INSTRUCTIONS

FOR

COURTS-MARTIAL

INCLUDING

SUMMARY COURTS.

PREPARED, UNDER DIRECTION OF

BRIG. GEN. WESLEY MERRITT, U. S. A.,

BY

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CIRCULAR.

The following instructions for courts-martial, including summary courts, are published for the information and guidance of officers serving in this department.

BY COMMAND OF BRIGADIER GENERAL MERRITT:

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INTRODUCTORY NOTE.

The manuscript for this pamphlet was submitted to Major Wirt Davis and Lieut. O. J. Brown of the Department Staff and to Capt. E. H. Crowder, Acting Judge Advocate, Department of the Platte, for review, and, through the War Department, to Col. G. Norman Lieber, Acting Judge Advocate General, for criticism as to its legal correctness. To these officers my thanks are due for their suggestions and criticisms.

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ST. PAUL, MINN., Oct. 1, 1891.

REFERENCES.

Reference.	Book or Pamphlet.	Date.
Win. Law	Winthrop's Military Law	1886
Win. Dig	Winthrop's Digest Opinions Judge Advocate General	1880
Ives	Ives' Military Law	1879
Glf	Greenleaf on Evidence	1888
Ins. Dep. Dak	C. M. Instructions Dept. Dakota	1879
Ins. Dep. Columbia	C. M. Instructions Dept. Columbia	1880
Ins. Dep. Cal	C. M. Instructions Dept. California	1887
Ins. Dep. Ariz	C. M. Instructions Dept. Arizona	1887
Ins. Dep. Platte	C. M. Instructions Dept. Platte	1890
A. R.	Army Regulations	1889
A. W	Articles of War	

GENERAL INSTRUCTIONS

FOR

COURTS-MARTIAL.

JURISDICTION.

"The officers and soldiers of any troops, whether militia or others, mustered and in pay of the United States, shall, at all times and in all places,[1] be governed by the Articles of War, and shall be subject to be tried by courts-martial." (64th A. W.) As regards persons, the jurisdiction also embraces prisoners in the military prison at Fort Leavenworth, Kan. (sec. 1361 Rev. Stat.); and as regards offenses, besides those defined by the Articles of War, those named in sections 1359, 1360, 5306 and 5313 Rev. Stat.

"No person shall be liable to be tried and punished by a general court-martial for any offense which appears to have been committed more than two years before the issuing of the order for such trial, unless, by reason of having ab-

[1] See G. C. M. O. 14, Dept. Tex. 1888.

sented himself, or of some other manifest impediment, he shall not have been amenable to justice within that period." (103d A. W.) This article has been amended by adding thereto the following words:

"No person shall be tried or punished by a court-martial for desertion in time of peace and not in the face of an enemy, committed more than two years before the arraignment of such person for such offense, unless he shall meanwhile have absented himself from the United States, in which case the time of his absence shall be excluded in computing the period of the limitation: *Provided*, That said limitation shall not begin until the end of the term for which said person was mustered into the service." (Act April 11, 1890; see G. O. 45, A. G. O. 1890.)

"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." (1 Win. Law, pp. 553-4.)

THE PRESIDENT.

"A president of the court will not be announced. The officer highest in rank present will act as president." (Par. 1004 A. R.)

"The president of a court martial, besides his duties and privileges as a member, is the organ of the court to maintain order and conduct its business. He speaks and acts for the court in every instance where a rule of action has been prescribed by law, regulations, or its own resolution. In all deliberations the law secures the equality of members." (Par. 1005 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, inform him of his right to have counsel,[1] 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," p. 39) 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.

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[1] See "Counsel," page 12.

1887), and, as far as possible, systematize his plans for conducting the case. (Ins. Dep. Columbia, p. 45; also, Ives, p. 216.)

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. 298–9.)

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 the end, that the evidence may so exhibit the case that the court may render impartial justice. (Ins. Dep. Columbia, p. 46.)

"Inquiry into applications for clemency shows that some judge advocates of courts-martial have a habit of recom-

mending 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." (Extract G. O. 91, A. G. O. 1881.)

COUNSEL.

"By direction of the Secretary of War it is ordered, that hereafter commanding officers at posts where general courts-martial are convened, shall, at the request of any prisoner who is to be arraigned, detail a suitable officer of the command as counsel to defend such prisoner. If there be no such officer available at the post, the fact will be reported to the appointing authority for action." (G. O. 29, A. G. O. 1890.)

REPORTER.

"The employment of a reporter, under section 1203 R. S., is only authorized for general courts-martial in cases where the authority appointing the court may consider it

necessary. The convening authority may also, when deemed necessary, authorize the detail of an enlisted man to assist the judge advocate of a general court-martial in preparing the proceedings of the court." (Par. 1046 A. R.)

"When a reporter is employed under section 1203 R. S., he will be paid not to exceed ten dollars a day, during the whole period of absence from his residence, traveling, or on duty. In special cases, when authorized by the Secretary of War, stenographic reporters for courts-martial, courts of inquiry and important boards may be employed at rates not exceeding twenty-five cents per folio for taking and transcribing the notes in shorthand, or ten cents per folio for other notes, exhibits and appendices. Reporters will be paid by the Pay Department, on the certificate of the judge advocate." (Par. 1047 A. R.)

"No person in the military or civil service of the Government can lawfully receive extra compensation for clerical duties performed for a military court." (Par. 1048 A. R.)

INTERPRETER.

"Interpreters to courts-martial are paid by the Pay Department, upon the certificate of the judge advocate that they were employed by order of the court. They will be allowed the pay and allowances of civilian witnesses." (Par. 1049 A. R.)

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 absence 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 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.)

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 you do further swear that

you will not divulge the sentence of the court until it shall be published by the proper authority; neither will you disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence thereof, as a witness, by a court of justice, in a due course of law. So help you God." (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 oath 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. Dep. 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." (Ins. Dep. Dak., p. 20.)

CHARGES AND SPECIFICATIONS.[1]

The essentials of a charge and its specifications are:

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

Second—That its specification shall set forth facts sufficient to constitute the particular offense. (Win. Dig., 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

[1] For forms for charges, see page 93.

under the 62d article, when the offense committed is in direct violation of any other. (Ib., p. 146; 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, and this then followed by the words "in violation of the.....Article of War." (Win. Dig., p. 146.)

When the offense is not specifically 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. 42–46.)

In case of an 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. Dep. 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.)

"Whenever the same court-martial tries more than one prisoner on separate and distinct charges, the court will be sworn at the commencement of each trial, and separate proceedings in each case prepared. Prisoners will not be joined in the same charge, nor tried on joint charges, unless for concert of action in the same offense." (Par. 1016 A. R.; see G. O. 29, A. G. O. 1891.)

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 dis-

tinctly and accurately described; this should be done, if possible, in the words of the article violated. (7 Op. Atty. Genl., 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. 150-53.)

Many of the Articles of War include two or more offenses. When a charge is to be laid under such an article, the particular offense committed should be stated. "Laying a specification in an alternative form is bad pleading. It is unqualifiedly wrong to charge with 'selling *or* through neglect losing,' in violation of the 17th Article of War. Our practice here [at War Department] is in accordance with this view." (Op. Actg. Judge Adv. Genl., June 26, 1891.)

"The prosecution is at liberty to charge an act under two or more forms, where it is doubtful under which it will more properly be brought by the testimony. In the mili-

tary practice, the accused is not entitled to call upon the prosecution to '*elect*' under which charge it will proceed in such, or indeed any, case." (Win. Dig., p. 147.)

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. (Win. Dig., 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 next 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, sergeants of the post non-commissioned staff and hospital stewards excepted,[1] for offenses for which the punishment prescribed by order or given by custom of service does not exceed the limit defined by the 83d Article of War, should be referred for trial to a summary court;[2] 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

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[1] See pp. 71 and 74.

[2] See "III," page 64 and "IV," page 65.

for crimes of an infamous nature, such as "Theft," "Burglary," "Forgery," should be forwarded to the department commander, for trial by general court-martial.[1] (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 indorsed upon the charges, and no recommendation for trial should be made unless the officer transmitting them is convinced that there are good grounds for sustaining the charges.

"Charges forwarded to the authority ordering a general court-martial, or submitted to a summary, garrison or regimental court, must[2] be accompanied by the proper evidence of such previous convictions as may have to be considered

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[1] For further instructions see note 2, page 64.

[2] All charges for offenses cognizable by inferior courts-martial *must* be accompanied by evidence of all previous convictions of the soldier during his current enlistment and within two years preceding trial.

Charges for offenses cognizable only by general courts-martial (*i. e.*, where the usual punishment for the offense exceeds that an inferior court can inflict), but *not*, ordinarily, punishable by dishonorable discharge, *should not* be accompanied by evidence of previous convictions, *unless* the soldier has been tried five or more times within preceding two years of his current enlistment, in which case evidence *must* be forwarded.

Charges for offenses ordinarily punishable by dishonorable discharge *should not* be accompanied by evidence of previous convictions, *except* in case of *desertion*, in which case evidence of previous convictions of *desertion* must be submitted. (Concurred in by Acting J. A. G., July 6, 1891.)

in determining upon a sentence." (See par. 1018 A. R., as amended by G. O. 29, A. G. O. 1891.)

"When charges against an enlisted man are forwarded to the authority competent to appoint a general court-martial for his trial, they will be accompanied by a statement setting forth the dates of his present and former enlistments, the character upon each of the discharges given him, and the date of his confinement for the offenses covered by the charges."[1] (See par. 1015 A. R., as amended by G. O. 29, A. G. O. 1891.)

In case of a deserter, the medical report required by paragraph 121 A. R. will also be forwarded.

After charges have been formally referred by competent authority to a court-martial for trial, the court is not authorized, in its discretion and upon its own motion, to strike out a charge or specification; nor to direct or permit the judge advocate to drop, or withdraw, such charge or specification, or to enter a *nolle prosequi* as to the same. For such action the authority of the convening officer is requisite. Where, however, by a special plea or objection, an *issue* is made by the accused as to the sufficiency of any charge and specification, the court, without referring the question to the convening officer, is empowered to allow the plea or objection, and quash or strike out the charge. (Win. Dig., p. 202.)

[1] See form on page 157,—approved by Act'g. Sec. of War, Nov. 3, 1891.

ADDITIONAL CHARGES.

"After the accused has been arraigned upon certain charges, and has pleaded thereto, and the trial on the same has been entered upon, new and additional charges, which the accused has had no notice to defend, cannot be introduced or the accused required to plead thereto. Such charges should be made the subject of a separate trial, upon which the accused may be enabled properly to exercise the right of challenge to the court and effectively to plead and defend." (Win. Dig., p. 148.)

PLEAS.

In all cases of discretionary punishment (see "Punishment" p. 53), 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. (Ib., 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. Dep. 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.)

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." (89th A. W.)

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. Dep. 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 page 23; if the plea be overruled, the accused should be required to plead to the merits, *i. e.*, "Guilty," or "Not guilty."

"A second enlistment in the service of the United States when the first has not been fulfilled, is not void, but voidable at the option of the United States only; so that a man who, whilst serving under such a second enlistment, commits an offense, cannot successfully plead the fraudulent character of his second enlistment in bar of trial. Paragraph 131 of the Regulations relates to soldiers *not charged with crime* who are discovered to be deserters from the navy or

marine corps, and does not interpose any obstacle to the action of the reviewing authority or proceedings of courts-martial in such cases." (Cir. 3, A. G. O. 1890.)

PROOF OF INTENT.

"Where an act, *in itself indifferent*, becomes criminal if done with a particular intent, then the intent must be proved and found; but where the act is *in itself unlawful*, the proof of justification or excuse lies on the defendant; and in failure thereof, the law implies a criminal intent." (See 3 Glf., sec. 13.)

"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 accom-

panied 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." (See G. O. 91, A. G. O. 1881.)

ATTENDANCE OF WITNESSES.

"The judge advocate should summon the necessary witnesses for the trial; but he shall not summon witnesses at the expense of the Government without the order of the court, unless satisfied that their testimony is material and necessary to the ends of justice." (Par. 1008 A. R.)

"Judge advocates of courts-martial will send subpœnas, whenever it is possible, through the regular military channels." (Par. 1010 A. R.)

To procure the necessary witnesses, the judge advocate should usually proceed as follows:

I. For witnesses stationed, or residing within the State, Territory or District in which the court may be ordered to sit.

1st. If the desired witness is *an officer*, the summons, (see page 141) should be addressed to him, *through* his post commander.

2d. If *an enlisted man*, the summons should be sent *to* his post commander for service.

In either case, the post commander should, as a rule, issue an order directing compliance with the summons; but in a military emergency, he may first refer the matter to department headquarters for instructions.

3d. If the desired witness is *a civilian*, living near the post where the court is convened, duplicate subpœnas (see page 142) should be made out and one of these served upon the witness by the judge advocate or by any person instructed by him; if the residence of the witness wanted is not near the post, but still within the State, etc., the judge advocate should send the duplicate subpœnas to the post commander stationed nearest the witness' residence, requesting service of the same.

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[1] original to the

[1] "The issuing of duplicate subpœnas is a court-martial practice. The ordinary practice is regulated by statute or rule of court, and generally consists in delivering a copy to the witness." (Op. Actg. Judge Adv. Genl., June 26, 1891.)

judge advocate indorsed (for form of affidavit or certificate see page 144) 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*. (Ins. Dep. Dak., pp. 16 and 17; and par. 1009 A. R.)

Should this 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. Genl., 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 indorsed 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. (Ins. Dep. Dak., p. 17.)

The record should show the decision of the court; if the motion is granted the judge advocate should, in compliance with paragraph 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 page 145) 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 indorse 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 *v.* Booth, 21 Howard, p. 506; also, U. S. *v.* Tarble, 13 Wallace, p. 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 *v.* Booth, 21 Howard, p. 517, and par. 1061, A. R.)

Although a court-martial has power, under section 1202 R. S., to thus procure the *attendance* of civilian witnesses, it has *practically none*, under 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 deposition 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."[1] (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 page 147) 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; redirect and recross interrogatories are added, if desired; finally the court

[1] In time of peace, desertion is not a capital offense.

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 civil officer 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 civil officer is not known, the space for the name of the latter should be left blank, to be filled out by the army officer 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.)

"General Orders, No 37, current series, from this office, on the subject of the authentication of depositions which are to be used in evidence before courts-martial, are held to interpret the 91st Article of War as to imperatively require that such depositions shall be authenticated in the manner indicated; and, hereafter, convictions based on depositions authenticated by persons not having the power to administer oaths will be disapproved." (Cir. "K," 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 a ..... 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 army 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 page 151) 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.)

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 advo-

cate, certified to as above, if necessary, and transmitted to the department commander, with a request that they be duly forwarded to the desired witness, if an officer, or the nearest post commander for service, if an enlisted man or a civilian.

"An officer or enlisted man who receives a summons to attend as a witness before any military court, board, civil court, or other tribunal competent to issue subpœnas, and sitting beyond the limits of the department where he is serving, will, before starting to obey the summons, forward it through the proper channel to his department commander, that necessary orders or authority to obey a civil process may be given." (Par. 1011 A. R.)

"In extreme urgency, and when the public interest would be liable to suffer by delay, post commanders may authorize immediate departure in obedience to the summons. In such cases they will make special reports of the facts to the department commander for his approval. A post commander who may be summoned will be governed by these instructions." (Par. 1012 A. R.)

"Officers and enlisted men, reporting as witnesses before a civil court, should receive the necessary expenses incurred in travel and attendance from the civil authorities. Neither mileage nor travel allowances will be paid in such cases by the War Department. If, however, it is absolutely necessary to furnish them transportation, in kind, to enable them to appear as witnesses for the Government, before a

civil court of the United States, an account of such expenditure, together with the evidence that they were properly subpœnaed and did attend the court, will be forwarded to the War Department for refundment by the Department of Justice. Officers providing such transportation will notify the court, or the marshal thereof, that it was furnished to enable the witnesses to perform the requisite journeys in obedience to the summons." (Par. 47 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 paragraph 1008 Army Regulations, 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.)

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 answer-

ing 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. (Ib.)

From inquiry at the office of the chief paymaster of the department, it has been learned that a large number of the accounts of civilian witnesses, sent to that office, have to be returned for correction. The blank form of vouchers for such witnesses is published on pages 151–156, and instructions in reference to same are given on back of form, in paragraphs 1050–1055 A. R., and in following extract from Cir. 10, A. G. O. 1889:

"A civilian witness, not in the employ of the United States, is entitled to all the allowances made to a Government employe under similar circumstances, and in addition thereto to $3 per day for time necessarily spent in traveling and in attendance on the court."

In making out such accounts the judge advocate should see that the name of the witness, wherever it appears in the voucher, agrees with that given in the summons, and that the vouchers and all accompanying papers are in *duplicate.*

If "authorized items of expense" are shown in a "statement" or memorandum, this should be signed by the witness.

The certificate should state the period of attendance, if only for a single day, strictly according to the blank form, thus: "From the first day of January, 1888, to the first day of January, 1888, inclusive," and not, as is often stated, "On the first day of January, 1888."

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.

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 rests with the court.[1] (1 Glf., sec. 326, 430.)

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 other-

[1]The old common law rule that persons convicted and sentenced for treason, felony and *crimen falsi* are incompetent, has been so changed by practice in the state and United States courts, that such conviction would now probably be held to affect the credibility of the witness only. (Op. Actg. Judge Adv. Genl., June 26, 1891.)

wise, 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 witnesses. 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 1 Glf., sec. 334) included husband and wife in cases in which either was a party, it might 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 as stated by Wharton (Crim. Ev., sec. 400), "the reason for the exclusion of husband and wife, when called for or against the other, being social policy, and not in-

terest, statutes abolishing incompetency resting on interest do not remove the common law incompetency of husband and wife for or against the other." 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.)

Incompetency must, in all cases, be proven, not inferred. Except in case of want of religious belief, the witness may be examined on his *voir dire;* he may, in any case, be questioned not under oath. (Ins. Dep. Columbia, p. 54.)

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 interests 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 liberal 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 witnesses 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 so formed 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. (Ins. Dep. Dak., p. 13.)

Direct Examination.—Upon direct examination, leading questions are not allowed. This rule, however, is to be understood in a reasonable sense; for, otherwise, the exami-

nations 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., sec. 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 assist; 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. (1 Win. Law, 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. (Ib., 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 matters have been introduced, the witness may be re-examined upon these 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 ma-

terial omitted, wishes to put a question 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 reopened 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 his 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 unexpectedly testifies adversely, he may contradict him by others. (1 Glf., sec. 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 the seal of a court of record, or when its authenticity is admitted by the accused. (Ins. Dep. Cal., p. 21.) As to proof of writings, see 1 Win. Law, p. 509 *et seq.*

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 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. Dep. Dak., p. 12.)

FINDING.

The finding of the court should be governed by the evidence considered in connection with the plea; and that upon the charge should be consistent with that upon the specification. (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 opposite to the charge, guilty of the charge. (Ins. Dep. Ariz., p. 19.)

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. (Ins. Dep. Columbia, p. 58.)

Of this form of verdict, the most familiar is the finding of guilty of absence without leave under a charge of desertion. In such a case, in its finding of guilty upon the specification, the court should in terms *except* the words, "Did desert," and substitute therefor the words, "Did ab-

sent himself without authority." The finding upon the charge should regularly be "Not guilty, but guilty of absence without leave." (Win. Dig., p. 264.)

Another legal and now common form of finding, is where an accused is charged with a *specific* offense, made punishable by the Articles of War, other than the 62d, and the court is of the opinion that, while the material allegations in the specification are proven, they do not fully sustain the charge as laid, but do clearly establish a breach of military discipline; in this case, the accused may properly be found guilty of the specification, and not guilty of the charge, but guilty of "*Conduct to the prejudice of good order and military discipline.*" (Win. Dig., p. 265.) It should be remembered, however, that the court cannot in its finding legally substitute the 62d Article of War for any other, unless the proof under the specification fails to substantiate the original charge.

The *reverse* of the form of finding indicated in the last paragraph has never been sanctioned. As where a charge is laid under the general article, a finding under any other article, or where a charge is laid under a specific article, a finding under any other specific article, would be wholly irregular and invalid. (Win. Dig., p. 265, and 1 Win. Law, p. 545.)

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 CONVICTIONS.[1]

"After arriving at the findings, a court-martial may be opened to receive evidence of previous convictions. These convictions must be proved by the records of previous trials, or by duly authenticated orders promulgating the same, showing the actual offenses of which the soldier was convicted, except in the cases of conviction by summary court, when a duly authenticated copy of the record of said court shall be deemed sufficient proof."[2] (See par. 1018 A. R., as amended by G. O. 29, A. G. O. 1891.)

"The language of paragraph 894½ [now paragraph 1018] of the Regulations 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

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[1] For instructions as to when evidence of previous convictions should be submitted with charges, see note 2, page 22.

[2] "The proper proof of previous convictions by summary court is by authenticated extract from the summary court record, giving: Name, rank, company and regiment; charge and specification; plea; finding; sentence; and action of commanding officer, with date." (Dec. War Dept. Oct. 19, 1891.)

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."[1] (Cir. 8, A. G. O. 1886.)

"It is not contemplated by paragraph 1018 Army Regulations, to authorize the introduction of evidence of convictions by civil courts." (Dec. Actg. Sec. of War, Nov. 13, 1890.)

PUNISHMENT.[2]

Punishment, under the Articles of War, is either left to the discretion of a court-martial, or is made wholly or partially mandatory. 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. For easy reference, those Articles of War describing offenses for which enlisted men may be punished by courts-martial are published on pages 81–92.

"The legal punishments of soldiers which courts-martial may award (depending upon the character of the offense

[1] "This rule is not changed by General Orders No. 21, current series, Headquarters of the Army." (Op. Actg. J. A. G., Aug. 29, 1891.)

[2] For forms for sentences, see page 135.

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; [detention of pay, see page 67]; and for non-commissioned officers, also reduction to the ranks." (Par. 1019 A. R.)

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

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

"Sentences imposing tours of guard duty are forbidden. The performance of the honorable and important duty of guards should never be considered as punishment." (Par. 1020 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.)

"A court-martial cannot assign the pay of a soldier to any other person; nor can a soldier be required to receipt for money paid without his consent." (Par. 1035 A. R.)

Under the 17th Article of War, stoppage of pay 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.[1] (G. O. 110, A. G. O. 1876.)

"In accordance with an act of Congress approved Sept. 27, 1890, the following limits to the punishment of enlisted men, together with the accompanying regulations, are established for the government in time of peace of all courts-martial, and will take effect thirty days after the date of this order:

I. Subject to the modifications authorized in subdivision 3 of this section, the punishment for desertion shall not exceed the following:

1. In the case of a soldier who surrenders—

(*a*) When such surrender is made within thirty days after desertion, confinement at hard labor, with forfeiture of pay and allowances, for three months.

(*b*) When such surrender is made after an absence of more than thirty days and not more than ninety days, confinement at hard labor, with forfeiture of pay and allowances, for six months.

(*c*) When such surrender is made after an absence of more than ninety days, dishonorable discharge, with forfeiture of all pay and allowances, and confinement at hard labor for eighteen months; *Provided*, that in the case of a deserter who had not been more than three months in the service, the confinement shall not exceed ten months.

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[1]For further instructions in reference to this article see note, page 57.

2. In the case of a soldier who does not surrender—

(*a*) When at the time of desertion he shall have been less than three months in the service,[1] dishonorable discharge, with forfeiture of all pay and allowances, and confinement at hard labor for one year.

(*b*) When at the time of desertion he shall have been three months or more but less than six months in the service,[1] dishonorable discharge, with forfeiture of all pay and allowances, and confinement at hard labor for eighteen months.

(*c*) When at the time of desertion he shall have been six months or more in the service,[1] dishonorable discharge, with forfeiture of all pay and allowances, and confinement at hard labor for two years and six months.

3. The foregoing limitations will be subject to modification under the following conditions:

(*a*) The punishment of a deserter may be increased by one year of confinement at hard labor in consideration of each previous conviction of desertion, and also by dishonorable discharge and forfeiture of all pay and allowances when not already authorized.

(*b*) The punishment for desertion when joined in by two or more soldiers in the execution of a conspiracy, or for desertion in the presence of an outbreak of Indians, or of any unlawful assemblage which the troops may be opposing, shall not exceed dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for five years.

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[1] The expression "in the service" "has reference not only to the soldier's present enlistment, but to all previous enlistments as well, service in the Navy and Marine Corps included—in other words, to the aggregate of his service." (Cir. 11, A. G. O. 1891.)

II. Except as herein otherwise indicated, punishments shall not exceed the limits prescribed in the following table:

OFFENSES.	LIMIT OF PUNISHMENT.
UNDER 17TH ARTICLE OF WAR.	
Selling horses or arms, either or both	Three years' confinement at hard labor; for non-commissioned officer, reduction in addition thereto.*
Selling accoutrements	Four months' confinement at hard labor; for non-commissioned officer, reduction in addition thereto.*
Selling clothing	Two months' confinement at hard labor; for non-commissioned officer, reduction in addition thereto.*
Losing or spoiling horse or arms, through neglect	Four months' confinement at hard labor; for non-commissioned officer, reduction in addition thereto.*
Losing or spoiling accoutrements or clothing through neglect	One month's confinement at hard labor; for non-commissioned officer, reduction in addition thereto.*

* *In addition* to the stoppages "sufficient for repairing the loss or damage" which the law requires the court-martial to adjudge. The court's action under this requirement in the case of sale or loss through neglect of *clothing* shall be limited to a confirmation of the charge made against the offender on his clothing account.[1]

1 "The foot-note on page 2, G. O. No. 21, c. s., was not intended to change the 17th Article of War, for that is a matter of law. But it was intended to change the practice under it. When the 17th article was enacted, the clothing of the soldier was the property of the Government. The circumstances are now changed and the clothing is the property of the soldier. He has been charged with it, which charge operates as a stoppage of pay. If the value is to be again stopped from his pay, the soldier is made to pay twice for the same clothing, which was not intended by Article 17. Hence it is that the note *intentionally* provides that the 'court's action under this requirement in the case of sale or loss through neglect of *clothing* shall be limited to a confirmation of the charge made against the offender on his clothing account.'" (Cir. 5, A. G. O. 1891.) For form of sentence in accordance with the above foot-note, see page 135.

OFFENSES.	LIMIT OF PUNISHMENT.
UNDER 20TH ARTICLE OF WAR.	
Behaving himself with disrespect toward his commanding officer..	Six months' confinement at hard labor and forfeiture of $10 per month for the same period; for non-commissioned officer, reduction in addition thereto.
UNDER 24TH ARTICLE OF WAR.	
Refusal to obey or using violence to officer or non-commissioned officer while quelling quarrels or disorders.	Dishonorable discharge, with forfeiture of all pay and allowances and imprisonment for two years.
UNDER 31ST ARTICLE OF WAR.	
Lying out of quarters.....	Forfeiture of $2; corporal, $3; sergeant, $4.
UNDER 32D ARTICLE OF WAR.	
Absence without leave—	
Less than one hour (not including absence from a roll-call).....	Forfeiture of 50 cents; corporal, $1; sergeant, $2.
Less than one hour (including absence from a roll-call).....	Forfeiture of $1; corporal, 2; sergeant, $3; 1st sergeant or non-commissioned officer of higher grade, $4.
From one to six hours.....	Forfeiture of $2; corporal, $3; sergeant, $4; 1st sergeant or non-commissioned officer of higher grade, $5.
From six to twelve hours.	Forfeiture of $3; corporal, $4; sergeant, $6; 1st sergeant or non-commissioned officer of higher grade, $7.
From twelve to twenty-four hours.	Forfeiture of $5; corporal, $6; sergeant, $7; 1st sergeant or non-commissioned officer of higher grade, $10.

Offenses.	Limit of Punishment.
Under 32d Article of War—*Continued.*	
From twenty-four to forty-eight hours	Forfeiture of $6 and five days' confinement at hard labor; for corporal, forfeiture of $8; sergeant, $10; first sergeant or non-commissioned officer of higher grade, $12, or for all non-commissioned officers, reduction.
From two to nine days	Forfeiture of $10 and ten days' confinement at hard labor; for non-commissioned officer, reduction in addition thereto.
From ten to twenty-nine days	Forfeiture of $20 and one month's confinement at hard labor; for non-commissioned officer, reduction in addition thereto.
From thirty to ninety days	Three months' confinement at hard labor and forfeiture of $10 per month for same period; for non-commissioned officer, reduction in addition thereto.
For more than ninety days	Dishonorable discharge and forfeiture of all pay and allowances and three months' confinement at hard labor.
Under 33d Article of War.	
Failure to repair at the time fixed, etc., to the place of parade—	
For reveille or retreat roll-call	Forfeiture of 50 cents; corporal, $1; sergeant, $2; 1st sergeant, $3.
For guard detail	Forfeiture of $5; corporal, $8; sergeant, $10.
For fatigue detail For dress parade For the weekly inspection For target practice For drill For guard-mounting (by musician) For stable duty	Forfeiture of $2; corporal, $3; sergeant, $5.

Offenses.	Limit of Punishment.
Under 38th Article of War.	
Drunkenness on—	
Guard	Six months' confinement at hard labor and forfeiture of $10 per month for the same period; for non-commissioned officer, reduction in addition thereto.
Duty as company cook	Forfeiture of $10.
Extra or special duty At drill At target practice At parade At inspection At inspection of company guard detail At stable duty	Forfeiture of $6; for non-commissioned officer, reduction and forfeiture of $10.
Under 40th Article of War.	
Quitting guard	Six months' confinement at hard labor and forfeiture of $10 per month for the same period; for non-commissioned officer, reduction in addition thereto.
Under 51st Article of War.	
Persuading soldiers to desert	Six months' confinement at hard labor and forfeiture of $10 per month for the same period; for non-commissioned officer, reduction in addition thereto.
Under 60th Article of War.	Dishonorable discharge, forfeiture of all pay and allowances, and four years' imprisonment.
Under 62d Article of War.	
Manslaughter	Dishonorable discharge, forfeiture of all pay and allowances, and ten years' imprisonment.

OFFENSES.	LIMIT OF PUNISHMENT.
UNDER 62D ARTICLE OF WAR— *Continued.*	
Assault, with intent to kill.....	Dishonorable discharge, forfeiture of all pay and allowances, and ten years' imprisonment.
Burglary.....	Dishonorable discharge, forfeiture of all pay and allowances, and five years' imprisonment.
Forgery.....	Dishonorable discharge, forfeiture of all pay and allowances, and four years' imprisonment.
Perjury	Dishonorable discharge, forfeiture of all pay and allowances, and four years' imprisonment.
False swearing.....	Dishonorable discharge, forfeiture of all pay and allowances, and two years' imprisonment.
Robbery.....	Dishonorable discharge, forfeiture of all pay and allowances, and six years' imprisonment.
Larceny or embezzlement of property—*	
Of the value of more than $100..	Dishonorable discharge, forfeiture of all pay and allowances, and four years' imprisonment.
Of the value of $100 or less and more than $50.....	Dishonorable discharge, forfeiture of all pay and allowances, and three years' imprisonment.
Of the value of $50 or less and more than $20.....	Dishonorable discharge, forfeiture of all pay and allowances, and two years' imprisonment.
Of the value of $20 or less.....	Dishonorable discharge, forfeiture of all pay and allowances, and one year's imprisonment.

* In specifications to charges of larceny or embezzlement, the value of the property shall be stated.

OFFENSES.	LIMIT OF PUNISHMENT.
UNDER 62D ARTICLE OF WAR— *Continued.*	
Disobedience of orders, involving willful defiance of the authority of a non-commissioned officer in charge of a guard or party	Six months' confinement at hard labor and forfeiture of $10 per month for the same period; for non-commissioned officer, reduction in addition thereto.
Using threatening or insulting language or behaving in an insubordinate manner to a non-commissioned officer while in the execution of his office	One month's confinement at hard labor and forfeiture of $10; for non-commissioned officer, reduction in addition thereto.
Absence from fatigue duty	Forfeiture of $4; corporal, $5; sergeant, $6.
Absence from extra or special duty	Forfeiture of $4; corporal, $5; sergeant, $6.
Absence from duty as company or hospital cook	Forfeiture of $10.
Introducing liquor into post or camp in violation of standing orders	Forfeiture of $3; for non-commissioned officer, reduction and forfeiture of $5.
Drunkenness at post or in quarters	Forfeiture of $3; for non-commissioned officer, reduction and forfeiture of $5.
Drunkenness and disorderly conduct, causing the offender's arrest and conviction by civil authorities at a place within ten miles of his station	Forfeiture of $10 and seven days' confinement at hard labor; for non-commissioned officer, reduction and forfeiture of $12.
Noisy or disorderly conduct in quarters	Forfeiture of $4; corporal, $7; sergeant, $10.
Abuse by non-commissioned officer of his authority over an inferior	Reduction, three months' confinement at hard labor, and forfeiture of $10 per month for the same period.
Non-commissioned officer encouraging gambling	Reduction and forfeiture of $5.
Non-commissioned officer making false report	Reduction, forfeiture of $8, and ten days' confinement at hard labor.

OFFENSES.	LIMIT OF PUNISHMENT.
UNDER 62D ARTICLE OF WAR—*Continued.*	
Sentinel allowing a prisoner under his charge to escape through neglect	Six months' confinement at hard labor and forfeiture of $10 per month for the same period.
Sentinel willfully suffering prisoner under his charge to escape	Dishonorable discharge, forfeiture of all pay and allowances, and one year's imprisonment.
Sentinel allowing a prisoner under his charge to obtain liquor	Two months' confinement at hard labor and forfeiture of $10 per month for the same period.
Sentinel or member of guard drinking liquor with prisoners	Two months' confinement at hard labor and forfeiture of $10 per month for the same period.
Disrespect or affront to a sentinel	Two months' confinement at hard labor and forfeiture of $10 per month for the same period: for non-commissioned officer, reduction in addition thereto.
Resisting or disobeying sentinel in lawful execution of his duty	Six months' confinement at hard labor and forfeiture of $10 per month for the same period; for non-commissioned officer, reduction in addition thereto.
Lewd or indecent exposure of person	Three months' confinement at hard labor and forfeiture of $10 per month for the same period; for non-commissioned officer, reduction in addition thereto.

III. (1) When a soldier shall be found guilty of an offense cognizable when committed for the first time by an inferior court-martial[1] his punishment therefor may exceed the prescribed limit by one-half, if it shall appear that during his current enlistment and within two years preceding his trial he has been once convicted of one offense or more; it may be doubled if he has been twice so convicted; and it may be increased[2] by one-half of the prescribed limit for every such previous conviction, provided that upon proof of five or more previous convictions, the punishment may be either that authorized for a fifth conviction or dishonorable discharge with forfeiture of all pay and allowances.[3] When found guilty of an offense cognizable only by a general court-martial,[4] and on proof of five or more previous convictions within the two years, dishonorable discharge, with forfeiture of all pay and allowances, may be added to any confinement[5] at hard labor.

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1 *i. e.*, When the limit of punishment prescribed for the offense does not exceed that an inferior court can inflict.

2 When the limit of punishment thus prescribed exceeds that an inferior court can inflict, the case should be referred to a general court-martial.

3 In this case, if dishonorable discharge is awarded, all pay and allowances *must* be forfeited, and *no* confinement can be given.

4 *i. e.*, When the limit of punishment prescribed for the offense, or the punishment given according to custom of service, exceeds that an inferior court can inflict.

5 Any confinement prescribed in this order, or awarded according to custom of service.

And when a non-commissioned officer shall be found guilty of an offense not punishable by reduction, reduction may be added to the punishment if it shall appear that he has been convicted of a military offense within one year and during his current enlistment.[1]

(2)[2] * * * * * * * *

IV. This order prescribes the *maximum* limit of punishment for the offenses named, and this limit is intended for those cases where the severest punishment should be awarded. In other cases the punishment must be graded down according to the extenuating circumstances. Offenses not herein provided for remain punishable as authorized by the Articles of War and the custom of the service.

V.[3] * * * * * * * *

[1] "General Orders No. 21, Feb. 27, 1891, from this office, does not limit the introduction of evidence of previous convictions to cases when soldiers are on trial for offenses mentioned in the order, but does subject it to certain other limitations. When a soldier is on trial for desertion evidence of previous desertions may go to increase his term of imprisonment; and so when on trial for an offense which, when committed for the first time, would be cognizable by an inferior court-martial, the punishment may be increased, in regular proportion, in view of previous convictions. But with these exceptions evidence of previous convictions can only be introduced under the following conditions: 1st, the trial must be for an offense not ordinarily punishable with dishonorable discharge; 2d, there must be at least five previous convictions; 3d, the only additional punishment that can be awarded in consequence of the introduction of such evidence is dishonorable discharge with forfeiture of pay and allowances." (Cir. 5, A. G. O. 1891.) For instructions as to when evidence of previous convictions should be submitted with charges, see page 22.

[2] See extracts G. O. 29, A. G. O. 1891, pages 22 and 52.

[3] See extract G. O. 21, A. G. O. 1891, page 79.

VI. The following substitutions for punishments named in section II of this order are authorized at the discretion of the court:

Detention of pay to the extent of four times the amount of the forfeiture;[1] two days' confinement at hard labor for one dollar of forfeited pay; one day's solitary confinement on bread and water diet for two day's confinement at hard labor, or for one dollar of forfeited pay; *Provided*, that a non-commissioned officer not sentenced to reduction shall not be subject to confinement; *And provided*, that solitary confinement shall not exceed fourteen days at one time, nor be repeated uutil fourteen days have elapsed, and shall not exceed eighty-four days in one year. Wherever the limit herein prescribed for an offense or offenses may be brought within the punishing power of inferior courts-martial, as defined by the 83d Article of War, by substitution of punishment under the provisions of this section, the aforesaid courts shall be deemed to have jurisdiction of such offense or offenses.[2]

VII.[3] * * * * * * * "

(G. O. 21, A. G. O. Feb. 27, 1891.)

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[1] Under this rule of equivalents "an inferior court can sentence to a detention of pay of four times the amount of one month's pay." (Op. Act. Judge Adv. Genl., June 26, 1891.)

[2] If the limit exceed that defined by 83d A. W., the case should be referred to a general court-martial.

[3] See extracts G. O. 29, A. G. O. 1891, pages 74 and 75.

"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)[1] may direct. The amounts so retained will be paid only on the final statements furnished enlisted men on discharge from the service.

"That the proper amount of punishment is the *least* amount by which discipline can be efficiently maintained, is a principle of recognized validity in the administration of military justice. It is expected that the punishment herein authorized, while of the least possible severity, will, if judiciously applied, diminish military offenses by compelling, for the time being, sobriety and abstention from vicious indulgences of every kind; and that it may thus be made a potent factor in the promotion of discipline and of the welfare of the service at large." (G. O. 63, A. G. O. 1889.)

"The monthly pay of a soldier retained until discharge under sentence of a court-martial can only be forfeited when, subsequent to such sentence, he shall be expressly sentenced to such forfeiture, or to a forfeiture of all pay to become due." (Cir. 1, A. G. O. 1890.)

"If a soldier for whose apprehension a reward has been paid be brought to trial under a charge of desertion and acquitted, or convicted of absence without leave only; or if

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[1] See note 1, page 66.

the sentence be disapproved by proper authority, the amount specified in paragraph 122 shall not be stopped against his pay, unless, in case of conviction of absence without leave, the sentence of the court shall so direct."[1] (Par. 125 A. R., as amended by G. O. 38, A. G. O. 1890.)

"No person in the military service shall, under the sentence of a court-martial, be punished by confinement in a penitentiary, unless the offense of which he may be convicted would, by some statute of the United States, or by some statute of the State, Territory or District in which such offense may be committed, or by the common law, as the same exists in such State, Territory or District, subject such convict to such punishment." (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.)

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[1] In commenting on manuscript of this pamphlet, the Acting Judge Advocate General stated: "I have recently given an opinion to the effect that, in view of the specific limitation of punishment for the offense of absence without leave, by G. O. No. 21, c. s., Headquarters of the Army, it would be illegal, by sentence of court-martial, to charge a soldier with the amount of reward paid for his apprehension. Such a charge or stoppage of pay would in fact be a punishment, and in excess of the limit prescribed. (No action has as yet been taken on this opinion.)"

"By direction of the President, General Orders No. 21, February 27, 1891, Headquarters of the Army, Adjutant General's Office, shall not hereafter be construed as impairing or modifying paragraph 125, of the Army Regulations as amended by General Orders No. 38, March 28, 1890, from the same Headquarters." (G. O. 92, A. G. O., 1891.)

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.)

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.)

AUTHENTICATION OF PROCEEDINGS.

"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. * * *" (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 should 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.

As the 94th Article of War provides that the "proceedings of trials shall be carried on only between the hours of eight in the morning and three in the afternoon, excepting in cases which, in the opinion of the officer appointing the court, require immediate example," the hour of adjournment should be stated, unless the court is authorized to sit without regard to hours.

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.)

The practice, sometimes followed, of noting the adjournment *after* the blank space left for the action of the reviewing authority, is *wrong;* for when the review is dated, this leaves the adjournment, as ordinarily written, under a wrong date, or, if the adjournment is dated, the *entire* proceedings not in proper sequence as to dates.

SPECIAL INSTRUCTIONS

FOR

INFERIOR COURTS-MARTIAL.

"Regimental and garrison courts-martial, and field officers detailed to try offenders, shall not have power to try capital cases or commissioned officers, 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."[1] (83d A. W.)

Hospital stewards, though liable to discharge, will not be reduced, nor will they be tried by garrison courts-martial unless by special permission of the department commander. The detail of an acting hospital steward may be revoked by the post commander, upon the recommendation of the senior medical officer, or by the sentence of a court-martial. (Par. 1563 A. R., as amended by G. O. 38, A. G. O. 1890.)

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1 See "VI," page 66.

A stoppage, to reimburse the Government, under article 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.)

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.)

"Whenever, under the provisions of the summary court act,[1] it becomes legal to convene a garrison or regimental court-martial, the order appointing the court must state the fact which brings the case within the exceptions of the law, substituting the summary court for the garrison and regimental court-martial, and thus makes it a legal court." (Cir. 9, A. G. O. 1891.)

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1 See "Jurisdiction," page 73.

INSTRUCTIONS.

FOR

SUMMARY COURTS.

COMPOSITION.

"A summary court shall consist of the line officers[1] second in rank at the post or station, or of the command of the alleged offender, and at stations where only officers of the staff are on duty, the officers second in rank shall constitute such court. * * * *Provided*, that when but one commissioned officer is present with a command, he shall hear and finally determine such cases as require summary action." (See Act establishing, published in G. O. 117, A. G. O. 1890.)

JURISDICTION.

"Hereafter in time of peace, all enlisted men charged with offenses now cognizable[2] by a garrison or regimental court-martial shall, within twenty-four hours[3] from the

1 "*Sic* in the roll."

2 *i. e.*, by law or by custom of service

3 See page 75.

time of their arrest, be brought before a summary court."

* * * *Provided*, that any enlisted man charged with an offense and brought before such summary court, may, if he so desires, object to a hearing and determination of his case by such court, and request a trial by court-martial, which request shall be granted as of right, and when the court is the accuser the case shall be heard and determined by the post commander, or by regimental or garrison court-martial." (Act Estab.)

"It is held that an officer cannot act as accuser and court in the same case; and when the post or other commander is the accuser, and the only officer present, the case must, necessarily, go to a regimental or garrison court-martial. This is not confined to offenses committed in the presence of the court." (Cir. 1, A. G. O. 1891.)

"It is the intention of the summary court acts to substitute the summary for the garrison and regimental court-martial, except as expressly excepted, and that when the post commander is the only officer at the post, or when the second in rank is the accuser, he—the post commander—must try the case, unless the accused shall demand a trial by garrison or regimental court." (Endt. Actg. J. A. G., March 21, 1891.)

"Sergeants of the post non-commissioned staff, though liable to discharge for inefficiency, will not be reduced, nor

will they be tried by garrison or summary courts-martial, unless by special permission of the authority competent to order their trial by general court-martial." (Par. 105 A. R., as amended by G. O. 29, A. G. O. 1891.)

"Non-commissioned officers may be reduced to the ranks by order of the commander of the regiment on their own application, approved by the company commanders, or by the sentence of a court-martial; *Provided*, that sergeants shall not, if they object thereto, be tried by regimental, garrison or summary courts-martial, except by special permission of the authority competent to order their trial by general court-martial." (Par. 254 A. R., as amended by G. O. 29, A. G. O. 1891.)

The jurisdiction of the court is not affected by the time when cases are brought before it. It is the province of the commanding officer, and not of the court, to determine when and what cases shall be brought before it for trial. A delay of more than twenty-four hours does not make the action of the court void or voidable. The law does not "declare that trials shall take place within twenty-four hours after the commission of the offense," but it provides for trial within twenty-four hours from time of arrest. Whether arrest shall immediately follow the commission of the offense is wholly within the discretion of the officer in command. (Cir. 2, A. G. O. 1891.)

POWER.

Summary courts "shall have power to administer oaths and to hear and determine the case, and when satisfied of the guilt of the accused party adjudge the punishment to be inflicted." (Act Estab.)

They are subject to the restrictions named in the 83d Article of War; but under rule of equivalents, given in sec. VI of G. O. 21, A. G. O. 1891, they may sentence a soldier to have four months' pay *detained*. (See note 1, p. 66.)

They have power to forfeit the whole of a soldier's pay for one month, including "retained pay." (Op. Actg. J. A. G., July 7, 1891, concurred in by Actg. Sect. of War.)

CLERK OF COURT.

"The necessary summary court writing can be done through the 'necessary clerks in the adjutant's office,' as authorized by General Orders No. 129, of 1890, from this office. In that way a clerk can be supplied 'when actually required.'" (Cir. 1, A. G. O. 1891.)

PROCEDURE.

"The accused will be arraigned and allowed to plead, according to the practice of courts-martial. If an accused does not demand a removal of his case to a regimental or

garrison court-martial, or if, being a sergeant, he does not object to trial by inferior court-martial, or if he does not object to be tried by the officer second in rank on the ground of his being the accuser, or if he does not plead guilty, witnesses will be sworn and testimony heard, the accused being permitted to testify and make a statement in defense; but the evidence and statement will not be recorded." (G. O. 137, A. G. O. 1890.)

"When the summary court shall have arrived at a finding and judgment,[1] the 'summary court record' book,[2] with the entries therein made in accordance with the headings to its columns, will be laid before the post commander for his action, which also will be entered in the record book, dated and signed. When a case is heard by the post commander, the proceedings will be recorded in the same book. No other record of the proceedings will be kept." (Ib.)

REVIEW OF PROCEEDINGS.

"No sentence adjudged by said summary court shall be executed until it shall have been approved by the post or other commander." (Act Estab.)

"Held, that the officer approving the finding and sentence of a summary court cannot change the sentence; he can, however, disapprove." (Cir. 1, A. G. O. 1891.)

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1 For forms for sentences, see page 135.

2 See page 133.

"It is held by the War Department, that the action of a 'post or other commander' upon a sentence imposed by a summary court is confined to *approval* or *disapproval;* that he cannot mitigate, remit, nor in any other manner change the sentence." (Endt. A. G. O., March 17, 1891.)

"Neither the post nor the department commander can remit or mitigate an approved sentence of a summary court, which in this respect is beyond the reach of any power except the pardoning power of the President." (Op. Actg. Judge Adv. Genl., March 28, 1891.)

SPECIAL INSTRUCTIONS

FOR

POST COMMANDERS,

RELATING TO SUMMARY COURTS.

"Soldiers against whom charges may be preferred for trial by summary court, shall not be confined in the guard-house, but shall be placed in arrest[1] in quarters, before and during trial and while awaiting sentence, unless in particular cases restraint may be deemed necessary." (G. O. 21, A. G. O. 1891.)

"When charges are preferred against enlisted men for offenses heretofore cognizable by garrison or regimental court-martial, they will be laid before the post commander, who will cause the accused to be brought before the summary court within the statutory time." (G. O. 137, A. G. O. 1890.)

[1] "The status of arrest is inconsistent with a status of duty and the two cannot fully exist together; but this does not mean that a soldier in arrest cannot be required to clean up or do other work about his quarters which otherwise other soldiers would have to do for him." (Op. Actg. J. A. G., Oct. 6, 1891.)

"Summary courts should be open at a stated hour every morning, except Sunday,[2] for the trial of such cases, if any, as may properly be brought before them. Trials should be had on Sunday only when the exigencies of the service make it necessary." (Cir. 2, A. G. O. 1891.)

"The trials of men before summary courts will not be published in orders." (G. O. 137, A. G. O. 1890.)

"Post commanders will furnish company and other commanders extracts from the 'summary court record' of the trials of men of their commands, to enable them to make the proper record in company books and on rolls and returns." (Ib.)

"The names of the officers at a post who act as summary court must be reported on the post return, with dates." (Cir. 2, A. G. O. 1891.)

"Post and other commanders shall, on the last day of each month, make a report to the department headquarters of the number of cases determined by summary court during the month, setting forth the offenses committed and the penalties awarded, which reports shall be filed in the office of the judge advocate of the department." (Act Estab.)

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[2] If it be understood that the court shall not sit Sunday, the officer charged with the duty of bringing offenders before it will comply with his duty by doing so at the first session of the court thereafter. (Op. Actg. Judge Adv. Genl., Feb. 13, 1891.)

ARTICLES OF WAR

DEFINING OFFENSES FOR WHICH ENLISTED MEN MAY BE PUNISHED

Parts subsequently repealed are printed in italics and inclosed in ( ); parts supplied by subsequent amendment are indicated by being inclosed in [ ].

ART. 16. Any enlisted man who sells, or willfully or through neglect wastes, the ammunition delivered out to him, shall be punished as a court-martial may direct.

ART. 17. Any soldier who sells or, through neglect, loses or spoils his horse, arms, clothing or accoutrements, shall suffer such stoppages, not exceeding one-half of his current pay, as a court-martial may deem sufficient for repairing the loss or damage, and shall be punished by confinement or such other corporal punishment as the court may direct.

ART. 19. Any officer who uses contemptuous or disrespectful words against the President, the Vice President, the Congress of the United States, or the chief magistrate or legislature of any of the United States in which he is quartered, shall be dismissed from the service, or otherwise

punished, as a court-martial may direct. Any soldier who so offends shall be punished as a court-martial may direct.

ART. 20. Any officer or soldier who behaves himself with disrespect toward his commanding officer shall be punished as a court-martial may direct.

ART. 21. Any officer or soldier who, on any pretense whatsoever, strikes his superior officer, or draws or lifts up any weapon, or offers any violence against him, being in the execution of his office, or disobeys any lawful command of his superior officer, shall suffer death, or such other punishment as a court-martial may direct.

ART. 22. Any officer or soldier who begins, excites, causes or joins in any mutiny or sedition, in any troop, battery, company, party, post, detachment or guard shall suffer death, or such other punishment as a court-martial may direct.

ART. 23. Any officer or soldier who, being present at any mutiny or sedition, does not use his utmost endeavor to suppress the same, or having knowledge of any intended mutiny or sedition, does not, without delay, give information thereof to his commanding officer, shall suffer death, or such other punishment as a court-martial may direct.

ART. 24. All officers, of what condition soever, have power to part and quell all quarrels, frays and disorders, whether among persons belonging to his [1] own or to another

[1] *Sic* in Rev. Stat.

corps, regiment, troop, battery or company, and to order officers into arrest, and non-commissioned officers and soldiers into confinement, who take part in the same, until their proper superior officer is acquainted therewith. And whosoever, being so ordered, refuses to obey such officer or non-commissioned officer, or draws a weapon upon him, shall be punished as a court-martial may direct.

ART. 26. No officer or soldier shall send a challenge to another officer or soldier to fight a duel, or accept a challenge so sent. Any officer who so offends shall be dismissed from the service. Any soldier who so offends shall suffer such (*corporal*) punishment as a court-martial may direct.

ART. 27. Any officer or non-commissioned officer, commanding a guard, who, knowingly and willingly suffers any person to go forth and fight a duel, shall be punished as a challenger; and all seconds or promoters of duels, and carriers of challenges to fight duels, shall be deemed principals, and punished accordingly. It shall be the duty of any officer commanding an army, regiment, troop, battery, company, post or detachment, who knows, or has reason to believe, that a challenge has been given or accepted by any officer or enlisted man under his command, immediately to arrest the offender and bring him to trial.

ART. 28. Any officer or soldier who upbraids another officer or soldier for refusing a challenge shall himself be

punished as a challenger; and all officers and soldiers are hereby discharged from any disgrace or opinion of disadvantage which might arise from their having refused to accept challenges, as they will only have acted in obedience to the law, and done their duty as good soldiers, who subject themselves to discipline.

ART. 30. Any soldier who thinks himself wronged by any officer may complain to the commanding officer of his regiment, who shall summon a regimental court-martial for the doing of justice to the complainant. Either party may appeal from such regimental court-martial to a general court-martial; but if, upon such second hearing, the appeal appears to be groundless and vexatious, the party appealing shall be punished at the discretion of said general court-martial.

ART. 31. Any officer or soldier who lies out of his quarters, garrison or camp, without leave from his superior officer, shall be punished as a court-martial may direct.

ART. 32. Any soldier who absents himself from his troop, battery, company or detachment, without leave from his commanding officer, shall be punished as a court-martial may direct.

ART. 33. Any officer or soldier who fails, except when prevented by sickness or other necessity, to repair, at the fixed time, to the place of parade, exercise or other rendezvous appointed by his commanding officer, or goes from the

same, without leave from his commanding officer, before he is dismissed or relieved, shall be punished as a court-martial may direct.

ART. 34. Any soldier who is found one mile from camp, without leave in writing from his commanding officer, shall be punished as a court-martial may direct.

ART. 35. Any soldier who fails to retire to his quarters or tent at the beating of retreat, shall be punished according to the nature of his offense.

ART. 36. No soldier belonging to any regiment, troop, battery or company shall hire another to do his duty for him, or be excused from duty, except in cases of sickness, disability or leave of absence. Every such soldier found guilty of hiring his duty, and the person so hired to do another's duty, shall be punished as a court-martial may direct.

ART. 37. Every non-commissioned officer who connives at such hiring of duty shall be reduced. Every officer who knows and allows such practices shall be punished as a court-martial may direct.

ART. 38. Any officer who is found drunk on his guard, party or other duty, shall be dismissed from the service. Any soldier who so offends shall suffer such (*corporal*) punishment as a court-martial may direct. [No court-martial shall sentence any soldier to be branded, marked or tattooed.]

ART. 39. Any sentinel who is found sleeping upon his post, or who leaves it before he is regularly relieved, shall suffer death, or such other punishment as a court-martial may direct.

ART. 40. Any officer or soldier who quits his guard, platoon or division, without leave from his superior officer, except in a case of urgent necessity, shall be punished as a court-martial may direct.

ART. 42. Any officer or soldier who misbehaves himself before the enemy, runs away, or shamefully abandons any fort, post or guard, which he is commanded to defend, or speak words inducing others to do the like, or casts away his arms or ammunition, or quits his post or colors to plunder or pillage, shall suffer death, or such other punishment as a court-martial may direct.

ART. 43. If any commander of any garrison, fortress or post is compelled, by the officers and soldiers under his command, to give up to the enemy or to abandon it, the officers or soldiers so offending shall suffer death, or such other punishment as a court-martial may direct.

ART. 44. Any person belonging to the armies of the United States who makes known the watchword to any person not entitled to receive it, according to the rules and discipline of war, or presumes to give a parole or watchword different from that which he received, shall suffer death, or such other punishment as a court-martial may direct.

ART. 45. Whosoever relieves the enemy with money, victuals or ammunition, or knowingly harbors or protects an enemy, shall suffer death, or such other punishment as a court-martial may direct.

ART. 46. Whosoever holds correspondence with, or gives intelligence to, the enemy, either directly or indirectly, shall suffer death, or such other punishment as a court-martial may direct.

ART. 47. Any officer or soldier who, having received pay, or having been duly enlisted in the service of the United States, deserts the same, shall, in time of war, suffer death, or such other punishment as a court-martial may direct; and in time of peace, any punishment, excepting death, which a court martial may direct.

ART. 48. Every soldier who deserts the service of the United States shall be liable to serve for such period as shall, with the time he may have served previous to his desertion, amount to the full term of his enlistment; and such soldier shall be tried by a court-martial and punished, although the term of his enlistment may have elasped previous to his being apprehended and tried.

ART. 50. No non-commissioned officer or soldier shall enlist himself in any other regiment, troop or company without a regular discharge from the regiment, troop or company in which he last served, on a penalty of being reputed a deserter, and suffering accordingly. And in case

any officer shall knowingly receive and entertain such non-commissioned officer or soldier, or shall not, after his being discovered to be a deserter, immediately confine him and give notice thereof to the corps in which he last served, the said officer shall, by a court-martial, be cashiered.

ART. 51. Any officer or soldier who advises or persuades any other officer or soldier to desert the service of the United States, shall, in time of war, suffer death, or such other punishment as a court-martial may direct; and in time of peace, any punishment, excepting death, which a court-martial may direct.

ART. 55. All officers and soldiers are to behave themselves orderly in quarters and on the march; and whoever commits any waste or spoil, either in walks or trees, parks, warrens, fish ponds, houses, gardens, grain fields, inclosures or meadows, or maliciously destroys any property whatsoever belonging to inhabitants of the United States (unless by order of a general officer commanding a separate army in the field), shall, besides such penalties as he may be liable to by law, be punished as a court-martial may direct.

ART. 56. Any officer or soldier who does violence to any person bringing provisions or other necessaries to the camp, garrison or quarters of the forces of the United States in foreign parts, shall suffer death, or such other punishment as a court-martial may direct.

ART. 57. Whosoever, belonging to the armies of the United States in foreign parts, or at any place within the United States or their territories, during rebellion against the supreme authority of the United States, forces a safeguard, shall suffer death.

ART. 58. In time of war, insurrection or rebellion, larceny, robbery, burglary, arson, mayhem, manslaughter, murder, assault and battery with an intent to kill, wounding, by shooting or stabbing, with an intent to commit murder, rape or assault and battery with an intent to commit rape, shall be punishable by the sentence of a general court-martial, when committed by persons in the military service of the United States, and the punishment in any such case shall not be less than the punishment provided, for the like offense, by the laws of the State, Territory or District in which such offense may have been committed.

ART. 60. Any person in the military service of the United States who makes, or causes to be made, any claim against the United States, or any officer thereof, knowing such claim to be false or fraudulent; or,

Who presents, or causes to be presented, to any person in the civil or military service thereof, for approval or payment, any claim against the United States or any officer thereof, knowing such claim to be false or fraudulent; or,

Who enters into any agreement or conspiracy to defraud the United States by obtaining, or aiding others to obtain, the allowance or payment of any false or fraudulent claim; or,

Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance or payment of any claim against the United States or against any officer thereof, makes or uses, or procures or advises the making or use of, any writing or other paper, knowing the same to contain any false or fraudulent statement; or,

Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance or payment of any claim against the United States or any officer thereof, makes, or procures or advises the making of, any oath to any fact or to any writing or other paper, knowing such oath to be false; or,

Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance or payment of any claim against the United States or any officer thereof, forges or counterfeits, or procures or advises the forging or counterfeiting of, any signature upon any writing or other paper, or uses, or procures or advises the use of, any such signature, knowing the same to be forged or counterfeited; or,

Who having charge, possession, custody or control of any money or other property of the United States, furnished or intended for the military service thereof, knowingly delivers, or causes to be delivered, to any person having authority to receive the same, any amount thereof less than that for which he receives a certificate or receipt; or,

Who, being authorized to make or deliver any paper certifying the receipt of any property of the United States,

furnished or intended for the military service thereof, makes, or delivers to any person, such writing, without having full knowledge of the truth of the statements therein contained, and with intent to defraud the United States; or,

Who steals, embezzles, knowingly and willfully misappropriates, applies to his own use or benefit, or wrongfully or knowingly sells or disposes of any ordnance, arms, equipments, ammunition, clothing, subsistence stores, money or other property of the United States, furnished or intended for the military service thereof; or,

Who knowingly purchases, or receives in pledge for any obligation or indebtedness, from any soldier, officer or other person who is a part of or employed in said forces or service, any ordnance, arms, equipments, ammunition, clothing, subsistence stores, or other property of the United States, such soldier, officer or other person not having lawful right to sell or pledge the same,

Shall, on conviction thereof, be punished by fine or imprisonment or by such other punishment as a court-martial may adjudge. And if any person, being guilty of any of the offenses aforesaid, while in the military service of the United States, receives his discharge, or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial, in the same manner and to the same extent as if he had not received such discharge nor been dismissed.

ART. 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 such court.

SEC. 1343. All persons who, in time of war, or of rebellion against the supreme authority of the United States, shall be found lurking or acting as spies, in or about any of the fortifications, posts, quarters or encampments of any of the armies of the United States, or elsewhere, shall be triable by a general court-martial, or by a military commission, and shall, on conviction thereof, suffer death.

FORMS FOR CHARGES.

Charge and specification preferred against Private A..... B....., Co....., ...U. S. Infantry.

Charge: "Selling clothing,[1] in violation of the 17th Article of War."

Specification: "That Private A.....B....., Co....., ...U. S. Infantry, did sell the following articles of his clothing, viz.: One (1) forage cap, value $.....; one (1) overcoat, made, value $.....; and one (1) blanket, woolen, value $....., total value of articles sold, $.....

"This at....., on the.....of....., 18...."

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

Captain.....Infantry.

Officer preferring charge.

Witnesses:

1st Sergeant E..... F....., Co....., ...Infantry.

Private G..... H....., Troop....., ...Cavalry.

Mr. I..... K....., Citizen.

or,

"Losing accoutrements, in violation of the 17th Article of War."

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1 See Op. Actg. Judge Adv. Genl., page 20.

Specification: "That.....did, through neglect, lose the following of his accoutrements, viz.: One (1)....., value $....., and one (1)....., value $....., total value of articles lost, $.....

"This at, etc."

If both clothing and accoutrements have been sold or lost, separate specifications should be made out for each; as the action of a court, if the accused is convicted, differs in case of clothing from that in case of articles of equipment.[2]

If any of the clothing lost or sold was *Government property*, issued to the soldier for *temporary use*, such as a buffalo overcoat, fur cap or gauntlets, a separate specification should be made out for these articles.

If a soldier is known to have unlawfully disposed of his clothing or accoutrements in a way not mentioned in the 17th article, the charge should be laid under the 62d article.

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Charge: "Disobedience of orders, in violation of the 21st Article of War."

Specification: "That Private A..... B....., Co....., ... U. S. Infantry, having received a lawful command from

2 See note, page 57.

his superior officer, 2d Lieutenant C..... D....., ... Infantry, to (*insert order*), did disobey said order.

"This at....., on the.....day of....., 18....."

or,

"Striking his superior officer, in violation of the 21st Article of War."

Specification: "That Private A..... B....., Co.....,..... U. S. Infantry, did strike his superior officer, 2d Lieutenant C..... D....., Co....., ...Infantry, the said Lieutenant being in the execution of his office, with.....

"This at....., on the.....day of....., 18....."

"A non-compliance by a soldier with an order emanating from a non-commissioned officer, is not an offense under this article, but one to be charged, in general, under the 62d." (Win. Dig., p. 9.) For form, see page 100.

"A simple neglect to comply with a standing order is an offense under the 62d Article of War, and not under the 21st, which implies a willful defiance of authority." (Op. Actg. J. A. G., June 26, 1891.)

Charge: "Absence without leave, in violation of the 32d Article of War."

Specification: "That Private A..... B....., Co....., ... U. S. Infantry, did absent himself from his company, without leave from his commanding officer, from....., on the ..... of ..... 18....., until....., on the..... of ....., 18.....

"This at ....."

Charge: "Absence from parade, in violation of the 33d Article of War."

Specification: "That Private A..... B....., Co....., ... U. S. Infantry, not being prevented by sickness or other necessity, did fail to repair, at the time fixed, to the place appointed by his commanding officer for parade.

"This at..... on the.....of.....,18....."

Charge: "Drunkenness on duty, in violation of the 38th Article of War."

Specification: "That Private A..... B....., Co....., ... U. S. Infantry, while on stable guard, was found drunk.

"This at....., about..... on the..... of....., 18....."

or,

"That Private A..... B....., Co....., ...U. S. Infantry, while at drill, was found drunk.

"This at, etc."

Charge: "Sleeping on post, in violation of the 39th Article of War."

Specification: "That Private A..... B....., Co....., ... U. S. Infantry, while a sentinel, was found sleeping on his post.

"This at ...., about ..... on the ..... of ....., 18..."

or,

"Leaving post, in violation of the 39th Article of War."

Specification: "That Private A..... B....., Co..... , ... U. S. Infantry, while a sentinel, did leave his post before he was regularly relieved.

"This at, etc."

Charge: "Quitting guard, in violation of the 40th Article of War."

Specification: "That Private A..... B....., Co....., ... U. S. Infantry, did, without urgent necessity, quit his guard without leave from his superior officer.

"This at ...., about ..... on the ..... of ....., 18..."

Charge: "Desertion, in violation of the 47th Article of War."

Specification: "That Private A..... B....., Co....., ... U. S. Infantry, a soldier in the service of the United States, did desert the same at..... ....., on or about the ..... of ....., 18..., and did remain absent in desertion until he was apprehended (or until he surrendered himself), at ....., on or about the ..... 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 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 ....., ... U. S. Cavalry, without a regular discharge from the said Company ....., ... U. S. 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 1st: "That Private ...., Co. ....., ... U. S. Infantry, a 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 at ....., on the ..... of ....., 18..."

Specification 2d: "That Private ...., Co. ....., ... U. S. Infantry, having deserted and enlisted again under the name of ...., in Troop ....., ... U. S. 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..."

"Enlisting without having received a discharge can be laid under the 62d article, as 'Fraudulent enlistment, to the prejudice of good order and military discipline.'" (Op. Actg. J. A. G., June 26, 1891.)

Charge: "Theft, in violation of the 60th Article of War."

Specification: "That Private A..... B....., Co....., ... U. S. Infantry, did steal....., valued $....., the property of the United States, and intended for the military service thereof.

"This at ....., on the ..... of ....., 18..."

VIOLATIONS OF THE 62D ARTICLE OF WAR.

Charge: "Neglect of duty, to the prejudice of good order and military discipline."

Specification: "That Private A..... B....., Co....., ... U. S. Infantry, while on ....., did neglect to .....
"This at ....., on the ..... of ....., 18..."

Charge: "Drunk and disorderly, to the prejudice of good order and military discipline."

Specification: "That Private A..... B....., Co....., ... U. S. Infantry, was drunk and disorderly in..... .....
"This at ....., about ..... on the ..... of ....., 18..."

Charge: "Conduct to the prejudice of good order and military discipline."

Specification: "That Private A..... B....., Co....., ... U. S. Infantry, having received an order from 1st Sergeant C ..... D.....,Co....., ... U. S. Infantry, the said Sergeant being in the execution of his office, to (*insert order*) did disobey said order.
"This at ....., on the ..... of ....., 18..."

Charge: "Assault, to the prejudice of good order and military discipline."

Specification: "That Private A..... B..... , Co....., ... U. S. Infantry, did assault Sergeant ....., Co ....., ... U. S. Infantry, by shaking his fist in the said Sergeant's face in a menacing and threatening manner.

"This at ....., on the ..... of ....., 18..."

Charge: "Assault and battery, to the prejudice of good order and military discipline."

Specification: "That Private A..... B....., Co....., ... U. S. Infantry, did assault and beat, with his fist, Sergeant ....., Co....., ... U. S. Infantry.

"This at ....., on the ..... of .. .., 18..."

Charge: "Felonious assault, to the prejudice of good order and military discipline."

Specification: "That Private A..... B....., Co....., ... U. S. Infantry, did feloniously assault Sergeant ....., Co....., ... U. S. Infantry, by stabbing him with a knife, with intent to kill."

Or,

"To do him serious bodily harm."

"This at ..... on the ..... of ....., 18..."

Charge: "Burglary, to the prejudice of good order and military discipline."

Specification: "That Private A..... B....., Co....., ... Infantry, did break into and enter, at night, the quarters of 1st Lieut. C..... D....., ... U. S. Cavalry, with intent to commit a felony.

"This at....., about ..... o'clock ... M., on the ..... day of ..... 18..."

Charge: "Theft, to the prejudice of good order and military discipline."

Specification: "That Private A..... B....., Co....., ... U. S Infantry, did take, steal and carry away..... valued at.....dollars ($.....), the property of Corporal....., Co....., ...U. S. Infantry.

"This at ..... on the ..... of ....., 18..."

Charge: "Perjury, to the prejudice of good order and military discipline."

Specification: "That Private A..... B....., Co ....., ... U. S. Infantry, having been duly sworn, at his own request, as a witness in his own defense before a .....

court-martial, did testify, in a matter material to the issue, as follows:

"Question by judge advocate .....

"Answer .....

"Which testimony was known by him to be false and wilfully given with intent to deceive the said court.

"This at ....., on the ..... of ....., 18..."

"* * * Wharton says (Criminal Law, sec. 1259), 'Perjury before courts-martial is by statute made indictable in most jurisdictions; but even when a statute does not apply, the weight of authority is that it is perjury at common law.' It is a statutory crime under section 5392 Revised Statutes of the United States. So that false swearing before a court-martial, if it possesses the other elements of perjury, is perjury, and can be tried as such by court-martial under the 62d Article of War. The rules of evidence in regard to perjury will then apply. When any of the elements of perjury are lacking the offense will properly be charged as 'false swearing'" [*e. g.*, when the matter is *not* material to the issue]. (Op. Actg. J. A.G., June 26, 1891.)

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 DAKOTA.

ST. PAUL, MINN., ..., 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....., 5th Cavalry.
Captain....., 2d Artillery.
Captain....., assistant surgeon.

1st Lieutenant..... ....., 10th Infantry.
1st Lieutenant....., 5th Cavalry.
2d Lieutenant..... ....., 2d Artillery.
2d Lieutenant..... ....., 10th Infantry.
1st Lieutenant... ....., 5th Cavalry, judge advocate. [1]

(*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 the detail, received before the court assembled, should be here inserted.*)

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

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

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[1] See "Judge Advocate," page 9.

PRESENT.[1]

Major....., 5th Cavalry.
Captain....., assistant surgeon.
1st Lieutenant....., 10th Infantry.
1st Lieutenant....., 5th Cavalry.
2d Lieutenant....., 2d Artillery.
1st Lieutenant....., 5th Cavalry, judge advocate.

ABSENT.

Captain....., 2d Artillery.
2d Lieutenant....., 10th Infantry.

(*If the cause of absence is known, it should be recorded; if unknown, this should be stated.*[2])

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[1] In the record of the proceedings of a court-martial at its organization for the trial of a case, the officers detailed as members and judge advocate will be noted by name as present or absent. In the record of the proceedings of subsequent sessions the following form of words will be used, subject to such modifications as the facts may require: "Present, all the members of the court and the judge advocate." When the absence of an officer who has not qualified, or who has been relieved or excused as a member, has been accounted for, no further note will be made of it. (Cir. 5, A. G. O. 1891.)

[2] It is the duty of the judge advocate to ascertain, if possible, the cause of absence. If a member is absent by order, the number and date of order should be given; if absent sick, a surgeon's certificate, furnished by absent member, should be appended.

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.....
....., Battery....., ...Artillery, who was brought before the court, and having heard the order convening it read, stated that he did not desire counsel; (*or*) requested permission to introduce.....as his counsel; the court assenting, the counsel took his seat.[1]

(*If the judge advocate has authority to employ a reporter,*[2] *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 reporter for the court; which request having been granted,..... was duly sworn[3] 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;[4] to which he replied in the negative; (*or*) that he objected to ..... on the following grounds:

(*In latter case insert objections.*)

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[1] See "Counsel," page 12; also, 1 Win. Law, page 220.
[2] See "Reporter," page 12.
[3] See "Oaths," page 15.
[4] See "Challenge," page 14.

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*,[1] ..... was then duly sworn by the judge advocate, and testified as follows:[2]

(*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 correct; (*or*) corrected as follows:[3]

(*Insert corrections, if any.*)

The court was then cleared and closed.[4]

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

---

[1] For oath see page 17.

[2] The form of examination should be similar to that given for witness for the defense; the accused should first ask his questions, and then the judge advocate and court, such as they may deem pertinent.

[3] See note 2, page 114.

[4] Before the court is closed, the accused should be fully heard; and while the court is closed, the judge advocate should refrain from making any argument upon the question to be decided.

After due deliberation the court was opened and the challenged member, the accused, his counsel and the reporter having resumed their seats, the president [1] 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, [2] named in the detail; to which he replied in the negative. The court and the judge advocate were thereupon duly sworn [3] in presence of the accused.

(*If an interpreter is required, he should now be sworn.*)

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

The accused was then duly arraigned upon the following charges and specifications:[4]

CHARGE I.— ....

.....

---

[1] See "President," page 9.

[2] Only one member at a time can be challenged, and a record of the proceedings in each case must be made.

[3] See "Oaths," page 15.

[4] See "Charges and Specifications," page 17.

Specification 1st.— .....

Specification 2d.— .....

CHARGE II.— .....

.....

To which the accused pleaded[1] as follows:

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

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

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

To the 1st specification, 2d charge, etc., etc.

Sergeant Jones, a witness for the prosecution, was duly sworn[2] and testified as follows:

DIRECT EXAMINATION.[3]

Questions by the judge advocate:

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

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

---

[1] See "Pleas," page 24.

[2] See "Oaths," page 16.

[3] See "Examination of Witnesses," page 41.

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

Answer. I do; Private ...., Battery ....., ... Artillery.

(*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.....

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

The accused declined to cross-examine the witness.

RE-EXAMINATION.

Questions by the judge advocate:

Question.....

Answer.....

EXAMINATION BY THE COURT.

Question.....

Answer.....

Question by a member:[1]

To this question, the accused (or party objecting) objected as follows:

(*Insert objection.*)

To which the member asking question, replied:

(*Insert reply.*)

The court was then cleared and closed, and, after due deliberation, re-opened; the accused, his counsel, and the reporter having thereupon resumed their seats, the president announced that the objection was (*or*) was not, sustained.

(*In the latter case, the record should continue:*)

The question was then repeated by the judge advocate.

Answer.....

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

---

[1]If a question, put by a member, is objected to and the objection is sustained, it should be *recorded as a question by a member*, and *not* answered; if the objection is not sustained, it should be *recorded as a question by the court*, repeated by the judge advocate, and *must* be answered. (Ives, p. 132.) If a question is objected to by anyone, at any time during the trial, the above method of recording the action of the court should be followed.

The testimony of the witness was then read to him, and by him pronounced correct; (*or*) corrected as follows:[1]

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

(*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.[2]

Fort.....

....., 18...

---

[1] 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. For the sake of brevity, if a number of witnesses are examined and no corrections found necessary, a single remark, at close of examination of witnesses, that the testimony of each witness was read to him and by him pronounced correct, will be sufficient.

[2] The daily record is usually subscribed by the judge advocate; but this is not necessary. (Win. Dig., p. 103.)

The court met, pursuant to adjournment, at...o'clock...M.

PRESENT:[1]

All the members of the court and the judge advocate.

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

The proceedings of.....were then read[2] and approved; (*or*) corrected as follows:

(*Enumerate corrections, if any, giving page and line on which they occur.*[3])

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

DIRECT EXAMINATION.

Question by the judge advocate:[4] What is your name, rank, company, regiment and station?

Answer.....

---

[1] See note 1, page 107.

[2] 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.)

[3] The record should, as far as practicable, be free from alterations and interlineations. (Par. 1038 A. R.) If corrections are *necessary*, a marginal note, signed by the judge advocate, should show that they were authorized by the court.

[4] Though this is a witness for the defense, the judge advocate usually, and properly, asks the two preliminary questions establishing identity of witness and his recognition of accused.

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

Answer.....

Questions by the accused:

Question.....

Answer.....

(*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,*[1] *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:*[2])

The accused declined to be sworn in his own behalf.

---

[1] See "Competency of Witnesses," page 39.

[2] See page 10.

(*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;"[1] (*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.

---

[1] 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."[1]

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 ....., Battery....., ... Artillery:[2]

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....."

---

[1]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.

[2]See "Finding," page 50.

(*If evidence of previous trials*[1] *accompanies the charges, the record should continue:*)

The court was then re-opened, and the accused, his counsel and the reporter having resumed their seats, the judge advocate read the evidence of 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 evidence (*or*) stated as follows:

(*Insert statement, if any.*)

The court was then cleared and closed, and, having maturely considered the case, does therefore sentence[2] him, Private ....., ... Battery ..... Artillery, * * * (*or*) does therefore acquit him, Private ....., ... Battery ..... Artillery.

A..... B.....,[3]
Major.....,
President.

C..... D.....,
1*st Lieut*.....,
Judge Advocate.

---

[1] See "Previous Convictions," page 52.
[2] See "Punishment," page 53.
[3] See "Authentication of Proceedings," page 69.

(*Unless the court is authorized to sit without regard to hours, the record should state the hours of adjournment, as follows:*)

The court then, at ....M., adjourned until .... M., the ..... inst.; (*or*) to meet at the call of the president.

(*Or, on completion of the trial of the last case before the court:*)

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

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

C..... D.....,
1*st Lieut*.....,
Judge Advocate.

(*At least two blank pages should be left after the adjournment for the decision and orders of the reviewing authority.*[1])

[1] See "Adjournment and Remarks of Reviewing Authority," page 70.

(*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 indorsed on the first* (*par.* 1039 *A.R., as amended by G. O.* 82, *A. G. O.* 1891), *as follows:*

.....

Private, Company.....

Trial by general court-martial

at.....;

commencing.....189...;

ending.....189....

President,

Colonel .....

.....

Judge Advocate,

Captain .....

.....

RECAPITULATION.

Special facts to be shown in record.

1. All orders relating to detail should be recorded.
2. The place and hour of meeting, stated.
3. Names of members and judge advocate, present, recorded.
4. Absentees noted and cause of absence stated.
5. Accused present—name correctly recorded throughout proceeding.
6. If accused does not desire counsel, stated.
7. If reporter is employed, duly sworn.
8. Full right of challenge allowed accused.
9. If court is cleared, accused present on re-opening.
10. The court and judge advocate duly sworn.
11. Accused arraigned.
12. Charges correctly copied.
13. Pleas recorded, in full.
14. If interpreter is employed, duly sworn.
15. Witnesses duly sworn.
16. Testimony read witnesses for correction.
17. Prosecution rests.
18. Court adjourned, hour recorded.
19. Court met, hour stated.
20. Presence of members and judge advocate recorded.
21. Absence of members, heretofore present, noted.

22. Accused present.
23. Record previous day read.
24. Accused sworn *at his own request*, or declined to be sworn.
25. Statement of accused.
26. Remarks of judge advocate.
27. Court cleared.
28. Findings recorded.
29. Court reopened, accused present, previous convictions read.
30. Remarks of accused.
31. Court cleared.
32. Sentence recorded.[1]
33. Signatures of president and judge advocate.
34. Adjournment signed, hour stated.
35. Proceedings indorsed.

REMARKS ON THE RECORD.

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

[1] See that limit of punishment is not exceeded.

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. (Par. 1037 A. R.)

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. (Win. Dig. (*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.)

It should appear of record that the plea of "Guilty" to a charge of desertion is understood by the prisoner as an acknowledgment 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. (See G. O. 91, A. G. O. 1881.)

"The statement referred to in paragraph 1015 of the Regulations, which does not call for a general character of the soldier, is intended simply for the information of the convening authority; it should not be introduced in evidence, nor made a part of the record of the trial." (Cir. 13, A. G. O. 1890.)

"This statement will be returned to the convening authority with the record of the trial." (See par. 1015 A. R.)

"The use of a 'typewriter' in writing out sentences of courts-martial is disapproved." (Cir. 12, A. G. O. 1883.)

"A recommendation to clemency will not be embraced in the body of the sentence. Only those members who concur in the recommendation will sign it." (Par. 1040 A. R.) It should be appended to the record after any exhibits referred to in the proceedings.

"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 decisions and orders thereon." (Par. 1041 A. R.)

REVISION OF RECORD.

"When the record of a court-martial exhibits error in preparation, or seemingly erroneous conclusions on the part of the court, the reviewing authority may reconvene it for a reconsideration of its action, with suggestions for its guidance. The court may thereupon, should it concur in the views submitted, proceed, by amendment, to remedy the errors pointed out, and may modify or completely change its findings. A reopening of the case, by calling or recalling witnesses, is illegal." (Par. 1043 A. R.)

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

REVISION.

Fort....,

...., 18...

The court reconvened, with closed doors, pursuant to the following order, or instructions, at ..... o'clock ... M.

(*Insert copy of order or instructions.*)

PRESENT.[1]

.....

[1] If the findings 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.)

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.[1]

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

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

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

---

[1]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.) If omissions in the record are to be supplied, the page and line on which they occur should be stated and the corrections given in full. The original record should not be interlined, nor altered in any way.

FORM FOR RECORD

OF A

GARRISON COURT-MARTIAL.[1]

CASE NO.....

Proceedings of a garrison court-martial convened at ....., pursuant to the following order:

Fort.....,

.....18....

ORDERS
No... }

Under the provisions of the summary court act, 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 Private ....,

[1] 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.

Company ....., ... Infantry, he having objected to trial by summary court and requested trial by garrison court-martial.[1]

Detail for the Court.

Captain.....
1st Lieutenant.....
2d Lieutenant .....
2d Lieutenant ....., judge advocate.

By order of.....
(Signed).....,
1*st Lieutenant*.....,
Post Adjutant.

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

The court met, pursuant to the foregoing order, at..... o'clock.....M.[2]

PRESENT.

Captain.....
1st Lieutenant.....
2d Lieutenant.....
2d Lieutenant....., judge advocate.

---

[1] See page 72.

[2] If the order contains the sentence, "The court may sit without regard to hours," the hours 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 court and the judge advocate were thereupon duly sworn[1] in the presence of the accused, who was then duly arraigned upon the following charge and specification:

CHARGE. ....

Specification .....

To which the prisoner pleaded:

To the Specification—"Guilty."

To the Charge—"Guilty."

The judge advocate announced that the prosecution here rested.

The prisoner stated that he had no testimony to offer or statement to make.

---

1 See "Oaths," page 15.

The court was then cleared and closed and after due deliberation finds the prisoner, Private....., Company....., ...Infantry:

Of the Specification—"Guilty."

Of the Charge—"Guilty."

And the court does therefore sentence him, Private..... .....Company..... .....Infantry, etc.

A.....B.....,
Captain.....,
President.

C.....D.....,
2d *Lieutenant*.....,
Judge Advocate.

(*A sine die adjournment should be added to the last case before the court; and the record of each case folded and indorsed in same manner as that for a general court-martial.*)[1]

REMARKS ON THE RECORD OF A GARRISON COURT.

The decision and orders of the post commander properly dated and over his official signature, should follow immediately after the sentence, *adjournment*, or other final proceeding of the court in the case.

"The complete proceedings of garrison and regimental courts-martial will be transmitted without delay, by the post or regimental commanders, to the department headquarters for file." (Par. 1042 A. R.)

[1] See page 121.

FORM FOR RECORD

OF A

SUMMARY COURT.

The following form for the "summary court record" book has been adopted, and will be furnished by the adjutant general of the army, with blank forms of reports required to be made monthly to department headquarters:

SUMMARY COURT RECORD.[1]

No.	Name, Rank, Company and Regiment.	Charges and Specifications.	Names of Witnesses.	When Arrested.	When Arraigned.	Plea.	Finding.[2]	Sentence[3] with Signature of Trial Officer.	Action of Commanding Officer, with Date and Signature.

(G. O. 137, A. G. O. 1890.)

[1] For procedure, see page 77.
[2] See next page.
[3] See "Punishment," page 53, and "Forms for Sentences," page 135.

REMARKS ON RECORD OF A SUMMARY COURT.

"There shall be a summary court record book or docket kept at each military post, and in the field at the headquarters of the command, in which shall be entered a record of all cases heard and determined and the action had thereon." (Act Estab.)

"Whenever, in determining on its sentence, a summary court shall take into consideration previous convictions, a note of the number of such previous convictions will be made on the summary court record." (Cir. 5, A. G. O. 1891.)

FORMS FOR SENTENCES.

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."

Detention of Pay: * * * "to have..... ( ) dollars of his pay detained until his discharge."

"By the phrase 'detained pay' (* * *) is meant such amounts of the pay of enlisted men as, *by sentence of court-martial*, are to be withheld until the soldier's discharge." (Cir. 3, A. G. O. 1891.)

Confinement and forfeiture: * * * "to be confined at hard labor, under charge of the post guard, for..... ( ) months, and to forfeit..... ( ) dollars per month[1] for the same period."

Confinement and detention of pay: * * * "to be confined at hard labor, under charge of the post guard, for ..... ( ) months, and to have..... ( ) dollars per month for the same period detained until his discharge."

Confinement, forfeiture and detention of pay: * * * "to be confined at hard labor, under charge of the post guard, for..... ( ) months; to forfeit..... ( ) dollars per month for..... ( ) months, and to have..... ( ) dollars per month for ..... ( ) months detained until his discharge."

Under the 17th Article of War, in accordance with footnote to G. O. 21, A. G. O. 1891, published on page 57.

(*Confirmation of charge on clothing account and confinement:*)

"And the court therefore confirms the charge of..... dollars and ..... cents ($.....), already made against him, Private ....., on his clothing account for the articles sold (or lost), and sentences him to be confined, etc."

---

[1] During the first year of enlistment, $4 per month of a soldier's pay is retained. (Act June 16, 1890; see G. O. 68, A. G. O. 1890.)

The charge confirmed should embrace only those articles which the soldier is convicted of selling or losing. If the soldier is found not guilty of selling or losing clothing, no reference to the charge on clothing account need be made by the court.

If the clothing sold or lost was *Government property*, that had been issued to the soldier for *temporary use*, such as a buffalo overcoat, a fur cap or gauntlets; or, if the soldier is convicted of selling or losing his arms, accoutrements, etc., the sentence should read:

"And the court therefore sentences him 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 ..... [articles other than *clothing owned by the soldier*], sold (or lost) by him, and to be confined, etc."

If a soldier is convicted of selling or losing both clothing and accoutrements, the sentence should read:

"And the court therefore confirms the charge of ..... dollars and ..... cents ($.....), made against him, Private....., on his clothing account, for the clothing sold (or lost), and sentences him to suffer a stoppage of .....dollars and ..... cents ($.....) from his pay until he shall have reimbursed the United States the sum of ..... dollars and ..... cents ($.....), the total money value of the ac-

coutrements sold (or lost) by him, and to be confined at hard labor, under charge of the post guard, for ....."

The monthly stoppage must not exceed one-half the prisoner's current pay. (See 17th A. W., page 81.) If a prisoner is sentenced to dishonorable discharge, a "stoppage" should not be mentioned in the sentence.

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 proper authority may direct, for ..... ( ) years."

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.

If the period of confinement is less than one year, such a sentence should read: " * * * at hard labor, under charge of the post guard, for ..... ( ) months." (See par. 557 A. R.)

"When the sentence of a court-martial prescribes imprisonment, the court will state therein whether the prisoner shall be confined in a penitentiary[1] 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.)

---

[1] 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 confinement of prisoners under sentence of courts-martial in a penitentiary within the department, the department commander is directed by paragraph 1023 A. R., to forward the record to the Judge Advocate General for the action of the Secretary of War.

GENERAL FORMS.

SUMMONS FOR A MILITARY WITNESS.

(See Ives, p. 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.

C..... ..... D.....,

.....,

Judge Advocate.

SUBPŒNA FOR CIVILIAN WITNESS.

UNITED STATES

vs.

..... } *Subpœna.*

.....

The President of the United States, to ....., *Greeting:*

You are hereby summoned and required to be and appear in person, on the..... day of....., 18....., at..... o'clock.....M., before a general court-martial of the United States, convened at..... ....., by Special Orders, No....., Headquarters..... .....dated....., 18....., then and there to testify and give evidence as a witness for the..... ....., in the above named case. And have you then and there this precept.

Dated at....., this.....day of.....,18.....

....

Judge Advocate of the Court-Martial.

(From Office Judge Adv. Genl.)

SUBPŒNA DUCES TECUM.

CIVILIAN WITNESS.

UNITED STATES
vs.
.....
.....
Subpœna.

The President of the United States, to....., *Greeting:*

You are hereby summoned and required to be and appear in person, on the.....day of....., 18....., at.....o'clock ... M., before a general court-martial of the United States, convened at.....by Special Orders, No....., Headquarters....., dated....., 18....., then and there to testify and give evidence as a witness for the.....in the above named case; and you are hereby required to bring with you, to be used in evidence in said case, the following described documents, to-wit:.....
.....
.....
.....

And have you then and there this precept.

Dated at.....,this.....day of....., 18.....

.....,
Judge Advocate of the Court-Martial.

(From Office Judge Adv. Genl.)

(*Back of forms of preceding writs.*)

SUBPŒNA DUCES TECUM.

CIVILIAN WITNESS.

UNITED STATES

vs.

.....

.....

....., 18.....

I certify that I made the service of the within subpœna on....., the witness named therein, by personally delivering to him in person a duplicate of the same at....., on the.....day of....., 18.....

.....

..... } *ss.*
.....

.....

being duly sworn, on his oath states that the foregoing certificate is true. .....,

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

.....

(" *Observe that on the back there are forms for both certificate and affidavit. The reason for this is that it is not necessary to make the affidavit unless the witness be in default and it is proposed to issue process to compel attendance. In such case the affidavit can be filled out from the certificate made at the time of service.*" (*Actg. J. A. G., June* 26, 1891.)

(*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 (*see page* 154), *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 (*State, Territory or District where the court-martial sits*[1]), and him safely keep, and bring you his

[1] "I am of the opinion that the courts would hold that this process does not, under the law, run beyond the State, Territory or District where the military court sits. It is certain that if you should succeed in getting a witness before the court-martial by virtue of such process, you could not compel him to testify or punish him for contempt. It is a very defective piece of machinery." (Op. Act'g Judge Adv. Genl., June 26, 1891.)

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 *vs.* ....., now depending, and then and there to be continued and tried.

And have you then and there this writ.

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.....

C..... D.....,
1*st Lieutenant* ..... *Infantry*, [SEAL.]
Judge Advocate.

INTERROGATORIES AND ANNEXED DEPOSITION.

INTERROGATORIES.

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, convened at ....., pursuant to Special Orders, No....., from Headquarters Department of the....., of....., 18..., and whereof.....is president and..... judge advocate.

Interrogatories by judge advocate (or prisoner).

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

2*d 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?

3*d 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).

1*st Cross-Interrogatory:* Etc.

Redirect Interrogatories by judge advocate (or prisoner).

1*st Redirect Interrogatory:* Etc.

Interrogatories by court.

1*st Interrogatory:* Etc.

By order of the court.

C..... D.....,
1*st 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 1*st Interrogatory by judge advocate* (*or prisoner*).

* * * * * * * *

To the 1*st Cross-Interrogatory by prisoner* (*or judge advocate*).

* * * * * * * etc., etc.

And further deponent (*or affiant*) saith not.

.....

(*Signature of witness.*)

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

.....

(*Signature of civil officer administering oath.*)

....

.....

I, ..., the officer designated and directed by.....to cause to be taken the deposition of the within named....., do certify that the same was duly made and taken under oath as hereinbefore set forth and contained.

.....

.....

(*Official signature of army officer directed to procure deposition.*)

(Ives, p. 419, and II. Win. Law, p. 352.)

ACCOUNT OF CIVILIAN WITNESS.

(*Form* 13, *Paymaster General's Department.*—*Army Regulations, as altered by orders. In making out accounts, judge advocates should correct forms issued by Pay Department, accordingly.*)

The United States, *To* ....., *Dr.*

18.....	On account of expenses incident to his attendance as witness before a Military Court convened under the annexed orders.	Dolls.	Cts.
	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 at $3 per day and for cost of subsistence, etc., while traveling to and from said court, between the dates above specified, ... days, as per memorandum herewith.....		
	For *per diem* allowance at $3 per day and for cost of subsistence, etc., as per memorandum herewith, during attendance upon said court, from ...., 18.. .. , to ..... 18....., inclusive, as per judge advocate's certificate hereon, ... days.....		

NOTE 1.—For rules governing payment of allowances to citizen witnesses see back of this form, page 153.[1]

NOTE 2.—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.

[1] For further instructions see page 38.

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.

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 for Account Civilian Witness.*)

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.*

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 Government employ," those words will be inserted in the above certificate after the word "citizen."

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

The Paymaster General is, under section V. of G. O. No. 97, A. G. O. Sept. 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. (In duplicate.)

2. The affidavit of the witness (on face of the 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 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 travel 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,[1] 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, in addition thereto, the cost of meals, not to exceed 50 cents each, and room, total cost of meals and room not to exceed $3 per day; *Provided*, that where meals are included in the transportation, or fare, by steamers, no *per diem* will be charged.

[1] The Second Comptroller recently decided that only so much of account as covered use of sleeping car at night would be allowed.

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 paragraph 4, section V, G. O. No. 97, A. G. O. Sept. 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 Sept. 1, 1876.

11. Compensation to citizens, in or out of Government employ, for attendance upon civil courts is payable only by the civil authorities.[1]

"Note.—It is recommended that judge advocates supply themselves with blank accounts for citizen witnesses, which they can procure of any army paymaster or by addressing this (the Paymaster General's) office. They may then *—*—* perfect the papers so that the witness fee for attendance and travel will be at once available. If no paymaster be present, the papers, thus all authenticated by the judge advocate, may be assigned with confidence that the assignee will receive his pay without hindrance when presented, or transmitted, to any paymaster."

[1] For "Form 13," see A. R. 1881, page 1159.

[FORM.]

STATEMENT OF SERVICE OF

....., Company ....., ... Regiment .....

(*Required by paragraph* 1015, *Army Regulations.*)

FORMER SERVICE.

DATE OF ENLISTMENT.	DATE OF DISCHARGE.	CHARACTER ON DISCHARGE.

PRESENT SERVICE.

DATE OF ENLISTMENT.	DATE OF CONFINEMENT UNDER PRESENT CHARGES.

.....

.....

Commanding .....

[NOTE.—This statement should be on letter size paper.]

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