HANDBOOK of CANADIAN MILITARY LAW

Singer and Langford

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1941
THE COPP CLARK COMPANY LIMITED
TORONTO

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PREFACE.

HANDBOOK OF CANADIAN MILITARY LAW is the result of a civilian lawyer, and a professional soldier with many years practical experience in military law, putting their heads together with the object of achieving a book which would simplify the study of military law. The lawyer wrote, the soldier criticized; both lawyer and soldier will be content if their object has been achieved. The verdict lies with the reader.

The book provides, in one volume, a handy exposition of the subject of military law in such form as to be of some practical value to those who may have occasion to refer to it, civilians as well as soldiers and officers. For the convenience and assistance of those charged with the maintenance and enforcement of discipline and the conduct of courts-martial, such paragraphs and sections of statutes and regulations as would normally most frequently be referred to, have been quoted *verbatim* to relieve them from the necessity of searching the original sources.

This volume is not intended, however, in any way to replace any of the official texts, to which the reader is recommended for a more exhaustive treatment of the subject.

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May 1st, 1941.

STATUTES.

THE ARMY ACT. 44 & 45 Vict. C. 58. This may be found (as amended by successive Army and Air Force (Annual) Acts) in Manual of Military Law, 1929 edition, reprinted in 1939, which also contains the Rules of Procedure.

CRIMINAL CODE. R.S.C. 1927 c.36.

THE DEPARTMENT OF NATIONAL WAR SERVICES ACT, 1940. S.C. 1940 c.22.

MILITIA ACT. R.S.C. 1927 c.132.

THE NATIONAL RESOURCES MOBILIZATION ACT, 1940. S.C. 1940 c.13.

THE OFFICIAL SECRETS ACT. S.C. 1939 c.49.

THE TREACHERY ACT. S.C. 1940 c.43.

THE VISITING FORCES (BRITISH COMMONWEALTH) ACT, 1933. S.C. 1933 c.21.

WAR MEASURES ACT. R.S.C. 1927 c.206.

THE WILLS ACT. R.S.O. 1937 c.164.

ABBREVIATIONS

A.A. ..... The Army Act.
C.C. ..... Criminal Code.
C.O.T.C. ..... Canadian Officers Training Corps.
K.R. (Can.) ..... King's Orders and Regulations for the Canadian Militia.
M.M.L. ..... Manual of Military Law.
R.P. ..... Rules of Procedure.
R.S.C. ..... Revised Statutes of Canada.
R.S.O. ..... Revised Statutes of Ontario.
S.C. ..... Statutes of Canada.

PAGE HEADINGS

The reader will find the number of the page where any particular matter is dealt with in this book, by referring to the Table of Contents, which divides and sub-divides the text into titles, sub-titles, sections and sub-sections, each dealing with a different topic. For additional convenience, that portion of the Table of Contents dealing with each chapter also precedes the text of the chapter.

The heading on each page shows the number and the subject, of the chapter of which it forms a part, followed by a symbol which indicates the full extent of the contents of the page. For example, the heading on page 128, which is **V—COURTS AND TRIBUNALS—D.I.b.i.-D.I.b.iii** indicates that page 128 is a part of Chapter V which deals with the subject of Courts and Tribunals and that the page

commences with a part		*and ends with a part*	
of sub-section	i.	of sub-section	iii.
of section	b.	of section	b.
of SUB-TITLE	1.	of SUB-TITLE	1.
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CHAPTER I

INTRODUCTORY.

A. DISTINCTIONS BETWEEN MILITARY LAW, CIVIL LAW AND MARTIAL LAW.

Preliminarily, in order to avoid terminological confusion, the distinctions between the terms "Military Law", "Civil Law" and "Martial Law" must be recognized.

1. MILITARY LAW. The term "Military Law" designates the system of law which applies to and prescribes the special rights and duties of soldiers, as such. It is a statutory code of law which, generally speaking, is administered by military tribunals (*see the Militia Act, which provides an exception to this general rule*) in contradistinction to Civil Law, which is administered by the civil courts. It deals with administrative matters such as terms of service, enlistment, discharge and billeting as well as disciplinary matters such as offences, trial and punishment for committing them, *etc.* It is often used with reference to the disciplinary provisions alone, although, as stated above, it is concerned, also, with administrative matters raised by the exigencies of military service.

2. CIVIL LAW. The term "Civil Law", as used in this book, designates the general law of the land to which, subject to some minor exceptions, all persons, including soldiers as well as civilians, are amenable, in contradistinction to Military Law, to which only soldiers are amenable. And the term is not used here in contradistinction to, but includes what is known as, Criminal Law. It embraces all the law (except Military Law) in force in Canada, whether of Dominion, Provincial or Municipal origin. It is administered exclusively by the civil authorities.

3. MARTIAL LAW. The term "Martial Law" designates, in reality, no system of law at all, and it is not recognized, as such, by English or Canadian jurisprudence. It is not Military Law and it is not Civil Law. In its proper sense, the term means the suspension of ordinary law, and the temporary government of a country or parts thereof by military authorities. There is nothing, either in England or in Canada, such as there is in many foreign countries, corresponding to a "Declaration of a State of Siege or Emergency", under which the authority ordinarily vested in the civil power for the maintenance of order passes entirely to the armed forces. It is a kind of law of necessity, expressed in Orders and Regulations of the military authorities, in exercise of their power to enforce order, when confronted with such a situation of disorder, that the ordinary law enforcement agencies cannot function or, by reason of conquest, have lost the right to function. Although Martial Law is not Military Law, it is of some importance that soldiers should have some familiarity with its attributes. More particularly, it describes

a. The Powers exercised by Military Commanders in the Field. What is done by a commander-in-chief in occupation of foreign territory, in his relations with the inhabitants of such foreign territory, is not a matter for the civil courts of his own country. It is governed by the International Law rules of warfare to a large extent. Martial Law, in this sense, forms part of what are known as the "Customs of War". By these customs, for the most part tacitly, and in some cases explicitly, agreed upon between "civilized" nations, the commander of an army in occupation of a foreign country governs his troops by the Military Law of his own country, while he imposes such laws and regulations upon its inhabitants, as he deems necessary for the security of his forces and for the maintenance of good order among the population. It is this species of Martial Law which the Duke of Wellington had in mind when he described it as the will of the General in Command of the Army. The Great War made many changes, and more are being made during the present war. It is a matter of military and political policy. The powers exercised by a military commander in the field seem to include, also, an undefined residuum of power to inflict punishment on his own soldiers, without recourse to the regularly constituted military courts, if, in his opinion, such a state of emergency exists that drastic action is necessary to prevent a complete failure of discipline. For example, a commander-in-chief might consider it necessary to order his tanks into action against his own men, who are mutinying, or who have fallen into such a state of panic-stricken rout as jeopardizes the safety of the whole army. For any such exercise of discretion, a commander-in-chief is liable, of course, to be put in a position of being called upon to justify his action before a civil court at home. But if his action, taking the surrounding circumstances into consideration, was reasonable and necessary, it is unlikely that the court would afford any remedy against him, though it is usual for Parliament, after the war, to pass Acts of Indemnity covering such cases.

b. A certain State of Relations between the Military and Civil Authorities in Time of Emergency. The nature of the state of relations between military and civil authorities in time of emergency is difficult to define with accuracy, owing to dearth of authority on the matter. But it has been held by the House of Lords, in a decision that would be binding on our courts, that a military tribunal, set up after a proclamation of Martial Law, is not a person or body in the nature of an inferior court exercising jurisdiction, but only an advisory committee of officers to assist the Commander-in-Chief. It follows, therefore, that such a tribunal is not subject to an order of prohibition.

It is not easy to state the precise legal effect of such an emergency. Various statutes have been enacted so as to remove, as far as possible, the actions of the Executive, in time of emergency, from the scrutiny of the courts. But, at Common Law, apart from Statute, just as the plea of necessity is accepted as

justifying an injurious act done in self-defence of person or property, so, necessity justifies acts of the Executive, provided they are shown to have been required in the interests of public safety. Every subject has the right to repel force by force, in certain circumstances; and every subject is under a duty to assist in preserving the peace, if called upon to do so. This right and duty is not confined, exclusively, to an armed force, even though policemen and soldiers are, most generally, called upon to act in such a situation. So the Executive, with organized and powerful military forces at its disposal, may, even at Common Law, take the law into its own hands. When such a state of affairs has arisen, there is probably a state of Martial Law, irrespective of a proclamation to that effect. If this be so, it is not the proclamation but, rather, the emergency, which makes Martial Law. Subjects have the right to question any act of the Executive in the courts, which can decide whether or not a state of Martial Law exists. A proclamation may be evidence of such a state being already in existence, but it cannot change existing conditions from a peace-time footing to one of war within the realm. The prerogative of declaring war does not enable the Crown to declare war on the people. But the Executive has a Common Law duty, which it shares with every subject, to assist in the maintenance of order.

The next question to determine is what degree of emergency constitutes a state of Martial Law. Clearly, in any true emergency, the authorities may have to act without regard to their strict legal powers, since perils to the public safety cannot always be suppressed by prosecuting under the Criminal Law, or by applying for an injunction in the civil courts. If the civil courts, on account of hostilities, have ceased to sit for the time being, the maintenance of order passes from the civil power to the military. It may safely be asserted that the military power can then take control. What is necessary, in such a situation, is, clearly, a matter of discretion for the Commander-in-Chief and his advisers although, even so, when the courts are again able to sit, the acts of the military may be shown to be illegal, as having been in excess of necessity. Much has been written as to whether the test, in such cases, would be strict necessity, or the *bona fide* belief that military action was necessary, and as to

whether it would be for the defendant to show that the test had been complied with, or for the complainant to show that it had not been complied with. There is no authority which makes it possible to answer these questions. Where the courts have not ceased, entirely, to operate, as where the insurrection or disturbance is confined to part of the country, there is authority for the legality of military government. Martial Law is thus a state of fact, not to be decided by the simple test: *Were the courts sitting at the time?* The test would seem to be: *Is the insurrection still of a kind that justifies military rule?* It devolves upon the civil courts alone to determine this difficult question of fact.

This leads to a further problem. In so far as the civil courts may be sitting, what control, if any, have they over the acts of the military? There is authority for the proposition that ordinary courts, sitting in a Martial Law area where "war is still raging", have no control over the acts of the military. Once a state of war is recognized by the courts, (and such recognition must, in the nature of things, be *ex post facto*) the Executive, with the aid of its military forces, may conduct warlike operations with impunity. They may deal with the inhabitants of a Martial Law area on the same footing as with the population of hostile invaded territory in time of war, subject only, it may be presumed, to such rules of warfare as International Law prescribes and the commanding officer decides will suit his purposes.

It is difficult to say how far the military authorities could be called to account in the civil courts after hostilities, because an Act of Indemnity would be passed by Parliament, in the ordinary course, to protect them from legal proceedings. Probably, however, such an Act would not indemnify them against claims arising from acts done otherwise than in the course of *bona fide* operations for the suppression of the insurrection.

Thus the law affords little protection to persons in a Martial Law area who have been convicted under the military regime, particularly if convicted of a capital offence. If the civil courts are not sitting, the accused has no remedy, and even if they are in session, a writ of prohibition will not lie since a military tribunal enforcing what is known as Martial Law is not a court but merely an advisory board, and the writ of *habeas corpus* would be available only if the court was satisfied that

"war was not raging" at the time of the commission of the offence. The control now being exercised over the civilian population is strictly legal, and our courts, under certain statutory restrictions, are exercising their full functions. When the military authorities exceed their legal powers the courts will intervene at the instance of the person aggrieved. But the situation might be different if parts of Canada should become part of the front line, such as parts of England now are. In such an event the civil courts might hold that a sufficient emergency existed in such parts of Canada, and refuse to intervene at the instance of a subject affected by the actions of the military, unless it was indeed a very unreasonable exercise of power.

B. HISTORY OF MILITARY LAW.

In the early days of our history, Military Law, as distinct from the ordinary law, only existed during war time. The general levy of Anglo-Saxon days (from which our militia has descended) was organized and governed by the ordinary law of the land; and, in later days, the existence of the feudal levies was based on the ordinary law dealing with the tenure of land. When war broke out and the troops were called out for service, they were governed, while in the field, by Ordinances or Articles of War made by the Crown, or by the Commander-in-Chief under authority delegated to him by the Crown. These Articles only remained in force so long as the war lasted; and when the troops were disbanded, their operation ceased. Thus, in time of peace, there was no Military Law in those days, although various attempts were made by the more despotic of our Sovereigns to enforce Military (or, as it was then called, "Martial") Law, during peace time, by the prerogative of the Crown.

On the establishment of a standing army after the Restoration in 1660, the necessity for special powers to keep this force in "an exact state of discipline" soon became felt, and on April 3rd 1689 the first Mutiny Act was passed to punish mutiny and desertion. This Act was only to last six months; but on its expiration another was passed and, with few exceptions, a Mutiny Act was passed annually thereafter, until 1878, inclusive. Owing to Parliament's jealousy and fear of the Army, the duration of the Act was always limited to one year. It is

interesting to note that Parliament never manifested the same fear and jealousy of the Navy, perhaps because it had never been used by any Sovereign as an instrument to interfere with the liberties of the subject and to further his power to rule despotically, whereas the Army, frequently, had been used for that purpose by ambitious rulers with a predilection for dictatorial methods.

The earlier Mutiny Acts did not extend abroad; but until 1712, the nation was almost constantly at war, and the troops on active service were governed by Articles of War made, as of old, under the prerogative of the Crown. In this year, statutory power was given, in the Mutiny Act, to the Crown, to make Articles of War binding on the troops, in time of peace, while out of the United Kingdom. This power was extended to troops at home, by the Mutiny Act of 1715. In 1718, the Mutiny Act was extended to apply to troops in the colonies, who were thus governed by the Act and the statutory Articles of War made by the Crown under it, until 1803; the prerogative power of the Crown, to govern the troops in foreign countries, during war, by Articles of War, still remaining. In 1803, the Mutiny Act and the statutory Articles of War were extended to the Army, whether serving within or without the Crown's dominions; thus the prerogative power of making Articles of War, in time of war, was superseded.

Things continued thus until 1879, when the inconvenience of having the Army governed partly by an Act of Parliament and partly by Articles of War, led to their being combined in one statute, called the Army Discipline and Regulation Act; the law as to enlistment being embodied in the same statute. In order to obviate the necessity of passing, annually, this long Act through Parliament, while at the same time continuing the constitutional control of Parliament over the standing army, it was enacted that the provisions of this Act should be continued, from year to year, by a short Act called the Army Discipline and Regulation Commencement Act. After a lapse of two years, the Army Discipline and Regulation Act was repealed, and its provisions re-enacted in the present Army Act, which is similarly continued in force, annually, by the Army and Air Force (Annual) Act.

The military enactments of Canada incorporate by reference, and adopt the existing Military Law of England, with such express modifications and additional substantive provisions as are deemed suitable and requisite for this country.

CHAPTER II

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A. DEFINITION.

Military Law is the law which, in peace and in war, at home and abroad, governs officers and soldiers, as such, as well as civilians attached to the forces, but not those civilians having no continuous contact or association with the armed forces and owing no special duty to them.

B. CONSTITUTIONAL BASIS.

Section 91 (7) of the British North America Act provides that the exclusive legislative authority of the Parliament of Canada extends to all matters concerning militia, military and naval service and defence.

C. SOURCES.

The military law applicable to officers and soldiers in Canada or under Canadian jurisdiction takes its source from statutes enacted by the Parliament of Canada by virtue of their exclusive legislative authority on the subject. Such statutes may

(i) themselves enact military law (*direct legislation*); or

(ii) merely set up the framework and authorize the Governor-in-Council, or some specified administrative body, to fill it in, by orders-in-council or regulations. Such orders-in-council or regulations, if properly within the framework and authority provided by Parliament, and after certain formalities laid down in the enabling statute are complied with, have the same force in law as if they formed part of the statute (*delegation of power*);

(iii) by reference, incorporate into the military law of Canada certain English statutes and regulations under them, with whatever limitations or under whatever conditions the Parliament of Canada may think fit to impose.

1. MILITIA ACT. This is the cornerstone of Canadian military law. In this statute, Parliament made use of the three methods of legislation mentioned above. The statute itself expressly provides for the enrolment and control of the militia, either in peace or in war, and the taking of such measures as may be deemed necessary for the protection of the interests of Canada in any emergency. Generally speaking, unless otherwise mentioned, this Act can be enforced either through the military or the civil courts and, in a number of cases, may be enforced against civilians.

2. KING'S REGULATIONS AND ORDERS FOR THE CANADIAN MILITIA. Sections 139-141 of the Militia Act provide that the Governor-in-Council may make regulations for carrying the Militia Act into effect, for the organization, discipline, efficiency and good government generally, of the Militia, and for anything required to be done in connection with the military defence of Canada. And, after the formalities set out are complied with, the regulations, so made, have the same force and effect in law, as if they formed part of the Act. By virtue of this power, the Governor-in-Council has made regulations known as the King's Regulations and Orders for the Canadian Militia.

3. ORDERS-IN-COUNCIL. Section 5 of the Militia Act provides that the Governor-in-Council may, from time to time, make such orders as are necessary, respecting the duties to be performed by the Minister of National Defence. This power is exercised by orders-in-council.

4. ENGLISH MILITARY LAW. Sections 69 (1) of the Militia Act provides that "the Army Act for the time being in force in Great Britain, the King's Regulations, and all other laws applicable to His Majesty's troops in Canada and not inconsistent with this Act or the regulations made thereunder, shall have the same force and effect as if they had been enacted by the Parliament of Canada for the government of the Militia." This section of the Militia Act, with the limitations therein mentioned, incorporates into the body of Canadian military law the military law of Great Britain, more particularly the Army Act, the King's Regulations for the Army and the Army Reserve, the Rules of Procedure, and the Customs of the Service.

a. The Army Act. This may be found in the Manual of Military Law, and was enacted by the Parliament of the United Kingdom in 1881, and is a re-enactment, with some amendments, of the Army Discipline and Regulation Act. The Army Act has, of itself, no force, but requires to be brought into operation, annually, by another Act of Parliament, now called "The Army and Air Force Annual Act", and prior to 1917 when the Royal Air Force was constituted, simply the Army (Annual) Act. Thus the constitutional principle of control of Parliament over discipline, without which a standing army and air force cannot be maintained, is secured. These annual Acts afford opportunities of amending the Army Act, and considerable use has been made of these opportunities. The Act deals with discipline, courts-martial and other cognate subjects.

b. King's Regulations for the Army and the Army Reserve. These are regulations approved by His Majesty, and notified to all ranks, as a general basis for the good government of the Army. By Army Order 133 of 1940, the King's Regulations of 1935 and amendments were cancelled, and a new issue of King's Regulations for the Army and The Army Reserve was approved. These form the basis of the King's Regulations and Orders for the Canadian Militia.

c. Rules of Procedure. Section 70 of the Army Act authorizes His Majesty to make rules of procedure which must be judicially noticed with respect to matters set out in the section. The rules of procedure, made under that section, must not contain anything contrary to, or inconsistent with, any provision of the Act itself. These rules constitute an official guide to the correct procedure in connection with arrest, trial, courts of enquiry, courts-martial, etc. Appendices include—forms of charges, forms as to courts-martial, forms of summons to witnesses, forms of oaths and declarations, and forms of commitment.

d. Articles of War. Section 69 of the Army Act empowers His Majesty to make Articles of War for the better government of officers and soldiers. Such Articles may be applicable to officers and soldiers at home or abroad, and must be judicially noticed by all judges and in all courts. The penalty of death or penal servitude cannot be imposed by an Article of War, except for an offence expressly made liable to such punishment by the Act itself; nor can an Article of War render any offence punishable under the Act liable to be punished in a manner which does not accord with the provisions of the Act. The enumeration of offences in the Act is so complete that the necessity for the exercise of the power of making Articles of War for the purpose of creating offences would appear unlikely to arise.

e. General and Other Orders. Section 11 of the Army Act makes it an offence to neglect to obey any general or garrison or other orders, provided that the expression "general orders" shall not include His Majesty's Regulations and Orders for the Army, or any similar order in the nature of a regulation published for the information and guidance of the Army. The orders specified in this section are standing orders, or orders having a

continuous operation, whether garrison or regimental, or of a like nature. Disobedience to a specific order in the nature of a command would be dealt with under section 9 of the Army Act; and non-compliance, through forgetfulness or negligence, with an order to do some specific act at some future time, would be dealt with under section 40, which is a general section which provides for offences that cannot properly be brought under any other section of the Army Act.

f. Custom of the Service. This is expressly recognized by the Army Act and the Rules of Procedure, *A.A.171, R.P. 131.* Jurisdiction and procedure frequently depends on such custom rather than on formal enactments or regulations. For example, delegation of powers by the holder of a military office to another person, depends on the custom of the service, *A.A. 171, R.P. 131:* the determination of which officer is called upon to exercise the power of the "commanding officer" in dealing with an offender, depends on the custom of the service, *R.P. 129*, and the establishment of the validity of a command given through an intermediary by a commanding officer depends on the custom of the service, *A.A. 9.*

As an aid to the application and enforcement of military law generally, Part I of the Manual of Military Law, and the notes to the Army Act and the Rules of Procedure are useful, since they provide explanations and interpretations that afford guidance as to what course should be followed or has been followed in a number of varied situations, and provide a store of precedents, rulings by the Judge-Advocate-General, and other authorities and, as well, refer to the relevant sections of the Army Act, Rules of Procedure, and King's Regulations.

5. CRIMINAL CODE. The Criminal Code of Canada sets out certain offences, for the commission of which, soldiers may be tried, either by military or civil courts. The statute also imposes and confers certain duties and immunities upon a soldier when acting in aid of the civil power, in the case of a disturbance of the peace. *See C.C. 51.*

6. THE OFFICIAL SECRETS ACT. This Act sets out certain offences in which military persons are more likely to be involved than others. Prosecution thereunder may be instituted, only by

or with the consent of the Attorney-General of Canada, and are conducted in the civil courts. A digest of the Act, for the information of officers and other ranks, is contained in Appendix IV to K.R. (Can.).

In particular, the Act makes it an offence for an officer or other rank

(a) to approach, inspect or enter, for any purpose prejudicial to the interests of the State, any defence works and establishments, including any place where munitions of war are being made or stored, or where any sketches, plans and information relating thereto are kept;

(b) to obtain or communicate to any person any information which might be, or is intended to be, useful to a foreign power;

(c) to use any information, lawfully or unlawfully obtained, or which has been entrusted officially to him in confidence, for the benefit of any foreign power, or in any manner prejudicial to the interests of the State; (*see The Treachery Act, post, p. 15*).

(d) to retain any sketch, plan or document in his possession or control when he has no right to retain it, or fails to take reasonable care of, or so conducts himself as to endanger the safety of, any such sketch, plan or document, or other information in his possession or control;

(e) to receive any secret official information, knowing or believing that when he so receives it, the same is communicated to him in contravention of the Act, unless he proves that such communication was contrary to his desire.

7. THE VISITING FORCES (BR. COMMONWEALTH) ACT, 1933. This is an Act passed by the Parliament of Canada to make provision, with respect to Forces of His Majesty from other parts of the British Commonwealth, or from a colony when visiting the Dominion of Canada; with respect to the exercise of command and discipline when Forces of His Majesty from different parts of the Commonwealth are serving together; with respect to the attachment of members of one such Force to another such Force; and with respect to deserters from such Forces.

Most important for our purposes, is that it provides that, when a visiting Force is present in Canada, it shall be lawful for the Naval, Military and Air Force courts and authorities of that part of the Commonwealth to which the Force belongs, to exercise within Canada, in relation to members of such Force, in matters concerning discipline, and in matters concerning the internal administration of such Force, all such powers as are conferred upon them by the law of that part of the Commonwealth. Provisions with respect to the privileges and immunities of such courts, the legality of sentence, constitution of courts, and proceedings *etc.*, are contained in the Act, to enable such powers to be exercised. In effect, extra-territorial rights are conferred on the visiting Forces so contemplated in the Act.

There is a corresponding statute of the British Parliament, extending the same kind of extra-territorial rights to a visiting Canadian Force in the United Kingdom, which removes, for this one purpose at least, the limitation upon Dominion legislation which has been the rule, i.e., though supreme within the spheres so allotted to the Dominion, its powers are restricted to legislation for the peace, order and good government of its own territories, and cannot be given extra-territorial effect. This principle of extra-territoriality applies to a Canadian Force in a foreign country. The military law recognized by such Force is that derived from Canadian Statutes, Regulations, and Orders.

8. THE TREACHERY ACT. This is an Act respecting treachery, for which it imposes the penalty of death. The penalty is exacted either by the civil courts, proceeding by way of indictment, which proceedings are considerably accelerated beyond the usual civil pace or, in certain cases, by courts-martial. It is with the part that Parliament has allotted to courts-martial, in the enforcement of this Act, that we are interested. Section 3 of the Act sets out the offence and penalty and is as follows: "Notwithstanding anything contained in any other Act, regulation or law, if, with intent to help the enemy, any person does, or attempts or conspires with any other person to do, any act which is designed or likely to give assistance to the naval, military or air operations of the enemy, to impede such operations of His Majesty's Forces, or to endanger life, he shall be guilty of an indictable offence and shall, on conviction, suffer

death." The offence and penalty is made part, also, of our substantive military law by section 5 (1)(a) which provides that the Army Act, as part of the law of Canada, shall be deemed to be amended so that members of our armed forces may be tried and punished by courts-martial for the commission of this offence.

In certain circumstances, an enemy alien may be so dealt with. Section 5 (1)(b) provides that "An enemy alien may, if the Attorney-General of Canada so directs, be prosecuted for an offence against Section 3 of this Act before a court-martial, and upon such direction being given with respect to an enemy alien, the Army Act shall apply for the purpose of his custody, trial, sentence and punishment, as if he were, and had been, at the time when the offence is alleged to have been committed, a person subject to military law." And where, in accordance with this sub-section, such a direction is given by the Attorney-General of Canada, the enemy alien, if not then in military custody, may be transferred to military custody, in accordance with such directions as may be given by the Attorney-General of Canada; and the Attorney-General of Canada may, by order, provide for discharging or varying any order which may have been made by a justice of the peace, as to remand or committal for trial of that person.

If, upon representations made to him, it appears to the Attorney-General of Canada that any person sentenced to death, after being convicted on indictment of an offence against section 3 of this Act, was at the time of the commission of the offence a member of the armed forces of the Crown, or of the armed forces of any foreign power, including an enemy power, the Attorney-General of Canada may, by direction, substitute military death by shooting, under the appropriate military Act, for civil death by hanging, a more ignoble way of dying.

While no prosecution in the civil courts, in respect of an offence against section 3 of this Act, may be instituted, except by or with the prior consent of the Attorney-General of Canada, proceedings by way of trial by court-martial may be instituted without anybody's prior consent, and constitute a much more expeditious way of dealing with such a matter.

Section 7 (2) enlarges the jurisdiction of a court-martial trying an offence under this Act, by providing that charges against this Act or otherwise, except murder, may be joined with a charge for any offence against this Act in the same charge, if they are founded on the same facts or are part of a series of offences of the same or a similar character. It provides, further, that when any person is charged with an offence against section 3 of this Act, before a court-martial, and charges for other offences are so joined, the court-martial shall have jurisdiction to try and punish the person charged with those offences, notwithstanding that they may be offences for which that person would not otherwise be triable by court-martial.

The life of this Act is measured in section 11, which provides that it shall expire on the issue of the second of the two proclamations hereinafter referred to, and specified in section 2 of the War Measures Act.

9. WAR MEASURES ACT. Section 2 of this Act provides that the issue of a proclamation by His Majesty, or under the authority of the Governor-in-Council, shall be conclusive evidence that war, invasion or insurrection, real or apprehended, exists, and has existed for any time therein stated, and of its continuance, until, by the issue of a further proclamation, it is declared that the war, invasion or insurrection no longer exists. It is the second of the above proclamations that is referred to in The Treachery Act as the proclamation, the declaration of which determines the life of that Act.

10. ORDERS AND REGULATIONS UNDER THE WAR MEASURES ACT. Section 3 of the War Measures Act provides that the Governor-in-Council may do and authorize such acts and things, and make, from time to time, such orders and regulations as he may, by reason of the existence of real or apprehended war, invasion or insurrection, deem necessary or advisable for the security, defence, peace, order and welfare of Canada; and for greater certainty, but not so as to restrict the generality of the foregoing, certain classes of subjects are enumerated, none of which are, by their nature, necessarily, sources of military law. The Orders-in-Council made under the authority of this section, which are within the scope of our inquiry, as directly affecting and being sources of military law are as follows:

(1) P.C. 2396, dated August 26th 1939, providing that the Minister of National Defence may call out the militia.

(2) P.C. 2434, dated August 31st 1939, approving financial regulations and instructions for the Canadian Field Force.

(3) P.C. 2477, dated September 1st 1939, authorizing Proclamation concerning the existence of apprehended war.

(4) P.C. 2482, dated September 1st 1939, placing Active Militia on war establishment.

(5) P.C. 2498, dated September 2nd 1939, authorizing expression "Canadian Active Service Force" to be substituted for "Canadian Field Force."

(6) P.C. 2626, dated September 10th 1939, authorizing Proclamation that a state of war exists between Canada and the German Reich as and from September 10th 1939.

(7) P.C. 3093, dated October 12th 1939, granting pardon, under certain circumstances, to deserters from Permanent Force—re-enlisting.

(8) P.C. 3297, dated October 25th 1939, temporarily rescinding right to retire—Permanent Active Militia and Permanent Active Air Force.

(9) P.C. 3988, dated December 5th 1939, establishing Regulations for discipline—members, Naval, Militia or Air Forces receiving medical care.

(10) P.C. 4022, dated December 5th 1939, approving financial regulations re C.A.S.F. overseas.

(11) P.C. 4122, dated December 13th 1939, authorizing reduction in rank of Warrant Officers and non-commissioned officers.

(12) P.C. 4129, dated December 20th 1939, authorizing free postage of correspondence by members of Overseas Forces.

(13) P.C. 1022, dated March 29th 1940, authorizing war service badges, forms, etc.

(14) P.C. 1065, dated March 19th 1940, establishing regulations Naval, Military and Air Force Estates. *See Appendix A, post.*

(15) P.C. 1066, dated April 3rd 1940, with respect to the visiting Forces (British Commonwealth) Act 1933.

(16) P.C. 2218, dated May 28th 1940, establishing status of Canadian Forces in Bermuda and West Indies.

(17) P.C. 2506, dated June 10th 1940, authorizing Proclamation declaring state of war with Italy exists in Canada.

(18) P.C. 2581, dated June 14th 1940, establishing status of Canadian Military and Air Forces in Iceland.

(19) P.C. 3749, dated August 7th 1940, empowering certain Provincial officials to requisition services of Active Militia when necessary.

(20) P.C. 4671, dated September 11th 1940, authorizing Proclamation—National War Services Regulations 1940.

(21) P.C. 5155, dated September 26th 1940, approving indefinite postponement of military training for Mennonites and Doukhobors.

(22) P.C. 5299, dated October 2nd 1940, authorizing regulations governing civilian claims against the Crown involving Canadian Active Service Force in the United Kingdom and the R.C.A.F. in the United Kingdom. *See Appendix B, post.*

(23) P.C. 5321, dated October 3rd 1940, approving medical treatment re communicable diseases.

(24) P.C. 5831, dated October 22nd 1940, authorizing medical treatment re venereal disease.

(25) P.C. 6184, dated November 2nd 1940, approving amendments—National War Services Regulations 1940 Recruits.

(26) P.C. 6645, dated November 19th 1940, designating Military Forces of Canada as the "Canadian Army."

(27) P.C. 6808, dated November 25th 1940, authorizing alteration in description, War Service Badge.

(28) P.C. 6879, dated November 28th 1940, authorizing regulations governing civilian claims against members of the Canadian Forces in Iceland, Newfoundland and the West Indies. *See Appendix C, post.*

(29) P.C. 7215, dated December 24th 1940, amending the National War Services Regulations 1940 (Recruits).

(30) P.C. 7249, dated December 11th 1940, amending "Regulations for the Administration and Distribution of Naval, Military and Air Force Estates 1940". *See Appendix D, post.*

(31) P.C. 7520, dated December 21st 1940, establishing Committee re utilization and distribution of canteen funds.

(32) P.C. 7521, dated December 19th 1940, authorizing regulations respecting payment of Rehabilitation Grant.

This list of Orders-in-Council does not purport to be exhaustive, and new ones are constantly being passed as the exigencies of the situation demand. However, the Orders-in-Council that the soldier is likely to encounter most frequently are included.

11. THE NATIONAL RESOURCES MOBILIZATION ACT, 1940. This is an Act conferring certain powers upon the Governor-in-Council for the mobilization of national resources in the present war. Section 2 of the Act sets out the special powers of the Governor-in-Council and is as follows: "Subject to the provisions of Section 3 hereof, the Governor-in-Council may do and authorize such acts and things, and make, from time to time, such orders and regulations requiring persons to place themselves, their services and their property at the disposal of His Majesty in the right of Canada, as may be deemed necessary or expedient for securing the public safety, the defence of Canada, the maintenance of public order, or the effective prosecution of the war, or for maintaining supplies or services essential to the life of the community." Section 3 provides that the powers conferred by the above section may not be exercised for the purposes of requiring persons to serve in the Military, Naval or Air Forces outside of Canada and the territorial waters thereof.

The powers conferred by the Act remain in force only during the state of war now existing, and the Act is enforced by the civil courts.

12. THE DEPARTMENT OF NATIONAL WAR SERVICES ACT 1940. This Act sets up a department of the Government called the Department of National War Services presided over and administered by the Minister of National War Services. It is the duty of this Minister to assist in carrying out the objects of the National Resources Mobilization Act 1940, and to perform such other duties as may be assigned to him from

time to time, by the Governor-in-Council. The Governor-in-Council is given the power to make such orders and regulations as are deemed necessary or advisable for carrying into effect the purposes of this Act, and any such orders and regulations have the same force and effect as if enacted as part of the Act.

13. NATIONAL WAR SERVICES REGULATIONS, 1940. These regulations were made under the authority given by the Department of National War Services Act. They provide, among other things, for the compulsory military training of men from 21 to 45 years of age, inclusive, and set up National War Services Boards to administer the Act.

It is interesting to note that although these regulations depend on the civil courts for their enforcement, the civil courts are expressly prohibited from interfering with the proceedings of the Boards which administer them, by means of injunction, prohibition, mandamus, *certiorari* or *habeas corpus*, although the civil courts have that power, in relation to the proceedings of military tribunals such as courts-martial, *etc.*

It must not be thought that because the Militia Act, the King's Regulations and Orders for the Canadian Militia, the Army Act and the Rules of Procedure have been discussed very briefly, they are of lesser importance than other statutes and regulations treated at greater length. The contrary is the case. They are of considerably greater importance; and, because of their importance, are dealt with further, in the following chapters, under appropriate headings.

D. PUBLICATION AND PRESUMPTION OF LEGAL KNOWLEDGE.

Ignorance of the law does not excuse persons so as to exempt them from the consequences of their acts. All men are presumed to be cognizant of the law. This presumption, in the case of a soldier in respect of military law, is not unreasonable, since great pains are taken to bring the law to his attention. The following sections of K.R. (Can.) and of the Militia Act exemplify the solicitude shown to keep the soldier fully informed, and are collected here to emphasize categorical responsibilities imposed upon officers and soldiers. They are as follows:

"A commanding officer will cause every order issued for general information to be either republished in unit orders or circulated to all under his command whom it may concern. He will afford his officers facilities for becoming acquainted with changes in the regulations promulgated through general or militia orders. Publication of unit and standing orders will be as directed in paragraphs 1490 and 1491." *K.R. (Can.) 40.*

"An officer commanding is responsible that all personnel under his command to whom the same may be applicable are notified of the provisions of the Official Secrets Act (see Appendix IV). A record that this has been done will be kept." *K.R. (Can.) 410.*

"All officers will acquaint themselves with regulations and orders. Ignorance of published orders will not be admitted as an excuse for their non-observance. Soldiers will be held personally responsible that they make themselves acquainted with such orders as are published in accordance with paragraph 40 and such details of duties as are posted in quarters as directed by paragraph 834." *K.R (Can.) 411.*

"Officers commanding units will ensure that every soldier is acquainted with the purport of sections 4 to 44 of the Army Act—which sections deal with crimes and punishments and methods of redress of complaints." *K.R. (Can.) 420 (a).*

"The provisions of these sections will, from time to time, be explained to soldiers, particularly to recruits on first joining, so as to preclude the possibility of ignorance on their part of the additional offences and punishments to which a person renders himself liable by becoming subject to military law." *K.R. (Can.) 420(b).*

"In addition to complying with the above instructions, officers commanding units will ensure that the following notice is read out on parade to the troops under his command, once in every three months: 'Under the existing law, any person who shall maliciously and advisedly endeavour to seduce any person or persons serving in His Majesty's Forces by sea, land or air from his or their duty and allegiance to His Majesty, or to incite or stir up any person or persons to commit any act of mutiny, or to make or endeavour to make any mutinous assembly, or to commit any traitorous or mutinous practice whatsoever,

may, on being convicted of such offence, be sentenced to imprisonment for life." *K.R. (Can.) 420(c).*

"All general orders issued to the Militia shall be held sufficiently notified to all persons whom they concern by their insertion in the Canada Gazette." *M.A. 136.* "General orders" means orders and instructions issued to the Militia through or by the Adjutant-General with the approval of the Minister. *M.A. 2(c).*

"Every order made by a commanding officer of any corps of the Militia, other than the permanent force, shall be held to be sufficiently notified to all persons whom it concerns by insertion in some newspaper published in the regimental division in which such corps is situated, or, if there is no such newspaper, then by posting a copy thereof in a post office, or in some other public place, in each company division affected by such order." *M.A. 137.* "Corps" means a military body appearing in the list of establishments as a separate unit. *M.A. 2(a).*

"It shall not be necessary that any order or notice under this Act (Militia Act) shall be in writing unless herein required to be so, if it is communicated to the person who is to obey, or be bound by it, either directly by the officer or person making or giving it, or by some other person by his order." *M.A. 138.*

CHAPTER III

THE MILITIA AND THE LAW.

A. THE MILITIA. (THE CANADIAN ARMY).

1. DEFINITION. "Militia" is defined in the Militia Act as meaning all the military forces of Canada. *M.A. 2(e)*; that is to say, that branch of His Majesty's armed forces which is organized, primarily, to serve on land, in contradistinction to the Royal Canadian Navy and the Royal Canadian Air Force, which are organized to serve, primarily, on the sea and in the air, respectively.

By an Order-in-Council, (P.C. 6645), dated November 19th 1940, it was ordered that, notwithstanding the provisions of the Militia Act, or of any other act or law,

"1. The Military Forces of Canada shall henceforth be designated as 'The Canadian Army'. Those Formations and Units of the Military Forces of Canada placed on active service, or which have been embodied for continuous military service, including all personnel attached thereto or serving therewith, will be designated as 'Active' Formations, Units or personnel, as the case may be. All other Formations, Units or personnel of the said Military Forces will be designated as 'Reserve' Formations, Units or personnel, as the case may be.

"2. This order shall come into force and effect as of and from the 7th day of November 1940."

2. COMPOSITION. The Militia of Canada comprises the Active Militia and the Reserve Militia, and is composed of officers and soldiers of different arms and services, who have undertaken a definite liability for service, or who have been required to serve thereon under the provisions of the Militia Act, or any other statute of the Dominion of Canada.

a. The Active Militia. This comprises

(i) the Permanent Active Militia, which includes the Permanent Force, officers permanently employed (but not borne on any regimental establishment), headquarters staff, and staffs of military districts. *K.R. (Can.) 1.* It is available for general service, and for the instruction of the Non-Permanent Active Militia;

(ii) the Non-Permanent Active Militia;

(iii) the Reserve of the Active Militia, which consists of officers only who have left the Militia, but are willing to serve again if and when called upon. Their names are registered at the headquarters of the military district in which they reside and to which they are required to report, annually, if they wish to be kept on the Reserve of the Active Militia. Their qualifications are set out in K.R. (Can.) 240 *et seq.*

b. The Reserve Militia. This is a voluntary force which the government neither pays, equips nor uniforms, except on active service. Its organization is authorized subject to the regulations for that purpose prescribed by the Governor-in-Council under Section 14(3) of the Militia Act, which are set out as Appendix X of K.R. (Can.).

It may be said that, whereas the Reserve of the Active Militia is composed of a group of trained officers who are available if needed, the Reserve Militia is composed of men, not necessarily trained, who take part in military training voluntarily and at their own expense.

Officers in the Reserve Militia are junior to officers of the same rank in the Active Militia, and may not exercise command over officers or men other than those in the Reserve Militia. It should be borne in mind that officers in the Reserve of the Active Militia are not officers of the Reserve Militia, but are officers of the Active Militia.

c. Supplementary to the Militia. Supplementary to, but not an integral part of the Militia, as educational and training establishments, are

(i) the Royal Military College
(ii) officially authorized Cadet Corps
(iii) officially authorized rifle associations and clubs
(iv) such training centres as may be authorized from time to time by the Minister.

It should be noted that section 62 of the Militia Act provides that Cadet Corps shall not be liable to service in the Militia in any emergency, save only in the case of a *levée en masse*. On the other hand, in the event of an emergency, members of officially authorized rifle associations and clubs become members of the Militia.

Although members of the Canadian Officers Training Corps are subject to Military Law as officers and men of the Non-Permanent Active Militia, their liability for service is not the same as that of other members of the Non-Permanent Active Militia, but are as follows:

(i) Officers of a C.O.T.C., as individuals, may be called out for active service;

(ii) Cadets will not be called out for duty in aid of the civil power or for active service, save in cases of grave emergency;

(iii) A unit or any part thereof may be called out in a levée en masse. (*Instructions for the C.O.T.C. 1936, sections 22 & 35*).

B. CLASSIFICATION.

Persons subject to military law are subject, either as officers or as men, and either as "on service" or as "on active service". The jurisdiction of the military tribunals, and the nature of the punishments that may be awarded, are determined in accordance with these classifications.

1. OFFICER. This expression means an officer commissioned, or in pay, as an officer in His Majesty's forces, or any arm, branch or part thereof; and includes also

(a) a person, who, by virtue of his commission, is appointed to any department or corps of His Majesty's forces, or of any arm, branch, or part thereof;

(b) a person, whether retired or not, who, by virtue of his commission or otherwise, is legally entitled to the style and rank of an officer of His Majesty's said forces, or of any arm, branch or part thereof;

(c) any officer of His Majesty's naval or air forces, who is, for the time being, subject to military law; and

(d) any officer of a Dominion force, who is, for the time being, subject to military law.

Officers holding honorary commissions are officers within the meaning of The Army Act, subject to the exceptions in the Act mentioned. *A.A. 190(4)*.

A woman cannot be an "officer" within the meaning of the Act. Any honorary rank conferred upon her, even though accompanied by a commission, is a mere matter of honour and dignity. She might, however, be liable as an officer.

2. SOLDIER. This expression does not include an officer as defined in The Army Act, but, with modifications (*see A.A. 182, 183*) in this Act contained, in relation to warrant officers and non-commissioned officers, it does include a warrant officer and a non-commissioned officer, and every person subject to military law during the time he is so subject. *A.A. 190(6)*.

The Militia Act, section 2(a), provides that "man" includes a warrant officer and non-commissioned officer, as well as a private. The terms "soldier" and "man", in military law, seem to have the same connotation, and are used interchangeably.

3. ON ACTIVE SERVICE. This expression, as applied to a person subject to military law, means,—in the enforcement of the Militia Act—whenever he is enrolled, enlisted, drafted or warned for service or duty during an emergency, or when he is on duty, or has been warned for duty in aid of the civil power. *M.A. 2(g)*. In the enforcement of the provisions of the Army Act, the expression means—whenever he is attached to, or forms part of, a force which is engaged in operations against the enemy, (this would cover members of the C.A.S.F. in Canada), or is engaged in military operations in a country or place wholly or partly occupied by the enemy, or is in military occupation of any foreign country. *A.A. 189(1)*. Under certain circumstances, he may be deemed to be on active service, before embarkation, and during the voyage. *A.A. 188*.

4. ON SERVICE. This expression means, when called upon for the performance of any military duties, other than those specified as "active service". For example, all personnel of the N.P.A.M., attached, for instruction, to schools of instruction, will, for the purposes of discipline, be held to be on service, and be subject to the laws and regulations which, under the provisions of the Militia Act, apply to all such personnel so called out. *K.R. (Can.) 408*.

C. WHO IS SUBJECT TO MILITARY LAW.

The persons subject to military law may be divided into five categories and are as follows:

1. MEMBERS OF THE NON-PERMANENT ACTIVE MILITIA. Every officer and man of the Militia shall be subject to military law

(a) from the time of being called out on active service;

(b) during the period of annual drill or training under the provisions of The Militia Act;

(c) at any time, while upon military duty, or in the uniform of his corps, or within any rifle range or any armoury or other place where arms, guns, ammunition or other military stores are kept, or within any drill shed or any other building or place used for militia purposes;

(d) during any drill or parade of his corps at which he is present in the ranks;

(e) when going to or from the place of drill or parade; or

(f) at any drill or parade of his corps. at which he is present as a spectator, whether in uniform or not. *M.A. 69(2)*.

2. MEMBERS OF THE PERMANENT ACTIVE MILITIA. "Officers and men of the Permanent Active Militia and members of the permanent staff of the Militia shall at all times be subject to military law." *M.A. 69(3)*.

3. ROYAL CANADIAN MOUNTED POLICE. "Whenever any officer, non-commissioned officer or man of the Royal Canadian Mounted Police Force is serving with the Militia by order of the Governor-in-Council, every such officer, non-commissioned officer and man shall be subject to this Act in the same manner and to the same extent as the Militia." *M.A. 70*.

4. CIVILIANS ATTACHED TO THE FORCES. The general rule is, that all persons, not otherwise subject to military law, who are followers of or accompany His Majesty's troops or any portion thereof on active service, are subject to military law as soldiers. *A.A. 176(10)*. This rule is modified by A.A. 175 (7) & (8), which provides that every person, not otherwise subject to military law, shall be subject to military law as an officer, and the Army Act shall apply accordingly, if

(i) such person, under special authority from NDHQ, accompanies, in an official capacity equivalent to that of an officer, any of His Majesty's troops on active service, or

(ii) such person accompanying a force on active service, holds, from the commanding officer of such force, a pass revocable at the pleasure of such commanding officer, entitling him to be treated as an officer.

The effect of subsections (7) and (8) is to make certain persons subject to military law, as officers, who would, otherwise, be subject, under A.A. 176(10), to trial and punishment as soldiers. Subsection (7) extends to persons attached to a

military expedition, by order of the Minister of National Defence, in a diplomatic, scientific, or other official capacity. Subsection (8) would apply to persons like contractors or newspaper correspondents, who obtain passes from the commanding officer of the force, directing them to be treated as officers. Section 184 of the Army Act provides for trial by court-martial of a person who, by section 175(7) & (8) or section 176(9) & (10) of the Act, is made subject to military law.

5. CIVILIANS NOT ATTACHED TO THE FORCES. While civilians, unattached to any military force are, in general, not subject to military law, section 93 of the Militia Act empowers a court-martial, not only to try officers and men for offences under the Act, but also to try and to punish any other person punishable under it. Normally, civilian offenders, under the Militia Act, would be dealt with in the civil courts, but, in certain circumstances, this might be found impracticable or undesirable, in which cases, the military authorities would exercise the power they have, and try him themselves.

See also sections 97 & 98 of the Militia Act, concerning courts-martial general, for trial of foreigners, and concerning courts-martial general, for trial of subjects.

D. RELATIONS OF OFFICERS AND SOLDIERS TO CIVIL LIFE.

1. GENERAL. The English law on this subject differs from that of some foreign countries. A man who joins the army—whether as an officer or as a private—does not cease to be a citizen. His military character is superimposed upon his civil character, and does not obliterate it. At the same time, it has been found necessary or desirable, to modify, in certain minor respects, his status as a civilian, in some cases, by imposing restrictions, and in others, by conferring immunities and privileges. *M.M.L. 241.*

2. LEGAL STATUS IN CRIMINAL MATTERS. So far as the criminal law is concerned, the position of an officer or soldier is the same as that of a civilian. If he commits an offence against the ordinary criminal law, he can be tried by the civil courts, as if he were a civilian; and various liabilities are incurred by an officer who, on due application being made, refuses to hand

over a man under his command to the civil authorities, or to assist in his apprehension. *A.A. 39, 41, 162: M.M.L. 241.*

3. LEGAL STATUS IN CIVIL MATTERS. In the case of civil rights, duties and liabilities, there is a difference between the position of a soldier and that of an ordinary citizen. *M.M.L. 241.* The following list of differences does not purport to be complete, but contains the differences most commonly encountered:

(a) A soldier cannot be punished for deserting or neglecting to maintain his wife and family or permitting them to become a public charge. Although his legal liability to maintain them and bastard children remains, it cannot be enforced against his person, pay or equipment; but provision has been made for deducting limited sums from his pay for the maintenance of such dependents. *A.A. 145.* It will be noted that this section does not apply to an officer.

(b) Certain restrictions have been imposed on the creditors of a soldier, so as to prevent the Crown from losing his services. A soldier cannot, under section 144 of the Army Act, be arrested or compelled to appear before a court on account of any debt, damages or sum of money under thirty pounds (one hundred and fifty dollars in Canadian money), but the exemption applies to his person, and not to his property; and a creditor may sue and have execution, so long as he does not touch the person, pay or equipment of the soldier. A soldier cannot be placed under stoppages for his private debts, and persons who suffer soldiers to contract such debts, do so at their own risk. The effect of the section is, that it exempts a soldier from appearing in person, though not from being sued for a debt under thirty pounds (one hundred and fifty dollars in Canadian money). The exemption does not apply to a soldier required to attend as a witness before a court of law, neither does it, at all, apply to an officer.

(c) Certain procedural protection is given an officer or person, if action is brought against him for anything purporting to have been done by him pursuant to the Militia Act or any regulation; and this protection is set out in the Militia Act, which provides as follows:

"Every action against any officer or person, for anything purporting to be done in pursuance of this Act or of any regu-

lation, shall be laid or tried in the judicial district where the act complained of was done, and shall be commenced within six months from the time of the act committed." *M.A. 134(1)*.

"In any such action the defendant may plead the general issue and give this Act and the special matter in evidence at the trial." *M.A. 134(2)*.

"No plaintiff shall recover in any such action if a tender of sufficient amends was made before the action was brought, or if a sufficient sum of money has been paid into court by the defendant after action was brought: provided that where money is paid into court after action brought and without tender before action, the plaintiff may, in the discretion of the court, recover costs of action down to the time of such payment into court." *M.A. 134(3)*.

"No action shall be brought against any officer or person for anything purporting to be done in pursuance of this Act, or of any regulation, until at least one month after notice in writing of such action has been served upon him or left at his usual place of abode." *M.A. 135(1)*.

"In such notice, the cause of action, and the court in which it is to be brought, shall be stated, and the name and place of abode of the claimant and his solicitor shall be endorsed thereon." *M.A. 135(2)*.

(d) Officers and men of the Active Militia are exempt from jury service while they are subject to military law either as being on service or on active service. *A.A. 147*.

(e) Officers and soldiers have, while in actual military service, certain privileges in regard to making wills. The basis of their privileges is to be found in the Wills Act 185 (Imp) 1 Vict. Ch. 26. By section 11 of this Act: A soldier (which term includes an officer) "being in actual military service", may dispose of his personal estate by a so-called "soldier's will" although under the age of 21.

This section is incorporated into the law of Ontario by section 13 (1) of the Wills Act of Ontario, R.S.O. 1937, Ch. 164, which provides, by section 13(2), that "any such soldier . . . shall be deemed to have been, since the 4th day of August 1914, of testamentary capacity and to have been capable of making a valid disposition by his will of any of his property whether real

or personal, notwithstanding that he was at the time of the execution of the will under the age of 21 years." The effect of this subsection is that such a soldier may dispose, also, of his real property by will, though not by a soldier's will, even though he is under the age of 21 years.

For the above purposes, a man is "in actual military service" when a state of war exists and he has taken some step towards joining the field forces, *e.g.*, from the time when he, or the unit to which he belongs, receives embarkation or mobilization orders for active service, down to the final conclusion of operations.

A "soldier's will" may consist of a document not attested (as a civilian's will must be) *e.g.*, a private letter to the person intended to benefit under it, or to someone else stating his wishes; also, a mere verbal statement of his wishes is sufficient, if such statement can be proved to the satisfaction of the court. To establish the validity of such a will, it is not necessary to prove that he knew he was making a will, or had power to make one in that manner; but it must be shown that he intended to express, deliberately, his wishes as to the disposal of his property, in the event of his death. Such a will is revoked, like any other will, by his subsequent marriage. It continues in force until revoked or superseded, unless its language shows an intention that it should only take effect if the testator died during the particular expedition. A person who, although attestation is unnecessary, does in fact attest such a will, is not thereby precluded from taking a benefit thereunder.

Under the authority of an Order-in-Council, dated March 19th 1940, regulations were enacted to deal with the administration and distribution of the Service Estates of members of the Military, Naval or Air Forces of Canada dying on active service. "Service Estate" is defined in section 1(d) of these regulations as meaning that part of a deceased member's personal estate which consists of balance of pay and allowances and other emoluments emanating from the Crown, which, at the date of death, are due or otherwise payable, and effects issued by the Crown, which, under regulations, he is permitted to retain, and all personal belongings found on the deceased and in camp, quarters, or otherwise in the care or custody of the service authorities, including cash on hand and personal articles and

effects. The scope of these regulations was widened by Order-in-Council, dated December 11th 1940, to include small bank balances of such deceased person.

The reason for these regulations is that, in a majority of instances, the "service estates" of deceased members of the Forces will not be large, and if the collection and distribution of the assets were left to the next-of-kin or beneficiaries of the individual Estate, the same would involve costs quite out of proportion to the amount of the Estate concerned, and their purpose is to provide for the collection of the assets, comprising his "service estate," of a member of the Naval, Military or Air Forces of Canada who dies on active service, and for the distribution thereof in a speedy economical manner, by means of as uniform a procedure as possible. *For the text of these regulations, see Appendices A. and D, post.*

(f) An officer or soldier is unable, legally, to charge or assign his pay or pension. *A.A. 141.*

(g) An officer or soldier is forbidden to accept invitations to appear as an expert witness in private lawsuits, for the purpose of giving evidence on matters of which he has acquired knowledge in the course of, and in connection with, his official duties. *K.R. (Can.) 438.*

(h) With respect to the marriage of an officer or soldier, there are certain conditions and formalities that must be observed. *K.R. (Can.) 931 et seq, and 1531 et seq.*

(i) An officer or soldier cannot recover pay alleged to be due him, by action or by petition of right against the Sovereign in the civil courts.

Under the authority of an Order-in-Council, dated October 2nd 1940, and entitled Order-in-Council authorizing regulations governing civilian claims against the Crown involving the Canadian Active Service Force in the United Kingdom and the R.C.A.F. in the United Kingdom", and of an Order-in-Council, dated November 28th 1940, and entitled "Order-in-Council authorizing regulations governing civilian claims against members of the Canadian Forces in Iceland, Newfoundland and the West Indies", regulations, having the force of law, were enacted to cover the matters indicated in their respective titles. *For the text of these regulations, see Appendices B. and C. post.*

E. POWERS OF CIVIL COURTS WITH RESPECT TO OFFICERS AND SOLDIERS.

1. TO ENFORCE THE LAW. The Army Act (sec. 41A) pro-provides that nothing in the Act shall affect any jurisdiction of any civil court to try a person subject to military law, for any offence. And any officer or soldier is liable to be punished if, on due application being made, he refuses to hand over to the civil authorities, or to assist in the apprehension of, an officer or soldier accused of an offence punishable by the civil court.

It is to be noted that, while the provisions of the Army Act, relating to discipline, are administered by military tribunals, and not by the civil courts, the provisions of the Militia Act, relating to discipline, may be enforced, generally speaking, either by a military tribunal or by a civil court. So an officer or soldier is liable to be tried by a civil court, not only for breaches of the civil law, but also for breaches of the Military Code as provided in the Militia Act.

2. THE SOLDIER'S DILEMMA. It is sometimes alleged that obedience to Military Law may be in conflict with a soldier's duty as an ordinary citizen. Military Law is, however, part of the Statute Law, and obedience to it cannot be unlawful. On the other hand, a soldier is required by Military Law to obey the commands of his superior officer. This obligation extends only to lawful commands (*i.e.*, commands which, not only are not contrary to the ordinary law, but which, as well, are justified by military law); and a soldier is not liable in military law for disobeying an unlawful order. But how is the soldier to judge the lawful character of the order? He has not the time to weigh up its merits, even if he has the inclination and the ability to do so. His training makes compliance instinctive. Unlawful injury, inflicted as the result of such compliance, renders him liable to criminal and civil proceedings. He cannot plead obedience to the order of his military superior, because no such defence is accepted by a civil court. If the order of the superior is, in the soldier's opinion, unlawful, he disobeys it at the peril of being court-martialled for a serious military offence, and runs the risk of the court-martial not accepting his view of the order's unlawful character. Moreover, unless the order is wholly unreasonable, it would prejudice military discipline, if

strict compliance were not enforced by military law. A soldier, therefore, ought to obey orders, at the peril of civil proceedings being instituted against him for the resulting act. If such proceedings result from obedience to the order there is some authority for saying that, if the order is not manifestly unlawful, he cannot be made liable. *C.C. 51.*

F. PROCEDURE FOR TRIAL BY CIVIL COURTS.

1. CIVIL OFFENCES. "When a soldier receives, otherwise than through his commanding officer, a summons issued by the civil court in respect of an offence, he will at once report the matter to his company *etc.* commander in order that arrangements may be made for his attendance before the court and for the provisions of Para. 484 to be complied with." *K.R. (Can.) 483.*

Paragraph 484 of K.R. (Can.) provides for an officer from the soldier's unit or, if one is not available or if it is not convenient, an officer from another unit, being present at the trial to watch proceedings and, if required by the court, to give such information as he is permitted to, concerning the accused's character, previous convictions by a civil court, *etc.* Where the court signifies its intention of imposing a fine, he will inform the court of the rate of pay to which the offender is entitled, together with any compulsory stoppages or deductions to which it is subject. This officer detailed to watch the proceedings will take with him a sum of money in order that he may pay, on behalf of the accused, any fine imposed by the court. If, however, the fine imposed is such that, in the ordinary course, recovery could not be effected from the soldier's account within a period of six months, or if he is due for discharge before the fine could be recovered, the circumstances should be represented to the court, and no steps should be taken by the officer to pay the fine or any part of it. The amount paid will be recovered from the soldier's account, as required by the Pay and Allowance Regulations. Where damages, compensation or costs in respect of an offence are awarded against a soldier, and the accused is not in a position to pay at once, arrangements may be made, in suitable cases, for recovery to be effected by deductions from his pay, but payment of sums to an aggrieved person in this

respect will only be made as and when recovered from the soldier's pay.

2. OFFENCES AGAINST THE MILITIA ACT. Section 125 of the Militia Act sets out the jurisdiction and powers of the civil court, in respect of offences against the Militia Act, as follows:

"Except as otherwise herein provided, every penalty incurred under this Act shall be recoverable, with costs, on summary conviction before one Justice of the Peace." *M.A.125(1).*

"In default of immediate payment on conviction, the convicting justice may commit the person so convicted to the common gaol of the territorial division for which the said justice is then acting, or to some lock-up situated therein, for a term not exceeding 40 days if the penalty does not exceed twenty dollars, and for a term not exceeding sixty days if it exceeds that sum." *M.A. 125(2).*

There are, however, certain conditions precedent which must be observed before the aid of the civil court can be enlisted as aforesaid, and there are certain restrictions on its powers. They are as follows:

"No prosecution against any officer in the Militia for any penalty under this Act, or under any regulation made hereunder shall be brought, except on the complaint of the officer for the time being commanding the Militia." *M.A. 126(1).*

"No prosecution against any man in the Militia for any penalty under this Act, or under any regulation, shall be brought except on complaint by or in the name of the commanding officer or Adjutant of the corps or captain of the company or corps to which such man belongs or belonged." *M.A. 126(2).*

"The officer for the time being commanding the said corps or company may authorize any officer of militia to make such complaint in his name, and the authority of any such officer alleging himself to have been so authorized to make any complaint shall not be controverted or called in question except by the officer commanding the said corps or company." *M.A. 126(3).*

"No prosecution shall be brought under the above mentioned in a civil court after the expiration of six months from the commission of the offence except for the offence of unlawfully buying, selling, or having in possession arms, accoutrements or other articles belonging to the corps, or for desertion." *M.A. 126(4).*

CHAPTER IV

AID TO THE CIVIL POWER

A. GENERALLY.

1. DUTY TO AID CIVIL POWER IN CASE OF PUBLIC DISORDER, APART FROM MILITARY STATUS. The Common Law, which governs soldiers and other citizens alike, imposes two main duties in case of riot and other disturbances of the peace, which are, first: every citizen is bound to come to the aid of the civil power when the civil power requires his assistance to enforce law and order, and, secondly: to enforce law and order, no one is allowed to use more force than is necessary. These obligations apply to everyone, in every type of disturbance. And when called to the aid of the civil power, soldiers in no way differ in the eyes of the law from other citizens, although, by reason of their organization and equipment, there is always a danger that their employment in aid of the civil power may in itself constitute more force than is necessary. Sections 49 and 50 of the Criminal Code confer certain protection against prosecution for acts done in fulfilment of the above common law duty. They are as follows:

"Everyone, whether subject to military law or not, acting in good faith in obedience to orders given by any sheriff, deputy sheriff, mayor or other head officer or acting head officer of any county, city, town or district, or by any magistrate or justice, for the suppression of a riot, is justified in obeying the orders so given, unless such orders are manifestly unlawful, and is protected from criminal responsibility in using such force as he, on reasonable and probable grounds, believes to be necessary for carrying into effect such orders." *C.C. 49(1).*

"It shall be a question of law whether any particular order is manifestly unlawful or not." *C.C. 49(2).*

"Everyone, whether subject to military law or not, who, in good faith and on reasonable and probable grounds, believes that serious mischief will arise from a riot before there is time to procure the intervention of the authorities aforesaid, is justified in using such force as he, in good faith and on reasonable and probable grounds, believes to be necessary for the suppression of such riot, and as is not disproportioned (*sic*) to the danger which he, on reasonable grounds, believes to be apprehended from the continuance of the riot." *C.C. 50.*

2. RESPONSIBILITY OF CIVIL POWER BEFORE INVOKING AID OF MILITARY. The primary obligation for the preservation of order and for the suppression of disturbance, rests with the civil authority. The civil authority should only requisition troops when satisfied that it is, or will be, impossible to deal with the situation which has developed, or is immediately apprehended, by means of all the resources of the civil power, that is to say, the local police, supplemented by any additional police that can be procured from elsewhere, or by any police reserves or special constabulary that may be available.

3. KINDS OF PUBLIC DISORDERS OR DISTURBANCES WHICH MAY RESULT IN THE AID OF THE MILITARY BEING INVOKED. Public disorders or disturbances, even though unlawful, may vary in the degree of their seriousness. The action which may be taken to quell them, and the punishment which may be imposed for taking part in them, similarly, varies.

a. Unlawful Assembly. By this term, is meant "an assembly of three or more persons who, with intent to carry out any common purpose, assemble in such a manner or so conduct themselves when assembled as to cause people in the neighbourhood of such assembly to fear, on reasonable grounds, that the persons so assembled will disturb the peace tumultuously, or will, by such assembly, needlessly and without any reasonable occasion provoke other persons to disturb the peace tumultuously." *C.C. 87(1)*. If the character of the assembly is such as to alarm persons of reasonable firmness and courage, it will be deemed unlawful even though no actual act of violence is committed.

"Persons lawfully assembled may become an unlawful assembly if they conduct themselves with a common purpose in such a manner as would have made their assembly unlawful if they had assembled in that manner for that purpose. Intention is not necessary." *C.C. 87(2)*.

"An assembly of three or more persons for the purpose of protecting the house of any one of their number against persons threatening to break and enter such house in order to commit any indictable offence is not an unlawful assembly even though it might lead to a disturbance of the peace." *C.C. 87(3)*.

b. Rout. By this term, is meant an unlawful assembly which has made a motion towards the execution of the common purpose.

c. Riot. By this term, is meant "an unlawful assembly that has begun to disturb the peace tumultuously." *C.C. 88*. Or, better to distinguish it from insurrection, it may be defined as an unlawful assembly which has actually begun to execute a common purpose of a PRIVATE nature by a breach of

the peace and to the terror of the public. Every rioter is guilty of an indictable offence and liable to two years' imprisonment with hard labour. *C.C. 90*.

The Criminal Code deals with the reading of the proclamation under the Riot Act and provides: "It is the duty of every sheriff, deputy sheriff, mayor or other head officer, and justice, of any county, city or town, who has notice that there are within his jurisdiction persons to the number of twelve or more unlawfully, riotously and tumultuously assembled together to the disturbance of the public peace, to resort to the place where such unlawful, riotous and tumultuous assembly is, and among the rioters, or as near to them as he can safely come, with a loud voice to command or cause to be commanded silence, and after that, openly and with a loud voice to make or cause to be made a proclamation in these words or to the like effect: 'Our Sovereign Lord the King charges and commands all persons being assembled immediately to disperse and peaceably to depart to their habitations or to their lawful place of business, upon the pain of being guilty of an offence on conviction of which they may be sentenced to imprisonment for life. God Save the King.'" *C.C. 91*.

Section 92 of the Criminal Code provides that "all persons are guilty of an indictable offence and liable to imprisonment for life who,

"(a) with force and arms wilfully oppose, hinder or hurt any person who begins or is about to make the said proclamation, whereby such proclamation is not made; (*i.e., who prevents the reading of the proclamation*) or

"(b) continue together to the number of twelve for thirty minutes after such proclamation has been made, or, if they know that its making was hindered as aforesaid, within thirty minutes after such hindrance." (*i.e. do not disperse*).

The duty of officers, if the rioters do not disperse, is as follows:

"If the persons so unlawfully, riotously and tumultuously assembled together, or twelve or more of them, continue together and do not disperse themselves, for the space of thirty minutes after the proclamation is made or after such hindrance as aforesaid, it is the duty of every such sheriff, justice and

other officer, and of all persons required by them to assist, to cause such persons to be apprehended and carried before a justice." *C.C. 93(1)*.

"If any of the persons so assembled are killed or hurt in the apprehension of such persons or in the endeavour to apprehend or disperse them, by reason or their resistance, every person ordering them to be apprehended or dispersed, and every person executing such orders, are indemnified against all proceedings of every kind in respect thereof." *C.C. 93(2)*.

"Nothing in this section contained shall in any way limit or affect any duties or powers imposed or given by this Act as to the suppression of riots before or after the making of the said proclamation." *C.C. 93(3)*.

The reading of the Proclamation under the Riot Act is not necessary before a riot can exist. The effect of such reading is merely to render the rioters liable to imprisonment for life, if they do not comply with the Proclamation, instead of to two years' imprisonment with hard labour.

d. Insurrection. An insurrection differs from a riot in having an object of a GENERAL AND PUBLIC nature, and it is really a species of treason known technically as levying war against the King. *M.M.L. 252*.

B. CALLING OUT THE MILITIA.

The law in regard to the Militia being called out in aid of the civil power will be found in the Militia Act, Sections 75-85 inclusive. *K.R. (Can.) 848*.

1. WHO IS LIABLE TO BE CALLED OUT. "The Active Militia, or any corps thereof, shall be liable to be called out for active service, within or without the municipality in which such corps is raised or organized, with their arms, ammunition and equipment, in aid of the civil power, in any case in which a riot or disturbance of the peace requiring such service occurs, or is, in the opinion of the civil authority, hereinafter designated in that behalf, anticipated as likely to occur, which is beyond the powers of the civil authorities to suppress, or to prevent, or to deal with." *M.A. 75*.

Section 120 of the Militia Act provides that every officer and man of the Militia who, when his corps is lawfully called upon to act in aid of the civil power, refuses or neglects to go out with such corps, shall, if an officer, incur a penalty not exceeding $100.00 and, if a man, a penalty not exceeding $20.00.

2. PROCEDURE. "In any case where a riot or disturbance occurs, or is anticipated as likely to occur, the Attorney-General, or acting Attorney-General, of the province in which is situated the place where such riot or disturbance occurs, or is anticipated as likely to occur, on his own motion or upon receiving notification from a judge of a superior or county or district court, having jurisdiction in such place, that the services of the Active Militia are required in aid of the civil power, may by requisition in writing (*see M.A. 80*) addressed to the district officer commanding the military district in which such place is situated, require the Active Militia or such portion thereof as the district officer commanding considers necessary, to be called out on active service to assist the civil power." *M.A. 76*.

An Order-in-Council was passed on August 7th 1940 empowering certain other Provincial officials to requisition the services of the Active Militia when necessary. This was passed by reason of representations to the Minister of National Defence that situations might arise, during the state of war now existing, necessitating military action in aid of the civil power, and that delay might ensue, by reason of the Attorney-General or acting Attorney-General being absent or otherwise not available, or by reason of the locality where military aid was required being so distant from the place where the Attorney-General or acting Attorney-General could be found, that communication with him would entail considerable loss of time. Accordingly, regulations under the authority of this Order-in-Council, empowering "any Crown Attorney or any other provincial official or class of provincial official designated from time to time for that purpose by the Attorney-General or acting Attorney-General of the province concerned" as persons who, in the manner prescribed by the Militia Act, may requisition the services of the Active Militia in aid of the civil power, and "may notify the district officer commanding that their services are no longer required in aid of the civil power."

"The district officer commanding a military district, or the officer for the time being performing his duties, shall call out the Active Militia in the district of which he is in command, or such portion thereof as he considers necessary for the purpose of suppressing or preventing any actual or anticipated riot or disturbance upon receiving requisition in writing made by the authority hereinbefore designated in that behalf; Provided that, so far as the Permanent Force is available, it shall be employed upon the duty of suppressing or preventing such actual or anticipated riot or disturbance, and recourse shall not be had to other militia corps except to the extent that the Permanent Force is not available." *M.A. 77.*

"A district officer commanding, upon receiving a requisition from the civil authority empowered by law to make the same, has no discretionary power as to the necessity for aid, nor has he the power to call out the Active Militia in any district other than the one of which he is in command. (*M.A. 78(1)*. Such district officer commanding has, however, complete discretion as to the number of troops he shall employ. If such district officer commanding considers that the services of the Active Militia in districts other than the one of which he is in command are necessary for the purpose of preventing any such actual or anticipated riot or disturbance as recited in the requisition, he is required by law (*M.A. 78(2)*, to notify the Adjutant-General of the number of officers and other ranks, together with their horses and equipment, which he considers necessary and of which number he is the sole judge, and upon receiving such notification the Adjutant-General is empowered to call out such of the Active Militia as in his judgment are available to meet the requirements of the said district officer commanding as set forth in the notification, and to cause them to be dispatched to him." *M.A. 78(2)*, *K.R.* (*Can.*) *850.*

C. STATUS, RESPONSIBILITIES AND DUTIES OF TROOPS AND CIVIL AUTHORITIES.

"The officers and men of such Active Militia when so called out shall, without any further authority or appointment, and without taking oath of office, be held to have and

may exercise, in addition to their military powers and duties, all the powers and duties of special constables, so long as they remain so called out, but they shall act only as a military body, and shall be individually liable to obey the orders of their military superior officer. It is the duty of every officer and man of the Active Militia at all times while so called out to obey the orders of his military superior officer." *M.A. 82.*

The Criminal Code gives a certain amount of protection to persons subject to military law who obey the orders of their superior military officers under such circumstances, by providing that "everyone who is bound by military law to obey the lawful command of his superior officer is justified in obeying any command given him by his superior officer for the suppression of a riot, unless such order is manifestly unlawful. And it shall be a question of law whether any particular order is manifestly unlawful or not. *C.C. 51.*

"Troops proceeding in aid of the civil power will invariably have the requisite quantity of ammunition served out to them before going on duty. The unused portion of this supply will be collected immediately after the duty has been performed and returned without delay into stores." *K.R.* (*Can.*) *851.*

"On arrival in the locality where the disturbance, real or apprehended, occurs, or is anticipated as likely to occur, the officer in command of troops called out in aid of the civil power will consult with the magistrate and with the senior police officer present, and will decide as to the disposition of the troops. He will move his force to the place to which he may be directed by the magistrate, in regular military order, with the usual precautions. He will not permit the troops to be scattered, detached or posted in a situation where they would not be able to act in their own defence." *K.R.* (*Can.*) *852.*

"Troops called out under Section 75 of the Militia Act to aid the civil power do not replace the civil power, the officer commanding troops thus called out will be careful that his command and each detached portion thereof is accompanied, on all occasions when on duty, by a magistrate to represent, and to give orders in the name of, the civil power." *K.R.* (*Can.*) *853.* He should also make sure that every patrol or picquet,

when employed in the actual suppression of disturbances, is under the command of an officer. *K.R. (Can.) 844.*

"All orders from magistrates to troops acting in aid of the civil power should be obtained in writing. Should this not be possible, an officer commanding will take care that he is accompanied by a reliable witness when taking a verbal order, and that there is a clear understanding among all concerned as to the meaning of such order." *K.R. (Can.) 854.*

"When troops are called out in aid of the civil power, the responsibility for the reading of Proclamation under the Riot Act (*C.C. 91*) or of making any proclamation required by the Criminal Code, rests entirely with the civil power, and in no way with the troops. The latter act solely upon the orders of the accompanying magistrate, invariably conveyed through the officer commanding the troops present." *K.R. (Can.) 855.*

"If the magistrate concludes that the police are unable to cope with the riot, and that the situation demands the interference of the troops by action, then, whether the proclamation has been read or not, it is his duty to request the commander of the troops to take action. This request should be made distinctly and, if possible, in writing, although if given by word of mouth it will be sufficient." *K.R. (Can.) 856(a).*

"When so required to take action, it will be the duty of the officer to take such military steps as in his opinion the situation demands. In doing so, he will have absolute discretion as to the action to be taken, and as to the arms, including firearms, which the troops shall use, and as to the orders he shall give, including the order to fire. But the magistrate and the officer are each responsible, respectively, for anything done or ordered by them which is not justified by the circumstances of the case." *K.R. (Can.) 856(b).*

"If the officer thinks it unnecessary to take immediate action, it is not obligatory upon him to do so, nor will he continue action longer than he thinks absolutely necessary." *K.R. (Can.) 857.*

"All commands to the troops will be given by their officer who, if it becomes necessary to order the troops to fire, will exercise a humane discretion in deciding both the number of rounds and the object or objects to be aimed at." *K.R. (Can.) 857.*

"In order to guard against all misunderstanding, officers commanding troops or detachments are, on every occasion in which they are employed in the suppression of riots, or in the enforcement of the law, to take the most effectual means, in conjunction with the magistrates under whose orders they may be placed, for notifying beforehand and explaining to the people opposed to him that in the event of the men being ordered to fire, their fire will be effective." *K.R. (Can.) 858.*

"If the commander should be of the opinion that a slight effort would be sufficient to attain the object, he is to give the word of command to one or two specified files to fire. If greater effort should be required, he is to give the word of command to one of the sections, told off as above ordered; the fire of the other sections, if required, will only be given on the regular word of command of the commander." *K.R. (Can.) 860.*

"If there are more officers than one with the detachment, and it is necessary for more than one section to fire at a time, the officer commanding will clearly indicate to the troops what officer is to order any of the sections to fire. No person, except the officer indicated by the commanding officer, is to give orders to any file or section to fire." *K.R. (Can.) 861.*

"If it becomes necessary to fire, officers and soldiers have a serious duty, which they must perform with coolness and steadiness, and in such a manner as to be able to cease fire the instant it is no longer necessary." *K.R. (Can.) 862.*

Care will be taken to fire upon only those persons who can be seen to be implicated in the disturbance. To fire over the heads of the crowd has the effect of favouring the most daring and guilty, and of sacrificing the less daring, and even the innocent.

The division of responsibility between civil and military authority after the decision to take action has been made may, therefore, be summed up as follows:

(i) The primary duty of preserving order rests with the civil authority. A commander, therefore, in all cases where it is practicable, should place himself under the direction of a magistrate;

(ii) The duties of a magistrate do not, however, impose upon him a knowledge of the weapons at the disposal of

the troops, or of the effect of those weapons; he may not be, therefore, the best judge as to the degree of force to be employed by the soldiers in the particular circumstances for which he desires and requests their intervention. A magistrate, therefore, if he acts with discretion, will necessarily defer to the opinion of the commander on military matters, particularly as to the degree of force to be used. The primary responsibility, however, remains with the magistrate, and if he is on the spot it is his duty to request the commander "to take action" when the civil resources at his disposal are insufficient to deal with the circumstances which present themselves;

(iii) On the other hand, a commander will not perform his duty if, from fear of responsibility, he takes no action and allows outrages to be committed which it is in his power to check, merely because there is no magistrate to direct him to take action;

(iv) If the magistrate and the commander are acting together, the obligation lies on the magistrate to request the commander to take action, but the action to be taken, i.e. the degree of force required in the circumstances, must be judged by the commander; the latter would incur considerable responsibility if he were to fire without a request to take action from the magistrate, or if he were to refuse to fire when requested to do so, but circumstances which he sees before him might justify the commander in firing, or not firing, notwithstanding the request which he receives from the magistrate. The commander must judge the degree of force to be employed and it is his duty to fire if he cannot otherwise stop the violence which is being committed before him. He must decide whether it is necessary to fire or not, and is responsible for his action. (*See M.M.L., Chapter XIII.*)

"During the period that any portion of the Militia is on service in aid of the civil power, the commanding officer will forward direct to National Defence Headquarters, daily, a statement showing the number of the different ranks actually employed on such duty." *K.R. (Can.) 865.*

"Under section 83 of the Militia Act, troops called out in aid of the civil power are to remain on duty until notification is received from the authority which made the requisition calling them out that their services are no longer required in aid of the

civil power. The strength of the force on such duty shall be such as the district officer commanding considers necessary, and he is empowered to diminish the number of officers and men so called out from time to time as in his opinion the exigencies of the case require. On receipt of such notification that the services of the troops are no longer required in aid of the civil power, the district officer commanding will at once order the force to be withdrawn, and will notify National Defence Headquarters by telegram." *K.R. (Can.) 864.*

"On completion of the duty for which the force was called out, an immediate report thereof, in writing, will be made by the commanding officer to the district officer commanding for transmission to National Defence Headquarters." *K.R. (Can.) 866.*

On completion, by troops called out in aid of the civil power, of the duty for which they were so called out, district officers commanding districts in which any costs or expenses have been incurred in connection with any such duty, will forward to National Defence Headquarters a statement of such costs and expenses, in order that steps may be taken to effect recovery from the province concerned under the provisions of section 84 of the Militia Act.

D. REQUISITION.

"Any statements of fact contained in any requisition made under the Militia Act shall be final and binding upon the province concerned, and any such statement of fact shall not be open to dispute by the officer upon whom such requisition is made." *M.A. 79.*

The form of the requisition may be found in section 80 of the Militia Act, and the provisions of the following section as to its contents and effect are of importance.

"In every requisition in writing as aforesaid it shall be stated that information has been received by the Attorney-General from responsible persons or, as the case may be, that a notification has been received by the Attorney-General from the county court or district court judge, or from a judge of a superior court, as the case may be, that a riot or disturbance beyond the powers of the civil authorities to suppress or to prevent or to deal with as the case may be has occurred, or is

anticipated as likely to occur and that the services of the Active Militia are required in aid of the civil power. The said requisition shall further state that it has been made to appear to the satisfaction of the said Attorney-General that the services of the Active Militia are so required." *M.A. 81(1)*.

"Moreover in every case there shall be embodied in the requisition, which shall be signed by the Attorney-General, an unconditional undertaking that the province shall pay to His Majesty all expenses and costs incurred by His Majesty by reason of the militia, or any part thereof, being called out or serving in aid of the civil power as by the requisition required." *M.A. 81(2)*.

"Every statement of fact contained in any requisition made under the provisions of this Act shall be conclusive and binding upon the province on behalf of which the requisition is made; and every undertaking or promise in any such requisition contained shall be binding upon the province and not open to any question or dispute by reason of any alleged incompetence or lack of authority on the part of the Attorney-General to make the same, or for any other reason." *M.A. 81(3)*.

E. EXPENSES AND COSTS OF CALLING OUT MILITIA TO ASSIST THE CIVIL POWER.

The expenses and costs of calling out the militia to assist the civil power are provided for by sections 84 and 85 of the Militia Act as follows:

"All expenses and costs incurred by His Majesty by reason of any of the Militia being so called out in aid of the civil power shall be paid to His Majesty by the province of which the Attorney-General made the requisition requiring them to be called out." *M.A. 84(1)*.

"His Majesty may retain from any annual grant payable by Canada to such province and under the control of the Parliament of Canada any unpaid balance of moneys due to His Majesty under the provisions of this Section." *M.A. 84(2)*.

"Such moneys as are required to meet the expenses and costs occasioned by the calling out of the militia as hereinbefore provided and for their services shall, pending payment by the province, be advanced in the first instance out of the

Consolidated Revenue Fund by the authority of the Governor-in-Council, but shall be payable by and recoverable from the province and by His Majesty as moneys paid by the latter to and for the use of the province at the request of the latter." *M.A. 85*.

F. OPINION OF LAW OFFICERS (AUG. 18, 1911) ON DUTY OF SOLDIER CALLED UPON TO ASSIST POLICE.

"A soldier differs from the ordinary citizen in being armed and subject to discipline; but his rights and duties in dealing with crime are precisely the same as those of the ordinary citizen. If the aid of the military has been invoked by the police, and the soldiers find that a situation arises in which prompt action is required, although neither magistrates nor police are present for consultation, they must act on their own responsibility. They are bound to use such force as is reasonably necessary to protect premises over which they are watching, and to prevent serious crime or riot. But they must not use lethal weapons to prevent or suppress minor disorders or offences of a less serious character, and in no case should they do so if less extreme measures will suffice. Should it be necessary for them to use extreme measures they should, whenever possible, give sufficient warning of their intention."

Signed "Rufus D. Isaacs"
"John Simon"

M.M.L.

CHAPTER V

COURTS AND TRIBUNALS.

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A. SINGLE COURTS.

The term "single court" is used to describe a court consisting of a single officer of whatever rank, whether he be a commander, or an acting commander, or a "commanding officer", or a higher officer exercising authority under section 47 of The Army Act.

1. COMPANY COMMANDER. The term "company commander" as used in this chapter, means the commander or acting commander of a company, squadron, troop or battery, as the case may be. This meaning is expressed in K.R. (Can.) by the use of the term "company *etc.* commander."

a. Powers. The company commander has jurisdiction to dispose of charges against private soldiers and non-commissioned officers, below the rank of sergeant or the appointment of lance-sergeant.

i. Generally. The powers of the company commander are those delegated to him by his commanding officer under the authority of K.R. (Can.) 477, which provides that a commanding officer may delegate power—to dispose of any offence which he himself may deal with under K.R. (Can.) 459—to a company commander.

ii. Offences. The offences so referred to in K.R. (Can.) 459 are those mentioned in the following sections of the Army Act, namely: section 6, except on active service; section 8(2) (threatening or insubordinate language only), except on active service; section 9(2), except on active service; section 10 (except sub-section (1) thereof); sections 11, 14, 15, 18(1), 18(3) and 19; section 20 (except where the act is wilful); sections 21, 22, 24 and 27(4); section 33 (except cases of enlisting from army reserve); and sections 34 and 40 –all of which sections may be found in Appendix F, *post*.

iii. Restrictions upon Punishments. The regulation which authorizes the commanding officer to delegate power to a company commander, as aforesaid, provides, however, that the punishments which may be awarded by a company commander must not exceed."

"(i) In the case of a private soldier— seven days confinement to barracks for minor offences; extra guards and picquets; fines for drunkenness; and in the case of absence without leave where pay is automatically forfeited under the conditions specified in K.R. (Can.) 478, any punishment within his ordinary powers for such absence. In all cases involving such forfeiture, a soldier has the right, under section 46(8) of the Army Act, to elect to be tried by a district court-martial, as he has whenever his pay or pocket book might be affected. *K.R. (Can.) 478.* A commanding officer may further limit the power of award of an officer of less than three years' service, to three days confinement to barracks. Any such awards will be subject to any remission the commanding officer may order, but cannot be increased.

"(ii) In the case of a non-commissioned officer, below the rank of sergeant or the appointment of lance-sergeant—admonition or reprimand." *K. R. (Can.) 477.*

b. Procedure. Every charge against a soldier (*which includes warrant officer, non-commissioned officer or private soldier*), will be investigated, in the first instance, by the company *etc.* commander at his orderly room, which is to be held at such an hour as will allow of a soldier reserved for disposal by the commanding officer being ready to go before him at the appointed time. *K.R. (Can.) 454 (c).*

"Every charge against a soldier will be investigated without delay in his presence. Soldiers of the Permanent Force in arrest are to be disposed of daily (Sundays, Good Friday and Christmas Day excepted), and, when practicable, in the morning before the principal parade." *K. R. (Can.) 454 (b).*

"A soldier charged with drunkenness will not be brought before an officer for investigation of the charge until he is sober. For this purpose twenty-four hours should usually be allowed to elapse before the investigation." *K.R. (Can.) 447 (c).*

Where the accused is a private, this officer, if he decides that the case is a minor offense or a case of drunkenness, or of absence without leave with which he can deal under the powers delegated to him under section 46(9) of the Army Act and K.R. (Can.) 459 and 477, will either dispose of the case himself, remand the accused for further inquiry, or leave it for his commanding officer to deal with. The case of a non-commissioned officer must always be dealt with by the commanding officer, except where the company commander has power to admonish or reprimand (but not severely reprimand) a non-commissioned officer below the rank of sergeant or the appointment of lance-sergeant.

"If a charge against a non-commissioned officer or man, for which he has not been in close arrest, is reserved by the company etc. commander for the commanding officers' award, the former officer will send the charge (M.F.B. 264) for entry in the guard report, before the hour fixed for the disposal of soldiers in arrest by the commanding officer. If, on the other hand, a charge for which a non-commissioned officer or man has been in close arrest is disposed of by the company etc. commander, that officer will report the fact to the orderly room and the entry disposed of on M.F.B. 224 will be made in the punishment column of the guard report." *K.R. (Can.) 456(b).*

"If a soldier is remanded for further inquiry, his case will be brought under review daily, and the order for remand will be entered daily in the guard report, or M.F.B. 224, by the investigation officer." *K.R. (Can.) 456(d).*

"M.F.B. 224, for recording the awards of company etc. commanders, will be retained in the orderly room, and will be obtained therefrom by the commander concerned whenever necessary for the disposal of offences. After completing the last three columns in each case disposed of, the company commander will return the form to the orderly room, in order that particulars may be available for inclusion in Part II Orders for the day, if necessary." *K.R. (Can.) 457(a).*

"On the last day of the week the company commander will obtain and sign the form, whether blank or otherwise, and it will then be attached to the guard report for that day." *K.R. (Can.) 457(b).*

"A company etc. commander who has reserved a case for the award of the commanding officer will attend with the company conduct book, when the soldier is brought before the commanding officer." *K.R. (Can.) 456(c).*

The procedure during conduct of trial before a company commander, being similar to that followed in the court of the commanding officer, will be dealt with, *post*, in the discussion of procedure in the commanding officer's court.

2. COMMANDING OFFICER. "The expression 'commanding officer', as used in the sections of the Army Act, relating to "Courts-Martial" and to the 'Power of Commanding Officer', and in the provisions consequential thereon, and in these rules, means in relation to any person, the officer whose duty it is, under the provisions of the King's Regulations for the Army, or, in the absence of any such provisions, under the custom of the service, to deal with a charge against that person of having committed an offence, that is, to dispose of it on his own authority. It also, so far as relates to the summary award of any punishments for offences, being punishments which under the provisions of His Majesty's Regulations an officer commanding a squadron, company, troop, or battery is authorized to award, and so far as relates to a summary finding in a case of absence without leave, includes the officer commanding a squadron, company, troop, or battery." *R.P. 129.*

a. Powers.

i. Generally. A commanding officer has no power to punish a warrant officer or an officer. He may, without reference to superior authority, dispose summarily of a charge for an offence committed by a non-commissioned officer or soldier under the following sections of the Army Act: section 6, except on active service; section 8(2) (threatening or insubordinate language only), except on active service; section 9(2) except on active service; section 10 (except sub-section (1)); sections 11, 14, 15, 18(1), 18(3) and 19, section 20 (except when the act is wilful), sections 21, 22, 24, 27(4), section 33 (except cases of

enlisting from the army reserve), and sections 34 and 40—all of which sections may be found in Appendix F, *post*. *K.R.* (*Can.* *459*.

"First, and less serious, offences under the above sections, and minor neglects or omissions, not resulting from deliberate disregard of authority or not associated with graver offences, should, as a rule, be dealt with summarily. A charge for any other offence which the commanding officer desires to dispose of summarily, will be referred to superior authority in a letter stating the circumstances of the case, and accompanied by the soldier's conduct sheets. The commanding officer may refer a charge for any offence to superior authority with an application for a district court-martial." *K.R.* (*Can.*) *459*.

ii. Punishments by Officer in Command of a Unit.

UPON PRIVATE SOLDIERS.

A commanding officer may, subject to the soldier's right to elect previous to the award to be tried by a district court-martial, inflict on a soldier the following SUMMARY PUNISHMENTS, *i.e.*, punishments which affect soldier's pay.

(a) Detention, not exceeding twenty-eight days. The power of awarding detention exceeding seven days, except in the case of absence without leave, will not be exercised by a commanding officer under the rank of field officer, save that (i) any officer in command not below the rank of brigadier may empower a captain in command of a unit, whether temporarily or otherwise, to award detention not exceeding fourteen days; and (ii) the minister may empower a captain temporarily in command of a unit to award detention not exceeding twenty-eight days.

(b) A fine not exceeding $16.00 for drunkenness only. The scale of fines for drunkenness is set out in K.R. (Can.) 492.

(c) Any reduction from ordinary pay allowed to be made by a commanding officer under Articles 64(2) and 72(7) of the Pay and Allowance Regulations.

In the case of a soldier who, by neglect or culpable mismanagement, loses or damages any articles of his personal equipment or other Government property, the approval of the

district officer commanding must be obtained if the amount to be recovered from any soldier exceeds $20.00.

(d) Field punishment not exceeding twenty-eight days (on active service only).

(e) Forfeiture of all ordinary pay under section 46(2) (b) of the Army Act, for a period commencing on the day of the award and not exceeding twenty-eight days (on active service only).

A soldier forfeits his pay for every day undergoing detention, and it is because every one of the above mentioned punishments affects the soldier's pay, that he has the right to elect trial by court-martial.

A commanding officer may also inflict on a private soldier the following MINOR PUNISHMENTS, (*i.e.* punishments which do not affect a soldier's pay) the soldier having no right to claim trial by court-martial since his pay is not thereby affected.

(a) Confinement to barracks for a period not exceeding fourteen days. Defaulters will be required to answer to their names at uncertain hours throughout the day, and will be employed on fatigue duties to the fullest practicable extent with a view to relieving well-conducted soldiers therefrom. Defaulters will attend parades, and take all duties in regular turn. When the fatigue duties are not sufficient to keep the defaulters duly employed, the commanding officer may order them to attend extra drill, which shall be limited to one hour a day, and include some form of useful instruction.

(b) Extra guards or picquets. These are only awarded as a punishment for minor offences or irregularities when on, or parading for, these duties.

(c) Admonition. A rebuke entailing no entry on conduct sheet, unless forfeiture of pay is entailed under the Pay and Allowance Regulations, in which case he would have the option of trial by court-martial, or in a charge of drunkenness. *K.R.* (*Can.*) *1523*, *K.R.* (*Can.*) *472*.

Field punishment and forfeiture of ordinary pay may be awarded severally or conjointly, but a conjoint award will only be necessary when the period of forfeiture exceeds the period of field punishment, the reason being that forfeiture of pay commences as from the day of award. When, therefore, it is

desired to order forfeiture of pay for a period in excess of the field punishment awarded, (*e.g.*, ten days' field punishment and an additional forfeiture of fourteen days' ordinary pay) it will be necessary to award ten days' field punishment with forfeiture of twenty-four days' pay, as pay is forfeited for the period of field punishment awarded. *K.R. (Can). 473.*

The other punishments may be awarded severally or conjointly, subject to the provisions set out in K.R. (Can.) 473(b), which provides that no soldier shall be awarded detention by summary award for more than twenty-eight consecutive days, and that the whole extent of consecutive punishment, including detention and confinement to barracks, shall not exceed forty-two days in the aggregate. *K R. (Can.) 473.*

UPON NON-COMMISSIONED OFFICERS.

"A commanding officer may, subject to the right of the non-commissioned officer to elect, previous to the award, to be tried by district court-martial, award any deduction from the ordinary pay of a non-commissioned officer allowed to be made by a commanding officer under Articles 64(2) and 72(7) of the Pay and Allowance Regulations." *K.R. (Can.) 470(a).* Deductions will be awarded as "stoppages" of the specific amount assessed for the loss or damage and will not be awarded as "forfeiture" or stoppages of pay for any number of days.

A commanding officer may also inflict on a non-commissioned officer the following minor punishments, the non-commissioned officer having no right to claim trial by court-martial, since his pay is not affected;

(a) Reprimand. This entails no entry on the regimental conduct sheet. *K.R. (Can.) 1518;* but does entail entry on the company conduct sheet. *K.R. (Can.) 1523.*

(b) Severe Reprimand. This entails entry on the regimental conduct sheet. *K.R. (Can.) 1518;* as well as entry on the company conduct sheet. *K.R. (Can.) 1523.*

(c) Admonition. A rebuke entailing no entry on either the company or on the regimental conduct sheet, unless forfeiture of pay is entailed under the Pay and Allowance Regulations in which case he would have the option of trial by court-martial, or in a case of drunkenness, when an entry would be made on both. *K.R. (Can.) 1523.*

iii. Punishments by Officer in Command of Detachment. "The officer commanding a detachment is vested with the power of awarding summary punishment to the extent mentioned below—

"(1) *If of field rank*— the full powers accorded to a commanding officer of a unit;

"(2) *If not of field rank*— the powers of a commanding officer of a unit as modified by K.R. (Can.) 472(a), (i.e., the power of awarding detention exceeding seven days, except in cases of absence without leave) will not be exercised by a commanding officer under the rank of field officer, save that any officer not below the rank of brigadier may empower a captain in command of a unit, whether temporarily or otherwise, to award detention not exceeding fourteen days. And the Minister may empower a captain of a unit to award detention not exceeding twenty-eight days;

"(3) *When the officer commanding a detachment is below the rank of field officer,*- the commanding officer of the unit, if the detachment is serving in the same military district, or the district officer commanding the district where the detachment may be, or other superior authority, may, having regard to the rank and experience of the officer commanding the detachment, restrict him from the exercise of any or all the powers of a commanding officer;

"(4) Nevertheless, an officer commanding a detachment who is under the rank of field officer may, if necessity arises, act to the full extent of his powers as mentioned in (2) for the maintenance of discipline notwithstanding any restrictive order under (3), but in such case he will immediately report his action for the information of the superior by whom such restrictive order was made". *K.R. (Can.) 475.*

"A district officer commanding may, on the embarkation of troops and on other special occasions, associate two or more detachments for the purposes of discipline, and place them under the command of one officer. In such cases the powers of the officers commanding the several detachments to award summary punishments, will, for the time being, remain in abeyance". *K.R. (Can.) 476.*

"An officer will not introduce or adopt any system of punishment which is in any respect at variance with the regulations." *K.R. (Can.) 474.*

b. Procedure. "Before proceeding with a case it is the duty of the commanding officer to ascertain that the soldier is liable to be proceeded against, having regard to the limitations of time prescribed by the Army Act. For the purposes of exemption from trial under section 161 of the Army Act, a soldier will be considered as having served in an exemplary manner, if, at any time during his service since his fraudulent enlistment, he has had no entry in his regimental conduct sheet for a continuous period of three years." *K.R. (Can.) 460.*

A case left by the company commander to be dealt with by a commanding officer must be investigated *de novo* by the commanding officer himself. He can dismiss the charge; remand the case for trial by court-martial; or refer it to superior military authority; or, in the case of a private soldier, award punishment summarily, subject to the right of the soldier to elect to be tried by a district court-martial, in any case where the award or finding involves forfeiture to pay, and in any other case where the commanding officer proposes to deal with the offence otherwise than by awarding a minor punishment, and subject to the limitations imposed on the discretion of commanding officers by K.R. (Can.) A warrant officer cannot be summarily punished except as provided for in section 47 of the Army Act. A non-commissioned officer, though not legally exempt, is not allowed by the K.R. (Can.) to be summarily punished except as specially laid down therein. It should be noted that a person subject to military law as a soldier but not belonging to His Majesty's forces cannot be summarily punished by a commanding officer. *A.A. 182(1), 184(2).*

Present in the orderly room will be the accused's company commander with the conduct book,—the accused's platoon commander and the adjutant, as well as the commanding officer, witnesses, escort, *etc.*

The adjutant will read the charge. Witnesses will be examined, and in the case where the commanding officer has power to deal with the case summarily, the accused has the right to demand that the witnesses against him be sworn; he

will, also have full liberty of cross-examination, and of making any statement. *A.A. 46(6); R.P. 3 & 4 & note.*

The commanding officer, after hearing what is urged against the accused, will, if he is of opinion that no military offence at all, or no offence requiring notice, has been made out, at once dismiss the charge. *R.P. 4(A).* Otherwise, he must ask the accused what he has to say in his defence, and whether he has any witnesses to call, and will give him full opportunity both of making a statement and of supporting it by evidence, including the evidence of the accused himself and that of his wife. *R.P. 3(A) & note.* The commanding officer will then consider whether to dismiss the case or to deal with it summarily himself, or to adjourn it for the purpose of having the evidence reduced to writing, with a view to having the case tried by court-martial or, when the accused is below the rank of field officer or is a warrant officer, disposed of under section 47 of the Army Act. *R.P. 4(B).* "If, on the investigation of a charge, sufficient evidence is not forthcoming as to whether the accused has, or has not, committed the offence, and there is no opportunity of carrying the investigation further at the time, the accused, if the offence charged is not serious, may be released from arrest, and ordered to do duty without prejudice to his re-arrest when further evidence is forthcoming and the matter can be further inquired into. If, however, the offence is not serious, and there is no probability of sufficient evidence being obtainable within a reasonable time, the case should be dismissed". *K.R. (Can.) 463.* First and less serious offences of the class which he has authority under the K.R. (Can.) to dispose of summarily, without reference to superior authority, should, as a rule, be so dealt with, subject to the soldier's right to elect before the award to be tried by a district court-martial. And "when proposing to deal with a case summarily a commanding officer will satisfy himself that the evidence produced before him is sufficient to disclose the exact nature of the offence. If he is not so satisfied, he should remand the case for further inquiries, so that the offence as entered in the guard report may be substantially the charge upon which the accused would be arraigned in the event of his electing to be tried by a

district court-martial under the provisions of 46(8) of the Army Act". *K.R.* (*Can.*) *461*(*a*).

"Except where it is important that the guilt or innocence of the accused should be definitely decided, it is undesirable to send a case before a court-martial when it appears doubtful whether the evidence will lead to a conviction. In such a case the charge should ordinarily be dismissed, under the provisions of section 46 of the Army Act". *K.R.* (*Can.*) *462*.

During the investigation, the officer conducting it must be careful not to let fall, before he disposes of the case, any expression of opinion as to the guilt of the accused, or one which might prejudice him at a subsequent trial. It frequently happens that officers who have been present at the investigation are detailed as members of the court convened in consequence of it; therefore nothing should be said or done which might, though unconsciously, bias their judgment beforehand. Conduct sheets should be examined by the commanding officer when, and not before, he has satisfied himself as to the guilt of the accused.

If the commanding officer proposes to deal with the case summarily, otherwise than by awarding a minor punishment, he must ask the soldier whether he desires to be dealt with summarily, or to be tried by a district court-martial; and the soldier may, if he chooses, thereupon elect to be tried by a district court-martial. A soldier who has so elected and chosen should on the following day be given an opportunity of reconsidering such decision, unless there are reasons against such a course. *K.R.* (*Can.*) *464*(*b*); and his commanding officer may, if he thinks the circumstances of the case warrant it, release the accused from arrest pending trial. *K.R.* (*Can.*) *464*(*a*). When once an accused has elected to be so tried upon the charge as read out to him from the guard report, it should under no circumstances be added to or increased in gravity, unless facts subsequently appear which disclose a more grave offence or offences. These facts must be set out fully when application is made for the convening of the court-martial. *K.R.* (*Can.*) *461*(*b*).

"Where an accused elects trial by court-martial, that fact should be noted, in red ink, on top of the application form and of the charge-sheet. This serves (*inter alia*) to notify the

court that the commanding officer did not consider the case to be one deserving of a more severe punishment than he himself could have awarded." *A.A. 46, note 17*.

"The officer commanding a military hospital is temporarily the commanding officer of patients therein, and can investigate charges against them and apply for a court-martial. R.P. 6(B) prohibits a commanding officer from increasing a punishment after he has once made his award which is complete when the man has quitted his presence. This rule applies in the case of minor as well as other punishments. But a commanding officer can at any time before the punishment has been completed, mitigate or remit a minor or a summary punishment. Awards by a commanding officer which appear to be illegal or excessive can be reviewed by superior authority under R.P. 10." *A.A. 46, note 18*.

As stated above, a commanding officer has power to award minor punishments without restriction, but should it happen, for example, as in the case of absence without leave in excess of six hours, that a commanding officer proposes to deal with the offence by awarding a MINOR PUNISHMENT, his decision, nevertheless, will constitute a finding of 'guilty' in respect of the offence with resultant forfeiture of pay. Consequently, in such a case, before final disposal, the soldier must be afforded an opportunity of electing trial by district court-martial. The principle does not apply in the case of deprivation by a commanding officer of acting or lance rank, since although the deprivation might result in reduction in the rate of pay, the loss would not amount to a forfeiture of pay within the meaning of section 138 of the Army Act.

Where a commanding officer adjourns the case for the purpose of having the evidence reduced to writing, the evidence given by any witness before him must be taken down in writing in the presence of the accused. The accused and his wife, even if they have given evidence before the commanding officer cannot be compelled to repeat their evidence. While police and other civilian witnesses cannot be compelled to attend before a commanding officer, they can be compelled to attend at the taking of a summary of evidence. (*See A.A. 125*(*3*), *R.P. 4*(*H*)) The accused must be allowed to cross-examine within reasonable

limits, especially if there is any variance between the evidence as taken down and that given on the prior investigation. When all the evidence for the prosecution has been taken, the accused, before he makes any statement, must be formally cautioned in the following prescribed words: "Do you wish to make any statement or give evidence upon oath? You are not obliged to say anything or give evidence unless you wish to do so, but whatever you say or any evidence you give will be taken down in writing, and may be given in evidence". This is most important, for any statement made by him at the taking of the summary will be inadmissible at his trial unless he has first been duly cautioned, and the fact of his having been duly cautioned should be recorded in the summary. Any statement or evidence of the accused will be taken down, but he will not be cross-examined upon it. *R.P. 4(E)*.

The accused may make his statement not upon oath or, if he wishes give evidence on oath; he may call witnesses on his behalf (including his wife). The statement or evidence of the accused and the evidence of his witnesses must be taken down, all hearsay and irrelevant matter being excluded.

The evidence and statement, if any (called the summary of evidence), must be taken down in the presence of the commanding officer himself, or of some officer deputed by him. *R.P. 4(C)*. If the commanding officer so directs, or if the accused so demands, the evidence will be taken on oath. But the commanding officer cannot direct the evidence of the accused to be taken on oath. It rests entirely with the accused whether he will give sworn evidence or not, and he may do so even if the witnesses against him are not sworn.

When the summary of evidence has been taken, the commanding officer must consider it and determine whether or not to remand the accused for trial by court-martial. It may be that on reading the evidence the commanding officer will come to the conclusion that the case is one which ought to be disposed of summarily. In such a case, unless the accused has himself elected to be tried by a district court-martial, the commanding officer will either re-hear the case and dispose of it summarily, or if he is not competent to do so without leave from superior military authority, will refer it to the proper authority. In any

other case he will remand the accused for trial by court-martial, (*R.P. 5(A)*), and without unnecessary delay, ordinarily within thirty six hours, send to superior authority an application for a district or general court-martial (*R.P. 5(B)*) accompanied by the summary of the evidence, the charges on which he proposes the accused should be tried, and other documents; and in his letter of application he will state his reasons for desiring the particular description of court for which he applies. If a court-martial is ordered or applied for, the accused can be kept in arrest or confinement until the charge is disposed of. It is the duty of the commanding officer on reading the summary of the evidence to note whether or not the evidence taken down in the summary corresponds with the evidence given at the inquiry before him.

The summary of evidence, like the depositions before justices, may be used for certain limited purposes at the trial, (*R.P. 17*) and also for the purpose of giving the accused notice of the charge he will have to meet, and the convening officer and the president of the court notice of the case to be tried. Either the summary itself or a true copy must be laid before the court-martial before whom the accused is tried.

Drunkenness and absence without leave are the two offences which, most frequently, require to be dealt with by the commanding officer, and will be discussed at some length in another place in this book.

There is no appeal from the award of the commanding officer, but, as has already been mentioned, the soldier may, in certain cases, instead of submitting to the jurisdiction of the commanding officer, elect to be tried by a district court-martial. *A.A. 46(8)*.

When once an offender has been punished or the charge otherwise disposed of by his commanding officer he cannot be tried by a court-martial for the same offence; and similarly he cannot be punished by his commanding officer or subjected by him to any stoppage of pay for any offence of which he has been acquitted or convicted by a court-martial or by a competent civil court. *A.A. 46(7)*. When a commanding officer has once awarded punishment for an offence he cannot afterwards increase it. *R.P. 6(B)*. (As to the power to cancel an award, or reduce

the punishment see *R.P. 10*). It is considered that his award is complete when the man has left the presence of the commanding officer.

If a commanding officer, contrary to K.R. (Can.) 459, (which requires him to refer certain offences to superior authority) through inadvertence and with full knowledge of the facts, dismisses the charge or deals with any offence summarily, his award is legal and the offender cannot be tried again by court-martial for the same offence.

"If, when a soldier is charged with one offence, another, the investigation of which cannot be immediately completed or proceeded with comes to light, the investigation and trial of the original offence may proceed independently, the charge for the other offence being dealt with as prescribed in para. 463." *K.R. (Can.) 465.*

"When a soldier already under sentence of court-martial is charged with an offence for which it is necessary to arraign him before a court-martial, the trial should take place at once." *K.R. (Can.) 466.*

3. Authorities Specified in Section 47 of the Army Act. The authorites specified in section 47 of the Army Act are—any general officer or brigadier authorized to convene a general court-martial, any officer (not under the rank of major-general) appointed for the purpose by the minister, each district officer commanding a military district, and in the case of a force on service out of the country the general or air officer commanding the force and any other officer (not under the rank of major-general appointed for the purpose by him).

a. Powers.

i. General. Section 47 of the Army Act provides that the above mentioned authorities shall have power to deal summarily with a charge against an officer below the rank of field officer or against a warrant officer. The purpose of this section is to obviate the necessity for trying by court-martial a junior officer or warrant officer who commits some offence which is not of a serious nature but yet cannot be overlooked.

ii. Offences. The authority having power to deal with a case against an officer or warrant officer under the provisions of section 47 of the Army Act should exercise this power

only when the charge is laid under the following sections of the Army Act: section 6 (except on active service); section 8(2) (threatening or insubordinate language only), except on active service; section 9(2) except on active service; sections 10, 11, 14, 15, 18(1), 18(3) and 19; section 20 (except when the act is wilful), and sections 21, 22, 26, 28(1), 30(3), 31(2), 31(4), 34, 39 and 40—all of which sections may be found in Appendix F, *post. K.R. (Can.) 458.*

iii. Punishments. Section 47 of the Army Act provides that should the officer (as therein defined) decide to deal with the matter summarily, he may award punishment as follows:

UPON OFFICERS.

one or more of the following punishments, —

(a) Forfeiture of seniority of rank either in the army or in the corps to which the offender belongs, or in both, or, in the case of an officer whose promotion depends upon length of service, forfeiture of all or any part of his service for purposes of promotion. The forfeiture in either case, however, should not exceed twelve months seniority or service as the case may be.

(b) Severe reprimand or reprimand.

UPON WARRANT OFFICERS.

one or more of the following punishments.

(a) Forfeiture in the prescribed manner of seniority of rank.

(b) Severe reprimand or reprimand.

(c) Any deduction authorized by the Army Act to be made from his ordinary pay.

"Where the authority having power to deal summarily with the case considers that he may so deal with the case, he shall, unless he awards a severe reprimand, or a reprimand, in every case, ask the accused whether he desires to be dealt with summarily or to be tried by a court-martial, and if the accused elects to be tried by a court-martial, take steps for bringing him to trial by a court-martial, but otherwise shall proceed to deal with the case summarily." *A.A. 47(3).* The accused being given the right to elect because forfeiture of rank affects his pay.

"When an officer has power under section 47 of the Army Act to dispose summarily of a case against an officer or warrant officer of the Royal Canadian Air Force seconded, lent or attached to the Permanent Force, he will not in the case of an officer, award the punishment of forfeiture of seniority of rank in the Royal Canadian Air Force or of service for promotion in that force, or, in the case of a warrant officer, forfeiture of seniority of rank in that force." *K.R. (Can.) 469.*

b. Procedure. In proceedings under section 47 of the Army Act, the specified authority may dismiss the charge with or without evidence; if he thinks it ought to be proceeded with and decides not to send it for court-martial, he will hear the evidence given orally unless the accused consents in writing to the mere reading of the summary or abstract of evidence.

The accused has a right to elect trial by court-martial, if the specified authority proposes to award a sentence other than severe reprimand or reprimand; and he has also a right to demand that the evidence be taken on oath.

"An offender shall not be liable to be tried by court-martial where the charge has been dismissed or the offence has been dealt with summarily under this section, and shall not be liable to be punished by a general officer or brigadier under this section for any offence, of which he has been acquitted or convicted by a competent civil court or by a court-martial." *A.A. 47(5).*

B. COURTS-MARTIAL.

There are four kinds of Courts-Martial viz: District Court-Martial, General Court-Martial, Field General Court-Martial and Militia General Court-Martial; and the Militia Act provides, generally, for their composition, modes of procedure and powers, in the following terms.

"The Governor-in-Council may, at any time, convene courts-martial and delegate power to convene such courts, and to appoint officers to constitute them, for the purpose of trying any officer or man of the militia for any offence under this Act, or for the purpose of trying any other person punishable under this Act, and may also delegate power to approve, confirm, mitigate or remit any sentence of any such court" *M.A. 93.*

A Militia General Court-Martial is assembled for the particular purposes, prescribed in sections 97 and 98 of the Militia Act, which are discussed *post.*

"The regulations for the composition of courts-martial and the modes of procedure and powers thereof, shall be the same as the regulations which are at the time in force for the composition, modes of procedure and powers of courts-martial for His Majesty's regular army, which are not inconsistent with this Act or the regulations made thereunder". *M.A. 94.*

"Under the Army Act, the jurisdiction of courts-martial in respect of the trial of different offences is unrestricted, and it will be observed that, except where a particular course is prescribed by the regulations, it is not imperative to try any offence by court-martial." *K.R. (Can.) 524.*

The offences that must be tried by a court-martial are enumerated in K.R. (Can.) as follows—

"Any officer or soldier who, when in the presence of the enemy, displays a white flag or other symbol in anticipation or in token of surrender, will be tried by a district court-martial. In cases where the evidence is not sufficient to justify a charge under sections 4 or 5 of the Army Act, the charge will be laid under Section 40 of that Act." *K.R. (Can.) 529.*

"Theft from a comrade will, unless there are peculiarly complicated circumstances, be dealt with by court-martial in preference to trial by the civil power, and the charge is to be framed under section 18(4) of the Army Act. Where there is no evidence of theft, and a soldier is charged with improper possession of a comrade's property, the charge is to be laid under section 40." (of the Army Act). *K.R. (Can.) 530.*

1. DISTRICT COURT-MARTIAL. This court-martial cannot try officers or impose the more severe punishments.

a. Composition. "A district court-martial shall consist of not less than three officers, each of whom must have held a commission during not less than two whole years". *A.A. 48(4).* They must be subject to military law, or otherwise qualified to serve under the provisions of Army Act. *R.P. 19(A).*

The minimum of three is a legal minimum, *A.A. 48(5),* and though the convening officer can increase beyond the legal minimum the number of officers to sit on a court-martial, he

cannot decrease the number below that minimum. Para. 553 of K.R. (Can.) provides that for a district court-martial the legal minimum will ordinarily be sufficient, but, if necessary, a larger number may be detailed, and waiting members provided. For the trial of doubtful or complicated cases, a district court-martial should, when possible, consist of five officers. When the minimum number is detailed, not more than one member should be a subaltern.

"The president of a district court-martial shall be appointed by order of the authority convening the court, but he shall not be under the rank of field officer, unless the officer convening the court is under that rank, or unless in the opinion of the officer who convenes the court, such opinion to be expressed in the order convening the court and to be conclusive, a field officer is not, with due regard to the public service, available, in either of which cases an officer not below the rank of captain may be the president of such court-martial, and he shall not be under the rank of captain except where, in the opinion of the officer who convenes the court, such opinion to be expressed in the order convening the court and to be conclusive, a captain is not, having due regard to the public service, available." *A.A. 48(9)*.

But where the accused is a warrant officer, the president must not in any case be under the rank of captain. *A.A. 182(4)*. "When an officer of the rank of captain is not available as president of a district court-martial, the power of convening the court should not be exercised except when such course is absolutely necessary and when the case cannot conveniently be referred to the Adjutant-General." *K.R. (Can.) 544*.

"If it becomes necessary to convene a court-martial under this Act at any place where, in the opinion of the convening officer, the necessary number of military officers is not available to form such a court, or where in his opinion such a necessary number could not be made available without serious injury to the interests of the service, such opinion to be expressed in the order convening the court, and to be conclusive, then the said convening officer may, subject to any directions which may be given by the Army Council (*Minister, in Canada*) and with the consent of the proper air force authority, nominate any air force officer to preside over the court, or nominate as members of the court any necessary number of air force officers in addition to or in lieu of military officers; provided that no air force officers shall be qualified to perform any function in relation to such court-martial unless he is of equal seniority and equivalent rank to that which would have been required by the provisions of this Act if he had been a military officer." *A.A. 48(10)*.

Air force officers properly attached or lent to, or seconded for service with the Army, can sit on a court-martial. So also can an Army chaplain, if he holds a commission, but he is not qualified to preside.

"An officer is disqualified for serving on a court martial if he—

(i) is the officer who convened the court; or

(ii) is the prosecutor or a witness for the prosecution; or

(iii) investigated the charges before trial, or took down the summary of evidence, or was a member of a court of inquiry respecting the matters on which the charges against the accused are founded, or was the company etc. commander who made preliminary inquiry into the case, or was a member of a previous court-martial which tried the accused in respect of the same offence; or

(iv) is the commanding officer of the accused, or of the corps or battalion to which the accused belongs; or

(v) has a personal interest in the case" (*and this extends to even a remote and very small interest*). *R.P. 19(B)*.

A district court-martial shall, as far as seems to the convening officer practicable, be composed of officers of different corps; in no case shall it be composed exclusively of officers of the same regiment of cavalry, or the same brigade of artillery, or the same battalion of infantry, unless the convening officer states in the order convening the court that in his opinion other officers are not (having regard to the public service) available. *R.P. 20(A)*.

"In the case of a court-martial for the trial of an accused person belonging to the auxiliary (*N.P.A.M., in Canada*) and not to the regular forces (*P.A.M., in Canada*), unless the convening officer states in the order convening the court that in

his opinion it is not (having due regard to the public service) practicable, one member at least of the court should belong to that branch of the auxiliary forces (*N.P.A.M. in Canada*) to which the accused belongs." *R.P. 20(B)*.

"Officers of the Non-Permanent Active Militia attached to the Permanent Force for instruction, who are detailed as members of courts-martial, will take seniority according to their militia rank." *K.R. (Can.) 545*.

The general rule as to courts-martial, subject to the exceptions mentioned above, may be said to be

(1) They should not be composed exclusively of officers of the same corps; and

(2) They must not be composed exclusively of officers belonging to the same regiment of cavalry, brigade of artillery or battalion of infantry.

b. Jurisdiction. A district court-martial can try any person subject to military law as a soldier. *A.A. 48(6)*. That is, it can try a private soldier, a non-commissioned officer and a warrant officer, but not an officer or a person subject to military law as an officer.

Subject to the proviso in section 41 of the Army Act that a person subject to military law shall not be tried by a court-martial, but by the civil courts, for treason, murder, manslaughter, treason-felony, or rape committed in the King's Dominions, unless such person, at the time he committed the offence was on active service, or such place is more than 100 miles as measured in a straight line from any city or town in which the offender can be tried for such offence by a competent civil court, a district court-martial can try any person over whom it has jurisdiction for the commission of any military or civil offence.

The powers of punishment of a district court-martial are limited in the case of a private soldier and non-commissioned officer to two years' imprisonment with or without hard labor. *A.A. 48(6)*. In the case of a warrant officer, its powers of punishment are further limited by section 182(2)(a) of the Army Act, which provides that a warrant officer "may be sentenced by a district court-martial to be severely reprimanded or reprimanded, or to such forfeitures, fines and stoppages as are allowed by this

Act, and, either in addition to or in substitution for any such punishment to be dismissed from the service or, if he was originally enlisted as a soldier but not otherwise, to be reduced to the ranks, or in any case, to be reduced to a lower grade or to an inferior class of warrant officer (if any), or to the bottom or any other place in the list of the rank which he holds."

2. **GENERAL COURT-MARTIAL.** This court-martial can try officers as well as soldiers, but usually tries soldiers for very serious offences only. It can impose very severe punishments.

a. Composition. The provisions as to the composition of a district court-martial are applicable to a general court-martial with the following changes:

"A general court-martial shall consist of not less than five officers, each of whom must have held a commission during not less than three whole years and of whom not less than four must be of a rank not below that of captain." *A.A. 48 (3), and see R.P. 21(A)*.

"The members of a court-martial for the trial of an officer shall be of an equal, if not superior, rank to that officer, unless in the opinion of the convening officer, to be stated in the order convening the court and to be conclusive, officers of that rank are not (having due regard to the public service) available; and in no case shall an officer under the rank of captain be a member of a court-martial for the trial of a field officer." *R.P. 21(B), and see A.A. 48(7)*.

"In addition to the restrictions in the rank of officers appointed to serve on courts-martial which are prescribed by the Army Act, and the Rules of Procedure, the following rules will be observed:—

(i) Whenever a general officer or a colonel is available to sit as president of a general court-martial, an officer of inferior rank will not be appointed (but in no case is the president of such court-martial to be of rank below captain). *A.A 48(9)*.

(ii) When the commanding officer of a corps is to be tried, as many members as possible will be officers who have held or are holding commands equivalent to that held by the accused." *K.R. (Can.) 552*.

"In the case of a general court-martial, when a trial is likely to be prolonged, it will usually be expedient to form the

court of a larger number than the legal minimum, and two or four additional members should be detailed." *K.R. (Can.) 553.*

b. Jurisdiction. Any person subject to military law either as an officer or soldier can be tried and punished by a general court-martial, and subject to the restrictions set out in section 41 of the Army Act with respect to trial of offenders for treason, murder, manslaughter, treason-felony and rape, every offence against the military or civil law is within its jurisdictional purview. *A.A. 48(6).*

Its powers of punishments are unlimited and include death and penal servitude as well as such punishments as may be imposed by a district court-martial.

3. FIELD GENERAL COURT-MARTIAL. A field general court-martial is a rarer type of court-martial than the two mentioned above, and is not frequently encountered in practice. Its purpose is to provide for the speedy trial of offences, committed abroad against the foreign civilian population or on active service in cases where it is not practicable, with due regard to the interests of discipline and of the service, to try such offences by the ordinary general court-martial.

a. Composition. "A field general court-martial shall consist of not less than three officers, unless the officer convening the same is of opinion that three officers are not available having due regard to the public service, in which case the court martial may consist of two officers." *A.A. 49(1)(b), and see R.P. 106(A) and R.P. 107(A).*

"The officers should have held commissions for not less than one year and if, in the opinion of the convening officer, any officers are available who have held commissions for not less than three years, he should appoint those officers in preference to officers of less service." *R.P. 106(C).*

The convening officer may preside unless he is not himself, by reason of his position as confirming officer or otherwise, available, but he shall, whenever he deems it practicable, appoint another officer as president, who may be of any rank, but shall, if practicable in the opinion of the convening officer, be not below the rank of captain. *A.A. 49(1)(c), R.P. 106(B).*

"Provided that convening officer must not appoint as president any officer below the rank of field officer, unless he is himself below that rank, or unless in his opinion a field officer is unavailable." *R.P. 106(B)(1).*

By reason of A.A. 49(1)(c), which provides that the president of a field general court-martial may be of any rank, the convening officer may under some circumstances follow the section and disregard the above rule.

b. Jurisdiction. A field general court-martial may try any one subject to military law who is under the command of the convening officer. It can try any offence committed on active service except the civil offences of treason, murder, manslaughter, felony or rape committed in the King's Dominions, but where the troops are not on active service it can only be convened when abroad for the trial of offences against the person or property of some inhabitant of, or resident in, the foreign country. It can award any punishment which a general court-martial is competent to award for the same offence, if it is composed of three officers or more. If the court is composed of less than three officers, the sentence must not exceed such field punishment as is allowed by the Army Act on imprisonment. *A.A. 49.*

4. MILITIA GENERAL COURT-MARTIAL. This court-martial has authority to try persons not otherwise subject to military law. It is resorted to rarely.

a. For Trial of Foreigners. Section 97 of the Militia Act provides for the trial of foreigners by a militia general court-martial as follows:

"(1) if any person, being a citizen or subject of any foreign state or country at peace with His Majesty, is or continues in arms against His Majesty, within Canada, or commits any act of hostility therein, or enters Canada with design or intent to levy war against His Majesty, the Governor-in-Council may order the assembling of a Militia General Court-Martial for the trial of such person, under this Act;

"(2) upon being found guilty by such court-martial of offending against the provisions of this section, such person shall be sentenced by such court-martial to suffer death, or such other punishment as the court awards."

b. For Trial of Subjects. Section 98 of the Militia Act provides for the trial of subjects by a militia general court-martial as follows:

"Every subject of His Majesty, within Canada, who levies war against His Majesty, in company with any of the subjects or citizens of any foreign state or country then at peace with His Majesty, or enters Canada in company with any such subject or citizens with intent to levy war on His Majesty, or who, with the design or intent to aid or assist, joins himself to any person or persons whatsoever, whether subjects or aliens, who have entered Canada with design or intent to levy war on His Majesty, may be tried and punished by a militia general court-martial, in the same manner as any citizen or subject of a foreign country or state at peace with His Majesty may be tried and punished under the last preceding section."

5. PROCEDURE.

a. Preliminary.

i. The Convening Officer. "Every charge preferred against an officer or soldier, and the circumstances on which it is founded, will be carefully examined by the officer under whose authority the order for trial is issued, and the evidence should be in his opinion sufficient to justify the arraignment of the accused before a court-martial. He must satisfy himself that the charge is for an offence under the Army Act, and is properly framed in accordance with the Rules of Procedure and these Regulations." *K.R. (Can.) 541.*

"In all cases of indecency, fraud and theft, the charge and summary of evidence will be submitted to the Judge Advocate-General before the trial is ordered. Any other case in which difficulty is experienced or anticipated or a doubt is felt should similarly be submitted to the Judge Advocate-General before trial." *K.R. (Can.) 540.*

"When a soldier is to be arraigned on a serious charge, and charges for minor offences are pending against him, or the circumstances of the serious offence disclose minor offences, the convening officer may use his discretion in striking out any minor offence and directing that it shall not be proceeded with. Special provision is made for the case of simple drunkenness in para. 490. As a rule, a charge should not be brought to trial as an addition to a serious charge if it would not otherwise have been tried by a court-martial." *K.R. (Can.) 542.*

"In deciding the description of court before which a charge shall be tried, general and other officers in superior command will bear in mind that there are few offences which cannot effectually be dealt with by district court-martial. In cases, however, of very aggravated offences, when the state of discipline in a district, garrison or corps, renders a serious example expedient, or when the offender bears a bad character, a general court-martial may be convened." *K.R. (Can.) 543.*

"If, in the opinion of a convening officer, a court-martial could more conveniently be held at a place other than where the accused is, he may cause the court to be convened at any place within his command. If it is desired to hold the trial in any place beyond his command, application will be made to National Defence Headquarters, with an explanation for the reasons for this course. A saving of expense owing to transit of witnesses or members would be a sufficient reason, but no change of place will be made when it appears that the accused is likely to be prejudiced in his defence by the change. When the case is to be tried in another command, the court will be convened under the orders and on the responsibility of the officer to whose command the accused is removed." *K.R. (Can.) 546.*

"When an officer or soldier is required as a witness before a court-martial, and is not serving in the district in which the court is to be held, application for his attendance is to be made to National Defence Headquarters. The probable day of the assembly of the court will be stated in such application." *K.R. (Can.) 547.*

An officer is not to be nominated as a member of a court-martial, even though otherwise qualified, until his commanding officer deems him competent to perform so important a duty. *K.R. (Can.) 548.*

"In a difficult case, the convening officer will select a specially qualified officer to act as prosecutor. If such an officer is not available, he should apply as soon as possible to superior authority for the services of one." *K.R. (Can.) 549.*

"When a district officer commanding considers it necessary that counsel should appear on behalf of a prosecutor, he will apply to National Defence Headquarters therefor. The application for the assistance of counsel will be made only in cases of exceptional difficulty or of a complicated nature, and this course should be very rarely necessary when the offences are of a purely military character." *K.R. (Can.) 550.*

"In every application for counsel to appear on behalf of a prosecutor, the hour, date and place of assembly fixed for the court-martial will, if possible, be stated. The name of the officer who will act as prosecutor and a copy of the approved charges and the summary of evidence will invariably accompany the application, together with a statement setting forth the reasons why the employment of counsel is considered necessary. If, on receipt of such application, National Defence Headquarters considers it necessary that counsel should so appear, an application for the employment of counsel will be made to the Department of Justice, and on receipt of authority from that Department, the names of counsel so authorized, together with such instructions as the circumstances warrant, will be communicated to the district officer commanding. Under no circumstances will the district officer commanding, on his own authority, retain counsel to appear on behalf of a prosecutor. If, subsequent to making an application for the retention of counsel on behalf of a prosecutor, any alteration is made in the charges contained in the charge sheet accompanying such application, a copy of the amended charges will at once be forwarded to National Defence Headquarters." *K.R. (Can.) 551.*

The convening officer must be careful to appoint officers who are qualified with respect to length of service.

"The president of a court-martial must be named in the order for the assembly of the court. The members and the waiting members may be mentioned by name or the number and ranks and the unit to which they belong may alone be named." *K.R. (Can.) 554(a).*

"When the composition of a court-martial differs from the normal, in respect either of the description or of the rank of the officers ordered to form the court, or on account of the suspension of the operation of a rule, the prescribed form of the

order convening the court must be strictly followed, as the legality of the trial may depend on the correct wording of the order." *K.R. (Can.) 554(b).*

"It is essential that M.F.B. 220 should be free from alterations or erasures as regards the portion relating to the officers appointed and detailed to compose the court. Where alterations in the composition of the court are necessary at any time after M.F.B. 220 has been prepared, this document will be withdrawn and a new M.F.B. 220 will be substituted. This procedure is not necessary when a waiting member is directed to serve on a court-martial." *K.R. (Can.) 554(c).*

The convening officer may direct any charges against an accused person to be inserted in different charge sheets, and where he so directs, the accused shall be arraigned, and until after the finding tried, upon each charge sheet separately, as if it contained the whole of the charges against the accused. *R.P. 62(A).*

The convening officer may direct in what order the charges shall be tried. *R.P. 62(B).*

If the convening officer directs that, in the event of the conviction of an accused person upon a charge in any charge sheet, he need not be tried upon the subsequent charge sheets, the court may in such an event proceed as if all the charges had been contained on that one charge sheet. *R.P. 62(C)* & *(D).*

The difficulty of laying down any definite rules for the guidance of convening officers as to the placing of charges on different charge sheets is obvious, since so much must depend on the circumstances of each particular case. The following general principles, however, are laid down in M.M.L., at page 660.

(a) Alternative charges must not be placed in different charge sheets;

(b) A series of offences forming part of one escapade should normally be placed in a single charge sheet. Multiplicity of charges arising out of the same transaction should, however, be avoided, although in some cases it may be necessary to allege a series of offences, *e.g.* to prove some particular intent, or to guide the court in determining the proper punishment to be awarded;

(c) Repeated instances of offences of the same or similar character should be included in a single charge sheet;

(d) Offences of different descriptions should be entered in separate charge sheets except where they form part of or are relevant to one transaction.

"The charge sheet is usually prepared by the Adjutant of the accused's unit; but rule 17 makes the convening officer responsible for its correctness. It must be signed by the officer in actual command of the unit to which the accused belongs; if trial is ordered, the order must be added at the foot and signed by—or by a staff officer for—the convening officer". *R.P. 11, note 1.* "The 'charge' here referred to is the formal written charge upon which the accused is to be tried, as distinct from any charge or complaint (mentioned in A.A. 46(1) and rules 3, 4 and 8, which give rise to a preliminary investigation." *R.P. 11, note 2.*

"The officer convening a court-martial shall send to the officer appointed President the original charge sheet on which the accused is to be tried and the summary or abstract of evidence." *R.P. 17(E).*

"Where the convening officer is authorized to appoint a judge-advocate, he shall, in the case of a general, and may, in the case of a district court-martial, by order appoint a fit person to act as judge-advocate at the court-martial." *R.P. 101(A).*

"An officer who is disqualified for serving on a court-martial shall be disqualified for acting as judge-advocate at the court-martial." *R.P. 101(B).*

But "a court-martial shall not be invalid by reason of any invalidity in the appointment of the judge-advocate officiating thereat, in whatever manner appointed, if a fit person has been appointed; but this rule shall not relieve from responsibility the person who made the invalid appointment." *R.P. 101(C).*

"A judge-advocate should be free of all suspicion of bias or prejudice. He should have had experience of the practice and procedure of courts-martial and a knowledge of the general principles of law and the rules of evidence." *R.P. 101, note 3.*

"If the judge-advocate dies, or from illness, or from any other cause whatever, is unable to attend, the court shall adjourn, and the president shall report the circumstance to the convening authority; and in the case of death, or, if in any other case the convening officer is of opinion that it is inexpedient to delay the continuance of the trial, the court shall be dissolved and the accused may be tried again before another court." R.P 102. "The court will in no circumstances proceed in the absence of a judge-advocate who has been duly appointed." *R.P. 102, note 1.*

"As soon as practicable after an accused has been remanded for trial by court-martial, and in any case not less than 24 hours before his trial, an officer shall give him gratis a copy of the summary of the evidence or (in the case of an officer where there is no summary of evidence) an abstract of the evidence, and explain to him his rights under these rules as to preparing his defence and being assisted or represented at the trial, and shall ask him to state in writing whether or not he wishes to have an officer assigned by the convening officer to represent him at the trial, if a suitable officer should be available. The convening officer shall be informed whether or not the accused so elects. If any other or additional summary or abstract of evidence be taken, a copy thereof shall be given gratis to the accused as soon as may be." *R.P. 14(B).*

ii. The Accused. "An accused person for whose trial a court-martial has been ordered to assemble shall be afforded proper opportunity of preparing his defence, and shall be allowed free communication with his witnesses, and with any friend, defending officer or legal adviser with whom he may wish to consult." *R.P. 14(A).*

"The accused, before he is arraigned, shall be informed by an officer of every charge on which he is to be tried; and also that, on his giving the names of any witnesses whom he desires to call in his defence, reasonable steps will be taken for procuring their attendance, and those steps shall be taken accordingly; the interval between his being so informed and his arraignment shall not be less than twenty-four hours." *R.P. 15(A).*

"The officer, at the time of so informing the accused, shall give the accused a copy of the charge-sheet, and where the accused is a soldier, should, if necessary, explain the charge-

sheet and charges to him, and should also, if he is illiterate read the charges to him." *R.P. 15(B).*

"Any number of accused persons may be charged jointly and tried together for an offence alleged to have been committed by them collectively, but in such a case notice of the intention to try the accused persons together shall be given to each of the accused at the time of his being informed of the charge, and any accused person may claim, either by notice to the authority convening the court, or, when arraigned before the court, by notice to the court, to be tried separately, on the ground that evidence of one or more of the other accused persons proposed to be tried with him will be material to his defence; the convening authority or court, if satisfied that the evidence will be material, and if the nature of the charge admits of it, shall allow the claim, and the person making the claim shall be tried separately." *R.P. 16.*

"A list of the ranks, names and corps (if any) of the president and officers who are to form the court, and where officers in waiting are named, also of those officers, should, as soon as the president and officers are named, be delivered to the accused if he desires it," *R.P. 15(C)*; and "if there is any reason to suppose that the accused may reasonably object to any member, the list should be delivered even if not demanded." *R.P. 15, note 6.*

"Where it appears to the officer convening a court-martial, or to the senior officer on the spot, that military exigencies, or the necessities of discipline render it impossible or inexpedient to observe any of the Rules 4(C), (D), (E), (F) and (G), 5, 8, 14, 15 and 87(B), he may, by order under his hand, make a declaration to that effect specifying the nature of such exigencies or necessities, and thereupon the trial or other proceeding shall be valid as if the rule mentioned in the declaration had not been contained herein; and the declaration may be made with respect to any or all of the rules above in this rule mentioned in the case of the same court-martial. Provided that the accused shall have full opportunity of making his defence, and shall have every facility for preparing it which is practicable, having due regard to the said exigencies or necessities." *R P 104.*

"The power conferred by this rule should be rarely exercised except on active service and then only if absolutely necessary. Occasionally it may be necessary to resort to it in the case of embarkation or on the line of march, or possibly in an extreme case where the necessities of discipline require speedy trial and punishment." *R.P. 104, note 2.*

"The commanding officer of the accused, the convening officer, or, after the assembly of the court, the president, shall take the proper steps to procure the attendance of the witnesses whom the prosecutor or accused desires to call, and whose attendance can reasonably be procured, but the person requiring the attendance of a witness may be required to undertake to defray the cost (if any) of his attendance." *R.P. 78(A).*

"Every person required to give evidence before a court-martial may in the prescribed manner be summoned or ordered to attend." *M.A. 96.*

Any such witness who is not subject to military law may be summoned to attend by order under the hand of the convening officer, or after the assembly of the court, the president or judge-advocate (if any). *R.P. 78(B)*, and see sec. 130 of the Militia Act which sets out machinery for enforcing attendance of witnesses.

Any such witness who is subject to military law shall be ordered to attend by the proper military authority, and failure to attend would be an offence and punishable under A.A. 28(1).

"If the prosecutor intends to call a witness whose evidence is not contained in any summary or abstract of evidence given to the accused, notice of such intention shall be given to the accused a reasonable time before the witness is called, together with an abstract of his proposed evidence; and, if the witness is called without such notice or abstract having been given, the court shall, if the accused so desire it, either adjourn after taking the evidence of the witness, or allow the cross-examination of the witness to be postponed and the court shall inform the accused of his right to demand such an adjournment or postponement." *R.P. 76.*

"The accused shall not be required to give to the prosecutor a list of the witnesses whom he intends to call, but it shall rest with the accused alone to secure the attendance of

any witness whose evidence is not contained in the summary or abstract, and for whose attendance the accused has not requested steps to be taken as provided for by Rule 15(A)." *R.P. 77.*

"An accused person intending to be represented by counsel shall give to his commanding officer or to the convening officer the earliest practicable notice of such intention and, if no sufficient notice has been given, the court may, if it thinks fit, on the application of the prosecutor, adjourn to enable him to obtain counsel on behalf of the prosecutor at the trial." *R.P. 89(A).*

"If the convening officer so directs, counsel may appear on behalf of the prosecutor, but in that case, unless the notice in (A) has been given by the accused, notice of the direction for counsel to appear shall be given to the accused at such time (not in any case less than 7 days) before the trial, as would, in the opinion of the court, have enabled the accused to obtain counsel to represent him at the trial." *R.P. 89(B).*

The accused should remember that if he or the prosecutor are represented by counsel the person who is so represented by counsel will speak through his counsel, and his right to take an active part in the proceedings will be restricted. *R.P. 89(C).*

"When the convening officer intends to appoint or apply for the services of an officer holding legal qualifications to act as prosecutor, similar notice should be given to the accused to enable him, if he so desires, to obtain counsel to represent him at the trial." *R.P 89, note 2.*

"If an accused person is not represented at his trial by counsel, he may be represented by any officer subject to military law who shall be called "the defending officer" or assisted by any person whose services he may be able to procure and who shall be called "the friend of the accused". *R.P. 87(A).*

"It shall be the duty of the convening officer to ascertain whether an accused person not otherwise represented desires to have a defending officer assigned to represent him at his trial and, if he does so desire, the convening officer shall use his best endeavours to ensure that the accused shall be so represented by a suitable officer. If, owing to military exigencies, or for any other reason, there shall in the opinion of the convening officer be no such officer available for the purpose, the convening officer shall give written notice to the president of the court-martial, and such notice shall be attached to the proceedings." *R.P. 87(B).*

While the defending officer will have the same rights as counsel to speak for the accused, a friend of the accused may only advise the accused on all points and suggest questions to be put to witnesses, but he cannot examine or cross-examine the witnesses or address the accused. *R.P. 87(C) and (D).* This rule is one that can be dispensed with under the authority of rule 104 in military exigencies, *etc.*

b. Conduct of trial.

i. Dramatis Personae. Before discussing the conduct of the trial, it is advisable to introduce the principal characters liable to be present and, briefly to describe the parts they play, and to define their duties.

THE PRESIDENT.

"The President is responsible for the trial being conducted in proper order and in accordance with the Army Act, and in a manner befitting a court of justice." *R.P. 59(A).* "It is the duty of the president to see that justice is administered, and that the accused has a fair trial, and that he does not suffer any disadvantage in consequence of his position as a person under trial or of his ignorance, or of his incapacity to examine or cross-examine witnesses or to make his own evidence clear or intelligible or otherwise." *R.P. 59(B).*

A court-martial may, by order under the hand of the president, cause a counsel to be removed from the court who is guilty of such an offence as may, in the opinion of the court-martial, require his removal from court. In every such case, the president shall certify the offence committed to a court of law, and the court of law to which the same is certified shall deal with such offence in the same manner as if it had been committed in a proceeding before that court.

If, in the case of a court-martial held in a Dominion, a counsel contravenes any rule made under this Act (*A.A.*) with respect to the conduct of counsel at courts-martial, the steps, if any, to be taken to secure his punishment shall be such steps as may be competent for the purpose under the law of the Dominion. *A.A. 129(2)(3).* Such removal, however, could only be justified under very grave circumstances.

THE OTHER MEMBERS OF THE COURT.

The other members of the court are bound to live up to the terms of their oath and endeavour to do justice.

THE PROSECUTOR.

The Prosecutor must be a person subject to military law and, where only the production of documents is necessary, may be a non-commissioned officer. *R.P. 24.* "It is the duty of the prosecutor to bring all the facts of a case fully before a court in evidence, and to take care, especially when the accused is not assisted in his defence, that no material fact in connection with the offence charged is omitted which would, if given in evidence, tell in favor of the accused. Drunkenness is no excuse for the commisson of an offence, but if the charges against a soldier do not allege drunkenness, and he was drunk at the time he committed an offence with which he is charged, the prosecutor should bring out this fact in evidence." *K.R. (Can.) 555, and see R.P. 60.*

THE JUDGE-ADVOCATE.

If there is a judge-advocate, his powers and duties are as follows:

"The prosecutor and the accused, respectively, are at all times, after the judge-advocate is named to act on the court, entitled to his opinion on any question of law or procedure relative to the charge or trial, whether he is in or out of court, subject, when he is in court, to the permission of the court." *R.P. 103(a).*

"At a court martial he represents the Judge Advocate-General;" *R.P. 103(b).*

"He is responsible for informing the court of any informality or irregularity in the proceedings. Whether consulted or not, he will inform the convening officer and the court of any informality or defect in the charge, or in the constitution of the court, and will give his advice on any matter before the court;" *R.P. 103(c).*

"Any information or advice given to the court on any matter before the court will, if he or the court desire it, be entered in the proceedings;" *R.P. 103(d).*

"At the conclusion of the case, he will, unless both he and the court consider it unnecessary, sum up the evidence and advise the court upon the law relating to the case before the court proceed to deliberate upon their finding; (See rule 42)" *R.P. 103(e).*

"Upon any point of law or procedure which arises upon the trial which he attends, the court should be guided by his opinion, and not disregard it, except for very weighty reasons. The court are responsible for the legality of their decisions, but they must consider the grave consequences which may result from their disregard of the advice of the judge-advocate on any legal point. The court, in following the opinion of the judge-advocate on a legal point, may record that they have decided in consequence of that opinion." *R.P. 103 (f).*

"If a court-martial, acting without jurisdiction or in excess of jurisdiction, convict an officer or soldier, the members of the court may be held liable in damages by a civil court. Such liability—or at least the quantum of damages—may depend upon the question whether they exercised a bona fide judgment, and the fact that they accepted the advice of the judge-advocate, even if such advice was held to be wrong, might practically exonerate the members from liability. The advice of the judge-advocate, therefore, should always be acted upon unless the court consider that he is acting improperly or in such a manner as to obstruct the proceedings. If his advice is disregarded the court should record their reason for disregarding it." *R.P. 103, notes 2 and 4.*

"The judge-advocate has, equally with the president, the duty of taking care that the accused does not suffer any disadvantage in consequence of his position as such, or of his ignorance or incapacity to examine or cross-examine witnesses or to make his own defence clear or intelligible, or otherwise, and may, for that purpose, advise the court that witnesses should be called or recalled for the purpose of being questioned by him on any matters which appear to be necessary or desirable for the purpose of eliciting the truth;" *R.P. 103(g).*

"In fulfilling his duties the judge-advocate will be careful to maintain an entirely impartial position." *R.P. 103(h).*

"At a court-martial the judge-advocate or, if there is none, the president, shall record or cause to be recorded all transactions

of that court, and shall be responsible for the accuracy of the record. In these rules, referred to as the 'proceedings', if the judge-advocate is called as a witness by the accused, the president will be responsible for the accuracy of the record in the proceedings of the evidence of the judge-advocate." *R.P. 94.*

COUNSEL.

"The counsel who appears before a court-martial on behalf of the prosecutor or accused, shall have the same right as the prosecutor or accused for whom he appears, to call and orally examine, cross-examine and re-examine witnesses, to make an objection or statement, to address the court, to offer any plea, and to inspect the proceedings, and shall have the right otherwise to act in the course of the trial in the place of the person on whose behalf he appears, and he shall comply with these rules as if he were that person; and in such a case that person shall not have the right himself to do any of the above matters except as regards the statement allowed by Rules 40 (D) (ii) (a) and 41 (B) (ii)(a), (*i.e. giving his account of the charge against him*), or except so far as the court permit him to do so." *R.P. 89 (C).*

Counsel shall be deemed properly qualified to appear at a court-martial, wherever held, if in any part of His Majesty's Dominions he is recognized by the convening officer as having in that part rights and duties similar to those of a barrister-at-law in England and as being subject to punishment or disability for a breach of professional rules. *R.P. 93.*

Subject to the rules of procedure, counsel shall be allowed to appear on behalf of the prosecutor and accused at general and district courts-martial if the minister or the convening officer declares that it is expedient to allow the appearance of counsel thereat, and such a declaration may be made as regards all general and district courts-martial held in any particular place, or as regards any particular general or district court-martial, and may be made subject to such reservation as to cases on active service, or otherwise, as seems expedient. *R.P. 88 (A) (ii).*

"Counsel will treat the court and judge-advocate with due respect and shall, while regarding the exigencies of his case, bear in mind the requirements of military discipline in the respectful treatment of any superior officer of the accused who may attend as a witness." *R.P. 92 (F).*

"Apart from this special provision in the interest of discipline, counsel, whether appearing on behalf of the prosecutor or the accused, will conform strictly to these rules and to the rules of civil courts in England relating to the examination, cross-examination and re-examination of witnesses and relating to the duties of counsel." *R.P. 92 (A).*

DEFENDING OFFICER.

"The defending Officer shall have the same rights and duties as appertain to counsel under these rules and shall be under like obligations." *R.P. (87 (c); (i.e.* he must conduct the case as representing the accused, *etc.)*

FRIEND OF THE ACCUSED.

"The friend of the accused may advise the accused on all points and suggest questions to be put to witnesses, but he cannot examine or cross-examine the witnesses or address the court." *R.P. 87 (D).*

THE ACCUSED.

The duty of the accused is to defend himself as well as he can either through counsel etc., or directly himself as the case may be, not forgetting his paramount duty to tell the truth.

WITNESSES.

Witnesses are under no obligation save to answer truthfully all proper questions that may be put to them.

ii. Assembly of Court. "The members of a court-martial will take their seats according to their army rank. *R.P. 58.*

On the Court assembling, the order covering the Court shall be laid before them with the charge-sheet and the summary or abstract of evidence or a true copy thereof, and also the ranks, names and corps of the officers appointed to serve on the court; and it shall be the first duty of the court to satisfy themselves that the court is legally constituted, that is to say—

(a) that so far as the court can ascertain, the court has been convened in accordance with the Army Act and these rules. They cannot inquire as to the convening officer's authority to act.

(b) that the court consists of a number of officers not less than the legal minimum, and, save as mentioned in Rule

18, not less than the number detailed. (Rule 18 provides that as long as the legal minimum are available to serve, even though not the number detailed, if the court is of the opinion that in the interests of justice and for the good of the service it is inexpedient to adjourn so that fresh members may be appointed, they may proceed, recording their reasons for so doing);

(c) that each of the officers so assembled is elegible for and not disqualified from serving on that court-martial;

(d) that the president is of the required rank, and duly appointed; and

(e) in the case of a general court-martial, that the officers are of the required rank. *R.P. 22 (A).*

"The court should further, if a judge-advocate has been appointed, ascertain that the judge-advocate is duly appointed and is not disqualified from acting at that court-martial." *R.P. 22 (B).*

"The court, if not satisfied on the above matters, should report their opinion to the convening authority, and may adjourn for that purpose." *R.P. 22 (c).*

The inquiries necessitated by R.P. 22 and 23 should be conducted in private. The court is not 'open' at this stage, and the accused has not yet been brought before it. *R.P. 22, note 1.*

"The court, when satisfied on the above matters, should satisfy themselves in respect of each charge about to be brought before them—

(i) That it appears to be laid against a person amenable to military law, and to the jurisdiction of the court; and

(ii) That each charge discloses an offence under the military code and is framed in accordance with the Rules, and is so explicit as to enable the accused readily to understand what he has to answer." *R.P. 23 (A).*

"The court, if not satisfied on the above matters, should report their opinion to the convening authority, and may adjourn for that purpose." *R.P. 23 (B).*

iii. Trial Proper. "When the court have satisfied themselves as to the above facts, they shall cause the accused to be brought before the court and the prosecutor who must be a person subject to military law will take his place." *R.P. 24.*

"An accused person for trial will be examined by a medical officer on the morning of each day the court is ordered to sit, and a commanding officer is responsible for ensuring that no accused person is brought before a court-martial if, in the opinion of the medical officer, he is unfit to undergo his trial." *K.R. (Can.) 557.*

"If, on account of the illness of the accused, before the finding, it is impossible to continue the trial, a court-martial shall be dissolved." *A.A. 53 (3).*

"An accused person brought before a court-martial will, if he is an officer, warrant officer or non-commissioned officer, be attended by an officer or non-commissioned officer having him in custody or, if of lower rank, by an escort. The officer or non-commissioned officer in charge will be responsible for his safe conduct, but will obey the directions of the court while the accused is in court. An accused person will not be handcuffed unless this is absolutely necessary for the purpose of preventing his escape or rescue, or of restraining his violent conduct." *K.R. (Can.) 557.*

The general rule is that all proceedings of a court-martial shall be in open court (*i.e. the public have a right to be present and listen to the proceedings*) and in the presence of the accused. *R.P. 63 (B).*

"The president of any court-martial, however, may on any deliberation amongst the members cause the court to be cleared of all other persons." *A.A. 53 (5).*

"When a court-martial sits in closed court on any deliberation amongst the members or otherwise, no person shall be present except the members of the court, the judge-advocate and any officers under instruction, and the court may either retire or cause the place where they sit to be cleared of all other persons not entitled to be present," *R.P. 63 (A);* and the proceedings would be invalidated if the prosecutor happened to be present when the court was so closed.

The court, in addition, has the inherent power to exclude any person other than the accused who interferes with its proceedings and to sit *in camera* if necessary for the proper administration of justice.

"The court may also, where necessary, view any place," *A.A. 53 (7)*, in the presence of the accused, *R.P. 63 (B)*, at which 'view' every member of the court must be present as well as the accused even if he is represented by counsel or defending officer." *R.P. 63, note 3.*

"If a court-martial, after the commencement of the trial, is, by death or otherwise, reduced below the legal minimum, it shall be dissolved." *A.A. 53 (1).*

"A court-martial, in the absence of either the president or judge-advocate (if any), shall not proceed and, if necessary, shall adjourn." *R.P. 65 (B).*

"If after the commencement of the trial, the president dies or is otherwise unable to attend, and the court is not reduced below the legal minimum, the convening authority may appoint the senior member of the court, if of sufficient rank, to be president, and the trial shall proceed accordingly, but if he is not of sufficient rank the court shall be dissolved." *A.A. 53 (2).*

"If the judge-advocate dies or, from illness, or from any other cause whatever, is unable to attend, the court shall adjourn, and the president shall report the circumstances to the convening authority; and in the case of death, or, if in any other case the convening officer is of opinion that it is inexpedient to delay the continuance of the trial, the court shall be dissolved and the accused may be tried again before another court." *R.P. 102.*

Where the absence of either the president or judge-advocate is due to temporary causes, the court should adjourn until he is able to attend. *R.P. 65, note 5.*

"The court may adjourn from time to time," *A.A. 53 (6).* This absolute power to adjourn, however, is to be used sparingly.

"When a court is assembled and the accused has been arraigned, the court should (but subject to the provisions of the Army Act and these rules as to adjournment) continue the trial from day to day and sit for a reasonable period on every day, (*see K.R. (Can.) 556*), unless it appears to the court that an adjournment is necessary for the ends of justice, or that such continuance is impracticable." *R.P. 65 (A).*

"An accused about to be tried by any court-martial may object, for any reasonable cause, to any member of the court, including the president, whether appointed to serve thereon originally or to fill a vacancy caused by the retirement of an officer objected to, so that the court may be constituted of officers to whom the accused makes no reasonable objection." *A.A. 51 (1).*

"The accused has no right to object to the prosecutor or judge-advocate." *R.P. 25 (B).*

"In order to enable an accused to avail himself of his privilege of objecting to any officer, the names of the officers appointed to form the court shall be read over in the hearing of the accused on their first assembling, and before they are sworn, and he shall be asked whether he objects to any of such officers, and a like question shall be repeated in respect of an officer appointed to serve in lieu of a retiring officer." *A.A. 51(6).*

"The accused shall state the names of all the officers to whom he objects before any objection is disposed of." *R.P. 25(C).*

"Every objection made by an accused to any officers shall be submitted to the other members appointed to form the court." *A.A. 51 (2).*

"The accused may call any person to make a statement in support of his objection. Such person may be questioned by the accused and by the court." *R.P. 25 (D).*

"If more than one officer is objected to, the objection to each officer will be disposed of separately, and the objection to the lowest in rank will be disposed of first; except that, if the president is objected to, the objection to him will be disposed of before the objection to any other officer. On an objection to an officer, all the other officers present shall declare their opinions on the disposal of the objection, notwithstanding that objections have been made to any of those officers." *R.P. 25 (E).*

"If the objection is to the president, such objection, if allowed by one-third or more of the officers appointed to form the court, shall be allowed, and the court shall adjourn for the purpose of the appointment of another president." *A.A.51 (3).*

"If an objection to the president is allowed, the authority convening the court shall appoint another president, subject to the same right of the accused to object." *A.A. 51 (4).*

If the objection is to a member other than the president and is allowed by one-half or more of the votes of the officers entitled to vote, the objection shall be allowed, and the member objected to shall retire, and his vacancy may be filled in the prescribed manner, i.e. if there are any officers in waiting detailed as such, the president shall appoint one of such waiting officers to fill the vacancy, and if there is no officer in waiting available, the court will proceed as directed by Rule 18 as mentioned above. Such appointment is, of course, subject to the same right of the accused to object. *A.A. 51 (5), R.P. 25 (G).*

"When an objection to an officer is allowed, that officer shall forthwith retire and take no further part in the proceedings." *R.P. 25 (F).*

As soon as the court is constituted with the proper number of officers who are not objected to, or the objections to whom have been over-ruled, an oath shall be administered to and taken in the presence of the accused in the prescribed form and manner. *R.P. 26 (A), and see A.A. 52 (1).*

"If there is a judge-advocate, the oath shall be administered by him to the president first, and afterwards to the other members of the court; if there is no judge-advocate, the oath shall be administered by the president to the other members of the court, and shall be administered to the president by any member of the court already sworn." *R.P. 26 (B), and see A.A. 52 (2).*

After the members of the court are all sworn, an oath in the prescribed form shall be taken in the presence of the accused by the judge-advocate (if any), by every officer attending for the purpose of instruction, and also by any shorthand writer or interpreter (if any) in attendance at the trial. The oath shall be administered by the president or by some member of the court or, except in the case of the judge-advocate, by the judge-advocate, (if any). *R.P. 27, A.A. 52 (2).*

"Before a person is sworn as interpreter or shorthand writer, the accused should be informed of the person who is proposed to be sworn, and he may object to the person as not being impartial; and the court, if they think the objection is reasonable, shall not swear that person as interpreter or shorthand writer." *R.P. 72 (C).*

Subject to the accused's objection, at any time during the trial an impartial person may, if the court think it necessary, and shall, if either the prosecutor or the accused requests it on any reasonable ground, be sworn to act as interpreter. *R.P. 72 (A).*

An impartial person may at any time during the trial, if the court think it desirable, be sworn to act as a shorthand writer subject also to the accused's objection. *R.P. 72 (B).*

A solemn declaration may be substituted for the oath and a person may be sworn according to the form of his religion, so long as the person to be sworn declares it to be according to his religion and binding on his conscience. *R.P. 29 and 30.*

ARRAIGNMENT.

"After the members of the court and other persons are sworn as above mentioned, the accused shall be arraigned on the charges against him." *R.P. 31 (A).*

"The charges upon which the accused is arraigned will be read to him, and he will be required to plead separately to each charge as soon as it has been read to him." *R.P. 31 (B).*

Arraignment consists of (1) calling upon the accused by his number (if any), rank, name and description; (2) reading the charge to him; and (3) asking him whether he is guilty or not guilty. And where two or more persons are jointly charged and tried for the same offence, each shall be arraigned separately. The accused is arraigned by the president or judge-advocate (if any). *R.P. 31, note 1.*

"The accused, when required to plead to any charge, may object to the charge on the ground that it does not disclose an offence under the Army Act, or is not in accordance with these rules. The court, after hearing any submission which may be made by the prosecutor or by or on behalf of the accused, will consider the objection in closed court and will either disallow it and proceed with the trial, or allow it and adjourn to report to the convening authority; or, if they are in doubt, they may adjourn to consult the convening authority." *R.P. 32.*

"At any time during the trial, if it appears to the accused that there is any mistake in the name or description of the accused in the charge sheet, the court may amend the charge

sheet so as to correct that mistake." *R.P. 33 (A)*. Such a mistake should only be so amended if it is clear to the court that the accused is the person intended to be charged, and that he has not been prejudiced in his defence by the mistake.

"If, on the trial of any charge, it appears to the court, at any time before they have begun to examine the witnesses, that in the interests of justice any addition to, or omission from, or alteration in, the charge is required, they may report their opinion to the convening authority, and may adjourn, and the convening authority may either direct a new trial to be commenced, or amend the charge, and order the trial to proceed with the amended charge after due notice to the accused." *R.P. 33 (B)*.

"The accused, before pleading to a charge, may offer a special plea to the jurisdiction of the court and, if he does so and the court consider that anything stated in the plea shows that the court have not jurisdiction, they shall receive any evidence offered in support, together with any evidence offered by the prosecutor in disproof or qualification thereof, and any address by or on behalf of the accused, and any reply by the prosecutor in reference thereto." *R.P. 34 (A)*.

"If the court over-rule the special plea, they shall proceed." *R.P. 34 (B)*.

"If the court allow the special plea, they shall record their decision and the reasons for it, and report it to the convening authority and adjourn; such a decision shall not require any confirmation, and the convening authority shall either forthwith convene another court for the trial of the accused or order the accused to be released." *R.P. 34 (C)*.

"If the court are in doubt as to the validity of the plea, they may refer the matter to the convening authority, and may adjourn for that purpose, or may record a special decision with respect to the plea and proceed with the trial." *R.P. 34 (D)*. If the court follows the latter course, the effect is that the decision as to the validity of the plea is transferred to the confirming officer, who should act as if the plea had been over-ruled, i.e. refuse to confirm the finding of the court if he thinks the plea should have been allowed.

If no special plea to the general jurisdiction of the court is offered, or if such plea, being offered, is over-ruled, or is dealt with by a special decision under Rule 34 (D), the accused person's plea—'Guilty' or 'Not Guilty' (or, if he refuses to plead, a plea of 'not guilty')—shall be recorded on each charge on which he is arraigned. *R.P. 35 (A)*.

PLEA OF "GUILTY"

"If the accused pleads 'Guilty', that plea shall be recorded as a finding of the court; but before it is recorded, the president, on behalf of the court, shall ascertain that the accused understands the nature of the charge to which he has pleaded guilty, and shall inform him of the general effect of that plea, and in particular of the meaning of the charge to which he has pleaded guilty, and of the difference in procedure which will be made by the plea of guilty, and shall advise him to withdraw that plea if it appears from the summary of evidence that the accused ought to plead 'not guilty'." *R.P. 35 (B)*.

"A plea of 'Guilty' shall not be accepted in cases where the accused is liable, if convicted, to be sentenced to death, and where such plea is offered a plea of 'Not Guilty' shall be recorded and the trial shall proceed accordingly." *R.P. 35 (D)*.

"Where an accused person pleads guilty to the first of two or more charges, laid in the alternative, the prosecution may, after rule (B) of this rule has been complied with by the court and before the accused is arraigned on the alternative charge or charges, withdraw such alternative charge or charges without requiring the accused to plead thereto, and a record to that effect shall be made upon the proceedings of the court." *R.P. 35 (C)*.

"The accused, at the time of his general plea of 'Guilty' or 'Not Guilty' to a charge for an offence, may offer a plea in bar of trial on the ground that—

"(i) he has been previously convicted or acquitted of the offence by a competent civil court or by a court-martial, or has been dealt with summarily for the offence by his commanding officer or by an officer having power to deal summarily with the case, or a charge in respect of the offence has been dismissed; or

"(ii) the offence has been pardoned or condoned by competent military authority; or

"(iii) the time which has elapsed between the commission of the offence and the beginning of the trial was more than three years, or, in the case of a civil offence, proceedings in respect of which must be commenced within a shorter period than 3 years, more than that shorter period." *R.P. 36 (A)*.

"If he offers a plea in bar, the court shall record it as well as his general plea, and if they consider that any fact or facts stated by him are sufficient to support the plea in bar, they shall receive any evidence offered (on oath) and hear any address made by or on behalf of the accused and the prosecutor in reference to the plea." *R.P. 36 (B)*.

"If the court find that the plea in bar is proved, they shall record their finding, and notify it to the confirming authority. and shall either adjourn, or if there is any other charge against the accused, whether in the same or in a different charge-sheet, which is not affected by the plea in bar, may proceed to the trial of the accused thereon." *R.P. 36 (C)*.

"If the finding that a plea in bar is proved is not confirmed, the court may be re-assembled by the confirming authority, and proceed as if the plea had been found not proved." *R.P 36 (D)*.

"If the court find that a plea in bar is not proved, they shall proceed with the trial, but such a finding shall be subject to confirmation like any other finding of the court." *R.P. 36 (E)*.

It will be noted that the finding of the court upon plea in bar of trial, whether for or against the plea, is subject to confirmation.

"Upon the record of the plea of 'Guilty', if there is any other charge on the same charge-sheet to which the plea is 'Not Guilty', the trial will first proceed with respect to every such other charge, and, after the finding on those charges, will proceed with the charges on which the plea of 'Guilty' has been entered, but if they are alternative charges, the court may either proceed with respect to all the charges as if the accused has not pleaded 'Guilty' to any charge, or may, instead of trying him, record a finding of 'Guilty' upon any one of the alternative charges to which he has pleaded 'Guilty' and a finding of 'Not Guilty' upon all the other alternative charges." *R.P. 37 (A)*.

"After the record of the plea of 'Guilty' on a charge (if the trial does not proceed on any other charges) the court shall receive any statement which the accused desires to make in reference to the charge, and shall read the summary or abstract of evidence, and annex it to the proceedings, or if there is no such summary or abstract, shall take and record sufficient evidence to enable them to determine the sentence, and the confirming officer to know all the circumstances connected with the offence. This evidence will be taken in like manner as is directed by these rules in the case of a plea of 'Not Guilty'." *R.P. 37 (B)*.

"After the evidence has been so taken, or the summary or abstract of evidence has been read, as the case may be, the accused may make a statement in mitigation of punishment, and may call witnesses as to his character." *R.P. 37 (C)*.

"If from the statement of the accused, or from the summary or abstract of evidence, or otherwise, it appears to the court that the accused did not understand the effect of his plea of 'Guilty' the court shall alter the record and enter a plea of 'Not Guilty' and proceed with the trial accordingly." *R.P. 37 (D)*.

"If the plea of 'Guilty' is recorded, and the trial proceeds with respect to other charges in the same charge-sheet, the proceedings under (B) and (C) will take place when the findings on the other charges in the same charge-sheet are recorded." *R.P. 37 (E)*.

"When the accused states anything in mitigation of punishment which in the opinion of the court requires to be proved, and would, if proved, affect the amount of punishment, the court may (and should) permit the accused to call witnesses to prove the same." *R.P. 37 (F)*.

"The accused may, if he thinks fit, at any time during the trial, withdraw his plea of 'Not Guilty' and plead 'Guilty', and in such a case the court will at once, subject to compliance with Rule 35 (B), (i.e. after making sure that the accused understands the effect of his action,) record a plea and finding of 'Guilty', and shall, so far as is necessary, proceed in the manner directed by Rule 37." *R.P. 38*.

PLEA OF "NOT GUILTY".

After the plea of 'Not Guilty' to any charge is recorded the trial will proceed as follows:

"(A) The court shall ask the accused whether he wishes to apply for an adjournment on the ground that any of these rules relating to procedure before trial have not been complied with, and that he has been prejudiced thereby or on the ground that he has not had sufficient opportunity for preparing his defence, and shall record his answer. If the accused should make any such application, the court shall hear any statement or evidence which he may desire to adduce in support thereof, and any statement of the prosecutor or evidence in answer thereto; and if it should appear to the court that the accused has been prejudiced by non-compliance with any such rule of procedure (if the court has any doubt the accused shall be permitted the adjournment) or that he has not had sufficient opportunity of preparing his defence, they may grant such adjournment as may appear to them in the circumstances to be proper.

"(B) The prosecutor may, if he desires, and shall if required by the court, make an opening address, and should state therein the substance of the charge against the accused and the nature and general effect of the evidence which he proposes to adduce in support of it without entering into any unnecessary detail.

"(C) The evidence for the prosecution shall then be taken.

"(D) If it should be necessary for the prosecutor to give evidence for the prosecution, he should give it after the delivery of his address (if any), and he must be sworn and give his evidence in detail.

"(E) He may be cross-examined by or on behalf of the accused, and afterwards may make any statement which might be made by a witness on re-examination." *R.P. 39.*

"At the close of the evidence for the prosecution, the accused shall be told by the court that he may, if he wishes, give evidence as a witness, but that if he gives evidence he will subject himself to cross-examination." *R.P. 40 (A).*

"The accused will then be asked whether he intends to give evidence as a witness himself, and whether he intends to call any witnesses to the facts other than himself." *R.P. 40 (B).*

"If the accused states that he wishes to give evidence as a witness himself but does not intend to call any other witness to the facts of the case, the procedure, whether or not he is represented by counsel or by an officer subject to military law, will be as follows:

"(i) The accused will give evidence immediately after the close of the evidence for the prosecution.

"(ii) The accused may, if he wishes, call witnesses as to his character.

"(iii) The prosecutor may then make a final address for the purpose of summing up the evidence for the prosecution and commenting on the evidence of the accused.

"(iv) The accused or counsel or the defending officer (as the case may be) may then make a closing address in his defence." *R.P. 40 (C).*

"If the accused states that he does not wish to give evidence as a witness himself and does not intend to call any witnesses to the facts of the case, the procedure will be as follows:

"(i) *If he is not represented by counsel or by an officer subject to military law:*

"(a) The accused may, if he wishes, call witnesses as to his character.

"(b) The prosecutor may make a final address for the purpose of summing up the evidence for the prosecution.

"(c) The accused may then make an address in his defence, giving his account of the subject of the charge against him. The address may be made orally or in writing.

"(ii) *If he is represented by counsel or by an officer subject to military law:*

"(a) The accused may make a statement giving his account of the subject of the charge against him. This statement may be made orally or in writing but the accused must not be sworn and no question may be put to him by the court or by any other person;

"(b) The accused may, if he wishes, call witnesses as to his character.

"(c) Counsel or the defending officer (as the case may be) may then make a closing address;

"(d) If the accused has made the statement referred to in (a), the prosecutor may reply; but if the accused has made no such statement, the address of the prosecutor will precede the closing address of counsel or the defending officer." *R.P. 40 (D)*.

"If the accused states that he wishes to give evidence himself and to call witnesses to the facts of the case, the procedure, whether or not he is represented by counsel or by an officer subject to military law, will be as follows:

"(i) The accused or, if he is represented by counsel or by a defending officer, then such counsel or defending officer may make an opening address for the defence.

"(ii) The accused will give evidence as a witness, and call his other witnesses, including, if he so desires, witnesses as to his character.

"(iii) After the evidence of all the witnesses has been taken, the accused or counsel or the defending officer (as the case may be) may make a closing address.

"(iv) The prosecutor may reply." *R.P. 41 (A)*.

"If the accused states that he does not intend to give evidence himself but intends to call witnesses to the facts of the case, the procedure will be as follows:

"(i) *If he is not represented by counsel or by an officer subject to military law:*

"(a) the accused may make an opening address giving his account of the subject of the charge against him. The address may be made orally or in writing.

"(b) the accused will then call his witnesses including, if he so desires, any witnesses as to character.

"(c) after the evidence of all the witnesses has been taken, the accused may make a closing address.

"(d) the prosecutor may reply.

"(ii) *If he is represented by counsel or by an officer subject to military law:*

"(a) the accused may make a statement giving his account of the subject of the charge against him. This statement may be made orally or in writing, but the accused must not be sworn and no question may be put to him by the court or by any other person. If the accused makes no such statement, counsel or the defending officer (as the case may be) may make an opening address.

"(b) the accused will then call his witnesses, including, if he so desires, any witnesses as to character.

"(c) after the evidence of all the witnesses has been taken, counsel or the defending officer (as the case may be) may make a closing address.

"(d) the prosecutor may reply." *R.P. 41 (B)*.

When the accused calls witnesses, the prosecutor has a right to reply. But the failure of the accused or his wife to give evidence must not be made the subject of any comment by the prosecutor. Such a comment might invalidate the proceedings. *R.P. 80 (B)*.

Neither counsel nor the defending officer may state as a fact any matter which has not been proved or which it is not intended to prove in evidence, *R.P. 92(C), 87 (C)*; but the accused has the privilege, whether he has given evidence or not, of making statements in his address which are unsupported by evidence.

The judge-advocate (if any) will, unless he and the court think a summing up unnecessary, sum up in open court the whole case to the court, and if a summing up is considered unnecessary, a record to that effect must be made in the proceedings. *R.P. 42 (A) and note 1*.

"After the summing up of the judge-advocate, no other address shall be allowed." *R.P. 42 (B)*.

"The evidence shall be taken down in a narrative form in as nearly as possible the words used; but in any case where the prosecutor, the accused, the judge-advocate or the court considers it material, the question and answer shall be taken down verbatim." *R.P. 95 (A)*.

"Where an objection has been taken to any question or to the admission of any evidence or to the procedure of the court, such objection shall, if the prosecutor or accused so requests, or the courts think fit, be entered upon the proceedings together with the grounds of the objection, and the decision of the court thereon." *R.P. 95 (B)*.

"Where any address by or on behalf of the prosecutor or the accused, or the summing up of the judge-advocate, is not

in writing, it shall not be necessary to record the address or summing up in the proceedings further or otherwise than the court think proper, or, in the case of the summing up, than the judge-advocate requires, except that

"(i) The court shall in every case make such record of the defence made by the accused as will enable the confirming officer to judge of the reply made by or on behalf of the accused to each charge against him; and

"(ii) The court should also record any particular matters in the address by or on behalf of the prosecutor or accused which the prosecutor or accused, as the case may be, requires." *R.P. 95 (C).*

If the addresses are in writing they shall be read and attached to the proceedings.

"The court shall not enter in the proceedings any comment, or anything not before the court, or any report of any fact not forming part of the trial; but if any such comment or report seems to the court necessary, the court may forward it to the proper military authority in a separate document, signed by the president." *R.P. 95 (D).*

iv. Finding of Court.

"The court will deliberate on their finding in closed court." *R.P. 43 (A).*

"The opinion of every member of the court as to the finding will be given by word of mouth on each charge separately." *R.P. 43 (B).*

"Every member of a court-martial must give his opinion by word of mouth on every matter which the court has to decide, including the sentence, notwithstanding that he may have given his opinion in favour of acquittal." *R.P. 69 (A).*

"The opinions of the members of the court shall be taken in succession, beginning with the junior in rank." *R.P. 69 (C).*

The general rule is that every question shall be determined by an absolute majority of the members of the court. *R.P. 69 (B).* In the case of an equality of votes on the finding the accused shall be deemed to be acquitted. In the case of an equality of votes on the sentence, or any question arising after the commencement of the trial except the finding, the president shall have a second or casting vote. *A.A. 53 (8).* To this rule there are two exceptions:

(a) "Sentence of death shall not be passed on any person without the concurrence of at least two-thirds of the officers serving on the court-martial by which he is tried." *A.A. 48(8).*

(b) Sentence of death may not be passed on any person by a field general court-martial without the concurrence of all the members.

It is to be noted that the president of a court-martial has no second or casting vote in the case of a sentence of death, or where there is an equality of votes on the findings of a court, (*i.e. guilty, or not guilty*). In such a case, the accused reaps the benefit of the doubt and must be acquitted. *A.A. 53 (8).*

"The finding of acquittal, whether on all or some of the offences with which the accused is charged, shall not require confirmation or be subject to be revised, and shall be pronounced at once in open court, and if it relates to the whole of the offences the accused shall be released." *A.A. 54 (3).*

"When a court-martial recommends a person under sentence to mercy, such recommendation shall be attached to and form part of the proceedings of the court, and shall be promulgated to the person under sentence, together with the finding and sentence." *A.A. 53 (9).*

"If the court make a recommendation of mercy, they shall give their reasons for their recommendation." *R.P. 49 (A).*

"If the court recommend any restoration of service under Section 79 of the Army Act the recommendation, with the reasons for it, shall be entered in the proceedings." *R.P. 49 (B).*

"The number of opinions by which a recommendation mentioned in this rule, or any question relative thereto, is adopted or rejected, may be entered in the proceedings." *R.P. 49 (C).*

A court-martial, in passing sentence, will take into account the considerations set out in *K.R. (Can.) 563*, the text of which may be found in Appendix G, *post.*

"When a court-martial passes sentence on a soldier already under sentence of imprisonment or detention, or on a soldier tried, at the expiration of a term of imprisonment or detention, for an offence committed or discovered during its continuance,

regard must be had to proviso (1B) to section 44 of the Army Act; the limit of two consecutive years of imprisonment or detention, including the term already undergone, will under no circumstances be exceeded. If the punishment is of so serious a nature as to require a more severe punishment than can be inflicted under this rule, penal servitude, when applicable, should be awarded in lieu of imprisonment." *K.R. (Can.) 564.*

"A court-martial, in framing sentence, will observe the following rules:

"(i) Terms of imprisonment or detention not amounting to six months will be awarded in days;

"(ii) Terms of imprisonment or detention of one year and two years will be awarded in years;

"(iii) Other terms of imprisonment or detention will be awarded in months, or, if required, in months and days." *K.R. (Can.) 565.*

"Upon the court awarding the sentence, the president alone shall sign and date the sentence, and such signature shall authenticate the whole of the proceedings, and the proceedings, upon being signed by the judge-advocate (if any), shall as soon as possible be transmitted for confirmation in the manner provided by Rule 97 of these rules." *R.P. 50.*

"It is essential that the date of the sentence should be inserted, as under A.A. 68 a term of penal servitude, imprisonment or detention is reckoned to commence on the day on which the sentence and proceedings were signed by the president." *R.P. 50, note 1.*

c. Subsequent Proceedings.

i. Confirmation and Revision. Except for the finding of acquittal which does not require to be confirmed, no finding and sentence of a court-martial shall be valid except in so far as the same may be confirmed by an authority authorized to confirm the same. *A.A. 54 (6) and (3).*

"As soon as the proceedings of a court-martial are received by an officer having power to confirm the same, he may, and in normal circumstances should, at once order the release of the accused if the sentence awarded by the court is lower in the scale of punishments set out in Section 44 of the Army Act than dismissal from His Majesty's Service in the case of an officer, or discharge with ignominy in the case of a soldier. If the sentence is, or includes, forfeiture of seniority of rank, or reduction to a lower grade or to the ranks, instructions should, at the same time, be given that the accused should not, unless the exigencies of the service demand it, be placed on any duty whatsoever until after the promulgation of the proceedings; in such cases the accused may, in the interests of discipline, be placed in open arrest instead of being released from arrest." *K.R. (Can.) 567.*

"Except as provided for in para. 526, a commanding officer who has investigated a case in his capacity as commanding officer cannot subsequently confirm the proceedings of a court-martial arising out of the same matter. If he purports so to act in a case outside the exceptions, the proceedings are not void but must be confirmed by a properly qualified authority." *K.R. (Can.) 568.*

"A confirming authority, when the proceedings require confirmation, may confirm or refuse confirmation, or may send back the finding and sentence or either of them, for revision once, but not more than once, and where the finding only is sent back for revision, the court have power, without any direction to revise the sentence also." *K.R. (Can.) 570 (a), and see A.A. 54 (5) and R.P. 51 (B).*

"When the confirming authority finds it necessary to comment upon the proceedings of such a court-martial, whether original or revised, his remarks will be separate from and form no part of the proceedings. They will be communicated in a separate minute to the members of the court, or, in exceptional cases where in the interests of discipline a more public instruction is required, they will be made known in the orders of the command. In no case will he comment upon the finding of 'not guilty' (except as laid down in para. 572) or upon the inadequacy of a sentence, and great care is to be taken not to interfere with the discretion with which the court is vested in the exercise of its judicial functions." *K.R. (Can.) 570 (b).*

Para. 572 of the regulations provides that "if an officer who would have confirmed the finding and sentence of a court, had the trial resulted in a conviction, thinks it necessary to remark upon the proceedings in a case where the accused has

been acquitted, he will not annex his observations to the proceedings, but will embody them in a letter for the information of superior authority, who will give such orders as may be necessary."

"When it appears from a perusal of the proceedings that the mental condition or fitness for service of the accused is open to doubt, the confirming officer will, after confirmation, take steps to ensure that the commandant of the detention barrack or the governor of the prison to which the soldier is committed to undergo his sentence, is informed of the circumstances with a view to the soldier so committed being placed under medical observation and, if considered desirable, admitted to a military hospital. He will also furnish a report of the case to the district officer commanding in whose command such detention barrack or prison is situated." *K.R. (Can.) 570 (c).*

"Where the finding or sentence is sent back for revision, the court shall re-assemble in closed court, and shall not receive any further evidence." *R.P. 52 (A).*

"Where the finding is sent back for revision and the court do not adhere to their former finding, they shall revoke the finding and sentence and record a new finding, and, if the new finding involves a sentence, pass sentence afresh." *R.P. 52 (B).*

"Where the sentence alone is sent back for revision, the court shall not revise the finding." *R.P. 52 (C).*

"After revision, the president shall date and sign the decision of the court, and the proceedings, upon being signed by the judge-advocate (if any), shall as soon as possible be transmitted for confirmation in the manner provided in Rule 97 of these rules." *R.P. 52 (D).*

"The confirming authority may, when confirming the sentence of any court-martial, mitigate or remit the punishment thereby awarded, or commute such punishment for any less punishment or punishments to which the offender might have been sentenced by the said court-martial, or, if such punishment is death awarded for the offence of murder, then for penal servitude or such less punishment as in this Act mentioned, or, if such punishment is cashiering awarded for an offence under section 16 of this Act, then for dismissal from His Majesty's

service or such less punishment as is in this Act mentioned. The confirming authority may also suspend for such time as seems expedient the execution of a sentence." *A.A. 57 (1).*

"Where a confirming officer proposes to recommend suspension of a sentence of penal servitude, imprisonment or detention, or is required to refer such cases to a superior military authority under the provisions of Section 57 A of the Army Act, he will take action in accordance with instructions regarding the Suspension and Review of Sentences awarded by Courts-martial" contained in the Manual of Military Law, so far as the same may be applicable." *K.R. (Can.) 576 B.*

"Where statements made by an accused, in mitigation of punishment, reveal facts which might influence confirming officers in determining the proper sentence, or contain matter which might call for disciplinary action, investigation into the truth or otherwise of such statements should be made by the confirming officer, if practicable, prior to confirmation." *K.R. (Can.) 571(a).*

"If such inquiry is likely to cause substantial delay in confirmation, confirming officers may confirm the proceedings forthwith, and make investigation with a view to subsequent consideration. They will use their own discretion as to whether they will retain the proceedings or will forward them at once to the Judge-Advocate-General; in the latter case the outcome of the investigation will be communicated to the Judge-Advocate-General subsequently." *K.R. (Can.) 571(b).*

"It is the province of a confirming officer, by the exercise of his powers of commutation or mitigation, to regulate the amount of punishment awarded by courts-martial and to ensure that the finding and sentences are legal, and that no sentence is heavier than the interests of discipline and the merits of the particular case require. In exercising his powers of commutation or mitigation, the confirming officer will be guided by the instructions in 563 in order that, having due regard to the soldier's character etc., no great disparity may exist between sentences awarded for similar offences." *K.R. (Can.) 569.*

"If it appears to a confirming officer that the proceedings of a court-martial are illegal, or involve substantial injustice

to the accused, and he has not confirmed the finding and sentence, he will withhold his confirmation; if he has confirmed the finding and sentence, he will direct the record of the conviction to be removed, and the soldier to be relieved from all consequences of his trial. If he is in doubt, he may refer the case for the opinion of superior authority. When the circumstances of the case admit of reference without undue delay, the proceedings of a court-martial that has been confirmed will not be quashed without reference to the Judge-Advocate-General. If proceedings can be legally sustained, and there is no substantial injustice, but an irregularity has occurred, the conviction may take effect, but the confirming officer will consider what reduction of the sentence (if any) is due to the soldier. The same rule will apply when the proceedings of a court-martial after confirmation come under the review of any of the authorities specified in Section 57(2) of the Army Act. Except as above provided, when a soldier has been tried and sentenced by a court-martial, and the proceedings have been confirmed but the sentence has been wholly remitted, the remission does not extend to any penalty or forfeiture consequent on conviction." *K.R.* (*Can.*) *573.*

There is no appeal properly so-called from the finding of a court-martial. But any officer or soldier who considers himself aggrieved by the finding or sentence of a court-martial may forward a petition to the confirming officer or any reviewing authority through the usual channels. If such petition raises any question of law, it should be referred to the Judge Advocate-General. *K.R.* (*Can.*) *574.*

Independently of petitions, the proceedings of courts-martial are reviewed by the Judge-Advocate-General in order to detect miscarriages of justice. Sentences must be confirmed by a higher competent military authority, which authority has no power to increase the sentence of the court. But there is no right of appeal to a higher military tribunal before which the case can be argued on its merits.

"The proceedings of any general court-martial will be immediately forwarded to the Judge-Advocate-General who, after review, will transmit them to the Minister for confirmation or otherwise by His Excellency the Governor-in-Council." *K.R.* (*Can.*) *575, and see M.A. 99.*

"As soon as an officer who has power to confirm the findings and sentence of a court-martial has dealt with any proceedings by way of confirmation or non-confirmation, he will forward the proceedings direct to the officer commanding the unit to which the accused belongs, in order that they may be promulgated without delay." *K.R.* (*Can.*) *576(a).*

ii. Promulgation. The charge, finding and sentence, and any recommendation to mercy shall, together with the confirmation or non-confirmation of the proceedings, be promulgated in such manner as the confirming authority may direct; and if no direction is given, according to the custom of the service. Until promulgation has been effected, confirmation is not complete and the finding and sentence shall not be held to have been confirmed until they have been promulgated." *R.P. 53.* Up to the time of promulgation when the confirmation is complete, the confirming authority may cancel his minute of confirmation and order a revision, but after the proceedings have been promulgated, the confirming officer is *functus officio* and has no further power of jurisdiction in the matter.

"In the event of a court-martial resulting in a conviction on all or some of the charges against the accused, the proceedings of the court, including the charges, finding, sentence and confirmation, will be promulgated in all cases by communication to the accused; promulgation will only be effected by the above particulars being read out on parade in those cases in which the confirming authority specially directs that this shall be done. The date of promulgation will be recorded on the proceedings." *K.R.* (*Can.*) *577(a).*

"The results of all courts-martial will be published in the orders of all formations in which appeared the notice of the convening of the court. In every case such results will be published in the orders of the unit concerned in Part I Orders in the case of officers and in Part II Orders in the case of soldiers. (see para. 1494)." *K.R.* (*Can.*) *577(b).*

"If, subsequent to conviction but before promulgation can be effected, an accused absents himself, and a declaration by a court of inquiry under Section 72 of the Army Act is made in respect thereof, or in the case of an officer if the commanding officer furnishes a certificate (to be annexed to the court-martial

proceedings) that the accused has been absent without leave for 21 clear days, the proceedings of the court-martial may be promulgated by the publication of the foregoing particulars in Part II orders of the unit. They will, however, forthwith be communicated to the accused upon his apprehension (if liable for further service) or surrender." *K.R. (Can.) 577(c).*

"All proceedings of courts-martial, whether transmitted before or after promulgation, will be accompanied by a letter specifying the nature of the contents." *K.R. (Can.) 578.*

"The proceedings of a district court-martial will, when promulgated, be returned to the district officer commanding, who will make any necessary communication respecting them to the president and judge-advocate (if any) for their information. The district officer commanding will then transmit them to the Judge-Advocate-General without delay." *K.R. (Can.) 579 (a).*

"The proceedings of a general court-martial will, after promulgation, be forwarded to the Judge-Advocate-General, National Defence Headquarters." *K.R. (Can.) 579 (b).*

"In forwarding proceedings which disclose any matters which appear to require investigation, such as allegations as to irregularities or statements as to the mental condition (or fitness for service) of the accused, made either in mitigation of punishment or on the recommendation of the court, or otherwise, the covering letter will state that steps have been taken, or are being taken, to inquire into the matter in question. In cases where the accused has been convicted of mis-appropriating sums of money which involve errors in his or in other soldiers' pay accounts, the covering letter will also state whether appropriate steps are being taken, or have been taken, to adjust the accounts, as laid down in the Pay and Allowance Regulations." *K.R. (Can.) 580.*

"If the proceedings of a general court-martial or district court-martial have not been forwarded to the Judge-Advocate-General within one month from the date of confirmation, a special report of the cause of delay will be made." *K.R. (Can.) 581.*

iii. Power over Witnesses. The powers of a court-martial over military and civilian witnesses are as follows, that is to say:

MILITARY WITNESSES

"Every person subject to military law who commits any of the following offences; that is to say:

"(1) being duly summoned or ordered to attend as a witness before a court-martial, makes default in attending; or

"(2) refuses to take an oath or make a solemn declaration legally required by a court-martial to be taken or made; or

"(3) refuses to produce any document in his power or control legally required by a court-martial to be produced by him; or

"(4) refuses when a witness to answer any question to which a court-martial may legally require an answer; or

"(5) is guilty of contempt of a court-martial by using insulting or threatening language, or by causing any interruption or disturbance in the proceedings of such court,

"shall, on conviction by a court-martial other than the court in relation to or before whom the offence was committed, be liable if an officer, to be cashiered, or to suffer such less punishment as is in this Act mentioned, and if a soldier, to suffer imprisonment, or such less punishment as is in this Act mentioned.

"Provided that where a person subject to military law is guilty of contempt of a court-martial by using insulting or threatening language, or by causing any interruption or disturbance in the proceedings of such court, that court if they think it expedient, instead of the offender being tried by another court-martial, may by order under the hand of the president, order the offender to be imprisoned with or without hard labour, or, in the case of a soldier, to undergo detention for a period not exceeding twenty-one days." *A.A. 28.*

It should be noted that section 48(6) of the Army Act which prohibits a district court-martial from trying an officer, would not exempt an officer guilty of contempt of such court from liability to be committed to prison by the court under the provision to section 28 of the Army Act, *supra*, but the course

the court would follow in practice would be almost invariably to adjourn and report to the proper authority. *A.A. 28, note 6.*

"The summary proceeding for contempt is not a trial, and the offence being as a rule committed in view of the court, opportunity should be given to the offender to make any explanation of, or excuse for his conduct, but no further inquiry will be necessary. The order of the court does not require confirmation. To imprison or send to detention for contempt of court a person who is under trial, though legal, requires very exceptional circumstances to justify it; punishment so inflicted must immediately follow the contempt, and cannot be an addition to any sentence after conviction, or be ordered to commence at the date of the expiration of the punishment under sentence. The court must adjourn until the expiration of the punishment inflicted for the contempt, and must record upon the proceedings the facts which have necessitated the order." *A.A. 28, note 7.*

CIVILIAN WITNESSES

"If any person who is not enrolled in the Militia is summoned as a witness before a court-martial, and after payment or tender of the reasonable expenses of his attendance, makes default in attending, or being in attendance as a witness,

"(a) refuses to take an oath or affirmation lawfully required by the court to be taken;

"(b) refuses to produce any document in his power or control lawfully required by the court to be produced by him;

"(c) refuses to answer any question to which the court lawfully requires an answer; or

"(d) is guilty of any contempt of the court-martial by causing any interruption or disturbance in its proceedings; "the president of the court shall certify the default, refusal or contempt of such person under his hand to a judge of any court of justice in the locality having power to punish persons guilty of like offences in that court." *M.A. 130(1)*

"Such court may thereupon inquire thereinto, hearing such person, any witnesses that may be produced for or against him and, if such person is found guilty, punish him in like manner as if he had committed the offence in a proceeding in such court." *M.A. 130(2).*

d. Special Procedure with respect to Field General Court-Martial. The procedure followed in a field general court-martial is similar, as far as may be practicable, to the procedure followed in a district court-martial. Its character, however, as a kind of emergency court that may be convened when it is not practicable in the interests of discipline and the service to convene an ordinary general court-martial, necessitates some modifications in procedure, of which the following are the more important.

No formal charge-sheet is necessary. *R.P. 108.*

Sentence of death shall not be passed on any person by a field general court-martial without the concurrence of all the members.

"In any case where a sentence of death is passed, the confirming authority shall, after confirmation, forthwith transmit the proceedings to the officer in chief command of the forces in the field comprising the force with which the accused is present, and such sentence shall not be carried into effect pending the decision of that officer on the case: Provided that where the confirming officer is of opinion that, by reason of the nature of the country, the great distance, or the operations of the enemy, it is not practicable to delay the case for the purpose of referring it to the officer in chief command in the field, a sentence of death may be carried into effect if confirmed by the general or field officer commanding the force with which the person under sentence is present at the date of the sentence." *R.P. 120(D).*

"A prosecutor of an accused person or a member of the court trying the accused person cannot confirm the finding or sentence of the court as regards that person, except that if a member of the court trying an accused person would otherwise under these rules have power to confirm the sentence, and is of opinion that it is not practicable to delay the case for the purpose of referring it to any other officer, he may confirm the finding and sentence." *R.P. 120(C).*

"Subject to the preceding provisions of this rule, the finding and sentence of a field general court-martial as regards any person may be confirmed:—

"(i) where the court was convened by an officer in command of a detachment or portion of any troops not on active service, by an officer authorized to confirm the findings and sentences of general courts-martial for the trial of offences in the force of which the detachment or portion of troops form part; and

"(ii) where the court was convened by an officer in command of any troops on active service, by the senior officer, not being an officer below the rank of field officer, present at the place where the trial takes place, or if there is no officer not below that rank present at that place, by the senior officer not below the rank of field officer present at any other place." *R.P. 120(E).*

C. EFFECT OF LAPSE OF TIME.

The Statutes of Limitations applicable to civil matters have their counterpart in military law.

1. THE ARMY ACT. Trial for offences against the provisions of the Army Act, is subject to the limitations contained in section 161 of that Act, which reads as follows:—

"161. A person shall not in pursuance of this Act be tried or punished for any offence triable by court-martial committed more than three years before the date at which his trial begins except in the case of the offence of mutiny, desertion or fraudulent enlistment; but this section shall not affect the jurisdiction of a civil court in the case of any offence triable by such court, as well as by court-martial; and where a soldier has served continuously in an exemplary manner for not less than three years as a soldier of the regular forces he shall not be tried for any such offence of desertion (other than desertion on active service), or of fraudulent enlistment as was committed before the commencement of such three years, but where the offence was fraudulent enlistment all service prior to such enlistment shall be forfeited: Provided that a soldier who has fraudulently enlisted during a period of re-engagement shall only forfeit the service rendered during such re-engagement, and that the Army Council (*in Canada, the Minister of Defence*) may by general or special regulations provide for the restoration of all or any part of the service forfeited under this section to any soldier who may perform good and faithful service or may otherwise be deemed to merit such restoration of service."

a. Trial by Court-Martial. Accordingly, the liability of a soldier to be tried by court-martial for offences against the Army Act, may be expressed as follows:—

(a) He may NOT be tried for any offence "COMMITTED MORE THAN THREE YEARS BEFORE THE DATE AT WHICH HIS TRIAL BEGINS"; *except in case of the offence of mutiny, desertion or fraudulent enlistment.*

(b) He may NOT be tried for the offence of desertion (other than desertion on active service) or of fraudulent enlistment "COMMITTED MORE THAN THREE YEARS BEFORE THE DATE AT WHICH HIS TRIAL BEGINS"; *provided he has served continuously in an exemplary manner, (i.e., he has had no entry in the regimental conduct sheet) for not less than three years as a soldier of the regular forces.*

(c) He may be tried for the offence of mutiny, desertion on active service, or (if he shall not have served continuously in an exemplary manner for the required period) of desertion or fraudulent enlistment, WHENEVER COMMITTED BY HIM, WITHOUT REFERENCE TO THE LENGTH OF TIME WHICH HAS ELAPSED SINCE THE COMMISSION OF THE OFFENCE.

(d) The fact that he has already ceased to serve in the militia does not affect his liability to be tried.

b. Trial by a Civil Court. Where a civil court has concurrent jurisdiction to try him for the same offence, its jurisdiction is not interfered with.

2. THE MILITIA ACT. Trial for offences against the provisions of the Militia Act, is subject to the limitations contained in section 71 of that Act, which reads as follows:—

"71.(1) Every officer or man charged with any offence committed while serving in the militia, shall, while so serving, be liable to be tried by court-martial, and if convicted to be punished therefor.

"(2) Every officer or man so charged with any offence notwithstanding he has been discharged from the militia, or that

the corps to which he belongs or belonged is relieved from active service, may be tried, convicted and punished by court-martial for such offence, within six months after being so discharged, or after such corps is so relieved from active service.

"(3) Any officer or man of the militia may be tried by court-martial for the crime of desertion at any time, without reference to the length of time which has elapsed since the desertion."

a. Trial by Court-Martial. Accordingly the liability of a soldier to be tried by court-martial for offences against the Militia Act, may be expressed as follows:—

(a) He may NOT be charged with or tried for any offence committed while serving in the militia, except desertion, after he has ceased to serve in the militia for six months.

(b) He may be charged with or tried for the crime of desertion, at any time, while serving or after he has ceased to serve in the militia, without reference to the length of time which has elapsed since his desertion.

(c) He may be charged with or tried for any offence committed while serving in the militia, at any time while so serving, without reference to the length of time which has elapsed since the commission of the offence.

b. Trial by a Civil Court. Where a civil court has concurrent jurisdiction to try him for the same offence—(and the Militia Act provides that any offence under it may be tried and punished by a civil court as well as a court-martial, unless it is expressly provided that a court-martial shall try and punish the accused)—the commencement of a prosecution for such an offence, in a civil court, is subject to the limitation contained in section 126(4) of the Militia Act, which reads as follows:—

"126(4) No such prosecution shall be commenced after the expiration of six months from the commission of the offence charged, except for the offence of unlawfully buying, selling or having in possession arms, accoutrements or other articles belonging to the Crown or Corps, or for desertion."

It is to be noted that where it is proposed to commence a prosecution in a civil court, time begins to run, in the computation of the period of limitation, from the date of the commission of the offence; and the offender's serving, or having

ceased to serve, or when he ceased to serve, in the militia, is of no importance.

D. COURTS OF INQUIRY, COMMITTEES AND BOARDS

"A court of inquiry, committee or board may be assembled by the Minister, or by an officer in command to assist in arriving at a correct conclusion on any subject on which it may be expedient for them to be thoroughly informed; it may be required to give an opinion on any point, but when the inquiry affects the character or military reputation of an officer or soldier, full opportunity must be afforded to the officer or soldier of being present throughout the inquiry. A court of inquiry, committee or board of officers may consist of two or more members, its composition being determined by the convening officer according to the circumstances under which it is assembled. Three members, the senior acting as president, will in ordinary cases be sufficient. Where so provided by regulations or by instructions of the minister, a court of inquiry, committee or board may consist of one or more officers together with one or more warrant or non-commissioned officers. Attention is particularly drawn to the rules for Courts of inquiry contained in Rules of Procedure 124 and 125A". *K.R. (Can.) 625(a).*

"The officer assembling a court of inquiry, committee, or board, will appoint a president by name, or failing such appointment, the senior member will preside. When the convening officer has so appointed a president, no officer senior in rank to the president will be appointed to serve as a member of the court of inquiry, committee or board." *K.R. (Can.) 632.*

"No court of inquiry, committee or board, the assembly of which involves expense to the public, will be convened without special authority from National Defence Headquarters except in connection with examination for qualification of non-permanent active militia officers and non-commissioned officers, and medical boards required in connection with the retirement or discharge of personnel from the permanent force." *K.R. (Can.) 626.*

"Unless otherwise specified, the president will fix the time and place for assembly, cause notice of the same to be given to all witnesses and persons interested, and preside during the sittings. If the members cannot agree on an opinion collectively, any dissenting member should state, in writing, the nature and

extent of the difference, or give his opinion to the president for transmission with the proceedings." *K.R. (Can.) 628.*

"Unless the exigencies of the service render it absolutely necessary, district, garrison, or regimental courts of inquiry committees and boards should not be held during those hours which are devoted to parades or other instruction of the soldier." *K.R. (Can.) 625(b).*

"The hour for the assembly of boards, committees or courts of inquiry in hospital will be arranged between officers commanding units and the medical officer in charge." *K.R. (Can.) 631.*

"All proceedings of courts of inquiry, committees, and boards for which special forms are not provided are to be written on M. F. B. 303. The president and all the members will sign the proceedings." *K.R. (Can.) 629(b).*

1. COURTS OF INQUIRY. A court of inquiry is an assembly of officers or of one or more officers, together with one or more warrant or non-commissioned officers, (who may belong to any branch or arm of the service, according to the nature of the investigation), directed to collect and record evidence, and, if and as required, to report or make a declaration with regard to any matter which may be referred to them. *R.P. 124 (A) & (C).*

It may be assembled for the purpose of investigating and reporting on any matter connected with the government and discipline of the Militia, or on the conduct of any officer or man of the force. *M.A. 93.*

"The regulations for the composition of courts of inquiry, and the modes of procedure and powers thereof, shall be the same as the regulations which are at the time in force for the composition, modes of procedure and powers of courts of inquiry for His Majesty's regular army, which are not inconsistent with this Act, or the regulations made thereunder." *M.A. 94.*

"Courts of inquiry, as a general rule, sit with closed doors, but they may be either open or closed, according to the nature of the investigation, or as may be directed by the convening officer. When the inquiry may affect the character or reputation of an officer or soldier, full opportunity must be offered to the officer or soldier of being present throughout the inquiry, and such officer or soldier may either answer or refuse to answer any question put to him, or may avail himself of the opportunity to explain any particular act or any part of his conduct on which an imputation prejudicial to him may have arisen. The rank of the officers composing the court should be equal or superior to that of any officer whose conduct or character may be implicated in the investigation. The presence before a court of inquiry of counsel or a professional adviser acting for or on behalf of any officer or soldier is not permissible. The convening officer, however, may detail an officer of the Judge Advocate-General's office to attend at the court of inquiry or board, to assist such court or board in the examination of witnesses, or in any other manner wherein the court may require assistance." *K.R. (Can.) 627.*

"Previous notice should be given of the time and place of meeting of a court of inquiry, and of all sittings of the court, to all persons concerned in the inquiry." *R.P. 124(D).*

"It is the duty of a court of inquiry to put such questions to a witness as they may think desirable for the purpose of testing the truth or accuracy of any evidence he has given, and otherwise for eliciting the truth." *R.P. 124(E).*

"The whole of the proceedings of a court of inquiry will be forwarded by the president to the authority who assembled the court." *R.P. 124(F).*

Unlike a court-martial, a court of inquiry has no power to compel the attendance of civilian witnesses. *R.P. 124 note 1.*

a. Under Section 72 of the Army Act (Illegal Absence). "A court of inquiry under Section 72 of the Army Act, composed in accordance with Rule of Procedure 124 (A) and (C), for the purpose of determining the illegal absence of a soldier will be held in all cases (except in cases of absconded recruits) at the expiration of 21 clear days from the date of absence, or as soon after as practicable, unless before such court of inquiry has been assembled, it has come to the knowledge of the soldier's commanding officer that the soldier has been apprehended or has surrendered." *K.R. (Can.) 643(a).*

"Before declaring the deficiency of any arms, etc., the court will satisfy itself by evidence that the absentee, was, within a reasonable period of the date of absenting himself, in

possession of the articles it finds to be deficient. The court will record the values of the unexpired wear of all articles of government property found to be deficient." *K.R. (Can.) 643(b).*

"A court of inquiry will not be held on a man on the Non-Permanent Active Militia unless he was subject to military law, as described in Section 69(2) of the Militia Act, at the time of the commission of his offence." *K.R. (Can.) 643(c).*

"A court of inquiry under Section 72 of the Army Act will require the attendance of such witnesses as they may think sufficient to prove the absence and other facts specified as matters of inquiry in that Section." *R.P. 125(A).*

"They will take down in writing the evidence given before them, and at the end of the proceedings they will make a declaration of the conclusions at which they have arrived in respect of the facts into which they are assembled to inquire." *R.P. 125(B).*

"They will examine all witnesses who may be desirous of coming forward on behalf of the absentee, and will put such questions to them as may be desirable for testing the truth or accuracy of any evidence they may have given, and otherwise for eliciting the truth, and the court, in arriving at their conclusions, will give due weight to the evidence of all such witnesses." *R.P. 125*(C).

"The court will administer the same oath or solemn declaration to the witnesses as if the court were a court-martial, but the members themselves will not be sworn." *R.P. 125(D).*

"The commanding officer of the absent soldier will enter into the regimental books a record of the declaration of the court, and the original proceedings will be destroyed." *R.P. 125(E).*

"The soldier, the subject of the inquiry, will be entitled to a copy of the declaration of the court, to be supplied by the person having the custody of the regimental books, on payment of the actual cost of the copy required, not exceeding two pence for every folio of 72 words." *R.P. 125(F).*

b. Other than Those held under Section 72 of the Army Act. "The court will be guided by the written instructions of the authority who assembled the court. The instructions will be full and specific, and will state the general character of the information required. They will also state whether a report is required or not." *R.P. 125A-(A).*

"Whenever any inquiry affects the character or military reputation of an officer or soldier, full opportunity must be offered to the officer or soldier of being present throughout the inquiry, and of making any statement and of giving any evidence he may wish to make or give, and of cross-examining any witness whose evidence, in his opinion, affects his character or military reputation, and of producing any witnesses in defence of his character or military reputation. The president of the court will take such steps as may be necessary to ensure that any person so affected and not previously notified, receives notice of his rights under this rule, and will satisfy himself that he fully understands them." *R.P. 125A-(B).*

"When a court of inquiry is held on recovered prisoners of war, and in any other case in which the authority who assembled the court has so directed, the evidence will be taken on oath, in which case the court will administer the same oath or solemn declaration to witnesses as if the court were a court-martial." *R.P. 125A-(C).*

"A court may be re-assembled as often as the authority who assembled the court may direct, for the purpose of examining additional witnesses or further examining any witness, or recording further information. They may also be directed to make such further report or reports as may be required." *R.P. 125A-(F).*

"Except upon the trial of any officer or soldier under Section 29 of the Army Act, for wilfully giving false evidence before the court, the proceedings of a court of inquiry, or any confession, statement, or answer to a question made or given at a court of inquiry shall not be admissible in evidence against an officer or soldier, nor shall any evidence respecting the proceedings of the court be given against any officer or soldier." *R.P. 125A-(G).*

It should be noted that a charge can only be laid under A.A. 29, if the evidence before the court of inquiry was properly given on oath, (i.e., if under paragraph (C) of rule 125A it was required to be so taken). *R.P. 125A, note 3:* This privilege mentioned above extends only to military tribunals. If a

person is being tried in an ordinary criminal court, statements made by him, voluntarily, before a court of inquiry, may be given in evidence against him. *R.P. 125A, note 4.*

"On a trial under A.A. 29, in respect of evidence given on oath before a court of inquiry, the fact that the accused swore as charged must be proved in the manner described in note 2 to that Section. The proceedings of the court of inquiry are not admissible for this purpose and must not be produced in evidence or attached to the court-martial proceedings." *R.P. 125A, note 3A.*

The proceedings of the court before which the false swearing is alleged to have taken place are not admissible as evidence that the accused swore as charged. The member of the court who recorded the proceedings, or some other person who heard the evidence given, must prove this fact by oral evidence. The lawful custodian of the proceedings (or his deputy) should, however, attend the court with the proceedings, for a witness who recorded them may use them to refresh his memory. *A.A. 29, note 2.*

"An officer or soldier who is tried by court-martial in respect of any matter or thing which has been investigated by a court of inquiry, and unless the Army Council (*in Canada, Minister of National Defence*) see reason to order otherwise, an officer or soldier whose character or military reputation is, in the opinion of the Army Council (*in Canada, Minister of National Defence*) affected by anything in the evidence before, or in the report of, a court of inquiry, shall be entitled to a copy of the proceedings of the court, including any report made by the court, on payment of the actual cost of the copy required, not exceeding two pence for every folio of 72 words." *R.P. 125A-(H).*

1. Losses of Buildings, Stores, Animals and Cash. "When stores equipment, clothing, or supplies of any kind, belonging to the public, are lost, stolen, destroyed, or damaged, or when a deficiency is discovered in any store account, or in case of losses of animals other than through natural causes, or of structural damage, the amount of loss, i.e., the value of the stores lost, stolen, or destroyed, or deficient, or the cost of making good damages, will be ascertained." *K.R. (Can.) 633(a).*

When the amount of the loss, including the cost of structural repairs, exceeds $250.00, the matter will at once be reported to the district officer commanding and if he is of the opinion that the interests of discipline demand an investigation by a court of inquiry, he will, whether or not a financial settlement has been arranged, convene a court of inquiry, such court to be composed if possible of officers not belonging to the unit or service concerned. *K.R. (Can.) 634.*

When any loss or damage is believed to have been occasioned by an officer or soldier on duty to any company, corporation or person, and it appears probable that such loss or damage will lead to a claim for compensation against the public, the commanding officer of the officer or soldier will at once report the matter to the district officer commanding, who will cause the matter to be investigated forthwith by a court of inquiry, except as provided in sub-para. (d) (*post*) composed, as far as possible, of officers not belonging to the same unit as the officer or soldier in question." *K.R. (Can.) 637(a).*

"Such court will inquire generally into the circumstances of the case, and in particular report:—

"(i) The amount of the loss or damage.

"(ii) Whether the officer or soldier was on duty when the loss or damage was alleged to have been occasioned.

"(iii) Whether the loss or damage was occasioned by any wrongful act or negligence on the part of the officer or soldier." *K.R. (Can.) 637(b).*

"At any court of inquiry held under this regulation full opportunity must be offered to the officer or soldier concerned of being present throughout the inquiry, of making any statement, and of giving any evidence he may wish to make or give, and cross-examining any witnesses and producing witnesses in his defence." *K.R. (Can.) 637(c).*

"If it is decided to convene a court-martial in connection with the case, the district officer commanding will exercise his discretion as to whether a court of inquiry will be held or not." *K.R. (Can.) 637(d).*

"All claims for compensation will be submitted to National Defence Headquarters for decision supported by the proceedings of any court of inquiry or court-martial held in connection

therewith. Where the proceedings of a court-martial have already been forwarded to National Defence Headquarters for custody, the officer dealing with the claim at National Defence Headquarters will obtain such proceedings from the Judge Advocate-General." *K.R. (Can.) 637(e).*

ii. Loss of Small Arms. "All losses of arms including machine guns, light automatics, rifles, pistols, bayonets and swords, will be reported to district headquarters immediately they are discovered. As soon as possible after the investigation of the circumstances surrounding the loss, the district officer commanding will submit full details to National Defence Headquarters recommending how the deficiencies should be adjusted. If a court of inquiry is held, the proceedings will be submitted for National Defence Headquarters' decision." *K.R. (Can.) 638.*

iii. Explosions, Accidents and Injuries. "Should any explosion occur in any magazine, cartridge, or other explosive store, or should an accident caused by an explosion during the firing of guns, etc., and involving severe injury to personnel or extensive damage to material, happen, the district officer commanding the district in which such explosion or accident occurs will, in addition to any other procedure otherwise laid down, notify the occurrence by telegraph direct to National Defence Headquarters stating the time and place of the court of inquiry ordered to investigate the case. *K.R. (Can.) 639.*

"When an officer or soldier of the Permanent Active Militia, whether on or off duty, is maimed, mutilated, otherwise injured (except by wounds received in action) a report will be forwarded by the medical officer in charge of the case to the commanding officer concerned as soon as possible after the patient's admission to hospital." *K.R. (Can.) 640(a).*

"When an officer or soldier is injured by, or through the fault of, a civilian or civilians, any offer of compensation by way of settlement made by the person or persons causing such injury will at once be reported to National Defence Headquarters. An officer or soldier should, as soon as possible, report to his superior officer any such offer of compensation. The officer or soldier should be informed that as the acceptance by him of any such compensation might possibly jeopardize his eligibility, if any,

for disability pension he should therefore not accept any such offer pending advice from National Defence Headquarters. If a court of inquiry is held, the fact that the compensation was offered should be recorded in the proceedings." *K.R. (Can.) 640(b).*

"If the medical officer certifies that the injury is of a trivial character, unlikely to cause permanent ill effects, no court of inquiry need be held, unless considered necessary under sub-para. (d), clauses (ii), (iii) and (iv) (which follow)." *K.R. (Can.) 640(c).*

"In the following cases a court of inquiry will be assembled to investigate the circumstances:—

"(i) If the injury is fatal (unless an inquest is held) or certified by the medical officer to be of a serious nature.

"(ii) If, in the opinion of the commanding officer, doubt exists as to the cause of the injury.

"(iii) If, in the opinion of the commanding officer, it is doubtful whether the officer or soldier was on or off duty at the time he received the injury.

"(iv) In cases where for any reason it is desirable thoroughly to investigate the causes of injury.

"In cases where the injured person is a soldier the court may consist of one officer as president, with two warrant officers or senior non-commissioned officers as members." *K.R. (Can.) 640(l).*

"When no evidence as to the circumstances attending the injury, beyond that of the injured person is forthcoming, it should be so stated in the proceedings. The court will not give any opinion, but the commanding officer concerned will record his opinion on the evidence, stating whether the officer or soldier was on duty and whether to blame. The proceedings will then be sent to the district officer commanding for confirmation, and that latter will state on the proceedings whether or not he has remitted the hospital stoppages (see Pay and Allowance Regulations). In the Permanent Active Militia a record will be made on *M.F.B. 313 (6)*, by the commanding officer, that a court of inquiry has been held and also as to whether the officer or soldier was on duty and whether or not to blame. This document will then be passed to the medical officer,

who will record his opinion as to the probable effect of the injury on the future fitness for service of the injured person. Finally, the proceedings will be attached to the soldier's original attestation or, in the case of an officer, filed at National Defence Headquarters." *K.R. (Can.) 640(e).*

"The procedure set out in this paragraph will be followed with respect to officers or soldiers of the Non-Permanent Active Militia who incur or suffer any injury, disease or illness.

"(i) If the injury, disease or illness is incurred or suffered other than at a duly authorized training camp or a school established for full time courses, no report thereon will be submitted by the officer commanding unless the injury, disease, or illness was incurred on military duty. If it was incurred on military duty, the officer commanding will immediately forward to the district officer commanding a full report of the circumstances of the case, accompanied by the report of the medical officer. If in the opinion of the district officer commanding, the injury, disease or illness may have been attributable to a hazard peculiar to military service, he will at once convene a court of inquiry to investigate the circumstances of the case, and will, after recording his opinion thereon forward the proceedings to National Defence Headquarters.

"(ii) If the injury, disease or illness is incurred or suffered at a duly authorized training camp or a school established for full time courses, the procedure set out in paragraph 640 will be followed." *K.R. (Can.) 641(a).*

"For the purposes of this paragraph, (*i.e.*, *K.R. (Can.) 641*):—

"(i) 'Military duty' shall mean a duty which under military law an officer or soldier is required to perform pursuant to orders or regulations made or issued under due authority.

"(ii) 'A hazard peculiar to military service' shall not include participation by an officer or soldier in divisional, brigade or unit recreational or athletic activities, such as games, sports, races, mounted or dismounted, or mechanical transport competitions, or the proceeding to or returning from a duly authorized place of parade or training, except when the officer or soldier is part of a formed body proceeding to or returning from a training camp or school established for full time courses." *K.R. (Can.) 641(b).*

iv. Prisoners of War. "Whenever officers or soldiers are taken prisoners by an enemy, a court of inquiry under Rules of Procedure 124 and 125A, will be assembled under local arrangements to inquire into the conduct of the senior officer or soldier of the party, and, if the general officer commanding considers it desirable, into the conduct of any other officers or soldiers of the party." *K.R. (Can.) 644(a).*

"The court of inquiry will be held as soon as possible after the return of the prisoner." *K.R. (Can.) 644(b).*

"The members of the court will not themselves be sworn, but when the court is a court of inquiry on recovered prisoners of war, the members will make the following declaration:

"*I, A. B., do declare upon my honour that I will duly and impartially inquire into and give my opinion as to the circumstances in which.....became a prisoner of war, according to the true spirit and meaning of the King's Regulations for the Army on this head; and I do further declare, upon my honour that I will not on any account, or at any time, disclose or discover my own vote or opinion, or that of any particular member of the court, unless required to do so by competent authority.*" *R.P. 125A-(E).*

When a court of inquiry is held on recovered prisoners of war, the evidence will be taken on oath, in which case the court will administer the same oath or solemn declaration to witnesses as if the court were a court-martial. *R.P. 125A-(C).*

"The authority who assembled the court will, when the court is held on a returned prisoner of war, direct the court to record their opinion, whether the officer or soldier concerned was taken prisoner by reason of the chances of war, or through neglect or misconduct on his part, and the authority who assembled the court will record his own opinion." *R.P. 125A-(D).*

"When in consequence of the evidence adduced before a court of inquiry an opinion adverse to the character or military reputation of an officer or soldier is formed by the officer who determines the case so inquired into, the adverse opinion will be communicated to the officer or soldier against whom it has been given." *K.R.(Can.) 644(c).*

"The proceedings will be communicated to National Defence Headquarters". *K.R. (Can.) 644(d).*

2. COMMITTEES AND BOARDS. "Committees and boards differ only from courts of inquiry in so far as the objects for which they are assembled should not involve any point of discipline. They will follow as far as may be convenient, the rules for courts of inquiry, but are in no way bound by them." *K.R. (Can.) 629(a).*

a. Medical Boards. "A medical board is composed entirely of medical officers convened to give a technical medical opinion upon any matter referred to it." *K.R. (Can.) 630.*

b. Committees of Adjustment. "The appointment, composition and duties of committees of adjustment on the death of a person subject to military law and in certain other circumstances are governed by the instructions contained in the Departmental pamphlet 'Instructions concerning the Distribution of Estates of Deceased Officers and Soldiers of the Permanent Active Militia' and to the extent that the same are applicable in Canada by the Regimental Debts Act and the regulations under that act which are printed in Part III of the Manual of Military Law." *K.R. (Can.) 645.*

c. Officers' Meetings, Committees, etc. "Meetings of officers will be called only by the commanding officer who will be responsible that they shall be for a proper purpose." *K.R. (Can.) 646.*

"The commanding officer concerned will annually call a meeting of all his officers for the consideration of general regimental business, for the election of a regimental committee, and for the election of a band committee (if the corps has a band). Such meeting, of which fourteen days notice will be given by the commanding officer, will take place in January, February or March, or during annual training in camp, whichever time may be most convenient." *K.R. (Can.) 647(a).*

"Each committee will be composed of three officers, who will hold office for the ensuing year, or until successors are appointed." *K.R. (Can.) 647(b).*

"If a member of either committee resigns or becomes inefficient, the commanding officer will appoint a successor. Each committee will appoint one of its members to be president and another to be secretary-treasurer. The commanding officer will be ex-officio, a member of all committees." *K.R. (Can.) 647(c).*

"The secretary-treasurer of each committee will be responsible to the president for all moneys and will keep books of account showing receipts and expenditures with vouchers. These books and vouchers will be laid before the officers at their annual meeting, and at such other times as the commanding officer may direct." *K.R. (Can.) 648.*

"No expenditures forming a charge against the officers of the corps shall be incurred without the same being approved at a meeting of officers. Each committee will submit to the annual meeting of officers the following:

"(i) Statement of all moneys received and expended during the past year or since the last annual report.

"(ii) The cash balance supported by the bank pass-book.

"(iii) Statement of all liabilities chargeable against any corps funds." *K.R. (Can.) 649(a).*

"A certified copy of these statements and the proceedings of the annual meeting, will be forwarded by the commanding officer within one month after the annual meeting to the district officer commanding." *K.R. (Can.) 649(b).*

"No remuneration will be given in respect of service as a member of a regimental or band committee." *K.R. (Can.) 650.*

E. RELATION OF CIVILIAN COURTS TO MILITARY COURTS.

1. CONCURRENT JURISDICTION. The Army Act acknowledges the supremacy of the Civil Law over the Military Law; but a soldier may not be tried and punished by a civil court for such an offence "as is declared not to be a crime for the purpose of the provisions of this Act (*the Army Act*) relating to taking a soldier out of His Majesty's service." *A.A. 162(2).*

The declaration referred to, is contained in section 144 of the Army Act which reads in part as follows.

"144(1) A soldier of the regular forces shall not be taken out of His Majesty's service by a process, execution, or order of any court of law or otherwise, or to be compelled to appear in

person before any court of law, except in respect of the following matters, or one of them; that is to say,

"(a) On account of a charge of a conviction for crime; or

"(b) On account of any debt, damages, or sum of money, when the amount exceeds thirty pounds over and above all costs of suit.

"(2) For the purposes of this section a crime shall mean a felony, misdemeanor, or other crime or offence punishable, according to the law in force in that part of His Majesty's Dominions in which such soldier is, with fine or imprisonment or some greater punishment, and shall not include the offence of a person absenting himself from his service, or neglecting to fulfil his contract, or otherwise misconducting himself respecting his contract.

"(3) For the purposes of this section a court of law shall be deemed to include a court of Summary Jurisdiction and any magistrate."

The exemption in this section does not apply to a soldier required to attend as a witness before a court of law; neither does the section apply to an officer.

"If a person sentenced by a court-martial in pursuance of this Act to punishment for an offence is afterwards tried by a civil court for the same offence, that court shall, in awarding punishment, have regard to the military punishment he may have already undergone." *A.A. 162(1).*

"Where a person subject to military law has been acquitted or convicted of an offence by a competent civil court, he shall not be liable to be tried in respect of that offence under this Act." *A.A. 162(6).*

In respect of an offence triable by both courts the offender's rights depend upon which court tries him first. If he is tried first by a civil court, his conviction or acquittal will preclude another trial by a military court for the same offence. If he is tried first by a military court, and convicted or acquitted, he may be tried, nevertheless, again, by a civil court for the same offence. If convicted at the first trial by the military court, his punishment must be taken into consideration by the civil court when sentencing him on his second trial for the same offence. But, if on

his second trial for the same offence for which he has been convicted by the military court, he is acquitted by the civil court, it appears that the law gives him no redress. There is no authority entitling him to recover any stoppages incurred during his detention or any damages on account thereof, or even for releasing him from detention. In practice, however, if he has not yet finished serving the sentence imposed upon him by the military court upon his first trial, his subsequent acquittal by the civil court, probably, would result in his immediate release from custody, by the exercise of official discretion.

The case of a non-commissioned officer is anomalous. His conviction by a civil court would preclude his trial again by a military court for the same offence; but nevertheless, he becomes liable to an additional military punishment, even without a military trial, under the authority of *K.R. (Can.) 485*, which reads as follows: –

"485. When a non-commissioned officer is convicted by the civil power for any offence, the case will, with whatever recommendations the commanding officer sees fit to make, be reported to the district officer commanding, who will, should he consider it desirable to recommend the reduction of the offender, report accordingly to National Defence Headquarters."

2. SUPERVISORY POWER. While there is no right of appeal, in the ordinary sense of the term, to the civil courts, from the judgment or award of a military tribunal, nevertheless, military tribunals are, to some extent, subject to control and supervision by superior civil courts. The proceedings by which such control and supervision are exercised may be either criminal or civil.

The right of a person subject to military law to invoke the aid of the civil courts to redress grievances arising out of his service as an officer or soldier, or out of the authority exercised over him by his superiors, has been stated by the court to be embodied in the following three principles, namely:—

(i) If the rights which an officer or soldier is seeking to enforce are given to him, not by the common law, but only by military law—if, for example, they concern only his rank, promotion or emoluments—it may well be that he can seek his remedy in the military code alone;

(ii) If such rights are fundamental common law rights—such as immunity of person or liberty—then, save in so far as they are taken away by military law, they may be asserted in the ordinary courts;

(iii) In the case of such fundamental rights, distinction is to be drawn between acts done in excess of or without jurisdiction, and acts within jurisdiction but maliciously. First, a military tribunal or officer would be liable to an action for damages, if and when acting in excess of or without jurisdiction, it or he does, or directs to be done, to a military man, whether officer or private, an act which amounts to assault, false imprisonment or other common law wrong, even though the injury purports to be done in the course of actual military discipline. Secondly, if the act causing the injury to person or liberty be within jurisdiction and in the course of military discipline, no action will lie upon the ground only that such act has been done maliciously and without reasonable and probable cause.

The jurisdiction of any tribunal may be limited by conditions as to its constitution, as to the persons whom or the offences which it is competent to try, and as to the sentences which it is empowered to award, or by other conditions which the law makes essential to the validity of its proceedings and judgments. If it fails to observe these essential conditions, it acts without jurisdiction, or in excess of jurisdiction as the case may be.

a. Criminal Court Proceedings. Criminal proceedings might take the form of a prosecution, or an indictment on a criminal charge such as assault, manslaughter or murder.

With respect to the question how far a defect in the jurisdiction or procedure of the court by whom sentence is given, may render the court criminally responsible, there is but little to be found in books. There appears, however to be authority for the following propositions

(i) If such a court acts without jurisdiction, or colour of jurisdiction, ITS PROCEEDINGS ARE A NULLITY; and its members are just as liable as any other wrong doers, to criminal prosecution for their acts and, in strictness of law, might be guilty, as accessories to murder, in the case of an execution ordered by them.

(ii) If such a court acts erroneously, either with jurisdiction, (*e.g.*, by passing an erroneous sentence), or even without jurisdiction, but with colour of jurisdiction, (*e.g.*, under such a writ or commission as might be issued lawfully but is irregular), ITS PROCEEDINGS ARE NOT A NULLITY, but are merely voidable; and its members are not liable to criminal prosecution for any such erroneous acts.

b. Civil Court Proceedings. Civil court proceedings (the term "Civil" is used here in contradistinction to the term "Criminal") may be either preventive, (*i.e.* to restrain the commission or continuance of an injury), or remedial (*i.e.* to give a remedy for an injury actually suffered). Broadly speaking, the civil jurisdiction of the courts of law is exercised against a court-martial as a tribunal, in applications for prerogative writs (mandamus, prohibition *certiorari* and *habeas corpus*) and against individual officers, in actions for damages.

i. Mandamus. The writ of Mandamus is a command issuing from the High Court of Justice directing some person or inferior court to do some particular act which is in the nature of a public duty. There must be a specific legal right to have the act performed, and there must be no other equally convenient and effectual remedy available. There is no record of an application for a mandamus to a court-martial.

ii. Prohibition. The writ of prohibition issues out of the High Court of Justice to any inferior court which concerns itself with any matter not within its jurisdiction, or transgresses the bounds prescribed to it by law. It forbids the inferior court to proceed further in the matter, or to exceed the bounds of its jurisdiction, and if want of jurisdiction in the inferior court be once shown, any person aggrieved by the usurpation of jurisdiction is entitled to the writ as a matter of right. The writ will not be granted for irregularity in the proceedings or wrong decision of the merits; or when it can be of no use, as, for example, after a sentence has been carried into execution. Prohibition applications to restrain a court-martial have hitherto been few and for technical reasons uniformly unsuccessful.

iii. Certiorari. *Certiorari* is a writ issuing to the judges or officers of inferior courts, commanding them to certify and return

the record of a matter, (*e.g.* a conviction or order), depending before them, to the end that more sure and speedy justice may be done. If the conviction or order of the inferior court is found to be bad in law, it will be quashed.

In the case of inferior civil courts, if absence or excess of jurisdiction is shown, the writ is issued on the application of the person aggrieved almost as a matter of course, unless he has by his conduct precluded himself from taking an objection. As the law is at present understood, in the case of a court-martial sentence, it will issue only when the rights affected by the judgment of the court are civil rights, and not when they are dependent on military status and military regulations.

iv. Habeas Corpus. Any person who is detained in what he conceives to be illegal custody by order of a court-martial or other military authority can apply for a writ of *habeas corpus*.

This writ is the most celebrated writ in English law, being the constitutional remedy for a person wrongfully deprived of his liberty. It is addressed to the person who detains another in custody, and commands him to produce and "have the body" of the prisoner before the court to "undergo and receive" whatever the court considers proper. The person to whom it is addressed must make a "return" to the writ stating why he holds the person in custody; and upon consideration of such return the prisoner is either discharged, or, if the return shows sufficient cause for detention in custody, is remanded to custody or admitted to bail.

The court, upon *habeas corpus* proceedings, do not retry the case, for they do not sit as a court of appeal to consider whether an inferior court has decided rightly or wrongly upon some point, the decision of which has been entrusted to them. Broadly speaking, the question is whether the document, under which the custodian justifies his act, is a valid one. It is enough if the sentence is pronounced by a court of competent jurisdiction to inquire into the offence, and with the power to inflict such a sentence. Neither will the court give effect to technical objections to the form of a commitment warrant. It will go behind the commitment and see whether there is a valid conviction; if so, a flaw in the commitment is immaterial; and the

Army Act (section 172 (4)) contains an express provision which practically precludes a prisoner from obtaining his release by *habeas corpus* on the ground of errors and informalities, so long as there is a valid conviction and sentence against him.

To sum up, the High Court will look to see whether the inferior court had jurisdiction, and whether its proceedings are, upon their face, regular and according to law, but it will not consider whether that tribunal has correctly decided some question of law or fact which it was its duty to decide—unless there was before it no evidence at all to support its decision.

Proceedings by *habeas corpus* are not of course, restricted to cases where there has been a conviction. For instance, the writ may issue where a man is detained for an unreasonable length of time without being brought to trial (for example, when remanded by one court for trial for another). Neither a prisoner of war nor an alien internee can obtain a writ of *habeas corpus*.

v. Actions for Damages. It is a general rule that magistrates and others, who acting without jurisdiction, or in excess of their jurisdiction, violate the personal rights of any person by causing his arrest, or imprisonment, or otherwise, are liable to an action for damages. It is now recognized that the same general rule applies to officers and members of a court-martial, where a person's common law rights are infringed. Members of a court-martial who try a person, not subject to military law, or for an act which is not an offence cognisable by them, or who pass a sentence which they have no right to pass, and the officer who confirms the proceedings, are all liable to an action for damages at the suit of the person so aggrieved. So, too, are individual officers who transgress the bounds of their lawful authority.

Members of a court-martial, like civil judges and magistrates, cannot be made responsible for mere errors of judgment in deciding points which it is their duty to adjudicate. On the other hand, if an act is in itself unlawful—as being done without, or in excess of, jurisdiction—*bona fides* and honesty of purpose are no excuse.

CHAPTER VI

EVIDENCE.

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The limited scope and purpose of this book permitted only a short sketch of the important subject of evidence. This chapter, therefore, contains (in many cases, in the language of accepted legal reference books), only a bare enumeration, and brief discussion, of the more important rules of evidence, familiarity with which, it is hoped, will enable the reader who may be unfamiliar with court procedure, when called upon to take part in military trials, to do so creditably and with some confidence. The student who desires to expand his field of study, or who is called upon to deal with any particular problem not dealt with in this chapter, is referred to the standard legal text books and the authorities therein cited.

A. GENERALLY.

1. "EVIDENCE" and "PROOF". In its colloquial connotation, the word "evidence" may be interpreted to include anything, however ascertained, upon which the judgment of any person is based; and, the establishment, to the satisfaction of any person, of any fact, by means of "evidence" of that description, constitutes "proof" of that fact. Of course, in law, both these terms, necessarily, have a more exact and a much narrower meaning. Since a person is bound by, and must obey, the judgment of a judicial tribunal acting with jurisdiction,—and his property, or his liberty, or even his life, may be placed in jeopardy as a result of the evidence adduced before such a tribunal,—special rules, in the interests of justice, have been adopted for his protection, limiting the nature of the evidence which may be adduced, prescribing the methods in which and the conditions under which it may be given and received, and defining the nature the quality and the amount of evidence which may be accepted by a judicial tribunal as "proof". These special rules are the subject of the discussion in this chapter.

2. RULES APPLICABLE TO COURTS-MARTIAL. Subject only to a few substantive modifications contained in military statutes, the rules of evidence applicable to courts-martial are the same as those applicable at criminal trials, which, of course, afford a much larger measure of protection to the accused person, than is available to litigants in ordinary civil litigation. The rules of evidence applicable to courts-martial are prescribed, in part, by the following sections of the Army Act and of the Rules of Procedure.

"A court-martial under this Act shall not, as respects the conduct of its proceedings, or the reception or rejection of evidence, or as respects any other matter whatsoever, be subject to any Act, law or ordinance of any legislature or authority whatsoever other than the Parliament of the United Kingdom." *A.A. 127.*

"The rules of evidence to be adopted in proceedings before courts-martial shall be the same as those which are followed in civil courts in England, and no persons shall be required to answer any question or to produce any document which he could not be required to answer or produce in similar proceedings before a civil court." *A.A. 128.*

"A court-martial shall not receive evidence for the prosecution which is not relevant to the facts stated in the statement of particulars in the charge, or any evidence which is not admissible either according to the rules of civil courts in England, or under the Army Act, or under any other Act of the Parliament of the United Kingdom." *R.P. 73 (A).*

"The rules of evidence adopted in civil courts in England, including those contained in the Criminal Evidence Act, 1898, will be followed by courts-martial, and objections to any question to a witness or to the admission of any evidence may be made accordingly, and a person will not be required to answer any question or produce any document which he could not be required to answer or produce in a like proceeding before a civil court in England." *R.P. 73 (B).*

3. TO SUPPORT A CONVICTION. A charge must contain allegations of all the facts essential to constitute a specific offence against a specific enactment. The accused can be tried only upon the charge brought: and, generally speaking, what must be proven against him to support a conviction, is the truth of all such essential allegations. The reason for this is, of course, the unfairness of calling upon an accused to meet a charge for which he is not prepared. The accused will be convicted—

a. Upon the Offence as Charged, upon proof of all the essential allegations. If any allegations of unessential facts are made, they will not require proof to support a conviction, and may be rejected as redundant.

b. Upon the Offence Charged, with a 'Special Finding'. "Where the court are of opinion as regards any charge that the facts which they find to be proved in evidence differ materially from the facts alleged in the statement of particulars in the charge, but are nevertheless sufficient to prove the offence stated in the charge, and the difference is not so material as to have prejudiced the accused in his defence they may, instead of a finding of Not Guilty, record a special finding." *R.P. 44 (D).*

"The special finding may find the accused guilty on a charge subject to the statement of exceptions or variations specified therein. *R.P. 44 (E).*

Such a special finding relates only to the particulars of the charge, and not to the statement of the offence. Before recording a special finding, the court must be satisfied that the facts which they find to be proved, subject to certain exceptions and variations, amount to the substance of the charge, otherwise they must acquit. *R.P. 44, note 6.*

c. Upon an Offence other than the Offence Charged. Where the evidence fails to support a conviction upon the offence charged but would support a conviction upon another offence, the difference between the two being one of degree and not of kind, or merely technical or only a matter of description, the accused in some cases may be found guilty of such other offence, although not so charged. The Army Act provides that

"(1) An accused charged before a court-martial with stealing may be found guilty of embezzlement or of fraudulently misapplying property.

"(2) An accused charged before a court-martial with embezzlement may be found guilty of stealing or fraudulently misapplying property.

"(3) An accused charged before a court-martial with desertion may be found guilty of attempting to desert or of being absent without leave.

"(4) An accused charged before a court-martial with attempting to desert may be found guilty of desertion or of being absent without leave.

"(4A) An accused charged before a court-martial with striking may be found guilty of using or offering violence.

"(4B) An accused charged before a court-martial with using violence may be found guilty of offering violence.

"(4C) An accused charged before a court-martial with using threatening language may be found guilty of using insubordinate language.

"(5) An accused charged before a court-martial with any offence under this Act may, on failure of proof of an offence being committed under circumstances involving a higher degree of punishment, be found guilty of the same offence as being committed under circumstances involving a less degree of punishment.

"(6) Where an accused is charged before a court-martial with a civil offence and the charge is one upon which if he had been tried by a civil court in England for such an offence committed in England he might have been found guilty of any other offence, the court-martial shall have power to find him guilty of that offence." *A.A. 56.*

4. BURDEN OF PROOF. In adducing the evidence, it is incumbent on the prosecution to prove the commission of the offence and to connect the accused therewith. He cannot look to the accused for assistance, for the accused is at liberty to refuse to testify on his own behalf or to submit himself to examination. He is presumed to be innocent until he is proven guilty by evidence adduced at the trial by the prosecution; and his failure to testify on his own behalf will not be treated as evidence of his guilt. Many an innocent and absolutely honest man would be a timid, hesitating or otherwise unsatisfactory witness, and might very well make a poor impression on the court and be prejudiced at his trial, by his inability to satisfy the court that he was telling the truth, the whole truth and nothing but the truth. Such a man might be well advised not to testify on his own behalf.

However, when the subject matter of some allegation made by the prosecution is peculiarly within the knowledge of the accused, and the prosecution, though not able strictly to prove the allegation, is able to adduce evidence, (such as e.g., of the conduct of the accused), from which an inference of the guilt of the accused reasonably may be drawn, the court may accept such evidence as justifying a conviction, in the absence of an explanation by the accused. Such charges as, "leaving a post without orders," or "releasing a person without authority," or "being absent without leave," suggest possible examples of such cases.

B. ADMISSIBILITY OF EVIDENCE.

The legal rules of evidence are, largely, exclusionary in character. Certain facts and circumstances which, in ordinary affairs, might well be accepted and used as bases for inferences and judgment, would be rejected and could not so be used by a court at a trial. Accordingly, evidence offered at a trial, may be objected to as inadmissible on the grounds, principally, of

irrelevancy, immateriality, or incompetency: and the evidence will not be admitted if any one of these objections is well founded. To decide upon whether evidence is admissible or inadmissible is the function of the court.

1. IRRELEVANCY. There is no exact test which may be applied to evidence, so as to settle whether it is relevant or irrelevant. The word relevant is derived from the French word "*reliever*", which means "to assist": and it would not be incorrect to say that, if the evidence offered is not of such a kind as will assist in arriving at the truth, it is irrelevant and inadmissible. There will be considerable difference of opinion, however, upon the question of what evidence comes within the foregoing description. The matter in issue at the trial, is the question of the guilt or innocence of the accused upon the offence charged; and, unless the evidence directly touches upon that issue, it is irrelevant and, of course, inadmissible. The rules of evidence are founded on the rules of logic, modified, in the interests of justice, by the lessons of judicial experience. Subject to some exceptions, the law recognizes, as admissible, therefore, evidence of all facts which are logically relevant. The burden of showing the relevancy of the evidence proposed to be adduced, is upon the person offering it, and the duty and the power of deciding whether or not such evidence is relevant, is in the court. In each case, the court, in deciding upon the question of relevancy, must be guided by common sense and experience.

a. Examples of Relevant and of Irrelevant Evidence. An enumeration of some classes of relevant and of irrelevant evidence will assist in indentifying and distinguishing them.

(1) All the details of the offence charged, and all the facts which affirmatively prove that the offence charged was committed and that the accused was the person who committed it, are in issue and, of course, relevant.

(2) If connected with the issue—but with some exceptions—all acts done, and all oral or written statements made, by the accused, or by any other person in his presence, or by his authority in his absence, whether at the time of, or before, or after the alleged offence, are relevant.

(3) The credibility or impartiality of any witness who gives evidence, and his connection, if any, with the person for whom he gives evidence, are all matters which are relevant.

(4) Subject to some exceptions, evidence, ON BEHALF OF THE PROSECUTION, that the accused is of bad character, or that he has formerly committed offences of the same kind as the offence charged, is not relevant.

(5) In cases, however, where a guilty knowledge or intention or design is of the essence of the offence charged, evidence that the accused did other acts similar to those which form the basis of the charge, is relevant (not to prove that the accused did the acts which form the basis of the charge, but) to show that, if he did such acts, he did them intentionally, and not accidentally or innocently.

(6) Evidence, ON BEHALF OF THE ACCUSED, of his good character, if touching on the particular charge, may tend to show the unlikelihood of his committing such an offence as the one charged and, therefore, is relevant.

(7) When evidence has been adduced, ON BEHALF OF THE ACCUSED, of his own good character, (and he may do this by means of cross-examination of witnesses for the prosecution), his character becomes a matter relevant to the issue; and, consequently, in most cases, any evidence, ON BEHALF OF THE PROSECUTION, of the bad character, or of a previous conviction of the accused, becomes relevant.

(8) The fact that the accused has induced, or has attempted to induce, a witness to testify falsely on his behalf, is relevant.

2. IMMATERIALITY. It is not sufficient that the evidence proposed to be adduced should be logically relevant. The practical conditions under which cases are tried, do not permit the court to spend time listening to unimportant facts, even though they may be logically relevant to the issue. They should also be "legally" relevant, *i.e.*, "material". The rule may be stated to be that whenever the court feels that the facts offered in proof are of too little weight to warrant their introduction and consideration, either because too remote in time, or too uncertain, or too conjectural in their nature, the court, in the exercise of a sound discretion, notwithstanding the logical relevancy of such

facts, may reject the evidence thereof as immaterial. *22 Corpus Juris, pp. 443-6.*

3. **INCOMPETENCY.** Evidence will be rejected if it is of such a character that, properly, it should not be received in a court of justice, even though it may be both relevant and material. The objection is that such evidence is "incompetent". Evidence is not incompetent merely because it is weak, and even strong evidence may be incompetent. The quality of incompetency goes to the character of the evidence offered, rather to its weight or to the facts which are sought to be proved thereby. A consideration of a number of well settled rules will indicate the classes of evidence which, most frequently, are the subject of objection for incompetency. These rules are as follows:

a. The Rule as to Primary Evidence. Primary evidence is evidence of the most reliable character which it is in the power of the proponent to produce. It is sometimes called "best evidence". The rule may be expressed to be "that the best evidence must always be given; in other words, the evidence which affords the greatest certainty of the facts in question. The reasons for this rule are sufficiently obvious. Why should a litigant tender evidence less direct and consequently less convincing than other existing and attainable evidence unless for some reason which would make it improper for the court to receive it? Thus, if a fact is to be proved by oral evidence, it is obvious that the evidence must be that of a person who has directly perceived the fact to which he testifies. Equally, if something is alleged to have been seen, the evidence must be that of the person who says he saw it; if heard, that of the person who says he heard it; otherwise it would be impossible to test by cross-examination the truth of the testimony, and the law rejects evidence which cannot be adequately tested. Similarly, where the transaction sought to be proved is primarily evidenced by a writing, as in the case of a written contract, the writing, if it exists and is obtainable, must be produced. It is again obvious that it would be improper for the court to rely upon a possibly imperfect copy of an original when the original itself can be produced, or to accept the recollection of witnesses which may be faulty, as to the contents of a document, when the document can itself be referred to . . . The rule as to the production of the best evidence is inflexible and the mind of the court is invariably alert to discover, when evidence of an alleged fact is tendered, whether it is not within the power of the persons tendering it to produce better evidence of the same fact, and if the court is satisfied that better evidence can be produced it will insist . . . upon the production thereof." *13 Halsbury, pp. 421-2.* The rule as to primary evidence is broad and comprehensive, and the rules which follow are really subdivisions thereof.

b. The Rule as to Secondary Evidence. Sometimes it is impossible to produce the best or primary evidence. In such an event, under certain conditions, secondary evidence will be accepted. "In the unavoidable absence of the best or primary evidence the court will accept what is known as secondary evidence. Secondary evidence is evidence which suggests, on the face of it, that other and better evidence exists. It follows that it will never be received until the party tendering it proves that it is out of his power to obtain the best evidence. The fact that secondary evidence is receivable is sometimes stated as forming an exception to the rule which provides that the best evidence alone can be given. This is an error, so far from forming an exception to the rule, it is the logical outcome of it, for, as secondary evidence may only be given when the party tendering it has proved that primary evidence is not obtainable, the secondary evidence becomes the best which the court can procure and consequently satisfies the rule." *Ibid. p. 422.* The rule as to secondary evidence is confined to written documents or things upon which sometimes is written, printed or engraved, and secondary evidence thereof will be admitted only "when the written document is lost or destroyed or is in the possession of the adverse party, who does not produce it after being served with a proper notice to produce, or is in the possession of a person who is privileged to withhold it and who insists on his privilege, or where the production of the document would be physically impossible or highly inconvenient, or where the document is of a public nature and some other mode of proof has been specially substituted." *9 Halsbury, p. 390.*

i. Documents in Possession of Accused. Since the accused cannot be compelled to give evidence against himself, he cannot be ordered to produce documents in his possession

or under his control to be used as evidence against him. But if the prosecution requires such a document at the trial, a notice to produce it at the trial may be served upon the accused; and if the accused fails or refuses to produce it, and if proof is given tracing the document to his possession or to the possession of his solicitor, servant or agent, and that the notice to produce was served, secondary evidence of the document may be given.

ii. Official Documents. Sections 163 and 165 of the Army Act prescribe the manner of proving certain official documents and, as well, enumerate the facts deemed to have been proven by their production. These two sections are as follows:—

"163. (1) The following enactments shall be made with respect to evidence in proceedings under this Act, whether before a civil court or a court-martial; that is to say,

"(a) The attestation paper purporting to be signed by a person on his being attested as a soldier, or the declaration purporting to be made by any person upon his re-engagement in any of the regular forces, or upon any enrolment in any branch of His Majesty's service, shall be evidence of such person having given the answers to questions which he is therein represented as having given. The enlistment of a person in His Majesty's service may be proved by the production of a copy of his attestation paper purporting to be certified to be a true copy by the officer having the custody of the attestation paper without proof of the handwriting of such officer, or of his having the custody of the paper:

"(b) A letter, return, or other document with respect to a person—

"(i) having, or not having, at any time or times served in, or been discharged from, any part of His Majesty's forces (including any Dominion force); or

"(ii) having, or not having, held any rank or appointment in, or been posted or transferred to, any part of such forces, or having, or not having, served in any particular country or place; or

"(iii) being, or not being, authorised to use or wear any military decoration, medal, medal ribbon, badge, wound

stripe or emblem, the use or wearing of which by an unauthorised person is under this Act an offence,

if purporting to be signed by or on behalf of a Secretary of State or on behalf of the Army Council, the Admiralty, or the Air Council, or by the commanding officer or the officer having the custody of the records of any portion of those forces, or of any of His Majesty's ships to which such person appears to have belonged, or alleges that he belongs or had belonged, shall be evidence of the facts stated in such letter, return or other document:

"(c) Copies purporting to be printed by a Government printer of King's regulations, or regulations referred to in section one hundred and forty-two of this Act of royal warrants, of army circulars or orders, and of rules made by His Majesty, or a Secretary of State or the Army Council, in pursuance of this Act, shall be evidence of such regulations, royal warrants, army circulars or orders, and rules:

"(d) An army list or gazette purporting to be published by authority, and either to be printed by a Government printer or to be issued, if in the United Kingdom, by His Majesty's Stationery Office, and if in India, by some office under the Governor-General of India, and if in Burma, by some office under the Governor of Burma, shall be evidence of the status and rank of the officers therein mentioned, and of any appointment held by such officers, and of the corps or battalion or arm or branch of the service to which such officers belong:

"(e) Any warrants or orders made in pursuance of this Act by any military authority shall be deemed to be evidence of the matters and things therein directed to be stated by or in pursuance of this Act, and any copies of such warrants or orders purporting to be certified to be true copies by the officer therein alleged to be authorised by a Secretary of State or the Army Council to certify the same shall be admissible in evidence:

"(g) Where a record is made in one of the regimental books in pursuance of any Act or of the King's regulations, or otherwise in pursuance of military duty, and purports to be signed by the commanding officer or by the officer whose duty it is to make such record, such record shall be evidence of the facts thereby stated:

"(h) A copy of any record in one of the said regimental books purporting to be certified to be a true copy by the officer having the custody of such book shall be evidence of such record:

"(i) A descriptive return within the meaning of this Act, purporting to be signed by a justice of the peace, shall be evidence of the matters therein stated:

"(j) Where the proceedings are proceedings against an officer or soldier on a charge of being a deserter or absentee without leave, and the officer or soldier has surrendered himself into the custody of a provost marshal, assistant provost marshal or other officer, or any portion of His Majesty's forces, a certificate purporting to have been signed by such provost marshal, assistant provost marshal or other officer, or by the commanding officer of the portion of His Majesty's forces to whom the surrender was made, and stating the fact, date, and place of such surrender shall be evidence of the matters so stated:

"(k) Where the proceedings are proceedings against an officer or soldier on a charge of being a deserter or absentee without leave, and the officer or soldier has been delivered into military custody by a police officer in charge of a police station in the United Kingdom, a certificate purporting to be signed by such police officer, and stating the fact, date, and place of the surrender of the officer or soldier shall be evidence of the matter so stated:

"(l) Any document which would have been admissible in any proceeding under the Air Force Act by virtue of section one hundred and sixty-three of that Act shall in like manner and for the same purpose be admissible in evidence under this Act:

"(m) Where an officer or soldier has been apprehended and on arrest taken to a police station in any place in any part of His Majesty's dominions, or has on surrender been taken into custody at any such police station, then, for the purpose of any proceedings against that officer or soldier, a certificate purporting to be signed by the police officer in charge of that police station, stating the fact, date, and place of arrest or surrender, shall be evidence of the matters so stated.

"(2) For the purposes of this Act the expression 'Government printer' means any printer to His Majesty, and in India or Burma any Government press."

"165. The original proceedings of a court-martial, purporting to be signed by the president thereof and being in the custody of the Judge Advocate General, or of the officer having the lawful custody thereof, shall be deemed to be of such a public nature as to be admissible in evidence on their mere production from such custody; and any copy purporting to be certified by such Judge Advocate General or his deputy authorised in that behalf, or by the officer having such custody as aforesaid, to be a true copy of such proceedings or of any part thereof, shall be admissible in evidence without proof of the signature of such Judge Advocate General, deputy, or officer; and a Secretary of State upon production of any such proceedings or certified copy, may, by warrant under his hand, authorise the offender appearing therefrom to have been convicted and sentenced to any punishment, to be imprisoned and otherwise dealt with in accordance with the sentence in the proceedings or certified copy mentioned."

c. The Rule as to Hearsay Evidence. The rule as to best evidence lays it down that second-best evidence shall not be produced if better evidence can be found. The rule as to hearsay goes a step further, and says that in certain classes of cases second-best evidence shall not be produced in any circumstances. The term "hearsay" is primarily applicable to what a witness has heard another person say with respect to facts in dispute. But it is extended to all statements whether reduced to writing or not, which are brought before the court, not by the authors of the statements, but by persons to whose knowledge the statements have been brought.

"As a general rule, statements made by persons not called as witnesses are inadmissible to prove the truth of the facts stated. The term 'hearsay' in the present connection, imports a purpose, not a quality. A statement is hearsay if rendered to prove the truth of the facts asserted; it is original, or circumstantial, evidence if its materiality depends on the fact that it was made, and not on the fact that it was true. This main test or distinction, if carefully borne in mind, will suffice to obviate many of the difficulties occurring in the law of evidence.

. . . The reasons usually advanced for the rejection of hearsay evidence are numerous, chief among them being—the irresponsibility of the original declarant, the depreciation of truth in the process of repetition, the opportunities for fraud its admission would open, and the waste of time involved in listening to idle rumor. In strictness, however, only two objections appear to be essential and decisive, namely, the absence of an oath and the deprivation of cross-examination." *13 Halsbury, pp. 455-6.*

The rule as to hearsay, in its narrower sense, may be stated to be that no statement with reference to a person charged with an offence, relative to the charge, made in his absence, can be received in evidence against him. It is, however, subject to *EXCEPTIONS*, some of which are as follows:—

i. Statements made in the Presence of Accused. A statement made in a man's presence and hearing, accusing him, expressly or impliedly, of having committed a crime, is evidence against him of the truth of the allegation or suggestion so far, but only so far as, by words or demeanour (including his silence if the occasion calls for a reply), he accepts the statement so as to make it his own. In strict law the prosecution may put such statement before the court, together with the evidence of the accused's behaviour on hearing it—even if such behaviour was a plain denial—and leave it to the court to decide whether he accepted it or not; but in practice, courts do not allow such a statement to be proved, unless they see some evidence that the accused did accept it. In a trial by court-martial, if the accused, when he heard the statement made, merely denied it, or said or did nothing which could reasonably be construed as an acceptance of it, the court ought to reject the whole of the statement, and pay no attention to it.

ii. Statements forming Part of Res Gestae. "In any particular case submitted to judicial investigation, the nature of the right or liability asserted involves consideration by the tribunal of a certain number of principal facts, the happening of which extends over a definite period of time and directly determines the existence of the right or liability. This collection of primary facts constituting the necessary and immediate field of a judicial inquiry has been designated as the *res gestae*. The term

'*res gestae*' has, however, been given a greatly extended application, and has been defined as 'those circumstances which are the undesignated incidents of a particular litigated act and which are admissible when illustrative of such act'. It has been made to embrace all facts which are relevant to the principal fact in any degree . . . although the facts covered by this extended definition may be attendant or explanatory circumstances involving no idea of action, or may be prior or subsequent to the happening of the primary fact, even by a considerable length of time, and although the facts may have happened at a different place from that at which the primary occurrence took place, or the acts may have been done by others than the principal participants. The term has also been extended to cover the admissions of a party or his agents, statements indicative of a relevant mental state, and facts which tend to establish liability by showing acts done on other distinct occasions as being part of a consistent plan of operation . . . The rule is, therefore, that where the making of a statement in controversy, or the doing of an act, assists in constituting the transaction or in proving, *per se*, a relevant fact, the declaration or act is competent." *22 Corpus Juris, pp. 443-6.*

iii. Dying Declarations. Dying declarations are admissible only in trials for murder and manslaughter. In such trials, a declaration made, before his death, by the person killed, as to the cause of his death, or as to any of the circumstances of the transaction or conduct which resulted in his death, is admissible in evidence if it is proved that the declarant, at the time of making the declaration, had abandoned all hope of living and was expecting to die within a very short time, though not necessarily immediately. Dying declarations are admissible in evidence only when the death of the deceased is the subject of the charge and the cause of the dying declaration. The grounds of admission are (1) necessity, since if the evidence of the victim were excluded, such crimes might often go unpunished; and (2) the sense of impending death which supplies the most potent of all incentives to speak the truth.

iv. Statements made by a Person, since deceased, against his Pecuniary or Proprietary Interest. Such a statement, whether written or oral, is admissible. If it is admitted, the whole of the statement of which it forms a part becomes admissible.

The expressions "pecuniary" and "proprietary" must be strictly construed, and a declaration tending to show that the declarant had committed a crime or to expose him to penal action would not be considered a declaration against his pecuniary or proprietary interest. The statement must have been against interest at the time it was made; it is not sufficient that it might possibly turn out to be so afterwards. And such statements are admissible even though the declarant had no personal knowledge of the facts and although he might even have had an interest to misstate the facts. Such circumstances affect the weight, not the admissibility, of the evidence.

v. Statements made by a Person, since deceased, in the Course of Duty. Statements made by a deceased person in the course of his duty and in the ordinary routine of his business are admissible in certain circumstances. To be admissible on this ground a statement must (a) relate to some act or transaction performed by the person making it in the ordinary course of his business and duty; (b) be made in the ordinary course of his business under a duty to make it; and (c) be made at or near the time at which the act or transaction to which it relates was performed. The statement must not only relate to some act done by the person making it, but must be made by him in performance of a duty to make it. The rule as to statements made in the course of duty differs from that regulating the admissibility of statements against interest in two important particulars: (1) they must be contemporaneous—that is, they must be shown to have been made at or near the time when the transaction they record was performed; and (2) they are admitted as evidence only if the particular fact or facts which the person making them was under a duty to state or record, and their admission does not extend to any other facts stated or recorded, however closely such facts may be connected with the admissible portion of any statement. If the above conditions are fulfilled, it is immaterial whether the statements sought to be proved were made orally or in writing. *13 Halsbury, pp. 464-7.*

vi. Statements in Public Documents. Such statements "are received to prove the facts stated, on the general grounds that they were made by the authorised agents of the public, in the course of official duty, and respecting facts which

were of public interest, or required to be recorded for the benefit of the community . . . Statements contained in any public statute, Speech from the Throne, royal proclamation, parliamentary journal, Government gazette, or State paper, are admissible, even against strangers, to prove facts of a public, but not of a private, nature. Such statements, however, unless otherwise provided, are only *prima facie*, and not conclusive, evidence of the facts asserted. Entries in public registers are evidence of the facts recorded, even against strangers, provided the book was required by law to be kept for public reference, and the entries were made promptly, by the proper officer. There must be a public duty to keep the register, and the information must be required to be preserved for the public use and benefit; registers kept under private authority, or for the benefit or information merely of private individuals, are inadmissible . . . Certificates by public officers, duly authorised by law for the purpose, are in certain cases receivable in proof of the facts certified . . . By statute, also, various matters are provable by certificates of public officers, such documents being rendered in some cases conclusive, but in general only *prima facie*, evidence of the facts certified, and of the necessary preliminaries having been performed." *Ibid. pp. 472-7.*

vii. Admissions and Confessions. "All statements relevant to the issue which are made by a party can be proved in evidence against the party who made them, unless they are privileged from disclosure, subject to this exception, that admissions or confessions of guilt made by a defendant before his trial can only be proved against him, if they were made freely and voluntarily, *i.e.*, without being induced by hopes held out or fear or threats caused or used by a person in authority. In giving evidence of such admissions or confessions it lies upon the prosecution to prove affirmatively to the satisfaction of the judge who tries the case that such admissions were not induced by any promise of favor or advantage or by the use of fear or threats or pressure by a person in authority. By a person in authority is meant any magistrate or other officer or person having custody of the defendant, the prosecutor and any person acting on behalf of the prosecutor for the purpose of having the defendant in custody or preferring a complaint against him. If the inducement is

made by a person not in authority in the presence of a person in authority, and is acquiesced in by the person in authority, the confession made in consequence of such an inducement is just as inadmissible as if it had been made by the person in authority. An inducement made not to the accused himself, but to someone else, with the expectation that it will be communicated to the accused, may have the effect of making a confession inadmissible, unless it is shown that the confession was not brought about by the inducement. It is for the judge in each case to decide whether on the facts the confession is or is not admissible. A defendant may be convicted on his own confession without any corroborating evidence. A statement made by another person by the authority of the prisoner is evidence against the prisoner as much as if he had made the statement himself . . . If evidence of a confession by an accused person is given on behalf of the prosecution, the whole of the confession must be used; the prosecution must take the whole of it together, and cannot select one part and leave another. But if part of a statement tends to show the guilt of the accused and part of it to show his innocence" *the court may, if it chooses,* "believe the part which is against him and disbelieve that which is in his favour . . . If a confession has been reduced to writing, and it is written or signed by the accused, the writing must be given in evidence and, if proved, read by the officer of the court. If it is not written by the accused, but taken down by someone else and not signed by the prisoner, the confession can only be proved by the person who took it down, who must state what the accused said, and may use the writing to refresh his memory . . . Any evidence which a defendant has given on a former occasion is evidence against him if properly proved, unless the defendant was wrongly compelled to answer questions tending to criminate him which he objected to answer, or unless there is some statutory provision making such evidence inadmissible in other proceedings." *9 Halsbury, pp. 394-400.*

It may sometimes happen that a material witness, who has given evidence at the preliminary inquiry, cannot attend at the trial. In proceedings before a civil court for indictable offences, provision is made for such cases by statute. In the case however of trial by court-martial, there is no similar provision for making the summary of the evidence taken before a commanding officer, when an accused is remanded for trial, admissible in evidence in the same circumstances as depositions taken before a magistrate when a prisoner is committed for trial by a jury. Accordingly, the summary, except so far as it contains admissions of the accused himself, made after proper caution, cannot be admitted as evidence of the facts recorded in it unless the accused has pleaded guilty. But where a statement recorded in the summary is put in issue before a court-martial, as, for example, where a discrepancy is alleged between that statement and the evidence given before the court, or where the alleged wilful falsehood of such statement is made the subject of a charge, the summary, if purporting to give the *verbatim* signed statement of the witness, may be given in evidence as confirmatory of the statement having been made.

d. The Rule as to Opinion Evidence. The fact that a person has formed a particular opinion is not evidence that the truth is in accordance with such opinion. A witness must tesify as to the particular facts which he has seen, heard or otherwise observed, and it is for the court to make the necessary inferences from such facts. "Opinions whether of the community (reputation) or of individuals, are, in general, inadmissible in proof of material facts. The ground of exclusion of such evidence is that opinions, in so far as they may be founded on no evidence, or evidence not recognizable by law, are worthless, and in so far as they may be founded on legal evidence, tend to usurp the functions of the court . . . whose province alone it is to draw conclusions of law or fact." The above rule is, however, subject to *EXCEPTIONS, (see i. and ii. post)*, mainly on the ground of necessity, since better evidence is, in such cases, often difficult or impossible to obtain. *13 Halsbury 479.*

i. Opinions of Experts. "The opinions of experts are, in general, admissible whenever the subject is one a knowledge of which can only be acquired by special training or experience . . . An expert in order to be competent as a witness, need not have acquired his knowledge professionally; it is sufficient, so far as the admissibility of the evidence goes, if he has made a special study of the subject, or acquired a special experience therein. Thus, hospital students, dressers, and

unqualified practitioners may be permitted to testify as medical experts . . . In every case in which the opinions of experts are admissible, the grounds of such opinions may be inquired into, either in chief or, as is most usual, in cross-examination. And facts and experiments, even though not themselves relevant to the issue, are also receivable—in corroboration or rebuttal of the opinion. Moreover, experts may refresh their memories by reference to accredited works on their special topics." *Ibid. pp. 480-2.*

A military officer may be asked as an expert, to give his opinion on any point within his special knowledge, but to make his opinion, or indeed the opinion of any other expert, admissible, the knowledge of the expert must be of a kind not generally possessed by a court. Where, *e.g.*, unsoundness of mind is set up as a defence, an expert, may be asked whether, in his opinion, the symptoms proved to be exhibited by the accused person commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of their act, or of knowing that what they do is either wrong or contrary to law. Handwriting may be proved by expert witnesses, but also by ordinary witnesses who are acquainted with it.

ii. Opinions of Ordinary Witnesses. "The opinions of ordinary witnesses are admissible as to identity, handwriting, age, and certain other miscellaneous matters. They may testify to their belief that the prisoner in the dock is the person they saw committing a crime; or that a photograph, which is produced, is the likeness of some absent party . . . A party's handwriting may, amongst other means, be proved by the opinion of witnesses who are acquainted with it. The knowledge requisite for this purpose may have been acquired by the witness having, at any time, either (1) seen the party write; or (2) received communications purporting to come from him in answer to those addressed to him by the witness; or (3) observed, in the ordinary course of business, documents purporting to be in the party's handwriting. On the other hand, knowledge acquired by a non-expert witness for the express purpose of qualifying him to prove the party's handwriting at the trial will not suffice to admit the evidence. Testimony thus admitted is considered to

be primary, and not secondary, in its nature, and so will not be excluded, even though better evidence of the handwriting in question could be obtained . . . In practice, although not perhaps in strictness, witnesses called to prove a prisoner's character are allowed to speak to their individual opinion thereof, and not merely to his general reputation in the community". *Ibid. pp. 482-3.*

In cases affecting the conduct of the accused, either as to deportment or language, it is not only proper, but often necessary, to require a witness to declare his opinion, because that opinion may be an impression derived from a combination of circumstances, occurring at the time, which it would be difficult if not impossible, fully to impart to the court. But it would be improper to draw attention of a witness to facts, whether stated by himself or by another witness, and to ask his opinion as to their accordance with military discipline or usage, because the court, being in possession of facts, are the only proper judge of their tendency. If the witness is asked a question inviting him to express his opinion as to the general conduct of the person accused, or to give his judgment on the whole matter of the charge, he may, and should, decline to answer it.

The rule which requires a witness to state what he knows, and not what he thinks, does not require him to depose to facts with an expression of certainty that excludes all doubt in his mind. For example, the belief of a witness as to the identity of a person or thing is admissible in evidence, though he will not positively swear to the fact. A witness who falsely swears that he BELIEVES a thing to be so-and-so is as much guilty of perjury as one who falsely swears that it IS so-and-so.

C. WITNESSES.

1. WHO MAY GIVE EVIDENCE. "All persons are competent to give evidence except (1) children of such tender years that they have not sufficient intelligence to testify, or a proper appreciation of the duty of speaking the truth; (2) idiots and insane persons who at the time of being tendered as witnesses are mentally incapable of testifying; (3) deaf and dumb persons, if they are unable by signs or otherwise to understand what is said to them or to communicate their thoughts to others; and

(4) other persons who from temporary causes, such as illness and drunkenness, are for the time incapable of understanding questions and of giving a rational account of events. Persons who are not incompetent for the specified reasons are compellable to give evidence unless they are privileged from making disclosures. But the defendant in a criminal prosecution and the husband or wife of the defendant are incompetent witnesses for the prosecution except in certain cases, and in most criminal proceedings are only competent witnesses for the defence subject to certain limitations . . . It is for the judge to decide on the competency of a witness." *9 Halsbury, pp. 400-2.*

A member of a court-martial or a judge advocate has only a limited competency as a witness. They are competent witnesses for the defence but not for the prosecution. The Army Act and Rules of Procedure provide that a witness for the prosecution shall not sit on a court-martial at the trial of the person against whom he is a witness. *A.A. 50(3); R.P. 19(B)(ii); R.P. 106(D).*

a. Privilege. "A witness though competent generally to give evidence, may in certain cases claim privilege as a ground for refusing to disclose matter which is relevant to the issue". *13 Halsbury, p. 570.*

i. Evidence of the Accused. "Every defendant is now by statute a competent witness for the defence at every stage of criminal proceedings either on his own behalf or on behalf of any person who is tried along with him, but he cannot be called as a witness except upon his own application: he cannot, therefore be compelled to give evidence for a co-defendant. The defendant gives his evidence like other witnesses, on oath or affirmation, and, unless otherwise ordered by the court, from the witness box or other place from which the other witnesses give their evidence. He is not, however, treated altogether as an ordinary witness or as a person who might naturally be expected to be called as a witness". *9 Halsbury, pp. 403-4.*

"The accused when giving evidence may be asked any question in cross-examination, notwithstanding that it would tend to criminate him as to the offence charged, but shall not be asked, and if asked, shall not be required to answer, any question tending to show that he has committed, or been convicted of, or

been charged with, any offence other than that with which he is charged, or is of bad character, unless—

"(i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence with which he is then charged; (such evidence would be admissible to show design or to negative design or lack of purpose) or

"(ii) he has personally or by his counsel or defending officer asked questions of the witnesses for the prosecution with a view to establish his own good character or has given evidence of his good character, or the nature or the conduct of the defence is such as to involve imputations on the character of the witnesses for the prosecution; or

"(iii) he has given evidence against any other person charged with the same offence." *R.P. 80(D).*

ii. Evidence of Wife or Husband of Accused. By statute, "the wife or husband of every person charged with an offence is a competent witness for the defence at every stage of the proceedings, but cannot except in certain specified cases (*including among others, a man neglecting to maintain, or deserting his wife or any of his family; rape; abduction of women and girls; child stealing; manslaughter; common assault; aggravated assault; indecent assault; and an attempt to commit an infamous crime; in which cases they are competent but not compellable, either for the prosecution or the defence*), be called as a witness except upon the application of the person charged who is the husband or the wife of the proposed witness. The provisions of the statute do not render a husband compellable to disclose any communication made to him by his wife during the marriage, or a wife compellable to disclose a communication so made to her by her husband. A husband or wife who gives evidence under the provisions of the statute may be cross-examined as to his or her previous offences or as to his or her character. The failure of the wife or husband of the person charged to give evidence must not, any more than the failure of the person charged to give evidence, be made the subject of any comment by the prosecution." *9 Halsbury, p. 407.*

"The wife of an accused shall not be compelled to disclose any communication made to her by her husband during

the marriage, nor shall an accused person be compelled to disclose any communication made to him by his wife during the marriage." *R.P. 80(E).*

iii. Professional Communications between Solicitor and Client. "Confidential communications, whether oral or written, passing between a client and his legal advisers, i.e. solicitor or counsel, and whether made directly or indirectly through an agent of either, are, if made for the purpose of obtaining or giving legal advice, privileged from disclosure; neither the client nor the legal adviser can be compelled to disclose such communications. The communications must have been made to or by the legal adviser in his professional capacity, and while the relation of client and legal adviser subsisted, but it is immaterial whether such communications were or were not made when litigation was pending or contemplated . . . The privilege may be waived by the client . . . but, unless waived, holds good after the relation of legal adviser and client has ceased, and indeed for ever. But secondary evidence of such communications, if written, may be given in spite of the privilege attaching to the originals." *13 Halsbury, pp. 571-2.*

The exception to this rule is that even a confidential communication between a client and his legal adviser is not privileged if made for the purpose of committing a fraud or crime.

The expression "legal adviser" includes barristers and solicitors, their clerks, and interpreters between them, and their clients, and the person representing or assisting the accused during trial before a court-martial.

It should be noted that this privilege is limited to communications made to or by a legal adviser, and does not extend to doctors or clergymen, who are not privileged from disclosure of communications made to them in professional confidence; but in practice, it is not usual to press for the disclosure of communications so made to clergymen.

iv. Affairs of State.

Secrets of state, state papers, confidential official documents, communications between the Government and its officers and official communications between public officers are privileged from disclosure. This privilege can only be waived by the head of the department concerned. This class of privilege is

based on considerations of public policy. On this principle, a confidential report, or letter, or official communication of a confidential character, although it may refer to matters which a court-martial may have decided to be relevant to the inquiry before it, cannot be produced or disclosed except by consent of superior authority and this consent is refused if the production or disclosure is considered detrimental to the public service. And following the same principle, in cases in which the Government is immediately concerned, where the witness is a public official or witness for the Crown in a prosecution undertaken by the Government, the witness is privileged and cannot be compelled to answer any question the answer to which would tend to discover the names of persons by or to whom the information was given as to the commission of offences.

v. Proceedings of Court of Inquiry. Except upon the trial of any officer or soldier for wilfully giving false evidence before a court of inquiry, the proceedings of a court of inquiry, or any confession, statement, or answer to a question made or given at such court, are not admissible in evidence against an officer or soldier being tried by court-martial, nor can any evidence respecting the proceedings of the court of inquiry be given against such officer or soldier. *R.P. 125A-(G).*

vi. Incriminating Questions. A witness other than the accused, may refuse to answer a question on the ground that the answer might incriminate him, that is, would have a tendency to expose him to any criminal charge, penalty, or forfeiture, or to any military punishment. But the witness himself is not the sole judge whether his evidence will bring him into danger, the court must be satisfied that there is really a reasonable ground to apprehend such danger, and in case of doubt the matter will be decided in favour of the witness. If the court should decide that there is no resonable ground for such apprehension, the witness must answer the question and may be compelled so to do.

vii. Protection of Witness. Questions, whether answered or not, should be entered in the proceedings. When the witness claims the privilege of not answering, it is for the court to decide whether the question falls within any of the classes of questions to which such privilege attaches. Courts-martial like other

courts, should, in practice, interpose by informing a witness, at the time when a question is put to him, that he is not bound to answer. Any such interposition, and any claim of privilege by the witness, and the fact whether the witness is required to answer or not, should be noted, on the proceedings.

2. HOW EVIDENCE MUST BE GIVEN. The Rules of Procedure deal with the mode in which evidence is to be given before a court-martial with some particularity.

a. Swearing of Witness. The general rule is that no evidence is receivable at a trial by court-martial unless it is given upon oath or affirmation. *A.A. 52.* The oath may be administered in such form and with such ceremonies as the person to be sworn declares to be, according to his religion, binding on his conscience. *R.P. 30(B).* And the fact that a witness has been sworn in a manner contrary to the custom of his religion is no ground for a new trial. The witness if he has sworn falsely, may be convicted of perjury.

However, if a person, by the Army Act required as a witness before a court-martial, "to take an oath, objects to take an oath, or is objected to as incompetent to take an oath, the court, if satisfied of the sincerity of the objection, or, where the competence of the person to take an oath is objected to, of the oath having no binding effect on the conscience of such person, shall permit such person instead of being sworn to make a solemn declaration in the prescribed form, and for the purposes of this Act, such solemn declaration shall be deemed to be an oath." *A.A. 52(4).* Where a witness has taken the oath without objection, the fact that he had at the time no religious belief will not affect its validity in any way.

The exception to the rule that no evidence is receivable at a trial by court-martial unless given upon oath or affirmation, occurs in the case of a witness who is an infant of tender years, and who does not understand the nature of an oath. In such a case, the court may, if satisfied that the child is of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth, allow the child to give evidence without being sworn. Such unsworn evidence must, however, be corroborated.

b. Examination in Chief. A witness may then be examined by or on behalf of the person calling him. The examination of a witness by or on behalf of the person who calls him is called his examination, a direct examination, or examination in chief. On this examination, the questions must be relevant to the issue, that is to say, must relate to the matters in issue at the trial. The court must see that the witness is not compelled to answer any question in respect of which he is entitled to claim privilege and that, as far as possible, a witness is so dealt with that his honest testimony is obtained from him.

Accordingly, leading questions, that is to say, questions which by their form suggest the answer which it is desired that the witness should give, are not permissible in an examination in chief. A question couched in an alternative form is not necessarily a leading question. The rule has always been relaxed where evidence is being given of facts about which no dispute can possibly arise, or which are merely formal and in the nature of an introduction to the rest of the evidence which the witness is going to give, such as his name, address and calling. The mind of a witness may be directed to a particular topic concerning which it is desired to examine him by a preliminary leading question, the limit of this indulgence being a matter of discretion for the court. But even if the question contravenes this rule of evidence and is a leading question, the witness is bound to answer it, unless objection is taken to its admissibility.

If, however, a witness be directly hostile to the party calling him, or interested in the other side, or unwilling to give evidence, the enforcement of this rule would be waived by the court. The court would then allow the person calling the witness not only to ask him leading questions but to cross-examine him, and to treat him in every respect as though he were a witness called by the other side; except, as he had been put forward as worthy of credit by the person calling him, that person will not be permitted whether by cross-examination or by direct evidence to impeach his credit by general evidence as to bad character.

c. Cross-Examination. The cross-examination of a witness unless postponed by the court follows immediately upon the examination in chief. *R.P. 84.* And the court should,

if the accused so requests, allow the cross-examination of a witness to be postponed, especially if his evidence comes as a "surprise", or was not contained in the summary or abstract of evidence; but a request for postponement should not be acceded to, if, in the opinion of the court, it was made merely for the purposes of obstruction.

In cross-examination, leading questions, and questions not confined to the subject-matter of the evidence already given by the witness on his examination in chief, may be asked and must be answered, as the cross-examining party is entitled to test the examination in chief by every means in his power. Questions also may be put in cross-examination which tend either to test the accuracy or credibility of the witness or to shake his credit by impeaching his motives or injuring his character, though such questions cannot be put on examination in chief or re-examination. But the right so to cross-examine must not be abused.

"If counsel puts to a witness other than the accused a question as to a matter which is not relevant except so far as it affects the credit of the witness by injuring his character, and the witness objects to answering the question, the court shall consider whether the witness should be compelled to answer it; and

"(i) If they are of opinion that the imputation conveyed by the question would, if true, seriously affect their opinion as to the credibility of the witness, the court should require the witness to answer the question; but

"(ii) If they are of opinion that the imputation, if true, would not affect, or would not seriously affect the opinion of the court as to the credibility of the witness, the court should disallow the question.

"If the question is disallowed, counsel on both sides will refrain from further examining or commenting on the matter." *R.P. 92(B)*.

d. Re-Examination. At the conclusion of the cross-examination the person who called the witness may, if he pleases, re-examine him for the purpose of explaining any part of the witnesses evidence given during cross-examination, which is capable of being construed unfavourably to the person

who called him. No questions should be asked on re-examination which introduce wholly new matters. The re-examination should be directed exclusively to the explanation of matters referred to in cross-examination. If new matter is, by permission of the court, introduced in re-examination, the other side may further cross-examine upon it. And where questions asked in cross-examination let in evidence which would not have been admissible in chief, the witness may be re-examined upon it.

e. Examination by Members of Court. "The president, the judge-advocate (if any) and, with permission of the court, any member of the court may address a question to a witness while such witness is giving his original evidence and before he withdraws." *R.P. 85(A)*.

"Upon any such question being answered, the president or judge-advocate (if any) shall also put to the witness any question relative to that answer which the prosecutor or the accused or counsel or the defending officer may request him to put and which the court deem reasonable." *R.P. 85(B)*.

"At the request of the prosecutor or of the accused a witness may, by leave of the court, be re-called at any time before the closing address of or on behalf of the accused for the purpose of having any question put to him through the president or judge-advocate (if any)." *R.P. 86(A)*.

The president or judge-advocate should also put to a witness recalled under the provisions of the above rule (86) any further questions which he may consider necessary in view of the answer given. It should be noted that rule 85 applies only to the original evidence of a witness, and not to evidence given by him on being recalled, which is covered by rule 86.

f. Refreshing Memory. "A witness is permitted to refresh his memory in the course of his evidence by reference to documents or memoranda. By doing so he does not make them evidence; and it is, indeed, immaterial that they would not in fact be admissible in evidence if tendered as such. But the document or memorandum must have been made by the witness contemporaneously with the facts about which he is testifying, or shortly afterwards, while the facts were still fresh in his memory, or, if not made by him personally, must have been

made in his presence or assented to or checked by him. Documents made with a view to subsequently giving testimony therefrom cannot be referred to. Documents may be read over to a witness who has become blind to refresh his memory. It is apprehended that copies of documents may not be used to refresh the memory unless the original be lost or destroyed, or cannot for some sufficient reason be produced, and it is in every case necessary that the witness should be able to swear positively to the accuracy of the copy. It is not, however, necessary that the witness should have any independent recollection of the facts to which he testifies and of which he seeks to refresh his memory, apart from the document to which he refers." *13 Halsbury, pp. 595-6.*

"The document from which memory is refreshed must be produced at the trial in every case in which the witness has no independent recollection of the facts, and it is customary (though not necessary) to produce it in all cases, in order that the witness may be cross-examined upon it, if thought desirable, by the other party, who may not, however, look at those parts of the document which have not been used by the witness for the purpose of assisting his memory. If, in fact, the other party go further, and cross-examine on other parts of the document, he makes it evidence in the case, but otherwise he does not. But he may not see the document at all, where the witness is in fact unable to refresh his memory even with its assistance, or where it is used only for the purpose of enabling a witness to identify handwriting, except for purposes of subsequent recognition or re-examination as to the handwriting, and therefore, if he does more, he makes his own evidence." *Ibid. pp. 596-7.*

3. MODES OF PROOF. "As regards the manner in which facts relevant to the issue must or may be proved there is in general no difference between civil and criminal cases, but there are some particular points of difference arising out of the special nature of criminal proceedings." *9 Halsbury, p. 386.*

a. Admissions before Trial. "In criminal proceedings no admissions preliminary to the trial can ordinarily be made by the defendant or his advisers so as to dispense with oral evidence and strict proof of facts necessary to be proved." *Ibid.*

b. Admissions at Trial. "The plea of guilty at the trial is a formal and conclusive admission of the offence charged . . . and dispenses with the necessity of proving the facts alleged therein. When the plea is not guilty, in cases of misdemeanor (*lesser offences such as created by statute and made punishable only on summary conviction*) the defendant or his counsel may at the trial make other admissions of facts; but in cases of felony (*graver offences, being those below the degree of treason but not misdemeanors*) no such admissions can be made. Therefore if the defendant pleads not guilty on a charge of felony, oral evidence is indispensable, whereas if he pleads not guilty on a charge of misdemeanor, such evidence may by agreement be dispensed with in certain cases." *Ibid.*

c. Presumptions. "There are some presumptions which are peculiar to criminal proceedings and others which, though common to civil and criminal proceedings, are much more commonly applied in criminal than in civil procedure . . . A presumption of any fact is an inferring of that fact from other facts that are known. Presumptions are sometimes divided into (*a*) conclusive and irrebuttable presumptions of law: (*b*) rebuttable presumptions of law, *i.e.*, inferences recognized by law which stand instead of proofs until the contrary be proved: and (*c*) presumptions of fact or mere ordinary inferences of fact. But the so-called presumptions of fact are only ordinary inferences not specially recognized by law." *Ibid. pp. 388-9.*

An example of an irrebuttable presumption of law peculiar to criminal procedure is the presumption that a child under the age of seven is incapable of committing a crime. This presumption is conclusive IN FAVOUR OF the defendant. There are no irrebuttable presumptions of law in criminal cases which are conclusive AGAINST a defendant, except possibly in prosecutions for the non-repair etc. of highways. *Ibid. p. 389.*

A rebuttable presumption of law is one that establishes a *prima facie* case, and which, if not rebutted, should lead to a verdict in favour of the side which establishes the presumption. Examples of rebuttable presumptions of law are (a) the presumption of the innocence of a person accused of a crime: (b) the presumption of intention, *i.e.*, that every man is to be deemed to have intended the natural and probable consequences

of his acts: and (c) that a person found in possession of stolen goods soon after the theft is guilty of the theft thereof, or of receiving stolen goods with guilty knowledge. *Ibid.*

There are statutory presumptions of guilt which are peculiar to criminal cases. Examples of such statutory presumptions are the presumptions of guilt from the making or possessing *etc.* of coinage tools, or from the possession of forged instruments, or from the possession of public stores, or from being found by night in possession without lawful excuse of any instrument of housebreaking. *Ibid.*

d. Judicial Notice. The court is said to have judicial notice when it does not require evidence as to any facts which are so generally known as not to require proof.

"The court may take judicial notice of all matters of notoriety, including all matters within their general military knowledge." *R.P. 74.*

e. Adducing Evidence. After hearing all the evidence adduced, the court must weigh the evidence. In weighing the evidence the court may reject the evidence of one witness as being honest enough, but (by reason of ignorance, mistake, motive to misrepresent or prejudice) untrustworthy; or may reject the evidence of another witness because he is of the opinion that the witness is lying; or may accept one portion, and reject another portion, of the evidence of a witness; or may believe the story of one witness against the denials of many. The verdict of the court is then given UPON THE EVIDENCE, and a conviction should not be made unless the evidence supports a verdict of guilty, beyond a reasonable doubt. If there be such a doubt, the accused is entitled to the benefit of it, and should be acquitted.

The greatest weight will not be given, necessarily, to the best evidence adduced. The kind of evidence only goes to the question of admissibility; and the weight to be given to it does not depend upon its kind. An example is furnished by making a comparison between "direct" and "indirect" evidence. By direct evidence, is meant the statement of a person who saw, or otherwise observed with his senses, the fact in question. By indirect, or, as it is often called, circumstantial evidence, is

meant evidence of facts, from which the facts in question may be inferred or presumed. Direct evidence is not better than indirect evidence.

From the circumstances in which crimes are ordinarily committed, it follows that direct evidence of their commission is not always obtainable, and that in very many cases reliance must be placed on circumstantial evidence. Such evidence is in no way inferior to direct evidence, and is in some respects superior to it; for it has become a proverb that "facts cannot lie," whilst witnesses may. On the other hand it must always be borne in mind that if facts cannot "lie", they may, and often do, deceive; in other words, that the interpretation which they appear to suggest is not that which ought to be placed upon them. Therefore, before the court finds an accused person guilty on circumstantial evidence, it must be satisfied not only that the circumstances are consistent with the accused having committed the act, but that they are inconsistent with any other rational conclusion than that the accused was the guilty person.

The rule which requires the production of the best obtainable evidence does not require the strongest possible assurance; in other words, does not require the fullest proof of which the case will admit, nor repetition of evidence beyond that which is sufficient to establish the fact. For instance, if a whole regiment should be present at some overt act of mutiny or insubordination, as the striking of a commanding officer in front of his regiment, the law would not require the production of all the persons present; for if one witness only was produced, and if, from his situation at the moment of the occurrence, he had as favourable an opportunity of observing what took place as any person present, his evidence would be complete, and not inferior in kind to any that could be produced.

D. POINTS REQUIRING ATTENTION OF COURT.

The Manual of Military Law summarizes the duties of the court, in ten commandments, in the following words

"It will be the duty of the court in every case to see that the rules of evidence are strictly conformed to. The following points will require attention in relation to any evidence that may be tendered:—

"(a) That it is relevant to the issue.

"(b) That it is the best evidence procurable.

"(c) That it is not within the rule rejecting hearsay evidence.

"(d) That (except in the case of experts) it is not a mere expression of opinion.

"(e) That if it is a confession or admission, it is legally admissible.

"(f) That if it is a document, it is legally admissible and properly put in evidence.

"(g) That no document or other thing which has not been properly put in is used for the purposes of the trial.

"(h) That any witnesses called are legally competent to give evidence.

"(i) That any document with which a witness proposes to refresh his memory can be legally used by him for the purpose.

"(j) That the examination of witnesses is fairly and properly conducted". *M.M.L. pp. 98-9.*

CHAPTER VII

CONDUCT AND DISCIPLINE.

A. GENERALLY.
- 1. Responsibility of Officers and Other Ranks.
- 2. Praise or Censure of Superiors; Testimonials, etc.
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- 4. Character and Conduct of Officers, etc.
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B. ARREST AND MILITARY CUSTODY.
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  - d. Duties of Person Causing Arrest.
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C. REDRESS OF GRIEVANCES.
- 1. Procedure Prescribed by K.R. (Can.).
- 2. Procedure Prescribed by The Army Act.
  - a. Officers.
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A. GENERALLY.

1. RESPONSIBILITY OF OFFICERS AND OTHER RANKS. "A district officer commanding will be responsible for the discipline of all the troops in his command." *K.R. (Can.) 405.*

"A commanding officer is to use every effort to prevent crime and to suppress any tendency to screen its existence. For first offences, not of an aggravated character, admonition is the most suitable treatment. Other punishment should be resorted to only when admonition has failed to have effect." *K.R. (Can.) 412.*

"No corps and no non-commissioned officer or man shall, at any time, appear in uniform or armed or accoutred, except,

(a) when actually on duty;

(b) at parade or drill;

(c) at target practice;

(d) at reviews or on field days or inspection; or

(e) by permission of the commanding officer of the corps." *M.A. 46.*

"A commanding officer should impress upon all under his command the propriety of courtesy in intercourse with all ranks and classes of society, and should particularly caution them to pay deference and respect to the civil authorities." *K.R. (Can.) 415(a).*

"When in a civil court an officer or soldier, except when on duty under arms or as escort, will remove his headdress while the judge or magistrate is present." *K.R. (Can.) 415(b).*

"All schools of instruction, with their duly appointed commanding officers, are, for every purpose of command and administration, independent of each other and directly under the district officers commanding within whose commands they are situated." *K.R. (Can.) 407.*

"All personnel of the Non-Permanent Active Militia attached for instruction to schools of instruction will, for the purposes of discipline, be held to be on service, and be subject to the laws and regulations which, under the provisions of the Militia Act, apply to all such personnel so called out." *K.R. (Can.) 408.*

"An officer commanding a school of instruction may remand to his unit an officer or soldier attached for instruction who, by his conduct or otherwise, is not likely to benefit the service by his retention at the school. Every such case will be reported to National Defence Headquarters, through the usual channels." *K.R. (Can.) 409.*

"An officer is at all times responsible for ensuring that good order and the rules and discipline of the service are maintained. He will afford the utmost aid and support to the commanding officer. It is his duty to notice, repress and instantly report, any negligence or impropriety of conduct of warrant officers, non-commissioned officers and private soldiers whether on or off duty, and whether the offenders do or do not belong to his particular unit." *K.R. (Can.) 406.*

"Officers, warrant officers and non-commissioned officers will adopt towards subordinates such methods of command and treatment as will not only ensure respect for authority, but also foster the feelings of self-respect and personal honour essential to military efficiency. They will avoid intemperate language or an offensive manner." *K.R. (Can.) 413.*

"An officer will not reprove a warrant officer or non-commissioned officer in the presence or hearing of private soldiers unless it is necessary for the purpose of making an example that the reproof be public." *K.R. (Can.) 414.*

2. PRAISE OR CENSURE OF SUPERIORS; TESTIMONIALS, ETC. "Deliberations or discussions by officers or soldiers with the object of conveying praise, censure, or any mark of approbation towards their superiors or any other in His Majesty's service, are prohibited. The publication of laudatory orders regarding an officer quitting a station or relinquishing an appointment is forbidden. A commanding officer is to refuse to allow subscriptions for testimonials in any shape to a superior on quitting the service, or on being removed from his corps. Every officer will be held responsible should he allow himself to be complimented by officers or soldiers, who are serving, or who have served, under his command, by means of presents of plate, swords, etc., or by any collective expression of their opinion." *K.R. (Can.) 421(a).*

"Officers and soldiers are forbidden to accept presents in money from public bodies or private individuals in recognition of services rendered in the performance of their duty." *K.R. (Can.) 421(b).*

"An officer or soldier is forbidden to forward testimonials relating to his services or character, with any application he may make to superior authority. In the event of an officer wishing that the opinion of officers under whom he has served should be brought to notice he will submit their names, so that if necessary they may be referred to." *K.R. (Can.) 422.*

3. INTERVIEWS AT NATIONAL DEFENCE HEADQUARTERS. "An officer or soldier is forbidden to write private letters to officials at National Defence Headquarters, on official personal matters." *K.R. (Can.) 423(a).*

"Attempts to obtain favourable consideration of any application by the use of outside influence are forbidden, and, if resorted to, will be regarded as an admission on the part of the applicant that the case is not good on its merits, and it will be dealt with accordingly." *K.R. (Can.) 423(b).*

"When an interview is asked for, or a letter written on behalf of an officer by any person other than himself, such application will be deemed to have been made at his suggestion, unless he can show to the satisfaction of the authorities that he has no knowledge, directly or indirectly, of such application." *K.R. (Can.) 423(c).*

4. CHARACTER AND CONDUCT OF OFFICERS, ETC. "Every officer, whose character or conduct as an officer and gentleman has been impugned must submit the case within a reasonable time to his commanding officer, or other competent military authority, for investigation. Pending the investigation an officer may be suspended from duty, in which case he will be placed under same restrictions as an officer in open arrest, but will be shown as effective on the first day of each month, while so situated, and may be permitted to wear plain clothes." *K.R. (Can.) 424.*

"If complaint is made that an officer neglects to pay his just debts, or if an officer by bankruptcy, liquidation, composition or other legal proceedings becomes unable to meet his engagements, the facts will at once be reported to National Defence Headquarters; whereupon a court of inquiry will be assembled to ascertain the details. Should it be found that the officer has neglected to pay his debts or has become insolvent, he shall, at the end of three months from the date of the report of the court of inquiry, be removed from the service, unless in the meantime he has paid his debts or purged his insolvency." *K.R. (Can.) 425.*

"Officers, soldiers and others in military employment, must at all times guard against being placed in such a position as may lay them open to the suspicion of being influenced in the discharge of their duty by other than purely public considerations. They are to be scrupulously careful in their relations and are to have no private dealings with Militia contractors, their agents, or employees." *K.R. (Can.) 426(a).*

"If they have occasion, in the course of their duty, to come in contact with any matter concerning a business organization in which they have an interest, they will disclose that interest to their superior officer, and ask that some other person may deal with the case. They should not be permitted to deal with the case without the sanction of the Minister." *K.R. (Can.) 426(b).*

5. BUSINESS APPOINTMENTS; RELATIONS WITH GOVERNMENT DEPARTMENTS. "No officer or soldier of the Permanent Active Militia is permitted, without the sanction of the Minister, to accept a directorship (except as a nominee of the Government of Canada) in any public, industrial, or other company or firm, or to assist or advise any such company or firm in questions relating to their plant, processes, or products. They are also forbidden to act either directly or indirectly as agents for any company, firm or individual engaged in trade, or themselves to engage therein." *K.R. (Can.) 427(a).*

"No National Defence Department contract will be entered into with an officer or soldier of the Permanent Active Militia, or with any partnership, or corporation of which he is a member (apart from one in which he is merely a shareholder) or with any company of which he is a director (except as a nominee of the Government of Canada), unless permission has been obtained from the Minister for the contract, sale or purchase to proceed." *K.R. (Can.) 427(b).*

"In no circumstances may an officer or soldier, who, in his private capacity is a principal or shareholder in a firm or company, deal in his official capacity with any negotiation or arbitration in any matter affecting a contract with, purchase from, or sale to, that firm or company." *K.R. (Can.) 427(c).*

"No officer or soldier of the Permanent Active Militia will (without the sanction of the Minister) be permitted to make purchases from, or sales to, any Government Department, except:—

"(i) Transactions occurring in the ordinary course of public business, e.g., the purchase of publications from the Department of Public Printing and Stationery or of other Government departments, postage stamps, money orders, etc.

"(ii) Purchase from the Department of National Defence of provisions, clothing, officers' chargers, etc., in accordance with regulations from time to time issued in that behalf.

"(iii) Purchase of old Government stores, etc., at fixed prices (available to the public)." *K.R. (Can.) 427(d).*

"Purchases from or sales to the Department of National Defence may be permitted in exceptional circumstances, the authority of the Minister being necessary in each case; but permission for the purchase of National Defence Department stores will not be granted merely on the ground that the stores are required to meet personal requirements and not for commercial purposes." *K.R. (Can.) 427(e).*

"In no circumstances will officers or soldiers of the Permanent Active Militia be permitted to purchase Department of National Defence stores at auction sales held under the auspices of that department or on special terms by private treaty." *K.R. (Can.) 427(f).*

6. POLITICAL AND NON-MILITARY ACTIVITIES. "No meetings, demonstrations or processions for party or political purposes are permitted to be held in barracks, quarters or camps. Meetings may be held in barracks, quarters or camps for the purpose of hearing addresses on questions of public interest, provided that such addresses are not of party or political nature, but no such meetings or addresses are permitted to be held or given during the course of any election campaign, or during the

period between the date of the issue of writs of election and the election in respect of which such writs are issued." *K.R. (Can.) 428.*

"An officer or soldier of the Permanent Active Militia is forbidden to act as an agent or scrutineer for, or on behalf of, a candidate at a dominion, provincial or municipal election, or to engage in partizan work in connection with any such election. He will not deal in any way with money belonging to any party funds, nor will he contribute to or receive money therefrom. Provided that it shall not be deemed engaging in partizan work to attend but not take part in party or political meetings held elsewhere than in barracks, quarters or camps." *K.R. (Can.) 429.*

"No member of the Active Militia is permitted, without the express sanction of the Minister, to take official cognizance of any private association the organization of which purports to be of a military character or to be intended to meet military requirements, but which is not recognized by the Minister as forming part of the Militia or of the educational or training establishments supplementary thereto." *K.R. (Can.) 430.*

"An officer or soldier shall not be allowed to give displays of horsemanship, boxing or gymnastics at local fetes or exhibitions or on the stage, without the previous sanction of his commanding officer." *K.R. (Can.) 431(a).*

"Military parties are not to give public displays at such places unless the sanction of National Defence Headquarters has previously been obtained, and unless they are under the command of an officer who must be present throughout the performance." *K.R. (Can.) 431(b).*

7. COMMUNICATION OF MILITARY INFORMATION. "An officer or soldier is forbidden to communicate any military information which might directly or indirectly assist an enemy, to any person other than a person to whom he is authorized to communicate it, or a person to whom it is, in the interests of the State, his duty to communicate such information." *K.R. (Can.) 432.*

"An officer or soldier is forbidden to publish or communicate, either directly or indirectly, to the press, any military information, or his views on any military subject, without special authority from National Defence Headquarters. Any informa-

tion of a professional nature which he may acquire while travelling or employed on duty is to be regarded as the property of the Department of National Defence and is not to be published in any form without previously obtaining the permission of National Defence Headquarters. An officer or soldier will be held responsible for all statements contained in communications to other persons which may subsequently be published in the press. He is not to prejudge questions which are under the consideration of superior authority by the publication, anonymously or otherwise, of his opinions, and he is not to take part, in public, in a discussion relating to orders, regulations, or instructions, issued by his superiors." *K.R. (Can.) 433(a).*

"An officer or soldier who desires to publish an article will make written application direct to the Secretary, National Defence Headquarters, for permission to publish such article. The application must be accompanied by the article in duplicate, either in typewritten or proof form, together with a statement from the authority, if any, under whom the applicant is immediately serving, that such authority has no objection to permission being applied for. One of the copies so submitted will be retained at National Defence Headquarters for reference. Permission to publish will apply only to the article, etc., as submitted, and no alterations therein, or additions thereto, other than those of a mere editorial nature are to be made subsequently without authority from National Defence Headquarters." *K.R. (Can.) 433(b).*

"The permission to publish the article, etc., will not convey official endorsement of its contents, and no statement tending to imply official approval or endorsation is to be included in any part of the publication, nor is the permission to be referred to in any way." *K.R. (Can.) 433(c).*

"Any communications affecting the Militia generally, or any arm or service thereof which it may be considered desirable to make to the press, will be made by National Defence Headquarters. In military districts, communications to the press may only be made when they solely affect the command concerned, and in this case they will be made through District Headquarters; all applications of press representatives will be referred to an authorized staff officer." *K.R. (Can.) 434.*

"An officer or soldier of the Permanent Active Militia is forbidden without the sanction of the Adjutant-General, to assist private tutors or tutorial establishments in preparing candidates for examination in military subjects." *K.R. (Can.) 437.*

"An officer or soldier is forbidden to accept invitations to appear as an expert witness in private lawsuits for the purpose of giving evidence on matters of which he has acquired knowledge in the course of, and in connection with, his official duties." *K.R. (Can.) 438(a).*

"Any officer or soldier who receives an invitation should reply that he is precluded by regulations from giving such evidence. If, however, after replying in these terms, he is subpoenaed to appear as an expert witness he should report the matter to his commanding officer, who will refer it at once through the usual channels to National Defence Headquarters when instructions will be issued as to the further action to be taken." *K.R. (Can.) 438(b).*

8. MISCELLANEOUS. "All gambling in garrisons, camps, barracks or cantonments is forbidden. This includes bookmaking or acting as agent for a book-maker." *K.R. (Can.) 440.*

"No officer or soldier shall bring into barracks for his personal consumption any wine or spirituous or malt liquor; provided however that the same may be brought in for consumption in his own quarters by an officer or soldier who is married and living with his family in such quarters." *K.R. (Can.) 441.*

"Should an officer or soldier become involved in legal proceedings pertaining to matters arising out of the performance of his official duties, the case, with all relevant information, will be at once reported to National Defence Headquarters, with such recommendations as to official intervention as the reporting officer may see fit to make. Unless the circumstances so require, the officer or soldier concerned should not on his own initiative retain counsel to act for him until the matter has been considered by National Defence Headquarters and a decision reached." *K.R. (Can.) 443.*

B. ARREST AND MILITARY CUSTODY.

"Under section 45 of the Army Act any person subject to military law when charged with an offence punishable under the Army Act may be taken into military custody, which means that the offender is placed under arrest." *K.R. (Can.) 445(a).*

"Arrest is either close arrest or open arrest. When the arrest is not described by the authority ordering it as open arrest it means close arrest." *K.R. (Can.) 445(b).*

"When an accused person is remanded for further investigation, or for trial by court-martial (whether upon his own election or not), the question of arrest is a matter for the commanding officer, and it is always his duty to decide whether, having regard to all the circumstances, open or close arrest will best meet the case or whether the accused may be released without prejudice to re-arrest until trial or further orders (see also paras. 463 and 464). The commanding officer will also use his discretion to change the form of arrest from time to time according to the circumstances." *K.R. (Can.) 446(i).*

1. POWERS TO ARREST. "The power of an officer, warrant officer or non-commissioned officer to place an offender in military custody is defined in section 45(3) of the Army Act." *K.R. (Can.) 446(a).*

Section 45(3) of the Army Act reads as follows: "An officer may order into military custody an officer of inferior rank or any soldier, and any non-commissioned officer may order into military custody any soldier, and an officer may order into military custody any officer (though he be of higher rank) engaged in a quarrel, fray, or disorder; and any such order shall be obeyed, notwithstanding the person giving the order and the person in respect of whom the order is given do not belong to the same corps, arm, or branch of the service:"

The powers conferred by section 45(3) of the Army Act are modified in the case of junior non-commissioned officers by K.R. (Can.) 446(h), which provides that "Except in cases of personal violence or when on detached duties, a lance-corporal or lance-bombardier with less than four years service will not place a private soldier under close arrest, but will report the offence to the orderly sergeant, who will act as the circumstances require."

2. INCIDENTS OF ARREST. The incidents of arrest differ according to the rank of the person arrested.

a. Officers and Warrant Officers. "An officer or warrant officer may be placed under arrest by a competent authority when charged with an offence, but he will not ordinarily be placed under arrest by an authority other than his Commanding Officer unless the needs of discipline so require, nor will he be kept under arrest, unless his Commanding Officer is satisfied, on investigation that it will be necessary to proceed with the case and to report it to superior authority (see para. 450)." *K.R. (Can.) 446(b).*

"When an officer or warrant officer is placed under arrest the commanding officer, unless he dismisses the case, will report the matter without delay to the district officer commanding or other senior officer under whose command the unit may be. The commanding officer will also advise the district paymaster through the proper channel whenever an OFFICER is placed under or released from arrest." *K.R. (Can.) 450(a).*

"Whenever possible, the sanction of the highest authority to whom a case may have been referred should be obtained before an officer or warrant officer is released from arrest." *K.R. (Can.) 450(e).*

i. Arrest (Open or Close). "An officer or warrant officer when under arrest will not wear sash, sword, belt or spurs." *K.R. (Can.) 450(b).*

"An officer or warrant officer under arrest will not perform any duty other than personal routine duties and such duties as may be necessary to relieve him from the charge of any cash, equipment, stores, accounts or office of which he may have charge or for which he may have been responsible." *K.R. (Can.) 452(a).*

If by error, or in an emergency, an officer or warrant officer under arrest has been ordered to perform any duty, he is not thereby absolved from liability to be proceeded against for the offence for which he is under arrest. *K.R. (Can.) 452(e).*

ii. Open Arrest. "An officer or warrant officer under open arrest may take exercise at stated periods and within stated limits, which will usually be the precincts of the barracks or camp of his unit; these limits may be enlarged at the discretion of the

officer commanding on the spot. He will not use his own or any other mess premises. He will not appear at any place of amusement or entertainment, or at public assemblies. He will not appear outside his quarters or tent dressed otherwise than in uniform." *K.R. (Can.) 450(d).*

iii. Close Arrest. "An officer or warrant officer under close arrest will be placed under the charge of an escort consisting of another officer or warrant officer of the same rank, if possible, and will not leave his quarters or tent except to take such exercise under supervision as the medical officer considers necessary. An officer or warrant officer may, however, if circumstances so require, be placed in custody under charge of a guard, picquet, patrol, sentry or provost-marshal." *K.R. (Can.) 450(e).*

b. Non-Commissioned Officers. "A non-commissioned officer may be placed under arrest by a competent authority when charged with a serious offence. If however the offence alleged appears not to be serious, it should be investigated and disposed of without previous arrest." *K.R. (Can.) 446(c).*

i. Arrest (Open or Close). Except on active service a non-commissioned officer under arrest will not be required to perform any duty other than personal routine duties, such for instance, as may be necessary to keep clean his quarters, person and belongings; also the duties necessary to relieve him from the charge of any cash, equipment, stores, accounts or office of which he may have charge or for which he may be responsible. He will not bear arms except in an emergency by order of his commanding officer, or on the line of march, or when proceeding to a detention barrack by order of the commandant for purposes of instruction, exercise or practice. On active service he may be ordered to bear arms, attend parades and perform all such duties as may be required of him. *K.R. (Can.) 452(b).*

If by error or in an emergency a non-commissioned officer under arrest has been ordered to perform any duty, he is not thereby absolved from liability to be proceeded against for the offence for which he is under arrest. *K.R. (Can.) 452(e).*

ii. Open Arrest. A non-commissioned officer under open arrest may take exercise under the same conditions as an officer or warrant officer under open arrest. He is forbidden to enter the sergeants' mess or the corporals' room. *K.R. (Can.) 451(e).*

iii. Close Arrest. "So far as is applicable para 451(b) and (c) (which apply to officers and warrant officers under close arrest) will apply to a non-commissioned officer under close arrest." *K.R. (Can.) 451(a).*

c. Private Soldiers. "A private soldier charged with a serious offence will be placed under arrest on the commission or discovery of the offence. He will not be placed under close arrest unless confinement is necessary to ensure his safe custody or for the maintenance of discipline. If the offence alleged is not of a serious nature, the offender should not normally be placed under arrest, but should be informed of the charge and ordered to attend at orderly room at a specified time." *K.R. (Can.) 446(d).*

All ordinary pay, for every day a soldier is in custody for an offence of which he is afterward found guilty by a court-martial, may be deducted from his ordinary pay due him, as a penal deduction. *A.A. 138.*

A soldier under arrest can only be released by order of competent authority. For example, a soldier confined in a regimental guard room could be released by the commanding officer of the regiment, and a soldier confined in a garrison guard room, by the officer commanding the garrison.

i. Arrest (Open or Close). "Care will be taken to ensure that a soldier under arrest is called upon to perform no duties in addition to those performed by soldiers who are not under arrest or undergoing punishment." *K.R. (Can.) 452(d).*

ii. Open Arrest. A soldier under open arrest will not quit barracks (except on duty or with special permission) until his case has been disposed of, and is forbidden to enter a liquor bar. *K.R. (Can.) 451(e).*

iii. Close Arrest. "A private soldier who disobeys an order distinctly given, or resists the authority of an officer, warrant officer or non-commissioned officer, will be placed under close arrest forthwith." *K.R. (Can.) 446(e).*

"A private soldier who is drunk will be placed under close arrest alone, if possible, in a guard detention room. He may be deprived of his boots except when the weather is cold and he is likely to suffer in consequence. He will be visited, and his

condition ascertained at least every two hours by a non-commissioned officer, of the guard and an escort. Should any symptoms of serious illness be observed, a medical officer will be sent for forthwith." *K.R. (Can.) 447(a).*

"A soldier suspected of being drunk will not be put through any drill or test for the purpose of ascertaining his condition." *K.R. (Can.) 447(b).*

"When a warrant officer or non-commissioned officer (other than a member of the Provost Staff, who will act according to circumstances) has occasion to place a soldier under close arrest, he will obtain the assistance of one or more privates to conduct the offender to the guard room and will avoid coming into personal contact with him, unless it is essential to obviate the escape of an offender in a serious case." *K.R. (Can.) 446(g).*

"A private soldier on being placed under close arrest will be placed in confinement under charge of a guard, picquet, patrol, sentry or provost-marshal, and will be searched and deprived of knives or other weapons. The accommodation usually available in barracks for the temporary confinement of soldiers under close arrest is the guard detention room attached to a guard room, and similar smaller rooms for the confinement of those who are to be kept apart." *K.R. (Can.) 451(b).*

"A soldier in military custody may, by order signed by his commanding officer on form Q (See Appendix III, Rules of Procedure), be committed for temporary detention, not exceeding seven days, to any prison, police station, lock-up or other place of confinement in which he may be legally confined. This order may be made at any time in case of necessity." *K.R. (Can.) 451(f).*

"A soldier under close arrest awaiting trial by court-martial and after court-martial, up to the time of promulgation of his sentence, will be allowed his bedding. A soldier under close arrest pending investigation will be allowed his bedding if the period of his arrest exceeds two days. In severe weather a soldier under close arrest will be allowed such bedding as is necessary for the preservation of his health. A soldier under close arrest will take sufficient exercise under supervision." *K.R. (Can.) 451(c).*

Except on active service a private soldier under close arrest will not be required to perform any duty other than

personal routine duties, such, for instance, as may be necessary to keep clean his quarters, person and belongings; also the duties necessary to relieve him from the charge of any cash, equipment, stores, accounts or office of which he may have charge or for which he may be responsible. He will not bear arms except in an emergency by order of his commanding officer, or on the line of march, or when proceeding to a detention barrack, or in a detention barrack by order of the commandant for purposes of instruction, exercise or practice. On active service he may be ordered to bear arms, attend parades and perform all such duties as may be required of him. *K.R. (Can.) 452(b).*

If by error, or in an emergency, a soldier under close arrest has been ordered to perform any duty, he is not thereby absolved from liability to be proceeded against for the offence for which he is under arrest. *K.R. (Can.) 452(e).*

d. Duties of Person causing Arrest. "Attention is directed to section 45(4) of the Army Act under which it is the duty of an officer, warrant officer or non-commissioned officer, who commits any person into military custody, to deliver at the time or as soon as practicable, and always within twenty-four hours, to the officer or other person in whose custody he may be, an account in writing signed by himself of the offence with which the person so committed is charged." *K.R. (Can.) 448(a).*

If this account in writing, *i.e.*, the charge report (M.F.B. 264), is not delivered at the time, a verbal report giving the nature of the charge will be made. *K.R. (Can.) 448(b).*

"Under section 21(1) of the Army Act, serious liability is incurred by an officer who causes any person to be detained for an unnecessarily long period without investigating the case or taking steps to bring him to trial." *K.R. (Can.) 449(b).*

e. Duties of Custodian. An officer or non-commissioned officer commanding a guard or a provost marshal or assistant provost marshal, shall not refuse to receive or keep any person who is committed to his custody by any officer or non-commissioned officer. *A.A. 45(4).*

If the charge report is not received within twenty-four hours, the commander of the guard will take steps to procure it. A report that a charge report was not received within twenty-four hours will be made to the officer to whom his guard report

is furnished, who, if the charge report or other evidence sufficient to justify the continued arrest is not forthcoming, will at the expiration of forty-eight hours from the time of committal, order the release of the person in custody (without prejudice to his re-arrest). *K.R. (Can.) 448(b).*

"The number, rank, name and offence of every person received into close arrest, and the rank and name of the person by whom he is charged will be entered by the commander of the guard in his guard report, and the original charge report, or copy thereof, will be forwarded to the commanding officer of the person in custody.", *K.R. (Can.) 448(c).*

"The commander of the guard will upon the request of any person received into custody inform him of the rank and name of the person preferring charges against him or ordering his arrest, and give to him a copy of the charge report as soon as he himself receives it." *K.R. (Can.) 448(d).*

f. Rights of Person under Arrest. "A person has a right to be informed of the rank and name of the person preferring charges against him or ordering his arrest, and to receive a copy of the charge sheet as soon as it is received by the commander of the guard." *K.R. (Can.) 448(c) & (d).*

"Except as provided in para. 504, when circumstances render the identification of an alleged offender necessary, the identification should, as a rule, be carried out in the presence of an officer." *K.R. (Can.) 453(a).*

"When an identification is necessary, care must be taken that other soldiers of the same rank and dressed similarly to the alleged offender are present with him during the process of identification." *K.R. (Can.) 453(b).*

C. REDRESS OF GRIEVANCES.

"The manner in which an officer or soldier should proceed to obtain redress for any grievance under which he conceives himself to be suffering is described in sections 42 and 43 of the Army Act and the notes thereto in the Manual of Military Law. An officer or soldier may also make any complaint to an inspecting officer as laid out in para. 73." *K.R. (Can.) 417(a).*

"The above methods of complaint alone will be recognized, and an officer or soldier is forbidden to use any other method of

obtaining redress for a grievance, real or supposed. When complaints are advanced by a soldier they will be fully and distinctly stated, and such explanations will be annexed as may be necessary, with a view to their being duly investigated and adjusted as soon as practicable." *K.R. (Can.) 417(b).*

In his attempt to obtain redress for an alleged grievance, an officer or soldier must not, knowingly, make any false accusation or statement, or suppress any material facts, concerning any other officer or soldier.

"Every person subject to military law who commits any of the following offences, that is to say;

"(1) Being an officer or soldier, makes a false accusation against any other officer or soldier, knowing such accusation to be false; or

"(2) Being an officer or soldier, in making a complaint where he thinks himself wronged, knowingly makes any false statement affecting the character of an officer or soldier, or knowingly and wilfully suppresses any material facts: . . . . . "shall on conviction by court-martial, be liable to suffer imprisonment, or such less punishment as is in this Act mentioned." *A.A. 27(1) & (2).*

While the Army Act recognizes no such offence as "making a frivolous complaint", the repetition of baseless complaints may amount to an offence under section 40 of the Army Act, as would, also, a complaint so framed as to be offensive, or indicative of insubordination, *etc.*

"Anonymous complaints and publication through the medium of the press of anything calculated to act injuriously in the interest of the service, or to excite discontent in the Militia, are strictly prohibited." *K.R. (Can.) 417(c).*

"Everything in the nature of combination to obtain redress of grievances is strictly forbidden among individuals composing a military force. Each individual must speak for himself alone. Appeals for redress by 'round robins' or by means of any document bearing the signature of more than one complainant are strictly forbidden." *K.R. (Can.) 419.*

1. PROCEDURE PRESCRIBED BY K.R.(Can.) "If an officer or soldier desires to bring any grievance to the notice of an

PLEA OF "NOT GUILTY".

After the plea of 'Not Guilty' to any charge is recorded the trial will proceed as follows:

"(A) The court shall ask the accused whether he wishes to apply for an adjournment on the ground that any of these rules relating to procedure before trial have not been complied with, and that he has been prejudiced thereby or on the ground that he has not had sufficient opportunity for preparing his defence, and shall record his answer. If the accused should make any such application, the court shall hear any statement or evidence which he may desire to adduce in support thereof, and any statement of the prosecutor or evidence in answer thereto; and if it should appear to the court that the accused has been prejudiced by non-compliance with any such rule of procedure (if the court has any doubt the accused shall be permitted the adjournment) or that he has not had sufficient opportunity of preparing his defence, they may grant such adjournment as may appear to them in the circumstances to be proper.

"(B) The prosecutor may, if he desires, and shall if required by the court, make an opening address, and should state therein the substance of the charge against the accused and the nature and general effect of the evidence which he proposes to adduce in support of it without entering into any unnecessary detail.

"(C) The evidence for the prosecution shall then be taken.

"(D) If it should be necessary for the prosecutor to give evidence for the prosecution, he should give it after the delivery of his address (if any), and he must be sworn and give his evidence in detail.

"(E) He may be cross-examined by or on behalf of the accused, and afterwards may make any statement which might be made by a witness on re-examination." *R.P. 39.*

"At the close of the evidence for the prosecution, the accused shall be told by the court that he may, if he wishes, give evidence as a witness, but that if he gives evidence he will subject himself to cross-examination." *R.P. 40 (A).*

"The accused will then be asked whether he intends to give evidence as a witness himself, and whether he intends to call any witnesses to the facts other than himself." *R.P. 40 (B).*

"If the accused states that he wishes to give evidence as a witness himself but does not intend to call any other witness to the facts of the case, the procedure, whether or not he is represented by counsel or by an officer subject to military law, will be as follows:

"(i) The accused will give evidence immediately after the close of the evidence for the prosecution.

"(ii) The accused may, if he wishes, call witnesses as to his character.

"(iii) The prosecutor may then make a final address for the purpose of summing up the evidence for the prosecution and commenting on the evidence of the accused.

"(iv) The accused or counsel or the defending officer (as the case may be) may then make a closing address in his defence." *R.P. 40 (C).*

"If the accused states that he does not wish to give evidence as a witness himself and does not intend to call any witnesses to the facts of the case, the procedure will be as follows:

"(i) *If he is not represented by counsel or by an officer subject to military law:*

"(a) The accused may, if he wishes, call witnesses as to his character.

"(b) The prosecutor may make a final address for the purpose of summing up the evidence for the prosecution.

"(c) The accused may then make an address in his defence, giving his account of the subject of the charge against him. The address may be made orally or in writing.

"(ii) *If he is represented by counsel or by an officer subject to military law:*

"(a) The accused may make a statement giving his account of the subject of the charge against him. This statement may be made orally or in writing but the accused must not be sworn and no question may be put to him by the court or by any other person;

"(b) The accused may, if he wishes, call witnesses as to his character.

"(c) Counsel or the defending officer (as the case may be) may then make a closing address;

take such steps as may be necessary for giving full redress to the complainant in respect of the matter complained of." *A.A. 43.*

A complaint cannot legitimately be preferred to a superior officer except in the regular course defined by this section—that is to say, first to the captain and then to the commanding officer. It is only where the captain refuses, or unnecessarily delays, to redress or forward the complaint, that a direct complaint can be made to the commanding officer; and it is only if the commanding officer similarly refuses or delays, that a direct application can be made to the prescribed officer. The captain in the one case, and the commanding officer in the other, ought to be informed of the application being made to his superior.

The commanding officer to whom the complaint is made will usually be the commanding officer as defined in Rule of Procedure 129, but if the complaint is made to any other officer, that officer should receive it and should forward it at once to the commanding officer of the complaining soldier as defined by that rule, and the complaint will then be dealt with as properly made.

"The general officer or brigadier to whom a complaint may be made in pursuance of section 43 of the Army Act shall, as respects a soldier serving elsewhere than in India, be the general or other officer, not below the rank of brigadier, in chief command or a command or district, in or under whose command the soldier may for the time being be." *R.P. 126-(A).*

CHAPTER VIII

OFFENCES.

Crimes and punishments under the Army Act are enumerated in Appendix F, *post;* and offences and penalties under the Militia Act are enumerated in Appendix E, *post.* It is proposed, in this chapter, to discuss several offences more commonly the subject of investigation by officers.

A. DRUNKENNESS.

"Every person subject to military law who commits the following offence; that is to say,

"The offence of drunkenness, whether on duty or not on duty, shall, on conviction by court-martial, be liable, if an officer to be cashiered, or to suffer such less punishment as is in this Act mentioned, and if a soldier, to suffer imprisonment, or such less punishment as is in this Act mentioned, and either in addition to or in substitution for any other punishment, to pay a fine not exceeding five pounds (*$16.00, under Canadian military law*):

"Provided that, where the offence of drunkenness is committed by a soldier not on active service or on duty, the sentence imposed shall not exceed detention for a period of six months, with or without the addition of the aforesaid fine." *A.A. 19.*

In dealing with the offence of drunkenness, it is to be noted that the term includes intoxication from the effects of opium or any similar drug, as well as from liquor.

"A private soldier will be dealt with for drunkenness under the provisions of Section 46 of the Army Act." *K.R. (Can.) 486.* The effect of this section is to modify the application of section 19 of the Army Act with respect to private soldiers, so that only under particular circumstances are they tried before a court-martial for the offence of drunkenness.

"A private soldier will not be tried by court-martial for an act of simple drunkenness—that is to say, an act of drunkenness committed when not on active service, when the soldier was not on duty, or had not been warned for duty, or had not by reason of the drunkenness rendered himself unfit for duty—unless four instances of drunkenness have been recorded against him within the twelve months preceding the date of the offence under disposal, or unless he has elected to be tried rather than be awarded fine or detention by his commanding officer." *K.R. Can.) 487. (See also A.A. 46(3)).*

"Drunkenness on duty includes drunkenness on parade and on the line of march, and drunkenness on the line of march includes drunkenness during the whole period between the date of departure and the date of arrival at destination." *K.R. (Can.) 488.*

"In dealing with simple drunkenness unconnected with another offence, confinement to barracks should be added to a fine only when the circumstances of the case are such as to increase its gravity. Detention should never be awarded for an instance of drunkenness not triable by court-martial, except where the amount of unpaid fines for drunkenness recorded against a soldier is $30 and upwards, in which case a commanding officer should substitute detention or some other punishment which it is in his power to award." *K.R. (Can.) 489.*

"When a private soldier commits the offence of simple drunkenness in connection with a more serious offence for which he is to be tried by court-martial, he should not be charged with drunkenness before the court-martial unless he is liable to trial as stated in para. 487 and the commanding officer considers it a case which should be tried; but, as a record of the drunkenness the commanding officer will, when a charge of drunkenness is not preferred in such cases before the court-martial, make an entry of the offence, either imposing a fine, if the soldier is liable thereto, or making the following note in the punishment column. 'No punishment; awaiting trial on another charge.' If an entry of the court-martial is subsequently made, the above entry will be bracketed with it, and will not be considered a separate entry." *K.R. (Can.) 490.*

"In computing fines for drunkenness in the case of a private soldier, the commanding officer will use his discretion within the following limits, having regard to the attendant circumstances of the case:

"(i)	For the first offence	nil
"(ii)	For the second offence	not exceeding $ 5.00
"(iii)	For the third offence	not exceeding $10.00
"(iv)	For each subsequent offence	not exceeding $10.00
	For each subsequent offence if within six months of the last offence	not exceeding $15.00
	For each subsequent offence within three months of last offence	not exceeding $16.00

"Time during which a soldier is absent from duty by reason of penal servitude, imprisonment, detention, or absence without leave will not be reckoned in the above periods." *K.R. (Can.) 492(a).*

"A soldier should not be fined for drunkenness when the unpaid fines amount to $30.00." *K.R. (Can.) 492(b).*

"A fine that cannot be recovered from a soldier's pay will not be recovered from any other source while he remains in military service. Subject to this regulation, the daily deduction

on account of a fine, or fines, recorded against a soldier will be limited only by the provisions of the Pay and Allowance Regulations as to the residue that should be paid to him." *K.R. (Can.) 493.*

"All fines for drunkenness recovered from a soldier's pay will be disposed of in accordance with the Pay and Allowance Regulations for the Permanent and Non-Permanent Active Militia." *K.R. (Can.) 494.*

It should be noted that drunkenness is the only military offence, for the commission of which, a commanding officer or court-martial can impose a fine as a penalty, though if the offence is a civil offence under section 41 of the Army Act, for the commission of which a fine is allowed as a penalty by the civil law, such fine can be awarded by the commanding officer or court-martial dealing with the case. *A.A. 41(5).*

Drunkenness is no excuse for a crime. It may however be material when intention is an essential element in the offence charged, as negativing the allegation that the accused formed the intention required to constitute the offence, being incapable of so doing by reason of his intoxicated condition.

B. DESERTION AND ABSENCE WITHOUT LEAVE

1. GENERALLY. "Every person subject to military law who commits any of the following offences; that is to say,

"(a) Deserts or attempts to desert His Majesty's service; or.....

shall, on conviction by court-martial—If he committed such offence when on active service or under orders for active service, be liable to suffer penal servitude or such less punishment as is in this Act mentioned; and

"If he committed such offence under other circumstances, be liable for the first offence to suffer imprisonment or such less punishment as is in this Act mentioned; and for the second or any subsequent offence to suffer penal servitude, or such less punishment as is in this Act mentioned . . ." *A.A. 12(1).*

"Every person subject to military law who commits any of the following offences; that is to say,

"(1) Absents himself without leave; or.....

shall, on conviction by court-martial, be liable, if an officer, to be cashiered, or to suffer such less punishment as is in this Act mentioned, and if a soldier, to suffer imprisonment, or such less punishment as in this Act mentioned." *A.A. 15.*

Desertion is absence without leave plus the intention of not returning or of avoiding some particular important service such as embarking with his regiment for service abroad or participating with his regiment when it is called out in aid of the civil power. Evidence of surrounding circumstances is admissible to prove such an intention. For example, if he was found attempting to leave the country, that would be strong evidence of his intention not to return.

Attempted desertion is an act preparatory to desertion which if completed would constitute desertion.

"Every member of the Militia called out for active service who absents himself without leave from his corps, for a longer period than seven days, may be tried by court-martial as a deserter." *M.A. 72.*

2. PROCEDURE ON DISCOVERY OF OFFENCE. "As soon as it is known that a soldier has absented himself without leave, his equipment, clothing and regimental necessaries will at once be placed in safe custody, and an inventory of these articles will be taken as soon as practicable. If there is a detachment of military police in the locality they should immediately be notified of the particulars of the absentee." *K.R. (Can.) 495(a).*

"A commanding officer will transmit to the officer commanding every other unit of the Permanent Force, a descriptive report, on M.F.B. 483, of every deserter or absentee without leave, giving particulars of the man's height, age, etc., at the time of his absenting himself, and the fullest information possible. When there is good ground for supposing an absentee to have deserted, the report should be rendered within 24 hours after his absence has been discovered, but in no case should it be delayed beyond five days. Up to 21 days the man should not be returned as a deserter, unless there is ground for supposing that he has deserted. After 21 days every absentee without leave should, pending investigation be considered as a deserter. In the case of a recruit who absconds en route to join, a note should be made of this fact on the report." *K.R. (Can.) 495(b).*

"A copy of the report will also be transmitted to the civil police of the locality in or near which the man deserted. Similar reports should be sent to the police of the place to which it is supposed the deserter or absentee may have proceeded, and elsewhere, as the commanding officer may consider desirable." *K R (Can.) 496.*

"The name of a soldier absent without leave will be notified in Part II Regimental Orders as follows:—

"(i) If absent from 1 to 20 days, the name will appear on the day following the day of rejoining, and also, if applicable, on the eighth day of absence.

"(ii) If absent for 21 consecutive days—the name will appear on the eighth day of absence and also on the 22nd day.

"(iii) If absent on the last day of the month his name will appear in the Part II Orders of that day and in those of the first day of the next month if still so absent." *K.R. (Can.) 497.*

"A court of inquiry under Section 72 of the Army Act, composed in accordance with Rule of Procedure 124(A) and (C), for the purpose of determining the illegal absence of a soldier will be held in all cases (except in cases of absconded recruits) at the expiration of 21 clear days from the date of absence, or as soon after as practicable, unless, before such court of inquiry has been assembled, it has come to the knowledge of the soldier's commanding officer that the soldier has been apprehended or has surrendered." *K.R. (Can.) 643(a).*

"When a soldier who has been reported to the civil police as a deserter or absentee without leave rejoins or ceases to be liable to apprehension the commanding officer concerned will immediately notify such civil police." *K.R. (Can.) 498.*

3. APPREHENSION OR SURRENDER. "When a person is apprehended by the civil authorities on suspicion of being a deserter or absentee without leave he will be brought before a justice of the peace or magistrate for examination, and if it appears that he is a deserter he will be confined in jail until claimed by the military authorities." *K.R. (Can.) 499.*

"When a person surrenders himself as being a deserter or absentee without leave, he will be dealt with as follows:—

"(i) If he surrenders himself to a peace officer in Canada, he will be taken into custody and dealt with in accordance with paragraph 499.

"(ii) If he surrenders himself to any portion of his own corps, and evidence of identity is immediately available, he will at once be taken into military custody, and the commanding officer will forthwith proceed against him.

"(iii) If he surrenders himself to a provost-marshal, assistant provost-marshal or other officer, or to any portion of His Majesty's Forces not provided for in sub-paragraph (ii), the provost-marshal, assistant provost-marshal or other officer, or the commanding officer of that portion of His Majesty's Forces to which the man surrenders will arrange for an escort to be sent to conduct him back to his unit, and for his detention in military custody pending the arrival of the escort. The officer concerned will himself investigate the case, and will furnish a certificate, in accordance with Section 163(1) (j) of the Army Act, signed by himself, setting forth the fact, date, and place of surrender. This certificate will be forwarded to the man's unit without delay and will be evidence of the matters stated in it. If the man is an absentee without leave, he may, at the discretion of the district officer commanding concerned, be provided with a warrant (the expense being subsequently recovered from the man), and despatched to his unit without escort.

"(iv) The certificate under Section 163(1) (j) of the Army Act should be prepared in accordance with the example given below, and duly signed and dated by the actual officer concerned, and it should contain nothing except a sufficient description to identify the person who surrendered (e.g., number, rank, name, initial, unit) and the date and place at which, and the person to whom, the surrender took place. In any event where the return of the man to his unit will involve expense whether he is returned under escort or otherwise no action towards so returning him will be taken without authority of National Defence Headquarters." *K.R. (Can.) 500.*

a. Protecting Certificate. "When a committed deserter is not claimed for service as a soldier an authority having power to convene a court-martial will issue a protecting certificate in the following form in manuscript:—

"PROTECTING CERTIFICATE

The Bearer Hereof

who has been apprehended (or surrendered) as being.....

.....

.....

a deserter from the.....Regiment

Age.....Height.....Feet.....Inches

Eyes.....Hair.....Complexion.....

Marks.....

IS NOT CLAIMED FOR SERVICE IN THE PERMANENT FORCE OF CANADA.

He is therefore not liable hereafter to arrest on suspicion of being a deserter whose present description is given above.

Given at.....this.....day of.....19....

TO ALL WHOM IT MAY CONCERN.

.....

Officer Empowered to Issue Certificate."

K.R. (Can.) 501.

"If a soldier committed as a deserter cannot conveniently be taken over into military custody by reason of the distance of the place of committal from a Permanent Force station, or when the committal has been ordered on the soldier's confession, by reason of the delay that must necessarily take place in procuring evidence of the truth of the confession, the district officer commanding or commanding officer may take steps to cause him to be discharged from custody without a protecting certificate and consequently without prejudice to his subsequent apprehension." *K.R. (Can.) 502.*

4. DISPENSATION FROM TRIAL. When a soldier has signed a confession that he is a deserter, and it is not considered desirable that the soldier should be tried for his offence, application will be made to the district officer commanding, in or under whose command the soldier is serving, who, under section 73 of the Army Act, may dispense with the soldier's trial by court-martial for desertion, and make an order as to forfeitures. *K.R. (Can.) 518.*

a. Form of Confession of Desertion.

"A copy of the confession should accompany the application, and, whenever possible, evidence as to the truth of the confession should have been previously obtained. The following forms will be used:—

I.....(here insert name), do hereby confess that I am No.....of the.....Corps and that I deserted from that Corps on.....and remained absent till.....when I (surrendered) (was apprehended) (enlisted in.....).*

(Any other particulars to be added.)

Signed this.....day of.....

(Signature of soldier)

I have explained to the above soldier the effect of this confession, and I am satisfied that he understands thoroughly the nature and consequences of the same and that he is not immune from trial under Section 161 of the Army Act.

(Signature of Commanding Officer)

* Strike out whichever is inapplicable.

Note.—Where the soldier confesses to more than one offence of desertion, the form may be varied to suit the case." *K.R. (Can.) 519.*

Before signing the form of confession the commanding officer should explain to the soldier that, if his trial be dispensed with, he will be liable to suffer the same forfeitures as if convicted by a court-martial, and, he should satisfy himself that the soldier understands thoroughly that he is confessing to desertion and not to absence without leave. *K.R. (Can.) 520.*

If the application for dispensing with trial in the case of desertion is approved, it is a disposal of the case. It will therefore be illegal for a commanding officer to award any punishment in addition. An order should not be made where any fact stated by the soldier in his confession is inconsistent with his having committed the full offence of desertion. *K.R. (Can.) 521.*

"The soldier's confession and the order dispensing with trial, or copies thereof, will be preserved with the attestation paper and an entry of the order dispensing with trial will be made in the conduct sheets as if the soldier had been convicted by

court-martial of his offence. This entry will be shown upon page 3 of Statement as to Character, etc., at any subsequent trial." *K.R. (Can.) 522.*

5. PROCEDURE WHEN NOTIFIED DESERTERS ETC. IN CUSTODY OF CIVIL POWER—ESCORTS. "The regulations laid down in para. 504 to 510 will be observed in respect of an escort despatched for deserters, or absentees without leave which will invariably take with it the route issued for the journey." *K.R. (Can.) 503.*

"When a notification is received that a person apprehended on suspicion of being a deserter or absentee without leave, has been committed to confinement to await an escort, or that a person has surrendered to the police and subsequently confessed to being a deserter or absentee without leave, a commanding officer will deal with the case as follows:—

"(i) If the man is traced as being illegally absent, and evidence as to identity is available, he will, if authorized by the district officer commanding, despatch an escort (capable, if possible, of identifying the deserter or absentee without leave) to bring him back should he be identified. (See para. 602 as to strength of escort.) A deserter route will be filled in for this service, and must be taken by the non-commissioned officer detailed for the duty as the authority to receive the deserter or absentee.

"(ii) If it appears to the commanding officer that the person is not a deserter or absentee without leave from the unit under his command, he will so inform the magistrate or the governor of the prison or the officer in charge of the police station, as the case may be.

"(iii) If no evidence of identity is available, but the man admits the offence, and there is documentary evidence as to his desertion, he may be taken over into military custody, and instructions should forthwith be applied for from an officer not below the rank of brigadier having power to deal with the case by district court-martial, the case being dealt with under Section 73 of the Army Act or otherwise.

"(iv) When the person is identified and received into military custody, the descriptive return will be retained by the

unit concerned, the reward for the apprehension and the attendant expenses, if any, being dealt with as provided in the Pay and Allowance Regulations." *K.R. Can.) 504.*

"When a notification is received from the police that an alleged deserter or absentee without leave is to be brought before a court of summary jurisdiction for disposal, a commanding officer will, if the man can be traced as a deserter or absentee (not an absconded recruit) from the unit, despatch an escort with a view to the alleged deserter or absentee without leave being, if identified, taken over at the court, instead of being committed to prison; if an escort can be sent so as to be at the court before the case is disposed of, the police should be notified by telegraph that an escort is being sent. In such cases the non-commissioned officer of the escort should take with him the Form of Descriptive Return as described in the Fourth Schedule of the Army Act prepared in manuscript and he should be instructed to have the same completed before leaving the court." *K.R. (Can.) 505.*

"An escort proceeding to receive over from civil custody a deserter, or absentee without leave, will be provided with an order for the removal of the man. The order will be given up to the governor, magistrate, police officer, or chief officer of the prison. When a route is issued, this order, which forms part of it, will be detached and similarly given up on taking over the deserter or absentee." *K.R. (Can.) 506.*

"The commander of an escort is required to compare the deserter or absentee without leave and his necessaries with the description and account inserted in the route as he is responsible for the identity of the person committed to his charge, and liable to punishment for suffering the necessaries of the deserter or absentee without leave to be misused or made away with on the road." *K.R. (Can.) 507.*

"Such necessaries as the deserter or absentee without leave may absolutely require, and which are not amongst the articles left behind by him, not exceeding, however, one shirt, one pair of boots or shoes, and one pair of socks, will be provided under the orders of the commanding officer of the corps furnishing the escort, and the charge for the same will be defrayed by the company, etc., commander to which the man belongs, and

will be subsequently included in the deserter's accounts." *K.R. (Can.) 508.*

"In cases where identification is necessary, and it appears to a commanding officer doubtful if the deserter or absentee without leave should be conveyed to the headquarters of his unit, he will make an immediate report to the district officer commanding with a view to special instructions being given." *K.R. (Can.) 509.*

"Except as provided in para. 504 where a deserter or absentee admits the offence, and there is documentary evidence as to his desertion, an escort will not take into custody a prisoner who is not identified as a deserter or absentee without leave." *K.R. (Can.) 510.*

6. PENAL DEDUCTIONS AND TIME. In the case of a soldier,—all ordinary pay for every day of absence, either on desertion or without leave or whilst he is in custody on a charge of absence without leave, for which he is afterwards awarded detention or field punishment by his commanding officer, may be deducted as a penal deduction from the ordinary pay due to him as a soldier of the regular forces. *A.A. 138(1).*

In the case of an officer,—all ordinary pay due to an officer who absents himself without leave or overstays the period for which leave of absence has been granted him, may be deducted as a penal deduction, unless a satisfactory explanation has been given through the commanding officer of such officer, and has been approved by the Army Council (*In Canada, Minister of National Defence.*) *A.A. 137.*

"Any sum authorized by this Act to be deducted from the ordinary pay of an officer or soldier may, without prejudice to any other mode of recovering the same, be deducted from the ordinary pay or from any sums due to such officer or soldier, in such manner and when deducted or recovered may be appropriated in such manner, as may be from time to time directed by a regulation or order of the Army Council. (*In Canada, Minister of National Defence.*" *A.A. 140(1).*

Any such regulation or order may from time to time declare what shall be deemed, for the purposes of the provisions of the Army Act relating to deductions from pay, to constitute a day of absence provided that—

(a) No person shall be treated as absent for the purposes aforesaid, unless the absence has lasted six consecutive hours or upwards, except where the absence prevented the absentee from fulfilling any military duty which was thereby thrown on some other person;

(b) A period of absence which commences before and ends after midnight may be reckoned as a day;

(c) The number of days shall be reckoned as from the time the absence commences; and

(d) No period of less than twenty-four hours shall be reckoned as more than one day. *A.A. 140(2).*

C. FAILURE TO REPORT VENEREAL DISEASE

"In every unit there shall be an order directing that a soldier who is suffering from venereal disease is to report himself sick without delay. This order will be brought to the attention of all personnel of the unit at intervals not exceeding three months, care being taken that it is specially brought to the notice of all recruits on joining. Concealment of venereal diseases will be dealt with under Section II of the Army Act, and not under Section 18(3) or 40." *K.R. (Can.) 442.*

"Every person subject to military law who commits the following offence; that is to say,

"neglects to obey a general or garrison or other orders, shall, on conviction by court-martial, be liable, if an officer, to be cashiered, or to suffer such less punishment as is in this Act mentioned, and if a soldier to suffer imprisonment, or such less punishment as is in this act mentioned.

"Provided that the expression 'general orders' in this section shall not include the King's Regulations for the Army, or any order in the nature of a regulation published for the general information and guidance of the Army." *A.A. 11.*

By Order-in-Council, dated October 22nd, 1940, provision is made for precautions to be taken with respect to members of the Armed Forces of Canada, serving on active service, who are about to be discharged, and who have had venereal disease.

D. OFFENCES UNDER SECTION 40 OF THE ARMY ACT

1. PURPOSE OF THE SECTION. It is neither possible nor practicable to make provision for the punishment of every specific

act, conduct, disorder or neglect, to the prejudice of good order and military discipline. This *omnibus* section was enacted, therefore, to enable charges to be brought for all offences, (not civil offences) which are not made substantive offences by any other section of the Army Act.

2. ANALYSIS OF THE SECTION. The text of the section is as follows:

"Every person subject to military law who commits any of the following offences; that is to say,

"Is guilty of any act, conduct, disorder, or neglect to the prejudice of good order and military discipline,

"shall, on conviction by court-martial, be liable, if an officer, to be cashiered, or to suffer such less punishment as is in this Act mentioned, and if a soldier, to suffer imprisonment, or such less punishment as is in this Act mentioned. Provided that no person shall be charged under this section in respect of any offence for which special provision is made in any other section of this Act, and which is not a civil offence; nevertheless the conviction of a person so charged shall not be invalid by reason only of the charge being in contravention of this proviso, unless it appears that injustice has been done to the person charged by reason of such contravention; but the responsibility of any officer for that contravention shall not be removed by the validity of the conviction." *A.A. 40.*

An offence, in order, properly, to come within the scope of the section, therefore, must satisfy the following four conditions:—

(1) The accused must be a person subject to military law;

(2) The conduct, complained of, must be to the prejudice of, BOTH, good order and military discipline;

(3) The offence must be one, which is not a civil offence, and for which no specific provision has been made in any other section of the Army Act.

Non-compliance with the first condition would invalidate the proceedings. But the conviction would not be invalidated by reason of the contravention of the other two conditions or either of them, unless such contravention appeared to have caused an injustice to be done to the accused. The fact, however, that the

conviction might stand, would not remove from any officer his responsibility for any such contravention.

3. APPLICATION OF THE SECTION. Section 40 would be resorted to for the purpose of punishing, *e.g.*, an ATTEMPT by a soldier to commit, or to procure the commission of, a strictly military offence, (other than desertion, which is dealt with by section 12 of that Act), for such an attempt would come within all three conditions. The accused is a person subject to military law; his conduct would be to the prejudice of both good order and military discipline; and such an attempt is not a civil offence, (although an attempt to commit, or to procure the commission of any CIVIL OFFENCE is in itself a CIVIL OFFENCE and would render the person guilty thereof responsible in the CIVIL COURTS); and an ATTEMPT to commit, or to procure the commission of, a strictly military offence, (other than desertion, as aforesaid), is not made a substantive offence by the Army Act.

CHAPTER IX

APPENDICES.

APPENDIX A.

ORDER IN COUNCIL DATED MARCH 19th, 1940.

(referred to, ante, at pages 18, 33 and 34)

P.C. 1065.

REGULATIONS (*THEREUNDER*) FOR THE ADMINISTRATION AND DISTRIBUTION OF NAVAL, MILITARY AND AIR FORCE ESTATES 1940.

1. In these Regulations, unless the context otherwise requires:

(a) "Minister" means the Minister of National Defence.

(b) "Administrator of Estates" means the Officer of the Department of National Defence appointed to administer the service estates of deceased members of the Naval, Military and Air Forces of Canada on Active Service.

(c) "Member" means any person serving in the Naval, Military, or Air Forces of Canada on Active Service.

(d) "Service Estate" in respect of a deceased member means that part of his personal estate which consists of balance of pay and allowances and other emoluments emanating from the Crown, which at date of death are due or otherwise payable, and effects issued by the Crown, which under Regulations he is permitted to retain, and all personal belongings found on the deceased and in camp, quarters or otherwise in the care or custody of the Service authorities, including cash on hand and personal articles and effects."

(e) "Appropriate Paymaster" means:

(i) In respect of a member of the Naval Forces, the Accountant Officer of the ship or establishment,

(ii) In respect of a member of the Military Forces or of the Air Forces, the Paymaster of the unit or formation, who at the date of such members' death was responsible for the issue of pay to said member.

2. Except as otherwise specifically provided herein, these Regulations shall apply in respect of a member notwithstanding anything to the contrary in the provisions of any Act (other than the War Measures Act), Regulations or Order relating to the Force in which such member was serving at date of death, provided that in respect of a member of the Naval Forces, these Regulations shall only apply to the extent that they are not inconsistent with any law, Regulation or Order relating to the

Naval Service, and the provisions of King's Regulations and Admiralty Instructions shall continue to apply to Naval personnel.

3. The Minister may appoint an Administrator of Estates who shall be a barrister of at least fifteen years' standing and who shall be directly responsible to the Deputy Minister of National Defence. Such officers, clerks and employees as are necessary for the administration of the service estates of deceased members may be appointed in the manner authorized by law.

4. On receipt of report of death, the Officer i/c Records—Naval, Military, or Air, as the case may be, at National Defence Headquarters shall promptly forward notice thereof to the Administrator of Estates, giving particulars thereof and of the next-of-kin as appearing on the "Particulars of the Family" form, together with the deceased member's will on deposit in such Record Office, or if there is no Will so deposited, information as to where such Will is located, if known.

5. On the death of a member, a committee of Adjustment shall be appointed to:

(a) Secure and make an inventory of all the personal effects of the deceased, on his person, in camp, quarters or otherwise in the care or custody of the Service authorities.

(b) Ascertain the amount of the preferential charges on the service estate of the deceased.

(c) Forward all personal effects, wherever located, for custody, to the appropriate officer designated by Article 221 or by Article 831 (as the case may be) of the Financial Regulations and Instructions hereinafter referred to.

(d) Lodge with the appropriate Paymaster on the forms supplied, the inventory of effects, showing disposition of such effects, and a report including particulars of preferential charges and of any other debts or claims of any nature which have come to its notice, together with any cash on hand, vouchers and accounts.

6. The following shall be the preferential charges on the service estate of the deceased member, and shall be a first charge or lien against such estate and be payable in preference to all other debts and liabilities, and as among such charges, in the following order:

(i) Expenses of last illness and funeral over and above those borne by the Government of Canada.

(ii) Service debts, namely sums due in respect of, or of any advance in respect of (a) quarters, (b) mess, canteen, band and other service accounts, (c) service clothing, appointments and equipment, not exceeding a sum equal to six months' pay of the deceased, and having become due within eighteen months before his death.

7. When Death Occurs in Canada.

The provisions of Articles 221 of Financial Regulations and Instructions for the Canadian Active Service Force (Canada) and of Financial Regulations and Instructions for the Royal Canadian Air Force on Active Service (Canada) shall, except to the extent that such provisions are inconsistent with these Regulations, apply with respect to a deceased member of the Active Militia on Active Service and of the Royal Canadian Air Force on Active Service respectively. Wherever in the said Articles the expressions "Officer i/c Estates" and "Estates Branch" occur, there shall for the purposes of these Regulations be substituted therefore the expression "The Administrator of Estates", Department of National Defence.

8. When Death Occurs in the United Kingdom:

(i) The provisions of Articles 831 of Financial Regulations and Instructions for the Canadian Active Service Force (Overseas) and of Financial Regulations and Instructions for the Royal Canadian Air Force on Active Service (Overseas) shall, except to the extent that such provisions are inconsistent with these Regulations, apply with respect to a deceased member of the Active Militia on Active Service and of the Royal Canadian Air Force on Active Service respectively.

(ii) The personal effects and documents referred to in said Articles 831 shall, pending instructions from the Administrator of Estates as to their disposal, be retained by the Officer i/c Estates, Overseas, in said custody.

9. When Death Occurs Outside of Canada or the United Kingdom:

(i) The Commanding Officer of the deceased member's unit shall as soon as possible appoint an Officer who shall act

as a Committee of Adjustment to secure all the deceased member's effects and forward same, with an inventory thereof, giving full regimental description of the deceased member, in a sealed package to the Officer i/c Estates, Overseas, who shall retain same in safe custody, pending instructions from the Administrator of Estates.

(ii) The Officer acting as a Committee of Adjustment shall forward to the appropriate Paymaster a copy of the inventory of effects referred to in clause (i) of this paragraph together with a statement of such preferential charges as may have come to his notice, Pay Book, and the documents and cash referred to in Articles 831 of the Financial Regulations and Instructions (Overseas) mentioned in paragraph 8 of these Regulations. Such Paymaster shall then deal with such inventory, statement, Pay Book, documents and cash in the manner prescribed in the said Articles.

(iii) The Commanding Officer of any unit, or formation, may, if he considers it desirable or expedient, appoint an officer to act as a standing Committee of Adjustment and may appoint more than one officer to act in such capacity, each of whom shall act as a standing Committee of Adjustment.

10. A Last Pay Certificate for a member dying outside of Canada shall be forwarded, as soon as possible by the Chief Treasury Officer, Overseas, to the Officer i/c Estates, Overseas, who will retain same pending instructions from the Administrator of Estates.

11. In case a doubt or difference arises in relation to any preferential charge, or the payment or disposition of same, the decision of the Minister shall be final and binding on all persons for all purposes.

12. Where any member is certified by the proper Service authorities as being insane, the provisions of these Regulations shall apply as if he had died at the time of his insanity being so certified, and his service estate shall be dealt with accordingly and, when so dealt with, shall be applied for the benefit of such insane person.

13. The Administrator of Estates shall administer the service estates of deceased members, and

(a) Where, in a Will of a deceased member, an executor has been named and such nominee has been appointed executor by the Court of competent jurisdiction, or where an administrator, or an administrator with Will annexed, has been appointed by the court of competent jurisdiction, the Administrator of Estates may cause to be delivered over to such executor or administrator for distribution, the net assets of the said service estate in his possession.

(b) Where, in a Will of a deceased member, an executor has been named and such nominee has not been appointed executor by the Court of competent jurisdiction, or where no administrator has been appointed by the Court of competent jurisdiction, the Administrator of Estates may cause to be distributed the net assets of the said estate in accordance with the law applicable in each case to the distribution of personal estates.

(c) Where, under sub-paragraph (b) hereof, no distribution, or only a partial distribution, of any service estate can be made in accordance with such law, the Administrator of Estates shall convert the net assets, or such balance thereof, into cash and pay the same to the Receiver General of Canada, to be by him deposited in a special Trust Account or Accounts as designated by the Comptroller of the Treasury pending final distribution to the person or persons entitled thereto.

14. Notwithstanding anything in these Regulations contained, no person shall have as a matter of right any claim against the service estate, or any part thereof, of a deceased member.

15. In respect of service estates of deceased members distributable, or partly distributable, in or from the United Kingdom, these Regulations shall apply and the powers, duties, and functions thereunder of the Administrator of Estates shall be exercised and performed by the Officer i/c Estates, Overseas, under the direction of the Administrator of Estates.

16. In the exercise of their powers, duties and functions under these Regulations, any Committee of Adjustment, and Paymaster, and the Administrator of Estates, shall, to the exclusion of all authorities and persons whomsoever, have the same rights and powers in respect of the service estate of a deceased

member as if they and each of them respectively had taken out legal representation in respect of said estate.

17. Compliance with these Regulations with respect to the administration of a service estate shall discharge the Minister, the Administrator of Estates, any Paymaster, any Committee of Adjustment or other person complying therewith, from all liability by reason of any assets in his hands having been paid, transmitted, remitted, or otherwise dealt with in accordance therewith.

APPENDIX B.

ORDER IN COUNCIL, DATED OCTOBER 2nd, 1940.

(*referred to, ante, at pages 19 and 34*)

P.C. 5299.

REGULATIONS (*THEREUNDER*) COVERING CIVILIAN CLAIMS AGAINST THE CROWN IN THE RIGHT OF THE DOMINION OF CANADA INVOLVING THE CANADIAN ACTIVE SERVICE FORCE IN THE UNITED KINGDOM AND THE ROYAL CANADIAN AIR FORCE IN THE UNITED KINGDOM.

1. Appropriate Headquarters shall mean:

(a) With respect to Military Forces under the command of the Senior Combatant Officer at Canadian Military Headquarters in Great Britain, other than those units and detachments under the command of an Area or Group Commander, those Headquarters.

(b) With respect to units and detachments under the command of an Area or Group Commander, such Area or Group Headquarters.

(c) With respect to Military Forces other than those mentioned in Clauses (a) and (b), the Brigade Headquarters under which the individual was serving or if there is no such Brigade Headquarters, the Divisional Headquarters.

(d) With respect to the Royal Canadian Air Force, the Royal Canadian Air Force Headquarters in Great Britain.

2. In connection with every civilian claim against the Crown arising in the United Kingdom out of any death or injury to

the person or to property resulting from the alleged negligence of any officer or servant of the Crown while acting within the scope of his duties or employment, the procedure hereinafter set forth shall be observed by Canadian Military Headquarters and Royal Canadian Air Force Headquarters in Great Britain hereinafter referred to as "Canadian Headquarters."

3. As soon as Canadian Headquarters becomes aware that circumstances have arisen which may give rise to a civilian claim against the Crown of the nature set forth in Paragraph 2 of these Regulations, it shall cause an immediate investigation to be made of all such circumstances.

4. When said investigation has been completed and when the necessary material has been obtained from the claimant, the claim shall then be dealt with in the following manner:

(a) If the officer commanding the appropriate Headquarters is of the opinion that there is a legal liability on the part of the Crown and that the civilian claim should be paid, the said officer commanding is hereby authorized to arrange settlement of civilian claims not exceeding £10-0-0. In the event that such a settlement is arranged by such officer commanding, the Chief Treasury Officer (Overseas) will pay the amount of such settlement to the civilian claimant upon production of a duly executed release.

(b) Where the amount of the civilian claim exceeds £10-0-0 the claim and all necessary documents shall be forwarded to the Deputy Judge Advocate-General, Canadian Military Headquarters in Great Britain.

(c) Where any such claim arises other than by reason of an aircraft accident, the said Deputy Judge Advocate-General, if he is of the opinion that the officer or servant of the Crown was acting within the scope of his duties or employment at the time of the accident and that the damage to persons, vehicles, or property was a direct result of the negligence or partial negligence of such officer or servant, the said Deputy Judge Advocate-General shall, in his discretion, decide what is a fair and reasonable amount of compensation and shall endeavour to arrange a settlement with the claimant, provided that no such settlement in any one case shall be for a sum exceeding £50 with respect to personal injuries and £50 with respect to property damage.

If such settlement is arranged, the Chief Treasury Officer (Overseas) will pay the amount of such settlement to the claimant upon production of a duly executed release.

(d) In respect of aircraft accidents the said Deputy Judge Advocate-General shall first obtain an opinion from the Senior Combatant Officer, Royal Canadian Air Force Headquarters in Great Britain on the question as to whether or not the officer or servant operating said aircraft was acting within the scope of his duties or employment and was negligent. The said Deputy Judge Advocate-General, if he is of the opinion that the officer or servant of the Crown was acting within the scope of his duties or employment at the time of the accident and that the damage to persons, vehicles or property was a direct result of the negligence or partial negligence of such officer or servant, shall in his discretion, decide what is a fair and reasonable amount of compensation and shall endeavour to arrange a settlement with the claimant, provided that no such settlement in any one case shall be for a sum exceeding £50 with respect to personal injuries and £50 with respect to property damage. If such settlement is arranged, the Chief Treasury Officer (Overseas) will pay the amount of such settlement to the claimant upon production of a duly executed release.

(e) If the said Deputy Judge Advocate-General is of the opinion that the officer or servant of the Crown was not acting within the scope of his duties or employment or in the alternative, while acting within the scope of his duties was not negligent, the claimant will be promptly notified that the Crown denies liability and that the question as to what legal remedy the claimant will seek is a matter for his determination. A similar notification will be given to a claimant who refuses an offer of settlement. Notwithstanding the above, the said Deputy Judge Advocate-General shall have the power in any case where in his discretion he deems it just and reasonable, to settle with a claimant upon an *ex gratia* basis, regardless as to whether negligence has or has not been established on the part of the officer or servant of the Crown, provided that no such settlement in any one case shall be for a sum exceeding £25 with respect to personal injuries and £50 with respect to property damage.

5. (a) Where the officer commanding appropriate headquarters has arranged a settlement of a civilian claim pursuant to Paragraph 4 (a) of these Regulations, he shall then refer the matter to the said Deputy Judge Advocate-General for an opinion as to whether or not any officer or servant of the Crown on whose alleged negligence the said claim is based is legally liable to reimburse the Crown in respect of the liability which the Crown has incurred by reason of such alleged negligence.

(b) Where any matter is so referred and also in cases involving civilian claims exceeding £10-0-0, the said Deputy Judge Advocate-General, where the facts as disclosed indicate only a slight degree of negligence and do not involve recklessness, undue carelessness, or intentional omission or commission of any act amounting to a wrongful act, shall, if he give an opinion that any officer or servant of the Crown is legally liable to reimburse the Crown, state that the negligence was of a minor character.

(c) In any case where, in the opinion of the said Deputy Judge Advocate-General, such officer or servant is so liable after the claim has been paid in whole or in part, demand shall, except where the negligence involved is of a minor character, be made upon such officer or servant for reimbursement to the following extent,—

(i) where the amount paid by the Crown in respect of such claim is £5-0-0 or less, the full amount paid by the Crown;

(ii) where the amount paid by the Crown in respect of such claim is more than £5-0-0 and does not exceed £20-0-0, one-half of the amount paid by the Crown, or £5-0-0, whichever is the greater;

(iii) where the amount paid by the Crown in respect of such claim is more than £20-0-0 and does not exceed £60-0-0, one-third of the amount paid by the Crown, or £10-0-0, whichever is the greater;

(iv) where the amount paid by the Crown in respect of such claim is more than £60-0-0 and does not exceed £100-0-0, one-quarter of the amount paid by the Crown or £20-0-0, whichever is the greater;

(v) where the amount paid by the Crown in respect of such claim is more than £100-0-0, one-fifth of the amount

paid by the Crown or £25-0-0, whichever is the greater;

Provided always that the liability of such officer or servant is not to exceed the sum of £100-0-0.

(d) If the officer or servant concerned does not within a reasonable time arrange for the payment of such amounts, action shall be taken by the appropriate Canadian Headquarters to charge such officer or servant, if a member of the Military or Air Force, under the appropriate Section of the Army Act or the Air Force Act, and if a conviction is obtained, the amount provided above shall be awarded as a stoppage of pay against the officer or servant concerned.

6. In the event that a claimant is entitled to receive compensation from an insurance company for the damages he has suffered, any claim either by the claimant or by the insurance company will be rejected, save and except that if in the case of collision insurance, the insurance contract of the claimant provides for a sum to be payable by the claimant in respect of each claim, the claim for compensation may be considered up to but not exceeding the amount so payable by the claimant as provided in his policy.

7. Should a person who claims damage or injury institute legal proceedings against an officer, soldier, or airman, or should criminal proceedings be instituted against such officer, soldier or airman as a result of his operation of a motor vehicle or aircraft, then, if the said Deputy Judge Advocate-General is of the opinion that the officer, soldier or airman concerned was acting within the scope of his duties or employment and was not guilty of negligence, and that it is proper and advisable, the appropriate Canadian Headquarters is empowered to employ counsel at the expense of the Crown to act for the officer, soldier or airman in question.

8. The Minister of National Defence may, from time to time, make such orders and issue such instructions as are necessary for the purpose of carrying out these Regulations and giving effect to the intention thereof.

9. These Regulations shall have force and effect as of and from the 29th day of September, 1940, and will apply as well to all claims pending on that date.

APPENDIX C.

ORDER IN COUNCIL DATED NOVEMBER 28th, 1940.

(referred to, ante, at pages 19 and 34)

P.C. 6879.

REGULATIONS (*THEREUNDER*) GOVERNING CIVILIAN CLAIMS AGAINST THE CROWN IN THE RIGHT OF THE DOMINION OF CANADA INVOLVING THE CANADIAN ACTIVE SERVICE FORCE AND THE ROYAL CANADIAN AIR FORCE, IN ICELAND, NEWFOUNDLAND, AND THE WEST INDIES.

1. (a) Officer Commanding shall mean with respect to civilian claims arising in Iceland, Newfoundland or the West Indies:

(i) the officer commanding the Canadian Forces serving in Iceland,

(ii) the officer commanding the Canadian Forces serving in Newfoundland,

(iii) the officer commanding the Canadian Forces serving in the West Indies,

as the case may be.

(b) Where in these regulations an amount is set out in terms of Canadian currency, said amount shall be deemed to include the equivalent thereof in the currency of Iceland, Newfoundland or the West Indies as the case may be.

2. In connection with every civilian claim against the Crown arising in Iceland, Newfoundland and the West Indies out of any death or injury to the person or property (other than by reason of an aircraft accident) resulting from the alleged negligence of any officer or servant of the Crown while acting within the scope of his duties or employment, the procedure hereinafter set forth shall be observed by the Officer Commanding concerned.

3. As soon as the Officer Commanding concerned becomes aware that circumstances have arisen which may give rise to a civilian claim against the Crown of the nature set forth in Paragraph 2 of these Regulations, he shall cause an immediate investigation to be made of all such circumstances.

4. When said investigation has been completed and when the necessary material has been obtained from the claimant, the claim shall then be dealt with in the following manner:

(a) with respect to such civilian claims arising in Iceland, if, on the report of the joint Civilian and Army Committee established in Iceland, the Officer Commanding is hereby authorized to arrange settlement of civilian claims not exceeding with respect to any one accident, $250 with respect to personal injuries and $100 with respect to property damage. In the event that such a settlement is arranged by such Officer Commanding, the Paymaster of the Canadian Forces in Iceland will pay the amount of such settlement to the civilian claimant upon production of a duly executed release.

(b) With respect to such civilian claims arising in Newfoundland and the West Indies, if the Officer Commanding concerned is of the opinion that there is a legal liability on the part of the Crown, and that the civilian claim should be paid, the said Officer Commanding is hereby authorized to arrange a settlement of civilian claims not exceeding, with respect to any one accident, $50. In the event that such a settlement is arranged by such Officer Commanding, the Paymaster of the Canadian Forces in Newfoundland or the West Indies, as the case may be, will pay the amount of such settlement to the civilian claimant upon production of a duly executed release.

5. (a) With regard to civilian claims which the Officer Commanding concerned has settled, pursuant to the provisions of Paragraph 4 (a) and (b) of these Regulations, the said Officer Commanding concerned shall, after the claim has been paid, forward all necessary documents to National Defence Headquarters, Ottawa, Canada.

(b) The matter shall then be referred to the Deputy Minister of Justice for an opinion as to whether or not any officer or servant of the Crown on whose alleged negligence the claim is based is legally liable to reimburse the Crown in respect of any liability which the Crown has incurred by reason of such alleged negligence.

(c) Where in the opinion of the Deputy Minister of Justice the facts as disclosed in the reference indicate only a slight degree of negligence, and do not involve recklessness, undue carelessness, or intentional omission or commission of any act amounting to a wrongful act, he shall, if he gives an opinion pursuant to the provisions of Paragraph 5 (b) of these

Regulations that any officer or servant of the Crown is legally liable to reimburse the Crown, state that the negligence was of a minor character.

(d) In a case where in the opinion of the Deputy Minister of Justice such officer or servant is so liable after the claim has been paid in whole or in part, demand shall, except where the negligence involved is of a minor character, be made upon such officer or servant for reimbursement to the following extent:

(i) where the amount paid by the Crown in respect of such claim is $25 or less the full amount paid by the Crown;

(ii) where the amount paid by the Crown in respect of such claim is more than $25 and does not exceed $100, one-half of the amount paid by the Crown, or $25, whichever is the greater;

(iii) where the amount paid by the Crown in respect of such claim is more than $100 and does not exceed $300, one-third of the amount paid by the Crown or $50, whichever is the greater;

(iv) where the amount paid by the Crown in respect of such claim is more than $300 and does not exceed $350, one-quarter of the amount paid by the Crown or $100, whichever is the greater.

6. If such officer or servant does not within a reasonable time arrange for the payment of the amount so demanded, action shall be taken by the Officer Commanding concerned to charge said officer or servant, if a member of the Military or Air Forces, under the appropriate Section of the Army Act or the Air Force Act, and if a conviction is obtained, the amount provided above shall be awarded as a stoppage of pay against the officer or servant concerned.

7. In the event that a claimant is entitled to receive compensation from an insurance company for the damages he has suffered, any claim either by the claimant or by the insurance company will be rejected, save and except that if in the case of collision insurance, the insurance contract of the claimant provides for a sum to be payable by the claimant in respect of each claim, the claim for compensation may be considered up to

but not exceeding the amount so payable by the claimant as provided in his policy.

8. Should a person who claims damage or injury institute legal proceedings against an officer, soldier, or airman as a result of his operation of a motor vehicle, then, if the Officer Commanding concerned is of the opinion that the officer, soldier or airman concerned was acting within the scope of his duties or employment and was not guilty of negligence, and that it is proper and advisable, the said Officer Commanding concerned is empowered to employ counsel at the expense of the Crown to act for the officer, soldier or airman in question.

9. The Minister of National Defence may, from time to time, make such orders and issue such instructions as are necessary for the purpose of carrying out these Regulations and giving effect to the intention thereof.

10. These Regulations shall have force and effect as of and from the First day of November, 1940, and will apply as well to all claims pending on that date.

APPENDIX D.

ORDER IN COUNCIL DATED DECEMBER 11th, 1940.

(referred to, ante, at pages 19 and 34)

P.C. 7249.

Order in Council amending "Regulations for the Administration and Distribution of Naval, Military and Air Force Estates, 1940".

The Canada Gazette, December 21, 1940

P.C. 7249

AT THE GOVERNMENT HOUSE AT OTTAWA

WEDNESDAY, the 11th day of December, 1940.

PRESENT:

HIS EXCELLENCY

THE GOVERNOR GENERAL IN COUNCIL:

Whereas the Associate Minister of National Defence reports:

That an Estates Branch of the Department of National Defence was established, effective April 1, 1940, under the direction of an Administrator of Estates, for the administration of the service estates of deceased members of the Naval, Military and Air Forces of Canada on Active Service in the present War;

That by Order in Council of March 19, 1940 (P.C. 1065), Regulations entitled "Regulations for the Administration and Distribution of Naval, Military and Air Force Estates, 1940," were made, effective said April 1, 1940;

That said Regulations have not provided for the collection of small bank balances of deceased members and the distribution thereof with their service estates by the Estates Branch;

That in respect to the pay and allowances of an officer of Canada serving Overseas, the total amount thereof, converted into sterling, is, by the Treasury Officer (Overseas), deposited monthly to the credit of his account in the bank or other approved financial institution (hereinafter referred to as bank), designated by the officer, and it is frequently found that at his death there is a small balance at credit therein;

The small amounts at credit of all ranks in the Forces are also found at their death in banks in Canada as well as Overseas;

That it is not unusual that the amount of such balance is so small as not to justify the persons entitled to the estate of the deceased making the expenditure necessary to obtain administration thereof;

That it is a great convenience to such persons entitled and a great saving to them of the proportionately large expense of obtaining probate of the last Will of the deceased, or administration of the estate where there is an intestacy, to have the amounts of such balances paid by the banks to the credit of the Receiver-General of Canada and distributed with the service estate by the Estates Branch;

That numerous requests have been made for the Department to adopt such practice;

That during the War 1914-1918 such practice was found beneficial and was authorized by Orders in Council of June 11, 1917, (P.C. 1595) in respect to officers only, and June 3, 1918 (P.C. 1311) in respect to all ranks, for balances not exceeding in all $400, and the bank concerned relieved from further liability and saved harmless in respect of the amount thereof;

That during the present War the banks concerned have expressed their willingness on condition of the Government of Canada giving the same relief from liability, to transfer such

balances of deceased members to the credit of the Receiver-General to the intent that such balances be paid out by the Receiver-General to such beneficiaries as the Administrator of Estates shall determine are, according to law, entitled thereto;

That the rates of pay and allowances in force in the present War are considerably higher than those in the War 1914-1918 and accordingly it would not be inappropriate to increase said $400-amount to $600;

That it is desirable that such small bank balances should be dealt with accordingly;

That many instances have been found wherein infants, being persons under the age of twenty-one years, are entitled to share in the estate of a deceased member and each such share consists of or represents only a small sum of money;

That in the administration of such estates under the provisions of the said Regulations, no distribution may be made of any such share until the infant entitled attains the age of twenty-one years, and the amount thereof must accordingly in the meantime be held at the credit of the Receiver-General for a period which in some cases will extend in excess of twenty years;

That this procedure tends toward and frequently results in hardship to the widow of the deceased or the guardian, relative or person who has, or assumes, the care of the infant, and it has been urged that the small sum of money involved should be made immediately available for the present maintenance, education and benefit of the infant during minority rather than years later when majority is attained;

That where any such infant's share exceeds $100, distribution thereof in any year should be limited to $100;

That numerous requests have been made for the Department to adopt such practice;

That it is desirable that infants' shares should be dealt with accordingly;

Therefore, His Excellency the Governor General in Council, on the recommendation of the Associate Minister of National Defence, and under and by virtue of the War Measures Act, Chapter 206, Revised Statutes of Canada, 1927, and notwithstanding the provisions of any other Act, Law or Regulation, is pleased to order and doth hereby order:

1. That Banks and other financial institutions holding balances of money at the credit of deceased members of the Naval, Military and Air Forces of Canada on Active Service pay such balances at the request of the Administrator of Estates to the Receiver-General of Canada, provided such balances do not, in respect to any one deceased member, exceed in all $600.

2. That the Bank or institution be relieved from further liability and saved harmless in respect of any such balance upon the payment thereof to the Receiver-General of Canada.

3. That the share, not exceeding $300 of an infant, being a person under the age of twenty-one years, in the estate of a deceased member be distributed and applied for the benefit of such infant, provided that the amount distributed in any year be limited to $100.

His Excellency in Council on the same recommendation, is further pleased to amend the Regulations entitled "Regulations for the Administration and Distribution of Naval, Military and Air Force Estates, 1940", and they are hereby amended by adding to Paragraph 13 thereof, as sub-paragraphs (d) and (e), the following:

(d) Where it is ascertained that a deceased member has a balance of money at his credit in any Bank or other financial institution, the Administrator of Estates may cause the amount thereof, not exceeding in all $600, to be paid to the Receiver-General of Canada, and may distribute same with the service estate of such deceased.

(e) Where an infant, being a person under the age of twenty-one years, is entitled to a share, not exceeding $300, in the estate of a deceased member, the Administrator of Estates may cause such share to be distributed and applied for the benefit of such infant, provided that the amount distributed in any year may not exceed $100.

His Excellency in Council, on the same recommendation and under the aforesaid authority is further pleased to order that this Order shall be published in *The Canada Gazette* and that the provisions thereof shall be deemed to have come into force and operation as of and from the first day of April, 1940.

(Sgd.) A. D. P. HEENEY,
Clerk of the Privy Council.

APPENDIX E.

SECTIONS 103-124 OF THE MILITIA ACT.

(referred to, ante, at page 195)

OFFENCES AND PENALTIES.

103. Every medical practitioner, who signs a false certificate in respect of any case of permanent disability, arising from injuries received or illness contracted on active service, drill, or training, or on duty, coming before a medical board for report, shall incur a penalty of four hundred dollars.

104. The forging or counterfeiting of any stamped signature of the Governor General, in use for stamping commissions granted or issued under this Act, or the uttering thereof, knowing it to be forged or counterfeited, shall be an indictable offence, punishable in like manner as the forgery of the privy seal or seal-at-arms of the Governor General.

105. Every person who leaves Canada with any article of public clothing or other public or corps property in his possession, is guilty of theft, and may be tried therefor at any time.

106. (1) Any officer who knowingly

(a) claims pay on account of any drills performed with his corps for any man belonging to any other corps;

(b) claims pay for officers or men not present; or

(c) includes in any parade state, or other return, the name of any person not duly enlisted;

is guilty of an indictable offence.

(2) Every man who claims, or has received pay on account of any drill performed in the ranks of any other than his own proper corps, or in more than one corps in any one year is guilty of an indictable offence.

107. Any officer or man who obtains by means of any false pretense, or who unlawfully retains or keeps in his possession, any of the pay or moneys belonging to any other officer or man, is guilty of an indictable offence.

108. Any officer or man, who knowingly signs a false parade state, roll or pay-list, or any false return whatsoever, is guilty of an indictable offence.

109. Every person of whom information is required by any officer making any roll, in order to enable such officer to comply with the provisions of this Act, who when applied to by such officer

(a) refuses to give such information;

(b) gives false information;

(c) refuses to give his own name and proper information; or

(d) gives a false name or false information; shall,

(a) for each item of information demanded and refused;

(b) for each item of information falsely stated;

(c) for refusing to give his own name or proper information; or

(d) for giving false name or false information; incur a penalty not exceeding twenty dollars.

110. Every officer and every man of the Militia who refuses or neglects to make any enrolment or ballot, or to make or transmit, as herein prescribed, any roll or return or copy thereof, required by this Act or by the regulations, shall incur a penalty, if an officer, not exceeding fifty dollars, and, if a man, not exceeding twenty-five dollars, for each offence.

111. Every man drafted for service in the Militia, who refuses or neglects to take the oath or to make the declaration hereinbefore prescribed, when tendered to him by a justice of the peace or by any commissioned officer duly authorized for that purpose, shall on summary conviction before two justices of the peace be liable to imprisonment for a term not exceeding six months, and for every subsequent neglect or refusal to a further imprisonment not exceeding twelve months.

112. Every officer and man of the Militia, and every person whatsoever, who at any parade, or on any other occasion for any of the purposes required by this Act, falsely personates another is guilty of an indictable offence, and liable to a fine not exceeding one hundred dollars.

113. Every officer and man of the Militia who refuses or neglects to assist his commanding officer in making any roll or return, or refuses or neglects to obtain or to assist him in obtaining any information which he requires in order to make or correct any roll or return, shall incur a penalty, if an officer not

exceeding fifty dollars, and if a man, not exceeding twenty-five dollars, for each offence.

114. Every person required by this Act to give to the commanding officer of any company, or to any officer or non-commissioned officer thereof, any notice or information necessary for making or correcting the roll of any company, who refuses or neglects to give such notice or information to any such officer, demanding it at any reasonable hour and place, shall incur a penalty of ten dollars for each offence.

115. (1) Every officer and man of the Militia who, without lawful excuse, neglects or refuses to attend any parade or drill or training at the place and hour appointed therefor, or who refuses or neglects to obey any lawful order at or concerning such parade, drill or training, shall incur a penalty, if an officer, of ten dollars, and if a man of five dollars for each offence.

(2) Every day's absence shall be held to be a separate offence.

116. Every person who interrupts or hinders any portion of the Militia at drill, or trespasses on the bounds set out by the proper officer for such drill, shall incur a penalty of five dollars for each offence, and may be taken into custody and detained by any person by the order of the commanding officer until such drill is over for the day.

117. Every officer and man of the Militia who disobeys any lawful order of his superior officer, or who when on service is guilty of any insolent or disorderly behaviour towards such officer, shall incur a penalty, if an officer, of twenty-five dollars, and if a man, of ten dollars for each offence.

118. Every man who fails to keep in proper order any arms or accoutrements delivered or entrusted to him, or who appears at drill, parade or on any other occasion, with his arms or accoutrements out of proper order, or unserviceable, or deficient in any respect, shall incur a penalty of four dollars for each such offence.

119. (1) Every person who

(a) unlawfully disposes of or removes any arms, accoutrements or other articles belonging to the Crown or corps;

(b) refuses to deliver up any arms, accoutrements or other articles in his possession belonging to the Crown or corps when lawfully required; or

(c) has in his possession any arms, accoutrements or other articles belonging to the Crown or corps except for lawful cause, the proof of which shall lie upon him;

shall incur a penalty of twenty dollars for each offence.

(2) Every such person may be arrested by order of the justice of the peace before whom a complaint is made, upon affidavit showing that there is reason to believe that such offender is about to leave Canada, carrying with him any such arms, accoutrements or articles.

(3) Nothing in this section shall prevent such person from being indicted and punished for any greater offence if the facts amount to such greater offence.

120. Every officer and man of the Militia who, when his corps is lawfully called upon to act in aid of the civil power, refuses or neglects to go out with such corps, or to obey any lawful order of his superior officer, shall, if an officer, incur a penalty not exceeding one hundred dollars, and if a man, a penalty not exceeding twenty dollars for each offence.

121. Every person who

(a) resists any calling out of any man enlisted or drafted under regulations, or any process prescribed for enforcing enrolment by ballot;

(b) counsels or aids any person to resist any calling out of any man, enlisted or drafted under the regulations, or under any process prescribed for enforcing enrolment by ballot, or the performance of any service in relation thereto;

(c) counsels or aids any man enlisted or liable to military service, not to appear at the place of rendezvous;

(d) dissuades any man enlisted or liable to military service, from the performance of any duty he is required by law or regulation to perform;

(e) does any act to the detriment of any man enlisted or liable to military service, in consequence of his having performed any such duty;

(f) interferes with the drill or training of any corps or portion thereof; or

(g) obstructs any corps or portion thereof, on the march or elsewhere;

shall incur a penalty not exceeding one hundred dollars.

122. Every person lawfully required under this Act, or the regulations, to furnish a car, engine, boat, barge, scow, steamship or other vessel, wagon, carriage, or pack animal, for the conveyance or use of any portion of the Militia, who refuses or neglects to furnish it, shall be liable to a penalty not exceeding five hundred dollars, and in default of payment to imprisonment for a term not exceeding one year, with or without hard labour, or to both the penalty and imprisonment, at the discretion of the court.

123. Every person, not being at the time an officer or man of the Militia, or a member of a rifle association or club formed or recognized under regulations, who, without the consent of the person in charge of such rifle range, or of some person authorized in that behalf by regulations, uses for target practice a rifle range which has been inspected and approved shall incur a penalty not exceeding twenty-five dollars.

124. (1) Every person who wilfully violates any provision of this Act, shall, when no other penalty is imposed for such violation, incur a penalty not exceeding twenty dollars, for each offence.

(2) Nothing in this section shall prevent his being indicted and punished for any greater offence if the facts amount to such greater offence.

APPENDIX F.

SECTIONS 4-44 OF THE ARMY ACT.

(referred to, ante, at pages 55, 58, 69 and 195)

CRIMES AND PUNISHMENTS.

Offences in respect of Military Service.

4. Every person subject to military law who commits any of the following offences; that is to say,

(1) Shamefully abandons or delivers up any garrison, place, post, or guard, or uses any means to compel or induce any governor, commanding officer, or other person shamefully to abandon or deliver up any garrison, place, post, or guard, which it was the duty of such governor, officer, or person to defend; or

(2) Shamefully casts away his arms, ammunition, or tools in the presence of the enemy; or

(3) Treacherously holds correspondence with or gives intelligence to the enemy, or treacherously or through cowardice sends a flag of truce to the enemy; or

(4) Assists the enemy with arms, ammunition, or supplies, or knowingly harbours or protects an enemy not being a prisoner; or

(5) Having been made a prisoner of war, voluntarily serves with or voluntarily aids the enemy; or

(6) Knowingly does when on active service any act calculated to imperil the success of His Majesty's forces, or any forces co-operating therewith, or any part of any such force,

shall, on conviction by court-martial, be liable to suffer death, or such less punishment as is in this Act mentioned.

5. Every person subject to military law who on active service commits any of the following offences; that is to say,

(1) Without orders from his superior officer leaves the ranks in order to secure prisoners or horses, or on pretence of taking wounded men to the rear; or

(2) Without orders from his superior officer wilfully destroys or damages any property; or

(3) Is taken prisoner, by want of due precaution, or through disobedience of orders, or wilful neglect of duty, or having been taken prisoner fails to rejoin His Majesty's service when able to rejoin the same; or

(4) Without due authority either holds correspondence with, or gives intelligence to, or sends a flag of truce to the enemy; or

(5) By word of mouth, or in writing, or by signals, or otherwise spreads reports calculated to create unnecessary alarm or despondency; or

(6) In action, or previously to going into action, uses words calculated to create alarm or despondency; or

(7) Misbehaves or induces others to misbehave before the enemy in such manner as to show cowardice,

shall, on conviction by court-martial, be liable to suffer penal servitude, or such less punishment as is in this Act mentioned.

6. (1) Every person subject to military law who commits any of the following offences; that is to say,

(*i*) Treacherously makes known the parole, watchword, or countersign to any person not entitled to receive it; or treacherously gives a parole, watchword, or countersign different from what he received;

shall, on conviction by court-martial,

if he commits any such offence on active service, be liable to suffer death, or such less punishment as is in this Act mentioned; and

if he commits any such offence not on active service be liable if an officer, to be cashiered, or to suffer such less punishment as is in this Act mentioned, and if a soldier, to suffer imprisonment, or such less punishment as is in this Act mentioned:

(2) Every person subject to military law who commits any of the following offences; that is to say,

(a) Leaves his commanding officer to go in search of plunder, or

(b) Forces a safeguard, or

(c) Forces or strikes a sentinel; or

(d) Breaks into any house or other place in search of plunder; or

(e) Being a soldier acting as sentinel sleeps or is drunk on his post, or

(f) Without orders from his superior officer, leaves his guard, piquet, patrol or post; or

(g) By discharging firearms, drawing swords, beating drums, making signals, using words, or by any means whatever, intentionally occasions false alarms in action, on the march, in the field, or elsewhere; or

(h) Being a soldier acting as sentinel, leaves his post before he is regularly relieved,

shall, on conviction by court-martial,

if he commits any such offence on active service, be liable to suffer penal servitude, or such less punishment as is in this Act mentioned; and

if he commits any such offence not on active service, be liable, if an officer, to be cashiered, or to suffer such less punishment as is in this Act mentioned, and if a soldier, to suffer imprisonment, or such less punishment as is in this Act mentioned.

(3) Every person subject to military law who commits any of the following offences; that is to say,

(a) By discharging firearms, drawing swords, beating drums, making signals, using words, or by any means whatever, negligently occasions false alarms in action, on the march, in the field, or elsewhere; or

(b) Makes known the parole, watchword, or countersign to any person not entitled to receive it; or, without good and sufficient cause, gives a parole, watchword, or countersign different from what he received; or

(c) Impedes the provost-marshal or any assistant provost-marshal or any officer or non-commissioned officer or other person legally exercising authority under or on behalf of the provost-marshal, or, when called on, refuses to assist in the execution of his duty the provost-marshal, assistant provost-marshal, or any such officer, non-commissioned officer, or other person; or

(d) Does violence to any person bringing provisions or supplies to the forces whether His Majesty's forces or forces co-operating therewith; or commits any offence against the property or person of any inhabitant of or resident in the country in which he is serving; or

(e) Irregularly detains or appropriates to his own corps, battalion, or detachment any provisions or supplies proceeding to any such force as aforesaid, contrary to any orders issued in that respect,

shall, on conviction by court-martial, be liable, if an officer, to be cashiered, or to suffer such less punishment as is in this Act mentioned, and if a soldier, to suffer imprisonment, or such less punishment as is in this Act mentioned.

Mutiny and Insubordination

7. Every person subject to military law who commits any of the following offences; that is to say,

(1) Causes or conspires with any other persons to cause any mutiny or sedition in any of His Majesty's military, naval, or air forces including any Dominion force: or

(2) Endeavours to seduce any person in any such force as aforesaid, from allegiance to His Majesty, or to persuade any person in any such force as aforesaid, to join in any mutiny or sedition; or

(3) Joins in, or being present does not use his utmost endeavour to suppress, any mutiny or sedition in any such force as aforesaid; or

(4) Coming to the knowledge of any actual or intended mutiny or sedition in any such force as aforesaid, does not without delay inform his commanding officer of the same,

shall, on conviction by court-martial, be liable to suffer death, or such less punishment as is in this Act mentioned.

8. (1) Every person subject to military law who commits any of the following offences; that is to say,

Strikes or uses or offers violence to his superior officer, being in the execution of his office,

shall, on conviction by court-martial, be liable to suffer penal servitude or such less punishment as is in this Act mentioned; and

(2) Every person subject to military law who commits any of the following offences; that is to say,

Strikes or uses or offers any violence to his superior officer or uses threatening or insubordinate language to his superior officer,

shall, on conviction by court-martial, if he commits such offence on active service, be liable to suffer penal servitude, or such less punishment as is in this Act mentioned; and

if he commits such offence not on active service, be liable, if an officer, to be cashiered, or to suffer such less punishment as is in this Act mentioned, and if a soldier, to suffer imprisonment, or such less punishment as is in this Act mentioned.

9. (1) Every person subject to military law who commits the following offence; that is to say,

Disobeys in such manner as to show a wilful defiance of authority any lawful command given personally by his superior officer in the execution of his office, whether the same is given orally, or in writing, or by signal, or otherwise,

shall, on conviction by court-martial, be liable to suffer penal servitude or such less punishment as is in this Act mentioned; and

(2) Every person subject to military law who commits the following offence; that is to say,

Disobeys any lawful command given by his superior officer, shall, on conviction by court-martial, if he commits such offence on active service, be liable to suffer penal servitude or such less punishment as is in this Act mentioned; and

if he commits such offence not on active service, be liable, if an officer to be cashiered, or to suffer such less punishment as is in this Act mentioned, and if a soldier, to suffer imprisonment or such less punishment as is in this Act mentioned.

10. Every person subject to military law who commits any of the following offences; that is to say,

(1) Being concerned in any quarrel, fray or disorder, refuses to obey any officer (though of inferior rank) who orders him into arrest, or strikes or uses or offers violence to any such officer; or

(2) Strikes or uses or offers violence to any person, whether subject to military law or not, in whose custody he is placed, and whether he is or is not his superior officer; or

(3) Resists an escort whose duty it is to apprehend him or to have him in charge; or

(4) Being a soldier, breaks out of barracks, camp, or quarters, shall, on conviction by court-martial, be liable, if an officer, to be cashiered, or to suffer such less punishment as is in this Act mentioned, and if a soldier, to suffer imprisonment, or such less punishment as is in this Act mentioned.

11. Every person subject to military law who commits the following offence; that is to say,

neglects to obey any general or garrison or other orders, shall, on conviction by court-martial, be liable, if an officer to be cashiered, or to suffer such less punishment as is in this Act mentioned, and if a soldier, to suffer imprisonment, or such less punishment as is in this Act mentioned.

Provided that the expression "general orders" in this section shall not include the King's Regulations for the Army, or any order in the nature of a regulation published for the general information and guidance of the army.

Desertion, Fraudulent Enlistment, and Absence without Leave.

12. (1) Every person subject to military law who commits any of the following offences; that is to say,

(a) Deserts or attempts to desert His Majesty's service; or

(b) Persuades, endeavours to persuade, procures or attempts to procure, any person subject to military law to desert from His Majesty's service,

shall, on conviction by court-martial:

if he committed such offence when on active service or under orders for active service, be liable to suffer penal servitude or such less punishment as is in this Act mentioned; and

if he committed such offence under any other circumstances, be liable for the first offence to suffer imprisonment or such less punishment as is in this Act mentioned; and for the second or any subsequent offence to suffer penal servitude, or such less punishment as is in this Act mentioned.

(2) Where an offender has fraudulently enlisted once or oftener, he may, for the purposes of trial for the offence of deserting or attempting to desert His Majesty's service, be deemed to belong to any one or more of the corps to which he has been appointed or transferred as well as to the corps to which he properly belongs; and it shall be lawful to charge an offender with any number of offences against this section at the same time, and to give evidence of such offences against him, and if he be convicted thereof to punish him accordingly; and further it shall be lawful on conviction of a person for two or more such offences to award him the higher punishment allowed by this section for a second offence as if he had been convicted by a previous court-martial of one of such offences.

(3) For the purposes of the liability under this section to the higher punishment for a second offence, a previous offence of fraudulent enlistment may be reckoned as a previous offence under this section.

13. (1) Every person subject to military law who commits any of the following offences; that is to say,

(a) When belonging to either the regular forces, or the territorial army when embodied, without having obtained a regular discharge therefrom, or otherwise fulfilled the conditions enabling him to enlist or enrol, enlists or enrols himself in the regular forces or in any force raised in India, Burma or a colony; or

(b) When belonging to the regular forces without having fulfilled the conditions enabling him to enlist, enrol, or enter, enrols himself, or enlists in the territorial army or in any of the reserve forces, or in the Air Force, or enters the Royal Navy, shall be deemed to have been guilty of fraudulent enlistment, and shall, on conviction by court-martial, be liable

(i) for the first offence to suffer imprisonment, or such less punishment as is in this Act mentioned; and

(ii) for the second or any subsequent offence to suffer penal servitude, or such less punishment as is in this Act mentioned.

(2) Where an offender has fraudulently enlisted on several occasions he may, for the purposes of this section, be deemed to belong to any one or more of the corps to which he has been appointed or transferred, as well as to the corps to which he properly belongs; and it shall be lawful to charge an offender with any number of offences against this section at the same time, and to give evidence of such offences against him, and if he be convicted thereof to punish him accordingly; and further it shall be lawful on conviction of a person for two or more such offences to award him the higher punishment allowed by this section for a second offence as if he had been convicted by a previous court-martial of one of such offences.

(3) Where an offender is convicted of the offence of fraudulent enlistment, then for the purposes of his liability under this section to the higher punishment for a second offence, the offence of deserting or attempting to desert His Majesty's service may be reckoned as a previous offence of fraudulent enlistment under this section, with this exception, that the absence of the offender next before any fraudulent enlistment shall not upon his conviction for that fraudulent enlistment be reckoned as a previous offence of deserting or attempting to desert.

14. Every person subject to military law who commits any of the following offences; that is to say,

(1) Assists any person subject to military law to desert His Majesty's service; or

(2) Being cognizant of any desertion or intended desertion of a person subject to military law, does not forthwith give notice to his commanding officer, or take any steps in his power

to cause the deserter or intending deserter to be apprehended, shall, on conviction by court-martial, be liable to suffer imprisonment, or such less punishment as is in this Act mentioned.

15. Every person subject to military law who commits any of the following offences; that is to say,

(1) Absents himself without leave; or

(2) Fails to appear at the place of parade or rendezvous appointed by his commanding officer, or goes from thence without leave before he is relieved, or without urgent necessity quits the ranks; or

(3) Being a soldier, when in camp or garrison or elsewhere, is found beyond any limits fixed or in any place prohibited by any general garrison or other order, without a pass or written leave from his commanding officer; or

(4) Being a soldier without leave from his commanding officer, or without due cause, absents himself from any school when duly ordered to attend there,

shall, on conviction by court-martial, be liable, if an officer, to be cashiered, or to suffer such less punishment as is in this Act mentioned, and if a soldier, to suffer imprisonment, or such less punishment as is in this Act mentioned.

Disgraceful Conduct.

16. Every officer who, being subject to military law, commits the following offences, that is to say,

behaves in a scandalous manner, unbecoming the character of an officer and a gentleman,

shall, on conviction by court-martial, be cashiered.

17. Every person subject to military law who commits any of the following offences, that is to say,

Being charged with or concerned in the care or distribution of any public, regimental or garrison property, steals, fraudulently misapplies, or embezzles the same, or is concerned in or connives at the stealing, fraudulent misapplication, or embezzlement thereof, or wilfully damages any such property, shall, on conviction by court-martial be liable to suffer penal servitude, or such less punishment as is in this Act mentioned.

18. Every person subject to military law who commits any of the following offences; that is to say,

(1) Malingers, or feigns or produces disease or infirmity; or

(2) Wilfully maims or injures himself or any other person subject to military law, whether at the instance of that person or not, with intent thereby to render himself or that person unfit for service, or causes himself to be maimed or injured by any person with intent thereby to render himself unfit for service; or

(3) Is wilfully guilty of any misconduct, or wilfully disobeys, whether in hospital or otherwise, any orders, by means of which misconduct or disobedience he produces or aggravates disease or infirmity, or delays its cure; or

(4) Steals, embezzles or fraudulently misapplies or receives, knowing it to have been stolen or embezzled, any property belonging to a person subject to military law, or belonging to any regimental band, regimental or garrison mess or regimental or garrison institution, or to the Navy, Army and Air Force Institutes, or any public property; or

(5) Is guilty of any other offence of a fraudulent nature not before in this Act particularly specified, or any other disgraceful conduct of a cruel, indecent or unnatural kind,

shall, on conviction by court-martial, be liable to suffer imprisonment, or such less punishment as is in this Act mentioned.

Drunkenness.

19. Every person subject to military law who commits the following offence; that is to say,

The offence of drunkenness, whether on duty or not on duty, shall, on conviction by court-martial, be liable, if an officer, to be cashiered, or to suffer such less punishment as is in this Act mentioned, and if a soldier, to suffer imprisonment, or such less punishment as is in this Act mentioned, and, either in addition to or in substitution for any other punishment, to pay a fine not exceeding five pounds:

Provided that, where the offence of drunkenness is committed by a soldier not on active service or on duty, the sentence imposed shall not exceed detention for a period of six months, with or without the addition of the aforesaid fine.

Offences in relation to Persons in Custody.

20. Every person subject to military law who commits any of the following offences, that is to say,

(1) When in command of a guard, picquet, patrol, or post, releases without proper authority, whether wilfully or

otherwise, any person committed to his charge; or

(2) Wilfully or without reasonable excuse allows to escape any person who is committed to his charge, or whom it is his duty to keep or guard,

shall, on conviction by court-martial, be liable, if he has acted wilfully, to suffer penal servitude, or such less punishment as is in this Act mentioned, and in any case to suffer imprisonment or such less punishment as is in this Act mentioned.

21. Every person subject to military law who commits any of the following offences; that is to say,

(1) Unnecessarily detains a person in arrest or confinement without bringing him to trial, or fails to bring his case before the proper authority for investigation; or

(2) Having committed a person to the custody of any officer, non-commissioned officer, provost-marshal, or assistant provost-marshal, fails without reasonable cause to deliver at the time of such committal, or as soon as practicable, and in any case within twenty-four hours thereafter to the officer, non-commissioned officer, provost-marshal, or assistant provost-marshal, into whose custody the person is committed, an account in writing signed by himself of the offence of which the person so committed is charged;

(3) Being in command of a guard, does not as soon as he is relieved from his guard or duty, or if he is not sooner relieved, within twenty-four hours after a person is committed to his charge, give in writing to the officer to whom he may be ordered to report that person's name and offence so far as known to him; and the name and rank of the officer or other person by whom he was charged, accompanied, if he has received the account above in this section mentioned, by that account,

shall, on conviction by court-martial, be liable, if an officer to be cashiered, or to suffer such less punishment as is in this Act mentioned, and if a soldier, to suffer imprisonment, or such less punishment as is in this Act mentioned.

22. Every person subject to military law who commits the following offence; that is to say,

Being in arrest or confinement, or in prison or otherwise in lawful custody, escapes, or attempts to escape,

shall, on conviction by court-martial, be liable, if an officer to be cashiered, or to suffer such less punishment as is in this Act mentioned, and if a soldier to suffer imprisonment, or such less punishment as is in this Act mentioned.

23. Every person subject to military law who commits any of the following offences; that is to say,

(1) Connives at the exaction of any exorbitant price for a house or stall let to a sutler; or

(2) Lays any duty upon, or takes any fee or advantage in respect of, or is in any way interested in, the sale of provisions or merchandise brought into any garrison, camp, station, barracks, or place, in which he has any command or authority, or the sale or purchase of any provisions or stores for the use of any of His Majesty's Forces (including any Dominion force)

shall, on conviction by court-martial, be liable to suffer imprisonment, or such less punishment as is in this Act mentioned.

24. Every soldier who commits any of the following offences; that is to say,

(1) Makes away with, or is concerned in making away with (whether by pawning, selling, destruction, or otherwise howsoever), his arms, ammunition, equipments, instruments, clothing, regimental necessaries, or any horse of which he has charge, or any public property issued to him for his use or entrusted to his care for military purposes; or

(2) Loses by neglect anything before in this section mentioned; or

(3) Makes away with (whether by pawning, selling, destruction, or otherwise howsoever) any military or air force decoration granted to him; or

(4) Wilfully injures anything before in this section mentioned, or any property belonging to a comrade, or to an officer, or to any regimental band, regimental or garrison mess, or regimental or garrison institution, or to the Navy, Army and Air Force Institutes, or any public property; or

(5) Ill-treats any horse or other animal used in the public service.

shall, on conviction by court-martial, be liable to suffer imprisonment, or such less punishment as is in this Act mentioned.

Offences in Relation to False Documents and Statements.

25. Every person subject to military law who commits any of the following offences; that is to say,

(1) In any report, return, muster roll, pay list, certificate, book, route, or other document made or signed by him, or of the contents of which it is his duty to ascertain the accuracy:

(a) Knowingly makes or is privy to the making of any false or fraudulent statements; or

(b) Knowingly makes or is privy to the making of any omission with intent to defraud; or

(2) Knowingly and with intent to injure any person, or knowingly or with intent to defraud, suppresses, defaces, alters, or makes away with any document which it is his duty to preserve or produce; or

(3) Where it is his official duty to make a declaration respecting any matter, knowingly makes a false declaration,

shall, on conviction by court-martial, be liable to suffer imprisonment or such less punishment as is in this Act mentioned.

26. Every person subject to military law who commits any of the following offences; that is to say,

(1) When signing any document relating to pay, arms, ammunition, equipments, clothing, regimental necessaries, provisions, furniture, bedding, blankets, sheets, utensils, forage, or stores, leaves in blank any material part for which his signature is a voucher; or

(2) Refuses or by culpable neglect omits to make or send a report or return which it is his duty to make or send,

shall, on conviction by court-martial, be liable, if an officer, to be cashiered, or to suffer such less punishment as is in this Act mentioned, and if a soldier, to suffer imprisonment, or such less punishment, as is in this Act mentioned.

27. Every person subject to military law who commits any of the following offences; that is to say,

(1) Being an officer or soldier, makes a false accusation against any other officer or soldier, knowing such accusation to be false; or

(2) Being an officer or soldier, in making a complaint where he thinks himself wronged, knowingly makes any false statement affecting the character of an officer or soldier, or knowingly and wilfully suppresses any material facts; or

(3) Being a soldier falsely states to his commanding officer that he has been guilty of desertion or of fraudulent enlistment, or of desertion from the navy or air force, or has served in and been discharged from any portion of the regular forces, reserve forces, or auxiliary forces, or the navy or air force; or

(4) Being a soldier, makes a wilful false statement to any military officer or justice in respect of the prolongation of furlough,

shall, on conviction by court-martial, be liable to suffer imprisonment, or such less punishment as is in this Act mentioned.

Offences in relation to Courts-Martial.

28. Every person subject to military law who commits any of the following offences; that is to say,

(1) Being duly summoned or ordered to attend as a witness before a court-martial, makes default in attending; or

(2) Refuses to take an oath or make a solemn declaration legally required by a court-martial to be taken or made; or

(3) Refuses to produce any document in his power or control legally required by a court-martial to be produced by him; or

(4) Refuses when a witness to answer any question to which a court-martial may legally require an answer; or

(5) Is guilty of contempt of a court-martial by using insulting or threatening language, or by causing any interruption or disturbance in the proceedings of such court,

shall, on conviction by a court-martial, other than the court in relation to or before which the offence was committed, be liable, if an officer, to be cashiered, or to suffer such less punishment as is in this Act mentioned, and if a soldier, to suffer imprisonment, or such less punishment as is in this Act mentioned:

Provided that where the person subject to military law is guilty of contempt of a court-martial by using insulting or threatening language, or by causing any interruption or disturbance in the proceedings of such court, that court if they think it expedient, instead of the offender being tried by another court-martial, may by order under the hand of the president, order the offender to be imprisoned, with or without hard labour, or, in the case of a soldier, to undergo detention for a period not exceeding twenty-one days.

29. Every person subject to military law who commits the following offence; that is to say,

When examined on oath or solemn declaration before a court-martial or any court or officer authorized by this Act to administer an oath, wilfully give false evidence,

shall be liable on conviction by court-martial, to suffer imprisonment, or such less punishment as is in this Act mentioned.

Offences in relation to Billeting.

30. Every person subject to military law who commits any of the following offences (in this Act referred to as offences in relation to billeting); that is to say,

(1) Is guilty of any ill-treatment, by violence, extortion, or making disturbances in billets, of the occupier of a house in which any person or horse is billeted; or

(2) Being an officer, refuses or neglects, on complaint and proof of such ill-treatment by any officer or soldier under his command, to cause compensation to be made for the same; or

(3) Fails to comply with the provisions of this Act with respect to payment of the just demands of the person on whom he or any officer or soldier under his command, or his or their horses have been billeted, or to the making up and transmitting of an account of the money due to such person; or

(4) Wilfully demands billets which are not actually required for some person or horse entitled to be billeted; or

(5) Takes or knowingly suffers to be taken from any person any money or reward for excusing or relieving any person from his liability in respect of the billeting or quartering of officers, soldiers, or horses, or any part of such liability; or

(6) Uses or offers any menace to or compulsion on a constable or other civil officer to make him give billets contrary to this Act, or tending to deter or discourage him from performing any part of his duty under the provisions of the Act relating to billeting, or tending to induce him to do anything contrary to his said duty; or

(7) Uses or offers any menace to or compulsion on any person tending to oblige him to receive, without his consent, any person or horse not duly billeted upon him in pursuance of the provisions of this Act relating to billeting, or to furnish any accommodation which he is not hereby required to furnish,

shall, on conviction by court-martial, be liable, if an officer to be cashiered, or to suffer such less punishment as is in this Act mentioned, and if a soldier, to suffer imprisonment, or such less punishment as is in this Act mentioned.

Offences in relation to Impressment of Carriages, etc.

31. Every person subject to military law who commits any of the following offences (in this Act referred to as offences in relation to the impressment of carriages); that is to say,

(1) Wilfully demands any carriages, animals, vessels, food, forage, or stores which are not actually required for the purposes authorized by this Act; or

(2) Fails to comply with the provisions of this Act relating to the impressment of carriages as regards the payment of sums due for carriages or as regards the weighing of the load; or

(3) Constrains any carriage, animal, or vessel furnished in pursuance of the provisions of this Act relating to the impressment of carriages to travel against the will of the person in charge thereof beyond the proper distance, or to carry against the will of such person any greater weight than he is required by the said provisions to carry; or

(4) Does not discharge as speedily as practicable any carriage, animal, or vessel, furnished in pursuance of the provisions of this Act relating to the impressment of carriages; or

(5) Compels the person in charge of any such carriage, animal, or vessel, or permits him to be compelled, to take thereon any baggage or stores not entitled to be carried, or, except where the carriage or animal is furnished upon a requisition of emergency, to take thereon any soldier or servant (except such as are sick), or any woman or person; or

(6) Ill-treats or permits such person in charge to be ill-treated; or

(7) Uses or offers any menace to or compulsion on a constable to make him provide any carriage, animal, vessel, food, forage, or stores which he is not bound in pursuance of the provisions of this Act relating to the impressment of carriages to provide, or tending to deter or discourage him from performing any part of his duty in relation to the providing of carriages, animals, vessels, food, forage, or stores, or tending to induce him to do anything contrary to his said duty; or

(8) Forces any carriage, animal, vessel, food, forage, or stores from the owner thereof,

shall, on conviction by court-martial, be liable if an officer, to be cashiered, or to suffer such less punishment as is in this Act mentioned, and if a soldier, to suffer imprisonment, or such less punishment as is in this Act mentioned.

Offences in relation to Enlistment.

32. (1) Every person having become subject to military law, who is discovered to have committed the following offence; that is to say,

Having been discharged with disgrace from any part of His Majesty's military or air forces, or having been dismissed with disgrace from the navy, has afterwards enlisted in the regular forces without declaring the circumstances of his discharge, or dismissal,

shall, on conviction by court-martial, be liable to suffer imprisonment, or such less punishment as is in this Act mentioned.

(2) For the purpose of this section, the expression "discharged with disgrace from any part of His Majesty's military or air forces" means discharged with ignominy, discharged for misconduct, or discharged on account of conviction for felony or of a sentence of penal servitude.

33. Every person having become subject to military law who is discovered to have committed the following offence; that is to say,

To have made a wilfully false answer to any question set forth in the attestation paper which has been put to him by or by direction of the justice before whom he appears for the purpose of being attested,

shall, on conviction by court-martial, be liable to suffer imprisonment or such less punishment as is in this Act mentioned.

34. Every person subject to military law who commits any of the following offences; that is to say,

(1) Is concerned in the enlistment for service in the regular forces of any man, when he knows or has reasonable cause to believe such man to be so circumstanced that by enlisting he commits an offence against this Act; or

(2) Wilfully contravenes any enactments or the regulations of the service in any matter relating to the enlistment or attestation of soldiers of the regular forces,

shall, on conviction by court-martial, be liable to suffer imprisonment or such less punishment as is in this Act mentioned.

Miscellaneous Military Offences.

35. Every person subject to military law who commits the following offence; that is to say,

Uses traitorous or disloyal words regarding the Sovereign,

shall, on conviction by court-martial, be liable, if an officer, to be cashiered, or to suffer such less punishment as is in this Act mentioned, and if a soldier, to suffer imprisonment or such less punishment as is in this Act mentioned.

36. Every person subject to military law, who commits the following offence; that is to say,

Whether serving with any of His Majesty's forces or not, without due authority, either verbally or in writing, or by signal or otherwise, discloses the numbers or position of any forces, or any magazine or stores thereof, or any preparations for, or orders relating to, operations or movements of any forces, at such time and in such manner as in the opinion of the court to have produced effects injurious to His Majesty's service,

shall, on conviction by court-martial, be liable, if an officer, to be cashiered, or to suffer such less punishment as is in this Act mentioned, and if a soldier, to suffer imprisonment, or such less punishment as is in this Act mentioned.

37. Every officer or non-commissioned officer who commits any of the following offences; that is to say,

(1) Strikes or otherwise ill-treats any soldier; or,

(2) Having received the pay of any officer or soldier, unlawfully detains or unlawfully refuses to pay the same when due,

shall, on conviction by court-martial, be liable, if an officer, to be cashiered, or to suffer such less punishment as is in this Act mentioned, and if a non-commissioned officer, to suffer imprisonment or such less punishment as is in this Act mentioned.

38. Every person subject to military law who commits any of the following offences; that is to say,

(1) Fights, or promotes, or is concerned in or connives at fighting a duel; or

(2) Attempted to commit suicide,

shall, on conviction by court-martial, be liable, if an officer, to be cashiered, or to suffer such less punishment as is in this Act mentioned, and if a soldier, to suffer imprisonment or such less punishment as is in this Act mentioned.

39. Every person subject to military law who commits any of the following offences; that is to say,

On application being made to him neglects or refuses to deliver over to the civil magistrate, or to assist in the lawful apprehension of, any officer or soldier accused of an offence punishable by a civil court,

shall, on conviction by court-martial, be liable, if an officer, to be cashiered, or to suffer such less punishment as is in this Act mentioned, and if a soldier, to suffer imprisonment, or such less punishment as is in this Act mentioned.

40. Every person subject to military law who commits any of the following offences; that is to say,

Is guilty of any act, conduct, disorder, or neglect to the prejudice of good order and military discipline,

shall, on conviction by court-martial, be liable, if an officer, to be cashiered, or to suffer such less punishment as is in this Act mentioned, and if a soldier, to suffer imprisonment, or such less punishment as is in this Act mentioned. Provided that no person shall be charged under this section in respect of any offence for which special provision is made in any other section of this Act, and which is not a civil offence; nevertheless the conviction of a person so charged shall not be invalid by reason only of the charge being in contravention of this proviso, unless it appears that injustice has been done to the person charged by reason of such contravention, but the responsibility of any officer for that contravention shall not be removed by the validity of the conviction."

Offences Punishable by Ordinary Law.

41. Subject to such regulations for the purpose of preventing interference with the jurisdiction of the civil courts as are in this Act after mentioned, every person who, whilst he is subject to military law, shall commit any of the offences in this section mentioned shall be deemed to be guilty of an offence against military law, and if charged under this section with any offence (in this Act referred to as a civil offence) shall be liable to be

tried by court-martial, and on conviction to be punished as follows; that is to say,

(1) If he is convicted of treason, be liable to suffer death, or such less punishment as is in this Act mentioned; and

(2) If he is convicted of murder, be liable to suffer death; and

(3) If he is convicted of manslaughter or treason-felony, be liable to suffer penal servitude, or such less punishment as is in this Act mentioned; and

(4) If he is convicted of rape, be liable to suffer penal servitude, or such less punishment as is in this Act mentioned; and

(5) If he is convicted of any offence not before in this section particularly specified, which when committed in England is punishable by the law of England, be liable, whether the offence is committed in England or elsewhere, either to suffer such punishment as might be awarded to him in pursuance of this Act in respect of an act to the prejudice of good order and military discipline, or to suffer any punishment assigned for such offence by the law of England.

Provided that a person subject to military law shall not be tried by court-martial for treason, murder, manslaughter, treason-felony, or rape committed in any place within His Majesty's Dominions, other than the United Kingdom or Gibralter, unless such person at the time he committed the offence was on active service or such place is more than one hundred miles as measured in a straight line from any city or town in which the offender can be tried by a competent civil court.

Saving for Jurisdiction of Civil Courts.

41*A*. Nothing in this Act affects any jurisdiction of any civil court to try any person subject to military law for any offence.

Redress of Wrongs.

42. If an officer thinks himself wronged by his commanding officer, and on due application made to him does not receive the redress to which he may consider himself entitled, he may complain to the Army Council in order to obtain justice, who are hereby required to examine into such complaint, and (if so required by the officer) through a Secretary of State make their

report to His Majesty in order to receive the directions of His Majesty thereon.

43. If any soldier thinks himself wronged in any matter by any officer other than his captain, or by any soldier, he may complain thereof to his captain, and if he thinks himself wronged by his captain, either in respect of his complaint not being redressed or in respect of any other matter, he may complain thereof to his commanding officer, and if he thinks himself wronged by his commanding officer, either in respect of his complaint not being redressed or in respect of any other matter, he may complain thereof to the prescribed general officer or brigadier or, in the case of soldiers serving in India, to such officer as the Commander-in-Chief of the Forces in India with the approval of the Governor-General of India in Council may appoint; and every officer to whom a complaint is made in pursuance of this section shall cause such complaint to be inquired into, and shall, if on inquiry he is satisfied of the justice of the complaint so made, take such steps as may be necessary for giving full redress to the complainant in respect of the matter complained of.

Punishments.

44. Punishments may be inflicted in respect of offences committed by persons subject to military law and convicted by courts-martial—

In the case of officers according to the scale following:

(a) Death;

(b) Penal servitude for a term not less than three years;

(c) Imprisonment, with or without hard labour, for a term not exceeding two years;

(d) Cashiering;

(e) Dismissal from His Majesty's service;

(f) Forfeiture in the prescribed manner of seniority of rank, either in the army or in the corps to which the offender belongs, or in both; or, in the case of an officer whose promotion depends upon the length of service, forfeiture of all or any part of his service for the purposes of promotion;

(g) Severe reprimand or reprimand;

(gg) Stoppages.

In the case of soldiers, according to the scale following:

(h) Death;

(j) Penal servitude for a term not less than three years;

(k) Imprisonment, with or without hard labour, for a term not exceeding two years;

(kk) Detention for a term not exceeding two years;

(i) Discharge with ignominy from His Majesty's service;

(m) In the case of a non-commissioned officer, reduction to the ranks or to a lower grade, or forfeiture in the prescribed manner, of seniority of rank;

(mm) In the case of a non-commissioned officer, severe reprimand or reprimand;

Provided that—

(1) Where in respect of any offence under this Act there is specified a particular punishment, or such less punishment as is in this Act mentioned, there may be awarded in respect of that offence, instead of such particular punishment (but subject to the other regulations of this Act as to punishments, and regard being had to the nature and degree of the offence) any one punishment lower in the above scales than the particular punishment:

(1A) For the purposes of commutation and revision of punishment, detention shall not be deemed a less punishment than imprisonment if the term of detention is longer than the term of imprisonment:

(1B) An offender under this Act shall not be subject to imprisonment or detention for more than two consecutive years, whether under one or more sentences:

(2) An officer shall be sentenced to be cashiered before he is sentenced to penal servitude or imprisonment:

(2A) The Army Council may restore the whole or any part of any lost seniority or forfeited service in the case of an officer who may perform good and faithful service, or who may otherwise be deemed by the Army Council to merit such restoration:

(3) An officer or a non-commissioned officer when sentenced to forfeiture of seniority of rank and an officer when sentenced to forfeiture of all or any part of his service for the

purposes of promotion may also be sentenced to be severely reprimanded or reprimanded:

(4) A soldier when sentenced to penal servitude or imprisonment may, in addition thereto, be sentenced to be discharged with ignominy from His Majesty's service:

(5) Where a soldier on active service is guilty of any offence, it shall be lawful for a court-martial to award for that offence such field punishment, other than flogging or attachment to a fixed object, as may be directed by rules to be made from time to time by a Secretary of State, and such field punishment shall be of the character of personal restraint or hard labour, but shall not be of a nature to cause injury to life or limb:

(6) In addition to or without any other punishment in respect of an offence committed by a soldier on active service, it shall be lawful for a court-martial to order that the offender forfeit all ordinary pay for a period commencing on the day of the sentence and not exceeding three months:

(9) All rules with respect to field punishment made in pursuance of this section shall be laid before Parliament as soon as practicable after they are made, if Parliament be then sitting, and if Parliament be not then sitting, as soon as practicable after the beginning of the then next session of Parliament:

(10) For the purpose of commutation of punishment the field punishment above mentioned shall be deemed to stand in the scale of punishments next below detention:

(11) In addition to or without any other punishment in respect of any offence, an offender convicted by court-martial may be subject to forfeiture of any deferred pay, service towards pension, naval, military or air-force decoration or naval, military or air-force reward, in such manner as may for the time being be provided by Royal Warrant, but shall not, save as may be provided by Royal Warrant, be liable to any forfeiture under the Regimental Debts Act, 1893, or under any Act relating to the military savings banks, or any regulations made in pursuance of either of the above-mentioned Acts.

(12) In addition to or without any other punishment in respect of any offence, an offender may be sentenced by a court-martial to any deduction authorized by this Act to be made from his ordinary pay:

(13) No officer or non-commissioned officer shall, under or by virtue of any power or authority derived from any foreign potentate or ruler, inflict or cause to be inflicted on any person subject to military law under this Act, for or in respect of any offence against such law, any punishment not authorized by this Act.

APPENDIX G.

PARAGRAPH 563 OF K.R. (CAN.).

(referred to, ante, at page 107)

SENTENCES OF COURTS-MARTIAL.

563. (a) When passing sentence, a court-martial will have regard not only to the nature and degree of the offence and the previous character of the accused, as proved in evidence, but also to the nature and amount of any such consequences which, by virtue of any statute, warrant, order, or regulation, are involved in their finding, or entailed by their sentence, in addition to the punishment awarded by the court. Where attention has been called in local orders to the unusual prevalence of the offence whereof the accused has been found guilty, the court will also pay regard to the fact that such warning has been issued.

(b) All convictions, whether by courts-martial or by civil courts (except as provided in para. 1518, (b), (iii)) for offences committed by a soldier, since his first enlistment, including any time passed in a state of desertion, will be given in evidence against him. The court will consider if any circumstances have been disclosed by the evidence in extenuation or aggravation of the offence. In awarding imprisonment or detention they will keep in view the locality and climate in which the accused has to undergo his sentence. Sentences must vary according to the requirements of discipline, but in ordinary circumstances, and for the first offence, a sentence should be light. Care must be taken to discriminate between offences due to youth, temper, sudden temptation or unaccustomed surroundings, and those due to premeditated misconduct.

(c) If the accused has elected to be tried by a district court-martial instead of submitting to the jurisdiction of his

commanding officer, his punishment should not on that ground be increased. In ordinary circumstances the court should not award a heavier sentence than that which the commanding officer had power to award.

(d) A soldier who is convicted by a court-martial of an offence under Sections 17, 18 (4) or (5) or 41 of the Army Act, ought, unless in the opinion of the court there are special reasons to the contrary, to be sentenced to imprisonment, and undergo his sentence in a civil prison, but in cases where the confirming officer does not consider the soldier should be discharged as a consequence of his conviction, he may commute the sentence of imprisonment to one of detention.

(e) Except as provided in the preceding sub-paragraph, a soldier sentenced by a court-martial to imprisonment with or without discharge with ignominy, will be committed to a military prison to undergo his sentence, if such prison is available, otherwise he will undergo his sentence in a civil prison.

(f) Detention was introduced into the scale of punishment in order that soldiers, who are convicted of offences which do not warrant discharge, should not, as a rule, be subject to the stigma attached to imprisonment. The latter punishment ought, as a rule, to be reserved for men convicted of serious offences, or of grave military offences, which, in the opinion of the court render their discharge with ignominy advisable.

(g) A soldier who is convicted by a court-martial of a purely military offence and who, at the expiration of his sentence, will rejoin his corps, should not ordinarily be sentenced to imprisonment.

(h) Where a soldier has for a purely military offence been sentenced by a court-martial to imprisonment without discharge with ignominy, the confirming officer, or other superior authority, should, except under very special circumstances, commute the sentence to a sentence of detention.

(i) When a sentence of imprisonment is commuted into one of detention, the term of detention must in no case exceed the term of imprisonment originally awarded.

(j) A sentence of detention, being lower in the scale of punishments than imprisonment, cannot be commuted into one of imprisonment.

(k) Where a soldier has been sentenced to imprisonment and to be discharged with ignominy, and a confirming officer, or other superior authority, commutes the imprisonment to detention, he will, in such a case, remit the discharge with ignominy, as such a discharge cannot accompany a sentence of detention. The converse will also hold good, that is, when a confirming officer, or other superior authority, remits a discharge with ignominy, he will at the same time commute the sentence of imprisonment to one of detention.

(l) A soldier awarded detention will undergo his sentence in a detention barrack or a branch detention barrack. He cannot be sent to a prison for that purpose, but a soldier sentenced to imprisonment may undergo his sentence in a detention barrack.

(m) The following general instructions are issued for the guidance of courts-martial, but nothing contained in them must be construed as limiting the discretion of the court to pass any legal sentence, whether in accordance with these instructions or not, if in their opinion there is any good reason for doing so:—
(*The general instructions referred to in this sub-section appear on pages 258 and 259, post.*)

(n) When an offender is convicted on two or more charges, the sentence should be that which is considered adequate for the gravest of the offences, with some addition for each of the other charges.

(o) The addition of "discharge with ignominy" to a sentence of imprisonment is, as a rule, advisable in the case of any persistent offender, e.g., one who has been twice previously convicted of desertion or fraudulent enlistment. It should also be awarded for an offence under (iii), (iv), (v) or (vi) of sub-para. (m).

Offences	Punishment: Detention Period	Punishment: Imprisonment Period	Remarks
(i) In the absence of a previous conviction, or of aggravating circumstances, or of antecedents appearing to require a severe lesson, or of an unusual prevalence* in the unit or garrison of the species of offence forming the subject of the charge. First desertion within first 6 months' service, and when not under orders for embarkation. Leaving guard or post. Offence of sentries. Insubordinate or threatening language. Disobedience not of a grave nature. Resisting escort, not involving an attempt at serious injury. Breaking out of barracks. Neglect of orders. Absence. Failing to appear at parade. Being out of bounds. Drunkenness. Release of person or allowing person to escape (not wilfully). Escaping from custody. Loss of kit, etc. Irregularity or omission in regard to returns (not fraudulent). Minor contempt of court-martial. False answer on attestation. Conduct to prejudice, etc. (not of a serious nature).	Not exceeding 28 days.	.....	An addition of from 7 to 28 days' detention may appropriately be made in the case of each previous conviction whether for a similar, or any other offence or of any circumstances that aggravate† the gravity of the offence.
(ii) Striking a superior officer..... Disobeying a lawful command (graver cases). Desertion other than under (i).	Not exceeding 112 days.	.....	If the offence has been repeated, or attended with circumstances which add to its gravity a sentence should be proportionately increased.

Fraudulent enlistment. False evidence. False accusations. Conduct to prejudice, etc. (of a more serious nature than under (i)).			Offences of violence under Army Act, Sec. 8, in their gravest form, may justify a sentence of imprisonment or, if the charge is laid under Sec. 8 (1) and the court has the necessary powers of penal servitude. Offences under Army Act, Sec. 8 (1) should normally be punished more severely than those under Sec. 8 (2) (see para. 528, and Manual of Military Law, 1929, Chap. III, para. 8).
(iii) Ordinary theft..... Frauds.	.....	Not exceeding 112 days.	If the offence has been repeated, or attended with circumstances which add to its gravity, a sentence of from 113 days to 6 months imprisonment should suffice. If repeated three or more times, a sentence of imprisonment for 1 year and upwards should suffice.
(iv) An offence under Section 32 of the Army Act.	.....	Not exceeding 6 months.	If repeated, a sentence of imprisonment for 1 year and upwards should suffice.
(v) Disgraceful conduct of a cruel, indecent or unnatural kind under Sec. 18 (5) of the Army Act.	.....	Not exceeding 1 year.	If the offence has been committed under circumstances which add to its gravity, the sentence should be proportionately increased up to the maximum of 2 years.
(vi) Offences under Section 41 of the Army Act.	.....	According to nature of offence and attendant circumstances. See para. 5 Ch. VII, M.M.-L. 1929.	In awarding punishment for civil offences, the court will be guided by exactly the same principles as those which guide them in punishing military offences. See paras. 76-86, Chap. V, Manual of Military Law, 1929.

* Where an offence is unusually prevalent in a district or garrison, attention should be drawn to the fact periodically in local orders, and not by special directions to courts-martial.

† Cases of absence, or failing to appear at parade, which involve the avoidance of embarkation will be held to aggravate the gravity of such offences.