

for his witnesses.

In comparing the above circumstances with those under which the Court Martial convened on the eighteenth day of October last made their decision it will be observed

I That in the latter case none of the officers composing the Court were in actual service; their residence enabled them to attend the Court at any time without much inconvenience to themselves, and without any detriment to the public. The defendant also resided in the town where they met.

II. The charges before the Court were not exhibited by an individual, but proceeded from the report of a Court of Inquiry. There was therefore no ground for presuming malice, or persecution in the charges; and those charges expressly referred to an individual whose testimony must be presumed to be material, and who resided in or near the town where the Court was convened.

III As the charges resulted from the proceedings of a Court of Inquiry, and as the Judge Advocate was appointed by the Court Martial on the spot, and desired an adjournment for a short period only, to enable him to become acquainted with the duties assigned him, the reasonableness of adjourning to a remote and uncertain day could not have come in question.

IV By the laws of this State the Judge Advocate is to be appointed by the Court Martial. It is therefore impossible for the officer who organizes the Court to recognize any person as Judge Advocate, until after the Court has convened and appointed one, and the person so appointed has accepted the trust and of course no preparatory interviews or consultations can be had. A reasonable opportunity of making himself acquainted with the case which he is to manage, ought therefore, and especially in cases where there is no private accuser, to be afforded to the Judge Advocate.

It will be observed that from the manner in which these charges came before the Court, and the manner of constituting a Judge Advocate, there is but one alternative to prevent an invariable acquittal in the like cases according to the precedent established, and that is for the officer appointing the Court, to combine

the character of individual accuser with his official functions, and previously to the first meeting of the Court to examine and subpoena witnesses and perform all their offices incident to private accuser and Judge Advocate, which in the opinion of the Commander in Chief would be undignified and improper, and lead to prepossessions and prejudices unfavorable to an impartial review of, and decision upon, the proceedings of the Court when reported to him; and he is therefore clearly of opinion that in such cases the Court Martial ought to indulge the Judge Advocate with sufficient and reasonable time to notify the officers, who have organized the Court, of his appointment. One day would have been ample in the present case for that purpose.

Of the vicinity of the Commander in Chief and Adjutant General to the meeting of the Court Martial no doubt could have been entertained because on the very day of their meeting General Orders were issued authorizing the Court to adjourn to another day, which order were issued on the application of the President and obtained by a member of the Court. It may be fairly concluded that those orders increased the expectation of the Commander in Chief of an adjournment of the Court for the purpose of giving him an opportunity of knowing who the Judge Advocate was.

If any affidavit of the materiality of witnesses should be suggested, it may be remarked that in cases resulting from the report of a Court of Inquiry no one except the officers issuing the orders of the Judge Advocate, can be officially called upon to make it; and this would be futile, since their belief of materiality must result from the proceedings of the Court of Inquiry, and that very evidence is here furnished to the Court Martial by the orders creating it.

The Commander in Chief could not therefore approve of the proceedings of the Court Martial on the eighth day of October last. His reasons for disapproving of the proceedings which took place at the meeting of the said Court on the ninth day of November instant, will now be assigned.

As much as the General Orders, referring the first determination back to the Court Martial, were issued within fifteen days after their proceedings were reported to the Commander in Chief, he entertains an opinion that the question agitated before the Court and upon which they decided, could not arise at that time, whether the orders referring the proceedings amounted to a disapproval or not. If the Court must be deemed still in possession of the said proceedings under a course of review and reconsideration, and therefore the provisions of the Statute could not apply until after those proceedings had been, upon such review and reconsideration, disposed of and reported.

But whether this opinion be correct or not, he entertains no doubt that those orders were to be received and acted upon as orders containing a disapprobation of the former decision. It cannot be deemed necessary to constitute orders of approval or disapproval that those express words should be contained in the orders. It is abundantly sufficient if they virtually and substantially comprise them. It is usual & certainly the most delicate and respectful course to make a request in orders which is considered equivalent to, and effectually, a command. Courts Martial being generally composed of officers of respectable standing, of sensibility and honor, orders addressed to them should be worded in the most delicate and respectful terms; and more particularly orders which, but for the delicacy of expressions, may contain an impeachment of their discernment or decisions. A contrary course would not only be painful to the officers issuing such orders, but might tend to offend or prejudice the members of the Court so as to preclude an impartial and candid review of the point which they had previously decided.

These considerations, with the advice and approbation of the Adjutant General and Judge Advocate, reported upon the Commander in Chief to be circumspect and delicate in the order for review and reconsideration.

eration which in due course to be is a comprehensive were not duly appreciated by the Court at their last meeting. He considers that the inevitable inference to be drawn by the Court from that order, was that he disapproved of their former decision.

I Because the exercise of the authority of an officer to refer back the proceedings of a Court Martial for their review, is by usage and authority predicated solely upon his disapprobation of their proceedings.

II Because, as the former decision of the Court was upon a simple point without any testimony, a request to review that decision would be very a long and absurd upon any other ground than such disapprobation.

III Because he transferred the Court to the Judge Advocate who is a adjutant and adviser of the Court and appointed by themselves, for views and considerations which induced the Commander in Chief to make the request, which views and considerations were the reasons assigned to him by the Commander in Chief for his disapprobation of the former decision, and ought to be taken in connection with and as collateral to the order.

The order therefore, exercising an authority which only exists in case of disapprobation, which would be negating & absurd upon any other principle, and which required the Court to their Judge Advocate for the reasons of it, ought in the opinion of the Commander in Chief to have been denied and taken by the Court as virtual disapprobation of their ^{prior} proceedings and to have been proceeded upon as such.

That the difference in opinion which has existed between the Court and the Commander in Chief, as to the matters upon which the Court has heretofore acted, excites in his mind a belief that it would not be acceptable to the Court to place the proceedings ^{again} before them, and that no beneficial consequences would result from the exercise of that authority.

The Commander in Chief therefore dissolves the Court Martial of which General Walton is President, and directs that Captain Davis be discharged from his arrest.

The said Captain Davis however will not resume the command of his Company until further general orders to that effect.

By order of the Commander in Chief
P. A. P. P. P.
Paulding P. A. P.
Adjutant General