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Administration of Justice in the Army

BY A. W. BROWN¹

The Articles of War are contained in section 1342 of the Revised Statutes, and were enacted in their present form on August 29, 1916,² the greater part of them being made effective on March 1, 1917.

The old code, most of which had survived without substantial modification since Revolutionary times, was poorly arranged and, among other defects, contained provisions that were archaic or obsolete and omitted certain statutory provisions that should have been included in our military code.

The new code represents a much needed advance in our military legislation and the credit for this advance is largely due to that able lawyer and distinguished administrator, Major General E. H. Crowder, the Judge Advocate General of the Army, under whose supervision the original draft of the new articles was prepared.

The articles are divided into five groups. The first group contains definitions of certain terms used in the articles, and indicates the classes of persons who are subject to the Articles of War. These classes are:

“(a) All officers and soldiers belonging to the Regular Army of the United States; all volunteers, from the dates of their muster or acceptance into the military service of the United States; and all other persons lawfully called, drafted or ordered into, or to duty or for training in, the said service, from the dates they are required by the terms of the call, draft or order to obey the same;

“(b) Cadets;

“(c) Officers and soldiers of the Marine Corps when detached for service with the armies of the United States by order of the President: *Provided*, That an officer or soldier of the Marine Corps when so detached may be tried by military court-martial for an offense committed against the laws for the government of the naval service prior to his detachment, and for an offense committed against these articles he may be tried by a naval court-martial after such detachment ceases;

“(d) All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial

¹LL.B., Cornell, 1897. Lieutenant Colonel, Judge Advocate General's Department, National Army.

²39 Stat. 650-670.

jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles;

“(e) All persons under sentence adjudged by courts-martial;

“(f) All persons admitted into the Regular Army Soldiers' Home at Washington, District of Columbia.”

Later legislation expressly subjects to the Articles of War the personnel of the Coast and Geodetic Survey when transferred to the service and jurisdiction of the War Department, and officers of the Public Health Service when detailed in time of war for duty with the Army.³

The second group of articles deals with the creation, composition, jurisdiction and procedure of courts-martial; with limitations upon prosecutions and punishments; and with the powers of the authorities appointing such courts. More particular reference will hereafter be made to some of the articles in this group.

The third group contains what are known as the punitive articles (one article in this group is not punitive, however); the fourth group deals with courts of inquiry; and certain miscellaneous provisions are embodied in the fifth group. In order to insure that these articles shall be known and understood by the enlisted men of the Army it is provided in Article 110 that “Articles one, two, and twenty-nine, fifty-four to ninety-six, inclusive, and one hundred and four to one hundred and nine, inclusive, shall be read and explained to every soldier at the time of his enlistment or muster in, or within six days thereafter, and shall be read and explained once every six months to the soldiers of every garrison, regiment, or company in the service of the United States.”

The punitive articles include Articles 54 to 96, and a few of the important articles will be quoted:

“Art. 54. Fraudulent enlistment. Any person who shall procure himself to be enlisted in the military service of the United States by means of willful misrepresentation or concealment as to his qualifications for enlistment, and shall receive pay or allowances under such enlistment, shall be punished as a court-martial may direct.”

“Art. 58. Desertion. Any person subject to military law who deserts or attempts to desert the service of the United States shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct, and, if the offense be

³Acts of Congress approved May 29, 1917, and July 9, 1917.

committed at any other time, any punishment, excepting death, that a court-martial may direct."

"Art. 61. Absence without leave. Any person subject to military law who fails to repair at the fixed time to the properly appointed place of duty, or goes from the same without proper leave, or absents himself from his command, guard, quarters, station, or camp without proper leave, shall be punished as a court-martial may direct."

"Art. 64. Assaulting or willfully disobeying superior officer. Any person subject to military law 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 willfully disobeys any lawful command of his superior officer, shall suffer death or such other punishment as a court-martial may direct."

"Art. 75. Misbehavior before the enemy. Any officer or soldier who misbehaves himself before the enemy, runs away, or shamefully abandons or delivers up any fort, post, camp, guard, or other command which it is his duty to defend, or speaks words inducing others to do the like, or casts away his arms or ammunition, or quits his post or colors to plunder or pillage, or by any means whatsoever occasions false alarms in camp, garrison, or quarters, shall suffer death or such other punishment as a court-martial may direct."

"Art. 82. Spies. Any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be tried by a general court-martial or by a military commission, and shall, on conviction thereof, suffer death."

"Art. 92. Murder—Rape. Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial may direct; but no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace."

"Art. 93. Various crimes. Any person subject to military law who commits manslaughter, mayhem, arson, burglary, robbery, larceny, embezzlement, perjury, assault with intent to commit any felony, or assault with intent to do bodily harm, shall be punished as a court-martial may direct."

"Art. 95. Conduct unbecoming an officer and gentleman. Any officer or cadet who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service."

"Art. 96. General article. Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and

military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court."

It will be noted in reading the Articles of War that in most of them the punishment is left to the discretion of the court. There are, however, important restrictions upon this discretion. The 45th Article of War provides:

"Whenever the punishment for a crime or offense made punishable by these articles is left to the discretion of the court-martial, the punishment shall not, in time of peace, exceed such limit or limits as the President may from time to time prescribe."

This article has been construed to refer to offenses committed in time of peace. Under the authority conferred by this article the President has fixed a maximum limit of punishment for all of the more usual offenses.

Other articles prohibit the imposition of the death penalty except for offenses expressly made so punishable⁴; limit the power to impose confinement in a penitentiary to certain cases⁵; and forbid punishment by flogging, or by branding, marking or tattooing "on the body".⁶

With reference to the death penalty it is provided⁷ that where this penalty is made mandatory by the Articles, two-thirds of the members of the court must concur in the finding of guilty, and that in any case where a capital sentence is imposed the same proportion of the members must concur in the sentence.

The more usual punishments imposed in the case of enlisted men are dishonorable discharge, confinement at hard labor, hard labor, forfeiture or detention of pay, and loss of rating as non-commissioned officers, first-class privates, etc.

By far the greater number of offenses committed by soldiers are disposed of either without any trial, in the way presently to be considered, or by trial by one of the inferior courts, i.e., the special and the summary court-martial, the latter being much the busier court of the two.

During the fiscal year ended June 30, 1917, out of an approximate total of 60,000 trials in the Regular Army, about 90 per cent. were by inferior courts and over 48,000 of them were by summary court.

⁴Article 43.

⁵Article 42.

⁶Article 41.

⁷Article 43.

Offenses in number probably at least equal to those tried by summary court were disposed of without trial under the authority of the 104th Article of War, or under the regulations on the same subject which were in force prior to March 1, 1917, the date the article referred to took effect.

This article provides: "Under such regulations as the President may prescribe, and which he may from time to time revoke, alter, or add to, the commanding officer of any detachment, company, or higher command may, for minor offenses not denied by the accused, impose disciplinary punishments upon persons of his command without the intervention of a court-martial, unless the accused demands trial by court-martial.

"The disciplinary punishments authorized by this article may include admonition, reprimand, withholding of privileges, extra fatigue, and restriction to certain specified limits, but shall not include forfeiture of pay or confinement under guard. A person punished under authority of this article, who deems his punishment unjust or disproportionate to the offense may, through the proper channel, appeal to the next superior authority, but may in the meantime be required to undergo the punishment adjudged. The commanding officer who imposes the punishment, his successor in command, and superior authority shall have power to mitigate or remit any unexecuted portion of the punishment. The imposition and enforcement of disciplinary punishment under authority of this article for any act or omission shall not be a bar to trial by court-martial for a crime or offense growing out of the same act or omission; but the fact that a disciplinary punishment has been enforced may be shown by the accused upon trial, and when so shown shall be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty."

Let us assume that a minor infraction of the Articles of War, such, for instance, as a trivial unauthorized absence, comes to the attention of the immediate commander of an enlisted man. This class of offenses—that is, unauthorized absences—is, by the way, the most numerous of any, there having been approximately 25,000 convictions in the Regular Army for offenses of this kind in the last fiscal year.

The officer causes the man to be brought before him, states to him the particulars of the supposed offense, and announces that, in the absence of a denial or a demand for trial, he intends to proceed to impose a "company punishment," as it is usually termed. Of course, if the man denies his guilt or demands a trial the summary jurisdiction is ended. If the man does neither, the officer fixes the punish-

ment, which usually takes the form of restriction to the post, camp or barracks for a specified time or of assignment of a number of days' "kitchen police" or other labor. The man is notified of the punishment and a brief note of the case is made in the company records. To discourage groundless appeals in these cases it is provided by regulation that the officer to whom the appeal is made may increase the punishment imposed, without, however, changing its kind.

For some reason this excellent method of disposing of minor offenses is not resorted to as much as it should be, although the regulations not only encourage its use but indicate the desire of the War Department that it should be used in appropriate cases.

It may be mentioned that the authority conferred by the 104th Article of War is not limited in its application to enlisted men. An officer may be summarily punished under this article, except that "extra fatigue" or other punishment not appropriate for an officer cannot be imposed.

Let us now assume an offense by an enlisted man where, either on account of the fact that the summary disciplinary action described has been tried without producing the desired effect, or because of the offense being of a more serious nature (such, for instance, as the disobedience of an order of a non-commissioned officer) or for some other reason, the company commander decides that the case should go before a summary court-martial.

This court consists of one officer. It may be appointed by the commanding officer of any place where troops are on duty and by the commanding officer of a regiment, detached battalion, detached company or other detachment. Provision is made for the appointment of the court by the authorities superior to those mentioned when any such authority deems it desirable; and it is further provided that where there is but one officer present with the command he shall be the summary court-martial of that command.

The summary court can try any person subject to military law for any non-capital offense, except an officer, a cadet, a soldier who holds a certificate that he is eligible for promotion to the grade of second lieutenant, a non-commissioned officer who objects to trial by summary court unless such trial is authorized by one of certain higher commanders; and any person included in a class exempted by the President from the jurisdiction of summary courts-martial. Up to date the President has exempted Army Field Clerks and Field Clerks of the Quartermaster Corps only.

The punishing power of the summary court is also restricted. It cannot impose dishonorable discharge, nor can it adjudge confine-

ment or forfeiture of pay in excess of three months. It may sentence non-commissioned officers, rated privates, and some others to reduction, except in the cases of certain non-commissioned officers who are not subject to reduction. It is further provided⁸ that where the summary court officer is also the commanding officer no sentence of the court which adjudges confinement at hard labor or forfeiture of pay or both for a period in excess of one month shall be carried into execution until the sentence shall have been approved by superior authority.

The company commander having investigated the case, which investigation usually includes giving the accused an opportunity to make a statement in regard to the accusation against him, and having decided, as above stated, that the accused shall be tried by summary court-martial, places the accused man in arrest or confinement.

Arrest is the usual restriction imposed where it is contemplated that the case will be disposed of by an inferior court. The 69th Article of War provides a penalty for escaping from confinement or for breaking arrest, which penalty in the case of an officer may include dismissal from the service.

The arrest in the assumed case would be accomplished by simply communicating to the man the order of the officer placing him in arrest.

The company commander then proceeds to prepare the charges in the case. The charge corresponds to the civil indictment, and consists of two parts. The first part is a bare statement of the Article of War violated, and the second, known as the specification, is a statement of the facts constituting the supposed violation, including details of time and place. With reference to the specification the Manual provides "that it shall set forth in simple, concise language facts sufficient to constitute the particular offense and in such manner as to enable a person of common understanding to know what is intended."

The charges are usually prepared on a printed blank form. Spaces are provided in this form for various administrative notations and for the name, rank, rate of pay, previous service, number of previous convictions, and the date of arrest or confinement of the accused. A list of the witnesses is also included. The Manual for Courts-Martial contains a great number of forms for specifications corresponding to the forms of indictment given in the ordinary form book on criminal law. These forms cover most of the offenses usually

⁸Article 14.

encountered in military practice and greatly facilitate the preparation of charges.

Charges are prepared in triplicate, one original and two exact copies, the original bearing the signature of the officer, with his rank and organization.

For use in determining the amount of punishment to be imposed in the event of conviction, the officer attaches to the charges properly authenticated evidence of convictions by court-martial, if any, of offenses committed by the accused during his current enlistment and within one year next preceding the date of the commission of any offense set forth in the charges. The company commander then forwards the charges to the officer immediately exercising summary court-martial jurisdiction over the command to which the accused belongs, unless the officer preferring the charges happens to be the only officer present with the command, in which case he would ordinarily try the accused himself.

If the officer receiving the charges concurs in the view of the company commander that the case should be tried by a summary court, he causes the charges to be referred to the summary court officer for trial. This reference is usually accomplished by an indorsement on the face of the charges.

With reference to the procedure of the summary court, the Manual provides as follows:⁹

“(a) The summary court will be opened at a stated hour daily, except Sundays, for the trial of such cases as have been properly referred to it for trial. Trials will be had on Sunday only when the exigencies of the service make it necessary.

“(b) The summary court will at the beginning of each trial, in the order of such trial, give to and enter in the proper place on the charges in the case a serial number.

“(c) The procedure of and before summary courts-martial will, so far as practicable, be identical with that prescribed for general courts-martial. In the trial of a case the summary court represents both the Government and the accused. He will see to it that the interests of both are fully conserved.

“(d) When the accused pleads guilty he will—

“1. Explain to him (a) the elements constituting the offense to which he has pleaded guilty, and (b) the maximum punishment therefor;

“2. Ask him whether he fully understands (a) that by pleading

⁹Par. 351, Manual for Courts-Martial.

guilty thereto he admits all the elements of the crime or offense, and (b) that he may be punished as explained to him.

"In any such case he will also, in the manner below stated, make such impartial investigation, if any, as the doing of justice may appear to require.

"(e) In the absence of a plea of guilty he will make a full, thorough and impartial investigation of both sides of the entire matter before him. On behalf of the Government he will obtain the attendance of, swear, and examine such witnesses, and will obtain such other evidence, documentary and other, as may tend or may appear likely to tend to establish the allegations before him against the accused. On behalf of the accused he will, in the absence of a plea of guilty, obtain the attendance of, swear, and examine such witnesses, and will obtain such other evidence, documentary and other, as may tend to disprove or negative guilt of such allegations, or explain the acts or omissions charged, or show extenuating circumstances or establish good character. He will permit the accused fully to examine all witnesses that appear, and will, to the fullest extent, aid him in making such examination. He will, in every proper way, encourage and aid the accused in making his defense. In all cases he will extend to the accused full opportunity to testify in his own behalf and to make a statement in denial, in explanation, or in extenuation, and will, before arriving at a finding, assure himself, by inquiry of the accused, that he has no further testimony to offer and no further statement to make.

"(f) Having done so, he will, as soon as the trial is concluded, arrive at his findings and record them in the proper place on the charges.

"(g) In the event of the conviction of a soldier he will consider the evidence of previous convictions, if any, referred to him.

"(h) In any case of conviction he will, as soon as trial is concluded, impose sentence and record it in the proper place upon the charges.

"(i) In the event of a finding of not guilty of all the charges and specifications he will record an acquittal instead of a sentence.

"(j) Having recorded his findings and an acquittal or sentence, he will subscribe his name, rank, and organization as summary court, and then without delay transmit the record of trial to the appointing authority."

Upon receipt of the original record and the two copies thereof from the summary court, the officer who appointed it or the officer who has succeeded him in the command, proceeds to exercise the authority conferred upon him by the Articles of War and by regulations.

The functions of the authority appointing a court-martial and the

proceedings subsequent to his action will be fully considered in connection with the discussion of general courts-martial.

In the case of a summary court-martial the final action of the appointing authority, whatever it may be, is written on the record of trial, dated, and signed by him as commanding officer. The action of the appointing authority is also entered on each of the two copies of the record.

In the great majority of cases tried by summary court the trial results in a conviction and the sentence as fixed by the court is usually approved.

A typical summary court record is as follows:

Smith, John
Date current enlistment: June 10, 1917. Rate of pay: \$30.00
Previous service: None.
Date of arrest: Dec. 9, 1917.
Date of confinement:
Number of previous convictions: None.

Witnesses: Sgt. William Jones, Co. A, 42d Infantry
Corp. Arthur Allen, Co. A, 42d Infantry
Pvt. Henry Adams, Co. A, 42d Infantry.

Charge: Violation of the 96th Article of War.

Specification: In that Private John Smith, Company A, 42d Infantry, was, at Camp Williams, Fla., on or about the 8th day of December, 1917, drunk, in quarters.

(sgd.) John Jones,
Captain, 42d Infantry.

1st Ind.

Hdqrs. 42d Inf., Dec. 10, 1917, To Capt. Frank M. Anderson, 42d Inf., Summary Court, for trial.

By Order of Colonel Addington:
(sgd.) George F. Wilson,
Captain, 42d Infantry,
Adjutant.

Findings: Guilty.

Sentence: To be confined at hard labor for ten days, and to forfeit ten days' pay.

(sgd.) Frank M. Anderson,
Captain, 42d Infantry, Summary Court.

Approved: December 12, 1917.

(sgd.) J. C. Addington,
Colonel, 42d Infantry, Commanding.

The original record is filed in the summary court record of the command; one copy, certified as an official copy, is sent to the commanding officer of the man's organization; and the remaining copy is forwarded as a report of the trial to the officer exercising general court-martial jurisdiction over the command.

This report of trial is reviewed by a staff officer, who is usually an officer of the Judge Advocate General's Department. In case any substantial irregularity, defect or abuse is disclosed by the report, appropriate action is taken either to correct it or to cause it to be corrected. Occasions for such action are comparatively rare. Once in a while cases are met where the summary court has exceeded the limit of punishment prescribed for an offense committed in time of peace, or has assumed to try an offense not within its jurisdiction. In these cases the report is usually returned to the officer from whom it is received, with direction to take the necessary action, which in the former case would be to set aside so much of the sentence as is in excess of the legal limit, and in the latter, to announce the entire proceedings as void.

From the copy sent to him the organization commander makes whatever entries are necessary in the man's service record and in the muster and pay rolls and then files it. If the soldier offends again within a year of the date of any offense of which he was convicted, and charges are preferred, this company copy of the record is forwarded as already described with the new charges as evidence of a "previous conviction". In case the man is transferred within a year the record of trial goes with him to his new organization.

Let us now assume a non-capital offense by an enlisted man, which, in the opinion of the company commander, requires a punishment beyond the power of a summary court to impose, but which, in the officer's opinion, can be adequately punished by a special court-martial. A minor assault on a comrade, and suffering a prisoner to escape through neglect are examples of offenses usually referred to special courts-martial.

A special court-martial consists of any number of officers from three to five, inclusive, and may be appointed by the commanding officer of a district or other place where troops are on duty and by the commanding officer of a brigade, regiment, detached battalion or any other detached command. A judge advocate is appointed for each special court-martial by the authority appointing the court. The court may also be appointed by any authority superior to those mentioned when deemed by him desirable to do so, and must be so appointed when the officer who would normally convene the court is the accuser or prosecutor of the person to be tried.

A special court-martial can try persons subject to military law for any non-capital offense made punishable by the Articles of War, except an officer, a cadet, or a soldier holding a certificate of eligibility for promotion. The President is authorized to remove from the jurisdiction of special courts-martial any class or classes of persons subject to military law. It is under this authority that cadets and soldiers holding certificates of eligibility are excepted from the jurisdiction of these courts.

The following crimes and offenses may be punished capitally and consequently are beyond the jurisdiction of summary or special courts-martial:

Offenses committed either in time of war or peace.

Striking a superior officer or drawing or lifting up any weapon or offering violence against him when in the execution of his office; willfully disobeying a lawful command of a superior officer; attempting to create, beginning, exciting, causing or joining in any mutiny or sedition; failing to use utmost endeavor to suppress mutiny or sedition; failing to give information upon knowing or having reason to believe that mutiny or sedition is to take place; murder or rape committed outside of the geographical limits of the States of the Union and the District of Columbia.

Offenses when committed in time of war only.

Desertion; attempting to desert; advising, persuading or knowingly assisting another to desert. Misbehaving before the enemy, or running away, or shamefully abandoning or delivering up any command when under a duty to defend it, or speaking words inducing others to do the like. Casting away arms or ammunition; quitting post or colors to plunder or pillage; occasioning false alarm in camp, garrison or quarters; compelling a superior to surrender his command; making known parole or countersign to a person not entitled to receive it; giving a parole or countersign different from the one received; forcing a safeguard; relieving the enemy with arms, ammunition, etc.; knowingly harboring or protecting or holding correspondence with or giving intelligence to the enemy; lurking or acting as a spy; being found drunk or asleep on post as a sentinel; leaving post as a sentinel before being relieved; murder, and rape.

A special court-martial cannot impose a sentence of dishonorable discharge nor a sentence of confinement or of forfeiture of pay in excess of six months. It may sentence certain non-commissioned officers and other rated men to be reduced to the grade of private.

The company commander takes the same action as in the case of a trial by summary court except that he is required to forward with the charges a brief statement of all the evidence in the case.

If the officer to whom the charges are sent decides that the case should be tried by a special court-martial he causes the charges to be referred to the judge advocate of such a court, with direction to try the case.

With reference to the determination of the proper trial court, the Manual provides as follows:¹⁰

"When an officer who exercises court-martial jurisdiction receives charges against an enlisted man it is his duty to consider whether they shall be tried by general, special, or summary court-martial. He should not withhold charges from trial or summary court solely for the reason that the maximum limit of punishment is beyond the jurisdiction of such courts to impose. On the other hand, he should not refer to a special or summary court-martial offenses which by reason of their inherent gravity or of the circumstances surrounding their commission merit greater formality of trial or more condign punishment than is found in the procedure or jurisdiction of such courts. No fixed rule can be laid down and the matter must be decided by the careful consideration of commanders subject to the limitations that while, in a proper case, desertion may be tried before a special court, felonies and crimes involving moral turpitude should not be, and capital crimes can not be tried by special or summary courts-martial."

The procedure before special courts-martial and the record of such courts are so nearly identical with those of general courts-martial that further reference to these matters is unnecessary here.

The record of trial is sent to the officer appointed by the court or his successor and after final action by him is forwarded to the headquarters of the officer exercising general court-martial jurisdiction over the command. There the case is reviewed and filed, after appropriate action in case any irregularity or defect is discovered.

The result of the trial is promulgated in orders issued by the officer appointing the court. One official copy of the order is sent to the commanding officer of the man's organization for the same purposes as the copy of the summary court record.

A typical record of trial by a special court-martial, and the order publishing the result of such trial, are as follows:

¹⁰Par. 78, Manual for Courts-Martial.

ADMINISTRATION OF JUSTICE IN THE ARMY 191

Fort Johnson, Texas, Dec. 15, 1917.

The special court-martial appointed by paragraph 3, Special Orders, No. 4, Headquarters Fort Johnson, Dec. 8, 1917, met at 10.00 a. m.

Present:

Captain Frank M. Maxwell, Inf. R. C.
1st Lieut. George E. Briggs, Inf. R. C.
1st Lieut. Orlando M. Benedict, Inf. R. C.
2d Lieut. Arthur S. Jones, Inf. R. C., judge advocate.

Absent:

None.

The court proceeded to the trial of Private John Doe, Company M, 18th Infantry, who, on appearing before the court, introduced 2d Lieut. William F. Beck, Inf. R. C., as counsel.

No reporter was sworn.

The accused stated that he had no objection to trial by any member present.

The members of the court and the judge advocate were sworn.

The accused was arraigned upon the following charges and specifications:

Charge I: Violation of the 58th Article of War.

Specification: In that Private John Doe, Company M, 18th Infantry, did, at Fort Johnson, Texas, on or about November 29, 1916, desert the service of the United States, and did remain absent in desertion until he was apprehended at New Orleans, La., on or about December 4, 1917.

Charge II: Violation of the 84th Article of War.

Specification: In that Private John Doe, Company M, 18th Infantry, did, at Fort Johnson, Texas, on or about November 29, 1916, through neglect, lose one overcoat, olive drab, value \$14.84, and one blanket, light weight, value \$3.29, issued for use in the military service.

(sgd.) William H. Anderson,
Captain, 18th Infantry.

Pleas.

To all the specifications and charges: Not guilty.

The following-named persons were sworn and testified:

Sergt. Charles A. O'Reilly, Co. M, 18th Infantry.

Corp. Allen S. Hinkley, Co. M, 18th Infantry.

Pvt. Alfred W. Morgan, Co. M, 18th Infantry.

Pvt. Andrew Hill, Co. M, 18th Infantry.

The defense was given full opportunity to examine each witness.

The accused at his own request was sworn and testified.

The accused stated that he had nothing further to offer.

The court was closed and finds the accused:

Of all the specifications and charges: Guilty.

The court was opened and the judge advocate, in the presence of the accused and his counsel, read the evidence of two previous convictions.

The court was closed and sentences the accused to be confined at hard labor for six months and to forfeit two-thirds of his pay per month for a like period.

The court was opened and proceeded to other business.

(sgd.) Frank M. Maxwell,

Captain, Inf. R. C., President.

(sgd.) Arthur S. Jones,

2d Lieutenant, Inf. R. C., Judge Advocate.

Approved, Dec. 17, 1917.

(sgd.) George W. Welsh,

Colonel, 18th Infantry, Commanding.

(Order)

Special Court-Martial

Headquarters Fort Johnson, Texas,

Order No. 11.

December 17, 1917.

Before a special court-martial which convened at Fort Johnson, Texas, pursuant to paragraph 3, Special Orders, No. 4, these headquarters, Dec. 8, 1917, was arraigned and tried:

Private John Doe, Company M, 18th Infantry.

Charge I: Violation of the 58th Article of War.

Specification: In that Private John Doe, Company M, 18th Infantry, did, at Fort Johnson, Texas, on or about November 29, 1916, desert the service of the United States, and did remain absent in desertion until he was apprehended at New Orleans, La., on or about December 4, 1917.

Charge II: Violation of the 84th Article of War.

Specification: In that Private John Doe, Company M, 18th Infantry, did, at Fort Johnson, Texas, on or about November 29, 1916, through neglect, lose one overcoat, olive drab, value \$14.84, and one blanket, light weight, value \$3.29, issued for use in the military service.

Pleas.

To all the specifications and charges: "Not guilty."

Findings:

Of all the specifications and charges: "Guilty."

Sentence:

"To be confined at hard labor for six months and to forfeit two-thirds of his pay per month for a like period." (Two previous convictions considered.)

The sentence is approved.

By Order of Colonel Welsh:

(sgd.) Charles M. Davis,
Captain, 18th Infantry,
Adjutant.

Official:

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Let us now assume a case which the company commander decides should go before a general court-martial.

The 64th Article of War provides that a soldier charged with crime or with a serious offense under the Articles of War shall be placed in confinement. In view of this article it is usual to place a man whom it is proposed to try by a general court-martial in the guardhouse. This is usually accomplished by sending the accused under sentinel to the commander of the local guard, with a request signed by the officer committing him that the man be confined. The request includes a statement of the crime or offense charged.

The commander of the guard is obliged to receive a person delivered under such circumstances, and his failure to do so is made punishable by the 71st Article of War. Other articles¹¹ provide penalties for failure by the commander of the guard promptly to report the confinement to the commanding officer of the place where the prisoner is held, for an unauthorized release of the prisoner, and for suffering him to escape through neglect or design.

In order to prevent confinement for an unreasonable period it is provided by the 70th Article of War that, except at remote stations, a copy of the charges shall be served on the accused and the accused brought to trial within certain specified limits of time. In the

¹¹Articles 72 and 73.

excepted cases it is provided by the same article that no person shall be continued in confinement more than eight days, or until such time as a court-martial can be assembled. To prevent trial before the accused has had a chance to prepare his defense, it is provided by the same article that in time of war no person shall, against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of the charges upon him.

A general court-martial consists of any number of officers from five to thirteen, inclusive. Thirteen are required to be detailed unless the detail of this number involves manifest injury to the service. The decision of the appointing authority as to the number available for detail is conclusive.

All officers in the military service of the United States, including officers of the Marine Corps detached for service with the Army, are, in general, competent to sit on any court-martial, but no officer is eligible to sit in any case to be tried by special or general court-martial when he is the accuser or a witness for the prosecution.

A general court-martial may be appointed by various higher commanders, including the President, and the commanding officers of territorial departments, armies, tactical divisions and separate brigades. These courts may also be appointed by the commanding officer of any district or any force or body of troops when empowered by the President to do so.

For each general court-martial the appointing authority details a judge advocate and may detail one or more assistant judge advocates.

The appointment of a general court-martial is usually made in a special order, in about the following form:

"A general court-martial is appointed to meet at this camp, at — o'clock, on ———, or as soon thereafter as practicable, for the trial of such persons as may properly be brought before it.

"Detail for the Court:

(Here follow the names of the officers detailed as members and as judge advocates, with their rank and the organization to which they are attached or assigned.)"

The jurisdiction of a general court-martial is very extensive. It may try any person subject to military law for any crime or offense made punishable by the Articles of War, and also any persons other than those subject to military law who by the law of war are subject to trial by military tribunals for any crime or offense in violation of the law of war.

Except in cases where the penalty is made mandatory the punishing power of a general court-martial is subject only to the general limitations already referred to and to certain other limitations established by custom. Shaving the head, placarding, putting in stocks and tying up by the thumbs are some of the punishments prohibited by custom.

It is provided in the 44th Article of War that when an officer is dismissed from the service for cowardice or fraud, the crime, punishment, name, and place of abode of the delinquent shall be published in the newspapers in and about the camp and the state from which the offender came or where he usually resides, and after such publication it shall be scandalous for an officer to associate with him.

Charges preferred with a view to trial by general court-martial are preferred in the same way and forwarded to the same officer as in the case of charges for trial by a special court-martial. If the officer receiving the charges decides that the case should be handled by a general court-martial he either investigates the case himself or has another officer investigate it for him. In this investigation the accused is given an opportunity to make any statement, offer any evidence or present any matter in extenuation that he may desire to have considered in connection with the accusation against him.

If, as a result of this investigation, the officer decides that the charges should be considered by higher authority he forwards them to the officer exercising general court-martial jurisdiction over the command, with an indorsement in which he states his views as to whether or not the charges can be sustained and gives the substance of any material statement made by the accused.

When the papers are received at the headquarters of the commander exercising general court-martial jurisdiction they are examined by a staff officer who is usually a member of the Judge Advocate General's Department. If the case presented indicates that trial by general court-martial is advisable, the charges are referred to the judge advocate of the court for trial.

In case trial by general court-martial is not considered advisable, which frequently happens, the charges are returned to the officer who forwarded them, by an indorsement to the effect that the case should either be dropped or disposed of by an inferior court.

The judge advocate of a general court-martial is charged by statute with the duty of prosecuting cases referred to him and preparing the record of the court. Where the accused is not represented by counsel the judge advocate is required to advise the accused from time to time throughout the proceedings of his legal rights.

Upon receipt of the charges and the order appointing the court the judge advocate examines them and brings any substantial irregularity or defect to the attention of the officer from whom he received them. He may ordinarily correct obvious mistakes of form or slight errors in the names, dates, amounts, etc. He is not authorized, however, without the authority of the officer appointing the court, to make substantial amendments in the charges or to withdraw a charge or specification.

The judge advocate is required to inform the prisoner of the accusations against him, of his right to have counsel, and to testify in his own behalf. He should also tender the accused a copy of the charges.

It is provided in the Manual that in so far as such action may be taken without prejudice to the rights of the accused, any advice given him by the judge advocate should be given or repeated in open court and noted upon the record. The judge advocate is required to do his utmost throughout the trial to present the whole truth of the matter in question, and to oppose every attempt to suppress facts or to distort them.

The 17th Article of War provides that the accused shall have the right to be represented before a general or special court-martial by counsel of his own selection for his defense, if such counsel be reasonably available. The counsel performs such duties as usually devolve upon the counsel for a defendant before civil courts in criminal cases. He is required to guard the interests of the accused by all honorable and legitimate means known to the law, but is enjoined not to obstruct the proceedings with frivolous or manifestly useless objections or discussions. Civil counsel must be engaged by an accused at his own expense.

The judge advocate having prepared the case, a date is agreed upon for the trial and the necessary arrangements are made by the judge advocate for the accommodation of the court and the attendance of the accused, witnesses, reporter, etc.

Upon the assembling of the court the members seat themselves in order of rank alternately to the right and left of the senior officer present, who is the president of the court. The general powers and duties of the president of a general court-martial are thus defined:¹²

"The president is the presiding officer of the court, and as such is the organ of the court to maintain order and conduct its business.

¹²Par. 89, M. C. M.

In addition, he has the duties and privileges of other members. He has an equal vote with other members in deciding all questions, including challenges, findings, sentence, acquittal, and adjournments. 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, and has no authority to open or close the court or make a ruling upon the admissibility of evidence, the competency of witnesses, or method of procedure without the acquiescence of the court or by custom of the service. He administers the oath to the judge advocate and authenticates by his signature all acts, orders, and proceedings of the court requiring it. It is his duty to take the proper steps to insure prompt trial and disposition of all charges referred for trial and to keep the court advised thereof."

As a general rule a court-martial is open to the public during a trial, but it is authorized in its discretion to sit with doors closed and usually does so when the offenses charged are of a scandalous nature.

The court being assembled and brought to order by its president, the judge advocate introduces the accused and the counsel, if any, by name, and swears the reporter.

The 18th Article of War provides as follows:

"Members of a general or special court-martial may be challenged by the accused, 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."

The right of challenge is accorded by reading the order or orders appointing the court to the accused and asking him if he objects to being tried by any member present. With reference to challenges the Manual provides:¹³

"(a) Principal challenges. In the following cases a member will be excused when challenged upon proof of the fact as alleged:

"(1) That he sat as a member of a court of inquiry which investigated the charges.

"(2) That he has personally investigated the charges and expressed an opinion thereon, or that he has formed a positive and definite opinion as to the guilt or innocence of the accused.

"(3) That he is the accuser.

"(4) That he will be a witness for the prosecution.

"(5) That (upon a rehearing of the case) he sat as a member on the former trial.

¹³Pars. 121 to 123, inc., M. C. M.

"(6) That, in the case of the trial of an officer, the member will be promoted by the dismissal of the accused.

"(7) That he is related by blood or marriage to the accused.

"(8) That he has a declared enmity against the accused.

"(b) Challenges for favor. Where prejudice, hostility, bias, or intimate personal friendship are alleged it is for the court, after hearing the grounds for challenging stated and the reply, if any, of the challenged member, as well as any other evidence presented, to determine whether the grounds stated and proved or admitted are sufficient in fact to disqualify a challenged member."

"Challenge of new members. Where new members join or are added to the court after its organization the order detailing such new members should be read to the accused and he should be given full opportunity to challenge. The record will show affirmatively that the right has been accorded the accused to challenge every member of the court."

"Challenge by judge advocate. There is no statutory authority for a challenge by the judge advocate, but under the custom of the service after the accused has fully exercised his right of challenge the judge advocate may also challenge for cause in the same manner as the accused."

Another paragraph of the Manual enjoins liberality in passing upon challenges.

If, as a result of successful challenges or for any other reason, the membership of a court is reduced below the minimum required by law, additional members are usually added unless evidence has been taken, in which case the court is usually dissolved and a new one ordered before which the trial is commenced *de novo*.

After the challenges are disposed of the members of the court, the judge advocate, and assistant judge advocates, if any, are sworn. The following oath is taken by the members:¹⁴

"You, A. B., do swear (or affirm) that you will well and truly try and determine, according to the evidence, the matter now before you, between the United States of America and the person 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 (or affirm) that you

¹⁴Article 19.

will not divulge the findings or sentence of the court until they shall be published by the proper authority, except to the judge advocate and assistant judge advocate; neither will you disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence thereof as a witness by a court of justice in due course of law. So help you God."

The judge advocate takes the following oath:¹⁵

"You, A. B., do swear (or affirm) that you will not divulge the findings or sentence of the court to any but the proper authority until they shall be duly disclosed by the same. So help you God."

After the oaths are administered the accused is arraigned. This is accomplished by the judge advocate reading the charges and specifications separately and in order to the accused and asking him how he pleads to each.

Although special pleas are sometimes encountered in military practice the accused usually pleads guilty or not guilty to all or part of each specification and charge. Courts are authorized in any case to permit an accused to withdraw a plea of not guilty and substitute one of guilty, and vice versa, or to withdraw either of these general pleas and substitute a special plea. The Manual further provides, with reference to pleas, as follows:¹⁶

"(c) A plea of guilty does not necessarily exclude the taking of evidence, on behalf of either the accused or the prosecution, or at the request of the court. In cases where the punishment is discretionary a full knowledge of the circumstances attending the offense is essential to the court in measuring the punishment, and to the reviewing authority in acting on the sentence. In cases where the punishment is *mandatory*, a full knowledge of the attendant circumstances is necessary to the reviewing authority to enable him to comprehend the entire case and correctly judge whether the sentence should be approved or disapproved or clemency granted. The court should therefore take evidence after a plea of guilty, except when the specification is so descriptive as to disclose all the circumstances of mitigation or aggravation. When evidence is taken after a plea of 'guilty', the witnesses may be cross-examined, evidence may be produced to rebut their testimony, and the court may be addressed by the prosecution or defense on the merits of the evidence and in extenuation of the offense or in mitigation of punishment. After a plea of 'guilty' the accused will always be given an opportunity to offer evidence in mitigation of the offense charged if he desires to do so.

¹⁵Article 19.

¹⁶Par. 154, M. C. M.

"(d) In each case tried by a general court-martial in which the accused enters a plea of guilty in whole or in part as to any charge or specification the president of the court shall explain to him as to that part:

"First. The various elements which constitute the offense charged, as set forth in Chapter XVII, defining the punitive articles of war; and

"Second. The maximum punishment which may be adjudged by the court for the offense to which he has pleaded guilty.

"The accused will then be asked whether he fully understands that by pleading guilty to such a charge or specification he admits having committed all the elements of the crime or offense charged and that he may be punished as stated. If he replies in the affirmative, the plea of guilty will stand; otherwise a plea of not guilty will be entered. The explanation of the president and the reply of the accused thereto shall appear in the record. The same rule will apply in cases tried by special court-martial *when the evidence heard is made of record.*

"(e) When the accused pleads 'guilty', and, without any evidence being introduced, makes a statement inconsistent with his plea, the statement and plea will be considered together, and if guilt is not conclusively admitted the court will direct the entry of a plea of 'not guilty' and proceed to try the case on the general issue thus made. The most frequent instances of inconsistency are in cases involving a specific intent, as in desertion, larceny, etc. In such cases, where after a plea of guilty the accused makes a statement, the latter should be carefully scrutinized by the court, and if in the case of desertion in any part there is a statement that the accused had no intention of remaining away, that he expected to return when he had earned some money, or that when arrested he was on his way back to his organization, etc.; or, in the case of larceny, that he intended to return the property alleged to have been stolen, etc., the court should direct the entry of a plea of 'not guilty', but the criminality of an intent once formed is not affected by a subsequent change of intent."

In complicated and important cases the judge advocate before introducing his witnesses is usually required by the court to make a brief statement of the issues and what he expects to prove.

The attendance of military witnesses is secured either by informal notice or by request to the proper military superior that the witness be ordered to attend. Civilian witnesses usually attend on request but their attendance may be enforced under the 22d Article of War, which provides that judge advocates of general and special courts-martial and any summary court-martial have power to issue like

process to compel witnesses to appear and testify which courts of the United States having criminal jurisdiction may lawfully issue. Such process, however, runs to any part of the United States and its territorial possessions.

The use of depositions, except by the prosecution in capital cases, is authorized by the 25th Article of War in certain cases.

With reference to the rules of evidence for courts-martial, the Manual provides as follows:¹⁷

"Prior to the act of August 29, 1916, courts-martial followed in general the rules of evidence, including the rules as to competency of witnesses to testify, that are applied by Federal courts in criminal cases. These consisted of the rules of the common law as they existed in the several states at the adoption of the Federal Constitution in 1789, as modified from time to time by subsequent acts of Congress. But courts-martial were, however, not required by express *statute* to follow these rules, and have always been allowed to pursue a more liberal course in regard to the admission of testimony than do, habitually, the civil tribunals. Their purpose was to do justice; and if the effect of a technical rule was found to be to exclude material facts or otherwise obstruct a full investigation, it was deemed that the rule may and should be departed from. Proper occasions, however, for such departures were regarded as exceptional and unfrequent. It was believed that 'courts-martial had much better err on the side of liberality towards a prisoner, than by endcavoring to solve nice and technical refinements of the laws of evidence, assume the risk of injuriously denying him a proper latitude for defense.' And now, by the provisions of the act of August 29, 1916:

"The President may, by regulations which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals: *Provided*, That nothing contrary to or inconsistent with these articles shall be so prescribed: *Provided further*, That all rules made in pursuance of this article shall be laid before the Congress annually.

"The modes of proof, therefore, including the rules of admissibility for witnesses and other evidence, are now by express congressional enactment placed under the authority of Executive regulation; and the rules laid down in this Manual have the force of such regulation. They therefore form the only binding rules, except such rules

¹⁷Pars. 198, 199, M. C. M.

of evidence as are expressly prescribed (1) in the Articles of War; (2) in the Federal Constitution; and (3) in such Federal statutes as expressly mention courts-martial.

"The common-law rules, with their legislative modifications, will be found in the various textbooks on the subject of evidence. These rules have been the subject of much interpretation by the courts, which will be found in the published decisions of such courts. While resort to textbooks and decisions will sometimes be necessary in the trial of an especially difficult case, it is the purpose of this chapter to state the rules of evidence applicable to trials by courts-martial in sufficient fullness to cover the field in practically all cases. Where the rule herein laid down is clear it should be taken as law (subject to the discretionary relaxation noted in par. 198) unless modified by Federal statute or some decision of the Federal courts made since the date of the publication of the Manual.

"Where, in the preparation of a case, the judge advocate or counsel finds that the rules laid down in this chapter are not sufficiently specific clearly to settle a specially important question as to the competency of a witness to testify or as to the admissibility of evidence intended to be introduced or the exclusion of such as the nature of the case or other information indicates will be offered, he should secure in advance of the trial and have with him in court authorities to sustain his contentions for such admission or exclusion.

"But it should be kept in mind that the use of such authorities is merely to inform the court of the reason of a rule or the good sense and fairness of a proposed ruling, and not to control the decision of the court with binding effect. This caution rests on the two grounds of principle: First, because the State decisions and statutes, and the writers of treatises, never have had any binding effect on courts-martial, the Federal statutes and decisions being the only ones that are entitled to such effect; and, secondly, because since the Federal statute of August 29, 1916, the modes of proof in courts-martial are governed by regulations issued by presidential order, as explained in par. 198."

The chapter of the Manual for Courts-Martial referred to above contains about one hundred paragraphs on the subject of evidence and was revised and approved by Professor Wigmore.

Witnesses are usually examined apart from one another and in the ordinary way. It is provided by the Manual, however, that the court may, in the interests of truth and justice, call or recall witnesses or permit their recall at any stage of the proceedings. The court may also permit material testimony to be introduced by either party

out of its regular order or permit a case, once closed by either or both sides, to be reopened for the introduction of testimony if convinced that such testimony is material.

The accused, under the Act of Congress, of March 16, 1878, is a competent witness, at his own request.

After the evidence is in the defense may submit an oral or written statement and argument to the court, after which both prosecution and defense make their final arguments. The judge advocate has the right to open and close, except that the court, in its discretion, may permit the defense to reply to the closing argument of the judge advocate.

After the arguments are concluded the court is closed and proceeds to deliberate on its findings. Each specification and charge is voted on separately, the voting beginning with the officer junior in rank.

The decision of the court is determined by a majority vote, except where a death sentence is made mandatory, in which case two-thirds of the members present must concur in a finding of guilty. With reference to the authority of a court-martial at this stage of the proceedings, the Manual provides as follows:¹⁸

"If the evidence proves the commission of an offense which is included in that with which the accused is charged the court may except words of the specification, and if necessary substitute others instead, pronounce the innocence and guilt of the excepted and substituted words, respectively, and then find the accused either guilty of the charge, or not guilty of the charge, but guilty of a violation of another proper article of war as the finding on the specification may require. 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 the court should find as follows where the charges are in the usual form:

"Of the specification, guilty except the words 'desert' and 'in desertion', substituting therefor respectively the words 'absent himself without leave from' and 'without leave', of the excepted words not guilty, of the substituted words guilty.

"Of the charge, not guilty but guilty of violation of the sixty-first article of war."

"It is a peculiarity of the finding at military law that a court-martial, where of opinion that any portion of the allegations in a specification is not proved, is authorized to find the accused guilty of a part of a specification only, *excepting* the remainder; or, in finding

¹⁸Pars. 298, 299, 300, M. C. M.

him guilty of the whole (or any part), to *substitute* correct words or allegations in the place of such as are shown by the evidence to be incorrect. And provided the exceptions or substitutions leave the specification still appropriate to the charge and legally sufficient thereunder, the court may then properly find the accused guilty of the charge in the usual manner. Familiar instances of the exercise of the authority to *except* and *substitute* in a finding of guilty occur in cases where, in the specification, the name or rank of the accused or some other person is erroneously designated, or there is an erroneous averment of time or place, or a mistaken date, or an incorrect statement as to amount, quantity, quality, or other particular, of funds or other property. But the authority to find guilty of a lesser included offense, or otherwise to make exceptions and substitutions in the findings, does not justify the conviction of the accused of an offense entirely separate and distinct in its nature from that charged, thus 'selling' and 'through neglect losing' property are separate offenses though each is a violation of A. W. 84.

"Another legal and now common form of finding is where an accused is charged with an offense, made punishable by an article of war other than the ninety-sixth (as for instance the ninety-fifth article), and the court is of the opinion that, while the material allegations in the specification are proved, they do not fully sustain the charge as laid, but do clearly constitute a violation of the ninety-sixth article of war. In this case the accused may properly be found guilty of the specification and not guilty of the charge, but guilty of 'violation of the ninety-sixth article of war'. It should be remembered, however, that the court can not in its findings legally substitute the ninety-sixth article of war for any other, unless the proof fails to substantiate the specification under the original charge."

If the court acquits the accused the judge advocate is recalled and the court adjourns as to that case.

If the accused is convicted of any offense the court is reopened for the purpose of ascertaining whether any evidence of previous conviction has been referred to the judge advocate by the appointing authority, and, if so, of receiving it. The statement of service which appears on the upper part of the charge sheet is also shown to the court at this time.

These matters are submitted to the court to assist it in determining the amount and kind of punishment to be imposed. The accused is given an opportunity to contest the accuracy of the statement of service and of the evidence of previous convictions, after which the court is again closed for the purpose of fixing the punishment.

The procedure in voting upon the sentence is thus described in the Manual:¹⁹

"In voting, the thirty-first article of war requires that the junior in rank shall vote first, and the votes are therefore taken in the inverse order of rank. Those members desiring to propose a sentence usually write it on a slip of paper and hand it to the president. The president reads the proposed sentences to the court and the members vote on them in order, beginning with the lightest, until a majority present, or, in cases where the death penalty is mandatory, two-thirds of the members of the general court-martial agree upon a sentence. Even in a case where the punishment is fixed, as, for instance, under the eighty-second article where the punishment for lurking or acting as a spy is death, and under the ninety-fifth article where the punishment is dismissal, the members must by vote impose this punishment. All the members of the court, those who voted for an acquittal equally with those who voted for conviction, should vote for some sentence."

A court martial may formulate and include in the record of its proceedings a statement of the reasons for its findings or sentence, or both. Such statement is of considerable value to the appointing authority in reaching a decision as to the action to be taken by him.

The court or any member thereof may also submit a general recommendation for clemency or a recommendation that all or a part of the sentence be suspended. Such recommendation is to be accompanied by a statement of the reasons for making it.

When the accused is acquitted or where the sentence does not include dishonorable discharge or confinement, the judge advocate is required to inform the commanding officer under whose jurisdiction the prisoner is held, of the fact, and the commanding officer is thereupon required to release the man from arrest or confinement unless other charges are pending against him.

After the sentence is decided upon the judge advocate is recalled and the court adjourns or proceeds with other business.

The judge advocate or the reporter, under his supervision, then proceeds to make up the record of trial. The 33d Article of War requires that each general court-martial shall keep a separate record of its proceedings in the trial of each case brought before it and that such record shall be authenticated by the signature of the president and the judge advocate. Provision is also made for the authentication of the record in case of the death, disability or absence of the judge advocate and the assistant judge advocates.

¹⁹Par. 308, M. C. M.

In general, the record of proceedings of a general court-martial shows a complete history of the proceedings had in open court and the material conclusions arrived at in both open and closed sessions. The record of a special court-martial is substantially the same, except that the testimony and arguments are not recorded. The 111th Article of War provides that every person tried by general court-martial shall, on demand therefor made by himself or by any person in his behalf, be entitled to a copy of the record of trial.

In making up the record the usual practice is for the reporter to type the entire record except the findings and sentence, if any, and submit it to the judge advocate who makes such interlineations and corrections as may be necessary to have the record of proceedings conform to the facts and inserts the findings and sentence, if any. The record is then submitted to the president of the court, who, if he finds it correct, signs it. In case of any dispute as to the record the matter is submitted to the court which, as a whole, is responsible for it.

After the record is authenticated it is forwarded "with such expedition as circumstances may permit"²⁰ to the appointing authority who, while exercising the supervising powers conferred on him by the Articles of War, is usually termed the "reviewing authority."

The articles referred to are Articles 46 to 53, inclusive, and are as follows:

"Art. 46. Approval and execution of sentence. No sentence of a court-martial shall be carried into execution until the same shall have been approved by the officer appointing the court or by the officer commanding for the time being.

"Art. 47. Powers incident to power to approve. The power to approve the sentence of a court-martial shall be held to include:

"(a) The power to approve or disapprove a finding and to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense when, in the opinion of the authority having power to approve, the evidence of record requires a finding of only the lesser degree of guilt; and

"(b) The power to approve or disapprove the whole or any part of the sentence.

"Art. 48. Confirmation—when required. In addition to the approval required by article forty-six, confirmation by the President is required in the following cases before the sentence of a court-martial is carried into execution, namely:

²⁰Article 35.

“(a) Any sentence respecting a general officer;

“(b) Any sentence extending to the dismissal of an officer, except that in time of war a sentence extending to the dismissal of an officer below the grade of brigadier general may be carried into execution upon confirmation by the commanding general of the Army in the field or by the commanding general of the territorial department or division;

“(c) Any sentence extending to the suspension or dismissal of a cadet; and

“(d) Any sentence of death, except in the cases of persons convicted in time of war of murder, rape, mutiny, desertion, or as spies; and in such excepted cases a sentence of death may be carried into execution upon confirmation by the commanding general of the Army in the field or by the commanding general of the territorial department or division.

“When the authority competent to confirm the sentence has already acted as the approving authority no additional confirmation by him is necessary.

“Art. 49. Powers incident to power to confirm. The power to confirm the sentence of a court-martial shall be held to include:

“(a) The power to confirm or disapprove a finding, and to confirm so much only of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense when, in the opinion of the authority having power to confirm, the evidence of record requires a finding of only the lesser degree of guilt; and

“(b) The power to confirm or disapprove the whole or any part of the sentence.

“Art. 50. Mitigation or remission of sentences. The power to order the execution of the sentence adjudged by a court-martial shall be held to include, *inter alia*, the power to mitigate or remit the whole or any part of the sentence, but no sentence of dismissal of an officer and no sentence of death shall be mitigated or remitted by any authority inferior to the President.

“Any unexecuted portion of a sentence adjudged by a court-martial may be mitigated or remitted by the military authority competent to appoint, for the command, exclusive of penitentiaries and the United States Disciplinary Barracks, in which the person under sentence is held, a court of the kind that imposed the sentence, and the same power may be exercised by superior military authority; but no sentence extending to the dismissal of an officer or loss of files, no sentence of death, and no sentence approved or confirmed by the President shall be remitted or mitigated by any other authority.

"The power of remission and mitigation shall extend to all uncollected forfeitures adjudged by sentence of a court-martial.

"Art. 51. Suspension of sentences of dismissal or death. The authority competent to order the execution of a sentence of dismissal of an officer or a sentence of death may suspend such sentence until the pleasure of the President be known, and in case of such suspension a copy of the order of suspension, together with a copy of the record of trial, shall immediately be transmitted to the President.

"Art. 52. Suspension of sentence of dishonorable discharge. The authority competent to order the execution of a sentence, including dishonorable discharge, may suspend the execution of the dishonorable discharge until the soldier's release from confinement; but the order of suspension may be vacated at any time and the execution of the dishonorable discharge directed by the officer having general court-martial jurisdiction over the command, exclusive of penitentiaries and the United States Disciplinary Barracks, in which the soldier is held or by the Secretary of War.

"Art. 53. Suspension of sentences of forfeiture or confinement. The authority competent to order the execution of a sentence adjudged by a court-martial may, if the sentence involve neither dismissal nor dishonorable discharge, suspend the execution of the sentence in so far as it relates to the forfeiture of pay or to confinement, or to both; and the person under sentence may be restored to duty during the suspension of confinement. At any time within one year after the date of the order of suspension such order may, for sufficient cause, be vacated and the execution of the sentence directed by the military authority competent to order the execution of like sentences in the command, exclusive of penitentiaries and the United States Disciplinary Barracks, to which the person under sentence belongs or in which he may be found; but if the order of suspension be not vacated within one year after the date thereof the suspended sentence shall be held to have been remitted."

To prevent overtechnicality on the part of reviewing authorities, the 37th Article of War provides that "The proceedings of a court-martial shall not be held invalid, nor the findings or sentence disapproved in any case on the ground of improper admission or rejection of evidence or for any error as to any matter of pleading or procedure unless in the opinion of the reviewing or confirming authority, after an examination of the entire proceedings, it shall appear that the error complained of has injuriously affected the substantial rights of an accused: *Provided*, That the act or omission upon which the accused has been tried constitutes an offense denounced and made punishable by one or more of these articles."

Where, in the opinion of the authority appointing a general or special court-martial, the findings of the court are not sustained by the evidence or the sentence is inadequate or otherwise inappropriate or where the record exhibits some substantial omission or error, he may return the record to the president of the court directing that the court be reconvened for appropriate action. In view of the powers of the reviewing authority over the findings and sentence of the court the occasions for such return of the record are usually limited to cases where there is some omission in the record or to cases where the court has, in the opinion of the reviewing authority, erroneously acquitted the accused of all or part of a charge or has imposed too lenient a sentence.

Where the record is returned the court, consisting of only those members who participated in the final session, assembles and takes the views of the reviewing authority under advisement. If the record has been returned for correction or for supplying some omission, the record is formally amended to conform to the facts. If the record is returned for reconsideration of the findings or sentence, or both, the court may, in its proceedings on revision, adhere to its original views or may revoke its former findings or sentence and substitute other findings or impose a different sentence.

Records of trial by summary court may be similarly returned to the court but the occasions for so doing are comparatively infrequent.

Where the sentence of a general court-martial includes confinement the sentence is so worded that the designation of the place of confinement is left to the reviewing authority. In cases where a sentence of confinement for six months or more is coupled with a sentence of dishonorable discharge, the United States Disciplinary Barracks or a branch thereof is usually designated. In certain cases a penitentiary may be designated as the place of confinement.²¹

The action of the reviewing authority is entered in the record after the signatures of the president and judge advocate.

A typical form of action is as follows:

Headquarters ——— Division, Camp ———

January 1, 1918.

In the foregoing case of Private John Smith, Company K, — Infantry, the sentence is approved but, owing to the length of time the accused has been in confinement, two months of the confinement imposed are remitted. As thus modified, the sentence will be duly

²¹Article 42.

executed. The United States Disciplinary Barracks at Fort Leavenworth, Kansas, is designated as the place of confinement.

(sgd.) Peter Jones,
Major General,
Commanding.

After final action by the reviewing authority each record of trial by general court-martial is transmitted to the Judge Advocate General of the Army who is charged by the statute with the duty of reviewing such records.²²

The results of a trial by general court-martial are announced in orders, the order being in substantially the same form as in the case of orders publishing the result of trial by special court-martial. Copies of these orders are furnished, among others, to the company commander of the soldier who was tried, and, in important cases, to all the organizations in the command.

It would unduly prolong this paper to go into the details of the treatment of military prisoners while undergoing confinement in guardhouses or in the Disciplinary Barracks. It will be sufficient to remark that the system provides for good conduct allowances, release by remission of sentence or under parole or on probation, and for honorable restoration to duty or re-enlistment in the cases of men sentenced to be dishonorably discharged.

The Disciplinary Barracks, as its name partially implies, is less a penal institution than a military school where the inmate who chooses to avail himself of the opportunity is systematically trained with a view to returning him to civil or military life better equipped for either than when he entered. Provision is also made in the Disciplinary Barracks for giving the prisoners vocational training.

The system I have thus attempted roughly to outline in the limited space at my disposal has been found in practice to be admirably adapted to the needs of our military service. Substantial justice is, as a rule, swiftly but fairly administered, and while a guilty soldier finds that a journey through a military court cannot be retarded or stopped by merely technical obstructions, an innocent man need have no fear if he is compelled to undertake it.

²²Sec. 1199, Revised Statutes.