jurisdiction of Courts Martial. — Lord Loughborough examining the Military Law of England &c. — — — — — — — — —

" " " Where Martial law prevails the authority under which it is exercised claims a jurisdiction over all Military persons in all circumstances; even their debts are subject to inquiry by a military authority; every species of offence committed by any person who appertains to the army, is tried not by a civil judicature, but by the judicature of the Regiment or Corps to which he belongs. — — — — — —

" " " The right of the Legislature to adopt this violent but necessary remedy and to invest the crown with this extraordinary power of the sword, is assented on constitutional principles that all may perceive its entire legality. — — —

" Military Law of England pg: 19. Hough on Court Martial pg 383. McArthur vol. 1. p. 34 & 35.

Military jurisprudence.

DIGEST OF OPINIONS

OF THE

JUDGE ADVOCATE GENERAL

OF THE ARMY.

WAR DEPARTMENT,
BUREAU OF MILITARY JUSTICE.

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A.

ARTICLES OF WAR.

FIFTH ARTICLE.

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

(2.) The use, by an officer, in the course of a political discussion with other officers, of rude and positive language of disapprobation of the public acts of the President, unaccompanied, however, by offensive or personally disrespectful expressions in regard to him, does not constitute a violation of this article. Such language, however, when assuming a decided tone of disloyalty, forms a proper ground for a summary dismissal. V, 491.

SIXTH ARTICLE.

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

NINTH ARTICLE.

(1.) Merely a recital in a specification, that because a soldier had broken his arrest he had violated the command of his superior officer, is not such a distinct and positive averment of the crime of "disobedience of orders" as would warrant the infliction of the death penalty under this article. It seems to be a straining of the true intent and meaning of the article to treat a simple breach of arrest by an

enlisted man as within its purview. The language of the 77th article in the case of an officer shows that a breach of arrest is not the disobedince of the orders of a superior officer contemplated by the 9th article. I, 461.

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

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

TENTH ARTICLE.

SEE ENLISTMENT, I, (1.)

ELEVENTH ARTICLE.

The muster-out of service of an officer by an order of a commanding general, who had been duly authorized to pursue this course in the case of supernumerary officers, and whose action in the case had been approved by the Secretary of War—*held*, a formal dismissal reconcilable with the provisions of this article, since the action of the general, so approved, became constructively that of the President. III, 211.

SEE APPEAL, (1.)

TWENTIETH ARTICLE.

(1.) Receiving pay as a soldier is treated in this article as such an open acknowledgment of being in the military service as to be tantamount to proof of a formal enlistment; and *clothing* may well be held to be a part of a soldier's pay in the sense of this article. The receipt, therefore, of clothing from the United States by a soldier charged with a violation of this article, estops him from denying that he is in the military service, and is sustaining the character he has thus assumed. V, 103.

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

TWENTY-FOURTH ARTICLE.

Where a superior officer called his inferior an "impudent pup," and threatened to have him "strung up" and "put in irons"—*held*, that his offence involved a breach of this article, (and possibly of the 3d paragraph of article 1 of the Army Regulations,) and that he was liable "*to be put in arrest*" therefor. III, 672.

TWENTY-FIFTH ARTICLE.

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

THIRTY-SECOND ARTICLE

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

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

SEE STOPPAGE, (2.)

THIRTY-THIRD ARTICLE.

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

(2.) Where a larceny was committed by a soldier *before* he entered the military service, *held* that he should be delivered up to the civil authorities, upon a proper demand being made for him, in accordance with the provisions of the 33d article. XII, 145. See "*Jurisdiction*," (2.)

THIRTY-FOURTH ARTICLE.

SEE ARREST, (7.)

THIRTY-NINTH ARTICLE.

It is not essential to the offence of embezzlement, &c., of money under this article, that the United States should be the *absolute* owner of the funds. Thus where the bounty money belonging to a substitute is temporarily intrusted to an officer, the United States is deemed to become the *bailee*, through its officer, of the amount, and to have such an interest in the funds that in case of their embezzlement or

misapplication by him, such officer may properly be held chargeable with a violation of this article. XI, 150; X, 117.

FORTY-FIFTH ARTICLE.

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

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

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

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

See CHARGE, (5.)

FIFTY-SIXTH ARTICLE.

A citizen unconnected with the military service is triable by court-martial for a violation of this article. II, 498.

See FIFTY-SEVENTH ARTICLE, (4.)

FIFTY-SEVENTH ARTICLE.

(1.) It is not a necessary legal inference from an attempt to smuggle goods within the enemy's lines that the accused also gave intelligence to, or had correspondence with, the enemy. I, 343.

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

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

(4.) Under this article a court-martial has jurisdiction of the cases of civilians as well as of persons in the military service. That this was the intention of the article is well ascertained by its history, and is evident, also, from the consideration that those who would be most likely to give intelligence to, and correspond with, the enemy in time of war, would be persons other than military, and that, therefore, in order to guard against such persons, it was necessary for Congress to enact

this article as a "proper and necessary" measure for rendering effective the war-making power. V, 291.

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

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

SEE AUTREFOIS ACQUIT.
MILITARY COMMISSION, II, (6,) (18.)

SIXTIETH ARTICLE.

SEE CONTRACT SURGEON.
COURT-MARTIAL, II, (4,) (6,) (7,) (13.)
MILITARY COMMISSION, II, (8).
PAYMASTER'S CLERK.
RAM FLEET.
SLAVE, (2.)

SIXTY-FOURTH ARTICLE.

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

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

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

(4.) If the court at any time in the course of its proceedings, as during the examination of the witnesses, has been temporarily reduced below the minimum number, the sentence is inoperative. II, 448.

(5.) In view of the positive and explicit language of the 64th article, *held* that, where a general court-martial is *originally* constituted with less than thirteen members, an omission to add in the order convening it a statement to the effect that *no officers other than those named can be assembled without manifest injury to the service*, is fatal to the validity of the proceedings. The fact also that the use of this

statement is prescribed by paragraph 883 of the Army Regulations and is almost universal throughout the service goes to show that it is not considered as a mere formality, but as an essential part of the order where the court is to consist of a number less than thirteen. Moreover, in view of the provision of the 75th article that "no officer shall be tried by officers of an inferior rank if it can be avoided," the phrase in question may also be regarded essential as presenting the requisite evidence that officers of a superior rank (in case any of inferior rank to the accused have been placed upon the detail) could not have been selected; the words "no other officers" being well construable as indicating no officers of other (higher) rank, as well as no greater number.

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

SIXTY-FIFTH ARTICLE.

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

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

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

(4.) Where the record has been lost before it can be laid before the proper reviewing officer, to wit, "the officer ordering the court or the officer commanding the troops for the time being," the informal approval, subsequent to the loss, by this officer, contained in a

letter, cannot stand for the approval required by the article. III, 503.

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

(6.) A corps commander is held, by the Secretary of War, to be a commander of an army in the field, and may convene a court-martial under the authority of this article. A corps commander may also convene such court where the division or separate brigade commander is the accuser or prosecutor, by authority of the act of December 24, 1861. VII, 237.

(7.) The fact that a general commands a "district" has nothing whatever to do with his authority to convene a court-martial, unless such district shall amount to a separate military "department." It is the extent and character of his command in a military, and not a territorial, point of view, which, in determining whether his command be actually an "army," a division, or a separate brigade, determines also whether he may call a court-martial. VII, 237.

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

SIXTY-SIXTH ARTICLE.

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

(2.) A captain of a battery with an isolated command cannot appoint a regimental court-martial. If in command of a garrison, fort, or barracks, where the troops consisted of different corps, he would have the power to convene a garrison court-martial. I, 491.

(3.) The presence, as part of a garrison, either of an ordnance sergeant or of an assistant commissary of subsistence, would bring the garrison within the provisions of this article, as consisting of different corps, and entitle its commanding officer to summon a garrison court-martial. VII, 175. See (7.)

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

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

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

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

SEE FIELD OFFICER'S COURT, 1 ,(7.)

SIXTY-SEVENTH ARTICLE.

(1.) Regimental and garrison courts-martial have no jurisdiction to try cases of violation of the 9th article of war, because any of the crimes mentioned therein may be punished with death. II, 189.

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

SEE FIELD OFFICER'S COURT, (7.)

SIXTY-NINTH ARTICLE.

(1.) The judge advocate referred to in this article is not the officer of that designation detailed for duty on a general court-martial, but the judge advocate of the army of the United States, as the incumbent of the present office of judge advocate general was entitled before the passage of the act of July 17, 1862, ch. 201, sec. 5. V, 549.

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

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

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

(5.) The presence on a court-martial, during the hearing of part of the testimony, of a member who has not been sworn as such, is a grave and fatal irregularity. VIII, 37; X, 563.

SEE RECORD, IV, (1.)

SEVENTY-FIRST ARTICLE.

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

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

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

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

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

SEE SIXTY-FOURTH ARTICLE, (1,) (3.)
SEVENTY-FIFTH ARTICLE, (1.)
RECORD, IV, (6;) V, (2.)

SEVENTY-FIFTH ARTICLE.

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

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

SEE SIXTY-FOURTH ARTICLE, (5.)

SEVENTY-SIXTH ARTICLE.

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

SEE WITNESS, (13,) (14.)

SEVENTY-SEVENTH ARTICLE.

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

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

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

(4.) There can be no technical breach of arrest and violation of this article, except in case of a close arrest and confinement in "barracks, quarters, or tent." VII, 141.

(5.) Where, for a violation of this article, the accused is sentenced to be cashiered *and* to a forfeiture of pay, the sentence is not altogether inoperative, but is valid as to the cashiering, and void only as to the forfeiture. VIII, 296.

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

SEE NINTH ARTICLE, (1.)

EIGHTY-THIRD ARTICLE.

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

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

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

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

(5.) To justify proceedings under this article, it is not necessary that the officer's conduct should have any connexion with the military service. It is enough that it is morally wrong, and compromises his personal honor. V, 148.

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

(7.) The article requires that, upon conviction, the sentence shall be dismissal. A sentence upon such conviction, to be dismissed, to forfeit all pay, and to be forever disqualified from holding office under the government, is valid only as to the dismissal. The remainder of the sentence is irregular and inoperative. IV, 283; IX, 672. See "*Seventy-Seventh Article*," (5.)

SEE FINDING, (13.)

EIGHTY-FIFTH ARTICLE.

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

EIGHTY-SEVENTH ARTICLE.

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

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

(3.) A withdrawal of any charge may be made by the judge advocate, with the assent of the court; and upon such charge, if the interest of public justice require it, the party may be again arraigned. V, 213. See "*Nolle Prosequi.*"

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

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

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

See AUTREFOIS ACQUIT.

EIGHTY-NINTH ARTICLE.

(1.) The class of cases referred to by this article as exceptional are those in which the sentence is not disapproved, but, because of some mitigating circumstances, is formally suspended until the pleasure of the President, in the exercise of the pardoning power, can be known. Where a sentence is formally disapproved by the proper reviewing authority, it is thenceforth inoperative, and the case cannot be submitted to the President under this article, as there remains nothing for him to act upon. II, 50. See "*Sixty-Fifth Article*," (8.)

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

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

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

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

(6.) The power to mitigate sentences extending to loss of life or the dismissal of an officer is virtually in the President alone, except in the cases specified in section 21, of chapter 75, of act of 3d March, 1863, which gives to the general commanding the army in the field, in approving the sentences, the power to carry them into execution. The execution of a sentence of death which has been approved by

the general commanding is *necessarily* suspended by the provision of section 5, chapter 201, of the act of July 17, 1862, until the pleasure of the President may be known. II, 175.

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

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

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

SEE FIELD OFFICER'S COURT, (20.)
SENTENCE, II, (6.)

NINETIETH ARTICLE.

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

SEE COURT OF INQUIRY, (2.)

NINETY-FIRST ARTICLE.

SEE COURT OF INQUIRY, (3.)

NINETY-SECOND ARTICLE.

SEE COURT OF INQUIRY, (3.)

NINETY-FIFTH ARTICLE.

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

NINETY-SEVENTH ARTICLE.

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

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

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

(4.) Drafted men or substitutes, not belonging to the "regular forces," in the sense of this article, are entitled to be tried by courts-martial composed entirely of "militia" officers; which term is held to embrace officers of the volunteer service. V, 105. See IX, 198. See (8.)

(5.) A court composed of regular officers cannot try a volunteer officer though a regular officer may be tried by a court of volunteers. A mixed court, therefore, composed of officers belonging to the regular army, to the volunteer service, and to the invalid corps, (which is regarded as part of the latter,) would have authority to try regular officers only. V, 320. See (10.)

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

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

(8.) Officers of the veteran reserve corps cannot be tried by a court-martial composed in whole or in part of officers of the regular army, this corps being regarded as a part of the volunteer force. XI, 121. See XI, 267. So of officers of the United States colored troops. XI, 267.

NINETY-NINTH ARTICLE.

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

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

(3.) The offence of manufacturing counterfeit money, committed by an enlisted man, is not properly chargeable under this article. II, 566. See "*Court-martial*," II, (12.)

(4.) A communication addressed by a number of officers to the commanding officer of their regiment, to the effect that accusations have been made against a captain thereof in regard to his character, which,

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

(5.) A disorder manifestly comprehended in the provisions of the 99th article may be charged by its name, instead of as "conduct to the prejudice of good order and military discipline," though the latter is the regular form of pleading it. VII, 485. See (6.) See IX, 328.

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

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

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

(9.) The "disorders" and "neglects" referred to in this article are such only as affect or are connected with the military service. VIII, 590.

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

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

(12.) A soldier who escapes from confinement while under sentence —*held*, chargeable with a violation of this article; such offence being made by the common law a felony where the original commitment is for felony or treason, and a misdemeanor where the commitment is for a less offence. X, 514.

See SIXTH ARTICLE.
CHARGE, (5.)
COURT-MARTIAL, II, (12.)
FINDING, (13.)

ABSENCE WITHOUT LEAVE.

(1.) Where an officer, on his return from an unauthorized absence, was, with a knowledge of all the facts on the part of his commanding

officer, put upon full duty by the latter, and continued on duty with his company for a period of four months—*held*, that the general custom of the service, making such action of his superior a complete defence to this charge, applied to his case. II, 376. See II, 391.

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

See COMMISSION, (FIELD.)
DESERTER, (12.)
DISMISSAL, I, (6.)
FIELD OFFICERS' COURT, (18,) (19.)
PAY AND ALLOWANCES, (19,) (21.)
PUNISHMENT, (13.)
REDUCTION TO RANKS, OF OFFICERS, (1,) (2.)
SPECIFICATION, (8.)

ABSENT MEMBER.

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

(2.) The member, on resuming his seat, should be made acquainted with all the testimony introduced during his absence. VII, 411.

(3.) The admission of an absent member after the arraignment, but before the introduction of any evidence, does not affect the validity of the proceedings. VIII, 692.

ACCUSER OR PROSECUTOR.

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

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

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

(3.) An objection made by the accused, during the progress of the trial, to proceeding further without knowing by whom the charges were drawn or advanced, should not be overruled. Every officer on

trial is entitled to this information, since without it he cannot know whether the court has been legally constituted or not. I, 430.

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

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

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

ADDITIONAL AIDES-DE-CAMP.

Held that *additional aides-de-camp* are a part of the regular army. They are appointed by the President, and confirmed by the Senate, and the act creating them provides that they shall "bear the *rank* and *authority* of captains, majors, lieutenant colonels, or colonels *of the regular army*." Moreover this act is expressly entitled as "*supplementary*" to the act to increase the military establishment of the United States, of a prior date of the same year, which provides for an increase of the *regular army* by the addition of new regiments. And although the act provides for the appointment of these officers only during the rebellion, and for their discharge when not employed in active service, and their reduction in number at the discretion of the President, yet provisions of a similar character are found in the principal act to which this is supplementary. XI, 267.

SEE MUSTER-OUT, (1.)

ADJOURNMENT.

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

SEE SIXTY-FOURTH ARTICLE, (1,) (2.)

DISCHARGE FROM SERVICE OF MEMBER OF MILITARY COURT.

AFFIRMATION.

SEE JUDGE ADVOCATE, (14.)

ALIEN.

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

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

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

ALLOWANCES

SEE BOUNTY, (3.)
PAY AND ALLOWANCES.
MILEAGE.

AMENDMENT.

SEE RECORD, I.
JUDGE ADVOCATE, (3.)

APPEAL.

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

(2) Where the proper reviewing officer has confirmed the sentence, and dissolved the court, the judgment is final; no appeal can be taken from it, or new trial ordered by the President. I, 451. See "*New Trial.*"

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

SEE PRESIDENT, AS PARDONING POWER.

APPROVAL, &c., OF PROCEEDINGS.

SEE SIXTY-FIFTH ARTICLE.
EIGHTY-NINTH ARTICLE.
PRESIDENT AS REVIEWING OFFICER, (3.)
PUNISHMENT, (15.)
RECORD, III, (3,) (4.)
REVIEWING OFFICER, (1,) (4,) (7.)
SENTENCE, II, (2,) (4;) III, (8.)

ARRAIGNMENT.

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

ARREST.

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

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

(3.) There is no law or usage which disables an officer from preferring charges while under arrest. V, 348.

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

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

(6.) It is the effect of the provisions of section 11, chapter 200, act of 17th July, 1862, to relieve an officer from arrest, if not brought to trial, &c., within the time therein specified. VII, 162.

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

(8.) Although to release a soldier from arrest, and compel him to perform military duty after his trial, and while awaiting the promulgation of his sentence, would in general be improper and illegal, it might, however, be warranted by the exigencies of the war; and

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

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

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

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

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

SEE THIRTY-THIRD ARTICLE.
SEVENTY-SIXTH ARTICLE.
SEVENTY-SEVENTH ARTICLE.
SUSPENSION, (2.)

ARTIFICIAL LIMBS.

Only soldiers, and not officers, are entitled to be furnished with artificial limbs under the acts of Congress making appropriations for that purpose. (Act of 16th July, 1862, chapter 182, section 6, and act of 9th February, 1863, chapter 25, section 1.) I, 394.

ASSESSMENT OF DISLOYAL CITIZENS.

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

ATTACHMENT.

SEE WITNESS, (13,) (14.)

AUTHORITY TO RAISE A REGIMENT.

Where the Secretary of War authorizes a party to raise a regiment, and agrees to give him the command of it, as colonel, if raised in 30 days, this is not an absolute appointment, like one in the regular army, but a conditional one only. and, till the condition be fulfilled, of no more effect than a power of attorney. I, 368.

AUTREFOIS ACQUIT.

A party who has been acquitted by a court-martial upon a charge of a violation of the 57th article of war, in giving intelligence to

the enemy, cannot plead this acquital in bar of a criminal prosecution, under section 2, chapter 195, of act of 17th July, 1862, for "giving aid and comfort to the rebellion," since, as it is well understood, the same act may be an offence against two jurisdictions, and may subject the offender to be tried and punished by both. Such would not be a case of a double punishment, but of a punishment of a double offence. V, 140. See "*Thirty-Second Article*," (2.)

SEE EIGHTY-SEVENTH ARTICLE.

B.

BAIL.

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

SEE CONTRACTOR, II, (4.)

BLOCKADE.

A special application, in the interest of private individuals, to be permitted to export wheat and tobacco from certain blockaded ports in Virginia—*advised* not to be granted, since it would operate as a violation or suspension of the blockade, which foreign nations could not then be expected to respect, as broken by ourselves. Importations into certain ports have been permitted in a limited degree, by the Secretary of the Treasury, for military purposes only. The blockade, while it remains, should be enforced by the government as strictly against its own citizens as against foreign nations. I, 342, 346.

SEE MILITARY COMMISSION, II, (14.)

BOARD OF EXAMINATION.

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

(2.) The act requires that the report of the board shall be formally approved by the President before any action is taken thereon. Upon the unfavorable report of the board, the department commander is not authorized to summarily dismiss an officer. VIII, 482.

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

(4.) It is not a proper function of a board, constituted under the provisions of section 10 of act of July 22, 1861, chapter 9, to investi-

gate charges relating to a single offence properly cognizable by court-martial, the object of such board being rather to inquire into the general military standing, &c., of the party ordered before it. VI, 253. See XI, 104.

BOARD OF SURVEY.

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

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

BOND.

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

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

BOUNTY.

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

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

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

(3.) Where a soldier was sentenced by court-martial to a forfeiture of "pay and allowances due and to become due for the balance of his term of enlistment;" *held*, (in opposition to the opinion of the Paymaster General,) that he was entitled to an *honorable discharge* at the end of his term, (of three years' service,) and consequently to the bounty of $100 payable by law thereon; the mere forfeiture of

pay, &c., not being regarded as involving dishonor where the status of the soldier has been otherwise determined by the government, in continuing him in the service to discharge its duties, and to associate with men engaged in the honorable profession of arms. A discharge in the case of an enlisted man is technically honorable, except where, in case of conviction of an infamous crime by court-martial, a disability to re-enlist is imposed by the sentence, or where a dishonorable discharge is held to result from a sentence of imprisonment, permanently separating the convict from the service up to the period of the expiration of his term of enlistment.

And *held*, where the bounty is payable *by instalments*, that a soldier sentenced for desertion to a forfeiture of all pay and allowances due or to become due, would be entitled to the instalments falling due subsequently to the sentence, unless there were some provision in the specific law or order authorizing the bounty, which excepted the case of an enlisted man so sentenced or that of a deserter generally. XI, 352.

Held, further, that bounty, whether regarded as "pay" or "allowances," (and it is believed to be technically distinct from either,) is neither *due* during the term of enlistment, being payable only upon the final discharge; nor due for a balance of a term, being earned by two years' service. X, 661.

(4.) Where a soldier who has been sentenced to forfeit all pay, bounties, and allowances, to be dishonorably discharged from the service, and *then* imprisoned during the remainder of the war, was, after having commenced to undergo his imprisonment, pardoned by the President for the unexecuted part of his sentence—*held*, that such pardon did not revive the right to pay, &c., or authorize an honorable discharge, without which the party could not become entitled to bounty. VII, 138.

But where a soldier, upon conviction for "sleeping on his post," was sentenced to forfeit all pay, allowances, and bounties, and be confined at hard labor during the remainder of his term of three years, and, before the expiration of his term, the unexecuted portion of his sentence was remitted by the President, and he released and returned to duty with his regiment—*held*, that this pardon entitled him to an honorable discharge at the end of his term, or upon his re-enlistment as a veteran volunteer, and to the bounty of $100, payable in the event of such discharge, &c. XIII, 27.

(5.) A deserter who avails himself of the President's proclamation of amnesty to absentees, of March 10, 1863, by voluntarily returning to his regiment within the period fixed thereby, is entitled at the end of his term of service to an honorable discharge, and to the bounty consequent thereon, if he has served two years. The acceptance of the pardon extended by the proclamation completely rehabilitates the soldier; he being subjected only to the forfeiture of pay for the time of his absence, which he would incur in any event by operation of law, and to the obligation to make good the time lost by his desertion. Further, if the government honorably discharges him, without requiring him to make good this time, he is entitled to the bounty if he has served two years. XII, 139.

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

SEE ENLISTMENT, I, (4.)

BRANDING.

SEE PUNISHMENT, (3.)

BREACH OF ARREST.

SEE SEVENTY-SEVENTH ARTICLE.

C.

CASHIERING.

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

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

CHALLENGE.

(To fight a duel.) See "Twenty-fifth article."
(To a member of a military court.) See "Seventy-first article."

SEE FIELD OFFICER'S COURT, (14.)

CHAPLAIN.

SEE MILEAGE.
PAY AND ALLOWANCES, (22.)

CHARGE.

(1.) Where certain conduct is a clear violation of a specific article of war, it should be charged under that article. Thus an offence which is clearly a violation of the 45th article is not properly charged as a violation of the 83d or 99th. The latter mode of charging the offence would give the court a discretion as to the punishment, which it would not have if charged under the appropriate article. II, 51, XI, 312. But see "*Finding*," (12.)

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

(3.) To charge a military offence as a *violation of a certain article of war*, naming it by its number, is regular and proper, and in accordance with the mode of declaring which prevails in the ordinary criminal courts. An indictment for a crime which a statute has created by simply affixing a penalty for its commission, always concludes by averring the conduct of the party to be contrary to or in violation of the statute in such case made and provided. When a statute or an article of war enacts that whosoever shall do a particular act shall receive a specified punishment, it thereby prohibits, by the strongest possible implication, the offence named. The prohibition is part and parcel of the statute or article—is, indeed, its essence—and the act committed is necessarily in violation of it, and is properly averred so to be. Denouncing a penalty or punishment for an offence is the legal language or mode for prohibiting it, and this language is so well understood as to have led to great uniformity in the use of the form in question. V, 77. See VII, 457.

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

(5.) Where the specification sets forth that the accused was drunk on duty, but the charge is "drunkenness" merely, the pleading is irregular. There is no such offence known to military law as "drunkenness," unless it be manifestly prejudicial to good order and military discipline. XI, 177.

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

SEE SIXTH ARTICLE.
FORTY-FIFTH ARTICLE, (1.)
EIGHTY-THIRD ARTICLE.
NINETY-NINTH ARTICLE, (13.)
CONTRACTOR, II, (3)
DISABILITY, (2.)
FRAUD. (3.) (4.)
GUERILLA, (1.)
PENITENTIARY, III, (6.)
TRIAL, (2.)
WITHDRAWAL OF CHARGE.

CLERK.

(1.) The clerk, or "reporter" of a court-martial appointed under section 28 of chapter 75 of the act of March 3, 1863, is not entitled to remain with the court when its doors are closed for deliberation. III, 640. Nor can he be permitted to record the findings or sentence. XI, 318.

(2.) The compensation of clerks and interpreters of general court-martial (other than enlisted men detailed in these capacities) is not fixed by law or regulation. They are entitled to a reasonable allowance, which should be certified to by the judge advocate. VII, 71.

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

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

COMMISSION—(CIVIL.)

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

COMMISSION—(FIELD.)

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

COMMISSION—(SPECIAL.)

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

COMPANY FUND.

The "company fund," when once appropriated, is, in equity, the property of the enlisted men of the company; but the legal owner and trustee thereof is the commanding officer of the company, who is obliged by the regulations to disburse it for the benefit of his men, and who is responsible to the government for a proper performance

of his trust. On ceasing to command the company, he is also obliged to account to his successor in command for the fund remaining in his hands, for which the latter in turn becomes trustee. If he retains the fund to his own use without accounting for it to his successor, the latter, who is alone entitled to receive it, may institute a suit against him for its recovery, if meanwhile he has left the service. V, 588. See VIII, 148.

SEE REGIMENTAL FUND.

COMPENSATION FOR USE OF PRIVATE PROPERTY.

In accordance with the principle incorporated into our national and State constitutions, it is the invariable practice of the United States government, both in peace and war, to pay for all property of loyal citizens that, either by purchase or seizure, may be appropriated to its use. *Held*, therefore, that the use of a turnpike road, (in Kentucky,) by the trains of the government, is a *use of private property*, and that the government should pay the regular tolls for such use. It cannot be claimed that the use and wear of the road is merely a *damage* to private property, which it should be left to Congress to liquidate. The worn condition of such roads is a natural consequence, not of their *abuse*, but of their legitimate *use*, the indemnification for which is measured and fixed by their charters in the form of tolls. I, 475.

SEE ALIEN, (1.)
RECAPTURED PROPERTY, RESTORATION OF, (4.)

CONDUCT TO THE PREJUDICE OF GOOD ORDER AND MILITARY DISCIPLINE.

SEE NINETY-NINTH ARTICLE.

CONDUCT UNBECOMING AN OFFICER AND A GENTLEMAN.

SEE EIGHTY-THIRD ARTICLE.

"CONFEDERATE" SECURITIES.

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

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

(3.) Not only are confederate notes regarded by our government as possessed of no pecuniary value, but they are also viewed as evi-

dence of the existing rebellion, and *indicia* of treason, and as tending to excite a sympathy and an interest in the rebellion on the part of those who may use or receive them. They are illegal and disloyal publications, and as such are ordered to be destroyed wherever found. An application, therefore, on the part of a foreign resident, to restore a quantity of such notes to him as their former possessor, either in their original form or in federal currency of an equal amount, cannot be entertained. II, 354.

SEE CONFISCATION, (9.)

CONFISCATION.

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

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

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

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

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

(6.) Property conveyed by a husband to his wife, which had previously been used by him in aid of the rebellion, or which was conveyed in order that it might be so used upon the transfer, would be liable to confiscation in the hands of the wife, under the act of 6th August, 1861, chapter 60, section 1. The fact that the transfer was made in contemplation of a treasonable act by the grantor—as where it was made with the intent on his part of taking up arms against the government, after thus making provision for his wife and family—would not render it liable to confiscation under this statute, but *would* have that effect under the act of 17th July, 1862. II, 55.

(7.) A judge of the United States district court for Eastern Virginia, who holds his court under the shelter of the bayonets of the army, and is, indeed, but an instrumentality co-operating with it for the suppression of the rebellion and the re-establishment of the authority of the general government, may properly be assigned quarters in one of the residences of rebels in Alexandria, which have been vacated by the treason of their owners, and are under the control of the government, as property subject to confiscation. II, 294.

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

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

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

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

(12.) Money or merchandise in transitu, without proper authority, from a loyal State or district to one in rebellion, to be used for com-

mercial purposes or otherwise, is subject to confiscation under sec. 5, ch. 3, act of 13th July, 1861. III, 35.

(13.) Merchandise evidently intended to be used for commercial purposes, belonging to a citizen of Virginia, and found stored in a warehouse in Georgetown, under circumstances strongly indicating that it had been so stored merely to await a good opportunity for transportation to the south, may be confiscated as *in transitu* to the rebel lines, under the provisions of sec. 5, ch. 3, act of 13th July, 1861. III, 125.

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

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

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

SEE MILITARY COMMISSION, V, (3.)

CONSOLIDATION OF REGIMENTS.

Where a regiment is not disbanded, but consolidated with another, under the name of the latter, no remuster or change of any kind taking place in the *status* of the enlisted men of either regiment, the men of each organization become members of the new regiment, not by virtue of any consent on their part, but because of the conditions of their original enlistment and muster into the United States service. V, 595.

CONTEMPT.

SEE SEVENTY-SIXTH ARTICLE.
WITNESS, (13,) (14.)

CONTINGENT FUND.

A band mustered out of the service by operation of law, (under the requirements of sec. 5, ch. 200, of act of 17th July, 1862, which repeals the law under which they were mustered into service,) but retained in service by an express agreement with the Secretary of War, cannot be recognized by a paymaster as regularly in the service, but would have to be paid out of the contingent fund of the department, by special order of the Secretary. II, 64.

SEE COUNSEL TO ASSIST PROSECUTION.

CONTRABAND TRADE.

SEE VIOLATION OF THE LAWS OF WAR, (5.)

CONTRACT BY OFFICER WITH UNITED STATES.

SEE DISABILITY.

CONTRACTOR I, (GENERALLY.)

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

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

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

CONTRACTOR, II.

(Under sec. 16, ch. 200, Act 17th July, 1862.)

(1.) Every seller of supplies is not necessarily a contractor for the army of the United States, in the sense of this act. To constitute a contractor, there must be an engagement between him and the government, imparting an obligation on the one hand to sell and deliver, and on the other to receive and pay for the supplies, and this contract

may be verbal or written. A continued supply, on an ordinary running account, without further stipulations fixing the obligations of the parties, and defining the prices, terms, &c., would not charge the party supplying with the responsibilities of a government contractor under the act. III, 274.

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

(3.) In charging "wilful neglect of duty" against a contractor, it is not necessary to allege that the neglect was with an intention to defraud. IV, 371.

(4.) Contractors arrested for trial under this act should be proceeded against, so far as the forms of trial are concerned, as though they were *enlisted men.* They cannot claim *to be bailed*, this being a privilege unknown to the proceedings of military courts. V, 101. But see the recent act of July 4, 1864, ch. 253, sec. 7.

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

(6.) The act making contractors amenable to trial by court-martial *held* to be *constitutional.* This enactment is one of the many acts of Congress passed under the authority of the *war power* so fully delegated by the Constitution. V, 605.

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

(8.) The assignee of a government contractor, although assuming to act as principal under the contract, and proceeding to fulfil its stipulations, cannot be proceeded against by court-martial under the act, *as contractor*, for the reason that the 14th section of the same act prohibits all transfers of government contracts, and provides that every such transfer shall cause the annulment of the contract so far as the United States are concerned. V, 649. But see the recent act of July 4, 1864, ch. 253, sec. 7.

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

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

(11.) Where, after a contract for horses had been formally entered

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

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

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

SEE SENTENCE, I, (10,) (12.)
SPECIFICATION, (9.)

CONTRACT SURGEON.

A "contract surgeon" is not regarded as in the military service of the United States in the ordinary acceptation of the term, except when serving with the armies of the United States in the field in the sense of the 60th Article of War. IX, 678.

COPY OF RECORD.

SEE NINETIETH ARTICLE.
COURT OF INQUIRY, (2.)

COPY OF TESTIMONY.

As a court-martial sits with open doors, and the accused has the right in person, or through a clerk or stenographer, to take down all the testimony introduced and the proceedings of the court from day to day, no objection is perceived to allowing him to take, at his own expense, a copy of the testimony from the formal record, provided it can be done without inconvenience to the prosecution. Such a copy

would not be official, and the allowing it to be taken is simply an act of courtesy to the accused. VII, 100.

CORRESPONDENCE WITH REBELS.

(Under Act of February 25, 1863, ch. 60.)

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

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

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

See FIFTY-SEVENTH ARTICLE (3, .)

COUNSEL FOR THE ACCUSED.

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

COUNSEL TO ASSIST PROSECUTION.

There is no provision of law for compensating attorneys retained as counsel for judge advocates. Such counsel should not be retained, except in important and complicated cases; and the assent of the Secretary of War should, when practicable, be first obtained. The claims of such counsel, approved by the judge advocate, should be presented to the Secretary of War, to be paid out of the contingent fund. V, 446.

COURT-MARTIAL, I, (GENERALLY.)

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

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

(3.) A court-martial, after having entered upon a trial which has to be suspended on account of the absence of material witnesses, or for other cause, may take up a new case, and proceed with it to its termination, before resuming the trial of the first case. III, 281; IX, 650.

(4.) A general court-martial has no power to "honorably discharge" an officer. III, 426.

(5.) To authorize a general court-martial regularly in session to sit as a military commission also, would be a course not sanctioned by principle. The same members can be constituted a commission, but not before they have been formally dissolved as a court-martial. VII, 134.

SEE ARREST, (2.)
DETAIL.
JUDGE ADVOCATE, (9,) (11,) (13.)
SENTENCE, I, (1,) (2,) (4,) (6.)

COURT-MARTIAL, II, (JURISDICTION OF.)

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

Where an officer procured his discharge from the service by means of false representations in regard to his physical condition, *held* that the order of his discharge might be revoked and he be brought to trial for his offence by court-martial. VI, 662; XIII, 185.

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

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

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

(5.) The "*deputy provost marshals*" and "*special officers,*" appointed by the district provost marshals, by virtue of circular No. 19, of the Provost Marshal General's office, of June 8, 1863, are employed to assist the district provost marshals in the performance of the duties expressly devolved upon the latter by statute, and particularly in the arrest of deserters and spies. They are therefore deemed to be in the military service, and, like their principals, triable by court-martial, because, as in the performance of their duty they represent the latter, whose substitutes they are, they should be held bound by operation of law to the same military control, as well judicial as executive. VIII, 246, 658; XI, 52; XII, 119.

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

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

(10.) A court-martial has not jurisdiction of a case of mutiny or murder committed by a citizen or person not in the military service. VII, 261; VIII, 394.

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

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

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

(14.) While military cases will ordinarily be tried near the *locus* of the offence, or where the witnesses may most readily be assembled, yet the jurisdiction of a general court-martial is co-extensive with the limits of the federal domain. A court-martial, therefore,

convened in any army is competent to pass upon the case, which may happen to be brought before it, of a soldier belonging to another army and charged with desertion therefrom. And upon the deserter being sentenced to death by such court, the proceedings must be acted upon, and the sentence, if approved, must (unless suspended to await the pleasure of the President) be executed by the commander of the army in which the court is convened. XI, 351. See XI, 234.

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

COURT-MARTIAL, PROCEEDINGS OF NOT TO BE DISCLOSED TO THE ENEMY.

Where a demand was made by the rebel authorities for information in reference to the proceedings of certain of our courts-martial, which resulted in the conviction of certain spies and traitorous emissaries in Kentucky—*held*, that such demand was impertinent, and that the information sought should not be communicated; that this government is in no way responsible to rebels in arms for the action of its own military courts, and that it would utterly degrade itself by recognizing any such responsibility; that any such recognition would involve an ignoring of the great truth that this is a war upon crime and criminals—a truth which we cannot lose sight of without incurring the risk of becoming, in the judgment of the world, criminals ourselves. II, 369; III, 86.

COURT OF INQUIRY.

(1.) Where an officer has been dishonorably discharged by the President, or is otherwise out of the service, he is not entitled to have a court of inquiry granted him. I, 395, 402.

(2.) A copy of the record of a court of inquiry is not to be furnished to parties, or their attorneys, &c., as a matter of *right*, as is a copy of the record of a court-martial. I, 427.

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

SEE EVIDENCE, (2.)

D.

DEATH SENTENCE.

SEE SENTENCE, II.

DEFENCE OF ACCUSED.

(1.) There is no law or usage of the service which would justify a court-martial in denying to a prisoner on trial the right of conducting his own defence. He should, of course, be advised of his privilege to employ counsel; but if he declines to do so, however unskilful or troublesome his action may be, he cannot be interfered with except so far as to enforce on his part the observance of that decorum and respect for the law, and those who administer it, which it is the duty of every court to insist upon in its proceedings. V, 214.

(2.) Neither the high rank in the army of the accused, nor his previous political position, can be regarded as affording the slightest grounds why any more than the usual latitude or privilege should be granted him in his defence by a court-martial. The administration of justice by a military, as by a civil court, must be strictly impartial, or it ceases to be pure. All persons on trial by either tribunal are deemed to be equal before the law; nor are the rules of evidence or of practice to be, under any circumstances, more relaxed in favor of one who is distinguished than of one who is obscure. XI, 204.

SEE ESCAPE, (1.)

DEPARTMENT COMMANDER.

It is understood to have been the custom of the service for department commanders to remit, in their discretion, for good behavior or other sufficient cause, the unexecuted portion of the punishments of men confined within their commands, even where the court which imposed the sentence was not convened by such commander, as well as where such commander was assigned to the department at a date subsequent to the approval of the sentence by some other officer. Such action by the department commander, in remitting the punishment upon grounds which, in his judgment, render such remission just or desirable, has heretofore been invariably sanctioned by the War Department. VI, 35; VIII, 582.

(2.) It is competent for a department commander to issue an order requiring courts-martial within his command to take testimony in regard to the merits in all cases in which a plea of guilty is interposed. XI, 234.

(3.) The mere fact that a general has been designated by his department commander as "second in command" in the department, and ordered to perform the duties of such commander in the absence of the latter, is not sufficient to authorize him to exercise those powers which are required by law to be exercised by a department commander alone. The authority expressly delegated by law to a department commander, as such, cannot be delegated by him to a subordinate.

While, therefore, a certain officer continues to be the only commander appointed to a military department by the President, he alone can confirm, execute, remit, or mitigate sentences of death or of dismissal or cashiering pronounced by courts-martial convened therein. XI, 183.

SEE SIXTY-FIFTH ARTICLE, (5,) (7.)
CONFISCATION, (16.)
CONTRACTOR, II, (5.)
ORDER, (5.)
PUNISHMENT, (8,) (9,) (15.)
REDUCTION TO RANKS, OF OFFICER, (4.)
REVIEWING OFFICER, (9,) (13.)
SENTENCE, III, (4.)

DEPOSITION.

(Act of 3d March, 1863, ch. 75, sec. 27.)

(1.) The act authorizes depositions to be taken "in cases not capital." Depositions cannot, therefore, be taken in a case where the accused is charged with "being a spy." III, 485.

(2.) The deposition of the general commanding, like that of any other witness, may be taken in cases not capital, when he resides or has his headquarters in a different State, Territory, or district from that in which the court sits, but not otherwise. VII, 5.

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

(4.) Although the 74th article indicates justices of the peace as the officers before whom depositions are to be taken, yet, under the act of March 3, 1863, ch. 75, sec. 27, *any* officer authorized to take depositions by the laws of the State, district, or Territory in which the witness is examined, may take a deposition to be used as evidence before a military court. IX, 632.

(5.) As neither the 74th article nor the 27th section of the act of March 3, 1863, ch. 75, can be construed as authorizing the use of depositions as evidence in capital cases tried by military courts, a prisoner charged with desertion is entitled to be confronted with the witnesses. IX, 646.

DEPUTY PROVOST MARSHAL.

SEE COURT-MARTIAL, II, (5.)

DESERTER.

(1.) Section 26, ch. 75, of act of 3d March, 1863, does not apply to cases of desertion in which arrests have been made before the passage of the act or the issuing of the proclamation, but only to deserters not apprehended at that time, and who voluntarily returned to the service before April 1, 1863. Where deserters are arrested before this date, so that their voluntary return is rendered impracticable, their case should not be prejudiced by this proceeding on the part of the government, but they should have the full benefit of the act, and be liable only to the forfeiture of pay and allowances

therein prescribed. They should be treated as though they had returned, because prevented from doing so by superior military authority; for it could not be certainly known that they would not have returned had not the action of the government prevented them. II, 96, 173; III, 123, 276.

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

(3.) It is no defence to the charge of desertion that the accused, after his arrest, was returned to duty and received pay and clothing, if such return, &c., was not by the authority specified in paragraph 159 of the Army Regulations. III, 253.

(4.) That a deserter was arrested before April, 1863, not for the desertion, but for another and graver crime, constitutes no defence to the charge of desertion. III, 276.

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

(6.) Under the requirements of paragraphs 158, 1357, 1358, 1359, of the Army Regulations, and of section 18 of the act of March 16, 1802, a deserter must be held, *by operation of law*, to forfeit all pay remaining due at the time of his desertion, as well as that which accrues during the period of his absence as a deserter, and also to be obliged to make good to the United States the time lost by his desertion. But, of course, in the vast majority of cases, justice can only be done by bringing the party to trial before a court-martial, and having the fact of desertion judicially determined. VII, 325.

(7.) Where a soldier who has deserted is, by competent authority, restored to duty without trial, the mere noting his name on the muster and muster-for-pay rolls as a deserter, with the proper dates in regard to his absenting himself and returning, is a sufficient notice to the paymaster to enforce the forfeiture required by paragraphs 1357 and 1358 of the regulations; and is sufficient evidence for the government that the party owes military service for a period equal to that of his unauthorized absence. VII, 325.

(8.) Under the act of January 11, 1812, section 21, a deserter is amenable to trial as such after he has been discharged from or disconnected with the service. VIII, 375.

(9.) The General Order No. 76, of 1864, in regard to restoring deserters to duty without trial, is prospective as well as retrospective in its operation. This order gives to commanders in the field power to pardon this class of offenders in their discretion, but does not require the exercise of such power as a duty. VII, 674.

(10.) The General Order No. 76 applies to cases of deserters *only*. Where an accused was found guilty, not only of desertion, but also of four other distinct offences, one of which was capital—*held*, that the "commanding general" had no power to pardon him or commute his punishment. IX, 25, 51; VIII, 563.

(11.) Where a general commanding suspended the execution of the

sentence of a deserter, with a recommendation, and forwarded the proceedings for the action of the President, under the 89th article of war, and the President subsequently acted upon the case, adopting the recommendation—*held*, that a restoration of the man to duty meanwhile, pursuant to General Orders No. 76, of 1864, by the successor of that general, was of no effect, the suspension having put the case out of the power of such successor to act upon. VIII, 401.

(12.) An *officer* who leaves his post on a three days' leave of absence, and never returns or reports himself, but absconds to Canada with a large amount of government funds, and remains concealed there, is guilty of the crime of desertion. III, 230.

(13.) Held that cases where the sentences were finally approved after the date of General Order 76, but in which the sentences were pronounced by the court prior to that date, were within the spirit of the order. IX, 119.

(14.) Escaping from confinement while under sentence of a military court—*held*, not to constitute the crime of desertion, on the ground that an escape from a degrading punishment cannot be regarded as an abandonment of the military service, which is a *status* of honor. X, 574.

(15.) A deserter cannot be required to make good the time lost by his desertion upon merely being *charged* with that offence. He must be proved a deserter, either by testimony before a court-martial or by such satisfactory evidence (as his own admission) as would justify his commanding officer in treating him as such without resort to a judicial investigation. VI, 468.

(16.) It is a perfect defence to a charge of desertion on the trial of a soldier for that offence by court-martial, that the department commander has, by a special order, relieved him from the same charge, and restored him to duty. VI, 418.

(17.) The President's proclamation of March 10, 1863, offering an amnesty to soldiers absent without leave who may return to their regiments, &c., within the period fixed thereby, operates as a limited pardon, relieving offenders from all *punishment*, except forfeiture of pay; but it does not relieve a *deserter* from the necessity of making good the time lost by his desertion, or affect, in any way, his obligations under his original contract with the government. X, 549; VI, 469; XII, 139. See "*Bounty*," (5.)

SEE TWENTIETH ARTICLE.
COURT-MARTIAL, II, (1.)
DISMISSAL, I, (6.)
ENROLMENT, I, (5,) (10,) (18,) (19,) (28,) (38,) (39.)
PAY AND ALLOWANCES, (10,) (16,) (18,) (19.)
PENITENTIARY, III, (2.)
PLEA, (2,) (4.)

DETACHED SERVICE.

Where an officer on detached service has neglected to report to his regiment, pursuant to paragraph 468 of the Army Regulations, he cannot properly be dropped on the rolls of the regiment, and thus deprived of pay. The proper penalty for such neglect is to be determined by some form of investigation of the facts of his case. X, 215.

SEE FIELD OFFICER'S COURT, (4.)

DETAIL.

(1.) There is nothing in the law or orders under which the "invalid corps" is constituted to prevent the officers of that corps being detailed as members of a court-martial. The circular of August 7, 1863, from the Provost Marshal General's office, which provides that they shall not be detached on special duty from their companies, evidently intends only to prohibit their being separated from the invalid corps, *as such*. IV, 457.

(2.) Officers detailed on courts-martial, boards of examination, &c., are not properly liable, while thus engaged, for the discharge of their ordinary duties as regimental and company officers, &c. When the proximity of their commands will enable them to perform these duties without interference with those of the service upon which they have been thus detailed, they may, in their discretion, do so; but they cannot be held to be strictly bound to the performance of this extra labor. V, 436.

(3.) Officers detailed for special duty are, while performing it, necessarily relieved from the general duties of their commands, which, however, it is entirely proper for them to discharge, in whole or in part, when practicable to do so. It often happens that officers whose commands are in Washington or its vicinity pursue this course, while sitting in this city as members of military courts. So far as the question of rightful authority is concerned, the same rule applies to those called on to obey, as to those issuing, orders under such circumstances. V, 558. See VI, 53.

(4.) Officers of colored troops, appointed by Brigadier General Wild, whose appointments have been confirmed by the War Department, and who have been duly mustered, and are on duty as such, may be detailed on courts-martial, though they may not have received formal commissions. VIII, 584.

SEE SIXTY-FOURTH ARTICLE.
SEVENTY-FIFTH ARTICLE, (1.)
NINETY-SEVENTH ARTICLE.
FIELD OFFICER'S COURT, (1,) (2,) (3,) (4,) (5.)

DISABILITY.

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

(2.) An officer against whom charges have been preferred is under no disability to prefer charges against another officer. I, 467. So of an officer under arrest. V, 348.

SEE REMOVAL OF DISABILITY.

DISCHARGE.

SEE BOUNTY, (2,) (3,) (4,) (5.)
COURT MARTIAL, I, (4.)
DISQUALIFICATION, (3.)
ENLISTMENT, II, (2,) (5,) (6,) (7.)
PRESIDENT AS PARDONING POWER, (11.)
REMOVAL OF DISABILITY, (1.)

DISCHARGE FROM SERVICE OF MEMBER OF MILITARY COURT.

When, in the course of a trial by court-martial, a member is served with an order from the War Department, or other competent authority, discharging him from the service, the general rule is, that he can no longer sit upon the court, and that he should withdraw therefrom, and the fact of his withdrawal, explained by a copy of the order, be noted upon the record. But where there is reason to believe that such order will be forthwith revoked by the authority issuing it, in order that the member may remain upon the court, there is no impropriety in the court adjourning, for a day, in order that it may be informed whether such revocation will be resorted to. XI, 203.

DIMISSAL, I, (SUMMARY.)

(1.) From the foundation of the government the President has been in the habit of summarily dismissing officers in the land and naval service. The power to do so seems to inhere in him, under the Constitution, as commander-in-chief of the army and navy. The exercise of such a power is necessary to preserve the discipline of the army as at present constituted. VII, 397.

(2.) The power of summary dismissal by the President does not depend for its authority upon the act of Congress, (section 17, chapter 200, act of July 17, 1862,) the act being simply declaratory of the right which has been exercised by the President since the earliest history of the government. VIII, 297.

(3.) The fact that an officer was formally indicted by a grand jury for numerous and grave offences against the laws of the United States—*held* sufficient ground to justify his summary dismissal from the service. VII, 371.

(4.) When an officer fell bravely in battle, before or about the time of the publication of an order dismissing him from the service—*recommended* that, for the protection of his memory, the order be revoked. IX, 222.

(5.) The insertion in a clause, in an order of summary dismissal, depriving the subject of the order of all arrears of pay due, is without legal sanction. (See opinion of Attorney General Mason, 4 Opinions of Attorney General, 444, (1845;) X, 1, 4; VI, 379.

(6.) A summary order of the dismissal of an officer, made to take effect as of a date prior to its issue, has the effect of forfeiting pay due at its date, and is, therefore, in violation of the principle that an officer cannot be deprived of his pay by an order of the President, but only by sentence of court-martial. But where an officer is summarily dismissed for desertion or absence without leave, his dismissal may properly take effect as of the date of the commencement of the unauthorized absence, for at that date he ceases to perform service, and is, therefore, not entitled to pay. VI, 405.

(7.) It cannot affect the operation of an order summarily dismissing an officer as "Second Lieutenant," that before its promulgation in the regiment he had become by promotion a First Lieutenant. VI, 558.

(8.) Where an officer, against whom charges of a grave character (and which, if he were tried and convicted thereon, would justify a sentence of dismissal) had been formally preferred by a responsible superior officer, tendered his resignation with an evident intention of avoiding a trial, and while he was serving in the face of the enemy—*held*, that his act might well be regarded as an admission of the substantial truth of the charges, and afforded a reliable ground for his summary dismissal, in orders, by the President. X, 645.

(9.) Where two officers were shown to have taken part in an attempt to prevent a fair and free expression of the political preferences of the enlisted men of their regiment at the late Presidential election, by offering and furnishing liquor to those who voted against the administration, by promising furloughs to such only, and by giving out that others would be deprived of privileges and subjected to annoyances, and, in one case at least, by even refusing to forward a vote for Mr. Lincoln—such attempt being in some degree successful—*held*, that their summary dismissal was fully warranted and that they should not be restored to the service. XII, 201.

SEE FIFTH ARTICLE, (2.).
COURT-MARTIAL, I, (1)
DISQUALIFICATION, (2)
PRESIDENT AS PARDONING POWER, (3) (4,) (5)
PRESIDENT AS REVIEWING OFFICER, (4,) (6)

DISMISSAL, II, (BY SENTENCE.)

SEE CASHIERING.
DISQUALIFICATION, (1,) (4.)
SENTENCE, I, (5.)

DISQUALIFICATION.

(1.) Section 11, chapter 183, act of July 16, 1862, which declares that no officer of the navy who has been dismissed by sentence of a court-martial shall ever again become an officer therein, amounts to a declaration that officers thus dismissed shall be forever disqualified to hold office in the navy. An attempt to reinstate an officer by revoking the approval of the sentence dismissing him, would contravene directly the provisions of this law. V, 481.

(2.) Dismissal as an officer does not disqualify for entering the service as an enlisted man. VII, 253.

(3.) A dishonorable discharge as a soldier by an executed sentence of a court-martial—"to be drummed out of the service of the United States"—deprives him of no right as a citizen, and does not disqualify him from any employment under the government. VIII, 91.

(4.) Neither a simple sentence of cashiering or dismissal (each having the same effect in law) operates to disqualify an officer of the army from subsequently holding a civil office under the government. VIII, 601.

SEE REDUCTION TO THE RANKS, (2.)

DISRESPECT TOWARD COMMANDING OFFICER.

SEE SIXTH ARTICLE.

DISTRICT.

SEE SIXTY-FIFTH ARTICLE, (7.)
ORDER CONVENING MILITARY COURT.
SEPARATE BRIGADE, (5,) (7.)

DRAFT.

SEE ENROLMENT, I, II.

DRUNKENNESS ON DUTY.

SEE FORTY-FIFTH ARTICLE.
CHARGE, (5.)

E.

EMBEZZLEMENT.

Embezzlement of government property must be such a conversion as evinces an intention to deprive the government of the property itself, not of its temporary use. For a quartermaster to use temporarily in his private carriage a pair of government horses in his charge, as such quartermaster, is not embezzlement, though a reprehensible practice. IV, 421.

SEE THIRTY-NINTH ARTICLE.
FRAUD, (5.)
SUB-TREASURY ACT.

ENLISTMENT, I, (GENERALLY.)

(1.) The oath is an essential part of a *formal* enlistment, and is necessary to complete it. It should be administered by some one of the officers designated in the 10th article of war, or other officer or person authorized by law. II, 111.

(2.) A soldier duly mustered into the service, who has received the pay and performed the duties of a soldier, should be treated as duly enlisted, though he may not have signed enlistment articles. III, 84.

(3.) It is not proper to enlist a man in the volunteer service *as* wagoner, musician, &c. Wagoners, musicians, &c., should be selected from soldiers enlisted as privates. IV, 544, 559.

(4.) The acceptance of pay or bounty from the United States, as a soldier, estops the party from denying the *status* which he has thus openly assumed and the emoluments of which he has received. He is as fully in the service as if all the formalities of the regulations for enlistments had been complied with. VII, 132.

(5.) One who has rendered service as an enlisted man, and, as such, has been armed and clothed by the government, though he may not have been paid, is estopped from denying the validity of his contract of enlistment upon the ground of any informality therein, and cannot on that account be relieved therefrom under a writ of habeas corpus. V, 618.

ENLISTMENT, II, OF MINORS.

(1.) In a case where minors volunteered without the consent of their parents, which was then required by law, their subsequent acceptance by the government, *in lieu* of drafted men, is not regarded as supplying the legal constraint which would dispense with the parents' consent. I, 425.

(2.) Since the repeal of the 5th section of the act of September 28, 1850, chapter 78, the Secretary of War is held to be under no *obligation* to discharge minors between eighteen and twenty-one years, because of having enlisted without the consent of their parents, &c. Congress evidently intended that he should use his *discretion* as to granting applications for such discharge; and it is the custom of the department to refuse all such applications, except when accompanied by proper surgeon's certificate of the minor's physical incapacity for military duty. *Ibid.* But see acts of February 24, 1864, ch. 13, sec. 20, and of July 4, 1864, ch. 237, sec. 5, passed since the date of this opinion. And see (7.)

(3.) The enactment in section 2, chapter 25, of act of February 13, 1863, that "the oath of enlistment taken by the recruit shall be conclusive as to his age," (which it was entirely competent for Congress to declare,) has been literally construed by the Secretary of War, and the right of the party to offer any evidence in conflict with his oath has been uniformly denied. V, 210. But see (7.)

(4.) Held that the President's proclamation, suspending the writ of habeas corpus, embraces in its provisions the case of a minor enlisted without his parents' consent, and that therefore such writ cannot be issued in his behalf.

(5.) The act of 1850, chapter 78, section 5, being repealed by the act of February 13, 1862, chapter 25, section 2, the result is as follows: That minors between eighteen and twenty-one years are not *entitled* to be discharged because of non-age; that minors under eighteen are not *entitled* to discharge, if, in their oath of enlistment, it is set forth that they are fully of that age; and that minors of either of these classes can only be discharged by an order of the Secretary of War, upon a proper case made; lastly, that in the case of a minor actually under eighteen, and whose age is correctly stated in his oath, or who has been enlisted or mustered without taking an oath, the enlistment is wholly void, and a discharge must be granted as of right. V. 372, 398; VIII, 361. But see acts of February 24, 1864, ch. 13, sec. 20, and of July 4, 1864, ch. 237, sec. 5, in regard to discharges by the Secretary of War. And see (7.)

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

(7.) By the provisions of sec. 20, ch. 13, act of February 24, 1864, and of sec. 5, ch. 237, act of July 4, 1864, it is made the posi-

tive *duty* of the Secretary of War to discharge all persons in the military service of the United States who are under the age of eighteen years at the time of the application for their discharge, when it shall appear upon due proof that such persons are in the service without the consent of their parents or guardians, as well as all persons under the age of sixteen who are in the service whether with or without such consent. These enactments are inconsistent with sec. 2, ch. 25, act of February 13, 1862, providing that the oath of enlistment taken by a recruit shall be conclusive as to his age, inasmuch as they evidently contemplate the admission of evidence *dehors* the oath of enlistment to establish the fact of age. The latter enactment must therefore be now held inoperative as to the provision indicated. Previous to the passage of the acts first named, the discharge of minors was left to the *discretion* of the Secretary of War, but the legislation of the Congress of 1864 indicates a well-considered determination to enforce the policy of the government in this matter, by releasing from service all minors under the age of eighteen, upon a proper application addressed to the Secretary. XII, 151.

SEE HABEAS CORPUS, (2,) (3,) (4.)

ENROLMENT, I.

(Act of March 3, 1863, chapter 75.)

(1.) When a foreigner is exempted from military duty because of his alienage, a substitute furnished by him before the question of his liability under the draft was decided is entitled to be discharged from the service. II, 225.

(2.) The enrolment of persons of foreign birth, who shall have declared on oath their intention to become citizens under and in pursuance of the laws of the United States, can add nothing to their rights of suffrage, or to their eligibility to office, unless it may hereafter be provided to that effect by State or congressional legislation. II, 509.

(3.) Paymasters' clerks are liable to draft, not being so far in the military service as to be liable to the specific field duties as soldiers, for which the national forces are drafted. III, 269.

(4.) The judgment of the enrolling board is made *final* by law; but, like any other *quasi* judicial body, it may revise, correct, and reverse its own action, and the revision may be based upon errors either of law or fact. Thus where an exemption certificate has been granted by the board, and the evidence upon which it was granted is discovered to be unreliable, the board should, on notice to the party, proceed to reconsider its action, and may, for good cause, vacate the certificate and hold the party to military duty. III, 441.

(5.) One who is under an obligation to perform military duty on his own account, as an enlisted man, cannot be received as a substitute for another. Where a board has accepted as a substitute one who is proved to be a deserter, it should, after notice to the principal, proceed to reconsider its action, and should set aside its former judgment and annul the certificate of exemption granted. The certificate being vacated, the party's original liability under the draft is revived. III, 273.

(6.) Men who are in the service of the government merely as manufacturers of fire-arms, as are the employés of Colt's establishment, are not so far in the military service as to be exempted from the draft. III. 274.

(7.) Sutlers are liable to draft; so are members of the enrolling board who were not in service on the 3d of March, 1863. III, 278.

(8) There must be two members of the same family in the military service, *at the same time*, to entitle the residue of the family to the privilege granted by the seventh provision of section 2 of the act. III, 278.

(9.) The term "subject to draft," as found in the third provision of the second section of the enrolling act, means, simply, enrolled and liable to draft. III, 281.

(10.) When a drafted man is abroad, or at sea, or otherwise placed in such circumstances as to render it physically impossible for him to have had knowledge of the draft, or of his duty under it, he should not be advertised or treated as a deserter. III, 282.

(11.) In the case of aged or infirm parents having two or more sons subject to military duty, election of the son to be exempted must be made before the draft, and his name should not then appear in the draft-box. If one of only two sons of such parents is already in the military service, the other is exempt, provided his parents are dependent upon his labor for their support. III, 299. See III, 300.

(12.) In case of a father having three sons, one at home, one in the military service, and one having been killed in it, the son remaining at home is not exempt, unless the father be aged and infirm, and depended on such son's labor for support. III, 338.

(13.) If the party is a citizen of the United States, or subject to military duty under its laws, the place of his residence cannot properly be considered in determining the question of his acceptability, either as a recruit for the regular army, or as a substitute for one drafted under the conscript act. III, 344.

(14.) The elements of good character and habits which are, under the regulations, required in the case of recruits for the regular army, may well be insisted on in the case of those offered as substitutes; and when the board is in doubt, or without information on these points, it may, in its discretion, demand proof in relation thereto before accepting a substitute. III, 344.

(15.) A woman who is divorced from her husband who is still living is not a "widow;" and her only son, upon whose labor she is dependent for support, is not exempt under the second clause of the second section of the act. III, 425.

(16.) In the case of a widow having three sons, two of whom are in the naval service, the third is exempt, provided his mother is dependent upon his labor for her support. III, 426.

(17.) A person convicted of felony, though pardoned before the passage of the act, is, under the unqualified language used therein, exempt from the draft. The disability being imposed by the statute, "the pardon will not, according to the better opinion, restore the competency of the offender, the prerogative of the government being

controlled by the authority of the express law." (See Wharton's American Criminal Law, ¶ 765.) III, 426.

(18.) The board of enrolment, being charged with the duty of determining whether a substitute is acceptable, have an original jurisdiction over the question whether the substitute offered be a deserter or not, and are not bound to await its solution by any other tribunal, civil or military. III, 437.

(19.) A drafted man arrested for not reporting himself is arrested as a "deserter," and under the seventh section of the act he should be sent to the nearest military commander or post. III, 438.

(20.) The father of motherless children under twelve years of age, dependent upon his labor for their support, is exempt, notwithstanding he may have married a second time, and his wife be living. A step-mother is not believed to be a mother in the sense of the act. III, 438.

(21.) When a widow has two sons, one of whom is permanently physically disabled for duty, the other is exempt, provided his mother is dependent on his labor for her support. III, 438, 442.

(22.) A son who has furnished a substitute should be treated as in the service for all the purposes of the exemption secured by the 7th clause of the 2d section of the act. It is the amount of contribution to the military service, made by the members of the same family, that is the basis of the exemption; and it is wholly immaterial whether this contribution be made personally, or through a substitute. III, 442.

(23.) Where there is one son in the first, and two or more in the second class, subject to draft, the latter are within the meaning of the 4th provision of the 2d section of the act. III, 442.

(24.) The only son of parents dependent on his labor for their support is not exempt if but one of the parents is aged or infirm. The supposed disability which gives rise to the exemption must apply to both. III, 442.

(25.) Under the 24th section of the act, persons not in the military service arrested for aiding or harboring deserters, &c., are to be delivered to the civil authorities for trial. III, 443. But the Secretary of War has decided that of such offences, when committed in the District of Columbia, a military commission has, in time of war, concurrent jurisdiction with the civil court. VII, 252.

(26.) The right of exemption, secured under the 2d clause of the 2d section of the enrolling act, to the only son of a widow, does not arise out of any obligation, legal or otherwise, on his part, to support his mother. It rests upon the facts that, from a sense of duty, affection, or other influence, he does support her, and that she receives this support from him, and is dependent for it on his labor. III, 458.

(27.) Under the 4th clause of the 2d section of the act it is not necessary that the two or more sons of aged or infirm parents, subject to draft, should be of one household, in order to entitle the parent or parents to elect one of them for exemption. To protect the government from the fraud of having more than one exemption claimed, where the sons reside in different States or within the jurisdiction of

different boards, it would be a justifiable precaution to require the parent making the election to accompany it with an affidavit that no other claim to exemption has been preferred by him or her on behalf of either of the sons. III, 458.

(28.) The 13th section of the enrolling act fully recognizes the right of the party as a deserter to appear before the board of enrolment and insist upon his exemption. III, 459.

(29.) If parents have one son in the army and one at home, and are not dependent on his labor for their support, the son at home cannot be exempted. The right of aged and infirm parents to elect which of two sons shall be exempt exists only when both of these sons are subject to draft, which is not the case when one is already in the service. III, 459.

(30.) The son elected is exempt not only from military duty, but also from draft. His name, therefore, cannot be put into the draft-box. III, 504.

(31.) The State in which a drafted man is enrolled is necessarily credited with one soldier, whether such drafted man enters the service personally or furnishes a substitute, or pays the commutation money. The theory of the governor of New York, that if the drafted man furnishes a substitute who chances to be from another State, then this State also must be credited with one soldier, is erroneous; for thus the government would be debited with two soldiers though receiving but one, and the object of the act would be defeated. III, 552.

(32.) The right of a widow who is aged or infirm to have one of her two sons subject to draft exempted does not depend under the law on the place of her residence; and it may be claimed when she is a resident of a foreign government. Should one of these two sons not be subject to draft, the other cannot be exempted unless his widowed mother is dependent on his labor for her support. III, 553.

(33.) A drafted man who furnishes a substitute must, for all the purposes of exemption, be held to be personally in the service, so long as his substitute continues there. The principle announced in the 17th section of the enrolment act is one which would probably have been declared in the absence of any special legislation on this point. III, 594.

(34.) As it is physically impossible for the substitute to perform at the same time a double duty, one on his own account, and one on account of his principal, his acceptance by the government as a substitute operates necessarily as an exemption from the military service on his own account, so long as his engagement as substitute continues. This is one of the practical results of the substitute system which, however it may be deplored, cannot, it seems, be avoided. III, 602.

(35.) The right of a board of enrolment to revise and correct errors in its proceedings is inherent in the body, and should not be surrendered, though it should be exercised with caution, and always on notice to the party to be affected, and the grounds of the revision should appear. It would not be competent for the board to *assume* that a fraud had been committed, and thereupon proceed to treat the certificate of exemption as a nullity. A fraud, before it can become

the basis of any judicial action, must be *proved;* and to the proceedings in which such proof is introduced the person implicated must be a party, and have an opportunity of disproving the allegations against him. III, 613.

(36.) Labor, within the meaning of the act, may be either physical or intellectual. It may be professional, mechanical, commercial or agricultural; and each of these forms of labor may exist under modifications, or in combination with each other. The means for the support of the parents or widow must be produced by this labor, whatever may be its character. It need not be wholly produced from it, but it must be *mainly* so. Where the income of the son is derived from dividends or rents, it is not produced from his *labor.* Otherwise, where the income is the fruit of professional or physical toil. Where the income is the product of labor and capital co-operating together, the application of the law is rendered more difficult. In such case the income which furnishes the support must be *mainly* derived from the personal labor of the son, in order to bring his case within the exemption. In a doubtful case the test may be found in an answer to the question, whether, if the son's personal labor be withdrawn by calling him to the military service, a support for the parent or widow would remain. III, 615. See V, 92.

(37.) The right of a drafted person to insist on his exemption from service is a privilege which he may waive, and which he does waive when he furnishes a substitute or pays the commutation. He cannot afterwards be permitted to retract that waiver. The act gives the right to furnish the substitute or pay the commutation only on or *before* the day fixed for the party's appearance. III, 631; See III, 638.

(38.) If the drafted party fails to report himself, and is arrested as a deserter, he has still the right to go before the board of enrolment and prove that "he is not liable to do military duty;" but if, on a hearing, his claim is disallowed, he cannot escape personal service, and he is also subject to be proceeded against as a deserter. III, 638.

(39.) Drafted men cannot be treated as a part of the required number of able-bodied men until they have been examined and found physically capable of military service. The expression "obtained from the list of those drafted" implies, first, that the persons referred to are in the possession of the government; secondly, that they have been found capable of, and subject to perform military duty. This necessarily excludes from the computation deserters who have failed to report. III, 639.

(40.) The *clerks* of naval or military commanders are not in the military service within the meaning of the act. III, 437.

(41.) When a claimant to exemption on the ground of physical disability has been examined and found competent to serve, he is not precluded from afterwards setting up the objection of "non-residence," because this would naturally precede the objection of disability. V, 147.

(42.) It is provided that no person who has been convicted of any felony shall be enrolled or permitted to serve in the United States forces. One who in Connecticut has committed the crime of "simple" theft, is a *felon*, and exempt from enrolment. V, 269.

ENROLMENT, II.

(Act of February 24, 1864, chapter 13)

Under the 5th section of this act, which repeals so much of the enrolment act of March 3, 1863, as is inconsistent with its provisions, a drafted man who has paid the commutation money is simply relieved from draft in filling the particular quota which the draft was intended to make up; but such exemption cannot extend beyond the period of one year, at the end of which time the liability to draft is revived. IX, 562.

SEE SLAVE, (6)

ESCAPE.

(1.) Where, after a trial had been continued for ten days, the prisoner effected his escape from the custody of the military authorities, and the judge advocate thereupon rested the case of the prosecution upon the evidence which had been submitted, and the court at once proceeded to convict and sentence the prisoner—*held*, upon the authority of judicial decisions in the State of Indiana, where the trial was held, and in other States, that the proceedings were regular and sentence operative; the prisoner being competent to waive his right to offer testimony and make a defence, and having waived it by his escape and flight. XI, 260, 295.

(2.) An escape by a soldier under sentence of a military court from the confinement imposed by his sentence, which is a degrading punishment, *held* not to be a technical *desertion*, which is an abandonment of the United States service, a status of honor. X, 574. See "*Deserter*," (14.) But *held* that a soldier so escaping may, upon being retaken, be brought to trial on a charge of "conduct to the prejudice of good order and military discipline;" such escape being, at common law, a felony where the original commitment was for felony or treason, and a misdemeanor where the commitment was for a less offence. X, 574. XII, 251. See "*Ninety-Ninth Article*," (12.)

ESTOPPEL.

SEE TWENTIETH ARTICLE, (1.)
ENLISTMENT, I, (4), (5)
MUSTER, (1.)

EVIDENCE.

(1.) A telegraphic despatch may, under certain circumstances, be used as evidence, but not without previous proof that it was sent by the party purporting to have signed it. V, 458.

(2.) A record of a court of inquiry not properly authenticated is not admissible in evidence on a trial by court-martial if objected to. VII, 60.

(3.) The depositions of rebel officers in regard to the innocence of a fellow rebel charged with being a spy, like the testimony of accomplices, should be received with suspicion, unless corroborated by

other evidence. VII, 67. So *held* of the testimony of rebel soldiers in favor of the innocence of a rebel officer on trial by military commission for the murder of a loyal citizen, the witnesses having deserted to our lines as soon as they ascertained the fact of the capture of the accused. X, 330.

(4.) The experience of the war has shown that little weight is to be attached to the unsupported evidence of witnesses of known disloyalty when it jeopardizes the lives or liberty of loyal men. IX, 164, 173. VIII, 311, 312.

(5.) A disloyal citizen under arrest and in confinement, but not convicted of any crime by the judgment of the court, is competent to testify against an officer of the United States on trial. The objection growing out of his disloyalty would, under such circumstances, go to his credibility alone. The testimony of such a witness, when affecting the rights of an officer of the government, should be received with extreme caution, and would be an unsafe basis for a sentence unless corroborated. X, 227.

(6.) An *ex parte* affidavit, taken without notice to the opposite party, cannot be read as evidence before a general court-martial, unless by consent. VII, 113.

(7.) The offence of "publication of falsehoods or misrepresentations of facts, calculated to embarrass or weaken the military authorities"—made punishable as a military offence by a general order of the department of the Missouri—*held* not sustained by evidence merely of a private letter, setting forth grievances, and addressed to the general commanding by citizens. IX, 230.

(8.) The confessions of a disloyal party, induced by means of a deception successfully practiced upon her by an officer of the government, of whose character and intentions she was ignorant, and whom she believed her friend, are admissible in evidence, not having been induced by fear or hope of favor. VII, 455.

(9.) Where the court, against the protest of the accused, allowed a staff officer to testify to a remark made by the chief of the staff to a subordinate concerning the negligence and drunkenness of the accused, and further ruled that such remark was evidence of the *fact* of such drunkenness, &c., because an official statement—*held* that it erred, the testimony being, on the one hand, hearsay, and on the other irrelevant and incompetent, and that such ruling invalidated the finding. VIII, 663. And where the court ruled that the accused could not be allowed to ask on what information the chief of staff made the statement—*held* also to be error, invalidating the finding. *Ibid.*

(10.) A report from the Adjutant General's office containing extracts from the muster-rolls of the regiment on which a soldier was noted as a deserter on a certain date—*held* to be insufficient proof of the fact of desertion. XII, 28.

(11.) The government has no right to tempt innocent men to crime and then to punish them for its perpetration, but is justified in availing itself of the services of detectives in order to convert suspected into positive guilt by an accumulation of proof. Where, therefore, certain

parties were convicted of violation of the laws of war in trading with the enemy, upon the testimony of a government detective, through whom the goods were sold to be carried by him across the lines and delivered to the rebel Moseby, who had recommended the witness to the accused—*held* that the conviction was justified by this state of fact; the opinion delivered by Taney, C. J., in the United States district court at Baltimore, in June, 1864, in the case of *Stern*, (a proceeding *in rem*,) being reviewed, and that case distinguished from the present. The fact that the Department Commander, having reason to believe that the accused had been guilty of engaging, and were seeking opportunities to engage again, in a contraband trade with the enemy, had authorized his detective to afford them facilities for doing so, with a view to a discovery of their criminal purposes, does not in any manner vary the legal aspect of the offence committed by them under such circumstances. This ruling is supported by the decision in *Regina* vs. *Williams*, 1 Carrington & Kirwan, 195. In this case "overtures were made by a person to the servant of a publican, to induce him to join in robbing his master's till. The servant communicated the matter to the master, and the former, by the direction of the latter, some weeks after, opened a communication with the person who had made the overtures, in consequence of which he came to the master's premises. The master having previously marked the money, it was placed on the counter by the servant, in order that it might be taken up by the party who had come for the purpose. The money being so taken up, it was *held* that the offence was *larceny*, and that the fact that the felony was induced by the artifice of the owner, exercised for the purpose of entrapping the thief, constituted no defence." (See 2 Wharton's American Criminal Law, § 1859.) This is the leading case upon the principle involved, and has been repeatedly approved by jurists both of England and this country. XI, 87.

SEE MUSTER, (1.)
PROCEEDINGS AT LAW AGAINST OFFICER, (10.)
SPY, *passim*.

EXEMPTION.

SEE ENROLMENT, I, *passim*.

F.

FALSE PRETENCES.

(1.) The offence of obtaining money by false pretences is not, according to the current of authorities, technically made out by proof only of false affirmation used, and of a suppression of truth in regard to the ownership of the property by the sale of which the money was obtained. Yet *held* that this general rule should not be strictly applied to a finding of guilty by a military commission upon a charge

of such offence so proved, when by the sentence justice is done in a region where the ordinary civil courts are not open, and where military tribunals can alone be depended up. for the protection of private rights. VIII, 617.

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

FELONY.

The offences specified in section 1st, chapter 67, of act of 2d March, 1863, in regard to frauds upon the government—*held* not to be felonies. They are not specially designated as such, nor is there any indication in the statute that the intention of Congress in framing the act was to create new felonies, nor are they construable as such by the rules of the common law. VIII, 332.

SEE ENROLMENT, (17,) (42.)
JURISDICTION, (1.)

FIELD OFFICER'S COURT.

(Act of July 17, 1862, chapter 201, section 7.)

(1.) The colonel or commanding officer of the regiment should detail the field officer as a court, where there is more than one field officer on duty with the regiment. If there be but one field officer on duty with it, *he* cannot, as commanding officer, detail himself as a court, but he may be detailed as such by the brigade, or next superior commander; if there be no field officer present with the regiment, the act is inoperative, and the regimental or garrison court-martial must be resorted to. The latter court can now be held only in cases where it is impracticable to detail a field officer as a court in the regiment. In other words, the pre-existing law (*Sixty-Sixth Article*) as to such court is repealed only in cases where it is practicable to convene the field officer's court under the act. Under a different interpretation of the act a numerous class of offences would be left without any tribunal for their trial and punishment. I. 368, 400; II, 58, 68; III, 81, 182, 280, 644; V, 523; VII, 49; VIII, 413.

(2.) Where the detail of a field officer as a court is made by the brigade commander, in a case where there is present in command of the regiment a field officer superior to the one detailed, who, in accordance with the usual practice derived from that of the regimental, &c., court-martial, would ordinarily be the proper officer to make the detail—*held* that such irregularity does not affect the validity of the proceedings of the field officer's court, especially in view of the fact that his proceedings must eventually be submitted to the brigade commander for his approval. X, 470. And see XIII, 14.

(3.) The captain commanding a regiment, in the absence of any field officer, cannot be detailed as a court under the act which con-

templates a field officer only as constituting such court. But where, in the case of the regular regiments of the 5th corps, which were quite destitute of field officers, certain senior captains commanding were by a formal order of Major General Meade, commanding the army, appointed "acting majors" of their regiments, and ordered to be obeyed, respected, and treated as such—*held* that they might be deemed field officers within the meaning of the act, and could be detailed as a court by their brigade commander. V, 523; IV, 537. But this is the only instance in which the rulings of this bureau have approved the appointment of an "*acting*" field officer as a field officer's court. XI, 209.

(4.) The field officer detailed must be in service with his regiment, and his jurisdiction is expressly confined to offences committed by members of the regiment to which he belongs. III, 613. An enlisted man, detached from his regiment by being detailed for duty at a division hospital, is not within the jurisdiction of a court held by a field officer of his regiment. X, 470.

(5.) The act was intended to provide for the summary disposition of cases occurring in regiments when on the march and in active field service. It is applicable to the regimental organization only. The field officer, to be detailed as the court, must be the field officer of a regiment *as such*. An ordnance officer (with a field officer's rank) commanding a detachment of ordnance officers and men at an arsenal cannot derive from the statute any authority whatever to act in the judicial capacity indicated. V, 413.

(6.) Though it is to be inferred from the act that it was the intention of Congress to confer on the "field officer" an *exclusive* jurisdiction over that class of offences previously triable by regimental and garrison courts-martial, yet it is not certain that the authority of *general* courts-martial, whose jurisdiction is co-extensive with the trial of *all* crimes and all persons subject to military law, should be held to be thus restricted by implication. It would probably be safer to determine that it was the purpose of Congress to put the field officer's courts in the place and stead of garrison and regimental courts-martial, and to do no more than this. II, 58.

(7.) The field officer's court, like the regimental, &c.. court, is not competent to pass upon a charge of desertion, this being a capital crime. Nor should it assume to pass upon so serious an offence as an "attempt at murder," since the proper punishment therefor, in case of conviction, would be more severe than such a court is authorized to impose; the limitations upon its power to sentence (as upon its jurisdiction) being the same as those prescribed by the 66th and 67th articles for the regimental, &c., court-martial. XI, 210.

(8.) It is only where a *battery company* forms part of a regiment, or is attached for the time to some regiment, (which rarely happens in the field,) that the men may be tried by a court held by a field officer of the regiment under the provisions of the act. The enlisted men of a detached battery company in the field should be tried by a general court-martial convened in the usual manner. V, 563.

(9.) The "field officer" need not be specially sworn before enter-

ing on his duties as a court. The law imposes this duty upon him as an officer of the army, and he discharges it under the sanction of his official military oath. I, 371; V, 395, 405.

(10.) The whole duty of the court is performed by the field officer. No judge advocate is provided for, or required. I, 371.

(11.) There is no such separate officer as a "recorder" of a field officer's court. The field officer prepares his own record. XI, 210.

(12.) The proceedings of the field officer are necessarily summary; he will therefore make a brief but distinct *record* thereof, setting forth the order detailing him as a court, the names of offenders, the offences with which they are charged, with the time and place of commission, the pleas, the findings, and the sentences imposed. The record should also show that the accused were present before the court, and that the charges were investigated. But the testimony, except under very peculiar circumstances, need not be recited, nor need it be set forth that the accused had an opportunity to offer evidence or make a statement. Though it is preferable that the record of each case should be made up separately, it is not a fatal irregularity if the proceedings in a number of cases are united and accompanied by a single copy of the order detailing the court, instead of repeating it with each case. I, 371, 400, 486; III, 280; VIII, 249, 414, IX, 29; VI, 584.

(13.) In reviewing the proceedings of a field officer's court, the regularity of the proceedings, and the adaptation of the punishment to the offence of which the party has been found guilty, are the only questions on which the reviewing officer can be enabled to pass a judgment. It could not have been contemplated that he should inquire into the sufficiency of the testimony to sustain the sentence. Had this been intended, it would have been necessary to spread upon the record the evidence in all its details in each case; and such a record it would generally be out of the power of the "field officer" to prepare. He may well add, however, to this record any statement he may deem proper to be made in reference to the character of the testimony, so as to put the revising authority more fully in possession of the case. I, 375; I, 371; VIII, 249; IX, 29.

(14.) It is not deemed *essential* to the validity of a field officer's court that the accused should appear from the record to have had an opportunity of challenge. It is advisable, however, that if any valid objection to being tried by the field officer detailed as the court is entertained by the accused, such objection should be set forth in the record as a fact for the information of the reviewing officer. XI, 210.

(15.) The "field officer" can in no case review his own proceedings. Where the regiment is not in command of a "brigade commander" or "post commander," the record should be submitted to the division commander, or the commander next higher in authority to the commanding officer of the regiment, who in such case would be the proper officer to review the proceedings within the spirit of the enactment. Such commander, if he approve the proceedings, is also the proper officer to order the execution of the sentence. V, 175. See XIII, 14.

(16.) The *punishment* ordered by the field officer's court must be

inflicted by direction of the brigade commander, or commanding officer of the post, as the case may be, (see (11,) after having examined and approved the proceedings. V, 52.

(17.) When detailed under the act, the officer constitutes a court, and as his jurisdiction is confined to cases arising in his own regiment, and previously to the passage of this act triable by a regimental or garrison court-martial, it seems that, with strict propriety of language, his proceedings may be designated as those of a regimental court-martial. The caption of the record should, in such case, indicate his *status* by a recital somewhat as follows: "Proceedings of a regimental court-martial, consisting of,—(name of officer,)—detailed for that duty under the provisions of section 7, chapter 201 of act of July 17, 1862." V, 395.

(18.) Though cases where the time of absence without leave is unusually long are more properly brought before a general court-martial, yet the long duration of the absence does not put them without the jurisdiction of a field officer's court, which has the right to take cognizance of all cases of absence without leave. VII, 207.

(19.) The sentence of a field officer's court, in a case of absence without leave, that the accused shall forfeit $10, in addition to the forfeiture required by paragraph 1357 of the army regulations, is valid. The allusion to the latter forfeiture is mere surplusage, such forfeiture accruing in any event by operation of law, and being therefore no part of the sentence. VII, 207.

(20.) The brigade commander, who is constituted by the act the reviewing officer of the proceedings of a field officer's court, is invested with the same power of pardon or mitigation of the sentence as is conferred by the 89th article upon the commanding officer of a regiment or garrison in regard to the sentence of a regimental or garrison court-martial. X, 283.

FINDING.

(1.) To find guilty of the specification, attaching no criminality thereto, and guilty of the charge, is irregular, as nothing remain in the case to sustain the charge, or form the basis of a sentence. IV, 275.

(2.) It is not competent for a court-martial to find an accused not guilty of the specification, and yet guilty of the charge, where there is but one specification. By finding him not guilty of the specification they acquit him of all that goes to constitute the offence described in the charge. Where the court believe that the accused is guilty of the charge, but not precisely as laid in the specification, they should find him guilty of the latter, but with such exceptions or substitutions as may be necessary to present the facts as proved on the trial, and then guilty of the charge. V, 576. And see V, 51; IX, 130.

(3.) If it is found that none of the facts set forth in the specification are true, then no offence is made out, and the prisoner is entitled to an unqualified acquittal; but if it is found that a portion of them are true, the finding should be guilty of that portion, and not guilty of the remainder. If the facts set forth and proved are decided to

be void of criminality, it should be so stated, and a verdict of not guilty of the charge rendered; but if they make out a kindred offence of lesser degree than that designated in the charge, then in the finding that lesser offence should be designated by substituting the charge proved for the one originally set up in the pleadings. VII, 634; IX, 24, 26, 46, 49.

(4.) Where the finding is guilty of the specification, but not guilty of the charge or of any lesser kindred offence, there is nothing left upon which a sentence can rest. It is equivalent to finding that the state of facts set forth in the specification do not make out the specific offence charged. VII, 600, 608, 633. See IX, 19, 135.

(5.) In case of a finding of guilty of the specification, and not guilty of the charge of desertion, but guilty of absence without leave, the date when the accused absented himself, and the period of his absence, should fully appear from the finding, in connexion with the specification. Otherwise there is nothing in the judgment of the court furnishing a basis for a plea in bar in case of a subsequent arraignment for the same offence. VII, 513, 348.

(6.) The accused cannot be found not guilty both of the entire specification and of the charge of desertion, and yet guilty of absence without leave. VII, 616, 634; IX, 24, 26, 46, 49. And see VII, 357.

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

(8.) A finding expressed in the record in this form, "The court is of opinion that the accused (naming him) is guilty," &c., is regular. IV, 445.

(9.) A finding of guilty upon the charge is warranted, where, of three specifications, one is void and insufficient, but the others are well pleaded and sufficient. IX, 90.

(10.) Where an officer is charged with "conduct unbecoming an officer and gentleman" in the appropriation of moneys, the gist of the offence, as set forth in the specification, being fraud; and the court find him guilty of the charge, and guilty of the specification *except* the words 'corruptly and fraudulently," (by which alone the fraud is alleged)—*held* that the findings were inconsistent, and the sentence irregular and invalid. XI, 41. And see XI, 44, 81.

(11.) The fact that the finding of guilty upon one of several charges is irregular or unauthorized, does not invalidate the proceedings of the court-martial where the remaining charges are sufficient in form to support the sentence. XI. 67.

(12.) Where the conviction upon one of several charges is unauthorized, the evidence failing to sustain the charge, but the findings upon the remaining charges are supported by the facts proved, and these charges are sufficient in law to warrant the sentence imposed, such sentence is to be held valid and operative. XII, 30.

(13.) It is held by the Secretary of War that an accused brought to trial under any specific charge may legally be convicted under the 99th article, where the evidence proves the commission of an act contrary to good order and military discipline, but does not sustain the specific charge. IX, 656. So held in the case of *Brigadier General Revere*,

(V, 265,) where the accused was found *not guilty* of "*conduct unbecoming an officer and a gentleman,*" the offence with which he was charged, but *guilty* of "*conduct to the prejudice of good order and military discipline.*" This finding was approved by the President upon the suggestion of the general-in-chief that in time of war a strict observance of the *general rule*—that if the accused is found not guilty of the specific charge he must be acquitted—was not called for.

So held, and such a finding sustained, in the case of a soldier charged with a violation of the 20th article. XI, 87.

But under a charge of a violation of a specific article the accused cannot be found not guilty but guilty of a violation of another article, (other than the 99th,) setting forth an entirely different specific offence or offences. Thus where the accused is charged with a violation of the 46th Article, a finding of not guilty but guilty of a violation of the 50th Article is irregular and invalid. XI, 276. And so *held*, where, *under* a charge of violating the 52d Article, the accused was acquitted, but convicted of a violation of the 21st Article, or of "absence without leave." XI, 274.

SEE DESERTER, (1.)
LESSER KINDRED OFFENCE.

FINE.

(1.) A corps commander, upon discontinuing court-martial proceedings against an enlisted man charged with absence without leave, and allowing him to re-enlist as a veteran volunteer, required him by special order to forfeit the pay due for the term of his absence, (and which he would have forfeited by operation of law,) and fifty dollars additional from his pay, by way of fine. *Held* that this fine, imposed as a punishment, and independently of any judicial investigation, was imposed without authority, and could not be enforced. VIII, 444.

(2.) Where a hospital steward, in consideration of the withdrawal of proceedings against his wife and himself before a United States commissioner for obtaining money by means of a false voucher, paid the sum of three hundred dollars to a United States district attorney, who received and accepted it by way of fine and sufficient punishment for the offence, and thereupon transmitted it to the War Department—*advised*, that the government, having by the unwarrantable act of its own official, which it must condemn, been made the recipient of the money paid, might properly, for the purification of the public service, refund the same as received in an immoral and dishonorable transaction, although the party was not *in law* entitled to its recovery. XII, 209.

SEE SENTENCE, III, (7.)

FLAG OF TRUCE.

(1.) The reception of persons within our lines under a flag of truce does not necessarily preclude their subsequent detention for the purpose of further examination into their character and business, as a precaution against the designs of such persons as should properly be excluded from the privilege of penetrating within our territory.

That the enforcement of this rule should sometimes subject neutrals to temporary inconvenience is almost inevitable. V, 193.

(2.) The reception of a person within military lines under a flag of truce does not operate as a *safe conduct*, allowing him a free passage within the territory whose lines he has entered. The safe conduct and flag of truce differ materially both in their nature and purpose. The one, like a passport or safeguard, is a formal and specific instrument in writing, issued by the sovereign authority for some purpose of public policy. Since the privilege which it extends is "so far a dispensation from the legal effects of war," the instrument of safe conduct is strictly construed, and it is usual to set forth therein "every particular branch and extent of the indulgence" thereby conveyed. It is generally granted to a subject of the enemy, or to a public minister, or other personage ordinarily entitled under the *comitas gentium* to such privilege, and authorizes him to pass through the territory of the sovereign, either alone or with his family, servants, and effects, as the case may be. The sovereign is thereupon bound to afford him full protection against any of his own subjects or forces, and to indemnify him for any injury which he may sustain by reason of a violation of the security thus solemnly guaranteed. (See Vattel, ch. XVII; 1 Kent, 162; Woolsey, ¶ 147.) On the other hand, the flag of truce is not limited to particular persons or objects, but is used for a great variety of purposes, nor is its design required to be expressed in writing. It is often merely an informal means of communication, for mutual convenience, between hostile armies; but beyond affording a safe communication and transit, it is, ordinarily, in the absence of any special convention, without efficacy. The protection it insures is but temporary, and is not to be continued after the immediate mission of the flag has been accomplished. The detention and confinement, therefore, on reasonable grounds of suspicion, of one who has been permitted to enter our lines under a flag of truce from the enemy, is warranted by the laws of war. The party is protected by the flag during his transit, and is *prima facie* entitled to enter our lines under it; but he comes subject to the supervision and control of the police power, to which all strangers entering military lines must necessarily be subjected. VIII, 612. See VI, 434.

FORFEITURE, (BY OPERATION OF LAW.)

See BOUNTY, (3.)
DESERTER, (6,) (7,) (8.)
FIELD OFFICER'S COURT, (19.)
PAY AND ALLOWANCES, (16,) (18,) (19.)

FORFEITURE, (BY ORDER.)

See DETACHED SERVICE
DISMISSAL, I, (5.)
FINE.
PUNISHMENT, (13.)

FORFEITURE, (BY SENTENCE.)

1.) The sentence of a court-martial forfeiting the pay of a soldier or officer cannot be remitted except as to such of the pay as is not yet

due at the date of the remission. As to all other pay, the sentence has become executed, and cannot be reached by the pardoning power. I, 393; VIII, 392, 576, 658; IX, 196; X, 676.

But where the sentence is void *ab initio*, and the forfeiture *illegal*, the amount forfeited should be made good to the accused, although the sentence has been executed. IX, 485.

(2.) A court-martial, in forfeiting pay by its sentence, has no power to apply it to satisfy a personal liability of the accused, however justly adjudged, or to the use of his family. The amount forfeited can accrue to the United States only. See "*Sentence*," I, (2,) (4.) Nor has the Secretary of War any power to so apply any portion of the fine when paid. See "*Sentence*" I, (4.)

SEE BOUNTY, (2,) (3,) (4.)
FRAUD, (6.)
PAY AND ALLOWANCES, (8) (9,) (10,) (17.)
PROVOST JUDGE OR COURT, (2.)
PUNISHMENT, (5,) (12.)
SENTENCE, I, (1,) (2,) (3,) (4.)

FORGERY.

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

FORMER TRIAL.

SEE EIGHTY-SEVENTH ARTICLE.
AUTREFOIS ACQUIT.

FRAUD.

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

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

(2.) The act authorizes the trial by court-martial of those who are no longer in the military service, but only for offences committed while in it. V, 342, 341.

(3.) In framing a charge for wilfully misappropriating, &c., public money, &c., under the act of March 2, 1863, it is not necessary to allege in terms an intention to defraud. The act itself is necessarily a fraud upon the government. V. 498.

(4.) A charge simply of "aiding in obtaining the payment of a claim upon the United States, knowing the same to be false," &c., is not a proper statement of the offence of entering into an agreement, combination, or conspiracy, to cheat or defraud the government, &c., by aiding to obtain the payment of a false claim, specified in section 1, chapter 67, of the act of March 2, 1863. VII, 567.

(5.) The offence of embezzlement or misappropriation of money of the United States must have been consummated by an officer while in the service, in order to render him amenable to trial therefor under the provision of the act of March 2, 1863, ch. 67. If his deficit, which is supposed to constitute this offence, was not ascertained until, at some period after he left the service, he was called upon to present

an account, or a demand was made upon him for the deficiency, he would be held in law, in the absence of other proof of the circumstances of his offence, to have committed the act charged at the date of such demand, &c., and of his refusal to comply therewith, and not before. XI, 173.

(6.) A sentence imposed by a court-martial upon an officer is not executed as to him until he is formally notified of its confirmation by the proper authority. If, therefore, after the publication in the general order of the department commander, of the confirmation of a sentence of dismissal of an officer with forfeiture of all pay due, but before he is properly notified thereof, such officer draws a portion of the pay so forfeited, he is not chargeable with fraud under the provisions of the act of March 2, 1863, ch. 67, sec. 1. X, 609.

(7.) Where an assistant quartermaster employed certain teams, tools, lime and other property in his charge, belonging to the United States, in the construction of stables, &c., at the race-track of a sporting club of which he was vice-president—*held* that this unauthorized *use* was a misappropriation of such property within the meaning of the act of March 2, 1863, ch. 67, sec. 1, and that this officer was triable by court martial therefor. X, 664.

SEE CONTRACTOR, II, (7.)

G.

GARNISHMENT OF PAY.

The principle of public policy which protects employés in the service from having their salaries and emoluments garnisheed in the hands of the government does not extend to a case where the pay of a soldier has been received by him, and become his private property. In that case it is liable to be proceeded against by his creditors, and may be attached by garnishee process in the hands of his agent. I, 378; VIII, 493.

GENERAL COMMANDING ARMY IN THE FIELD.

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

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

GIVING AID AND COMFORT TO THE REBELLION.

(Act July 17, 1862, chapter 195, section 2.)

(1.) A person who acts at the north as banker and financial agent of rebels residing in the disloyal States, and as a broker dealing in confederate securities, is chargeable with giving aid and comfort to the rebellion, in the sense of the 2d section of the act of July 17, 1862, chapter 195. II, 458, 580.

(2.) One who has contracted to furnish munitions of war to the enemy, and has manufactured them under his contract, is liable to a prosecution under the act, although the munitions were not actually delivered by him. V, 275.

(3.) One who sells contraband property to be conveyed by another to the enemy, and which he understands is to be so conveyed, is equally criminal under the act as if he had himself shipped the goods to the south. V, 275.

See MILITARY COMMISSION, II, (3.)

GIVING INTELLIGENCE TO THE ENEMY.

See FIFTY-SEVENTH ARTICLE.

GOVERNOR OF STATE.

See JURISDICTION, (2.)
PRISONER OF WAR, (6,) (7.)
TRANSFER, (1.)

GUERILLA.

(1.) The charge of "being a guerilla" may be deemed a military offence *per se*, like that of "being a spy;" the character of the guerilla having become, during the present rebellion, as well understood as that of a spy, and the charge being therefore such an one as could not possibly mislead the accused as to its nature or criminality if proved, or embarrass him in making his plea or defence. The epithet "guerilla" has, in fact, become so familiar, that, as in the case of the term "spy," its mere annunciation carries with it a legal definition of crime.

The charge of "being a guerilla," with the specification "in that he did unlawfully take up arms as a guerilla, and did act and co-operate with guerillas," &c., is also held to be well averred under the rules of pleading which apply to offences where the criminality consists, not in a single malfeasance, but in habitual conduct, or a series of similar acts, as the offence of "being a barrator," or "being a common scold."

The charge of "being a guerilla," (in a case occurring in Missouri,) is also justified as a technical and proper charge of specific offence by the military orders of the department of Missouri, (No. 30, of April 22, 1863,) in which the character and offence of the guerilla are published and stigmatized, and he is declared to be beyond the pale of the laws of regular warfare, and to be punishable with death. III, 589.

(2.) Section 1, chapter 215, of act of July 2, 1864, gives to commanders of armies in the field, and of departments, the power to carry into execution *all* sentences, whether of court-martial or military commission, imposed upon guerilla marauders, for the offences named therein. The expletive "*marauder*" adds nothing to, and detracts nothing from, the significance of the term *guerilla*, the programme of whose life, as understood in this country, imports marauding as one of its leading features. IX, 535.

See PRESIDENT AS REVIEWING OFFICER, (6.)
MILITARY COMMISSION, IV, (4.)
SENTENCE, II, (2.)

H.

HABEAS CORPUS.

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

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

(3.) Under the act of 13th February, 1862, chapter 25, section 2, if the oath of enlistment shows that the soldier was fully eighteen years of age, no court is justified in discharging him upon habeas corpus, whatever be the testimony offered as to his actual age. It is therefore a proper return to the writ that the party is a soldier in the United States service, and that, on signing the enlistment papers, he made oath that he was at least eighteen. If no such oath has been taken, the party would be entitled to be discharged, on proof that he was under eighteen at his enlistment. *Ibid.* See "*Enlistment*," II, (3,) (5,) (6.)

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

(5.) It is a proper and sufficient return to a writ of *habeas corpus*, by an officer, that the prisoner was not in his custody, but in the custody of a military court charged with the duty of, and having full ju-

risdiction for, trying him for the crime of desertion, with which he was charged. Such a return ought certainly to be satisfactory to the civil authorities. II, 34.

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

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

(8.) A provost marshal would violate his duty in producing the body of a drafted man before the State court issuing the writ of habeas corpus. He should make the return prescribed in circular No. 36 issued from the Provost Marshal General's office. The State court has no jurisdiction of the question whether the drafted man is *legally held* in the military service. It is enough to exclude that jurisdiction that he *is in fact* so held, (III, 457, 578,) and if the provost marshal is arrested for an alleged contempt in not obeying the mandate to produce the body of the deserter, the arrest should be resisted by military force; and should the judge persist, through a *posse comitatus* in aid of his ministerial officer, in an endeavor to enforce such mandate, the military authorities would be fully justified in placing him in arrest. III, 502.

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

In the case of a most active and audacious offender, in open hostility to the government, and engaged in discouraging enlistments. I, 345.

In the case of one detected in treasonable correspondence with the enemy, and shown to be a dangerous character, alike from his ability and his intense and active disloyalty. II, 174.

In the case of one who had been largely engaged in dealing in "confederate" notes and securities, in acting as the banker and finan-

cial agent for southern rebels, and in carrying on a disloyal and treasonable correspondence with the latter, and who had also been a notorious sympathizer with the rebellion. II, 456.

In the case of a citizen of Pennsylvania, of good social position, and influence, and unusual intelligence, who, upon the invasion of that State in September, 1862, by the rebels, joined them, and rendered them efficient service as a guide, and in furnishing them valuable information as to the roads and the country. III, 72.

In the case of a citizen of Baltimore, arrested while swimming the Potomac for the purpose of joining the enemy and engaging in overt acts of treason and rebellion—suspension of the writ recommended till he should enter into a sufficient bond to refrain from any similar act or attempt in the future. III, 255.

See ENLISTMENT, I, (5;) II, (4.)
VIOLATION OF THE LAWS OF WAR, (3.)

HOSTAGES.

Where two of our soldiers were treacherously captured, as well as fired upon and robbed, by eight of the enemy, by means of a pretended flag of truce—*held*, that the act was one of marked atrocity, and that the government might well resort to the seizing of hostages, as a means known to civilized warfare, to compel the surrender of our soldiers as well as of the criminals who committed the act. So, when ten disloyal citizens had been seized as hostages for the two soldiers and the eight traitors who were engaged in their capture, &c., and the two captives had afterwards been given up by the enemy—*recommended* that two of the hostages be discharged, but that these should not be the fathers or relatives of any of the criminals still at large; and further, that (such relatives, &c., being excluded) the two oldest and least noted for disloyalty should be chosen. IX, 210.

See PRISONERS OF WAR, (5.)

HOURS OF SESSION OF COURT MARTIAL.

See SEVENTY-FIFTH ARTICLE, (2.)
RECORD, IV, (24.)

I.

IMPRISONMENT.

See PENITENTIARY, I, II, III.
SENTENCE, III, (1, (2,) (3)

INSANITY.

In capital cases, where the defence of insanity has been set up, and the evidence in support of it has consisted in eccentricities of character and numerous acts and appearances, extending back for a period of

years, which might justly be considered strange and peculiar for one in the full enjoyment of his mental faculties, it has been the custom of the President to refer the case for examination and report to a medical expert, before finally acting upon it. VI, 125; V, 397; VIII, 202.

INTERPRETER.

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

SEE CLERK, (2.)

INVALID CORPS.

SEE NINETY-SEVENTH ARTICLE, (5,) (8.)
DETAIL, (2.)

J.

JOINDER.

No legal objection exists, when two or more persons have concurred in the commission of a military offence, to joining them in the charges, specifications, and trial, though the practice has been to try but one case at a time. V, 479.

JUDGE ADVOCATE.

(1.) The position and duties of judge advocate are regarded as incompatible with those of a *member* of the court-martial on which he has been detailed. It is clear that the blending of these two characters is forbidden by principle and unsanctioned by usage, and would be in derogation of the rights of the party on trial. II, 60.

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

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

(4.) The judge advocate appointed by the order convening the court, unless relieved by an order which appears on the record, is the only judge advocate who can properly authenticate the proceed-

ings or certify the sentence pronounced. Until such judge advocate is so relieved, an order appointing another officer judge advocate is inoperative, and no sentence certified by that officer can be enforced. II, 148.

(5.) It is at all times competent for the officer convening a general court-martial to relieve the judge advocate first detailed, and to substitute another in his place. This course, however, especially when resorted to pending a trial, tends to embarrass the prosecution, and should not be pursued except in extreme cases. VII, 534; V, 550.

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

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

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

(9.) A judge advocate cannot be appointed by the court; and in a case where one is so appointed and acts temporarily, the proceedings are irregular, and the sentence is void. IV, 26. See (13.)

(10.) No precedent is known to exist of the assignment of an officer holding the appointment of judge advocate, under the act of July 17, 1862, ch. 201, sec. 6, to the duty of conducting the *defence* before a court-martial; and for him *to act* in such capacity would be manifestly improper. VII, 58.

(11.) For the president of a court to order the judge advocate under arrest is an exercise of power unwarranted and wholly without example in the military service. III, 603.

(12.) A judge advocate is entitled to the allowances mentioned in paragraph 1138 of the regulations, only when attached to a general court martial for which he has been duly detailed. VIII, 313.

(13.) The court has no power to order or authorize its junior member to act as judge advocate upon a trial in place of the judge advocate originally detailed, but who has been relieved without a successor being appointed in his place by the proper authority. VII, 246.

(14.) The judge advocate of a military court who is at his own request affirmed, instead of being sworn, is legally qualified to perform his duties. II, 562.

(15.) There is no law against the appointment of a surgeon as a judge advocate, but the present usage of the service is opposed to it. IX, 377.

(16.) Where a judge advocate dies or is disabled pending a trial, another may be appointed in his stead; but where he dies after the conclusion of the trial, and before authenticating the proceedings and certifying the sentence, the record cannot be completed by the signature of his successor, and the sentence is inoperative. IX, 110.

(17.) The refusal of a judge advocate to communicate to the court for its consideration an order transmitted to him from the Secretary of War, requiring him to enter a *nolle prosequi* in a certain case, is unwarrantable, and an act of insubordination. IX, 488. See "*Nolle prosequi.*"

(18.) It is a part of the duty of a judge advocate of a department or army in the field to cause to be corrected, as far as practicable, all errors and irregularities in the records of military courts which come into his hands for review and transmission, by forthwith calling attention to such errors, &c., on the part of commanders, who have acted upon and forwarded the proceedings. XI, 154.

SEE SIXTY-SIXTH ARTICLE, (1.)
SIXTY-NINTH ARTICLE, (1.)
COUNSEL TO ASSIST PROSECUTION.
FIELD OFFICERS' COURT, (10.)
PAY OF MEMBERS OF MILITARY COURT, (3.)
RECORDER.
WITNESS, (1,) (5,) (6,) (8,) (13,) (14.)

JURISDICTION.

(1.) There can be no doubt of the constitutionality of the enactment of section 30, chapter 75, act of 3d March, 1863, extending the jurisdiction of military courts over certain cases of felony. V, 559.

(2.) *Held* that the jurisdiction conferred, by sec. 30, ch. 75, Act of March 3, 1863, upon military courts in time of war, &c., to pass upon cases of the crimes therein specified, when committed by persons in the military service, is *exclusive.* It was the manifest purpose of the act to make the crimes therein mentioned military crimes, and triable by military courts, when committed anywhere in the United States, in time of war, insurrection, or rebellion, by persons in the military service of the United States and subject to the articles of war. The highest interests of the military service, as well as of the public at large, demand the prompt and summary punishment of these offences, when perpetrated under the circumstances mentioned; and this consideration doubtless controlled Congress in transferring the jurisdiction from the civil to the military courts. To accomplish, therefore, the leading object of the law, as well as to prevent any conflict between the civil and military authority, it should be held that the jurisdiction thus conferred is *exclusive.* It follows that a trial for one of the crimes named, before a general court-martial or military commission, whether resulting in an acquittal or a conviction, would be a bar to any subsequent prosecution for the same offence. II, 146; III, 252; VII, 248, 539. And in any case where a person in the military service is held in custody by the civil authorities, charged with one of the crimes mentioned in this section, the governor of the State in which the prisoner is confined should be called upon to deliver him up to the military authorities for trial by a military court, he being entitled to such a disposition under the provisions of the act. Requests of this character have frequently been addressed by the Secretary of War to governors of States, and, except in a single instance, (as far as the knowledge of this Bureau

extends,) have been favorably entertained, and at once acceded to. X, 651. See *Thirty-Third Article*," (2.)

(3.) The United States courts have no jurisdiction of the crime of larceny, except as conferred by the act of 30th April, 1790, sec. 16, where the crime is committed in a place under the sole and exclusive jurisdiction of the United States, or on the high seas; or, as conferred by act of 3d March, 1825, sec. 3, where committed in a fort, dock-yard, or other place, whereof the site has been ceded to the United States, and which is under their jurisdiction, though that jurisdiction may not be exclusive. VIII, 658.

(4.) Section 24 of ch. 75 of Act of March 3, 1863, providing a punishment for the offence of aiding soldiers to desert, &c., applies only to "persons not subject to the rules and articles of war" at the time of the commission of the offence. Where, therefore, such offence was committed by an officer, against whom, however, no proceedings were commenced while he was in the service, but who was suffered to be mustered out without an attempt to bring him to trial therefor—*held* that, under the present state of the law, which in this respect certainly requires amendment, he could not be prosecuted for such offence, the ordinary criminal courts having no jurisdiction of the case and that of the military courts having lapsed by reason of his discharge. XIII, 108.

For *Jurisdiction of Court Martial*, see "Court Martial," II.

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

For *Jurisdiction of Field Officers' Court*, see "Field Officers' Court," (4,) (5,) (6,) (7,) (8,) (17,) (18.)

L.

LARCENY.

The term "theft" expresses the crime of "larceny," and should be accepted as a substantial and accurate averment of the offence enumerated in 30th section of act of 3d March, 1863. III, 641.

SEE JURISDICTION, (3.)

LESSER KINDRED OFFENCE.

(1.) Under a charge of "*desertion*" the accused cannot properly be found guilty of "*having broken guard*" as a lesser kindred offence. I, 495.

(2.) Where, in the case of a rebel soldier convicted of being a spy and sentenced to be shot, but the execution of whose sentence had been suspended to await the action of the President, it was apparent, upon a review of the testimony, that the *gravamen* of the specific crime charged—the intent to gain information—was not made out, but that the offence of *secretly penetrating our lines and lurking within*

them was fully established—*held* that such offence was really a kindred offence, of lesser degree to that of being a spy, and bore the same relation to it as the offence of absence without leave to that of desertion; that the accused might well be deemed to have been tried upon the less, together with the graver offence, upon the same arraignment; and that, therefore, the President might legally commute the penalty adjudged the accused, upon conviction of the offence not technically made out in the testimony, to a punishment appropriate for the lesser kindred offence actually proved to have been committed. IX, 585.

(3.) Under a charge of violating the 52d article of war, to find the accused not guilty but guilty of "absence without leave" is irregular and invalid, the latter offence not being a lesser kindred offence to any enumerated in that article, but quite another and different offence from any therein set forth. XI, 274. So *held*, for the same reasons, where under a charge of violation of the 46th article, the finding was not guilty, but guilty of a violation of the 50th article. XI, 276.

SEE DESERTER, (1.)
FINDING, (4.)

LOST RECORD.

(1.) Where the proceedings of a court-martial have regularly terminated, and the sentence has been confirmed and ordered to be executed by the proper and final reviewing authority, the fact that the record has since been lost affects in no way the decision of the court or the enforcement of the penalty. IX, 238.

(2.) Where the record of a court-martial was lost before any action was taken upon it by the reviewing officer—*held* that the proceedings were thus terminated against the accused, unless the court could be reconvened and a new record could be made out from extant original notes of the proceedings, and could be duly authenticated by the signatures of the President and Judge Advocate. VI, 582. See XIII, 22.

(3.) But where the record has been lost *in transitu* to the President, in a case where the execution of the sentence has been suspended to await his action under the 89th article of war, the President cannot review or act upon the proceedings unless, possibly, the history of the case can be supplied from original papers made out by the judge advocate, and duly authenticated by him. In the absence of any such, the President would be justified in withholding his approval from the proceedings and declaring the sentence inoperative. VIII, 537. See IX, 677.

SEE SIXTY-FIFTH ARTICLE, (4.)

M.

MARTIAL LAW.

(1.) Martial law is defined to be "the will of the general who commands the army;" and its proclamation by the President necessarily invests a general, commanding in a district where it is declared that it shall prevail, with plenary powers. While its declaration could not properly be referred to as authorizing acts of excess or wanton wrong, it would, at the same time, justify the military commander in summary and stringent measures, which, in the absence of martial law, might be deemed extraordinary and oppressive. XII, 105.

(2.) In view of the President's proclamation of martial law in the State of Kentucky, *held* competent for the general commanding the military district of Kentucky, if in his judgment the effective maintenance of martial law and the accomplishment of the ends proposed by its declaration required it, to restrain, by such means as in his discretion might be deemed needful, the further prosecution by disloyal persons of suits instituted against United States officers for acts done in the line of their duty, originating in a desire to obstruct military operations and having the effect of embarrassing and oppressing "the constituted authorities of the government of the United States." X, 669.

(3.) Where the Commanding General reported that the United States district judge at Key West was disloyal and guilty of aiding and abetting the rebellion in facilitating communication between the rebel States and their chief *entrepots* at Nassau, Havana, &c.—*held*, that if, upon investigation, these allegations were ascertained to be well founded, the President would be justified in *declaring martial law* at Key West, and finally suspending the functions of his court until Congress could have an opportunity of exercising its power of impeachment and removal. II, 172.

MEMBER OF MILITARY COURT.

SEE SIXTY-FOURTH ARTICLE.
SEVENTY-FIFTH ARTICLE, (1.)
NINETY-SEVENTH ARTICLE.
DETAIL.
DISCHARGE FROM SERVICE OF MEMBER OF MILITARY COURT.
JUDGE ADVOCATE, (1,)(13.)
PAY OF MEMBERS, &c., OF MILITARY COURT.

MILEAGE.

Mileage is not a "compensation" in the sense of sec. 9, ch. 200, of act of 17th July, 1862, relating to pay, &c., of chaplains. It is simply a commutation of the actual expenses supposed to be necessarily made by an officer while travelling under orders from the government. It should be allowed to a chaplain as to other officers. I, 371.

MILITARY COMMISSION. I. (ORIGIN, CONSTITUTION, AND FORMS OF PROCEDURE.)

(1.) Long and uninterrupted usage has made military commissions, as it were, part and parcel of the common military law. I, 344, 358.

(2.) A military commission may be convened by any officer authorized to convene a general court-martial. VIII, 111.

(3.) Usage and the course of decision have enforced in regard to military commissions the same principles which prevail in the organization of courts-martial. II, 27.

(4.) Military commissions have grown out of the necessities of the service, but their powers have not been defined nor their mode of proceeding regulated by any statute law. It is therefore held that the rules which apply to the convening, the constitution, and the proceedings of courts-martial should apply to them. The action of military commissions should also be subjected to review in the same manner and by the same authority as courts-martial. I, 453, 465; II, 563, 83; III, 428; V, 95; VII, 556, 561.

(5.) As an exception, however, to the rule that military commissions are to be constituted in all respects like courts-martial, the minimum number of members for such commission has been fixed at *three*. To establish a military commission with but two members would be against all precedent. VIII, 7.

(6.) A majority of the detail of a military commission will constitute a quorum, where it does not fall below three. IX, 591.

(7.) To subject military commissions partly to the laws and practice which govern civil courts, and partly to those which control courts-martial, would be to destroy the harmony between the two different military tribunals, and to embarrass the administration of military justice. Such a course would tend also to defeat the purpose of Congress, which, in placing them in many respects on the same footing, evidently contemplated that the statutory rules of procedure which apply to the court-martial should be applied, as far as practicable, to the military commission. *Held*, therefore, that proceedings before military commissions should be subject to the two years' limitation prescribed in the case of courts-martial by the 88th article. IX, 657.

(8.) The oaths prescribed by the 69th article to be administered to the members and judge advocate of a court-martial are properly, and usually, employed upon the trial of citizens by military commissions. XI, 111.

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

(1.) In a military department the military commission is a substitute for the ordinary State or United States court, when the latter is closed by the exigencies of the war, or is without jurisdiction of the offence committed. VIII, 153; VII, 20.

(2.) A military commission is not restricted in its jurisdiction to

offences committed in the State or district where it sits, as are the ordinary criminal courts of the country. VII, 20. The jurisdiction of a military commission, like that of a general court-martial, is not confined to the place of the commission of the offence, but extends to any military department in which, on account of facilities for obtaining testimony, or for other good reason, it may be convenient to bring a case to trial. XI, 252. See "*Court-Martial*," II, (14.)

(3.) A person guilty of giving "aid and comfort to the rebellion," under sec. 2, ch. 195, of act of 17th July, 1862, may be tried for this crime by a military commission, in a case where the ordinary criminal courts are not open in the State in which the crime was committed. II, 242. And so, under the same circumstances, may an offender under sec. 24, ch. 75, act of March 3, 1863, in regard to aiding the escape of deserters, &c. VII, 20.

(4.) The offence, committed in a part of Kentucky occupied by our armies, of kidnapping and abstracting from the military service of the United States a "contraband" negro serving with the armies in the field as an employé of the quartermaster's department, is triable by military commission, though the ordinary courts of that part of the State may be open. V, 36.

(5.) A citizen of Kentucky is amenable to trial by military commission for the offence of "using disloyal language," in violation of a general order of the department commander. III, 401.

(6.) A military commission has no jurisdiction of the offence of a civilian charged with the violation of the fifty-seventh article of war. II, 541.

(7.) A military commission in the District of Columbia has jurisdiction of the offence of forging soldiers' discharge papers, committed there by a clerk or messenger of the War Department. The offence is one which is aimed directly at the efficiency of the service, and is therefore peculiarly a *military* offence. Moreover, it is committed in a district occupied by our armies, and, in fact, one vast camp, and which, being also constantly threatened by the enemy, is therefore an appropriate field for the exercise of such a jurisdiction. III, 514.

So held, for the same reasons, in the case of a citizen of Washington charged with the same offence, which is not, indeed, strictly punishable by the criminal law of the District. II, 331; III, 149; III, 151.

Also in the case of a citizen of the District of Columbia, charged with forging pay certificates, although this offence would ordinarily be triable by a civil court under the provisions of the act of 2d March, 1831, sec. 11. III, 563.

Also in the case of an enrolling officer of a sub-district of the District of Columbia, charged with violation of duty and accepting a bribe, while engaged in the enrolment of inhabitants subject to draft. VII, 453.

Also in the case of the offence of aiding a soldier to desert, committed by a citizen at one of the forts in the District of Columbia; the jurisdiction of this class of offences conferred upon the civil courts by sec. 24, ch. 75, of act of March 3, 1863, being deemed by the

Secretary of War not to be exclusive in the District of Columbia. VII, 252. See VI, 580. And *held* by the Secretary of War that a military commission has, in time of war, even in a locality where the ordinary courts are open, a jurisdiction, concurrent with these courts, of the case of a citizen charged with resisting the draft, &c., contrary to secs. 24 and 25 of chap. 75, Act March 3, 1863, as well as of the case of a citizen charged with having, (while engaged in obstructing an enrolment, &c., contrary to sec. 12, ch. 13, Act of Feb. 24, 1864,) caused the death of a U. S. officer. XI, 287.

Also in the case of parties charged with aiding and abetting the enemy by the public utterance of disloyal and treasonable sentiments in the District of Columbia, when actually invaded or threatened by a large force of the enemy. IX, 481, 524.

So held in the case of the offence of "causing to be presented a fraudulent claim against the United States," committed in the District of Columbia, by a citizen employé of the quartermaster's department, not connected with the military service. By the act of March 2, 1863, ch. 67, sec. 3, this offence is made triable by an ordinary criminal court; but upon the principle that in the District of Columbia, in time of war, and in matters affecting the military service, the military commission has a concurrent jurisdiction of this offence, it is held triable by *such* commission, being deemed by the Secretary of War to be one affecting the military service. VIII, 194.

(8.) Employés of the Quartermaster's department (when not actually serving with the armies in the field, and therefore triable by court-martial) may, for offences affecting the military service, be brought to trial by military commission, when the special circumstances of the case render them amenable to its jurisdiction. Upon this subject no fixed rule can be laid down, since the circumstances which might subject the employé to such jurisdiction in the District of Columbia—a vast military camp, and the theatre of constant military operations of the most active character—might not be deemed sufficient to give a military commission cognizance of his case, in a department differently situated, or in a loyal State not in the occupation of our armies. IX, 657.

(9.) An inspector of harness, who is a citizen, but employed as inspector by the local quartermaster, and paid for his services out of the appropriation for the Quartermaster General's department, held triable by a military commission, in New York, for the offence committed there, of neglect of duty, in accepting defective harness, and causing the government to be defrauded; such being an offence of a military character, needing, in time of war, prompt punishment, and one which could be most appropriately passed upon by a military court. VIII, 395.

(See the *recent act* of 4th July, 1864, ch. 253, sec. 6, which makes inspectors employed in the Quartermaster's department amenable to trial by court-martial *or* military commission, for "corruption, wilful neglect, or fraud, in the performance of their duties.")

(10.) A military commission has no jurisdiction of a case in the nature of a civil suit for damages between citizens, and to which the United States is not a party. III, 190; V, 86.

(11.) Where a military commission was invested, by the original order of the general convening it, "with jurisdiction in all cases, civil, criminal, and in equity, usually triable in courts established by law"—*held*, that such a tribunal was not authorized to be created, either by law or usage, and *recommended* that it be ordered by the Secretary of War to be dissolved. XI, 231.

(12.) The offence of defrauding recruits of the bounties to which they are entitled by the local law is grossly immoral and flagitious, but not within the jurisdiction of a military commission. IX, 205.

(13.) The jurisdiction of a military commission sustained, in a case of a citizen charged with having smuggled liquors to Alexandria, Virginia, by means of bribing a soldier on the Long Bridge, contrary to the orders of the department commander and to the laws of war. IX, 149.

(14.) Because blockade-running involves a forfeiture of goods, it does not follow that it is not triable by a military commission. It involves a criminal responsibility also, and when engaged in by citizens of the United States, owing allegiance to its government, it is clearly so triable. IX, 205.

(15.) One who obstructs the recruiting of colored soldiers by our government within the States in rebellion is amenable to trial for his offence by a military commission. VIII, 529.

(16.) The murder of Union soldiers, for the disloyal and treasonable purpose of resisting the government in its efforts to suppress the rebellion, is a military offence, quite other than the ordinary offence of murder, cognizable by the criminal courts; and citizens who have been guilty thereof, though in a State where the courts are open, may be brought to trial before a military commission. In such case, the circumstances conferring jurisdiction should be indicated in the charge and distinctly set forth in the specification. IX, 285.

(17.) Parties in Kentucky who, for the purpose of obstructing the enlistment of colored troops, cut off the ears of two negro men while on their way to enter the military service of the United States—*held* triable by a military commission. IX, 225.

(18.) The principle, well expressed by Major General Halleck, in General Order No. 1, of Headquarters, Department of the Missouri, of January 1, 1862, that "many offences which, in time of peace, are civil offences, become, in time of war, military offences, and are to be tried by a military tribunal, even in places where civil tribunals exist," has been followed by this government in a great number of cases; and offences aimed at impairing the efficiency of the service or the efforts of the government to suppress the rebellion, and committed within our military lines, and on the theatre of military operations, have been repeatedly brought to trial by military commissions. It is the fact that the State of Indiana is in this category (with the additional consideration that it has been constantly threatened with invasion by the enemy,) which confers jurisdiction upon the military commission that has passed upon the cases of Dodd, Bowles, Bingham, and other conspirators against the government.

The amendment of the Constitution, which gives the right of *trial*

by jury to persons held to answer for capital or otherwise infamous crimes, except when arising in the land or naval forces, is often referred to, as conclusive against the jurisdiction of military courts over such offences when committed by citizens. But though the letter of the article would give force to such an argument, yet in construing the different parts of the Constitution together, such a literal interpretation of the amendment must be held to give way before the necessity for an efficient exercise of the *war power* which is vested in Congress by that instrument.

A striking illustration of the recognition of this principle by the legislation of the country since an early period of our history is furnished by the 57th article of war, in the fact that it has from the beginning rendered amenable to trial by court-martial, for certain offences, not only military persons, but all persons whatsoever.

This article, establishing this jurisdiction, was adopted by the Congress of the Confederation, and its terms and effect remained unchanged at the time of the formation of the Constitution. In 1806 a slight modification was introduced in its language—the substitution of the word "whosoever" for the words "all persons;"—and thus a Congress, composed probably of many of the founders of the republic, substantially reaffirmed the jurisdiction previously conferred.

(19.) *Held*, that a military commission in Washington has jurisdiction of the cases of parties accused of the perpetration in that city of frauds upon the right of suffrage of soldiers of the State of New York. The offence, if committed as alleged, was directed not against citizens as such only, but against citizens as *soldiers*, since while the elective franchise in the abstract belongs only to the citizen the right to exercise it in the field belongs only to the *soldier*, and it is this right which the government, from the highest considerations of public policy, is called upon to defend. These soldiers were beyond the jurisdiction of State laws, and it is not perceived how they could be protected in the enjoyment of their right of suffrage by State officials. The United States alone could afford them such protection, and as the offence necessarily affects the efficiency, security, and welfare of the military service, it should certainly be held that the government, in the exercise of the war power, may bring to trial before a military court, as for a military offence, any parties accused of having fraudulently attempted to defeat the right referred to. XII, 214. See XII, 204.

SEE FALSE PRETENCES, (2.)
PRISONER OF WAR, (2.)
SEPARATE BRIGADE, (8.)

MILITARY COMMISSION, III. (JURISDICTION IN CASE OF MILITARY PERSONS.)

(1.) A military commission has no jurisdiction over a purely military offence, defined in the articles of war, unless where it is specially conferred by Congress. I, 468; VII, 440, 486; IX, 236.

(2.) A court-martial cannot be so far superseded by a military commission as to give the latter jurisdiction of a proceeding against

a commissioned officer for conduct in violation of the articles of war. I, 389, 482.

(3.) An enlisted man may be tried by a military commission for the offence of "manufacturing counterfeit money," in a region of country where there is no civil court by which it is practicable to try him. III, 404.

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

(1.) Rebels in the military service, who took the oath of allegiance in order to effect their release as prisoners, and afterwards violated their oath—*held*, triable by military commission. The ordinary criminal courts of the country have no jurisdiction in such cases; and if they had, the necessities of the war would justify a military commission in assuming jurisdiction of this and similar crimes. III, 649.

(2.) The violation of a parole by an enemy is not defined as a crime, nor prohibited by the rules and articles of war. It is an offence within the jurisdiction of a military commission, and by the common law of war (Lieber, in paragraph 124, General Order No. 100, of 1863) may be punished with death. VI, 20.

(3.) A confederate soldier charged with murder may be tried by a military commission, if his offence was committed in a region of country where the ordinary criminal courts are closed by the prevalence of war; the general powers of a military commission, under such circumstances, not being held to be restrained by the 30th section of the act of March 3, 1863, chapter 75. VII, 418.

(4.) Guerillas are triable by military commission for a "violation of the laws and customs of war" in the commission of acts of violence, robbery, &c. V, 590.

(5.) A rebel soldier may be tried by military commission for the murder of a loyal negro outside of our military lines, committed before his capture. VIII, 529.

SEE PRISONERS OF WAR, (3.)
VIOLATION OF LAWS OF WAR, (2, (4.)

MILITARY COMMISSION, V. (JUDGMENT AND SENTENCE.)

(1.) The proceedings of military commissions may be confirmed and carried into effect under the same rules and regulations which govern those of courts-martial, except where the *death sentence* is imposed. In this instance the letter of the act, (section 21, chapter 75, act of March 3, 1863,) which gives the army commander the power of executing the sentence in certain cases, when adjudged by a court-martial, does not extend to a similar sentence pronounced by a *military commission*. In regard to the latter, the restriction imposed by the former act (section 5, chapter 201, act of July 17, 1862,) has not been repealed, and still applies. Every case, therefore, of a death sentence by a military commission must be submitted to the President for his approval before it can be acted upon. VI, 50; II, 542; V, 479. (But see the *recent act* of July 2, 1864, chapter 215, section

1, which gives to the commander of a department or army the power to execute the death sentences of military commissions in certain cases.)

(2.) Under a charge of a violation of the common law of war, a military commission may inflict such punishment as in its discretion may de deemed adequate and proper. VII, 62.

(3.) A military commission has no right to direct that the personal property of an accused be levied on and confiscated. VII, 380. Nor has a military commission (or other military court or officer) authority to issue or order an execution to satisfy judgment in damages; nor, of course, authority to *stay* an execution, as such. III, 190.

(4.) Where a lieutenant in the United States revenue service was sentenced by a military commission to fine and imprisonment, and to be cashiered—*held*, that the sentence was valid and operative as to all but the cashiering; but that as to the cashiering it was invalid, it not being in the power of the commission either to annul a civil appointment such as the accused held in the case, or to pronounce a sentence of cashiering in any event. X, 356.

SEE SENTENCE, II, (6.)

MILITIA.

SEE NINETY-SEVENTH ARTICLE, (4,) (6,) (8.)

MITIGATION OF SENTENCE.

SEE EIGHTY-NINTH ARTICLE.
REVIEWING OFFICER, (2,) (3.)

MURDER.

(1.) Held, that a rebel officer or soldier who took the life of an officer in our service after the latter had surrendered, or was unarmed and a prisoner, was guilty of murder. VII, 360.

(2.) The government must and does recognize the colored population of the rebellious States as occupying the status of freedmen. So where a negro, still held by his former master as a slave, in defiance of law and the proclamation of the President, and subjected to constant cruel treatment, on one occasion, when about being punished without cause by his master, suddenly attacked and killed him —*held*, that his crime was not murder; that it wanted the element of malice and deliberate purpose, and was committed under the highest degree of provocation. IX, 182.

(3.) Where two negro men, who had gone to the house of a slaveholder with the justifiable purpose of rescuing the two daughters of one of them held by him in slavery contrary to law and the proclamation of the President, were driven away and pursued by the master, who was armed, and, to prevent being captured or shot, one of them fired at and killed his pursuer—*held*, not to be murder. IX, 178, 180.

SEE COURT-MARTIAL, II, (10,) (11.)
MILITARY COMMISSION, II, (16;) III, (3,) (5.)
SENTENCE, I, (13.)

MUSICIAN.

SEE ENLISTMENT, I, (3.)

MUSTER.

(1.) The muster-rolls on file in the War Department being official records,—on any question which a soldier may raise as to his continuance in the service, or on any claim that he may urge for a discharge, copies of these rolls, verified by a duly authorized officer, afford conclusive evidence as to the soldier's having been mustered in at the time and place and for the period therein set forth; and a soldier who has been thus received and accepted as such, and has been armed, subsisted, and paid by the United States, and has rendered military service, cannot, upon any ground of mere informality, deny the validity of his enlistment or of the contract of his engagement for the number of years specified in the muster roll. III, 423.

(2.) Where a company of militia in the United States service was on a certain day mustered out of the service as militia, and thereupon mustered into the service as volunteers, a member thereof, then absent and a deserter, cannot be held to have thereby become connected with the volunteer service. Not being present at the muster, he could not have assented thereto, or joined in the contract. VIII, 375.

(3.) Where the official muster-rolls of a regiment show that certain men were duly mustered for three years, the burden of the proof is upon them, in seeking to be discharged from service before the expiration of that time, to establish that fraud was practiced upon them in their muster by the United States, or its authorized representative. To prove that they were induced to enter the service by the false and unauthorized representations of recruiting officers, is not sufficient to relieve them from the obligations thus assumed, in the absence of any evidence of fraud on the part of the mustering officer, who represents the government in the formal contract of enlistment. VIII, 488.

(4.) The discharge from service of the Pennsylvania reserve corps, recommended on the ground that, though not yet entitled to their discharge in strict law, they were mustered into service upon the express assurance of the United States mustering officer that such muster could not be construed to extend the time for which they had been originally enlisted; and *held* that, as the mustering officer represented the government, this condition, assented to and publicly announced by him, should be regarded as an element of the contract. VII, 599.

SEE CONSOLIDATION OF REGIMENTS.
ENLISTMENT, I, (2.)
PAY AND ALLOWANCES.

MUSTER OUT.

(1.) The right of the Secretary of War to muster out the additional aides-de-camp appointed by the President is regarded as well

established. In exercising this authority he acts for and in the stead of the President, who, as commander-in-chief of the army, may muster out or dismiss officers, of every grade, from the service, at his pleasure. V, 319.

(2.) General Order 108 of War Department, of April 28, 1863, in regard to the muster-out of two-years' regiments, was intended to apply only to regiments which were about to be entitled to be mustered out *as such*, because of the expiration of the term of service of the original organization. It was *not* intended to apply to those men who, having joined these regiments at periods subsequent to their original organization, and when enlistments for two years were no longer authorized by law, were enlisted for three years. V, 595.

(3.) An officer who, upon promotion, is duly mustered into his new grade in the same company, is strictly engaged to a term of service of three years from the date of such muster. It is the rule, however, of the War Department to muster out officers of volunteers, with their regiments or companies, at the expiration of the regular term of service of the latter, if not re-enlisted as veteran volunteers. VI, 80.

(4.) Held that the formal and regular muster-out of service of an officer cannot be revoked by an order of the War Department, which at the same time dishonorably discharges him instead. Having once duly left the military service, he cannot be caused to re-enter it without his consent. VI, 478; XI, 197.

SEE ELEVENTH ARTICLE.
BOUNTY. (1.)
CONTINGENT FUND.
PAY AND ALLOWANCES.

MUTINY.

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

SEE COURT-MARTIAL, II, (10.)

N.

NAVY, DISMISSAL OF OFFICER OF.

SEE DISQUALIFICATION, (1.)

NEUTRALS.

As this government has recognized the right of the Peruvian government to possess itself of the guano in the hands of its factors at Norfolk, it would seem to be in entire harmony with this action to order these factors to pay over to the agents of the Peruvian government the proceeds of such part of the guano as they may have sold; and as Norfolk is in the possession of the United States—*recommended* that this relief be afforded by a direct military order upon the parties holding the funds. I, 352.

NEW MEMBER.

Where one member of a military commission was relieved on account of sickness during the pendency of the trial, and another was detailed in his place, and on taking his seat had the evidence read over in his presence, the proceedings *held* regular and the sentence valid. VII, 411.

That new members may be added, pending a trial, (to keep up the number of the court to thirteen,) the proceedings as recorded being read to them, was ruled upon the trial of Brigadier General Hull in 1814. This ruling was made by the court pursuant to the opinion given by the Hon. John Armstrong, then Secretary of War, whom the court, through Hon. Martin Van Buren, specia judge advocate, had addressed, asking to be advised upon points raised at the trial. The Secretary in his opinion referred to similar rulings in the cases of Generals Howe and Whitelocke. VII, 467.

SEE ABSENT MEMBER, (1.)

NEW TRIAL.

A new trial can be granted to an accused by the President in a case where he is the reviewing power, without whose approval the sentence cannot be carried into effect; and where the sentence, on the ground that the findings are not sustained by the evidence, is formally disapproved by him. Otherwise, where the proper reviewing general has confirmed the sentence and dissolved the court, the judgment of which is thus made final. I, 451.

NOLLE PROSEQUI.

The Secretary of War, as the executive officer of the President, may order a *nolle prosequi* to be entered, with the consent of the court, at any time after a trial has been commenced. The court may properly allow the same to be entered, since a prosecution before a court-martial, as before an ordinary criminal court, proceeds in the name and by the authority of the government, which may abandon such prosecution at will. The only instance where the court would be justified in withholding its consent to such a suspension of the proceedings is where there is reason to believe that the accused might thereby be oppressed by being subjected to a second trial for the same offence. IX, 533, 488.

NON-COMMISSIONED OFFICER.

SEE NINTH ARTICLE, (3.)

O.

OATH.

SEE SIXTY-NINTH ARTICLE.
DEPOSITION, (3,) (4.)

For *Oath of Enlistment*, see "Enlistment," I; II, (3,) (5.)

OATH OF ALLEGIANCE.

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

SEE MILITARY COMMISSION, IV, (1.)
SPECIFICATION, (6.)
VIOLATION OF LAWS OF WAR, (4.)

OFFICER.

The term "*officer*," when used in the Army Regulations, as well as in the Articles of War and other enactments regarding the military service is held to mean *commissioned officer* only. XII. 171. See "*Ninth Article*," (3.)

OFFICERS' SERVANTS.

The act of July 17, 1862, ch. 200, sec. 3, as well as the late act of June 15, 1864, ch. 124, sec. 1, authorizes, by implication, the employment of soldiers as servants by officers of whatever grade, both in the regular and volunteer service. Paragraph 124 of the Regulations, which provides that no officer other than a company officer may employ a soldier as a waiter, may be regarded as superseded. IX. 620.

ORDER.

(1.) A general or special order, signed "*by order of the Secretary of War*," is valid; the order is issued by the Secretary as the executive officer representing the President, and the phrase used is the official sign of the executive authority. VIII, 297.

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

(3.) A general order cannot be allowed to retroact so as to fetter a contract with conditions which did not exist at the time it was entered into. Thus General Order 171 of the War Department of June 9, 1863, prohibiting an officer from selling a horse purchased from the quartermaster's department, *held* not to invalidate the sale of such a horse made to a citizen before the date of the order. IX, 602.

(4.) Where the aide-de-camp of a department commander was by a special order of the War Department summarily mustered out of the service for using language expressive of disrespect to the President and hostility to the measures of the government—these offences being recited in the order—and the commanding general thereupon, with full knowledge of the facts, issued a Department General Order, in which, while complimenting his staff officer for his general good conduct on the field, he stated that he could not part with him without expressing the regret which he felt in so doing—*advised* that this public manifestation of commendation and regret was, under the circumstances, insubordinate and reprehensible, and that some proper action should be taken to rebuke it, in order that it might not be drawn into a precedent. IX, 646.

SEE SIXTY-FOURTH ARTICLE, (5.)
DISMISSAL, I, (4,) (5.)
FINE.
FRAUD, (6.)
SEPARATE BRIGADE, (5.)

ORDER CONVENING MILITARY COURT.

Where the order convening a court-martial is subscribed by a general officer, who adds to his signature, "commanding district of West Tennessee," such order is upon its face invalid; further and other evidence being necessary to show that he had authority to convene the court. XI, 162. And see XI, 214. So in case of an order issued for the same purpose by an officer whose authority to convene a court-martial is not sufficiently exhibited therein, the caption of the order being only "headquarters of the post, Vicksburg." XI, 170. So in case of an order signed by a colonel, as "commanding post at Winchester, Virginia;" the commander of a post not being competent, as such, to convene a general court-martial, and there being no evidence presented, in connexion with the order, that his command was an "army," division or "separate brigade." XI, 176.

ORDER OF PROMULGATION.

(1.) A general order promulgating the proceedings of a court-martial need not contain a clause dissolving the court. III, 84.

(2.) It is not made requisite by law (paragraph 897 of Army Regulations) that a copy of the order of promulgation of sentence, &c., should accompany the record when transmitted to the Adjutant General; it is a judicious practice, however, to enclose a copy of such order with the record of each separate case so transmitted. X, 263.

P.

PARDON.

SEE EIGHTY-NINTH ARTICLE.
BOUNTY, (4,) (5.)
PAY AND ALLOWANCES, (9,) (10.)
PLEA, (9.)
PRESIDENT AS PARDONING POWER.

PAROLE.

(1.) The violation of a parole is an offence under the common law of war, (Lieber, in par. 124, G. O. 100 of 1863,) and is punishable with death. VI, 20.

(2.) The custom of the service does not allow the privilege of a parole to an officer in confinement and awaiting trial, when the evidence on file presents a *prima facie* case of decided criminality against him. VII, 78.

SEE MILITARY COMMISSION, IV, (2.)

PAROLED PRISONERS.

Paroled prisoners, so far as pay and allowances are concerned, must be regarded as in actual service. Officers, however, who are thus circumstanced are not "on duty" in the sense of section 1, chapter 200, act of July 17, 1862, unless engaged in other duty than that against the rebels, which the terms of their parole oblige them to desist from; and except in such case, therefore, are not entitled to draw forage, &c. I, 385.

SEE PRISONERS OF WAR, (2.)

PAY AND ALLOWANCES.

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

(2.) Upon considering together the various acts on the subject, (see acts of March 3, 1799, March 16, 1802, January 11, 1812, January 29, 1813, March 19, 1836, July 22, 1861)—*held*, that officers mustered into service for a term of six months or upwards are not entitled to an allowance for pay, clothing, and subsistence of servants during their journey, after their discharge, to their place of residence; but otherwise in the case of officers of the three-months' service, or for any entering the service for a period less than six months; to these the allowance for servants is properly payable. I, 356.

(3.) An officer awaiting orders cannot be regarded as on duty in the sense of the act of July 17, 1862, chapter 200, section 1, and is not entitled to draw forage in kind for his horses. The act entitles him to draw only for horses actually kept by him when and at the place where he is on duty. I, 350, 372

(4.) The officers referred to in the second proviso of section 1,

chapter 200, of act of July 17, 1862, are those *temporarily assigned* from duties, that *do not*, to those that *do* require them to be mounted; and the pay, emoluments, &c, allowed them in consequence, are to continue only "during the time they are employed on such duty." The proviso does not apply to a case where an officer has been *permanently* promoted to the position requiring him to be mounted, as a field officer of infantry. I, 423.

(5.) The act of July 17, 1862, chapter 200, section 1, places all officers entitled to forage on the same footing. They must receive it in kind, whenever the government can so furnish it to them. When it cannot, then they may claim commutation, but only then. The law is the same in regard to officers entitled, from the duty to which they are assigned, to the pay and allowances of cavalry officers. II. 13.

(6.) Where an officer had been mustered out of the service, as of 31st May, 1863—*held*, that a subsequent order of the President of 27th September, 1863, (based upon a mistaken supposition that he was in the service,) by which he was formally dismissed, was an absolute nullity, and that the claim of this officer to pay for the period between these dates was without foundation. V, 481.

(7.) Where there was a delay of four months in formally mustering into the new grades to which they had been promoted two officers who had used all reasonable efforts to remove the cause of the delay—which, however, proceeded from a cause beyond their control—and meantime had done active duty, and rendered full service to the government—*advised* that their muster be dated back by order of the Secretary of War, so that they might receive pay for the four months. III, 57.

(8.) Where an officer was sentenced on 12th January, 1863, to forfeit all pay, and be dismissed the service, and the execution of the sentence being suspended for the action of the President, the latter, under date of 28th March, 1863, approved the sentence, except as to the dismissal, which he remitted—*held*, that as in this case the President acted as the reviewing officer, his action should apply to the sentence as it stood, as of 12th January; and that the period of the forfeiture could not be extended, unless so directed in express terms by the President; therefore, that though the action of the President was indorsed under a later date, the officer was entitled to be paid from 12th January, the proper termination of the forfeiture under the circumstances. III, 116.

(9.) Where a soldier has been sentenced to confinement and a forfeiture, and his sentence has been remitted by the President in the exercise of his general pardoning power, and he ordered to be released and returned to duty, he is only entitled to pay from the date of the order. No pay forfeited during the time of his confinement, and before the date of the order, is thus restored to him. III, 279.

(10.) In case of a soldier returned from desertion on February 7, 1863; sentenced to imprisonment for one year, with forfeiture of pay, &c., during *that* period, on April 24, 1863; and pardoned by the President on August 5, 1863; the following is *held* in regard to his right to pay: (1.) He is entitled to be paid for the period between his return from desertion and the date of his sentence. This pay is not for-

feited by operation of law, not being pay due at the time of his desertion referred to in paragraph 1358 of the Regulations, nor pay for the time of the unauthorized absence referred to in paragraph 1357; nor is it forfeited by paragraph 1359, which merely suspends the pay due up to the time of the trial and sentence, in order that any forfeiture of back pay may, if imposed, be stopped against it; but in this case no such forfeiture is imposed. (2.) The pay for the latter portion of the period (from the commencement of the term of sentence till the pardon) was forfeited by the sentence; and the interposition of the pardon does not relieve the soldier from such forfeiture, but only absolves him from liability to further punishment. He is *not* entitled, therefore, to pay for this second period. V, 386.

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

(12.) The period of absence specified in the last-named act must be a continuing one, and cannot be made up by adding fragments of time together. VII, 44.

(13.) A major general who is required to attend on several military courts as a witness, &c., is performing duties appropriate and belonging to his duty as an officer, and is relieved during the period of such attendance from the operation of the limitation of six months fixed by the act last named. VII, 44.

(14.) An officer, though under charges, is still entitled to his pay. VIII, 478.

(15.) Where a wife, in an action of divorce against her husband, a captain in the United States service, obtained an interlocutory judgment for an allowance *pendente lite—held*, that there was no precedent or legal ground for requiring him to satisfy the amount of such judgment out of his pay. VIII, 493.

(16.) A soldier convicted of desertion is subject (though no forfeiture is imposed by his sentence) to a forfeiture, by operation of law, (par. 1357 and 1358 of Army Regulations,) of all pay due at the time of his desertion, and of all pay accruing for the time of his unauthorized absence. But if no further forfeiture is embraced in his sentence, he is again entitled to pay from the date on which he was apprehended, or, in the language of the Regulations, (par. 161,) "delivered up to the proper authority as a deserter." VIII, 650.

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

(18.) A deserter forfeits, by operation of law, all pay due at the time of his desertion, (par. 1358 of Regulations,) and all pay for the period of his unauthorized absence, (par. 1357.) Whether he shall forfeit any further pay, to wit, pay accruing after his apprehension, depends upon the action taken by a court-martial upon his trial, if any be had. If not tried, but restored to duty by the commanding officer authorized to so restore him without trial, in accordance with

the provisions of par. 159 of the Army Regulations, he becomes entitled to pay for the period intervening since his arrest as a deserter, (par. 161;) but such commander cannot, by his order, restore him to pay forfeited for the period of his absence as such. VIII, 540.

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

(20.) Where an officer has been sentenced to be dismissed with forfeiture of all pay due and to become due, and the sentence has been executed, his subsequent restoration by the President, in the exercise of his pardoning power, does not revive his right to pay which has been extinguished by the sentence. He is entitled to be paid only from and after the date of the order of restoration. X, 201.

(21.) In the case of a soldier convicted of "absence without leave," the forfeiture of his pay for the period of his unauthorized absence results by operation of law, (par. 1357 of Army Regulations,) and, to be enforced, need not therefore be included in the sentence.

(22.) Where a chaplain was sentenced to be dismissed the service by a court-martial, the proceedings of which, on account of a fatal defect in its constitution, were set aside as void *ab initio*, and the chaplain, upon the facts appearing in the testimony at the trial, was subsequently summarily dismissed by an order of the President—*held*, that he was entitled to receive his pay, &c., up to the date of his being officially notified of such order. The act of July 17, 1862, ch. 200, sec. 9, provides that thereafter "the compensation of all chaplains shall be one hundred dollars per month and two rations a day *when on duty*." Where, however, an officer is prevented from doing duty, not through his own fault or voluntary action, but by reason of the unauthorized and illegal proceeding of the government, his rights, as against the government, are the same as if he had been on duty in fact. This is an elementary principle of the law of contracts, which will allow no party to take advantage of his own wrong; and from the operation of this rule it is believed that the government should not claim an exemption. VIII, 640.

SEE TWENTIETH ARTICLE.
ARREST, (10.)
BOUNTY, (2,) (3,) (4.)
DESERTER, (7,) (8.)
DETACHED SERVICE.
DISMISSAL, I, (5.)
ENLISTMENT, I, (4,) (5.)
FINE.
GARNISHMENT OF PAY.
MILEAGE
REMOVAL OF DISABILITY, (2.)
SENTENCE, I, (1,) (2,) (3,) (4.)

PAYMASTER.

Loyally to maintain the public credit, and to protect the public creditors, as far as practicable, from loss, is clearly the duty of all officers, but especially of those connected with the pay department. So soon, however, as officers are permitted to traffic in pay-rolls, or other evidences of claims against the treasury, they labor under strong inducements to depress their market value, which can best be effected by a depreciation of the public credit. The influence of a paymaster in this direction would necessarily be very great, and might operate most oppressively upon the creditors of the government. Thus the conduct of a paymaster who invests the funds of his friends by buying up officers' pay-rolls at a discount, while not an offence within the provisions of the sub-treasury act, or a violation of the requirements of paragraph 1342 of the Regulations, is morally reprehensible, because exposing him to the temptation to violate one of his clearest duties to the government and country. While this paragraph, in requiring that no paymaster shall be interested in the purchase of a pay certificate or other claim against the United States, contemplates a pecuniary interest only, still it is undeniable that the evil intended to be prevented might be produced in a but slightly diminished degree, by the solicitude of a faithful agent anxious to make the best possible bargain for his employers or friends. II, 36.

PAYMASTER'S CLERK.

A paymaster's clerk, though not so far in the military service as to be liable to perform the duties of a soldier, and therefore subject to draft, (see "*Enrolment*," (3,) is yet, in the sense of the 60th article of war, a person "serving with the armies in the field," and therefore is amenable to trial by court-martial. III, 269.

PAY OF COLORED EMPLOYÉS.

The 15th section of chapter 201 of act of 17th July, 1862, applies, so far as persons of African descent are concerned, only to those employed under and by virtue of the act itself, and not to those who may have been employed before as teamsters or laborers in the Quartermaster General's department, with the system of the hiring of whom the act was not intended to interfere. I, 377.

PAY OF MEMBERS, &c., OF MILITARY COURT.

(1.) In the absence of special legislation on the subject, it is but reasonable and just that the same compensation should be allowed to the members, judge advocate, and clerks of a military commission, and to the witnesses summoned before it, as in the case of a court-martial; and it has been the practice so to pay them. VIII, 88; II, 337.

(2.) The additional allowance of $1 25 *per diem*, to which an officer is entitled who is obliged to leave his station when attending a

court-martial, was evidently intended to cover the expenses of lodging, meals, &c., necessarily incurred by him, because separated from his quarters and ordinary sphere of duties. A line officer attending a court-martial in Washington, whose quarters, &c., are at Fort Lincoln, three or four miles distant, though within the department, should be viewed as coming within the provisions of section 1137 of the Regulations, and entitled to this allowance. V, 139.

(3.) It is the duty of the judge advocate to give to the members of a court-martial certificates of attendance, and for the Quartermaster General to decide upon their compensation, under section 1137 of the Regulations. I, 488.

PENITENTIARY, I, (GENERALLY.)

(1.) Where the offence charged and proved is punishable by the laws of the State where committed, as infamous—*recommended* that a penitentiary, and not a military or other prison, be designated by the court in the sentence as the place of confinement. VII, 600.

(2.) Confinement in a penitentiary is intended to be and is an infamous punishment, not only because of its nature, but especially because of the place where it is suffered. A sentence inflicting such punishment is not satisfied by confining the party in one of the military prisons of the country. IX, 42. See IX, 366.

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

PENITENTIARY, II.

(Under act of 17th July, 1862, chapter 201, section 5.)

(1.) Confinement at hard labor at the military prison at Alton, imposed by sentence of court-martial, is not "imprisonment in the penitentiary," in the sense of the act. Such prison is not a penitentiary, although formerly used as such by the State of Illinois. I, 361, 362; IX, 42.

(2.) Fort Delaware is not a proper place for the confinement of a soldier convicted of a capital offence and sentenced to imprisonment in a penitentiary. VI, 88.

(3.) A general sentence "to hard labor," which may be carried into effect in any of the posts, forts, or military prisons of the United States, is not a sentence to imprisonment in the penitentiary in the sense of the act. I, 409.

PENITENTIARY, III.

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

(1.) In a case of a purely military offence, a sentence to confinement in a penitentiary is irregular, as being against the usage of the service.

(2.) Desertion is a purely military offence, and is not, "by any statute of the United States, or at common law as it exists in the District of Columbia," or indeed by the laws of any of the States,

punishable by confinement in a penitentiary. A sentence to such confinement in the case of a deserter would seem to be in conflict with the letter of the act of 16th July, 1862, ch. 190. VII, 538; V, 500. It is understood, however, to be held by the Secretary of War that where an article of war authorizes for a particular offence the infliction of the death penalty, "or such other punishment as may be ordered by a court-martial," upon the principle that the major includes the minor, a sentence of confinement in the penitentiary may be properly pronounced, as in accordance with a "statute of the United States" in the sense of the act referred to.

(3.) Where parties (citizens) were sentenced to the penitentiary of the District of Columbia for harboring deserters and aiding them to desert—*held*, that the sentences were unauthorized under the act, as neither the laws of the District nor any statute of the United States inflict such a punishment for these offences. II, 99; VII, 418.

(4.) A sentence to the penitentiary for a "false muster" merely cannot be sustained, the offence being a purely military one. If the accused had obtained money thereby, he might have been prosecuted for obtaining it under "false pretences," and under the act [the offence might have been properly punished by confinement in the penitentiary. I, 443.

(5.) Under the 2d section of the act the President may, in his discretion, commute the punishment of an offender improperly sentenced to the penitentiary and confined therein. II, 99; VII, 418.

(6.) Where the charge was "conduct to the prejudice of good order and military discipline," but the specification showed that the offence was assault and battery with intent to kill—*held*, that the sentence of confinement in a penitentiary was valid, since the actual offence (though made by law triable by court-martial) was not strictly a military one, and by the laws of the District of Columbia is punishable by confinement in the penitentiary. IX, 281.

PLEA.

(1.) The general rule is, that a plea of "guilty" precludes the introduction of testimony by the prosecution. II, 488.

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

(3.) It is believed to be essential to a proper administration of justice in the majority of cases, that the prosecution should offer evidence of the circumstances of the offence, notwithstanding the plea of guilty has been interposed. The duty of the court does not end with their conviction of the accused; an imperative obligation remains to determine the nature and extent of the punishment proper to be awarded, and for this purpose some testimony is ordinarily necessary;

especially as the punishment for military offences is definitely fixed by law in a few cases only, and may be of any degree, in the discretion of the court, from a reprimand to death. Such testimony is also necessary to enable the reviewing officer to pass intelligently and justly upon the whole case. This ruling is in accordance with the uniform practice of the English military courts. VI, 370. See (14.)

(4.) A plea of guilty to a specification which alleges that the accused "did absent himself without authority from his regiment, and did remain absent until arrested and sent to his regiment as a deserter," is only a confession that he was arrested and sent to his regiment as a deserter. It is, therefore, not a confession that he was in law and fact a deserter, but only that the military authorities so regarded him. II, 520.

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

(6.) Where the specification to a charge of desertion was defective in form, in not describing the accused by his rank, regiment, &c., nor in alleging his enlistment, or stating that his absence was without authority—yet *held*, that a plea of guilty to both charge and specification cured the defects, and warranted a conviction of the specific offence charged. V, 577.

(7.) That an accused had not at the time of the trial been mustered into service as of the grade mentioned in the description of him in the specification, is a matter of defence which should be taken advantage of by plea at the trial; and if not so pleaded, cannot properly be claimed to authorize an interference with the execution of the sentence. VII, 234.

8.) Subsequent brave and gallant conduct cannot be pleaded in bar to a charge of misbehavior before the enemy, but may properly avail to mitigate the sentence with the court. VI, 79.

(9.) If an arrested soldier be released from arrest and placed on duty by competent authority, whether before or after charges are preferred against him, such release, &c., cannot be pleaded by him in bar, as a *pardon* for his offence, when brought to trial for its commission. VII, 233.

(10.) A plea of former trial by the same court, upon a charge of desertion, and consequent absence for a period covering a greater length of time, and including the period of the alleged desertion as newly charged, is a good plea in bar, since the greater includes the less. V, 577.

(11.) For a court-martial to take testimony on the merits, and then proceed to convict the accused and sentence him, without ever giving him an opportunity to plead to the merits, but only specially to the jurisdiction, is a fatal irregularity. IX, 328.

(12.) A plea of guilty waives any objection which might have been taken by the accused on the score of want of preparation by reason of an alleged failure to serve a copy of the charges, &c., upon him. VI, 259.

(13.) Where the accused is described in the specification as of the wrong regiment, his plea of not guilty—no objection being taken to the specification—is a confession that he is identical with the person therein described, and the error is not fatal. IX, 518.

(14.) In a case where the accused, being evidently ignorant of the forms of law, pleaded guilty to an artificially worded charge and specification, and immediately thereupon made a verbal statement to the court of the particulars of his conduct, setting forth facts quite inconsistent with his plea, and no evidence whatever was introduced in the case—*held*, that the statement, rather than the plea, should be regarded as the intelligent act of the accused, and that, upon considering both together, the accused should not be deemed to have confessed his guilt of the specific charge. VIII, 274. In such a case the court should ordinarily direct the plea of *not guilty* to be entered, and proceed to a trial and investigation of the merits of the case. VI, 357, 370.

(15.) Held, that the fact of drunkenness furnished no valid plea to a charge of felony before a military as before a civil court. XII, 59.

SEE ACCUSER AND PROSECUTOR, (2.)
AUTREFOIS ACQUIT.

POLITICAL PRISONERS.

(1.) Held, that the "*list of political prisoners*," to be furnished the United States judges, in compliance with the requirements of section 2, chapter 81, of the act of March 3, 1863, should not properly include cases of persons clearly triable by court-martial or military commission. It is not believed that it was intended in the act to invite attention to cases of persons charged with purely military offences, or of persons suffering under sentences of military tribunals. II, 553.

(2.) Where certain parties (citizens) were charged with offences intended to embarrass the military operations of the government, and committed during a period of war at a place within our military lines and the theatre of active military operations, and which was constantly threatened to be invaded by the enemy, and the parties had been, or were about to be, placed on trial therefor by military commission—*held*, that they were not entitled to relief in having their names returned, in *lists* of citizen prisoners, to the judges of the circuit and district courts, in accordance with the act of March 3, 1863, ch. 81, sec. 3, their cases not being properly embraced within its provisions. X, 648.

PRESIDENT AS COMMANDER-IN-CHIEF.

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

PRESIDENT AS PARDONING POWER.

(1.) The power of pardon, either full or partial, by mitigation or commutation of the punishment, can be exercised *by the President alone*, in cases of sentence of death or dismissal. The authority given

to commanding generals by the Sixty-Fifth Article, by the act of December 20, 1861, and by section 21, chapter 75, of act of March 3, 1863, to confirm and execute such sentences, does not import a power of pardon or mitigation. Nor is such a power given to commanding generals by General Order No. 76, of February 26, 1864, which authorizes them to restore to duty deserters under sentence of death. The order simply empowers these officers to act in the stead of the President, and by his express direction, in the exercise of the pardoning power in such cases. I, 481, 486. (But see the recent act of July 2, 1864, chapter 215, section 2, which empowers commanders of armies in the field and of departments to remit or mitigate sentences of death, dismissal, and cashiering, when imposed by military courts.) See "*Eighty-Ninth Article*," *passim*.

(2.) The pardoning power of the President cannot reach an *executed sentence*, which has been regularly imposed by a competent court. VIII, 149, 228, and *passim*. When a sentence has been executed only in part, he can remit the remainder. II, 29.

(3.) A pardon by the President will restore a regular officer who has been dismissed, or an officer of volunteers who has been appointed by the President. V, 446.

(4.) It is the undoubted prerogative of the President, in the exercise of the pardoning power, to reinstate in his former grade and position any officer appointed by him who may have been dismissed the service by sentence of court-martial. This power has been frequently exercised by the President in this class of cases since the commencement of the rebellion. X, 606.

(5.) When a volunteer officer has been dismissed by a sentence of court-martial which has been duly executed, the President can exercise the pardoning power in his behalf only by *removing the disability* imposed by his sentence, and authorizing his being recommissioned by the governor of his State. I, 365, 372, 374; VIII, 465.

(6.) Where an officer has been sentenced to suspension from rank and pay for one year, and the sentence has been duly executed, and he dies pending this period, the President has no power to remove the stigma of this sentence from his record in the service. VIII, 138.

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

(8.) Where a soldier had been sentenced for theft and burglary—*recommended*, as a condition to his pardon, if granted, that he be required to restore the goods stolen or their monied value. 1, 366.

(9.) The power to remit is the same as that to pardon, and is coordinate with that to execute. The President alone can order the execution of a sentence of confinement in a penitentiary; therefore he alone can remit it. VII, 609. (But *otherwise*, under the recent act of July 2, 1864, chapter 215, section 2, which empowers "every officer authorized to order a general court-martial" to pardon or mitigate a sentence of confinement in a penitentiary.)

(10.) It accords with the usage of the service for the President to pardon, or mitigate the sentence of, a soldier sentenced by court-martial, who is shown to have conducted himself with bravery in battle while awaiting the promulgation of his sentence. IX, 245, 595; XIII, 99.

(11.) It is the effect of the exercise of the pardoning power by the President to relieve the party from all punishment remaining to be suffered. Where, therefore, he remits the unexecuted portion of a term of imprisonment, an additional penalty, which, by the sentence, was to be incurred at the end of the adjudged term, as a dishonorable discharge from the service, cannot be enforced. The pardon having intervened, the sentence ceases to have any effect whatever in law, and the soldier must be honorably discharged. VIII, 669; X, 286.

SEE EIGHTY-NINTH ARTICLE.
REMOVAL OF DISABILITY.

PRESIDENT AS REVIEWING OFFICER.

(1.) In cases where the commanding general cannot execute the sentence, and the action of the President is made necessary by law, as well as in the cases where the execution of the sentence is suspended by the commanding general, under the 89th article of war, to await the pleasure of the President, the latter becomes reviewing officer. As such, under the almost unlimited discretionary power vested in him, he may, where some of the findings of guilty are unauthorized, adjust the sentence to the amount of criminality properly averred and proved in the record. VII, 594; III, 492. See "*Sentence*," II, (4.)

(2.) Where a death sentence rests upon a finding of the prisoner's guilt, not merely of desertion, but of *other* crimes, (in case of a conviction of which the general commanding is not authorized by law to execute the sentence,) such sentence can be executed by the President alone, to whom, therefore, the proceedings should be transmitted by the general commanding. III, 81; VII, 347, 476.

(3.) Where a sentence of dismissal of an officer, requiring the President's confirmation, has once been duly confirmed by him, and upon new facts being presented it is desired to restore the officer to the service, the President (instead of removing the disability of the sentence) may accomplish the object proposed, by reconsidering his action and revoking his approval of the sentence. III, 94.

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

(5.) An officer was dismissed by sentence of a court-martial; but the execution of his sentence was suspended, under the 89th article of war, for the action of the President. This action was published, May 31, by the President, who commuted the sentence to a forfeiture of pay. Pending this action, and before that date, the accused was killed while bravely fighting at Spottsylvania Court House, having received permission to go on duty. *Recommended* that the order in

regard to his case be recalled; and that the sentence be then formally disapproved by the President. VIII, 556.

(6.) In a case of a guerilla sentenced to be shot, where the President is the final reviewing authority, *recommended* that if the sentence be mitigated, it be commuted to confinement in the penitentiary, and *not* in a military prison; that the punishment imposed upon a guerilla should be infamous, while confinement in a military prison should be reserved for those among civil offenders whose offences were more political in their character. IX, 226. (But see the *recent act* of July 2, 1864, ch. 215, sec. 1, which gives to the commanders of armies and departments the power to execute the death sentence upon a guerilla in certain cases.)

SEE EIGHTY-NINTH ARTICLE.
LOST RECORD, (2.)
PAY AND ALLOWANCES, (8.)

PRESIDENT'S PROCLAMATION.

(In regard to deserters, &c.)

SEE BOUNTY, (5.)
DESERTER, (17.)
ENLISTMENT, II, (4.)

(Suspending writ of habeas corpus.)

SEE HABEAS CORPUS.

(Declaring martial law.)

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

(Of the emancipation of slaves.)

A citizen of a part of the State of Arkansas in the occupation of the federal forces, for the sum of seven thousand dollars, sold, against their will, to be conveyed into slavery beyond our military lines, ten persons, mostly women and children, who had previously been his slaves, but who had been emancipated by operation of the President's proclamation; he himself having full knowledge of the proclamation and of its effect, and having once actually renounced his claims to the services of his slaves by informing them that they were free and could leave him. He was brought to trial by military commission upon a charge of "kidnapping and selling into slavery persons of African descent made free by the President's proclamation of January 1st, 1863," and was convicted and sentenced to confinement in a military prison for five years. Upon his applying for a remission of this sentence, *held* that his offence was in the highest degree criminal, as well as brutal and depraved; that the proclamation is an irrevocable decree of freedom to all within its terms, and that the absence in it of prohibitory sanctions could not exempt from punishment one who had deliberately re-enslaved persons made free thereby; that the conduct of the prisoner in applying for a pardon, with the price of his guilt in his pocket and while his victims still remained in slavery, was an act of shameless effrontery, and that such application should not even be considered until the slaves were returned to our military lines and to freedom. VI, 352.

PRISONER OF WAR.

(1.) Officers, non-commissioned officers, and privates of volunteers and militia, as well as of the regular service, are entitled, while prisoners of war, to the same pay and emoluments as if in actual service; and this after their term of service has expired, if they are still held as prisoners. The captivity of the officer or soldier is accepted as a substitute for actual service. But the officers, when prisoners, are not entitled to an allowance for horses; for the law only allows them forage for horses actually kept by them, when and at the place where they are on duty. They would however be entitled to an allowance for servants, though not personally attending on them, if they actually have them employed at their homes or elsewhere. I, 382.

(2.) Parties found in the rebel ranks and uniform, although citizens of a loyal State (Maryland,) cannot be tried for treason by a military commission. They must be treated as prisoners of war. II, 171.

(3.) When prisoners of war are willing to take the oath of allegiance, they are often permitted to do so. When they are not thuswilling, they have been invariably exchanged under the cartel. An intermediate course, allowing a prisoner to take the simple oath of a *non-combatant*, has not been pursued, as the government would thereby lose the advantage of the exchange, and would have no reliable guarantee that the prisoner would not re-enter the military service. Such a course, therefore, *not advised*, in the case of a rebel major, whose treason was without any circumstances of palliation. II, 371.

(4.) For the governor of a State to seize, confine, and put at hard labor in a chain-gang, certain suspected rebels in his State, until certain civilians and officers thereof shall be released and exchanged by the enemy, is an interference in the disposition and treatment of prisoners of war by the regular United State officials, and is a transcending of the ordinary police power which the governor is alone authorized to exercise over rebels within his jurisdiction. II, 511.

(5.) The seizing and holding of *hostages* in reprisal for captures made by the enemy, is certainly an exercise of the war-making power belonging exclusively to the general government, and which cannot be shared by the governors of the States without leading to deplorable complications. III, 558.

(6.) Where persons not positively shown to have been mustered into the rebel military service, and apparently engaged in an independent border warfare, made a raid from Kentucky into Indiana, and were arrested by the civil authorities of the latter State for robbery and held to trial as felons—*held*, that a request from the confederate agent, Ould, that they be treated and exchanged as prisoners of war, should be denied, and that they should be left to have their offence passed upon by the court which had assumed jurisdiction of the case, and by which alone their defence (that they were actually confederate soldiers acting under the orders of their superior officers) could be properly investigated. II, 591; V, 344.

(7.) The cartel is not regarded as at all interfering with the right

of our government to punish prisoners of war, when in our possession, for crimes committed by them before they entered the military service, and not already punished by their own authorities, except in the case of a *spy*. V, 286; VII, 360, 377. So for crimes committed by them while in the rebel service, and before their capture. VIII, 529.

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

PRIZE.

(1.) When our inland waters become the theatre of war, the reason of the law would require that captures made upon them should be treated, and the prizes should be adjudicated for condemnation, as in ordinary cases by the United States courts. I, 346.

(2.) An officer of the navy, who, in prosecuting the proceeding for the condemnation of a captured prize, incurs responsibilities and losses, will be indemnified by the government. *Ibid.*

PROCEEDINGS AT LAW AGAINST OFFICER.

(1.) It is clearly the duty of the government to protect those who have made arrests under its authority, by having a proper defence made, through counsel employed by it, to the suits instituted against them. III, 105.

(2.) An officer who, in arresting a soldier, acts in good faith, and in the proper discharge of a public duty, should be protected by the government from the injurious consequences of his action. The United States attorney for the district should generally be instructed to appear and defend him in a suit for false imprisonment. I, 348.

(3.) Where an officer reported, in accordance with paragraph 1461 of the Regulations, that he had been sued in a civil court for damages, alleged to have been sustained by a soldier on being illegally mustered into service—*advised*, that the United States district attorney be requested to appear for him, and to transfer the case to the United States circuit court if he deemed it desirable. X, 576.

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

(5.) An officer, against whom suits have been commenced for acts done in the line of his duty, may properly be instructed to employ counsel for his defence, with the understanding that, if upon the trial it shall appear that he was acting in the proper performance of his duty and in conformity to law, he will be indemnified by the government, as well for the expenses incurred in defending the suits as for any judgments that may be rendered against him. II, 16.

(6.) Where an officer is sued in damages for acts done by him while acting under the authority of the government, the question of his indemnification is not to be determined till judgment shall have been

rendered against him, and will then depend upon the character of his conduct considered in all its bearings, and examined in the light of the testimony produced on the trial. If he acted within the scope of his power, fairly interpreted, his claim to protection against the results of the suit should be allowed; and the fact that the gold, for the seizure of which the suit was brought, had been, and is still, held by the officer subject to the order of the government, is not considered as affecting the rights or obligations involved. XI, 201.

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

(8.) Where a *detective* in the employment of the provost marshal of the middle department, in consequence of his making an arrest ordered by the general commanding, was subjected to a criminal prosecution for acts done in the regular performance of his duty—*held*, that his case was within the *spirit* of paragraph 1461 of the Regulations, and that the just charges of the counsel employed in his defence should be borne by the government. VII, 45.

(9.) Where a *deputy provost marshal*, acting directly by the orders of the Provost Marshal General, and in the legitimate exercise of the functions of his office, arrested a noisy and violent secessionist who created disturbance at an election in Maryland, and bills of indictment for false imprisonment, &c., were consequently found against him, and his case appointed for trial—*advised*, (1st,) that the prosecution be defended by the United States; (2d,) that the governor of Maryland, in case of his conviction, be requested immediately to pardon him; (3d,) that in case of his refusal, it would devolve upon the government by all needful force to promptly release him from the custody of the State authorities, and set him at liberty.

These views are equally applicable to the cases of recruiting officers of colored troops against whom indictments have been found in the circuit court of Kent county, Maryland. VIII, 51.

Also suggested in this case, in view of the reported disloyal character of the State court, and the notorious disloyalty of the region in which it is held, that the counsel of the provost marshal remove the case to the United States circuit court, under the provisions of section 5, chapter 81, of act of 3d March, 1863. VIII, 108; VIII, 130.

(10.) That a horse is marked "U. S." is not conclusive, but only *prima facie*, evidence that it is the property of the United States. If a horse so marked be taken from the United States quartermaster or other officer in charge, upon a writ of replevin, he should employ counsel and contest the title, at the same time giving notice of the facts to the Adjutant General, in accordance with paragraph 1461 of the Regulations, whereupon the government will assume the defence of the case. VIII, 612.

SEE THIRTY-THIRD ARTICLE.
PRIZE, (2.)

PROMOTION.

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

PROSECUTOR.

There is no doubt of the right of the prosecutor to be present and propound questions through the judge advocate. If, however, he is a witness in the case, he should be first examined. II, 1.

SEE ACCUSER AND PROSECUTOR.

PROTEST.

Where the majority of the members of a court-martial have come to a decision upon any question raised in the course of the proceedings, no individual of the minority, whether the President or other member, is entitled to have his *protest* against the decision entered upon the record. The conclusions of the court (except in cases of death sentences, where a concurrence of two-thirds is required) are to be determined invariably by the vote of the majority of its members, and it is much less important that individual members should have an opportunity of publishing their personal convictions, than that the action of the court should appear upon the formal record as that of the aggregate body, and should carry weight and have effect as such. XI, 203.

PROVOST JUDGE OR COURT.

(1.) A general commanding a department in which the ordinary criminal courts are suspended is authorized, under circumstances requiring the prompt administration of justice, to appoint a provost judge for the trial of minor offences. It is proper, however, that the graver violations of the law (in the case of offenders not amenable to trial by court-martial) should be referred to military commissions. While the line between the jurisdiction of a provost judge and that of a military commission is not defined, both tribunals derive their powers from the same source, and are alike sanctioned by the principles of public law. II, 14.

(2.) A provost court has no power to impose or enforce forfeitures or stoppages of pay in cases of enlisted men. It is deemed to be a principle of public policy that the pay of soldiers shall not be taken from them or affected by process of law, except in cases specially provided for by statute or the regulations of the service. The provost court is a tribunal whose jurisdiction is derived from the customs of war, and which is quite unknown to our legislation. It is believed, therefore, that it is without authority to exercise jurisdiction over a soldier's pay by adjudging its forfeiture. VIII, 638; X, 39.

(3.) A provost court has no jurisdiction of the offences of soldiers specifically made triable by law before a court-martial or military

commission. Where therefore it appeared that the provost judge at New Orleans, Judge Atocha, had sentenced a considerable number of enlisted men to long terms of imprisonment at Ship Island and the Dry Tortugas for desertion, marauding, mutiny, robbery, and larceny, (and some even to death,)—*held* that such administration of military justice was without sanction of law and wholly void. VI, 635, 639; X, 560; XIII, 55, 114. *Held*, also, that such judge had no jurisdiction of the crime of murder committed by a citizen, whom it appeared that he had sentenced to an imprisonment for life. XIII, 114. And *recommended*, especially as the sentences adjudged by this official were characterized by an unusual and excessive rigor, that measures be taken by the War Department to ascertain what soldiers or others remained confined at the posts mentioned, or elsewhere, under sentences illegally imposed by him, in order that they might at once be released, and returned to duty, or for trial by a competent tribunal. *Ibid.*

PROVOST MARSHAL.

SEE HABEAS CORPUS, (8.)
COURT-MARTIAL, II, (5.)
SENTENCE, III, (7.)

PUBLIC PROPERTY, (USE OF.)

Property of the United States acquired by public law cannot be disposed of through the will of any of the departments, but only by act of Congress. Thus, government land at Sandy Hook cannot be allowed to be used and improved by a railroad company without the sanction of public law. There is no principle or precedent which can be held to authorize the Executive to transfer either the absolute title to, or a usufructuary interest in, property of the United States so acquired, without the concurrence of Congress. VII, 404.

PUNISHMENT.

(1.) The punishments which may be imposed by a court-martial, where not restricted by law to particular penalties, are not limited to those enumerated in paragraph 895 of the Regulations. The custom of the service and usages of war have established various other penalties which may be resorted to. IV, 13I, 217.

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

(3.) The punishment of *branding* rests for its sanction in this country upon the custom of the service. This custom, however, is opposed to its infliction in any mode which might be deemed cruel or unnecessarily severe. Branding *with a hot iron* is therefore discountenanced; and a sentence of marking the letter "D" in indelible ink *on the cheek* should be disapproved. The ordinary practice is to mark this letter in ink upon the hip. But the penalty of branding or marking, however mildly it may be executed, is regarded as against public policy and opposed to the dictates of humanity, and consequently as not

conducive to the interests of the service. The effect of fixing upon an offender an ineffaceable brand of guilt must be to deprive him of the *locus pœnitentiæ* which modern legislation, as well as true philanthropy, is careful to extend to the criminal, and almost hopelessly to discourage him in making an attempt to reform his life. There is indeed in this punishment a certain merciless quality which might well characterize the code of a less civilized period, but is certainly abhorrent to the sense and judgment of an enlightened age. It is conceived, therefore, that if reviewing officers should in general remit that part of a sentence of court-martial which imposes this penalty upon the deserter, they would materially promote the welfare of the military service. XI, 205. See III, 200; IV, 380.

(4.) A sentence "to do guard duty every other day for a year" degrades that most important and honorable duty to the level of an infamous punishment. Such a punishment should be discountenanced. IV, 402.

(5.) The punishment of "forfeiture of pay and allowances" cannot be inflicted by implication, but must be distinctly imposed by the sentence of the court. A condemnation of the party to "confinement," to "ball and chain," to "hard labor," or to any other of the punishments enumerated in paragraph 895, Army Regulations, cannot be held as involving also a forfeiture of pay and allowances. V, 409

(6.) The phrase in section 30, chapter 75, of act of March 3, 1863, "shall never be less than those (punishments) inflicted by the laws of the State, Territory, or district, &c.," should be held to mean such punishments as are directed or authorized to be inflicted by the law, common or written, of such State, Territory, or district, and this whether the local government under which these laws are ordinarily enforced is in full operation, or, from rebellion or other causes, temporarily suspended. VII, 205.

(7.) That a military court may *exceed* the punishment imposed by the local law, in cases of sentences for the crimes enumerated in section 30, chapter 75, of act of 3d March, 1863, is undeniable. Thus, where in the case of one of these crimes, punishable by the State law with confinement in the penitentiary, the prisoner was condemned to death by a military commission, the President did not hesitate to approve it as sustainable on principles of public law. II, 564.

(8.) While a temporary confinement of a suspected party, preparatory to his being brought to trial, or for other necessary purpose, is customary and allowable, there is believed to be no precedent in our service for the imposition by a commanding general or department commander of a formal *punishment*, and especially of an infamous punishment, as confinement at hard labor, without any trial whatever. VIII, 344. See XI, 205.

(9.) An officer cannot properly be subjected to a degrading punishment except by sentence of a court-martial in a case where such punishment is authorized by law. Thus, for an army or department commander to order that an officer be *reduced to the ranks*, as a punishment, without trial, is an unauthorized act. VI, 105; VIII, 620; VIII, 505.

(10.) An officer may, by sentence of court-martial, be dismissed the service with circumstances of ignominy; but (except where such penalty is expressly authorized by law) he cannot be punished by imprisonment at hard labor. VI, 242.

(11.) *Held* that a "general commanding" had no right to order the maker of a promissory note (a civilian) to be arrested and committed to close confinement, unless he should give security for the payment of the debt. VIII, 414.

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

(13.) Where an officer has been convicted of a violation of the laws of war, but the court, in its sentence, has not included a forfeiture of pay, the government cannot add such forfeiture as a *punishment* for the *disloyalty* which appears from the testimony to have characterized the action of the accused, although it might, on general principles of policy, have withheld his pay on the ground of his disloyal practices, independently of any judicial proceeding. VIII, 557.

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

(15.) Where a department commander, who was the reviewing officer whose confirmation was indispensable to the legal enforcement of the sentence, formally *disapproved* it, and then ordered that the accused should be confined at hard labor at a military post till further orders—*held* that his action in imposing such punishment was illegal and unauthorized. XI, 310.

SEE DESERTER, (17.)

PUT IN JEOPARDY.

SEE EIGHTY-SEVENTH ARTICLE, (2,) (6.)

Q.

QUARTERMASTER'S EMPLOYÉS.

SEE COURT-MARTIAL, II, (13.)
MILITARY COMMISSION, II, (8)

R.

RAM FLEET.

The force employed on the ram fleet is regarded as a special contingent or portion of the army, and not of the navy. Pilots and engineers on the ram fleet, although not technically officers or soldiers, are persons serving for pay with the armies of the United States in the field, and are within the provisions of the sixtieth article. They are, therefore, amenable to the articles of war, and triable by court-martial. II, 570.

RECAPTURED PROPERTY, (RESTORATION OF.)

(1.) Where funds taken by a Commanding General from an agent of the Confederate States were shown by proper proof to be the property of a loyal claimant—*advised* that they be paid over to him, upon his executing a bond to indemnify the United States against any loss which may hereafter accrue on account of such payment. I, 370.

(2.) Where the vessel of a loyal owner was recaptured by our forces from the enemy—*advised* that upon the representations in regard to ownership, loyalty, &c., being found on investigation to be true) it be at once delivered to such owner, *relieved of all claim for salvage growing out of the recapture.* To treat such property as lawful prize, or as subject to salvage, would be to recognize the confederates as *belligerents*, which has not been and cannot be done. The rebels, by such a seizure of the property of loyal citizens, acquire no more legal interest in it than does the robber in a purse which he snatches from a traveller on the highway. I, 424. See XI, 266.

(3.) If a claim for salvage is urged, it should be enforced before the courts of the country; but no officer in the military service should be allowed to present such a claim, since such officer, in the recapture, represents the government, which is bound to deliver the property lost by its own neglect to protect it. I, 428.

(4.) Where the United States authorities have had the use of a vessel for a considerable time after its recapture, *held* that a just compensation for such use should be made to the owners. *Ibid.* I, 456.

RECOMMISSION OF OFFICER.

SEE COURT-MARTIAL, II, (2.)

RECONVENING COURT.

SEE RECORD, II.

RECORD, I, (GENERALLY.)

(1.) The charges and specifications should properly be embodied in the record, not annexed on a separate sheet. II, 495.

(2.) When a commissioned officer has been dismissed by sentence of general court-martial, there should be found in the record itself every fact which is necessary to justify the enforcement of such sentence. Of such facts the record, with its appropriate indorsements by the reviewing officers, is the only reliable and enduring evidence. II, 59.

SEE FIELD OFFICER'S COURT, (11,) (12,) (13.)

RECORD, II, (AMENDMENT OF.)

(1.) In the case of a fatal defect or omission in the record, the court, if it has not been dissolved, may be reconvened to make the necessary amendment, *provided the facts will warrant its being made.* If it has been dissolved, or for other cause cannot be reassembled, the sentence will remain inoperative. II, 154.

(2.) When a court is reconvened for a substantial amendment, the reconvening order should be spread upon the record, which should also show that at least five members of the court, the judge advocate, and the accused were present, and that the amendment was then made to conform to, and express, the truth in the case. I, 487. But a merely clerical error may be amended by the court, without having the accused present. IX, 653.

(3.) The correction of a clerical error in a record, by erasure or interlineation, is an informal proceeding, and one not to be encouraged. The legal course to be pursued is, for the proper officer to reconvene the court, calling its attention in the order of reconvention to the error needing correction; and for the court, on reassembling, to continue the record by a report of the proceedings of the additional session in which the amendment is made. XI, 93.

(4.) When a military court is reconvened for the purpose of amending omissions in the record, the order reconvening it should be annexed to the proceedings; and these should be entered in full, verified in the ordinary manner by the signatures of the president and judge advocate, and transmitted to the reviewing officer for his approval. XI, 113. A separate certificate of the president of the court, setting forth certain facts amendatory of the record, is not sufficient; the amendment must be the act of the court itself. IX, 484.

(5.) An amendment of record, made by two of the five members composing a military commission, is invalid and inoperative, and the sentence (the amendment being necessary to its validity) remains inoperative. II, 97.

RECORD, III, (ACTION UPON.)

(1.) The formal confirmation of the proceedings, required by paragraph 896 of the Army Regulations, must be set forth upon the record by the reviewing officer, although the case is required to be acted upon by higher authority. A mere reference or forwarding of the record is not expressive of any "decision" or "order" thereon, and does not fulfil the requirements of law. IV, 313; VII, 132.

(2.) The "decision" and "orders" of the reviewing officer must be written upon the record at the end of the proceedings. Reference merely to a separate paper, such as a printed order, is not a compliance with the requirement of paragraph 896 of the Regulations. IV, 428.

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

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

See RECORD, IV, (21.)

RECORD, IV, (FATAL DEFECTS.)

The following defects in the record of a military court *held* to be fatal to the validity of the sentence, *unless corrected upon a reassembling of the court for the purpose; or*, in the case noted in paragraph (21,) *by the reviewing officer* upon a return of the proceedings to him.

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

(2.) Where it does not show that they were sworn *in the presence of the accused*. II, 24, 25; VII, 141; VIII, 97.

(3.) Where it only states that the court and judge advocate were "*duly sworn.*" This is an averment of a legal conclusion, and not of a fact, and does not necessarily import that they were sworn in the presence of the accused. II, 240. Where it does not show that a member who took his seat after the organization of the court was sworn in the presence of the accused. IX, 222.

(4.) Where a new judge advocate was detailed for the court pending the trial, in place of the former one, deceased; but the record did not show that he was sworn, although acting in the case, and certifying the record as judge advocate. III, 548.

(5.) Where the record does not contain a copy of the order convening the court. A copy of the order must be annexed to or entered upon the record of each case. It is not sufficient to annex a copy to the first case of a series tried by the same court and attached together. IV, 607; III, 517; VIII, 649.

(6.) Where the record does not show that the order convening the court was read in the presence of the accused, or that he had any

opportunity of challenge afforded him. II, 83, 153, 526, 531. Or that he was offered the privilege of challenging a member who joined and took part in the court after the arraignment and organization of the court. VIII, 662.

(7.) Where the proceedings are not authenticated by the signature of the president or of the judge advocate. II, 546. Where such signatures were appended, but not till after the court had been dissolved. III, 485. And where the sentence is not certified by the signatures of these officers. IV, 323.

(8.) Where the record does not show that the court was "organized as the law requires." III, 338.

(9.) Where it does not show how many members were present, and took part in the trial. VIII, 649.

(10.) Where the record merely states, "The court being in session, proceeded," &c., it does not sufficiently set forth the organization of the court. Each record must be complete *per se*, and the fact that the court was duly organized cannot be made out by a reference to a preceding record in the same series. III, 413.

(11.) Where the record *for one of the days of a trial* shows only that the court "met and proceeded with the trial," &c., without setting forth what and how many members were present at the opening of the court. VI, 384, 593.

(12.) Where the record does not show that the court convened pursuant to the order constituting it, nor how many and what members were present, these defects cannot be supplied by a reference to the record of another case tried earlier on the same day, from which it *does* appear that the court was once properly organized on that day. Each record must be complete in itself. III, 402.

(13.) In a case where the detail consisted of six members only, the record merely set forth that the roll of the members was called, and a *quorum* was found to be present—*held* that such statement did not show that the court was organized with the minimum number. III, 415.

(14) Where it appears from the record that less than five members were present at the trial. III, 413.

(15.) Where it appears from the record that a military commission was constituted with but three members, neither of whom was designated as judge advocate, and without a separate judge advocate. III, 427.

(16.) Where the record shows a non-compliance with *any* of the requirements of paragraph 891 of the Army Regulations. II, 494.

(17.) Where the record does not show that the witnesses were sworn. III, 550.

(18.) Where it does not set forth the testimony of the witnesses examined, since it is impossible in such case for the reviewing officer to determine upon the sufficiency of the proof. II, 23.

(19.) Where the judge advocate only recorded such testimony on the cross-examination of the witnesses as he considered material. For him to decide what testimony was material, was to substitute his judgment for that of the court and the reviewing officer. III, 189.

(20.) Where the record did not show that the charge against the accused was in writing; or that he had, in advance of the examination of witnesses, any knowledge of the offence for which he was tried; or that he was allowed to plead. II, 83.

(21.) Where the reviewing officer fails to state his "decision and orders" at the end of the proceedings. II, 550. And it is not sufficient to state such decision, &c., at the end of a series of cases passed upon by the same reviewing officer. It must be stated independently at the end of each case. VIII, 656. To annex a copy of the general order promulgating the proceedings to a collection of records is not a compliance with paragraph 896 of the Regulations. I, 412; II, 438; IX, 614.

(22.) Where, in the case of a capital sentence, the concurrence therein of two-thirds of the members of the court does not appear from the record. II, 21, 23; IV, 158.

(23.) Where the specification charges that Corporal *Woodworth* committed the offence, but the sentence is pronounced upon Corporal Woodman. II, 555. See "*Variance*," (2,) (3,) (4.)

(24.) Where the record shows that the court continued in session after 3 o'clock p. m., and sets forth no authority therefor from the officer appointing the court. VII, 433; II, 123.

(25.) Where the record sets forth the sentence, but not the findings. IX, 221.

(26.) Where the record shows that the prisoner was arraigned and pleaded prior to the organization of the court. XI, 1.

(27.) Where, in the order convening a court-martial with less than thirteen members, there is an omission to add the statement to the effect that no officers other than those named can be assembled without manifest injury to the service. XI, 208.

RECORD, V, (DEFECTS, &c., NOT FATAL.)

(1.) The fact that the officer who preferred the charges was a member of the court, and also a witness on the trial, does not invalidate the proceedings. II, 584.

(2.) It does not affect the validity of a record that it does not show that a member of the detail who was challenged by the accused withdrew from the court during the consideration of the challenge. V, 96.

(3.) The failure to state that a witness was for the prosecution does not affect the validity of the proceedings. IV, 218.

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

(5.) While it is a common practice to note in the record the conclusion of the testimony for the prosecution, and the close of the case on the part of the government, yet the omission to make such entry does not affect the validity of the proceedings. IV, 131, 217.

(6.) A statement in the record that the vote on the findings or sentence was "unanimous," though irregular, does not affect the validity of the proceedings. VII, 3.

(7.) That the record does not show that the court was cleared for deliberation on the various questions arising during the trial is an informality, though not a fatal one. IX, 221.

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

(9.) It need not set forth the exact words of the accused in answer to the inquiry, whether he has any objection to any member of the court. It is sufficient if it simply appears that he had none. IX, 166.

RECORDER.

The *per diem* allowed to judge advocates by paragraph 1135 of the Regulations is now, by an order of the Secretary of War, extended to the judge advocates or recorders of military commissions. VII, 324.

SEE FIELD OFFICER'S COURT, (11.)

REDUCTION TO THE RANKS, OF OFFICER.

(1.) The 22d section of enrolment act of March 3, 1863, authorizing courts-martial to sentence officers to be reduced to the ranks for absence without leave, is without restriction in its language, and applies to officers of the regular army as well as to those of the volunteer service. V, 224. Such penalty can be imposed only upon conviction of the offence of absence without leave. VII, 144. See IX, 606.

(2.) An officer reduced to the ranks by sentence of court-martial cannot be promoted or commissioned so long as the sentence remains in force. His *status* in the ranks is a punishment, and it must continue until changed by authority competent to remit or commute the sentence. V, 432.

(3.) The punishment of reduction to the ranks should not generally be resorted to in the case of an officer, except where the absence without leave is of a grave and aggravated character. VII, 141.

(4.) An army or department commander has no power, as such, to reduce officers to the ranks. VI, 105; VIII, 620. And see "*Punishment*," (9)

REGIMENTAL AND GARRISON COURTS-MARTIAL.

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

SEE SIXTY-SIXTH ARTICLE
SIXTY-SEVENTH ARTICLE.
FIELD OFFICER'S COURT, (1,) (2,) (7.)

REGIMENTAL FUND.

This fund belongs to the men of the regiment; but the colonel, or commanding officer, is the proper trustee thereof. As legal owner, therefore, he is the only party who can properly sue a predecessor in command, who has been discharged while in default in regard to the fund in his hands. VII, 70.

SEE COMPANY FUND.

REMISSION OF SENTENCE.

SEE EIGHTY-NINTH ARTICLE.
PRESIDENT AS PARDONING POWER.
REVIEWING OFFICER, (8.)

REMOVAL OF DISABILITY.

(1.) Where a volunteer officer has been dismissed by the duly executed sentence of a competent court, whose proceedings were regular and valid, he can re-enter the service only after having the disability imposed by his sentence removed by the President. This is an exercise of the pardoning power, and authorizes his being recommissioned by the governor of his State. I, 365, 372, 374; V, 446, and *passim*. A sentence of dismissal, duly confirmed and executed, cannot be modified to an honorable discharge. VI, 578.

(2.) A removal by the President of the disability consequent upon the sentence does not, *per se*, operate to restore the officer to any pay duly forfeited by reason of his dismissal. VIII, 300.

(3.) The fact that the court was convened and the sentence approved by the Secretary of War, acting as the executive officer of the President, does not affect the operation of the rule, that in the case of the dismissal by court-martial of a volunteer officer, the President cannot reappoint him, but can only afford relief by a removal of the disability imposed by the sentence. IX, 43.

SEE PRESIDENT AS PARDONING POWER, (5.)

REPORTER.

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

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

SEE CLERK, (1.)

REPRIMAND.

(1.) It is according to the better usage of the service that a reprimand required to be pronounced by the sentence of a court-martial should proceed from the commander authorized to confirm the proceedings. While it may be competent for the court to require that an inferior officer should give expression to the reprimand, yet the commander before whom all the facts are spread on the record will be in the best position for administering it, and can publish his remarks in the same order as that in which he promulgates his approval of the proceedings. XII, 18.

(2.) Where, in the case of an officer charged with permitting his men to maraud and pillage on a single occasion, the court acquitted the accused—there appearing to be a reasonable doubt of his guilt—and on being reconvened for a reconsideration of the evidence, convicted him, but sentenced him only to forfeit fifty dollars and to be reprimanded in general orders; and the commanding general issued accordingly a reprimand which pronounced the conduct of the accused to have been "criminal and disgraceful," spoke of his "reckless disregard of the rules and articles of war, and of existing orders and military dicipline," and said that he was "unworthy to hold a commission," and further stigmatized his offence as that of a "bandit," and added that he "should suffer the severest punishment known to the law, and should be held up to public execration, to be loathed, scorned, and despised by all good officers and law-abiding citizens," and then concluded by ordering that he "resume his sword and return to duty"—*held* that such reprimand was improper and unwarranted, and the same was therefore submitted to the Secretary of War for his consideration, lest, if allowed to pass without remark, it might be drawn into precedent. IX, 137.

RETIRING OF OFFICER.

Where an officer of the army of the rank of brigadier general is *retired*, under the 12th section of act of 17th July, 1862, chapter 200, because of being of the age of sixty-two years, or because his name has been borne on the Army Register for forty-five years, the officer next in rank in the same corps has no *right* in law to the promotion to which he would have been entitled if his superior had been retired for incapacity, under the act of 3d August, 1861, chapter 42, section 16. In the act of 1862 there is an entire absence of provision in regard to the promotion which in the former act is expressly provided for; and as the whole subject of promotion in the service is one of positive law, the case in question must be left to the operation of the general rule, which denies promotion *as a right*, when the rank to be reached is that of a brigadier or major general. In such case, therefore, the promotion must be made by *selection* under paragraph 21 of the Army Regulations. IX, 585.

REVIEWING OFFICER.

(1.) The power exercised by a reviewing officer in approving or disapproving the sentences of military courts is judicial in its nature, and cannot be delegated. The loose practice which has grown up in some of the departments, of making the "statement" required by paragraph 896 of the Regulations, on the record, in the name of the commanding general, "by" his adjutant general, is not to be encouraged. VII, 19; IX, 27; VIII, 639.

(2.) The review of the proceedings by the division, &c., commander, or his successor, (authorized to convene a court-martial by the 65th article, or act of December 24, 1861,) is *final* in all cases, except in the case of sentences approved by him which extend to loss of life or to the dismissal of a commissioned officer, or to cases of confinement in a penitentiary, in which case he must forward the proceedings, with his action indorsed thereon, for the review of the proper superior officer or the President. VI, 299; VII, 237. (But see the *recent act of* 2d July, 1864, chapter 215, section 2, which gives such division commander the right to execute, pardon, or mitigate sentences of confinement in a penitentiary.)

(3.) A sentence of confinement in a "*State prison*" is the same as one of confinement in a penitentiary; and if the general commanding, in ordering its execution, requires that it be carried out at the Tortugas, this is a mitigation of the sentence which he had no right to make, as it is a sentence which he has no power to carry into effect except by order of the President. He should have forwarded the proceedings for the action of the President. IX, 70, 147, 296. (But see the *recent act* of 2d July, 1864.

(4.) If the reviewing officer disapproves a sentence of confinement in the penitentiary, the effect is the same as that which follows similar action in other cases: the proceedings are thereby terminated. VII, 479.

(5.) Where the sentence is disapproved by the reviewing officer without remanding the record to the court for reconsideration, the proceedings against the accused are terminated, and he should be released. II, 531; VI, 299.

(6.) It is not in the power of the reviewing officer, either directly or by implication from his language, to enlarge the measure of punishment imposed by sentence of court-martial. VII, 243.

(7.) A division commander, in disapproving the sentence of a court-martial, has no power given him by the act of 24th December, 1861, to substitute therefor a more severe sentence. Further, in so doing—the original sentence being disapproved—no sentence remains, and the prisoner must be discharged. II, 446, 525.

(8.) It is a long-established usage of the service for reviewing officers to remit, for good cause, in the case of enlisted men within their commands, any part of a sentence remaining to be executed at any period after promulgating the same. V, 71; VIII, 582. See "*Department commander.*"

(9.) Where the general officer who duly confirmed the sentence of

dismissal of an officer tried in his department ceases to command that department before any order of publication of the sentence is promulgated, he may still proceed to promulgate such order, *nunc pro tunc*. III, 555.

(10.) When an accused is sentenced to confinement in a penitentiary, *or* such "prison" or "military prison" as the commanding general may direct, it should expressly appear in the indorsement of the reviewing authority which of these two classes of punishment is to be suffered. The *record* will then contain a complete history of the case, and indicate, when received for examination at the office of the Judge Advocate General, precisely what action, if any, is called for. IX, 55, 56, 70.

(11.) The reviewing officer has no power to compel a court to change its sentence, where, upon being reconvened by him, they have refused to modify it. VII, 112.

(12.) An order of the reviewing authority that the sentence shall be executed "in any fortified place in the United States" does not sufficiently indicate what place is decided upon. IX, 124.

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

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

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

SEE SIXTY-FIFTH ARTICLE.
EIGHTY-SEVENTH ARTICLE, (5.)
EIGHTY-NINTH ARTICLE.
COURT-MARTIAL, (14.)
FIELD OFFICER'S COURT, (15,) (16,) (20.)
PUNISHMENT, (15.)
RECORD, III; IV, (21.)
SENTENCE, III, (2,) (3.)

S.

SAFE-CONDUCT.

See FLAG OF TRUCE, (2.)

SALE OF GOVERNMENT HORSE.

It is provided in General Order No. 171, of the War Department, of June 9, 1863, that no officer shall be "permitted to sell a serviceable horse which has been purchased from the Quartermaster's department." An officer, therefore, who has been allowed to buy a horse which had been captured from the enemy, and consequently belonged to the Quartermaster's department, cannot be permitted to sell the same unless it may have been formally condemned as unserviceable. The fact that the horse is, in his opinion, unfit for his use as a cavalry officer, does not authorize him to sell it; and in case he sells it on this ground alone, he must be held accountable to the United States for the amount of the price which he received from the purchaser. XI, 126.

See ORDER, (3.)

SALVAGE.

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

SECRET SERVICE FUND.

See CONFISCATION, (16.)

SENIOR CAPTAIN.

A senior captain, upon whom the command of a regiment, devolved, cannot be permitted to impose it or confer it, at his discretion, upon a junior. It cannot be said that he may *waive* his right to the command in favor of the latter, since no question of waiver can properly be raised. It is not only his right, but his positive duty, to assume the command; and his neglect to do so, by allowing it to be exercised by a junior, would render him amenable to trial by court-martial for a breach of duty. XI, 172.

SENTENCE, I, (GENERALLY.)

(1) It is fully within the scope of the authority of a court-martial to forfeit, by its sentence, the pay of a soldier convicted by it of a military offence. II, 20.

(2.) A court-martial has no power to appropriate, by its sentence, the pay due a convicted prisoner to his wife or family, or otherwise than in forfeiture to the United States. II, 54; XIII, 91.

(3.) In forfeiting, by sentence of a court-martial, a soldier's pay, it

is in accordance with the usages of the service to except the just dues of the sutler and laundress; but their rights being recognized and provided for in the Army Regulations, (paragraph 1360,) it is not strictly necessary to refer to them in the sentence, though it is frequently and properly done. V, 405.

(4.) A sentence requiring the accused to satisfy a private pecuniary liability is irregular. A court-martial has no power to render or collect a judgment of debt against an individual, and any fine which it imposes can accrue to the United States only. VII, 52, 643; VIII, 632. But where a sentence, besides requiring the accused to refund a certain sum to an individual, also imposes a further punishment, the sentence, though inoperative as to the former requirement, is valid as to the latter. VI, 177; IX, 9, 240, 257, 275. Where an officer, upon being convicted of robbery from an enlisted man, was sentenced to forfeit all his pay, &c., and it was recommended by the court that an appropriation be made from the pay so forfeited for the purpose of reimbursing the soldier—*held*, that the relief to which the latter was clearly entitled could be afforded him by Congress only, and that the Secretary of War had not the requisite authority for the purpose. XI, 19. But upon the opinion of Major General Halleck, that such an appropriation could be made by the authority of the Secretary of War under the provisions of sec. 7, ch. 24, Act of March 3, 1861, (to "found a military asylum for invalid and disabled soldiers,") the Secretary has since disallowed the ruling in this case, and held that the reimbursement could be made, and has ordered it to be made accordingly.

(5.) A sentence that a soldier "be dismissed from service" is equivalent to one that he be discharged from service, and is intended to have the same meaning, and should not be disturbed for informality. III, 671.

(6.) There is no principle of law which forbids a court-martial from sentencing an enlisted man to confinement for a period extending beyond the term of his enlistment. *Ibid.*

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

(8.) Where an enlisted man is convicted of drunkenness on duty, and at the same time of another offence, the punishment of which is left discretionary by law with the court; the court *may legally* impose a sentence which inflicts a punishment other than corporeal, such sentence being deemed sufficiently warranted by the finding of guilty upon the second charge. But a sentence affixing some other punishment, *in connexion with* the penalty required by the 45th article, is more logical and regular, and therefore preferable to be adopted in a case of conviction upon both charges. VIII, 670.

(9.) Though a court-martial is left to its discretion in imposing

sentence upon a contractor, tried under the act of July 17, 1862, ch. 200, sec. 16, yet where the conviction was for an attempt to bribe a government officer—*advised*, that the court, in its sentence, should follow the requirements of the act of February 26, 1853, ch. 81, sec. 6, which provides for the punishment of this precise offence. XII, 6; IX, 483. See (12.)

(10.) A sentence that a soldier shall be confined at a certain military prison, or "*at such other place as his regimental commander may direct*," is without precedent. IX, 600.

(11.) Where a white sergeant of a colored regiment was, for an offence which made such punishment a proper one, sentenced to be reduced to the ranks, and the court at the same time required that he should be transfered to a white regiment—*held*, that this feature of the sentence was without precedent and clearly illegal; and that, if it was for the interest of the service that the accused should be transferred to another regiment, such transfer should be made by the proper authority. XI, 205.

(12.) The act of July 4, 1864, ch. 253, sec. 6, in regard to the offence of bribery by a contractor, was not designed to repeal or abrogate any existing laws or remedies for the punishment of such offence, but only to add the penalty of a forfeiture of the contract and a publication in the newspapers of the particulars of the offence. *Held*, therefore, that a government contractor convicted of offering a bribe to a United States inspector should be sentenced not only to undergo such penalty, but to the punishment provided by the act of February 26, 1853, ch. 81, sec. 6, which is directly applicable to such a crime. VI, 640.

(13.) Where a slave woman in Tennessee, on suspicion of having committed a petty theft—though there was no evidence whatever of her guilt, which she persistently denied—was by her owner seized and stripped, and, after having been half hanged, had her hands and knees tied together, and was thus for the space of some two hours and a half whipped by her master, in the presence of his neighbors and in sight of his wife and daughters, until she expired under the lash, a military commission found the murderer guilty of manslaughter only, and merely sentenced him to imprisonment in the penitentiary for five years. *Held*, that some action should be taken which would indicate to the service the strong disapprobation with which the government regards the disgrace brought upon it by such judicial trifling with one of the most cowardly and revolting murders on record. IV, 570.

SEE TWENTY-FIFTH ARTICLE.
FORTY-FIFTH ARTICLE, (3,) (4.)
SEVENTY-SEVENTH ARTICLE, (5.)
EIGHTY-THIRD ARTICLE, (7.)
EIGHTY-FIFTH ARTICLE.
EIGHTY-NINTH ARTICLE.
BOUNTY, (2,) (3,) (4.)
FIELD OFFICER'S COURT, (19.)
PAY AND ALLOWANCES, *passim.*
PENITENTIARY, I, II, III.
PUNISHMENT, *passim.*
REMOVAL OF DISABILITY.
REVIEWING OFFICER, *passim.*

SENTENCE, II, (OF DEATH.)

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

2. Death sentences against guerilla marauders for the crimes specified in sec. 1, ch. 215, of act of July 2, 1864, as well as for violation of the laws and customs of war, and against spies, mutineers, deserters, and murderers, may be carried into effect during the rebellion by department commanders or generals commanding armies in the field. In all other cases death sentences must be submitted to the President for his approval before they can be executed. XI, 44.

(3.) A death sentence, adjudged by a military commission, cannot be carried into execution by a general commanding an army in the field. VII, 439. (But otherwise, in certain cases, under the *recent act* of July 2, 1864, ch. 215, sec. 1.)

(4.) When the division commander disapproves a death sentence, (as he has power to do,) the case is terminated, unless he should refer it back to the court for reconsideration. The power of confirmation of such sentence given to the general commanding the army in the field contemplates the existence of a sentence in force—not one that has been rendered inoperative by the disapproval of the officer appointing the court, and charged specially under the articles of war with the duty of reviewing its proceedings. III, 537. See VI, 299.

(5.) Where a death sentence rests upon findings of guilty upon different charges, and the finding upon one or more is unwarranted or defective, yet if there remain other offence or offences, properly averred and proved, upon which the accused is found guilty, and his guilt of which would warrant the sentence of death, under the law, that sentence is operative and may properly be executed. III, 253, 276, 480.

(6.) No doubt is entertained that it was the intention of Congress, in the recent act of July 2, 1864, ch. 215, secs. 1 and 2, to put death sentences pronounced by military commissions on the same footing with those pronounced by courts-martial, as well with reference to the power of commuting as to that of enforcing them. It is well established that the proceedings of military commissions should be subjected to review in the same manner and by the same authority as those of courts-martial; and as the act has specifically removed the limitations imposed by the 89th article of war upon the power of mitigating sentences of courts-martial, it would seem proper to hold that such removal of previous restrictions should apply also to sentences of military commissions, and that the lesser power of mitigating them should not be deemed to be denied where the greater power of enforcing them is expressly given. Taking the whole act together, and interpreting it in the light of previous legislation *in pari materia*, the words "*which sentences*," occurring in the 2d section, should be expounded as referring to death sentences, &c., *in the abstract*, and not necessarily to such sentences only when pronounced by courts-martial. In this view, the act gives to the commander of the department or army in the field full authority over all death sen-

tences, whether of military commissions or courts-martial, for purposes of remission or mitigation. It is to be added that this interpretation of the act is *in favorem vitæ*, and will tend to accomplish one of the well-known objects of Congress in its enactment. IX, 592.

SEE EIGHTY-NINTH ARTICLE.
NINETY-NINTH ARTICLE, (7.)
PENITENTIARY, III, (2.)
PRESIDENT AS PARDONING POWER.
PRESIDENT AS REVIEWING OFFICER, (2.)

SENTENCE, III, (EXECUTION OF.)

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

(2.) Sentences of confinement in a military prison may be carried into effect by the proper reviewing officer, who may send the convict, with a copy of his order in the case, to any such prison within the limits of the department to which his command belongs. IV, 356.

(3.) If no suitable place of imprisonment can be found in the department where the sentence is pronounced and where the prisoner is held, the Secretary of War is to be appealed to for authority to send him elsewhere. The same course is to be taken where the reviewing officer is called upon to execute a sentence of imprisonment specified in the sentence to be outside the department which he commands or to which he is attached. V, 309; IX, 174; XI, 16, 44, 65, 71.

(4.) Where a man has been tried within a certain division or district, and sentenced to be confined at a prison outside the department, the division, &c., commander must dispose of the accused according to the orders of his department commander, previously issued, or then sought and obtained. The department commander is supposed to act in this regard under the instructions of the War Department. In cases, therefore, of men sentenced within his department to be confined in another, he will either require the prisoner to be forwarded by the division, &c., commander in the first instance, under such special directions as he may think proper to adopt, or to be sent by such commander to his own headquarters to be forwarded directly thence. VI, 33.

(5.) Where a sentence of death was confirmed by the army commander, and ordered to be carried into execution by the division commander between 12 o'clock m. and 4 o'clock p. m. of a certain day, and the hour of 4 was allowed to go by without the sentence being executed, the division commander (although required to do so by the corps commander in person) would not be justified in carrying the sentence into execution later on that day, but should report the omission to obey the order to the army commander issuing it, who would have the right to renew it, fixing another day or hour for the execution. V, 22.

(6.) The sentence, in capital cases, should not attempt to fix the place, day, or hour of its execution. These should be left to the discretion of the commanding general. If, however, these are so

fixed by the court, and the day and hour happen to pass without the sentence being executed, the court should be reconvened, if not dissolved, and another day and hour appointed, or, what is better, the execution of the sentence ordered on a day or hour and at a place to be designated by the commanding general. Nevertheless the time named not being properly a part of the sentence, but directory merely to the officer charged with its execution, if the direction is not from any cause complied with, it would seem that the general power which belongs to the proper commanding officer to enforce the sentence would remain, and that he could exercise it at will. Where, however, the time is fixed by the *General*, and not by the court, and it passes without the sentence being executed, the case is simply one of an order not obeyed, and the right to renew and modify it at the pleasure of the commanding general is unquestionable. III, 650; III, 666.

(7.) A military court, in imposing a fine by its sentence, has no power to collect it as a debt, or as a penalty from the individual, by any compulsory process; and it is equally clear that a provost marshal cannot, either in his capacity as such, or as the executive officer for a military court, legally enforce the payment of such fine. VIII, 298.

(8.) Where the accused is found guilty of "conduct unbecoming an officer and a gentleman," as well as of cowardice, and sentenced to be dismissed, the disapproval of the finding upon the second charge raises no obstacle to the enforcement of the sentence, which for the first offence is mandatory by law. V, 481.

(9.) In the case of a soldier convicted of desertion, and sentenced merely to a forfeiture of pay during the remainder of his term of service, it is entirely incompetent for the department commander to require the sentence, as such, to be executed at the Dry Tortugas. XI, 98.

(10.) A general commanding an army in the field cannot be regarded as failing to comply with General Order No. 270, of the War Department, of October 11, 1864, which enjoins upon commanding officers to forward promptly to the Bureau of Military Justice the proceedings of courts-martial, &c., if he retains without forwarding, until after the execution of the sentence, the record of a court-martial in a capital case, it being proper and necessary for him to so retain the record in his hands in order to pass upon such applications as may be addressed to him for the mitigation or remission of the sentence. It is to be added, that in cases of serious doubt or legal difficulty he should refer the questions involved to this Bureau for decision before proceeding to execute the sentence. XI, 106.

SEE EIGHTY-NINTH ARTICLE.
DESERTER, (2.)

SEPARATE BRIGADE.

(1.) A brigade, while attached to and forming a component part of a division, cannot properly be termed a "separate brigade," in the sense of the act of 24th December, 1861. It is where it is *detached* from the division, and in a different field of duty, that it may be regarded as a "separate brigade." See IX, 629.

(2.) Where it appeared from the record that a court was convened by a colonel commanding "2d brigade, 3d division, 14th army corps," it was held to be clear that such colonel did not command a separate brigade, and was therefore not authorized to convene the court. III, 546; IX, 629.

(3.) Where the command of the officer convening the court is not attached to any division, but is at a separate post, and made up of different detachments, and is such an aggregation of troops as is ordinarily constituted into a brigade, such command, without any express designation as such, may yet properly be considered as a "separate brigade," and its commander held competent to convene the court. VI, 250; X, 52, 107; XIII, 29. But a command consisting of one regiment of infantry and three batteries of artillery cannot be held to come within such general rule, and its commander is not competent to appoint a military court. X, 107.

(4.) Commanders of artillery brigades in the army of the Potomac *held* not to command "separate brigades," and therefore not to be qualified to convene courts-martial. VI, 271, 272.

NOTE.—The foregoing opinions were delivered prior to the publication of the recent General Order No. 251, of the War Department, of August 31, 1864, entitled "Courts-martial for separate brigades," and which provides as follows: "Where a post or district command is composed of mixed troops, equivalent to a brigade, the commanding officer of the department or army will designate it in orders as a "separate brigade," and a copy of such order will accompany the proceedings of any general court-martial convened by such brigade commander. Without such authority, commanders of posts and districts having no brigade organization will not convene general courts-martial."

The following rulings have been made since the publication of the General Order:

(5.) The proper proof that a post or district command has been constituted a "separate brigade," in accordance with General Order No. 251, of August 31, 1864, is an authenticated copy of the order so constituting it. Where a general court-martial is convened by its commander, it is necessary that a copy of such order should accompany the record. The caption of the order by which the court is convened should be "Separate Brigade," &c. XI, 159.

(6.) The mere fact that a command is a *mixed* one (but has not been designated as a separate brigade) does not authorize its commander to convene courts-martial. Until such designation of his command, he is forbidden to exercise such authority by General Order No. 251, of August 31, 1864. IX, 651.

(7.) Though a "district" in which the military force is composed of mixed troops has no brigade organization, yet if this force is designated in orders as a "separate brigade" by the department commander, (in pursuance of General Order No. 251, of the War Department, of August 31, 1864,) the district commander is competent to convene general courts-martial. XI, 110.

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

SEE SIXTY-FIFTH ARTICLE, (3,) (7.)
REVIEWING OFFICER, (14.)

SIGNAL CORPS.

The present signal corps of the army, organized under the provisions of secs. 17, 18, 19, and 20, of ch. 79, of the act of March 3, 1863, *held* to be a part of the *regular* army of the United States. V, 121.

SLAVE.

(1.) If a commanding general regards the presence of slaves within the camps of his command as injurious to the military service, he may expel them without any violation of existing laws; but such police power must be exercised in good faith, and solely on the ground named. If this expulsion is based upon a decision made by the commander on any claim to the service or labor of such slaves, or if the object of expelling such slaves from the camp is to place them within the reach of those claiming to be their owners, then such order of expulsion would be a violation of the letter and spirit of the 10th section of the act of 17th July, 1862, ch. 195. II, 143; V, 591.

(2.) Slaves who are virtually in the military service as "retainers to the camp," in the sense of the 60th article of war, are not liable to be seized as fugitive slaves by the civil authorities. Slaves of owners in rebellion, who have taken refuge within the lines of our army, are declared by the 9th section of chapter 195 of the act of 17th July, 1862, to be "captives of war and forever free of their servitude;" and the civil authorities have no more right to seize and imprison *them* than any other captives of war taken by the armies of the United States. These classes of slaves should, therefore, be protected against such authorities, as well as against those attempting to kidnap them with the view to their sale into slavery under the local law, with the whole power of the government, if necessary. II, 212. V, 36.

(3.) The *status* of slaves, as growing out of the 4th section of the act of August 6, 1861, ch. 60, is, that their emancipation results, *ipso facto*, from the fact of their being required to take up arms or to do labor against the United States; and it is further provided in the act that the fact of the performance of such acts by them shall be a full defence to any claim or attempt to hold them as slaves. But this defence must be made in the United States courts, in a State where such courts are open; and if the person of the slave is seized, he should sue out a writ of habeas corpus, and make his proof thereupon. But the *status* of those enumerated in the 9th section of the act of 17th July, 1862, is that of captives of war and freedmen, and they are placed by the act directly under the protection of the military authorities. This protection should be fully extended to them in good faith against all efforts made to re-enslave them or to deprive them of the freedom which the act bestows. As to the fugitive slaves of loyal masters mentioned in the 10th section of the act of 17th July, 1862, the duty of the military authorities is that

of absolute non-intervention. As the military authority cannot surrender the fugitive or decide upon the validity of the claim to his service, and can exert no power in behalf of the claimant, primarily or as a *posse comitatus* to the civil authorities, or otherwise, it follows that a loyal claimant, attempting in any way to arrest his fugitive, must do so on his own responsibility, and cannot claim any support or protection whatever from the military authorities. III, 617.

(4.) The right of the government to employ, for the suppression of the rebellion, persons of African descent held to service or labor under the local laws, rests upon two distinct grounds:

1st. That they are "*property*"—the government being authorized to seize and apply to public use private property, on making compensation therefor. What the use may be to which it is to be applied does not affect the question of the right.

2d. That they are *persons*. Slaves, under the federal government, occupy the *status* of "persons." They are referred to as such *eo nomine* in the Constitution, and as such they are represented in Congress. The obligation of all persons, irrespective of creed or color, to bear arms, if physically able, in defence of their government, is universally acknowledged and enforced; and corresponding to this is the duty resting on those charged with the administration of the government to employ such persons in the military service, whenever the public safety may demand it. Congress has recognized both the obligation and the duty in the 12th section of the act of July 17, 1862, which authorizes the President to employ, for such military service as they may be found competent to perform, persons of African descent. No distinction is made in the act between such persons who are held to service or labor and those *not* so held. The tenacious and brilliant valor displayed by troops of this race at numerous engagements has sufficiently demonstrated the character of the service of which they are capable. In the interpretation given to the enrolment act, *free* persons of African descent are treated as "citizens of the United States," and, equally with white citizens, are everywhere being drafted into the service. In reference to the other class, *slaves*, the 12th section of the act of July 17, 1862, is in full force. Whether this class shall be generally employed in the service is a question, not of power or right, but purely of policy, to be determined by the estimate which may be entertained of the conflict in which we are engaged, and of the necessity that presses to bring this waste of blood and treasure to a close. That there exists a prejudice against the employment of soldiers of African descent is undeniable. It is, however, rapidly giving way, and never had any foundation in reason or loyalty. It originated with, and has been diligently nurtured by, those in sympathy with the rebellion, and its utterance at this moment is necessarily in the interests of treason.

The action of the President in employing such persons in the service should be in subordination to the constitutional principle, which exacts that compensation shall be made for private property devoted to public uses. As, however, soldiers of this class could not be reenslaved without a national dishonor, revolting, and unendurable for

all those who are themselves worthy to be free, the compensation made to loyal owners of slaves enlisted in the service should be such as entirely to exhaust the interest of claimants, so that when these soldiers lay down their arms at the close of the war, they may at once enter into the enjoyment of that freedom symbolized by the flag which they have followed and defended. V, 163.

(5.) The law, (section 3, chapter 54, act of April 16, 1862,) in fixing the maximum of compensation for slaves freed in the District of Columbia, has imposed *no other* restriction on the Commission in making its estimate of the value of the slave. The compensation is to be awarded in each case, and may be as much less than $300 as the commission shall deem just. The actual value of the slave should, of course, determine the amount of compensation, and the time for which the slave is held to service would, other things being equal, control in ascertaining that actual value. VII, 503. See X, 647.

(6.) The loyal master of a slave volunteering in the *naval* service is not entitled, under the act of February 24, 1864, chapter 13, section 24, to be paid the *special compensation* of $300, or less, provided by that act to be paid to such master in case his slave is drafted or volunteers in the *military* service. X, 274.

(7.) The act of July 1, 1864, chapter 201, section 4, which provides "that persons hereafter enlisted into the naval service shall be entitled to receive the same *bounty* as if enlisted in the army," cannot, in the absence of express provision to that effect, be held to apply to *slaves* so enlisted. X, 274.

(8.) *Held* that a loyal person, invested by the laws of Delaware with a legal title to the labor and services, for a term of years, of a "*convict servant*," may claim, in the case of the enlistment of the latter in the army, the "just compensation" provided, by section 24, chapter 13, act of February 24, 1864, to be awarded to loyal masters to whom "colored volunteers" may "owe service;"—the term of the servitude due at the period of the enlistment, whether for life or years, not being deemed to affect the question of the abstract right to the compensation provided by the statute. X, 647.

See MURDER, (2,) (3)

SPECIAL OFFICER.

See COURT-MARTIAL, II, (5.)

SPECIFICATION.

(1.) It is clear that upon objection made by the accused the court may reject a specification which is defective in not being sufficiently certain, and may then proceed to trial with the remaining specifications. I, 488.

(2.) A specification held fatally defective, in which the rank of the accused, an officer, was not set forth. II, 533.

(3.) Where the specification, which is not subscribed by any person, alleges that the accused addressed abusive language to "*me*," and committed an assault upon "*me*," without naming or otherwise

indicating the subject of the abuse or assault, it is defective, and a finding of "guilty," upon it cannot be supported. III, 429.

(4.) The specification should contain averments of the time and place of the offence. 1, 461, 473; II, 148. But it is held by the Secretary of War that the want of such averments, if not excepted to by the accused, is not a fatal defect, if they can be supplied from the testimony in the record.

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

(6.) In a charge of "violation of the oath of allegiance," the oath, where a copy of it can be obtained, should be set out either *verbatim*, or at least substantially and fully, and the manner of its violation should be distinctly averred. III, 649.

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

(8.) It is double pleading to allege in a specification that an accused was absent without leave "at various times between July 13 and August 2, 1864;" since each such absence is a distinct substantial offence. X, 471.

(9.) Where a specification alleged the presentation of a claim for rations furnished to recruits as well as of a claim for lodgings furnished to the same recruits and for the same period as that for which the rations were furnished—*held* that but one transaction and one offence were set forth, and that the specification was not a double pleading. X, 392.

(10.) The designation of a contractor, in the specification of a charge preferred under section 16, chapter 200, act of July 17, 1862. as "*special*," has no significance, and the term is surplusage merely. X, 392.

SEE NINTH ARTICLE, (1,) (2.)
FORTY-FIFTH ARTICLE, (2.)
FIFTY-SEVENTH ARTICLE, (2.)
MILITARY COMMISSION, II, (16.)

SPY.

(1.) That an officer or soldier of the rebel army comes within our lines disguised in the dress of a citizen is *prima facie* evidence of his being a spy. The disguise, so assumed, strips him of all claim to be treated as a prisoner of war. II, 26, 208; IV, 307; IX, 1. But such evidence may be rebutted by proof that he had come within the lines to visit his family, and not for the purpose of obtaining information as a spy. IV, 307; V, 315, 572; VII, 66. And see II, 377, 580.

(2.) The spy must be taken *in flagrante delicto*. If he is successful in making his escape, the crime, according to a well-settled principle of law, does not follow him, and, of course, if subsequently captured in battle, he cannot be tried for it. V, 286, 248; IX, 100.

(3.) Merely for a citizen to come secretly within our lines from the south, in violation of paragraph 86, of General Order 100, of 1863, does not constitute him a spy. IX, 95.

(4.) A rebel soldier cut off on Early's retreat from Maryland, and wandering about in disguise within our lines for more than a month, and seeking for an opportunity to join the rebel army, but not going outside our lines since first entering them—*held* not strictly chargeable as a *spy*. XI, 82. And see II, 377, 580.

SEE LESSER KINDRED OFFENCE, (2.)
PRISONER OF WAR, (7.)

STAMP.

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

STENOGRAPHER.

(1.) The act of Congress, section 28, chapter 75, act of March 3, 1863, which authorizes the judge advocate of a military court to appoint a stenographer, does not seem to give this power to the recorder of a court of inquiry. But in important cases the Secretary of War, if applied to, would, no doubt, grant him the requisite authority. II, 94.

(2.) Stenographers should be retained only in cases of importance, and when the other duties of the judge advocate do not allow him the time to take down the testimony in the ordinary manner.

In the absence of any regulation or order of the War Department as to their pay, they have generally been allowed $10 per day, when the charge has been *per diem;* and when the charge has been according to the number of pages reported, the rate usually allowed has been the same as for congressional reporting. II, 515; VII, 71.

STOPPAGE.

(1.) A surgeon in charge of a hospital cannot properly be authorized to stop, against the pay of the hospital steward, certain amounts due to merchants for tea purchased by the steward from them, under the pretence that it was on account of the government, but which he really appropriated to his own use. III, 628.

(2.) A stoppage against the pay of a regiment, imposed by a commanding general, for the amount of damage done by them *as* a regiment to private property, and assessed by a commission appointed for that purpose, is proper and warranted by the customs of the service. But in imposing an additional liability of 100 per cent.—*held* that he exceeded his authority, whether sought to be derived from

the Regulations, the 32d article, or the customs of war; and that such penalty could not properly be enforced against the regiment. VIII, 671.

SEE THIRTY-SECOND ARTICLE, (1.)
PAY AND ALLOWANCES, (17.)
PROVOST JUDGE OR COURT, (2.)
SENTENCE, I, (3.)

SUBSTITUTE.

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

SUB-TREASURY ACT.

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

A failure or refusal by an officer to pay over, or account for, public moneys in his hands, upon formal demand made, constitutes a *prima facie* case of embezzlement under this act, liable, however, to be rebutted by proof that the money was lost, or fraudulently or feloniously abstracted from him, since his default under such circumstances, would not amount to a conversion, loan, deposit, or exchange of the money. I, 435.

SUPPRESSION OF DISLOYAL PUBLICATIONS.

The authority to suppress or restrain disloyal publications, made in the interest of the rebellion—as a persistently disloyal newspaper—rests on the same broad foundations as the authority to prosecute the war, and to make that prosecution effectual. That it is the duty of the government zealously to guard the fountains of public sentiment from being poisoned by traitors will scarcely be controverted. It is believed that in a period of active hostilities, with either a foreign or domestic foe, no government has ever tolerated open traitorous utterances or publications within its military lines; nor, indeed, can any government, however strong, do so without imminent hazard to its own honor, and to the lives of its own people. The publisher of a disloyal newspaper, while sheltering himself from the dangers of war, yet serves the enemy far more efficiently than he would do with musket or sword, and to the extent of his influence, the blood of our soldiers who fall in battle is upon his skirts. Were the enemies in our rear more severely dealt with, it is probable that fewer lives would have to be sacrificed in subduing the enemies in our front. If the success of his military operations demand it, the commanding general, whose forces are being demoralized by a treasonable press, may silence it with as clear a right as he may bombard one of the enemy's forts, from which shot and shell are being thrown into the ranks of his army. II, 585.

SURGEON.

SEE JUDGE ADVOCATE, (15.)

SUSPENSION.

(1.) An officer suspended from rank and pay by sentence of a court-martial can go where he pleases, unless it be specified in the sentence that he shall meantime confine himself to limits. Suspension from rank involves suspension of command. If during such suspension an officer in the regular army becomes entitled to promotion, he loses his promotion, and the next in rank takes it. VII, 8.

(2.) A sentence of suspension from duty and pay, for fifteen days, does not imply confinement to quarters. It is not equivalent to arrest, for arrest does not, *per se*, carry loss of pay. It is customary for an officer undergoing sentence of suspension from pay and duty to be allowed the limits of his command. VII, 242.

SEE PRESIDENT AS PARDONING POWER, (6.)

SUTLER.

(1.) There is no law authorizing the appointment of a "staff sutler." The 3d and 6th sections of the act of 19th March, 1862, ch. 47, are conclusive upon the point. The law provides for no other sutler than one for each regiment, to be selected by its commissioned officers. II, 49.

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

SWEARING THE COURT, &c.

SEE SIXTY-NINTH ARTICLE.
FIELD OFFICER'S COURT, (9.)
JUDGE ADVOCATE, (14.)
RECORD, IV, (1,) (2,) (3,) (4;) V, (8.)

T.

TAX.

Under the revenue act of 1st July, 1862, (ch. 119, sec. 86,) the income tax of 3 per cent. should be deducted from the pay and allowances of military officers. These, if not all included under the head of "salary," are included under the term "payments" used in the bill. When the allowances are commuted, the tax should be collected from the money paid under the commutation. Only what remains of the salary and allowances after the deduction of $600 is taxable. Therefore, to facilitate the collection in this case, deduct $600 from the pay proper, and then collect the tax on the balance of the pay proper and allowances, as an entire sum. I, 359.

TENDER OF RESIGNATION UNDER CHARGES.

SEE DISMISSAL, I, (8.)

THEFT.

See LARCENY.

TRANSFER.

(1.) The 3d paragraph of General Order 75, of 1862, does not give to the governor of a State authority to transfer men from organized companies which have been mustered into the service of the United States, for the purpose of filling up unorganized companies. III, 287.

(2.) It is a well-settled usage in the volunteer as in the regular service to transfer officers from one company to another. The particularization of the company in the commission by the State authorities does not affect the power of making transfers, which may be exercised by the regimental commander after the regiment has been mustered into the United States service. VIII, 162.

See SENTENCE, I, (11.)

TREASON.

(1.) The theory on which the war is prosecuted, by exchanging, instead of punishing *traitors* taken with arms in their hands, would seem to give little encouragement to the prosecution of this class of offenders. The policy of the government appears to be to visit its punishments rather upon those guilty of violating the laws and usages of war, and of disloyal practices which fall short of levying war, and which are not, therefore, generally regarded as constituting *treason* in the sense of the Constitution. VII, 20.

(2.) Bearing arms against the United States is treason; but the government has heretofore waived its right to proceed against the offenders as criminals, by consenting to their being treated as prisoners of war under the cartel. VIII, 529.

See PRISONER OF WAR, (3.)

TRIAL.

No legal objection exists, when two or more persons have concurred in the commission of a military offence, to joining them in the charges, specifications, and trial, though the practice has been to try but one case at a time. V, 479.

(2.) An officer who has been dismissed by summary order, and upon the revocation thereof has been required to report to his command, for trial by general court-martial upon the charges on which his dismissal was based, should be arraigned upon substantially the same charges as those thus referred to. If after joining his command, and before his trial, he has been guilty of any new specific offence, a charge for this may be preferred; but upon this he should be brought to a *separate* trial. XI, 127.

See EIGHTY-SEVENTH ARTICLE.
COURT-MARTIAL, (14.)
ESCAPE, (1.)

V.

VARIANCE.

(1.) Where the word *feasible* in a letter is written *possible* in a specification embodying the letter—*held* an immaterial variance, as it could in no way result to the prejudice of the prisoner, the portion of the letter in which the word occurred constituting no part of the gravamen of the offence. IV, 368; V, 289, 315.

(2.) It is a fatal variance (unless corrected upon a reconvening of the court) where the prisoner arraigned is *Daniel* Norris, while the one sentenced is *John* Norris. VIII, 666; IX, 134.

(3.) So where one was arraigned and pleaded guilty as *George* Sheldon, but was found guilty and sentenced as *Charles* Sheldon. IX, 27.

(4.) So where the specification charges that Corporal *Woodworth* committed the offence, but the sentence is pronounced upon Corporal *Woodman*. II, 555.

(5.) Where the accused is described by the wrong name of *Williams* in the specification and by his right name of *Whitney* in the testimony—*held* a fatal variance. XII, 67.

(6.) Where, under a charge of "horse-stealing," the specification sets forth that the horse was the property of the United States, and the proof was that it was the property of an officer—*held* a fatal variance, and that the finding of guilty and the sentence should be disapproved. VI, 203.

VETERAN RESERVE CORPS.

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

VETERAN VOLUNTEERS.

One who, though charged with desertion, was convicted of absence without leave only, and sentenced merely to a forfeiture of pay for the period of his absence—*held*, eligible for re-enlistment as a *veteran volunteer*, and entitled to bounty, &c., upon such re-enlistment. VIII, 400; VIII, 441, 443.

SEE BOUNTY, (4.)
MUSTER OUT, (3.)

VIOLATION OF ARTICLE OF WAR.

SEE CHARGE, (3.)

VIOLATION OF THE LAWS OF WAR.

(1.) Where an accused is charged with a violation of the laws of war, as laid down in paragraph 86 of General Orders No. 100, of War Department, of April 24, 1863, it is no defence that the actual offence

for which he was tried was committed before the date of the order; the latter being merely a publication and affirmance of the law as it had previously existed. VIII, 53.

(2.) A recital in the specification that the accused, "being a confederate soldier, came within our lines," cannot be held to sustain a charge of violation of the laws of war as laid down in paragraph 86 of General Order 100, of 1863. It is not alleged that the accused held intercourse with our citizens; and the offence, as laid, is no more than that which might be committed by any rebel prisoner captured within the lines of our forces, and who would thereupon be entitled to be treated as a prisoner of war, and would not be triable by military commission. VIII, 274; IV, 213.

(3.) In the case of a citizen of Baltimore, arrested while attempting a violation of the laws of war by swimming the Potomac for the purpose of joining the enemy beyond our lines, and engaging in overt acts of treason and rebellion in their service—*held*, that though he had committed no offence strictly cognizable by a military tribunal, yet his act brought him so far within the control of our criminal courts as to authorize his being placed under legal surveillance. *Recommended*, therefore, that he be ordered before the proper United States judge, and required to enter into a bond, with sufficient sureties, obliging him to desist from any attempt to join the enemy, or engage in or in any way aid or abet the rebellion; and that at the same time the oath of allegiance be administered to him. And, further, as the accused was a highly disloyal character, and one who, if released, would probably join the enemy at the first opportunity, *recommended* that the privilege of the writ of *habeas corpus* be suspended in his case until disposed of before the United States judge in the manner suggested. III, 255.

(4.) Prisoners taken with arms in their hands, who had previously, under the President's amnesty proclamation, taken the oath of allegiance, are not to be treated as prisoners of war, but should be brought to trial at once by military commission for violation of their oath of allegiance and of the laws and customs of war. VII, 678.

(5.) Where a party had laden his vessel with goods which he intended to convey to the enemy, had made complete arrangements for reaching the disloyal States, and had sailed from port and was on his way to the place where he had agreed to deliver, and, but for his capture, would have delivered the goods—*held*, that the fact that he did not succeed in carrying out his purpose did not modify the character, nor lessen the degree, of his offence—of violation of the laws of war in engaging in a contraband trade. VII, 413.

(6.) Recruiting for the rebel army within our lines by rebel officers or agents is not an act of war, but a clear violation of the laws of war. The commission of the officer, detected in the perpetration of this crime, furnishes no more protection against a prosecution before a military court than it would afford in the case of a spy. Parties have been frequently sentenced to a severe punishment for this crime, and in the cases of two conspicuous offenders a sentence of death adjuded by a military commission was approved by the President and carried into effect. XI, 290. See IV, 329.

(7.) The offence of proceeding toward the territory of the enemy with the intention of entering it, which was prevented by the vigilance of our military authorities, is not a violation of paragraph 86, Order 100, of 1863, which contemplates actual intercourse with the enemy, by means of travel or otherwise. IX, 283.

(8.) A woman who forwarded from Baltimore to an officer in the rebel army a sword, which she had caused to be purchased for him, and toward the price of which she had contributed—*held*, triable by military commission for a violation of the laws of war in aiding the public enemy by furnishing him with arms, although the sword was seized by our military authorities before it reached the rebel lines. So *held* of the party who, at the request of this woman, personally made the purchase of the sword at New York city, and caused it to be forwarded to Baltimore; of the party at Baltimore to whom it was consigned, and who accepted the consignment; and of the party who stored it temporarily at her house; each of these three parties being represented to have been well aware of the destination of the arm. At every stage of the transit of this sword from New York, all parties who, knowing its destination, engaged or assisted in forwarding it, were guilty of a grave offence, and one calling for a severe punishment. X, 567.

(9.) Packing contraband goods and transporting them to the Maryland shore of the Potomac river, with the avowed intention of conveying them within the territory of the enemy on the opposite side, constitutes a violation of the laws of war as laid down in paragraph 86 of General Order 100 of 1863. XIII, 125.

SEE EVIDENCE, (11.)
MILITARY COMMISSION, II, (14,) (15;) III, (1,) (2,) (4;) IV, (2.)
PAROLE, (1.)
SPY, (1.)
TREASON, (1.)

VOTE OF SOLDIERS.

See DISMISSAL, I, (9.)
MILITARY COMMISSION, II, (19.)

W.

WAGONER.

SEE ENLISTMENT, I, (3.)

WAIVER OF DEFENCE.

SEE ESCAPE, (1.)

WITHDRAWAL OF CHARGE.

A mere withdrawal of the charges in the case of an officer constitutes no legal bar to their being subsequently preferred against him, and that course should be pursued, provided the interests of the service require it. XI, 202.

SEE EIGHTY-SEVENTH ARTICLE, (3.)

WITNESS.

(1.) The judge advocate, the president, or any member of the court, may testify as a witness, either for the prosecution or defence. The fact that the court may consist of five members only would not affect the rule. VII, 202; XI, 299.

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

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

(4.) Where a witness having given his testimony and been dismissed from the stand, afterwards returned and requested permission to change it in some particular which was not disclosed, and his request was refused by the court, such refusal should be held to invalidate the proceedings, unless, from the whole record, it can be concluded that, beyond all doubt, the defence of the accused was not prejudiced by this wrongful action of the court. VII, 447.

(5.) It is the duty of the judge advocate to give certificates to witnesses, whether officers or citizens, showing the time they have been in attendance; and it is for the Quartermaster General to determine all questions as to their compensation which may arise upon these certificates or otherwise. I, 488; VIII, 88.

(6.) The judge advocate should not refuse the certificate in the case of any witness, civil or military. If the certificate does not present such a case as entitles the party to compensation, it is the function of the disbursing officer to withhold payment. The act of February 26, 1863, has been decided not to deprive an employé of the United States government of his allowances as a witness before courts-martial. V, 475.

(7.) Under paragraph 1139 of the Regulations, resident citizen witnesses are entitled to a fee of $3 per day while attending a court-martial. V, 310.

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

(9.) *Recommended*, that the witnesses confined by military authority at Fort McHenry for twenty months to await the trial of Zarvona before a United States court be released on their personal recognizances, and that the United States attorney at Baltimore be instructed to have a *subpœna* issued for them, and served before their discharge, in order to render formal and obligatory the recognizances which it is proposed they shall execute. Further, that, as an act of

simple justice, these witnesses be paid a reasonable *compensation* for the long period of time which they have lost by the confinement to which they have been subjected, inasmuch as no allowance can be made them by the court, because they have not been formally summoned, being held in military custody and beyond the reach of civil process. II, 88.

(10.) The exercise of a discretionary power by a military commander in detaining a witness in custody may be deemed a substituted equivalent for a summons, so far as those rights are concerned which accrue to the witness touching compensation for attendance. VIII, 88.

(11.) It is not a valid objection to the regularity of the proceedings of a court-martial that the court refused to cause to be summoned, at the request of the accused, a witness residing without the federal lines, who was also generally reputed a disloyal man. VII, 184, 201.

(12.) The jurisdiction of a general court-martial being coextensive with that of the United States government, a summons may be sent to any witness within the limits of the federal domain. XI, 234.

(13.) Under section 25, ch. 79, of act of March 3, 1863, a judge advocate is authorized to issue the usual process for contempt against witnesses disregarding his summons, and his messenger is justified in using the needful force to compel obedience. XI, 234.

(14.) By sec. 25, of ch. 79, of act of March 3, 1863, a judge advocate, when his summons to a witness has been disregarded, is authorized to issue process of *attachment* to compel, by arrest, the attendance of such witness; but *held* that this section does not confer upon military courts the power to punish the witness for his default in not obeying the *subpœna*, by fine and imprisonment, which is exercised by the ordinary criminal courts. The right of a court-martial to *punish* a party disregarding or resisting its authority is confined to cases of misconduct specially designated in the 76th article. IX, 208, 278.

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

(16.) For the court to refuse a continuance, to enable the accused to introduce absent witnesses, when his application is not based upon an affidavit of the character described in paragraph 887 of the Regulations, is not an irregularity. VIII, 662.

(17.) Where a question is put by the accused to a witness, the answer to which, if affirmative, would criminate him, it is for him alone to decide that he will avail himself of the privilege of not answering it. It is not for the judge advocate to check, or for the court to exclude, without consultation with, or reference to, the witness, the interrogation. XI, 220.

(18.) Where a witness is in attendance before a court-martial in more than one case at a time, he is entitled to his mileage and *per diem* allowance in but one. IX, 672.

SEE DEPOSITION.
RECORD, IV, (17,) (18,) (19;) V, (3,) (8.)