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Report : Petition of W. Foulk

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IN THE SENATE OF THE UNITED STATES.

FEBRUARY 14, 1877.—Ordered to be printed.

Mr. COCKRELL submitted the following

REPORT:

[To accompany bill S. 1250.]

The Committee on Military Affairs, to whom was referred the petition of Willis L. Foulk, late captain Tenth Regiment United States Cavalry, have duly considered the same, and submit the following report :

Your committee referred the petition to the Secretary of War, and received the following report from him, and the following report through him from the Adjutant-General and Judge-Advocate-General, to wit :

WAR DEPARTMENT, WASHINGTON CITY,
February 9, 1877.

SIR: Agreeably to the request in your letter of the 1st instant, I have the honor to transmit a letter of the Adjutant-General with the military history of W. L. Foulk, late captain Tenth Infantry, and copy of a report of the Judge-Advocate-General in his case, with the remark that this Department is in favor of a bill for the relief prayed for by the petitioner.

The petition, inclosure to your letter, is herewith returned.

Very respectfully, your obedient servant,

J. D. CAMERON,
Secretary of War.

Hon. F. M. COCKRELL,
United States Senate.

ADJUTANT-GENERAL'S OFFICE,
February 6, 1877.

SIR: I have the honor to return herewith letter of the 1st instant, from the Committee on Military Affairs, United States Senate, inclosing petition of Willis L. Foulk, for restoration to his position as captain Tenth Cavalry, and requesting report of his military services, &c., and to invite attention to the military history of Captain Foulk, General Court-Martial Order No. 147, November 24, 1871, from headquarters Department of the Missouri; General Court-Martial Orders No. 58, December 6, 1873, and No. 20, March 23, 1874, from this office, and copy of the report of the Judge-Advocate-General in the case, dated June 25, 1876, hereto annexed.

Very respectfully, your obedient servant,

E. D. TOWNSEND,
Adjutant-General.

The Hon. SECRETARY OF WAR.

ADJUTANT-GENERAL'S OFFICE,
Washington, February 6, 1874.

Military History of Willis L. Foulk, of the United States Army, as shown by the files of this office.

VOLUNTEER RECORD.

Entered the service April 23, 1861, as second lieutenant in the Seventh Pennsylvania Volunteers, for three months, and served therewith in General Patterson's command until August 5, 1861, when mustered out as first lieutenant, having been promoted June 11, 1861.

Re-entered the service August 26, 1861, as a captain in the Forty-sixth Pennsylvania Volunteers, and was promoted lieutenant-colonel June 9, 1863.

Service.—With regiment in Maryland, the Shenandoah Valley of Virginia, and in Eastern Virginia, until wounded in action and taken prisoner at Cedar Mountain, August 9, 1862; in the hands of the enemy to October 22, 1862; on parole and under medical treatment to June, 1863; with regiment in the Army of the Potomac to September 25, 1863, and in the Army of the Cumberland to January 26, 1864; on detached duty recruiting, &c., at Pittsburgh and Erie, Pa., to December 11, 1864; in command of Exchange Barracks, Nashville, Tenn., to July 29, 1865, when honorably mustered out of service.

REGULAR ARMY RECORD.

Appointed second lieutenant Eighteenth Infantry	May 11, 1866
Transferred to Thirty-sixth Infantry	September 21, 1866
First lieutenant Thirty-sixth Infantry	March 1, 1867
Unassigned	May 19, 1869
Assigned to Tenth Cavalry	December 15, 1870
Captain Tenth Cavalry	March 3, 1873

Service.—Joined regiment in October, 1866, and served with it in Nebraska and Utah to May 26, 1869; awaiting orders to July 22, 1869; on duty with the First Infantry at Fort Porter, New York, from August 7, 1869, to February 3, 1871; with Tenth Cavalry in Indian Territory to April 30, 1871; in arrest to October 31, 1871, (see G. C. M. Order No. 147, Department of Missouri, November 24, 1871;) with regiment in Indian Territory to September 29, 1872; in arrest to November 9, 1872; with regiment in Indian Territory to February 17, 1873; in arrest to March 29, 1873; with regiment in Texas to September 17, 1873; in arrest until dismissed January 4, 1874, (see G. C. M. O. 58, A. G. O., December 6, 1873, and G. C. M. O. 20, A. G. O., March 23, 1874.)

THOMAS M. VINCENT,
Assistant Adjutant-General.

[General Court-Martial Orders No. 58.]

WAR DEPARTMENT, ADJUTANT-GENERAL'S OFFICE,
Washington, December 6, 1873.

I. Before a general court-martial which convened at Fort Griffin, Texas, September 19, 1873, pursuant to Special Orders No. 163, dated August 28, and No. 164, dated August 29, 1873, headquarters Department of Texas, San Antonio, Texas, and of which Colonel Henry B. Clitz, Tenth Infantry, is president, was arraigned and tried—
Captain Willis L. Foulk, Tenth Cavalry.

CHARGE I.—“Violation of the ninth Article of War.”

Specification—“In this: that he, Captain Willis L. Foulk, Tenth Cavalry, did strike his superior officer, Captain Charles D. Viele, Tenth Cavalry, with a drawn sword or saber, he, the said Captain Charles D. Viele, Tenth Cavalry, being at the time in the execution of his office. This at Fort Griffin, Texas, on or about the evening of the 6th day of August, 1873.”

CHARGE II.—“Conduct unbecoming an officer and a gentleman.”

Specification—“In this: that he, Captain Willis L. Foulk, Tenth Cavalry, did, without just cause or provocation, attack and violently assault with his drawn sword or saber Captain Charles D. Viele, Tenth Cavalry, who was unarmed, saying at the same time, ‘G—d d— you, I will give it to you,’ or words to that effect. This at Fort Griffin, Texas, on or about the evening of the 6th day of August, 1873.”

CHARGE III.—“Conduct prejudicial to good order and military discipline.”

Specification—“In this: that he, Captain Willis L. Foulk, Tenth Cavalry, did, without cause or provocation, attack and assault Captain Charles D. Viele, Tenth Cavalry,

striking him repeatedly with his drawn sword or saber, in presence of enlisted men, greatly to the scandal of the service and to the prejudice of good order and military discipline. This at Fort Griffin, Texas, on or about the evening of the 6th day of August, 1873."

To which charges and specifications the accused, Captain Willis L. Foulk, Tenth Cavalry, pleaded "not guilty."

FINDING.

The court, having maturely considered the evidence adduced, finds the accused, Captain Willis L. Foulk, Tenth Cavalry, as follows:

CHARGE I.

Of the specification, "guilty."
Of the charge, "guilty."

CHARGE II.

Of the specification, "guilty."
Of the charge, "guilty."

CHARGE III.

Of the specification, "guilty."
Of the charge, "guilty."

SENTENCE.

And the court does therefore sentence him, Captain Willis L. Foulk, Tenth Cavalry, "to be dismissed the service."

II. In conformity with the sixty-fifth of the Rules and Articles of War, the proceedings of the general court-martial in the foregoing case of Captain Willis L. Foulk, Tenth Cavalry, have been forwarded to the Secretary of War for the action of the President of the United States, and the proceedings, findings, and sentence are approved.

III. Before the same court, which convened at Fort Griffin, Texas, September 26, 1873, and of which Colonel Henry B. Clitz, Tenth Infantry, is president, was arraigned and tried—

Captain Willis L. Foulk, Tenth Cavalry.

CHARGE.—"Conduct unbecoming an officer and a gentleman."

Specification first—"In that he, Willis L. Foulk, captain Tenth Cavalry, did maliciously, and with intent to deceive, allege in charges that 'Captain Charles D. Viele, Tenth Cavalry, when commanding officer of a detachment of the Tenth Cavalry, was so much under the influence of intoxicating liquor as to be unable to discharge the duties of his office;' also, that when he, the said Captain Willis L. Foulk, Tenth Cavalry, reported to Captain Charles D. Viele, Tenth Cavalry, in obedience to orders, he, the said Captain Charles D. Viele, Tenth Cavalry, 'was found sitting in a drunken condition on a cot or bed, and after he, the said Captain Viele, seemingly endeavored to peruse the above recited orders, and on being asked by Captain W. L. Foulk, in a polite and gentlemanly manner, for instructions in assuming command of the company, as to time of starting and transportation, did with difficulty arise from the cot or bed and stagger forward and say in a drunken manner, in words or substance: "Mr. Foulk, I want you, sir, to understand that you will not come to my quarters without it is on official business, sir;" and on being told by Captain Foulk that he was there now only on official business, did reply in the same manner, in words or substance: "I'll smash your head, sir, with this tin cup, sir;"' also, that 'when he, the said Captain Foulk, was obliged to go to his, Captain Viele's, quarters on important official business,' that Captain Viele did 'take advantage of the occasion to insult him, in a cowardly, ungentlemanly, and drunken manner, before the members of his, Captain Viele's, family and others;' also, that the said Captain Viele, 'on being asked by Captain Foulk, in a polite and gentlemanly manner, for instructions in assuming command of the company, for information as to time of starting, transportation, &c., * * * * * he, the said Captain Viele, was so much under the influence of intoxicating liquor as to be unable to give the proper instructions, or answer the said request, and did utterly fail to give him,' Captain Foulk, any instructions, the said Captain Foulk being compelled to return at a later hour on the same day for the desired information and instructions. All of which is alleged to have occurred at 'Fort Sill, I. T., on the 25th day of April, 1873;' which allegations were without foundation in substance or fact, and false within the knowledge of the said Captain Willis L. Foulk, Tenth Cavalry. This at Fort Griffin, Texas, on or about the 15th day of August, 1873."

Specification second—"In that he, Captain Willis L. Foulk, Tenth Cavalry, did maliciously, and with intent to deceive, allege in charges that 'Captain Charles D. Viele,

Tenth Cavalry, officer of the day for a detachment of the Tenth United States Cavalry en route to Fort Griffin, Tex., did send a guard to the private quarters of Captain Willis L. Foulk, Tenth Cavalry, and did there take a servant woman from the table while eating her supper, and conduct her to the guard-house or tent; this without any notice whatever or explanation to the said Captain Foulk, and without any provocation or cause being given on part of the woman; the said servant woman having been hired at Fort Sill, I. T., by the wife of Captain Foulk for the express benefit of herself and children; and did thereby deprive the wife of the said Captain Foulk of the services of a female servant while en route from near Fort Sill, I. T., to Fort Griffin, Tex., during a period of fifteen days and more, putting the said Captain Foulk's wife to great inconvenience. This at a camp of a detachment of the Tenth United States Cavalry, near Fort Sill, I. T., on or about the 28th day of April, 1873; which allegation was entirely a false representation within the knowledge of the said Captain Foulk, he, the said Captain Willis L. Foulk, Tenth Cavalry, having been informed at the time by the commanding officer of the detachment of the cause and necessity for the arrest, and that it was made by his, the detachment commander's, order. This at Fort Griffin, Tex., on or about the 15th day of August, 1873."

Specification third—"In that he, Willis L. Foulk, captain Tenth Cavalry, did, maliciously, and with intent to deceive, allege in charges that 'Captain Charles D. Viele, Tenth Cavalry, did proceed to the picket-line of "D" Company, Tenth Cavalry, and did there forcibly and defiantly take possession of a mule in charge of a corporal of the company, intended and turned over for pack purposes of the company; this when he well knew that Captain W. L. Foulk, commanding "D" Company, Tenth Cavalry, had sent after the mule; also, that 'Captain Charles D. Viele, Tenth Cavalry, did, defiantly, against the protest of Captain W. L. Foulk, Tenth Cavalry, seize and lead away a pack animal from the picket-line of "D" Company, Tenth Cavalry, and being requested by the said Captain Foulk to take it no further, did proceed, defiantly and contemptuously, in presence of enlisted men, for a certain distance with said animal, and on the said Captain Foulk, who was officer of the day of the post, approaching him, did suddenly halt, and placing himself in a threatening and striking attitude, assaulting the said Captain Foulk, saying, in words or substance: "G—d— you, where are you going?"' also, that 'Captain Charles D. Viele, having defiantly and contemptuously led off a pack-mule in charge of "D" Company, Tenth Cavalry, from near the picket-line of the company, against the wish or consent of the commanding officer of the company, standing near by at the time, and being prevented by the officer of the day, Captain W. L. Foulk, Tenth Cavalry, from taking it further, did call upon enlisted men of his company for a carbine, and did receive at the hands of an enlisted man a carbine, with intent to shoot the said Captain W. L. Foulk; all of which is alleged to have occurred 'at Fort Griffin, Tex., on the 6th day of August, 1873; which allegations were in detail and in fact wholly false within the knowledge of the said Captain Willis L. Foulk, Tenth Cavalry. This at Fort Griffin, Tex., on or about the 15th day of August, 1873."

To which charges and specifications the accused, Captain Willis L. Foulk, Tenth Cavalry, pleaded "not guilty."

FINDING.

The court, having maturely considered the evidence adduced, finds the accused Captain Willis L. Foulk, Tenth Cavalry, as follows:

Of the first specification, "not guilty."

Of the second specification, "guilty, excepting the words, 'maliciously and with intent to deceive,' and 'which allegation was entirely a false representation within the knowledge of the said Captain Foulk,' and of the excepted words, 'not guilty.'"

Of the third specification, "guilty."

Of the charge, "guilty."

SENTENCE.

And the court does therefore sentence him, Captain Willis L. Foulk, Tenth Cavalry, "To be dismissed the service."

IV. In conformity with the sixty-fifth of the Rules and Articles of War, the proceedings of the general court-martial in the foregoing case of Captain Willis L. Foulk, Tenth Cavalry, have been forwarded to the Secretary of War for the action of the President of the United States, and the proceedings, findings, and sentence are approved.

V. Captain Willis L. Foulk, Tenth Cavalry, ceases to be an officer of the Army from the date of this order.

By order of the Secretary of War:

E. D. TOWNSEND,
Adjutant-General

[General Court-Martial Orders No. 147, First Lieut. Willis L. Foulk, Tenth Cavalry.]

HEADQUARTERS, DEPARTMENT OF THE MISSOURI,
Fort Leavenworth, Kans., November 24, 1871.

I. Before a general court-martial, which convened at Camp Supply, Indian Territory, August 28, 1871, pursuant to paragraph 1, Special Orders No. 144, current series, from these headquarters, and of which Maj. Robert M. Morris, Sixth United States Cavalry, is president, was arraigned and tried:

First Lieut. Willis L. Foulk, Tenth Cavalry, on the following charges and specifications:

CHARGE 1ST—*Failing to repair at guard-mounting, in violation of the forty-fourth Article of War.*

Specification.—In that First Lieut. Willis L. Foulk, Tenth Regiment of United States Cavalry, having been regularly detailed as officer of the day, did fail to repair at the time fixed to the place designated by his commanding officer for the mounting of the guard.

This at Camp Supply, Indian Territory, on or about the 18th day of April, 1871.

CHARGE 2D—*Conduct unbecoming an officer and a gentleman.*

Specification 1st.—In that First Lieut. Willis L. Foulk, Tenth Regiment United States Cavalry, in answer to a letter from his commanding officer, Capt. Joseph B. Rife, Sixth Infantry, through Second Lieut. W. S. Mackay, Third Infantry, post adjutant Camp Supply, Indian Territory, as to the cause of his absence from guard-mounting on the 18th day of April, 1871, did reply in words and figures following, to wit:

"Respectfully returned, through the post adjutant, with the information that I was quite as early, if not earlier, at the place of guard-mounting this morning after first call for guard as I have been on former occasions, as officer of the day at this post, when prior to this morning I found myself present at the place designated, awaiting the inspection to conclude, to take my post. This morning I left my quarters and proceeded direct to the place of guard-mounting a very few minutes after first call and sounded in the cavalry camp. I walked faster than I had done at previous times in going to the same place of guard-mounting. If the adjutant had consumed one-third the time in inspecting the guard as has been his custom every time I have mounted as officer of the day at this post, or if he had inspected the guard as prescribed in general regulations of the Army, I would have been, as I always have been, at my post before the time required for me to be present. The guard was formed in haste, (at double quick,) brought to arms port, and inspected in that manner in haste—marched off in haste;"

—which statement was false within the knowledge of the said Lieutenant Foulk, in that the guard was not inspected and marched off as stated by him, but that the customary time was consumed by the post adjutant aforesaid in the whole ceremony of guard-mounting.

This at Camp Supply, Indian Territory, on or about the 18th day of April, 1871.

Specification 2d.—In that First Lieut. Willis L. Foulk, Tenth Regiment United States Cavalry, being on duty as officer of the day, at the post of Camp Supply, Indian Territory, and as such having been ordered by his commanding officer, Capt. Joseph B. Rife, Sixth Infantry, to relieve from guard and confine in the guard-house Private Andrew Jenkins, Company F, Tenth Cavalry, and having, in compliance with said order, so relieved and confined the said Private Jenkins, did afterward state to his said post commander that the said Private Jenkins aforesaid had been relieved from guard and "slapped" in the guard-house without his (Lieutenant Foulk's) knowledge; which statement was false within the knowledge of the said Lieutenant Foulk, in that the said Private Jenkins was relieved from guard and confined in the guard-house by his (Lieutenant Foulk's) order, in compliance with instructions from his said commanding officer, as before stated.

This at Camp Supply, Indian Territory, on or about the 18th day of April, 1871.

CHARGE 3D—*Violation of the sixth Article of War.*

Specification 1st.—In that First Lieut. Willis L. Foulk, Tenth Regiment United States Cavalry, did enter the office of his commanding officer, Captain Joseph B. Rife, Sixth Infantry, and in an excited and disrespectful manner address him respecting certain charges which had been preferred against Private Andrew Jenkins, Company F, Tenth Cavalry: "These charges have been preferred without any investigation at all; I have investigated the matter, and it is an outrage; and here (slapping the table) are charges against Sergeant Quinan," or words to that effect, thereby manifesting contempt to the official conduct of his said commanding officer.

This at Camp Supply, Indian Territory, on or about the 19th day of April, 1871.

Specification 2d.—In that First Lieut. Willis L. Foulk, Tenth Regiment United

States Cavalry, having sought, and having been accorded an interview with his commanding officer, Lieut. Col. John W. Davidson, Tenth United States Cavalry, commanding post of Camp Supply, Indian Territory, did behave toward his said commanding officer in a contemptuous and disrespectful manner, in words and actions as follows: By shaking his finger at him, by demanding a board of officers on his (Lieutenant Foulk's) conduct, and did say, "I'll report you to General Pope—you have treated me meanly," and when ordered by his said commanding officer to repair to his quarters, did repeat the words, "I'll report you to General Pope, sir;" and further the words, "I'll report the rascality going on here," or words to that effect.

This in the presence and hearing of enlisted men at the post of Camp Supply, Indian Territory, on or about the 30th day of April, 1871.

CHARGE 4TH—*Disobedience of orders, in violation of the ninth Article of War.*

Specification—In that First Lieut. Willis L. Foulk, Tenth Regiment United States Cavalry, having been ordered by his superior and commanding officer, Lieut. Col. John W. Davidson, Tenth United States Cavalry, commanding the post of Camp Supply, Indian Territory, to repair immediately to his (Lieutenant Foulk's) quarters in close arrest, did willfully disobey said order, and did sit down in front of the quarters occupied by Lieutenant R. G. Smithers, Tenth Cavalry, and there remain until forced to proceed to his quarters as ordered by Lieutenant Col. John W. Davidson, Tenth Cavalry, his superior and commanding officer aforesaid.

This at Camp Supply, Indian Territory, on or about the 30th day of April, 1871.

PLEA Not Guilty.

FINDING.

Of the specification, first charge Guilty,
but attach no criminality thereto.
Of the first charge Guilty,
but attach no criminality thereto.
Of the first specification, second charge Not Guilty.
Of the second specification, second charge Guilty.
Of the second charge Guilty.
Of the first specification, third charge Guilty.
Of the second specification, third charge Guilty.
Of the third charge Guilty.
Of the specification, fourth charge Guilty.
Of the fourth charge Guilty.

SENTENCE.

To be dismissed from the service of the United States.

In the foregoing case of First Lieutenant William L. Foulk, Tenth United States Cavalry, the proceedings are approved. The findings to the first charge and its specification, the first specification, second charge; the first specification, third charge, and the third charge; the specification to the fourth charge, and the fourth charge, are approved. The findings to the second charge and second specification thereto are disapproved, as the evidence on this point does not establish the allegation in the specification that the accused intentionally misrepresented the circumstances of the arrest of Private Jenkins; that the accused should make the statement, as alleged, "That Private Jenkins had been slapped into the guard-house without his knowledge," in face of the fact that Jenkins had been confined by the accused's own order, which, within his knowledge, must have been familiar to every officer then present, is alike inconsistent with the other circumstances of the case and with probability. The accused no doubt states the facts when he says that he said that Private Jenkins had been taken off post and "slapped" into the guard-house without informing him, (Lieutenant Foulk,) although officer of the day, what offense Private Jenkins had committed, and that he could not be responsible for his guard if such things were done. The finding to the second specification, third charge, is disapproved. The evidence is not sufficient to sustain the finding of guilty. It is evident from the proceedings and evidence in this case, as well as from the order in the case of Sergeant Quinan, that the accused was naturally hurt at some of the occurrences at the post with which he was connected, and which seem throughout to have been too much imbued with personal feeling. At the commencement of his interview with his commanding officer in regard to the order in Sergeant Quinan's case, there was nothing objectionable in his manner or conduct, but toward its close he became excited, and probably acted in a manner which was blamable. In the midst of this excitement he was ordered to his

quarters in close arrest. On his way to obey this order it appears he met some of his brother officers, and, still under great excitement, he stopped for a moment to inform them of the result of the interview which, in conformity with their advice, he had had. It was then that Colonel Davidson came up and conducted the accused to his quarters. While the conduct of the accused is reprehensible, and calls for censure, yet the circumstances, as shown in the testimony before the court, are of such a character as to excuse, in a great measure, his excitement, and so far to modify the military offense as to render the sentence entirely disproportionate. The sentence is disapproved. Lieutenant Foulk will accordingly resume his sword and return to duty.

II. The general court-martial convened by paragraph 1, Special Orders No. 144, current series, from these headquarters, and of which Major Robert M. Morris, Sixth United States Cavalry, is president, is hereby dissolved.

By command of Brigadier-General Pope :

R. WILLIAMS,
Assistant Adjutant-General.

[General Court-Martial Orders No. 20.]

WAR DEPARTMENT, ADJUTANT-GENERAL'S OFFICE,
Washington, March 23, 1874.

Paragraph V, General Court-Martial Orders No. 58, War Department, Adjutant-General's Office, Washington, December 6, 1873, is hereby amended so as to make the dismissal of Willis L. Foulk, late captain Tenth Cavalry, take effect January 4, 1874, the date on which the order of dismissal was received at the post where the officer was stationed.

By order of the Secretary of War :

E. D. TOWNSEND,
Adjutant-General.

Official :

THOMAS M. VINCENT,
Assistant Adjutant-General.

WAR DEPARTMENT,
Bureau of Military Justice, June 25, 1876.

SIR: In compliance with your direction, conveyed through the indorsement of the Adjutant-General of the 23d instant, I have the honor to report as follows upon the application for reinstatement of W. L. Foulk, late captain Tenth Cavalry, dismissed the service in December, 1873. (See G. C. M. O. No. 58, of that year.)

Captain Foulk was brought to trial, first, for an assault, accompanied by threatening words, committed (on August 3, 1873) upon his superior officer, Capt. C. D. Viele, of the same regiment, by striking him on the neck with his saber. Of this offense, presented under different charges, he was convicted and sentenced to be dismissed.

Upon the conclusion of this trial, Captain Foulk was at once arraigned a second time before the same court upon a charge of having preferred false and malicious charges against Captain Viele, in charging him—1. With having (on April 25, 1873) been intoxicated, and, while in that condition, applying insulting and unjustifiable language to him, Captain Foulk; 2. With having (on April 28, 1873) improperly arrested and confined a female servant of Captain Foulk, and deprived his family of her services, to their great inconvenience; 3. With having taken the aggressive and assaulted him, Captain Foulk, on the occasion of the altercation which was the subject of the charge at the first trial.

Of these three specifications the accused was acquitted of the two first and convicted of the third, and upon this conviction was sentenced again to be dismissed.

The proceedings and sentences in both cases were approved by the President, as indicated by the General Order already referred to.

The second trial of this officer appears to have been resorted to because the additional charges did not arrive at the department headquarters in time to be consolidated with the originals. Its effect has been, no doubt, to prejudice, and, in the view of this bureau, to prejudice unfairly, the case of this officer. It was valuable, however, in presenting facts without which the merits of the entire case could scarcely be comprehended.

Upon a careful re-review at this time of the testimony comprised in the two records of trial, the case of this officer presents itself to this bureau in brief as follows:

In the first place, the evidence is deemed to furnish good ground for believing that when Captain Foulk reported for duty to Captain Viele, on April 25, 1873, the latter was, somewhat at least, under the influence of liquor, and did, in fact, improperly and offensively receive and address Captain Foulk, who was naturally incensed at his treatment. He is thus deemed to have been justified in preferring a charge against Captain Viele founded upon this interview. As to his charge against the latter for improperly depriving him of his servant, this was without foundation, since Captain

Viele is shown to have acted by the orders of a common superior. It was natural enough, however, that Captain Foulk should connect the act of Captain Viele on this occasion with his hostile and rude conduct three days before, and the court was clearly correct in finding that the second charge was preferred without malice or improper intent. As to the third accusation, though that is not deemed to have been sustained by the testimony, there yet was, in my opinion, enough ground for it to have relieved the accused from a conviction for having preferred it falsely and maliciously. In my judgment, therefore, he should have been wholly acquitted at the second trial.

As to the main offense—that which was the subject of the first trial—the evidence was conflicting. It was admitted by the accused that he struck Captain Viele with his saber, but it was claimed by him that he did so practically in self-defense.

The altercation between the two officers arose as follows: Captain Viele had been detailed to take command of a scouting party, to consist of a detachment from his own company and a smaller one from the company of the accused. A certain number of pack-mules had been furnished to attend the party, and their disposition was, of course, under the control of its commanding officer. One of these mules which had been tied to the picket-line of accused's company, was supposed—and with some reason—by accused to be intended for the use of the detachment from his own company, and he sent a corporal to lead it away to be packed. Captain Viele proposing to use this mule for his own detachment, ordered the corporal to leave it, and, on his hesitating, took it from him by the halter. Captain Foulk then approached and apparently remonstrated with Captain Viele, who thereupon, as accused asserts, and three of the witnesses at the trial positively declared, struck at, or made motions as if to strike at the accused with his clenched fists, at the same time, as was stated by these witnesses, using angry and opprobrious words. That Captain Foulk thereupon struck Captain Viele a violent blow on the neck with his sheathed saber, which he had been carrying under his arm as officer of the day, is, as has already been noticed, admitted, but that the latter first struck at or threatened Captain Foulk is denied by himself and by the other witnesses on the part of the prosecution, who claim to have seen what occurred. From all the evidence, however, taken together, there is deemed to be good ground for the inference that Captain Viele probably did in fact assume a menacing attitude toward the accused before the latter struck him, and that the accused had some reason, at least, for believing that he was about to be attacked. So, though the blow inflicted by the accused was certainly without sufficient justification and constituted a grave offense, yet when it is considered that the officer struck was one of his own rank, and his superior only by seniority of commission, that he had on a previous occasion treated him with contumely and refused to have any but official relations with him, and that on the occasion of the assault he had, in a degree at least, provoked him, it must be admitted that there were in the case such palliating circumstances as would have justified some mitigation of the sentence.

Mr. Foulk has filed, in connection with his present application and on previous occasions, a large number of testimonials, both from military men and civilians, which ascribe to him a high character for efficiency and fidelity as an officer, both in the volunteer and regular service, and an excellent reputation as a citizen. Among these persons are Governors Hartranft and Geary, Senators Cameron and Scott, Hon. Mr. Negley, Messrs. F. R. Brandt, Samuel Harper, James Park, and others, of Pennsylvania; and by the Commissary-General and Paymaster-General of the Army, Lieutenant-Colonel Hardin, Majors O. H. Moore and William Myers, A. Q. M., Capts. R. E. Johnston and L. Catlin, &c. Brigadier-General Angur, by whom the court in this case was convened, writes as follows:

"I should be glad to have the record of the proceedings of the court examined again by the Judge-Advocate-General of the Army, and, if anything is found therein to confirm Captain Foulk's impression, that it be corrected. My wish has been, and is now, that full justice should be done both to him and to the service. I have known the captain since 1867, when he first joined his regiment, and during that time I have never heard his integrity questioned, and, so far as I know and believe or have heard, he is entirely free from habits of dissipation."

Although this bureau has on previous occasions declined to make a favorable recommendation in this case, yet now, after a thorough re-examination of all the testimony, and in view of the impressions derived therefrom, as above expressed, I am induced to conclude that a re-appointment of the applicant may well be accorded to by the President. As already remarked, the second dismissal of this officer is regarded as unwarranted, while the first is deemed to have been a proper subject for mitigation. Mr. Foulk has now suffered under his sentence for two years and a half, and his personal worth as a gentleman and a soldier is, as has been seen, most fully vouched for.

It may be added that if the views here expressed are approved, and the President determines to re-appoint Mr. Foulk, his authority—if the opinion of Attorney-General Williams in the case of Major Baird (14 Opinions, 164) be followed—will be limited to an appointment to the grade of second lieutenant. Congress, however, may, of

course, by a special act, authorize the President to re-appoint him to his former rank of captain upon the occurrence of a vacancy.

W. M. DUNN,
Judge-Advocate-General.

ADJUTANT-GENERAL'S OFFICE, *February 7, 1877.*

A true copy.

THOMAS M. VINCENT,
Assistant Adjutant-General.

Hon. J. D. CAMERON,
Secretary of War.

Under section 1228 Revised Statutes United States, page 215, "No officer of the Army who has been or may be dismissed from the service by the sentence of a general court-martial, formally approved by the proper reviewing authority, shall ever be restored to the military service except by a re-appointment confirmed by the Senate."

This section was first enacted by Congress as a law July 20, 1868, (see vol. 15 United States Statutes at Large, page 135,) and is merely declaratory of the law as it then was and had been declared for a long series of years by the unbroken opinions of the Attorneys-General of the United States. Under the Constitution it is the exclusive right of the President, the executive department of the Government, to appoint all officers. "He shall nominate, and by and with the advice and consent of the Senate, shall appoint all ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of Departments." "The Congress shall have power to make rules for the government and regulation of the land and naval forces." Under these provisions of the Constitution, the Congress has the constitutional power to provide for the appointment of officers by law, and to designate the classes of persons from whom the President may appoint.

In regard to the Army, Congress has uninterruptedly for a long series of years designated the classes of persons from whom the President might appoint, until this provision established by law has come to be known as "promotion."

Section 1204 Revised Statutes United States, page 213, provides that, "Promotions in the line shall be made through the whole Army, in its several lines of artillery, cavalry, and infantry, respectively. Promotions in the staff of the Army shall be made in the several departments and corps respectively."

Under these provisions it is universally conceded that the President can only appoint a civilian to a second lieutenantancy in the United States Army, and must fill all vacancies above that grade by appointment of the officer next in rank, which appointment is known as a promotion.

To enable the President to appoint any person in civil life to a position in the line of the Army above the grade of second lieutenant, there must be an enabling act passed by Congress repealing or suspending the operation of the general law regulating appointments in that particular case. This must be the effect of the enabling act; otherwise the President would be bound to follow the mode of appointment provided and established by law.

What is the effect in law of a dismissal of an officer of the Army?

Unquestionably when an officer is dismissed the service or resigns he is thenceforth a civilian—a mere private citizen; nothing more. In a case of dismissal, after execution or promulgation of sentence, a pardon

by the President cannot restore the officer to his former rank. Even Congress has absolutely no authority or power under the Constitution to restore an ex-officer to his former rank. Such an act would be an appointment, which can only be made by the President. Congress can only regulate the appointments; cannot make them.

Attorney-General John Nelson, in November, 1843, (see volume 4, Opinions of the Attorneys-General, page 274,) decided that "no case has been brought to my notice in which an officer once dismissed has ever been restored to the service otherwise than by nomination by the Chief Magistrate and confirmation by the Senate, where the grade was within the control of their joint action, and if such a case has occurred I should not hesitate to declare it to be in direct repugnance to the Constitution and laws, and to every principle applicable to their just and safe construction." In same volume, page 306, on January 23, 1844, he further says: "I know of no power by which an officer once out of the service can be brought back to it other than that of appointment."

January 22, 1869, Attorney-General William M. Evarts, in volume 12, Opinions of Attorneys-General, page 547, says: "A pardon by the President will restore an officer whose rank has been reduced by sentence of a court-martial to his former relative rank according to the date of his commission.

"The case of an officer who has been reduced in rank differs essentially from that of an officer who has been dismissed from service by sentence of a military court. After the latter is duly confirmed and executed, the dismissed officer cannot be re-instated by means of a pardon or in any other manner than by a new appointment and confirmation by the Senate."

These decisions are in full accord with the settled principles of the Constitution and laws, sanctioned and adhered to by all departments of the Government in all well-considered cases.

The full extent of the power of Congress, then, by legislative enactment, is to untrammel the discretion of the Chief Executive by suspending for the time being and in the given case the operations of the laws of the land, so that he can, if he desire, appoint an ex-officer, a civilian, to a rank and grade in the line of the Army above that to which he could otherwise appoint—to a vacancy above the grade and rank of second lieutenant.

To preserve inviolate the balance of power intended by our Constitution, and to discountenance encroachments of one department upon another, Congress, in such legislative enactments, should not direct or attempt to influence or control the sound discretion of the President.

With these views briefly expressed, as guiding your committee in the discharge of its duties, your committee have fully considered the case of Captain Foulk, and in view of the letter of the Secretary of War and the recommendations of the Secretary of War and Judge-Advocate-General, and the long and valuable services of this officer and his very high character for efficiency, sobriety, and integrity, and the very strong palliating circumstances in his case, your committee consider this case justifies legislative action by Congress, within the limits and for the purposes hereinbefore stated, and have prepared and report the accompanying bill to the Senate, with the recommendation that it do pass.

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