatious*,’ ‘*unwarranted*,’ ‘*unfounded*,’ or ‘*malicious*,’ and that the prosecutor, in preferring it, was actuated by private pique and resentment, and not by any motive for the good of the public service.”—Kennedy.

166.—“The Court may also give their opinion on any incidental circumstances, though they do not form part of the charge, which have arisen in the course of the trial, implicating the conduct of the prosecutor or prisoner, or even a third person; but *this right ought to be exercised in the soundest discretion*, and Courts Martial ought *never* to avail themselves of it in order to make improper or irrelevant remarks.”—Kennedy.

167.—“Courts Martial may also *observe upon* and *censure any* inconsistencies or prevarications of which a witness may be

" *guilty*. In justice, however, this power ought to be exercised " with regard to *military persons only*, who, if the Court have expressed an erroneous opinion, can obtain immediate redress, by " applying to the Commander-in-Chief; but persons in a civil " capacity may, without being aware of such a censure having " been passed, find their character materially injured; and even " if they were aware of it, they could obtain no redress, except by " an inconvenient process at law: for there can be no doubt but " that, as the Court would in such a case assume a power which " is not legally vested in it, *every individual member* would be " liable to an action for defamation, on the part of the person so " censured."—*Kennedy*.

168.—The manner in which the finding of a Court Martial is to be drawn up, as well as *the right and power* of Military Courts to animadvert on the conduct of the prosecutor or witnesses, are most clearly set forth in the above quotations, all of which demand the most careful perusal and attention on the part of Judge Advocates, whose express duty it is to obviate, to the utmost of their power, any attempt that may be made by a Court at any time, either through ignorance or inadvertency, to assume powers which are not legally vested in it.

169.—" Should the Court be unanimous in their opinion on " any point, the Judge Advocate is not authorized to insert the " word *unanimous*."—*Griffiths*.

170.—It appears to be generally admitted,—

" That the President has no double or casting vote."—*Hough*.
—*Simmons*.—*Horse Guards*. " And if the votes on any question be " equal, the subject ought to be *again considered*, and the votes " *retaken*, to insure the majority required by the Articles of " War."—*Hough*. " The MAJORITY in every case binds the

“MINORITY, the opinion of the MAJORITY is the opinion of the Court.”—*Simmons*.

PREVIOUS CONVICTIONS.

171.—If the prisoner is a non-commissioned officer or private soldier, and is found guilty of the charge preferred against him, the Court is again opened to the public, and the parties before it are recalled to give evidence relative to previous convictions and general character.

172.—Her Majesty's Regulations direct,

“When a soldier has been found guilty of the charge preferred against him, the Court, at that stage of the proceedings, is bound to inquire into and record the prisoner's former convictions, *if any*, and his previous character, for its own guidance in awarding punishment, as well as that of the confirming authority in sanctioning it being carried into effect.”

173.—“The Court has no discretionary power vested in it of receiving or rejecting such evidence, but they are bound to receive it, the same as any other lawful evidence which may be submitted for their consideration.”—*Horse Guards Letter to C. C. in India, May, 1837*.

174.—“The evidence of previous convictions should be limited to convictions by a Court Martial, or a court of ordinary criminal jurisdiction.”—*Horse Guards Circular, April, 1839*.

175.—Similar regulations are in force on this subject in the European branch of the Honourable East India Company's armies in India. Notice is, in all cases, to be given to the prisoner (24) *twenty-four hours* before the assembly of the Court, of the intention to produce evidence regarding his previous convictions and general character. The Judge Advocate should ascertain, previous to the commencement of

the trial, that due notice, &c., has been given to the prisoner on these points.

176.—The following is the mode of taking evidence relating to previous convictions and general character :—

Court re-opened.—*The Court being re-opened, the prisoner is again brought before it.*

1st Witness.—*Lieutenant ———, adjutant of the ——— Regiment, is duly sworn, or examined on his former oath.*

Question from the Judge Advocate.—*Have you any evidence to give this Court as to previous convictions?*

Answer.—*Yes, I have.*

Question from the Judge Advocate.—*Has the prisoner been warned that his former convictions would be brought in evidence against him?*

Answer.—*Yes, I warned him myself yesterday morning.*

Question from the Judge Advocate.—*State what you know relative to the prisoner having been previously convicted?*

Answer.—*The prosecutor here produces and deposes to the Court Martial Book of the Regiment, or duly authenticated extracts from it; from which it appears the prisoner, No. —, Private ———, was tried by a District Court Martial, at ———, on the ——— day of June, 1843, for insubordinate conduct, of which he was convicted and sentenced to receive ——— lashes: Also, by a Regimental Court Martial, at ———, on the ——— day of ———, 1844, for ———, of which he was likewise convicted and sentenced to twenty days imprisonment, ten of which were solitary.*

Question from the Judge Advocate.—State what you know of the prisoner's general character?

Answer.—The prisoner has for some time borne an indifferent character. Or as the case may be.

Question by the Prisoner.—What facts or grounds have led you to give such a character of me to the Court?*

Answer.—The prisoner has been brought up so constantly before the commanding officer. Or as the case may be.

Question from the Judge Advocate.—What is the prisoner's age, and his length of service?

Answer.—He is twenty-eight years old, and has been ten years and two months in the service.

The prisoner is remanded to confinement, all parties are discharged from further attendance, and the Court is closed.

IF THE PRISONER HAS NOT BEEN PREVIOUSLY
CONVICTED.

Question from the Judge Advocate.—Have you any evidence to give this Court as to previous convictions?

Answer.—No, I have not.

Question from the Judge Advocate.—State what you know of the prisoner's general character?

Answer.—The prisoner, up to the present time, has borne a good character. Or as the case may be.

[The prisoner may here cross-examine the witness, if he wish it.]

* There is no occasion to put this question unless the prisoner wish it,—it is only inserted here to point out the mode of cross-examination.

Question from the Judge Advocate.—What is the prisoner's age, and length of service?

Answer.—The prisoner is twenty years of age, and has been three years in the service.

The prisoner is remanded to confinement, all parties discharged from further attendance, and the Court is closed.

THE COURT MAY ADJOURN, AND TAKE TIME TO
CONSIDER THEIR VERDICT OR SENTENCE.

177.—Major Hough says:—

“There seems no doubt that a Court Martial may adjourn to consider of their *finding* as well as *sentence*. On the trial of the late Lieutenant-Colonel Hunter, at Meerut, in 1834 (*the proceedings occupied 1250 pages folio*), the Court Martial took three days to read over the proceedings and to deliberate. Juries do not separate till they have given the verdict,—Courts Martial do adjourn and meet again, and for more than one day, before they determine upon their finding. Judges often postpone their judgments for several days, and even consult the other judges of their court, or all the judges, upon points of law; and Courts Martial must at times do so, and have done so.”—*Hough, Military Law Authorities.*

SENTENCE.

[*Vide par. 26, Chapter IV. ; also pars. 20, 21, and 22, Chapter VIII.*]

178.—If the prisoner on trial is a non-commissioned officer or private soldier, the Judge Advocate must now lay on the table the medical certificate furnished him by the surgeon of the prisoner's regiment, in which should be clearly represented *the actual state*

of the prisoner's health, so that the Court may be enabled to judge what sentence can be duly carried into effect. The certificate must be appended to the proceedings.

179.—“Should the Court find the prisoner is guilty, the Judge Advocate then proceeds to take their opinions on the punishment to be awarded, by putting to each member, commencing with the youngest, this question:—*The Court having found the prisoner guilty of such an offence, in your opinion what punishment ought to be awarded?*”—Kennedy.

180.—The Judge Advocate, as on the finding, writes down on a sheet of paper the nature and quantum of punishment each member considers should be awarded; and immediately after he has taken the votes of all, states the result, as below pointed out.* Here also,

“*The MAJORITY in every case binds the MINORITY; the opinion of the majority is the opinion of the Court.*”—Simmons.

Except in cases where the extreme penalty of the law is awarded, when the votes of two-thirds of the Court are requisite.

The Nature of Punishment.

Lieut. A.	Transportation.
Lieut. B.	Death.
Lieut. C.	Transportation.
Lieut. D.	Transportation.
Lieut. E.	Death.
Capt. F.	Transportation.
Col. M.	Death.

* *J. A.*—The punishment is to be Transportation.

The Nature of Punishment.

Ensign A.	Reprimand.
Ensign B.	Reprimand.
Lieut. C.	Loss of Rank.
Lieut. D.	Loss of Rank.
Lieut. E.	Reprimand.
Lieut. F.	Reprimand.
Col. M.	Loss of Rank.

* *J. A.*—The Punishment is to be Loss of Rank.

The Quantum of Punishment.

Lieut. A.	7 Seven Years.
Lieut. B.	3 Three Years.
Lieut. C.	3 Seven Years.
Lieut. D.	For Life.
Lieut. E.	7 Seven Years.
Capt. F.	7 Seven Years.
Col. M.	For Life.

* *J. A.*—The Sentence is Transportation for Seven Years.

The Quantum of Punishment.

Ensign A.	To be put down 2 steps in his Regt.
Ensign B.	To be put down 2 steps in his Regt.
Lieut. C.	To be put down 2 steps in his Regt.
Lieut. D.	To be put down 2 steps in his Regt.
Lieut. E.	To be put down 3 steps.
Lieut. F.	To be put down 2 steps.
Col. M.	To be put down 2 steps in his Regiment.

* *J. A.*—The Sentence is, to be put down 2 steps in his Regt.

The Nature of Punishment.

Lieut. A. ..To be dismissed. Capt. G.....To be cashiered.
 Lieut. B.....To be cashiered. Capt. H.....To be dismissed.
 Lieut. C.....To be dismissed. Capt. I.To be cashiered.
 Lieut. D. ..To be dismissed. Major J.....To be cashiered.
 Capt. E.To be cashiered. Major K. ..To be cashiered.
 Capt. F.To be dismissed. Lt.-Col. L....To be cashiered.
 Col. M.....To be cashiered.

* *J. A.*—The Sentence is to be Cashiered.

The Nature of Punishment.

Ensign A.....Corporal. Lieut. G.Imprisonment.
 Ensign B.....Imprisonment. Capt. H.Imprisonment.
 Lieut. C.Corporal. Capt. I.Corporal.
 Lieut. D.Corporal. Capt. J.Imprisonment.
 Lieut. E.Imprisonment. Capt. K.Corporal.
 Lieut. F.Corporal. Capt. L.Corporal.
 Lieut.-Col. M.....Imprisonment.

* *J. A.*—The Punishment is to be Corporal.

The Quantum of Punishment.

Ensign A.200 Lashes. Lieut. G.....150 Lashes.
 Ensign B.100 Lashes. Capt. H.150 Lashes.
 Lieut. C.150 Lashes. Capt. I.200 Lashes.
 Lieut. D.150 Lashes. Capt. J.200 Lashes.
 Lieut. E.200 Lashes. Capt. K.....200 Lashes.
 Lieut. F.200 Lashes. Capt. L.150 Lashes.
 Col. M.200 Lashes.

* *J. A.*—The Sentence is 200 Lashes.

The Quantum of Punishment.

Ens. A.... 6 months. Capt. G....12 mos. 3 solitary.
 Ens. B. . . 4 months, 1 solitary. Capt. H.... 6 mos. 1 solitary.
 Lt. C. . . 12 months, 3 solitary. Capt. I. . . 12 mos. 3 solitary.
 Lt. D. . . 12 months, 3 solitary. Capt. J. . . 12 mos. 3 solitary.
 Lt. E. 6 months. Capt. K....12 mos. 3 solitary.
 Lt. F. 3 months. Capt. L....12 mos. 3 solitary.
 Lieut.-Col. M.....6 Months.

* *J. A.*—The Sentence is Twelve Months Imprisonment, of which Three Months are to be in Solitary Confinement.

181.—“ *Every member must give his vote, whether he has acquitted or condemned the prisoner.*”—*Kennedy.*

182.—In the remarks on a General Court Martial, General Sir H. Fane, Commander-in-Chief in India, in May, 1839, thus expresses himself:—

“ On a reference to the Judge Advocate General of Her Majesty’s army on this point ” [*namely, refusing to vote as to a question of punishment, when the prisoner had been convicted by a majority of a Court Martial of which he was a member*], “ in the year 1834, he ruled as follows:—*Upon a finding of guilty by a Court Martial, I am of opinion that, although all the members of the Court may not have concurred in it, it must be deemed the finding of the whole; and the members who voted for acquittal may be called upon to vote upon the punishment to be awarded on the prisoner, as if they had concurred in the finding of guilty.*”

183.—Major Hough says:—

“ It is the practice of the Bengal Army for the acquitting members to vote as to punishment; and *repeated references* to the Judge Advocate General have received *the same answer.*”

184.—“ In all cases wherein the offence of which a prisoner is convicted comes under any particular Article of War, the Court can award *no other punishment than the one prescribed in such Article.*”—*Bombay Military Regulations, 99.*

185.—“ When, however, the punishment is left to the discretion of the Court, it is to be understood that such discretion must be regulated *by the custom of war in the like cases*; and Courts Martial ought, therefore, to award no unusual punishment, except when the circumstances of a particular case may imperiously require it.”—*Bombay Military Regulations, 100.*

186.—Where the judgment of members differs as to the nature of the punishment, *it is usual to separate the question*:—First to ascertain the *nature*, the majority deciding; then the *quantum*.—*Simmons.*

187.—“ Two punishments, of a distinct nature and degree from each other, cannot be inflicted for the same offence, except

“in cases wherein such power has been conveyed to Courts Martial by some express provisions of the Mutiny Act.”—*Bombay Military Regulations*, 117.

188.—If an officer is sentenced to be transported, that sentence is in itself sufficient to exclude him from the service he belongs to, *as a felon cannot be a soldier*. An officer must not in any case be sentenced to be “dismissed” and “transported” in the same sentence. This would be two punishments of a distinct nature, thereby rendering the sentence illegal, null, and void.

189.—It sometimes happens that an individual holding a staff or civil appointment, is brought to trial before a Court Martial; in such cases, if the prisoner is convicted, it is irregular for the Court to pass a sentence having reference to the appointment held by the prisoner. If a brigade-major, paymaster, an adjutant, or any staff-officer, or a surgeon, apothecary, or hospital-assistant employed on the staff, or in a civil capacity, be brought forward and *convicted*, the Court must not sentence the offender to be removed from his staff or civil appointment, but should award such punishment as is laid down in the Articles of War, or as is awarded in such like cases for the crime of which the prisoner has been found guilty, as an *officer* or *soldier*; the Government, and the Commander-in-Chief, having the power *at any time* to remove any individual from the staff or civil employ, if considered necessary, without bringing the subject before a Court Martial.

190.—In like manner, it is irregular to sentence a warrant or a non-commissioned officer to be reprimanded, or a private soldier to be sent to drill for a

certain period. Such punishments are unusual, and should never be awarded.

191.—AN OFFICER is liable to be adjudged the following punishments:—1. *death*; 2. *transportation*; 3. *fine*; 4. *imprisonment*; 5. *to be cashiered*; 6. to be *dismissed* (with incapacity to serve for *embezzlement* only); 7. loss of rank; 8. to be *reprimanded* or *admonished*; and in the Honourable E. I. Company's Army, 9. to be *suspended from rank and pay*.

192.—The punishment to which NATIVE OFFICERS in the East India Company's Army are liable are,—1. *death*; 2. *dismissal*; 3. *suspension*, and 4. *reprimand*, for any military offence; and death, transportation, imprisonment, and fine, for any offence of a civil nature.

193.—A WARRANT OFFICER is liable to be sentenced to—1. *death*; 2. *transportation*; 3. *fine*; 4. *imprisonment*; 5. *to be discharged*; 6. *to be reduced*,

“If he was originally enlisted as a private soldier, and continued in the service until his appointment to be a warrant officer.”

194.—NON-COMMISSIONED OFFICERS of Her Majesty's, or of the Honourable E. I. Company's European or Native Armies, on conviction of any offence, when a capital punishment is not awarded, *must be reduced to the ranks* in the first instance; and after this is done, *any of the punishments a private soldier is liable to can be awarded in addition*.

195.—A PRIVATE SOLDIER can be adjudged—1. *death*; 2. *transportation*; 3. *corporal punishment*, not exceeding 200 lashes,

“For mutiny, insubordination and violence, or offering violence to superior officers; drunkenness on duty; sale of, or making away

“with arms, accoutrements, or necessaries; stealing from a comrade, or other disgraceful conduct of the nature particularized in the Articles of War.”

4. *imprisonment*, with or without hard labour; 5. *imprisonment*, part of which may be *solitary*; 6. *loss of pay*; 7. *loss of pay and pension*, in addition to other punishments; 8. *forfeiture of all additional pay whilst serving, and of pension on discharge*; 9. *to be marked with the letter D*, a second additional punishment for desertion; 10. *deprivation of liquor*, when issued in kind, or *beer or liquor money and pay*, for drunkenness; 11. *one penny a day*, not exceeding *thirty days*, for drunkenness on parade or on the line of march; and 12. on conviction of disgraceful conduct, the Court may, as a cumulative punishment, *recommend* that the prisoner be discharged with ignominy.

196.—There is a slight difference in some of the above-mentioned punishments, when awarded to soldiers in the Honourable E. I. Company's Service. [*Vide 2nd Section, Articles of War for the Honourable E. I. Company's Troops.*]

“In the native army, in the East Indies, *corporal* punishment cannot be awarded; but imprisonment, either with or without hard labour, and forfeiture of increased pay arising out of length of service, may be adjudged.”—*Bombay Military Regulations*, 112.

Death and transportation are also awardable; and for civil offences, *death, transportation, imprisonment, and fine*.

197.—“In Her Majesty's and the Honourable Company's European army, non-commissioned officers and privates *may be adjudged to be transported*, as felons, for life, or for a term of years, for any military offence for which *death* is awardable. Transportation cannot be awarded in the native army for any

“military offence, except embezzlement or fraudulent misapplication of military stores, or any sort of public property applied to military purposes.”—*Bombay Military Regulations*, 113.

198.—When the Judge Advocate has taken the votes of the members of the Court on all points, he draws up the finding and sentence, which, being approved of by the Court, must be entered on the proceedings.

199.—“The finding and sentence must always be inserted in the proceedings, in the Judge Advocate’s own handwriting.”—*Kennedy*.

200.—The greatest care and attention is requisite in drawing up the sentence of a General Court Martial. On this point, Captain Simmons observes:—

“With respect to the wording of the sentence, in cases discretionary with the Court, no special form is necessary. It should, obviously, be expressed *in clear* and unambiguous language. In cases not discretionary, the Court would do well to adhere as literally as possible to the terms of the statute, or Article of War, by virtue of which the punishment is awarded.”—*Simmons*.

201.—“In drawing up the findings and sentences of Courts Martial the utmost precision is to be observed in specifying how far a prisoner is guilty or not guilty of *each charge*, or *instance of charge*, and in specifying the *exact nature and degree* of punishment which the Court has awarded.”—*Bombay Military Regulations*, 119.

202.—The finding and sentence are usually drawn up as follows:—

Finding.—*The Court, having maturely weighed and considered the evidence brought forward in support of the prosecution, together with that*

adduced on the defence, is of opinion that the prisoner, Captain A. B., — regiment —, is
Guilty of the first instance of the charge.
Not guilty of second instance of the charge.
Guilty of the third instance of the charge,
with the exception of the words “ —
———— ————.”

Guilty of the fourth instance of the charge,
but attach no criminality to the act.
Guilty of conduct unbecoming an officer
and a gentleman.

Sentence.—The Court having found the prisoner guilty, as above specified, do adjudge him the said Captain A. B., — regiment —, to be cashiered.

Camp at ———, 10th July, 1844.

—————
 Colonel and President.

—————, Captain.

Deputy Judge Advocate.

[*If the prisoner is acquitted.*]

Finding.—*The Court, having maturely weighed and considered all that has been adduced in support of the prosecution, as well as what has been brought forward on the defence, is of opinion that the prisoner, Lieutenant C. D. —, regiment —, is*

Not guilty of the first instance of the charge.
Not guilty of the second instance of the charge.

Not guilty of insubordinate and unofficer-like conduct,

And do therefore most fully acquit him

the said Lieutenant C. D., — regiment, of all and every part of the charge.

Signed as above.

203.—“If mitigating circumstances have appeared during the trial, which could not be taken into consideration in determining the degree of guilt found by their verdict, the Court can *only avail themselves* of such circumstances as adequate grounds for recommending the prisoner to mercy.”—*Bombay Military Regulations*, 120.

204.—“No recommendation to mercy is to be written in the body of the sentence, but it is to be inserted *on the same page if possible*, below the signatures of the President and Judge Advocate, and to bear the signature of the President alone.”—*Bombay Military Regulations*, 121.

The usual mode of recording recommendations to mercy, or “*to be discharged with ignominy*,” is as follows:—

The Court, having thus performed the painful duty of awarding punishment, in strict conformity to an Article of War, which deprived them of all discretionary power, beg leave to recommend the case of ——— to the merciful consideration of the confirming authority.

Signed _____
Colonel and President.

The Court can add any further remarks that may be deemed necessary after the word “*authority*.”

In consequence of the disgraceful (or infamous) nature of the prisoner’s conduct, and his general bad character, as developed on this trial, the Court respectfully recommend that the prisoner, Private ——— be discharged from Her Majesty’s Service, with ignominy.

Signed _____
Colonel and President

205.—“When the President signs the proceedings of the Court, he must insert the date when he affixes his signature.”—*Clause in Mutiny Act, 1843. Captain Simmons says*:—“Presidents have been since recommended, upon the highest official authority, to affix the date of their signature IN ALL CASES.”—*Horse Guards Circular, 9th May, 1842.*

206.—The Bombay Military Regulations direct:—

“The period of the different descriptions of imprisonment is to be reckoned *from the date of the proceedings being signed by the President, which is to be thereon minuted.* The period of imprisonment adjudged to native soldiers commences from the date of the original sentence.”—*Bombay Military Regulations, 110 and 112.*

207.—The President should invariably *on all trials*, whatever may be the sentence, affix the date above his signature; the Judge Advocate signs the proceedings, after the President has done so; and in India, in all Native Courts Martial, the Interpreter adds his signature.

208.—The proceedings must invariably *be signed* as above directed, *and sealed in the presence of the Court.* The President franks the envelope, and the Judge Advocate should send the packet direct from the Court *by an orderly to the Post Office*, with a request that the accompanying receipt (which he should write out and send with the packet) may be returned to him stamped or signed.

Received from Captain ———, Deputy Judge Advocate General, a letter “On the Service,” to the address of the Judge Advocate General ———

Camp at ———, 10th January, 1844.

This receipt should be carefully taken care of by the Deputy Judge Advocate.

209.—“ A blank space, of at least half a page, is invariably to be left at the conclusion of the record of proceedings of all Courts Martial, in order that the Commander-in-Chief, or officer to whom the proceedings are to be submitted, may find room to insert his signature, together with such remarks as the particular case may call for.”—*Madras Military Regulations.*

210.—The proceedings of NATIVE COURTS MARTIAL are conducted in precisely the same manner as European ones, and are recorded in English; a Judge Advocate and Interpreter being attached to the Court.

REVISION.

211.—When a Court Martial is ordered to revise its finding and sentence, it is usually minuted on the proceedings in the following manner:—

Tenth day.

11 o'clock, a.m., Monday, the twentieth day of June, 1844.

At a General Court Martial, reassembled at ———, under orders from his Excellency ——— ———

Present the same Members as on Thursday, the tenth day of June, 1844.

The President [Judge Advocate at a Native General Court Martial] lays before the Court the annexed letter from ——— ———, dated ———, which is read.

The Court proceeds to reconsider its finding and Sentence.

Revised finding } _____
and sentence. }

212.—“Whenever the instructions of the Commander-in-Chief, or other confirming officer for the revision of the proceedings, may be communicated to Courts Martial by letter, the letter in which such instructions are contained is invariably to be entered on the record, in order that the grounds upon which revision was directed may appear, together with the further proceedings of the Court thereon.”—*Madras Military Regulations*.

213.—“Whenever the proceedings of a Court Martial are ordered to be revised, it is *illegal* for the Court to call and examine fresh witnesses: the revision is to be confined entirely to a reconsideration of the matter *already recorded on the proceedings*.”—*Bombay Military Regulations*, 122.

214.—“It is to be particularly observed, that however excusable an adherence from conscientious motives to finding and sentence once pronounced may be, where *error of judgment*, arising from a misconception of the law, or of the custom of war in the like cases, is brought to the notice of a Court Martial, *supported by* respectable authority, their perseverance in error is a dereliction of duty, and a baneful example.”—*Bombay Military Regulations*, 123.

APPEALS FROM REGIMENTAL TO GENERAL COURTS MARTIAL.

215.—When a Judge Advocate is consulted, or called on to conduct the proceedings of a trial, regarding an appeal from a Regimental to a General Court Martial, he must remember there are *two* descriptions of appeal, which are perfectly different and distinct from each other. On the part of the Crown, he acts in conjunction with both parties,—appellant and respondent,—to search out the truth, and to obviate a failure of justice in all cases.

216.—The appeal authorized by the 16th Section of the Mutiny Act for Her Majesty's Forces, and the 25th Section of the Mutiny Act for the Honourable

East India Company's European Troops, is that, when a non-commissioned officer or private soldier, after being tried and acquitted, or convicted of *any offence* by a Regimental Court Martial, considers the minor Court has not properly administered justice, and consequently appeals to a General Court Martial, by which the very same circumstances are reinvestigated and judgment passed thereon.

217.—The Section of the Mutiny Act alluded to directs:—

“ That no officer or soldier being acquitted or convicted of any offence shall be liable to be tried a second time by the same or any other Court Martial for the same offence, *unless in the case of an appeal from a Regimental to a General Court Martial.*”

218.—The regulations of the Bombay Army, on this subject, are both clear and explicit; it is therein stated:—

“ That the latter part of the above-quoted section of the Mutiny Act relates to non-commissioned officers and soldiers [as no commissioned officer is amenable for any offence to the former description of Court] who, having been tried by a Regimental Court Martial, appeal from the sentence thereof to a general one. With the view, therefore, of establishing an uniformity of practice in cases in which such appeals are made and sanctioned, the following mode of procedure is directed to be observed.”—*Bombay Military Regulations*, 169.

219.—“ On an appeal from a Regimental to a General Court Martial, the proceedings are to be conducted *entirely* as an original trial, without the slightest reference being had to the former trial; the individual, consequently, who makes the appeal again appears as a prisoner before the General Court Martial, and is arraigned and tried on precisely *the same specific charge* which was investigated by the Regimental Court Martial; the person preferring it supports the prosecution; the witnesses called by either party are *not restricted* to such as were

“formerly examined, but may be any other persons who can give information on the subject. The members of the *Regimental Court Martial* can neither appear in Court as *defendants*, nor *take any part in the proceedings*; nor can they be examined as to *any points connected with the former trial, or with their own finding and sentence*; and on the *new trial* being conducted and closed in the usual manner, the *General Court Martial* proceeds to pass its final decision *according to the evidence in the matter before it*, without therein *adverting to the previous investigation*, and without allowing its opinion to be in any manner *biased by it*. The consequence of its finding and sentence remain for the consideration of the *Commander-in-Chief*, with whom alone it rests to reinstate, as far as possible, the prisoner in precisely the same situation in which he stood at the time of his first trial, in case of the *General Court Martial* acquitting him after conviction by the *Regimental Court Martial*; or in case of such conviction being confirmed, and a severer punishment adjudged than was first awarded, to determine whether this excess shall be carried into execution or not.”—*Bombay Military Regulations*, 170.

220.—The above remarks were contained in an opinion which was given by Major General Vans Kennedy, when Judge Advocate General of the Bombay Army, in the year 1828, in the case of private *William Henderson*, of Her Majesty’s Queen’s Royals, who, on being tried and convicted by a *Regimental Court Martial*, for “*malversation*” while *canteen-sergeant*, appealed from the *Regimental* to a *General Court Martial*:—and in the year 1843, these remarks were OFFICIALLY issued as a regulation for the guidance of *Courts Martial* held in the *Bombay Army*. But they may be relied on as a safe guide in all cases (*coming under the 16th and 25th Sections of the two Mutiny Acts*) both in Her Majesty’s Army and in the *Armies of Bengal and Madras*; for the proceedings of the *General Court Martial* were approved and

confirmed by Lieutenant-General Sir Thomas Bradford, the then Commander-in-Chief at Bombay. And Major-General Kennedy, in his *Treatise on the Principles and Practice of Military Law*, mentions:—

“That along with the proceedings of the Court Martial on Private Henderson, he transmitted a copy of this opinion contained in the above remarks to the Judge Advocate General of Her Majesty’s Forces, and never received any intimation that the manner in which they had been conducted was considered to be objectionable.”

221.—Major-General Kennedy also observes:—

“It may be justly held that in the case contemplated in that section (of the Mutiny Acts here referred to), the Legislature intended that the proceedings should be conducted *not* in the manner of appeal as in *civil* cases, but as a *new trial*, precisely in the manner which Blackstone thus describes:—‘*Granting a new trial under proper regulations cures all these inconveniences, and at the same time preserves entire and renders perfect that most excellent method of decision, which is the glory of the English law. A new trial is a rehearing of the cause before another jury, but with as little prejudice to either party as if it had never been heard before. No advantage is taken of the former verdict on the one side, or the rule of the Court for awarding such second trial on the other; and the subsequent verdict, though contrary to the first, imports no tittle of blame upon the former jury, who, had they possessed the same lights and advantages, would probably have altered their own opinion.*’”

222.—The other description of appeal is that authorized by the 121st Article of War, Queen’s Troops, and the 107th Article of War, Company’s Troops: which direct:—

“If a non-commissioned officer or private soldier shall think himself wronged by his captain, or other officer commanding the troop or company to which he belongs, he is to complain thereof to the commanding officer of the regiment, who is hereby required to sum-

“ *mon a Regimental Court Martial for doing justice to the soldier complaining: from which Regimental Court Martial either party may, if he thinks himself still aggrieved, appeal to a General Court Martial: but if the party appealing be convicted of having made a vexatious and groundless appeal from the Regimental to the General Court Martial, he shall be liable to such punishment as, by the judgment of a General Court Martial, may be awarded.*”

223.—The Regulations of the Bombay Army direct the mode of proceeding in such cases to be as follows:—

“ The Regimental Court being assembled, and the parties in attendance, the complainant proceeds to prove his alleged wrong. The officer then brings forward what he has to adduce in refutation or explanation of the allegation, and the Court, having heard both parties and their witnesses, gives an opinion on the subject before it. If either of the parties considers himself aggrieved by that decision, he may appeal to a General Court Martial, by which the matter is again heard, the appellant first stating his case and grounds of appeal, and supporting the same by evidence, to which the respondent (or party in whose favour the inferior Court decided) makes such reply, and adduces such evidence, as he may consider necessary. When the case is fully before the General Court Martial, it gives its opinion, either affirming or reversing the decree of the first tribunal; and if, in addition to the former of these decisions, it should declare the appeal to be vexatious and frivolous, the party who made it is liable to such punishment as shall, by another General Court Martial, be awarded.”—*Bombay Military Regulations*, 173.

224.—“ The Courts specified in the preceding paragraph are to be constituted and conducted in the regular manner, and all evidence given before them is to be *on oath*; but no person appears as a prisoner (in relation to the matter under investigation) till brought before the *second* General Court Martial, on the specific charge of having made a vexatious and frivolous appeal.”—*Bombay Military Regulations*.

225.—In cases of appeal of this description coming under the 121st and 107th Articles of War, the investigation by the General Court Martial is a new trial of the very same circumstances which were inquired into by the Regimental Court. As in the former-mentioned description of appeal (*par.* 219), the subject is laid before a General Court Martial to be reinvestigated, the trial is conducted as is usual on other General Courts Martial, and a decision is passed by the General Court Martial according to the evidence adduced before it; but neither the proceedings nor any thing that took place on the Regimental Court can be received as evidence by the General Court Martial: any witnesses, whether examined before the minor Court or not, may be called by either party, and examined: there is not, however, any prisoner before the Court, neither can the Court award any punishment.

226.—The proper mode of procedure in such cases is as follows:—

The Court having assembled, the Appellant and Respondent are called before it; the orders for assembling, the Court, the President's and Judge Advocate's warrants, are read. The Judge Advocate then informs the Court, that the case about to be investigated is an appeal from a Regimental to a General Court Martial; both parties have the right of challenging; and the Judge Advocate should put the usual question on this point, to the Appellant first, and then to the Respondent, minuting such, and the answer thereto, on the proceedings: the President, Members, and Judge Advocate are duly sworn: the statement of the Appellant's alleged

wrongs is now read and recorded: the Appellant first addresses the Court, and lays what he considers his grievances or wrongs before it, and then adduces evidence in proof thereof: the Appellant should *not in any case* be sworn: the examination of witnesses, who must *all* give their evidence on oath, is taken in precisely the same manner as on other Courts Martial: when the Appellant's case is fully before the Court the Respondent then replies to it, adducing such evidence as he thinks necessary: the Respondent also should not be sworn, unless required to be so by the Appellant, or when such is considered necessary by the Court, *that he may depose to facts*: the trial being finished, the Court deliberates *on the evidence* which has been *adduced before it*, and gives an opinion thereon, thus:—

1.—*The Court having maturely weighed and considered the evidence that has been adduced on the part of the Appellant, as well as that brought forward by the Respondent, is of opinion that — — private — — regiment, has failed to substantiate the grievances complained of [or as the case may be], viz.: — —*

2.—*The Court are further of opinion, that the appeal made by — — private — — regiment, is vexatious and groundless.*

It then remains with the confirming authority to *approve* and *confirm* the proceedings and opinion of the Court; and, if *he* thinks it necessary, to issue instructions for the Appellant to be placed a prisoner, and brought to trial “*for submitting a vexatious and groundless appeal from a Regimental to a General Court Martial.*”

227.—It is evident the Article of War does not authorize a *General Court Martial* held to investigate an appeal from a *Regimental Court*, to award punishment; as was done by the *General Court Martial* held at Dinapoor, 9th October, 1826; though it was approved and confirmed by Lord Combermere, Commander-in-Chief in India, in G. O. C. C., 15th (King's Troops, 7th) Nov. 1826; and which trial is given by Major Hough, *at length*, at page 226 '*Military Law Authorities*,' as a precedent; for the approval and confirmation of the convening authority of the opinion of the *General Court Martial* is requisite *before* the Appellant can be tried, much less have punishment awarded, for the offence of making a vexatious and groundless appeal.

228.—If the Appellant is brought to trial "*for submitting a vexatious and groundless appeal from a Regimental to a General Court Martial*," the proceedings of *both* Courts before which the subject of appeal was investigated can be brought in evidence against him.

229.—Major Hough, at page 236 '*Military Law Authorities*,' mentions "*a case of appeal by a native soldier, G.O.C.C., 3rd Nov. 1834*;" but the Articles of War for the *native* troops of all three Presidencies do *not* authorize appeals from *Regimental* to *General Courts Martial* in the *Native Army*; the redress of grievances being directed to be decided by general officers commanding divisions of the army, or by the Commander-in-Chief.

230.—In concluding this chapter, it may be as well to remind the Judge Advocate, that, as OFFICER of the Court, in recording and conducting the proceedings

of General Courts Martial, the Court may direct him to perform these duties in *any* manner in which the Court may deem proper. In obeying, however, and carrying the orders of the Court into effect, the Judge Advocate must also bear in mind, that *he* has also a most responsible duty to discharge, and that it is *incumbent* on him to submissively and respectfully point out to the Court the slightest deviation which may occur in their orders from established forms and rules, whether it be at variance with the customs of war or the laws of the land. The Judge Advocate is responsible to his Sovereign, and those delegated by her, that all ordinances relating to trial by Courts Martial are fully acted up to, and, in the absence of official rules, that the established customs of the army are adhered to; and above all, that those who are appointed jurors and judges discharge their duties, without exceeding the power vested in them, so that, under all circumstances, “*there may not, in any case, be a failure of justice.*”

CHAPTER V.

DUTIES OF A JUDGE ADVOCATE AS PUBLIC PROSECUTOR.

“As Public Prosecutor, the Court can exercise no control over the Judge Advocate:—in the performance of this duty he must be allowed to act according to his own judgment and discretion.”—Kennedy.

1.—“The Judge Advocate formerly instituted proceedings before Courts Martial by virtue of his appointment, as in the present day the Attorney General files ex-officio informations. The older treatises on military discipline, and ‘*complete regulations*,’ represent the Judge Advocate as ‘*instructing*’ the Court and reading ‘*informations*’ respecting the charge at issue. In the reign of James the Second, the Town Major, or Aide Major, or Quarter Master of the regiment, discharged the duties of Judge Advocate at Garrison or Regimental Courts Martial, which appear to have been clearly distinguished from General Courts Martial or Councils of War.”—*Simmons*.

2.—“In all cases where a prisoner was committed to the Marshal General, the ‘*informations*’ against him were directed to be given to the Judge Advocate within eight-and-forty hours of his commitment;—this was expressly provided for by the 3rd clause, under the head of ‘Administration of Justice in several of the earlier Articles of War.’”—*Simmons*.

3.—“The fifty-second article of the Rules and Regulations for the better Government of His Majesty’s Forces in pay, established 1686, is as follows:—*In all criminal cases which may concern the Crown, His Majesty’s Advocate General, or Judge Advocate of the Army, shall inform the Court, and prosecute in His Majesty’s behalf.* Until the alteration of the articles in 1829, the duty of the Judge Advocate to prosecute was speci-

“fied, and ‘*to inform*’ continued in the marginal note, although expunged from the article: thus the duty of the Judge Advocate to advise the Court on points of law would seem to have arisen in the practice of Courts Martial, and not having been prescribed by any ancient ordinances, or reglements, requiring him to instruct or inform the Court.”—*Simmons*.

4.—“It was formerly provided in the Articles of War, that the Judge Advocate prosecute in the King’s name: by the custom of the service the actual duties of prosecutor more frequently devolve on the individual originating the charge, or on the staff officer ordered to perform the duty: occasionally, where the accusation involves distinct transactions, the conduct of the prosecution is entrusted to the different persons who may be more particularly acquainted with the circumstances to be investigated: it is, however, *always considered to be at the suit of the Crown*.”—*Simmons*.

5.—“No person except the Judge Advocate can appear as prosecutor before a Court Martial, who is not subject to martial law.”—*Simmons*.

6.—Major Hough says, the rule in the Bengal Army is,

“If a crime be of a general nature, and not an injury to an individual, to call on the person preferring the charge to appear as prosecutor; and the Judge Advocate is to submit to the general officer commanding the division the expediency generally of the officer commanding the regiment or department to which the prisoner may belong being required to sustain the prosecution:—in cases of a *civil* person being complainant, he becomes the principal witness, and after giving his evidence, should be allowed to remain in Court, that the Judge Advocate may refer to him.”—*Bengal Military Regulations*.

7.—“In all cases of trial before a General Court Martial, the offence charged is considered as having been committed against Government, because, although its character may have been contumacy or injury towards an individual, the crime is stated and presented as a breach of the law, or discipline, established by the supreme power. The Judge Advocate General, or Deputy Judge Advocate, is, by his office, the prosecutor on the part

“ of Government, for the violation of its ordinances have suffered, “ and no other prosecutor is necessary. For the surer further-
 “ ance of justice, the individual who has been directly affected in
 “ his authority or person by the transgression, is usually allowed
 “ to act as joint prosecutor: this is, however, a matter of conve-
 “ nience, and is not essential to the proceedings.”—*G. O. C. C. in India* (Marquis of Hastings), 23d Jan., 1818.

8.—“ As a general rule in this army” (*Madras*), “ and more
 “ especially upon all trials before General Courts Martial arising
 “ from a breach of the *public military law*, the Judge Advocate in
 “ attendance upon the Court will be prepared to prosecute. In
 “ cases where particular circumstances may render it advisable
 “ that the conduct of the prosecution should remain with the
 “ complainant, special directions will be given by the Commander-
 “ in-Chief accordingly.”—*Madras Military Regulations*.

9.—“ As the Queen is the *prosecutor of all military offences*, it
 “ is the duty of the Judge Advocate to prosecute in Her Majesty’s
 “ name all persons who may be brought before a *General Court*
 “ *Martial*: but it is, at the same time, the established practice of
 “ the army, that the person of an officer who is either from his
 “ situation the best acquainted with the circumstances to be in-
 “ vestigated, or who has individually suffered an aggression or
 “ injury from the prisoner to be tried, shall sustain in Court,
 “ jointly with the Judge Advocate, the character of prosecutor,
 “ and as such shall conduct of himself the whole of the prose-
 “ cution.”—*Bombay Military Regulations*.

10.—“ But if the person bringing forward an accusation against
 “ any person in the army is not himself an officer, either in the
 “ naval or military service, he cannot appear in Court as the
 “ prosecutor, but merely as an informer; and in that case the
 “ Judge Advocate conducts the prosecution.”—*Bombay Military*
Regulations.

11.—Major-General Kennedy observes :—

“ As public prosecutor, the conducting of all official prosecu-
 “ tions devolves on the Judge Advocate; and even when there is
 “ a private prosecutor, it is universally admitted that the latter
 “ merely sustains this character in conjunction with the Judge
 “ Advocate.”—*Kennedy*.

12.—“ In the former case, as the conducting of the prosecution depends entirely upon himself, he can never be under any difficulty in performing this duty ; for it is to be supposed that he has acquired such a competent knowledge of the duties of his situation as will enable him to lay the case before the Court in a clear and pointed manner, and unembarrassed with any extraneous or irrelevant matter.”—*Kennedy*.

13.—“ But if the prosecution is carried on by a private prosecutor, it becomes a delicate point for a Judge Advocate to decide how far he ought to take a part in giving effect to such prosecution : he is aware that a strong prejudice in favour of the prisoner in general prevails at a Court Martial ; and should he then put questions omitted by the prosecutor which too evidently tend to prove the guilt of the prisoner, he exposes himself to many a disagreeable remark. But, in order to avoid such remarks, can a Judge Advocate reconcile it to his sense of duty to allow the prosecution to fail, in consequence of the inability of the prosecutor, when it was in his power to prevent it ? However disagreeable, therefore, it may be, it is still incumbent on a Judge Advocate to afford a private prosecutor every assistance in his power, and to prevent a failure in the due substantiation of the charge, by pointing out to him the evidence required for that purpose, and by putting to the witnesses such material questions as the prosecutor may have omitted to ask.”—*Kennedy*.

14.—Major-General Kennedy further observes :—

“ Let me not, however, be understood as being of opinion that a Judge Advocate ought to avail himself of any advantage which his superior knowledge and ability, or his influence with the Court, may give him, in order to enforce the conviction, rather than the acquittal, of a prisoner ; for I perfectly agree in opinion with Adye : ‘ That impartiality, which is necessary in every member of a Court Martial, is *peculiarly so in the Judge Advocate*, who should be particularly careful not to let one part of his business prejudice him in conducting of another, nor lead him to endeavour to bias the Court by any ambiguous explanation of the law, or other matters : TRUTH and EQUITY should be most conspicuously seen at all Courts

“ ‘ Martial, but chicanery never permitted to enter the door.’ ”—
Kennedy.

15.—“ The Judge Advocate being prosecutor for the Crown
 “ must not induce him to omit any thing on the records of the
 “ Court that may be of service to the prisoner ; neither is he, on
 “ the other hand, to let his master’s cause suffer, and a criminal
 “ escape unpunished, through lenity or any motive whatever.
 “ But, in the prosecution, though he should act with spirit and
 “ resolution against daring offenders, yet he ought to be cautious
 “ not to injure and oppress, and, much more, not to add insult to
 “ severity. In all cases where misfortune is interwoven with
 “ guilt, he should make it appear that detestation of the crime,
 “ and a regard to the public safety and service, are not incon-
 “ sistent with pity to the man, particularly to offenders for the
 “ first time ;—to such whose crimes are small, whose temptations
 “ were powerful, and who appear to have been seduced by
 “ others.”—*Adye.*

16.—Major-General Sir Charles J. Napier appears
 to be of opinion that the Judge Advocate should
 not be the prosecutor on Courts Martial. He ob-
 serves :—

“ The practice of making the Judge Advocate the prosecutor
 “ appears to me to be a bad system, because it throws into the
 “ scale an unfair weight against the prisoner : it requires but a
 “ small degree of judgment to perceive, that if the Judge Advo-
 “ cate be also the prosecutor, two things are likely to happen :—
 “ *First*, he will try to succeed in his prosecution, because it is
 “ natural for a man to seek success in whatever he undertakes ;
 “ therefore no prosecutor is without a bias.—*Secondly*, if the pro-
 “ secutor, with this bias against the prisoner, be also Judge Advo-
 “ cate, he has power to gratify his bias ; because, by being privy
 “ to all consultations of the Court, from which the prisoner is
 “ excluded, he can, if he choose, bear hard upon the latter ; thus
 “ an advantage is given to the prosecutor which seems neither to
 “ be called for nor just. Then the prosecutor, in this case, is
 “ also the legal adviser of the Court ! Is this fair ? I say not ;
 “ even giving the Judge Advocate credit for being an honourable
 “ and able man : if he be a foolish man, or a prejudiced man, or

“ a dishonest man, who has a spite at the prisoner, the latter has
 “ a most dangerous enemy to deal with. For these reasons, it
 “ seems objectionable that the Judge Advocate should be allowed
 “ to conduct the prosecution. As to his being counsel for
 “ the prisoner, it is an idle fancy. Let the reader imagine the
 “ Judge Advocate acting in such capacity for the prisoner, and
 “ advising him to call witnesses whose testimony he, the Judge
 “ Advocate, is conscious that he possesses the power to disprove,
 “ and does so as soon as the said witnesses’ depositions have been
 “ taken! On the other hand, suppose him producing witnesses
 “ that he knows cannot prove the prisoner guilty,—witnesses
 “ whose testimony he can make the prisoner overset in his
 “ defence! Such doctrine amounts to just this:—that the Judge
 “ Advocate, being both prosecutor and counsel for the prisoner,
 “ can, nine times out of ten, make the latter appear innocent or
 “ guilty, at his pleasure: he is like a man playing a game of
 “ chess with himself, he can cause either the red or the white side
 “ to win! Such an error would be below notice, had it not been
 “ maintained by a writer like Tytler, and often acted upon.”—
Sir C. J. Napier.

17.—Major Hough appears to be of opinion that the Judge Advocate should be prosecutor in *all* cases; and, in alluding to the Bengal Regulations on this point (par. 6), remarks:—

“ In the case of crimes committed by officers and soldiers, such
 “ as murder, or other crimes of a civil nature, I do not see how
 “ the commanding officer of a regiment, generally speaking, can
 “ be the proper person to be the prosecutor: he cannot be
 “ acquainted with the mode of proceeding in such cases; there can
 “ be no facts within his knowledge which have not either been re-
 “ corded on the proceedings of the previous Court of Inquiry, or
 “ which he cannot communicate to the Judge Advocate. . . . If
 “ we take the case of an officer who has been at variance with his
 “ commanding officer, we will suppose a disobedience of orders:
 “ here the proofs are simple. If the case refers to a mixed question,
 “ in which there may be concerned several officers, I do not see
 “ why the commanding officer should be prosecutor and cham-

" pion for the whole. The *Court of Inquiry*, and other means,
 " are in the hands of the Judge Advocate, who, not being a party,
 " and having no interest in the issue, must be unprejudiced against
 " the officer to be tried: there are in his breast no feelings of party
 " or bias against the person to be tried; no regimental grievances of
 " long standing rankling in his mind; he comes forth as the PUBLIC
 " PROSECUTOR TO SEE JUSTICE DONE between the ACCUSING
 " and ACCUSED. The commanding officer, whose orders have
 " been disobeyed, whose authority may have been called in
 " question, whose impartiality may have been impeached,
 " comes into Court, in many cases, not with an unprejudiced
 " mind; and, until we can school the human mind to better
 " thoughts and better actions, the case will always remain so.
 " A private prosecutor and commanding officer stands
 " in the awkward position, if an officer of his regiment is to be
 " tried, of pressing the prosecution against an officer, under his
 " command; and if any adverse feeling did exist between the
 " two, such a proceeding is calculated to make it lasting. . . .
 " The argument against the INDIVIDUAL being the prosecutor is
 " so adversely strong, that I cannot conceive that any doubt can
 " exist but that he is the last person to advocate his own cause:
 " he comes into Court with the full belief that he is an injured
 " man, and no doubt he is, or the trial would not be ordered:
 " even feelings which time might have softened down are
 " revived; and the very circumstance of the order for the trial
 " puts in activity all the private prosecutor's ill-will towards the
 " accused. With a strong belief in favour of his own cause, he
 " is very likely to be led away by his feelings, and to lose his
 " judgment, and to view the case as one entirely of a *personal*
 " nature; whereas every *private* injury against the character of
 " the individual is brought before the Military Court, as some mis-
 " conduct which affects the character of the accused as an officer or
 " a gentleman."—*Vide Par. 7.* " Now, if we examine the case
 " of the Judge Advocate as prosecutor, we see in him no interest
 " to favour either side; his course is straightforward; he acts as it
 " were as moderator between the parties; he will not try to aggra-
 " vate the prosecution by bringing forward extraneous matter or
 " using intemperate language: besides, we must well know that
 " the prosecution has to undergo, at times, the ordeal of two par-

“ties examining, cross-examining, &c.; in fact, it is one of those cases in which ‘*in the multitude of counsellors there is not always wisdom.*’ I, therefore, most strongly recommend that the Judge Advocate should be the prosecutor, and that, in necessary cases, the joint prosecutor should be appointed to give information, but *to act perfectly under the advice of the Judge Advocate.*”—Hough.

18.—The Judge Advocate, as *public* prosecutor, has a right in all cases to reply to any defence made by a prisoner. Sergeant Spankie, when Advocate General at Calcutta, in a letter to the most noble the Marquis of Hastings, dated 3rd November, 1822, thus expressed his opinion:—

“*In all cases where the king is prosecutor, even in form, the reply is warranted by law, though no witnesses are called, and in strictness is matter of right.*”

On Lieut.-General Whitelock’s trial, the Judge Advocate, being prosecutor for the crown, made the reply; and on Lieut.-General Sir J. Murray’s trial, the Judge Advocate, being prosecutor on the 1st and 2d charges, made the reply on those charges. The Bombay Military Regulations direct:—

“*In cases in which the prosecution is wholly conducted by the Judge Advocate, that officer has the right to reply, whether evidence has been adduced on the defence or not.*”

19.—The duty of a Judge Advocate as public prosecutor cannot be mistaken: he is appointed to prosecute in her Majesty’s name, *to search out the TRUTH*, and at the same time “*to obviate a failure of justice;*” he is bound to lay before the Court the *full* particulars of the circumstances which are considered to have been an infringement of the ordinances of the Army, or perhaps of the State; and in doing so must produce,

without partiality or favour to either party, *all* evidence that tends to elicit the TRUTH. However painful it may be to his feelings as an individual to sustain a prosecution, whether the evidence tends to conviction or acquittal, his allegiance to his Sovereign, his duty to the State, the maintenance of discipline, and, above all, JUSTICE, equally demand a faithful discharge of the duty. Let the Judge Advocate, in the performance of this duty, also remember :—

“ The good of the service excuses all things ; the convenience of individuals excuses nothing, when the question is one of justice.”

CHAPTER VI.

DUTIES OF A JUDGE ADVOCATE AS LEGAL ADVISER
TO A COURT MARTIAL.

"In matters of FORM and LAW, the Court can exercise no control over the Judge Advocate;—in the performance of these duties, he must be allowed to act according to his own judgment and discretion."—Kennedy.

"The business of Courts Martial is not to discuss points of law, but to get at the TRUTH by all the means in their power."—Sir C. J. Napier.

1.—"The Commander-in-Chief desires that any officer who is hereafter placed in the position of a President of a Court Martial, will recollect that there are authorities in every military division, whose duty it is to remove any doubts which may arise relative to the construction of a section of the Mutiny Act or an Article of War; and that, when any doubtful point arises, it is preferable to refer that point to the officer who is responsible for the opinion he gives, rather than to trust to any member of the Court Martial, however high an opinion may be entertained of his judgment or knowledge."—*Bengal Military Regulations.—G. O. C. C. in India (Sir H. Fane), 5th July, 1836.*

2.—"So simple is military law, that nothing more is generally required to interpret its provisions, in justice and equity, than the good sense of members of Courts Martial: should a legal difficulty, however, occur, reference to the officiating Judge Advocate is always the safer means, as he is responsible to his superiors for his opinions, which can be corrected on a revision, if mistaken, without putting the Court to an ill-judged feeling of defence on an error of its own."—*Madras Military Regulations.*

3.—Major-General Kennedy observes, the duty of a Judge Advocate, as the legal adviser of the Court, is clearly defined in the following passages from Tytler's 'Essay on Military Law : '—

"Another important duty of the Judge Advocate, during the trial, is the instructing or counselling the Court, not only in matters of essential and necessary form, with which he must be presumed to be, from practice, thoroughly acquainted, but in explaining to them such points of law as may occur in the course of their proceedings; for which purpose a Judge Advocate ought to instruct himself in the general principles and rules of law, and in the practice of criminal courts."—*Tytler*.

4.—"In the performance of this duty the Judge Advocate will always be guided by a just sense of his official character and situation: as he has no judicial power, nor any determinative voice, either in the sentence or interlocutory opinions of the Court, so he is not entitled to regulate or dictate those sentences or opinions, or in any shape to interfere in the proceedings of the Court, further than by giving counsel or advice; and his own discretion must be his sole director in suggesting when that may be seasonable, proper, or necessary."—*Tytler*.

5.—"On every occasion when the Court demand his opinion he is bound to give it with freedom and amplitude; and even when not requested to deliver his sentiments, his duty requires that he should put the Court upon their guard against any deviation either from any essential or necessary forms in their proceedings, or a violation of material justice in their final sentence and judgment."—*Tytler*.

6.—"A remonstrance of this nature, urged with due temperance and respect, will seldom, it is presumed, fail to meet with its proper regard from the Court; but should it happen that an illegal measure or an unjust opinion is, nevertheless, persevered in, the Judge Advocate, though not warranted to enter his dissent *in the form of a protest* upon the record of the proceedings" [for that implies a judicative voice], "ought to insert therein the opinion delivered by him upon the controverted point, in order not only that he may stand absolved from all imputations of failure in his duty of giving counsel, but that

“ the error or wrong may be fairly brought under the consideration of the power with whom it lies, in the last report, either to approve, and order into effect, or to remit the operation of the sentence.”—*Tytler*.

7.—The Regulations of the Madras Army are most explicit on this point:—

“ Courts Martial are required to notice on their proceedings every material point in which they have acted solely upon the legal opinion of the Judge Advocate; and also to record any protest which he may find it his duty to make against what he may consider an illegal proceeding, and in which the Court may think proper to persevere. By these means the question will come regularly before the Commander-in-Chief for ultimate decision, and the responsibility on so important a point will rest where it ought.”—*Madras Military Regulations*.

8.—“ A Judge Advocate is, not only by the custom of the service, entitled to record a minute of his opinion on the proceedings, but it is in many cases proper that he should do so.”—*Hough*.

9.—“ If a Judge Advocate propose any evidence or course of procedure for the Crown, &c., and the Court overrule it, he should enter a minute on the subject matter proposed. If he is not allowed to prosecute, the Court should grant leave to adjourn.”—*Hough*.

10.—“ There may be a legal necessity for a proposed course; and if the Court stopped him, and the trial proceeded, the error could not be remedied on a revision, and the cause of justice would suffer. If the Court distrust their *law* adviser, in such cases the least they *can* do is to do him and the Government the justice of directing a reference. When a General Court Martial has opposed the opinion of the Judge Advocate, they have stayed the proceedings pending a reference.”—*M^r Arthur*.

11.—Sullivan also observes:—

“ The Judge Advocate should enter his objections” [*on the proceedings, I presume*], “and with reverence submit them to the consideration of his Sovereign, or other delegates of his power.”

12.—“The attendance of a Judge Advocate at a Court Martial could be of no use whatever, were he not allowed to insert in the proceedings any opinions of importance which he may have given during a trial, whether they were adopted by the Court or not. Their insertion is requisite for the information of the approving officer; and, for the same reason, it would be perfectly right for a Court Martial, whenever it refused to adopt the suggestions of the Judge Advocate, to record the grounds upon which its decision rested.”—*Kennedy*.

13.—“The opinions offered by the Judge Advocate form an essential part of the proceedings, and that, without their insertion, the record does not exhibit a true and faithful account of all that took place during the trial; and, consequently, that the approving officer becomes called upon, without being apprized of the circumstances, to decide upon the merits of a case which has not been fully and correctly submitted to him. For the Judge Advocate, however, it must be a matter of perfect indifference whether his opinions are inserted on the face of the proceedings or not, because he has always the means of bringing them to the notice of the approving officer; and thus, in excluding them, a Court Martial would merely deprive itself of the opportunity of explaining its reasons for having acted contrary to the Judge Advocate’s advice.”—*Kennedy*.

14.—Major-General Kennedy says, that,

“During twenty-five years that he had performed the duties of a Judge Advocate, many have been the opinions which he had inserted in the proceedings of Courts Martial, and never but twice did a Court Martial refuse to admit their insertion. One of these occasions was on the trial of Lieutenant-Colonel Robinson, of Her Majesty’s 24th regiment, when the Court would neither allow him to reply,* nor to state his reasons for wishing to reply.”—*Kennedy*.

15.—“A Judge Advocate ought certainly to refrain interposing his opinion, except on occasions where he apprehends the probable occurrence of some irregularity or illegality, or where

* This circumstance, on being submitted by the Governor-General and Commander-in-Chief in India, the most noble the Marquis of Hastings, to the Advocate General at Calcutta (Serjeant Spankie), for his opinion thereon, was declared to be an unjustifiable act of the Court.

“ questions of importance arise, to the proper decision of which he may think that the expression of his sentiments might con- tribute.”—*Kennedy*.

16.—“ It is, however, his most particular duty to object to the admission of improper evidence, and to point out to the Court the irrelevancy of all such matters as may be adduced which does not tend to prove, either directly or consequentially, the charge under investigation.”—*Kennedy*.

17.—The Regulations of the Madras Army direct it to be considered

“ The special duty of the Judge Advocate to inform the Court of any attempt to bring forward extraneous evidence; and such representation having been made by him, the *full responsibility* of the undue admission must rest with the President and members of the Court themselves.”—*Madras Military Regulations*.

18.—“ When the Court is deliberating on its finding, it will be obvious that the Judge Advocate is likely to be the person best qualified to assist in judging of the credibility and weight of the evidence recorded, and in applying it correctly to the facts at issue. If, therefore, he should observe that the Court appeared inclined to find a verdict *contrary* to such evidence, it is undoubtedly his duty to endeavour, by the expression of his opinion, to prevent it from deciding so erroneously.”—*Kennedy*.

19.—Major Hough mentions a case, when a Court Martial, acting contrary to the advice offered to it by the Deputy Judge Advocate, called forth the following animadversive remarks on their proceedings from the Commander-in-Chief in India (the Honourable Sir H. Fane, G.C.B.) in G. O. C. C., 20th March, 1838 :—

“ Disapproved.—Because the Court, having taken on itself the decision of a question of law, *instead of having permitted the exposition of the law given by the Deputy Judge Advocate General to guide it*, has committed the error of finding the prisoner guilty of manslaughter, with the exception of the words ‘*feloniously and wilfully* :’—the first of those words being indispensable to define the crime of manslaughter; thus the Court has affirmed

“ the crime, having abstracted the essence which constituted the crime; if the act was not feloniously done, the crime charged was not committed.”—*Bengal, G. O. C. C.*

20.—“ But when the Court is passing sentence, the Judge Advocate ought not then to offer any opinion; for, though he may be considered to be in no slight degree responsible for the correctness of the finding, he is in no manner answerable for the adequacy or inadequacy of the punishment which the Court may award.”—*Kennedy.*

21.—“ In cases, however, where the Judge Advocate thinks that a particular Article of War applies to the offence of which a prisoner has been found guilty, it is his duty to point it out to the Court; and if any question arises relative to its applicability, it will not be disputed that he ought also to give his opinion on such an occasion.”—*Kennedy.*

22.—“ As also the Judge Advocate may be supposed to possess more acquaintance with the practice of military law than the members, there can be no impropriety in his pointing out, *after* the sentence has been passed, any irregularity, or illegality, which may have taken place with respect to the kind and degree of punishment that may have been awarded.”—*Kennedy.*

23.—As Captain Simmons differs with Major-General Kennedy, and *all other writers on Military Law*, on the propriety of allowing the Judge Advocate to insert any opinion he may give on the record of the proceedings of a Court Martial, I conceive it better to give the observations of Captain Simmons at full length, as well as those relating the duty of a Judge Advocate during the deliberation of the Court on their verdict.

24.—On the latter subject, Captain Simmons remarks,

“ That the duty of the Acting Judge Advocate at this stage of the proceedings being simply to act as Registrar of the Court, and to advise on legal points, when his opinion may be demanded, he necessarily abstains from making any remark by

“ which his judgment, as to the guilt or innocence of the prisoner, may be ascertained.”—*Simmons*.

25.—Captain Simmons is of opinion that a Judge Advocate is not entitled, as a matter of right, to record opinions given by him in closed Court, and observes that,

“ If at any time, by inadvertence, a member in passing sentence should deviate from the letter of the law, or assume a power at variance with it, it is clearly the duty of the Judge Advocate to point out the error.” *But Captain Simmons further observes:—* “ In opposition to the opinion in Tytler (p. 352), it is believed that, should the Court decline acting on his advice, the custom of the service will not only prohibit a record of the Judge Advocate’s dissent in form, but that it will exclude it in any shape; and that he will not, as a matter of right, be permitted to engross on the face of the proceedings any opinion, either on a controverted point or otherwise, which at any period, when the Court is closed, he may think it his duty to offer:—the record is confined to the proceedings of the Court; it is not usual, nor would it be right, to detail the grounds which might have led the Court to the result finally adopted. The decision only of the Court both to interlocutory and final judgments is made known, but in no case the judgment of individuals;—as well may an individual member claim a right of protesting as the Judge Advocate, and on much more plausible grounds, the members of a Court Martial being individually amenable to a superior Court of Justice for the sentence which the Court may record, whereas the Judge Advocate, having no deliberative opinion, is not in any case legally responsible.”

Colonel Hough, after quoting the above at page 71, ‘Military Authorities,’ and giving the opinions of several authors on the subject, pronounces his judgment as follows:—

“ *Simmons differs from all others as to the right of the Judge Advocate to dissent in form, or to engross his opinion,—I never knew it objected to, and no one but Captain Simmons entertains the opinion.*”

It may be urged, in defence of an opinion thus unhesitatingly condemned, that it was offered as the author's impression of the custom of war in like cases, but not without consideration, or availing himself of more extended experience:—after some thirty years' practical acquaintance with the customs of Her Majesty's service, though unavoidably ill informed as to the regulations binding on the army in India, he did not alter this passage in the second edition;—nor since then did Colonel Hough's remarks affect his opinion, except as to the practice in that country; which, after several years' experience as a Deputy Judge Advocate, he had no wish to see adopted elsewhere:—he conceives that the existence of a right such as that contended for might tend to promote dogmatism in the officiating Judge Advocate at General Courts Martial, and to make members less likely to listen to arguments which, when offered without assumption, would be readily attended to when a point of law had escaped their notice. Under these circumstances, it is not very probable that a Court Martial, after having been put on its guard against committing an illegal act, will persist in opposition to an officiating Judge Advocate, if he has formed his opinion on sufficient grounds, and was able to bring them in a clear and intelligible manner to the attention of the Court.

26.—Captain Simmons mentions in a note:—

“ A field officer officiating as Deputy Judge Advocate having stated, that, *in his opinion, the Court at which he was officiating as Judge Advocate was proceeding to give an illegal sentence, and that if the Deputy Judge Advocate is not to enter his opinion on the proceedings, he may be supposed to have concurred with the Court, and thereby incur undeserved censure.*”

Which called forth the following opinion of the Judge Advocate General, to whom it was referred :—

“ *If the Court will not attend to such suggestions as he may think it his duty to offer for their guidance upon a point of law, it then becomes the duty of the Deputy Judge Advocate, in order to prevent the confirmation or execution of the sentence, which may not in his opinion be warranted by law, to submit to the consideration of the competent authority a statement of those circumstances which he considers material as affecting the legality of the proceedings.*”

27.—Captain Simmons adds :—

“ The Judge Advocate General in his reply would hardly seem to entertain the opinion that the Deputy Judge Advocate may ‘ *dissent in form*’ or ‘ *engross his opinion*.’ — but the Judge Advocate General, in giving the above-quoted opinion, in answer to the statement submitted to him by the field officer, does not mention the channel through which the statement of the Deputy Judge Advocate is to be submitted ; neither does he say the statement is *not* to be entered on the proceedings of the Court, but merely that it is the duty of a Judge Advocate *to submit to the consideration of the competent authority, a statement of those circumstances which he considers material as affecting the legality of the proceedings.*”

Leaving it to the Deputy Judge Advocate to act according to custom in such like cases ; and without giving any direct answer to the point regarding which information was required.

28.—It certainly appears far more likely to attain the ends of justice, having the advice and opinion tendered by the Judge Advocate, together with the reasons of the Court for not attending to it, entered at length on the proceedings ; than for the convening authority to have to decide on the circumstances laid before him, by the *ex parte* statement of the Judge Advocate alone.

CHAPTER VII.

DUTIES OF A JUDGE ADVOCATE AFTER THE PROCEEDINGS OF A GENERAL COURT MARTIAL ARE CLOSED.

1.—“The proceedings of all General Courts Martial are to be transmitted sealed by the Deputy or Officiating Judge Advocate to the Judge Advocate General, by whom they are laid before the Commander-in-Chief.”—*Bengal, Madras, and Bombay Military Regulations.*

2.—“The proceedings of all General Courts Martial held on officers and soldiers of Her Majesty’s regiments are to be prepared in duplicate.”—*Bengal, Madras, and Bombay Military Regulations.*

3.—“Every Judge Advocate, or person officiating as such at a General Court Martial, or the President of any District or Garrison Court Martial, is required to transmit, with as much expedition as the opportunity of time and distance of place can admit, the original proceedings and sentence thereof, to the Judge Advocate General in London, in whose office they shall be carefully preserved.”—*Mutiny Act, H. M.’s Forces.*

4.—“Every Judge Advocate, or person officiating as such at a General Court Martial, shall transmit with as much expedition as circumstances will admit, the original proceedings, and the sentence, finding, or opinion of such Courts Martial to the Judge Advocate General of the army in which such Courts Martial shall be held, in whose office they are to be carefully preserved.”—*Mutiny Act, Hon. E. I. Company’s Troops.*

5.—“When copies of Courts Martial are required by the party entitled to them, they will be furnished by the Judge

“ Advocate General at fifty rupees each, whatever the magnitude of them.”—*Bombay Military Regulations*, 130.

6.—“ The original proceedings of Courts Martial held on officers in Her Majesty’s service, are forwarded to the Judge Advocate General, London, from whence a copy can only be obtained.”—*Bombay Military Regulations*.

7.—“ The Judge Advocate General lays the proceedings of Courts Martial before the Commander-in-Chief, to whom he makes his report. Though he is very properly forbidden to discover or disclose the vote or opinion of any particular member, still he is not precluded by the Article, when he makes his report, if required so to do, to state any circumstance within his knowledge which may not be recorded on the proceedings, which the Commander-in-Chief should be confidentially informed of. So long as it does not extend to the prohibited discovery or disclosure of the vote or opinion of any particular member, it may go to the general opinion of the Court, which cannot affect the members individually or collectively.”—*Hough*.

8.—Deputy Judge Advocates, and those officiating as such, in like manner *as above stated*, can with propriety report to the Judge Advocate General any circumstance, not recorded on the proceedings, which they may consider necessary to be communicated for the information of the confirming authority.

9.—“ By referring to the oath of the Judge Advocate, it will appear that this officer is not sworn to conceal the sentence of the Court until it shall be duly approved :—the difference between this oath and that taken by the President and Members has been made to enable the Judge Advocate to communicate with counsel (should any doubtful points of law have arisen in the trial) previous to the officer, who orders the assembly of the Court, finally approving and confirming the proceedings of the Court Martial.”—*Adye*.

10.—Tytler observes :—

“ It is proper that the Judge Advocate should retain in

“his own possession the *original* minutes of the proceedings drawn up by him in Court during the course of the trial, that in case of any after questions which may be moved in the ordinary Courts of Law, touching the conducting or result of the trial, the Judge Advocate may have recourse to them as necessary documents, if he should be called upon to give evidence in relation thereto.”

11.—Captain Griffiths, in his ‘Notes on Military Law,’ quotes the following opinion of a late Judge Advocate General to Her Majesty’s Forces. *No. 40, Votes or Opinions of Members noted by the Judge Advocate.*

“I rather differ from Mr. Tytler, with respect to its being absolutely incumbent on a Judge Advocate to retain written minutes of the particular vote or opinions of each individual member. Concerning the expediency of the measure, every Judge Advocate will judge for himself: under some particular circumstances it may perhaps be desirable: there is one inconvenience which may result from it, in the event of a Judge Advocate’s death, or other circumstance which may give access to his private papers, those minutes may be made public.”

12.—The Madras Regulations direct

“Deputies Judge Advocate General invariably to furnish the Judge Advocate General of the army with attested copies of the proceedings of General Courts Martial upon all trials of European commissioned officers conducted by them for transmission to the Honourable the Court of Directors: such copies are to be forwarded together with the original proceedings, or as soon after as possible.”

13.—The Madras Regulations also direct

“Deputies Judge Advocate General invariably to preserve, as office records, the rough draughts of all proceedings of General Courts Martial which may be conducted by them: officers officiating temporarily as Deputy Judge Advocate General, will be held responsible for depositing the draughts of proceedings,

“ conducted by them in the office of the Deputy Judge Advocate
 “ General of the district or field force. In cases where there
 “ may not be any Deputy Judge Advocate attached to the district
 “ or field force, then such draught of proceedings are to be sent
 “ for deposit to the office of the Judge Advocate General of the
 “ army.”

14.—“ All proceedings of Detachment Courts Martial, held
 “ within the frontier on the trial of warrant officers, are invariably
 “ to be forwarded by the *President* to the Judge Advocate General
 “ of the army for submission and report to the Commander-
 “ in-Chief, in like manner with the proceedings of General Courts
 “ Martial.”—*Madras Military Regulations.*

15.—“ The proceedings of District Courts Martial, holden
 “ under the 90th Article of War for the Company’s European
 “ troops for the trial of warrant officers, are to be forwarded for
 “ the confirmation of His Excellency the Commander-in-Chief.”
 —*Bombay Military Regulations.*

16.—“ When the proceedings upon the trial of the *last* prisoner
 “ to be tried before any General Court Martial are forwarded to
 “ head quarters, the Deputy Judge Advocate, or officer officiating
 “ as such, is invariably to make a report to the Adjutant General
 “ of the army, that the Court is adjourned until further orders,
 “ and that there are not any more prisoners for trial.”—*Madras
 Military Regulations.*

17.—When an adjournment of a General Court
 Martial takes place, the Judge Advocate conducting
 the proceedings should immediately report the cir-
 cumstance to the staff officer of the station, where
 the Court is held, stating the reasons why the Court
 has adjourned.

18.—The Madras Regulations direct that,

“ When it may be found necessary to summon or detain indi-
 “ viduals not in the public service on Courts Martial, Committees
 “ of Inquiry, or other occasions of a similar nature, the Judge
 “ Advocate, or officer conducting the proceedings, is to inquire
 “ into the circumstances of the parties, and to submit to division
 “ head quarters, or the Town Major, if at the Presidency, the

“rate of compensation which he may consider equitable with
 “reference to their trade or occupation, the approval of which
 “by those authorities is to be considered as sufficient sanction to
 “the pay department for the discharge of such claims, the period
 “of detention to be certified by the Judge Advocate or officer
 “conducting the proceedings.”

19.—“Claims to batta for any period during the sitting of the
 “Court will be adjusted as they become due on the 1st of each
 “month, supported by a certificate from the President in the
 “case of a member of the Court, and of the Deputy Judge Ad-
 “vocate in the case of witnesses.”—*Madras Government General
 Order, No. 85, 5th June, 1838.*

FORM OF CERTIFICATE FOR A MEMBER.

“I certify that Captain A. B. of the — Regiment, a member
 “of the General Court Martial assembled at — on the —,
 “and of which I was President, was employed on that duty from
 “— to — inclusive.

(Signed) “C. D. Lieut.-Colonel, President.”

“The final certificate will have further added to it ‘on which
 “latter date the Court was dissolved in orders at this station.’”

FORM OF CERTIFICATE FOR A WITNESS.

“I certify that — of the — Regiment, was summoned to
 “attend the Court Martial assembled at — on the —, as
 “an evidence that he was not summoned unnecessarily, and that he
 “was detained in attendance as a witness from — to —
 “inclusive.

(Signed) “—, Deputy Judge Advocate General.”

N.B.—“If summoned unnecessarily the certificate will be
 “modified, and the name of the individual at whose instance
 “summoned will be specified.”

“The batta of witnesses summoned unnecessarily will be dis-
 “bursed to them by the pay department, and the amount will be
 “recovered from the individuals at whose instance they attend.”
 —*Madras Military Regulations.*

20.—In the Bombay Military Regulations, it is directed that the expenses of witnesses

“ Should pass through the channel prescribed for all others of a
“ contingent nature, and the Judge Advocate and his Deputies
“ should furnish the claimants with certificates, specifying the
“ extent of compensation which it may be deemed equitable to
“ award them, together with the place they came from, for the
“ purpose of being annexed to the bill when presented to the
“ pay office.”

CHAPTER VIII.

GENERAL DUTIES OF JUDGE ADVOCATES; ORDERS AND REGULATIONS RELATIVE TO THE SUPERVISION OF MINOR COURTS MARTIAL IN HER MAJESTY'S AND THE HONOURABLE EAST INDIA COMPANY'S ARMIES OF BENGAL, MADRAS, AND BOMBAY; MISCELLANEOUS MEMORANDA; CHARGES, MILITARY AND NON-MILITARY, HOW TO BE FRAMED.

1.—The duties of a Judge Advocate General are :—

- 1.—“ *To superintend the administration of Military Law throughout the army.*”
- 2.—“ *To check any irregularity of procedure of which he may become cognizant, and point the course that should be adopted.*”
3. “ *To prevent deviation from established rules, and adoption of new ones without proper authority.*”
- 4.—“ *To insure uniformity of practice throughout the different divisions of the army.*”
- 5.—“ *To submit to the Commander-in-Chief the proceedings of all General Courts Martial received from the various Deputies or Officiating Judge Advocates.*”
- 6.—“ *To report on the merits of each case, and the regularity of procedure, and generally to advise on every point connected with each trial, and its disposal.*”
- 7.—“ *To advise Government and the Commander-in-Chief on all subjects connected with Military Law, and under their authority, to give opinions to other parties.*”
- 8.—“ *To frame and revise charges as may be necessary.*”

9.—“ *To preserve the proceedings of all General Courts Martial, to furnish copies to the Judge Advocate General of the British army, or to the Court of Directors, as the culprit may belong to the Queen’s or Company’s Service : and to supply copies of trials to individuals tried, or to other parties in their behalf.*”

10.—“ *To keep the different Deputies cognizant of all important alterations of the law or practice; and to give them opinions on all points connected with the Divisional duties; and to notice all irregularities.*”

2.—The duties of a Deputy Judge Advocate General are :—

1.—“ *To conduct the proceedings of General Courts Martial within his Division.*”

2.—“ *To advise officers in command of the Division of corps and stations on any point of practice connected with the administration of Military Law.*”

3.—“ *To register all trials by Courts Martial inferior to General ones, and to submit them to the officer commanding the Division for approval or otherwise, with such remarks on the merits or law of the cases, as may be considered necessary.*”

4.—“ *To frame charges, or revise those preferred against offenders, when called upon by due authority; and to advise generally as to the probability of conviction on the evidence available on a prosecution.*”

5.—“ *To forward monthly to the head of the Department a copy of the Register of Trials by inferior Courts Martial for the month just expired (a second copy, prepared by him, being transmitted to the Adjutant General of the Army by the officer commanding the Division), and yearly a copy of the Register of Minutes of General Courts Martial, or proceedings of Courts of Inquiry, that may have been lodged as records in his office during the year.*”

3.—The above is a brief detail of the multifarious duties of the officers in the Judge Advocate General’s Department in the East Indies; but the following Orders and Regulations regarding the supervision of

Minor Courts Martial, which are in force in her Majesty and the East India Company's armies, will describe more fully the mode in which a greater part of these duties are directed to be conducted.

4.—In Her Majesty's Regulations there does not appear to be any particular rule laid down relative to the supervision of Minor Courts Martial by Judge Advocates in the British army ; but Captain Simmons remarks, that

“ Undue exercise of authority by regimental Courts Martial, independent of the corrective power of the Common Law Courts, may at any time be made the subject of inquiry by superior military authority. A great degree of responsibility attaches to the officer who confirms the sentence ; and, with a view to the prevention of abuse or irregularity, the whole proceedings of Courts Martial are required to be recorded in the archives of each regiment, signed by the president, and countersigned as approved by the commanding officer ; and returns of all Courts Martial held in regiments are made to the general officer under whose orders the corps is serving, and through him to the Adjutant-General of the Forces on the twenty-fifth of each month, showing the length of service of the offender ; whether tried before, and, if so, when, how, and what sentence ; the crime, date, and place of commission ; the description of Court Martial by which tried ; the date and place of trial ; the finding and sentence ; by whom and when confirmed ; punishment inflicted, punishment remitted, and the name of the officer in command of the regiment ; a column is also in the return for remarks, in which the general officer is directed to notice any irregularities which may have occurred, and to state what steps he has taken thereon, and also to explain any special case in which he may have thought it right to sanction a departure from the established regulations.”

5.—Her Majesty's Regiments in the East Indies are exempted from sending any *Regimental* Courts Martial for examination to the Judge Advocate of the

division in which they are serving, by the following General Order, issued by the Commander-in-Chief in India on the 26th October, 1822 :—

“ The Commander-in-Chief is pleased to exempt the regiments in His Majesty’s service from the Regulation of the 6th November, 1818, for transmitting the proceedings of Regimental Courts Martial, within a week after the Court is dissolved, to the general officer commanding the division : a periodical review of the proceedings of such Courts being otherwise provided for by the returns which are furnished at the half yearly inspection of those corps. The registers which are forwarded monthly by the Deputy Judge Advocates to head-quarters, and to the Judge Advocate General’s office, will therefore in future not include the Regimental Courts Martial which may be held in His Majesty’s corps.

6.—In Her Majesty’s Regulations particular attention is called to the following points :—

“ In framing charges, the utmost care is to be taken to render them specific in names, dates, and places.”

“ In charges against non-commissioned officers and soldiers, the prisoner’s regimental number should be invariably inserted.”

“ Care is to be taken that the minutes of proceedings of all Courts Martial be fairly and accurately recorded in a clear and legible hand, without erasures or interlineations.”

“ The pages of the minutes are to be numbered, and the sheets, when more than one, are to be stitched together.”

“ A certificate from a medical officer of the prisoner’s actual state of health should be required by the Court and attached to the proceedings.”

“ Whenever the Court proceeds to direct that an offender shall be kept in solitary confinement for any portion or portions of his imprisonment, the precise portion or portions of the imprisonment which is or are to be passed in solitary confinement must be distinctly specified in the sentence. Solitary confinement is not in any case to exceed *one* month at a time, nor *three* months in any *one* year; and that, whenever more than one portion of

“solitary confinement is directed, an interval of one month at the least must be interposed between the several portions of solitary confinement.”

“When the President signs the proceedings of the Court, he must insert the date when he affixes his signature, because the Mutiny Act enacts every period of imprisonment is to be reckoned from the date when the proceedings shall have been signed by the President.”

7.—*General Order, relative to the Supervision of Minor Courts Martial, issued to the Bengal Army by the most noble the Marquis of Hastings, G.C.B., &c., Commander-in-Chief in India, on the 6th November, 1818.*

“The Most Noble the Commander-in-Chief considering it of essential importance to the discipline and best interests of the army, that the proceedings of Regimental and other Courts Martial inferior to General ones should be conducted with the utmost regularity and decorum, and with the strictest adherence to legal form and to the laws of evidence; and it appearing to His Excellency that those desirable ends can best be attained by bringing the proceedings of all Regimental Courts Martial, and other military tribunals inferior to General Courts Martial, under the review of the General Officers commanding divisions, and ultimately, when necessary, under the cognizance of the highest authority: His Lordship is pleased to establish the following rules for that purpose:—

1.—“The original proceedings of every Regimental, Line, or other Court Martial inferior to a General one, with all necessary relative documents, are to be transmitted to the Deputy Judge Advocate General of the division within one week after the dissolution of such Court, for the purpose of being laid before the General Officer commanding the district, with such observations as the Deputy Judge Advocate may wish to offer, touching the regularity and precision with which the proceedings shall appear to have been conducted; it will be the province of the General Officer, after due consideration of the proceedings and remarks of the Deputy Judge Advocate, to cause such

“ remarks and instruction to be conveyed to the officer under whose authority the Court shall have been held, as the circumstances of the case may in his judgment call for.”

2.—“ A register of all Courts Martial submitted to the General Officers commanding divisions, is to be kept by each Deputy Judge Advocate, in which, under the head of Remarks, the opinion of the General Officer upon the quality of the proceedings, the aptitude of the finding and sentence, and of the Commanding Officer’s procedure thereon, is to be briefly entered.”

3.—“ It will be the duty of each Deputy Judge Advocate to prepare two copies of all entries in his register, at the close of every month, one copy of which is to be delivered to the General Officer for the purpose of being transmitted to the Adjutant General of the army, with such observations as he may have to offer for the consideration of the Commander-in-Chief upon the systems of internal economy, and general tone of discipline observable in the several corps serving in the division under his command ; the other copy of the register is to be sent direct by the Deputy Judge Advocate to the Judge Advocate General: the Deputy Judge Advocates will avail themselves of these opportunities to bring to notice any remarkable features in the trials, as well as to submit any points upon which they may be desirous of obtaining information or instruction.”

4.—“ In cases where the General Officer commanding a division shall consider the proceedings of a Line, Regimental, or other inferior Court Martial, or the circumstances connected with such Court Martial, of sufficient importance to be brought under the notice of the Commander-in-Chief, a complete copy of the proceedings is to be prepared by the Deputy Judge Advocate under the order of the General Officer, and transmitted, with all necessary documents, to the Judge Advocate General for the purpose of being laid before His Excellency: a brief report of the circumstance is at the same time to be made by the General Officer to the Adjutant General of the army.”

5.—“ In Rajpootana, the Nerbudda Field Force, and other special commands or divisions not attached to any of the permanent divisions of the army where a Deputy Judge Advocate

“is stationed, the original proceedings of all inferior Courts Martial held within the limits of these commands are to be submitted to the General or other officer holding such special command, through the Assistant Adjutant General or Brigade Major, by whom they are to be registered in the prescribed form, and returned to the officer from whom received, with the sentiments of the commander of the division thereon. The Assistant Adjutant General or Brigade Major will also prepare copies of the register for transmission to head-quarters.”—*G. O. C. C. in India, 6th November, 1818.*

8.—Regulations *in force in the Madras Army relative to the Supervision of Minor Courts Martial.*

1.—“Commanding officers, upon confirming or otherwise the proceedings of Regimental or other Courts Martial inferior to General, assembled by their authority, are immediately to forward such (original) proceedings for examination *direct* to the Deputy Judge Advocate General of the district.”

2.—“It will be the duty of the Judge Advocate carefully to examine all proceedings so referred to him; noting that the prescribed forms have been observed therein; that the law of evidence has been adhered to, and that the finding and sentence are legal and apposite: and, in the event of any irregularity or illegality, to communicate his opinion thereon, *in a report attached to the proceedings themselves*, to the Commanding Officer of the division in which the trial may have been held; to whom he will forward such proceedings *so soon as examined.*”

3.—“The Divisional Commanding Officer will, at his discretion, add any directions which he may consider requisite for the future avoidance of similar irregularities or illegalities in like cases, *or for remedying the consequences thereof in the particular instance* where practicable; and cause the proceedings to be returned to the officer by whose order the Court was assembled.”

4.—“The proceedings of all Courts Martial inferior to General are, *with a view to greater facility of reference and certainty of preservation*, invariably to be bound up, together with such appended remarks and directions, in *half-yearly* volumes, for

“ deposit in the regimental or station offices to which they be-
 “ long.”

5.—“ The proceedings of Courts Martial held in regiments or
 “ detachments *on foreign service*, or otherwise so situated as to
 “ be without the range of districts to which Judge Advocates are
 “ attached, are to be forwarded to army head-quarters; being
 “ made up in packets for the entire month, and despatched on
 “ the first of the following month, or as soon after as possible to
 “ the address of the Judge Advocate General of the army, who
 “ will provide for the supervision of the same.”

6.—“ The provisions of this order are specially intended to
 “ produce future regularity by bringing past irregularity to no-
 “ tice and animadversion; and it is expressly to be understood
 “ that they do not authorize delay in the infliction of punish-
 “ ments awarded by Courts Martial, or remove the responsibility
 “ of officers approving the sentences of such; which punishments
 “ will be carried into prompt execution, and which responsibility
 “ will continue to exist as heretofore.”

7.—“ Deputies Judge Advocate General will send, on the
 “ fifteenth of each month, to the Judge Advocate General of the
 “ army, for submission to the Commander-in-Chief, a general
 “ report of all remarks passed by them upon Courts Martial
 “ inferior to General held during the month preceding. Such
 “ reports to be made out on demi paper according to the annexed
 “ Form.

“ JUDGE ADVOCATE GENERAL'S DEPARTMENT,

“ I. *District.*

“ Report of Remarks passed upon Courts Martial inferior to
 “ General for the month of January, 1843.

Designa- tion of Court.	Designa- tion of Prisoner.	Where and when held.	Charge (in full).	Finding and Sentence.	Decision of Com- manding Officer.	Remarks by Deputy Judge Adv- ocate General.

“ A. B. CAPTAIN,

“ Deputy Judge Advocate General.”

8.—“The following memoranda, exhibiting the principal points upon which Deputies Judge Advocate General have to report in the examination of the proceedings of Courts Martial inferior to General are circulated to the army, in order to afford to Commanding Officers a better opportunity of ascertaining the correctness of charges *previous* to sanctioning them; and in order to induce officers conducting proceedings, and members of minor Courts Martial, to *anticipate* revision to the utmost by carefully guarding against inaccuracies.

“ MEMORANDA.

1. “ AS REGARDS THE CHARGE.

- “ Is the charge duly consisting of three parts,—the commencement, the statement of the offence, and the conclusion,—separately and distinctly set forth as directed in Section 7, Part 3*?
- “ Is there due and perfect specification of time?
- “ Is there due and perfect specification of place?
- “ Are all persons alluded to in the charge clearly and perfectly designated therein?
- “ Are there unnecessary averments, or superfluous matter of any kind in the charge?
- “ Are more offences than one irregularly included in one and the same charge, or instance of charge?
- “ Are the facts of the charge sufficient to constitute an offence?
- “ Are these facts distinctly and entirely set forth?
- “ Is the offence described in the charge provided for by any particular article of war? if not, has it been designated in the statement of the offence as conduct to the prejudice of good order and military discipline, according to the directions given in par. 2. of Section 7, Part 3*?
- “ Is the offence described in the charge within the legal cognizance of a Court Martial inferior to General?

2. “ AS REGARDS THE RECORD.

- “ Has the printed Form established for the guidance of minor Courts been adhered to in all respects as far as practicable?
- “ Are there any interlineations, erasures, or abbreviations?

3. "AS REGARDS THE EVIDENCE.

- “Has the prescribed order of examining witnesses, by examination in chief, cross-examination, re-examination, and examination by the Court, been strictly followed ?”
 —“Has any hearsay evidence been recorded ?”
 —“Has any irrelevant or extraneous matter been admitted ?”
 —“Are there any leading questions ?”

4. "AS REGARDS THE JUDGMENT.

- “Is the finding according to the evidence before the Court ?”
 —“Is the sentence within the Court’s competence to award ?”

9.—“Much inconvenience having arisen to the public service from the irregular and unintelligible manner in which charges have been framed for trial before Courts Martial, the Commander-in-Chief finds it expedient to give the following directions for general observance in that respect, and expects that Commanding Officers will withhold their sanction to all charges which may not be framed accordingly ; for although proceedings in Military Courts are not subject to the same technical formalities which prevail in Courts of Law, yet it is obviously requisite to the ends of justice that certain forms should be observed, and that all military charges should be so worded as at once to inform the Court of the matter which is to come before it, and to enable the prisoner to defend himself against a distinct and specific accusation.”

* ALL CHARGES SHOULD CONSIST OF THREE PARTS.

1.—“THE COMMENCEMENT :—designating the prisoner by his name, surname, rank or station, and by the regiment to which he belongs ; and showing by whose order he is placed in arrest or confinement.”

2.—“THE STATEMENT OF THE OFFENCE :—clearly, consistently, and succinctly setting forth the fact or facts to which criminality is attributed, with a careful avoidance of all trivial or irrelevant circumstances, and invariably specifying the time when, and place where, the offence was committed.”

[“When the offence charged is not described in any Article of War, and is not within the special provi-

“ sions of Article 4, Section 21, of the European, or of
 “ Article 6, Section 12, of the Native Articles of War, or
 “ of the Bazar Regulations, it should be designated
 “ in the statement, as conduct to the prejudice of good
 “ order and military discipline,—the designation re-
 “ quired to be made of disorders and neglects not spe-
 “ cified in the Articles of War, in order to the same
 “ being taken cognizance of by Courts Martial.”]

3.—“ THE CONCLUSION :—declaring the offence to be either
 “ (generally) in breach of the Articles of War; or (specially)
 “ within the provision of Article 4, Section 21, of the European,
 “ or of Article 6, Section 12, of the Native Articles of War, or of
 “ the Bazar Regulations;—as the case may be.”—*Madras Mili-
 tary Regulations.*

9.—Orders in force *regarding the supervision of
 Minor Courts Martial issued to General Officers
 commanding divisions of the Bombay Army by his
 Excellency Sir Thomas Bradford, Commander-in-
 Chief of the Bombay Army.*

“ I convey the orders of His Excellency the Commander-in-
 “ Chief that you will cause the proceedings of all Regimental
 “ and other inferior Courts Martial, which may be held within
 “ the division or force under your command, to be forwarded
 “ for your inspection regularly every three months; and which
 “ you will afterwards be pleased to return to the regiments, with
 “ such observations as you may deem necessary to call to the
 “ notice of the respective Commanding Officers. This measure,
 “ it is hoped, will not only tend to diminish the number of trials
 “ hastily ordered, but to introduce and insure greater regularity
 “ to the proceedings.

“ His Excellency the Commander-in-Chief is further pleased
 “ to direct that, on the original proceedings being forwarded to
 “ the Commanding Officer of the division, force, or garrison,
 “ they are to be referred for examination to the Judge Advocate
 “ General, or his Deputies within whose range of duty they may
 “ be held.

“ It will be the special duty of the Judge Advocates to exa-

“ mine carefully all such proceedings, noting that all forms
 “ have therein been strictly observed; that the law of evidence
 “ has been adhered to; and that the finding and sentence are
 “ legal and appropriate; and, in the event of any irregularity
 “ or illegality, to communicate their opinion thereupon to the
 “ Commanding Officer of the division or force, who will duly
 “ notice it to the officer by whose authority the Court was as-
 “ sembled.

“ The Deputy Judge Advocates will also forward a duplicate
 “ of their opinion, and report to the Judge Advocate General.

“ Commanding Officers of divisions and forces will in future
 “ transmit to the Adjutant General of the army, for the Comman-
 “ der-in-Chief’s information, a Report of the Quarterly Inspection
 “ of the Proceedings of all such Courts Martial having taken
 “ place, and whether they have occasioned any and what re-
 “ marks either from themselves or Judge Advocates.

“ The original proceedings of all such Courts Martial shall,
 “ after examination, be returned as records to the garrison or
 “ regimental officers to whom they may belong, by the divisional
 “ Commanding officer: who will, at the same time, take such
 “ measures as may be requisite for the future avoidance of the
 “ irregularities or illegalities which may appear therein.”

MISCELLANEOUS MEMORANDA.

10.—As there are some few points which demand the attention of a Judge Advocate when examining the proceedings of Minor Courts Martial which are not expressed in the foregoing regulations, the following memoranda may perhaps be found useful:—

Is the Court properly constituted, and the rank and regiment of each member inserted?

Does it appear that the Court was properly sworn in or affirmed?

Is the charge in every respect correctly drawn up?
 (*Vide Madras Regulations on this point.*)

Is the regimental number of the prisoner [*if an European*] inserted in the charge?

Does it appear that the charge has been read to any of the witnesses?—(*Vide Chapter 6, pars. 61, 62, 63, and 64.*)

Has the prescribed order of examining witnesses been strictly followed?

Are there any leading questions?

Has any hearsay evidence been recorded?

Has any irrelevant or extraneous matter been admitted?

Has the evidence (on the trials of Europeans for habitual drunkenness) been correctly taken?

Is the finding according to the evidence before the Court?

Have the regulated forms relative to the reception of previous convictions on European Courts Martial been attended to?

Is the sentence drawn up according to regulation?

Is the sentence within the Court's competence to award?

Is the sentence appropriate and commensurate to the crime?

Is the date on which the President signed the proceedings minuted thereon?

If a Native Court or any Native evidence has been taken, has the interpreter authenticated such evidence by signing the proceedings?

Is the recommendation for discharge or mercy inserted as directed?

Have the proceedings of the Court been confirmed by proper authority?

Has the established form for the guidance of Minor Courts Martial in conducting the proceedings been strictly adhered to?

Are there any interlineations, erasures, or abbreviations?

Are the pages of the proceedings numbered and the sheets stitched together as directed?

Are the proceedings endorsed and numbered as directed?

Is a medical certificate of the prisoner's state of health [*if an European*] attached to the proceedings?

Is an extract from the Regimental Register detailing the age, length of service, and general character, of a prisoner [*if a Native*], attached as directed to the proceedings?

11.—With regard to the constitution of the Court, the Judge Advocate should remember that the Rules of Her Majesty's Service, the European and the Native branches of the Honourable East India Company's Army are all three perfectly distinct from each other, and that the Court should be constituted, and the proceedings of the trial conducted, as directed by the Articles of War and the Regulations of *that* Service or Presidency to which the offender belongs.

12.—*76th Article of War*.—A District or Garrison Court Martial, held for the trial of any soldier in Her Majesty's Service, must consist of *seven* members at the least, except in Bermuda, the Bahamas, St. Helena, Africa, and the Australian Colonies, where *five* members are sufficient.

13.—*73rd Article of War*.—A District or Garrison Court Martial, assembled for the trial of any soldier in the Honourable East India Company's European

branch of the army, must consist of *five* members at the least.

In both Services the President of a District or Garrison Court Martial cannot be under the rank of captain.

14.—79th and 86th Articles of War Queen's Troops, 76th and 82nd Articles of War Company's Troops.—Regimental and Detachment Courts Martial in both Services must consist of not less than *five* members, unless it is found impracticable to assemble that number, when three may be sufficient.

15.—100th Article of War Queen's Troops, 90th Article of War East India Company's Troops.—Warrant officers in both services may be tried by District Courts Martial: the President must be a *field officer*; and no more than *two* officers under the rank of captain can sit on the trial. The sentence passed on a warrant officer requires the confirmation of Her Majesty, if the trial takes place in Great Britain; of the Commander-in-Chief of the army in which he is serving, in India; or of the general officer commanding on the station, in any of Her Majesty's dominions abroad.

16.—The designations of Native Minor Courts Martial held for the trial of Sepoys and camp followers belonging to the Native Army in India, are:—Native Line, Garrison, Detachment, and Regimental; each of these Courts must consist of *five* members [*Native officers*], excepting in cases when that number cannot conveniently be assembled, when *three* are sufficient. There are also a superintending officer, and an interpreter, both European commissioned officers attached to these Courts, the duty of the

former being to conduct and record the proceedings.

17.—In the Madras Army, by the authority conveyed in the under-quoted additional Article of War for the Native troops serving under that Presidency, natives of all ranks previous to trial have the option of being tried by a Native Court, composed, as is usual, of native officers alone, with a superintending officer and interpreter attached, or by a Court designated an European General Court Martial, consisting of seven European commissioned officers.

18.—“ Every native officer, soldier, or other person subject to trial by Court Martial, under the rules and articles established for the government of the native officers and soldiers of the Army of this Presidency [*Madras*], and who may be under orders for trial, shall (*before trial*), should he so think fit, have a right to claim to be tried under those articles by an European General Court Martial; and to render this object more easily obtainable, *seven* officers shall for this purpose be considered a competent number to form such Court, the President of which shall not be under the rank of Captain, or a subaltern of at least eight years' standing.”—*Madras Articles of War, Native Troops*.

19.—There is no authority for a like indulgence in the Bengal or Bombay Armies.

20.—“ The Commander-in-Chief directs that in future all drummers, fifers, and soldiers of every description *professing the Christian religion*, whether born in Europe or India, and without reference to their parentage, be tried on any crime of a military nature, which may be preferred against them by a Court Martial composed of European commissioned officers only.”—*Bengal Military Regulations*.

21.—“ All persons of the offspring of an European parent, whether father or mother, and their descendants, *professing the Christian religion*, who are subject to military law, shall be

“ tried, when accused of any offence, by Courts Martial composed of European officers : the Court is to be constituted, and the sentence to be in conformity to the Acts, Articles of War, and Regulations in force for the regiment, department, or class of the army under which the prisoner may have enlisted, or to which he belongs.”—*Bombay Military Regulations*.

22.—The trials of all persons in the Native Army, of the description alluded to in the two above paragraphs, are conducted exactly the same as the trials of Native soldiers ; only that the Court is composed of European commissioned officers, with an interpreter, being guided by the Articles of War for the Native troops, and the Acts and Regulations in force for the Native Army.

23.—“ In the Native Army corporal punishment cannot be awarded ;”

Consequently it should be remembered that *Christian* soldiers in the *Native* Army cannot be sentenced by any Court Martial to receive corporal punishment.

24.—“ All proceedings of Regimental Native Courts Martial awarding *forfeiture of additional pay*, are to be sent to head quarters for the approbation of the Commander-in-Chief.”—*Bengal, Madras, and Bombay Military Regulations*.

25.—“ It is only sentences of Minor Native Courts Martial involving the discharge of the prisoner that require the confirmation of the officer commanding the division, and when the convening officer considers a mitigation removing the latter penalty expedient, it is unnecessary to transmit the proceedings to higher authority.”—*Bombay Military Regulations*.

26.—“ In submitting the proceedings of Minor Courts Martial for the consideration and disposal of superior authority, no intermediate approval or remission is to be attached ; but whatever remarks the respective authorities may consider necessary are to be made by letter.”—*Bombay Military Regulations*.

27.—“ At trials of non-commissioned officers and privates in

“ Her Majesty’s service, and the European branch of the East India Company’s army, in all cases, a medical certificate of the prisoner’s state of health, and capability of undergoing different descriptions of punishment, is to be laid before the Court, and attached to the proceedings.”—*Bombay Military Regulations*.

28.—“ At all Native Courts Martial, both general and minor, on the trial of commissioned, non-commissioned officers, and privates, an extract from the Regimental Register, detailing the age, length of service, and general character of the prisoner, is to be transmitted to the officiating Judge Advocate or superintending officer, for the purpose of being attached to the proceedings.”—*Bombay Military Regulations*.

29.—“ The period of imprisonment adjudged to Native soldiers commences from the date of the original sentence. The period of the different descriptions of imprisonment is to be reckoned from the date of the proceedings being signed by the President, which is to be thereon minuted.”—*Bombay Military Regulations*.

30.—“ In sentences of imprisonment passed on European soldiers, it is to be specified that the confinement is to be in such place as the Court, or the officer commanding the regiment or corps to which the offender belongs or is attached, may appoint.”—*77th Article of War Queen’s Troops, 74th East India Company’s Troops*.

CHARGES, MILITARY AND NON-MILITARY, HOW TO BE FRAMED.

31.—When a Judge Advocate receives instructions to draw up charges, or has charges sent to him for examination and revision, he would do well to consult the Madras Regulations on this subject [*vide* page 81]; and if further information is requisite, I would recommend the Judge Advocate to consult “*Archbold’s Criminal Pleadings and Evidence*,” page 2, 6 to 28, from which the above-mentioned regulations are evidently taken. The following memoranda, however,

will no doubt prove useful to him in the performance of this duty.

32.—The name of the prisoner should be written at full length.

33.—The regimental number of the prisoner (if a non-commissioned officer or private soldier) should be inserted.

34.—All the dates must be in *words* and *not* in *figures*.

35.—“ The utmost precision must be observed in specifying the fact to which *criminality* is attached, and in describing the ‘ *time* ’ and ‘ *place*,’ ‘ *when* ’ and ‘ *where*,’ such fact took place, “ by inserting the words ‘ *on or about*,’—‘ *at or near*.’ ”—*Bombay Military Regulations*.

36.—“ Facts of a distinct nature are not to be included in one “ and the same charge, or instance of a charge; but each different “ fact is to be specified in a distinct instance or charge.”—*Bombay Military Regulations*.

37.—“ All extraneous matter is to be carefully avoided, and “ nothing is to be alleged but that which is culpable, and which “ the complainant is prepared to substantiate before a Court “ Martial.”—*Bombay Military Regulations*.

38.—“ It is not to be specified in a charge, that the offence “ alleged has been committed in breach of any particular Article “ of War or Statute; but in cases in which the allegation comes “ directly under any enactment, it is to be set forth in the terms “ therein used; and when it is a disorder or neglect not specifically provided for, it is to be charged (if the accused be an “ officer or soldier) as conduct to the prejudice of good order “ and military discipline.”—*Bombay Military Regulations*.

39.—“ In framing a charge for *insubordinate* or improper language, the expressions which may have been made use of by “ the prisoner are not to be specified, as such are quite unnecessary for the ends of justice; and the offence may be equally “ developed under the simple allegation of *unsoldierlike*, or *insubordinate*, or *improper* language, as by inserting the disgusting “ words of a drunken or mutinous soldier. The words, however,

“ must be given in evidence in support of the charge.”—*Bombay Military Regulations*.

40.—“ In framing a charge for any CRIMINAL OFFENCE, such offence ought to be described *substantially* in the same manner as it would be set forth in an indictment. For otherwise the Court Martial, to whose investigation it might be submitted, could not be aware of the real nature of the subject on which it was called to decide, nor could it judge how far the evidence adduced in its support legally proved the offence laid; and thus it would find itself unable to award such punishment as was sanctioned by law. Since it must be recollected that, whenever General Courts Martial exercise criminal jurisdiction, they are bound to pass sentence in conformity to the *common and statute law of England*. It is not, however, required that such a charge should be drawn up in the technical style and form of an indictment, but it will be sufficiently precise and certain if it merely specifies the fact or facts charged in such a manner as will show whether or not they constitute the criminal offence intended. For instance, in a case of alleged murder, it would be sufficient to frame a charge against A, B, and C, in this manner: *That he, the said A, did, in or near the Military Cantonment at —, on the —, wilfully and maliciously murder D, by mortally wounding him with a bullet, which he, the said A, did then and there discharge from a pistol at the said D, of which wound the said D did then and there immediately die. And that they, the said B and C, were present, aiding and abetting at the murder aforesaid, committed in the manner and form aforesaid.* For the words *wilfully and maliciously* show sufficient certainty that the offence laid in the charge is wilful murder, and not manslaughter.”—*Bombay Military Regulations, and Kennedy*.

41.—The Judge Advocate General of the Bengal Army, in letters dated June, 1835, and November, 1836, gave the following instructions on this point:—

“ The Judge Advocate must take care to frame charges for *non-military* offences with precision and conciseness.” *And*

“ the technical strictness used in an indictment is not necessary
 “ in the framing of charge for *military* offences, still it is ob-
 “ viously objectionable to charge a prisoner with stealing, *or* having
 “ in his possession, knowing it to have been stolen,—to charge a
 “ *second* with instigating to, *or* conniving at,—and a *third* with
 “ conniving at, *or* not taking due precautions to prevent the com-
 “ mission of an offence; and to find all the prisoners guilty,
 “ without declaring whether the *first* was a thief or receiver;
 “ whether the *second* originated, *or* only connived; and whether
 “ the *third* was guilty of conniving, *or* only of negligence. Such
 “ faults ought to be avoided, by stating the allegations in *separate*
 “ charges or instances of a charge; nor should Judge Advocates,
 “ in framing charges, imitate the minutia of Civil Courts, details
 “ quite unnecessary before Military Courts. There should be no
 “ disgusting expressions of a drunken or mutinous soldier (either
 “ in Hindostanee or English)—‘*unsoldierlike conduct,*’ or ‘*insub-*
 “ ‘*ordinate,*’ or ‘*improper language,*’ being quite sufficient.”—
G. O. C. C. in India, 26th October, 1835, by the Commander-in-
Chief in India, requesting conformity at Madras and Bombay.—
Hough.

42.—“ But it is to be most particularly observed, that every
 “ charge for such an offence which is submitted to the investi-
 “ gation of a Court Martial, in places where Civil Judicature is
 “ in force, should clearly and distinctly specify the facts charged
 “ in such a manner as will constitute a *military* offence. If,
 “ therefore, under such circumstances, a charge should be brought
 “ before a Court Martial, accusing *Lieutenant A B of having*
 “ *killed Lieutenant C D in a duel, or Private E F of having com-*
 “ *mited a robbery,*—these charges, being for capital crimes, ought
 “ immediately to be thrown out by the Court, as not coming under
 “ their jurisdiction. But all that is requisite, in order to render
 “ them cognizable by the Court, is to frame them in this, or a
 “ similar manner :—*Lieutenant A B placed in arrest for unofficer-*
 “ *like conduct in having challenged Lieutenant C D to fight a duel.*
 “ The subsequent meeting, and what took place on the ground,
 “ may, however, be given in evidence as the best proof of the
 “ challenge having been given and accepted. Or, *Private E F*
 “ *confined for highly irregular and unsoldierlike conduct in having*
 “ *been absent without leave from his quarters, and in having at that*

“ *time robbed Mr. G H*; in which case the circumstance of the robbery can be only received as evidence of *the irregular and unsoldierlike conduct*. In these and similar cases, it will be perfectly evident that neither the Commander-in-Chief who approves of such a charge, nor the Court who try it, in any respect whatever exceed the powers and jurisdiction vested in them.”—*Kennedy*.

CHAPTER IX.

DUTIES OF A JUDGE ADVOCATE AT A COURT OF
INQUIRY.

1.—Courts of Inquiry are appointed by warrant, directed to the Judge Advocate General under the sign-manual, naming the officers to compose the Court, and authorizing the Judge Advocate to summon such officers as the Court may deem expedient for the investigation committed to it; or simply by order from Her Majesty, the Commander-in-Chief, or the other officer in command of a body of troops, of a regiment, or even of a detachment.—*Simmons*.

2.—The power of convening such Courts forms part of military command, for they may be held by the order of a Commander-in-Chief, or of the commanding officer of a regiment, without previous reference to superior authority.—*Kennedy*.

3.—The following is a copy of a portion of the warrant issued by his Majesty George II., to the Judge Advocate General of His Majesty's Forces, for inquiring into the causes of the failure of the Rochfort expedition in 1757.—*Tytler*.

Our will and pleasure therefore is, and We do hereby nominate and appoint Our right trusty and right entirely beloved Cousin and Counsellor, Charles, Duke of Marl-

borough, *Lieutenant-General*; and *Our trusty and well beloved George Sackville, commonly called Lord George Sackville, and John Waldegrave, Major-Generals of Our Forces, to examine and inquire touching the matter aforesaid: And you are to give notice to the said general officers when and where they are to meet for the said examination; and the said general officers are hereby directed to cause you (the Judge Advocate General, or his deputy) to summon such persons, whether the Generals or other officers employed on the expedition, or others, as are necessary to give information touching the said matters, or as shall be desired by those who were employed on the expedition: And the said general officers are hereby further directed to hear such persons as shall give them information touching the same: And they are authorized, empowered, and required strictly to examine into the matters before mentioned, and to report a state thereof as it shall appear to them, together with their opinion thereon: All of which you are to transmit to Our Secretary at War, to be by him laid before Us for Our consideration; and for so doing this shall be as well to you as to Our said general officers, and all others concerned, a sufficient warrant.*

*Given at Our Court at Kensington,
this 1st day of November,
1757, in the 31st year of Our
reign.*

(Signed) BARRINGTON.

To Our trusty and well-beloved T. MORGAN, Esq., Judge Advocate General of Our Forces, or his deputy.

Tyler.

4.—Captain Simmons states :—

“ A Court of Inquiry, when assembled by order of Her Majesty or the Commander-in-Chief, is sometimes attended by a Judge Advocate, at other times not.”

5.—The Courts of Inquiry held to inquire into the “ Armistice and Convention of Cintra ” in 1808, and the “ case of Private Somerville of H. M.’s 2nd Dragoons ” in 1832, were both conducted by the Judge Advocate General of Her Majesty’s Forces; and in all cases of importance in the British army the Judge Advocate General, or a Deputy Judge Advocate General, is appointed to conduct and record the proceedings.

6.—In the East Indies also, in all cases of a serious nature, a Judge Advocate is appointed to conduct and record the proceedings of Courts of Inquiry; but, as in Her Majesty’s Services on Regimental and Detachment Courts of Inquiry, this duty devolves on the President.

7.—M’Arthur says :—

“ Where the matter is important, it is usual in the navy to have five members. In the army, Courts of Inquiry may consist of *any number* of officers and of any rank; but the latter *should not be*, if possible, *inferior* to that of the officer whose conduct or character may be implicated in the investigation. The Court may be either close or open, depending in this on the will of the officer convoking it.”—*Griffiths*.

8.—The duties of a Court of Inquiry, and of the Judge Advocate, when directed to conduct the proceedings, depend *entirely* on the instructions which the authority convening the Court may think proper to give.

9.—It is, however, the particular duty of the Judge

Advocate to summon all witnesses required for the investigation of the circumstances, regarding which the Court is assembled.

10.—“There is no process by which civil witnesses can be compelled to attend a Court of Inquiry; but all military witnesses ordered to attend cannot refuse to come to the Court, as it would be a disobedience of orders.—*Hough*. The controlling power over military men, which enforces their attendance before Courts of Inquiry, arises from the order of a superior officer, and not from any authority which these Courts actually possess.”

11.—A Court of Inquiry is not in any light to be considered as a judicial body. The main object is to receive and methodize information, so as to enable the authority convening the Court to arrive at a correct conclusion as to the necessity, or otherwise, of assembling a Court Martial.

12.—It is to the exertions of the Judge Advocate, as much as it is of the members of a Court of Inquiry, by a searching inquiry into the very minutiae of the subject ordered to be investigated, that an innocent man may be saved the degradation of being brought before a Court Martial, and the crimes of a bad character brought to light in such a conclusive shape as inevitably to insure conviction on being brought to trial.

13.—The specific duties of a Judge Advocate, when ordered to attend a Court of Inquiry and to conduct the proceedings, are as follows:—To summon all persons required for examination; to record the proceedings of the Court; to put the questions to the several witnesses; to copy all original documents in the proceedings; to assist the Court in methodizing

the information it may receive; to minute on the proceedings the opinion of the Court (if called for); and to render every assistance in his power in the investigation, so that the whole circumstances of the case may be laid before the convening authority in a *clear and explicit* form.

14.—When a Judge Advocate is ordered to conduct the proceedings of a Court of Inquiry, he should, according to his instructions, exercise his judgment.

15.—Neither party (the accuser or accused) can demand a copy of the proceedings, which are *only intended for the officer convening the Court*.

16.—“The power of the Sovereign, or of a Commander, to appoint Courts of Inquiry, and the right to withhold the proceedings, when required to be produced as evidence in a Supreme Court of Law, has been evinced by a decision of the Court of Queen’s Bench, confirmed on appeal to the Judges.”
—*Home v. Lord F. Bentinck, Exchequer Chamber, 17th June, 1820.—Griffiths.*

17.—The usual mode of conducting the proceedings of a Court of Inquiry is as follows:—

18.—The members on assembly arrange themselves on the right and left of the President, according to their rank in the army. The Judge Advocate sits opposite to the President, with the interpreter on his right.

19.—The Court, on first assembling, is usually closed. The orders directing the assembly of the Court, and appointing the President, members, interpreter, and Judge Advocate, are read; and then the instructions to the President or Judge Advocate, relative to the duty they are assembled to perform, which should be attached to the proceedings.

20.—The Court having decided on the best mode of procedure, the complainant (if there is one) and the accused, are called in; when the complaint, or subject to be investigated, is communicated by the Judge Advocate to the accused party.

21.—The Court, Judge Advocate, Interpreter, and witnesses, are *not* sworn.

22.—The Court now proceeds with the investigation, and calls before it the several witnesses, who should all be cautioned, in giving their evidence, to speak to facts only which are within their own knowledge.

23.—The evidence should be *regularly* taken down in writing, and the same rules observed as in conducting the proceedings of a Court Martial, but without the precise and strict form of a Court Martial.

24.—Original documents handed into Court must be copied in the proceedings; and each witness should be first called on to state all he knows on the subject, then questioned (if necessary) by the complainant, next cross-examined by the accused, and lastly questioned by the Court.

25.—The evidence on the part of the accuser must be first taken; after which the accused should be asked if he has anything to offer on the subject, or any evidence to produce.

26.—The accused should not be himself examined, and he may decline answering any questions put to him.

27.—It is also optional on the part of the accused to abstain from putting any question to witnesses, either on examination in chief or on cross-examina-

tion; and, further, the accused may respectfully decline making any statement to the Court touching his alleged misconduct, should he apprehend that such a course would operate against him in the event of the institution of any ulterior judicial proceedings.

28.—If directed in the instructions, which should be most scrupulously adhered to, the Court give *in general terms* their opinion.

29.—The President, members, and Judge Advocate, all sign the proceedings.

30.—A Court of Inquiry may be reassembled as often as may be found necessary, and new evidence may be received and recorded on every such occasion. On the reassembly of the Court, the President may recall any of the previous witnesses, and put such additional questions to them as may appear desirable, with a view to elicit every possible information that the case admits.

31.—Though the Court are not sworn, it is highly irregular and unmilitary for any member of it to divulge the opinion it may have formed.

32.—The proceedings of Courts of Inquiry, on being closed, are transmitted, as directed, in the instructions to the convening authority.

[*Kennedy, Hough, D'Aguilar, and others are herein quoted.*]

CHAPTER X.

DUTIES OF AN INTERPRETER AT A GENERAL COURT
MARTIAL.

1.—“To all General Courts Martial shall be attached an European Commissioned Officer as Interpreter; and to him, previously to any proceedings being held before the Court, shall be administered, by the Judge Advocate, the following oath:—

“I, ———, do swear, that I will well and truly interpret, according to the best of my skill and judgment, such matter as may be brought before this Court: That I will not divulge the sentence of the Court, until it shall be approved by the General, or other Commander-in-Chief of the Forces, or other competent authority: Neither will I, upon any account, at any time whatsoever, disclose the vote or opinion of any particular member of the Court Martial, unless required to give evidence thereof, as a witness, by a Court of Justice, or a Court Martial. So help me, God!”—Bengal, Madras, and Bombay Native Articles of War.

2.—“At all Native Courts Martial, the Interpreter shall remain in Court whenever it is closed, in order to assist the Judge Advocate or Superintending Officer in correctly and faithfully ascertaining the votes and opinions of the different members; and he is also to countersign the proceedings.”—*Bombay Military Regulations*.

3.—“It is declared to be contrary to the invariable principles of justice, that the officiating Judge Advocate, conducting a trial, should be the Interpreter of the evidence in support or refutation of the charges.”—*Bombay Military Regulations*.

4.—The Right Honourable the Commander-in-

Chief in India, Earl Moira, remarked, on a Native General Court Martial held on the 12th October, 1815:—

“The proceedings of the accompanying Court Martial are vitiated, in consequence of the duties of Interpreter having been performed by the Judge Advocate. It is contrary to that invariable principle of justice which should leave to a prisoner the clearest facility and advantage in conducting his defence, that the interpretation of the evidence adduced in support and in refutation of the charge should devolve on the officer who is prosecuting in the name of the Crown, and whose duties, if he be in earnest discharge of them, have an apparent tendency to bias his judgment: the circumstance might really occasion an involuntary but important deviation from accuracy. But at all events, it suggests the possibility that the person engaged in the examination of the witnesses may be incapable of that nice and undivided attention to the tenor of the phrases used by them, out of which an equitable construction in favour of the prisoner may be deduced. Of course all the security possible for a just decision on the case does not seem to have been established, and such defect ought unquestionably to render the proceedings null and void.”—*G. O. C. C. in India, Nov., 1815.*

5.—His Excellency the Commander-in-Chief of the Bombay Army, Sir T. M'Mahon, remarked, on the proceedings of a General Court Martial held at Kar-rack in April, 1841:—

“An attentive perusal of the proceedings in this case has impressed me with the full conviction of the correctness of the finding on both charges, and of the justice of the sentence; and I regret to observe no point of extenuation presents itself by which I could have considered myself justified in withholding my confirmation from the award of the Court, had not a material, and what has been previously deemed a *vitiating, illegality occurred in the proceedings by the officiating Judge Advocate, by whom the prosecution was wholly conducted, having also been allowed to perform the duty of Interpreter in the examination of*

“ *several witnesses both on the prosecution and defence.* The illegality of that proceeding was first noticed and animadverted on by General the late Marquis of Hastings (then Earl Moira), when Commander-in-Chief in India; and the sentiments of that eminent ornament of the British army, who was deeply versed in every branch of military jurisprudence, form a part of the Military Court of this Presidency, wherein the practice now adverted to is, without reservation or qualification, declared to be contrary to the principles of justice; and in a subsequent case which occurred in this army, the proceedings were on the same grounds set aside by the then Commander-in-Chief, in the year 1816. With these precedents, therefore, before me, I cannot give effect to the present sentence, passed under the invalidating circumstances before referred to.”—*G. O. C. C. Bombay Army, 1841.*

6.—Hough says, that the Interpreter,

“ Having been furnished by the Judge Advocate with a copy of the charges, should prepare a correct translation of them, in order that the members of the Court Martial, to whom the charges are to be read and explained, may comprehend clearly their *full* import and meaning.”—*Hough.*

7.—Simmons says :—

“ The greatest caution should be exercised to insure faithful translation, and guard against misconception of the true meaning of any expression, either from the incompetence or from the possible bias of the person employed to interpret. The interpreter should render the very words as closely as possible, and not run the risk of obscuring the proper force of an expression by attempting to give the corresponding idiom, as the Court may call upon him to explain any part of his translation, or refer to a second interpreter, if they should entertain any doubt, or be desirous of further information.”—*Simmons.*

8.—“ A party to the trial is at liberty to request the presence and assistance of a private interpreter, and may urge upon the Court the propriety of hearing his version of the precise meaning of the evidence, or any illustration on his part of a phrase

“ which will admit of a second construction being put upon it ;
 “ and the Court, under all the circumstances of the particular
 “ case before them, would decide on an application of this nature,
 “ neither allowing unnecessary interruption on the one hand, nor
 “ obstructing the accurate investigation of justice on the other.”—
Simmons.

9.—“ An Interpreter may be sworn *at any period* of the pro-
 “ ceedings, if required by either party, or judged necessary by
 “ the Court. The Mutiny Act (Section 14) requires that he must
 “ be duly sworn before being examined.”—*Simmons.*

10.—Captain Simmons says :—

“ There is no fixed form of oath directed to be administered,
 “ but the following may answer the purpose :—

“ I, ——, *do swear* (if a Quaker,—*do solemnly, sincerely, and*
 “ *truly declare and affirm*) *that I will, to the best of my ability,*
 “ *faithfully and truly interpret and translate, in all cases in which*
 “ *I shall be required so to do, touching the matter now before the*
 “ *Court, between our Sovereign Lady the Queen’s Majesty and the*
 “ *prisoner on trial. So help me, God !*”—*Simmons.*

11.—The Madras Regulations direct, that,

“ In the event of any Interpreter attached to, or in attendance
 “ upon, a Court Martial, being unable to conduct his duties
 “ before the Court, the President, in the instance of European,
 “ and the Judge Advocate, or Superintending Officer, as the case
 “ may be, in the instance of Native Courts, will be held strictly
 “ responsible for *staying the proceedings*, and reporting the in-
 “ competency of the Interpreter to the officer by whose order the
 “ Court was assembled, who will without delay take measures to
 “ replace such Interpreter by a more efficient officer, reporting the
 “ circumstance to head-quarters.”—*Madras Military Regulations.*

12.—Interpreters, when in attendance upon *Euro-
 pean* Courts Martial, are not on any account, or under
 any circumstances, to be considered as forming an
 integral part of the Court, to be present when the
 Court is closed, or to sign the proceedings, as in the
 case of Native Courts Martial: they are merely to

attend the Court, and to afford their services, if required so to do.—*Madras Military Regulations.*

13.—General Kennedy observes:—

“ It is sometimes necessary to employ an Interpreter for the purpose of translating the evidence given by the witnesses; in which case he may be sworn in either at the commencement of the trial *or at any stage of the proceedings.* Whenever this takes place, a minute of *his rank or situation, and of his having been duly sworn, must be entered* on the face of the proceedings.”
—*Kennedy.*

14.—On Native Courts Martial, the Judge Advocate, at the proper stage of the proceedings, reads the charge first in English, after which the Interpreter reads and explains it to the Court and to the prisoner in the Native language.

15.—Major Hough mentions a case when a Native General Court Martial inadvertently continued the proceedings beyond the hour authorized by the Articles of War *then* in force; on which occasion, on a reference being made, the Most Noble the Commander-in-Chief, the Marquis of Hastings, directed,

“ That such part of the evidence as had been entered on the proceedings subsequent to three o'clock should be read over to the witnesses, who were to declare on their former oath whether the same was correct: if not, they were to be allowed to correct it. This was easily accomplished, as the Interpreter to the Court had taken down the evidence *verbatim* from the mouths of the witnesses, read to the witnesses their evidence in their own words from his own minutes. *This plan,* which must always save time, as well as prevent the possibility of any misconception as to the precise words used by Natives, and on which much frequently depends, *is obviously the most correct,* though it is not often adopted. Should *any future proceeding be had* regarding a trial, or a prisoner in his defence [or during the prosecution, which I have frequently known to occur] *object*

“to the interpretation of any phrase or word, or think any other words were used, the Interpreter’s minutes, which should be preserved, can be referred to. A native frequently uses other words when told to repeat what he has said; and what witness can be expected to recollect the precise words which he has used in a long narrative—and I would ask, what Interpreter can listen to such a narrative, and recollect the same so as to give a proper translation? In the case above alluded to, the Interpreter translated every question before he explained it to a native witness.”—*Hough*. [The finding and sentence of this Court was published to the Bengal Army, *G. O. C. C.*, 27th Nov., 1820.]

CHAPTER XI.

THE JUDGE ADVOCATE GENERAL'S DEPARTMENT IN
THE EAST INDIES; PAY OF JUDGE ADVOCATES.*

1.—The Judge Advocate General's Department in the East Indies at present consists of three Judge Advocates General, viz. :—

One to each of the Armies of Bengal, Madras, and Bombay, and twenty deputies, who are thus distributed :—

In the Bengal and Agra Presidencies there is a Deputy Judge Advocate to each of the following divisions of the army :—Meerut, Saugor, Dinapoor and Benares, the Presidency, Sirhind, Caunpore, and the Meywar Field Force. Total, 7.

In the Madras Presidency, there is a Deputy Judge Advocate to each of the following divisions of the army :—Nagpore Subsidiary Force, Jaulna, Secunderabad, Northern, Mysore, Malabar and Canara, Ceded Districts, Centre Presidency and St. Thomas Mount, Southern and the Tenasserim Provinces. Total, 9.

In the Bombay Presidency, there is a Deputy Judge Advocate to each of the following divisions of

* Vide Appendix, No. IV.

the army:—Southern, Northern, Poona, and the Scinde Field Force. Total, 4.

Bengal, 7. Madras, 9. Bombay, 4. Total, 20.

2.—The Judge Advocate General of the Bengal Army being also Judge Advocate to Her Majesty's Forces in India, holds the brevet rank of lieutenant-colonel, and the Judge Advocates General of the Madras and Bombay Armies hold the brevet rank of major, should they not have attained that rank regimentally.

3.—All Deputies Judge Advocate General vacate their appointments, and leave the Department on attaining the rank of major regimentally.

4.—The pay of Judge Advocates in India is as follows:—

The staff salary of the Judge Advocate General of the Bengal Army, is	1,450
Horse allowance,	60
	<hr/>
Total,	1,510 Rps. monthly.

The staff salary of the Judge Advocate General of the Madras Army, is	1,000
Horse allowance,	60
	<hr/>
Total,	1,060 Rps. monthly.

The staff salary of the Judge Advocate General of the Bombay Army, is	600
Horse allowance,	60
	<hr/>
Total,	660 Rps. monthly.

The staff salary of all Deputies Judge Advocate General is 350 Rps. monthly.

The staff salary of those acting
as Deputies Judge Advocate
is the half salary, or 175 Rps. monthly.

5.—The above staff salaries are exclusive of contingent allowances for stationery, &c. &c. &c.

6.—The Judge Advocates General indent on Government for stationery, and their establishment of writers is paid by Government on monthly abstracts.

7.—All the Deputies Judge Advocate General draw a monthly allowance of (50) fifty rupees for writers, stationery, and other contingent expenses, and when on field service draw 75 rupees for office tent allowance.

8.—The allowance to an officer not in the department, when officiating as Judge Advocate in the East Indies, is 7 Rps. per diem.

9.—“The Right Honourable the Governor-General in Council
“having had occasion to advert to a custom which appears to
“prevail, of the officiating Deputy Judge Advocate to a General
“Court Martial being considered in employ until the Court is
“dissolved, which his Lordship conceives to be founded on an
“erroneous principle, an adherence to which would entail at
“remote stations much unnecessary expense, is pleased to resolve,
“that in future, when officers are specially appointed to do the
“duty of Deputy Judge Advocates, as occasion may require, they
“shall receive the authorized allowance of Sonat rupees 7 per
“diem, for the number of days the Court actually sits, not in-
“cluding, however, any period of adjournment, unless it is for the
“express purpose of enabling the Deputy Judge Advocate to
“transcribe the proceedings;—the sittings to be considered to
“commence with the day the Court first convenes, and to end
“with the date of the transmission of the proceedings for the
“approval of His Excellency the Commander-in-Chief, or of the

“ officer under whose warrant the Court shall have assembled, both days inclusive; and when the functions of the Deputy Judge Advocate cease. In the case, however, of a revision being ordered, the allowance to be drawn for the further number of days that may be occupied in such revision. Bills for the established allowance to be countersigned by the Presidents of Courts Martial respectively, in evidence that the period drawn for by the officiating Deputy Judge Advocate is correct.”—*G. O. G.* (Marquis of Hastings) 10th May, 1816.

10.—“ In continuation of the *G. O. G.*, 10th May, 1816, it is hereby directed, that the Presidents of all General Courts Martial, at which an acting Deputy Judge Advocate may officiate, shall certify distinctly, on the back of that officer's bills for allowance, the number of days such Courts actually sat for the despatch of business; with all adjournments under the two heads of *no business*; or, to transcribe proceedings.”—*G. O. G.*, 3d October, 1823, *Bengal Military Regulations*.

11.—“ The allowance for officers officiating as Judge Advocates at General Courts Martial is seven rupees per day, for the days on which the Courts may actually sit.”—*Bombay Military Regulations*.

12.—The allowance to a Deputy Judge Advocate, when officiating at a Naval Court Martial, appears from the following certificate to be eight shillings per diem.

Certificate by the President of a Court Martial to the officiating Judge Advocate, and which entitles him to eight shillings per day for the time employed. It is usual at home to insert ten days in the certificate, and abroad twelve days for each trial.

“ These are to certify, that _____ officiated as Judge Advocate at a Court Martial, at which I presided, held on board His Majesty's ship _____ in the North River, New York, the _____ May, 1782, for the trial of _____ belonging to His Majesty's

“ ship——for mutiny and sedition; and that he was employed
 “ twelve days in making preparations for the trial, attending
 “ the Court, and copying and transmitting the minutes of
 “ proceedings.”

“ Given on board His Majesty’s ship——

“ &c., &c., &c.

“ Signed _____

“ Admiral and President.”

13.—The salary of the Judge Advocate General of Her Majesty’s Forces is two thousand pounds (£2000) per annum.

14.—The allowance to a Deputy Judge Advocate, when officiating as such in England, or in any of the British Colonies, is (2) two guineas per diem.

15.—The following is the form of account required from an officiating Deputy Judge Advocate, with certificate attached, in England and the British Colonies.

*An account of the expenses incurred by ——
 officiating as Deputy Judge Advocate, at a
 General Court Martial held at —— on —— on
 the —— day of —— 1844.*

Number of Vouchers.		Amount.		
		£.	s.	d.
Nos. 1—	Stationery as per Bill and Receipt annexed.			
2—	Hire of Room, Fuel, &c. &c.			
3—	Postage			
	Pay for —— days at two guineas per day.			
	Travelling expenses, viz. from —— to ——			
	No. of miles			
	Total £			

“ I do hereby certify, that I have paid the sum for stationery,
 “ and for postage and carriage of letters and packets, as specified in
 “ the above account :—and that the whole of the above stationery has

*“ been applied to the Public Service ; and that the said letters and
 “ packets were all on the Public Service.—I do further certify, that
 “ I actually paid the above sum for travelling expenses.*

“ Signed _____

“ Deputy Judge Advocate.”

*“ I hereby confirm this account, the necessity and reasonableness
 “ of the several disbursements and sums charged therein, amount-
 “ ing to _____*

“ Signed _____

“ President.”

16.—“ When the person acting as Deputy Judge Advocate is
 “ an officer on the staff, the following addition is to be made to
 “ the certificate:—*and that the occasions above referred to required
 “ more than ordinary expedition, and could not have been performed
 “ with my own horses, consistently with the purposes for which they
 “ are kept.*”—Simmons.

17.—Form of officiating Deputy Judge Advocate’s
 receipt:—

*“ Received from the Right Honourable the Judge Advocate Gene-
 “ ral, the sum of _____ being amount of expenses incurred as
 “ officiating Deputy Judge Advocate, at General Courts Martial,
 “ for the Quarter ending 30th April, 1844.*

“ Signed _____

“ Deputy Judge Advocate.”

CHAPTER XII.

GENERAL OBSERVATIONS.

IN collecting and arranging the materials for this work, various reflections on the subject treated of have occurred to my mind, which induce me to offer in conclusion the following observations, with the hope that eventual benefit may accrue to the army by drawing attention to points which both merit and demand consideration.

The perusal of the foregoing pages will be sufficient to convince the reader that the situation of Judge Advocate is no sinecure; but that it requires qualifications and attainments of no mean quality to perform with ability the multifarious duties of the office; yet, notwithstanding all this must be evident, and that the duties are of a highly responsible nature, together with the fact that the appointment is expressly made by Her most gracious Majesty's commands, "*that there may not in any case be a failure of justice,*" it seems extraordinary that so little solicitude should be shown regarding the competency and qualifications of those appointed; nor is it the less surprising that, instead of specific regulations on *all* points being *officially* issued for the information of

Judge Advocates, custom should be the principal guide in the performance of such important duties.

“The Courts of Law at home, and the Supreme Courts, &c., in India, have regular rules for their conduct; and it would seem to be an anomaly that the army should not have their code, while the first Mutiny Act and Articles of War date from the year 1689.”—*Hough*.

“It is curious to observe, in this age of reform and progress, how little has been done for the amendment of our military law. There are in the Mutiny Act several contradictions and anomalies that ought to be corrected, and the law revised; but the annual Act is forced through the Houses *with infinitely less consideration* than is given to a turnpike bill or anything else that is a mere matter of routine. If there are defects and blemishes in the law itself, there are still more in its administration; nothing is more wanting than instructions under authority. There can be little doubt that some code of instructions, illustrated by precedents and examples, are quite necessary for the right administration of military law.”—*Naval and Military Gazette, May, 1843*.

In Her Majesty's Regulations and Orders for the Army, there are only *two* allusions to the Judge Advocate General's department, which are to be found at pages 10 and 248; the former relates to *the rank* of Deputy Judge Advocates, the latter to *the mode of transmission* of certain Courts Martial to the Judge Advocate General in London.

The third paragraph of Her Majesty's Regulations on Courts Martial directs Commanding Officers

“To require officers on their entrance into the army to attend the proceedings of all Courts Martial, as may occur in the corps for at least six months from the date of their joining, and they are not to be nominated members of Courts Martial until the Commanding Officer shall deem them competent to the performance of so important a duty.”

These are the rules directed to be observed regarding members of Courts Martial; but there are not any regulations, relative either to the nomination, qualifications, or competency of those who, though neither Judge nor Juror on Military Courts, are nevertheless appointed *to assist, advise, and instruct* the members of these Courts on all matters, and in the performance of those very duties which the latter are not permitted to exercise until deemed competent!—in fact, the Judge Advocate General's is the only department in the Army that has not official regulations established for the guidance of those belonging to it.

It is true, the warrant under the sign-manual commands a FIT PERSON to be appointed:—but is this command implicitly obeyed and attended to?—is the fitness of any person appointed Judge Advocate *ever* ascertained previous to appointment?—the persons appointed may be considered fit from possessing superior attainments, and abilities either as lawyers, or soldiers,—but the qualifications of *both* professions are requisite for this specific duty.

In the Mutiny Act and Articles of War, neither orders nor instructions are conveyed relative to the manner in which a Judge Advocate's multifarious duties are to be conducted; and from the absence of any rules and regulations on this subject, it might be supposed, *though most erroneously so*, that the competency and qualifications of the person

“Whose presence, duly appointed by authority, is essential to the jurisdiction of a General Court Martial; who is the legal adviser of the Court; the primum mobile of a Court Martial,” as M'Arthur says, *“not only impelling it to action, but on whom in*

“a great measure depends that harmony of motion so necessary to constitute a regular Court:”

Are of so little importance, that neither are necessary, and restrictive rules relative to appointment less requisite.

But it cannot be denied that every trade and profession requires an apprenticeship; or that a science or competent knowledge of any subject is to be obtained without a regular course of study and instruction, or without application and research. The lawyer, the physician, the engineer, the carpenter, the blacksmith, have all to labour hard for years to acquire a competent knowledge of their respective trades and professions; all have to serve an apprenticeship, or to undergo the strictest examination previously to being allowed to set up in trade, or to practice in their calling; and even the soldier must go through a course of drill before he is considered fit to enter the ranks;—but MILITARY JURISPRUDENCE appears to be considered INTUITIVE; and the proper administration of justice in the Army by *qualified* superintendants seems to be thought of such little consequence, that instances daily occur of persons being appointed to officiate as Judge Advocates at Courts Martial who have never even so much as given the subject a moment's thought or consideration, much less made it a study; indeed, few are appointed *anywhere*, or *at any time*, who are as conversant with the duties expected from them as they ought to be *for the ends of substantial justice*:—and this is the more striking, when the immense power given to Courts Martial by the 102nd Article of War is taken into consideration, and the fact that

a great portion of Her Majesty's Army is always serving at stations at which civil offences *must* be investigated by Military Courts.

Nor is this all: it is remarkable that in Great Britain, where delinquencies of soldiers are not tryable by Military Law, but where all ordinary offences *against the civil peace* are tried by the Common Law Courts,—so that no offence except those of a purely military nature can be tried by Courts Martial,—in almost every instance, civilians are appointed to conduct the duty of Judge Advocate;* and abroad, where alone civil offences committed by soldiers can be tried by Courts Martial, military men are usually selected for the duty.

The consequence of this is, that few Deputies Judge Advocate, whether officiating as such at home or abroad, can be said to be *properly qualified* to conduct the duties expected from them:—if the person nominated be a civilian, even if he is professionally a lawyer, it stands to reason, from his not having been brought up in the Army, and never having had occasion to study Military Law or customs, or in fact any thing appertaining to the military profession, he cannot be a "*proper person*," as directed in the warrant, from not being as conversant as a Judge Advocate ought to be with the duties of a soldier and the customs of war. If a military man is

* On three of the most celebrated Courts Martial (and many more might be adduced) which ever took place in England, Lieut.-Gen. Whitelocke's, in 1808; Col. Quentin's, 1814; Lieut.-Gen. Sir J. Murray's, 1815,—all of whom were tried for offences of a purely military nature,—the proceedings were conducted by civilians. The first-mentioned by the Hon. Mr. Ryder, who acknowledged the difficulty he laboured under "*from being completely unacquainted with the nature of military operations*;" the second was conducted by the Right Hon. C. M. Sutton; and the last by F. S. Larpent, Esq.

selected for the duty, there are few in the British army who ever give their attention sufficiently to the subject; for though

“It is the incumbent duty of all officers to apply themselves diligently to the acquirement of a competent knowledge of military law,”

Yet this is not all that is expected from a Deputy Judge Advocate General in the present day, and unless he has studied the general principles and rules of the Common Law of England, as well as the practice of Criminal Courts, he cannot be, as directed in the warrant, a *“fit person”* to advise and instruct the members of a Court Martial on the occurrence of any legal difficulty, or on trials for civil offences: in fact, it is equally as impossible for a military man to give a correct opinion on any legal point, as it is for a civilian to offer judicious advice on military matters, without having previously attained an adequate degree of knowledge on the respective subjects, and which, it must be acknowledged, is neither to be gained in a day nor by intuition.

The appointment of persons to officiate as Judge Advocates on trials by Courts Martial under such circumstances, instead of obviating a failure of justice, must be the reverse, and will in most cases prove an injustice to the prisoner under trial, an incalculable mischief to the State, besides being a source of difficulty to every member of a Court Martial, as well as to the Judge Advocate himself.

It would also appear that the very head of the department—the Judge Advocate General of Her Majesty’s Forces—enters office totally unacquainted with military law or customs;—and yet *his* opinion,

on whatever subject it may be, is *Law*, and as such must be obeyed and attended to by the army.

Captain Simmons observes :—

“ If it be true that the ‘*præteritorum memoria eventorum*’ is one of the chief qualifications of those who are required to be ‘*legibus militaribus optime institute*,’ the Judge Advocates General of the British army, selected as they are from political associations, must, notwithstanding the brilliant talent often evinced by them, frequently find themselves much at a loss on first acceding to office. The same may be said of the generality of Secretaries at War, who issue instructions controlling the proceedings of Courts Martial, some of whom have been known to pass their whole political lives in deprecating measures which, on acceding to office, they have felt themselves compelled to uphold; and hence it may be that the same doctrine has not at all times been held at the Horse Guards, the War Office, and Crown Street. It may likewise be attributable to this cause, that the Judge Advocate General’s office has at one moment adhered most scrupulously to the rules of common law and the maxims of special pleaders, and at other times has in practice deprecated all restraint, declaring, in effect, that Courts Martial are bound by no tangible rules in the interpretation of charges, and consequent application of punishment; and that, whether expressly charged, or indirectly imputed, provided an offence be proved, and referable to a clause in the Mutiny Act or Articles of War, it may be visited by a peculiar penalty authorized by that Article, and attached to a special offence. The officers of the British army, when called to the duty of Courts Martial, swear they will administer justice, if any doubts shall arise, according to the custom of war. Now the Judge Advocate General, WHOSE PECULIAR OFFICE IT IS TO ADVISE IN CRITICAL AND DOUBTFUL CASES AS TO THE CUSTOM AND USAGE OF WAR, must, on first emerging from forensic or Parliamentary pursuits, unless he acquire it intuitively, or by the wonder-working installation to office, be absolutely ignorant of such customs; nor will his ‘*viginti annorum lucubrationes*,’ if of such he can boast, have much assisted him.”—*Simmons*.

And yet it is to the officer holding this appointment

that every individual in the armies of Great Britain looks up, and relies, that through him substantial justice is duly administered according to the customs of war, as well as the Law of the land.

It is really much to be regretted that the situation of Judge Advocate General to Her Majesty's Forces is not conferred on an experienced military man for life, *freed from all political duties*; for it is actually denying justice under the mask of granting it, appointing one who must be unacquainted with military usages and law, and who is also fettered or biassed by political motives in his decisions, though the intent of the office is to supervise the due administration of justice throughout the army, and to uphold it in every respect according to the *Mutiny Act*, "*the Customs of War*," and "*the Laws of England*."

In the Bengal and Bombay Armies, all officers nominated to officiate temporarily, and even those posted permanently to the department, enter on their duties without any previous course of study or instruction, and consequently, for some time at least, can have but a very superficial acquaintance with what is expected from them;—qualifications or competency on appointment are little thought of; they are nominated and then left to themselves to get through the work as well as they can; their knowledge of Military and Criminal Law is dependent on their own application and research; and the correctness of their opinions on all points depends also on their own industry; it seems, therefore, extraordinary that where the welfare of these two armies is so much at stake all should be thus left to intuition.

In the Madras Army these matters are better managed, and the system therein adopted regarding the administration of justice appears not only to be excellent, but to work well:—all officers previously to entering on their duties are placed for a certain period under the immediate superintendence of the Judge Advocate General at the Presidency, for the purpose of making themselves acquainted with the duties they are to be called on sooner or later to perform; they have the personal aid and advice of the heads of the department; free access to the records, &c. of the Judge Advocate General's office, which latter affords them an opportunity of consulting the various trials held in the Madras Army for precedents, and of instructing themselves in the practice of Military Courts:—the reports of the several divisional deputies, with the remarks of the Commander-in-Chief and Judge Advocate General on all points of reference, are also placed at their disposal; in fact every thing appears to be done to render them efficient and qualified for the duty of Judge Advocate under all circumstances, and they are not allowed to enter on their duties, till reported qualified to do so.

A system of instruction similar to this is really indispensable in India, for, independent of the difficulties Judge Advocates always labour under on first appointment, from being totally uninstructed in their duties, little information is to be gained from the records in out-station offices; and treatises and works on Military and Criminal Law are not, without great difficulty and delay, procurable, whilst many of these works, especially those published in

England, do not contain all the information which the duties of Judge Advocates in India require; so that, unless they have an opportunity afforded them, when appointed to the department, of being able to consult those who are capable of giving them correct advice on any difficult or doubtful point, and of searching for information where alone it is to be found, it is next to an impossibility that they can attain even an insight into their duties, much less a competent knowledge of them.

There can be little doubt that the most beneficial advantages would result both to the armies of Great Britain and India, if Sir Charles J. Napier's recommendation was carried into effect, viz.—

“That no man should be appointed either to officiate or be permanently posted to the Judge Advocate General's department, till after a certain length of service as a regimental officer. That, previously to entering on his duties, a Judge Advocate should undergo a strict examination as to his knowledge of military and criminal law, and the practice of Military Courts;”

And all Deputies Judge Advocate be placed under the head of the department for a certain period, and not on any account permitted to enter on their duties until reported by the Judge Advocate General qualified to do so.

I am aware there are some who cannot divest themselves of the opinion, that the discipline of the Indian Army was not the less efficient, or crime of more frequent occurrence, when so great attention regarding form and legal technicalities was not required from officers [*such as Judge Advocates, Superintending Officers, and Members of all Military Courts*] appointed to conduct the duties at Courts Martial:—

but let those who are sceptical on this point remember that every order and regulation which has been issued on the subject, as well as the unremitting exertion of those in authority to have these orders acted up to, has emanated solely for the furtherance of justice to all. It surely will be admitted that the due administration of justice by Military Courts, in the investigation of offences committed by any member of an army, whether of a civil or a military nature, is of as essential importance to the welfare of that army, as the framing correct returns and accounts in the Adjutant General's, Pay, and other departments, more especially when human life on many trials, and on all a soldier's honour, is at stake. If these are not sufficient reasons, I know not what are ; for if the proceedings of a tribunal, the result of which may cost the offender his life,—or, what is as dear to him, his honour,—are not conducted in the strictest sense according to the established forms directed to be adhered to in the army, and at the same time according to the common law of the land, "*to the benefit of which,*" as Tytler justly observes, "*all British subjects are entitled for the protection of their life and liberty,*" the purpose for which alone Courts Martial are convened is not attained.

It must be evident to those who will give the subject the slightest consideration, that it is as much from incompetency as it is from inattention to established rules and regulations that we so often see offenders escape merited punishment ; the confirming authority finding it impossible to carry into execution a punishment justly adjudged and merited, but remitted in consequence of the trial having being irregularly or

illegally conducted. Hence evidently has arisen the necessity which, of late years, has compelled those in authority to demand greater care and attention on all points connected with trials by Courts Martial; it is consequently the duty of Judge Advocates *not only* to be thoroughly acquainted with, but to uphold to the utmost of their power, every rule and regulation in force on this subject, as it is also incumbent on them to be careful that Courts Martial conform to the laws of the land, more especially on trials for civil offences, "*that there may not in any case, or under any circumstances whatever, be a failure of justice.*"

Let it not be supposed that I am an advocate for soldiers of any grade being lawyers,—very far from it; it is unnecessary, and often the cause of great mischief. Officers of all ranks can easily qualify themselves for the duties expected from them as members of Courts Martial, without the necessity of transforming themselves "*into ill-informed attorneys;*" but I do most decidedly assert, after some little experience in the department, and not without giving the subject the deepest consideration, that the duties of Judge Advocates in the present day require qualifications and attainments which are *not to be obtained* without instruction and a regular course of study, to which must be added, if proficiency is an object, assiduity and research.

If proper attention was paid to these points, and none but those known to be qualified were appointed to conduct the proceedings of Courts Martial, greater deference would invariably be paid to the opinions of Judge Advocates when called on at

Courts Martial for advice ; for what reliance can be placed on the counsel of those who, from following a different calling to that they are exercising, are known to be unqualified to give it? The reason why Courts Martial decline to follow the advice of those appointed their "*law adviser*," emanates, in most instances, from the conviction on the mind of the Court that the members are better acquainted how to act than the Judge Advocate is to guide them : it is from the lamentable fact, that those whom the warrant under the sign-manual commands to be

"Fit persons, that there may not in any case be a failure of justice,"—and "for the more orderly proceedings of Courts Martial,"

Are in too many instances *unfit* and *unqualified* to perform the duties which are expected from them. Now, when it is taken into consideration that the maintenance of discipline, together with the welfare and happiness of so many individuals belonging to an army, indisputably depend so much on the due and correct administration of justice, few will hesitate to acknowledge that the appointment of properly qualified persons to conduct the duties of a Judge Advocate General demands greater attention than is at present paid to it.

In the first chapter of this work, it will be observed there are no less than *five* Forms of Warrants which are issued to Deputies Judge Advocate, one and all differing from each other ; the duties of this office, let them be conducted by a civilian or a military man, are precisely the same ; the powers conveyed by these warrants to Deputies Judge Advocate, as

well as the authority to issue them, emanate from one source—the warrant issued under the sign-manual in conformity with the power conveyed by the Mutiny Act. There may be some good reason for this difference of form, but it certainly appears an anomaly, especially in the East Indies, where the three armies of the Honourable East India Company, though serving under separate Presidencies, are yet under one Government, and ruled by the same Articles of War.

Major Hough, at page 152, ‘Military Law Authorities,’ states:—The Judge Advocate General of the Bengal Army, in a letter No. 2492½ of 1830, to the Advocate General at Calcutta, wrote:—

“ I have submitted to His Excellency the Commander-in-Chief, “ that the Judge Advocate being a *military* man does not bring “ him under the Articles of War, for acts done in the capacity of “ Judge Advocate, which is a *civil* office.”

This opinion, and those expressed in Captain Simmons’s work on the Practice of Courts Martial,—

“ *That he was not prepared to say whether the Judge Advocate “ was under Military Law or not,*”—and “ *that he is not respon- “ sible to any court of justice for the opinion he may give,*—”

Appear to be so liable to mislead those who only give the subject a hasty or casual consideration, and at the same time so likely to induce a careless performance of such important duties, that a few remarks on these points are indispensable; more especially as Captain Simmons’s work is so generally, and most justly, acknowledged one of the best modern authorities on *all* points relating to military jurisprudence.

If the Judge Advocate being a military man does not bring him under the Articles of War for acts done in the capacity of Judge Advocate, as it is a

civil office, "and he is also not responsible to any court of justice for the opinion he may give," to whom, then, I would ask, is the Judge Advocate responsible? He cannot be an irresponsible officer because he holds a civil office; for in that case commissaries, paymasters, and all other military men holding *civil* appointments would be equally exempt, and not amenable to military law; but if this was the case, why should army rank be assigned to Judge Advocates, which it is at page 10 of Her Majesty's Regulations:—that Deputies Judge Advocate, *when at the head of the department,*

"[Are to rank] as colonels; *if not at the head of the department,* as major;—and if an officer, according to his rank in the "army."

This is in itself sufficient authority; for here it is directed, that persons holding the appointment are to be considered as holding the rank of military men: now if Judge Advocates obtain rank, serve, and receive pay as soldiers, there can be little doubt of their being amenable to military law.

It must be remembered that Courts Martial are constituted, and Judge Advocates are appointed by Her Majesty, and those under her, in pursuance of provisions of the Mutiny Act, passed by the Legislature for the better government of Her Majesty's Forces; the Judge Advocate's warrant (except in England) is always issued by a *general officer*;—the Judge Advocate in almost every case receives *instructions* and *orders* from the same authority;—the Judge Advocate, as officer of a General Court Martial, is *under the orders of the Court*, composed entirely of *military men*:—now if the Judge Advocate should disobey

the orders of his superior or of the Court—or act insubordinately in either case—is it possible that any one can suppose he is not under *military* law, or that a Judge Advocate is not liable to *censure*, or to *dismissal* from *office* for any propriety committed by him in the capacity of Judge Advocate; and would not either penalty be inflicted under authority conveyed by the Mutiny Act. In India there can be no doubt on the subject, for General the Honourable Sir H. Fane, when Commander-in-Chief in India, told the army in a General Order dated 25th July, 1836,—that there were authorities (meaning Deputies Judge Advocate) in every military division “*who were responsible for the decisions they gave;*”—and the Madras Regulations are equally explicit [*vide* Chapter 6, pars. 1, 2, and 7].*

On the other hand, let us suppose an action brought against a Court Martial for some illegal act; which, on the case being investigated, is clearly proved to

* Some time after the above observations were written, the following remarks were issued to the Madras Army on the 10th June, 1844, by His Excellency Lieut.-Gen. the Most Noble the Marquis of Tweeddale, K.T. and C.B., Commander-in-Chief of the Madras Army:—

“His Excellency cannot but express his disapprobation of the manner in which the prosecution has been conducted by the Deputy Judge Advocate General in not going into the evidence to prove the averment in the charge that — — committed the act imputed to him *maliciously* and *wilfully*; it was incumbent on the Deputy Judge Advocate to have entered fully into the facts, which appear so distinctly recorded in the proceedings of the Court of Inquiry. It is for the Deputy Judge Advocate to establish the charge, and for the Commander-in-Chief to commute such part of the sentence as he may deem fit.”

Now here is a case in point; the *military* authority delegated by Her Majesty to convene General Courts Martial, and to appoint a Judge Advocate, expresses in a *General Order* issued to the army, his disapprobation of the manner in which the prosecution was conducted by the Judge Advocate. Nothing can be more conclusive than this:—that although the duties of a Judge Advocate are of a *civil* nature, yet he is responsible to the *military* authority who appoints him, and consequently is amenable to military law.

have arisen from advice given by the Judge Advocate! Is the person who thus misleads the Court; who is expressly appointed to *obviate a failure of justice*, and for the more orderly proceedings of Courts Martial; whose particular duty it is to *prevent*, by pointing out to Courts Martial such occurrences as *undue exercise of authority, excess of jurisdiction, or illegality of proceedings*, to escape the penalty all the other members of a Court Martial, collectively and individually, are liable to?—the 76th and 56th sections of the two military acts are surely sufficiently explicit on this point [*vide* Chapter 1, pars. 28, 29, 30, and 31].

If the Judge Advocate was considered an irresponsible officer, Her Majesty's warrant issued under the sign-manual would not command the appointment of such an officer; the presence also of a Judge Advocate duly appointed would not be considered essential to the jurisdiction of a Court Martial; neither would the word "Minister" be inserted by the Legislature in the 76th and 56th sections of the two Mutiny Acts.

If, again, the sole object of a Judge Advocate being appointed to attend at a General Court Martial was merely to record and register the proceedings of the Court, any clerk would perform this duty equally well; but the Judge Advocate is appointed for a far different and more important purpose, it being his duty, in conducting and recording the proceedings, to *obviate a failure of justice and the slightest deviation from either military law, or custom, or the law of the land; to administer oaths; to advise on points of law, of custom, and of form; the very performance of*

which duties, under *military* orders and instructions, renders him responsible *to those who appoint him*, and *to the laws of his country*, if he misleads the members of the Court, as whose “minister” he is appointed to guide and instruct.

It is very much to be regretted that any difference of opinion should exist on this point; and that, too, by those who are considered the most eminent writers on Military Law:—General Kennedy, Major Hough, and all others, being diametrically opposed to the opinions advanced by Major Adye and Captain Simmons; but the fact *that there is a difference of opinion* is a convincing proof of the necessity that exists that a clear exposition of the law, and explicit regulations on this subject, should be issued by *authority*.

APPENDIX I.

1.—Considering the information contained in the following excellently drawn-up Tabular Statement likely to afford much valuable assistance to Judge Advocates, I have included it entire as the best epitome on the subject extant.

2.—“ By the provisions of the 102nd Article of War for Her Majesty’s Forces, and the 2nd Section of the Mutiny Act for the Company’s European Troops, and the 92nd Article of War thereto annexed, General Courts Martial are empowered to try certain Offences therein specified, committed by Officers and Men of the respective Services above one hundred and twenty miles from the Presidencies of Fort William, Fort St. George, and Bombay ; and by the Articles of War referred to, it is directed, that in all such cases the Sentence shall be ‘ *in conformity to the common and statute Law of England.*’ It therefore becomes necessary, that the nature of the several offences of which cognizance is so given, and which may come before Military Courts, with their respective punishments, should be generally known, as they are severally provided for by Law, together with the distinction which exists between Principals and Accessaries, as determined by judicial decisions, and defined by writers of note and authority.”—*Bombay Military Regulations*, 192.

3.—“ The following Tabular Statement will briefly show the nature

“ of the offences under consideration, and the Statutes applicable to
“ each, and the punishments which attach to the Principals and Acces-
“ saries. It is, however, incumbent on all Officers (*more especially*
“ *those who may be called on to discharge the duties of JUDGE ADVO-*
“ *CATE*) to make themselves acquainted, *as fully as possible*, with the
“ *facts and circumstances* which constitute the crimes specified.”—
Bombay Military Regulations, 202.

4.—“ In passing sentences in cases involving a capital punishment,
“ an important discretionary power is vested in Courts Martial, which
“ it behoves them to exercise with the fullest consideration of all the
“ circumstances connected with the matter under trial. By the
“ respective Articles of War referred to, it is provided, ‘ *That in*
“ ‘ *all cases where such Court Martial shall have convicted any Soldier*
“ ‘ *of any offence punishable with death, it shall be lawful for such*
“ ‘ *Court Martial, instead of sentencing the offender to death, to*
“ ‘ *adjudge him to be transported as a Felon for Life, or for a certain*
“ ‘ *term of years.*’ ”—*Bombay Military Regulations, 203.*

**TABULAR STATEMENT OF CRIMINAL OFFENCES, WITH THE AUTHORIZED PUNISHMENTS,
AGREEABLE TO THE LATEST STATUTES.**

		Punishments.		
No.	Nature of Offence.	Authorities.	Principals in the first and second degree and Accessories before the fact.	Accessories after the fact.
I.	ABDUCTION.			
	1st.—Abduction of a Woman on account of her fortune— <i>Felony.</i>	9 Geo. 4 c. 31. s. 19. 31.	Transportation for life, or not less than seven years; or imprisonment, with or without hard labour, not exceeding four years.	Imprisonment, with or without hard labour, not exceeding two years.
	2d.—Abduction of a Girl under sixteen years of age, from her parents or guardians— <i>Misdemeanor.</i>	9 Geo. 4. c. 31. s. 20. 31.	Fine or imprisonment, or both. No accessories—all parties concerned must be indicted as principals.	
	3d.—Abduction of a Child under ten years of age— <i>Felony.</i>	9 Geo. 4. c. 31. s. 21. 31.	Transportation for seven years; or imprisonment, with or without hard labour, not exceeding two years, and if a male, to be once, twice, or thrice publicly or privately whipped, in addition to the imprisonment, if the Court shall think fit.	Imprisonment, with or without hard labour, not exceeding two years.
II.	ABORTION.			
	Unlawfully procuring the miscarriage of a woman— <i>Felony.</i>	7 W. 4. & 1 Vict. c. 85. s. 6, 7, 8.	Transportation for life, or for not less than fifteen years; or imprisonment not exceeding three years, with or without hard labour, and with or without solitary confinement.— <i>Vide Note 1, at the end of Tabular Statement.</i>	Imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement.

III.

ARSON.	7 W. 4. & 1 Vict. c. 89. s. 2. 11, 12.	Death.	Imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement.— <i>Vide</i> Note 1.
1st.—Burning a House, some person being therein— <i>Felony</i> .	7 W. 4. & 1 Vict. c. 89. s. 3. 11, 12.	Transportation for life, or for not less than fifteen years; or imprisonment not exceeding three years, with or without hard labour, and with or without solitary confinement.— <i>Vide</i> Note 1, at the end of <i>Tabular Statement</i> .	Same as in the preceding paragraph of this column.
2d.—Burning Houses, &c., with intent to injure or defraud any person— <i>Felony</i> .	7 W. 4. & 1 Vict. c. 89. s. 3. 11, 12.	Death.	Same as in the preceding paragraph of this column.
3rd.—Setting fire to Ships, with intent to murder— <i>Felony</i> .	7 W. 4. & 1 Vict. c. 89. s. 4. 11, 12.	Same as in 2d para. of this column, under the head of "Arson."	Same as in 1st para. of this column, under the head of "Arson."
4th.—Setting fire to Ships, with intent to injure or defraud any person— <i>Felony</i> .	7 W. 4. & 1 Vict. c. 89. s. 6. 11, 12.	Same as in 2d para. of this column, under the head of "Arson."	Same as in 1st para. of this column, under the head of "Arson."
5th.—Setting fire to Stacks of Corn, Grain, Hay, Coal, Wood, Charcoal, &c.— <i>Felony</i> .	7 W. 4. & 1 Vict. c. 89. s. 10, 11, 12.	Same as in 2d para. of this column, under the head of "Arson."	Same as in 1st para. of this column under the head of "Arson."
6th.—Setting fire to Crops, whether standing or cut down, or to any Wood, Coppice, or Plantation of Trees, &c.— <i>Felony</i> .	7 & 8 Geo. 4. c. 30. s. 17. 26, 27. W. 4. & 1 Vict. c. 90. s. 5.	Transportation for seven years, or imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement; and if a male, to be once, twice, or thrice publicly or privately whipped, if the Court shall think fit.	Same as in 1st para. of this column under the head of "Arson."

IV.

BIGAMY.
Any person, being married, marrying again during the life-time of the former Husband or Wife—*Felony.*

9 Geo. 4. c. 31.
s. 22. 31.

Transportation for seven years, or imprisonment with or without hard labour, not exceeding two years.

Imprisonment, with or without hard labour, not exceeding two years.

V.

BURGLARY.
1st.—Breaking and entering into any Dwelling House, between 9 P. M. and 6 A. M., with intent to commit felony—attended with violence to any person being therein—*Felony.*
2d.—Burglary, unattended with violence to any person—*Felony.*

7 W. 4. & 1 Vict.
c. 86. s. 2. 4,
6, 7.

Death.

Imprisonment, not exceeding two years, with or without hard labour, and with or without solitary confinement.—*Vide Note 1.*

7 W. 4. & 1 Vict.
c. 86. s. 3. 4,
6. 7.

Transportation for life, or not less than ten years; or imprisonment not exceeding three years, with or without hard labour, and with or without solitary confinement.

Same as in the preceding paragraph of this column.

By the 7th & 8th C. 4. c. 29. s. 13, it is enacted, that no building, though within the same curtilage (or courtyard) with the dwelling house and occupied therewith, shall be deemed to be part of such dwelling house for the purpose of burglary, unless there shall be a communication between such building and dwelling house, either immediately or by means of a covered and inclosed passage leading from one to the other.
For stealing in a dwelling house, see under the head of Larceny.
For House-breaking, not amounting to burglary, see under that head.

VI.

CHEATING.
Any person, by any false pretence, obtaining from any other person

7 & 8 Geo. 4. c.
29. s. 53. 61.

Transportation for seven years, or fine or imprisonment, or both.—The imprison-

<p>VII.</p> <p>any Chattel, Money, or valuable Security—<i>Misdemeanour</i>.</p>	<p>7 W. 4. & 1 Vict. c. 90. s. 5.</p>	<p>ment may be either with or without hard labour, and with or without solitary confinement. No accessories—all parties concerned must be indicted as principals.</p>	
<p>COINING.</p>			
<p>1st.—Counterfeiting the Gold or Silver Coin of the Realm—<i>Felony</i>.</p>	<p>2 W. 4. c. 34. s. 3. 19.</p>	<p>Transportation for life, or for any term not less than seven years; or imprisonment for any term not exceeding four years, with or without hard labour, and with or without solitary confinement. — <i>Vide Note 1.</i></p>	<p>Imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.</p>
<p>2nd.—Counterfeiting Foreign Coin—<i>Felony</i>.</p>	<p>37 Geo. 3. c. 126. s. 2.</p>	<p>Transportation for any term of years not exceeding seven years.</p>	
<p>VIII.</p> <p><i>In the 102d Article of War for Her Majesty's Forces, there are no specific provisions relating to coining; but as that enactment gives cognizance to Courts Martial of "any offence which if committed in England would be felony," and as counterfeiting British, and also foreign, coin is declared by several statutes to be such, Courts of the above description must be considered empowered to try the same. In the 92d Article of War for the Company's European troops, offences of the nature referred to are expressly declared to be cognizable by a General Court Martial.</i></p> <p>FORGERY.</p> <p>1st.—Forging or altering, or offering, uttering, disposing of, or putting off, knowing the same to be forged, or altered, any Bank-</p>	<p>11 Geo. 4. & 1 W. 4. c. 66. s. 3, 4., 7 W. 4. & 1 Vict. c.</p>	<p>Transportation for life, or for not less than seven years; or imprisonment not exceeding four, nor less than two years, with or without hard labour, and with or</p>	<p>Imprisonment not exceeding two years, with or without hard labour, and with or</p>

<p>note, Will, Testament, Codicil, or Testamentary Writing, or any Bill of Exchange, or Promissory Note for the payment of money, or any undertaking Warrant, or Order for the payment of money, with intent to defraud any person whatsoever—<i>Felony</i>.</p>	<p>84. s. 1, 2, 3., 1 W. 4. c. 66. s. 25.</p>	<p>without solitary confinement. — <i>Vide Note 1.</i></p>	<p>without solitary confinement.</p>
<p>2nd.—Forging any Deed, Bond, or Writing Obligatory, or any Receipt or any Order for the delivery of goods, &c.—<i>Felony</i>.</p>	<p>11 Geo. 4. & 1 W. 4. c. 66. s. 10.</p>	<p>Same as in the preceding paragraph of this column.</p>	<p>Same as in the preceding paragraph of this column.</p>
<p>3rd.—Purchasing or receiving forged Bank Notes, knowing them to be such—<i>Felony</i>.</p>	<p>11 Geo. 4. & 1 W. 4. c. 66. s. 12.</p>	<p>Fourteen years' transportation.</p>	<p>Same as in the 1st para. of this column under the head of "Forgery."</p>
<p>HOUSE-BREAKING. (NOT AMOUNTING TO BURGLARY.) 1st.—Breaking and entering any Dwelling House, and stealing therein any Chattel, Money, or valuable Security, to any value whatsoever—<i>Felony</i>.</p>	<p>7 & 8 Geo. 4. c. 29. s. 12., 7 W. 4. & 1 Vict. c. 90. s. 1. 3.</p>	<p>Transportation for not more than fifteen, nor less than ten years; or imprisonment not exceeding three years, with or without hard labour, and with or without solitary confinement.—<i>Vide Note 1.</i></p>	<p>Imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement.</p>
<p><i>The enactment, in respect to the connection of buildings with the dwelling house, in cases of burglary, applies to those of house-breaking.</i></p>	<p>7 & 8 Geo. 4. c. 29. s. 14., 7 W.</p>	<p>Same as in the preceding paragraph of this column.</p>	<p>Same as in the preceding paragraph of this column.</p>
<p>2nd.—Breaking and entering any building, and stealing therein</p>			

<p>any Chattel, Money, or valuable Security, such building being within the curtilage of a Dwelling House, and occupied therewith, but not being part thereof—<i>Felony</i>.</p> <p>3rd.—Breaking and entering any Shop, Warehouse, or Counting House, and stealing therein any Chattel, Money, or valuable Security—<i>Felony</i>.</p> <p>4th.—Breaking and entering a Church or Chapel, and stealing therein; or after having stolen, breaking thereout—<i>Felony</i>.</p>	<p>4. & 1 Vict. c. 90. s. 2, 3.</p> <p>7 & 8 Geo. 4. c. 29. s. 15., 7 W. 4. & 1 Vict. c. 90. s. 2, 3.</p> <p>7 & 8 Geo. 4. c. 29. s. 10., 6 & 7 W. c. 4., 7 W. 4. & 1 Vict. c. 90. s. 5.</p>	<p>Same as in the 1st paragraph of this column, under the head of "House-breaking."</p> <p>Transportation for life, or not less than seven years; or imprisonment not exceeding three years, with or without hard labour, and with or without solitary confinement.—<i>Vide Note 1.</i></p>	<p>Same as in the 1st paragraph of this column under the head of "House-breaking."</p> <p>Same as in the 1st paragraph of this column under the head of "House-breaking."</p>
<p><i>For stealing in a dwelling house, &c., unaccompanied with a breaking, see under the head of "Larceny."</i></p> <p>X. LARCENY (<i>Theft</i>).</p> <p>1st.—Simple Larceny (<i>i. e.</i> unaccompanied with violence, or taking from the person, or the habitation of the owner)—<i>Felony</i>.</p>	<p>7 & 8 Geo. 4. c. 29. s. 2, 3, 4. 61., 7 W. 4. & 1 Vict. c. 90. s. 5.</p>	<p>Transportation for seven years, or imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement; and if a male, to be once, twice, or thrice publicly or privately whipped, in addition to the imprisonment, if the Court shall think fit.</p>	<p>Imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement.</p> <p><i>If the act amounts to a receiving of stolen goods, see under that head.</i></p>

<p>2d.—Any Clerk or Servant stealing any Chattel, Money, or valuable Security belonging to, or in the possession or power of his Master.—<i>Felony.</i></p>	<p>7 & 8 Geo. 4. c. 29. s. 46. 4. 61., 7 W. 4. & 1 Vict. c. 90. s. 5.</p>	<p>Transportation for not more than fourteen, nor less than seven years; or imprisonment not exceeding three years, with or without hard labour, and with or without solitary confinement; and if a male, to be once, twice, or thrice publicly or privately whipped, in addition to the imprisonment, if the Court shall think fit.</p>	<p>Same as in the preceding paragraph of this column.—<i>See note to ditto.</i></p>
<p>3d.—Any Clerk or Servant receiving or taking into his possession any Chattel, Money, or valuable Security, for, or in the name or on the account of his Master, and fraudulently embezzling the same or any part thereof.—<i>Felony.</i></p>	<p>7 & 8 Geo. 4. c. 29. s. 47. 4. 61., 7 W. 4. & 1 Vict. c. 90. s. 5.</p>	<p>Same as in the preceding paragraph of this column.</p>	<p>Same as in the 1st para of this column under the head of "Larceny."—<i>See note to ditto.</i></p>
<p>4th.—Any person stealing Horses, Cows, Sheep, &c., or wilfully killing any such Cattle, with intent to steal the carcase, or skin, or any part of the Cattle so killed.—<i>Felony.</i></p>	<p>7 & 8 Geo. 4. c. 29. s. 25. 4. 61., 7 W. 4. & 1 Vict. c. 90. s. 1. 5. 3.</p>	<p>Transportation for not more than fifteen, nor less than ten years; or imprisonment not exceeding three years, with or without hard labour, and with or without solitary confinement.—<i>Vide Note 1.</i></p>	<p>Same as in the 1st para. of this column under the head of "Larceny."—<i>See note to ditto.</i></p>
<p>5th.—Stealing any property in a Dwelling House, and by any menace or threat putting any one, being therein, in bodily fear.—<i>Felony.</i></p>	<p>7 W. 4. & 1 Vict. c. 86. s. 5, 6, 7.</p>	<p>Same as in the 4th paragraph of this column, under the head of "Larceny."</p>	<p>Same as in the 1st para. of this column under the head of "Larceny."</p>
<p>6th.—Stealing in a Dwelling House any Chattel, Money, or valuable Security, to the value in</p>	<p>7 & 8 Geo. 4. c. 29. s. 12. 4. 61., 7 W. 4. & 1</p>	<p>Same as in the 4th paragraph of this column, under the head of "Larceny."</p>	<p>Same as in the 1st para. of this column under the head of "Larceny."</p>

<p>the whole of five pounds or more—<i>Felony</i>. 7th.—Stealing from a Vessel, Barge, or Boat, in any port of entry or discharge, or upon any navigable River, Canal, &c., or stealing from any Dock, Wharf, or Quay—<i>Felony</i>.</p>	<p>Vict. c. 90. s. 5. 7 & 8 Geo. 4. c. 29. s. 17. 4. 61., 7 W. 4. & 1 Vict. c. 90. s. 2. 5.</p>	<p>Same as in the 4th paragraph of this column, under the head of "Larceny."</p>	<p>Same as in the 1st paragraph of this column under the head of "Larceny."</p>
<p>8th.—Plundering or stealing any part of any Ship or Vessel which shall be in distress, or wrecked, stranded, or cast on shore, or any Goods, Merchandise, or articles of any kind belonging to such Ship or Vessel—<i>Felony</i>.</p>	<p>7 W. 4. & 1 Vict. c. 87. s. 8, 9, 10.</p>	<p>Same as in the 4th paragraph of this column, under the head of "Larceny."</p>	<p>Same as in the 1st paragraph of this column under the head of "Larceny."—See note to <i>ditto</i>.</p>
<p>9th.—Stealing silk, &c., (to the value of ten shillings) in the process of manufacture—<i>Felony</i>.</p>	<p>7 & 8 Geo. 4. c. 29. s. 16. 4. 61. 7 W. 4. & 1 Vict. c. 90. s. 5. 2.</p>	<p>Same as in the 4th paragraph of this column under the head of "Larceny."</p>	<p>Same as in the 1st paragraph of this column under the head of "Larceny."—See note to <i>ditto</i>.</p>
<p>10th.—Any person stealing any chattel or fixture let to be used by him or her, in or with any house or lodging—<i>Felony</i>.</p>	<p>7 & 8 Geo. 4. c. 29. s. 45. 3. 4. 61., 7 W. 4. & 1 Vict. c. 90. s. 5.</p>	<p>Punishable as a simple larceny. See 1st paragraph of this column under the head of "Larceny."</p>	<p>Same as in the 1st paragraph of this column under the head of "Larceny."—See note to <i>ditto</i>.</p>
<p>11.—Stealing, or cutting, or otherwise destroying or damaging, with intent to steal, the whole or any part of any tree, shrub,</p>	<p>7 & 8 Geo. 4. c. 29. s. 38, 39. 42. 3, 4. 61., 7 W. 4. & 1</p>	<p>Punishable as a simple larceny. See 1st paragraph of this column under the head of "Larceny."</p>	<p>Same as in the 1st paragraph of this column under the head of "Larceny."—See note to <i>ditto</i>.</p>

<p>&c. growing in any ground adjoining or belonging to any Dwelling House, if the value exceed one pound; or, if elsewhere, the value exceed five pounds; or on conviction after two previous convictions, provided the damage amount to one shilling at the least;—or stealing, or destroying, or damaging, with intent to steal, any Plant, Root, Fruit, &c., growing in any garden, orchard, &c., having previously been convicted of the same offence—<i>Felony</i>.</p>	<p>Vict. c. 90. s. 5.</p>	<p><i>Committing any waste or spoil in walks of trees, parks, warrens, gardens, &c., or maliciously destroying any property, may be tried as a military offence under the 68th Article of War for Her Majesty's Forces, and 63d of those for the Company's European Troops.</i></p>	<p>Punishable as a simple larceny. See 1st paragraph of this column under the head of "Larceny."</p>	<p>Same as in the 1st paragraph of this column under the head of "Larceny."</p>
<p>12th.—Stealing or cutting, &c., with intent to Steal, any Glass, Wood-work, Lead, Metal, or Fixtures belonging to any building being private property, or to any place dedicated to the public use or ornament—<i>Felony</i>.</p>	<p>7 & 8 Geo. 4. c. 29. s. 44. 3. 4. 61. 7 W. 4. & 1 Vict. c. 90. s. 5.</p>	<p>Punishable as a simple larceny. See 1st paragraph of this column under the head of "Larceny."</p>	<p>Punishable as a simple larceny. See 1st paragraph of this column under the head of "Larceny."</p>	<p>Same as in the 1st paragraph of this column under the head of "Larceny."</p>
<p>13th.—Stealing, or for any fraudulent purpose destroying or concealing any Will, Codicil, or other Testamentary Instrument; or stealing any Paper or Parchment, being evidence of the title to any real estate—<i>Misdemeanour</i>.</p>	<p>7 & 8 Geo. 4. c. 29. s. 22. 23. 4. 61. 7 W. 4. & 1 Vict. c. 90. s. 5.</p>	<p>Transportation for seven years, or imprisonment, fine, or both.—The imprisonment may be with or without hard labour, and with or without solitary confinement. No accessories—all parties concerned must be indicted as principals.</p>	<p>Transportation for seven years, or imprisonment, fine, or both.—The imprisonment may be with or without hard labour, and with or without solitary confinement. No accessories—all parties concerned must be indicted as principals.</p>	<p>No accessories—all parties concerned must be indicted as principals.</p>

<p>14th.—Stealing any Deed, Bond, Bill, Note, Warrant, Order, or other Security for Money, or for payment of money, or any Warrant or Order for the delivery or transfer of any goods or valuable thing—<i>Felony</i>.</p>	<p>7 & 8 Geo. 4. c. 29. s. 5. 4. 61. 7 W. 4. & 1 Vict. c. 90. s. 5.</p>	<p>Punishable in the same manner as if the defendant had stolen any chattel of like value with the share, interest, or deposit to which the security so stolen may relate, or with the money due on the security so stolen, or secured thereby, and remaining unsatisfied, or with the value of the goods, or other valuable thing mentioned in the warrant or order. Transportation for life, or for not less than seven years; or imprisonment not exceeding four years, with or without hard labour, and with or without solitary confinement.—<i>Vide Note 1.</i></p>	<p>Same as in the 1st paragraph of this column under the head of "Larceny."</p>
<p>15th.—Stealing from, or out of, a post letter, any Chattel, Money, or valuable Security—<i>Felony</i>.</p>	<p>7 W. 4. & 1 Vict. c. 36. s. 27. 35. 41, 42. 7 W. 4. & 1 Vict. c. 90. s. 5.</p>	<p>Same as in the 1st paragraph of this column under the head of "Larceny." If the act amount to a receiving of stolen letters, see 3d paragraph under the head of "Receiving stolen goods."</p>	<p>Same as in the 1st paragraph of this column under the head of "Larceny." If the act amount to a receiving of stolen letters, see 3d paragraph under the head of "Receiving stolen goods."</p>
<p>16th.—Stealing a Post Letter-bag, or a post letter from a post letter-bag, or from a post-office, or from any officer of the post-office, or from a mail.</p>	<p>7 W. 4. & 1 Vict. c. 36. s. 23. 35. 41, 42. 7 W. 4. & 1 Vict. c. 90. s. 5.</p>	<p>Same as in the 15th paragraph of this column under the head of "Larceny."</p>	<p>Same as in the 1st paragraph of this column under the head of "Larceny."—<i>See note to ditto.</i></p>
<p>For "Stealing from the person," "Stealing, attended with violence," and "Extorting property by threats," see under the head of "Robbery."</p>	<p>MANSLAUGHTER.</p>	<p>Transportation for life, or for not less than</p>	<p>Imprisonment not ex-</p>
<p>XI.</p>			

ing of another, without any malice, either expressed or implied—*Felony*.

MURDER.

1st.—Unlawfully Killing any reasonable Creature in being, with malice aforethought, either expressed or implied—*Felony*.

2nd.—Poisoning, Stabbing, Cutting, or Wounding, or by any means whatsoever causing to any person any bodily injury dangerous to life, with intent to commit murder—*Felony*.

3rd.—Attempting to administer to any person Poison, or other destructive thing, or Shooting at, or attempting to Discharge any kind of loaded Arms at any person, or attempting to Drown, Suffocate, or Strangle any person, with intent to commit murder, although no bodily injury be effected—*Felony*.

4th.—Shooting at any person, stabbing, Cutting, &c., with intent to

seven years; or imprisonment, with or without hard labour, not exceeding four years, or with fine.

In Manslaughter, the offence being sudden and unpremeditated, there can be no accessaries before the fact.

Death.

9 Geo. 4. c. 31. s. 3.

Death.

7 W. 4. & 1 Vict. c. 85. s. 2. 7 W. 4. & 1 Vict. c. 90. s. 5.

Transportation for life, or not less than fifteen years; or imprisonment not exceeding three years, with or without hard labour, and with or without solitary confinement.—*vide Note 1.*

7 W. 4. & 1 Vict. c. 85. s. 3. 7. 7 W. 4. & 1 Vict. c. 90. s. 5.

ceeding two years, with or without hard labour.

Transportation for life, or imprisonment not exceeding four years, with or without hard labour.

Imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement.

Same as in the 2nd paragraph of this column under the head of "Murder."

Same as in the 2nd paragraph of this column

<p>maim, disfigure, or disable such person, or to do some grievous bodily harm, or with intent to resist or prevent the lawful apprehension or detention of any person—<i>Felony</i>.</p> <p>5th.—Unlawfully and maliciously sending or delivering to, or causing to be taken or received by, any person, any explosive substance, or other dangerous or noxious thing, or casting or throwing upon, or otherwise applying to, any person any corrosive fluid, or other destructive matter, with intent to burn, maim, disfigure, or disable any person, or to do some other grievous bodily harm, and whereby any person shall be burnt, maimed, &c.—<i>Felony</i>.</p> <p>6th.—A woman indicted for the Murder of a Child, recently born, and the Jury, though acquitting her of the capital offence, finding that she was delivered of a Child, and that she did, by secret burying or otherwise disposing of the dead body of such child,</p>	<p>7 W. 4. & 1 Vict. c. 90. s. 5.</p> <p>7 W. 4. & 1 Vict. c. 85. s. 5. 7. 7 W. 4. & 1 Vict. c. 90. s. 5.</p>	<p>Same as in the 3rd paragraph of this column under the head of "Murder."</p>	<p>Same as in the 2nd paragraph of this column under the head of "Murder."</p>
<p>9 Geo. 4. c. 31. s. 14. 31.</p>	<p>Imprisonment, with or without hard labour, not exceeding two years. No accessories—all parties concerned must be indicted as principals.</p>		

<p>endeavour to conceal the birth thereof—<i>Misdemeanour</i>.</p>	<p>PERJURY. 1st.—A false Oath or Affirmation taken in a judicial proceeding, before a competent jurisdiction—<i>Misdemeanour</i>.</p>	<p>2 Geo. 2. c. 25. s. 2. 3 Geo. 4. c. 114. 7 W. 4. & 1 Vict. c. 23.</p>	<p>Transportation not exceeding seven years, or imprisonment with hard labour, for the same period, and a fine. (An accessary before the fact would be liable to an indictment for "Subornation of Perjury." See under that head.)</p>
<p>endeavour to conceal the birth thereof—<i>Misdemeanour</i>.</p>	<p>PERJURY. 2d.—Subornation of Perjury, viz. instigating or endeavouring to persuade another to swear falsely—<i>Misdemeanour</i>.</p>	<p>2 Geo. 2. c. 25. s. 2. 3 Geo. 4. c. 114. 7 W. 4. & 1 Vict. c. 23.</p>	<p><i>This offence may be punished according to sec. 55 of the Mutiny Act, for the Company's European Troops. 2nd. To convict a prisoner of perjury two witnesses are necessary.</i></p>
<p>endeavour to conceal the birth thereof—<i>Misdemeanour</i>.</p>	<p>ROBBERY. 1st.—Robbery, attended with stabbing, cutting, or wounding—<i>Felony</i>.</p>	<p>7 W. 4. & 1 Vict. c. 87. s. 2. 9.</p>	<p>Same as in the 1st paragraph of this column under the head of "Perjury."</p>

Imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement.
If the act amounts to the receiving of stolen goods, see under that head.

<p>2nd.—Robbery, attended with beating, or other personal violence; or Robbing, being armed with any offensive weapon, or robbing in concert with one or more—<i>Felony</i>.</p>	<p>7 W. 4. & 1 Vict. c. 87. s. 3. 9.</p>	<p>Transportation for life, or not less than fifteen years; or imprisonment not exceeding three years, with or without hard labour, and with or without solitary confinement.—<i>Vide Note 1.</i></p>	<p>Same as in the 1st paragraph of this column under the head of "Robbery."</p>
<p>3rd.—Extorting property by a threat of accusing another of Sodomy—<i>Felony</i>.</p>	<p>7 W. 4. & 1 Vict. c. 87. s. 4. 9.</p>	<p>Same as in the 2nd paragraph of this column under the head of "Robbery."</p>	<p>Same as in the 1st paragraph of this column under the head of "Robbery."</p>
<p>4th.—Robbery, unattended with violence, but the person robbed being in bodily fear—<i>Felony</i>.</p>	<p>7 W. 4. & 1 Vict. c. 87. s. 5. 9.</p>	<p>Transportation for not more than fifteen years, nor less than ten years; or imprisonment not exceeding three years, with or without hard labour, and with or without solitary confinement.</p>	<p>Same as in the 1st paragraph of this column under the head of "Robbery."</p>
<p>5th.—Stealing from the person, unattended with violence or bodily fear—<i>Felony</i>.</p>	<p>7 W. 4. & 1 Vict. c. 87. s. 5. 9.</p>	<p>Same as in the 4th paragraph of this column under the head of "Robbery."</p>	<p>Same as in the 1st paragraph of this column under the head of "Robbery."</p>
<p>6th.—Demanding property with menaces or by force, with intent to steal the same—<i>Felony</i>.</p>	<p>7 W. 4. & 1 Vict. c. 87. s. 7. 9.</p>	<p>Imprisonment, not exceeding three years, with or without hard labour, and with or without solitary confinement.— <i>Vide Note 1.</i></p>	<p>Same as in the 1st paragraph of this column under the head of "Robbery."</p>
<p>7th.—Assault, with intent to rob—<i>Felony</i>.</p>	<p>7 W. 4. & 1 Vict. c. 87. s. 6. 9.</p>	<p>Same as in the 6th paragraph of this column under the head of "Robbery."</p>	<p>Same as in the 1st paragraph of this column under the head of "Robbery."</p>

<p>8th.—Violent Assaults, with intent to rob, under any of the circumstances detailed in paragraph 2 of this column, under the head of "Robbery"—<i>Felony</i>.</p>	<p>7 W. 4. & 1 Vict. c. 87. s. 3. 9.</p>	<p>Punishable in the same manner as the robbery would have been, had it been completed.</p>	<p>Same as in the 1st paragraph of this column under the head of "Robbery."</p>
<p>1st.—Having carnal knowledge of a woman against her will—<i>Felony</i>.</p>	<p>9 Geo. 4. c. 31. s. 16. 31. 4 & 5 Vict. c. 56. s. 3.</p>	<p>Principals in the first and second degree, transportation for life; accessories before the fact, transportation for not more than fourteen years, nor less than seven years, or imprisonment, not exceeding three years, with or without hard labour.</p>	<p>Imprisonment not exceeding two years, with or without hard labour.</p>
<p>2nd.—Unlawfully and carnally knowing any Girl under the age of ten (even with the consent of such Child)—<i>Felony</i>.</p>	<p>9 Geo. 4. c. 31. s. 17. 31. 4 & 5 Vict. c. 56. s. 3.</p>	<p>Same as in the 1st paragraph of this column under the head of "Rape."</p>	<p>Same as in the 1st para. of this column under the head of "Rape."</p>
<p>3rd.—Carnally knowing any Girl above ten and undertwelve years of age (even with the consent of such Girl)—<i>Misdemeanour</i>.</p>	<p>9 Geo. 4. c. 31. s. 17. 31. 4 & 5 Vict. c. 56. s. 3.</p>	<p>Imprisonment, with or without hard labour, for such term as the Court shall award. No accessories—all parties concerned must be indicted as principals.</p>	<p>No accessories—all parties concerned must be indicted as principals.</p>
<p>4th.—Assault, with intent to commit Rape—<i>Misdemeanour</i>.</p>	<p>9 Geo. 4. c. 31. s. 25. 31.</p>	<p>Imprisonment, with or without hard labour, for not more than two years, or five, or both; and to find, if required, sureties to keep the peace. No accessories—all parties concerned must be indicted as principals.</p>	<p>No accessories—all parties concerned must be indicted as principals.</p>
<p>SODOMY. 1st.—Having carnal knowledge of mankind or an animal against the order of nature—<i>Felony</i>.</p>	<p>9 Geo. 4. c. 31. s. 15. 31.</p>	<p>Death.</p>	<p>Same as in the 1st para. of this column under the head of "Rape."</p>

XV.

XVI.

<p>2nd.—Assault with intent to commit Sodomy—<i>Misdemeanour</i>.</p>	<p>9 Geo. 4. c. 31. s. 25. 31.</p>	<p>Imprisonment, with or without hard labour, not exceeding two years, or fine, or both; and to find, if required, sureties to keep the peace. No accessories—all persons concerned must be indicted as principals.</p>	<p>No accessories—all persons concerned must be indicted as principals.</p>
<p>XVII. RECEIVING STOLEN GOODS. 1st.—Receiving Stolen Goods, knowing them to be stolen, in cases where the stealing amounts to Felony—<i>Felony</i>.</p>	<p>7 & 8 Geo. 4. c. 29, s. 54. 7 & 8 W. 4. & 1 Vict. c. 90. s. 5.</p>	<p>Transportation for not more than fourteen nor less than seven years, or imprisonment not exceeding three years, with or without hard labour, and with or without solitary confinement; and if a male, to be once, twice, or thrice publicly or privately whipped, in addition to the imprisonment, if the Court shall think fit. <i>The above is the punishment, whether the culprit be tried for a substantive felony, or as an accessory after the fact to the stealing.</i></p>	<p>See note to paragraph 1st of the preceding column under the head of "Receiving Stolen Goods."</p>
<p>2nd.—Receiving Stolen Goods, knowing them to be stolen, in cases where the stealing amounts to a Misdemeanour—<i>Misdemeanour</i>.</p>	<p>7 & 8 Geo. 4. c. 29, s. 55. 7 & 8 W. 4. & 1 Vict. c. 90. s. 5.</p>	<p>Transportation for seven years, or imprisonment not exceeding two years, with or without hard labour, solitary confinement and whipping, as in paragraph 1st of this column, under the head of "Receiving stolen goods." No accessories—all parties concerned must be indicted as principals.</p>	<p>No accessories—all parties concerned must be indicted as principals.</p>
<p>3rd.—Receiving Stolen Letters, knowing them to have been sto-</p>	<p>7 W. 4. & 1 Vict. c. 36. s. 30.</p>	<p>Transportation for life, or for not less than seven years; or imprisonment not ex-</p>	<p>See note to paragraph 3rd of the preceding</p>

len, in cases where the stealing amounts to Felony—*Felony*.

40, 41, 7 W.
4. & 1 Vict. c.
90, s. 5.

ceeding four years, with or without solitary confinement, and with or without hard labour.

column under the head of "Receiving Stolen Goods."

The above is the punishment, whether the culprit be tried for the substantive felony, or as an accessory after the fact to the stealing.

XVIII. COMPOUNDING FELONY.

Taking any Money, &c., for helping a person to the recovery of stolen property (unless he cause the offender to be apprehended and brought to trial for the same)—*Felony*.

7 & 8 Geo. 4. c.
29. s. 58.

Transportation for life, or for not less than seven years; or imprisonment not exceeding four years, with or without hard labour, and with or without solitary confinement; and if a male, to be once, twice, or thrice publicly or privately whipped, if the Court shall think fit.

Imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement.—*Vide Note* 1.

1. There is a general Legislative provision (7 W. 4. and 1 Vict. c. 90, s. 5.) by which no Court can adjudge an offender "to be kept in solitary confinement for any longer period than one month at a time, or than three months in one year." It is, therefore, to be understood, that although that restriction is not specified in the following Table, in cases for which that punishment is awardable, it applies to all.

2. The offences specified in the foregoing Table are designated Felonies and Misdemeanours.—The former, in the general acceptation of the English law, comprises every species of crime which occasions at common law the forfeiture of lands and goods. Soldiers convicted of Felony by any Court of Civil Jurisdiction, thereupon forfeit all advantage as to additional pay or pension on discharge, in addition to any punishment which such Court may award.

3. A Misdemeanour, in its usual acceptation, is applied to all those crimes and offences for which the law has not provided a particular name; and

they may be punished, according to the degrees of the offences, by fine or imprisonment, or both. Many offences are by statute made punishable as misdemeanours, without specifying the nature or amount of punishment; others (as those in the above Table) have specific punishment annexed. Every attempt to commit a felony (unless declared by statute to be itself a felony) is a misdemeanour, and in general an attempt to commit a misdemeanour is an offence of the same nature. It has been decided by the Supreme Criminal Court in England that the bare solicitation to commit a crime is a misdemeanour, though the crime be not committed.

4. It is to be observed, that offences which are not treason or felony (unless they be against the persons or property of individuals) are not cognizable under the provisions of the Act and Articles of War before referred to.

Bombay Military Regulations, 204.

6.—The foregoing Tabular Statement will no doubt be useful to Judge Advocates, as it not only points out *the punishment* authorized by the Common Law of England to be awarded for each offence, but *the authority* by which the penalty is adjudged. The official authorities, however, should be carefully consulted by Judge Advocates; as well as the latter part of the works of Kennedy, Simmons, Hough, and Griffiths, in which the subject of "*Criminal offences cognizable by General Courts Martial*" is fully and explicitly treated of. If further information is required, the following legal works must be resorted to:—Archbold's "*Criminal Pleading and Evidence*;" Blackstone's "*Commentaries*;" Phillipps's "*Law of Evidence*;" Russell's "*Crimes and Misdemeanours*;" Starkie's "*Civil and Criminal Evidence*." There are many others to which it is needless to allude, but in the above all the information a Judge Advocate is likely to require is to be found.

APPENDIX II.

Letter from the Secretary at War relating to the new Clauses in the Mutiny Act and the Articles of War, 1844, on the Selection, &c., of the Place of Confinement for Offenders sentenced to Imprisonment ; and on Duelling in the Army.—Judge Advocate General's letter thereon.—Charges on this subject how to be framed, &c. &c.

WAR OFFICE, APRIL 18, 1844.

Sir,—In transmitting to you the Mutiny Act and Articles of War for the year commencing 25th April, 1844, I have, in order to obviate any misapprehension as to the construction to be put upon the new clauses, to request your attention to the following points:—

The 27th clause has been enacted for the purpose of giving to the superior Officer in command, whose duty it may be to confirm the sentence of a Court Martial, the power, which he did not previously possess, of selecting the place, whether a civil gaol or a military prison, in which the offender is to be confined, and from which he may at any time remove the prisoner, in order that the prisoner may undergo the remainder or any part of his sentence in some other public prison or place of confinement, and henceforward Courts Martial will not in their sentence notice the place of confinement. The Officer confirming the sentence is to be guided in the selection of the prison by such instructions as he may, from time to time, receive from superior authority. By the 28th clause it is enacted, " That forts, barracks, or other buildings, may be set apart by the Secretary-at-War as places where the sentences of Courts Martial may be carried into execution ; and as soon as such buildings shall have been prepared for the reception of military offenders, the practice of confining soldiers in public gaols will be resorted to as seldom as possible." By the 29th clause it is enacted, " That the term of imprisonment under any sentence of a Court Martial, shall be reckoned from the day on which the original sentence and proceedings of the Court Martial

shall have been signed by the President; and the Officer commanding the regiment or corps to which the offender belongs, shall specify, in the written order to the Gaoler or Provost-Martial receiving the offender into custody, the period of imprisonment which the prisoner is to undergo: the days both of the signing of the sentence and the release of the prisoner must be included," as, for instance, "if a soldier is sentenced on the first day of the month to fourteen days' imprisonment, the sentence will terminate at twelve o'clock at night on the thirteenth." We find, with respect to the alterations in the Articles of War, "That the 85th Article prescribes, that whenever it may be impracticable to carry into execution sentences of solitary confinement, the officer convening the Court Martial will give an instruction to such Court that should the prisoner be found guilty, and imprisonment form a part of his sentence, it will not be expedient to direct that any portion of it should be solitary, and the Court will govern itself accordingly."

I have to draw your attention to the amended Articles relating to Duelling in the Army. These alterations have been inserted by Her Majesty's Authority, for the purpose of more effectually discouraging and prohibiting a practice which is a violation of Her Majesty's orders, and a flagrant breach of the law of the land.

"These Articles declare that it is suitable to the character of honourable men to apologize and offer redress for wrong or insult committed, and equally so for the party aggrieved to accept, frankly and cordially, explanations and apologies for the same. If such redress be refused to be given, or to be accepted, and the friends of the parties have failed to reconcile the differences, a reference should, in conformity with the signification of Her Majesty's pleasure in the 106th Article, be made to the Commanding Officer on the spot, who will use his best advice and influence to reconcile the parties; and the differences, having been honourably settled by the good offices and responsibility of the Commanding Officer, ought never to be revived by either party, or by any other Officer or body of Officers; if, however, the Commanding Officer fail to reconcile the parties, it will become his duty to take such measures as he may deem necessary in order to prevent a duel, or to maintain good order in Her Majesty's Service, and the person refusing to be reconciled will be liable to be brought to a Court Martial, and, if convicted, cashiered, or suffer such other punishment as the Court may award. All parties implicated in duelling are liable, on conviction before a General Court Martial, to be cashiered. Her Majesty's pleasure is expressed in the 107th Article, that Officers being the friends or seconds of the par-

ties, shall exert their influence to adjust a difference on terms consistent with the honour of each of the parties. The failure in settling a difference being generally attributable to excessive demands for reparation made by one of the parties, the conduct of the seconds, by the 107th Article, is made liable to be investigated as well as that of the principals, in all cases in which a dispute shall be referred for the consideration of a General Court Martial. Personal differences between gentlemen living together as brother officers can seldom fail to be honourably and promptly adjusted, in the first instance, by explanation between their mutual friends; the propriety of an early explanation and acknowledgment of error was so forcibly pointed out by Field-Marshal the Duke of Wellington, in confirming the sentence of a General Court Martial in 1810, that Sir Henry Hardinge inserts the following extract of his Grace's sentiments on this point:—'The Officers of the Army should recollect that it is not only no degradation, but that it is meritorious in him who is in the wrong to acknowledge and atone for his error, and that the momentary humiliation which every man may feel upon making such an acknowledgment is more than atoned for by the subsequent satisfaction which it affords him, and by avoiding a trial and conviction of conduct unbecoming an officer.'

In reference to the 31st Article of War, and to the framing of charges in certain cases arising out of differences, or out of reproachful speeches and gesture, I have to direct your attention to a letter which the Judge Advocate General of Her Majesty's Forces has addressed to me.

JUDGE ADVOCATE GENERAL'S OFFICE, 30th MARCH, 1844.

Sir,—The recent discussions on Duelling in the Army, and the alterations in the Articles of War, have directed my attention to the language of charges, under which officers, alleged to have submitted to indignity and insult, or to the imputation of dishonourable or unworthy conduct, have been in repeated instances brought to trial. An erroneous notion has, to a limited extent, obtained, that an officer can be brought to trial and punished for not challenging another, or for refusing to accept a challenge, or to fight a duel, and in charges upon which officers have been cashiered, or otherwise punished, expressions may possibly be found, which, if detached from the context, and considered without reference to the undoubted law of England, and to the clear and unambiguous language of the Articles of War, might afford some colour to this error. But it must be remembered that, by the common law of England, duelling, unattended by

any injury to either party, is an aggravated offence against the public peace, punishable by fine and imprisonment. Thus Mr. Justice Blackstone says—"The punishment of common affrays is by fine and imprisonment. Where two persons coolly and deliberately engage in a duel, this, being attended with an apparent intention and danger of murder, and being a high contempt of the justice of the nation, is a strong aggravation of the affray, though no mischief has actually ensued." Under a recent statute, such persons may become liable to transportation. If death ensues, the parties implicated may be tried for murder. The military code has been, and will continue, consistent with this. The 107th Article of War, 1844, renders all parties, principals as well as seconds, implicated in duelling, liable to be cashiered. The 103rd and 104th Articles prescribe to a commanding officer the duty of preserving order in his regiment, and of placing under arrest all who use reproachful speeches and gestures,—a duty enjoined with the view of preventing duels, and of bringing to trial by Court Martial parties who offer insults, and who will not afford redress by apology and acknowledgment of their error. Moreover, officers in command of guards are, under the 60th Article, punishable for allowing persons to go forth to fight a duel. By the 104th Article, officers of inferior rank may place under arrest those who are engaged in quarrels, frays, or disorders; and by Articles 35 and 104, any officer, though of superior rank, who refuses to obey is liable to be cashiered; while, in the 105th Article, Her Majesty points out to the Army that those who, being willing to make or accept frank explanations, apologies, or redress, refuse challenges, act as is suitable to the character of honourable men, do their duty as good soldiers, and are not only acquitted of all disgrace, but of all opinion of disadvantage. It is manifest, then, that an officer cannot be subjected to trial and punishment for leaving undone that which the law thus expressly forbids, or for doing that which is thus distinctly declared, not merely to be no offence, but to be suitable to the character of a man of honour, to be conformable to military duty, and to be conduct above all blame or reproach. Still an officer who allows the stigma of dishonourable conduct to rest upon him, or passes over without notice an insult offered to him, is liable to be brought to trial before a Court Martial, not because he declines to fight a duel, but because, having failed to obtain speedy atonement through the intervention of mutual friends, or by other lawful means, he neglects to report the matter to his commanding officer, and thereby to invite a searching investigation into his character and conduct. By such neglect he seems either to acquiesce in the justice of the imputation cast upon him, and to

admit that there is something in his conduct which he fears to lay bare before honourable men, or to show that, regardless of his own reputation and honour, he knows not what is becoming the character of an officer and a gentleman, and that, indifferent to the peace and order of the regiment, he is unmindful of the rules of military discipline. His conduct then becomes the proper subject of inquiry and adjudication before a Court Martial.

In all such cases, however, it is most desirable to exclude the possibility of misconstruction. And as the new articles point out with clearness the course which is consistent with the character of honourable men, it will be the duty of those who may have to frame charges, as well as of those to whose revision and correction, or approval, charges may be submitted, to take care that the offence be described in language which shall distinctly state those particulars in which the letter or spirit of Her Majesty's Articles of War has been neglected or violated.

I have, &c., (Signed) J. NICHOLL.

This letter of instructions is so well calculated to set at rest any erroneous impressions which may have existed on this point, and places the question of framing charges in reference to the 31st Article of War on a footing so clear and intelligible, that it is only necessary for me to express my entire concurrence in the principles so ably laid down by the Judge Advocate General.

I have, &c., (Signed) H. HARDINGE.

APPENDIX III.

ORDERS ISSUED RELATIVE TO COURTS OF INQUIRY.

1.—GENERAL ORDERS BY THE RIGHT HONOURABLE THE GOVERNOR-GENERAL OF INDIA.

Camp Ferozepore, 27th December, 1842.

The Governor-General is pleased to appoint

His Excellency GEORGE CLERK, Esq., Envoy to the Maharajah Shere Singh ;

Major-General LUMLEY, Adjutant General of the Army ;

Major-General SMITH, Adjutant General H. M. Forces ;

Brigadier MONTEATH, C.B., and

Brigadier WYMER ;

to be a Court of Inquiry into the conduct of Major Pottinger, subsequently to the death of Sir William Macnaghten, until he became a prisoner to the Affghans.

The Court to have the power of sending for persons, papers, and records, and to appoint its own Secretary, and any writers who may be required.

The Secretary to the Government of India will place before the Court, on its assembling, all the papers which are now in the office, apparently bearing upon the matters to be subjected to inquiry.

All evidence taken is to be recorded and reported.

The Court will communicate its opinion upon the question, Whether the conduct of Major Pottinger, from the death of Sir William Macnaghten, until he became a prisoner, was, under then existing circumstances, best calculated to secure the safety of the British Army at Cabool, and to maintain the honour of the British arms ?

The Court will also report their opinion upon the question, Whether the bills drawn by Major Pottinger upon the British Government, within the period above mentioned, were drawn by him in the exercise of legitimate authority and of due discretion ? and, Whether the

circumstances under which, and any conditions upon which, they may have been drawn and made payable, were duly made known to the several persons to whom they were delivered, or by whom they were negotiated ?

The Court will assemble on the day subsequent to the date of this Order, at the tent of His Excellency the Envoy to Maharajah Shere Singh, who will act as President of the Court.

By order of the Right Honourable the Governor-General of India,

T. H. MADDOCK,
Secy. to the Govt. of India,
with the Governor-General.

2.—21st January, 1843.

The Governor-General directs the publication of the following paragraph, concluding the report of the Court of Inquiry into the conduct of Major E. Pottinger, C.B.

“ The Court, advertent to documents which have been laid before
“ it in course of this inquiry, cannot conclude its proceedings with-
“ out expressing a strong conviction, that throughout the whole period
“ of the painful position in which Major Pottinger was so unexpect-
“ edly placed, his conduct was marked by a degree of energy and
“ manly firmness, that stamps his character as one worthy of high
“ admiration.”

(True extract,)

T. H. MADDOCK,
Secy. to the Govt. of India,
with the Governor-General.

3.—GENERAL ORDERS BY HIS EXCELLENCY THE COMMANDER-IN-CHIEF
IN INDIA.

Head Quarters, Camp Ferozepore, 7th January, 1843.

A Court of Inquiry will assemble in the Camp of the Commander-in-Chief, at 10 o'clock, to-morrow morning, to receive and record evidence on a subject which will be laid before the Court by the Judge Advocate General, who will conduct the proceedings.

President.—Brigadier G. Moore.

Members.—Lieutenant-Colonel S. Bolton, Her Majesty's 31st Regiment; and Brigadier C. Graham, C.B.

APPENDIX IV.

JUDGE ADVOCATE GENERAL'S DEPARTMENT IN THE
BRITISH AND EAST INDIAN ARMIES, 1844.

JUDGE ADVOCATE GENERAL OF HER MAJESTY'S FORCES.
The Right Hon. J. Nicholl, LL.D. M.P. for Cardiff.

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Francis Newman Rogers, Esq. Queen's Counsel.
Office,—No. 35, Great George Street, Westminster.

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Captain Edmonstone, 81st Foot.

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DURAS.
Captain E. S. N. Campbell, 2nd W. I. Regiment.

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Captain Bruce, 18th Foot.

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FORCES IN INDIA.
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JUDGE ADVOCATE GENERAL, MADRAS ARMY.
Major T. B. Chalon, 33rd Regt. N. I.

JUDGE ADVOCATE GENERAL, BOMBAY ARMY.

Lieut.-Col. Wm. Ogilvie, 26th Regt. N. I.

DEPUTY JUDGE ADVOCATES GENERAL, BENGAL ARMY.

*Captain W. Macgeorge, 71st N. I. . . . Meerut Division.**Bt. Maj. H. Moore, C.B. 34th N. I. . . . Sirhind Division—Absent, S. C.**Captain J. Dyson, 21st N. I. Dinapore & Benares Division.**Captain K. Young, 50th N. I. Presidency Division—On duty
in Scinde.**Captain W. Martin, 52nd N. I. Cawnpore Division.**Captain W. H. Rickards, 14th N. I. Western Circle, Neemuch.**Captain H. Cotton, 67th N. I. Saugor Division.*

OFFICIATING.

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and St. Thomas's Mount.**Captain T. K. Whistler, Artillery Southern Division.**Captain P. Pope, 24th N. I. Tenasserim Provinces.*

DEPUTY JUDGE ADVOCATES GENERAL, BOMBAY ARMY.

*Captain G. J. Mant, 19th N. I. Southern Division.**Captain P. K. Skinner, 9th N. I. Poona Division.**Captain W. E. Rawlinson, Fusiliers Northern Division.**Captain R. M. Hughes, 12th N. I. Scinde Force, Absent, S. C.*

OFFICIATING.

Captain F. Cristal, 8th N. I. Scinde Force.

London :
Printed by STEWART and MURRAY,
Old Bailey.

65, Cornhill, London,
March, 1860.

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SMITH, ELDER AND CO.

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