

REVIEW

BY THE

JUDGE ADVOCATE GENERAL

OF THE

PROCEEDINGS, FINDINGS, AND SENTENCE OF A GENERAL COURT MARTIAL

HELD IN THE CITY OF WASHINGTON,

FOR THE TRIAL OF

Major General Fitz John Porter

OF THE

UNITED STATES VOLUNTEERS.

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RECORD OF THE COURT MARTIAL.

CHARGES AND SPECIFICATIONS.

Charges and Specifications exhibited against Major General Fitz John Porter, of the Volunteers of the United States Army, by B. S. Roberts, Brigadier General of United States Volunteers, and Inspector General of Major General Pope's Army of Virginia.

Charge First—Violation of the Ninth Article of War.

Specification First—In this, that the said Major General Fitz John Porter, of the volunteers of the United States, having received a lawful order, on or about the 27th of August, 1862, while at or near Warrenton Junction, in Virginia, from Major General John Pope, his superior and commanding officer, in the following figures and letters, to wit:

HEADQUARTERS ARMY OF VIRGINIA,
BRISTOW STATION, Aug. 27, 1862, 6.30 p. m.

MAJOR GENERAL F. J. PORTER, WARRENTON JUNCTION—

General: The Major General Commanding directs that you start at one o'clock to night, and come forward with your whole corps, or such part of it as is with you, so as to be here by daylight to-morrow morning. Hooker has had a very severe action with the enemy, with a loss of about three hundred killed and wounded. The enemy has been driven back, but is retiring along the railroad, We must drive him from Manassas, and clear the country between that place and Gainesville, where General McDowell is. If Morrell has not joined you, send word to him to push forward immediately; also send word to Banks to hurry forward with all speed, to take your place at Warrenton Junction. It is necessary, on all accounts, that you should be here by daylight. I send an officer with this dispatch who will conduct you to this place. Be sure to send word to Banks, who is on the road from Fayetteville, probably in the direction of Bealton. Say to Banks, also, that he had best run back the railroad trains to this side of Cedar Run. If he is not with you, write him to that effect.

By command of Major General POPE.

(Signed) GEORGE D. RUGGLES, Colonel and Chief of Staff.

P. S.—If Banks is not at Warrenton Junction, leave a regiment of infantry and two pieces of artillery, as a guard till he comes up, with instructions to follow you immediately. If Banks is not at the Junction, instruct Colonel Cleary to run the trains back to this side of Cedar Run, and post a regiment and section of artillery with it.

By command of Major General POPE.

(Signed) GEORGE D. RUGGLES, Colonel and Chief of Staff.

—did then and there disobey the said order, being at the time in the face of the

enemy. This at or near Warrenton, in the State of Virginia, on or about the 28th of August, 1862.

Specification Second—In this, that the said Major General Fitz John Porter, being in front of the enemy, at Manassas, Virginia, on or about the morning of August 29th, 1862, did receive from Major General John Pope, his superior and commanding officer, a lawful order, in the following letters and figures, to wit:

HEADQUARTERS ARMY OF VIRGINIA,
CENTREVILLE, August 29, 1862.

GENERALS MCDOWELL AND PORTER: You will please move forward, with your joint command, towards Gainesville. I sent General Porter written orders to that effect, an hour and a half ago. Heintzleman, Sigel, and Reno, are moving on the Warrenton turnpike, and must now be not far from Gainesville. I desire that, as soon as communication is established between this force and your own, the whole command shall halt. It may be necessary to fall back behind Bull Run, at Centreville, to night I presume it will be so on account of our supplies I have sent no orders of any description to Rickett, and none to interfere in any way, with the movements of General McDowell's troops, except what I sent by his aid de-camp last night, which were to hold his position on the Warrenton pike, until the troops from here should fall on the enemy's flank and rear I do not even know Ricketts' position, as I have not been able to find out where General McDowell was, until a late hour this morning General McDowell will take immediate steps to communicate with General Ricketts, and instruct him to join the other division of his corps as soon as practicable If any considerable advantages are to be gained by departing from this order, will not be strictly carried out One thing must be held in view—that the troops must occupy a position from which they can reach Bull Run to night or by morning. The indications are that the whole force of the enemy is moving in this direction, at a pace that will bring them here by tomorrow night or the next day

My own headquarters will, for the present, be with Heintzleman's corps, or at this place.
(Signed)

JOHN POPE,
Major General Commanding.

—which order the said Major General Porter did then and there disobey. This at or near Manassas, in the State of Virginia, on or about the 29th August, 1862.

Specification Third.—In this : that the said Major General Fitz John Porter, having been in front of the enemy during the battle of Manassas, on Friday, the 29th of August, 1862, did on that day, receive from Major General John Pope, his superior and commanding officer, a lawful order, in the following letters and figures, to wit :

HEADQUARTERS IN THE FIELD,
August 29th, 1862, 4.30 p. m.

MAJOR GENERAL PORTER : Your line of march brings you on the enemy's right flank. I desire you to push forward into action at once on the enemy's flank, and, if possible, on his rear, keeping your right in communication with

General Reynolds. The enemy is massed in the woods in front of us, but can be shelled out as soon as you engage their flank. Keep heavy reserves and use your batteries—keeping well closed to your right all the time. In case you are obliged to fall back, do so to your right and rear, so as to keep you in close communication with the right wing

(Signed)

JOHN POPE,

Major General Commanding.

—which said order the said Major General Porter did then and there disobey, and did fail to push forward his forces into action, either on the enemy's flank or rear, and in all other respects did fail to obey said order. This at or near Manassas, in the State of Virginia, on or about the 29th of August, 1862

Specification Fourth—In that the said Major General Fitz John Porter, being at or near Manassas Junction, on the night of the 29th of August, 1862, did receive from Major General John Pope, his superior and commanding officer, a lawful order, in figures and words as follows, to wit

HEADQUARTERS ARMY OF VIRGINIA,

IN THE FIELD NEAR BULL RUN, August 29, 1862, 8.50 P. M.

MAJOR GENERAL F. J. PORTER—

General : Immediately upon receipt of this order, the precise hour of receiving which you will acknowledge, you will march your command to the field of battle of to-day, and report to me in person for orders. You are to understand that you are expected to comply strictly with this order, and to be present on the field within three hours after its reception, or after daybreak to-morrow morning.

(Signed)

JOHN POPE,

Major General Commanding.

And the said Major General Fitz John Porter did then and there disobey the said order, and did permit one of the brigades of his command to march to Centreville, out of the way of the field of battle, and there to remain dining the entire day of Saturday, the 30th of August. This at or near Manassas Station, in the State of Virginia, on the 29th and 30th days of August, 1862.

Specification Fifth—In this that the said Major General Fitz John Porter, being at or near Manassas Station, in the State of Virginia, on the night of the 29th August, 1862, and having received from his superior commanding officer, Major General John Pope, the lawful order set forth in specification fourth to this charge, did then and there disobey the same, and did permit one other brigade attached to his command, being the brigade commanded by Brigadier General A. L. Piatt, to march to Centreville, and did thereby greatly delay the arrival of the said General Piatt's brigade on the field of battle of Manassas on Saturday, the 30th of August, 1862. This at or near Manassas, in the State of Virginia, on or about the 29th of August, 1862.

(Signed)

B. S. ROBERTS,

Brigadier General Volunteers, and Inspector General Pope's Army.

Charge Second—Violation of the Fifty-second Article of War.

Specification First—In this, that the said Major General Fitz John Porter, during the battle of Manassas, on Friday, the 29th of August, 1862, and while

within sight of the field, and in fall hearing of its artillery, did receive from Major General John Pope, his superior and commanding officer, a lawful order to attack the enemy, in the following figures and letters, to wit:

HEADQUARTERS IN THE FIELD,
August 29th, 1862—4.30 p. m.

MAJOR GENERAL PORTER : Your line of march brings you in on the enemy's right flank. I desire you to push forward into action at once on the enemy's flank, and, if possible, on his rear, keeping your right in communication with Gen. Reynolds.

The enemy is massed in the woods in front of us, but can be shelled out as soon as you engage their flank. Keep heavy reserves, and use your batteries, keeping well closed to your right all the time. In case you are obliged to fall back, do so to your right and rear, so as to keep you in close communication with the right wing.

(Signed)

JOHN POPE,
Major General Commanding.

Which said order the said Major General Porter did then and there shamefully disobey, and did retreat from advancing forces of the enemy, without any attempt to engage them, or to aid the troops who were already fighting greatly superior numbers, and were relying on the flank attack he was thus ordered to make to secure a decisive victory and to capture the enemy's army—a result which must have followed from said flank attack had it been made, by the said General Porter in compliance with said order, which he so shamefully disobeyed. This at or near Manassas, in the State of Virginia, on or about the 29th of August, 1862.

Specification Second—In this, that the said Major General Fitz John Porter, being with his army corps on Friday, the 29th of August, 1862, between Manassas Station and the field of a battle, then pending between the forces of the United States and those of the rebels, and within sound of the guns, and in the presence of the enemy, and knowing that a severe action of great consequence was being fought, and that the aid of his corps was greatly needed, did fail all day to bring it on the field, and did shamefully fall back and retreat from the advance of the enemy without any attempt to give them battle, and without knowing the forces from which he shamefully retreated. This, near Manassas Station, in the State of Virginia, on the 29th of August, 1862.

Specification Third—In this, that the said Major General Fitz John Porter, being with his army corps near the field of battle of Manassas, on the 29th of August, 1862, while a severe action was being fought by the troops of Major General Pope's command, and being in the belief that the troops of the said General Pope were sustaining defeat and retiring from the field, did shamefully fail to go to the aid of the said troops and General, and did shamefully retreat away and fall back with his army to the Manassas Junction, and leave to the disasters of a presumed defeat the said army, and did fail, by any attempt to attack the enemy, to aid in averting the misfortunes of a disaster that would have endangered the safety of the capital of the country. This at or near Manassas Station, in the State of Virginia, on the 29th day of August, 1862.

Specification Fourth—In this, that the said Major General Fitz John Porter, on the field of battle of Manassas, on Saturday, the 30th August, 1862, having received a lawful order from his superior officer and commanding general, Major General John Pope to engage the enemy's lines and to carry a position near their center, and to take an annoying battery. there posted, did proceed in the execution of that order with unnecessary slowness, and, by delays, give the enemy opportunities to watch and know his movements, and to prepare to meet his attack, and did finally so feebly fall upon the enemy's lines as to make little, or no impression on the same, and did fall back and draw away his forces unnecessarily and without making any of the great personal efforts to rally his troops or to keep their lines, or to inspire his troops to meet the sacrifices and to. make. The resistance demanded by the importance of his position and the momentous consequences and disasters of a retreat at so critical a juncture of the day.

(Signed)

B. S. ROBERTS,
Brigadier General Volunteers and Inspector General Pope's Army.

To all of which charges and specifications—except to fourth specification of second charge, which was withdrawn—the accused entered the plea of “not guilty.”

FINDINGS AND SENTENCE OF THE COURT.

The court was thereupon cleared for deliberation, and having maturely considered the evidence adduced, find the accused Major General Fitz John Porter, of United States Volunteers, as follows:

Of the first specification of first charge, guilty;

Of the second specification of first charge, guilty;

Of the third specification of first charge, guilty;

Of the fourth specification of first charge, not guilty;

Of the fifth specification of first charge, not guilty;

Of the first charge, guilty;

Of the first specification of second charge, guilty, except so much of the specification as implies that he, the accused, “did retreat from advancing forces of the enemy” *after* the receipt of the order set forth in said specification;

Of the second specification of second charge, guilty;

Of the third specification of second charge, guilty, except the words “to the Manassas Junction; ”

Of the second charge, guilty.

And the Court do therefore sentence him, Major General Fitz John Porter, of the United States Volunteers, to be cashiered and to be forever disqualified from holding any office of trust or profit under the Government of the United States.

D. HUNTER, Major General,
President.

J. HOLT, Judge Advocate.

THE APPROVAL BY THE PRESIDENT.

The record of the proceedings having been transmitted by Major General Halleck to the Secretary of War, and by him, under the 65th article of war, laid

before the President on the 12th inst., he, on the 21st inst., confirmed the same by an endorsement thereon in the following words:

The foregoing proceedings, findings, and sentence in the foregoing case of Major General Fitz John Porter, are approved and confirmed, and it is ordered that the said Fitz John Porter be, and he is hereby cashiered and dismissed from the service of the United States as a major general of volunteers, and as colonel and brevet brigadier general in the regular service of the United States, and forever disqualified from holding any office of trust or profit under the Government of the United States.

ABRAHAM LINCOLN.

JANUARY 21, 1863.

REVIEW OF THE JUDGE ADVOCATE.

JUDGE ADVOCATE GENERAL'S OFFICE,
January 19, 1863.

SIR: In compliance with your written instructions, under date of the 13th instant, "to revise the proceedings of the court martial in the case of Major General Fitz John Porter, and to report fully upon any legal questions that may have arisen in them, and upon the bearing of the testimony in reference to the charges and specifications exhibited against the accused, and upon which he was tried," I have the honor to submit the following report :

As the animus of the accused towards his commanding general, in pursuing the line of conduct alleged against him, must largely affect the question of his criminality, and may furnish a safe and reliable light for your guidance in determining points otherwise left doubtful by the evidence, it is proper that it should, if possible, be ascertained before entering at large upon the review of the case, which you have instructed me to make.

General Porter, with his command, belonged to the army of the Potomac, which had closed its disastrous campaign on the peninsula just before the moment at which the narrative of the events set forth in the record before you, is taken up by the witnesses who have deposed. General McClellan and Assistant Secretary of War Tucker state that he displayed great energy and zeal in debarking his troops and hastening their departure for Aquia Creek. The former, however, adds that it was not then known to the accused that he was to be placed under the immediate command of General Pope, the question of the command not having at that time been decided. It should likewise be borne in mind that the transfer of the army of the Potomac, once begun, was a movement of extreme peril, and that extraordinary efforts on the part of all engaged in it were prompted, not only by those high considerations of patriotism which must be supposed to have been present, but also by the equally urgent instincts of self-preservation. The order of General Halleck, directing the junction of the command of the accused with that of General Pope, seems to have reached him at Aquia Creek. From this he proceeded, in obedience to the order, to effect the junction, and at that time, as we learn from General Burnside, he lacked confidence in General Pope, and shared the distrust, alleged by the witness to have been entertained by many officers, of his capacity to conduct the campaign in which the army of Virginia was then engaged. He reported to General Pope

by note on the 26th, and in person on the morning of the 27th of August, 1862, at Warrenton Junction. In the brief conference which ensued between them in the forenoon of that day, he must have acquired all the information he then possessed as to the plan of the campaign, and as to the disposition of the forces of the contending armies. After this conference, at 4 o'clock p. m. of that day, he sent to General Burnside the dispatch first referred to in the testimony. In that dispatch, interspersed amid various items of military intelligence, are found the following expressions :

"We are working now to get behind Bull Run, and I presume will be there in a few days, if strategy don't use us up. The strategy is magnificent and tactics in the inverse proportion." "I was informed to-day, by the best authority, that in opposition to General Pope's views, this army was pushed out to save the army of the Potomac—an army that could take care of itself." "Most of this is private, but if you can get me away, do so." In another dispatch to the same officer on 27th August, he says: "Please hasten back the wagons I sent down and inform McClellan, that I may know that I am doing right." Again, at 2 p. m. of the 28th, he dispatches "all that talk about bagging Jackson, &c., was bosh." "That enormous gap, Manassas, was left open, and the enemy jumped through, and the story of McDowell having cut off Longstreet, had no good foundation." "The enemy destroyed an immense amount of property at Manassas—cars and supplies. I expect the next thing will be a raid on our rear by Longstreet, *who was cut off*." Another dispatch to same, dated Bristow, August 28th, 1862, 9.30 a. m., and introduced by the accused, concludes as follows: "I hope for the best. My lucky star is always up about my birthday, the 31st, and I hope McClellan's is up also. You will hear of us soon by way of Alexandria." To same officer, from Bristow, 6 a. m., 29th, he telegraphs : "Heintzelman and Reno are at Centreville, where they marched yesterday. Pope went to Centreville with the last two as a body guard, at the time not knowing where was the enemy, and when Sigel was fighting within eight miles of him and in sight. Comment is unnecessary. I hope Mc.'s at work, and we will soon get ordered out of this. It would seem, from proper statements of the enemy, that he was wandering around loose, but I expect they know what they are doing, which is more than any one here or anywhere knows."

The precise import of these remarkable words, in their connection, cannot be mistaken, nor can it fail to be observed how harshly they jar upon the proprieties of military life. It may be safely affirmed that they express, on the part of the accused, an intense scorn and contempt for the strategy and movements of the army of Virginia, a weariness and disgust for his association with it, added to a bitter fling at his commanding general, as found in the extraordinary declaration, that he had taken two divisions of his army as a "body guard" to Centreville. The words, as quoted, disclose also a looking by the accused not to General Pope, but to General McClellan as his guide, and a reliance upon his exertions and influence to relieve him from his connection with the army of Virginia, and an expectation, if not a hope, that they would all soon arrive at Alexandria. This, it is, true, would involve the discomfiture of that army, but it would also involve the discredit of its commander, and would restore the accused to his former position under General McClellan. Such must have been the anticipation, and such certainly was the result.

In explanation of these dispatches, and with a view to relieve, the mind of the impression they tend to make, it was alleged in the defense, and was proved by General Burnside, that they were official in their character, and that the accused had been requested to furnish him information in reference to current military events occurring in connection with the army with which he was serving. So far as the purpose for which they were offered by the Government is concerned, it is wholly immaterial under whose prompting, or for what end, they were written. If the words make it manifest that the accused entertained feelings of contempt and hostility towards the army of Virginia and its commander, it matters not whether they were spoken in a private and confidential, or in an official communication. The fact, however, that such words are found in a grave and formal official correspondence, must serve to show how strong these feelings were, and how difficult it was to repress their utterance.

In reply to what must be regarded as the prevailing sentiment of the language quoted, there was read in the defense a dispatch from the accused to General McClellan—which was not sent—dated September 2, 1862. It is full of fervent patriotism, and of professions of devotion to his duty in connection with the army of Virginia and its commander. The court undoubtedly gave to this paper the consideration it deserved. Unhappily, it came, too late. The army of Virginia had suffered, in the way of disaster, all that the enemy and the inaction of the accused could inflict upon it; and at the very moment this dispatch was written, the field for the “cordial co-operation and constant support” which it promised, was being swept away by the order issued that morning for the army of Virginia to fall back within the entrenchments of Washington, and, of course, under the command of General McClellan.

The testimony furnishes yet other indications of the animus of the accused. General Pope was warned by General Roberts, and, Lieutenant Col. Smith, and by others, that the accused “would fail him.” In his frank and unsuspecting nature, he seems to have, flung the imputation from him. He had not then the light which the pages of the record before you now furnish. When, afterwards, on his arrival at Washington, he was informed of the dispatches sent by the accused to General Burnside, his mind appears: to have been very differently impressed.

In the afternoon of the 28th August, General Roberts became satisfied that the accused was not doing his duty in good faith to General Pope. He arrived at this conclusion as well from his alleged disobedience of the order to march at 1 a. m, of that morning, as from the declaration of General Kearney. General Roberts had previously held the accused in high estimation, and when mentioning this to General Kearney, the latter said that “he (General Roberts) did not know him, and that he would fail General Pope.”

Lieutenant Colonel Thomas C. H. Smith, an aid-de-camp on the staff of General Pope, called on the accused in the afternoon of the 28th of August. He had not heard of his disobedience of any orders, and had, like General Roberts, the most favorable opinion of his character and conduct as an officer; yet, such was the impression made upon him by his manner and conversation, that, at the close of their interview, he left him fully satisfied that he would fail General Pope, and would withhold from him his support in the then pending operations of the army of Virginia. Soon thereafter he arrived at the headquarters of Gene-

ral Pope, and said to him that he had just seen General Porter on his way there, and that he would fail him, and added : “So certain am I that Fitz John Porter is a traitor, that I would shoot him to-night, so far as any crime before God is concerned, if the law would allow me to do it.” The impression thus expressed he still retains, and reiterated in his testimony. This evidence is of a most striking character, and should be closely examined with a view to the ascertainment of the weight to which the opinion of the witness is entitled. It has been stigmatized in the defense of the accused as “ravings,” and as “wild fantasies,” which “encumber the record” as “rubbish.” Such epithets were not warranted either by the language or manner of the witness. While expressing himself thus forcibly, it was evident that he was a man of fine intelligence, and equally evident that his conscientiousness rendered him careful and guarded in his statements. Certainly the particular impression referred to was depomed to with a depth and solemnity of conviction rarely paralleled in judicial proceedings. Under the pressure of the severe cross-examination to which he was subjected, he endeavored to lay bare the foundations on which his belief of the accused’s meditated treachery rested. The task, however, was a difficult one, and he may not have been entirely successful. In reference to a large quantity of ammunition ordered by and forwarded to the accused, but which had not been received, he manifested utter indifference, stating that “it was going where it belonged; that it was on the road to Alexandria, where we are all going”—a favorite thought, as appears from his dispatches. His manner was sneering throughout, whenever allusion was made to matters connected with General Pope, and “his look was that of a man having a crime on his mind.” It was physically impossible for the witness to reproduce the manner, the tone of voice, and the expression of the eye, and the play of the features, which may have so much influenced his judgment; yet these often afford a language more to be relied on than that of the lips. He could not hold up before the Court, for its inspection and appreciation, the sneer of which he spoke; and yet we know that a sneer is as palpable to the mental as a smile is to the natural vision. It is a life-long experience that souls read each other, and that there are intercommunings of spirits, through instrumentalities which, while defying all human analysis, nevertheless completely command the homage of human faith.. Great crimes, too, like great virtues, often reveal themselves to close observers of character and conduct as unmistakeably as a flower garden announces its presence by the odors it breathes upon the air. The witness may have misconceived this “look,” but from the calamities likely to follow such an act of treachery, if indeed it was then contemplated, it must be admitted as altogether probable that the shadow of such a crime struggling into being would have made itself manifest. In view of the fearful perils which then menaced the army of Virginia, to which they owed a common duty, is it not passing strange that during this interview, the accused uttered not to the witness one word of kindness or cordiality, of encouragement or determination in reference to the sanguinary conflict in which the morrow was to involve them with a common enemy?

With this exhibition of the disposition of the accused towards the service in which he was engaged, I will proceed to review, as briefly as possible, the testimony in its bearing upon the charges and specifications of the record.

The order of General Pope, set forth in the first specification of the first

charge, directed the accused, then at Warrenton Junction, to start at one o'clock on the morning of the 28th of August, and to march with his whole corps so as to be at Bristow Station, distant nine miles, at daylight. It recited that General Hooker had "had a very severe action with the enemy, with the loss of about three hundred killed and wounded;" that the enemy were retiring along the railroad, and that it was necessary to drive them from Manassas and clear the country between that place and Gainesville. The urgency of the necessity under which the order was issued was further expressed in these words : "It is necessary, *on all accounts*, that you should be here (Bristow Station) by daylight. I send an officer with this dispatch, who will conduct you to this place." The order was delivered by the officer referred to, (Captain Drake De Kay,) at between half-past nine and ten o'clock of the evening of the 27th. On delivering it he stated to the accused : "The last thing General Pope said to me, on leaving Bristow Station, was, that I should remain with General Porter and guide the column to Bristow Station, leaving at one o'clock, and that General Pope expected him certainly to be there by daylight." General Hooker's command was out of ammunition, and an attack from the combined forces of Jackson and Ewell was expected early on the morning of the 28th, and hence the urgency with which this prompt and vigorous movement was pressed upon the accused. The order was not obeyed.

The march, according to several of the witnesses, did not begin until daylight. Captain De Kay, who acted as guide, and moved at the head of the column, states that he was waked up just at dawn, and that he breakfasted before the march began. Captain Monteith, called by the accused, when asked if, in point of fact, the march commenced before daylight, replied, "I think it was about dawn of day." General Sykes, also a witness of the accused, deposed that his division led on that morning; that he generally allowed from one and a half to two hours between reveille and the advance; that on the morning of the 28th, the reveille was beaten from $\frac{1}{4}$ to $\frac{1}{2}$ past 2 o'clock, and that the advance was sounded as soon as they could distinguish the road—thereby evidently referring to the dawn of day. General Pope having been asked whether, on the receipt of certain messages from the accused, the latter was on his march in obedience to the order of the 27th of August, answered:

"I do not know that he was. On the contrary, from a note I had received from him, I did not understand that he would march until daylight in the morning."

While the weight of the testimony is to the effect that the troops did not move forward until daylight, none of the witnesses represent them as having done so earlier than 3 o'clock, and the arrival at Bristow Station took place, not at daylight, as directed by the order, but at twenty minutes past ten of the forenoon of the 28th. If our army—a large part of it without ammunition—had not, in the meanwhile, been fallen upon and beaten, it was not because of any exertions made by the accused to prevent such a catastrophe, but simply because the enemy had not thought proper to make the anticipated attack.

The violation of this peremptory order is sought to be excused, or rather fully justified by the accused on three grounds: first, the fatigue of his troops; second, the darkness of the night; third, the obstructions on the road growing out of breaks and difficult places in it, and the presence of wagon trains in motion.

A part of the troops had marched on the 27th from seventeen to nineteen miles—the remainder not so far. The command of General Sykes had marched

but from twelve to fourteen miles. A portion of them did not arrive at their encampment at Warrenton Junction until about sundown—half past six o'clock; the others arrived earlier—some of them as early as ten o'clock in the morning. The generals who advised and participated in the determination not to move at one o'clock, deposed that their troops were very much exhausted. Had the order been obeyed, the troops reaching their encampment earliest would have had fifteen hours, while those arriving latest would have had six hours and a half for rest. Would not this have been sufficient to prepare them for a march of only nine miles? Had they reached Bristow Station at daylight, the march for none of them would have exceeded twenty-eight miles in twenty-four hours, while for a large part of the command it would have been less. Does not the military history of the world show that in great emergencies such forced marches often occur, and that soldiers are fully capable of enduring them?

The early part of the night was starlit, and not unusually dark. At about 11 o'clock the sky became overcast, and the night grew very, or as some of the witnesses express it, "extremely dark," and so continued until morning. It was a darkness, however, not complicated with cold, or rain, or storm. It is a noticeable fact, also, that the determination not to move at 1 o'clock in obedience to the order, was not occasioned by this extreme darkness, but had been taken before Captain DeKay lay down, which was at 11 o'clock.

The first answer to the position taken in the defense, that in consequence of this darkness it was impossible to obey the order, is found in the testimony of Captain Duryea, who deposes that on the night of the 27th of August, he marched with his command from Warrenton, and did not halt until about midnight, and that "he did not experience any unusual difficulties growing out of the night." Major F. S. Barstow was also on the march that night until 9 o'clock, and was up the following morning before daylight, and says: "I have no vivid recollection of that night beyond other nights. It seemed to me to be very much like other nights on which we moved." He adds that no difficulty was experienced in marching the troops up to the hour at which they encamped. Lieutenant Colonel Myers, who, as chief quartermaster to General McDowell, had charge of the trains passing over this road on the night of the 27th, states that he was up nearly all that night. He was asked the following question:

Question. In view of the condition of the road, as you have described it, and also the character of the night, was or was not the movement of troops along that road practicable that night?

He replied:

"I do not know of anything to hinder troops marching along the railroad there. There was a road running each side of the railroad. I should think it would have been easy for troops to move along there, although I may be mistaken in that."

General Reynolds, called by the accused, and who entertained a very strong estimate of the embarrassments in the way of the march of troops on the night of the 27th, over the road to Bristow Station, admitted, on cross-examination, the dark as was the night, troops could have marched, provided they had had a road and a guide to conduct them—both of which the command of Gen. Porter had. General Heintzelman testifies that it was not impossible for troops to have marched over that road on the night of the 27th, but that there would have been

a great many stragglers, of which, he said, there are more or less on all night marches. He describes the road as narrow, but "in tolerably good condition."

General Pope was asked this question:

Question. "If there were any obstacles in the way of such a march as your order contemplated, either growing out of the night or the character of the road, will you please state them?"

He answered:

"There was no difficulty in marching, so far as the night was concerned. I have several times made marches with a larger force than General Porter had, during the night. There was some obstruction on the road, in a wagon train that was stretched along the road, marching towards the Manassas Junction, in rear of Hooker's division, not sufficient, in my judgment, to have delayed, for any considerable length of time, the passage of artillery. But even had the roads been entirely blocked up, the railroad track was clear, and along that track had passed the larger portion of General Hooker's infantry. There was no obstruction to the advance of infantry."

There were a very few breaks in the road, but its general condition is shown to have been good. General Pope made the following statement on this point:

"Along the road between Warrenton Junction to Kettle Run, which is perhaps three miles west from Bristow Station, the track had been torn up in places; but during the day of the 27th of August, I directed Captain Merrill, of the Engineers, with a considerable force, to repair the track up to the bridge over Kettle Run, which had been burned. He reported to me on the night of the 27th that he had done so; so that from Warrenton Junction to the bridge over Kettle Run, there was no obstruction on the railroad of any description. The bridge to Kettle Run had been burned, but a hundred yards above the bridge the road crossed the creek by a ford. And from there towards Bristow Station, the most of the country, in fact nearly the whole of it, was open country; that is as I remember the country, riding along on the afternoon of the 27th of August."

Gen. Roberts, who passed from Warrenton Junction to Bristow Station, on the 27th, says: "The condition of the road was good generally;" and in another part of his testimony, General Pope used this language: "The road was in good condition everywhere. At most places it was a double road on each side of the railroad track. I am not sure it was a double road all the way; a part of the way, I know it was." Captain DeKay states that "the road was good," and Lieutenant Brooks, who was well acquainted with it, that it was "very good." Lieut. Col. Myers was asked:

Question. "What was the condition of the road between Warrenton Junction and Bristow Station at that time, (27th,) so far as regards the passage of wagons, artillery, &c.?"

Answer, "It was in excellent condition at that time."

The chief obstructions upon the road, however, and those most elaborately presented by the evidence and argument of the accused, were wagon trains. Captain DeKay thinks that, had the march begun at one o'clock, the greater part of these wagons would probably have been in camp, and would thus have been avoided. A part of them are shown to have been on the road throughout the night, and between two and three o'clock Colonel Cleary found them so jammed as to constitute a serious obstruction for some three miles. But even here the railway track was alongside of the road, and could easily have been

used by the infantry. For the first three miles from Warrenton Junction, it was in proof that the road was wholly unobstructed.

Captain Fifield, a witness of the accused, deposed that with one hundred men he could have prevented the jam of the wagons, and that with one hundred and fifty he could have kept the road entirely clear. Why did not the accused detail this force, and at once remove the obstacles which are now relied on to excuse him for this alleged disobedience of orders? The testimony leaves no doubt but that he could have done so, and that every wagon might thus have been taken out of the way of his troops by one o'clock. The subject does not appear to have been discussed, or even thought of. It is true that at twelve o'clock on the night of 27th Lieut. Brinton came from Catlett's Station to Warrenton Junction, and on having an interview with the accused, he spoke to him of the wagons on the road, whereupon accused directed him on his return to have the road cleared. On his arrival at Catlett's Station, he told the adjutant "to send out some men to get these wagons out of the way." He does not know that the direction he gave was complied with. This was at one o'clock, the hour at which the troops should have been in motion. All the circumstances surrounding this direction on the part of the accused, leave the impression that he could not have anticipated from it, the removal of the obstacles in his way. It was accidental, and was without vigor or precision, and given at an hour that showed the subject had not been with him, one of any solicitude. It is observable also, that even this feeble and inefficient provision looked to clearing the road, not for a march at one o'clock—for all thought of that had been abandoned—but at daylight, or at earliest at three o'clock.

On the consultation which took place between the accused and his generals when the order was received, the opinion was expressed by the latter—and it has been repeated in their testimony—that nothing would be gained in the way of time by starting at one o'clock, instead of a later hour—say three or four. As starting at three would require a night march of one hour, and starting at one a night march of three hours, this opinion imports a declaration that the troops could march no further in three than they could in one hour, the darkness for the whole period of time being the same. If the opinion referred to a starting at daylight, then it carries with it the assumption that during the three hours, from one to four o'clock, the troops would have been unable to make any progress whatever, and this, notwithstanding the three first miles of the road from their encampment is shown to have been entirely unobstructed. Surely these opinions have not been well considered.

There are certain other facts disclosed in the testimony which go far to indicate a settled purpose on the part of the accused to disregard this order of his commanding general. It was couched in terms as strong as a military man could employ in addressing a subordinate; and yet its urgent language was not commented upon, and does not seem to have attracted any attention, as appears from the conversation that ensued between the accused and his generals after its receipt. The accused, as we learn from Captain De Kay, handed it to one of his generals present, saying, "There is something for you to sleep on"—not something that you are to prepare to execute—not something which announces that the army with which we are connected is threatened by great perils, which we must make extraordinary efforts to meet, but "some-

thing for you to sleep on.” The whole tone of that conversation was, to the last degree, saddening and discouraging for those who believe that, in the prosecution of this war, much vigor is much wisdom.

Again: General Griffin, called by the accused, testified that, after having marched about a mile with his brigade, he came to a halt, and remained there until two hours after daylight; and the remainder of the forces no doubt did the same. This explains why the arrival at Bristow Station was not until twenty minutes past ten. No reason, that deserves a moment’s consideration, is given for this long delay. It is true that General Griffin says: “I know the artillery which followed the brigade—that is, a carriage or two of the artillery which followed the brigade—got stuck in the mud or in a little creek, and had trouble in getting out.” When more closely questioned as to the cause of the halt, he said: “I halted because I found, when I got to the point where I did halt, that I had only .a portion of my brigade with me. In the darkness, by some accident or other, we had become separated, and I halted to get my brigade together. And the artillery, I presume, is what detained us there until we started again. That is my impression. I do not know that positively. General Morrell was in command of the division.” This may explain the halt, but not the delay until the late hour mentioned. It was in summer, and a season of drought, as appears from the clouds of dust which are continually brought to our notice by the testimony; and we cannot be misled as to the amount of obstacle the mud in such a stream, at such a season, would offer to the onward march of soldiers determined to do their duty.

Again: when the forces were in motion there was no haste or vigor displayed. Captain De Kay says “the march was at the rate at which troops would move if there was no necessity for a rapid movement; ” and, he adds, “they could have moved faster than they did.” General Pope deposed: “I sent back several officers to try and see General Porter, and request him to hurry up and report to me where his troops were, as I was very apprehensive that after day had dawned, we should have an attack upon us from the enemy.” “I think they all returned. The report made to me was that General Porter was coming along very slowly, and was pushing the wagons out of the road.”

Whatever may be thought of the difficulties in the way of the night march required by this order, it was the manifest duty of the accused to make a sincere and determined endeavor to overcome them. If, after having promptly and vigorously made this effort, and started as ordered, he had failed to arrive at Bristow Station at daylight, either from the exhaustion of his troops, the darkness of the night, or the character of the road, the responsibility of the failure would not have been charged upon him. The contemptuous and unfriendly feelings disclosed in the dispatch to General Burnside—which was written but about five hours and a half before this order was received—will probably furnish a more satisfactory solution of the question why this effort was not made than can be found in the nature of the obstacles themselves.

Nor is it believed that the conduct of the accused finds any shelter in the Napoleonic maxim quoted in the argument for the defense. The discretion it allows to a subordinate, separated from his superior officer, is understood to relate to the means, and not the end of an order. When the accused determined that, instead of starting at one o’clock, he would start at three or four, he did not.

resolve that he would arrive at Bristow Station by daylight in a different manner from that indicated by his commanding general, but that he would not arrive there by daylight at all. In regard to this, the end of the order, he had no discretion.

The order set forth in the second specification to first charge was addressed to Generals McDowell and Porter, jointly, and a copy, or, rather, duplicate of it, was delivered to each of them—it may be inferred from all the evidence on the point—at about ten o'clock in the morning of the 29th of August. Previously to this they had met with their forces, and, under the 62d Article of War, General McDowell had assumed the command. The order directed them to move with their joint command towards Gainesville until they should effect a communication with the forces of Heintzelman, Sigel and Reno, and then to halt, taking care to occupy such a position that they could reach Bull Run that night or by the morning of the following day. The order contained these further words : “If any considerable advantages are to be gained by departing from this order it will not be strictly carried out.” At the time this order reached Generals McDowell and Porter they were on the road between Manassas Junction and Bethlehem Church, and were proceeding in the direction of Gainesville, as the order contemplated. The order being issued to them jointly showed that it was the purpose of General Pope that they should act independently of each other, and each in direct subordination to himself, and he testified that such was his intention. Under these circumstances it may be well questioned whether, under the 62d Article of War, General McDowell could continue the command which he had assumed over their joint forces. That article excludes the idea of the presence of an officer superior in rank to those commanding the different corps of which it speaks. In this case General Pope was absent but a few miles—was in fact occupying the same field of military operations with Generals McDowell and Porter, and claimed to decide the question (which it certainly belonged to him to determine) that these generals were so far in his presence that he might command them directly, and not through each other.

Their forces continued their march—those of the accused being in the advance—until the front of his column had reached some three miles beyond Bethlehem Church, and until a small part of General McDowell's command had passed that point General McDowell then rode forward to the head of the column of the accused, where an interview and conference took place between them, to which reference is frequently made in the testimony. They discussed the joint order, and General McDowell determined for himself, that there were “considerable advantages to be gained by departing from it,” and by moving with his forces along the Sudley Springs road towards the field of a battle then being fought by the main army of General Pope, at the distance of three or four miles. His purpose was to throw himself on the enemy's center, and he wished the accused to attack his right flank. He, therefore, said to him, “You put your force in here, and I will take mine up the Sudley Springs road, on the left of the troops engaged at that point with the enemy;” and he left him, at about 12 o'clock, with the belief and understanding that he would put in his force at that point. Why this expectation was doomed to disappointment, may possibly be gathered from the following extract from General

McDowell's testimony as to what occurred during his conversation with the accused:

Question. "You have said that the accused made an observation to you which showed that he was satisfied that the enemy was in his immediate front. Will you state what that observation was?"

Answer. "I do not know that I can repeat it exactly, and I do not know that the accused meant exactly what the remark might seem to imply. The observation was to this effect—(putting his hand in the direction of the dust rising above the top of the trees)— 'we cannot go in there any where without getting into a fight.' "

Question. "What reply did you make to that remark?"

Answer. "I think to this effect: 'That is what we came here for.' "

These words will certainly stand in memorable contrast with the sad utterance to which they were a reply.

General McDowell, on parting with the accused, ceased to exercise any authority over his command, and he was thus left untrammelled and in possession of the joint order still in full force. Soon after, General Griffin's brigade—a part of the corps of the accused—was ordered to move to the right, as if for the purpose of advancing on the enemy, as directed by General McDowell. It had proceeded, however, only about six hundred yards, when, coming into "some small pine bushes," and somebody saying there were obstacles ahead, a retreat was ordered, and they fell back to their original position. General Griffin saw no obstacles himself, and he made no reconnoissance. This was all that was done towards carrying into effect the stirring and soldierly direction of General McDowell.

Some time after this faint demonstration—it may have been an hour or more, General McDowell having left at about 12—a rebel battery threw three or four shot at the head of the accused's column. It was at once replied to and silenced, and then came the order to full back, of which Colonel B. F. Smith, who witnessed the artillery firing, speaks so distinctly. The note of the accused to Generals McDowell and King, which was read in evidence, and is without date, must have been written immediately after this artillery firing, and after the order to retreat which followed it. It is in the following words:

"GENERALS MCDOWELL AND KING: I found it impossible to communicate by crossing the roads to Groveton. The enemy are in strong force on this road, and as they appear to have driven our forces back, the firing of the enemy having advanced and ours retired, I have determined to withdraw to Manassas. I have attempted to communicate with McDowell and Sigel, but my messengers have run into the enemy. They have gathered artillery and cavalry and infantry, and the advancing masses of dust show the enemy coming in force. I am now going to the head of the column to see what is passing and how affairs are going. Had you not better send your train back? I will communicate with you.

F. J. PORTER, Major General."

This note appears to have been written for the purpose of explaining why the accused had not "put his force in" at the place which General McDowell had pointed out. It announces most energetically a determination "to withdraw,"

i. e., retreat to Manassas, because of the approach of the enemy, and because the battle seemed to be going against the Federal forces. That this purpose was promptly carried out, substantially, if not to the letter, is made evident from the fact that at between five and six o'clock, the accused was found at or near Bethlehem Church, surrounded by his troops, whose arms were stacked. It is further proved by Colonel B. F. Smith, who was in the front, at the time of the artillery firing, and alleges that he and the troops of his command then fell back under orders, to within a mile or two of Manassas, where they passed the night, having arrived there in the afternoon. It is yet further shown by General Griffin, examined by the accused, who says his brigade retreated from a mile and a half to two miles. This retrograde movement might have been excused had it been made in good faith for the purpose of reaching Bull Run that night, but no such purpose was entertained, nor has it been insisted that it was, either by the testimony or the argument. General McDowell says the accused might have attacked the enemy, and would have still had ample time for falling back on Bull Run. Indeed, as appears from the map, such an attack would have been an advance in the direction of Bull Run. He might have found justification, too, for this step, had it been taken from a conviction that in the sense of the order, "considerable advantages" were to be gained by departing from its terms. No such position, however, could be successfully taken in the defense. The only "advantages" which the retreat promised, were the personal safety of the accused and staff, and the exemption of his troops from any participation in the sanguinary battle then being fought immediately to his right. Surely such advantages as these, purchased, as they were, at the imminent hazard of the sacrifice of the whole army, were not those contemplated by the order. The advance of the accused, either along the Gainesville road or to the right, would have brought him into conflict with the enemy. The court concluded, and justly, that his falling back, under the circumstances and for the purpose mentioned in his note to Generals McDowell and King, was a violation of the joint order to himself and General McDowell.

It would seem also to have been a manifest violation of the duty resting on him as a soldier in the position in which he was placed, without reference to any specific order or direction, leading or directing him to engage the enemy. In forward, aggressive movements, it is an established principle of military science that the columns shall be so held in their advance as to be ready to afford mutual assistance in time of need. Another elementary principle of such movements is, that in the absence of positive, restraining orders, the march shall always be towards the sound of the guns—thus confirming the sentiment of the words of General McDowell, that it is the soldier's mission to fight. Both these fundamental rules of the military profession were disregarded in the retreat of the accused. He fell back precisely at the moment that the obligation to cooperate which was pressing upon him, required him to advance, and his march was not towards, but from the sound of the enemy's cannon.

The order of 4.30 p. m., August 29, directed the accused "to push forward into action at once on the enemy's right flank, and, if possible, on his rear." It was not obeyed, nor was any attempt made to obey it.

It was claimed in the defense that the accused should not be condemned for this disobedience: first, because the order was received too late to be obeyed

and secondly, because obedience to it was impracticable in consequence of the presence of the enemy in overwhelming force, and in consequence of the character of the country over which the movement would have had to be made.

There is a decided conflict in the testimony as to the hour at which the order was received. It bears date 4:30 p. m., and Captain Pope, the staff officer who bore it, says that he proceeded direct from General Pope to the accused, and delivered it "as early as five o'clock, or probably three or four minutes after five." Charles Duffee, the orderly who accompanied him, testifies that they left General Pope at about half past four, and went on to the headquarters of the accused, at a pace "about as fast as they thought their horses could travel." He thinks about an hour was occupied on the road, and that the order reached the accused at about half-past five. These statements are corroborated by the evidence of General McDowell as to the time and place at which he met them, and read the order. General Pope says: "I know that an aid-de-camp, riding rapidly, could go from the field of battle to Manassas Junction, or to any point west of Manassas Junction, on the Gainesville road, if he found General Porter in advance of Manassas Junction, within an hour, by going at speed." General Roberts, who was present when the order was issued, expressed the opinion that it should have been delivered "in half an hour or less, as orders are generally, carried on such occasions." Adopting the latest estimate—that of General Pope and the orderly—this would give the accused two hours of daylight, within which to make the attack.

On the other hand, there are five witnesses introduced by the accused—three of them being his staff officers—viz : General Sykes, Lieutenant Colonel Locke, Captain Monteith, Lieutenant Weld, and Lieutenant Ingham, who depose that the order was not received until about sundown. One of them indeed—though he is not supported by the others—fixes the hour much later. If in ascertaining the value of testimony, witnesses were counted, and not weighed, the question would be at once settled by the relative numbers as given. Such, however, is not the rule of law, and it may be that after carefully considering all the circumstances, the court felt that the explicit and intelligent statements of Capt. Pope and his orderly, fortified by the corroborative evidence of Gens. Pope, McDowell and Roberts, were not overcome by the opinions of the five officers named. There was, outside of the positive testimony, a consideration strongly supporting this view, and it is this: There is no question as to the time at which Captain Pope left with the order; it was at 4 ½ o'clock; he rode as fast as his horse could carry him, and had but about five miles to travel; and yet, according to the theory of the defense—that he did not arrive until sunset, or half-past six—he was two hours on the way. Is it credible that a staff officer, bearing an important order, in the midst of a fiercely-contested battle, would have traveled at this rate; and this, too, when he was conducted by an orderly acquainted with the road, and encountered no obstacle to his progress? Is it not much more probable that but a single hour was occupied, and flint, in point of fact, he arrived at half-past five?

Conceding, however, for the sake of the argument, the position taken by the defense, that the order was not received until sunset, this would have left the accused an hour of daylight within which to make the movement. The enemy had been so far encouraged in their advance by the inaction of the forces of the

accused, and by their falling back, that at this late moment the front of his column was not separated from the advance of the rebels by more than a mile or a mile and a half. But little time therefore was required to make the attack. It is admitted that it was not made; but was there any earnest or vigorous effort on the part of the accused to obey the order? Col. Locke states that soon after the receipt of the order from General Pope, he bore one from the accused to General Morrell, directing him to engage the enemy—which, as appears from the statement of Colonel Marshall was to be done with but four regiments—but General Morrell testified that before there was time to carry this order into execution—say within about half an hour after its receipt—it was countermanded by another, directing him to pass the night with his troops where he was. This was all that was done towards attacking the enemy; and yet General McDowell testified that an attack even at this late hour—indeed at any hour before the battle closed, which was at dark—would have resulted in a victory for our arms.

There is one fact—probably the most remarkable one disclosed by the record—which must have impressed the court as going far to manifest the true spirit of the conduct of the accused on this occasion. The forces of General Morrell were in the front, and those of General Sykes were immediately in thin rear, and supporting them. In the progress of any determined movement against the enemy, therefore, the command of General Sykes would be necessarily involved, and the presence of that General would be required; yet Gen. Sykes states that he was with Gen. Porter when the order from General Pope was received, and when that to Gen. Morrell was sent, that he remained with him all the evening and night, and that he never heard that an order to attack the enemy had been received from Gen. Pope, or had been forwarded to Gen. Morrell. What conclusion is necessarily drawn from this? If the accused had seriously determined that the order to Gen. Morrell should be executed, would he not have apprised General Sykes of its character, and directed him to proceed at once to his command? When we add to this the feebleness of the attack directed—being but with four regiments—and the further fact that the order was revoked before it was possible to make the movement, can we escape a painful impression that the order itself was issued without any expectation that it would or any purpose that it should be obeyed?

There is yet one other fact presented in connection with this order which deserves a passing notice. Captain Pope found the accused with his troops halted, and the arms of some of them stacked. After delivering the order, and during his stay of fifteen or twenty minutes, he did “not observe any orders given, or any indication of preparation for a movement in the direction of the battle-field.” On his return, nearly an hour afterwards, the same condition of things existed. The following extract from the testimony of Mr. Duffee, who accompanied Captain Pope, will yet further illustrate the absence of all anxiety, if not of all interest, on the part of the accused:

“Question. Did you see the order delivered into the hands of General Porter?

*The troops of General Sykes extended along the road from those of General Morrell toward, and it may be, to where General Porter was. It is not, therefore, intended to intimate that, in being with General Porter at the moment, he was out of place, but to say that had it been General Porter’s purpose that his order to General Morrell to engage the enemy should be vigorously carried out, he would, from General Sykes’s necessary relation to the movement, have advised him of it, and have directed him to go forward and prepare for performing his part in its execution.

“Answer. Yes, sir; I saw him take the order from Captain Pope.

“Question. Was he in his tent or out of doors?

“Answer. He was lying down under a shade tree when he took the order.

“Question. Did he change his position on reading the order, or did he continue to lie down?

“Answer. I cannot state positively whether he rose to his feet or not; but at the time he was reading the order, I noticed that he was lying in this position on the ground, (describing him as resting on his elbow, his head upon his hand.)

“Question. Did you leave him lying down on the ground when you came away?

“Answer. Yes, sir”

The accused had, for between five and six hours, been listening to the sounds of the battle raging immediately to his right. Its dust and smoke were before his eyes, and the reverberation of its artillery was in his ears. He must have known the exhaustion and carnage consequent upon this prolonged conflict, and he had reason to believe, as shown by his note to Generals McDowell and King, that our army was giving way before the heavy reinforcements of the enemy. He had a command of some 13,000 fresh and well appointed troops, who had marched but a few miles, and had not fought at all on that day. Under these circumstances, should not an order to charge the enemy have electrified him as a soldier, and have brought him not only to his feet and to his saddle, but have awakened the sounds of eager preparation throughout his camp? But the bugle note of this order seems to have fallen unheeded, and after reading it and at the close of an interview of from fifteen to twenty minutes, the messenger who bore it, turned away, leaving the accused still “lying on the ground.”

There is some contrariety in the evidence as to the force of the enemy by which the accused was opposed. The weight of the testimony is that it was small—decidedly so in the early part of the afternoon, when the attack directed by Gen. McDowell should have been made. Gen. Roberts thinks there was only a cavalry force, with some light artillery Col. B. F. Smith, who was at the head of the column at the time the rebel battery was silenced, and who fell back with his command half an hour afterwards noticed clouds of dust beyond the trees, but whether there were troops advancing or moving in another direction, he could not tell. He saw nothing to induce him to believe that they were retreating before the enemy, but supposed that they had been making a reconnoissance in force, and having completed it, were falling back for some other duty. Gen. Griffin, a witness for the accused, who was also at the front, and enjoyed every opportunity of observation, having been asked as to the position of the enemy in relation to Gen. Porter’s corps, between 5 and 7 o’clock of the 29th, replied, “It is a hard question to answer. I do not know much about the enemy, I only know that, during the day, large clouds of dust were going to our front and to our left, from a point slated to us then to be Thoroughfare Gap. The batteries which opened upon us at 1 o’clock were within 1,200 or 1,500 yards of us. We saw no force at all; we saw scattering groups of horsemen, or of infantry. I do not believe we saw in any one group over forty men.”

Major Hyland, who belonged to Colonel Marshall’s regiment of skirmishers, and was some eight hundred or a thousand yards in advance of General Morrell, says the enemy began to form in his front and to the right between 2 and

3 o'clock. He saw none to the left. Thinks the force was very large, and although unable to give even a proximate estimate of their numbers, believes they were strong enough to have resisted an attack of General Porter's corps. Second lieutenant Stevenson supposed the enemy's forces to consist of from twelve to fifteen thousand but he was a young man, with limited experience, and when he stated that the enemy's line of battle was but a mile long, it was sufficiently evident that a large abatement was to be made from his estimate. Colonel Marshall set the enemy's troops down at twice the number of the corps of the accused. It is obvious, however, that he was largely influenced in forming this opinion from the clouds of dust, which may have arisen as much from the movement of ambulances and wagons, as from the march of troops. He states that they came from towards Thoroughfare Gap, and separated into two columns, one of which proceeded in the direction of the battle-field, at Groveton, and the other came down on the Gainesville and Manassas road. Now, we learn from General Buford that the enemy's forces passing through Gainesville that day from Thoroughfare Gap, and counted by himself, did not exceed fourteen thousand men, and dividing these into two columns, it is believed that at no time, on the 29th, could the accused have been confronted by a rebel force exceeding seven thousand—a little more than one half the strength of his own corps. The strong probability is that the force was not so large; but supposing the enemy to have had quite as large a force as his own, was that a reason why he should not make the attack, seeing that a severely contested battle was then pending?

The course of the inquiry on the part of the defense would seem to imply an impression that the accused could not attack the right flank because he found an enemy in his front, and could not attack the front because the order was to engage the right. A dead lock, however, in military movements could scarcely be produced by such a process as this. General McDowell solves this question, by saying that if the enemy's forces were posted in the front of the accused in the manner indicated by the witnesses, they must have constituted his right flank, so that a movement in that direction would have been a literal compliance with the order.

A conclusive reply to the suggestion that the ground between the enemy and the accused was impracticable for military movements is found in the testimony of Lieutenant Colonel Smith. He says: "I infer that the corps of the accused could have moved up, its right wing joining with the forces engaged, and have flanked the enemy. This is not all an inference merely from the general character of the country. It is based also on the fact that that portion of the country over which, as I understand it, the corps of the accused would have moved upon the enemy *was sufficiently practicable to enable the enemy, as they did, to make a similar movement on our left on the next day.*"

Some of the witnesses of the accused declare that artillery could not have passed over this ground, while others testified that infantry could not have been marched through the woods in any order. Under a cross-examination, however, the obstacles on which these opinions were based were much reduced in the attempt to enumerate them. The general description of the country given is that it is open, with fields and woods and occasional ravines, but not remarkable for its ruggedness. There were no impassable streams or morasses, or precipices. General McDowell deposed that he did not consider that there were, any insu-

perable obstacles “in the way of the advance on the part of General Porter’s command upon the flank of the enemy,” and he proved the sincerity of this opinion by directing him to make the movement. After reciting in detail certain facts leading to this belief, he thus concludes : “These movements by these two divisions of my corps, my own movements, and the movements of the enemy, give me the belief that troops could move through the country comprised between the Warrenton turnpike and the Sudley Spring road and the road from Bethlehem Church to Gainesville. I will mention further, that that country is a mixture of woods, cleared ground, and hills, and that it is easy for troops to march without being seen or seeing the enemy.” A glance at the map which accompanies the record will show that the ground in question is embraced by this boundary and description.

It may be admitted—and perhaps the testimony requires the admission to be made—that in falling upon the enemy on the afternoon of the 29th the accused would have encountered both difficulty and danger, but difficulty and danger, in time of war, are daily and hourly in the category of the soldier’s life. Their presence should be for him, not a discouragement, but an inspiration. To grapple with them should be his ambition, to overcome them, his glory.

That a vigorous attack upon the enemy by the accused, at any time between twelve o’clock, when the battle began, in dark, when it closed, would have secured a triumph for our arms, and not only the overthrow of the rebel forces, but probably the destruction or capture of Jackson’s army, the record fully justifies us in maintaining. This opinion, in effect, is emphatically expressed by Generals Pope, McDowell and Roberts, and by Lieut. Col. Smith, all of whom participated in the engagement, and were well qualified to judge General Roberts, who was on the field throughout the day, says: “I do not doubt at all that it would have resulted in the defeat, if not in the capture of the main army of the confederates that were in the field at that time.” To the same effect is the following explicit language of General Pope: “Late in the afternoon of the 29th—perhaps towards half-past five or six o’clock—about the time that I hoped General Porter would be in his position and assaulting the enemy on the flank, and when General McDowell had himself arrived with his corps on the field of battle, I directed an attack to be made on the left of the enemy’s line, which was handsomely done by Heintzelman’s and Reno’s corps. The enemy was driven back in all directions, and left a large part of the ground, with his dead and wounded upon it, in our possession. Had General Porter fallen upon the flank of the enemy, as it was hoped, at anytime up to eight o’clock that night, it is my firm conviction that we should have destroyed the army of Jackson.” Even had the attack itself failed, General McDowell states that the number of troops which would have been withdrawn from the main battle by the enemy to effect this result would have so far relieved our center as to render our victory complete. When we recall the calamities already suffered by our country, and contemplate the untold griefs to the homes and hearts of its people, which may yet follow from the escape of that army on that day, we can appreciate with some approach to accuracy the responsibilities incurred by a line of conduct which no certainly and so fatally led to that disaster.

The first, second, and third specifications of the second charge, arraign the conduct of the accused on the 29th, under the 52d Article of War, as “misbe-

havior before the enemy.” If a soldier disobeys the order of his superior officer before the enemy, he commits a double crime, by violating both the 9th and 52d Articles of War; and he may be prosecuted and convicted of either or both offenses. So any other breach of duty, connected with military movements, and occurring in the presence of the enemy, has assigned to it by the Articles of War a depth of criminality which would not belong to it under other and ordinary circumstances. This results from the increased disaster likely to follow from misconduct in such a conjuncture, and from the fact that insensibility to duty is doubly criminal when displayed in the midst of those dangers which ever inspire the true soldier with renewed devotion to the honor and interests of his flag. The accused is shown to have been, with his command, in the presence of the enemy, from the beginning to the end of the battle of the 29th—a period of at least seven and a half, or eight hours. His troops were fresh and well equipped; and that from his position he was bound to have taken part in the engagement, and that his failure to do so, was to the last degree culpable, can not be denied, unless it can be made to appear that he was restrained by some uncontrollable physical necessity, or by some positive order of his commanding general. The attempt has been made to justify his conduct on both grounds. The examination already made of the testimony, warrants the conviction, that the material obstacles in his way, growing out of the proximity and strength of the enemy, and the nature of the country, were not sufficient to excuse his inaction. His chief of staff, however, Lieutenant Colonel Locke, called by the defense, deposed that in the afternoon of the 29th, he bore a message from the accused to General King, whom he found near Bethlehem Church with General McDowell; that General McDowell sent back by him to the accused a reply in the following words: “Give my compliments to General Porter, and say to him that I am going to the right, and will take General King with me. I think he (General Porter) had better remain where he is; but if it is necessary for him to fall back, he can do so upon my left;” and the witness testified that he regarded this as an order, and communicated it to the accused—and this, it is insisted, restrained him from attacking the enemy.

In the first place, it is to be remarked that this language does not import an order, but simply a suggestion, and counsel from one companion in arms to another. Again: General McDowell was not then in a condition to command the accused, and this both he and the accused must have well known. They were separated from each other, and were not, in the terms of the 62d Article of War, “joined or doing duty together.” General McDowell was proceeding at the moment, with his forces, upon an entirely distinct service from that in which the accused was engaged. But the whole of Lieut. Col. Locke’s statement in regard to this message was swept away by the evidence of Gens. McDowell and King. The witness had stated that the message was given to him in the presence of Gen. King and was heard by him. General King, however, testified that he was not with Gen. McDowell at all after the *morning* of the 29th, and that he heard no such message; while Gen. McDowell declared that none such was sent by him. It is further urged in the defense, that although the evidence may thus fail to show that such a message was sent, yet that it was delivered to the accused and he was justified in obeying it. This position is assumed in disre-

gard of the maxim, "*falsum in uno, falsum in omnibus.*" The same witness who deposed to the receipt of the message from Gen. McDowefl, deposed to its delivery to the accused, and in neither point was he supported by the testimony of others. Having been discredited, as laboring under a complete misapprehension, in regard to the first, this discredit necessarily attaches to the second, and under the maxim quoted, his entire statement falls to the ground.

But even if it had been established that this message had been sent and received, and that it was in form an order, and given by proper authority, still it is not claimed that it reached the accused before about 3 o'clock. This would leave his inaction, from 12 to 3 o'clock, in the presence of the enemy, and in the midst of a battle, unexplained, and therefore unpalliated in its culpability by anything that is contained in the record.

Although that portion of the defense which would justify the inaction of the accused, because of the enemy and of the difficult nature of the ground in his front and to his right, has been commented on, it may not be inappropriate to add that history shows these obstacles to be insignificant as contrasted with those which have been often in great emergencies overcome by military commanders. The battle of Hohenlinden furnishes an illustration, and in one respect bears a striking analogy, while in another offering a remarkable contrast to the events of 29th August. A few extracts from Thiers' History of the Consulate and the Empire, vol. 1, pp. 217—18--19, Lippincott & Co.'s edition of 1861, will suffice to show the appositeness of the reference.

Moreau, with 60,000 French troops, was met by an Austrian army 70,000 strong "Richepanse and Decaen's divisions," says the historian, "were sent by Moreau an order, somewhat vaguely expressed, but positive, to throw themselves from the right hand to the left hand road, to get into the latter, into the environs of Maltenboet, and there surprise the Austrian army, entangled in the forest. He neither indicated the route to be pursued, nor provided against accidents which might occur. He left everything that was to be done to the intelligence of Richepanse." "At length, as the battle progressed, a wavering was observed in the Austrian troops of the center, which proved to be Richepanse falling on their rear." "*He had started without waiting for Decaen and daringly penetrated into that tract of thickets and ravines, which separated the two roads, and marching while the fight was going on at Hohenlinden, and making incredible efforts to drag with him over that inundated ground six pieces of small calibre.*" "Richepanse reckoning upon Decaen to extricate Drouet's brigade, had marched without losing a moment for Maltenboet, for his military instinct told him that was the decisive point. *Though he had left but two demi-brigades of infantry, the Eighth and Forty-eighth, a single regiment of cavalry, the First Chasseurs, and six pieces of cannon, with about 6,000 men, he had continued his march, dragging his artillery by hand, almost always through the quagmire.*" "He then fell to the left and took the bold resolution of falling on the Austrian rear, in the defile of the forest." "Marching, sword in hand, amidst his grenadiers, he penetrated into the forest, sustained, without flinching, a violent discharge of grape shot, then fell in with two Hungarian battalions which hastened to bar up his passage. Richepanse would have inspired his brave soldiers with words and gestures, but they had no need of them. "Those fellows are our prisoners," cried they; "let us charge." They charged accord-

ingly, and completely routed the Hungarian battalions. Presently they came to masses of baggage, artillery, infantry, accumulated pell mell at this spot. Richepanse struck inexpressible terror into this multitude, and threw it into frightful disorder. At the same moment he heard confused shouts at the other extremity of the defile. It was Ney who, advancing from Hohenlinden, had penetrated by the head of the defile, and *pushed before him the Austrian column, which Richepanse was driving the other way, by attacking it in the rear.*" A complete rout of the Austrian army ensued. Its loss was some 20,000 men, with nearly all its artillery and baggage, and "what," as the historian observes, "was of still greater importance, its moral courage." "This battle," continues M. Thiers, "is the most brilliant that Moreau ever fought, and certainly one of the greatest in the present century, which has beheld such extraordinary conflicts."

What were the difficulties that appalled the accused on the 29th, as compared with those surmounted by Richepanse with but six thousand men? This example is an impressive proof of what a general can and will achieve, when his heart is in his work, and when he finds himself in the presence of the enemies of his country. General McDowell, as a soldier and a commander, deposed that it was the duty of the accused to have attacked the enemy on the 29th, and it would seem this duty was so manifest and so clearly the result of his position, that no order to that effect could have added much, if anything to its force and urgency. What General McDowell prescribed for his associate in arms, he unhesitatingly accepted for himself. He had no summons to arouse him and no guide to conduct him, but the sound of the cannon, following which, he, with his command, found his way to the battle field, where his instincts as a soldier told him both his duty and his honor required him to be. And it is no doubt to his timely arrival and active participation in the conflict, that we are largely indebted for General Roberts' declaration, that at the close of the day, the advantages were decidedly on the side of the Federal troops. Had the accused, obeying the same impulse that carried General McDowell up the Sudley Springs road, made a movement upon the enemy with the vigor and heroism which the occasion demanded, it is altogether probable that the glory of Richepanse would have been his, and the fate of the Austrians that of the rebel army. After carefully considering all the impediments, which have been so elaborately arrayed as in the way of the accused on the night of the 27th, and throughout the day of the 29th, we cannot but realize that they chunk away and are scarcely to be named beside those obstacles of darkness and tempest, and snow, and morass, and Alpine precipices, and frowning batteries, which the warriors of other times and lands have unhesitatingly confronted and bravely overcome.

But there is one feature of the inaction of the accused on the 29th which it is especially sorrowful to contemplate. How, unrestrained as he was, and with the cannonade of the battle in his ears, and its smoke and the dust of the gathering forces before his eyes, he could for seven and a half or eight hours resist the temptation to plunge into the combat, it is difficult to conceive. But this alone is not the saddest aspect in which his conduct presents itself. This aspect is distinctly set forth in the third specification of the second charge. Colonel Marshall states that from the cheerings and peculiar yells of the enemy heard on the evening of the 29th, he and every man of his command believed that

General Pope's army was being driven from the field. General Morrell also says that from the sound of the artillery, the battle seemed to be receding, which dictated that it was going against the Federal forces. The accused, in his note to Generals McDowell and King, speaking of the enemy, says: "As they appear to have driven our forces back, the firing of the enemy having advanced and ours retired, I have determined to withdraw to Manassas;" and in further justification of this step, he adds: "They have gathered artillery and cavalry and infantry, and the advancing masses of dust show the enemy coming in force." In the afternoon then of the 29th, it is clear that the conviction was entered by the accused and his officers that our forces were being driven before the enemy—a conviction, which in tones above even the roar of the artillery should have appealed to his soldier's heart to rush to the rescue. But heedless of the summons, he turned, not towards, but away, from his struggling companions in arms, in the direction of Manassas.

Must we seek an explanation of this want of sympathy with the brave men who were doing battle that day in the feelings, as shown by his dispatches, which unhappily possessed him in reference to the army of Virginia and its commanding general? That army, as he seems to have been aware, was sent forth not to capture Richmond or to occupy the South but simply to harass and baffle the march of the advancing masses of the enemy, while the army of the Potomac was being extricated from the perils that surrounded it on the peninsula—a service which should not have provoked a sneer from the accused. It cannot be improper to add, what his record will sustain me in saying, that so far as light is shed upon the subject by the testimony, the army of Virginia appears to have nobly performed the arduous and perilous work committed to its hands. Its campaign was brief, but marked by signal vigor and ability, and animated by a spirit which, shrinking from neither toil nor exposure nor danger, bravely struck the enemy whenever and wherever he could be found.

The accused presents two general grounds of defense, which apply to all the accusations against him. They are—first, his general reputation for zeal and loyalty, and, secondly, the expression of satisfaction with his conduct which General Pope is alleged to have made at Fairfax Court House on the 2d September.

In reference to the first, the testimony is full and earnest as to his former services and character for faithfulness and efficiency as an officer. The law admits such proof in criminal prosecutions, because a presumption of innocence arises from former good conduct, as evidenced by general reputation. The presumption, however, is held to be entitled to little weight except in doubtful cases. Where it comes into conflict with evidence that is both positive and reliable, it at once gives way.

In regard to the second, Colonel Ruggles testified that at the close of a conversation on 2d September, at Fairfax Court House, between General Pope and the accused, the general expressed himself satisfied with his conduct, referring, as the witness believed, to the transactions on which the present charges are based. Colonel Ruggles admits, however, that he was not a party to the conversation; that he heard it only in scraps, and endeavored not to hear it at all. General Pope, on the other hand, deposed that he was not satisfied, and could not have been, and that the expression heard by Colonel Ruggles related to ex-

planations made by the accused as to certain disparaging telegrams which he was understood to have sent to General Burnside. In view of the relation of these two officers to the conversation, the court, of course, could not hesitate to accept the version of General Pope as the true one. Even if General Pope had declared himself satisfied, it would not have affected the status of the accused before the law. His responsibility was to his Government and country, and not to the commanding general. Nor can any presumption arise against this proceeding from the failure of General Pope to prefer charges against the accused. It was his privilege to prefer them, but he was not bound to do so. He discharged his whole duty when, in his official report, he laid these transactions before his Government for its consideration.

This case has been most patiently investigated. If, in war, and in the midst of active hostilities, any Government has ever devoted so long a period of time—some forty-five days—to the examination of a military charge, it has not come to my knowledge. The court was not only patient and just, but liberal, and in the end, everything was received in evidence, which could possibly tend to place the conduct of the accused in its true light. It is not believed that there remains upon the record a single ruling of the court to which exception could be seriously taken.

The case is important, not only because of the gravity of the charges and the dignity of the officer arraigned, but also because of the fact that it involves a principle which lies at the very foundation of all discipline and of all efficiency in military operations—the principle of military obedience. A standard author, treating on this branch of jurisprudence, says: “Hesitancy in the execution of a military order is clearly, under most circumstances, a serious offense, and would subject one to severe penalties, but actual disobedience is a crime which the law has stigmatized as of the highest degree, and against which is denounced the extreme punishment of death.” (DeHart, p. 165.) The same author continues: “In every case, then, in which an order is not clearly in derogation of some right or obligation created by law, the command of a superior must meet with unhesitating and instant obedience.” So vital to the military system is this subordination of will and action deemed that it is secured by the most solemn of human sanctions. Each officer and soldier before entering the service, swears that he “will observe and obey the orders of the officers appointed over him;” and it is from this, probably, that the offense of disobedience derives much of the depth and darkness of the criminality with which it is stamped by the Articles of War. Obedience is indeed the very jewel of the soldier’s life. It adorns him more even than laurels, which are so often plucked by unholy hands. The soldier who has given to the order of his superior officer a prompt, an earnest, a heartfelt support, has triumphed in the field of duty, even though he may have fallen on the field of arms.

The offenses, for which the pleadings and testimony arraign the accused, are the very gravest that a soldier can possibly commit—being neither more nor less than the wilful violation of the orders of his commanding general in the midst of momentous and perilous military movements, and the shameful abandonment of a struggling army which it was his solemn duty to support, in the very presence of the enemy, and under the very sound of his artillery. The court was careful to give to the accused the benefit of all well-founded doubts that arose in their

minds, in reference either to the fact of disobedience, or in reference to the measure of criminality that prompted it; and hence they found him not guilty of the fourth and fifth specifications of first charge; and in the same spirit, the fourth specification of second charge was withdrawn. While, however, the court felt that of crimes such as these, no officer should be convicted but upon the clearest and most convincing proof of his guilt, they must also have felt that the honor of the profession of arms, and the most enduring interests of our common Government and country, imperatively demanded that there should be no acquittal when that proof had been made.

J. HOLT.

Judge Advocate General.

TO THE PRESIDENT.