ANALYTICAL DIGEST
OF THE
MILITARY-LAWS
OF THE
UNITED STATES

Scott

AN

ANALYTICAL DIGEST

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UNITED STATES.

A COMPILATION OF THE CONSTITUTIONAL AND STATUTORY PROVISIONS CONCERNING THE MILITARY ESTABLISHMENT, IN ALL ITS BRANCHES AND RELATIONS,

ACCOMPANIED BY

JUDICIAL AND EXECUTIVE DECISIONS EXPLANATORY OF THE TEXT.

BY

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TO

BREVET MAJOR-GENERAL

JAMES B. FRY,

LIEUTENANT-COLONEL AND ASSISTANT ADJUTANT-GENERAL
UNITED STATES ARMY,

BY WHOSE ADVICE, ENCOURAGEMENT, AND AID IT WAS UNDERTAKEN,
PERSEVERED IN AND PUBLISHED, THIS COMPILATION
IS GRATEFULLY DEDICATED BY
HIS FRIEND,

THE AUTHOR.

PREFACE.

A COMPILATION of the constitutional and statutory laws now in force concerning the military establishment of the United States, arranged in the order of subjects, and interpreted and explained by the latest judicial and executive decisions, dicta, and opinions, in the form of notes, is herewith submitted.

Much legislation affecting army officers in their relations to the civil service is inserted herein, and for the first time in a work intended principally for their use. See Chapters III., XXVII., XXVIII.

A synoptical index to the Constitution is appended to Chapter I., the matter of which is not embraced in the general index to the volume.

Omitting only the enacting clauses, the text is a literal transcript of the statutes at large as officially promulgated—the references by chapters being to the edition of Little & Brown. The citations of authorities and the inter-references are believed to be all that the military or other reader could desire. R. N. S.

FARIBAULT, MINN., December 30, 1872.

ERRATA.

PAGE 14. In fourth line of note 6, *for* vol. xi., *read* vol. ii.

" 18. In eleventh line of note 10 *d*, *for* vol. xi., *read* vol. ii.

" 59. In first line of note 7, reference should read Chap. viii., ¶ 225.

" 63. In last line of note 15, *for* "348–352," *read* 337–341.

In last line but one of note 17, *for* 104, *read* 85; and *for* 353, *read* 342.

" 91. Reference in first line of note 41 should be to ¶ 65.

" 150. Strike out no. 359 from note 18.

" 179. In note 12, clause *i*, *for* "their stations," *read* these stations.

" 181. Last line of note 13 *k* should read 27 *c*, instead of 287 *c*.

" 186. In fifth line of note 20, reference should be to ¶¶ 337–341.

" 250. Substitute "corps of engineers," for "engineer" in note 6 *c*.

" 282. In third paragraph, on this page, of note 8 *a*, *for* ¶ 78, *read* 79.

" 336. Insert no. 806, after nos. 783, 784, in last line but one of note 18.

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GENERAL INDEX.

CHAPTER I.

THE CONSTITUTION OF THE UNITED STATES.

(WITH A SYNOPTICAL INDEX.)

WE, THE PEOPLE OF THE UNITED STATES, *in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this* CONSTITUTION FOR THE UNITED STATES OF AMERICA.[1]

ARTICLE I.

SECTION 1.

1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION 2.

1. The House of Representatives shall be composed of members chosen every second year by the people of the several States; and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

2. No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

3. Representatives[2] and direct taxes shall be apportioned among the several States which may be included within this Union, accord-

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[1] In the case of *Owings* v. *Speed*, the Supreme Court of the United States declared that this Constitution went into effect on the first Wednesday [the 4th day] of March, 1789. In delivering the opinion of the Court, Chief Justice Marshall remarked that "the conventions of nine States having adopted the Constitution, Congress, in September or October, 1788, passed a resolution in conformity with the opinions expressed by the Convention, and appointed the first Wednesday in March of the ensuing year as the day, and the then seat of Congress as the place, 'for commencing proceedings under the Constitution.'"—5 Wheaton, 422.

[2] See secs. 2 and 3, 14th Amendment, modifying the basis of representation.

ing to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative; and until such enumeration shall be made, the State of *New Hampshire* shall be entitled to choose three; *Massachusetts* eight; *Rhode Island* and *Providence Plantations* one; *Connecticut* five; *New York* six; *New Jersey* four; *Pennsylvania* eight; *Delaware* one; *Maryland* six; *Virginia* ten; *North Carolina* five; *South Carolina* five; and *Georgia* three.

4. When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

5. The House of Representatives shall choose their Speaker and other officers, and shall have the sole power of impeachment.

SECTION 3.

1. The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof, for six years; and each Senator shall have one vote.

2. Immediately after they shall be assembled in consequence of the first election, they shall be divided, as equally as may be, into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen by resignation or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

3. No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

4. The Vice-President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

5. The Senate shall choose their other officers, and also a President pro tempore, in the absence of the Vice-President, or when he shall exercise the office of President of the United States.

6. The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside, and no person shall be convicted without the concurrence of two-thirds of the members present.

7. Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit, under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to law.

Section 4.

1. The times, places, and manner of holding elections, for Senators and Representatives, shall be prescribed in each State by the legislature thereof; but the Congress may, at any time, by law, make or alter such regulations, except as to the places of choosing Senators.

2. The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

Section 5.

1. Each house shall be the judge of the elections, returns, and qualifications of its own members; and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties, as each house may provide.

2. Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.

3. Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either house on any question shall, at the desire of one-fifth of those present, be entered on the journal.

4. Neither house, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

SECTION 6.

1. The Senators and Representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall, in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to or returning from the same; and for any speech or debate in either house they shall not be questioned in any other place.

2. No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a member of either house during his continuance in office.

SECTION 7.

1. All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.

2. Every bill, which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it; but if not, he shall return it, with his objections, to the House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If, after such reconsideration, two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of that house, it shall become a law. But in all such cases, the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

3. Every order, resolution, or vote, to which the concurrence of the Senate and House of Representatives may be necessary (except

on a question of adjournment), shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or, being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

SECTION 8.

The Congress shall have power—

1. To lay and collect taxes, duties, imposts, and excises; to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;

2. To borrow money on the credit of the United States;

3. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;

4. To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

5. To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

6. To provide for the punishment of counterfeiting the securities and current coin of the United States;

7. To establish post-offices and post-roads;

8. To promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries;

9. To constitute tribunals inferior to the Supreme Court: to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;

10. To declare war,[3] grant letters of marque and reprisal, and make rules concerning captures on land and water;

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[3] Under this clause, war was declared with TRIPOLI, February 6, 1802; with GREAT BRITAIN, June 18, 1812; and with ALGIERS, March 3, 1815. A quasi state of war existed with FRANCE in 1799 (see 4 Dallas, 37); and, by act of May 13, 1846, Congress recognized the existence of war with MEXICO.

(*a.*) A state of war may exist without any formal declaration by either party; but whenever war is to be initiated by an act of our national will, that will can be constitutionally expressed only by an act of Congress. If, however, war is instituted by a foreign power, and precipitated upon the country, "the President is not only authorized, but bound, to resist force by force. He does not initiate the war, but is bound to accept the challenge, without waiting for any especial legislative authority. And, whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be unilateral."—2 Black's Reports, 635.

(*b.*) It is not only lawful for the President to resist invasion, but to carry hostilities

11. To raise and support armies; but no appropriation of money to that use shall be for a longer term than two years;

12. To provide and maintain a navy;

13. To make rules for the government and regulation of the land and naval forces;[4]

14. To provide for calling forth the militia[5] to execute the laws of the Union, suppress insurrections, and repel invasions;

15. To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers,[6] and the authority of training the militia according to the discipline prescribed by Congress;

16. To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of

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into the enemy's country.—Trials of Smith and Ogden. See Brightly's Fed. Digest, vol. i., p. 848.

(*c.*) If a hostile power, either from without or within our territory, shall assail and capture our forts, and raise armies to overthrow our government and invade its soil, &c., the President is bound to use the army and navy to carry on a war effectively against such an enemy, both by sea and land. The manner in which these forces are to be used is left to the discretion of the President, under the usages and principles of civilized warfare.—*The Amy Warwick*, 2 Sprague, 134–5.

(*d.*) The conditions of peace and war, public and civil, in a legal sense, must be determined by the political department of the government, and the courts are bound by that decision.—*United States* v. *Probasco*, 11 American Law Reports, 419.

(*e.*) Congress is not deprived of the power to make war, to suppress insurrection, to levy taxes, and make rules concerning captures on land and sea, when the necessity for their exercise is called out by domestic insurrection and internal civil war, instead of by foreign war.—*Tyler* v. *Defrees*, 11 Wallace, 331.

[4] The power to make rules and regulations for the army delegated to the secretary of war, acting under the direction of the President. See Chap. v.

[5] MILITIA. For general provisions made for calling out the militia see Chap. xxv., ¶ ¶ 801–820; and for its employment in enforcing the Constitutional Amendments (13th, 14th and 15th) see Chap. xxvii., ¶ 892, 896, 903, and notes 13 and 18 *a*.

THE ARMY, under act of 1807, may be employed in all cases where it is lawful to employ the militia, and under like restrictions.—Chap. xxvii., ¶ 870.

[6] By acts of March 5, 1792, May 28, 1798, and March 2, 1799, the President was authorized to appoint officers of volunteer forces in service of the United States; and by the act of June 22, 1798, these appointments were to be confirmed by the Senate. Mr. Story (Const., vol. xi., § 1192) says that "this exercise of power was complained of at the time as a virtual infringement of the constitutional authority of the States in regard to the militia."

During the war of 1812–15 this power was, however, again exercised in acts of July 6, 1812, and February 24 and March 30, 1814; and by the 21st section of act last cited the volunteers were so entirely withdrawn from State control as to become in fact a part of the regular establishment—their officers becoming "entitled to promotion in the line of the army." By act of March 3, 1847, the President appointed officers for such volunteers as were re-enlisted in Mexico.

(*a.*) By an act of March 3, 1791, the President was authorized "to employ troops under the denomination of levies, in addition to, or in place of, the militia, which, in virtue of the powers vested in him by law [the Constitution], he is authorized to call into the service of the United States;" and, by sec. 9, of same act, he is "alone to appoint the commissioned officers thereof, in the manner he may deem proper." During the late rebellion, the appointment of officers of volunteers was reserved to the States; but an officer once mustered into United States service could not be displaced by the State executive. See Chap. xx., note 4.

particular States,[7] and the acceptance of Congress, become the seat of government of the United States, and to exercise like authority over all places purchased, by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings;[8]—and,

17. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

SECTION 9.

1. The migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

2. The privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it.

3. No bill of attainder or ex post facto law shall be passed.

4. No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

5. No tax or duty shall be laid on articles exported from any State. No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another: nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another.

6. No money shall be drawn from the treasury, but in conse-

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[7] The act of February 21, 1871, chap. 62, provides a government for the District of Columbia, with a governor, secretary, and legislative assembly, to consist of council and house of delegates. For municipal purposes, it is a corporation, and for many other purposes a territorial, or inchoate State government.

[8] Territory over which exclusive jurisdiction has been ceded to the United States is subject only to laws of Congress.—*United States* v. *Ames*, 1 Woodbury & Minot's Reports, 76.

The United States has exclusive jurisdiction over offenses committed therein, notwithstanding any reservation by the State of concurrent jurisdiction in executing process therein, for offenses committed without such reservation.—*United States* v. *Travers*, 2 Wheeler's Criminal Cases, 490; *United States* v. *Cornell*, 2 Mason's Reports, 91; and *United States* v. *Davis*, 5 Mason, 356.

State jurisdiction is not abrogated by a simple purchase of land for public purposes, but when the legislature consents to such purchase the State jurisdiction is ousted.—*United States* v. *Cornell*, 2 Mason, 60; and *United States* v. *Ames*, 1 Woodbury & Minot, 76.

See "MILITARY RESERVATIONS," Chap. xxiv.

quence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

7. No title of nobility shall be granted by the United States, and no person holding any office of profit or trust under them shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.

SECTION 10.

1. No State shall enter into any treaty, alliance, or confederation; grant letters of marque or reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts; or grant any title of nobility.

2. No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the treasury of the United States, and all such laws shall be subject to the revision and control of the Congress. No State shall, without the consent of Congress, lay any duty of tonnage, keep troops,[9] or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

ARTICLE II.

SECTION I.

1. The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice-President, chosen for the same term, be elected as follows:

2. Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number

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[9] But, unquestionably, a State may use its military power to put down an armed insurrection, too strong to be controlled by the civil authority. The power is essential to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the States of this Union, as to any other government. The State itself must determine what degree of force the crisis demands. —*Luther* v. *Borden*, 7 Howard, 45.

of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

3. The electors shall meet in their respective States, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for, each; which list they shall sign and certify; and transmit sealed to the seat of the government of the United States, directed to the president of the Senate. The president of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose, by ballot, one of them for President; and if no person have a majority, then from the five highest on the list, the said house shall, in like manner, choose the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote: a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them, by ballot, the Vice-President. [*See* 12*th Amendment.*]

4. The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

5. No person, except a natural born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office, who shall not have attained to the age of thirty-five years, and been fourteen years a resident of the United States.

6. In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President, and the Congress may, by law, provide for the case of removal, death,

resignation,[10] or inability, both of the President and Vice-President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected.

7. The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emoluments from the United States, or any of them.

8. Before he enter on the execution of his office, he shall take the following oath or affirmation.

9. "I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States."

SECTION 2.

1. The President shall be commander-in-chief[11] of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States[11d]; he may

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[10] "The only evidence of a refusal to accept or of the resignation of the office of President, or Vice-President, shall be an instrument in writing, declaring the same, and subscribed by the person refusing to accept or resigning, as the case may be, and delivered into the office of the secretary of state."—Sec. 11, March 1, 1792, chap. 8.

[11] "No act of Congress, no act even of the President himself, can, by constitutional possibility, authorize or create any military officer not subordinate to the President."—7 Opinions, 465.

(*a.*) The President's power to control an officer in the exercise of his official functions, can extend only to cases in which the executive order would by law justify the action of such officer.—*United States* v. *Kendall*, 12 Peters, 524.

(*b.*) "By the Constitution the President is made commander-in-chief of the army and navy of the United States. The departments of war and of the navy are the channels through which his orders proceed to them respectively, and the secretaries of these departments are the organs by which he makes his will known to them. The orders issued by those officers are, in contemplation of law, not their orders, but the orders of the President of the United States."—1 Opinions, 380. See also Chap. ii., second paragraph of note 1.

(*c.*) "The lawful will of the President may be announced, and an act in the authority of the President be performed, not merely by a head of department, but in the second or other degree of delegation, by some officer subordinate to such head."—7 Opinions, 473.

(*d.*) The President need not assume personal command of the militia. He may place them under the command of army officers to whom, in his absence, he may delegate his constitutional powers. It may be indispensable that officers of the army be required to serve in the militia; as, for example, when vacant offices are not immediately filled by the States, or where the militia officers are absent or disabled. It must be remembered, however, that this power must be exercised in accordance with the reserved rights of the States to officer their quotas.—2 Opinions, 711. There has, however, never been a judicial decision upon this important question, and during the war of 1812–15 several of the States declared that their militia were exclusively under the command of their own officers, and subject only to the personal command of the President. See Story on the Const., vol. xi., § 12, 15.

See "CALLING OUT THE MILITIA," Chap. XXV., ¶ ¶ 801–812.

require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices; and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

2. He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers, and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law.[12] But the Congress may, by law, vest the appointment of such inferior officers as they think proper, in the President alone, in the courts of law, or in the heads of departments.

3. The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

SECTION 3.

1. He shall, from time to time, give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed; and shall commission all the officers of the United States.

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[12] The "Articles of Confederation" (Art. 6th) provided that "When land forces are raised by any State for the common defense, all officers of, or under, the rank of colonel, shall be appointed by the legislature of each State respectively by which such forces shall be raised, or in such manner as such State shall direct, and all vacancies shall be filled up by the State which made the appointment." The military establishment existing at the adoption of the Constitution was "except as to mode of appointing the officers," recognized and adopted by our present form of government in the act of September 29, 1789; and, beginning with the act of March 3, 1791, we find that Congress has required from time to time that all officers to be appointed in the regular army, and in some instances those for the volunteer forces (see note 6), were to be appointed *by and with the advice and consent of the Senate.*

The action of the senate is confined to a simple confirmation or rejection of the President's nomination. It may suggest conditions and limitations to the President, but cannot vary those submitted by him.—3 Opinions, 189.

The President and Senate, by nomination and confirmation, may at any time correct the dates of military appointments.—3 *Ibid.*, 307.

As to what constitutes an appointment, see Chap. xix., note 1, clause *a*.

SECTION 4.

1. The President, Vice-President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

ARTICLE III.

SECTION 1.

1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior; and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

SECTION 2.

1. The judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States, between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign states, citizens, or subjects. [*See* 11*th Amendment.*]

2. In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

3. The trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

SECTION 3.

1. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid

and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

2. The Congress shall have power to declare the punishment of treason; but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.

ARTICLE IV.

SECTION 1.

1. Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

SECTION 2.

1. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

2. A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

3. No person held to service or labor in one State under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor; but shall be delivered up on claim of the party to whom such service or labor may be due.

SECTION 3.

1. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State, nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned, as well as of the Congress.

2. The Congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.

SECTION 4.

1. The United States shall guarantee to every State in this Union

a republican form of government,[13] and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.[13a]

ARTICLE V.

1. The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution; or, on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided, that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State without its consent shall be deprived of its equal suffrage in the Senate.

ARTICLE VI.

1. All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the confederation.

2. This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby; anything in the constitution or laws of any State to the contrary notwithstanding.

3. The Senators and Representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation, to support this Constitution;

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[13] Under this section of the Constitution it rests with Congress to decide what government is the established one in a State, and as its decision is binding on every other department of the government it cannot be questioned by the judicial tribunals. It rests also with Congress to determine upon the means proper to fulfill this guarantee; and by the act of February 28, 1795, the power of deciding whether the exigency has arisen, upon which the general government is bound to interfere, is confided to the President. He is to act upon the application of the legislature or of the executive, and, consequently, he must determine what body of men constitute the legislature, and who is the governor.—*Luther* v. *Borden*, 7 Howard, 42, 43.

(*a*.) Provision made for employment of the militia, and the land and naval forces, to fulfill this guarantee—see Chap. xxv., ¶ ¶ 801, 802, and Chap. xxvii., ¶ 870.

but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII.

1. The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution betweeen the States so ratifying the same.

Done in convention, by the unanimous consent of the States present, the seventeenth day of September, in the year of our Lord, one thousand seven hundred and eighty-seven, and of the independence of the United States of America, the twelfth. In witness whereof, we have hereunto subscribed our names.

GEORGE WASHINGTON,
President, and Deputy from Virginia.

NEW HAMPSHIRE.
John Langdon,
Nicholas Gilman.

MASSACHUSETTS.
Nathaniel Gorham,
Rufus King.

CONNECTICUT.
Wm. Samuel Johnson,
Roger Sherman.

NEW YORK.
Alexander Hamilton.

NEW JERSEY.
William Livingston,
David Brearly,
William Patterson,
Jonathan Dayton.

PENNSYLVANIA.
Benjamin Franklin,
Thomas Mifflin,
Robert Morris,
George Clymer,
Thomas Fitzsimons,
Jared Ingersoll,
James Wilson,
Gouverneur Morris.

DELAWARE.
George Read,
Gunning Bedford, jr.,
John Dickinson,
Richard Bassett,
Jacob Broom.

MARYLAND.
James M'Henry,
Daniel of St. Thomas Jenifer,
Daniel Carroll.

VIRGINIA.
John Blair,
James Madison, jr.

NORTH CAROLINA.
William Blount,
Richard Dobbs Spaight,
Hugh Williamson.

SOUTH CAROLINA.
John Rutledge,
Charles Cotesworth Pinckney,
Charles Pinckney,
Pierce Butler.

GEORGIA.
William Few,
Abraham Baldwin.

Attest, WILLIAM JACKSON, *Secretary.*

AMENDMENTS TO THE CONSTITUTION.

ARTICLE I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

ARTICLE II.

A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

ARTICLE III.

No soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor in time of war, but in a manner to be prescribed by law.[14]

ARTICLE IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V.[15]

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty or

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[14] No provision has ever been made, by statute, for billeting troops upon the citizens of the United States; but in time of war, rebellion, &c., troops have thus been quartered, under the authority of the "customs of war in like cases."

[15] The 5th and 6th Amendments were not designed as limits upon the State governments in reference to their own citizens, but exclusively as restrictions upon the Federal power.—*Twitchell* v. *The Commonwealth*, 7 Wallace, 326, 327.

property, without due process of law; nor shall private property be taken for public use without just compensation.[15a]

ARTICLE VI.[16]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

(*a.*) A military commander, under circumstances of actual, urgent, and immediate pressing public necessity, may justify the taking of private property for public use; but the existence of such necessity must be clearly established.—*Holmes* v. *Sheridan*, 4 Western Jurist, 339.

(*b.*) "There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed, to prevent it from falling into the hands of the public enemy; and also where a military officer, charged with a particular duty, may impress private property into the public service or take it for public use. Unquestionably, in such cases, the government is bound to make full compensation to the owner; but the officer is not a trespasser.

"But we are clearly of opinion, that in all of these cases the danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. It is impossible to define the particular circumstances of danger or necessity in which this power may be lawfully exercised. Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified.

"In deciding upon this necessity, however, the state of the facts, as they appeared to the officer at the time he acted, must govern the decision; for he must necessarily act upon the information of others as well as his own observation. And if, with such information as he had a right to rely upon, there is reasonable ground for believing that the peril is immediate and menacing, or the necessity urgent, he is justified in acting upon it; and the discovery afterwards that it was false or erroneous will not make him a trespasser. But it is not sufficient to show that he exercised an honest judgment, and took the property to promote the public service; he must show by proof the nature and character of the emergency, such as he had reasonable grounds to believe it to be, and it is then for a jury to say, whether it was so pressing as not to admit of delay; and the occasion such, according to the information upon which he acted, that private rights must for the time give way to the common and public good." But the law does not permit private property to be seized in order to insure the success of a distant and hazardous expedition.—*Mitchell* v. *Harmony*, 13 Howard 134, 135.

(*c.*) The rightful taking, by a military officer, of private property for *use or destruction*, when the public exigency demands it, is an exercise of the right of *eminent domain*. Necessity justifies the action of the officer, and unless it exists he is a trespasser, and the government is not liable. The officer must decide upon the existence of such necessity, and if the danger, as he *ought* to have seen, was remote, and the necessity not pressing, the courts will hold him personally responsible, but if he had good grounds for belief that the facts were as they appeared to him, he is justified and the government is liable.—*Grant* v. *United States*, 1 Nott & Huntington, 47, 48.

(*d.*) The municipal courts have no jurisdiction, in a common law action, to determine on the validity of a seizure made as an act of war.—*Coolidge* v. *Guthrie*, (17 American Law Reports, 22) cited in Brightly's Fed. Digest, vol. ii., p. 120.

[16] This amendment is not a limitation upon the State governments. See note 15.

ARTICLE VII.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

ARTICLE VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

ARTICLE IX.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

ARTICLE X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

ARTICLE XI.

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state.[17]

ARTICLE XII.[18]

1. The electors shall meet in their respective States, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President; and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted; the person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from

[17] See Art. III., Sec. 2, clause 1. [18] See Art. II., Sec. 1, clause 3.

the persons having the highest numbers, not exceeding three, on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.

2. The person having the greatest number of votes as Vice-President shall be the Vice-President if such number be a majority of the whole number of electors appointed; and if no person have a majority, then from the two highest numbers on the list the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice.

3. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

ARTICLE XIII.

1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

2. Congress shall have power to enforce this article by appropriate legislation.[19]

ARTICLE XIV.

1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole

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[19] In enforcement of this amendment an act of March 2, 1867, abolishes and forever prohibits the system of peonage in New Mexico and other parts of the United States, and requires all persons in the military service, in New Mexico, to aid in enforcing said act. See Chap. xxiii., ¶ 724, and note 16.

number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each house, remove such disability.

4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States, nor any State, shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.[20]

ARTICLE XV.

SECTION 1.

The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude.

SECTION 2.

Congress shall have power to enforce this article by appropriate legislation.[20]

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[20] For legislation enforcing these amendments, in so far as it especially concerns officers of the army, see Chap. xxvii., ¶ ¶ 892, 896, 903, and notes 13, and 18 *a*.

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to raise and support armies	1	8	11
to provide and maintain a navy	1	8	12
to make rules for the government and regulation of the land and naval forces	1	8	13
to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions	1	8	14
to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the U. S.	1	8	15
to exercise exclusive jurisdiction over the District of Columbia, or seat of government, and over all places purchased, by the consent of the particular State legislature, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings	1	8	16
to make all laws necessary and proper for carrying into execution the foregoing and all other powers vested by this Constitution in the government of the U. S., or in any department or officer thereof	1	8	17
to impose a tax or duty of ten dollars upon each slave imported	1	9	1
to invest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments	2	2	2
to declare the punishment of treason	3	3	2
to prescribe, by general laws, the manner in which the acts, records, and judicial proceedings in each State shall be proved, and the effect thereof, in view of their full faith and credit in every other State	4	1	1
to admit new States into the Union	4	3	1
to dispose of and make all needful rules and regulations respecting the territory or other property of the U. S.	4	3	2
(*Note* 13.) To decide what government is the established one in a State			
to enforce by appropriate legislation the 13th Amendment, prohibiting slavery or involuntary servitude except for crime. (13th Amendment.)	..	..	2
to remove, by a vote of two-thirds of each house, the disability imposed for having engaged in rebellion. (14th Amendment.)	..	..	3
to enforce by appropriate legislation the 14th Amendment, relating to citizenship; representation; disability arising from participation in rebellion; debts incurred to suppress or to aid rebellion: and claims for the loss of slaves. (14th Amendment.)	..	..	5

CONGRESS—*Continued.*	*Art.*	*Sec.*	*Par.*
to enforce by appropriate legislation the 15th Amendment, forbidding the denial or abridgment of the right of citizens of the U. S. to vote, on account of race, color, or previous condition of servitude. (15th Amendment.)	..	..	2
Powers denied to, namely:			
to prescribe the places of choosing Senators	1	4	1
to appropriate money to raise and support armies, for a longer term than two years	1	8	11
to appoint the officers of the militia, and to authorize the training of the militia	1	8	15
to prohibit the migration or importation of slaves, prior to 1808	1	9	1
to suspend the privilege of the writ of habeas corpus, unless when, in case of rebellion or invasion, the public safety may require it	1	9	2
to pass any bill of attainder or ex post facto law	1	9	3
to lay any capitation or other direct tax, unless in proportion to the census	1	9	4
to lay any tax or duty on articles exported from any State; to give any preference to the ports of one State over those of another; or to oblige vessels bound to or from one State, to enter, clear, or pay duties in another	1	9	5
to draw money from the treasury, but in consequence of appropriations made by law	1	9	6
to grant any title of nobility	1	9	7
to deprive any State, without its consent, of its equal suffrage in the Senate	5	..	1
to require any religious test as a qualification to any office or public trust under the U. S.	6	..	3
to make any law respecting an establishment of religion, or prohibiting the free exercise thereof. (1st Amendment.).	..	..	..
to make any law abridging the freedom of speech or of the press. (1st Amendment.)	..	..	..
to make any law abridging the right to assemble, and to petition. (1st Amendment.)	..	..	..
to assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the U. S. (14th Amendment.)	..	..	4
to assume or pay any claim for the loss or emancipation of any slave. (14th Amendment.)	..	..	4
to abridge the right of citizens of the U. S. to vote, on account of race, color, or previous condition of servitude. (15th Amendment.)	..	..	1
Those not delegated by the Constitution to the U. S., nor prohibited by it to the States. (10th Amendment.)	..	..	..
Required:			
to consist of a Senate and House of Representatives	1	1	1
to revise and control all State laws laying imposts or duties	1	10	2
to take the census every ten years	1	2	3
to assemble at least once in every year	1	4	2
to guarantee to every State in the Union a republican form of government	4	4	1
to protect each State against invasion	4	4	1
to protect each State against domestic violence, on the application of the legislature, or of the executive (when the legislature cannot be convened)	4	4	1
to propose amendments to this Constitution, whenever two-thirds of both houses shall deem it necessary	5	..	1
to call a convention for proposing amendments, on the application of the legislatures of two-thirds of the several States	5	..	1
Powers vested in each house of, namely:			
when the number is smaller than a quorum, to adjourn from day to day, and, if authorized, to compel the attendance of absent members	1	5	1
to determine the rule of its proceedings	1	5	2
to punish its members for disorderly behavior, and, with the concurrence of two-thirds, to expel a member	1	5	2

	Art.	Sec.	Par.
CONGRESS—*Continued.*			
Powers denied to each house of, namely:			
to publish such parts of the journal of its proceedings as may require secrecy	1	5	3
to adjourn for more than three days, or to any other place, without the consent of the other	1	5	4
Each house of, required:			
to be the judge of the elections, returns, and qualifications, of its own members	1	5	1
to consider a majority as constituting a quorum to do business	1	5	1
to keep a journal of its proceedings, and from time to time publish the same	1	5	3
to enter on the journal the yeas and nays on any question, at the desire of one-fifth of those present	1	5	3
to enter on its journal the yeas and nays, in all such cases as the reconsideration by both houses of a bill returned with the President's objections	1	7	2
CONSTITUTION—			
How amendments to this, may be made	5	..	1
This, the laws made in pursuance of it, and treaties made by the U.S., to be the supreme law of the land	6	..	2
The ratification of the conventions of nine States, to be sufficient for the establishment of this, between the States so ratifying the same	7	..	1
(*Note* 1.) Constitution went into effect March 4, 1789.			
CONSULS—			
The President to nominate, and by and with the advice and consent of the Senate to appoint	2	2	2
The judicial power to extend to all cases affecting	3	2	1
CONTRACTS—			
No law impairing the obligation of, to be passed by any State	1	10	1
CONTROVERSIES—			
to which the judicial power shall extend	3	2	1
CONVENTION—			
for proposing amendments to this Constitution, a, shall be called by Congress, on the application of the legislatures of two-thirds of the States	5	..	1
for the formation of this Constitution, by whom and when signed	7	..	1
The ratification of the conventions of nine States to be sufficient for the establishment of this Constitution between the States so ratifying the same	7	..	1
COPYRIGHTS—			
Congress may secure, to authors, to promote the progress of science and useful arts	1	8	8
COUNSEL—			
The accused to enjoy the right to have the assistance of, in all criminal prosecutions	6	..	..
COUNTERFEITING—			
Congress may provide for the punishment of, the securities and current coin of the U. S	1	8	6
COURT—			
Supreme, original and appellate jurisdiction of the	3	2	2
COURTS—			
Congress may constitute, inferior to the Supreme Court	1	8	9
of law, may be invested by Congress with the appointment of such inferior officers as they think proper	2	2	2
The judicial power to be vested in one Supreme Court, and in such inferior courts as Congress may, from time to time, ordain and establish	3	1	1
CREDIT—			
Congress may borrow money on the, of the U. S	1	8	2
Full, to be given in each State to the public acts, records, and judicial proceedings of every other State	4	1	1
Bills of. (See *Bills.*)			

	Art.	*Sec.*	*Par.*
CRIMES—			
On impeachment for, and conviction of, high, and misdemeanors, the President, Vice-President, and all civil officers of the U. S., to be removed from office	2	4	1
The trial of all, except in cases of impeachment, to be by jury, and in the State where committed	3	2	3
Persons, charged with, fleeing from justice, and found in another State, to be delivered up on demand of the executive authority of the State from which they fled	4	2	2
Persons not to be held to answer for capital or otherwise infamous, unless on a presentment or indictment of a grand jury, except in cases in the land or naval forces, or in the militia when in actual service, in time of war or public danger. (5th Amendment.)	..	..	..
CRIMINAL—			
cases, no one to be compelled, in, to be a witness against himself, or deprived of life, liberty, or property, without due process of law. (5th Amendment.)	..	..	..
prosecutions, the rights of the accused in all. (6th Amendment.)	..	..	..
DAY TO DAY—			
Adjournment from. (See *Adjournment.*)			
DEATH—			
of the President. (See *Vacancies.*)			
DEBTS—			
Congress may pay the, of the U. S	1	8	1
Gold and silver coin only a tender in payment of	1	10	1
against the confederation, to be valid against the U. S. under this Constitution	6	..	1
The validity of the public, of the U. S., including debts incurred for the payment of bounties and pensions, not to be questioned. (14th Amendment.)	..	..	4
incurred in aid of rebellion, to be illegal and void, and not to be assumed or paid by the U. S. or by any State. (14th Amendment.)	..	..	4
DEFENSE—			
To provide for the common, one of the objects in establishing this Constitution. (*Preamble.*)			
Congress may provide for the common	1	8	1
DEPARTMENTS—			
The opinion, in writing, of the principal officer of each of the executive, may be required by the President	2	2	1
Heads of, may be invested by Congress with the appointment of such inferior officers as they think proper	2	2	2
DIRECT TAX—			
No, to be laid, unless in proportion to the census	1	9	4
DISABILITY—			
The, of those persons, who, having previously taken an oath, in a certain capacity, to support the Constitution of the U. S., shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof, may, by a vote of two-thirds of each house, be removed. (14th Amendment.)	..	..	3
DISCOVERIES. (See *Inventors.*)			
DISTRICT—			
(*Note* 7.) Of Columbia, government for the.			
Judicial. (See *Judicial.*)			
DOCKYARDS. (See *Forts.*)			
DOMESTIC—			
tranquillity, to insure, one of the objects in establishing this Constitution. (*Preamble.*)			
violence, the U. S. to protect each State against, on the application of the legislature thereof, or of the executive (when the legislature cannot be convened)	4	4	1
DUTIES—			
Congress may lay and collect, uniform throughout the U. S.	1	8	1

	Art.	Sec.	Par.
DUTIES—*Continued.*			
Vessels bound to or from one State not to be obliged to pay, in another	1	9	5
not to be laid by any State, without the consent of Congress, except to execute inspection laws	1	10	2
The net produce of all, laid by any State, to inure to the treasury of the U. S.	1	10	2
DUTY—			
A, may be imposed on the importation of slaves, not exceeding ten dollars each	1	9	1
No, to be laid on articles exported from any State	1	9	5
of tonnage, not to be laid by any State without the consent of Congress	1	10	2
EFFECTS—			
The right of the people to be secure in their, against unreasonable searches and seizures, not to be violated. (4th Amendment.)	..	..	..
ELECTION—			
The denial, to certain inhabitants of a State, of the right to vote at any, for the choice of electors for President and Vice-President, Representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, or the abridgment of that right in any way except for participation in rebellion, or other crime, to be followed by a reduction of the basis of representation in such State. (14th Amendment.)	..	..	2
Writs of. (See *Executive of a State.*)			
ELECTIONS—			
for Senators and Representatives, the legislature of each State to prescribe the times, places, and manner of holding; but Congress may make or alter such regulations, except as to the places of choosing Senators	1	4	1
Each house to be the judge of the, of its own members	1	5	1
ELECTORS—			
of President and Vice-President. (See also *Votes.*)			
to be appointed by each State, in number equal to that of the Senators and Representatives to which the State may be entitled in Congress	2	1	2
No Senator, Representative, or person holding an office of trust or profit under the U. S., to be appointed an elector	2	1	2
Congress may determine the time of choosing the	2	1	4
to vote on the same day throughout the U. S.	2	1	4
Where, how, and for whom, the, shall vote. (12th Amendment.)	..	..	1
A majority of the whole number appointed necessary to elect. (12th Amendment.)	..	..	1&2
How the denial of the right to vote for, shall affect a reduction of the basis of representation. (14th Amendment.)	..	..	2
No person to be an elector, who, having previously taken an oath, in a certain capacity, to support the Constitution of the U. S., shall have engaged in insurrection or rebellion against the same, or given aid and comfort to the enemies thereof, unless by a vote of two-thirds of each house. (14th Amendment.)	..	..	3
EMANCIPATION. (See *Slaves.*)			
EMOLUMENT—			
from any king, prince, or foreign state. (See *Present.*)			
ENEMIES—			
of the U. S., aid and comfort, and adhering, to the. (See *Disability* and *Treason.*)			
ENGAGEMENTS—			
entered into by the confederation. (See *Confederation.*)			
ENTER—			
Vessels bound to or from one State not to be obliged to, in another	1	9	5

	Art.	*Sec.*	*Par.*
ENUMERATION—			
of the people. (See *Census.*)			
EQUITY. (See *Law.*)			
EXCISES—			
Congress may lay and collect, uniform throughout the U. S.....	1	8	1
EXECUTIVE OF A STATE—			
to issue writs of election to fill vacancies happening in the representation	1	2	4
may make temporary appointments of Senators, in case of vacancies happening during the recess of the legislature.....	1	3	2
Duty of the, with respect to fugitives. (See *Fugitives.*)			
may apply to the U. S., when the legislature cannot be convened, for protection of the State against domestic violence (See *Governor.*).....	4	4	1
EXECUTIVE POWER—			
vested in the President. (See *President.*)			
EXPENDITURES—			
of all public money, a regular statement and account of the receipts and, to be published from time to time.....	1	9	6
EXPORTS—			
from any State, no tax or duty to be laid on.....	1	9	5
No State, without the consent of Congress, to lay any imposts or duties on, except to execute inspection laws.....	1	10	2
EX POST FACTO LAW—			
No, to be passed.....	1	9	3
No, to be passed by any State.....	1	10	1
FAITH—			
Full, and credit, to be given, in each State, to the public acts, records, and judicial proceedings of every other State.....	4	1	1
FELONIES—			
Congress may define and publish, committed on the high seas.	1	8	9
FELONY. (See *Arrest.*)			
FINES—			
Excessive, not to be imposed. (8th Amendment.).....	..	..	..
FOREIGN—			
power, no State, without the consent of Congress, to enter into any agreement or compact with a.....	1	10	2
state, no present, emolument, office, or title to be accepted from any. (See *Present.*)			
FORFEITURE. (See *Treason.*)			
FORTS—			
magazines, arsenals, dockyards, and other needful buildings, the exclusive legislative authority of Congress may be exercised over all places purchased by the consent of the State legislature for the erection of.....	1	8	16
FREEDOM—			
of the press. (See *Press.*)			
FUGITIVES—			
from justice, charged in any State with treason, felony, or other crime, and found in another State, to be delivered up on demand of the executive authority of the State from which they fled.....	4	2	2
from service or labor, not to be discharged therefrom in consequence of any law or regulation of the State to which they may have fled, but to be delivered up on claim of the party to whom such service or labor may be due.....	4	2	3
GOVERNMENT—			
The U. S. to guarantee to every State in the Union a republican form of.....	4	4	1
(*Note* 13.) Congress to decide what, is the established one in a State.			
of the land and naval forces. (See *Rules.*)			
GOVERNOR—			
(*Note* 13.) The President, under certain circumstances, to decide who is.			
GRAND JURY. (See *Jury.*)			

	Art.	Sec.	Par.
GRIEVANCES. (See *Petition.*)			
HABEAS CORPUS—			
The privilege of the writ of, not to be suspended unless when, in case of rebellion or invasion, the public safety may require it	1	9	2
HOUSE OF REPRESENTATIVES. (See also *Representatives.*)			
to be composed of members chosen every second year	1	2	1
to choose its Speaker and other officers	1	2	5
to have the sole power of impeachment	1	2	5
to be the judge of the elections, returns, and qualifications of its own members	1	5	1
may determine the rule of its proceedings	1	5	2
may punish its members for disorderly behavior	1	5	2
with the concurrence of two-thirds, may expel a member	1	5	2
to keep a journal of its proceedings and, from time to time, to publish the same, excepting those parts requiring secrecy	1	5	3
to enter the yeas and nays on the journal, at the desire of one-fifth of those present	1	5	3
not during the session of Congress to adjourn for more than three days, or to any other place, without the consent of the Senate	1	5	4
All bills for raising revenue, to originate in the	1	7	1
To enter on its journal the yeas and nays, in all such cases as the reconsideration by both houses of a bill returned by the President with his objections	1	7	2
may, on extraordinary occasions, be convened by the President	2	3	1
To choose, by ballot, the President, from the three highest on the list voted for, in case of his non-election by a majority of the whole number of electors appointed. (12th Amendment.)	..	..	1
HOUSES—			
The right of the people to be secure in their, against unreasonable searches and seizures, not to be violated. (4th Amendment.)	..	..	..
Quartering of soldiers in. (See *Billeting.*)			
IMMUNITIES. (See *Privileges.*)			
IMPEACHMENT—			
The sole power of, in the House of Representatives	1	2	0
The sole power to try all cases of, in the Senate	1	3	6
When sitting as a court of, the Senators to be on oath or affirmation	1	3	6
When the President of the U. S. is tried, the Chief Justice to preside	1	3	6
Judgment in cases of, not to extend further than removal from office, and disqualification to hold or enjoy any office of honor, trust, or profit under the U. S.	1	3	7
Judgment in cases of, no bar to indictment, trial, judgment, and punishment, according to law	1	3	7
The President without power to grant reprieves and pardons in cases of	2	2	1
The President, Vice-President, and all civil officers of the U. S. subject to, for treason, bribery, or other high crimes and misdemeanors, and upon conviction are to be removed from office	2	4	1
The testimony of two witnesses to the same overt act, or confession in open court, necessary for conviction of treason	3	3	1
IMPORTATION. (See *Persons* and *Slaves.*)			
IMPORTS—			
No State, without the consent of Congress, to lay any imposts or duties on, except to execute inspection laws	1	10	2
IMPOSTS—			
Congress may lay and collect, uniform throughout the U. S.	1	8	1
Not to be laid by any State, without the consent of Congress, except to execute inspection laws	1	10	2

	Art.	*Sec.*	*Par.*
INABILITY—			
of the President. (See *Vacancies.*)			
INDIAN—			
tribes, power vested in Congress to regulate commerce with the	1	8	3
INDIANS—			
not taxed, excluded from the number in each State according to which Representatives are to be apportioned. (14th Amendment.)	..	..	2
INDICTMENT. (See *Grand Jury.*)			
INHABITANTS—			
How the denial of the right to vote to certain male, will affect the basis of representation. (14th Amendment.)	..	..	2
INSPECTION LAWS—			
A State may lay imposts or duties absolutely necessary for executing its	1	10	2
INSURRECTION—			
Congress may provide for calling forth the militia to suppress.	1	8	14
The privilege of the writ of habeas corpus may be suspended in case of	1	9	2
INVASION—			
Congress may provide for calling forth the militia to repel	1	8	14
In case of, the privilege of the writ of habeas corpus may be suspended	1	9	2
The U. S. to protect each State against	4	4	1
INVENTORS—			
Congress may secure to, for limited times, the exclusive right to their discoveries	1	8	8
JEOPARDY—			
of life or limb, no person to be twice put in, for the same offense. (5th Amendment.)	..	..	..
JOURNAL—			
Each house to keep a, of its proceedings, and, from time to time, to publish the same, excepting such parts as may require secrecy	1	5	3
The yeas and nays to be entered on the, at the desire of one-fifth of those present	1	5	3
The house in which a bill shall have originated, when the same is returned to it by the President with his objections, to enter the objections at large on its	1	7	2
In all such cases as the reconsideration of a bill returned by the President with his objections, the votes of both houses to be determined by yeas and nays, and the names of those voting for and against the bill to be entered on the, of each house respectively	1	7	2
JUDGES—			
of the Supreme Court, the President to nominate, and by and with the consent of the Senate, appoint the	2	2	2
of the Supreme and inferior courts, the, to hold their offices during good behavior, and their compensation not to be diminished during their continuance in office	3	1	1
The, in every State, to be bound by the supreme law of the land, non obstante anything in the constitution or laws of any State	6	..	2
JUDICIAL—			
proceedings in each State. (See *Faith* and *Congress.*)			
tribunals, Congress may constitute, inferior to the Supreme Court	1	8	9
district, the, wherein crime may be committed, to be ascertained beforehand. (6th Amendment.)	..	..	..
power, the, of U. S., vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish	3	1	1
Power, the, to extend:			
to all cases in law and equity arising under this Constitution, the laws of the U. S., and treaties made under their authority	3	2	1

JUDICIAL—*Continued.*	*Art.*	*Sec.*	*Par.*
to all cases affecting ambassadors, other public ministers, and consuls	3	2	1
to all cases of admiralty and maritime jurisdiction	3	2	1
to controversies to which the U. S. shall be a party	3	2	1
to controversies between two or more States	3	2	1
to controversies between a State and citizens of another State	3	2	1
but not to any suit in law or equity commenced or prosecuted against a State by citizens of another State. (11th Amendment.)	..	..	..
to controversies between citizens of different States	3	2	1
to controversies between citizens of the same State claiming land under grants of different States.	3	2	1
to controversies between a State, or the citizens thereof, and foreign states, citizens, or subjects	3	2	1
but not to any suit in law or equity commenced or prosecuted against a State by citizens or subjects of any foreign state. (11th Amendment.)	..	..	..
JURISDICTION. (See also *Territory* and *Forts.*)			
Exclusive, may be exercised by Congress over the District of Columbia, and over places purchased, by consent of the particular State legislature, for the erection of forts, etc.	1	8	16
Original and appellate, of the Supreme Court	3	2	2
No new State to be formed or erected within the, of another, without the consent of the latter, and of Congress	4	3	1
Admiralty and maritime. (See *Admiralty.*)			
Slavery or involuntary servitude, prohibited within the, of the U. S. (13th Amendment.)	..	..	1
Subjection to the, of the U. S., as well as native birth, or naturalization, necessary to citizenship. (14th Amendment.).	..	..	1
JURY—			
The trial of all crimes, except in cases of impeachment, to be by, in the State where committed, but when not committed in any State, where Congress may by law have directed...	3	2	3
In all criminal prosecutions, the accused to enjoy the right to a speedy and public trial by an impartial, of the State and district wherein the crime shall have been committed. (6th Amendment.)	..	..	..
The right of trial by, to be preserved, in suits at common law, where the value in controversy shall exceed twenty dollars. (7th Amendment.)	..	..	..
No fact tried by a, to be otherwise re-examined in any court of the U. S., than according to the rules of the common law. (7th Amendment.)	..	..	..
JURY, GRAND—			
No person to be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a, except in cases in the land and naval forces, or in the militia, when in actual service, in time of war or public danger. (5th Amendment.)	..	..	..
JUSTICE—			
To establish, one of the objects in ordaining this Constitution. (*Preamble.*)			
Fugitives from, found in another State, to be delivered up on demand of the executive authority of the State whence they fled	4	2	2
KING. (See *Present.*)			
LABOR—			
Persons held to in one State escaping to another. (See *Fugitives.*)			
LAND AND NAVAL FORCES—			
Congress may make rules for the government and regulation of the	1	8	13
Persons may be held to answer in the, for capital or otherwise infamous crimes, without the presentment or indictment of a grand jury. (5th Amendment.)	..	..	..

	Art.	Sec.	Par.
LAW—			
The supreme, of the land. (See *Supreme Law of the Land.*)...			
of nations, Congress may define and punish offenses against the	1	8	9
and equity, the judicial power to extend to all cases in, arising under this Constitution, the laws of the U. S., and treaties made under their authority	3	2	1
Common. (See *Jury.*)			
No State to make or enforce any, abridging the privileges or immunities of citizens of the U. S. (14th Amendment.)....	..	..	1
No one to be deprived of life, liberty, or property without due process of. (5th Amendment.)	..	..	..
No State to deprive any person of life, liberty, or property without due process of. (14th Amendment.)	..	..	1
LAWS—			
of the Union, Congress may provide for calling forth the militia to execute	1	8	14
The President to take care that the, be faithfully executed	2	3	1
of the U. S., made in pursuance of this Constitution, a part of the supreme law of the land	6	..	2
No State to deny to any person within its jurisdiction the equal protection of the. (14th Amendment.)	..	..	1
(See *Bills.*)			
LEGISLATIVE POWERS. (See *Congress.*)			
LEVIES—			
(*Note* 6 *a.*) The employment of troops under the denomination of, and the appointment of officers thereof.			
LIBERTY—			
To secure the blessings of, to ourselves and our posterity, one of the objects in establishing this Constitution. (*Preamble.*)			
Life, or property. (See *Life.*)			
LIFE OR LIMB. (See *Jeopardy.*)			
LIFE—			
liberty, or property, no one to be deprived of, without due process of law. (5th Amendment.)	..	..	..
liberty, or property, no State to deprive any one of, without due process of law. (14th Amendment.)	..	..	1
LOANS. (See *Money.*)			
MAGAZINES. (See *Forts.*)			
MARITIME JURISDICTION. (See *Admiralty.*)			
MARQUE AND REPRISAL—			
Congress may grant letters of	1	8	10
No State to grant letters of	1	10	1
MEASURES—			
Congress may fix the standard of weights and	1	8	5
MIGRATION. (See *Persons.*)			
MILITARY OFFICERS. (See *Officers.*)			
MILITIA—			
Congress may provide for calling forth the, to execute the laws of the Union, suppress insurrections, and repel invasions.	1	8	14
Congress may provide for organizing, arming, and disciplining the, and for governing such part of them as may be employed in the service of the U. S	1	8	15
The appointment of the officers of the, and the authority of training the, reserved to the States respectively	1	8	15
The President to be commander-in-chief of the, when called into actual service	2	2	1
(*Note* 11 *a.*) He need not assume personal command of them, but may place them under the command of army officers; but query as to the exclusiveness of his command.			
A well regulated, being necessary to the security of a free state, the right of the people to keep and bear arms is not to be infringed. (2d Amendment.)	..	..	..
MINISTERS—			
The President to nominate, and, by and with the advice and consent of the Senate, to appoint	2	2	2

	Art.	Sec.	Par.
MINISTERS—*Continued.*			
The President to receive	2	3	11
The judicial power to extend to all cases affecting	3	2	
MISDEMEANORS. (See *Crimes.*)			
MONEY—			
Congress may borrow, on the credit of the U. S	1	8	2
Congress may coin, and regulate the value of	1	8	5
No, to be drawn from the treasury, but in consequence of appropriations made by law	1	9	6
A regular statement and account of the receipts and expenditures of all public, to be published from time to time	1	9	6
No State to coin	1	10	1
NATURALIZATION—			
Congress may establish a uniform rule of	1	8	4
NATURALIZED—			
All persons in the U. S., and subject to the jurisdiction thereof, are citizens of the U. S., and of the State wherein they reside. (14th Amendment.)	..	..	1
NAVAL FORCES—			
Congress may make rules for the government and regulation of the	1	8	13
Persons may be held to answer in the, for capital or otherwise infamous crimes, without a presentment or indictment of a grand jury. (5th Amendment.)	..	..	..
NAVY—			
Congress may provide and maintain a	1	8	12
No State to keep ships of war in time of peace	1	10	2
NOBILITY. (See *Title.*)			
NUMBER—			
constituting a quorum, necessary to elect, to pass a bill, etc. (See *Votes* and *Quorum.*)			
OATH—			
or affirmation, to be taken by the President before entering on the execution of his office, form of the	2	1	9
The Senators and Representatives in Congress, the members of the several State legislatures, and all executive and judicial officers, both of the U. S. and of the several States, to be bound by, to support this Constitution	6	..	3
No person who, having previously taken an, in either of the above-mentioned capacities, shall have engaged in insurrection, or rebellion against the U. S., or given aid or comfort to the enemies thereof, shall be a Senator, Representative, or elector of President and Vice-President, or hold any office, civil or military, under the U. S., or under any State, unless by a vote of two-thirds of each house. (14th Amendment.)	..	..	3
No warrants to issue, but upon probable cause, supported by and describing places, persons, and things. (4th Amendment.)	..	..	..
OBLIGATION. (See *Debt.*)			
OFFENSE. (See *Jeopardy.*)			
OFFENSES against the law of nations. (See *Law.*)			
OFFICE—			
Judgment in cases of impeachment not to extend further than removal from, and disqualification to hold or enjoy any, of honor, trust, or profit under the U. S	1	6	7
No Senator or Representative to be appointed to any civil, under the authority of the U. S., created, or the emoluments whereof shall have been increased, during the time for which he was elected	1	6	2
of profit or trust, persons holding any, under the U. S., forbidden, without the consent of Congress, to accept any present, emolument, office, or title from any king, prince, or foreign state	1	9	7
The President to hold his, for the term of four years; the Vice-President ditto	2	1	1

	Art.	Sec.	Par.
OFFICE—*Continued.*			
No person holding an, of trust or profit, under the U. S., to be appointed an elector	2	1	2
No person, not a natural born citizen of the U. S., thirty-five years of age, and fourteen years a resident of the U. S., to be eligible to the, of President	2	1	5
Or the, of Vice-President. (12th Amendment.)	..	..	3
The President, Vice-President, and all civil officers of the U. S., to be removed from, on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors	2	4	1
The judges of the Supreme and inferior courts to hold their offices during good behavior, and their compensation not to be diminished during their continuance in	3	1	1
No religious test ever to be required as a qualification to any, under the U. S	6	..	3
No person to hold any, civil or military, who, having previously taken an oath to support this Constitution, shall have engaged in insurrection or rebellion, unless by a vote of two-thirds of each house. (14th Amendment.)	..	..	3
OFFICERS—			
The House of Representatives to choose its own	1	2	5
The Senate to choose its own, except President	1	3	5
The President to nominate, and, by and with the advice and consent of the Senate, to appoint all, of the U. S., not herein otherwise provided for	2	2	2
Congress may vest the appointment of inferior, in the President alone, in the courts of law, or in the heads of departments	2	2	2
(*Notes* 11, 12.) No military officer can be authorized or created, not subordinate to the President.—Officers of the army not considered by Congress as "inferior."—How far the President's power to control an officer in the exercise of his official functions extends.			
The opinion, in writing, of the principal officer of each executive department, may be required by the President	2	2	1
Military, under the Confederation. (See *Confederation.*)			
of levies. (See *Levies.*)			
of the militia. (See *Militia.*)			
of volunteers. (See *Volunteers.*)			
The President to commission all, of the U. S	2	3	1
All civil, of the U. S., on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors, to be removed from office	2	4	1
All executive and judicial, both of the U. S. and of the several States, to be bound by oath or affirmation to support this Constitution	6	..	3
The denial or abridgment of the right to vote for the executive and judicial, of a State, to work a reduction of the basis of representation. (14th Amendment.)	..	..	2
OPINION—			
The, inwriting, of the principal officer of each of the executive departments, may be required by the President	2	2	1
ORDERS—			
resolutions, or votes, requiring the concurrence of both houses, before taking effect, must pass through the same stages as bills	1	7	3
(*Note* 11.) The, of the President, how and through whom issued.			
PAPERS—			
The right of the people to be secure in their, against unreasonable searches and seizures, not to be violated. (4th Amendment.)	..	..	..
PARDONS—			
may be granted by the President, except in cases of impeachment	2	2	1

	Art.	Sec.	Par.
PATENTS—			
Congress may grant, to inventors, to promote the progress of science and useful arts	1	8	8
PEACE—			
Breach of the. (See *Arrest.*)			
Quartering of soldiers in time of. (See *Billeting.*)			
PENSIONS—			
The validity of debts incurred for the payment of, not to be questioned. (14th Amendment.)	..	..	4
PEONAGE—			
(*Note* 19.) Abolished and prohibited, in New Mexico and elsewhere.			
PEOPLE. (See also *Rights.*)			
We, the, do ordain and establish this Constitution. (*Preamble.*)			
Congress to make no law abridging the right of the, to petition for a redress of grievances. (1st Amendment.)	..	..	..
The right of the, to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, not to be violated. (4th Amendment.)	..	..	..
Powers reserved to the. (10th Amendment.)	..	..	..
PERSONS—			
The right of the people to be secure in their, against unreasonable searches and seizures, not to be violated. (4th Amendment.)	..	..	..
The migration or importation of such, as any State now existing shall think proper to admit, not to be prohibited by Congress prior to 1808	1	9	1
fleeing from justice. (See *Fugitives.*)			
escaping from service or labor. (See *Fugitives.*)			
PETITION—			
Congress to make no law abridging the right of the people to, for a redress of grievances. (1st Amendment.)	..	..	..
PIRACIES—			
and felonies on the high seas, Congress may define and punish.	1	8	9
PORTS—			
The, of one State, not to be preferred over those of another, by any regulation of commerce or revenue	1	9	5
POST-OFFICES—			
and post-roads, Congress may establish	1	8	7
POWERS—			
Enumeration of the, of Congress	1	8	..
The, not delegated by the Constitution to the U. S. nor prohibited by it to the States, are reserved to the States respectively, or to the people. (10th Amendment.)	..	..	..
Legislative. (See *Congress.*)			
Executive. (See *President.*)			
Judicial. (See *Judicial.*)			
PRESENT—			
emolument, office, or title, no, to be accepted from any king, prince, or foreign state, by any person holding an office of profit or trust under the U. S., without the consent of Congress	1	9	7
PRESENTMENT. (See *Grand Jury.*)			
PRESIDENT—			
At the trial of the, by the Senate, on impeachment, the Chief Justice to preside	1	3	6
to hold his office during the term of four years	2	1	1
(*Note* 10.) May signify his refusal to accept, or his resignation, by an instrument in writing delivered into the office of the Secretary of State.			
how elected by the electors, or chosen by the House of Representatives. (See *Votes.*)			
Qualifications of, with respect to citizenship, age, and length of residence	2	1	5
Who is to act in case of vacancy in the office of	2	1	6
Same. (12th Amendment.)	..	..	1

	Art.	Sec.	Par.
PRESIDENT—*Continued.*			
to receive a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected	2	1	7
(*Note* 11.) Subordination of all military officers to the.			
On impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors, the, shall be removed from office	2	4	1
How the denial or abridgment of the right to vote for, is to work a reduction of the basis of representation. (14th Amendment.)	..	..	2
Powers vested in the, viz.:			
the veto power	1	7	2
the executive power	2	2	1
to require the opinion, in writing, of the principal officer of each of the executive departments	2	2	1
to grant reprieves and pardons, except in cases of impeachment	2	2	1
to make treaties, by and with the advice and consent of the Senate, two-thirds of the Senators present agreeing	2	2	2
to fill all vacancies happening during the recess of the Senate, by granting commissions which shall expire at the end of its next session	2	2	3
to convene both houses of Congress, or either of them, on extraordinary occasions	2	3	1
to adjourn them to such time as he shall think proper, in case of disagreement between them with respect to the time of adjournment	2	3	1
(*Note* 13.) To decide whether the emergency has arisen for interfering in a State.			
(*Ibid.*) And incidentally to determine what body of men constitute the legislature, and who is governor.			
Required:			
to be a natural born citizen, or a citizen of the U. S., at the time of the adoption of this Constitution	2	1	5
to have attained to the age of thirty-five years	2	1	5
to have been fourteen years a resident of the U. S	2	1	5
not to receive, within the period for which he shall have been elected, any other emolument from the U. S., or any of them, than his stated compensation	2	1	7
to take the oath (or affirmation) of office	2	1	8
to be commander-in-chief of the army and navy, and of the militia when in actual service	2	2	1
(*Note* 11.) Query as to the exclusiveness of his command of the militia, and his power to delegate it to army officers.			
to nominate, and by and with the advice and consent of the Senate to appoint, ambassadors, or other public ministers, consuls, judges of the Supreme Court, and all other officers of the U. S., whose appointments are not herein provided for, and which shall be established by law	2	2	2
but the appointment of such inferior officers as they think proper may be vested by Congress in him alone	2	2	2
from time to time to give to Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient	2	3	1
to receive ambassadors and other public ministers	2	3	1
to take care that the laws be faithfully executed	2	3	1
to commission all officers of the U. S	2	3	1
PRESS—			
Congress to make no law abridging the freedom of the. (1st Amendment.)	..	..	..
PRINCE. (See *Present.*)			
PRIVATE PROPERTY. (See *Property.*)			
PRIVILEGES. (See also *Rights.*)			
of members of Congress. (See *Arrest.*)			
of citizens. (See *Citizens.*)			

	Art.	Sec.	Par.
PROCEEDINGS—			
of Congress. (See *Journal.*)			
Judicial in each State. (See *Faith* and *Congress.*)			
PROPERTY—			
of the U. S., Congress may dispose of, and make rules and regulations concerning, the	4	3	2
Private, not to be taken for public use, without just compensation. (5th Amendment.)	..	..	..
(*Note* 15.) When an officer taking, is, and when he is not, a trespasser.			
(See *Life, Territory,* and *Forts.*)			
PROSECUTIONS. (See *Trial, Crimes,* and *Criminal Cases.*)			
PROTECTION—			
The equal, of the laws. (See *Laws.*)			
PUBLIC SAFETY. (See *Habeas Corpus.*)			
PUNISHMENTS—			
Cruel and unusual, not to be inflicted. (8th Amendment.)	..	..	..
QUALIFICATIONS—			
of its own members, each house to be the judge of the	1	5	1
QUARTERING—			
of soldiers. (See *Billeting.*)			
QUORUM—			
To do business, a majority of each house to constitute a	1	5	1
A smaller number than a, may adjourn from day to day, and may be authorized to compel the attendance of absent members	1	5	1
A, of States, in choosing a President by the House of Representatives, to consist of a member or members from two-thirds of the States. (12th Amendment.)	..	..	1
A, of Senators, in choosing a Vice-President by the Senate, to consist of two-thirds of the whole number of Senators. (12th Amendment.)	..	..	2
(See *Votes.*)			
RACE—			
The right of citizens to vote, not to be denied or abridged on account of. (15th Amendment.)	..	..	1
RATIFICATION—			
The, of the conventions of nine States, to be sufficient for the establishment of this Constitution between the States so ratifying the same	7	..	1
REBELLION—			
In case of, the privilege of the writ of habeas corpus may be suspended	1	9	1
Disability arising from participation in. (See *Oath* and *Disability.*)			
The validity of debts incurred for payment of pensions and bounties for services in suppressing, not to be questioned. (14th Amendment.)	..	..	4
All debts and obligations incurred in aid of, to be illegal and void. (14th Amendment.)	..	..	4
stigmatized as "crime." (14th Amendment.)	..	..	2
(See *Domestic Violence.*)			
RECEIPTS—			
and expenditures of all public money, regular statements and accounts of, to be published	1	9	6
RECORDS—			
Public, in each State. (See *Faith* and *Congress.*)			
REDRESS—			
of grievances. (See *Petition.*)			
REFUSAL—			
to accept, of the President, or Vice-President, elect. (See *Vacancies.*)			
REGULATION—			
of the land and naval forces. (See *Rules.*)			
REGULATIONS—			
for holding elections for Senators and Representatives. (See *Elections.*)			

	Art.	*Sec.*	*Par.*
RELIGION—			
Congress to make no law respecting an establishment of, or prohibiting the free exercise thereof. (1st Amendment.)...	..	..	..
RELIGIOUS—			
test, never to be required as a qualification to any office or public trust, under the U. S.....	6	..	3
REMOVAL—			
of the President from office. (See *Impeachment* and *Vacancies.*)			
RENDITION—			
of fugitives from justice, and from service or labor. (See *Fugitives.*)			
REPRESENTATION. (See also *Representatives.*)			
Basis of, when reduced. (See *Election.*)			
Vacancies in the, from any State. (See *Vacancies.*)			
REPRESENTATIVES. (See also *House of Representatives.*)			
to be chosen every second year.....	1	2	1
Voters for, to have the qualifications requisite for voters of the most numerous branch of the State legislature.....	1	2	1
Qualifications of, with respect to age, length of citizenship, and place of habitation.....	1	2	2
Disqualification for, arising from participation in insurrection or rebellion, after having taken an oath to support the Constitution of the U. S. (14th Amendment.).....	..	..	3
Apportionment of, to be according to population, excluding Indians not taxed and two-fifths of the slaves.....	1	2	3
But, by the 14th Amendment, according to population, excluding Indians not taxed.....	..	..	2
Number of, not to exceed one for every thirty thousand, but each State to have at least one Representative.....	1	2	3
Each State legislature to prescribe the times, places, and manner of holding elections for, but Congress may alter such regulations.....	1	4	1
A smaller number than a majority or quorum may adjourn from day to day, and may be authorized to compel the attendance of absent members.....	1	5	1
Compensation of, to be ascertained by law, and paid out of the treasury.....	1	6	1
To be privileged from arrest, except for treason, felony, and breach of the peace.....	1	6	1
Not to be questioned elsewhere, for any speech or debate in the house.....	1	6	1
No Representative to be appointed to any civil office under the U. S., created, or the emoluments of which shall have been increased, during the time for which he was elected.....	1	6	2
No person holding any office under the U. S., to be a representative during his continuance therein.....	1	6	2
No Representative to be appointed an elector.....	2	1	2
to be bound by oath or affirmation to support this Constitution	6	..	3
How the denial or abridgment of the right to vote at any election for, is to be followed by a reduction of the basis of representation. (14th Amendment.).....	..	..	2
REPRIEVES—			
The President may grant, except in cases of impeachment.....	2	2	1
REPRISALS. (See *Marque.*)			
REPUBLICAN—			
form of government. (See *Government.*)			
RESIGNATION—			
of the President or Vice-President. (See *Vacancies.*)			
RESOLUTIONS. (See *Orders.*)			
RETURNS—			
of its own members, each house to be the judge of the.....	1	5	1
REVENUE—			
All bills for raising, to originate in the House of Representatives.....	1	7	1
or commerce, no regulations of, to give preference to the ports of one State over those of another.....	1	9	5

RIGHTS—	Art.	Sec.	Par.
Of citizens of the U. S.:			
to their privileges and immunities, without abridgment by the law of any State. (14th Amendment.)	..	..	1
to vote, without denial or abridgment by the U. S., or by any State, on account of race, color, or previous condition of servitude. (15th Amendment.)	..	..	1
Of male citizens of the U. S., inhabitants of any State:			
to vote at certain specified elections; the denial or abridgment of which right shall work a reduction of the basis of representation in such State. (14th Amendment.)	..	..	2
Of citizens of each State:			
to all the privileges and immunities of citizens in the several States	4	2	1
Of the people:			
to the writ of habeas corpus, unless when, in case of rebellion or invasion, the public safety may require its suspension	1	..	2
to the free exercise of religion. (1st Amendment.)	..	..	..
to the freedom of speech, and of the press. (1st Amendment.)	..	..	..
to peaceably assemble. (1st Amendment.)	..	..	..
to petition. (1st Amendment.)	..	..	..
to keep and bear arms. (2d Amendment.)	..	..	..
to be exempt from the quartering of soldiers without their consent, unless in time of war, and then as prescribed by law. (3d Amendment.)	..	..	..
to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. (4th Amendment.)	..	..	..
to be free from answering for capital or otherwise infamous crimes, unless on presentment or indictment of a grand jury, except in cases arising in the military service. (5th Amendment.)	..	..	..
not to be twice put in jeopardy of life or limb for the same offense. (5th Amendment.)	..	..	..
not to be compelled, in any criminal case, to be a witness against one's self. (5th Amendment.)	..	..	..
not to be deprived of life, liberty, or property, without due process of law. (5th Amendment.)	..	..	..
not to be deprived of life, liberty, or property, by any State, without due process of law. (14th Amendment.)	..	..	1
not be denied by any State the equal protection of the laws within its jurisdiction. (14th Amendment.)	..	..	1
to be justly compensated for any private property taken for public use. (5th Amendment.)	..	..	..
to their retained rights, non obstante the enumeration in the Constitution of certain other rights. (9th Amendment.)	..	..	..
to the powers not delegated to the U. S. by the Constitution, or prohibited by it to the States—the same being reserved to them, or to the States respectively. (10th Amendment.)	..	..	..
Of the accused, in criminal prosecutions:			
to a speedy and public trial, by an impartial jury of the vicinage. (6th Amendment.)	..	..	..
to be informed of the nature and cause of the accusation. (6th Amendment.)	..	..	..
to be confronted with the witnesses against him. (6th Amendment.)	..	..	..
to have compulsory process for obtaining witnesses in his favor. (6th Amendment.)	..	..	..
to have the assistance of counsel for his defense. (6th Amendment.)	..	..	..
not to be required to furnish excessive bail. (8th Amendment.)	..	..	..
not to be mulcted in excessive fines. (8th Amendment.)	..	..	..
not to be cruelly and unusually punished. (8th Amendment.)	..	..	..
Of suitors at common law:			
to the trial by jury, where the value in controversy exceeds twenty dollars. (7th Amendment.)	..	..	..

	Art.	Sec.	Par.
RIGHTS—*Continued.*			
to the application of the rules of the common law in the re-examination of any fact tried by a jury. (7th Amendment.)	..	..	..
Of each State:			
to at least one Representative in the house	1	2	3
to two Senators in the Senate	1	3	1
to appoint the officers of, and to train, its militia	1	8	15
to a republican form of government	4	4	1
to protection against invasion and domestic violence	4	4	1
to equal suffrage in the Senate	5	..	1
to the powers reserved to it. (10th Amendment.)	..	..	..
RULES—			
Each house may determine the, of its proceedings	1	5	2
and regulations, respecting the territory or other property of the U. S., may be made by Congress	4	3	2
for the government of the land and naval forces. (See *Land and Naval Forces* and *Armies.*)			
SAFETY—			
Public. (See *Habeas Corpus.*)			
SCIENCE. (See *Copyrights* and *Patents.*)			
SEARCHES—			
and seizures, security against. (4th Amendment.)	..	..	..
SEAT—			
of government, Congress may exercise exclusive legislation over the	1	8	16
(See *District of Columbia.*)			
SECRECY. (See *Journal.*)			
SECURITIES—			
of the U. S., Congress may provide for the punishment of counterfeiting the	1	8	6
SECURITY—			
of the people, in their persons, houses, papers, and effects. (4th Amendment.)	..	..	..
SENATE. (See also *Senators.*)			
to be composed of two Senators from each State, chosen by the legislature thereof, for six years	1	3	1
The Vice-President of the U. S. to be President of the, but to have no vote unless in case of a tie	1	3	4
to choose its other officers, and also a President pro tempore, in the absence of the Vice-President, or when he is exercising the office of President of the U. S.	1	3	5
to have the sole power to try all impeachments	1	3	6
When sitting for that purpose, to be on oath or affirmation	1	3	6
When the President of the U. S. is tried, the Chief Justice to preside	1	3	6
to convict no one without the concurrence of two-thirds of the members present	1	3	6
The judgment of the, in cases of impeachment, not to extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the U. S.	1	3	7
to be the judge of the elections, returns, and qualifications of its own members	1	5	1
may determine the rule of its proceedings	1	5	2
may punish its members for disorderly behavior	1	5	2
with the concurrence of two-thirds, may expel a member	1	5	2
to keep a journal of its proceedings, and, from time to time, to publish the same, excepting those parts requiring secrecy	1	5	3
to enter the yeas and nays on the journal, at the desire of one-fifth of those present	1	5	3
not, during the session of Congress, to adjourn for more than three days, or to any other place, without the consent of the House of Representatives	1	5	4
may propose, or concur with, amendments on bills for raising revenue, as on other bills	1	7	1
to enter on its journal the yeas and nays, in all such cases as			

	Art.	Sec.	Par.
SENATE—*Continued.*			
the reconsideration by both houses of a bill returned by the President with his objections	1	7	2
by and with the advice and consent of the, what the President is empowered and required to do. (See *President.*)			
may, on extraordinary occasions, be convened by the President.	2	3	1
No State, without its consent, to be deprived of its equal suffrage in the	5	..	1
The President of the, in presence of both houses, to open the certified lists of persons voted for by the electors as President and Vice-President. (12th Amendment.)	..	..	1
to choose the Vice-President, from the two highest on the list of those voted for, in case of his non-election by a majority of the whole number of electors appointed. (12th Amendment.)	..	..	2
SENATORS. (See also *Senate.*)			
Two, to be chosen by the legislature of each State for six years.	1	3	1
Each Senator to have one vote	1	3	1
to be divided into three classes, so that one-third may be chosen every second year	1	3	2
If vacancies happen during the recess of the legislature of any State, the executive thereof may make temporary appointments	1	3	2
Qualifications of, with respect to age, length of citizenship, and place of habitation	1	3	3
Disqualification of, arising from participation in insurrection or rebellion, after having taken an oath to support the Constitution of the U. S. (14th Amendment.)	..	..	3
Each State legislature to prescribe the times, places, and manner of holding elections for; but Congress may alter such regulations, except as to the places	1	4	1
A smaller number than a majority, or a quorum, may adjourn from day to day, and may be authorized to compel the attendance of absent members	1	5	1
Compensation of, to be ascertained by law and paid out of the treasury	1	6	1
to be privileged from arrest, except for treason, felony, and breach of the peace	1	6	1
not to be questioned elsewhere, for any speech or debate in the Senate	1	6	1
No Senator to be appointed to any civil office under the U. S., created, or the emoluments of which shall have been increased, during the time for which he was elected	1	6	2
No person holding any office under the U. S. to be a Senator during his continuance therein	1	6	2
No Senator to be appointed an elector	2	1	2
to be bound by oath or affirmation to support this Constitution.	6	..	3
SERVICE—			
Persons held to, in one State, escaping to another. (See *Fugitives.*)			
SERVITUDE—			
Involuntary, except as a punishment for crime, forbidden. (13th Amendment.)	..	..	1
The right of citizens to vote, not to be denied or abridged on account of previous condition of. (14th Amendment.)	..	..	4
SHIPS OF WAR—			
No State, without the consent of Congress, to keep, in time of peace	1	10	2
SIGNATURES—			
of the framers of this Constitution	7	..	1
SLAVERY—			
Except as a punishment for crime, forbidden. (13th Amendment.)	..	..	1
SLAVES—			
The importation of, into any of the now existing States, not to be prohibited by Congress prior to 1808	1	9	1

	Art.	Sec.	Par.
SLAVES—*Continued.*			
Fugitive. (See *Fugitives from service or labor.*)			
Claims for the loss or emancipation of, illegal and void. (14th Amendment.)	..	..	4
SOLDIER. (See *Billeting.*)			
SPEAKER—			
The House of Representatives to choose its	1	2	5
SPEECH—			
Congress to make no law abridging the freedom of. (1st Amendment.)	..	..	..
STANDARD—			
of weights and measures, the, may be fixed by Congress	1	8	5
STATEMENT—			
of receipts and expenditures. (See *Receipts.*)			
STATE JUDGES. (See *Judges.*)			
STATES—			
to have at least one Representative, each, in the house	1	2	3
to have two Senators, each, in the Senate	1	3	1
No State to be deprived, without its consent, of its equal suffrage in the Senate	5	..	4
Each State to appoint electors of President and Vice-President. (See *Electors.*)			
Each State to prescribe the times, places, and manner of holding elections for Senators and Representatives; but Congress may make or alter such regulations, except as to the places of choosing Senators	1	4	1
The appointment of the officers of, and the authority of training the militia, reserved to the, respectively	1	8	15
Particular, may cede to Congress a district, not exceeding ten miles square, for the seat of government	1	8	16
And may consent to the purchase of places for the erection of forts, magazines, arsenals, dockyards, and other needful buildings	1	8	16
not to be prohibited by Congress from importing slaves, prior to 1808	1	9	1
Controversies affecting, or their citizens. (See *Judicial Power.*)			
The public acts, records, and judicial proceedings in each State, to have full faith and credit in every other State	4	1	1
The privileges and immunities of citizens of each State, in the several. (See *Citizens.*)			
Fugitives from justice, and from service or labor, in one State, found in another. (See *Fugitives.*)			
New, may be admitted by Congress into the Union	4	3	4
But if erected or formed within the jurisdiction of another State, or by the junction of two or more States, or parts of States, not without the consent of the States concerned	4	3	1
The claims of any State, to be prejudiced by nothing in this Constitution	4	3	2
to be guaranteed a republican form of government, protection against invasion, and, on application, against domestic violence	4	4	1
On the application of two-thirds of the, Congress to call a convention for proposing amendments to this Constitution	5	..	1
When ratified by the legislatures of, or conventions in, three-fourths of the, amendments to be valid	5	..	1
The judges in every State, to be bound by the supreme law of the land, non obstante anything in the constitution or laws of any State	6	..	2
The members of the several State legislatures, and all executive and judicial officers of the several, to be bound by oath or affirmation to support this Constitution	6	..	3
The ratification of the conventions of nine, to be sufficient for the establishment of this Constitution between the, so ratifying the same	7	..	1
Apportionment of Representatives among the several. (See *Representatives.*)			

	Art.	Sec.	Par.
STATES—*Continued.*			
Disqualification for office under any State. (See *Office.*)			
Powers reserved to the. (10th Amendment.)	..	..	..
Prohibited from:			
entering into any treaty, alliance, or confederation	1	10	1
granting letters of marque or reprisal	1	10	1
coining money	1	10	1
emitting bills of credit	1	10	1
making anything but gold and silver coin a tender in payment of debts	1	10	1
passing any bill of attainder	1	10	1
passing any ex post facto law	1	10	1
passing any law impairing the obligations of contracts	1	10	1
granting any title of nobility	1	10	1
making or enforcing any law abridging the privileges or immunities of citizens of the U. S. (14th Amendment.)	..	..	1
depriving any person of life, liberty, or property, without due process of law. (14th Amendment.)	..	..	1
denying to any person within their jurisdiction the equal protection of the laws. (14th Amendment.)	..	..	1
assuming or paying any debt or obligation incurred in aid of insurrection or rebellion against the U. S. (14th Amendment.)	..	..	4
Prohibited from, without the consent of Congress:			
laying any imposts or duties on imports or exports, except what may be necessary for executing their inspection laws	1	10	2
laying any duty on tonnage	1	10	2
keeping troops in time of peace	1	10	2
keeping ships of war in time of peace	1	10	2
entering into any agreement or compact with each other	1	10	2
entering into any agreement or compact with a foreign power	1	10	2
engaging in war, unless actually invaded, or in imminent danger	1	10	2
SUFFRAGE—			
No State, without its consent, to be deprived of its equal, in the Senate	5	..	1
SUITS—			
at common law. (See *Jury.*)			
SUPREME COURT. (See *Court* and *Courts.*)			
SUPREME LAW—			
of the land, this Constitution, the laws of the U. S. made in pursuance thereof, and all treaties made under the authority of the U. S., to be the	6	..	2
The judges in every State to be bound by the, anything in the constitution or laws of any State to the contrary notwithstanding	6	..	2
TAXES—			
Direct, to be apportioned according to population, excluding Indians not taxed and two-fifths of the slaves	1	2	3
Capitation, or other direct, not to be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken	1	9	4
Congress shall have power to lay and collect, uniform throughout the U. S.	1	8	1
A tax or duty, not exceeding ten dollars a head, may be imposed on the importation of slaves	1	9	1
No tax, or duty, to be laid on articles exported from any State	1	9	5
TENDER—			
No State to make anything but gold and silver coin a, in payment of debts	1	10	1
TENURE—			
of office. (See *Office.*)			
TERM—			
of office. (See *Office.*)			
TERRITORY—			
or other property of the U. S., Congress may dispose of, and make rules and regulations concerning, the	4	3	2

	Art.	*Sec.*	*Par.*
TESTS—			
Religious. (See *Religious.*)			
TITLE—			
of nobility, no, to be granted by the U. S.	1	9	7
or by any State	1	10	1
No person holding any office of profit or trust under the U. S., without the consent of Congress, to accept any, of any kind whatever, from any king, prince, or foreign state	1	9	7
TONNAGE DUTY. (See *Duty.*)			
TRAINING. (See *Militia.*)			
TRANQUILLITY—			
To establish domestic, one of the objects in ordaining this Constitution. (*Preamble.*)			
TREASON—			
On impeachment for, and conviction of, the President, Vice-President and all civil officers of the U. S., to be removed from office	2	4	1
against the U. S., to consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort	3	3	1
The testimony of two witnesses to the same overt act, or confession in open court, necessary for conviction of	3	3	1
Congress may declare the punishment of	3	3	2
No attainder of, to work corruption of blood, or forfeiture, except during the life of the person attainted	3	3	2
TREASURY—			
The compensation of Senators and Representatives, to be paid out of the	1	6	1
No money to be drawn from the, but in consequence of appropriations made by law	1	9	6
The net produce of all duties and imposts laid by any State, to be for the use of the	1	10	2
TREATIES—			
No State to enter into any treaty	1	10	1
The President, by and with the advice and consent of the Senate, may make, provided two-thirds of the Senators present concur	2	2	2
The judicial power to extend to all cases in law and equity arising under, made under the authority of the U. S.	3	2	1
All, made under the authority of the U. S., to be part of the supreme law of the land	6	..	2
TRESPASSER. (See *Property.*)			
TRIAL. (See also *Rights, Jury, Courts, Crimes, Criminal, Judicial, Witnesses, Counsel, Law.*)			
in cases of impeachment, to be solely by the Senate	1	3	6
The party convicted in such cases, to be nevertheless liable to, according to law	1	3	7
The, of all crimes, except in cases of impeachment, to be by jury, in the State where committed, but when not committed in any State, where Congress may by law have directed	3	2	3
The, of a person, twice for the same offense, forbidden. (5th Amendment.)	..	..	..
In all criminal prosecutions, the accused to enjoy the right to a speedy and public, by an impartial jury of the vicinage. (6th Amendment.)	..	..	..
In suits at common law, where the value in controversy exceeds twenty dollars, the right of, by a jury, to be preserved. (7th Amendment.)	..	..	..
TRUST—			
Office of. (See *Office.*)			
UNION—			
To form a more perfect, one of the objects in establishing this Constitution. (*Preamble.*)			
Among the several States which may be included within this, Representatives and direct taxes to be apportioned how	1	2	3

	Art.	Sec.	Par.
UNION—*Continued.*			
Congress may provide for calling forth the militia to execute the laws of the	1	8	14
The President, from time to time, to give Congress information concerning the state of the	2	3	1
Congress to guarantee to every State in this, a republican form of government, etc	4	4	1
VACANCIES—			
in the representation from any State, to be filled by election, for which writs are to be used by the executive authority thereof	1	2	4
in the seats of Senators, during the recess of the legislature of any State, to be filled, temporarily, by the executive thereof	1	3	4
in the presidency of the Senate (or vice-presidency of the U. S.) to be filled by a President pro tempore	1	3	5
in the presidency of the U. S., to be filled by the Vice-President	2	1	6
The same. (12th Amendment.)	..	..	1
in the Presidency, in case of the removal, death, resignation, or inability, both of the President and Vice-President, to be filled by such officer as Congress may, by law, have declared shall act as President, until the disability be removed, or a President shall be elected	2	1	6
(*Note* 10.) The President, or Vice-President, elect, may signify his refusal to accept, or subsequently may resign, by an instrument in writing delivered into the office of the secretary of state	2	1	6
The President may fill all, happening during the recess of the Senate, by granting commissions which shall expire at the end of its next session	2	2	3
VESSELS—			
bound to or from one State, not to be obliged to enter, clear, or pay duties, in another	1	9	5
VETO—			
Two-thirds of each house requisite to pass a bill over the President's	1	7	2
VICE-PRESIDENT—			
to be President of the Senate, but with no vote, unless there be a tie	1	3	4
In the absence of the, or when he shall exercise the office of President of the U. S., the Senate to choose a President pro tempore	1	3	5
to hold his office during the term of four years	2	1	1
(*Note* 10.) May signify his refusal to accept, or his resignation, by an instrument of writing delivered into the office of the secretary of state.			
how elected by the electors, or chosen by the Senate. (See *Votes.*)			
to fill the office of President, in case of the latter's removal therefrom, or of his death, resignation, or inability	2	1	6
to be removed from office, on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors	2	4	1
Qualifications of, with respect to citizenship, age, and length of residence, to be the same as those of the President. (12th Amendment.)	..	..	3
VOLUNTEERS—			
(*Note* 6.) The appointment of officers of, when and how exercised by the President.			
VOTERS—			
Qualifications of, under the name of "electors"	1	2	1
VOTES—			
Each Senator to have one vote.	1	3	1
The Vice-President, as President of the Senate, to have no vote, unless there be a tie	1	3	4

VOTES—*Continued.*	*Art.*	*Sec.*	*Par.*
The concurrence of two-thirds of the Senators present necessary to convict in cases of impeachment	1	3	6
The concurrence of two-thirds of either house necessary to expel a member	1	5	2
The yeas and nays of the members of either house on any question, at the desire of one-fifth of those present, to be entered on the journal	1	5	3
The agreement of two-thirds of each house necessary to pass a bill over the President's veto	1	7	2
But in all such cases, the votes of both houses to be determined by yeas and nays, and the names of the persons voting for and against the bill to be entered on the journal of each house respectively	1	7	2
The agreement of two-thirds of each house necessary to pass a concurrent order, resolution, or vote, over the President's veto	1	7	3
The concurrent vote of both houses to adjourn, to take effect without the President's sanction	1	7	3
The agreement of two-thirds of the Senators present necessary to the ratification of a treaty	2	2	2
The electors to vote by ballot for President and Vice-President, naming in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President. (12th Amendment.)	..	..	1
The electors to make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, signing and certifying the same, and transmitting them sealed directed to the President of the Senate. (12th Amendment.)	..	..	1
The President of the Senate, in the presence of both houses, to open all the certificates, and the electoral votes then to be counted	..	..	1
The person having the greatest number of votes for President to be the President, if such number be a majority of the whole number of electors appointed. (12th Amendment.)	..	..	1
If no person have such majority for President, the House of Representatives to choose by ballot the President from the three highest on the list voted for as such, the votes to be taken by States, and the representation from each State to have one vote, a quorum consisting of two-thirds of the States, and a majority of all the States being necessary to a choice. (12th Amendment.)	..	..	1
The person having the greatest number of votes as Vice-President to be the Vice-President, if such number be a majority of the whole number of electors appointed. (12th Amendment.)	..	..	2
If no person have such majority for Vice-President, the Senate to choose the Vice-President from the two highest numbers on the list; a quorum consisting of two-thirds of the whole number of Senators, and a majority of the whole number being necessary to a choice. (12th Amendment.)	..	..	2
When the right to vote for electors, Representatives, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any male inhabitants of such State, being twenty-one years of age, and citizens of the U. S., except for participation in rebellion or other crime, the basis of representation therein to be reduced, and how. (14th Amendment.)	..	..	2
By a vote of two-thirds of each house, Congress may remove the disability incurred by engaging in insurrection or rebellion against the U. S., or giving aid and comfort to the enemies thereof, after having taken an oath, in a certain capacity, to support the Constitution of the same. (14th Amendment.)	..	..	3

VOTES—*Continued.*	*Art.*	*Sec.*	*Par.*
The right of citizens of the U. S. to vote, not to be denied or abridged by the U. S., or by any State, on account of race, color, or previous condition of servitude. (14th Amendment.)	..	..	4
VOTING. (See *Votes.*)			
WAR—			
Congress may declare	1	8	10
(*Note* 3.) The different wars of the U. S., when declared or when recognized, to exist.			
No State, without the consent of Congress, to engage in, unless invaded, or in imminent danger	1	10	2
WARRANTS—			
Not to issue, but upon probable cause, supported by oath or affirmation, and describing places, persons, and things. (4th Amendment.)	..	..	..
WEIGHTS—			
and measures, Congress may fix the standard of	1	8	5
WELFARE—			
to promote the general, one of the objects in establishing this Constitution. (*Preamble.*)			
Congress may provide for the general	1	8	1
WITNESSES—			
The testimony of two, to the same overt act, or confession in open court, necessary for conviction of treason	3	3	1
No one in any criminal case, to be compelled to be a witness against himself. (5th Amendment.)	..	..	..
In all criminal prosecutions, the accused to enjoy the right to be confronted with the, against him, and to have compulsory process for obtaining those in his favor. (6th Amendment.)	..	..	..
WRITINGS. (See *Authors.*)			
WRITS—			
of election. (See *Vacancies.*)			
of habeas corpus. (See *Habeas Corpus.*)			
YEAS AND NAYS—			
The, of the members of either house on any question, at the desire of one-fifth of those present, to be entered on the journal	1	5	3
In all such cases as the reconsideration of a bill returned by the President with his objections, the votes of both houses to be determined by, and the names of those voting for and against the bill to be entered on the journal of, each house respectively	1	7	2

CHAPTER II.

THE WAR DEPARTMENT.

1. THERE shall be an executive department, to be denominated the department of war; and there shall be a principal officer therein, to be called the secretary for the department of war, who shall perform and execute such duties as shall, from time to time, be enjoined on, or intrusted to, him, by the President of the United States,[1] agreeable to the Constitution, relative to military commissions, or to

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[1] THE SECRETARY OF WAR.—In addition to the general authority invested, by this law, in the secretary (as the general agent or executive officer of the President), he is by other statutes charged with a special supervision over the administration of all the supply departments—their estimates, appropriations, contracts, and expenditures being under his direction and control. The Military Academy is also under his immediate direction.

Although it may be true that "he does not compose a part of the army and has no duties to perform in the field" (1 Opinions, 457), and that "he is a civil officer, and all his duties are civil duties" (4 Nott & Huntington, 125), yet he is "the regular constitutional organ of the President for the administration of the military establishment of the nation; and rules and orders publicly promulgated through him must be received as the acts of the executive, and as such be binding upon all within the sphere of his legal and constitutional authority." See *United States* v. *Eliason*, 16 Peters, 291; and *Wilcox* v. *Jackson*, 13 *ibid.*, 498.

"He must exercise his judgment in expounding the laws and resolutions of Congress, under which he is from time to time required to act. If he doubts, he has a right to call on the attorney-general to assist him with his counsel; and it would be difficult to imagine why a legal adviser was provided by law for the heads of departments, as well as for the President, unless their duties were regarded as executive in which judgment and discretion were to be exercised." (See 15 Peters, 575.) And "whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts."—*Martin* v. *Mott*, 12 Wheaton, 19.

Acts done within the peculiar and legitimate sphere of the secretary's official duty are to be taken and understood as rightly done, and to preclude all collateral inquiry by the accounting officers.—5 Opinions, 387; see also 18 Howard, 96, and Chap. iii., note 5.

It follows, therefore, that so long as the President and the secretary of war are in accord with each other, the powers of the latter, with reference to the army, find their only limitation in the constitutional boundaries to the authority of the chief executive.

"The war department has a staff officer, the adjutant-general, through whom the secretary, in behalf of the President, that is the President, speaks when he sees fit, in matters appertaining to the army."—7 Opinions, 473. But see, in reference to the chief clerk as the medium of communication, note 12.

The secretary of war has also been charged from time to time with special duties in connection with the distribution of national charities, the protection of emigrants, adjustment of State claims, construction of bridges over navigable waters, and of railroads through the public domain; and for many years past the practice has obtained of providing that all appropriations for river and harbor improvements, national surveys, etc., shall be expended under his supervision. See note 8.

The salary of the secretary, under act of March 3, 1853, is $8,000 per annum.

the land or naval forces,[2] ships, or warlike stores, of the United States, or to such other matters respecting military or naval affairs, as the President of the United States shall assign to the said department, or relative to the granting of lands to persons entitled thereto, for military services rendered to the United States,[3] or relative to Indian affairs;[4] and furthermore, that the said principal officer shall conduct the business of the said department in such manner as the President of the United States, shall, from time to time, order or instruct.[2a]—Sec. 1, August 7, 1789, chap. 7.

2. There shall be in the said department an inferior officer, to be appointed by the said principal officer, to be employed therein as he shall deem proper, and to be called the chief clerk in the department of war, and who, whenever the said principal officer shall be removed from office by the President of the United States, or in any other case of vacancy, shall, during such vacancy, have the charge and custody of all records, books, and papers appertaining to the said department.[5]—Sec. 2, *ibid.*

3. The said principal officer, and every other person to be appointed or employed in the said department, shall, before he enters on the execution of his office or employment, take an oath or affirmation well and faithfully to execute the trust committed to him.—Sec. 3, *ibid.*

4. The secretary for the war department shall be, and he is, hereby authorized and directed to define and prescribe the species, as well as the amount, of supplies to be respectively purchased by commissary-general's and quartermaster-general's departments, and

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[2] By the establishment of a navy department, under act of April 30, 1798, the supervision of naval affairs was withdrawn from the war department. The secretary of war was, however, one of the commissioners of the "Naval Pension Fund," from April 23, 1800, till that board of commissioners was abolished under act of July 10, 1832.

(*a.*) "By direction of the President all official business which, by law or regulations, requires the action of the President or secretary of war, will be submitted by the chiefs of staff corps, departments and bureaus, to the secretary of war."

"All orders and instructions relating to military operations, issued by the President or secretary of war, will be issued through the general of the army."—G. O. No. 28, A.-G. O., 1869.

[3] A general control over the public lands was exercised by the secretary of war till, by act of April 25, 1812, they were placed under the supervision of the treasury department.

The commissioner of pensions was under the direction of the war department by the acts of March 3, 1835, and January 19, 1849; but the administration of all pension and bounty land laws was transferred to the department of the interior, by act of March 3, 1849.

[4] The commissioner of Indian affairs was attached to this department by the act of July 9, 1832; but by act of March 3, 1849, the entire control of Indian affairs was transferred to the department of the interior.

[5] For duties of the chief clerk see ¶ 13 and note 12.

the respective duties and powers of the said departments respecting such purchases; and also to adopt and prescribe general regulations for the transportation of the articles of supply from the places of purchase to the several armies, garrisons, posts, and recruiting places, for the safe keeping of such articles, and for the distribution of an adequate and timely supply of the same to the regimental quartermasters, and to such other officers as may, by virtue of such regulations, be intrusted with the same.[6] And the secretary aforesaid is also authorized to fix and make reasonable allowances for the storerent, storage, and salary of storekeepers[6a] necessary for the safe keeping of all military stores and supplies.—Sec. 5, March 3, 1813, chap. 48.

5. The transportation of troops, munitions of war, equipments, military property and stores, throughout the United States, shall be under the immediate control and supervision of the secretary of war,[7] and such agents as he may appoint; and all rules, regulations, articles, usages, and laws in conflict with this provision are hereby annulled.—Sec. 4, January 31, 1862, chap. 15.

6. All moneys appropriated for the Washington Aqueduct, and for the other public works in the District of Columbia, shall be expended under the direction of the secretary of war.[8]—Sec. 3, March 30, 1867, chap. 20.

7. The secretary of war shall cause to be prepared and submitted to Congress, in connection with the reports of examinations and surveys of rivers and harbors hereafter made by order of Congress, full statements of all existing facts tending to show to what extent

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[6] The matter of transportation placed under the immediate control of the secretary. See ¶ 5, and note 7. For his power over the Army Regulations see Chap. v.

(*a.*) MILITARY STOREKEEPERS, eo nomine, have rank and pay prescribed by law. See Chap. xviii., ¶ 521. But in this statute rests the authority for employment of such clerks, warehousemen, watchmen, and others as may be necessary to the safe-keeping and distribution of all military stores and supplies.

(*b.*) The annual appropriations make provision for the employment of clerks, etc., under the direction of the chiefs of bureaus. See also ¶ 234.

[7] TRANSPORTATION.—Under the act of 1812 (see Chap. viii., ¶ 226), it was exclusively the duty of the quartermaster's department, under the supervisory control of the secretary of war, to provide transportation for the army, its stores, etc. But it is evidently intended by this act of 1862 to authorize the secretary either to keep the whole matter of transportation under his own immediate control, or to transfer it in whole or in part to such department or departments of the army as he may deem best. The duty of transporting all troops, supplies, etc., has, however, been left with the quartermaster's department.

[8] PUBLIC WORKS.—And, beginning with the act of June 28, 1864, it has been a condition incorporated in all appropriations for the public works, connected with commerce and navigation, that the moneys appropriated should be expended under the direction of the secretary of war. See acts of June 23, 1866; March 2, 1867; July 25, 1868; April 10, 1869; December 23, 1869; July 7, 11, and 15, 1870; February 2, 1871; March 3, 1871; and April 15, 1871; and Joint Resolutions of March 29, 1867; May 5, 1870; and February 21, 1871.

the general commerce of the country will be promoted by the several works of improvements contemplated by such examinations and surveys, to the end that public moneys shall not be applied excepting where such improvements shall tend to subserve the general commercial and navigation interests of the United States.[8a]—Joint Resolution, July 27, 1868.

8. All books, papers, documents, and records in the war, navy, treasury, and post-office departments, . . . may be copied and certified under seal in the same manner as those in the state department may now by law[9] be, and with the same force and effect.—Sec. 3, February 22, 1849, chap. 61.

9. That during the absence of the quartermaster-general, or the chief of any other military bureau of the war department, the President be authorized to empower some officer of the department or corps whose chief is absent to take charge thereof and to perform the duties of quartermaster-general or chief of the department or corps,[10] as the case may be, during such absence. *Provided*, That no additional compensation be allowed therefor.—Sec. 5, July 4, 1836, chap. 356.

10. In case of the death, resignation, absence, or sickness of the head of any executive department of the government, the first or sole assistant thereof shall, unless otherwise directed by the President of the United States, as is hereinafter provided, perform the duties of such head until a successor be appointed, or such absence or sickness shall cease.—Sec. 1, July 23, 1868, chap. 227.

11. In case of the death, resignation, absence, or sickness of the chief of any bureau, or of any officer thereof, except commissioner of patents, whose appointment is not in the head of any executive department, the deputy of such chief or of such officer, or if there be no deputy, then the chief clerk of such bureau, shall, unless otherwise directed by the President of the United States,[11] as is herein-

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(*a.*) And the secretary is to make annual reports to Congress of the progress toward completion of the improvements in "water communication between the Mississippi River and Lake Michigan, by the Wisconsin and Fox Rivers."—Act of July 7, 1870, chap. 210.

[9] The statute thus referred to (sec. 5, September 15, 1789) enacts that "the said secretary [of state] shall cause a seal of office to be made for the said department [of state] of such device as the President of the United States shall approve; and all copies of records and papers in the said office, authenticated under the said seal, shall be evidence equally as the original record or paper."

[10] Are ¶ ¶ 11, 12, to be considered in connection with this section? See following note.

[11] TEMPORARY VACANCIES IN THE DEPARTMENT AND ITS BUREAUS.—This act (¶ ¶ 10–12) seems to mean that:—

If the President does not see fit to let the deputy of the chief of a bureau, or the

after provided, perform the duties of such chief or of such officer until a successor be appointed or such absence or sickness shall cease. And no appointment, designation, or assignment otherwise than as is herein provided, in the cases mentioned in the first, second, and third sections of this act, shall be made except to fill a vacancy happening during the recess of the Senate.—Sec. 2, *ibid.*

12. In any of the cases hereinbefore mentioned it shall be lawful for the President of the United States, in his discretion, to authorize and direct the head of any other executive department or other officer in either of those departments whose appointment is, by and with the advice and consent of the Senate, vested in the President, to perform the duties of the office vacant as aforesaid until a successor be appointed, or the sickness or absence of the incumbent cease. *Provided,* That nothing in this act shall authorize the supplying as aforesaid a vacancy for a longer period than ten days when such vacancy shall be occasioned by death or resignation, and the officer so performing the duties of the office temporarily vacant shall not be entitled[11a] to extra compensation therefor. . . . —Sec. 3, *ibid.*

13. It shall be the duty of each chief or principal clerk[12] in the

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deputy of any officer of a bureau whose appointment is not vested in the head of the executive department, or, if there be no deputy, then the chief clerk of such bureau, act in his chief's stead, in any of the cases provided for in this act, it shall be lawful for him to authorize and direct some other officer, in either of those departments whose appointment is vested in himself, to perform the duties, etc. Under such power, the President can appoint to a vacancy occurring in the chieftaincy of a bureau, or in any office thereof, the appointment to which is not in the head of any executive department, any officer in either of those departments whose appointment is, by and with the advice and consent of the Senate, vested in him. He is not, as by the act of 1836 (¶ 9), limited in the exercise of this power, to the appointment of some officer of the department or corps whose chief is absent.

(*a.*) See also last clause of ¶ 9. Sec. 4, act of March 3, 1849, had, however, modified the prohibition in act of 1836, by enacting that "no clerk or other officer shall receive the salary of any secretary or head of bureau for acting or having acted in his place or office, while said secretary or head of bureau receives such salary."

[12] CHIEF CLERKS.—A chief clerk, in the department of war, to be appointed by the secretary, was first authorized in the act of 1789 (¶ 2), but in the act of March 3, 1853, it was also provided "that there shall be a chief clerk for each of the departments of the treasury, war," etc., "who shall be allowed an annual compensation of two thousand two hundred dollars each." A salary of two thousand five hundred dollars is, however, appropriated for the chief clerk of this department, for the year ending June 30, 1873. See note 18.

"The chief clerk will receive all communications from the several bureaus of the war department addressed to the secretary of war, and which may require his action.

"The chief clerk will also receive and distribute the official mail; have the custody and be responsible for the safe-keeping of all the books and papers in the department, of the building, and all property therein; and be the medium of communication between the secretary of war and the officers of the department and all other persons.

"He will, for the present, continue to discharge the duties of disbursing clerk."—Secretary of War, April 15, 1871.

A chief clerk in each of the bureaus, excepting the signal office, and office of the inspector-general, is recognized in the act of May 8, 1872, appropriating a salary for each of two thousand dollars. See note 18.

respective departments, bureaus and other offices, to supervise, under the direction of his immediately superior officer, the duties of the other clerks therein, and to see that their duties are faithfully executed, and that such duties are distributed with equality and uniformity, according to the nature of the case. And such distribution shall be revised, from time to time, by the said chief or principal clerk, for the purpose of correcting any tendency to undue accumulation or reduction of duties, whether arising from individual negligence or incapacity, or from increase or diminution of particular kinds of business; and such chief or principal clerk shall report monthly to his superior officer any existing defect that he may be aware of in the arrangements or dispatch of business; and such defect shall be amended by new arrangements of duties, dismissal of negligent or incompetent officers or otherwise.—Sec. 13, August 26, 1842, chap. 202.

14. The clerks in the departments of the treasury, war, navy, the interior, and the post-office, shall be arranged into four classes, of which class number one shall receive an annual salary of nine hundred dollars each, class number two an annual salary of one thousand two hundred dollars each, class number three an annual salary of one thousand five hundred dollars each,[13] and class number four an annual salary of one thousand eight hundred dollars each. . . . . No clerk shall be appointed in either of the four classes until after he has been examined and found qualified by a board,[14] to consist of three examiners, one of them to be the chief of the bureau or office into which he is to be appointed, and the two others to be selected by the head of the department to which the said clerk will be assigned. Nor shall any clerk in the departments herein named receive any other salary or money for extra services than the sum or sums specified in this section,[15] at any time after this section has been executed by a classification of the

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[13] SALARIES of classes one, two, and three, increased by act of 1854. See ¶ 15.

[14] OATH OF OFFICE.—And upon appointment each clerk must take the oath prescribed in Chap. xix., ¶ 542. That oath, or affirmation, may be taken before any justice of the peace, or notary public, or other person who is legally authorized to administer an oath, in the State or district where the same may be administered. See sec. 2, August 6, 1861.

[15] EXTRA COMPENSATION has been prohibited time and again—the legislature having apparently found difficulty in giving unequivocal expression to its intentions. Sec. 11, act of August 26, 1842, provides that "no greater allowance shall be made to any such clerk or other person than is or may be authorized by law, except to watchmen and messengers, for any labor or services required of them beyond the particular duties of their respective stations, rendered at such times as does not interfere with the performance of their regular duties;" and sec. 12, same act, declares that "no allowance or compensation shall be made to any clerk or other officer, by reason of the discharge of duties which belong to any other clerk or officer in the same or any other department; and no allowance or compensation shall be made for

clerks as it prescribes. There shall be a disbursing clerk for each of the departments of war, navy, and . . . at the discretion of the secretary thereof; . . . . The said clerks to be appointed out of class four by the heads of the respective departments,[16] and to receive such sum, in addition to their regular salaries, as may amount in all to two thousand dollars per annum. But it shall be their further duty, when designated by the head of the department for that service, to superintend the buildings, and they shall give bonds as required by the independent treasury act.[16a] *Provided,* That the clerks when distributed and arranged as required by this section shall be paid according to its provisions, out of any money in the treasury not otherwise appropriated, and shall constitute the whole of the permanent[17] clerical force of the departments of the treasury, war, navy, . . . *And provided further,* That each head of the said departments may alter the distribution herein made of the clerks amongst the various bureaus and offices in his department, if he should find it necessary and proper to do so.—Sec. 3, March 3, 1853, chap. 97.

15. Of the clerks authorized by the third section of the act approved March 3, 1853, entitled "An act making appropriations for the civil and diplomatic expenses of government for the year ending the 30th of June, 1854" [¶ 14], those of the first class shall receive a salary of twelve hundred dollars per annum; those of the second class, a salary of fourteen hundred dollars per annum; those of the third class, a salary of sixteen hundred dollars per annum.—Sec. 1, April 22, 1854, chap. 52.

16. That all acts and joint resolutions, or parts thereof, ... granting extra compensation or pay, be, and the same are hereby,

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any extra services whatever, which any clerk or other officer may be required to perform." See also the prohibitory legislation in ¶ ¶ 9, 12, 16, and 348–352.

[16] DISBURSING CLERKS.—The additional compensation of two hundred dollars per annum may be paid whether the disbursing clerk "shall have been appointed from class four, or from a higher grade, any existing law to the contrary notwithstanding. —Act of May 31, 1872, chap. 246.

(*a.*) SUPERINTENDENT OF PUBLIC BUILDINGS.—See appropriations for extra pay to clerks acting as: note 18.

[17] EXTRA CLERKS.—Sec. 15, act of August 26, 1842, had enacted that "no extra clerk shall be employed, in any department, bureau, or office, at the seat of government, except during the session of Congress, or when indispensably necessary to enable such department, bureau, or office, to answer some call made by either house of Congress at one session, to be answered at another; and not then, except by order of the head of the department in which, or in some bureau or office of which, such extra clerk shall be employed; and no such extra clerk, for copying, shall receive more than three dollars per day, or for any other service more than four dollars per day, for the time actually and necessarily employed." But, under the prohibitions recited in ¶ ¶ 19, 104, and 353, it would seem that no "*extra clerks*" are authorized under any circumstances. See Chap. viii., note 12.

repealed, to take effect on the 1st day of July, 1870.—Sec. 4, July 12, 1870, chap. 251.

17. That the heads of the several executive departments be, and they are hereby, directed to report at the opening of the session of Congress beginning on the first Monday of December next, the number of desks in their several departments, the number of clerks in their several departments, the number employed therein during the preceding fiscal year, when employed and when discharged, and the amount of compensation received by each, and what reduction, if any, can be made in the number of clerks in each grade.—Sec. 2, March 3, 1869, chap. 121.

18. The heads of the several departments are hereby authorized to appoint female clerks, who may be found to be competent and worthy, to any of the grades of clerkships known to the law, in the respective departments, with the compensation belonging to the class to which they may be appointed; but the number of first, second, third, and fourth class clerks shall not be increased[18] by this section.—Sec. 2, July 12, 1870, chap. 251.

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[18] For several years past the annual appropriations by Congress have determined the number of civilian clerks, messengers, assistant messengers, laborers, and watchmen that might be employed in the various executive departments; and it is, therefore, deemed unnecessary to republish so much of the act of March 3, 1853, and supplementary legislation, as determined the number of these employees authorized prior to the present fiscal year. The act of May 8, 1872 (chap. 140), among other items makes the following appropriations for the war department, in the year ending June 30, 1873:

"For chief clerk, at two thousand five hundred dollars; two clerks, at two thousand dollars; three clerks of class four; for additional to one clerk of class four, as disbursing clerk, two hundred dollars; for six clerks of class three, three clerks of class two, eight clerks of class one, one messenger, three assistant messengers, one laborer.

Office of the Adjutant-General.—For chief clerk, two thousand dollars; two clerks of class four, nine clerks of class three, twenty-seven clerks of class two, twenty-six clerks of class one, and two messengers. [For detail of enlisted men in adjutant-general's department, see Chap. vii., note 1 c.]

Office of the Quartermaster-General.—For chief clerk, two thousand dollars; three clerks of class four, eight clerks of class three, twenty clerks of class two, seventy-five clerks of class one; thirty copyists, at nine hundred dollars each; superintendent of the building, two hundred dollars; one messenger, two assistant messengers, and six laborers.

Office of the Paymaster-General.—For chief clerk, two thousand dollars; four clerks of class four, nine clerks of class three, twenty-three clerks of class two, twelve clerks of class one, and two messengers.

Office of the Commissary-General.—For chief clerk, two thousand dollars; one clerk of class three, eight clerks of class two, twelve clerks of class one, one messenger, and two laborers.

Office of the Surgeon-General.—For chief clerk, two thousand dollars; one clerk of class three, two clerks of class two, eight clerks of class one, one messenger, and one laborer. [For detail of enlisted men in surgeon-general's office, see Chap. x., ¶ 295.]

Office of Chief Engineer.—For chief clerk, two thousand dollars; three clerks of class four, four clerks of class three, four clerks of class two, four clerks of class one, one messenger, and one laborer.

Office of Chief of Ordnance.—For chief clerk, two thousand dollars; three clerks of class four, two clerks of class three, four clerks of class two, six clerks of class one, and one messenger.

Office of Military Justice.—For one chief clerk, at two thousand dollars; one clerk of class three, one clerk of class one.

19. The compensation of all messengers, assistant messengers, laborers, and watchmen (whether day or night) provided for in this act, unless otherwise specifically stated, shall be as follows: For messengers, eight hundred and forty dollars per annum; for assistant messengers, seven hundred and twenty dollars per annum; for laborers and watchmen, seven hundred and twenty dollars per annum;[19] and after the passage of this act no moneys herein or otherwise appropriated, or that may be hereafter appropriated, for contingent,[20] incidental, or miscellaneous purposes, shall be expended or paid for official or clerical compensation; and it shall be the duty of the accounting officers to reject and disallow all such payments as illegal.—Sec. 3, July 12, 1870, chap. 251.

20. . . . That the bureau of refugees, freedmen, and abandoned lands shall be discontinued from and after June 30, 1872,[21] and that all agents, clerks, and other employees then on duty shall be discharged, except such as may be retained by the secretary of war for the purposes of this proviso; and all acts and parts of acts pertaining to the collection and payment of bounties, or other moneys due to colored soldiers, sailors, and marines, or their heirs, shall remain in force until otherwise ordered by Congress, the same to be carried into effect by the secretary of war, who may employ such clerical force as may be necessary for the purpose.—June 10, 1872, chap. 415.

Signal Office.—For two clerks of class two.

Office of the Inspector-General.—For one clerk of class three.

War Department Buildings.—For compensation of superintendent of the building occupied by the war department (two hundred and fifty dollars), four watchmen, and two laborers.

For superintendent of the building occupied by the paymaster-general (two hundred and fifty dollars), and for five watchmen and two laborers.

For superintendent of building corner of Seventeenth and F Streets (two hundred and fifty dollars), and four watchmen and two laborers.

[19] These rates of pay, though in the first instance established only for the year ending June 30, 1871, have been recognized in the appropriations for succeeding year. See act of March 3, 1871 (which also determines the number of messengers, laborers, and watchmen authorized during the same period), quoted in preceding note.

"No messenger, assistant messenger, laborer, or other person, shall be employed in any department, bureau, or office at the seat of government, or paid out of the contingent fund appropriated to such department, bureau, or office, unless such employment shall be authorized by law, or shall become necessary to carry into effect some object for which appropriations may be specifically made."—Sec. 16, August 26, 1842.

[20] CONTINGENT FUNDS. See ¶ ¶ 40, 62, 63.

[21] "The bureau of refugees, freedmen, and abandoned lands will be discontinued from and after June 30, 1872, and, after that date, all business relating in any way to the said bureau—exclusive of the freedmen's hospital and asylum at Washington—with all the accounts and claims connected therewith, of whatever character or date, or whensoever incurred, will be conducted through the adjutant-general of the army, to whom all the records, checks, and treasury certificates (received under sec. 1 of the act of March 29, 1867), or the amounts received therefrom, and all other funds, papers, and property, will be delivered by the 1st of July proximo, at such place as the adjutant-general may designate."—G. O. No. 55, A.-G. O., 1872.

CHAPTER III.

THE TREASURY DEPARTMENT.

ADJUSTMENT OF ACCOUNTS.

25. THE forms of keeping and rendering all public accounts whatsoever shall be prescribed[1] by the department of the treasury. —Sec. 9, May 8, 1792, chap. 37.

26. All claims and demands whatever, by the United States or against them, and all accounts whatever, in which the United States are concerned, either as debtors or as creditors, shall be settled and adjusted in the treasury department.[2]—Sec. 2, March 3, 1817, chap. 45.

27. It shall be the duty of the secretary of the treasury to cause all accounts of the expenditure of public money to be settled within the year,[3] except where the distance of the places where such

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[1] But regulations prescribed by the department for the settlement of accounts are subject to revision by the court.—*United States* v. *Cadwalader*, Gilpin's Reports, 563. An appeal lies to the court of claims: see ¶ 122.

The accounting officers have no discretion or control over the mode or manner in which disbursing officers transmit their accounts for settlement.—Second Comptroller, § 32. Transmittal of money accounts regulated by law: see ¶ ¶ 41, 50.

[2] Therefore no officer has a right to submit a claim to the decision of referees.—Second Comptroller, § 414. But in certain instances the court of claims has jurisdiction: see ¶ ¶ 47, 48, 125. Congress alone has power to submit the rights of the United States to arbitration.—*Childs* v. *United States*, 4 Nott & Huntington, 184.

(*a*.) It is out of the province of a disbursing officer to rectify alleged errors in the payment of accounts of other officers, or to pay any claims for short allowances on former settlements. Such claims should be adjusted only at the treasury; and any such additional payments should be disallowed in the accounts of the disbursing officers.—Second Comptroller, § 762.

(*b*.) The first section of this act abolished "the offices of accountant (note 4) and additional accountant (note 8) of the department of war, the office of accountant of the navy, and the office of superintendent-general." The latter officer was specially charged with the settlement, under direction of the secretary of war, of *property accounts*. See note 19 *a*.

[3] "The fiscal year of the treasury of the United States, in all matters of accounts, receipts, expenditures, estimates, and appropriations, shall commence on the first day of July in each year."—Sec. 1, August 26, 1842.

"Sound policy requires that the accounts of disbursing officers should be adjusted at the proper department, with as much dispatch as is practicable. This is alike due to the public, and to persons who are held responsible as sureties. To the individual who has received advances of money, no lapse of time nor change of circumstances can weaken the claim of the government for reimbursement. . . . The law on this subject is founded upon considerations of public policy. While various acts of limitation apply to the concerns of individuals, none of them operate against the government."—*Smith* v. *United States*, 5 Peters, 298. See ¶ ¶ 41, 50.

expenditure occurs may be such as to make further time necessary; and, in respect to expenditures at such places, the secretary of the treasury, with the assent of the President, shall establish fixed periods at which a settlement shall be required.—Sec. 13, *ibid.*

THE ACCOUNTING OFFICERS.

28. It shall be the duty of the comptroller of the treasury, in every case where in his opinion further delays would be injurious to the United States, and he is hereby authorized, to direct the auditor of the treasury [and the accountants of the war and navy departments],[4] at any time, forthwith to audit and settle any particular account which the said officers may be respectively authorized to audit and settle, and to report such settlement for his revision and final decision. And the said comptroller shall also lay an annual statement before Congress, during the first week of their session, of the accounts in the treasury, war, or navy departments, which may have remained more than three years unsettled, or on which balances appear to have been due more than three years prior to the 30th of September then last past, together with a statement of the causes which have prevented the settlement of the accounts or the recovery of the balances due to the United States.—Sec. 2, March 3, 1809, chap. 28.

29. It shall be the duty of the second comptroller to examine all accounts settled by the second, third, and fourth auditors, and certify the balances arising thereon to the secretary of the department in which the expenditure has been incurred;[5] to countersign all war-

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[4] The accountants of the war department (appointed under acts of May 8, 1792, and April 29, 1816) were charged with the adjustment, subject to revision of the accounting officers of the treasury, of all money accounts arising in the military establishment. They were abolished, and their duties transferred to the auditors, by act of March 3, 1817. See ¶ ¶ 33, 35, and also note 7 *b*.

[5] JURISDICTION OF ACCOUNTING OFFICERS.—The second comptroller has long claimed independent, exclusive, and final jurisdiction in respect to all settlements of accounts made by him, and now claims that the act of March 30, 1868, has confirmed to him this absolute authority. (See digest of his decisions [1869], § § 11, 17, 440, 441, 442, 527, 760.) In reference to this act (¶ 32) the court of claims holds that "Whatever doubts existed prior to the act of March 30, 1868, there can be none now that the settlements of public accounts by the auditors and the comptrollers are final and conclusive, upon the executive departments of the government. Whatever uncertainty or controversy existed on the subject has been effectually removed by the plain and explicit provisions of that enactment. When they have acted, the head of the department to which the claim or account belongs has no power to change or modify their award."—See 5 Nott & Huntington, 60. But the question arises as to how far the act of 1868, as thus construed, derogates from the authority of the heads of departments to direct the manner in which the appropriations, to be expended under their direction, are to be applied, or how far it restrains them from making or denying allowances for items arising in the settlement of such accounts as pertain to their respective departments. On this subject the controversy has been long and acrimonious, and the act of

rants drawn by the secretaries of the war [¶90] and navy departments, which shall be warranted by law; to report to the said

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1868 is hardly more determinate in its terms than are those under which these disputes first arose.

(*a.*) In the case of the *United States* v. *Jones*, the accounting officers of the treasury had refused to recognize the authority of the secretary of the navy, and held a subordinate officer responsible for moneys disbursed by such authority. The circuit court for the District of Columbia sustained the authority of the secretary; and an appeal being taken, the Supreme Court, in affirming the judgment of the lower court, held that "the secretary of the navy represents the President, and exercises his powers on the subjects confided to his department. He is responsible to the people and to the law for any abuse of the power intrusted to him. His acts and decisions, on subjects submitted to his jurisdiction and control by the Constitution and the laws, do not require the approval of any officer of another department to make them valid and conclusive. The accounting officers of the treasury have not the burden of the responsibility cast upon them of revising the judgments, correcting the supposed mistakes, or annulling the orders of the heads of departments": and the court declares further that acts done within the legitimate sphere of the secretary's official duty are to be taken and understood as rightly done, and to preclude all collateral inquiry by the accounting officers: see 18 Howard, 95, 96. And as the construction placed upon statutes by the heads of the executive departments are, when not affecting private rights, held to be binding on the courts, they must, a fortiori, be held to be binding upon other executive officers. See Chap. ii., note 4 *a*; and Chap. v., note 3 *a*.

(*b.*) The attorney-generals have differed in opinion on this subject, and in more than one instance the same opinion is claimed by both parties to the controversy. In the majority of instances, however, these opinions sustain Mr. Crittenden, who, after a comprehensive view and analysis of the opinions of his predecessor, says: "the independent, exclusive, and final jurisdiction claimed as belonging to the five auditors and two comptrollers, and commissioner of customs performing the duties of a comptroller, to the exclusion of the heads of departments, and of the jurisdiction and control of the secretary of the treasury, in particular, is, in my opinion, contrary to the true meaning of the Constitution, which intends that each of the executive departments shall have a head" (5 Opinions, 656; and see 10 Opinions, 436); and Mr. Johnson held that the decision of the head of a department, directing payment of a particular claim, is binding upon all the subordinate officers by whom the same is to be audited and passed. This, he says, has been the practice of the government from its origin, and is well authorized by the laws organizing the departments, as it is necessary to the proper operation of the government.—5 Opinions, 87.

(*c.*) Attorney-general Akerman, however, makes a distinction between money accounts and the accounts and returns for public property, and held (in 1871) that the authority of the accounting officers relative to the settlement of property accounts "does not exist independent of, but rather in subordination to, the department of war. Originally the general supervision of the keeping, preservation, and disposition of property in the military service belonged to that department, and it belongs there still. All officers charged with the custody, distribution, or issuing of any stores or supplies of any description are, and have always been, accountable to the war department for the discharge of their duties and for the property intrusted with them. We have seen that immediately prior to the act of 1817 an officer existed in that department whose duty it was to audit and settle property accounts, and that he was required to perform this duty under the direction of the secretary of war. By the provisions of that act the duty of the officer referred to was transferred to the accounting officers of the treasury; nevertheless, it was left to be performed as before, under the direction of the secretary of war. No alteration of the law in this respect has been made by any subsequent statute; and hence, as regards the settlement of property accounts, there exists an official relation between the secretary of war and the accounting officers of the treasury charged with such settlements. But while this is true in reference to property accounts, it is not true in reference to money accounts arising in the military service, the latter being now, and ever having been, settled under the supervision and subject to the revision of the treasury department exclusively, with the exception, perhaps, of a few special cases."

(*d.*) For other opinions pro and con see 1 Opinions, 596, 624, 629, 678, 681, 705; 2 *ibid.*, 303, 463, 480, 481, 508, 515, 544, 625, 652; 3 *ibid.*, 148, 461, 731; 5 *ibid.*, 387, 630; 6 *ibid.*, 576; 7 *ibid.*, 439, 464, 724; and 8 *ibid.*, 293.

secretaries the official forms to be issued in the different offices for disbursing the public money in those departments, and the manner

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(*e.*) ACCOUNTS STATED.—"Even when an officer's account has been closed, a settled account being only prima facie evidence of its correctness, 'it may be impeached by proof of unfairness, or mistake in law or in fact.' (See *Perkins* v. *Hart*, 11 Wheaton, 256.) And the true state of the account between the parties being thus shown, the balance resulting may be recovered."—Second Comptroller, § 22. But the case thus cited was one of disputed accounts between individuals, and, if at all relevant, affirms only that the settlement of an account may be impeached in the proper courts. It does not justify the comptroller in asserting that a settled account between the government and its officers can be reopened by the *accounting officer*. See note 30.

"An incumbent second comptroller has no right to reopen a case decided by his predecessors, except upon the presentation of new and material facts, or the discovery of errors in calculations."—Second Comptroller, § 524.

"The right in an incumbent second comptroller to reverse a predecessor's decisions extends to mistakes in matters of fact arising from errors in calculation, and to cases of rejected claims in which material testimony is afterwards discovered and produced (15 Peters, 401)."—Second Comptroller, § 526. In this case, however, the court goes on to say: "but if a credit has been given, or an allowance made, by the head of a department, and it is alleged to be an illegal allowance, the judicial tribunals of the country must be resorted to, to construe the law under which the allowance was made, and to settle the rights between the United States and the party to whom the credit was given. It is no longer a case between the correctness of one officer's judgment and that of his successor." See *United States* v. *Bank of the Metropolis*.

In ex parte *Randolph*, the right of an accounting officer to reopen an account is denied upon grounds applicable, as well to accounts adjusted by the incumbent accounting officer as to those adjusted by a predecessor. In that case Justice Barbour says: "after an auditor shall once have settled an account of a public officer, and closed it, as in this case, is it competent for *him* at an after-time, upon an allegation of error or omission, or for other cause, to open it, restate it, and upon the account thus restated to institute proceedings, etc.? I think it is not. I take it to be a sound principle that when a special tribunal is created, with limited powers and a particular jurisdiction, whenever the power is once executed, the jurisdiction is exhausted and at an end; that the person thus invested with power is, in the language of the law, 'functus officio.'"—2 Brockenborough, 448. See also note 30.

"The settlement made of the accounts of individuals, by the accounting officers appointed by law, is final and conclusive, so far as the executive department of the government is concerned. If an individual conceives himself injured by such settlement, his recourse must be one of the other two branches of the government—the legislative or judicial."—1 Opinions, 629. See also note 7.

Confining the question to an account presented for settlement in the ordinary course and under the general laws, Attorney-general Butler says: "in my opinion, the accounting officer is not authorized by law to reopen accounts of the claimants which have been long since examined and finally settled, and to call upon the claimant to furnish evidence of the correctness of the settlements, as a condition precedent to the auditing and reporting upon the account so presented. Rests and settlements may be made in an account, which cannot with propriety be called a *final* settlement; and until a *final* settlement I hold it to be the duty of the accounting officers to make all such corrections as may be rendered necessary by the detection of palpable errors or false items in such rests or partial settlements. This is not to be done, strictly speaking, by reopening or restating the previous adjustments; but by making such entries in the new settlements, by which the account is continued, as shall produce the proper correction."—2 Opinions, 629, 630.

"It is undoubtedly a good general principle of law, as well as of expediency, not to say absolute necessity, that the accounting officers, as well as all other responsible executive officers, should, as far as possible, refrain from disturbing, unsettling, or reversing any of the official determinations of their predecessors; and if, in the observance and preservation of this wholesome general rule, injustice shall be done to any person, it will be far better for the aggrieved individual to seek redress at the hands of Congress, than to place the whole past transactions of the accounting officers in an unsettled condition. By which means, not only would great, and perhaps inextricable, confusion be introduced into the transactions of these officers, but, in the resettlement of accounts, great injustice might be done in many cases to individuals as well as to

and form of keeping and stating the accounts of the persons employed therein; and it shall also be his duty to superintend the preservation of the public accounts subject to his revision.—Sec. 9, March 3, 1817, chap. 45.

30. It shall be the duty of the first comptroller to lay before Congress annually, during the first week of their session, a list of such officers as shall have failed in that year to make the settlement required by law.—Sec. 13, March 3, 1817, chap. 45.

31. In the annual statement of all accounts on which balances appear to have been due more than three years, which the comptroller is now required by law to make, he shall hereafter distinguish those accounts, the balances appearing on which shall, in his opinion, be owing to difficulties of form, which he may think it equitable shall be removed by an act of Congress; and where the debtors, by whom such balances shall have been due more than three years, shall be insolvent, and have been reported to Congress for three successive years as insolvent, the comptroller shall not be required in such case to continue to include such balances in the statement above mentioned. —Sec. 14, *ibid.*

32. The act of March 3, 1817, entitled "An act to provide for the prompt settlement of public accounts," shall not be construed to authorize the heads of departments to change or modify the balances that may be certified to them by the commissioner of customs or the comptroller of the treasury, but that such balances, when stated by the auditor and properly certified by the comptroller as provided by that act, shall be taken and considered as final and conclusive upon the executive branch of the government, and be subject to revision only by Congress or the proper courts.[5f] *Provided,* That the head of the proper department, before signing a warrant for any balance certified to him by a comptroller, may submit to such comptroller any facts in his judgment affecting the correctness of such balance, but the decision of the comptroller thereon shall be final and conclusive as hereinbefore provided.—March 30, 1868, chap. 36.

33. It shall be the duty of the second auditor to receive all

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government. A serious question has been made and sanctioned by at least one member of the Supreme Court, whether the accounting officers can, in any case, revise and re-adjudicate upon the items of an account once settled in those offices. I do not name this as intending to give my approval of all that was said by the judges in the case of ex parte *Randolph* (2 Brockenborough, 447); but in order to show that the necessity of preventing a re-examination of claims against the United States is felt and appreciated by members of another department of the government."—3 Opinions, 462. See also 2 *ibid.*, 9, 303, 464, 625; 3 *ibid.*, 46, 148, 521; 5 *ibid.*, 122, 176; 6 *ibid.*, 576; 9 *ibid.*, 509; and 10 *ibid.*, 255.

(*f.*) See also ¶ 125, and note 7 *c.*

accounts relative to the pay and clothing[6] of the army, the subsistence of officers, bounties, and premiums, military and hospital stores, and the contingent expenses of the war department; it shall be the duty of the third auditor to receive all accounts relative to the subsistence of the army, the quartermaster's department, and generally, all accounts of the war department other than those provided for; . . . and the second, third, and fourth auditors, aforesaid, shall examine the accounts respectively, and certify the balance, and transmit the accounts, with the vouchers and certificate, to the second comptroller, for his decision thereon.[7] *Provided,* That the President of the United States may assign to the second or third auditor the settlement of the accounts which are now confided to the additional accountant of the war department.[8]—Sec. 4, March 3, 1817, chap. 45.

34. Hereafter all the accounts and vouchers of the disbursing officers of the quartermaster's department of the army shall be audited and settled by the third auditor of the treasury.—Sec. 1, March 3, 1857, chap. 106.

35. It shall be the duty of the auditors, charged with the examination of the accounts of the war and navy departments, to keep all accounts of the receipts and expenditures of the public money in regard to those departments, and of all debts due to the United States on moneys advanced relative to those departments; to receive from the second comptroller the accounts which shall have been finally adjusted, and to preserve such accounts, with their vouchers

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[6] But see following paragraph.

[7] "*Provided,* That if any person whose account shall be so audited be dissatisfied therewith, he may, within six months, appeal to the comptroller against such settlement."—Sec. 5, Sept. 2, 1789.

(*a.*) "Even after the account is finally closed, so far as the auditor is concerned, there may be cases in which the comptroller, or the head of the department, may be authorized to interfere for the purpose of correcting errors or frauds which may have been discovered after the action of the auditor; and, still further, although the matter may have passed beyond the reach of all the executive officers, the government will yet be entitled to surcharge and falsify, by an appeal to the appropriate remedies furnished by the judicial tribunals."—2 Opinions, 630.

(*b.*) Under the provisions of the act of 1809 (¶ 28) the second comptroller can call upon the second and third auditors forthwith to settle any particular account which they may be authorized to examine.—2 Opinions, 627.

(*c.*) Balances found by the accounting officers, and duly certified, though conclusive upon the executive branch, do not conclude the court of claims. "If the auditor and comptroller certify a balance due from a public officer or contractor, the latter may refuse payment; and when the United States bring suit to recover that balance, the defense may be interposed, and the matter undergo judicial investigation and scrutiny. So if an officer or creditor claim a larger amount than the accounting officers allow, he may refuse it, and sue in this court [of claims] or apply to Congress for relief."—*Delaware Steamboat* v. *United States,* 5 Nott & Huntington, 61.

[8] That additional accountant was, however, to be appointed only for one year "to adjust and settle all the accounts in that department existing at the conclusion of the late war and now unsettled." See note 4.

and certificates; and to record all warrants drawn by the secretaries of those departments, the examination of the accounts of which has been assigned to them by the preceding section.[9] And it shall be the duty of the said auditors to make such reports, on the business assigned to them, as the secretaries of the war and navy departments may deem necessary and require, for the services of those departments.—Sec. 5, March 3, 1817, chap. 45.

DISBURSING OFFICERS.

36. All officers of the pay, commissary, and quartermaster's departments, shall, previous to their entering on the duties of their respective offices, give good and sufficient bonds to the United States, fully to account for all moneys and public property which they may receive, in such sum as the secretary of war shall direct.[10] And all paymasters, commissaries, and storekeepers shall be subject to the rules and articles of war, in the same manner as commissioned officers. *Provided also,* That all officers of the pay and commissary's departments be submitted to the Senate for their confirmation, in the same manner as the officers of the army.—Sec. 6, April 24, 1816, chap. 69.

37. It shall be lawful for the President of the United States, and he is hereby authorized, from time to time, as, in his opinion, the interest of the United States may require, to regulate and increase the sums for which the bonds required, or which may be required by the laws of the United States, to be given by the said officers, and by all[10a] other officers employed in the disbursement of the

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[9] See ¶ 33. The auditors are empowered to administer oaths or affirmations to witnesses in any case in which they may deem it necessary for the due examination of accounts.—Sec. 12, March 3, 1817.

[10] BONDS.—"The act [¶ 36] merely prescribes the form and purport of the bond to be taken of paymasters by the war department. It is in this respect directory to that department; and doubtless it would be illegal for that department to insist upon a bond containing other provisions and conditions differing from those prescribed or required by law. But the act has nowhere declared that all other bonds, not taken in the prescribed form, shall be utterly void: nor does such an implication arise from any of the terms contained in the act, or from any principles of public policy which it is designed to promote. A bond may, by mutual mistake or accident, and wholly without design, be taken in a form not prescribed by the act. It would be a very mischievous interpretation of the act to suppose that, under such circumstances, it was the intendment of the act that the bond should be void. Nothing, we think, but very strong and express language, should induce a court of justice to adopt such an interpretation. Where the act speaks out, it would be our duty to follow it; where it is silent, it is a sufficient compliance with the policy of the act, to declare the bond void, as to any conditions which are imposed upon a party, beyond what the law requires. This is not only the dictate of the common law, but of common sense.—*United States* v. *Bradley*, 10 Peters, 364. See 10 Wallace, 395; also note 13 *a*, and Chap. xix., note 1 *a*, last paragraph.

(*a*.) Bonds voluntarily given to the United States, to secure the fidelity of disbursing officers, though given in cases not prescribed by law, are held to be valid instruments

public moneys under the direction of the war or navy departments, shall be given; and all bonds given in conformity with such regulations shall be as valid and effectual, to all intents and purposes, as if given for the sums respectively mentioned in the laws requiring the same.—Sec. 3, May 15, 1820, chap. 102.

38. The medical purveyors and storekeepers shall give bonds in such sums as the secretary of war may require, with security to be approved by him.[10b]—Sec. 16, July 17, 1862, chap. 201.

39. From and after the passing of this act, no advance of public money shall be made in any case whatever; but in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment. *Provided*, That it shall be lawful, under the especial[11] direction of the President of the United States, to make such advances to the disbursing officers of the gov-

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upon the parties thereto; but no officer of the government has a right by color of his office to require from any subordinate, as a condition of holding office, that he shall execute a bond with conditions different from those prescribed by law.—*United States* v. *Tingey*, 5 Peters, 128, 129. See also Chap. xix., note 1 *c*; and notes 13 *a* and 44 of this chapter.

Agents appointed by the President or by heads of departments to give bonds. See Chap. xxviii., ¶ ¶ 925, 926.

Disbursing clerks to give bonds.—Chap. ii., ¶ 14.

Engineer officers disbursing money on public works may be required to give bonds if the President sees fit to require such security.—6 Opinions, 24.

Paymasters to renew their bonds, or furnish additional security, every four years.—Chap. xi., ¶ 318.

There is no general rule which can be applied to determine what constitutes the approval of official bonds. "Every case must depend upon the laws directing such an approval. The purpose for which such a bond is required must be looked to. The character of the office and its duties must be examined. The time within which such a bond must be given and approved, and whether it is to be retrospective or for the future only, must be considered before it can be determined how and when the approval must be made."—*Broome* v. *United States*, 15 Howard, 156.

(*b*.) But by the act of 1866 medical purveyors are to give the same bonds which are required of assistant paymasters-general [deputy paymaster-general] of like grades.—Chap. x., ¶ 281; and Chap. xi., ¶ 318.

(*c*.) SEALS.—An obligation binding the sureties of an officer for the faithful discharge of the duties of his office is, if executed without seal, not a "*bond*" within the meaning of the acts of Congress; but such an instrument is good at common law, as a contract binding upon the parties voluntarily subscribing thereto.—*United States* v. *Linn*, 15 Peters, 317.

"By direction of the secretary of war, formal seals will hereafter be fixed to all official bonds given by officers of the army, as quartermasters, etc.; and none but bonds formally sealed with wax, 'or other adhesive substance,' will hereafter be accepted from contractors or their sureties; and this, notwithstanding that the law of the State where the instrument is executed may dispense with such seals."—Circular, A.-G. O., June 11, 1869.

[11] ADVANCES OF PUBLIC MONEY, when made by order of the chief of the proper department, must be regarded as having been made by direction of the President. The prohibition by statute of any action, unless performed by direction of the President, is not to be construed as requiring his personal and ministerial performance of such act; it can be properly performed only through the agency of the appropriate department.—*Williams* v. *United States*, 1 Howard, 290.

ernment as may be necessary to the faithful and prompt discharge of their respective duties, and to the fulfillment of the public engagements. *And provided also*, That the President of the United States may direct such advances as he may deem necessary and proper, to such persons in the military and naval service as may be employed on distant stations, where the discharge of the pay and emoluments to which they may be entitled cannot be regularly effected.—Sec. 1, January 31, 1823, chap. 9.

40. No part of the contingent fund appropriated to any department, bureau, or office, shall be applied to the purchase of books, periodicals, pictures, or engravings, or other thing, except such books, periodicals, and maps, or other thing, as the head of such department shall deem necessary and proper to carry on the business of such department, and shall, by written order, direct to be procured for that purpose.[12]—Sec. 19, August 26, 1842, chap. 202.

41. From and after the passage of this act any officer or agent of the United States, who shall receive public money which he is not authorized to retain as salary, pay, or emolument, shall render his accounts monthly, instead of quarterly, as heretofore;[13] and such accounts, with the vouchers necessary to the correct and prompt settlement thereof, shall be rendered direct[13c] to the proper accounting officer of the treasury, and be mailed or otherwise forwarded to its proper address within ten days after the expiration of each successive month. And in case of the non-receipt at the treasury of any accounts within a reasonable and proper time thereafter, the officer whose accounts are in default shall be required to furnish satisfac-

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[12] See also Chap. ii., ¶ 19. It is the duty of the secretary of war to lay before Congress, during the first week in each annual session, a statement of the expenditures made by him from the contingent fund of his department.—Sec. 2, May 9, 1836. See also ¶ ¶ 62, 63.

[13] Under act of January 31, 1823, sec. 2 of which is clearly supplied by above act. Sec. 3 of the act of 1823 enacted, however, that every officer failing to render his accounts in the manner prescribed in the preceding section "shall, by the officer charged with the direction of the department to which such offending officer is responsible, be promptly reported to the President of the United States, and dismissed from the public service. *Provided*, That in all cases, where any officer, in default as aforesaid, shall account to the satisfaction of the President for such default, he may be continued in office, anything in the foregoing provision to the contrary notwithstanding." And in sec. 4 it is enacted that:

(*a.*) "No security given to, or obligation entered into, with the government, shall be in anywise impaired, by the dismissing any officer, or from failure of the President to dismiss any officer coming under the provisions of this act."

(*b.*) The act of 1862 (¶ 41) applies only to the accounts and vouchers relative to the receipt and disbursement of public money, and not to property or other returns, which will be rendered as heretofore, according to the regulations.—Second Comptroller, § 14. See also note 19.

(*c.*) Accounts to be submitted through the chief of the bureau to which they pertain, ¶ 50.

tory evidence of having complied with the provisions of this act; and for any default on his part the delinquent officer shall be deemed a defaulter, and be subject to all the penalties prescribed by the 16th section of the act of August 6, 1846,[14] "to provide for the better organization of the treasury, and for the collection, safe-keeping, transfer, and disbursement of the public revenue." *Provided,* That the secretary of the treasury may, if in his opinion the circumstances of the case justify and require it, extend the time hereinbefore prescribed for the rendition of accounts. *And provided further,* That nothing herein contained shall be construed to restrain the heads of any of the departments from requiring such other returns or reports from the officer or agent subject to the control of such heads of departments as the public interest may require.—July 17, 1862, chap. 199.

42. All amounts of moneys that are represented by certificates, drafts, or checks, issued by the treasurer of the United States, or by any disbursing officer of any department of the government of the United States, upon the treasurer or any assistant treasurer, or designated depositary of the United States, or upon any national bank designated as a depository of the United States, and which shall be represented on the books of either such offices as standing to the credit of any disbursing officer, and bearing date prior to July 1, 1863, and which were issued to facilitate the payment of warrants, or for any other purpose in liquidation of a debt due from the United States, which may remain outstanding on the 1st day of July, 1856, shall be deposited by the Treasurer of the United States, to be covered into the treasury by warrant, and to be carried to the credit of the parties in whose favor such certificates, drafts, or checks were respectively issued, or to the persons who are entitled to receive pay therefor, and into an appropriation account to be denominated "outstanding liabilities."—Sec. 1, May 2, 1866, chap. 70.

43. At the termination of every fiscal year after this act shall begin to operate, the provisions thereof shall apply to all similar certificates, drafts, and checks, which shall then have for three years or more remained outstanding, unsatisfied and unpaid,[15] and to all

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[14] The section referred to is in ¶ 74.

[15] DRAFTS, CHECKS, ETC.—The payee, or the bona-fide holder of any such draft or check, the amount of which has been so deposited and covered into the treasury, is, on presenting the same to the proper officer of the treasury, entitled to have it paid by the settlement of an account and the issuing of a warrant in his favor.—Sec. 3, same act.

disbursing officers' accounts that shall have so remained unchanged, as in the next section provided for.—Sec. 4, *ibid.*

44. The amounts, except such as are provided for in the first section [¶ 42] of this act, of the accounts of every kind of disbursing officer of the government of the United States, which shall have remained unchanged, or which shall not have been increased by any new deposit thereto, nor decreased by drafts drawn thereon, for the space of three years, shall in like manner be covered into the treasury, to the proper appropriation to which they may belong; and the amounts thereof shall, on the certificate of the treasurer of the United States that such amount has been deposited in the treasury, be credited by the proper accounting officer of the treasury on the books of the treasury department, to the officer in whose name it had stood on the books of any agency of the treasury, if it shall be made to appear that he is entitled to such credit.[15a]—Sec. 5, *ibid.*

45. In place of original checks, when lost, stolen, or destroyed, disbursing officers and agents of the United States are hereby authorized, after the expiration of six months from the date of such checks, and within three years from such date, to issue duplicate checks; and the treasurer, assistant treasurers, and designated depositaries of the United States are directed to pay such checks, drawn in pursuance of law by such officers or agents, upon notice and proof of the loss of the original check or checks, under such regulations in regard to their issue and payment, and upon the execution of such bonds, with sureties, to indemnify the United States, as the secretary of the treasury shall prescribe.[15b] *Provided*, That this act shall not apply to any check exceeding in amount the sum of one thousand dollars.—Sec. 1, February 2, 1872, chap. 12.

(*a.*) "For the purpose of giving force and effect to the full intent and meaning of this act, it shall be the duty of the treasurer, and of all assistant treasurers, and of all designated depositaries of the United States, and of the cashiers of all national banks designated as such depositories, to report to the secretary of the treasury, at the close of business on the 30th day of June next, and in like manner at the close of business on every 30th day of June thereafter, the condition of every such account so standing, as in the preceding section specified, on the books of their respective offices, stating the name of each depositor, respectively, with his official designation, the total amount so remaining on deposit to his credit, and the dates, respectively, of the last credit and the last debit made to each of such accounts, respectively. And it shall be the duty of every and each disbursing officer in any and every department of the government of the United States to make a like return of all checks issued by such officer, and which may then have been outstanding and unpaid for three years and more, stating fully in such report the name of the payee, for what purpose given, the office on which drawn, the number of the voucher received therefor, and the date, number, and amount for which it was drawn, and, when known, the residence of the payee."—Sec. 6, *ibid.*

(*b.*) Circular from the treasury department, containing instructions concerning duplicate checks, form of indemnity bond, etc., will be found in G. O. No. 15, A.-G. O., 1872.

(*c.*) For instructions relative to public moneys and official checks, see note 88.

46. In case the disbursing officer or agent by whom such lost, destroyed, or stolen original check [¶ 45] was issued, be dead, or no longer in the service of the United States, it shall be the duty of the proper accounting officer, under such regulations as the secretary of the treasury shall prescribe, to state an account in favor of the owner of such original check for the amount thereof, and to charge such amount to the account of such officer or agent.—Sec. 2, *ibid.*

47. The court of claims shall have jurisdiction to hear and determine the claim of any paymaster, quartermaster, commissary of subsistence, or other disbursing officer of the United States, or of his administrators or executors, for relief from responsibility on account of losses by capture or otherwise, while in the line of his duty, of government funds, vouchers,[16] records, and papers in his charge, and for which such officer was and is held responsible.[16a] *Provided,* That an appeal may be taken to the Supreme Court, as in other cases.—Sec. 1, May 9, 1866, chap. 75.

48. Whenever such court shall have ascertained the facts of any such loss to have been without fault or neglect on the part of any such officer,[16b] it shall make a decree, setting forth the amount thereof,

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[16] This act (¶ ¶ 47, 48) gives the sole jurisdiction to the court of claims to hear and determine the claims of disbursing officers for relief from responsibility on account of losses of government funds, vouchers, records, and papers. And, by construction of law, the words "vouchers," etc., include "property accountability," when vouchers thereto are lost.—Second Comptroller, § 658. The act of June 23, 1870 (chap. 153), enacts, however (sec. 1), "That the proper accounting officers of the treasury be and they are hereby authorized, in the settlement of the accounts of disbursing officers of the war and navy departments arising since the commencement of the rebellion, and prior to the 20th day of August, 1866, to allow such credits for over-payments, and for losses of funds, vouchers, and property, as they may deem just and reasonable, when recommended under authority of the secretaries of war and navy, by the heads of the military and naval bureaus to which such accounts respectively pertain."

(Sec. 2.) "The accounts of military and naval officers, whether of the line or staff, for government property charged to them, may be closed by the proper accounting officers whenever, in their judgment, it will be for the interest of the United States so to do. *Provided,* That such accounts originated prior to the 20th day of August, 1866. *Provided,* that no settlement shall be made by the officers of the treasury under this act which shall exceed the sum of five thousand dollars, and only of such officers of the army and navy and of the pay department in whose accounts there is no apparent fraud against the United States. *And provided further,* That this act shall remain in force for two years from and after its passage and no longer." Provisions of this act to continue and be in force for two years from June 23, 1872, and no longer: act of June 7, 1872, chap. 321.

(*a.*) The act of 1866 is prospective in its operations, and gives relief where losses might thereafter occur as well as where they had occurred prior to the passage of the act.—*Glenn* v. *United States,* 4 Nott & Huntington, 510.

(*b.*) Claims arising under this act must be examined and considered by the light of surrounding circumstances. "What might be exacted from a disbursing officer as prudential should have regard to his situation, necessities, and condition. What might excuse the conduct of a party, at one time or place, would not do so under another state of facts. What caution or wariness might require at some times would not be

upon which the proper accounting officers of the treasury shall allow to such officer the amount so decreed as a credit in the settlement of his accounts.—Sec. 2, *ibid.*

49. From and after the passage of this act it shall be the duty of every disbursing officer of the United States having any public money intrusted to him for disbursement, to deposit the same with the treasurer or some one of the assistant treasurers of the United States, and to draw for the same only as it may be required for payments to be made by him in pursuance of law; and all transfers from the treasury of the United States to a disbursing officer shall be by draft or warrant on the treasury or an assistant treasurer of the United States.[17] *Provided,* That in places where there is no treasurer nor assistant treasurer of the United States, the secretary of the treasury may, when he deems it essential to the public interest, specially authorize in writing the deposit of such public money in any other public depository, or, in writing, authorize the same to be kept in any other manner, and under such rules and regulations as he may deem most safe and effectual to facilitate the payments to public creditors.—Sec. 1, June 14, 1866, chap. 122.

50. That so much of the act entitled "An act to provide for the more prompt settlement of the accounts of disbursing officers," approved July 17, 1862 (¶ 41), as provides that "such accounts, with the vouchers necessary to the correct and prompt settlement thereof, shall be rendered direct to the proper accounting officers of the treasury," be and the same is hereby repealed; and all such accounts and vouchers shall hereafter be sent to the bureau to which they pertain, and, after examination there, shall be passed to the proper accounting officer of the treasury for settlement.—Joint Resolution, March 2, 1867.

PROPERTY ACCOUNTABILITY.

51. Any commissioned officer, storekeeper, or commissary, who shall be convicted at a general court-martial, of having sold without a proper order for that purpose, embezzled, misapplied, or willfully or

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necessary at others."—*Ibid.*, 504. See also cases of *Ruggles, Moore, Norton, Beckwith,* and *Hubbell,* 2 *ibid.*, 520–528, and of *Prime, Murphy,* and of *Pattee,* 3 *ibid.*, 209, 212, 397; and of *Whittlesey,* and *Malone,* 5 *ibid.*, 453, 486.

[17] Under secs. 19 and 20, act of August 6, 1846, disbursing officers were to "make all payments in gold and silver coin, or in treasury notes, if the creditor agree to receive said notes in payment;" and "no exchange of funds shall be made by any disbursing officer other than an exchange for gold and silver; and every such disbursing officer shall, when the means for his disbursements are furnished to him in gold and silver, make his payments in the money so furnished."

Duplicate checks may be made under certain conditions: ¶ ¶ 45, 46, and see note 88.

through neglect suffered any of the provisions, forage, arms, clothing, ammunition, or other military stores, belonging to the United States, to be spoiled or damaged, shall, at his own expense, make good the loss or damage, and shall, moreover, forfeit all his pay, and be dismissed from the service.[18]—36th Article of War.

52. Any non-commissioned officer or soldier who shall be convicted at a regimental court-martial, of having sold, or designedly or through neglect wasted, the ammunition delivered out to him to be employed in the service of the United States, shall be punished at the discretion of such court.[18]—37th Article of War.

53. Every non-commissioned officer or soldier who shall be convicted, before a court-martial, of having sold, lost, or spoiled, through neglect, his horse, arms, clothes, or accoutrements, shall undergo such weekly stoppages (not exceeding the half of his pay) as such court-martial shall judge sufficient for repairing the loss or damage; and shall suffer confinement or such other corporeal punishment as his crime shall deserve.[18]—38th Article of War.

54. Every captain of a troop or company is charged with the arms, accoutrements, ammunition, clothing, or other warlike stores belonging to the troop or company under his command, which he is to be accountable for to his colonel, in case of their being lost, spoiled, or damaged, not by unavoidable accidents or on actual service.[19]—40th Article of War.

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[18] Query how far ¶ ¶ 51, 52, 53 are supplied by the act cited in ¶ 78. See also notes 44, 46.

[19] PROPERTY RETURNS.—Under existing laws and regulations there is no system of accountability to regimental commanders for property belonging to the United States. All accounts and returns for such property are made upon forms prescribed by the war department, and are rendered to the CHIEFS OF THE BUREAUS to which the property pertains; and, in consequence of an opinion from Attorney-general Akerman, these accounts, etc., are submitted to the auditors of the treasury for settlement under the general direction of the secretary of war. See General Orders, A.-G. O., No. 64, 1871, and No. 7, 1872.

(*a*.) This opinion (see note 5 *c*) rests upon an assumption that the act of March 2, 1817 (¶ ¶ 26, 27, 29, 30, 31, 33, 35, and note 2 *b*), transferred to the accounting officers of the treasury the duties theretofore incumbent upon the SUPERINTENDENT-GENERAL OF MILITARY SUPPLIES, as well as those that had been discharged by the accountants of the war department. But the act establishing the office of the superintendent-general of military supplies (§ § 2, 3, March 3, 1813, chap. 48) provided that it should be the duty of said officer, "under the direction of the secretary for the war department, to keep proper accounts of all the military stores and supplies of every description purchased or distributed for the use of the army of the United States, and of the volunteers and militia in their service; to prescribe the forms of all the returns and accounts of such stores and supplies purchased, on hand, distributed, used, or sold, to be rendered by the commissary of ordnance and officers in his department, by the commissary-general of purchases and his deputies, by the several officers in the quartermaster-general's department, and by the regimental quartermasters, by the hospital surgeons and other officers belonging to the hospital and medical department, and by all other officers, agents, or persons who shall have received, distributed, or been intrusted with such stores and supplies as aforesaid; to call to account all such persons; to audit and settle all such accounts, and, in case of delinquency, to transmit the

55. All public stores taken in the enemy's camp, towns, forts, or magazines, whether of artillery, ammunition, clothing, forage, or provisions, shall be secured for the service of the United States,[20] for the neglect of which the commanding officer is to be answerable.—58th Article of War.

56. That the President of the United States be and he is here-

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account, and to state the value of the articles unaccounted for by such delinquency, to the accounting officers of the treasury, for final settlement and recovery of such value; to transmit all such orders, and, generally, to perform all such other duties, respecting the general superintendence of the purchase, transportation, safe-keeping, and accountability of military supplies and stores, as aforesaid, as may be prescribed by the secretary for the war department;" and (§ 3) "that the commissary-general of purchases and his deputies, the several officers in the quartermaster's department, the regimental quartermasters, the commissary of ordnance, his assistant and deputies, the principal hospital surgeons and officers belonging to the hospital and medical departments, and all other officers, agents, or persons, who shall have received, or may be intrusted with, any stores or supplies, of any description whatever, for the use of the army of the United States, and of the volunteers or militia in their service, shall render quarterly accounts of the disposition and state of all such stores and supplies to the superintendent aforesaid; and shall also make such other returns respecting the same, and at such other times, as the secretary for the war department may prescribe. *Provided, however,* That the accounts and returns thus rendered shall relate to the articles of supply only, which may have been received and disposed of, or as may remain on hand, and shall not embrace the specie accounts for money disbursed by such officers, agents, or other persons; which specie accounts shall be rendered, as heretofore, to the accountant for the war department." (See also § 4, same act, in Chap. ii., ¶ 4.)

The intention of this act, passed in time of war, was to provide assistance to the secretary of war in enforcing a system of accountability for property and supplies distinct from that for public moneys; and the necessity for such assistance having ceased, the office of superintendent-general was abolished, and the matter of property accountability thus re-committed to the chiefs of bureaus under the direction of the secretary. Settlements made by the accountants had always been subject to revision in the treasury; but as stated by the secretary of war, in a circular of December 10, 1870, there is no law, regulation, or apparent necessity for the transmission to the accounting officers of the treasury of the PROPERTY RETURNS rendered to the bureaus of this department, by army officers in charge of public property. So too the third auditor has decided (June 20, 1863) that "*property returns* and *reports* prescribed by army regulations are not required to be sent to the treasury; nor do officers accountable for *property alone* render accounts therefor to the treasury. Such returns, reports, etc., should be sent to the chief of the proper military bureau." In fact it seems sufficiently evident from the terms of the act of March 2, 1817, that the jurisdiction of the accounting officers of the treasury is confined to "accounts of the receipt and expenditure of the *public money;*" or, in other words, to the settlement of such accounts as had theretofore been audited by the accountants of the war department (see ¶ ¶ 27, 33, 35); and that the supervision of property accountability properly rests with the chiefs of bureaus, subject to final revision by the secretary of war. It is for making false returns to the secretary that a penalty is denounced in the 18th Article of War (¶ 749); he prescribes the *kind* and *amount* of supplies to be provided (¶ 4); the quartermaster-general is responsible to *him* for the regularity and *correctness* of all returns relating to quartermaster's property (¶ 226); under *his direction* "all arms, military stores, clothing, and, generally, all articles of supply requisite to the military service," are to be procured and provided (¶ ¶ 227, 230); he regulates the manner of issuing and *accounting* for clothing (¶ ¶ 236, 237, 238); contracts for subsistence must be made under regulations prescribed by him (¶ 262); he is to approve regulations for the equipment and supply of the battalion of engineers (¶ 375); and he is to approve of all rules and regulations governing accountability for ordnance and ordnance stores. See ¶ 409.

[20] And for disposition to be made of captured or abandoned property in insurrectionary States, see Chap. xxviii., ¶ 953.

by authorized to cause to be sold any ordnance, arms, ammunition, or other military stores or subsistence, or medical supplies, which, upon proper inspection or survey, shall appear to be damaged or otherwise unsuitable for the public service, whenever, in his opinion, the sale of such unserviceable stores will be advantageous to the public service.—Sec. 1, March 3, 1825, chap. 93.

57. The inspection or survey of the unserviceable stores shall be made by an inspector-general, or such other officer or officers as the secretary of war may appoint for that purpose; and the sales shall be made under such rules and regulations as may be prescribed by the secretary of war.[21]—Sec. 2, *ibid.*

58. In settling the accounts of the commanding officer of a company for clothing and other military supplies, the affidavit of any such officer may be received to show the loss of vouchers, or company books, or any matter or circumstance tending to prove that any apparent deficiency was occasioned by unavoidable accident, or lost in actual service, without any fault on his part, or that the whole or any part of such clothing and supplies had been properly and legally used and appropriated; and such affidavit may be considered as evidence to establish the facts set forth, with or without other evidence, as may seem to the secretary of war just and proper under the circumstances of the case.[22]—Sec. 2, February 7, 1863, chap. 22.

59. The clothes, arms, military outfits, and accoutrements furnished by the United States to any soldier, shall not be sold, bartered, exchanged, pledged, loaned, or given away; and no person not a soldier, or duly authorized officer of the United States, who has possession of any such clothes, arms, military outfits, or accoutrements, furnished as aforesaid, and which have been the subject of any such sale, barter, exchange, pledge, loan, or gift, shall have any right, title, or interest therein; but the same may be seized and taken

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[21] Inspection, condemnation, and public sale necessary to pass valid title to unsuitable military stores.—*Cooper* v. *United States*, 1 Nott & Huntington, 88; and 2 Opinions, 580.

(*a.*) The war department can properly make no sale of arms, except at auction, and on due public notice.—9 Opinions, 391. But see exceptional provision for such sales (Chap. xiii., ¶ 429, and note 16), and for sales of clothing, quartermaster and medical stores to the National Asylum (Chap. viii., ¶ 242). See also ¶ 91, and note 62.

[22] And the secretary of war is authorized "to detail one or more of the employees of the war department for the purpose of administering the oaths required by law in the settlement of officers' accounts for clothing, camp, and garrison equipage, quartermaster's stores, and ordnance, which oaths shall be administered without expense to the parties taking them, and shall be as binding upon the persons taking the same, and if falsely taken shall subject them to the same penalties, as if the same were administered by a magistrate or justice of the peace."—Sec. 25, March 3, 1865. See ¶ ¶ 47, 48, giving jurisdiction to the court of claims; and ¶ 61.

wherever found by any officer of the United States, civil or military, and shall thereupon be delivered to any quartermaster, or other officer authorized to receive the same; and the possession of any such clothes, arms, military outfits, or accoutrements, by any person not a soldier or officer of the United States, shall be prima facie evidence of such a sale, barter, exchange, pledge, loan, or gift, as aforesaid.—Sec. 23, March 3, 1863, chap. 75.

60. Whenever any property owned or held by the United States, or in which the United States have or claim an interest, shall, in any judicial proceeding under the laws of any State, District, or Territory, be seized, arrested, attached, or held for the security or satisfaction of any claim made against said property, it shall be lawful for the secretary of the treasury, in his discretion, to direct the solicitor of the treasury to cause a stipulation to be entered into by the proper district attorney for the discharge of such property from such seizure, arrest, attachment, or proceeding, to the effect that upon such discharge, the person asserting the claim against such property shall become entitled to all the benefits of this act; and in all cases where such stipulation shall be entered into, as aforesaid, and the property shall, in consequence thereof, be discharged as aforesaid, and final judgment shall be given in the court of last resort to which the secretary of the treasury may deem proper to cause such proceedings to be carried, affirming the claim for the security or satisfaction of which such proceedings shall have been instituted, and the right of the person asserting the same to enforce it against such property by means of such proceedings notwithstanding the claims of the United States thereto, such final judgment shall be deemed, to all intents and purposes, a full and final determination of the rights of such person, and shall entitle such person, as against the United States, to such rights as he would have had in case possession of said property had not been changed; and if such claim be for the payment of money, and the same shall by such judgment be found to be due, the presentation of a duly authenticated copy of the record of such judgment and proceedings shall be sufficient evidence to the proper accounting officers for the allowance thereof; and the same shall thereupon be allowed and paid out of any moneys in the treasury not otherwise appropriated. *Provided*, That the amount so to be allowed and paid shall not exceed the value of the interest of the United States in the property in question. *And provided further*, That nothing herein contained shall be considered as recognizing or conceding any right to enforce by seizure, arrest,

attachment, or any judicial process, any claim against any property of the United States, or against any property held, owned, or employed by the United States, or by any department thereof, for any public use, or as waiving any objection to any proceeding instituted to enforce any such claim.—June 11, 1864, chap. 117.

61. That the second auditor be and is hereby authorized and instructed to audit and settle the accounts of line officers of the army to the extent of their pay for their services as such, due them from the United States, in all cases where such auditor shall be satisfied, by affidavit of such line officer or otherwise, of their inability to make their monthly report or returns by reason of their having been prisoners in the hands of the enemy, or any accident or casualty of war, they have been unable to account for property in their possession.[23]—Joint Resolution, March 29, 1867.

62. It shall be the duty of the secretary of state, the secretary of the treasury, the secretary of the interior, the secretary of war, the secretary of the navy, the postmaster-general, and the adjutant-general, and the commissioner of agriculture, each severally as soon as practicable to make a full and complete inventory of all the property belonging to the United States in the buildings, rooms, offices, and grounds occupied by each of them, and under their charge. And hereafter to keep in proper books such inventories and accounts, adding thereto an account of such property as may be procured subsequently to the taking of the same; and also an account of the sale or disposal of any of such property.—Sec. 1, July 15, 1870, chap. 300.

63. It shall be the duty of the officers hereinbefore required to make and keep such inventories and accounts,[24] to make out an annual report thereof on the 1st day of December to Congress. *Provided,* That this law shall not apply to the books, pamphlets, papers, and documents in the library of Congress, nor to the supplies of stationery and fuel in the several public offices and buildings, which shall be accounted for as now provided for by law.—Sec. 3, *ibid.*

PROCEEDINGS AGAINST DELINQUENT OFFICERS.

64. When any revenue officer, or other person accountable for public money,[25] shall neglect or refuse to pay into the treasury the

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[23] Query whether this section provides relief for any other officers than those whose inability to make returns, etc., was caused by the exigencies of the late rebellion? But see ¶ ¶ 58, 47, 48.

[24] As are indicated in preceding paragraph.

[25] This applies to any officer receiving public money in advance for the contingencies of his office.—*United States* v. *Lee,* 2 Cranch, C. C., 462. The official bond of

sum or balance reported to be due to the United States upon the adjustment of his account, it shall be the duty of the comptroller,[26] and he is hereby required, to institute suit for the recovery of the same.—Sec. 1, March 3, 1797, chap. 20.

65. In every case of delinquency,[27] where suit has been or shall be instituted, a transcript from the books and proceedings of the treasury certified by the register, and authenticated under the seal of the department, shall be admitted as evidence,[28] and the court trying the cause shall be thereupon authorized to grant judgment and award execution accordingly. And all copies of bonds, contracts, or other papers relating to or connected with the settlement of any account between the United States and an individual, when certified by the register to be true copies of the originals on file, and authenticated under the seal of the department as aforesaid, may be annexed to such transcripts, and shall have equal validity, and be entitled to the same degree of credit, which would be due to the original papers, if produced and authenticated in court. *Provided,* That where suit is brought upon a bond, or other sealed instrument, and the defendant shall plead, "non est factum," or upon motion to the court, such plea or motion being verified by the oath or affirmation of the defendant, it shall be lawful for the court to take the same into consideration, and (if it shall appear to be necessary for the attainment of justice) to require the production of the original bond, contract, or other paper specified in such affidavit.—Sec. 2, *ibid.*

66. Where suit shall be instituted against any person or persons indebted to the United States, as aforesaid, it shall be the duty of the court where the same may be pending, to grant judgment at the

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an officer does not extinguish the simple contract arising on receipt of money.—*Watson* v. *United States*, 9 Wheaton, 651.

[26] Under sec. 10, act of 1817 (chap. 45), it became the duty of the first comptroller to superintend the recovery of all debts to the United States, to direct suits and legal proceedings, and to take all such measures as may be authorized by law to enforce prompt payment of all debts to the United States. See also ¶ 69.

[27] Extended to trials on indictment for embezzlement. See ¶ 74.

[28] The provisions of the first clause in this section "extended, in regard to the accounts of the war and navy departments, to the auditors respectively charged with the examination of those accounts; and certificates, signed by them, shall be of the same effect as that directed to be signed by the register."—Sec. 11, March 3, 1817.

In the case of the *United States* v. *Griffith* the court held that under the subsequent clause in this section, bonds, contracts, etc., must still be certified by the register; but in the case of the *United States* v. *Vanzant* it was held that a copy of a bond when certified by an auditor, under the act of March 3, 1817, was competent evidence.—2 Cranch, 338, 366.

The treasury transcript, though prima facie, is not conclusive evidence. See 1 Howard, 250.

For description of those transcripts, see *Smith* v. *United States*, 5 Peters, 300–303.

return term, upon motion, unless the defendant shall, in open court (the United States attorney being present), make oath or affirmation that he is equitably entitled to credits which had been, previous to the commencement of the suit, submitted to the consideration of the accounting officers of the treasury, and rejected; specifying each particular claim so rejected, in the affidavit; and that he cannot then come safely to trial. Oath or affirmation to this effect being made, subscribed, and filed, if the court be thereupon satisfied, a continuance, until the next succeeding term, may be granted; but not otherwise, unless as provided in the preceding section.—Sec. 3, March 3, 1797, chap. 20.

67. In suits between the United States and individuals, no claim for a credit shall be admitted upon trial but such as shall appear to have been presented to the accounting officers of the treasury for their examination, and by them disallowed,[29] in whole or in part, unless it should be proved to the satisfaction of the court that the defendant is, at the time of trial, in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit, at the treasury, by absence from the United States, or some unavoidable accident.—Sec. 4, *ibid.*

68. From and after the 30th day of September next, if any collector of the revenue, receiver of public money, or other officer, who shall have received the public money before it is paid into the treasury of the United States, shall fail to render his account, or pay over the same in the manner, or within the time, required by law, it shall be the duty of the first comptroller of the treasury to

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[29] Where a defendant has in his own right an equitable claim against the government for services rendered or otherwise, and in the manner of presentation has conformed to the conditions of this section, he may offset the claim as a credit on the writ brought against him. But a claim assigned to the defendant, or one for unliquidated damages, will not be allowed as a set-off.—*United States* v. *Robeson*, 9 Peters, 325.

(*a.*) "It is wholly immaterial whether the claim be a legal or an equitable claim, as in either view, under the act of 1797 [¶ ¶ 66, 67], as was decided by this court in the case of the *United States* v. *Wilkins*, 6 Wheaton, 135, it constitutes a good ground of set-off, or deduction. To establish that such claim ought to be rejected, it is not sufficient to show that there is no positive law providing for such allowances, but it must be shown that there is some law which positively prohibits, or by just implication denies, any allowance of the disputed items."—*Gratiot* v. *United States*, 15 Peters, 370, 371.

(*b.*) Claims for credit can only be admitted as such, and not as a demand for judgment: "When the United States is plaintiff and the defendant has pleaded a set-off, which the acts of Congress have authorized him to do, no judgment can be rendered against the government, although it may be judicially determined that, on striking a balance of just demands, the government is indebted to the defendant in an ascertained amount."—*United States* v. *Eckford*, 6 Wallace, 491.

(*c.*) "No judgment for the payment of money can be rendered against the United States in any court other than the court of claims, without a special act of Congress conferring jurisdiction."—*Case* v. *Terrell*, 11 Wallace, 203.

cause to be stated[30] the account of such collector, receiver of public money, or other officer, exhibiting truly the amount due to the United States, and certify the same to the agent of the treasury, who is hereby authorized and required to issue a warrant of distress against such delinquent officer and his sureties, directed to the marshal of the district in which such delinquent officer and his surety or sureties shall reside; and where the said officer and his surety or sureties shall reside in different districts, or where they, or either of them, shall reside in a district other than that in which the estate of either may be situate, which may be intended to be taken and sold, then such warrant shall be directed to the marshals of such districts, and to their deputies, respectively; therein specifying the amount with which such delinquent is chargeable, and the sums, if any, which have been paid. And the marshal authorized to execute such warrants shall, by himself or by his deputy, proceed to levy and collect the sum remaining due, by distress and sale of the goods and chattels of such delinquent officer, having given ten days' previous notice of such intended sale, by affixing an advertisement of the articles to be sold at two or more public places in the town or county where the said goods or chattels were taken, or in the town or county where the owner of such goods or chattels may reside; and if the goods and chattels be not sufficient to satisfy the said warrant, the same may be levied upon the person of such officer, who may be committed to prison, there to remain until discharged by due course of law. Notwithstanding the commitment of such officer, or if he abscond, or if goods and chattels cannot be found sufficient to satisfy the said warrant, the marshal or his deputy may and shall proceed to levy and collect the sum which remains due by such delinquent officer, by the distress and sale of the goods

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[30] "The account having been once stated and settled at the treasury department, the law invests the auditor with no power to open and resettle it, of his own mere authority. The act creates a special and limited jurisdiction, and after the accounts of any of the class of officers on whom it was intended to act [¶ 66] have been adjusted, however erroneously, that special jurisdiction is functus officio, and any process issued upon a resettlement of such accounts is absolutely null and void. Nobody doubts the power of the auditor to settle the accounts of the public officers from time to time, as they shall fail to account, or pay, any sums accruing after previous settlement; the objection is, to resettling an account once settled, and which must have imported to have been a full and final settlement at the time when made; for the law requires that to be done."—Ex parte *Randolph*, 9 Peters (note), 14, 15.

(*a*.) The statement or certificate of the account cannot be viewed as a judgment, nor the warrant which coerces payment as judicial process. They must be viewed as mere ministerial acts performed by mere ministerial agents. They cannot be otherwise sustained; and the general principle of construction requires that the authority vested by the act shall be strictly construed. It does not reach all public debtors and has designated especially (¶ 66) those for whom it is intended.—*Ibid.*, 19–21.

and chattels of the surety or sureties of such officer, having given ten days' previous notice of such intended sale, by affixing an advertisement of the articles to be sold at two or more public places in the town or county where the said goods or chattels were taken, or in the town or county where the owner of such goods or chattels resides. And the amount due by any such officer as aforesaid shall be, and the same is hereby declared to be, a lien upon the lands, tenements, and hereditaments of such officer and his sureties, from the date of a levy in pursuance of the warrant of distress issued against him or them, and a record thereof made in the office of the clerk of the district court of the proper district, until the same shall be discharged according to law. And for want of goods and chattels of such officer, or his surety or sureties, sufficient to satisfy any warrant of distress issued pursuant to the provisions of this act, the lands, tenements, and hereditaments of such officer, and his surety or sureties, or so much thereof as may be necessary for that purpose, after being advertised for at least three weeks in not less than three public places in the county or district where such real estate is situate, prior to the time of sale, may and shall be sold by the marshal of such district or his deputy; and for all lands, tenements, or hereditaments sold in pursuance of the authority aforesaid, the conveyance of the marshals or their deputies, executed in due form of law, shall give a valid title against all persons claiming under such delinquent officer, or his surety or sureties. And all moneys which may remain of the proceeds of such sales, after satisfying the said warrant of distress, and paying the reasonable costs and charges of the sale, shall be returned to such delinquent officer or surety, as the case may be.—Sec. 2, May 15, 1820, chap. 107.

69. From and after the 30th day of September next, if any officer[31] employed, or who has heretofore been employed, in the civil, military, or naval departments of the government, to disburse the public money appropriated for the service of those departments, respectively, shall fail to render his accounts, or to pay over, in the manner, and in the times, required by law, or the regulations of the department to which he is accountable, any sum of money remaining in the hands of such officer, it shall be the duty of the first or second comptroller of the treasury, as the case may be, who shall

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[31] This act applies only to those officers whose regular duty it is to receive and disburse the public money, who are appointed for that purpose, and who are required to give bonds for the faithful discharge of their duties. Judicial proceedings must be had as against any other officer into whose hands any public money may be intrusted.—Ex parte *Randolph*, 9 Peters (note), 20, 21. See also note 30 *a*.

be charged with the revision of the accounts of such officer, to cause to be stated and certified, the account of such delinquent officer, to the agent of the treasury, who is hereby authorized and required immediately to proceed against such delinquent officer, in the manner directed in the preceding section, all the provisions of which are hereby declared to be applicable to every officer of the government charged with the disbursement of the public money, and to their sureties, in the same manner, and to the same extent, as if they had been described and enumerated in the said section. *Provided nevertheless*, That the said agent of the treasury, with the approbation of the secretary of the treasury, in cases arising under this or the preceding section, may postpone for a reasonable time the institution of the proceedings required by this act, where, in his opinion, the public interest will sustain no injury by such postponement.[32]—Sec. 3, *ibid.*

70. If any person[33] should consider himself aggrieved by any warrant issued under this act, he may prefer a bill of complaint to any district judge[34] of the United States, setting forth therein the nature and extent of the injury of which he complains; and thereupon the judge aforesaid may, if in his opinion the case requires it, grant an injunction[35] to stay proceedings on such warrant altogether, or for so much thereof as the nature of the case requires; but no injunction shall issue till the party applying for the same shall give bond, and sufficient security, conditioned for the performance of such judgment as shall be awarded against the complainant, in such amount as the judge granting the injunction shall prescribe, nor shall the issuing of such injunction in any manner impair the lien produced by the issuing of such warrant. And the same proceedings shall be had on such injunction as in other cases, except that no answer shall be necessary on the part of the United States; and if, upon dissolving the injunction, it shall appear to the satisfaction of the judge who shall decide upon the same, that the appli-

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[32] This section is not modified by act of January 25, 1828 [¶ 70].—Second Comptroller, § 1249.

[33] "The character of the individual against whom the warrant may be issued is entirely disregarded by this part of the act. Be he whom he may, an officer or not an officer, a debtor or not a debtor; if the warrant be levied on his person or property, he is to appeal to the laws of his country, and to bring his case before the district judge to be adjudicated by him."—*United States* v. *Nourse*, 9 Peters, 31.

[34] This power is conferred upon the district court, not upon the judge as an individual.—*Porter* v. *United States*, 3 Paine, 313. But see 6 Peters, 493, 494.

[35] The jurisdiction of the district court is complete, and its decision final. The judgment is consequently a bar to any subsequent action on the account which formed the subject-matter of the warrant. See 9 Peters, 32. The injunction may be granted or dissolved by the judge, either in or out of court.—Sec. 5, same act.

cation for the injunction was merely for delay, in addition to the lawful interest which shall be assessed on all sums which may be found due against the complainant, the said judge is hereby authorized to add such damages as that, with the lawful interest, it shall not exceed the rate of ten per cent. per annum on the principal sum.—Sec. 4, May 15, 1820, chap. 107.

71. If any person shall consider himself aggrieved by the decision of such judge, either in refusing to issue the injunction, or, if granted, on its dissolution, it shall be competent for such person to lay a copy of the proceedings had before the district judge before a judge of the Supreme Court,[36] to whom authority is hereby given, either to grant the injunction or permit an appeal, as the case may be, if, in the opinion of such judge of the Supreme Court, the equity of the case requires it; and thereupon the same proceedings shall be had upon such injunction in the circuit court as are prescribed in the district court, and subject to the same conditions in all respects whatsoever.—Sec. 6, *ibid.*

72. No money hereafter appropriated shall be paid to any person, for his compensation, who is in arrears to the United States, until such person shall have accounted for, and paid into the treasury, all sums for which he may be liable. *Provided*, That nothing herein contained shall be construed to extend to balances arising solely from the depreciation of treasury notes received by such person, to be expended in the public service; but in all cases where the pay or salary of any person is withheld, in pursuance of this act, it shall be the duty of the accounting officers, if demanded by the party, his agent or attorney, to report, forthwith, to the agent of the treasury department, the balance due; and it shall be the duty of the said agent, within sixty days thereafter, to order suit to be commenced against such delinquent and his sureties.[37]—January 25, 1828, chap. 2.

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[36] "As this special mode is pointed out, by which an appeal from the decision of the district judge to the circuit court may be taken, it negatives the right to an appeal in any other manner. No provision is made for an appeal by the government, [and] of course, none was intended to be given it."—*United States* v. *Nourse*, 6 Peters, 493, 495.

[37] STOPPAGES OF PAY.—The second comptroller holds that this act does not derogate from that in ¶ 66 (see Digest, § 1249); that under the act of 1828 "it is within the power and made the duty of the second comptroller to direct the paymaster-general to stop the officer's pay who is in arrears to the United States;" and that "it is the uniform and correct practice for the auditor to report the circumstances of the indebtedness to the comptroller, who, if the facts reported seem sufficient, is bound to take the necessary steps to cause to be withheld the officer's compensation" (§ 528, *ibid.*). He holds also that "if by act of January 25, 1828, the United States is under obligation to commence suit in all cases of stoppage on the demand of the party whose pay is withheld under that law, yet it does not create the converse obligation to stop an

FRAUDS AND EMBEZZLEMENTS.

73. Every officer who shall be convicted before a court-martial, of having embezzled or misapplied any money, with which he may have been intrusted for the payment of the men under his command, or for enlisting men into the service, or for other purposes, if a commissioned officer, shall be cashiered and compelled to refund the money; if a non-commissioned officer, shall be reduced to the ranks, be put under stoppages until the money be made good, and suffer such corporeal punishment as such court-martial shall direct.[38] —39th Article of War, April 10, 1806.

74. All officers and other persons, charged by this act, or any other act, with the safe-keeping, transfer, and disbursement of the public moneys, other than those connected with the post-office department, are hereby required to keep an accurate entry of each sum received, and of each payment or transfer. And if any one of the said officers,[39] or of those connected with the post-office department, shall convert to his own use, in any way whatever, or shall use, by way of investment in any kind of property or merchandise, or shall loan, with or without interest, or shall deposit in any bank, or shall exchange for other funds, except as allowed by this act, any portion of the public moneys intrusted to him for safe-keeping, disbursement, transfer, or for any other purpose, every such

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officer's pay, whenever he may choose to demand that a suit should be instituted against him to recover a balance claimed by the United States" (§ 1257); and that "when the pay of an officer is stopped to meet his liability to the government, he should be credited the amount as of the time it becomes due, and not as of the time his account is stated and settled by the auditor; and interest should be charged on the balance only" (§ 1258).

(*a.*) Officers of the treasury are authorized to withhold the pay of officers who are in default, when the time for accounting has actually passed, but not otherwise. If there be due any sum over the amount of default, it should not be retained.—4 Opinions, 33, 316.

(*b.*) The treasury department has the right to deduct the pay of an officer by setting it off against a balance reported against him upon a settlement of accounts: "The United States possess the general right to apply all sums due for such pay and emoluments, to the extinguishment of any balance due to them by the defendant on any other account, whether owed by him as a private individual, or as chief engineer. It is but the exercise of the common right, which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due him."—*Gratiot* v. *United States*, 15 Peters, 370.

[38] This article is perhaps modified, or supplied by the acts of 1846 and 1863. See ¶ ¶ 74, 76–78, 80, and note 44.

[39] This act applies only to persons invested by some act of Congress with the legal possession of public money, not to clerks, workmen, and other subordinates, who, not having been intrusted with such possession, could be punished for felonious conversion.—*United States* v. *Hutchison*, 7 Penn. Law Journal, 365.

The act embraces only the embezzlement of public money (7 Opinions, 13), and does not apply to a commanding officer, who, requiring a disbursing officer to pay him more money than is due, fails to account therefor.—*Ibid.*, 82.

act shall be deemed and adjudged to be an embezzlement of so much of the said moneys as shall be thus taken, converted, invested, used, loaned, deposited, or exchanged, which is hereby declared to be a felony, and any failure to pay over or to produce the public moneys intrusted to such person shall be held and taken to be prima facie evidence of such embezzlement. And if any officer charged with the disbursements of public moneys shall accept, or receive, or transmit to the treasury department to be allowed in his favor, any receipt or voucher from a creditor of the United States, without having paid to such creditor, in such funds as the said officer may have received for disbursement, or such other funds as he may be authorized by this act to take in exchange, the full amount specified in such receipt or voucher, every such act shall be deemed to be a conversion by such officer to his own use of the amount specified in such receipt or voucher;[40] and any officer or agent of the United States, and all persons advising or participating in such act, being convicted thereof before any court of the United States, of competent jurisdiction, shall be sentenced to imprisonment for a term of not less than six months nor more than ten years, and to a fine equal to the amount of the money embezzled. And, upon the trial of any indictment against any person for embezzling public money under the provisions of this act, it shall be sufficient evidence, for the purpose of showing a balance against such person, to produce a transcript from the books and proceedings of the treasury, as required in civil cases, under the provisions of the act[41] entitled "An act to provide more effectually for the settlement of accounts between the United States and receivers of public money," approved March 3, 1797. And the provisions of this act shall be so construed as to apply to all persons charged with the safe-keeping, transfer or disbursement of the public money, whether such persons be indicted as receivers or depositaries of the same; and the refusal of such person, whether in or out of office, to pay any draft, order, or warrant, which may be drawn upon him by the proper officer of the treasury department, for any public money in his hands belonging to the United States, no matter in what capacity the same may have been received or may be held, or to transfer or disburse any such money promptly, upon the legal requirement of any authorized officer of the United States, shall be deemed and taken, upon the

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[40] See also ¶ ¶ 77, 80.

[41] This reference is to law in ¶ 62. As to the effect of a treasury transcript on the trial of an indictment for embezzlement, see *United States* v. *Forsythe*, 6 McLean, 584.

trial of any indictment against such person for embezzlement, as prima facie evidence of such embezzlement.—Sec. 16, August 6, 1846, chap. 90.

75. No officer of the United States shall either directly or indirectly sell or dispose to any person or persons, or corporations, whatsoever, for a premium, any treasury note, draft, warrant, or other public security, not his private property; or sell or dispose of the avails or proceeds of such note, draft, warrant, or security, in his hands for disbursement, without making return of such premium, and accounting therefor by charging the same in his accounts to the credit of the United States; and any officer violating this section shall be forthwith dismissed from office.—Sec. 21, *ibid.*

76. If any officer who is or may hereafter be charged with the payment of any of the appropriations made by this or any other act of Congress shall pay to any clerk, or other employee of the United States, a sum less than that provided by law, and require such employee to receipt or give voucher for an amount greater than that actually paid to and received by him, such officer thus acting shall be deemed guilty of embezzlement, shall be fined in a sum double the amount so withheld from any employee of government, and shall be imprisoned for the term of two years, and may be prosecuted and punished in any court of the United States having jurisdiction for the trial of such offenses, in the district where such offense shall be committed.[42]—Sec. 4, March 3, 1853, chap. 104.

77. It shall be the duty of each and every person who shall have moneys of the United States in his hands or possession, to pay the same to the treasurer, the assistant treasurer, or public depositary of the United States, and take his receipt for the same in duplicate, and forward one of them forthwith to the secretary of the treasury; and for a failure to make such deposit, when required by the secretary of the treasury or any other department or the accounting officers of the treasury, the person so failing shall be held guilty of the crime of embezzlement and subject to the punishment for that offense provided in the act to which this is an amendment.[43]—Sec. 3, March 3, 1857, chap. 114.

78. That any person in the land or naval forces of the United States,[44] or in the militia in actual service of the United States, in

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[42] See ¶ 78 and note 44.

[43] Which see in ¶ 74.

[44] Sec. 9 of this act enacts: "That all acts and parts of acts inconsistent with or repugnant to any of the provisions of this act are hereby repealed, saving, however, and excepting any and all suits or prosecutions now commenced pending, and all

time of war, who shall make or cause to be made, or present or cause to be presented for payment or approval to or by any person or officer in the civil or military service of the United States, any claim upon or against the government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent; any person in such forces or service, who shall, for the purpose of obtaining, or aiding in obtaining, the approval or payment of such claim, make, use, or cause to be made or used, any false bill, receipt, voucher, entry, roll, account, claim, statement, certificate, affidavit, or deposition, knowing the same to contain any false or fraudulent statement or entry; any person in said forces or service who shall make or procure to be made, or knowingly advise the making of any false oath to any fact, statement, or certificate, voucher or entry, for the purpose of obtaining, or of aiding to obtain, any approval or payment of any claim against the United States or any department or officer thereof; any person in said forces or service who, for the purpose of obtaining, or enabling any other person to obtain, from the government of the United States, or any department or officer thereof, any payment or allowance, or the approval or signature of any person in the military, naval, or civil service of the United States, of or to any false, fraudulent, or fictitious claim, shall forge or counterfeit, or cause or procure to be forged or counterfeited, any signature upon any bill, receipt, voucher, account, claim, roll, statement, affidavit, or deposition; and any person in said forces or service who shall utter or use the same as true or genuine, knowing

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rights of suit or prosecution under any prior act of Congress, on account of the doing or committing of any act hereby prohibited; and all rights and claims which the United States, or any person or persons, now have, growing out of such prior act; all which pending suits and prosecutions shall proceed and be determined, and all which rights and claims shall remain and be as valid and effectual as if this present act had not been passed; nor shall this act be so construed as in any way to impair or affect the obligation, duty, or liability of any person who now is or shall hereafter become the surety of any person contracting with the United States, or any officer or agent thereof; but every such surety shall be liable and answerable for the default of his principal in the same manner as if this act had not been passed, save to the extent to which his principal has performed the contract, or, if damages had been so recovered, to the extent of one-half of the damages so recovered and paid; which last amount may be shown in reduction of damages in any suit brought against the principal and surety, or principals and sureties, on their contract." Query, how far the acts cited in ¶ ¶ 51, 52, 53, 73, 74, 76, 749, are "inconsistent with, or repugnant to, any of the provisions of this act"—of 1863? See also Chap. xxviii., ¶ 953.

The act extends also to persons not in the military service, who shall do any of the acts prohibited in this paragraph. See its 3d section in note 48.

(*a.*) *Abstraction of Vouchers.*—The taking without authority, from any place of deposit, any paper prepared, fitted, or intended to be used to procure the payment of money from, or allowance of claim against, the government, punishable by imprisonment for not more than ten years or fine not exceeding ten thousand dollars. See sec. 7, February 5, 1867, chap. 26.

the same to have been forged or counterfeited;[45] any person in said forces or service who shall enter into any agreement, combination, or conspiracy to cheat or defraud the government of the United States, or any department or officer thereof, by obtaining, or aiding and assisting to obtain, the payment or allowance of any false or fraudulent claim; any person in said forces or service who shall steal, embezzle, or knowingly and willfully misappropriate or apply to his own use or benefit, or who shall wrongfully and knowingly sell, convey, or dispose of any ordnance, arms, ammunition, clothing, subsistence stores, money, or other property of the United States, furnished or to be used for the military or naval service of the United States;[46] any contractor, agent, paymaster, quartermaster, or other person whatsoever in said forces or service, having charge, possession, custody, or control of any money or other public property, used or to be used in the military or naval service of the United States, who shall, with intent to defraud the United States, or willfully to conceal such money or other property, deliver or cause to be delivered to any other person having authority to receive the same any amount of such money or other public property less than that for which he shall receive a certificate or receipt; any person in said forces or service who is or shall be authorized to make or deliver any certificate, voucher, or receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other public property so used or to be used, who shall make or deliver the same to any person without having full knowledge of the truth of the facts stated therein, and with intent to cheat, defraud, or injure the United States; any person in said forces or service who shall knowingly purchase or receive, in pledge for any obligation or indebtedness,

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[45] For penalties for forging, etc., bids, proposals, guarantees, official bonds, etc., see act of April 5, 1866, chap. 24.

[46] This act seems to supply sec. 16, act of April 30, 1790, which, as amended by sec. 4, act of August 23, 1842, enacted that: "If any person or persons, having at any time hereafter the charge or custody of any arms, ordnance, munition, shot, powder, or habiliments of war belonging to the United States, or of any victuals provided for the victualing of any soldiers, gunners, marines, or pioneers, shall for any lucre or gain, or wittingly, advisedly, and of purpose to hinder or impede the service of the United States, embezzle, purloin, or convey away any of the said arms, ordnance, munition, shot or powder, habiliments of war, or victuals, that then, and in every of the cases aforesaid, the person or persons so offending, their counselors, aiders and abettors (knowing of and privy to the offenses aforesaid), shall, on conviction, be punished by fine not exceeding one thousand dollars, or by imprisonment not exceeding one year, or by both, according to the nature and aggravation of the offense." (See also ¶ ¶ 51-53.) But the act of March 2, 1867 (chap. 193), enacts that: "If any person shall rob another of any kind or description of personal property belonging to the United States, he shall, on conviction, be punished by fine not exceeding five thousand dollars, or by imprisonment at hard labor, not less than one, nor more than ten years, or by both at the discretion of the court."

from any soldier, officer, or other person called into or employed in said forces or service, any arms, equipments, ammunition, clothes, or military stores, or other public property, such soldier, officer, or other person not having the lawful right to pledge or sell the same, —shall be deemed guilty of a criminal offense, and shall be subject to the rules and regulations made for the government of the military and naval forces of the United States, and of the militia when called into and employed in the actual service of the United States in time of war, and to the provisions of this act.[47] And every person so offending may be arrested and held for trial by a court-martial, and if found guilty shall be punished by fine and imprisonment, or such other punishment as the court-martial may adjudge, save the punishment of death.—Sec. 1, March 2, 1863, chap. 67.

79. That any person heretofore called or hereafter to be called into or employed in such forces or service, who shall commit any violation of this act and shall afterwards receive his discharge, or be dismissed from the service, shall, notwithstanding such discharge or dismissal, 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 or been dismissed.[48] —Sec. 2, March 2, 1863, chap. 67.

80. That if any disbursing officer of the United States shall deposit any public money intrusted to him in any place or in any manner, except as authorized by law, or shall convert to his own use in any way whatever, or shall loan, with or without interest,[49]

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[47] See also ¶ ¶ 59, 715, and note 48.

[48] And (by sec. 3, same act) "Any person not in the military or naval forces of the United States, nor in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the foregoing provisions of this act [¶ 78], he shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit, and every such person shall in addition thereto, on conviction in any court of competent jurisdiction, be punished by imprisonment not less than one nor more than five years, or by fine of not less than one thousand dollars, and not more than five thousand dollars."

(*a.*) The 88th Article of War (¶ 630) applies to offenses under the act cited in ¶ ¶ 78, 79.—Attorney-general, June 12, 1872.

(*b.*) Secs. 4, 5, 6, and 7 provide for the prosecution of civilians violating any of the provisions of the act. The district courts have jurisdiction. It is the duty of the United States district attorney to inquire into, and prosecute for, violations of the act; but any person may bring suit for himself or on behalf of the United States; and all suits must be commenced within six years from commission of the act.

[49] And sec. 3 of same act enacts: "That if any banker, broker, or any person, not an authorized depositary of public moneys, shall knowingly receive from any disbursing officer, or collector of internal revenue, or other agent of the United States, any public money on deposit or by way of loan or accommodation, with or without interest,

or shall for any purpose not prescribed by law withdraw from the treasurer, or any assistant treasurer, or any authorized depositary, or shall for any purpose not prescribed by law[50] transfer or apply any portion of the public money intrusted to him, every such act shall be deemed and adjudged an embezzlement of the money so deposited, converted, used, loaned, withdrawn, transferred, or applied, and every such act is hereby declared a felony, and upon conviction thereof shall be punished by imprisonment for a term not less than one year nor more than ten years, or by fine not more than the amount embezzled nor less than one thousand dollars, or by both such fine and imprisonment, at the discretion of the court.—Sec. 2, June 14, 1866, chap. 122.

81. That if any person or persons shall, directly or indirectly, promise, offer, or give, or cause or procure to be promised, offered, or given, any money, goods, right in action, bribe, present, or reward, or any promise, contract, undertaking, obligation, or security for the payment or delivery of any money, goods, right in action, bribe, present, or reward, or any other valuable thing whatever to any officer of the United States, or person holding any place of trust or profit, or discharging any official function under, or in connection with, any department of the government of the United States, after the passage of this act, with intent to influence his decision or action on any question, matter, cause, or thing which may then be pending, or may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence any such officer or person to commit, or aid or abet in committing, any fraud on the revenue of the United States, or to connive at or collude in, or to allow or permit, or make opportunity for the commission of any such fraud, and shall be thereof convicted, such person or persons so offering, promising, or giving, or causing, or procuring to be promised, offered, or given any such money, goods,

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or otherwise than in payment of a debt against the United States; or shall use, transfer, convert, appropriate, or apply any portion of the public money for any purpose not prescribed by law; or shall counsel, aid, or abet any disbursing officer or collector of internal revenue or other agent of the United States in so doing, every such act shall be deemed and adjudged an embezzlement of the money so deposited, loaned, transferred, used, converted, appropriated, or applied; and any president, cashier, teller, director, or other officer of any bank or banking association who shall violate any of the provisions of this act shall be deemed and adjudged guilty of embezzlement of public money, and punished as provided in sec. 2 of this act."

[50] Public funds in the hands of disbursing officers, though due and payable to an individual for services to the government, cannot be attached under State process, and when a State affirms the validity of such an attachment an appeal may be had, on writ of error, to the Supreme Court of the United States.—*Buchanan* v. *Alexander*, 4 Howard, 20. See also 3 Opinions, 718; 5 *ibid.*, 759; and 10 *ibid.*, 120.

right in action, bribe, present, or reward, or any promise, contract, undertaking, obligation, or security for the payment or delivery of any money, goods, right in action, bribe, present, or reward, or other valuable thing whatever, and the officer or person who shall in anywise accept or receive the same, or any part respectively, shall be liable to indictment in any court of the United States having jurisdiction, and shall, upon conviction thereof, be fined not exceeding three times the amount so offered, promised, given, accepted, or received, and imprisoned not exceeding three years; and the person convicted of so accepting or receiving the same, or any part thereof, if an officer or person holding any such place of trust or profit, shall forfeit his office or place; and any person so convicted under this section shall forever be disqualified to hold any office of honor, trust, or profit under the United States.—Sec. 62, July 13, 1866, chap. 184.

82. Any officer or clerk of any of the executive departments of the government, who shall be lawfully detailed to investigate frauds or attempts to defraud on the government, or any irregularity or misconduct of any officer or agent of the United States, shall have power to administer oaths to affidavits[51] taken in the course of any such investigation.—March 7, 1870, chap. 23.

ESTIMATES.

83. It shall be the duty of the several heads of departments, in communicating estimates of expenditures and appropriations to Congress, and to any of the committees thereof, to specify, as nearly as may be convenient, the sources from which such estimates are derived, and the calculations upon which they are founded; and in so doing, to discriminate between such estimates as are conjectural in their character, and such as are framed upon actual information and application from disbursing officers; and in communicating the several estimates, reference shall be given to the laws and treaties by which they are authorized, the dates thereof, and the volume, page, and section in which the necessary provisions are contained. —Sec. 14, August 26, 1842, chap. 202.

84. Whenever, hereafter, in submitting to Congress the annual estimates from the several executive departments of the government, it shall be found that the usual items of such estimates vary materially in amount from the appropriation ordinarily asked for the object named, and especially from the appropriation granted for the

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[51] See also ¶ ¶ 133–135 and note 22.

same objects for the year next preceding, and whenever new items not theretofore usual shall be introduced into such estimates for any year, the estimates shall be accompanied by minute and full explanations from the head of the appropriate department, of all such variations and new items, setting forth the reasons and grounds upon which the amounts are required and the different items added; and whenever any such estimate, whether annual or special, shall ask an appropriation for any new specific expenditure, such as the construction of a fort, the erection of a custom-house, or other public building, or the construction of any other public work requiring a plan before the building or work can be properly completed, every such estimate shall be accompanied by a full plan and detailed estimates of the cost of the whole work; and all subsequent estimates for every such work shall give the original estimated cost, the aggregate amount theretofore appropriated for the same, and the amount actually expended thereupon, as well as the amount asked for the current year for which such estimates shall be made; and whenever any such subsequent estimates shall ask for an appropriation for any such work beyond the original estimate of the cost, the full reasons for the excess, and the extent of the anticipated excess, shall be also stated.—Sec. 2, June 17, 1844, chap. 105.

85. That the provisions contained in the 2nd section of the act act entitled "An act making appropriations for the civil and diplomatic expenses of the government," approved the 17th day of June, 1844, be required to be carried into effect in all particulars,[52] any act in conflict therewith being hereby repealed; and all estimates for the compensation of officers of the government authorized by law to be employed shall be based upon the expressed provisions of law, and not upon the authority of executive distribution thereof; and the act and section authorizing the same, with the volume and page where such authority may be found, shall be cited in each and all estimates respectively.—Sec. 8, March 3, 1855, chap. 175.

86. Hereafter the estimates for the various executive departments shall designate not only the amount required to be appropriated for the next fiscal year, but also the amount of the outstanding appropriation, if there be any, which will probably be required to be used for each particular item of expenditure.[53]—Sec. 2, June 2, 1858, chap. 82.

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[52] See preceding paragraph.

[53] But all balances of appropriations (annual) are to be covered in to the treasury: see ¶ ¶ 93, 94.

APPROPRIATIONS.

87. All warrants drawn by the secretary of the treasury, or of war, or of the navy, upon the treasurer of the United States, shall specify the particular appropriation or appropriations to which the same should be charged; the moneys paid by virtue of such warrants shall, in conformity therewith, be charged to such appropriation or appropriations, in the books kept in the office of the comptroller of the treasury, in the case of warrants drawn by the secretary of the treasury, and in the books of the accountants[54] of the war or navy department respectively, in the case of warrants drawn by the secretary of war or by the secretary of the navy; and the officers, agents, or other persons, who may be receivers of public moneys, shall render distinct accounts of the application of such moneys according to the appropriation or appropriations under which the same shall have been drawn; and the secretary of war and of the navy shall, on the 1st day of January, in each and every year,[55] severally report to Congress a distinct account of the expenditure and application of all such sums of money as may, prior to the 30th day of September preceding, have been by them respectively drawn from the treasury in virtue of the appropriation law of the preceding year, and the sums appropriated by law for each branch of expenditure in the several departments shall be solely applied to the objects for which they are respectively appropriated, and to no other.[56]—Sec. 1, March 3, 1809, chap. 28.

88. It shall be the duty of the secretaries of the war and navy departments to cause any balance of moneys drawn out of the treasury, which shall remain unexpended, after the object for which the appropriation was made shall be effected, to be repaid to the treasury of the United States; and such moneys, when so repaid, shall be carried to the surplus fund.[57]—Sec. 1, May 1, 1820, chap. 52.

89. It shall be the duty of the secretaries of the war and navy departments to lay before Congress, on the 1st day of February, of each year, a statement of the appropriations of the preceding year, for their departments respectively, showing the amount appropriated under each specific head of appropriation, the amount

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[54] These accountants abolished, and their duties transferred to the auditors, by act of March 3, 1817.

[55] But see ¶ 89, requiring report to be laid before Congress on the 1st day of February.

[56] The last clause of this section (omitted above) authorized certain transfers of appropriations; but see ¶ 92.

[57] See ¶ ¶ 93, 94.

expended under each, and the balance remaining unexpended, either in the treasury, or in the treasurer's hands, as agent of the war or navy departments, on the 31st December preceding; and it shall be further the duty of the secretaries aforesaid to estimate the probable demands which may remain on each appropriation, and the balance[58] shall be deducted from the estimates of their departments, respectively, for the service of the current year; and accounts shall also be annually rendered, in manner and form as aforesaid, exhibiting the sums expended out of the estimates aforesaid, and the balance, if any, which may remain on hand, together with such information connected with the same as shall be deemed proper. And whenever any moneys, appropriated to the departments of war or of the navy, shall remain unexpended in the hands of the treasurer, as agent of either of those departments, for more than two years after the expiration of the calendar year in which the act of appropriation shall have been passed, or to which it refers, it shall be the duty of the secretary of such department to inform the secretary of the treasury of the fact, and the secretary of the treasury shall thereupon cause such moneys to be carried to the account of the surplus fund.[59]—Sec. 2, *ibid.*

90. All moneys appropriated for the use of the war and navy departments shall, from and after the day and year last aforesaid,[60] be drawn from the treasury, by warrants of the secretary of the treasury, upon the requisitions of the secretaries of those departments, respectively, countersigned by the second comptroller of the treasury, and registered by the proper auditor.[61]—Sec. 3, May 7, 1822, chap. 90.

91. All proceeds of sales of old material, condemned stores, supplies, or other public property, of any kind, shall hereafter be deposited and covered into the treasury as miscellaneous receipts, on account of "proceeds of government property," and shall not be withdrawn or applied except in consequence of a subsequent appropriation made by law; and a detailed statement of all such proceeds of sales shall be included in the appendix to the book of estimates. But this section shall not be held to repeal the existing authority of law in relation to . . . the sale of commissary stores to the

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[58] But see requirement that balances of appropriations be turned into the treasury, ¶ ¶ 93, 94.

[59] Remainder of this section supplied by proviso in ¶ 92, and last clause of ¶ 94.

[60] Viz., June 30, 1822.

[61] This act repealed so much of the act of March 3, 1817 (chap. 45, sec. 7), as constituted the treasurer disbursing agent for the war and navy departments.

officers of the army. And it shall be the duty of the register of the treasury to furnish to the proper accounting officers copies of all warrants covering such proceeds, where the same may be necessary in the settlement of accounts in their respective offices.[62] . . . —Sec. 5, May 8, 1872, chap. 140.

92. That so much of the first section of the act of March 3, 1809, entitled "An act further to amend the several acts for the establishment and regulation of the treasury, war, and navy departments," as authorizes the President, on the application of the secretary of any department, to transfer the moneys appropriated for a particular branch of that department to another branch of expenditure in the same department, be and the same is hereby repealed; and all acts or parts of acts authorizing such transfers of appropriations be and the same are hereby repealed, and no money appropriated for one purpose shall hereafter be used for any other purpose than that for which it is appropriated.[63]—Sec. 2, February 12, 1868, chap. 8.

93. All balances of appropriations contained in the annual ap-

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[62] This section "shall not be held to apply to materials, stores, or supplies sold to officers and soldiers of the army or to exploring or surveying expeditions authorized by law, and said section shall not be held to repeal such part of paragraph 1032, Revised Army Regulations of 1863, as provides that expenses of sales of military stores or supplies regularly condemned will be paid from their proceeds." See amendatory act, June 8, 1872, chap. 348.

(*a.*) An act of March 3, 1849, had required that the gross amount of money received from sales of public lands and from all miscellaneous sources, for the use of the United States, should "be paid by the officer or agent receiving the same into the treasury of the United States at as early a day as practicable, without any abatement or deduction on account of salary, fees, costs, charges, expenses, or claims of any description whatever." But the act of September 28, 1850 (chap. 78, sec. 3), enacted "that the moneys which may be received by the proper officers of the army from the sales of subsistence, military stores, and other supplies, be and they are hereby exempted from the operations of"—the said act of 1849.

Under the act of 1850, disbursing officers were sometimes authorized to retain and disburse moneys received from sales of property, without depositing it in, and then drawing it from, the treasury. The act of July 12, 1870 (¶ 95), was doubtless intended to prohibit this practice.

(*b.*) "The secretary of war directs all disbursing officers of the war department, upon depositing moneys received from the sales of property, or otherwise, to designate as near as possible upon the certificate of deposits the fiscal year to which such credit shall apply; that is, to credit the appropriation for the fiscal year during which the moneys were originally drawn."—Adjutant-general, July 6, 1871. See also G. O. No. 68, A.-G. O., 1871.

[63] This section repealed a clause of sec. 1, March 3, 1809 (omitted from ¶ 87); sec. 5, May 1, 1820; sec. 2, July 2, 1836; act of April 6, 1838; sec. 23, August 26, 1842; sec. 2, March 3, 1843; and sec. 2, August 31, 1852. This act of 1852 was similar in its provisions to above section, but provided that nothing therein contained should be construed to "prevent the President from authorizing appropriations for the subsistence of the army, for forage, for the medical and hospital department, and for the quartermaster's department, to be applied to any other of the above-mentioned branches of expenditure in the same department, and appropriations made for a specific object for one fiscal year shall not be transferred to any other object, after the expiration of that year."

propriation bills, and made specifically for the service of any fiscal year, and remaining unexpended at the expiration of such fiscal year, shall only be applied to the payment of expenses properly incurred during that year, or to the fulfillment of contracts properly made within that year; and such balances not needed for the said purposes shall be carried to the surplus fund.[64] *Provided*, That this section shall not apply to appropriations known as permanent or indefinite appropriations.—Sec. 5, July 12, 1870, chap. 251.

94. All balances of appropriations which shall have remained on the books of the treasury without being drawn against in the settlement of accounts for two years from the date of the last appropriation made by law shall be reported by the secretary of the treasury to the auditor of the treasury whose duty is to settle accounts thereunder, and the auditor shall examine the books of his office, and certify to the secretary whether such balances will be required in the settlement of any accounts pending in his office; and if it shall appear that such balances will not be required for this purpose, then the secretary may include such balances in his warrant, whether the head of the proper department shall have certified that it may be carried into the general treasury or not. But no appropriation for the payment of the interest or principal of the public debt, or to which Congress may have given a longer duration of law, shall be thus treated.—Sec. 6, *ibid.*

95. It shall not be lawful for any department of the government to expend in any one fiscal year any sum in excess of appropriations made by Congress for that fiscal year, or to involve the government in any contract for the future payment of money in excess of such appropriations.—Sec. 7, *ibid.*

CONTRACTS.

96. All purchases, and contracts for supplies or services for the military and naval service of the United States, shall be made by or under the direction of the chief officers of the departments of war and the navy, respectively.[65]—Sec. 3, July 16, 1798, chap. 85.

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[64] Prior to the passing of this act it had been customary to apply appropriations, or balances thereof, made in any one year, for any continuous contract or other service of the government, to the same purposes during succeeding years, and no balance lapsed into the surplus fund until the particular object of the appropriation had been consummated.

[65] THE POWER TO MAKE CONTRACTS.—Prior to the passing of this act "all purchases and contracts for supplying the army with provisions, clothing, supplies in the quartermaster's department, military stores, Indian goods, and all other supplies, or articles for the use of the department of war," were to be made by or under the direction of the treasury department. (Sec. 5, May 8, 1792.) These purchases were made

97. It shall be lawful for the secretary of war to cause to be provided, in each and every year, all clothing, camp utensils, and equi-

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(by act of February 23, 1795) through the agency of a "purveyor of public supplies," who was by above act (¶ 96) placed, so far as military purchases were concerned, under the control of the secretary of war; and who was superseded by the appointment of a "commissary-general of purchases." See note 19 *a*, and Chap. viii., notes.

(*a*.) The supervisory control of the secretary of war is reiterated in the acts authorizing the quartermaster-general (¶ ¶ 225, 226), the commissary-general of subsistence (¶ 262), the surgeon-general (Chap. x., note 1 *a*), the chief of engineers (¶ ¶ 6, 375, 379), and the chief of ordnance (¶ ¶ 405, 407) to make contracts and purchases for their respective departments. See also ¶ 4. And for regulations governing, see G. O. No. 97, A.-G. O., 1867, and G. O. No. 57, *ibid.*, 1871; but, in cases of necessity, a commanding general may order the purchase of all such articles as may be requisite to the military service of the United States. Chap. viii., ¶ 226.

(*b*.) "The power to bind the government by contract can only be exercised by those officers whom Congress has constituted its agents, either by the express words of a statute, or by necessary legal implication; yet where a person has parted with his property for a lawful purpose, which has been received and used by the proper agents of the government in the necessary service of the government, there the owner may recover for its actual value."—*Reeside* v. *United States*, 2 Nott & Huntington, 33.

(*c*.) A commanding general has no right to appoint a civilian as purchasing agent for the government, nor to invest him with discretion to make contracts, nor to transfer to him the responsibility which the law imposes on military officers of the supply departments. Nor has such agent the power to bind the government.—*Ibid.*, 30–33.

(*d*.) "In reference to the relations of commanding and subaltern officers to the United States and the public, in the matter of contracts, the analogies of the laws applicable to general and special agents will best illustrate our opinion. Ordnance officers, quartermasters, and commissaries of subsistence are special agents, authorized to perform specific duties only; a general in command of a department is a general agent, with larger powers and authorized to use discretion in their application. By usage and common understanding, he is empowered to perform all the duties of the special agents, and has direct authority over them; at his bidding they go and come, do and undo. He makes and unmakes, at least for the time being; nor is it supposed that his powers are precisely limited by the words of his commission. His powers are better known by the character in which he is held out to the world, which is generally understood to be without much limit as to authority, and its exercise to any needful extent is always sustained. The authority of a general agent as to the public, says Parsons, in his work on Contracts, 'may be regarded by them as measured by the usual extent of his general employment.' Now, what employment of a commander of a department is more general or necessary than that of equipping his soldiers for the field? If other ways are not provided, the public will and does understand that he may do this by purchase, or in any other proper manner."—*Stevens* v. *United States*, 2 Nott & Huntington, 101. See also note 67 *a b*, and ¶ 226.

(*e*.) Approval of Contracts.—When there is no stipulation as to the time and manner in which an approval should be made, it may be evidenced in any way which would satisfy the mind that the contract was acceptable to those who, by its terms, were to pass upon it.—*Wilder* v. *United States*, 5 Nott & Huntington, 473. See also clause *k* of this note.

(*f*.) Transportation Contracts.—"Where a written agreement for the transportation of army supplies specifies no period of duration, but by different enumerated rates for different months covers one year of service, the contractors may, subsequently, at any time, decline to continue the service, and may then enter into a new agreement with the quartermaster in charge, fixing a different rate for the same services, notwithstanding that they have continued to act for a long time under the written agreement and seek to terminate it in the midst of a year.—Syllabus, in Wilder's case, 5 Nott & Huntington, 462.

(*g*.) "Where a claimant enters into a contract with the government for the transportation of all its military supplies to be transported in a specified military district, and the contract is violated by the defendants by entering into another contract for the transportation of supplies which are included in the claimant's contract, he is entitled to recover, by reason of the breach of his contract, such sum as he would have made on the services which he had a right to render under his contract, deducting therefrom a reasonable sum for the less time engaged, and for the release from the care,

page, medicines, and hospital stores, necessary for the troops and armies of the United States for the succeeding year, and for this purpose to make purchases, and enter or cause to be entered into all necessary contracts or obligations for effecting the same.—Sec. 24, March 3, 1799, chap. 48.

98. All purchases and contracts for supplies or services, in any of the departments of the government, except for personal[66] services, when the public exigencies do not require the immediate delivery of the article or articles, or performance of the service, shall be made by advertising a sufficient time previously for proposals respecting the same.[67] When immediate delivery or per-

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trouble, risk, and responsibility attending a full execution of his contract."—Syllabus, in Wilder's second case, *ibid.*, 469.

(*h.*) "Military depots and posts are the termini which define and constitute military transportation routes. Transportation contracts are made for such routes; hence places not within a specified route are not within a contract for that route. Where a contractor agrees '*to furnish all transportation the United States may require*' from a specified military depot to a specified military post, '*and to and from all points between*,' his contract must be construed to include only supplies passing exclusively on his route, and not to extend to supplies carried by other contractors from a point without to one within."—Syllabus in Scott's case, 4 *ibid.*, 241.

(*i.*) RECISSION OF CONTRACTS.—"If made in accordance with law, and without fraud, the contracts of this government with its citizens are no more subject to recission by the United States than are ordinary engagements between man and man, without the consent of both parties."—*Fowler* v. *United States*, 3 Nott & Huntington, 48. But if the secretary of war becomes satisfied that contracts made by him are being fraudulently executed, or that those made by others were made in disregard of the rights of the government, or with intent to defraud it, or are being unfaithfully executed, it is his duty to interfere, arrest the execution, and adopt effectual measures to protect the government against the dishonesty of subordinates.—*United States* v. *Adams*, 7 Wallace, 477.

(*k.*) Where a contract provides that it shall be approved by certain designated officers, and the discretion of approval has once been exercised by them, such discretion is thereby exhausted and ended, and these officers cannot withdraw any approval theretofore given. See *Wilder* v. *United States*, 5 Nott & Huntington, 469–475; also *United States* v. *Speed*, 8 Wallace, 83.

(*l.*) DAMAGES.—The rule of damages, where the government has prevented the performance of a contract, is such damages as would put the contractor as nearly as possible in the same situation as he would have been in, if he had been allowed to perform according to his contract. See *Wormer* v. *United States*, 4 Nott & Huntington, 258–271.

[66] PERSONAL SERVICES.—In all contracts for personal services which presuppose trained skill and experience, the public officer who employs the service must be allowed to exercise a judicious discrimination, and to select such as, in his judgment, possess the requisite qualifications. It is, therefore, not necessary to invite proposals for such service by advertisement.—10 Opinions, 268. But contra, *ibid.*, 28. See note 67 *b c*.

[67] ADVERTISEMENT FOR PROPOSALS.—This act "invests the officer charged with the duty of procuring supplies or services, with a discretion to dispense with advertising, if the exigencies of the public service require immediate delivery or performance"; and "it is too well settled to admit of dispute at this day, that when there is a discretion of this kind conferred upon an officer or board of officers, and a contract is made in which they have exercised that discretion, the validity of the contract cannot be made to depend on the degree of wisdom or skill which may have accompanied its exercise." —*United States* v. *Speed*, 8 Wallace, 83.

(*a.*) "An officer in command [of a department] may decide as to the existence of an emergency which will excuse the omission to advertise, and act upon his conclusions;

formance is required by the public exigency, the articles or service required may be procured by open purchase or contract at the places and in the manner in which such articles are usually bought and sold, or such services engaged between individuals. No contract or purchase shall hereafter be made unless the same be authorized by law, or be under an appropriation adequate to its fulfillment, except in the war and navy departments, for clothing, subsistence, forage, fuel, quarters, or transportation, which, however, shall not exceed the necessities of the current year.—Sec. 10, March 2, 1861, chap. 84.

99. All contracts made for, or orders given for the purchase of, goods or supplies by any department of the government shall be promptly reported to Congress by the proper head of such department if Congress shall at the time be in session, and if not in session, said report shall be made at the commencement of the next ensuing session.[68]—Sec. 13, July 17, 1862, chap. 200.

100. No contract or order, or any interest therein, shall be transferred by the party or parties to whom such contract or order may be given to any other party or parties, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned. *Provided,* That all rights of action are hereby reserved to the United States for any breach of such contract by the contracting party or parties.—Sec. 14, *ibid.*

101. It shall be the duty of the secretary of war, of the secre-

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and we [the court of claims] will uphold his contracts unless it be shown that the emergency was not real, or that the transaction was not one of good faith and the result of necessity."—*Stevens* v. *United States,* 2 Nott & Huntington, 101, and Crowell's case, *ibid.,* 501. See also Chap. viii., ¶ 226, and note 7 *a.* But a contract made without advertisement for *future supplies* is void. So is also a contract made by a subordinate officer to meet a present emergency, unless it be made pursuant to orders from the commanding general.—*McKinney* v. *United States,* 4 Nott & Huntington, 540–542.

(*b.*) "It may be regarded as the settled rule of this court [of claims] that, whether an emergency exists or not is left to the discretion of the commanding officer of the army, or the detachment for which the services or supplies are required. His orders in that respect are made conclusive on the officers charged with obtaining the services or supplies required, and it would be often highly embarrassing to the movements of the army and navy were it otherwise."—*Wentworth* v. *United States,* 5 *ibid.,* 309.

(*c.*) Where the expenditure of an appropriation is specially confided by law to the discretion of the head of an executive department, he has discretionary power to award contracts therefor without advertisement.—*Fowler* v. *United States,* 3 *ibid.,* 48.

(*d.*) Advertisements for proposals may be admitted in evidence for the better construction of the contracts, but they do not enlarge, control, or change the express terms of the contract.—*Gibbons* v. *United States,* 5 *ibid.,* 423.

(*e.*) For further legislation in reference to advertisements see ¶ ¶ 106, 921–923.

[68] Such reports to state "fully all the facts and circumstances which in his judgment rendered such contract necessary," sec. 4, May 4, 1858; and to exhibit "the name of the contractor, the article or thing contracted for, the place where the article was to be delivered or the thing performed, the sum to be paid for its performance or delivery, [and] the date and duration of the contract."—Sec. 5, April 21, 1808.

tary of the navy, and of the secretary of the interior, immediately[69] after the passage of this act, to cause and require every contract made by them, severally, on behalf of the government, or by their officers under them appointed to make such contracts, to be reduced to writing,[70] and signed by the contracting parties with their names at the end thereof, a copy of which shall be filed by the officer making and signing the said contract in the "Returns Office" of the department of the interior (hereinafter established for that purpose)[71] as soon after the contract is made as possible, and within thirty days, together with all bids, offers, and proposals to him made by persons to obtain the same, as also a copy of any advertisement he may have published inviting bids, offers, or proposals for the same; all the said copies and papers in relation to each contract to be attached together by a ribbon and seal, and numbered in regular order numerically, according to the number of papers composing the whole return.—Sec. 1, June 2, 1862, chap. 93.

102. It shall be the further duty of the said officer, before making his return according to the first section of this act, to affix to the same his affidavit in the following form, sworn to before some magistrate having authority to administer oaths: "I do solemnly swear (or affirm) that the copy of contract hereto annexed is an exact copy of a contract made by me personally with——— ———; that I made the same fairly, without any benefit or advantage to myself, or allowing any such benefit or advantage corruptly to the said——— ———, or any other person; and that the papers ac-

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[69] This act did not go into effect till the first Monday in January, 1863. See act of July 17, 1862, chap. 203.

[70] It is as much the duty of the contractor as of the officer to see that the contract is reduced to writing: see 4 Nott & Huntington, 84, 359. But an unwritten agreement may receive a legal ratification from the acts of the parties. Faithful performance by the contractor and a benefit received by the government will take a case out of the statute so far as to leave it within the equitable rule of implied contracts.—5 *ibid.*, 70, 86.

[71] Sec. 4 of same act, enacting that "it shall be the duty of the secretary of the interior, immediately after the passage of this act, to provide a fit and proper apartment in his department, to be called the 'Returns Office,' within which to file the returns required by this act to be filed, and to appoint a clerk to attend to the same, who shall be entitled to an annual salary of twelve hundred dollars, and whose duty it shall be to file all returns made to said office, so that the same may be of easy access, filing all returns made by the same officer in the same place, and numbering them as they are made in numerical order. He shall also provide and keep an index book, with the names of the contracting parties, and the number of each and every contract opposite to the said names; and he shall submit the said index book and returns to any person desiring to inspect the same; and he shall also furnish copies of said returns to any person paying for said copies to said clerk at the rate of five cents for every one hundred words, to which said copies certificates shall be appended in every case by the clerk making the same, attesting their correctness, and that each copy so certified is a full and complete copy of said return; which return, so certified under the seal of the department, shall be evidence in all prosecutions under this act."

companying include all those relating to the said contract, as required by the statute in such case made and provided." And any officer convicted of falsely and corruptly swearing to such affidavit shall be subject to all the pains and penalties now by law inflicted for willful and corrupt perjury.—Sec. 2, *ibid.*

103. Any officer making contracts, as aforesaid, and failing or neglecting to make returns of the same, according to the provisions of this act, unless from unavoidable accident and not within his control, shall be deemed, in every case of such failure or neglect, to be guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not less than one hundred dollars, nor more than five hundred dollars, and be imprisoned for not more than six months, at the discretion of the court trying the same.—Sec. 3, June 2, 1862, chap. 93.

104. It shall be the duty of the secretary of war, of the secretary of the navy, and of the secretary of the interior, immediately after the passage of this act, to furnish each and every officer severally appointed by them with authority to make contracts on behalf of the government, with a printed letter of instructions,[72] setting forth the duties of such officer under this act, and also to furnish therewith forms, printed in blank, of contracts to be made, and the affidavit of returns required to be affixed thereto, so that all the instruments may be as nearly uniform as possible.—Sec. 5, *ibid.*

105. Every person who shall furnish supplies of any kind to the army or navy shall be required to mark and distinguish the same, with the name or names of the contractors so furnishing said supplies in such manner as the secretary of war and the secretary of the navy may respectively direct, and no supplies of any kind shall be received unless so marked and distinguished.—Sec. 15, July 17, 1862, chap. 200.

106. It shall not be lawful for any of the executive departments to make contracts for stationery or other supplies for a longer term

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[72] Contracts shall be made in *quintuplicate,* to be disposed of as follows: one to be kept by the officer signing the contract; one by the contractor; two to be sent to the chief of the proper bureau in Washington City (one of these, with an abstract of the bids and a copy of each bid and advertisement, to be retained in that bureau, and the other to be transmitted to the second comptroller of the treasury); and the fifth to be sent by the officer making and signing the same to the Returns Office [see note 71] of the department of the interior, within thirty days after the contract is made, together with bids, offers, and proposals connected therewith, and a copy of any advertisement in the case, the said copies or papers in relation to each contract to be attached together, sealed and numbered in regular order, numerically according to the number of papers composing the whole return."—G. O. No. 97, A.-G. O., 1867.

than one year[73] from the time the contract is made; and that whenever proposals for supplies have been solicited, the parties responding to such solicitation shall be duly notified[74] of the time and place of opening the bids, and be permitted to be present either in person or by attorney, and a record of each bid shall then and there be made.—Joint Resolution, January 31, 1868.

107. From and after the passage of this act, no member of Congress shall, directly or indirectly, himself, or by any other person whatsoever in trust for him, or for his use or benefit, or on his account, undertake, execute, hold, or enjoy, in the whole or in part, any contract or agreement hereafter to be made or entered into with any officer of the United States, in their behalf, or with any person authorized to make contracts on the part of the United States; and if any member of Congress[75] shall, directly or indirectly, himself, or by any other person whatsoever in trust for him, or for his use or benefit, or on his account, enter into, accept of, agree for, undertake, or execute any such contract or agreement, in the whole or in part, every member so offending shall, for every such offense, upon conviction thereof before any court of the United States, or of the Territories thereof, having cognizance of such offense, be adjudged guilty of a high misdemeanor, and shall be fined three thousand dollars; and every such contract or agreement as aforesaid shall, moreover, be absolutely void and of no effect. *Provided nevertheless,* That in all cases where any sum or sums of money shall have been advanced on the part of the United States, in consideration of any such contract or agreement, the same shall be forthwith repaid; and in case of refusal or delay to repay the same, when demanded, by the proper officer of the department under whose authority such contract or agreement shall have been made or entered into, every person so refusing or delaying, together with his surety or sureties, shall be forthwith prosecuted at law for the recovery of any such sum or sums of money advanced as aforesaid.—Sec. 1, April 21, 1808, chap. 48.

108. Nothing herein contained shall extend, or be construed to extend, to any contract or agreement, made or entered into, or accepted, by any incorporated company, where such contract or agreement shall be made for the general benefit of such incorpora-

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[73] See ¶ 95, and last clause of ¶ 98.

[74] ADVERTISEMENT OF CONTRACTS.—See ¶ 98, and Chap. xxviii., ¶ ¶ 921–923.

[75] This act applies only to contracts entered into with persons who, *at the time* of contracting, are members of Congress. The subsequent election of a contractor to Congress does not vitiate the contract.—5 Opinions, 697.

tion or company; nor to the purchase or sale of bills of exchange, or other property, by any member of Congress, where the same shall be ready for delivery, and for which payment shall be made at the time of making or entering into the contract or agreement.—Sec. 2, *ibid.*

109. In every such contract or agreement, to be made or entered into, or accepted, as aforesaid, there shall be inserted an express condition that no member of Congress shall be admitted to any share or part of such contract or agreement, or to any benefit to arise thereupon.—Sec. 3, *ibid.*

110. If any officer of the United States, on behalf of the United States, shall directly or indirectly, make or enter into any contract, bargain, or agreement, in writing or otherwise, other than such as are herein excepted, with any member of Congress, such officer so offending, on conviction thereof before any court having jurisdiction thereof, shall be deemed and taken to be guilty of a high misdemeanor, and be fined in a sum of three thousand dollars.—Sec. 4, *ibid.*

111. Any member of Congress or any officer of the government of the United States who shall, directly or indirectly, take, receive, or agree to receive, any money, property, or other valuable consideration whatsoever, from any person or persons, for procuring, or aiding to procure, any contract, office, or place from the government of the United States, or any department thereof, or from any officer of the United States, for any person or persons whatsoever, or for giving any such contract, office, or place to any person whatsoever, and the person or persons who shall directly or indirectly offer or agree to give, or give, or bestow any money, property, or other valuable consideration whatsoever, for the procuring or aiding to procure any contract, office, or place, as aforesaid, and any member of Congress who shall directly or indirectly take, receive, or agree to receive, any money, property, or other valuable consideration whatsoever after his election as such member, for his attention to, services, action, vote, or decision on any question, matter, cause, or proceeding which may then be pending, or may by law or under the Constitution of the United States be brought before him in his official capacity, or in his place of trust and profit as such member of Congress, shall, for every such offense, be liable to indictment as for a misdemeanor in any court of the United States having jurisdiction thereof, and on conviction thereof shall pay a fine of not exceeding ten thousand dollars, and suffer imprisonment in the

penitentiary not exceeding two years, at the discretion of the court trying the same; and any such contract or agreement, as aforesaid, may, at the option of the President of the United States, be declared absolutely null and void; and any member of Congress or officer of the United States convicted, as aforesaid, shall, moreover, be disqualified from holding any office of honor, profit, or trust under the government of the United States."[76]—July 16, 1862, chap. 180.

112. Whenever any contractor for subsistence, clothing, arms, ammunition, munitions of war, and for every description of supplies for the army or navy of the United States, shall be found guilty by a court-martial of fraud or willful neglect of duty, he shall be punished by fine, imprisonment, or such other punishment as the court-martial shall adjudge; and any person who shall contract to furnish supplies of any kind or description for the army or navy, he shall be deemed and taken as a part of the land or naval forces of the United States, for which he shall contract to furnish said supplies, and be subject to the rules and regulations for the government of the land and naval forces of the United States.—Sec. 16, July 17, 1862, chap. 200.

INDEMNITY FOR PROPERTY LOST OR DESTROYED.

113. Any field, or staff, or other officer, mounted militiaman, volunteer, ranger, or cavalry, engaged in the military service of the United States since the 18th of June, 1812, or who shall hereafter be in said service, and has sustained, or shall sustain, damage without any fault or negligence on his part, while in said service, by the loss of a horse in battle,[77] or by the loss of a horse wounded in battle, and which has died or shall die of said wound, or, being so wounded, shall be abandoned by order of his officer and lost, or shall sustain damage by the loss of any horse by death or abandonment because of the unavoidable dangers of the sea when on board an

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[76] The provisions of this act "shall be so construed as to embrace any agent of the government of the United States."—Act of February 25, 1863, chap. 61. See also ¶ ¶ 81, 132.

[77] "This term 'battle' has acquired a restricted meaning among military writers, and is applied by them only to the great engagements of armies; but in the law it has a much broader signification, extending from the contest between two individuals, known as 'wager of battle,' up to the great conflicts of nations and of armies, and including all skirmishes, engagements, and encounters which, in the course of war, must occur between contending military forces. In this act [¶ ¶ 113, 115, 117, 119, 120], where the term is used so unrestrictedly, we should not hesitate to apply it to the case of a single soldier engaging a single enemy, provided that he acted in the strict line of his duty, and the affair was free from doubt and suspicion."—*Powell* v. *United States*, 1 Nott & Huntington, 402.

United States transport vessel, or because the United States failed to supply transportation for the horse, and the owner was compelled by the order of his commanding officer to embark and leave him, or in consequence of the United States failing to supply sufficient forage, or because the rider was dismounted and separated from his horse and ordered to do duty on foot at a station detached from his horse, or when the officer in the immediate command ordered, or shall order, the horse turned out to graze in the woods, prairies, or commons, because the United States failed, or shall fail, to supply sufficient forage, and the loss was or shall be consequent thereof, or for the loss of necessary equipage, in consequence of the loss of his horse, as aforesaid, shall be allowed and paid the value thereof, not to exceed two hundred dollars. *Provided,* That if any payment has been, or shall be, made to any one aforesaid, for the use and risk, or for forage after the death, loss, or abandonment of his horse, said payment shall be deducted from the value thereof, unless he satisfied, or shall satisfy, the paymaster at the time he made, or shall make, the payment, or thereafter show, by proof, that he was remounted, in which case the deduction shall only extend to the time he was on foot. *And provided also,* If any payment shall have been, or shall hereafter be made to any person above mentioned, on account of clothing to which he was not entitled by law, such payment shall be deducted from the value of his horse or accoutrements." [78]—Sec. 1, March 3, 1849, chap. 129.

114. The act to which this is an amendment shall, from the

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[78] RULES OF EVIDENCE.—(*a.*) To establish claim under provisions of this and following paragraph, "the claimant must furnish the evidence of the officer under whose command he was serving when the loss occurred, if alive, or if dead then the next surviving officer, describing the property, the value thereof at the time of entering the service, the time when, place where, and manner in which the loss occurred, and whether or not it was without any fault or negligence on the part of the claimant. The claimant must himself state the facts above required, and also whether or not he has received from any officer or agent of the government a horse or equipage in lieu of that lost by him, or any compensation for the same; also, whether the horse or equipage lost had not been furnished by the United States or purchased from some quartermaster; and if so, the name of the officer from whom purchased and the price paid therefor. If the property was appraised at the time the same was taken into the United States service, the original valuation list or certified statement of the value as appraised should be furnished.

"In cases where the loss is alleged to have occurred 'because the United States failed to supply transportation for the horse, and the owner was compelled, by the order of his commanding officer, to embark and leave him,' the affidavit of the claimant must, in addition to the declaration above mentioned, declare 'that he did, in obedience to the order of his commanding officer, leave said horse and equipage, and that he never sold or otherwise disposed of said horse or equipage, and never received any compensation for either from any person whatever;' and this must be corroborated by the officer who gave the order."

"In all cases where the claim extends to *equipage,* the several articles of which the same consisted, and separate value of each, must be specified."

commencement of the present rebellion, extend to and embrace all cases of the loss of horses by any officer, non-commissioned officer, or private in the military service of the United States, while in the line of their duty in such service, by capture by the enemy, whenever it shall appear that such officer, non-commissioned officer, or private was or shall be ordered by his superior officer to surrender to the enemy, and such capture was or shall be made in pursuance of such surrender.—June 25, 1864, chap. 150.

115. Any person who has sustained, or shall sustain, damage by the capture or destruction by an enemy, or by the abandonment or destruction by the order of the commanding general, the commanding officer, or quartermaster, of any horse, mule, ox, wagon, cart, boat, sleigh, or harness, while such property was in the military service of the United States, either by impressment or contract, except in cases where the risk to which the property would be exposed was agreed to be incurred by the owner; and any person who has sustained, or shall sustain, damage by the death or abandonment and loss of any such horse, mule, or ox, while in the service aforesaid, in consequence of the failure on the part of the United States to furnish the same with sufficient forage, and any person who has lost, or shall lose, or has had, or shall have, destroyed by unavoidable accident, any horse, mule, ox, wagon, cart, boat, sleigh, or harness, while such property was in the service aforesaid, shall be allowed and paid the value thereof at the time he entered the service. *Provided,* It shall appear that such loss, capture, abandonment, destruction, or death was without any fault or negligence on the part of the owner of the property, and while it was actually employed in the service of the United States.[78b]—Sec. 2, March 3, 1849, chap. 129.

(*b.*) To establish claim under provisions of this paragraph, it is necessary to produce "the testimony of the officer or agent of the United States who *impressed* or *contracted for* the service of the property mentioned in such claim, describing the property, showing when and in what manner it was taken into the service, the reasons and necessity therefor, the manner in which it was employed, and the value thereof when taken into the service. The officer in whose charge the property was at the time of loss must also state the time, place, and manner in which the loss happened, and whether or not it was sustained without any fault or negligence on the part of the owner. In cases where the property was in the service by *contract,* the rate of compensation to be allowed must appear, and also whether or not the risk to which it would be exposed was agreed to be incurred by the owner; and in cases of horses, mules, or oxen lost for want of forage, whether the same was to be furnished by the owner or by the United States."

"Each claim must be accompanied by a deposition of the claimant, declaring that he 'has not received from any officer or agent of the United States any horse, mule, wagon, cart, etc. (as the case may be), in lieu of the property lost, nor any compensation for the same, nor any certificate of indebtedness or certified voucher therefor on which payment has or might be made. The claim must be supported by the original

116. Sec. 2 of the act approved March 3, 1849, entitled "An act to provide for the payment of horses and other property lost or destroyed in the military service of the United States" shall be construed to include the steamboats and other vessels,[78c] and "railroad engines and cars,"[78d] in the property to be allowed and paid for when destroyed or lost under the circumstances provided for in said act.—Sec. 5, March 3, 1863, chap. 78.

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valuation list if the property was appraised at the time of being taken into the United States service; if no appraisement was made, the best attainable evidence as to the value thereof may be received."

(*c.*) To establish a claim for a STEAMBOAT or other VESSEL under the above provision, it will be necessary to produce the following testimony:

"If the steamboat, or vessel, was in the service of the United States by *contract*, the charter-party, or a certified copy thereof, must be filed with the evidence in support of the claim."

"It must be shown in what particular branch of the military service the boat was engaged—whether transporting troops, freight, or otherwise; and whether or not the risk to which it would be exposed was agreed to be incurred by the owner."

"If in the service by *impressment*, the evidence of the officer by whom the impressment was made must be furnished, showing when and where such impressment was made; by what authority or under whose order; the reasons therefor; and whether such boat was at the time of loss actually employed in the transportation of troops, supplies, or otherwise in the military service of the United States."

"Complete evidence of ownership must be furnished. The owners must state when, where, and from whom the boat was purchased, and the price paid. The names and residences of all the owners must appear, together with their separate interests therein. The bills of sale, or certified copy thereof, must accompany the papers."

"A complete description of the boat must be given, showing when and where the same was built; the trade in which she was employed previous to being taken into the United States service; her capacity for freight and passengers; the number, description, and power of engines; the number and size of boilers; extreme length and width, number of decks, depth of draft; whether side or stern wheels; and the last certificate of inspection, or a certified copy thereof, must also be furnished."

"Evidence must be furnished showing the particular circumstances attending the loss, when and where it occurred; also whether the loss was total or only partial; and if the latter, the extent of damage done."

"A statement must be furnished showing the respective payments made, by officers or agents of the United States, for or on account of the service of said vessel or steamboat, during the time she was employed in the service prior to the loss thereof."

"The owners, in each case, must make affidavit that they have not, by themselves or agents, received from any officer or agent of the United States any property in lieu of that lost or destroyed, nor any compensation for the same, nor any certificate of indebtedness or certified voucher therefor on which payment has been or might be made. The owners must also state what insurance, if any, was had on such vessel or boat; the names of the companies in which insured; the amounts thereof, and the payments received therefrom."

"Each witness must state his place of residence and business, and his opportunities for knowing the facts concerning which he testifies. All evidence must be sworn to before some officer authorized to administer oaths, and duly authenticated."

(*d.*) The evidence to substantiate claims for railroad engines and cars "should be, as far as applicable, the same as is required in the cases of steamboats and other vessels. Claims for losses occurring from casualties while engaged in the transportation of troops, supplies, etc., and where the roads, machinery, etc., are in the possession and management of the agents of the railroad, are not embraced in this class of cases."

"IN NO CASE can the foregoing evidence be dispensed with, unless the impracticability of producing it be clearly proved; and then the nearest and best other evidence of which the case is susceptible must be furnished in lieu thereof."

ALL EVIDENCE, other than the certificates of officers who, at the time of giving them, were in the military service of the United States, must be sworn to before some judge,

117. The claims provided for under this act [¶ ¶ 115, 119, 120, 121] shall be adjusted by the third auditor, under such rules as shall be prescribed by the secretary of war, under the direction or with the assent of the President of the United States, as well in regard to the receipt of applications of claimants as the species and degree of evidence, the manner in which such evidence shall be taken and authenticated, which rules shall be such as in the opinion of the President shall be best calculated to obtain the object of this act, paying a due regard as well to the claims of individuals' justice as to the interest of the United States; which rules and regulations shall be published for four weeks in such newspapers, in which the laws of the United States are published, as the secretary of war shall direct.—Sec. 3, March 3, 1849, chap. 129.

118. That sec. 4 of the act entitled "An act to provide for the payment of horses and other property lost or destroyed in the service of the United States," approved March 3, 1849, be amended by striking out all after the enacting clause, and in lieu thereof inserting the words: "That the said auditor shall, in all cases, transmit his adjustment, with all the papers relating thereto, to the second comptroller, for his revision and decision thereon, the same in all respects as is provided in the act of the 2d of September, *eighteen* [seventeen] hundred and eighty-nine."—Sec. 8, July 28, 1866, chap. 297.

119. In all instances where any minor has been, or shall be, engaged in the military service of the United States, and was, or shall be, provided with a horse or equipments, or with military accoutrements, by his parent or guardian, and has died, or shall die, without paying for said property, and the same has been, or shall be, lost, captured, destroyed, or abandoned in the manner before mentioned, said parent or guardian shall be allowed pay therefor, on making satisfactory proof, as in other cases, and the further proof that he is entitled thereto by having furnished the same.—Sec. 5, March 3, 1849, chap. 129.

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justice of the peace, or other person duly authorized to administer oaths, and of which authority proof should accompany the evidence."—G. O. No. 113, A.-G. O., 1863.

(*e.*) APPROPRIATIONS.—So much of another act of same date, as made a general or continuous appropriation for the payment of claims arising under this law, has been repealed by the act of July 12, 1870, which provides that thereafter "it shall be the duty of the proper department to submit estimates for the expenses and expenditures under these several heads in the usual manner."

The second comptroller decides that this repeal establishes no legal objection to entertaining such claims, and that the auditor can report the case as usual to the comptroller, and if approved the sum allowed stands as an adjudicated claim, to be paid when the necessary appropriation is made.

120. In all instances where any person other than a minor has been, or shall be, engaged in the military service aforesaid, and has been, or shall be, provided with a horse or equipments, or with military accoutrements, by any person, the owner thereof, who has risked, or shall take the risk of such horse, equipments, or military accoutrements on himself, and the same has been, or shall be, lost, captured, destroyed, or abandoned in the manner before mentioned, such owner shall be allowed pay therefor, on making satisfactory proof, as in other cases, and the further proof that he is entitled thereto, by having furnished the same, and having taken the risk on himself.—Sec. 6, *ibid.*

121. In all cases where horses have been condemned by a board of officers, on account of their unfitness for service, in consequence of the government failing to supply forage, all such horses and their equipage shall be allowed and paid for, whenever the facts shall be proven, by legal and satisfactory evidence, whether oral or written, that such condemned horse and the equipage was turned over to a quartermaster of the army, whether any receipt therefor was given and produced or not.—Sec. 7, March 3, 1849, chap. 129.

THE COURT OF CLAIMS.

122. The said court[79] shall hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, which may be suggested to it by a petition filed therein; and also all claims which may be referred to said court by either house of Congress. It shall be the duty of the claimant in all cases to set forth a full statement of the claim, and of the action thereon in Congress, or by any of the departments, if such action has been had; specifying also what person or persons are owners thereof or interested therein,[80] and when and upon what

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[79] THE COURT OF CLAIMS.—Only such of the statutes in reference to this court as are of importance to officers of the army, in the discharge of their official duties, will be found in this compilation. All of the statutes concerning the court may be found in Nott & Huntington's Reports.

The court consists of one chief justice and four judges; its regular sessions commence on the first Monday of December of each year; and the attorney-general, with his assistants, attend to the prosecution and defense of all suits on behalf of the United States.

[80] ASSIGNMENT OF CLAIMS.—"Any petition filed under this act shall be verified by the affidavit of the claimant, his agent, or attorney, stating that no assignment or transfer of said claim, or any part thereof, or any interest therein, has been made, except as in said petition stated; that said claimant is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets; and that

consideration such person or persons became so interested.—Sec. 1, February 24, 1855, chap. 122.

123. The said court [of claims], in addition to the jurisdiction now conferred by law,[81] shall also have jurisdiction of all set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the government, against any person making claim against the government in said court; and upon the trial of any such cause it shall hear and determine such claim or demand both for and against the government and claimant; and if upon the whole case it finds that the claimant is indebted to the government, it shall render judgment to that effect, and such judgment shall be final, with the right of appeal, as in other cases herein provided for.[82] Any transcript of such judgment, filed in the clerk's office of any district or circuit court of the United States, shall be entered upon the records of the same, and shall ipso facto become and be a judgment of such district or circuit court, and shall be enforced in like manner as other judgments therein.—Sec. 3, March 3, 1863, chap. 92.

124. It shall also be the duty of the said attorney-general and his assistants, in all cases brought against the United States in said court of claims founded upon any contract, agreement, or transac-

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he believes the facts as stated in said petition are true. *Provided however*, That in order to authorize the said court to render a judgment in favor of any claimant, if a citizen of the United States, it shall be set forth in the petition that the claimant, and the original and every prior owner thereof, where the claim has been assigned, has at all times borne true allegiance to the government of the United States, and whether a citizen or not, that he has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said government, which allegations may be traversed by the government; and if on the trial such issue shall be decided against the claimant, his petition shall be dismissed.—Sec. 12, March 3, 1863.

[81] JURISDICTION OF THE COURT extends:

To claims of disbursing officers for relief from responsibility on account of losses by capture or otherwise of funds, property, or vouchers: see ¶ ¶ 47, 48.

To disputed balances between accounting officers and the chiefs of departments: see note 7 *b* and ¶ 125.

To all petitions or bills for the satisfaction of private claims against the government, referred to the court by either house of Congress.—Sec. 2, March 3, 1863, chap. 92. See ¶ 125.

Its jurisdiction does not extend to claims against the United States growing out of the destruction or appropriation of or damage to property during the late rebellion, by the army or navy (sec. 1, July 4, 1864); nor does it extend to any claim "growing out of or dependent on any treaty stipulation entered into with foreign nations, or with Indian tribes." See Sec. 9, March 3, 1863, chap. 92.

Claims are barred unless the petition is filed in or transmitted to the court within six years after the claim first accrues. See Sec. 10, March 3, 1863, chap. 92.

(*a*.) EVIDENCE.—No plaintiff, claimant, or person from or through whom any such plaintiff or claimant derives his alleged title, claim, or right, or any person interested in any way in such claim, is a competent witness, unless he be examined on behalf of the government. See Sec. 4, June 25, 1868, chap. 71.

[82] APPEALS.—See Sec. 5 and 7, same act; sec. 1, June 25, 1868; and *United States* v. *Adams*, 6 Wallace, 107.

tion with any executive department, or any bureau, officer, or agent of such department, or where the matter or thing on which the claim is based shall have been passed upon and decided by any department, bureau, or officer intrusted by law or department regulations with the settlement and adjustment of such claims, demands, or accounts, to transmit to said department, bureau, or officer, as aforesaid, a printed copy of the petition filed by the claimant in such case, with a request that the said department, bureau, or officer to whom the same shall be so transmitted as aforesaid, will furnish to said attorney-general all facts, circumstances, and evidence touching said claim as is or may be in the possession or knowledge of the said department, bureau, or officer; and it shall be the duty of the said department, bureau, or officer to whom such petition may be transmitted and such request preferred as aforesaid, without delay, and within a reasonable time, to furnish said attorney-general with a full statement of all the facts, information, and proofs which are or may be within the knowledge or in the possession of said department, bureau, or officer, relating to the claim aforesaid. Such statement shall also contain a reference to or description of all official documents or papers, if any, as may or do furnish proof of facts referred to in said statement, or that may be necessary and proper for the defense of the United States against the said claim, together with the department, office, or place where the same is kept or may be procured. And if the said claim shall have been passed upon and decided by the said department, bureau, or officer, the statement or answer to be transmitted to said attorney-general as hereinbefore provided, shall succinctly state the reasons and principles upon which such decision shall have been based. In all cases where such decision shall have been made upon any act of Congress, or upon any section or clause of such act, the same shall be cited specifically. And if any previous interpretation or construction shall have been given to such act, section, or clause by the said department or bureau transmitting such statement, the same shall be set forth succinctly in said statement, and a copy of the opinion filed, if any, shall be annexed to such statement and transmitted with the same to the attorney-general aforesaid. And where any decision in the case shall have been based upon any regulation of an executive department, or where such regulation shall or may, in the opinion of the department, bureau, or officer transmitting such statement, have any bearing upon the claim in suit, the same shall be distinctly referred to and quoted in extenso in the statement transmitted to

said attorney-general. *Provided however*, That where there shall be pending in said court more than one case, or a class of cases, the defense to which shall rest upon the same facts, circumstances, and proofs, the said department, bureau, or officer shall only be required to certify and transmit one statement of the same, and such statement shall be held to apply to all such classes of cases as if made out, certified, and transmitted in each case respectively.—Sec. 6, June 25, 1868, chap. 71.

125. It shall and may be lawful for the head of any executive department, whenever any claim is made upon said department involving disputed facts or controverted questions of law, where the amount in controversy exceeds three thousand dollars, or where the decision will affect a class of cases or furnish a precedent for the future action of any executive department in the adjustment of a class of cases, without regard to the amount involved in the particular case, or where any authority, right, privilege, or exemption is claimed or denied under the Constitution of the United States, to cause such claim, with all the vouchers, papers, proofs, and documents pertaining thereto, to be transmitted to the court of claims, and the same shall be there proceeded in as if originally commenced by the voluntary action of the claimant.[83] And the secretary of the treasury may, upon the certificate of any auditor or comptroller of the treasury, direct any account, matter, or claim of the character, amount, or class described or limited in this section to be transmitted, with all the vouchers, papers, documents, and proofs pertaining thereto, to the said court of claims, for trial and adjudication. *Provided however*, That no case shall be referred by any head of a

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[83] CLAIMS BEFORE HEADS OF DEPARTMENTS AND CHIEFS OF BUREAUS.—The act of July 4, 1864, imposed upon the quartermaster-general and commissary-general of subsistence the duty of investigating the claims for stores and supplies (pertaining to their respective departments) alleged to have been used by the army in the loyal States, and when satisfied that the stores had actually been received or taken by the army, and that the claimants are loyal, the cases are to be submitted for settlement to the third auditor of the treasury. This jurisdiction extended to similar claims from the State of Tennessee, and the counties of Berkeley and Jefferson, West Virginia, (see Joint Resolutions, June 18 and July 28, 1866), but is restricted to claims presented to the bureaus prior to March 3, 1871. See acts of March 3 (chap. 116), and April 20 (chap. 21), 1871, and Joint Resolutions, March 2, 1867, December 28, 1869, and March 3, 1871.

Claims of the loyal citizens of insurrectionary States, for stores or supplies taken or furnished during the rebellion for the use of the army, are to be submitted to the board of commissioners created by the act of March 3, 1871.

(*a.*) *Heads of Departments.*—This act (¶ 125) defines the manner in which and by whom the act of March 30, 1868 (¶ 32), may be made effective. The head of a department may refer a claim direct to the court of claims, and he does not waive his right to send a claim before that tribunal by allowing it in the first instance to be passed upon by the accounting officers of the treasury.—*Delaware Steamboat* v. *United States*, 5 Nott & Huntington, 64.

department unless it belongs to one of the several classes of cases to which, by reason of the subject-matter and character, the said court of claims might, under existing laws, take jurisdiction on such voluntary action of the claimant. And all the cases mentioned in this section which shall be transmitted by the head of any executive department, or upon the certificate of any auditor or comptroller, shall be proceeded in as other cases pending in said court, and shall, in all respects, be subject to the same rules and regulations; and appeals from the final judgments or decrees of said court therein to the Supreme Court of the United States shall be allowed in the manner now provided by law. The amount of the final judgments or decrees in such cases so transmitted to said court, where rendered in favor of the claimants, shall in all cases be paid out of any specific appropriation applicable to the same, if any such there be; and where no such appropriation exists, the same shall be paid in the same manner as other judgments of said court.—Sec. 7, June 25, 1868, chap. 71.

126. That at the end of every term of the court of claims, the clerk of said court transmit a copy of the decisions thereof to the heads of departments; to the solicitor, comptrollers, and auditors of the treasury; to the commissioners of the general land office and of Indian affairs; to the chiefs of bureaus; and to other officers charged with adjusting claims against the United States.—Sec. 3, March 17, 1866, chap. 19.

GENERAL PROVISIONS IN REGARD TO CLAIMS.

127. Whenever a claim on the United States aforesaid shall hereafter have been allowed by a resolution or act of Congress, and thereby directed to be paid, the money shall not, nor shall any part thereof, be paid to any person or persons other than the claimant or claimants, his or their executor or executors, administrator or administrators, unless such person or persons shall produce to the proper disbursing officer a warrant of attorney executed by such claimant or claimants, executor or executors, administrator or administrators, after the enactment of the resolution or act allowing the claim; and every such warrant of attorney shall refer to such resolution or act, and expressly recite the amount allowed thereby, and shall be attested by two competent witnesses, and be acknowledged by the person or persons executing it, before an officer having authority to take the acknowledgment of deeds, who shall certify such acknowledgment; and it shall appear by such certificate that such officer, at

the time of the making of such acknowledgment, read and fully explained such warrant of attorney to the person or persons acknowledging the same.—Sec. 1, July 29, 1846, chap. 66.

128. All transfers and assignments hereafter made of any claim upon the United States, or any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or any part or share thereof, shall be absolutely null and void, unless the same shall be freely made and executed in the presence of at least two attesting witnesses, after the allowance of such claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. —Sec. 1, February 26, 1853, chap. 81.

129. Any officer of the United States, or person holding any place of trust or profit, or discharging any official function under or in connection with any executive department of the government of the United States, or under the Senate or House of Representatives of the United States, who, after the passage of this act, shall act as an agent or attorney for prosecuting any claim against the United States, or shall in any manner, or by any means, otherwise than in the discharge of his proper official duties, aid or assist in the prosecution or support of any such claim or claims, or shall receive any gratuity, or any share of or interest in any claim from any claimant against the United States, with intent to aid or assist, or in consideration of having aided or assisted, in the prosecution of such claim, shall be liable to indictment as for a misdemeanor, in any court of the United States having jurisdiction thereof, and, on conviction, shall pay a fine not exceeding five thousand dollars, or suffer imprisonment in the penitentiary not exceeding one year, or both, as the court in its discretion shall adjudge.[84]—Sec. 2, *ibid.*

130. The provisions of this act, and of the act of July 29, 1846, entitled "An act in relation to the payment of claims," shall apply and extend to all claims against the United States, whether allowed by special act of Congress, or arising under general laws or treaties, or in any other manner whatever.—Sec. 7, February 26, 1853, chap. 81.

131. Nothing in the second and third[85] sections of this act contained shall be construed to apply to the prosecution or defense of

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[84] See also ¶ ¶ 81, 111, 130, 131, 744.
[85] The third section has no application to army officers.

any action or suit in any judicial court of the United States.—Sec. 8, *ibid.*

132. No member of the Senate or House of Representatives shall, after his election and during his continuance in office, nor shall any head of a department, head of a bureau, clerk, or any other officer of the government, receive or agree to receive any compensation whatsoever, directly or indirectly, for any services rendered, or to be rendered, after the passage of this act, to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party, or directly or indirectly interested, before any department, court-martial, bureau, officer, or any civil, military, or naval commission whatever. And any person offending against any provision of this act shall, on conviction thereof, be deemed guilty of a misdemeanor, and be punished by a fine not exceeding ten thousand dollars, and by imprisonment for a term not exceeding two years, at the discretion of the court trying the same, and shall be, forever thereafter, incapable of holding any office of honor, trust, or profit under the government of the United States.[86]—June 11, 1864, chap. 119.

133. Any head of a department or bureau in which a claim against the United States is properly pending may apply to any judge or clerk of any court of the United States, in any State, District, or Territory, to issue a subpœna for any witness, residing or being within the jurisdiction of such court, to appear at a time and place in said subpœna stated, before any officer authorized to take depositions to be used in the courts of the United States, there to give full and true answers to such written interrogatories and cross-interrogatories as may be submitted with said application, or to be orally examined and cross-examined upon the subject of such claim; and if any witness, after being duly served with such subpœna, shall neglect or refuse to appear, or appearing shall refuse to testify, the judge of the district in which the subpœna issued may proceed upon proper process to enforce obedience to the process, or to punish the disobedience, in like manner as any court of the United States may do in case of process of subpœna ad testificandum issued by such court; and witnesses in such case shall be allowed the same compensation as is allowed witnesses in the courts of the United States.[87]—Sec. 1, February 14, 1871, chap. 51.

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[86] This act seems to be fully supplied by that of 1866 (¶ 81). See also ¶ ¶ 111, 744.
[87] See ¶ 82.

134. If any witness, who shall be duly sworn and examined under the provisions of this act, shall be guilty of intentional false swearing in his testimony, he shall be deemed guilty of the crime of perjury, and on conviction thereof shall be punished in the same manner and to the same extent as is provided against perjury committed in the courts of the United States.—Sec. 2, *ibid.*

135. Whenever any head of a department or bureau shall make application to take testimony under this act, and shall be of opinion that the interests of the United States require the attendance of counsel at the examination, or if he shall be of opinion that the interests of the United States require legal investigation of such claim, he shall give notice thereof to the attorney-general, and of all facts necessary to enable the attorney-general to furnish proper professional service in attending such examination, or making such investigation; and it shall be the duty of the attorney-general to provide for such service.—Sec. 3, *ibid.*

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[88] INSTRUCTIONS RELATIVE TO PUBLIC MONEYS AND OFFICIAL CHECKS OF THE UNITED STATES DISBURSING OFFICERS.—All public money advanced to disbursing officers of the United States must be deposited immediately, to their respective credits, with either the United States treasurer, some assistant treasurer, or designated depositary, other than a national bank depositary, nearest or most convenient; or, by special direction of the secretary of the treasury, with a national bank depositary, except—

(1.) Each disbursing officer of the war department, specially authorized by the secretary of war, when stationed on the extreme frontier or at places far remote from such depositaries, may keep, at his own risk, such moneys as may be intrusted to him for disbursement.

Any officer, receiving money remitted to him upon specific estimates, will at once disburse the same accordingly, without waiting to place it in a depository, if the payments are due, and he prefers this method to that of drawing checks.

Checks drawn by disbursing officers upon money thus deposited should be in favor of the person, by name, to whom the payment is to be made, or in favor of such person by name or bearer, with these exceptions:

[A.] Any disbursing officer may draw checks *in favor of himself or bearer* for such amounts as may be necessary [1] to pay sums under twenty dollars; [2] to pay (*a*) fixed salaries due at a certain period, he may withdraw the necessary amount by checks two days before the salaries are to be paid; (*b*) to make payments at a distance from a depository, he may withdraw the necessary amount by check.

[B.] Any disbursing officer of the war department, specially designated by the secretary of war, may also draw by checks payable to himself or bearer the amount of his regular monthly pay-rolls or vouchers, not to exceed five days before the regular date when payment of such pay-rolls or vouchers is due.

All disbursing officers or agents, except pension agents, drawing checks on moneys deposited to their official credit, must state on the face or back of each check the object or purpose to which the avails are to be applied. Such statement may be made in brief form, but must clearly indicate the object of the expenditure, as, for instance, "pay," "pay-roll," or "payment of troops," adding the fort or station, "purchase of subsistence" or other supplies, "on contract for construction," mentioning the fortification or other public work for which the payment is made, etc.

Pension agents drawing checks in favor of themselves, or in favor of any person other than a pensioner, must furnish a list containing the names of the persons to whom payment is to be made from the avails, and the amounts payable to each.

Transfer checks drawn by *one* disbursing officer in favor of another will be used only to effect a transfer of credit from the drawer to the payee in the depository

where they are payable and to which they should be transmitted by the payee for such purpose.

Excepting checks of pension agents in favor of pensioners, and "bounty checks," public depositaries are not required to pay checks of disbursing officers made payable in the alternative to any person or his order. They *may*, however, pay them when drawn to order if satisfied of the genuineness of the indorsements and sufficient sums remain to the credit of the drawer.

Checks will not be returned to the drawer after their payment; but the depositary with whom the account is kept shall furnish the officer with a monthly statement of his deposit account.

No allowance will be made to any disbursing officer for expenses charged for collecting money on checks.

In case of the death, resignation, or removal of any disbursing officer, checks previously drawn by him will be paid from the funds at his credit, unless said checks have been drawn more than four months before the presentation thereof, or reasons exist for suspecting fraud.

Each disbursing officer is required, when first opening a disbursing account, to furnish his official signature to the officer on whom the checks are drawn before drawing such checks.

No. —. OFFICE OF THE U. S. (*Assistant Treasurer or Depositary.*)

———, ———, 18—.

RECEIVED *of* ——— ———, ——— *dollars, consisting of* ———, *to be placed to his credit as* ———, *and subject only to his check in that official capacity.*

$———. ——— ———, U. S. (*Assistant Treasurer or Depositary.*)

A receipt of this form shall be given for every deposit made by a disbursing officer, which shall show, besides its serial number and the place and date of issue, the character of the funds, *i.e.* whether coin or currency; and if the credit is made by a disbursing officer's check, transferring funds to another disbursing officer, the essential items of the check shall be enumerated; if by a treasury draft, like items shall be given, including the warrant number. The title of each officer shall be expressed, and the title of the disbursing account shall also show for what branch of the public service the account is kept, it being essential for the proper transaction of department's business that moneys advanced to a disbursing officer serving in two or more distinct capacities, from different bureaus, be kept separate and distinct from each other, and be so reported to the department both by the officer and the depositary.

These regulations are intended to supersede those of May 27, 1857, November 10, 1866, January 18, 1868, November 23, 1869, July 14, 1871, October 10, 1871, and November 24, 1871.—Independent Treasury Circular, No. 1, January 2, 1872. [See ¶ ¶ 49, 74, 75, 77, 80.]

CHAPTER IV.

THE MILITARY ACADEMY.

141. THE Military Academy[1] shall consist of the corps of engineers, and the following professors, in addition to the teachers of the French language and drawing already provided,[2] viz., one professor of natural and experimental philosophy, with the pay and emoluments of lieutenant-colonel, if not an officer of the corps, and, if taken from the corps, then so much in addition to his pay and emoluments as shall equal those of a lieutenant-colonel; one professor of mathematics, with the pay and emoluments of a major, if

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[1] The ACADEMY first established under act of March 16, 1802. Sec. 27 of that act provided that the corps of engineers "shall be stationed at West Point, in the State of New York, and shall constitute a military academy [but see ¶ 165]; and the engineers, assistant engineers, and cadets of the said corps shall be subject, at all times, to do duty in such places, and on such service, as the President of the United States shall direct."

The professors and corps of cadets declared a part of the military peace establishment. See Chap. xv., ¶ 450.

A military staff, consisting of an adjutant [¶ 152], a quartermaster [note 11, ¶ 323], a treasurer, and a suitable number of medical officers, is provided by regulations.

By act of April 23, 1856 (chap. 19), documents published by the Senate are to be furnished to the library of the Academy; and by circular letter from the superintendent, department and district commanders in the army are solicited to furnish copies of all printed general orders, issued by them from time to time, for deposit therein.

(*a.*) RESIDENTS AND VISITORS AT THE ACADEMY.—"No person can be entitled, as a matter of right, to enter within the limits of this post unless he be authorized to do so by the laws of the United States, or by some officer having authority under the laws to grant permission to enter such limits. The superintendent of the Academy, as commandant of this post, has a general authority to prevent any person within its limits from interrupting its discipline, or obstructing in any way the performance of the duties assigned by law to the officers and cadets. In the exercise of a sound discretion, the commandant of the post may therefore order from it any person not attached to it by law, whose presence is, in his judgment, injurious to the interests of the Academy. And in case any person so ordered shall refuse to depart, after reasonable notice and within a reasonable time, having regard to the circumstances of the case, I think the superintendent may lawfully remove him by force."—3 Opinions, 268–273, passim. But, having leased a dwelling-house, within the limits, to an individual, the United States have no greater right than an individual would have in respect to the ejectment of the lessee.—*Ibid.*, 273.

[2] THE ACADEMIC STAFF.—These teachers (by act of February 28, 1803) "to be attached to the corps of engineers," and their compensation not to "exceed the pay and emoluments of a captain in the line of the army." They are now rated as professors (¶ 151).

For additional professorships see ¶ ¶ 144, 145, 155; and for the pay of all of them see ¶ 169.

The pay of all assistant professors is that of a captain mounted: see ¶ ¶ 145, 148, 153, 167. They are also entitled to a captain's allowance of quarters.—9 Opinions, 284.

not an officer of the corps, and, if taken from the corps, then so much in addition to his pay and emoluments as shall equal those of a major; one professor of the art of engineering in all its branches, with the pay and emoluments of a major, if not an officer of the corps, and, if taken from the corps, then so much in addition to his pay and emoluments as shall equal those of a major; each of the foregoing professors to have an assistant professor, which assistant professor shall be taken from the most prominent characters of the officers or cadets, and receive the pay and emoluments of captains, and no other pay or emoluments, while performing these duties. *Provided,* That nothing herein contained shall entitle the academical staff, as such, to any command in the army separate from the Academy.—Sec. 2, April 29, 1812, chap. 72.

142. The cadets, heretofore appointed in the service of the United States, whether of artillery, cavalry, riflemen, or infantry, or that may in future be appointed as hereinafter provided, shall at no time exceed two hundred and fifty;[3] that they may be attached, at the discretion of the President of the United States, as students to the Military Academy, and be subject to the established regulations thereof; that they shall be arranged into companies of non-commissioned officers and privates, according to the directions of the commandant of engineers,[3a] and be officered from the said corps, for the purpose of military instruction; that there shall be added to each company of cadets four musicians; and the said corps shall be trained and taught all the duties of a private, non-commissioned officer, and officer; be encamped at least three months of each year, and taught all the duties incident to a regular camp; that the candidates for cadets be not under the age of fourteen,[4] nor above the age of twenty-one years; that each cadet previously to his appointment by the President of the United States shall be well versed in reading, writing, and arithmetic, and that he shall sign articles, with the consent of his parent or guardian, by which he shall engage to serve *five* years,[5] unless sooner discharged; and all such cadets shall be entitled

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[3] But see ¶ 149.

(*a.*) These companies are organized by the commandant of cadets who nominates the non-commissioned officers, for appointment, to the superintendent.

[4] For governing legislation as to age and qualifications see ¶ ¶ 149, 162, 163, 164.

[5] CADETS must engage to serve *eight* years (¶ 146). Under the 96th Article of War (¶ 626), the clause of above section subjecting them to the regulations of the Academy, and provisions of sec. 7, March 3, 1815 (¶ 492), held that cadets were subject to the Articles of War.—1 Opinions, 276, 469. See also ¶ 450.

Cadets, not being commissioned officers, may be tried by regimental or garrison court-martial. The action of such courts has a limitation, however, in the peculiar status of the cadets. They cannot be treated as "mere privates," or as "technical non-

to and receive the pay and emoluments[6] now allowed by law to cadets in the corps of engineers.—Sec. 3, April 29, 1812, chap. 72.

143. When any cadet shall receive a regular degree from the academical staff, after going through all the classes, he shall be considered as among the candidates for a commission in any corps, according to the duties he may be judged competent to perform; and in case there shall not, at the time, be a vacancy in such corps, he may be attached to it at the discretion of the President of the United States, by brevet of the lowest grade, as a supernumerary officer, with the usual pay and emoluments of such grade, until a vacancy shall happen.[7] *Provided*, that there shall not be more than one supernumerary officer to any one company at the same time.—Sec. 4, April 29, 1812, chap. 72.

144. There shall be one chaplain stationed at the Military Academy at West Point, who shall also be a professor of geography, history, and ethics, with the pay and emoluments allowed the professor of mathematics[8].—Sec. 2, April 14, 1818, chap. 61.

145. That an additional professor be appointed to instruct in the studies of chemistry, mineralogy, and geology, with the pay and emoluments now allowed to the professor of mathematics; and that the secretary of war may assign to the said professor an assistant, to be taken from the officers of the line or cadets: which assistant professor will receive the pay and emoluments allowed to other assistant professors.—Sec. 19, July 5, 1838, chap. 162.

146. That the term for which cadets hereafter admitted into the

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commissioned officers," but must be considered as "quasi commissioned officers." Graduated cadets when assigned by brevet as supernumerary officers are, however, to all intents and purposes commissioned officers.—7 Opinions, 323.

[6] For pay and allowances see ¶ ¶ 159, 166.

[7] The faith of the public is pledged that a commission shall be awarded when a vacancy happens in corps to which he is attached, but he is not a commissioned officer till appointed to a vacancy.—2 Opinions, 251. But see last paragraph of note 5.

"Under this act the President is not required either to commission such graduate when there is a vacancy, or to attach him as supernumerary officer by brevet of the lowest grade, when there is no vacancy; but he may do so at his discretion; and having exercised that discretion, such graduate, so commissioned and attached, becomes an officer of the lowest grade in the corps, and is entitled to all consideration as a commissioned officer."—G. O. No. 11, A.-G. O., 1845.

The President decides that brevet second lieutenants, appointed from the Academy, take rank, when promoted as second lieutenants, from date of brevet commission.—General Orders, A.-G. O., October 3, 1821.

Promotion to be in arm of service to which they are attached: Army Register, 1822. To be in regiment or corps, by Register of 1829; in the *arm of service*, by Army Register of 1846; again in regiment or corps, G. O. No. 8, 1851; and again in *arm of service*, by and since G. O. No. 17, 1853.

By a decision of the war department, dated August 12, 1871, graduates of the Military Academy, for whom there are no vacancies, are to be assigned to duty as "additional second lieutenants." See ¶ 170.

[8] Pay of all professors established July 15, 1870: see ¶ 169.

Military Academy at West Point shall engage to serve be and the same is hereby increased to *eight* years, unless sooner discharged. —Sec. 28, *ibid.*

147. The commander of the corps of cadets at the Military Academy shall be either the instructor of infantry tactics, of cavalry and artillery tactics, or of practical engineering, and his pay and emoluments shall in no case be less than the compensation allowed by law to the professor of mathematics;[9] and the pay and emoluments of the instructors in these branches shall in no case be less than is allowed by law to the assistant professor of mathematics.—Sec. 2, June 20, 1840, chap. 50.

148. The assistant professor of ethics shall be allowed the same compensation as is now allowed by law to the other assistant professors in the institution.—Sec. 3, June 20, 1840, chap. 50.

149. Hereafter, in all cases of appointments of cadets to the West Point Academy, the individual selected shall be an actual resident of the congressional district of the State or Territory, or District of Columbia, from which the appointment purports to be made. *And provided further,* That the number of cadets, by appointments hereafter to be made, shall be limited to the number of the representatives and delegates in Congress, and one for the District of Columbia, and that each congressional and territorial district and District of Columbia shall be entitled to have one cadet at said Academy.[10] *Provided,* That nothing in this section shall prevent the appointment of an additional number of cadets not exceeding ten, to be appointed at large, without being confined to a selection by congressional districts.—Sec. 2, March 1, 1843, chap. 52.

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[9] Rank, pay, and duties of commandant prescribed June 12, 1858: see ¶ 157.

[10] APPOINTMENT OF CADETS.—The act of August 31, 1852, provides that no appointment to the Naval Academy be made, "unless recommended by the member of Congress representing the district in which the applicant resides, in the same manner that cadets at West Point are now appointed." Referring thereto, it was held by the attorney-general (10 Opinions, 46) that a member of Congress could not *appoint* to the Academy; that his recommendation was simply a prerequisite to appointment; and that when more than one applicant stood recommended by congressmen, representing, at the time of such nomination, the said district, the President could make a selection.

The selections *at large,* and from the District of Columbia, are especially made by the President. Application can at any time be made by letter to the secretary of war to have the name of the applicant placed upon the register, that it may be furnished to the proper representative or delegate when a vacancy occurs. The application should exhibit the full name, precise age, and permanent abode of the applicant, and the number of the congressional district in which he resides. Whenever possible, appointments are made one year in advance of the date of admission (¶ 164), viz., about the 1st of July in each year. Candidates selected by the war department will be ordered to report in person to the superintendent, for examination, between the 25th and 31st of May, annually.—Regulations of the Military Academy, amended edition of 1866.

For summary of qualifications, and disqualifications, see note 14.

150. That the President be authorized to appoint a board of visitors to attend the annual examination of the Military Academy, whose duty it shall be to report to the secretary of war, for the information of Congress, at the commencement of the next succeeding session, the actual state of the discipline, instruction, police administration, fiscal affairs, and other concerns of the institution. [*Provided*,[11] That the whole number of visitors each year shall not exceed the half of the number of States in the Union; and that they shall be selected, alternately, from every second State, each member being a bona-fide resident citizen of the State from which he shall be appointed; that not less than six members shall be taken from among officers actually serving in the militia; and that a second member shall not be taken from any congressional district until every other district in the State shall have supplied a member.] *Provided further*, That no compensation shall be made to said members beyond the payment of their expenses for board and lodging while at the Military Academy, and an allowance, not to exceed eight cents per mile, for traveling by the shortest mail route from their respective homes to the Academy and back to their homes. —Sec. 2, August 8, 1846, chap. 96.

151. The teacher of drawing, and the first teacher of French, at the Military Academy, shall hereafter be, respectively, professor of drawing, and professor of the French language.—Sec. 3, *ibid.*

152. The adjutant of the Military Academy shall hereafter be entitled to receive the same pay and allowances as an adjutant of a regiment of dragoons.—March 3, 1851, chap. 22.

153. Hereafter, the assistant professors of French and drawing shall receive the pay and emoluments allowed to other assistant professors.—Sec. 2, August 6, 1852, chap. 81.

154. A sufficient number of the supernumerary second lieutenants, graduates of the Military Academy, for whom there is no command in the army, shall, upon the application of the superintendent of the coast survey, be detailed to take the places and do duty on the coast survey, instead of the civilians now employed in that service.—Sec. 1, August 31, 1852, chap.

155. That there shall be appointed at the Military Academy, in

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[11] The act making appropriation for the Academy for year ending June 30, 1869, provides, "That the second section of the act approved August 8, 1846, . . . be amended by striking out the first provision of said section, and by inserting in lieu thereof the following: 'Provided, That the whole number of visitors shall not exceed seven.'"—March 16, 1868.

For board of congressional visitors see ¶ 168.

addition to the professors authorized by the existing laws, a professor of Spanish, at a salary of two thousand dollars per annum.—Sec. 2, February 16, 1857, chap. 45.

156. That the compensation of the master of the sword be fifteen hundred dollars per annum, with fuel and quarters.—Sec. 3, *ibid.*

157. The superintendent of the Military Academy, while serving as such by appointment of the President,[12] shall have the local rank, the pay and allowances, of a colonel of engineers; the commandant of the corps of cadets at the Military Academy, while serving as such by appointment of the President, shall have the local rank, the pay and allowances, of a lieutenant-colonel of engineers, and, besides his other duties, shall be charged with the duty of instructor in the tactics of the three arms at said Academy; and the senior assistant instructor in each of the arms of service, viz. of artillery, cavalry, and infantry, shall severally receive the pay and allowances of the assistant professor of mathematics.—Sec. 2, June 12, 1858, chap. 156.

158. No cadet, who has been or shall hereafter be reported as deficient, either in conduct or studies, and recommended to be discharged from the Academy, shall be returned or reappointed, or appointed to any place in the army before his class shall have left the Academy and received their commissions, unless upon the recommendation of the academic board of the Academy. *Provided,* That all cadets now in the service, or hereafter entering the Military Academy at West Point, shall be called on to take and subscribe the following oath: "I, A. B., do solemnly swear that I will support the Constitution of the United States, and bear true allegiance to the national government; that I will maintain and defend the sovereignty of the United States paramount to any and all allegiance, sovereignty, or fealty I may owe to any State, county, or country whatsoever; and that I will at all times obey the legal orders of my superior officers, and the rules and articles governing the armies of the United States." And any cadet or candidate for admission who shall refuse to take this oath shall be dismissed from the service.—Sec. 8, August 3, 1861, chap. 42.

159. From and after the 1st day of July, 1863, the annual pay of cadets at the Military Academy at West Point shall be the same

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[12] By sec. 28, March 16, 1802, "the principal engineer, and in his absence the next in rank, shall have the superintendence of the said Military Academy." But see ¶ 165.

The superintendent "is regarded as the commandant of that post," the Military Academy.—Sec. 6, August 23, 1842, chap. 186.

The Academy is not subject to supervision of department commanders.—G. O. No. 12, A.-G. O., 1869.

as that allowed to midshipmen at the Naval Academy,[13] and the amount necessary for that purpose is hereby appropriated.—Sec. 3, April 1, 1864, chap. 45.

160. Sec. 4 of chap. 45 of the public acts of the first session of the thirty-eighth Congress, relating to cadets "found deficient," is hereby repealed.[13a]—Sec. 2, March 2, 1865, chap. 75.

161. Sec. 31 of the act entitled "An act for enrolling and calling out the national forces, and for other purposes," approved March 3, 1863, or sec. 11 of an "Act to increase the pay of soldiers in the United States army, and for other purposes," approved June 20, 1864, shall not be construed to abridge the privileges usually allowed to the professors of the Military Academy of being absent during the suspension of the ordinary academic studies of that institution.—Joint Resolution, July 2, 1864.

162. No person who has served in any capacity in the military or naval service of the so-called Confederate States during the late rebellion shall hereafter receive an appointment as a cadet at the military or naval academy.—Sec. 2, June 8, 1866, chap. 110.

163. The age for the admission of cadets to the United States Military Academy shall hereafter be between seventeen and twenty-two years; but any person who has served honorably and faithfully not less than one year as an officer or enlisted man in the army of the United States, either as a volunteer or in the regular service, in the late war for the suppression of the rebellion, and who possesses the other qualifications prescribed by law, shall be eligible to appointment up to the age of twenty-four years.[14]—Sec. 1, Joint Resolution, June 16, 1866.

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[13] And the ration, ¶ 166. "The daily and monthly rates of pay of cadets, based upon the gross sum per year, salary (five hundred dollars) and commuted rations (one hundred and nine dollars and fifty cents), six hundred and nine dollars and fifty cents, are hereby fixed as follows:

Pay per day	$1 67
Pay per month (arranged for all months alike)	50 79

"This rule has the concurrence of the accounting officers of the treasury."—Paymaster's Manual (1871), ¶ 194.

Sec. 8, July 28, 1866 (chap. 296), provides that acting midshipmen "shall be entitled to one ration or commutation thereof."

Four dollars per month are to be retained from each cadet's pay, with which, at his promotion, to purchase a uniform and equipments.—Regulations of the Military Academy, amended edition of 1866.

(*a.*) That section provided that "cadets found deficient at any examination shall not be continued at the Military Academy, or be reappointed except upon the recommendation of the academic board." But see first clause of ¶ 158.

[14] QUALIFICATIONS—*Mental:* The candidate is required by law to be proficient in reading and writing; in the elements of English grammar; in descriptive geography, particularly of our own country, and in the history of the United States.

In arithmetic, the various operations in addition, subtraction, multiplication, and

164. Cadets at the Military Academy shall hereafter be appointed one year in advance of the time of their admission, except in cases where, by reason of death or other cause, a vacancy occurs which cannot be thus provided for by such appointment in advance; but no pay or allowance shall be made to any such appointee until he shall be regularly admitted on examination as now provided by law; nor shall this provision apply to appointments to be made in the present year. And in addition to the requirements necessary for admission as provided by sec. 3 of the "Act making further provisions for the corps of engineers," approved April 29, 1812 [¶ 142], candidates shall be required to have a knowledge of the elements of English grammar, of descriptive geography, particularly of our own country, and of the history of the United States.[14]—Sec. 2, *ibid.*

165. The superintendent of the United States Military Academy may hereafter be selected, and the officers on duty at that institution detailed, from any arm of the service;[15] and the supervision

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division, reduction, simple and compound proportion, and vulgar and decimal fractions, must be thoroughly understood and readily performed.

Physical: Candidates must be free from any infectious or immoral disorder, and generally from any deformity, disease, or infirmity which may render them unfit for arduous military service.

DISQUALIFICATIONS: No candidate less than five feet in height can be admitted.

The following are the leading physical disqualifications:

Feeble constitution and muscular tenuity; unsound health, from whatever cause; indications of former disease; glandular swellings or other symptoms of scrofula.

Chronic cutaneous affections, especially of the scalp.

Severe injuries of the bones of the head; convulsions.

Impaired vision, from whatever cause; inflammatory affections of the eyelids; immobility or irregularity of the iris; fistula lachrymalis, etc.

Deafness; copious discharge from the ears.

Loss of many teeth, or the teeth generally unsound.

Impediment of speech.

Want of due capacity of the chest, and any other indication of a liability to pulmonic disease.

Impaired or inadequate efficiency of one or both of the superior extremities on account of fractures, especially of the clavicle, contraction of a joint, extenuation, deformity, etc.

An unusual excurvature or incurvature of the spine.

Hernia.

A varicose state of the veins of the scrotum or spermatic cord (when large), sarcocele, hydrocele, hemorrhoids, fistulas.

Impaired or inadequate efficiency of one or of both of the inferior extremities on account of varicose veins, fractures, malformation (flat feet, etc.), lameness, contraction, unequal length, bunions, overlying or supernumerary toes, etc.

Ulcers or unsound cicatrices of ulcers likely to break out afresh.

Every person appointed, upon arrival at West Point, is submitted to a rigid medical examination; and if any causes of disqualification are found to exist in him to such a degree as may now or hereafter impair his efficiency, he is rejected.

No person who has served in any capacity in the army or navy of the so-called Confederate States can be appointed.

As a general rule, no person who has had a brother educated at the Academy will be appointed.—Regulations for the Academy.

[15] This section repeals the law of 1802 cited in note 12.

"Under the 6th sec. of the act of July 13, 1866 (¶ 165), which authorizes the selection of superintendent of the Military Academy to be made from any arm of the

and charge of the Academy shall be in the war department, under such officer or officers as the secretary of war may assign to that duty.—Sec. 6, July 13, 1866, chap. 176.

166. That the cadets of the Military Academy be entitled to the ration now received by the acting midshipmen at the Naval Academy, commencing at the date of the approval of the law authorizing the same.—Sec. 2, February 28, 1867, chap. 100.

167. Hereafter the assistant professor of Spanish shall receive the same pay and emoluments allowed to other assistant professors of the Academy.—Sec. 3, *ibid.*

168. And hereafter, in addition to the other members of the board of visitors to be appointed by the President, according to existing law [¶ 150], to attend the annual examination of cadets at the United States Military Academy, there shall be on every such board two Senators, to be designated by the Vice-President or President pro tempore of the Senate; and three members of the House of Representatives, to be designated by the Speaker of the House of Representatives; such designations respectively to be made at the session of Congress next preceding the time of such examination; and the Senators and members so appointed shall make full report of their action as such visitors, with their views and recommendations in regard to the said Military Academy, within twenty days after the meeting of Congress, at the session next succeeding the time of their appointment.—February 21, 1870, chap. 18.

169. The professors of the United States Military Academy whose service in the army and at the Academy exceeds thirty-five years shall have the pay of colonel; and those whose like service is less than thirty-five, but exceeds twenty-five years, shall have the pay of lieutenant-colonel; and all other professors shall have the pay of major; and hereafter there shall be allowed and paid to said professors ten per cent. of their current yearly pay for each and every term of five years' continuous service. *Provided,* That such addition shall in no case exceed forty per cent. of said yearly pay; and said professors are hereby placed upon the same footing as regards retirement from active service as officers of the army.[16]—Sec. 13, July 15, 1870, chap. 294.

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service, it is held that he is not required to give bond for disbursing the funds of the institution, his authority as disbursing officer being derived from the 27th sec. of the act of July 5, 1838 (¶ 385).—Second Comptroller, § 1039.

[16] Professors of the Military Academy are "commissioned officers of the army."—Secretary of War, May 27, 1857. But they are not commissioned officers within the meaning of the 64th Article of War (¶ 632), and therefore cannot be detailed as mem-

170. Nothing in this act shall be construed to prevent the assignment to duty as additional second lieutenants of the graduates of the Military Academy.[17]—Sec. 19, *ibid.*

171. That the secretaries of war and the navy be and they are hereby authorized and directed so to arrange the course of studies and the order of recitations at the military and naval academies that the students in said institutions will not be required to pursue their studies on Sunday.—Sec. 21, *ibid.*

THE ACADEMY BAND.

172. Fifteen bands, including the band at the Military Academy, may be retained or enlisted in the army, with such organization as is now provided by law, to be assigned to brigades in time of war, and in time of peace to assembled brigades, or to forts or posts at which the largest number of troops shall be ordinarily stationed; and the band at the Military Academy shall be placed on the same footing as other bands.[18]—Sec. 7, July 28, 1866, chap. 299.

173. Of the fifteen bands now in the service, organized under the provisions of sec. 7 of an act entitled "An act to increase and fix the military peace establishment of the United States," approved July 28, 1866, all except the band at the Military Academy[18] shall be honorably discharged without delay, and shall receive full pay and allowance to the date of such discharge.—Sec. 5, March 3, 1869, chap. 124.

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bers of courts-martial. "The President may, by his regulations of the civil police of the Academy, invest them with authority adequate to all the purposes of their professorships; but he can invest them with no portion of judicial power to affect the life or liberty of others."—1 Opinions, 469. See also last clause of ¶ 141.

[17] There is nothing in that act susceptible of such construction, unless it be by implication from sec. 16 (¶ 551).

[18] The "other bands" were those authorized by the act of July 29, 1861, providing "that the bands of the regular regiments shall consist of not more than twenty-four musicians for each regiment of infantry and artillery, and sixteen musicians for each regiment of mounted troops" (sec. 2); and (sec. 4) that "the regimental bands will be paid as follows: one-fourth of each, the pay and allowances of sergeants of engineer soldiers; one-fourth, those of corporals of engineer soldiers; and one-half, those of engineer soldiers of the first class; the drum-major, or leader of the band, the pay and emoluments of a second lieutenant of infantry." Bands for mounted troops, being discontinued by sec. 11, act of July 17, 1862, chap. 201, the act of 1866 must be construed as referring to the infantry bands.

THE BAND LEADER.—The act of June 20, 1864, intended to give a temporary increase of pay to the enlisted men, reduced the pay of the leader of a regimental band to seventy-five dollars per month. That act was continued in force from time to time, but expired June 30, 1871. It would seem as though the leader, since that date, should receive the pay provided in sec. 4, July 29, 1861, chap. 24; but, under circular No. 78, paymaster-general's office, 1871, the rate of seventy-five dollars is continued.

THE TEACHER OF MUSIC to receive seventy-five dollars per month, by order of the secretary of war, December 8, 1868.

CHAPTER V.

ARMY REGULATIONS.

181. It shall be the duty of the secretary of the war department, and he is hereby authorized, to prepare general regulations,[1] better defining and prescribing the respective duties and powers of the several officers in the adjutant-general, inspector-general, quarter-master-general, and commissary of ordnance, departments, of the topographical engineers, of the aides of generals, and generally of the general and regimental staff;[2] which regulations, when approved by the President of the United States, shall be respected and obeyed; until altered or revoked by the same authority. And the said general regulations, thus prepared and approved, shall be laid before Congress at their next session.—Sec. 5, March 3, 1813, chap. 52.

182. That the regulations in force before the reduction of the army[3] be recognized, as far as the same shall be found applicable to the service; subject, however, to such alterations as the secretary of war may adopt,[3a] with the approbation of the President.—Sec. 9, April 24, 1816, chap. 69.

183. That the secretary of war be and he is hereby directed to have prepared, and to report to Congress at its next session, a code of regulations for the government of the army, and of the militia in

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[1] "A Regulation" of an executive department is a rule made by the head of such department for its action, under a statute conferring such power, and has the force of law; a mere order of the President, or of the secretary of the department, is not a regulation.—*Harvey* v. *United States*, 3 Nott & Huntington, 42.

[2] The secretary of war to prescribe general regulations for the purchase and transportation of supplies, see ¶ 4; and for manner of issuing and accounting for clothing see ¶ 239.

[3] The regulations referred to are those of May 1, 1813. By act of March 2, 1821, Congress "approved and adopted" a system of regulations prepared by General Scott; but by act of May 7, in following year, that action was reconsidered, and the authority to make and amend regulations was thus recommitted to the secretary of war, under direction of the President.

(*a.*) The executive departments must necessarily do many things essential to the proper action of the government, for which there is no statutory provision; and it is necessary that they should construe such laws as they are required to execute; their construction of a statute, when not affecting private rights, is held to be binding on the courts. See *United States* v. *MacDaniel*, 7 Peters, 2; *United States* v. *Lytle*, 5 McLean, 9.

(*b.*) "The power of the executive to establish rules and regulations for the government of the army is undoubted. The power to establish implies necessarily the power to modify or repeal, or to create anew. The secretary of war is the regular constitu-

actual service, which shall embrace all necessary orders and forms of a general character for the performance of all duties incumbent on officers and men in the military service, including rules for the government of courts-martial. The existing regulations to remain in force until Congress shall have acted on said report.—Sec. 37, July 28, 1866, chap. 299.

184. The secretary of war shall prepare a system of general regulations for the administration of the affairs of the army, which, when approved by Congress, shall be in force and obeyed until altered or revoked by the same authority, and said regulations shall be reported to Congress at its next session. *Provided*, That said regulations shall not be inconsistent with the laws of the United States.—Sec. 20, July 15, 1870, chap. 294.

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tional organ of the President for the administration of the military establishment of the nation; and rules and orders publicly promulgated through him must be received as the act of the executive, and as such be binding upon all within the sphere of his legal and constitutional authority. Such regulations cannot be questioned or defied, because they may be thought unwise or mistaken."—*United States* v. *Eliason*, 16 Peters, 291.

(*c.*) "The army regulations when sanctioned by the President have the force of law."—*United States* v. *Freeman*, 3 How, 566; and reaffirmed in *Gratiot* v. *United States*, 4 How, 80.

(*d.*) The responsibilities and authority of military officers are regulated by law, and are for the courts to determine.—*United States* v. *Willard*, 1 Penn, 539. See also chap. 1, note 11 *a*.

(*e.*) "The war department, representing the President in the administration of the army, has permanent authority from Congress to make regulations in aid and complement of statutes."—Attorney-general, January 1, 1857.

(*f.*) "I have no doubt that the secretary of war may, with the approbation of the President, alter, at pleasure, the existing regulations for the government of the Military Academy, or any other portion of the army, even although such alteration should go to an entire change of the present system; provided, that the regulations, as proposed to be altered, be consistent with the Constitution and laws of the United States."—Attorney-general, May 19, 1821. But see last clause of ¶ 183.

CHAPTER VI.

GENERAL OFFICERS, AIDES-DE-CAMP, AND MILITARY SECRETARIES.

191. THERE shall be one general, one lieutenant-general, five major-generals, and ten brigadier-generals,[1] who shall have the same pay and emoluments and be entitled to the same staff officers in number and grade as now provided by law.—Sec. 9, July 28, 1866, chap. 299.

192. The offices of general and lieutenant-general of the army shall continue until a vacancy shall occur in the same, and no longer; and when such vacancy shall occur in either of said offices, immediately thereupon all laws and parts of laws creating said office shall become inoperative, and shall by virtue of this act from thenceforward be held to be repealed.—Sec. 6, July 15, 1870, chap. 294.

193. No appointment to the grade of major-general shall be made until the number of officers of that grade is reduced below three, after which the number of major-generals shall not exceed three.—Sec. 7, *ibid.*

194. No appointment to the grade of brigadier-general shall be made until the number of officers of that grade is reduced below six, after which the number of brigadier-generals shall not exceed six.—Sec. 8, *ibid.*

THE GENERAL AND STAFF.

195. That the grade of "general[2] of the army of the United States" be and the same is hereby revived; and that the President is hereby authorized, whenever he shall deem it expedient, to appoint, by and with the advice and consent of the Senate, a general of the army of the United States, to be selected from among those officers

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[1] For reduction in these grades see next three paragraphs.

[2] First established by act of March 3, 1799 (chap. 48), providing "that a commander of the army of the United States shall be appointed and commissioned by the style of 'general of the armies of the United States;' and the present office and title of lieutenant-general shall thereafter be abolished," no appointment was made under that act, and the grade was discontinued by act of March 16, 1802, which authorized but one general officer (a brigadier-general) for the army.

in the military service of the United States most distinguished for courage, skill, and ability, who, being commissioned as general, may be authorized, under the direction and during the pleasure of the President, to command the armies of the United States —Sec. 1, July 25, 1866, chap. 232.

196. The said general may select from the regular army for service upon his staff[3] such number of aides, not exceeding six, as he may judge proper, who, during the term of such staff service, shall each have the rank, pay, and emoluments of a colonel of cavalry.—Sec. 2, July 25, 1866, chap. 232.

THE LIEUTENANT-GENERAL AND STAFF.

197. That the grade of lieutenant-general be and the same is hereby revived[4] in the army of the United States; and the President is hereby authorized, whenever he shall deem it expedient, to appoint, by and with the advice and consent of the Senate, a lieutenant-general, to be selected from among those officers in the military service of the United States, not below the grade of major-general, most distinguished for courage, skill, and ability, who, being commissioned as lieutenant-general, may be authorized, under the direction and during the pleasure of the President, to command the armies of the United States.—Sec. 1, February 29, 1864, chap. 14.

198. And it is hereby provided that, in lieu of the staff now allowed by law[5] to the lieutenant-general, he shall be entitled to

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[3] CHIEFS OF STAFF.—By an act of March 3, 1865, a chief of staff with the rank of brigadier-general was provided for the lieutenant-general commanding the army. By a clause of sec. 2, of the act of July 25, 1866, that officer was transferred to the staff of the general, and the office was abolished by act of April 3, 1869.

Sec. 2, act of March 3, 1813 (chap. 52), enacted "that the President of the United States be and is hereby authorized, if he shall deem it expedient, to assign one of the brigadiers-general to the principal army of the United States, who shall, in such case, act as adjutant- and inspector-general, and as chief of the staff of such army." This enactment has never been repealed in express terms, but it has been regarded as obsolete by Brightly, Cross, and Callan. It probably was in effect repealed by so much of the act of 1821 as discontinued the joint office of "adjutant- and inspector-general."

It is believed that no legislative sanction is required to authorize the assignment of any officer to duty as a chief of staff; and in the Army Regulations of 1825 it was provided that there should be "attached as *chief of the staff*, to a brigade, a major; to a division, a colonel; to an army corps, a brigadier-general; and if the particular army consists of two or more army corps, a major-general will be attached to it as chief of the staff." Subsequent additions of the Army Regulations provide simply that a "suitable staff" be attached to brigades, divisions, etc.

[4] The grade first recognized in the act to raise a "provisional army," May 28, 1798; abolished in 1802 (see note 2); and revived, so as to be conferred by brevet only, by resolutions of February 15, 1855. See also 7 Opinions, 399–439.

[5] The law of February 29, 1864, had authorized a personal staff of four aides-de-camp and two military secretaries, with rank, etc., of lieutenant-colonel.

It is remarkable that while the law limits the selection of aides-de-camp for all

two aides and one military secretary, each to have the rank, pay, and emoluments of a lieutenant-colonel of cavalry during the term of such staff service.—Sec. 2, July 25, 1866, chap. 232.

STAFF OF MAJOR- AND BRIGADIER-GENERALS.

199. The aides-de-camp of the major-general commanding the army in time of war may be taken from the line, without regard to rank; and the aides-de-camp allowed to other major-generals and brigadier-generals may be taken from the grade of captain or subaltern;[6] and the commanding or highest general in rank may, while in the field, appoint a military secretary from the subalterns of the army, who shall have the pay and emoluments of a major of cavalry for the time being.—Sec. 8, June 18, 1846, chap. 29.

200. The senior aide-de-camp of the major-general commanding the army may be taken from the captains or majors of the army, and shall be allowed the pay and emoluments of a major of calvary.[6c]—Sec. 2, September 26, 1850, chap. 50.

201. The general commanding the army[6d] of the United States shall be allowed a secretary, to be taken from the line of the army, who shall receive twenty-four dollars per month, in addition to his pay in the line, and shall be allowed forage for two horses.—Sec. 5, May 16, 1812, chap. 86.

202. There shall be added to the army of the United States the following general officers, namely:[6f] four major-generals, with three aides-de-camp each, to be taken from captains or lieutenants of the army, and six brigadier-generals, with two aides-de-camp each, to be taken from the lieutenants of the army.—Sec. 3, July 29, 1861, chap. 24.

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other general officers of the army, to details from the army, it is silent as to the class from which selections for the personal staff of the lieutenant-general are to be made.

[6] AIDES-DE-CAMP TO MAJOR- AND BRIGADIER-GENERALS.—Subalterns only can be detailed as aides to the brigadier-generals: see ¶ 202.

(*a.*) There is no law interdicting the employment and payment of aides of a brevet general officer when he is assigned to duty as such.—Second Comptroller, § 1786. And it is the practice to allow an officer commanding under the brevet of major-general to select his aides-de-camp from the grade of captain. See Chap. xi., note 6.

(*b.*) The act of March 2, 1821, having abolished the office of assistant adjutant-general, enacted that "aides-de-camp, in addition to their other duties, shall perform the duties of assistant adjutant-general."

(*c.*) And for rank and pay of the aides-de-camp of army corps commanders, see Chap. xviii., ¶ 523.

(*d.*) "The general commanding the army" was, at the passing of this act, a major-general. An appointment was made under this section as late as 1863.

(*e.*) For the staff of general officers of the MILITIA, see Chap. xxv., ¶ ¶ 783, 784.

(*f.*) The number of general officers determined in ¶ ¶ 191–194. This section determines only the number and rank of the aides-de-camp allowed to these grades. See also clause *a*.

CHAPTER VII.

ADJUTANT-GENERAL'S AND INSPECTOR-GENERAL'S DEPARTMENTS, BUREAU OF MILITARY JUSTICE, AND SIGNAL SERVICE.

ADJUTANT-GENERAL'S DEPARTMENT.

206. THE adjutant-general's department[1] of the army shall hereafter consist of the officers now authorized by law, viz.: one adjutant-general, with the rank, pay, and emoluments of a brigadier-general;[1a] two assistant adjutant-generals, with the rank, pay, and emoluments of colonels of cavalry; four assistant adjutant-generals, with the rank, pay, and emoluments of lieutenant-colonels of cavalry;[1b] and thirteen assistant adjutant-generals, with the rank, pay, and emoluments of majors of cavalry.—Sec. 10, July 28, 1866, chap. 299.

207. They [the assistant adjutant-generals] shall be taken from the line of the army, and in addition to their own, shall perform the duties of assistant inspector-generals when the circumstances of the service may require.[2]—Sec. 7, July 5, 1838, chap. 162.

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[1] The adjutant-general's department, eo nomine, was first established under the act of March 3, 1813, chap. 52, to consist of one "adjutant- and inspector-general," a brigadier-general; eight assistant adjutant-generals, with rank as colonels; and sixteen with rank as majors. The department was not provided for in the act (reducing the army) of March 3, 1815, but some of the officers were "provisionally retained" by executive orders of May 17, 1815; and by act of April 24, 1816, the department was re-established—to consist of an adjutant- and inspector-general, a brigadier-general; an assistant adjutant-general, with rank of colonel, to each division; (two) and an assistant, with rank of major, to each brigade (four). The offices of adjutant-general and inspector-general were separated in the reorganization of 1821, by which the office of assistant adjutant-general was abolished.

(*a.*) The adjutant-general to be appointed by selection from the department: Chap. xix., ¶ 536.

(*b.*) Assistant adjutant-generals assigned to army corps to have rank of lieutenant-colonel: Chap. xviii., ¶ 523.

(*c.*) ENLISTED CLERKS.—Under the acts of July 27, 1861, and January 27 and July 5, 1862, the adjutant-general is authorized to employ, in addition to his force of civilian clerks, thirty non-commissioned officers, to be selected by him from the army. Other enlisted men are detailed, from time to time, from the army, to serve as clerks and messengers in the office of the adjutant-general, and at the headquarters of military (geographical) divisions and departments. See G. O. No. 92, A.-G. O., 1868, and No. 30, *ibid.*, 1869.

[2] And aides-de-camp to perform the duties of assistant adjutant-generals. See Chap. vi., note 6 *b*.

208. All vacancies occurring in the grade of major shall be filled by selection from among the captains of the army.[3]—Sec. 22, July 17, 1862, chap. 200.

INSPECTOR-GENERAL'S DEPARTMENT.

209. There shall be four inspector-generals of the army,[4] with the rank, pay, and emoluments of colonels of cavalry;[4b] three assistant inspector-generals, with the rank, pay, and emoluments of lieutenant-colonels of cavalry;[4c] and two assistant inspector-generals, with the rank, pay, and emoluments of majors of cavalry.[4a]—Sec. 11, July 28, 1866, chap. 299.

BUREAU OF MILITARY JUSTICE.

210. There shall be attached to, and made a part of, the war

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[3] APPOINTMENTS.—While the lowest grade in the department was that of captain, vacancies therein were filled from the grades of subalterns; but, as the context of this section advanced the lowest grade to that of major, it was deemed proper to make a corresponding advance in the grade from which selections, for the department, were to be made. Upon well-established rules of construction (see 3 Howard, 197, 636; 4 *ibid.*, 37; 16 Peters, 342; 11 Wheaton, 385-6; and 11 Wallace, 92), this section should be construed, in connection with the acts of 1816 (¶ 532), and 1838 (¶ 207), to mean that vacancies in the grade of major "shall be filled by selection from among the *captains of the line of the army.*"

[4] The inspector-general's department was first established under the act of March 3, 1813, with an organization of eight inspector-generals (colonels) and sixteen assistant inspector-generals (majors). These offices were abolished in the army reduction of 1815, brigade inspectors being substituted; but were again established by the act of April 24, 1816. The office of assistant inspector-general was abolished in 1821, but the existence of an inspector-general's department has been continuous since 1816, and is recognized by the act of March 3, 1869 (Chap. xix., ¶ 538), and by the act of June 8, 1872. See clause *b* of this note.

(*a.*) APPOINTMENTS.—By sec. 2, August 3, 1861, the President was authorized to appoint, "in addition to the number authorized by existing laws and in accordance with existing regulations, five assistant inspector-generals, with the rank and pay of majors of cavalry."

There were, however, no assistant inspector-generals "authorized by existing laws," the office not being recognized in the reorganization of 1821. Sec. 4, act of March 3, 1813, provided that the assistant inspector-generals should be taken from the line, and that the inspector-generals should be taken from the line, or not, as the President may deem expedient. But see Chap. xix., ¶ ¶ 532, 540.

(*b.*) PROMOTIONS.—It having been held in 1864 that the laws regulating promotion in the staff corps or departments (¶ ¶ 539, 540) were not applicable to the inspectors and assistant inspector-generals, a vacancy occurring during that year in the grade of inspector-general was filled by selection, or "appointment." An appeal to Congress from the officer entitled by the law of seniority to this vacancy elicited the following act, approved June 8, 1872 (chap. 351): "That the President be and hereby is authorized to nominate, and, by and with the advice and consent of the Senate, to appoint, Nelson H. Davis, of the inspector-general's department, to the rank and place therein to which he is entitled, and which he would have held had the law of promotions by seniority under the act of March 3, 1851, and the Army Regulations of 1863, been carried out. *Provided,* That no officer in said department shall, by this act, be reduced from his present grade, nor shall any pay or allowance be made to any officer under it, except from the date of his confirmation. *And provided further,* That no promotion to the grade of inspector-general shall hereafter be made until the number of inspector-generals is reduced to four."

(*c.*) An assistant inspector-general to each army corps, to have rank of lieutenant-colonel. See Chap. xviii., ¶ 523.

department, during the continuance of the present rebellion,[5] a bureau, to be known as the bureau of military justice, to which shall be returned for revision the records and proceedings of all the courts-martial, courts of inquiry, and military commissions of the armies of the United States, and in which a record shall be kept of all proceedings had thereupon.—Sec. 5, June 20, 1864, chap. 145.

211. The bureau of military justice shall hereafter consist of one judge-advocate-general, with the rank, pay, and emoluments of a brigadier-general, and one assistant judge-advocate-general, with the rank, pay, and emoluments of a colonel of cavalry; and the said judge-advocate-general shall receive, revise, and have recorded the proceedings of all courts-martial, courts of inquiry, and military commissions, and shall perform such other duties as have been heretofore performed by the judge-advocate-general of the army. And of the judge-advocates now in office[6] there may be retained a number not exceeding ten, to be selected by the secretary of war, who shall perform their duties under the direction of the judge-advocate-general[7] until otherwise provided by law, or until the secretary of war shall decide that their services can be dispensed with.[8]—Sec. 12, July 28, 1866, chap. 299.

212. The last clause of sec. 12, of chap. 299, of the laws of the first session of the thirty-ninth Congress, approved July 28, 1866, is hereby amended by repealing all after and including the words "until otherwise provided by law," so as to place the judge-advocates thereby authorized to be retained in service upon the same footing in respect to tenure of office and otherwise as other officers of the army of the United States.—February 25, 1867, chap. 79.

213. That the number of judge-advocates of the army be and

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[5] Continued in reorganization. See following paragraphs.

[6] The judge-advocates "now in office" were those who, under the provision of sec. 6, July 17, 1862, were "appointed by the President, by and with the advice and consent of the Senate, for each army in the field, with the rank, pay, and emoluments each of a major of cavalry."

[7] DUTIES OF THE BUREAU.—"All communications pertaining to questions of military justice, or the proceedings of military courts and commissions, throughout the armies of the United States, must be addressed to the judge-advocate-general; and commanding officers are enjoined to forward promptly to the bureau of military justice all proceedings of courts-martial, military commissions, and courts of inquiry, together with the orders promulgating decision thereon. Judge-advocates will be held responsible for the prompt execution of this paragraph, and they are required to forward to the judge-advocate-general, at the end of each month, a list of all cases tried and to be tried within their jurisdiction."—G. O. No. 270, A.-G. O., 1864.

A judge-advocate, on duty at division or department headquarters, is liable to detail, by the commanding officer, as judge-advocate of a general court-martial; "that is his appropriate function, and the very object of his office." (Decision of general-in-chief, concurred in by secretary of war.)—Adjutant-general, August 11, 1870.

[8] See succeeding paragraphs for present status of judge-advocates.

the same is hereby fixed at eight, and the President is hereby authorized, by and with the advice and consent of the Senate, to fill all vacancies which have occurred or may hereafter occur therein.—April 10, 1869, chap. 20.

SIGNAL SERVICE.

214. There shall be one chief signal officer of the army, who shall have the rank, pay, and emoluments of a colonel of cavalry; and the secretary of war shall have power to detail six officers[9] and not to exceed one hundred non-commissioned officers and privates, from the battalion of engineers, for the performance of signal duty; but no officer or enlisted man shall be so detailed until he shall have been examined and approved by a military board, to be convened by the secretary of war for that purpose; and enlisted men, while so detailed, shall, when deemed necessary, be mounted upon horses provided by the government.—Sec. 22, July 28, 1866, chap. 299.

215. That the secretary of war be and he hereby is authorized and required to provide for taking meteorological observations at the military stations in the interior of the continent, and at other points in the States and Territories of the United States, and for giving notice on the northern lakes and on the seacoast, by magnetic telegraph and marine signals, of the approach and force of storms.[10] —Joint Resolution, February 9, 1870.

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[9] Officers assigned to signal duty by the war department are entitled to the pay of mounted officers of like grades. See ¶ 323, and Paymaster's Manual (1871), ¶ 205.

"The recommendation of the chief signal officer of the army, 'that no instructed acting signal officer or qualified signal men may be relieved from duty as such until the chief signal officer is advised of the intention, in order that, if necessary, a proper successor may be nominated; and that the careful observance of ¶ 17, Appendix B, revised Army Regulations, requiring that they shall be relieved only by orders from the adjutant-general of the army, is secured,' has been approved by the secretary of war."—Adjutant-general to the chief signal officer of the army, May 12, 1870.

[10] The chief signal officer of the army is charged, subject to the direction of the secretary of war, with the special duties of the observation and giving notice, by telegraph and signal, of the approach and force of storms, under the provisions of this resolution.—G. O. No. 29, A.-G. O., 1870.

(*a.*) For rates of signal service messages see ¶ ¶ 973, 976, and their notes.

(*b.*) SIGNAL SERVICE DETACHMENT.—Under this authority (¶ 215) the secretary of war has directed special enlistments for signal service. Such enlistments are made only at the signal office in Washington, but persons desiring to enter this service can obtain all necessary information as to the requisite qualifications, etc., by written application to the signal officer of the army.

Observer-sergeants are appointed from the detachment. In addition to their pay proper and clothing allowance, they are entitled to extra-duty pay at the rate of thirty-five cents per day; and, when not serving with other troops, they receive commutation of subsistence at the rate of seventy-five cents per day; commutation of quarters at the rate of ten dollars per month; and of fuel at eight dollars for like period.

Privates of the detachment, serving as assistants to the observer-sergeants, receive like rates of commutation, but no extra-duty pay.

216. That the secretary of war be and he hereby is authorized and required to provide, in the system of observations and reports in charge of the chief signal officer of the army, for such stations, reports, and signals as may be found necessary for the benefit of agriculture and commercial interests.[11]—Sec. 1, June 10, 1872, chap. 415.

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[11] The chief signal officer of the army is hereby directed and ordered to carry into effect the special duties imposed upon the secretary of war by the act of Congress approved July 24, 1866, entitled "An act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military, and other purposes" [¶ ¶]; and by the public resolution No. 9, approved February 9, 1870, and entitled "Joint resolution to authorize the secretary of war to provide for taking meteorological observations at the military stations and other points in the interior of the continent, and for giving notice on the northern lakes and seaboard of the approach and force of storms" [¶ 215]; and by the act approved June 10, 1872, entitled "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1873, and for other purposes" [¶ ¶ 216, 976]. And the said chief signal officer of the army, and all such persons as have been or shall be designated and employed by him for the taking of meteorological observations, or for preparing or presenting telegraphic communications for transmission, or for transmitting the same, are hereby recognized and appointed as agents of the war department, for those purposes, and are hereby authorized and directed by and in behalf of said department to offer to any telegraph company in the United States for transmission any and all such telegraphic communications as they may be required by the chief signal officer to make, and to request the transmission thereof by such company or companies, at such times and in such places as may be directed by said officer."—G. O. No. 72, A.-G. O., 1872.

CHAPTER VIII.

THE QUARTERMASTER'S DEPARTMENT.

ORGANIZATION.

220. THE quartermaster's department of the army[1] shall hereafter consist of one quartermaster-general,[2] with the rank, pay, and emoluments of a brigadier-general; six assistant quartermaster-generals, with the rank, pay, and emoluments of colonels of cavalry; ten deputy quartermaster-generals, with the rank, pay, and emoluments of lieutenant-colonels of cavalry; fifteen quartermasters, with the rank, pay, and emoluments of majors of cavalry; and forty-four assistant quartermasters, with the rank, pay, and emoluments of captains of cavalry; and the vacancies hereby created in the grade of assistant quartermaster shall be filled by selection from among the persons who have rendered meritorious services, as assistant quartermasters of volunteers during two years of the war; but after the first appointments made under the provisions of this section, as vacancies may occur in the grades of major and captain in this department, no appointment to fill the same shall be made until the number of majors shall be reduced to twelve, and the number of captains to thirty, and thereafter the number of officers in each of said grades shall continue to conform to said reduced numbers.[2a]—Sec. 13, July 28, 1866, chap. 299.

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[1] THE QUARTERMASTER'S DEPARTMENT, eo nomine, was first organized under the act of March 28, 1812 (which, in abolishing the office of "purveyor of public supplies," divided its duties between the quartermaster's and the purchasing departments); and was declared to be in the "*General Staff*" by the acts of March 3, 1813 (chap. 52), and of April 24, 1816, chap. 69; and that status has been recognized in the act of March 2, 1821, and subsequent organic legislation.

[2] The quartermaster-general to be selected from the department (¶ 536), and temporary vacancy in his office provided for: ¶ ¶ 9–12.

(*a.*) APPOINTMENTS AND PROMOTIONS.—A further suspension of appointments and promotions obtains under the act cited in ¶ 538; but the act of June 3, 1872 (chap. 279), enacted: "That the President be and hereby is authorized to nominate, and by and with the advice and consent of the Senate to appoint, certain officers of the quartermaster's department to the grade they would have held in said department, respectively, had the vacancies created therein by the act of July 28, 1866, from the rank of major to the rank of colonel, both inclusive, been filled by promotion by seniority. *Provided*, That no officer shall be deprived of his relative rank or reduced from his present grade by this act, and that the officers whose appointments are herein authorized shall take rank and receive pay only from the date of their confirmation."

221. The number of military storekeepers in the quartermaster's department shall hereafter be as many as shall be required, not exceeding sixteen, who shall have the rank, pay, and emoluments of captains of infantry.[3]—Sec. 14, *ibid.*

222. All appointments in the quartermaster's department shall be made from the army.[4]—Sec. 9, July 5, 1838, chap. 162.

223. That the quartermaster-general be and he is hereby authorized, from time to time, to employ as many forage-masters and wagon-masters as he may deem necessary for the service, not exceeding twenty in the whole, who shall be entitled to receive each forty dollars per month, and three rations per day, and forage for one horse;[5] and that neither of whom shall be interested or concerned, directly or indirectly, in any wagon or other means of transport employed by the United States, nor in the purchase or sale of any property procured for or belonging to the United States, except as an agent for the United States.—Sec. 10, July 5, 1838, chap. 162.

224. Whenever any army captain of the quartermaster's department shall have served fourteen years' continuous service[6] he shall be promoted to the rank of major; and there shall be added to the quartermaster's department as many master-wagoners, with the rank, pay, and allowances of sergeants of cavalry, and as many wagoners, with the pay and allowances of corporals of cavalry, as the military service, in the judgment of the President, may render necessary.—Sec. 3, August 3, 1861, chap. 42.

GENERAL PROVISIONS.

225. In addition to their duties in the field, it shall be the duty of the quartermaster-general, his deputies, and assistant deputies,[7]

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[3] They have now the rank, etc., of captains of cavalry: Chap. xviii., ¶ 519.

[4] A subsequent clause in this section, requiring that assistant quartermasters should be separated from the line of the army, by relinquishing their rank therein, was repealed by the supplementary act of July 7, 1838.

(*a*) *Acting assistant quartermasters* are appointed, in cases of necessity, by commanding officers. Their appointment or removal to be reported to the quartermaster-general.—G. O. No. 40, A.-G. O., 1866.

[5] FORAGE- AND WAGON-MASTERS.—The act of March 3, 1817, refers to barrack-, forage-, and wagon-masters, as being "warrant officers of the staff of the regular army"; but under the act of 1857, which increased the commutation price of "officers' subsistence," the second comptroller held that "forage- and wagon-masters are entitled to the same commutation price of rations as commissioned officers": see digest of his decisions, § 1836. For status of MASTER-WAGONERS and WAGONERS see ¶ 224.

[6] This continuous service must have been as a captain in the quartermaster's department.—10 Opinions, 166. But promotions suspended under last clause of ¶ 220, and in ¶ 538.

[7] DUTIES OF THE QUARTERMASTER'S DEPARTMENT.—This section (¶ 225) transferred to the quartermaster's department the duties theretofore discharged by the "military agents," who (authorized under the act of March 16, 1802) were, under sec. 18 of the

when thereto directed by the secretary of war, to purchase military stores, camp equipage, and other articles requisite for the troops, and generally to procure and provide means of transport for the army, its stores, artillery, and camp equipage.[8] That the quartermaster-general shall account as often as may be required, and at least once in three months, with the department of war, in such manner as shall be prescribed, for all property which may pass through his hands, or the hands of the subordinate officers in his department, or that may be in his or their care or possession, and for all moneys which he or they may expend in discharging their respective duties;[9] that he shall be responsible for the regularity and correctness of all returns in his department, and that he, his deputies and assistant deputies, before they enter on the execution of their respective offices shall severally take an oath faithfully to perform the duties thereof.—Sec. 3, March 28, 1812, chap. 46.

226. It shall be the duty of the commissary-general of purchases,[10] under the direction and supervision of the secretary of war,

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act of 1812, to be discharged when "the deputy and assistant deputy quartermasters shall be appointed and ready to enter on the execution of their respective offices." Other specific duties have devolved upon the department, under the laws in ¶ ¶ 226, 230, 261, 612, and pursuant to regulations made by the secretary of war under the act of 1813 (Chap. ii., ¶ 4), till it now stands charged with the superintendence of the national cemeteries, and the performance of all duties connected with the supply and movements of the army, not expressly assigned to the other departments. For detailed description of the duties thus imposed see the annual appropriations for support of the army; and see also notes 10 and 14 of this chapter.

(*a*) Referring to the statutes cited in ¶ ¶ 226, 229, 230, the court of claims remarks: "Thus it is seen that the only military purchasing agents contemplated by the statutes are specifically named by Congress, and are, moreover, selected by the President, confirmed by the Senate, and before entering into their office take an official oath, and give security for the faithful performance of their duties. It also appears that not only are *all* of the articles requisite for the military service of the United States to be purchased by these officers, but that the statutes also contemplate '*cases of necessity*,' and provide that then the purchases shall be made by the same officers, under the direction of the commanding general, not requiring the sanction of the secretary of war." —*Reeside* v. *United States*, 2 Nott and Huntington, 31. The claim of Reeside being exclusively for quartermaster's supplies, no reference was made by the court to such laws and regulations as constituted purchasing agencies in the engineer, medical, ordnance, and subsistence departments. See note 14, and also Chap. ix., ¶ 261.

[8] TRANSPORTATION.—All military transportation under the immediate control and supervision of the secretary of war: Chap. ii., ¶ 5.

For regulations governing the transportation of troops and military supplies, and for list of LAND GRANT RAILROADS, see G. O. No. 98, A.-G. O., 1872.

[9] But see last clause of ¶ 229. And for duty of the quartermaster-general in reference to claims, under the act of July 4, 1864, and amendatory laws, see Chap. iii., note 83.

[10] THE COMMISSARY-GENERAL OF PURCHASES, by sec. 9 of this act, superseded the PURVEYOR OF PUBLIC SUPPLIES—an officer who, acting first under the sole direction of the secretary of the treasury (§ 5, May 5, 1792, and § 1, February 23, 1795), and then subject to control of the secretary of war (§ 4, July 16, 1798), was "to conduct the procuring and providing of all arms, military stores, provisions, clothing, Indian goods, and generally all articles of supply requisite to the service of the United States." The Army Regulations of May 1, 1813, under authority of the act of March

to conduct the procuring and providing of all arms, military stores, clothing, and generally all articles of supply requisite for the military service of the United States; and it shall be the duty of the deputy commissaries, when directed thereto, either by the secretary of war, the commissary-general of purchases, or, in cases of necessity, by the commanding general, quartermaster-general, or deputy quartermasters, to purchase all such of the aforesaid articles as may be requisite for the military service of the United States.—Sec. 5, *ibid.*

227. Neither the quartermaster-general, the commissary-general, nor any or either of their deputies or assistant deputies, shall be concerned, directly or indirectly, in the purchase or sale, for commercial purposes, of any article intended for, making a part of, or appertaining to, their respective departments, except for, and on account of, the United States; nor shall they, or either of them, take or apply to his or their own use any gain or emolument for negotiating or transacting any business in their respective departments other than what is or may be allowed by law.[11]—Sec. 1, May 22, 1812, chap. 92.

228. In addition to the allowance made to the quartermaster-general and commissary-general respectively, in and by the act hereby amended, it shall and may be lawful for the secretary for the department of war, for the time being, to allow to them respectively, such sums as in his opinion shall have been actually and necessarily expended in their several departments for office rent, fuel, candles, and extra clerk hire.[12]—Sec. 3, *ibid.*

229. The quartermaster-general, the deputy quartermaster, and the assistant deputy quartermasters, shall, before they or either of them enter upon the duties of their appointment respectively, enter

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3, same year (Chap. ii., ¶ 4), defined the respective duties of the quartermaster's and the purchasing departments, in reference to purchases, so as to commit to the former the purchase of forage, fuel, soldiers' bedding, stationery, dragoon and artillery horses, means of transportation, and material for the construction and repair of barracks, hospitals, and bridges. For a further distribution of duties pertaining to the supply of the army see ¶ 230 and note 14.

[11] See further prohibitory legislation on this subject, applicable to all officers: Chap. iii., ¶ ¶ 129, 132, and Chap. xxiii., ¶ 744.

[12] The authority claimed under this "or by any other act, for the employment of non-commissioned officers, or the appointment of extra clerks in any of the offices of the war department, [shall] be and the same are hereby repealed. *Provided however*, that where express appropriations are made by law, for the employment of clerks, such employment shall not be deemed to be extra within the meaning of the above act."—Sec. 1, May 9, 1836; and see Chap. ii., note 17. But the employment of enlisted men as clerks in the adjutant-general's office is now authorized by law: see Chap. vii., note 1 *a*. And for employment of hospital stewards in the surgeon-general's offices see Chap. x., ¶ 295, and note 24, this chapter. The number of clerks, messengers, etc., allowed in the office of the quartermaster-general will be found in Chap. ii., note 18.

into bond with sufficient security, to be approved of by the secretary at war, conditioned for the faithful expenditure of all public moneys, and accounting for all public property, which may come to their hands respectively;[13] and the quartermaster-general shall not be liable for any money or property that may come into the hands of the subordinate officers of his department.—Sec. 4, *ibid.*

230. The office of commissary-general of purchases, sometimes called commissary of purchases, shall be and the same is hereby abolished, and the duties thereof[14] shall hereafter be performed by the officers of the quartermaster's department, with such of the officers and clerks now attached to the purchasing department as shall be authorized by the secretary of war, and under such regulations as shall be prescribed by the said secretary, under the sanction of the President of the United States.—Sec. 3, August 23, 1842, chap. 186.

231. The quartermaster's department shall in all cases, in obtaining supplies for the military service, state in advertisements for bids for contracts that a preference shall be given to articles of domestic production and manufacture, conditions of price and quality being equal, and that such preference shall be given to articles of American production and manufacture, produced on the Pacific coast, to the extent of the consumption required by the public ser-

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[13] For further legislation in reference to BONDS OF DISBURSING OFFICERS see Chap. iii., ¶ ¶ 36, 37.

[14] The duties originally assigned by law to the "purchasing department" are defined in general terms in ¶ 226. But under the Army Regulations of 1813 we find (p. 220) that "the commissary-general of this department, and his deputies, will purchase, upon the orders and estimates of the war department, all ordnance, ordnance stores, laboratory utensils, artificers' tools, artillery carriages, ammunition wagons, timber, and other material for making and repairing these; artillery harness, ammunition, small arms, accoutrements, and equipments; clothing, dragoon saddles and bridles; tents, tent poles, camp kettles, mess pans, bed sacks, medicines, surgical instruments, hospital stores, and all other articles required for the public service of the army of the United States, excepting only such as are directed to be purchased [see note 10] by the quartermaster-general's department." But the exigencies of the service soon demanded a further segregation of these duties, and prior to this act of 1842 we find that:

The purchase of subsistence stores had been transferred to its appropriate department: Chap. ix., ¶ 262.

The procurement of medicines, etc., to the medical department: Chap. x., ¶ 288, and note 1 *a*.

The equipment of engineer troops to the chief of that corps: Chap. xii., ¶ 375. And

The purchase and fabrication of arms, ammunition, etc., to the ordnance department: Chap. xiii., ¶ 405.

This distribution of duties had been perfected in 1825, if not at an earlier date: see Army Regulations of that year, ¶ 1099, under which the duties of the commissary-general of purchases were restricted to the purchase of clothing and equipage, "and all other articles required for the public service for the army of the United States, excepting only such as are ordered to be purchased by the ordnance, quartermaster's, subsistence, and medical departments."

vice there; and in advertising for army supplies the quartermaster's department shall require all articles which are to be used in the States and Territories of the Pacific coast to be delivered and inspected at points designated in those States and Territories; and the advertisements for such supplies shall be published in the newspapers of the cities of San Francisco, in California, and Portland, in Oregon.—Sec. 4, July 13, 1866, chap. 176.

PUBLIC BUILDINGS.

232. Hereafter barracks and quarters, and all buildings and structures whatever of a permanent nature, shall be constructed upon special authority, to be given by act of Congress, except when constructed by the troops;[15] and no such structures whose cost shall exceed twenty thousand dollars shall be erected or continued in erection unless by such authority so specially granted.[15a]—Sec. 1, May 18, 1872, chap. .

233. That the quartermaster-general be and he is hereby empowered to appoint one principal barrack-master, and as many deputy barrack-masters as may from time to time be necessary, not exceeding one to each separate barrack or cantonment: which said principal barrack-master shall be entitled to receive the same pay, rations, and emoluments as the principal forage-master; and each of his deputies, the same pay, rations, and emoluments as is by law allowed to a deputy forage-master.[16]—Sec. 2, May 22, 1812, chap. 92.

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[15] And not until the attorney-general has approved the title, and the consent of the legislature of the State in which the land or site may be shall have been given to the purchase thereof. See Chap. xxiv., ¶ 773.

(a.) This proviso apparently supersedes that of the act of March 3, 1859, chap. 83: "That no permanent barracks and quarters shall hereafter be constructed unless detailed estimates shall have been previously submitted to Congress, and shall have been approved by a special appropriation for the same."

[16] BARRACK-MASTERS.—In Brightly's Digest (vol. i.) this and the following paragraph (233, 234) are cited as being in force as late as 1857, and if so they must still obtain. But barrack-, forage-, and wagon-masters were not expressly retained by the act of March 3, 1815 (chap. 79), nor were they embraced in the supplementary act of April 24, 1816 (chap. 69); and in the act of March 3, 1817 (chap. 107), we find "that the provisions contained in an act entitled 'An act fixing the military peace establishment of the United States,' passed on the 3d of March, 1815, granting to the commissioned officers of the regular army, who were deranged by said act, three months' pay in addition to the pay and emoluments to which they were entitled by law at the time of their discharge, shall equally extend to wagon-masters, forage-masters, barrack-masters, and other warrant-officers of the staff of the regular army who were deranged by the before-recited act, except those provisionally retained by the President of the United States." It does not appear that any of the barrack-masters were provisionally retained. If the above section (¶ 233) be still in force, a barrack-master is entitled to forty dollars per month, three rations per day, and forage for two horses; and a deputy to thirty dollars per month, two rations per day, and forage for one horse. See sec. 16, March 28, 1812, chap. 46; and the power to appoint them may have been "a privilege" revived under sec. 9, act of April 24, 1816. See Chap. xix., ¶ 531.

234. The forage-, wagon-, and barrack-masters shall be appointed as heretofore; but each quartermaster-general, attached to any separate army, command, or district, shall be authorized, with the approbation and under the direction of the secretary of the war department, to appoint as many such officers, and to employ as many artificers, mechanics, and laborers, as the public service may require.[17]—Sec. 8, March 3, 1813, chap. 52.

CLOTHING AND EQUIPAGE.

235. The President of the United States shall have power to prescribe the uniform of the army.—100th Article of War, April 10, 1806.

236. That the President of the United States be and he hereby is authorized to prescribe the quantity and kind of clothing to be issued annually to the troops of the United States. *Provided,* That whenever more than the authorized quantity is required the value of the extra articles shall be deducted from the soldiers' pay; and, in like manner, the soldiers shall receive pay according to the annual estimated value for such authorized articles of uniform as shall not have been issued to him in each year.[18] *Provided also,* That the manner of issuing and accounting for clothing shall be established in the general regulations of the war department.—Sec. 7, April 24, 1816, chap. 69.

237. It shall be the duty of the quartermaster's department, in addition to its present duties, to receive, from the purchasing department, and distribute to the army of the United States, all clothing and camp and garrison equipage required for the use of the troops;[19] and it shall be the duty of the quartermaster-general, under the direction of the secretary of war, to prescribe and enforce, under the provisions of this act, a system of accountability for all clothing and equipage issued to the army.—Sec. 1, May 18, 1826, chap. 74.

238. Every captain, or commander of a company, detachment, or recruiting station, or other officer, who shall have received clothing or camp equipage for the use of his command, or for issue to the troops, shall render to the quartermaster-general, at the expiration

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[17] This section, so far as it concerns forage- and wagon-masters, has been supplied by the acts of 1838 and 1861 (¶ ¶ 223, 224); but in this, and in sec. 5 of another act of same date (chap. 48), rests the general authority for the employment of citizens in the department. See Chap. ii., ¶ 4, note 6 *a*.

[18] These clothing accounts are adjusted by the pay department. See Chap. xi., ¶ ¶ 348, 349, 359.

[19] The purchasing devolving also upon this department under the act of 1842. See ¶ 230.

of each regular quarter of the year, quarterly returns of such supplies, according to the forms which may be prescribed, accompanied by the requisite vouchers for any issues that shall have been made; which returns and vouchers, after due examination by the quartermaster-general, shall be transmitted for settlement to the proper office of the treasury department.—Sec. 2, *ibid.*

239. It shall be the duty of all officers charged with the issue of clothing, or other supplies, carefully to preserve the same from waste or damage; and, in case of deficiency, on final settlement, of any article of supplies, the value thereof shall be charged against the delinquent, and deducted from his monthly pay, unless he shall show, to the satisfaction of the secretary of war, by one or more depositions, setting forth the circumstances of the case, that the said deficiency was occasioned by unavoidable accident, or was lost in actual service, without any fault on his part; and, in case of damage, he shall also be subject to charge for the damage actually sustained, unless he shall show, in like manner, to the satisfaction of the secretary of war, that due care and attention were given to the preservation of said supplies, and that the damage did not result from neglect.[20]—Sec. 3, *ibid.*

240. That the secretary of war be and is hereby authorized and required to furnish one complete suit of clothing to each invalid soldier who is an inmate of any regularly constituted "soldiers' home" in the United States, out of the stock on hand in the quartermaster's department.—Sec. 1, March 22, 1867, chap. 4.

241. Such clothing shall be delivered to the managers of such institutions upon their requisition therefor, accompanied with such certificates as to numbers and condition as the secretary of war may prescribe.—Sec. 2, *ibid.*

242. That the secretary of war be and hereby is authorized to sell such surplus clothing, quartermaster's, and medical stores, as he may deem expedient, at first prices, to the National Asylum, for the use of disabled volunteer soldiers therein.—Sec. 2, Joint Resolution, March 22, 1867.

243. That the secretary of war be and he is hereby authorized, at any time, on the recommendation of the surgeon-general of the army, to order gratuitous issues of clothing to soldiers who have had contagious diseases, and to hospital attendants who have nursed and attended such soldiers, to replace the articles of their

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[20] See also act of February 2, 1863, providing relief from responsibility for such losses: Chap. iii., ¶ 58.

clothing which have been destroyed by order of the proper medical officers to prevent contagion.—Joint Resolution, March 12, 1868.

FUEL, FORAGE, AND QUARTERS.

244. When forage is not drawn in kind by officers of the army entitled thereto, eight dollars per month, for each horse, not exceeding the number authorized by existing regulations, shall be allowed in lieu thereof.[21] *Provided,* That neither forage nor money shall be drawn by officers, but for horses actually kept by them in service.—Sec. 12, April 24, 1816, chap. 69.

245. Officers of the army entitled to forage for horses shall not be allowed to commute it, but may draw forage in kind for each horse actually kept by them when, and at the place where, they are on duty, not exceeding the number authorized by law. *Provided however,* That when forage in kind cannot be furnished by the proper department, then, and in all such cases, officers entitled to forage may commute the same according to existing regulations.[21c]—Sec. 1, July 17, 1862, chap. 200.

246. Major-generals shall be entitled to draw forage in kind for five horses; brigadier-generals for four horses; colonels, lieutenant-colonels and majors for two horses each; captains and lieutenants of cavalry and artillery, or having the cavalry allowance, for two horses each; and chaplains[22] for one horse only.—Sec. 2, *ibid.*

247. Fuel, quarters,[23] and forage[21] in kind may be furnished to

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[21] FORAGE.—Paragraphs 244–247 must be considered in connection with each other. The number of animals for which forage may be drawn is determined by law (¶ 246), but the amount of forage for each is determined by Army Regulations.

(*a.*) Officers assigned to duty requiring them to be mounted are placed upon the footing, as to forage for their horses, of cavalry officers of like grades. See Chap. xi., ¶ 322.

(*b.*) "An officer of infantry, ordered by his superior to take temporary command of mounted men, should be provided, at the expense of the United States, with horses to enable him to perform his duty. If he happens, however, to have a horse or horses of his own, and prefers to use it or them, that horse, or those horses, not exceeding the number pertaining to his grade, ought, while he is on such mounted duty, to be fed (foraged) by the quartermaster's department. This decision also to apply to the case of acting assistant surgeons who are required to be mounted."—Quartermaster-general, August 6, 1872.

(*c.*) *Commutation of forage* prohibited. See ¶ ¶ 321, 247.

(*d.*) "The secretary of war decides that when an officer entitled to draw forage is on leave of absence, not exceeding thirty days, or when temporarily on duty away from his post, the forage in kind is still to be issued, and is not affected by General Orders No. 5, of 1872."—Adjutant-general, July 1, 1872.

[22] Chaplains, though ranking as captains of infantry, to receive forage for two horses under an act of 1864. See Chap. xiv., ¶ 443.

[23] FUEL AND QUARTERS.—"The right of an officer to quarters and fuel is not like pay and subsistence, an absolute right pertaining under all circumstances to the officer's rank, but depending on certain conditions of duty and service; and his employment upon civil works not being a military duty, although one in which quarters and

officers by the quartermaster's department as now allowed by law and regulations.—Sec. 24, July 15, 1870, chap. 294.

EXTRA-DUTY MEN.

248. When it is necessary to employ soldiers as artificers or laborers in the construction of permanent military works, public roads, or other constant labor of not less than ten days' duration in any case, they shall receive, in addition to their regular pay, the following additional compensation therefor: enlisted men working as artificers, and non-commissioned officers employed as overseers of such work, not exceeding one overseer for every twenty men, thirty-five cents per day; and enlisted men employed as laborers twenty cents per day; but such working-parties shall only be authorized on the written order of a commanding officer.[24] This allow-

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fuel were obviously necessary, the allowance therefor must be regarded as properly chargeable, not upon military appropriation, but upon the several appropriations for the civil works on which the officer might be engaged."—Second Comptroller, § 1788.

(*a.*) "Quarters and fuel of officers engaged on fortifications and military works are chargeable to the appropriation of the quartermaster's department."—*Ibid.*, § 1789.

(*b.*) The nature of the duty to which an officer is assigned should always be stated in his application for quarters.—Adjutant general, August 19, 1871.

(*c.*) "To be entitled to quarters and fuel, an officer must be assigned to some particular duty at the place, when he makes his requisition for them on some quartermaster. In case an officer be ordered to some point to await orders, it has been held that he is not entitled to quarters and fuel."—Second Comptroller, § § 1790, 1804, reaffirmed by adjutant-general, October 20, 1871.

(*d.*) "An officer is entitled to fuel and quarters, in kind, wherever he may be on duty, either at his permanent or temporary station. If he desires to relinquish his quarters at the permanent station he may be allowed to do so, and be provided with quarters at his temporary one, but in no case to be provided with fuel or quarters at two stations at the same time."—Secretary of War, July 20, 1872.

(*e.*) The question of the right of an officer to any allowance of fuel and quarters exceeding that authorized by regulations can be adjusted only by the secretary of war, whose decision in this matter governs as the law in the case.—Second Comptroller, § 1791.

(*f.*) *Brevet rank.*—If an officer holding brevet rank be assigned by the President to the appropriate duties of that rank, he is entitled to the fuel and quarters pertaining thereto.—*Ibid.*, § 1786—as modified by act of 1869. See Chap. xix., ¶ 550.

(*g.*) *Acting assistant surgeons* are entitled to a lieutenant's allowance, if there are sufficient quarters at the post, but they have no choice of quarters over a commissioned officer.—Adjutant-general, August 31, 1870.

(*h.*) Fuel and quarters denied to officers detailed to colleges and universities under act of July 28, 1866 (¶ 929).—Adjutant-general, April 2, 1872.

(*i.*) Superintendents of national cemeteries entitled to fuel and quarters: ¶ 622.

(*k.*) For *commutation of fuel and quarters* to enlisted men see following section, "Extra-duty Pay." Commutation to officers prohibited by act of July 15, 1870. See ¶ 321.

(*l.*) Officers' servants entitled to quarters in kind, as prescribed in the regulations. —Quartermaster-general, June 10, 1872.

[24] EXTRA-DUTY PAY.—Extra pay and commutation of rations, fuel, and quarters allowed to detachments of general service clerks at headquarters of divisions and departments (not exceeding ten at each headquarters) at following rates: Extra pay per diem, thirty-five cents; rations, seventy-five cents per diem; fuel, eight dollars per month, and ten dollars per month for quarters. For any detailed men in excess of the number prescribed (10), only the cost price of the regulation allowance of rations, fuel,

ance of extra pay is not to apply to the troops of the engineer and ordnance departments.[25]—Sec. 7, July 13, 1866, chap. 176.

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and quarters, and no extra pay, will, under any circumstances, be authorized.—G. O. No. 92, A.-G. O., 1868; and G. O. No. 30, *ibid.*, 1869.

(*a.*) The war department having designated no clerical duty as coming within the act of 1866, except that at the bureau of the war department, at the headquarters of the army, and military division and department headquarters, no other clerical duty will be recognized by the accounting officers as entitling the soldier to extra-duty pay. —Second Comptroller, § 1346. But the superintendents of the general recruiting service will hereafter be allowed, each, three enlisted men for duty as clerks, and one enlisted man as orderly, whose extra pay, etc., is to be the same as that granted to general service detachments at headquarters divisions, and departments (see first paragraph of this note).—Circular, A.-G. O., August 23, 1869.

"When a soldier is employed as a clerk, under such circumstances as entitle him to extra pay for constant labor of not less than ten days' duration, he should, I think, be paid, as a skilled man or artificer, at thirty-five cents per day."

"In regard to the persons who may be entitled, the accounting officers refer to the action of the war department and its bureaus, designating the parties to whom extra duty has been assigned in such sense as to give them a right to extra pay."—Second Comptroller, November 26, 1870.

(*b.*) The medical department is to pay from its own appropriations accounts for extra-duty pay of enlisted men employed in the offices of the assistant surgeon-general and the medical directors of departments.—Paymaster's Manual (1871), ¶ 112.

(*c.*) Hospital stewards and ordnance sergeants (of posts) are not entitled to extra-duty pay.—*Ibid.*, ¶ 111.

"When a hospital steward is taken from his appropriate duties in connection with a hospital, and detailed to duty elsewhere as clerk, he is thereby put on extra duty, and becomes entitled to extra-duty pay, just as another enlisted man would be for performing the same extra labor."—Secretary of War, August 30, 1871.

Said decision applies to hospital stewards on duty as *clerks* in the medical director's office at department headquarters, and is retroactive.—Adjutant-general, December 5, 1871.

The "clerical duty" of hospital stewards recognized, eo nomine, as *extra-duty*, by the act to supply deficiencies, etc., approved May 18, 1872.

(*d.*) For allowance of extra-duty pay to hospital attendants (payable by pay department), see Chap. xi., note 13 *h*.

(*e.*) "The secretary of war has decided against the payment of extra-duty pay to soldiers employed as clerks to post quartermasters, post commissaries of subsistence, regimental clerks, company clerks, and clerks at post headquarters."—Adjutant-general, May 18, 1872.

[25] But see Chap. xi., note 13 *h*.

CHAPTER IX.

THE SUBSISTENCE DEPARTMENT.

ORGANIZATION.

260. THE subsistence department[1] of the army shall hereafter consist of the number of officers now authorized by law, viz.: one commissary-general of subsistence, with the rank, pay, and emoluments of a brigadier-general; two assistant commissary-generals of subsistence, with the rank, pay, and emoluments of colonels of cavalry; two assistant commissary-generals of subsistence, with the rank, pay, and emoluments of lieutenant-colonels of cavalry; eight commissaries of subsistence, with the rank, pay, and emoluments of majors of cavalry; and sixteen commissaries of subsistence,[2] with the

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[1] THE SUBSISTENCE DEPARTMENT had its origin in the act of April 14, 1818, which, in sec. 6, enacted that: "As soon as the state of existing contracts for the subsistence of the army shall, in the opinion of the President of the United States, permit it, there shall be appointed by the President, by and with the advice and consent of the Senate, one commissary-general," etc. The last clause of that section provided that "the commissary-general and his assistants shall perform such duties, in purchasing and issuing of rations to the army of the United States, as the President may direct," and thus withdrew the subsistence of the army from the purchasing department. This section, together with those in ¶ ¶ 262, 263, 271, was (by provision of the 10th sec. of same act) to continue in force for five years from the passage of the act, "and thence to the end of the next session of Congress, and no longer." But the (6th) section was supplied by sec. 8 of the act, "to reduce and fix the *military peace establishment*," approved March 2, 1821, and enacting: "That there shall be one commissary-general of subsistence; and that there shall be as many assistant commissaries as the service may require, not exceeding fifty, who shall be taken from the subalterns of the line, and shall, in addition to their pay in the line, receive a sum not less than ten, nor more than twenty, dollars per month; and that the assistant quartermasters, and assistant commissaries of subsistence, shall be subject to duties in both departments, under the orders of the secretary of war." This section, "having never been repealed or superseded by any subsequent law, is yet [1836], by virtue of its original enactment as a permanent law, in full force."—3 Opinions, 87. See note 7.

(*a.*) *Status of the department.*—The purchasing department had, from its organization, been recognized as of the "general staff," and that portion of its duties transferred to the subsistence department being of the nature incumbent upon staff officers, the new department was classified under the same general title (see Army Register, May, 1818); and if the act of 1821 be considered (as statutes should be: 6 Wallace, 458), in the order of its clauses, as enacted, there is no doubt of the propriety of this classification. See also note 2 *a*.

[2] APPOINTMENTS.—The commissary-general to be selected from the department (¶ 536), and temporary vacancy in his office to be filled under provisions of ¶ ¶ 9–12. But see ¶ 538.

(*a.*) The act of April 24, 1816 (¶ 532), provided that the staff of the army be taken from the line or from civil life; but the acts of March 2, 1829, and September 26, 1850, provided that the commissaries thereby added to the organization of the depart-

rank, pay, and emoluments of captains of cavalry.[3]—Sec. 16, July 28, 1866, chap. 299.

261. That the President of the United States be and he is hereby empowered, as he may deem it expedient, either to appoint, for the time being, a special commissary or commissaries, for the purpose of supplying by purchase or contract, and of issuing, or to authorize any officer or officers in the quartermaster-general's department to supply and issue, as aforesaid, the whole or any part of the subsistence of the army, in all cases where, either from the want of contractors, or from any deficiency on their part, or from any other contingency, such measure may be proper and necessary in order to insure the subsistence of the army, or of any part thereof; and such special commissaries shall, each, whilst employed, be entitled to the pay and emoluments of a deputy quartermaster-general.[4]—Sec. 8, March 3, 1813, chap. 48.

262. Supplies for the army, unless in particular and urgent cases the secretary of war should otherwise direct, shall be purchased by contract, to be made by the commissary-general [of subsistence]

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ment should be selected from the *line of the army*, and the act of July 7, 1838, provided that those officers to be appointed under the act of July 5, same year, "shall not be separated from the line of the army." During the late rebellion provision was made for appointing volunteers to vacancies. See acts of August 3, 1861, and February 9, 1863.

(*b.*) A commissary of subsistence to each army corps, to have rank of lieutenant-colonel: Chap. xviii., ¶ 523. And a commissary with the rank of major, and an assistant with the rank of captain, to each brigade of militia or volunteers: Chap. xxv., ¶ 822.

[3] ACTING ASSISTANT COMMISSARIES OF SUBSISTENCE.—As assistant commissaries of subsistence are no longer appointed, the propriety of designating as "*acting assistants*" those line officers detailed to act as "*commissaries of subsistence*," may well be doubted; but this designation has been adopted in the act of July 15, 1870 (see Chap. xi., ¶ 321), giving them one hundred dollars per annum in addition to the pay of their "rank."

Copies of orders appointing or relieving these officers must be forwarded to the commissary-general.—G. O. No. 40, A.-G. O., 1866.

But the act of 1870 is qualified by that of 1821 (see note 1), and no officer above the rank of first lieutenant is entitled to the extra pay.—Paymaster's Manual (1871), ¶ 159.

A regimental quartermaster, or adjutant, debarred from this extra pay.—Adjutant-general, June 21, 1871.

Officers of engineer, ordnance, and medical corps, "not being line officers," are not entitled to the additional pay.—Second Comptroller, §§ 104, 105.

An acting assistant commissary of subsistence, to be paid his additional pay, must obtain, as heretofore, the certificate of the commissary-general of subsistence as to the service. He may be paid the additional allowance on his regular pay account, filing such certificate therewith.—Paymaster's Manual (1871), ¶ 159.

[4] This section seems to have been supplied by the act of 1818, creating a military corps of officers charged especially with the subsistence of the army; but the section appears in Brightly's Digest as of effect in 1857, and in 1866 it was referred to by the chief justice of the court of claims as being still operative.—Sec. 2, Nott & Huntington, 44. In the compilations of military laws, by Callan, Cross, and Mordecai, the above section is regarded as repealed by the act of March 3, 1815, but there is nothing in the terms of that act affecting the authority conferred upon the President by that section.

on public notice, to be delivered, on inspection, in the bulk, and at such places as shall be stipulated, which contract shall be made under such regulations as the secretary of war may direct.[5]—Sec. 7, April 14, 1818, chap. 61.

263. The commissary-general and his assistants shall not be concerned, directly or indirectly, in the purchase or sale, in trade or commerce, of any article entering into the composition of the ration allowed to the troops in the service of the United States, except on account of the United States, nor shall such officer take and apply to his own use any gain or emolument for negotiating or transacting any business connected with the duties of his office, other than what is or may be allowed by law; and the commissary-general and his assistants shall be subject to martial law.[6]—Sec. 9, *ibid.*

264. That the seventh, eighth, ninth, and tenth sections of the act entitled "An act regulating the staff of the army," passed April 14, 1818, be and the same are hereby continued in force until repealed by Congress.[7]—March 3, 1835, chap. 49.

265. Commissioned officers of the army, serving in the field, shall hereafter be permitted to purchase rations for their own use, on credit, from any commissary of subsistence, at cost prices, and the amount due for rations so purchased shall be reported monthly to the paymaster-general, to be deducted from the payment next following such purchases.[8] And the secretary of war is hereby

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[5] CONTRACTS.—See Chap. iii., ¶ ¶ 96–111.

[6] And are to give bonds for the faithful discharge of their duties: Chap. iii., ¶ 37.

[7] The seventh, eighth, and ninth sections are in ¶ ¶ 262, 271, 263 respectively. But the tenth section "*provided*, That the sixth [see note 1], seventh, eighth, ninth, and tenth sections of this act shall continue and be in force for the term of five years from the passing of the same, and thence until the end of the next session of Congress, and no longer." The seventh, eighth, ninth, and tenth sections were continued for five years by the act of January 23, 1823; and the sixth, seventh, eighth, ninth, and tenth sections, and the eighth section, act of March 2, 1821 [quoted in note 1], were continued for five years "*and no longer*," by act of March 2, 1829. Advising upon this curious legislation, the attorney-general held that the act of 1829 did not withdraw sec. 8, act of 1821, from its position as a permanent law, but merely provided that the 6th sec. of the act of 1818, as modified by the 8th sec. of the act of 1821, should be in force for five years and no longer; that this provision not being continued in the act of 1835 (¶ 264), that section of the law of 1818 has expired, but the law of 1821 obtains.—3 Opinions, 87.

[8] SALES OF SUBSISTENCE.—Sales to officers *on credit* discontinued by G. O. No. 3, A.-G. O., 1868.

Any officer of the army, including retired officers, whether on duty or not, may, on the conditions prescribed in the Army Regulations, make purchases from the subsistence department. When an officer is absent from his family, any member thereof designated by him (in writing, to the issuing commissary) may in his name make such purchases. The number and designation of the family should be stated in the notice filed. The subsistence department is not required to deliver the stores or to receive payment therefor elsewhere than at the store-house. Stores should be purchased monthly, and the commissary may decline to sell an unreasonable amount to any officer. —See Circular No. 4, Commissary-general of Subsistence, July 22, 1868.

directed to issue such orders and regulations as he may deem best calculated to insure the proper observance hereof.—Sec. 5, March 3, 1865, chap. 81.

266. The secretary of war is hereby authorized and directed to cause tobacco to be furnished to the enlisted men of the army at cost prices, exclusive of the cost of transportation, in such quantities as they may require, not exceeding sixteen ounces per month, and the amount due therefor shall be deducted from their pay in the same manner as at present provided for the settlement of clothing accounts.[9]—Sec. 6, *ibid.*

267. The office of sutler in the army and at military posts is hereby abolished, and the subsistence department is hereby authorized and required to furnish such articles as may from time to time be designated by the inspector-generals of the army, and the same to be sold to officers and enlisted men at cost prices; and if not paid for when purchased, a true account thereof shall be kept, and the amount due the government shall be deducted by the paymaster at the payment next following such purchase.[8a] *Provided*, That this section shall not go into effect until the 1st day of July, 1867. —Sec. 25, July 28, 1866, chap. 299.

268. That the President be and he is hereby authorized to cause such rations as he shall judge proper, and as can be spared from the army provisions without injury to the service, to be issued, under such regulations as he shall think fit to establish, to Indians who may visit the military posts or agencies of the United States on the frontiers, or in their respective nations, and a special account of these issues shall be kept and rendered.[10]—Sec. 16, June 30, 1834, chap. 162.

THE RATION.

269. The commissioned officers aforesaid[11] shall be entitled to

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Sales to officers and enlisted men will be made at the price stated on the invoice of the supply of the article last received at the post.—Commissary-general, 1871.

Commanding officers of companies are authorized to purchase for their companies at the same prices that are charged to officers.—G. O. No. 87, A.-G. O., 1867.

COAST SURVEY.—Sales of subsistence may be made to officers of the coast survey (upon their written application) at cost prices, with transportation added.—Circular No. 5, Commissary-general, 1866. See also ¶ 91.

(*a.*) This section authorizes sales *on credit* to both officers and enlisted men, but the war department has not made provision for its being carried into effect.

[9] Officers will be charged by the paymaster-general with the cost of all tobacco receipted for by them on the "Tobacco Return," and not properly charged on the muster-roll.—G. O. No. 64, A.-G. O., 1866.

[10] Issues to Indians, and sales to Indian agents, must be governed by the conditions set forth in the Army Regulations. See G. O. No. 54, A.-G. O., 1872.

[11] Only so much of this section as provides for the issue of rations to enlisted men, laundresses, matrons, and nurses, is now in force.

receive, for their daily subsistence, the following number of rations of provisions: a colonel, six rations; a lieutenant-colonel, five rations; a major, four rations; a captain, three rations; a lieutenant, two rations; an ensign, two rations; a surgeon, three rations; a surgeon's mate, two rations; a cadet, two rations or money in lieu thereof, at the option of the said officers and cadets at the posts respectively, where the rations shall become due; and if at such posts supplies are not furnished by contract, then such allowance as shall be deemed equitable, having reference to former contracts, and the position of the place in question; and each non-commissioned officer, musician, and private, one ration;[12] to the commanding officer of each separate post, such additional number of rations as the President of the United States shall, from time to time, direct, having respect to the special circumstances of each post; to the women who may be allowed to any particular corps not exceeding the proportion of four to a company,[13] one ration each; to such matrons and nurses as may be necessarily employed in the hospital, one ration each; and to every commissioned officer who shall keep one servant, not a soldier of the line, one additional ration.—Sec. 5, March 16, 1802, chap. 9.

270. Each ration shall consist of one pound and a quarter of beef, or three-quarters of a pound of pork, eighteen ounces of bread or flour, one gill of rum, whisky, or brandy; and at the rate of two quarts of salt, four quarts of vinegar, four pounds of soap, and one pound and a half of candles, to every hundred rations.[14]—Sec. 6, *ibid.*

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[12] One and one-half rations per day to sergeants and corporals of ordnance. See § 11, February 11, 1815, chap. 38; and ¶ 404, note 5 *b*.

[13] LAUNDRESSES.—The companies under sec. 2 of same act consisted of seventy-six enlisted men. They are now allowed to each company or detachment of twelve or more enlisted men, at the rate of one for every nineteen, or fraction of nineteen, enlisted men *present*.—G. O. No. 72, A.-G. O., 1868.

"The secretary of war authorizes the number of laundresses to remain as fixed by the authorized strength of a company, though it may fall below that strength for a time, by casualties."—Adjutant-general, September, 1870.

A laundress absent from her company will not be rationed, unless the officer commanding the company shall send, *each* month, to the commanding officer of the post or station where she may be living, a notification in writing, designating her by name as a laundress attached to his company, and entitled to rations for the month specified in such notification.—Circular from Commissary-general, April 3, 1865.

[14] ISSUES.—This ration was re-established under the 7th sec., act of March 2, 1815. See Chap. xvii., ¶ 492.

But in determining the present ration ¶ ¶ 271–276 must also be considered. See note 15.

Seamen and marines, of the navy, when acting on shore in co-operation with the army, are to be rationed, but the contract price of rations thus issued is to be reimbursed from the navy appropriations. See Chap. xxviii., ¶ 959.

271. The President may make such alterations in the component parts of the ration as a due regard to the health and comfort of the army and economy may require.—Sec. 8, April 14, 1818, chap. 61.

272. The allowance of sugar and coffee to the non-commissioned officers, musicians, and privates, in lieu of the spirit or whisky component part of the army ration, now directed by regulation, shall be fixed at six pounds of coffee and twelve pounds of sugar to every one hundred rations, to be issued weekly when it can be done with convenience to the public service, and, when not so issued, to be paid in money.—Sec. 17, July 5, 1838, chap. 162.

273. The allowance of sugar and coffee to the non-commissioned officers, musicians, and privates of the army, as fixed by the 17th section of the act of July 5, 1838, shall hereafter be ten pounds of coffee and fifteen pounds of sugar for every one hundred rations.—Sec. 4, June 21, 1860, chap. 163.

274. That the secretary of war be authorized to commute the army ration of coffee and sugar for the extract of coffee, combined with milk and sugar, to be procured in the same manner and under like restrictions and guarantees as preserved meats, pickles, butter, and desiccated vegetables are procured for the navy, if he shall believe it will be conducive to the health and comfort of the army, and not more expensive to the government than the present ration, and if it shall be acceptable to the men.—Sec. 10, July 5, 1862, chap. 133.

275. The army ration shall hereafter include pepper, in the proportion of four ounces to every hundred rations.—Sec. 11, March 3, 1863, chap. 78.

276. The army ration shall hereafter be the same as provided by law and regulations on the 1st day of July, 1861.[15] *Provided,*

Veterinary surgeons are not entitled to draw rations.—Adjutant-general, March 18, 1864. But they may purchase subsistence for cash, at cost prices, exclusive of transportation.—*Ibid.*, June 16, 1871.

Acting assistant surgeons serving west of the hundredth degree of west longitude to receive one ration daily, in kind, upon report of the surgeon-general that the contract made by his order allows such ration.—G. O. No. 48, A.-G. O., 1868.

Superintendents of national cemeteries not entitled to rations.—See note 22 *a*, Chap. xxi.

[15] THE RATION thus re-established, and subject (¶ 271) to alteration in its component parts, consists of:—

Twelve ounces of pork or bacon, or one pound and four ounces of salt or fresh beef; eighteen ounces of soft bread or flour, one pound of hard bread, or one pound and four ounces of corn meal: and, to every one hundred rations, fifteen pounds of beans or

That the ration of pepper prescribed in the 11th section of the "Act to promote the efficiency of the corps of engineers and of the ordnance department, and for other purposes," approved March 3, 1863, shall continue to be furnished as heretofore. But nothing contained in this act shall be construed to alter the commutation[16] value of rations as regulated by existing laws.—Sec. 2, June 20, 1864, chap. 145.

277. It shall be lawful for the commander-in chief of the army, or the commanding officer of any separate detachment or garrison thereof, at his discretion, to cause to be issued, from time to time, to the troops under his command, out of such supplies as shall have been provided for the purpose, rum, whisky, or other ardent spirits, in quantities not exceeding half a gill to each man per day, excepting

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peas, or ten pounds of rice or hominy; ten pounds of green coffee, or eight pounds of roasted (or roasted and ground) coffee, or one pound and eight ounces of tea; fifteen pounds of sugar; four quarts of vinegar; one pound and four ounces of adamantine or star candles; four pounds of soap; three pounds and twelve ounces of salt, and four ounces of pepper. The subsistence department, as may be most convenient or least expensive to it, and according to the condition and amount of its supplies, shall determine whether soft bread or flour, and what other component parts of the ration as equivalents, shall be issued.

Desiccated compressed potatoes, or desiccated compressed mixed vegetables, at the rate of one ounce and a half of the former and one ounce of the latter to the ration, may be *substituted* for beans, peas, rice, or hominy.

When deemed necessary, fresh vegetables, dried fruit, molasses, pickles, or any other proper food, may be purchased and issued in lieu of any component part of the ration of *equal money value.* The commissary-general of subsistence is alone authorized to order such purchases.—G. O. No. 226, A.-G. O., 1864, and G. O. No. 62, A.-G. O., 1867.

A ration of fish, fourteen ounces of dried fish, or eighteen ounces of pickled fish, may be issued once a week in lieu of the ration of fresh beef.—Circular No. 5, Commissary-general, 1865.

[16] COMMUTATION OF RATIONS.—The last clause of this section was intended to guard against an increase in the pay of commissioned officers; but they are no longer authorized to draw or commute them. See Chap. xi., ¶ 321.

Soldiers on furlough have their ration, while so absent, commuted at twenty-five cents.—G. O. No. 88, A.-G. O., 1865. But they are not entitled to commutation unless they return to the company, regiment, or station whence furloughed, at or before the expiration of their furlough.—Secretary of War, December 7, 1867.

Discharged soldiers have their ration commuted at thirty cents [paid by pay department].—S. O. No. 5, A.-G. O., 1868.

Ordnance sergeants, at stations where there are no other troops, commute their rations at forty cents.—G. O. No. 53, A.-G. O., 1869.

Sergeants and corporals of ordnance, while on furlough, are entitled to commutation at the rate of one and a half rations per day.—Second Comptroller, § 1840. See Chap.

General service clerks at the headquarters of geographical divisions and departments (not more than ten at each headquarters) commute their rations at seventy-five cents per day.—G. O. No. 92, A.-G. O., 1868, and No. 30, *ibid.*, 1869.

Soldiers traveling under orders.—"The attention of the department having been called to the growing frequency with which accounts are presented for commutation of rations of enlisted men traveling under orders, greatly in excess of the regulation rate of seventy-five cents per day, it is directed that hereafter rations in kind be furnished, cooked, to be taken in the haversacks of the men, in all practicable cases where the cost of their subsistence would exceed the regulation rate."—G. O. No. 108, A.-G. O., 1872.

in cases of fatigue service, or other extraordinary occasions.[17]—Sec. 22, March 3, 1799, chap. 48.

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[17] EXTRA ISSUES.—In 1802 (¶ 270) the regular spirit ration was increased to one gill, but under the act of 1818 (¶ 271) a ration of sugar and coffee had been substituted for the regular issue of spirits, and by and since the act of 1838 (¶ 272) substituting coffee and sugar, all issues of spirits have been *extra issues*. By act of March 2, 1819, an "extra gill of whisky or spirits" was allowed to the enlisted men employed on fortification, surveys, etc.; but the act of May 19, 1846, provided for the commutation in money of that allowance, and the only authority for the issue of spirits from the subsistence department is to be found in the above act of 1799.

"The whisky ration will no longer be supplied to the troops of the United States by the subsistence department."—G. O. No. 120, A.-G. O., 1865.

CHAPTER X.

THE MEDICAL DEPARTMENT.

ORGANIZATION.

281. THE medical department of the army shall[1] hereafter consist of one surgeon-general,[1a] with the rank, pay, and emoluments of a brigadier-general; one assistant surgeon-general,[4a] with the rank, pay, and emoluments of a colonel of cavalry; one chief medical purveyor[4b] and four assistant medical purveyors, with the rank, pay, and emoluments of lieutenant-colonels of cavalry, who shall give the same bonds which are or may be required of assistant paymaster-generals of like grade,[1b] and shall, when not acting as purveyors, be

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[1] THE MEDICAL DEPARTMENT, as now constituted, had its foundation in the act of March 2, 1821; but a medical establishment, afterwards called the hospital department, was created by the act of March 2, 1799, and continued under various modifications till the organization of 1821.

(*a.*) THE SURGEON-GENERAL.—Under the act of March 2, 1799, the "physician-general" was "charged with the superintendence and direction of all military hospitals, and, generally, of all medical and chirurgical practice or service concerning the army or navy of the United States, and of all persons who shall be employed in and about the same, in camps, garrisons, and hospitals." This office was abolished in the reduction of 1802; but the act of March 3, 1813, "for the better organization of the general staff of the army," established the offices of a physician- and surgeon-general, and of an apothecary-general, "whose respective duties and powers shall be prescribed by the President of the United States." These offices were not provided for in the reduction of 1815, but the apothecary-general was "provisionally retained" by the President (his action being confirmed by the act of April 24, 1816), and obtained till reorganization of 1821. The office of surgeon-general was re-established, April 14, 1818, and has since been continuous.

(*b.*) The deputy paymaster-generals are of like grade, and give bonds in the sum of twenty-five thousand dollars. See Chap. xi., ¶ 318. And for duties of medical purveyors see ¶ 288.

(*c.*) CONTRACT SURGEONS.—The army regulations make provision for the employment, in cases of necessity, of private physicians under contracts with commanding officers, medical directors, or the surgeon-general.

Contracts made with private physicians by the surgeon-general, or the medical director of a department, can be annulled only by these officers, or by the department commander.—G. O. No. 3, A.-G. O., 1869.

Forage allowed to acting assistant-surgeons detailed upon duty requiring them to be mounted. See note 21 *b*, ¶ 244.

Mileage allowed. See note 12 *h*, ¶ 324.

Pay accounts.—"The physician's account of pay due, in the ordinary form of an officer's pay account, shall be presented to a paymaster for payment, vouched for by a certificate thereon by the commanding officer that it is correct and agreeably to contract, and that the services have been duly rendered, which certificate he will not make unless the contract has been approved by the surgeon-general or the medical director of the department."

assignable to duty as surgeons by the President; sixty surgeons, with the rank, pay, and emoluments of majors of cavalry; one hundred and fifty assistant surgeons, with the rank, pay, and emoluments of lieutenants of cavalry for the first three years' service, and with the rank, pay, and emoluments of captains of cavalry after three years' service; and five medical storekeepers, with the same compensation as is now provided by law;[2] and all the original vacancies in the grade of assistant surgeon shall be filled by selection, by examination, from among the persons who have served as staff or regimental surgeons or assistant surgeons of volunteers in the army of the United States two years during the late war, and persons who have served as assistant surgeons three years in the volunteer service shall be eligible for promotion to the grade of captain.[3]—Sec. 17, July 28, 1866, chap. 299.

282. So much of the act entitled "An act to increase and fix the military peace establishment of the United States," approved July 28, 1866, as relates to the promotion of assistant surgeons after three years' service, shall be amended so as to read "and persons who have served as surgeons or assistant surgeons three years in the volunteer force shall be eligible for promotion to the grade of captain."—Sec. 5, March 2, 1867, chap. 145.

283. From and after the passing of this act, no person shall receive the appointment of assistant surgeon in the army of the United States unless he shall have been examined and approved by an army medical board, to consist of not less than three surgeons or assistant surgeons, who shall be designated for that purpose by the secretary of war; and no person shall receive the appointment of surgeon in the army of the United States unless he shall have served at least five years as an assistant surgeon,[4] and unless also

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"The payment shall be made under the same rules that govern in the payment of officers at the same station."—G. O. No. 90, A.-G. O., 1866.

Pensions granted to: ¶ 577.

Quarters, in kind, allowed. See note 23 *g*, ¶ 247.

Rations to, in certain cases. See note 14, ¶ 270.

[2] MEDICAL STOREKEEPERS to have rank, pay, and allowances of captains of cavalry. —See Chap. xviii., ¶ 521. And to give bonds: Chap. iii., ¶ 38.

[3] For modification of last clause in this section see ¶ 283.

[4] APPOINTMENTS AND PROMOTIONS.—The surgeon-general to be appointed by selection from the department (Chap. xix., ¶ 536); and temporary vacancy in office of, to be filled as provided in Chap. ii., ¶ ¶ 9–12.

See Chap. xix., ¶ ¶ 538, 540.

(*a*.) The act of April 16, 1862, by which the office of assistant surgeon-general was revived, authorized his appointment by selection from the medical corps or from the surgeons of volunteers, and provided that the office should expire with the then existing rebellion. As the office was either continued or revived by the act of 1866 (¶ 281), was not the authority to fill vacancies in that office, by selection, thus perpetuated? See 7 Opinions, 399–439.

he shall have been examined by an army medical board constituted as aforesaid.—Sec. 1, June 30, 1834, chap. 133.

284. The rank of the officers of the medical department of the army shall be arranged upon the same basis which at present determines the amount of their pay and emoluments. *Provided*, That the medical officers shall not in virtue of such rank be entitled to command in the line or other staff departments of the army.[5]—Sec. 8, February 11, 1847, chap. 8.

GENERAL PROVISIONS.

285. The medical inspector-general,[6] or any medical inspector, is hereby authorized and empowered to discharge from the service of the United States any soldier or enlisted man, with the consent[7] of such soldier or enlisted man, in the permanent hospitals, laboring under any physical disability which makes it disadvantageous to the service that he be retained therein; and the certificate, in writing, of such inspector-general or medical inspector, setting forth the existence and nature of such physical disability, shall be sufficient evidence of such discharge. *Provided however*, That every such certificate shall appear on its face to have been founded on personal inspection of the soldier so discharged, and shall specifically describe the nature and origin of such disability; and that such discharge shall be without prejudice to the right of such soldier or enlisted man to the pay due him at the date thereof, and report the same to the adjutant-general and the surgeon-general.—May 14, 1862, chap. 70.

286. The officers of the medical inspector's department shall be charged, in addition to the duties now assigned to them by existing laws, with the duty of making regular and frequent inspections of all military general hospitals and convalescent camps, and shall, upon each such inspection, designate to the surgeon in charge of such hospitals or camps all soldiers who may be, in their opinion, fit sub-

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(*b.*) The act of March 12, 1872 (chap. 47), enacted, in view of the law in ¶ 538, "That the President of the United States be and hereby is authorized to appoint by selection from the present assistant medical purveyors, by and with the advice and consent of the Senate, a chief medical purveyor of the army, to fill the vacancy now existing. Nothing herein shall be construed to increase the pay of the officers appointed to fill said vacancy."

[5] But see "Ambulance Corps," ¶ ¶ 296–307.

[6] MEDICAL INSPECTORS.—The offices of medical inspector-general and medical inspectors were not recognized in the reorganization of 1866 (¶ 281), but the President undoubtedly would have the power to assign officers to such duties as are indicated in this and succeeding paragraph, upon the recurrence of circumstances rendering such details advisable.

[7] Consent of the soldier not essential to his legal discharge: see last clause ¶ 286.

jects for discharge from the service, on surgeon's certificate of disability, or sufficiently recovered to be returned to their regiments for duty, and shall see that such soldiers are discharged or so returned. And the medical inspecting officers are hereby empowered, under such regulations as may be hereafter established, to direct the return to duty, or the discharge from service, as the case may be, of all soldiers designated by them.—Sec. 2, December 27, 1862, chap. 5.

287. The medical director[8] of an army in the field consisting of two or more army corps, and the medical director of a military department in which there are United States general hospitals containing four thousand beds or upwards, shall have the rank, pay, and emoluments of a colonel of cavalry; and the medical director of an army corps in the field, or of a department in which there are United States general hospitals containing less than four thousand beds, shall have the rank, pay, and emoluments of a lieutenant-colonel of cavalry. But this increased rank and pay shall only continue to medical officers while discharging such special duties; and the assignments from time to time to such duty shall be at least two-thirds of them made from among the surgeons and assistant surgeons of volunteers.—February 25, 1865, chap. 53.

288. Medical purveyors shall be charged, under the direction of the surgeon-general, with the selection and purchase of all medical supplies, including new standard preparations, and of all books, instruments, hospital stores, furniture, and other articles required for the sick and wounded of the army. In all cases of emergency they may provide such additional accommodations for the sick and wounded of the army, and may transport such medical supplies as circumstances may render necessary, under such regulations as may hereafter be established, and shall make prompt and immediate issues upon all special requisitions made upon them under such circumstances by medical officers; and the special requisitions shall consist simply of a list of the articles required, the qualities required, dated and signed by the medical officers requiring them.[9]—Sec. 5, April 16, 1862, chap. 55.

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[8] MEDICAL DIRECTORS.—"The assignment of medical officers as medical directors, assistant medical directors, and acting medical inspectors of armies, army corps, and divisions, is discontinued. Medical directors will be assigned to the headquarters of military geographical departments only, and by the order of the secretary of war. Owing to the reduction of the army, the act of Congress approved February 25, 1865, becomes inoperative, and no increase of rank, pay, or emoluments pertains to such assignment."—G. O. No. 121, A.-G. O., 1865.

[9] MEDICAL PURVEYORS.—Sec. 7 of this act provides that its provisions "shall continue and be in force during the existence of the present rebellion, and no longer;"

289. In general or permanent hospitals, female nurses may be substituted for soldiers, when in the opinion of the surgeon-general or medical officer in charge it is expedient to do so, the number of female nurses to be indicated by the surgeon-general or surgeon in charge of the hospital. The nurses so employed to receive forty cents a day and one ration in kind, or by commutation, in lieu of all emoluments except transportation in kind.[10b]—Sec. 6, August 3, 1861, chap. 42.

290. From and after the 1st day of July, 1864, hospital matrons shall be entitled to, and shall receive, ten dollars per month and one ration.[10]—Resolution, July 4, 1864.

291. There may be allowed in hospitals, to be provided under such rules as the surgeon-general of the army, with the approval of the secretary of war, may prescribe, such quantities of fresh or preserved fruits, milk or butter, and of eggs, as may be necessary for the proper diet of the sick.—Sec. 14, August 3, 1861, chap. 42.

292. That the officers of the medical department shall unite with the line officers of the army, under such rules and regulations as shall be prescribed by the secretary of war, in supervising the cooking within the same as an important sanitary measure; and that said medical department shall promulgate to its officers such regulations and instructions as may tend to insure the proper preparation of the ration of the soldier.—Sec. 8, March 3, 1863, chap. 78.

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but as medical purveyors were continued as members of the permanent establishment by the act of 1866 (¶281), it is supposed that the provisions of the above section (¶ 288) were thus perpetuated. The medical purveyors, appointed under the act of 1862, were to give bonds in such sums as the secretary of war may require. See Chap. iii., ¶ 38; but see ¶ 281. For appointment to fill the then existing vacancy in the office of chief medical purveyor, see note 4.

[10] HOSPITAL MATRONS AND NURSES may be employed in post or regimental hospitals in such numbers as may be necessary. See Chap. ix., ¶ 269.

(*a.*) "When it is considered necessary by the attending surgeons to employ matrons in *regimental* hospitals, the same proportion will be allowed as in post hospitals, and payment will be made when the matrons have been duly appointed and mustered as such upon the rolls of the regimental hospitals."—Adjutant-general, February 1, 1864.

(*b.*) Whenever civilians are employed as nurses, the rolls for their payment should be forwarded, through the medical director of the department, to the surgeon-general's office for settlement.—Adjutant-general, June 6, 1870.

(*c,*) Enlisted men (other than non-commissioned officers) employed as COOKS and NURSES are entitled to the extra-duty pay granted by the act of July 13, 1866.—Paymaster's Manual (1871), ¶ ¶ 105, 110. Engineer or ordnance soldiers entitled to same allowance if specifically mustered as COOKS or NURSES.—*Ibid.*, ¶ 108.

(*d.*) "On the muster-rolls of hospitals the enlisted men detailed to perform the duty of hospital attendants will be mustered as 'nurses or cooks.' This regulation becomes necessary, as the accounting officers disallow the payment of extra pay if they are mustered as hospital attendants or ward-masters, under the act of July 13, 1866, and S. O. No. 94, of Feb. 22, 1867, from adjutant-general's office."—Par. ii., G. O. No. 8, A.-G. O., 1872.

MEDICAL MUSEUM.

293. [Appropriation] for the purchase of the property in Washington City, known as Ford's theatre, for the deposit and safe-keeping of documentary papers relating to the soldiers of the army of the United States, and of the museum of the medical and surgical department of the army, 100,000 dollars.—April 7, 1866, chap. 28.

HOSPITAL STEWARDS.

294. That the secretary of war be and he is hereby authorized to appoint, from the enlisted men of the army, or cause to be enlisted, as many competent hospital stewards as the service may require, not to exceed one for each military post; the said hospital stewards to be mustered and paid on hospital muster-rolls as non-commissioned staff officers, with the rank, pay, and emoluments of a sergeant of ordnance,[11] and to be permanently attached to the medical and hospital department, under such regulations as shall be prescribed by the secretary of war.—Sec. 2, August 16, 1856, chap. 125.

295. The secretary of war is hereby authorized to appoint from the enlisted men of the army,[11a] or cause to be enlisted, as many hospital stewards as the service may require, to be permanently attached to the medical department, under such regulations as the secretary of war may prescribe.[11b]—Sec. 17, July 28, 1866, chap. 299.

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[11] There were no "sergeants of ordnance" at that time, as the title is now understood, and reference was undoubtedly had to the post ordnance sergeants. See Chap. xiii., note 5 *a*, and Chap. xiv., ¶ 446.

Sec. 7, act of July 28, 1866, provided for the retention of "one hospital steward for each military post," in addition to those authorized by sec. 17 of same act. See ¶ 295.

The stewards are classified as follows: "The *first class* will consist of those appointed in the regular army by the secretary of war, and those of the non-commissioned staff of regular battalions and volunteer regiments.

"The *second class* will consist of those selected by surgeons of hospitals and detailed by the *written order* of the commanding officer at a post (or with bodies of troops) of *more* than four companies.

"The *third class* will consist of those selected by surgeons and detailed by the *written order* of the commanding officer at a post (or with bodies of troops) of four or less number of companies."—Circular No. 52, A.-G. O., 1864. This classification recognized in act of June 20, 1864. See also § 12, July 5, 1838, chap. 162.

"Hospital stewards of the second and third class (being detailed from the companies at a post) have no rank by virtue of their acting in the capacity of hospital stewards."—Adjutant-general, April 13, 1872.

(*a*.) A private soldier or non-commissioned officer appointed by the war department a hospital steward is not discharged, but continues to serve out the term for which he enlisted.—Adjutant-general, March 6, 1868.

(*b*.) *Extra-duty pay.*—The medical department to pay from its own appropriations accounts for extra-duty pay of enlisted men employed in the offices of the assistant surgeon-general and the medical directors of departments.—Secretary of War, June 13, 1864.

"When a hospital steward is taken from his appropriate duties in connection with a hospital, and detailed to duty elsewhere as a clerk, he is thereby put on extra duty and becomes entitled to extra-duty pay."—Secretary of War, August 30, 1871.

(*c*.) PAY OF HOSPITAL STEWARDS.—See Chap. xi., ¶ 326.

AMBULANCE CORPS.

296. The medical director, or chief medical officer, of each army corps shall, under the control of the medical director of the army to which such army corps belongs, have the direction and supervision of all ambulances, medicine, and other wagons, horses, mules, harness, and other fixtures appertaining thereto, and of all officers and men who may be detailed or employed to assist him in the management thereof, in the army corps in which he may be serving. —Sec. 1, March 11, 1864, chap. 27.

297. The commanding officer of each army corps shall detail officers and enlisted men for service in the ambulance corps of such army corps, upon the following basis, viz.: one captain, who shall be commandant of said ambulance corps; one first lieutenant for each division in such army corps; one second lieutenant for each brigade in such army corps; one sergeant for each regiment in such army corps; three privates for each ambulance, and one private for each wagon; and the officers and non-commissioned officers of the ambulance corps shall be mounted. *Provided*, That the officers, non-commissioned officers, and privates so detailed for each army corps shall be examined by a board of medical officers of such army corps as to their fitness for such duty; and that such as are found to be not qualified shall be rejected, and others detailed in their stead.—Sec. 2, March 11, 1864, chap. 27.

298. There shall be allowed and furnished to each army corps two-horse ambulances, upon the following basis, to wit: three to each regiment of infantry of five hundred men or more; two to each regiment of infantry of more than two hundred and less than five hundred men or more; and one to each regiment of infantry of less than two hundred men; two to each regiment of cavalry of five hundred men or more; and one to each regiment of cavalry of less than five hundred men; one to each battery of artillery, to which battery of artillery it shall be permanently attached; to the headquarters of each army corps two such ambulances; and to each division train of ambulances two army wagons; and ambulances shall be allowed and furnished to division brigades and commands not attached to any army corps, upon the same basis; and each ambulance shall be provided with such number of stretchers and other appliances as shall be prescribed by the surgeon-general. *Provided*, That the ambulances and wagons herein mentioned shall be furnished, so far as practicable, from the ambulances and wagons now in the service.—Sec. 3, *ibid.*

299. Horse- and mule-litters may be adopted or authorized by the secretary of war, in lieu of ambulances, when judged necessary, under such rules and regulations as may be prescribed by the medical director of each army corps.—Sec. 4, *ibid.*

300. The captain shall be the commander of all the ambulances, medicine, and other wagons in the corps, under the immediate direction of the medical director, or chief medical officer of the army corps to which the ambulance corps belongs. He shall pay special attention to the condition of the ambulances, wagons, horses, mules, harness, and other fixtures appertaining thereto, and see that they are at all times in readiness for service; that the officers and men of the ambulance corps are properly instructed in their duties, and that their duties are performed, and that the regulations which may be prescribed by the secretary of war, or the surgeon-general, for the government of the ambulance corps are strictly observed by those under his command. It shall be his duty to institute a drill in his corps, instructing his men in the most easy and expeditious manner of moving the sick and wounded, and to require in all cases that the sick and wounded shall be treated with gentleness and care, and that the ambulances and wagons are at all times provided with attendants, drivers, horses, mules, and whatever may be necessary for their efficiency; and it shall be his duty also to see that the ambulances are not used for any other purpose than that for which they are designed and ordered. It shall be the duty of the medical director, or chief medical officer of the army corps, previous to a march, and previous to and in time of action, or whenever it may be necessary to use the ambulances, to issue the proper orders to the captain for the distribution and management of the same, for collecting the sick and wounded, and conveying them to their destination. And it shall be the duty of the captain faithfully and diligently to execute such orders; and the officers of the ambulance corps, including the medical director, shall make such reports, from time to time, as may be required by the secretary of war, the surgeon-general, the medical director of the army, or the commanding officer of the army corps in which they may be serving; and all reports to higher authority than the commanding officer of the army corps shall be transmitted through the medical director of the army to which such army corps belongs. —Sec. 5, March 11, 1864, chap. 27.

301. The first lieutenant assigned to the ambulance corps for a division shall have complete control, under the captain of his corps and the medical director of the army corps, of all the ambulances,

medicine, and other wagons, horses, mules, and men in that portion of the ambulance corps. He shall be the acting assistant quartermaster for that portion of the ambulance corps, and will receipt for and be responsible for all the property belonging to it, and be held responsible for any deficiency in anything appertaining thereto. He shall have a traveling cavalry forge, a blacksmith and a saddler, who shall be under his orders, to enable him to keep his train in order. He shall have authority to draw supplies from the depot quartermaster, upon requisitions approved by the captain of his corps, the medical director, and the commander of the army corps to which he is attached. It shall be his duty to exercise a constant supervision over his train in every particular, and keep it at all times ready for service.—Sec. 6, *ibid.*

302. The second lieutenant shall have command of the portion of the ambulance corps for a brigade, and shall be under the immediate orders of the first lieutenant, and he shall exercise a careful supervision over the sergeants and privates assigned to the portion of the ambulance corps for his brigade; and it shall be the duty of the sergeants to conduct the drills and inspections of the ambulances under his orders, of their respective regiments.—Sec. 7, March 11, 1864, chap. 27.

303. The ambulances in the armies of the United States shall be used only for the transportation of the sick and wounded, and, in urgent cases only, for medical supplies; and all persons shall be prohibited from using them, or requiring them to be used for any other purpose. It shall be the duty of the officers of the ambulance corps to report to the commander of the army corps any violation of the provisions of this section, or any attempt to violate the same. And any officer who shall use an ambulance, or require it to be used, for any other purpose than as provided in this section, shall, for the first offense, be publicly reprimanded by the commander of the army corps in which he may be serving, and for the second offense shall be dismissed from the service.—Sec. 8, *ibid.*

304. No person except the proper medical officers, or the officers, non-commissioned officers, and privates of the ambulance corps, or such persons as may be specially assigned, by competent military authority to duty with the ambulance corps for the occasion, shall be permitted to take or accompany sick or wounded men[12] to the rear, either on the march or upon the field of battle.—Sec. 9, *ibid.*

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[12] The penalty for quitting the ranks, without urgent necessity, or without permission from proper authority, is discretionary with the court. See Chap. xxiii., ¶ 692.

305. The officers, non-commissioned officers, and privates of the ambulance corps shall be designated by such uniform or in such manner as the secretary of war shall deem proper. *Provided*, That officers and men may be relieved from service in said corps and others detailed to the same, subject to the examination provided in the second section of this act, in the discretion of the commanders of the armies in which they may be serving.—Sec. 10, *ibid.*

306. It shall be the duty of the commander of the army corps to transmit to the adjutant-general the names and rank of all officers and enlisted men detailed for service in the ambulance corps of such army corps, stating the organizations from which they may have been so detailed; and if such officers and men belong to volunteer organizations, the adjutant-general shall thereupon notify the governors of the several States in which such organizations were raised of their detail for such service; and it shall be the duty of the commander of the army corps to report to the adjutant-general from time to time the conduct and behavior of the officers and enlisted men of the ambulance corps, and the adjutant-general shall forward copies of such reports, so far as they relate to officers and enlisted men of volunteer organizations, to the governors of the States in which such organizations were raised.—Sec. 11, *ibid.*

307. Nothing in this act shall be construed to diminish or impair the rightful authority of the commanders of armies, army corps, or separate detachments, over the medical and other officers and the non-commissioned officers and privates of their respective commands.—Sec. 12, March 11, 1864, chap. 27.

FREEDMEN'S HOSPITAL.

308. After June 30, 1872, the Freedmen's Hospital in the District of Columbia shall, until otherwise ordered by Congress, be continued[13] under the supervision and control of the secretary of war,[14] who shall make all estimates, and pass all accounts, and be accountable to the treasury of the United States for all expenditures.—Sec. 1, June 10, 1872, chap. 415.

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[13] But by a proviso of this act no part of the appropriation (made for the support of this hospital in the year ending June 30, 1873) shall be used in the support of, or to pay any expenses on account of, any persons hereafter to be admitted to said hospital and asylum, unless persons removed thither from *some other government hospital.*

[14] "After June 30, 1872, all business relating in any way to the "Freedmen's Hospital and Asylum at Washington, D. C.," with all the accounts connected therewith, of whatever character or date, be conducted through the surgeon-general of the army, to whom all the records, papers, funds, and property will be turned over by the 1st of July proximo [1872]."—G. O. No. 55, A.-G. O., 1872.

CHAPTER XI.

THE PAY DEPARTMENT, AND PAY OF THE ARMY.

ORGANIZATION AND DUTIES OF THE DEPARTMENT.

310. THE pay department[1] of the army shall hereafter consist of one paymaster-general, with the rank, pay, and emoluments of a brigadier-general;[1a] two assistant paymaster-generals, with the rank, pay, and emoluments of colonels of cavalry; two deputy paymaster-generals, with the rank, pay, and emoluments of lieutenant-colonels of cavalry; and sixty paymasters, with the rank, pay, and emoluments of majors of cavalry,[1b] to be selected from persons who have served as additional paymasters.—Sec. 18, July 28, 1866, chap. 299.

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[1] THE PAY DEPARTMENT, by that name, was first organized under the act of April 24, 1816 (chap. 69); but a paymaster for the army, "to reside near the headquarters of the troops of the United States," and "to receive from the treasurer all the moneys which shall be intrusted to him for the purpose of paying the pay, and arrears of pay, subsistence or forage, due to the troops of the United States," had been authorized by the act of May 8, 1792. This officer exercised supervision over the regimental and battalion paymasters, and in 1796 he was by law designated as paymaster-general. Other paymasters and assistants having been added to the army in 1802, the corps of officers thus formed has since that time been designated as a department, and is so recognized in the act of 1816.

(*a.*) The *paymaster-general.*—But the act of June 4, 1872 (chap. 286), enacted "That the 6th sec. of the act of March 3, 1869 [¶ 538], making appropriations for the support of the army, is so far modified, that the President is hereby authorized to appoint a paymaster-general, with the rank, pay, and emoluments of a colonel, said appointment to date from the time the appointee assumed the duties of the office, to fill the vacancy now existing." Under the act cited in ¶ 536, he is to be appointed by selection from the department, and provision is made for supplying temporary vacancy in his office, by acts cited in ¶ ¶ 9–12. See also first paragraph of this note.

(*b.*) *Appointments and promotions.*—And, under the act of April 24, 1816, all officers of this department are to be "submitted to the Senate for their confirmation, in the same manner as the officers of the army." See ¶ ¶ 36, 312, 317, and clause *c* of this note.

So much of above section (¶ 310) as requires paymasters to be appointed from those who have served as additional paymasters had reference undoubtedly to the first appointments, to fill the original vacancies *created by the act.* Subsequent vacancies in the lowest grade are to be filled either from the line of the army, or from civil life. See ¶ 532. But all appointments and promotions (except as provided for in clause *a* of this note) have been suspended. See ¶ 538.

(*c.*) *Status of the department.*—Under the act of May 15, 1820, paymasters of the army were to be "appointed for the term of four years, but shall be removable from office at pleasure," and it was held by attorney-general Wirt (April 29, 1826) that this act, embracing also the paymaster-general, was not modified by the act of March 2,

311. When volunteers or militia are called into the service of the United States, so that the paymasters authorized by law shall not be deemed sufficient to enable them to pay the troops with proper punctuality, it shall be lawful for the President to appoint as many additional paymasters as he shall deem necessary, who shall perform the same duty, give the same bond, be subject to the same liability, and receive the same pay and emoluments as are now provided for paymasters of the army. *Provided however*, That the number so appointed shall not exceed one for every two regiments of militia or volunteers. *And provided also*, That the persons so appointed shall continue in service only so long as their services are required to pay militia and volunteers.—Sec. 25, July 5, 1838, chap. 162.

312. All paymasters hereafter to be appointed by the President for the volunteer service of the United States shall be nominated to the Senate for confirmation to such office.—Sec. 14, March 3, 1847, chap. 61.

313. That whenever suitable non-commissioned officers or privates cannot be procured from the line of the army to serve as paymasters' clerks,[2] paymasters be and hereby are authorized and empowered by and with approbation of the secretary of war to employ citizens to perform that duty.—Sec. 20, July 5, 1838, chap. 162.

314. From and after the passage of this act the pay of clerks of paymasters in the army of the United States shall be twelve hundred dollars per annum, without rations.—Sec. 10, June 20, 1864, chap. 145.

315. The paymaster [general] shall perform the duties of his office agreeable to the direction of the President of the United States, for the time being.—Sec. 16, March 16, 1802, chap. 9.

316. The deputy paymaster-generals shall, in addition to paying troops, superintend the payment of armies in the field.—Sec. 12, March 3, 1847, chap. 61.

1821. By act of March 2, 1849, however, the officers of this department were placed upon the same footing as to tenure of office as other disbursing officers of the army. The Supreme Court has held that the act of 1821, reorganizing the army, did not determine the status of the officers of this department as being of the *general staff* (see Chap. xix., note 2 *a*), but the act of 1847 (¶ 317) has certainly determined that this is a staff department; and its officers, except those retained for duty in the paymaster-general's office, are, like other staff officers, assigned to military departments or districts, and are subject to the orders of the commanders thereof. See G. O. No. 37, A.-G. O., 1869, and No. 15, *ibid.*, 1871.

[2] Paymasters must nominate them for approval of the secretary of war,—giving name, age, and residence, and state circumstances justifying their appointment. They will not be appointed if under twenty years of age.—Paymaster's Manual (1871), ¶ 72.

317. All officers of the pay department shall have rank corresponding with the rank to which their pay and allowances are assimilated. *Provided,* That paymasters shall not in virtue of such rank be entitled to command in the line, or other staff departments in the army. *Provided also,* That the right to command in the pay department, between officers having the same rank, shall be in favor of the oldest in service in the department without regard to the date of commission under which they may be acting at the time.[3]—Sec. 13, March 3, 1847, chap. 61.

318. It shall be the duty of all disbursing officers of the pay department to renew their bonds, or furnish additional security, at least once in four years, or as much oftener as the President may direct.[4]—March 2, 1849, chap. 162.

319. It shall be the duty of the regimental and battalion paymasters to pay all the regular troops.[4a]—Sec. 4, April 24, 1816, chap. 69.

320. It shall be the duty of the district paymasters of the army of the United States, in addition to the payments required to be made by them to the regular troops, to make payment to all other troops in the service of the United States, whenever required thereto by order of the President.[4b]—Sec. 4, July 14, 1832, chap. 224.

PAY OF COMMISSIONED OFFICERS.

321. The pay of the officers of the army shall be as follows:[5] the pay of the general shall be thirteen thousand five hundred dollars a

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[3] This last proviso is obsolete,—being sequent upon act of May 15, 1820, which required a reappointment every four years. Rank in their respective grades must now be determined by date of commission or appointment.

[4] Under the provisions in Chap. iii., ¶ ¶ 36, 37, an assistant paymaster-general gives bonds in $50,000; a deputy paymaster-general in $25,000, and a paymaster in $20,000.

(*a.*) Regimental and battalion paymasters discontinued in reorganization of 1821, but this duty devolves upon all officers of the department authorized in lieu thereof.

(*b.*) "District paymasters" by that name had been discontinued, but this undoubtedly referred to the paymasters of the army, then as now usually assigned to military geographical districts.

[5] The acts establishing the pay of the officers and cadets of the Military Academy are recited in Chap. iv., and are referred to in the TABLES OF PAY that close this chapter.

(*a.*) PAY COMMENCES.—An officer's pay commences from the acceptance of his appointment, or from the date of his promotion.—Army Regulations.

Acceptance of an appointment may be indicated by letter, or by entering upon the duties of the office.—Second Comptroller, § § 1099, 1103.

"A staff appointment conferred on an officer in the line of the army is not a promotion, but an original appointment; its pay will, therefore, commence from the date of the officer's acceptance" (*ibid.*, § 1101), and under a ruling of the same officer, a promotion from the ranks is held to be an "appointment" (§ 1111). The Supreme Court has held, however, that the salary of an officer begins from the date of his appointment, and the Senate has declared that "every *promotion* is a new appointment." See Chap. xix., note 1 *a*.

year; the pay of the lieutenant-general shall be eleven thousand dollars a year; the pay of major-general shall be seven thousand five hundred dollars; the pay of brigadier-general shall be five thousand five hundred dollars; the pay of colonel shall be three thousand five hundred dollars; the pay of lieutenant-colonel shall be three thousand dollars; the pay of major shall be two thousand five hundred dollars; the pay of captain, mounted, shall be two thousand dollars; the pay of captain, not mounted, shall be eighteen hundred dollars; the pay of adjutant shall be eighteen hundred dollars; the pay of regimental quartermaster shall be eighteen hundred dollars; the pay of first lieutenant, mounted, shall be sixteen hundred dollars; the pay of first lieutenant, not mounted, shall be fifteen hundred dollars; the pay of second lieutenant, mounted, shall be fifteen hundred dollars; the pay of second lieutenant, not mounted, shall be fourteen hundred dollars; the pay of chaplain shall be fifteen hundred dollars; the pay of aide-de-camp[6] to major-general shall be two

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"*Promoted* officers are paid in the lower grade up to the day the higher appointment takes effect, and thereafter, including the day their promotion takes place, in the higher grade."—Second Comptroller, § 1093.

(*b.*) PAY TERMINATES.—An officer *on leave*, who resigns, will be paid to the date given in the acceptance of his resignation. An officer *on duty*, who resigns, will be paid to the date at which he received notice of the acceptance of his resignation, provided he continued on duty till that time; otherwise, to the date when he was relieved from duty. An officer *on leave*, when he is dropped or dismissed from the military service, will be paid to the date inclusive of the order dropping or dismissing him, provided no other time be specified in the order as the date when his pay should cease, or when he ceased to be an officer, and, in such case, to the date so specified. An officer *on duty* or in hospital, when he is dropped or dismissed from the military service, will be paid to the date at which the order dropping or dismissing him was received at his post or hospital, if no other time be specified in the order as the date when he ceased to be an officer, and, in such case, to the date so specified. An officer dismissed by sentence of court-martial will be paid to the date when the order approving the sentence was received at the post where the officer was, if no other time be specified in the sentence, or in the order promulgating it, as the termination of his service and pay.—G. O. No. 103, A.-G. O., 1864.

The right of an officer to his pay, up to *the time of his actual discharge* from the service, cannot be defeated by an order discharging him as of a prior date.—*Allstaedt* v. *United States*. 3 Nott & Huntington, 385.

The right of an officer, restored to the service, to pay for the period during which he has stood as dismissed has been passed upon by the court of claims. See Chap. xx., note 6 *a*.

(*c.*) FINAL PAYMENTS.—Certificates of non-indebtedness, from accounting officers, required, before final payments to officers resigning, wholly retired, or dismissed.—Paymaster's Manual (1871), ¶ ¶ 180, 203.

An officer wholly retired with one year's pay, etc., to receive the whole amount in one payment.—Second Comptroller, May 20, 1864.

[6] AIDES-DE-CAMP to the general paid as colonels: Chap. vi., ¶ 196. Those of the lieutenant-general, and his SECRETARY, are paid as lieutenant-colonels: *ibid.*, ¶ 198. Aides-de-camp to the major- and brigadier-generals get the prescribed extra pay, in addition to the mounted pay of their grade (see note 11), but the allowance is not included in computing the service increase. See notes 1 and 2, Pay Table, Army Register, 1871.

(*a.*) There is no interdiction in any law to the employment and payment of the aides of a brevet general officer who is on duty according to his brevet rank.—Second Comptroller (April 4, 1867), § 1786.

hundred dollars per annum in addition to pay of his rank; the pay of aide-de-camp to brigadier-general shall be one hundred and fifty dollars per annum in addition to pay of his rank; the pay of acting assistant commissary[7] shall be one hundred dollars in addition to pay of his rank; and there shall be allowed and paid to each and every commissioned officer below the rank of brigadier-general, including chaplains and others having assimilated rank or pay, ten per cent. of their current yearly pay for each and every term of five years of service.[8] *Provided,* That the total amount of such increase for length of service shall in no case exceed forty per cent. on the yearly pay of his grade as established by this act. *And provided further,* That the pay of a colonel shall in no case exceed four thousand five hundred dollars per annum, nor the pay of a lieutenant-colonel four thousand dollars per annum; and these sums shall be in full of all commutation of quarters, fuel, forage, servants' wages, and clothing, longevity rations, and all allowances of every name and nature whatever,[9] and shall be paid monthly by the paymaster. . . . Officers retired from active service shall receive seventy-five per cent. of the pay of the rank upon which they are retired.—Sec. 24, July 15, 1870, chap. 294.

322. Officers of the army and of volunteers assigned to duty which requires them to be mounted, shall, during the time they are employed on such duty, receive the pay, emoluments, and allowances of cavalry officers of the same grade respectively.[10]—Sec. 1, July 17, 1862, chap. 200.

(*b.*) The aides of brevet general officers (on duty as such), whose selection has received the special sanction of the war department, so announced officially, are entitled to the additional pay, etc.—Paymaster-general, March 14, 1867.

(*c.*) An aide-de-camp accompanying his general on leave of absence must be governed by the same conditions as to reduction of pay as the general.—Paymaster-general, April 28, 1870.

[7] No officer to receive pay for two staff appointments for the same period. A regimental quartermaster is, therefore, barred by law from receiving the additional pay of acting commissary of subsistence.—Adjutant-general, June 21, 1871. See also ¶ 338.

[8] Rule for determining length of service of officers appointed from the volunteers will be found in Chap. xviii., ¶ 519. Paymasters to require such officers to certify on pay account the regiment or corps in which such service accrued, with date of muster into the same.—Circular No. 62, P.-G. O., 1868.

(*a.*) An officer dismissed the service, and restored, not entitled to include time between the dates of dismissal and restoration in computing for the "service increase."—Paymaster-general, May 29, 1868. But see Chap. xx., note 6 *a.*

[9] Subsequent clause in this proviso, however, continues allowances of fuel, forage and quarters, *in kind* (Chap. viii., ¶ 247), and makes provision for mileage. See ¶ 324.

[10] This section is perhaps supplied by acts cited in ¶ ¶ 321, 323. "In all cases of this kind, the certificate of the commanding officer of the department to the fact that the claimant's duties required him to be mounted shall be sufficient to entitle him to cavalry pay, the claimant himself certifying that he was not furnished with a public horse during the time."—Adjutant-general, July 15, 1869.

323. The pay and emoluments of all field and other mounted officers[11] shall hereafter be the same as is now provided by law for cavalry officers of like grades.—Sec. 1, March 2, 1867, chap. 144.

MILEAGE.

324. . . . . When any officer shall travel under orders, and shall not be furnished transportation by the quartermaster's department, or on a conveyance belonging to or chartered by the United States, he shall be allowed ten cents per mile,[12] and no more,

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[11] "*Aides-de-camp* are clearly embraced in the terms of the 1st section of the act of March 2d, 1867, 'other mounted officers,' and are entitled to the pay of cavalry officers in addition to the special allowance as aides."—Paymaster-general, May 14, 1867.

Acting signal officers are, when detailed by the war department and not mounted at expense of the government, entitled to the cavalry pay of their grades.—Paymaster's Manual (1871), ¶ 205.

The quartermaster at the Military Academy is, under the laws cited in ¶ ¶ 322, 323, entitled to the mounted pay of his grade, but there is no law giving that officer the grade of "regimental quartermaster."—Paymaster-general, November 27, 1872.

[12] MILEAGE.—"The following decision, made on a reconsideration of the subject by the second comptroller of the treasury, and concurred in by the secretary of war, is announced for the government of the army:

"Under the act of July 15, 1870, giving 'ten cents per mile and no more' to officers traveling under orders, the discretion to elect whether to receive mileage or actual expenses of transportation no longer exists. In no case can any payment for traveling expenses be made exceeding ten cents per mile."

"Under the same act, the provision that the pay of officers respectively shall be in full 'of all allowances of every name and nature whatever,' the former per diem paid to officers serving on courts-martial, etc., must be discontinued."—G. O. No. 116, A.-G. O., 1870.

(*a.*) "The second proviso to sec. 24 of the act gives a mileage in money to an officer traveling under orders and not furnished with transportation by the quartermaster's department, or on a conveyance belonging to or chartered by the United States, and by necessary implication authorizes transportation in kind, but for nobody except the officer himself. If this proviso continued in force existing laws and regulations on the subject to which it refers, I should hold it to include the servants as well as officers; but no words of such import are found in it, and, therefore, the very comprehensive declaration in the earlier part of the act, that these sums shall be in full of all allowances of every name and nature whatever, is left without any modification in relation to transportation for servants."—Attorney-general. See G. O. No. 52, A.-G. O., 1871.

Officers traveling on duty with troops are not entitled to mileage.—G. O. No. 3, A.-G. O., 1872; and the acts of May 18, and June 6, 1872, appropriate to the pay department "for the allowance to the officers of the army for transportation of themselves and their baggage, when traveling on duty, *without troops, escort, or supplies.*"

(*b.*) The law (¶ 324) must be construed strictly. The "nearest post route" shall govern in all cases, by whatever route the officer may choose to travel, unless such "nearest route" shall from temporary causes and for the time be impossible.—Paymaster's Manual (1871), ¶ 126.

(*c.*) "The distance book (G. O. No. 98, of 1870) has been furnished to this department as the official guide for determining distances upon which to pay mileage and traveling allowances. These, in the main, are regarded as correct, and will be followed, unless the paymaster has positive knowledge that any distance laid down therein is error. In such case, by authority of the law (July 15, 1870) he can depart from the order and pay by what he knows to be the true distance, as by the "shortest post-routes.' "—Paymaster-general, August 10, 1871.

(*d.*) Officers ordered to new stations, while on leave of absence, are entitled to mileage only for that distance which is in excess of that which would be traveled if they had returned to their former stations.—Second Comptroller, § 2137.

(*e.*) An officer while in the field, ordered to a new station, is, if transportation in

for each mile actually by him traveled under such order, distances to be calculated according to the nearest post routes; and no payment shall be made to any officer except by a paymaster of the army.—Sec. 24, July 15, 1870, chap. 294.

325. Mileage shall not be allowed, when the officer has been transferred or relieved at his own request.—Sec. 1, March 3, 1859, chap. 83.

PAY OF ENLISTED MEN.

326. From and after the 1st day of July, 1872, the monthly pay of the following enlisted men of the army shall, during their first

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kind has not been furnished him, entitled to mileage while journeying back to his old station for his baggage, etc.—Paymaster's Manual (1871), ¶ 135.

(*f.*) An officer summoned by the civil authorities to attend as a witness before a civil court, and so ordered by his military commander, is not entitled to mileage, or other expense account payable by the pay department.—Paymaster-general, February 24, 1871. See ¶ ¶ 339, 341.

(*g.*) When an officer travels under verbal orders, they must be confirmed by written orders in order to pay his account.—Second Comptroller, § § 2114, 2151.

(*h.*) Acting assistant surgeons entitled to mileage from place where contract is made to first station, provided transportation in kind has not been asked for by the surgeon-general, or received by the applicant. In change of station they are to receive the usual mileage.—Paymaster's Manual (1871), ¶ 139. But when summoned as witnesses before courts-martial they are entitled only to their extra expenses. See note 20 *b*.

(*i.*) Officers detailed to colleges or universities under the act of 1866 (¶ 929) are not entitled to mileage for journey to their stations.—Secretary of War, by adjutant-general, June 7, 1872.

(*k.*) There is nothing in the law of July 15, 1870 (¶ 324), which now governs in the matter of allowances for transportation, which forbids this department from giving, nor the officer from receiving, transportation in kind for part of a journey, for the other portion of which he draws mileage.—Quartermaster-general, June 7, 1872.

(*l.*) "The transportation of officers employed on civil works is chargeable to the appropriations for the works on which they are respectively engaged."—Second Comptroller, § 2077.

(*m.*) "Travel pay, etc. (mileage), is not always due when the journey is performed under an order, but it must be also on duty, and the case of an officer ordered to attend his own trial, and found guilty, is not included in the provisions of law or regulations allowing it."—*Ibid.*, § 2082 [Query].

(*n.*) "A private soldier who is appointed an officer may receive transportation or mileage for travel in obedience to his first order received as an officer. The regulation requiring *citizens* receiving military appointments to join their stations without expense to the government does not apply to him."—*Ibid.*, 2127.

(*o.*) "In cases where an examination is required before appointment, the war department considers the direction for the officer to appear before the board as his first order."—*Ibid.*, 2133.

(*p.*) RECRUITING SERVICE.—"Officers detailed on recruiting service will be paid mileage upon joining rendezvous, under orders from the superintendent, when returning to depot after being relieved from charge of rendezvous, upon returning to their proper stations after conducting recruits from rendezvous to depot or from depot to regiments.

"For all other journeys on recruiting service, such as visiting and returning from branch rendezvous, only actual personal transportation will be allowed, which will be obtained from the quartermaster's department.

"The items of actual transportation to which an officer so traveling is entitled are: a first-class ticket over the route, a sleeping-car ticket, and a ticket to secure passage for himself through cities where such transportation is not included in his trip ticket. No porterage or expenses for board are allowed.—G. O. No. 110, A.-G. O., 1872.

term of enlistment, be as follows, with the contingent additions thereto hereinafter provided:[13] sergeant-majors of cavalry, artillery, and infantry, twenty-three dollars; quartermaster sergeants of cavalry, artillery, and infantry, twenty-three dollars; chief trumpeters of cavalry, twenty-two dollars; principal musicians of artillery and infantry, twenty-two dollars; saddler sergeants of cavalry, twenty-two dollars; first sergeants of cavalry, artillery, and infantry, twenty-two dollars; sergeants of cavalry, artillery, and infantry, seventeen dollars; corporals of cavalry and light artillery, fifteen dollars; corporals of artillery and infantry, fifteen dollars; saddlers of cavalry, fifteen dollars; blacksmiths and farriers of cavalry, fifteen dollars; trumpeters of cavalry, thirteen dollars; musicians of artillery and infantry, thirteen dollars; privates of cavalry, artillery, and infantry, thirteen dollars; hospital stewards, first class, thirty dollars; hospital stewards, second class, twenty-two dollars; hospital stewards, third-class, twenty dollars; ordnance sergeants of posts, thirty-four dollars; sergeant-majors of engineers, thirty-six dollars; quartermaster sergeants of engineers, thirty-six dollars; sergeants

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[13] PAY OF ENLISTED MEN.—Although ¶ ¶ 326, 332, 333, 334 are sections of an "act to establish the pay of the enlisted men of the army," they make no provision for the pay of any grades or classes not specified in the 1st section (¶ 326) of the act, and in determining the pay of artificers, the Academy band, chief musicians, company quartermaster sergeants, Indian scouts, veterinary surgeons (enlisted), and wagoners, recourse must be had to former laws.

(*a.*) ARTIFICERS have been authorized for the artillery ever since the reorganization of 1821, and were added to the infantry companies in 1866 (see ¶ 462). Under sec. 16, act of July 5, 1838, the monthly pay of an artificer was established at eleven dollars, and by acts of August 4, 1854, and March 3, 1857, the rate was raised to fifteen dollars. From June 20, 1864, till June 30, 1871, the pay of an artificer was (under the act of June 20, 1864, et sequentes) eighteen dollars. Since June 30, 1871, the rate is again fifteen dollars per month.

(*b.*) THE ACADEMY BAND.—The monthly pay of this band is determined under the acts of July 29, 1861, July 28, 1866, and March 3, 1869 (see Chap. iv., ¶ ¶ 172, 173, and note 18), in connection with the act of 1872, in ¶ 326, as follows: musicians of the first class, thirty-four dollars; of the second class, twenty dollars; of the third class, seventeen dollars.

The *band leader* and *the teacher of music* receive (each) seventy-five dollars per month under rulings of the war department. See Chap. iv., note 18.

(*c.*) THE CHIEF MUSICIANS—one to each regiment of artillery, cavalry, and infantry, ¶ 328—are not entitled to the service increase, or additional pay for re-enlistment. They must not be confounded with the chief trumpeters of cavalry (¶ ¶ 452, 454, 326), or the principal musicians of artillery and infantry: ¶ ¶ 459, 462, 326.

(*d.*) QUARTERMASTER SERGEANTS—COMPANY—are not allowed, under existing orders, to artillery batteries not mounted, or in the infantry organization.—Adjutant-general, October 18, 1870. No special rate of pay having been prescribed for this grade, these sergeants have been paid as duty sergeants. The grade in dismounted batteries and in the infantry companies is practically abolished under the act cited in ¶ 504.

(*e.*) INDIAN SCOUTS are paid by the pay department, receiving the pay and allowances of cavalry soldiers. ¶ See 464, and note 26, Chap. xv.

(*f.*) VETERINARY SURGEONS.—Each cavalry regiment entitled to one (enlisted) at seventy-five dollars per month; and an additional one (civilian) to each of the new regiments (the 7th, 8th, 9th, and 10th) receives one hundred dollars per month. See ¶ ¶ 453, 454, and note 11, Chap. xv.

of engineers and ordnance, thirty-four dollars; corporals of engineers and ordnance, twenty dollars; musicians of engineers, thirteen dollars; privates (first class) of engineers and ordnance, seventeen dollars; privates (second class) of engineers and ordnance, thirteen dollars.—Sec. 1, May 15, 1872, chap. 160.

327. The wagoners[13g] and saddlers shall receive the pay and allowances of corporals of cavalry; [and] the regimental commis-

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(*g.*) WAGONERS.—One allowed to each troop of cavalry (¶ 452), each battery of artillery (¶ 458), and each company of infantry (¶ 462); and under the act of July 22, 1861, ¶ 327, they are to receive the pay and allowances of corporals of cavalry. Corporals of cavalry were, at the date of this act (and under the provisions of the acts of December 12, 1812, March 2, 1833, and August 4, 1854), receiving fourteen dollars per month, and that rate is continued to this class of enlisted men under a ruling of the paymaster-general.—Memoranda, P.-G. O., July 1, 1872.

(*h.*) NURSES AND COOKS.—"Under the provisions of sec. 7, act approved July 13, 1866 [¶ 248], enlisted men employed continuously in hospitals as cooks and nurses, under existing regulations, for a period exceeding ten days, will be paid twenty cents per day as extra-duty pay by the paymaster on the hospital muster-rolls, when the men so employed are properly mustered as entitled to it."—S. O. No. 94, A.-G. O., 1867.

Female nurses, allowed only in general or permanent hospitals, receive forty cents per day. See Chap. x., ¶ 289, and note 10.

Extra-duty pay allowed to engineer and ordnance soldiers detailed as nurses. In all cases the claimant must be mustered specifically as COOK or NURSE, not in general terms as "attendant."—Paymaster's Manual (1871), ¶ 108.

Non-commissioned officers should not be detailed, and are not entitled to the extra pay.—Adjutant-general, March 18, 1863.

Hospital attendants must be mustered as *cooks* or *nurses*. See Chap. x., note 10 *d*.

(*i.*) DURATION OF PAY.—Soldiers rendering little or no service on the day of enlistment or discharge, payment for both by the government is unjust. The day of enlistment, therefore, will hereafter be allowed, and the day of discharge excluded.—Second Comptroller, March 1, 1864.

When a soldier without fault on his part is from necessity kept in the service beyond his term of enlistment, he is entitled to pay to the date of his actual discharge.—Paymaster's Manual (1871), ¶ 195. But no pay allowed to men serving beyond expiration of enlistment under sentence of imprisonment.—Adjutant-general, September 8, 1864.

(*k.*) DEDUCTIONS FROM PAY:

Soldiers' Home.—Twelve and a half cents per month to be deducted from the pay of all enlisted men of the regular army, and passed by the paymaster-general to the credit of this institution. See ¶ ¶ 598, 604.

Tobacco.—Amounts due for, to be deducted on each muster-roll. See ¶ 266.

Laundresses.—So much of the pay due a soldier as is required to satisfy the certified claims of a laundress cannot be diverted from that object by sentence of a court-martial. Its sentences should apply only to the balance due the soldier after satisfying these claims, and to his future pay.—Second Comptroller, September 20, 1843. Laundress claims against deserters to be paid out of amount due at date of desertion.—*Ibid.*, § 705. But if a soldier be discharged for his own misconduct, no part of his "retained pay" can be paid to them.—*Ibid.*, § 1377. See note 24 *a*, and Chap. xxxiii., note 15 *a*.

The transportation of laundresses' children to be paid for by the quartermaster's department, but the amounts must be deducted from the pay of the fathers of the children.—Adjutant-general, July 16, 1872.

Clothing.—Amounts due for clothing overdrawn to be settled on muster-rolls June 30 and December 31 of each year, and on final statement when discharged. See ¶ ¶ 348, 349, 350.

Public property lost, damaged, etc.—For stoppages to reimburse government for, see ¶ 53.

Reparation to individuals.—For the manner of making, under 32d Article of War, see ¶ 693, and note thereto.

See also "*forfeitures for desertion*" (Chap. xxiii., note 15 *a*), and "*confinement by civil authority*," note 287 *c*, this chapter.

sary sergeant shall receive the pay and allowances of regimental sergeant-major.[14]—Sec. 8, July 22, 1861, chap. 9.

328. There shall be enlisted in each regiment a chief musician, who shall be instructor of music, with a salary of sixty dollars a month, and the allowances of a quartermaster sergeant.—Sec. 5, March 3, 1869, chap. 124.

ADDITIONAL PAY TO ENLISTED MEN.

329. Every soldier who, having been honorably discharged from the service of the United States, shall, within one month thereafter, re-enlist, shall be entitled to two dollars per month, in addition to the ordinary pay of his grade, for the first period of five years after the expiration of his previous enlistment, and a further sum of one dollar per month for each successive period of five years, so long as he shall remain continuously in the army; and soldiers now in the army who have served one or more enlistments, and been honorably discharged, shall be entitled to the benefits herein provided for a second enlistment.[15]—Sec. 2, August 4, 1854, chap. 247.

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[14] Regimental commissary sergeants abolished. See ¶ 456.

[15] ADDITIONAL PAY FOR RE-ENLISTMENT.—Paragraphs 329, 332, 333, 334 must be considered in connection with each other.

(*a.*) The additional pay allowed only for each completed term of *five years'* continuous service, in which may be reckoned service either in the marine corps, or in the volunteers, when in the service of the United States.—Circulars, P.-G. O., May 13, 1864, and February 24, 1866. Second Comptroller, §§ 1914, 1915.

(*b.*) This additional pay not interrupted by desertion, if the soldier be restored to duty without trial, or if tried and not expressly forfeited by the sentence, and the time lost be made good.—Paymaster-general, July 9, 1868. But see note 17 *c*, *d*, and *n*.

(*c.*) A "*re-enlistment* is one constituting continuous service, and must be dated within thirty days from discharge on expiration of service."—Adjutant-general, February 10, 1871.

(*d.*) Enlisted men enumerated in the act (¶ ¶ 326, 332, 333, 334), who are serving on the 1st of July, 1872, in their first enlistment, are entitled to the rates of pay prescribed in the 1st and 2d secs. of the act for the particular year in which they are serving.

(*e.*) The provisions of the 3d sec. of the act (¶ 333), giving re-enlisted pay, will be held to apply to the following classes of enlisted men, upon the fulfillment by them of the conditions set forth in the following classification:

Class 1. Those who on July 1, 1872, shall be serving as re-enlisted men "under the provisions of the act of August 4, 1854" (¶ 329), which provisions require re-enlistment within one month after honorable discharge at expiration of previous enlistment.

Class 2. Those who at any time subsequent to July 1, 1872, shall re-enlist under the said provisions of the act of August 4, 1854.

Class 3. Those men in service July 1, 1872, or any who may enlist after that date, who have once re-enlisted under the act of August 4, 1854, but are precluded from the benefits of that act by having allowed a longer period than one month to elapse between subsequent enlistments.

Men of classes 1 and 2 will be indicated upon the muster-roll by the remarks, "two dollars per month for five years' continuous service," "three dollars per month for ten years' continuous service," etc., heretofore employed to secure the additional pay authorized by the act of August 4, 1854.

Men of class 3 will be indicated upon the rolls by the remark, "entitled to re-

330. Soldiers who served in the war with Mexico, and received a certificate of merit for distinguished services, as well those now in the army as those that may hereafter enlist, shall receive the two dollars per month to which that certificate would have entitled them had they remained continuously in the service.[16]—Sec. 3, *ibid.*

331. Non-commissioned officers, who, under the authority of the 17th section of the act approved March 3, 1847 [¶ 552], were recommended for promotion by brevet to the lowest grade of commissioned officer, but did not receive the benefit of that provision, shall be entitled, under the condition recited in the foregoing section, to the additional pay authorized to be given to such privates as received certificates of merit.—Sec. 4, *ibid.*

332. To the rates of pay above established [¶ 326] one dollar per month shall be added for the third year of enlistment, one dollar more per month for the fourth year, and one dollar more per month for the fifth year, making in all three dollars' increase per month for the last year of the first enlistment of each enlisted man named in the 1st section of this act [¶ 326]. But this increase[15] shall be considered as retained pay, and shall not be paid to the soldier until his discharge from the service, and shall be forfeited unless he shall have served honestly and faithfully to the date of discharge. And all former laws concerning retained pay for privates of the army are hereby rescinded.[17]—Sec. 2, May 15, 1872, chap.

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enlisted pay." If recruiting officers and company commanders have not satisfactory evidence to show that they are entitled to this rate of pay, they will apply to the adjutant-general's office for the data needed to decide the question.

Men serving under a second, third, fourth, etc., enlistment, but who were never "re-enlisted" under the provisions of the act of August 4, 1854, will only be entitled to the pay provided in the 1st and 2d secs. (¶ 326, 332) of the act of May 15, 1872.

(*f.*) On the certificate of discharge given to discharged soldiers, company commanders will hereafter note, "This is his first (or second, third, etc.) re-enlistment under the act of 4th August, 1854.—G. O. No. 51, A.-G. O., 1872.

[16] A CERTIFICATE OF MERIT entitles the holder to the two dollars per month additional pay for re-enlistment, irrespective of service in regulars, volunteers, or veteran reserve corps, or of continuous service.—Second Comptroller, July 5, 1866. For sec. 17, March 3, 1847, see Chap. xix., ¶ 552.

[17] RETAINED PAY.—The rate from July 5, 1838, to include August 2, 1861, was one dollar per month. From August 3, 1861, to include July 16, 1862, it was two dollars.—Sec. 10, August 3, 1861. This section having been repealed by sec. 10, July 17, 1862, the rate was again one dollar per month from that date till July 1, 1872. Under the former laws retained pay was withheld only from *privates.*

(*a.*) Retained pay should be computed to date of discharge, and not to date of last payment only.—Paymaster's Manual (1871), ¶ 294.

(*b.*) The law construed as not applicable to engineer and ordnance soldiers.—*Ibid.*, ¶ 295. But see ¶ ¶ 326, 332.

Forfeitures of retained pay:

(*c.*) When a soldier, in consequence of desertion or of absence without leave, has forfeited his pay during the period of unauthorized absence, the forfeiture carries with it the retained pay for the same period.—Circular No. 41, Paymaster-general, 1866.

(*d.*) The sentence, in the case of a deserter, "to forfeit all pay and allowances

333. All the enlisted men enumerated in the 1st section of this act [¶ 326] who have re-enlisted or who shall hereafter re-enlist under the provisions of the act of August 4, 1854 [¶ ¶ 329–331], shall be paid at the rates allowed in the 2d section of this act [¶ 332], to those serving in the fifth year of their first enlistment. *Provided*, That one dollar per month shall be retained[17] from the pay of the re-enlisted men, of whatever grade, named in the 1st section of this act [¶ 326], during the whole period of their re-enlistment, to be paid to the soldier on his discharge, but to be forfeited unless he shall have served honestly and faithfully to the date of discharge.—Sec. 3, *ibid.*

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that are or may become due up to promulgation of sentence," takes away all previously accrued retained pay, *i.e.* from enlistment to date of such promulgation. And this rule would apply to date of discharge, if the sentence of forfeiture should continue so long, notwithstanding the soldier had, by making good lost time, served out his full contract of enlistment. "The compulsory subsequent service of an arrested deserter would not give him a title to retained pay, any more than it would give him a title to ordinary pay accrued and unpaid previous to his desertion."—Paymaster-general, December 20, 1870; Second Comptroller (files), December 15, 1870.

(*e.*) A soldier sentenced by court-martial to forfeit a month's pay does not thereby forfeit his retained pay.—Second Comptroller, § 1371.

(*f.*) A soldier *dishonorably* discharged before expiration of his term of enlistment, *without any cause being assigned*, the paymaster is to withhold the retained pay until the cause of his discharge is ascertained, and refer the case to the paymaster-general.—*Ibid.*, § 1376.

(*g.*) A soldier, having served out the full term of his enlistment, is entitled to "retained pay," notwithstanding the words "honestly and faithfully" are stricken out of his discharge and certificates.—Paymaster's Manual, 1871, ¶ 264. But see ¶ 333.

(*h.*) A soldier, discharged on surgeon's certificate of disability before the expiration of his term of enlistment, is entitled to "retained pay" up to the time of discharge, notwithstanding the words "honestly and faithfully" are stricken out of his discharge and certificates.—Paymaster-general, February 16, 1846.

(*i.*) A soldier discharged for his own misconduct forfeits his retained pay, and no part of it can be paid to the sutler or laundress.—Second Comptroller, § 1377. But see Chap. xxiii., note 15 *a*.

(*k.*) If discharged for "*utter worthlessness*" before expiration of term of service, a soldier forfeits retained pay.—*Ibid.*, § 1378.

(*l.*) But the secretary of war holds it to be unlawful to discharge a soldier "without pay," for worthlessness, etc., except upon sentence of a general court-martial.—Adjutant-general, August 9, 1869.

(*m.*) If a soldier be discharged at his own request before his term expires, he is entitled to his retained pay.—*Ibid.*, § 1379.

(*n.*) The retained pay provided for the discharged soldier, "but to be forfeited unless he shall have served honestly and faithfully to the date of discharge," by the 2d and 3d sec. of the act of May 15, 1872 (¶ ¶ 332, 333), shall be withheld for the following causes, either of which shall be noted on the final statements:

1st. Desertion during the period of enlistment. 2d. When discharged (by way of punishment for an offense) before expiration of term of service by sentence of court-martial, or by order from the war department specifying that such forfeiture shall be made. 3d. Conviction and imprisonment by the civil authorities. 4th. When discharged as a minor, or for other cause involving fraud on his part in the enlistment. 5th. Repeated trials by court-martial and punishment for misconduct, of which timely report shall be made to the war department and approved as basis of forfeiture. In which case the soldier shall be discharged without character, and shall not be re-enlisted.—G. O. No. 51, A.-G. O., 1872.

(*o.*) "The retained pay withheld prior to July 1, 1872, will be paid on the discharge of the soldier, and its payment will be subject to the interpretation of laws existing prior to the passage of the act of May 15, 1872."—Circular No. 87, P.-G. O., 1872.

334. Enlisted men now in the service shall receive the rates of pay established in this act [¶¶ 326, 332, 333], according to the length of their service, and nothing contained in this act shall be construed as affecting the additional monthly pay allowed for re-enlistments by the act of August 4, 1854 [¶¶ 329–331].—Sec. 4, *ibid.*

GENERAL PROVISIONS AS TO PAY AND ALLOWANCES.

335. The said corps ["the military peace establishment"] shall be paid in such manner that the arrears shall at no time exceed two months, unless the circumstances of the case shall render it unavoidable.[18]—Sec. 13, March 16, 1802, chap. 9.

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[18] GENERAL PROVISIONS.—"Where the words of a statute, fixing the compensation of a public officer, are loose and obscure, and admit of two interpretations, they should be construed in favor of the officer."—*United States* v. *Morse*, 3 Story, 87.

(*a.*) "When a statute revives a statute grade or office, it is to be intended, if nothing to the contrary appear, that the statute provision as to pay and emolument, previously annexed to the grade or office, is, by legal consequence, revived, whether that provision of the [first] statute had or not been repealed."—7 Opinions, 439.

(*b.*) *Rules for computation of time.*—The law providing compensation having ignored unequal durations of months by allotting the same pay to each, and the pay-tables having, for convenience, subdivided each month's pay into thirty equal parts, thus paying, in twelve months, of thirty days each, the full salary provided by law for the entire year, the months should be assumed, in computing pay, as they are by law, to be of equal length, any other duration than thirty days being ignored.

To conform with the foregoing, to secure greater accuracy in computation, and to save the trouble and delay of four distinct calculations of monthly pay in hereafter computing the time of service of government officers and employees, thirty days will be assumed as the length of each and every month in the year.

For any full month's service performed by persons employed by the government at a stipulated monthly rate of compensation (or yearly salary, if paid in regular monthly or bi-monthly installments), payments will be made at such stipulated monthly rate, without regard to the number of days the months paid for may contain.

In cases when the service *commences* on an intermediate day of the month, and thus embraces only a fractional part thereof, thirty days will be assumed to constitute the entire duration of such month, whether the calendar length thereof be twenty-eight, twenty-nine, thirty, or thirty-one days, and pay will be computed accordingly.

When the service *terminates* at an intermediate day of the month, and hence embraces but a fractional part thereof, the whole number of days during which service was rendered in such fractional part of a month will be allowed in making payments.

For convenience in calculating service embracing two or more months, or parts of months, but one fraction will be made. Thus from the 21st of September to the 25th of November, *inclusive*, will be calculated: from 21st of September to 20th October, *inclusive*, as one month; from October 21 to November 20, *inclusive*, another month; and from 21st to 25th November, *inclusive*, five days,—making two months and five days.

When two fractions of months occur in any account for service, both together being less than a whole month, as from the 21st of August to the 10th of September, the calculation of time will be from August 21 to 30, inclusive (ignoring the 31st), ten days, and from the 1st to the 10th September, inclusive, ten days—making the time to be paid for twenty days. Service commencing in February will be calculated as though that month contained thirty days: thus from February 21 to end of month, inclusive, ten days will be allowed, though the actual time be but eight or nine days; *provided*, that when service commences on the last day of February payment will be made for only one day in that month.

The foregoing rules do not apply to commutation of rations, nor to laborers employed at a per diem allowance. In computing them the actual number of days are to be ascertained and allowed. Laborers employed by the month, and actually performing their first day's labor on the 31st day of any month, will be paid for that day.

336. No money hereafter appropriated shall be paid to any person, for his compensation, who is in arrears to the United States, until such person shall have accounted for, and paid into the treasury, all sums for which he may be liable.[19]—January 25, 1828, chap. 2.

337. No officer in any branch of the public service, or any other person whose salary, pay, or emoluments is or are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or any other service or duty whatsoever, unless the same shall be authorized by law, and the appropriation therefor explicitly set forth that it is for such additional pay, extra allowance, or compensation.[20]—Sec. 2, January 23, 1842, chap. 183.

338. The proper accounting officers of the treasury, or other pay officers of the United States, shall in no case allow and pay to one individual the salaries of two different offices on account of having performed the duties thereof at the same time.[20] But this prohibition shall not extend to the superintendents of the executive buildings.—Sec. 1, September 30, 1850, chap.

339. No officer of the United States, who is in attendance upon any court of the United States, in the discharge of the duties of said office, shall receive any pay or compensation for his attendance as a witness on behalf of the government, at the same time that he receives compensation as such officer.[20a]—Sec. 1, July 21, 1852, chap.

Individual pay accounts and company and staff pay-rolls should distinctly specify the exact time during which officers actually rendered service, under authority entitling to pay, in the grade for which pay is claimed.

When accounts are hereafter rendered for service stated to have been performed from one given date to another, one of the days named will be excluded, unless it is specified or clearly shown by the form of the account that the service rendered was "inclusive" of both.—Second Comptroller, March 1, 1864.

[19] STOPPAGES OF PAY.—See Chap. iii., ¶ 72, note 37 *a* and *b*. A suspension from "rank and command" does not forfeit pay: Second Comptroller, § 1129; but when an officer is under stoppage of "pay," or is suspended from "rank and pay," he is for the time deprived of all salary and service increase.—Paymaster-general, August 8, 1870.

[20] EXTRA COMPENSATION.—This act differs from that of March 3, 1839, only in requiring that any additional compensation must not only be authorized by law, but must also be provided for by an explicit appropriation. In order to carry out the intentions of the legislature, the various acts of Congress upon the same subject-matter (¶ ¶ 348–352) must be construed together, and the just inference from them is that no discretion is left to the head of a department to allow an officer who has a fixed compensation any credit beyond his salary, unless the services he has performed are required by existing laws, and have no connection with the duties of his office, and unless the remuneration for them is fixed by law. Even under these circumstances the officer would be entitled to no compensation beyond his pay, if that amounted to two thousand five hundred dollars. See 9 Howard, 487; 10 *ibid.*, 141; and 21 *ibid.*, 467–476; also 16 Peters, 291, and 8 Wallace, 37.

(*a.*) See application of this law to army officers summoned before civil courts, though traveling under orders: note 12 *f*.

340. No person hereafter, who holds or shall hold any office under the government of the United States, whose salary or annual compensation shall amount to the sum of two thousand five hundred dollars, shall receive compensation for discharging the duties of[20] any other office.—Sec. 18, August 31, 1852, chap. 108.

341. When a clerk or other officer of the United States shall be sent away from his place of business as a witness for the government, either with or without papers or books, his salary shall continue; his necessary expenses, stated in items and sworn to, in going, returning, and attendance on the court, shall be audited and paid, but no mileage nor other compensation shall in any case be allowed.[20a]—Sec. 3, February 26, 1853, chap. 80.

342. No money shall be paid from the treasury of the United States to any person acting or assuming to act as an officer, civil, military, or naval, as salary in any office, which office is not authorized by some previously existing law, unless where such office shall be subsequently sanctioned by law; nor shall any money be paid out of the treasury, as salary, to any person appointed during the recess of the Senate, to fill a vacancy in any existing office, which vacancy existed while the Senate was in session and is by law required to be filled by and with the advice and consent of the Senate, until such appointee shall have been confirmed by the Senate. —Sec. 2, February 9, 1863, chap. 25.

343. In all matters relating to pay, allowances, rank, duties, privileges, and rights of officers and soldiers of the army of the United States, the same rules and regulations shall apply without distinction for such time as they may be or have been in the service, alike to those who belonged permanently to that service, and to those who, as volunteers, may be or have been commissioned or mustered into the military service under the laws of the United States for a limited period.[21] But nothing in this act shall be construed as affecting or in any way relating to the militia of the several States when called into the service of the United States.—Sec. 2, March 2, 1867, chap. 159.

(*b.*) Contract surgeons, summoned as witnesses before court-martials, are entitled to their expenses, *i.e.* those in excess of what they would have been if he had not performed the journey.—Adjutant-general, November 3, 1870. See note 12 *h.*

(*c.*) For compensation of citizen witnesses before military courts see Chap. xxii., note 16.

[21] For computing length of service in the volunteer forces see Chap. xviii., ¶ 519. And see note 8, this chapter.

TRAVELING ALLOWANCES ON DISCHARGE.

344. Whenever any officer or soldier shall be discharged from the service, except by way of punishment for any offense, he shall be allowed his pay and rations, or an equivalent in money, for such term of time as shall be sufficient for him to travel from the place of discharge to the place of his residence, computing at the rate of twenty miles to a day.[22]—Sec. 24, March 16, 1802, chap. 9.

345. In all cases where the government shall furnish transportation and subsistence to discharged officers and soldiers from the place of their discharge to the place of their enrolment or original muster into the service, they shall not be entitled to travel pay, or commutation of subsistence.[22f]—Sec. 8, June 20, 1864, chap. 145.

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[22] TRAVEL PAY.—This section (repeated in acts of January 11, 1812, and January 29, 1813) is continued in force under the general provisions of sec. 7, March 3, 1815. See ¶ 492.

(*a.*) *The ration* commuted at thirty (30) cents.—S. O. No. 5, A.-G. O., 1868. But no longer allowed to the commissioned officers: see last clause of ¶ 321.

(*b.*) *Fractions of days* not recognized. If the fraction (at the rate of twenty miles to a day) be more than half a day, payment is made for a whole day; if less than half a day, nothing is allowed for the fraction.—Second Comptroller, § 2177.

(*c.*) *Place of residence.*—An officer is entitled to travel pay only to the place where he entered service: and the place where an officer or soldier enters the service is, in contemplation of law, the place of residence to which he is entitled to be returned when honorably discharged; the place of enrollment being always fixed by the muster-roll, but the place of residence seldom known. But if a soldier is enlisted in an enemy's country and brought to the United States and discharged, his traveling allowances will be computed from place of discharge to his home or actual residence.—Second Comptroller, § § 2144, 2178.

(*d.*) *Travel pay allowed:*

On re-enlistment, at expiration of service.—*Ibid.*, § 2188.

On discharge for employment in the Q.-M. D.—*Ibid.*, § 2049.

To soldiers dishonorably discharged, provided they serve their full term, and are not convicts by civil courts, nor deserters.—*Ibid.*, July 10, 1868.

(*e.*) *Allowance refused:*

To soldiers at home on furlough when discharged.—*Ibid.*, § 2176.

To soldiers in custody of civil authority, under sentence of imprisonment.—*Ibid.*, § 2165.

To soldiers dishonorably discharged, prior to expiration of service, unless upon surgeon's certificate.—*Ibid.*, § 2170.

To soldiers discharged at their own request, prior to expiration of enlistment, and not in consequence of disability.—*Ibid.*, April 28, 1855.

To soldiers discharged for promotion.—*Ibid.*, § 2191.

As a general rule, to an officer who resigns; but when his resignation is in consequence of disability incurred in the line of his duty, an exception is sometimes made.—*Ibid.*, § § 2078, 2079.

To veterinary surgeons, as being neither military officers nor enlisted men.—*Ibid.*, § 2087.

When the government is able and willing to furnish transportation within a reasonable time.—*Ibid.*, § 2172.

To officers "wholly retired."—Paymaster's Manual (1871), ¶ 203.

(*f.*) *Transportation in kind.*—Department commanders are authorized to make such arrangements as will insure to discharged soldiers transportation and subsistence to their homes. When it is necessary to furnish transportation *in kind* to points where access can be had to a paymaster, it should be charged and deducted on the final payment as transportation furnished in kind, but not as so much money on account of trans-

346. Every non-commissioned officer and private of the army, or officer, non-commissioned officer, and private of any militia or volunteer corps, in the service of the United States, who has been, or who may be, captured by the enemy, shall be entitled to receive, during his captivity, notwithstanding the expiration of his term of service,[23] the same pay, subsistence, and allowance to which he may be entitled whilst in the actual service of the United States. *Provided*, That nothing herein contained shall be construed to entitle any prisoner of war, of the militia, to the pay and compensation herein provided, after the date of his parole, other than the traveling expenses allowed by law.—Sec. 14, March 30, 1814, chap. 37.

ASSIGNMENT OF PAY.

347. No assignment of pay, made after the 1st day of June next, by a non-commissioned officer or private, shall be valid.[24]—Sec. 4, May 8, 1792, chap. 37.

CLOTHING.

348. Whenever more than the authorized quantity [of clothing]

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portation. In such case the quartermaster will make entry on the man's final statements of the fact of such transportation being furnished between certain points, but will not note the cost of the same.—G. O. No. 24, A.-G. O., 1872.

[23] PRISONERS OF WAR, during imprisonment, entitled to same pay as if doing active duty.—G. O. No. 9, A.-G. O., 1862. Nor do they suffer any deduction of pay if on leave while awaiting exchange.—Second Comptroller, § 1163.

The war department has power to dismiss an officer while in captivity, but during that period he would still be entitled to his pay.—*Ibid.*, § § 1156, 1158. See also *Jones* v. *United States*, 4 Nott & Huntington, 203.

An officer, however, is not entitled during captivity to any additional pay as A. D. C., or A. C. S., etc.—Circular, P.-G. O., May 8, 1865; and Second Comptroller, § § 1159, 1160.

[24] ASSIGNMENTS OF PAY.—"If an officer conveys away his pay, and afterwards revokes the authority given to receive it, the remedy of the assignee is against the officer. It is not incumbent upon the accounting officers to enforce private transactions of this character."—Second Comptroller, § 1086.

"Assignments of pay by non-commissioned officers and privates are invalid. But when certificates of discharge were given in payment of a debt, or when the claim was purchased at the time of discharge with the intent that the assignee should receive the amount due, payment may be made."—*Ibid.*, § 1271.

When discharge papers are transferred, the transfer must be made upon the certificates or "final statements," as they are called, and must be witnessed by a commissioned officer, when practicable; and to guard against fraudulent use of such papers, the officer should indorse the fact of transfer upon the "DISCHARGE," and should also note upon the "FINAL STATEMENT" that such indorsement has been made upon the "discharge."—Paymaster's Manual (1871), ¶ 64.

(*a*.) *Laundress dues.*—"The authorized claim of a company laundress is a lien upon the undrawn pay of a deserter after dues to the United States are first stopped. If the stoppages on the rolls set opposite to a deserter's name as "due the United States," be more than covered by his pay undrawn at date of desertion, the laundress may be paid out of the remainder, the paymaster taking her receipt upon the rolls for the amount."—Paymaster-general, September 27, 1870.

"After dues to the United States shall have been satisfied, none but a company laundress has a lien upon the undrawn pay of a deserter."—Paymaster-general, March 18, 1870. See also note 13 *k*, and Chap. xxiii., note 15 *a*.

is required, the value of the extra articles shall be deducted from the soldier's pay [¶ 350]; and, in like manner, the soldier shall receive pay according to the annual estimated value for such authorized articles of uniform as shall not have been issued to him in each year.[25]—Sec. 7, April 24, 1816, chap. 69.

349. In all cases where a soldier of the regular army shall have been discharged from the service of the United States, and clothing shall be due to said soldier, it shall be the duty of the paymaster-general to cause the same to be paid for, according to the price paid in the 7th section of this act [¶ 348].—Sec. 8, *ibid.*

350. The money value of all clothing overdrawn by the soldier beyond his allowance shall be charged against him every six months, on the muster-roll of his company, or on his final statements if sooner discharged. The amount due him for clothing, he having drawn less than his allowance, shall not be paid to him until his final discharge from the service.[25]—Sec. 3, May 15, 1872, chap.

DEPOSITS.

351. Any enlisted man of the army may deposit his savings, in sums of not less than five dollars, with any army paymaster, who shall furnish him a deposit-book, in which shall be entered the name

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[25] CLOTHING ACCOUNTS.—The company or detachment commander will settle the clothing accounts of all men of his command on the 30th of June and 31st of December of each year, without regard to dates of individual enlistment.

"Balances found due the United States at date of each settlement will be charged to the soldier upon the muster-rolls of that date, and upon subsequent rolls until deducted."

"Balances found due the soldier at any settlement will be credited to him upon the company clothing-book, but will not be placed upon the muster-rolls."

"Upon transfer, death, or discharge, the balance due United States or due soldier will be stated in words and figures upon the descriptive roll or final statements as the case may be."

"Balances stated upon muster-rolls as due the United States will be treated by the paymaster as 'pertaining to pay of the army' for the fiscal year to which the period embraced in the settlement belongs."

"Balances stated upon final statements will be treated by paymasters as pertaining to 'pay of the army' for the fiscal year in which the soldier is discharged" [see ¶ 354]. G. O. No. 51, A.-G. O., 1872.

(*a.*) *Commutation.*—Prior to the passage of this act (¶ 350) the monthly commutation value of their clothing was paid to hospital stewards on duty in Washington, to the enlisted men of the signal corps, and to the enlisted clerks in the bureaus of the war department and at geographical division and department headquarters. (See Circular No. 77, P.-G., 1871, and indorsement from adjutant-general, August 7, 1871.) But under the above act these men cannot receive their clothing money until discharge. (Circular No. 88, P.-G. O., 1872.)

(*b.*) No clothing allowance to:

Sergeants of ordnance: see Chap. xiii., note 5.

Superintendents of national cemeteries: see Chap. xxi., note 22 *a.*

Veterinary surgeons.—Adjutant-general, March 18, 1864.

Deserters, for clothing not drawn prior to desertion.—Second Comptroller, § 496.

Soldiers for period of absence without leave.—*Ibid.*, § 498.

of the paymaster and of the soldier, and the amount, date, and place of such deposit. The money so deposited shall be accounted for in the same manner as other public funds, and shall pass to the credit of the appropriation for the pay of the army, and shall not be subject to forfeiture by sentence of court-martial, but shall be forfeited by desertion, and shall not be permitted to be paid until final payment on discharge, or to the heirs or representatives of a deceased soldier, and that such deposit be exempt from liability for such soldier's debts. *Provided,* That the government shall be liable for the amount deposited to the person so depositing the same.—Sec. 1, May 15, 1872, chap. 161.

352. For any sums of not less than fifty dollars so deposited for the period of six months, or longer, the soldier, on his final discharge, shall be paid interest at the rate of four per cent. per annum.—Sec. 2, *ibid.*

353. That the system of deposits herein established shall be carried into execution under such regulations as may be established by the secretary of war.[26]—Sec. 4, *ibid.*

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[26] SOLDIERS' DEPOSITS.—The following regulations have been established by the secretary of war, for carrying into execution the acts cited in ¶ ¶ 350–355.

(*a.*) All enlisted men present for payment with their companies or detachments shall hereafter receipt upon the pay-rolls for amounts due them.

(*b.*) Soldiers may deposit with the paymaster any portion of their savings, in sums not less than five dollars, the same to remain so deposited until final payment on discharge.

(*c.*) The paymaster will furnish each depositor with a deposit-book, in which each deposit made will be entered in the form of a certificate, signed by the paymaster and the company commander, setting forth the date, place, and amount (in words and figures) of deposit, and the name of the soldier making same.

(*d.*) The company commander shall keep in the company record-book an account of every deposit made by the soldier; and, after each regular payment, shall transmit direct to the paymaster-general a list of names of depositors, showing in each case the date, place, and amount of deposit, and name of paymaster receiving the same.

(*e.*) In case of the transfer of a soldier, his descriptive roll will be made to exhibit the date and amount of each separate deposit.

(*f.*) On the discharge of a soldier, the date and amount (in words and figures) of each deposit will be entered upon his final statements; and his deposit-book will be taken up by the paymaster who makes final payment and filed with his voucher.

(*g.*) On the death of a soldier, similar account shall be made, of each deposit, in the inventory of his effects, and on the accompanying final statements with which his deposit-book will be filed. The separate and accurate statement, by date and amount, of each deposit is absolutely essential to the correct calculation of interest.

(*h.*) Interest on deposits at the rate of four per cent. per annum will be paid on final settlement, the same to be calculated upon each deposit from the date thereof to date of discharge. No interest is payable, however, upon any deposit of less than fifty dollars, or upon any sum, whatever its amount, which has been on deposit for a less period than six months prior to date of discharge.

(*i.*) Deposits and interest thereon are forfeited by desertion, but are wholly exempt from forfeiture by sentence of court-martial and from liability for the soldier's debts.

(*k.*) Paymasters will forward with each account an abstract of soldiers' deposits, if any, received by them, during the time embraced therein. The abstract will set forth the name, company, and regiment of each depositor, with the date and amount of his deposit. The gross amount of the abstract will be carried to the account current

354. That the amounts of deposits and clothing balances accumulated to the soldier's credit under the provisions of secs. 1 & 3 of this act [¶ ¶ 351, 350] shall, when payable to the soldier upon his discharge, be paid out of the appropriations "for pay of the army" for the then current fiscal year.—Sec. 5, *ibid.*

355. That all acts and parts of acts inconsistent with the provisions of this act are hereby repealed.—Sec. 6, *ibid.*

DEDUCTIONS AND FORFEITURES.

356. Officers of the army, when absent from their appropriate duties for a period exceeding six months, either with or without leave, shall not receive the allowances authorized by the existing laws for servants, forage, transportation of baggage, fuel, and quarters, either in kind or in commutation.[27]—Sec. 20, August 3, 1861, chap. 42.

357. Any officer absent from duty with leave, except for sickness or wounds,[27a] shall, during his absence, receive half of the pay and allowances prescribed by law, and no more; and any officer absent without leave shall, in addition to the penalties prescribed by law

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under the appropriation of "pay of the army" for the fiscal year in which the deposits were received. The amount may be disbursed by the paymaster under the same appropriation.

(*l.*) The amounts of deposits and interest thereon paid on final statements will be charged by the paymaster to "pay of the army" for the fiscal year in which the soldier is discharged.

(*m.*) The paymaster-general will keep in his office such record as may be necessary to show the deposits made by the enlisted men of the army.—G. O. No. 51, A.-G. O., 1872.

[27] ABSENCE FROM DUTY OF OFFICERS.—Any condition, that an officer on leave shall submit to any greater forfeiture of pay than may be prescribed by law, is void.—1 Opinions, 592.

The act of August 3, 1861 (¶ 356), although regarded in most cases as superseded by the acts of March 3, 1863, and June 20, 1864 (¶ ¶ 357, 358), is understood to be still operative upon the cases of officers withdrawn from duty awaiting orders, and those absent with leave on account of sickness or wounds.—Circular No. 65, P.-G. O., 1868; Second Comptroller, § 1097. But "the act stopping allowances for absence from duty more than six months, and the act reducing to half pay when on leave more than one month, do not both operate at one and the same time; the latter is regarded as superseding the former in all cases where it becomes operative."—Paymaster-general, February 19, 1870.

Officers detailed as professors at colleges or universities are not absent from their appropriate duties."—Adjutant-general, June 26, 1868.

Paragraphs 357, 358 are not to be construed as abridging the privilege allowed the professors of the Military Academy of being absent during suspension of academic duties. See Chap. iv., ¶ 161.

(*a.*) An officer on leave of absence, under half pay, is restored to the status of full pay upon receiving the proper certificate; and "where a leave on account of disability is promulgated in orders, payments can be made thereon without further action, but, where the officer is absent on a certificate of disability (G. O. No. 2, A.-G. O., 1872), he will be required, in order to payment under the status of full pay, to submit to the paymaster a notification from this office that the certificate of disability has been

or a court-martial, forfeit all pay or allowances during such absence. —Sec. 31, March 3, 1863, chap. 75.

358. That the 31st section of an act entitled "An act for enrolling and calling out the national forces, and for other purposes," approved March 3, 1863, be and the same is hereby so amended as that an officer may have, when allowed by order of his proper commander, leave of absence for other cause than sickness or wounds, without deduction from his pay or allowances. *Provided,* That the aggregate of such absence shall not exceed thirty days in any one year.[27b] —Sec. 11, June 20, 1864, chap. 145.

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accepted as satisfactory, the said notification to state the commencement of the leave so covered.—Adjutant-general, December 15, 1871.

This act does not apply to paroled prisoners of war placed on leave of absence, pending their exchange.—Second Comptroller, § 1163.

(*b.*) This period of "any one year" extends from June 20 of one year to the same date in the following year.—Paymaster's Manual (1871), ¶ 246.

An order to "delay joining," following immediately upon a leave of absence during which an officer has been reduced to half pay, etc., the reduction to half pay continues during the "delay."—Paymaster-general, February 16, 1870.

Leave of absence to graduating cadets must be taken at once, at date of graduation, and not during after-service as officers.—Circular, A.-G. O., August 6, 1869, announcing opinion of judge-advocate-general.

(*c.*) ABSENCE FROM DUTY OF ENLISTED MEN.—No crime except desertion forfeits the pay of a soldier, except upon sentence of a court-martial, unless in consequence of the crime he is withdrawn from service.—Second Comptroller, § 1304. But see Chap. xxiii., ¶ 693.

Confinement by civil authority:

Soldiers under arrest, by civil authority, on criminal charges, entitled to pay for the time that they were in custody, provided they are tried and acquitted, or are released without trial. But when convicted of crime and thus withdrawn from service, by their own fault, all pay, etc., due at time of conviction is forfeited.—*Ibid.,* § § 1311, 1312.

"Soldiers confined by civil authority are not entitled to pay during such confinement, unless discharged therefrom without trial, or by trial and acquittal; and commanders of companies and detachments are required to state explicitly upon the muster-rolls of their companies or detachments the periods of such confinements, and whether the soldiers so confined were discharged without trial, and if tried, whether they were acquitted or convicted.—G. O. No. 21, A.-G. O., 1853.

[For Pay Tables, see succeeding pages.]

PAY TABLE *A*.

MONTHLY PAY OF THE OFFICERS OF THE ARMY, AND OF THE OFFICERS AND CADETS AT THE MILITARY ACADEMY.*

Grades.	Arm of Service.	Pay.	Reference to Authority.
Adjutant	Engineer Battalion	$150 00	¶ 371
Adjutant	Military Academy	150 00	¶ 152, 321.
Adjutant	Regimental	150 00	¶ 321.
Assistant Professor	Military Academy	166 67	¶ 145, 148, 153, 167, 321.
Brigadier-general	General Staff	458 33	¶ 321.
Cadet	Military Academy	50 79	¶ 159, 166.
Captain, mounted	Line and Staff	166 67	¶ 321.
Captain, not mounted	Line and Staff	150 00	¶ 321.
Chaplain	Line and Staff	125 00	¶ 321.
Colonel	Line and Staff	291 67	¶ 321.
Commandant of Cadets	Military Academy	250 00	¶ 157, 321.
General	General Staff	1125 00	¶ 321.
Lieutenant, First, mounted	Line and Staff	133 33	¶ 321.
Lieutenant, First, not mounted	Line and Staff	125 00	¶ 321.
Lieutenant, Second, mounted	Line and Staff	125 00	¶ 321.
Lieutenant, Second, not mounted	Line and Staff	116 67	¶ 321.
Lieutenant, Second (additional)	Line and Staff	116 67	¶ 143, 170, 321.
Lieutenant-colonel	Line and Staff	250 00	¶ 321.
Lieutenant-general	General Staff	916 67	¶ 321.
Major	Line and Staff	208 33	¶ 321.
Major-general	General Staff	625 00	¶ 321.
Military Storekeepers†	Quartermaster's, Ordnance, and Medical Departm'ts.	166 67	¶ 321, 521.
Professor, after 35 years' service	Military Academy		
Professor, after 25 years', and less than 35 years' service	Military Academy	291 67	
	Military Academy	250 00	¶ 169, 321.
Professor, less than 25 years' serv.	Military Academy	208 33	
Quartermaster	Engineer Battalion	150 00	¶ 371.
Quartermaster	Military Academy		Note 11, ¶ 323.
Quartermaster	Regimental	150 00	¶ 321.
Superintendent	Military Academy	291 67	¶ 157, 321.
Sword-master	Military Academy	125 00	¶ 156.

* This table gives the rate of pay of officers on the Active List, without the Service Increase.
† The Ordnance Storekeeper and Paymaster at Springfield Armory paid as a major. See ¶ 521.

MEMORANDA.

Retired Officers, including the professors at the Academy, receive seventy-five per cent. of pay (salary and increase) of their rank, but no increase accrues subsequent to retirement. ¶ 482.

A retired chaplain receives three-fourths of the pay (salary and increase) of a captain, not mounted.—Army Register, 1871.

Acting Commissaries of Subsistence are allowed one hundred dollars per year in addition to the pay of their rank, not to be included in computing the service increase. —*Ibid.*, and see Chap. ix., note 3.

Aides-de-Camp to the general paid as colonels (Chap. vi., ¶ 196); to lieutenant-general paid as lieutenant-colonels (Chap. vi., ¶ 198); and to major- and brigadier-generals as in ¶ 321, and note 6. See also Chap. vi., ¶ 200, for senior aide-de-camp to major-general when commanding the army.

Assistant to Chief of Ordnance to receive pay of major (Chap. xiii., ¶ 412).

Military Secretaries to the lieutenant-general paid as lieutenant-colonel (Chap. vi. ¶ 198); to commanding general in the field, paid as major (Chap. vi., ¶ 199); and to major-general commanding the army, see Chap. vi., ¶ 201.

PAY TABLE *B.*

PAY OF ENLISTED MEN OF THE ARMY, UNDER ACT OF MAY 15, 1872.
(*Published by Paymaster-general, July* 1, 1872.)

RANK. (*Alphabetically Arranged.*)	SERVICE.	RETAINED PAY NOT INCLUDED IN AMOUNT GIVEN BELOW.					
		First Enlistment.†	Re-Enlisted Pay.‡	First Re-Enlistment.§	Second Re-Enlistment.§	Third Re-Enlistment.§	Fourth Re-Enlistment.§
Artificer*	Artillery and Infantry	$15	...	...	...	...	...
Blacksmith and Farrier	Cavalry	15	$17	$19	$20	$21	$22
Chief Musician*	Artillery, Cavalry, and Infantry	60	...	...	...	...	...
Chief Trumpeter	Cavalry	22	24	26	27	28	29
Corporal	Artillery, Cavalry, and Infantry	15	17	19	20	21	22
Corporal	Engineers and Ordnance	20	22	24	25	26	27
First Sergeant	Artillery, Cavalry, and Infantry	22	24	26	27	28	29
Hospital Matron*		10	...	...	...	...	...
Hospital Steward	First Class	30	32	34	35	36	37
Ditto	Second Class	22	24	26	27	28	29
Ditto	Third Class	20	22	24	25	26	27
Leader of Band*	(At West Point)	75	...	...	...	...	...
Musician	Engineers, Artillery and Infantry	13	15	17	18	19	20
Ditto*	First Class, at West Point	34	...	...	...	...	...
Ditto*	Second Class, "	20	...	...	...	...	...
Ditto*	Third Class, "	17	...	...	...	...	...
Ordnance Sergeant	Of Posts	34	36	38	39	40	41
Principal Musician	Artillery and Infantry	22	24	26	27	28	29
Private	Artillery, Cavalry, and Infantry	13	15	17	18	19	20
Ditto	First Class Engineers and Ordnance	17	19	21	22	23	24
Ditto	Second Class Engineers and Ordnance	13	15	17	18	19	20
Quartermaster Sergeant	Artillery, Cavalry, and Infantry	23	25	27	28	29	30
Ditto	Engineers	36	38	40	41	42	43
Saddler	Cavalry	15	17	19	20	21	22
Saddler Sergeant	Ditto	22	24	26	27	28	29
Sergeant	Artillery, Cavalry, and Infantry	17	19	21	22	23	24
Ditto	Engineers and Ordnance	34	36	38	39	40	41
Sergeant-major	Artillery, Cavalry, and Infantry	23	25	27	28	29	30
Ditto	Engineers	36	38	40	41	42	43
Superintendents of National Cemeteries‖		...	...	...	...	...	...
Trumpeter	Cavalry	13	15	17	18	19	20
Veterinary Surgeon (Senior)*	Ditto	100	...	...	...	...	...
Ditto (Junior)*	Ditto	75	...	...	...	...	...
Wagoner*	Artillery, Cavalry, and Infantry	14	...	...	...	...	...

* Not changed by act of May 15, 1872. No pay retained in these cases.

† These rates are due soldiers serving in a first term of enlistment, and to those who have served a previous term, or terms, without ever re-enlisting under provisions of act of August 4, 1854. The same rate is payable for each year of first term; the increase provided by sec. 2, act May 15, 1872, for third, fourth, and fifth year is treated as retained pay due only upon discharge. See General Orders No. 51, of 1872, from adjutant-general's office.

‡ These rates are due soldiers who having heretofore re-enlisted under act of August 4, 1854, have since been honorably discharged, and are serving a new term of enlistment. This includes the class of men referred to in ¶ 98 (6th and 7th lines), also ¶ 102.—Paymaster's Manual, June, 1871. One dollar per month additional, for all grades, paid on discharge, on conditions explained in General Orders No. 51, of 1872.

§ These rates are due soldiers who are serving in first, second, third, or fourth continuous terms of re-enlistment, under provisions and with benefits of act of August 4, 1854.

‖ Superintendents of national cemeteries (not enlisted men) "shall receive for their compensation from sixty to seventy-five dollars per month, to be determined by the secretary of war." Not entitled to clothing, or rations, or money in lieu of either. See General Orders No. 51, ¶ 12, War Department, Adjutant-general's Office, June 22, 1872.

CLOTHING—Due soldier, paid only on final discharge. Due United States, settled 30th of June and 31st of December of each year, or on final statements if sooner discharged.

CHAPTER XII.

THE CORPS OF ENGINEERS.

ORGANIZATION.

368. THE corps of engineers[1] shall consist of one chief of engineers, with the rank, pay, and emoluments of a brigadier-general; six colonels, twelve lieutenant-colonels, twenty-four majors, thirty captains, and twenty-six first and ten second lieutenants, who shall have the pay and emoluments now provided by law for officers of the engineer corps.—Sec. 19, July 28, 1866, chap. 299.

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[1] THE CORPS OF ENGINEERS, as a distinct arm of service, was first established under the act of March 16, 1802, "fixing the military peace establishment." But under the act of May 9, 1794, a "*corps of artillerists and engineers*" had been constituted—"to serve in the field, on the frontiers, or in the fortifications on the sea-coast," as the President might direct. This corps was continued from time to time till, in the reorganization of 1802, it was segregated into a corps of engineers and a regiment of artillery. By sec. 27 of the act of 1802 it was enacted that the corps of engineers "shall be stationed at WEST POINT, in the State of New York, and shall constitute a MILITARY ACADEMY; and the engineers, assistant engineers, and cadets of the said corps shall be subject, at all times, to do duty in such places, and on such service, as the President of the United States shall direct." (And see ¶ 376.) The supervision and charge of the Academy has, however, been transferred to the war department: see Chap. iv., ¶ 165.

(*a.*) *The topographical engineers.*—The act of March 3, 1813, "for the better organization of the general staff of the army," authorized eight "topographical engineers," with brevet rank, etc., of majors of cavalry; and eight "assistant topographical engineers," with brevet rank, etc., of captains of infantry. By the act of April 24, 1816, three topographical engineers to each division, and an assistant to every brigade, were authorized; and these officers were retained in the reorganization of 1821. They were borne upon the Army Registers till 1818, under the title "*General Staff*"; but upon establishment of the "engineer department" (see clause *b.*) the roll of these officers was transferred thereto, Army Register, 1818, and Army Regulations, 1821, Art. 67; and they remained thus "attached" till the creation of a distinctive "corps of topographical engineers," by the act of July 5, 1838. By an act of March 3, 1863, that corps "as a distinct branch of the army" was abolished and "merged into the corps of engineers."

(*b.*) "*The engineer department*" was first organized, soon after the war of 1812–1815, not by law as a staff department, but by the President's orders as a separate command with geographical limits coextensive with those of the United States, and embracing the corps of engineers, such officers of topographical engineers, and of other arms of the service, as might be attached thereto, and the Military Academy. See orders Hd. Qrs. Engineer Department, July 13, 1818; and Army Regulations of 1825, ¶ ¶ 887, 904, 911. For some time the chief engineer seems to have exercised all the functions of a departmental commander. He was allowed an aide-de-camp, and, apparently ex mero motu, convened general court-martials, assigned officers to their stations, granted them leaves of absence, and placed them on "waiting orders."

Officers of the corps of engineers, while attached to the office of the engineer depart-

369. No officer of the corps of engineers below the rank of a field officer shall hereafter be promoted[2] to a higher grade before having passed a satisfactory examination before a board of three engineers senior to him in rank; and should the officer fail at said examination, shall be suspended *from* [for] one year, when he shall be re-examined, and upon a second failure shall be dropped by the President from the army.—Sec. 3, March 3, 1863, chap. 73.

370. That so much of sec. 6 of an act entitled "An act making appropriations for the support of the army for the year ending June 30, 1870, and for other purposes," approved March 3, 1869 [¶ 538], as prohibits promotions and new appointments in the engineer department, be and the same is hereby repealed. *Provided,* That nothing herein contained shall authorize promotion in said department beyond the grade of colonel.—June 10, 1872, chap. 426.

BATTALION OF ENGINEERS.

371. The five companies of engineer soldiers and the sergeant-major and quartermaster sergeant heretofore prescribed by law shall constitute a battalion of engineers,[3] to be officered by officers of

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ment, were subject to the orders only of the secretary of war and the chief engineer.—Orders Hd. Qrs. Engineer Department, April 17, 1819.

(*c.*) *Status of the corps of engineers.*—It seems doubtful whether this corps should be classified as of the staff of the army, when it is considered that:

The "corps of artillerists and engineers" were clearly of *the line* (see acts of March 3, 1795, April 27 and July 16, 1798, and May 14, 1800); that Congress, in separating that organization into two distinct arms of service, re-enacted that the resultant "corps" should remain liable to the performance of similar duties to those theretofore incumbent upon it (see quotation from act of 1802, in first clause of this note); that in the acts of February 28, 1803, and April 29, 1812, the chief of engineers is designated as the "commanding officer" of that corps, while there is not an instance where the law has designated the chief of a staff department as its commanding officer; that so long as the Army Registers exhibited a general classification under the title "*general staff,*" the corps of engineers was excluded from that classification; that the acts of March 3, 1813, and April 24, 1816, though passed for the express purpose of declaring the "general staff of the army," make no mention of the corps of engineers except (¶ 410) by declaring that ordnance officers shall be assigned to their duties *with the staff* of the army, in the same manner as *from* that corps; and finally, that the distinction between "officers of engineers," and "of the staff," is clearly recognized in the act of March 2, 1821. See also Chap. xix., note 2.

[2] APPOINTMENTS AND PROMOTIONS.—The chief of engineers to be appointed by selection from the corps (¶ 536); and provision made for supplying temporary vacancy in his office, in ¶ ¶ 9–12; but see ¶ 370. Lieutenants entitled to promotion after fourteen years' service (¶ 541), and graduated cadets for whom there are no vacancies, may be assigned as "additional second lieutenants." See Chap. iv., last clause note 7.

[3] THE BATTALION OF ENGINEERS had its origin in the company created by an act of 1846, of which ¶ ¶ 373–375 are sections. The other four companies were organized under the following enactments:

"There shall be added to the corps of engineers three companies of engineer soldiers, to be commanded by appropriate officers of said corps, to have the same pay and rations, clothing, and other allowances, and be entitled to the same benefits, in every respect, as the company created by the act for the organization of a company of sappers and miners and pontoniers, approved May 16 [15], 1846. The said three

suitable rank detailed from the corps of engineers; and the officers of engineers acting respectively as adjutant and quartermaster of this battalion shall be entitled to the pay and emoluments of adjutants and quartermasters of cavalry.—Sec. 20, July 28, 1866, chap. 299.

372. Each of the four [five] companies of engineer soldiers shall hereafter be composed of ten sergeants, ten corporals, two musicians, sixty-four privates of the first class, or artificers, and sixty-four privates of the second class, in all one hundred and fifty men each. —Sec. 4, August 3, 1861, chap. 42.

373. The said engineer company [battalion] shall be subject to the Rules and Articles of War, shall be recruited in the same manner, and with the same limitation, and shall be entitled to the same provisions, allowances, and benefits in every respect as are allowed to the other troops constituting the present military peace establishment.[4]—Sec. 3, May 15, 1846, chap. 21.

374. The said engineer company [battalion] shall be attached to and compose a part of the corps of engineers, and be officered by officers of that corps, as at present organized; they shall be instructed in and perform all the duties of sappers, miners, and pontoniers, and shall aid in giving practical instructions in these branches at the Military Academy; they shall, moreover, under the orders of the chief engineer, be liable to serve by detachments, in overseeing and aiding laborers upon fortifications or other works under the engineer department, and in supervising finished fortifi-

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companies shall be subject to the Rules and Articles of War; shall be recruited in the same manner and with the same limitation, shall be instructed in and perform the same duties, and be liable to serve in the same way, and shall have their vehicles, pontoons, tools, implements, arms, and other supplies regulated in the same manner as the existing engineer company." [The remainder of this section is in ¶ 372.]—Sec. 4, August 3, 1861, chap. 42.

"There shall be added to the corps of topographical engineers one company of soldiers, to be commanded by appropriate officers of said corps, to have the same pay and rations, clothing, and other allowances, and to be entitled to the same benefits in every respect as the company created by the act for the organization of a company of sappers and miners and pontoniers, approved May 16 [15], 1846. The said company shall be subject to the Rules and Articles of War, and shall have the same organization as the companies of engineer soldiers attached to the corps of engineers."—Sec. 2, August 6, 1861, chap. 57. (See note 1 *a*.)

(*a*.) The sergeant-major and the quartermaster sergeant (to be also commissary sergeant) were added to the battalion by act of June 30, 1864, chap. 145.

(*b*.) Total enlisted strength of the battalion is limited to 354 men.—Mem. from Engineer Department.

(*c*.) For pay of this organization see Chap. xi., ¶ 326.

(*d*.) A company of "bombardiers, sappers, and miners" was attached to the corps by the act of April 29, 1812, but was discontinued in the reorganization of 1821.

[4] But the act of July 12, 1866, re-establishing extra-duty pay, expressly denies the allowance to the troops of the engineer and ordnance departments, except when employed on extra duty as cooks or nurses in hospitals. See Chap. viii., ¶ 248, and Chap. xi., note 13 *h*.

cations, as fort-keepers, preventing injury and applying repairs.[5]—Sec. 4, May 15, 1846, chap. 21.

375. That the chief engineer, with the approbation of the secretary of war, be authorized to regulate and determine the number, quality, form, dimensions, etc., of the necessary vehicles, pontoons, tools, implements, arms, and other supplies for the use and service of said company [battalion] as a body of sappers, miners, and pontoniers.—Sec. 5, May 15, 1846, chap. 21.

GENERAL PROVISIONS.

376. The functions of the engineers being generally confined to the most elevated branch of military science, they are not to assume, nor are they subject to be ordered on, any duty beyond the line of their immediate profession, except by the special order of the President of the United States;[6] but they are to receive every mark of

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[5] SIGNAL SERVICE.—And the secretary of war is authorized to make details from this battalion for signal duty. See Chap. vii., ¶ 214.

[6] DUTIES OF ENGINEER OFFICERS.—This article of war must be considered in connection with so much of the act of 1802 as enacts that the officers of this corps "shall be subject, at all times, to do duty in such places, and on such service, as the President of the United States shall direct." (See note 1.) Referring to that clause, the Supreme Court has held that, however broad that enactment is in its terms, it had never been supposed to authorize the President to employ the corps of engineers upon any other duty except such as belongs either to military or civil engineering; and the court remarks further, that "it is apparent also, from the whole history of the legislation of Congress on this subject, that, for many years after the enactment, works of internal improvement and mere civil engineering were not ordinarily devolved upon the corps of engineers." But in the same case the attorney-general cited a series of statutes "showing that from the earliest period when these civil works of internal improvement became the subject of legislation, they were regarded by Congress as appropriately belonging to the war department and the military service;" and he asks, "to what officer of that department, or to what branch of that service, could they belong but to the department and corps of engineers?" See *Gratiot* v. *United States*, 15 Peters, 362, 363, 371. But whether, during the period referred to in that case, the employment of engineer officers upon works of internal improvement had been *usual* or *exceptional*, it is apparent that more recent legislation has identified this corps with our whole system of internal improvement. Beginning in 1864, all appropriations for such works have been accompanied by condition that the expenditures be made under the direction of the secretary of war, and it has been his practice to execute this trust through the agency of this corps. In addition to their constant employment under the series of acts referred to (see Chap. ii., note 8), on lighthouse duty ¶ ¶ 380-393), and in connection with their purely military duties, we find that engineer officers have been especially charged with:

Making surveys, plans, etc., for certain ship canals.—Joint Resolutions, March 22, 29, 1867.

Building and operating dredge-boats.—Joint Resolution, March 29, 1867.

Improvements in Wisconsin and other rivers.—Act of July 7, 1870, chap. 210.

Examining and reporting upon bridges over the Ohio River.—Act of July 11, 1870, chap. 240.

Examining and reporting upon the Sutro tunnel.—Act of April 4, 1871, chap. 9.

(*a.*) And the act of March 19, 1872 (chap. 62), authorizing a completion of the survey of the boundary between the United States and the Canadian confederation, provides: "That engineers in the regular service of the United States shall be employed exclusively as engineers in the performance of the duties contemplated by this act, without any additional salary, and the secretary of war is hereby directed to make the necessary details of engineers for that purpose."

respect to which their rank in the army may entitle them respectively, and are liable to be transferred, at the discretion of the President, from one corps to another, regard being paid to rank.—63d Article of War, April 10, 1806, chap. 20.

377. The President of the United States is hereby authorized to cause the necessary surveys, plans, and estimates to be made of the routes of such roads and canals as he may deem of national importance, in a commercial or military point of view, or necessary for the transportation of the public mail; designating, in the case of each canal, what parts may be made capable of sloop navigation. The surveys, plans, and estimates for each, when completed, to be laid before Congress.—Sec. 1, April 30, 1824, chap. 46.

378. That to carry into effect the objects of this act, the President be and he is hereby authorized to employ two or more skillful civil engineers,[7] and such officers of the corps of engineers, or who may be detailed to do duty with that corps, as he may think proper. —Sec. 2, *ibid.*

379. The office of commissioner of public buildings is hereby abolished; and the chief engineer of the army shall perform all the duties now required by law of said commissioner, and shall also have the superintendence of the Washington aqueduct and all the public works and improvements of the government of the United States in the District of Columbia,[8] unless otherwise provided by law.—Sec. 2, March 2, 1867, chap. 167.

380. The chief of engineers may, with the approval of the secretary of war, employ such civil engineers, not exceeding five in number, for the purpose of executing the surveys and improvements of western and northwestern rivers, ordered by Congress, as may be necessary to the proper and diligent prosecution of the same; and the persons so employed may be allowed a reasonable compensation for their services, not to exceed the sum of three thousand dollars per annum.[9]—Joint Resolution, March 29, 1867.

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[7] The authority to employ these civil engineers was repealed (in connection with the organization of the corps of topographical engineers) by act of July 5, 1838. But see ¶ 380, and Chap. xxviii., ¶ 928.

[8] And sec. 7, act of March 29, 1867, enacted that "the several sums of money heretofore appropriated to be expended under the direction of the commissioner of public buildings be transferred to and may be expended under the direction of the chief engineer of the army, or such officer of the engineer corps as he may direct." But all money appropriated for these works to be expended under the direction of the secretary of war. See Chap. ii., ¶ 6.

[9] CIVIL ENGINEERS.—"The war department, which appoints them, is responsible for their proper employment under the act. Upon proof of appointment and services, the accounting officers must allow their pay as fixed by approval of the secretary of war, within the limits prescribed by the law."—Second Comptroller, § 796.

FORTIFICATIONS.

381. That the following ports and harbors be fortified,[10] under the direction of the President of the United States, and at such time or times as he may judge necessary, to wit: Portland, in the District of Maine; Portsmouth, in the State of New Hampshire; Gloucester, Salem, Marblehead, and Boston, in the State of Massachusetts; Newport, in the State of Rhode Island; New London, in the State of Connecticut; New York; Philadelphia; Wilmington, in the State of Delaware; Baltimore, in the State of Maryland;[11] Norfolk and Alexandria, in the State of Virginia; Cape Fear River, and Ocracock Inlet, in the State of North Carolina; Charleston and Georgetown, in the State of South Carolina; and Savannah and St. Mary's, in the State of Georgia.—Sec. 1, March 20, 1794, chap. 9.

382. It shall be lawful for the President of the United States to employ, as garrisons, in the said fortifications, or any of them, such of the troops on the military establishment of the United States as he may judge necessary.—Sec. 2, *ibid.*

383. It shall be lawful for the President of the United States to receive from any State (in behalf of the United States) a cession of the lands on which any of the fortifications aforesaid, with the necessary buildings, may be erected, or intended to be erected; or, where such cessions shall not be made, to purchase such lands, on behalf of the United States.[12] *Provided,* That no purchase shall be made where such lands are the property of a State.—Sec. 3, *ibid.*

384. The President of the United States is hereby authorized to cause such of the fortifications heretofore built or commenced, as he may deem necessary, to be repaired or completed, and such other fortifications and works to be erected[12] as will afford more effectual

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[10] The act of May 3, 1798, "providing for the further defense of the ports and harbors of the United States," granted appropriations "to make and complete, at the discretion of the President of the United States, the fortifications heretofore directed for certain ports and harbors, and to erect fortifications in any other place or places, as the public safety shall require, in the opinion of the President of the United States; and which other fortifications he is hereby authorized to cause to be erected, under his direction, from time to time, as he shall judge necessary." By the act of June 14, 1809, further appropriations were made "for the purpose of completing the fortifications commenced for the security of the seaport towns and harbors of the United States, and Territories thereof, and for erecting such fortifications as may, in the opinion of the President of the United States, be deemed necessary for the protection of the northern and western frontiers." See also the general authority in ¶ 384.

[11] And the harbor of Annapolis, Md., by act of May 9, 1794.

[12] But the general authority to purchase, conferred upon the President by these statutes, finds limitation in Chap. xxiv., ¶ ¶ 770, 773.

With reference to OBSTRUCTION OF HARBORS in time of war see Chap. xxviii., ¶ 958.

protection to our ports and harbors, and preserve therein the respect due to the constituted authorities of the nation.—January 8, 1808, chap. 7.

385. It shall be the duty of the engineer superintending the construction of a fortification, or engaged about the execution of any other public work, to disburse[13] the moneys applicable to the same. —Sec. 27, July 5, 1838, chap. 162.

LIGHTHOUSE DUTY.

386. That the President be and he is hereby authorized and required to appoint, immediately after the passage of this act, two officers of the navy, of high rank, one officer of the corps of engineers of the army, one officer of the corps of topographical engineers of the army, and two civilians of high scientific attainments, whose services may be at the disposal of the President; and an officer of the navy and an officer of engineers of the army as secretaries; who shall constitute the lighthouse board of the United States,[14] and

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[13] But the supplementary act of July 7, 1838, provided that "no compensation shall be allowed to officers of the engineer department for disbursement of public money while superintending public works." Extra compensation prohibited by subsequent and more comprehensive legislation. See Chap. xi., ¶ ¶ 348–351.

It is discretionary with the President whether or not to require bonds of the officers on this duty.—6 Opinions, 24.

(*a.*) Permanent forts in process of construction, or extensive repairs, are not subject to supervision of department commanders.—G. O. No. 12, A.-G. O., 1869.

[14] THE LIGHTHOUSE BOARD.—Exhibited in the text is only such legislation governing the board as indicates the special relationship of engineer officers to lighthouse duty; but the following synopsis of the statutes defining further the duties of this board may prove of value.

(*a.*) The secretary of the treasury is ex officio president of the board; but the board was directed at its first meeting to ballot for one of its members as chairman. The member receiving a majority of the ballots of the whole board to be, by the president, declared its chairman, and in his absence to preside over its meetings and perform such other duties as its rules may require.—§ 9, Aug. 31, 1852.

(*b.*) The board meets on the first Monday in March, June, September, and December, in each year, and at such other times as its president may designate. It is its duty to furnish, upon requisition of the secretary of the treasury, all estimates of expense of the lighthouse service, and such other information as may be required by Congress.—§ § 10, 16, *ibid.*

(*c.*) The board is authorized, subject to approval of the secretary, to make rules and regulations for securing an efficient, uniform, and economical system of administering the lighthouse establishment.—§ 13, *ibid.*

(*d.*) The board authorized to substitute permanent lighthouses for light-vessels, when such substitution is desirable and practicable.—§ 2, March 3, 1859. And whenever an appropriation has been made for a new lighthouse upon a site not belonging to the United States, the board is authorized to purchase the necessary land out of such appropriation—§ 4, March 2, 1867—the attorney-general approving title. See Chap. xxiv., ¶ 773.

(*e.*) The board authorized to place light-vessels, or other suitable warnings of danger, on or over any temporary obstruction to the entrance of any harbor, or in any channel, fairway, bay, or sound.—Resolution, March 2, 1868. And, under direction of the secretary, to mark all government pier-heads on the lakes.—§ 3, July 15, 1870.

shall have power to adopt such rules and regulations for the government of their meetings as they may judge expedient. And the board so constituted shall be attached to the office of the secretary of the treasury, and under his superintendence shall discharge all the administrative duties of said office relating to the construction, illumination, inspection, and superintendence of lighthouses, light-vessels, beacons, buoys, sea-marks, and their appendages, and embracing the security of foundations of works already existing, procuring illuminating and other apparatus, supplies and materials of all kinds for building and for rebuilding when necessary, and keeping in good repair, the lighthouses, light-vessels, beacons, and buoys of the United States.[15]—Sec. 8, August 31, 1852, chap. 112.

387. It shall be the duty of the lighthouse board, immediately after being organized, to arrange the Atlantic, Gulf, Pacific, and Lake coasts of the United States into lighthouse districts, not exceeding twelve in number;[16] and the President is hereby authorized and required to direct that an officer of the army or navy be assigned to each district as a lighthouse inspector, subject to and under the orders of the lighthouse board, who shall receive for such service the same pay and emoluments that he would be entitled to by law for the performance of duty in the regular line of his profession, and no other, except the legal allowance per mile, when traveling under orders connected with his duties.—Sec. 12, *ibid.*

388. It shall be the duty of the lighthouse board to cause to be prepared by the engineer secretary of the board, or by such officer of engineers of the army as may be detailed for that service, all plans, drawings, specifications, and estimates of cost of all illuminating and other apparatus, and of construction and repair of towers, buildings, etc., connected with the lighthouse establishment; and no bid or contract shall be accepted or entered into except upon the decision of the board, at a regular or special meeting, and through their properly authorized officers.—Sec. 14, *ibid.*

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[15] THE SECRETARY OF THE TREASURY assigns to the collectors of customs the superintendence of such lighthouses, beacons, light-boats, and buoys as he judges best and most convenient for the service.—§ 7, September 28, 1850.

(a.) Upon the recommendation of the board, the secretary may discontinue such lights as may become useless by reason of the mutations of commerce, changes in channels, etc., and may from time to time re-establish such lights, if so recommended by the board.—§ 3, March 3, 1859, and § 5, June 20, 1860. He regulates the salaries of lighthouse-keepers within limits prescribed by law.—§ 4, March 2, 1867. And the act of March 3, 1869, appropriating for civil expenses, "*Provided*, That the secretary of the treasury shall have power, after a week's notice to the public, to sell and convey any real estate no longer used for lighthouse purposes, the avails of such sale to be paid into the national treasury." But see note 18.

[16] There are now thirteen lighthouse districts.

389. Hereafter all materials for the construction and repair of lighthouses, light-vessels, beacons, buoys, etc., shall be procured by public contracts under such regulations as the board may from time to time adopt, subject to the approval of the secretary of the treasury; and all works of construction, renovation, and repair shall be made by the orders of the board, under the immediate superintendence of their engineer secretary, or of such engineer of the army as may be detailed for that service.—Sec. 15, *ibid.*

390. That the President be and he is hereby required to cause to be detailed from the engineer corps of the army, from time to time, such officers as may be necessary to superintend the construction and renovation of lighthouses.—Sec. 9, March 3, 1851, chap. 37.

391. No additional salary shall be allowed to any civil, military, or naval officer who shall be employed on the lighthouse board, or who may be in any manner attached to the lighthouse service of the United States under this act. *And provided further*, That it shall not be lawful for any member of the lighthouse board, inspector, light-keeper, or other person in any manner connected with the lighthouse service, to be engaged either directly or indirectly in any contract for labor, materials, or supplies for the lighthouse service; nor to possess, either as principal or agent, any pecuniary interest in any patent, plan, or mode of construction or illumination, or in any article of supply for the lighthouse service of the United States.—Sec. 17, August 31, 1852, chap. 112.

392. If such person as the secretary of the treasury shall designate shall report, in any of the cases herein provided for,[17] that preliminary surveys are necessary to determine the site of a proposed lighthouse or light-boat, beacon or buoy, or to ascertain more fully what the public exigency demands, the secretary of the treasury shall thereupon direct the superintendent of the survey of the coast of the United States to perform such duty on the seaboard, and the colonel of the corps of topographical engineers to perform such duty on the northwestern lakes.—Sec. 2, March 3, 1851, chap. 37.

393. The officers so directed shall forthwith enter upon the discharge of the duty, and after fully ascertaining the facts shall report: First, whether the proposed facility to navigation is the most

[17] PRELIMINARY SURVEYS.—Paragraphs 392, 393 are sections of an act making appropriations for the construction, repair, etc., of certain designated lighthouses, etc., and their provisions were, therefore, under the terms of the first paragraph, limited to the works appropriated for in that act; but by a clause in the act of August 31, 1852, it is enacted that these sections of the former act "are hereby declared to be in full force." In this awkward manner provision seems to have been made for such future surveys as might be required.

suitable for the exigency which exists; and second, where it should be placed, if the interests of commerce demand it; third, if the thing proposed be not the most suitable, whether it is expedient to make any other kind of improvement; fourth, whether the proposed light has any connection with other lights; and if so, whether it cannot be so located as to subserve both the general and the local wants of trade and navigation; and fifth, whether there be any, and if any, what other facts of importance touching the subject.—Sec. 3, *ibid.*

394. Where cessions have been or hereafter may be made by any State, of the jurisdiction of places[18] where lighthouses, beacons, buoys, or public piers have been erected and fixed, or may by law be provided to be erected and fixed, with reservation that process, civil and criminal, issuing under the authority of such State, may be executed and served therein, such cessions shall be deemed sufficient, under the laws of the United States providing for the supporting or erecting of lighthouses, beacons, buoys, and public piers.[19]—Sec. 1, March 2, 1795, chap. 40.

395. Where any State hath made or shall make a cession of jurisdiction, for the purposes aforesaid, without reservation, all process, civil and criminal, issuing under the authority of such State or the United States, may be served and executed within the places, the jurisdiction of which has been so ceded, in the same manner as if no such cession had been made.—Sec. 2, *ibid.*

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[18] LIGHTHOUSE RESERVATIONS.—The reservation of public lands for lighthouse purposes is, in Oregon and Washington Territory, limited to twenty acres "at any one point or place." See Chap. xxiv., note 2.

Purchases of lands, for lighthouse purposes, must be made in conformity to statutes quoted in note 14 *d* of this chapter, and in ¶ ¶ 770, 773, Chap. xxiv.

Sales of lighthouse reservations.—Sec. 1, act of April 28, 1828, provides "that in all cases where lands have been, or shall hereafter be, conveyed to, or for, the United States, for forts, arsenals, dockyards, lighthouses, or any like purpose, or in payment of debts due the United States, which shall not be used, or necessary for the purposes for which they were purchased, or other authorized purpose, it shall be lawful for the President of the United States to cause the same to be sold for the best price to be obtained, and to convey the same to the purchaser by grant or otherwise." But all laws authorizing the sale of military sites have been repealed: see ¶ 774; and see last clause of note 15 *a*.

[19] BUOYS.—"Hereafter all buoys along the coast, or in bays, harbors, sounds, or channels, shall be colored and numbered, so that passing up the coast or sound, or entering the bay, harbor, or channel, red buoys with even numbers shall be passed on the starboard hand; black buoys with uneven numbers on the port hand; and buoys with red and black stripes on either hand; buoys in channel-ways to be colored with alternate white and black perpendicular stripes."—Sec. 6, September 29, 1850.

CHAPTER XIII.

THE ORDNANCE DEPARTMENT.

ORGANIZATION.

401. THE ordnance department[1] of the army shall consist of the same number of officers and enlisted men as now authorized by law, and the officers shall be of the following grades, viz.: one brigadier-general, three colonels, four lieutenant-colonels, ten majors, twenty captains, sixteen first lieutenants, and ten second lieutenants, with the same pay and emoluments as now provided by law; and thirteen ordnance storekeepers, of whom a number not exceeding six may be appointed and authorized to act as paymasters at armories and arsenals. The ordnance storekeeper and paymaster at the national

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[1] This department was first established under act of May 14, 1812, but was materially modified by act of February 8, 1815. It was not provided for in the reduction of the army under act of March 3, 1815, but was retained on the ground that "departments which do not form a constituent part of the army are preserved except so far as the [said] act of Congress by express provision, or necessary implication, introduces an alteration.—The ordnance department is preserved. It is a distinct establishment with a view to a state of peace, as well as a state of war. It is not affected by any express provision in the act of Congress, and it is an object of the appropriations made for the military peace establishment."—Secretary of War to board of officers, April 17, 1815. Congress, however, deemed it necessary to recognize, and continue the department in express terms. See ¶ 410.

(*a*.) Sec. 4, act of March 2, 1821, enacted "That the ordnance department shall be merged in the artillery; and that the President of the United States be and he is hereby authorized to select, from the regiments of artillery, such officers as may be necessary to perform ordnance duties, who, while so detached, shall receive the pay and emoluments now received by ordnance officers, and shall be subject only to the orders of the war department." And, making provision for such details, sec. 2 of same act attached "to each regiment of artillery one supernumerary captain to perform ordnance duty," and to each company of that arm of service four subaltern officers. Under this arrangement there were but four officers (the supernumerary captains of artillery) whose assignments possessed the permanency essential to acquirement of practical experience in the duties of a department charged generally, in all its details, with the armament of our fortifications and national forces, regulars, volunteers, and militia; and the want of efficiency resulting from such a system [see Ex. Doc., vol. 1, First Sess. 22d Congress, pp. 23, 138–145] evoked the act of April 5, 1832, by which a corps of ordnance officers was re-established. That act contained a proviso, however, that nothing therein contained "shall be so construed as to divest the President of the United States of authority to select from the regiments of artillery such number of lieutenants as may be necessary for the performance of the duties of the ordnance department." But in connection with an increase in the department, by transfer of subalterns from the artillery, the number of subalterns to be attached to each company of artillery was reduced to three, and the proviso of the act of 1832 may have been thus repealed by implication. See secs. 1, 13, July 5, 1838.

armory at Springfield shall have the rank, pay, and emoluments of major of cavalry, and all other ordnance storekeepers shall have the rank, pay, and emoluments of captains of cavalry, and two-thirds of the military storekeepers and ordnance storekeepers to be appointed under this and the 14th section[2] of this act shall be selected from volunteer officers or soldiers who have performed meritorious service in the army of the United States during the late rebellion.—Sec. 21, July 28, 1866, chap. 299.

402. No officer of the ordnance department below the rank of a field officer shall be promoted or commissioned to a higher grade, nor shall any officer of the army be commissioned as an ordnance officer,[3] until he shall have passed a satisfactory examination before a board of not less than three ordnance officers senior to him in rank; and should such officer fail on such examination, he shall be suspended from promotion or appointment for one year, when he may be re-examined before a like board; and if upon such second examination an ordnance officer fail he shall be dismissed from the service, and if an officer of the army he shall not be commissioned. —Sec. 4, March 3, 1863, chap. 78.

403. The colonel or senior officer of the ordnance department is authorized to enlist, for the service of that department, as many master-armorers, master-carriage-makers, master-blacksmiths, artificers, armorers, carriage-makers, blacksmiths, and laborers, as the public service, in his judgment, under the direction of the secretary for the department of war, may require.[4]—Sec. 11, June 18, 1846, chap. 29.

404. The enlisted men of the ordnance department now designated as master-workmen[5] shall hereafter be designated and mustered

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(*b.*) The ordnance department holds that the functions and relations of that department, as an integral part of the military establishment, were defined and fixed by the act of Feb. 8, 1815, and that these functions and relations remained unimpaired under the change in the personnel of the department in 1821; that the execution of these functions was, under the laws of 1815 and 1821, placed under the immediate direction and control of the secretary of war, and of him only; and that the act of 1832, re-establishing a corps of ordnance officers, did not modify pre-existing laws in this regard. This status is still maintained by the ordnance department. See G. O. No. 12, A.-G. O., 1869, as modified by G. O. No. 54, A.-G. O., 1871. See note 21 *c*, ¶ 743.

[2] Which made provision for military storekeepers in the quartermaster's department.

[3] PROMOTIONS AND APPOINTMENTS.—The chief of ordnance to be selected from the department (¶ 536); and temporary vacancy in the office of, to be filled as provided in ¶ ¶ 9–12. Lieutenants entitled to promotion after fourteen years' service (¶ 541); but for a general suspension of appointments and promotions see ¶ 538.

[4] This is a reiteration of the authority granted in the act of February 8, 1815, which had been restricted by intermediate legislation. The number of enlisted men is limited to 475, by G. O. No. 23, A.-G. O., 1871.

[5] Viz., master-armorers, master-carriage-makers, and master-blacksmiths. Sergeants of ordnance are, under act of February 8, 1815, excluded from any right to an allowance for clothing.—Second Comptroller, November 12, 1864.

as sergeants;[5a] those now designated as armorers, carriage-makers, and blacksmiths shall be designated and mustered as corporals; those now designated as artificers shall be designated and mustered as privates of the first class; and those now designated as laborers shall be designated and mustered as privates of the second class. *Provided*, That the pay, rations, and clothing now authorized by law to the respective grades of enlisted ordnance men shall not be changed.[5b]—Sec. 3, July 5, 1862, chap. 133.

GENERAL PROVISIONS.

405. It shall be the duty of the colonel [chief[6]] of the ordnance department to direct the inspection and proving of all pieces of ordnance, cannon-balls, shot, shell, small-arms, and side-arms, and equipments, procured for the use of the armies of the United States; and to direct the construction of all cannon and carriages, and every implement and apparatus for ordnance, and all ammunition wagons, traveling forges, and artificers' wagons, the inspection and proving of powder, and the preparation of all kinds of ammunition and ordnance stores. And it shall also be the duty of the colonel, or senior officer of the ordnance department, to furnish estimates, and, under the direction of the secretary for the department of war, to make contracts and purchases for procuring the necessary supplies of arms, equipments, ordnance, and ordnance stores.—Sec. 3, February 8, 1815, chap. 38.

406. The colonel [chief] of the ordnance department shall organize and attach to regiments, corps, or garrisons such number of

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(*a.*) The distinction between sergeants of ordnance and ordnance sergeants to be observed. The status of the former class is determined by above section; but ordnance sergeants, though appointed under "An act providing for the organization of the ordnance department," are by force of army regulations wholly disconnected from that department. They are classed in the non-commissioned staff of the army, and are appointed and assigned to duty under the immediate direction of the adjutant-general's office. See Chap. xiv., ¶ 446.

(*b.*) Sec. 11, act of February 11, 1815 (chap. 38), had enacted that "The pay of a master-armorer shall be thirty dollars per month, and one and a half rations per day; of a master-carriage-maker, thirty dollars per month, and one and a half rations per day; of a master-blacksmith, thirty dollars per month, and one and a half rations per day. The pay of armorers, carriage-makers, or blacksmiths, each, sixteen dollars per month, and one and a half rations per day; the pay of artificers, thirteen dollars per month, and one ration per day; and the pay of laborers, nine dollars per month, and one ration per day; and to all of the said workmen, artificers, and laborers the same clothing, and other allowances, as are allowed to privates of infantry in the army of the United States, except clothing to the master-workmen." But for present rates of pay see ¶ 326.

[6] It was the *chief of the corps*, who is designated in this act by the title of colonel. He is now a brigadier-general.

artificers,[7] with proper tools, carriages, and apparatus, under such regulations and restrictions relative to their government and number, as, in his judgment, with the approbation of the secretary for the department of war, may be considered necessary.—Sec. 4, *ibid.*

407. The colonel [chief] of the ordnance department, or senior officer of that department of any district, shall execute all orders of the secretary for the department of war, and, in time of war, the orders of any general, or field officer, commanding any army, garrison, or detachment, for the supply[8] of all arms, ordnance, ammunition, carriages, forges, and apparatus, for garrison, field, or siege service.—Sec. 5, February 8, 1815, chap. 38.

408. The colonel [chief] of the ordnance department shall make half-yearly, to the war department, or oftener, if the secretary for that department shall so direct, a correct report of the officers, and all artificers and laborers, in his department; also of all ordnance, arms, military stores, implements, and apparatus, of every description, and in such form as the secretary for the department of war shall direct.—Sec. 8, *ibid.*

409. The colonel [chief] of the ordnance department, under the direction of the secretary for the department of war, is hereby authorized to draw up a system of regulations for the government of the ordnance department, forms of returns and reports, and for the uniformity of manufactures of all arms, ordnance, ordnance stores, implements, and apparatus, and for the repairing and better preservation of the same.—Sec. 10, *ibid.*

410. That the ordnance department be continued as at present organized under the act of February 8, 1815,[9] and that the ordnance officers be assigned to their duties with the staff of the army, in the same manner as from the corps of engineers.—Sec. 11, April 24, 1816, chap. 69.

411. A competent person may be employed by the ordnance bureau, under the direction of the secretary of war, for such time as may be necessary, to superintend the manufacture of iron cannon at

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[7] The ordnance soldiers thus attached to light batteries (four to each) are corporals, and are entitled to pay formerly allowed to armorers, etc.—Chief of Ordnance, April 7, 1864.

[8] The drawing of supplies from the ordnance department is regulated by ¶ 1415, Army Regulations of 1863. The "districts" referred to in above section were the geographical subdivisions thus designated prior to May 17, 1815, and since that date known as "departments."

[9] The first clause of this section is retained simply for its historical interest in connection with note 1 to this chapter, and note 2, Chap. xix., on the "staff of the army." In connection with the last clause see the 63d Article of War (¶ 376), ¶ 407, and note 1 *b*.

the several foundries where such cannon may be made under contracts with the United States, whose pay and emoluments shall not exceed those of a major of ordnance during the time he shall be so employed, to be paid out of the appropriations for armament of fortifications.—Sec. 5, August 23, 1842, chap. 186.

412. The principal assistant in the ordnance bureau of the war department shall receive a compensation not less than that of the person employed at the foundries, under sec. 5 of the act approved August 23, 1842, from and after the date thereof.—Sec. 2, September 28, 1850, chap. 78.

ARMORIES AND ARSENALS.

413. For the safe-keeping of the military stores, there shall be established, under the direction of the President of the United States, three or four arsenals, with magazines, as he shall judge most expedient, in such places as will best accommodate the different parts of the United States. Either, or both, of the arsenals heretofore used at Springfield and Carlisle, to be continued as part of the said number, at his discretion. *Provided,* That none of the said arsenals be erected until purchases of the land necessary for their accommodation be made, with the consent of the legislature of the State in which the same is intended to be erected.[10]—Sec. 1, April 2, 1794, chap. 14.

414. There shall be established at each of the aforesaid arsenals a national armory, in which shall be employed one superintendent,[11] and one master-armorer[12] (who shall be appointed by the President of the United States).—Sec. 2, *ibid.*

415. That an annual account of the expenses of the national

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[10] The discretionary powers conferred upon the President, for the establishment of armories and arsenals, by this act, by an act of March 3, 1803, and by the act quoted in ¶ 419, find their limitation in the act of May 1, 1820, enacting "that no land shall be purchased on account of the United States, except under a law authorizing such purchase" (¶ 770); and not until the attorney-general has, in writing, declared in favor of the validity of title, etc. See ¶ 773. The reservation of public lands for arsenals and magazines, in Oregon and Washington Territory, limited to twenty acres at any one point or place. See Chap. xxiv., note 2 *b;* and for conditions precedent to the erection of permanent buildings see ¶ 232.

Arsenals established since 1820 have either been located by special enactment, or under the authority implied in appropriations for their construction. See list of armories and arsenals closing this chapter.

[11] SUPERINTENDENTS OF ARMORIES.—The national armories were placed under the direction of the ordnance department, first by the act of May 14, 1812, and again by the act of 1815 (¶ 421); but civilian superintendents were employed till the office was abolished in 1842 (¶ 422). These civil officers were again authorized by the acts of March 3, 1853, and August 5, 1854; but the authority for their appointment was again repealed in 1861. See ¶ 425.

[12] For pay of master-armorers see ¶ 424.

armories be laid before the legislature of the United States, together with an account of the arms made and repaired therein.—Sec. 5, *ibid.*

416. If any person shall procure, or entice, any artificer or workman, retained or employed in any arsenal or armory of the United States, to depart from the same during the continuance of his engagement, or avoid or break his contract with the United States, or who, after due notice of the engagement of any such workman or armorer in any arsenal or armory, shall, during the continuance of such engagement, retain, hire, or in any wise employ, harbor, or conceal such artificer or workman, the person so offending shall, upon conviction, be fined, at the discretion of the court, not exceeding fifty dollars, or be imprisoned for any term not exceeding three months.—Sec. 2, May 7, 1800, chap. 46.

417. If any artificer or workman, hired, retained, or employed in any public arsenal or armory, shall, wantonly and carelessly, break, impair, or destroy any implements, tools, or utensils, or any stock, or materials for making guns, the property of the United States, or shall, willfully and obstinately, refuse to perform the services lawfully assigned to him, pursuant to his contract, every such person shall forfeit a sum, not exceeding twenty dollars, for every such act of disobedience or breach of contract, to be recovered in any court having competent jurisdiction thereof.—Sec. 3, *ibid.*

418. All artificers and workmen, who are or shall be employed in the said armories, shall be and they are hereby exempted, during their term of service, from all military service, and service as jurors in any court.—Sec. 4, *ibid.*

419. That the President of the United States be and he hereby is authorized to purchase sites for, and erect, such additional arsenals and manufactories of arms as he may deem expedient, under the limitations and restrictions now provided by law.[13]—Sec. 2, April 23, 1808, chap. 55.

420. That the keepers of all magazines and arsenals shall, quarterly or oftener, if so directed, and in such manner as directed by the colonel of the ordnance department, make correct returns to the colonel, or senior officer, of the ordnance department, of all ordnance, arms, and ordnance stores they may have in charge.—Sec. 6, February 8, 1815, chap. 38.

421. To insure system and uniformity in the different public armories, they are hereby placed under the direction of the ordnance

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[13] See note 10 for references to statutory limitations and restrictions now obtaining.

department. And the colonel [chief] of the ordnance department, under the direction of the secretary for the department of war, is hereby authorized to establish depots of arms, ammunition, and ordnance stores in such parts of the United States, and in such numbers, as may be deemed necessary.—Sec. 9, February 8, 1815, chap. 38.

422. The offices of the superintendents of the armories at Springfield and at Harper's Ferry shall be and the same are hereby abolished, and the duties thereof shall be performed by such officers of the ordnance corps as shall be designated by the President.[14]—Sec. 2, August 23, 1842, chap. 186.

423. And that the secretary of war be and he is hereby authorized to abolish such of the arsenals of the United States as in his judgment may be useless or unnecessary.[15]—Sec. 2, March 3, 1853, chap. 98.

424. The master-armorers at the national armories shall receive fifteen hundred dollars each per annum.—Sec. 3, March 3, 1857, chap. 106.

425. That so much of the 1st section of the act approved August 5, 1854, as authorizes the appointment of civilians to superintend the national armories, be and the same is hereby repealed, and that the superintendents of these armories shall be appointed hereafter from officers of the ordnance department.—Sec. 5, August 6, 1861, chap. 57.

426. The secretary of war is hereby authorized, at his discretion, to increase the pay of the clerks of the United States armory at Springfield, Massachusetts, to twelve hundred dollars per annum, instead of eight hundred dollars as now fixed by law.—Sec. 12, March 2, 1867, chap. 167.

ORDNANCE AND ORDNANCE STORES.

427. The costs of repairs of damages done to arms, equipments, or implements, in the use of the armies of the United States, shall

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[14] The last clause of this section provides that "none of the above-named officers [paymasters, storekeepers, master-armorers, inspectors, and clerks], and no officers at the armories, of any grade whatever, shall hereafter receive emoluments of any kind, or any compensation or commutation beyond their stipulated pay in money, except quarters actually provided for and occupied by such officers."

In reference to civilian superintendents see note 11.

[15] This law is rendered by Callan as being no longer in effect and does not appear in Brightly's Digest; but it has never been expressly repealed nor abrogated by any inconsistent legislation.

True, the consent of Congress is now a condition antecedent to the sale of the *site* of an arsenal, but there is certainly no law to prevent the secretary of war, at his discretion, from "abolishing," or discontinuing the use of *an arsenal*, or turning it over to some other branch of the military service.

be deducted from the pay of any officer or soldier in whose care or use the said arms, equipments, or implements were when the said damages occurred. *Provided*, The said damages were occasioned by the abuse or negligence of the said officer or soldier. And it is hereby made the duty of every officer commanding regiments, corps, garrisons, or detachments, to make, once every two months, or oftener if so directed, a written report to the colonel [chief] of the ordnance department, stating all damages to arms, equipments, or implements belonging to his command, noting those occasioned by negligence or abuse, and naming the officer or soldier by whose negligence or abuse the said damages were occasioned.—Sec. 7, February 8, 1815, chap. 38.

428. That the secretary of war be authorized to issue, at his discretion and under proper regulations to be prescribed by him, out of any small-arms or pieces of field artillery belonging to the government, and which can be spared for that purpose, such number of the same as may appear to be required for military instruction and practice by the students of any college or university, under the provisions of sec. 26 [¶ 929] of the "act to increase and fix the military peace establishment of the United States;" the secretary to require a bond in each case, in double the value of the property, for the care and safe-keeping thereof, and for the return of the same when required.[16]—Joint Resolution, May 4, 1870.

429. That the secretary of war be and he is hereby authorized and directed to cause to be sold, after offer at public sale on thirty days' notice, in such manner and at such times and places, at public or private sale, as he may deem most advantageous to the public interest, the old cannon, arms, and other ordnance stores now in possession of the war department, which are damaged or otherwise unsuitable for the United States military service, or for the militia

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[16] By joint resolution of March 24, 1868, the secretary of war is "authorized to furnish from the captured ordnance such ordnance, with their implements, as he may deem proper, to the several national asylums for the purpose of firing salutes; and also such small-arms and equipments as may be necessary for the purpose of guard duty at the asylums."

And, by joint resolution of March 2, 1849, the secretary of war is authorized, "at his discretion, and having due regard to the necessities of the public service, to furnish to such persons as may apply for the same, and who design to emigrate to the Territories, either of Oregon, California, or New Mexico, such arms and ammunition, from the army stores, as they may require to arm themselves for such expedition. *Provided*, That the arms and ammunition so furnished shall not exceed a supply sufficient to arm and equip each person of such expedition; *and provided further*, That before the same are delivered the actual cost to the government of such arms and ammunition shall first be paid to the United States; and that the secretary of war shall be satisfied that the persons so applying really and bona fide design them for the use aforesaid."

of the United States,[17] and to cause the net proceeds of such sales, after paying all proper expenses of sale and transportation to the place of sale, to be deposited in the treasury of the United States.—Joint Resolution, July 20, 1868.

430. That the following sums be and the same are hereby appropriated, out of any moneys in the treasury not otherwise appropriated, for the support of the army for the year ending June 30, 1873. . . . . .

For experiments and tests of heavy rifled ordnance, two hundred and seventy thousand dollars. *Provided*, That this appropriation shall be applied to at least three models of heavy ordnance, to be designated by a board of officers to be appointed by the secretary of war, which report shall include both classes, breech and muzzle-loading cannon, and the powder and projectiles necessary for testing the same shall be supplied from stores on hand. . . .

For manufacture of arms at the national armory, one hundred and fifty thousand dollars. *Provided*, That no part of this appropriation shall be expended until a breech-loading system for muskets and carbines shall have been adopted for the military service upon the recommendation of the board to be appointed by the secretary of war, which board shall consist of not less than five officers, as follows: one general officer, one ordnance officer, and three officers of the line, one to be taken from the cavalry, one from the infantry, and one from the artillery. *And provided further*, That the system, when so adopted, shall be the only one to be used by the ordnance department in the manufacture of muskets and carbines for the military service; and no royalty shall be paid by the government of the United States for the use of said patent to any of its officers or employees, or for any patent in which said officers or employees may be directly or indirectly interested.—Sec. 1, June 6, 1872, chap. 316.

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[17] Provision made for the sale of military stores of every description, after inspection and condemnation. See Chap. iii., ¶ ¶ 56, 57.

[For list of Armories and Arsenals see next page.]

ARMORIES AND ARSENALS.

DESIGNATION.	LOCATION.	EST.*	REMARKS.
ARMORIES.			
Harper's Ferry	Harper's Ferry, Va	1794	Destroyed April 18, 1861. Lands, etc., sold November 30, 1869.
Springfield	Springfield, Mass	1794	See ¶ 413.
ARSENALS.			
Allegheny	Pittsburg, Pa	1814	Under act of August 2, 1813.
Appalachicola.†	Chattahooche River, Fla	1832	Taken by rebels in 1861. Donated to State by act of December 15, 1870.
Augusta	Augusta, Ga	1816	Taken by rebels in 1861. Re-established January, 1866.
Baton Rouge	Baton Rouge, La	1819	Taken by rebels in 1861. Re-established in 1865. Discontinued 1871. Used for garrison purposes.
Bellona	Richmond, Va	1816	Discontinued in 1832, and sold December 30, 1856.
Benicia	Benicia, Cal	1852	See sec. 1, August 5, 1854, chap. 267.
Bergen Heights	Bergen Heights, N. J	...	Never used as an arsenal. Purchased in 1812, and sold in 1871.
Champlain†	Vergennes, Vt	1826	Discontinued in 1855. Re-established in 1861.
Charleston	Charleston, S. C	1837	Taken by rebels in 1860. Re-established in 1865.
Columbus	Columbus, Ohio	1863	Under act of July 11, 1862.
Detroit	Dearbornville, Mich	1832	Under act of February 19, 1818.
Fort Monroe	Old Point Comfort, Va	1826	
Fort Union	Fort Union, N. M	1854	See act of August 30, 1856, chap. 29.
Frankford	Philadelphia, Pa	1816	
Indianapolis	Indianapolis, Ind	1863	Under act of July 11, 1862.
Kennebec	Augusta, Me	1827	Under act of March 3, 1827.
Leavenworth	Leavenworth, Kansas	1860	
Liberty	Liberty, Mo	1837	Discontinued 1861, and sold in 1869.
Little Rock	Little Rock, Ark	1837	Taken by rebels in 1861. Turned over to Q.-M. Dept., April 20, 1866, for use as barracks, etc.
Memphis	Memphis, Tenn	1837	Discontinued, and sold in 1853.
Mount Vernon†	Mount Vernon, Ala	1829	Taken by rebels in 1861. Re-established 1865. To be discontinued and turned over to the Q.-M. Dept. for garrison purposes.
New York	New York, N. Y	1835	
North Carolina†	Fayetteville, N. C	1837	Taken by rebels in 1861, and destroyed by Union forces in 1865. Land not yet sold.
Pikesville	Pikesville, Md	1816	
Rock Island	Rock Island, Ill	1863	Under act of July 11, 1862.
Rome†	Rome, N. Y	1814	Discontinued in 1857. Re-established in 1863.
St. Louis	St. Louis, Mo	1827	Removed to Jefferson Barracks, and arsenal turned over to General Recruiting Service, 1871.
San Antonio	San Antonio, Texas	1855	Taken by rebels in 1861. Re-established in 1865.
Vancouver	Vancouver, W. T	1859	Under act of August 30, 1856, chap. 29.
Washington	District of Columbia	1816	
Watertown	Watertown, Mass	1816	
Watervliet	West Troy, N. Y	1814	

* The date of establishment is given in the year in which the first expenditure of money was made at each place. This information received from ordnance bureau.

† Secretary of war authorized and directed to sell these arsenals by act of June 10, 1872.

CHAPTER XIV.

CHAPLAINS, POST SCHOOLS, AND ORDNANCE SERGEANTS.

CHAPLAINS.

435. THE posts at which chaplains shall be allowed shall be limited to the number of twenty,[1] and shall be approved by the secretary of war, and shall be confined to places most destitute of instruction.—July 7, 1838, chap. 194, clause 2.

436. That the provisions of the act of 1838 be and hereby are extended so as to authorize the employment of ten additional chaplains for military posts of the United States.—Sec. 3, March 2, 1849, chap. 83.

437. The post chaplains now in service, or hereafter to be appointed, shall be commissioned by the President; and all vacancies occurring in the grade of chaplain, which is hereby established to rank as captain of infantry, shall be filled by the President, by and with the advice and consent of the Senate; and all army chaplains shall hereafter be on the same footing as to tenure of office, retirement, allowances for service and pensions, as now provided by law for other officers of the army.—Sec. 7, March 2, 1867, chap. 145.

438. One chaplain may be appointed by the President, by and with the advice and consent of the Senate, for each regiment of colored troops, whose duty shall include the instruction of the enlisted men in the common English branches of education; and chaplains, when ordered from one field of duty to another, shall be entitled to transportation at the same rate as other officers.—Sec. 30, July 28, 1866, chap. 299.

439. No person shall be appointed a chaplain in the United States army who is not a regularly ordained minister of some reli-

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[1] Sec. 18, July 5, 1838, provided "That it shall be lawful for the officers composing the council of administration at any post, from time to time, to employ such person as they may think proper to officiate as chaplain, who shall also perform the duties of schoolmaster at such post." The number of chaplain posts was established at thirty, (see next ¶), by act of 1849, and that number of post chaplains were recognized and continued in service by sec. 7, July 28, 1866, chap. 299. No chaplain to be appointed to posts or regiments until those on waiting orders are assigned: sec. 12, July 15, 1870.

gious denomination, and who does not present testimonials of his present good standing as such minister, with a recommendation for his appointment as an army chaplain from some authorized ecclesiastical body, or not less than five accredited ministers belonging to said religious denomination.—Sec. 8, July 17, 1862, chap. 200.

440. It shall be the duty of chaplains in the military service of the United States to make monthly reports to the adjutant-general of the army, through the usual military channels, of the moral condition and general history of the regiments, hospitals, or posts to which they may be attached; and it shall be the duty of all commanders of regiments, hospitals, and posts to render such facilities as will aid in the discharge of the duties assigned to them by the government.—Sec. 3, April 9, 1864, chap. 53.

441. All chaplains in the military service of the United States shall hold appropriate religious services at the burial of soldiers who may die in the command to which they are assigned to duty, and it shall be their duty to hold public religious services at least once each sabbath when practicable.[2]—Sec. 4, April 9, 1864, chap. 53.

442. Chaplains employed at the military posts called "chaplain posts" shall be required to reside at the posts.—Sec. 9, July 17, 1862, chap. 200.

443. Chaplains shall be borne on the field and staff rolls next after the surgeons, and shall wear such uniform as is or may be prescribed by the Army Regulations, and shall be subject to the same rules and regulations as other officers of the army.[3] They shall be entitled to draw forage for two horses,[4] and when assigned to hospitals, posts, and forts they shall be entitled to quarters and fuel within the hospitals, posts, or forts while they are so assigned, without the privilege of commutation, subject to the same conditions and limitations as are now by law provided in the case of surgeons. When absent from duty with leave, or on account of sickness or other disability, or when held by the enemy as prisoners, they shall be subject to no other diminution or loss of pay and

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[2] And "perform the duties of schoolmaster." See note 1.

[3] This clause abrogates the 4th Article of War, which provided that "every chaplain, commissioned in the army or armies of the United States, who shall absent himself from the duties assigned him (excepting in cases of sickness or leave of absence), shall, on conviction thereof before a court-martial, be fined not exceeding one month's pay, besides the loss of his pay during his absence; or be discharged, as the said court-martial shall judge proper."

[4] The law of April 9, 1864 [¶ 444], allowing forage to army chaplains, is not affected by the act of March 2, 1867 [¶ 437], but remains in this respect in full force.—Second Comptroller, § 874.

allowances than other officers in the military service are under like circumstances.—Sec. 1, April 9, 1864, chap. 53.

444. That the act approved July 14, 1862, entitled "An act to grant pensions,"[5] is hereby so amended as to include chaplains in the regular and volunteer forces of the army. *Provided*, That the pension to which a chaplain shall be entitled to a total disability shall be twenty dollars per month, and all the provisions of the act to which this section is an amendment shall apply to and embrace the widows, children, mothers, and sisters of chaplains of the land forces who have died since the 4th day of March, 1861, or shall die of wounds or disease contracted in the service of the United States, and while such chaplains are, or shall be, in the line of their duty.—Sec. 2, April 9, 1864, chap. 53.

POST SCHOOLS.

445. Whenever troops are serving at any post, garrison, or permanent camp, there shall be established a school where all enlisted men may be provided with instruction in the common English branches of education, and especially in the history of the United States; and the secretary of war is authorized to detail such commissioned officers[6] and enlisted men as may be necessary to carry out the provisions of this section; and it shall be the duty of the post or garrison commander to cause to be set apart a suitable room or building for school and religious purposes.—Sec. 27, July 28, 1866, chap. 299.

ORDNANCE SERGEANTS.

446. That the secretary of war be authorized to select from the sergeants of the line of the army, who shall have faithfully served eight years in the service, four years of which in the grade of non-commissioned officer, as many ordnance sergeants[7] as the service may require, not to exceed one for each military post; whose duty it shall be to receive and preserve the ordnance, arms, ammunition, and other military stores at the post, under the direction of the commanding officer of the same, and under such regulations as shall be prescribed by the secretary of war, and who shall receive for their services five dollars per month, in addition to their pay in the line.[7a] —Sec. 2, April 5, 1832, chap. 67.

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[5] See Chap. xxi., ¶ 575, for the pension act, and ¶ 437.

[6] Chaplains to perform such duty: see ¶ 438 and note 1.

[7] The ORDNANCE SERGEANTS of POSTS are, under Army Regulations, classed as of the *non-commissioned staff of the army*. See Chap. xiii., note 5 *a*.

One ordnance sergeant for each military post retained in the reorganization of the army in 1866. See Sec. 7, July 28, 1866, chap. 299.

(*a*.) But for their PAY see Chap. xi., ¶ 326.

CHAPTER XV.

TROOPS OF THE LINE.

THE PEACE ESTABLISHMENT.

450. THE military peace establishment of the United States shall hereafter consist of five regiments of artillery, ten regiments of cavalry, forty-five regiments [twenty-five] of infantry, the professors and corps of cadets of the United States Military Academy, and such other forces as shall be provided for by this act, to be known as the army of the United States.—Sec. 1, July 28, 1866, chap. 299.

CAVALRY.

451. To the six regiments of cavalry[1] now in service there shall be added four regiments, two of which shall be composed of colored men,[1a] having the same organization as is now provided by law for cavalry regiments, with the addition of one veterinary surgeon to each regiment, whose compensation shall be one hundred dollars per month; but the grade of company commissary sergeant of cavalry is hereby abolished. The original vacancies in the grades of first and second lieutenants shall be filled by selection from among the

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[1] The 1st dragoons raised under act of March 2, 1833; the 2d dragoons under act of May 23, 1836; the mounted rifles, May 19, 1846; the 1st and 2d cavalry, March 3, 1855; and the 3d cavalry, July 19, 1862. Sec. 12, August 3, 1861, provided that "the two regiments of dragoons, the regiment of mounted riflemen, and the two regiments of cavalry, shall hereafter be known and recognized as the 1st, 2d, 3d, 4th, and 5th regiments of cavalry, respectively; the officers thereof to retain their present relative rank, and to be promoted as of one arm of service, according to existing law and established usage and regulation." And:

"In pursuance of the 12th sec. of the act of Congress, approved August 3, 1861, the six mounted regiments of the army are consolidated in one corps, and will hereafter be known as follows:

The 1st dragoons, as the 1st cavalry.
The 2d dragoons, as the 2d cavalry.
The mounted riflemen, as the 3d cavalry.
The 1st cavalry, as the 4th cavalry.
The 2d cavalry, as the 5th cavalry.
The 3d cavalry, as the 6th cavalry."—G. O. No. 55, A.-G. O., 1861. The corps of cavalry thus formed was reorganized in 1862 and 1863, as shown in following paragraphs and notes thereto. For tabular exhibit of organization see note 27.

(*a.*) These are the 9th and 10th regiments. A chaplain is added to their regimental organization. See ¶ 438.

officers and soldiers of volunteer cavalry, and two-thirds of the original vacancies in each of the grades above that of first lieutenant shall be filled by selection from among the officers of volunteer cavalry, and one-third from officers of the regular army, all of whom shall have served two years in the field during the war, and have been distinguished for capacity and good conduct. Any portion of the cavalry force may be armed and drilled as infantry or dismounted cavalry at the discretion of the President,[1b] and each cavalry regiment shall hereafter have *but one hospital steward*,[3] and the regimental adjutants, quartermasters,[2] *and commissaries*[2] shall hereafter be extra lieutenants selected from the first or second lieutenants of the regiment.—Sec. 3, July 28, 1866, chap. 299.

452. The cavalry forces in the service of the United States shall hereafter be organized as follows: each regiment of cavalry shall have one colonel, one lieutenant-colonel, three majors, one surgeon, one assistant surgeon,[4] one regimental adjutant, one regimental quartermaster,[2] *one regimental commissary*,[2] one sergeant-major, one quartermaster sergeant, *one commissary sergeant*,[3] *two*[4] *hospital stewards*, one saddler sergeant, one chief trumpeter, *and one chief farrier or blacksmith*;[5] and each regiment shall consist of twelve companies or troops, and each company or troop shall have one captain, one first lieutenant, one second lieutenant, *and one supernumerary second lieutenant*,[6] one first sergeant, one quartermaster sergeant, *one commissary sergeant*,[7] five sergeants, *eight*[7] corporals, *two teamsters*,[8] two farriers or blacksmiths, one saddler, one wagoner,

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(*b.*) DISMOUNTED CAVALRY.—The act (March 2, 1833), establishing the 1st dragoons, provided that the officers and enlisted men when mounted should receive the same pay and allowance as was allowed under the act of December 12, 1812, and when serving on foot, the same pay, etc., as might be allowed to the infantry arm of the service. This proviso was extended to the 2d dragoons, but did not apply to the mounted rifles (4 Opinions, 535); and, if this opinion of the attorney-general be correct, it did not extend to the 1st and 2d (now 4th and 5th) regiments of cavalry. Volunteer regiments of cavalry were, however, dismounted during the late rebellion, as a punishment for neglect of their horses, and when so dismounted by the President's command their status for pay was held to be that of infantry (Second Comptroller, § 1265); but under existing laws there is no distinction between the pay of enlisted men of artillery, cavalry, and infantry. See ¶ 326.

[2] Regimental commissary abolished: see ¶ 455. For appointment of the regimental quartermaster see note 13.

[3] Regimental commissary sergeants and hospital stewards abolished: ¶ 456.

[4] But the act cited in ¶ 281 has been construed as making provision in the "medical department" for all the surgeons and assistant surgeons who are to be included in the army. Medical officers are assigned to regiments when necessary, but no *appointments* in these grades have ever been made to the regular regiments.

[5] Chief farriers or blacksmiths abolished: see ¶ 454.

[6] Supernumerary second lieutenants abolished: see ¶ 454.

[7] Company commissary sergeants abolished (¶ 451) and number of corporals reduced to four: see ¶ 456.

[8] Teamsters abolished: see ¶ 454.

and seventy-eight privates; the regimental adjutants, the regimental quartermasters, and regimental commissaries to be taken from their respective regiments. *Provided,* That vacancies caused by this organization shall not be considered as original, but shall be filled by regular promotion.—Sec. 11, July 17, 1862, chap. 201.

453. Hereafter, each regiment of cavalry[9] organized in the United States service may have two assistant surgeons, and each company or troop of cavalry shall have from sixty to seventy-eight privates.[10] —January 6, 1863, chap. 7.

454. The grades created in the cavalry forces of the United States by sec. 11 of the act approved July 17, 1862, and for which no rate of compensation has been provided, shall be paid as follows, to wit [¶ 326]: regimental commissary[2] the same as regimental quartermaster; chief trumpeter the same as chief bugler; saddler sergeant the same as regimental commissary sergeant;[3] company commissary sergeant[7] the same as company quartermaster's sergeant. *Provided,* That the grade of supernumerary second lieutenant, and two teamsters for each company, and one chief farrier and blacksmith for each regiment, as allowed by said section of that act, be and they are hereby abolished; and each cavalry company may have two trumpeters, to be paid as buglers; and each regiment shall have one veterinary surgeon, with the rank of regimental sergeant-major, whose compensation shall be *seventy-five dollars per month.*[11]—Sec. 37, March 3, 1863, chap. 75.

455. The grade of regimental commissary in the several cavalry regiments is hereby abolished; and the lieutenants now holding the appointments of regimental commissary may be assigned for duty to companies of their regiment, and shall fill the first vacancies that may occur, in their respective grades of first or second lieutenants, in the regiments to which they now belong; and nothing herein contained shall affect their relative rank with other lieutenants of their grade.—Sec. 9, July 15, 1870, chap. 294.

456. The grades of regimental commissary sergeant and regimental hospital steward are hereby abolished. The number of cor-

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[9] Allowed a chief musician, in addition to the chief trumpeter. See ¶ 460.

[10] Total enlisted of each company not to exceed eighty-four. See note 12. Chap. xvii.

[11] VETERINARY SURGEONS.—An additional veterinary surgeon, to receive one hundred dollars per month, added to the 7th, 8th, 9th, and 10th regiments. (See ¶ 451.) Held to be a citizen employed. See Army Register, 1871.

They are allowed the quarters and fuel allowed a sergeant-major, but are not entitled to either clothing or rations; they may, however, purchase subsistence from the commissary.—Adjutant-general, March 18, 1864, and June 16, 1871.

They are not entitled to travel pay on discharge.—Second Comptroller, § 2087.

porals in each company of cavalry, artillery, and infantry shall be reduced to four, and the said non-commissioned officers shall have the privilege of receiving an honorable discharge, with full pay and allowances to the actual date thereof, if they shall so elect, in preference to remaining in the service in such other grades as may be assigned to them by the secretary of war.—Sec. 10, *ibid.*

ARTILLERY.

457. The five regiments of artillery provided for by this act shall consist of the five regiments now organized; and the first, second, third, and fourth regiments of artillery shall have the same organization as is now prescribed by law for the fifth regiment of artillery;[12] but the regimental adjutants, quartermasters,[13] *and commissaries,*[14] shall hereafter be extra lieutenants selected from the first or second lieutenants of the regiment.—Sec. 2, July 28, 1866, chap. 299.

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[12] Organization of the 5th regiment described in ¶ ¶ 458, 459. Sec. 2, March 2, 1821, provided that each regiment should consist of nine companies, "one of which shall be designated and equipped as light artillery;" and sec. 18, March 3, 1847, authorized the President, "when he shall deem it necessary, to designate four other companies, one in each regiment, to be organized and equipped as light artillery.". These acts are, undoubtedly, supplied by the act of 1866, because the 5th artillery was organized *as a regiment of light artillery,* or mounted batteries. The first four regiments, having the same organization, may be mounted or dismounted at the discretion of the President. See also note 17 *a.*

(*a.*) Under the last clause in ¶ 458, the President has retained two first lieutenants in each battery, and two second lieutenants and six sergeants in each light battery. It is doubtful whether or not the authority to add four corporals has been abrogated by act in ¶ 456.

(*b.*) The designation "BATTERY" will be applied to companies of artillery not mounted, and the designation "LIGHT BATTERY" to those mounted.—Adjutant-general, May 20, 1871.

(*c.*) Under the act of March 3, 1847, "officers and men of the light artillery, when serving as such, and mounted, shall receive the same pay and allowances as provided by law for the dragoons." But there is now no distinction between the pay of enlisted men of artillery, cavalry, or infantry, and the pay of mounted officers is provided for in the acts cited in ¶ ¶ 322, 323.

(*d.*) Artificers assigned also from ordnance department to light batteries. See ¶ 406.

(*e.*) Vacancies occurring in the companies of artillery, designated by the President, to be organized and equipped as light artillery, will be filled by selection. If the vacancy happen in the grade of captain, it will be filled by the order of the secretary of war, on the recommendation of the colonel, who will name the captain best qualified for the service.—G. O. No. 12, A.-G. O., 1849.

See note 27 for tabular exhibit of regimental and battery organization.

[13] REGIMENTAL QUARTERMASTERS.—"Each colonel, or other *permanent* commander of a regiment will appoint the regimental quartermaster (subject to the approval of the secretary of war), and report the same to the adjutant-general. The appointments will be announced in regimental orders, and will not be vacated except by sentence of a general court-martial, or by the authority of the *permanent* commander of the regiment. These appointments will only be conferred upon subalterns who to experience in service unite high qualifications and sound practical discretion necessary for the efficient performance of the responsible and varied military duties of the station."

"The regimental quartermaster will perform the functions of assistant commissary of subsistence, in addition to his duties as quartermaster of the regiment or post, if the command be less than a regiment."—G. O. No. 9, A.-G. O., 1847.

[14] But, in organization of the 5th regiment, the regimental quartermaster was also the regimental commissary. See ¶ 459.

458. The regiment of artillery hereby authorized shall consist of not more than twelve batteries;[12b] and each battery shall consist of one captain, one first and one second lieutenant, one first sergeant, one quartermaster sergeant,[15] four sergeants, *eight*[15] corporals, two musicians, two artificers,[12d] one wagoner, and as many privates, not exceeding one hundred and twenty-two, as the President of the United States may, according to the requirements of the military service, direct.[16] And there may be added to the aforesaid battery organization, at the discretion of the President, having due regard to the public necessities and means, one first and one second lieutenant, two sergeants, and four corporals.[12a]—Sec. 1, July 29, 1861, chap. 24.

459. The field and staff, commissioned and non-commissioned officers of the regiments herein before authorized, shall be as follows. . . . . To the regiment of artillery, one colonel, one lieutenant-colonel; one major to every four batteries, one adjutant, one regimental quartermaster and commissary, to be taken from the lieutenants of the regiment; one sergeant-major, one quartermaster sergeant, *one commissary sergeant*,[15] two principal musicians, *and one hospital steward*.[15]—Sec. 6, *ibid.*

460. There shall be enlisted in each regiment [artillery, cavalry, and infantry] a chief musician, who shall be instructor of music, with a salary of sixty dollars a month and the allowances of a quartermaster sergeant.—Sec. 5, March 3, 1869, chap. 124.

INFANTRY.

461. The forty-five regiments of infantry[17] provided for by this act shall consist of the first ten regiments, of ten companies each, now in service; of twenty-seven regiments, of ten companies each, to be formed by adding two companies to each battalion of the remaining nine regiments; and of eight new regiments, of ten companies each, four regiments of which shall be composed of colored men,[18]

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[15] Commissary sergeants and regimental hospital stewards discontinued, and number of corporals reduced to four: see ¶ 456. Company quartermaster sergeant not allowed to dismounted batteries: see note 24.

[16] Maximum enlisted strength of battery, sixty; and of light battery, eighty-four.—G. O. No. 23, A.-G. O., 1871.

[17] The number of regiments reduced to TWENTY-FIVE: see ¶ 463. The act of July 5, 1838, provides that the President may cause two of the regiments of infantry to be armed and equipped as riflemen, and one other to be armed and equipped as light infantry; but that provision may be regarded as obsolete.

(*a.*) MOUNTED INFANTRY.—Under sec. 2, June 17, 1850, the President is authorized "to cause such portions of the army as may, by law, be serving on foot, to be properly equipped and mounted whenever, in his opinion, the exigency of the public service may require the same." See also ¶ 322, and Chap. viii., note 21. For tabular exhibit of the present organization of regiments and companies see note 27.

[18] These regiments consolidated into two (the 24th and 25th) under act of March 3, 1869: ¶ 463. A chaplain added to their regimental organization: Chap. xiv., ¶ 438.

and four regiments of ten companies each to be raised and officered as hereinafter provided for, to be called the veteran reserve corps;[19] and all the original vacancies in the grades of first and second lieutenant shall be filled by selection from among the officers and soldiers of volunteers, and one-half the original vacancies in each of the grades above that of first lieutenant shall be filled by selection from among the officers of volunteers, and the remainder from officers of the regular army, all of whom shall have served two years during the war, and have been distinguished for capacity and good conduct in the field. The veteran reserve corps shall be officered by appointment from any officers and soldiers of volunteers or of the regular army who have been wounded in the line of their duty while serving in the army of the United States in the late war, and who may yet be competent for garrison or other duty, to which that corps has heretofore been assigned.—Sec. 4, July 28, 1866, chap. 299.

462. Each regiment of infantry provided for by this act shall have one colonel, one lieutenant-colonel, one major,[20] one adjutant, one regimental quartermaster,[21] one sergeant-major, one quartermaster sergeant, one *commissary sergeant*,[22] *one hospital steward*,[22] two principal musicians,[23] and ten companies; and the adjutant and quartermaster shall hereafter be extra lieutenants, selected from the first or second lieutenants of the regiment. Each company shall have one captain, one first lieutenant, and one second lieutenant, one first sergeant, one quartermaster sergeant,[24] four sergeants, *eight*[22] corporals, two artificers, two musicians, one wagoner, and fifty privates, and the number of privates may be increased at the discretion of the President, not to exceed one hundred,[25] whenever the exigencies of the service require such increase.—Sec. 6, *ibid.*

463. There shall be no new commissions, no promotions, and

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[19] Veteran reserve regiments discontinued, in consolidation, under act of March 3, 1869: ¶ 463.

[20] Each regiment, of ten companies, had been allowed two majors under act of February 11, 1847; and the additional regiments authorized by the act of July 29, 1861, had three battalions of eight companies each, and one major to each battalion.

[21] See note 13 as to appointment and duties of the quartermaster.

[22] Grades of regimental commissary sergeants and regimental hospital stewards abolished, and the number of corporals in each company reduced to four. See ¶ 456.

[23] Allowed also a "chief musician": see ¶ 460.

[24] "Company quartermaster sergeants of infantry and artillery, not mounted, are not allowed under existing orders."—Adjutant-general, October 18, 1870. Under this decision, and in view of the acts cited in ¶ 504, this grade, except in the cavalry and light artillery, is practically abolished.

"The secretary of war has decided that under existing orders there shall be one first sergeant, four duty sergeants, and no quartermaster sergeant to a company of infantry. Where there is already a quartermaster sergeant he can be retained as such; but no new appointments can be made."—Adjutant-general, December 19, 1872.

[25] Maximum enlisted strength of each company limited to sixty.—G. O. No. 23, A.-G. O., 1871.

no enlistments in any infantry regiment until the total number of infantry regiments is reduced to twenty-five; and the secretary of war is hereby directed to consolidate the infantry regiments as rapidly as the requirements of the public service and the reduction of the number of officers will permit.—Sec. 2, March 3, 1869, chap. 124.

INDIAN SCOUTS.

464. The President is hereby authorized to enlist and employ in the Territories and Indian country a force of Indians,[26] not to exceed one thousand, to act as scouts, who shall receive the pay and allowances of cavalry soldiers and be discharged whenever the necessity for their further employment is abated, or at the discretion of the department commander.[27]—Sec. 6, July 28, 1866, chap. 299.

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[26] The total *enlisted* strength of the army has been reduced to 30,000 (Chap. xvii., ¶ 504), and Indian scouts have not been included therein, by G. O. No. 23, A.-G. O., 1871. The act of March 3, 1871, however, appropriates for pay of Indian scouts, for purchase of horses for their use, and for hire of spies and guides; and as the war department deems the authority granted above as in nowise impaired by subsequent legislation, these scouts are still enlisted, and are to be paid by the pay department. The term of enlistment depends upon the requirements of the service, as reported from time to time by department and division commanders.

[27] Organization of regiments and companies under existing laws:

CAVALRY REGIMENTS. (*Twelve Companies or Troops.*)

1 Colonel,
1 Lieutenant-colonel,
3 Majors,
1 Adjutant, } extra Lieutenants.
1 Quartermaster, } extra Lieutenants.
1 Veterinary Surgeon (*see note* 11),
1 Sergeant-major,
1 Quartermaster Sergeant,
1 Saddler Sergeant,
1 Chief Musician,
1 Chief Trumpeter.

COMPANY OR TROOP.

1 Captain,
1 First Lieutenant,
1 Second Lieutenant,
1 First Sergeant,
1 Quartermaster Sergeant,
5 Sergeants,
4 Corporals,
2 Farriers or Blacksmiths,
1 Saddler,
1 Wagoner,
2 Trumpeters,
67 Privates.
Total enlisted not to exceed 84.

ARTILLERY REGIMENTS. (*Twelve Batteries.*)

1 Colonel,
1 Lieutenant-colonel,
3 Majors,
1 Adjutant, } extra Lieutenants.
1 Quartermaster, } extra Lieutenants.
1 Sergeant-major,
1 Quartermaster Sergeant,
1 Chief Musician,
2 Principal Musicians.

BATTERY. (*See note* 12 *b.*)

1 Captain,
2 First Lieutenants,
1 Second Lieutenant,
1 First Sergeant,
1 Quartermaster Sergeant (*see note* 24),
4 Sergeants,
4 Corporals,
2 Musicians,
2 Artificers,
1 Wagoner,
45 Privates.
Total enlisted not to exceed 60.

LIGHT BATTERY. (*See note* 12 *a.*)

1 Captain,
2 First Lieutenants,
2 Second Lieutenants,
1 First Sergeant,
1 Quartermaster Sergeant,
6 Sergeants,
4 Corporals,
2 Musicians,
2 Artificers,
1 Wagoner,
67 Privates.

Total enlisted not to exceed 84.

INFANTRY REGIMENTS. (*Ten Companies.*)

1 Colonel,
1 Lieutenant-colonel,
1 Major,
1 Adjutant, } extra Lieutenants.
1 Quartermaster, } extra Lieutenants.
1 Sergeant-major,
1 Quartermaster Sergeant,
1 Chief Musician,
2 Principal Musicians.

COMPANY.

1 Captain,
1 First Lieutenant,
1 Second Lieutenant,
1 First Sergeant,
4 Sergeants,
4 Corporals,
2 Musicians,
2 Artificers,
1 Wagoner,
45 Privates.

Total enlisted not to exceed 60.

CHAPTER XVI.

THE RETIRED LIST.

470. ANY commissioned officer of the army, or of the marine corps, who shall have served as such for forty consecutive years,[1] may, upon his own application to the President of the United States, be placed upon the list of retired officers, with the pay and emoluments allowed by this act.—Sec. 15, August 3, 1861, chap. 42.

471. If any commissioned officer of the army, or of the marine corps, shall have become, or shall hereafter become, incapable of performing the duties of his office, he shall be placed upon the retired list and withdrawn from active service and command, and from the line of promotion, with the following pay and emoluments, namely: the pay proper of the highest rank held by him at the time of his retirement, whether by staff or regimental commission, and four rations per day,[2] and without any other pay, emoluments, or allowances; and the next officer in rank shall be promoted to the place of the retired officer, according to the established rules of the service. And the same rule of promotion shall be applied successively to the vacancies consequent upon the retirement of an officer. *Provided*, That should the brevet lieutenant-general be retired under this act, it shall be without reduction in his current pay, subsistence, or allowances. *And provided further*, That there shall not be on the retired list at any one time more than seven per cent. of the whole number of officers of the army, as fixed by law.[3]—Sec. 16, *ibid.*

472. In order to carry out the provisions of this act, the secretary of war or secretary of the navy, as the case may be, under the direction and approval of the President of the United States, shall, from time to time, as occasion may require, assemble a board of not more than nine nor less than five commissioned officers, two-fifths of whom shall be of the medical staff; the board, except those taken from the medical staff, to be composed, as far as may be, of his

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[1] He may retire after thirty years' service: see ¶ 479.
[2] By act of March 2, 1867, retired officers receive their service rations. But see ¶ 482. For relative rank with retired officers of the navy see ¶ 516.
[3] Whole number not to exceed three hundred: ¶ 480.

seniors in rank, to determine the facts as to the nature and occasion of the disability of such officers as appear disabled to perform such military service, such board being hereby invested with the powers of a court of inquiry and court-martial [¶ 643]; and their decision shall be subject to like revision as that of such courts by the President of the United States. The board, whenever it finds an officer incapacitated for active service, will report whether, in its judgment, the said incapacity result from long and faithful service, from wounds or injury received in the line of duty, from sickness or exposure therein, or from any other incident of service. If so, and the President approve such judgment, the disabled officer shall thereupon be placed upon the list of retired officers, according to the provisions of this act. If otherwise, and if the President concur in opinion with the board, the officer shall be retired, as above, either with his pay proper alone or with his service rations alone,[4] at the discretion of the President, or he shall be wholly retired from the service, with one year's pay and allowances; and in this last case his name shall be thenceforward omitted from the Army Register or Navy Register, as the case may be. *Provided always*, That the members of the board shall in every case be sworn to an honest and impartial discharge of their duties, and that no officer of the army shall be retired, either partially or wholly, from the service without having had a fair and full hearing before the board, if, upon due summons, he shall demand it.—Sec. 17, August 3, 1861, chap. 42.

473. The officers partially retired shall be entitled to wear the uniform of their respective grades, shall continue to be borne upon the Army Register or Navy Register, as the case may be, and shall be subject to the Rules and Articles of War, and to trial by general court-martial for any breach of the said articles.—Sec. 18, *ibid.*

474. Retired officers of the army,[5] navy, and marine corps may be assigned to such duties as the President may deem them capable of performing, and such as the exigencies of the public service may require.—Sec. 25, *ibid.*

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[4] OFFICERS WHOLLY RETIRED.—"By a decision of the second comptroller of the treasury, dated the 20th instant, an officer of the army 'wholly retired from the service with one year's pay and allowances,' under the provisions of sec. 17, act No. 38, of August 3, 1861, is entitled to receive the year's pay and allowances *immediately upon his retirement.*" But he "must before payment obtain certificates of non-indebtedness from the second and third auditors."—Paymaster's Manual (1871), ¶ ¶ 199, 203.

Traveling allowance denied to officers wholly retired.—*Ibid.*, ¶ 218.

Query whether in view of the act of 1870 (see ¶ 482, and Chap. xi., ¶ 321), an officer can be retired "with his service rations alone"?

[5] Retired officers of the army can be assigned to military duty only at the Soldiers' Home, or as professors in colleges. See ¶ ¶ 477, 478, 481.

475. Whenever the name of any officer of the army or marine corps, now in the service, or who may hereafter be in the service of the United States, shall have been borne on the Army Register or Naval Register, as the case may be, forty-five years, or he shall be of the age of sixty-two years, it shall be in the discretion of the President to retire him from active service and direct his name to be entered on the retired list of officers of the grade to which he belonged at the time of such retirement; and the President is hereby authorized to assign any officer retired under this section or the act of August 3, 1861, to any appropriate duty; and such officer thus assigned shall receive the full pay and emoluments of his grade while so assigned and employed.[6]—Sec. 12, July 17, 1862, chap. 200.

476. Officers of the regular army, entitled to be retired on account of disability occasioned by wounds received in battle, may be retired upon the full rank of the command held by them, whether in the regular or volunteer service at the time such wounds were received.[6a] —Sec. 32, July 28, 1866, chap. 299.

477. No retired officer of the army shall hereafter be assigned to duty of any kind,[7] or be entitled to receive more than the pay and allowances provided by law for retired officers of his grade; and all such assignments heretofore made shall terminate within thirty days from the passage of this act.—Sec. 1, January 21, 1870, chap. 9.

478. The law passed January 21, 1870, prohibiting the assignment of retired army officers to duty, shall not apply to officers selected by the board of commissioners of the Soldiers' Home, District of Columbia, for duty at that institution, such selection being approved by the secretary of war. *Provided,* That they receive from the government only the pay and emoluments allowed by law to retired officers.—Resolution, April 6, 1870.

479. That the President be and he is hereby authorized at his discretion to place on the retired list of the army, on their own application, any commissioned officers[8] who have been thirty years in the service; and the officers who may be retired by virtue of this section shall be entitled to the same pay and emoluments as are now allowed or may be hereafter allowed to officers retired from active service.—Sec. 4, July 15, 1870, chap. 294.

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[6] In no case can a retired officer receive from the government more than his retired pay: ¶ ¶ 478, 481, 482, and note 9.

(*a.*) This section repealed by act of June 10, 1872. See ¶ 483.

[7] Except as provided in ¶ ¶ 478, 481. And query, as to effect upon *retired officers* of the act of March 30, 1868? See Chap. xx., ¶ 562.

[8] By sec. 13 of same act, the professors at Military Academy placed on same footing as to retirement as other officers. See ¶ 169.

480. That the proviso of the 16th section of the act approved August 3, 1861, limiting the number of officers on the retired list to seven per cent. of the whole number of existing officers, be and the same is hereby repealed; and hereafter the number of officers who may be retired in accordance with existing laws shall be in the discretion of the President. *Provided*, That the whole number on the retired list shall at no time exceed three hundred.—Sec. 5, *ibid.*

481. Any retired officer may, on his own application, be detailed to serve as professor in any college; but while so serving such officer shall be allowed no additional compensation.—Sec. 23, *ibid.*

482. Officers retired from active service shall receive seventy-five per cent. of the pay of the rank upon which they are retired.[9]—Sec. 24, July 15, 1870, chap. 294.

483. All officers of the United States army who may hereafter be retired shall be retired upon the actual rank held by them at the date of retirement, and the 32d section of the act to increase and fix the military peace establishment of the United States, approved July 28, 1866 [¶ 476], is hereby repealed.—June 10, 1872, chap. 419.

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[9] "Officers retired receive three-fourths of the pay (salary and increase) to which under this law [Chap. xi., ¶ 321] they would be entitled in the active service, but no increase can accrue after retirement."—Circular No. 73, P.-G. O., 1870.

"Retired officers, and officers on leave of absence or waiting orders, are not entitled to medicines or medical attendance from the government, and no bills for such will be paid by the medical department."—Circular No. 4, Surgeon-general's office, 1871. But they are entitled to purchase commissary stores from the subsistence department, upon the conditions prescribed for other officers. See Chap. ix., note 8.

CHAPTER XVII.

RECRUITING SERVICE.

490. THE commissioned officers who shall be employed in the recruiting service,[1] to keep up, by voluntary enlistments, the corps as aforesaid, shall be entitled to receive, for every effective, able-bodied citizen of the United States who shall be duly enlisted by them, for the term of five years, and mustered, of at least five feet six inches high, and between the ages of eighteen and thirty-five years, the sum of two dollars.[1a] *Provided nevertheless,* That this regulation, so far as respects the height and age of the recruit, shall not extend to musicians, or to those soldiers who may re-enlist into the service.[1b] *And provided also,* That no person under the age of twenty-one years shall be enlisted by any officer, or held in the

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[1] The recruiting service is conducted by the adjutant-general of the army, under the direction of the secretary of war; and officers on the general recruiting service are not to be ordered on any other duty, except from the adjutant-general's office.—Army Regulations, 1863.

"The commanding-generals of the military departments in which the [recruiting] depots are located will designate the barracks to be used by the recruits and officers on duty with them, which will not be changed in any change of commanders; and they will have the general supervision of their discipline, as well as command them when occasions require their service at the depots; but in no event will they remove recruits from the depots without orders from the headquarters of the army."—G. O. No. 46, A.-G. O., 1869.

(*a.*) The payment of premiums was abolished by act of March 2, 1833; was revived under regulations of the war department, and again abolished, by act of August 3, 1861. But see ¶ 497 and note.

(*b.*) Limitation as to height repealed in 1838 (¶ 494), and now determined by regulations. See note 4.

"Hereafter none but unmarried men who are not less than five feet five inches in height will be enlisted into the army of the United States for any arm of the service. This regulation will not apply to men re-enlisting, to men enlisting in the regiments of the veteran reserve corps, or to men enlisting as musicians."—Circular, A.-G. O., February 18, 1867.

(*c.*) "It is not desired to enlist married men, or those under size, except in special cases where company commanders desire to have old soldiers retained in their companies."—Adjutant-general, February 10, 1871.

Married men may be enlisted in the detachments of general service clerks at division and department headquarters.—Adjutant-general, July 9, 1872.

(*d.*) If a recruit, at the time of his enlistment, represents himself to be a single man, the fact that he has a wife does not entitle him to a discharge, although the enlistment of married men be prohibited by Army Regulations.—Ex parte *Schmeid,* 2 Chicago Legal News, 186.

(*e.*) "The particulars in the Regulations of the Army for the enrollment and enlistment of soldiers into the service of the United States are not essential to the validity of the contract of enlistment, where there has been an actual mustering into the ser-

service of the United States, without the consent of his parent, or guardian, or master, first had and obtained, if any he have; and if any officer shall enlist any person contrary to the true intent and meaning of this act, for every such offense he shall forfeit and pay the amount of the bounty and clothing which the person so recruited may have received from the public, to be deducted out of the pay and emoluments of such officer.[2]—Sec. 11, March 16, 1802, chap. 9.

491. It shall be lawful for any person, during the time he may be performing a tour of militia duty, to enlist in the regular army of the United States, and the recruiting officers are hereby authorized to enlist any such person, in the same manner, and under the same regulations, as if he were not performing such militia duty; and every person who shall enlist, while performing a tour of militia duty as aforesaid, shall be thereby exonerated from serving the remainder of said tour; and the State to which he may belong shall not be required to furnish any other person to serve in his stead.—Sec. 6, January 20, 1813, chap. 12.

492. That the several corps authorized by this act[3] shall be sub-

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vice of the United States, and *service rendered by the soldier under it;* and a contract made under such circumstances is binding upon the soldier and the government, notwithstanding the omission of any formality prescribed for the enlistment of a recruit."—Ex parte *Stevens*, 24 Law Reports, 205.

[2] MINORS.—There have been conflicting decisions as to this second proviso. Some of the courts have held that it was repealed by the act of December 10, 1814; and on the other hand it has been decided that this prohibition is still in force, and that thereupon the courts have jurisdiction on habeas corpus to discharge those enlisted contrary thereto. Similar provisions appeared in the acts of January 11, 1812, and January 29, 1813, "for raising an additional military force;" and in the act of January 20, 1813, "for the more perfect organization of the army." The act of December 10, 1814, repealed in express terms such legislation inconsistent therewith as was contained in the act last cited, and which it is therefore to be presumed was held to have superseded similar claims in above section. But, whatever may have been the effect of intermediate legislation, we find that in fixing the "military peace establishment" the corps are to be recruited in the same manner, and with the same limitations, indicated above. (See ¶ 492.) But whether above act is, or is not, in force, the discharge of minors under certain conditions has been enjoined upon the secretary of war (¶ ¶ 499, 500); and the question of most interest is, what courts, *if any*, have the right to inquire into the legality of an enlistment, or other authority, by which persons are held to military service or in military custody? See Appendix, ¶ ¶ 1009, 1024, 1028–1046.

State courts have both exercised, and disclaimed, jurisdiction in the premises; in the majority of instances prior to 1858 asserting jurisdiction concurrent with the United States judiciary.—Hurd on Habeas Corpus, 164–202.

The federal courts have uniformly held that State courts had no right to go behind a return to the writ, setting forth that the prisoner or soldier was held under or by color of the authority of the United States (see Appendix, ¶ ¶ 1001–1046); but they are not unanimous as to whether the *sole* and *exclusive* power of discharging for minority is or is not vested in the secretary of war. See note 5.

[3] That is, "the military peace establishment," which, as organized under this act, consisted of the corps of engineers, one regiment of light artillery, a corps of artillery, eight regiments of infantry, and one regiment of riflemen. For this organization, and the general staff retained therewith, see G. O., Adjutant and Inspector-general's Office, May 17, 1815.

ject to the Rules and Articles of War, be recruited in the same manner, and with the same limitations; and that officers, non-commissioned officers, musicians, and privates shall be entitled to the same provision for wounds and disabilities, the same provision for widows and children, and the same benefits and allowances in every respect, not inconsistent with the provisions of this act, as are authorized by the act of March 16, 1802, entitled "An act fixing the military peace establishment of the United States," and the act of April 12, 1808, entitled "An act to raise, for a limited time, an additional military force"; and that the bounty to the recruit, and compensation to the recruiting officer, shall be the same as are allowed by the aforesaid act of April 12, 1808.[3a]—Sec. 7, March 3, 1815, chap. 79.

493. No person who has been convicted of any criminal offense shall be enlisted into the army of the United States.—Sec. 6, March 2, 1833, chap. 68.

494. That so much of the 11th section of the act of March 16, 1802, and so much of the 5th section of the act of April 12, 1808, as fix the height of enlisted men at five feet six inches, be and the same are hereby repealed.[4]—Sec. 30, July 5, 1838, chap. 162.

495. In all cases of enlistment and re-enlistment in the military service of the United States the prescribed oath of allegiance may be administered by any commissioned officer of the army.—Sec. 11, August 3, 1861, chap. 42.

496. That the 5th section of the act of September 28, 1850, providing for the discharge from the service of minors enlisted without the consent of their parents or guardians, be and the same hereby is repealed. *Provided,* That hereafter no person under the age of eighteen shall be mustered into the United States service, and the oath of enlistment taken by the recruit shall be conclusive as to his age.[5]—Sec. 2, February 13, 1862, chap. 25.

(a.) The whole of this section inserted because, besides its perpetuation of the provisions of ¶ 490, it continues in force various enactments cited elsewhere in this compilation, and referred hereto for support.

[4] Since the passage of this act the minimum height of recruits has been determined, according to the exigencies of the service, by instructions from the war department. During the war of the rebellion the standard fell to five feet.

"The standard height of recruits for artillery and infantry will hereafter be five feet four inches, and upwards. This will not be applicable to musicians or to recruits for colored regiments, the present regulations for enlisting whom still remain in force." —Circular, A.-G. O., July 5, 1872.

"Until further orders no cavalry recruits will be enlisted who are less than five feet five inches or more than five feet ten inches in height. This will not be applicable to musicians or to recruits for colored cavalry regiments, the present regulations for enlisting whom still remain in force."—Circular, A.-G. O., December 23, 1872.

[5] In a note to the case of Captain Farrand (1 Abbott, 140) Judge Ballard remarks: "I do not regard the act of 1862, or the act of 1864 [¶ 500], as at all affecting the

497. That so much of the 9th section of the act approved August 3, 1861, entitled "An act for the better organization of the military establishment," as abolishes the premium paid for bringing accepted recruits to the rendezvous, be and the same is hereby repealed, and hereafter a premium of two dollars shall be paid to any citizen, non-commissioned officer, or soldier for such accepted recruit for the regular army [as] he may bring to the rendezvous.[6] And every soldier who hereafter enlists, either in the regular army or the volunteers, for three years, or during the war, may receive his first month's pay in advance, upon the mustering of his company into the service of the United States, or after he shall have been mustered into and joined a regiment already in the service.—Joint Resolution, June 21, 1862.

498. That any alien, of the age of twenty-one years and upwards, who has enlisted or shall enlist in the armies of the United States, either the regular or the volunteer forces, and has been or shall be hereafter honorably discharged, may be admitted to become a citizen of the United States, upon his petition, without any previous declaration of his intention to become a citizen of the United States, and that he shall not be required to prove more than one year's residence within the United States previous to his application to become such citizen; and that the court admitting such alien shall, in addition to such proof of residence and good moral character as is now provided by law, be satisfied by competent proof of such person having been honorably discharged from the service of the United States as aforesaid.—Sec. 21, July 17, 1862, chap. 200.

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jurisdiction conferred by sec. 14 of the act of 1789 [¶ 908] on judges of the United States to issue writs of habeas corpus. I think they still have the right to inquire into the cause of commitment of any one who is in custody under or by color of the authority of the United States. I regard the act of 1862 as simply furnishing a *rule of evidence*. I treat the 'oath of enlistment' as nothing but evidence—conclusive evidence, it is true, but still only evidence. . . . I dissent from the opinion rendered in the matter of Riley [1 Benedict, 408] so far as it denies the jurisdiction of the federal courts and judges in cases of this kind."

(*a.*) The oath of enlistment held to be conclusive on the court, in *United States* v. *Taylor*, 20 Legal Intelligencer, 284; ex parte *Conley*, 24 *ibid.*, 21; ex parte *Cline*, 1 Benedict, 338; ex parte *Stokes*, *ibid.*, 341; and ex parte *Riley*, *ibid.*, 408. Contra, *United States* v. *Wright*, 5 Philadelphia, 296.

(*b.*) The power to discharge a minor enlisted in violation of the acts of Congress is exclusively in the secretary of war; the courts are without jurisdiction.—Ex parte *Riley*, 1 Benedict, 408; ex parte *Hamilton*, *ibid.*, 455.

(*c.*) A prisoner of war, paroled by the enemy, though a minor, is not entitled to his discharge from the army until exchanged.—*United States* v. *Wright*, 5 Philadelphia Reports, 299.

[6] "The premium of two dollars will hereafter not be paid to a recruit who presents himself, but will continue to be paid [out of the recruiting fund] to any citizen, non-commissioned officer, or soldier, for each accepted recruit that he may bring to the rendezvous."—Circular No. 24, A.-G. O., 1866. But payments are suspended until further orders, by Circular, February 11, 1868, *ibid.*

499. The secretary of war may order the discharge of all persons in the military service who are under the age of eighteen years at the time of the application for their discharge, when it shall appear upon due proof that such persons are in the service without the consent, either express or implied, of their parents or guardians. *And provided further*, That such persons, their parents, or guardians, shall first repay to the government and to the State and local authorities all bounties and advance pay which may have been paid to them, anything in the act to which this is an amendment to the contrary notwithstanding.—Sec. 20, February 20, 1864, chap. 13.

500. The 20th section of the act entitled "An act to amend an act entitled an act for enrolling and calling out the national forces, and for other purposes," approved February 24, 1864, shall be construed to mean that the secretary of war shall discharge minors under the age of eighteen years under the circumstances and on the conditions prescribed in said section;[7] and hereafter, if any officer of the United States shall knowingly enlist or muster into the military service any person under the age of sixteen years

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[7] "Applications for discharge of minors (to entitle them to receive the favorable consideration of this department) under the above acts [¶ ¶ 496, 499, 500] must be accompanied by the following evidence of minority, viz.: Affidavits of the surviving parents, with those of at least two other respectable persons (all to be signed and sworn to before a magistrate competent to administer oaths, whose authority to administer oaths shall be officially certified, and with proper revenue stamps), setting forth: 1st. The day, month, and year in which the soldier whose discharge is applied for was born. 2d. The place of his birth. 3d. The place where he enlisted. 4th. The date of his enlistment. 5th. The name of the officer or person that enlisted him. 6th. The amount of bounty money and advanced pay received by the person enlisted; and fully establishing, by the oath of the parent or guardian, the fact that he enlisted without the consent, either express or implied, of his parent or guardian, with full particulars. If possible, the certificate of a judge of the United States, State, or county courts, a provost-marshal, postmaster, or other civil or military officer, showing that they are acquainted with the parties or facts of the case, and vouch for the reliability of the representations made by the applicants and petitioners, and that the soldier on whose behalf the application is made was under eighteen years of age at the time of the application for his discharge, should accompany the affidavit. The application must be accompanied with an actual tender of the bounty and advanced pay received. The money must be deposited to the credit of the United States, with any of the officers authorized to receive commutation money, and receipts taken. The money must *not* be sent to this department, but the receipts as above.

"I have the honor, also, to inform you that if it is ascertained that the minor is undergoing sentence, or is awaiting trial under charges, this department will not interfere with the administration of justice, nor proceed to discharge such minor, until the expiration of his sentence, or his trial and punishment if found guilty. With a view to settle this point, final action will be deferred until a report from the commanding officer of the soldier has been received, showing the facts required above, and giving in addition the amount of bounties received by the soldier from the United States, State, and local authorities."—Adjutant-general, October 31, 1866.

"The duty of the secretary of war being mandatory, on compliance of the applicant with the statutes, courts of law can no longer take cognizance, with propriety, of questions affecting the validity of an enlistment founded upon the minority of a recruit."—Cases cited in re *Harrington*, and *Severy*, United States Circuit Court (Maine); Error to District Court, Major Barr, of counsel. See also note 5.

with or without the consent of his parent or guardian, such person so enlisted or recruited shall be immediately discharged upon repayment of all bounties received; and such recruiting or mustering officer, who shall knowingly enlist any person under sixteen years of age, shall be dismissed the service, with forfeiture of all pay and allowances, and shall be subject to such further punishment as a court-martial may direct.[8]—Sec. 5, July 4, 1864, chap. 237.

501. Any officer who shall muster into the military or naval service of the United States any deserter from said service, or insane person, or person in a condition of intoxication, or any minor between the ages of sixteen and eighteen years,[8a] without the consent of his parents or guardian, or any minor under the age of sixteen years, knowing him to be such, shall, upon conviction by any court-martial, be dishonorably dismissed the service of the United States. —Sec. 18, March 3, 1865, chap. 79.

502. All enlistments into the army shall hereafter be for the term of five years for cavalry, and three years for artillery and infantry;[9] and recruits may at all times be collected at the general rendezvous, in addition to the number required to fill to the minimum all the regiments of the army, provided that such recruits shall not exceed in the aggregate three thousand men.[10] It shall be competent to enlist men for the service who have been wounded in the line of their duty while serving in the army of the United States, provided it shall be found, on medical inspection, that by such wounds they are not unfitted for efficiency in garrison or other light duties, and such men when enlisted shall be assigned to service exclusively in the regiments of the veteran reserve corps.[11]—Sec. 8, July 28, 1866, chap. 299.

503. Hereafter the term of enlistment shall be five years.[9]—Sec. 4, March 3, 1869, chap. 124.

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[8] "Hereafter, boys under the age of twenty-one will not be enlisted except for the purpose of learning music, and then only under authority from the superintendent of recruiting service, or the adjutant-general of the army, after the written consent of the parent, guardian, or master has been obtained. In cases where there is neither parent, guardian, nor master, no enlistment will be made. In case of every recruit rejected or discharged on account of minority, whose enlistment has been made in violation of the above, recommendation will be made that the expenses incurred by the government for such enlistment be stopped from the pay of the officer making it." —Circular, A.-G. O., January 31, 1867. See also note 1 *a*.

(*a*.) See also ¶ ¶ 505, 506.

[9] See ¶ 503. No discretion is conferred upon the executive department to enlist men for any other term than that established by law.—4 Opinions, 537.

[10] See ¶ 504, and notes thereto.

[11] Regiments of veteran reserves discontinued in consolidation of the infantry under act of March 3, 1869.

504. That the President be and he is hereby authorized and directed, on or before the 1st day of July, 1871, to reduce the number of enlisted men in the army to thirty thousand,[12] and thereafter there shall be no more than thirty thousand enlisted men in the army at any one time, unless otherwise authorized by law.—Sec. 2, July 15, 1870, chap. 294.

505. That no person under the age of twenty-one years shall be enlisted or mustered into the military service of the United States

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[12] Under the foregoing act the following will be the table of organization of the army from and after July 1, 1871:

Enlisted men of Engineers (but see Chap. xii., note 3 *b*)	301
Enlisted men of Ordnance	475
Ordnance Sergeants at Posts	200
Military Academy Band	24
60 enlisted men per company, for 55 companies of Artillery	3,300
84 enlisted men per battery, for 5 batteries Light Artillery	420
84 enlisted men per company, for 120 companies Cavalry	10,080
60 enlisted men per company, for 250 companies Infantry	15,000
Non-commissioned staff of regiments	200
	30,000

The non-commissioned staff of regiments are computed as follows:

Sergeant-majors	40
Quartermaster Sergeants	40
Chief Musicians	40
Principal Musicians of Artillery and Infantry	60
Saddler Sergeants of Cavalry	10
Chief Trumpeters of Cavalry	10
	200

The rate of enlisted men per company is to include non-commissioned officers and all other grades.—G. O. No. 23, A.-G. O., 1871.

(*a.*) The hospital stewards are authorized by law in excess of the 30,000 enlisted men.—Adjutant-general, April 18, 1871.

(*b.*) Any captain of a company is empowered to enlist for his own company, provided it is not already at the maximum strength, and in such cases no order, either post or regimental, is necessary for assignment of the men.—Adjutant-general, November 4, 1870.

(*c.*) DETACHMENTS OF GENERAL SERVICE CLERKS—not exceeding ten men at each geographical division or department headquarters—are kept up by enlistments or transfers from companies under direction of the commanding general. The men enlisted for or transferred to these detachments may be discharged or transferred to companies at discretion of the commanding general.—G. O. No. 92, A.-G. O., 1868, and No. 30, 1869.

(*d.*) REGIMENTAL RECRUITING SERVICE is conducted in the manner prescribed by Army Regulations for the general service.

"Every commander of a regiment is the superintendent of the recruiting service for his regiment, and will endeavor to keep it up to its establishment; for which purpose he will obtain the necessary funds, clothing, etc., by requisition on the adjutant-general."

"At every station occupied by his regiment, or any part of it, the colonel will designate a suitable officer to attend to the recruiting duties, which selection will not relieve such officer from his company or other ordinary duties. The officer thus designated will be kept constantly furnished with funds, and, when necessary, with clothing and camp equipage."

"The regimental recruiting officer will, with the approbation of the commanding officer of the station, enlist all suitable men. He will be governed, in rendering his

without the written consent of his parents or guardians.[13] *Provided*, That such minor shall have such parents or guardians entitled to his custody and control.—Sec. 1, May 15, 1872, chap. 162.

506. That in case any officer knowingly violates the provisions of this act by the enlistment or muster of a minor, he shall be liable to be arrested and tried by a court-martial, and, upon conviction, shall be dismissed from the service, or suffer such other punishment as such court may direct.—Sec. 2, *ibid.*

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accounts and returns, by the rules prescribed for the general service; and, when leaving a post, will turn over the funds in his hands to the senior company officer of his regiment present, unless some other be appointed to receive them.—¶ ¶ 985–988, Army Regulations, 1863.

[13] Enlistment of minors under sixteen, with or without the consent of parents or guardians, prohibited. See ¶ ¶ 500, 501.

CHAPTER XVIII.

RANK AND COMMAND, ARMY CORPS, DIVISIONS, AND BRIGADES.

RANK AND COMMAND.

510. If, upon marches, guards, or in quarters, different corps of the army shall happen to join, or do duty together, the officer highest in rank of the line of the army, marine corps, or militia, by commission,[1] there on duty or in quarters, shall command the whole, and

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[1] Command.—The following extracts from General Orders No. 51, series of 1851, from the war department, give the executive interpretation of this article:

"The interpretation of this act has long been a subject of controversy. The difficulty arises from the vague and uncertain meaning of the words '*line of the army*, which neither in the English service (from which most of our military terms are borrowed) nor in our own have a well-defined and invariable meaning. By some they are understood to designate the regular army as distinguished from the militia; by others, as meant to discriminate between officers by ordinary commissions and those by brevet [but see ¶ 514]; and finally, by others, to designate all officers not belonging to the staff. [See note 2, Chap. xix.] The question is not without difficulty, and it is surprising that Congress should not long since have settled, by some explanatory law, a question which has been so fruitful a source of controversy and embarrassment in the service."

"The President has maturely considered the question, and finds himself compelled to differ from some for whose opinions he entertains a very high respect. His opinion is, that, although these words may sometimes be used in a different sense (to be determined by the context and subject-matter), in the 62d Article of War they are used to designate those officers of the army who do *not* belong to the staff, in contradistinction to those who do, and that the article intended, in the case contemplated by it, to confer the command exclusively on the former. The reasons which have brought him to this conclusion are briefly these:

"1st. It is a well-settled rule of interpretation that in the construction of *statutes* words of doubtful or ambiguous meaning are to be understood in their usual acceptation. Now it must be admitted that, in common parlance, both in and out of the army, the words 'line' and 'staff' are generally used as correlative terms.

"2d. Another rule of construction is, that the same word ought not to be understood, when it can be avoided, in two different senses in different laws on the same subject, and especially in different parts of the same law. Now, in another article (74) of this same law, the words 'line and staff of the army' are clearly used as correlative and contradistinctive terms." [See Chap. xxii., ¶ 649.] "The same remark applies to almost every case in which the words 'line' and 'staff' occur in acts of Congress. . . . There are many other instances in which the words are so employed, but I have selected these as the most striking. On the other hand, I find but one act of Congress in which the words 'line of the army' have been employed to designate the regular army in contradistinction to the militia, and none in which they have been manifestly used as contradistinctive of brevet." [But the term "*lineal rank*" has since been used clearly as contradistinctive to *brevet rank*. See ¶ 515.]

"In the discussion which took place in 1828 relative to ordinary rank and rank by brevet, the then secretary of war says: 'Rank in the line of the army or lineal rank,

give orders for what is needful to the service, unless otherwise specially directed by the President of the United States, according to the nature of the case.—62d Article of War, April 10, 1806.

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as understood by the President, is applicable to the existing organization of that portion only of the army which is intended for field operations, or the exertion of physical force against an enemy. It is commonly used in contradistinction to the staff,' etc. He then goes on to show that in the 62d Article it has another meaning.—House Doc. 58, 20th Congress, 2d Session, p. 13. In the same discussion, Mr. Drayton, as chairman of the committee on military affairs of the House of Representatives, expresses the same opinion. He says: 'Rank in the line of the army is conceived to be rank in a military body especially organized for the exertion of physical force, or in other words, for combating an enemy; and an officer in such a body has a direct and paramount command over the troops which compose it. The expressions, rank in the line of the army, rank in the line, lineal rank, *are generally used in contradistinction to staff appointments.*' He adds: 'and to rank which confers upon officers only an occasional right to command, including brevet officers,' etc. Thus we see that, while both these gentlemen admit that these words, in their proper and usual significance, are employed to distinguish the combatant from the staff or non-combatant portions of the army, they nevertheless say that, in the article in question, it also means something else, though they do not agree what that something else is. The question under discussion in that case was different from the one now presented. In that case it was a question between ordinary rank and brevet rank; in the present, between lineal rank and staff rank. The President has no wish whatever to controvert the correctness of this decision of the former question, but he cannot entirely concur in all the reasoning on which it is founded." [The decision referred to is published in G. O. No. 54, A.-G. O., 1829.]

"3d. If Congress had meant by these words to discriminate between officers of the regular army and those of the militia, or between officers by brevet and by ordinary commission, it is to be presumed that they would have employed those terms respectively which are unequivocal, and are usually employed to express those ideas.

"4th. If we look at the policy of the law, we can discover no reasons of expediency which compel us to depart from the plain and ordinary import of the terms; on the contrary, we may suppose strong reasons why it may have been deemed proper, in the case referred to by the article, to exclude officers of the staff from command. In the first place, the command of troops might frequently interfere with their appropriate duties, and thereby occasion serious embarrassment to the service. In the next place, the officers of some of the staff corps are not qualified by their habits and education for the command of troops; and although others are so qualified, it arises from the fact that (by laws passed long subsequently to the article in question) the officers of the corps to which they belong are required to be appointed from the line of the army. Lastly, officers of the staff corps seldom have troops of their own corps serving under their command, and if the words 'officers of the line' are understood to apply to them, the effect would often be to give them command over the officers and men of all the other corps when not a man of their own was present—an anomaly always to be avoided where it is possible to do so.

"5th. It is worthy of observation that article 25, of the first 'rules and articles' enacted by Congress for the government of the army, corresponds with Article 62 of the present Rules and Articles, except that the words 'of the line of the army' are not contained in it. It is evident, therefore, that these words were inserted intentionally with a view to a change in the law, and it is probable that some inconvenience had arisen from conferring command indiscriminately on officers of the line or the staff, and had suggested the necessity of this change.

"It is contended, however, that sec. 10 of the act of 1795 enumerates the major-general and brigadier-general as among the staff officers, and that this construction of the article would exclude them from command, which would be an absurdity. No such consequence would, however, follow. The article in question was obviously designed to meet the case (of not unfrequent occurrence) where officers of different corps of the army meet together, with no officer among them who does not belong exclusively to a corps. In such a case, *there being no common superior*, in the absence of some express provision conferring the power, no officer, merely of a corps, would have the right to command any corps but his own; to obviate this difficulty, the article in

511. All officers serving by commission from the authority of any particular State,[2] shall, on all detachments, courts-martial, or other duty, wherein they may be employed in conjunction with the regular forces of the United States, take rank next after all officers of the like grade in said regular forces, notwithstanding the commissions of such militia or State officers may be elder than the commissions of the officers of the regular forces of the United States.—98th Article of War, April 10, 1806.

512. That . . . . and a resolution entitled "A resolution to authorize the President to assign the command of troops in the same field or department to officers of the same grade without regard to seniority," approved April 4, 1862, be and the same are hereby repealed.[3]—Sec. 5, July 13, 1866, chap. 176.

513. That the 61st article of "An act for establishing rules and articles for the government of the armies of the United States," approved April 10, 1806, be and the same is hereby repealed.[4]—Sec. 1, March 1, 1869, chap. 52.

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effect provides that, in such an event, the officer *of the line*, highest in rank, shall command the rest. But if there be a major-general or brigadier-general present, the case contemplated by the article does not exist. No question can arise as to the right of command, because the general officer, not belonging to any particular corps, takes the command by virtue of the general rule which assigns the command to the officer highest in rank."

(*a.*) The Army Regulations of 1813 precluded discussion upon this subject by declaring (p. 179) that "in all cases in which command shall not have been specially given, the eldest officer, whether of cavalry, of artillery, or of infantry, will command;" and (p. 180) that "brevet rank gives no precedence nor command, except on detachments; nor shall persons having such rank only be included in the roster of officers for any other duty than that performed by detachments, and to which they shall be specially assigned."

(*b.*) The rank referred to in the Articles of War (¶ ¶ 510, 511, 632, 653) is that *by commission*. Query as to the extent to which precedence and command accompany temporary or local rank created simply by an assignment from the President, or by the appointment of a general officer?

(*c.*) Officers of the MEDICAL and PAY DEPARTMENTS are, by express terms of the laws, first conferring upon them military rank, debarred from "command in the line or other staff departments." See Chap. x., ¶ 284, and Chap. xi., ¶ 317.

For the status of the CORPS OF ENGINEERS, in connection with the 62d Article of War, see Chap. xii., ¶ 376 and note 1 *b*, *c*; and for status of the ORDNANCE DEPARTMENT see Chap. xiii., ¶ 407, note 1 *b*, and note 9.

[2] But officers of volunteer forces, though serving under State commissions, are, when mustered into the service of the United States, upon the same footing as to rank, etc., as regular officers. See ¶ ¶ 519, 520.

[3] The resolution thus repealed provided: "That whenever military operations may require the presence of two or more officers of the same grade in the same field or department, the President may assign the command of the forces in such field or department, without regard to seniority of rank."

Officers of the regular army, and of volunteers in the service of the United States, being now upon an equal footing as to rank, etc., seniority of rank can only be disregarded as between them and the officers of militia—of like grades. But superiority *in grade* can only be disregarded in the temporary emergencies provided for in the 27th Article of War. See Chap. xxiii., ¶ 747.

[4] That article of war provided that: "Officers having brevets, or commissions of a prior date to those of the regiment in which they serve, may take place in courts-

514. Brevet rank shall not entitle an officer to precedence or command except by special assignment of the President,[4a] but such assignment shall not entitle any officer to additional pay or allowance. —Sec. 7, March 3, 1869, chap. 124.

515. The relative rank between officers of the navy and the army shall be as follows, lineal rank only to be considered:[5]

Rear-admirals with major-generals.
Commodores with brigadier-generals.
Captains with colonels.
Commanders with lieutenant-colonels.
Lieutenant-commanders with majors.
Lieutenants with captains.
Masters with first lieutenants.
Ensigns with second lieutenants.—Sec. 13, July 16, 1862, chap. 183.

516. The relative rank between officers of the navy and army on the retired list shall be the same as on the active list.—Sec. 20, July 16, 1862, chap. 183.

517. The officers of the marine corps shall be, in relation to rank, on the same footing as officers of similar grades in the army.[6]—Sec. 4, June 30, 1834, chap. 132.

518. All officers who have served during the rebellion as volunteers in the armies of the United States, and who have been or may hereafter be honorably mustered out of the volunteer service, shall be entitled to bear the official title, and upon occasions of ceremony to wear the uniform of the highest grade they have held by brevet or

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martial and on detachments, when composed of different corps, according to the ranks given them in their brevets or dates of their former commissions; but in the regiment, troop, or company to which such officers belong, they shall do duty and take rank both in courts-martial and on detachments which shall be composed of their own corps, according to the commissions by which they are mustered in the said corps."

(*a.*) No officer to wear any other than the uniform of his actual rank, nor to be addressed officially by his brevet title. See Chap. xix., ¶ 551.

[5] The act of December 21, 1864, provides for a vice-admiral "whose relative rank with officers of the army shall be that of lieutenant-general of the army."

The relative rank of the admiral with army officers has not been determined by law.

Officers of the revenue cutter service, when serving as part of the navy, are entitled to relative rank as follows: captains, with and next after lieutenants commanding in the navy; first lieutenants, with and next after lieutenants in the navy; second lieutenants, with and next after masters in line in the navy; third lieutenants, with and next after passed midshipmen in the navy.—Sec. 4, February 4, 1863.

[6] Under act of July 11, 1798, the marine corps "shall, at any time, be liable to do duty in the forts and garrisons of the United States, on the sea-coast, or any other duty on shore, as the President, at his discretion, shall direct." When serving with the army they are subject to the Rules and Articles of War (see ¶ ¶ 954, 955; and under the 68th Article of War they may be associated on courts-martial with army officers; "and, in such cases, the orders of the senior officer of either corps, who may be present and duly authorized, shall be received and obeyed." See ¶ 637.

other commissions in the volunteer service. In case of officers of the regular army, the volunteer rank shall be entered upon the official Army Register.[7] *Provided*, That these privileges shall not entitle any officer to command, pay, or emoluments.—Sec. 34, July 28, 1866, chap. 299.

519. In computing the length of service of any officer of the army, in order to determine what allowance and payment of additional or longevity rations he is entitled to, and also in fixing the relative rank to be given to an officer as between himself and others having the same grade and date of appointment and commission, there shall be taken into account and credited to such officer whatever time he may have actually served, whether continuously or at different periods, as a commissioned officer of the United States, either in the regular army, or, since the 19th day of April, 1861, in the volunteer service, either under appointment or commission from the governor of a State or from the President of the United States; and the provision herein contained as to relative rank shall apply to all appointments that have already been made under the "act to fix the military peace establishment of the United States," approved July 28, 1866.—Sec. 1, March 2, 1867, chap. 159.

520. In all matters relating to pay, allowances, rank, duties, privileges, and rights of officers and soldiers of the army of the United States, the same rules and regulations shall apply without distinction for such time as they may be or have been in the service, alike to those who belong permanently to that service and to those who, as volunteers, may be or have been commissioned or mustered into the military service under the laws of the United States for a limited period.[8] But nothing in this act shall be construed as affecting or in any way relating to the militia of the several States when called into the service of the United States.—Sec. 2, *ibid.*

521. Excepting the ordnance storekeeper and paymaster at the Springfield Armory, who has the rank, pay, and allowances of a

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[7] Under sec. 29 of same act, providing "that, in construing this act, officers who have heretofore been appointed or commissioned to serve with the United States colored troops shall be deemed and held to be officers of volunteers; and officers of the regular army who have also held commissions as officers of volunteers, or have commanded volunteers, shall not on that account be held to be volunteers under the provisions of this act," the war department decides that this section does not apply to officers while holding commissions in the regular army, except that their volunteer rank shall be entered upon the Army Register.—G. O. No. 78, A.-G. O., 1867.

No officer shall be addressed in orders or official communications by any title other than that of his actual rank. See Chap. xix., ¶ 550.

[8] The act of February 24, 1814, enacted: "That the officers of the corps of volunteers which shall be taken into service shall rank, according to grade and the dates of their commissions or appointments, with other officers of the army."

major of cavalry, all storekeepers of the army shall hereafter have the rank, pay, and allowances of captains of cavalry.—Sec. 7, March 2, 1867, chap. 145.

ARMY CORPS.

522. That the President be and he is hereby[9] authorized to establish and organize army corps according to his discretion.[9a]—Sec. 9, July 17, 1862, chap. 201.

523. Each army corps shall have the following officers, and no more, attached thereto, who shall constitute the staff of the commander thereof:[10] one assistant adjutant-general, one quartermaster,

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[9] ARMY CORPS.—No legislation was necessary to authorize the establishment of army corps, of two or more divisions; or of armies, of two or more army corps; or for the further subdivision of armies into "wings" or "grand divisions." These are simply executive organizations, for war purposes, of the military forces of the state. Army corps are expressly recognized in the Army Regulations of 1825 (¶ ¶ 430, 432), again in the Regulations of 1841 (¶ ¶ 383, 387), and in those of 1847 (¶ 668); but in the edition of 1861 it is declared that "the formation by divisions is the basis of the organization and administration of armies in the field."

(*a.*) In time of peace our army has been habitually distributed into geographical commands, styled respectively military divisions, departments, and districts—the "districts," as organized prior to 1815, corresponding to the commands now designated as "departments." These divisions and departments can be established only by the President; but, within their respective departments, commanding generals have from time to time grouped adjacent posts into temporary commands, now known as districts.

(*b.*) MILITARY DIVISIONS, each embracing two or more departments, have obtained from May 17, 1815, to June 1, 1821; from May 19, 1837, to July 12, 1842; from April 20, 1844, to October 31, 1853; from July 25, to August 17, 1861; and since October 13, 1863.

(*c.*) DEPARTMENT ORGANIZATIONS have been continuous since 1815.

(*d.*) FIVE MILITARY DISTRICTS were established in the Southern States, as a means toward their reconstruction, by act of March 2, 1867, chap. 153.

(*e.*) THE STAFF OF DIVISION AND DEPARTMENT COMMANDERS will be limited to—

1st. One assistant adjutant-general, or an officer to act in that capacity if none be assigned.

2d. The authorized number of aides-de-camp, of the commander's grade.

3d. One medical director, who shall also perform the duties of attending surgeon of the post where the headquarters of the commander is established.

4th. An officer of the quartermaster and one of the subsistence departments may be designated as chiefs of those departments at any headquarters, provided they also perform depot or purchasing duties; but no additional officer will be allowed for that purpose without special authority.

5th. An officer of the pay department may be designated as chief paymaster, provided he also makes his proportion of the payments within the command.

6th. When an officer of engineers or of ordnance is required temporarily for a specific duty on the staff of a division or department commander, he will be announced as such in orders from the adjutant-general's office, and will only be relieved or transferred by similar orders.

7th. Officers belonging to the inspector's or judge-advocate's departments who have heretofore been assigned from the adjutant-general's office, will continue as assigned; but no additional line officers will be allowed for the duties of those departments.—G. O. No. 7, A.-G. O., 1871.

[10] "The assistant adjutant-general, quartermaster, commissary of subsistence, and inspector-general for each army corps, once assigned from the war department, will remain permanently attached to their respective corps without regard to the movements of corps commanders, *unless otherwise assigned by the President.*"

"The aides-de-camp authorized for corps commanders may accompany the generals for whom they were appointed in their changes of duty or station, except when assigned

one commissary of subsistence, and one assistant inspector-general, who shall bear respectively the rank of lieutenant-colonel, and who shall be assigned from the army or volunteer force by the President. Also, three aides-de-camp, one to bear the rank of major, and two to bear the rank of captain, to be appointed by the President, by and with the advice and consent of the Senate, upon the recommendation of the commander of the army corps. The senior officer of artillery in each army corps shall, in addition to his other duties, act as chief of artillery and ordnance at the headquarters of the corps.—Sec. 10, July 17, 1862, chap. 201.

524. All persons who have served as officers, non-commissioned officers, privates, or other enlisted men, in the regular army, volunteers, or militia forces of the United States, during the war of the rebellion, and have been honorably discharged from the service, or still remain in the same, shall be entitled to wear, on occasions of ceremony, the distinctive army badge ordered for or adopted by the army corps and division, respectively, in which they served.—Joint Resolution, July 25, 1868.

DIVISIONS AND BRIGADES.

525. In the ordinary arrangement of the army, two regiments of infantry, or cavalry, shall constitute a brigade, and shall be commanded by a brigadier-general; two brigades, a division, and shall be commanded by a major-general. *Provided always*, That it shall be in the discretion of the commanding general to vary this disposition, whenever he shall judge it proper.[11]—Sec. 8, March 3, 1799, chap. 48.

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to a command inferior to an army corps; then their appointments will be revoked, and they will fall back upon the commission previously held."—G. O. No. 212, A.-G. O., 1862.

"All officers other than aides-de-camp in the corps staff are assigned and relieved by orders from the war department. These orders determine the question as to their right to pay."—Secretary of War, by Col. Hardie, September 15, 1863.

For rank and pay of medical director see Chap. x., ¶ 287, and note thereto.

[11] By act of March 3, 1847, the troops raised for the Mexican war were to be organized into brigades, of not less than three regiments, and divisions of not less than two brigades each; and by act of July 22, 1861, the volunteer forces were to be organized into brigades of four or more regiments, and divisions of three or more brigades each.

Brigades and divisions not organized in the army in time of peace: see note 9 *a*.

For organization of brigades and divisions in the militia see Chap. xxv., ¶ ¶ 783, 784.

CHAPTER XIX.

APPOINTMENTS, PROMOTIONS, BREVETS, CERTIFICATES OF MERIT, AND MEDALS OF HONOR.

APPOINTMENTS.[1]

530. OFFICERS taken from the line, and transferred to the staff, shall receive only the pay and emoluments attached to the rank in the staff; but their transfer shall be without prejudice to their rank and promotion in the line according to their said rank and seniority; which promotion shall take place according to usage, in the same

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[1] APPOINTING POWER.—In the absence of statutory restrictions, the President's power to appoint and promote, either in the line or staff or the army, is not confined to selections from any class or grade. Congress, however, has established uniform rules for promotion (see ¶ ¶ 539, 540), and in several instances has prescribed the classes from which selections must be made in *appointing* to original or other vacancies. For example: the general to be selected from officers in military service (¶ 195); the lieutenant-general, from the grade of major-general (¶ 197); and, in the reorganization of 1866, a proportion of the original vacancies created by the act of July 28, of that year, to be filled by selections from the volunteer forces. See also the act of April 12, 1808, which required that every commissioned officer to be appointed in the additional forces thereby authorized should be a "citizen of the United States;" and the acts cited in note 15.

In 1822 President Monroe, in a message referring to the army reduction under act of 1821, claimed "that in filling original vacancies, that is, offices newly created, it is my opinion that Congress has no right under the Constitution to interpose any restraint, by law, on the power granted to the President, so as to prevent his making a free election for these offices from the whole body of his fellow-citizens." The Senate, however, disagreed to his doctrine, and contended that as Congress possessed the power to make rules and regulations for the land and naval forces, they had a right to make any which they thought would promote the public service; that such power had been exercised from the foundation of the government in respect to the army and navy; that Congress had a right to establish rules for appointments and promotions; that every promotion is a new appointment, and is submitted to the Senate for confirmation; that Congress, in all reductions of the army, had fixed the rules for such reductions; and that no executive had hitherto denied their rightful power so to do, or had hesitated to execute such rules as Congress had prescribed.—Sergeant on the Constitution, chaps. 29, 31.

See CONSTITUTION OF THE UNITED STATES (Art. ii., sec. 2, clauses 2 and 3; sec. 3; and note 6), Chap. i.

(*a.*) WHAT CONSTITUTES AN APPOINTMENT? In answer to this query, citations are made from decisions of the Supreme Court, as follows:

(Case of *Marbury* v. *Madison.*) "Some point of time must be taken when the power of the executive over an officer, not removable at his will, must cease. That point of time must be when the constitutional power of appointment has been exercised. And this power has been exercised when the last act, required from the person possessing the power, has been performed. This last act is the signature of the commission. The transmission of the commission is the sole act of the officer to whom that duty is as-

manner as if they had not been thus transferred.[1b]—Sec. 3, March 3, 1813, chap. 52.

531. The several officers of the staff shall, respectively, receive the pay and emoluments, and retain all the privileges, secured to the staff of the army, by the act of March 3, 1813, and not incompatible with the provisions of this act.—Sec. 9, April 24, 1816, chap. 69.

532. Hereafter, the staff of the army[2] may be taken from the

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signed, and may be accelerated or retarded by circumstances which can have no influence on the appointment."

"If the transmission of a commission be not necessary to give validity to an appointment, still less is its acceptance. The appointment is the sole act of the President; the acceptance is the sole act of the officer, and is, in plain common sense, posterior to the appointment. As he may resign, so may he refuse to accept; but neither the one nor the other is capable of rendering the appointment a nonentity. A commission bears date, and the salary of the officer commences from his appointment; not from the transmission or acceptance of his commission. When a person, appointed to any office, refuses to accept, the successor is nominated in the place of the person who has declined, and not in the place of the person who had been previously in office."

"When a commission has been signed by the President, the appointment is made; and, where the officer is not removable at the will of the executive, the appointment is not revocable, and cannot be annulled. It has conferred legal rights which cannot be resumed; and the commission itself is only *evidence* of such appointment.—1 Cranch, 137–180, passim. (See also 4 Opinions, 217; 9 *ibid.*, 297; and 5 Nott & Huntington, 97.)

(In case of *United States* v. *Le Baron.*) An appointment becomes complete upon signature of commission; and when the appointee complies with such conditions as may have been imposed by law, as to bonds, oath of office, etc., he is entitled to all the benefits of that complete action.—19 Howard, 78.

(In case of *United States* v. *Bradley.*) Held that giving a bond was merely a ministerial act for the security of the government, and was not a condition precedent to authority of the appointee to perform the functions of his office, and that the *appointment* was complete when "made by the President and confirmed by the Senate."—10 Peters, 344.

(*b.*) But see ¶ 533.

[2] THE STAFF OF THE ARMY is generally understood with us to include all corps other than the artillery, cavalry, and infantry, but the right to adopt so comprehensive a classification is somewhat clouded by incongruous legislation, by regulations, and by an opinion of the Supreme Court. The language of this section, and of the 74th Article of War (¶ 649), certainly indicates that the whole military establishment must be considered as arranged under one or the other of the correlative terms, "the *line*," or "the *staff*," of the army. Under the acts of March 3, 1795, March 3, 1813, and April 24, 1816, the "general staff" embraced general officers, aides-de-camp, judge-advocates, topographical engineers, and chaplains, and such officers of the adjutant-general's, inspector-general's, quartermaster's, and medical departments as were then authorized; and in the act last cited we find a provision "that ordnance officers be assigned to their duties *with the staff* of the army, in the same manner as from the corps of engineers." (¶ 410.) The Army Regulations refer to the staff departments *and* the engineers and ordnance; but the second comptroller says that the officers of the corps named "do not belong to the line of the army." What then is their status? The law implies that they do not belong to the staff; the comptroller denies their identity with the line; and the Army Regulations of 1863 (¶ 20) suggest their isolation from either the one or the other. See Chap. xii., note 1 *c*; and Chap. xiii., notes 1 *b* and 8.

(*a.*) In the absence of determinate legislation, it would seem to be not only the right, but the duty, of the President to arrange, as has been done, such classification of the various corps as is indicated by the nature of the duties for which they are established; but that such distribution is conclusive as to resultant questions of pay, command, or

line of the army, or from citizens.[2b]—Sec. 10, April 24, 1816, chap. 69.

533. Appointments in the line, and in the general staff, which confer equal rank in the army, shall not be held by the same officer at the same time; and when any officer of the staff who may have been taken from the line shall, in virtue of seniority, have obtained or be entitled to promotion to a grade in his regiment equal to the commission he may hold in the staff, the said officer shall vacate such staff commission, or he may, at his option, vacate his commission in the line.[3]—Sec. 7, June 18, 1846, chap. 29.

534. That the President of the United States be and he is hereby authorized, by and with the advice and consent of the Senate, to confer the brevet of second lieutenant upon such meritorious non-

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other privileges, is denied by the Supreme Court in case of *Whetmore* v. *United States*. In that case cavalry pay was claimed by a paymaster on the ground that the officers of his department belonged to the staff, and had been so graded by the war department, as shown in the Army Register. The claim was rejected, and in delivering opinion of the court, the judge remarked: "The registers are compilations issued and published to the army by the direction of the secretary at war, in the exercise of his official authority; and when authenticated by him would be evidence of the facts, strictly so, they may contain; such as the names of officers, date of commissions, promotions, resignations, and regimental rank, brevet, and other rank, or the department of the army to which officers belong; but from none of these can an inference be drawn by a jury to establish the pay and emoluments of officers; as they are provided for by law, and must be determined by the court when they are doubtful and the subject of dispute, in a suit between an officer and the United States. Nor can such registers be evidence of the correctness of any classification of the officers of departments into a general staff of the army; for though they are probably correct, being prepared by persons whose professional duty it is to be well informed upon the subject, and who, from their familiarity with military science and the general arrangement of armies, are supposed to be expert interpreters of the acts of Congress for the organization of our army, still, what officers are of the staff, or general staff, depends upon acts of Congress, which are to be expounded by the courts, when an officer claims a judicial determination of his right as to pay and emoluments, from his having been arranged as belonging to the staff.

"Considering the staff as a central point of military operations, whence should proceed all general orders for the army, the orders of detail, of instruction, of movement, all general measures for subsisting, paying, and clothing the army; and as the administrative organ of all supplies for the military service and land defense of the country: it seems to us that paymasters, from their duties and responsibilities, should be classed with the general staff, and we presume it has been done under the act of the 2d of March, 1821, which, without being express upon the point, has rendered indeterminate the previous acts of Congress fixing with certainty the officers composing the staff."—10 Peters, 652. But see ¶ 317 and note 1 *a*, Chap. xi.

(*b*.) Appointments in the adjutant-general's and quartermaster's departments are restricted to selections from the army. See Chap. vii., ¶ ¶ 207, 208, and note 3; and Chap. viii., ¶ 222.

With reference to appointments in the subsistence department see Chap. ix., notes 1 *a* and 2 *a*; and for conditions precedent to appointments in the medical and ordnance departments see Chaps. x., ¶ 283, and xiii., ¶ 402.

[3] Under a ruling of the war department, his commission in the line may be vacated, by resignation, immediately upon transfer to the staff.

"A staff appointment conferred on an officer in the line of the army is not a promotion, but an original appointment. Its pay will, therefore, commence from the date of the officer's acceptance. Such acceptance may be either by letter or by commencing to perform the duty."—Second Comptroller, October 13, 1851. But see note 1 *a*.

commissioned officers, as may, under regulations to be established, be brought before an army board, composed of four officers of rank, specially convened for the purpose, and be found qualified for the duties of commissioned officers; and to attach them to regiments, as supernumerary officers, according to the provisions of the 4th section of the act approved April 29, 1812, entitled "An act making further provision for the corps of engineers."[4]—Sec. 5, August 4, 1854, chap. 247.

535. Whenever a regiment in the regular army is reduced below the minimum number, no officer shall be appointed in such a regiment beyond those necessary for the command of such reduced number.—Sec. 8, March 3, 1865, chap. 79.

536. The adjutant-general, quartermaster-general, commissary-general of subsistence, surgeon-general, paymaster-general, chief of engineers, and chief of ordnance, shall hereafter be appointed by selection from the corps to which they belong.—Sec. 23, July 28, 1866, chap. 299.

537. Nothing in this act shall be construed to authorize or permit the appointment to any position or office in the army of the United States of any person who has served in any capacity in the military, naval, or civil service of the so-called Confederate States or of either of the States in insurrection during the late rebellion; but any such appointment shall be illegal and void.—Sec. 28, July 28, 1866, chap. 299.

538. Until otherwise directed by law there shall be no new appointments, and no promotions in the adjutant-general's department,[5] in the inspector-general's department,[6] in the pay depart-

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[4] See Chap. iv., ¶ ¶ 143, 170. "As a general rule, one-fourth of the vacancies occurring annually will be filled, agreeably to existing laws and regulations, from non-commissioned officers in the army. The remainder, not filled by the graduating classes of the Military Academy, will be supplied from civil life."—G. O. No. 93, A.-G. O., 1867. That order also promulgates regulations for examination of the candidates.

(*a.*) Sec. 24, of the act of July 28, 1866, by which the army was reorganized, provided: "That no person shall be commissioned in any of the regiments authorized by this act until they shall have passed a satisfactory examination before a board, to be composed of officers of that arm of the service in which the applicant is to serve, to be convened under the direction of the secretary of war, which shall inquire into the services rendered during the war, capacity and qualifications of the applicants; and such appointments, when made, shall be without regard to previous rank, but with sole regard to qualifications and meritorious services; and persons applying for commissions in any of the regiments authorized by this act shall be entitled, in cases of passing the examination, and being appointed or commissioned, to receive mileage from the place of his residence to the place of examination, or such portion of that distance as he may actually travel, the same as is paid to officers traveling under orders, but there shall be paid no other compensation." This section was construed as applying only to the "original vacancies" created by that act.

[5] Vacancies existing in this department at date of this act were excepted by Resolution, April 10, 1869.

[6] Appointment of an inspector-general authorized: see note 4 *b*, ¶ 209.

ment,[6a] in the quartermaster's department,[6b] in the commissary department, in the ordnance department, in the engineer department,[6c] and in the medical department.[6d]—Sec. 6, March 3, 1869, chap. 124.

PROMOTION.

539. From and after the passing of this act, promotions may be made through the whole army in its several lines of light artillery, light dragoons, artillery, infantry, and riflemen, respectively; and that the relative rank of officers of the same grade, belonging to regiments or corps already authorized, or which may be engaged to serve for five years, or during the war, be equalized and settled by the war department, agreeably to established rules; and that so much of the act entitled "An act for the more perfect organization of the army of the United States,"[7] passed the 26th of June, 1812, as comes within the purview and meaning of this act, be and the same is hereby repealed.[15]—Sec. 12, March 30, 1814, chap. 37.

(*a.*) Vacancy arising in office of paymaster-general filled: note 1 *a*, ¶ 310.

(*b.*) A further suspension obtains in this department under the act in ¶ 220. Special appointments since authorized: note 1 *a*, ¶ 220.

(*c.*) This act repealed so far as it relates to the engineer. ¶ 370.

(*d.*) Vacancy in office of chief medical purveyor filled: note 4 *b*, ¶ 283.

[7] That portion of said act referring to promotion provided: "That the military establishment authorized by law previous to the 12th day of April, 1808, and the additional military force raised by virtue of the act of the 12th day of April, 1808, be and the same are hereby incorporated; and that, from and after the passing of this act, the promotions shall be made through the lines of artillerists, light artillery, dragoons, riflemen, and infantry, respectively, according to established rule." The "established rule" thus referred to is found in Army Regulations of 1813, viz.: "Original vacancies will be supplied by selection; accidental vacancies by seniority, excepting in extraordinary cases." "Promotions to the rank of captain will be made regimentally; to that of field appointments, by *line;* the light artillery, dragoons, artillery, infantry, and riflemen being kept always distinct."

Suggested—that the object of the act of March 30, 1814, was to repeal so much of the act of June 26, 1812, as restricted the application of the rule of promotion to the forces thereby incorporated; that, by inserting the words "through the whole army," it was meant to embrace under that rule the additional forces added to regular establishment, for the war, by acts of January 29, 1813, January 27, 1814, and February 10, 1814; and that it was not intended to alter, otherwise, the manner in which promotions were made under the "established rule." That it was simply the intention of Congress to extend the application of the rule is the more apparent from the terms of sec. 2, same act, which enacted that officers of the volunteer forces, "raised for five years or during the war," be entitled to "*promotion in the line of the army.*"

(*a.*) The regulations adopted by Congress in 1821 provided that "the executive will fill *original* vacancies, when created, by selection: *accidental* vacancies, below the rank of brigadier-general, by promotion, and according to seniority, except in extraordinary cases;" but the act by which these regulations were adopted was repealed by the act of May 7, 1822.

(*b.*) The Army Regulations of 1863 provide that "all vacancies in established regiments and corps, to the rank of colonel, shall be filled by promotion according to seniority, except in case of disability or other incompetency. Promotion to the rank of captain shall be made regimentally; to major and lieutenant-colonel and colonel, according to the arm, as infantry, artillery, etc., and in the staff departments, and in the engineers and ordnance, according to corps."

(*c.*) Promotion, vice officers retired, to be "by seniority according to established rule": Chap. xvi., ¶ 471.

540. All promotions in the staff department or corps shall be made as in other corps of the army.[8]—Sec. 1, March 3, 1851, chap. 33.

541. Whenever any lieutenant of the corps of engineers, corps of topographical engineers, or ordnance corps[9] shall have served fourteen years' continuous service as lieutenant, he shall be promoted to the rank of a captain. *Provided*, That the whole number of officers in either of said corps shall not be increased beyond the number now fixed by law. *And provided further*, That no officer shall be promoted before those who rank him in said corps.—Sec. 9, March 3, 1853, chap. 98.

OATH OF OFFICE.

542. Hereafter, every person elected or appointed to any office of honor or profit under the government of the United States, either in the civil, military, or naval departments of the public service, excepting the President of the United States, shall, before entering upon the duties of such office, and before being entitled to any of the salary or other emoluments thereof, take and subscribe to the following oath or affirmation: "I, A. B., do solemnly swear, or affirm, that I have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have neither sought nor accepted nor attempted to exercise the functions of any office whatever under any authority or pretended authority in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power, or constitution within the United States, hostile or inimical thereto. And I do further swear, or affirm, that to the best of my knowledge and ability, I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter, so help me God;" which said oath, so taken and signed, shall be preserved among the files of the court, house of Congress, or department to which the

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[8] See ¶ 539 and preceding note. For conditions precedent to promotion in medical department see ¶ 283; in corps of engineers, ¶ 376; and in ordnance department, ¶ 402. See also note 4 *b*, ¶ 209, and note 1 *a*, ¶ 220.

[9] Promotion in quartermaster's department by length of service: see Chap. viii., ¶ 224.

said office may appertain. And any person who shall falsely take the said oath shall be guilty of perjury, and on conviction, in addition to the penalties now prescribed for that offense, shall be deprived of his office and rendered incapable forever after of holding any office or place under the United States.—July 2, 1862, chap. 128.

BREVETS.

543. The President is hereby authorized to confer brevet rank on such officers of the army as shall distinguish themselves by gallant actions or meritorious conduct.[10]—Sec. 4, July 6, 1812, chap. 137.

544. No brevet commission shall hereafter be conferred but by

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[10] BREVET RANK.—This act is not mandatory, and the President exercises his own discretion in determining whether or not the services rendered by an officer merit this distinction.—2 Opinions, 75.

(*a.*) The provisions in ¶ ¶ 545, 546, 548, 550 render valueless a long series of decisions and opinions, from the second comptrollers and the attorney-generals, as to the condition under which pay and command, according to brevet rank, obtained under concurrent legislation; there is now no money in it, and disputes as to precedence are precluded by ¶ 550. It seems, however, to be questionable whether there is any limitation upon the power of conferring brevet rank, other than is found in ¶ 549; and whether the rank, when once conferred, is self-sustaining.

(*b.*) The existence of statutory limitations to the exercise of brevet rank indicates a recognition of its inherent vitality and force; and the propriety of using the term "*actual rank*" as contradistinctive to that "*by brevet*" may be questioned. To sustain that distinction a difference must be assumed as existing between the brevet rank concomitant upon staff appointments under acts of March 3, 1813, April 24, 1816, et sequentes, and that conferred under the laws in this chapter. Under the series of acts first referred to, *brevet rank only* was conferred upon most of the officers in the "general staff"; and those appointments were not only conferred irrespective of the lineal rank of such officers as were selected from the army, but in many instances the higher grades were conferred upon citizens—the Regulations of 1813, and subsequent editions, making special provisions for the assignment to duty of those officers having brevet rank only. It has happened too, at no remote periods, that officers vacating their regimental commissions (¶ 553) have continued in service solely upon the *brevet* commissions of like grades to those thus vacated.

(*c.*) In reference to this rank as bestowed for distinguished services, etc., we are informed that it can be granted only for a grade, or rank, otherwise existing in the military establishment; but that where a grade has been established, it may be conferred by brevet upon an officer, irrespective of his lineal rank, either in the army or in the marine corps. See 1 Opinions, 352, 480, 578, 584; 5 *ibid.*, 22. (But see note 13 *a.*) On the other hand it has been argued that these brevet commissions confer only a parasitic rank—perishing upon any interruption of the links connecting with the grade held by commission, not brevet. Hence has recently arisen the practice, when it is proposed to promote an officer, by brevet, more than one grade above his corps or regimental rank, of brevetting him also for the intervening grades. This practice was, however, found to be unnecessary when the President was brevetted a captain, so also in the case of General Fremont; and brevet rank has not only survived a reduction from the grades held by officers when brevetted, as in the cases of Generals Macomb, Towson, J. E. Johnston, and others, but has been found to survive an absolute discharge from service—obtaining upon reappointment, even to positions in the army at the time conferring no military rank—as in the cases of the Paymasters William Piatt and Donald Frazer. See Army Registers, 1834, 1837.

The Army Register of 1829 indicates that the brevet of brigadier-general was conferred upon *General* Simon Bernard, who was employed as an assistant engineer under an act conferring no military rank upon that office.

and with the advice and consent of the Senate.—Sec. 2, April 16, 1818, chap. 64.

545. That the President of the United States be and he hereby is authorized, by and with the advice and consent of the Senate, to confer brevet rank upon such commissioned officers of the volunteer and other forces in the United States service as have been, or may hereafter be, distinguished by gallant actions or meritorious conduct; which rank shall not entitle them to any increase of pay or emoluments.—March 3, 1863, chap. 82.

546. Officers by brevet in the regular army shall receive the same pay and allowance as brevet officers of the same grade or rank in the volunteer service, and no more [¶ 545].—Sec. 9, March 3, 1865, chap. 79.

547. The President is hereby authorized, with the advice and consent of the Senate, to confer brevet rank on officers in the army of the United States on account of gallant, meritorious, or faithful conduct in the volunteer service, prior to appointment in said army of the United States.—March 2, 1867, chap. 175.

548. That the 61st article of "an act for establishing rules and articles for the government of the armies of the United States," approved April 10, 1806, be and is hereby repealed.[11]—Sec. 1, March, 1869, chap. 52.

549. From and after the passage of this act, commissions by brevet shall only be conferred in time of war, and for distinguished conduct and public service in the presence of the enemy. And all brevet commissions shall bear date from the particular action or service for which the officer was brevetted.—Sec. 2, *ibid.*

550. Brevet rank shall not entitle an officer to precedence or command except by special assignment of the President; but such assignment shall not entitle any officer to additional pay or allowances.—Sec. 7, March 3, 1869, chap. 124.

551. Hereafter, no officer shall be entitled to wear, while on duty, any uniform other than that of his actual rank, on account of having been brevetted. Nor shall he be addresssed in orders or official communications by any title other than that of his actual rank.[12]—Sec. 16, July 15, 1870, chap. 294.

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[11] For text of the Article of War thus repealed see note to ¶ 513.

[12] "Officers, if they please, have the right to affix their brevet titles to their signatures, there being no prohibition in the law. The issuing of orders 'By command of Brevet—— ——,' is deemed illegal."—Circular, A.-G. O., September 23, 1870.

On occasions of ceremony, all officers honorably mustered out of the volunteer service are entitled to wear the uniform of the highest grade to which they attained, by brevet or otherwise. See ¶ 513.

CERTIFICATES OF MERIT.

552. When any non-commissioned officer shall distinguish himself, or may have distinguished himself in the service, the President of the United States shall be and is hereby authorized on the recommendation of the commanding officer of the regiment to which said non-commissioned officer belongs, to attach him by brevet of the lowest grade to any corps of the army.[13] *Provided,* That there shall not be more than one so attached to any one company at the same time, and when any private soldier shall so distinguish himself, the President may in like manner grant him a certificate of merit, which shall entitle him to additional pay at the rate of two dollars per month.—Sec. 17, March 3, 1847, chap. 61.

See Order [illegible] A.G.O. [illegible] 1878—

MEDALS OF HONOR.

553. That the President cause to be struck, from the dies recently prepared at the United States mint for that purpose, "medals of honor" additional to those authorized by the act [resolution] of July 12, 1862,[14] and present the same to such officers, non-commissioned officers, and privates as have most distinguished or who may hereafter most distinguish themselves in action; and the sum of twenty thousand dollars is hereby appropriated out of any money in the treasury not otherwise appropriated, to defray the expenses of the same.—Sec. 6, March 3, 1863, chap. 79.

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[13] So much of this section as refers to promotion of non-commissioned officers seems to be supplied by act of 1854: see ¶ 534. The same act makes provision for extra pay on certificates of merit: see Chap. xi., ¶ 331.

(*a.*) This act (¶ 552) invests the President with authority to issue such brevets to those who as non-commissioned have rendered distinguished services; and this whether they, at time the appointment issues, have been reduced to lower rank, or have left the service. As the President has the power to appoint a citizen as second lieutenant, "much more would he be deemed to have the power to appoint a private citizen to the place of brevet second lieutenant," etc.—5 Opinions, 22. See note 10 *b*.

[14] The resolution referred to provided for the presentation of medals of honor to such *enlisted men* as should most distinguish themselves during the then existing rebellion.

[15] Acts of Congress regulating appointments and promotions in the army:

June 26, 1812, § 4. Promotion established through the line. (See note 7.)

March 3, 1813, § 4. Adjutant-generals, inspector-generals, quartermaster-generals, deputy quartermaster-generals, and assistant deputy quartermaster-generals may be appointed from the line or not, as the President may deem expedient. Assistant adjutant-generals and assistant inspector-generals to be taken from the line.

March 30, 1814, § 12. Promotion throughout the line. (¶ 539.)

April 24, 1816, § 10. Appointments in the staff. (¶ 532.)

May 18, 1826, § 4. Quartermaster's department. Additional offices to be filled from the line.

March 2, 1829, § 2. Subsistence department. Additional offices to be filled from the line. (See Chap. ix., note 2.)

June 30, 1834, § 1. Medical department. Appointments and promotions. (See ¶ 283.)

July 5, 1838, § 4. Topographical engineers to be organized into a corps by regular promotion, etc.

§ 7. Adjutant-general's department. Additional offices to be filled from the line. (See ¶ 207.)

§ 9. Quartermaster's department. Appointments in, to be from the line. Promotion by seniority.

July 7, 1838, § 3. Quartermaster's department. Assistant quartermasters not to be separated from the line.

§ 7. Subsistence department. Commissaries not to be separated from the line.

June 18, 1846, § 6. Adjutant-general's department. Additional offices to be filled from the line.

§ 7. Quartermaster's department. Promotion to grade of major by selection from captains of the army.

February 11, 1847, § 3. Regiments. Additional majors to be selected from the captains of the army.

§ 10. Quartermaster's department. Additional offices to be filled by selection from the line.

March 3, 1847, § 2. Adjutant-general's department. Additional offices to be filled by selection from the line.

September 26, 1850, § 1. Subsistence department. Additional offices to be filled by selection from the line. (See Chap. ix., note 2.)

March 3, 1851, § 1. Staff corps and departments. Promotion in, to be by seniority. (¶ 540.)

March 3, 1853, § 9. Engineers and ordnance. Promotion by length of service. (¶ 541.)

February 15, 1855, § 1. Lieutenant-general. Appointment of, by brevet, to be conferred on a major-general. (See 7 Opinions, 403.)

August 3, 1861, § 2. Subsistence department. Additional offices to be filled from the line, regulars or volunteers.

§ 3. Quartermaster's department. Promotions of captains by length of service.

§ 3. Engineers. Additional offices in, to be filled by regular promotion.

§ 3. Ordnance department. Additional offices to be filled by selection.

August 6, 1861, § 1. Engineers. Additional offices in, to be filled by regular promotion. (See 10 Opinions, 144.)

April 16, 1862, § 4. Medical department. Certain offices created in, to be filled by selection. (See Chap. x., note 4.)

July 17, 1862, § 22. Adjutant-general's department. Appointments in, from captains. (¶ 208.)

July 17, 1862, § 11. Cavalry. Vacancies created in the, to be filled by promotion.

December 27, 1862, § 1. Medical department. Inspectors appointed by selection.

February 9, 1863, § 1. Subsistence department. Certain vacancies to be filled by promotion.

February 29, 1864, § 1. Lieutenant-general. The, selected from grade of major-general. (¶ 197.)

July 25, 1866, § 1. General. The, to be selected from those in military service. (¶ 195.)

March 3, 1869, § 2. Infantry promotions suspended. (¶ 463.)

§ 6. Staff departments. Suspension of appointments and promotions in. (¶ 538.)

March 12, 1872. Medical department. Provides for the designation of a chief medical purveyor. (See Chap. x., note 4 *b*.)

June 3, 1872. Quartermaster's department. Special promotions authorized. (See Chap. viii., note 2 *a*.)

June 4, 1872. Paymaster-general to be appointed. (See Chap. xi., note 1 *a*.)

June 8, 1872. Inspector-general's department. Special promotion in. (See Chap. vii., note 4 *b*.)

June 10, 1872. Engineer corps. Promotion and appointments in, re-established. (¶ 370.)

CHAPTER XX.

RESIGNATIONS, DISMISSALS, DISCHARGES FROM SERVICE, AND DISEASED OFFICERS AND SOLDIERS.

RESIGNATIONS.

561. ANY commissioned officer of the army, navy, or marine corps, who, having tendered his resignation,[1] shall, prior to due notice of the acceptance of the same by the proper authority, and, without leave, quit his post or proper duties with the intent to remain permanently absent therefrom, shall be registered as a deserter, and punished as such.—Sec. 2, August 5, 1861, chap. 54.

562. Any officer of the army or navy of the United States who shall, after the passage of this act, accept or hold any appointment in the diplomatic or consulate service of the government, shall be considered as having resigned his said office; and the place held by him in the military or naval service shall be deemed and taken to be vacant, and shall be filled in the same manner as if the said officer had resigned the same.—Sec. 2, March 30, 1868, chap. 38.

563. It shall not be lawful for any officer of the army of the United States, on the active list, to hold any civil office,[2] whether by election or appointment; and any such officer accepting or exercising the functions of a civil office shall at once cease to be an officer of the army, and his commission shall be vacated thereby.—Sec. 18, July 15, 1870, chap. 294.

DISMISSALS AND DISCHARGES.

564. After a non-commissioned officer or soldier shall have been

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[1] According to the general principles of law, the resignation of an officer made while he was insane is a mere nullity which could not be made valid by its acceptance.—6 Opinions, 456; 10 *ibid.*, 229.

[2] AN OFFICE is a public station or employment conferred by the appointment of government, and embraces the ideas of tenure, duration, emolument, and duties.—*United States* v. *Hartwell*, 6 Wallace, 385.

The employment of army officers on coast survey and lighthouse duties, on river and harbor improvements, on surveys of roads, canals, etc., has been repeatedly authorized, or directed, by laws which are believed to suffer no derogation from above section. See Chap. iv., ¶ 154; Chap. xii., ¶ ¶ 378, 390; Chap. xxviii., ¶ ¶ 928, 929.

duly enlisted and sworn, he shall not be dismissed the service without a discharge in writing; and no discharge granted to him shall be sufficient which is not signed by a field officer of the regiment to which he belongs, or commanding officer, where no field officer of the regiment is present; and no discharge shall be given to a noncommissioned officer or soldier, before his term of service has expired, but by order of the President, the secretary of war, the commanding officer of a department,[3] or the sentence of a general court-martial; nor shall a commissioned officer be discharged the service, but by order of the President of the United States, or by sentence of a general court-martial.[4]—11th Article of War, April 10, 1806.

565. In all cases where it has become necessary for any officer or enlisted man of the army to file his evidence of honorable discharge from the military service of the United States, to secure the settlement of his accounts, the accounting officer with whom it has been filed shall, upon application by said officer or enlisted man, deliver to him such evidence of honorable discharge,[3a] *providing* [provided] his accounts shall have been duly settled; and provided that the fact, date, and amount of such settlement shall first be clearly written across the face of such evidence of honorable discharge, and attested by the signature of the accounting officer.—Joint Resolution, May 4, 1870.

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[3] DISCHARGE FROM SERVICE.—Under this Article of War a department commander can discharge a soldier only upon surgeon's certificate of disability, or in accordance with sentence of a general court-martial.—Adjutant-general, October 14, 1871.

In time of war, enlisted men in general or permanent hospitals may be discharged by the medical inspector. See Chap. x., ¶ ¶ 285, 286.

It is unlawful to discharge a soldier "without pay," except upon sentence of court-martial.—Adjutant-general, August 9, 1869.

(*a.*) "No discharge shall be made in duplicate, nor any certificate given in lieu of discharge."—Army Regulations (1863), ¶ 165. See ¶ 570.

(*b.*) "It is decided that a discharge from the service, given before the expiration of the term of confinement imposed by sentence of court-martial (where by the terms of the sentence a dishonorable discharge is to be given at the end of the confinement), will operate as a remission of the remaining portion of the sentence."—Adjutant-general, August 12, 1871.

(*c.*) "Applications of soldiers for discharge, by reason of twenty years' service, are not entertained by this office, unless the soldier is a fit subject for discharge on certificate of disability, or desires to enter the Soldiers' Home."—Adjutant-general, May 1, 1872. See ¶ 595.

(*d.*) General service clerks may be discharged, or transferred to companies at the discretion of the commanding general.—Indorsement of Adjutant-general on G. O. No. 92, A.-G. O., 1868.

[4] DISMISSAL OF OFFICERS.—No officer can be dismissed in time of peace except by, or under commutation of, sentence of general court-martial (¶ 567); but he may be dropped from the rolls, for desertion, under the law cited in ¶ 569.

This article transferred to the President the power of summary dismissal theretofore vested in Congress, and this power finds its only limitation in ¶ 567.

The last clause of this Article of War is as applicable to the commissioned officers of

566. In case any officer of the military or naval service who may be hereafter dismissed by authority of the President shall make an application in writing for a trial, setting forth under oath that he has been wrongfully and unjustly dismissed, the President shall, as soon as the necessities of the public service may permit, convene a court-martial to try such officer on the charges on which he was dismissed.[4a] And if such court-martial shall not award dismissal or death as the punishment of such officer, the order of dismissal shall be void. And if the court-martial aforesaid shall not be convened for the trial of such officer within six months from the presentation of his application for trial, the sentence of dismissal shall be void.—Sec. 12, March 3, 1865, chap. 79.

567. That sec. 17 of an act entitled "An act to define the pay and emoluments of certain officers of the army," approved July 17, 1862, . . . be and the same are hereby repealed. And no officer in the military or naval service shall, in time of peace, be dismissed from service except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof.[5]—Sec. 5, July 13, 1866, chap. 176.

568. No officer of the army of the United States, who has been or shall hereafter be cashiered or dismissed from the service by the

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volunteers, when mustered into the service of the United States, as it is to regular officers. Having once been mustered into the national forces, the volunteer officer cannot be dismissed or discharged by the State executive.—10 Opinions, 281, 306.

(*a*.) Regulations for carrying into effect provisions of this section:

Army, department, or division commanders, forwarding recommendations for summary dismissal, will transmit, accompanying the same, charges and specifications appropriate to the offenses imputed, properly framed, and supported by affidavits or official reports, with the names of the witnesses by whom all material allegations can be substantiated.

Applications for trial under this act must be made as soon as practicable after receipt of notice of dismissal, setting forth, under oath, facts showing the error or injustice complained of, and must be addressed to the adjutant-general of army.

Should there be no general court-martial, appointed by direction of the President, then in session at a convenient point, one will be convened within the department or corps where the accused last served, unless the latter shall have suggested sufficient reasons for causing the trial to be elsewhere held.

The trial will proceed in the usual manner, upon the charges originally forwarded; and, should the President revoke the order of dismissal before arraignment of the accused, he may also be tried upon such additional charges as may be properly preferred. Should the court award any other punishment than death or dismissal, such sentences will, if approved by the President, be duly executed.—G. O. No. 112, A.-G. O., 1865.

[5] The section thus repealed provided "that the President of the United States be and hereby is authorized and requested to dismiss and discharge from the military service either in the army, navy, marine corps, or volunteer force, in the United States service, any officer for any cause which, in his judgment, either renders such officer unsuitable for, or whose dismission would promote, the public service;" and simply affirmed a power held by the Supreme Court to be "an incident of the power of appointment" (see 13 Peters, 259), and exercised from the foundation of the government. —4 Opinions, 603; 8 *ibid.*, 223. See also last clause of ¶ 564; and for power to drop an officer from the roll see ¶ 569.

(*a*.) But see ¶ 744.

sentence of a general court-martial, formally approved by the proper authority, shall ever be restored to the military service except by a reappointment, confirmed by the Senate of the United States.[6]—July 20, 1868, chap. 185.

569. That the President of the United States be and he is hereby authorized to drop from the rolls of the army, for desertion, any officer who is now, or who may hereafter be, absent from duty three months without leave; and any officer so dropped shall forfeit all pay and allowances due or to become due, and shall not be eligible for reappointment.[7]—Sec. 17, July 15, 1870, chap. 294.

570. Any claim-agent, attorney, or other person engaged in the collection of claims for pay, bounty, pension, or other allowances for any soldier, sailor, or marine, or for any commissioned officer of the military or naval forces, or who may have been a soldier, sailor, marine, or officer of the regular or volunteer forces of the United States, and honorably discharged, who shall retain, without the consent of the owner or owners thereof, or shall refuse to deliver or account for the same upon demand duly made by the owner or owners thereof, or by their agent or attorney, the discharge-papers or land-warrant of any such soldier, sailor, or marine, or com-

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[6] RESTORATION OF OFFICERS.—The attorney-generals have repeatedly advised that officers dismissed or cashiered pursuant to sentences of courts-martial could be legally restored to the service only in the manner pointed out in this statute. Disregard of their advice invited this legislation.

(*a.*) *Pay of restored officers:*

Officers dismissed, or dropped from the rolls, and subsequently restored and reinstated to their former rank, are not entitled to pay, etc., for intervening period.—Second Comptroller, §§ 1132, 1133, 1137, 1138; 4 Opinions, 123, 318, 348, 603; 5 *ibid.*, 132; 9 *ibid.*, 137; but contra, 3 Opinions, 641.

Restoration does not entitle to pay for period when out of service, unless the same be expressly ordered.—Secretary of War, July 7, 1863.

Officers restored under provisions of ¶ 568 allowed pay only from date of assignment to duty by the war department.—Adjutant-general, February 25, 1869.

An officer *is* entitled to pay from date of dismissal to restoration, when the order of dismissal is revoked as made without cause and by mistake.—2 Nott & Huntington, 209; 3 *ibid.*, 136; 4 *ibid.*, 216.

When an order of dismissal is simply revoked the officer is entitled to pay ad interim; but when the restoration is accepted with condition that he be paid only from date of restoration, the condition is held to be binding.—4 *ibid.*, 202. But in the case of Major Montgomery the court of claims has taken occasion to qualify its previous decisions by holding that "an order of the President dismissing a military officer may be revoked by the same President that issued it; and if the office be not filled at the time of revocation, and if the pay thereof has not been paid lawfully to another, the dismissed officer will be entitled to the office and to the pay ad interim; but if the office be filled by another, the revocation must remain suspended till a vacancy occur; and if the pay ad interim has been paid lawfully to another, the officer must take his reinstatement cum onere."—5 *ibid.*, 98.

[7] The act of July 13, 1866 (¶ 567), was construed by the war department as prohibiting the "dropping from the rolls" of an officer for desertion. A number of officers, absent without leave for prolonged periods, were therefore dropped "with loss of all pay and allowances," by Joint Resolution of July 27, 1868. The above paragraph (569) makes general provision for such cases, and to that extent qualifies the act in ¶ 567.

missioned officer, which may have been placed in his hands for the purpose of collecting said claims, shall be deemed guilty of a misdemeanor, and shall, upon conviction, be punished by fine not exceeding five hundred dollars, or by imprisonment not exceeding six months, or both, at the discretion of the court, and shall thereafter be debarred from prosecuting any such claim in any executive department of the government.—May 21, 1872, chap. 178.

DECEASED OFFICERS AND SOLDIERS.

571. When any commissioned officer shall die or be killed in the service of the United States, the major of the regiment or the officer doing the major's duty in his absence, or in any post or garrison the second officer in command, or the assistant military agent, shall immediately secure all his effects or equipage, then in camp or quarters, and shall make an inventory thereof, and forthwith transmit the same to the office of the department of war, to the end that his executors or administrators may receive the same.[8]—94th Article of War, April 10, 1806.

572. When any non-commissioned officer or soldier shall die, or be killed in the service of the United States, the then commanding officer of the troop, or company, shall, in the presence of two other commissioned officers, take an account of what effects he died possessed of, above his arms and accoutrements, and transmit the same to the office of the department of war, which said effects are to be accounted for, and paid to the representatives of such deceased non-commissioned officer or soldier. And in case any of the officers, so authorized to take care of the effects of deceased officers and soldiers, should, before they have accounted to their representatives for the same, have occasion to leave the regiment or post, by preferment or otherwise, they shall, before they be permitted to quit the same, deposit in the hands of the commanding officer, or of the assistant military agent, all the effects of such deceased non-commissioned officers and soldiers, in order that the same may be secured for, and paid to, their respective representatives.[9]—95th Article of War, *ibid.*

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[8] Balances due from the United States to deceased persons are payable at the treasury, and not by disbursing officers.—Second Comptroller, § 676.

"There is no law or regulation under which the private debts of a soldier can be deducted from the pay due at date of death."—Adjutant-general, November 16, 1872.

[9] "Expenses of the interment of officers killed in action, or who die when on duty in the field, or at posts on the frontier, or at posts and other places *when ordered by the secretary of war*, and of non-commissioned officers and soldiers," provided for in the annual appropriation bills. See act of March 3, 1871. See also NATIONAL CEMETERIES, ¶ ¶ 610–623.

CHAPTER XXI.

PENSIONS, ARTIFICIAL LIMBS, SOLDIERS' HOME, INSANE ASYLUM, AND NATIONAL CEMETERIES.

PENSIONS.

575. If any officer, non-commissioned officer, musician, or private of the army, including regulars, volunteers, and militia, . . . has been, since the 4th day of March, 1861, or shall hereafter be, disabled by reason of any wound received or disease contracted while in the service of the United States, and in the line of duty, he shall, upon making due proof of the fact according to such forms and regulations as are or may be provided by or in pursuance of law, be placed upon the list of invalid pensions[1] of the United States, and be entitled to receive, for the highest rate of disability, such pension as is hereinafter provided in such cases, and for an inferior disability an amount proportionate to the highest disability,[2] to commence as hereinafter provided, and continue during the existence of such disability. The pension for a total disability for officers, non-commissioned officers, musicians, and privates employed in the military service of the United States, whether regulars, volunteers, or militia, and in the marine corps, shall be as follows, viz.: lieutenant-colonel, and all officers of a higher rank, thirty dollars per month; major, twenty-five dollars per month; captain, twenty dollars per month; first lieutenant, seventeen dollars per month; second lieutenant, fifteen dollars per month; and non-commissioned officers, musicians, and privates, eight dollars per month. . . . . And all commissioned officers, of either service, shall receive such and only such pension as is herein provided for the

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[1] The act of July 14, 1862, is the basis of all legislation governing such claims for pension as may hereafter arise in the army. As the commissioner of pensions (¶ 585) furnishes gratuitously to all applicants the forms and instructions necessary to substantiate a claim, it has been deemed advisable to insert here only such portion of the pension laws as indicate the military individuals entitled to pensions, the rates thereof, and conditions upon which granted. Those desiring to pursue the subject further are referred to acts of Congress cited in note 6 to this chapter.

[2] For special rates see ¶ 578 and note thereto.

rank in which they hold commissions.[3]—Sec. 1, July 14, 1862, chap. 166.

576. All enlisted soldiers in the army who shall have become disabled in the service, whether they shall have been regularly mustered in or not, shall be entitled to the same benefits of the pension laws, as those who have been regularly mustered into the United States service; and the widows or other dependents entitled to pensions by law, as prescribed by the act of July 14, 1862, of any such soldier who may have been killed, or shall have died, or shall hereafter die, by reason of any wound received or disease contracted while in said service and in the line of duty, shall be entitled to the same pension as though such soldier had been regularly mustered into the service.—Sec. 11, July 4, 1864, chap. 247.

577. Acting assistant or contract surgeons, disabled by any wound received or disease contracted while actually performing the duties of assistant surgeons or acting assistant surgeons, with any military forces in the field or in transitu, shall be entitled to the benefits of the pension laws in the same manner as if they had actually been mustered into the service with the rank of assistant surgeon; and the widows, minor children, or the dependents of acting assistant surgeons dying while performing the duty aforesaid, shall in like manner be entitled to the same benefits of the pension laws as if the deceased had been actually mustered into the service as assistant surgeons.—Sec. 2, March 3, 1865, chap. 84.

578. That the act entitled "An act supplementary to the several acts relating to pensions," approved June 6, 1866, be so amended that from and after the passage of this act all persons entitled by law to a less pension than hereinafter specified, who, while in the military or naval service of the United States and in line of duty, shall have lost the sight of both eyes, or shall have lost both hands, or shall have lost both feet, or been permanently and totally disabled in the same, or otherwise so permanently and totally disabled as to render them utterly helpless, or so nearly so as to require the constant personal aid and attendance of another person, shall be entitled to a pension of thirty-one dollars and twenty-five cents per month; and all persons who under like circumstances shall have lost one hand and one foot, or been totally and permanently disabled in the same, or otherwise so disabled as to be incapacitated for performing

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[3] Brevet rank is not considered in determining rate of pension.—Attorney-general, August 30, 1853.

(*a*.) This pension law (¶ 575) to embrace chaplains: see ¶ 441.

any manual labor, but not so much as to require constant personal aid and attendance, shall be entitled to a pension of twenty-four dollars per month; and all persons who under like circumstances shall have lost one hand or one foot, or been totally and permanently disabled in the same, or otherwise so disabled as to render their incapacity to perform manual labor equivalent to the loss of a hand or foot, shall be entitled to a pension of eighteen dollars per month, from and after the 4th day of June, 1872.[4]—June 8, 1872, chap. 342.

579. In all cases when a commission shall have been regularly issued to any person in the military or naval service who shall have died or been disabled while in the line of duty, after the date of such commission, and before being mustered, such officer or other person entitled to a pension for such death or disability by existing laws shall receive a pension corresponding to his rank, as determined by such commission, the same as if he had been mustered. *Provided,* That this section shall not apply to any officer who shall have willfully neglected or refused to be so mustered.—Sec. 7, June 6, 1866, chap. 106.

580. Officers absent on sick leave, and enlisted men absent on sick furlough, shall be regarded in the administration of the pension laws in the same manner as if they were in the field or hospital.[5]—Sec. 8, *ibid.*

581. The period of service of all persons entitled to the benefits of the pension laws, or on account of whose death any person may become entitled to a pension, shall be construed to extend to the time of disbanding the organization to which such persons belonged, or until their actual discharge for other cause than the expiration of the service of such organization.—Sec. 9, *ibid.*

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[4] SPECIAL RATES.—The act thus amended enacted that from and after its passage "all persons by law entitled to a less pension than hereinafter specified, who, while in the military or naval service and in line of duty, shall have lost the sight of both eyes, or who shall have lost both hands, or been permanently and totally disabled in the same, or otherwise so permanently and totally disabled as to render them utterly helpless, or so nearly so as to require the constant personal aid and attendance of another person, shall be entitled to a pension of twenty-five dollars per month; and all persons, who, under like circumstances, shall have lost both feet, or one hand and one foot, or been totally and permanently disabled in the same, or otherwise so disabled as to be incapacitated for performing any manual labor, but not so much as to require constant personal aid and attention, shall be entitled to a pension of twenty dollars per month; and all persons who, under like circumstances, shall have lost one hand or one foot, or been totally and permanently disabled in the same, or otherwise so disabled as to render their inability to perform manual labor equivalent to the loss of a hand or a foot, shall be entitled to a pension of fifteen dollars per month."

(*a.*) The provisions of the section amended by this act have been extended to persons who, "having only one eye, shall have lost the same." See sec. 12, July 27, 1868, chap. 264.

[5] But see ¶ 584.

582. Enlisted men employed as teamsters, wagoners, artificers, hospital stewards, farriers, saddlers, and all other enlisted men, however employed in the service of the army or navy, not specifically mentioned in the first section of an act entitled "An act to grant pensions," approved July 14, 1862, shall be regarded, in the administration of the pension laws, as non-commissioned officers or privates.—Sec. 10, *ibid.*

583. The provisions of the pension laws are hereby extended to and made to include provost-marshals, deputy provost-marshals, and enrolling officers who have been killed or wounded in the discharge of their duties; and for the purpose of determining the amount of pension to which such persons and their dependents shall be entitled, provost-marshals shall be ranked as captains, deputy provost-marshals as first lieutenants, and enrolling officers as second lieutenants.—Sec. 1, July 25, 1866, chap. 235.

584. No person shall be entitled to a pension by reason of wounds received, or disease contracted, in the service of the United States, subsequently to the passage of this act, unless the person who was wounded or contracted disease was in the line of duty; and if in the military service, was at the time actually in the field, or on the march, or at some post, fort, or garrison.—Sec. 2, July 27, 1868, chap. 264.

585. The commissioner of pensions, on application made to him in person or by letter by any claimants[6] or applicants for pension, bounty, or other allowance required by law to be adjusted and paid by the pension office, shall furnish such claimants, free of all expense or charge to them, all such printed instructions and forms as may be necessary in establishing and obtaining said claim; and in case such claim is prosecuted by an agent or attorney[7] of such claimant or applicant, on the issue of a certificate of pension or the grant-

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[6] MEMORANDA OF PENSION LAWS, providing for:

Widows and *children.* Sec. 2, July 14, 1862; sec. 7, July 4, 1864; sec. 4, March 3, 1865; secs. 2, 6, July 25, 1866; and secs. 4, 5, 10, July 27, 1868.

Mothers. Sec. 3, July 14, 1862; and sec. 1, July 27, 1868.

Fathers. Sec. 1, July 27, 1868.

Brothers and *sisters.* Sec. 4, July 14, 1862; sec. 12, June 6, 1866; and sec. 1, July 27, 1868.

Mode of payment. Secs. 1, 2, 3, 6, July 8, 1870.

Duration of pensions. Sec. 5, July 4, 1862; sec. 6, July 4, 1864; sec. 3, June 6, 1866; and secs. 3, 6, July 27, 1868.

Loyalty of claimants. Sec. 4, July 14, 1862.

Assignment of claims (prohibited). Secs. 2, 3, June, 1866; and secs. 3, July 8, 1870.

General provisions. Sec. 10, July 4, 1864; sec. 4, July 25, 1866; secs. 8, 9, 15, July 27, 1868; and act of July 7, 1870.

[7] AGENTS AND ATTORNEYS.—"Any pension agent or other person employed or appointed by him, who shall take, or receive, or demand any fee or reward from any pensioner for any service in connection with the payment of his or her pension, shall

ing of a bounty or allowance, the commissioner of pensions shall forthwith notify the applicant or claimant that such certificate has been issued or allowance made, and the amount thereof.—Sec. 9, July 14, 1862, chap. 166.

ARTIFICIAL LIMBS.

586. The secretary of war is authorized and directed to furnish to discharged soldiers of the United States who have been disabled in the service, as well as to those not yet discharged, transportation[8] to and from their homes and the place where they may be required to go to obtain artificial limbs[8a] provided for them under authority of law.—July 28, 1866, chap. 305.

587. All officers in the military or naval service, of the rank of captain in the army or lieutenant in the navy, and of less rank, who have lost a leg or arm in such service and in the line of duty, or in consequence of wounds received or disease contracted therein, shall be entitled to receive an artificial limb on the same term as privates in the army are now entitled to receive the same.—Sec. 14, July 27, 1868, chap. 264.

588. Every soldier who was disabled during the late war for the suppression of the rebellion, and who was furnished by the war department with an artificial limb or apparatus for resection, shall be entitled to receive a new limb or apparatus as soon after the passage of this act as the same can be *practically* [practicably]

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be held guilty of a misdemeanor, and shall be punished by a fine not exceeding five hundred dollars."—Sec. 4, July 8, 1870, chap. 225.

"The fee of agents and attorneys for the preparations and prosecution of a claim for pension or bounty land, under any or all of the various acts of Congress granting the same, shall not exceed in any case the sum of twenty-five dollars. It shall be the duty of the agent or attorney of record in the prosecution of the case to cause to be filed with the commissioner of pensions, for his approval, duplicate articles of agreement, without additional cost to the claimant, setting forth the fee agreed upon by the parties, and which agreement shall be executed in presence of and certified by some officer competent to administer oaths. In all cases where application is made for pension or bounty land, and no agreement is filed with and approved by the commissioner as herein provided, the fee shall be ten dollars and no more."—Sec. 7, *ibid.*

"Any agent or attorney who shall directly or indirectly contract for, demand, receive, or retain any greater compensation for his services as such agent or attorney, in any claim for pension or bounty land, than is prescribed or allowed under the provisions of the preceding section, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall, for every such offense, be fined not exceeding five hundred dollars, or imprisoned at hard labor not exceeding five years, or both, at the discretion of the court."—Sec. 8, *ibid.*

[8] "The transportation allowed for having artificial limbs fitted shall be furnished by the quartermaster-general of the army, the cost of which shall be refunded from the appropriations for invalid pensions."—Sec. 2, June 8, 1872, chap. 353.

Quartermaster's department to furnish transportation upon requisition from medical directors, or other officers designated by surgeon-general.—G. O. No. 73, A.-G. O., 1866.

(a.) Artificial limbs authorized by appropriations therefor.—July 16, 1862; February 9, 1863; March 14, and June 15, 1864; and March 2, 1867.

furnished, and at the expiration of every five years[8b] thereafter, under such regulations as may be prescribed by the surgeon-general of the army. *Provided*, That the soldier may, if he so elect, receive, instead of said limb or apparatus, the money value thereof, at the following rates, viz.: for artificial legs, seventy-five dollars; for arms, fifty dollars; for feet, fifty dollars; for apparatus for resection, fifty dollars.—Sec. 1, June 17, 1870, chap. 132.

589. The surgeon-general shall certify to the commissioner of pensions a list of all soldiers who have elected to receive money commutation instead of limbs or apparatus, with the amount due to each, and the commissioner of pensions shall cause the same to be paid to such soldiers in the same manner as pensions are now or hereafter may be paid.—Sec. 2, *ibid.*

590. Every soldier who lost a limb during the late war, but, from the nature of his injury, was not able to use an artificial limb, and consequently received none from the government, shall be entitled to the benefits of this act, and shall receive money commutation as hereinbefore provided.—Sec. 3, *ibid.*

591. The benefits[8c] of the act approved June 17, 1870, entitled "An act to provide for furnishing artificial limbs to disabled soldiers," shall be extended to all officers, soldiers, seamen, and marines disabled in the military or naval service of the United States, as fully as the same are provided for in the acts approved July 16, 1862,

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(*b.*) "The term of five years specified in the 1st section of the act approved June 17, 1870, entitled 'An act to provide for furnishing artificial limbs to disabled soldiers,' shall be held to commence in each case with the filing of the application under that act."—Sec. 3, June 8, 1872, chap. 353.

(*c.*) And "the acts approved June 17, 1870 [¶ ¶ 588, 589, 590], and June 30, 1870 [¶ 591], for supplying artificial limbs, or commutation for the same, to officers, soldiers, and seamen, shall apply to all officers, non-commissioned officers, enlisted and hired men of the land and naval forces of the United States, who, in the line of their duty as such, shall have lost limbs or sustained bodily injuries depriving them of the use of any of their limbs, to be determined by the surgeon-general of the army."—Sec. 1, June 8, 1872, chap. 353.

"The benefits of the laws extend to all persons who, *at the time of incurring the disability*, held a rank in the army not above that of *captain*, whatever their rank may be at the time of making their application, or whether *now* in the service or not.

"Also to all such who may be disabled, in like manner, in time to come, while the law remains in force."—The Surgeon-general, September 20, 1871.

"Those who received orders for artificial limbs dated on or before June 16, 1870, are held entitled to have those orders filled, and also to claim under the recent acts. Orders on and after June 17, 1870, will be reckoned under the act of that date, and no person will be held entitled to receive two orders or their equivalents for the same injury within the period of five years prescribed by law.

"Applications will be received where there has been no actual amputation or resection, in cases of anchylosis, paralysis, or other lesion of the limbs, where the injury is of a kind to be relieved by a mechanical appliance, and of such extent as to form the basis for an invalid pension."—The Surgeon-general, September 1, 1871.

July 28, 1866, and July 27, 1868, in so far as the said acts relate to artificial limbs and to transportation for procuring said limbs.[8d]—June 30, 1870, chap. 179.

SOLDIERS' HOME.

592. That all soldiers of the army of the United States, and all soldiers who may have been, or may hereafter be, of the army of the United States, whether regulars or volunteers, and who have contributed, or may hereafter contribute, according to sec. 7 of this act, to the support of the military asylum hereby created,[9] shall, under the restrictions and provisions which follow, be members of the said asylum, with all the rights annexed thereto.—Sec. 1, March 3, 1851, chap. 25.

593. That, for the good government and attainment of the objects proposed by the institution aforesaid, the general-in-chief commanding the army, the generals commanding the eastern and western geographical military divisions, the quartermaster-general, the commissary-general of subsistence, the paymaster-general, the surgeon-general, and the adjutant-general, shall be ex officio commissioners of the same,[10] constituting a board of commissioners, a majority of whom shall have power to establish, from time to time, regulations for the general and internal direction of the institution, to be submitted to the secretary of war for approval; and may do any other act or acts necessary for the government and interests of the same, as authorized herein.—Sec. 2, *ibid.*

594. That the officers of the institution shall consist of a governor, a deputy governor, and a secretary, for each separate site of the asylum, the latter to be also treasurer; and the said officers shall be taken from the army, and appointed or removed, from time to time, as the interests of the institution may require, by the secretary of war, on the recommendation of the board of commissioners.[11] —Sec. 3, *ibid.*

(*d.*) The last two acts cited are in ¶ ¶ 586, 587, the others are referred to in clause *a* of this note.

[9] APPLICATIONS FOR ADMISSION should be made through the adjutant-general of the army to the board of commissioners. If the board approves such application, the secretary of war directs that the applicant be furnished with transportation by the quartermaster's department (to be refunded from the fund appropriated for the benefit of disabled soldiers) to the soldiers' home.—Adjutant-general, June 27, 1868.

[10] Board of commissioners reduced to three—the commissary-general, surgeon-general, and adjutant-general. See ¶ 601.

[11] These officers may be detailed from the retired list: see ¶ 478.

595. That the following persons, members of the army asylum according to sec. 1, shall be entitled to the rights and benefits herein conferred, and no others, viz.: every soldier of the army of the United States who shall have served, or may serve, honestly and faithfully, twenty years in the same, and every soldier, and every discharged soldier, whether regular or volunteer,[12] who shall have suffered by reason of disease or wounds incurred in the service and in the line of his duty, rendering him incapable of further military service, if such disability has not been occasioned by his own misconduct. *Provided*, That no deserter, mutineer, or habitual drunkard, shall be received without such evidence of subsequent service, good conduct, and reformation of character as the commissioners shall deem sufficient to authorize his admission.—Sec. 4, March 3, 1851, chap. 25.

596. That any soldier admitted into this institution, for disability as aforesaid, and who shall recover his health, so as to fit him again for military service (he being under fifty years of age), shall be discharged. *Provided*, That any pensioner on account of wounds or disability incurred in the military service, although he may not have contributed to the funds of the institution, shall be entitled to all the benefits herein provided, upon transferring his pension to said asylum, for and during the period that he may voluntarily continue to receive such benefits.[13]—Sec. 5, *ibid.*

597. That the provisions of the foregoing section shall not be extended to any soldier in the regular or volunteer service who shall have been convicted of felony or other disgraceful or infamous

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[12] Benefits extended to regulars and volunteers of war of 1812, etc.: see ¶ 602.

(*a*.) THE NATIONAL ASYLUM FOR DISABLED VOLUNTEER SOLDIERS was incorporated by the act of March 3, 1865, and consists of the central asylum, at Dayton, Ohio, the eastern branch, at Augusta, Maine, and the northwestern branch, at Milwaukee, Wisconsin. Volunteer soldiers desiring admission may apply by letter to either of the managers, or at the branch asylum nearest to their place of residence; whereupon blank applications will be sent to the applicant, and, if duly qualified, transportation will be furnished him. If the applicant is unable to travel, relief will be granted by the manager to whom the application is made.

The requirements are:

First. An honorable discharge from the volunteer service.

Second. Disability by wounds received or sickness contracted in the line of duty.

Third. A soldier entitled to, or having a pension, making application for admission, must forward to the manager to whom he applies for admission his discharge-paper and pension certificate, or receipt therefor, or both, as the case may be, before his application is granted, which papers will be sent to the branch of the asylum to which the applicant is admitted, to be kept there for his use and returned to him when he is discharged. The rule is adopted to prevent the losses of such papers and certificates, and to hinder fraudulent practices.

More particular information as to either of the asylums can be obtained by addressing the governor of such asylum.

[13] For surrender of pensions see also ¶ 603.

crimes of civil nature since he shall have been admitted into the service of the United States.—Sec. 6, *ibid.*

598. That for the support of the said institution the following funds shall be set apart, and the same are hereby appropriated: any unexpended balance of the appropriation remaining in the treasury, for the benefit of discharged soldiers disabled by wounds; the sum of $118,791.19, levied by the commanding general of the army of the United States in Mexico, during the war with that republic, for the benefit of the soldiers of the United States army, regulars and volunteers, engaged in that war, but taken possession of as funds of the United States and placed in the treasury; all stoppages or fines adjudged against soldiers by sentence of courts-martial, over and above any amount that may be due for the reimbursement of government or of individuals; all forfeitures on account of desertion;[14] . . . . and all moneys belonging to the estates of deceased soldiers, which now are or may hereafter be unclaimed for the period of three years, subsequent to the death of said soldier or soldiers, to be repaid by the commissioners of the institution, upon the demand of the heirs or legal representatives of the deceased. *And provided also,* That from the first day of the month next after the passage of this act there shall be deducted from the pay of every non-commissioned officer, musician, artificer, and private, of the army of the United States, the sum of twenty-five cents per month,[15] which sum so deducted shall, by the pay department of the army, be passed to the credit of the commissioners of the army asylum, who are hereby also authorized to receive all donations of money or property made by any person or persons for the benefit of the institution, and hold the same for its sole and exclusive use. *Provided,* That the deduction of twenty-five cents per month from the pay of non-commissioned officers, musicians, artificers, and privates of regiments of volunteers, or other corps or regiments, raised for a limited period, or for a temporary purpose or purposes, shall only be made with their consent. —Sec. 7, March 3, 1851, chap. 25.

599. That the commissioners of this institution, by and with the approval of the President, be and the same are hereby authorized and required to procure for immediate use, at a suitable place or places, a site or sites for the military asylum, and if the necessary

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[14] See ¶ 605, repealing clause omitted from this section.

[15] Rate reduced to twelve and a half cents: see ¶ 604. Men enlisted for the ordnance embraced in above act.—Second Comptroller, July 24, 1851.

buildings cannot be procured with the site or sites, to have the same erected, having due regard to the health of the locations, facility of access, to economy, and giving preference to such places as with the most convenience and least cost will accommodate the persons provided for in this act.—Sec. 8, *ibid.*

600. That the commissioners, with the approval of the secretary of war, prepare the necessary rules and regulations for the government of said institution, and cause the same to be fitted and furnished for the immediate reception of those provided for in this act, and that the secretary of war report upon the execution of this duty at the next session of Congress.—Sec. 9, *ibid.*

601. That the 2d section of the act of March 3, 1851, entitled "An act to found a military asylum for the relief and support of invalid and disabled soldiers of the army of the United States," be so amended as to reduce the number of commissioners authorized by that section to three, and to consist of the commissary-general of subsistence, the surgeon-general, and the adjutant-general (any two of whom shall be a quorum for the transaction of business), whose duty it shall be to examine and audit the accounts of the treasurer quarter-yearly, and to visit and inspect the military asylum at least once in every month.—Sec. 4, March 3, 1859, chap. 83.

602. That the benefits of the said act be and they are hereby extended so as to include the invalid and disabled soldiers, whether regulars or volunteers, of the war of 1812, and of all subsequent wars; and that so much of the act of the 3d of March, 1851, as is inconsistent herewith be and the same is hereby repealed.—Sec. 5, *ibid.*

603. That all pensioners on account of wounds or disability incurrred in the military service shall transfer and surrender their pensions to the institution for and during the time they may remain therein and voluntarily continue to receive its benefits.—Sec. 6, *ibid.*

604. That the deductions of twenty-five cents per month from the pay of the non-commissioned officers, musicians, artificers, and privates in the army shall be reduced, from and after the 30th of June next, to twelve and a half cents per month, and that the title of the act be and the same is hereby changed from the "military asylum" to that of the "soldiers' home." *And provided further,* That all persons now in, or that may hereafter be admitted into, the institution, shall be and are hereby made subject to the Rules and Articles of War, and will be governed thereby in the same manner as soldiers in the army.—Sec. 7, *ibid.*

605. That so much of the 7th section of the act approved March 3, 1851, entitled "An act to found a military asylum for the relief and support of invalid and disabled soldiers of the army of the United States," as requires that "all moneys, not exceeding two-thirds of the balance on hand, of the hospital fund and of the post fund of each military station, after deducting the necessary expenses," shall be set apart for the support of the military asylum, be and the same is hereby repealed.—Sec. 2, July 5, 1862, chap. 133.

INSANE ASYLUM.

606. That the title of the institution shall be the "government hospital for the insane," and its object shall be the most humane care and enlightened curative treatment of the insane of the army and navy of the United States, and of the District of Columbia.[16]—Sec. 1, March 3, 1855, chap. 190.

607. That sec. 4 of the act of March 3, 1855, entitled "An act to organize an institution for the insane of the army and navy, and of the District of Columbia, in the said District," be and the same is hereby amended so as to read as follows:

"§ 4. That the order of the secretary of war, and that of the secretary of the navy, and that of the secretary of the treasury, shall authorize the superintendent to receive insane persons belonging to the army and navy and revenue cutter service, respectively, and keep them in custody until they are cured, or removed by the same authority which ordered their reception."—June 15, 1860, chap. 66.

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[16] The insane of the military service are entitled to treatment in the government hospital established in this city. To protect, however, their own interests, as well as those of the government, it is prescribed by the secretary of war, that to procure admission into the hospital, application must be made to the adjutant-general, setting forth the name, rank, company, and regiment of the patient, with a certificate from the surgeon of the regiment as to the duration of the insanity, and whether insane before enlistment. It will likewise be accompanied by the descriptive list of the soldier, and copies of his pay and clothing accounts. The application should precede the arrival of the soldier in this city by at least one day, that the signature of the secretary of war may be obtained to the paper authorizing admission into the hospital, and that the patient may not have to wait in the streets during that time.

On the departure of the patient from his station, the commanding officer will give such orders, to the person in charge, as will provide for the transportation of the necessary attendants, to the institution and back again to their post, and for their subsistence, either in kind or by commutation, during their absence.

To procure the release of a patient, when cured, or for delivery to his friends, application must again be made to the adjutant-general, who will procure the necessary authorization, and also cause a statement of his accounts to be made and delivered to him.—G. O. No. 98, A.-G. O., 1861.

Insane soldiers will not be discharged from the service; but are to be sent, under proper protection, by department commanders to Washington.—Army Regulations, 1863. See also note 1, Chap. xx.

608. Civilians employed in the service of the United States in the quartermaster's department and the subsistence department of the army, who may be, or may hereafter become, insane while in such employment, shall be admitted, on the order of the secretary of war, the same as persons belonging to the army and navy, to the benefits of the asylum for the insane in the District of Columbia, as now provided by law in reference to soldiers and sailors in the army and navy.—Sec. 1, July 13, 1866, chap. 179.

609. The following classes of persons, under the following circumstances, shall be entitled to admission to said asylum on the order of the secretary of war if in the army, or the secretary of the navy if in the navy, to wit:

First. Men who, while in the service of the United States, in the army or navy, have been admitted to said asylum, and have been thereafter discharged therefrom on the supposition that they had recovered their reason, and have, within three years after such discharge, become again insane from causes existing at the time of such discharge, and have no adequate means of support.

Second. Indigent insane persons who have been in the same service, and been discharged therefrom on account of disability arising from such insanity.

Third. Indigent insane persons who have become insane within three years after discharge from such service, from causes which arose during and were produced by said service.—Sec. 2, July 13, 1866, chap. 179.

NATIONAL CEMETERIES.

610. The President of the United States shall have power, whenever in his opinion it shall be expedient, to purchase cemetery grounds, and cause them to be securely inclosed, to be used as a national cemetery for the soldiers who shall die in the service of the country.—Sec. 18, July 17, 1862, chap. 200.

611. That the secretary of war be and he is hereby authorized and required to take immediate measures to preserve from desecration the graves of the soldiers of the United States who fell in battle, or died of disease in the field and in hospital during the war of the rebellion; to secure suitable burial-places in which they may be properly interred, and to have the grounds inclosed, so that the resting-places of the honored dead may be kept sacred forever.—Joint Resolution, April 13, 1866.

612. In the arrangement of the national cemeteries established for the burial of deceased soldiers and sailors, the secretary of war is hereby directed to have the same inclosed with a good and substantial stone or iron fence; and to cause each grave to be marked with a small headstone or block, with the number of the grave[17] inscribed thereon, corresponding with the number opposite to the name of the party, in a register of burials to be kept at each cemetery and at the office of the quartermaster-general,[17a] which shall set forth the name, rank, company, regiment, and date of death of the officer or soldier; or if unknown, it shall be so recorded.—Sec. 1, February 22, 1867, chap. 61.

613. The secretary of war is hereby directed to cause to be erected at the principal entrance of each of the national cemeteries aforesaid a suitable building to be occupied as a porter's lodge; and it shall be his duty to appoint a meritorious and trustworthy superintendent,[18] who shall be selected from enlisted men of the army, disabled in service,[22a] and who shall have the pay and allowances of an ordnance sergeant, to reside therein, for the purpose of guarding and protecting the cemetery and giving information to parties visiting the same. The secretary of war shall detail some officer of the army, not under the rank of major, to visit annually all of said cemeteries, and to inspect and report to him the condition of the same, and the amount of money necessary to pro-

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[17] An amendatory act, approved June 8, 1872 (chap. 368), provides that "the secretary of war shall cause each grave to be marked with a small headstone, with the name of the soldier and the name of his State inscribed thereon, when the same are known, in addition to the number required to be inscribed by said section; and he shall, within ninety days from the passage of this act, advertise for sealed proposals of bids for the making and erection of such headstones, which advertisements shall be made for sixty days successively in at least twenty newspapers of general circulation in the United States, and shall call for bids for the doing of said work, in whole or in part; and upon the opening of such bids the secretary of war shall, without delay, award the contracts for said work to the lowest responsible bidder or bidders, in whole or in part; and said bidders shall give bond to his satisfaction for the faithful completion of the work."

(a.) The national cemeteries are directly under the charge of the quartermaster-general and the officers of the quartermaster's department (G. O. No. 45, A.-G. O., 1868); but it is the duty of any officer having cognizance of misconduct or neglect of duty by a superintendent to report the facts to the adjutant-general.—G. O. No. 64, A.-G. O., 1867.

"The care of the national cemeteries does not appertain to the army, and it is not necessary for the military service that division or department commanders shall have supervision over them. You will, therefore, please dispense with the usual channel of communication through chief quartermasters of divisions and departments, on cemeterial business, and have the whole of that business placed under the charge of an officer of your department, to be on duty in your office; who will, under your orders, conduct all the correspondence and business, pertaining to the cemeteries, directly with the superintendents or quartermasters in charge."—Secretary of War to the quartermaster-general, July 18, 1872.

[18] For further legislation in reference to superintendents see ¶ ¶ 621, 622.

tect them, to sod the graves, gravel and grade the walks and avenues, and to keep the grounds in complete order; and the said secretary shall transmit the said report to Congress at the commencement of each session, together with an estimate of the appropriation necessary for that purpose.—Sec. 2, February 22, 1867, chap. 61.

614. Any person who shall willfully destroy, mutilate, deface, injure, or remove any monument, gravestone, or other structure, or shall willfully destroy, cut, break, injure, or remove any tree, shrub, or plant, within the limits of any of said national cemeteries, shall be deemed guilty of a misdemeanor, and upon conviction thereof before any district or circuit court of the United States within any State or district where any of said national cemeteries are situated, shall be liable to a fine of not less than twenty-five nor more than one hundred dollars, or to imprisonment of not less than fifteen nor more than sixty days, according to the nature and aggravation of the offense. And the superintendent in charge of any national cemetery is hereby authorized to arrest forthwith any person engaged in committing any misdemeanor herein prohibited, and to bring such person before any United States commissioner or judge of any district or circuit court of the United States within any State or district where any of said cemeteries are situated, for the purpose of holding said person to answer for said misdemeanor, and then and there shall make complaint in due form.[19]—Sec. 3, *ibid.*

615. It shall be the duty of the secretary of war to purchase from the owner or owners thereof, at such price as may be mutually agreed upon between the secretary and such owner or owners, such real estate as in his judgment is suitable and necessary for the purpose of carrying into effect the provisions of this act, and to obtain from said owner or owners title in fee simple for the same. And in case the secretary of war shall not be able to agree with said owner or owners upon the price to be paid for any real estate needed for the purpose of this act, or to obtain from said owner or owners title in fee simple for the same, the secretary of war is hereby authorized to enter upon and appropriate any real estate which, in his judgment, is suitable and necessary for the purposes of this act.—Sec. 4, February 22, 1867, chap. 61.

616. The secretary of war, or the owner or owners of any real estate thus entered upon and appropriated, are hereby authorized to

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[19] A copy of this section shall be kept posted at the entrance, and in several other conspicuous places in each cemetery.—G. O. No. 64, A.-G. O., 1867.

make application for an appraisement of said real estate thus entered upon and appropriated to any district or circuit court within any State or district where such real estate is situated; and any of said courts is hereby authorized and required, upon such application, and in such mode and under such rules and regulations as it may adopt, to make a just and equitable appraisement of the cash value of the several interests of each and every owner of the real estate and improvements thereon entered upon and appropriated for the purposes of this act, and in accordance with its provisions.—Sec. 5, *ibid.*

617. The fee simple of all real estate thus entered upon and appropriated for the purposes of this act, and of which appraisement shall have been made under the order and direction of any of said courts, shall, upon payment to the owner or owners, respectively, of the appraised value, or in case said owner or owners refuse or neglect for thirty days after the appraisement of the cash value of the said real estate or improvements by any of said courts to demand the same from the secretary of war, upon depositing the said appraised value in the said court making such appraisement, to the credit of said owner or owners respectively, be vested in the United States, and its jurisdiction over said real estate shall be exclusive and the same as its jurisdiction over real estate purchased, ceded, or appropriated for the purposes of navy-yards, forts, and arsenals.[20] And the secretary of war is hereby authorized and required to pay to the several owner or owners, respectively, the appraised value of the several pieces or parcels of real estate, as specified in the appraisement of any of said courts, or to pay into any of said courts by deposit, as hereinbefore provided, the said appraised value; and the sum necessary for such purpose may be taken from any moneys appropriated for the purposes of this act.—Sec. 6, *ibid.*

618. From the time any State legislature shall have given, or shall hereafter give, the consent of such State to the purchase, by the United States, of any national cemetery mentioned in the act entitled "An act to establish and protect national cemeteries," approved February 22, 1867, the jurisdiction and power of legislation of the United States over such cemetery shall, in all courts and places, be held to be the same as is granted by sec. 8,[21] Art. I. of

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[20] But see following paragraph for modification of this section.

[21] See clause 16 of said section.

In reference to the EXCLUSIVE JURISDICTION of the United States over all its reservations see also Chap. xxiv., note 1.

the Constitution of the United States; and all the provisions of said act of February 22, 1867, shall be applicable to the same.—Sec. 1, July 1, 1870, chap. 200.

619. It shall be the duty of the secretary of war to cause copies of this present act to be sent to the governors of all such States wherein any of such national cemeteries may be situated, to the end that the legislatures of such States may give the consent herein mentioned.—Sec. 2, *ibid.*

620. That the secretary of war be and he is hereby directed to accept and take charge of the Soldiers' National Cemetery at Gettysburg, Pennsylvania, and the Antietam National Cemetery at Sharpsburg, Maryland, whenever the commissioners and trustees having charge of said cemeteries are ready to transfer their care to the general government. That when the aforementioned cemeteries are placed under the control of the secretary of war, that they be taken care of and maintained in accordance with the provisions of the act of Congress entitled "An act to establish and protect national cemeteries," approved February 22, 1867.—Joint Resolution, July 14, 1870.

621. The secretary of war is hereby authorized to select the superintendents of the national cemeteries from meritorious and trustworthy soldiers, either commissioned officers or enlisted men of the volunteer or regular army, who have been honorably mustered out or discharged from the service of the United States, and who may have been disabled for active field service in the line of duty.—Sec. 1, May 18, 1872, chap. 173.

622. That the superintendents of the national cemeteries shall receive for their compensation from sixty dollars to seventy-five dollars per month, according to the extent and importance of the cemeteries to which they may be respectively assigned, to be determined by the secretary of war; and they shall also be furnished with quarters and fuel, as now provided at the several cemeteries.[22] —Sec. 2, *ibid.*

623. From and after the passage of this act all soldiers and sailors honorably discharged from the service of the United States, who

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[22] SUPERINTENDENTS may be paid monthly, and each payment must be noted upon the descriptive list.—Paymaster's Manual (1871), ¶ 209.

(*a.*) They are not considered as enlisted men, but are appointed by the secretary of war. They are not entitled to clothing or subsistence, or money in lieu of either, and are not subject to deduction on account of army asylum.—G. O. No. 51, A.-G. O., 1872. Nor are they entitled to medicines or medical attendance from the United States.—Quartermaster-general, July 20, 1872.

may die in a destitute condition, shall be allowed burial in the national cemeteries of the United States.—June 1, 1872, chap. 257.

(*b.*) The cemeteries are divided into four classes, as follows:

FIRST CLASS.

[*Pay of Superintendents,* $75 *per month.*]

Arlington, Virginia.
Beaufort, South Carolina.
Chattanooga, Tennessee.
Chalmette, Louisiana.
Gettysburg, Pennsylvania.
Jefferson Barracks, Missouri.
Mobile, Alabama.
Memphis, Tennessee.
Mound City, Illinois.
Natchez, Mississippi.
Pittsburg Landing, Tennessee.
Richmond, Virginia.
Soldiers' Home, D. C.
Andersonville, Georgia.
Camp Nelson, Kentucky.
Corinth, Mississippi.
Fredericksburg, Virginia.
Hampton, Virginia.
Little Rock, Arkansas.
Murfreesboro', Tennessee.
Marietta, Georgia.
Nashville, Tennessee.
Poplar Grove, Virginia.
Port Hudson, Louisiana.
Salisbury, North Carolina.
Vicksburg, Mississippi.

SECOND CLASS.

[*Pay of Superintendents,* $70 *per month.*]

Alexandria, Virginia.
Beverly, New Jersey.
Philadelphia, Pennsylvania.
Baton Rouge, Louisiana.
City Point, Virginia.
Mills Springs, Kentucky.
Raleigh, North Carolina.
Winchester, Virginia.
Alexandria, Louisiana.
Barrancas, Florida.
Brownsville, Texas.
Knoxville, Tennessee.
New Berne, North Carolina.
Wilmington, North Carolina.
Yorktown, Virginia.

THIRD CLASS.

[*Pay of Superintendents,* $65 *per month.*]

Culpepper, Virginia.
Florence, South Carolina.
Fort Leavenworth, Kansas.
Lebanon, Kentucky.
Cold Harbor, Virginia.
Fort Donelson, Tennessee.
Fort Smith, Arkansas.
Springfield, Missouri.

FOURTH CLASS.

[*Pay of Superintendents,* $60 *per month.*]

Annapolis, Maryland.
Camp Butler, Illinois.
Fort Harrison, Virginia.
Fayetteville, Arkansas.
Glendale, Virginia.
Jefferson City, Missouri.
New Albany, Indiana.
San Antonio, Texas.
Seven Pines, Virginia.
Battle Ground, D. C.
Cypress Hill, New York.
Danville, Virginia.
Fort Scott, Kansas.
Fort Gibson, Indian Territory.
Grafton, West Virginia.
Keokuk, Iowa.
Staunton, Virginia.

G. O. No. 51, A.-G. O., 1872.

(*c.*) The 3d section of the act of May 18, 1872 (¶ ¶ 621, 622), provides "that all acts and parts of acts inconsistent with the provisions of this act are hereby repealed."

CHAPTER XXII.

MILITARY TRIBUNALS.

JURISDICTION.

625. ALL sutlers and retainers to the camp, and all persons whatsoever, serving with the armies of the United States in the field,[1c] though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war.[1]—60th Article of War, April 10, 1806.

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[1] JURISDICTION.—The Constitution of the United States (Art. I., sec. 8, clause 13; Art. II., sec. 2, clause 1; and Amendment V.) shows that Congress has power to provide for the trial and punishment of military offenses in the manner practiced by civilized nations, and that this power is given without any connection between it and the 3d Article of the Constitution defining the *judicial* power of the United States; indeed, that the two powers are entirely independent of each other.—*Dynes* v. *Hoover*, 20 Howard, 79; and see Chap. xxvii., note 22.

(*a.*) "Courts-martial derive their jurisdiction and are regulated with us by acts of Congress, in which the crimes which may be committed, the manner of charging the accused, and of trial, and the punishments which may be inflicted, are expressed in terms; or they may get jurisdiction by a fair deduction from *the definition of the crime* that it comprehends; and that the legislature meant to subject to punishment one of a minor degree of a kindred character, which has already been recognized to be such by the practice of courts-martial in the army and navy services of nations, and by those functionaries in different nations to whom has been confided a revising power over the sentences of courts-martial. And when offenses and crimes are not given in terms or by definition, the want of it may be supplied by a comprehensive enactment, such as the 32d article of the rules for the government of the navy [corresponding in terms with our 99th Article of War], which means that courts-martial have jurisdiction of such crimes as are not specified, but which have been recognized to be crimes and offenses by the usages in the navy [army] of all nations, and that they shall be punished according to the laws and customs of the sea [or war]."—*Ibid.*, 82. See also note 8 to this chapter, and note 28 *c*, Chap. xxvii.

(*b.*) There is no doubt of the competency and completeness of the jurisdiction of military courts in all cases, and under the conditions, provided for by statute law, by the rules and regulations prescribed for the army, and by the customs of [see note 14] service or laws of war. See *Houston* v. *Moore*, 5 Wheaton, 1; Sergeant on Const., 130; and note 28 (clause *c*), Chap. xxvii. But being courts of limited and special jurisdiction, called into existence for special purposes, the law presumes nothing in their favor, and "he who seeks to enforce their sentences, or to justify his conduct under them, must set forth affirmatively and clearly all the facts which are necessary to show that the court was legally constituted, and that the subject was within their jurisdiction."—Greenleaf on Evidence, vol. iii., § 470. Their jurisdiction is not to be stretched by implication.—1 Opinions, 177.

(*c.*) When the court has been illegally constituted, or is without jurisdiction, or, having jurisdiction, disregards the rules of proceeding enjoined by the law for its exercise so as to render the case before one who is not the proper judge, its action is absolutely void; and civil courts have never failed, upon a proper suit, to give the

626. All officers, conductors, gunners, matrosses, drivers, or other persons whatsoever, receiving pay or hire in the service of the artillery, or corps of engineers of the United States, shall be governed by the aforesaid rules and articles, and shall be subject to be tried by courts-martial, in like manner with the officers and soldiers of the other troops in the service of the United States.[2]—96th Article of War, April 10, 1806.

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party redress who has been injured by a void process or void judgment. Trespass for false imprisonment is the proper remedy, when the liberty of the citizen has been restrained by process of the court or by execution of its judgment; and, on an action by the party aggrieved, the civil court may inquire into the want of jurisdiction in the military court, and give him redress. The decision of a court-martial in a case clearly without its jurisdiction cannot protect the officer who executes its sentence; the court and the officers are all trespassers, and liable for damages in the courts of common law.—*Wise* v. *Withers*, 3 Cranch, 337; and *Dynes* v. *Hoover*, 20 Howard, 80–83, passim. But see Chap. xxvii., note 28 *d*.

(*d*.) Under the English law it has been repeatedly determined that the sentences of courts-martial are conclusive in any action brought in the courts of common law; but that those courts will examine whether the courts-martial have exceeded the jurisdiction given them, though it is said "not, however, after the sentence has been ratified and carried into execution."—Cases cited by Supreme Court in case of *Dynes* v. *Hoover*, 20 Howard.

(*e*.) "These words ['in the field'] imply military operations with a view to an enemy. Hostilities with Indians seem to be as much within their meaning as any other kind of warfare. To enable the officers of an army to preserve good order and discipline is the object of this article, and these may be as necessary in the face of hostile savages as in front of any other enemy. When an army is engaged in offensive or defensive operations, I think it safe to say that it is an army 'in the field.'

"To decide exactly where the boundary line runs between civil and military jurisdiction as to the civilians attached to an army is difficult; but it is quite evident that they are within military jurisdiction, as provided for in said article, when their treachery, defection, or insubordination might endanger or embarrass the army to which they belong in its operations against what is known in military phrase as 'an enemy.' Possibly the fact that troops are found in a region of country chiefly inhabited by Indians, and remote from the exercise of civil authority, may enter into the description of 'an army in the field.' Persons who attach themselves to an army going upon an expedition against hostile Indians may be understood as agreeing that they will submit themselves for the time being to military control.

"I am therefore of the opinion that, under the circumstances as above set forth, persons serving with the army are subject to orders according to the rules and discipline of war."—Attorney-general, April 1, 1872.

[2] The 1st section of the act establishing rules and articles for the government of the armies of the United States provides (¶ 680) that its provisions "shall be the rules and articles by which the armies of the United States shall be governed," etc. Under so comprehensive an enactment it would seem that all bodies of troops, and each individual, becoming a constituent part of the army, would ipso facto become subject to this code. But in discussing this subject Mr. Wirt says: "Even in relation to the land and naval forces (including the militia when in actual service), Congress has never considered the mere act of stamping on these bodies a military character, by ordering them to be raised, organized, and called into service, as being sufficient, of itself, to subject them to trial by court-martial under the Rules and Articles of War; because this would be to abrogate a high constitutional privilege by implication. In every instance, therefore, in which Congress has impressed a military character on any body of men whom they intended to divest of the civil right of trial by jury, besides the impressment of that military character, they have uniformly and expressly declared that they should be subject to the Rules and Articles of War." [Acts cited.] "And what is still more remarkable is, that even after the general act of 1806 had passed, declaring the Rules and Articles of War, and containing the permanent provision that the armies of the United States should be subject to these rules

627. The officers and soldiers of any troops, whether militia[3] or others, being mustered and in pay of the United States,[4] shall, at all times and in all places, when joined, or acting in conjunction with the regular forces of the United States,[5] be governed by these Rules and Articles of War, and shall be subject to be tried by courts-martial, in like manner with the officers and soldiers in the regular forces; save only that such courts-martial shall be composed entirely of militia officers.—97th Article of War, April 10, 1806.

628. . . . No officer, non-commissioned officer, soldier, or follower of the army shall be tried the second time for the same offense.[6]—87th Article of War.

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and articles, Congress, not content to leave after-raised troops to the operation of that general provision, have in every instance repeated the provision of their subjection to military law. A course of legislation so long continued and so uniform marks the sacred respect in which Congress has ever regarded the right of trial by jury, and will justify us in assuming it *as their sense*, that this right is never to be taken away by implication; never by the mere impressment of a military character on a body; *never without a positive provision to that effect.*"—1 Opinions, 276.

That Congress deemed it necessary in all cases of increase, and even in reductions, of the army to provide that the forces added, or retained, should be subject to this military code is apparent also from most of the legislation subsequent to date of Mr. Wirt's opinion. Until act of July 29, 1861, this subjection has been declared in express terms, and in that act the additional forces were placed "*on the same footing in every respect*" with the "corresponding grades and corps now in the regular service." The act of July 28, 1866, which reorganized the army de novo, is, however, silent upon this important question—doubtless because Congress had at last determined that a reiteration of the subjecting clause was mere surplusage.

The Articles of War are to be observed and obeyed by all officers and soldiers in the service of the United States: see Chap. xxiii., ¶ 684.

CONTRACTORS subjected to Articles of War (Chap. iii., ¶ 112); also inmates of the SOLDIERS' HOME: see Chap. xxi., ¶ 604.

For special, and perhaps unnecessary, legislation extending jurisdiction beyond term of military service in cases of fraud and desertion, see Chap. iii., ¶ 78; and Chap. xxiii., ¶ 713; also ¶ 630, and note 8, this chapter.

[3] Conditions of militia subjection: see Chap. xxv., ¶ ¶ 804, 809, and notes 8, 9.

[4] A soldier who has served out his term, but is refused his discharge, is, nevertheless, whilst he remains in barracks, subject to the rules of the military establishment. —*United States* v. *Travers*, 2 Wheeler's Crim. Cases, 490.

[5] MARINE CORPS subject to the Rules and Articles of War "when detached for service with the army, by order of the President."—Chap. xxviii., ¶ 955.

[6] The Constitution declares that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb;" and that "no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."—Amendments V. and VII.

A former trial must have proceeded to an acquittal, or conviction and sentence, by a court of competent jurisdiction, and upon a sufficient indictment. Failing in either of these conditions, the prisoner has not been "in jeopardy," and may again be placed upon his defense to answer for the same offense.—*United States* v. *Gilbert*, 2 Sumner, 42; and *United States* v. *Perez*, 9 Wheaton, 579; and see 1 Opinions, 294.

"A judgment or decree set up as a bar by plea, or relied on as evidence by way of estoppel, to be conclusive, must have been made: 1, by a court of competent jurisdiction upon the same subject-matter; 2, between the same parties; [and] 3, for the same purpose."—*Aspden* v. *Nixon*, 4 Howard, 497, 498. See also *Wilkes* v. *Dinsman*, APPENDIX, ¶ ¶ 1097, 1098.

A nolle prosequi entered by competent authority, and with consent of the court, operates simply as an interruption or suspension of proceedings in the case, and is

629. No officer shall be tried but by a general court-martial, nor by officers of an inferior rank, if it can be avoided.[7] Nor shall any proceedings of trials be carried on, excepting 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-martial, require immediate example.—75th Article of War.

630. No person shall be liable to be tried and punished by a general court-martial for any offense which shall appear to have been committed more than two years before the issuing of the order for such trial,[8] unless the person, by reason of having absented himself,

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no bar to a subsequent trial for the same offense: see *United States* v. *Shoemaker*, 2 McLean, 114; and *United States* v. *Morris*, 1 Curtis, C. C., 23.

In connection with this subject it should be borne in mind that the same act may bear criminal relations both to municipal law and to the military code, and may draw to its commission the penalties denounced by either as appropriate to its character in reference to each; "yet it cannot be truly averred that the offender has thus been twice punished for the same offense; but only that by one act he has committed *two* offenses, for each of which he is justly punished."—*Fox* v. *State of Ohio*, 5 Howard, 434; *United States* v. *Marigold*, 9 Howard, 569; *Moore* v. *State of Illinois*, 14 Howard, 20; 3 Opinions, 749; 6 *ibid.*, 413-420, 506-516.

"Immunity from one crime cannot be obtained by proving that, in doing the act, the party had committed another."—Rawle on Const., p. 208.

For an express recognition of the collateral and cumulative responsibility of the army, see 54th Article of War: Chap. xxvii., ¶ 914.

The privilege of a new trial is not denied by this article. Its provision is borrowed from the common law, and is not held, in either civil or military tribunals, to preclude the accused from having a second trial on his own motion. The plea of "autrefois acquit," or *conviet*, is the *privilege* of the accused, which he may use or waive at pleasure; if he does not choose to use it, courts will not take notice of it so as to bar a trial.—1 Opinions, 233.

Officers who sat on the former should not be detailed for the new trial. "They have formed and expressed opinions upon the case, which would disqualify them from serving as jurors in a criminal case in a common law court; and I can see no reason why officers under the same circumstances should not be excluded from a court-martial, and especially as they are the triers of the facts as well as the law."—3 *ibid.*, 398.

[7] The decision of the officer who orders a court-martial, as to whether the appointment thereon of officers of inferior rank can be avoided, is conclusive, though subject to revision by the President.—*Wooley* v. *United States*, 20 Law Reports, 631; and see note 10.

[8] This limitation as to time, being absolute, cannot be waived by the accused.—1 Opinions, 384, and 6 *ibid.*, 239. And the limitation obtains over prosecutions for frauds or embezzlement under the act of 1863 (¶ ¶ 78, 79).—Attorney-general, June 12, 1872.

(*a.*) Query whether any other limitation than that of time obtains against the trial by court-martial of offenders subject to trial by such courts at time the offense was committed?

When English statutes are adopted into our legislation, the Supreme Court holds that the known and settled construction of such statutes, by the English courts, must be held to be incorporated into the acts as adopted by us: see 2 Peters, 2; 5 *ibid.*, 264, 358; and 12 *ibid.*, 527. And hence the value of British precedents in construing such of our Articles of War as are mere adaptations to our service of similar provisions in the Mutiny Act obtaining in Great Britain when our military code was adopted.

Although this statute of limitations was not adopted into our code until 1806, a similar provision had obtained for many years in the Mutiny Act, being re-enacted from year to year, from a period anterior to our national existence, substantially as follows:

"No person is liable to be tried or punished for any offense against the present, or former, Mutiny Act, which shall appear to have been committed more than three years before the date of the warrant for such trial, unless the person accused, from

or some other manifest impediment,[8b] shall not have been amenable to justice within that period.—88th Article of War, April 10, 1806.

631. In time of war, insurrection, or rebellion, murder, assault and battery with an intent to kill, manslaughter, mayhem, wounding by shooting or stabbing with an intent to commit murder, robbery, arson, burglary, rape, assault and battery with an intent to commit rape and larceny, shall be punishable by the sentence of a general court-martial or military commission, when committed by persons who are in the military service of the United States, and subject to the Articles of War; and the punishments for such

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having absented himself, or other manifest impediment, has not been amenable to justice within that period."

This provision of the Mutiny Act had, when we adopted it, been construed by British courts-martial (under sanction of no less authority than an unanimous affirmatory opinion from the judges of the King's Bench) as containing the only limitation to trials by courts-martial for offenses committed while the offender is subject to military law; and, therefore, that jurisdiction obtained even after the offender had been discharged from the service. See cases of Lord George Sackville (1760), and Lieutenant James Blake (1805), cited by Simmons and Tytler.

In the only instances in which this phase of the question of jurisdiction has been passed upon by the civil courts of our own country, it has been affirmed that the jurisdiction of courts-martial comprehended all offenses committed while the offender is subject to the Rules and Articles of War, *whether he had, or had not,* continued in the military service. See "*in the matter of William B. Bird,*" and case cited therein.—APPENDIX, ¶ ¶ 1068–1073. But the President has announced that the enactments to be found in ¶ ¶ 78, 713, "are held to show legislative recognition of the general rule, to which the military department of the government also has uniformly adhered in practice, to wit, that officers or soldiers, after they have been regularly discharged from the military service, or after their term of service has expired, unless proceedings against them have been commenced before such expiration, are not (except where otherwise provided by statute) within the jurisdiction of a court-martial for offenses committed by them while in the service."—G. C. M. O., No. 16, A.-G. O., 1871.

Attorney-general Wirt was of opinion that soldiers discharged, in consequence of the reorganization of 1821, were no longer subject to military law,—"at least for the completion of a punishment which in its character looks to their restoration to the military service when the punishment shall be over, as sentences to confinement, hard labor, etc. There is color for the opposite opinion; but I hold this to be the safest and soundest on the law as it stands."—5 Opinions, 736. Mr. Cushing *doubted* whether an officer dismissed *while under charges* could be afterwards arrested and tried by military authority.—8 Opinions, 328. And Mr. Black said "it is by no means clear that this circumstance [the dismissal of the officer whose case was then under advisement] placed him beyond the jurisdiction of a court-martial." He remarked also that "in England the jurisdiction of a court-martial under such circumstances was unanimously sustained by the twelve judges in the case of Lord George Sackville, and their decision is recognized as the law by Tytler, p. 113, in Griffith's notes, p. 32, and in other respectable works on military law and courts-martial." This point was incidental only to the question before Mr. Black, and he explained that its introduction "was not for the purpose of pronouncing an opinion upon it, but to avoid misconception, because silence would have been regarded as an admission that the jurisdiction of a court-martial expires with the soldier's term of service."—9 Opinions, 182.

(*b.*) "The words 'other manifest impediment' must be construed in connection with the words immediately preceding, namely, 'by reason of having absented himself'; and taken together it is apparent that the impediment intended by the article is an impediment similar in kind to absence; that is, one which renders it impossible for a prosecution to take place. I do not think it could be extended so far as to include concealment of the offense."—Attorney-general, June 12, 1872.

offenses shall never be less than those inflicted by the laws of the State, Territory, or District in which they may have been committed.[9]—Sec. 30, March 3, 1863, chap. 75.

GENERAL COURTS-MARTIAL.

632. General courts-martial may consist of any number of commissioned officers, from five to thirteen, inclusively; but they shall not consist of less than thirteen, where that number can be convened without manifest injury to the service.[10]—64th Article of War, April 10, 1806.

633. Any general officer commanding an army, or colonel commanding a separate department, may appoint general courts-martial whenever necessary.—65th Article of War.

634. Whenever a general officer commanding an army, or a

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[9] "The jurisdiction conferred by sec. 30, chap. 75, act of March 3, 1863, upon military courts in time of war, etc., to pass upon cases of the crimes therein specified when committed by persons in the military service, is *exclusive.* It was the manifest purpose of the act to make the crimes therein mentioned military crimes, and triable by military courts, when committed anywhere in the United States, in time of war, insurrection, or rebellion, by persons in the military service of the United States and subject to the Articles of War. The highest interests of the military service, as well as of the public at large, demand the prompt and summary punishment of these offenses when perpetrated under the circumstances mentioned; and this consideration doubtless controlled Congress in transferring the jurisdiction from the civil to the military courts. To accomplish therefore the leading object of the law, as well as to prevent any conflict between the civil and military authority, it should be held that the jurisdiction thus conferred is *exclusive.* It follows that a trial for one of the crimes named, before a general court-martial or military commission, whether resulting in an acquittal or a conviction, would be a bar to any subsequent prosecution for the same offense."—Judge-advocate-general.

(*a.*) Exclusive military jurisdiction obtains also over all conquered territory, during its military occupancy. When ceded by treaty, it is under the civil government of the United States, and the terms of the treaty and the federal statutes are the only laws that bind it. The power of the United States over conquered and ceded territory is therefore sovereign, and exclusive of State jurisdiction. See 3 Story, Const., 1318; 1 Peters, 511, 526, 542; 9 Howard, 615–619; and 16 *ibid.*, 181–202.

[10] This article "is merely directory to the officer appointing the court; and his decision as to the number which can be convened without manifest injury to the service, being in a matter submitted to his discretion, must be conclusive." (*Martin* v. *Mott*, 12 Wheaton, 19–35, passim.) But Attorney-general Wirt remarks upon this article as follows: "The phrase, you will observe, is not 'where that number (thirteen) can be *conveniently* convened,' but where they *can* be convened *at all*, not only without *probable* injury, but without *manifest* injury to the service. It is difficult to conceive an emergency in time of peace so pressing as to disable the general officer who orders the court from convening thirteen commissioned officers on a trial of life and death, *without manifest injury to the service.* And if a smaller number act, without such manifest emergency, I repeat that they are not a lawful court, and an execution under their sentence would be murder. With all the respect, therefore, which we ought to feel for our officers, I suggest it to you, sir [the secretary of war], as a matter of legal propriety, that, *in every case of life and death, at least,* the President ought to be satisfied of the *manifest injury* which the service would have sustained in convening a court of *thirteen,* before he gives his sanction to a sentence of death by a smaller number." —1 Opinions, 299, 300. A court-martial reduced below the minimum, by the absence of members, is still competent to meet and adjourn from day to day, till absentees return, or till the court is dissolved by competent authority.—4 *ibid.*, 18.

colonel commanding a separate department, shall be the accuser or prosecutor of any officer in the army of the United States, under his command, the general court-martial for the trial of such officer shall be appointed by the President of the United States.—Sec. 1, May 29, 1830, chap. 179.

635. The proceedings and sentence of the said court shall be sent directly to the secretary of war, to be by him laid before the President, for his confirmation or approval, or orders in the case.—Sec. 2, *ibid.*

636. So much of the 65th article of the 1st section of "An act for establishing rules and articles for the government of the armies of the United States," passed on the 10th of April, 1806, as is repugnant hereto, shall be and the same is hereby repealed.—Sec. 3, May 29, 1830, chap. 179.

637. Whenever it may be found convenient and necessary to the public service, the officers of the marines shall be associated with the officers of the land forces, for the purpose of holding courts-martial, and trying offenders belonging to either; and in such cases, the orders of the senior officer of either corps, who may be present, and duly authorized, shall be received and obeyed.—68th Article of War, April 10, 1806.

638. The commanding officer of any post or detachment, in which there shall not be a number of officers adequate to form a general court-martial, shall, in cases which require the cognizance of such a court, report to the commanding officer of the department, who shall order a court to be assembled at the nearest post or detachment, and the party accused, with necessary witnesses, to be transported to the place where the said court shall be assembled.—86th Article of War.

639. In time of war the commander of a division or separate brigade may appoint general courts-martial, and confirm, execute, pardon, and mitigate their sentences, as allowed and restrained in the 65th and 89th Articles of War [¶ ¶ 657, 658], to commanders of armies and departments. *Provided*, That sentences of such courts, extending to loss of life, or dismission of a commissioned officer, shall require the confirmation of the general commanding the army in the field to which the division or brigade belongs.[11] *And provided further*, That when the division or brigade commander shall be the accuser or prosecutor, the court shall be appointed by the next higher commander.—December 24th, 1861, chap. 3.

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[11] SENTENCES.—See notes 22, 23.

THE JUDGE-ADVOCATE.

640. The judge-advocate,[12] or some person deputed by him, or by the general, or officer commanding the army, detachment, or garrison, shall prosecute in the name of the United States, but shall so far consider himself as counsel for the prisoner, after the said prisoner shall have made his plea, as to object to any leading question to any of the witnesses, or any question to the prisoner, the answer to which might tend to criminate himself; and 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 the regimental and garrison courts-martial:[13]

"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, according to the provisions of 'An act establishing rules and articles for the government of the armies of the United States,' without partiality, favor, or affection; and if any doubt shall arise, not explained by said articles, according to your conscience, the best of your understanding, and the custom of war in like cases;[14] and you do further swear that you will not divulge the sentence of the court until it shall be published by the

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[12] THE JUDGE-ADVOCATE.—The first paragraph of this article is a transcript from the "rules and articles for the administration of justice," etc. (Art. 6), adopted by resolve of Congress, May 31, 1786; but in the mean time the office of judge-advocate had been abolished by the act of March 16, 1802, which provided in its 21st sec. that "whenever a general court-martial shall be ordered, the President of the United States may appoint some fit person to act as judge-advocate, who shall be allowed, in addition to his other pay, one dollar and twenty-five cents for every day he shall be necessarily employed in the duties of the said court; and in cases where the President shall not have made such appointment, the brigadier-general [commanding the army] or the president of the court may make the same."

(*a.*) "The power to appoint a judge-advocate, or some person to officiate as such whenever a general court-martial is ordered and assembled, flows from the above-quoted laws [¶ 640, and act of 1802]; and the practice, based upon their liberal interpretation, is, that the power to appoint some fit person to act as such is coextensive with the power to convene a general court-martial. This power may be deputed to a commanding officer of a detachment or garrison, when the peculiar exigencies of the service demand it."—Benét (Courts-martial), p. 193.

(*b.*) Held that the court has no power to appoint a judge-advocate, nor to direct one of its members to act as such in the absence of the officer detailed for that duty.—Opinions, Judge-advocate-general, p. 207.

(*c.*) The judge-advocate has the right of reply in a trial, and so has the accuser, when acting as prosecutor; but such reply should be restricted to comments on the evidence introduced by the accused and in his remarks in enforcing it, or to arraigning testimony of the prosecution. No new matter should be introduced at this stage of the trial, without special leave from the court, and if such matter be introduced the prisoner should be allowed to reply thereto.—2 Opinions, 287.

[13] Manner of swearing regimental and garrison courts-martial described in note 17.

[14] Here is an express statutory recognition of the *common law* of war, or customs of service, as binding upon all subject to the military code. See also note 25.

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."

And as soon as the said oath shall have been administered to the respective members, the president of the court shall administer to the judge-advocate, or person officiating as such, an oath in the following words:

"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."—69th Article of War, April 10, 1806.

641. Every judge-advocate, or person officiating as such, at any general court-martial, shall transmit, with as much expedition as the opportunity of time and distance of place can admit, the original proceedings and sentence of such court-martial, to the secretary of war;[15] which said original proceedings and sentence shall be carefully kept and preserved in the office of said secretary, to the end that the persons entitled thereto may be enabled, upon application to the said office, to obtain copies thereof.—90th Article of War, April 10, 1806.

642. The judge-advocate shall have power to appoint a reporter, whose duty it shall be to record the proceedings of and testimony taken before military courts instead of the judge-advocate; and such reporter may take down such proceedings and testimony in the first instance in short-hand. The reporter shall be sworn or affirmed faithfully to perform his duty before entering upon it.[16]—Sec. 28, March 3, 1863, chap. 75.

643. Every judge-advocate of a court-martial or court of inquiry, hereafter to be constituted, shall have power to issue the like process, to compel witnesses to appear and testify, which courts of criminal jurisdiction within the State, Territory, or District where

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[15] Record goes to bureau of military justice: Chap. vii., ¶ 210, note 7.

[16] The pay department is to pay the citizen clerks, or reporters, upon the usual certificate of the judge-advocate.—Paymaster's Manual (1871), ¶ 76.

Phonographic reporters will be allowed not exceeding ten dollars per day, and when the place of meeting of the court is changed, their actual traveling expenses; but no reporter will be employed except in cases of importance, and when the other duties of the judge-advocate will not allow him to take down the testimony in the ordinary way.—G. O. No. 208, A.-G. O., 1863.

such military courts shall be ordered to sit may lawfully issue.[16a]—Sec. 25, March 3, 1863, chap. 79.

REGIMENTAL AND GARRISON COURTS.

644. Every officer commanding a regiment or corps may appoint, for his own regiment or corps, courts-martial,[17] to consist of three

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(*a.*) "The attorney-general of the United States having given his official opinion that the power conferred upon the judge-advocate of a court-martial or court of inquiry by the 25th sec. of the act approved March 3, 1863 [¶ 643], to issue the like process to compel the attendance of witnesses before such military court as is issued by the local courts of criminal jurisdiction, includes also the power to execute such process through some officer who shall be especially charged with its execution: *It is ordered,* That judge-advocates of military courts, who may hereafter issue such process to compel the attendance, as witnesses, of persons not in the military service, formally direct the same, by name, to some military officer, who shall be designated by the department commander as available for the purpose. And the nearest military commander will thereupon furnish a sufficient force for the execution of the process, whenever such force shall be actually required. It will be noted, however, that whereas a process of attachment can only be enforced as herein directed, the preliminary summons or subpœna may be served by any person whatsoever."—G. O. No. 93, A.-G. O., 1868.

(*b.*) PROCESS OF ATTACHMENT AND SUBPŒNAS.—The forms used by Major Barr, judge-advocate, will be found in note 29 closing this chapter.

(*c.*) *Pay of citizen witnesses.*—Those who have been duly summoned will be paid the actual cost of their transportation or travel fare to and from the courts, together with the per diem (three dollars a day) for the time necessarily required to make the journeys, and the time consumed in attendance upon the court. If the citizen witness be an employee of the government (whose salary or monthly compensation continues while he is so absent from his ordinary duties), he will be paid the traveling expenses as above, but not the per diem. Payments in these cases will be made by any paymaster on the certificate, in duplicate, of the judge-advocate or the recorder of the court, in substance, as follows:

"I certify that , a citizen (or government employee), has been in attendance as a material witness from the day of , 187 , to the day of , 187 , inclusive, before a general court-martial (or other court-martial, or court of inquiry, as the case may be), duly and legally appointed by Special Order No. , Headquarters Department of , and holden at this place, and that he was duly summoned thereto from .

(Signed) ——— ———,
"Judge-advocate, or Recorder."

[Date and place of holding the court.]

Upon the presentation of this certificate, the witness, having executed and subscribed the oath appended to the printed form of the blank accounts for "citizen witnesses," may be paid at once his entire claim, without necessarily, as heretofore, requiring the return travel to be actually performed before it can be paid for. In such case the amount allowed for the return journey will be the same determined for the journey to the court. The oath of the witness attesting the correctness of his account should, when practicable, be administered and certified by the judge-advocate or recorder of the court; otherwise by a notary, with his seal attached.—Circular No. 75, Paymaster-general's office, 1870.

[17] In view of the act of 1862 (¶ 647), these courts can be held only in cases where it is impracticable to detail a field officer as a court in the regiment.—Opinions, Judge-advocate-general, p. 173. The commander of the engineer battalion is commanding a "corps" in the sense of above Article of War, and is therefore authorized to convene the court described in the first clause of the article.—*Ibid.*, p. 26.

The records of regimental and garrison courts-martial to be transmitted to the judge-advocate-general, for review and file.—*Ibid.*, p. 28. (See ¶ 211.)

These courts have power to reduce non-commissioned officers to the ranks.—Adjutant-general, November 17, 1868.

commissioned officers, for the trial and punishment of offenses not capital, and decide upon their sentences. For the same purpose, all officers commanding any of the garrisons, forts, barracks, or other places where the troops consist of different corps, may assemble courts-martial, to consist of three commissioned officers, and decide upon their sentences.—66th Article of War, April 10, 1806.

645. No garrison or regimental court-martial shall have the power to try capital cases, or commissioned officers; neither shall they inflict a fine exceeding one month's pay, nor imprison, nor put to hard labor, any non-commissioned officer or soldier, for a longer time than one month.—67th Article of War.

646. The colonel or commanding officer of the regiment or garrison, where any regimental or garrison court-martial shall be held, may pardon or mitigate any punishment ordered by such court to be inflicted.—89th Article of War.

FIELD OFFICERS' COURTS.

647. Hereafter, all offenders in the army charged with offenses now punishable by a regimental or garrison court-martial shall be brought before a field officer of his regiment,[18] who shall be detailed

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When a regimental court is convened under the 35th Article of War (¶ 695), its proceedings should be governed by the rules and practice of courts of inquiry. See Chap. xxiii., note 8.

(*a*.) OATH.—"With a view to establish a uniform and correct practice in the mode of swearing a regimental or garrison court-martial, the following is announced as a proper interpretation of the 69th Article of War in this respect:

"The junior member of the court shall be its recorder, and shall administer to the other two members the oath prescribed in the article for members, after which the presiding officer shall administer to the recorder the following oath, which combines with the oath of a member the additional obligation required of the judge-advocate or person officiating as such:

"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, according to the provisions of 'An act establishing rules and articles for the government of the armies of the United States,' without partiality, favor, or affection; and if any doubt should arise, not explained by said articles, 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 to any but the proper authority, until it shall be duly disclosed by the same; 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."

"These oaths having been duly taken, the fact will be sufficiently stated as follows:

"'The court, including the recorder, was then duly sworn according to law in presence of the prisoner.'"—G. O. No. 49., A.-G. O., 1871.

[18] The regimental commander makes the detail, when there is more than one field officer of the regiment on duty with it. If there be but one field officer with the regiment the detail must be made by his next superior officer; and if there be no field officers present with the regiment recourse must be had to regimental or garrison courts. The above law (¶ 647) applies only to regimental organizations. See Opinions, Judge-advocate-general, p. 173.

for that purpose, and who shall hear and determine the offense, and order the punishment that shall be inflicted; and shall also make a record of his proceedings, and submit the same to the brigade commander, who, upon the approval of the proceedings of such field officer, shall order the same to be executed. *Provided*, That the punishment in such cases be limited to that authorized to be inflicted by a regimental or garrison court-martial. *And provided further*, That, in the event of there being no brigade commander, the proceedings as aforesaid shall be submitted for approval to the commanding officer of the post.—Sec. 7, July 17, 1862, chap. 201.

EVIDENCE.

648. All persons who give evidence before a court-martial are to be examined on oath or affirmation, in the following form:

"You swear, or affirm (as the case may be), the evidence you shall give in the cause now in hearing shall be the truth, the whole truth, and nothing but the truth. So help you God."—73d Article of War, April 10, 1806.

649. On the trials of cases not capital, before courts-martial, the deposition of witnesses, not in the line or staff of the army, may be taken before some justice of the peace, and read in evidence;[19] provided the prosecutor and person accused are present at the taking the same, or are duly notified thereof.—74th Article of War.

650. Depositions of witnesses residing beyond the limits of the State, Territory, or District in which military courts shall be ordered to sit, may be taken in cases not capital by either party,

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[19] EVIDENCE.—"Courts-martial, when administering the military law, having cognizance only of criminal offenses, are bound by the rules of evidence administered in criminal cases in the courts of common law; and therefore ought not to convict the prisoner until all reasonable doubt of his guilt is removed; allowing the presumption of innocence in all cases to operate in his favor."—Greenleaf on Evidence, vol. iii., § 469. And see 2 Opinions, 344.

The rule of law that no evidence shall be given against a prisoner, except in his presence, is a personal privilege which he may waive.—1 Opinions, 706.

This article, by providing, under certain restrictions, and in cases not capital, that depositions may be taken, negatives their allowance in other cases; and the existence of the provision sufficiently proves that, without it, such testimony would not be competent, even in those minor cases.—2 Opinions, 344.

A member of the court absent while any of the witnesses are giving testimony becomes disqualified to sit in judgment upon the accused.—2 Opinions, 414.

It is the duty of the court, in all cases where the punishment of the offense charged is discretionary, and the specifications do not show all the circumstances attending the offense, to receive such testimony as the judge-advocate may offer, for the purpose of illustrating the actual degree of the offense, notwithstanding the party accused may have pleaded guilty.—2 Opinions, 637.

Copies of all records in the war department, when certified under seal of the department, are to be received as evidence, equally as the originals would be. See Chap. ii., ¶ 8; and see also Chap. iii., ¶ ¶ 65, 74.

and read in evidence; provided the same shall be taken upon reasonable notice to the opposite party, and duly authenticated.—Sec. 27, March 3, 1863, chap. 75.

PROCEEDINGS.

651. When a prisoner, arraigned before a general court-martial, shall, from obstinacy and deliberate design, stand mute, or answer foreign to the purpose, the court may proceed to trial and judgment, as if the prisoner had regularly pleaded not guilty.[20]—70th Article of War, April 10, 1806.

652. When a member shall be challenged by a prisoner, he must state his cause of challenge, of which the court shall, after due deliberation, determine the relevancy or validity, and decide accordingly; and no challenge to more than one member at a time shall be received by the court.[21]—71st Article of War.

653. All the members of a court-martial are to behave with decency and calmness; and in giving their votes are to begin with the youngest in commission.—72d Article of War.

654. No person whatsoever shall use any menacing words, signs, or gestures in presence of a court-martial, or shall cause any disorder or riot, or disturb their proceedings, on the penalty of being punished, at the discretion of the said court-martial.—76th Article of War.

655. The party tried by any general court-martial shall, upon demand thereof, made by himself, or by any person or persons in his behalf, be entitled to a copy of the sentence and proceedings of such court-martial.—90th Article of War.

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[20] CHARGES AND SPECIFICATIONS.—It is sufficient if the description of the offense be sufficiently clear to inform the accused of the military offense for which he is to be tried, and to enable him to prepare his defense.—1 Opinions, 294.

"A specification" is good, and will support the finding and sentence upon it, with or without descriptive designation of the quality of the imputed criminal act, provided it appear that the facts alleged and proven constitute, in any point of view, the offense charged.—7 Opinions, 601.

[21] PROCEEDINGS OF THE COURT.—No proceedings of trials shall be carried on, excepting between the hours of eight in the morning and three in the afternoon, except as provided for in 75th Article. See ¶ 629.

(*a.*) The Articles of War prescribe rules only for such of the proceedings of these courts as were intended to differ from the methods usual in ordinary courts of law; when, therefore, the Rules and Articles are silent, it should be understood that the manner of proceeding must conform as far as practicable to the rules governing in the civil courts.—Greenleaf on Evidence, vol. iii., § 469.

(*b.*) There is no doubt of the power of the President to order a NOLLE PROSEQUI in any stage of a criminal proceeding in the name of the United States.—5 Opinions, 729.

(*c.*) It is within the power of the authority appointing the court to order the case back for revision; but this must be done before the court has actually been dissolved: but doubted whether the proceedings can be returned for revision more than once.—6 Opinions, 200–209.

(*d.*) On reassembling a court for revision of proceedings or sentence, the absence of some of its members is immaterial, provided a legal quorum remains.—7 Opinions, 338.

656. The court shall, for reasonable cause, grant a continuance to either party for such time and as often as shall appear to be just. *Provided,* That if the prisoner be in close confinement the trial shall not be delayed for a period longer than sixty days.—Sec. 29, March 3, 1863, chap. 75.

SENTENCE.

657. No sentence[22] of a court-martial shall be carried into execution until after the whole proceedings shall have been laid before the officer ordering the same, or the officer commanding the troops for the time being; neither shall any sentence of a general court-martial, in time of peace, extending to the loss of life,[23] or the dis-

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[22] THE SENTENCE.—The power of the President over the sentence is a power over the whole of it, and he may approve, reject, or mitigate the same at pleasure.—2 Opinions, 289. He may, therefore, commute sentences of dismission from the service to suspension without pay or emoluments, for a limited time (4 *ibid.*, 433; and 5 *ibid.*, 43); but a sentence simply of suspension, which, according to the second comptroller, (§ 1125), does not entail forfeiture of pay, cannot be mitigated by an abbreviation of the term of suspension, accompanied by a forfeiture of pay, etc. See 4 Opinions, 445.

(*a.*) It is a maxim of the common law that "any corporal punishment, although the very least, is greater than pecuniary punishment."

(*b.*) The sentence of a court-martial having been approved and carried into effect, there is no supervisory power by which it can be rescinded, annulled, or modified. It forever stands as the judgment of a court of justice.—See 1 Opinions, 486; 4 *ibid.*, 170, 274; 5 *ibid.*, 28; 6 *ibid.*, 339, 514; 7 *ibid.*, 99; 10 *ibid.*, 64; and 11 *ibid.*, 19, 139.

"The executed portion of a sentence of a general court-martial, involving stoppage of pay, cannot be remitted, the money having lapsed into the treasury, from which it can only be withdrawn by act of Congress."—Adjutant-general, November 9, 1871.

(*c.*) The appointment of an officer to a new commission is constructive pardon of a previous sentence pronounced but not yet executed.—4 Opinions, 8; and 6 *ibid.*, 125. For effect of a discharge given to an enlisted man undergoing sentence, see Chap. xx., note 3 *b.*

(*d.*) The commander-in-chief has no power whatever to pardon or mitigate the sentence of dismissal or cashiering. All the authority he has is to suspend the carrying of the sentence into execution until the pleasure of the President could be known. —6 Opinions, 125.

(*e.*) Courts-martial, during the term of sitting, have power to reconsider any judgment and sentence rendered by them, and to change the judgment and sentence even to death when the former imposed only imprisonment.—1 Opinions, 297–300.

(*f.*) See ¶ ¶ 53, 351, 668, 719.

[23] THE DEATH PENALTY.—The punishment of death, under the Articles of War, can be adjudged only for the specific crimes stated in ¶ ¶ 709–713, 729–734, 740–743, 750, 752, 757. But see also ¶ 631, and note (10) to ¶ 632.

Taking in connection with this sec. (¶ 664) the 65th and 89th Articles of War (¶ ¶ 657, 658), and the amendatory acts quoted in ¶ ¶ 634, 635, 639, 665, 666, 667, we find that no sentence of a military court inflicting the death penalty can be carried into execution until it shall have been confirmed by the President; *except* in the cases of persons convicted, in time of war, as spies, mutineers, deserters, or murderers, and in the cases of guerrilla marauders, convicted, in time of war, of robbery, burglary, arson, rape, assult with intent to commit rape, or of violation of the laws and customs of war; and *in such excepted cases the sentence of death may be carried into execution* upon confirmation by the commanding general in the field, or the commander of the department, as the case may be.

By the municipal code of the United States it is provided that "the manner of inflicting the punishment of death shall be by hanging the person convicted by the neck until dead": see sec. 33, April 30, 1790; but under the *customs of war* the death penalty is, for purely military offenses, generally inflicted by "shooting to death with musketry."

mission of a commissioned officer,[22d] or which shall, either in time of peace or war, respect a general officer, be carried into execution, until after the whole proceedings shall have been transmitted to the secretary of war, to be laid before the President of the United States, for his confirmation or disapproval, and orders in the case. All other sentences may be confirmed and executed by the officer ordering the court to assemble, or the commanding officer for the time being, as the case may be.—65th Article of War, April 10, 1806.

658. Every officer authorized to order a general court-martial shall have power to pardon or mitigate any punishment ordered by such court, except the sentence of death,[23] or of cashiering an officer;[22d] which, in the cases where he has authority (by Article 65) to carry them into execution, he may suspend, until the pleasure of the President of the United States can be known, which suspension, together with copies of the proceedings of the court-martial, the said officer shall immediately transmit to the President for his determination. And the colonel or commanding officer of the regiment or garrison where any regimental or garrison court-martial shall be held may pardon or mitigate any punishment ordered by such court to be inflicted.—89th Article of War.

659. Any commissioned officer convicted before a general court-martial of conduct unbecoming an officer and a gentleman shall be dismissed the service.—83d Article of War, April 10, 1806.

660. In cases where a court-martial may think it proper to sentence a commissioned officer to be suspended from command, they shall have power also to suspend his pay and emoluments for the same time, according to the nature and heinousness of the offense. —84th Article of War.

661. In all cases where a commissioned officer is cashiered for cowardice or fraud, it shall be added in the sentence, that the crime, name, and place of abode, and punishment of the delinquent, be published in the newspapers in and about the camp, and of the particular State from which the offender came, or where he usually resides; after which it shall be deemed scandalous for an officer to associate with him.—85th Article of War.

662. No person shall be sentenced to suffer death but by the concurrence of two-thirds of the members of a general court-martial, nor except in the cases herein expressly mentioned.[23]—87th Article of War.

663. Flogging as a punishment in the army is hereby abolished. —Sec. 3, August 5, 1861, chap. 54.

664. No sentence of death,[23] or imprisonment in the penitentiary,[24] shall be carried into execution until the same shall have been approved by the President.—Sec. 5, July 17, 1862, chap. 201.

665. That so much of the 5th section of the act approved July 17, 1862, entitled "An act to amend an act calling forth the militia to execute the laws of the Union," and so forth, as requires the approval of the President to carry into execution the sentence of a court-martial, be and the same is hereby repealed, as far as relates to carrying into execution the sentence of any court-martial against any person convicted as a spy or deserter, or of mutiny or murder; and hereafter sentences in punishment of these offenses may be carried into execution upon the approval of the commanding general in the field.—Sec. 21, March 3, 1863, chap. 75.

666. The provisions of the 21st section of an act entitled "An act for enrolling and calling out the national forces, and for other purposes" [¶ 665], approved March 3, 1863, shall apply as well to the sentences of military commissions[25] as to those of courts-martial, and hereafter the commanding general in the field, or the commander of the department, as the case may be, shall have power to carry into execution all sentences against guerrilla marauders, for robbery, arson, burglary, rape, assault with intent to commit rape, and for violation of the laws and customs of war, as well as sentences against spies, mutineers, deserters, and murderers.—Sec. 1, July 2, 1864, chap. 215.

667. Every officer authorized to order a general court-martial shall have power to pardon or mitigate any punishment ordered by such court, including that of confinement in the penitentiary, except the sentence of death, or of cashiering or dismissing an officer, which

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[24] So much of this section as refers to sentences of confinement in the penitentiary is repealed by act cited in ¶ 667. But such punishment cannot be inflicted for purely military offenses: see ¶ ¶ 703, 706.

[25] MILITARY COMMISSIONS.—"Military jurisdiction is of two kinds: first, that which is conferred and defined by statute; second, that which is derived from the common law of war. Military offenses under the statute law must be tried in the manner therein directed; but military offenses which do not come within the statute must be tried and punished under the common law of war. The character of the courts which exercise these jurisdictions depends upon the local laws of each particular country."

"In the armies of the United States the first is exercised by courts-martial; while cases which do not come within the 'Rules and Articles of War,' or the jurisdiction conferred by statute on courts-martial, are tried by military commissions."—¶ 13, G. O. No. 100, A.-G. O., 1863.

"These jurisdictions [paragraph of G. O. No. 100, just quoted] are applicable, not only to war with foreign nations, but to a rebellion, when a part of a country wages war against its legitimate government, seeking to throw off all allegiance to it, to set up a government of its own."—Ex parte *Vallandigham*, 1 Wallace, 249.

The Supreme Court disclaims power to review proceedings of these courts: see Chap. xxvii., notes 22, 27. Jurisdiction extended over spies: see ¶ 753.

sentences it shall be competent during the continuance of the present rebellion for the general commanding the army in the field, or the department commander, as the case may be, to remit or mitigate; and the 5th section of the act approved July 17, 1862, chap. 201, be and the same is hereby repealed, so far as it relates to sentences of imprisonment in the penitentiary.[26]—Sec. 2, *ibid.*

668. Hereafter it shall be illegal to brand, mark, or tattoo on the body of any soldier by sentence of court-martial, and the word "corporeal" shall be stricken from the 45th of the rules and articles [¶ 719] for the government of the armies of the United States. —Sec. 2, June 6, 1872, chap. 316.

COURTS OF INQUIRY.

669. In cases where the general or commanding officer may order a court of inquiry[27] to examine into the nature of any transaction, accusation, or imputation, against any officer or soldier, the said court shall consist of one or more officers, not exceeding three, and a judge-advocate, or other suitable person, as a recorder, to reduce the proceedings and evidence to writing; all of whom shall be sworn to the faithful performance of their duty. This court shall have the same power to summon witnesses as a court-martial, and to examine them on oath. But they shall not give their opinion on the merits of the case, excepting they shall be thereto specially required. The parties accused shall also be permitted to cross-examine and interrogate the witnesses, so as to investigate fully the circumstances in the question.—91st Article of War.

670. The proceedings of a court of inquiry must be authenticated by the signature of the recorder and the president, and delivered to the commanding officer, and the said proceedings may be admitted as evidence by a court-martial, in cases not capital, or extending to the dismission of an officer, provided that the circumstances are such

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[26] Act repealed will be found in ¶ 664. But no person in the military service can be confined in the penitentiary, except under the conditions declared in ¶ ¶ 703-706; and for commutation of sentence, for good behavior, while thus confined, see ¶ ¶ 707, 708.

[27] THE STATUTE OF LIMITATION (¶ 630) applies only to trials by courts-martial. "Courts of inquiry are not limited in the terms of the Article of War; it is well settled that they are not limited by construction in Great Britain; the more general conclusion has been the same in this country; and that conclusion seems to me consonant with the general principles of law, and especially convenient in a constitutional government like the United States."—6 Opinions, 243; 8 *ibid.*, 349. See also Macomb, p. 94; Benét, p. 183; O'Brien, p. 292; Tytler, pp. 160, 161; and Hough's Military Law Authorities, p. 7; and contra, Simmons, p. 100; and De Hart, p. 280.

that oral testimony cannot be obtained. But as courts of inquiry may be perverted to dishonorable purposes, and may be considered as engines of destruction to military merit in the hands of weak and envious commandants, they are hereby prohibited, unless directed by the President of the United States, or demanded by the accused. —92d Article of War.

671. The judge-advocate or recorder shall administer to the members the following oath:

"You shall well and truly examine and inquire, according to your evidence, into the matter now before you, without partiality, favor, affection, prejudice, or hope of reward. So help you God."

After which the president shall administer to the judge-advocate, or recorder, the following oath:

"You, A. B., do swear that you will, according to your best abilities, accurately and impartially record the proceedings of the court, and the evidence to be given in the case in hearing. So help you God."

The witnesses shall take the same oath as witnesses sworn before a court-martial.[28]—93d Article of War.

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[28] See ¶ 648.

[29] FORMS OF PROCESS OF ATTACHMENT AND SUBPŒNA:—

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 , 187 , pursuant to Special Orders No. of 187 , from Headquarters , a copy of which said order is hereto annexed, marked "A". And *whereas,* on the day of 187 , 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 is hereto annexed, marked "B". And *whereas,* one of in the was, on the day of 187 , 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 187 , 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 or testify in said cause, he being a necessary and material witness therein:

Now therefore, under and by virtue of the 25th sec., chap. 79, of the Act of Congress approved March 3, 1863, you are hereby commanded that you take the said wherever he may be found within the United States, and him safely keep, and bring you his body without delay before the said General Court-Martial convened at said Fort and of which , United States Army, is

President, at the Court-Room thereof on the day of 187 , at o'clock in the forenoon, at the opening of said Court, to then and there testify in the said cause of the United States versus , now depending and then and there to be continued and tried,

And have you then and there this writ.

By Order of the Court:

In witness whereof, I, as Judge-Advocate of said Court, duly appointed and sworn, have hereto set my hand and seal, at Fort this day of 187 .

.....

..... SEAL

Judge-Advocate.

GENERAL COURT-MARTIAL ROOMS.

.....

The President of the United States of America

To

Greeting:

Pursuant to the 25th Section of the Act of Congress, approved March 3, 1863, you are hereby required to be and appear, in your own proper person, on the day of 187 , at o'clock in the noon, before a General Court-Martial of the United States, convened at said by virtue of Special Orders Number of from the Headquarters of the Department of the East, New York City, to testify and give evidence all that you may know concerning the pending case then and there to be tried, of the United States versus accused of under the laws of the United States, and have you then and there this precept.†

Witness: President of said Court, this day of 187 .

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Judge-Advocate.

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* The judge-advocate should affix seal on the scroll.

† General Orders No. 93, A.-G. O., 1868, and the act cited in ¶ 643, might well be printed on the back of these forms.

CHAPTER XXIII.

RULES AND ARTICLES FOR THE GOVERNMENT OF THE ARMIES OF THE UNITED STATES.

THE ARTICLES OF WAR.

680. FROM and after the passing of this act the following shall be the rules and articles by which the armies of the United States shall be governed.[1]—Sec. 1, April 10, 1806, chap. 20.

681. Every officer now in the army of the United States shall, in six months from the passing of this act, and every officer who shall hereafter be appointed shall, before he enters on the duties of his office, subscribe these rules and regulations.—1st Article.

682. Every non-commissioned officer or soldier, who shall enlist himself in the service of the United States, shall, at the time of his so enlisting, or within six days afterwards, have the articles for the government of the armies of the United States read to him, and shall, by the officer who enlisted him, or by the commanding officer of the troop or company into which he was enlisted, be taken before the next justice of the peace, or chief magistrate of any city or town corporate, not being an officer of the army, or where recourse cannot be had to the civil magistrate, before the judge-advocate, and in his presence shall take the following oath or affirmation: "I, A. B., do solemnly swear, or affirm (as the case may be), that I will bear true allegiance to the United States of America, and that I will serve them honestly and faithfully against all their enemies or opposers whatsoever; and observe and obey the orders of the President of the United States, and the orders of the officers appointed over me, according to the rules and articles for the government of the armies of the United States." Which justice, magistrate, or judge-advocate,

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[1] In this chapter will be found such of the articles prescribed in the original act of Congress, and amendatory legislation, as are now in force, and which have not, for more convenient reference, been embraced in other chapters. In Chaps. iii., viii., xii., xiv., xviii., xx., xxii., and xxvii., will be found such of the articles of war as have immediate reference to the subject-matter of those chapters respectively.

"INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD" may be found in the Appendix, ¶ ¶ 1141–1297.

is to give the officer a certificate, signifying that the man enlisted did take the said oath or affirmation.[2]—10th Article.

683. 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 regimental court-martial, according to the nature and degree of the offense, and be punished at their discretion.—99th Article.

684. The foregoing articles[3] are to be read and published, once in every six months, to every garrison, regiment, troop, or company mustered, or to be mustered, in the service of the United States, and are to be duly observed and obeyed by all officers and soldiers who are, or shall be, in said service.—101st Article.

685. That the rules and regulations by which the armies of the United States have heretofore been governed, and the resolves of Congress thereunto annexed, and respecting the same, shall henceforth be void and of no effect, except so far as may relate to any transactions under them, prior to the promulgation of this act, at the several posts and garrisons respectively, occupied by any part of the army of the United States.[4]—Sec. 3, April 10, 1806, chap. 20.

ABSENCE WITHOUT LEAVE.

686. Any officer absent without leave shall, in addition to the penalties[5] prescribed by law or a court-martial, forfeit all pay or allowances during such absence.—Sec. 31, March 3, 1863, chap. 75.

687. Any non-commissioned officer or soldier[5a] who shall, without leave from his commanding officer, absent himself from his troop,

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[2] The oath of enlistment may be administered by any commissioned officer: see ¶ 495.

[3] This refers of course to preceding articles in same act of Congress; but some of them have been repealed, and many of them are modified by subsequent legislation.

[4] The "rules and regulations" by which the army had before been governed were those prescribed by Congress, September 20, 1776; modified by subsequent "resolves," and adopted under the Constitution by act of September 29, 1789.

[5] Sec. 22 of this act provided: "that courts-martial shall have power to sentence officers who shall absent themselves from their commands without leave, to be reduced to the ranks to serve three years or during the war;" but its provisions did not survive the suppression of the then existing rebellion.

Under sec. 17, July 15, 1870, officers absent without leave for three months may be dropped from the rolls, as deserters, by order of the President. See Chap. XX., ¶ 569.

(*a.*) "Deserters shall make good the time lost by desertion, unless discharged by competent authority. Non-commissioned officers or soldiers, who have absented themselves without authority from their companies, regiments, or posts of duty, shall also, in fulfillment of their contract of enlistment, make good the time lost by reason of their unauthorized absence, upon such absence being found by a court-martial."—G. O. No. 16, A.-G. O., 1865; and enlisted men absent without leave must refund any reward paid for their apprehension: see note 15 *a*.

company, or detachment, shall, upon being convicted thereof, be punished according to the nature of his offense, at the discretion of a court-martial.—21st Article, April 10, 1806.

688. All non-commissioned officers and soldiers who shall be found one mile from the camp, without leave in writing from their commanding officer, shall suffer such punishment as shall be inflicted upon them by the sentence of a court-martial.—41st Article.

689. No officer or soldier shall lie out of his quarters, garrison, or camp, without leave from his superior officer, upon penalty of being punished according to the nature of his offense, by the sentence of a court-martial.—42d Article.

690. Every non-commissioned officer and soldier shall retire to his quarters or tent at the beating of the retreat; in default of which he shall be punished according to the nature of his offense.—43d Article.

691. No officer, non-commissioned officer, or soldier shall fail in repairing, at the time fixed, to the place of parade, of exercise, or other rendezvous, appointed by his commanding officer, if not prevented by sickness, or some other evident necessity; or shall go from the said place of rendezvous, without leave from his commanding officer, before he shall be regularly dismissed or relieved, on the penalty of being punished, according to the nature of his offense, by the sentence of a court-martial.—44th Article.

692. Any officer or soldier who shall, without urgent necessity, or without the leave of his superior officer, quit his guard, platoon, or division,[6] shall be punished, according to the nature of his offense, by the sentence of a court-martial.—50th Article.

ABUSES AND DISORDERS.

693. Every officer commanding in quarters, garrisons, or on the march, shall keep good order, and, to the utmost of his power, redress all abuses or disorders which may be committed by any officer or soldier under his command; if, upon complaint made to him of officers or soldiers beating or otherwise ill-treating any person, or disturbing fairs or markets, or of committing any kind of riots, to the disquieting of the citizens of the United States, he, the said commander, who shall refuse or omit to see justice done to the offender or offenders, and reparation[7] made to the party or parties injured,

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[6] For details to carry wounded from the field see Chap. x., ¶ 304.

[7] Under the 32d of the Rules and Articles of War, it is made the duty of commanding officers to see reparation made to the party or parties injured, from the pay of

as far as part of the offender's pay shall enable him or them, shall, upon proof thereof, be cashiered, or otherwise punished, as a general court-martial shall direct.—32d Article.

APPEALS.

694. If any officer shall think himself wronged by his colonel, or the commanding officer of the regiment, and shall, upon due application being made to him, be refused redress, he may complain to the general commanding in the State or Territory where such regiment shall be stationed, in order to obtain justice; who is hereby required to examine into said complaint, and take proper measures for redressing the wrong complained of, and transmit, as soon as possible, to the department of war a true state of such complaint, with the proceedings had thereon.—34th Article.

695. If any inferior officer or soldier shall think himself wronged by his captain or other officer, he is to complain thereof to the commanding officer of the regiment, who is hereby required to summon a regimental court-martial,[8] for the doing justice to the complainant; from which regimental court-martial either party may, if he thinks himself still aggrieved, appeal to a general court-martial. But if, upon a second hearing, the appeal shall appear vexatious and groundless, the person so appealing shall be punished at the discretion of the said court-martial.—35th Article.

ARRESTS AND IMPRISONMENT.

696. Whenever any officer shall be charged with a crime, he shall be arrested and confined in his barracks, quarters, or tent, and de-

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soldiers who are guilty of abuses or disorders committed against citizens. Upon proper representation, by any citizen, of wanton injury to his person or property, accompanied by satisfactory proof, the commanding officer of the troops will cause the damage to be assessed by a board of officers, the amount stopped against the pay of the offenders, and reparation made to the injured party. This proceeding will be independent of any trial or sentence by court-martial for the criminal offense.—G. O. No. 35, A.-G. O., 1868.

The amount assessed upon each offender "should be entered as a stoppage upon the muster and pay rolls. The paymaster can then withhold the several amounts, and turn over the whole sum to the commanding officer of the post, upon his receipt therefor."—Adjutant-general, December 21, 1870.

[8] APPEALS.—This provision is imperative and compulsory. "It is not a matter of favor or discretion, but of right, and is strictly ex debito justiciæ. It constitutes, in fact, a special court of inquiry on the subject, and affords a summary remedy to the party supposed to be injured. The only authority, however, given to this court, is to decide on the justice or injustice of the complaint. By the subsequent articles [¶ ¶ 629, 645] they have no authority to punish any officer against whom a complaint may be exhibited or preferred, though they may think it well founded. If further redress be proper, a general court-martial must be called."—1 Opinions, 166.

prived of his sword, by the commanding officer.[9] And any officer who shall leave his confinement before he shall be set at liberty by his commanding officer, or by a superior officer, shall be cashiered.[10] —77th Article.

697. Non-commissioned officers and soldiers, charged with crimes, shall be confined until tried by a court-martial, or released by proper authority.—78th Article.

698. No officer or soldier, who shall be put in arrest, shall continue in confinement more than eight days,[11] or until such time as a court-martial can be assembled.—79th Article.

699. Whenever an officer shall be put under arrest, except at remote military posts or stations, it shall be the duty of the officer by whose orders he is arrested to see that a copy of the charges on which he has been arrested and is to be tried shall be served upon him within eight days thereafter, and that he shall be brought to trial within ten days thereafter, unless the necessities of the service prevent such trial; and then he shall be brought to trial within thirty days after the expiration of the said ten days, or the arrest shall cease.[12] *Provided,* That if the copy of the charges be not served upon the arrested officer, as herein provided, the arrest shall cease; but officers released from arrest under the provisions of this section may be tried whenever the exigencies of the service will permit, within twelve months after such release from arrest. *And provided further,* That the provisions of this section shall apply to all persons now under arrest and awaiting trial.—Sec. 11, July 17, 1862, chap. 200.

700. No officer commanding a guard, or provost-marshal, shall refuse to receive or keep any prisoner committed to his charge, by an officer belonging to the forces of the United States; provided the

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[9] None but commanding officers have power to arrest commissioned officers, except in quelling quarrels, affrays, etc., as provided in 27th Article: see ¶ 747.

[10] Take this article in connection with ¶ 699, and note 12.

[11] A military officer who orders the arrest and confinement of an individual is bound to see that his subordinates, to whom the execution of the order is intrusted, use no unnecessary severity or cruelty in carrying it into execution; and he is liable in damages for oppression or undue harshness practiced by them through his neglect to superintend the course of his subordinates.—*McCall* v. *McDowell.* APPENDIX, ¶ 1080. That ruling was made in the case of a *citizen* imprisoned by the military authority, but the principle obtains also over the confinement of military persons. See APPENDIX, ¶ ¶ 1120–1131.

[12] Under this statute an officer is not entitled to terminate his arrest, or resume his command, independently of the authority of his superiors. If not relieved from arrest at the time designated by law, he should apply for the appropriate relief to the officer who ordered the arrest or to his successor. If his application is not granted he can apply for redress to the officer superior to the latter in the manner set forth in 34th Article of War (¶ 694), and when all other means have failed he should appeal to the secretary of war.—Judge-advocate-general, p. 58, ¶ 7.

officer committing shall, at the same time, deliver an account in writing, signed by himself, of the crime with which the said prisoner is charged.—80th Article of War.

701. No officer commanding a guard, or provost-marshal, shall presume to release any person committed to his charge, without proper authority for so doing, nor shall he suffer any person to escape, on the penalty of being punished for it by the sentence of a court-martial.—81st Article.

702. Every officer or provost-marshal, to whose charge prisoners shall be committed, shall, within twenty-four hours after such commitment, or as soon as he shall be relieved from his guard, make report in writing, to the commanding officer, of their names, their crimes, and the names of the officers who committed them, on the penalty of being punished for disobedience or neglect, at the discretion of a court-martial.—82d Article.

703. That hereafter no person in the military service of the United States, convicted and sentenced by a court-martial, shall be punished by confinement in the penitentiary of the District of Columbia, unless the offense of which such person may be convicted would by some statute of the United States or at common law, as the same exists in the said District, subject such convict to said punishment. —Sec. 1, July 16, 1862, chap. 190.

704. That all such persons in the military service, as aforesaid, who have heretofore been, or may hereafter be, convicted and sentenced by a court-martial for any offense which, if tried before the criminal court of said District, would not subject such person to imprisonment in said penitentiary, and who are now or may hereafter be confined therein, shall be discharged from said imprisonment, upon such terms and conditions of further punishment as the President of the United States may, in his discretion, impose as a commutation of said sentence.—Sec. 2, July 16, 1862, chap. 190.

705. That upon the application of any citizen of the United States, supported by his oath, alleging that a person or persons in the military service, as aforesaid, are confined in said penitentiary under the sentence of a court-martial for any offense not punishable by imprisonment in the penitentiary by the authority of the criminal court aforesaid, it shall be the duty of the judge of said court, or, in case of his absence or inability, of one of the judges of the circuit court of said District, if, upon an inspection of the record of proceedings of said court-martial, he shall find the facts to be as alleged in said application, immediately to issue the writ of habeas corpus to bring

before him the said convict; and if, upon an investigation of the case, it shall be the opinion of such judge that the case of such convict is within the provisions of the previous sections of this act, he shall order such convict to be confined in the common jail of said District, until the decision of the President of the United States as to the commutation aforesaid shall be filed in said court, and then such convict shall be disposed of and suffer such punishment as by said commutation of his said sentence may be imposed.—Sec. 3, *ibid.*

706. That no person convicted upon the decision of a court-martial shall be confined in any penitentiary in the United States, except under the conditions of this act.[13]—Sec. 4, *ibid.*

707. All prisoners who have been, or shall hereafter be, convicted of any offense against the laws of the United States, and confined in any State prison, or penitentiary, in execution of the judgment or sentence upon such conviction, who so conduct themselves that no charge for misconduct shall be sustained against them, shall have a deduction of one month in each year made from the term of their sentence, and shall be entitled to their discharge so much the sooner, upon the certificate of the warden or keeper of such prison or penitentiary, with the approval of the secretary of the interior.—March 2, 1867, chap. 146.

708. Prisoners who are now, or who may hereafter be, confined in prisons of any of the States, as punishment for crimes of which they have been convicted and sentenced by courts of the United States, shall hereafter be entitled to the same system of credits for good behavior as other prisoners confined in the same prison. And hereafter the act approved March 2, 1867, entitled "An act in relation to persons imprisoned under sentence for offenses against the United States," shall only apply to such persons as are confined in

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[13] Soldiers may, for certain offenses not strictly military, be sentenced by general court-martial to confinement in a penitentiary.

If any State, in a military department, has made provision by law for confinement in a penitentiary thereof, of prisoners under sentence by courts-martial of the United States, the department commander may designate such penitentiary as a place for the execution of any such sentence to penitentiary confinement; but if no such provision has been made by any State in the department, the record will be forwarded to the secretary of war for designation of a prison.

The authority which has designated the place of confinement, or higher authority, can change the place of confinement, or mitigate or remit the sentence.—G. O. No. 90, A.-G. O., 1868.

(*a.*) "A sentence of imprisonment in a penitentiary upon conviction of desertion is improper, because such a sentence is, by the act of July 16, 1862, chap. 190, *prohibited to be enforced.* . . . . . The statute law is clear upon the subject; and no executive order, or opinion entertained by a court-martial, can avail to except any case whatever from the provisions of such law."—Judge-advocate-general, April 10, 1871.

prisons where no credits for good behavior are allowed.—June 14, 1870, chap. 128.

DESERTION.

709. All officers[14] and soldiers who have received pay, or have been duly enlisted in the service of the United States, and shall be convicted of having deserted the same, shall suffer death or such other punishment as, by sentence of a court-martial, shall be inflicted.[14a]—20th Article.

710. From and after the passage of this act, no officer or soldier in the army of the United States shall be subject to the punishment of death, for desertion in time of peace.—May 29, 1830, chap. 183.

711. 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 the 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.—22d Article.

712. Any officer or soldier who shall be convicted of having advised or persuaded any other officer or soldier to desert the service of the United States, shall suffer death,[14a] or such other punishment as shall be inflicted upon him by the sentence of a court-martial.—23d Article.

713. If any non-commissioned officer, musician, or private shall desert the service of the United States, he shall, in addition to the penalties mentioned in the Rules and Articles of War, be liable to serve for and during such a 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 and may be tried by a court-martial, and punished, although the term of his enlistment may have elapsed previous to his being apprehended or tried.[15]—Sec. 18, March 16, 1802, chap. 9.

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[14] Officers quitting the service on tender of resignation, and prior to acceptance thereof, considered as deserters: Chap. xx., ¶ 561.

Officers absent from duty three months, without authority, may be dropped from the rolls as deserters: see ¶ 569.

(*a.*) See ¶ ¶ 710, 713, in connection with ¶ ¶ 709, 712, 714.

[15] This section is sometimes cited as obtaining under date of January 29, 1813. It was repeated in that act as well as in the act of January 11, 1812; but those laws had reference only to the "additional forces" raised for the war, and were held by the war department to have expired in 1815. The above provision of the act of

714. In addition to the other lawful penalties of the crime of desertion from the military or naval service, all persons who have deserted the military or naval service of the United States, who shall not return to said service, or report themselves to a provost-marshal within sixty days after the proclamation hereinafter mentioned, shall be deemed and taken to have voluntarily relinquished and forfeited their rights of citizenship and their rights to become citizens: and such deserters shall be forever incapable of holding any office of trust or profit under the United States, or of exercising any rights of citizens thereof; and all persons who shall hereafter desert the military or naval service, and all persons who, being duly enrolled, shall depart the jurisdiction of the district in which he is enrolled, or go beyond the limits of the United States, with intent to avoid any draft into the military or naval service, duly ordered, shall be liable to the penalties of this section. And the President is hereby authorized and required forthwith, on the passage of this act, to issue his proclamation setting forth the provisions of this section, in which proclamation the President is requested to notify

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1802 is, however, claimed as continued in force under sec. 7 of the act of March 3, 1815: see Chap. xvii., ¶ 492. Suggested that the term of an enlistment ceases to run during an unauthorized absence, and therefore could not elapse while the soldier was absent in desertion. See also Chap. xxii., ¶ 630, note 8 *a*.

(*a*.) *Forfeitures for desertion.*—The forfeiture of pay and allowances by a soldier absent without leave, during the period of such absence, results from operation of law [Army Regulations], additional to sentence of forfeiture or other punishment by courts-martial. Such forfeiture carries with it the retained pay, and obtains for the period of unauthorized absence, notwithstanding a restoration to duty without trial.—Paymaster's Manual (1871), ¶ ¶ 270, 272.

A soldier tried for desertion, and acquitted of all blame, is entitled to pay, not only to date of arrest, but for the time that he was in custody.—Second Comptroller, § 1305. But if convicted of absence without leave, he, in addition to other forfeitures, must reimburse the expenses that may have been incurred in his apprehension.—Second Comptroller, February 11, 1869, and Adjutant-general, July 29, 1871.

Desertion, ipso facto, forfeits to the United States all then due the deserter. A subsequent pardon or remission of sentence cannot restore his right to pay, etc., which the law puts into the treasury eo instanti with his desertion. But the laundresses are to be paid out of any amount found to be due the deserter.—Second Comptroller, § § 697, 705, 707, 723.

A ruling of the second comptroller, that "for an over-payment to a soldier who subsequently deserts, a paymaster cannot be reimbursed from the amount due at time of desertion," has been overruled by the secretary of war.—*Ibid.*, § 1514.

When a soldier on his return from desertion or absence without leave is sentenced to make good the time of his illegal absence, he will not be allowed the benefits of any law raising the rate of pay, subsequently to date of desertion, until he shall have satisfied the sentence or served a time equal that which elapsed between his desertion and the passage of the law. In short, a deserter cannot claim *exemption* from laws reducing pay, nor *inclusion* in laws raising pay, so as to profit by his crime.—Paymaster's Manual (1871), ¶ 90.

The proceedings and sentence against a deserter, disapproved by the reviewing officer on account of fatal error in the record or the proceedings, virtually acquit of desertion, and also of the lesser offense of "absence without leave," and relieve from all penalties as if the charge had never been entertained.—(Judge-advocate-general, June 3, 1868), *ibid.*, ¶ 89.

all deserters returning within sixty days as aforesaid that they shall be pardoned on condition of returning to their regiments and companies, or to such other organizations as they may be assigned to, until they shall have served for a period of time equal to their original term of enlistment.—Sec. 21, March 3, 1865, chap. 79.

715. Every person not subject to the Rules and Articles of War, who shall procure or entice, or attempt to procure or entice, a soldier in the service of the United States to desert; or who shall harbor, conceal, or give employment to a deserter, or carry him away, or aid in carrying him away, knowing him to be such; or who shall purchase from any soldier his arms, equipments, ammunition, uniform, clothing, or any part thereof; and any captain or commanding officer of any ship or vessel, or any superintendent or conductor of any railroad, or any other public conveyance, carrying away any such soldier as one of his crew or otherwise, knowing him to have deserted, or shall refuse to deliver him up to the orders of his commanding officer, shall, upon legal conviction, be fined, at the discretion of any court having cognizance of the same, in any sum not exceeding five hundred dollars, and he shall be imprisoned not exceeding two years nor less than six months.—Sec. 24, March 3, 1863, chap. 75.

DISRESPECT AND CONTEMPT.

716. Any officer or soldier who shall use contemptuous or disrespectful words against the President of the United States, against the Vice-President thereof, against the Congress of the United States, or against the chief magistrate or legislature of any of the United States, in which he may be quartered, if a commissioned officer, shall be cashiered, or otherwise punished, as a court-martial shall direct; if a non-commissioned officer or soldier, he shall suffer such punishment as shall be inflicted on him by the sentence of a court-martial. —5th Article.

717. Any officer or soldier who shall behave with contempt or disrespect towards his commanding officer shall be punished, according to the nature of his offense, by the judgment of a court-martial.—6th Article.

DIVINE SERVICE.

718. It is earnestly recommended to all officers and soldiers diligently to attend Divine service; and all officers who shall behave indecently or irreverently at any place of Divine worship shall, if commissioned officers, be brought before a general court-martial, there to be publicly and severely reprimanded by the president; if non-

commissioned officers or soldiers, every person so offending shall, for his first offense, forfeit one-sixth of a dollar, to be deducted out of his next pay; for the second offense, he shall not only forfeit a like sum, but be confined twenty-four hours; and for every like offense, shall suffer and pay in like manner; which money, so forfeited, shall be applied, by the captain or senior officer of the troop or company, to the use of the sick soldiers of the company or troop to which the offender belongs.—2d Article.

DRUNKENNESS ON DUTY.

719. Any commissioned officer who shall be found drunk on his guard, party, or other duty, shall be cashiered. Any non-commissioned officer or soldier so offending shall suffer such corporeal[16] punishment as shall be inflicted by the sentence of a court-martial. —45th Article.

DUELING.

720. No officer or soldier shall send a challenge to another officer or soldier, to fight a duel, or accept a challenge if sent, upon pain, if a commissioned officer, of being cashiered; if a non-commissioned officer or soldier, of suffering corporeal punishment,[16] at the discretion of a court-martial.—25th Article.

721. If any commissioned or non-commissioned officer commanding a guard shall knowingly or willingly suffer any person whatsoever to go forth to fight a duel, he shall be punished as a challenger; and all seconds, promoters, and carriers of challenges, in order to duels, shall be deemed principals, and be punished accordingly. And it shall be the duty of every officer commanding an army, regiment, company, post, or detachment, who is knowing to a challenge being given or accepted by any officer, non-commissioned officer, or soldier, under his command, or has reason to believe the same to be the case, immediately to arrest and bring to trial such offenders.—26th Article.

722. Any officer or soldier, who shall upbraid another 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 of challenges, as they will only have acted in obedience to the laws, and done their duty as good soldiers who subject themselves to discipline.—28th Article.

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[16] The word "corporeal" stricken from this article by act of June 6, 1872: see ¶ 668.

FUGITIVES FROM SERVICE.

723. Hereafter the following shall be promulgated as an additional article of war for the government of the army of the United States, and shall be obeyed and observed as such:

ARTICLE —. All officers or persons in the military or naval service of the United States are prohibited from employing any of the forces under their respective commands for the purpose of returning fugitives from service or labor, who may have escaped from any persons to whom such service or labor is claimed to be due, and any officer who shall be found guilty by a court-martial of violating this article shall be dismissed from the service.[16a]—Sec. 1, March 13, 1862, chap. 40.

724. It shall be the duty of all persons in the military or civil service in the Territory of New Mexico to aid in the enforcement of the foregoing section of this act;[16a] and any person or persons who shall obstruct, or attempt to obstruct, or in any way interfere with or prevent the enforcement of this act, shall be liable to the pains and penalties hereby provided; and any officer or other person in the military service of the United States who shall so offend, directly or indirectly, shall, on conviction before a court-martial, be dishonorably dismissed the service of the United States, and shall thereafter be ineligible to reappointment to any office of trust, honor, or profit under the government.—Sec. 2, March 2, 1867, chap. 187.

FURLOUGHS.

725. Every colonel, or other officer commanding a regiment, troop, or company, and actually quartered with it, may give furloughs to non-commissioned officers or soldiers, in such numbers, and for so long a time, as he shall judge to be most consistent with the good of the service; and a captain, or other inferior officer, commanding

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(*a.*) "The holding of any person to service or labor under the system known as peonage is hereby declared to be unlawful, and the same is hereby abolished and forever prohibited in the Territory of New Mexico, or in any other Territory or State of the United States; and all laws, resolutions, orders, regulations, or usages of the Territory of New Mexico, or of any other Territory or State of the United States, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, be and the same are hereby declared null and void; and any person or persons who shall hold, arrest, or return, or cause to be held, arrested, or returned, or in any manner aid in the arrest or return of any person or persons to a condition of peonage, shall, upon conviction, be punished by fine not less than one thousand nor more than five thousand dollars, or by imprisonment not less than one nor more than five years, or both, at the discretion of the court."—Sec. 1, March 2, 1867, chap. 187.

a troop or company, or in any garrison, fort, or barrack of the United States (his field officer being absent), may give furloughs to non-commissioned officers or soldiers, for a time not exceeding twenty days in six months, but not to more than two persons to be absent at the same time, excepting some extraordinary occasion should require it.—12th Article.

726. The commanders of regiments and of batteries in the field are hereby authorized and empowered to grant furloughs for a period not exceeding thirty days at any one time to five per cent. of the non-commissioned officers and privates, for good conduct in the line of duty, and subject to the approval of the commander of the forces of which such non-commissioned officers and privates form a part.—Sec. 32, March 3, 1863, chap. 75.

HIRING OF DUTY.

727. No soldier belonging to any regiment, troop, or company shall hire another to do his duty for him, or be excused from duty, but in cases of sickness, disability, or leave of absence; and every such soldier found guilty of hiring his duty, as also the party so hired to do another's duty, shall be punished at the discretion of a regimental court-martial.—47th Article.

728. And every non-commissioned officer conniving at such hiring of duty aforesaid shall be reduced; and every commissioned officer, knowing and allowing such ill practices in the service, shall be punished by the judgment of a general court-martial.—48th Article.

MISCONDUCT IN TIME OF WAR.

729. Any officer belonging to the service of the United States, who, by discharging of fire-arms, drawing of swords, beating of drums, or by any other means whatsoever, shall occasion false alarms, in camp, garrison, or quarters, shall suffer death, or such other punishment as shall be ordered by the sentence of a general court-martial.—49th Article.

730. Any officer or soldier who shall misbehave himself before the enemy,[17] run away, or shamefully abandon any fort, post, or guard which he or they may be commanded to defend, or speak words inducing others to do the like; or shall cast away his arms and ammunition, or who shall quit his post or colors to plunder and pillage; every such offender, being duly convicted thereof, shall suffer death,

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[17] For publication of sentence, in cases of cowardice, see ¶ 661.

or such other punishment as shall be ordered by the sentence of a general court-martial.—52d Article.

731. Any person belonging to the armies of the United States, who shall make known the watchword to any person who is not entitled to receive it according to the rules and discipline of war, or shall presume to give a parole or watchword different from what he received, shall suffer death, or such other punishment as shall be ordered by the sentence of a general court-martial.—53d Article.

732. Whoever, 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, shall force a safeguard, shall suffer death.—55th Article, as amended by Sec. 5, February 13, 1862, chap. 25.

733. Whosoever shall relieve the enemy[18] with money, victuals, or ammunition, or shall knowingly harbor or protect an enemy,[18a] shall suffer death, or such other punishment as shall be ordered by the sentence of a court-martial.—56th Article.

734. Whosoever shall be convicted of holding correspondence with, or giving intelligence to, the enemy, either directly or indirectly, shall suffer death, or such other punishment as shall be ordered by the sentence of a court-martial.—57th Article.

MUSTERS.

735. At every muster[19] the commanding officer of each regiment,

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[18] Suggested that the provisions of this article are applicable to persons supplying ammunition, etc., to INDIANS, who at the time are in open and notorious hostility to the United States, and thus within the description of public enemies. "In making this suggestion I assume that there exists such a state of hostility on the part of the Indians as amounts to war. This state, in our peculiar relations with Indian tribes, is, perhaps, not susceptible of an exact definition. It is not necessary to the existence of war that hostilities should have been formally proclaimed. When any Indian tribes are carrying on a system of attacks upon the property or persons, or both, of the settlers upon our frontiers, or of the travelers across our territories, and the troops of the United States are engaged in repelling such attacks, there is war in such a sense as will justify the enforcement of the articles of war against persons who are engaged in relieving the enemy with ammunition, etc. Yet, with regard to the property which may be found in their possession, and may be captured with them, it would be advisable to turn that over to the proper civil authorities, to be proceeded against under the statute regulating trade and intercourse with the Indians."—Attorney-general, July 19, 1871.

(*a.*) For an enumeration of certain crimes made punishable by military tribunals in time of war, insurrection, and rebellion, see Chap. xxii., ¶ ¶ 631, 666.

[19] MUSTERS.—The Army Regulations direct that troops be mustered for pay on the last day of February, April, June, August, October, and December; but the detachments of clerks and messengers on duty at division and department headquarters are, under special authority from the war department, mustered for pay every month.

(*a.*) MUSTER AND PAY ROLLS.—Commanders of companies are required to prepare at each regular muster, beside one muster-roll, three copies of the "*muster and pay roll,*" two for the paymaster, and one to be retained in the company files. When the

troop, or company there present shall give to the commissary of musters, or other officer who musters the said regiment, troop, or company, certificates signed by himself, signifying how long such officers, as shall not appear at the said muster, have been absent, and the reason of their absence. In like manner the commanding officer of every troop or company shall give certificates, signifying the reasons of the absence of the non-commissioned officers and private soldiers; which reasons and time of absence shall be inserted in the muster-rolls, opposite the names of the respective absent officers and soldiers. The certificates shall, together with the muster-rolls,[19] be remitted by the commissary of musters, or other officer mustering, to the department of war, as speedily as the distance of the place will admit.—13th Article.

736. Every officer who shall be convicted before a general court-martial of having signed a false certificate relating to the absence of either officer or private soldier, or relative to his or their pay, shall be cashiered.—14th Article.

737. Every officer who shall knowingly make a false muster of man or horse, and every officer or commissary of musters who shall willingly sign, direct, or allow the signing of muster-rolls, wherein such false muster is contained, shall, upon proof made thereof, by two witnesses, before a general court-martial, be cashiered, and shall be thereby utterly disabled to have or hold any office or employment in the service of the United States.—15th Article.

738. Any commissary of musters, or other officer, who shall be convicted of having taken money, or other thing, by way of gratification, on mustering any regiment, troop, or company, or on signing muster-rolls, shall be displaced from his office, and shall be thereby utterly disabled to have or hold any office or employment in the service of the United States.—16th Article.

739. Any officer who shall presume to muster a person as a soldier who is not a soldier shall be deemed guilty of having made a false muster, and shall suffer accordingly.—17th Article.

MUTINY AND SEDITION.

740. Any officer or soldier who shall begin, excite, cause, or

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paymaster's rolls have been computed and returned to the company for examination and signature, the calculations thereon will be transcribed on the triplicate muster and pay roll, under the direction of or by the company commander, who is responsible for the correct performance of this duty. See G. O. No. 9, A.-G. O., 1851.

join in, any mutiny,[20] or sedition, in any troop or company in the service of the United States, or in any party, post, detachment, or guard, shall suffer death, or such other punishment as by a court-martial shall be inflicted.—7th Article.

741. Any officer, non-commissioned officer, or soldier, who, being present at any mutiny or sedition, does not use his utmost endeavor to suppress the same, or, coming to the knowledge of any intended mutiny, does not, without delay, give information to his commanding officer, shall be punished by the sentence of a court-martial with death, or otherwise, according to the nature of his offense.—8th Article.

742. If any commander of any garrison, fortress, or post shall be compelled, by the officers and soldiers under his command, to give up to the enemy, or to abandon it, the commissioned officers, non-commissioned officers, or soldiers, who shall be convicted of having so offended, shall suffer death, or such other punishment as shall be inflicted upon them by the sentence of a court-martial.—59th Article.

743. Any officer or soldier who shall strike his superior officer, or draw or lift up any weapon, or offer any violence against him, being in the execution of his office, on any pretense whatsoever, or shall disobey any lawful command of his superior officer,[21] shall

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[20] "To strike an officer, even a warrant officer, constitutes the crime of mutiny under certain circumstances, namely, if done while the officer is in execution of his duty, or in disobedience of any lawful command of said officer."—8 Opinions, 396.

[21] DISOBEDIENCE OF ORDERS.—All inferiors are required to obey strictly, and to execute with alacrity and *good faith* the lawful orders of the superiors appointed over them.—Army Regulations, 1863.

(*a.*) It is possible that a commanding officer may transcend his authority; but in all such cases the inferior should act upon the reasonable presumption [of law] that his superior *was* authorized to issue an order, which he *might* be authorized to issue. If the subordinate acts otherwise, he does so at his peril, and subjects himself to the risk of being punished for disobedience (G. O. No. 34, A.-G. O., 1852); and, except in a plain case of excess of authority, where at first blush it is palpable to the commonest understanding that the order given is illegal, a military subordinate should be held excused, in law, for acts done in obedience to his commander, though such acts may have been declared illegal by the court. See *McCall* v. *McDowell*, APPENDIX, ¶ ¶ 1081–1089, but also Chap. xxvii., note 28 *d.*

(*b.*) It is an error for officers of the staff to suppose, when the Regulations prescribe certain duties to them, that they are, as regards the performance of those duties, independent of the authority of the commanding officer; when the Regulations prescribe certain duties to subordinate officers, whether of the staff or the line, the commanding officer is bound to see that these duties are properly performed. All of the staff departments have certain duties thus prescribed to them, and if the effect of such Regulations were to withdraw them from the authority of the commanding officer, the army, instead of being one body, composed of different parts, all subordinate to a single head, would be an association of several distinct corps independent of each other, and acknowledging no common superior. The mischievous consequences that would flow from the adoption of such a principle are too manifest to require illustration."—G. O. No. 28, A.-G. O., 1851.

(*c.*) Generals commanding military departments, in addition to the duties hereto-

suffer death, or such other punishment as shall, according to the nature of his offense, be inflicted upon him by the sentence of a court-martial.—9th Article.

PRESENTS.

744. No officer or clerk in the United States government employ shall at any time solicit contributions of other officials or employees in the government service for a gift or present to those in a superior official position; nor shall any such officials or clerical superiors receive any gift or present offered or presented to them as the contribution of those in government employ receiving a less salary than themselves; nor shall any officer or clerk make any donation as a gift or present to any official superior. Any officer or clerk violating any of the provisions of this bill shall be summarily discharged from the government employ.—February 1, 1870, chap. 11.

PROFANE SWEARING.

745. Any non-commissioned officer or soldier who shall use any profane oath or execration shall incur the penalties expressed in the foregoing article [¶ 718]; and a commissioned officer shall forfeit and pay for each and every offense one dollar, to be applied as in the preceding article.—3d Article.

QUARRELS, FRAYS, AND DISORDERS.

746. No officer or soldier shall use any reproachful or provoking speeches or gestures to another, upon pain, if an officer, of being put in arrest; if a soldier, confined, and of asking pardon of the party offended, in the presence of his commanding officer.—24th Article.

747. All officers, of what condition soever, have power to part

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fore required of them, will give their special attention to the economical administration of all branches of the service within their command, whether of the line or staff, and to this end will exercise supervision and command of every part of the army within their limits not specially excepted.

The Military Academy, general depots of supply, all arsenals, permanent forts in process of construction or extensive repairs, general recruiting depots, and officers employed on duties not military, are excepted from the operation of the foregoing paragraph.

All orders and general instructions to the troops, or to staff officers serving in military departments, must go from the headquarters of the army through the adjutant-general's office, and through the generals commanding the military divisions and departments in which the officers are serving; but ordinary correspondence relating to the details of execution may be carried on between the parties concerned and the heads of the staff department or corps charged with their execution.—G. O. No. 12, A.-G. O., 1869, and No. 54, 1871.

and quell all quarrels, frays, and disorders, though the persons concerned should belong to another regiment, troop, or company; and either to order officers into arrest, or non-commissioned officers or soldiers into confinement, until their proper superior officers shall be acquainted therewith; and whosoever shall refuse to obey such officer (though of an inferior rank), or shall draw his sword upon him, shall be punished at the discretion of a general court-martial.—27th Article.

RETURNS.

748. The commanding officer of every regiment, troop, or independent company, or garrison, of the United States, shall, in the beginning of every month, remit, through the proper channels, to the department of war, an exact return of the regiment, troop, independent company, or garrison, under his command, specifying the names of the officers then absent from their posts, with the reasons for, and the time of, their absence. And any officer who shall be convicted of having, through neglect or design, omitted sending such returns, shall be punished, according to the nature of his crime, by the judgment of a general court-martial.—19th Article.

749. Every officer who shall knowingly make a false return to the department of war, or to any of his superior officers, authorized to call for such returns, of the state of the regiment, troop, or company, or garrison, under his command; or of the arms, ammunition, clothing, or other stores thereunto belonging, shall, on conviction thereof before a court-martial, be cashiered.[22]—18th Article.

SENTINELS.

750. Any sentinel who shall be found sleeping upon his post, or shall leave it before he shall be regularly relieved, shall suffer death or such other punishment as shall be inflicted by the sentence of a court-martial.—46th Article.

SERVANTS.

751. It shall be unlawful for any officer to use any enlisted man as a servant in any case whatever.[23]—Sec. 14, July 15, 1870, chap. 294.

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[22] But see act of 1863, Chap. iii., ¶ 78, and note 44; also Chap. xxviii., ¶ 953.

[23] A violation of this enactment is no doubt punishable under the 99th Article of War (¶ 683); but when it was lawful to employ a soldier as a servant the law required that for each soldier thus employed there should be deducted from the monthly pay of such officer the full monthly pay and allowances of the soldier.—Sec. 1, March 3, 1865. See old laws, and ¶ 321.

SPIES.

752. In time of war or rebellion against the supreme authority of the United States, all persons who shall be found lurking as spies, or acting as such, in or about the fortifications, encampments, posts, quarters, or headquarters of the armies of the United States, or any of them, within any part of the United States which has been or may be declared to be in a state of insurrection by proclamation of the President of the United States, shall suffer death by sentence of a general court-martial.—Sec. 2, April 10, 1806, as amended by Sec. 4, February 13, 1862, chap. 25.

753. 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 military commission, and shall, upon conviction, suffer death.—Sec. 38, March 3, 1863, chap. 75.

SUTLERS AND TRADERS.

754. No sutlers[24] shall be permitted to sell any kind of liquors or victuals, or to keep their houses or shops open for the entertainment of soldiers, after nine at night, or before the beating of the reveille, or upon Sundays, during Divine service or sermon, on the penalty of being dismissed from all future sutling.—29th Article of War, April 10, 1806.

755. All officers commanding in the field, forts, barracks, or garrisons of the United States, are hereby required to see that the persons permitted to suttle shall supply the soldiers with good and wholesome provisions, or other articles, at a reasonable price, as they shall be answerable for their neglect.—30th Article.

756. No officer commanding in any of the garrisons, forts, or barracks of the United States, shall exact exorbitant[25] prices for houses or stalls, let out to sutlers, or connive at the like exactions in others; nor by his own authority, and for his private advantage, lay any duty or imposition upon, or be interested in, the sale of any victuals, liquors, or other necessaries of life brought into the

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[24] Although the office of sutler has been abolished (¶ 759), it is deemed advisable, in view of the employment of post traders, to present this legislation in convenient shape for reference.

[25] EXTORTION.—Any officer guilty of extortion, under or by color of his office, shall be punished by fine not exceeding five hundred dollars, or by imprisonment not exceeding one year.—Sec. 12, March 3, 1825.

garrison, fort, or barracks, for the use of the soldiers, on the penalty of being discharged from the service.—31st Article.

757. No officer or soldier shall do violence to any person who brings provisions or other necessaries to the camp, garrison, or quarters, of the forces of the United States, employed in any parts out of the said States, upon pain of death, or such other punishment as a court-martial shall direct.—51st Article.

758. That the 5th section of the act of June 12, 1858, giving sutlers a lien[26] upon the soldiers' pay, be and the same is hereby repealed; and all regulations giving sutlers rights and privileges beyond the Rules and Articles of War be and the same are hereby abrogated.—Sec. 3, December 24, 1861, chap. 4.

759. The office of sutler in the army and at military posts is hereby abolished, and the subsistence department is hereby authorized and required to furnish such articles as may from time to time be designated by the inspectors-general of the army, and the same to be sold to the officers and enlisted men at cost prices; and if not paid for when purchased, a true account shall be kept, and the amount due the government shall be deducted by the paymaster at the payment next following such purchase. *Provided*, That this section shall not go into effect until the 1st day of July, 1867.—Sec. 25, July 28, 1866, chap. 299.

760. That from and after the passage of this act the secretary of war be and is hereby authorized to permit one or more trading establishments to be maintained at any military post on the frontier, not in the vicinity of any city or town, when, in his judgment, such establishment is needed for the accommodation of emigrants, freighters, and other citizens, and the persons to maintain such trading establishments shall be appointed by him. *Provided*, That such traders shall be under protection and military control as camp followers.[27] The joint resolution approved March 30, 1867, to author-

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[26] Recruits at general depots are authorized to purchase certain articles from the sutler or post trader, which are paid for by the government, the amount being collected for the United States on payment of the recruit.—Adjutant-general, January 22, 1868.

[27] TRADERS.—"Post traders appointed under the authority given by the act of July 15, 1870, will be furnished with a letter of appointment from the secretary of war, indicating the post to which they are appointed.

"No tax or burden in any shape will be imposed upon them, nor will they be allowed the privilege of the pay-table.

"They will be permitted to erect buildings, for the purpose of carrying on their business, upon such part of the military reservation or post to which they may be assigned as the commanding officer may direct. Such buildings to be within convenient reach of the garrison.

"They will be allowed the exclusive privilege of trade upon the military reserve to

ize the commanding-general of the army to permit traders to remain at certain military posts, is hereby repealed.—Sec. 22, July 15, 1870, chap. 294.

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which they are appointed, and no other person will be allowed to trade, peddle, or sell goods, by sample or otherwise, within the limits of the reserve.

"They are under military protection and control as camp followers.

"Commanding officers will report to the war department any breach of military regulation or any misconduct on the part of traders."—Circular, June 7, 1871, A.-G. O. But this circular is not intended to prohibit "sale of fresh vegetables and fresh fruits by producers, at the discretion of the commanding officer."—Adjutant-general, August 31, 1871.

"The council of administration at a post where there is a post trader will, from time to time, examine the post trader's goods and invoices or bills of sale; and will, subject to the approval of the post commander, establish the rates and prices (which should be fair and reasonable) at which the goods shall be sold. A copy of the list thus established will be kept posted in the trader's store. Should the post trader feel himself aggrieved by the action of the council of administration, he may appeal therefrom through the post commander to the war department."

"In determining the rate of profit to be allowed, the council will consider, not only the prime cost, freight, and other charges, but also the fact that while the trader pays no tax or contribution of any kind to the post fund for his exclusive privileges, he has no lien on the soldier's pay, and is without the security in this respect once enjoyed by the sutlers of the army."

"Post traders will actually carry on the business themselves, and will habitually reside at the station to which they are appointed. They will not farm-out, sublet, transfer, sell, or assign the business to others."

"Post commanders are hereby directed to report to the war department any failure on the part of traders to fulfill the requirements of this circular."—Circular, A.-G. O., March 25, 1872.

CHAPTER XXIV.

MILITARY RESERVATIONS.

770. No land shall be purchased on account of the United States, except under a law authorizing such purchase.—Sec. 7, May 1, 1820, chap. 52.

771. That the President of the United States be authorized to procure the assent of the legislature of any State, within which any purchase of land has been made for the erection of forts, magazines, arsenals, dockyards, and other needful buildings, without such consent having been obtained; and also to obtain exclusive legislation[1] over any such tract as is provided for in the 16th clause of the

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[1] EXCLUSIVE JURISDICTION OF THE UNITED STATES.—"The Constitution of the United States declares that Congress shall have power to exercise '*exclusive legislation*' in all 'cases whatsoever' over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings. When, therefore, a purchase of land for any of these purposes is made by the national government, and the State legislature has given its consent to the purchase, the land so purchased, by the very terms of the Constitution, ipso facto, falls within the exclusive legislation of Congress, and the State jurisdiction is completely ousted. This is the necessary result, for exclusive jurisdiction is the attendant upon exclusive legislation; and the consent of the State legislature is, by the very terms of the Constitution by which all the States are bound, and to which all are parties, a virtual surrender and cession of its sovereignty over the place." Such a place is "to the State as much a foreign territory as if it had been occupied by a foreign sovereign." The purchase of lands for public purposes within the territorial limits of a State "does not, of itself, oust the jurisdiction or sovereignty of such State over the land so purchased. It remains until the State has relinquished its authority over the land, either expressly, or by necessary implication." The reservation by a State of the power to serve process within such tracts does not qualify the jurisdiction of the United States, as it does not reserve to the State any right to punish offenses committed upon the ceded lands.—*United States* v. *Cornell*, 2 Mason, 63, 65, 97. See also *United States* v. *Ames*, 1 Woodbury & Minot, 76, and *United States* v. *Travers*, 2 Wheeler's Crim. Cases, 490. See also *Cohens* v. *Virginia*, 6 Wheaton, 426–429. State courts have also decided that they cannot take cognizance of offenses committed within such ceded districts, and that, on the other hand, the inhabitants of such places cannot exercise any civil or political privileges under the laws of the State. See 8 Mass., 72; and 1 Hall's Journal of Jurisprudence, 58, quoted in Kent's Com., § 431.

That the reservation by the State of a right to serve process within a ceded district was not deemed by Congress to impair the exclusive jurisdiction of the United States is apparent from terms of the act of March 2, 1795, which declares that cessions, qualified by the reservation "that process, civil and criminal, issuing under the authority of such State may be executed and served therein," shall be deemed sufficient, under the laws of the United States providing for the supporting or erecting of lighthouses, beacons, buoys, and public piers; and, by sec. 2 of same act, this right

8th section of the 1st Article of the Constitution; and that he be authorized to procure the like consent and exclusive legislation as to all future purchases of land for either of those purposes.—Sec. 2, April 28, 1828, chap. 41.

772. That the President of the United States, in all cases where lands have been conveyed for the United States to individuals or officers, be authorized to obtain from the person or persons to whom the conveyance has been made, a release of their interest to the United States.[2]—Sec. 3, *ibid.*

773. It shall be the duty of the attorney-general of the United

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to execute and serve such process is granted to the State, irrespective of any reservation by it to that effect. See Chap. xii., ¶ ¶ 394, 395.

The United States cannot accept a cession of jurisdiction from a State coupled with condition that crimes committed within the limits of the jurisdiction ceded shall continue to be punishable by the courts of the State.—8 Opinions, 418.

[2] RESERVATION OF PUBLIC LANDS.—In general, the decision as to the quantity of land to be reserved for military or other public uses, and the places where to be located, rests in the discretion of the President, subject only to such regulations as Congress may, from time to time, make, either as to the particular public use, or the quantity capable of reservation therefor, or as to the disposal, for private use, of the whole or any part of that which may have been set apart for public use.—6 Opinions, 159.

(*a.*) "From an early period in the history of the government, it has been the practice of the President to order, from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public uses." (And the authority of the President in this respect is recognized in numerous acts of Congress cited in opinion of the court.)—*Grisar* v. *McDowell*, 6 Wallace, 381.

(*b.*) Under the act of February 14, 1853 (chap. 69), all reservations of public lands in OREGON and WASHINGTON TERRITORY are for *magazines, arsenals, dockyards,* and other needful public uses (except for forts), limited to an amount not exceeding twenty acres for each and every of said objects at any one point or place; and reservations for forts are not to exceed six hundred and forty acres at any one point or place. These limitations probably extend to IDAHO TERRITORY, constructed within the original limits of the Territory of Oregon.

(*c.*) The aforesaid act of 1853 provides also (in sec. 9) "that if it shall be deemed necessary, in the judgment of the President, to include in any such reservation the improvements of any settler made previous to such reservation, it shall, in such case, be the duty of the secretary of war to cause the value of such improvements to be ascertained; and the amount so ascertained shall be paid to the party entitled thereto out of any money in the treasury not otherwise appropriated."

(*d.*) The act of March 3, 1853, providing for survey of public lands, etc., in CALIFORNIA, enacts, in sec. 7, that "no person shall make a settlement or location upon any tract or parcel of land selected for a military post, or within one mile of such post, or on any other lands reserved by competent authority."

(*e.*) Military reservations established on the public domain are established simply by an act of the President withdrawing, formally, the land in question from the immediate administration of the commissioner of public lands; that is, from sale at public auction and by pre-emption or general private entry. Attorney-general Cushing is "not prepared to say that such an act of the President excludes the jurisdiction of the State in which the land lies, whether the reservation be made before or after the admission of such State into the Union."—7 Opinions, 575.

(*f.*) Held, in case of *United States* v. *Stahl*, that upon the admission of a State into the Union the federal government parted with its jurisdiction to punish crimes within military reservations contained in such new State, unless there be a cession thereof by the State legislature.—Brightly's Federal Digest, vol. ii., p. 72.

(*g.*) Lands purchased or reserved by the national government for public uses are

States to examine into the titles of all the lands or sites which have been purchased by the United States, for the purpose of erecting thereon armories, arsenals, forts, fortifications, navy-yards, custom-houses, lighthouses, or other public buildings of any kind whatever, and report his opinion as to the validity of the title in each case to the President of the United States.

It shall be the duty of all the officers of the United States having any of the title-papers to the property aforesaid in their possession, to furnish them forthwith to the attorney-general, to aid him in the investigation aforesaid.

No public money shall be expended upon any site or land hereafter to be purchased by the United States for the purposes aforesaid until the written opinion of the attorney-general shall be had in favor of the validity of the title, and also the consent of the legislature of the State in which the land or site may be shall be given to said purchaser.

It shall be the duty of the district attorneys of the United States, upon the application of the attorney-general, to furnish any assistance or information in their power in relation to the titles of the public property aforesaid, lying within their respective districts.

It shall be the duty of the secretaries of the executive departments, upon the application of the attorney-general, to procure any additional evidence of title which he may deem necessary, and which may not be in the possession of the officers of government; the expense of procuring which to be paid out of the appropriations made for the contingencies of the departments respectively.

It shall be the duty of the secretaries of the executive departments, respectively, under whose direction any lands for the purposes aforesaid may have been purchased, and over which the United States do not possess jurisdiction, to apply to the legislatures of the States in which the lands are situated for a cession of jurisdiction, and in case of refusal, to report the same to Congress at the commencement of the next session thereafter.—Joint Resolution, September 11, 1841.

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thenceforth excluded from the designation "public lands," and no right of way through such reservation is given by the act of August 4, 1852.—5 Opinions, 578.

Nor are such tracts embraced in subsequent laws authorizing the sale of public lands.—*Wilcox* v. *Jackson*, 13 Peters, 498.

(*h.*) THE RIGHT OF WAY through military reservations has been granted to various railroads by express legislation, in each case; and telegraph companies are granted the right of way, and other privileges, by the act of July 24, 1866. See Chap. xxviii., ¶ 972.

774. That all the existing laws or parts of laws which authorize the sale of military sites which are, or may become, useless for military purposes, be and the same are hereby repealed;[3] and said lands shall not be subject to sale or pre-emption under any of the laws of the United States. *Provided further*, That the provisions of the act of August 18, 1856, relative to certain reservations in the State of Florida, shall continue in force.—Sec. 6, June 12, 1858, chap. 156.

775. If any person or persons shall unlawfully cut, or aid, assist, or be employed in unlawfully cutting, or shall wantonly destroy, or procure to be wantonly destroyed, any timber standing, growing or being upon any lands of the United States, which in pursuance of any law passed, or hereafter to be passed, have been, or shall be, reserved or purchased by the United States, for military or other purposes, every such person or persons so offending, on conviction thereof before a court having competent jurisdiction, shall, for every such offense, pay a fine not exceeding five hundred dollars, and shall be imprisoned not exceeding twelve months.[4]—March 3, 1859, chap. 78.

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[3] An act of March 3, 1819, had authorized the sales of such military sites as had at that time become useless; and, by act of March 3, 1857, the provisions of the first act were extended to embrace all military sites, or parts thereof, as might thereafter become useless for military purposes.

The act of August 18, 1856, referred to above, provides under certain conditions that useless reservations in Florida may be turned over to the land office to be disposed of as other government lands.

[4] INTRUSION ON PUBLIC LANDS.—Under the act of March 3, 1807, the President is authorized to employ such military force as he may judge necessary and proper to remove from lands ceded or secured to the United States (by any treaty made with a foreign nation, or by a cession from any State) any person or persons who shall thereafter take possession of the same, or make, or attempt to make, settlement thereon, until thereunto authorized by law.

Neither an injunction, nor any other judicial process, is necessary to prevent parties from taking possession of a fort or other military property. If such an invasion is threatened, the officer of the post ought to be instructed to resist it by force.—9 Opinions, 107; and see 10 Opinions, 74; 7 *ibid.*, 534.

It seems, however, that the United States marshal should first attempt the removal of intruders, that instructions to that purpose must proceed from the President, and that the military ought not to be employed until the marshal has failed in his attempt to effect the removal. See 1 Opinions, 181, 471, 475. But the later authorities do not refer to any such conditions as precedent to the right of summary ejectment; on the contrary, Mr. Black remarks that "it was the practice of the federal government, in early times, to vindicate her right to the possession of the public property in a very short way. She turned out and kept out all lawless intruders, without stopping to ask leave of the courts. I do not know at what precise period she became humble enough to forego the privilege of self-defense, or when she began to prefer the shelter of an injunction to the protection of her own right hand."—9 Opinions, 107. See also 3 *ibid.*, 268, 566, and 2 *ibid.*, 574.

"Contractors for fuel will not be allowed, after this date, the privilege of cutting timber on the military reservations."—Secretary of War, October 31, 1871.

"Any contracts for supplying wood for military service, having a stipulation that the contractor may cut the wood on military reservations, should be carried out; but after the contracts are fulfilled, such permission should not be again given. Wood on *Indian reservations* should not be allowed to be cut by contractors, the military should

776. That the islands of Saint Paul and Saint George, in Alaska, be and they are hereby declared a special reservation for government purposes; and that, until otherwise provided by law, it shall be unlawful for any person to land or remain on either of said islands, except by the authority of the secretary of the treasury; and any person found on either of said islands, contrary to the provisions of this resolution, shall be summarily removed; and it shall be the duty of the secretary of war to carry this resolution immediately into effect.—Joint Resolution, March 3, 1869.

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prevent it. If contractors cut wood on public lands, they do so subject to charge for stumpage. The war department cannot free them from the obligation to pay, although the wood furnished by them is designed for the military service. Though it is desirable that steamers plying on western rivers should have fuel, it is not the business of the government, though interested to have steamers navigate the rivers, to provide fuel, directly or indirectly; that is the business of the steamer owners, who, no doubt, can, by proper payments, procure a supply."—Adjutant-general, December 26, 1871.

"In view of the large size of many [military] reservations, contractors will be permitted to cut wood on the same, at a reasonable distance from the posts, and on limits fixed by the department commander; and the decision communicated by letter of December 26, 1871, is modified accordingly."—*Ibid.*, February 17, 1872.

For special provisions in reference to NATIONAL CEMETERIES see Chap. xxi., ¶ 614; and for privileges to TELEGRAPH COMPANIES see Chap. xxvii., ¶ ¶ 977–980.

CHAPTER XXV.

THE MILITIA.

ORGANIZATION.

780. THAT each and every free able-bodied [white][1] male citizen of the respective States, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years (except [¶ 782] as is hereinafter excepted), shall, severally and respectively, be enrolled in the militia by the captain or commanding officer of the company within whose bounds such citizen shall reside, and that within twelve months after the passing of this act. And it shall, at all times hereafter, be the duty of every such captain or commanding officer of a company to enroll every such citizen, as aforesaid, and also those who shall, from time to time, arrive at the age of eighteen years, or, being of the age of eighteen years and under the age of forty-five years (except as before excepted), shall come to reside within his bounds; and shall, without delay, notify such citizen of the said enrollment, by a proper non-commissioned officer of the company, by whom such notice may be proved. That every citizen, so enrolled and notified, shall, within six months thereafter, provide himself with a good musket, or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch with a box therein to contain not less than twenty-four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball; or with a good rifle, knapsack, shot-pouch, and powder-horn, twenty balls suited to the bore of his rifle, and a quarter of a pound of powder; and shall appear, so armed, accoutred, and provided, when called out to exercise, or into service; except, that when called out on company days to exercise only, he may appear without a knapsack.[1] That the commissioned officers shall, severally, be armed with a sword or hanger,

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[1] Word "white" stricken from all militia laws: see ¶ 795.
So much of this and following paragraph as prescribes the arms and equipments to be provided may be regarded as obsolete: see provisions for distributing arms and equipments, ¶ ¶ 796–800.

and espontoon; and that, from and after five years from the passing of this act, all muskets for arming the militia, as herein required, shall be of bores sufficient for balls of the eighteenth part of a pound. And every citizen so enrolled, and providing himself with the arms, ammunition, and accoutrements, required as aforesaid, shall hold the same exempted from all suits, distresses, executions, or sales for debt, or for the payment of taxes.—Sec. 1, May 8, 1792, chap. 33.

781. Every citizen duly enrolled in the militia shall be constantly provided with arms, accoutrements, and ammunition, agreeably to the direction of the said act, from and after he shall be duly notified of his enrollment; and any notice or warning to the citizens so enrolled, to attend a company, battalion, or regimental muster, or training, which shall be according to the laws of the State in which it is given for that purpose, shall be deemed a legal notice of his enrollment.—Sec. 2, March 2, 1803, chap. 15.

782. The Vice-President of the United States; the officers, judicial and executive, of the government of the United States; the members of both houses of Congress and their respective officers; all custom-house officers, with their clerks; all post-officers, and stage-drivers, who are employed in the care and conveyance of the mail of the post-office of the United States; all ferrymen employed at any ferry on the post-road; all inspectors of exports; all pilots; all mariners, actually employed in the sea service of any citizen or merchant within the United States; and all persons who now are, or may hereafter be, exempted by the laws of the respective States, shall be and are hereby exempted from militia duty, notwithstanding their being above the age of eighteen, and under the age of forty-five years.[2]—Sec. 2, May 8, 1792, chap. 33.

783. That within one year after the passing of this act, the militia of the respective States shall be arranged into divisions, brigades, regiments, battalions, and companies, as the legislature of each State shall direct;[3] and each division, brigade, and regiment shall be numbered at the formation thereof; and a record made of such numbers in the adjutant-general's office in the State; and when in the field,

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[2] Further exemptions.—Artificers and workmen at armories and arsenals, May 7, 1800; and, except in time of war, the professors, tutors, stewards, and pupils of seminaries of learning, and active members of fire department, in District of Columbia, May 4, 1826, and March 2, 1837.

All persons employed in any branch of the postal service shall be exempt from militia duty.—Sec. 11, June 8, 1872.

The act of July 17, 1862, says, however, that enrollment shall in all cases include all able-bodied male citizens between the ages of eighteen and forty-five. See ¶ 805.

[3] Sec. 9, May 13, 1846, provided that the militia called out under that act have the same organization as the regular army. But see ¶ 806.

or in service in the State, each division, brigade, and regiment shall, respectively, take rank according to their numbers, reckoning the first or lowest number highest in rank. That, if the same be convenient, each brigade shall consist of four regiments; each regiment of two battalions; each battalion of five companies; each company of sixty-four privates. That the said militia shall be officered by the respective States, as follows: to each division,[4] one major-general and two aides-de-camp, with the rank of major; to each brigade,[4] one brigadier-general, with one brigade-inspector, to serve also as brigade-major,[4a] with the rank of a major; to each regiment, one lieutenant-colonel commandant; and to each battalion,[5] one major; to each company, one captain, one lieutenant, one ensign, four sergeants, four corporals, one drummer, and one fifer or bugler. That there shall be a regimental staff, to consist of one adjutant and one quartermaster, to rank as lieutenants; one paymaster;[5a] one surgeon, and one surgeon's mate; one sergeant-major; one drum-major, and one fife-major.—Sec. 3, *ibid.*

784. In addition to the officers of the militia, provided for by the act entitled "An act more effectually to provide for the national defense, by establishing an uniform militia throughout the United States," approved May 8, 1792, and by an act in addition to the said recited act, approved March 2, 1803, there shall be to each division one division inspector, with the rank of lieutenant-colonel, and one division quartermaster, with the rank of major; to each brigade, one aide-de-camp, with the rank of captain; and the quartermasters of brigade, heretofore provided for by law, shall have the rank of captain. And it shall be incumbent on the said officers to do and perform all the duties which, by law and military principles, are attached to their offices respectively.—April 18, 1814, chap. 80.

785. From and after the 1st day of May next, instead of one lieutenant-colonel commandant to each regiment, and one major to each battalion, of the militia, as is provided by the act entitled "An act more effectually to provide for the national defense, by establishing an uniform militia throughout the United States," approved

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[4] For additional officers, appointed by the States, see ¶ 784; and for appointment by the President of quartermasters and commissaries of subsistence see ¶ 822.

(*a.*) The duties of a "brigade-major" are those of an adjutant-general.

[5] For a modification of the regimental organization see ¶ 785; but see also ¶ 806.

(*a.*) So much of this section as authorizes the appointment of regimental paymasters is practically supplied by the act authorizing appointment of additional paymasters to pay militia and volunteers while in the service of the United States. See Chap. xi., ¶ 311.

May 8, 1792, there shall be one colonel, one lieutenant-colonel, and one major to each regiment of the militia consisting of two battalions. Where (there) shall be only one battalion, it shall be commanded by a major. *Provided*, That nothing contained herein shall be construed to annul any commission in the militia which may be in force, as granted by authority of any State or Terrritory, in pursuance of the act herein recited, and bearing date prior to the said 1st day of May next.—April 20, 1816, chap. 64.

786. Out of the militia[6] enrolled, as is herein directed, there shall be formed, for each battalion, at least one company of grenadiers, light infantry, or riflemen; and to each division there shall be at least one company of artillery, and one troop of horse; there shall be to each company of artillery one captain, two lieutenants, four sergeants, four corporals, six gunners, six bombardiers, one drummer, and one fifer. The officers to be armed with a sword, or hanger, a fusee, bayonet and belt, with a cartridge-box, to contain twelve cartridges; and each private, or matross, shall furnish himself with all the equipments of a private in the infantry, until proper ordnance and field artillery is provided. There shall be to each troop of horse one captain, two lieutenants, one cornet, four sergeants, four corporals, one saddler, one farrier, and one trumpeter. The commissioned officers to furnish themselves with good horses, of at least fourteen hands and a half high, and to be armed with a sword and pair of pistols, the holsters of which to be covered with bearskin caps. Each dragoon to furnish himself with a serviceable horse, at least fourteen hands and a half high, a good saddle, bridle, mail pillion, and valise, holsters, and a breastplate and crupper, a pair of boots and spurs, a pair of pistols, a sabre, and a cartouch-box, to contain twelve cartridges for pistols. Each company of artillery and troop of horse shall be formed of volunteers from the brigade, at the discretion of the commander-in-chief of the State, not exceeding one company of each to a regiment, nor more in number than one-eleventh part of the infantry, and shall be uniformly clothed in regimentals, to be furnished at

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[6] The provisions of this section are obsolete. It was certainly never intended that the militia should have a different organization while under State control to that which is to obtain when they are called into the service of the United States. The act of March 3, 1839, provided that "whenever militia or volunteers are called into the service of the United States they shall have the organization of the army of the United States," but it is doubtful whether that provision referred to any other troops than those authorized for a special emergency by the context of the act. In the act of July 17, 1862 (see ¶ 806), we find, however, that the militia, when called into the national service, are to be organized in the mode prescribed by law for volunteers.

their own expense; the color and fashion to be determined by the brigadier commanding the brigade to which they belong.—Sec. 4, May 8, 1792, chap. 33.

787. Each battalion and regiment shall be provided with the State and regimental colors, by the field officers, and each company with a drum, and fife or bugle horn, by the commissioned officers of the company in such manner as the legislature of the respective States shall direct.—Sec. 5, *ibid.*

788. There shall be an adjutant-general appointed in each State, whose duty[7] it shall be to distribute all orders from the commander-in-chief of the State to the several corps; to attend all public reviews, when the commander-in-chief of the State shall review the militia, or any part thereof; to obey all orders from him, relative to carrying into execution and perfecting the system of military discipline established by this act; to furnish blank forms of different returns, that may be required, and to explain the principles on which they should be made; to receive from the several officers of the different corps, throughout the State, returns of the militia under their command, reporting the actual situation of their arms, accoutrements, and ammunition, their delinquencies, and every other thing which relates to the general advancement of good order and discipline. All which the several officers of the divisions, brigades, regiments, and battalions are hereby required to make in the usual manner, so that the said adjutant-general may be furnished therewith. From all which returns he shall make proper abstracts, and lay the same annually before the commander-in-chief of the State.—Sec. 6, *ibid.*

789. It shall be the duty of the adjutant-general of the militia, in each State, to make return of the militia of the State to which he belongs, with their arms, accoutrements, and ammunition, agreeably to the directions of the act to which this is an addition, to the President of the United States, annually, on or before the first Monday in January, in each year; and it shall be the duty of the secretary of war, from time to time, to give such directions to the adjutant-generals of the militia as shall, in his opinion, be necessary to produce an uniformity in the said returns; and he shall lay an abstract of the same before Congress, on or before the first Monday of February, annually.—Sec. 1, March 2, 1803, chap. 15.

790. In addition to the officers provided for by the said act, there shall be, to the militia of each State, one quartermaster-

[7] For additional duties see ¶ 789.

general, to each brigade one quartermaster of brigade, and to each regiment one chaplain.—Sec. 3, *ibid.*

791. All commissioned officers shall take rank according to the date of their commissions; and when two of the same grade bear an equal date, then their rank to be determined by lot, to be drawn, by them, before the commanding officer of the brigade, regiment, battalion, company, or detachment.—Sec. 8, May 8, 1792, chap. 33.

792. It shall be the duty of the brigade-inspector to attend the regimental and battalion meetings of the militia composing their several brigades, during the time of their being under arms, to inspect their arms, ammunition, and accoutrements; superintend their exercise and manœuvres, and introduce the system of military discipline, before described, throughout the brigade, agreeable to law, and such orders as they shall, from time to time, receive from the commander-in-chief of the State; to make returns to the adjutant-general of the State, at least once in every year, of the militia of the brigade to which he belongs, reporting therein the actual situation of the arms, accoutrements, and ammunition, of the several corps, and every other thing which in his judgment may relate to their government and the general advancement of good order and military discipline; and the adjutant-general shall make a return of all the militia of the State to the commander-in-chief of the said State, and a duplicate of the same to the President of the United States.

And whereas sundry corps of artillery, cavalry, and infantry now exist in several of the said States which, by the laws, customs, or usages thereof, have not been incorporated with or subject to the general regulations of the militia.—Sec. 10, *ibid.*

793. That such corps retain their accustomed privileges, subject nevertheless to all other duties required by this act in like manner with the other militia.—Sec. 11, *ibid.*

794. The system of discipline and field exercise, which is and shall be ordered to be observed by the regular army of the United States, in the different corps of infantry, artillery, and riflemen, shall also be observed by the militia, in the exercise and discipline of the said corps respectively throughout the United States.—Sec. 1, May 12, 1820, chap. 97.

795. That the act entitled "An act more effectually to provide for the national defense by establishing an uniform militia throughout the United States," approved May 8, 1792, and the several acts amendatory thereof, be and they are hereby amended by striking out the word "white."—Sec. 6, March 2, 1867, chap. 145.

ARMS AND EQUIPMENTS.

796. That the annual sum of two hundred thousand dollars be and the same hereby is appropriated for the purpose of providing arms and military equipments for the whole body of the militia of the United States, either by purchase or manufacture, by and on account of the United States.—Sec. 1, April 23, 1808, chap. 55.

797. All the arms procured in virtue of this act shall be transmitted to the several States composing this Union, and Territories thereof, to each State and Territory respectively in proportion to the number of the effective militia in each State and Territory, and by each State and Territory to be distributed to the militia in such State and Territory, under such rules and regulations as shall be by law prescribed by the legislature of each State and Territory.—Sec. 3, *ibid.*

798. The annual sum of two hundred thousand dollars, as appropriated for the purpose of providing arms and military equipments for the militia, either by purchase or manufacture, according to the act of the 23d of April, 1808, entitled "An act making provision for arming and equipping the whole body of the militia of the United States," shall be paid, for each year respectively, out of any moneys in the treasury not otherwise appropriated.—Sec. 1, April 29, 1816, chap. 135.

799. The sum appropriated, to be paid as aforesaid, shall be applied for the purpose, and according to the intention, specified in said act, without being liable, at any time, to be carried to the account of the surplus fund. And nothing in the act of the 3d of March, 1809, entitled "An act further to amend the several acts for the establishment and regulation of the treasury, war, and navy departments," shall be construed to authorize the transferring of the sum annually appropriated as aforesaid, or any portion thereof, to any other branch of expenditure.—Sec. 2, *ibid.*

800. The annual distribution of arms to the several States, under the act approved April 23d, 1808, entitled "An act making provision for arming and equipping the whole body of the militia of the United States," shall be hereafter made according to the number of their Representatives and Senators in Congress respectively; and that arms be distributed to the Territories and the District of Columbia, in such quantities and under such regulations as the President, in his discretion, may prescribe. *Provided,* That the secretary of war shall first equalize, as far as practicable, the number of arms heretofore distributed and now in possession of the

several States, so that each State which has received less than its pro rata share shall receive a number sufficient to make an equal pro rata proportion for all the States, according to the present number of their Representatives and Senators in Congress, respectively. —Sec. 7, March 3, 1855, chap. 169.

CALLING OUT THE MILITIA.

801. Whenever the United States shall be invaded, or be in imminent danger of invasion, from any foreign nation or Indian tribe, it shall be lawful for the President of the United States to call forth such number of the militia of the State or States, most convenient to the place of danger, or scene of action, as he may judge necessary to repel such invasion, and to issue his orders, for that purpose, to such officer or officers of the militia as he shall think proper.[8] And in case of an insurrection in any State, against the government thereof, it shall be lawful for the President of the United States, on application of the legislature of such State, or of the executive (when the legislature cannot be convened), to call forth such number of the militia of any other State or States, as may be applied for, as he may judge sufficient to suppress such insurrection.—Sec. 1, February 28, 1795, chap. 36.

802. Whenever by reason of unlawful obstructions, combina-

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[8] The militia may be called out either by requisition upon, or orders to, the State executive, or by orders direct to any subordinate officer of militia.—Story, Const., vol. ii., § 1212; *Hudson* v. *Moore*, 5 Wheaton, 16; and see note 11 *d*, Chap. i. See also Chap. xxvii., note 1, in reference to employment of the army.

During the war of 1812–15, and among many other pretexts resorted to by some of the States to embarrass the national government, it was claimed that a State executive could decide whether or not a call for the militia was justified by the existing circumstances. In the case of *Martin* v. *Mott*, however, the Supreme Court of the United States has silenced such pretensions. Judge Story in delivering opinion of the court in that case, says: "We are all of opinion that the authority to decide whether the exigency has arisen belongs exclusively to the President, and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself, and from the manifest object contemplated by this act of Congress. He [the President] is necessarily constituted the judge of the exigency in the first instance, and is bound to act according to his belief of the facts. If he does so act, and decides to call forth the militia, his orders for this purpose are in strict conformity with the provisions of the law; and it would seem to follow, as a necessary consequence, that every act done by a subordinate officer, in obedience to such orders, is equally justifiable. The law does not provide for any appeal from the judgment of the President, or for any right in subordinate officers to review his decision, and in effect defeat it. Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts. When the President exercises an authority confided to him by law, the presumption is that it is exercised in pursuance of law. Every public officer is presumed to act in obedience to his duty, until the contrary is shown; and, a fortiori, this presumption ought to be favorably applied to the chief magistrate of the Union."—12 Wheaton, 30–33. See 14 Peters, 458, and 8 Wallace, 83; and for further quotation from *Martin* v. *Mott*, see APPENDIX, ¶ ¶ 1082–1086.

tions, or assemblages of persons, or rebellion against the authority of the government of the United States, it shall become impracticable, in the judgment of the President of the United States, to enforce, by the ordinary course of judicial proceedings, the laws of the United States, within any State or Territory of the United States, it shall be lawful for the President of the United States to call forth the militia of any or all the States of the Union, and to employ such parts of the land and naval forces of the United States as he may deem necessary, to enforce the faithful execution of the laws of the United States, or to suppress such rebellion in whatever State or Territory thereof the laws of the United States may be forcibly opposed, or the execution thereof forcibly obstructed.—Sec. 1, July 29, 1861, chap. 25.

803. Whenever in the judgment of the President it may be necessary to use the military force hereby directed to be employed and called forth by him, the President shall forthwith, by proclamation, command such insurgents to disperse and retire peaceably to their respective abodes, within a limited time.—Sec. 2, *ibid.*

804. That the militia so called into the service of the United States[9] shall be subject to the same Rules and Articles of War as the troops of the United States, and be continued in the service of the United States until discharged by proclamation of the President. *Provided,* That such continuance in service shall not extend beyond sixty days after the commencement of the next regular session of Congress, unless Congress shall expressly provide by law therefor.[10] *And provided further,* That the militia so called into the service of the United States shall, during their time of service, be entitled to the same pay, rations, and allowances for clothing as are or may be established by law for the army of the United States.—Sec. 3, *ibid.*

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[9] It is argued that the phraseology of the first clause of this section exempts the militia from subjection to the Rules and Articles of War except when called into service under the provisions of ¶ 802; but as the act of 1861 is amendatory to that of 1795, and as the first section (¶ 801) of the old law is excepted from repealing clause of the last act (¶ 814), it is evident that Congress intended no such inconsistency. If it be a fact, however, that the militia when called out *to repel invasion* cannot, under the acts of 1795 and 1861, be subjected to the military code, they may nevertheless be so subjected under the terms of articles 60, 97, or 101 of that code. See Chap. xxii., ¶ ¶ 625, 627, and Chap. xxiii., ¶ 684.

The old law declared that the militia "*employed*" in the service of the United States should be subject to the Rules and Articles of War, and in the case of *Houston* v. *Moore* (5 Wheaton, 20) it was determined that the "employment" of the militia-man did not begin till his arrival at the designated rendezvous (see ¶ 816). It seems however that, under the law as it now stands, the militia are subjected to national control, under military law, upon being *called into service.* But see ¶ 816.

[10] Term of service extended, not to exceed nine months: ¶ 805.

805. Whenever the President of the United States shall call forth the militia of the States, to be employed in the service of the United States, he may specify in his call the period for which such service will be required, not exceeding nine months; and the militia so called shall be mustered in and continue to serve for and during the term so specified, unless sooner discharged by command of the President. If, by reason of defects in existing laws, or in the execution of them, in the several States, or any of them, it shall be found necessary to provide for enrolling the militia and otherwise putting this act into execution, the President is authorized in such cases to make all necessary rules and regulations; and the enrollment of the militia shall in all cases include all able-bodied male citizens between the ages of eighteen and forty-five, and shall be apportioned among the States according to representative population.[11] —Sec. 1, July 17, 1862, chap. 201.

806. The militia, when so called into service, shall be organized in the mode prescribed by law for volunteers.[11a]—Sec. 2, *ibid.*

807. All persons who have been or shall be hereafter enrolled in the service of the United States under this act shall receive the pay and rations now allowed by law to soldiers according to their respective grades.—Sec. 15, *ibid.*

808. Every officer, non-commissioned officer, or private of the militia, who shall fail to obey the orders of the President of the United States in any of the cases before recited, shall forfeit a sum not exceeding one year's pay, and not less than one month's pay, to be determined and adjudged by a court-martial; and such officer shall be liable to be cashiered by a sentence of court-martial, and be incapacitated from holding a commission in the militia, for a term not exceeding twelve months, at the discretion of the court; and such non-commissioned officer and private shall be liable to imprisonment by a like sentence, on failure of payment of the fines adjudged against them, for one calendar month for every twenty-five dollars of such fine.[12]—Sec. 4, July 29, 1861, chap. 25.

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[11] Congress prescribed rules and regulations for enrolling and calling out the national forces, by acts of March 3, 1863 (chap. 75), and amendments thereto. See exemptions, ¶ 782, and note 2.

(*a.*) That is to say, according to executive construction of this act, "the organization must be by batteries and regiments, and the officers of such batteries and regiments are to be appointed by the States; but the brigade, division, and army corps commanders are to be appointed by the President."—General-in-chief to the Governor of Missouri, September 27, 1862.

[12] This is a re-enactment of sec. 5, February 28, 1795, under which the Supreme Court has held that the general government, and the States respectively, had *concurrent* jurisdiction to punish such militia-men as failed to obey the President's call;

809. Courts-martial for the trial of militia shall be composed of militia officers only.[13]—Sec. 5, *ibid.*

810. All fines to be assessed as aforesaid shall be certified by the presiding officer of the court-martial, and shall be collected and paid over according to the provisions and in the manner prescribed by the 7th and 8th sections of the act of February 28, 1795, to which this is an amendment.[14]—Sec. 6, July 29, 1861, chap. 25.

811. All fines to be assessed, as aforesaid, shall be certified by the presiding officer of the court-martial before whom the same shall be assessed, to the marshal of the district in which the delinquent shall reside, or to one of his deputies, and also to the supervisor of the revenue of the same district, who shall record the said certificate in a book to be kept for that purpose. The said marshal, or his deputy, shall forthwith proceed to levy the said fines, with costs, by distress and sale of the goods and chattels of the delinquent; which costs, and the manner of proceeding, with respect to the sale of the goods distrained, shall be agreeable to the laws of the State in which the same shall be, in other cases of distress. And where any non-commissioned officer or private shall be adjudged to suffer imprisonment, there being no goods or chattels to be found, whereof to levy the said fines, the marshal of the district, or his deputy, may commit such delinquent to gaol, during the term for which he shall be so adjudged to imprisonment, or until the fine shall be paid, in the same manner as other persons condemned to fine and imprisonment at the suit of the United States may be committed.—Sec. 7, February 28, 1795, chap. 36.

812. The marshals and their deputies shall pay all such fines by

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that courts-martial convened for that purpose derived authority from the act under consideration, and *not* from the Articles of War, and that as no provision was made for the constitution of such courts, the usages of military service should obtain in reference thereto; that authority of such tribunals did not expire with determination of exigency under which militia had been called out; and that there was no law requiring that sentence of such court should be approved by higher authority; but, after the militia had entered the service of the United States, the authority, over it, of the general government, became exclusive: "over the national militia the State governments never had, or could have, jurisdiction. None such is conferred by the Constitution of the United States; consequently, none such can exist."—Courts-martial for the trial of its members must then be constituted under the Articles of War.—*Houston* v. *Moore*, 5 Wheaton, 16-31; and *Martin* v. *Mott*, 12 Wheaton, 34-38. See ¶ 809.

Militia-men, duly drafted, may be *forced* to the rendezvous and into military subjection.—McCall's case, 5 Philadelphia, 259. See also note 9.

[13] The term "militia officers" deemed synonymous, so far as organization of courts-martial is concerned, with volunteer officers. Regular officers holding commissions in the volunteer service may be detailed on general courts-martial for trial of volunteers.—Judge-advocate-general on 97th Article of War.

[14] See ¶ ¶ 811, 812.

them levied, to the supervisor of the revenue in the district in which they are collected, within two months after they shall have received the same, deducting therefrom five per cent. as a compensation for their trouble; and, in case of failure, the same shall be recoverable by action of debt or information, in any court of the United States, of the district in which such fines shall be levied, having cognizance thereof, to be sued for, prosecuted, and recovered, in the name of the supervisor of the district, with interest and costs.—Sec. 8, *ibid.*

813. The marshals of the several districts of the United States and their deputies shall have the same powers in executing the laws of the United States as sheriffs and their deputies in the several States have, by law, in executing the laws of the respective States. —Sec. 7, July 29, 1861, chap. 25.

814. Secs. 2, 3, and 4 of the act entitled "An act to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions, and to repeal the act now in force for those purposes," approved February 28, 1795, and so much of the residue of said act and of all other acts as conflict with this act, are hereby repealed.—Sec. 8, *ibid.*

815. That the expenses incurred, or to be incurred, by marching the militia of any State or Territory of the United States to their places of rendezvous, in pursuance of a requisition of the President of the United States, or which shall have been, or may be, incurred in cases of calls made by the authority of any State or Territory, which shall have been, or may be, approved by him, shall be adjusted and paid in like manner as the expenses incurred after their arrival at such places of rendezvous, on the requisition of the President of the United States. *Provided,* That nothing herein contained shall be considered as authorizing any species of expenditure, previous to arriving at the place of rendezvous, which is not provided by existing laws to be paid for after their arrival at such place of rendezvous. —April 10, 1818, chap. 84.

816. Whenever the militia shall be called into the actual service of the United States, their pay shall be deemed to commence from the day of their appearing at the places of battalion, regimental, or brigade rendezvous.—Sec. 3, January 2, 1795, chap. 9.

817. The officers, non-commissioned officers, musicians, artificers, and privates of volunteer and militia corps, who have been in the service of the United States at any time since the 1st day of November, in the year of our Lord 1835, or may hereafter be in the service of the United States, shall be entitled to and receive the same

monthly pay, rations, clothing, or money in lieu thereof, and forage, and be furnished with the same camp equipage, including knapsacks, as are or may be provided by law for the officers, musicians, artificers, and privates of the infantry of the army of the United States.[15] —Sec. 1, March 19, 1836, chap. 44.

818. That the officers of all mounted companies who have been in, or may hereafter be in, the service of the United States, shall each be entitled to receive forage, or money in lieu thereof, for two horses, when they actually keep private servants, and for one horse when without private servants, and that forty cents per day be allowed for the use and risk of each horse, except horses killed in battle or dying of wounds received in battle.[15a] That each non-commissioned officer, musician, artificer, and private of all mounted companies shall be entitled to receive forage in kind for one horse, with forty cents per day for the use and risk thereof, except horses killed in battle, or dying of wounds received in battle, and twenty-five cents per day in lieu of forage and subsistence, when the same shall be furnished by himself, or twelve and a half cents per day for either, as the case may be.—Sec. 2, *ibid.*

819. The officers, non-commissioned officers, musicians, artificers, and privates shall be entitled to one day's pay, subsistence, and other allowances, for every twenty miles' travel from their places of residence to the place of general rendezvous, and from the place of discharge back to their residence.[16]—Sec. 3, *ibid.*

820. When any officer, non-commissioned officer, artificer, or private of said militia or volunteer corps, who shall die in the service of the United States, or returning to his place of residence after being mustered out of the service, or at any time in consequence of wounds received in service, and shall leave a widow, or if no widow, a child or children under sixteen years of age, such widow, or if no widow, such child or children, shall be entitled to receive half the monthly pay to which the deceased was entitled, at the time of his death, for and during the term of five years; and in case of the death or intermarriage of such widow before the expiration of five years, the half-pay for the remainder of the time shall go to the child or children of said decedent. *Provided always,* That the secretary of war shall adopt such forms of evidence, in applications under this

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[15] This section, in so far as it prescribes the pay, rations, and clothing of the militia, is supplied by the act of 1861. See ¶ 804.

(a.) This does not include regimental officers.—3 Opinions, 566.

[16] And see ¶ 821.

act, as the President of the United States may prescribe.—Sec. 5, March 19, 1836, chap. 44.

821. The non-commissioned officers, musicians, and privates of volunteers and militia, when called into the service of the United States, shall be entitled to receive fifty cents in lieu of subsistence, and twenty-five cents in lieu of forage for such as are mounted, for every twenty miles, by the most direct route, from the period of leaving their homes to the place of general rendezvous, and from the place of discharge back to their homes.[17]—Sec. 10, June 18, 1846, chap. 29.

822. When volunteers or militia are called into the service of the United States in such numbers that the officers of the quartermaster, commissary, and medical departments, authorized by law, be not sufficient to provide for supplying, quartering, transporting, and furnishing them with the requisite medical attendance, it shall be lawful for the President to appoint, with the advice and consent of the Senate, as many additional officers of said departments as the service may require, not exceeding one quartermaster and one commissary for each brigade with the rank of major, and one assistant quartermaster with the rank of captain, one assistant commissary with the rank of captain, one surgeon and one assistant surgeon for each regiment; the said quartermasters and commissaries, assistant quartermasters and assistant commissaries, to give bonds with good and sufficient sureties for the faithful performance of their duties; and they and the said surgeons and assistant surgeons to perform such duties as the President shall direct. *Provided,* That the said officers shall be allowed the same pay and emoluments as are now allowed to officers of the same descriptions and grades in those departments, respectively; that they be subject to the Rules and Articles of War; and continue in service only so long as their services shall be required in connection with the militia and volunteers.[18]—Sec. 5, *ibid.*

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[17] See also ¶ 819.

[18] A note to this section in Callan's "Military Laws" says: "this is very like a general enactment, but was regarded as temporary." In Brightly's Digest, however, this section (¶ 822) is cited as in force as late as 1857. It has never been repealed in express terms, nor, so far as the compiler can ascertain, has it ever been abrogated or supplied by inconsistent legislation. Other sections of the same act, not more general in their terms, have been regarded as permanent provisions (see ¶ ¶ 199, 403, 533); and this section is not less general in its terms than the act providing additional officers for the payment of the same class of troops under like conditions (see ¶ 311), and of which use was made during the late rebellion. But see ¶ ¶ 783, 784; and the CONSTITUTION OF THE UNITED STATES (Chap. i.), Art. I., sec. 8, clause 15.

In the act of July 22, 1861, and the acts supplementary thereto, such provision was made for the organization of the volunteer forces, thereby called into service, as obviated the calling into requisition of the act of 1846.

CHAPTER XXVI.

INDIANS.

830. THAT all that part of the United States west of the Mississippi, and not within the States of Missouri and Louisiana, or the Territory of Arkansas, and also that part of the United States east of the Mississippi River, and not within any State to which the Indian title has not been extinguished, for the purpose of this act, be taken and deemed to be the Indian country.[1]—Sec. 1, June 30, 1834, chap. 161.

831. No person shall be permitted to trade with any of the Indians (in the Indian country)[2] without a license therefor from a superintendent of Indian affairs, or Indian agent, or sub-agent, which license shall be issued for a term not exceeding two years for the tribes east of the Mississippi, and not exceeding three years for the tribes west of that river. And the person applying for such license shall give bond in a penal sum not exceeding five thousand dollars, with one or more sureties, to be approved by the person issuing the same, conditioned that such person will faithfully observe all the laws and regulations made for the government of trade and intercourse with the Indian tribes, and in no respect violate the same. And the superintendent of the district shall have power

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[1] Only such legislation in reference to trade and intercourse with the Indian tribes as is important to the military officers who may be called upon to enforce the Indian policy of the government appears in this compilation.

By sec. 13, June 30, 1834 (chap. 162), it was provided that an army officer should be present at, and certify to, all distributions of annuities. That provision may have become inoperative upon transfer of Indian affairs to the interior department; but it exists in some of the Indian treaties, and in special cases has been re-enacted.

Under sec. 4 of the same act "it shall be competent for the President to require any military officer of the United States to execute the duties of Indian agents." But under the act of July 5, 1838 (¶ 928), these details are conditional, and they are perhaps prohibited by the act of July 15, 1870: see ¶ 563.

[2] The laws regulating trade and intercourse with the Indian tribes, in so far as they are applicable, are extended over the Indian tribes in OREGON, by act of June 5, 1850; and over those in NEW MEXICO and UTAH, by act of February 27, 1851. The extension of these laws over Oregon, New Mexico, and Utah, undoubtedly renders them applicable to the Territories of ARIZONA, IDAHO, and WASHINGTON. These laws have not been extended to ALASKA; but under the act of July 27, 1868, the President has "power to restrict and regulate or to prohibit the importation and use of fire-arms, ammunition, and distilled spirits into and within the said Territory."

to revoke and cancel the same, whenever the person licensed shall, in his opinion, have transgressed any of the laws or regulations provided for the government of trade and intercourse with the Indian tribes, or that it would be improper to permit him to remain in the Indian country. And no trade with the said tribes shall be carried on within their boundary, except at certain suitable and convenient places, to be designated, from time to time, by the superintendents, agents, and sub-agents, and to be inserted in the license. And it shall be the duty of the persons granting or revoking such licenses forthwith to report the same to the commissioner of Indian affairs, for his approval or disapproval.—Sec. 2, *ibid.*

832. Any superintendent or agent may refuse an application for a license to trade,[3] if he is satisfied that the applicant is a person of bad character, or that it would be improper to permit him to reside in the Indian country, or if a license previously granted to such applicant has been revoked, or a forfeiture of his bond decreed. But an appeal may be had from the agent or the superintendent to the commissioner of Indian affairs; and the President of the United States shall be authorized, whenever in his opinion the public interest may require the same, to prohibit the introduction of goods, or of any particular article, into country belonging to any Indian tribe, and to direct all licenses to trade with such tribe to be revoked, and all applications therefor to be rejected; and no trader to any other tribe shall, so long as such prohibition may continue, trade with any Indians of or for the tribe against which such prohibition is issued.—Sec. 3, *ibid.*

833. Any person other than an Indian who shall attempt to reside in the Indian country as a trader, or to introduce goods, or to trade therein without such license, shall forfeit all merchandise offered for sale to the Indians, or found in his possession, and shall moreover forfeit and pay the sum of five hundred dollars.—Sec. 4, *ibid.*

834. No license to trade with the Indians shall be granted to any persons except citizens of the United States. *Provided*, That the President shall be authorized to allow the employment of foreign boatmen and interpreters, under such regulations as he may prescribe.—Sec. 5, June 30, 1834, chap. 161.

835. If a foreigner shall go into the Indian country without a passport from the war department, the superintendent, agent, or

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[3] See ¶ 863 for further legislation in reference to traders.

sub-agent of Indian affairs, or from the officer of the United States commanding the nearest military post on the frontiers, or shall remain intentionally therein after the expiration of such passport, he shall forfeit and pay the sum of one thousand dollars; and such passport shall express the object of such person, the time he is allowed to remain, and the route he is to travel.—Sec. 6, *ibid.*

836. If any person other than an Indian shall, within the Indian country, purchase or receive of any Indian, in the way of barter, trade, or pledge, a gun, trap, or other article commonly used in hunting, any instrument of husbandry or cooking utensils of the kind commonly obtained by the Indians in their intercourse with the white people, or any other article of clothing, except skins or furs, he shall forfeit and pay the sum of fifty dollars.—Sec. 7, *ibid.*

837. If any person other than an Indian shall, within the limits of any tribe with whom the United States shall have existing treaties, hunt, or trap, or take and destroy, any peltries or game, except for subsistence, in the Indian country, such person shall forfeit the sum of five hundred dollars, and forfeit all the traps, guns, and ammunition in his possession, used or procured to be used for that purpose, and peltries so taken.—Sec. 8, *ibid.*

838. If any person shall drive or otherwise convey any stock of horses, mules, or cattle, to range and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe, such person shall forfeit the sum of one dollar for each animal of such stock.—Sec. 9, *ibid.*

839. The superintendent of Indian affairs and Indian agents and sub-agents shall have authority to remove from the Indian country all persons found therein contrary to law; and the President of the United States is authorized to direct the military force to be employed in such removal.[4]—Sec. 10, *ibid.*

840. If any person shall make a settlement on any lands belonging, secured, or granted by treaty with the United States to any Indian tribe, or shall survey or shall attempt to survey such lands,

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[4] The commissioner of Indian affairs, with the approval of the secretary of the interior, is "to remove from any tribal reservation any person found therein without authority of law, or whose presence within the limits of the reservation may, in his judgment, be detrimental to the peace and welfare of the Indians; and to employ for the purpose such force as may be necessary to enable the agent to effect the removal of such person or persons."—Sec. 2, June 12, 1858, chap.

If any person who has been removed under this (10th) section "shall thereafter, at any time, return or be found within the Indian territory, such offender shall forfeit and pay the sum of one thousand dollars."—Sec. 2, Aug. 18, 1856, chap.

or designate any of the boundaries by marking trees, or otherwise, such offender shall forfeit and pay the sum of one thousand dollars. And it shall, moreover, be lawful for the President of the United States to take such measures, and to employ such military force, as he may judge necessary to remove from the lands as aforesaid any such person as aforesaid.[5]—Sec. 11, *ibid.*

841. No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. And if any person, not employed under the authority of the United States, shall attempt to negotiate such treaty or convention, directly or indirectly, to treat with any such nation or tribe of Indians, for the title or purchase of any lands by them held or claimed, such person shall forfeit and pay one thousand dollars. *Provided nevertheless,* That it shall be lawful for the agent or agents of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner or commissioners of the United States appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made for their claim to lands within such State which shall be extinguished by treaty.—Sec. 12, June 30, 1834, chap. 161.

842. If any citizen or other person residing within the United States or the territory thereof shall send any talk, speech, message, or letter to any Indian nation, tribe, chief, or individual, with an intent to produce a contravention or infraction of any treaty or other law of the United States, or to disturb the peace and tranquillity of the United States, he shall forfeit and pay the sum of two thousand dollars.—Sec. 13, *ibid.*

843. If any citizen or other person shall carry or deliver any such talk, message, speech, or letter, to or from any Indian nation, tribe, chief, or individual, from or to any person or persons whatsoever, residing within the United States, or from or to any subject, citizen, or agent of any foreign power or state, knowing the con-

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[5] Where lands are secured to the Indians by treaty, against occupation by the whites, the military commanders shall keep intruders off, by military force, if necessary, until such time as Indian title is extinguished, or lands are opened by Congress for settlement."—G. O. No. 72, A.-G. O., 1870.

Under the act of May 28, 1830, the President has authority to establish Indian reservations, and to protect the Indians thereupon "against all interruption or disturbance from any other tribe or nation of Indians, or from any other person or persons whatever."

tents thereof, he shall forfeit and pay the sum of one thousand dollars.—Sec. 14, *ibid.*

844. If any citizen or other person, residing or living among the Indians, or elsewhere within the territory of the United States, shall carry on a correspondence, by letter or otherwise, with any foreign nation or power, with an intent to induce such foreign nation or power to excite any Indian nation, tribe, chief, or individual to war against the United States, or to the violation of any existing treaty, or in case any citizen or other person shall alienate, or attempt to alienate, the confidence of any Indian or Indians from the government of the United States, he shall forfeit the sum of one thousand dollars.—Sec. 15, *ibid.*

845. That where, in the commission, by a white person, of any crime, offense, or misdemeanor, within the Indian country, the property of any friendly Indian is taken,[6] injured, or destroyed, and a conviction is had for such crime, offense, or misdemeanor, the person so convicted shall be sentenced to pay to such friendly Indian to whom the property may belong, or whose person may be injured, a sum equal to twice the just value of the property so taken, injured, or destroyed. And if such offender shall be unable to pay a sum at least equal to the just value or amount, whatever such payment shall fall short of the same shall be paid out of the treasury of the United States. *Provided,* That no such Indian shall be entitled to any payment out of the treasury of the United States, for any such property, if he, or any of the nation to which he belongs, shall have sought private revenge, or attempted to obtain satisfaction by any force or violence. *And provided also,* That if such offender cannot be apprehended and brought to trial, the amount of such property shall be paid out of the treasury, as aforesaid.—Sec. 16, June 30, 1834, chap. 161.

846. That if any Indian or Indians, belonging to any tribe in amity with the United States, shall, within the Indian country, take or destroy the property of any person lawfully within such country, or shall pass from the Indian country into any State or Territory inhabited by citizens of the United States, and there take, steal, or destroy any horse, horses, or other property, belonging to any citizen or inhabitant of the United States, such citizen or inhabitant,

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[6] An officer in command of an army in the field, in the Indian country, may lawfully arrest a person who has induced friendly Indians to steal cattle for him, with a view to turn them over to the government under a contract to furnish supplies.—*Holmes* v. *Sheridan,* 4 Western Jurist, 339.

his representative, attorney, or agent, may make application to the proper superintendent, agent, or sub-agent, who, upon being furnished with the necessary documents and proofs, shall, under the direction of the President, make application to the nation or tribe to which said Indian or Indians shall belong, for satisfaction; and if such nation or tribe shall neglect or refuse to make satisfaction, in a reasonable time, not exceeding twelve months, it shall be the duty of such superintendent, agent, or sub-agent, to make return of his doings to the commissioner of Indian affairs, that such further steps may be taken as shall be proper, in the opinion of the President, to obtain satisfaction for the injury; and in the mean time, in respect to the property so taken, stolen, or destroyed, the United States guarantee to the party so injured an eventual indemnification.[7] *Provided*, That if such injured party, his representative, attorney, or agent, shall, in any way, violate any of the provisions of this act, by seeking or attempting to obtain private satisfaction or revenge, he shall forfeit all claim upon the United States for such indemnification. *And provided also*, That unless such claim shall be presented within three years after the commission of the injury, the same shall be barred. And if the nation or tribe to which such Indian may belong receive an annuity from the United States, such claim shall, at the next payment of the annuity, be deducted therefrom, and paid to the party injured; and, if no annuity is payable to such nation or tribe, then the amount of the claim shall be paid from the treasury of the United States. *Provided*, That nothing herein contained shall prevent the legal apprehension and punishment of any Indians having so offended.—Sec. 17, *ibid.*

847. That so much of the act entitled "An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers," approved June 30, 1834, as provides that the United States shall make indemnification out of the treasury for property taken or destroyed, in certain cases, by Indians trespassing on white men, as described in the said act, be and the same is hereby repealed.[8] *Provided however*, That nothing herein contained shall be so construed as to impair or destroy the obligation of the Indians to make indemnification out of the annuities as prescribed in said act.—Sec. 8, Feb. 28, 1859, chap. 66.

848. No funds belonging to any Indian tribe with which treaty

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[7] See modification of indemnification clause in ¶ 847.
[8] This section refers to preceding paragraph.

relations exist shall be applied in any manner not authorized by such treaty, or by express provisions of law, nor shall money appropriated to execute a treaty be transferred or applied to any other purpose, unless expressly authorized by law.—Sec. 2, July 26, 1866, chap. 266.

849. That the superintendents, agents, and sub-agents, within their respective districts, be and are hereby authorized and empowered to take depositions of witnesses touching any depredations within the purview of the two preceding sections [¶ ¶ 845, 846] of this act, and to administer an oath to the deponents.—Sec. 18, June 30, 1834, chap. 161.

850. It shall be the duty of the superintendents, agents, and sub-agents to endeavor to procure the arrest and trial of all Indians accused of committing any crime, offense, or misdemeanor, and all other persons who may have committed crimes or offenses within any State or Territory, and have fled into the Indian country, either by demanding the same of the chiefs of the proper tribe, or by such other means as the President may authorize; and the President may direct the military force of the United States to be employed in the apprehension of such Indians, and also in preventing or terminating hostilities between any of the Indian tribes.[9]—Sec. 19, *ibid.*

851. If any person shall sell, exchange, give, barter, or dispose

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[9] EMPLOYMENT OF THE MILITARY.—"There being differences of opinion how far the authority of this department extended in its efforts to protect and preserve the Indians, and it being essential that harmony of action upon this subject should exist between the civil and military authorities, you are hereby advised that it is the wish and policy of the government to localize all the Indians upon reservations, to be selected either by themselves or for them by the authorized agents of the government. When so located, every assistance practicable, authorized by law, will be given to advance them in agricultural pursuits and arts of civilized life. Most of the Indians have agreed to locate in permanent abodes upon reservations. It is your duty, and you are hereby required, to protect, in all their legal rights, to the extent of your powers, all Indians within your jurisdiction who are, and remain, so located, or who may hereafter come in and locate. Indians who fail or refuse to come in and locate in permanent abodes upon reservations, will be subject wholly to the control and supervision of the military authorities, who, as circumstances may justify, will, at their discretion, treat them as friendly or hostile."

"It is proper that you should at once notify the Indians of this determination of the government, so that those who are friendly may not leave their reservations, and subject themselves to the suspicion and supervision of the military authorities. Care should also be taken to inform Indians claiming to be friendly, that they must not violate the laws of the United States by acts of murder, theft, or robbery, that for such crimes the tribe will be held responsible, and their annuities will be withheld until the offenders are delivered up by them to be properly punished."

"Application for the use of the military against unlawful members of any friendly tribe will not be made unless the determination to commit outrage be too strong, and the combination too great for you to subdue with the means at your command."

"Presents of goods or provisions will not be given by the superintendents or agents to roving Indians, or Indians in hostility to the government; but when they come in and locate upon reservations, with a view of becoming friendly to the government and cultivating the arts and habits of civilized life, every assistance practicable in

of any spirituous liquor or wine to any Indian under the charge of any Indian superintendent or Indian agent appointed by the United States, or shall introduce or attempt to introduce any spirituous liquor or wine into the Indian country, such person, on conviction thereof before the proper district or circuit court of the United States, shall be imprisoned for a period not exceeding two years, and shall be fined not more than three hundred dollars. *Provided however*, That it shall be a sufficient defense to any charge of introducing or attempting to introduce liquor into the Indian country if it be proved to be done by order of the war department, or of any officer duly authorized thereto by the war department.[10] And if any superintendent of Indian affairs, Indian agent or sub-agent, or commanding officer of a military post, has reason to suspect or is informed that any white person or Indian is about to introduce or has introduced any spirituous liquor or wine into the Indian country, in violation of the provisions of this section, it shall be lawful for such superintendent, agent, sub-agent, or commanding officer, to cause the boats, stores, packages, wagons, sleds, and places of deposit of such person to be searched; and if any such liquor is found therein, the same, together with the boats, teams, wagons, and sleds used in conveying the same, and also the goods, packages, and peltries of such person, shall be seized and delivered to the proper officer, and

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the way of clothing, provisions, and agricultural implements will be given to them." —Circular Letter, June 12, 1869, from Commissioner of Indian affairs.

"Inasmuch as the military authorities, under the construction given to circular letter of this office to superintendents and agents, dated the 12th of June, 1869, are unwilling to pursue and arrest criminal and predatory Indians when within the Indian Territory, and to recover from them stolen property and captives taken into said Territory, it has been deemed advisable and expedient that the circular letter in question shall be so far modified as to permit hereafter, and until it shall be deemed necessary to direct otherwise, the military to enter into the Indian Territory and upon the reservations therein at all times for these purposes. I am advised by the secretary of the interior to so inform your department, and to suggest that on such occasions the military take with them, when practicable, an Indian agent or superintendent to witness the proceedings."

"In accordance with this determination, all superintendents and agents, affected by the modification indicated of the circular letter referred to, will be duly notified thereof, and instructed to act in harmony with the military in the premises."—Indian Commissioner to Secretary of War, June 21, 1871.

[10] Nothing in this section "shall be construed to extend to any Indian committing said offenses in the Indian country, or to any Indian committing *any offense* in the Indian country, who has been punished by the local laws of the tribe, or in any case where, by treaty stipulations, the exclusive jurisdiction over such offenses may now or hereafter be secured to said Indian tribes, respectively; and anything in said act inconsistent with this act be and the same is hereby repealed."—Sec. 3, March 27, 1854, chap. 26. Under this section it is penal to sell liquors to an Indian, under charge of an Indian agent, though within the limits of a State.—*United States* v. *Holliday*, 3 Wallace, 407. If spirits be found among the goods of a trader, in the Indian country, it is prima facie evidence of a violation of the act of Congress.—*American Fur Company* v. *United States*, 2 Peters, 358.

shall be proceeded against by libel in the proper court, and forfeited, one half to the informer and the other half to the use of the United States; and if such person be a trader, his license shall be revoked and his bond put in suit. And it shall, moreover, be the duty of any person in the service of the United States, or for any Indian, to take and destroy any ardent spirits or wine found in the Indian country, except such as may be introduced therein by the war department.[10a] And in all cases arising under this act Indians shall be competent witnesses.—Sec. 20, as amended by act of March 15, 1864, chap. 33.

852. If any person whatever shall, within the limits of the Indian country, set up or continue any distillery for manufacturing ardent spirits, he shall forfeit and pay a penalty of one thousand dollars; and it shall be the duty of the superintendent of Indian affairs, Indian agent, or sub-agent, within the limits of whose agency it shall be set up or continued, forthwith to destroy and break up the same; and it shall be lawful to employ the military force of the United States in executing that duty.—Sec. 21, June 30, 1834, chap. 161.

853. In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.—Sec. 22, *ibid.*

854. It shall be lawful for the military force of the United States to be employed in such manner and under such regulations as the President may direct, in the apprehension of every person who shall or may be found in the Indian country, in violation of any of the provisions of this act, and him immediately to convey from said Indian country, in the nearest convenient and safe route to the civil authority of the Territory or judicial district in which said persons shall be found, to be proceeded against in due course of law; and also, in the examination and seizure of stores, packages, and boats, authorized by the 20th section of this act, and in preventing the introduction of persons and property into the Indian country contrary to law; which persons and property shall be proceeded against according to law. *Provided,* That no person apprehended by military force as aforesaid shall be detained longer than five days after the arrest and before removal.[11] And all officers and soldiers who may

(a.) For disposition of persons arrested under this section see ¶ 854.

11 "Persons apprehended by the military for unlawful traffic with the Indians, and also the property taken with them, should be placed in the custody of the marshal of

have any such person or persons in custody shall treat them with all the humanity which the circumstances will possibly permit; and every officer or soldier who shall be guilty of maltreating any such person while in custody shall suffer such punishment as a court-martial shall direct.—Sec. 23, *ibid.*

855. So much of the laws of the United States as provides for the punishments of crimes committed within any place within the sole and exclusive jurisdiction of the United States shall be in force in the Indian country.[12] *Provided,* The same shall not extend to crimes committed by one Indian against the person or property of another Indian.—Sec. 25, *ibid.*

856. If any person who shall be charged with a violation of any of the provisions or regulations of this act shall be found within any of the United States, or either of the Territories, such offenders may be there apprehended, and transported to the Territory or judicial district having jurisdiction of the same.—Sec. 26, *ibid.*

857. All penalties which shall accrue under this act shall be sued for and recovered in an action of debt, in the name of the United States, before any court having jurisdiction of the same (in any State or Territory in which the defendant shall be arrested or found), the one half to the use of the informer, and the other half to the use of the United States, except when the prosecution shall be first instituted on behalf of the United States, in which case the whole shall be to their use.—Sec. 27, *ibid.*

858. When goods or other property shall be seized for any violation of this act, it shall be lawful for the person prosecuting on behalf of the United States to proceed against such goods, or other property, in the manner directed to be observed in the case of goods, wares, or merchandise brought into the United States in violation of the revenue laws.—Sec. 28, *ibid.*

859. Any white person who shall hereafter set fire, or attempt to set fire, to any house, outhouse, cabin, stable, or other building in

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the Territory or judicial district in which the capture occurred, whereupon it will be the duty of the United States attorney to institute proceedings for the recovery of the penalty and for the forfeiture of the property, under the statutory provisions already cited."

"Where the party apprehended has not only been engaged in unlawful traffic with the Indians, but in violating the articles of war (*e. g.* relieving the enemy with ammunition, etc.), he may be tried and punished by court-martial, or be turned over to the civil authorities to be proceeded against as above mentioned."—Attorney-general, July 19, 1871. See also ¶ 733, and note.

[12] Nothing in this section, however, is to be construed as extending to the Indian country any of the laws enacted for the District of Columbia. See sec. 3, March 27, 1854.

said Indian country, to whomsoever belonging; and any Indian who shall set fire to any house, outhouse, cabin, stable, or other building in said Indian country, belonging to or in lawful possession of a white person, in whole or in part, and whether the same be consumed or not; shall be deemed guilty of a felony, and shall be punished by confinement and imprisonment, with hard labor, for not more than twenty-one nor less than two years.—Sec. 4, March 27, 1854, chap. 26.

860. Any white person who shall make an assault upon an Indian or other person, or any Indian who shall make an assault upon a white person, within said Indian country, with a gun, rifle, sword, pistol, knife, or any other deadly weapon, with intent to kill or maim the person so assaulted, shall be deemed guilty of a felony, and shall, on conviction, be punished with confinement and imprisonment, with hard labor, for not more than five years nor less than one year.—Sec. 5, *ibid.*

861. Any person who may drive or remove, except as hereinafter provided, any cattle, horses, or other stock from the Indian Territory for the purposes of trade or commerce, shall be guilty of a felony, and on conviction be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding three years, or by both such fine and imprisonment.—Sec. 8, March 3, 1865, chap. 127.

862. That the agent of each tribe of Indians, lawfully residing in the said Indian Territory, be and he is hereby authorized to sell for the benefit of said Indians any cattle, horses, or other live stock belonging to said Indians, and not required for their use and subsistence, under such regulations as shall be established by the secretary of the interior. *Provided,* That nothing in this and the preceding section shall interfere with the execution of any order lawfully issued by the secretary of war, connected with the movement or subsistence of the troops of the United States.—Sec. 9, *ibid.*

863. Any loyal person, a citizen of the United States, of good moral character, shall be permitted to trade with any Indian tribe upon giving bond to the United States in the penal sum of not less than five nor more than ten thousand dollars, with at least two good securities, to be approved by the superintendent of the district within which such person proposes to trade, or by the United States district judge or district attorney for the district in which the obligor resides, renewable each year, conditioned that such person will faithfully observe all the laws and regulations made for the government of trade and intercourse with Indian tribes, and in no respect violate

the same.[13] *Provided*, That the laws now in force regulating trade and intercourse with Indian tribes, affecting licensed traders, and prescribing the powers and duties of the commissioner of Indian affairs, superintendents, agents, and sub-agents in connection therewith, shall be continued in force and apply to traders under this provision, except as herein otherwise provided.[14]—Sec. 4, July 26, 1866, chap. 266.

864. Hereafter no contract or agreement of any kind shall be made by any person with any tribe of Indians, or individual Indian or Indians, not a citizen of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him or her, or any other person or persons in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be in writing, and executed and approved in the manner hereinafter directed.—Sec. 1, May 21, 1872, chap. 177.

865. All contracts or agreements between such parties and for such purposes as named in the 1st section of this act shall be in writing, a duplicate or copy of which shall be delivered to each party thereto, as hereinafter provided. All such contracts shall be executed before a judge of a court of record and approved in writing thereon by the secretary of the interior and commissioner of Indian affairs. Such contract or agreement shall contain the names of all parties in interest, their residence and occupation; but those made with a tribe by their tribal authorities, the scope of authority and the reason for exercising that authority shall be given specifically. Such contracts or agreements shall state the time when and place where made, the particular purpose for which made, the special thing or things to be done under it, and, if for the collection of money, the basis of the claim, the source from which it is to be collected, the disposition to be made of it when collected, the amount or rate per cent. of the fee in all cases; and if any contingent matter or condition constitutes a part of the contract or agreement it

[13] The right to regulate trade with the Indians resides exclusively in the general government. Congress has power to prohibit all intercourse with the tribes, except under a license, and such power does not necessarily cease upon their being included within the limits of a State. See 1 McLean, 254; 6 Peters, 515; and 3 Wallace, 407.

[14] See ¶ ¶ 831–834 for antecedent legislation in reference to traders.

shall be specifically set forth. *Provided,* That all such contracts shall have a fixed limited time to run, and shall be invalid unless so limited. *And provided,* That such contracts shall not be assignable, in whole or in part, unless the names of the assignees and their residences and occupations be entered in writing upon the contract, and the consent of the secretary of the interior and the commissioner of Indian affairs to such assignment be also indorsed thereon. *And be it further provided,* That the judge before whom such contract or agreement is executed shall certify officially the time when and place where such contract or agreement was executed, and that it was in his presence, and who are the interested parties thereto, as stated to him at the time, the parties present making the same, the source and extent of authority claimed at the time by the contracting parties to make the contract or agreement, and whether made in person, or by agent or attorney of either party or parties.—Sec. 2, May 21, 1872, chap. 177.

866. No money shall be paid to any agent or attorney by an officer of the United States under any such contract or agreement, other than the fees due him for services rendered thereunder; but the moneys due the tribe, Indian, or Indians, as the case may be, shall be paid by the United States, through its own officers or agents, to the party or parties entitled thereto. *Provided,* That no money or thing shall be paid to any person for services under such contract or agreement, until such person shall have first filed with the commissioner of Indian affairs a sworn statement, showing each particular act of service under the contract, giving date and fact in detail, and the secretary of the interior and commissioner of Indian affairs shall determine therefrom whether, in their judgment, such contract or agreement has been complied with or fulfilled; if so, the same may be paid, and if not, it shall be paid in proportion to the services rendered under the contract. *Provided,* That all such contracts or agreements hereafter made in violation of the provisions of this act are hereby declared null and void, and all money or other thing of value paid to any person by any Indian or tribe, or any one else for or on his or their behalf, on account of such services, in excess of the amount approved by said commissioner and secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy, one half of which shall be paid to the person suing for the same, and the other half shall be paid into the treasury of the United States for the use of the Indian or tribe by or for whom it

was paid; and the person so receiving said money, and his aiders and abettors shall, in addition to the forfeiture of said sum, be subject to prosecution for misdemeanor in any court of the United States, and, on conviction, shall be fined not less than one thousand dollars, and imprisoned not less than six months; and it shall be the duty of all district attorneys of the United States to prosecute such cases when applied to to do so, and their failure and refusal shall be ground for their removal from office; and any Indian agent or other person in the employment of the United States who shall, in violation of the provisions of this act, advise, sanction, or in any way aid in the making of such contracts or agreements, in making such payments as are here prohibited, shall, in addition to the punishment herein imposed on the person making said contract or receiving said money, be, on conviction, dismissed from the service of the United States, and be forever disqualified from holding any office of profit or trust under the same.—Sec. 3, *ibid.*

CHAPTER XXVII.

EXECUTION OF LAWS; QUARANTINE AND HEALTH LAWS; NEUTRALITY ACT; ETC.

EXECUTION OF THE LAWS.

870. In all cases of insurrection, or obstruction to the laws,[1] either of the United States, or of any individual State or Territory, where it is lawful for the President of the United States to call forth the militia for the purpose of suppressing such insurrection, or of causing the laws to be duly executed, it shall be lawful for him to employ, for the same purposes, such part of the land or naval force of the United States as shall be judged necessary, having first observed all the prerequisites of the law in that respect.—Sec. 1, March 3, 1807, chap. 39.

QUARANTINE AND HEALTH LAWS.

871. The quarantines and other restraints, which shall be required and established by the health laws of any State, or pur-

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[1] Employment of Troops in Execution of the Laws.—So far as this act authorizes the employment of the army and navy to enforce the faithful execution of the laws of the United States, or to suppress rebellion in whatever States or Territories thereof the laws of the United States may be forcibly opposed, it has been supplied by the act of 1861. See Chap. xxv., ¶ 802.

"The army," as existing at the adoption of the Constitution, consisted of levies of State quotas, under State officers, raised for limited periods, and for the sole and specific purpose of protecting the settlers on the public lands from Indian depredations. From that sort of an "army," and originally hampered with the same conditions as to the nature of its service, has arisen the present military establishment; and hence has Congress deemed it necessary to declare that the army, as an organization, may be used under the circumstances and conditions set forth in ¶ ¶ 802, 870, and that it may be employed:

To garrison our fortifications, and preserve in our ports and harbors the respect due to the constituted authorities of the nation. See Chap. xii., ¶ ¶ 382, 384.

To prevent and terminate hostilities between the Indian tribes, and to enforce the Indian intercourse acts. See Chap. xxvi., ¶ ¶ 840, 850, 851, 852, 854.

To remove intruders from the public lands. See Chap. xxiv., note 4.

To protect the rights of discoverers of guano islands: act of August 18, 1856. And in this chapter, under the appropriate sub-titles, will be found further provision for the employment of military force in execution of the laws. Query, whether Congress, in thus affirming the circumstances and conditions under which the army may be employed, has not negatived its employment in other cases; and whether the existence of this legislation does not prove that without it the army could not be lawfully employed for those purposes? For executive recognition of the liability of individual officers and soldiers to serve as a posse comitatus, upon summons of United States marshals, collectors of internal revenue, etc., see notes 11, 12, 15.

suant thereto, respecting any vessels arriving in or bound to any port or district thereof, whether from a foreign port or place, or from another district of the United States, shall be duly observed by the collectors and all other officers of the revenue of the United States, appointed and employed for the several collection districts of such State respectively, and by the masters and crews of the several revenue cutters, and by the military officers who shall command in any fort or station upon the sea-coast. And all such officers of the United States shall be and they hereby are authorized and required, faithfully to aid in the execution of such quarantines and health laws, according to their respective powers and precincts, and as they shall be directed from time to time by the secretary of the treasury of the United States.[2]—Sec. 1, February 25, 1799, chap. 12.

THE NEUTRALITY ACT.

872. If any citizen of the United States shall, within the territory or jurisdiction thereof, accept and exercise a commission to serve a foreign prince, state, colony, district, or people, in war, by land or by sea, against any prince, state, colony, district, or people, with whom the United States are at peace, the person so offending shall be deemed guilty of a high misdemeanor, and shall be fined not more than two thousand dollars, and shall be imprisoned not exceeding three years.[3]—Sec. 1.

873. If any person[4] shall, within the territory or jurisdiction of the United States, enlist[5] or enter himself, or hire or retain another person to enlist or enter himself, or to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered

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[2] But this law is not to be construed as placing military posts under control of the civil authorities. The secretary of war, replying to the mayor of New York City, in reference to the military in New York harbor, says: "To place these posts in any manner under the direction of the board of health would deprive the military authorities of that complete control over its officers and property which this department should always maintain, and would be subversive of military discipline without advantage to the health of the city or the posts." See Army and Navy Journal, September 9, 1871.

[3] All of the sections quoted under this title are provisions of the act of April 20, 1818, chap. 88, with which, in view of its secs. 8 and 9 (¶¶ 878, 879), all army officers should be familiar.

[4] All persons engaged in undertaking to raise troops in the United States for the military service of any other government, whether citizens or foreigners, individuals or officers, unless protected by diplomatic privilege, are indictable under this statute, and foreign consuls are not exempt, either by treaty or the law of nations, from its penal effects.—7 Opinions, 367.

[5] The prohibition of foreign enlistments is a matter of domestic or municipal right, as to which foreign governments have no right to inquire, the international offense being independent of the question of the existence of a prohibitory act of Congress.—7 Opinions, 367.

in the service of any foreign prince, state, colony, district, or people, as a soldier, or as a marine or seaman, on board of any vessel of war, letter of marque, or privateer, every person so offending shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding one thousand dollars, and be imprisoned not exceeding three years. *Provided*, That this act shall not be construed to extend to any subject or citizen of any foreign prince, state, colony, district, or people who shall transiently be within the United States, and shall on board of any vessel of war, letter of marque, or privateer, which, at the time of its arrival within the United States, was fitted and equipped as such, enlist or enter himself, or hire or retain another subject or citizen of the same foreign prince, state, colony, district, or people, who is transiently within the United States, to enlist or enter himself to serve such foreign prince, state, colony, district, or people, on board such vessel of war, letter of marque, or privateer, if the United States shall then be at peace with such foreign prince, state, colony, district, or people.—Sec. 2.

874. If any person shall, within the limits of the United States, fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly be concerned in the furnishing, fitting out, or arming of any ship or vessel with intent that such ship or vessel shall be employed in the service of any foreign prince or state, or of any colony, district, or people, to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, or shall issue or deliver a commission within the territory or jurisdiction of the United States, for any ship or vessel, to the intent that she may be employed as aforesaid, every person so offending shall be deemed guilty of a high misdemeanor, and shall be fined not more than ten thousand dollars, and imprisoned not more than three years; and every such ship or vessel, with her tackle, apparel, and furniture, together with all materials, arms, ammunition, and stores, which may have been procured for the building and equipment thereof, shall be forfeited; one half to the use of the informer, and the other half to the use of the United States.[6]—Sec. 3.

875. If any person shall, within the territory or jurisdiction of

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[6] Military officers, ordered out by the President to prevent a violation of the neutrality act, may lawfully seize property and hold it, until it can be proceeded against in the mode prescribed by law; and such officer is not responsible for subsequent loss of property so seized, if occasioned without fault on his part.—*Stoughton* v. *Dimick*, 3 Blatchford, C. C., 356.

the United States, increase or augment, or procure to be increased or augmented, or shall knowingly be concerned in increasing or augmenting, the force of any ship of war, cruiser, or other armed vessel, which, at the time of her arrival within the United States, was a ship of war, or cruiser, or armed vessel, in the service of any foreign prince or state, or of any colony, district, or people, or belonging to the subjects or citizens of any such prince or state, colony, district, or people, the same being at war with any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, by adding to the number of the guns of such vessel, or by changing those on board of her for guns of a larger calibre, or by the addition thereto of any equipment solely applicable to war, every person so offending shall be deemed guilty of a high misdemeanor, shall be fined not more than one thousand dollars, and be imprisoned not more than one year.—Sec. 5.

876. If any person shall, within the territory or jurisdiction of the United States, begin or set on foot, or provide or prepare the means for, any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state, or of any colony, district, or people, with whom the United States are [at] peace, every person so offending shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding three thousand dollars, and imprisoned not more than three years.—Sec. 6.

877. The district courts shall take cognizance of complaints, by whomsoever instituted, in cases of captures made within the waters of the United States, or within a marine league of the coasts or shores thereof.—Sec. 7.

878. In every case in which a vessel shall be fitted out and armed, or attempted to be fitted out and armed, or in which the force of any vessel of war, cruiser, or any other armed vessel, shall be increased or augmented, or in which any military expedition or enterprise shall be begun or set on foot, contrary to the provisions and prohibitions of this act; and in every case of the capture of a ship or vessel within the jurisdiction or protection of the United States as before defined, and in every case in which any process issuing out of any court of the United States shall be disobeyed or resisted by any person or persons having the custody of any vessel of war, cruiser, or other armed vessel of any foreign prince or state, or of any colony, district, or people, or of any subjects or citizens of any foreign prince or state, or of any colony, district, or people, in every

such case it shall be lawful for the President of the United States, or such other person as he shall have empowered for that purpose, to employ such part of the land or naval forces of the United States,[7] or of the militia thereof, for the purpose of taking possession of and detaining any such ship or vessel, with her prize or prizes, if any, in order to the execution of the prohibitions and penalties of this act, and to the restoring the prize or prizes in the cases in which restoration shall have been adjudged, and also for the purpose of preventing the carrying on of any such expedition or enterprise from the territories or jurisdiction of the United States against the territories or dominions of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace.—Sec. 8.

879. It shall be lawful for the President of the United States, or such person as he shall empower for that purpose, to employ such part of the land or naval forces of the United States, or of the militia thereof, as shall be necessary to compel any foreign ship or vessel to depart the United States in all cases in which, by the laws of nations or the treaties of the United States, they ought not to remain within the United States.—Sec. 9.

880. The owners or consignees of every armed ship or vessel sailing out of the ports of the United States,[8] belonging wholly or in part to citizens thereof, shall enter into bond to the United States,

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[7] In 1852 an assumption by certain officers that they were not bound to obey an order from their commanding officer to aid in carrying out the provisions of this act, unless evidence had been previously given to them of his authority from the President to give such order, resulted in a court-martial, in remarking upon which the secretary of war said:

"There can be no question that in the cases referred to the order was perfectly *lawful*. The President, in virtue of the authority conferred on him by the 8th sec. of the act above mentioned, had expressly authorized and directed the commanding officer to aid, with the troops under his command, in executing the provisions of the act. In issuing this order, the President acted in his capacity of commander-in-chief of the army. The order was a military one, and was transmitted through the appropriate military channel. The service was as much a military service as any other in which the army could be employed, and an officer who had received the order had no more right to call upon his superior to produce the evidence of his authority to give it, than he would have in any other case. In this, as in other cases, it is possible that an officer may transcend the limits of his authority, but in all such cases an officer should act upon the reasonable presumption that his superior was authorized to issue an order which he *might* be authorized to issue. If he acts otherwise, he does so at his peril, and subjects himself to the risk of being tried for disobedience of orders.

The case would be different if the President, instead of issuing his orders directly to the army, should, in virtue of the authority conferred on him, by the above section of the act referred to, delegate to another person the power to employ the land and naval forces in executing the provisions of the act. In the latter case, it is clear that no officer would be bound to obey the order of the person so delegated until he produced evidence of his authority to issue it."—G. O. No. 34, A.-G. O., 1852.

[8] "The law does not prohibit armed vessels belonging to citizens of the United States from sailing out of our ports; it only requires the owners to give security that such vessels shall not be employed by them to commit hostilities against foreign powers at peace with the United States."—6 Peters, 466.

with sufficient sureties, prior to clearing out the same, in double the amount of the value of the vessel and cargo on board, including her armament, that the said ship or vessel shall not be employed by such owners to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace.—Sec. 10.

881. That the collectors of the customs be and they are hereby respectively authorized and required to detain[9] any vessel manifestly built for warlike purposes, and about to depart the United States, of which the cargo shall principally consist of arms and munitions of war, when the number of men shipped on board, or other circumstances, shall render it probable that such vessel is intended to be employed by the owner or owners to cruise or commit hostilities upon the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, until the decision of the President be had thereon, or until the owner or owners shall give such bond and security as is required of the owners of armed ships by the preceding section of this act.—Sec. 11.

THE CENSUS.

882. If, in any of the Territories or places where the population is sparse, the officers of the army or any persons thereto belonging can be usefully employed in taking the census, the secretary of war is hereby directed to afford such aid, if it can be given without prejudice to the public service.[10]—Sec. 18, May 23, 1850, chap. 11.

COLLECTION OF DUTIES ON IMPORTS.

883. Whenever it shall in the judgment of the President, by reason of unlawful combinations of persons in opposition to the laws of the United States, become impracticable to execute the revenue laws[11] and collect the duties on imports by the ordinary

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[9] The collectors are not authorized to detain vessels, although manifestly built for warlike purposes, and about to depart from the United States, unless circumstances render it probable that such vessels are intended to be employed against some foreign power at peace with the United States. All the latitude, therefore, necessary for commercial purposes is given to our citizens; and they are restrained only from such acts as are calculated to involve the country in war.—6 Peters, 466.

[10] "The commanding generals of departments will furnish United States marshals military aid in taking the census, on the written application of the marshals, provided they have troops to spare in each case."—G. O. No. 62, A.-G. O., 1870.

[11] INTERNAL REVENUE.—The situation and duty of the collector of internal revenue, as to the enforcement of the laws, held to be analogous to that of a United States marshal, who is vested with the authority to call out the posse comitatus (which includes the military) in cases of necessity. [See note 15.] The course pursued in regard to the employment of the military forces in aid of the enforcement of the

means in the ordinary way, at any port of entry in any collection district, he is authorized to cause such duties to be collected at any port of delivery in said district until such obstruction shall cease.—Sec. 1, July 13, 1861, chap. 3.

884. If, from the cause mentioned in the foregoing section, in the judgment of the President, the revenue from duties on imports cannot be effectually collected at any port of entry in any collection district, in the ordinary way, and by the ordinary means, or by the course provided in the foregoing section, then and in that case he may direct that the custom-house for the district be established in any secure place within said district, either on land or on board any vessel in said district or at sea near the coast; and in such case the collector shall reside at such place, or on shipboard, as the case may be, and there detain all vessels and cargoes arriving within or approaching said district, until the duties imposed by law on said vessels and their cargoes are paid in cash.—Sec. 2, *ibid.*

885. It shall be unlawful to take any vessel or cargo detained as aforesaid from the custody of the proper officers of the customs, unless by process of some court of the United States; and in case of any attempt otherwise to take such vessel or cargo by any force or combination, or assemblage of persons, too great to be overcome by the officers of the customs, it shall and may be lawful for the President, or such person or persons as he shall have empowered for that purpose, to employ such part of the army or navy or militia of the United States,[12] or such force of citizen volunteers as may

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revenue laws has, however, been for the collector of the district first to report to the commissioner his inability to execute the laws with the force at his command, and for the commissioner then, if he deems the exigency to require it, to call for military assistance upon the secretary of war, who thereupon, if he concurs in the view of the commissioner, issues the proper orders to the local commander, who then proceeds to act, not independently, but in aid of the collector, etc. Nor has it been the general practice for the marshal to avail himself of this authority so far as the military are concerned, but to call upon the executive for the military aid required; and the President would, in a proper case, be fully empowered to furnish either of these civil officers with adequate military support.—Memoranda, A.-G. O., February 24, 1870.

[12] Every officer or other person authorized to make searches and seizures under "An act further to prevent smuggling," etc., has "authority to demand of any person within the distance of three miles to assist him in making any arrest, search, or seizure authorized by this act, where such assistance may be necessary; and if such person shall, without reasonable excuse, neglect or refuse so to assist, upon proper demand, he shall be deemed guilty of a misdemeanor, and shall forfeit a sum not exceeding two hundred dollars, nor less than five dollars."—Sec. 10, July 18, 1866, chap. 201. But query whether "*any person*" embraces members of the army. The parties authorized to make the searches, etc., aforesaid, are "any officers of the customs, including inspectors and occasional inspectors, or of a revenue cutter, or other authorized agent of the treasury department, or other person specially appointed for the purpose in writing by a collector, naval officer, or surveyor of the customs." See Sec. 2, *ibid.*

If foreign ships of war enter our ports with merchandise on board, and with the

be deemed necessary for the purpose of preventing the removal of such vessel or cargo, and protecting the officers of the customs in retaining the custody thereof.—Sec. 3, *ibid.*

INTERFERENCE WITH ELECTIONS.

886. That it shall not be lawful for any military or naval officer of the United States, or other person engaged in the civil, military, or naval service of the United States, to order, bring, keep, or have under his authority or control, any troops or armed men at the place where any general or special election is held in any State of the United States of America, unless it shall be necessary to repel the armed enemies of the United States, or to keep the peace at the polls.[13] And that it shall not be lawful for any officer of the army or navy of the United States to prescribe or fix, or attempt to prescribe or fix, by proclamation, order, or otherwise, the qualifications of voters in any State of the United States of America, or in any manner to interfere with the freedom of any election in any State, or with the exercise of the free right of suffrage in any State of the United States. Any officer of the army or navy of the United States, or other person engaged in the civil, military, or naval service of the United States, who violates this section of this act, shall, for every such offense, be liable to indictment as for a misdemeanor, in any court of the United States having jurisdiction to hear, try, and determine cases of misdemeanor, and on conviction thereof shall pay a fine not exceeding five thousand dollars, and suffer imprison-

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intention to land such merchandise for sale and consumption within our jurisdiction, they must be treated by our revenue officers as merchant vessels.—1 Opinions, 337.

[13] The act of May 31, 1870 (chap. 114), "to enforce the right of citizens of the United States to vote in the several States of the Union, and for other purposes," in prescribing the duties of the commissioners appointed by the circuit and superior territorial courts of the United States, enacts as follows:

"And the better to enable the said commissioners to execute their duties faithfully and efficiently, in conformity to the Constitution of the United States and the requirements of this act, they are hereby authorized and empowered, within their districts respectively, to appoint in writing, under their hands, any one or more suitable persons from time to time to execute all such warrants and other process as may be issued by them in the lawful performance of their respective duties; and the persons so appointed to execute any warrant or process as aforesaid shall have authority to summon and call to their aid the bystanders, or posse comitatus of the proper county, or such portion of the land or naval forces of the United States, or of the militia, as may be necessary to the performance of the duty with which they are charged and to insure a faithful observance of the Fifteenth Amendment to the Constitution of the United States; and such warrants shall run and be executed by said officers anywhere in the State or Territory within which they are issued."—Sec. 10.

(*a.*) "That it shall be lawful for the President of the United States to employ such part of the land and naval forces of the United States, or of the militia, as shall be necessary to aid in the execution of judicial process issued under this act."—Sec. 13.

For the obligations of the military acting as a POSSE COMITATUS see note 15 to this chapter.

ment in the penitentiary not less than three months, nor more than five years, at the discretion of the court trying the same; and any person convicted as aforesaid shall, moreover, be disqualified from holding any office of honor, profit, or trust, under the government of the United States. *Provided*, That nothing herein contained shall be so construed as to prevent any officers, soldiers, sailors, or marines, from exercising the right of suffrage in any election district to which he may belong, if otherwise qualified, according to the laws of the State in which he shall offer to vote.—Sec. 1, February 25, 1865, chap. 52.

887. Any officer or person in the military or naval service of the United States, who shall order or advise, or who shall directly or indirectly, by force, threat, menace, intimidation, or otherwise, prevent or attempt to prevent any qualified voter of any State of the United States of America from freely exercising the right of suffrage at any general or special election in any State of the United States, or who shall in like manner compel, or attempt to compel, any officer of an election in any such State, to receive a vote from a person not legally qualified to vote, or who shall impose or attempt to impose any rules or regulations for conducting such election different from those prescribed by law, or interfere in any manner with any officer of said election in the discharge of his duties, shall for any such offense be liable to indictment as for a misdemeanor, in any court of the United States having jurisdiction to hear, try, and determine cases of misdemeanor, and on conviction thereof shall pay a fine of not exceeding five thousand dollars, and suffer imprisonment in the penitentiary not exceeding five years, at the discretion of the court trying the same, and any person convicted as aforesaid shall, moreover, be disqualified from holding any office of honor, profit, or trust under the government of the United States.—Sec. 2, *ibid.*

THE CIVIL RIGHTS BILL.[14]

888. All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right,

[14] Entitled "An act to protect all persons in the United States in their civil rights, and furnish the means of their vindication:" passed April 9, 1866, over the President's veto.

in every State and Territory, in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.—Sec. 1, April 9, 1866, chap. 31.

889. Any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.—Sec. 2, *ibid.*

890. The district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offenses committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied, or cannot enforce in the courts or judicial tribunals of the State or locality where they may be, any of the rights secured to them by the 1st section of this act; and if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court against any such person, for any cause whatsoever, or against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act or the act establishing a bureau for the relief of freedmen and refugees, and all acts amendatory thereof, or for refusing to do any act upon the ground that it would be inconsistent with this act, such defendant shall have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the "act relating to habeas corpus and regulating judicial proceedings in certain cases," approved March 3, 1863, and all acts amendatory thereof. The jurisdiction in civil and criminal matters hereby

conferred on the district and circuit courts of the United States shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of the cause, civil or criminal, is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern said courts in the trial and disposition of such cause, and if of a criminal nature, in the infliction of punishment on the party found guilty.—Sec. 3, *ibid.*

891. The district attorneys, marshals, and deputy marshals of the United States, the commissioners appointed by the circuit and territorial courts of the United States, with powers of arresting, imprisoning, or bailing offenders against the laws of the United States, the officers and agents of the freedmen's bureau, and every other officer who may be specially empowered by the President of the United States, shall be and they are hereby especially authorized and required, at the expense of the United States, to institute proceedings against all and every person who shall violate the provisions of this act, and cause him or them to be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States or territorial court as by this act has cognizance of the offense. And with a view to affording reasonable protection to all persons in their constitutional rights of equality before the law, without distinction of race or color, or previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, and to the prompt discharge of the duties of this act, it shall be the duty of the circuit courts of the United States and the superior courts of the Territories of the United States, from time to time to increase the number of commissioners, so as to afford a speedy and convenient means for the arrest and examination of persons charged with a violation of this act; and such commissioners are hereby authorized and required to exercise and discharge all the powers and duties conferred on them by this act, and the same duties with regard to offenses created by this act as they are authorized by law to exercise with regard to other offenses against the laws of the United States.—Sec. 4, *ibid.*

892. It shall be the duty of all marshals and deputy marshals to obey and execute all warrants and precepts issued under the provisions of this act, when to them directed; and should any marshal or deputy marshal refuse to receive such warrant or other process when tendered, or to use all proper means diligently to execute the same, he shall, on conviction thereof, be fined in the sum of one thousand dollars, to the use of the person upon whom the accused is alleged to have committed the offense. And the better to enable the said commissioners to execute their duties faithfully and efficiently, in conformity with the Constitution of the United States and the requirements of this act, they are hereby authorized and empowered within their counties respectively to appoint, in writing, under their hands, any one or more suitable persons, from time to time, to execute all such warrants and other process as may be issued by them in the lawful performance of their respective duties; and the persons so appointed to execute any warrant or process as aforesaid shall have authority to summon and call to their aid the bystanders or posse comitatus[15] of the proper county, or such portion of the land or naval forces of the United States, or of the militia, as may be necessary to the performance of the duty with which they are charged, and to insure a faithful observance of the clause of the Constitution which prohibits slavery, in conformity with the provisions of this act; and said warrants shall run and be executed by said officers anywhere in the State or Territory within which they are issued.—Sec. 5, *ibid.*

893. Any person who shall knowingly and willfully obstruct,

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[15] POSSE COMITATUS.—"The obligation of the military (individual officers and soldiers), in common with all citizens, to obey the summons of a marshal or sheriff, must be held subordinate to their paramount duty as members of a permanent military body. Hence the troops can act only in their proper organized capacity, under their own officers, and in obedience to the immediate orders of those officers. The officer commanding troops summoned to the aid of a marshal or sheriff must also judge for himself, and upon his own official responsibility, whether the service required of him is lawful and necessary, and compatible with the proper discharge of his ordinary military duties, and must limit his action absolutely to proper aid in execution of the lawful precept exhibited to him by the marshal or sheriff."

"If time will permit, every demand from a civil officer for military aid, whether it be for the execution of civil process or to suppress insurrection, should be forwarded to the President, with all the material facts in the case, for his orders; and in all cases the highest commander whose orders can be given in time to meet the emergency will alone assume the responsibility of action."

"By a timely disposition of troops where there is reason to apprehend a necessity for their use, and by their passive interposition between hostile parties, danger of collision may be averted."—Secretary of War, by Col. Kelton, to Gen. Meade, August 25, 1868.

(*a.*) "As it is generally lawful and proper for the military commander to send his troops wherever he may apprehend a necessity for their use, it is much better thus to prevent such necessity than to wait until it has actually arisen."—Secretary of War to Gen. Buchanan, September 14, 1868.

hinder, or prevent any officer, or other person charged with the execution of any warrant or process issued under the provisions of this act, or any person or persons lawfully assisting him or them, from arresting any person for whose apprehension such warrant or process may have been issued, or shall rescue or attempt to rescue such person from the custody of the officer, other person or persons, or those lawfully assisting as aforesaid, when so arrested pursuant to the authority herein given and declared, or shall aid, abet, or assist any person so arrested as aforesaid, directly or indirectly, to escape from the custody of the officer or other person legally authorized as aforesaid, or shall harbor or conceal any person for whose arrest a warrant or process shall have been issued as aforesaid, so as to prevent his discovery and arrest after notice or knowledge of the fact that a warrant has been issued for the apprehension of such person, shall, for either of said offenses, be subject to a fine not exceeding one thousand dollars, and imprisonment not exceeding six months, by indictment and conviction before the district court of the United States for the district in which said offense may have been committed, or before the proper court of criminal jurisdiction, if committed within any one of the organized Territories of the United States.—Sec. 6, *ibid.*

894. The district attorneys, the marshals, their deputies, and the clerks of the said district and territorial courts shall be paid for their services the like fees as may be allowed to them for similar services in other cases; and in all cases where the proceedings are before a commissioner, he shall be entitled to a fee of ten dollars in full for his services in each case, inclusive of all services incident to such arrest and examination. The person or persons authorized to execute the process to be issued by such commissioners for the arrest of offenders against the provisions of this act shall be entitled to a fee of five dollars for each person he or they may arrest and take before any such commissioner as aforesaid, with such other fees as may be deemed reasonable by such commissioner for such other additional services as may be necessarily performed by him or them, such as attending at the examination, keeping the prisoner in custody, and providing him with food and lodging during his detention, and until the final determination of such commissioner, and in general for performing such other duties as may be required in the premises; such fees to be made up in conformity with the fees usually charged by the officers of the courts of justice within the proper district or county, as near as may be practicable, and paid

out of the treasury of the United States on the certificate of the judge of the district within which the arrest is made, and to be recoverable from the defendant as part of the judgment in case of conviction.—Sec. 7, *ibid.*

895. Whenever the President of the United States shall have reason to believe that offenses have been or are likely to be committed against the provisions of this act within any judicial district, it shall be lawful for him, in his discretion, to direct the judge, marshal, and district attorney of such district to attend at such place within the district, and for such time as he may designate, for the purpose of the more speedy arrest and trial of persons charged with a violation of this act; and it shall be the duty of every judge or other officer, when any such requisition shall be received by him, to attend at the place and for the time therein designated.—Sec. 8, *ibid.*

896. It shall be lawful for the President of the United States, or such person as he may empower for that purpose, to employ such part of the land or naval forces of the United States,[16] or of the militia, as shall be necessary to prevent the violation and enforce the due execution of this act.—Sec. 9, *ibid.*

897. Upon all questions of law arising in any cause under the provisions of this act, a final appeal may be taken to the Supreme Court of the United States.—Sec. 10, *ibid.*

EXTRADITION.

898. Whenever any person who shall have been delivered by any foreign government to an agent or agents of the United States for the purpose of being brought within the United States and tried for any crime of which he is duly accused, the President shall have power to take all necessary measures for the transportation and safe-keeping of such accused person, and for his security against lawless violence, until the final conclusion of his trial for the crime[s] or offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such crimes or offenses, and for a reasonable time thereafter. And it shall be lawful for the President, or such person as he may empower for that purpose, to employ such portion of the land or naval forces of the United States, or of the militia thereof,

[16] But see sec. 5 of this act (¶ 892) and sec. 10, act of May 31, 1870 (note 13), by which like powers are given to the United States commissioners.

as may be necessary for the safe-keeping and protection of the accused as aforesaid.—Sec. 1, March 3, 1869, chap. 141.

899. Any person duly appointed as agent to receive in behalf of the United States the delivery by a foreign government of any person accused of crime committed within the jurisdiction of the United States, and to convey him to the place of his trial, shall be and hereby is vested with all the powers of a marshal[17] of the United States in the several districts through which it may be necessary for him to pass with such prisoner, so far as such power is requisite for his safe-keeping.—Sec. 2, *ibid.*

900. If any person or persons shall knowingly and willfully obstruct, resist, or oppose such agent in the execution of his duties, or shall rescue, or attempt to rescue, such prisoner, whether in the custody of the agent aforesaid, or of any marshal, sheriff, jailer, or other officer or person to whom his custody may have lawfully been committed, every person so knowingly and willfully offending in the premises shall, on conviction thereof before the district or circuit court of the United States for the district in which the offense was committed, be fined not exceeding one thousand dollars, and imprisoned not exceeding one year.—Sec. 3, *ibid.*

THE KU-KLUX BILL.[18]

901. Any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or

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[17] POWERS OF UNITED STATES MARSHALS.—They are to execute throughout their respective districts all lawful precepts, to them directed and issued under the authority of the United States, and are empowered "to command all necessary assistance" in the execution of their duties (sec. 27, September 24, 1789; and under the act of July 29, 1861: see ¶ 813). The marshal and their deputies have the same powers in executing the laws of the United States as sheriffs and their deputies in the several States have, by law, in executing the laws of the respective States. A marshal having a prisoner in custody is bound to retain such custody, and in doing so may use such force as may be necessary.—Ex parte Sifford, 5 American Law Reports, 659. State courts have no power, on habeas corpus, to discharge one held on a warrant of extradition issued by the secretary of state.—*Veremaitre's* case, 3 American Law Journal, 438. See also APPENDIX, ¶ ¶ 1024, 1029–1046.

[18] Entitled "An act to enforce the provisions of the Fourteenth Amendment to the Constitution of the United States, and for other purposes"; approved April 20, 1871.

(*a.*) "The President directs that whenever occasion shall arise the regular forces of the United States stationed in the vicinity of any locality where offenses described by the aforesaid act [¶ ¶ 901–909; approved April 20, 1871] may be committed, shall, in strict accordance with the provisions of the said act, be employed by their commanding officers in assisting the authorized civil authorities of the United States in making arrests of persons accused under the said act; in preventing the rescue of persons arrested for such cause; in breaking up and dispersing bands of disguised marauders, and of armed organizations, against the peace and quiet or the lawful pursuits of the citizens in any State."

"Whenever troops are employed in the manner indicated in this order, the commanding officer will, at the earliest opportunity, make a full report of his operations to the proper superior authority."—G. O. No. 48, A.-G. O., May 15, 1871.

cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the 9th of April, 1866, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication;" and the other remedial laws of the United States which are in their nature applicable in such cases.—Sec. 1, April 20, 1871, chap.

902. That if two or more persons within any State or Territory of the United States shall conspire together to overthrow, or to put down, or to destroy by force the government of the United States, or to levy war against the United States, or to oppose by force the authority of the government of the United States, or by force, intimidation, or threat to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, or by force, intimidation, or threat to prevent any person from accepting or holding any office or trust or place of confidence under the United States, or from discharging the duties thereof, or by force, intimidation, or threat to induce any officer of the United States to leave any State, district, or place where his duties as such officer might lawfully be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or to injure his person while engaged in the lawful discharge of the duties of his office, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duty, or by force, intimidation, or threat to deter any party or witness in any court of the United States from attending such court, or from testifying in any matter pending in such court fully, freely, and truthfully, or to injure any such party or witness in his person or property on account of his having so attended or testified, or by force, intimidation, or threat to influence the verdict, presentment, or indictment of any juror or grand juror in any court of the United States, or to injure such juror in his person or property on

account of any verdict, presentment, or indictment lawfully assented to by him, or on account of his being or having been such juror, or shall conspire together, or go in disguise upon the public highway or upon the premises of another for the purpose, either directly or indirectly, of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws, or shall conspire together for the purpose of in any manner impeding, hindering, obstructing, or defeating the due course of justice in any State or Territory, with intent to deny to any citizen of the United States the due and equal protection of the laws, or to injure any person in his person or his property for lawfully enforcing the right of any person or class of persons to the equal protection of the laws, or by force, intimidation, or threat to prevent any citizen of the United States lawfully entitled to vote from giving his support or advocacy in a lawful manner towards or in favor of the election of any lawfully qualified person as an elector of President or Vice-President of the United States, or as a member of the Congress of the United States, or to injure any such citizen in his person or property on account of such support or advocacy, each and every person so offending shall be deemed guilty of a high crime, and, upon conviction thereof in any district or circuit court of the United States or district or supreme court of any Territory of the United States having jurisdiction of similar offenses, shall be punished by a fine not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, as the court may determine, for a period of not less than six months nor more than six years, as the court may determine, or by both such fine and imprisonment as the court shall determine. And if any one or more persons engaged in any such conspiracy shall do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby any person shall be injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the person so injured or deprived of such rights and privileges may have and maintain an action for the recovery of damages occasioned by such injury or deprivation of rights and privileges against any one or more of the persons engaged in such conspiracy, such action to be prosecuted in the proper district or circuit court of the United

States, with, and subject to, the same rights of appeal, review upon error, and other remedies provided in like cases in such courts under the provisions of the act of April 9, 1866, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication."—Sec. 2.

903. That in all cases where insurrection, domestic violence, unlawful combinations, or conspiracies in any State shall so obstruct or hinder the execution of the laws thereof, and of the United States, as to deprive any portion or class of the people of such State of any of the rights, privileges, or immunities, or protection, named in the Constitution, and secured by this act, and the constituted authorities of such State shall either be unable to protect, or shall, from any cause, fail in or refuse protection of the people in such rights, such facts shall be deemed a denial by such State of equal protection of the laws to which they are entitled under the Constitution of the United States; and in all such cases, or whenever any such insurrection, violence, unlawful combination, or conspiracy shall oppose or obstruct the laws of the United States or the due execution thereof, or impede or obstruct the due course of justice under the same, it shall be lawful for the President, and it shall be his duty, to take such measures, by the employment of the militia or the land and naval forces of the United States, or of either, or by other means, as he may deem necessary for the suppression of such insurrection, domestic violence, or combinations; and any person who shall be arrested under the provisions of this and the preceding section shall be delivered to the marshal of the proper district, to be dealt with according to law.—Sec. 3.

904. That whenever in any State or part of a State the unlawful combinations named in the preceding section of this act shall be organized and armed, and so numerous and powerful as to be able, by violence, to either overthrow or set at defiance the constituted authorities of such State, and of the United States within such State, or when the constituted authorities are in complicity with, or shall connive at the unlawful purposes of, such powerful and armed combinations; and whenever, by reason of either or all of the causes aforesaid, the conviction of such offenders and the preservation of the public safety shall become in such district impracticable, in every case such combinations shall be deemed a rebellion against the government of the United States; and during the continuance of such rebellion, and within the limits of the district which shall be so under the sway thereof, such limits to be prescribed by proclamation, it

shall be lawful for the President of the United States, when in his judgment the public safety shall require it, to suspend the privileges of the writ of habeas corpus, to the end that such rebellion may be overthrown. *Provided,* That all the provisions of the 2d section of an act entitled "An act relating to habeas corpus, and regulating judicial proceedings in certain cases," approved March 3, 1863, which relate to the discharge of prisoners other than prisoners of war, and to the penalty for refusing to obey the order of the court, shall be in full force so far as the same are applicable to the provisions of this section.[19] *Provided further,* That the President shall first have made proclamation, as now provided by law, commanding such insurgents to disperse. *And provided also,* That the provisions of this section shall not be in force after the end of the next regular session of Congress.[19a]—Sec. 4.

905. That no person shall be a grand or petit juror in any court of the United States upon any inquiry, hearing, or trial of any suit, proceeding, or prosecution based upon or arising under the provisions of this act, who shall, in the judgment of the court, be in complicity with any such combination or conspiracy; and every such juror shall, before entering upon any such inquiry, hearing, or trial, take and subscribe an oath in open court that he has never, directly or indirectly, counseled, advised, or voluntarily aided any such combina-

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[19] That section, after declaring it to be the duty of the secretary of war to furnish as soon as practicable to the United States circuit and district judges a list of all persons held as state or political prisoners, or otherwise than as prisoners of war, within the jurisdiction of said courts, by the military, provides as follows:

"And in all cases where a grand jury, having attended any of said courts having jurisdiction in the premises, after the passage of this act, and after the furnishing of said list as aforesaid, has terminated its session without finding an indictment, or presentment, or other proceeding against any such person, it shall be the duty of the judge of said court forthwith to make an order that any such prisoner desiring a discharge from said imprisonment be brought before him to be discharged; and every officer of the United States having custody of such prisoner is hereby directed immediately to obey and execute said judge's order; and in case he shall delay or refuse so to do, he shall be subject to indictment for a misdemeanor, and be punished by a fine of not less than five hundred dollars, and imprisonment in the common jail for a period not less than six months, in the discretion of the court. *Provided however,* That no person shall be discharged by virtue of the provisions of this act until after he or she shall have taken an oath of allegiance to the government of the United States, and to support the Constitution thereof; and that he or she will not hereafter in any way encourage or give aid and comfort to the present rebellion or the supporters thereof. *And provided also,* That the judge or court before whom such person may be brought, before discharging him or her from imprisonment, shall have power, on examination of the case, and, if the public safety shall require it, shall be required to cause him or her to enter into recognizance, with or without surety, in a sum to be fixed by said judge or court, to keep the peace and be of good behavior towards the United States and its citizens, and from time to time, and at such times as such judge or court may direct, appear before said judge or court to be further dealt with, according to law, as the circumstances may require. And it shall be the duty of the district attorney of the United States to attend to such examination before the judge."

(*a.*) Which adjourned June 10, 1872.

tion or conspiracy; and each and every person who shall take this oath, and shall therein swear falsely, shall be guilty of perjury, and shall be subject to the pains and penalties declared against that crime; and the 1st section of the act entitled "An act defining additional causes of challenge and prescribing an additional oath for grand and petit jurors in the United States courts," approved June 17, 1862, be and the same is hereby repealed.—Sec. 5.

906. That if any person[20] or persons, having knowledge that any of the wrongs conspired to be done and mentioned in the 2d section of this act are about to be committed, and having power to prevent or aid in preventing the same, shall neglect or refuse so to do, and such wrongful act shall be committed, such person or persons shall be liable to the person injured, or his legal representatives, for all damages caused by any such wrongful act which such first-named person or persons by reasonable diligence could have prevented; and such damages may be recovered in an action on the case in the proper circuit court of the United States, and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in such action. *Provided,* That such action shall be commenced within one year after such cause of action shall have accrued; and if the death of any person shall be caused by any such wrongful act and neglect, the legal representatives of such deceased person shall have such action therefor, and may recover not exceeding five thousand dollars damages therein, for the benefit of the widow of such deceased person, if any there be, or if there be no widow, for the benefit of the next of kin of such deceased person.—Sec. 6.

907. That nothing herein contained shall be construed to supersede or repeal any former act or law except so far as the same may be repugnant thereto; and any offenses heretofore committed against the tenor of any former act shall be prosecuted, and any proceeding already commenced for the prosecution thereof shall be continued and completed, the same as if this act had not been passed, except so far as the provisions of this act may go to sustain and validate such proceedings.—Sec. 7.

THE WRIT OF HABEAS CORPUS.

908. All the before-mentioned courts of the United States shall have power to issue writs of "scire facias, habeas corpus," and all

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[20] Query, whether "any persons" can be construed to include the military? The context of the section seems to preclude that idea; and the interference of troops is perhaps contemplated only under conditions indicated in ¶ 903.

other writs[21] not specially provided for by statutes which may be necessary for the exercise of their respective jurisdictions, and agreeably to the principles and usages of law. And either of the justices of the Supreme Court, as well as judges of the district courts, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment.[22] *Provided*, That writs of habeas corpus shall in no case extend to prisoners in jail,[23] unless where they are in custody, under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.—Sec. 14, September 24, 1789, chap. 20.

909. Either of the justices of the Supreme Court or a judge of any district court of the United States, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases of a prisoner or prisoners, in jail or confinement, where he or they shall be committed or confined, on, or by any authority or law, for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process, or decree of any judge or court thereof, anything in any act of Congress to the contrary notwithstanding. And if any person or persons to whom such writ of habeas corpus may be directed shall refuse to

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[21] Officers of the army are so often served with writs of habeas corpus, issued under both federal and State authority, that it has been deemed advisable, in connection with this chapter, and in addition to notes running pari passu with the statutes, to republish in an appendix such leading decisions of the federal courts as define most clearly the limits of judicial jurisdiction. See APPENDIX, ¶ ¶ 1001–1046.

[22] "The words in the section, 'the before-mentioned courts' can only have reference to such courts as were established in the preceding part of the act [Supreme, circuit, and district], and excludes the idea that a court of military commission can be one of them." The authority to be exercised by a MILITARY COMMISSION is not judicial in the sense in which judicial power is granted to the courts of the United States. "It involves discretion to examine, to decide and sentence, but there is no original jurisdiction in the Supreme Court to issue a writ of habeas corpus, ad subjiciendum, to review or reverse its proceedings, or the writ of certiorari to revise the proceedings of a military commission."—Ex parte *Vallandigham*, 1 Wallace, 251–254, passim. See notes 27 and 28 c; and Chap. xxii., note 1.

The Supreme Court holds, however, that in the exercise of its appellate jurisdiction it may, by habeas corpus, relieve from unlawful imprisonment one held in military custody, who had been remanded to that custody by an inferior court of the United States.—See ex parte *Yerger*, 8 Wallace, 102, 103.

Soldiers confined in a penitentiary for purely military offenses may be discharged on habeas corpus. See Chap. xxiii., ¶ 705, and note 13.

[23] But this limitation has been gradually narrowed, and the benefits of the writ have been extended (¶ 909) to prisoners confined under any authority, whether State or national, for any act done or omitted in pursuance of a law of the United States, or of any order, process, or decree of any judge or court of the United States; to prisoners being subjects or citizens of foreign states (¶ 910), in custody under national or State authority for acts done or omitted by or under color of foreign authority, and alleged to be valid under the law of nations; and (¶ 911) to all cases where any person may be restrained of liberty in violation of the Constitution, or of any treaty or law of the United States.—Ex parte *Yerger*, 8 Wallace, 101.

obey the same, or shall neglect or refuse to make return, or shall make a false return thereto; in addition to the remedies already given by law, he or they shall be deemed and taken to be guilty of a misdemeanor, and shall, on conviction before any court of competent jurisdiction, be punished[24] by fine, not exceeding one thousand dollars, and by imprisonment, not exceeding six months, or by either, according to the nature and aggravation of the case.—Sec. 7, March 2, 1833, chap. 57.

910. Either of the justices of the Supreme Court of the United States, or judge of any district court of the United States, in which a prisoner is confined, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases of any prisoner or prisoners, in jail or confinement, where he, she, or they, being subjects or citizens of a foreign state, and domiciled therein, shall be committed or confined, or in custody, under or by any authority or law, or process founded thereon, of the United States, or of any one of them, for or on account of any act done or omitted under any alleged right, title, authority, privilege, protection, or exemption, set up or claimed under the commission, or order or sanction, of any foreign state or sovereignty, the validity and effect whereof depend upon the law of nations, or under color thereof. And upon the return of the said writ, and due proof of the service of notice of the said proceeding, to the attorney-general or other officer prosecuting the pleas of the state under whose authority the petitioner has been arrested, committed, or is held in custody, to be prescribed by the said justice or judge at the time of granting said writ, the said justice or judge shall proceed to hear the said cause; and if, upon hearing the same, it shall appear that the prisoner or prisoners is or are entitled to be discharged from such confinement, commitment, custody, or arrest, for or by reason of such alleged right, title, authority, privileges, protection, or exemption, so set up and claimed, and the laws of nations applicable thereto, and that the same exists in fact, and has been duly proved to the said justice or judge, then it shall be the duty of the said justice or judge forthwith to discharge such prisoner or prisoners accordingly. And if it shall appear to the said justice or judge that such judgment or dis-

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[24] If the service of the writ be prevented by military force, it will be ordered to be placed on the files of the court, to be served when practicable.—Ex parte *Winder*, 2 Clifford, 89.

An order from a subordinate in the war department, to an officer, not to obey the writ, by the production of the body, is no justification to the officer.—Ex parte *Field*, 5 Blatchford, C. C., 63.

charge ought not to be rendered, then the said prisoner or prisoners shall be forthwith remanded. *Provided always,* That from any decision of such justice or judge an appeal may be taken to the circuit court of the United States for the district in which the said cause is heard; and from the judgment of the said circuit court to the Supreme Court of the United States, on such terms and under such regulations and orders, as well for the custody and appearance of the prisoner or prisoners, as for sending up to the appellate tribunal a transcript of the petition, writ of habeas corpus, return thereto, and other proceedings, as the judge hearing the said cause may prescribe; and pending such proceedings or appeal, and until final judgment be rendered therein, and after final judgment of discharge in the same, any proceeding against such prisoner or prisoners, in any State court, or by or under the authority of any State, for any matter or thing so heard and determined, or in process of being heard and determined, under and by virtue of such writ of habeas corpus, shall be deemed null and void.—August 29, 1842, chap. 257.

911. The several courts of the United States, and the several justices and judges of such courts, within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States; and it shall be lawful for such person so restrained of his or her liberty to apply to either of said justices or judges for a writ of habeas corpus, which application shall be in writing and verified by affidavit, and shall set forth the facts concerning the detention of the party applying, in whose custody he or she is detained, and by virtue of what claim or authority, if known; and the said justice or judge to whom such application shall be made shall forthwith award a writ of habeas corpus, unless it shall appear from the petition itself that the party is not deprived of his or her liberty in contravention of the Constitution or laws of the United States. Said writ shall be directed to the person in whose custody the party is detained, who shall make return of said writ and bring the party before the judge who granted the writ, and certify the true cause of the detention of such person within three days thereafter, unless such person be detained beyond the distance of twenty miles; and if beyond the distance of twenty miles and not above one hundred miles, then within ten days; and if beyond the distance of one hundred miles, then within twenty days. And upon the return of the writ of

habeas corpus a day shall be set for the hearing of the cause, not exceeding five days thereafter, unless the party petitioning shall request a longer time. The petitioner may deny any of the material facts set forth in the return, or may allege any fact to show that the detention is in contravention of the Constitution or laws of the United States, which allegations or denials shall be made on oath. The said return may be amended by leave of the court or judge before or after the same is filed, as also may all suggestions made against it, that thereby the material facts may be ascertained. The said court or judge shall proceed in a summary way to determine the facts of the case, by hearing testimony and the arguments of the parties interested, and if it shall appear that the petitioner is deprived of his or her liberty in contravention of the Constitution or laws of the United States, he or she shall forthwith be discharged and set at liberty. And if any person or persons to whom such writ of habeas corpus may be directed shall refuse[25] to obey the same, or shall neglect or refuse to make return or shall make a false return thereto, in addition to the remedies already given by law, he or they shall be deemed and taken to be guilty of a misdemeanor, and shall, on conviction before any court of competent jurisdiction, be punished by fine not exceeding one thousand dollars, and by imprisonment not exceeding one year, or by either, according to the nature and aggravation of the case. From the final decision of any judge, justice, or court, inferior to the circuit court, an appeal may be taken to the circuit court of the United States for the district in which said cause is heard [and from the judgment of said circuit court to the Supreme Court[26] of the United States], on such terms and under such regulations and orders, as well for the custody and appearance of the person alleged to be restrained of his or her liberty, as for sending up to the appellate tribunal a transcript of the petition, writ of habeas corpus, return thereto, and other proceedings, as may be prescribed by the Supreme Court, or, in default of such, as the judge hearing said cause may prescribe; and pending such proceedings or appeal, and until final judgment be rendered therein, and after final judgment of discharge in the same, any pro-

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[25] See preceding note.

[26] So much of this act as authorizes an appeal from the judgment of the circuit court to the Supreme Court, or the exercise of any such jurisdiction by said Supreme Court, on appeals, is repealed by sec. 2, March 27, 1868. But the Supreme Court holds that this act of 1868 does not take away or affect its appellate jurisdiction by habeas corpus, under the Constitution and the acts of Congress prior to date of above act.—Ex parte *Yerger*, 8 Wallace, 104-6.

ceeding against such person so alleged to be restrained of his or her liberty in any State court, or by or under the authority of any State, for any matter or thing so heard and determined, or in process of being heard and determined, under and by virtue of such writ of habeas corpus, shall be deemed null and void.—Sec. 1, February 5, 1867, chap. 28.

912. A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity, or where is drawn in question the validity of a statute of or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of such their validity, or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of or commission held, or authority exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court of the United States, upon a writ of error, the citation being signed by the chief justice, or judge, or chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the Supreme Court of the United States, in the same manner, and under the same regulations, and the writ shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a court of the United States; and the proceeding upon the reversal shall also be the same, except that the Supreme Court may, at their discretion, proceed to a final decision of the same, and award execution, or remand the same to an inferior court. This act shall not apply to the case of any person who is or may be held in the custody of the military authorities of the United States, charged with any military offense, or with having aided or abetted rebellion against the government of the United States prior to the passage of this act.[27]—Sec. 2, February 5, 1867, chap. 28.

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[27] There seems to be some doubt as to the application of this qualification. If the true reading is, "held in custody of the military authorities *prior to the passage of this act,*" whether as military or non-military offenders, it is difficult to imagine a reason for the law. But by applying the expression "prior to the passage of this act" to its contiguous context we satisfy grammatical requirements, and at the same time the reason of the law seems to be vindicated. Therefore military offenders in

SUBORDINATION TO CIVIL AUTHORITY.

913. When any commissioned officer or soldier shall be accused of a capital crime, or of having used violence, or committed any offense against the person or property of any citizen of any of the United States, such as is punishable by the known laws of the land, the commanding officer and officers of every regiment, troop, or company, to which the person or persons so accused shall belong, are hereby required, upon application duly made by or in behalf of the party or parties injured, to use their utmost endeavors to deliver over such accused person or persons to the civil magistrate, and likewise to be aiding and assisting to the officers of justice in apprehending and securing the person or persons so accused, in order to bring him or them to trial.[28] If any commanding officer or officers

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military custody are not within the purview of this act (¶ ¶ 911, 912) of 1867. Other interpretations are possible, but would have no present significance.

[28] Accepting as an axiom that under our system of government the military is subordinate to the civil authority, it is important to ascertain the precise limits of such subjection,—whether absolute under all conditions (*a*); whether in certain cases the jurisdiction of municipal and military law may not be concurrent (*b*); and whether there are not conditions under which military jurisdiction is complete and exclusive (*c*). And in this connection it is desirable to understand the degree of our individual responsibility in issuing or obeying such military commands as may be declared illegal by the civil courts (*d*).

(*a*). SUBORDINATION ABSOLUTE.—The military power is subordinate to the civil authority.—Ex parte *Keeler*, Hempstead's Reports, 306.

It is wholly inadmissible under our government to place the military above the civil authority; and, therefore, whilst the latter shall have the custody of an officer for the purpose of trying him for a homicide, he cannot legally be made amenable to a court-martial.—3 Opinions, 466.

But the interests of the whole body politic, as well as of the army, demand that this subordination to the civil magistracy should not degenerate into servility, and thereupon Mr. Wirt remarks, in connection with the 33d Article (¶ 913), that "the commanding officer owes a duty to the men under his command: he owes them the duty of protection, so long as they continue in the faithful discharge of their duty. This duty is first in point of time, and highest in point of obligation. This 33d Article gives him no authority to withdraw that protection and deliver over his men to others, except in the cases it describes, where they are accused of such an offense as is punishable by the known laws of the land. To justify him in delivering them up, he must see that the case described by the article has arisen. He is required by his duty to exercise his judgment upon the case. It is not enough to tell him that *some* offense has been committed; he must know what the specific offense is, in order that he may see whether it is an offense punishable by the known laws of the land."—2 Opinions, 11.

It is a general principle of both American and British law that "an officer or soldier of the army who does an act criminal both by the military and the general law is subject to be tried by the latter in preference to the former, under certain conditions and limitation" [not very clearly set forth]. In all ordinary cases of violence or injury to the person or property of third parties, an application made *by or on behalf of the party injured* is a necessary antecedent condition to the power of the civil authority to act. It is not a right provided to the criminal, nor does the law give to the civil magistracy any right of voluntary or officious interference. In cases of murder or other felony, however, the law of the land, through the public prosecutor, or the grand jury, takes the place of the party injured. Or the whole society may be the party injured, and the public prosecutor may justly demand that the

shall willfully neglect, or shall refuse, upon the application aforesaid, to deliver over such accused person or persons to the civil

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criminal shall be held amenable to the law of the land either with or without a technical conformity to the letter of this article of war."—6 Opinions, 413–429, passim.

(*b.*) CONCURRENT JURISDICTION.—When an offense bears criminal qualifications to two jurisdictions, both may punish the offense.—*Moore* v. *State of Illinois*, 14 Howard, 20. See note 6, Chap. xxii.

It is a rule of law that "in a case of concurrent jurisdiction in different tribunals, the one first exercising jurisdiction rightfully acquires control to the exclusion of the other" (see 9 Wheaton, 532). Any other court having lawful jurisdiction may, however, proceed against the prisoner, says Mr. Cushing, "at the same time for another offense, or for another criminal qualification of the same act; but the latter court cannot take the custody of his person away from another court where jurisdiction has lawfully attached." The attorney-general remarks further that it is a capital mistake for one of the army to suppose that, being guilty of a crime, he gains anything in a military sense by the interference of the civil magistrate. The military obligations of the party are not extinguished on his committing a crime of which the civil magistrate has cognizance. So long as the civil magistrate holds the party in actual physical custody, he holds him rightfully; and the military authorities are bound to aid the civil magistrate in this respect. "But, if the party escape from the sheriff, or if he be released on bail, or if he be tried and acquitted, or if he be tried and convicted, in each of these cases, so soon as he leaves the manual custody of the civil magistrate, he reverts to the authority of his military superior."—6 Opinions, 413. See also note 6, Chap. xxii.

(*c.*) EXCLUSIVE MILITARY JURISDICTION.—Offenses, of a purely military character, committed while the party is in the military service, are not cognizable under the *common law* jurisdiction of the courts of the United States, and the statute law has given no criminal jurisdiction over such offenses to the civil courts. Inasmuch as Congress under its power to make rules for the government of the land and naval forces, and under the constitutional exception of cases arising in those forces from the ordinary operations of law, has created a code of military law for the trial of military crimes and offenses, it must be conceded that cognizance of such acts is withdrawn from the courts of civil jurisdiction and placed *exclusively* in courts-martial.—Kent's Commentaries, § 341, 363, note *a*. See also Chap. xxii., note 1.

While it seems to be admitted that the civil courts can inquire into the jurisdiction of military courts (note 1, clauses *b*, *c*, and *d*, Chap. xxii.), it has been decided by the Supreme Court that "with the sentences of courts-martial which have been convened regularly, and have proceeded legally, and by which punishments are directed, not forbidden by law, or which are according to the laws and customs of the sea [and, sequitur, of the military service], civil courts have nothing to do, nor are they in any way alterable by them. If it were otherwise, the civil courts would virtually administer the Rules and Articles of War, irrespective of those to whom that duty and obligation has been confided by the laws of the United States, and from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrate or civil court."—20 Howard, 82.

Referring to opinion of Supreme Court in the case of *Dynes* v. *Hoover*, the attorney-general remarks: "Courts-martial are then not only legally constituted courts of justice, but also, according to this high authority, courts of justice, whose judgments in cases fitted for their consideration, are as final, conclusive, and authoritative as those of any judicial tribunal of the country."—11 Opinions, 139. See note 6, Chap. xxii.

State courts have no power on habeas corpus to discharge one held in lawful custody under authority of the United States.—*Ferrand* v. *Fowler* (cited in Brightly's Federal Digest, vol. ii.). But no judge, State or national, can, under a habeas corpus, discharge a party who is in *lawful custody;* and if it appear that the prisoner is in custody under what *purports* to be the authority of the United States, the State courts can go no further. See APPENDIX, ¶ ¶ 1024, 1029–1046.

Military law to govern conquered territory: see Chap. xxii., note 9 *a*.

(*d.*) CIVIL RESPONSIBILITY OF OFFICERS.—The Supreme Court has held that as the duties of a commanding officer were imposed by the government, under conditions of grave responsibility, and necessarily involved the exercise of discretionary powers, he could not be made amenable for injuries resulting from actions, within the scope of his authority, that were not influenced by malice, corruption, or cruelty; and, hence,

magistrates, or to be aiding and assisting to the officers of justice in apprehending such person or persons, the officer or officers so offending shall be cashiered.—33d Article of War, April 10, 1806.

914. All officers and soldiers are to behave themselves orderly in quarters and on their march; and whosoever shall commit any waste or spoil, either in walks of trees, parks, warrens, fish-ponds, houses, or gardens, cornfields, inclosures of meadows, or shall maliciously destroy any property whatsoever belonging to the inhabitants of the United States, unless by order of the then commander-in-chief of the armies of the said States, shall (besides such penalties as they are liable to by law) be punished according to the nature and degree of the offense, by the judgment of a regimental or general court-martial.—54th Article of War, April 10, 1806.

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that in any action against him the burden of proof, that the officer exceeded his authority, is upon the party complaining; the rule of law being that the acts of public officers on public matters within their jurisdiction and where they have discretionary powers, are to be presumed legal till shown by others to be unjustifiable; it is not enough to show that he committed an error of judgment, but it must have been a malicious and willful error. See *Wilkes* v. *Dinsman*, in APPENDIX, ¶ ¶ 1095, 1102, 1104–1116, 1125, 1131. See also Chap. i., note 15 *a*, *b*, *c*, and APPENDIX, ¶ ¶ 1081–1089.

"We are not aware of any case in England or in this country in which it has been held that a public officer, acting to the best of his judgment and from a sense of duty, in a matter of account with an individual, has been held liable to an action for an error of judgment."—*Kendall* v. *Stokes*, 3 Howard, 97, 98.

If the power exercised by a commanding officer has been within the limits of a discretion confided to him by law, his orders would justify the subordinate, even if the commander had abused his powers, or acted from improper motives; but, where no discretionary power exists in the commander, the order, if illegal, does not justify the subordinate; and "upon principle, independent of the weight of judicial decision, it can never be maintained that a military officer can justify himself for doing an unlawful act, by producing the order of his superior. The order may palliate, but it cannot justify."—*Mitchell* v. *Harmony*, 13 Howard, 137. See Chap. i., note 15 *b*.

After martial law has been proclaimed by the proper authority, the officers engaged in the military service of the State may lawfully arrest any one whom they have reasonable grounds to believe is engaged in insurrection or rebellion, and may forcibly enter and search premises where it is reasonable to suppose that such offenders are secreted. "Without the power to do this martial law and the military array of the government would be mere parade, and rather encourage attack than repel it. No more force, however, can be used than is necessary to accomplish the object. And if the power is exercised for the purpose of oppression, or any injury willfully done to person or property, the party by whom, or by whose order, it is committed, would undoubtedly be answerable."—*Luther* v. *Borden*, 17 Howard, 46.

Military officers, acting under the law martial, rightfully proclaimed, justified by orders from their superiors, apparently within the scope of such superior's authority.—*Despan* v. *Olney*, 1 Curtis, 305.

In an action for trespass against an officer executing the sentence of a court-martial, it is a sufficient defense, to show that the court was properly constituted, had jurisdiction, and imposed the sentence.—*Slade* v. *Minor*, 2 Cranch, C. C., 139; *Dynes* v. *Hoover*, 20 Howard, 65.

Except in a plain case of excess of authority, a military subordinate should be held excused, in law, for acts done in obedience to the orders of his commanding officer. The rule is applicable, whether the legality of the order depends upon a question of fact or upon a question of law.—*McCall* v. *McDowell*. See APPENDIX, ¶ ¶ 1081–1089.

CHAPTER XXVIII.

MISCELLANEOUS PROVISIONS AFFECTING THE ARMY.

ADVERTISEMENTS.

921. It shall be the duty of the several executive departments of the government to publish, in one of the daily newspapers of the city of Washington, on Tuesday of each week, a list of all contracts which shall have been solicited or proposed to each, respectively, during the week next preceding, which list shall state briefly the subject-matter of each contract so solicited or proposed to be made, its terms, the name of the proposed contractor and of all persons known to be interested therein, directly or indirectly, and of all persons who solicit, request, or recommend the making of any such contract. *Provided*, That the foregoing provision shall not be applicable to bids made in pursuance of advertisements for contracts or purchases made under existing laws, but shall apply to all proposed modifications of existing contracts.[1]—Joint Resolution, July 12, 1862.

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[1] Under this joint resolution and the appropriation acts of May 18, 1866, March 2, 1867, July 20, 1868, and July 15, 1870, the heads of executive departments are required to publish all advertisements, to be published in the District of Columbia, and in Maryland and Virginia, in the two daily papers in said District having the largest circulation, and in another paper in said District designated by the clerk of the House of Representatives; and such advertisements as are made to the other States and Territories may be published also in these District of Columbia papers, if so authorized by the chief of the executive department.

(*a.*) The same publications are to be made in each of said papers equally as to frequency; the circulation of such papers is to be determined upon the 10th day of June annually; the publishers of all papers competing for such advertising are to furnish a sworn statement of their bona fide paid circulation of each regular issue for the preceding three months; and, in like manner, to certify under oath that such circulation has not, during the said three months, been increased by any gratuitous circulation, by a reduction in price below the ordinary and usual price of such papers, or by any other means, for the purpose of obtaining the official advertising; and the charges for such advertising are not to be greater than are paid for the same publications in other cities, or at a higher rate than is paid by individuals for like advertising.

(*b.*) Sec. 7, act of March 2, 1867, provides, That it shall be the duty of the clerk of the House of Representatives to select in Virginia, South Carolina, North Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, and Arkansas, one or more newspapers, not exceeding the number now allowed by law, in which all such

922. The laws relating to the army, navy, the militia and the marine corps of the United States shall be published officially in the United States Army and Navy Journal, at such rates as are fixed by the secretary of state for the publication of the laws of the United States.—Sec. 13, March 2, 1867, chap. 167.

923. No advertisement, notice, or proposal for any executive department of the government, or for any bureau thereof, or for any office therewith connected, shall be published in any newspaper whatever, except in pursuance of a written authority for such publication from the head of such department; and no bill for any such advertising, or publication, shall be paid, unless there be presented with such bill a copy of the written authority aforesaid.[2]—Sec. 2, July 15, 1870, chap. 292.

AGENTS.

924. Exclusively of the purveyor of public supplies,[3] paymasters of the army, pursers of the navy, military agents,[3] and other officers already authorized by law, no other permanent agents shall

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advertisements as may be ordered for publication in said districts, by any executive officer of the United States, shall be published, the compensation for which, and other terms of publication, shall be fixed by said clerk at a rate not exceeding one dollar per square of eight lines of space, for the publication of advertisements, the accounts for which shall be adjusted by the proper accounting officers and paid in the manner now authorized by law in the like cases; and said clerk shall notify each head of the several executive departments of the papers selected by him in accordance with the foregoing provisions; and it shall be the duty of the several executive officers charged therewith to furnish to such selected papers only an authentic copy of the publications to be made as aforesaid; and no money hereby or otherwise appropriated shall be paid for any publications or advertisements hereafter to be made in said districts, nor shall any such publication or advertisement be ordered by any department or public officer, otherwise than as herein provided.

See also Chap. iii., ¶ ¶ 98, 106.

[2] The heads of the several bureaus of the war department will furnish to all officers charged with the publication of advertisements complete lists of newspapers selected for the public advertising, in pursuance of secs. 7 [see clause *b*, note 1] and 10 of an act approved March 2, 1867, and sec. 2 of an act approved July 20, 1868 [see note 1, and clause *a*], and the list of newspapers designated by the secretary of war, together with the regulations and orders of the war department upon the subject, and all necessary blanks for compliance with these regulations. The publication of military orders and circulars in newspapers is, however, not authorized by these regulations. —Special Regulations, August 10, 1871.

For laws governing "job printing," or all other printing than that inserted in newspapers, see ¶ ¶ 964–967, and notes thereto.

[3] AGENTS.—The offices of "*purveyor of public supplies*" and of "*military agents*" were abolished by the act of March 28, 1812 (secs. 9, 18); the purveyor's duties being divided between the purchasing and the quartermaster's department (see Chap. viii., ¶ ¶ 225, 226, and notes 7, 10, 14), and the agents being superseded by the "deputy and assistant deputy quartermasters." It had been the duty of these agents "to purchase, receive, and forward to their proper destination all military stores, and other articles for the troops of their respective departments," and were to "account with the department of war, annually, for all the public property which may pass through their hands, and all the moneys which they may expend in discharge of the duties of their offices respectively," etc. See sec. 17, act of March 16, 1802, chap. 9.

be appointed either for the purpose of making contracts, or for the purchase of supplies, or for the disbursement in any other manner of moneys for the use of the military establishment, or of the navy of the United States, but such as shall be appointed by the President of the United States, with the advice and consent of the Senate.[3a] *Provided*, That the President may, and he is hereby authorized, in the recess of the Senate, to appoint all or any of such agents, which appointments shall be submitted to the Senate at their next session, for their advice and consent, and the President of the United States is hereby authorized, until otherwise provided by law, to fix the number and compensation of such agents. *Provided*, That the compensation allowed to either shall not exceed one per cent. on the public moneys disbursed by him, nor in any instance the compensation allowed by law to the purveyor of public supplies.—Sec. 3, March 3, 1809, chap. 28.

925. Every such agent as may be appointed by virtue of the next preceding section, and every purser of the navy, shall give bond with one or more sufficient sureties, in such sums as the President of the United States may direct, for the faithful discharge of the trust reposed in him.—Sec. 4, *ibid.*

926. Whenever it shall become necessary for the head of any department or office to employ special agents, other than officers of the army or navy, who may be charged with the disbursement of public moneys, they shall prior to entering upon duty as such give bond in such form and with such security as the head of the department or office employing said agent may approve.[3f]—Sec. 14, August 4, 1854, chap. 242.

(*a.*) A department commander has no authority to appoint a civilian purchasing agent for the government, nor can he invest a civilian with discretion to make contracts.—*Reeside* v. *United States*, 2 Nott & Huntington, 1. See also Chap. viii., note 7 *a*.

(*b.*) The law of general and special agents declared applicable to commanding and subordinate officers in their relations with the government and its contractors.—*Stevens* v. *United States*, 2 *ibid.*, 101. See Chap. iii., note 65 *d*.

(*c.*) The United States are not bound by the declarations and representations of their agents, unless it clearly appears that he was acting within the scope of his authority, and was empowered in his capacity as agent to make the declaration. See 2 Paine's Reports, 68.

(*d.*) Agents for the transportation of troops, etc., may be appointed by the secretary of war. See Chap. ii., ¶ 5.

(*e.*) Agents to receive and collect abandoned property, etc., in insurrectionary States, provided for in ¶ 952.

(*f.*) And the acts of June 23, 1866, and March 2, 1867, making appropriations for the public works of internal improvement, provide that "all persons not holding commissions in the regular army of the United States, who shall be intrusted with a disbursement of the funds appropriated for the works named in this act, shall be required to give bond and ample security for the faithful application of the same;

927. No officer or agent of any banking or other commercial corporation, and no member of any mercantile or trading firm, or person directly or indirectly interested in the pecuniary profits or contracts of such corporation or firm, shall be employed or shall act as an officer or agent of the United States for the transaction of business with such corporation or firm; and every such officer, agent, or member, or person, so interested, who shall so act, shall, upon conviction thereof, be punished by a fine of not more than two thousand dollars nor less than five hundred dollars, and by imprisonment for a term not exceeding two years.—Sec. 8, March 2, 1863, chap. 67.

CIVIL EMPLOYMENT.

928. The officers of the army shall not be separated from their regiments and corps for employment on civil works of internal improvement,[4] or be allowed to engage in the service of incorporated companies; and no officer of the line of the army shall hereafter be employed as acting paymaster, or disbursing agent for the Indian department, if such extra employment require that he be separated from his regiment or company, or otherwise interfere with the performance of the military duties proper.—Sec. 31, July 5, 1838, chap. 162.

929. For the purpose of promoting knowledge of military science among the young men of the United States, the President may,

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and no such disbursing officer in the army of the United States shall receive any commission or compensation for making such disbursements."

[4] CIVIL EMPLOYMENT OF OFFICERS.—This prohibition is remarkable in view of the fact that the same act in providing (sec. 5) for organization of a distinctive corps of topographical engineers, repealed (sec. 6) the authority granted to the President, by act of April 30, 1824, to employ *civil engineers* upon national works of internal improvement. See Chap. xii., ¶ 378, and note 6.

(*a.*) *Coast survey.*—The act of March 3, 1843, in making provision for a reorganization of the coast survey, directs the employment upon that duty of "as many officers of the army and navy as will be compatible with the successful prosecution of the work," etc. And, for assignment of graduated cadets to that duty, see Chap. iv., ¶ 154.

(*b.*) *Lighthouse duty.*—For statutes authorizing and directing employment of army officers on this duty see Chap. xii., ¶ ¶ 386–393; and their employment on the board of public works for the District of Columbia is recognized by the act of February 21, 1871, sec. 38, chap. 62.

(*c.*) MILITARY INSTRUCTION.—It is a condition of the act of July 2, 1862, "donating public lands to the several States and Territories" for educational purposes, that the funds received from the sales of such lands shall be appropriated by each State to the endowment of "at least one college where the leading object shall be, without excluding other scientific and classical studies, *and including military tactics*, to teach such branches of learning as are related to agriculture and the mechanic arts."

(*d.*) "*Any officer*" who accepts or holds any appointment in the diplomatic or consular service, or any officer "*on the active list*" who accepts or exercises the functions of "a civil office," held to have vacated their commissions in the army. See Chap. xx., ¶ ¶ 562, 563.

upon the application of an established college or university within the United States, with sufficient capacity to educate at one time not less than one hundred and fifty male students, detail an officer of the army to act as president, superintendent, or professor of such college or university; that the number of officers so detailed shall not exceed twenty at any time, and shall be apportioned through the United States, as nearly as practicable, according to population, and shall be governed by general rules, to be prescribed from time to time by the President.[4e]—Sec. 26, July 28, 1866, chap. 299.

COMPANY COOKING.

930. The officers of the medical department shall unite with the line officers of the army, under such rules and regulations as shall be prescribed by the secretary of war, in supervising the cooking within the same, as an important sanitary measure, and that said medical department shall promulgate to its officers such regulations and instructions as may tend to insure the proper preparation of the ration of the soldier.—Sec. 8, March 3, 1863, chap. 78.

931. Cooks shall be detailed, in turn, from the privates of each company of troops in the service of the United States, at the rate of one cook for each company numbering less than thirty men, and two cooks for each company numbering over thirty men, who shall serve ten days each.—Sec. 9, *ibid.*

COMPANY TAILORING.

932. It shall be lawful for the commanding officer of each regiment whenever it may be necessary, to cause the coats, vests, and overalls, or breeches, which may from time to time be issued to and for his regiment,[5] to be altered and new made, so as the better to fit them to the persons, respectively, for whose use they shall be delivered, and for defraying the expense of such alteration, to cause to be deducted and applied, out of the pay of such persons, a sum or sums not exceeding twenty-five cents for each coat, eight cents for each vest, and for each pair of overalls or breeches.—Sec. 23, March 3, 1799, chap. 48.

(*e.*) Officers detailed under this act (¶ 929) are not absent from their "appropriate duties."—Adjutant-general, June 26, 1868. But under rulings of the secretary of war they are denied mileage, quarters, and fuel.—*Ibid.*, April 2, June 7, 1872.

[5] Army Regulations make provision for the necessary alteration of the men's clothing, under direction of the company commanders, and as these regulations were made under authority of more recent legislation (¶ 182), the above paragraph is probably fully supplied.

THE DEPARTMENT OF JUSTICE.

933. There shall be and is hereby established an executive department of the government of the United States, to be called the department of justice, of which the attorney-general shall be the head. His duties, salary, and tenure of office shall remain as now fixed by law, except so far as they may be modified by this act.—Sec. 1, June 22, 1870, chap. 150.

934. Whenever a question of law arises in the administration, either of the war or navy department, the cognizance of which is not given by statute to some other officer from whom the head of either of these departments may require advice, the same shall be sent to the attorney-general, to be by him referred to the proper officer in his department provided for in this act, or otherwise disposed of, as he may deem proper; and each head of any department of the government may require the opinion of the attorney-general on all questions of law arising in the administration of their respective departments.[6]—Sec. 6, *ibid.*

935. The attorney-general may require any solicitor or officers of the department of justice to perform any duty required of said department or any officer thereof; and the officers of the law department, under the direction of the attorney-general, shall give all opinions and render all services requiring the skill of persons learned in the law necessary to enable the President and heads of the executive departments, and the heads of bureaus and other officers in such departments, to discharge their respective duties; and shall, for and on behalf of the United States, procure the proper evidence for, and conduct, prosecute, or defend all suits and proceedings in, the Supreme Court of the United States and in the court of claims, in which the United States or any officer thereof is a party or may be interested. And no fees shall be allowed or paid to any other attorney or counselor at law for any service herein required of the officers of the department of justice.—Sec. 14, *ibid.*

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[6] OPINIONS OF THE ATTORNEY-GENERALS.—Although the statutes defining the duties of the attorney-generals do not declare the effect of their advice, it has been the practice of the departments to heed it. It has been found advantageous, if not necessary, to have uniformity of action upon analogous questions and cases; and that result is more likely to be attained under the guidance of a department constituted for that purpose, than by disregarding its advice.—5 Opinions, 97; 6 *ibid.*, 334.

(*a.*) The opinion of the attorney-general, for the time being, is in terms advisory to the secretary who calls for it; but it is obligatory as the law in the case, unless, on appeal by such secretary to the President, it be by the latter overruled.—7 *ibid.*, 691.

(*b.*) Subordinate officers of the government, who desire an official opinion, must seek it through the head of the department to which such subordinate is accountable.—1 *ibid.*, 211.

936. The attorney-general shall have supervision of the conduct and proceedings of the various attorneys for the United States in the respective judicial districts, who shall make report to him of their proceedings, and also of all other attorneys and counselors employed in any cases or business in which the United States may be concerned.—Sec. 16, *ibid.*

937. It shall not be lawful for the secretary of either of the executive departments to employ attorneys or counsel at the expense of the United States; but such departments, when in need of counsel or advice, shall call upon the department of justice, the officers of which shall attend to the same; and no counsel or attorney fees shall hereafter be allowed to any person or persons, besides the respective district attorneys and assistant district attorneys, for services in such capacity to the United States or any branch or department of the government thereof, unless hereafter authorized by law, and then only on the certificate of the attorney-general that such services were actually rendered, and that the same could not be performed by the attorney-general, or solicitor-general, or the officers of the department of justice, or by the district attorneys. And every attorney and counselor who shall be specially retained, under the authority of the department of justice, to assist in the trial of any case in which the government is interested, shall receive a commission from the head of said department, as a special assistant to the attorney-general or to some one of the district attorneys, as the nature of the appointment may require, and shall take the oath required by law to be taken by the district attorneys, and shall be subject to all the liabilities imposed upon such officers by law.—Sec. 17, *ibid.*

DETAILS.

938. Hereafter details to special service shall only be made with the consent of the commanding officer of forces in the field; and enlisted men, now or hereafter detailed to special service, shall not receive any extra pay for such services beyond that allowed to other enlisted men.[7]—Sec. 35, March 3, 1863, chap. 75.

EIGHT-HOUR LAW.

939. Eight hours shall constitute a day's work for all laborers, workmen, and mechanics now employed, or who may be hereafter

[7] In so far as this act prohibits extra pay to men detailed on extra duty, it has been repealed by the act of 1866. See Chap. viii., ¶ 248. The first clause is probably inoperative in time of peace.

employed, by or on behalf of the government of the United States; and that all acts and parts of acts inconsistent with this act be and the same are hereby repealed.[8]—June 25, 1868, chap. 72.

FLAGS, STANDARDS, AND COLORS.

940. That, from and after the 4th day of July next, the flag of the United States be thirteen horizontal stripes, alternate red and white; that the union be twenty stars, white in a blue field.[9]—Sec. 1, April 4, 1818, chap. 34.

941. That, on the admission of every new State into the Union, one star be added to the union of the flag; and that such addition shall take effect on the 4th day of July then next succeeding such admission.—Sec. 2, *ibid.*

942. That the secretaries of the war and navy departments be and they are hereby directed to cause to be collected and transmitted to them, at the seat of the government of the United States, all such flags, standards, and colors as shall have been, or may hereafter be, taken by the army and navy of the United States from their enemies. —Sec. 1, April 18, 1814, chap. 78.

943. That all the flags, standards, and colors, of the description aforesaid, which are now in the possession of the departments aforesaid, and such as may be hereafter transmitted to them, be, with all convenient dispatch, delivered to the President of the United States, for the purpose of being, under his direction, preserved and displayed in such public place as he shall deem proper.—Sec. 2, *ibid.*

IMPRISONMENT FOR DEBT.

944. No non-commissioned officer, musician, or private shall be

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[8] No reduction shall be made in the wages paid by the government by the day to such laborers, workmen, and mechanics, on account of such reduction of the hours of labor.—President's Proclamation, May 19, 1869. See also G. O. No. 46, A.-G. O., 1868.

The act does not apply to enlisted men sentenced to hard labor.—Adjutant-general, September 17, 1869.

[9] THE NATIONAL COLORS are not to be "*dipped*" to any vessel. It is usual for foreign ships of war intending to salute the flag to give notice to the commanding officer of the post where such flag is flying. The latter returns the salute, gun for gun, but no salute should be returned except to a vessel of war.—Adjutant-general, March 9, 1871.

(*a.*) *The hospital* and *ambulance flags* of the army are established as follows: for general hospitals, yellow bunting nine by five feet, with the letter H, twenty-four inches long, of green bunting, in centre.

For post and field hospitals, yellow bunting six by four feet, with letter H, twenty-four inches long, of green bunting, in centre.

For ambulances and guidons to mark the way to field hospitals, yellow bunting fourteen by twenty-eight inches, with a border, one inch deep, of green.—G. O. No. 9, A.-G. O., 1864.

arrested, or subject to arrest, or be taken in execution for any debt, under the sum of twenty dollars, contracted before enlistment, nor for any debt contracted after enlistment.[10]—Sec. 23, March 16, 1802, chap. 9.

INSURRECTIONARY STATES.

945. Whenever[11] the President, in pursuance of the provisions of the 2d section of the act entitled "An act to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions, and to repeal the act now in force, for that purpose," approved February 28, 1795,[11a] shall have called forth the militia to suppress combinations against the laws of the United States, and to cause the laws to be duly executed, and the insurgents shall have failed to disperse by the time directed by the President, and when said insurgents claim to act under the authority of any State or States, and such claim is not disclaimed or repudiated by the persons exercising the functions of government in such State or States, or in the part or parts thereof in which said combination exists, nor such insurrection suppressed by said State or States, then and in such case it may and shall be lawful for the President, by proclamation, to declare that the inhabitants of such State, or any section or part thereof, where such insurrection exists, are in a state of insurrection against the United States:[12] and thereupon all commercial intercourse by and between the same and the citizens thereof and the citizens of the rest of the United States shall cease and be unlawful so long as such condition of hostility shall continue; and all goods and chattels, wares and merchandise, coming from said State or section into the other parts of the United States, and all proceeding to such State or section, by land or water, shall, together with the vessel or vehicle conveying the same, or conveying persons to or from such State or section, be forfeited to the United States. *Provided however*, That the President[13] may, in his discretion, license and permit commercial intercourse with any such part of said State or section, the inhabitants

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[10] This section continues in force under provisions of sec. 7, act of March 3, 1815. See Chap. xvii., ¶ 492.

[11] This is not a temporary act. See 3 Wallace, 617.

(*a.*) This section referred to was repealed and supplied by the act of July 29, 1861. See ¶ ¶ 802, 814.

[12] When the President has declared a State or part thereof to be in insurrection, the courts must hold that this condition continues until he declares the contrary.—*United States* v. *Probasco*, 11 Law Reports, 419.

[13] The President alone has authority to authorize such intercourse (5 Wallace, 630; 6 *ibid.*, 521), and his authority finds limitation in ¶ 949.

of which are so declared in a state of insurrection, in such articles, and for such time, and by such persons, as he, in his discretion, may think most conducive to the public interest; and such intercourse, so far as by him licensed, shall be conducted and carried on only in pursuance of rules and regulations prescribed by the secretary of the treasury. And the secretary of the treasury may appoint such officers at places where officers of the customs are not now authorized by law as may be needed to carry into effect such licenses, rules, and regulations; and officers of the customs and other officers shall receive for services under this section, and under said rules and regulations, such fees and compensation as are now allowed for similar service under other provisions of law.—Sec. 5, July 13, 1861, chap. 3.

946. The power of the President to declare the inhabitants of any State, or any part thereof, in a state of insurrection, as provided in the 5th section of the act to which this is an addition, shall extend to and include the inhabitants of any State, or part thereof, where such insurrection against the United States shall be found by the President at any time to exist.—July 31, 1861, chap. 32.

947. The prohibitions and provisions of the act approved July 13, 1861 [¶ 945], and of the acts amendatory or supplementary thereto, shall apply to all commercial intercourse by and between persons residing or being within districts within the present or future lines of national military occupation in the States or parts of States declared in insurrection, whether with each other or with persons residing or being within districts declared in insurrection and not within those lines; and that all persons within the United States, not native or naturalized citizens thereof, shall be subject to the same prohibitions, in all commercial intercourse with inhabitants of States or parts of States declared in insurrection, as citizens of loyal States are subject to under the said act or acts.—Sec. 4, July 2, 1864, chap. 225.

948. Whenever any part of a loyal State shall be under the control of insurgents, or shall be in dangerous proximity to places under their control, all commercial intercourse therein and therewith shall be subject to the same prohibitions and conditions as are created by the said acts, as to such intercourse between loyal and insurrectionary States, for such time and to such extent as shall, from time to time, become necessary to protect the public interests, and be directed by the secretary of the treasury, with the approval of the President.—Sec. 5, *ibid.*

949. So much of sec. 5 of the act of 13th of July, 1861 [¶ 945], aforesaid, as authorizes the President, in his discretion, to license or permit commercial relations in any State or section the inhabitants of which are declared in a state of insurrection, is hereby repealed, except so far as may be necessary to authorize supplying the necessities of loyal persons residing in insurrectionary States, within the lines of actual occupation by the military forces of the United States, as indicated by published order of the commanding general of the department or district so occupied; and, also, except so far as may be necessary to authorize persons residing within such lines to bring or send to market in the loyal States any products which they shall have produced with their own labor or the labor of freedmen or others employed and paid by them, pursuant to rules relating thereto, which may be established under proper authority. And no goods, wares, or merchandise shall be taken into a State declared in insurrection, or transported therein, except to and from such places, and to such monthly amounts, as shall have been previously agreed upon in writing by the commanding general of the department in which such places are situated, and an officer designated by the secretary of the treasury for that purpose.—Sec. 9, July 2, 1864, chap. 225.

950. If, during the present or any future insurrection against the government of the United States, after the President of the United States shall have declared, by proclamation, that the laws of the United States are opposed, and the execution thereof obstructed, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the power vested in the marshals by law, any person or persons, his, her, or their agent, attorney, or employee, shall purchase or acquire, sell or give any property of whatsoever kind[14] or description, with intent to use or employ the same, or suffer the same to be used or employed, in aiding, abetting, or promoting such insurrection or resistance to the laws, or any person or persons engaged therein; or if any person or persons, being the owner or owners of any such property, shall knowingly use or employ, or consent to the use or employment of the same as aforesaid, all such property is hereby declared to be lawful subject of prize and capture wherever found; and it shall be the duty of the President of the United States to cause the same to be seized, confiscated, and condemned.—Sec. 1, August 6, 1861, chap. 60.

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[14] This act embraces all descriptions of property, real or personal, on land or water. —*Union Insurance Company* v. *United States*, 6 Wallace, 759.

951. It shall be the duty of every officer or private of the regular or volunteer forces of the United States, or any officer, sailor, or marine in the naval service of the United States upon the inland waters of the United States, who may take or receive any such abandoned property,[15] or cotton, sugar, rice, or tobacco, from persons in such insurrectionary districts, or have it under his control, to turn the same over to an agent appointed as aforesaid, who shall give a receipt therefor; and in case he shall refuse or neglect so to do, he shall be tried by a court-martial and shall be dismissed from the service, or, if an officer, reduced to the ranks, or suffer such other punishment as said court shall order, with the approval of the President of the United States.—Sec. 6, March 12, 1863, chap. 120.

952. The 1st section of the "act to provide for the collection of abandoned property and for the prevention of fraud in insurrectionary districts of the United States," approved March 12, 1863,[16] is hereby extended so as to include the descriptions of property mentioned in an act entitled "An act further to provide for the collection of duties on imports, and for other purposes," approved July 13, 1861,[17] and an act entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes," approved July 17, 1862,[18] respectively; and that the sales provided for in said act first mentioned may be made at such places as may be designated by the secretary of the treasury. And sec. 6[19] of said first-mentioned act is hereby amended so as to include every description of property mentioned in the acts of July

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[15] This section amended so as to embrace any kind of property mentioned in ¶ 945, and the "estates and property, moneys, stocks, and credits of such persons" as incur the forfeitures prescribed in act of July 17, 1862. See ¶ 952, and its notes.

(*a.*) Sec. 7 of this act provided that none of the provisions of the act should apply to any lawful maritime prize made by our naval forces; but in sec. 7 of the amendatory act of July 2, 1864 (chap. 225), it is enacted: "That no property, seized or taken upon any of the inland waters of the United States by the naval forces thereof, shall be regarded as maritime prize; but all property so seized or taken shall be promptly delivered to the proper officers of the courts, or as provided in this act and in the said act approved March 12, 1863" [¶ 951].

[16] Enacting, "That it shall be lawful for the secretary of the treasury, from and after the passage of this act, as he shall, from time to time, see fit, to appoint a special agent or agents to receive and collect all abandoned or captured property in any State or Territory, or any portion of any State or Territory of the United States, designated as in insurrection against the lawful government of the United States by proclamation of the President of July 1, 1862. *Provided*, That such property shall not include any kind or description which has been used, or which was intended to be used, for waging or carrying on war against the United States, such as arms, ordnance, ships, steamboats, or other water craft, and the furniture, forage, military supplies, or munitions of war."

[17] See sec. quoted in ¶ 945.

[18] Which, however, became inoperative after suppression of the late rebellion.

[19] In ¶ 951.

13, 1861, and July 17, 1862, aforesaid; and that all property, real or personal, described in the acts to which this is in addition, shall be regarded as abandoned when the lawful owner thereof shall be voluntarily absent therefrom, and engaged, either in arms or otherwise, in aiding or encouraging the rebellion.—Sec. 3, July 2, 1864, chap. 225.

953. All officers and privates of the regular and volunteer forces of the United States, and all officers, sailors, and marines in the naval service, are hereby prohibited from buying or selling, trading, or in any way dealing in the kind or description of property mentioned in this act, and the act to which this is an addition,[20] whereby to receive or expect any profit, benefit, or advantage to himself, or any other person, directly or indirectly connected with him; and it shall be the duty of such officer, private, sailor, or marine, when such property shall come into his possession or custody, or within his control, to give notice thereof to some agent appointed by virtue of this act, and to turn the same over to such agent without delay: any officer of the United States, civil, military, or naval, or any sutler, soldier, marine, or other person, who shall violate any provision of this act, or who shall take, or cause to be taken, into a State declared to be in insurrection, or to any other point to be thence taken into such State, or who shall transport or sell, or otherwise dispose of therein, any goods, wares, or merchandise whatsoever, except in pursuance of license and authority of the President, as provided in said 5th section of the act of July 13, 1861, aforesaid [¶ 945], and any officer or other person aforesaid who shall make any false statement or representation upon which license and authority shall be granted for such transportation, sale, or other disposition, and any officer or other person aforesaid who shall, under any license or authority obtained, willfully and knowingly transport, sell, or otherwise dispose of, any other goods, wares, or merchandise, than such as are in good faith so licensed and authorized, or shall willfully and knowingly transport, sell, or dispose of the same or any portion thereof, in violation of the terms of such license or authority, or of any rule or regulation prescribed by the secretary of the treasury concerning the same, or shall be guilty of any act of embezzlement, of willful misappropriation of public or private money or property, of keeping false accounts, or of willfully making any false returns, or of any other act amounting to a felony, shall be liable to indictment as

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[20] The property referred to as mentioned in this, and in former acts, is described in ¶¶ 945–952, and in notes 17, 18; and, under 2d section of the act of 1864, includes "the abandoned lands, houses, and tenements" within the insurrectionary districts.

for a misdemeanor, and fine not exceeding five thousand dollars, and to punishment in the penitentiary not exceeding three years, before any court, civil or military, competent to try the same.[21] And it shall be the duty of the secretary of the treasury, from time to time, to institute such investigations as may be necessary to detect and prevent frauds and abuses in the trade and other transactions contemplated by this act, or by the acts to which this is supplementary. And the agents making such investigations shall have power to compel the attendance of witnesses, and to make examinations on oath.—Sec. 10, *ibid.*

MARINE CORPS.

954. The marine corps established by this act shall, at any time, be liable to do duty in the forts and garrisons of the United States on the sea-coast, or any other duty on shore, as the President, at his discretion, shall direct.[22]—Sec. 6, July 11, 1798, chap.

955. The said corps shall, at all times, be subject to, and under the laws and regulations which are or may hereafter be established for the better government of the navy, except when detached for service with the army by order of the President of the United States.—Sec. 2, June 30, 1834, chap.

NAVAL REQUISITIONS.

956. It shall be the duty of the several officers of the staff of the army of the United States to provide the officers, seamen, and marines of the navy of the United States, when acting or proceeding to act on shore, in co-operation with the land troops, upon the requisition of the commanding naval or marine officer of any such detachment of seamen or marines under orders to act as aforesaid, with rations; also the officers and seamen with camp equipage according to the relative rank and station of each, and the military regulations in like cases, together with the necessary transportation, as well for the men as for their baggage, provisions, and cannon.

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[21] Query, how far this act qualifies the statutes in ¶ ¶ 51–53, 74, 75, 77, 78, and 749? (*a.*) See also ¶ 82.

[22] The order directing it to this duty should pass through the secretary of the navy; but, when the President incorporated it with an army for any given service on land, its identity as a marine corps is, for the occasion, lost in that of the army, and orders may be passed to it through the war department.—1 Opinions, 380.

(*a.*) Officers of the army and of the marine corps may transfer, in cases where the rank of other officers will not be prejudiced; but such exchanges can be effected only by action of the President, by and with the advice and consent of the Senate.—11 Opinions, 355.

(*b.*) Officers of the marine corps on same footing as to rank as army officers: see ¶ 517.

Provided nevertheless, That the contract price of the rations which may be furnished shall be reimbursed out of the appropriations for the support of the navy.—Sec. 1, December 13, 1814, chap. 13.

957. The respective quartermasters of the army shall, upon the requisition of the commanding naval officer of any such detachment of seamen or marines, furnish the said officer and his necessary aides with horses, accoutrements, and forage during the time they may be employed in co-operating with the land troops as aforesaid.—Sec. 2, *ibid.*

OBSTRUCTION OF HARBORS.

958. That the President be and he is hereby authorized, whenever the same shall be deemed necessary for the defense and security of any of the ports and harbors of the United States, to cause to be hired or purchased, hulks, or other means of impediment to the entrance of the ships or vessels of the enemy, to be sunk with the consent[23] of the proper authority of the State in which such port or harbor may be, and the same to be removed whenever in his opinion it may be done with safety to such ports or harbors.—Sec. 1, July 16, 1813, chap. 13.

OFFICE HOURS.

959. From the 1st of the month of October until the 1st day of the month of April, in each and every year, the general land-office and all the bureaus and offices therein, as well as all those in the departments of the treasury, war, navy, state, and general post-office, shall be open for the transaction of the public business at least eight hours in each and every day, except Sundays and the 25th day of December; and from the 1st day of April until the 1st day of October, in each year, all the aforesaid offices and bureaus shall be kept open for the transaction of the public business at least ten hours in each and every day, except Sundays and the 4th day of July.—Sec. 12, July 4, 1836, chap. 352.

960. The postmaster-general may provide by regulation for transmitting unpaid and duly certified letters of soldiers, sailors, and marines in the service of the United States, to their destination.[24]—Sec. 155, June 8, 1872, chap. 335.

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[23] But if the proper State authorities should not consent to such obstruction of the ports and harbors of the United States?

[24] All domestic letters, deposited in the post-office, on which the postage is wholly unpaid or paid less than one rate, except letters lawfully free, and duly certified letters of soldiers, sailors, and marines in the service of the United States, are to be sent to the dead-letter office, in accordance with sec. 195 of same act.

961. Packages of woolen, cotton, or linen clothing, not exceeding two pounds in weight, may be sent through the mail to any non-commissioned officer or private in the army of the United States, if prepaid, at the rate of one cent for each ounce or fraction thereof, subject to such regulation as the postmaster-general may prescribe.—Sec. 164, *ibid.*

962. Authority to frank mail-matter is conferred upon and limited to the following persons: . . . .

Third. The chiefs of the several executive departments. . . .

Fifth. Such principal officers of the executive departments, being heads of bureaus or chief clerks, as the postmaster-general may by regulation prescribe, to cover official communications only. . . .

And no person entitled by law to the franking privilege shall exercise said privilege otherwise than by his written autograph signature on the matter franked; and all mail-matter not thus franked shall be charged with the legal rates of postage thereon.[25] —Sec. 180, *ibid.*

963. The following mail-matter shall be allowed to pass free in the mail: . . . .

Second. Official communications addressed to chiefs, heads of bureaus, chief clerks, or franking officer of either of the executive departments. . . . .

Eleventh. Medals, certificates of thanks, or other testimonials, which have been, or may be, awarded, by the legislatures of the several States and Territories, to the soldiers thereof, to be sent by the adjutant-generals of said States and Territories, under such regulations as the postmaster-general may prescribe.—Sec. 184, *ibid.*

PRINTING.

964. It shall not be lawful for the officer or person in charge of any bureau or office in any of the departments of the government to print or cause to be printed, at the public expense, any report he may make to the President of the United States, or to

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[25] POSTAGE ACCOUNTS.—"Each officer of the army will keep a postage memorandum-book, in which will be entered all official postage paid by him, giving, in each case, the amount, date, and address of the person to whom sent, or from whom received.

"In rendering his account to the paymaster for reimbursement, he need only state the aggregate sum charged for the period embraced. But in certifying the correctness of his account in the usual form, he shall add 'the sum charged is the true amount as verified by my postage-book.'

"Officers will preserve their postage-books, to be produced when called for, as they may become subjects of useful reference to establish facts, dates," etc.—G. O. No. 121, A.-G. O., Dec. 2, 1870.

the head of any of the departments.[26]—Sec. 8, August 31, 1852, chap. 108.

965. All printing of any kind ordered by the executive departments shall be executed by the government printer, when practicable, and if not, at such office as may be designated by the clerk of the House of Representatives, at rates not exceeding the current rates for such printing.—Sec. 10, March 2, 1867, chap. 167.

966. All necessary letter-press printing and book-binding,[27] in all the departments and bureaus, shall be done and executed at the government printing-office, and not elsewhere, except registered bonds and written records, which may be bound as heretofore at the departments.—Sec. 1, July 20, 1868, chap. 177.

967. No printing shall be hereafter executed except on written order under the direction of heads of departments, or by the two houses of Congress, as authorized by law.[27d]—Sec. 1, March 3, 1871, chap. 115.

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[26] Such documents as accompany the secretary's annual report are, however, upon his requisition, printed by the public printer, to whom they must be transmitted, by the secretary, on or before the 1st of November in each year. Sec. 1, March 14, and sec. 1, June 25, 1864. And the secretary's report is to be furnished to the public printer on or before the third Monday in November in each year.—Sec. 3, June 25, 1864.

[27] "And binding and all blank books" ordered by the heads of departments, or of the bureaus thereof, to be executed under the direction of the public printer.—Sec. 5, June 23, 1860.

(*a.*) And "payments of public money for government printing or binding not done at the government printing-office, according to the provision of the act of July 20 [¶ 966], 1868, shall not be allowed by the accounting officers of the government."—Proviso in sec. 1, March 3, 1869, chap. 121.

(*b.*) "After the 30th day of June, 1872, it shall be the duty of each head of an executive department of the government, and of all other public officers who have heretofore had printing and binding done at the congressional printing-office for the use of their respective departments or public offices, to include in their annual estimates for appropriations for the next fiscal year such sum or sums as may to them seem necessary 'for printing and binding, to be executed under the direction of the congressional printer.'"—Sec. 2, May 8, 1872.

(*c.*) And "it shall be the duty of the congressional printer, when Congress shall have made an appropriation for any department or public office, to be expended 'for printing and binding, to be executed under the direction of congressional printer,' to cause an account to be opened with each of said departments or public offices, on which he shall charge, for all printing and binding ordered by the heads of said departments or public offices, in accordance with the schedule of prices established in accordance with law, and it shall not be lawful for him to cause to be executed any printing or binding the value whereof shall exceed the amount appropriated for such purpose."—Sec. 3, *ibid.*

(*d.*) Bills for JOB PRINTING must be submitted to the war department prior to payment, and orders authorizing such printing are not to be construed as authorizing payment of the bills therefor, until audited and approved according to the regulations of August 1, 1870, from the war department, which may be obtained on application to the chief clerk of that department.

(*e.*) All acts prescribing and limiting the number of congressional documents to be printed for the use of any head of department or public office have been repealed by sec. 4, May 8, 1872.

RAILROADS AND TELEGRAPH LINES.

968. That the President of the United States, when in his judgment the public safety may require it, be and he is hereby authorized to take possession of any or all the telegraph lines in the United States, their offices and appurtenances; to take possession of any or all the railroad lines in the United States, the rolling stock, their offices, shops, buildings, and all their appendages and appurtenances; to prescribe rules and regulations for the holding, using, and maintaining of the aforesaid telegraph and railroad lines, and to *extend*, repair, *and complete*[28] the same, in the manner most conducive to the safety and interest of the government; to place under military control all the officers, agents, and employees belonging to the telegraph and railroad lines thus taken possession of by the President, so that they shall be considered as a post road and a part of the military establishment of the United States, subject to all the restrictions imposed by the Rules and Articles of War.—Sec. 1, January 31, 1862, chap. 15.

969. Any attempt by any party or parties whomsoever, in any State or district in which the laws of the United States are opposed or the execution thereof obstructed by insurgents and rebels against the United States, too powerful to be suppressed by the ordinary course of judicial proceedings, to resist or interfere with the unrestrained use by government of the property described in the preceding section, or any attempt to injure or destroy the property aforesaid, shall be punished as a military offense, by death, or such other penalty as a court-martial may impose.—Sec. 2, *ibid.*

970. Three commissioners shall be appointed by the President of the United States, by and with the advice and consent of the Senate, to assess and determine the damages suffered, or the compensation to which any railroad or telegraph company may be entitled by reason of the railroad or telegraph line being seized and used under the authority conferred by this act, and their award shall be submitted to Congress for their action.—Sec. 3, *ibid.*

971. The compensation of each of the commissioners aforesaid shall be eight dollars per day while in actual service; and that the provisions of this act, so far as it relates to the operating and using

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[28] This act is not to be construed as authorizing the construction of any railroad, and so much thereof as authorizes the extension or completion of any such road is repealed.—Joint Resolution, July 14, 1862.

said railroads and telegraphs, shall not be in force any longer than is necessary for the suppression of this rebellion.[29]—Sec. 5, *ibid.*

972. Any telegraph company now organized, or which may hereafter be organized under the laws of any State in this Union, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by act of Congress, and over, under, or across the navigable streams or waters of the United States. *Provided,* That such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads. And any of said companies shall have the right to take and use from such public lands the necessary stone, timber, and other materials for its posts, piers, stations, and other needful uses in the construction, maintenance, and operation of said lines of telegraph, and may pre-empt and use such portion of the unoccupied public lands subject to pre-emption through which its said lines of telegraph may be located as may be necessary for its stations, not exceeding forty acres for each station; but such stations shall not be within fifteen miles of each other.—Sec. 1, July 24, 1866, chap. 230.

973. Telegraphic communications between the several departments of the government of the United States and their officers and agents shall, in their transmission over the lines of any of said companies, have priority over all other business, and shall be sent at rates[30] to be annually fixed by the postmaster-general.—Sec. 2, *ibid.*

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[29] That Congress intended to limit the power of the President to the then existing rebellion is inferred from the fact, that, though the act may, in terms, give him the right to take possession of railroads and telegraphs *upon a future emergency,* it *expressly* deprives him of authority, in such case, *to operate and use them.*

The latter clause of sec. 5 is not a negative pregnant of the President's continuing authority to take possession, but of the continuing authority of the commissioners to assess and determine damages, of courts-martial to punish offenders not yet caught or tried, etc. "*Ratione cessante lex ipsa cessat.*"

[30] SCHEDULE OF RATES (for the year ending June 30, 1873).—"The rate for all telegraphic communications known as the signal service messages and reports shall be three cents for each word of said reports and messages for each circuit over which it may pass in accordance with the schedule of circuits and plans of the chief signal officer of the army, which are now adopted, or may hereafter be adopted, by him for transmitting these dispatches, or such part thereof as he may designate, in such words or ciphers as may, from time to time, be directed by him. The amount thus estimated is to be taken in full payment for said dispatches, no additional allowance to be made for drops, office messages, or other services or special facilities required by the chief signal officer for the correct and prompt transmission of said signal service messages and reports.

The rate for all telegraphic communications, sent otherwise than over circuits estab-

974. The rights and privileges hereby granted shall not be transferred by any company acting under this act to any other corporation, association, or person. *Provided, however*, That the United States may at any time, after the expiration of five years from the date of the passage of this act, for postal, military, or other purposes, purchase all the telegraph lines, property, and effects of any or all of said companies at an appraised value, to be ascertained by five competent disinterested persons, two of whom shall be selected by the postmaster-general of the United States, two by the company interested, and one by the four so previously selected.—Sec. 3, *ibid.*

975. Before any telegraph company shall exercise any of the powers or privileges conferred by this act, such company shall file their written acceptance with the postmaster-general of the restrictions and obligations required by this act.—Sec. 4, *ibid.*

976. No part of this appropriation,[31] nor of any appropriation for the several departments of the government, shall be paid to any telegraphic company which shall neglect or refuse to transmit telegraphic communications between said departments, their officers, agents, or employees, under the provisions of the 2d section of chap. 230 of the statutes of the United States for the year 1866, and at rates of compensation therefor to be established by the postmaster-general. *Provided also*, That whenever any telegraph company shall have filed its written acceptance with the postmaster-general, of the restrictions and obligations required by the act approved July 24, 1866, entitled "An act to aid in the construction of telegraph lines, and to secure to the government the use of the same, for postal, military, and other purposes," if such company, its agents, or employees shall hereafter refuse or neglect to transmit any such telegraphic communications as are provided for by the aforesaid act,

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lished as aforesaid, shall be as follows, viz.: one cent per word for each circuit through which it shall be transmitted, said rate to be computed subject to the following conditions, viz.:

A distance of two hundred and fifty miles, as computed by the tables of the post-office department, shall be deemed a circuit.

If, in computing circuits, there shall be found one or more circuits and a fraction of a circuit, such fraction shall be deemed a circuit.

If a communication shall be sent a distance less than two hundred and fifty miles, that distance shall be deemed a circuit.

All words of the communication transmitted are to be counted, excepting the date and place at which such communication is filed; all messages of less than twenty-five words, address and signature included, shall be rated as if containing twenty-five words, and all messages exceeding twenty-five words shall be rated by the exact number of words they contain, address and signature included."—Postmaster-general, June 29, 1872.

[31] Signal service for year ending June 30, 1873.

or by the joint resolution approved the 9th day of February, 1870, "to authorize the secretary of war to provide for taking meteorological observations at the military stations and other points of the interior of the continent, and for giving notice on the northern lakes and seaboard of the approach and force of storms," such telegraphic company shall forfeit and pay to the United States not less than one hundred and not exceeding one thousand dollars for each refusal or neglect aforesaid, to be recovered by an action or actions at law, in any district court of the United States.—Sec. 1, June 10, 1872, chap.

TRUSSES.

977. Every soldier of the Union army who was ruptured while in the line of duty, during the late war for the suppression of the rebellion, shall be entitled to receive a single or double truss of such style as may be designated by the surgeon-general of the United States army as the best suited for such disability.—Sec. 1, May 28, 1872, chap. 228.

978. Application for such truss shall be made by the ruptured soldier to an examining surgeon for pensions, whose duty it shall be to examine such applicant, and for every such applicant, found to have a rupture or hernia, shall prepare and forward to the surgeon-general an application for such truss, without charge to the soldier.—Sec. 2, *ibid.*

979. The surgeon-general of the United States army is hereby authorized and directed to purchase and procure the number of trusses which may be required for distribution to such disabled soldiers, at a price not greater than the same are sold to the trade at wholesale; and the cost of the same shall be paid, upon the requisition of the surgeon-general, out of any moneys in the treasury not otherwise appropriated.—Sec. 3, *ibid.*

APPENDIX.

DECISIONS OF THE FEDERAL COURTS.

SUPREME COURT OF THE UNITED STATES.

STEPHEN V. R. ABLEMAN, *Plaintiff in Error*, v. SHERMAN M. BOOTH; *and* THE UNITED STATES, *Plaintiff in Error*, v. SHERMAN M. BOOTH.

1001. The process of a State court or judge has no authority beyond the limits of the sovereignty which confers the judicial power.

A habeas corpus, issued by a State judge or court, has no authority within the limits of the sovereignty assigned by the Constitution to the United States. The sovereignty of the United States and of a State are distinct and independent of each other within their respective spheres of action, although both exist and exercise their powers within the same territorial limits.

When a writ of habeas corpus is served on a marshal or other person having a prisoner in custody under the authority of the United States, it is his duty, by a proper return, to make known to the State judge or court the authority by which he holds him. But, at the same time, it is his duty not to obey the process of the State authority, but to obey and execute the process of the United States.

This court has appellate power in all cases arising under the Constitution and laws of the United States, with such exceptions and regulations as Congress may make, whether the cases arise in a State court or an inferior court of the United States. And, under the act of Congress of 1789, when the decision of the State court is against the right claimed under the Constitution or laws of the United States, a writ of error will lie to bring the judgment of the State court before this court for re-examination and revision.

THESE two cases were brought up from the supreme court of the State of Wisconsin by a writ of error issued under the 25th sec. of the judiciary act.

The facts are stated in the opinion of the court.[1]

They were argued by Mr. Black (attorney-general) for the plaintiffs in error, no counsel appearing for the defendant.

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[1] The narrative of these cases omitted as unimportant in view of the distinct enunciation by the court of the general principles involved. These cases are reported in 21 Howard, and a synopsis of the facts may be found in ¶ ¶ 1032, 1033.

Mr. Chief Justice TANEY delivered the Opinion of the Court.

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1002. It will be seen, from the foregoing statement of facts, that a judge of the supreme court of the State of Wisconsin in the first of these cases claimed and exercised the right to supervise and annul the proceedings of a commissioner of the United States, and to discharge a prisoner, who had been committed by the commissioner for an offense against the laws of this government, and that this exercise of power by the judge was afterwards sanctioned and affirmed by the supreme court of the State.

1003. In the second case, the State court has gone a step further, and claimed and exercised jurisdiction over the proceedings and judgment of a district court of the United States, and upon a summary and collateral proceeding, by habeas corpus, has set aside and annulled its judgment, and discharged a prisoner who had been tried and found guilty of an offense against the laws of the United States, and sentenced to imprisonment by the district court.

1004. And it further appears that the State court have not only claimed and exercised this jurisdiction, but have also determined that their decision is final and conclusive upon all the courts of the United States, and ordered their clerk to disregard and refuse obedience to the writ of error issued by this court, pursuant to the act of Congress of 1789, to bring here for examination and revision the judgment of the State court.

1005. These propositions are new in the jurisprudence of the United States, as well as of the States; and the supremacy of the State courts over the courts of the United States, in cases arising under the Constitution and laws of the United States, is now for the first time asserted and acted upon in the supreme court of a State.

1006. The supremacy is not, indeed, set forth distinctly and broadly, in so many words, in the printed opinions of the judges. It is intermixed with elaborate discussions of different provisions in the fugitive slave law, and of the privileges and power of the writ of habeas corpus. But the paramount power of the State court lies at the foundation of these decisions; for their commentaries upon the provisions of that law, and upon the privileges and power of the writ of habeas corpus, were out of place, and their judicial action upon them without authority of law, unless they had the power to revise and control the proceedings in the criminal case of which they were speaking; and their judgments, releasing the prisoner, and disregarding the writ of error from this court, can rest upon no other foundation.

1007. If the judicial power exercised in this instance has been reserved to the States, no offense against the laws of the United States can be punished by their own courts, without the permission and according to the judgment of the courts of the State in which the party happens to be imprisoned; for if the supreme court of Wisconsin possessed the power it has exercised in relation to offenses against the act of Congress in question, it necessarily follows that they must have the same judicial authority in relation to any other law of the United States; and, consequently, their supervising and

controlling power would embrace the whole criminal code of the United States, and extend to offenses against our revenue laws, or any other law intended to guard the different departments of the general government from fraud or violence. And it would embrace all crimes, from the highest to the lowest; including felonies, which are punished with death, as well as misdemeanors, which are punished by imprisonment. And, moreover, if the power is possessed by the supreme court of the State of Wisconsin, it must belong equally to every other State in the Union, when the prisoner is within its territorial limits; and it is very certain that the State courts would not always agree in opinion; and it would often happen, that an act which was admitted to be an offense, and justly punished, in one State, would be regarded as innocent, and indeed as praiseworthy, in another.

1008. It would seem to be hardly necessary to do more than state the result to which these decisions of the State courts must inevitably lead. It is, of itself, a sufficient and conclusive answer; for no one will suppose that a government which has now lasted nearly seventy years, enforcing its laws by its own tribunals, and preserving the union of the States, could have lasted a single year, or fulfilled the high trusts committed to it, if offenses against its laws could not have been punished without the consent of the State in which the culprit was found.

1009. The judges of the supreme court of Wisconsin do not distinctly state from what source they suppose they have derived this judicial power. There can be no such thing as judicial authority, unless it is conferred by a government or sovereignty; and if the judges and courts of Wisconsin possess the jurisdiction they claim, they must derive it either from the United States or the State. It certainly has not been conferred on them by the United States; and it is equally clear it was not in the power of the State to confer it, even if it had attempted to do so; for no State can authorize one of its judges or courts to exercise judicial power, by habeas corpus or otherwise, within the jurisdiction of another and independent government. And although the State of Wisconsin is sovereign within its territorial limits to a certain extent, yet that sovereignty is limited and restricted by the Constitution of the United States. And the powers of the general government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge or a State court, as if the line of division was traced by landmarks and monuments visible to the eye. And the State of Wisconsin had no more power to authorize these proceedings of its judges and courts, than it would have had if the prisoner had been confined in Michigan, or in any other State of the Union, for an offense against the laws of the State in which he was imprisoned.

1010. It is, however, due to the State to say, that we do not find this claim of paramount jurisdiction in the State courts over the courts of the United States asserted or countenanced by the constitution or laws of the

State. We find it only in the decisions of the judges of the supreme court. Indeed, at the very time these decisions were made, there was a statute of the State which declares that a person brought up on a habeas corpus shall be remanded, if it appears that he is confined:

"1st. By virtue of process, by any court or judge of the United States, in a case where such court or judge has exclusive jurisdiction; or,

"2d. By virtue of the final judgment or decree of any competent court of civil or criminal jurisdiction."—Revised Statutes of the State of Wisconsin, 1849, chap. 124, p. 629.

Even, therefore, if these cases depended upon the laws of Wisconsin, it would be difficult to find in these provisions such a grant of judicial power as the supreme court claims to have derived from the State.

1011. But, as we have already said, questions of this kind must always depend upon the Constitution and laws of the United States, and not of a State. The Constitution was not formed merely to guard the States against danger from foreign nations, but mainly to secure union and harmony at home; for if this object could be attained, there would be but little danger from abroad; and to accomplish this purpose it was felt by the statesmen who framed the Constitution, and by the people who adopted it, that it was necessary that many of the rights of sovereignty which the States then possessed should be ceded to the general government; and that, in the sphere of action assigned to it, it should be supreme, and strong enough to execute its own laws by its own tribunals, without interruption from a State or from State authorities. And it was evident that anything short of this would be inadequate to the main objects for which the government was established; and that local interests, local passions or prejudices, incited and fostered by individuals for sinister purposes, would lead to acts of aggression and injustice by one State upon the rights of another, which would ultimately terminate in violence and force, unless there was a common arbiter between them, armed with power enough to protect and guard the rights of all, by appropriate laws, to be carried into execution peacefully by its judicial tribunals.

1012. The language of the Constitution, by which this power is granted, is too plain to admit of doubt or to need comment. It declares that "this Constitution, and the laws of the United States which shall be passed in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

1013. But the supremacy thus conferred on this government could not peacefully be maintained, unless it was clothed with judicial power, equally paramount in authority, to carry it into execution; for if left to the courts of justice of the several States, conflicting decisions would unavoidably take place, and the local tribunals could hardly be expected to be always free from the local influences of which we have spoken. And the Constitution and laws and treaties of the United States, and the powers granted to the fed-

eral government, would soon receive different interpretations in different States, and the government of the United States would soon become one thing in one State and another thing in another. It was essential, therefore, to its very existence as a government, that it should have the power of establishing courts of justice, altogether independent of State power, to carry into effect its own laws; and that a tribunal should be established in which all cases which might arise under the Constitution and laws and treaties of the United States, whether in a State court or a court of the United States, should be finally and conclusively decided. Without such a tribunal, it is obvious that there would be no uniformity of judicial decision; and that the supremacy (which is but another name for independence), so carefully provided in the clause of the Constitution above referred to, could not possibly be maintained peacefully, unless it was associated with this paramount judicial authority.

1014. Accordingly, it was conferred on the general government, in clear, precise, and comprehensive terms. It is declared that its judicial power shall (among other subjects enumerated) extend to all cases in law and equity arising under the Constitution and laws of the United States, and that in such cases, as well as the others there enumerated, this court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as Congress shall make. The appellate power, it will be observed, is conferred on this court in all cases or suits in which such a question shall arise. It is not confined to suits in the inferior courts of the United States, but extends to all cases where such a question arises, whether it be in a judicial tribunal of a State or of the United States. And it is manifest that this ultimate appellate power in a tribunal created by the Constitution itself was deemed essential to secure the independence and supremacy of the general government in the sphere of action assigned to it; to make the Constitution and laws of the United States uniform, and the same, in every State; and to guard against evils which would inevitably arise from conflicting opinions between the courts of a State and of the United States, if there was no common arbiter authorized to decide between them.

1015. The importance which the framers of the Constitution attached to such a tribunal, for the purpose of preserving internal tranquillity, is strikingly manifested by the clause which gives this court jurisdiction over the sovereign States which compose this Union, when a controversy arises between them. Instead of reserving the right to seek redress for injustice from another State by their sovereign powers, they have bound themselves to submit to the decision of this court, and to abide by its judgment. And it is not out of place to say here that experience has demonstrated that this power was not unwisely surrendered by the States; for in the time that has already elapsed since this government came into existence, several irritating and angry controversies have taken place between adjoining States, in relation to their respective boundaries, and which have sometimes threatened to end in force and violence, but for the power vested in this court to hear them and decide between them.

1016. The same purposes are clearly indicated by the different language employed when conferring supremacy upon the laws of the United States, and jurisdiction upon its courts. In the first case, it provides that "this Constitution, and the laws of the United States *which shall be made in pursuance thereof*, shall be the supreme law of the land, and obligatory upon the judges in every State." The words in italics show the precision and foresight which marks every clause in the instrument. The sovereignty to be created was to be limited in its powers of legislation, and if it passed a law not authorized by its enumerated powers, it was not to be regarded as the supreme law of the land, nor were the State judges bound to carry it into execution. And as the courts of a State, and the courts of the United States, might, and indeed certainly would, often differ as to the extent of the powers conferred by the general government, it was manifest that serious controversies would arise between the authorities of the United States and of the States, which must be settled by force of arms, unless some tribunal was created to decide between them finally and without appeal.

1017. The Constitution has accordingly provided, as far as human foresight could provide, against this danger. And in conferring judicial power upon the federal government, it declares that the jurisdiction of its courts shall extend to all cases arising under "this Constitution" and the laws of the United States,—leaving out the words of restriction contained in the grant of legislative power which we have above noticed. The judicial power covers every legislative act of Congress, whether it be made within the limits of its delegated powers, or be an assumption of power beyond the grants in the Constitution.

1018. This judicial power was justly regarded as indispensable, not merely to maintain the supremacy of the laws of the United States, but also to guard the States from any encroachment upon their reserved rights by the general government. And as the Constitution is the fundamental and supreme law, if it appears that an act of Congress is not pursuant to and within the limits of the power assigned to the federal government, it is the duty of the courts of the United States to declare it unconstitutional and void. The grant of judicial power is not confined to the administration of laws passed in pursuance to the provisions of the Constitution, nor confined to the interpretation of such laws; but, by the very terms of the grant, the Constitution is under their view when any act of Congress is brought before them, and it is their duty to declare the law void, and refuse to execute it, if it is not pursuant to the legislative powers conferred upon Congress. And as the final appellate power in all such questions is given to this court, controversies as to the respective powers of the United States and the States, instead of being determined by military and physical force, are heard, investigated, and finally settled with the calmness and deliberation of judicial inquiry. And no one can fail to see, that if such an arbiter had not been provided in our complicated system of government, internal tranquillity could not have been preserved; and if such controversies were left to arbitrament of physical force, our government, State and National, would

soon cease to be governments of laws, and revolutions by force of arms would take the place of courts of justice and judicial decisions.

1019. In organizing such a tribunal, it is evident that every precaution was taken, which human wisdom could devise, to fit it for the high duty with which it was intrusted. It was not left to Congress to create it by law; for the States could hardly be expected to confide in the impartiality of a tribunal created exclusively by the general government, without any participation on their part. And as the performance of its duty would sometimes come in conflict with individual ambition or interests, and powerful political combinations, an act of Congress establishing such a tribunal might be repealed in order to establish another more subservient to the predominant political influences or excited passions of the day. This tribunal, therefore, was erected, and the powers of which we have spoken conferred upon it, not by the federal government, but by the people of the States, who formed and adopted that government, and conferred upon it all the powers, legislative, executive, and judicial, which it now possesses. And in order to secure its independence, and enable it faithfully and firmly to perform its duty, it engrafted it upon the Constitution itself, and declared that this court should have appellate power in all cases arising under the Constitution and laws of the United States. So long, therefore, as this Constitution shall endure, this tribunal must exist with it, deciding in the peaceful forms of judicial proceeding the angry and irritating controversies between sovereignties, which in other countries have been determined by the arbitrament of force.

1020. These principles of constitutional law are confirmed and illustrated by the clause which confers legislative power upon Congress. That power is specifically given in Article I., sec. 8, ¶ 17, in the following words:

"To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

1021. Under this clause of the Constitution, it became the duty of Congress to pass such laws as were necessary and proper to carry into execution the powers vested in the judicial department. And in the performance of this duty the first Congress, at its first session, passed the act of 1789, chap. 20, entitled "An act to establish the judicial courts of the United States." It will be remembered that many of the members of the Convention were also members of this Congress, and it cannot be supposed that they did not understand the meaning and intention of the great instrument which they had so anxiously and deliberately considered, clause by clause, and assisted to frame. And the law they passed to carry into execution the powers vested in the judicial department of the government proves, past doubt, that their interpretation of the appellate powers conferred on this court was the same with that which we have now given; for by the 25th sec. of the act of 1789 Congress authorized writs of error to be issued from this court to a State court, whenever a right had been claimed under the Constitution

or laws of the United States and the decision of the State court was against it. And to make this appellate power effectual, and altogether independent of the action of State tribunals, this act further provides, that upon writs of error to a State court, instead of remanding the cause for a final decision in the State court, this court may at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution.

1022. These provisions in the act of 1789 tell us, in language not to be mistaken, the great importance which the patriots and statesmen of the first Congress attached to this appellate power, and the foresight and care with which they guarded its free and independent exercise against interference or obstruction by States or State tribunals.

1023. In the case before the supreme court of Wisconsin, a right was claimed under the Constitution and laws of the United States, and the decision was against the right claimed; and it refuses obedience to the writ of error, and regards its own judgment as final. It has not only reversed and annulled the judgment of the district court of the United States, but it has reversed and annulled the provisions of the Constitution itself, and the act of Congress of 1789, and made the superior and appellate tribunal the inferior and subordinate one.

1024. We do not question the authority of State court, or judge, who is authorized by the laws of the State to issue the writ of habeas corpus, to issue it in any case where the party is imprisoned within its territorial limits, provided it does not appear, when the application is made, that the person imprisoned is in custody under the authority of the United States. The court or judge has a right to inquire, in this mode of proceeding, for what cause and by what authority the prisoner is confined within the territorial limits of the State sovereignty. And it is the duty of the marshal, or other person having the custody of the prisoner, to make known to the judge or court, by a proper return, the authority by which he holds him in custody. This right to inquire by process of habeas corpus, and the duty of the officer to make a return, grows necessarily out of the complex character of our government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each within its sphere of action, prescribed by the Constitution of the United States, independent of the other. But, after the return is made, and the State judge or court judicially apprised that the party is in custody under the authority of the United States, they can proceed no further.[2] They

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[2] After quoting the whole of this paragraph (1024), Solicitor-general BRISTOW, acting as attorney-general, advises the secretary of war, under date of June 19, 1871, as follows:

"It is impossible to misunderstand the meaning of the court in this case, or to resist the clear and forcible logic of the eminent judge who delivered the opinion. Mr. Justice Nelson, in his charge to the grand jury, in the circuit court of the United States for the southern district of New York, in April, 1851, referring to the subject, uses the following language:

"'It is proper to say, in order to guard against misconstruction, that I do not claim

then know that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of habeas corpus, nor any other process issued under State authority, can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States. If he has committed an offense against their laws, their tribunals alone can punish him. If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress. And although, as we have said, it is the duty of the marshal, or other person holding him, to make known, by a proper return, the authority under which he detains him, it is at the same time imperatively his duty to obey the process

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the mere fact of the commitment or detainer of a prisoner by an officer of the federal government bars the issuing of this writ or the exercise of power under it. Far from that. Those officers may be guilty of illegal restraint of the liberty of the citizen, the same as others. The right of State authorities to inquire into such restraints is not doubted, and it is the duty of the officer to obey the authority by making a return. All that is claimed or contended for is, that when it is shown that the commitment or detainer is under the Constitution, or a law of the United States, or a treaty, the power of the State authority is at an end; and any further proceeding under the writ is coram non judice and void. In such a case, that is, when the prisoner is in fact held under process issued from a federal tribunal under the Constitution, or a law of the United States, or a treaty, it is the duty of the officer not to give him up, or allow him to pass from his hands in any stage of the proceedings. He should stand upon his process and authority, and, if resisted, maintain them with all the powers conferred upon him for that purpose.'

"Opinions to the same effect have been delivered by several of the judges of the United States, among the most able and notable of which is that of Judge Ballard, district judge of the United States for the district of Kentucky, in the case of ex rel. *Ferrand* v. *Fowler*, reported in 2 American Law Times Reports, p. 4, and 1 Abbott, 140-158.

"It seems quite clear then, that when a State judge is given to understand that the prisoner is held under authority of the United States, his jurisdiction is at an end, and all further proceeding on his part to enforce the surrender of the prisoner is, in the language of Mr. Justice Nelson, 'coram non judice and void.' It is not necessary that it shall be proved before the State judge that the party is in custody under *lawful* authority of the United States, for upon such proof being made no judge, not even a judge of a court of the United States, could discharge the prisoner. On the contrary, when it is made to appear by the return to the writ that the prisoner is held under the authority of the United States, it is then shown that he is within the jurisdiction of a sovereignty which for all the purposes of the case is wholly foreign to that represented by the State judge, and that the prisoner is entirely beyond his jurisdiction. Whether or not such return might be traversed, and an issue of fact made thereon before the State judge by the party on whose application the writ is issued, is a question which need not now be considered, for the reason that the papers before me do not show that any effort was made to controvert the facts stated in the return.

"I am not distinctly advised by the papers accompanying your letter as to the manner in which Captain Snyder was called upon by the marshal to assist in making the arrest, but the facts stated in the correspondence show that the prisoners had committed an offense against the United States, punishable under the 22d sec. of the act of Congress approved April 30, 1790 (1 Statutes, 115); and assuming, as I must do from the facts before me, that the United States marshal made the arrest under a proper process or warrant of a court or commissioner of the United States, or for an offense committed within his own view, and that Captain Snyder was duly and regularly summoned by the marshal to assist in making the arrest and holding the prisoners, I am clearly of opinion that it was his duty to obey the writ of habeas corpus issued by the probate judge of the county of Ellsworth no further than to make a respectful return of the facts of the case, showing that he held the prisoner under the authority of the United States; and that any further process issued by the said judge in aid of the writ of habeas corpus was void, and therefore need not have been obeyed by the marshal or his posse."—Army and Navy Journal, July 1, 1871.

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.[3] 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. No State judge or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or to require him to be brought before them. And if the authority of a State, in the form of judicial process or otherwise, should attempt to control the marshal or other authorized officer or agent of the United States, in any respect, in the custody of his prisoner, it would be his duty to resist it, and to call to his aid any force that might be necessary to maintain the authority of law against illegal interference. No judicial process, whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the court or judge by whom it is issued; and an attempt to enforce it beyond these boundaries is nothing less than lawless violence.

1025. Nor is there anything in this supremacy of the general government, or the jurisdiction of its judicial tribunals, to awaken the jealousy or offend the natural and just pride of State sovereignty. Neither this government, nor the powers of which we are speaking, were forced upon the States. The Constitution of the United States, with all the powers conferred by it on the general government, and surrendered by the States, was the voluntary act of the people of the several States, deliberately done, for their own protection and safety against injustice from one another. And their anxiety to preserve it in full force, in all its powers, and to guard against resistance to or evasion of its authority, on the part of a State, is proved by the clause which requires that the members of the State legislatures, and all executive and judicial officers of the several States (as well as those of the general government), shall be bound, by oath or affirmation, to support this Constitution. This is the last and closing clause of the Constitution, and inserted when the whole frame of government, with the powers hereinbefore specified, had been adopted by the Convention; and it was in that form, and with these powers, that the Constitution was submitted to the people of the several States for their consideration and decision.

1026. Now it certainly can be no humiliation to the citizen of a republic to yield a ready obedience to the laws as administered by the constituted authorities. On the contrary, it is among his first and highest duties as a citizen, because free government cannot exist without it. Nor can it be inconsistent with the dignity of a sovereign State to observe faithfully, and in the spirit of sincerity and truth, the compact into which it voluntarily entered when it became a State of this Union. On the contrary, the highest honor of sovereignty is untarnished faith. And certainly no faith could be more deliberately and solemnly pledged than that which every State has plighted to the other States to support the Constitution as it is, in all its

[3] See also ¶ 1042.

provisions, until they shall be altered in the manner which the Constitution itself prescribes. In the emphatic language of the pledge required, it is *to support this Constitution.* And no power is more clearly conferred by the Constitution and laws of the United States, than the power of this court to decide, ultimately and finally, all cases arising under such Constitution and laws; and for that purpose to bring here for revision, by writ of error, the right judgment of a State court, where such questions have arisen, and the right claimed under them denied by the highest judicial tribunal in the State.

1027. We are sensible that we have extended the examination of these decisions beyond the limits required by any intrinsic difficulty in the questions. But the decisions in question were made by the supreme judicial tribunal of the State; and when a court so elevated in its position has pronounced a judgment which, if it could be maintained, would subvert the very foundations of this government, it seemed to be the duty of this court, when exercising its appellate power, to show plainly the grave errors into which the State court has fallen, and the consequences to which they would inevitably lead. . . . The judgment of the supreme court of Wisconsin must therefore be reversed in each of the cases now before the court.

SUPREME COURT OF THE UNITED STATES.—No. 54. DECEMBER TERM, 1871.

THE UNITED STATES, *Plaintiff in Error,* *vs.* ABIJAH TARBLE.	In error to the Supreme Court of the State of Wisconsin.

1028. The government of the United States and of a State are distinct and independent of each other within their respective spheres of action, although existing and exercising their powers within the same territorial limits. Neither government can intrude within the jurisdiction, or authorize any interference therein by its judicial officers with the action of the other. But whenever any conflict arises between the enactments of the two sovereignties, or in the enforcement of their asserted authorities, those of the national government have supremacy until the validity of the different enactments and authorities is determined by the tribunals of the United States.

A State judge has no jurisdiction to issue a writ of habeas corpus, or to continue proceedings under the writ when issued, for the discharge of a person held under the authority, or claim and color of the authority, of the United States, by an officer of that government. If upon the application for the writ it appear that the party, alleged to be illegally restrained of his liberty, is held under the authority, or claim and color of the authority, of the United States, by an officer of that government, the writ should be refused. If this fact do not thus appear, the State judge has the right to inquire into the cause of imprisonment, and ascertain by what authority the person is held within the limits of the State; and it is the duty of the marshal, or other officer having the custody of the prisoner, to give, by a proper return,

information in this respect. But after he is fully apprised by the return that the party is held by an officer of the United States, under the authority, or claim and color of the authority, of the United States, he can proceed no further.

These principles applied to a case where a habeas corpus was issued by a court commissioner of one of the counties of Wisconsin to a recruiting officer of the United States, to bring before him a person who had enlisted as a soldier in the army of the United States, and whose discharge was sought on the alleged ground that he was a minor, under the age of eighteen years at the time of his enlistment, and that he enlisted without the consent of his father. The petition for the writ alleging that the prisoner had enlisted as a soldier and been mustered into the military service of the national government, and was detained by the officer as such soldier, this court held that the court commissioner had no jurisdiction to issue the writ for the discharge of the prisoner, as it thus appeared upon the petition that the prisoner was detained under claim and color of the authority of the United States by an officer of that government; and that if he was illegally detained, it was for the courts or judicial officers of the United States, and for those courts or officers alone, to grant him release.

Mr. Justice FIELD delivered the Opinion of the Court.

1029. This case[4] comes before us on writ of error to the supreme court of Wisconsin. It was a proceeding on habeas corpus for the discharge of one Edward Tarble, held in the custody of a recruiting officer of the United States as an enlisted soldier, on the alleged ground that he was a minor, under the age of eighteen years at the time of his enlistment, and that he enlisted without the consent of his father.

The writ was issued on the 10th of August, 1869, by a court commissioner of Dane County, Wisconsin, an officer authorized by the laws of that State to issue the writ of habeas corpus upon the petition of parties imprisoned or restrained of their liberty, or of persons on their behalf. It was issued in this case upon the petition of the father of Tarble, in which he alleged that his son, who had enlisted under the name of Frank Brown, was confined and restrained of his liberty by Lieutenant Stone, of the United States army, in the city of Madison, in that State and county; that the cause of his confinement and restraint was that he had, on the 20th of the preceding July, enlisted, and been mustered into the military service of the United States; that he was under the age of eighteen years at the time of such enlistment; that the same was made without the knowledge, consent, or approval of the petitioner, and was, therefore, as the petitioner was advised and believed, illegal; and that the petitioner was lawfully entitled to the custody, care, and services of his son.

The writ was directed to the officer thus named, commanding him to have Tarble, together with the cause of his imprisonment and detention, before the commissioner, at the latter's office, in the city of Madison, immediately after the receipt of the writ.

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[4] Published in General Order No. 16, A.-G. O. April 16, 1872.

The officer thereupon produced Tarble before the commissioner and made a return in writing to the writ, protesting that the commissioner had no jurisdiction in the premises, and stating, as the authority and cause for the detention of the prisoner, that he, the officer, was a first lieutenant in the army of the United States, and by due authority was detailed as a recruiting officer at the city of Madison, in the State of Wisconsin, and as such officer had the custody and command of all soldiers recruited for the army at that city; that on the 27th of July preceding, the prisoner, under the name of Frank Brown, was regularly enlisted as a soldier in the army of the United States for the period of five years, unless sooner discharged by proper authority; that he then duly took the oath required in such case by law and the regulations of the army, in which oath he declared that he was of the age of twenty-one years, and thereby procured his enlistment, and was on the same day duly mustered into the service of the United States; that subsequently he deserted the service, and being retaken, was then in custody and confinement under charges of desertion, awaiting trial by the proper military authorities.

To this return the petitioner filed a reply, denying, on information and belief, that the prisoner was ever duly or lawfully enlisted or mustered as a soldier into the army of the United States, or that he had declared on oath that he was of the age of twenty-one years, and alleging that the prisoner was at the time of his enlistment under the age of eighteen years, and on information and belief that he was enticed into the enlistment, which was without the knowledge, consent, or approval of the petitioner; that the only oath taken by the prisoner at the time of his enlistment was an oath of allegiance; and that the petitioner was advised and believed that the prisoner was not, and never had been, a deserter from the military service of the United States.

On the 12th of August, to which day the hearing of the petition was adjourned, the commissioner proceeded to take the testimony of different witnesses produced before him, which related principally to the enlistment of the prisoner, the declarations which he made as to his age, and the oath he took at the time, his alleged desertion, the charges against him, his actual age, and the absence of any consent to the enlistment on the part of his father.

The commissioner, after argument, held that the prisoner was illegally imprisoned and detained by Lieutenant Stone, and commanded that officer forthwith to discharge him from custody.

Afterwards, in September of the same year, that officer applied to the supreme court of the State for a certiorari, setting forth in his application the proceedings before the commissioner and his ruling thereon. The certiorari was allowed, and in obedience to it the proceedings had before the commissioner were returned to the supreme court. These proceedings consisted of the petition for the writ, the return of the officer, the reply of the petitioner, and the testimony, documentary and parol, produced before the commissioner.

Upon these proceedings the case was duly argued before the supreme court, and in April, 1870, that tribunal pronounced its judgment, affirming the order of the commissioner discharging the prisoner. This judgment is now before us for examination.

1030. The important question is thus presented, whether a State court commissioner has jurisdiction, upon habeas corpus, to inquire into the validity of the enlistment of soldiers into the military service of the United States, and to discharge them from such service when, in his judgment, their enlistment has not been made in conformity with the laws of the United States. The question presented may be more generally stated thus: whether any judicial officer of a State has jurisdiction to issue a writ of habeas corpus, or to continue proceedings under the writ when issued, for the discharge of a person held under the authority, or claim and color of the authority, of the United States, by an officer of that government. For it is evident, if such jurisdiction may be exercised by any judicial officer of a State, it may be exercised by the court commissioner within the county for which he is appointed; and if it may be exercised with reference to soldiers detained in the military service of the United States, whose enlistment is alleged to have been illegally made, it may be exercised with reference to persons employed in any other department of the public service when their illegal detention is asserted. It may be exercised in all cases where parties are held under the authority of the United States, whenever the invalidity of the exercise of that authority is affirmed. The jurisdiction, if it exist at all, can only be limited in its application by the legislative power of the State. It may even reach to parties imprisoned under sentence of the national courts, after regular indictment, trial, and conviction, for offenses against the laws of the United States. As we read the opinion of the supreme court of Wisconsin in this case, this is the claim of authority asserted by that tribunal for itself and for the judicial officers of that State. It does, indeed, disclaim any right of either to interfere with parties in custody, under judicial sentence, when the national court pronouncing sentence had jurisdiction to try and punish the offenders, but it asserts, at the same time, for itself and for each of those officers, the right to determine, upon habeas corpus, in all cases, whether that court ever had such jurisdiction. In the case of Booth, which subsequently came before this court, it not only sustained the action of one of its justices in discharging a prisoner held in custody by a marshal of the United States, under warrant of commitment for an offense against the laws of the United States, issued by a commissioner of the United States, but it discharged the same prisoner when subsequently confined under sentence of the district court of the United States for the same offense, after indictment, trial, and conviction, on the ground that, in its judgment, the act of Congress creating the offense was unconstitutional, and in order that its decision in that respect should be final and conclusive, directed its clerk to refuse obedience to the writ of error issued by this court, under the act of Congress, to bring up the decision for review.

1031. It is evident, as said by this court when the case of Booth was finally brought before it, if the power asserted by that State court existed, no offense against the laws of the United States could be punished by their own tribunals, without the permission and according to the judgment of the courts of the State in which the parties happen to be imprisoned; that if that power existed in that State court, it belonged equally to every other State court in the Union where a prisoner was within its territorial limits; and, as the different State courts could not always agree, it would often happen that an act which was admitted to be an offense and justly punishable in one State would be regarded as innocent and even praiseworthy in another, and no one would suppose that a government which had hitherto lasted for seventy years, "enforcing its laws by its own tribunals, and preserving the union of the States, could have lasted a single year, or fulfilled the trusts committed to it, if offenses against its laws could not have been punished without the consent of the State in which the culprit was found."

1032. The decision of this court in the two cases which grew out of the arrest of Booth, that of *Ableman* v. *Booth*, and that of *The United States* v. *Booth*,[5] disposes alike of the claim of jurisdiction by a State court, or by a State judge, to interfere with the authority of the United States, whether that authority be exercised by a federal officer or be exercised by a federal tribunal. In the first of these cases Booth had been arrested and committed to the custody of a marshal of the United States by a commissioner appointed by the district court of the United States, upon a charge of having aided and abetted the escape of a fugitive slave. Whilst thus in custody a justice of the supreme court of Wisconsin issued a writ of habeas corpus directed to the marshal, requiring him to produce the body of Booth, with the cause of his imprisonment. The marshal made a return, stating that he held the prisoner upon the warrant of the commissioner, a copy of which he annexed to and returned with the writ. To this return Booth demurred as insufficient in law to justify his detention, and, upon the hearing which followed, the justice held his detention illegal, and ordered his discharge. The marshal thereupon applied for and obtained a certiorari, and had the proceedings removed to the supreme court of the State, where, after argument, the order of the justice discharging the prisoner from custody was affirmed. The decision proceeded upon the ground that the act of Congress respecting fugitive slaves was unconstitutional and void.

1033. In the second case, Booth had been indicted for the offense with which he was charged before the commissioner, and from which the State judge had discharged him, and had been tried and convicted in the district court of the United States for the district of Wisconsin, and been sentenced to pay a fine of a thousand dollars, and to be imprisoned for one month. Whilst in imprisonment, in execution of this sentence, application was made by Booth to the supreme court of the State, for a writ of habeas corpus,

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[5] See ¶¶ 1001–1028.

alleging in his application that his imprisonment was illegal by reason of the unconstitutionality of the fugitive slave law, and that the district court had no jurisdiction to try or punish him for the matter charged against him. The court granted the application, and issued the writ, to which the sheriff, to whom the prisoner had been committed by the marshal, returned that he held the prisoner by virtue of the proceedings and sentence of the district court, a copy of which was annexed to his return. Upon demurrer to this return, the court adjudged the imprisonment of Booth to be illegal, and ordered him to be discharged from custody, and he was accordingly set at liberty.

1034. For a review in this court of the judgments in both of these cases, writs of error were prosecuted. No return, however, was made to the writs, the clerk of the supreme court of Wisconsin having been directed by that court to refuse obedience to them; but copies of the records were filed by the attorney-general, and it was ordered by this court that they should be received with the same effect and legal operation as if returned by the clerk. The cases were afterwards heard and considered together, and the decision of both was announced in the same opinion. In that opinion the chief justice details the facts of the two cases at length, and comments upon the character of the jurisdiction asserted by the State judge and the State court: by the State judge to supervise and annul the proceedings of a commissioner of the United States, and to discharge a prisoner committed by him for an offense against the laws of the United States; and by the State court to supervise and annul the proceedings and judgment of a district court of the United States, and to discharge a prisoner who had been indicted, tried, and found guilty of an offense against the laws of the United States and sentenced to imprisonment by that court.

1035. And in answer to this assumption of judicial power by the judges and by the supreme court of Wisconsin thus made, the chief justice said as follows: "If they possess the jurisdiction they claim, they must derive it either from the United States or the State. It certainly has not been conferred on them by the United States; and it is equally clear it was not in the power of the State to confer it, even if it had attempted to do so; for no State can authorize one of its judges or courts to exercise judicial power, by habeas corpus or otherwise, within the jurisdiction of another and independent government. And although the State of Wisconsin is sovereign within its territorial limits to a certain extent, yet that sovereignty is limited and restricted by the Constitution of the United States. And the powers of the general government and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge or a State court, as if the line of division was traced by landmarks and monuments visible to the eye. And the State of Wisconsin had no more power to authorize these proceedings of its judges and courts, than

it would have had if the prisoner had been confined in Michigan, or in any other State of the Union, for an offense against the laws of the State in which he was imprisoned."

1036. It is in the consideration of this distinct and independent character of the government of the United States, from that of the government of the several States, that the solution of the question presented in this case, and in similar cases, must be found. There are within the territorial limits of each State two governments, restricted in their spheres of action, but independent of each other, and supreme within their respective spheres. Each has its separate departments; each has its distinct laws, and each has its own tribunals for their enforcement. Neither government can intrude within the jurisdiction, or authorize any interference therein by its judicial officers with the action of the other. The two governments in each State stand, in their respective spheres of action, in the same independent relation to each other, except in one particular, that they would if their authority embraced distinct territories. That particular consists in the supremacy of the authority of the United States when any conflict arises between the two governments. The Constitution and the laws passed in pursuance of it are declared by the Constitution itself to be the supreme law of the land, and the judges of every State are bound thereby, "anything in the constitution or laws of any State to the contrary notwithstanding." Whenever, therefore, any conflict arises between the enactments of the two sovereignties, or in the enforcement of their asserted authorities, those of the national government must have supremacy until the validity of the different enactments and authorities can be finally determined by the tribunals of the United States. This temporary supremacy until judicial decision by the national tribunals, and the ultimate determination of the conflict by such decision, are essential to the preservation of order and peace, and the avoidance of forcible collision between the two governments. "The Constitution," as said by Mr. Chief Justice Taney, "was not framed merely to guard the States against danger from abroad, but chiefly to secure union and harmony at home; and to accomplish this end it was deemed necessary, when the Constitution was framed, that many of the rights of sovereignty which the States then possessed should be ceded to the general government; and that in the sphere of action assigned to it it should be supreme and strong enough to execute its own laws by its own tribunals, without interruption from a State, or from State authorities." And the judicial power conferred extends to all cases arising under the Constitution, and thus embraces every legislative act of Congress, whether passed in pursuance of it, or in disregard of its provisions. The Constitution is under the view of the tribunals of the United States when any act of Congress is brought before them for consideration.

1037. Such being the distinct and independent character of the two governments, within their respective spheres of action, it follows that neither can intrude with its judicial process into the domain of the other, except so far as such intrusion may be necessary on the part of the national government to preserve its rightful supremacy in cases of conflict of authority. In

their laws and mode of enforcement, neither is responsible to the other. How their respective laws shall be enacted; how they shall be carried into execution; and in what tribunals, or by what officers; and how much discretion, or whether any at all, shall be vested in their officers, are matters subject to their own control, and in the regulation of which neither can interfere with the other.

1038. Now, among the powers assigned to the national government is the power "to raise and support armies," and the power "to provide for the government and regulation of the land and naval forces." The execution of these powers falls within the line of its duties; and its control over the subject is plenary and exclusive. It can determine, without question from any State authority, how the armies shall be raised, whether by voluntary enlistment or forced draft, the age at which the soldier shall be received, and the period for which he shall be taken, the compensation he shall be allowed, and the service to which he shall be assigned. And it can provide the rules for the government and regulation of the forces after they are raised, define what shall constitute military offenses, and prescribe their punishment. No interference with the execution of this power of the national government in the formation, organization, and government of its armies by any State officials could be permitted without greatly impairing the efficiency, if it did not utterly destroy, this branch of the public service. Probably in every county and city in the several States there are one or more officers authorized by law to issue writs of habeas corpus on behalf of persons alleged to be illegally restrained of their liberty; and if soldiers could be taken from the army of the United States, and the validity of their enlistment inquired into by any one of these officers, such proceeding could be taken by all of them, and no movement could be made by the national troops without their commanders being subjected to constant annoyance and embarrassment from this source. The experience of the late rebellion has shown us that, in times of great popular excitement, there may be found in every State large numbers ready and anxious to embarrass the operations of the government, and easily persuaded to believe every step taken for the enforcement of its authority illegal and void. Power to issue writs of habeas corpus for the discharge of soldiers in the military service, in the hands of parties thus disposed, might be used, and often would be used, to the great detriment of the public service. In many exigencies the measures of the national government might in this way be entirely bereft of their efficacy and value. An appeal in such cases to this court, to correct the erroneous action of these officers, would afford no adequate remedy. Proceedings on habeas corpus are summary, and the delay incident to bringing the decision of a State officer, through the highest tribunal of the State, to this court for review, would necessarily occupy years, and in the mean time, where the soldier was discharged, the mischief would be accomplished. It is manifest that the powers of the national government could not be exercised with energy and efficiency at all times, if its acts could be interfered with and controlled for any period by officers or tribunals of another sovereignty.

1039. It is true similar embarrassment might sometimes be occasioned, though in a less degree, by the exercise of the authority to issue the writ possessed by judicial officers of the United States, but the ability to provide a speedy remedy for any inconvenience following from this source would always exist with the national legislature.

1040. State judges and State courts, authorized by laws of their States to issue writs of habeas corpus, have undoubtedly a right to issue the writ in any case where a party is alleged to be illegally confined within their limits, unless it appear upon his application that he is confined under the authority, or claim and color of the authority, of the United States by an officer of that government. If such fact appear upon the application, the writ should be refused. If it do not appear, the judge or court issuing the writ has a right to inquire into the cause of imprisonment, and ascertain by what authority the person is held within the limits of the State; and it is the duty of the marshal, or other officer having the custody of the prisoner, to give, by a proper return, information in this respect. His return should be sufficient, in its detail of facts, to show distinctly that the imprisonment is under the authority, or claim and color of the authority, of the United States, and to exclude the suspicion of imposition or oppression on his part. And the process or orders, under which the prisoner is held, should be produced with the return and submitted to inspection, in order that the court or judge issuing the writ may see that the prisoner is held by the officer, in good faith, under the authority, or claim and color of the authority, of the United States, and not under the mere pretense of having such authority.[6]

1041. This right to inquire by process of habeas corpus, and the duty of the officer to make a return, "grows necessarily," says Mr. Chief Justice Taney, "out of the complex character of our government and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its power, and each within its sphere of action, prescribed by the Constitution of the United States, independent of the other. But, after the return is made, and the State judge or court judicially apprised that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of habeas corpus nor any other process issued under State authority can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States. If he has committed an offense against their laws, their tribunals alone can punish him. If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress."

1042. Some attempt has been made in adjudications, to which our attention has been called, to limit the decision of this court in *Ableman* v. *Booth*, and *The United States* v. *Booth*, to cases where a prisoner is held in custody

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[6] The return need not be verified under oath.—In the matter of Thomas H. Neill, on habeas corpus, U. S. District Court, Southern District of New York.

under undisputed lawful authority of the United States, as distinguished from his imprisonment under claim and color of such authority. But it is evident that the decision does not admit of any such limitation. It would have been unnecessary to enforce, by any extended reasoning such as the chief justice uses, the position that when it appeared to the judge or officer issuing the writ, that the prisoner was held under undisputed lawful authority, he should proceed no further. No federal judge even could, in such case, release the party from imprisonment, except upon bail when that was allowable. The detention being by admitted lawful authority, no judge could set the prisoner at liberty, except in that way, at any stage of the proceeding. All that is meant by the language used is, that the State judge or State court should proceed no further when it appears, from the application of the party, or the return made, that the prisoner is held by an officer of the United States under what, in truth, purports to be the authority of the United States; that is, an authority, the validity of which is to be determined by the Constitution and laws of the United States. If a party thus held be illegally imprisoned it is for the courts or judicial officers of the United States, and those courts or officers alone, to grant him release.[7]

1043. This limitation upon the power of State tribunals and State officers furnishes no just ground to apprehend that the liberty of the citizen will thereby be endangered. The United States are as much interested in protecting the citizen from illegal restraint under their authority, as the several States are to protect him from the like restraint under their authority, and are no more likely to tolerate any oppression. Their courts and judicial officers are clothed with the power to issue the writ of habeas corpus in all cases where a party is illegally restrained of his liberty by an officer of the United States, whether such illegality consist in the character of the process, the authority of the officer, or the invalidity of the law under which he is held. And there is no just reason to believe that they will exhibit any hesitation to exert their power, when it is properly invoked. Certainly there can be no ground for supposing that their action will be less prompt and efficient in such cases than would be that of State tribunals and State officers.[8]

1044. It follows, from the views we have expressed, that the court commissioner of Dane County was without jurisdiction to issue the writ of habeas corpus for the discharge of the prisoner in this case, it appearing, upon the application presented to him for the writ, that the prisoner was held by an officer of the United States, under claim and color of the authority of the United States, as an enlisted soldier mustered into the military service of the national government; and the same information was imparted to the

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[7] But in the case of Riley (1 Benedict, 408) it was decided that by virtue of the acts of 1864 (¶¶ 499, 500) the power of discharging from service in the army minors under the age of eighteen (the enlistment of minors over that age without the consent of their parents or guardians being lawful) was taken away from the courts, and was confided wholly to the secretary of war. But see Chap. xvii., note 5.

[8] In the matter of Severy, 4 Clifford. In the matter of Keeler, Hempstead, 306.

commissioner by the return of the officer. The commissioner was, both by the application for the writ and the return to it, apprised that the prisoner was within the dominion and jurisdiction of another government, and that no writ of habeas corpus issued by him could pass over the line which divided the two sovereignties.

1045. The conclusion we have reached renders it unnecessary to consider how far the declaration of the prisoner as to his age, in the oath of enlistment, is to be deemed conclusive evidence on that point on the return to the writ.[9]

1046. The judgment of the supreme court of Wisconsin must be reversed; and it is so ordered.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON.—MAY 24, 1871.

In the matter of WILLIAM B. BIRD,—on writ of habeas corpus.[10]

1047. Where by the sentence of a court-martial a soldier is discharged from the service before the expiration of his term of enlistment, and such sentence is afterwards set aside as null and void, the status of such soldier is not affected in any way by such sentence, and he is deemed to have been in the service all the time between the sentence and the order setting it aside.

Under Article of War 88, it appears that a soldier may be arrested and tried *after* the expiration of his term of service, for a military offense committed during such term of service, so that the order for the court-martial is issued within two years from the commission of such offense.

In any view of the matter a soldier may be held for trial after the term of his enlistment, by military authority, if arrested for the offense before the expiration of his term of service.

The petitioner while in fact discharged from the army, but before the expiration of his term of enlistment, having committed a homicide, might be arrested and held for trial therefor by the military authority, the discharge being afterward set aside as null and void, and the petitioner being at the time a soldier de jure.

1048. DEADY, J.—The petition for the writ was filed May 8, 1871, and on the same day an order was made allowing the writ as prayed for returnable before the judge at chambers, on May 11. In the petition it is alleged that petitioner is confined in Multnomah County jail by one James H. Lappeus, chief of police of the city of Portland, for the purpose of aiding the

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[9] See Chap. xvii., note 5.

[10] Published in memorandum of June 10, 1871, from headquarters department of the Columbia.

officers of the military department of the Columbia to transport petitioner to Alaska, upon the pretense that a crime has been committed by the petitioner against the rules and regulations of the army of the United States; and that the imprisonment of petitioner is illegal in this, that petitioner is a citizen of the United States, and not amenable to said rules and regulations.

1049. On May 11, respondent Lappeus produced the body of the petitioner as commanded by the writ, and filed a return thereto, stating that the petitioner was placed in his custody on May 7, 1871, by one Lieutenant Dennison of the army of the United States, and the cause of his imprisonment as he was informed.

1050. Thereupon, it appearing from the return of said Lappeus that the petitioner was really in the custody of the military authority for the department of the Columbia, and that said Lappeus only held said petitioner in his custody casually, as a jailer for said authority; it was ordered that petitioner's counsel cause a copy of the petition, writ, return, and this order to be served upon the general commanding the department of the Columbia within twenty-four hours, to the end that such officer might take such steps to appear and contest the petition as he may be advised to be necessary and proper, and that the proceeding be continued until May 15.

1051. On May 15, the parties aforesaid appeared, and also the general commanding the department, by Louis V. Caziarc, A. A. A.-G., who then stated in writing that petitioner was a soldier of the army of the United States, and in the lawful custody of the military authority of this department, and as such was held for violations of the rules and regulations for the government of the army; and that since May 8 respondent Lappeus only held petitioner because of the writ herein. On the same day the petitioner demurred to the returns to the writ as insufficient in law to justify the detention.

1052. Thereupon an order was made restoring the custody of the petitioner to the authority of the general commanding the department of the Columbia, to be by him, and those acting under his orders or authority, safely kept within the jurisdiction of this court, and produced before the judge thereof on May 18, and that said general then make a return herein, in due form, of the causes and reasons for detaining the petitioner in custody.

1053. On May 18, respondent Caziarc filed an answer to the petition, and the petitioner replied thereto.

1054. On May 19, the cause was argued and submitted upon the answer and replication and exhibits thereto, and taken under advisement. From these it appears:

1055. I. That William B. Bird, the petitioner, was duly enlisted as a private in the army of the United States on June 15, 1867, to serve for the period of three years.

1056. II. That at the post of Sitka, Alaska, by the sentence of a court-martial, convened at said post in pursuance of Special Order No. 70, dated October 14, 1869, the petitioner, then being a private in Battery "H," Second

Artillery, was sentenced to three months hard labor and to be dishonorably discharged from the army; and that about January 23 petitioner was so discharged at the post aforesaid.

1057. III. That the petitioner was tried before said court-martial upon two charges and sundry specifications thereunder, to the effect that said petitioner, about September 25, 1869, refused to be sworn or testify as a witness before a board of officers convened at the post aforesaid, to investigate certain accusations against sundry citizens and enlisted men, and that on October 18, 1869, he wrote a disrespectful letter to his department commander, General J. C. Davis.

1058. IV. On the trial, at Sitka aforesaid, the petitioner made the preliminary objection that the court-martial could not lawfully take cognizance of the charges against him, because it was convened by said Davis, who was also his accuser; and on September 24, 1870, the secretary of war, upon the report and opinion of the judge-advocate-general, sustained the objection, and set aside the sentence of the court as illegal and void, on that account, and also directed that the petitioner "be brought to trial on a charge of manslaughter to the prejudice of good order and military discipline," committed in the killing of Lieutenant L. C. Cowan, of the United States revenue service, as hereinafter stated; and afterwards, on November 10, 1870, the petitioner, by Special Order No. 150, of headquarters department of the Columbia, in pursuance of the aforesaid order of the secretary of war, was "reinstated in his rights, duties, and obligations as a soldier, as if no such proceedings had been taken, and as of the date of the order appointing the court," to wit: October 14, 1869.

1059. V. That on March 8, 1870, by the verbal order of said Davis to Captain Brady, commanding post of Sitka, the petitioner was arrested and confined at said post upon the charge of killing said Cowan, which order was, on June 14, 1870, confirmed and continued by a written order from said Davis to said Brady, instructing the latter to "retain petitioner in custody until further instructions from the proper authority;" and as appears from the report of a board of officers convened at the post aforesaid, on March 10, 1870, the petitioner on the night of February 25, 1870, in an unlawful attempt to take the life of his former company commander, Captain Dennison, in a saloon at Sitka, shot and killed said Cowan under circumstances which "showed a perfect disregard of human life," and constituted "an aggravated case of manslaughter."

1060. VI. That a court-martial convened at Sitka aforesaid, November 30, 1870, pursuant to Special Orders No. 149, of headquarters of the department of the Columbia, and afterwards adjourned to Fort Vancouver, Washington Territory, the petitioner was tried and found guilty of the charge of "murder—to the prejudice of good order and military discipline," committed on the killing of Lieutenant Cowan as aforesaid, and by said court was among other things sentenced to be dishonorably discharged from the service of the United States, and to be confined at hard labor for the period of fifteen years in such penitentiary as the commanding general may designate; and

on February 24, 1871, said sentence was approved by the general commanding the department of the Columbia, and ordered to be executed in Alcatraz Island, in the harbor of San Francisco, until otherwise ordered by the secretary of war.

1061. VII. That in General Court-martial Orders No. 3,[11] dated April 11, 1871, the proceedings of the court-martial last aforesaid were "set aside as null and void, for the reason that murder, being a capital crime, is not legally cognizable by a court-martial." Such order also stated and directed as follows: "Moreover, the facts disclosed in the evidence show the homicide was committed in a saloon in the town of Sitka, when the prisoner was de facto a citizen, and held no such practical relations to the military service as to connect his acts with its good order or discipline. The prisoner will be turned over for trial to the federal judiciary;" and that in pursuance of such order the petitioner, at the time of the allowance and service of the writ, was being conveyed to Washington Territory by Lieutenant Dennison aforesaid, to be there turned over to the United States courts, for trial therein upon said charge of murder.

1062. Two principal questions arise in this case, and were argued by counsel.

1063. (1) Was the petitioner a soldier on February 25, 1870, when he committed the homicide at Sitka? and (2) can a soldier be detained in custody by the military authority, for trial or lawful disposition after his term of service expires, on account of an act committed during such service?

Upon authority and the plainest reason both these questions must be answered in the affirmative. The sentence of the court-martial dishonorably discharging the petitioner from the service was set aside as null and void, because of want of jurisdiction in the court. The proceedings of the court having been declared by competent authority to have been void ab initio, in contemplation of law, the status of the petitioner was not changed in any particular by reason of it. This conclusion necessarily follows from the premises. The proposition is so axiomatic that it scarcely admits of argument, and needs only to be stated for the truth of it to be perceived. The same rule obtains in relation to the proceedings of all courts, civil as well as military.

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[11] From the war department, adjutant-general's office, directing as follows:

"In the case of William B. Bird, late private Battery 'H,' 2d Artillery, sentenced by a general court-martial 'To be dishonorably discharged the service of the United States, with loss of all pay and allowances now due or hereafter to become due, and to be confined at hard labor for the period of fifteen (15) years in such penitentiary as the commanding general may designate,' and in which case Alcatraz Island, harbor of San Francisco, California, was designated as the place of confinement until a penitentiary may be designated by the secretary of war (General Orders No. 7, headquarters department of the Columbia, Portland, Oregon, February 24, 1871), the proceedings are set aside as null and void, for the reason that murder, being a capital crime, is not legally cognizable by a court-martial. Moreover, the facts disclosed in the evidence show that the homicide was committed in a saloon in the town of Sitka, when the prisoner was de facto a citizen, and held no such practical relations to the military service as to connect his acts with its good order or discipline.

"The prisoner will be turned over for trial to the federal judiciary."

A void judgment or sentence works no change in the status of the person or thing against or concerning which it is given or pronounced.

1064. A sentence of divorce passed in an inferior court, which is afterward set aside as null and void on appeal, would not affect the status of the parties thereto. They would still be husband and wife, the same as if the sentence of the inferior court had never been pronounced, and that too during all the period between such sentence and its reversal.

1065. A judgment convicting a party of a felony, when reversed for error, is considered as never having been given, and does not affect the rights or liabilities of such party, although he may have been imprisoned under it during the interval between its rendition and reversal. It may be said that in some instances this rule works hardly, but the subject admits of no other, and in the great majority of cases it is well adapted to the ends of justice. Upon a second conviction, the punishment upon the first and erroneous one can and should be taken into consideration. Besides, it must be borne in mind that the reversal is procured by the party affected by the judgment or sentence, and for his benefit. If the petitioner had not procured the reversal of the sentence discharging him from the service, his subjection to military authority growing out of his enlistment on June 15, 1867, would have then ceased; but having procured that sentence to be set aside, upon the allegation not merely that it was erroneous, but null and void, it does not lie in his mouth to say that nevertheless the discharge given in pursuance and execution of it was valid, and terminated his contract of enlistment months before the expiration of his term.

1066. True, it may be, as stated in General Court-martial Order No. 3, that the petitioner at the date of the homicide was a citizen de facto, but it is equally true and more material, as now known, that he was at the same time a soldier de jure. Being a citizen de facto is nothing more than acting and living as a citizen for the time being, for any reason. This might be a good cause, as suggested in said order, why proceedings for the military offense of manslaughter to the prejudice of good order and military discipline, committed by the act of unlawful killing, should be postponed or suspended until the petitioner had been proceeded against in the civil courts, for the greater and graver offense of murder, committed by means of the same act.

1067. I have no doubt but that the petitioner was a soldier at the date of the killing of Lieutenant Cowan, and as such liable to be arrested, tried, and punished by military authority for any military offense committed by the same act.

1068. As to the second question: Article of War 88 provides that "No person shall be liable to be tried and punished by a general court-martial for any offense which shall appear to have been committed more than two years before the issuing of the order for such trial; unless," etc.

1069. Congress has full power "to make rules for the government of the land and naval forces." (Constitution, Article I., sec. 8.)

1070. This article of war [Chap. xxii., ¶ 630] is a statute of limitations in case of proceedings to punish persons for offenses "arising in the land forces."

As at present advised, I do not see what provision of the Constitution, or statute or principle of common law, can be invoked to prevent the *arrest and trial* of a person by court-martial for a military offense, committed while such person was an officer or soldier of the army of the United States, *after* the expiration of the term of service, so that the order for the trial is issued within the time limited by the article of war. And so in principle it seems to have been held in the case of Lord George Sackville, as reported by Tyler in his treatise on court-martials.[12]

1071. In that case it appeared that as the defendant had been dismissed from his majesty's service previously to the prosecution against him, it was doubted, under the mutiny act, whether he was subject to the jurisdiction of the court; upon which that question was referred to the twelve judges, who certified that under the circumstances of the case they saw no reason to doubt the jurisdiction of the court-martial.

1072. In re William Walker, decided by Mr. Justice Wilde, of the supreme court of Massachusetts, and after consultation with, and with the concurrence of his brother judges, and reported in Am. Jur., April No., 1830, it was held that a seaman who had committed a naval offense and had been arrested therefor on the day preceding the expiration of his term of his service, might be detained for trial and punishment after the expiration of such term. In the course of the opinion the learned judge cites the case of Sackville, cited supra, with approval; and upon the general question says: "It is true that a seaman is not bound to do service after the term of his enlistment. But within that term he is bound to observe the rules and regulations provided for the government of the navy, and is punishable for all crimes and offenses committed in violation of them during his term of service. There is no limitation of time within which he is to be prosecuted and tried for such offenses, but if there were it would be sufficient to show that the prosecution was commenced within the time of limitation."

1073. It is proper to note that there was an arrest and charges preferred in this case during the term of service, and that the conclusion reached was therefore irrespective of the question whether the seaman was liable to *arrest* and prosecution after his discharge from the service for an offense committed prior thereto; but the citation from the opinion, as well as the case of Sackville, goes to sustain the jurisdiction of the naval authority to arrest and try the offender as well after the discharge from service as before.

1074. Neither is it necessary to absolutely decide that question in this case. For the fact is, the petitioner was arrested for the commission of two distinct military offenses before the expiration of his term of enlistment, and, so far as I can perceive, both are still pending and undisposed of. An arrest for the purpose of trial is a commencement of a prosecution, without reference to the time when a formal accusation is preferred. The jurisdiction to try and punish attaches upon the arrest. It is true that there has been a trial on both of the accusations in this case, but the

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[12] See Chap. xxii., ¶ 630, and note 8 *a*.

proceedings, having been set aside as null and void at the instance and for the benefit of the petitioner, are to be regarded, so far as this question is concerned, as if they had never taken place. It is also true that the highest military authority has directed that the petitioner be turned over to the proper civil authority for trial upon the charge of murder; but this direction, as I understand it, only suspends the prosecution for the military offense, which may be still carried on to a final determination for any reason satisfactory to the war department, by the issuing of an order convening a court-martial for that purpose within two years from the commission of the offenses respectively.

1075. During this period, for aught that has been shown or occurs to me, the petitioner may be lawfully detained in the custody of the military authority for trial by court-martial or delivery to the civil authorities under Article of War 33, as under all the circumstances may be deemed proper and best. If there is unnecessary delay, error of conduct, or abuse of power on the part of the military subordinates charged with the conduct of these affairs, the remedy is within the military department and not without it,—by appeal or petition to the higher authorities. The Constitution and laws of Congress have intrusted this power to the military authority, for the good of the service, as necessary to maintain the discipline and efficiency of the army. The delays and mistakes which appear to have occurred in the disposition of the charges against the petitioner are common to like proceedings in all human tribunals. The petitioner voluntarily entered the army, and must submit to the necessary consequences of that act and the relation created thereby.

1076. In this view of the matter, it is unnecessary to consider whether the petitioner is held in custody merely for the purpose of being turned over to the civil authority, or whether it is proposed to turn him over to the proper civil authority or not. For his conduct in these particulars the respondent is only responsible to his military superiors and to the military law. The order to deliver the petitioner to the civil authority may be countermanded to-morrow, and it would be the duty of the respondent to act accordingly. No application has been or can be made for the delivery of the petitioner, by or on behalf of the party injured, as specially provided in Article 33. His voice is hushed in the silence of the grave upon the distant and unknown shore of Alaska. The delivery of the petitioner to the civil authority must ultimately depend upon the fact of an application by some public officer or body entitled to prosecute for offenses against the particular civil society injured by the act of the petitioner.

1077. Upon deliberate reflection and consideration, I see no reason to question the authority of the respondent to detain the petitioner in custody as a person amenable to military law upon the charge preferred at Alaska in 1869, as well as the military offense of manslaughter "to the prejudice of good order and discipline" committed in the killing of Lieutenant Cowan.

Let the petition be dismissed, and the petitioner remanded to the custody of the respondent.

UNITED STATES CIRCUIT COURT, NINTH CIRCUIT, DISTRICT OF CALIFORNIA.—FEBRUARY TERM, 1867.

McCALL v. McDOWELL.[13] (*Damages for False Imprisonment.*)

(*Extracts.*)

1078. In actions for false imprisonment exemplary damages are only given where it appears that the wrong of which the plaintiff complains was done with an evil intention, or from a bad motive. Where it appears that the arrest of the plaintiff was made in the course of what the defendants supposed to be their duty as public officers, and without malice, and from good motives, only compensatory damages should be given.

A military officer who orders the arrest and confinement of an individual is bound to see that his subordinates, to whom the execution of the order is intrusted, use no unnecessary severity or cruelty in carrying it into execution; and he is liable in damages for oppression or undue harshness practiced by them through his neglect to superintend the course of his subordinates.

Except in a plain case of excess of authority, where at first blush it is palpable to the commonest understanding that the order given is illegal, a military subordinate should be held excused, in law, for acts done in obedience to the orders of his commander. This rule is equally applicable whether the legality of the order depends upon a question of fact or upon a question of law.

1079. DEADY, J.—On the trial of the issue in this action, by the court, the defendants were allowed to give evidence of the circumstances attending the promulgation of Order No. 27 [by which General McDowell directed the arrest of any person "so utterly infamous as to exult over the assassination of the President"], and the consequent arrest and imprisonment of the plaintiff; not as a justification, but in mitigation of damages. From the evidence the court has found the fact to be that the defendant McDowell issued the order which led to the arrest and imprisonment complained of, without malice or any intention to injure or oppress the plaintiff, but from good motives and considerations involving the public peace and safety; and also that the defendant Douglas acted in the premises without malice or evil intention, but in obedience to the order of his superior, and upon satisfactory information that the plaintiff's conduct had brought him within the purview of the order. These facts, although not sufficient to constitute a legal justification of the conduct of the defendants, are to be considered in estimating the amount of damages which the plaintiff is entitled to recover.

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[13] This was an action brought by John McCall, citizen, against General McDowell, and Captain Charles D. Douglas, U. S. army, to recover damages for the military arrest and confinement of the plaintiff. The facts are stated in opinion of the court, so much of which is quoted as is necessary to illustrate the syllabus. The case is reported at length in 1 Abbott, 212-245.

The acts complained of being done without the authority of law, the plaintiff, as a matter of law, is entitled to recover some damages therefor. But vindictive or exemplary damages are only given where it appears that the wrong complained of was done with an evil intention or from a bad motive. In the present case no such intention or motive can be attributed or imputed to either of the defendants. It follows that the plaintiff is only entitled to recover damages for the necessary consequences of the act complained of, what the law calls compensatory damages.

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1080. In estimating the damages of the plaintiff beyond his expenses and loss of time, I have been materially influenced by the facts, that while in the custody of the provost-marshal in San Francisco he was confined one night in the common guard-house in company with drunken soldiers, and that while he was in custody at Fort Alcatraz he was compelled to labor in common with military culprits. The treatment of the plaintiff in these respects was, to say the least, oppressive and uncalled for. True, it does not appear that this was done with the knowledge or approbation of defendant McDowell; but so far as appears, it would seem that he did not expect or intend that "political prisoners" should be required to labor while at Fort Alcatraz. The plaintiff was not in the actual custody of the defendant McDowell, but of his subordinates, and his treatment in these respects was the direct act of the latter and not the former. Yet McDowell, having caused the arrest and imprisonment, ought to be held responsible for whatever injuries and indignities the plaintiff suffered thereby, in consequence of his neglect or omission to provide against the same. The provost-marshal's office and Alcatraz were within the command and under the authority of McDowell; and having caused the imprisonment of the plaintiff, he should have taken some precaution to prevent his being treated with undue harshness and severity while in custody at these places. In *Dinsman* v. *Wilkes*, 12 Howard, 405, which was an action brought by a marine against Commander Wilkes, for illegal imprisonment in a jail at Honolulu, the Supreme Court say that "it was his duty, through proper and trustworthy officers, to inquire into his situation and treatment, and to see that it was not cruel or barbarous in any respect." It is proper to add that the court held Wilkes to something more than the ordinary responsibility of a commanding officer in that respect, because "he had placed him out of the protection which the ordinary place of confinement on shipboard afforded, in a prison belonging to and under the control of an uncivilized people." So it appears to me in this case, the plaintiff being a private citizen not belonging to the military forces, nor under condemnation as a criminal, when the defendant, McDowell, caused him to be imprisoned with military culprits and persons subject to military law and discipline, it was his duty to provide that the plaintiff should not be confounded with them and treated like them. And although, as I have said, I am satisfied that the defendant McDowell neither expected or intended that the plaintiff should be subject to any treatment or discipline beyond what was necessary and proper to restrain him of his liberty for the

time being, yet, as such treatment and discipline were among the probable consequences of the plaintiff's confinement, when and where it took place, if not provided against by the department commander, I think he must be held responsible for it.

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1081. This action has been tried upon the assumption that Douglas is equally liable with McDowell for the arrest of the plaintiff. Granting this, his liability cannot be extended beyond the time when he delivered him to the provost-marshal in San Francisco. The imprisonment, so far as Douglas is concerned, then terminated. He did no further act in the premises, and he had no authority over those who did, nor is he in any sense responsible for what happened to the plaintiff thereafter. If the plaintiff had been killed by the guard while at Alcatraz, the defendant Douglas could as well be held liable for it as for the imprisonment which the plaintiff suffered there. But I am not satisfied that Douglas ought to be held liable to the plaintiff at all. He acted not as a volunteer, but as a subordinate, in obedience to the order of his superior. Except in a plain case of excess of authority, where at first blush it is apparent and palpable to the commonest understanding that the order is illegal, I cannot but think that the law should excuse the military subordinate, when acting in obedience to the orders of his commander. Otherwise he is placed in the dangerous dilemma of being liable in damages to third parties for obedience to an order, or to the loss of his commission and disgrace, for disobedience thereto. If Douglas is liable to the plaintiff, so is every private soldier who constituted his guard from Potter Valley to San Francisco, and even the almost unconscious sentry who stood guard at the prison of Alcatraz. Yet there was no alternative for either Douglas or these soldiers but to do as they did, or refuse obedience to their lawful superiors, in a matter of which they were incapable of judging correctly, at the peril of disgrace and punishment to themselves. The first duty of a soldier is obedience, and without this there can be neither discipline nor efficiency in an army. If every subordinate officer and soldier were at liberty to question the legality of the orders of the commander, and obey them or not as they may consider them valid or invalid, the camp would be turned into a debating school, where the precious moment for action would be wasted in wordy conflicts between the advocates of conflicting opinions.

1082. In *Martin* v. *Mott*, 12 Wheaton, 19, a question arose as to whether the President had authority to call out the militia in a particular exigency. A drafted militia man had refused to be mustered into the service of the United States because, as he alleged, the President had made the order in a case not contemplated by the act of Congress under which he professed to act. The Supreme Court held, "that the authority to decide whether the exigency had arisen belongs exclusively to the President, and that his decision is conclusive upon all other persons." The reasoning of the court in support of this conclusion is peculiarly in point upon this branch of the case at bar.

1083. "The power itself is to be exercised upon sudden emergencies,

upon great occasions of state, and under circumstances which may be vital to the existence of the Union. A prompt and unhesitating obedience to orders is indispensable to a complete attainment of the object. The service is a military service, and the command of a military nature; and in such cases every delay, and every obstacle to an efficient and immediate compliance, necessarily tends to jeopard the public interests. While subordinate officers or soldiers are pausing to consider whether they ought to obey, or are scrupulously weighing the evidence of the facts upon which the commander-in chief exercises the right to demand their services, the hostile enterprise may be accomplished without the means of resistance. If a superior officer has a right to contest the orders of the President upon his own doubts as to the exigency having arisen, it must be equally the right of every inferior officer and soldier; and any act done by any person in furtherance of such orders would subject him to responsibility in a civil suit, in which his defense must finally rest upon his ability to re-establish the facts by competent proofs. Such a course would be subversive of all discipline, and expose the best-disposed officers to the chances of ruinous litigation. Besides, in many instances, the evidence upon which the President might decide that there is imminent danger of invasion might be of a nature not constituting strict technical proof, or the disclosure of the evidence might reveal important secrets of state, which the public interests, and even safety, might imperiously demand to be kept in concealment."

1084. The difference between that case and this is, that there the legality of the order depended mainly upon a question of fact, while here it depends upon a question of law. But the reasoning of the court is equally applicable to both; for the same disasters and disorders may be expected, if subordinates and soldiers are allowed to disobey the orders of their superiors upon a question of opinion upon a question of law. Again, how often would this difference of opinion be a mere pretext to escape the demands of duty? In the war of 1812, the *constitutional scruples* of the militia-men, as to the power of the President to order them out of the United States, led to their refusing to march across the Canada line to the aid of the regulars, when the latter were seriously engaged with the enemy, and thus a well-planned enterprise failed, with serious loss to the American forces.

1085. Nor is it necessary to the ends of justice that the subordinate or soldier should be responsible for obedience to the illegal order of a superior. In any case, the party injured can have but one satisfaction, and that may and should be obtained from the really responsible party,—the officer who gave the illegal order. I am aware that in civil life the rule is well settled otherwise, and that a person committing an illegal act cannot justify his conduct upon the ground of a command from another. But the circumstances of the two cases are entirely different. In the latter case the party giving the command and the one obeying it are equal in the eye of the law. The latter does not act upon compulsion; he is a free agent, and at liberty to exercise his judgment in the premises.

1086. Personal responsibility should be commensurate with freedom of

action to do or refrain from doing. For acts done under what is deemed compulsion or duress, the law holds no one liable. In contemplation of law, the wife is under the power and authority of the husband. Therefore, for even criminal acts, when done in the presence of the latter, she is not held responsible. The law presumes that she acted under coercion of her husband, and excuses her.

1087. If the law excuses the wife on the presumption of coercion, for what reason should it refuse a like protection to the subordinate and soldier when acting in obedience to the command of his lawful superior? The latter may be said to act, particularly in time of war, under actual coercion. As a matter of abstract law, it may be admitted that ultimately the law will justify a refusal to obey an illegal order. But this involves litigation and controversy, alike injurious to the best interests of the inferior and the efficiency of the public service. The certain vexation and annoyance, together with the risk of professional disgrace and punishment which usually attend the disobedience of orders by an inferior, may safely be deemed sufficient to constrain his judgment and action, and to excuse him for yielding obedience to those upon whom the law has devolved both the duty and responsibility of controlling his conduct in the premises. True, cases can be imagined, where the order is so palpably atrocious as well as illegal that one must instinctively feel that it ought not to be obeyed, by whomever given. But there is no rule without its exception. This one is practical and just, and the possibility of extreme cases ought not to prevent its recognition and application by the courts.

1088. Between an order plainly legal and one palpably otherwise—particularly in time of war—there is a wide middle ground, where the ultimate legality and propriety of orders depends or may depend upon circumstances and conditions of which it cannot be expected that the inferior is informed or advised. In such cases, justice to the subordinate demands, and the necessities and efficiency of the public service require, that the order of the superior should protect the inferior; leaving the responsibility to rest where it properly belongs, upon the officer who gave the command.

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1089. And the court finds, as a conclusion of law from the premises, that the defendant Douglas is not liable to the plaintiff as he hath complained against him, and that such defendant is entitled to judgment against the plaintiff in bar of this action, and for his costs and expenses in this behalf sustained.

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Judgment accordingly.[14]

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[14] "Motion for new trial, argued before Justice FIELD and Judge HOFFMAN, denied." —Reporter's Note.

SUPREME COURT.—JANUARY TERM, 1849.

CHARLES WILKES, *Plaintiff in Error*, v. SAMUEL DINSMAN.

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1090. An acquittal of the commanding officer by a court-martial, when tried for the same acts by order of the government, is not admissible evidence in a suit by an individual.

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The commander was acting as a public officer, invested with certain discretionary powers, and cannot be made answerable for any injury, when acting within the scope of his authority, and not influenced by malice, corruption, or cruelty. His position is quasi judicial.

Hence the burden of proof that the officer exceeded his powers is upon the party complaining; the rule of law being, that the acts of a public officer, on public matters, within his jurisdiction, and when he has a discretion, are to be presumed legal till shown by others to be unjustifiable. It is not enough to show that he committed an error in judgment, but it must have been a malicious and willful error.

Mr. Justice WOODBURY delivered the Opinion of the Court.

1091. The original action in this case was trespass by a marine in the exploring expedition, against its commanding officer.

1092. It will be seen by the statement of the case that the injury complained of was a punishment inflicted on the plaintiff by the defendant, in November, 1840, near the Sandwich Islands, for disobedience of orders, or a refusal to perform duty when directed.

1093. The plaintiff claimed that the term for which he was bound to serve as a marine had then expired; that the defendant had no right or justification to detain him longer on board; and that his refusal to do duty longer being the only reason, and an insufficient one, for punishing him at all, under such circumstances he was entitled to recover damages of the defendant for subjecting him to receive twelve lashes, and for a repetition of the punishment on a subsequent day, after another request and refusal by him to obey; and also, in the mean time, for putting him in irons, and confining him in a native prison on the island of Oahu.

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1094. In a public enterprise like the exploring expedition, specially authorized by Congress in 1836 (see act of Congress of 14th of May, 1836, 5 Statutes at Large, 29, sec. 2), for purposes of commerce and science, very valuable to the country, and not entirely without interest to most of the civilized world, it was essential to secure it from being defeated by any discharge of the crews before its great objects were accomplished, or by any want of proper authority, discretionary or otherwise, in the commander, to insure, if possible, a successful issue to the enterprise.

1095. It is not to be lost sight of, however, and will be explained more fully hereafter, that while the chief agent of the government, in so important

a trust, when conducting with skill, fidelity, and energy, is to be protected under mere errors of judgment in the discharge of his duties, yet he is not to be shielded from responsibility if he acts out of his authority or jurisdiction, or inflicts private injury either from malice, cruelty, or any species of oppression, founded on considerations independent of public ends.

1096. The humblest seaman or marine is to be sheltered under the ægis of the law from any real wrong as well as the highest in office.

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1097. The other question relates to the propriety of excluding the proceedings of a court-martial, which, after the return of Captain Wilkes, was convened, and acquitted him of this among the charges.

1098. We think that such proceedings were not conclusive on the plaintiff here, though a bar to subsequent indictments in courts of common law for the same offense, the parties then being the same likewise, and the tribunal acquitting competent to examine and acquit.—*Aspden et al.* v. *Nixon et al.*, 4 Howard, 467; *Burnham* v. *Webster*, 1 Woodbury & Minot, 172. And though sometimes, yet questionably, they have been deemed a bar to civil suits for damages, where the plaintiff was the prosecutor before the court-martial for that injury.—Buller, N. P., 19; *Hannaford* v. *Hunn*, 2 Carr & Payne, 146, semble.

1099. But here the parties were not the same, nor the plaintiff a complainant before the court-martial; and the courts of common law have jurisdiction over the wrong, though committed at sea.— *Warden* v. *Bailey*, 4 Taunton, 70–75; 1 MacArthur on Courts-martial, 268; *Wilson* v. *McKenzie*, 7 Hill, 95; O'Brien on Military Law, 223, semble; *Luscomb* v. *Prince*, 12 Mass., 579.

1100. . . . "Nor was it competent for him (the plaintiff) to object to this detention, as if retrospective in its operation (being authorized by an act passed after his first enlistment), because before that enlistment Congress, June 30, 1834, had enacted, as before cited, that the marine corps should be subject to and under the laws and regulations which are or *may be hereafter* established for the better government of the navy."

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1101. If precedents were needed to justify this course (renewed flogging for renewed disobedience), it has been settled in a penal prosecution that a like act, when prohibited, if distinctly repeated, even on the same day, constitutes a second offense, and incurs an additional penalty.—*Brooks, qui tam* v. *Milliken*, 3 D. & E., 509.

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1102. In order to settle this point (the competency of the commander to decide on these various questions without being amenable to the plaintiff in an action at law for any mere error of judgment in the exercise of his discretion, which may have been involuntarily committed under the exigencies of the moment) correctly, it being in itself a very important one, ... it will be necessary to advert to the circumstances that Captain Wilkes was not acting here in a private capacity and for private purposes; but, on the

contrary, the responsible duties he was performing were imposed on him by the government as a public officer. In the next place, those duties were not voluntarily sought or assumed, but met and discharged in the routine of his honorable and gallant profession, and under high responsibilities for any omission or neglect on his part, instead of being a volunteer, as in most of the cases of collectors and sheriffs made liable.—2 Strange, 820; 6 D. & E., 443. Now, in respect to those compulsory duties, whether in re-enlisting or detaining on board, or punishing or imprisoning on shore, while arduously endeavoring to perform them in such a manner as might advance the science and commerce and glory of his country, rather than his own personal designs, a public officer, invested with certain discretionary powers, never has been, and never should be, made answerable for any injury, when acting within the scope of his authority, and not influenced by malice, corruption, or cruelty. (See the cases hereafter cited.)

1103. Nor can a mandamus issue to such an officer, if he is intrusted with discretion over the subject-matter.—*Paulding* v. *Decatur*, 14 Peters, 497; *Brashear* v. *Mason*, 6 Howard, 102.

1104. His position in such case, in many respects, becomes quasi judicial, and is not ministerial, as in several other cases of liability by mere ministerial officers.—11 Johns., 108; *Kendall* v. *United States*, 12 Peters, 516; *Decatur* v. *Paulding*, 14 Peters, 516. And it is well settled that "all judicial officers, when acting on subjects within their jurisdiction, are exempted from civil prosecution for their acts."—*Evens* v. *Foster*, 2 N. Hamp., 377; 14 Peters, 600, App.

1105. Especially is it proper, not only that a public officer, situated like the defendant, be invested with a wide discretion, but be upheld in it, when honestly exercising, and not transcending it, as to discipline in such remote places, on such a long and dangerous cruise, among such savage islands and oceans, and with the safety of so many lives, and the respectability and honor of his country's flag in charge.

1106. In such a critical position, his reasons for action, one way or another, are often the fruits of his own observation, and not susceptible of technical proof on his part. No review of his decisions, if within his jurisdiction, is conferred by law on either courts, or juries, or subordinates; and, as this court held in another case, it sometimes happens that "a prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object." "While subordinate officers or soldiers are pausing to consider whether they ought to obey, or are scrupulously weighing the evidence of the fact upon which the commander-in-chief exercises the right to demand their services, the hostile enterprise may be accomplished without the means of resistance."—12 Wheaton, 30.

1107. Hence, while an officer acts within the limits of that discretion, the same law which gives it to him will protect him in the exercise of it. But for acts beyond his jurisdiction, or attended by circumstances of excessive severity, arising from ill-will, a depraved disposition, or vindictive feeling, he can claim no exemption, and should be allowed none under color

of his office, however elevated or however humble the victim.—2 Carr & Payne, 158, note; 4 Taunton, 67.

1108. When not offending under such circumstances, his justification does not rest on the general ground of vindicating a trespass in private life, and between those not acting officially and not with a discretion. Because then, acts of violence being first proved, the person using them must go forward next, and show the moderation or justification of the blows used.—2 Greenleaf on Evidence, sec. 99.

1109. The chief mistake below was in looking only to such cases as a guide. For the justification rests here on a rule of law entirely different, though well settled, and is, that the acts of a public officer on public matters, within his jurisdiction, and where he has a discretion, are to be presumed legal, till shown by others to be unjustifiable.—*Gidley* v. *Palmerston*, 7 Moore, 111; *Vanderheyden* v. *Young*, 11 Johns., 150; 6 Har. & Johns., 329; *Martin* v. *Mott*, 12 Wheaton, 31.

1110. This, too, is not on the principle merely that innocence and doing right are to be presumed, till the contrary are shown.—1 Greenleaf, sec. 35–37. But that the officer, being intrusted with a discretion for public purposes, is not to be punished for the exercise of it, unless it is first proved against him, either that he exercised the power confided in cases without his jurisdiction, or in a manner not confided to him, as with malice, cruelty, or willful oppression, or, in the words of Lord Mansfield, in *Wall* v. *McNamara*, that he exercised it as "if the heart is wrong."—2 Carr & Payne, 158, note. In short, it is not enough to show he committed an error in judgment, but it must have been a malicious and willful error.—*Harman* v. *Lappenden et al.*, 1 East, 562, 565, note.

1111. It may not be without some benefit, in a case of so much interest as this, to refer a moment further to one or two particular precedents in England and this country, and even in this court, in illustration of the soundness of these positions.

1112. Thus in *Drewe* v. *Coulton*, 1 East, 562, note, which was an action against the defendant, who was a public returning officer, for refusing a vote, Wilson, J., says: "This is, in the nature of it, an action for misbehavior by a public officer in his duty. Now, I think it cannot be called misbehavior unless maliciously and willfully done, and that the action will not lie for a mistake in law." "By willful, I understand contrary to a man's own conviction."

1113. "In very few instances is an officer answerable for what he does to the best of his judgment in cases where he is compellable to act, but the action lies where the officer has an option whether he will act or no." See these last cases collected in *Seaman* v. *Patten*, 2 Caines, 313, 315.

1114. In a case in this country, *Jenkins* v. *Waldron*, 11 Johns., 121, Spencer, J., says, for the whole court, on a state of facts much like the case in East: "It would, in our opinion, be opposed to all the principles of law, justice, and sound policy to hold that officers called upon to exercise their deliberate judgments are answerable for a mistake in law, either civilly or criminally, when their motives are pure, and untainted with fraud or malice."

Similar views are again expressed by the same court in the same volume (p. 160), in *Vanderheyden* v. *Young*. And in a like case, the supreme court of New Hampshire recognized a like principle. "It is true," said the chief justice for the court, "that moderators may decide wrongly with the best intentions, and then the party will be without remedy. And so may a court and jury decide wrongly, and then the party will also be without remedy." But there is no liability in such case without malice alleged and proved.—*Wheeler* v. *Patterson*, 1 N. Hamp., 90.

1115. Finally, in this court, like views were expressed, through Justice Story, in *Martin* v. *Mott*, 12 Wheaton, 31: "Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statutes constitute him the sole and exclusive judge of the existence of these facts." "Every public officer is presumed to act in obedience to his duty until the contrary is shown."

1116. Under these established principles and precedents, it will be seen that the rulings below must be held erroneous whenever the court departed from them, and required the defendant, as on several occasions, to go forward, and in the first instance to prove details rebutting any error or excess.

1117. As, for illustration, to prove in the outset facts showing a necessity to detain the plaintiff, before the latter had offered any evidence it was done from malice or without cause; or to prove that the prison on shore was safer and more suitable for the plaintiff's confinement than the vessels, under the peculiar circumstances then existing, until the plaintiff had first shown that no discretion existed in the defendant to place him there, or that he did it mala fide, or for purposes of cruelty and oppression; or to prove that the punishment inflicted was not immoderate and not unreasonable, when it is admitted to have been within the limits of his discretion, as confided to him by the articles for the government of the navy. On the contrary, as has been shown, all his acts within the limits of the discretion given to him are to be regarded as prima facie right till the opposite party disprove this presumption.

1118. The judgment below must therefore be reversed, and a "venire de novo" awarded, and the new trial be governed by the principles here decided.

SUPREME COURT.—DECEMBER TERM, 1851.

SAMUEL DINSMAN, *Plaintiff in Error*, v. CHARLES WILKES.

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1119. The decision of this question (whether the commander of a squadron had power to detain a marine after the term of his enlistment expired, if, in the opinion of the commander, public interest required it), by the commander, was final and conclusive; and if the marine did not conform to it, he was liable to punishment.

So, too, the commander was the judge of the degree of punishment necessary to suppress a spirit of disobedience and insubordination; and he is not liable to an action for a mere error in judgment, even if the jury suppose that milder measures would have accomplished his object.

But, at the same time, he is bound never to inflict any severer punishment than he conscientiously believes to be necessary to maintain discipline and due subordination in his ships.

The question being one of motives, the jury are to judge whether he was actuated alone by an upright intention to maintain the discipline of his command, or whether punishment was in any manner or degree increased or aggravated by malice or vindictive feeling.

In deciding this question, the jury are to take into consideration all the circumstances of the case.

Mr. Chief Justice TANEY delivered the Opinion of the Court.

1120. This case was before the court on a former occasion, and is fully reported in 7 Howard, 89. The present defendant in error was then the plaintiff, and the judgment of the circuit court was reversed, and a "venire de novo" awarded, the new trial to be governed by the principles decided by this court. Upon the trial under mandate, the judgment was in favor of the present defendant, and the plaintiff thereupon brought this writ of error. The testimony, so far as the questions of law upon the merits are concerned, is substantially the same with that offered at the former trial.

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1121. This is not an action for a malicious prosecution; but for an assault and false imprisonment. And whether the acts charged were done or not, and what motives actuated the defendant, are questions of fact exclusively for the jury; and probable cause or not is of no further importance than as evidence to be weighed by them in connection with all the other evidence in the case, in determining whether the defendant acted from a sense of duty or from ill-will to the plaintiff.

1122. It is an action by a marine against his commanding officer for punishment inflicted upon him for refusing to do duty, in a foreign port, upon the ground that the time of his enlistment had expired, and that he was entitled to his discharge. The case is one of much delicacy and importance as regards our naval service. For it is essential to its security and efficiency

that the authority and command confided to the officer, when it has been exercised from proper motives, should be firmly supported in the courts of justice, as well as on shipboard. And if it is not, the flag of the United States would soon be dishonored in every sea. But at the same time it must be borne in mind that the nation would be equally dishonored if it permitted the humblest individual in its service to be oppressed and injured by his commanding officer, from malice or ill-will, or the wantonness of power, without giving him redress in the courts of justice.

1123. At the time these events happened, Captain Wilkes was in a distant sea, charged with the execution of a high public duty. He was bound, by all lawful means in his power, to preserve the strength and efficiency of the squadron intrusted to his care, and was equally bound to respect the rights of every individual under his command. It is hardly necessary to inquire whether the plaintiff was or was not entitled to his discharge at the time he demanded. It is, however, very clear that he was not. But to guard against a misconstruction of this opinion, it is proper to say that the right to determine the question was, for the time being, in Captain Wilkes. In his position as commander, the law not only conferred upon him this power, but made it his duty to exercise it. If, in his judgment, the plaintiff was entitled to his discharge, it was his duty to give it, even if it was inconvenient to weaken the force he commanded. But if he believed he was not entitled, it was his duty to detain him in the service. Captain Wilkes might err in his decision. But that decision, for the time being, was final and conclusive; and it was the duty of the plaintiff to submit to it, as the judgment of the tribunal which he was bound by law to obey; and for any error of judgment in this respect, no action would lie against the defendant.

1124. Nor did the belief of the plaintiff as to his rights furnish any justification for his disobedience to orders. For there would be an end of all discipline if the seamen and marines on board a ship of war, on a distant service, were permitted to act on their own opinion of their rights, and to throw off the authority of the commander whenever they supposed it to be unlawfully exercised. And whether the plaintiff was legally entitled to his discharge or not, his disobedience, when the question had been decided against him by the proper tribunal, was an act of insubordination for which he was liable to punishment.

1125. So, too, as regards the degree of punishment to which he was subjected. It was the duty of Captain Wilkes to maintain proper discipline and order among the officers and men under his command; and if a spirit of disobedience and insubordination manifested itself in the squadron, he was bound to suppress it; and he might use severe measures for that purpose, if he deemed such measures necessary. And if, in his judgment, the continual refusal of the plaintiff to do duty made it proper to confine him on shore, rather than on shipboard, in order to reduce him to obedience, or necessary as an example to deter others from a like offense, he was justified in so doing; and while he acted honestly and from a sense of duty, and with a single eye to the welfare of the service in which he was engaged, the law protects him. He is not

liable to an action for a mere error in judgment, even if the jury suppose that milder measures would have accomplished his object.

1126. But, on the other hand, he was equally bound to respect and protect the rights of those under his command, and to cause them to be respected by others; to watch over their health and comfort; and, above all, never to inflict any severer or harsher punishment than he at the time conscientiously believed to be necessary to maintain discipline and due subordination in his ships. The almost despotic powers with which the law clothes him for the time, and which are absolutely necessary for the safety and efficiency of the ship, make it more especially his duty not to abuse them. And if from malice to an individual, or vindictive feeling, or a disposition to oppress, he inflicted punishment beyond that which, in his sober judgment, he would have thought necessary, he is liable to this action.

1127. This is not a case where the punishment alleged to have been inflicted was forbidden by law, or beyond the power which the law confided to him; for in such a case he would be liable, whatever were his motives. But the fact to be ascertained in this case is whether in the exercise of that discretion and judgment with which the law clothed him for the time, and which is in the nature of judicial discretion, he acted from improper feelings, and abused the power confided to him to the injury of the plaintiff.

1128. The case, therefore, turns upon the motive which induced Captain Wilkes to inflict the punishment complained of.

1129. And this question is one exclusively for the jury, to be decided by them upon the whole testimony. And the rule of law by which they must be governed in making up their verdict is contained in a single proposition. It is this:

1130. If they believe, from the whole testimony, that the defendant, in all the acts complained of, was actuated alone by an upright intention to maintain the discipline of his command and the interest of the service in which he was engaged; then the plaintiff is not entitled to recover. But if they find that the punishment of the plaintiff was in any manner or in any degree increased or aggravated by malice or a vindictive feeling towards him on the part of Captain Wilkes, or by a disposition to oppress him, then the plaintiff is entitled to recover.

1131. And, in deciding this question, they are to take into consideration the service in which Captain Wilkes was engaged; the place where these transactions happened; the condition of the vessels under his command; the spirit and temper of the marines and seamen, as he understood it to be, in his own vessel and the other vessels of the squadron, gathering his knowledge from his own observation as well as the information of others; also the nature and character of the voyage yet before him, and which it was his duty, if possible, to accomplish; and how far the conduct and example of the plaintiff might, in the judgment of the defendant, be calculated to embarrass or frustrate it altogether, unless he was reduced to obedience. And further, that under the order to imprison him in the fort, if the jury believe it to be truly stated in the defendant's testimony, the plaintiff was left at

liberty to relieve himself from confinement at any moment by returning to his duty. But, on the other hand, the jury must likewise take into consideration the different punishments he received; his confinement in the fort on shore; the situation and condition of the place; the character of the persons by whose authority it was governed; his food, his clothing, and general treatment; and whether Captain Wilkes, through proper officers, inquired into his treatment and condition during the time of his confinement. For certainly when, from whatever motives, he had placed him out of the protection which the ordinary place of confinement on shipboard afforded, in a prison belonging to and under the control of an uncivilized people, it was his duty, through proper and trustworthy officers, to inquire into his situation and treatment, and to see that it was not cruel or barbarous in any respect, and that he did not suffer for the want of those necessaries which the humanity of civilized countries always provides even for the hardened offender.

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1132. The judgment of the circuit court must be reversed and a "venire de novo" awarded.

INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD.[15]

SECTION I.

Martial law—Military jurisdiction—Military necessity—Retaliation.

1141. A PLACE, district, or country occupied by an enemy stands, in consequence of the occupation, under the martial law of the invading or occupying army, whether any proclamation declaring martial law, or any public warning to the inhabitants, has been issued or not. Martial law is the immediate and direct effect and consequence of occupation or conquest.

The presence of a hostile army proclaims its martial law.[16]

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[15] These "instructions for the government of armies of the United States in the field" were prepared by Francis Leiber, LL.D., and revised by a board of officers, of which the late Major-General Hitchcock was president. Having been approved by the President of the United States, they were by his command "published for the information of all concerned," in General Orders No. 100, A.-G. O., April 24, 1863. These orders "were intended to embody the general principles of the laws of war, or the general rules by which the commanders of armies, departments, districts, etc., are to be governed in their treatment of the inhabitants of the country militarily occupied. The application of these principles or rules in particular places will be left mainly to the good judgment and discretion of the commanders whose knowledge of the circumstances of each case it is presumed best qualifies them to decide."—General-in-chief to General Hurlburt, June 22, 1863.

[16] MARTIAL LAW.—See Constitution of the United States, Chap. i., Article I., sec. 9, clause 2: also Chap. xxvii., note 28 *d*.

1142. Martial law does not cease during the hostile occupation, except by special proclamation, ordered by the commander-in-chief; or by special mention in the treaty of peace concluding the war, when the occupation of a place or territory continues beyond the conclusion of peace as one of the conditions of the same.

1143. Martial law in a hostile country consists in the suspension, by the occupying military authority, of the criminal and civil law, and of the domestic administration and government in the occupied place or territory, and in the substitution of military rule and force for the same, as well as in the dictation of general laws, as far as military necessity requires this suspension, substitution, or dictation.

The commander of the forces may proclaim that the administration of all civil and penal law shall continue, either wholly or in part, as in times of peace, unless otherwise ordered by the military authority.

1144. Martial law is simply military authority exercised in accordance with the laws and usages of war. Military oppression is not martial law; it is the abuse of the power which that law confers. As martial law is executed by military force, it is incumbent upon those who administer it to be strictly guided by the principles of justice, honor, and humanity: virtues adorning a soldier even more than other men, for the very reason that he possesses the power of his arms against the unarmed.

1145. Martial law should be less stringent in places and countries fully occupied and fairly conquered. Much greater severity may be exercised in places or regions where actual hostilities exist, or are expected and must be prepared for. Its most complete sway is allowed, even in the commander's own country, when face to face with the enemy, because of the absolute necessities of the case, and of the paramount duty to defend the country against invasion.

To save the country is paramount to all other considerations.

1146. All civil and penal law shall continue to take its usual course in the enemy's places and territories under martial law, unless interrupted or stopped by order of the occupying military power; but all the functions of the hostile government—legislative, executive, or administrative—whether of a general, provincial, or local character, cease under martial law, or continue only with the sanction, or, if deemed necessary, the participation of the occupier or invader.

1147. Martial law extends to property, and to persons, whether they are subjects of the enemy or aliens to that government.

1148. Consuls, among American and European nations, are not diplomatic agents. Nevertheless, their offices and persons will be subjected to martial law in cases of urgent necessity only; their property and business are not exempted. Any delinquency they commit against the established military rule may be punished as in the case of any other inhabitant, and such punishment furnishes no reasonable ground for international complaint.

1149. The functions of ambassadors, ministers, or other diplomatic agents, accredited by neutral powers to the hostile government, cease, so far as

regards the displaced government; but the conquering or occupying power usually recognizes them as temporarily accredited to itself.

1150. Martial law affects chiefly the police and collection of public revenue and taxes, whether imposed by the expelled government or by the invader, and refers mainly to the support and efficiency of the army, its safety, and the safety of its operations.

1151. The law of war does not only disclaim all cruelty and bad faith concerning engagements concluded with the enemy during the war, but also the breaking of stipulations solemnly contracted by the belligerents in time of peace, and avowedly intended to remain in force in case of war between the contracting powers.

It disclaims all extortions and other transactions for individual gain; all acts of private revenge, or connivance at such acts.

Offenses to the contrary shall be severely punished, and especially so if committed by officers.

1152. Whenever feasible, martial law is carried out in cases of individual offenders by military courts; but sentences of death shall be executed only with the approval of the chief executive, provided the urgency of the case does not require a speedier execution, and then only with the approval of the chief commander.

1153. Military jurisdiction is of two kinds: first, that which is conferred and defined by statute; second, that which is derived from the common law of war. Military offenses under the statute law must be tried in the manner therein directed; but military offenses which do not come within the statute must be tried and punished under the common law of war. The character of the courts which exercise these jurisdictions depends upon the local laws of each particular country.

In the armies of the United States the first is exercised by courts-martial; while cases which do not come within the Rules and Articles of War, or the jurisdiction conferred by statute or courts-martial, are tried by military commissions.[17]

1154. Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.

1155. Military necessity admits of all direct destruction of life or limb of *armed* enemies, and of other persons whose destruction is incidentally *unavoidable* in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the

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[17] MILITARY COMMISSIONS.—For statutory recognition of these tribunals see ¶ ¶ 631, 666, 753; and for judicial construction of their jurisdiction see Chap. xxii., notes 1 and 25, and Chap. xxvii., notes 22, 27, 28.

appropriation of whatever an enemy's country affords, necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another, and to God.

1156. Military necessity does not admit of cruelty, that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.

1157. War is not carried on by arms alone. It is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjection of the enemy.

1158. When the commander of a besieged place expels the non-combatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure, to drive them back, so as to hasten on the surrender.

1159. Commanders, whenever admissible, inform the enemy of their intention to bombard a place, so that the non-combatants, and especially the women and children, may be removed before the bombardment commences. But it is no infraction of the common law of war to omit thus to inform the enemy. Surprise may be a necessity.

1160. Public war is a state of armed hostility between sovereign nations or governments.[18] It is a law and requisite of civilized existence that men live in political, continuous societies, forming organized units, called states or nations, whose constituents bear, enjoy, and suffer, advance and retrograde together, in peace and in war.

1161. The citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of the war.

1162. Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.

1163. Private citizens are no longer murdered, enslaved, or carried off to distant parts, and the inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford to grant in the overruling demands of a vigorous war.

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[18] A state of war may exist without formal declaration. See Chap. i., note 3, *a–c*.

1164. The almost universal rule in remote times was, and continues to be with barbarous armies, that the private individual of the hostile country is destined to suffer every privation of liberty and protection, and every disruption of family ties. Protection was, and still is with uncivilized people, the exception.

1165. In modern regular wars of the Europeans, and their descendants in other portions of the globe, protection of the inoffensive citizen of the hostile country is the rule; privation and disturbance of private relations are the exceptions.

1166. Commanding generals may cause the magistrates and civil officers of the hostile country to take the oath of temporary allegiance or an oath of fidelity to their own victorious government or rulers, and they may expel every one who declines to do so. But whether they do so or not, the people and their civil officers owe strict obedience to them as long as they hold sway over the district or country, at the peril of their lives.

1167. The law of war can no more wholly dispense with retaliation than can the law of nations, of which it is a branch. Yet civilized nations acknowledge retaliation as the sternest feature of war. A reckless enemy often leaves to his opponent no other means of securing himself against the repetition of barbarous outrage.

1168. Retaliation will, therefore, never be resorted to as a measure of mere revenge, but only as a means of protective retribution, and moreover, cautiously and unavoidably; that is to say, retaliation shall only be resorted to after careful inquiry into the real occurrence, and the character of the misdeeds that may demand retribution.

Unjust or inconsiderate retaliation removes the belligerents farther and farther from the mitigating rules of a regular war, and by rapid steps leads them nearer to the internecine wars of savages.

1169. Modern times are distinguished from earlier ages by the existence, at one and the same time, of many nations and great governments related to one another in close intercourse.

Peace is their normal condition; war is the exception. The ultimate object of all modern war is a renewed state of peace.

The more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief.

1170. Ever since the formation and coexistence of modern nations, and ever since wars have become great national wars, war has come to be acknowledged not to be its own end, but the means to obtain great ends of state, or to consist in defense against wrong; and no conventional restriction of the modes adopted to injure the enemy is any longer admitted; but the law of war imposes many limitations and restrictions on principles of justice, faith, and honor.

SECTION II.

Public and private property of the enemy—Protection of persons, and especially women; of religion, the arts and sciences—Punishment of crimes against the inhabitants of hostile countries.

1171. A victorious army appropriates all public money, seizes all public movable property until further direction by its government, and sequesters for its own benefit or that of its government all the revenues of real property belonging to the hostile government or nation. The title to such real property remains in abeyance during military occupation, and until the conquest is made complete.

1172. A victorious army, by the martial power inherent in the same, may suspend, change, or abolish, as far as the martial power extends, the relations which arise from the services due, according to the existing laws of the invaded country, from one citizen, subject, or native of the same to another.

The commander of the army must leave it to the ultimate treaty of peace to settle the permanency of this change.

1173. It is no longer considered lawful—on the contrary, it is held to be a serious breach of the law of war—to force the subjects of the enemy into the service of the victorious government, except the latter should proclaim, after a fair and complete conquest of the hostile country or district, that it is resolved to keep the country, district, or place permanently as its own and make it a portion of its own country.

1174. As a general rule, the property belonging to churches, to hospitals, or other establishments of an exclusively charitable character, to establishments of education, or foundations for the promotion of knowledge, whether public schools, universities, academies of learning or observatories, museums of the fine arts, or of a scientific character—such property is not to be considered public property in the sense of paragraph 31 [¶ 1171]; but it may be taxed or used when the public service may require it.

1175. Classical works of art, libraries, scientific collections, or precious instruments, such as astronomical telescopes, as well as hospitals, must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded.

1176. If such works of art, libraries, collections, or instruments belonging to a hostile nation or government, can be removed without injury, the ruler of the conquering state or nation may order them to be seized and removed for the benefit of the said nation. The ultimate ownership is to be settled by the ensuing treaty of peace.

In no case shall they be sold or given away, if captured by the armies of the United States, nor shall they ever be privately appropriated, or wantonly destroyed or injured.

1177. The United States acknowledge and protect, in hostile countries occupied by them, religion and morality; strictly private property; the per-

sons of the inhabitants, especially those of women; and the sacredness of domestic relations. Offenses to the contrary shall be rigorously punished.

This rule does not interfere with the right of the victorious invader to tax the people or their property, to levy forced loans, to billet soldiers,[19] or to appropriate property, especially houses, land, boats or ships, and churches, for temporary and military uses.

1178. Private property, unless forfeited by crimes or by offenses of the owner, can be seized only by way of military necessity, for the support or other benefit of the army or of the United States.

If the owner has not fled, the commanding officer will cause receipts to be given, which may serve the spoliated owner to obtain indemnity.

1179. The salaries of civil officers of the hostile government who remain in the invaded territory, and continue the work of their office, and can continue it according to the circumstances arising out of the war—such as judges, administrative or police officers, officers of city or communal governments—are paid from the public revenue of the invaded territory, until the military government has reason wholly or partially to discontinue it. Salaries or incomes connected with purely honorary titles are always stopped.

1180. There exists no law or body of authoritative rules of action between hostile armies, except that branch of the law of nature and nations which is called the law and usages of war on land.

1181. All municipal law of the ground on which the armies stand, or of the countries to which they belong, is silent and of no effect between armies in the field.

1182. Slavery, complicating and confounding the ideas of property (that is of a *thing*) and of personalty (that is of *humanity*), exists according to municipal or local law only. The law of nature and nations has never acknowledged it. The digest of the Roman law enacts the early dictum of the pagan jurist, that "so far as the law of nature is concerned, all men are equal." Fugitives escaping from a country in which they were slaves, villains, or serfs, into another country, have, for centuries past, been held free and acknowledged free by judicial decisions of European countries, even though the municipal law of the country in which the slave had taken refuge acknowledged slavery within its own dominions.

1183. Therefore, in a war between the United States and a belligerent which admits of slavery, if a person held in bondage by that belligerent be captured by or come as a fugitive under the protection of the military forces of the United States, such person is immediately entitled to the rights and privileges of a freeman. To return such person into slavery would amount to enslaving a free person, and neither the United States nor any officer under their authority can enslave any human being. Moreover, a person so made free by the law of war is under the shield of the law of nations, and the former owner or state can have, by the law of post-liminy, no belligerent lien or claim of service.

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[19] See Constitution of the United States (Chap. i.), Amendment III.

1184. All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense.

A soldier, officer, or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior.

1185. All captures and booty belong, according to the modern law of war, primarily to the government of the captor.[20]

Prize-money, whether on sea or land, can now only be claimed under local law.

1186. Neither officers nor soldiers are allowed to make use of their position or power in the hostile country for private gain, not even for commercial transactions otherwise legitimate. Offenses to the contrary committed by commissioned officers will be punished with cashiering or such other punishment as the nature of the offense may require; if by soldiers, they shall be punished according to the nature of the offense.

1187. Crimes punishable by all penal codes, such as arson, murder, maiming, assaults, highway robbery, theft, burglary, fraud, forgery, and rape, if committed by an American soldier in a hostile country against its inhabitants, are not only punishable as at home; but in all cases in which death is not inflicted, the severer punishment shall be preferred.[21]

SECTION III.

Deserters—Prisoners of war—Hostages—Booty on the battle-field.

1188. Deserters from the American army, having entered the service of the enemy, suffer death if they fall again into the hands of the United States, whether by capture, or being delivered up to the American army; and if a deserter from the enemy, having taken service in the army of the United States, is captured by the enemy, and punished by them with death or otherwise, it is not a breach against the law and usages of war, requiring redress or retaliation.

1189. A prisoner of war is a public enemy armed or attached to the hostile army for active aid, who has fallen into the hands of the captor, either fighting or wounded, on the field or in the hospital, by individual surrender or by capitulation.

All soldiers, of whatever species of arms; all men who belong to the rising en masse of the hostile country; all those who are attached to the army for its efficiency and promote directly the object of the war, except

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[20] See Chap. iii., ¶ 55, and Chap. xxviii., ¶ 954.

[21] See act of Congress extending jurisdiction of military courts in time of war, ¶ 631.

such as are hereinafter provided for; all disabled men or officers on the field or elsewhere, if captured; all enemies who have thrown away their arms and ask for quarter,—are prisoners of war, and as such exposed to the inconveniences as well as entitled to the privileges of a prisoner of war.

1190. Moreover, citizens who accompany an army for whatever purpose, such as sutlers, editors or reporters of journals, or contractors, if captured, may be made prisoners of war, and be detained as such.

The monarch and members of the hostile reigning family, male or female, the chief, and chief officers of the hostile government, its diplomatic agents, and all persons who are of particular and singular use and benefit to the hostile army or its government, are, if captured on belligerent ground, and if unprovided with a safe-conduct granted by the captor's government, prisoners of war.

1191. If the people of that portion of an invaded country which is not yet occupied by the enemy, or of the whole country, at the approach of a hostile army, rise, under a duly authorized levy, en masse, to resist the invader, they are now treated as public enemies, and if captured are prisoners of war.

1192. No belligerent has the right to declare that he will treat every captured man in arms, of a levy en masse, as a brigand or bandit.

If, however, the people of a country, or any portion of the same, already occupied by an army, rise against it, they are violators of the laws of war, and are not entitled to their protection.

1193. The enemy's chaplains, officers of the medical staff, apothecaries, hospital nurses and servants, if they fall into the hands of the American army, are not prisoners of war, unless the commander has reasons to retain them. In this latter case, or if, at their own desire, they are allowed to remain with their captured companions, they are treated as prisoners of war, and may be exchanged if the commander sees fit.

1194. A hostage is a person accepted as a pledge for the fulfillment of an agreement concluded between belligerents during the war, or in consequence of a war. Hostages are rare in the present age.

1195. If a hostage is accepted, he is treated like a prisoner of war, according to rank and condition, as circumstances may admit.

1196. A prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering, or disgrace, by cruel imprisonment, want of food, by mutilation, death, or any other barbarity.

1197. So soon as a man is armed by a sovereign government, and takes the soldier's oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts, are no individual crimes or offenses. No belligerent has a right to declare that enemies of a certain class, color, or condition, when properly organized as soldiers, will not be treated by him as public enemies.

1198. The law of nations knows of no distinction of color, and if an enemy of the United States should enslave and sell any captured persons of their

army, it would be a case for the severest retaliation, if not redressed upon complaint.

The United States cannot retaliate by enslavement; therefore death must be the retaliation for this crime against the law of nations.

1199. A prisoner of war remains answerable for his crimes committed against the captor's army or people, committed before he was captured, and for which he has not been punished by his own authorities.

All prisoners of war are liable to the infliction of retaliatory measures.

1200. It is against the usage of modern war to resolve, in hatred and revenge, to give no quarter. No body of troops has the right to declare that it will not give, and therefore will not expect, quarter; but a commander is permitted to direct his troops to give no quarter, in great straits, when his own salvation makes it *impossible* to cumber himself with prisoners.

1201. Troops that give no quarter have no right to kill enemies already disabled on the ground, or prisoners captured by other troops.

1202. All troops of the enemy known or discovered to give no quarter in general, or to any portion of the army, receive none.

1203. Troops who fight in the uniform of their enemies, without any plain, striking, and uniform mark of distinction of their own, can expect no quarter.

1204. If American troops capture a train containing uniforms of the enemy, and the commander considers it advisable to distribute them for use among his men, some striking mark or sign must be adopted to distinguish the American soldier from the enemy.

1205. The use of the enemy's national standard, flag, or other emblem of nationality, for the purpose of deceiving the enemy in battle, is an act of perfidy by which they lose all claim to the protection of the laws of war.

1206. Quarter having been given to an enemy by American troops, under a misapprehension of his true character, he may, nevertheless, be ordered to suffer death if, within three days after the battle, it be discovered that he belongs to a corps which gives no quarter.

1207. The law of nations allows every sovereign government to make war upon another sovereign state, and, therefore, admits of no rules or laws different from those of regular warfare, regarding the treatment of prisoners of war, although they may belong to the army of a government which the captor may consider as a wanton and unjust assailant.

1208. Modern wars are not internecine wars, in which the killing of the enemy is the object. The destruction of the enemy in modern war, and, indeed, modern war itself, are means to obtain that object of the belligérent which lies beyond the war.

Unnecessary or revengeful destruction of life is not lawful.

1209. Outposts, sentinels, or pickets are not to be fired upon, except to drive them in, or when a positive order, special or general, has been issued to that effect.

1210. The use of poison in any manner, be it to poison wells, or food, or

arms, is wholly excluded from modern warfare. He that uses it puts himself out of the pale of the law and usages of war.

1211. Whoever intentionally inflicts additional wounds on an enemy already wholly disabled, or kills such an enemy, or who orders or encourages soldiers to do so, shall suffer death, if duly convicted, whether he belongs to the army of the United States, or is an enemy captured after having committed his misdeed.

1212. Money and other valuables on the person of a prisoner, such as watches or jewelry, as well as extra clothing, are regarded by the American army as the private property of the prisoner, and the appropriation of such valuables or money is considered dishonorable, and is prohibited.

Nevertheless, if *large* sums are found upon the persons of prisoners, or in their possession, they shall be taken from them, and the surplus, after providing for their own support, appropriated for the use of the army, under the direction of the command, unless otherwise ordered by the government. Nor can prisoners claim, as private property, large sums found and captured in their train, although they had been placed in the private luggage of the prisoners.

1213. All officers, when captured, must surrender their side-arms to the captor. They may be restored to the prisoner in marked cases, by the commander, to signalize admiration of his distinguished bravery, or approbation of his humane treatment of prisoners before his capture. The captured officer to whom they may be restored cannot wear them during captivity.

1214. A prisoner of war, being a public enemy, is the prisoner of the government, and not of the captor. No ransom can be paid by a prisoner of war to his individual captor, or to any officer in command. The government alone releases captives, according to rules prescribed by itself.

1215. Prisoners of war are subject to confinement or imprisonment such as may be deemed necessary on account of safety, but they are to be subjected to no other intentional suffering or indignity. The confinement and mode of treating a prisoner may be varied during his captivity according to the demands of safety.

1216. Prisoners of war shall be fed upon plain and wholesome food, whenever practicable, and treated with humanity.

They may be required to work for the benefit of the captor's government, according to their rank and condition.

1217. A prisoner of war who escapes may be shot, or otherwise killed in his flight; but neither death nor any other punishment shall be inflicted upon him simply for his attempt to escape, which the law of war does not consider a crime. Stricter means of security shall be used after an unsuccessful attempt at escape.

If, however, a conspiracy is discovered, the purpose of which is a united or general escape, the conspirators may be rigorously punished, even with death; and capital punishment may also be inflicted upon prisoners of war discovered to have plotted rebellion against the authorities of the captors, whether in union with fellow-prisoners or other persons.

1218. If prisoners of war, having given no pledge nor made any promise on their honor, forcibly or otherwise escape, and are captured again in battle, after having rejoined their own army, they shall not be punished for their escape, but shall be treated as simple prisoners of war, although they will be subjected to stricter confinement.

1219. Every captured wounded enemy shall be medically treated, according to the ability of the medical staff.

1220. Honorable men, when captured, will abstain from giving to the enemy information concerning their own army, and the modern law of war permits no longer the use of any violence against prisoners, in order to extort the desired information, or to punish them for having given false information.

SECTION IV.

Partisans—Armed enemies not belonging to the hostile army—Scouts—Armed prowlers—War-rebels.

1221. Partisans are soldiers armed and wearing the uniform of their army, but belonging to a corps which acts detached from the main body for the purpose of making inroads into the territory occupied by the enemy. If captured, they are entitled to all the privileges of the prisoner of war.

1222. Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers,—such men, or squads of men, are not public enemies, and therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.

1223. Scouts or single soldiers, if disguised in the dress of the country, or in the uniform of the army hostile to their own, employed in obtaining information, if found within or lurking about the lines of the captor, are treated as spies, and suffer death.

1224. Armed prowlers, by whatever names they may be called, or persons of the enemy's territory, who steal within the lines of the hostile army, for the purpose of robbing, killing, or of destroying bridges, roads, or canals, or of robbing or destroying the mail, or of cutting the telegraph wires, are not entitled to the privileges of the prisoner of war.

1225. War-rebels are persons within an occupied territory who rise in arms against the occupying or conquering army, or against the authorities established by the same. If captured, they may suffer death, whether they rise singly, in small or large bands, and whether called upon to do so by their own, but expelled, government or not. They are not prisoners of war; nor are they, if discovered and secured before their conspiracy has matured to an actual rising, or to armed violence.

SECTION V.

Safe-conduct—Spies—War-traitors—Captured messengers—Abuse of the flag of truce.

1226. All intercourse between the territories occupied by belligerent armies, whether by traffic, by letter, by travel, or in any other way, ceases. This is the general rule, to be observed without special proclamation.[22]

Exceptions to this rule, whether by safe-conduct, or permission to trade on a small or large scale, or by exchanging mails, or by travel from one territory into the other, can take place only according to agreement approved by the government, or by the highest military authority.

Contraventions of this rule are highly punishable.

1227. Ambassadors, and all other diplomatic agents of neutral powers, accredited to the enemy, may receive safe-conducts through the territories occupied by the belligerents, unless there are military reasons to the contrary, and unless they may reach the place of their destination conveniently by another route. It implies no international affront if the safe-conduct is declined. Such passes are usually given by the supreme authority of the state, and not by subordinate officers.

1228. A spy is a person who secretly, in disguise or under false pretense, seeks information with the intention of communicating it to the enemy.

The spy is punishable with death by hanging by the neck, whether or not he succeed in obtaining the information or in conveying it to the enemy.[23]

1229. If a citizen of the United States obtains information in a legitimate manner, and betrays it to the enemy, be he a military or civil officer, or a private citizen, he shall suffer death.[24]

1230. A traitor under the law of war, or a war-traitor, is a person in a place or district under martial law who, unauthorized by the military commander, gives information of any kind to the enemy, or holds intercourse with him.

1231. The war-traitor is always severely punished. If his offense consists in betraying to the enemy anything concerning the condition, safety, operations, or plans of the troops holding or occupying the place or district, his punishment is death.

1232. If the citizen or subject of a country or place invaded or conquered gives information to his own government, from which he is separated by the hostile army, or to the army of his government, he is a war-traitor, and death is the penalty of his offense.

1233. All armies in the field stand in need of guides, and impress them if they cannot obtain them otherwise.

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[22] Statutes regulating trade and intercourse with States declared to be in insurrection may be found in Chap. xxviii., ¶ ¶ 945–953.

[23] See ¶ ¶ 752, 753.

[24] See also 57th Article of War, ¶ 734.

1234. No person having been forced by the enemy to serve as guide is punishable for having done so.

1235. If a citizen of a hostile and invaded district voluntarily serves as a guide to the enemy, or offers to do so, he is deemed a war-traitor, and shall suffer death.

1236. A citizen serving voluntarily as a guide against his own country commits treason, and will be dealt with according to the law of his country.

1237. Guides, when it is clearly proved that they have misled intentionally, may be put to death.

1238. All unauthorized or secret communication with the enemy is considered treasonable by the law of war.

Foreign residents in an invaded or occupied territory, or foreign visitors in the same, can claim no immunity from this law. They may communicate with foreign parts, or with the inhabitants of the hostile country, so far as the military authority permits, but no further. Instant expulsion from the occupied territory would be the very least punishment for the infraction of this rule.

1239. A messenger carrying written dispatches or verbal messages from one portion of the army, or from a besieged place, to another portion of the same army, or its government, if armed, and in the uniform of his army, and if captured while doing so, in the territory occupied by the enemy, is treated by the captor as a prisoner of war. If not in uniform, nor a soldier, the circumstances connected with his capture must determine the disposition that shall be made of him.

1240. A messenger or agent who attempts to steal through the territory occupied by the enemy, to further, in any manner, the interests of the enemy, if captured, is not entitled to the privileges of the prisoner of war, and may be dealt with according to the circumstances of the case.

1241. While deception in war is admitted as a just and necessary means of hostility, and is consistent with honorable warfare, the common law of war allows even capital punishment for clandestine or treacherous attempts to injure an enemy, because they are so dangerous, and it is so difficult to guard against them.

1242. The law of war, like the criminal law regarding other offenses, makes no difference on account of the difference of sexes, concerning the spy, the war-traitor, or the war-rebel.

1243. Spies, war-traitors, and war-rebels are not exchanged according to the common law of war. The exchange of such persons would require a special cartel, authorized by the government, or, at a great distance from it, by the chief commander of the army in the field.

1244. A successful spy or war-traitor, safely returned to his own army, and afterwards captured as an enemy, is not subject to punishment for his acts as a spy or war-traitor, but he may be held in closer custody as a person individually dangerous.

SECTION VI.

Exchange of prisoners—Flags of truce—Flags of protection.

1245. Exchanges of prisoners take place—number for number—rank for rank—wounded for wounded—with added condition for added condition—such, for instance, as not to serve for a certain period.

1246. In exchanging prisoners of war, such numbers of persons of inferior rank may be substituted as an equivalent for one of superior rank as may be agreed upon by cartel, which requires the sanction of the government, or of the commander of the army in the field.

1247. A prisoner of war is in honor bound truly to state to the captor his rank; and he is not to assume a lower rank than belongs to him, in order to cause a more advantageous exchange; nor a higher rank, for the purpose of obtaining better treatment.

Offenses to the contrary have been justly punished by the commanders of released prisoners, and may be good cause for refusing to release such prisoners.

1248. The surplus number of prisoners of war remaining after an exchange has taken place is sometimes released either for the payment of a stipulated sum of money, or, in urgent cases, of provision, clothing, or other necessaries.

Such arrangement, however, requires the sanction of the highest authority.

1249. The exchange of prisoners of war is an act of convenience to both belligerents. If no general cartel has been concluded, it cannot be demanded by either of them. No belligerent is obliged to exchange prisoners of war.

A cartel is voidable so soon as either party has violated it.

1250. No exchange of prisoners shall be made except after complete capture, and after an accurate account of them, and a list of the captured officers, has been taken.

1251. The bearer of a flag of truce cannot insist upon being admitted. He must always be admitted with great caution. Unnecessary frequency is carefully to be avoided.

1252. If the bearer of a flag of truce offer himself during an engagement, he can be admitted as a very rare exception only. It is no breach of good faith to retain such a flag of truce, if admitted during the engagement. Firing is not required to cease on the appearance of a flag of truce in battle.

1253. If the bearer of a flag of truce, presenting himself during an engagement, is killed or wounded, it furnishes no ground of complaint whatever.

1254. If it be discovered, and fairly proved, that a flag of truce has been abused for surreptitiously obtaining military knowledge, the bearer of the flag thus abusing his sacred character is deemed a spy.

So sacred is the character of a flag of truce, and so necessary is its sacred-

ness, that while its abuse is an especially heinous offense, great caution is requisite, on the other hand, in convicting the bearer of a flag of truce as a spy.

1255. It is customary to designate by certain flags (usually yellow) the hospitals in places which are shelled, so that the besieging enemy may avoid firing on them. The same has been done in battles, when hospitals are situated within the field of the engagement.

1256. Honorable belligerents often request that the hospitals within the territory of the enemy may be designated, so that they may be spared.

An honorable belligerent allows himself to be guided by flags or signals of protection as much as the contingencies and the necessities of the fight will permit.

1257. It is justly considered an act of bad faith, of infamy or fiendishness, to deceive the enemy by flags of protection. Such act of bad faith may be good cause for refusing to respect such flags.

1258. The besieging belligerent has sometimes requested the besieged to designate the buildings containing collections of works of art, scientific museums, astronomical observatories, or precious libraries, so that their destruction may be avoided as much as possible.

SECTION VII.

The Parole.

1259. Prisoners of war may be released from captivity by exchange, and, under certain circumstances, also by parole.

1260. The term "parole" designates the pledge of individual good faith and honor to do, or to omit doing, certain acts after he who gives his parole shall have been dismissed, wholly or partially, from the power of the captor.[25]

1261. The pledge of the parole is always an individual, but not a private, act.

1262. The parole applies chiefly to prisoners of war whom the captor allows to return to their country, or to live in greater freedom within the captor's country or territory, on conditions stated in the parole.

1263. Release of prisoners of war by exchange is the general rule release by parole is the exception.

1264. Breaking the parole is punished with death when the person breaking the parole is captured again.

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[25] A *military parole* not to serve until exchanged must not be confounded with a *parole of honor* to do or not to do a particular thing not inconsistent with the duty of a soldier. Thus, a prisoner of war actually held by the enemy may, in order to obtain exemption from a close guard or confinement, pledge his parole of honor that he will make no attempt to escape. Such pledges are binding upon the individuals giving them; but they should seldom be given or received, for it is the duty of a prisoner to escape if able to do so. Any pledge or parole of honor extorted from a prisoner by ill usage or cruelty is not binding.—G. O. No. 207, A.-G. O., 1863.

(*a.*) A prisoner of war, paroled by the enemy, cannot be discharged from the service, though a minor; he must be held to service till exchanged.—*United States* v. *Wright*, 5 Philadelphia Reports, 299.

Accurate lists, therefore, of the paroled persons must be kept by the belligerents.

1265. When paroles are given and received there must be an exchange of two written documents, in which the name and rank of the paroled individuals are accurately and truthfully stated.

1266. Commissioned officers only are allowed to give their parole, and they can give it only with the permission of their superior, as long as a superior in rank is within reach.

1267. No non-commissioned officer or private can give his parole except through an officer. Individual paroles not given through an officer are not only void, but subject the individual giving them to the punishment of death as deserters. The only admissible exception is where individuals, properly separated from their commands, have suffered long confinement without the possibility of being paroled through an officer.

1268. No paroling on the battle-field;[26] no paroling of entire bodies of troops after a battle; and no dismissal of large numbers of prisoners, with a general declaration that they are paroled, is permitted, or of any value.

1269. In capitulations for the surrender of strong places or fortified camps the commanding officer, in cases of urgent necessity, may agree that the troops under his command shall not fight again during the war, unless exchanged.

1270. The usual pledge given in the parole is not to serve during the existing war, unless exchanged.

This pledge refers only to the active service in the field, against the paroling belligerent or his allies actively engaged in the same war. These cases of breaking the parole are patent acts, and can be visited with the punishment of death; but the pledge does not refer to internal service, such as recruiting or drilling the recruits, fortifying places not besieged, quelling civil commotions, fighting against belligerents unconnected with the paroling belligerents, or to civil or diplomatic service for which the paroled officer may be employed.

1271. If the government does not approve of the parole, the paroled officer must return into captivity; and should the enemy refuse to receive him, he is free of his parole.

1272. A belligerent government may declare, by a general order, whether it will allow paroling, and on what conditions it will allow it. Such order is communicated to the enemy.

1273. No prisoner of war can be forced by the hostile government to parole himself, and no government is obliged to parole prisoners of war, or to parole all captured officers, if it paroles any. As the pledging of the parole is an individual act, so is paroling, on the other hand, an act of choice on the part of the belligerent.

1274. The commander of an occupying army may require of the civil

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[26] An officer who gives a parole for himself or his command on the battle-field is under the common law and usages of war deemed a deserter.—See G. O. No. 49, A.-G. O., 1863.

officers of the enemy, and of its citizens, any pledge he may consider necessary for the safety or security of his army, and upon their failure to give it he may arrest, confine, or detain them.[27]

SECTION VIII.

Armistice—Capitulation.

1275. An armistice is the cessation of active hostilities for a period agreed upon between belligerents. It must be agreed upon in writing, and duly ratified by the highest authorities of the contending parties.

1276. If an armistice be declared, without conditions, it extends no further than to require a total cessation of hostilities, along the front of both belligerents.

If conditions be agreed upon, they should be clearly expressed, and must be rigidly adhered to by both parties. If either party violates any express condition, the armistice may be declared null and void by the other.

1277. An armistice may be general, and valid for all points and lines of the belligerents; or special, that is, referring to certain troops or certain localities only.

An armistice may be concluded for a definite time; or for an indefinite time, during which either belligerent may resume hostilities on giving the notice agreed upon to the other.

1278. The motives which induce the one or the other belligerent to conclude an armistice, whether it be expected to be preliminary to a treaty of peace, or to prepare during the armistice for a more vigorous prosecution of the war, do in no way affect the character of the armistice itself.

1279. An armistice is binding upon the belligerents from the day of the agreed commencement; but the officers of the armies are responsible from the day only when they receive official information of its existence.

1280. Commanding officers have the right to conclude armistices binding on the district over which their command extends, but such armistice is subject to the ratification of the superior authority, and ceases so soon as it is made known to the enemy that the armistice is not ratified, even if a certain time for the elapsing between giving notice of cessation and the resumption of hostilities should have been stipulated for.

1281. It is incumbent upon the contracting parties of an armistice to stipulate what intercourse of persons or traffic between the inhabitants of the territories occupied by the hostile armies shall be allowed, if any.

If nothing is stipulated the intercourse remains suspended, as during actual hostilities.

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[27] The obligations imposed by the general laws and usages of war upon the non-combatant inhabitants of a section of country passed over by an invading army cease when the military occupation ceases; and any pledge or parole given by such persons, in regard to future service, is null and of no effect.—G. O. No. 207, A. G.-O., 1863.

1282. An armistice is not a partial or a temporary peace; it is only the suspension of military operations to the extent agreed upon by the parties.

1283. When an armistice is concluded between a fortified place and the army besieging it, it is agreed by all the authorities on this subject that the besieger must cease all extension, perfection, or advance of his attacking works, as much so as from attacks by main force.

But as there is a difference of opinion among martial jurists, whether the besieged have the right to repair breaches or to erect new works of defense within the place during an armistice, this point should be determined by express agreement between the parties.

1284. So soon as a capitulation is signed, the capitulator has no right to demolish, destroy, or injure the works, arms, stores, or ammunition, in his possession, during the time which elapses between the signing and the execution of the capitulation, unless otherwise stipulated in the same.

1285. When an armistice is clearly broken by one of the parties, the other party is released from all obligation to observe it.

1286. Prisoners, taken in the act of breaking an armistice, must be treated as prisoners of war, the officer alone being responsible who gives the order for such a violation of an armistice. The highest authority of the belligerent aggrieved may demand redress for the infraction of an armistice.

1287. Belligerents sometimes conclude an armistice while their plenipotentiaries are met to discuss the conditions of a treaty of peace; but plenipotentiaries may meet without a preliminary armistice; in the latter case, the war is carried on without any abatement.

SECTION IX.

Assassination.

1288. The law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government, an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such international outlawry; on the contrary, it abhors such outrage. The sternest retaliation should follow the murder committed in consequence of such proclamation, made by whatever authority. Civilized nations look with horror upon offers of rewards for the assassination of enemies as relapses into barbarism.

SECTION X.

Insurrection—Civil War—Rebellion.

1289. Insurrection is the rising of people in arms against their government, or a portion of it, or against one or more of its laws, or against an officer or officers of the government. It may be confined to mere armed resistance, or it may have greater ends in view.

1290. Civil war is war between two or more portions of a country or

state, each contending for the mastery of the whole, and each claiming to be the legitimate government. The term is also sometimes applied to war of rebellion, when the rebellious provinces or portions of the state are contiguous to those containing the seat of government.

1291. The term rebellion is applied to an insurrection of large extent, and is usually a war between the legitimate government of a country and portions or provinces of the same who seek to throw off their allegiance to it, and set up a government of their own.

1292. When humanity induces the adoption of the rules of regular war toward rebels, whether the adoption is partial or entire, it does in no way whatever imply a partial or complete acknowledgment of their government, if they have set up one, or of them, as an independent or sovereign power. Neutrals have no right to make the adoption of the rules of war by the assailed government toward rebels the ground of their own acknowledgment of the revolted people as an independent power.

1293. Treating captured rebels as prisoners of war, exchanging them, concluding of cartels, capitulations, or other warlike agreements with them; addressing officers of a rebel army by the rank they may have in the same; accepting flags of truce; or, on the other hand, proclaiming martial law in their territory, or levying war-taxes or forced loans, or doing any other act sanctioned or demanded by the law and usages of public war between sovereign belligerents, neither proves nor establishes an acknowledgment of the rebellious people, or of the government which they may have erected, as a public or sovereign power. Nor does the adoption of the rules of war toward rebels imply an engagement with them extending beyond the limits of these rules. It is victory in the field that ends the strife and settles the future relations between the contending parties.

1294. Treating, in the field, the rebellious enemy according to the law and usages of war has never prevented the legitimate government from trying the leaders of the rebellion or chief rebels for high treason, and from treating them accordingly, unless they are included in a general amnesty.

1295. All enemies in regular war are divided into two general classes; that is to say, into combatants and non-combatants, or unarmed citizens of the hostile government.

The military commander of the legitimate government, in a war of rebellion, distinguishes between the loyal citizen in the revolted portion of the country and the disloyal citizen. The disloyal citizens may further be classified into those citizens known to sympathize with the rebellion, without positively aiding it, and those who, without taking up arms, give positive aid and comfort to the rebellious enemy, without being bodily forced thereto.

1296. Common justice and plain expediency require that the military commander protect the manifestly loyal citizens, in revolted territories, against the hardships of the war as much as the common misfortune of all war admits.

The commander will throw the burden of the war, as much as lies within his power, on the disloyal citizens of the revolted portion or province, sub-

jecting them to a stricter police than the non-combatant enemies have to suffer in regular war; and if he deems it appropriate, or if his government demands of him that every citizen shall, by an oath of allegiance, or by some other manifest act, declare his fidelity to the legitimate government, he may expel, transfer, imprison, or fine the revolted citizens who refuse to pledge themselves anew as citizens obedient to the law and loyal to the government.

Whether it is expedient to do so, and whether reliance can be placed upon such oaths, the commander or his government have the right to decide.

1297. Armed or unarmed resistance by citizens of the United States against the lawful movements of their troops is levying war against the United States, and is therefore treason.[28]

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[28] See the Constitution of the United States, Chap. i., Art. III., sec. 3, clause 1.

ADDENDA.

ACTS PASSED AT THE THIRD SESSION OF THE FORTY-SECOND CONGRESS.[1]

ADJUTANT-GENERAL'S DEPARTMENT.

1300. THE sixth section of an act entitled "An act making appropriations for the support of the army for the year ending June 30, 1870," approved March 3, 1869 [¶ 538], is so far modified as to authorize and permit the President of the United States to nominate, and, by and with the advice and consent of the Senate, to appoint one assistant adjutant-general, with the rank, pay, and emoluments of a major in the said department.—March 3, 1873.

COMMISSARY SERGEANTS.

1301. That the secretary of war be and he is hereby authorized and empowered to select from the sergeants of the line of the army who shall have faithfully served therein five years, three years of which in the grade of non-commissioned officer, as many commissary sergeants as the service may require, not to exceed one for each military post or place of deposit of subsistence supplies, whose duty it shall be to receive and preserve the subsistence supplies at the posts, under the direction of the proper officers of the subsistence department, and under such regulations as shall be prescribed by the secretary of war.[2] The commissary sergeants hereby authorized shall be subject to the Rules and Articles of War, and shall receive for their services the same pay and allowances as ordnance sergeants.—March 3, 1873.

DISCHARGE CERTIFICATES.

1302. Whenever satisfactory proof shall be furnished to the war department that any non-commissioned officer or private soldier who served in the

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[1] Such of the acts of this session of Congress as have been accessible to the compiler in an authentic shape are published herewith. Other legislation of importance to the army, happening since this volume went to press, may have been published too late for insertion in this edition.

[2] Regulations relative to commissary sergeants are published in G. O. No. 38, A.-G. O., 1873.

army of the United States in the late war against the rebellion has lost his certificate of discharge, or the same has been destroyed without his privity or procurement, the secretary of war shall be authorized to furnish, on request, to such non-commissioned officer or private, a duplicate of such certificate of discharge, to be indelibly marked, so that it may be known as a duplicate. *Provided*, Such certificate shall not be accepted as a voucher for the payment of any claim against the United States for pay, bounty, or other allowance, or as evidence in any other case.—Sec. 1, March 3, 1873.

1303. The army regulations now in force are hereby modified in accordance with the provisions of this act.—Sec. 2, *ibid.*

THE CORPS OF ENGINEERS.

1304. The enlisted men of engineers in the army are hereby placed on the same footing with respect to compensation for extra-duty service as the other enlisted men of the army, and that all laws or parts of laws in conflict with this provision be and the same are hereby repealed.[3]—February 1, 1873.

1305. The officer in charge of the public buildings and grounds shall have the rank, pay, and emolument of a colonel.—Sec. 1, March 3, 1873.

MEDICAL DEPARTMENT.

1306. The chief medical purveyor of the army shall have, under the direction of the surgeon-general, supervision of the purchase and distribution of all hospital and medical supplies.—March 3, 1873.

MILITARY ACADEMY.

1307. The professors of the United States Military Academy whose service at the Academy exceeds ten years shall have the pay and allowances of colonel; and all other professors shall have the pay and allowances of lieutenant-colonel; and the instructors of ordnance and science of gunnery and of practical engineering shall have the pay and allowances of major; and hereafter there shall be allowed and paid to the said professors ten per cent. of their current yearly pay for each and every term of five years' service in the army and at the Academy. *Provided*, That such addition shall in no case exceed forty per cent. of said yearly pay; and said professors are hereby placed upon the same footing, as regards restrictions upon pay and retirement from active service, as officers of the army.—February 28, 1873.

1308. The superintendent of the United States Military Academy shall have power to convene general courts-martial for the trial of cadets, and to execute the sentences of such courts, except the sentences of suspension and dismission, subject to the same limitations and conditions now existing as to other general courts-martial.—March 3, 1873.

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[3] This act modifies that in ¶ 248, and restores the engineer soldiers to the status contemplated by the organic act of 1846. See ¶ 373.

MILITARY PRISON.

1309. There shall be established at Rock Island, in the State of Illinois, a prison for the confinement and reformation of offenders against the rules, regulations, and laws for the government of the army of the United States, in which shall be securely confined, and employed at labor, and governed in the manner hereinafter directed, all offenders convicted before any court-martial or military commission in the United States, and sentenced according to law to imprisonment therein.—Sec. 1, March 3, 1873.

1310. The secretary of war shall organize a board of five members, to consist of three officers of the army and two persons from civil life, who shall adopt a plan for the building of such prison, and who shall frame regulations for the government of the prisoners, in accordance with the provisions of this act. The said commissioners from civil life shall hold their offices for the term of three years, and shall be paid five dollars a day while on duty, and necessary traveling expenses; and the said officers of the army shall, at all times, be subject to removal by the secretary of war.—Sec. 2, *ibid.*

1311. The secretary of war shall, with said commissioners, semi-annually, and as much oftener as may be deemed expedient, visit said prison for the purposes of examination, inspection, and correction; and they shall inquire into all abuses or neglects of duty on the part of the officers or other persons in charge of the same, and make such changes in the general discipline of the prison as they may hold to be essential.—Sec. 3, *ibid.*

1312. The officers of the prison shall consist of a commandant and such subordinate officers as may be necessary, a chaplain, a surgeon, and a clerk, who shall be detailed by the secretary of war from the commissioned officers of the army; and a sufficient number of enlisted men shall be detailed by the secretary of war to act as turnkeys, guards, and assistants in the prison.—Sec. 4, *ibid.*

1313. One of the inspectors of the army shall at least once in three months visit the prison for the purpose of examining into the books and all the affairs thereof, and ascertaining whether the laws, rules, and regulations relating thereto are complied with, the officers are competent and faithful, and the convicts properly governed and employed, and at the same time treated with humanity and kindness. And it shall be the duty of the inspector, at once, to make full report thereof to the secretary of war.—Sec. 5, *ibid.*

1314. Before the commandant enters upon the duties of his office he shall give bonds with sufficient sureties, in a sum to be fixed by the secretary of war, to be approved by him, conditioned that he shall faithfully account for all money placed in his hands for the use of the prison and for the faithful discharge of all his duties as commandant. He shall have command of the prison; shall have the charge and employment of the prisoners, and the custody of all the property of the government connected with the prison. He shall receive and pay out all money used for the prison, and shall cause to be kept, in suitable books, complete accounts of all the property, expenses,

income, business, and concerns of the prison; and shall make full and regular reports thereof to the secretary of war; and shall, under the direction and with the approval of the secretary of war, employ for the benefit of the United States, the convicts at such labor and in such trades as may be deemed best for their health and reformation. He shall have power to sell and dispose of any articles manufactured by the convicts, and shall regularly account for the proceeds thereof, and shall give bond and security for the faithful keeping and accounting of all moneys and property coming to his hands as such commandant. He shall take note and make record of the good conduct of the convicts, and shall shorten the daily time of hard labor for those who, by their obedience, honesty, industry, or general good conduct, earn such favors; and the secretary of war is authorized and directed to remit, in part, the sentences of such convicts, and to give them an honorable restoration to duty in case the same is merited; and in case any convict shall disobey the lawful orders of the officers of the prison, or refuse to comply with the rules and regulations thereof, he may be placed in solitary confinement, and the commandant shall at once report the case to the secretary of war, who shall direct the inspector to make full examination and report of the matter at the next inspection; but in no case shall any prisoner be subjected to whipping, branding, or the carrying of weights for the purpose of discipline, or for producing penitence; and every prisoner, upon being discharged from prison, shall be furnished with decent clothing.—Sec. 6, *ibid.*

1315. The use of newspapers and books shall not be denied the convicts at times when not employed; and that unofficial visitors shall be admitted to the prison under such restrictions as the board of commissioners may impose. The prisoners shall not be denied the privilege of communicating with their friends by letter, and from receiving like communications from them, all of which shall be subject to the inspection of the commandant, or such officer as he may assign to that duty.—Sec. 7, *ibid.*

1316. The prisoners shall be supplied with ample and clean bedding, and with wholesome and sufficient food; but when in hospital or under discipline their diet shall be prescribed by the proper authority. The prison shall be suitably ventilated, and each prisoner shall have a weekly bath of cold or tepid water, which shall be applied to the whole surface of the body, unless the surgeon shall direct otherwise for the health of the prisoner.—Sec. 8, *ibid.*

1317. No officer of the prison, or other person connected therewith, shall be concerned or interested, directly or indirectly, in any contract, purchase, or sale made on account of the prison.—Sec. 9, *ibid.*

1318. Any officer who shall suffer a convict to escape, or shall in any way consent to his escape, or shall aid him to escape, or in an attempt to escape, shall, upon conviction, be dismissed from the service, and suffer such other punishment as a court-martial may inflict.—Sec. 10, *ibid.*

1319. Any soldier or other person employed in the prison who shall suffer a convict to escape, or shall in any way consent to his escape, or shall aid

him to escape, or in an attempt to escape, shall, upon conviction by a court-martial, be confined therein not less than one year.—Sec. 11, *ibid.*

1320. All prisoners under confinement in said military prisons undergoing sentence of courts-martial shall be liable to trial and punishment by courts-martial, under the Rules and Articles of War, for offenses committed during the said confinement.—Sec. 12, *ibid.*

POSTAGE.

1321. That the franking privilege be and the same hereby is abolished from and after the 1st day of July, A.D. 1873, and that thenceforth all official correspondence, of whatever nature, and other mailable matter sent from or addressed to any officer of the government or person now authorized to frank such matter, shall be chargeable with the same rates of postage as may be lawfully imposed upon like matter sent by or addressed to other persons. *Provided,* That no compensation or allowance shall now or hereafter be made to Senators, members, and delegates of the House of Representatives, on account of postage.—January 23, 1873.

1322. The postmaster-general shall cause to be prepared a special stamp or stamped envelope, to be used only for official mail-matter for each of the executive departments; and said stamps and stamped envelopes shall be supplied by the proper officer of said departments to all persons under its direction requiring the same for official use; and all appropriations for postage heretofore made shall no longer be available for said purpose; and all said stamps and stamped envelopes shall be sold or furnished to said several departments or clerks only at the price for which stamps and stamped envelopes of like value are sold at the several post-offices.—Sec. 4, March 3, 1873.

SIGNAL SERVICE.

1323. That the secretary of war be and hereby is authorized to establish signal-stations, at lighthouses, at such of the life-saving stations on the lake- or sea-coasts as may be suitably located for that purpose, and to connect the same with such points as may be necessary for the proper discharge of the signal service by means of a suitable telegraph-line in cases where no lines are in operation, to be constructed, maintained, and worked under the direction of the chief signal officer of the army, or the secretary of war and the secretary of the treasury; and the use of the life-saving stations as signal-stations shall be subject to such regulations as may be agreed upon by said officials; and the sum of thirty thousand dollars is hereby appropriated to carry into effect this provision.—March 3, 1873.

1324. The chief signal officer may cause to be sold any surplus maps or publications of the signal office, the money received therefor to be applied towards defraying the expenses of the signal service, an account of the same to be rendered in each annual report of the chief of the signal service.—*Ibid.*

TRANSPORTATION.

1325. The secretary of the treasury is directed to withhold all payments to any railroad company and its assigns, on account of freights or transportation over their respective roads of any kind, to the amount of payments made by the United States for interest upon bonds of the United States issued to any such company, and which shall not have been reimbursed, together with the five per cent. of net earnings due and unapplied, as provided by law. And any such company may bring suit in the court of claims to recover the price of such freight and transportation, and in such suit the right of such company to recover the same upon the law and the facts of the case shall be determined, and also the rights of the United States upon the merits of all the points presented by it in answer thereto by them; and either party to such suit may appeal to the Supreme Court; and both said courts shall give such cause or causes precedence of all other business.—Sec. 2, March 3, 1873.

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NOTE.—*The index references are to* PARAGRAPHS *and* NOTES *by their numbers, the numbers and clauses of the notes being indicated in parenthesis next preceding the number of the paragraph to which they are appended.*

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