INSTRUCTIONS FOR COURTS-MARTIAL AND JUDGE ADVOCATES

Prepared under direction of
Brig. Gen. John R. Brooke,
Commanding Department,

By

Captain P. HENRY RAY,
Acting Judge Advocate, U.S.A.

Headquarters Department of
the Platte, Omaha, Nebraska,
March 1, 1890.

INSTRUCTIONS

—FOR—

COURTS-MARTIAL

—AND—

JUDGE ADVOCATES.

PREPARED UNDER DIRECTION OF

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OMAHA, NEBRASKA:
HEADQUARTERS DEPARTMENT OF THE PLATTE.
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HEADQUARTERS DEPARTMENT OF THE PLATTE,

Omaha, Nebraska, March 1, 1890.

GENERAL ORDERS, }
No. 4. }

The following instructions and forms for procedure and record of courts-martial are published for the information and guidance of officers serving in this Department.

BY COMMAND OF BRIGADIER GENERAL BROOKE:

M. V. SHERIDAN,
Ass't Adjutant General.

OFFICIAL:

Captain and Acting Judge Advocate,
U. S. Army.

REFERENCES.

De Hart Military Law.
Bennet " "
Winthrop " "

Instructions Department of Dakota, Lieut. Col. T. F. Barr, Deputy Judge Advocate General.

Instructions Department of Missouri, Captain A. Murray, Acting Judge Advocate.

Decisions Attorney General.

ARMY REGULATIONS, 1037.—Every court-martial shall keep a complete and accurate record of its proceedings. The record will be authenticated by the signatures of the president and judge advocate in each case. The record must show that the court was organized as the law requires; that the prisoner was asked if he wished to object to any member, and his answer to such question, and that the court and judge advocate were duly sworn in the presence of the prisoner. The record in each case will be complete in itself, and will set out a copy of the order appointing the court.

"The duties devolved upon officers appointed to sit as members of Courts-Martial are of the most grave and important character, and that these duties may be discharged with justice and propriety it is incumbent on all officers to apply themselves diligently to the acquirement of a competent knowledge of Military Law, and to make themselves perfectly acquainted with all orders and regulations, and with the practice of Military Courts."—(*Order No. 23, A. G. O., May 8, 1830.*)

FORM FOR RECORD OF A GENERAL COURT-MARTIAL.

PAGE 1.
(*In margin.*)

CASE 1.

Proceedings of a General Court-Martial which convened at..... ....., pursuant to the following order:

HEADQUARTERS DEPARTMENT OF THE PLATTE,

Omaha, Neb.,.....*18*....

SPECIAL ORDERS } No....

A General Court-Martial is appointed to meet at..... at.....m., on....., the..... .....

or as soon thereafter as practicable, for the trial of such persons as may be properly brought before it:

DETAIL FOR THE COURT:

Major....., 8th Infantry.
Captain....., 2d Infantry.
Captain....., Assistant Surgeon.
1st Lieutenant....., 16th Infantry.
1st Lieutenant....., 9th Cavalry.
2d Lieutenant....., 2d Infantry.
2d Lieutenant....., 8th Infantry.
1st Lieutenant....., 9th Cavalry, Judge Advocate.*

(*If less than 13 members are detailed, the order should continue:*)

A greater number of officers cannot be assembled without manifest injury to the service.

(*In case travel is necessary, the following sentence should be added:*)

The journeys required in complying with this order are necessary for the public service.

By Command of Brigadier General.....
(Signed).....
Assistant Adjutant General.

(*All orders modifying in detail, received before the court assembled, should be here inserted.*)

Fort.....
.....18....

The court met pursuant to the foregoing order at....o'clock..m.

PRESENT:

Major....., 8th Infantry.
Captain....., Assistant Surgeon.
1st Lieutenant....., 16th Infantry.
1st Lieutenant....., 9th Cavalry.
2d Lieutenant....., 2d Infantry.
1st Lieutenant....., 9th Cavalry, Judge Advocate.

ABSENT:

Captain....., 2d Infantry.
2d Lieutenant....., 8th Infantry.

*See "Judge Advocate."

(*Here set forth the cause of absence of any absent member, if the same is known. It is the duty of a Judge Advocate to ascertain, if possible, the cause of absence and record it, and in cases of sickness, medical certificates must be furnished by the absent members, and appended to the record. Five members constitute a minimum quorum (75th A. W.); if the detail, from any cause, be reduced below that number, the court should report the fact to the convening authority and await orders.*)

The court then proceeded to the trial of Private....., Company....., ...Infantry, who was brought before the court, and having, thereupon, heard the order convening it read, requested permission to introduce.....as his counsel; the court assenting, the counsel took his seat.*

(*If the Judge Advocate has authority to employ a reporter (A. R. 1046), the record will continue:*)

The Judge Advocate then stated to the court that he had authority to employ a reporter, and requested permission to introduce..... ....., as a reporter for the court; which request having been granted,....., was duly sworn† by the Judge Advocate, and took his seat.

The accused was then asked if he objected to being tried by any member present, named in the order convening the court;‡ to which he replied in the negative; (*or*) that he objected to..... .... on the following grounds:

(*In latter case insert objections.*)

The challenged member stated:

(*Insert the statement of the challenged member, who should always be requested to respond to the challenge and inform the court upon its merits. Should the accused, after this statement, desire to put the challenged member upon his* voir dire, *the record should continue:*)

The accused requested that the challenged member be sworn upon his *voir dire*,§.....was then duly sworn by the Judge Advocate and testified as follows:‖

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*See 1 Win. Law, p. 220.

†See "Oath."

‡See "Challenge."—A record of proceedings, in case of each challenge, must be made.

§See "Oath."

‖The form of examination should be similar to that given for witness for defense; the accused should first ask his questions, and then the Judge Advocate and court such as they may deem pertinent.

(*At the close of the examination of the member, the record should continue:*)

The testimony of the challenged member was then read to him and was by him pronounced as correct; (*or*) corrected as follows:*

(*Insert corrections, if any.*)

The court was then cleared and closed.

(*The challenged member as well as the accused should retire at this time.*)

After due deliberation the court was opened and the challenged member, the accused, his counsel, and the reporter having resumed their seats, the president announced that the objection of the accused was not sustained; (*or*) that the objection was sustained, and that... .....was, therefore, excused from serving as a member of the court in this case.

The accused was then asked if he objected to any other member present, named in the detail; to which he replied in the negative.

(*Here the Judge Advocate may challenge and record his objection.*)

(*Objection can only be urged to one member at a time, and a record as above must be made in each instance. If the person on trial has no further objection to offer, the record will continue as follows:*)

The members of the court and judge advocate here sworn.†

(*If any delay is wanted, application should now be made; in passing upon the request, the court should be governed by the 93d A. W., and paragraphs, 1013 and 1014, A. R. If no delay is requested the record should continue:*)

(*If an interpreter is required by the accused, he should be here sworn.*)

The accused was then duly arraigned upon the following charges and specifications:

CHARGE 1st.—

* * * * *

Specification 1st.— * * * *

Specification 2d.— * * * *

(*The name of officer preferring charges should be recorded.—Win. Dig. p. 417.*)

* * * * *

To which the accused pleaded‡ as follows:

To the 1st specification, 1st charge:—"Guilty;" (*or*) "Not Guilty."

*See Note 2, page 9.

†See "Oaths."

‡See "Pleas."

To the 2d specification, 1st charge:—"Guilty;" (*or*) "Not Guilty."
To the 1st charge:—Guilty;" (*or*) "Not Guilty."

* * * * *

The accused may in lieu of pleading to the merits put in a special plea in bar of trial, to the jurisdiction, or autre fois convict, or other recognized plea. If he stands mute the plea of not guilty should be entered on the record with a statement of his refusal to plead.

In order to ascertain as to the competency of a witness, the opposite party, whether Judge Advocate or accused, is entitled on request, to examine him upon the subject before he is examined in chief.

This is termed an examination on the *voir dire*; but if the incompetency appear at any period during the trial, the court will give the opposite party the benefit of it, by ruling, on motion, not to consider the testimony of the witness.

His competency, when thus impeached on *voir dire*, may, however, be restored by cross examination, by the party calling him, or by introducing other evidence thereto.

All this must become matter of record.

John Jones, a witness for the prosecution, was duly sworn* and testified as follows:

DIRECT EXAMINATION.†

Questions by the Judge Advocate:

Question: What is your name, rank, company, regiment, and station?

Answer: John Jones, Sergeant, Co...., ...Infantry, Fort .....

Question: Do you know the accused; if so, who is he?

Answer: I do; Private....., Company.., ...Infantry.

(*The succeeding questions of the Judge Advocate should elicit everything within witness' personal knowledge, material to the prosecution.*)

CROSS-EXAMINATION.

Questions by the accused:

Question: * * * * *

Answer: * * * * *

*See "Oath."

†See "Examination of Witnesses."

(*If the accused declines to cross-examine the witness, the record should state.*)

RE-EXAMINATION.

Questions by the Judge Advocate:

Question: * * * *

Answer: * * * *

* * * *

EXAMINATION BY THE COURT.

Question: * * * *

Answer: * * * *

(*Questions by the court cannot be objected to.*)

Objections may be made by members of the court, but inasmuch as members occupy the position of judges and not of counsel and it is no part of their business to try the case as counsel, the frequent interposition of objections by members is a vicious practice, and should be discountenanced.—(See Win. vol. 1, p. 404.)

* * * * *

(*At the close of the examination of each witness, the record should state:*)

The testimony of the witness was then read to him, and was by him pronounced correct; (*or*) corrected as follows:*

(*Enumerate corrections, if any.*)

(*At the close of the prosecution, the record should continue:*)

The Judge Advocate announced that the prosecution here rested.

(*If the court adjourns to meet the following day, the record should continue:*)

The court then at....o'clock..m. adjourned to meet at...o'clock ..m., to-morrow.

....

1st Lt. 9th Cav., Judge Advocate.

Fort.....

....., 18....

The court met pursuant to adjournment at ....o'clock..m.

*If a witness desires to make corrections, after hearing his testimony read, his statement in explanation should be recorded. Changes in the testimony as originally given should not be permitted.

PRESENT:

Major..... ....., 9th Cavalry.
Captain..... ....., Assistant Surgeon.
1st Lieutenant....., 8th Infantry.
1st Lieutenant....., 9th Cavalry.
2d Lieutenant....., 2d Infantry.
1st Lieutenant....., 9th Cavalry, Judge Advocate.

ABSENT:

(*The absence of sworn members, heretofore present, will be noted and an explanation given therefor, when practicable. Members absent by authority, or excused at former session, and so reported, need not be again accounted for during the trial.—Ins. Dept. Columbia, p. 37.*)

* * * *

The accused, ..., his counsel, and the reporter were also present.

The proceedings of. .....were then read* and approved (*or*) corrected† as follows:

(*Enumerate corrections, if any, giving page and line on which they occur.*)

John Smith, a witness for the defense, was then duly sworn and testified as follows:

DIRECT EXAMINATION.

Question by the Judge Advocate‡: What is your name, rank, company, regiment and station?

Answer: * * *
Questions by the accused:
Question: * * *
Answer: * * *

*The reading of the record of the preceding day should not be neglected; the accused should be present thereat.—(G. C. M. O. 35, A. G. O. 1867. See also Win. Dig. p. 219.)

†The corrections should also be entered in their proper place in the record, which should, as far as practicable be free from alterations and interlineations not so authorized.—(Par. 1038, A. R.) If other corrections are *necessary*, a marginal note, signed by the Judge Advocate, should show that they were authorized by the court.

‡Though this is a witness for the defense, the Judge Advocate usually, and properly, asks the preliminary questions.

(*The examination should be completed as in case of witness for prosecution, the Judge Advocate cross-examining and the accused, if he so desires, re-examining the witness.*)

(*Should the accused wish to testify in his own behalf,* the record should continue:*)

The accused, at his own request, was duly sworn as a witness, and testified as follows:

Question by the Judge Advocate: What have you to say in your defense?

Answer: * * *

(*The examination of the accused should be conducted in the same manner as that of any other witness.*)

(*Should the accused decline to be sworn in his own behalf, the record should state:*†)

The accused declined to be sworn in his own behalf.

(*If the accused has no other witness to call, the record should continue:*)

The accused had no further testimony to offer and no statement to make; (*or*) having no further testimony to offer, made the following verbal statement in his defense; (*or*) having no further testimony to offer, submitted a written statement in his defense, which statement was read to the court by the Judge Advocate, and is hereto appended and marked "A"‡; (*or*) requested until 2 o'clock p. m. to prepare his final defense.

(*If the court takes a recess during the time asked for, the record should continue:*)

The court then took a recess until 2 o'clock p. m., at which hour the members of the court, the Judge Advocate, the accused, his counsel, and the reporter resumed their seats.

(*Or, if the court has other business before it, the record may continue:*)

The court then proceeded to other business, and at....o'clock p. m. resumed the trial of this case; at which hour, etc.

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*See "Competency of Witnesses."

†See "Judge Advocate."

‡All documents and papers, made part of the proceedings, should be appended to the record, in the order of their introduction, after the space left for the remarks of the reviewing authority, and marked, so as to afford easy reference, with the consecutive letters of the alphabet.—(See par. 1038, A. R.)

The accused then submitted his final defense; which was read to the court by himself, his counsel, or the Judge Advocate, and is hereto appended and marked "B".*

(*Counsel cannot properly sign statement of accused.*)

The Judge Advocate submitted the case without remark; (*or*) replied as follows:

(*Insert reply, if verbal.*)

(*or*) submitted and read to the court a written reply, which is hereto appended and marked "C."

The court was then cleared and closed for deliberation, and having maturely considered the evidence adduced, finds the accused, Private....., Company....., ...Infantry:†

Of the 1st specification, 1st Charge.—"Guilty;" (*or*) "Not Guilty."

Of the 2d specification, 1st Charge—" 'Guilty,' except the words '..... .....,' and of the excepted words 'Not Guilty,' "

Of the 1st Charge.—"Guilty;" (*or*) "Not Guilty;" (*or*) "Not Guilty, but Guilty of, etc....."

* * * *

(*If copies of orders of previous trials‡ accompany the charges, the record should continue:*)

The court was then reopened and the accused, his counsel, and the reporter having resumed their seats, the Judge Advocate read in evidence copies of orders publishing previous trials and convictions, hereto appended and marked "D," "E," etc., which had been referred to the court by the Department Commander for consideration in connection with this case.

The accused admitted the correctness of the copies (*or*) stated as follows:

(*Insert statement, if any.*)

The court was then cleared and closed, and, having maturely con-

*The statement of the accused, when in writing, or argument in his defense, and all pleas in bar of trial or in abatement, should be signed by the accused referred to in the proceedings as having been submitted by him, and appended to the record whether he is defended by counsel or not.—(Ins. Dept. Columbia, p. 28.)

†See "Finding."

‡See "Previous Trials and Convictions."

sidered the case, does therefore sentence* him, Private..... ...., Company...., ...Infantry, * * *
(*or*) does therefore acquit him, Private.....Company...., ...Infantry.

A.....B .....†

Major.....

President.

C.....D.....

1st Lieut.....

Judge Advocate.

(*Upon completion of the trial of the last case before the court, the record should continue:*)

There being no further business before it, the court at..o'clock, ..m., adjourned *sine die.*

A... .....B .....

Major.... ... .

President.

C.....D.....

1st Lieut..... ...

Judge Advocate.

(*At least two blank pages should be here left for the decision and orders of the reviewing authority.*‡)

(*The papers forming the complete record should be fastened together at the top; the pages numbered (Par. 1038, A. R.); and the record folded in four folds, and endorsed on the first (Par. 1039, A. R.); as follows:*

Fort..... .....

....., 18....

Proceedings of a General Court-Martial,
Convened by Special Orders No ...,
dated Headquarters Department of
...., 18....

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*See "Punishment" and "Sentence."

†See "Authentication of Proceedings."

‡See "Adjournment and remarks of reviewing authority."

Major A.....B..... ...

....

President.

1st Lieut. C.....D .....

....

Judge Advocate.

Case Tried, No....

Private..... ....,

Company...., ...Infantry.

REMARKS ON THE RECORD.

The record of each separate trial must be complete within itself and independent in every particular of any other case.—(Win. Dig., (*b.*) p. 413.)

All orders, modifying the detail of the court, and issued after its original organization, must be incorporated in the record. In connection with this, the record should note the fact of a new member taking his seat, or a new Judge Advocate commencing to officiate, according to order, on a certain day.—(Ib. (*c*), p. 413.)

The entire proceedings should be spread upon the record; all orders, motions, or rulings of the court; all motions, propositions, objections, arguments, statements, etc., of the Judge Advocate or the accused; the testimony of each witness, as nearly as possible in his own language; in short, every feature of the proceedings, material to a complete history of the case and to a correct understanding of every point of the same by the reviewing authority, should be recorded at length.—(Ib. (*a*), p. 413.)

"The Judge Advocate shall transmit the proceedings, without delay, to the officer having authority to confirm the sentence, who shall state, at the end of the proceedings in each case, his decision and orders thereon."—(Par. 1041, A. R.)

REVISION OF RECORD.—See 1043, A. R.

(*If the proceedings are returned to the court for revision, its action should be recorded as follows:*)

REVISION.

Fort.....
....., 18....

The court re-convened, with closed doors, pursuant to the following order, or instructions, at... o'clock..m.

(*Insert copy of order of instructions.*)

PRESENT:

* * * * *

ABSENT:

(*Insert names of absentees and state cause, if known.*)

The Judge Advocate then read to the court the foregoing order, or instructions, of the Department Commander.

The court, having carefully considered the whole of the proceedings in connection with the reasons set forth in the instructions for revision, now revokes its former findings* and, in lieu thereof, finds the accused, etc.; (*or*) revokes its former sentence and, in lieu thereof, sentences the accused, etc.; (*or*) respectfully adheres to its former findings and sentence; (*or*) amends the record by, etc.

The amendment can only be made by the court, when duly reconvened for the purpose, and when made, must be the act of the court as such. A correction made by the president or other member, or by the Judge Advocate, independently of the court, and by means of an erasure or otherwise, is unauthorized and a grave irregularity.—(*Win. Dig., p. 441.*)

A.....B.....
Major.....
President.

C.....D .....
1st Lieutenant.....
Judge Advocate.

(*The record of revision should be appended to the original proceedings, and the whole endorsed and forwarded as before.*)

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*If the finding and sentence are to be considered, all the members who voted upon the same should, if possible, be present.

At least five members of the court, who acted upon the trial must, and the Judge Advocate should, be present at a revision; but it is in general, neither necessary, nor desirable, that the accused should be so.—(Win. Dig., p. 441.)

FORM FOR GARRISON COURT-MARTIAL.*

CASE NO..

Proceedings of a Garrison Court-Martial convened at..... ... ...pursuant to the following order:

Fort.....

....., 18....

ORDERS }
No.. }

A garrison court-martial will convene at this post at ....o'clock, a. m., on the..... ....., 18... or as soon thereafter as practicable, for the trial of such persons as may be properly brought before it.

DETAIL FOR THE COURT:

Captain ....
1st Lieutenant..... ....
2d Lieutenant..... ....
2d Lieutenant....., Judge Advocate.

By order of..... .....

(Signed).....

1st Lieutenant.....

Post Adjutant.

Fort.....,

....., 18....

The court met, pursuant to the foregoing order, at..o'clock ..m.†

PRESENT:

Captain.... ....
1st Lieutenant..... ....
2d Lieutenant..... ....
2d Lieutenant....., Judge Advocate.

*The form of record for a garrison court-martial differs from that for a general court-martial, only in respect to the form of the order appointing the court

The form here given is that for a simple "guilty" case; if the prisoner pleads "not guilty," or any other complication arises, the form before given should be followed.

†If the order contains the sentence, "the court may sit without regard to hours," the hour of meeting and adjournment need not be recorded.

The court then proceeded to the trial* of Private..... Company...., ... Infantry, who was brought before the court and having thereupon heard the order convening it read, was asked if he had any objection to being tried by any member named therein; to which he replied in the negative.

(*The record will be made up in the same general manner as indicated for the proceedings of General Courts.*)

(*A* sine die *adjournment should be added to the last case before the court; and the record of each case folded and endorsed in same manner as that for a General Court-Martial.*)

REMARKS ON THE RECORD OF A GARRISON COURT.

The decision and orders of a post commander properly dated and over his official signature, should follow immediately after the signatures authenticating the proceedings and sentence, or immediately after the signatures to the *sine die* adjournment, in case there is one, and must explicitly and clearly set forth the action of the reviewing authority in approving or disapproving the proceedings, findings and sentence in part or in whole. An approval of sentence must always precede mitigation.

"The complete proceedings of garrison and regimental courts-martial, with copy of order promulgating the same, will be transmitted without delay, by the post or regimental commanders, to the Department Headquarters for file.—(Par. 1042, A. R.)

REMARKS ON GARRISON COURTS.

"Regimental and garrison courts-martial, and field officers detailed to try offenders shall not have power to try capital cases or commissioned officers—(See Articles 21 to 23-39-41 to 46 and 56)—or to inflict a fine exceeding one month's pay, or to imprison or put to hard labor any non-commissioned officer or soldier for a longer time than one month."—(83d A. W.)

Ordnance, commissary or post quartermaster sergeants, or hospital stewards, cannot be tried by garrison courts except by special permission of the Department Commander.—(Par. 105 and 1563, A. R.)

A stoppage to reimburse the government, under Art. 17, not being a *punishment,* may be imposed by a garrison court, even though such stoppage exceeds one month's pay.—(G. O. 110, A. G. O. 1876.)

*See "Remarks on Garrison Courts."

A garrison court, while it may reject charges on legal grounds, such as a want of jurisdiction or a fatal defect in their construction, cannot refuse to try them because it deems them too serious for its cognizance. The court may return such charges with its opinion; but, should the post commander reiterate his order for trial, it has no option, but must obey, the post commander and not the court being responsible to the Department Commander for the expediency of such trial and its effect upon discipline.—(G. O. 81, A. G. O. 1868.)

GENERAL INSTRUCTIONS.

Jurisdiction.

The fact that, pending the trial, the accused has escaped from military custody, furnishes no ground for not proceeding to a finding, and in the event of conviction, to a sentence, in his case; and the court may and should thus find and sentence precisely as in any other instance. The court having once duly assumed jurisdiction of the offense and person, cannot, by any wrongful act of the accused, be ousted of its authority or discharged from its duty to proceed fully to try and determine, according to law and its oath.—(Win. pp. 553-4.)

The jurisdiction of courts-martial, as regards place, is co-extensive with the United States; as regards offenses it is limited to violations of the Articles of War, Secs. 1359, 1360, 1361, 5306 and 5313, Rev. Stat. and the Act of May 11, 1880; as regards persons, it embraces officers and soldiers of the regular army, any other troops in the pay of the United States (64 A. W.), prisoners confined in the Leavenworth Military Prison (Sec. 1361, Rev. Stat.), etc. (1 Win. Law, pp. 95-135.)

It is not only competent, but proper, for a general court-martial to make and enter an order for a witness to produce and submit in evidence a required telegram, and also to furnish to the witness a certified copy of the order, for his own protection against any rule of the corporation of which he is an employe. That the court has such power, as a legally constituted tribunal, is sufficiently established by the laws of the United States under which it is appointed. —(See Cir. 4, A. G. O., 1889.)

The President.

"The officer highest in rank present will act as president."—(Pars. 104, 105, A. R.)

THE JUDGE ADVOCATE.

"The Judge Advocate, * * * , shall prosecute in the name of the United States, but when the prisoner has made his plea, he shall so far consider himself counsel for the prisoner as to object to any leading question to any of the witnesses, and to any question to the prisoner, the answer to which might tend to criminate himself.—(90th A. W.)

Before the trial the Judge Advocate should note and report any irregularity in the order convening the court and see that the charges are technically and correctly drawn. He may ordinarily correct obvious mistakes of form, or slight errors in name, dates, amounts, etc.; but he should not, without the authority of the convening officer, make *substantial* amendments in the allegations, or —least of all—reject or withdraw a charge or specification, or enter a *nolle prosequi* as to the same, or substitute a new and distinct charge for one transmitted to him for trial.—(Win. Dig., p. 298.)

He should acquaint the prisoner with the accusations against him and furnish him with a copy of the charges, if desired. He may ask a prisoner how he intends to plead; but, when the accused is an enlisted man, he should, in no case, try to induce him to plead guilty, or leave him to infer that, if he does so, his punishment will be lighter. When, however, such a plea is voluntarily and intelligently made, the Judge Advocate should properly advise the prisoner of his right to offer evidence in explanation of his offense and, if any such evidence exists, should assist him in securing it.—(Ib., p. 299.)

He should, before the assembling of the court, call the attention of enlisted men to be arraigned for trial to the right given them by law (G. O. 10, A. G. O., 1878, see "Competency of Witnesses," page 31) to testify under oath in their own behalf.—(G. O. 75, A. G. O., 1887.)

He should also, before the court assembles, obtain a suitable room for the same, see that it is in order, procure the requisite stationery, summon necessary witnesses, make a preliminary examination of the latter (see Cir. 9, A. G. O., 1887), and, as far as possible, systematize his plans for conducting the case.

During the trial he should call the attention of the court to any illegalities in its action and to any irregularities in its proceedings. He should act as legal adviser of the court so far as to give his opinion upon any point of law arising during the trial, when the same is asked for by the court, but he should not advance that opinion

unless requested to do so. He should regard his duty toward the accused as not strictly limited by the 90th Article of War, and where the latter is ignorant and without counsel, especially where he is an enlisted man, the Judge Advocate should take care that he does not suffer upon the trial from any ignorance or misconception of his legal rights, and has full opportunity to interpose such plea and make such defense as may best bring out the facts, the merits, or the extenuating circumstances of his case.—(Win. Dig., pp. 208-9.)

Throughout the trial the Judge Advocate should do his utmost to get at and lay before the court the whole truth of the matter in question. He should oppose every attempt to suppress facts or to torture them into false shapes; to that end, that the evidence may so exhibit the case that the court may render impartial justice.—(Ins. Dept. Columbia. p. 56.)

REPORTER.

Employment of—(1046-1047-1048, A. R., 1889.)

INTERPRETER.

(1049, A. R., 1889.)

CHALLENGE.

"Members of a court-martial may be challenged by a prisoner, but only for cause stated to the court. The court shall determine the relevancy and validity thereof, and shall not receive a challenge to more than one member at a time."—(88th A. W.)

A positive declaration by the challenged member that he is not prejudiced against the accused, nor interested in the case, will ordinarily satisfy the accused, and, in the absense of material evidence in support of the objection, justify the court in overruling it.—(Win. Dig , p. 72.)

If, however, the statement is unsatisfactory, or the member makes no response, the accused may offer testimony in support of his objection, or may subject the challenged member to an examination by interrogatories in the same manner that a juror may be examined by criminal courts.—(1 Win. Law, p. 287.)

If the accused desires that the challenged member be sworn on his *voir dire*, the Judge Advocate may administer the oath before the court is sworn.—(See G. C. M. O. 35, A. G. O., 1867; Ives, p. 92; O'Brien, p. 240; *contra*, Win. Dig., p. 72; 1 Win. Law, p. 288.)

Courts should be liberal in passing upon challenges; but they should not entertain an objection that is not *specific*, nor one upon the mere assertion of the accused, if it is not admitted by the challenged member.—(Win. Dig., p. 72.)

A challenge against a member that he is the author of the charges and a material witness, is ordinarily sufficient ground to justify the court in sustaining it. The court of itself cannot excuse a member in the absence of a challenge. A member, not challenged, who thinks himself disqualified, can only be relieved by application to the convening authority.—(Win. Dig. p. 73.)

The Judge Advocate may exercise the right of challenge on behalf of the prosecution.—(Win., vol. 1, p. 281.)

The Judge Advocate is not challengeable; but in case of personal interest in the trial, he should apply to the convening authority to be relieved.—(G. C. M. O. 41, A. G. O., 1875.)

FORMS OF OATHS.

Persons may be affirmed if they have conscientious scruples against being sworn.—(Rev. Stat., Sec. 1.)

OATHS.

Of Members.—The Judge Advocate shall administer to each member of the court, before they proceed upon any trial, the following oath, which shall also be taken by all members of regimental and garrison courts-martial:

"You, A. B., do swear that you will well and truly try and determine, according to evidence, the matter now before you, between the United States of America and the prisoner to be tried, and that you will duly administer justice, without partiality, favor or affection, according to the provisions of the rules and articles for the government of the armies of the United States, and, if any doubt should arise, not explained by said articles, then according to your conscience, the best of your understanding, and the custom of war in like cases; and do you further swear that you will not divulge the sentence of the court until it shall be published by the proper authority; neither will you disclose or discover the vote or opinion of any particular member of the court-martial unless required to give evidence thereof, as a witness, by a court of justice, in due course of law. So help you God."—(84th A. W.)

Of the Judge Advocate.—When the oath has been administered to the members of a court-martial, the president of the court shall administer to the Judge Advocate, or person officiating as such, an oat in the following form:

"You, A. B., do swear that you will not disclose or discover, the vote or opinion of any particular member of the court-martial, unless required to give evidence thereof, as a witness, by a court of justice, in due course of law; nor divulge the sentence of the court

to any but the proper authority, until it shall be duly disclosed by the same. So help you God."—(85th A. W.)

Of Witness.—All persons who give evidence before a court-martial shall be examined on oath, or affirmation, in the following form:

"You swear (or affirm) that the evidence you shall give, in the case now in hearing, shall be the truth, the whole truth, and nothing but the truth. So help you God."—(92d A. W.)

Of Reporter.—You, A. B., do swear that you will faithfully perform the duties of reporter to this court, and duly record the proceedings of, and testimony taken before said court. So help you God.—(See Sec. 1203, Rev. Stat.; also Ives, p. 120.)

Of Interpreter.—"You, A. B., do swear that you will truly and correctly interpret whatever may be submitted to you before this court for that purpose. So help you God."—(Ins. Dept. of Columbia, p. 63.)

Voir Dire.—"You, A. B., do swear that you will true answers make to questions put to you, touching your competency to serve as a member (or witness) in this case. So help you God."

Courts of Inquiry.

Of Member.—The recorder of a court of inquiry shall administer to the members the following oath: "You shall well and truly examine and inquire, according to the evidence, into the matter now before you, without partiality, favor, affection, prejudice, or hope of reward. So help you God."—(117th Art.)

Of Recorder.—The president of the court shall administer to the recorder the following oath: "You, A. B., do swear that you will, according to your best abilities, accurately and impartially record the proceedings of the court and the evidence to be given in the case in hearing. So help you God."—(117th Art.)

Arraignment.

The following is the form of arraignment: The accused standing, the charge and specifications should be read to him by the Judge Advocate, who then should say:

"You have heard the charge and specifications preferred against you.

"What say you to the (1st) specification—guilty or not guilty?

"What say you to the charge—guilty or not guilty?"

The pleadings should be to the specifications in their order, and lastly to the charge.—(See 89th A. W.)

Charges and Specifications.

The essentials of a charge and its specifications are:

1st.—That the charge shall be laid under the proper Article of War.

2d.—That its specifications shall set forth facts sufficient to constitute the particular offense.—(Win. D., p. 145.)

In preferring a charge the Articles of War should be examined to see if the offense committed is specially provided for in any Article; if so, the charge should be laid under that Article; if not, under the 62d. It should be remembered that a charge cannot, legally, be preferred under the 62d Article when the offense committed is in direct violation of any other.—(Ib., p. 147; also 1 Win. Law, p. 1042.)

In writing out a charge a brief synopsis of the offense, such as "making a false return," "wasting ammunition," "exciting mutiny," "absence without leave," "drunk on duty," "sleeping on post," "quitting guard," should be made.—(Win. Dig., p. 146.)

When the offense is not specially designated in any article, the charge should be laid under the 62d, and as before, the nature of the offense should, when practicable, be briefly described as "theft," "burglary," "drunkenness," etc., and this be then followed by the phrase "to the prejudice of good order and military discipline;" or, when the offense cannot be readily briefed, the charge may be simply given as "conduct to the prejudice of good order and military discipline."—(Win. Dig. pp. 42 to 46.)

In case of absence from any appointed parade, drill, or other exercise, but not from the limits of the post, the charge should be laid under the 33d Article of War; if absent from the post, under the 32d; and sometimes; in order that the court may be able to judge of the full nature of the offense, under both, as when some duty, other than an ordinary roll call is neglected; *e. g.*, when a soldier, regularly detailed for guard, absents himself not only from guard mounting, but also from his post.—(Ins. Dept. Dak., p. 10.)

Soldiers found drunk on any guard, party, or other duty, after having been actually placed on such duty and not, until then, discovered to be drunk, should be charged with violation of the 38th Article of War; otherwise, as when found to be intoxicated at guard-mounting or upon formation for drill, muster, etc., with violation of the 62d Article.—(Win. Dig., p. 16.)

"Cases of habitual drunkenness and utter worthlessness, which have not already been inquired into by courts-martial, may be tried under the charge of 'conduct prejudicial to good order and military discipline,' with separate specifications for each offense."—(Par. 1017, A. R.)

"Prisoners will not be joined in the same charge, nor tried on joint charges, unless for concert of action in the same offense." (See par. 1015, A. R.) To warrant the joining of several persons in the same charge, the offense must be such as requires for its commission a combination, and must have been committed in concert, in pursuance of a common intent.—(Win. Dig., p. 153.)

The specification need not possess the technical nicety of an indictment at common law. The most bald statement of facts is sufficient, provided the legal offense itself be distinctly and accurately described; this should be done, if possible, in the words of the Article violated.—(7 Op. Atty. Gen., p. 604.)

In order that the accused may be left in no doubt as to the precise offense which he is called on to disprove, the *time* and *place* of an alleged offense should be stated as carefully as possible. When any doubt exists as to the exact date and locality, it may be stated that the act specified was committed "on or about" a certain date, or "at or near" a given place. In specifying such offenses as "burglary," "robbery," or "drunkenness on duty," however, the time and place ought to be accurately stated. In preparing several specifications under a given charge, the date and place of the alleged offense should be given in each, and not merely in the final specification.—(Win. Dig., pp. 150-153.)

However slight the actual offenses committed may be, inferior courts cannot legally try cases that should be, properly, laid under any of the Articles of War prescribing capital punishment.—(Ib. p. 65.)

When, therefore, charges are placed before a post commander, he should examine them to see if the alleged offense is described in any of the articles prescribing such punishment, viz.: 21, 22, 23, 39, 41 to 46 and 57; if he finds it is not, he should look carefully to the nature of the offense as specified in order to determine by what court the accused should be tried.

All charges against enlisted men for light offenses (except against those noted on page 16), should be sent before a garrison court; while those for offenses capitally punishable, or of a serious nature, such as "disrespect toward his commanding officer," "drunkenness on duty," "quitting guard," "protracted absences without leave," "aggravated acts of drunkenness," together with all those for crimes of an infamous nature, such as "theft," "burglary," "forgery," should be forwarded to the Department Commander for trial by general court-martial.—(Win. Dig., p. 66.)

Before forwarding charges against officers or enlisted men of

their commands, post commanders should make a thorough personal examination of all the circumstances connected with the charges. The fact that such a personal examination has been made should be endorsed upon the charges, and forwarded with statement of service as provided in A. R. 1015, and, in case of deserters, medical certificate required by A. R. 121.

Specifications laid under any Article of War that includes several distinct offenses (as in Art. 17), must state the specific offense, and not be laid in the alternative.

PLEAS.

In all cases of discretionary punishment (see "Punishment,") full knowledge of the circumstances attending the offense is essential to an enlightened exercise of the discretion of the court in measuring punishment, and for the information of the reviewing authority in judging of the merits of the sentence. It is, therefore, proper for the court to take evidence after a plea of guilty in any such case, except when the specification is so descriptive as to disclose all the circumstances of mitigation or aggravation that accompany the offense.—(Win. Dig., p. 376.)

In cases where the punishment is mandatory, this full knowledge of the attendant circumstances is still more necessary to the reviewing authority, in order that he may be able to comprehend the entire case and correctly judge whether the sentence should be approved or disapproved. In *capital* cases, particularly, it is most important that all the facts of the case be exhibited in evidence. —(Ib.)

In practice, the absence of evidence to illustrate the offense has been found particularly embarrassing in cases of *desertion*. In a majority of these cases in which the plea is "Guilty," the record is found to contain no testimony whatever; and a full and intelligent comprehension of the nature of the offense, is thus, in many instances, not attainable.—(Win. Dig., p. 377.)

When the court takes evidence after a plea of "Guilty," the accused may cross-examine the witnesses, produce evidence to rebut their testimony, offer evidence as to character, and address the court in extenuation of the offense or in mitigation of punishment. —(Ins. Dept. Dak., p. 11.)

When the accused pleads "Guilty," and then with no evidence taken, makes a statement inconsistent with his plea, the statement

and plea should be considered together, and if guilt is not conclusively admitted, the court should direct the entry of a plea of "Not Guilty," and proceed to try the case on its merits.—(Win. Dig., p. 377.)

Instead of pleading to the merits, the accused may plead in bar of trial; either to the jurisdiction, by denying the legal right of the court to try him; or he may offer a special plea in bar, presenting reasons why he should not be tried on each separate specification. Such a plea in bar and any argument in its favor should be signed by the accused, appended to the record, and referred to in the proceedings as having been submitted by him. The *onus* of substantiating such pleas rests on the accused. Both sides should be heard, and the evidence *pro* and *con* recorded.—(Ins. Dept. Columbia, p. 49; also Ives, pp. 96 to 111.)

If the plea in bar of trial by the court be found valid, the court should report its decision to the convening authority and await further instructions; if, by special plea, an *issue* is made, the court should act as directed on preceding page; if the plea be overruled, the accused should be required to plead to the merits: *i. e.*, "Guilty," or "Not Guilty."

If the prisoner, from obstinacy or deliberate design, stands mute, or answers foreign to the purpose, the court should proceed to trial and judgment as if the prisoner had pleaded "Not Guilty."—(89 A. W.)

Plea of the 103d Article of War, in bar of trial. The Acting Judge Advocate General, in his report for 1887, states, page 9:

"Under date of January 20, 1877, the then Secretary of War held as follows:

" 'I decide that the old intrepretation of the 88th, now the 103d, of the Rules and Articles of War, under which a deserter might be tried by court-martial without regard to the length of his absence, notwithstanding the limitation clause in the said article, shall continue to be in force.'

"This ruling has been confirmed by the War Department, under date of June 14, 1887; it being then announced that, 'The decision of January 20, 1877, has, since its promulgation, been the rule for the guidance of officers of the army, and will so remain until officially set aside.' "

Plea of Minority. "Where a soldier, otherwise subject to be discharged on account of minority, is held in arrest prior to trial, or under sentence as a deserter, an application for his discharge by a parent entitled to claim his services (whether addressed to the Sec-

retary of War or to a U. S. court), will not be favorably entertained. In such a case the interest of the public in the administration of justice is paramount to the right of the parent, and requires that the party shall abide the legal consequences of his military offense before the question of the right of discharge be passed upon." —(Win. Dig., p. 251.)

ATTENDANCE OF WITNESSES.

"The Judge Advocate should summon the necessary witnesses for the trial."

To procure the necessary witnesses, the Judge Advocate should usually proceed as follows: (For summons and subpœnas see Forms.)

1. If the desired witness is an officer or a soldier, or a citizen living in the vicinity of the post or city, where the court is convened, the summons or subpœna may be served by the Judge Advocate or by a person instructed by him.

In all cases where expense will be incurred in mileage to officers or transportation to enlisted men in attending as witnesses before courts-martial, or serving subpœnas, the summons or subpœna will be forwarded to Department Headquarters for service; in case of emergency, military witnesses may be so summoned by telegraph.

2d. If the desired witness is *an officer* present at the post, the summons (see "Forms" *infra*), should be addressed to him *through* his post commander.

3d. If *an enlisted* man, present at the post, the summons should be sent *to* his post commander for service.

Service is made, under the laws of the United States, by a personal delivery of the subpœna to the witness.; and *proof* of service by returning the duplicate original to the Judge Advocate endorsed (for form of affidavit or certificate see "Forms" *infra*) to the effect that, on such a day, date and place, the affiant *personally* served upon the within named witness a subpœna, of which the within is a duplicate. Any person, instructed by the Judge Advocate or post commander, may serve the subpœna; but to be *legal* this service *must be personal*.—(Par. 1009, A. R.)

Should the witness fail to appear on due and reasonable notice, the Judge Advocate has power, by the provisions of section 1202, R. S., to issue like process, to compel any witness to appear and testify, which courts of criminal jurisdiction within the state, territory, or district where such court may be convened, may lawfully issue. This power also includes the power to execute such process

through some officer, who shall be specially charged with its execution.—(12 Op. Atty. Gen., p. 501.)

In the case of such failure to appear, the Judge Advocate should present and have attached to the record, referring to the same therein, the duplicate subpœna endorsed as stated; then, after stating to the court that "the witness is a material and necessary one," and noting the same in the record, formally move for a writ of attachment against the contumacious witness.

The record should show the decision of the court; if the motion is granted the Judge Advocate should, in compliance with par. 1009, A. R., apply to the Department Commander for designation of some military officer to serve the process; then, such officer having been named, formally direct the writ of attachment (see "Forms" *infra*) to him, attaching thereto a certified copy of the order convening the court, of the original subpœna, and of the charges and specifications in the case in question.—(Ib., p. 17.)

In executing such process it is lawful to use simply the necessary force to bring the witness before the court. Whenever force is actually required, the post commander, nearest witness' residence, will furnish a military detail sufficient to execute the process.—(See par. 1009, A. R.)

If, in executing this legal process, the officer detailed for that purpose should be served with a writ of *habeas corpus* from any United States court, or by a United States Judge for the production of the witness the writ must be implicitly obeyed and the prisoner produced with the orders or process under which he is held (see par. 1062, A. R.); if, however, the writ of *habeas corpus* is issued by any *State* court (or State judge), it will be the officer's duty to endorse and return such writ, respectfully informing the court (or judge) that he holds the within named prisoner pursuant to a writ of attachment issued by a lawfully convened court-martial; that he is diligently and in good faith engaged in executing said writ according to the commands of said court-martial; and that he respectfully submits for the inspection of the court (or judge) a copy of the original process under which he is acting, together with a copy of the order convening said court-martial, and of the subpœna and the charges, in the case in question. Further that, as he thus holds the prisoner under and by color of the authority of the United States, he most respectfully denies the jurisdiction of the honorable court (or judge) in the premises, and requests the dismissal of the writ of *habeas corpus* for such cause, and that, in this connection, he invites the attention of the court (or judge) to the decisions of

the Supreme Court of the United States upon this subject, given in Ableman vs. Booth, 21 Howard, page 506, also U. S. vs. Tarble, 13 Wallace, page 397.

After having made the above return, it is imperatively the duty of the officer "to obey the process of the United States, to hold the prisoner in custody under it, and to refuse obedience to the mandate or process of any other government. And, consequently, it is his duty not to take the prisoner, nor suffer him to be taken before a State Judge or court upon a *habeas corpus* issued under State authority."—(See Ableman vs. Booth, 21 Howard, page 517, and par. 1061, A. R.)

Although a court-martial has power, under Sec. 1202, R. S., to thus procure the *attendance* of civilian witnesses, it has *practically none*, under the same statute, *to compel them to testify*. On this subject the Acting Judge Advocate General, in his report for 1887, states: "In an opinion of this office, dated August 27, 1885, it was held that, in the absence of legislation to that effect, a court-martial had no power to punish for contempt a civilian who, having been summoned as a witness and having appeared, refused to testify. An opinion to the same effect was afterwards given by the Department of Justice, and the War Department has accepted these opinions as correct."

II. For witnesses stationed, or residing without the State, etc.

"The depositions of witnesses residing beyond the limits of the state, territory or district in which any military court may be ordered to sit, if taken on reasonable notice to the opposite party and duly authenticated, may be read in evidence before such court in cases not capital." (91st A. W.) In order to avoid expense to the United States, depositions should be taken in accordance with this Article, whenever they will be sufficient to meet the ends of justice.

The usual method of procedure to obtain a deposition (see "Forms") is as follows:

The party, prosecutor or defendant desiring the deposition, submits to the court a list of interrogatories to be propounded to the absent witness; the opposite party then prepares and submits a list of cross-interrogatories, a reasonable time being allowed for this purpose, re-direct and re-cross interrogatories are added, if desired; finally the court having assented to those thus submitted, adds such as, in its judgment, may be necessary to elucidate the whole of the witness' testimony.

Both parties then agree, if possible, upon some officer or person before whom the deposition is to be taken. The person agreed

upon should be a notary public, justice of the peace, or some civil officer competent to administer oaths in the state, territory or district in which the deposition is to be taken. If such an officer is not known, the space for the name of the latter should be left blank, to be filled out by the officer or person who may be directed, by the proper authority, to secure the deposition. Any officer of the army may be designated to see that the deposition is properly taken, but the oath must be administered and the deposition authenticated by a civil officer empowered by law to administer oaths for general purposes.—(See G. O. 37, A. G. O., 1889.)

The interrogatories having been accepted by the court, the Judge Advocate should make out duplicate subpœnas requiring the witness to appear in person, at the proper place, on—date, before the civil officer by whom the deposition is to be taken, and transmit the same, with the interrogatories, to the Department Commander, with the request that they be forwarded to the officer who may be directed to secure the deposition.—(See Cir. 3, A. G. O., 1888.)

Upon the return of the interrogatories with the required deposition, the latter is submitted to the court. The papers should then be properly marked, appended to the record, and referred to in the proceedings, where all action upon the subject necessary for the information of the reviewing authority should be recorded.

"When the deposition has been returned to the court, together with the subpœna, then the Judge Advocate should prepare and sign the usual certificates of attendance (see "Forms *infra*) and transmit them to the witness, with duplicate copies of the order convening the court. The fact of the attendance and the length of the same is to be ascertained from the deposition."—(Cir. 3, A. G. O., 1888.)

Depositions should be returned, sealed, direct to the Judge Advocate of the court and opened by the President thereof in open court.

Depositions of witnesses cannot be taken nor read in evidence where military offenders are charged with the violation of an Article of War, the penalty for which may be death.

In time of peace the crime of desertion is *not* a capital one.

In *capital* cases (*i. e.* those in which the offense is punishable by death), or in cases where the Judge Advocate can certify "that, under the peculiar circumstances of the case, to administer justice it is not best to take the desired testimony by deposition under the 91st Article of War," the regular subpœnas should be made out by the Judge Advocate, certified to as above, if necessary, and transmitted to the Department Commander for service.—(See pars. 1011 and 1012, A. R.)

Fees of Witnesses.

A civilian witness, upon his discharge, is entitled to receive from the Judge Advocate a certificate, setting forth the fact of his having been summoned as a witness in the case, and the number of days of his attendance in that capacity before the court. To entitle a witness to the payment of fees, it is not absolutely essential that he should produce a formal summons or subpœna, addressed to and complied with by him, or that he should have been formally summoned in the case. A strict observance, however, of par. 1008, A. R., would call for the issue of formal summons to witnesses on both sides, and it is the best practice for the Judge Advocate to cause such to be served in each instance.—(Win. Dig., pp. 487-8.)

From inquiry at the office of the chief paymaster of the department it has been learned that a large percentage of the accounts of civilian witnesses, sent to that office, have to be returned for correction. Instructions in reference to same are given in pars. 1050-1055, A. R.

The vouchers and all accompanying papers must be in *duplicate*, and the Judge Advocate should see that the vouchers are in proper form and complete.

The date of the summons must be prior to that of the witness' attendance before the court, that of the affidavit and certificate on or after the last day of his attendance; finally, the copy of the order convening the court should be certified to by some officer other than the Judge Advocate.

It cannot affect the right of a civilian witness to his compensation as such, that, when on the stand, he refused to testify in answer to proper questions, or that, in answering material questions, he testified falsely. Such a witness is paid for his *attendance*, and the fact that, after he has duly attended, he has committed a contempt or has been guilty of perjury, cannot impair a right not made, by law or regulation, conditional upon his good conduct under examination or upon his veracity.—(Win. Dig., p. 488.)

Competency of Witnesses.

As a general rule, all persons are competent witnesses; the exceptions may be summarized as follows: 1st, those insensible to the obligations of an oath; 2d, those deficient in understanding by reason of lunacy, idiocy, infancy or intoxication—the question of capacity resting with the court; 3d, those convicted and sentenced for treason, felony, and *crimen falsi*—reversal of judgment restores

competency; so does pardon, except in case of perjury or subornation of perjury.—(1 Glf. Sec. 326, 430; and R; S. 5392.)

By the Act of March 16, 1878, the exception that the accused party is not a competent witness has been so far set aside as to allow him, at his own request, but not otherwise, to testify in his own behalf. This Act provides: "That in the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses and misdemeanors, in the United States courts, Territorial courts, and courts-martial, and courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own request, but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him."

Parties testifying under this Act have no exceptional status or privileges; they must take the stand and be subject to cross-examination like other witneses. The submission, by the accused, of a sworn statement is not a legitimate exercise of the authority to testify, conferred by the statute, and such a statement should not be admitted in evidence by the court.—(Win. Dig., p. 482.)

As the exception by which parties were declared incompetent on the ground of interest (see Glf., Sec. 334) included husband and wife, in cases in which either was a party, it would appear to be proper, now that the party most interested is allowed to testify in his own behalf, to allow the wife to testify, at least upon the prisoner's request; but it has been uniformly held (see Win. Dig., p. 482) that she cannot be admitted as a witness for or against her husband, and that the above Act does not affect this rule. Where, however, the husband is under trial for violence inflicted on her person, the wife is competent either *for* or *against* him.—(Ives, p. 329.)

Examination of Witnesses.

Courts-martial should, in general, follow, so far as apposite, the rules of evidence observed by criminal courts of the United States. They are not, however, bound by any statute in this particular, and it is thus open to them, in the interest of justice, to apply those rules with more indulgence than the civil courts; *e. g.* to allow more latitude in the introduction of testimony and in the examination and cross-examination of witnesses than is commonly permitted by civil tribunals. The idea being that persons on trial by courts-martial are not, ordinarily, versed in legal science, and a lib-

eral course should, therefore, be pursued and over technicality avoided.—(Win. Dig., p. 253.)

The manner in which witnesses are to be examined lies chiefly within the discretion of the court. The great object is to elicit the truth from the witness; but the character, intelligence, moral courage, bias, memory, etc., of witnesses are so varied as to require an almost equal variety in the manner of interrogation, necessary to attain that end.—(1 Glf., Sec. 431.)

Before the examination of any particular witness is begun, it is customary for the court to require the others to retire. If a witness remains in court after such a request, by mistake or otherwise, the court will decide whether or not he shall be examined; but whether or not it is essential to the discovery of truth that the witness shall be thus examined out of hearing of each other, is a matter within the discretion of the court.—(Ib.)

After a witness has been sworn the first question should be formed, so as to ascertain his name, rank, regiment and station; the second, his recognition of the accused, together with the latter's name, rank, etc., the third, when practicable, in such form that the answer may show that the witness was so placed as to personally know something about the matter set forth in the specifications; while the fourth and subsequent interrogatories should be such as to elicit all the facts, whether they consist of words or actions, that may thus have come within the witness' personal knowledge.

It is not necessary that a witness for the defense should identify the accused.

Direct Examination.—Upon direct examination, leading questions are not allowed. This rule, however, is to be understood in a reasonable sense; for, otherwise, the examinations might be most inconveniently protracted. To abridge the proceedings, the witness may be led at once to points on which he is to testify, and the facts in the case already established be recapitulated to him. The rule is, therefore, not applicable to that part of the examination which is merely introductory.—(1 Glf., 434.)

Leading questions are those which plainly suggest the answer desired, or those which, embodying a material fact, admit of a simple *yes* or *no*. The exceptions to the above rule against their admission are: 1st, where the witness appears hostile to the party producing him, or in the interest of the other party, or unwilling to give evidence; 2d, where an omission in his testimony is evidently caused by want of recollection, which a suggestion may as-

sist; 3d, when a witness is called to contradict another, the particular expressions may be used instead of asking witness what was said.—(Ib. Sec. 435.)

When and under what circumstances a leading question may be put is a matter for the court to decide and not a matter which can be assigned for error. (Ib.) When, therefore, either party desires to ask such questions, the permission of the court should be obtained and this fact noted upon the record.

On the direct examination the questions should ordinarily be material and relevant, and irrelevant questions should be excluded; yet great caution should be exercised in excluding questions on this ground, as many questions which appear irrelevant may "constitute a link in the chain of proof" without bearing directly or immediately upon the charge.—(Ib., p. 452.)

As a rule also the testimony should be confined to facts within the witness' personal knowledge, and matters of opinion excluded; but in matters of common observation, such as drunkenness, or manner, whether insolent, insubordinate or otherwise, etc., he may state his opinion or belief as to the state of sobriety, or as to the manner of the accused at the time specified. There are, moreover, two other excepted classes of cases in which a witness may give his opinion: 1st, when a matter of fact resting wholly on belief is in question, such as the identity of a person, or of a handwriting with which the witness is familiar; 2d, when the case involves a question of science or a knowledge of a specialty, in which case the testimony of experts is admissible. (Ib. p. 479.) For a witness to be competent in the latter case it must be shown that he is *an expert.*

To refresh his memory, the witness may use a memorandum made at the time of the fact or action to which it refers; such a writing should be exhibited to the court to show its nature.—(1 Win. Law, p. 477.)

The accused is, in general, entitled to have all the material witnesses for his defense summoned; except when their testimony would be merely cumulative and evidently add nothing to the strength of his case. As far as possible he should be allowed a full and free defense, as the least denial to him of any proper facility, opportunity, or latitude for the same, not only serves to defeat the ends of justice, but often lends impunity to guilt.—(G. C. M. O. 128, A. G. O., 1876.)

Cross-Examination.—The cross-examination should ordinarily be confined to the matter of the direct examination; yet this rule does

not apply to questions, outside of the main issue, asked for the purpose of testing the motives, prejudice or credit of the witness. In view of its purpose and significance, a much greater latitude is allowed upon this than upon the direct examination; *e. g.* leading questions being freely allowed, and matters otherwise irrelevant and collateral permitted when the object is to test the knowledge, memory or animus of the witness and thus discredit his testimony. Collateral or irrelevant matter cannot, however, be entered into for the purpose of contradicting the witness by other testimony, and thus discrediting him; though such questions as whether the witness has not, at some previous time, told a different story, or whether the witness has not previously expressed hostility toward the accused, may be asked with the above view of contradicting him in case he answers in the negative.—(1 Win. Law., p. 487.)

Re-Examination.—Where the witness, in the cross-examination, has made statements at variance with those made upon his direct examination, the party calling him may *re-examine* him to elicit an *explanation* of those statements, or his *motive* in making them. This is strictly the full scope of a re-examination, and hence it is desirable that all material questions should be put upon the direct examination; but though this is the strict rule, the court may, in its discretion, make exceptions in the interests of justice. When, however, upon cross-examination, new matter has been introduced, the witness may be re-examined upon the subjects.—(Ib., p. 488.)

Rebuttal.—Witnesses in rebuttal may be called by the Judge Advocate to re-establish the character, for veracity, of his witnesses, impeached by the accused; to impeach the same of witnesses for the defense; and to rebut any and all *new matter* introduced by the accused and not touched upon by the prosecution. The Judge Advocate cannot offer evidence to rebut what he himself has elicited only by cross-examination of the accused's witnesses.—(Ins. Dept. Cal., p. 20.)

The accused may cross-examine such new witnesses, called in rebuttal, and may himself call other witnesses to fortify the character of his previous witnesses; but, for this purpose only when these have been impeached by the Judge Advocate.—(Ib.)

Examination by the Court.—The court should, ordinarily, defer questioning a witness until his examination by the Judge Advocate and the accused has been completed; if a member, for any reason, as when he sees something material omitted, wishes to put a ques-

tion before this time, he may suggest it to either the Judge Advocate or the accused.—(1 Win. Law, p. 402.)

The questions of the court should be for the purpose of clearing up doubt upon obscure points, or of reconciling discrepancies in the testimony. With this in view, if the court desires to hear evidence not introduced by either party, it may properly call upon the Judge Advocate to procure the same if practicable. Any testimony thus introduced would, of course, be subject to cross-examination and rebuttal by the party to whom it is adverse.—(Ib.)

Though the above is the proper order and sequence of examination, the court may, in the interests of truth and justice, recall witnesses at any stage of the proceedings, both parties being present; it may permit material testimony to be introduced by either party, quite out of its regular order and place; or permit a case, once closed by either or both sides, to be re-opened for the introduction of testimony, previously omitted, even though this may have been done through negligence, if convinced that this testimony is so material that its omission would leave the investigation incomplete.—(Ib. p. 401.)

Credibility of Witnesses.

A witness' credibility may be attacked: 1st by disproving his testimony; 2d, by evidence of his general reputation for truth and veracity—particular instances cannot be inquired into, but the character of the witness as shown, and connection with the case, may afford grounds for disbelieving him; 3d, by proof of statements out of court, contradictory to his testimony—this is not permitted unless he was asked on cross-examination, as before stated, whether at a time and place specified he had not made such or such a statement to a person named.—(1 Win. Law, pp. 492-5.)

A party cannot discredit his own witness; but if he is imposed upon, or the witness unexpected testifies adversely, he may contradict him by others.—(Glf., Secs. 442-4.)

Unless the accused calls witnesses as to his own character, this cannot be attacked by the prosecution.

Evidence.

The best evidence obtainable should, of course, always be given. The *weight* of evidence, however, does not necessarily, depend upon the number of witnesses. A single witness, whose statements, manner, and appearance on the stand, are such as to commend him

to credit and confidence, will sometimes properly outweigh several less acceptable and satisfactory witnesses.—(Win. Dig., p. 254.)

Hearsay evidence is inadmissible; but the court should be careful not to confound *original* with *hearsay*. Thus the fact in controversy may be whether such things were written or spoken, and not whether they are true, or such language or statement may be a necessary or an inseparable concomitant of the fact in issue. In such cases the writings or words are not *hearsay*, but *original* facts admissible as evidence.—(1 Glf., Sec. 100.)

Documentary evidence is only admissible when its authenticity has been established by sworn testimony, or by seal of a court of record, or when its authenticity is admitted by the accused.—(Ins. Dept. Cal., p. 21.)

When transcripts from the records of any of the executive departments of the Government are used, they should be certified to by the chief officer of the bureau in which the originals are filed, and the authenticity of the certification verified under the seal of the department by the secretary thereof.—(Sec. 882, R. S.)

When a document contains primary evidence of a fact, oral testimony of its contents is inadmissible, unless the non-production of the document can be satisfactorily explained.

When the original documents are introduced, and they are of such character that they cannot be retained, certified copies of the same should be appended to the record.—(Ins. Dept. Dak., p. 12.)

Finding.

The findings of the court should be governed by the evidence considered in connection with the pleas; and those upon the charge and specification should be consistent with each other.—(Win. Dig., p. 262.)

If the offense, as set forth in the specification, is substantially proven, the court should refrain from making immaterial exceptions or substitutions not necessary to support the charge; if exceptions are necessary, the accused may be found guilty of parts of the specification, not guilty of the remainder, and then, if the specification is still apposite to the charge, guilty of the charge.

If the evidence proves the commission of an offense less than that specified, yet kindred thereto, the court may except words of the specification, substitute others instead, pronounce the guilt and innocence of the substituted and excepted words respectively, and then find the accused not guilty of the charge, but guilty of the lesser kindred offense.

The court cannot in its findings legally substitute the 62d Article of War for any other, unless the proof under the specification fails to substantiate the original charge.—(Ib.)

In a case of virtual acquittal, to use the term "guilty" is improper; the correct expression is "found facts as stated, but attach no criminality thereto." "Guilty" should be employed only when the accused has been convicted of a crime deserving punishment.—(Ives, p. 153.)

Previous Trials and Convictions.

"As a matter of pleading, to recite previous trials and convictions in charges of new offenses is wrong; but previous trials and convictions may be properly inquired into after the court has arrived at its findings and before pronouncing sentence, to see if the prisoner is an old offender and, therefore, less entitled to leniency than if on trial for his first offense. After arriving at the findings, the court may be opened to receive evidence of previous convictions. These convictions should be proved by the records of previous trials, or by duly authenticated orders promulgating the same, showing the actual offenses of which the prisoner was convicted. When a charge is forwarded to a Department Commander or other officer authorized to appoint a general court-martial, and it is desired that previous convictions should be considered, such charge will be accompanied by authenticated copies of the orders promulgating the previous trials."—(Par. 1018, A. R.)

"The language of A. R. 1018 is not limited to previous convictions of offenses similar to the one for which the accused is on trial, and should not be so construed. The object of the paragraph is stated to be 'to see if the prisoner is an old offender, and therefore less entitled to leniency than if on trial for his first offense.' This information might not be fully obtained if evidence of previous convictions of similar offenses only were laid before the court. It has no bearing upon the question of guilt of the particular charge on trial; but only upon the amount and kind of punishment to be awarded, and to this end it is proper that all previous convictions should be known. As the accused is not on trial for the offenses, evidence of the previous convictions of which it is proposed to introduce, the 103d Article of War cannot be held to apply."—(Cir. 8, A. G. O. 1886.)

Punishment.

Punishment, under the Articles of War, is either left to the discretion of a court-martial, or is made wholly or partially manda-

tory. If the article violated is mandatory, any other punishment than that prescribed is illegal. Before pronouncing sentence, the court should, therefore, in case of any uncertainty, examine the article violated to see what punishment may be legally awarded.

"The legal punishment of soldiers which courts-martial may award (depending upon the character of the offense and the jurisdiction of the court), are death, confinement, confinement on bread and water diet, solitary confinement, hard labor, ball and chain, forfeiture of pay and allowances, dishonorable discharge from service and reprimand, and for non-commissioned officers, also reduction to the ranks."—(Par. 1021, A. R.)

"Upon conviction of offenses punishable at the discretion of courts-martial, a soldier may be sentenced to have his monthly pay, or a stated portion thereof, retained from him for such periods as the court, subject to the restrictions of the 83d Article of War, may direct. The amounts so retained will be paid only on the final statements furnished enlisted men on discharge from the service."—(Extract G. O. 63. A. G. O., 1889.)

Ordnance, commissary, and post quartermaster sergeants, and hospital stewards, though liable to discharge, will not be reduced.—(Pars. 105 and 1563, A. R.)

"Solitary confinement, or confinement on bread and water diet, shall not exceed fourteen days at a time, nor be again enforced until a period of fourteen days has elapsed. Nor shall such confinement exceed eighty-four days in any one year."—(Par. 1021, A. R.)

Punishment by ball and chain should be imposed only in extreme cases.—(Win. Dig., p. 449.)

"No person in the military service shall be punished by flogging, or by branding, marking, or tattooing on the body."—(98th A. W.)

"Sentence imposing tours of guard duty are forbidden."—(See par. 1020, A. R.)

"Pay of a soldier not assigned."—(See par. 1035, A. R.)

Under the 17th Article of War, stoppage of pay and punishment is mandatory; the stoppage shall not exceed the value of the articles alienated, nor exceed one-half current pay per month during period of reimbursement to the Government.—(G. O. 110, A. G. O., 1876.)

In a case that is discretionary, a court-martial may impose any sentence sanctioned by the "custom of the service," although (in cases of soldiers) the same may not be included in the list of the

more usual punishments contained in par. 1019, Army Regulations. —(Win. Dig., p. 448.)

Penitentiary, when lawful to sentence.—(See 97th A. W.)

"The 97th Article of War only limits 'the discretion of the court' as to imprisonment in the penitentiary, and it has been nowhere provided that the punishment may not in other respects be greater than the civil courts could inflict."—(Op. U. S. Sup. Court, published in G. O. 61, A. G. O. 1882.)

The most common offenses that are punishable by confinement in a penitentiary are the following: A conviction of any of the crimes mentioned in Article 60; robbery; grand larceny; embezzlement; forgery; burglary; arson; mayhem; manslaughter; assault and battery with intent to kill; shooting or stabbing with intent to commit murder; rape; or assault with intent to commit rape. Any of these offenses, when committed to the prejudice of good order and military discipline, although in time of peace, are punishable as stated.—(Win. Dig., p. 27—42.)

SENTENCE:

In passing sentence, the court should bear in mind that the object of the punishment to be awarded is not only to punish the offender, but also to prevent the repetition of the crime through *the example set*, and that it is generally conceded that this object will be best promoted by carrying into effect a system of discipline of a severe and stringent character such as will make men prudently resolve to keep clear of it if they can.—(See Ives, p. 159.)

Should a court, for any reason, adjudge a milder sentence than is usually awarded for a like offense, the reason for so doing should be stated, lest the punishment appear inadequate to the offense and *an example set.*—(G. C. M. O. 42, A. G. O., 1864.)

As the records of proceedings, received from courts in the department, show a great difference in the wording of sentences practically the same, the following simple forms are published for guidance in apposite cases:

Confinement: * * * "to be confined at hard labor under charge of the post guard for——( ) days."

Forfeiture: * * * "to forfeit —— ( ) dollars of his pay."

Confinement and forfeiture: * * * "to be confined at hard labor under charge of the post guard for —— ( ) months, and to forfeit —— ( ) dollars per month for the same period."

Stoppage of pay and confinement: * * * "to suffer a monthly stoppage of —— dollars and —— cents ($——) from his pay until he shall have reimbursed the United States the sum of——— dollars and —— cents, the total money value of the ——— sold, (or lost) by him, and to be confined at hard labor under charge of the post guard for the period of ——— months.—(See par. 1033, A. R.)

"And the court does therefore sentence him, ——; and to have stopped against his pay the sum of———— dollars per month for——— successive months, to be retained by the United States until such time as he shall be discharged from the service.—(See G. O. 63, A. G. O., 1889.)

Dishonorable discharge and forfeiture of pay and allowances: * * * "to be dishonorably discharged the service of the United States, forfeiting all pay and allowances due him."

Dishonorable discharge, forfeiture of pay and allowances and confinement: * * * "to be dishonorably discharged the service of the United States, forfeiting all pay and allowances due him, and to be confined at hard labor in such military prison (or penitentiary) as the reviewing authority may direct for—— ( ) years."

(*For confinement for less than one year see A. R. 557.*)

The clause "or to become due," so frequently added after "allowance due," in such sentences is superfluous; for the reason that the forfeiture takes effect on the date of the order promulgating the sentence, after which none but prison allowances accrue, and these cannot be taken away by sentence.

"When the sentence of a court-martial prescribes imprisonment, the court will state therein whether the prisoner shall be confined in a penitentiary or military prison, being guided in its determination by the 97th Article of War."—(Par. 1022, A. R.)

"When the court has sentenced a prisoner to a military prison for any offense, no power is competent to increase the punishment by designating a penitentiary as the place of confinement.—(Par. 1024, A. R.)

Unless the laws of the state, territory, etc., in which the court is convened, are at hand, it is impossible for the court to determine in all cases whether or not, under the 97th Article of War, the offender is punishable by penitentiary confinement. Therefore, in case of any doubt, the wording "in such place as the proper authority may direct" is recommended. "Proper" instead of "reviewing" authority should be used; for, if no provision has been made for confine-

ment of prisoners under sentence of courts-martial in a penitentiary within the department, the Department Commander is directed by par. 1023, A. R., to forward the record to the Judge Advocate General for the action of the Secretary of War.

Authentication of Proceedings.

"Every court-martial should keep a complete and accurate record of its proceedings. The record will be authenticated by the signatures of the President and Judge Advocate in each case. * * *." —(Par. 1037, A. R.)

It is sometimes held (1 Win. Law, p. 723) that, in addition to signing the sentence, the President and Judge Advocate sign such a certificate as "A true and complete record. Attest: A—— B——, President; C—— D——, Judge Advocate;" but this is considered unnecessary in ordinary cases. Where, however, there are material proceedings after the sentence, they should be authenticated by the signatures of these officers.

Adjournment and Remarks of Reviewing Authority.

"While the practice of noting the adjournment of the court at the end of the record of a trial is a usual and proper one, * * * a statement of such adjournment is not an essential part of the record of proceedings."—(Win. Dig., p. 103.)

The action of the original reviewing officer is properly written upon a blank page at the end of the record or a sheet attached thereto, below or after the sentence, *adjournment* or other final proceeding of the court in the case.—(1 Win. Law, p. 676.)

Recommendation.

See Par. 1040, A. R.

Proof of the Crime.

General Orders No. 91, Headquarters of the Army, A. G. O., December 16, 1881.

By direction of the Secretary of War, the following order is published to the Army:

The frequent failure in proceedings of general courts-martial to show, in cases of men tried for desertion, the intention of the accused, by which alone it can be determined whether the man is guilty of the crime of desertion (not of absence without leave merely), deprives the reviewing authority, and those to whom application is made to extend clemency, of a proper and intelligent understanding of the case.

The attention of officers composing general courts-martial is, therefore, called to the necessity for more careful and searching inquiry into the cases of enlisted men brought before them for trial under charges of desertion. That crime may be briefly defined as an unauthorized absence, accompanied by an intent of not returning. Both elements must be proved, but the second is the gist of the offense; and it follows that, in order to determine the question of intent, all the circumstances connected with the absence of the prisoner must be considered together. The entry on the descriptive list of a soldier that he has deserted is not *proof* of the crime, but merely evidence that he has been charged with its commission. Men enticed into dissipation, finding, on recovering from its effects, that they have been absent long enough to be reported deserters, prolong their absence through fear of being brought to trial for desertion, although they had from the first no intention to desert. Their offense deserves and should receive proper punishment, but it is not desertion. It should appear of record that the plea of "guilty" to a charge of desertion is understood by the prisoner as an acknowledgement of his intention to desert, and not merely of unauthorized absence; and it should not be accepted when the prisoner makes a statement at variance with his plea.

Inquiry into applications for clemency shows that some Judge Advocates of courts-martial have a habit of recommending enlisted men charged with desertion to plead guilty and submit their case to the merciful consideration of the court, when a careful examination of all the facts would have developed, at least, a fair line of defense against that charge. This practice is reprehensible in itself, and indicates a failure on the part of an officer resorting to it to appreciate the true functions of his office, and department and subordinate commanders should not only discourage it, but in every proper way secure protection to the prisoner from such ill-advised counsel.

A copy of this order will be furnished by the appointing power to every general court-martial convened for the trial of enlisted men or before which they may be brought.

FORMS OF PLEADING IN CASES OF ENLISTED MEN.

Charge and Specification preferred against Private A.— B.—, Troop...., ...Regiment, U. S. Cavalry.

CHARGE.—"Violation of the 16th Article of War."

Specification.—"That Private *A.*— *B.*—, Troop... , ..., Regiment U. S. Cavalry, did sell a certain quantity of ammunition delivered out to him for use, valued at..... This at.....on or about the.....day of ....18...."

(Or the specification should allege that the accused "did wilfully waste," or "did through neglect waste," etc., as the facts in the case may be. It should not be alleged in a specification that the accused did sell, *or* wilfully, *or* through neglect waste, etc. This remark applies to specifications laid under all Articles of War, which describe several distinct offenses.)

CHARGE.—"Violation of the 17th Article of War."

Specification.—"That Private *A* — *B.*—, Troop...., ... Regiment U. S. Cavalry, did, through neglect, lose the government horse which had been entrusted to his care;

or

did, through neglect, spoil the government horse, etc.;

or

did, through neglect, lose the clothing (or arms or accoutrements) which had been issued to him. This at..... on or about the....day of..... ..... 18...."

CHARGE.—"Violation of the 21st Article of War."

Specification.—"That Private *A.*— *B.*—, Troop ... , ...Regiment U. S. Cavalry, did, with his fist, strike his superior officer, Lieutenant *C.*— *D.*—, ...Regiment U. S. Cavalry, the said Lieutenant *C.*— *D.*— being at the time in the execution of his office;

or

did draw a revolver and threaten to shoot, etc.;

or

did lift up a sword (or musket, or club) and threaten to strike, etc.;

or

having been commanded by his superior officer, Lieutenant *C.— D.—*,..... Regiment U. S. Cavalry, in the execution of his office, to..... ....., did disobey said order. This at....., on or about the....day of .....18...."

CHARGE.—"Violation of the 22d Article of War."

Specification.—"That Private *A.— B.—*, Troop...., ... Regiment U. S. Cavalry, did begin (or excite, or cause) a mutiny against lawful military authority, by (*here set forth the acts of the accused*;)

or

did join with Privates *E.— F.—*, *G.— H.—* and *J. K.—*, all of Troop...., ... Regiment U. S. Cavalry, in a mutiny against lawful military authority, and did, (*here set forth the acts of the accused*). This at.....on or about the ....day of.....18...."

CHARGE.—"Violation of the 32d Article of War."

Specification.—"That Private *A.— B.—*, Troop...., ... Regiment U. S. Cavalry, did absent himself from his detachment, without leave from his commanding officer, from ...., until... .... This at..... ....on or about the.....day of....., 18...."

CHARGE.—"Violation of the 33d Article of War."

Specification.—"That Private *A.— B.—*, Troop...., ...Regiment U. S. Cavalry, did fail to repair to the place appointed by his commanding officer for dress parade (or other rendezvous), not having been prevented by sickness or other necessity, nor excused by proper authority. This at. .... on or about the.... day of....., 18...."

CHARGE.—"Violation of the 38th Article of War."

Specification.—"That Private *A.*— *B.*—, Troop...., ...Regiment U. S. Cavalry, having been regularly mounted, and on duty as a member of the post guard, was found drunk;

or

being on duty with a detachment escorting Major..... ....., a Paymaster in the U. S. Army, was found drunk. This at....., on or about the....day of ....18...."

CHARGE.—"Violation of the 39th Article of War."

Specification.—That Private *A.*— *B.*—, Company...., ...Regiment U. S. Infantry, having been regularly posted as a sentinel on post No...., was found asleep on his post;

or

did leave his post without having been regularly relieved. This at....., on or about the.....day of.... ....18...."

CHARGE.—"Violation of the 40th Article of War."

Specification.—"That Private *A.*— *B.*—, Company...., ...Regiment U. S. Infantry, having been regularly mounted as a member of the post guard, did quit his guard without leave from his superior officer, and without urgent necessity,

or

did quit his platoon or division. This at....., on or about the....day of .....18...."

CHARGE.—"Violation of the 47th Article of War."

Specification.—"That Private *A.*— *B.*—, Company....., Regiment U. S. Infantry, having been duly enlisted as a soldier in the service of the United States, did desert said service, on or about the....day of.....18...., at or near..... .....and did remain absent in desertion until he was apprehended (or "surrendered himself") at .....on the ....day of... .....18...."

As the 50th Article of War does not provide for an offense, other than is provided in the 47th Article (G. C. M. O. 55, A. G. O., 1886; also Win. Dig., p. 23), if the deserter enlist as specified in the 50th

Article, the charge should be laid under the 47th, and the specification read as follows:

"That Private....., Co.., ... Infantry, a duly enlisted soldier in the service of the United States, did desert the same at....., on the ...of....., 18...., and did remain absent in desertion until he was apprehended (or until he surrendered himself) on the....of ...., 18...., at....., where, having enlisted under the name of..... ..... he was serving as a Private in Troop..... ....Cavalry, without a regular discharge from the said Company...., ... Infantry."

If he enlist as specified in the 50th Article and again desert, the additional offense should be described in a second specification under the 47th Article, the two specifications to the charge reading thus:

Specification I.—"That Private....., Company... ....Infantry, having been duly enlisted in the service of the United States, did desert the same at....., on the.....of..... 18.., and did remain absent in desertion until he was apprehended at ..... on the.....of ....., 18...."

Specification II.—"That Private ...., Co...., ...Infantry, having deserted and enlisted again under the name of..... ....., in Troop...., ...Cavalry, did again desert the service at....., on the....of... ...., 18...., and did remain absent in desertion until he was apprehended (or surrendered himself) at....., on the... of...., 18...."

CHARGE.—"Violation of the 60th Article of War."

Specification.—"That Private *A.*— *B*—, Troop.. ...., ...Regiment U. S. Cavalry, did steal one horse of the value of..... ....., the property of the United States, and furnished for use in the military service thereof. This at ... . , on or about the.....day of.... ....., 18...."

or

"That Private *A.*— *B*—, Troop...., ...Regiment U. S. Cavalry, did steal the following described property of the United States, furnished for use in the military service thereof. (*Here set forth an itemized description of the property alleged to*

have been stolen.) This at..... .....on or about the .....day of.....18... "

CHARGE.—"Conduct to the prejudice of good order and military discipline."

Specification.—"That Private *A.*— *B.*—, Troop...., ...Regiment U. S. Cavalry, having been ordered by his superior non-commissioned officer, ...the said non commissioned officer being at the time in the execution of his office, to....., did wilfully disobey said order. This at..... ...., on or about the .....day of..... .....18...."

(ARTICLE 62.—All crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing Articles of War, are to be taken cognizance of by a general, or a regimental, garrison or field officers' court-martial, according to the nature and degree of the offense, and punished at the discretion of the court.)

The foregoing forms, applicable to a majority of the cases brought before courts-martial, afford, it is believed, a basis for all pleadings under the Articles of War. It is to be borne in mind that the offense charged must be described in accurate language, "sufficiently clear to inform the accused of the military offense for which he is to be tried, and to enable him to prepare his defsnse."—(Attorney General Wirt, 1 Opinions, 286.)

General Orders No. 25, Headquarters Department of the Platte, September 30, 1882.

Hereafter all charges preferred against commissioned officers, or enlisted men, serving in this Department, requiring the action of the Department Commander, the proceedings in such cases as are brought to trial, the original charges and all official communications connected therewith, will be forwarded to the Assistant Ad-

jutant General; and all parts of General Orders No. 18, series of 1887, Headquarters Department of the Platte, conflicting with this requirement, are revoked.

FORMS.

Summons for a Military Witness.

(See Ives, page 415.)

Fort.....
....., 18....

To.....
... Infantry.

Sir:—You are hereby summoned to appear on the ...of....., 18...., at....o'clock, ..m., before a General Court-Martial, convened at..... by Special Orders ....from....., as a witness in the case of Private A.... B...., Co...., ...Infantry.

A..... B.....
....
Judge Advocate.

Subpœna for Civilian Witness.

(See Ives, page 413.)

The President of the United States of America:

To....., *greeting*:

Pursuant to Section 1202, Revised Statutes of the United States, you are hereby required to be and appear, in your own proper person, on the....day of....., 18...., at..o'clock in the....noon, before a General Court-martial of the United States, convened at said ...., by virtue of Special Orders No....., of...., from the Headquarters of the Department of the....., to testify and give evidence, all that you may know, concerning the pending case, then and there, of the United States *versus*....., accused of..... under the laws of the United States, and have you then and there this precept.

(*To secure the production of papers, the following should be added:*)

You will bring with you, to be used in evidence, the following documents:

(*Describe the papers wanted.*)

Witness: (*Insert name of presiding officer*), President of said court, this. ..day of....., 18 ...

C.....D.....

.....Infantry,

(*Made in duplicate.*) Judge Advocate.

RETURN OF SERVICE OF SUBPŒNA.

(*If an officer serves the subpœna, the original should be endorsed as follows:*)

I certify that I served the within subpœna on ....., the witness named therein, by reading the same to him and by delivering to him, in person, a duplicate original thereof, at..... , on the ....of....,18....

E..... F..... .....

(See 2 Win. Law, p. 353.) 1st Lieut....Infantry.

(*If the service be made by a civilian, the subpœna should be endorsed with the following affidavit:*)

STATE OF....., } ss.
COUNTY OF..... }

On this....day of ....., 18...., personally appeared before me, ..., of ...., who, being duly sworn, says that on the ....day of ....., 18...., he served the within subpœna on..... ....., the witness named therein, by reading the same to him, and by delivering to him, in person, a duplicate original thereof, at ....., on the ...day of....., 18....

.....

(*Signature of person who served subpœna.*)

Subscribed and sworn to before me, this.... of....., 18....

.....

(*Signature of civil officer who administered oath.*)

(See Ins. Dept. Columbia, p. 51.)

(*After service as indicated, the original subpœna should be at once returned to the Judge Advocate of the court; if the witness cannot be*

found, the Judge Advocate should be so informed. If a civilian witness be summoned from a distance, paragraphs 4 and 5, G. O. 97, A. G. O., 1876, should be copied on back of subpœna, to enable witness to keep a proper memorandum of expenses.)

PROCESS OF ATTACHMENT.

THE PRESIDENT OF THE UNITED STATES OF AMERICA:

To.....
Stationed at.....
Greeting:

WHEREAS, a General Court-Martial of the United States was duly convened at....., on the... day of..... 18...., pursuant to Special Orders No....., of 18...., from Headquarters ... ., a copy of which said order is hereto annexed, marked "A"; and *whereas,* on the....day of...., 18. .., at....., the said General Court-Martial having been first duly sworn, ...of the United States Army was duly arraigned and his trial proceeded with on a certain charge, instituted at the prosecution of the United States, for the offense of..... under the laws of the United States, a copy of which charge is hereto annexed, marked "B."

And *whereas,* one.....of.....in the.....was, on the..... day of....., 18...., personally served with a subpœna (a duplicate of which is hereto annexed, marked "C"), directing him to appear and testify in said cause at the time and place therein commanded; and, *whereas,* the said..... did, on the....day of....., 18...., fail and neglect to appear before said court, or testify in said cause, as required by said subpœna, and still fails and neglects to appear and testify in said cause, he being a necessary and material witness therein, and no just excuse has been offered for such neglect;

NOW THEREFORE, under and by virtue of Section 1202, of the Revised Statutes of the United States, you are hereby commanded that you take the said..... wherever he may be found within the United States, and him safely keep, and bring you his body without delay before the said General Court-Martial convened at....., and of which ....., United States Army, is President, at the court room thereof, on the....day of....., 18... , at ....o'clock in the ....noon, at the opening of said court, to then

and there testify in the said cause of the United States *versus*..... ....., now pending, and then and there to be continued and tried.

And have you then and there this writ.

BY ORDER OF THE COURT.

In witness whereof, I, as Judge Advocate of said court, duly appointed and sworn, have hereto set my hand and seal, at... ...., this....day of.....18....

A..... .....B.....
1st Lieutenant....Infantry,
Judge Advocate. (SEAL.)

(Ives, p. 417.)

INTERROGATORIES AND ANNEXED DEPOSITION.

INTERROGATORIES.

NOTE.—(See G. O. 37, A. G. O., 1889.)

THE UNITED STATES
vs.
Private A....B ...,
Co..., ...Infantry,

To..... .....
(*Name of person who is to take the deposition; if not known to be filled up on return.*

Interrogatories to be administered, under the 91st Article of War, to..... (*name of witness*), of..... (*residence*), in the above entitled case now pending and to be tried before the United States General Court-Martial convend at....., pursuant to .....of....., 18...., and whereof....., is President, and....., Judge Advocate.

Interrogatories by Judge Advocate (or prisoner.)

1st Interrogatory: Please state your full name, occupation and present residence?

2d Interrogatory: Do you know....., the prisoner, if so, state how long you have known him, and how you know him to be the defendant in this trial?

3d Interrogatory: Etc., etc. * * *

Last Interrogatory: Do you know anything further relating to the cause now in hearing, if so, state it?

Cross-Interrogatories by prisoner (or Judge Advocate.)

1st Cross-Interrogatory: Etc. * * *

Re-direct Interrogatories by Judge Advocate (or prisoner.)

1st Re-direct Interrogatory: Etc. * * *

Interrogatories by Court:

1st Interrogatory: Etc. * * *

BY ORDER OF THE COURT.

C..... ....D.....
1st Lieutenant... ... Infantry,
Judge Advocate.

(Ives, p. 419.)

ANNEXED DEPOSITION.

THE UNITED STATES } *Deposition of witness*
VS. } *under the 91st Article of War.*
.... }

STATE OF.....
COUNTY OF. ... } ss.

..... the witness above named, being carefully examined and cautioned, and duly sworn (*or affirmed*) according to law, to tell the truth, the whole truth and nothing but the truth relating to the above entitled case, doth depose (or affirm) and say for full answers in evidence, respectively, to all and each of the foregoing interrogatories and cross-interrogatories as follows:

To the 1st Interrogatory by Judge Advocate (or prisoner.)

* * * * *

To the 1st Cross-Interrogatory by prisoner (or Judge Advocate.)

* * * etc., etc.

....
(*Signature of witness.*)

Subscribed and sworn to before me, this ...day of...., 18.... } SEAL

....
(*Signature of civil officer administering oath.*)

(Ives, p. 419.)

ACCOUNT OF CIVILIAN WITNESS.

(Form 13, Paymaster Gen'l Dept.—Army Reg., as altered by orders.)

THE UNITED STATES,

To....., *Dr.*

		Dolls	Cts
18....	ON ACCOUNT OF EXPENSES INCIDENT TO HIS ATTENDANCE AS WITNESS BEFORE A MILITARY COURT CONVENED UNDER THE ANNEXED ORDERS.		
	For cost of transportation, or travel fare, from ....to..... ....., between ....,18...., and..... . 18...., journeying to said court, as per memorandum herewith.		
	For cost of transportation, or travel fare, returning from said court, *between....., 18...., and....., 18...., as per memorandum herewith†.....		
	For per diem allowance (for cost of subsistence, etc.) while traveling to and from said court, between the dates above specified. ..... days, at $3.00 per day		
	For per diem allowance (for cost of subsistence, etc.) during attendance upon said court, from.... ... .., 18...., to....., 18...., inclusive, as per Judge Advocate's certificate hereon, ... days, at $3.00 per day.		

Fort..... .....

On this....day of... ...., one thousand eight hundred and.... .... . personally appeared before me, Judge Advocate of the General Court-Martial convened by the accompanying order, and made oath, in due form of law, that the above account is correct; that the specified travel was performed in the customary reasonable manner; that the stated charges for cost thereof were actually incurred and paid by him; and that its performance necessarily occupied the number of days, and between the dates stated.

.....

(*Signature of witness.*)

....

Judge Advocate.

*For rules governing payment of allowances to citizen witnesses see back of this form.

†Where the return journey is paid for before performance, the allowance being that made for travel to the court, the words between the *—† may be erased.

Received at....., the.... of ....., 18...., of .....
....., Paymaster United States Army, the sum of ..... dollars and ....cents, in full of the above account.

(DUPLICATE.) .....
(*Signature of witness.*)

(BACK OF FORM.)

I certify that....., a citizen, has been in attendance as a material witness from the .... day of ....., 18...., to the....day of ....., 18...., inclusive, before a General Court-Martial duly and legally appointed by Special Orders No ..., Headquarters ....., and holden at this place, and that he was duly summoned thereto from..... ... ..

DATE..... ....
PLACE..... Judge Advocate.

(*Paymaster's brief and endorsement omitted.*)

The Paymaster General is, under Section V, of G. O. No. 97, A. G. O., September 8, 1876, governed by the following rules in the treatment of vouchers for travel expenses of citizens, witnesses before military courts:

1. The voucher must be accompanied with a copy of the order convening the court and with the original summons in the case, or, if the attendance was authorized by military order, with the original order.

2. The affidavit of the witness (on the face of voucher) and the Judge Advocate's certificate (on back of voucher) are required in all cases.

3. Upon execution of the affidavit and certificate, the witness may be paid at once his entire claim without awaiting performance of the return travel. In such case the amount allowed for the

---

Note.—The above certificate to be given in duplicate by the Judge Advocate, who will also administer the oath (see other side). Should the witness be "in Goverment employ," those words will be inserted in the above certificate after the word "citizen."

return journey will be that determined for travel to the court (exclusive of any unusual delay which may have been admitted in connection therewith).

4. The following are the only authorized items of expense, and must appear in detail upon the voucher or upon a statement annexed thereto.

(*a*) Amount actually paid for transportation or traval fare. (*b*) Amount actually paid for cost of transportation to and from depot. (*c*) Amount actually paid for cost of one berth in sleeping car, or on steamers where extra charge is made therefor. (*d*) Three dollars per day for each and every day unavoidably consumed in travel to and from court and in attendance thereon, and not to exceed $3 per day for meals and room.—(See A. R. 1050 and 1051.)

5. Travel must be estimated by the shortest available usually traveled route; the charge for cost of travel (items (*a*), (*b*), (*c*),) by established lines of railroad, stage or steamer should not exceed the usual rates in like cases; the time occupied to be determined by the official schedules, reasonable allowance being made for customary unavoidable detention.

6. The summons, or order for attendance, will be presumed to show in all cases, by indorsement or otherwise, if transportation in kind or commutation of rations has been furnished.

Transportation in kind will, for any distance covered thereby, be a bar to payment of item (*a*).

Indorsements of transportation furnished are scrutinized to ascertain if any part of item (*c*) has been included.

Commutation of rations will be a bar to payment of item (*d*).

Transportation and commutation of rations will be a bar to payment of anything.

7. No per diem allowance can be made where attendance upon court does not require the witness to leave his station: (This applies only to citizens in government employ.)

8. See par. 4, Section V, G. O. No. 97, A. G. O., September 8, 1876. (This applies only to citizens in government employ.)

9. The only discrimination between citizens who are and those who are not in government employ is covered by the foregoing rules 7 and 8. If the witness is in government employ the Judge

Advocate's certificate should state the fact. If it does not appear in the certificate, or elsewhere in the papers, and is not known to the paymaster, it will be assumed that the witness is not in government employ.

10. The foregoing rules apply to travel on and after September 1, 1876.

Compensation to citizens, in or out of government employ, for attendance upon civil courts, is payable only by the civil authorities.

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