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29 March 2013

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U.S. Army. Judge Advocate General

A DIGEST

OF

OPINIONS

OF THE

JUDGE ADVOCATE GENERAL OF THE ARMY,

WITH NOTES,

BY

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PREFACE.

The opinions, of which abstracts are presented in this work, consist of a selection from a mass of opinions recorded in the forty four volumes of the Reports of the Bureau of Military Justice, and furnished—mainly to the Secretary of War—by BVT. MAJ. GEN. JOSEPH HOLT, Judge Advocate General, from September, 1862, to December, 1875, and by BRIG. GEN. WM. MCKEE DUNN, Judge Advocate General, from the latter date to the present time. These opinions embrace those given by the Judge Advocate General in the course of his official reviews of the proceedings of military courts, or otherwise in connection with the subject of the administration of justice in the Army; as also those rendered by him in his *ex officio* capacity of general legal adviser to the Secretary of War or law officer of the War Department, upon questions of law arising in the business of that Department, and referred to him for opinion by its Head.

The present work is not properly a later edition of the Digest of which the last issue was published in 1868, but is intended quite to supersede that publication. All that was deemed of permanent value therein has indeed been retained, but much the greater portion of the present volume consists of matter entirely new, or in part new and newly presented. Where practicable, such an arrangement has been made of the extracts as to divest them in a degree of the effect of *disjecta membra* and give them connection and sequence. With the view of adding to the interest as well as value of the work, the text has been illustrated by notes; the authorities cited being taken from compilations commenced, for personal use, some fifteen years ago, and kept up with the new adjudications, orders, enactments, &c., as they appeared. The references—especially those made to cases in General Orders—might have been considerably extended, but it has been preferred to select such as were especially

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pointed and pertinent. The citations include cases reported in 10 Otto, (100 U. S.,) the last volume of the Reports of the Supreme Court, (published in August;) as also cases in the 15th volume of the Reports of the Court of Claims, yet to be published; as well as opinions to be contained in the forthcoming volumes—XV and XVI—of the Opinions of the Attorneys General;* together with General Orders of the series of 1880, as thus far issued from the Headquarters of the Army and of the different military departments.

Except in two or three instances specially indicated, no opinion has been presented in this volume which is known or believed to have been disapproved by the Secretary of War. It is by his authority that the work has not only been printed at the public expense, but, in order that all proper persons desiring the same may be supplied with copies, has also been stereotyped.

* I desire to express my acknowledgments to the Attorney General, Hon. Charles Devens, for his courtesy in permitting me to examine and make extracts from the original opinions as recorded in the Department of Justice. W. W.

that the money, &c., furnished is *exchanged* for some commodity, as cotton, valuable to the other party. XII, 385; XIV, 266; XVI, 446.

4. The act of "relieving the enemy" contemplated by this Article is distinguished from that of trading with the enemy in violation of the laws of war; the former being restricted to certain particular forms of relief, while the latter includes every kind of commercial intercourse not expressly authorized by the government. XIV, 266. [See LAW OF WAR, § 1.]

FORTY-SIXTH ARTICLE.

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

1. *Held* that the offence of *holding correspondence* with the enemy was completed by writing and putting in progress a letter to an inhabitant of an insurrectionary State during the late war; it not being deemed essential to this offence that the letter should reach its destination.¹ IV, 368; V, 274, 287; X, 567.

2. It is essential, however, to the offence of *giving intelligence* to the enemy that material information should actually be communicated to him; the communication may be verbal, in writing, or by signals. XIV, 273.

FORTY-SEVENTH ARTICLE.

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

SEE DESERTION.

FORTY-EIGHTH ARTICLE.

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

1. The liability, to make good to the United States the time lost by desertion, enjoined by the first clause of this Article,

¹Compare Hensey's Case, 1 Burrow, 642; Stone's Case, 6 Term, 527; Samuel, 580.